



FEDERAL COURT ORDERS DEFENDANTS TO PAY OVER \$6M IN PRIVATE COPYING LEVIES WITHHELD FROM THE CANADIAN PRIVATE COPYING COLLECTIVE

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In *Canadian Private Copying Collective v. First Choice Recording Media Inc.*, (2008 FC 636 Hugessen J.; 2008-05-21), the Federal Court of Canada, in a motion for default judgment, ordered five defendants to pay over \$6M in private copying levies owed to the Canadian Private Copying Collective (hereinafter CPCC), in addition to a harsh penalty equaling five times the amount due in said levies.

In its claim, plaintiff alleged that the defendants, First Choice Recording Media Inc. (hereinafter First Choice), M3 Technology Inc. (hereinafter M3), AM/FM Marketing Ltd. (hereinafter AM/FM), Ion Tech Ltd. (hereinafter Ion), Shi Guang Phan and Harry Cheung, have elaborated a scheme to avoid the payment of levies required by Part VIII of the *Copyright Act*, while importing blank media into the country. Plaintiff also alleged that M3 should be considered as the actual importer of the blank media introduced in the country by Ion, seen that it was acting as its agent.

Moreover, plaintiff submitted that the corporate veil should be lifted in order for M3 to be held accountable for Ion's disregard of the applicable legal provisions and that the two defendants should be jointly liable.

In addition, plaintiff argued that Shi Guang Phan and Harry Cheung should also be responsible for the unpaid levies owed by the corporate defendants, seen that as sole directors of the corporations in question, they "acted with fraudulent intent to frustrate the CPCC's legitimate statutory rights". Finally, plaintiff requested that the defendants be ordered to pay a penalty pursuant to section 88(2) of the *Copyright Act*, along with interest on the owed amounts.

In the Court's opinion, First Choice and AM/FM had imported blank media into Canada and subsequently failed to report same and to pay any of the required levies. Consequently, they were respectively found liable for \$1,737,809.22 and \$1,427,181. As for Ion, the Judge

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concluded that it had been supplying blank media units to M3 which had not originated from the country and for which no levies had been paid. Therefore, Ion was held responsible for \$3,203,539.50 in unpaid levies.

However, the Judge rejected plaintiff's argument according to which M3 was the real importer of blank media and Ion, merely his acting agent. Justice Hugessen insisted on the fact that the term "importer", as defined in the *Private Copying Tariff*, was put in place to ensure that a levy is actually paid to compensate the eligible authors, makers and performers for the copying of their work onto blank media. The possibility that M3 may have taken part or somehow contributed to the imports in question was not significant and did not make it accountable for the levies owed by Ion.

The Court refused to lift the corporate veil regarding M3, since plaintiff had not alleged nor proved that Ion was indeed controlled by said entity. In addition, it seems that should in fact the corporate veil have been pierced, it would not *per se* have rendered M3 liable for Ion's dues in terms of levies. In spite of their conspicuous conduct, the request pertaining to the joint liability of M3 and Ion was also discarded by the Judge.

For their part, the individual defendants were found responsible for the sums owed by their respective corporations, being the only people to have acted as directors. Hence, the corporate veil was lifted in their regard in order for the plaintiff to be able to recover the amounts due, since the corporate defendants were inactive and apparently without assets.

Lastly, the conduct of the defendants and the need to further discourage from same justified the Court to impose an additional penalty and therefore order them to pay five times the sum that each was indebted for. Interest on the levies owed was also deemed appropriate.



