



## A COMPILATION OF THE CANADIAN COPYRIGHT CASES DECIDED IN 2011

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LAWYERS, PATENT & TRADEMARK AGENTS

First, a general listing.

*1429539 Ontario Limited v. Café Mirage Inc.*, 2011 CarswellNat 4648, 2011 FC 1290, 97 C.P.R. (4th) 95, <http://canlii.ca/en/ca/fct/doc/2011/2011fc1290/2011fc1290.html> (F.C.; 2011-11-09)

*9077-6204 Québec inc. v. Blanchard*, 2011 CarswellQue 369, JE 2011-482, 2011 QCCQ 205, <http://canlii.ca/fr/qc/qccq/doc/2011/2011qccq205/2011qccq205.html> (Que. Ct.; 2011-01-18)  
*Access Copyright Interim Post-Secondary Educational Institution Tariff, 2011-2013*, 92 CPR (4th) 434, [2011] CBD 2, [2011] DCDA 2, <http://www.cb-cda.gc.ca/decisions/2011/20110316.pdf> (Cop. Bd.; 2011-03-16)

*André Rodrigue Peintre décorateur inc. v. Rodrigue Peintre décorateur ltée*, 2011 QCCS 6797, 2011 CarswellQue 14499, <http://canlii.ca/fr/qc/qccs/doc/2011/2011qccs6797/2011qccs6797.html> (Que. Sup. Ct.; 2011-12-20)

*BBM Canada v. Research in Motion Limited\** 2011 CarswellNat 2621, 2011 FCA 151, 2011 CAF 151, 93 CPR (4th) 1, 419 NR 166, <http://www.canlii.org/en/ca/fca/doc/2011/2011fca151/2011fca151.html> (F.C.A.; 2011-05-05)

*Canada (Human Rights Commission) v. Warman\** 2010 CarswellNat 4440, 2010 CarswellNat 4818, 378 FTR 299, 2010 FC 1198, 2010 CF 1198, <http://www.canlii.org/en/ca/fct/doc/2010/2010fc1198/2010fc1198.html> (F.C.; 2010-11-29); revd 2011 CarswellNat 4389, 2011 FCA 297, <http://canlii.ca/en/ca/fca/doc/2011/2011fca297/2011fca297.html> (F.C.A.; 2011-10-06)

*Canadian Coast Guard, Sydney, N.S., for the reproduction of "Chaudières marine, questions et réponses" as translated by W.D. Ewart from "Marine Boilers Questions and Answers" by G.T.H. Flanagan and published in 1984 by Stanford Maritime, London UK [Application by]*, File 2010-UO/TI-13; 2011 CarswellNat 805, also available at <http://www.cb-cda.gc.ca/unlocatable-introuvables/licences/251-e.pdf> (Cop. Bd.; 2011-02-05)

*Canadian Radio-television and Telecommunications Commission's Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168 (Re)*, 2011 CarswellNat 398, 2011 FCA 64, 91 CPR (4th) 389, 413 NR 312, [2011] FCJ 197, <http://www.canlii.org/en/ca/fca/doc/2011/2011fca64/2011fca64.html> (F.C.A.; 2011-02-28); leave to appeal to the Supreme Court of Canada, [http://scc.lexum.org/en/news\\_release/2011/11-09-29.3a/11-09-29.3a.html](http://scc.lexum.org/en/news_release/2011/11-09-29.3a/11-09-29.3a.html) (S.C.C.; 2011-09-29)

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*Can-Auto Inspections Inc. v. Vascor Ltd.* 2010 BCSC 1895, <http://www.canlii.org/en/bc/bcsc/doc/2010/2010bcsc1895/2010bcsc1895.html> (B.C.S.C.-Bifurcation; 2010-12-16) 2011 CarswellBC 3197, 2011 BCSC 1644, <http://www.canlii.org/en/bc/bcsc/doc/2011/2011bcsc1644/2011bcsc1644.html> (B.C.S.C.; 2011-12-01)

*Centre collégial de développement de matériel didactique (CCDMD) for the reproduction of a poster created by the artists group Kukryniksy [Application by]*, File 2010-UO/TI-20 ; 2011 CarswellNat 4022, also available at <http://www.cb-cda.gc.ca/unlocatable-introuvables/licences/253-e.pdf> (Cop. Bd.; 2011-08-30)

*Century 21 Canada Limited Partnership v. Rogers Communications Inc.* 2011 CarswellBC 2348, 2011 BCSC 1196 96 CPR (4th) 1, [2011] BCWLD 8061, [2011] BCWLD 8057, [2011] BCWLD 7991, [2011] BCWLD 7990, [2011] BCWLD 7989, [2011] BCWLD 7988, [2011] BCWLD 7960, [2011] BCWLD 7948, [2011] BCWLD 7947, [2011] BCWLD 7944, [2011] BCWLD 7943, [2011] BCWLD 7942, [2011] BCWLD 7941, [2011] BCWLD 7939, [2011] BCWLD 7985, [2011] BCWLD 7984, [2011] BCWLD 7983, [2011] BCWLD 7925, [2011] BCWLD 8051, [2011] BCWLD 8050, [2011] BCWLD 8049, [2011] BCWLD 8048, [2011] BCWLD 8047, [2011] BCWLD 8042, [2011] BCWLD 7998, [2011] BCWLD 7997, [2011] BCWLD 7996, [2011] BCWLD 7995, [2011] BCWLD 7994, [2011] BCWLD 7993, [2011] BCWLD 7992, [2011] BCJ 1679, 338 DLR (4th) 32, <http://www.canlii.org/en/bc/bcsc/doc/2011/2011bcsc1196/2011bcsc1196.html> (B.C. S.C.; 2011-09-02)

*Dickson v. The Queen\**, 2011 TCC 153, <http://www.canlii.org/en/ca/tcc/doc/2011/2011tcc153/2011tcc153.html> (Tax Court; 2011-03-10)

*Dish Network L.L.C. v. Rex\** 2011 CarswellBC 2124. 2011 BCSC 1105, [2011] BCWLD 7345, [2011] BCWLD 7373, [2011] BCWLD. 7372, 8 CPC (7th) 264, <http://www.canlii.org/en/bc/bcsc/doc/2011/2011bcsc1105/2011bcsc1105.html> (B.C.S.C.; 2011-08-15)

*Educational Rights 2012-2016 Re (Use of broadcast programs by educational institutions (2012-2016))*, 2011 CarswellNat 5316, <http://www.cb-cda.gc.ca/decisions/2011/20111223.pdf> (Cop. Bd. ; 2011-12-23)

*Esin (Collinson Convenience) (Re)\**, 2011 CanLII 10877, <http://canlii.ca/en/on/onagc/doc/2011/2011canlii10877/2011canlii10877.html> (Ont. Alcohol and Gaming Commission ; 2011-02-03)

*Fabrikant v. Swany* 2011 CarswellQue 2903, JE 2011-651, 2011 QCCS 1385, <http://www.canlii.org/en/qc/qccs/doc/2011/2011qccs1385/2011qccs1385.html> (Que. Sup. Ct.; 2011-03-25); motion to dismiss the appeal granted 2011 CarswellQue 13240, 2011 QCCA 2205, <http://www.canlii.org/en/qc/qcca/doc/2011/2011qcca2205/2011qcca2205.html> (Que. C.A.; 2011-11-28)

*Flow Films v. Global Wealth Trade Corporation*, 2011 CarswellOnt 899, 2011 ONSC 1185, <http://canlii.ca/en/on/onsc/doc/2011/2011onsc1185/2011onsc1185.html> (Ont. Sup. Ct. ; 2011-02-15)

*Formation et gestion Pro-Santé M.R. Inc. v. Sampietro*, 2011 CarswellQue 8768, 2011 QCCS 4256, JE 2011-1835, <http://www.canlii.org/fr/qc/qccs/doc/2011/2011qccs4256/2011qccs4256.html> (Que. Sup. Ct.; 2011-08-10)

*Gagné v. R.\** 2011 QCCA 2157, <http://www.canlii.org/fr/qc/qcca/doc/2011/2011qcca2157/2011qcca2157.html> (Que. C.A.; 2011-11-22)

*Harmony Consulting Ltd. v. G.A. Foss Transport Ltd.*, 2011 CarswellNat 1922, 92 CPR (4th) 6, [2011] FCJ 451, 2011 CF 340, 2011 FC 340, <http://www.canlii.org/en/ca/fct/doc/2011/2011fc340/2011fc340.html> ((F.C.; 2011-03-18); 2011 FC 540,

<http://canlii.ca/en/ca/fct/doc/2011/2011fc540/2011fc540.html> (F.C.-Costs; 2011-05-10)

*Interim tariff of levies to be collected by CPCC in 2012 and 2013 on the sale of blank audio recording media in Canada*, <http://www.cb-cda.gc.ca/decisions/2011/2011212.pdf> (Cop. Bd.; 2011-12-19)

*Khan v. Tajdin*, [2011] ACF 10, [2011] FCJ 10, 329 DLR (4th) 521, 2011 CarswellNat 12, 2011 FC 14, <http://www.canlii.org/en/ca/fct/doc/2011/2011fc14/2011fc14.html> (F.C.; 2011-01-07); endorsement 2011 CanLII 69798, <http://canlii.ca/en/ca/fct/doc/2011/2011canlii69798/2011canlii69798.html> (F.C.; 2011-03-04); 2011 CarswellNat 1888, 2011 FCA 172, 93 CPR (4th) 411, 2011 FCA 17, <http://canlii.ca/en/ca/fca/doc/2011/2011fca172/2011fca172.html> (F.C.A.-Request for Stay; 2011-05-19)

*Latour v. 6921086 Canada inc. (Édikom)*, 2011 QCCQ 14817, <http://www.canlii.org/fr/qc/qccq/doc/2011/2011qccq14817/2011qccq14817.html> (QueCt-Small Claims; 2011-11-09)

*Laurier Glass Ltd. v. Simplicity Computer Solutions Inc.* 2011 CarswellOnt 1580, 2011 ONSC 1510, 80 BLR (4th) 305, <http://www.canlii.org/en/on/onsc/doc/2011/2011onsc1510/2011onsc1510.html> (OntSupCt; 2011-03-10)

*Layette Minimôme inc. v. Jarrar*, 2011 CarswellQue 3904, JE 2011-907, 2011 QCCS 1743, <http://canlii.ca/fr/qc/qccs/doc/2011/2011qccs1743/2011qccs1743.html> (Que. Sup. Ct.; 2011-04-11)

*Liette Couture Arts graphiques inc. c. Services immobiliers Versailles DB inc.*, 2011 QCCQ 14165, <http://www.canlii.org/fr/qc/qccq/doc/2011/2011qccq14165/2011qccq14165.html> (Que. Ct.- Small claims; 2011-11-15)

*Louis Vuitton Malletier S.A. v. Singga Enterprises (Canada) Inc.*, 2011 CarswellNat 470, 92 CPR (4th) 76, [2011] FCJ 288, 2011 FC 247, <http://canlii.ca/en/ca/fct/doc/2011/2011fc247/2011fc247.html> (F.C.- Motion to Strike; 2011-03-01); 2011 CarswellNat 2317, [2011] FCJ 908, 2011 FC 776, 95 CPR (4th) 297, <http://www.canlii.org/en/ca/fct/doc/2011/2011fc776/2011fc776.html> (F.C.-Summary Trial; 2011-06-27)

*M & E Hermanos Inc (Village Mart) (Re)\** 2011 CanLII 31670, <http://canlii.ca/en/on/onagc/doc/2011/2011canlii31670/2011canlii31670.html> (Ont. Alcohol and Gaming Commission ; 2011-05-19)

*Mitchinson (Wendy) for the reproduction and the communication to the public by the telecommunication of three images published in The Canadian Home Journal in a article entitled "The Media, Gendered, Fat and Other Problematic Bodies" [Application by]* File: 2011-UO/TI-1; also available at <http://www.cb-cda.gc.ca/unlocatable-introuvables/licences/257-e.pdf> (Cop. Bd.; 2011-09-30)

*Nolin BBDO, for the synchronization, reproduction and communication to the public by telecommunication of an excerpt of a musical work entitled "Le temps est bon" written by Stéphane Venne and published by JFM Investments Inc. in 1972 [Application by]*, File 2011-UO/TI-24; also available at <http://www.cb-cda.gc.ca/unlocatable-introuvables/licences/255-f.pdf> (Cop. Bd.; 2011-09-26)

*PCF Angle Mort Film Inc. for the reproduction, synchronization and public performance of an extract of a television series entitled "Maria del Barrio" Application by]*, File 2010-UO/TI-17; 2011 CarswellNat 829, also available at <http://www.cb-cda.gc.ca/unlocatable-introuvables/licences/252-e.pdf> (Cop. Bd.; 2011-02-21)

*Perfect 10, Inc. v. Google, Inc.*, Unreported T-1591-09 (F.C.-Prot.; 2010-07-15); affd 2011 CarswellNat 89, 91 CPR (4th) 444, [2011] FCJ 458, 2011 FC 348, <http://canlii.ca/en/ca/fct/doc/2011/2011fc348/2011fc348.html> (F.C.; 2011-03-21)

*Pinto v. Bronfman Jewish Education Center\**, 2011 QCCS 3458, <http://canlii.ca/fr/qc/qccs/doc/2011/2011qccs3458/2011qccs3458.html> (Que. Sup. Ct.; 2011-07-13)

*Post-Secondary Educational Institutions, Re* 2011 CarswellNat 3544 <http://www.cb-cda.gc.ca/decisions/2011/20110908.pdf> (Cop. Bd.; 2011-09-08)

*Productions Phi-Brassard (Jimmy) Inc., Quebec, for the reproduction, synchronization and public performance of an excerpt of a musical recording entitled "Seeburg Background Music Record BA-109A" in a short film, [Application by]*, File 2011-UO/TI-05; 2011 CarswellNat 4023, also available at <http://www.cb-cda.gc.ca/unlocatable-introuvables/licences/254-e.pdf> (Cop. Bd. ; 2011-08-30)

*Public Performance of Musical Works, Re* 2011 CarswellNat 2658, <http://www.cb-cda.gc.ca/decisions/2011/CBCRadioTariff1C-Motifsdedecision.pdf> (Cop. Bd.; 2011-07-08)

*Public Performance of Sound Recordings, Re* 2011 CarswellNat 2797, <http://www.cb-cda.gc.ca/decisions/2011/ReSound-6-A-Decision.pdf> (Cop. Bd.; 2011-07-15)

*R. v. Fiset*, 2011 CarswellQue 1683, 2011 QCCQ 1344, JE 2011-436, 2011 CarswellQue 11968, (English translation) <http://canlii.ca/fr/qc/qccq/doc/2011/2011qccq1344/2011qccq1344.html> (Que. Ct. -Crim.; 2011-02-21)

*R. v. Gravel*, 2011 QCCQ 2517, EYB 2011-188863, <http://canlii.ca/fr/qc/qccq/doc/2011/2011qccq2517/2011qccq2517.html> (Que. Ct. – Crim; 2011-03-24)

*R. v. Phillips\**, 2011 ONSC 1881, <http://canlii.ca/en/on/onsc/doc/2011/2011onsc1881/2011onsc1881.html> (Ont. Sup. Ct.; 2011-03-25); 2011 CarswellOnt 2057, 2011 ONSC 1892, <http://canlii.ca/en/on/onsc/doc/2011/2011onsc1892/2011onsc1892.html> (Ont. Sup. Ct.; 2011-03-25)

*Re:Sound v. Motion Picture Theatre Association of Canada*, 2009 CarswellNat 2889, 78 CPR (4th) 64 (Cop. Bd.; 2009-00-16); affd 2011 CarswellNat 429, 2011 FCA 70, 415 NR 10, [2011] FCJ 292, <http://www.canlii.org/en/ca/fca/doc/2011/2011fca70/2011fca70.html> (F.C.A.; 2011-02-25); leave to appeal to the Supreme Court of Canada granted 2011 CanLII 56032, <http://canlii.ca/fr/ca/csc-a/doc/2011/2011canlii56032/2011canlii56032.html> (S.C.C.; 2011-09-08)]

*Reprographic Reproduction 2011-2013, Re* 2010 CarswellNat 5028, 2010 CarswellNat 5029, 92 CPR (4th) 434, [http://www.cb-cda.gc.ca/decisions/2010/decision\\_of\\_the\\_board.pdf](http://www.cb-cda.gc.ca/decisions/2010/decision_of_the_board.pdf) (Cop. Bd.; 2010-12-13); var. 2011 CarswellNat 2254, 93 CPR (4th) 429, <http://www.cb-cda.gc.ca/decisions/2011/20110407.pdf> (Cop. Bd. - Application to vary an Interim Tariff; 2011-04-07); additional reasons at 2011 CarswellNat 2429, <http://www.cb-cda.gc.ca/decisions/2011/20110628.pdf> (Cop. Bd.: 2011-06-28) and 2011 CarswellNat 3708, <http://www.cb-cda.gc.ca/decisions/2011/20110923.pdf> (Cop. Bd.; 2011-09-23)

*Rhodes v. Cie Amway Canada\** 2011 CarswellNat 4872, 2011 FC 1341, <http://decisions.fct-cf.gc.ca/en/2011/2011fc1341/2011fc1341.pdf> (F.C.; 2011-11-23)

*Robertson v. Proquest Learning & Information LLC*, 84 CPR (4th) 224, 2010 CarswellOnt 3972, 2010 CanLII 31314, <http://www.canlii.org/en/on/onsc/doc/2010/2010canlii31314/2010canlii31314.html> (Ont. Sup. Ct.; 2010-06-11); 2011 CarswellOnt 1088, 2011 ONSC 1184 (Ont. Sup. Ct. – Fees approval; 2011-02-22); 2011 ONSC 1647; <http://canlii.ca/en/on/onsc/doc/2011/2011onsc1647/2011onsc1647.html> (Ont. Sup. Ct.; 2011-03-15), 2011 CarswellOnt 2923, 2011 ONSC 2629; <http://canlii.ca/en/on/onsc/doc/2011/2011onsc2629/2011onsc2629.html> (Ont. Sup. Ct. - Approval of Settlement; 2011-05-02); 2011 CarswellOnt 1770, 2011 ONSC 1647 (Ont. Sup. Ct.; 2011-03-15)

*Robinson v. Films Cinar Inc.* 2011 CarswellQue 7652, 2011 QCCA 1361, <http://www.canlii.org/fr/qc/qcca/doc/2011/2011qcca1361/2011qcca1361.html> (Que. C.A.; 2011-07-20); applications for leave to appeal to the Supreme Court of Canada filed 2011 CarswellQue 11024, 2011 CarswellQue 11521, 2011 CarswellQue 11982, 2011 CarswellQue 10416 (S.C.C.); 2011 QCCA 2305, <http://www.canlii.org/fr/qc/qcca/doc/2011/2011qcca2305/2011qcca2305.html> (Que. C.A. - Stay; 2011-12-09)

*Segura Mosquera v. University of Toronto\** 2011 HRTO 464, <http://canlii.ca/en/on/onhrt/doc/2011/2011hrto464/2011hrto464.html> (Ont. Human Rights Trib.; 2011-03-07)

*Seidel v. Telus Communications Inc.\** 2008 CarswellBC 1490, 2008 BCSC 933, 295 DLR (4th) 511, [2008] BCWLD 7491, [2008] BCWLD 7528, 85 BCLR (4th) 372 (B.S. S.C.; 2008-07-16) revd 2009 CarswellBC 608, 2009 BCCA 104, [2009] BCWLD 1852, [2009] BCWLD 2019, [2009] BCWLD 2020, [2009] BCWLD 2021, [2009] BCWLD 2028, [2009] BCWLD 2056, 88 BCLR (4th) 212, [2009] 5 WWR 466, 68 CPC (6th) 57, 267 BCAC 266, 450 WAC 266, 304 DLR (4th) 564 (B.C. C.A.; 2009-03-13) revd in part 2011 CarswellBC 553, 2011 SCC 15, JE 2011-498, [2011] BCWLD 2572, [2011] BCWLD 2568, [2011] BCWLD 2565, [2011] BCWLD 2563, [2011] BCWLD 2558, [2011] BCWLD 2557, [2011] BCWLD 2556, [2011] BCWLD 2651, [2011] BCWLD 2643, 16 BCLR (5th) 1, 329 DLR (4th) 577, [2011] 6 WWR 229, 1 CPC (7th) 221, 412 NR 195, 82 BLR (4th) 1, 301 BCAC 1, 510 WAC 1, [2011] 1 SCR. 531, <http://www.canlii.org/fr/ca/csc/doc/2011/2011csc15/2011csc15.html> (S.C.C.; 2011-03-18)

*Setanta Sports Canada Limited v. 840341 Alberta Ltd. (Brew'in Taphouse)*, 2011 FC 709, [2011] FCJ 987, <http://www.canlii.org/en/ca/fct/doc/2011/2011fc709/2011fc709.html> (FC; 2011-06-16)

*Setanta Sports Canada Limited v. Gentile Enterprises Inc. (Aceti Pizzeria & Pasta)*, 2011 CarswellNat 136, 2011 FCJ 84, 2011 FC 64, <http://canlii.ca/en/ca/fct/doc/2011/2011fc64/2011fc64.html> (FC; 2011-01-20); 2011 CarswellNat 697, 2011 FC 99, <http://canlii.ca/en/ca/fct/doc/2011/2011fc99/2011fc99.html> (F.C.-Contempt; 2011-01-27)

*Simard v. Sorel-Tracy (Ville de)\**, 2011 QCCQ 2622, <http://www.canlii.org/fr/qc/qccq/doc/2011/2011qccq2622/2011qccq2622.html> (Que. Ct.-Jurisdiction; 2011-03-25); 2011 QCCQ 5936, <http://canlii.ca/fr/qc/qccq/doc/2011/2011qccq5936/2011qccq5936.html> (Que. Ct. - Small Claims; 2011-06-10)

*Société des auteurs de radio, télévision et cinéma (SARTEC) v. Marcheterre\**, 2011 QCCS 3562, [http://www.canlii.org/fr/qc/qccs/doc/2011/2011qccs3562/2011qccs3562.html#\\_ftn37](http://www.canlii.org/fr/qc/qccs/doc/2011/2011qccs3562/2011qccs3562.html#_ftn37) (Que. Sup. Ct. ; 2011-07-07)

*Society of Composer, Authors and Music Publishers of Canada v. IIC Enterprises Ltd. (Cheetah's Nightclub)*, 2011 CarswellNat 3810, 2011 CarswellNat 4613, 2011 FC 1088, 2011 CF 1088 (F.C. - Proth.; 2011-09-21); affd. 2011 CarswellNat 5087, 2011 FC 1088, <http://www.canlii.org/en/ca/fct/doc/2011/2011fc1399/2011fc1399.html>, <http://decisions.fct-cf.gc.ca/en/2011/2011fc1399/2011fc1399.html> (F.C.; 2011-12-01)



*Suttie v. Canada (Attorney General)*, 2011 CarswellNat 1007, 2011 FC 119, 90 CPR (4th) 131, 2011 FC 119, <http://www.canlii.org/en/ca/fct/doc/2011/2011fc119/2011fc119.html> (F.C.; 2011-02-02)

*Taddo (Catherine) for the mechanical reproduction and the communication to the public by telecommunication of a musical work entitled "Men are Like Street Cars" by Louis Jordan or Charley Jordan [Application by]*, File 2011-UO-TI-13; also available at <http://www.cb-cda.gc.ca/unlocatable-introuvables/licences/256-e.pdf> (Cop. Bd.; 2011-09-30)

*Target Event Production Ltd v. Cheung*, 2011 CarswellNat 148, 2011 FC 83, <http://canlii.ca/en/ca/fct/doc/2011/2011fc83/2011fc83.html> (FC-Costs; 2011-01-25)

*Thomas v. Brand-u Media inc.*, 2011 QCCQ 395, <http://canlii.ca/en/qc/qccq/doc/2011/2011qccq395/2011qccq395.html> (Que. Ct. - Small Claims; 2011-01-20)

*Tony Martin v. Claims Administrator*, 2011 ONSC 1184, <http://canlii.ca/en/on/onsc/doc/2011/2011onsc1184/2011onsc1184.html> (Ont. Sup. C. 2011-02-22)

*Toronto (City) (Re)*, 2011 CanLII 43646, <http://canlii.ca/en/on/onipc/doc/2011/2011canlii43646/2011canlii43646.html> (Ont Information and Privacy Commissioner.; 2011-06-30)

*Tucows.Com Co. v. Lojas Renner S.A.\**, 2010 CarswellOnt 10841, 2010 ONSC 5851, 94 CPR (4th) 116, 334 DLR (4th) 564, 87 BLR (4th) 282 <http://canlii.ca/en/on/onsc/doc/2010/2010onsc5851/2010onsc5851.html> (Ont. Sup. Ct.; 2011-10-28); revd, 2011 CarswellOnt 8081, 2011 ONCA 548, 95 CPR (4th) 49, 7 CPC (7th) 35, 106 OR (3d) 561, 336 DLR (4th) 443, 87 BLR (4th) 42 <http://canlii.ca/en/on/onca/doc/2011/2011onca548/2011onca548.html> (Ont. C.A.; 2011-08-05)

*Union des producteurs agricoles v. La Vie agricole\** 2011 CanLII 43694, <http://canlii.ca/fr/qc/qccpq/doc/2011/2011canlii43694/2011canlii43694.html> (Que. Conseil de Presse; 2011-04-29)

*United States of America v. Orphanou\** 2010 ONSC 2153, <http://canlii.ca/en/on/onsc/doc/2010/2010onsc2153/2010onsc2153.html> (Ont. Sup. Ct.; 2010-04-28); affd. 2011 ONCA 612, <http://canlii.ca/en/on/onca/doc/2011/2011onca612/2011onca612.html> (OntCA; 2011-09-27)

*Valence Technology, Inc. v. Phostech Lithium Inc.\** 2011 CarswellNat 380, 2011 CarswellNat 1269, 92 CPR (4th) 123, 2011 FC 174, 2011 CF 174, <http://www.canlii.org/en/ca/fct/doc/2011/2011fc174/2011fc174.html> (F.C.; 2011-02-17) [2011 FCA 107, <http://www.canlii.org/en/ca/fca/doc/2011/2011fca107/2011fca107.html> (FCA-Stay; 2011-03-18); affd 2011 CarswellNat 3238, 2011 CarswellNat 3239, 96 CPR (4th) 207, 2011 CAF 237, 2011 FCA 237, <http://www.canlii.org/en/ca/fca/doc/2011/2011fca237/2011fca237.html> (F.C.A.; 2011-08-17)

*Velsoft Training Materials Inc. v. Global Courseware Inc.*, 2011 NSSC 274, <http://canlii.ca/en/ns/nssc/doc/2011/2011nssc274/2011nssc274.html> (N.S. S.C.; 2011-07-06)

*Voltage Pictures LLC v. Jane Doe*, 2011 CarswellNat 4129, 2011 FC 1024, <http://www.canlii.org/en/ca/fct/doc/2011/2011fc1024/2011fc1024.html> (F.C.; 2011-08-29)

Now, a section by section analysis of those 2011 Canadian cases.

## Definitions

- **Section 2 – Interpretation**

Statutory interpretation requires consideration of the ordinary meaning of the words used and their statutory context.

*BBM Canada v. Research in Motion Limited\** 2011 FCA 151 (F.C.A.; 2011-05-05)  
Dawson J.

[22] It is well-established that statutory interpretation requires consideration of the ordinary meaning of the words used and their statutory context. This was explained by the Supreme Court in *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54 (CanLII), [2005] 2 S.C.R. 601 at paragraph 10 and reiterated in *Celgene Corp. v. Canada (Attorney General)*, 2011 SCC 1 (CanLII), 2011 SCC 1 at paragraph 21. In that case the Supreme Court quoted from and commented on *Canada Trustco* as follows:

21. [...]:

It has been long established as a matter of statutory interpretation that “the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament”: see 65302 *British Columbia Ltd. v. Canada*, 1999 CanLII 639 (SCC), [1999] 3 S.C.R. 804, at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole. [para. 10.]

The words, if clear, will dominate; if not, they yield to an interpretation that best meets the overriding purpose of the statute. [emphasis added]

- **Section 2 – Definition of *Architectural work***

For a work to be held original, there is no requirement for special artistic quality. However, to attract the protection of the Copyright Act, the work must fall within one of the categories and a fence is not an architectural work nor an artistic work.

*9077-6204 Québec inc. v. Blanchard*, 2011 QCCQ 205 (Que.Ct.; 2011-01-18)  
Archambault J.

[70] Pour être jugée originale, une oeuvre n’a pas à avoir de qualités artistiques particulières.

[181] Appliquant ces principes dans le présent dossier, le Tribunal est d’opinion que la conception de la résidence du [...] et sa construction par le demandeur Legault et sa compagnie, constitue une oeuvre ou une oeuvre architecturale au

sens de la *Loi sur le droit d'auteur*. Il en est de même pour les plans de la résidence;

[182] Mais, le Tribunal est d'opinion qu'il n'en est pas de même pour la conception et la construction de la clôture entourant la propriété du [...]. Celles-ci ne constituent pas une œuvre, ni une œuvre architecturale, ni une œuvre artistique au sens de la *Loi sur le droit d'auteur* et ce, pour les raisons suivantes : [...]

[185] Selon les principes d'interprétation et l'utilisation du sens courant et usuel des mots, une clôture peut difficilement entrer dans l'une ou l'autre des définitions précitées;

[186] Force est de constater que, suivant les définitions précitées [*Copyright Act* and *Le Nouveau Petit Robert de la langue française*], une clôture ne peut être assimilée à un bâtiment ou édifice;

[190] Dans le présent dossier, les demandeurs tentent d'assimiler la clôture à la bâtisse elle-même, d'en faire une œuvre indépendante ou formant un tout au sens de la *Loi sur le droit d'auteur*;

[191] Avec respect, le Tribunal ne peut suivre ce raisonnement. En effet, le Tribunal est d'opinion que les demandeurs n'ont pas démontré l'originalité de la clôture par rapport à d'autres types de clôture de type « palissade »;

[213] Pour toutes ces raisons, le Tribunal est d'opinion que la conception et la construction de la clôture du [...] ne constituent pas un tout ou un amalgame avec la résidence, comme l'ont prétendu messieurs Legault et Beaulieu. La clôture du [...] est un simple accessoire à ladite résidence et ne constitue pas une œuvre, ni une œuvre architecturale ou artistique au sens de la *Loi sur le droit d'auteur*;

- **Section 2 – Definition of *Artistic work***

Applying the cautionary warning of *CCH Canadian Ltd. v The Law Society of Upper Canada*, 2004 SCC 13, it was held that copyright may subsist in a restaurant menu since the exercise of skill and judgment was not so trivial that it could be characterized as a purely mechanical exercise.

*1429539 Ontario Limited v. Café Mirage Inc.*, 2011 FC 1290 (F.C.; 2011-11-09) Mandamin J.

[113] However, *CCH* [*CCH Canadian Ltd. v The Law Society of Upper Canada*, 2004 SCC 13] cautions that the exercise of skill and judgment must not be so trivial that it could be characterized as a purely mechanical exercise. With regards to restaurant menus, it is possible to envision a menu that is little more than a standard list of food items with ubiquitous descriptions, prices and some identifying information such as the restaurant's name, location and store hours. While the creation of such a menu would inevitably be an exercise of some skill and judgment insofar as the author is required to determine which items are to be included, the prices, and possibly the order or grouping of the items, it is less clear whether an exercise of skill and judgment so described could be categorized as a purely mechanical exercise and thus not an original work for the purposes of copyright protection. However, where an author demonstrates a *de minimis* level of intellectual effort suggesting more than a purely mechanical exercise of skill and



judgment, the resulting menu would be an “original” work and protected under the *Copyright Act*.

[114] The new Symposium Café menu consists of the depiction of the School of Athens art, the inclusion of its trade-mark expressions, photographs of menu selections, descriptions extolling the menu items and prices. Mr. Argiropoulos described the process of selecting the food items and generating descriptions that achieved the effect they were striving for as part of the Symposium Café concept. It is clear that thought was given to the menu food items to be included, the phraseology used in descriptions and the linking with images to associate the menu with the Symposium concept. I am satisfied that Mr. Argiropoulos has described a process that meets the standard of an exercise of skill and judgment in the menu selection, arrangement and design to establish copyright.

- **Section 2 – Definition of *Artistic work***

A corporate logo could be protected as a trade-mark and as a copyright work.

*Union des producteurs agricoles v. La Vie agricole\** 2011 CanLII 43694 (Que. Conseil de Presse; 2011-04-29)

[7] Me Hotte [attorney for the complainant] s’insurge contre l’utilisation sans droit du logo de l’UPA.

[8] Concernant l’utilisation d’un logo, le Conseil estime qu’il n’est pas du ressort de la déontologie journalistique, mais que cela relève plutôt du domaine du droit d’auteur. Comme le Conseil de presse ne rend pas de décision en la matière, le grief n’a pas été traité.

- **Section 2 – Definition of *Board***

The Copyright Board is a federally regulated entity and, as not provincially regulated, cannot be made a respondent to an application for discrimination before the Ontario Human Rights Tribunal.

*Segura Mosquera v. University of Toronto\** 2011 HRTO 464 (Ont. Human Rights Trib. ; 2011-03-07) N. Overend

[On application under s. 34 of the *Human Rights Code*, R.S.O.1990, c. H.19, alleging discrimination in goods, services and facilities on the basis of race, colour, ancestry, place of origin, citizenship, ethnic origin, creed, sex, sexual orientation, marital status and age]

[18] Prior to serving an application on the named respondents, the Tribunal will only dismiss it as being under federal jurisdiction where it is plain and obvious that the matters do not fall within provincial jurisdiction. In this case, both the Copyright Board of Canada and the Canada Health Act Division, if they are proper entities, are part of the federal government. As part of the federal government, it is plain and obvious that these potential respondents are not provincially regulated. Accordingly, the Tribunal has no jurisdiction to proceed with the allegations against these two entities.

- **Section 2 – Definition of *Board***

It is the Copyright Board that certify and approved the tariffs establishing the royalties that could be collected by a collective society for the public performance of the rights it administers.

*Society of Composers, Authors and Music Publishers of Canada v. IIC Enterprises Ltd. (Cheetah's Nightclub)*, 2011 FC 1399 (F.C.; 2011-12-01) Lemieux J.

[11] As is well known, SOCAN is a collective society under section 67 of the *Copyright Act*; it is authorized to grant licences for the public performance in Canada of musical works and to collect, pursuant to such licences, royalties or fees sanctioned by the Copyright Board.

- **Section 2 – Definition of *Compilation***

“Where the form or expression of the compilation is original in presentation it will be given copyright protection. The impossibility of having copyright in the constituent parts does not prevent the compiled work from being protected by copyright.”

*Harmony Consulting Ltd. v. G.A. Foss Transport Ltd.*, 2011 FC 340 (F.C.; 2011-03-18) Heneghan J.

[150] Copyright may subsist in a compilation which includes non-copyrightable material. Where the form or expression of the compilation is original in presentation it will be given copyright protection. The impossibility of having copyright in the constituent parts does not prevent the compiled work from being protected by copyright. This does not give the author copyright in the individual parts, but rather a copyright in the compilation as a whole; see *CCH*, at paras. 33 – 36 [*CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13 (CanLII)].

- **Section 2 – Definition of *Computer program***

Copyright protection in a computer program is on the expression, not the data content.

*Harmony Consulting Ltd. v. G.A. Foss Transport Ltd.*, 2011 FC 340 (F.C.; 2011-03-18) Heneghan J.

[151] In my opinion, the owner of the copyright in a computer program does not, as a matter of general principle, have copyright in the user's data, unless there is an agreement to the contrary.

- **Section 2 – Definition of *Every original literary, dramatic, musical and artistic work...***

If there is only one or a very limited number of ways to achieve a particular result in a computer program, then the program will not be consider as an original literary work.

*Harmony Consulting Ltd. v. G.A. Foss Transport Ltd.*, 2011 FC 340 (F.C.; 2011-03-18) Heneghan J.

[149] Computer programming that is dictated by the operating system or reflects common programming practices is not original expression and will not receive copyright protection; see *Delrina Corp. v. Triolet Systems Inc.* 2002 CanLII 11389 (ON CA), (2002), 58 O.R. (3d) 339 (C.A.), at paras. 52 - 55.

- **Section 2 – Definition of *Every original literary, dramatic, musical and artistic work...***

Determining whether a work is original is a mixed question of fact and law.

*Robinson v. Films Cinar Inc.* 2011 QCCA 1361 (Que C.A.; 2011-07-20)

[32] La qualification de l'œuvre et la détermination de son caractère original constituent des questions mixtes de droit et de fait. [...]

[37] Bien entendu, le fait qu'il s'agisse d'un projet, qui n'a pas été mené à terme, demeure pertinent et doit être pris en considération dans la qualification de l'œuvre. Ce fait peut rendre la tâche plus ardue, mais il ne constitue pas un empêchement à ce que l'œuvre soit protégée, dans la mesure où elle est suffisamment développée et dépasse le simple stade des idées [...]

- **Section 2 – Definition of *Every original literary, dramatic, musical and artistic work...***

A *de minimis* level of intellectual effort would suffice for a work to be held original.

*1429539 Ontario Limited v. Café Mirage Inc.*, 2011 FC 1290 (F.C.; 2011-11-09) Mandamin J.

[113] However, *CCH [CCH Canadian Ltd. v The Law Society of Upper Canada, 2004 SCC 13]* cautions that the exercise of skill and judgment must not be so trivial that it could be characterized as a purely mechanical exercise. With regards to restaurant menus, it is possible to envision a menu that is little more than a standard list of food items with ubiquitous descriptions, prices and some identifying information such as the restaurant's name, location and store hours. While the creation of such a menu would inevitably be an exercise of some skill and judgment insofar as the author is required to determine which items are to be included, the prices, and possibly the order or grouping of the items, it is less clear whether an exercise of skill and judgment so described could be categorized as a purely mechanical exercise and thus not an original work for the purposes of copyright protection. However, where an author demonstrates a *de minimis* level of intellectual effort suggesting more than a purely mechanical exercise of skill and judgment, the resulting menu would be an "original" work and protected under the *Copyright Act*.

- **Section 2 – Definition of *Every original literary, dramatic, musical and artistic work...***

The Federal Court held that there is no copyright in a patent claim because, presumably, it is the only way to describe accurately, in technical terms, the extent of the protection conferred by a patent. [It refuels an old debate: was held that the drawings part of a patent are protected matter under the *Copyright Act* but are unenforceable when the patent is issued (1985), 7 C.P.R. (3d) 294 (F.C.T.D.), at p. 312; *contra R. v. Boutin* J.E. 97-1939 (Que. Ct.- Crim. Div.) Babin J., at p. 16.]

*Valence Technology, Inc. v. Phostech Lithium Inc.*\* 2011 FC 174 (FC; 2011-02-17)  
Gauthier J. [affd. 2011 FCA 237 (F.C.A.; 2011-08-17)], footnotes omitted

[207] Phostech went to great length to establish something that was not really contested by

Valence, that is, that its patent agent had recommended that Valence adopt in its divisional, which had already been filed, wording which followed very closely that used in the claims of the '129 Application (or the related '446 Application) wherever there was sufficient material in the Valence disclosure to support such changes.

[211] The Court agrees with Valence that there is no copyright on claim language.

- **Section 2 – Definition of *Every original literary, dramatic, musical and artistic work ...***

A purely mechanical input does not meet the originality level for a work [here a fence] to be protected under the *Copyright Act*.

*9077-6204 Québec inc. v. Blanchard*, 2011 QCCQ 205 (Que. Ct.; 2011-01-18)  
Archambault J.

[214] Le Tribunal estime que l'exercice de la rencontre de messieurs Legault et Beaulieu est négligeable, au point de la qualifier d'entreprise purement mécanique comme l'a d'ailleurs fait l'expert Sheppard dans les conclusions de son rapport;

[215] Le Tribunal ne voit aucune caractéristique inconnue des constructeurs et installateurs de clôtures ou qui relèverait d'un travail créateur particulier des demandeurs apparaissant sur la pièce P-18, ni dans la façon de construire la clôture du [...];

[219] Dans les circonstances, reconnaître un droit d'auteur sur une clôture risquerait d'aboutir et d'engendrer de nombreux litiges semblables au présent litige entre voisins, entre fabricants et installateurs de clôtures dont les modèles se ressembleraient, occasionnant ainsi des déboursés importants aux principaux intéressés;

- **Section 2 – Definition of *Infringing***

Where the plagiarized parts cannot be divided from the other parts, the injunction will issue for the whole.

*Formation et gestion Pro-Santé M.R. Inc. v. Sampietro* 2011 QCCS 4266 (Que. Sup. Ct.; 2011-08-10) Grenier J.

[77] La preuve d'un droit clair et apparent a été établie. Comme il est impossible de fractionner ce qui est plagé de ce qui ne l'est pas, l'injonction doit être émise pour interdire la publication et distribution intégrales des documents P-7, P-7 a) et P-7 b).

- **Section 2 – Definition of *Infringing***

For a work to be infringing, it has to reproduce a protected work or a substantial part thereof.

*Century 21 Canada Limited Partnership v. Rogers Communications Inc* 2011 BCSC 1196 (B.C. S.C.; 2011-09-02) Punnett J.

[203] I find that the practice of [co-defendant] Zoocasa, from its inception until November 2008, of indexing and copying the entire property description was, in the words of Slessor, L.J. in *Hawkes [Hawkes Son Ltd. v. Paramount Film Service Ltd., [1934] Ch. 593 (Eng. C.A.)*], “the indexing and copying of a substantial, a vital, and an essential part” of the plaintiffs’ Works.

[204] The continued copying of the entire property description to the Zoocasa server is a violation of copyright. The truncated versions of the property description in my view do not infringe copyright as they do not meet the criteria for substantial copying sufficient for copyright infringement.

[205] With respect to the photographs, Zoocasa was not merely copying a thumbnail image as in the case of *Kelly v. Arriba Soft Corporation*, 336 F. 3d 811 (USCA, 9th Circuit, 2003), but rather the entire photograph. This was a clear violation of copyright.

- **Section 2 – Definition of *Infringing***

In order to determine if a substantial part of a work was copied, the court does not have to identify the substance of the work in determining whether infringement occurred. It is not the substance of the work that must be compared to the copy, but the work in its entirety to determine whether a substantial thereof is reproduced in the copy.

*Robinson v. Films Cinar Inc.* 2011 QCCA 1361 (Que C.A.; 2011-07-20)

[43] Rien ne permet de croire que le tribunal doive, dans une étape préalable, dégager la substance de l'œuvre aux fins de déterminer s'il y a contrefaçon par la reproduction d'une partie importante, substantielle, de l'œuvre originale. Agir ainsi réduirait le contenu de l'œuvre, restreindrait indûment la portée de la protection conférée par la LDA et pourrait limiter, sans raison, l'exercice visant à dégager le nombre de similitudes susceptibles d'être retenues. Ce n'est donc pas la substance de l'œuvre qui doit être comparée à la copie, mais bien l'œuvre dans sa globalité pour déterminer s'il y a reprise substantielle de celle-ci dans la copie.

[45] Le tribunal doit donc s'interroger sur l'originalité de l'œuvre, sans laquelle il ne peut, bien sûr, y avoir contravention à la LDA. Il procède ensuite à une analyse



comparative aux fins de déterminer s'il y a des similitudes entre l'œuvre originale et la copie, similitudes qui doivent porter sur des aspects qui occupent une place importante dans l'ensemble de l'œuvre originale. [...]

- **Section 2 – Definition of *Literary work***

Religious messages or addresses can attract copyright protection as literary works.

*Khan v. Tajdin*, 2011 FC 14 (F.C.; 2011-01-07) Harrington J.

[4] As Imam of the Shia Imani Ismaili Muslims, the Aga Khan gives advice and guidance to his flock (“Jamāt”) on both religious and temporal matters. Two means of address frequently used are “Farmans” and “Talikas”. A Farman is an address given before an audience. It is recorded and preserved in audio and often in video form. A Talika is a brief written religious message.

[5] These Farmans and Talikas (hereinafter “Farmans”) are literary works within the meaning of the *Copyright Act*. The Aga Khan has taken action to assert his right of ownership and for a permanent injunction and other relief to stop the defendants from infringing his rights by printing and disseminating a book of Farmans entitled *Farmans 1957-2009 – Golden Edition Kalam-E-Iman-E-Zaman* (which means “Words of the Imam of the Time”). This book is accompanied by an MP3 audio bookmark, preloaded with 14 audio extracts of readings of Farmans by the Aga Khan himself.

- **Section 2 – Definition of *Literary work***

Works used for commercial purposes are also entitled to copyright protection and property listings used on a website, provided they are original, could attract copyright protection as literary works.

*Century 21 Canada Limited Partnership v. Rogers Communications Inc* 2011 BCSC 119, (B.C. S.C.; 2011-09-02) Punnet J.

[181] The initial issue is whether the property descriptions and photographs used by the plaintiffs are entitled to copyright protection. The work must have some “literary character”. The work must provide “information, instruction or ... literary enjoyment” and the “author must bestow some brainwork upon a work and that a work must not be a ‘mere collection of copies of public documents’”: John McKeown, *Fox Canadian Law of Copyright and Industrial Designs*, 4th ed. looseleaf (Toronto: Carswell, 2003), at s. 7:4 [Fox].

[183] Works used for commercial purposes are also entitled to copyright protection. [...]

[185] The property descriptions describe particular real properties. They are created to market the property to potential buyers. It is apparent they are written for each property in a manner to highlight the positive aspects of the properties. There is also the evidence of [co-plaintiffs] Bilash and Walton that there is some level of skill involved in writing an effective property description. I am satisfied that the property descriptions are the product of skill and judgment. As a result they meet the threshold for copyright protection.

- **Section 2 – Definition of *Literary work***

The definition of "literary work" should be construed as illustrative and not exhaustive; it should not be restricted to the dictionary meaning of the word "literary" since the enumeration following the words "literary works" in section 2 is added to the usual sense thereof.

*1429539 Ontario Limited v. Café Mirage Inc.*, 2011 FC 1290 (F.C.; 2011-11-09) Mandamin J.

[99] Finally, almost everything expressed in print or writing has been held to be literary works. The *Copyright Act* lists tables, computer programs, books, pamphlets, and writings. More unusual works include business records, forms, minutes of meetings, sudoku puzzles and lawyers' letters: *ibid* at 69 [David Vaver, *Intellectual Property Law: Copyright, Patents, Trade-marks*, 2d ed (Toronto: Irwin Law Inc., 2011)].

- **Section 2 – Definition of *Literary work***

Plaintiff used her knowledge, experience, expertise, teaching skills, judgment and ability to develop a document unique in its mode of expression. She presented an intelligible and logical information and her training program in business management and secretarial dentistry qualifies as a literary work

*M.R. Inc. v. Sampietro* 2011 QCCS 4266 (Que. Sup. Ct.; 2011-08-10) Grenier J.

[41] Toute personne peut puiser à différentes sources pour produire des compilations et des tableaux. C'est dans l'agencement, la mise en page, l'ordonnance et l'organisation que s'exprime l'originalité, c'est-à-dire l'expression de l'idée. La manière de s'exprimer est une forme de langage.

[43] La demanderesse n'a pas inventé la terminologie et le vocabulaire qu'elle a utilisés. Cela va de soi. Elle a créé quelque chose à partir du connu. Cette création est indéniable. Il suffit de prendre connaissance de l'œuvre de la demanderesse pour constater que cette dernière a utilisé ses connaissances, son expérience, son expertise, son sens pédagogique, son jugement et son habileté pour élaborer un document unique dans son mode d'expression. Elle a présenté de façon intelligible et logique l'information nécessaire à la préparation d'un diplôme en secrétariat dentaire. Il s'agit donc d'une œuvre littéraire originale dans laquelle subsistait le droit d'auteur enregistré.

- **Section 2 – Definition of *Literary work***

A chat is a written conversation using words in full, or abbreviated, in an electronic support, carried on a virtual forum: it constitutes a writing

*Gagné v. R.* \* 2011 QCCA 2157 (Que. C.A.; 2011-11-22)

[19] En effet, le produit du *clavardage* est une conversation écrite utilisant des mots, au long ou en abrégé, sur support électronique, portée sur un forum virtuel, par exemple sur une page Web ou directement à l'écran de l'ordinateur de l'utilisateur. Ce ne sont pas de simples mots qui sont perdus dès leur expression. Le *clavardage* permet aussi à l'internaute de lire ce qui a été écrit précédemment, de sauvegarder la conversation en format électronique ou encore de l'imprimer.

[20] Dès qu'une personne écrit un mot lors d'une séance de *clavardage*, le produit de cette communication est inscrit sur un serveur ou sur un ordinateur. Ce mot peut être lu, quel que soit son mode de présentation, suivant la définition de la *Loi d'interprétation* [L.R.C. (1985), c. I-21, art. 35].

[21] L'appelant prétend qu'en utilisant le terme « écrit » à l'article 163.1 *C.cr.*, le législateur voulait y inclure des « écrits » tels que des livres ou des essais, et non pas les conversations sous forme de *clavardage* entre deux personnes; selon lui, ces conversations ne sont pas des « écrits » ni des « documents ».

[22] Rien dans les dispositions des alinéas b) et c) de l'article 163.1 *C.cr.* ou encore dans la définition d'un « écrit » à l'article 2 *C.cr.* ne supporte cette prétention de l'appelant. D'abord, selon les dispositions de l'article 2 *C.cr.*, non seulement un « document de quelque nature qu'il soit », mais aussi « toute matière sur laquelle des mots ou chiffres, au long ou en abrégé, sont écrits, imprimés ou autrement énoncés » constituent un écrit et, ensuite, la « pornographie juvénile » s'entend, entre autres, de « tout écrit » qui correspond à la description qu'on retrouve aux articles 163.1 b) et c) *C.cr.*

## • Section 2 – Definition of *Maker*

It is no the title that the status of the owner of the copyright and the maker of a cinematographic film (here, an animated series) is the person by whom the arrangements for the making of the work are undertaken.

*Robinson v Films Cinar Inc.* 2011 QCCA 1361 (Que. C.A.; 2011-07-20)

[140] Le titre accolé à une personne n'est pas déterminant. Il faut plutôt se rattacher aux fonctions exercées par celle-ci et à toutes les circonstances pour déterminer qui est le réel titulaire d'un pouvoir ou d'une charge.

[141] Dans le présent dossier, les personnes qui ont effectué les opérations nécessaires à la confection de *Robinson Sucroë*, au sens de la définition précitée du mot « producteur », sont France Animation, Cinar et Ravensburger. Ce sont elles qui ont engagé le personnel nécessaire à la réalisation de la série et ce sont elles qui ont assumé la responsabilité de la gestion de la production de *Robinson Sucroë* tant sur le plan artistique que sur le plan financier, tel qu'il appert des contrats intervenus entre les personnes intéressées [Fn 38 Il s'agit de la Convention N° 794 entre le *CENTRE NATIONAL DE LA CINÉMATOGRAPHIE (C.N.C.)* et *FRANCE ANIMATION – S.A.*, du contrat intitulé « Robinson Sucroë » entre Ravensburger Film + TV et France Animation et de la *CONVENTION INTERNATIONALE ET BILATÉRALE DE COPRODUCTION* entre *FRANCE ANIMATION, S.A.* et *LES PRODUCTIONS CINAR INC./CINAR PRODUCTIONS INC.* Certes, ces sociétés commerciales ont agi par le truchement de dirigeants ou d'employés. Ces derniers ne sont pas, au sens juridique du terme, un producteur comme tel, mais bien les dirigeants et les employés d'un producteur. Il s'agit

notamment de M. Davin dans le cas de France Animation, de M. Weinberg et Mme Charest pour Cinar et de M. Hille pour Ravensburger.

- **Section 2 – Definition of *Photograph***

“With respect to the photographs in question, the requirement for originality is low and can arise from the choice of subject matter, the creation of the scene, the angle of the photograph or other factors.”

*Century 21 Canada Limited Partnership v. Rogers Communications Inc* 2011 BCSC 1196 (B.C. S.C.; 2011-09-02) Punnet J.

[187] With respect to the photographs in question, the requirement for originality is low and can arise from the choice of subject matter, the creation of the scene, the angle of the photograph or other factors: *Fox Canadian Law of Copyright* at s. 10:11(c) [John McKeown, *Fox Canadian Law of Copyright*, 3d ed. (Carswell: Scarborough, Ont., 2000)]. Again, I am satisfied that they satisfy the originality requirements of the *Copyright Act* and they are entitled to copyright protection.

- **Section 2 – Definition of *Sound recording***

A “sound recording” is not a “phonogram” and reference to a definition found in an International Convention to ascertain the meaning of a term defined in the Canadian *Copyright Act* is not warranted.

*Re:Sound v. Motion Picture Theatre Association of Canada*, 2011 CarswellNat 429, (FCA; 2011-02-25) Trudel J. [affirming 2009 CarswellNat 2889 (Cop. Bd.; 2009-00-16); leave to appeal to the Supreme Court of Canada granted 2011 CanLII 56032 (S.C.C.; 2011-09-08)]

[13] The applicant also raised an argument based on the incompatibility with Article 10 of the *Rome Convention* which provides that the producers of phonograms enjoy the right to authorize or prohibit the direct or indirect reproduction of their phonograms. This argument fails to consider that the *Rome Convention* defines “phonograms” as any exclusively aural fixation of sounds (Article 3, paragraph (b)), and that consequently a “fixation of images (e.g., cinema) or of images and sounds (e.g., television) are therefore excluded” (WIPO Guide to the Rome Convention section 3.7). Therefore, I find no reason to interfere with the Board’s conclusion.

- **Section 2 – Definition of *Telecommunication***

“Telecommunication” means any transmission of signs, signals, writing, images or sound or intelligence of any nature by wire, radio, visual, optical or other electromagnetic system”: it connotes a sender and a receiver.

*United States of America v. Orphanou\** 2011 ONCA 612 (Ont. C.A.; 2011-09-27) Cronk J.

[11] The word “telecommunication” is not defined under the Act. However, it is used in various provisions and defined in s. 326(2) of the [Criminal] Code. Section 326(2) of the Code concerns the offence of “theft of telecommunication service”. It defines “telecommunication” as “any transmission, emission or reception of signs, signals, writing, images or sounds or intelligence of any nature by wire, radio, visual, or other electromagnetic system”. Section 35 of the *Interpretation Act*, R.S.C. 1985, c. I-21, s. 2 of the *Copyright Act*, R.S.C. 1985, c. C-42, and s. 2(1) of the *Telecommunications Act*, S.C. 1993, c. 38 all contain virtually identical definitions of the terms “telecommunication” and “telecommunications”: DAKHOURY (Aliaa Ibrahim) *Present at the Creation: The Telecommission Studies and the Intellectual Origins of the Right to Communicate in Canada (1969-71)* PhD Thesis (Carleton, ON: Carleton University - School of Journalism and Communication, 2008)

[12] In *R. v. McLaughlin*, 1980 CanLII 212 (SCC), [1980] 2 S.C.R. 331, the Supreme Court of Canada considered the meaning of “telecommunication” for the purpose of the offence of fraudulent use of a telecommunication facility, established under a predecessor version of the Code. Justice Estey, at p. 341, in a comparison similar to the case at hand, stated that: “[t]aken too literally, the language [of the offence of fraudulent use of a telecommunication facility] may, of course, embrace the operation of a simple Xerox machine since it results in the transfer of optical images from one point (the item being printed) to another point (the blank sheet of paper on which the item is printed), but it would hardly fall within the ordinary usage of the language to classify such a device or system as being a telecommunication facility.”

[13] Justice Estey then continued at p. 341:

The term telecommunication as defined in the *Criminal Code* [R.S.C. 1970, c. C-34, s. 287] connotes a sender and a receiver. The computer, being a computing device, contemplates the participation of one entity only, namely, the operator. In a sense, he communicates with himself, but it could hardly be said that the operator by operating the terminal or console of the computer is thereby communicating information in the sense of transmitting information and hence it stretches the language beyond reality to conclude that a person using a computer is thereby using a telecommunication facility in the sense of the *Criminal Code*. [Fn 1 *McLaughlin* involved an individual who was charged with the fraudulent use of a telecommunication facility without colour of right after using a computer to obtain access to internal programs contained within the same computer. The Supreme Court essentially held that as the use of the computer for this purpose did not involve the “transmission” of information, that is, a “telecommunication”, the offence was not made out.]

[14] A similar meaning is attributed to the word “telecommunication” in general and specialized dictionaries. For example, both *The Oxford English Dictionary*, 2d ed. and *The Concise Oxford English Dictionary* define “telecommunication” as involving communication over a distance by various electrical and other means (e.g. cable, telegraph, telephone, broadcasting). Typically, the production of a written document by means of a photocopier does not involve communication over a distance by electrical or other means.

- **Section 2 – Definition of *Work***



As a full domain name may not exceed a total length of 253 characters in its external dotted-label specification, one may wonder in what circumstances a domain name will have the required originality to be protected under the Canadian *Copyright Act*.

*Tucows.Com Co. v. Lojas Renner S.A.* \*, 2011 ONCA 548 (Ont. C.A.; 2011-08-05)

[45] The registrant of a domain name has a service contract with a registrar. A domain name, however, can infringe upon trademarks or copyrights in a way that other service contracts cannot: Daniel Hancock, "You Can Have It, But Can You Hold It? Treating Domain Names as Tangible Property" (2011) 99 Ky. L.J. 185, at pp. 193-94.

## I Copyright and Moral Rights in Works

### • Section 3(1) – Copyright in works [Exclusive rights]

The *Copyright Act* could be adapted to new situations.

*Century 21 Canada Limited Partnership v. Rogers Communications Inc.*, 2011 BCSC 1196 (B.C. S.C.; 2011-09-02) Punnnett J.

[1] The ability of the law to adapt is part of its strength. Technological innovation tests that resilience. This case considers that ability as claims for breach of contract, trespass to chattels and copyright infringement meet the Internet. At the root of this lawsuit is the legitimacy of indexing publically accessible websites.

### • Section 3(1) – Copyright in works [Exclusive rights]

Acts of copyright infringements may vary according to the jurisdiction of alleged infringement and defences may not be the same from one jurisdiction to another.

*Perfect 10, Inc. v. Google, Inc.*, 2011 FC 348 (F.C.; 2011-03-21) Phelan J. [affirming Unreported T-1591-09 (F.C.-Prot.; 2010-07-15)]

[11] In the Canadian action in this Court, Perfect 10 alleges copyright infringement against Google US and Google CA related to their actions and service in Canada. The allegation is that Google US offers search functions through its sites which directly and/or indirectly reproduce infringing copies of the images in which Perfect 10 claims copyright. Perfect 10 alleges that Google CA sells advertising in Canada on the Google US site and both Google companies reproduce, distribute and communicate copies of Perfect 10's materials in Canada.

[12] The infringing conduct is alleged to occur in Canada and constitutes breaches of s. 27(1), (2) (b)-(e), and 3(1)(a), (b) of the Canadian *Copyright Act*.

[13] On July 15, 2010, the Learned Prothonotary dismissed the Defendants' motion, the critical findings being:

- the copyright infringement claims in either jurisdiction are in respect of rights under separate national legislative schemes;

- it is not for this Court, at this time, to decide the potential for extra-territorial enforcement or other practical effects of a decision;
- separate copyright infringement actions alone are not abuse of process;
- while the evidence and impugned conduct may be the same before the U.S. and Canadian courts, the legal meaning and the rights invoked may be different;
- on the matter of *forum non conveniens*, the Learned Prothonotary based her conclusion in part on the absence of geographical overlap of the Plaintiff's two actions, the availability of different defences and the absence of a request to the U.S. court for relief in respect of activities in Canada;
- pursuant to s. 50(1)(a) of the *Federal Courts Act*, neither the claims nor the parties are the same and therefore it was unnecessary to address the next step – an analysis of prejudice – in concluding that the Defendants failed to meet the requirements of s. 50(1)(a) of the *Federal Courts Act*.

- **Section 3(1) – Copyright in works [Substantial part]**

Indexing and copying a substantial part of a website is infringing upon the exclusive reproduction rights of a copyright owner.

*Century 21 Canada Limited Partnership v. Rogers Communications Inc* 2011 BCSC 1196 (B.C. S.C.; 2011-09-02) Punnett J.

[203] I find that the practice of [co-defendant] Zoocasa, from its inception until November 2008, of indexing and copying the entire property description was, in the words of Slessor, L.J. in *Hawkes [Hawkes Son Ltd. v. Paramount Film Service Ltd., [1934] Ch. 593 (Eng. C.A.)*], “the indexing and copying of a substantial, a vital, and an essential part” of the plaintiffs’ Works.

[204] The continued copying of the entire property description to the Zoocasa server is a violation of copyright. The truncated versions of the property description in my view do not infringe copyright as they do not meet the criteria for substantial copying sufficient for copyright infringement.

[205] With respect to the photographs, Zoocasa was not merely copying a thumbnail image as in the case of *Kelly v. Arriba Soft Corporation*, 336 F. 3d 811 (USCA, 9th Circuit, 2003), but rather the entire photograph. This was a clear violation of copyright.

- **Section 3(1) – Copyright in works [Substantial part]**

What is significant or important in a work is not really a question of quantity. It is rather a question of quality, although both remain important aspects. Infringement is assessed first by the similarities. Ascertaining whether the “copy” is a new and original work, which is simply inspired by the “copied work” is matter of nuance, of degree and context, so that in this respect as in many others, these are questions of fact.

*Robinson v Films Cinar Inc.* 2011 QCCA 1361 (Que C.A.; 2011-07-20)

[57] La contrefaçon n'est pas limitée à la copie conforme ou servile de l'œuvre, puisqu'elle peut en être une imitation déguisée pour autant qu'elle reprenne, sinon la totalité, à tout le moins une partie substantielle ou importante de l'œuvre.

[58] Qu'est-ce qui est substantiel ou important dans une œuvre ?

[59] D'abord, il ne s'agit pas vraiment d'une question de quantité. Il s'agit plutôt d'une question de qualité, bien que les deux aspects demeurent importants [...]

[61] Il va de soi, par ailleurs, que la contrefaçon s'apprécie d'abord par les ressemblances, puisque, par exemple, l'utilisation d'un personnage connu et important d'une bande dessinée peut suffire, malgré la présence d'innombrables différences dans le reste de la copie. En somme, les ressemblances permettent de déterminer s'il y a emprunt d'une partie substantielle d'une œuvre, alors que les différences pourraient notamment appuyer une allégation de création indépendante.

[66] En somme, les différences peuvent n'avoir aucun impact si l'emprunt demeure substantiel. À l'inverse, il se peut aussi qu'il en résulte une œuvre nouvelle et originale, qui s'est tout simplement inspirée de la première. Tout est donc question de nuance, de degré et de contexte, de sorte que, dans cette matière comme dans bien d'autres, il s'agit de questions de fait qui relèvent d'abord et avant tout du juge de première instance [Voir: *Construction Denis Desjardins inc. c. Jeanson*, 2010 QCCA 1287 (CanLII), [2010] R.J.Q. 1600, 2010 QCCA 1287, paragr. 33; *British Columbia Jockey Club c. Standen (c.o.b. Winbar Publications)*, 1985 CanLII 591 (BC CA), [1985] 6 W.W.R. 683, paragr. 8 (C.A. C.-B.); *Hager c. ECW Press Ltd.*, 1998 CanLII 9115 (CF), [1999] 2 C.F. 287, paragr. 18; *Duff c. Québec (Procureur général)*, 2005 QCCA 661 (CanLII), 2005 QCCA 661, paragr. 19 à 23.].

[67] Il faut aussi ajouter que, s'il y a reprise substantielle, la contrefaçon demeure, malgré un effort intellectuel important de la part du contrefacteur : [...]

[68] Ainsi, même si le contrefacteur, grâce à son talent, a produit une version « améliorée » de l'œuvre originale, ce que certains pourraient prétendre ici, cela ne change rien à la réalité : la contrefaçon demeure et l'auteur a droit à la protection de la LDA.

- **Section 3(1) – Copyright in works [Authorization]**

Officers and employees of a company acting for the latter and not on their own behalf cannot be held responsible for wrongful acts alleged against the company unless they have participated in a conscious way: lifting of the corporate veil refused.

*Robinson v Films Cinar Inc.* 2011 QCCA 1361 (Que. C.A.; 2011-07-20)

[142] Au risque de nous répéter, les dirigeants et employés d'une société agissent pour cette dernière et non pas en leur nom personnel. En conséquence, ils ne peuvent être tenus responsables des actes fautifs imputés à la société à moins d'y avoir participé de façon consciente.

- **Section 3(1) – Copyright in works [Authorization]**

Lifting the corporate is a fact driven issue but for a defendant to set aside a default judgment, the jurisprudence establishes that to be successful, the defendant must satisfy the Court that: i) he had a “satisfactory excuse,” a “reasonable explanation,” or “substantial reasons” for his failure to file a defence [Not met in this case]; ii) he had a *prima facie* defence to the claim; and iii) he moved promptly to set aside the Default Judgment.

*Setanta Sports Canada Limited v. Gentile Enterprises Inc. (Aceti Pizzeria & Pasta)*, 2011 FC 64 (F.C.; 2011-01-20) Zinn J.

[20] [...] There are decisions where this Court has recognized that it may be appropriate to pierce the corporate veil in cases involving alleged copyright infringement: see *Canadian Private Copying Collective v Fuzion Technology Corp.*, 2006 FC 1284, aff'd 2007 FCA 335; *Canadian Private Copying Collective v J & E Media Inc.*, 2010 FC 102. However, whether the facts at hand warrant the piercing of the corporate veil is an issue that is fact-dependant and accordingly appears to me to be worthy of further examination. Therefore, I cannot find that the defendants' defence is without any merit.

- **Section 3(1) – Copyright in works [Authorization]**

There are two ways to authorize copyright infringement. The authorization may result from positive acts: the encouragement or the express permission fall into this category. It may also result in a passive situation, for example, for failure to fulfill a control.

*Robinson v Films Cinar Inc.* 2011 QCCA 1361 (Que. C.A.; 2011-07-20)

[145] Il existe deux façons d'autoriser une violation du droit d'auteur. L'autorisation peut découler d'actes positifs : l'encouragement ou l'autorisation expresse font partie de cette catégorie. Elle peut également découler d'une situation passive, par exemple, en cas d'omission d'exécuter une obligation de contrôle [Fn 40 Daniel Gervais et Élisabeth F. Judge, *Le droit de la propriété intellectuelle*, Cowansville, Les Éditions Yvon Blais, 2006, p. 62.]

- **Section 3(1) – Copyright in works [Authorization]**

Authorizing copyright infringement may result from willful blindness and may result from the level of involvement of a party.

*Century 21 Canada Limited Partnership v. Rogers Communications Inc* 2011 BCSC 1196 (B.C. S.C.; 2011-09-02) Punnnett J.

[327] In my view, Rogers, in providing the means by which to establish the Zoocasa idea, Website and search engine, did no more than “authoriz[e] the mere use of equipment which could be used to infringe copyright.” As in *SOCAN [Society of Composers, Authors, and Music Publishers of Canada v. Bell Canada]* 2010 FCA 123], the technology in question is “neutral technology” in the sense that there are plausible legal uses for tools which index, list and link websites. Indeed, the evidence suggests that allowing for automatic indexing is an industry standard

provided that the site being indexed can reasonably exercise a right to “opt-out” if this is desired.

[360] To establish that [co-defendant] Rogers authorized copyright infringement or induced breach of contract the plaintiffs must establish more than the level of involvement of Rogers that they have shown. The fact that Rogers funded, supported and assisted with the development of Zoocasa does not establish that Rogers authorized [co-defendant] Zoocasa to infringe copyright or to breach the contract.

[361] The plaintiffs assert that liability for authorizing copyright infringement can arise from facts that are less than direct and positive and that such liability can be established by a “sufficient degree of indifference”.

[362] While Rogers level of involvement in the planning, creation, funding and promotion of Zoocasa has been established the evidence does not establish that Rogers intended that Zoocasa breach copyright or Century 21’s Terms of Use. Nor does the evidence support a finding that Rogers turned “a blind eye”. I am not satisfied that the plaintiff has, on the balance of probabilities, succeeded in proving that Rogers is liable for Zoocasa’s copyright infringement or breach of contract.

- **Section 5 – Conditions for subsistence of copyright**

Copyright will subsist in an original work if, at the time of creation, the author was a citizen or subject of “treaty country” or ordinarily residing in a “treaty country” (as defined in section 2, namely a country having adhered to the Berne Convention or a member of the WTO).

*Khan v. Tajdin*, 2011 FC 14 (F.C.; 2011-01-07) Harrington J.

[26] The Aga Khan’s copyright is not in issue. Canada, the United Kingdom and France are all parties to the *Berne Convention*. As a citizen of the United Kingdom and a resident of France, the Aga Khan is an author qualified to seek the protection of Canada’s *Copyright Act*. It is admitted that the *Golden Edition* was published here. Although copyright was only registered in June 2010, the date of registration is not relevant in the present case.

- **Section 13(2) – Engraving, photograph or portrait**

Absent any assignment or in case of work of command, the copyright remains on the head of the author. If the services of a photograph are retained [and paid] to do particular photographs, the person who ordered the photographs is the owner of the copyright therein.

*Century 21 Canada Limited Partnership v. Rogers Communications Inc* 2011 BCS 1196 (B.C. S.C.; 2011-09-02) Punnet J.

[188] [Co-plaintiff] Bilash deposed that he retained a professional photographer to take photographs of each property that he was hired to market as the listing agent. Ms. Gray arranged for photographers to take photographs of the property. Bilash ordered and paid for the original electronic files of the digital images so that he



could copy and use them as he saw fit in his marketing campaigns, as opposed to ordering just prints of the photographs. Prior to January 1, 2009, the money to pay the photographers came from Bilash's personal account. From January 1, 2009, onwards, the money to pay the photographers came from the account of Bilash Corporation.

[189] I am satisfied that Bilash owns copyright in the photographs pursuant to s. 13(2) given he ordered them, they were made for valuable consideration, he paid for the originals and there was no agreement between him and the photographers to the contrary.

- **Section 13(3) – Works made in the course of employment**

The transfer of the physical goods encompassing the copyright work does not avail for the assignment of the copyright in such work.

*1429539 Ontario Limited v. Café Mirage Inc.*, 2011 FC 1290 (F.C.; 2011-11-09) Mandamin J.

[97] The purchase of a copyrighted item does not transfer the copyright. For example, if one buys a book, one does not acquire the copyright to the book. While one can resell the book without offending the copyright, that person may not copy the book unless permission is granted by the owner of the copyright or the *Copyright Act* exceptions: see David Vaver, *Intellectual Property Law: Copyright, Patents, Trade-marks*, 2d ed (Toronto: Irwin Law Inc., 2011) at 58.

[120] The Defendants' claim that the Plaintiffs waived all rights by agreeing to transfer all assets does not succeed. Copyright does not transfer with the physical assets such as menus. There is no evidence that the Symposium Café Group ever transferred more than a license to use its trade-marks or copyrights. At best, the license to use the menus continued until they opted not to join the Symposium Café franchise. [...].

- **Section 13(3) – Works made in the course of employment**

Copyright ownership is generally vested to the employer.

*Harmony Consulting Ltd. v. G.A. Foss Transport Ltd.*, 2011 F.C. 340 (FC; 2011-03-18) Heneghan J.

[229] Subsection 13(3) of the *Copyright Act* provides that where the author of a work, under a contract of service, creates the work in the course of employment, it is the employer who is deemed to be the owner of the copyright unless there is an agreement to the contrary.

[230] This principle is also generally applicable to officers, directors, and key employees who create a work for the benefit of the corporation. Ownership normally vests in the corporation in the absence of an agreement to the contrary; see *Dubois v. Systèmes de Gestion et d'Analyse de Données Media* (1991), 41 C.P.R. (3d) 92 (Que. S.C.), *Setym International inc. c. Belout*, [2001] J.Q. no 3819 (Que. S.C.) (Q.L.) and *B & S Publications Inc. v. Max-Contacts Inc.*, [2001] 287 A.R. 201 (Q.B.).

- **Section 13(3) – Works made in the course of employment**

To ascertain whether an author was an employee rather than a free lance requires an analysis that will take into consideration the particularities of the entertainment industry.

*Dickson v. The Queen*\*, 2011 TCC 153 (Tax Court; 2011-03-10) Boyle J.

[25] It has been recognized by this Court that, in the case of creative artists such as painters, authors, musicians and sculptors, a broader range of criteria and a broader contextual view reflective of the reality of the particular industry may be needed than might be in more traditional commercial pursuits when trying to establish whether a taxpayer has yet commenced to carry on his or her planned creative business. See, for example, *Harrison v. The Queen*, 2007 TCC 19, 2007 DTC 377 (book publishing), *Maltezi v. The Queen*, 2009 TCC 149, [2009] T.C.J. No. 104 (QL) (product development), *Li v. The Queen*, 2008 TCC 175, 2008 DTC 3039 (product development), *Janitsch v. The Queen*, 2004 TCC 378, [2004] G.S.T.C. 70 (artist), *Arseneault v. The Queen*, 2006 TCC 42, 2008 DTC 2224 (film production), *Cossette v. R.*, [2003] 1 C.T.C. 2359 (visual artist) and *Tramble v. R.*, [2001] 4 C.T.C. 2160 (painter). This is also recognized by the CRA in its Interpretation Bulletin IT-504 on "Visual Artists and Writers".

- **Section 13(4) – Assignments and licences**

Copyright can be assigned and the assignment can be recorded at the Copyright Office.

*Harmony Consulting Ltd. v. G.A. Foss Transport Ltd.*, 2011 FC 340 (F.C.; 2011-03-18) Heneghan J.

[204] In the first place, I note that the *Copyright Act* recognizes that copyright can be assigned. The *Copyright Act* further provides, at sections 57 and 58, that an assignment can be registered. Subsection 53(2.1) provides that a certificate of registration of a copyright is "evidence that the right recorded in the certificate has been assigned and that the assignee registered is the owner of that right".

- **Section 13(4) – Assignments and licences**

The author of a work can assign her copyright in said work, even before the work is created.

*Thomas v. Brand-u Media inc.*, 2011 QCCQ 395 (Que.Ct. - Small Claims; 2011-01-20) Richard J.

[9] From the evidence adduced, the Court understands that Miss Thomas acted as the "chef d'orchestre" for the purposes of publishing the magazine. A small team to achieve her tasks supported her.

[22] Furthermore, no copyright infringement can be put forward by [Plaintiff] Miss Thomas due to the content of the contract P-1, as previously stated.

[Defendant] Naked Eye will retain all of the rights and ownership of all of your work including electronic and promotional rights.

- **Section 13(4) – Assignments and licences**

In the case of a contract for services, copyright are owned by the author and the assignment of copyright could only be made in writing; and, absent of an assignment, it is not sufficient for the hiring person to indicate on the material that he is the owner of copyright in a work created by someone who was not his employee.

*Pinto c. Bronfman Jewish Education Center\** 2011 QCCS 3458 (Que. Sup. Ct.; 2011-07-13)

[186] M. Pinto soutient que les défendeurs ont profité de sa demande d'avance pour le faire chanter et lui soutirer une renonciation à ses droits d'auteur. Il invoque qu'il s'agit là de l'usage déraisonnable et abusif du droit d'un client de mettre fin à un contrat de service.

[187] Au contraire, Mme Shimon et M. Shimon affirment qu'il a toujours été clair que les droits d'auteur appartiennent à Tal AM. Selon eux, chaque fois que M. Pinto est revenu sur cette question, il lui a été indiqué clairement qu'aucune discussion à ce sujet n'était possible. Devant l'insistance de M. Pinto, et notamment la découverte de certaines inscriptions sur ses factures, les défendeurs ont décidé d'obtenir de celui-ci une renonciation écrite à ses droits d'auteur. Étant donné son refus, ils ont mis fin à son contrat de service.

- **Section 13(4) – Assignments and licences**

It is incumbent to who is alleging copyright ownership to prove said ownership, either by way of a written assignment or work for hire.

*André Rodrigue Peintre décorateur inc. v. Rodrigue Peintre décorateur Ltée*, 2011 QCCS 6797 (Que. Sup. Ct.; 2011-12-20) Hallée, J.

[60] *André Rodrigue* soutient être le propriétaire des droits sur les photos. En défense, on a fait entendre monsieur Jacques Ménard, estimateur pour *Rodrigue Peintre* depuis 1987, lequel affirme que la photo P-3 lui appartient ayant en sa possession un original. Il ajoute que cette photo lui a été donnée par sa mère.

[61] Aucune preuve n'a permis d'établir clairement qui était le propriétaire du droit d'auteur sur chacune de ces photos.

[62] En effet, on ignore l'identité du photographe, son statut d'employé auprès de *Décorateur B. Rodrigue peintre général*, à l'époque, s'il s'agit de photographies commandées contre rémunération, etc. De plus, la cession de droit d'auteur devant se faire par écrit, aucun document ne prouve la chaîne de titre de ces photographies et qui en est le propriétaire aujourd'hui.

- **Section 13(4) – Assignments and licences**

An assignment is a transfer of rights in the ownership of the assigned copyright while licence is an authorization of the copyright owner do some acts which are vested in the copyright owner.

*Century 21 Canada Limited Partnership v. Rogers Communications Inc* 2011 BCSC 1196 (B.C. S.C.; 2011-09-02) Punnet J.

[174] An assignment is a transfer of a right such that the assignee is the owner of the legal interest in the right and the assignor is left without any control over the right transferred, except for moral rights. Under a licence, the licensee is given permission to do certain acts which might otherwise constitute infringement of the licensor's rights and does not involve any change of ownership in the copyright: *Marquis v. DKL Technologies Inc.* (1989), 24 C.I.P.R. 289 (C.S. Que.); *Fox Canadian Law of Copyright*, at 380.

[177] The right to assign a right of action arises from s. 13 of the *Copyright Act* ss. 6 and 7 which I will repeat for convenience: [...]

[178] The right is procedural and grants to the licensee the authority to enforce the rights of the copyright holder to the extent they are granted under the terms of the assignment or exclusive licence.

[179] The licence in this instance is not exclusive as it fails to state such. It simply grants a right to Century 21 to use the Works. Century 21 does not possess a proprietary interest or the grant of an interest in the infringed works. As a result, Century 21 can only enforce licencing, not copyright, infringement to the limited extent granted to it by the licence. In this case, that is the right to use the Works. However, as the licence that Century 21 holds is not exclusive, the assignment of the right of action to enforce copyright infringement is moot.

- **Section 13(4) – Assignments and licences**

The way people to an agreement are described does not mean that they are indeed author of the work described in said agreement.

*Tony Martin v. Claims Administrator*, 2011 ONSC 1184 (Ont. S.C.; 2011-02-22) Horkins J.

[17] The fact that the Settlement agreement distinguishes between the Creator and the Assignee does not mean that each can claim compensation for the same Works. The distinction is necessary to identify the different groups that may be eligible to seek compensation.

- **Section 13(4) – Assignments and licences**

The copyright owner may grant licence, which licences may include the right to grant sub-licences.

*Laurier Glass Ltd. v. Simplicity Computer Solutions Inc.* 2011 CarswellOnt 1580 (Ont. Sup. Ct.; 2011-03-10 ) Perell J.

[7] Although entitled to royalties under his agreement with Simplicity, Mr. Hale [software designer who owns the source code for Simplicity's products, including "Glassware," which is one of the products supplied by Simplicity.] has never received payments from Simplicity for his copyright in the software. It is common in the software industry that the licensor is a sub-licensor and not the owner of the copyright and that the sub-licensor may not keep enhancements developed for the software.

- **Section 13(4) – Assignments and licences**

Being the owner of the physical goods in which the copyright is encompassed does not mean ownership of the copyright.

*Latour v. 6921086 Canada inc. (Édikom)*, 2011 QCCQ 14817 (Que. Ct.-Small Claims; 2011-11-09) Dupuis J.

[26] Par conséquent, le Tribunal est d'avis qu'Édikom [who purchased certain assets from the liquidator] a violé les droits d'auteurs de Latour [the author] sur les articles publiés en 2009, puisque le Syndic ne pouvait lui céder plus de droits que n'en possédait Les Éditions Comestibles, au moment de sa faillite.

- **Section 13(4) – Assignments and licences**

A licence is not exclusive unless its says so and a non-exclusive licensee cannot sue for copyright infringement.

*Century 21 Canada Limited Partnership v. Rogers Communications Inc* 2011 BCSC 1196 (B.C. S.C.; 2011-09-02) Punnet J.

[179]The licence in this instance is not exclusive as it fails to state such. It simply grants a right to Century 21 to use the Works. Century 21 does not possess a proprietary interest or the grant of an interest in the infringed works. As a result, Century 21 can only enforce licencing, not copyright, infringement to the limited extent granted to it by the licence. In this case, that is the right to use the Works. However, as the licence that Century 21 holds is not exclusive, the assignment of the right of action to enforce copyright infringement is moot.

- **Section 13(4) – Assignments and licences**

The requirement that an assignment be in writing is a substantial legal requirement, not merely a rule of evidence and an assignment performed only in the mind of the parties cannot avail for a valid confirmatory assignment.



*Harmony Consulting Ltd. v. G.A. Foss Transport Ltd.*, 2011 FC 340 (F.C.; 2011-03-18) Heneghan J.

[205] In my opinion, there are problems with the assignment now relied upon by the Plaintiff. Pursuant to subsection 13(4) of the *Copyright Act*, an assignment of copyright must be in writing. The requirement that an assignment be in writing is a substantial legal requirement, not merely a rule of evidence; see *Motel 6, Inc. v. N.o 6 Motel Ltd.*, [1982] 1 F.C. 638 at para. 26.

[216] The March 2000 assignment was performed solely in his mind. Pursuant to subsection 13(4) of the *Copyright Act*, all assignments must be made in writing. An assignment in one's mind is not a valid assignment. The only assignment in writing made by Mr. Chari, with respect to Petro Dispatch, occurred on June 10, 2009.

[218] As in the *Star-Kist* case [*Star-Kist Foods Inc. v. Registrar of Trade Marks et al.*, 3 C.P.C. (3d) 208, rev'd at 20 C.P.R. (3d) 46], there is insufficient evidence to support an inference that there was an intention, on or about March 16, 2000 to assign the copyright in Petro Dispatch to the Plaintiff. The evidence of Mr. Chari suggests that the assignment dated June 10, 2009 was purely a self-serving attempt to avoid the problems arising from the fact that Mr. Chari is not a party to this action and I so find.

- **Section 14.1(2) – No assignment of moral rights**

Moral rights cannot be assigned, even in writing.

*Harmony Consulting Ltd. v. G.A. Foss Transport Ltd.*, 2011 FC 340 (F.C.; 2011-03-18) Heneghan J.

[219] Furthermore, Mr. Chari's attempt to assign the moral rights to Petro Dispatch is invalid. As the author of Petro Dispatch, Mr. Chari holds the moral rights to that software, but those rights cannot be assigned; see subsection 14.1(2) of the *Copyright Act*. Pursuant to subsection 14.1(2) and subsection 14.1(4), it is possible to waive moral rights in favour of an owner or assignee of a copyright, allowing the owner or assignee to invoke the moral rights.

- **Section 14.1(1) – Moral rights**

Misattribution or modification of software could constitute infringement of the author's moral rights but infringement of the moral rights of an author is not infringement of the copyright in a work

*Harmony Consulting Ltd. v. G.A. Foss Transport Ltd.*, 2011 FC 340 (F.C.; 2011-03-18) Heneghan J.

[289] It is possible to characterize misattribution or modification of software as an infringement of the author's moral rights pursuant to subsection 28.1(1).

[290] Misattribution of a work can be an infringement of the author's moral rights; see *Guilmette v. Centre Cooperatif de Loisirs et de Sports du Mont Orignal*, (1986), 15 C.P.R. (3d) 409 (F.C.T.D.). It may also be an infringement of the author's moral rights to violate the integrity of the work through modification. However, pursuant to

subsection 28.2(1) of the *Copyright Act*, modifying a work can only constitute an infringement of the author's moral rights if the modification causes prejudice to the honour or reputation of the author.

[291] Moral rights belong to the author and not to the owner of the copyright. In accordance with subsection 14.2(2) [sic, should be 14.1] of the *Copyright Act*, moral rights can be waived but cannot be assigned. The undisputed author of the software in question was Mr. Chari and he is not a party to this action. Further, the Plaintiff did not plead infringement of moral rights.

[292] In any event, an infringement of moral rights does not relate to anything which only the author has the right to do under section 3 of the *Copyright Act*. As a result, an infringement of moral rights is not tantamount to an infringement of copyright.

- **Section 14.1(1) – Moral rights**

An author is entitled to be associated with his work as his author.

*Suttie v. Canada (Attorney General)*, 2011 FC 119 (F.C.; 2011-02-02) O'Reilly J.

[5] An author is entitled to be associated with his or her work (*Copyright Act*, RSC 1985, c C-42, s 14.1 – enactments cited are set out in an Annex). Works of joint authorship are specifically recognized in the Act (s 2). As the Court has the jurisdiction to order the register to be corrected by adding information that was wrongly omitted (s 57(4)(a)), I see no reason not to grant Ms. Suttie's request to add her son's name to the register.

## II Copyright in Performer's performances, Sound Recordings and Communication Signals

- **Section 17(2) – Right to remuneration [in case of cinematographic works]**

An unauthorized embodiment of a performance in a cinematographic work contravenes the copyright in performer's performance. And for an argument to be the proper subject matter of judicial review, this argument should have been raised in the lower tribunal.

*Re:Sound v. Motion Picture Theatre Association of Canada*, 2011 CarswellNat 429 (F.C.A.; 2011-02-25) Trudel J. [affirming 2009 CarswellNat 2889 (Cop. Bd.; 2009-00-16); Leave to appeal to the Supreme Court of Canada granted 2011 CanLII 56032 (S.C.C.; 2011-09-08)]

[11] Indeed, under subsection 17(1) of the Act, a performer must authorize the embodiment of his or her performance in a cinematographic work. Consequently, an unauthorized embodiment of a performance in a cinematographic work contravenes the Act. Moreover, once a prior sound recording is extracted from the soundtrack that accompanied the cinematographic work, it again attracts the protections offered performers and makers under the Act for stand-alone sound recordings.

[12] The applicant also raised a comparative law argument. It relied on Australian jurisprudence, which I find of no assistance, as it is based on legislation that is fundamentally different in regard to sound recordings and soundtracks. The same can be said of the UK law on which the applicant also relied.

[13] The applicant also raised an argument based on the incompatibility with Article 10 of the *Rome Convention* which provides that the producers of phonograms enjoy the right to authorize or prohibit the direct or indirect reproduction of their phonograms. This argument fails to consider that the *Rome Convention* defines "phonograms" as any exclusively aural fixation of sounds (Article 3, paragraph (b)), and that consequently a "fixation of images (e.g., cinema) or of images and sounds (e.g., television) are therefore excluded" (WIPO Guide to the Rome Convention section 3.7). Therefore, I find no reason to interfere with the Board's conclusion.

[14] Finally, the applicant argued that regardless of the Board's construction of the definitions, it is entitled to a tariff for live-to-air broadcasts because these types of broadcasts are not "communications to the public of cinematographic work", as defined in section 2 of the Act. The applicant states that such broadcasts are not expressed by any process analogous to cinematography, hence not subject to the section 19 exclusion (applicant's memorandum at paragraph 88). The applicant asks that its application for judicial review be allowed on this point and that the matter be sent back to the Board so that it may pronounce itself on the issue.

[15] In my view, the judicial review application cannot be allowed on this limited ground. This argument was not raised in the applicant's notice of application and was not brought to the attention of the Board. As such, the Board cannot be faulted in any way for not having dealt with this issue. There are therefore no grounds for reviewing the decision of the Board on this basis.

- **Section 21 – Copyright in communication signal**

Section 18(1) of the *Radiocommunication Act* confers a cause of action on holders of an interest in the content of the subscription signal or network feed.

*Dish Network L.L.C. v. Rex*\* 2011 CarswellBC 2124 (B.C. S.C.; 2011-08-15) Walker J.

[24] Section 18(1) of the *Radiocommunication Act* also confers a cause of action on holders of an interest in the content of the subscription signal or network feed and to holders of a license issued by the Canadian Radio-Television and Telecommunications Commission ("CRTC") to carry on broadcasting under the *Broadcasting Act*, S.C. 1991, c. 11. Those persons may, as DIRECTV, Dish, and Bell have done in this litigation, sue to recover damages suffered as a result of conduct contrary to s. 9(1)(c) from persons who engaged in that conduct, or to obtain other remedies (e.g., injunctive relief or an accounting).

### III Infringement of Copyright and Moral Rights and Exceptions to Infringement

- **Section 27 – Infringement generally [Copyright]**

A letter of demand should be sufficient to alert a defendant on the nature of his acts and lead him to inquire as to the legitimacy of his actions.

*Century 21 Canada Limited Partnership v. Rogers Communications Inc* 2011 BCSC 1196 (B.C. S.C.; 2011-09-02) Punnnett J

[416] However, the defendants' argument focuses on the legitimacy of the letters and ignores the fact of notice. Surely the point is that notice alerts them to a potential claim which may or may not be proven valid at a future date. To ignore a claim however is to run the risk of potential liability if breach of contract or ownership of copyright and its infringement is eventually proven.

- **Section 27(1) – Infringement generally [Copyright]**

Copyright infringement claims are governed by the law of the jurisdiction in which these acts are committed.

*Perfect 10, Inc. v. Google, Inc.*, 2011 FC 348 (F.C.; 2011-03-21) Phelan J. [affirming Unreported T-1591-09 (F.C. - Prot.; 2010-07-15)]

[11] In the Canadian action in this Court, Perfect 10 alleges copyright infringement against Google US and Google CA related to their actions and service in Canada. The allegation is that Google US offers search functions through its sites which directly and/or indirectly reproduce infringing copies of the images in which Perfect 10 claims copyright. Perfect 10 alleges that Google CA sells advertising in Canada on the Google US site and both Google companies reproduce, distribute and communicate copies of Perfect 10's materials in Canada.

[12] The infringing conduct is alleged to occur in Canada and constitutes breaches of s. 27(1), (2) (b)-(e), and 3(1)(a), (b) of the *Canadian Copyright Act*.

[13] On July 15, 2010, the Learned Prothonotary dismissed the Defendants' motion, the critical findings being:

- the copyright infringement claims in either jurisdiction are in respect of rights under separate national legislative schemes;
- it is not for this Court, at this time, to decide the potential for extra-territorial enforcement or other practical effects of a decision;
- separate copyright infringement actions alone are not abuse of process;
- while the evidence and impugned conduct may be the same before the U.S. and Canadian courts, the legal meaning and the rights invoked may be different;
- on the matter of *forum non conveniens*, the Learned Prothonotary based her conclusion in part on the absence of geographical overlap of the Plaintiff's two actions, the availability of different defences and the absence of a request to the U.S. court for relief in respect of activities in Canada;
- pursuant to s. 50(1)(a) of the *Federal Courts Act*, neither the claims nor the parties are the same and therefore it was unnecessary to address the next step – an analysis of prejudice – in concluding that the Defendants failed to meet the requirements of s. 50(1)(a) of the *Federal Courts Act*.

- **Section 27(1) – Infringement generally [Copyright]**

A consent should emanate from the copyright owner and should be clear and unequivocal, but not necessarily in writing.

*Khan v. Tajdin*, 2011 FC 14 (F.C.; 2011-01-07) Harrington J.

[45] As mentioned earlier we are in the realm of civil law, not religion. No expert evidence has been filed as to the significance of ceremonial gestures. Given the ordinary meaning of the words used in the exchange between His Highness the Aga Khan and Mr. Alibhay, I simply cannot find that the Aga Khan gave his consent to Mr. Tajdin's endeavours.

[46] Furthermore, if I am wrong on that point and if consent were given at all, it could only be for that particular volume of Farmans, and not for future Farmans. In *Slumber-Magic Adjustable Bed Co. v. Sleep-King Adjustable Bed Co.* 1984 CanLII 54 (B.C. S.C.), (1984), 3 C.P.R. (3d) 81, [1985] 1 W.W.R. 112, which also stands for the proposition that the burden is upon the defendants to establish consent, McLachlin J., as she then was, dealt with the defendants' claim they had the right to use promotional material, based upon consent given during a dinner conversation. She said at paragraph 18 that "[t]hus if the defendants are to succeed on this defence, they must establish not only that Mr. Barker gave his consent to the use of materials then in existence, but to the use of all materials which the plaintiff might in the future develop." She found they had not. In this case, I am unable to accept the defendants' tortuous, convoluted reasoning.

- **Section 28.1 – Infringement generally [Moral rights]**

Misattribution or modification of software as an infringement of the author's moral rights.

*Harmony Consulting Ltd. v. G.A. Foss Transport Ltd.*, 2011 FC 340 (F.C.; 2011-03-18) Heneghan J.

[289] It is possible to characterize misattribution or modification of software as an infringement of the author's moral rights pursuant to subsection 28.1(1).

[290] Misattribution of a work can be an infringement of the author's moral rights; see *Guillmette v. Centre Cooperatif de Loisirs et de Sports du Mont Orignal*, (1986), 15 C.P.R. (3d) 409 (F.C.T.D.). It may also be an infringement of the author's moral rights to violate the integrity of the work through modification. However, pursuant to subsection 28.2(1) of the *Copyright Act*, modifying a work can only constitute an infringement of the author's moral rights if the modification causes prejudice to the honour or reputation of the author.

[291] Moral rights belong to the author and not to the owner of the copyright. In accordance with subsection 14.2(2) of the *Copyright Act*, moral rights can be waived but cannot be assigned. The undisputed author of the software in question was Mr. Chari and he is not a party to this action. Further, the Plaintiff did not plead infringement of moral rights.

[292] In any event, an infringement of moral rights does not relate to anything which only the author has the right to do under section 3 of the *Copyright Act*. As a result, an infringement of moral rights is not tantamount to an infringement of copyright.

- **Section 29 – Research or private study [Fair dealing]**

Under the Canadian *Copyright Act*, the exceptions or defences to copyright are more narrowly defined and extensively listed, and the Canadian Fair Dealing should not be confounded with the American Fair Use.

*Century 21 Canada Limited Partnership v. Rogers Communications Inc* 2011 BCSC 1196 (B.C. S.C.; 2011-09-02) Punnnett J.

[234] In my opinion, the difficulty that arises from the defendants' emphasis on "transformative use" is that what may be transformative, and as a result fair use in the US, may still be copyright infringement in Canada. For example, The US *Copyright Act of 1976*, 17 U.S.C. s. 107 [US Copyright Act] refers to "fair use of a copyright work, for purposes such as criticism, comment, news reporting, teaching, scholarship or research". The nature of this defence in the US is very broad and is essentially a codification of a judge-made rule. In comparison, Canadian copyright law is rooted in the *Copyright Act* which specifically grants to the creator rights to the reproduction of the entire work or a substantial portion of the work: *Copyright Act*, s.3. Under the Canadian *Copyright Act*, the exceptions or defences to copyright are more narrowly defined and extensively listed (although the list is not exhaustive) such as the purpose of the dealing is for research, private study, criticism, review or news reporting: see ss. 29, 29.1 and 29.2 of the *Copyright Act*. Canadian courts have not recognized "transformative use" as a characteristic of fair dealing.

[252] The issue of fair dealing only arises where there is no consent to the activity complained of. The fact that consent has not been given, or has been refused, whether orally or in writing or in a robots.txt file, is only the starting point for a fair dealing analysis. It is not the end point for an analysis of fair dealing. The test is the character of dealing not the dealing without consent.

- **Section 30.6 – Permitted acts [Computer programs]**

Making a single backup copy for the purpose of modifying the software is not equivalent to the concept of multiplication and will not constitute copyright infringement.

*Harmony Consulting Ltd. v. G.A. Foss Transport Ltd.*, 2011 FC 340 (F.C.; 2011-03-18) Heneghan J.

[269] In her testimony, Ms. Warth explained the process by which she performed modifications. She testified that before beginning a modification, or indeed the conversion to a newer version of Microsoft Access, she would make a backup copy. Such a backup copy was necessary in case there were an error or a failure in the process. The backup is necessary to restore the system to its prior state.



[270] In fact, Ms. Warth testified that everyone makes a backup. I infer from this evidence that it is the standard practice to backup a program file before making a modification and I so find.

[271] While making a copy could constitute an infringement of copyright, in these circumstances it does not. Making a single backup copy for the purpose of modifying the software is not equivalent to the concept of multiplication as discussed in *Théberge* [*Théberge v. Galerie d'Art du Petit Champlain Inc.*, 2002 SCC 34].

- **Section 31 – Retransmission**

Because subsection 31(2) contemplates a royalty only for the retransmission of distant signals (which by definition would not include the signal of a private local television station), a private local television station has no right under the *Copyright Act* to demand a royalty from a BDU [Broadcast Distribution Undertakings] for retransmitting its signals.

*Canadian Radio-television and Telecommunications Commission's Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168 (Re)*, 2011 FCA 64 (F.C.A.; 2011-02-28) Sharlow J., spec. at paras 29, 37-39 [Leave to appeal to the Supreme Court of Canada granted on 2011-09-29]

The copyright objection

[29] Both the *Copyright Act* and the *Broadcasting Act* are components of Canadian cultural policy. They may be viewed as sharing some territory, in the sense that both deal to some extent with the interest of the originators of television signals in benefiting economically from their work, and the interest of the public in having television signals made available to them. Both statutes are intended to ensure these competing interests are properly balanced. The two statutes now operate together harmoniously, but I am prepared to assume without deciding that there may be a theoretical possibility of a conflict in their operation.

[30] The question raised in this reference is whether, as the BDUs [Broadcast Distribution Undertakings] argue, the proposed value for signal regime necessarily conflicts with the *Copyright Act* in such a way that this Court should conclude that even if the *Broadcasting Act* on its face authorizes the Commission to adopt the proposed value for signal regime, it should be interpreted in a way that precludes that possibility.

[31] Part of the BDUs' legal argument is not controversial. I agree with them that the principles of statutory interpretation require a harmonious, coherent and consistent interpretation of all statutes dealing with the legal rights and obligations relating to the retransmission of television signals.

[32] The question, however, is whether there is merit to the argument of the BDUs that the implementation of the proposed value for signal regime necessarily conflicts with the rights of the BDUs under the *Copyright Act*, in so far as it would give each private local television station the right to block a BDU from retransmitting that station's signals in the absence of a concluded contract for compensation flowing from the BDU to the station.

[33] The BDUs rely principally on subsection 21(1) [of the *Broadcasting Act*] and section 31 of the *Copyright Act*. It is common ground that subsection 21(1), and in particular paragraph 21(1)(c), gives a private local television station a copyright in the signals it broadcasts, and that this copyright includes the sole right to authorize a BDU to retransmit those signals to the public simultaneously with its broadcast. [...]

[34] The section 21 rights of broadcasters are significantly affected by section 31 of the *Copyright Act* [...]

[35] Regulations have been made under paragraph 31(3)(a) of the *Copyright Act* to define “local signal” and “distant signal” (see *Local Signal and Distant Signal Regulations*, SOR/89-254), but no conditions have been prescribed under paragraph 31(3)(b). Generally, the signals of a private local television station are “local signals” and not “distant signals” under the *Local Signal and Distant Signal Regulations*.

[36] The BDUs that would be affected by the proposed value for signal regime are “retransmitters” and thus entitled to the benefit of subsection 31(2) of the *Copyright Act*. The effect of subsection 31(2) is that a BDU does not infringe the section 21 copyright of a private local television station when it retransmits the station’s local signals, if the retransmission is lawful under the *Broadcasting Act* and complies with any regulations made pursuant to paragraph 31(3)(b) of the *Copyright Act*, and the signal is retransmitted simultaneously and without alteration except as required or permitted by law.

[37] Because subsection 31(2) contemplates a royalty only for the retransmission of distant signals (which by definition would not include the signal of a private local television station), a private local television station has no right under the *Copyright Act* to demand a royalty from a BDU for retransmitting its signals. On that basis, the BDUs argue that subsection 31(2) gives them a statutory right, akin to the user right under the fair dealing provision of the *Copyright Act* (see *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339, at paragraph 48), to retransmit the local signal of a private local television station without paying a royalty. I agree, provided the retransmission meets the conditions stated in subsection 31(2).

[38] However, the subsection 31(2) conditions are significant. In particular, paragraph 31(2)(b) requires any retransmission of a local signal to be lawful under the *Broadcasting Act*. That necessarily means that a BDU wishing to take advantage of the user right in subsection 31(2) of the *Copyright Act* must do so in compliance with the *Broadcasting Act*, any regulations made under the *Broadcasting Act*, and any conditions the Commission has attached to the retransmitter’s broadcasting licence.

[39] Paragraph 31(2)(b) of the *Copyright Act* marks an intersection of the two statutory schemes – one implementing Canada’s broadcasting policy and the other implementing Canada’s copyright policy. In paragraph 31(2)(b) of the *Copyright Act*, Parliament has permitted the Commission to limit the transmission rights under subsection 31(2) by imposing any regulatory or licensing condition consistent with the Commission’s statutory mandate as stated in the *Broadcasting Act*.

[40] Put another way, by making the BDUs’ statutory retransmission rights in subsection 31(2) of the *Copyright Act* subject to paragraph 31(2)(b), Parliament has ranked the objectives of Canada’s broadcasting policy ahead of those statutory retransmission rights. I see nothing in the *Copyright Act* that would justify a reversal

of that ranking if the Commission determines that the objectives of Canada's broadcasting policy require the imposition of a regulation or licensing condition that would permit a private local television station to demand cash or other consideration from a BDU for the right to retransmit its signals.

[41] For substantially the same reasons, I conclude that it is open to the Commission to adopt a regulation or a licensing condition that would oblige a BDU to pay money to a private local television station for the right to retransmit its signals, provided the Commission determines that the imposition of such an obligation is required to meet the objectives of Canada's broadcasting policy as stated in subsection 3(1) of the *Broadcasting Act*.

[42] In my view, it is irrelevant that such an obligation might be characterized as an obligation to pay a royalty. Even now, the Commission requires BDUs to compensate private local television stations in respect of the retransmission of their signals, and it is not suggested that those requirements are not properly imposed. Some of the required compensation is not monetary (mandatory carriage, preferential channel placement, and simultaneous distribution), but it nevertheless represents something of value passing from a BDU to a television station. Some of the required compensation is monetary (the contribution of 1.5% of gross revenues to the local programming improvement fund and potentially (starting in August of 2011), contractual consideration for any retransmission of a local television signal outside of that station's local market). It seems to me that the proposed value for signal regime is different only in degree, not in kind, substance or function.

[43] The BDUs present a further argument based on the lengthy and complex history of various proposals made and rejected to amend the *Copyright Act* to grant television stations a statutory right to a royalty or similar retransmission fee. The argument is that this history should be understood to have resulted in a deliberate legislative policy adopted by Parliament that would be defeated by the proposed value for signal regime. I do not accept this argument.

[44] It may well be that Parliament has determined for any number of reasons relating to Canada's copyright policy that the *Copyright Act* should not be amended to provide private local television stations with a right to a royalty for the retransmission of local signals. However, it does not follow that the same determination necessarily indicates any intention on the part of Parliament to preclude the Commission from adopting the proposed value for signal regime in the interests of Canada's broadcasting policy. Indeed, the possibility that the Commission might adopt a value for signal regime has been under consideration for some time, but the record discloses no hint that Parliament or the Government of Canada would consider such a regime to be an improper or undesirable intrusion into copyright policy.

[45] Nor am I persuaded that there is merit to the suggestion of the BDUs that the proposed value for signal regime would undermine Canada's stated position in relation to recent proceedings of the 2001 World Intellectual Property Organization ("WIPO") Standing Committee on Copyright and Related Rights. Certainly Canada has taken no such position before the Commission or in this reference. Indeed, Canada has chosen not to participate in this reference at all.

[46] Finally, I note that the BDUs rely on past statements of the Commission (in 1993, 1999, 2001 and 2003) to the effect that the matter of compensation for local retransmission rights should be a matter of copyright policy, not broadcasting policy. I place no weight on those statements, particularly since the Commission

has brought this reference to have the scope of its statutory authority determined as a matter of law.

[47] I conclude that nothing in the *Copyright Act* or its legislative history precludes the Commission from adopting the proposed value for signal regime.

- **Section 31 – Retransmission**

[Dissenting] The Value For Signal regime conflicts with Parliament’s clear statement in paragraph 31(2)(d) of the *Copyright Act* that royalties must be paid only for the retransmission of distant signals and not for the retransmission of local signals.

*Canadian Radio-television and Telecommunications Commission's Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168 (Re)*, 2011 FCA 64, (F.C.A.; 2011-02-28) Nadon J. [dissident] [Leave to appeal to the Supreme Court of Canada granted on 2011-09-29]

[49] I have had the benefit of reading the Reasons of my colleague Sharlow J.A., but I must respectfully disagree with her disposition of this matter. In my opinion, the value for signal regime (the “VFS regime”) proposed in Broadcasting Order CRTC 2010-168 (the “Order”) is *ultra vires* the powers of the Canadian Radio-television and Telecommunications Commission (the “CRTC”). I so conclude because the VFS regime conflicts with Parliament’s clear statement in paragraph 31(2)(d) of the *Copyright Act* that royalties must be paid only for the retransmission of distant signals and not for the retransmission of local signals.

- **Section 32.1 – No infringement Statutory obligations]**

It is not an infringement of copyright for a person to disclose a record pursuant to the *Access for Information Act*.

*Toronto (City) (Re)*, 2011 CanLII 43646 (Ont Information and Privacy Commissioner; 2011-06-30)

Simply put, the fact that the information contained in the records may be subject to copyright, while it may suggest some measure of ownership, it does not, in and of itself, provide a basis to deny access to the information under the provisions of the *Act*, or oust its application.

## IV Remedies

- **Section 34(1) – Copyright Remedies**

Where copyright has been infringed, the owner of the copyright is entitled to all remedies by way of injunction, damages, accounts, delivery up and otherwise (which

may include destruction, and declaration of validity, ownership and infringement) that are or may be conferred by law for the infringement of a right.

*Louis Vuitton Malletier S.A. v. Singga Enterprises (Canada) Inc.*, 22011 CarswellNat 2317 (F.C.-Summary Trial; 2011-06-27) Russell J.

[123] Given that the activities of at least the Altec Defendants are ongoing, and given the nature of and long standing activities of each of the Defendants involved, the Plaintiffs are entitled to declarations regarding validity and ownership, injunctive relief against the infringing activity and delivery up or destruction of infringing goods as appropriate remedies under section 53.2 of the *Trade-marks Act* and sections 34 and 38 of the *Copyright Act*. See *Louis Vuitton Malletier S.A. v. 486353 B.C. Ltd.*, 2008 BCSC 799, [2008] B.C.W.L.D. 5075 (B.C. S.C. [In Chambers]) at paragraphs 49-52; and *Microsoft Corp. v. 9038-3746 Quebec Inc.*, 2006 FC 1509, 57 C.P.R. (4th) 204 (F.C.) at paragraphs 100-102

- **Section 34(1) – Copyright Remedies**

Where plaintiffs show that they have a *bona fide* claim that unknown persons are infringing their copyright, they have a right to have the identity revealed for the purpose of bringing action.

*Voltage Pictures LLC v. Jane Doe*, 2011 FC 1024 (F.C.; 2011-08-29) Shore J.

[16] To obtain the name and address of a customer of an internet service provider, plaintiffs must prove that they have a *bona fide* claim against that customer and that they meet the criteria of Rule 238 of the *Federal Courts Rules* (*BMG*, above, at paras. 33 and 34 [*BMG Canada Inc. v. John Doe*, 2005 FCA 193]).

[17] Voltage Pictures LLC has a *bona fide* claim against the defendants: it has brought an action against them for having infringed its copyright when they copied and publicly distributed the film *Hurt Locker*.

- **Section 34(1) Copyright Remedies**

Declaratory and Injunctive reliefs are not incompatible

*Target Event Production Ltd v. Cheung*, 2011 FC 83 (F.C.-Costs; 2011-01-25) Simpson J.

[15] First, it established copyright in its Market Site Plan and showed that it was knowingly and repeatedly infringed. Without this infringement, the Defendants would not have been able to open their market as they did in June of 2008. In this regard, I refer to my Reasons for Judgment and Judgment of January 11, 2010 (the Reasons) at paragraphs 45 to 49, 98, 111, 112 and 231. Target's success in proving this claim led to both declaratory and injunctive relief.

- **Section 34(1) – Copyright Remedies [Injunction]**

Where the plagiarized parts cannot be divided from the other parts, the injunction will issue for the whole.

*Formation et gestion Pro-Santé M.R. Inc. v. Sampietro* 2011 QCCS 4266 (Que. Sup. Ct.; 2011-08-10) Grenier J.

[77] La preuve d'un droit clair et apparent a été établie. Comme il est impossible de fractionner ce qui est plagié de ce qui ne l'est pas, l'injonction doit être émise pour interdire la publication et distribution intégrales des documents P-7, P-7 a) et P-7 b).

- **Section 34(1) – Copyright Remedies [Injunction]**

For an injunction to issue, the plaintiff would have to show that there is a probability of future damage or that the defendant is likely to continue the infringement. However the past conduct of a party may be a good indication of the probability of repetition of future infringements.

*Century 21 Canada Limited Partnership v. Rogers Communications Inc* 2011 BCSC 1196 (B.C. S.C.; 2011-09-02) Punnett J.

[372] In situations where damages are an adequate remedy, injunctions will be inappropriate to restrain actionable wrongs: *London & Blackwall Railway Co. v. Cross* (1886), 31 Ch. D. 354 at 369. In the same manner, injunctions should not be granted in situations where the plaintiff can be fully compensated by an award of damages or where the wrongdoing has ceased and there is no likelihood of its recurring: *Proctor v. Bayley*, (1889) 42 Ch. D. 390.

[373] However, where the defendant wrongfully interferes with the claimant's rights as an owner of property, and intends to continue that interference, the claimant is *prima facie* entitled to an injunction: *Hilton v. British Columbia (Ministry of Transportation and Highways)*, [1986] B.C.J. No. 1077 at para. 18 (S.C.) citing *Pride of Derby and Derbyshire Angling Association v. British Celanese Ltd*, [1953] Ch. 149 at 181; *Canadian Pacific Limited v. Paul et. al.*, (1983), 2 D.L.R. (4th) 22 at 40, (N.B.C.A.).

[374] An injunction may also be necessary in circumstances where the breach of contract cannot be fairly compensated through a monetary award. A defendant cannot buy the privilege of infringing the claimant's rights.

[375] In my view, the plaintiff is entitled to injunctive relief given the difficulty of assessing damages, Zoocasa's past conduct and their apparent view that with the consent of Century 21 brokers they can access the Century 21 Website in violation of the Terms of Use.

- **Section 34(1) – Copyright Remedies [Injunction]**

An Anton Piller order is used to preserve evidence on the basis that the defendant would hide or destroy relevant evidence if notified of the action As put in *Celanese Canada Inc. v. Murray Demolition Corp.*, 2006 SCC 36 (S.C.C.; 2006-07-27) Binnie J., at paragraph 35, the only justification for such an extraordinary remedy is that the plaintiff has a strong *prima facie* case and can demonstrate that on the facts, absent



such an order, there is a real possibility relevant evidence will be destroyed or otherwise made to disappear.

*Velsoft Training Materials Inc. v. Global Courseware Inc.*, 2011 NSSC 274 (N.S. S.C.; 2011-07-06) Anton Piller Quashed

[58] Accordingly, I am not satisfied that the plaintiffs have established a real possibility that the defendants will destroy evidence in the absence of an *Anton Piller* order.

- **Section 34(1) – Civil remedies [Injunction]**

The non respect of an order of the court is sanctioned by contempt proceedings. “In so far as the individual defendants are concerned, where a company is found in contempt, aiding and abetting officers may be in contempt”

*Setanta Sports Canada Limited v. Gentile Enterprises Inc. (Aceti Pizzeria & Pasta)*, 2011 FC 99 (F.C.-Contempt; 2011-01-27) Rennie J.

[Penalty of \$25,000.00 against each defendant corporation, and a \$10,000.00 fine for the individual defendants, plus solicitor-client costs.]

[12] I am satisfied, beyond a reasonable doubt, on the basis of the oral testimony and photographs received in evidence that the Defendants have breached the injunction Order of Barnes J. in an open and flagrant manner, and that the purported transfer of ownership to a new numbered company was effected to thwart enforcement of that Order.

[13] Although the evidence required to prove contempt is equivalent to a criminal case, and proof must be beyond a reasonable doubt, *mens rea* is not an element that must be proven. It is not necessary to show that the defendant is intentionally contumacious though contumacious conduct may be a mitigating factor when it comes to penalty.

[14] In so far as the individual defendants are concerned, where a company is found in contempt, aiding and abetting officers may be in contempt: *Telus Mobility v Telecommunications Workers Union*, 2002 FCT 656, [2002] FCJ No 872.

[15] The Court is satisfied, beyond a reasonable doubt, that the Defendants did, subsequent to the January 27, 2009 Order of this Court, display, in clear violation of the terms of that Order, Setanta programming.

- **Section 34(1) – Copyright Remedies [Damages]**

An infringer is liable for all loss actually sustained by the copyright owner that is the natural and direct consequence of the unlawful acts of the infringement. Difficulty in assessing damages or profits does not relieve the court from the duty of assessing them and doing the best it can.

*Louis Vuitton Malletier S.A. v. Singga Enterprises (Canada) Inc.*, 22011 CarswellNat 2317 (F.C.-Summary Trial; 2011-06-27) Russell J.

[125] In relation to damages, a defendant is liable for all loss actually sustained by a plaintiff that is the natural and direct consequence of the unlawful acts of the defendant, including any loss of trade actually suffered by the plaintiff, either directly from the acts complained of or properly attributable thereto, that constitute an injury to the plaintiff's reputation, business, goodwill or trade. The court may apply ordinary business knowledge and common sense, and is entitled to consider that there cannot be deceptive trading without inflicting some measure of damage on the goodwill. See *Ragdoll Productions (UK) Ltd. v. Jane Doe*, 2002 FCT 918, 21 C.P.R. (4th) 213 (Fed. T.D.) at paragraph 40.

[126] Difficulty in assessing damages or profits does not relieve the court from the duty of assessing them and doing the best it can. The court is entitled to draw inferences from the actions of the parties and the probable results that they would have. Once a plaintiff has proven infringement, if damages or profits cannot be estimated with exactitude, the best reasonable estimate must be made without being limited to nominal damages. See *Ragdoll Productions (UK) Ltd.*, above, at paragraphs 40-45; *Louis Vuitton Malletier S.A. v. Yang*, 2007 FC 1179, 62 C.P.R. (4th) 362 (F.C.) at paragraph 28; and *Louis Vuitton Malletier S.A. v. 486353 B.C. Ltd.*, 2008 BCSC 799, [2008] B.C.W.L.D. 5075 (B.C. S.C. [In Chambers]) at paragraphs 54-55.

[132] The Federal Court and British Columbia Supreme Court have both recognized the need to allow for a higher calculation of damages in situations of recidivist counterfeiting activities over a period of time. Therefore, where there is evidence of more than a single attendance at the location in question, and it can be shown that a defendant engaged in the complained of activities over a period of time, the Courts in Canada have allowed that the "nominal damages" *Anton Piller* award needs to be calculated on a "per instance of infringement" or, where the evidence is available, "per inventory turnover". See *Louis Vuitton Malletier S.A. v. Yang*, 2007 FC 1179, 62 C.P.R. (4th) 362 (F.C.) at paragraph 43; and *Louis Vuitton Malletier S.A. v. 486353 B.C. Ltd.*, 2008 BCSC 799, [2008] B.C.W.L.D. 5075 (B.C. S.C. [In Chambers]) at paragraphs 59-60 and 65-67.

- **Section 34(1) – Copyright Remedies [Damages]**

In circumstances involving counterfeit activities by a defendant in which the intellectual property rights of multiple plaintiffs' have been infringed, each plaintiff is entitled to damages.

*Louis Vuitton Malletier S.A. v. Singga Enterprises (Canada) Inc.*, 22011 CarswellNat 2317 (F.C.-Summary Trial; 2011-06-27) Russell J.

[134] Additionally, Canadian courts have held that in circumstances involving counterfeit activities by a defendant in which the intellectual property rights of multiple plaintiffs' have been infringed, each plaintiff is entitled to damages, as a defendant would be liable for damages to each plaintiff if each plaintiff enforced its rights individually. There is no reason to limit damage awards merely because multiple plaintiffs advanced their claims in one action. Applying such damages to each plaintiff is available in the case of a joint action brought by a trade-mark owner and its licensee/distributor, to reflect damages suffered by both the trade-mark owner and the licensee/distributor. See *Oakley Inc. v. Jane Doe* (2000), 193 F.T.R. 42, 8 C.P.R. (4th) 506 (Fed. T.D.) at paragraphs 12-13; *Louis Vuitton Malletier S.A. v. Yang*, 2007 FC 1179, 62 C.P.R. (4th) 362 (F.C.) at paragraph 43;

and *Louis Vuitton Malletier S.A. v. 486353 B.C. Ltd.*, 2008 BCSC 799, [2008] B.C.W.L.D. 5075 (B.C. S.C. [In Chambers]) at paragraphs 67 and 72.

- **Section 34(1) – Copyright Remedies [Punitive]**

Damages are to compensate the copyright owner for his loss and punitive damages shall be awarded when a defendant continue its acts of infringement.

*Louis Vuitton Malletier S.A. v. Singga Enterprises (Canada) Inc.*, 2011 CarswellNat 2317 (F.C.-Summary Trial; 2011-06-27) Russell J.

[179] A substantial monetary award against each of the Defendants is required to adequately compensate the Plaintiffs for past activities and in order to prevent the Defendants' activities from continuing in the future. Given the egregious nature of their activities, the normal trade-mark and copyright profit or damages assessments would not be sufficient, and punitive and exemplary damages should be awarded. This is particularly true with the Altec Defendants, who have blatantly continued their activities notwithstanding commencement of this proceeding, and have ignored the process of this Court in doing so.

- **Section 34(1) – Copyright Remedies [Punitive]**

A malicious and planned intent to monopolize the labor of others will be taken into account in awarding punitive damages.

*Formation et gestion Pro-Santé M.R. Inc. v. Sampietro* 2011 QCCS 4266 (Que. Sup. Ct.; 2011-08-10) Grenier J.

[104] La preuve a démontré que l'atteinte était intentionnelle. Rien d'autre n'explique la démarche de la défenderesse que le désir de s'accaparer l'œuvre de la demanderesse à des fins mercantiles et dans le but évident de s'éviter l'effort intellectuel que demande la compilation d'un cours de formation, surtout lorsqu'on n'a aucune expérience appropriée dans le domaine de la dentisterie.

[105] À l'automne 2003, de façon tout à fait fortuite, la défenderesse éprouve un engouement pour la chose dentaire. Elle s'inscrit au cours de formation de Pro-Santé. Elle ne démontre aucun intérêt particulier pour ses cours et accuse retards et absences. Après avoir reçu la documentation convoitée, elle rentre chez elle et dit au défendeur : pourquoi ne pas donner un cours de secrétariat dentaire !

[106] La proximité dans les faits est telle, qu'on ne peut conclure qu'à une intention malicieuse de s'accaparer le labeur d'autrui. Rien ici n'est accidentel. Tout est planifié. L'école des défendeurs était en pleine croissance et ces derniers se spécialisent dans le domaine de la santé (préposé aux bénéficiaires, assistance dentaire, assistance en pharmacie, etc.).

- **Section 34(1) – Copyright Remedies [Punitive]**

Punitive damages are not available under the Copyright Act if the proceedings are taken in the Province of Québec. [Indeed, in the Province of Quebec punitive damages are not available unless there is a specific provision allowing them. However this decision appears to have been rendered without knowledge of *Construction Denis Desjardins inc. v. Jeanson*, 2010 CarswellQue 6536 (Que. C.A.-Merits 2010-07-07) where the Quebec Court of Appeal, at paragraph 47, confirmed that punitive damages were available in the Province of Québec for copyright infringement as an encroachment of section 6 of the *Charter of human rights and freedoms*, RSQ, c C-12 which guarantees to every person the right to the peaceful enjoyment and free disposition of his property nor of *Robinson v Films Cinar Inc.* 2011 QCCA 1361 (Que.CA; 2011-07-20), at paragraphs 242 et sq.

*Liette Couture Arts graphiques inc. v. Services immobiliers Versailles DB inc.*, 2011 QCCQ 14165 (Que. Ct.- Small Claims; 2011-11-15) Richard J.

[21] Selon la preuve présentée, l'entente intervenue entre les parties ne vise que la conception et le montage d'un site internet au montant de 800 \$, en sus des taxes applicables. Ceci étant, la réclamation de Liette Couture quant aux maquettes pour la papeterie et les cartes d'affaires ne peut être accueillie.

[22] Quant à la conception du site internet de Versailles, Liette Couture réclame la somme de 2 260 \$, correspondant au prix réellement chargé à d'autres clients. Avec respect, cette position est insoutenable en droit, puisque la preuve établit un accord de volonté portant uniquement sur la somme de 800 \$ à cet égard.

[23] Quant à la réclamation de 3 000 \$ « à titre de dommages exemplaires », mieux connus sous le nom de « dommages-intérêts punitifs », elle ne peut être accueillie pour les motifs suivants.

[24] En droit québécois, l'attribution de dommages-intérêts punitifs ou exemplaires ne peut exister à moins qu'une loi le prévoit de façon spécifique, tel qu'il appert de l'article 1621 C.c.Q.: [...]

[25] En l'espèce, le Tribunal ne retrouve aucune loi qui permet à Liette Couture de se voir attribuer des dommages-intérêts punitifs ou exemplaires.

- **Section 34(1) – Copyright Remedies [Punitive]**

"Where the awarding of punitive damages is provided for by law, the amount of such damages may not exceed what is sufficient to fulfil their preventive purpose.

"Punitive damages are assessed in the light of all the appropriate circumstances, in particular the gravity of the debtor's fault, his patrimonial situation, the extent of the reparation for which he is already liable to the creditor and, where such is the case, the fact that the payment of the damages is wholly or partly assumed by a third person. ": Article 1621 of the *Quebec Civil Code*.

*Latour v. 6921086 Canada inc. (Édikom)*, 2011 QCCQ 14817 (Que. Ct.-Small Claims; 2011-11-09) Dupuis J.

[36] Le Tribunal est d'avis qu'on ne retrouve pas ici la "*conduite malveillante et répréhensible, qui déroge aux normes usuelles de la bonne conduite*", dans la

conduite du président d'ÉDIKOM. Certes, il pourrait s'agir de négligence, peut-être même d'une certaine insouciance, mais rien qui ne justifie l'octroi de dommages punitifs. Latour devait faire la preuve non seulement des revenus de la défenderesse et autres éléments permettant au Tribunal d'octroyer des dommages exemplaires [Fn 8 Art. 1621 C.c.Q.: Lorsque la loi prévoit l'attribution de dommages-intérêts punitifs, ceux-ci ne peuvent excéder, en valeur, ce qui est suffisant pour assurer leur fonction préventive. Ils s'apprécient en tenant compte de toutes les circonstances appropriées, notamment de la gravité de la faute du débiteur, de sa situation patrimoniale ou de l'étendue de la réparation à laquelle il est déjà tenu envers le créancier, ainsi que, le cas échéant, du fait que la prise en charge du paiement réparateur est, en tout ou en partie, assumée par un tiers.] mais elle devait également faire la preuve de sa mauvaise foi, ou celle de son représentant, preuve qui n'a pas été faite.

- **Section 34(3) – Copyright Remedies [Punitive]**

Because punitive damages are to be individualized, defendants cannot be jointly liable.

*Robinson v Films Cinar Inc.* 2011 QCCA 1361 (Que. C.A.; 2011-07-20)

[232] Cette disposition exige que l'attribution de dommages punitifs soit prévue par la loi. Ici, la LDA ne contenait pas, à l'époque où les intimés ont intenté leur recours, une telle disposition. Celle-ci est apparue en 1997 [Fn 51 Il s'agit de l'article 38.1, paragr. 7, LDA.]. La question est cependant théorique puisque, la violation ayant été continue, les intimés pouvaient modifier leurs procédures, dès 1997, pour réclamer des dommages punitifs. De toute façon, la Cour a décidé, dans un arrêt récent, dont les motifs ont été écrits par la juge Bich [*Construction Denis Desjardins inc. c. Jeanson*, 2010 QCCA 1287, paras 46-47], que l'atteinte intentionnelle au droit d'auteur était une atteinte au droit du titulaire à la jouissance de l'un de ses biens et qu'elle constituait une violation des articles 6 et 49 de la *Charte des droits et libertés de la personne* : [...]

[235] [...] L'individualisation des dommages punitifs préconisée dans *Solomon* [*Solomon c. Québec (Procureur général)* 2008 QCCA 1832], selon l'état de la situation patrimoniale de chaque contrevenant, a le mérite d'éviter de niveler l'indemnité, vers le haut ou vers le bas, en fonction du patrimoine du plus riche ou de celui qui l'est moins. Elle a aussi l'avantage de « punir » chaque contrevenant pour les actes qu'il a posés, en le condamnant à une somme déterminée sur mesure pour lui. En conséquence, la condamnation à des dommages punitifs ne sera pas solidaire.

[236] Avant d'examiner la question du quantum des dommages punitifs accordés, rappelons les règles fondamentales applicables. Elles ont été énoncées et expliquées par la Cour suprême dans l'arrêt *Whiten c. Pilot Insurance Co.* [Fn 57 2002 CSC 18]. Cet arrêt, d'un intérêt certain, a cependant une portée limitée en droit québécois. Il ne remplace pas les critères de l'article 1621 C.c.Q., mais il aide à en préciser les balises d'évaluation [Fn 58 Jean-Louis Baudouin et Patrice Deslauriers, *La responsabilité civile*, 7<sup>e</sup> éd., Cowansville, Éditions Yvon Blais, 2003, n<sup>o</sup> 380, p.401.]. Les dommages punitifs sont l'exception. Ils sont justifiés dans le cas d'une conduite malveillante et répréhensible, qui déroge aux normes usuelles de la bonne conduite. Ils sont accordés dans le cas où les actes répréhensibles resteraient impunis ou lorsque les autres sanctions ne permettraient pas de réaliser les objectifs de châtement, de dissuasion et de

dénonciation. À cet égard, la Cour suprême rappelle que les dommages punitifs n'ont pas pour but d'indemniser le demandeur, mais bien de punir le défendeur, de le dissuader de recommencer et d'exprimer la réprobation de l'ensemble de la communauté [Fn 59 Voir aussi *De Montigny c. Brassard (Succession)*, 2010 CSC 51].

[237] En ce qui concerne le quantum des dommages punitifs, la Cour suprême préconise une règle de proportionnalité. Cela signifie que les dommages punitifs doivent être proportionnés à différents facteurs comme le caractère répréhensible de la conduite du défendeur, le préjudice causé au demandeur, sa vulnérabilité, les bénéfices tirés par le défendeur et les autres dommages auxquels ce dernier a été condamné.

- **Section 34(3) – Costs**

The award of costs is a matter of judicial discretion and unless the conduct a party is reprehensible, scandalous or outrageous or obstructive, no costs on a solicitor-client basis should be awarded.

*1429539 Ontario Limited v. Café Mirage Inc.*, 2011 FC 1290 (F.C.; 2011-11-09)  
Mandamin J.

[166] In my view, the actions of the Defendants do not constitute a basis for punitive damages. The Defendants' conduct was planned and deliberate but did not involve concealment, obstruction of court proceedings, or profit not compensable by damages. Its attempt to exploit the Symposium Café Group's concept was more in the nature of commercial competition overreaching lawful bounds.

[169] Costs are within the discretion of the Court: *Federal Courts Rules*, SOR/98-106, r 400(1). The non-exhaustive factors that may be considered in awarding costs are delineated in rule 400(3), including "any other matter that [the Court] considers relevant". An award of solicitor-and-client costs is exceptional. The Supreme Court of Canada has stated that solicitor-and-client costs should generally be awarded only when a party has displayed reprehensible, scandalous or outrageous conduct: *Hamilton v Open Window Bakery Ltd.*, 2004 SCC 9, [2004] 1 S.C.R. 303 at para 26.

[170] Here, the Defendants at worst can be said to have tried to exploit what they saw as a business opportunity without due regard for the Plaintiff's intellectual property. While that conduct offended and distressed the Plaintiff, it cannot be said to be reprehensible, scandalous or outrageous. Nor did the Defendants obstruct the litigation to any degree more than what would be expected in defending in an action.

- **Section 34(3) – Costs**

The costs of all parties in a proceeding for copyright infringement are in the discretion of the court [which is not very different from the rule in civil matters] and in adjudicating on those costs, the court may consider numerous factors, including the adequacy of damages and the conduct of the parties.



*Target Event Production Ltd v. Cheung*, 2011 FC 83 (F.C.-Costs; 2011-01-25) Simpson J.

[39] The Federal Court of Appeal has ordered party and party costs. In setting a lump sum, I am mindful of the normal rule that Tariff B, Column III governs party and party costs. For the reasons given above, I have reached the following conclusions:

- The damage figure of \$15,000.00 does not represent the value of the litigation. This means that a figure below column III is not appropriate.
- The Plaintiff was untruthful about a material aspect of his claim and the damages claimed were unreasonably inflated so a figure based on or above Column V is not appropriate.

- **Section 34(5) – Practice and Procedure**

An action or application for copyright infringement should follow The procedural rules of the jurisdiction in which an action for copyright infringement is instituted should be followed.

*Flow Films v. Global Wealth Trade Corporation*, 2011 ONSC 1185 (OntSupCt; 2011-02-15) Lauwerts J.

[14] In relation to copyright infringement, the plaintiffs rely on a number of provisions in the *Copyright Act* but have not mentioned them in the Statement of Claim nor how they factually relate to the claim. This is improper as noted above.

- **Section 34(5) – Practice and Procedure**

When i) the reproduction of the infringing work is done in one province ii) by a defendant domiciled in the same province, iii) who ship the infringing goods from that province, iv) pursuant to a contract made in the same province, there is a real cause of action in that province and the courts of that province will be competent to hear an action for copyright infringement, v) especially when the damages to the plaintiff were sustained in that province!

*Layette Minimôme inc. c. Jarrar*, 2011 QCCS 1743 (Que. Sup. Ct.; 2011-04-11) Larouche J.

[45] En l'espèce, la confection des œuvres artistiques et des échantillons a été faite au Canada par une compagnie canadienne ayant son siège social à Montréal (Québec). La transmission des échantillons a été faite à partir de Montréal aux requérants, résidents canadiens, le tout en conformité à un contrat liant les parties, contrat établi au Québec. Le lien réel et important est ainsi donc respecté. Cette Cour est donc compétente pour rendre un jugement dans le présent dossier.

[46] On sait aussi que les dommages subis par la demanderesse/intimée, l'ont été au Québec puisque cette dernière y possède son siège social. Ainsi, le lien réel et important avec le Canada est indéniable.

- **Section 34.1 – Presumptions respecting copyright and ownership**

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When a defendant puts in issue the existence of copyright or the title of the plaintiff thereto, copyright and ownership are presumed and the defendant will bear the onus to rebut those presumptions.

*1429539 Ontario Limited v. Café Mirage Inc.*, 2011 FC 1290 (F.C.; 2011-11-09) Mandamin J.

[115] In addition, section 34.1 of the *Copyright Act* provides that in any proceeding for infringement of copyright, in which the defendant puts in issue the existence of the copyright or the Plaintiff's title to the copyright, then copyright shall be presumed, unless the contrary is proved, to subsist in the work in any proceedings for infringement of copyright. The Defendants have put the Symposium Café Group's copyright at issue as well as control over that copyright. I consider the Defendants' denials as engaging s. 34 of the *Copyright Act*. Accordingly, copyright is presumed and the Defendants must prove the contrary. They have not. I need not go further into the question of whether menu food descriptions can be copyrighted and preserved for the lifetime of an author plus fifty years.

- **Section 34.1 Presumptions respecting copyright and ownership**

The burden of proving that the work is not an original work belongs to the defendants.

*Formation et gestion Pro-Santé M.R. Inc. v. Sampietro* 2011 QCCS 4266 (Que. Sup. Ct.; 2011-08-10) Grenier J.

[20] Le fardeau de prouver que l'œuvre n'est pas une œuvre originale appartient aux défendeurs (art. 33)[[should have been s.34(1)]. L'enregistrement établit une présomption *juris tantum* (art. 34.1a).

[35] Le certificat d'enregistrement établit que le droit d'auteur subsiste dans l'œuvre dont son titulaire est propriétaire. La partie contestante doit donc renverser cette présomption légale [*Éditions Hurtubise H M H Ltée c. Cégep André Laurendeau*, [1989] R.J.Q. 1003, par. 50].

- **Section 35 – Liability for infringement**

There is a clear distinction between compensatory damages to which the copyright owner is entitled and the profits made by the person who has infringed this right.

*Robinson v Films Cinar Inc.* 2011 QCCA 1361 (Que. C.A.; 2011-07-20)

[159] Comme on peut le constater [in section 35], le législateur établit au premier paragraphe de l'article une nette distinction entre les dommages-intérêts compensatoires auxquels a droit le titulaire du droit d'auteur et les profits réalisés par la personne qui a violé ce droit.

- **Section 35 – Liability for infringement**

The court may order the infringer to pay a share of the profits he made but not to repay the profits made by the all infringers.

*Robinson v Films Cinar Inc.* 2011 QCCA 1361 (Que. C.A.; 2011-07-20)

[181] Les appelants soutiennent aussi que le juge a erré en prononçant une condamnation solidaire en ce qui concerne le remboursement des profits. En s'appuyant sur le texte du paragraphe 35(1) *LDA*, ils plaident qu'un contrefacteur ne peut être condamné au-delà des profits qu'il a lui-même réalisés.

[182] La Cour est d'accord avec cette interprétation.

[183] La fin du paragraphe 35(1) *LDA* déjà cité indique, d'une façon claire, que le tribunal peut condamner le contrefacteur à payer une proportion des profits qu'il a réalisés et non pas le condamner à rembourser les profits réalisés par l'ensemble des contrefacteurs.

- **Section 35 – Liability for infringement**

In order to ascertain the part of the profits that the infringer has made and that should be paid to the copyright owner, the court shall discriminate between the infringed work and other distinct matter for the copyright owner is only entitled to the portion of the profits of the infringer that a causal connection with his infringed work.

*Robinson v Films Cinar Inc.* 2011 QCCA 1361 (Que. C.A.; 2011-07-20)

[196] Le juge de première instance a donc commis une erreur en concluant au caractère indissociable de l'œuvre musicale et de l'œuvre littéraire de *Robinson Sucroë*. Il aurait dû se demander quels profits auraient réalisé les appelants selon que leur œuvre musicale ait accompagné ou non une œuvre non contrefaite. Il est acquis en effet que l'auteur a droit à la remise de la portion des profits réalisés par le contrefacteur qui a un lien de causalité avec son œuvre.

- **Section 35 – Liability for infringement**

The court has a very large discretion in determining the damages and/or the portion of profits to which a copyright owner is entitled.

*Formation et gestion Pro-Santé M.R. Inc. v. Sampietro* 2011 QCCS 4266 (Que. Sup. Ct.; 2011-08-10) Grenier J.

[81] Comme on le sait, la *Loi sur le droit d'auteur* est *sui generis* et son interprétation est indépendante du *Code civil* du Québec. En matière de dommages, elle est large et libérale. Le titulaire du droit d'auteur n'a pas à prouver qu'il a subi des dommages réels. Toutefois, l'octroi des dommages doit être fondé sur le sens commun. Le Tribunal jouit d'une grande discrétion [*Setym International inc. c. Belout*, REJB 2001-27041 (C.S.)].

[94] Ne pouvant distinguer entre les frais fixes et variables, le Tribunal se verra contraint d'opter pour le bon sens.

- **Section 36 – Protection of separate rights**

The holder of an interest in the content of a subscription programming signal or network feed, by virtue of copyright ownership or a licence granted by a copyright owner has a right of action recover damages from the person who engaged in the conduct, or obtain such other remedy, by way of injunction, accounting or otherwise, as the court considers appropriate. The Federal Court of Canada is a court of competent jurisdiction for the right of civil action provided by subsection 18(1) of the *Radiocommunication Act* (R.S.C. 1985, c. R-2).

*Dish Network L.L.C. v. Rex\** 2011 CarswellBC 2124 (B.C. S.C.; 2011-08-15) Walker J.

[24] Section 18(1) of the *Radiocommunication Act* also confers a cause of action on holders of an interest in the content of the subscription signal or network feed and to holders of a license issued by the Canadian Radio-Television and Telecommunications Commission ("CRTC") to carry on broadcasting under the *Broadcasting Act*, S.C. 1991, c. 11. Those persons may, as DIRECTV, Dish, and Bell have done in this litigation, sue to recover damages suffered as a result of conduct contrary to s. 9(1)(c) from persons who engaged in that conduct, or to obtain other remedies (e.g., injunctive relief or an accounting).

- **Section 36 – Protection of separate rights**

A licence is not exclusive unless its says so and a non-exclusive licensee cannot sue for copyright infringement

*Century 21 Canada Limited Partnership v. Rogers Communiations Inc* 2011 BCSC 1196 (B.C. S.C.; 2011-09-02) Punnet J..

[174] An assignment is a transfer of a right such that the assignee is the owner of the legal interest in the right and the assignor is left without any control over the right transferred, except for moral rights. Under a licence, the licensee is given permission to do certain acts which might otherwise constitute infringement of the licensor's rights and does not involve any change of ownership in the copyright: *Marquis v. DKL Technologies Inc.* (1989), 24 C.I.P.R. 289 (C.S. Que.); *Fox Canadian Law of Copyright*, at 380.

[177] The right to assign a right of action arises from s. 13 of the *Copyright Act* ss. 6 and 7 which I will repeat for convenience: [...]

[178]The right is procedural and grants to the licensee the authority to enforce the rights of the copyright holder to the extent they are granted under the terms of the assignment or exclusive licence.

[179]The licence in this instance is not exclusive as it fails to state such. It simply grants a right to Century 21 to use the Works. Century 21 does not possess a proprietary interest or the grant of an interest in the infringed works. As a result, Century 21 can only enforce licencing, not copyright, infringement to the limited extent granted to it by the licence. In this case, that is the right to use the Works. However, as the licence that Century 21 holds is not exclusive, the assignment of the right of action to enforce copyright infringement is moot.

- **Section 36 – Protection of separate rights**

The assignment of a joint interest in the copyright, including the right to enforce, will not per se be considered as champertous.

*Setanta Sports Canada Limited c. 840341 Alberta Ltd. (Brew'in Taphouse)*, 2011 CF 709 (F.C.; 2011-06-16) O'Reilly J.

[3] According to the affidavit of Mr. Rod Keary, an officer and director of Setanta, in 2008, Setanta entered into an agreement with Zuffa LLC, the owner of UFC, and Canadastar Boxing Inc., a distributor of pay-per-view [PPV] events, which assigned copyright in UFC broadcasts to Setanta and charged Setanta with enforcing the others' intellectual property interests in Canada. The assignment states that Setanta is a joint holder of Zuffa's and Canadastar copyright, "so as to enable [Setanta] to enforce and to take legal proceedings . . . to enforce any right or remedy available to [Zuffa and Canadastar] in relation to their proprietary rights in the broadcasts of UFC PPV matches in Canada."

[4] The defendants make two arguments in respect of this contract. First, they suggest that the agreement amounts to a champertous arrangement. They submit that in this proceeding Setanta's only role is to litigate on behalf of Zuffa and Canadastar, and divide any damages with those other companies. It has no interest of its own in the proceeding. As such, the defendants maintain that Setanta is really engaged in improper intermeddling in a law suit with no legitimate interest in it, and taking a share of the proceeds.

[5] In my view, the assignment grants Setanta a joint interest in Zuffa's and Canadastar's intellectual property, which enables it to enforce that interest for their joint benefit. It is not merely an assignment of the right of enforcement, although it includes that right. Accordingly, it is not an improper, champertous arrangement.

- **Section 37 – Concurrent jurisdiction of Federal Court**

The purpose of section 37 of the Copyright Act is merely the jurisdiction *ratione materiae* of the courts and does not exclude arbitration as a valid forum.

*Rhodes v. Cie Amway Canada\** 2011 CarswellNat 4872, 2011 FC 1341 (F.C.; 2011-11-23) Boivin J.

[61] The Court observes, as noted by the defendant, that in the case of *Desputeaux* [*Desputeaux v. Éditions Chouette* (1987) inc. 2003 SCC 17], the Supreme Court of Canada held that the purpose of section 37 of the Copyright Act was merely the jurisdiction *ratione materiae* of the courts. Analogous to the Competition Act, section 37 of the Copyright Act did not specifically confer jurisdiction upon the Federal Court or provincial superior courts to the exclusion of arbitration. On this basis, and notwithstanding the fact that the Copyright Act is of public order, the Supreme Court of Canada accordingly decided to enforce the arbitration agreement at issue in *Desputeaux*.

[63] The Court therefore agrees with the defendant that, as in the case of *Desputeaux*, above, section 36(3) of the *Competition Act* does not confer exclusive

jurisdiction to the Federal Court, but merely identifies the Federal Court as a court of competent jurisdiction to hear section 36 of the *Competition Act* claims. Put in other words, section 36 merely provides for the *ratione materiae* jurisdiction of the Federal Court and in no way excludes arbitration as a valid forum. The plaintiff's argument in this regard accordingly fails.

- **Section 37 – Concurrent jurisdiction of Federal Court**

The purpose of section 37 of the Copyright Act is merely the jurisdiction *ratione materiae* of the courts over a matter and does not exclude other courts or arbitrations panels.

*Seidel v. Telus Communications Inc.*\* 2011 CarswellBC 553 (S.C.C.; 2011-03-18) Lebel and Deschamps JJ (dissenting)

[156] This Court disagreed [referring to *Desputeaux v. Éditions Chouette* (1987) inc. 2003 SCC 17], concluding that the purpose of s. 37 was merely to designate a forum:

The purpose of enacting a provision like s. 37 of the *Copyright Act* is to define the jurisdiction *ratione materiae* of the courts over a matter. It is not intended to exclude arbitration. It merely identifies the court which, within the judicial system, will have jurisdiction to hear cases involving a particular subject matter. It cannot be assumed to exclude arbitral jurisdiction unless it expressly so states. Arbitral jurisdiction is now part of the justice system of Quebec, and subject to the arrangements made by Quebec pursuant to its constitutional powers. [para. 42]

- **Section 37(1) – Concurrent jurisdiction of Federal Court**

The Copyright Board is not provincially regulated and the Ontario Human Rights Tribunal has no jurisdiction over it.

*Segura Mosquera v. University of Toronto*\* 2011 HRT0 464 (Ont. Human Rights Trib. ; 2011-03-07) N. Overend

[On application under s. 34 of the *Human Rights Code*, R.S.O.1990, c. H.19, alleging discrimination in goods, services and facilities on the basis of race, colour, ancestry, place of origin, citizenship, ethnic origin, creed, sex, sexual orientation, marital status and age]

[18] Prior to serving an application on the named respondents, the Tribunal will only dismiss it as being under federal jurisdiction where it is plain and obvious that the matters do not fall within provincial jurisdiction. In this case, both the Copyright Board of Canada and the Canada Health Act Division, if they are proper entities, are part of the federal government. As part of the federal government, it is plain and obvious that these potential respondents are not provincially regulated. Accordingly, the Tribunal has no jurisdiction to proceed with the allegations against these two entities.

- **Section 37(1) – Concurrent jurisdiction of Federal Court**



In the judicial review of the decision of an arbitrator, the reasonableness standard applies and deference is appropriate.

*Société des auteurs de radio, télévision et cinéma (SARTEC) c. Marcheterre\**, 2011 QCCS 3562 (Que. Sup. Ct. ; 2011-07-07) Paquette J.

[40] Par ailleurs, la norme de contrôle applicable aux décisions de l'Arbitre s'apparente à celle applicable aux décisions d'un arbitre de griefs en matière de relations de travail. En effet, la dynamique dans laquelle s'inscrit ici la procédure de grief s'apparente à celle des conventions collectives de travail. L'Entente collective établit les règles du jeu entre les parties qui, d'une part, rendent les services et celles qui, d'autre part, les retiennent. La procédure de grief prévue pour les cas où un désaccord survient est calquée sur celle applicable en matière de relations de travail. Bien que la *Loi sur le statut des artistes* ne comporte pas de clause privative étanche, elle prévoit tout de même que la sentence arbitrale est sans appel [Fn27 *Loi sur le statut des artistes*, préc., note 1, art. 35.1. L'article 13.29 de l'Entente collective est au même effet.]. Il s'agit d'un domaine où le législateur et les parties ont mis en place un régime administratif distinct et particulier.

[41] En conséquence, et bien que le respect de règles de justice naturelle soit en cause ici, le Tribunal conclut que la norme de la raisonabilité s'applique. La déférence s'impose

- **Section 38(1) – Recovery of possession of copies, plates**

An authorised use of the goods is not conversion.

*Can-Auto Inspections Inc. v. Vascor Ltd.* 2010 BCSC 1895 (BCSC-Bifurcation; 2010-12-16) 2011 CarswellBC 3197 (B.C.S.C; 2011-12-01) Myers J.

[128] Conversion involves a wrongful interference with the goods of another, such as taking, using or destroying these goods in a manner inconsistent with the owner's right of possession. An authorised use of the goods is not conversion. 373409 *Alberta Ltd. (Receiver of) v. Bank of Montreal*, 2002 SCC 81 at paras. 8-9.

[129] Since I have concluded that the use of iSpect was authorised for all uses to which it was put by Vascor, both before and after November 2001, there can be no claim for conversion. It is therefore unnecessary for me to deal with the issue as to whether an unauthorised use of software can amount to a conversion, as opposed to a breach of copyright, or breach of a licence agreement.

- **Section 38.1(1) – Statutory damages**

When electing for statutory damages under section 38 of the Act, a plaintiff waives its right to recover damages and profit under section 35 of the Act. Statutory damages will exclude pre-judgment interest since a claim for statutory damages is only crystallized when the proceedings are instituted.

*Society of Composer, Authors and Music Publishers of Canada v. IIC Enterprises Ltd. (Cheetah's Nightclub)*, 2011 FC 1088 (F.C.; 2011-09-21) Lafrenière, Prothontary

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[25] According to SOCAN, the cause of action for each year's licence fees arose on February 1 of each year because the provisional licence fees for each year were due on January 31 of that year, but not paid. While that may be, statutory damages are awarded "in lieu of any other remedy of a monetary nature" provided by the *Copyright Act*. By electing statutory damages, SOCAN has essentially waived its right to pursue its claim for provisional licence fees, and any interest that may have accrued. In short, SOCAN can't have its cake and eat it too.

[26] In any event, I am not prepared to grant pre-judgment interest before the issuance of the Statement of Claim for the following reasons. First, SOCAN has failed to establish any contractual or statutory right to charge interest on outstanding licence fees. Second, there has been substantial delay by SOCAN in bringing the present action to recover license fees dating back to 2006. Third, the claim for statutory damages was first made and only crystallized when the proceeding was instituted.

- **Section 38.1(1) – Statutory damages**

An award of statutory damages is in lieu of any other remedy of a monetary nature (however, it does not affect the right of the copyright owner to have punitive damages).

*Society of Composers, Authors and Music Publishers of Canada v. IIC Enterprises Ltd. (Cheetah's Nightclub)*, 2011 FC 1399 (F.C.; 2011-12091) Lemieux J.

[27] However, Parliament was clear in section 36(1) of the Federal Courts Act in making that requirement subject to "Except as otherwise provided in any other Act of Parliament."

[28] The *Copyright Act*, in terms of remedies, provides for a number of options including ordinary damages, statutory damages, account of profits, putative damages and interest. Section 38 of that Act has a number of provisions. One deals specifically with collectives such as SOCAN. It speaks to the award of statutory damages over a certain range geared to unpaid applicable royalties "in lieu of any other remedy of a monetary nature provided by this Act."

[29] The Prothonotary reasoned that by electing for statutory damages SOCAN has elected not to pursue its claim for unpaid provincial license fees and, as a necessary consequence, pre-judgment interest on that sum. In my view, the Prothonotary's reasoning is compelling and fits with the purpose for which the election was granted by Parliament to collective societies. See *Telewizja Polsat S.A. v Radiopol Inc.*, 2006 FC 584, [2007] 1 FCR 444.

- **Section 38.1(3) – Special cases [Statutory damages]**

When there is more than one work incorporated in a single medium, has discretion to award a lesser amount than the minima per work provides in subsections 38.1(1) and 39.1(2).

*Century 21 Canada Limited Partnership v. Rogers Communications Inc* 2011 BCSC 1196 (B.C. S.C.; 2011-09-02) Punnnett J

[421] There are a number of factors that may be relevant in considering the applicability of 38.1(3). In this case the length of the infringement was relatively short, there was no evidence that a high award is required to deter others. The defendant stopped the activity and I have not made a finding of bad faith on the part of Zoocasa. In addition, the nature of the infringement, the fact that the copyright serves a commercial purpose, and that there was, in the eyes of the defendants, a benefit to the plaintiff, supports a lesser award. Of most importance is that the actual damages claimed are not substantial. [...]

[426] Statutory damages provided for in s. 38.1, are set at \$500.00 per infringement, this would result in a statutory damage award of \$64,000. However, given the circumstances of this case including Zoocasa's apparent unintentional infringement such an award is grossly out of proportion to the infringements. I therefore order damages in the sum of \$250 per infringement resulting in a total statutory damage award of \$32,000.

- **Section 38.1(5) – Factors to consider [Statutory damages]**

In exercising its discretion in the award of statutory damages, the court shall consider the underlying purpose of statutory damages and evaluate, amongst others, the factors enumerated at subsection 38(5) of the Act.

*Society of Composer, Authors and Music Publishers of Canada v. IIC Enterprises Ltd. (Cheetah's Nightclub)*, 2011 FC 1088 (F.C.; 2011-09-21) Lafrenière, Prothontary

[19] SOCAN has identified a number of factors that would justify granting an award of statutory damages in excess of the prescribed minimum. First, the Defendant has displayed a complete disregard for the terms of its licence with the Plaintiff over an extended period of time. Second, the Defendant has brazenly continued to advertise and publicly perform SOCAN's musical works at the nightclub. Third, the Defendant has repeatedly ignored SOCAN's letters, calls and visits, and evaded service of documents. Fourth, the Defendant has continued its infringing activities after notice of the present action was given. I find the Defendant's conduct clearly demonstrates bad faith both before and during the proceedings.

[20] Although the Defendant's conduct is deserving of sanction, the Court is required to relate the facts of the particular case to the underlying purpose of statutory damages. It must ask itself how the award of statutory damages would further one or other of the objectives of the law and what is the lowest award that would serve the purpose. Any higher award would not be justified.

[21] Taking into account the factors listed above, and the absence of any mitigating circumstances, I conclude that an award of statutory damages of six times the outstanding licence fees is appropriate in this case. The substantial award should serve as sufficient deterrent to the Defendant, as well as to others, who seek to profit from the Plaintiff's musical works with impunity. It will be a reminder to all licensees of the potentially serious consequences of non-compliance with the annual reporting requirements and non-payment of the applicable licence fees under Tariff 3C. Damages available to copyright holders under the *Copyright Act* serve an important function and should not be treated as just another cost of doing business.

- **Section 38.1(5) – Factors to consider [Statutory damages]**

The need for deterrence in awarding statutory damages is important.

*Louis Vuitton Malletier S.A. v. Singga Enterprises (Canada) Inc.*, 22011 CarswellNat 2317 (F.C.-Summary Trial; 2011-06-27) Russell J.

[155] Statutory damages for copyright infringement are awarded on a scale from \$500 to \$20,000 per work infringed. In exercising its discretion, the Court is required to consider all relevant factors, including:

- a. Good or bad faith;
- b. The conduct of the parties before and during the proceedings; and
- c. The need to deter other infringements of the copyrights in question.

See *Copyright Act*, R.S.C. 1985, c. C-42, s. 38.1; *Microsoft Corp. v. 9038-3746 Quebec Inc.*, 2006 FC 1509, 57 C.P.R. (4th) 204 (F.C.) at paragraph 106; *Microsoft Corp. v. 9038-3746 Quebec Inc.*, 2006 FC 1509, 57 C.P.R. (4th) 204 (F.C.) at paragraph 19; and *Louis Vuitton Malletier S.A. v. 486353 B.C. Ltd.*, 2008 BCSC 799, [2008] B.C.W.L.D. 5075 (B.C. S.C. [In Chambers]) at paragraph 74.

[156] Where minimum statutory damages are grossly out of proportion with the probable profits of the infringer, in the sense that they are much lower than the probable profits, the Court should award a higher amount. See *Microsoft Corp. v. 9038-3746 Quebec Inc.*, 2006 FC 1509, 57 C.P.R. (4th) 204 (F.C.) at paragraphs 110-112.

[157] It should be awarded on the high end of the scale where the conduct of the defendants, both before and during the proceedings, is dismissive of law and order and demonstrates a necessity for deterring future infringements. See *Microsoft Corp. v. 9038-3746 Quebec Inc.*, 2006 FC 1509, 57 C.P.R. (4th) 204 (F.C.) at paragraph 113; and *Louis Vuitton Malletier S.A. v. Yang*, 2007 FC 1179, 62 C.P.R. (4th) 362 (F.C.) at paragraphs 21-25.

[158] The need for deterrence in awarding statutory damages is important. There is a need for deterrence where, as in the present case, a defendant ignores the Court process while continuing the counterfeit activities complained of. See *Telewizja Polsat S.A. v. Radiopol Inc.*, 2006 FC 584, 52 C.P.R. (4th) 445 (F.C.) at paragraph 50; and *Louis Vuitton Malletier S.A. v. Yang*, 2007 FC 1179, 62 C.P.R. (4th) 362 (F.C.) at paragraph 25.

[159] The activities of the Defendants, and each of them, have been wilful and knowing, and entirely in bad faith. These Defendants have treated with disrespect the process of this Court in this proceeding, and at least the Altec Defendants continue to engage in blatant recidivist counterfeit activities. Given their ongoing actions, there is a clear need to deter the activities of the Defendants from continuing, and their actions are entirely dismissive of law and order.

- **Section 38.1(5) – Factors to consider [Statutory damages]**

In ascertaining the award of statutory damages, the court shall consider the factors enumerated in subsection 38.1(5) amongst which the circumstances related to the good or bad faith of the infringer.

*Setanta Sports Canada Limited c. 840341 Alberta Ltd. (Brew'in Taphouse)*, 2011 CF 709 (F.C.; 2011-06-16) O'Reilly J.

[19] Setanta seeks statutory damages under s 38.1 of the *Copyright Act*, RSC 1985, c C-42. It asks for an award of \$40,000. Taking account of the factors set out in s 38.1(5), namely, good or bad faith, the conduct of the parties, and the need for deterrence, I am satisfied that an award of \$20,000.00 is appropriate. I note the following circumstances:

- failure of the defendants to respond to written communication from Setanta;
- failure of the defendants to comply with an order of this Court;
- failure of the defendants to submit evidence to support its pleadings;
- at least two clear violations of Setanta's copyright during the relevant time frame; and
- the need for a significant damage award in order to deter future infringing activities.

- **Section 38.2 – Maximum amount that may be recovered [Statutory damages]**

Subsection 38.1(6) provides for the circumstances where no statutory damages may be awarded against an educational institution. The amount of statutory damages that may be recovered for certain unauthorized reprographic reproduction by educational institutions and the like applies only if statutory damages are claimed; otherwise, there is no cap.

*Reprographic Reproduction, 2011-2013, Re 2011 CarswellNat 3708* (Cop. Bd.; 2011-09-23)

[32] [...] Neither does section 38.2 of the *Copyright Act* necessarily cap damages payable for digital copies to a copyright owner whose works are not in the repertoire of Access [a collective society]. An institution probably must avail itself of the option provided for in section 29 of the tariff since the cap pertains only to "copying of that general nature and extent" [Fn 14 *Copyright Act*, s. 38.2(3)] as covered in the tariff.

- **Section 41 – Limitation period for civil remedies**

The three year limitation period applies to infringement of copyright as well as of moral rights.

*Fabrikant v. Swany* 2011 CarswellQue 2903 (Que. Sup. Ct.; 2011-03-25) [motion to dismiss the appeal granted 2011 QCCA 2205 (Que. C.A.; 2011-11-28)]

[97] The main financial claim is based on copyright infringement. On that issue, the Court can do no better than to reproduce an extract of Madam Justice St-Pierre's judgment of October 13, 2004 on a Motion to Quash this action [2004 CanLII 43458]. Discussing prescription, she referred to sections of the *Copyright Act*

[47] Until 1988, section 41 pertained only to the limitation period for remedies for infringement of copyright. After 1988, this section also applies to remedies for infringement of moral rights. The new text provides, without

distinction, that “[a]n action shall not be commenced after the expiration of three years immediately following the infringement.”

[48] This amendment to section 41, however, cannot have the effect of the loss of rights that were not subject until then to a time limit.

[49] The alleged infringements in this case occurred prior to the 1988 amendments, at a time when the Act did not provide for any limitation period for entitlement to copyright.

[98] I agree with these findings. The claim in damages for copyright infringement is prescribed and the action must be dismissed with respect to that claim.

- **Section 42(1) – Offences and punishment**

The time separating the making of the infringing copies and putting them up for sale becomes unimportant because the specific intent to commit the offence under section 42(1)(a) is present as soon as an infringing copy is made.

*R. v Fiset* 2011 QCCQ 1344 (Que. Ct. –Crim. Div.;2011-02-21) Bédard J.

[82] In fact, since Parliament's intention is to prohibit use for commercial purposes in violation of copyright, and not the mere making of infringing copies of works, the limitation period will start to run only when intent is indicated, namely when the copies are put up for sale. The time separating the making of the infringing copies and putting them up for sale becomes unimportant because the specific intent to commit the offence under section 42(1)(a) is present as soon as an infringing copy is made. The two essential elements coexist and coincide. They are concurrent. Contrary to the case under consideration, an infringer makes infringing copies for sale. This is a stage deliberately completed in pursuing an unlawful objective.

[83] The Court agrees that proving intent to sell while making the infringing copies may be very difficult. This, however, is Parliament's choice. Moreover, it did not create presumption to ease the burden of proof for the prosecution, as in the case of the offences under sections 348 and 349 Cr. C. [79] Le Tribunal ne peut être d'accord avec cette prétention. Accepter la proposition de la poursuite signifierait rendre illégal un comportement initial qui n'est pas interdit. Ce serait imputer rétroactivement une intention criminelle à l'accusée pour un geste irréprochable. Ces énoncés vont à l'encontre de tous les principes de droit criminel et pénal.

- **Section 42(1) – Offences and punishment**

Both the infringer who makes a copy with the intent to sell and the simple seller of infringing copies are liable to prosecution and sanction.

*R. v Fiset* 2011 QCCQ 1344 (Que. Ct.-Crim. Div.;2011-02-21) Bédard J.

TRANSLATION [84] Contrary to what the prosecution suggests, failure to be able to prove intent does not make the infringer immune from any prosecution under the Act. In fact, every person who knowingly sells or by way of trade offers for sale an infringing copy can be prosecuted under section 42(1)(b) of the Act. There is no need to prove the author of the infringing copy. In addition, the seller is liable to the



same sanction [Fn 35 Section 42(1) *in fine* of the *Copyright Act*, *supra* note 6] as under section 42(1)(a).

[85] Thus, both the infringer who makes a copy with the intent to sell and the simple seller of infringing copies are liable to prosecution and sanction. In both cases, Parliament's objective has been achieved. The use for trade purposes is controlled and the originality of the artistic work is protected.

[86] When the accused forms the intent to sell after the infringing copy has been made, the charge should be made under section 42(1)(b). The facts entered in evidence before the Court regarding count 4 alone correspond more to the situation covered by section 42(1)(b). The prosecution has opted for different charges by specifying the period of offence. It must live with its choices and prove the essential elements of the offences beyond a reasonable doubt.

[87] On each count, there is no evidence to show that the accused made for sale infringing copies with the specific intent to sell at the time she reproduced the artistic work. No evidence shows that the accused had the intent to do what is prohibited by the Act in section 42(1)(a), namely to make for sale infringing copies. And the accused is entitled to the benefit of a reasonable doubt on this essential element of the offence. Lastly, there is nothing to prove that she made an infringing copy of an artistic work between March 9 and 26, 2008.

- **Section 42(1) – Offences and punishment**

The Act prohibits the reproduction of artistic works in order to sell them and there is no divergence between the English and French text of paragraph 42(1)(a) of the Act.

*R. v. Fiset*, 2011 QCCQ 1344 (Que. Ct.- Crim. Div.; 2011-02-21) Bédard J.

TRANSLATION [45] To begin with, we must respond to the argument regarding interpretation submitted by counsel for the defendant, who asks the Court to give preference to the English text of section 42(1)(a) of the Act. In his opinion, the English version clearly indicates Parliament's intention of requiring the concurrence of the essential elements of the offence.

[46] For the prosecution, there is nothing to interpret. Neither the English nor the French versions of the text lend more support to the defence's position.

[47] The Supreme Court of Canada studied the issue of interpreting bilingual legislation in *Daoust*. [Fn 10 *R. c. Daoust*, 2004 CSC 6 (CanLII), [2004] 1 R.C.S. 217]. To interpret statutes, there must be a difference between the versions. The French text of section 42(1)(a) uses the expression "se livre, en vue de la vente" while the English version reads "makes for sale".

[48] The Act does not define these expressions. We must rely on the ordinary meaning of the words. Literally "makes for sale" is [TRANSLATION] "to make or manufacture in order to sell". [FN11 Larousse-Chambers, dictionnaire français-anglais 2005.] Admittedly, the French words used by Parliament are a poor or awkward translation of the English text. But the expression "se livrer" is used here in a figurative sense and means [TRANSLATION] "to effect, carry out, perform an activity". [Fn12 *Le nouveau Petit Robert de la langue française* 2007.]

[49] The Court finds that there is no inconsistency or divergence between the two versions. There is therefore no reason to apply the interpretative process suggested by Bastarache J. in *Daoust*. [Fn13 Précité note 10, paragraphes 26 et suivants.]. Indeed, there is no discordance between the two versions. Neither is likely to give rise to more than one interpretation. There is no ambiguity.

[50] Regardless of the version used, a litigant inevitably understands the purpose of the provision, namely, the Act prohibits the reproduction of artistic works in order to sell them. This is the common meaning that must be given to both the English and French versions.

- **Section 42(1) – Offences and punishment**

In using the word “knowingly”, subsection 42(1) provides for a *mens rea* offence; therefore the actual intent to commit the offence must be proven.

*R. v. Fiset*, 2011 QCCQ 1344 (Que. Ct.-Crim. Div.; 2011-02-21) Bédard J.

TRANSLATION [55] The wording of section 42(1) is not confusing with regard to the classification of the offence. By using the term "knowingly" ("*sciemment*" in the French version), Parliament clearly expressed its intention of creating a *mens rea* offence. [FN15 *R. c. Sault Ste-Marie* 1978 CanLII 11 (CSC), [1978] 2 R.C.S. 1299, juge Dickson, p. 1325 et p.1328 (classification des infractions confirmée récemment par le juge Lebel dans *Lévis (Ville de) c. Tétreault* 2006 CSC 12 (CanLII), [2006] 1 R.C.S. 420). Voir aussi G. Côté-Harper, A.D. Manganas et J. Turgeon, *Droit pénal canadien*, 3<sup>ème</sup> édition, Les éditions Yvon Blais Inc., 1989, p. 281.] This conclusion is in line with the majority of case law concerning section 42 of the Act. [Fn16 *Procureur général du Canada c. Habib* [2008] R.J.Q. 1172 (C.Q.), par. 30; *R. c. Biron*, [1992] N.B.J. no 746 (C.P. N.-B.) (QC/LN); *R. c. Laurier Office Mart*, [1995] O.J. no 2063 (C.J. Ont.) (QC/LN)].

[56] For the prosecution to prove this type of offence, it must show beyond a reasonable doubt the commission of the prohibited act and the perpetrator's guilty state of mind. It must prove the actual intent to commit the offence.

[57] The intent must be analyzed subjectively. The accused must be shown to have the intent to do what is prohibited by the Act. Furthermore, the accused is entitled to the benefit of a reasonable doubt concerning this essential element of the offence. Fn17 *Collection de droit 2008-2009*, volume 12, *Droit pénal, infraction, moyens de défense et peine*, M. le juge Alain Morand, p. 48 et p. 49.].

[58] Another expression informs us of the degree of intent required by Parliament. The words "makes for" in section 42(1)(a) of the Act indicates that it is a crime of specific intent.

- **Section 42(1) – Offences and punishment**

The *Copyright Act* does not prohibit the possession of an infringing copy of work or the copying of original copyrighted works; it is aimed to prevent the commercial marketing of infringing works.

*R. v. Fiset*, 2011 QCCQ 1344 (Que. Ct.-Crim. Div.; 2011-02-21) Bédard J.

TRANSLATION [60] In the case before us, the purpose or consequence sought is a sale. In fact, both section 42(1)(a) of the Act and the wording of the offence specify the unlawful objective, namely: "*makes for sale*" ("*se livrer en vue de la vente*") an infringing copy of an artistic work.

[61] In keeping with these principles, the Court is of the opinion that the evidence must show beyond a reasonable doubt that at the time the accused engaged in the copying of the works (*s'est livré à copier*), she had the intent to sell them. The reproduction is a deliberate stage in pursuing an unlawful objective, namely, the sale of an infringing copy of an artistic work.

[62] The *Copyright Act* does not prohibit the possession of an infringing copy of work or the copying of original copyrighted works. A reading of the relevant provisions reveals the objective of Parliament clearly. [Fn22 See Legal Provisions, par. 48, above]: It wishes to control the use of the artistic work. It wishes to prevent the commercial marketing thereof affecting prejudicially the owner of the copyright. Contrary to what the prosecution claims, section 27(2)(d) does not make a mere infringing copy a violation of the Act. What it prohibits is possession "for the purpose of doing anything referred to in paragraphs (a) to (c)", actions which all refer to the use, by way of trade, of the copyrighted work without the consent of the owner of the copyright.

[63] Since the issue of applying section 42(1)(a) of the Act has never been brought before the courts, we shall now try to understand its scope through an analogy with other provisions generating offences in the same category.

[64] As mentioned earlier, section 42(1)(a) creates an offence of specific intent. The expression "*makes for sale*" has the same effect as the words "*with intent to commit an indictable offence*" in sections 348(1)(a) and 349(1) of the *Criminal Code* (Cr. C.). Fn 23 L.R.C.1985, ch. C-46.]

- **Section 42 (1) – Offences and punishment**

The degree of criminal responsibility to be assumed by an offender is relatively high and exclusive, when the role of the offender in the commission of the offense is central and he was fully aware of the magnitude of his gesture.

*R. v. Gravel*, 2011 QCCQ 2517 (Que.Ct. – Crim. Div; 2011-03-24) Auger J.

3.2 Le principe de la proportionnalité des peines

[16] L'article 718.1 énonce le premier principe fondamental que la peine doit être "*proportionnelle à la gravité de l'infraction et au degré de responsabilité du délinquant*", soit la gravité objective et la gravité subjective.

[17] La gravité objective s'évalue par le libellé de l'article 42 de la *Loi sur le droit d'auteur* qui prévoit une peine maximale de 6 mois de détention ferme. Le ministère public a choisi de poursuivre l'accusé par voie de déclaration sommaire de culpabilité. Or, la peine est une amende maximale de 25,000\$ ou une détention maximale de six mois. La gravité objective tel que précisé dans l'affaire *Couillard* [Fn 1 *R. c. Michel Couillard*, 4 décembre 2007, 505-73-000318-068, Cour du Québec, Juge Anne-Marie Jacques.] se mesure par les objectifs de la *Loi sur le droit d'auteur*, car le petit commerçant qui vend selon la loi doit payer les

redevances aux distributeurs et aux artistes et faire un profit sur un prix de vente d'environ \$40. Or, la vente illégale pour trois fois moins constitue une concurrence déloyale. Comme l'affaire *Couillard*, l'accusé savait qu'il agissait malhonnêtement, mais c'était trop lucratif pour arrêter.

[18] La gravité subjective se mesure dans la façon dont le crime a été commis. Si l'on retourne au faits énoncés, monsieur Gravel se promenait avec les DVD pour la vente. Il sortait d'une taverne avec 120 DVD contrefaits. Au prix de vente, il y a de fortes chances que les acheteurs étaient bien au courant de la nature contrefaite des œuvres. La gravité subjective s'apprécie par les facteurs aggravants et atténuants découlant des circonstances du dossier.

[19] Quant au degré de responsabilité du délinquant, il est clair que le rôle de monsieur Gravel dans la commission de l'infraction est central et il avait pleinement connaissance de l'ampleur de son geste. Or, à ce titre, le degré de responsabilité pénale à être assumé est relativement élevé et exclusif.

- **Section 42(4) – Limitation period [Offences and punishment]**

Penal proceedings by way of summary conviction, are subject to a two year limitation.

*R. v Fiset* 2011 QCCQ 1344 (Que. Ct.-Crim. Div.;2011-02-21) Bédard J.

TRANSLATION [79] The Court cannot agree with this claim. Accepting the prosecution's argument would mean making unlawful initial conduct that is not proscribed. This would retroactively attribute criminal intent to the accused for an irreproachable act. These statements go against all the principles of criminal and penal law.

[80] Finally, the prosecution argues that backing the defence's position would be absurd as it would allow the infringer to avoid prosecution under section 42(1)(a) of the Act by waiting for the two-year limitation period to expire before selling the copies. According to the prosecution, Parliament could not have wanted to allow such a situation.

[81] Once again, with respect, the Court does not agree. Section 42(4) of the Act provides that proceedings may be instituted at any time within, but not later than, two years after the time when the offence was committed. In the situation described by the prosecution, the offence is committed when the infringer gives effect to her intent to sell.

Some other cases of interest but not directly dealing with copyright.

*R. v. Phillips*, 2011 ONSC 1881, (OntSC; 2011-03-25) Gordon J.

Comment: Contravention of rights under s. 7, 8, 9, 10(b) and 12 of the *Canadian Charter of Rights and Freedoms* may lead to the exclusion of the results of the searches.

*R. v. Phillips* 2011 ONSC 1892, (OntSC; 2011-03-25) Gordon J.

Comment: A stay of the charges could be requested based upon the infringement of the right to be tried within a reasonable time as guaranteed in s. 11(b) of the *Canadian Charter of Rights and Freedoms*.

*Esin (Collinson Convenience) (Re)\**, 2011 CanLII 10877, (Ont. Alcohol and Gaming Commission ; 2011-02-03)

Comment: The distribution of counterfeited DVDs would constitute a reasonable ground to believe that the Registrant will not act in accordance with the law, or with integrity, honesty, or in the public interest, hence the revocation of its permit as a gaming supplier.

*M & E Hermanos Inc (Village Mart) (Re)\** 2011 CanLII 31670 (Ont. Alcohol and Gaming Commission ; 2011-05-19)

Comment: Offering for sale pirated DVD movies infringing copies of works would constitute a reasonable ground to believe that the Registrant will not act in accordance with the law, or with integrity, honesty, or in the public interest, hence the revocation of its permit as a gaming supplier

## V Administration

### • Section 53 – Register to be evidence

The burden of proving that the work is not an original work belongs to the defendant. The registration establishes a rebuttable presumption and it is up to the defendant to rebut this legal presumption

*Formation et gestion Pro-Santé M.R. Inc. v. Sampietro* 2011 QCCS 4266 (Que. Sup. Ct.; 2011-08-10) Grenier J.

[20] Le fardeau de prouver que l'œuvre n'est pas une œuvre originale appartient aux défendeurs (art. 33). L'enregistrement établit une présomption *juris tantum* (art. 34.1a).

[35] Le certificat d'enregistrement établit que le droit d'auteur subsiste dans l'œuvre dont son titulaire est propriétaire. La partie contestante doit donc renverser cette présomption légale [*Éditions Hurtubise H M H Ltée c. Cégep André Laurendeau*, [1989] R.J.Q. 1003, par. 50].

### • Section 53 – Register to be evidence

Copyright can be assigned and the assignment recorded. A certificate of registration of this recordal will constitute evince of the facts refers to in the certificate.

*Harmony Consulting Ltd. v. G.A. Foss Transport Ltd.*, 2011 FC 340 (F.C.; 2011-03-18) Heneghan J.

[204] In the first place, I note that the *Copyright Act* recognizes that copyright can be assigned. The *Copyright Act* further provides, at sections 57 and 58, that an assignment can be registered. Subsection 53(2.1) provides that a certificate of registration of a copyright is “evidence that the right recorded in the certificate has been assigned and that the assignee registered is the owner of that right”.

- **Section 55 – Copyright in works**

The requirements of information to be supplied for the purpose of registration of copyright could be applied in a manner which will be in accordance with privacy concerns.

*Suttie v Canada (Attorney General)* 2011 FC 119 (F.C.; 2011-02-02) O’Reilly J.

[2] At the time she registered the book, Ms. Suttie was unaware that the information she had provided would be publicly available on CIPO’s website. She became concerned about her privacy, particularly because she had given her home address on her registration application. In addition, she realized that she had omitted her son’s name from the application.

[7] In some cases, an author’s home address could serve as a means of identifying him or her. Therefore, to require an author to provide a home address could interfere with his or her right to remain anonymous. In my view, the requirement in the Act to provide an address does not oblige an author to identify where he or she lives – it simply requires the person to provide an address for purposes of correspondence. This interpretation is borne out by the *Copyright Regulations*, which require an author to provide a complete mailing address, including street name and number, and the postal code (SOR/97-457, s 4(1)).

- **Section 57(4) – Rectification of the Register by the Court**

**The Federal Court may order the rectification of the register to replace the address of an author and add a co-author.**

*Suttie v Canada (Attorney General)* 2011 FC 119 (F.C.; 2011-02-02) O’Reilly J.

[8] Given Ms. Suttie’s privacy concerns, I am satisfied that the register contains an “error or defect” (s 57(4)(c)) and will issue an order amending the register to substitute Ms. Suttie’s counsel’s address for her home address.

IV. Order

[9] The Court orders that Ms. Suttie’s copyright registration (No. 1065339) be amended to add the name of her son, Denver Suttie, as a joint author, and by removing the existing address and replacing it with the address of her solicitors. There is no order as to costs.



## VI Miscellaneous

- **Section 64(3) – Exception [Non infringement re certain designs]**

Subsection 64(3) provides for exceptions to the non infringing use of certain designs.

*Layette Minimôme inc. c. Jarrar*, 2011 QCCS 1743 (Que. Sup. Ct.; 2011-04-11)  
Larouche J.

[54] La demanderesse ajoute qu'ainsi, les défendeurs ont tort de prétendre unilatéralement que la demanderesse ne peut plus se prévaloir de son droit d'auteur puisqu'elle a permis la production des vêtements copiés à plus de cinquante (50) exemplaires. En effet, les défendeurs n'ont pas tenu compte de l'exception légale prévue à l'article 64(3) de la *Loi sur le droit d'auteur* sur laquelle la demanderesse a basé son recours et dont elle entend prouver l'application lors de l'enquête et audition.

## VII Copyright Board and Collective Administration of Copyright

- **Section 66.51 – Interim decisions**

An interim tariff should reflect as much as possible the most recent agreements between the parties. An interim tariff does not definitely settle issues such as liability, what triggers it or for how long it is triggered.

*Reprographic Reproduction 2011-2013, Re 2011 CarswellNat 2429* (Cop. Bd. : 2011-06-28) [Additional reasons to *Reprographic Reproduction 2011-2013, Interim Statement of Royalties to be Collected by Access Copyright (Post-Secondary Educational Institutions) (Re)* (2011), 92 C.P.R. (4th) 434 (Cop. Bd.; 2010-12-23) and *Reprographic Reproduction 2011-2013, Re 2011 CarswellNat 2254*, 93 C.P.R. (4th) 429 (Cop. Bd. - Application to vary an Interim Tariff; 2011-04-07)]

[13] The solution to the ambiguity should be informed by the principle that the interim tariff should reflect as much as possible the most recent agreements between the parties. These agreements applied for a full academic year. Therefore, for the purposes of the interim tariff, both liability and the amount of royalties should be determined on the basis of the academic year. To dovetail this approach with the application period of the interim tariff probably requires providing that for the periods from January 1 to August 31, 2011 and from September 1 to December 31, 2013, royalties payable are only a corresponding fraction of what is otherwise payable for a full year. This can be addressed through proper wording.

[14] We will amend the interim tariff to reflect the principles set out in the preceding paragraph starting January 1, 2011. However, rather than dictating the wording of the required amendments, we prefer that the General Counsel of the Board and the parties attempt to agree on such wording. The General Counsel of the Board shall report back to us no later than on *Friday, August 5, 2011*. We will

remain seized of the matter until the wording of the required amendments is finalized.

[16] Some could argue that some institutions may be tempted to "game" the interim tariff, for example by making all copies they need for an academic year during the preceding Summer. We feel no need to address the issue now, but wish to make two comments. First, the interim tariff does not definitely settle issues such as liability, what triggers it or for how long it is triggered. Access put it well and succinctly by stating that "interpreting the Interim Tariff today as establishing an academic year-based royalty scheme is no guarantee that the Board will ultimately certify the final tariff based on an academic year." [Fn 14 Access Copyright Letter to the Board, June 10, 2011 at p. 3.]. The interim tariff *cannot* settle these issues once and for all: this would be unfair to the parties (who have yet to file their evidence and argument) and would illegally fetter the discretion of the panel that will be asked to set the final tariff. Second, attempts at "gaming" the interim tariff might be a relevant factor in setting a final tariff that is fair to both users and rights holders.

- **Section 66.51 – Interim decisions**

An interim tariff can be modified at any times.

*Access Copyright Interim Post-Secondary Educational Institution Tariff, 2011-2013*  
92 CPR (4<sup>th</sup>) 434 (Cop. Bd.; 2011-03-16)

[45] [...] users whose consumption patterns justify different rates remain free to secure, from Access or from others, transactional or other licences that will trump the tariff. The fact that the interim tariff can be modified at any time ensures that Access will display good faith in such negotiations. Any misconduct on its part would necessarily be reported to the Board, which would take it into account in any further consideration of this matter.

- **Section 66.51 – Interim decisions**

Absent any objection, the Board would most likely extend on an interim basis a certified tariff.

*Interim tariff of levies to be collected by CPCC in 2012 and 2013 on the sale of blank audio recording media in Canada* <http://www.cb-cda.gc.ca/decisions/2011/20112112.pdf> (Cop. Bd.; 2011-12-19)

On November 18, 2011, CPCC asked, pursuant to section 66.51 of the Copyright Act, that the Board extend for the years 2012 and 2013, on an interim basis, the application of the Private Copying Tariff, 2011 certified on December 18, 2010. Objectors were notified of the application; none opposed it. The Board grants the application. The interim tariff will remain in force, unless modified, from January 1, 2012 until the Board certifies the final tariff for 2012-2013.

- **Section 66.7(2) - Enforcement of decisions**

Any decision of the Board may be made an order of the Federal Court or of any superior court and be enforceable in the same manner as an order thereof

*Canada (Human Rights Commission) v. Warman\**, 2011 FCA 297 (F.C.A.; 2011-10-06) Dawson J.

[Discussing Section 57 of the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6 ]

[67] Other statutory provisions of the same kind can be found in the following federal statutes: *Broadcasting Act*, S.C. 1991, c. 11, s. 13, *Canada Oil and Gas Operations Act*, R.S.C. 1985, c. O-7, s. 13, *Canada Transportation Act*, S.C. 1996, c. 10 s. 33, *Copyright Act*, R.S.C., 1985, c. C-42, s. 66.7, *Employment Equity Act*, S.C. 1995, c. 44, s. 31, *National Energy Board Act*, R.S.C. 1985, c. N-7, s. 17, *Patent Act*, R.S.C. 1985, c. P-4 s. 99, *Public Service Labour Relations Act*, S.C. 2003, c. 22, s. 52, *Telecommunications Act*, S.C. 1993, c.38, s. 63. All of these provisions have a common thrust: the tribunal order is made an order of the Federal Court or of a provincial superior court by being filed in that court. The reference to the provincial superior courts does not make a material difference to the scheme. It simply provides the tribunal with the alternative of taking enforcement proceedings in the provincial superior court. For the purposes of this discussion, I will simply refer to the filing of a tribunal order in the Federal Court.

- **Section 67 – Public access to repertoire – Interim decisions**

SOCAN is a collective society under section 67 of the *Copyright Act*.

*Society of Composers, Authors and Music Publishers of Canada v. IIC Enterprises Ltd. (Cheetah's Nightclub)*, 2011 FC 1399 (FC; 2011-12091) Lemieux J.

[11] As is well known, SOCAN is a collective society under section 67 of the *Copyright Act*; it is authorized to grant licences for the public performance in Canada of musical works and to collect, pursuant to such licences, royalties or fees sanctioned by the Copyright Board.

- **67.1 – Filing of proposed tariffs**

A Tariff cannot impose royalties where none are payable under the Act. A Tariff may contain transitional provisions.

*Public Performance of Sound Recordings, Re* 2011 CarswellNat 2797 (Cop. Bd.; 2011-07-15)

[36] At the request of Re:Sound, the tariff expressly provides that it does not apply to any venue operated by a not-for-profit religious or not-for-profit educational institution, if the dancing is primarily made available to participants under the age of 19. Some of the activities mentioned may already be the subject of exceptions under the *Act*; others are not. The provision has the benefit of making clear that, in some cases, Re:Sound does not intend to collect royalties even though it may be entitled to do so. It does not impose royalties where none are payable under the *Act*, since a tariff cannot override the statute.

[38] Finally, the tariff contains transitional provisions made necessary because the tariff takes effect on January 1, 2008, while it is being certified much later. For the reasons set out in *CBC Radio, 2011* [Fn 9 *SOCAN-Re:Sound CBC Radio Tariff, 2006-2011* (8 July 2011) Copyright Board Decision at paras. 82 to 91.], we intend to follow this practice to all instances where a tariff is certified after it takes effect. A table setting out interest factors to be used on sums owed, derived using the previous month-end Bank Rate, is included in the Tariff. Interest is not compounded. The amount owed for a reporting period is the amount of the approved tariff multiplied by the factor set out for that period.

- **Section 68 – Board to consider proposed tariffs and objections**

Equality of treatment between broadcasters vis-à-vis collectives does not mean that the same formula should be used to calculate the royalties.

*Public Performance of Musical Works, Re 2011 CarswellNat 2658* (Cop. Bd.; 2011-07-08)

[61] [...] CBC does have a unique mandate. Having a unique mandate does not necessarily entitle CBC to be treated differently than commercial radio. The proposition that CBC should not be treated differently than commercial radio does not imply, however, that CBC should pay royalties using a formula based on what commercial radio pays. [...]

- **71 – Filing of proposed tariffs**

The transparent exercise of a clear right is not a sign of bad faith. And when a collective society administers rights on a non-exclusive basis and users are free to approach affiliates directly

*Reprographic Reproduction, 2011-2013, Re 2011 CarswellNat 3708* (Cop. Bd.; 2011-09-23)

[7] Access has acted and continues to act in good faith. The Board has already stated that the transparent exercise of a clear right is not a sign of bad faith. By conducting its business according to the interim tariff, Access is not showing bad faith. Access administers rights on a non-exclusive basis; users are free to approach affiliates directly. [Fn2 In turn, affiliates are free to deal with users, to decline issuing a licence or to ask them to deal with Access.] Access has informed its affiliates of the potential consequences of issuing transactional licences in the current context, [FN 3 See below, para. 19.] but has not tried to dictate their conduct, and could not do so. It has even informed them that they retain the option to licence institutions directly; according to the objectors' own evidence, many continue to do

- **71 – Filing of proposed tariffs**

A collective's refusal to deal with users outside of the tariff does not constitute misconduct warranting an intervention on the part of the Board

*Reprographic Reproduction, 2011-2013, Re 2011 CarswellNat 3708 (Cop. Bd.; 2011-09-23)*

[16] Third, we agree that once a tariff is in place, a collective should be entitled to rely on it. Arguably, when a collective opts for a tariff, it is in part to avoid the costs associated with transactional dealings. Such a course of conduct is rational and *prima facie* fair: see below, paragraph 25. Therefore, a collective's refusal to deal with users outside of the tariff does not constitute misconduct warranting an intervention on the part of the Board absent exceptional circumstances which have not been demonstrated in this instance.

- **71 – Filing of proposed tariffs**

A transactional licensing regime without reporting, monitoring and audit provisions is an invitation to copyright violation.

*Reprographic Reproduction, 2011-2013, Re 2011 CarswellNat 3708, (Cop. Bd.; 2011-09-23)*

[21] Sixth, we agree with Access that transactional licences inherently raise monitoring issues, especially in such a decentralized setting as the institutions. These issues are compounded with digital copying. Yet rather than suggesting reporting and monitoring mechanisms that might provide some comfort on compliance control, objectors propose the transactional licence be exempt from all of the provisions of the tariff, including those relating to reporting and monitoring.

[22] Reporting, monitoring and audit provisions are key to most licensing regimes: if rights holders are entitled to expect that users will seek licences without being prompted, [FN 10 *Access Copyright Interim Post-Secondary Educational Institution Tariff, 2011-2013* (March 16, 2011) Copyright Board Decision.[*Interim Tariff*], at paras. 40, 41.] they are also entitled to expect that users will either propose or accept mechanisms that allow the efficient monitoring of compliance with the licence. A transactional licensing regime without such provisions is an invitation to copyright violation and unthinkable. Yet objectors propose that they be taken at their word. Who would decide that permission is or not needed? How would that determination be made? How would one calculate the number of copies triggering royalties? Would each download be counted? What of multiple downloads by the same person? A digital transactional licence may well require giving the collective full access to teachers' course management systems: how can this be reconciled with the objectors' claims that existing reporting requirements already engage privacy issues? Based on the information available, in this market and for the time being, a digital transactional business model does not ensure that rights holders get paid for the uses of their works. [Fn 11 *Ibid.* at para. 36]

[23] Though the reporting difficulties associated with digital transactional copying in institutions may not be as formidable as Access paints them, they are nonetheless significant. Earlier in these proceedings, AUCC admitted that the value of a digital licence can be "undermined by onerous record keeping provisions that, *in a university setting, are impractical or impossible to meet.*" [Fn12 AUCC, January 21, 2011 letter at p. 5.] [our underlining]

- **71 – Certification**

Who should be informed of their rights to object to the certification of a tariff is for the Board to decide.

*Educational Rights 2012-2016 Re (Use of broadcast programs by educational institutions (2012-2016)), 2011 CarswellNat 5316 (Cop. Bd. ; 2011-12-23)*

[2] No one objected to the statement, which essentially is identical to the tariff certified by the Board for the years 2007-2011. The Board therefore certifies the 2012-2016 tariff as filed by ERCC.

Editorial comment. As provided by s.-s. 71(1), Educational Rights Collective of Canada (ERCC) filed on March 11, 2011, its statement of proposed royalties to be collected from educational institutions in Canada, for the reproduction and performance of works or other subject-matters communicated to the public by telecommunication for the years 2012 to 2016. As provided by s.-s. 72(1), the statement was published in the *Canada Gazette* on May 14, 2011. As stated in the decision, "Educational institutions or their representatives were informed of their right to object to it." [Prospective retransmitters were apparently not so informed except by the publication in the *Canada Gazette*.] As provided by s.-s. 72(1) objections were to be filed by July 15, 2011. Absent any objection, as provided by s.-s. 72(2), the Board consider the proposed tariff and 6 months thereafter certified, as provided by s.-s. 73(1) as is the proposed tariff and cause it to be, as provided by s.-s. 73(3), published in the December 24, 2011 issue of the *Canada Gazette*.

- **Section 71 – Filing of proposed tariffs.**

A repertoire is dynamic, making it impossible to provide a definitive list of what is on it;

*Reprographic Reproduction 2011-2013, Re 2011 CarswellNat 2254, 93 CPR (4th) 429 (Cop. Bd. -Application to vary an Interim Tariff; 2011-04-07) [Additional reasons at 2011 CarswellNat 2429 (Cop. Bd.; 2011-06-28)]*

[19] Dans l'ensemble, nous sommes d'accord avec Access. Il est impossible de tenir à jour une liste complète des oeuvres faisant partie du répertoire. En bout de piste, c'est toujours à l'utilisateur qu'il incombe de prendre les mesures qui s'imposent pour obtenir les autorisations nécessaires. Les outils mis à sa disposition pour faciliter sa prise de décisions ne devraient pas lier la société de gestion, sous réserve de ce qui suit.

- **Section 77(1) - Circumstances in which licence may be granted [Unlocatable copyright owners]**

For the reproduction and the communication to the public by the telecommunication of three images.



*Mitchinson (Wendy) for the reproduction and the communication to the public by the telecommunication of three images published in The Canadian Home Journal in a article entitled "The Media, Gendered, Fat and Other Problematic Bodies" [Application by] File: 2011-UO/TI-1; also available at <http://www.cb-cda.gc.ca/unlocatable-introuvables/licences/257-e.pdf> (Cop. Bd.; 2011-09-30)*

(1) The licence authorizes the reproduction in print and in any electronic format of three images published in *The Canadian Home Journal* in an article entitled "The Media, Gendered, Fat and Other Problematic Bodies". The Licence also authorises the communication to the public by telecommunication of the work as part of the book of the following work:

1. Illustration accompanying an article entitled "The Stenographer's Spread", *The Canadian Home Journal*, Vol. 46, No. 10, February 1950, p. 38.
2. A cartoon by Cy Olson, *The Canadian Home Journal*, Vol. 53, No. 6, October 1956, p. 89.
3. "Watch your Husband's Waistline", *The Canadian Home Journal*, Vol. 45, No. 4, August 1948, p. 42.

No more than 500 copies shall be reproduced.

This licence does not release the licensee from the obligation to obtain permission for any other use not covered by this licence.

- **Section 77(1) - Circumstances in which licence may be granted [Unlocatable copyright owners]**

For the mechanical reproduction and the communication to the public by telecommunication of a musical work.

*Taddo (Catherine) for the mechanical reproduction and the communication to the public by telecommunication of a musical work entitled "Men are Like Street Cars" by Louis Jordan or Charley Jordan [Application by], File 2011-UO-TI-13; also available at <http://www.cb-cda.gc.ca/unlocatable-introuvables/licences/256-e.pdf> (Cop. Bd; 2011-09-30)*

(1) The licence authorizes the mechanical reproduction of the musical work entitled "Men are like street Cars" by Louis Jordan or Charley Jordan, for up to six hundred (600) CDs. It also authorizes the reproduction and the communication to the public by telecommunication of the musical work for the purpose of digital sales (e.g., via iTunes, mp3 format, etc.).

The issuance of the licence does not release the applicant from the obligation to obtain permission for any other use not covered by this licence.

- **Section 77(1) - Circumstances in which licence may be granted [Unlocatable copyright owners]**

For the synchronization, reproduction and communication to the public by telecommunication of an excerpt of a musical work. [The question of moral right of an author to be associated with the promotion of a product was not discussed.]

*Nolin BBDO, for the synchronization, reproduction and communication to the public by telecommunication of an excerpt of a musical work entitled "Le temps est bon" written by Stéphane Venne and published by JFM Investments Inc. in 1972 [Application by], File 2011-UO/TI-24; also available at <http://www.cb-cda.gc.ca/unlocatable-introuvables/licences/255-f.pdf> (Cop. Bd.; 2011-09-26)*

1) La licence autorise la synchronisation, la reproduction et la communication au public par télécommunication d'un extrait de 30 secondes et de deux extraits de 15 secondes de l'œuvre musicale *Le temps est bon*, écrite par Stéphane Venne et publiée par JFM Investments Inc., pour les fins d'une campagne publicitaire diffusée à la télévision.

- **Section 77(1) - Circumstances in which licence may be granted [Unlocatable copyright owners]**

For the reproduction, synchronization and public performance of an excerpt of a musical recording.

*Productions Phi-Brassard (Jimmy) Inc., Quebec, for the reproduction, synchronization and public performance of an excerpt of a musical recording entitled "Seeburg Background Music Record BA-109A" in a short film, [Application by], File 2011-UO/TI-05; also available at <http://www.cb-cda.gc.ca/unlocatable-introuvables/licences/254-e.pdf> (Cop. Bd.; 2011-08-30)*

(1) The licence authorizes the synchronization of an excerpt of a musical recording entitled "Seeburg Background Music Record BA-109A" — total duration: 3 minutes and 28 seconds — in the 10-minute, 55-second short film entitled "Hope".

The licence also authorizes the reproduction of the excerpt in all forms of media (e.g., on DVD), its public performance or its communication to the public by telecommunication.

- **Section 77(1) - Circumstances in which licence may be granted [Unlocatable copyright owners]**

*Centre collégial de développement de matériel didactique (CCDMD) for the reproduction of a poster created by the artists group Kukryniksy [Application by], File 2010-UO/TI-20; also available at <http://www.cb-cda.gc.ca/unlocatable-introuvables/licences/253-e.pdf> (Cop. Bd.; 2011-08-30)*

1) La licence autorise la reproduction sur CD-ROM d'une affiche en format maximal de 20 cm par 25 cm (8" par 10"), créée par le groupe d'artistes Kukryniksy intitulée « Let's Annihilate the Kulak's Class », publié par *Moscow-Leningrad: Gosudarstvennoe izdatel'stvo* en 1930.

5) La délivrance de cette licence ne libère pas la titulaire de la licence de l'obligation d'obtenir une autorisation pour toute utilisation non visée par cette licence.

- **Section 77(1) - Circumstances in which licence may be granted [Unlocatable copyright owners]**

For the reproduction, synchronization and public performance of an extract of a television series.

*PCF Angle Mort Film Inc. for the reproduction, synchronization and public performance of an extract of a television series entitled "Maria del Barrio" Application by], File 2010-UO/TI-17; 2011 CarswellNat 829 (Cop.Bd.; 2011-02-21)*

(1) The licence authorizes the synchronization of an extract of a television series entitled "Maria del Barrio" — total duration: 10 seconds — The action taking place in the work can be described as follows: a female character lights a match while uttering the words "Prefiero la muerte" and proceeds to drop the match to the ground, whereupon the entire room bursts into flame — in the 90-minute film entitled "Angle Mort".

- **Section 77(1) - Circumstances in which licence may be granted [Unlocatable copyright owners]**

For the reproduction of a book.

*Canadian Coast Guard, Sydney, N.S., for the reproduction of "Chaudières marine, questions et réponses" as translated by W.D. Ewart from "Marine Boilers Questions and Answers" by G.T.H. Flanagan and published in 1984 by Stanford Maritime, London UK [Application by], File 2010-UO/TI-13; 2011 CarswellNat 805, also available at <http://www.cb-cda.gc.ca/unlocatable-introuvables/licences/251-e.pdf> (Cop. Bd.; 2011-02-05)*

(1) The licence authorizes the reproduction of "*Chaudières marine, questions et réponses*", as translated by W.D. Ewart from "*Marine Boilers Questions and Answers*" by G.T.H. Flanagan and published in 1984 by Stanford Maritime, London, UK.

No more than 500 copies of the work shall be reproduced.

The licence does not release the licensee from the obligation to obtain permission for any other use not covered by this licence.

Summary of the licences granted in 2012 by the Board with respect to unlocatable copyright owners:

<i>Canadian Coast Guard, Sydney, N.S. Rre)</i> 2010-UO/TI-13;	For the reproduction of "Chaudières marine, questions et réponses" as translated by W.D. Ewart from "Marine Boilers Questions and Answers" by G.T.H. Flanagan and published in 1984 by Stanford Maritime, London UK	2011-01-05 2015-12-31	Educational	\$750 Access Copyright	Includes digital uses of the work 99 pages No more than 500 copies Licence credit
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<i>PCF Angle Mort Film Inc. (Re)</i> 2010-UO/TI-17)	For the reproduction, synchronization and public performance of an extract of a television series entitled "Maria [la] del Barrio"	2011-02-21 2021-12-31	Commercial	\$250 PACC	Includes communication to the public by telecommunication Substantially: 10 seconds of a Mexican telenovela (each episode being of 45 minutes)...
<i>Centre collégial de développement de matériel didactique (CCDMD) (Re)</i> 2010-UO/TI-20)	For the reproduction of a poster created by the artists group Kukryniksy	2011-08-29 2016-12-31	Commercial	\$100 SODRAC	No more than 5000 copies
<i>Productions Phi-Brassard (Jimmy) Inc. (Re)</i> 2011-UO/TI-05)	For the reproduction, synchronization and public performance of an excerpt of a musical recording entitled "Seeburg Background Music Record BA-109A" in a short film,	2011-08-30 2018-08-31	Commercial	\$500 SODRAC	Includes the reproduction of the excerpt in all forms and communication to the public by telecommunication 3'28" excerpt [the total time of mine is 2'54" but I may not have the same copy!]
<i>Nolin BBDO, (Re)</i> 2011-UO/TI-24	For the synchronization, reproduction and communication to the public by telecommunication of an excerpt of a musical work entitled "Le temps est bon" written by Stéphane Venne and published by JFM Investments Inc. in 1972	2011-09-26 2016-12-31	Commercial	\$8750 SODRAC	For the purpose of a publicity campaign on television: quere moral rights No the usual "The issuance of this licence does not release the licensee from the obligation to obtain permission for any other use not covered by this licence"... Substantiality: 1'30" and two 15" extracts of a 3'20" musical work
<i>Taddo (Catherine) (Re)</i> 2011-UO-TI-13; also)	For the mechanical reproduction and the communication to the public by telecommunication of a musical work entitled "Men are Like Street Cars" by Louis Jordan or Charley Jordan	2011-09-30 2016-12-31	Commercial	\$48.90 SODRAC	No more than 600 copies Does not includes the right to public performance but includes the right to reproduce and communicate to the public by telecommunication of the musical work for the purpose of digital sales Caveat: licence provided inasmuch as the work is not in the public domain
<i>Mitchinson (Wendy)(Re)</i> 2011-UO/TI-1	For the reproduction and the communication to the public by the telecommunication of three images published in <i>The Canadian Home Journal</i> in a article entitled "The Media, Gendered, Fat and Other Problematic Bodies"	2011-10-20 2021-10-31	Commercial	\$300 CARCC \$150 Right holder (if discovered)	No more than 500 copies Reproduction in print and in electronic format of three images and includes communication to the public by telecommunication as part of a book

## VIII Private Copying

None

## IX General Provisions

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- **Section 89 – No copyright, etc., except by statute**

Copyright is entirely a creature of statute and its application is independent of the *Quebec Civil Code* [or Common Law].

*Formation et gestion Pro-Santé M.R. Inc. v. Sampietro* 2011 QCCS 4266, (Que. Sup. Ct.; 2011-08-10) Grenier J.

[81] Comme on le sait, la *Loi sur le droit d'auteur* est *sui generis* et son interprétation est indépendante du *Code civil* du Québec. En matière de dommages, elle est large et libérale. Le titulaire du droit d'auteur n'a pas à prouver qu'il a subi des dommages réels. Toutefois, l'octroi des dommages doit être fondé sur le sens commun. Le Tribunal jouit d'une grande discrétion [*Setym International inc. c. Belout*, REJB 2001-27041 (C.S.)].

[94] Ne pouvant distinguer entre les frais fixes et variables, le Tribunal se verra contraint d'opter pour le bon sens.

- **Section 89 – No copyright, etc., except by statute**

Rights, infringement and remedies are to be found in the *Copyright Act*.

*Harmony Consulting Ltd. v. G.A. Foss Transport Ltd.*, 2011 FC 340 (F.C.; 2011-03-18) Heneghan J.

[145] Copyright is a creature of statute. As such, it is necessary to find a basis in the *Copyright Act* for subsistence of copyright in a work, for ownership, and for infringement. If it cannot be grounded in the statute then there is no issue of copyright.

- **Section 89 – No copyright, etc., except by statute**

*Per se*, copyright infringement does not arise out of a breach of contract.

*Harmony Consulting Ltd. v. G.A. Foss Transport Ltd.*, 2011 FC 340 (FC; 2011-03-18) Heneghan J.

[261] In simple terms, the Plaintiff argued that any violation of the licensing agreements constituted a violation of copyright. This argument is inherently flawed and cannot succeed as "...copyright infringement does not arise out of a breach of contract"; see *Corel Corp. v. Guardian Insurance Co. of Canada* (2001), 26 C.C.L.I. (3d) 39 (O.S.C.J.) at para. 22. As I have explained, copyright is violated only if the defendant has performed, or authorized, an act that only the owner can do within the confines of the *Copyright Act*.

And, to conclude this brief review:

Being a member of a collective society does not qualify necessarily such member as a professional artist.

*Reid v. Canada (Public Safety and Emergency Preparedness)\**, 2011 CanLII 73054, (Immigration and Refugee Board; 2011-03-24))

[42] The appellant has cut a CD of rap music, which has been tendered into evidence [Fn14 Exhibit A-1] and said that he is a registered artist. He has tendered into evidence an agreement between himself and the Society of Composers Authors and Music Publishers of Canada [Fn15 Exhibit A-1, p. 8 et 9]. The appellant has nothing to prove that he is anything more than an amateur musician, who has registered himself with the Society of Composers and Publishers for copyright purposes. There is no real evidence that the appellant has embarked upon a serious music career.

[43] The appellant does not drive and does not have a telephone or cable TV.

[44] I am of the view and so find that the appellant has no financial or career establishment in Canada at all.

[63] Although the appellant has in the Biblical sense of the word, spread his seed so to speak, there is only very scant evidence that he has any familial relationship with his children. He is marginally employed and appears to contribute very little if anything to his family.

[64] The appellant's sojourn in Canada has accounted for about one third of his life, but he has nothing to show for it. There is nothing holding him here except his four children, whom he does not appear to support in any significant way. He has no worldly assets of any consequence in Canada and appears to have family in Jamaica.





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