

INDIRECT INFRINGEMENT AND SECTION 27 OF THE CANADIAN COPYRIGHT ACT

Laurent Carrière*
LEGER ROBIC RICHARD, Lawyers
ROBIC, Patent & Trademarks Agents
 Centre CDP Capital
 1001 Square-Victoria – Bloc E – 8th Floor
 Montreal (Quebec) H2Z 2B7
 Tel: 514-987-6242 - Fax: 514-845-7874
 info@robic.com – www.robic.ca

Text of the Section

INFRINGEMENT OF COPYRIGHT

General

Infringement generally

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.

Secondary infringement

(2) It is an infringement of copyright for any person to

- (a) sell or rent out,
- (b) distribute to such an extent as to affect prejudicially the owner of the copyright,
- (c) by way of trade distribute, expose or offer for sale or rental, or exhibit in public,

VIOLATION DU DROIT D'AUTEUR

Règle générale

Règle générale

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.

Violation à une étape ultérieure

(2) Constitue une violation du droit d'auteur l'accomplissement de tout acte ci-après en ce qui a trait à l'exemplaire d'une oeuvre, d'une fixation d'une prestation, d'un enregistrement sonore ou 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 si l'exemplaire avait été produit au Canada par la personne qui l'a produit :

- a) la vente ou la location;
- 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

© Laurent Carrière, 2003.

* Lawyer and trademark agent, Laurent Carrière is one of the senior partners with the lawfirm LEGER ROBIC RICHARD, g.p. and with the patent and trademark agency firm ROBIC, g.p. This material was designed for the purpose of a general presentation on Canadian Legislation made at the Understanding the Business of Copyright course sponsored by the Intellectual Property Institute of Canada and McGill University from 2002-08-26 to 2002-08-30. Publication 288.

(d) possess for the purpose of doing anything referred to in paragraphs (a) to (c), or

(e) import into Canada for the purpose of doing anything referred to in paragraphs (a) to (c),

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.

Knowledge of importer

(3) In determining whether there is an infringement under subsection (2) in the case of an activity referred to in any of paragraphs (2)(a) to (d) in relation to a copy that was imported in the circumstances referred to in paragraph (2)(e), it is irrelevant whether the importer knew or should have known that the importation of the copy infringed copyright.

Plates

(4) It is an infringement of copyright for any person to make or possess a plate that has been specifically designed or adapted for the purpose of making infringing copies of a work or other subject-matter.

Public performance for profit

(5) It is an infringement of copyright for any person, for profit, to permit a theatre or other place of entertainment to be used for the performance in public of a work or other subject-matter without the consent of the owner of the copyright unless that person was not aware, and had no reasonable ground for suspecting, that the performance would be an infringement of copyright.

public, dans un but commercial;

d) la possession en vue de l'un ou l'autre des actes visés aux alinéas a) à c);

e) l'importation au Canada en vue de l'un ou l'autre des actes visés aux alinéas a) à c).

Précision

(3) Lorsqu'il s'agit de décider si les actes visés aux alinéas (2)a) à d), dans les cas où ils se rapportent à un exemplaire importé dans les conditions visées à l'alinéa (2)e), constituent des violations du droit d'auteur, le fait que l'importateur savait ou aurait dû savoir que l'importation de l'exemplaire constituait une violation n'est pas pertinent.

Planches

(4) Constitue une violation du droit d'auteur la confection d'une planche conçue ou adaptée précisément pour la contrefaçon d'une oeuvre ou de tout autre objet du droit d'auteur, ou le fait de l'avoir en sa possession.

Représentation dans un but de profit

(5) Constitue une violation du droit d'auteur le fait, dans un but de profit, de permettre l'utilisation d'un théâtre ou d'un autre lieu de divertissement pour l'exécution en public d'une oeuvre ou de tout autre objet du droit d'auteur sans le consentement du titulaire du droit d'auteur, à moins que la personne qui permet cette utilisation n'ait ignoré et n'ait eu aucun motif raisonnable de soupçonner que l'exécution constituerait une violation du droit d'auteur.

§1.0 Related Sections

Section 2 - Definitions of: "copyright", "infringement", "plate"; section 3 - Copyright in works, section 13 - Ownership of copyright; section 15 - Copyright in performer's performance; section 18 - Copyright in sound recordings; section 21 - Copyright in communication signals; section 24 - Ownership of copyright; section 27.1 - Importation of books; section 34 - Copyright (civil remedies); section 39 - Injunction only remedy when defendant not aware of copyright.

§2.0 Related Regulations

None

§3.0 Prior Legislation

§3.1 Corresponding Section in Prior Legislation

Section 16 from 1924-01-01 to 1928-01-31 ; section 17 from 1928-02-01 to 1988-12-11 ; section 27 from 1988-12-12 to present.

§3.2 Legislative History

S.C. 1921, c. 24, s. 16 ; C.I.F. 1924-01-01 ; R.S.C. 1927, c. 32, s. 17 ; C.I.F. 1928-02-01 ; S.C. 1952, c. 55, s. 17 ; C.I.F. 1953-09-15 ; R.S.C. 1970, c. C-30, s. 17 ; C.I.F. 1971-07-15 ; R.S.C. 1985, c. C-42, s. 27 ; C.I.F. 1988-12-12 ; S.C. 1997, c. 24, s. 15 ; C.I.F. 1997-09-01.

§4.0 Purpose

This section describes what constitutes infringement of copyright.

§5.0 Commentary

§5.1 General

Although section 27 makes no such distinction, infringement of copyright may be categorized as direct or primary infringement, in which an owner's exclusive, legislated rights are violated, and indirect or secondary

infringement, consisting of certain dealings with respect to infringing works. A distinguishing feature between the two is knowledge on the part of the infringer that copyright is being infringed. Such knowledge is required in the case of indirect infringement, whereas direct infringement may occur whether or not knowledge is present. A common feature of any infringement is the absence of consent on the part of the copyright owner.

In accordance with subsection 5(1), infringement of copyright presupposes a work in which copyright subsists: see *Canadian Admiral Corporation v. Rediffusion, Inc.*, (1954), (1954) Ex. C.R. 382 (Ex. Ct.) Cameron J., at p. 390, *i.e.* a literary, dramatic, artistic or musical work, a performer's performance, a sound recording or a communication signal.

See also the discussion on copyright protection in unlawful works in LADDIE (Hugh) et al., *The Modern Law of Copyright*, 2nd ed. (London, Butterworths, 1995), at nos. 2.143-2.146. Because copyright does not exist other than under and in accordance with the *Copyright Act* or any other statutory enactment in force (section 89), direct infringing activities are limited to violations of a copyright owner's rights as enumerated in section 3 (works), section 15 (performer's performances), section 18 (sound recordings) and section 21 (communication signals). Indirect infringement may only take place with respect to works or other subject-matters found to infringe a validly subsisting copyright or works or other subject-matters which would infringe copyright if they had been made within Canada: see subsection 27(2) *in fine*.

Note that section 14.1 creates moral rights in favour of the author of a work which is susceptible to infringement, as defined in sections 28.1 and 28.2; there is no provisions in the *Copyright Act* dealing with the infringement of moral rights in performer's performances, sound recordings or communication signals.

§5.1.1 Categorization

Under section 27, copyright is infringed:

- (i) when any person who, without the copyright owner's consent, does anything that the *Copyright Act* gives the owner the sole right to do: subsection 27(1);
- (ii) by the accomplishment of certain acts with respect to infringing works or subject-matters: subsection 27(2);
- (iii) by the public performance of a work or other subject-matter for profit without the owner's consent: subsection 27(5).

Section 29 (research and private study), 29.1 (criticism or review), 29.2 (news reporting), 29.4 (reproduction for instruction), 29.5 (performances), 29.6 (news and commentary), 29.7 (reproduction of broadcast), 30 (literary collections), 30.1 (management and maintenance of collection), 30.2 (research or private study), 30.21 (copying works deposited in archive), 30.5 (copies for archival purposes by the National Archives of Canada), 30.6 (permitted acts - computer programs), 30.7 (incidental use), 30.8 (ephemeral recordings), 30.9 (pre-recorded recordings), 31 (retransmission), 32.1 (statutory obligations) and 32.2 (miscellaneous exceptions) provide for several exceptions to the infringement of copyright.

§5.1.2 Consent

Infringement of copyright requires an absence of consent by the copyright owner, who is the only person, under subsection 3(1) *in fine*, who can authorize acts which would otherwise constitute infringement.

In transferring the possession or property of a physical work, a copyright owner does not thereby assign the incorporal rights in the work: see *Underwriters' Survey Bureau Limited v. Massie & Renwick Limited* (1940), (1940) S.C.R. 218 (S.C.C.) Duff J., at p. 229; *Société d'informatique R.D.G. Inc. v. Dynabec Ltée* (1985), 6 C.P.R. (3d) 322, (Que. C.A.) Jacques J., at p. 329; *Lifestyle Homes Ltd. v. Randall Homes Ltd.* (1990), 30 C.P.R., (3d) 76 (ManQ.B.) Hirschfield J., at p. 92. Consent must emanate from the owner of the particular right considered, being the owner himself or his legal representative: see *Bishop v. Stevens* (1984), 4 C.P.R. (3d) 349 (F.C.T.D.) Strayer J., at pp. 361-362; *Compo Company Limited v. Blue Crest Music Inc.* (1974), 17 C.P.R. (2d) 149, (F.C.T.D.) Collier J., at p. 162.

Licences, which could be characterized as being the permission for the accomplishing of an act that would otherwise be an infringement of copyright, are either given voluntarily or compulsorily. Compulsory licences were provided for in sections 8, 15, 16 and 22 of the *Copyright Act* (now repealed) and, under certain circumstances may be provided for, under sections 32 and 61 of the *Competition Act* (R.S.C. 1985, c. C-34). Voluntary licences may be expressed or implied, verbally or in writing, with or without consideration. However, only those licences that transfer an interest in the copyright ought to be in writing: see subsections 13(4) and 57(1); *Amusements Wiltron Inc. v. Mainville* (1991), (1991) R.J.Q. 1930 (Que. Sup. Ct.) Marcerola J., at pp. 1937-1938.

Consent may be presumed from the circumstances or the conduct of the parties, but the inference of consent must be clear and the onus to establish it

lies on the one who is relying on the licence: see *Warner Brothers-Seven Arts Inc. v. CESM-TV Ltd.* (1971), 65 C.P.R. 215 (Ex. Ct.) Cattanach J., at p. 235; *Slumber-Magic Adjustable Bed Co. Ltd. v. Sleep-King Adjustable Bed Co.* (1984), 3 C.P.R. (3d) 81 (B.C.S.C.) McLaughlin J., at p. 87. For instance, it has been held that the acquisition of plans carries an implicit copyright licence and that alterations made to the plans with such implicit consent of the copyright owner do not constitute infringement, although the extent to which the copyright material may be altered is limited: see *Netupsky v. Dominion Bridge Co.* (1971), (1972) S.C.R. 368 (S.C.C.) Judson J., at pp. 377-378. As to implied licences, see also *ADI Ltd. v. Destein* (1982), 68 C.P.R. (2d) 262 (N.B.Q.B.); *John Maryon International Ltd. v. New Brunswick Telephone Co.* (1982), 141 D.L.R. (3d) 193 (N.B.C.A.) La Forest J.A., at pp. 246-249; *Katz v. Cytrynbaum* (1983), 76 C.P.R. (2d) 276 (B.C.C.A.). However, the consent must emanate from the owner of the particular right considered: *Kaffka v. Mountain Side Developments Ltd.* (1982), 62 C.P.R. (2d) 157 (B.C.S.C.) Esson J., at p. 161; *Bishop v. Stevens* (1990), (1990) 2 S.C.R. 467 (S.C.C.) McLachlin J., at pp. 485-487.

It is noteworthy that a consent granted gratuitously may be revoked at will, even though expenses have been incurred by the licensee on the faith of the consent: see *Hart v. Hyman* (1916), (1911-16) MacG. Cop. Cas. 301, Neville J. (Ch.D.), at pp. 304-305 and *Katz v. Cytrynbaum* (1983), 76 C.P.R. (2d) 276 (B.C.C.A.); see also FOX (Harold George), *The Canadian Law of Copyright and Industrial Designs*, 2nd ed. (Toronto, Carswell, 1967), at pp. 339-340 and 298 and McKEOWN (John S.), *Fox Canadian Law of Copyright and Industrial Designs*, 3rd ed. (Toronto, Carswell, 2001), at pp. 392-393.

§5.2 Direct Infringement: Subsection 27(1)

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.

§5.2.1 General

Infringement of copyright in a work or other subject-matter of copyright occurs when any person, without consent from the owner of the copyright, does anything which the *Copyright Act* considers as the owner's exclusive right. To infringe is to appropriate the protected work (or performer's performance, sound recordings or communication signals) of another person and without authorization deal with it as only the owner of the copyright has

the right to do. Conversely, any dealing not covered by the *Copyright Act* will constitute lawful use.

Infringement, with respect to an original work or any substantial part thereof consists of producing or reproducing the work in any material form whatever, of performing or (in the case of a lecture) delivering it in public, or of publishing the work. In each case these infringing acts are done without the copyright owner's consent. Copyright also carries rights of translation, conversion, recording through audio, audiovisual or cinematographic media, and rights of adaptation, radio broadcasting and exhibition, all of which belong exclusively to the copyright owner: see subsection 3(1).

Infringement, with respect to a performer's performance or any substantial part thereof, consists of communicating it to the public by telecommunication, performing it in public, fixing it in any material form, reproducing any unauthorized fixation, reproducing a reproduction thereof or renting out a sound recording of it. In each case, these infringing acts are done without the copyright owner's consent. See subsection 15(1).

Infringement, with respect to a sound recording or any substantial part thereof, consists in publishing it, reproducing it in any material form or renting it out. In each case, these infringing acts are done without the copyright owner's consent. See subsection 18(1).

Infringement, with respect to a communication signal or any substantial part thereof, consists of fixing it, reproducing any fixation of it, authorizing another broadcaster to retransmit it to the public or performing it in a place open to the public for a fee. In each case, these infringing acts are done without the copyright owner's consent. See subsection 21(1).

In addition, subsections 3(1), 15(1), 18(1) and 21(1) *in fine* give the copyright owner the exclusive right to authorize any of the acts enumerated in these subsections. Infringement may therefore consist of authorizing, without permission of the copyright holder, the doing of such acts: see *Compo Co. v. Blue Crest Music Inc.* (1979), (1980) 1 S.C.R. 357 (S.C.C.) Estey J., at pp. 364, 375 and 378-379.

It would not appear that infringement through authorization applies to indirect infringement under subsection 27(2), since the acts listed under the said subsection do not form part of those enumerated in subsections 3(1), 15(1), 18(1) and 21(1) of the *Copyright Act*, to which subsections 3(1), 15(1), 18(1) and 21(1) *in fine* respectively apply: see also GARNETT (Kevin) et al., *Copinger and Skone James on Copyright*, 14th ed. (London, Sweet & Maxwell,

1999), at no. 7-149 and *91439 Canada Ltée v. Éditions JCL Inc.* (1992), 41 C.P.R. (3d) 245 (F.C.T.D.) Pinard J., at pp. 252-253.

It is to be noted that "innocent intention affords no defence, and ignorance of the existence of copyright is no excuse for infringement. Copyright being a proprietary right, it does not avail the defendant to plead motive or intent": see FOX (Harold George), *The Canadian Law of Copyright and Industrial Designs*, 2nd ed. (Toronto, Carswell, 1967), at p. 331 and 298 and McKEOWN (John S.), *Fox Canadian Law of Copyright and Industrial Designs*, 3rd ed. (Toronto, Carswell, 2001), at pp. 414-415. However, if such a proposal is true with respect to subsection 27(1), it should be nuanced that ignorance may constitute a valid defence under subsection 27(2), where knowledge is an essential element of infringement. As expressed in SKONE JAMES (Edmund P.) et al., *Copinger and Skone James on Copyright*, 12th ed. (London, Sweet & Maxwell, 1980), at no. 654, at p.280: "Inasmuch as copyright is a proprietary right, it is usually no defence to prove that the defendant acted innocently, though, in the case of the indirect infringements by sale, importation and so on, it is necessary to prove that the defendant was aware of the infringement"; see also GARNETT (Kevin) et al., *Copinger and Skone James on Copyright*, 14th ed. (London, Sweet & Maxwell, 1999), at no. 22-33: "Plainly 'ignorance' is a defence for secondary infringement" and *Zamacois v. Douville* (1943), (1944) Ex. C.R. 21 (Ex. Ct.) Angers J., at pp. 32-35.

§5.2.2 "Deemed" infringement

Since the introduction of subsections 27(1) and 27(2) in the *Copyright Act* of 1921 (then subsections 16(1) and 16(2)) up to *An Act to amend the Copyright Act* of 1997, the acts referred to in these subsections were qualified by the words "shall be deemed". The use of the word "deemed" raised a presumption of infringement when the circumstances outlined in subsection 27(1) were found to exist, subject of course to the stated exceptions. "The purpose of any 'deeming' clause is to impose a meaning, to cause something to be taken to be different from that which it might have been in the absence of the clause": see *R. v. Sutherland* (1980), (1980) 2 S.C.R. 451 (S.C.C.) Dickson J., at p. 456. "Deemed" is an ambiguous term, and whether the presumption thus raised is conclusive or rebuttable must be determined in the context of the entire statute. In general, "where a deeming clause states the legal consequences that are to flow from described circumstances, it is *prima facie* conclusive; but where it merely states a fact that is to be presumed in described circumstances, it is *prima facie* rebuttable": see DRIEDGER (Elmer A.), *Construction of Statutes*, 2nd ed. (Toronto, Butterworths, 1983), at p. 25.

Since infringement can be considered a legal consequence flowing from a given situation, the presumption is conclusive in the sense that the reproached acts, if proven, constitute infringement. On the effect of legal and factual presumptions, see also ROYER (Jean-Claude), *La preuve civile*, 2nd ed. (Cowansville, Blais, 1995), at nos. 839-845 and SOPINKA (John) et al., *The Law of Evidence in Canada*, 2nd ed. (Toronto, Butterworths, 1999), at ch. 4. Therefore, one may have rightly argued that, in view of the description of the prohibited acts, the use of these «deeming» qualifications were useless and they were deleted in the stride of the 1997 amendments.

§5.2.3 Infringement "by any person"

Section 35 of the *Interpretation Act* (R.S.C. 1985, c. I-21) provides that a "person", or any word or expression descriptive of a person, includes a corporation."

A defendant may be found liable for infringement committed by an employee acting within the scope of his duties and under the control of the defendant: see *Canadian Performing Right Society Limited v. Canadian National Exhibition Association* (1934) O.R. 610 (Ont. H.C.J.) Rose J., at p. 616; *Canadian Performing Right Society Ltd. v. Yee* (1943), 3 C.P.R. 64 (Alta. Dist. Ct.) Ford J., at pp. 67-68; *Cardwell v. Leduc* (1962), (1963) Ex. C.R. 207 (Ex. Ct.) Kearney J., at p. 220.

§5.2.4 Copying

Subsection 3(1) gives the copyright owner, *inter alia*, "the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever". A similar right is given by subsections 15(1) regarding performer's performances, by subsection 18(1) regarding sound recordings and by subsection 21(1) regarding communication signals. Subsection 27(1) prohibits the doing of "anything that (...) only the owner of the copyright has the right to do." Although the term "copying" is not directly stated in these sections, "(T)he case-law has interpreted the statutory provisions in such a way that "copying" is an essential ingredient of infringement", as stated in *British Columbia v. Mihaljevic* (1989), 26 C.P.R. (3d) 184 (B.C.S.C.) MacDonnell J., at p. 189.

The literal reproduction of a work in its entirety, or of a substantial part thereof, as for instance in photocopying, constitutes the primary form of infringement. Similarly, quotation, even acknowledged, may constitute infringement (subject to the substantiality requirement). However, copying goes beyond

literal reproduction; the copying need not be slavish but similarities between the two works must be such that the first work can be said to be reproduced in the second one: see *Beauchemin v. Cadieux* (1900), 10 B.R. 255, (Que. C.A.) Lacoste J., at p. 270.

An interesting test of copying was suggested in *SKONE JAMES (F.E.), Copinger and Skone James on the Law of Copyright*, 8th ed. (London, Sweet & Maxwell, 1948), focusing on the substantial use made of an owner's work, rather than on the resemblance between the two works, at p. 123:

If this view is correct, it follows that the degree of resemblance between the two works is not in itself the test of infringement but is only one factor in determining whether an unlawful use of the plaintiff's work has been made. For example, assume two cases in which advertising posters resemble the plaintiff's original and that, in the one case in which the resemblance is less close, it is proved *aliunde* that the defendant's artist had the plaintiff's work in front of him and slavishly imitated certain specific features of the design, but, in the other, though the general appearance is closer, the artist is able to establish that, though he made use of the plaintiff's basic idea, his execution was quite independent; it is submitted that the former and not the latter would be an infringement.

It has been held that "(T)he word 'copying', in its ordinary usage, connotes a conscious, intended, or deliberate act": see *Gondos v. Hardy* (1982), 64 C.P.R. (2d) 145 (Ont. H.C.J.), Carruthers J., at p. 160. Improvements to the work do not obliterate the infringement: see *Beauchemin v. Cadieux* (1900), 10 B.R. 255 (Que. C.A.) Lacoste J., at pp. 272-273; *B.C. Jockey Club v. Standen (Winbar Publications)* (1983), 73 C.P.R. (2d) 164 (B.C.S.C.) Legg J., at pp. 173 and 175, nor does the addition of original material: see *C.P. Koch Ltd. v. Continental Steel Ltd.* (1984), 82 C.P.R. (2d) 156 (B.C.S.C.) Paris J., at p. 164.

§5.2.5 Access to copied work or other subject -matter

A striking similarity between two works, alone, is insufficient to prove plagiarism. While it is recognized that infringement may result from unconscious copying, there must be evidence of access to the copied work or a connection between the two works for a court to find that infringement has occurred: see section 2, definition of "infringing" and VINCKE (Christian) et al., *Problèmes de droits d'auteur dans le monde de l'éducation* (Quebec, Éditeur officiel, 1974), at pp. 32-45.

Evidence of access alone will not suffice for a court to find infringement. Evidence of *copying* of a substantial part of a protected work would also have to be proven: *Caron v. Association des Pompiers de Montréal* (1992), 42 C.P.R. (3d) 292 (F.C.T.D.).

When a common source can be shown and the allegedly infringing work is the result of independent creation, there is no infringement. Plagiarism is a question of fact and can be proven by any means: direct evidence, resemblance established by comparison, presumptions. The courts will closely scrutinize and compare the works submitted to them. Since resemblance between two works can result from the limited range of expression particular to a field of endeavour (see *Kilvington Brothers Ltd. v. Goldberg* (1957), 16 Fox Pat.C. 164 (Ont. H.C.J.) Judson J., at pp. 168-169, or to use of common sources: see *Gemmill v. Garland* (1887), 14 S.C.R. 321 (S.C.C.) Gwynne J., at p. 327), a court must be convinced that a defendant has actually used the plaintiff's work to produce his own, before finding the defendant liable for infringement. Thus, evidence of independent work and use of common sources or ideas will serve to establish non-infringement. On the other hand, reproduction of mistakes taken from the original work may constitute proof of copying: see *Beauchemin v. Cadieux* (1900), 10 B.R. 255, (Que. C.A.), Lacoste J., at p. 273 and Blanchet J., at p. 287.

The fact of copying from an unauthorized copy of the work (or other subject-matter), rather than from the original, is no defence to infringement: see *Underwriters' Survey Bureau Ltd. v. American Home Fire Assurance Co.* (1939), (1939) Ex. C.R. 296 (Ex. Ct.) MacLean J., at p. 306.

In order to rely on a defence of independent creation, a defendant must provide particulars of the source or sources of that independently created work: see for instance, *Garland v. Gemmill* (1887), 14 S.C.R. 321 (S.C.C.) Gwynne J., *Underwriters Survey Bureau Ltd. v. American Home Fire* (1939), (1939) Ex CR 296 (Ex. Ct.) Maclean J., *Éditions Hurtubise HMH Itée c. Cégep André-Laurendeau* (1989), (1989) R.J.Q. 1003 (QueSupCt) Tessier J., at 1018 and *W.I. Villager Ltd. v. Giant Tiger Stores Ltd.* (1994), (1994) CarswellNat 2254 (F.C.T.D.-Practice) Reed J., at p. 2.

§5.2.6 Colourable imitation

Infringement may also consist in the making of a colourable imitation of a work or part of a work: see *Cardwell v. Leduc* (1962), (1963) Ex. C.R. 207 (Ex. Ct.) Kearney J., at p. 220, *i.e.* an imitation meant to deceive, "a copy so altered that it may plausibly appear not to be a copy": see *Francis, Day & Hunter v. B. Feldman & Co.* (1914) 2 Ch. 728 (C.A.) Neville J., at p. 732.

§5.2.7 Substantial reproduction

There is no infringement unless the matter produced or reproduced constitutes a substantial part of the infringed work, performer's performance, sound recording or communication signal. What constitutes a "substantial" part is a question of fact. In this respect, the courts have considered that quantity matters less than quality: see *Éditions Hurtubise HMH Ltée v. Cégep André-Laurendeau* (1989), (1989) R.J.Q. 1003 (Que. Sup. Ct.) Tessier J., at p. 1017. The relative importance and value of the plagiarized elements to the whole work or to the other subject-matter must be taken into account.

§5.2.8 Parody

It is no defence to an action for infringement to claim that the reproduction forms a parody of the work, upon which a defendant may have employed labour and produced an original work: see *Schweppes Ltd. v. Wellingtons Ltd.* (1983), (1984) F.S.R. 210 (Ch. D.) Falconer J., at p. 212. See also *Williamson Music Ltd. v. Pearson Partnership Ltd.* (1986), (1987) 13 F.S.R. 97 (Ch. D.) Baker J., at p. 106 and *Productions Avanti Ciné-Vidéo Inc v. Favreau* (1999), (1999) RJQ 1939 (Que. C.A.). As infringement of copyright may be construed as an invasion of property, the motive of the infringer is irrelevant: see *Bishop v. Stevens* (1990), (1990) 2 S.C.R. 467 (S.C.C.) McLachlin J., at p. 479. As expressed by DWORKIN (Gerald), *United Kingdom*, in STEWART (Stephen M.) et al., *International Copyright and Neighbouring Rights*, 2nd ed. (London, Butterworths, 1989), at No. 18.40:

(...) it has been argued that because parody and satire are deserving of substantial freedom, both as entertainment and as a form of social and literary criticism; and as a parody necessarily must use, or at least conjure up, the earlier work to achieve its objection, more lenient rules relating to copyright infringement than is ordinarily the case should apply. This argument has been rejected. The parodist may certainly take the *idea* of a work and create something new; he may also parody within the terms of 'fair dealing for the purposes of criticism or review'. Nevertheless, the general test whether the defendant's parody reproduces a substantial part of the plaintiff's work still applies.

Therefore, the correct test in deciding whether a parody constitutes infringement is if a substantial part of the infringed material has been used: see BRAITHWAITE (William J.), *From Revolution to Constitution: Copyright*,

Compulsory Licences and the Parodied Song (1984) 18 University of British Columbia Law Journal 35.

§5.2.9 Infringement as theft of property

Infringement by copying does not constitute theft under subsection 322(1) of the *Criminal Code* (R.S.C. 1985, c. C-46): see *R. v. Stewart*, (1988), (1988) 1 SCR 963 (S.C.C.) Lamer J., at p. 982.

§5.2.10 Other acts of direct infringement

As previously indicated (§5.2.1, *supra*), direct infringement may consist of the exercise by an unauthorized person of any of the rights granted to the copyright owner by subsections 3(1), 15(1), 18(1) and 21(1) of the *Copyright Act*. For a discussion of these rights and of the expression "any material form whatever": see Commentary under these sections.

§5.3 Indirect Infringement: subsection 27(2)

(2) It is an infringement of copyright for any person to	(2) Constitue une violation du droit d'auteur l'accomplissement de tout acte ci-après
--	---

§5.3.1 General

Subsection 27(2) considers certain commercial dealings as infringement. These are:

- Selling or renting out: paragraph 27(2)(a);
- Distributing *in a manner prejudicial* to the copyright owner: paragraph 27(2)(b)
- Distributing, exposing, offering for sale or rental, exhibiting in public *by way of trade*: paragraph 27(2)(c)
- Possessing for the purpose of selling, renting or distributing as above: paragraph 27(2)(d);
- Importing into Canada for the purpose of selling, renting or distributing as above: paragraph 27(2)(e);

a copy of a work, sound recording or fixation of a performer's performance or of a communication signal. These dealings may also constitute criminal offences, as provided for in subsection 42(1).

Section 2 provides that the term "infringing", when applied to a work, means "any copy, including any colourable imitation, made or dealt with in contravention of this (Copyright) Act.", when applied to a performer's performance, means "any fixation or copy of a fixation of it made or dealt with in contravention of this (Copyright) Act", when applied to a sound recording, means "any copy of it made or dealt with in contravention of this (Copyright) Act", and when applied to a communication signal, means "any fixation or copy of a fixation of it made or dealt with in contravention with this (Copyright) Act. Of course, copyright must subsist in the works or other subject matters.

§5.3.2 "knowledge"

(...) 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.

(...)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 si l'exemplaire avait été produit au Canada par la personne qui l'a produit :

Subsection 27(2) requires knowledge on the part of the alleged infringer who deals with an infringing copy of a work, sound recording or fixation of a performer's performance or of a communication signal in any of the ways described in this subsection, 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. Knowledge is an essential element of the infringement under subsection 27(2). The requirement of knowledge applies not only to the infringement in paragraph (e) but also to paragraphs (a), (b), (c) and (d).

The burden of proving such knowledge rests upon the plaintiff. However, subsection 27(2) must be read with section 39, which states that if at the date of the infringement the copyright was duly registered under the *Copyright Act*, a defendant will be deemed to have had reasonable ground for suspecting that copyright subsisted in the work.

The term "knowledge" should be given the sense of notice of facts that would suggest to a reasonable man that a breach of copyright was being committed: see *Clarke, Irwin & Co. v. Cole & Co.* (1959), 33 C.P.R. 173 (Ont. H.C.J.) Spence J., at p. 181. For instance, a book dealer should, before selling an imported book, make inquiries as to where copyright lies and what right of resale exists. Obvious indications should not be overlooked. See *Simon & Schuster Inc. v. Coles Book Stores Ltd.* (1975), 23 C.P.R. (2d) 43 (Ont. H.C.J.) Weatherston J., at p. 45.

Knowledge can be proved by circumstantial evidence and, in proper circumstances, one can rely upon the principles of willful blindness: see *R. v. Jorgensen* (1995), 129 D.L.R. (4th) 510 (S.C.C.) Sopinka J., at pp. 547-549.

Furthermore, subsection 27(3) makes it clear that in determining whether there is an infringement under subsection (2) in the case of an activity referred to in any of paragraphs (2)(a) to (d) in relation to a copy that was imported in the circumstances referred to in paragraph (2)(e), it is irrelevant whether the importer knew or should have known that the importation of the copy infringed copyright.

As put by Tremblay-Lamer J. in *Milliken & Company v. Interface Flooring Systems (Canada) Inc.* (1998), (1998) 3 F.C. 103 (F.C.T.D.), at paragraphs 60-61, a principal is deemed to have knowledge if a person who was delegated to do the task has this knowledge.

§5.4 Sale or Renting: Paragraph 27(2)(a)

(a) sell or rent out,
(...) a copy of a work, sound recording
or fixation of a performer's performance
or of a communication signal (...)

a) la vente ou la location;
(en ce qui a trait à l'exemplaire d'une
oeuvre, d'une fixation d'une prestation,
d'un enregistrement sonore ou d'une
fixation d'un signal de communication)

Copyright is infringed under paragraph 27(2)(a) by any person who sells or rents out a copy of a work or other subject matter of copyright that to the knowledge of that person infringes copyright or would infringe copyright if it had been made in Canada. For instance, the hiring and selling of films and videotapes which are copies of protected films and videotapes would constitute infringement under this subsection. If the works were reproduced by the same person without authority, subsection 27(1) provides an additional ground for infringement: see *Aldrich v. One Stop Video Ltd.* (1987), 17 C.P.R. (3d) 27 (B.C.S.C.) Davies J., at p. 35.

§5.5 Distribution to Prejudice the Copyright Owner: Paragraph 27(2)(b)

(b) distribute to such an extent as to
affect prejudicially the owner of the
copyright,
(...) a copy of a work, sound recording
or fixation of a performer's performance
or of a communication signal (...)

b) la mise en circulation de façon à porter
préjudice au titulaire du droit d'auteur;
(en ce qui a trait à l'exemplaire d'une
oeuvre, d'une fixation d'une prestation, d'un
enregistrement sonore ou d'une fixation d'un
signal de communication)

Copyright is infringed under paragraph 27(2)(b) by any person who distributes a work or other subject matter of copyright to such an extent as to prejudicially affect the owner of the copyright, that to the knowledge of that person infringes copyright or would infringe copyright if it had been made in Canada

Thus, liability for the distribution of an infringing copy is subject to a prejudice being caused to the copyright owner.

For instance, the giving away of infringing copies not covered under paragraph 27(2)(a) might constitute infringement under paragraph 27(2)(b), inasmuch as it is done in a manner to prejudicially affect the owner of the copyright.

The prejudice to the copyright owner is apparently not restricted to prejudice flowing from the loss of sales in lawful copies but could also cover, if submitted, any damages flowing directly from the infringement: for instance, loss of goodwill or disruption in its sales organization.

The prejudice to the copyright owner is not restricted to economic losses, but could also encompass his moral rights inasmuch as the author is also the owner of the copyright: see sections 28(1) and 28(2). However such prejudice must be proved by the copyright owner/author: *Compagnie générale des établissements Michelin — Michelin & Cie v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW — Canada)* (1996), 71 C.P.R. (3d) 348 (F.C.T.D.) Teitelbaum J., at p. 386.

It is to be noted however that this paragraph covers the right of the copyright owner rather than the right of the author.

§5.6 Exhibition in Public by way of Trade: Paragraph 27(2)(c)

(c) by way of trade distribute, expose or offer for sale or rental, or exhibit in public,

(...) a copy of a work, sound recording or fixation of a performer's performance or of a communication signal (...)

c) la mise en circulation, la mise ou l'offre en vente ou en location, ou l'exposition en public, dans un but commercial;

(en ce qui a trait à l'exemplaire d'une oeuvre, d'une fixation d'une prestation, d'un enregistrement sonore ou d'une fixation d'un signal de communication)

Under paragraph 27(2)(c), copyright is infringed by any person who, *by way of trade*,

- exposes for sale
- exposes for rental

- exhibits in public
a copy of a work, sound recording or fixation of a performer's performance or of a communication signal that to the knowledge of that person infringes copyright or would infringe copyright if it had been made within Canada.

The operation of this paragraph covers all kinds of works, whether created before or after June 8, 1988. This paragraph could be contrasted with paragraph 3(1)(g), which deals with the public exhibition of artistic works only, created after June 8, 1988, and exhibited for non-trade purposes, *i.e.* "other than sale and hire".

Reference may be made to the 1998 fourth edition of the *Collins English Dictionary*, in which the word "trade" is defined as "the act or an instance of buying and selling goods and services either on the domestic (wholesale and retail) markets or on the international (import, export and entrepôt) markets" or the "exchange of one thing for something else."

§5.7 Possession of Infringing Material: Paragraph 27(2)(d)

(d) possess for the purpose of doing anything referred to in paragraphs (a) to (c),
(...) a copy of a work, sound recording or fixation of a performer's performance or of a communication signal (...)

d) la possession en vue de l'un ou l'autre des actes visés aux alinéas a) à c);
(en ce qui a trait à l'exemplaire d'une oeuvre, d'une fixation d'une prestation, d'un enregistrement sonore ou d'une fixation d'un signal de communication)

Paragraph also 27(2)(d)) creates infringement given the mere possession of an infringing a copy of a work, sound recording or fixation of a performer's performance or of a communication signal inasmuch as this possession is for the purpose of

- selling or renting out: paragraph 27(2)(a);
- distributing *in a manner prejudicial* to the copyright owner: paragraph 27(2)(b)
- distributing, exposing, offering for sale or rental, exhibiting in public *by way of trade*: paragraph 27(2)(c).

Knowledge is an essential ingredient of the infringement.

Possession is defined at paragraph 4(3) of the *Criminal Code* (R.S.C. 1985, c. C-34) as :

(3) For the purposes of this Act (Criminal Code),
(a) a person has anything in possession

(3) Pour l'application de la présente loi (code criminel) :
a) une personne est en possession d'une chose

when he has it in his personal possession or knowingly

- (i) has it in the actual possession or custody of another person, or
- (ii) has it in any place, whether or not that place belongs to or is occupied by him, for the use or benefit of himself or of another person; and
- (b) where one of two or more persons, with the knowledge and consent of the rest, has anything in his custody or possession, it shall be deemed to be in the custody and possession of each and all of them.

lorsqu'elle l'a en sa possession personnelle ou que, sciemment :

- (i) ou bien elle l'a en la possession ou garde réelle d'une autre personne,
- (ii) ou bien elle l'a en un lieu qui lui appartient ou non ou qu'elle occupe ou non, pour son propre usage ou avantage ou celui d'une autre personne;
- b) lorsqu'une de deux ou plusieurs personnes, au su et avec le consentement de l'autre ou des autres, a une chose en sa garde ou possession, cette chose est censée en la garde et possession de toutes ces personnes et de chacune d'elles.

As seen, "possession" may be actual or attributed by the operation of the law: see WATT (David) et al., *The 2002 Annotated Tremear's Criminal Code* (Toronto, Carswell, 2001), at §4. However, as put by the Supreme Court of Canada in *Beaver v. R* (1957), (1957) S.C.R. 531 (S.C.C.) Cartwright J., at paras 24 and 37, there is no possession of a thing without knowledge of what this thing is as possession and knowledge must co-exist with some act of control.

The infringement by possession of infringing material could be contrasted with the offence of possession provided by paragraph 42(2)(a) of the *Copyright Act* which states that "Every person who knowingly (...) makes or possesses any plate that is specifically designed or adapted for the purpose of making infringing copies of any work or other subject-matter in which copyright subsists" is guilty of an offence.

§5.8 Importation: Paragraph 27(2)(e)

(e) import into Canada for the purpose of doing anything referred to in paragraphs (a) to (c), a copy of a work, sound recording or fixation of a performer's performance or of a communication signal (...).

e) l'importation au Canada en vue de l'un ou l'autre des actes visés aux alinéas a) à c) (en ce qui a trait à l'exemplaire d'une oeuvre, d'une fixation d'une prestation, d'un enregistrement sonore ou d'une fixation d'un signal de communication)

§5.8.1 General

Though books, records, videotapes or any other type of work, sound recording or fixation may lawfully be manufactured and sold in another country, it is an infringement to import for sale or hire into Canada such works,

sound recordings or fixations, without authority of the Canadian copyright owner to do so: see *Fly by Nite Music Co. v. Record Warehouse Ltd.* (1975), (1975) F.C. 386 (F.C.T.D.) Mahoney J., at pp. 394-395.

§5.8.2 Territorial Limitation

As copyright can be assigned territorially under subsection 13(4), the copyright owner in Canada could be a person different from the copyright owner elsewhere in the world. Thus, the Canadian owner could prevent the importation of works otherwise lawfully made or purchased outside Canada: see *Dictionnaires Robert Canada SCC v. Librairie du Nomade Inc.* (1987), 16 C.P.R. (3d) 319 (F.C.T.D.) Denault J.

It was thus held that books acquired on the open United States market from a licensee of the copyright owner were infringing works when imported for sale into Canada: see *Clarke, Irwin & Co. v. Coles Book Stores Ltd.* (1975), 23 C.P.R. (2d) 43 (Ont. H.C.J.) Weatherston J.

§5.8.3 Conditions of application

For an infringement to be found under paragraph 27(3)(e), the infringing copies must be imported into Canada for the purpose of

- selling or renting out: paragraph 27(2)(a);
- distributing *in a manner prejudicial* to the copyright owner: paragraph 27(2)(b)
- distributing, exposing, offering for sale or rental, exhibiting in public *by way of trade*: paragraph 27(2)(c).

§5.8.4 "imports"

The word "import" is not defined in the *Copyright Act*. In the *Customs Act* (R.S.C. 1985 (2nd Supp.), c. 1, s. 2(2); c. C-52.6, s. 2(2)), it is stated that for the purpose of such Act, "import means import into Canada". This definition is not very helpful. Therefore, the expression "to import" should be construed in its ordinary meaning, namely to bring in, to introduce from abroad: see *Flavell v. Canada (Deputy Minister of National Revenue for Customs and Excise)* (1996), 137 D.L.R. (4th) 45 (F.C.T.D.), Campbell J. Goods brought into Canada in transit only would not appear to contravene the prohibition set forth by paragraph 27(4)(d) unless these goods are imported for sale and hire into Canada: see, for instance, *Gramophone Co. of India v. Pandey* (1984), (1985) 11 F.S.R. 136 (S.C. Calcutta) Reddy J., at p. 154.

Paragraph 27(2)(e) could be compared with section 44.1 which deals also with infringement by importation. However, the judicial remedies flowing from a contravention to paragraph 27(2)(e) are only available when the importation into Canada is made for one of the purposes stated in paragraphs 27(2)(a), 27(2)(b) or 27(2)(c) while the administrative remedies provided for by section 44.1 are available irrespective of the purpose of the importation.

It is to be noted however that the importation of books is further dealt with specifically at sections 27.1 and 44.2 of the *Copyright Act*.

§5.8.5 "into Canada"

Subsection 35(1) of the *Interpretation Act* (R.S.C. 1985), c. I-21, as amended by S.C. 1996, c. 31) provides for the following definition of Canada:

<p>"Canadian waters" includes the territorial sea of Canada and the internal waters of Canada;</p>	<p>« Canada » Il est entendu que les eaux intérieures et la mer territoriale du Canada font partie du territoire de celui-ci.</p>
--	---

Sections 4 to 7 of the *Oceans Act* (S.C. 1996, c. 31; R.S.C. O-2.4) delimit the territorial seas of Canada and its internal waters.

It is worthwhile to note that subsection 20(2) of the aforesaid *Oceans Act* provides that federal laws (of which is the *Copyright Act*.) apply also to the continental shelf installations as if those places form part of the territory of Canada. Furthermore, under subsection 22(1) of the *Oceans Act* a court that would have jurisdiction in respect of any matter had the matter arisen in a province has jurisdiction in respect of any such matter involving a federal law that applies pursuant to the *Oceans Act* to the extent that the matter arises in whole or in part in any area of the sea that is not within any province and (a) that area of the sea is nearer to the coast of that province than to the coast of any other province; or (b) that province is prescribed by the regulations.

The requirement for having the goods brought *into Canada* under paragraph 27(2)(e) should be contrasted with the absence of such a requirement under paragraph 27(2)(a), where it could be argued that a person within Canada could buy and sell infringing works located outside Canada and be held in contravention of paragraph 27(2)(a), without these infringing works actually being brought into Canada.

§5.8.6 Importation and Knowledge

As seen above, subsection 27(2) requires knowledge, on the part of the alleged infringer who deals with an infringing copy of a work, sound recording or fixation of a performer's performance or of a communication signal in any of the ways described in this subsection, that the person knows or should have known that the copy of the work, sound recording or fixation of a performer's performance or of a communication signal infringes copyright or would infringe copyright if it had been made in Canada by the person who made. Knowledge is an essential element of the infringement under subsection 27(2). The requirement of knowledge applies not only to the infringement in paragraph (e) but also to paragraphs (a), (b), (c) and (d).

However, subsection 27(3) provides that in determining whether there is an infringement under subsection 27(2) in relation to a copy that was imported in the circumstances referred to in paragraph 27(2)(e), it is irrelevant whether the importer knew or should have known that the importation of the copy infringed copyright.

§5.9 Permitting Use of Theatre for Performance of Work: Subsection 27(5)

(5) It is an infringement of copyright for any person, for profit, to permit a theatre or other place of entertainment to be used for the performance in public of a work or other subject-matter without the consent of the owner of the copyright unless that person was not aware, and had no reasonable ground for suspecting, that the performance would be an infringement of copyright.

(5) Constitue une violation du droit d'auteur le fait, dans un but de profit, de permettre l'utilisation d'un théâtre ou d'un autre lieu de divertissement pour l'exécution en public d'une oeuvre ou de tout autre objet du droit d'auteur sans le consentement du titulaire du droit d'auteur, à moins que la personne qui permet cette utilisation n'ait ignoré et n'ait eu aucun motif raisonnable de soupçonner que l'exécution constituerait une violation du droit d'auteur.

§5.9.1 History

Save for the 1997 amendment to include infringement in relation to other subject-matter of copyright, subsection 27(5) has remained unchanged since its introduction in the *Copyright Act, 1921*, reproducing subsection 2(3) of the United Kingdom *Copyright Act, 1911*. This subsection creates an infringement of copyright out of permitting, without authorization from the copyright owner, a theatre or other place of entertainment to be used for the performance in public of a work or other subject-matter of copyright, for profit, unless the person who permits such performance was unaware and

had no reasonable ground for suspecting that the performance would be an infringement of copyright. The presumption established by section 39 may serve to defeat a defendant's claim of absence of such reasonable ground.

§5.9.2 Conditions of application

Subsection 27(5) will come into operation if the following conditions are met, namely,

- a person
- permits
- for profit
- a theater or other place of entertainment to be used
- for the performance in public
- of a work or other subject-matter of copyright
- without the consent of the owner of copyright.

These conditions are cumulative.

§5.9.3 "performance"

This section applies only to protected works performed in public. The term "performance" is defined at section 2 of the *Copyright Act* as meaning " any acoustic or visual representation of a work, performer's performance, sound recording or communication signal, including a representation made by means of any mechanical instrument, radio receiving set or television receiving set."

§5.9.4 "in public"

The expression "in public" is not defined in the *Copyright Act*, but has been interpreted as being the antithesis of "in private": see *Canadian Admiral Corporation v. Rediffusion, Inc.*, (1954), (1954) Ex. C.R. 382 (Ex. Ct.) Cameron J., at p. 404 which, however, was strongly criticized and overturned in *Canadian Cable Television Assn. v. Canada (Copyright Board)* (1993), 46 C.P.R. (3d) 359 (F.C.A.), Létourneau J., at pp. 368-371. Whether a performance is given in private or in public depends solely on the character of the audience and, if not domestic or quasi-domestic, it is then a performance given in public. In this regard, it may be said that the words "in public" are to be given their plain and usual meaning, that is to say openly, without concealment and to the knowledge of all.

§5.9.5 "without the consent of the owner"

The consent required under subsection 27(5) must come from the owner of the performing rights in the executed work (or other subject-matter of copyright) and does not have to be given in writing, as opposed to the consent in writing required by section 43, which deals with criminal remedies. The consent could be expressed or implied, written or given orally. The consent of the author or of the owner of rights other than the performing rights will not suffice although it may constitute a mitigating factor in the assessment of punitive damages.

§5.9.6 "theatre or other place of entertainment"

The expression "place of public entertainment" is not defined in the *Copyright Act*. The United Kingdom *Copyright Act, 1956* states, however, that it "includes any premises which are occupied mainly for other purposes, but are from time to time made available for hire to such persons as may desire to hire them for purposes of public entertainment" (see also subsection 25(2) of the United Kingdom *Copyright Act, 1988*). As these United Kingdom *Copyright Act* definitions extend the ordinary meaning of what is normally understood as a "public place of entertainment", they should only be referred to in Canada with caution.

The wording of subsection 27(5) should be compared with the wording of section 69, which refers to "theatres that are ordinarily and regularly used for entertainment and for which an admission fee is charged." It can also be contrasted with the exclusive rights of broadcasters under paragraph 21(1)(d) which refers to the performance of a television communication signal in a place open to the public on payment of an entrance fee.

§5.9.7 "permits"

The permission under subsection 27(5) relates to a specific work (or performer's performance or communication signal) that should be known to the person giving the permission. A person cannot be said to have given permission to the public performance of a work if it cannot be established that the person knew that *the* work was to be performed. The owner of a building where a "place of public entertainment" is located cannot be said to have permitted the public performance of the work in which copyright subsists by the mere fact of having rented the said place. Support for this viewpoint can also be found through the use, in the English text of subsection

27(5), of the words "*the work*", as opposed to "*a work*" or "*any work*"; see *Performing Right Society Ltd. v. CiryI Theatrical Syndicate Ltd.* (1923), (1924) 1 K.B. 1 (C.A.) Scrutton J., at pp. 12-13; *Australasia Performing Right Association Ltd. v. Corporation of the City of Adelaide* (1928), 40 C.L.R. 481 (C.A. Aust.) Isaacs J., at pp. 490-491; *Canadian Performing Right Society v. Canadian National Exhibition Association*, (1934), (1934) O.R. 610 (Ont. H.C.J.) Rose J., at pp. 615-617.

As expressed by GARNETT (Kevin) et al., *Copinger and Skone James on Copyright*, 14th ed. (London, Sweet & Maxwell, 1999), at no. 8-21:

Under the equivalent provisions of the 1911 Act it was said that a person does not permit what he cannot control, and does not permit the use of a place for the performance of a work if he does not know that the work is going to be performed. Thus where a person permits a premises to be used knowing which works will be performed, this will be sufficient to establish "permission", but not if the music to be performed is left to the performers and the defendant has no knowledge of what in fact will be performed. Permission may be inferred from acts which fall short of being direct and positive, and may be inferred from indifference, but permission will not be inferred from a mere general authorization to use a theatre for a performance of musical or dramatic works. (Footnotes omitted.)

In *Canadian Performing Right Society Ltd. v. Ford Hotel Co. of Montreal* (1935), 73 C.S. 18 (Que. Sup. Ct.) McKinnon J., at p. 27, it was held that the performance in a hote, of a musical work in which copyright subsisted amounted to public performance for private profit thereof and therefore infringement under subsection 27(5). Similarly, the unauthorized performance in a cabaret of songs in which copyright subsists may constitute infringement under subsection 27(5). In such a situation, an individual defendant who is the director or the corporate owner of the cabaret responsible for operations at the time of infringement and for the music played on the premises may not escape liability: see *Performing Rights Organization of Canada Limited v. Lion d'Or* (1981) *Ltée* (1987), 17 C.P.R. (3d) 542 (F.C.T.D.) Strayer J., at p. 545. However, see *Performing Rights Society Ltd. v. CiryI Theatrical Syndicate Ltd.* (1923), (1924) 1 K.B. 1 (C.A.) at pp. 12-13, in which it was held that "a man does not permit who cannot control, and secondly, a man does not permit the use of a place for the performance of a work if he does not know the work is being performed."

The term "permit" under subsection 27(5) would appear broad enough to lift the corporate veil so as to render liable the individuals who have permitted

the work to be so performed: see *Performing Rights Society Ltd. v. Caryl Theatrical Syndicate Ltd.* (1923), (1924) 1 K.B. 1 (C.A.) Atkin J., at p. 15.

Section 43 of the *Copyright Act* also creates a criminal offence created out of an infringement similar to that of subsection 27(5).

Infringement in case of dramatic, operatic or musical work

43. (1) Any person who, without the written consent of the owner of the copyright or of the legal representative of the owner, knowingly performs or causes to be performed in public and for private profit the whole or any part, constituting an infringement, of any dramatic or operatic work or musical composition in which copyright subsists in Canada is guilty of an offence (...)

Public performance for profit

27. (5) It is an infringement of copyright for any person, for profit, to permit a theatre or other place of entertainment to be used for the performance in public of a work or other subject-matter without the consent of the owner of the copyright unless that person was not aware, and had no reasonable ground for suspecting, that the performance would be an infringement of copyright.

§5.9.8 "for profit"

Prior to 1997, subsection 27(5) was referring to the "private profit" of the person permitting the use of the premises. As it reads now, subsection 27(5) refers to "profit" without qualifying that profit to be "private" or to be for the benefit of the owner of the premises.

Prior to 1997, subsection 27(5) was referring to the profit which the person permitting use of the premises intends to make and not the profit that might derive from the performance itself: see *Australian Performing Right Association v. Turner & Son* (1927), 27 S.R.N.S.W. 344 (N.S.W.S.C.) Davidson J., at p. 348. Taken alone, the words "private profit" in the English text could be interpreted as including non-pecuniary advantages or benefits while the words "lucre personnel" in the French text put the emphasis on a pecuniary consideration: see *Performing Right Society Ltd. v. Bradford Corporation* (1921), (1917-23) MacG. Cop. Cas. 308 (K.B.D.) Roache J., at p. 316; *Performing Right Society, Ltd. v. Bray Urban District Council*, (1930) A.C. 377 (J.C.P.C.- Ireland) Stankey J., at p. 390.

However, since 1997, it appears that subsection 27(5) refers to profit in a larger sense and could encompass monetary gain as well as non-monetary gain, or any advantage or benefit. Furthermore, absent the qualification "his profit", this profit could enure to the owner of the premises as well as any third party. It is noteworthy that the *Copyright Act* refers sometimes to "private profit" (paragraph 42(2)(b) and subsections 43(1) and (2)), "motive of gain" (subsections 2.5(1) and 2.5(2), subsections 29.3(1) and (2) and subsection

32.2(2)) and "profit" and "non-profit" (section 2: definition of "educational institution" and of "library, museum and archive") and sections 29.5 and 32.

§5.9.9 Excuses

For a defendant to escape liability under subsection 27(5), he needs to establish that:

- a) he was not aware that the performance was an infringement
- b) he had no reasonable ground to suspect that it was an infringement: see section 39.

§ 6.0 Case Law

§ 6.1 Canada

§ 6.1.1 General

1. *Garland v. Gemmill* (1887), 14 S.C.R. 321 (S.C.C.) Gwynn J.

In works of this nature, where so much may be taken from common sources and where much of the information given, if given correctly, must be given in the same words we must be careful not to restrict the right of the defendant to publish a work similar in its nature to that of the plaintiff if, in truth, he obtains the information from common, independent sources open to all and does not, to save himself labor, merely copy from the plaintiff's book that which has been the result of his skill, diligence and literary attainments. We must be careful not to put manacles upon industry, intelligence and skill in compiling works of this nature.

The parts which the learned Chancellor has found, and as I think correctly found to have been copied by the defendant from the plaintiff's "Canadian Parliamentary Companion of 1883," consist of short biographical sketches of some of the members of the Parliament of Canada. It must, I think, be admitted, that the defendant set about the compiling his work in a perfectly legitimate manner by addressing circulars to each member of Parliament, requesting him to furnish a short sketch of his life for publication in the defendant's work. If all the gentlemen who received these circulars had answered them by writing in their own language, short sketches of their lives, and had sent them to the defendant for publication in his book, he would have had as much right to have published these sketches in the language in which they were sent to him, or in an abridgment thereof prepared by himself, as the plaintiff had to publish like sketches furnished to him, although the language in which both sketches might be expressed should be very similar; but unfortunately for the defendant, it appears that several of the gentlemen who had received the defendant's circular, instead of furnishing him with the biographical sketches he had asked for, replied to the effect that they had already supplied such a sketch to the plaintiff for publication and which was published in his book. The defendant conceiving this sufficient authority to entitle him to take from the plaintiff's book the biographical sketches of such gentlemen as so referred him to

the plaintiff's work, did copy them from the plaintiff's book, and thus, ignorantly perhaps but not the less actually, was guilty of the piracy of which the plaintiff has accused him. To the extent of the matter so copied the plaintiff has established his right to have an injunction. (at pp. 327-328)

2. *Beauchemin v. Cadieux* (1900), (1901) 10 B.R. 255 (Que. C.A.) Lacoste and Blanchet JJ.

C'est le travail original de l'auteur qui est protégé et non ce qu'il a puisé dans le domaine public. Ainsi dans un almanach d'adresses (*directory*), les noms, occupations, adresses, sont dans le domaine public, mais la compilation de ces noms accompagnés d'autres renseignements, présuppose un travail de recherches, d'informations prises au domicile de chacun, et celui qui, au lieu de s'imposer ce travail, copierait le premier almanach, serait coupable de contrefaçon.

Dans un dictionnaire de la langue, la nomenclature est dans le domaine public, elle peut être copiée d'un dictionnaire déjà publié; le travail de l'auteur est dans la forme intrinsèque qu'il donne à son dictionnaire, dans les définitions, dans les exemples, dans le choix, le groupement des faits sous chaque nom.

Afin de discerner s'il y a contrefaçon, il faut bien se rendre compte de l'étendue du droit d'auteur et bien distinguer ce qui formait partie du domaine public à l'époque de la publication.

La contrefaçon consiste à copier l'ouvrage protégé par la loi, à s'emparer du travail de l'auteur et à le reproduire pour lui faire une concurrence déloyale. Il n'est pas nécessaire pour qu'il y ait faute que la copie soit servile, mais les deux ouvrages doivent se ressembler assez pour qu'on puisse dire que l'œuvre du premier est reproduite dans le second. Copier une partie substantielle, notable d'un ouvrage suffit pour donner à la reproduction le caractère d'un délit. Dès que la reproduction est suffisante pour causer un préjudice, il y a contrefaçon délictuelle.

Le fait matériel de la contrefaçon se prouve par tous genres de preuve. La ressemblance est un élément de preuve qui se rencontre dans toutes les causes. Dans certains cas, elle peut être suffisante, à elle seule, pour convaincre le juge, comme par exemple dans la reproduction d'un poème d'un roman, d'une œuvre littéraire originale; dans d'autres cas, elle n'est qu'une présomption plus ou moins forte suivant les circonstances. On comprend, par exemple, que deux compilations de faits, de statistiques, etc., puisées aux mêmes sources, doivent se ressembler beaucoup.

Mais la ressemblance n'est pas le seul élément de preuve. La contrefaçon peut être prouvée directement, ou encore, il peut être prouvé des faits ou des circonstances qui, en soi, n'établissent pas la contrefaçon, mais la font présumer plus facilement. L'*animus furandi* que l'on découvre chez l'accusé crée une de ces présomptions; une fois prouvé, il constitue l'auteur de mauvaise foi et donne à sa cause une couleur défavorable.

Dans tous les cas, il faut que le juge soit convaincu que le défendeur s'est emparé de l'ouvrage du demandeur, l'a copié au lieu de puiser aux sources communes. (Lacoste J., at pp. 270-271)

Sans doute, comme le fait remarquer le savant juge qui a rendu le jugement de la cour supérieure, la simple reproduction de lignes dissimulées ou de passages épars, résultat de la similitude des sujets traités surtout dans des ouvrages abrégés, ne constitue pas en soi un délit de contrefaçon, mais la multiplicité de ces reproductions, une identité aussi prononcée de mots, de faits et de tournures de phrases nous fait croire qu'il existe une parenté bien rapprochée entre les deux dictionnaires et que le second procède du premier.

Sans doute que le second est dans un sens une amélioration sur le premier comme une seconde édition d'un ouvrage est une amélioration sur le premier comme une seconde édition d'un ouvrage est une amélioration sur la première, mais ces améliorations n'effacent pas le délit. Dans un sens, elles l'aggravent en rendant le second ouvrage plus utile, plus complet et plus attrayant, et par conséquent plus nuisible à l'ouvrage des appelants.

Mais il y a plus, nous trouvons la preuve convaincante de l'intention de copier dans la reproduction des erreurs et des renvois qui se trouvent dans l'ouvrage des appelants. (Lacoste J., at pp. 272-273)

(...) pour constituer la contrefaçon, il n'est pas nécessaire que le second auteur ait copié textuellement et en entier le travail original du premier, mais qu'il suffit que les emprunts soient assez nombreux et assez importants pour établir qu'il y a eu appropriation intentionnelle et répétée du travail d'autrui, et que si la nature identique des sujets traités peut donner lieu à des ressemblances dans les deux textes, ces ressemblances, qui peuvent s'expliquer facilement lorsqu'elles sont peu nombreuses et limitées à des noms de personnes et de lieux, à des dates et statistiques, ou à des renseignements ordinairement rédigés d'une manière succincte, deviennent au contraire la preuve irrésistible d'une contrefaçon évidente, lorsqu'elles sont répétées assez souvent pour faire disparaître toute idée d'accident ou de hasard. (Blanchet J. at p. 284)

Il est facile de comprendre que les noms d'hommes et de lieux, la description d'un territoire, sa population, ses industries, sa richesse, ses produits, et autres statistiques du même genre peuvent quelquefois être exprimés par des écrivains différents dans des termes plus ou moins ressemblants, et il est possible que ces ressemblances ne seraient pas toujours suffisantes, par elles-mêmes, pour établir la contrefaçon. Mais il nous semble aussi raisonnable de conclure que si, dans un ouvrage comme celui des intimés, composé de plus de 3,000 sujets différents, on trouve des centaines d'articles contenant parfois plusieurs lignes reproduisant textuellement la rédaction des articles correspondants de celui des appelants, des centaines d'autres qui n'en diffèrent que par une inversion par l'omission ou l'addition de quelques mots, des centaines d'autres parsemés d'extraits textuels qui ne peuvent avoir été puisés que dans l'ouvrage des appelants, il devient évident que le hasard ou l'identité de sujets ne suffisent plus à expliquer une ressemblance aussi phénoménale et qui ne peut avoir qu'une cause : l'appropriation systématique de travail des appelants. (Blanchet J., at p. 286)

S'il pouvait encore subsister un doute, deux raisons additionnelles le feraient disparaître. En effet, les erreurs ou les inexactitudes que l'on trouve en nombre assez considérable dans le dictionnaire des appelants, ont été textuellement reproduites dans celui des intimés, et il en est de même quant aux renvois d'un sujet à un autre, qui ont aussi été fidèlement copiés, au nombre d'environ cent-cinquante.

Ces deux faits, évidents et indéniables, sont considérés par les auteurs et les tribunaux, comme une des preuves les plus convaincantes de la contrefaçon.

Il est inutile d'ajouter que les intimés ne peuvent pas invoquer ici l'excuse des sources communes, car nous sommes en face de l'appropriation évidente d'une partie de l'ouvrage

des appelants qui ne peut être attribuée à d'autres qu'à eux-mêmes et qui leur appartient aussi exclusivement que leur rédaction.

Dans tous les cas, la preuve faite par les appelants suffisait pour mettre les intimés dans l'obligation d'expliquer comment leur ouvrage a été fait, soit par la production de leur manuscrit, soit par le témoignage de celui qui l'a écrit et qui était présent au procès. (Blanchet J., at p. 287)

3. *Deeks v. Wells* (1931), (1931) 4 D.L.R. 533 (J.C.P.C.- Canada), Orde J.

There can be no copyright in the facts of history or in their chronological sequence. Had "The Web" been published, the defendant Wells was as free to consult and use it in the preparation of his work as the plaintiff was to consult and use "The Encyclopaedia Britannica" or any other publication as a source of information. Infringement of copyright in such cases must, as a general rule, consist of the copying of the words of another in the order in which he has used them. The use of the same historical facts or of the same ideas is not enough.

As to the second, the plaintiff failed to prove by any direct evidence that the defendant Wells had ever seen or made use of her manuscript either directly or indirectly. She was forced to try to establish her case by the internal evidence afforded by a comparison of the manuscript of the defendant Wells with her own.

Now it is conceivable that her case might have been established in this way. If it were found that certain passages in the two works were couched in the same language, or that there were unexplained errors in both, these facts, coupled with the coincidences in time and other circumstances as to the possession of the plaintiff's manuscript by one of the defendant companies, might have constituted evidence so convincing as to justify a finding that the defendant Wells had used the plaintiff's work, notwithstanding his own denial. It was upon evidence of this sort that the plaintiff relied, but when the comparisons which she made in the course of her able and forcible argument are examined, they fall far short of what is necessary, in my judgment, to constitute evidence sufficiently overwhelming and convincing to offset the positive denials of the defendants' witnesses. The plaintiff fails on this ground also, and her appeal should be dismissed. (at pp. 547-548)

4. *Underwriters Survey Bureau Ltd. v. American Home Fire Assurance Co.*, (1939) Ex. C.R. 296 (Ex. Ct.), MacLean J.

I do not think it matters whether the unauthorized copies were made directly from the plaintiffs' work or from other unauthorized copies of the same work. I do not think infringement can be avoided by copying from an unauthorized copy of a work in which copyright subsists. (at p. 306)

5. *Moreau v. St. Vincent*, (1950) Ex. C.R. 198 (Ex. Ct.), Thorson J..

(...) It was in these two documents that the plaintiff expressed and described his arrangement and system for conducting his competition. I see no reason why this identification of the literary work in which the plaintiff has his copyright should not be accepted. It is only for this

work, and not for any ideas or any arrangement or system for conducting a competition expressed or described in it, that the plaintiff has any protection. If he is to succeed in an action for infringement of copyright he must show that his literary work has been copied. It will not be enough to prove that his ideas have been adopted or that his arrangement or system has been used. (at p. 205)

(...) Obviously, there must be similarities between the defendant's "Quiz général de la publication *Loisir Favori Enrg.*" and the plaintiff's "Concours: Recrutement d'Abonnés" to the extent that both are based on an arrangement of elements and a system for conducting a competition that are essentially the same but a comparison of the two literary works show that the former is not a copy of the latter. The lists of the clubs are different and the results of the sports contests are set out differently; the texts of the conditions and rules for the two competitions are not the same; the questions in the plaintiff's questionnaire relate to sports, whereas those in the defendant's quiz are of a general nature. The receipts likewise, although necessarily similar in that both are receipts, are different in text, type and appearance. Nor can the fact that in one issue of the plaintiff's paper the word "engagement" was used erroneously for "agencement" and a similar error appears on the back of the defendant's leaflet in the form of "engensement" outweigh the other evidence of difference. And while I have not overlooked the fact that copying need not be word for word if there is colourable imitation, I am also of the view that there should be no anxiety to find copying in a case such as this and thereby indirectly give protection to a system of competition such as that conducted by the plaintiff when the law does not give it directly. (at pp. 206-207)

6. *Kilvington Brothers Ltd. v. Goldberg* (1957), 16 Fox Pat.C. 164 (Ont. S.C.), Judson J..

There are many similarities between Goldberg's work and the plaintiff's design, but once the customer decides on a certain type of tombstone these are inevitable. The top, the two raised panels, the sunken panel with the lamp and flame and the symbolism are conventional. The height of the stone is governed by the regulations of the cemetery. This, to a certain extent, determines the proportions of the work. There are also differences, and in my opinion significant differences -- particularly in the flame and the lamp. Goldberg says that he drew these freehand and did not copy them from the plaintiff's work. His evidence is supported by the physical result, and I accept it as I do the rest of his evidence in denial of copying. The similarities are plain to be seen but they do not enable me to draw an inference of copying. Tombstone workers working on a task of this kind are working with common ideas and with only a limited field for the expression of these ideas. It is not surprising that the results are similar. The plaintiff cannot, by making a design embodying conventional ideas, obtain a monopoly of the use of these ideas. Others are entitled to use these ideas provided they do so by going to the common source and do not copy the plaintiff's expression. There is, therefore, no infringement of copyright and the action fails at this point. (at pp. 168-169)

7. *Cardwell v. Leduc* (1962), (1963) Ex. C.R. 207 (Ex. Ct.) Kearney J..

In conclusion, I wish to make some short observations in respect of infringement and its necessary constituents.

As Orde J.A. said in *Deeks v. Wells*, (1931) O.R. 818 at 840, in order to constitute infringement there must be identity or similarity of language, phraseology or literary style or form. Likewise, it was said in *Kantel v. Grant, Nisbet & Auld Ltd.*, (1933) Ex. C.R. 84 at 96, that there is no infringement unless a substantial part of a work is copied.

Over a century ago, Shadwell, V-C., made the following observations in *Sweet v. Cater* ((1841), 11 Sim. 572):

Upon the question of whether there has been a piracy it is not a question of one small passage here and another there, but when such a point is raised as to the quantity of the matter copied, I have always understood that the court at the time of trial, is to look at the two works and satisfy itself, as well as it can, whether there has been such an abstraction as forms a fair subject of complaint. (at p. 219)

I might add that it is well recognized that a work may be infringed by a colourable imitation of the whole or any part of it, and, in my opinion, the defendants have been guilty of infringement by making a colourable imitation of the plaintiff's copyrighted work, both in the literal and figurative sense of the term. (at p. 220)

8. *Webb & Knapp (Canada) Ltd. v. Edmonton (City)*, (1970) S.C.R. 588 (S.C.C.) Hall J.

What was the situation in the instant case? Webb & Knapp were necessarily taking a gamble in agreeing to spend an estimated \$100,000 on the prospect that the city would adopt its plan. If the city did adopt the plan Webb & Knapp stood to reap substantial financial benefits. If the plan was not adopted Webb & Knapp stood to lose the sum of \$138,484.90 it actually expended in the preparation of the plan. Had the city merely exercised the right it had under the contract not to adopt the plan that would have been the end of the matter. The plan and the plan material would, under clause 4, have become the property of the city. It would then have had the property rights but not the copyright in the plan.

But the city did not just elect not to adopt the plan. it instructed its commissioners at the meeting on March 22, 1962 to evaluate the plan. The commissioners proceeded to do so, but they did not merely evaluate the plan, and instead of reporting back to council recommending either adoption or rejection, they came to the meeting on June 25, 1962 with a plan of their own which was substantially the Webb & Knapp plan in a modified form. This use of the Webb & Knapp plan and plan materials occurred prior in time to the city's election not to adopt the Webb & Knapp plan, and, as stated, this was clearly a breach of the Webb & Knapp copyright. The city, in accepting and acting upon the recommendations of its commissioners, was purporting to accept without compensation the entire benefit of the expenditure made by Webb & Knapp and eliminating Webb & Knapp from the picture by not adopting the plan but still utilizing the ideas and overall scheme of development which the plan envisaged.

Webb & Knapp are, therefore, entitled to damages for this breach of copyright. (at pp. 598-599)

9. *Netupsky v. Dominion Bridge Co.* (1971), (1972) S.C.R. 368 (S.C.C.), Judson J.

Netupsky agreed with Hamilton to provide the plans for the structural design of the Ottawa Civic Centre. Hamilton, the architect for the project, was acting for the owner, the City of Ottawa, in his dealings with Netupsky. The plans SK-1 and SK-2 and S1 to S5 became the property of the owner to use for the purpose of erecting the intended structure in substantial accordance with those plans. Dominion Bridge, the successful bidder for the steelwork, used the plans for this purpose, and their authority was derived from the City of Ottawa, which held an implied licence to the copyright.

The extent to which the copyright material may be altered is not unfettered, however. The court may imply terms limiting that right, or the contract may expressly or impliedly forbid any alterations: *Frisby v. British Broadcasting Corpn.*, (1967) 1 Ch. 932, (1967) 2 All E.R. 106. There was no refusal by Dominion Bridge to give credit to Netupsky for the structural design. The final plans, though modified, described a structure which, to the layman, would be identical in appearance to a structure built in accordance with Netupsky 's plans. Netupsky himself had made various changes to his SK-1 and SK-2 drawings to prepare the plans S1 to S5. These changes were at least a partial cause of further changes being required to decrease the cost involved, and all changes were authorized by the City of Ottawa. In my opinion, the alterations made by Dominion Bridge were within the limits which should be considered acceptable. (at pp. 378-379)

10. *T.J. Moore Co. v. Accessoires de Bureau du Québec Inc.* (1973), 14 C.P.R. (2d) 113 (F.C.T.D.), Lacroix J.

We find it difficult to accept the defence's suggestions to the effect that defendant acted completely in good faith in proceedings as the evidence has shown, for two main reasons.

First, it did not obtain the permission of the Moore Company to reproduce its catalogue in whole or in part in its own catalogue.

Secondly, it could not have been unaware that what it was extracting from the Moore catalogue (P-3) to plagiarize and incorporate in its own catalogue (P-6), was the exclusive property of plaintiff, the Moore Company, and this appeared at the beginning of the Moore catalogue on the inside cover where it was clearly indicated that said catalogue P-3 -- catalogue No. 64 -- existed under "rights reserved 1964". (at pp. 121-122 (translation))

11. *Fetherling v. Boughner* (1978), 40 C.P.R. (2d) 253 (Ont. H.C.J.), Southey J.

I am quite prepared to draw the inference that the subjects of the photographs gave the plaintiff their consent to the use of the photographs in the article in question, but I do not think the plaintiff has established in the extraordinary facts of this case that he had a copyright in the photographs. The photographs, of course, were taken by a machine without the intervention of the plaintiff as a photographer. In the text of his article, the plaintiff referred several times to the subjects themselves being the artists.

If the plaintiff had a copyright, which is enforceable as against the defendant, then he must have a copyright in the use of the strips that is enforceable as against the subjects of the strip photographs. I am quite satisfied that he has not established in the material that he has such a copyright and I would not be satisfied in that regard even if the portions of the affidavit, referred to above, were taken into consideration by me.

The second question is whether the transfer process constitutes copying. My conclusion, after listening to the argument of counsel, but without hearing any evidence, is that such process does not constitute copying, because it involves the transfer physically of the picture on the copy of *The Canadian* from which the defendant's product is made. After such transfer there was no picture on the page of *The Canadian*. I am satisfied that the defendant would have been entitled to purchase a copy of *The Canadian*; cut out one of the strip photographs; paste it on a piece of paper; put a border around it; frame it; and sell it, without infringing copyright, just as she would have been entitled to sell the issue of *The Canadian* itself and just as any person, who purchases the work of an artist, is entitled to resell that work, or a piece of it. In my view that is essentially what was done by the defendant in this case.

Although the plaintiff's case that the defendant's process involved copying is not such that I would ever describe it as frivolous, I do not think it is sufficiently strong to justify the granting of an interlocutory injunction. (at pp. 255-256)

12. *Silverson v. Neon Products Ltd.* (1978), 39 C.P.R. (2d.) 234 (B.C.S.C.), Legg J.

Although the proprietors of the motel who ordered the sign from the defendant and the present proprietors of the motel are not parties to this action, I think the plaintiff's implied consent to the use of the silhouette for advertising the Davey Crockett Motel would prevent the plaintiff from succeeding against those proprietors for infringement of copyright. The plaintiff by his conduct has thus precluded himself from exercising his statutory rights against the motel proprietors. In my view he is also precluded from exercising those rights against the defendant because the defendant manufactured the fascia sign with the authority of the motel proprietors. (at p. 241)

13. *ATV Music Publishing of Canada Ltd. v. Rogers Radio Broadcasting Ltd.* (1982), 35 O.R. (2d) 417 (Ont. H.C.J.), Van Camp J.

The defendants admit that the music used in the recording of "Constitution" is the music to the song "Revolution" by Lennon and McCartney. The defendants admit that the words to the song "Revolution" were "authored by Lennon and McCartney". There is no evidence before me of any separate copyright of the words or of the music. There is no evidence before me that one was the author of the words and the other the author of the music. The evidence before me indicates only one copyright of the music with the words. Since the names of the two authors would indicate that there were two persons then it seems to me that the work herein falls within the definition "work of joint authorship" for which there would be one copyright of which the plaintiff is the owner in Canada.

The *prima facie* case then is that the defendant is proposing to use something that belongs to the plaintiff without the permission of the plaintiff. (at pp. 421-422)

14. *Gondos v. Hardy* (1982), 64 C.P.R. (2d) 145 (Ont. H.C.J.), Carruthers J.

Some of the authorities, and particularly the American, in discussing copying, refer to it as being either conscious or unconscious. Whether it be found to be one or the other, none of

the authorities suggest that there can be an infringement without a causal connection between the work in which copyright is claimed to subsist and the alleged infringing work or works. At page 28 of the Francis Day case, Diplock, L.J. says:

If the existence of the copyright work has no causal connexion with the production of the alleged infringing work, even though the latter be identical with the former, there is no infringement of copyright. (*Francis, Day & Hunter Ltd. v. Bron*, (1963) 2 All E.R. 16 (C.A.)).

If there is found to be no causal connection and, therefore, no copying, either conscious or unconscious, then, any similarities, however strong, which are found to exist between the works must be deemed a coincidence. The word "copying", in its ordinary usage, connotes a conscious, intended, or deliberate act. Unconscious copying occurs, then, in the absence of any of these elements, but, of necessity, with the required evidence of de facto familiarity with the work alleged to be copied. As is stated by Diplock, L.J. on p. 27, after referring to subconscious copying:

We know not whether it is rare or common, general or idiosyncratic, nor indeed whether it is possible to remember, not a mere isolated phrase, but a 'substantial part of' the remembered work without remembering that one is remembering. (at pp. 159-160)

The law is clear that in order to substantiate a finding of infringement on the basis of unconscious copying, there must be evidence of access or a causal connection between the works. Counsel for the plaintiff asked me to consider that this is not the law, and maintained that it is that a strong or striking similarity, as in the present case, alone, is sufficient to support a conclusion of infringement. In this respect, he is able to refer me to one authority only, and that is a 1972 paper prepared by Jeffrey G. Sherman entitled: "Musical Copyright Infringement: The Requirement of Substantial Similarity". From my reading of that paper, I must conclude that the learned author, although making this suggestion, does not refer to any authority in support. Counsel for the plaintiff referred me to one case; but a reading of it discloses it to be a judgment reached on default of a defence and, consequently, not of much persuasive authority, in any event, to offset what otherwise appears to be a well-entrenched principle of law. To support unconscious copying on the part of the defendants Hardy and Toth, plaintiff's counsel referred me to the fact that they, like the plaintiff, worked extensively in and about Toronto and that, accordingly, I should infer that at some time, at some place, they heard the plaintiff's work. This I will not do in this case. (at p. 167)

15. *B.C. Jockey Club v. Standen (Windbar Publications)* (1983), 73 C.P.R . (2d) 164 (B.C.S.C.) Legg J.

In *Football League Ltd. v. Littlewoods Pools Ltd.*, (1959) Ch. 637 at 651, (1959) 2 All E.R. 546, Upjohn J. said that it is clearly settled law that there can be no copyright in information or in an opinion per se and that copyright can only be claimed in the composition or language which is chosen to express the information or the opinion.

But in my opinion the defendant in the case at bar has done more than copy information from Overnight. He has appropriated the results of the labour and skills of the Club which has gone into the compilation of the information which the Club has developed and published.

The merit of the compilation of information in Overnight resides in the painstaking tasks which have been performed by the Club in assembling that information.

It is admitted in the admission of facts that the performance of those tasks is a necessary prerequisite to the publication of Overnight.

Copyright may be infringed by appropriating a substantial amount of the material published by the original author, although the language employed by the infringer be different and the material be altered (see *The Modern Law of Copyright*, Laddie, Prescott & Vitoria, p. 41, para. 2.65).

In *Scott v. Stanford* (1867), L.R. 3 Eq. 718 at 724, Wood V.-C. said:

No man is entitled to avail himself of the previous labours of another for the purpose of conveying to the public the same information, although he may append additional information to that already published. (at p. 173)

16. *C.P. Koch Ltd. v. Continental Steel Ltd.* (1984), 82 C.P.R. (2d) 156 (B.C.S.C.)
Paris J.

In my view it is clear that Koch was the author of and owner of the right of copyright in the Oakalla and Matsqui plans which he produced. There was never any agreement between him and Lloyd either express or implied, and most certainly not in writing, of assignment or grant of the right to Lloyd or his company. The fact that for the most part the plans were left in the possession of the defendants does not alter that. Even if it could be argued that it was contemplated that Continental Steel should become owners of the plans per se, the law is clear that the author retains the ownership in the copyright in the plans unless there is an express agreement to the contrary, *Meikle et al. v. Maufe et al.*, (1941) 3 All E.R. 144 at p. 152.

Were the plans copied or reproduced in some substantial way or can they be said to be a "colourable imitation"? Whether copy of some substantial part has or has not occurred is a fact which must be determined in the light of all the circumstances. However, it is no defence that a defendant may have added original material of his own to an original work copied *Schauenburg Industries et al. v. Borowski et al.*, *supra.* ((1979), 50 C.P.R. (2d) 69). (at pp. 163-164)

In September, 1981, Lloyd approached Koch with the final Aggasiz plans that Koch had produced in 1978. He asked Koch for some information about them, which Koch gave to him. However, Koch found the incident curious. A few days later, during a casual conversation over drinks, Lloyd told Koch that he had in fact received another contract for a set of "sally port" gates at another institution in the Aggasiz area. He said that Paulsen, his draughtsman, was using Koch's plans and trying to draw them up in more complete form for the new job. Koch testified that he said: "O.K. -- but I get a royalty", and Lloyd replied: "O.K.". Lloyd's account of this crucial conversation was somewhat different. But I am satisfied in all the circumstances that Koch's account is the accurate one. In fact, Paulsen used Koch's original plans and simply changed the date on them and added a few very minor details and then produced five plans of his own (ex. 26) by copying Koch's plans in good part.

The result therefore is that Koch did give permission to Lloyd to copy his plans but it was conditional upon receiving a reasonable royalty. In any event, this permission could not constitute a valid assignment of copyright because it was not in writing, as required by s. 12(4) (now s. 13(4)) of the Copyright Act. I must therefore find that there has been an infringement of Koch's copyright and assess damages accordingly. (at p. 167)

17. *R. v. Red Hot Video Limited* (1984), 6 C.C.C. (3d.) 331 (B.C. Prov. Ct.), Melvin J.

(19) The essence of the offences the appellant faced was possession, which is defined by s. 3(4) (now 4(3)) of the Criminal Code. To possess, one must have knowledge: *Beaver v. R.*, (1957) S.C.R. 531, 26 C.R. 193, 118 C.C.C. 129. Consequently, there can be no conviction for possession for the purpose of distribution of any obscene matter without knowledge on the part of the accused that he "possesses". By subs. (6) Parliament, in my view, has drawn a distinction between possession of an item and possession of that item with knowledge that it is obscene. That is, once the Crown has proved beyond a reasonable doubt that the accused possessed the item, it is no defence for an accused to say that, although he knew he had the item, he did not know that it was obscene.

18. *Bouliane v. Service de musique Bonanza Inc.* (1986), 18 C.I.P.R. 214 (Que. C.A.) *per curiam*.

CONSIDÉRANT également qu'en application de l'art. 17.(1) (now "art. " 27(1)) de la Loi l'action de Bouliane pouvait réussir sans que celui-ci soit obligé de prouver que l'appelante savait que Bonanza n'était pas autorisée à lui céder le droit d'auteur à l'égard de l'enregistrement en cause (at p. 218)

19. *École de conduite Tecnic Aubé Inc. v. 1509 8858 Québec Inc.* (1986), 12 C.I.P.R. 284 (Que. Sup. Ct.), Halperin J.

A comparison of Provost's manual, (Ex. P-3) with that of Can-Americ (Ex. D-6) suggests certain interesting conclusions. Even a cursory examination of pages dealing with the same subject, clearly reveals that the latter is a reproduction of the former. The sequence of treatment of the material, the juxtaposition of photographs, charts and sketches, the techniques used in the presentation of the material, all lead to the conclusion that except for minor variations, the Can-Americ manual was copied, perhaps even slavishly, from Provost's manual. (at pp. 296-297)

Having arrived at the conclusion that on the facts the Can-Americ manual has largely been copied from Provost's manual, there remains for consideration the question of law as to the validity of Provost's copyright in the work, considering the substantial portions which have their origin in third party sources. (at p. 297)

Provost's manual clearly qualifies as a textbook and as such, in the word of Fox cited above (p. 423), is:

... a development in the way of progress, and, to a certain extent by common consent, including the implied consent of the first publisher, others interested in advancing the same art or science may commence where the prior author stopped.

The latitude suggested in this rule seems all the more justified in the present case since the vast majority of the borrowed source material has its origin in governmental and quasi-governmental publications. The defence was generally content to rely on Provost's negative

response each time he was asked whether he had obtained the requisite consent of the apparent authors of the source materials. It strikes me that this approach suffers from perhaps a technical flaw in that it does not allow for the possibility that copyright in the materials in question may have been abandoned...

I am therefore of the opinion that Provost's manual qualifies as a compilation; secondly, that the amount of labour, skill, judgment and ingenuity which Provost brought to bear upon his compilation was sufficient to support a claim for copyright in his work; and thirdly, that given the nature of the source material employed by Provost and the fact that we are here dealing with a textbook as such, Provost was the beneficiary of the implied consent of the first publishers of his source material, if that consent was required.

The Court therefore finds that Provost is entitled to copyright in his manual and that the work of Comeau "Cours de conduite automobile Can-Améric, manuel de référence" has infringed Provost's copyright. (at p. 694)

20. *Apple Computer Inc. v. Mackintosh Computers Ltd.* (1987), (1988) 1 F.C. 673 (F.C.A.) Hugessen J.

The difficulty which this raises in the present case is obvious. The respondents' copyright is in the assembly code version of the programs. Clearly that version is expressed in print or writing. When the program is reproduced in either binary or hexadecimal notation, the result being in figures and letters is also in print or writing and hence a literary work. When, however, the binary code version is transposed into open-and-closed electrical circuits embodied in a silicon chip, the latter contains no print or writing and hence cannot be said to be a literary work.

Does this mean that the production of the chip embodying programs does not constitute an infringement of the copyright? I think not. We have already seen that the statute defines copyright as being, amongst other things, the sole right to produce or reproduce in any material form. It is, in my opinion, possible to read those words as including by necessary implication the sole right to produce the means of reproduction of the work or, to put the matter another way, the sole right to produce anything used or intended to be used to reproduce the work. When the opening words of subs. 3(1) are read in the context of the remainder of that subsection and of other sections of the *Copyright Act*, it is my view that such interpretation is not only possible but is required. (at p. 694)

21. *Selection Testing Consultants International Ltd. v. Humanex International Inc.* (1987), 15 C.P.R. (3d) 13 (F.C.T.D. – Interlocutory), Strayer J.

By s. 20 (now s. 34) of the *Copyright Act*, R.S.C. 1970, c. C-30, there is a right of action for damages and an injunction which may be brought in the Federal Court for breach of copyright. This is a right granted by statute independent of any contract. It is true that before the final termination of this matter it may be necessary for this Court to consider the continuing validity of the licence, and that may involve contractual questions. Section 17 (now s. 27) of the *Copyright Act* defines "infringement" as the act of doing anything "without the consent of the owner" that the owner of the copyright has the right to do. Subsection 12(4) (now s. 13(4)) of the Act provides for the granting of a licence in writing. Therefore when the plaintiff brings this action for infringement pursuant to the *Copyright Act* it is open to the

defendant to raise a defense of consent based on its sublicense from the plaintiff's licensee. This Court may have to determine whether that defence is sustainable and to do so it may have to consider whether the licence contract still exists. In dealing with a similar argument in a trade mark case, Addy J. said in *Fruit of the Loom Inc. v. Château Lingerie Manufacturing Co.* (1982), 63 C.P.R. (2d) 51 at 53 (Fed. T.D.) (affirmed (1983), 78 C.P.R. 194 (Fed. C.A.)):

... it would be nothing short of ludicrous if, wherever a licence is to be terminated, since the licence is always granted contractually, that the owner of the mark would first have to have the contract declared at end or rescinded by a provincial court before applying to the Federal Court of Canada for relief regarding the mark. It has been stated on many an occasion that the mere fact that an issue concerns property and civil rights in some way, does not automatically remove it from federal jurisdiction or from the jurisdiction of the Federal Court of Canada, as it is difficult to conceive of any court judgment which does not in some way affect property in civil rights.

Therefore, the existence or non-existence of a continuing consent by the plaintiff to the use by Huma-Res Inc. of its copyright is one of the important issues which this Court will have to decide. At this point I need not make a final determination of that issue. I believe this is a case where the threshold test for an interlocutory injunction is that only of there being a "serious question" to be tried, as laid down in *American Cyanamid Co. v. Ethicon Ltd.*, (1975) A.C. 396, (1975) 1 All E.R. 504 (H.L.). The plaintiff need not satisfy me on the balance of probabilities at this time that contract has been repudiated. It is sufficient if it shows me that there is evidence of serious breaches of the contract of a kind which might well be considered to amount to repudiation. (at pp. 18-19)

22. *Verge v. Imperial Oil Ltd.* (1987), 15 C.P.R. (3d) 187 (F.C.T.D.), Muldoon J.

Dr. Morey compared the musical scores of the plaintiff's and the defendant's respective songs, and he heard and listened to them as performed on the tape, Ex. 19. He testified that: the plaintiff's and the defendant's works are not musically similar; the melody or harmony are "not remotely similar"; the musical phrases for the words "it's a brand new world" are "distinctly different"; those for the words "do what you want to do" are "quite dissimilar with nothing in common"; and, as to possible objective similarity between Exs. 2 and 27, it is "not in my ears". Dr. Morey's testimony, unshaken on cross-examination, is conclusive of the issue of infringement of the plaintiff's copyright in his song. The defendant's music is not a copy and there has therefore been no infringement by means of it.

The words of the defendant's songs, despite the earlier noted identical phrases, are no more copies of the plaintiff's words than they are copies of the lyrics shown in Exs. 20, 21 and 22, above-mentioned. The plaintiff has utterly failed to demonstrate on a balance of probabilities, and despite those identical phrases, that his lyrics were the source, or the sine qua non of the defendant's lyrics, or that the latter are either a conscious or unconscious reproduction or adaptation of the plaintiff's lyrics. The identical phrases do not replicate a substantial or considerable part of the plaintiff's work. Again, Mr. Benderoth testified that he never heard of the plaintiff or his song, or of Mr. Karen, at the material times and there was no evidence either to prove or to raise the slightest inference that he had. Nor was it shown at all that Mr. Benderoth had any access to the plaintiff's lyrics before or when composing his own. The plaintiff has suffered no infringement of copyright nor any copying of the words of his song "It's a Brand New World". (at pp. 193-194)

The appearance of what are essentially only two identical, but rather common, clichés in the respective lyrics is not shown to be anything other than sheer, and far from unique, coincidences. Accordingly, the plaintiff's action must be dismissed with costs. (at p. 195)

23. *R. v. Stewart*, (1988) 1 S.C.R. 963 (S.C.C.) Lamer J.

Copyright is defined as the exclusive right to produce or reproduce a work in its material form (s. 3). A mere copier of documents, be they confidential or not, does not acquire the copyright nor deprive its owner of any part thereof. No matter how many copies are made of a work, the copyright owner still possesses the sole right to reproduce or authorize the reproduction of his work. Such copying constitutes an infringement of the copyright under s. 17 (now s. 27) of the Act, but it cannot in any way be theft under the criminal law. While one can, in certain circumstances, steal a chose in action, the rights provided in the *Copyright Act* cannot be taken or converted as their owner would never suffer deprivation. Therefore, whether or not copyright is property, it cannot, in my opinion, be the object of theft under s. 283(1) (now s. 322(1)) of the Code. (at p. 782)

24. *Constructions Nouvelle Dimension Inc. v. Berthiaume*, (1989) R.J.Q. 767 (Que. Civ. Div.), Cloutier J.

Considérant que le défendeur a utilisé sans autorisation préalable les plans faisant l'objet du droit d'auteur détenu par la demanderesse; la ressemblance entre les maisons construites par la demanderesse suivant ses plans et celle construite par le défendeur est frappante et ne peut être le résultat du simple hasard. Ceci s'explique du fait que, suivant la preuve que le Tribunal tient pour prépondérante, le défendeur a reproduit ou fait reproduire les plans de la demanderesse. Les quelques changements cosmétiques effectués par le défendeur, serait-ce par l'ajoute d'une porte, ne suffisent pas à effacer ce qui constitue, fondamentalement un plagiat (at p. 769)

25. *British Columbia v. Mihaljevic* (1989), 26 C.P.R. (3d) 184 (B.C.S.C.), Macdonell J.

The *Copyright Act* states that infringement of copyright occurs when "any person ... without the consent of the owner of the copyright, does anything that, by this Act, only the owner ... has the right to do" (s. 17(1)) (now s. 27(1)). Pursuant to s. 3 of the Act, the owner has the "sole right to ... reproduce the work or any substantial part thereof". The case law has interpreted the statutory provisions in such a way that "copying" is an essential ingredient of infringement. In other words, the allegedly infringing work must be derived from or have a causal connection to the copyrighted material. See: *Francis Day & Hunter Ltd. v. Bron*, (1963) 2 All E.R. 16 at pp. 23- 24 and 27 (C.A.), and *Gondos v. Hardy* (1982), 64 C.P.R. (2d) 145 at pp. 159-60, 38 O.R. (2d) 555 at pp.568-9, (Ont. H.C.J.).

The defendant Mihaljevic has failed to establish such a causal connection between the plaintiff's designs and the copyrighted designs. Even if the defendant were able to prove the necessary connection, he would still be unable to establish infringement because the allegedly infringing designs do not reproduce a "substantial part" of the defendant's designs.

The common element in the designs of the plaintiff and of the defendant is "Expo" or "Expo 86". Though a prominent part of the defendant's designs, these marks alone do not constitute a "substantial part" of the designs. Furthermore, none of the plaintiff's designs reproduce the defendant's graphic representations of the marks; the plaintiff's stylized marks are quite distinct and unique. In order for the defendant to succeed in his claim of infringement, he would have to persuade the Court that he held copyright in the name "Expo" or "Expo 86".

A person cannot have copyright in a single word, name or title, because "apart from the law as to trade-marks, no one can claim monopoly rights in the use of a word or name" (see: *Burberrys v. J.C. Cording & Co. Ltd.* (1909), 100 L.T. 985, 26 R.P.C. 693 at p. 701 (Ch. Div.). On this point, see also: *Exxon Corp. v. Exxon Insurance Consultants International Ltd.*, (1981) 3 All E.R. 241 at 247, (1982) Ch. 119, (1982) R.P.C. 69 (C.A.), and *Tavener Rutledge Ltd. v. Trexapalm Ltd.*, (1977) R.P.C. 275 at 278-279 (Ch. Div.). In order to gain exclusive use of a word or name, one must turn to the law of trade marks. (at pp. 189-190)

26. *Euclid Industries Canada Ltd. v. Reg Holloway Sales Inc.* (1989), 25 C.I.P.R. 290 (F.C.T.D.), MacKay J.

It was submitted on behalf of the plaintiffs that by copying a substantial portion of the plaintiffs' copyright works, without authorization, the defendants infringed the rights of the plaintiffs in these works. While it is true that the information in the plaintiffs' works appears in a somewhat different format from that in the price lists issued by the corporate defendant, it seems to me that a key element in both publications is the numbering system of parts by which customers would place their orders, on the basis of business operations of the plaintiff Transit and of the corporate defendant. Those codes were compiled through considerable skill, ingenuity and originality of the plaintiffs or their predecessors in title to the copyrights. The alpha-numeric codes so devised are varied in the defendants' price list only by change in the first letter from "T" to "H" in a six or seven letter and number code devised for each of the parts sold. On the basis of *Cardwell v. Leduc* (1962), (1963) Ex. C.R. 207 at 219, 23 Fox Pat. C. 99, *B.C. Jockey Club v. Standen (Winbar Publications)*, (1983) 4 W.W.R. 537, 146 D.L.R. (3d) 693, 73 C.P.R. (2d) 164 at 173 (B.C.S.C.), upheld on appeal, (1985) 6 W.W.R. 683, 66 B.C.L.R. 245, 22 D.L.R. (4th) 467, 8 C.P.R. (3d) 283 (C.A.), and *Slumber-Magic Adjustable Bed Co. v. Sleep-King Adjustable Bed Co.* (1984), (1985) 1 W.W.R. 112, 3 C.P.R. (3d) 81 at 84 (B.C.S.C.), I am satisfied that the plaintiffs present a serious claim that its rights have been infringed by the defendants' unauthorized use of a substantial key element of their catalogues and related price lists, the former of which are now subject to registered copyrights. (at pp. 295-296)

27. *Bishop v. Stevens*, (1990) 2 S.C.R. 467 (S.C.C.), McLachlin J.

This distinction between the right to perform and the right to record a work is unsurprising in light of the object and purpose of the Act. As noted by Maugham J., in *Performing Right Society, Ltd. v. Hammond's Bradford Brewery Co.*, (1934) 1 Ch. 121, at p. 127, "the Copyright Act, 1911, was passed with a single object, namely, the benefit of authors of all kinds, whether the works were literary, dramatic or musical". See also Article 1 of the Revised Berne Convention, cited above. A performance is by its very nature fleeting, transient, impermanent. When it is over, only the memory remains. A composer who authorizes performance of his work for a period of time has not irrevocably given up control over how the work is presented to the public. He may choose at a future time to withdraw his authorization, and be the sole interpreter of his own work, or he may place conditions on his

authorization. He may control the frequency of performance, and choose the audiences which are to hear his work. Other performers might copy his performances without authorization, but the public nature of performance is such that this will likely come to his attention. Furthermore, no imitation of a performance can be a precise copy. A recording, on the other hand, is permanent. It may be copied easily, privately, and precisely. Once a work has been recorded, the recording takes on a life of its own. This is why, from a composer's point of view, the right to control the circumstances under which the first recording is made is crucial. Once the composer has made or authorized a recording of his work, he has irrevocably given up much of his control over its presentation to the public. These are the reasons why the rights to perform and to record are recognized as distinct in the Act, and why in practice a composer may wish to authorize performances but not recordings of his work. (at pp. 478-479)

Furthermore, an implied exemption to the literal meaning of s. 3(1)(d) is all the more unlikely, in my opinion, in light of the detailed and explicit exemptions in s. 17(2) (now s. 27(2)) of the Act, providing for matters as diverse as private study, research or critical review, educational use, disclosure of information pursuant to various federal Acts, and performance of a musical work without motive of gain at an agricultural fair. (at p. 480-481)

28. *Energy Absorption Systems Inc. v. Y Boissoneault & Fils Inc.* (1990), 30 C.P.R. (3d) 420 (F.C.T.D.), Pinard J.

Copyright is infringed by making copies or reproductions of works in which copyright exists. The case-law has interpreted the statutory provisions of the Act in such a way that "copying" is an essential ingredient of infringement. Copying comprises the taking of the whole or substantial part of the work : see *Bradale Distribution Enterprises v. Safety First Inc.* (1987) 18 C.I.P.R. 71 at pp. 90-94; and *Horn Abbot Ltd v. W.B. Coulter Sales Ltd* (1984), 77 C.P.R. (2d) 145 at 153, 1 C.I.P.R. 97.

Where there is substantial similarity between the works and it is established that the author of the copy had access to the original work, as it is the case here, the Court may infer that one work is a copy of another work (see *King Features Syndicate Inc. v. Benjamin H. Lechter*, (1950), 12 C.P.R. 60, 297 at pp. 305-6, Fox Pat. C. 144; and *L.B. (Plastics) Limited v. Swish Products Ltd.*, (1979) R.P.C. 551 (H.L.), 619). The existence in two works of common errors and arbitrary details further supports a presumption of copying (see *Coral Index Limited v. Regent Index Ltd.*, (1970) R.P.C. 147, at 145-150; *L.B. (Plastics) Limited v. Swish Products Ltd.*, *supra*, at pp. 627-38; and *Horn Abbot Ltd v. W.B. Coulter Sales Ltd.*, *supra*, at pp. 157-9. (at p. 465)

29. *Pizza Pizza Ltd. v. Gillespie* (1990), 33 C.P.R. (3d) 515 (Ont Gen. Div.), Henry J.

In any event if in fact Rayman made use of some or all of the plaintiff's software and programming, he and/or his firm would be entitled to do so because as the author of the plaintiff's program and software they own the copyright in that work. No evidence is submitted by the plaintiff to show that the copyright was assigned to Pizza Pizza by the author; thus by s. 3 of the *Copyright Act*, R.S.C. 1985, c. C-42, Rayman's Consulting is free to reproduce and sell the Pizza Pizza software with or without the plaintiff's consent.

To summarize, the evidence of John Gillespie and Fred Rayman that the computer software system developed by Rayman for Chicken Chicken is a unique system and materially different from the system developed by Rayman for Pizza Pizza is not rebutted by specific facts adduced by Pizza Pizza in affidavit or other evidence. The affidavit of Pierre Michaud which is based on a functional comparison of the titles of the reports produced by the two systems, merely establishes that there is a similarity in some but not all of the titles and reports produced by the two systems. It does not establish the use of confidential information by the defendant Gillespie in the development of Chicken Chicken's computer system. It is not a matter of conflicting evidence or credibility of the witnesses. (at p. 541)

30. *Grignon v. Roussel* (1991), 44 F.T.R. 121 (F.C.T.D.), Denault J.

As the Court has found that the plaintiff owns a copyright to an original musical work, it remains to determine (1) whether the defendant's work, which he also regards as original, bears sufficient objective similarity to that of the plaintiff to be the subject of an order by the Court, and (2) whether it can be shown that the plaintiff's work was the basis for that of the defendant. That is the test applied by the courts in determining whether a plaintiff can obtain compensation for the infringement of his copyright. (at p. 135)

31. *Homelife/Realty (Victoria) Ltd. (Receiver-Manager of) v. Canada (Minister of National Revenue, Taxation – Customs and Excise – M.N.R.)* (1993), (1993) B.C.J. 2922 (B.C.S.C.) Hutchison J.

(39) I think I need go no further in alluding to how that would affect the trust than refer to the text of Professor Donovan Waters, *The Law of Trusts in Canada*. I think this is from the first edition, at Tab 22 in the book of authorities presented to me by the petitioner, (perhaps in violation of his exprofessor's copyright) (...)

32. *Mosport Park Ltd. v. Clarington (Municipality)* (1994), 116 D.L.R. (4th) 763 (Ont. Gen. Div.), Southey J.

These dictionary meanings suggest that fairs include the sale or display of goods or livestock. Such activities do not occur at an outdoor music festival or concert. On the other hand, the dictionary meanings suggest that fairs include shows and entertainments. An outdoor music festival or concert is a show or entertainment.

One might ask how many of the activities that normally occur at fairs must occur during any particular event before the event can qualify as a fairground use. Would the inclusion of a show of some farm livestock, or the sale of home-baked goods or handicrafts, or the provision of midway-type rides in conjunction with a rock festival result in qualifying the combined use as a fairground use? Someone with a rural or equestrian background might wonder whether it is essential that horses be present for an event to be a fair, and, if so, how many horses?

It is apparent that fairs can include a wide variety of activities, and that there is considerable diversity between the range of activities at different fairs. In my judgment, a presentation of any activity that is recognized as forming part of the activities at fairs constitutes a fairground use, and is permissible under By-law No. 84-63. Shows and entertainments are so recognized.

Accordingly, there will be a declaration that the use of Mosport Park for outdoor music festivals or concerts constitutes a permitted use under By-law No. 84-63. (at pp. 765-766)

§ 6.1.2 Indirect Infringement

1. *Clarke, Irwin & Co. v. Cole & Co.* (1959), 33 C.P.R. 173 (Ont. H.C.J.), Spence J.

Therefore, the report of the Commission is in accordance with the plaintiff's submission to this Court that the importer here Cole, was an infringer when the imported for sale or hire and knew the work would infringe copyright if it had been made in Canada. In this case I am of the opinion that the words "would infringe copyright if it had been made in Canada" mean when applied to the present situation, that the work would infringe copyright if it had been made within Canada by others than the plaintiff including Henry Holt & Company Incorporated. (at p.180)

2. *R. v. Fraser* (1966), (1967) S.C.R. 38 (S.C.C.), Richie J.

I agree with the view expressed by Maclean, J.A., on behalf of the majority of the court of appeal, that the word "distribution" as used in sec. 150 (1) (a) "is obviously a word of wider connotation than 'sale,' ... as sale is only one of a number of means of distribution." The appellant submitted that this construction would mean that everyone who "sells" within the meaning of sec. 150 (2) (a) would also be guilty of the offence defined in sec. 150 (1) (a), and that the provisions of the former section would thus be "reduced to a futility," to employ the language used in the factum filed on behalf of the appellants. Like Maclean, J.A., however, I can envisage cases of individual sales which would constitute an offence under sec. 150 (2) (a) and yet would not be a "distribution" within the meaning of sec. 150 (1) (a), and I think also that there may well be cases of a bookseller who has in his shop a scattered few of these publications amongst a mass of inoffensive books, where a charge of possession for the purpose of sale contrary to sec. 150 (2) (a) would be more appropriate than one relating to "distribution" under sec. 150 (1) (a). (at p. 44)

3. *R. v. Rioux*, (1968) B.R. 942(Que. C.A.), Pratte J. and Hyde J.

Selon le sens ordinaire des mots, mettre une chose en circulation c'est la faire passer de main en main, ce qui évoque l'idée de dessaisissement, temporaire ou définitif: ce que l'on garde pour soi n'est pas en circulation. Mais l'on invoque une décision de la Cour d'Appel de la Nouvelle-Écosse (*Regina v. Berringer*, 122 C.C.C., 350) pour rétendre que l'article 150 vise à prévenir toute communication d'images ou autres choses obscènes, et que par conséquent, les mots "mettre en circulation" doivent être entendus de manière à comprendre même le seul fait de montrer privément une image obscène. Or, dit-on, projeter un film, c'est en faire voir les images, donc les mettre en circulation.

Sauf tout le respect dû aux tenants de cette opinion, je ne suis pas d'accord; et cela pour les raisons que voici.

D'abord, s'agissant de matière pénale, les termes employés par le législateur doivent être pris dans leur sens ordinaire: c'est une règle fondamentale d'interprétation. (Pratte J., at p. 942)

I see no intent by the use of the word "circulates" or "circulation" to broaden the offence. Dissemination by circulation must be of a public nature. I think of circulation as used in reference to a circulating library or a newspaper or periodical. The Shorter Oxford Dictionary, for example, gives "To pass from place to place, from hand to hand, or from mouth to mouth; to pass into the hands of readers, as a newspaper". The recently published Random House Dictionary equates it with distribution, thus: "To be distributed or sold, especially over a wide area".

Before I am prepared to hold that private use of written matter or pictures within an individual's residence may constitute a criminal offence, I require a much more specific text of law than we are now dealing with. It would have been very simple for parliament to have included the word "exhibit" in this section if it had wished to cover this situation. (Hyde J., at pp. 942-943)

4. *Warner Bros-Seven Arts Inc. v. CESM-TV Inc.* (1971), 65 C.P.R. 215 (Ex. Ct.), Cattanach J.

In order to constitute an infringement of copyright the act or acts complained of must be done "without the consent of the owner of the copyright". (See s. 17(1) (now s. 27(1)) of the Copyright Act).

Mr. Chaplin, vice-president of the second named plaintiff testified that no authorization was given by either plaintiff to the defendant to show the six films mentioned in the statement of claim, nor did the defendant contend that it had.

However, such a consent may be presumed from the circumstances but the inference of consent must be clear before it will operate as a defence and the consent must come from the owner of the right alleged to be infringed. (at p. 235)

I am of the opinion that the defendant has infringed the plaintiffs' copyright rights by making the videotape which was in contravention of the plaintiffs' "sole right" by virtue of s. 3(1)(d) of the Copyright Act, which I repeat here for convenience:

3(d) in the case of a literary, dramatic, or musical work, to make any record, perforated roll, cinematograph film, or other contrivance by means of which the work may be mechanically performed or delivered;

In my view the videotape is a contrivance by means of which the work may be mechanically performed. When the videotape is inserted in an appropriate machine by the broadcaster, it reproduces the sound and images recorded thereon on the viewers' television tube automatically without intervening means. In order to determine what is meant by a work being "mechanically" performed or delivered, resort must be had to the common understanding of such word. In the Shorter Oxford Dictionary, 3rd ed. "mechanically" is defined as "acting, worked or produced by a machine or mechanism" and that is precisely what is done here. A tape is made, which when inserted in a machine causes the images and sound to be seen and heard by the viewer on his receiving set. It is the machine working on the tape and in my view that is what is meant by the word "mechanically" in this context.

The word, in its common parlance, is not to be contrasted with activation by electromagnetic principles. (at pp. 241-242)

(...) under the definition where there is an acoustic or visual representation including a representation made by means of any mechanical instrument there is a performance.

Here the defendant by its recording system captured on videotape the impulses broadcast by CJAY and CBWT and by the use of that tape those impulses were capable of being transmitted so that images and sounds could be seen and heard with proper equipment, innumerable times and after the passage of time.

I find it impossible to escape from the conclusion that the videotape could be used by the defendant so as to effect a performance of the plaintiffs' work.

It follows, therefore, that the preparation of videotapes by the defendant in the manner it did constitutes an infringement of the plaintiffs' sole right to make a contrivance by which the work may be mechanically performed or delivered. (at pp. 243-244)

5. *Godfrey, MacSkimming & Bacque Ltd. v. Coles Book Stores Ltd.* (1973), (1974) 1 O.R. (2d) 362 (Ont. H.C.J.), Callon J.

Counsel for the defendant submits that, since the American or Follett edition of the works was made in Canada, it is not an infringement of the copyright under s. 17(4) (now s. 27(4)) of the Act. He further submits that the defendant could not and did not have actual notice of the restriction of the sale or distribution of the American or Follett edition of the works in Canada and that therefore the defendant should not be affected by such restriction.

Dealing with the latter submission first, it is my view that the defendant had notice of facts that would suggest to a reasonable person that New Press has not consented to the sale or distribution of the American or Follett edition in Canada in competition to the sale and distribution in Canada of the Canadian edition -- see *Clarke, Irwin & Co. v. C. Cole & Co. Ltd.*, 33 C.P.R. 173. The defendant had purchased a limited number of copies of three of the works in question and, no doubt, fully considered its position before importing the works into Canada. In addition, by letter dated October 19, 1972, the solicitors for the plaintiff, New Press, gave notice to the defendant of its alleged infringement of its copyright with respect to the works *Rumors of War* and *Northern Realities*.

I cannot agree with the defendant's submission that the mere printing of the American or Follett edition of the works in Canada entitles the defendant to import for sale or hire into Canada those works when the defendant is seized with the knowledge that such importation is without the consent of New Press. By s. 3 of the Copyright Act, the sole right to publish, to produce or to reproduce a work is in the owner of the copyright and he is the only person who can authorize others to do the things that the Act gives to him the sole right to do. Where, as in this case, the defendant is impressed with the knowledge that the sale or distribution of the American or Follett edition has not been authorized by the owner of the copyright, the importation for sale into Canada of the work that to his knowledge infringes copyright is within the scope of s. 17(4) of the Copyright Act. (at p. 364)

6. *Fly by Nite Music Co. Ltd. v. Record Warehouse Ltd.*, (1975), (1975) F.C. 386(F.C.T.D.), Mahoney J.

Finally, the fact that the albums were lawfully made and purchased outside Canada is no defense to an action for infringement based on section 17(4) (now s. 27(4)). This precise point, in very similar circumstances, was dealt with in the Australian case of *Albert v. S. Hoffnung & Company Limited*. In that instance, records lawfully manufactured and purchased in England were imported and sold in Australia. The applicable legislation was the British *Copyright Act* of 1911, which had been adopted in Australia.

I find no material difference between the applicable provisions of the present Canadian Act and the British Act then in force in Australia. The learned judge at page 80, held:

The making of these records in Australia would, in my opinion, be an infringement unless notice had been given to the plaintiff and royalties paid to him. I see no indication in the Act whatever of any intention that provided records are lawfully made in any part of the British Empire they can be sold in the way of trade or imported for sale into every part of the Empire which has adopted the copyright Act. Although the defendant company might quite lawfully purchase these records in England ... it by no means follows that they can bring them into Australia; any more than it would follow that because they might legally acquire records made in a foreign country they could import them into Australia.

The plaintiffs, other than H.P. & Bell, are entitled to the declaratory and injunctive relief sought in their statement of claim. (at pp. 394-395)

7. *Simon & Schuster Inc. v. Coles Book Stores Ltd.* (1975), 9 O.R. (2d) 718 (Ont. H.C.J.), Weatherston J.

In the *McClelland and Stewart* case (*McClelland and Stewart Ltd. v. Coles Book Stores Ltd.* (1974), 7 O.R. (2d) 426, 55 D.L.R. (3d) 362) (at p. 720), I think I felt that if the works were lawfully imported into Canada, that implied the right to dispose of them in the normal way despite the literal language of that subsection. It would be rather ridiculous that works could be lawfully imported into Canada for resale and that the importer could not in fact resell without infringing s. 17(4)(a) (now s. 27(4)(a)).

In the present case, it was plain for everyone to see that someone had copyright in this work and there was sufficient notice given in the book to put any knowledgeable book dealer on inquiries to ascertain where that copyright lay and what rights of resale existed. It is not sufficient for such a person to close his eyes to facts which would have been obvious if he kept his eyes open. It is quite true that on the back of the book, on the outside cover, the sale price is shown and includes "Canada \$2.50". I do not think that any trader in the business is entitled to infer from that, that the books are thereby automatically available for resale in Canada.

Therefore, I do not think it can be said that at the time the defendant imported the work into Canada for resale, it was not to its knowledge infringing copyright. (at p. 720)

8. *Compo Co v. Blue Crest Music Inc.* (1979), (1980) 1 S.C.R. 357 (S.C.C.), Estey J.

As pointed out in the *Ash* case (*Ash v. Hutchison & Co. (Publishers) Ltd.*, (1936) 2 All E.R. 1496 (C.A.)), *supra*, the act of authorizing and the act of making are separate *tort* and the courts have held, both in the United Kingdom and the United States, that persons committing these separate *torts* are not of course joint *tort feasons*. Thus Canusa may be an infringer either by reason of its authorization of the actions of Compo, or perhaps because it may be found (but I do not find it necessary to so decide here) that Canusa "made" the offending records. The judgment then continued:

however, the immediate *tort feason* is not exonerated from liability by reason of the liability of the vicarious *tort feason*.

I take this to be a reference back to the distinction made earlier in the judgment between the infringement by authorization committed by Canusa, and the infringement by the making of the records committed by Compo. However, these are separate and distinct violations of the statute and hence separate and distinct infringements rendering each wrongdoer liable to the holder of the copyright without reference to the actions and responsibilities of the other wrongdoer. (at p. 373)

No unauthorized exercise of the owner's mechanical rights in a work can produce in the wrongdoer a copyright in the resultant record. The simple question is, did Compo, by taking the master acetate from Canusa and making therefrom the moulds and stampers, infringe the copyright in the musical work of the respondents by thereafter "making records" within the meaning of s. 3 and s. 17 (now s. 27) of the Act?

Some assistance can be obtained from other provisions in the statute. By s. 17(4) (now s. 27(4)), knowledge on the part of the alleged infringer is required in order to establish infringement where the alleged infringement consists of 'selling, distributing, importing or exhibiting in public' a work. 'Making' of records is not included in the list of actions with respect to which knowledge on the part of the alleged infringer is a prerequisite to infringement. Section 25 establishes as an offence the act of making for sale any infringing copy of a work in which copyright subsists. Again the condition of "knowingly" must be established before the offence is completed.

Sections 3 and 17(1) (now s. 27(1)), however, admit of no prerequisite of knowledge of the existence of the violated copyright or that the action in question amounts to infringement. Infringement is the single act of doing something which "only the owner of the copyright has the right to do". (at pp. 374-375)

9. *R. v. Bell*, (1983) 2 S.C.R. 471 (S.C.C.), Dickson J.

To import into Canada means to bring in goods from anywhere outside Canada to anywhere inside Canada. I see no reason in principle or precedent to restrict the relevant location within Canada to the actual point of border crossing. The word "import" should not be stultified by narrow interpretation. Importing is a process which, although it necessarily includes the act of crossing the border, extends to the point of intended final destination. In my view the test is whether there is a direct link between the place of origin outside Canada and the destination inside Canada. (at p. 477)

10. *Cooper Canada Ltd v. Amer Sport International Inc.* (1986), 9 C.I.P.R. 93. (F.C.T.D.), Muldoon J.

Thus, if the drawings and sketches in which copyright is alleged were kept secret, confidential or otherwise unpublished by the plaintiff, the defendant might well have sold, distributed or exhibited its wares which, to its knowledge, did not infringe any copyright, if they did in the circumstances. Subsection 17(4) (now s. 27(4)) of the Act is pertinent in this regard. If the defendant can properly allege that it was not aware of the existence of the alleged copyright in the works or drawings, then it must so allege in its statement of defence. Section 22 of the Copyright Act is pertinent in this regard. (at p. 95)

11. *Dictionnaires Robert Canada SCC v. Librairie du Nomade Inc.* (1987), 16 C.P.R. (3d) 319 (F.C.T.D.), Denault J.

Section 3 of the *Copyright Act* defines this expression and states that "copyright" . . . includes the sole right . . . to authorize any such acts as aforesaid". It necessarily follows that anyone who authorizes the performance of an act which is the exclusive right of the owner of the copyright infringes it: see Roger T. Hughes, *Hughes On Copyright and Industrial Design* (Toronto, Butterworths, 1984), p. 545. As we saw earlier, the evidence established that the defendant Librairie Nomade imported, distributed, exhibited in public by way of trade and sold the works protected by the copyright and derived a certain profit from so doing. It remains to be seen whether its president-general manager can be sued personally. In theory, the mere title of president or senior officer of a company is not sufficient make the individual personally liable. In *Mentmore Mfg. Co., Ltd. et al. v. National Merchandise Mfg. Co. Inc.* (1978), 40 C.P.R. (2d) 164, 89 D.L.R. (3d) 195, 22 N.R. 161, Le Dain J. stated the rule set forth in Halsbury's *Laws of England*:

Liability of directors for infringement. The directors of a company are not personally liable for infringements by the company, even if they are managing directors or the sole directors and shareholders, unless either (1) they have formed the company for the purpose of infringing; or (2) they have directly ordered or authorized the acts complained of; or (3) they have so authorized or ordered by implication.

It is a question of fact whether an individual who is acting for a company acted with full knowledge and in a voluntary and deliberate manner which makes him personally liable. In this regard, the provision should not be applied more strictly to a small company with one or two shareholders than to a large corporation (see *Mentmore*, supra, at p. 172); though ultimately in the case mentioned the officers of the company were not held liable, such liability was found to exist in several other cases. (see cases cited in Hughes, op cit p. 545-3 and *Performing Right Society, Ltd. v. Ciry Theatre Syndicate, Ltd.*, (1924) 1 K.B. 1) (at pp. 335-336)

In conclusion, the evidence amply demonstrated that, either alone or with others, the defendant participated in constructing this illegal importation operation, devised a billing system by which he tried to avoid any inquiry, and also by using a punch copied the method used by the plaintiffs as a means of protecting their market. He must be held personally responsible with Librairie du Nomade Inc for the infringement of the plaintiffs' copyrights. (ay p. 337)

12. *Éditions Hurtubise HMH Ltée v. Cégep André-Laurendeau*, (1989) R.J.Q. 1003 (Que. Sup. Ct.), Tessier J.

L'article 3.1 de la Loi énonce que le droit d'auteur s'entend du droit exclusif de reproduire une partie importante d'une oeuvre. Cela signifie que toute personne a droit d'en reproduire une partie non importante. La copie doit être substantielle. Ce qui est substantiel est cependant une question de fait et de degré (*Ladbroke (Football) Ltd. c. William Hill (Football) Ltd.* (1964) 1 All E.R. 465). Le degré d'importance dépend davantage de la qualité que de la quantité de la portion reproduite de l'oeuvre (Id., 481):

Par ailleurs, le degré de similitude exigé variera en fonction de la nature de l'oeuvre. Ainsi pour des oeuvres où le contenu est objectif ou n'est pas susceptible de formulations fondamentalement différentes, il sera exigé un fort degré de similitude. C'est le cas, par exemple, des compilations, des dictionnaires, des tableaux de données, de cartes géographiques etc. ... (Vincke, Christian, *Problèmes de droit d'auteur en éducation*, (Québec: Éditeur officiel du Québec, 1977) à la p. 40, qui se réfère à *Beauchemin c. Cadieux* (1901) 10 B.R. 255; précité, *Deeks c. Wells* (1933) 1 D.L.R. 353, *Garland c. Gemmil* (1884-88), 14 R.C.S. 321, 2 Can. Com. 292, et *Emmett c. Mergs*, (1921) 1 W.W.R. 35, 16 Alta. L.R. 132, 56 D.L.R. 63 (C.A.))

Dans le présent cas, un fort degré de similitude existe entre les deux oeuvres, puisque la seconde est une copie facilement identifiable de la première (at p. 1017)

Les intimées n'ont pas établi que la portion similaire de leur oeuvre provenait d'une création indépendante de leur part. Elles peuvent certes produire une oeuvre du même genre en utilisant toute source d'information ou tout matériel légitimement accessible; elle doivent cependant exécuter le travail déjà effectué par le premier auteur. Les tableaux des intimées devraient refléter le fruit de leur travail personnel. Ces tableaux devraient différer de ceux de la requérante, par leur contenu, leur formulation et leur présentation. S'ils sont identiques, il incombe aux intimées de démontrer-ce qu'elles n'ont pas établi -- qu'il ne s'agit pas d'une copie intégrale ou d'une imitation déguisée (...)

La présomption de contrefaçon provenant du fort degré de similitude entre les deux oeuvres sera repoussée si les intimées établissent, comme ils le prétendent, qu'ils étaient autorisés à reproduire l'oeuvre de la requérante. (at p. 1018)

L'absence de connaissance n'empêche pas l'émission d'une injonction. Le contrefacteur de bonne foi ne peut valablement plaider absence de connaissance puisque le droit d'auteur était dûment enregistré. Cet enregistrement établit sa connaissance présumée du droit d'auteur. Il s'agit d'une présomption légale absolue. (at p. 1020)

13. *Fletcher v. Polka Dot Fabrics Ltd.* (1993), 51 C.P.R. (3d) 241 (Ont. Gen. Div.), Smith J..

It is possible for this type of indirect infringer to plead that he did not know that the work he sold infringed on anyone's copyright. However, in this case there was a copyright notice on the Snappy Nappy pattern envelope and on the pattern sheets, which should have indicated that copyright probably existed in the work. Also, Polka Dot Fabrics Ltd., which sold the infringing work, has the same president as Designs by Lydia, which produced the

infringing work. Therefore, the defence of ignorance is not available to Polka Dot Fabrics Ltd. in this case. (at p. 254)

14. *Amusements Wiltron Inc. v. Mainville*, (1991) R.J.Q. 1930. (Que. Sup. Ct.), Macerola J.

Le législateur traite de deux formes d'autorisation possibles, soit le consentement et l'acquiescement. En vertu de l'article 13(4), un écrit est nécessaire pour qu'il y ait transfert de droit d'auteur. L'acquiescement serait un accord implicite ou verbal donné préalablement au consentement (*Op. cit. supra*, note 6, pp. 183-184). Toutefois, comme l'exigence d'un écrit est une condition de fond et non une règle de preuve, un écrit est requis pour qu'il y ait transfert de droit d'auteur (*Motel 6 Inc. c. N^o. 6 Motel Ltd.*, (1982), 1 C.F. 638 (1^{ière} inst.), 647; *Bradale Distribution Enterprises Inc.*, *supra*, note 10, 88, juge Frappier).

An assignment or grant of an interest must be in writing and must be signed by the owner of the right in respect of which the assignment or grant is made or by his duly authorized agent. But notwithstanding the provisions of s. 12(4) (13(4)) the owner of the copyright may be contract either made orally or to be implied from the conduct of the parties preclude himself from exercising his statutory rights as against the other party to the contract. A receipt in writing for the price of the copyright will operate as an official assignment.

(...)

It is possible that a receipt for purchase money may amount to an assignment of copyright, if it is clear that the intention of the parties was to assign an interest⁽¹⁵⁾.

En l'espèce, il y a eu acquiescement de la part de Mark Kraml à l'utilisation de son programme dans le but de le publier et le rendre accessible au public par la location; d'ailleurs, c'est ce dernier qui était titulaire du droit de publier.

L'écrit, non nécessaire mais qui confirme par ailleurs cet acquiescement très précis à la publication aux fins de location du programme de son jeu de poker, se retrouve dans les bons de commande de modifications de programme signés par Mark Kraml et déposés en preuve sous la cote P.-3.

En effet, même s'il n'y est pas fait précisément mention que M. Kraml y autorisait la publication pour fins de location, en pratique, il connaissait l'usage qu'en faisait Wiltron et l'autorisait. Il s'agit ici d'une condition implicite investissant la compagnie d'un droit de publication par voie de location de ce logiciel.

De plus, en ne livrant pas à la compagnie le « secret » pour rendre le jeu autonome, donc commercialisable pour la vente, il est d'autant plus clair qu'il n'en autorisait que la location. (at pp. 1937-1938)

15. *R. v. M.(J.P.)* (1996), 67 C.P.R. (3d) 152 (N.S.C.A.), Roscoe J.

Since computer programs are expressly protected by the *Act* as literary works, and the owners of the copyrights have the sole right to communicate the work to the public by telecommunication, there can be no doubt that the appellant created infringing copies of

the software by placing them on the bulletin board in such a way that they were available to be used and copied by the 16 "special" users.

It is also clear that when he accessed his computer by modem from his friends' homes and downloaded the programs onto their computers, he was "distributing" the infringing copies.

Furthermore, by controlling the means and manner by which the users of the bulletin board accessed area 20, and providing the software to assist in the downloading by modem by those users, the appellant was also distributing, that is giving out, or sharing the infringing copies. Although it is suggested that the programs were "scrambled" so that they could not be copied or downloaded by the callers, the evidence accepted by the trial judge was that they were "packaged" or "compressed" for efficient storage and "ease of transmission". (at p. 156)

16. Milliken & Company v. Interface Flooring Systems (Canada) Inc.
(1998), (1998) 3 F.C. 103 (F.C.T.D.) Tremblay-Lamer J.

(60) However, the question remains whether Ms. Madsen's knowledge of the copyright infringement can be equated to the knowledge of the corporate defendant itself. It has been recognized that the acts of certain employees deemed to be the "directing minds" of a corporation can be treated as those of the company itself. An employee is considered to be the company's "directing mind" when the corporation has given him the actual authority to decide matters related to a specific area. As stated by Estey J. in *Canadian Dredge & Dock Co. et al. v. The Queen*: (1985) 1 S.C.R. 662, at pp. 684-685:

The learned trial judge, in directing the jury, expressed it more accurately: ". . . so long as he was acting within the scope of the area of the work assigned to him." The essence of the test is that the identity of the directing mind and the company coincide so long as the actions of the former are performed by the manager within the sector of corporation operation assigned to him by the corporation. The sector may be functional, or geographic, or may embrace the entire undertaking of the corporation.

(61) Ms. Madsen was delegated the task of designing a pattern for carpet tile to be installed at the Calgary International Airport. As such, it is reasonable to infer that she was given permission to make decisions related to the development of the design. Despite her knowledge of the infringement of the plaintiffs' copyright, she went ahead and developed the infringing carpet tile. She made this decision within her assigned area of responsibility. As a result, her knowledge can be attributed to the corporate defendant. Thus, were it not for my previous finding regarding the application of the *Copyright Act*, I am satisfied that the defendant would be liable for secondary infringement of the plaintiffs' copyright.

6.1.3 Public Performance

1. *Canadian Performing Right Society Limited v. Lombardo*, (1939), (1939) O.R. 262 (Ont. C.A.), Kelly J..

So, in the present action, an admission that The Canadian National Exhibition Association is not run from motives of gain will not help very greatly in determining whether the dance pavilion was operated and, more particularly, whether the defendant was engaged and the

performances complained of authorized by the directors with or without motives of pecuniary gain to the exhibition or association. That question must depend on the evidence of the motives inducing the directors with relation to the defendant's engagement.

One important distinction must be made. A person or organization may do a thing for money, or even for profit, and yet the motive inducing him to do that thing may not be pecuniary gain. An example may make this important distinction more clear. Suppose a host, in order to entertain some guests, suggests that they play cards. The guests say that they never enjoy cards unless played for money stakes. The host may find playing for money most distasteful, but to entertain his guests may consent and the game proceeds. Now, in the game, the host is clearly playing for money and, if fortunate or skilful, may make a profit. It would remain undeniably true that his only motive in playing was to please his guests and that although he played cards for gain, he did so without motive of gain. This distinction is to my mind of paramount importance in this case. (at p. 268)

It is not for me to suggest what sort of performance would be one with motive of gain. The question will always depend on evidence and may be exceedingly difficult to determine. If, to mention one example, in this case the evidence showed that the defendant was engaged for the purpose of making a profit to bolster up otherwise falling revenues, this would then be a case, in my opinion, of a performance with motive of gain. (at p. 271)

2. *Francis, Day & Hunter Ltd. v. Twentieth Century Fox Corp.*, (1939) 4 D.L.R. 353 (J.C.P.C. – Canada), Wright J.

There cannot be an infringement of performing right in a musical composition (assuming it to exist) unless there has been a public performance of the musical composition by the defendant. But it is idle to suggest here that by anything the respondents have done they have performed the song in any sense. The motion picture it is true, is what is called a talkie film. But not a word of the song is repeated in any form except that the title is thrown on the film at the outset. It will be considered later if that constituted an infringement of the literary copyright in the film. But to say that this bare fact was a public performance of a musical composition is abhorrent to common sense. A musical composition is performed by audible reproduction, by the voice or by musical instruments or by mechanical methods of reproduction. Nothing of the sort can be predicated here. (at pp. 356-357)

3. *Composers', Authors' & Publishers Association (Canada) v. Western Fair Association*, (1951) S.C.R. 596 (S.C.C.) Kerwin and Kellock JJ.

Commencing with the basic proposition that the appellant is entitled to copyright in the musical works mentioned unless the respondent is able, on a fair reading of the exceptions in s. 17, to bring itself within one of them, and bearing in mind the history of the enactment, and particularly the fact that in 1936 special provision was made with respect to fees paid to the individual performers or their agents, I conclude that the respondent has not succeeded in bringing itself within exception (vii) and that the appeal should be allowed (...) (Kerwin J., at p. 601)

Whether it was or was not a performance without motive of gain on the part of the defendants, it was not a performance without motive of gain to the band concerned, whether the performance was before the grandstand to which a separate entry fee was charged or whether it was in the bandstand within the exhibition grounds outside the

grandstand and I cannot find any justification for reading the paragraph as meaning that so long as the performance is without motive of gain to the persons holding the exhibition, it is protected even if the actual performer is deriving private profit. The objection to such a construction is perhaps more clearly evident when the action is brought against the person who was paid for his performance than when it is brought against the persons who held the exhibition. It seems to me to be equally clear that in order to make the subsection protect the person who performs the work for his own private profit, that is, with a motive of gain, words must be interpolated and the paragraph must be read as a proviso excluding from the general law as established by the Act the performance (to which the Act but for the proviso would extend) of a musical work at an exhibition or fair (of the kind described in the proviso) so long as such performance is without motive of gain to the persons holding the exhibition or fair. I think that the subsection could not in an action brought against the paid performer be read in the way suggested; and if I am right as to that, I do not see how it is possible so to read it in an action brought against other persons. The reading of the section, I think, must be the same no matter who may be the defendant in the action in which the benefit of the proviso is invoked.

(...)

While it is evident that Parliament has intended to give some measure of freedom from liability to pay royalties in connection with the use of copyright material at these exhibitions, it is equally plain, from the presence in paragraph (vii) of qualifying language, that complete immunity was not intended. The difficulty arises from the failure on the part of Parliament to define without ambiguity the measure of immunity intended in paragraph (vii). (Kellock J., at p. 605-606)

4. *Composers', Authors' & Publishers' Association (Canada) v. Kiwanis Club of West Toronto*, (1953) 2 S.C.R. 111 (S.C.C.), Rand J.

It is the "public performance" that is to further the object. Now undoubtedly there can be an immediate charitable object in connection with and as part of which a performance can be given. Singing or performing music in and as part of a church service is directly furthering that service, itself a charitable object; an educational meeting with musical interpolations is carried on in a charitable sense and is itself such an object; and in the relief or amelioration of poverty, the accompaniment of the music of an orchestra at a Christmas dinner given to the poor through the means of voluntary contributions is equally so. Since, then, the proviso can be satisfied by a performance in the furtherance of a charitable activity of which it furnishes one of the functions, are we justified in attributing to the proviso the intention to embrace also an ultimate, possible and remote result following a series of disjoined business transactions?

(...)

The performance, to be "in furtherance of", must, I should say, be a participating factor in the charitable object itself or in an activity incidental to it, for the purpose of which the object may consist of component parts of cognate character; but it could not be said to be so associated with the objects here by its role in the ordinary business entertainment of a dance: there is neither a participation in the object nor in anything incidental to it. (at pp. 114-115)

5. *Muzak Corporation v. Composers', Authors' & Publishers' Association (Canada)*, (1953) 2 S.C.R. 182 (S.C.C.), Rand J. and Kellock J.

On the argument, Mr. Manning gave us a very full statement of the scope of copyright in musical compositions. It is distributed into a number of interests both "vertical" and "horizontal". By sec. 3 of the statute the copyright holder has the sole right "to produce, reproduce", say, a song in sheet form for ordinary sale; to perform it in public; to make a record of it by means enabling it to be performed mechanically; to adapt and present it publicly by cinematography or radio communication. These rights, again, may be limited to sale or production or performance in specified areas of specified countries and they may be exclusive to one person or open to the market. (Rand J., at pp.188-189)

Unless what is done by a defendant is to sanction, approve or countenance actual performance, it cannot be said, in my opinion, that it has "authorized" performance. While it is true that to perform by means of such a mechanical contrivance as is here in question involves the use of recordings, and while the appellant, on the evidence, has authorized the use of the recordings in performing, it has not authorized the performance itself and has, therefore, not invaded any right of the respondent. (Kellock J., at p.193)

6. *Canadian Admiral Corp. v. Rediffusion, Inc.*, (1954), (1954) Ex. C.R. 382 (Ex. Ct.), Cameron J.

Then s. 3 defines "copyright" as the sole right to do or to authorize the acts there specified in relation to the "work". S. 17(1) (now s. 27) provides that copyright in a work shall be deemed to be infringed by any person who without the consent of the owner of the copyright does anything the sole right to which is by the Act conferred on the owner of the copyright. Subss. (2) and (3) of s. 17 constitute certain other acts as infringements of copyright, but are not here of importance. It follows, therefore, that no matter how "piratical" the taking by one person of the work of another may appear to be, such taking cannot be an infringement of the rights of the latter unless copyright exists in that "work" under the provisions of s. 3. Copyright is, in fact only a negative right to prevent the appropriation of the labours of an author by another. (at p. 390)

(...)

That, however, does not conclude the matter; mere performance is not enough; in order to find that the defendant infringed the plaintiff's right, I must find that the performance was "in public". The Act does not define "in public" and it would be undesirable for me to attempt to do so except to state that I regard it as the antithesis of "in private". Each case must depend on its own particular facts.

I have read the cases referred to by counsel and it seems to me that the test to be applied is, "What is the character of the audience?" (at p. 404)

As to the character of the audience in homes and apartments to which the telecasts of the live films were "rediffused" by the defendant, there is no evidence whatever except that they were seen by the defendant's subscribers, presumably only the householders. The character of the audience was therefore a purely domestic one and the performance in each case was not a performance in public.

(...)

The situation, however, is quite different in regard to the defendant's Berri Street showroom. The evidence is that the showroom was operated by the defendant for the purpose of demonstrating and selling its services which included the leasing of its terminal units. The showroom was open to the public, and members of the public there on various occasions saw the film telecasts of the plaintiff broadcast on Station CBFT. There was nothing there of a domestic or quasi-domestic nature and in my opinion it was a performance in public and an infringement of the copyright of the plaintiff in the cinematograph films. It was suggested by counsel for the defendant that a finding to that effect might seriously interfere with the operations of store salesmen of any type of television receiving sets, and that may be so. If, however, the plaintiff has established its right to copyright, it is entitled to the protection afforded by the Act for such right and to restrain the defendant from infringing that right no matter what the consequences to others might be. (at p. 408-409)

7. *Performing Rights Organization of Canada Ltd. v. Lion d'or (1981) Ltée* (1987), 17 C.P.R. (3d) 542 (F.C.T.D.), Strayer J.

Counsel for the defendants contends that there was no proof that the individual defendant Gerald Bastarache was responsible for the management of the cabaret and therefore for the music which may be played there. It is true that there is no direct evidence on this point but I think I may reasonably conclude on the balance of probabilities that Gerald Bastarache was in a position to control the music played at this cabaret. He may therefore be treated as a "person who for his private profit permits a theatre or other place of entertainment to be used for the performance in public of the work without the consent of the owner of the copyright..."; and thus by subs. 17(5) (now subsection 27(5)) may be deemed responsible for any infringement of copyright which may have occurred. I come to this conclusion because Gerald Bastarache was a director of the defendant corporation as shown in the annual return for 1985 and in the return filed with the Department of Justice, Corporate and Trust Affairs Branch, Government of New Brunswick, on January 30, 1987. He was again shown as a director in an annual return filed with the same branch on July 7, 1987. When he was contacted personally about this matter on September 19, 1985, he referred the plaintiff's representative to his lawyer Lampert and he engaged in a meeting on the subject with Lampert and Albert on October 31, 1985. Albert testified that he saw the defendant Bastarache at the cabaret on at least two of the three nights when he was there as described above. At the examination for discovery of the defendants, Bastarache was authorized to answer for the defendant corporation in respect of the matters in issue. All of these facts lead to the conclusion that Bastarache was sufficiently involved with the management of the cabaret to be in a position to have withdrawn permission for the performance of any songs that might infringe copyright. There may have been other persons who have not been added as defendants who might equally have been in such a position but that does not eliminate his responsibility. It is also significant that neither Bastarache nor any one else appeared on his behalf as a witness to explain away the foregoing facts which imply his responsibility in the matter. (at p. 545)

8. *Titan Sports Inc. v. Mansion House (Toronto) Ltd.* (1989), 26 C.I.P.R. 105 (F.C.T.D.), MacKay J.

Unauthorized venues apparently have access to the television signal carrying the applicants' performance by satellite transmission through the acquisition, from an unauthorized supplier of electronic equipment, of an unscrambler box which has been wired to contain an unauthorized silicone chip specially programmed, without authority of the owners, to provide access to the signal. While the VideoCipher II technology seems highly sophisticated and effective for the purposes of scrambling and descrambling television signals, its function can apparently be duplicated relatively easily by so-called "pirates".

It seems clear that if there be unauthorized showing of the television program to which the applicants have copyright, this would constitute an infringement under ss. 27(1) and 27(5), that is the doing of something that only the owner of copyright may do or authorize, or permitting the performance in public of a work without the consent of the owner of the copyright for private profit. (at p. 110)

9. *de Tervagne v. Beloeil (Town)* (1993), 50 C.P.R. (3d) 419 (F.C.T.D.) Joyal J., at p. 437 :

Based on the case law I have examined, I cannot find that the defendants have any liability for the copyright infringement committed. The defendants did not authorize the performances of the play *Pique-Nique en Ville* within the meaning of subsection 3(1) of the Act. The question of authorization is a question of fact in each case. In this case, the producer of the play, Mr. Bossac, alone had control over the play. The other defendants were not in such a position as would have enabled them to authorize the infringement. The mere fact that the town of Beloeil and Les Productions de la Coulisse Inc. rented the hall to Mr. Bossac, even though this in a way made possible or facilitated the infringement, does not support a finding that they authorized the performance of a play which infringed copyright. The defendants could reasonably have assumed that the purpose of renting the hall was to present a play in a lawful manner.

10. *Society of Composers, Authors and Music Publishers of Canada v. 1041977 Ontario Inc.* (1996-10-04) <http://www.fja.gc.ca/cf/1996/ori/1996cf19480.html> (FCTD-Pleadings) Prothonotary Giles

The standard practice with regard to granting leave to amend, is to refuse leave when the proposed amended pleading would be struck out under Rule 419(1)(a). Here the proposed defence, that the corporate defendant did not authorize or cause the performance or any live or recorded music, does not provide a defence to claim under s. 27(5) that the defendant permitted a place of entertainment to be used for the performance in public of the work. (at p. 2)

§7.0 List of Cases

§7.1 Canada

§7.1.1 Direct infringement general

1. *Gemmill v. Garland* (1886), 12 O.R. 139 (Ont. Ch.D.); rev'd (1887), 14 S.C.R. 321.

2. *Beauchemin v. Cadieux* (1899), 10 B.R. 255 (Que. Sup. Ct.); rev'd (1900), 10 B.R. 255 (Que. C.A.); aff'd (1901), 31 S.C.R. 370 (Que. Sup. Ct.-Damages).
3. *Cartwright v. Wharton* (1912), 1 D.L.R. 392 (Ont. H.C.J.).
4. *Deeks v. Wells*, (1930) 4 D.L.R. 513 (Ont. H.C.J.); aff'd (1931) 4 D.L.R. 533 (Ont. C.A.); aff'd (1932), (1933) 1 D.L.R. 353, (1928,35) MacG. Cop. Cas. 353 (J.C.P.C.-Canada).
5. *Gribble v. Manitoba Free Press Co.*, (1931) 3 D.L.R. 648 (Man. Q.B.); rev'd (1932) 1 D.L.R. 169 (C.A.).
6. *Kantel v. Grant*, (1933) Ex. C.R. 84 (Ex. Ct.).
7. *Canadian Performing Right Society Ltd. v. Canadian National Exhibition Assn.*, (1934) 4 D.L.R. 154 (Ont. H.C.J.).
8. *Underwriters Survey Bureau Limited v. Massie & Renwick Limited*, (1936) 2 D.L.R. 341 (Ex. Ct.-Interlocutory); (1937) Ex. C.R. 15 (Ex. Ct.); rev'd (1937) 2 D.L.R. 213 (Quash); (1938) 2 D.L.R. 31 (Ex. Ct.); rev'd in part (1940) 1 D.L.R. 625; leave to appeal refused (1940) S.C.R. ix (P.C.); (1941), 1 C.P.R. 207 (Ex. Ct. -Referee); report var'd (1941), 1 C.P.R. 224 (Ex. Ct.-Reference).
9. *Canadian Performing Right Society Ltd. v. Canadian National Exhibition Ass'n*, (1938) 2 D.L.R. 621 (Ont. H.C.J.).
10. *Francis Day & Hunter Ltd. v. Twentieth Century Fox Corp.*, (1937) 4 D.L.R. 700 (Ont. H.C.J.); rev'd (1938) 3 D.L.R. 375 (Ont. C.A.); (1939), 8 F.L.J. 163 (J.C.P.C.-motion for leave); aff'd (1939) 4 All E.R. 192 (J.C.P.C.-Canada).
11. *International Press Ltd. v. Tunnell* (1937), (1938) 1 D.L.R. 393 (Ont. C.A.).
12. *Underwriters' Survey Bureau Ltd. v. American Home Fire Assurance Co.* (1939) 4 D.L.R. 89 (Ex. Ct.).
13. *Canadian Performing Right Society Ltd. v. Vigneux* (1942), 2 C.P.R. 59 (Ex. Ct.); var'd (1943), 2 C.P.R. 259; rev'd (1945), 4 C.P.R. 65 (J.C.P.C.).
14. *Zamacois v. Douville* (1943), in English translation at (1944) Ex. C.R. 208, 2 C.P.R. 270, in French text at (1945) R.L. 155 (Ex. Ct.).
15. *King Features Syndicate Inc. v Lechter* (1950), 12 C.P.R. 60 (Ex. Ct.).
16. *Moreau v. St. Vincent* (1950), 12 C.P.R. 32 (Exc. Ct.).
9. *Maple Leaf Broadcasting Co. v. Composers', Authors' & Publishers' Assn. (Canada)* (1953), 18 C.P.R. 1 (Ex. Ct.); Aff'd (1954), 21 C.P.R. 45 (S.C.C.).

17. *Muzak corporation v. Composers', Authors' & Publishers' Assn. (Canada)* (1953), 19 C.P.R. 1 (S.C.C.).
18. *Canadian Admiral Corp. v. Rediffusion, Inc.* (1954), 20 C.P.R. 75 (Ex. Ct.).
19. *Standard Industries Inc. v. Rosen* (1954), 24 C.P.R. 41 (Ont. H.C.J.).
20. *Kilvington Bros. Ltd. v. Goldberg* (1957), 28 C.P.R. 13 (Ont. S.C.).
21. *Hay v. Saunders* (1958), 30 C.P.R. 81 (Ont. H.C.J.).
22. *Cardwell v. Leduc* (1962), 41 C.P.R. 167 (Ex. Ct.).
23. *CTV Television Network Ltd. v. Composers' Authors' & Publishers' Assn. (Canada)* (1966), 48 C.P.R. 246 (Exc. Ct.); aff'd (1968), 55 C.P.R. 132 (S.C.C.).
24. *Hrycyk v. Smichure* (1966), 53 C.P.R. 177 (Alta. S.C.).
25. *Ludlow Music Inc. v. Canint Music Corp.* (1967), 51 C.P.R. 278 (Ex. Ct.).
26. *Warner Brothers Seven Arts Inc. v. CESM-TV Ltd.* (1969), 58 C.P.R. 97 (Ex. Ct.-Pleadings); rev'd (1971), 65 C.P.R. 215 (Ex. Ct.).
27. *Webb & Knapp (Canada) Ltd. v. Edmonton (City)* (1969), 3 D.L.R. (3d) (Alta. C.A.); rev'd in part (1970), 63 C.P.R. 21 (S.C.C.).
28. *Goldner v. Canadian Broadcasting Corporation* (1972), 7 C.P.R. (2d) 158 (F.C.T.D.); application for leave to adduce additional evidence refused (1974), 13 C.P.R. (2d) 230 (F.C.A. – Evidence); appeal A-200-72 dismissed on the merit 1980.04.09 (F.C.A.).
29. *T.J. Moore Co. v. Accessoires de bureau de Québec Inc.*, (1973) F.C. D-1413, English translation at 14 C.P.R. (2d) 113 (F.C.T.D.)
30. *Collins v. Rosenthal* (1974), 14 C.P.R. (2d) 143 (F.C.T.D.).
31. *Compo Co. v. Blue Crest Music Inc.* (1975), 17 C.P.R. (2d) 149 (F.C.T.D.); rev'd 17 C.P.R. (2d) 149 (F.C.T.D.); (1976), 30 C.P.R. (2d) 14 (F.C.A.); (1980), 45 C.P.R. (2d) 1 (S.C.C.).
32. *Fly by Nite Music co. v. Record Warehouse Ltd.* (1975), 20 C.P.R. (2d) 263 (F.C.T.D.).
33. *Fetherling v. Boughner* (1978), 40 C.P.R. (2d) 253 (Ont. H.C.J.).
34. *Le Nordet Inc. c. 82558 Canada Ltée*, (1978) C.S. 904 (Que. Sup. Ct.-Interlocutory); judgment by consent on the merit 1979.10.25 (Que. Sup. Ct.).

35. *Pro Arts Inc. v. Campus Crafts Holdings Ltd.* (1980), 50 C.P.R. (2d) 230 (Ont. H.C.J.).
36. *ATV Music Publishing of Canada Ltd. v. Rogers Radio Broadcasting Ltd.* (1982), 65 C.P.R. (2d) 109 (Ont. H.C.J.).
37. *Gondos v. Hardy* (1982), 38 O.R. (2d) 555, 64 C.P.R. (2d) 145 (Ont. H.C.J.).
38. *R. v. Stewart* (1982), 74 C.P.R. (2d) 1 (Ont. H.C.); rev'd (1983), 74 C.P.R. (2d) 1 (Ont. C.A.); rev'd (1988), 21 C.P.R. (3d) 289 (S.C.C.).
39. *Bouliane c. Service de Musique Bonanza Inc.* (1983) Que. Sup. Ct. 1190; aff'd in part (1986), 18 C.I.P.R. 214 (Que. C.A.).
40. *B.C. Jockey Club v. Standen (Winbar Publications)* (1983), 73 C.P.R. (2d) 164 (B.C.S.C.); aff'd (1985), 8 C.P.R. (3d) 283 (B.C.C.A.).
41. *Bishop v. Stevens* (1984), (1985) 1 F.C. 755, (sub. Nom *Bishop v. Télé-Metropole Inc.*) 4 C.P.R. (3d) 349 (F.C.T.D.); rev'd in part (1987), 18 C.P.R. (3d) 257 (F.C.A.); aff'd (1990), 31 C.P.R. (3d) 394 (S.C.C.).
42. *C.P. Koch Ltd. v. Continental Steel Ltd.* (1984), 82 C.P.R. (2d) 156 (B.C.S.C.); aff'd (1985), 4 C.P.R. (3d) 395 (B.C.C.A.).
43. *R. v. James Lorimer & Co.* (1984), 77 C.P.R. (2d) 262 (F.C.A.).
44. *Société d'informatique R.D.G. Inc. c. Dynabec Ltée.* (1984), 6 C.P.R. (3d) 299 (Que. Sup. Ct.-Interlocutory); aff'd (1985), 6 C.P.R. (3d) 322 (Que. C.A.-Interlocutory); declaration of settlement out of court filed 1986.09.16.
45. *Hopkins (Tom) International Inc. v. Wall & Redekop Reality Ltd.* (1984), 1 C.P.R. (3d) 348 (B.C.S.C.); var'd (1985), 6 C.P.R. (3d) 475 (B.C.C.A.).
46. *Bayliner Marine Corp. v. Doral Boats Ltd.* (1985), 5 C.P.R. (3d) 289 (F.C.T.D.); rev'd (1986), 10 C.P.R. (3d) 289 (F.C.A.); leave to appeal refused (1986), 14 C.P.R. (3d) 446 (note) (S.C.C.).
47. *Canadian Tire Corporation v. R.C.V., Local 1518 of U.F.C.W.* (1985), 7 C.P.R. (3d) 415 (F.C.T.D.).
48. *Apple Computer Inc. v. Mackintosh Computers Ltd.* (1985), 3 C.P.R. (3d) 34 (F.C.T.D.-Interlocutory); (1986), 10 C.P.R. (3d) 1 (F.C.T.D.); additional reasons at (1987), 14 C.I.P.R. 315 (F.C.T.D.-Supplementary); var'd (1987), 18 C.P.R. (3d) 129 (C.A.); aff'd (1990), 30 C.P.R. (3d) 257 (S.C.C.).
49. *Cooper Canada Ltd. v. Amer Sport International Inc.* (1986), 9 C.P.R. (3d) 549 (F.C.T.D.).

50. *École de Conduite Tecnic Aubé Inc. v. 1509 8858 Québec Inc.* (1986), 12 C.I.P.R. 284 (Que. Sup. Ct.); appeal 500-09-000807-867 and 500-09-000775-866.
51. *Gemologists International Inc. v. Gem Scan International Inc.* (1986), 9 C.P.R. (3d) 253 (Ont. H.C.J.).
52. *Selection Testing Consultants International Ltd. v. Humanex International Inc.* (1986), 10 C.P.R. (3d) 277 (F.C.T.D.-Pleadings; (1986), 11 C.P.R. (3d) 574 (F.C.T.D.-Evidence); (1986), 9 C.I.P.R. 178 (F.C.T.D.-Interim); (1987), 14 C.P.R. (3d) 234 (F.C.T.D.-Contempt); (1987), 15 C.P.R. (3d) 13 (F.C.T.D.-Interlocutory).
53. *Tele-Direct (Pulications) Inc. v. Intra Canada Telecommunications Ltd.* (1986), 13 C.P.R. (3d) 529 (Que. Sup. Ct.).
54. *Montour Ltée v. Jolicoeur*, (1987) R.J.Q. 2482 (Que. Sup. Ct.).
55. *Aldrich v. One Stop Video Ltd.* (1987), 17 C.P.R. (3d) 27 (B.C.S.C.); (1987), 6 A.C.W.S. (3d) 102 (B.C.C.A.-Leave to appeal granted).
56. *Dictionnaires Robert Canada SCC v. Librairie du Nomade Inc.* (1987), 16 C.P.R. (3d) 319 (F.C.T.D.); aff'd (1990), 37 F.T.R. 240 (note) (F.C.A.).
57. *Geremia v. Maric* (1987), 17 C.P.R. (3d) 433 (F.C.T.D.).
58. *New Era Publications International, SpA v. Key-Porter Books Ltd.* (1987), 18 C.P.R. (3d) 1562 (F.C.T.D.).
59. *Prism Hospital Software Inc. v. Hospital Medical Records Institute* (1987), 18 C.P.R. (3d) 398 (B.C.S.C.); leave to appeal refused (1987), 18 C.P.R. (3d) 401 (B.C.C.A.).
60. *R. v. Miles of Music Ltd.* (1987), 14 C.P.R. (3d) 181 (Ont. Prov. Ct.); aff'd (1987), 18 C.P.R. (3d) 77 (Ont. H.C.J.); rev'd (1989), 24 C.P.R. (3d) 301 (Ont. C.A.).
61. *Rôtisseries St-Hubert Ltée c. Syndicat des travailleurs(euses) de la rôtisserie St-Hubert de Drummondville (CSN)* (1987), 17 C.P.R. (3d) 461 (Que. Sup. Ct.); appeal 500-09-000068-874 withdrawn 1987.02.20 (Que. C.A.).
62. *Verge v. Imperial Oil Ltd.* (1987), 15 C.P.R. (3d) 187 (F.C.T.D.); aff'd (1988), 23 C.P.R. (3d) 159 (F.C.A.).
63. *Habitations du boisé d'en haut Inc. v. Yves Bilodeau Dessinateur Inc.* (1988), 20 C.I.P.R. 168 (Que. Sup. Ct.); appeal 599-09-001209-881 withdrawn 1988.11.14.

64. *Système informatisés Solartronix c. C.E.G.E.P. de Jonquière* (1988), 22 C.I.P.R. 101 (Que. Sup. Ct.-Interlocutory); (1990) R.J.Q. 1071, 38 C.P.R. (3d) 143 (Que. Sup. Ct.); appeal 200-09-000495-903.
65. *Milionis v. Petropoulos* (1988), 23 C.P.R. (3d) 52 (Ont. H.C.J.)
66. *MLW Systems in Education Ltd. v. Harts Systems Ltd.* (1988), 22 C.P.R. (3d) 90 (B.C.S.C.).
67. *British Columbia v. Mihaljevic* (1986), 2 B.C.L.R. (2d) 190 (B.C.S.C.-Interlocutory); (1989), 26 C.P.R. (3d) 184 (B.C.S.C.); aff'd (1991), 36 C.P.R. (3d) 445 (B.C.C.A.); leave to appeal refused (1992), 39 C.P.R. (3d) v (S.C.C.).
68. *Candour group Enterprises Inc. v. Argon Financial Consultants Inc.* (1989), 25 C.P.R. (3d) 555 (B.C.S.C.).
69. *Constructions Nouvelle Dimension Inc. c. Berthiaume* (1989), 24 C.I.P.R. 312 (Que. Civ. Div.).
70. *Éditions Hurtubise HMH Ltée v. Cégep André-Laurendeau*, (1989) R.J.Q. 1003 (Que. Sup. Ct.); partial settlement out of court filed 1991.01.10 (Que. Sup. Ct.).
71. *Euclid Industries Canada Ltd. v. Reg Holloway Sales Inc.* (1989), 27 C.P.R. (3d) 281 (F.C.T.D.).
72. *Fourgons Transit Inc. v. Fourgons Ramco Inc.* (1989), 26 C.P.R. (3d) 565 (F.C.T.D.).
73. *Hutton and Denail Music v. Canadian Broadcasting Corp.* (1989), 29 C.P.R. (3d) 398 (Alta. Q.B.); aff'd (1992), 41 C.P.R. (3d) 45 (Alta. C.A.).
74. *North American Systemshops Ltd. v. King* (1989), 27 C.P.R. (3d) 367 (Alta. Q.B.).
75. *Titan Sports Inc. v. Mansion House (Toronto) Ltd.* (1989), 28 C.P.R. (3d) 199 (F.C.T.D.).
76. *Energy Absorption Systems Inc. v. Y. Boissonneault & Fils Inc.* (1990), 30 C.P.R. (3d) 420 (F.C.T.D.).
77. *Overseas Enterprises Ltd. v. Feathers Publishing & Marketing Inc.* (1990), 34 C.P.R. (3d) 78 (F.C.T.D.-Interlocutory).
78. *Paramount Pictures Corp. v. Howley* (1991), 39 C.P.R. (3d) 419 (Ont. Gen. Div.).
79. *Sklar-Peppler Sales v. Decor-Rest Furniture Ltd.* (1990), 36 C.P.R. (3d) 12 (F.C.T.D.).

80. *Cartes-en-ciel Inc. v. Boutique Elfe Inc.* (1991), 43 C.P.R. (3d) 416 (Que. Prov. Ct.).
81. *Grigron v. Roussel* (1991), 38 C.P.R. (3d) 4 (F.C.T.D.); appeal withdrawn.
82. *91439 Canada Ltée v. Éditions JCL Inc.* (1992), 41 C.P.R. (3d) 245 (F.C.T.D.); rev'd in part (1994), 58 C.P.R. (3d) 38 (F.C.A.).
83. *Caron v. Assn. Des Pompiers de Montréal* (1992), 42 C.P.R. (3d) 292 (F.C.T.D.); in appeal A-450-92.
84. *Canadian Cable Television Assn.-Association Canadienne de Télévision par Cable v. Canada (Copyright Board)* (1991), 34 C.P.R. (3d) 521 (F.C.T.D.); aff'd (1993), 46 C.P.R. (3d) 359 (F.C.A.); application for leave to appeal to the Supreme Court of Canada refused (1993), 51 C.P.R. (3d) v (S.C.C.).
85. *De Tervagne v. Beloeil (Ville)* (1993), 50 C.P.R. (3d) 419 (F.C.T.D.).
86. *Humeur Design Inc. v. Ohayon* (1993), 94 L.P.J. 1935 (Que. Sup. Ct.-Interlocutory); (1994), L.P.J.S. 1967 (Que. Sup. Ct.-Contempt).
87. *W.I. Villager Ltd. v. Giant Tiger Stores Ltd.* (unreported), (Fed. T.D.), Doc. No. T-147-94, Reed J., March 19, 1994 (unreported) (F.C.T.D.-Practice); (unreported) (Fed.T.D.), Doc. No. T-147-94 Dubé J., March 19, 1994 (F.C.T.D.-Practice).
88. *Systèmes Fortune 1000 Ltée v. St-Pierre* (1995), J.E. 95-1132 (Que. Sup. Ct.).
89. *Lewicki v. Dixie Electric Ltd.* (1995), 61 C.P.R. (3d) 75 (F.C.T.D.-Interlocutory Injunction).
90. *Bernaquez v. Poirier* (1996), (1996) A.Q. 3430 (Que. Sup. Ct.).
91. *Productions Avanti Ciné-Vidéo Inc. v. Favreau* (1997), (1997) R.J.Q. 1918 (Que. Sup. Ct.); rev'd (1999), (1999) R.J.Q. 1939 (Que. C.A.).
92. *Lominger Limited Inc. v. Raymond, Chabot, Martin, Paré* (1999), (1999) F.C.J. 62 (F.C.T.D. Pron.-Strike).
93. *CCH Canadian Limited v. The Law society of Upper Canada* (1999), (1999) F.C.J. 1647 (T.D.).
94. *Candow v. Savory* (2000), (2000) N.J.228 (Nfld. T.D.).

§7.1.2 Direct infringement: consent of owner

1. *Muzak Corporation v. Composers', Authors' & Publishers' Assn. (Canada)* (1953), 19 C.P.R. 1 (S.C.C.).
2. *Netupsky v. Dominion Bridge Co.* (1968), 56 C.P.R. 134 (B.C.S.C.); rev'd (1969), 58 C.P.R. 7 (B.C.C.A.); (1969), 61 C.P.R. 150 (B.C.C.A.); rev'd (1971), 3 C.P.R. (2d) 1 (S.C.C.).
3. *Warner Brothers Seven Arts Inc. v. CESM-TV Ltd.* (1969), 58 C.P.R. 97 (Ex. Ct – Pleadings); rev'd (1971), 65 C.P.R. 215 (Ex. Ct.).
4. *Webb & Knapp (Canada) Ltd. v. Edmonton (City)* (1969), 3 D.L.R. (3d) 123 (Alta. C.A.); rev'd in part (1970), 63 C.P.R. 21 (S.C.C.).
5. *Compo Co. v. Blue Crest Music Inc.* (1974), 17 C.P.R. (2d) 149 (F.C.T.D.); rev'd (1976), 30 C.P.R. (2d) 14 (F.C.A.); aff'd (1979), 45 C.P.R. (2d) 1 (S.C.C.).
6. *Fetherling v. Boughner* (1978), 40 C.P.R. (2d) 253 (Ont. H.C.J.).
7. *Silverson v. Neon Products Ltd.* (1978), 39 C.P.R. (2d) 234 (B.C.S.C.).
8. *John Maryon International Ltd. v. New Brunswick Telephone Co. Ltd.* (1981), 33 N.B.R. (2d) 543, 80 A.P.R. 543 (Q.B.); var'd (1982), 43 N.B.R. (2d) 469, 113 A.P.R. 469, 24 C.C.L.T. 146 (C.A.); leave to appeal to S.C.C. refused (1982) 2 S.C.R. viii (S.C.C.).
9. *ADI Ltd. v. Destein* (1982), 68 C.P.R. (2d) 262 (N.B.Q.B.).
10. *Kaffka v. Mountain Side Developments Ltd.* (1982), 62 C.P.R. (2d) 157 (B.C.S.C.).
11. *Bishop v. Stevens* (1984), (1985) 1 F.C. 755, (sub nom Bishop v. Télé-Metropole Inc.) 4 C.P.R. (3d) 349 (F.C.T.D.); rev'd in part (1987), 18 C.P.R. (3d) 257 (F.C.A.); aff'd (1990) 2 S.C.R. 467 (S.C.C.).
12. *C.P. Koch Ltd. v. Continental Steel Ltd.* (1984), 82 C.P.R. (2d) 156 (B.C.S.C.); aff'd (1985), 4 C.P.R. (3d) 395 (B.C.C.A.).
13. *Katz v. Cytrynbaum* (1983), 76 C.P.R. (2d) 276 (B.C.C.A.).
14. *Slumber-Magic Adjustable Bed Co. v. Sleep-King Adjustable Bed Co.* (1984), 3 C.P.R. (3d) 81 (B.C.S.C.).
15. *Paul Couvrette Photographs Inc. v. The Ottawa Citizen* (1985), 7 C.P.R. (3d) 552 (Ont. Prov. ct.).
16. *Hétu v. Sabourin* (1986), 17 C.P.R. (3d) 204 (Que. Prov. Ct.).
17. *Selection Testing Consultants International Ltd. v. Humanex International Inc.* (1986), 10 C.P.R. (3d) 277 (F.C.T.D. – Pleadings); (1986), 11 C.P.R. (3d)

- 574 (F.C.T.D. – Evidence); (1986) 3 F.C. D-15 (F.C.T.D. – Interim); (1987), 14 C.P.R. (3d) 234 (F.C.T.D. – Contempt); (1987), 15 C.P.R. (3d) 13 (F.C.T.D. – Interlocutory).
18. *Éditions Hurtubise HMH Ltée v. Cégep André-Laurendeau*, (1989) R.J.Q. 1003 (Que. Sup. Ct.); partial settlement out of court filed 1991.01.10 (Que.Sup.Ct.).
 19. *Lifestyle Homes Ltd. v. Randall Homes Ltd.* (1990), 30 C.P.R. (3d) 76 (Q.B.); aff'd (1991), 34 C.P.R. (3d) 505 (C.A.).
 20. *Pizza Pizza Ltd. v. Gillespie* (1990), 33 C.P.R. (3d) 515 (Ont. Gen. Div.).
 21. *Amusements Wiltron Inc. c. Mainville*, (1991) R.J.Q. 1930, (sub nom. *Amusements Wiltron Inc. v. Mainville*) 40 C.P.R. (3d) 521 (Que. Sub. Ct.).
 22. *Cartes-en-ciel Inc. v. Boutique Elfe Inc.*, (1991) R.J.Q. 1775 (Que. Prov. Ct.).
 23. *Sedgewick v. Atlantic Mediaworks Ltd.* (1991), 38 C.P.R. (3d) 526 (N.B.Q.B.); aff'd (1991), 29 A.C.W.S. (3d) 983 (N.B.C.A.).
 24. *Cselko Associates Inc. v. Zellers Inc.* (1992), 44 C.P.R. (3d) 56 (Ont. Gen. Div.); appeal C12800.
 25. *955105 Ontario Inc. v. Video 99* (1993), 48 C.P.R. (3d) 204 (Ont. Gen. Div.).
 26. *Fletcher v. Polka Dot Fabrics Ltd.* (1993), 51 C.P.R. (3d) 241 (Ont. Gen. Div.).

§7.1.3 Direct infringement: parody

1. *Ludlow Music Inc. v. Canint Music Corp.* (1967), 51 C.P.R. 278 (Ex. Ct.).
2. *ATV Music Publishing of Canada Ltd. v. Rogers Radio Broadcasting Ltd.* (1982), 65 C.P.R. (2d) 109 (Ont. H.C.J.).
3. *Productions Lance & Compte Inc. c. Corp. des Concessionnaires General Motors du Montréal métropolitain* (1988), 18 C.I.P.R. 54 (Que. Sup. Ct. – Interim); (1988), 18 C.I.P.R. 45 (Que. Sup. Ct. – Interlocutory); declarations of settlement out of court filed 1989.01.11 (Que.Sup.Ct.).
4. *Productions O.P. Inc. c. Groupe Morrow Inc.* (1988), 26 C.P.R. (3d) 223 (Que. Sup. Ct. – Interlocutory); declaration of settlement out of court filed 1990.02.06 (Que. Sup. Ct.).

§7.1.4 Indirect Infringement: General

1. *Clarke, Irvin & Co. v. Cole & Co.* (1959), 33 C.P.R. 173 (Ont. H.C.J.).
2. *Eldon Industries Inc. v. Reliable Toy Co.* (1964), 28 Fox Pat. C. 163 (Ont. H.C.J.); aff'd (1965), 48 C.P.R. 109 (Ont. C.A.).
3. *R. v. Fraser* (1965), 51 D.L.R. (2d) 408 (B.C.C.A.); rev.d (1966), 59 D.L.R. (2d) 240 (S.C.C.).
4. *R. v. Rioux*, (1968) B.R. 942n (C.A.); aff'd (1969) S.C.R. 599, (1970) 3 C.C.C. 149 (S.C.C.).
5. *Godfrey, MacSkimming & Bacque Ltd. v. Coles Book Stores Ltd.* (1973), 13 C.P.R. (2d) 89 (Ont. H.C.J.).
6. *R. v. Small* (1973), 12 C.C.C. (2d) 145 (B.C.C.A.).
7. *Fly by Nite Music Co. v. Record Warehouse Ltd.* (1975), 20 C.P.R. (2d) 263 (F.C.T.D.).
8. *Simon & Schuster Inc. v. Coles Book Stores Ltd.* (1975), 23 C.P.R. (2d) 43 (Ont. H.C.J.).
9. *R. v. Sudbury News Service Limited* (1977), 37 C.C.C. (3d) 40 (Ont. H.C.J.); var'd (1978), 39 C.C.C. (2d) 1 (Ont. C.A.).
10. *Therrien v. Schola Inc.* (1981), (1982) 1 F.C. D-864 (F.C.T.D.).
11. *Apple Computer Inc. v. Computermat Inc.* (1983), 75 C.P.R. (2d) 26 (Ont. H.C.J. – Interlocutory); (1985), 3 C.P.R. (3d) 407 (Ont. H.C.J. – Interlocutory).
12. *B.C. Jockey Club v. Standen (Winbar Publications)* (1983), 73 C.P.R. (2d) 164 (B.C.S.C.); aff'd (1985), 8 C.P.R. (3d) 283 (B.C.C.A.).
13. *A & M Records of Canada Ltd. v. Millbank Music Corp. Ltd.* (1984), 1 C.P.R. (3d) 354 (F.C.T.D.).
14. *Duomo Inc. v. Giftcraft Ltd.* (1984), 1 C.P.R. (3d) 395 (F.C.T.D. – Practice); (1984), 1 C.P.R. (3d) 165 (F.C.T.D. – Interlocutory).
15. *Apple Computer Inc. v. Mackintosh Computers Ltd.* (1985), 3 C.P.R. (3d) 34 (F.C.T.D. – Interlocutory); (1986), 10 C.P.R. (3d) 1 (F.C.T.D.); additional reasons at (1987), 43 D.L.R. (4th) 184 (F.C.T.D. – Supplementary); var'd (1987), 18 C.P.R. (3d) 129 (F.C.A.); aff'd (1990), 30 C.P.R. (3d) 257.
16. *Breen v. Hancock House Publishers Ltd.* (1985), 6 C.P.R. (3d) 433 (F.C.T.D.).
17. *R. v. Germain* (1985), 21 D.L.R. (4th) 296 (S.C.C.).

18. *Cooper Canada Ltd. v. Amer Sport International Inc.* (1986), 9 C.P.R. (3d) 549 (F.C.T.D.).
19. *Gemologists International Inc. v. Gem Scan International Inc.* (1986), 9 C.P.R. (3d) 253 (Ont. H.C.J.).
20. *R. v. Harris* (1987), 35 C.C.C. (3d) 1 (Ont. C.A.).
21. *Millionis v. Petropoulos* (1988), 23 C.P.R. (3d) 52 (Ont. H.C.J.).
22. *R. v. Ghnaim* (1988), 28 C.P.R. (3d) 463 (Prov. Ct.); rev'd in part (1989), 32 C.P.R. (3d) 487 (Alta. C.A.).
23. *Édition Hurtubise HMH Ltée v. Cégep André-Laurendeau*, (1989) R.J.Q. 1003 (Que. Sup. Ct.); partial settlement out of court filed 1991.01.10 (Que. Sup. Ct.).
24. *Euclid Industries Canada Ltd. v. Reg Holloway Sales Inc.* (1989), 27 C.P.R. (3d) 281 (F.C.T.D.).
25. *Fletcher v. Polka Dot Fabrics Ltd.* (1993), 51 C.P.R. (3d) 241 (Ont. Gen. Div.).
26. *R. v. Jorgensen* (1995), 129 D.L.R. (4th) 510 (S.C.C.).
27. *R. v. M. (J.P.)* (1996), 67 C.P.R. (3d) 152 (N.S.C.A.).
28. *B.W. International Inc. v. Thomson Canada Ltd.* (1996), 68 C.P.R. (3d) 289 (Ont. Gen. Div.).
29. *Society of Composers, Authors and Music Publishers of Canada v. 1041977 Ontario Inc.* (unreported) 1996.10.04, Prothonotary Giles, Doc. T-363-96 (F.C.T.D.-Pleadings).
30. *Compagnie générale des établissements Michelin – Michelin & Cie v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW – Canada)* (1996), 71 C.P.R. (3d) 348, 71 C.P.R. (3d) vi (F.C.T.D.); appeal A-38-97 discontinued on 1997-11-10.
31. *NFL Enterprises L.P. v. 1019491 Ontario Ltd.* (1997), 72 C.P.R. (3d) 1 (F.C.T.D.– Summary Judgment); rev'd (1998), 85 C.P.R. (3d) 328 (F.C.A.).
32. *Wall v. Van Brunell* (1997), 75 C.P.R. (3d) 429, (F.C.T.D.-Summary Judgment); aff'd (2000), 7 CPR (4th) 321, (F.C.A.)
33. *Milliken & Company v. Interface Flooring Systems (Canada) inc.* (1998), (1998) 3 F.C. 103 (FCTD-Merits); aff'd (2000), 5 C.P.R. (4th) 209 (F.C.A.).

§7.1.5 Indirect infringement: importation

1. *Anglo-Canadian Music Publishers' Assn. v. J. Suckling & Sons* (1889), 17 O.R. 239 (Ont. H.C.J.).
2. *Maison du livre français de Montréal Inc. v. Institut Littéraire du Québec Ltée* (1957), 31 C.P.R. 69 (Que. Sup. Ct.).
3. *Clarke, Irwin & Co. v. Cole & Co.* (1959), 33 C.P.R. 173 (Ont. H.C.J.).
4. *Librairie Larousse (Canada) Limitée v. Ollu*, (unreported), Que. Sup. Ct., Doc. No. 500-05-738633, Lamarre J., February 5, 1968.
5. *Godfrey, MacSkimming & Bacque Ltd. v. Coles Book Stores Ltd.* (1973), 13 C.P.R. (2d) 89 (Ont. H.C.J.).
6. *Roy Export Co. Establishment v. Gauthier* (1973), 10 C.P.R. (2d) 11 (F.C.T.D.).
7. *McClelland & Stewart Ltd. v. Coles Book Stores Ltd.* (1974), 21 C.P.R. (2d) 270 (F.C.T.D.).
8. *Fly by Nite Music Co. v. Record Warehouse Ltd.*, (1975) F.C. 386, 20 C.P.R. (2d) 263 (F.C.T.D.).
9. *Simon & Schuster Inc. v. Coles Book Stores Ltd.* (1975), 23 C.P.R. (2d) 43 (Ont. H.C.J.).
10. *Dictionnaires Robert Canada SCC v. Presses Métropolitaines Inc.*, (unreported), Que. Sup. Ct. – Interlocutory, Doc. No. 500-05-000608-800, Deslongchamps J., February 21, 1980; appeal 500-09-000232-801 on the interlocutory withdrawn February 15, 1982 (Que. C.A.); consent judgment on the merit February 15, 1982 (Que. Sup. Ct.).
11. *Dictionnaires Robert Canada S.C.C. v. Librairie Leméac Inc.* (unreported) (Que. S.C.), Doc. No. 500-05-000606-804, Deslongchamps J., February 21, 1980 (Que. Sup. Ct.- Interlocutory).
12. *Benjamin Distribution Ltd. v. Éditions Flammarion Ltée*, (unreported), Que. Sup. Ct. – Interlocutory, Doc. No. 500-05-016867-812 Flynn J., December 22, 1981; (1982), 68 C.P.R. (2d) 251 (Que. C.A. – Interlocutory); consent judgment on the merit May 30, 1983 (Que. Sup. Ct.).
13. *R. v. Bell* (1982), 66 C.C.C. (2d) 317 (Que. C.A.); rev'd (1983) 1 S.C.R. 471 (S.C.C.).
14. *A & M. Records of Canada Ltd. v. Millbank Music Corp.*, (1984) 2 F.C. D-1040, 1 C.P.R. (3d) 354 (F.C.T.D.).

15. *Dictionnaires Robert Canada SCC v. Librairie du Nomade Inc.* (1987), 16 C.P.R. (3d) 319 (F.C.T.D.); (1990), 37 F.T.R. 240 (note) (F.C.A.).
16. *955195 Ontario Inc. v. Video 99* (1993), 48 C.P.R. (3d) 204 (Ont. Gen. Div.).
17. *Flavell v. Canada (Deputy Minister of National Revenue for Customs and Excise)* (1996), 137 D.L.R. (4th) 45 (F.C.T.D.).

§7.1.6 Indirect infringement: use of theatre

1. *Canadian Performing Right Society Ltd. v. Ford Hotel Co. of Montreal*, (1935) 2 D.L.R. 391; withdrawal of appeal filed 1936.10.18 (Que. C.A.).
2. *Canadian Performing Right Society Ltd. v. Ming Yee* (1943), 3 C.P.R. 64 (Alta. Dist. Ct.).
3. *Titan Sports Inc. v. Mansion House (Toronto) Ltd.* (1989), 28 C.P.R. (3d) 199 (F.C.T.D.).
4. *Performing Rights Organization of Canada Ltd. v. Lion d'Or (1981) Ltée* (1987), 17 C.P.R. (3d) 542 (F.C.T.D.).

§7.1.7 Exceptions : general

1. *Smith Kline & French Canada Ltd. v. Frank W. Horner Inc.* (1982), 68 C.P.R. (2d) 42 (F.C.T.D.-Interlocutory); (1982), 70 C.P.R. (2d) 128 (F.C.T.D.-Evidence).
2. *Bishop v. Stevens*, (1985) 1 F.C. 755, (sub nom. *Bishop v. Télé-Metropole Inc.*) 4 C.P.R. (3d) 349 (F.C.T.D.); rev'd in part (1987), 18 C.P.R. (3d) 257 (F.C.A.); aff'd (1990), 31 C.P.R. (3d) 394 (S.C.C.).
3. *Canavest House Ltd. v. Lett* (1984), 2 C.P.R. (3d) 386 (Ont. H.C.J.).
4. *Performing Rights Organization of Canada Limited v. Canadian Broadcasting Corporation* (1986), 7 C.P.R. (3d) 433 (F.C.A.).
5. *Rôtisseries St-Hubert Ltée c. Syndicat des travailleurs(euses) de la rôtisserie St-Hubert de Drummondville (CSN)* (1986), 17 C.P.R. (3d) 461 (Que. Sup. Ct.); appeal 50-09-000068-874 withdrawn February 20, 1987 (Que. C.A.).

§7.1.8 Exceptions : fair dealing

1. *Gribble v. Manitoba Free Press Co.*, (1931) 3 D.L.R. 648 (Man. Q.B.); rev'd (1932) 1 D.L.R. 169 (man. C.A.).
2. *Field v. Lemaire*, (1940) Ex. C.R. 21 (Ex. Ct).
3. *Zamacoïs v. Douville* (1943), in English translation at (1944) Ex. C.R. 208, in French text at (1945) R.L. 155 (Ex. Ct.).
4. *Canavest House Ltd. v. Lett* (1984), 2 C.P.R. (3d) 386 (Ont. H.C.J.).
5. *R. v. James Lorimer & Co.* (1984), 77 C.P.R. (2d) 262 (F.C.A.).
6. *Hopkins (Tom) International Inc. v. Wall & Redekop Realty Ltd.* (1984), 1 C.P.R. (3d) 348 (B.C.S.C.); var'd (1985), 6 C.P.R. (3d) 475 (B.C.C.A.).
7. *Breen v. Hancock House Publishers Ltd.* (1985), 6 C.P.R. (3d) 433 (F.C.T.D.).
8. *New Era Publications International, SpA v. Key-Porter Books Ltd.* (1987), 18 C.P.R. (3d) 562 (F.C.T.D.).
9. *Compagnie générale des établissements Michelin – Michelin & Cie v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW - Canada)* (1996), 71 C.P.R. (3d) 348, 71 C.P.R. (3d) vi (F.C.T.D.); appeal A-38-97 discontinued on 1997—11-10.

§7.1.9 Exceptions : performance at exhibitions

1. *Canadian Performing Right Society Ltd. v. Canadian National Exhibition Assn.*, (1934) O.R. 610 (Ont. H.C.J.).
2. *Canadian Performing Right society v. Canadian National Exhibition Assn.* (1937), (1938) O.R. 476 (Ont. H.C.J.).
3. *Canadian Performing Right Society Ltd. v. Lombardo*, (1939) O.R. 262 (Ont. C.A.).
4. *Canadian Performing Right Society Ltd. v. Ming Yee* (1943), 3 C.P.R. 64 (Alta. Dist. Ct.).
5. *Composers', Authors' & Publishers' Assn. (Canada) v. Western Fair Assn.* (1949), 13 C.P.R. 26 (H.C.); aff'd (1950), 13 C.P.R. 26 (C.A.); rev'd (1951), 15 C.P.R. 45 (S.C.C.).
6. *Mosport Park Ltd. and Clarington (Municipality)* (1994), 116 D.L.R. (4th) 763 (Ont. Gen. Div.).

§7.1.10 Public performance of musical works for charitable purposes

1. *Composers', Authors' & Publishers' Assn. (Canada) Limited v. Kiwanis Club of West Toronto* (1952), 15 C.P.R. 149 (Exc. Ct.); rev'd (1953), 19 C.P.R. 20 (S.C.C.).
2. *Assn. des compositeurs, auteurs & éditeurs du Canada v. Installation Radiophonique CRKL-MS, campus Laval FM Inc.* (1986), 17 C.P.R. (3d) 242 (Que. Sup. Ct.).
3. *Performing Rights Organization of Canada Limited v. Canadian Broadcasting Corporation* (1986), 7 C.P.R. (3d) 433 (F.C.A.).

§7.1.11 Varia

1. *R. v. « Evgenia Chandris » (The)* (1974), 19 C.C.C. (2d) 8 (N.B.C.A.); rev'd on other grounds (1976), 27 C.C.C. (2d) 241 (S.C.C.).
2. *R. v. Sutherland* (1979) 2 W.W.R. 552 (Man. C.A.); aff'd in part (1980) 2 S.C.R. 451 (S.C.C.).

§8.0 Authors

§8.1 Canada

- 1 A Charter of Rights For Creators, THE SUBCOMMITTEE ON THE REVISION OF COPYRIGHT (Ottawa, CCAC, 1985), at pp. 63-83.
- 2 BLOOM (Glen A.) *et al.*, *Research on the Internet: Is Access Copyright Infringement?* (1996) 12 Canadian Intellectual Property Review 337.
- 3 BONCOMPAIN (Jacques), *Le droit d'auteur au Canada: étude critique* (Montréal, Cercle du livre de France, 1971), at pp. 216-228.
- 4 BRAITHWAITE (William J.), *Derivative Works in Canadian Copyright Law* (1982), 20 Osgoode Hall Law Journal 191.
- 5 BRAITHWAITE (William J.), *From Revolution to Constitution: Copyright, Compulsory Licences and the Parodied Song* (1984), 18 University of British Columbia Law Journal 35.
- 6 BROWN (Raymond E.), *The Law of Defamation in Canada*, 2nd ed. (Toronto, Carswell, 1994), 2 Vol. at pp. 410-414, 583-589, 657-660, 709-710.

- 7 BRUNET (Claude), *Le loi du droit d'auteur canadienne - L'impossible révision* (Partie 3) (1981) 1 *Revue canadienne du droit d'auteur* 33.
- 8 BURSHTEIN (Sheldon), *Surfing the Internet: Canadian Intellectual Property Issues*, in *Meredith Lectures 1996* (Montreal, McGill University, 1996), at no. 3.
- 9 CAMERON (Donald M.) et al., *IP on the I-Way* (1997), 13 *Canadian Intellectual Property Review* 311.
- 10 CANADIAN RECORDING INDUSTRY ASSOCIATION, *Parallel Imports Indirect Infringement of Copyright Phase II Amendments* (Toronto CRIA, 1994).
- 11 CARD (Duncan C.), *Parallel Importation of Copyright Property: A proposal to Amend the Canadian Copyright Act* (1990), 6 *Intellectual Property Journal* 97.
- 12 CARRIÈRE (Laurent), *Hypertextes et hyperliens au regard du droit d'auteur - Quelques éléments de réflexions*, in *Pertinence de l'inforoute - La rencontre de l'informatique et du droit* (Montréal, AQDIJ, 1996); (1997), 9 *Les cahiers de propriété intellectuelle* 175.
- 13 COLBORNE (David A.) et al., *Downloading Medecine Records to Index a Personal Reprint Collection: Is it Useful, is it feasible, is it legal?* (1993) 14 *Bibliotheca Medica Canadiana* 175.
- 14 CONFORTI (Joe), *Copyright and Freedom of Expression: A Privilege for New Reports* (1989), 5 *Intellectual Property Journal* 103.
- 15 COONEY (Jane), *Copyright and Canadian Libraries* (1990), 11 *Bibliotheca Medica Canadiana* 127.
- 16 CÔTÉ (Pierre-André), *The Interpretation of Legislation in Canada*, 2nd ed. (Cowansville, Blais, 1992), at pp. 415-417.
- 17 CÔTÉ (Pierre-André), *Interprétation des lois*, 3rd ed. (Montreal, Thémis, 1999), at pp. 237 and 251.
- 18 CROWE (Carolyn), *The song You Write May Not Be Your Own! Proving Musical Copyright Infringement: A Review of Gondos v. Hardy; Gondos v. Thot* (1984), 5 *Intellectual Property Journal* 29.
- 19 DANIEL (Johanne), *Implications of Proposed Changes to the Copyright Act for Health Libraries* (1987), 9 *Bibliotheca Medica Canadiana* 93.
- 20 DE KINDER (Viviane), *Des légendes et des images - À propos de l'affaire Lambert c. Wardair Canada Inc.* (1991), 3 *Les cahiers de propriété intellectuelle* 365.

- 21 DE KINDER (Viviane), *Licences implicites lors de commandes d'œuvres et violations de droits d'auteurs*, in Journées d'étude du 24 novembre 1995 de l'ALAI-Canada: Publicité et droit d'auteur (Montréal, ALAI, 1995), pp. 34-36.
- 22 DE KINDER (Viviane), *Jurisprudence - École de conduite Tecnic Aubé Inc. et al. c. École de conduite Lauzon Canada Ltée et al.* (1998), 1 Les cahiers de propriété intellectuelle 87.
- 23 DRIEDGER (Elmer A.), *Construction of Statutes*, 2nd ed. (Toronto, Butterworths, 1983) at pp. 22-28.
- 24 EISEN (Mark B.), *Copyright and the World Wide Web*, (1996), 12 Canadian Intellectual Property Review 405.
- 25 ELRIFI (Ivor), *What' DAT - Amstrad Revisited: Canadian Copyright Law and Digital Audio Tape Players* (1988), 13 Canadian Business Law Journal 221.
- 26 FOX (Harold George), *The Canadian Law of Copyright and Industrial Designs*, 2nd ed. (Toronto, Carswell, 1967), at pp. 326-432.
- 27 FRANÇON (André), *Le droit d'auteur - aspects internationaux et comparatifs* (Cowansville, Blais, 1992), at pp. 213-214 and 217.
- 28 GAMACHE (Barry), *Union's Use of Employer's Symbol Not Protected by Federal Charter* (1997), 11 World Intellectual Property Report 119.
- 29 GILKER (Stéphane), *La protection des œuvres architecturales par le droit d'auteur au Canada* (1991), 4 Les cahiers de la propriété intellectuelle 7, at pp. 32-38.
- 30 GOUDREAU (Mistrale), *Introduction au droit d'auteur* (1991), 22 Revue générale de droit 273.
- 31 GOWLING (E. Gordon), *Industrial Property - Copyright-Section 17 of the Copyright Act-Public Performance of Musical Work "in Furtherance of a...Charitable Object"* (1954), 32 Canadian Bar Review 81.
- 32 GINSBURG (Jane C.), *Droit d'auteur sans frontières? Compétence judiciaire et législative en matière de contrefaçon internationale* (1997), 9 Les cahiers de propriété intellectuelle 381.
- 33 GRANT (Catherine), *The Proposed U.S. Audio Home Recording Act; An Answer to House Copying's Challenge to Copyright Law in the United States and in Canada?* (1993), 47 Canadian Patent Reporter (3d) 129.

- 34 GUILBAULT (Lucie) et al., *Les droits économiques concernés - rapport canadien*, in *Copyright in Cyberspace ALAI Study Days* (Amsterdam, Cramwinckel, 1997), pp. 71-95.
- 35 GUILBAULT (Lucie), *Les programmes d'ordinateur et le droit d'innovation technologique* (1997), 9 *Les cahiers de propriété intellectuelle* 171.
- 36 HARRIS (Lesley Ellen), *Canadian Copyright Law*, 2nd ed. (Toronto, McGraw-Hill Ryerson, 1995), at ch. 9.
- 37 HAYHURST (William L.), *Annual Survey of Canadian Law - Industrial Property* (1979), 11 *Ottawa Law Review* 481, at pp. 491-495.
- 38 HAYHURST (William L.), *Copyright and the Copying Machine* (1984), 9 *Canadian Business Law Journal* 129.
- 39 HAYHURST (William L.), *Copyright and the Copying Machine: The Amstrad Case* (1986), 11 *Canadian Business Law Journal* 331.
- 40 HAYHURST (William L.), *Intellectual Property as a Non-Tariff Barrier in Canada, With Particular Reference to "Grey Goods" and "Parallel Imports"* (1991), 31 *Canadian Patent Reporter* (3d) 289.
- 41 HENRY (Nicholas L.), *Copyright, Public Policy and Information Technology* (1974), 15 *Canadian Patent Reporter* (2d) 260.
- 42 HITCHCOCK (P. Dan), *Home Copying and Authorization* (1983), 67 *C.P.R.* (2d) 17.
- 43 HOWELL (Robert G.), *Intellectual Property, Private International Law, and Issues of Territoriality* (1997), 13 *Canadian Intellectual Property Review* 209.
- 44 HUGHES (Roger T.), *Hughes on Copyright* (Toronto, Butterworths, 1984), at pp. 541-579.
- 45 JOLLIFFE (R. Scott), *Copyright Litigation and Remedies for Infringement*, in *Developing Multimedia Products Legal and Business Issues* (Toronto, Insight, 1994), ch. XI, at pp. 219-221.
- 46 KERN (Tania), *Reprography issues in France, in Canada and in the United States* in *WIPLA: Copyright Canada Study 1* <<http://www.wipla.com/article/97/04/caauteeuduk01.html>>.
- 47 KEYES (Andrew A.) et al., *Copyright in Canada - Proposals for a Revision of the Law* (Ottawa, CCAC, 1977), at pp. 144-177.

- 48 KILGOUR (D.G.), *Canadian Copyright Law - Royal Commission Report - Fundamental Changes Recommended* (1958), 36 Canadian Bar Review 568.
- 49 KNOPF (Howard), *What is Infringement?*, in *Intellectual Property: Copyright Law* (Ottawa, National Judicial Institute, 1993), ch. 8, at pp. 30-36.
- 50 KRATZ (Martin P.J.), *Shrinkwrap software licences: North American Systemshops Ltd. v. King and Company* (1989), 6 Computer Law Reporter 127.
- 51 LEDUC-CAMPBELL (Diane), *Display of Employer's Symbol By Union Infringed Copyright* (1997), 11 World Intellectual Property Report 80.
- 52 LEVENTHAL (Jessica A.), *Derivative Works and Copyright Infringement: A Case for Copyrighting Ideas* (1985), 1 Intellectual Property Journal 271.
- 53 LOWN (Peter), *Home Taping in Protecting Creative Efforts Through Copyright* (Toronto, Insight, 1989), at ch. 3.
- 54 MANNING (H.E.), *Performance of Copyrighted Musical Works* (1954), 32 Canadian Bar Review 236;.
- 55 MARTIN (Stefan), *La copie privée* (1989), 2 Les cahiers de propriété Intellectuelle 27.
- 56 McANANAMA (Judith C.), *Copyright Law: Libraries and Their Uses Have Special Needs* (1991), 6 Intellectual Property Journal 225.
- 57 McKEOWN (John S.) et al., *Copyright*, in *Canadian Encyclopedic Digest*, 3rd Western Edition, (Toronto, Carswell, 1991), ch. 35, at nos. 143-177.
- 58 McKEOWN (John S.), *Fox Canadian Law of Copyright and Industrial Designs*, 3rd ed. (Toronto Carswell, 2001)
- 59 MESSIER (Hélène), *Les publicitaires, des créateurs inspirés...*, in *Journées d'étude du 24 novembre 1995 de l'ALAI-Canada: Publicité et droit d'auteur* (Montréal, ALAI, 1995), pp. 37-52.
- 60 MORSE (Charles), *Copyright - Infringement - Unauthorized Production of Musical Play at Club - "In Public" - Interpretation* (1927), 5 Canadian Bar Review 65.
- 61 NABHAN (Victor), *La situation de la reprographie au Canada*, in *Journées d'étude de Berne 1986* (Paris, ALAI, 1986), at p. 249.

- 62 NABHAN (Victor), *Le statut des représentations d'œuvres audio-visuelles pour fins d'enseignement au regard du droit d'auteur: Une opinion juridique* (1986), 2 *Intellectual Property Journal* 381.
- 63 NABHAN (Victor), *Quelques aspects des problèmes juridiques posés par la vidéoreproduction: l'affaire Betamax et ses répercussions au Canada* (1980), 1 *Revue canadienne du droit d'auteur* 7.
- 64 NABHAN (Victor), *Reprographie et éducation* (1982) 3 *Revue Canadienne du droit d'auteur* 5.
- 65 NOEL (Wanda), *The Importation Provisions of the Canadian Copyright Act* (1977), 9 *Ottawa Law Review* 156.
- 66 PEARSE (Richard), *Library Open - distribution Systems and Copyright Infringement in Canada and the United States* (1994), 86 *Law Library Journal* 399.
- 67 PEPIN (René), *Les appareils vidéo et le droit d'auteur; l'affaire Betamax devant la Court of Appeals* (1983), 14 *Revue générale de droit* 449.
- 68 PERRY (Rose-Marie), *Copyright in Motion Pictures and Other Mechanical Contrivances* (1972), 5 *Canadian Patent Reporter* (2d) 256, (1972), 7-30 *Patent and Trademark Institute of Canada Bulletin* 194; (1971), 3 *Canadian Communications Law Review* 98.
- 69 PRABHU (Mohan A.), *The Annotated Customs Act 1996* (Toronto, Carswell, 1995).
- 70 *Practical Points: Copyright-Manuscript orchestrations-Popular pieces-Performance* (1942), 11 *Fortnightly Law Journal* 172.
- 71 RACICOT (Michel), *La protection des logiciels en droit canadien* (1990), 2 *Les cahiers de propriété intellectuelle* 147.
- 72 RACICOT (Michel), *La réforme du droit d'auteur au Canada - Projet de loi C-60-Les programmes d'ordinateurs - Comparaison avec le droit américain* (1998), 1 *Les cahiers de propriété intellectuelle* 49.
- 73 RACICOT (Michel), *Jusqu'où va la protection du cybergiciel par le droit d'auteur?*, in *Meredith Lectures 1996* (Montreal, McGill University, 1996), at no.7.
- 74 RACICOT (Michel), et al., *Internet Content-Related Liability Study* (Ottawa, Industry Canada 1997); <<http://strategist.ic.gc.ca/nme>>.
- 75 RAMSAY (John T.), *Pirates Beware of Copyright Act Amendments* (1987), 22-3 *Les Nouvelles*; reprinted in BELL (Paul B.) et al., ed. *The Law Business*

of Licensing - Licensing in the 1990s (New York, Clark Boardman Callaghan, 1992), Vol 1, pp. 33-45.

- 76 RAMSAY (John T.) et al., *Computer Programs and the Copyright Act Amendments* (1992), 13 *Bibliotheca Medica Canadiana* 165.
- 77 RICHARD (Hughes G.), *Concept of Infringement under the Copyright Act*, in *Copyright Law of Canada* (Toronto, Carswell, 1994), ch. 6; reprinted from *What is Infringement?*, in *Intellectual Property: Copyright Law* (Ottawa, National Judicial Institute, 1993), ch. 7.
- 78 RICHARD (Hughes G.), *Violation du droit d'auteur sur les programmes d'ordinateur*, in *Une approche pratique au droit de l'informatique* (Montréal, Institut Wilson & Lafleur, 1995), ch. 7.
- 79 ROYER (Jean-Claude), *La preuve civile* (Cowansville, Blais, 1987), at Nos. 732-806.
- 80 SANDERSON (Paul), *Musicians and the Law in Canada*, 2nd ed. (Toronto, Carswell, 1992), at pp. 109-111 and 119-123.
- 81 SHARP (Roy C.), *Copyright - Shield or Shroud* (1975), 21 *Canadian Patent Reporter* (2d) 108.
- 82 SHARP (Roy C.), *Droit d'auteur: armure ou prison?* (1975), 99 *Le Droit d'Auteur* 112.
- 83 SOLOMON (Bernard H.), *A Current View of the Canadian Copyright Act as it Relates to the Entertainment Industry*, in *Comparative Study of Copyright Regulations in the Main Countries of the World with Emphasis on Practical Legal Problems Arising in the Show Business* (Cannes, Midem-IAEL, 1978), at pp. 7-8.
- 84 SOOKMAN (Barry B.), *Computer Law* (Toronto, Carswell, 1989), at pp. 3-133 to 3-198.
- 85 SOOKMAN (Barry B.), *Intellectual property rights and software reuse: A Canadian and U.S. perspective* (1990), 7 *Canadian Computer Law Reporter* 1; (1990), 7 *Canadian Computer Law Reporter* 25.
- 86 SOPINKA (John) et al., *The Law of Evidence in Canada*, 2nd ed. (Toronto, Butterworths, 1999), at ch. 4.
- 87 SULLIVAN (Ruth), *Driedger on the Construction of Statutes*, 3rd ed. (Toronto, Butterworths, 1994), at pp. 369-370.
- 88 TAMARO (Normand), *The annotated Copyright Act 2002* (Toronto, Carswell, 2001), under section 27.

- 89 TAMARO (Normand), *Le droit d'auteur et les institutions d'enseignement*, in *Développements récents en droit de l'éducation* (1996) (Cowansville, Blais, 1996), pp. 133-153.
- 90 VAN DYCK (Christian D.), *Fast-Forward: A Canadian Perspective on the Betamax Controversy* (1984), 16 *Ottawa Law Review* 506.
- 91 VAVER (David), *Copyright Phase 2: The New Horizon* (1990), 6 *Intellectual Property Journal* 238.
- 92 VAVER (David), *Dramatic and Musical Reproductions and Performances: Copyright and Performer's Rights and Their Implication for Educators* (1991), 6 *Intellectual Property Journal* 238.
- 93 VINCKE (Christian) et al., *Problèmes de droits d'auteur dans le monde de l'éducation* (Québec, Éditeur officiel, 1974).
- 94 YOUNG (Alain), *From Elvis's Pelvis to As Nasty As They Wanna Be: Freedom of Expression and Contemporary Popular Music* (1991), 1 *Media & Communications Law Review* 155.

§9.1 Exceptions for Educational Institutions

Circular No. 12 dated 1999-10-01 issued by the Canadian Intellectual Property Office

An exception permits the use of a work protected by copyright without the consent of the copyright owner and without the payment of royalties. Copyright laws all over the world aim for a balance between a) the rights of creators to be paid for and to control the use of their works; and b) the needs of users who want access to material protected by copyright. This balance is created by providing creators with legal "rights" and then limiting those rights through "exceptions" for the benefit of certain users. Educational institutions are one of those user groups. Subsections 27(3), 29.4, 29.5, 29.6, 29.7 and 30 provide educational institutions with exceptions defining certain activities which may be undertaken without infringing copyright.

An "educational institution" is defined in section 2. To qualify for the exceptions an educational institution must be non-profit.

Subsection 27(3) provides that an educational institution is not required to pay any royalties for the public performance of any musical work "in furtherance of an educational object". For example, performance of music in class for the purpose of giving music instruction falls within this exception. However, the exception excludes the use of music for non-educational objects such as dances, school concerts, or as background music. This means that music used at school concerts, assemblies, or school dances must be paid for through tariffs administered by a performing rights society called SOCAN, because those events are not "in furtherance of an educational object".

Subsection 29.4 is an exception to the right of reproduction. This exception allows copying onto a blackboard, a flip chart or other similar display devices in the classroom. Educational institutions are also permitted to copy materials onto transparencies. Copying works protected by copyright for tests or examinations is another permitted use. These exceptions apply unless the work is "commercially available" in a form which meets the educator's needs. "Commercially available" is defined (in section 2) as meaning available on the Canadian market within a reasonable time, for a reasonable price and with reasonable effort or is available through a licence from a collective society.

Subsections 29.5, 29.6 and 29.7 provide exceptions to a copyright owner's exclusive right of public performance. Subsection 29.5 permits non-profit educational institutions to have live performances on school premises and to play sound recordings, radios and televisions on school premises. Subsection 29.6 permits non-profit educational institutions to reproduce and perform, on their premises, news and commentary from radio and television programs for educational purposes. However, the proposed exception is subject to certain conditions. A copy may be made and shown, without authorization or payment, an unlimited number of times for a period of up to one year from the date of the taping. After the year is over, copied materials, must either be erased or the copyright owner notified. The Copyright Board, a specialized tribunal under the Copyright Act, would then set a royalty or fee for the reproduction and each subsequent performance of the copied material for educational purposes. Subsection 29.7 permits all other types of broadcast programs to be reproduced without permission and examined for up to 30 days in order to decide whether the copy will be used on school premises, for educational purposes. If these other types of broadcast programs are used, then a royalty, set by the Copyright Board for the reproduction and each subsequent use of the copy, must be paid by non-profit educational institutions.

If the unpublished work was deposited in an archive before September 1, 1999, then different rules apply. First, an archive must obtain the permission of the copyright owner before copying. If the copyright owner cannot be located a copy can still be made, but a record of making that copy must be kept by the archive. These records must be kept available for public inspection. This applies to all unpublished works deposited in an archive before September 1, 1999, except where the author of the unpublished work died before September 1, 1949.

Section 30 permits publication of short passages from literary works for schools. This exception has many conditions that must be met before it applies. For example, the publication must be composed primarily of non-copyright matter, the collection must be intended for the use of schools, what is reproduced must be from short passages of published literary works, those short passages must not have been published for use by schools, and a) not more than two passages from works by the same author can be reproduced by the same publisher within five years; b) the source from which the passages are taken is acknowledged; and c) the name of the author, if given in the source, is mentioned.

Information about the Copyright Act can be obtained from:

Canadian Intellectual Property Office
Industry Canada
Place du Portage I
50 Victoria Street
Hull, Quebec
K1A 0C9
Tel.: (819) 997-1936
Fax: (819) 953-7620

Internet: <http://cipo.gc.ca>
E-mail: cipo.contact@ic.gc.ca

This information is to be considered solely as a guide and should not be quoted as, or considered to be, a legal authority. It may become obsolete without notice. Authority must be found in the Copyright Act, the Copyright Regulations and in the decisions of the Courts interpreting them.

ROBIC + LAW
+ BUSINESS
+ SCIENCE
+ ART

ROBIC + DROIT
+ AFFAIRES
+ SCIENCES
+ ARTS

