



A COMPILATION OF THE CANADIAN COPYRIGHT CASES DECIDED IN 2012

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First, a general listing:

1. *Access Copyright - Provincial and Territorial Governments Tariffs (2005-2014) Decision (Crown immunity application)* [also sub nomine *Reprographic Reproduction 2005-2014, Re*] 2012 CarswellNat 6, 2012 CarswellNat 7, 98 C.P.R. (4th) 21, <http://www.cb-cda.gc.ca/decisions/2012/20120105-2.pdf> (Cop. Bd.; 2012-01-05); reasons for order available at http://www.cb-cda.gc.ca/decisions/2012/prov_reason_2012.pdf (Cop. Bd.; 2012-03-15) 2012 FCA 22, <http://www.canlii.org/en/ca/fca/doc/2012/2012fca22/2012fca22.html> (F.C.A-Motion to strike affidavit; 2012-01-23); affd 2012 CarswellNat 688 2012 FCA 96, 213 A.C.W.S. (3d) 183, <http://www.canlii.org/en/ca/fca/doc/2012/2012fca96/2012fca96.html> (F.C.A.; 2012-03-20)
2. *Adobe Systems Incorporated v. Dale Thompson DBA Appletree Solutions*, 2012 FC 1219, 2012 CarswellNat 4062, <http://www.canlii.org/en/ca/fct/doc/2012/2012fc1219/2012fc1219.html> (F.C.; 2012-10-18)
3. *Alberta (Education) v. Access Copyright* 2012 CarswellNat 2420, 2012 SCC 37, J.E. 2012-1382, 216 A.C.W.S. (3d) 215, 102 C.P.R. (4th) 255, 347 D.L.R. (4th) 287, 38 Admin. L.R. (5th) 214, 432 N.R. 134, <http://www.canlii.org/en/ca/scc/doc/2012/2012scc37/2012scc37.html> (S.C.C.; 2012-07-12) [reversing 85 C.P.R. (4th) 349 (F.C.A.; 2010-07-23), which was reversing in part 2009-Carswell 1930 (Cop. Bd.; 2009-06-26);
4. *Application to fix royalties for a licence and its related terms and conditions (SODRAC v. ARTV)*. 2012 CarswellNat 5; also available at <http://www.cb-cda.gc.ca/decisions/2012/20120105.pdf> (Cop. Bd.; 2012-01-05)

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5. *Arama v. Azoulay*, 2012 QCCQ 10913, <http://canlii.ca/fr/qc/qccq/doc/2012/2012qccq10913/2012qccq10913.html> (Que. Ct. Small Claims; 2012-11-14)
6. *Bibliothèque et Archives nationales du Québec (BAnQ) for the reproduction and communication to the public by telecommunication of posters, periodicals and monographs [Re application by]*, file 2010-UO/TI-14]; 2012 CarswellNat 3069, also available at <http://www.cb-cda.gc.ca/unlocatable-introuvables/licences/263-f.pdf> (Cop. Bd.; 2012-07-19)
7. *Canadian Artists' Representation/Le Front des artistes canadiens (CARFAC) and Le regroupement des artistes en arts visuels du Québec (RAAV) v. National Gallery of Canada (NGC)*, File: 1330-08-001, Decision 53, [2012] C.A.P.P.R.T.D. No. 1; <http://www.capprt-tcrpap.gc.ca/eic/site/capprt-tcrpap.nsf/eng/tn00626.html> (C.A.P.P.R.T.; 2012-02-16)
8. *Canadian Institute of Natural and Integrative Medicine (CINIM) for the digital reproduction and the communication to the public by telecommunication of two jokes. [Re application by]* File: 2012-UO/TI-05, 2012 CarswellNat 3073, also available at <http://www.cb-cda.gc.ca/unlocatable-introuvables/licences/264-f.pdf> (Cop. Bd.; 2012-07-24)
9. *Cloutier (Carol) for the reproduction of 362 photographs and album covers in a book [Re application by]* File 2007-UO/TI-20, 2012 CarswellNat 94; also available at <http://www.cb-cda.gc.ca/unlocatable-introuvables/licences/258-f.pdf> (Cop. Bd.; 2012-01-03)
10. *Collective Administration of Performing Rights & of Communication Rights*, Re 2012 CarswellNat 181 (Cop. Bd.; 2012-01-30)
11. *Corporation of the City of London (Re)*, 2012 CanLII 28372 (Ont. I.P.C.; 2012-05-18)
12. *Donnelly c. Toth**, 2012 QCCQ 2256, <http://www.canlii.org/fr/qc/qccq/doc/2012/2012qccq2256/2012qccq2256.html> (Que.Ct.; 2012-03-30)
13. *Droit de la famille - 12170* 2012 QCCS 326, <http://canlii.ca/fr/qc/qccs/doc/2012/2012qccs326/2012qccs326.html> (Que. Sup. Ct.; 2012-02-03)
14. *Éditions du Quartz, Rouyn-Noranda for the reproduction and the republication on hard copy of the text in a book [Re application by]* File: 2011-UO/TI-10, 2012 CarswellNat 991; also available at <http://www.cb-cda.gc.ca/unlocatable-introuvables/licences/261-f.pdf> (Cop. Bd.; 2012-04-04)

15. *Éditions du Quartz, Rouyn-Noranda, Quebec, for the reproduction and the republication on hard copy of the text in a book [Re application by]*, File: 2011-UO/TI-10, also available at <http://www.cb-cda.gc.ca/unlocatable-introuvables/licences/266-f.pdf> (Cop. Bd.; 2012-10-22)
16. *Emerging Artists Research and Rating Service (Copyright Depository Inc.) v Trustifi inc.*, 2012 QCCS 1038, 2012 CarswellQue 2089, 220 A.C.W.S. (3d) 510, EYB 2012-203934, <http://www.canlii.org/fr/qc/qccs/doc/2012/2012qccs1038/2012qccs1038.html> (Que. Sup. Ct.; 2012-03-19); revd 2012 QCCA 1116, 2012 CarswellQue 5938, EYB 2012-207826, J.E. 2012-1273, <http://www.canlii.org/fr/qc/qcca/doc/2012/2012qcca1116/2012qcca1116.html> (Que. C.A.; 2012-06-15)
17. *Entertainment Software Assn. v. Society of Composers, Authors & Music Publishers of Canada*, 2012 SCC 34, 2012 CarswellNat 2377, J.E. 2012-1379, 102 C.P.R. (4th) 161, 216 A.C.W.S. (3d) 218, 347 D.L.R. (4th) 193, 38 Admin. L.R. (5th) 71, 432 N.R. 200, <http://www.canlii.org/en/ca/scc/doc/2012/2012scc34/2012scc34.html> (S.C.C.; 2012-07-12). [reversing 86 C.P.R. (4th) 258, 2010 CarswellNat 3113, 323 D.L.R. (4th) 62, (sub nom. Entertainment Software Assn. v. SOCAN) 406 N.R. 288, 86 C.P.R. (4th) 258, 2010 FCA 221, 14 Admin. L.R. (5th) 151 (F.C.A.; 2010-09-02), which was affirming 61 C.P.R. (4th) 353 (Cop. Bd.; 2007-10-18)]
18. *Forensic Technology Inc. c. Pyramidal Technologies Ltd.*, 2012 CarswellQue 5649, 2012 QCCS 2463, EYB 2012-207438, <http://canlii.ca/en/qc/qccs/doc/2012/2012qccs2463/2012qccs2463.html> (Que. Sup. Ct.; 2012-06-06)
19. *Frontier School Division, Winnipeg, Manitoba, for the mechanical reproduction and public performance of the musical work entitled "Road to Fort Coulonge" written by Harry Reginald (Reg) Hill and published by Melbourne Musi [Re application]* File 2012-UO/TI-04, also available at <http://www.cb-cda.gc.ca/unlocatable-introuvables/licences/265-e.pdf> (Cop. Bd.; 2012-120-16)
20. *Gendarmerie Royale du Canada c. Benharroch*, 2012 QCCQ 017, <http://www.canlii.org/fr/qc/qccq/doc/2012/2012qccq917/2012qccq917.html> (Que. Ct.; 2012-01-17)
21. *Glanzmann Tours Ltd. v. Yukon Wide Adventures* 2012 CarswellYukon 41, 2012 YKSM 3, 214 A.C.W.S. (3d) 443, [2012] B.C.W.L.D. 5249, <http://www.canlii.org/en/yk/yksm/doc/2012/2012yksm3/2012yksm3.html> (YK - Small Claims Ct.; 2012-05-10)

22. *Hajdu v. FRO*, 2012 ONSC 1835, <http://www.canlii.org/en/on/onsc/doc/2012/2012onsc1835/2012onsc1835.html> (Ont. S.C.; 2012-03-12)
23. *Harmony Consulting Ltd. v. G.A. Foss Transport Ltd.*, 2012 CarswellNat 334, 2012 FCA 226, <http://canlii.ca/en/ca/fca/doc/2012/2012fca226/2012fca226.html> (F.C.A.; 2012-08-31) [confirming 92 C.P.R. (4th) 6 (F.C.; 2011-03-18)]
24. *Hidasi v. Davie & Associates*, 2012 CarswellBC 3457, 2012 BCHRT 384, <http://canlii.ca/en/bc/bchrt/doc/2012/2012bchrt384/2012bchrt384.html> (B.C. Human Rights Tribunal; 2012-11-02)
25. *Insurance Corporation of British Columbia v. Canadian Office and Professional Employees Union, Local 378*, 2012 CarswellBC 2470, 2012 BCSC 1244, [2012] B.C.W.L.D. 7826, [2012] B.C.W.L.D. 7764, 220 A.C.W.S. (3d) 406, <http://www.canlii.org/en/bc/bcsc/doc/2012/2012bcsc1244/2012bcsc1244.html> (B.C.S.C.; 2012-08-17)
26. *Keatley Surveying Ltd. v. Teranet Inc.*, 2012 ONSC 7120, <http://canlii.ca/en/on/onsc/doc/2012/2012onsc7120/2012onsc7120.html> (Ont. Sup. Ct.; 2012-12-14)
27. *Kennedy c. Ruminski*, 2012 QCCS 4417, <http://canlii.ca/fr/qc/qccs/doc/2012/2012qccs4417/2012qccs4417.html> (Que. Sup. Ct.; 2012-09-21)
28. *Khan v. Tajdin*, 2012 CarswellNat 73, 2012 FCA 12, 211 A.C.W.S. (3d) 440, 426 N.R. 190, 346 D.L.R. (4th) 712, <http://www.canlii.org/en/ca/fca/doc/2012/2012fca12/2012fca12.html> (F.C.A.; 2012-01-16). [affirming 2011 FCA 14 (F.C.; 2011-02-07)]; leave to appeal to the Supreme Court of Canada refused 2012 CarswellNat 2183, 2012 CarswellNat 2184, 2012 CanLII 36252, <http://www.canlii.org/fr/ca/csc-a/doc/2012/2012canlii36252/2012canlii36252.html> (S.C.C.; 2012-06-28)
29. *La Presse Télé III Ltée, Montreal, QC, for the synchronization, reproduction and communication to the public by telecommunication of an excerpt of a musical work [Re application by]*. File: 2012-UO/TI-06, 2012 CarswellNat 1763, available at <http://www.cb-cda.gc.ca/unlocatable-introuvables/licences/262-f.pdf> (Cop. Bd.; 2012-05-28)
30. *Lachance v Productions Marie Eykel inc.*, 2012 QCCS 1012 (Que. Sup. Ct.-Merits; 2012-03-15)
31. *Leuthold v. Canadian Broadcasting Corporation*, 2012 CarswellNat 2277, 2012 FC 748, 2012 CF 748, 217 A.C.W.S. (3d) 167, 104 C.P.R. (4th) 401, <http://www.canlii.org/en/ca/fct/doc/2012/2012fc748/2012fc748.html> ,

- <http://decisions.fct-cf.gc.ca/en/2012/2012fc748/2012fc748.html> (F.C.; 2012-06-14) [*Leuthold v. Canadian Broadcasting Corporation*, 2012 CarswellNat 4204, 2012 FC 1257, 2012 CF 1257, <http://canlii.ca/en/ca/fct/doc/2012/2012fc1257/2012fc1257.html> (F.C.-Costs; 2012-10-29)]
32. *Meads v. Meads*, 2012 ABQB 571, 2012 CarswellAlta 1607, <http://canlii.ca/en/ab/abqb/doc/2012/2012abqb571/2012abqb571.html> (2012-09-18; Alta. Q.B.)
33. *National Film Board of Canada for the reproduction and incorporation of a photograph in a documentary film [Re application by]* File 2011 UO/TI-25. 2012 CarswellNat 597; also available at <http://www.cb-cda.gc.ca/unlocatable-introuvables/licences/260-f.pdf> (Cop. Bd.; 2012-02-10)
34. *Nautical Data International, Inc. v. C-Map USA Inc.*, 2012 FC 300, 2012 CarswellNat 1055, <http://canlii.ca/en/ca/fct/doc/2012/2012fc300/2012fc300.html> (F.C.; 2012-04-03).
35. *Nexus Solutions Inc. v. Krougly*, 2012 CarswellOnt 1136, 2012 ONSC 583, 211 A.C.W.S. (3d) 216, <http://www.canlii.org/en/on/onsc/doc/2012/2012onsc583/2012onsc583.html> (Ont. Sup. Ct.; 2012-01-25)
36. *Nexus Solutions Inc. v. Krougly*, 2012 CarswellOnt 1136, 2012 ONSC 583, 211 ACWS (3d) 216, <http://www.canlii.org/en/on/onsc/doc/2012/2012onsc583/2012onsc583.html> (Ont. Sup. Ct. ; 2012-01-25)
37. *Pelletier v. Sindicatum Carbon Capital Ltd.*, 2012 QCCS 6184, <http://www.canlii.org/en/qc/qccs/doc/2012/2012qccs6184/2012qccs6184.pdf> (Que. Sup. Ct.; 2012-11-21)
38. *Philip Morris Products S.A. v. Marlboro Canada Limited*, 2012 CarswellNat 2208, 2012 FCA 201, 216 A.C.W.S. (3d) 994, 103 C.P.R. (4th) 259, <http://www.canlii.org/en/ca/fca/doc/2012/2012fca201/2012fca201.html> (F.C.A.; 2012-06-29) [reversing on other grounds 90 C.P.R. (4th) 1 (F.C.; 2010-11-08)]
39. *Public Performance of Musical Works, Re* 2012 CarswellNat 2221, http://www.cb-cda.gc.ca/decisions/2012/Decision_SOCAN_Various_Tariffs.pdf (Cop. Bd.; 2012-06-29)
40. *Public Performance of Musical Works, Re* 2012 CarswellNat 555, <http://www.cb-cda.gc.ca/decisions/2012/SOCAN-application-for-interim-tariff-22-4-22-7.pdf> (Cop. Bd.; 2012-02-17)

41. *R. v. Rundle (Nec Plus Ultra)*, 2012 ONSC 5185, 2012 CarswellOnt 11339, 2012 ONSC 5185, 104 C.P.R. (4th) 190, 220 A.C.W.S. (3d) 400 <http://canlii.ca/en/on/onsc/doc/2012/2012onsc5185/2012onsc5185.html> (Ont. Sup. Ct.; 2012-09-14)
42. *Re:Sound Tariff 5 – Use of Music to Accompany Live Events, 2008-20 12 (Parts A to G)*, File Public Performance of Sound Recordings, 2012 CarswellNat 1584; also available at <http://www.cb-cda.gc.ca/decisions/2012/20120430.pdf> (Cop. Bd.; 2012-05-25)
43. *Re:Sound Tariff No. 6B – Use of Recorded Music to Accompany Physical Activities, 2008-2009*, http://www.cb-cda.gc.ca/tariffs-tarifs/certified-homologues/2012/ReSound6_B_reasons.pdf (Cop. Bd.; 2012-07-06)
44. *Re:Sound v. Motion Picture Theatre Association of Canada*, 2012 CarswellNat 2383, 2012 SCC 38, J.E. 2012-1378, 216 A.C.W.S. (3d) 217, 102 C.P.R. (4th) 276, 347 D.L.R. (4th) 308, 38 Admin. L.R. (5th) 152, 432 N.R. 163, <http://www.canlii.org/en/ca/scc/doc/2012/2012scc38/2012scc38.html> (S.C.C.; 2012-07-12) [affirming 2011 CarswellNat 429 (F.C.A.; 2011-02-25) which was affirming 78 C.P.R. (4th) 64 (Cop. Bd.; 2009-00-16)]
45. *Refence re Broadcasting Regulatory Policy 2010-167 and Broadcasting Order CRTC 2010-168*, 2012 SCC 68. (S.C.C.; 2011-09-29) [reversing 91 C.P.R. (4th) 389 (F.C.A.; 2011-02-28):
46. *Reference, Re Broadcasting Act*, 2012 CarswellNat 214, 2012 SCC 4, J.E. 2012-299, 210 A.C.W.S. (3d) 360, 341 D.L.R. (4th) 385, 98 C.P.R. (4th) 391, 428 N.R. 190, [2012] 1 S.C.R. 142, <http://www.canlii.org/en/ca/scc/doc/2012/2012scc4/2012scc4.html> (S.C.C.; 2012-02-09) [affirming 2010 FCA 178, 2010 FCA 178, 322 D.L.R. (4th) 337, 404 N.R. 305, [2010] F.C.J. 849, 2010 CarswellNat 2092, <http://www.canlii.org/en/ca/fca/doc/2010/2010fca178/2010fca178.html> (F.C.A.; 2010-07-07)]
47. *Reprographic Reproduction 2011-2013, Re Reprographic Reproduction 2011-2013, Re*; 2012 FCA 22 (F.C.A. - Motion to strike affidavit; 2012-01-23)
48. *Retransmission of Distant Radio and Television Signals 2009-2013) Interim Decision for the* as of January 1st, 2013 <http://www.cb-cda.gc.ca/decisions/2012/retrans-21122012.pdf> (Cop. Bd.; 2012-12-21)
49. *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, 2012 CarswellNat 2379, J.E. 2012-1380, 102 C.P.R. (4th) 204, 216 A.C.W.S. (3d) 219, 347 D.L.R. (4th) 235, 38 Admin. L.R. (5th) 1, 432 N.R. 1, <http://www.canlii.org/fr/ca/csc/doc/2012/2012csc35/2012csc35.html> [also *Shaw*

Cablesystems G.P. v. Society of Composers, Authors & Music Publishers of Canada] (S.C.C.; 2012-07-12) [reversing in part 86 C.P.R. (4th) 239 (F.C.A.; 2010-09-02), which was affirming 61 C.P.R. (4th) 353 (Cop. Bd.; 2007-10-18)]

50. *Sapient Grid Corp. (Re)*, 2012 ABQB 357, <http://www.canlii.org/en/ab/abqb/doc/2012/2012abqb357/2012abqb357.html> (Alta. Q.B.; 2012-05-28)
51. *SOCAN (2008-2010), RE:SOUND (2008-2011), CSI (2008-2012), AVLA/SOPROQ (2008-2011), ARTISTI (2009-2011) Re Interim decision*, <http://www.cb-cda.gc.ca/decisions/2012/radio-21122012.pdf> (Cop. Bd.; 2012-12-21)
52. *SOCAN Tariff 22.A (2007-2010); CMRRA/SODRAC Inc. Tariff (2008-2010) (Online Service Music)*, <http://www.cb-cda.gc.ca/decisions/2012/socan-csi-reasons.pdf> (Cop. Bd.; 2012-10-05)
53. *Society for Reproduction Rights of Authors, Composers and Publishers in Canada v. Canadian Broadcasting Corp.* 2012 CarswellNat 4255, <http://www.cb-cda.gc.ca/decisions/2012/DecisionSODRAC5andArbitration02-11-2012.pdf> (Cop. Bd.; 2012-11-02)
54. *Society for Reproduction Rights of Authors, Composers and Publishers (Canada) v. Canadian Broadcasting Corporation (Interactive Kiosks; Explora; Blanket Licence 2012-2016)*, Files 70.2-2011-03 and 70.2 2012-01; 2012 CarswellNat 1406, available at <http://www.cb-cda.gc.ca/decisions/2012/20120430.pdf> (Cop. Bd.; 2012-04-30)
55. *Society of Composer, Authors and Music Publishers of Canada v. IIC Enterprises Ltd. (Cheetah's Nightclub)*, 2012 CarswellNat 2812, 2012 FCA 179, 2012 CAF 179, 217 A.C.W.S. (3d) 168, 433 N.R. 381, 104 C.P.R. (4th) 387, <http://www.canlii.org/en/ca/fca/doc/2012/2012fca179/2012fca179.html> (F.C.A.; 2012-06-14) [reversing 2011 CarswellNat 5087 (F.C.; 2011-12-01); affirming 2011 CarswellNat 3810 (F.C.- Proth.; 2011-09-21)]
56. *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada* 2012 SCC 36, 2012 CarswellNat 238, J.E. 2012-1381, 216 A.C.W.S. (3d) 216, 102 C.P.R. (4th) 241, 347 D.L.R. (4th) 272, 38 Admin. L.R. (5th) 186, 432 N.R. 103, <http://www.canlii.org/en/ca/scc/doc/2012/2012scc38/2012scc38.html> (S.C.C.; 2012-07-12) [affirming 83 C.P.R. (4th) 409 (F.C.A.; 2010-05-14); affirming 61 CPR (4th) 353 (Cop. Bd.; 2007-10-18)]
57. *SODRAC v. CBC/SRC and SODRAC v. Astral Re SODRAC Tariff 5 (Reproduction of Musical Works in Cinematographic Works for Private Use or for Theatrical Exhibition), 2009-2012; Applications to fix royalties for a licence*

and its related terms and conditions; also available at <http://www.cb-cda.gc.ca/decisions/2012/sodrac5-20-12-2012.pdf> (Cop. Bd.; 2012-12-20)

58. *Union des artistes (UDA) v. Commission des relations du travail* 2012 QCCS 1733, <http://www.canlii.org/fr/qc/qccs/doc/2012/2012qccs1733/2012qccs1733.html> (Que. Sup. Ct.; 2012-04-23) Collier J. [confirming *Union des artistes c. festival international de Jazz de Montréal inc.**, 2010 QCCRT 523. (Que. L.B.; 2010-11-08)]; leave to appeal granted [2012] J.Q. 7173, 2012 QCCA 1315, <http://www.canlii.org/fr/qc/qcca/doc/2012/2012qcca1315/2012qcca1315.html> (Que. C.A.; 2012-05-18)
59. *Victor Stanley Inc., Re.* 2012 CarswellNat 885 (Canada Patent Appeal Board & Patents Commissioner; 2012-03-28)
60. *Waldman v. Thomson Reuters Corporation*, 2012 CarswellOnt 2225, 99 C.P.R. (4th) 303 (Ont. Sup. Ct.; 2012-02-21); leave to appeal refused 2012 CarswellOnt 7472, 2012 CarswellOnt 7472, 2012 ONSC 3436, 219 A.C.W.S. (3d) 12 (Ont. Div. Ct.; 2012-06-11)
61. *Warman v. Fournier* 2012 FC 803, 2012 CarswellNat 3164, 2012 CF 803, 104 C.P.R. (4th) 21, 219 A.C.W.S. (3d) 661, <http://www.canlii.org/en/ca/fct/doc/2012/2012fc803/2012fc803.html> (F.C.; 2012-06-21)

Now, a section by section analysis of those 2012 Canadian cases.

- **Section 1 – Short title**

The *Status of the Artist Act* does not replace or modify the *Copyright Act* and nothing would prevent scale agreements to contain stipulations relating to copyright.

Canadian Artists' Representation/Le Front des artistes canadiens (CARFAC) and Le regroupement des artistes en arts visuels du Québec (RAAV) v. National Gallery of Canada (NGC), File: 1330-08-001, Decision 53, <http://www.capprt-tcrpap.gc.ca/eic/site/capprt-tcrpap.nsf/eng/tn00626.html> (C.A.P.P.R.T.; 2012-02-16)

[87] The Tribunal stated in CAPPRT Decision 028 that Parliament's intention in passing the [*Status of the Artist*] *Act* was not to replace or modify the *Copyright Act*. **There is no issue that artists alone should have the right to decide how their works should be used or exploited.** There is no doubt that the regime established by the *Copyright Act* continues to be a practical avenue available to artists to protect their copyrights internationally and with respect to users not subject to the *Act*.

[90] Parliament passed the *Act* in 1992 as part of a commitment to recognize and stimulate the contribution of the arts to the cultural, social, economic and political enrichment of the country. The *Act* reflects the recognition that constructive professional relations in the arts and culture sector are an important element of a vibrant Canadian culture and heritage.

[99] Many scale agreements negotiated under the *Act* contain matters related to copyright. It has become a standard in the cultural sector that these matters are included in scale agreements. It is unusual for a scale agreement between an artists' association and a producer not to contain stipulations relating to the use of artistic works. **The Tribunal is of the view that it would indeed be inconsistent with the purpose of the *Act* if a scale agreement concluded under the *Act* that governs professional relations between artists and producers could not contain stipulations relating to copyright.**

- **Section 1 – Short title**

Jurisdiction over copyright is solely within the **Legislative authority of Parliament of Canada**.

Meads v. Meads, 2012 ABQB 571 (2012-09-18; AltaQB) Rooke J. [Paragraph numbers in the public judgment are chaotic]

[21] The examples identified above will very likely be encountered in related but variant forms. For example, Mr. Meads expresses the “flesh and blood man” declaration motif as “the living flesh and blood sentient-man” and that he is “the creation for the Lord God Almighty Jehovah”. Similarly, Mr. Meads expresses copyright in his name in a different manner: “DENNIS LARRY MEADS (Copyright for the Province-Alberta)”. *I note, parenthetically, that this notation is nonsensical given that **The Constitution Act, 1867, 30 & 31 Vict., c. 3, s. 91 explicitly assigns jurisdiction for copyright to Canada.*** [Emphasis added.]

- **Section 2 - Definition of "artistic work"**

Plans of survey are artistic works.

Keatley Surveying Ltd. v. Teranet Inc., 2012 ONSC 7120 (Ont. Sup. Ct.; 2012-12-14) Horkings J.:

[183] There is no dispute that copyright exists in plans of survey and that when created the surveyor holds the copyright.

- **Section 2 - Definition of "artistic work"**

A "happening" is too vague a notion to qualify immediately as an "artistic work"; furthermore, if its organizers do not control the performance of the artists, they cannot qualify as producer within the meaning of the *Status of the Artists Act*.

Union des artistes (UDA) v. Commission des relations du travail 2012 QCCS 1733 (Que. Sup. Ct.; 2012-04-23) Collier J. [confirming *Union des artistes c. festival international de Jazz de Montréal inc.*, 2010 QCCRT 523. (Que. L.B.; 2010-11-08); leave to appeal granted 2012 QCCA 1315 (Que. C.A.; 2012-05-18)]

[62] Une lecture des transcriptions des travaux parlementaires qui ont mené à l'adoption de la LSA [*An Act respecting the Professional status and conditions of engagement of performing, recording and film artists*, RSQ, c S-32.1] démontre que les représentants de l'UDA n'exigeaient pas que le terme « producteur » s'applique aux personnes n'exerçant aucun ou peu de contrôle sur les conditions de travail des artistes. Les propos de monsieur Serge Demers sont éloquentes à ce sujet: UDA voulait que la définition de « producteur » soit étendue à ceux qui exerçaient un véritable contrôle sur l'organisation et la présentation du spectacle, mais qui « se déguisaient » en simple locateur de salle afin d'échapper à l'application de la LSA. Par ses propositions d'amendement, UDA

reconnaissait la distinction entre le producteur et le locateur de salle, et elle acceptait que la LSA ne s'applique pas aux diffuseurs de spectacles qui ne contrôlent pas la prestation de l'artiste

[68] UDA prétend que les festivals présentés par le Festival International de Jazz de Montréal et les Francofolies de Montréal sont devenus, par leur ampleur et renommée, un « happening », qui constitue en soi une « œuvre artistique » au sens de la définition de « producteur ». Selon UDA, les Festivals sont donc les producteurs d'une grande œuvre artistique ayant retenu les services d'artistes en vue de la représenter en public.

[69] **Cette prétention a été rejetée par la Commission, qui trouvait que la notion du « happening » était trop vague, subjective et confuse pour servir à interpréter la LSA.** Le Tribunal est d'accord avec les conclusions de la Commission qui sont en tous points raisonnables.

[70] Le Tribunal est aussi d'avis que l'argument de l'UDA est sans pertinence vu la décision de la Commission que, dans les faits, **les Festivals n'exerçaient pas de contrôle sur les prestations des artistes à l'égard de 22 des 26 spectacles. Cette absence de contrôle existe, peu importe que l'œuvre artistique soit le spectacle individuel ou le festival vu dans son ensemble.** Dans les deux cas, les faits n'appuient pas la conclusion que les Festivals ont retenu les services d'artistes et qu'ils ont agi à titre de producteurs

- **Section 2 - Definition of "board"**

It is for the Copyright Board, not the courts sitting in revision, to make findings of facts and ascertain the applicable law.

Reprographic Reproduction 2011-2013, Re 2012 FCA 22, (F.C.A-Motion to strike affidavit; 2012-01-23) [in judicial revision of 2011 CarswellNat 3708 (Cop. Bd.; 2011-09-23)]

[The applicants have filed the affidavit of Gregory L. Juliano in support of their application for judicial review of a decision of the Copyright Board. The respondent, Access Copyright, moves to strike it out.]

[17] In determining the admissibility of the Juliano affidavit, the differing roles played by this Court [the Federal Court of Appeal] and the Copyright Board must be kept front of mind. Parliament gave the Copyright Board – not this Court – the jurisdiction to determine certain matters on the merits, such as whether to make an interim tariff, what its content should be, and any permissible terms associated with it. As part of that task, **it is for the Board – not this**

Court – to make findings of fact, ascertain the applicable law, consider whether there are any issues of policy that should be brought to bear on the matter, apply the law and policy to the facts it has found, make conclusions and, where relevant, consider the issue of remedy. In this case, the Copyright Board has already discharged its role, deciding on the merits to make an interim tariff and to refuse to amend it.

- **Section 2 - Definition of "broadcaster"**

Broadcaster distribution undertaking (BDU) are not "broadcaster" because their primary activity is relation to communication signals is their retransmission.

Reference re Broadcasting Regulatory Policy 2010-167 and Broadcasting Order CRTC 2010-168, 2012 SCC 68 (S.C.C.; 2011-09-29) Rothstein J. [reversing 91 C.P.R. (4th) 389 (F.C.A.; 2011-02-28):

[48] The BDUs first submit that s. 21(1) of the *Copyright Act* conflicts with the value for signal regime. Section 21(1) grants broadcasters a limited copyright in the over-the-air signals they broadcast. This copyright gives the broadcaster the sole right to authorize or to do four acts in relation to a communication signal or any substantial part of it:

- (a) to fix it;
- (b) to reproduce any fixation of it that was made without the broadcaster's consent;
- (c) to authorize another broadcaster to retransmit it to the public simultaneously with its broadcast; and
- (d) in the case of a television communication signal, to perform it in a place open to the public on payment of an entrance fee, and to authorize any act described in paragraph (a), (b) or (d).

[49] The aspect relevant for this appeal is in para. (c). Under this paragraph, a broadcaster has the sole right to authorize another *broadcaster* to retransmit simultaneously a communication signal. Section 2 of the *Copyright Act* defines "broadcaster" as a body that, in the course of operating a broadcasting undertaking, broadcasts a communication signal in accordance with the law of the country in which the broadcasting undertaking is carried on, but excludes a body whose primary activity in relation to communication signals is their retransmission.

[50] **The underlined portion of the definition refers to BDUs. BDUs are not a "broadcaster" within the meaning of the *Copyright Act* because their primary activity in relation**

communication signals is their retransmission. Thus, the broadcaster's s. 21(1)(c) right to authorize, or not authorize, another broadcaster to simultaneously retransmit its signals does not apply against BDUs. In other words, under s. 21 of the *Copyright Act*, a broadcaster's exclusive right does not include a right to authorize or prohibit a *BDU* from retransmitting its communication signals.

- **Section 2 - Definition of "collective work"**

A collective work is a work in which works or parts of works of different authors, are incorporated.

Lachance v. Productions Marie Eykel inc., 2012 QCCS 1012 (Que. Sup. Ct.-Merits; 2012-03-15) Grenier J.

[42] La preuve démontre que Passe-Partout [A Quebec French language children's television program produced by Tele-Québec between 1977 and 1987] est une œuvre collective:

- Les synopsis de chaque émission ont été rédigés par les pédagogues Louise Poliquin et Carmen Bourassa;
- Les thèmes de chacun des modules étaient choisis par les pédagogues;
- Les scénarios ont été rédigés par des scénaristes professionnels, Michèle Poirier, Bernard Tanguay et Ronald Prigent;
- La réalisation a été confiée à quatre réalisateurs: Claude Boucher, Jean-Pierre Lichoni, François Côté et Pierre Tremblay;
- Pierre F. Brault a composé la musique;
- Nicole Lapointe et Pierre Régimbald sont les créateurs des marionnettes;
- Manon Brodeur a créé les costumes;
- Les décors ont été créés par Claude Lambert.

[43] Le demandeur donc, à l'instar des pédagogues et des membres de l'équipe de production avec qui il collaborait, est l'un des auteurs de Passe-Partout et son apport n'est pas négligeable.

- **Section 2 - Definition of "collective society"**

The scale agreements negotiated by an artists' association may contain provisions relating to copyright inasmuch as they do not bind a copyright collective or encroach on the rights conferred by an artist to a copyright collective.

Canadian Artists' Representation/Le Front des artistes canadiens (CARFAC) v. National Gallery of Canada (NGC), decision No. 53, file 1330-08-001, [2012] C.A.P.P.R.T.D. No. 1; C.A.P.P.R.T.; 2012-02-16)

[101] **Artists' associations and copyright collectives are two distinct entities.** Artists associations and copyright collectives regularly enter into agreements on how those agreements will work within particular sectors. Where copyright collectives exist, memoranda of understanding have been entered into between copyright collectives and artists association to clarify their common understanding of their respective functions. [Fn2 Such as the Memoranda of Understanding agreed to between the Writers' Union of Canada and CANCOPY; the Memo of Understanding between the Writers Guild of Canada and CANCOPY; the Agreement between the American Federation of Musicians of the United States and Canada (AFM) now the Canadian Federation of Musicians / Fédération Canadienne des musiciens et des musiciennes and the Society of Composers, Authors and Music Publishers of Canada (SOCAN) copies of which are available from the Tribunal.]

[103] The Tribunal reaffirms the principles expressed in CAPPRT Decision 028 and CAPPRT Decision 047 [file 1350-03-009; 2003-12-09] that **the [Status of the Artist] Act was intended to complement and supplement the regime provided in the Copyright Act. It is intended to do so by providing artists with an additional mechanism to obtain compensation for their work,** thereby enhancing and promoting artists' freedom of choice as to how they will exploit the fruits of their creative talents. The Tribunal finds that the right to use an existing work is a service that the artist who holds the copyright to that work may provide to a producer. The Tribunal further finds that representing artists' interest in this fundamental socio-economic right is an appropriate activity for a certified artists' association to bargain.

[104] The Tribunal finds that **an artist association may negotiate and conclude a scale agreement which contains minimum fees for the use of artistic works, as long as the artist association does not bind a copyright collective or encroach on the rights conferred by an artist to a copyright collective,** such as SODRAC, and exercised pursuant to the *Copyright Act*.

[105] It is not up to the Tribunal to determine the specific proposals or content of what the parties may bargain.

[106] The Tribunal finds that artists should have the choice as to how they will deal with the rights to their works, be it through agents,

copyright collectives, scale agreements or a combination of these mechanisms.

- **Section 2 - Definition of "collective society"**

Parliament's purpose in creating the collective societies was to efficiently manage and administer different copyrights under the *Copyright Act*.

Entertainment Software Assn. v. Society of Composers, Authors & Music Publishers of Canada, 2012 SCC 34, <http://www.canlii.org/en/ca/scc/doc/2012/2012scc34/2012scc34.html> (S.C.C.; 2012-07-12) Abella and Moldaver JJ. [reversing 86 C.P.R. (4th) 258 (F.C.A.; 2010-09-02), which was affirming 61 C.P.R. (4th) 353 (Cop. Bd.; 2007-10-18)]

[11] Justice Rothstein argues (at para. 126) that the Board can avoid such "double-dipping" by copyright owners by adjusting the two fees in a way that "divides the pie" between the collective societies administering reproduction rights, on the one hand, and communication rights, on the other. However, this seems to us to undermine **Parliament's purpose in creating the collective societies in the first place, namely to efficiently manage and administer different copyrights under the Act. This inefficiency harms both end users and copyright owners:**

When a single economic activity implicates more than one type of right and each type is administered by a separate collective, the multiplicity of licences required can lead to inefficiency. . . . The result is that the total price the user has to pay for all complements is too high .[...]

[T]he fragmentation of licences required for single activities among several monopolist-collectives generates inefficiencies, from which copyright owners as a whole also suffer. [...](Ariel Katz, "Commentary: Is Collective Administration of Copyrights Justified by the Economic Literature?", in Marcel Boyer, Michael Trebilcock and David Vaver, eds., *Competition Policy and Intellectual Property* (2009), 449, at pp. 461-63)

- **Section 2 - Definition of "compilation"**

Copyright in a compilation are independent and distinct from the copyright that may subsist in its individual parts.

Harmony Consulting Ltd. v. G.A. Foss Transport Ltd., 2012 FCA 226, <http://canlii.ca/en/ca/fca/doc/2012/2012fca226/2012fca226.html> (F.C.A.; 2012-08-31) Gauthier J. [confirming 92 C.P.R. (4th) 6 (F.C.; 2011-03-18)]

[66] Finally, it is worth noting that the only case cited by Harmony: *Star Data Systems Inc. v. Quasimodo Consulting Services Ltd.* (1996), 18 O.T.C. 42, 67 A.C.W.S. (3d) 55 (Ont. Gen. Div.), did not involve a compilation such as Petro. Generally, **copyright in a compilation are independent and distinct from the copyright that may subsist in its individual parts** (*CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13 (CanLII), 2004 SCC 13, [2004] 1 S.C.R. 339; *Robertson v. Thomson Corp.*, 2006 SCC 43 (CanLII), 2006 SCC 43, [2006] 2 S.C.R. 363).

- **Section 2 - Definition of "copyright"**

Editor's comment: a curious linguistic remark, in a Family case, on the incorporation of the word "copyright" in the French language.

Droit de la famille - 12170 2012 QCCS 326, <http://canlii.ca/fr/qc/qccs/doc/2012/2012qccs326/2012qccs326.html> (Que. Sup. Ct; 2012-02-03) Dugré J. [between note 12 and 15]

[...] Le terme anglais « copyright » est un des nombreux exemples d'un mot anglais dont l'emprunt a été considéré comme nécessaire - et finalement accepté - pour compléter le vocabulaire français spécialisé du droit d'auteur. [...]

- **Section 2 - Definition of "copyright"**

The copyright law is now viewed as a matter of public policy to balance the interests of the public and those of the authors.

Waldman v. Thomson Reuters Corporation, 99 C.P.R. (4th) 303 (Ont. Sup. Ct.; 2012-02-21) Perell J. [leave to appeal refused 2012 CarswellOnt 7472 (Ont. Div. Ct.; 2012-06-11)]

[56] **Copyright law is a matter of public policy.** The *Copyright Act* is a balance between, on the one hand, promoting the public interest in the encouragement and dissemination of works of the arts and intellect and, on the other hand, ensuring that the creator of a work obtains a just reward and preventing others from appropriating the creator's just reward: *Théberge v. Galerie d'Art du Petit Champlain inc.*, *supra*, [*Théberge v. Galerie d'Art du Petit Champlain inc.*, 2002 SCC 34] at para. 30.

[57] **The *Copyright Act* balances user's rights with creator's rights and neither right should be interpreted restrictively:** *CCH Canadian Limited v. Law Society of Upper Canada*, *supra*, [*CCH*

Canadian Limited v. Law Society of Upper Canada, 2004 SCC 13] at paras. 10, 48.

- **Section 2 - Definition of "dramatic work"**

Broadcasting Act, S.C. 1991 (Canada), Re (2012), 106 C.P.R. (4th) 241 (S.C.C.; 2012-12-13) Rothstein J. [reversing (2011), 91 C.P.R. (4th) 389 (F.C.A.; 2011-02-28)] [51] In addition to their s. 21 rights in communication signals, broadcasters may hold other retransmission rights under the *Copyright Act*. As mentioned, a prerecorded television program is often copyright subject matter that can be protected as an original "dramatic work" or a "compilation" thereof (s. 2 of the *Copyright Act*). The broadcaster, as a corporation, may hold copyright in the pre-recorded program or compilation of programs carried in its signals, either as the employer of the author of such a work or as an assignee of copyright from the original author.

- **Section 2 - Definition of "every original work"**

Copyright law protects the form in which the ideas are communicated, not the ideas themselves.

Waldman v. Thomson Reuters Corporation, 2012 ONSC 1138 (Ont. Sup. Ct.; 2012-02-21) Perell J.

[55] **There is no ownership in ideas, but copyright provides a property interest to the person who puts the idea into written form: *Donoghue v. Allied Newspapers Ltd.* [1938] Ch. 106. The purpose of copyright law is not to protect the ideas or opinions expressed by the creator, but rather it protects the various means and forms by which those ideas are communicated: *Théberge v. Galerie d'Art du Petit Champlain inc.*, supra, [*Théberge v. Galerie d'Art du Petit Champlain inc.*, 2002 SCC 34] at para. 115; *CCH Canadian Limited v. Law Society of Upper Canada*, 2004 SCC 13 at para. 8**

- **Section 2 - Definition of "every original work"**

The author is the person who expresses the idea in an original form.

Waldman v. Thomson Reuters Corporation, 2012 ONSC 1138 (Ont. Sup. Ct.; 2012-02-21) Perell J.

[65] [...] **Authorship of a copyrightable work connotes a creative process and ingenuity**; an author is more than a scribe, editor, or amanuensis and expresses ideas in an original or novel form [...]

- **Section 2 - Definition of "every original work"**

It is the original expression of an original thought that will be protected, not the thought itself.

Lachance v. Productions Marie Eykel inc., 2012 QCCS 1012 (Que. Sup. Ct.-Merits; 2012-03-15) Grenier J.

[23] **Le fait qu'une personne soit impliquée dans l'expression d'une idée, mais ne l'ait pas exprimée elle-même, ne la qualifie pas comme auteur** [Fn 5 Wall c. Horn Abbott Ltd et al, 2007 BCSC 33 (CanLII), 2007 CANLII 197 paragr. 501.]

[25] La Loi ne définit pas ce qui constitue une œuvre originale. Toutefois, comme le droit d'auteur ne protège que l'expression des idées et non l'idée, le critère de l'originalité doit s'appliquer à l'élément expressif de l'œuvre et non à l'idée .

[...]

[40] À l'évidence, la série Passe-Partout [A Quebec French language children's television program produced by Tele-Québec between 1977 and 1987] constitue une œuvre originale au sens de la jurisprudence et, comme telle, elle jouit de la protection de la Loi : **elle n'est pas une copie et elle est le fruit du talent et du jugement de plusieurs personnes, dont le demandeur.**

- **Section 2 - Definition of "infringingt"**

Infringement could be found in the copying of the overall arrangements of the impugned work.

Philip Morris Products S.A. v. Malboro Canada Limited, 2012 FCA 201 (F.C.A.; 2012-06-29) Gauthier J. [reversing on other grounds 90 C.P.R. (4th) 1 (F.C.; 2010-11-08)]

[120] [t]hat the trial judge not only looked at the particular elements identified throughout his reasons but also at the overall arrangement and display before concluding that he was "unable to find substantial similarity when viewing the works as a whole".

- **Section 2 - Definition of "literary work"**

Whether legal documents deserves copyright protection is a policy question yet to be decided.

Waldman v. Thomson Reuters Corporation, 2012 ONSC 1138 (Ont. Sup. Ct.; 2012-02-21) Perell J.

[94] Thus, there are serious policy questions about how much, if any, protection of legal documents, including court documents, should have.

- **Section 2 - Definition of "literary work"**

Linguistic tests can be protected as :literary work.

R. v. Rundle (Nec Plus Ultra), 2012 ONSC 5185 (Ont. Sup. Ct.; 2012-09-14) Smith J.

[17] I am satisfied that the AG has satisfied the first part of the test for the following reasons: [...]

(e) I am satisfied that the authors of the SLE French Language tests exercised considerable skill and judgment when producing the tests to assess the candidates' second language abilities;

(f) in *University of London Press v. University Tutorial Press*, [1916] 2 Ch. 601 at 608 (described by the Ontario Court of Appeal in as a "leading authority in *Delrina Corp. (c.o.b. Carolian Systems) v. Triolet Systems Inc.*, 2002 CanLII 11389 (ON CA), (2002) 58 O.R. (3d) 339 (C.A.) at para. 39) the Court held that mathematics examination papers developed for the University of London were "literary works" within the meaning of the *Copyright Act*;

(g) a similar conclusion was reached in *Educational Testing Services v. Katzman*, 793 F.2d 533; 1986 U.S. App. at p. 8, by the United States Court of Appeal for the Third Circuit, which held that questions developed for the Scholastic Aptitude Test ("SAT") were "original works of authorship" and entitled to copyright protection.

- **Section 2 - Definition of "literary work"**

Discovery transcript could be protected as literary work.

Hidasi v. Davie & Associates, 2012 BCHRT 384, (B.C. Human Rights Tribunal; 2012-11-02) Trerise, member

B Does Copyright Prevent the Disclosure of a Discovery Transcript?

[28] Jason Poon and Davie & Associates have advised that the discovery transcript is a copyrighted document and that they are not permitted to make an unauthorized copy. They have not provided any support for the fact that the transcript is copyrighted. However, I have no reason to disbelieve that.

[29] Whether the transcript is copyrighted or not, I am familiar with the practice of protecting the rights of court reporters to revenues from producing discovery transcripts by ensuring that any copies of transcripts are produced by the court reporter who recorded the transcript and prepared it.

- **Section 2 - Definition of "photograph"**

Photographs are artistic works.

Arama v. Azoulay, 2012 QCCQ 10913, (Que. Ct. Small Claims; 2012-11-14) Veilleux J.

[13] Il ne fait pas de doute pour le Tribunal que la demanderesse est l'auteure de **la photo, que celle-ci constitue une œuvre originale protégée par son droit d'auteur et que le défendeur, en utilisant comme il l'a fait la photo de la demanderesse sans son consentement, a violé son droit d'auteur.** Bien que le livre du défendeur ait été confectionné et distribué dans un souci de faire connaître le patrimoine juif à la jeunesse, il n'en reste pas moins que l'œuvre originale de la demanderesse a été utilisée sans son autorisation et de façon préjudiciable à tout le moins sur le plan pécuniaire. En effet, la demanderesse est photographe professionnelle.

- **Section 2 – Definition of "sound recording"**

A "soundtrack" is a "sound recording" except where it accompanies a motion picture, in which case, it will not trigger the right to remuneration provided for by section 19.

Re:Sound v. Motion Picture Theatre Association of Canada, 2012 SCC 38 (S.C.C.; 2012-07-12) Lebel J. [affirming 2011 CarswellNat 429 (F.C.A.; 2011-02-25) which was affirming 78 C.P.R. (4th) 64 (Cop. Bd.; 2009-00-16)]

[26] [...] Consequently, a pre-existing sound recording that is part of a soundtrack cannot be the subject of a tariff when the soundtrack accompanies the cinematographic work.

[35] According to s. 2, a "sound recording" is a recording consisting of sounds, "but excludes any soundtrack of a cinematographic work where it accompanies the cinematographic work". Therefore, a **"soundtrack" is a "sound recording" except where it accompanies the motion picture.** Otherwise, the exclusion would be superfluous.

[36] When it accompanies the motion picture, therefore, the recording of sounds that constitutes a soundtrack does not fall within the definition of “sound recording” and does not trigger the application of s. 19. A pre-existing sound recording is made up of recorded sounds. The Act does not specify that a pre-existing recording of “sounds” that accompanies a motion picture cannot be a “soundtrack” within the meaning of s. 2. In my view, a pre-existing sound recording cannot be excluded from the meaning of “soundtrack” unless Parliament expressed an intention to do so in the Act. It could have done this by, for example, excluding only “the aggregate of sounds in a soundtrack”.

[36]When it accompanies the motion picture, therefore, the recording of sounds that constitutes a soundtrack does not fall within the definition of “sound recording” and does not trigger the application of s. 19. A pre-existing sound recording is made up of recorded sounds. The Act does not specify that a pre-existing recording of “sounds” that accompanies a motion picture cannot be a “soundtrack” within the meaning of s. 2. In my view, a pre-existing sound recording cannot be excluded from the meaning of “soundtrack” unless Parliament expressed an intention to do so in the Act. It could have done this by, for example, excluding only “the aggregate of sounds in a soundtrack”.

[50] Contrary to the appellant’s assertion, a “ripped” (reproduced) recording of a pre-existing sound recording that accompanies a motion picture would be subject to copyright. As the Court of Appeal pointed out, once a pre-existing sound recording is extracted from a soundtrack accompanying a cinematographic work, it once again attracts the protection offered for sound recordings. There is therefore no violation of the *Rome Convention*.

- **Section 2 - Definition of "work"**

A personal name does not attract copyright protection.

[Editor’s comment, unfortunately, as drafted, paragraph 31 of this judgment, does not clearly deny the general copyrightability of a personal name and it remains to be seen if OPCA [Organized Pseudolegal Commercial Argument] litigant will use it in support of their general contention prohibiting the use of their name as a brach of copyright].

Hajdu v. FRO, 2012 ONSC 1835 (Ont. S.C.; 2012-03-12) Coats J.

[24 The Appellant has entered into a Security Agreement with himself, purporting to divide himself into two people. The Appellant alleges that Peter Janos Hajdu©, is the debtor who is the subject of the support action, a person who has been copyrighted. The

secured party is a “natural man as created by God”, who has been granted a \$1 billion security interest over the possessions of Peter Janos Hajdu, the debtor, under a Security Agreement dated August 17, 2001. The debtor purports to have transferred all of his possessions to the creditor. In addition, the debtor and creditor entered into a Hold Harmless and Indemnity Agreement dated August 17, 2001 that protects the creditor from any of the debtor’s liabilities.

[25] The Appellant claims that the copyrighting of himself carries fees for each use of the Appellant’s copyrighted trade-names. The secured party creditor Peter Janos Hajdu© has been granted a security interest in those fees. [...]

[31] The Appellant’s assertion that the Director or the court was in breach of copyright law throughout the default hearing is without merit. The Director was enforcing a valid support order when it issued a Notice of Default against the Appellant. The Director’s claim was against the Appellant support payor and not against the “literary” work copyrighted by the Appellant.

- **Section 2 - Definition of "work"**

There is no such thing as common law copyright and (bis) a personal name does not attract copyright protection and if so, copyright would probably vested in the parents who gave the name, not the individual who bear it !]

[Editor’s comment: the paragraph numbers in the public judgment are chaotic; however this judgment is a piece of anthology on the taxonomy of vexatious litigants.]

Meads v. Meads, 2012 ABQB 571 (2012-09-18; Alta.b Q.B.) Rooke J.

[57] Another name-related indication of an OPCA [Organized Pseudolegal Commercial Argument] litigant is that the litigant marks their name with a copyright and/or trade-mark indication, usually the ©, (T) and TM symbols. These markings likely indicate a foisted unilateral agreement strategy.

[9] Similarly, an OPCA litigant may make an unusual mention of copyright or trade-mark, typically because the OPCA litigant claims copyright or trade-mark in their own name: *Hajdu v. Ontario (Director, Family Responsibility Office)*, 2012 ONSC 1835 (CanLII), 2012 ONSC 1835 at para. 23; *Dempsey v. Envision Credit Union*, 2006 BCSC 1324 (CanLII), 2006 BCSC 1324 at para. 37, 60 B.C.L.R. (4th) 309.

[38] Mr. Meads’ copyright and trade-mark claims are suspect in a number of ways. First, he claims ownership of his “... common law

right of, in and to my Copyright(s), Trademark(s) and Trade-Name(s) ...” [emphasis added]. The special property interests provided by copyright and trade-mark flow from legislation (the *Copyright Act*, R.S.C. 1985, c. C-42, and the *Trade-marks Act*, R.S.C. 1985, c. T-13). **There has never been a common law right to either.**

[39] There is not authority present, nor, I believe, capable of establishing that a personal name can form a creative work that would be subject to copyright. In any case, even if that were so, then copyright in a name would presumably vest with its authors, Mr. Meads’ parents. [...]

[41] The entire ‘my name is copyright/trade-mark protected’ scheme has an overwhelmingly juvenile character. People necessarily use names in everyday interaction, commerce, and most certainly in court. Does it make any sense that any person who were to correspond with Mr. Meads would be liable to him for \$100 million dollars simply because they put his name in the address? Could people operate in this regime? Must we all address one another by arbitrary nicknames or some kind of functional description? The answer to these questions is an overwhelming “no.”

- **Section 2 - Definition of "work of joint authorship"**

A work of joint authorship is a work produced by the collaboration of two or more authors in which the contribution of one author is not distinct from the contribution of the other(s).

[Editor’s comment: a third requirement, namely, the existence of a common intention as to joint authorship is mentioned but this approach has been seriously doubted (and rejected) in *Neugebauer v. Labieniec*, 75 C.P.R. (4th) 364 (F.C.; 2009-06-25); affd. (revd on costs) 87 C.P.R. (4th) 1 (F.C.A.-Merits; 2010-09-15).]

Waldman v. Thomson Reuters Corporation, 2012 ONSC 1138 (Ont. Sup..Ct; 2012-02-21) Perell J.

[71] Having regard to [defendant] Thomson’s arguments, for the case at bar, it is important to note that a literary work may have more than one author. If authors collaborate one with the other and the contribution of each is not distinct from the contribution of the others, the work will have more than one author.

[72] The constituent elements of joint ownership are: (1) each author makes a substantial although not necessarily equal contribution to the work; and (2) there is a joint labour in carrying out a common purpose or design: *Levy v. Rutley* (1871),

6 L.R. 976 (C.P.); *Neugebauer v. Labieniec, supra*. **Some courts impose the additional requirement that the authors intend the work to be attributed to them as a joint work:** *Neudorf v. Nettwerk Productions Ltd.*, (1999), 3 C.P.R. (4th) 129 (B.C.S.C.); *Dolmage v. Erskine*, (2003), 23 C.P.R. (4th) 495 (S.C.J.).

- **Section 2.4 - Communication to the public by telecommunication**

From the headnote of the Supreme Court of Canada Reports: "The terms "broadcasting" and "broadcasting undertaking", interpreted in the context of the language and purposes of the *Broadcasting Act*, are not meant to capture entities which merely provide the mode of transmission. The *Broadcasting Act* makes it clear that "broadcasting undertakings" are assumed to have some measure of control over programming. The policy objectives listed under s. 3(1) of the Act focus on content. When providing access to the Internet, which is the only function of ISPs placed in issue by the reference question, they take no part in the selection, origination, or packaging of content. The term "broadcasting undertaking" does not contemplate an entity with no role to play in contributing to the Act's policy objectives. Accordingly, ISPs do not carry on "broadcasting undertakings" under the *Broadcasting Act* when they provide access through the Internet to "broadcasting" requested by end-users."

Reference re: Broadcasting Act (Can.) applicability to Internet Service Providers 98 C.P.R. (4th) 391 (S.C.C.; 2012-02-09) [affirming 2010 CarswellNat 2092 (F.C.A.; 2010-07-07)]

[5] An ISP does not engage with these policy objectives when it is merely providing the mode of transmission. ISPs provide Internet access to end-users. **When providing access to the Internet, which is the only function of ISPs placed in issue by the reference question, they take no part in the selection, origination, or packaging of content.** We agree with Noël J.A. that the term "broadcasting undertaking" does not contemplate an entity with no role to play in contributing to the *Broadcasting Act's* policy objectives.

[6] This interpretation of "broadcasting undertaking" is consistent with *Electric Despatch Co. of Toronto v. Bell Telephone Co. of Canada*, (1891), 20 S.C.R. 83. In *Electric Despatch*, the Court had to interpret the term "transmit" in an exclusivity contract relating to messenger orders. Like the ISPs in this case, Bell Telephone had no knowledge or control over the nature of the communication being passed over its wires. This Court had to determine whether the term "transmit" implicated an entity who merely provided the mode of transmission. The Court concluded that only the actual sender of the message could be said to "transmit" it, at p. 91:

It is the person who breathes into the instrument the message which is transmitted along the wires who alone can be said to be the person who "transmits" the message. The owners of the telephone wires, who are utterly ignorant of the nature of the message intended to be sent, cannot be said ... to transmit a message of the purport of which they are ignorant. [Emphasis added]

[7] This Court relied on *Electric Despatch in Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, , 2004 SCC 45, [2004] 2 S.C.R. 427, a proceeding under the *Copyright Act*, to conclude that since ISPs merely act as a conduit for information provided by others, they could not themselves be held to communicate the information.

[11] We therefore agree with Noël J.A.'s answer to the reference question, namely, **that ISPs do not carry on "broadcasting undertakings" under the *Broadcasting Act* when, in their role as ISPs, they provide access through the Internet to "broadcasting" requested by end-users.** We would therefore dismiss the appeal with costs.

- **Section 2.4 - Communication to the public by telecommunication**

In ascertaining the extent of the damages flowing from an infringement, the Court will not take into consideration each technical infringements and each transmission by the Broadcaster Distribution Underakings will not constitute a separate communication to the public that must be compensated.

Leuthold v. Canadian Broadcasting Corporation, 2012 FC 748 (F.C.; 2012-06-14) Scott J.

[128] The *Copyright Act* is meant to properly compensate the owner of a copyright if his rights are infringed. In the present case the rights of Miss Leuthold were infringed. On six separate occasions her Photographs were viewed by Canadians for a duration of 18 seconds without her authorization. The Court will compensate Miss Leuthold for every one of the six communications to the Canadian public, but it cannot accept the principle that compensation must be awarded on the basis of each technical act of infringement because applying such a method runs counter to our reading of the *Broadcasting Act* with the *Copyright Act*. **To this Court subparagraph 2.4(1) (c) (ii) of the *Copyright Act* must be read in conjunction with the definition of broadcast in the *Broadcasting Act*.** The important factor to consider is the number of occasions the infringing broadcasts could be seen by the public. In this instance there were six separate occasions lasting

18 seconds each where the Canadian public who subscribe to cable could see the Photographs on Newsworld. **The technical means used to relay the infringing work has no bearing on the amount of compensation owed to Miss Leuthold save for the revenues derived from the infringing broadcast.** What is important in this Court's opinion is to adequately compensate a copyright owner for the damage suffered. The number of potential viewers bears some significance in terms of the value to be assigned to a license.

- **Section 3 - Copyright in works (no right to distribute)**

Section 3 does not provide for a right to distribute.

Nautical Data International, Inc. v. C-Map USA Inc., (2012), 106 C.P.R. (4th) 341 (F.C.; 2012-04-03) Zinn J. [revd. 2013 FCA 63, (F.C.A.; 2013-03-03)

[On summary motion by defendants for dismissal for lack of standing]

[22] NDI claims that three permissions were given to it under the Agreement: the right to produce, to integrate and to distribute. Only two of these three rights, the right to produce and the right to integrate, are protected under the *Copyright Act*. The right to distribute is not protected because subsection 3(1) of the *Copyright Act* does not mention distribution as a protected right. A number of decisions have held that an exclusive right to distribute is not an interest in the copyright: *Mobilevision Technology Inc v Rushing Water Products Ltd*, [1984] FCJ No 1199 at para 3 [*Mobilevision Technology*]; *Tele-Metropole Inc v Bishop*, [1987] 18 CPR (3d) 257 (CA) at 263 [*Tele-Metropole*], aff'd (without reference to this issue) 1990 CanLII 75 (S.C.C.), [1990] 2 SCR 467; *955105 Ontario Inc v Video 99*, (1993), 48 CPR (3d) 204 at 208 [955105]; *Jeffrey Rogers Knitwear Productions Ltd v RD. International Style Collections Ltd*, (1986), 19 CPR (3d) 217 at 221-222 [*Jeffrey Rogers Knitwear Productions*]; and *Close Up International Ltd v 1444943 Ontario Ltd*, [2006] OJ No 3857 at para 24 [*Close Up*]. I agree with the submission of the defendants that "a collateral interest to distribution ... is not actionable under the *Copyright Act*." *Mobilevision Technology* at para 3. This principle is supported by *Tele-Metropole* at 263; *955105* at 208; *Jeffrey Rogers Knitwear Productions* at 221-222; and *Close Up* at para 24.

- **Section 3 - Copyright in works (substantial part)**

Deciding whether a substantial part of a work has been reproduced is a question of fact and involves a qualitative rather than quantitative analysis.

Warman v. Fournier 2012 FC 803 (F.C.; 2012-06-21) Rinnie J.

[23] [...]. **Whether a substantial part of a work has been reproduced is a question of fact and involves a qualitative rather than quantitative analysis.** The relevant factors to be considered include:

- a. the quality and quantity of the material taken;
- b. the extent to which the respondent's use adversely affects the applicant's activities and diminishes the value of the applicant's copyright;
- c. whether the material taken is the proper subject-matter of a copyright;
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- d. whether the respondent intentionally appropriated the applicant's work to save time and effort; and
- e. whether the material taken is used in the same or a similar fashion as the applicant's: *U & R Tax Services Ltd v H & R Block Canada Inc*, [1995] FCJ No 961, at para 35.

- **Section 3 - Copyright in works (authorization)**

Authorizing the communication of a work is a right distinct from the communication itself. However, making a work available on an internet website accessible to the public constitutes authorization of communication by telecommunication.

Warman v. Fournier 2012 FC 803 (F.C.; 2012-06-21) Rinnie J.

[36] The application in respect of the Barrera Work must fail because any communication of the Barrera Work by telecommunication was authorized by the applicant. **Communication of a work by telecommunication will only constitute infringement if it was unauthorized.** In *Public Performance*, [*Public Performance of Musical Work (Re)*] [1999] C.B.D. 5] the Copyright Board held at page 19 that making a work available on an internet website accessible to the public constitutes authorization of communication by telecommunication:

Authorization" constitutes a separate protected use under the Act. To authorize is to sanction, approve or countenance. The person who makes a musical work available on an Internet-accessible site authorizes its communication. The work is posted for the sole purpose of being communicated and with full knowledge and intention that such a communication would occur. The person who makes the work available does more than merely provide the means to communicate the work; he/she either controls or purports to control the right to communicate it.

- **Section 3 - Copyright in works**

Technological neutrality means that the *Copyright Act* shall be of equal application between different media.

Entertainment Software Assn. v. Society of Composers, Authors & Music Publishers of Canada, 2012 SCC 34 (S.C.C.; 2012-07-12) *Abella and Moldaver JJ.* [reversing 86 C.P.R. (4th) 258 (F.C.A.; 2010-09-02), which was affirming 61 C.P.R. (4th) 353 (Cop. Bd.; 2007-10-18)]

[4] The focus of this appeal is on the meaning of the word “communicate” in s. 3(1)(f), a term which is not defined in the *Act*. The Society of Composers, Authors and Music Publishers of Canada (SOCAN), which administers the right to “communicate” musical works on behalf of copyright owners, applied to the Board for a tariff under this provision to cover downloads of musical works over the Internet. The Entertainment Software Association and the Entertainment Software Association of Canada (collectively, ESA), which represent a broad coalition of video game publishers and distributors, objected to the tariff, arguing that “downloading” a video game containing musical works did not amount to “communicating” that game to the public by telecommunication under s. 3(1)(f). Instead, a “download” is merely an additional, more efficient way to deliver copies of the games to customers. The downloaded copy is identical to copies purchased in stores or shipped to customers by mail, and the game publishers already pay copyright owners reproduction royalties for *all* of these copying activities.

[5] We agree with ESA. In our view, the Board’s conclusion that a separate, “communication” tariff applied to downloads of musical works **violates the principle of technological neutrality, which requires that the *Copyright Act* apply equally between traditional and more technologically advanced forms of the same media:** *Robertson v. Thomson Corp.*, 2006 SCC 43 (CanLII), [2006] 2 S.C.R. 363, at para. 49. The principle of technological neutrality is reflected in s. 3(1) of the *Act*, which describes a right to produce or reproduce a work “in any material form whatever”. In our view, there is no practical difference between buying a durable copy of the work in a store, receiving a copy in the mail, or downloading an identical copy using the Internet. **The Internet is simply a technological taxi that delivers a durable copy of the same work to the end user.**

[12] **In our view, the Board improperly concluded that the Internet delivery of copies of video games containing musical works amounts to “communicating” the works to the public. This view is evidenced by the legislative history of the *Copyright Act*,**

which demonstrates that the right to “communicate” is historically connected to the right to perform a work and not the right to reproduce permanent copies of the work.

- **Section 3 - Copyright in works (communication)**

The 1988 replacement of the word “radio-communication” by the word “telecommunication” merely expands the means of transmitting a communication (but does not expand the communication right to technologies that involve transmitting data in a way that gives end users a permanent copy of the work).

Entertainment Software Assn. v. Society of Composers, Authors & Music Publishers of Canada, 2012 SCC 34 (S.C.C.; 2012-07-12) Abella and Moldaver JJ. [reversing 86 C.P.R. (4th) 258 (F.C.A.; 2010-09-02), which was affirming 61 C.P.R. (4th) 353 (Cop. Bd.; 2007-10-18)]

[23] SOCAN argues that the 1988 amendment from “radio communication” to “telecommunication” demonstrates Parliament’s intent to remove *all* reference in s. 3(1)(f) to conventional performance or broadcasting activities, and to expand the communication right to technologies that involve transmitting data in a way that gives end users a permanent copy of the work.

[24] With respect, we disagree. The 1988 amendments to the *Copyright Act* found at ss. 61 to 65 of the *Canada-United States Free Trade Agreement Implementation Act*, were enacted in order to give effect to Articles 2005 and 2006 of the 1987 *Canada-U.S. Free Trade Agreement (CUFTA)*: see *Canadian Wireless Telecommunications Assn. v. Society of Composers, Authors and Music Publishers of Canada*, 2008 FCA 6 (CanLII), 2008 FCA 6, [2008] 3 F.C.R. 539 (*CWTA v. SOCAN*), at para. 27. Before *CUFTA*, Canadian courts had held that “radio communication” **under the former s. 3(1)(f) was limited to Hertzian radio waves and did not extend to communication by co-axial cables**: *Canadian Admiral Corp. v. Rediffusion, Inc.*, [1954] Ex. C.R. 382, at p. 410. *CUFTA*, however, required Canada to compensate copyright owners for the retransmission of television signals that were sent over cable lines. **The amendments were therefore designed to ensure that cable companies, and not just radio broadcasters, would also be captured under s. 3(1)(f)**: John S. McKeown, *Fox on Canadian Law of Copyright and Industrial Designs* (4th ed. (loose-leaf)), at pp. 21-86, 21-87 and 29-1.

[25] In this context, the replacement of the words “radio communication” with “telecommunication” should be understood as merely expanding the *means of communicating* a work — that is, from

radio waves (“by radio communication”) to cable and other future technologies (“to the public by telecommunication”). **In our view, by substituting the word “telecommunication” in 1988, Parliament did not intend to change the fundamental nature of the communication right, which had for over 50 years been concerned with performance-based activities. Instead, Parliament only changed the *means of transmitting* a communication. The word “communicate” itself was never altered.**

- **Section 3 - Copyright in works (communication)**

Communication right is a category of performance right.

Entertainment Software Assn. v. Society of Composers, Authors & Music Publishers of Canada, 2012 SCC 34 (S.C.C.; 2012-07-12) Abella and Moldaver JJ. [reversing 86 C.P.R. (4th) 258 (F.C.A.; 2010-09-02), which was affirming 61 C.P.R. (4th) 353 (Cop. Bd.; 2007-10-18)]

[26] Parliament’s addition of the phrase “to the public” to s. 3(1)(f) also supports this interpretation of the 1988 amendments. Before 1988, there was no doubt that all communications were “to the public”, as the nature of a broadcast through radio waves was necessarily public. The term “telecommunication”, however, risked introducing ambiguity into the *Act*, as telecommunication could also include private communications. **By adding the phrase “to the public” with the term “telecommunication” in 1988, Parliament clarified its intent to maintain the communication right as a category of performance right.**

- **Section 3 - Copyright in works (performance)**

Contrary to reproduction, performance is impermanent in nature. Furthermore, the right to communicate should not be transformed by the use of the word “telecommunication” in a way that would capture activities akin to reproduction.

Entertainment Software Assn. v. Society of Composers, Authors & Music Publishers of Canada, 2012 SCC 34 (S.C.C.; 2012-07-12) Abella and Moldaver JJ. [reversing 86 C.P.R. (4th) 258 (F.C.A.; 2010-09-02), which was affirming 61 C.P.R. (4th) 353 (Cop. Bd.; 2007-10-18)]

[35] Performing a work is fundamentally different than reproducing it. As this Court concluded in *Bishop v. Stevens*, [1990] 2 S.C.R. 467 (S.C.C.; 1990-08-16)] **a performance is impermanent in nature, and does not leave the viewer or listener with a durable copy of the work [...]**

[37] Even though *Bishop* [*Bishop v. Stevens*, [1990] 2 S.C.R. 467 (S.C.C.; 1990-08-16)] interpreted the pre-1988 version of the *Copyright Act* (before the “telecommunication” amendment), the distinction between performance-based and reproduction-based rights established in s. 3(1) is evidenced in the provisions of the current *Act*. For example, in s. 2.2(1), the term “publication” *includes* “making copies”, but expressly *excludes* “the performance in public, or the communication to the public by telecommunication” of a work. Similarly, the educational institutions exception in s. 29.4(2) refers to the right to “reproduce” and the right to “communicate by telecommunication to the public” as distinct rights. The same is true of s. 15(1), which categorizes neighbouring rights under the *Act* into two categories: the right to “communicate” and “perform” a performance, and the right to “reproduce” a fixation of the performance.

[38] **The distinction between performance and communication rights on the one hand and reproduction rights on the other is also evident in the collective administration of copyright tariffs under the *Copyright Act*.** In 1993, SOCAN — a performing rights society — was put in charge of administering the communication right in s. 3(1)(f) in relation to musical works: S.C. 1993, c. 23, s. 3: see McKeown, at pp. 3-12, 27-2 and 27-3. These provisions are contained in a section of the *Act* entitled “Collective Administration of *Performing Rights and of Communication Rights*”: ss. 67 to 68.2 (S.C. 1997, c. 24, s. 45): see McKeown, at p. 26-3. Even the Copyright Board itself categorizes its decisions relating to musical works into two categories: “Public Performance of Music” and “Reproduction of Musical Works”: <http://www.cb-cda.gc.ca/decisions/index-e.html>.

[39] **Therefore, the term “communicate” in s. 3(1)(f), which has historically been linked to the right to perform, should not be transformed by the use of the word “telecommunication” in a way that would capture activities akin to reproduction.** Such transformation would result in abandoning the traditional distinction in the *Act* between performance-based rights and rights of reproduction. There is no evidence either in 1988 or in subsequent amendments to the *Act* that Parliament intended such abandonment.

- **Section 3 - Copyright in works (defined term)**

The introductory part of subsection 3(1) defines what constitutes “copyright” and, by using the term “means” clearly indicates that the definition is exhaustive and the

enumerated rights are merely illustrative. *Entertainment Software Assn. v. Society of Composers, Authors & Music Publishers of Canada*, 2012 SCC 34 (S.C.C.; 2012-07-12) Abella and Moldaver JJ. [reversing 86 C.P.R. (4th) 258 (F.C.A.; 2010-09-02)

[41] In our view, the Court in *Bishop* [*Bishop v. Stevens*, [1990] 2 S.C.R. 467 (S.C.C.; 1990-08-16)] merely used this quote to emphasize that the rights enumerated in s. 3(1) are distinct. ***Bishop* does not stand for the proposition that a single activity (i.e., a download) can violate two separate rights at the same time.** This is clear from the quote in *Ash v. Hutchinson*, which refers to “two . . . acts”. In *Bishop*, for example, there were two activities: 1) the making of an ephemeral copy of the musical work in order to effect a broadcast, and 2) the actual broadcast of the work itself. In this case, however, there is only one activity at issue: downloading a copy of a video game containing musical works.

[42] **Nor is the communication right in s. 3(1)(f) a sui generis right in addition to the general rights described in s. 3(1). The introductory paragraph defines what constitutes “copyright”. It states that copyright “means” the sole right to produce or reproduce a work in any material form, to perform a work in public, or to publish an unpublished work. This definition of “copyright” is exhaustive, as the term “means” confines its scope.** The paragraph concludes by stating that copyright “includes” several other rights, set out in subsections (a) through (i). As a result, the rights in the introductory paragraph provide the basic structure of copyright. **The enumerated rights listed in the subsequent subparagraphs are simply illustrative:** Sunny Handa, *Copyright Law in Canada* (2002), at p. 195; see also *Apple Computer Inc. v. Mackintosh Computers Ltd.*, [1987] 1 F.C. 173 (T.D.), at p. 197. The rental rights in s. 3(1)(i) referred to by Justice Rothstein, for example, can fit comfortably into the general category of reproduction rights.

- **Section 3 - Copyright in works (communication)**

It is necessary to consider the context of the communication, not the means used, to determine if the communication right was infringed and a communication under paragraph 3(1)(f) is not restricted to a purely non-interactive context.

Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada, 2012 SCC 35 (S.C.C.; 2012-07-12) Rothstein J. [reversing in part 86 C.P.R. (4th) 239 (F.C.A.; 2010-09-02), which was affirming 61 C.P.R. (4th) 353 (Cop. Bd.; 2007-10-18)

[30] **Focusing on each individual transmission loses sight of the true character of the communication activity in question and**

makes copyright protection dependant on technicalities of the alleged infringer's chosen method of operation. Such an approach does not allow for principled copyright protection. Instead, it is necessary to consider the broader context to determine whether a given point-to-point transmission engages the exclusive right to communicate to the public. This is the only way to ensure that form does not prevail over substance.

[33] With respect, this proposition too must be rejected, for the same reason that focusing the analysis on the recipient of a transmission rather than on the overall context of the communication produces results inconsistent with the true character of the communication. [...]

[34] In addition, the appellants' proposed rule that each transmission be analyzed in isolation because each is initiated at the request of individual members of the public would have the effect of excluding all interactive communications from the scope of the copyright holder's exclusive rights to communicate to the public and to authorize such communications. A stream is often effectuated at the request of the recipient. On-demand television allows viewers to request and view the desired program at the time of their choosing. By definition, on-demand communications — relating to the so-called “pull” technologies — are initiated at the request of the user, independently of any other user, and each individual transmission happens in a point-to-point manner. None of these telecommunications would be considered as being made “to the public” simply because the *actual* transmission occurs at the initiative and discretion of the consumer to accept the invitation to the public to access the content.

[35] Nothing in the wording of s. 3(1)(f) of the Act implies such a limitation. A communication is not restricted to a purely non-interactive context.

- **Section 3 - Copyright in works (communication)**

The communication right provided by paragraph 3(1)(f) was amended to the technologically *neutral* right to “communicate . . . to the public by telecommunication.

Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada, 2012 SCC 35 (S.C.C.; 2012-07-12) Rothstein J. [reversing in part 86 C.P.R. (4th) 239 (F.C.A.; 2010-09-02), which was affirming 61 C.P.R. (4th) 353 (Cop. Bd.; 2007-10-18

[36] The right to communicate to the public is historically linked to traditional media that operated on a broadcasting, or “push”,

model. As pointed out by the appellants, the predecessor to s. 3(1)(f) guaranteed copyright holders an exclusive right to communicate literary, dramatic, musical or artistic works by *radio-communication*. The predecessor section was introduced in 1931, implementing Article 11bis of the *Berne Convention for the Protection of Literary and Artistic Works*, 828 U.N.T.S. 221 (Rome Revision of 1928): J. S. McKeown, *Fox on Canadian Law of Copyright and Industrial Designs*, (4th ed. (loose-leaf), at p. 21:86; *Composers, Authors and Publishers Assoc. of Canada Ltd. v. CTV Television Network Ltd.*, 1968 CanLII 89 (S.C.C.), [1968] S.C.R. 676, at p. 681. Radio-communications were understood to include transmissions by microwave over the airwaves: *Canadian Admiral Corp. v. Rediffusion, Inc.*, [1954] Ex. C.R. 382. As such, the radio-communication right extended to radio and traditional over-the-air television broadcasting, notably leaving transmissions by cable outside of copyright protection.

[37] This technology-specific communication right was amended to the technologically *neutral* right to “communicate . . . to the public by telecommunication” to reflect the obligations entered into by Canada under NAFTA (*Canada-United States Free Trade Agreement Implementation Act*, S.C. 1988, c. 65, ss. 61 and 62). The change from radio-communication to telecommunication meant that Canadian *cable* companies which previously escaped any payment of royalties under the “radio-communication” right, were now caught by the Act: S. Handa, *Copyright Law in Canada*, (2002), at p. 320.

[38] The historic relationship between the right to communicate to the public and broadcasting-type, “push” technologies, and the 1988 amendment in particular, is evidence that the Act has evolved to ensure its continued relevance in an evolving technological environment. **The historic relationship does not support reading into the Act restrictions which are not apparent from and are even inconsistent with the neutral language of the Act itself.**

- **Section 3 - Copyright in works**

A point-to-point transmission is not necessarily a private transaction outside of the scope of the exclusive right to communicate to the public. “If the content is intentionally made available to anyone who wants to access it, it is treated as communicated “to the public” even if users access the work at different times and places”. (D. Vaver, *Intellectual Property Law: Copyright, Patents, Trade-Marks*, (2nd ed. 2011) at p. 173).”

Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada, 2012 SCC 35 (S.C.C.; 2012-07-12) Rothstein J. [reversing in part 86 C.P.R. (4th) 239 (F.C.A.; 2010-09-02), which was affirming 61 C.P.R. (4th) 353 (Cop. Bd.; 2007-10-18)]

[52] [...] CCH (S.C.C.) [*CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, S.C.C.; 2004-03-04)] determined that a “series of repeated ... transmissions of the same work to numerous different recipients” may constitute a communication “to the public” within the meaning of s. 3(1)(f) of the Act (CCH (S.C.C.), at para. 78). Where such a series of point-to-point communications of the same work to an aggregation of individuals is found to exist, it matters little for the purposes of copyright protection whether the members of the public receive the communication in the same or in different places, at the same or at different times or at their own or the sender’s initiative.

- **Section 3 - Copyright in works**

The *Copyright Act* does not give the owner of the copyrights an exclusive right to use the copyrighted work.

Harmony Consulting Ltd. v. G.A. Foss Transport Ltd., 2012 FCA 226 (F.C.A.; 2012-08-31) Gauthier J. [confirming 92 C.P.R. (4th) 6 (F.C.; 2011-03-18)]

[76] I agree with the trial judge that the *Act* does not give the owner of the copyrights an exclusive right to use the copyrighted work. In that respect, **the rights of a copyright owner differ from those granted to the owner of a patent or a trademark.**

- **Section 3 - Copyright in works**

All things being equal, using two rights should cost more than using only one.

SOCAN Tariff 22.A (2007-2010); CMRRA/SODRAC Inc. Tariff (2008-2010) (Online Service Music) <http://www.cb-cda.gc.ca/decisions/2012/socan-csi-reasons.pdf> (Cop. Bd.; 2012-10-05)

[80] This approach ignores a principle the Board has expressed on many occasions: all things being equal, using two rights should cost more than using only one. [FN 53 *SOCAN – Tariff 22.A (Internet – Online Music Services) for the years 1996-2006* (18 October 2007) Copyright Board Decision. See also *CMRRA/SODRAC Inc. (Online Music Services) for the years 2005 to 2007* (16 March 2007) Copyright Board Decision at para. 84.] As a result of *ESA*, [FN 54 *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34] however, this no longer is relevant in this instance.

- **Section 3 - Copyright in works**

A discovery transcript attracts copyright protection and a court reporter shall be compensated for its reproduction.

Hidasi v. Davie & Associates, 2012 BCHRT 384 (B.C. Human Rights Tribunal; 2012-11-02) Terrise, member

B Does Copyright Prevent the Disclosure of a Discovery Transcript?

[29] Whether the transcript is copyrighted or not, I am familiar with the practice of protecting the rights of court reporters to revenues from producing discovery transcripts by ensuring that any copies of transcripts are produced by the court reporter who recorded the transcript and prepared it.

[30] **Because of this, I do not intend to order Mr. Poon or Davie & Associates to provide a copy of the transcript which is in their possession. However, it is clear that Mr. Hidasi has a right to a copy of the transcript. I therefore order that Davie & Associates ascertain the cost of obtaining an original copy of the transcript from the court reporter who produced it, that they provide Mr. Hidasi with a statement of that cost and that, upon provision by Mr. Hidasi to Davie & Associates of the equivalent sum, that they order a copy of the transcript for Mr. Hidasi and provide it to him.**

- **Section 3 - Copyright in works**

The retransmission right is part of the right to communicate the work to the public by telecommunication but this right is carved by the provisions dealing with the retransmission of a local or distant signals.

Reference re Broadcasting Regulatory Policy 2010-167 and Broadcasting Order CRTC 2010-168, 2012 SCC 68 (S.C.C.; 2011-09-29) Rothstein J. [reversing 91 C.P.R. (4th) 389 (F.C.A.; 2011-02-28)]:

[58] [...] On the one hand, **the copyright owner is granted a general right to retransmit the work. This retransmission right is part of the right, under s. (3)(1)(f), to communicate the work by telecommunication to the public. On the other hand, the owner's general right to retransmit is restricted by a carve-out in s. 31(2) of the *Copyright Act*, which effectively grants to a specific class of retransmitters two retransmission rights. The first right lets these users simultaneously retransmit without a royalty payment, works carried in a local signal. The second right lets them simultaneously retransmit works carried in distant signals, but only**

subject to the payment of royalties under a form of compulsory licence regime (*Copyright Act*, s. 31(2)(a) and (d)). Both user rights are, subject to s. 31(2), beyond the owner's control.

- **Section 3 - Copyright in works**

Communicating a work to the public by cable is an exclusive right covered by the communication of a work to the public by telecommunication.

Reference re Broadcasting Regulatory Policy 2010-167 and Broadcasting Order CRTC 2010-168, 2012 SCC 68 (S.C.C.; 2011-09-29) Rothstein J. [reversing 91 C.P.R. (4th) 389 (F.C.A.; 2011-02-28)]:

[74] The same purposeful balancing is evidenced in the legislative history of the s. 31 regime for the retransmission of *works*. The predecessor to the current s. 3(1)(f) guaranteed copyright holders an exclusive right to communicate works by *radio communication*. Jurisprudence interpreted the radio communication right as excluding transmissions by *cable*: *Canadian Admiral Corp. v. Rediffusion, Inc.*, [1954] Ex. C.R. 382. **Section 3(1)(f) was amended in 1988 to confer the exclusive right to “communicate the work to the public by telecommunication”** to reflect the obligations entered into by Canada under the *Free Trade Agreement between the Government of Canada and the Government of the United States of America*, Can. T.S. 1989 No. 3 (see *Canada-United States Free Trade Agreement Implementation Act*, S.C. 1988, c. 65, ss. 61 and 62; see also *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35 (CanLII), 2012 SCC 35, at paras. 36-37 and McKeown, at para. 3:2(b)). **The change from radio communication to telecommunication meant that cable companies were now liable for copyright infringement when they communicate copyright-protected works to the public.**

- **Section 3 - Copyright in works [translation]**

The mere scanning of an original work is not a translation of a work and the scan does not constitute an original work attracting copyright protection.

Keatley Surveying Ltd. v. Teranet Inc., 2012 ONSC 7120 (Ont. Sup. Ct.; 2012-12-14) Horkings J.:

[119] What is a translation? The word “translation” is not defined in the *Copyright Act*. However, there is case law and authoritative texts that discuss the meaning of this word as used in the Act. **In essence these sources confirm that the word “translation” is used in the**

Act in its “primary sense of the turning of something from one human language into another.” (John S. McKeown, *Fox on Canadian Law of Copyright and Industrial Designs*, 4th ed., looseleaf (Toronto: Carswell, 2003) at 21:9; David Vaver, *Copyright Law* (Toronto: Irwin Law, 2000) at 130). In order to constitute a “translation”, the resulting work must also be original.

[122] The statement of claim alleges that copies of the plans of survey “were translated into various digital formats, including Portable Document Folder (PDF) and Tagged Image File Format (TIFF)”. Following *Apple [Apple Computer, Inc. v. Mackintosh Computers Ltd.]*, [1988] 1 F.C. 673 at para. 3 (C.A.), aff’d [1990] 2 S.C.R. 209., I conclude that **scanning the plans of survey to create a digital format is not a translation within the meaning of s. 3(1)(a) of the Copyright Act. The resulting digital plan of survey is not an original work, as there is no “skill and judgment” involved in simply scanning the plans of survey. It is therefore plain and obvious that there is no infringement of copyright for “translating copies” of the plans of survey by converting the plans into digital formats.** As a result, those parts of the statement of claim dealing with translation to advance an

Section 5 - Conditions for subsistence of copyright

The degree of originality under the *Copyright Act* is lesser than the degree of originality required under the *Industrial Design Act* (which, one will note, is rather referring to novelty than originality)

Victor Stanley Inc., Re. 2012 CarswellNat 885 (Canada Patent Appeal Board & Patents Commissioner; 2012-03-28)

[42] **The degree of originality required to register an original design is greater than that laid down by Canadian copyright legislation, but less than that required to register a patent:** *Rothbury International Inc. c. Canada (Ministre de l'industrie)*, 2004 FC 578 (F.C.) at ¶ 35.

- **Section 12 - Where copyright belongs to Her Majesty**

The *Copyright Act* binds the Crown.

Access Copyright - Provincial and Territorial Governments Tariffs (2005-2014) Decision (Crown immunity application) 98 C.P.R. (4th) 215 (Cop. Bd.; 2012-01-05)

[1] Alberta, Manitoba, New Brunswick, Newfoundland and Labrador, Nova Scotia, Nunavut, Prince Edward Island and Saskatchewan

(collectively the Objectors) rely on the principle of Crown immunity, as codified in section 17 of the *Interpretation Act*, [Fn 1 R.S.C. 1985, c. I-21] to claim that the *Copyright Act*[Fn2 R.S.C. 1985, c. C-42] (the “Act”) does not apply to them and that, consequently, the tariffs proposed by Access Copyright in respect of Provincial and Territorial governments cannot bind them.

[2] The Objectors’ claim for Crown immunity is dismissed by reason **that the Act binds the Crown by necessary implication.**

- **Section 12 - Where copyright belongs to Her Majesty**

The rights and privileges reserved to the Crown do not mean that the Crown is immune from copyright liability.

Access Copyright - Provincial and Territorial Governments Tariffs (2005-2014) Decision (Crown immunity application) 2012 CarswellNat 609 (Cop. Bd.; 2012-03-15)

[40] The parties debated at length the meaning of the words “without prejudice to any rights or privileges of the Crown”. If, as the Objectors argue, these rights and privileges are all the rights and privileges accorded to the Crown, including immunity, then the inference is that by adopting section 12, Parliament specifically allowed the Crown to maintain its overall immunity from the *Act* despite the Crown being granted certain rights pursuant to other provisions of the *Act*. **On the other hand, if these words mean only those copyrights granted to the Crown under common law, then section 12 is limited to the grant of copyright and cannot be read to infer any Parliamentary intent regarding immunity**

[68] [...] When analyzing the whole of the *Act* contextually, we are irresistibly drawn to the logical conclusion that the *Act* generally binds the Crown. Certain exceptions were put in place to ensure that certain activities undertaken by the Crown – both federal and provincial – did not infringe copyright.

- **Section 12 - Where copyright belongs to Her Majesty**

Crown’s prerogatives relating to Crown copyright, are preserved by section 12 of the *Act*, not other forms of prerogatives.

Access Copyright - Provincial and Territorial Governments Tariffs (2005-2014) Decision (Crown immunity application) 2012 CarswellNat 609 (Cop. Bd.; 2012-03-15)

[42] Section 12 of the *Act* finds its source in section 18 of the *Imperial Copyright Act of 1911*. This provision was significantly amended, especially with the passage of the *Copyright, Designs and Patents Act*

of 1988, which simplified the regime of Crown copyright and abolished the perpetual Crown copyright in unpublished works of the Crown. By contrast, section 12 has been in place, unchanged, since the Canadian Act came into force in 1924, even though the Act has undergone a number of significant reviews, including in 1988 and 1997.

[49] Section 12 has remained unchanged. Parliament has addressed no “mischief, evil or condition” inherent to this section that any report may have attempted to highlight. This can only confirm the need, consistent with *Morguard Properties*, [*Morguard Properties Ltd. v. City of Winnipeg* [1983] 2 S.C.R. 493 at 499] to limit our inquiry to the words of section 12 and the context of that provision.

[50] When undertaking this inquiry, the following facts should be kept in mind. First, section 12 grants Her Majesty rights in works prepared or published by or under her direction or control. However, Crown copyright covers many works which are not prepared or published under the direction or control of Her Majesty, such as judicial decisions. Second, the rights granted in section 12 generally limit the protection to 50 years following the first publication of the work [Fn 29 A term shorter than “normal” copyright.] whereas it is arguable that Crown copyright under the Crown prerogative is perpetual. Put another way, Crown copyright under the Crown prerogative is wider in scope and duration than what section 12 provides.

[51] In addition, section 12 must not be read in isolation. Rather, it must be interpreted within the overall context and scheme of the Act and, in particular, in relation to section 89 which states:

89. No person is entitled to copyright otherwise than under and in accordance with this Act or any other Act of Parliament, but nothing in this section shall be construed as abrogating any right or jurisdiction in respect of a breach of trust or confidence.

[52] Certain inferences can be drawn by reading section 12 together with section 89. As a result of section 89, all copyright is exclusively contained within the legal structure of the Act. Without the opening phrase of section 12, section 89 would operate to eliminate all remaining common law copyright held by the Crown. This seems to confirm that the terms “without prejudice to any rights or privileges of the Crown” are necessary to maintain the Crown prerogative in its copyright and that those words must be read to mean such a prerogative.

[55] Moreover, section 89 targets copyright exclusively. As a result, the opening words of section 12 fully serve their purpose by preserving the Crown’s prerogatives relating to Crown copyright, not other forms of prerogatives such as Crown immunity. This is where section 17 of the

Interpretation Act comes into play: it is under that provision that any claim of Crown immunity must be made. If section 12 also fulfills that purpose, as is argued by the Objectors, then the opening words of section 12 are largely redundant. This cannot be Parliament's intent.

- **Section 12 - Where copyright belongs to Her Majesty**

Section 12 applies to federal and provincial Crowns as well as Crown corporations.

Access Copyright - Provincial and Territorial Governments Tariffs (2005-2014) Decision (Crown immunity application) 20112 Carswell 609 (Cop. Bd.; 2012-03-15)

[70] The implications of our decision are therefore greater than the Objectors contend. Crown immunity applies, if at all, to any and all tariff proceedings before the Board seeking to set royalties for the use of copyrighted works by the Crown. **It applies not only to Objectors who have raised the issue, but to the federal and provincial Crowns and their agents. This would include Crown corporations that hold and use a significant amount of copyrighted material, such as the CBC, Telefilm, the National Film Board, provincial educational televisions stations, and scores of other similar provincial and federal agencies.**

- **Section 12 - Where copyright belongs to Her Majesty**

Crown immunity is a jurisdictional issue that shall be raised *proprio motu* by the decider.

Access Copyright - Provincial and Territorial Governments Tariffs (2005-2014) Decision (Crown immunity application) 2012 CarswellNat 609 (Cop. Bd.; 2012-03-15)

[71] Furthermore, Crown immunity is a jurisdictional issue. The Board is obliged to raise such issues *proprio motu*. Were the claim of Crown immunity to succeed in this case, the Board would be obliged to reject of its own motion any tariff filed in respect of any emanation of the Crown unless immunity had been waived.

[75] Modern governments create, transact, monetise and use copyrighted material, not just in relation to section 12, but significantly as a result of the general copyright granted pursuant to sections 3, 15, 18 and 21 of the *Act*. Governments hold such copyright either as of right (as first owners of the copyright), as a matter of contract (when they acquire the rights of others) and even as a result of common or statutory law (*escheat*). Governments are unable to enforce any of those rights without the benefit of the *Act*. In other terms, given the ambit of government action in the copyright market and the extent to which governments must rely

on the *Act* to enforce their copyrights, the *Act* makes no sense unless it binds the Crown.

- **Section 12 - Where copyright belongs to Her Majesty**

When a work was prepared for the Crown, the copyright in this work is vested into Her Majesty

R. v. Rundle (Nec Plus Ultra), 2012 ONSC 5185 (Ont. Sup. Ct.; 2012-09-14) Smith J.
[11] Section 12 of the *Copyright Act*, R.S.C., 1985, c. C-42, provides that **where a work has been prepared by the Crown the copyright belongs to Her Majesty.**

- **Section 12 - Where copyright belongs to Her Majesty**

When creating plans for survey a surveyor may be the owner of the copyright in those plans; however, when they are registered and/or deposited in the Ontario land registry office, the copyright is then vested in her Majesty.

Keatley Surveying Ltd. v. Teranet Inc., 2012 ONSC 7120 (Ont. Sup. Ct.; 2012-12-14) Horkings J.:

[Upon motion for for certification of a proposed class action pursuant to s. 5 of the *Class Proceedings Act*, 1992, S.O. 1992, c. 6]

[100] Applying s. 12, Teranet says that copyright belongs to the Crown if the plans of survey are:

- (5) published by the Crown;
- (6) published under the control of the Crown;
- (7) published under the direction of the Crown;
- (8) prepared by the Crown;
- (9) prepared under the control of the Crown; or
- (10) prepared under the direction of the Crown.

[101] Teranet argues that the plans of survey fall into at least five of the six categories. In particular, Teranet says it is plain and obvious that the plans of survey are prepared under the direction or control of the Crown, and therefore the copyright infringement claim will fail.

[102] For example, surveyors must comply with at least seven statutes and applicable regulations when preparing plans of survey. Legislation dictates the manner in which the survey is conducted, the content of the plan of survey, the form of the plan, and even details of the plan's physical appearance, such as the type of paper used, the shape of the paper and the type of ink used.

[103] The manner of conducting a survey, and in particular, the preparation of a plan of survey, is regulated and subject to statutory compliance. O. Reg. 43/96, made under the *Registry Act*, R.S.O. 1990, c. R.20, applies to plans that are to be registered or deposited under the *Registry Act* or the *Land Titles Act*, R.S.O. 1990, c. L.5. Section 5(1) of O. Reg. 43/96 states that plans submitted for registration or deposit *shall* comply with:

- (a) the *Registry Act*, or the *Land Titles Act* if the plan was prepared under that Act;
- (b) Regulation 43/96 made under the *Registry Act*;
- (c) the *Surveys Act*, R.S.O. 1990, c. S.30 and the regulations under the *Surveys Act*;
- (d) the Act and regulations under which the plan was prepared (for example, the *Condominium Act*, 1998, S.O. 1998, c. 19 or the *Expropriations Act*, R.S.O. 1990, c. E.26); and
- (e) the *Surveyors Act*, R.S.O. 1990, c. S.29 and the regulations made under it.

[104] In particular, the statutory framework for the registration and deposit of plans of survey states that all plans submitted for deposit or registration at a land registry office become the property of the Crown. Section 165(1) of the *Land Titles Act* provides that:

Every registered instrument and deposited or registered plan *is the property of the Crown* and, except as otherwise provided in the regulations, shall be retained in the custody of the land registrar in his or her office. [Emphasis added.]

[105] Similarly, section 50(3) of the *Registry Act* provides:

Every registered instrument *is the property of the Crown* and, subject to subsection 17(3) and the regulations, shall be retained in the custody of the land registrar in his or her office. [Emphasis added.]

[106] In addition, section 18(10) of the *Registry Act* provides:

All books, indexes, photographic film reproductions and other records used and kept in and for the purposes of a land registry office *are the property of the Crown*. [Emphasis added.]

[107] Consistent with the statutory provisions that plans of survey are property of the Crown, a plan of survey will not be accepted for registration or deposit at a land registry office if it contains any copyright mark, by words or symbols, on the face of the plan.

- **Section 13 - Ownership of copyright**

Numerous factors can be considered in order to determine the status of the author as an employee or an independent contractor (acting on his own account), amongst which is the integration of the tasks of the author in the business.

Lachance v Productions Marie Eykel inc., 2012 QCCS 1012 (Que. Sup. Ct.-Merits; 2012-03-15) Grenier J.

[47] **Le contrat entre le demandeur et son employeur est un contrat d'emploi. Bien sûr, le demandeur jouissait d'une grande latitude professionnelle. Ceci n'en fait pas pour autant un travailleur autonome comme il l'a prétendu. Le contrôle effectif de l'employeur ne constitue pas le critère le plus important lorsque, par son savoir, un employé jouit d'une autonomie professionnelle** [Fn15 BICH, Marie-France, «Emploi et propriété intellectuelle – méditations sur les droits moraux du salarié», dans *Développements récents en droit de la propriété intellectuelle*, Cowansville (Qc), Yvon Blais, 1999, p. 205.]

[48] La preuve a révélé que Laurent Lachance était subordonné à son employeur, le ministère de l'Éducation :

- Son supérieur immédiat était André Chamberland, directeur de la Production audiovisuelle pour le Ministère;
- Les fiches de notation du demandeur indiquent que ce dernier travaillait sous l'autorité du directeur de la Production audiovisuelle (D-7);
- Le Ministère imposait au demandeur le cadre général de son travail (D-7);
- Le Ministère l'évaluait annuellement;
- Il recevait un salaire, était syndiqué et avait des prélèvements à la source.

[49] Les fiches d'évaluation indiquent que le demandeur, en tant que coordonnateur de secteur, avait la responsabilité générale de l'aspect pédagogique d'un groupe de documents pédagogiques audiovisuels, qu'il avait un budget à administrer et des responsables pédagogiques à diriger.

[50] **Il va sans dire que le travail du demandeur était intégré à l'entreprise qui l'employait et qui lui fournissait les outils appropriés pour mener à bien le mandat que son supérieur immédiat lui avait confié.** Le fait qu'il ait fourni sa prestation de travail dans des locaux qui appartenaient à JPL Productions et, plus tard, à Télé-Québec, ne change rien à la situation. Le demandeur demeurait un employé du Ministère de l'Éducation.

- **Section 13 - Ownership of copyright**

On the importance of conducting an effective due diligence on the ownership of the works prior to their acquisition.

Donnely c. Toth, 2012 QCCQ 2256 (Que. Ct.; 2012-03-30) Renaud J.

[15] De plus, la vente comportait toutes les images contenues sur le disque dur ou les «CD» ou la galerie d'images d'art. Or, le défendeur a constaté que le demandeur ou son entreprise n'était pas propriétaire de toutes celles-ci. Des droits de propriété intellectuelle devaient être payés à des tierces entreprises.

[26] Le défendeur, si cette situation était si importante, aurait dû communiquer avec le demandeur bien avant que celui-ci exige le premier versement de 5 000\$. A la limite, on peut toujours dire qu'il en coûterait des dizaines de milliers de dollars pour vendre toutes ces nombreuses images, mais ce n'était pas la finalité de cette vente. Il y avait suffisamment d'images de disponibles pour opérer, sans enfreindre les limites des règles de la propriété intellectuelle.

- **Section 13 - Ownership of copyright**

There is no universal test to ascertain the existence of an employer-employee relationship.

Harmony Consulting Ltd. v. G.A. Foss Transport Ltd., 2012 FCA 226 (F.C.A.; 2012-08-31) Gauthier J. [confirming 92 C.P.R (4th) 6 (F.C.; 2011-03-18)]

[56] In *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.* 2001 SCC 59 (CanLII), 2001 SCC 59, [2001] 2 S.C.R. 983, (*Sagaz Industries*), the Supreme Court of Canada acknowledged that **there is no universal test to establish the existence of an employment relationship. The central question is whether the person has been performing the services as a person in business for his or her own account (*Sagaz Industries* at paragraph 47).**

- **Section 13 - Ownership of copyright**

Ascertaining whether an author was an employee of a contractor goes on the merit of a case relating to copyright ownership

Kennedy c. Ruminski, 2012 QCCS 4417 (Que. Sup. Ct. ; 2012-09-21) Poulin J.

[On a motion for summary dismissal of the statement of Defence and Cross-demand]

[11] CONSIDÉRANT QUE, pour sa part, le défendeur est d'avis que la question portant sur la qualité d'employé ou de « *commercial associate* » en est justement une qui devra être tranchée par le juge du procès;

- **Section 14.1 - Moral rights**

Misattribution of the authorship is an infringement of one of the moral rights but can only be litigated by the beneficiary of those rights, which cannot be assigned.

Harmony Consulting Ltd. v. G.A. Foss Transport Ltd., 2012 FCA 226, (F.C.A.; 2012-08-31) Gauthier J. [confirming 92 C.P.R.(4th) 6, (F.C.; 2011-03-18)]

[74] I have not been persuaded that the trial judge made a palpable and overriding error in concluding that Harmony had not establish that modification of the start-up screen necessarily involved making an unauthorised reproduction. Thus, in such circumstances, **the change in the name appearing on that screen (alleged misattribution of the work) could only be challenged by the owner of the moral rights in Petro. Such rights cannot be assigned and are vested in the author.**

- **Section 19 - Right to remuneration**

The right to remuneration for the performance in public or the communication to the public by telecommunication of a sound recording is a right distinct from the right of the performance in public of communication to the public of a work.

Re:Sound Tariff No. 6B – Use of Recorded Music to Accompany Physical Activities, 2008-2009, http://www.cb-cda.gc.ca/tariffs-tarifs/certified-homologues/2012/ReSound6_B_reasons.pdf (Cop. Bd.; 2012-07-06)

[28] Under s. 19 of the Act, the appellant is entitled to collect equitable remuneration on behalf of performers and makers of sound recordings when their recordings are performed in public or communicated to the public by telecommunication. **The right to collect these royalties was added to the Act in 1997 as part of a package of “neighbouring rights” in sound recordings which can be distinguished from traditional copyrights held by creators of musical works such as composers and lyricists (S.C. 1997, c. 24).** These new neighbouring rights were introduced by Parliament to comply with Canada’s obligations under the *Rome Convention*. In addition to art. 12 of the *Rome Convention*, which establishes the right to equitable remuneration where a published phonogram “is used directly for broadcasting or for any

communication to the public”, art. 10 provides that “[p]roducers of phonograms shall enjoy the right to authorise or prohibit the direct or indirect reproduction of their phonograms.”

[29] As I mentioned above, the right to collect royalties on behalf of performers and makers of sound recordings, although provided for in s. 19, is dependent on the definition of “sound recording” in s. 2 of the Act. **This definition has a bearing on the limits of the right. Unless what is being performed or communicated to the public by telecommunication is a “sound recording”, the right to collect royalties on that performance or communication will not be triggered.**

- **Section 19 - Right to remuneration**

When a sound recording is on the repertoire of a collective society, this collective collects royalties for both the performer and the maker, even if only one of them brought the sound recording in the repertoire of the collective.

Re:Sound Tariff No. 6B – Use of Recorded Music to Accompany Physical Activities, 2008-2009, http://www.cb-cda.gc.ca/tariffs-tarifs/certified-homologues/2012/ReSound6_B_reasons.pdf (Cop. Bd.; 2012-07-06)

[76] Either the maker or the performer can bring an eligible recording into the Re:Sound repertoire. **Furthermore, when this occurs, all the rights in the recording become part of the repertoire, not just those of the person who brought the recording into the repertoire.**

[77] **As a result, when the recording is in the repertoire, Re:Sound is entitled to collect royalties for the benefit of both performers and makers, even if some have not assigned their rights to Re:Sound. Re:Sound is in turn required to distribute equal shares to performers and makers, whether or not they are members of a Re:Sound collective.** Hence, the requirement in subsection 19(3) of the *Act* that equitable remuneration be equally shared between the performer and maker is satisfied.

[81] [...] That provision [section 58.1 of the Copyright Amendment Act, S.C. 1997, c. 24] limits the ambit of any assignment of a right that would be a right to remuneration under the *Act* made in an agreement concluded before April 25, 1996. A provision that limits assignments is not required where no assignment is possible.

- **Section 20 – Conditions [to the right of remuneration]**

For the right to remuneration to apply, several conditions are to be met: i) recordings made in a non-Rome country by a maker who is not a Rome resident are not eligible, ii) eligibility to the remuneration depends entirely on the status of the maker or the location of the fixation and not of the performers, and iii) residence-based eligibility is determined by looking at the maker itself.

Re:Sound Tariff No. 6B – Use of Recorded Music to Accompany Physical Activities, 2008-2009,
http://www.cb-cda.gc.ca/tariffs-tarifs/certified-homologues/2012/ReSound6_B_reasons.pdf (Cop. Bd.; 2012-07-06)

[66] Section 20 of the *Act* provides that a sound recording can trigger equitable remuneration pursuant to section 19 (i.e. is eligible) if the maker resides in a Rome convention country (residence based eligibility) or if all fixations were made in such a country (location-based eligibility). For the purposes of these proceedings, this is important in at least three respects.

[67] First, recordings made in a non-Rome country by a maker who is not a Rome resident are not eligible. This includes the vast majority of recordings made in the United States. [Fn6 Essentially, the Canadian *Act* applies to works originating from a country that is a party to the *Berne Convention for the Protection of Literary and Artistic Works* and to sound recordings originating from a country that is a party to the *Rome International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations*. Several countries that are parties to the *Berne Convention* are not parties to the *Rome Convention*, most notably the United States.] Users can avoid paying Re:Sound royalties by playing only sound recordings that are not eligible. This task becomes easier if music is provided, for example, by a supplier of exercise music or videos (e.g., Zumba), if the supplier only uses non-eligible recordings.

[68] Second, who performers are, where they live and whether they are members of a collective are irrelevant to the issue of sound recording eligibility; this depends entirely on the status of the maker or the location of the fixation.

[69] Third, residence-based eligibility is determined by looking at the maker, not its parent company or its Canadian agent. A recording made in a non-Rome country by a non-Rome maker is ineligible even if the maker is a wholly owned subsidiary of a Rome resident or if the maker's Canadian agent is a Rome maker. Contractual arrangements between the maker and its parent company or agent cannot make eligible a recording that is not.

- **Section 21 - Copyright in telecommunication**

Canadian Radio-television and Telecommunications Commission (Re), 2012 SCC 4 (S.C.C.; 2012-02-09) [affirming 2010 CarswellNat 2092, F.C.A.; 2010-07-07]

[6] This interpretation of “broadcasting undertaking” is consistent with *Electric Despatch Co. of Toronto v. Bell Telephone Co. of Canada*, (1891), 20 S.C.R. 83. In *Electric Despatch*, the Court had to interpret the term “transmit” in an exclusivity contract relating to messenger orders. Like the ISPs in this case, Bell Telephone had no knowledge or control over the nature of the communication being passed over its wires. This Court had to determine whether the term “transmit” implicated an entity who merely provided the mode of transmission. The Court concluded that only the actual sender of the message could be said to “transmit” it, at p. 91:

It is the person who breathes into the instrument the message which is transmitted along the wires who alone can be said to be the person who "transmits" the message. The owners of the telephone wires, who are utterly ignorant of the nature of the message intended to be sent, cannot be said ... to transmit a message of the purport of which they are ignorant. [Emphasis added]

[7] This Court relied on *Electric Despatch* in *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, , 2004 SCC 45, [2004] 2 S.C.R. 427, a proceeding under the *Copyright Act*, to conclude that **since ISPs merely act as a conduit for information provided by others, they could not themselves be held to communicate the information.**

- **Section 21 - Copyright in telecommunication**

Since their primary activity in relation communication signals is their retransmission, broadcasting distribution undertakings (or BDU) B are not a “broadcaster” within the meaning of the *Copyright Act*.

Reference re Broadcasting Regulatory Policy 2010-167 and Broadcasting Order CRTC 2010-168, 2012 SCC 68 (S.C.C.; 2011-09-29) Rothstein J. [reversing 91 C.P.R. (4th) 389 (F.C.A.; 2011-02-28):

[49] The aspect relevant for this appeal is in para. [21(1)](c). Under this paragraph, a broadcaster has the sole right to authorize another *broadcaster* to retransmit simultaneously a communication signal. Section 2 of the *Copyright Act* defines “broadcaster” as a body that, in the course of operating a broadcasting undertaking, broadcasts a communication signal in accordance with the law of the country in which the broadcasting

undertaking is carried on, but excludes a body whose primary activity in relation to communication signals is their retransmission.

[50] The underlined portion of the definition refers to BDUs. **BDUs are not a “broadcaster” within the meaning of the *Copyright Act* because their primary activity in relation communication signals is their retransmission.** Thus, the broadcaster’s s. 21(1)(c) right to authorize, or not authorize, another broadcaster to simultaneously retransmit its signals does not apply against BDUs. In other words, under s. 21 of the *Copyright Act*, a broadcaster’s exclusive right does not include a right to authorize or prohibit a *BDU* from retransmitting its communication signals.

[67] **In my view, s. 21(1) represents the expression by Parliament of the appropriate balance to be struck between broadcasters’ rights in their communication signals and the rights of the users, including BDUs, to those signals. It would be incoherent for Parliament to set up a carefully tailored signals retransmission right in the *Copyright Act*, specifically excluding BDUs from the scope of the broadcasters’ exclusive rights over the simultaneous retransmission of their signals, only to enable a subordinate legislative body to enact a functionally equivalent right through a related regime.** The value for signal regime would upset the aim of the *Copyright Act* to effect an appropriate “balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator” (*Théberge*, at para. 30 [*Théberge v. Galérie d’Art du Petit Champlain inc.*, 2002 SCC 34]).

- **Section 21 - Copyright in telecommunication**

Section 21 defines copyright in a communication signal.

Reference re Broadcasting Regulatory Policy 2010-167 and Broadcasting Order CRTC 2010-168, 2012 SCC 68 (S.C.C.; 2011-09-29) Rothstein J. [reversing 91 C.P.R. (4th) 389 (F.C.A.; 2011-02-28)]:

[81] **Contrary to s. 89, the value for signal regime would create a new type of copyright by regulation or licensing condition.** Sections 2 and 21 of the *Copyright Act* define copyright in a communication signal to include the sole right to authorize another broadcaster to retransmit it to the public simultaneously with its broadcast. Authorizing simultaneous retransmission is then an aspect of copyright, although the right under the *Copyright Act* is

limited to authorizing only specific defined entities, other broadcasters. In light of the legislative history discussed above, this limitation on copyright appears to be the result of a specific Parliamentary choice not to change the balance struck in the *Copyright Act* between broadcasters and BDUs. **The value for signal regime would create a new right to authorize retransmission (and correspondingly prevent retransmission if agreement as to compensation is not achieved), in effect, amending the copyright conferred by s. 21.** Thus the value for signal regime would create a new type of copyright and would do so without the required Act of Parliament, contrary to s. 89.

- **Section 25 – Ownership of copyright**

The right to remuneration is assignable.

Re:Sound Tariff No. 6B – Use of Recorded Music to Accompany Physical Activities, 2008-2009, http://www.cb-cda.gc.ca/tariffs-tarifs/certified-homologues/2012/ReSound6_B_reasons.pdf (Cop. Bd.; 2012-07-06)

The section 19 remuneration right clearly is one of “the rights conferred by this Part” for which section 25 of the Act specifies that they are transferable. Subsection 19(3) requires that royalties be divided so that performers and makers each receive half. No mention is made of any successor in title to the remuneration right.

- **Section 27 - Infringement**

Consent may be express or implied but must be clear.

Khan v. Tajdin, 2012 FCA 14 (F.C.A.; 2012-02-16) Gauthier J. [affirming 2011 FCA 14 (F.C.; 2011-02-07); leave to appeal to the Supreme Court of Canada refused 2012 CarswellNat 2183 (S.C.C.; 2012-06-28)]

[15] **It is not disputed that consent, in this statutory provision, can be either express or implied.** “Such a consent may be presumed from the circumstances. The inference of consent must be clear before it will operate [...] and must come from the person holding the particular right alleged to be infringed” (H. G. Fox, *The Canadian Law of Copyright and Industrial Designs*, 2d ed (Toronto: Carswell, 1967) at 339, cited with approval by Chief Justice McLachlin in *Bishop v Stevens*, [1990] 2 SCR 467 at paragraph 35).

[18] The fact that, in light of his undisclosed intentions and his knowledge of his “*Farmans* project”, Mr. Tajdin may have had a

genuine subjective belief that through this exchange consent was given for the publication and sale of the copyrighted works of the Aga Khan, past and future, so long as the sales and distribution were made only to Ismailis, is not particularly relevant. **The test to be applied here is an objective one, and the focus is on whether the owner of the copyright can be presumed to have consented to the otherwise infringing actions.**

- **Section 27 - Infringement**

Absence of consent of the owner of the copyright shall be proven in an action for copyright infringement.

Waldman v. Thomson Reuters Corporation, 2012 ONSC 1138 (Ont. Sup. Ct.; 2012-02-21) Perell J.

[59] For the purposes of the case at bar, it is important to note that for a class member to prove copyright infringement, the class member must prove four elements: (1) that copyright exists in the work; (2) that he or she is the owner of the copyright in the work; (3) that Thomson [the defendant] has done a thing that only the owner of the copyright has the right to do; and (4) that the class member did not consent to Thomson's conduct

[87] [...] **Consent is a fundamental part of any copyright infringement case.** The class member must establish that he or she is the owner of the copyright in a work, and that the work has been reproduced without consent.

[88] **Consent can be express. It can also be implied, for example, through knowledge and conduct.**

- **Section 27 - Infringement**

It is the burden of the plaintiff to prove the absence of consent of the copyright owner.

Harmony Consulting Ltd. v. G.A. Foss Transport Ltd., 2012 FCA 226, (F.C.A.; 2012-08-31) Gauthier J. [confirming 92 C.P.R. (4th) 6 (F.C.; 2011-03-18)]

[29] Harmony [The appellant/defendant] argues that the trial judge misplaced the burden of proof with respect to the element of consent. Relying on the decision of the Federal Court in *Aga Khan v. Tajdin*, 2011 FC 14 (CanLII), 2011 FC 14, 329 D.L.R. (4th) 521, (*Aga Khan*), aff'd 2012 FCA 12 (CanLII), 2012 FCA 12, 426 N.R. 190 (*Aga Khan* F.C.A.), Harmony says that consent is a defence and, as such, the burden of establishing it rests on Foss. It submits that the trial judge

misconstrued an earlier decision of this Court: *Positive Attitude Safety System Inc. v. Albian Sands Energy Inc.*, 2005 FCA 332 (CanLII), 2005 FCA 332, [2006] 2 F.C.R. 50 (*Positive*). In its view, this Court never intended to shift the burden of proof to the plaintiff in that case. I cannot agree.

[30] In *Aga Khan F.C.A.*, this Court confirmed the Federal Court decision in *Aga Khan*, noting expressly that the Federal Court's statements with respect to the burden of proof would not constitute an overriding error in the particular circumstances of that case. It is now important, in my view, to reaffirm an earlier statement of this Court on this question.

[31] Writing for the Court in *Positive*, Justice Pelletier held that **infringement is defined in the Act in terms of the absence of consent and, consequently, proof of infringement requires proof of lack of consent (see paragraph 39). In my view, this statement can only mean that the plaintiff bears the burden of persuasion with respect to the lack of consent. This is in line with the general principle that a plaintiff must establish on a balance of probabilities all the necessary elements of its claim.**

- **Section 27 - Infringement**

Use of a protected work, without the consent of the copyright owner, even for a good cause, is infringement. Availability of a work on the Internet is not per se an authorization and does not exempt to require consent of the owner of the copyright in this work.

Arama v. Azoulay, 2012 QCCQ 10913, (Que. Ct. Small Claims; 2012-11-14) Veilleux J.

[13] Il ne fait pas de doute pour le Tribunal que la demanderesse est l'auteure de la photo, que celle-ci constitue une œuvre originale protégée par son droit d'auteur et que le défendeur, en utilisant comme il l'a fait la photo de la demanderesse sans son consentement, a violé son droit d'auteur. Bien que le livre du défendeur ait été confectionné et distribué dans un souci de faire connaître le patrimoine juif à la jeunesse, il n'en reste pas moins que l'œuvre originale de la demanderesse a été utilisée sans son autorisation et de façon préjudiciable à tout le moins sur le plan pécuniaire. En effet, la demanderesse est photographe professionnelle.

[14] Enfin, ce n'est parce que cette photo a été trouvée par le défendeur sur Internet qu'il peut l'utiliser impunément.

- **Section 27 - Infringement**

It is up to the plaintiff to adduce sufficient evidence to establish infringement.

Harmony Consulting Ltd. v. G.A. Foss Transport Ltd., 2012 FCA 226 (F.C.A.; 2012-08-31) Gauthier J. [confirming 92 C.P.R.(4th) 6, (F.C.; 2011-03-18)]

[93] I would add that it is essential to provide the trial judge with precise and clear technical evidence supporting one's argument that reproduction is necessarily involved in carrying out certain actions in infringement actions involving computer programs. Findings made in other cases cannot replace actual evidence in the case at bar. Harmony did not present any expert evidence and it attempted to make its case through the testimony of Foss' witnesses. This is always risky. In fact, the trial judge found that Harmony had produced insufficient evidence to establish infringement on a balance of probabilities.

- **Section 27 - Infringement**

Consent is to be provided by the owner of the copyright.

Lachance v Productions Marie Eykel inc., 2012 QCCS 1012 (Que. Sup. Ct.-Merits; 2012-03-15) Grenier J.

[51] Le demandeur n'étant pas titulaire du droit d'auteur, les défendeurs n'ont pas besoin de son consentement pour reproduire les émissions Passe-Partout sur support DVD et les commercialiser.

- **Section 27 - Infringement**

The absence of intent to infringe copyright is not a defence to copyright infringement.

Glanzmann Tours Ltd. v. Yukon Wide Adventures 2012 CarswellYukon 41 (YK - Small Claims Ct.; 2012-05-10) Faulkner J.

[12] At the end of the day, it remains unclear how the plaintiff's aurora photo found its way onto the defendant's computer and website. **However, it is not a defence to the present action that the copyright infringement was inadvertent.** The plaintiff is still entitled to damages equal to the loss he suffered from the infringement.

- **Section 28.2 - Nature of right of integrity**

For infringement of the moral right to integrity to be found, prejudice to the honour or reputation of the author should be proven.

Waldman v. Thomson Reuters Corporation, 2012 ONSC 1138 (OntSupCt; 2012-02-21) Perell J.

[75] [...] **The need for prejudice to the honour or reputation of the author is an essential element of an infringement of the right of integrity; without prejudice, the right of integrity is not infringed:** *Prise de parole Inc. v. Guerin Editeur Ltee*, (1995), 66 C.P.R. (3d) 257 at 265, aff'd, (1996), 73 C.P.R. (3d) 557; *Harmony Consulting Ltd. v. G.A. Foss Transport Ltd.*, 2011 FC 340 at para. 290.

- **Section 29 - Research**

As a user's right, fair use must not be construed restrictively; "research" must be given a large interpretation

Waldman v. Thomson Reuters Corporation, 2012 ONSC 1138 (OntSupCt; 2012-02-21) Perell J.

[84] **Fair dealing was a user's right and** in order to maintain the proper balance between the rights of a copyright owner and users' interests, **it must not be interpreted restrictively.** In order to show that a dealing was fair under s. 29 of the *Copyright Act*, a defendant must prove: (1) that the dealing was for the purpose of either research or private study and (2) that it was fair. **"Research" has a large and liberal interpretation in order to ensure that users' rights are not unduly constrained and was not limited to non-commercial or private contexts. Research for the purpose of advising clients, giving opinions, arguing cases, preparing briefs and factums was research.**

- **Section 29 - Research**

"Fair dealing is a "user's right", and the relevant perspective when considering whether the dealing is for an allowable purpose [...] is that of the user"

Alberta (Education) v. Access Copyright 2012 SCC 37, (S.C.C.; 2012-07-12) Abella J. [reversing 85 C.P.R. (4th) 349 (F.C.A.; 2010-07-23), which was reversing in part 2009-Carswell 1930 (Cop. Bd.; 2009-06-26)]

[21] These cases, then, to the extent that they are germane, do not stand for the proposition that "research" and "private study" are inconsistent with instructional purposes, but for the principle that **copiers cannot camouflage their own distinct purpose by**

purporting to conflate it with the research or study purposes of the ultimate user.

[22] As noted in the companion appeal *SOCAN v. Bell* [2012 SCC 36 (S.C.C.; 2012-07-12)], fair dealing is a “user’s right”, and the relevant perspective when considering whether the dealing is for an allowable purpose under the first stage of *CCH* [*CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, S.C.C.; 2004-03-04] is that of the user (*CCH*, at paras. 48 and 64). **This does not mean, however, that the copier’s purpose is irrelevant at the fairness stage. If, as in the “course pack” cases, the copier hides behind the shield of the user’s allowable purpose in order to engage in a separate purpose that tends to make the dealing unfair, that separate purpose will also be relevant to the fairness analysis.**

[27] With respect, the word “private” in “private study” should not be understood as requiring users to view copyrighted works in splendid isolation. Studying and learning are essentially personal endeavours, whether they are engaged in with others or in solitude. By focusing on the geography of classroom instruction rather than on the *concept* of studying, the Board again artificially separated the teachers’ instruction from the students’ studying.

- **Section 29 - Research**

For the exception to apply, the court must determine whether the dealing is for one of the enumerated purpose and, thereafter, whether it is fair. Research is not to be confined to creative research.

Society of Composers, Authors and Music Publishers of Canada v. Bell Canada 2012 SCC 36, (S.C.C.; 2012-07-12) Abella J. [affirming 83 C.P.R. (4th) 409 (F.C.A.; 2010-05-14); affirming 61 CPR (4th) 353 (Cop. Bd.; 2007-10-18)]

[13] The test for fair dealing articulated in *CCH* [*CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, S.C.C.; 2004-03-04] involves two steps. The first is to determine whether the dealing is for the purpose of either “research” or “private study”, the two allowable purposes listed under s. 29. The second step assesses whether the dealing is “fair”. The onus is on the person invoking “fair dealing” to satisfy both aspects of the test under *CCH*.

[21] It is true that an important goal of fair dealing is to allow users to employ copyrighted works in a way that helps them engage in their own acts of authorship and creativity: Abraham Drassinower, “Taking User Rights Seriously”, in Michael Geist, ed., *In the Public*

Interest: The Future of Canadian Copyright Law (2005), 462, at pp. 467-72. But that does not argue for permitting *only* creative purposes to qualify as “research” under s. 29 of the *Copyright Act*. To do so would ignore the fact that the dissemination of works is also one of the *Act’s* purposes, which means that dissemination too, with or without creativity, is in the public interest. It would also ignore that “private study”, a concept that has no intrinsic relationship with creativity, was also expressly included as an allowable purpose in s. 29. Since “research” and “private study” both qualify as fair dealing purposes under s. 29, we should not interpret the term “research” more restrictively than “private study”.

[22] Limiting research to creative purposes would also run counter to the ordinary meaning of “research”, which can include many activities that do not demand the establishment of new facts or conclusions. It can be piecemeal, informal, exploratory, or confirmatory. It can in fact be undertaken for no purpose except personal interest. It is true that research can be for the purpose of reaching new conclusions, but this should be seen as only one, not the primary component of the definitional framework.

[26] Unlike the American approach of proceeding straight to the fairness assessment, we do not engage in the fairness analysis in Canada until we are satisfied that the dealing is for one of the allowable purposes enumerated in the *Copyright Act*. Under the test set out in *CCH*, “fairness” is not considered until the second step of the test for fair dealing: see *CCH* at para. 51; [...]

[27] In mandating a generous interpretation of the fair dealing purposes, including “research”, the Court in *CCH* created a relatively low threshold for the first step so that the analytical heavy-hitting is done in determining whether the dealing was fair. SOCAN’s submission that “research” be restricted to the creation of new works would conflate the allowable purpose with the fairness analysis and unduly raise the bar for entering that analysis. [...]

- **Section 29 - Research**

If an act falls within the fair dealing exception, it does not have to be covered by a tariff.

SOCAN Tariff 22.A (2007-2010); CMRRA/SODRAC Inc. Tariff (2008-2010) (Online Service Music), <http://www.cb-cda.gc.ca/decisions/2012/socan-csi-reasons.pdf> (Cop. Bd.; 2012-10-05)

[148] The previous CSI tariff **specified that previews of no more than 30 seconds did not attract royalties. This provision is removed, since such uses almost certainly involve fair dealing.**

- **Section 29 - Research**

What is fair dealing is a matter of context and evidence.

SOCAN (2008-2010), RE:SOUND (2008-2011), CSI (2008-2012), AVLA/SOPROQ (2008-2011), ARTISTI (2009-2011) *Re Interim decision*, <http://www.cb-cda.gc.ca/decisions/2012/radio-21122012.pdf> (Cop. Bd.; 2012-12-21)

[10] CAB further submits that *Bell* [SOCAN v. Bell Canada, 2012 SCC 36] is directly applicable to a station's evaluation and selection copies. **There are similarities between listening to a preview before purchasing a work and listening to a complete work to decide whether or not to broadcast it.** There are also some significant differences, to which the Supreme Court itself alluded, for example, full reproduction vs. Short excerpts, identical quality vs. low quality, and streaming vs. Downloading [*Bell*, paras. 35, 36, 47, 48.]. A significant amount of additional evidence will no doubt be required, since the question of what is or is not fair is above all a matter of context.

- **Section 29.2 – News reporting**

The news reporting exception also requires that the source and author be mentioned.

Warman v. Fournier 2012 FC 803 (F.C.; 2012-06-21) Rinnie J.

[29] In the alternative, even if the reproduced portions of the Kay Work amount to a substantial part, I find that the respondents' reproduction constitutes fair dealing for the purposes of news reporting, pursuant to section 29.2 of the *Copyright Act*.

[30] The SCC's decision in *CCH* [*CCH Canadian Ltd. v. Law Society of Upper Canada* 2004 SCC 13] sets out important guiding principles in applying the fair dealing exception. The SCC emphasized at paragraph 48 **that fair dealing is best understood as an integral part of the copyright regime and as a user's right, rather than a defence. In order to avail themselves of the exception the respondents must establish first, that the dealing**

was for one of the purposes articulated in section 29 of the Copyright Act, and second, that the dealing was fair.

[31] The SCC stated in *CCH*, at paragraph 51, that the fair dealing purposes (in that case, research) “must be given a large and liberal interpretation in order to ensure that users’ rights are not unduly constrained.” Applying this large and liberal interpretation to news reporting, I find that the respondents’ dealing in respect of the Kay Work falls within this purpose. They posted the excerpts of the Kay Work on Free Dominion to promulgate the facts recounted in that article. **Thus, the first criterion for fair dealing is met. The news reporting exception also requires that the source and author be mentioned, which is also satisfied in this case.**

- **Section 30.6 - Permitted Acts (Computer programs)**

Absent any evidence, “backup purposes” has its ordinary meaning of something kept in reserve for emergency replacement.

Harmony Consulting Ltd. v. G.A. Foss Transport Ltd., 2012 FCA 226, (F.C.A.; 2012-08-31) Gauthier J. [confirming 92 C.P.R. (4th) 6 (F.C.; 2011-03-18)]

[72] There was no expert evidence establishing that the expression “for backup purposes” had any technical meaning other than its ordinary meaning of something kept in reserve for emergency replacement. Nor is there any such evidence that “emergency” has a specific meaning in that industry restricting it to certain events and excluding corruption or errors while working on the software.

- **Section 30.7 - Incidental use**

The incorporation in a film of a specific photograph, even for a brief duration, does not qualify as incidental use, and to avoid infringement, a licence shall be obtained.

National Film Board of Canada for the reproduction and incorporation of a photograph in a documentary film [Re application by] File 2011 U/TI-25; also available at <http://www.cb-cda.gc.ca/unlocatable-introuvables/licences/260-f.pdf> (Cop. Bd.; 2012-02-10)

[1] [...] La photographie est en noir et blanc et fait partie d’un collage fait par M^{me} Baillargeon à l’époque.

L’image cinématographique de la photographie durera au plus 22 secondes dans le film documentaire de 75 minutes.

La licence autorise aussi l’exécution en public et la communication au public par télécommunication de la photographie ainsi incorporée ainsi que la reproduction du film documentaire sur tout support à des fins de

distribution pour représentation privée, comme partie de l'exploitation du film documentaire

2). La licence expire à l'égard de l'œuvre lorsque celle-ci relèvera du domaine public.

4) La licence est rétroactive à la date de la première reproduction de l'image dans le film documentaire mentionné au paragraphe 1). [starting October 2011]

- **Section 31 - Interpretation [Retransmission]**

Section 31 is an exception to the copyright owner's right to control the communication of their work to the public by telecommunication.

Reference re Broadcasting Regulatory Policy 2010-167 and Broadcasting Order CRTC 2010-168, 2012 SCC 68 (S.C.C.; 2011-09-29) Rothstein J. [reversing 91 C.P.R. (4th) 389 (F.C.A.; 2011-02-28)]:

[54] [...] However, **s. 31(2) of the *Copyright Act* proceeds in detailed fashion to circumscribe the right of copyright owners to control the *retransmission* of literary, dramatic, musical or artistic works carried in signals.** "Signal" is defined for the purposes of s. 31(2) to mean "a signal that carries a literary, dramatic, musical or artistic work and is transmitted for free reception by the public by a terrestrial radio or terrestrial television station" (see s. 31(1)). Section 31(1) defines "retransmitter" as "a person who performs a function comparable to that of a cable retransmission system . . .".

[56] **Read together, ss. 31(1) and 31(2) create an *exception* to the exclusive right of the copyright owners of literary, dramatic, musical or artistic works to control the communication of their works to the public by telecommunication.** The exception, or user's right, in effect, entitles BDUs to retransmit those works without the copyright owners' consent, where the conditions set out in paras. (a) through (e) are met. Paragraph (b) provides that the retransmission must be lawful under the *Broadcasting Act*. I will come back to the meaning of this particular condition.

[58] [...] On the one hand, the copyright owner is granted a general right to retransmit the work. This retransmission right is part of the right, under s. (3)(1)(f), to communicate the work by telecommunication to the public. On the other hand, **the owner's general right to retransmit is restricted by a carve-out in s. 31(2) of the *Copyright Act*, which effectively grants to a specific class of retransmitters two retransmission rights. The first right lets these users simultaneously retransmit without a royalty**

payment, works carried in a local signal. The second right lets them simultaneously retransmit works carried in distant signals, but only subject to the payment of royalties under a form of compulsory licence regime (*Copyright Act*, s. 31(2)(a) and (d)). Both user rights are, subject to s. 31(2), beyond the owner's control.

- **Section 31 - Interpretation [Retransmission]**

The goal of section 31 is to facilitate the simultaneous retransmission of television programs by cable.

Reference re Broadcasting Regulatory Policy 2010-167 and Broadcasting Order CRTC 2010-168, 2012 SCC 68 (S.C.C.; 2011-09-29) Rothstein J. [reversing 91 C.P.R. (4th) 389 (F.C.A.; 2011-02-28)]:

[71] The recent legislative history of the *Copyright Act* supports the view that Parliament made deliberate choices in respect of copyright and broadcasting policy. **The history evidences Parliament's intent to facilitate simultaneous retransmission of television programs by cable and limit the obstacles faced by the retransmitters.**

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

The *Copyright Act* provides for exception from copyright infringements when the act is done in compliance with a federal statute.

Access Copyright - Provincial and Territorial Governments Tariffs (2005-2014) Decision (Crown immunity application) 2012 CarswellNat 609 (Cop. Bd.; 2012-03-15)

[60] A first set of exceptions appear to benefit the Crown writ large. Paragraph 45(1)(b) has existed since the *Act* came into force in 1924. It makes lawful certain forms of parallel importation of a work or other subject-matter "for use by a department of the Government of Canada or a province". Since the Crown is an artificial person, unavailable to shield these intermediaries (whether civil servants or others) from liability. **Another such exception is sub section 32.1(1), which exempts from copyright infringement copies made to comply with federal or provincial access to information or privacy legislation. Such legislation largely concerns emanations of the Crown**

- **Section 34 - Civil Remedies**

For a quiet time injunction to issue, a plaintiff shall established irreparable harm.

Nexus Solutions Inc. v. Krougly, 2012 ONSC 583, , (OntSupCt; 2012-01-25) Hockin J.

[25] The plaintiff's only answer to this offer is that because Limesoft's productions are unreliable or doctored, there was no point to a comparison. There is no evidence of this beyond conjecture or suspicion.

[26] There is a strong controlling policy in the law favouring settlement of disputes without litigation. This litigation is likely to end after a comparison of the source codes and source code control systems. There is an opportunity now to determine this as a matter of fact. The defendants are anxious that this comparison take place and have gone so far as to consent to the participation of the plaintiff's expert for this purpose. It would be wrong for this court to grant relief by way of injunction where the defendants are prepared to submit their software to the test of a comparison when the plaintiff agrees the result will show whether there has been a breach of copyright. The court should not set the parties adrift to suffer great and unnecessary cost in these circumstances.

[27] **This action is a *quia timet* proceeding. The plaintiff has not lost a contract to the defendants. Furthermore, the plaintiff has not established irreparable harm. Moreover, the balance of convenience favours the defendants. The defendant company is a new company which will undoubtedly wither or die if it is prohibited from selling its software to the time of trial.**

- **Section 34 - Civil Remedies**

In an action for copyright infringement, the plaintiff shall prove that the defendant commit the unauthorized act.

Forensic Technology Inc. c. Pyramidal Technologies Ltd., 2012 QCCS 2463, (Que. Sup. Ct.; 2012-06-06) Collier J.

[30] [...] **Similarly, a finding of copyright infringement requires proof that the defendant reproduced the work, or authorized another to reproduce the work, without the copyright owner's permission.**[Fn 19 *Copyright Act*, R.S.C. 1985, c. C-42, s. 3.] In the present case, there is no evidence that the defendants made a prohibited use of the plaintiff's trade-mark or engaged in an act of copyright infringement. If anything, Crime Gun Solutions committed these acts, not the defendants.

- **Section 34 - Civil Remedies**

Prejudgment interest may be awarded on monetary award under the *Copyright Act*.

Society of Composer, Authors and Music Publishers of Canada v. IIC Enterprises Ltd. (Cheetah's Nightclub), 2012 FCA 179, (F.C.A.; 2012-06-14) Sharlow J. [reversing 2011 CarswellNat 5087 (F.C.; 2011-12-01); affirming 2011 CarswellNat 3810 (F.C.-Proth.; 2011-09-21)]

[21] The *Copyright Act* says nothing about prejudgment interest, and I have been unable to find any other Act of Parliament that could possibly be interpreted to preclude an award of prejudgment interest on a monetary award made under the *Copyright Act*. It follows that in this case, subsection 36(1) of the *Federal Courts Act* applies. SOCAN's entitlement to prejudgment interest must be determined by the law of British Columbia.

- **Section 34 - Civil Remedies**

An employer may be held liable for the copyright infringement of his employee.

Leuthold v. Canadian Broadcasting Corporation, 2012 FC 748 (F.C.; 2012-06-14) Scott J.

[170] However, he is not liable for this infringement because the CBC is held responsible for the misconduct of its employees. Vicarious liability is “a theory that holds one person responsible for the misconduct of another because of the relationship between them. Although the categories of relationships in law that attract vicarious liability are neither exhaustively defined nor closed, the most common one to give rise to vicarious liability is the relationship between master and servant, now more commonly called employer and employee” (see *671122 Ontario Ltd v Sagaz Industries Canada Inc*, 2001 SCC 59 at para 25 [*Sagaz*]). More specifically, **the master's tort theory “posits that the employer is vicariously liable for the acts of his employee because the acts are regarded as being authorized by him so that in law the acts of the employee are the acts of the employer”** (see *Sagaz* at para 28).

- **Section 34 - Civil Remedies**

Damages do not depend of the technical means used to infringe.

Leuthold v. Canadian Broadcasting Corporation, 2012 FC 748 (F.C.; 2012-06-14) Scott J.

[128] The *Copyright Act* is meant to properly compensate the owner of a copyright if his rights are infringed. In the present case the rights

of Miss Leuthold were infringed. On six separate occasions her Photographs were viewed by Canadians for a duration of 18 seconds without her authorization. **The Court will compensate [the plaintiff] Miss Leuthold for every one of the six communications to the Canadian public, but it cannot accept the principle that compensation must be awarded on the basis of each technical act of infringement because applying such a method runs counter to our reading of the *Broadcasting Act* with the *Copyright Act*.** To this Court subparagraph 2.4(1) (c) (ii) of the *Copyright Act* must be read in conjunction with the definition of broadcast in the *Broadcasting Act*. The important factor to consider is the number of occasions the infringing broadcasts could be seen by the public. In this instance there were six separate occasions lasting 18 seconds each where the Canadian public who subscribe to cable could see the Photographs on Newsworld. **The technical means used to relay the infringing work has no bearing on the amount of compensation owed to Miss Leuthold save for the revenues derived from the infringing broadcast.** What is important in this Court's opinion is to adequately compensate a copyright owner for the damage suffered. The number of potential viewers bears some significance in terms of the value to be assigned to a license.

- **Section 34 - Civil Remedies**

Injunction relief will be granted if there is a probability of repetition of the infringing act.

Leuthold v. Canadian Broadcasting Corporation, 2012 FC 748 (F.C.; 2012-06-14)
Scott J.

[161] There is no necessity to grant Miss Leuthold the injunction relief sought. CBC ceased to broadcast the Production in 2005. The injunction would have no effect whatsoever (see *De Montigny c Cousineau*, [1950] SCR 297 at page 304; *Durand and Cie v Patrie Publishing Co*, [1960] SCR 649 at page 658) **There is no probability of a repetition of the particular act complained of** (see *Canadian Performing Right Society Ltd v Canadian National Exhibition Association*, [1934] OR 610 (HC)).

- **Section 34 - Civil Remedies**

The alleged irreparable harm to be suffered by a defendant will not restrain a court to issue an interlocutory injunction when the defendant clearly infringe without cause the copyrights of the plaintiff.

R. v. Rundle (Nec Plus Ultra), 2012 ONSC 5185 (Ont. Sup. Ct.; 2012-09-14) Smith J. [interlocutory Injunction granted]

[23] The defendant submits that her business will suffer irreparable harm if she is not allowed to continue to use a copy of the official SLE tests to prepare her students. I do not agree and find that she should not be permitted to copy and use the Crown's copyrighted SLE test materials for her own financial benefit. Allowing her to use a copy of the SLE test questions invalidates the test results and gives her students a very unfair advantage. **I find that preventing the defendant from continuing to make unauthorized use of the copyright protected SLE tests would not cause irreparable harm to the defendant because she never had permission to use a copy of the SLE tests from the PSC in the first place.**

- **Section 34 - Civil Remedies**

An award of costs on a solicitor-client basis is appropriate when a party has acted in a reprehensive manner.

Adobe Systems Incorporated v. Dale Thompson DBA Appletree Solutions, 2012 FC 1219 (F.C.; 2012-10-18) Campbell J

[14] Finally, the Plaintiffs request an award of costs on a solicitor client basis within the Court's discretionary powers set out in Rule 400(1) of the *Federal Court Rules*. Such costs are appropriate where a party has acted in a reprehensible, scandalous or outrageous manner (*Louis Vuitton Malletier S.A. v Yang, supra*; *Young v Young*, 1993 CanLII 34 (S.C.C.), [1993] 4 SCR 3 (S.C.C.) at para 66; *Rice v. New Brunswick*, 2002 SCC 13 (CanLII), [2002] 1 SCR 405 (S.C.C.) at para 86). In my opinion, this is such a case.

- **Section 34 - Civil Remedies**

An award of statutory damages does not preclude an award for punitive and exemplary damages.

Adobe Systems Incorporated v. Dale Thompson DBA Appletree Solutions, 2012 FC 1219 (F.C.; 2012-10-18) Campbell J

[9] The Plaintiffs seek punitive damages in the amount of \$15,000 per Plaintiff for a total of \$45,000. **Section 38.1(7) of the Act provides that an award of statutory damages does not preclude the Plaintiffs from punitive and exemplary damages.**

[11] It appears that if a defendant's conduct can be characterized as "outrageous", "highly unreasonable" or showing a callous disregard for the rights of the plaintiff, punitive damages will be warranted (*Louis Vuitton Malletier S.A. v Singga Enterprises (Canada) Inc.*, 2011 FC 776 (CanLII), 2011 FC 776 (F.C.) at para 168). **When assessing whether conduct can be characterized in such terms, the following factors are helpful to consider: (i) the scale and duration of the infringing activities; (ii) cooperation of the infringing party during court proceedings and willingness to admit wrongdoing; (iii) whether the infringing party's actions were knowing, planned and deliberate; (iv) whether the infringing party attempted to conceal and cover up wrongdoings; (v) whether the infringing party continues to infringe the copyright in question; and (vi) whether the conduct of the infringing party in the course of the proceedings has resulted in the additional costs to the Plaintiffs** (*Louis Vuitton Malletier S.A. v Singga Enterprises (Canada) Inc.*, *supra* at para 170-176).

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

In a civil proceeding for copyright infringement, copyright shall be presumed.

R. v. Rundle (Nec Plus Ultra), 2012 ONSC 5185(Ont. Sup. Ct.; 2012-09-14) Smith J.

[17] I am satisfied that the AG has satisfied the first part of the test for the following reasons: [...]

(b) the SLE tests are stamped "Crown Copyrights Reserved";

(c) **where copyright is in issue, the existence of copyright is presumed unless the contrary is proven** pursuant to s. 34.1(1)(a) of the *Copyright Act*, *supra*;

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

The presumption respecting copyright and ownership are rebuttable presumptions.

Harmony Consulting Ltd. v. G.A. Foss Transport Ltd., 2012 FCA 226 C.A.; 2012-08-31) Gauthier J. [confirming 92 C.P.R.(4th) 6, (F.C.; 2011-03-18)]

[62] Finally, although it would have been preferable for the judge to refer to the presumption set out in [subparagraph 34.1\(2\)\(b\)\(ii\)](#) of the [Act](#), this presumption, like the one in favour of the author set out in [subsection 34.1\(1\)\(b\)](#) to which the judge refers, is easily rebutted when, like here, the party for whose benefit it is intended provides direct evidence of the legal basis on which its name appears on the copyrighted work as owner, and the judge holds that basis to be

untenable. The trial judge discarded the presumption in favour of the author based on the evidence before her, and found that [subsection 13\(3\)](#) of the [Act](#) applied.

- **Section 35 – Liability for infringement**

When damages cannot be exactly proven, the Court will grant damages at large.

Leuthold v. Canadian Broadcasting Corporation, 2012 FC 748 (F.C.; 2012-06-14) Scott J.

[131] More importantly the jurisprudence holds that “even if the evidence to support a calculation on the above-mentioned basis is not available, damages will nevertheless be awarded based on the evidence available and drawing reasonable inferences, using common-sense. Copyright is said to be a property that is a wasting asset. **When copyright infringement is established and actual loss or specific damages cannot be proven but, nevertheless, it is shown that damages resulted directly from the infringement, damages will be granted at large and "may be dealt with broadly and as a matter of common sense, without professing to be minutely accurate"**” (*Intellectual Property Disputes: Resolutions & remedies*, Vol 2, Ronald E. Dimock, « Monetary Relief – Damages by Me François Grenier, Carswell, 2003, Toronto, at page 17-16; *Prism Hospital Software v Hospital Medical Records Institute*, [1994] BCJ No 1906 at para 665).

- **Section 35 – Liability for infringement**

For an accounting of profits to be ordered, a link must be proven between the infringing activities and the revenues derived therefrom.

Leuthold v. Canadian Broadcasting Corporation, 2012 FC 748 (F.C.; 2012-06-14) Scott J.

[148] **The Court will only grant an accounting of profits where it finds a direct link between the infringements and the profits of the infringer. In the present case, there is no evidence on the record linking the revenues** of Newsworld to the six unauthorized communications to the public. Newsworld revenues did not increase as a result of the six communications to the public [...]

- **Section 35 – Liability for infringement**

Damages from copyright infringement are suffered at the domicile of the copyright owner.

Pelletier v. Syndicatum Carbon Capital Ltd., 2012 QCCS 6184 (Que. Sup. Ct.; 2012-11-21) Schragger J.

[Upon motion contesting the jurisdiction of the courts of Quebec]

[29] Moreover, if M.A.P. is correct in his allegations that the ideas encompassed in his design were appropriated by S.C.C., **then the resulting copyright infringement suffered by M.A.P. would mean that the damage was suffered by M.A.P. in the Province of Québec where he is domiciled.** This was the case in *MP3 Network Ltd. vs. Pena* [Fn 5 009 QCCS 4531]

- **Section 35 – Liability for infringement**

Absence evidence, infringement does not waste entirely the value of the copyright in the infringed work.

Glanzmann Tours Ltd. v. Yukon Wide Adventures 2012 CarswellYukon 41 (YK - Small Claims Ct; 2012-05-10) Faulkner J.

[26] I have already noted that, thus far, the plaintiff has made no attempt to market the photo in question. **It may be reasonable to assume that the value of the photo has been diminished somewhat, but there is no evidence capable of showing that the value of the aurora photograph, whatever it was, has been completely and utterly destroyed by the actions of the defendant.**

[27] In my view, the only reasonable estimation of damages in this case must be based on a *reduction* in the market value of the photo. One measure of that reduction in value would be the cost of a single use licence — which would be unlikely to have netted the plaintiff more than \$400.00 to \$500.00, especially considering that the plaintiff receives 37.5% of the gross revenue.

- **Section 35 – Liability for infringement**

When there is no specific evidence as to the damages flowing from infringement, the Court will fix an arbitrary award of damages.

Arama v. Azoulay, 2012 QCCQ 10913 (Que. Ct. Small Claims; 2012-11-14) Veilleux J.

[14] Enfin, ce n'est parce que cette photo a été trouvée par le défendeur sur Internet qu'il peut l'utiliser impunément. **Cette utilisation non autorisée de la photo entraîne un préjudice**

pécuniaire que le Tribunal doit arbitrer, faute d'une preuve spécifique à cet égard.

[15] À la lumière de la diffusion limitée de la photo sans l'autorisation préalable de la demanderesse, le Tribunal octroie à cette dernière un montant de 2 000 \$ en dommages-intérêts compensatoires.

- **Section 36 – Protection of separate rights [now section 41.23]**

Distribution rights are not a right under the *Copyright Act* and a distributor does not have the standing to bring an action for copyright infringement.

Nautical Data International, Inc. v. C-Map USA Inc., 2012 FC 300, (F.C.; 2012-04-03) Zinn J.

[On summary motion by defendants for dismissal for lack of standing]

[28] The Agreement does not explicitly state that CHS promises not to produce or integrate CHS Works. All that CHS has promised in section 2.1 of the Agreement is not to “distribute the Products or Product Updates to any person [emphasis added].” **As previously noted, the right to distribute is not a right under the *Copyright Act*. Therefore, although NDI may be correct that it has an exclusive licence to distribute the CHS Works for commercial purposes, it does not follow that the Agreement gives it an exclusive licence in copyright because the right to distribute is not a protected right under the *Copyright Act*.**

[39] For these reasons, the Agreement does not qualify as an exclusive licence. Consequently, NDI does not have the grant of interest necessary to bring an action for copyright infringement with respect to the CHS Works under the *Copyright Act*. Since the plaintiff does not have standing to advance the claims in these actions, there is no genuine issue for trial. Accordingly, these motions for summary judgment are granted and the actions are dismissed in their entirety, with costs in favour of the defendants.

- **Section 36 – Protection of separate rights [now section 41.23]**

An exclusive licensee has the proper standing to sue for copyright infringement.

Warman v. Fournier 2012 FC 803 (F.C.; 2012-06-21) Rinnie J.

[22] **The applicant obtained an exclusive license to the copyright in the Kay Work on January 13, 2010, and therefore is able to sue**

a third party for infringement: *Euro Excellence v Kraft Canada Inc*, 2007 SCC 37, at para 31. [...]

- **Section 37 – Concurrent jurisdiction of Federal Court [now section 41.24]**

Copyright infringement occurring during a labour dispute is not within the exclusive realm of arbitration and the copyright owner may ask the courts to restrain this infringement.

Insurance Corporation of British Columbia v. Canadian Office and Professional Employees Union, Local 378, 2012 BCSC 1244 (BCSC; 2012-08-17) Willcock J.

[35] In summary, the Court, on an application for an injunction in the course of a labour dispute, is required to look at the ambit of the collective agreement and the essential nature of the dispute that comes before the Court. The plaintiff in this case does not seek an order restricting picketing or leafleting. It does not seek any relief arising out of the Code [Labour Relations Code, RSBC 1996, c 244] the Regulations, or the collective agreement. While the question before me has arisen in the course of a labour dispute, the essential issue between the parties relates to the plaintiff's proprietary interest in its internet correspondence platform and the correspondence itself. **The trademark and copyright claims, as well as the claim in conversion and passing off, all arise out of the plaintiff's allegation that there is an unlawful interference with its proprietary interests that does not arise under the collective agreement. The issue before me, in my view, does not in its essential character arise from the interpretation, application, administration, or an alleged violation of the collective agreement. Accordingly, it is not a dispute falling within the broad remedial and jurisdictional authority of the Board. It is not a case involving the "why", "where", or "when" communication may occur, nor is it an attempt to regulate the content of communication; it is, rather, about the "how" communication occurs, and, as in the *Vancouver (City) v. Vancouver Municipal And Regional Employees' Union* decision, *supra*, [(1994), 118 D.L.R. (4th) 417 (B.C.S.C.) a question with respect to the property that may be used to communicate.**

[62] The plaintiff alleges the conduct of the Union and its members infringes its right as owner of registered trademarks to the exclusive use of those trademarks. It says the Union's use of the marks is likely to have the effect of depreciating the value of the goodwill attaching to them. It further says there has been copyright infringement in the reproduction of a substantial portion of its

copyright material by the Union. The parties have referred to a number of leading trademarks and copyright cases, including *NHL v. Pepsi-Cola*, and the labour cases of *British Columbia Automobile Assn. v. Office and Professional Employees* and *Compagnie générale des Etablissements Michelin - Michelin & Cie c. Syndicat national de l'automobile, de l'aérospatiale, du transport et des autres travailleurs et travailleuses du Canada (TCA - Canada)*, 1996 CanLII 3920 (F.C.), [1997] 2 C.F. 306 (TD). These cases have addressed the interesting and difficult question of whether use of an employer's marks by a Union in the course of a labour dispute can be said to constitute use in association with the wares or businesses or services of the union. While the case law casts some doubt upon the argument by the employer that the conduct of the Union in this case can be said to amount to use of any of its trademarked or copyrighted material, such as to give rise to a statutory injunction, I need not address that question, given my finding that there is a *prima facie* case that the conduct of the union and its members constitutes conversion of the employer's interest in its correspondence. I will therefore not address the trademark and copyright claims

- **Section 38 – Recovery of possession of copies, plates**

A plaintiff has a right to the recovery of the infringing copies and the burden is upon the defendant to justify why this recovery should not be ordered.

Leuthold v. Canadian Broadcasting Corporation, 2012 FC 748 (F.C.; 2012-06-14) Scott J.

[163] Subsection 38(1) of the *Copyright Act* governs the right for the Plaintiff to recover all infringing material in possession of the Defendants. **It is the infringer's burden to establish a reason why this Court should refuse this measure. This reason cannot be based on the infringer's behavior or motives** (CBC's practice concerning its logger tapes and archives). In the present case delivery-up is ordered.

- **Section 38.1 – Statutory damages**

Prejudgment interest can be ordered on statutory damages.

Society of Composer, Authors and Music Publishers of Canada v. IIC Enterprises Ltd. (Cheetah's Nightclub), 2012 FCA 179, (F.C.A.; 2012-06-14) Sharlow J. [reversing 2011 CarswellNat 5087 (F.C.; 2011-12-01); affirming 2011 CarswellNat 3810 (F.C. - Proth.; 2011-09-21)]

[23] A judgment for statutory damages under subsection 38.1(4) of the *Copyright Act* is a “pecuniary judgment” within the meaning of that phrase as used in subsection 1(1) of the *Court Order Interest Act* of British Columbia. It is well established by the jurisprudence of the British Columbia courts that where subsection 1(1) applies, an award of prejudgment interest from the date on which the cause of action arose is mandatory (subject to the exceptions in subsection 1(2), subsection 1(4), or section 2): see, for example, *Gould v. Royal Trust Corp. of Canada*, 2010 BCSC 16 (CanLII), 2010 BCSC 16. None of the stated exceptions apply in this case.

[24] The prothonotary construed SOCAN’s election for statutory damages in lieu of judgment for unpaid royalties as implicitly including a waiver of its statutory entitlement to prejudgment interest on unpaid royalties, which I assume was intended to invoke paragraph 2(d) of the *Court Order Interest Act*. **Generally, a party is not taken to have waived a statutory entitlement in writing unless the writing that is alleged to constitute the waiver is explicit, or sufficiently explicit in its intent that it would be unreasonable to characterize it as anything but a waiver of the statutory entitlement. Here, the election for statutory damages is necessarily a waiver of the right to judgment for unpaid royalties, but it cannot reasonably be taken as evidence of an intention on the part of SOCAN to waive any other statutory entitlement. In my view, the prothonotary erred in characterizing SOCAN’s election for statutory damages as a waiver of its entitlement to prejudgment interest under the *Court Order Interest Act*.**

[25] I conclude that SOCAN is entitled in this case to prejudgment interest on the statutory damages awarded by the prothonotary from the date on which the cause of action arose. Under subsection 1(1) of the *Court Order Interest Act*, the court has no discretion to choose any other period for which prejudgment interest is payable.

- **Section 38.1 – Statutory damages**

Addition of prejudgment interest is mandatory, even if it may be harsh on the defendant.

Society of Composer, Authors and Music Publishers of Canada v. IIC Enterprises Ltd. (Cheetah’s Nightclub), 2012 FCA 179, (F.C.A.; 2012-06-14) Sharlow J. [reversing 2011 CarswellNat 5087 (F.C.; 2011-12-01); affirming 2011 CarswellNat 3810 (F.C.-Proth.; 2011-09-21)]

[26] The use of a multiplier for statutory damages results in a judgment that exceeds the amount of the royalties payable. **From the point of view of a licensee under Tariff 3C, that result may seem harsh,**

but it is the intended consequence of the policy underlying subsection 38.1(4) of the *Copyright Act*. It may be that in some circumstances, the mandatory addition of prejudgment interest to the full amount of the statutory damages from the date on which the royalties were payable represents an unreasonable windfall to the collective society and a correspondingly undue burden on the debtor. However, there are two ways in which the potential harshness of the lack of judicial discretion may be alleviated.

[27] First, a defendant may have recourse to section 4 of the *Court Order Interest Act*. It provides that in certain circumstances, a defendant may avoid prejudgment interest by making a payment into court in satisfaction of the claim.

[28] Second, the court has the discretion to determine the appropriate rate of interest. In that regard, the British Columbia courts have determined that subsection 1(1) of the *Court Order Interest Act* requires prejudgment interest to be awarded on punitive damages, but the judge has the discretion to set the applicable rate of interest on the punitive damages at a nominal rate: see *J.L.M. v. P.H.* (1998), 109 B.C.A.C. 165. By analogy, the court may exercise its discretion to determine the rate of interest on statutory damages at an annual interest rate that combines a normal rate of interest on the unpaid royalties, and a lesser rate on the remainder.

- **Section 38.1 – Statutory damages**

The attitude of a defendant will be taken into consideration when fixing the amount of statutory damages.

Adobe Systems Incorporated v. Dale Thompson DBA Appletree Solutions, 2012 FC 1219, (F.C.; 2012-10-18) Campbell J.

[8] **Given what I consider to be a bad faith attitude on the part of the Defendant, his conduct** as recounted above, **the need for deterrent relief** as I have expressed, and given that no argument has been advanced by the Defendant on any these question, **I find no reason not to award maximum statutory damages** in the amount of \$340,000, being \$20,000 per work infringed for each of the three Plaintiffs.

- **Section 41 - Limitation of prescription period for civil remedies [now section 43.1]**

An injunction may issue irrespective of the prescription period if it is likely that the defendant will not stop the infringing activities.

Warman v. Fournier 2012 FC 803 (F.C.; 2012-06-21) Rennie J.

[15] The applicant has acknowledged that he knew about the respondent's infringement of the Warman Work since September 2007. Thus, he did not bring this proceeding within the limitation period prescribed by section 41(1) of the *Copyright Act* and therefore he is time-barred from raising copyright infringement in respect of that work: *Philip Morris Products SA v Malboro Canada Ltd*, 2010 FC 1099 at para 353.

[20] In my view, even if section 41(1) does not preclude the granting of injunctive relief, it at the very least informs the exercise of the Court's discretion to grant an injunction for copyright infringement. It would be contrary to Parliament's intent to find that an injunction is presumptively available for an infringement if the application is brought outside the limitation period. It is more consistent with the *Copyright Act* for the Court to limit the exercise of its discretion to grant an injunction to circumstances where it will have some practical effect and the balance of convenience strongly favours granting the injunction. The Supreme Court of Canada (S.C.C.) confirmed in *CCH Canadian Ltd. v Law Society of Upper Canada*, 2004 SCC 13, at para 85, that an injunction is an equitable remedy and thus within the Court's discretion.

[21] In this case, the applicant has not shown that an injunction is necessary to prevent further infringement; rather, the evidence is that the respondents have removed the Warman Work from their server and the physical copies they retain are for the purposes of defending the defamation action brought against them by the applicant. Thus, I decline to exercise my discretion to grant an injunction in respect of the Warman Work and this aspect of the application is dismissed

- **Section 42 - Offences and punishment**

General principles of sentencing in criminal law will apply to conviction on indictment for copyright infringement.

Gendarmerie royale du Canada v Benharroch 2012 QCCQ 017 (Que. Ct.; 2012-01-17)

Sentencing after having pleaded guilty of knowingly exposed or offered for sale by way of trade counterfeit clothing bearing popular brands]

[41] Le Tribunal ajoute que **la dissuasion individuelle tend également vers l'imposition d'une peine ayant des répercussions significatives qui susciteront une réflexion profonde chez le défendeur.** Les possibilités de récidives existent. L'accusé opère dans le même domaine que lorsqu'il a commis l'infraction. Sa conjointe n'exerce pas d'influence dissuasive sur lui puisque l'infraction a été commise au vu et au su de celle-ci. Il fréquente les mêmes lieux propices à ces offres illégales de vêtements contrefaits. **Il faut espérer que la peine sera suffisamment dissuasive pour motiver l'accusé à refuser de telles occasions dans le futur.**

- **Section 45 - Exceptions**

It is lawful to import for use by a department of the Government of Canada or a province copies of a work or other subject-matter made with the consent of the owner of the copyright in the country where it was made;

Access Copyright - Provincial and Territorial Governments Tariffs (2005-2014) Decision (Crown immunity application) 2012 CarswellNat 609 (Cop. Bd.; 2012-03-15)

[60] A first set of exceptions appear to benefit the Crown writ large. Paragraph 45(1)(b) has existed since the *Act* came into force in 1924. **It makes lawful certain forms of parallel importation of a work or other subject-matter “for use by a department of the Government of Canada or a province”.** Since the Crown is an artificial person, unavailable to shield these intermediaries (whether civil servants or others) from liability. Another such exception is sub section 32.1(1), which exempts from copyright infringement copies made to comply with federal or provincial access to information or privacy legislation. Such legislation largely concerns emanations of the Crown.

- **Section 55 – Copyright in works**

Poor man's copyright consists in the sending by registered mail of a copy of the work by the author to himself.

Emerging Artists Research and Rating Service (Copyright Depository Inc.) v Trustifi inc., 2012 QCCS 1038, (Que. Sup. Ct.; 2012-03-19) Beaugé J. [revd 2012 QCCA 1116 (Que. C.A.; 2012-06-15)]

[2] Constituée en 2007, Emerging Artists, domiciliée en Ontario, se donne pour mission de faciliter le travail d'artistes et créateurs indépendants par la protection de leurs droits d'auteurs. **À cette fin, elle se propose d'offrir une alternative à la méthode immémoriale du « poor man's copyright » selon laquelle l'artiste s'adresse un**

colis scellé contenant son œuvre par courrier recommandé, puis le conserve intact. Selon ce procédé, le sceau officiel de la SCP et le colis scellé attestent de l'existence de l'œuvre à une certaine date, et de son intégrité.

- **Section 66 - Establishment**

The jurisdiction of the Copyright Board and of the Court are different and the Court sitting in revision of a decision of the Copyright Board. This Court can only review the overall legality of what the Board has done.

Reprographic Reproduction 2011-2013, Re 2011 CarswellNat 3708, (Cop. Bd.; 2011-09-23); 2012 FCA 22, (F.C.A. - Motion to strike affidavit; 2012-01-23)

[The applicants have filed the affidavit of Gregory L. Juliano in support of their application for judicial review of a decision of the Copyright Board. The respondent, Access Copyright, moves to strike it out.]

[17] In determining the admissibility of the Juliano affidavit, the differing roles played by this Court [the Federal Court of Appeal] and the Copyright Board must be kept front of mind. **Parliament gave the Copyright Board – not this Court – the jurisdiction to determine certain matters on the merits, such as whether to make an interim tariff, what its content should be, and any permissible terms associated with it. As part of that task, it is for the Board – not this Court – to make findings of fact, ascertain the applicable law, consider whether there are any issues of policy that should be brought to bear on the matter, apply the law and policy to the facts it has found, make conclusions and, where relevant, consider the issue of remedy. In this case, the Copyright Board has already discharged its role, deciding on the merits to make an interim tariff and to refuse to amend it.**

[18] Now before the Court is an application for judicial review from this decision on the merits. In such proceedings, this Court has only limited powers under the *Federal Courts Act* to review the Copyright Board's decision. **This Court can only review the overall legality of what the Board has done, not delve into or re-decide the merits of what the Board has done.**

[19] **Because of this demarcation of roles between this Court and the Copyright Board, this Court cannot allow itself to become a forum for fact-finding on the merits of the matter. Accordingly, as a general rule, the evidentiary record before this Court on judicial review is restricted to the evidentiary record that was before the Board. In other words, evidence that was not before the Board and that goes to the merits of the matter**

before the Board is not admissible in an application for judicial review in this Court. As was said by this Court in *Gitksan Treaty Society v. Hospital Employees' Union*, [2000] 1 F.C. 135 at pages 144-45 (C.A.), “[t]he essential purpose of judicial review is the review of decisions, not the determination, by trial *de novo*, of questions that were not adequately canvassed in evidence at the tribunal or trial court.” See also *Kallies v. Canada*, 2001 FCA 376 at paragraph 3; *Bekker v. Canada*, , 2004 FCA 186 at paragraph 11.

- **Section 66 - Establishment**

Concurrent jurisdiction of the Copyright Board and the courts on legal question negates the application of the test of reasonableness when a court is sitting in review of a decision of the Copyright Board on a question of law.

Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada, 2012 SCC 35, (S.C.C.; 2012-07-12) Rothstein J. [reversing in part 86 C.P.R. (4th) 239 (F.C.A.; 2010-09-02), which was affirming 61 C.P.R. (4th) 353 (Cop. Bd.; 2007-10-18)]

[15] **Because of the unusual statutory scheme under which the Board and the court may each have to consider the same legal question at first instance, it must be inferred that the legislative intent was not to recognize superior expertise of the Board relative to the court with respect to such legal questions. This concurrent jurisdiction of the Board and the court at first instance in interpreting the *Copyright Act* rebuts the presumption of reasonableness review of the Board’s decisions on questions of law under its home statute.** This is consistent with *Dunsmuir* [*Dunsmuir v. New Brunswick*, 2008 SCC 9 (S.C.C.; 2008-03-07)], which directed that “[a] discrete and special administrative regime in which the decision maker has special expertise” was a “facto[r] that] will lead to the conclusion that the decision maker should be given deference and a reasonableness test applied” (para. 55). Because of the jurisdiction at first instance that it shares with the courts, the Board cannot be said to operate in such a “discrete . . . administrative regime”. Therefore, I cannot agree with Abella J. that the fact that courts routinely carry out the same interpretive tasks as the board at first instance “does not detract from the Board’s particular familiarity and expertise with the provisions of the *Copyright Act*” (para. 11). In these circumstances, courts must be assumed to have the same familiarity and expertise with the statute as the board. Accordingly, I am of the opinion that in *SOCAN v. CAIP*, Binnie J. determined in a satisfactory manner that the standard of correctness should be the appropriate standard of

review on questions of law arising on judicial review from the Copyright Board (*Dunsmuir*, at para. 62).

[20] **It should be equally clear that the Board's application of the correct legal principles to the facts of a particular matter should be treated with deference, as are the decisions of this nature by trial judges on appellate review.** However, I cannot agree with Abella J. [dissenting on this point] that the question arising in this appeal is a question of mixed fact and law (para. 74). The issue in this case has been argued by the parties as a pure question of law. The Court is asked to determine whether a point-to-point transmission can ever constitute a communication "to the public" within the meaning of s. 3(1)(f) of the *Copyright Act* (A.F. at para. 2). This is not a "questio[n] of mixed fact and law [that] involve[s] applying a legal standard to a set of facts" (*Housen v. Nikolaisen*, at para. 26); it is an extricable question of law.

- **Section 66.51 – Interim decision**

Interim decisions are made to maintain the status quo pending proceedings and in order to vary an interim decision, evidence of a change in the circumstances must be adduced.

Application to fix royalties for a licence and its related terms and conditions (SODRAC v. ARTV). <http://www.cb-cda.gc.ca/decisions/2012/20120105.pdf> (Cop. Bd.; 2012-01-05)

[8] **An interim decision serves chiefly to avoid the deleterious effects caused by the length of the proceedings. In general, the best way to fulfill these objectives is to maintain the *status quo* while avoiding a legal vacuum.**

[9] In this case, a negotiated agreement was in place until the day on which SODRAC filed its application. ARTV submits that it does not need a blanket licence. This submission relies on legal and factual arguments that reiterate the main points argued in the Astral arbitration under reserve. Moreover, the parties have agreed not to proceed on the merits in this instance until the Board has ruled on the Astral file. Therefore, at this stage, we cannot assume that ARTV's submissions are correct. That uncertainty and the legal vacuum resulting from the absence of a licence justify making an interim decision.

10] SODRAC requests the interim extension of the licence agreement recently terminated by ARTV until a final decision is issued. ARTV on the other hand wishes to negotiate rights on an

individual basis, or, alternatively, to significantly amend the terms and conditions of the agreement.

[11] When there is an agreement in existence between the parties, it is generally preferable to extend it on an interim basis, unless there is a change in circumstances tending to justify another approach. ARTV has not demonstrated any change in circumstances. The fact that ARTV challenges the need for a general licence is insufficient to justify a change in the *status Quo*.

- **Section 66.51 – Interim decision**

Maintaining the *status quo* pending proceedings and avoiding a legal gap are the purposes of interim decisions.

Public Performance of Musical Works, Re 2012 CarswellNat 555 (Cop. Bd.; 2012-02-17)

[12] The Board has, over the years, issued a number of interim decisions, reflecting the purpose of interim orders as articulated by the Supreme Court of Canada in *Bell Canada v. Canada (Canadian Radio-television and Telecommunications Commission)*. [Fn 9 *Bell Canada v. Canada (CRTC)*, [1989] 1 S.C.R. 1722 at 1754. In that decision, Mr. Justice Gonthier speaking for the Court, stated:

Traditionally, such interim rate orders dealing in an interlocutory manner with issues which remain to be decided in a final decision are granted for the purpose of relieving the applicant from the deleterious effects caused by the length of the proceedings. Such decisions are made in an expeditious manner on the basis of evidence which would often be insufficient for the purposes of the final decision. The fact that an order does not make any decision on the merits of an issue to be settled in a final decision and the fact that its purpose is to provide temporary relief against the deleterious effects of the duration of the proceedings are essential characteristics of an interim rate order.

[13] The Board has stated on a number of occasions that the best way to achieve the purposes of an interim decision is to maintain the *status quo* while preventing a legal vacuum. [Fn 10 *SODRAC v. MusiquePlus inc. (22 November 1999)* Copyright Board Decision; *SODRAC v. Les chaînes Télé Astral and Teletoon Inc. (14 December 2009)* Copyright Board Interim Decision; *Access Copyright - Post-Secondary Educational Institutions 2011-2013 (16 March 2011)*

Copyright Board Decision; *SODRAC v. ARTV* (5 January 2012) Copyright Board Interim Decision.]

[14] **While maintaining the *status quo* is not the only factor to be taken into account, it does remain an important consideration.** One must look at the last tariff certified by the Board in order to determine the nature of the *status quo* in this instance.

- **Section 66.51 – Interim decision**

Public Performance of Musical Works, Re 2012 CarswellNat 555 (Cop. Bd.; 2012-02-17)

[19] Finally, largely for the reasons advanced by the Objectors, we conclude that there are no deleterious effects that cannot be remedied through the issuance of the final tariff. For one thing, the delay at issue runs from 2007 to 2012 and the matter will proceed in a few months. In the event that SOCAN makes its case and that a tariff is certified in accordance with the terms it proposed, SOCAN will receive the quantum of royalties to which its members are entitled on a retroactive basis.

- **Section 66.51 – Interim decision**

The Copyright Board will not issue interim decisions for a period longer than the tariff they are to be applied to.

Society for Reproduction Rights of Authors, Composers and Publishers (Canada) v. Canadian Broadcasting Corporation (Interactive Kiosks; Explora; Blanket Licence 2012-2016), Files 70.2-2011-03 and 70.2 2012-01; available at <http://www.cb-cda.gc.ca/decisions/2012/20120430.pdf> (Cop. Bd.; 2012-04-30)

[10] We agree with SODRAC. The application is not premature. The conditions set out in section 70.2 of the Act have been met. **In arbitration matters, the Board is seized when a notice of application is filed, as long as parties are unable to agree and that the person who filed the notice advised the other of its intention to do so. The fact that the inability to agree may result from the absence of a final decision in another, earlier matter is simply not relevant.**

[11] Neither is the application unnecessary. The March 2009 interim decision does provide that it applies until the Board disposes of the matter under advisement. However, interim measures cannot achieve more than what is sought in the main application. That application targets uses ending on March 31, 2012. The date has passed. It is therefore

possible, if not probable, that the March 2009 interim licence has ceased to be in effect.

- **Section 66.51 – Interim decision**

Unless there is an interim decision, compliance with the reporting requirements are those referred to in the homologated tariff rather than the one to be approved.

SODRAC v. CBC/SRC and SODRAC v. Astral Re SODRAC Tariff 5 (Reproduction of Musical Works in Cinematographic Works for Private Use or for Theatrical Exhibition), 2009-2012; Applications to fix royalties for a licence and its related terms and conditions; also available at <http://www.cb-cda.gc.ca/decisions/2012/sodrac5-2012-2012.pdf> (Cop. Bd.; 2012-12-20)

[2] **Reporting requirements under the interim tariff are those set out in the 2004-2008 tariff. Distributors are not required to comply with the reporting requirements set out in the 2009-2012 tariff, for the time being.** Were the Board to conclude that the CBC rate structure for videocopies is also suited to the market targeted in Tariff 5, the reporting requirements set out in the 2009-2012 tariff probably would be reinstated. Distributors will wish to govern themselves accordingly and to ensure they have access to the required information, at least with respect to their dealings as of January 1, 2013.

- **Section 66.51 – Interim decision**

When dealing with a request for interim decision, the Copyright Board may consider the issues at stake, as well as the balance of convenience in the event of a need for reimbursement of overpayment.

SOCAN (2008-2010), RE:SOUND (2008-2011), CSI (2008-2012), AVLA/SOPROQ (2008-2011), ARTISTI (2009-2011) Re Interim decision, <http://www.cb-cda.gc.ca/decisions/2012/radio-21122012.pdf> (Cop. Bd.; 2012-12-21)

[16] The application for an interim decision is denied in all other respects, for the following reasons.

[17] First, the evidentiary problems and legal issues we alluded to regarding the application on the merits are as much at issue in the application for an interim decision. **We do not see how we could deal with the interim application more expeditiously or with less evidence than for the decision on the merits. It is more convenient and fair to leave the parties in their current state and to deal with all of these questions when the application is considered on the merits, so long as this is done without delay.**

[18] Second, the point of view that CSI may have expressed before a parliamentary committee is not evidence in this case to substantiate CAB's claims. A person's argument may set out what that person thinks but it does not constitute a basis for statutory interpretation.

[19] Third, **the balance of convenience, to the extent that it is relevant in this instance, favours the collective societies. A station is more likely to go out of business than a collective. A station could easily and quickly deduct any overpayment from future royalties.** If overpayments are considerable, the Board could easily provide in the tariff that the collectives are to pay them back immediately. The inverse is not necessarily possible.

- **Section 66.52 – Variation of decisions**

Tariffs enforcement are generally for the courts to decide, not the Copyright Board; in any event the issues at stake should not be meaningless.

Collective Administration of Performing Rights & of Communication Rights, Re 2012 CarswellNat 181 (Cop. Bd.; 2012-01-30)

[3] For its part, Re:Sound argues that section 66.52 cannot be invoked, because no material change in circumstances has occurred since the decision. Re:Sound also advances a number of factual statements to argue that its licensing practices are perfectly acceptable and that nothing untoward has happened in its dealings with the applicant.

[5] The application is dismissed. **To the extent the application raises issues of tariff enforcement, these generally are for the courts, not the Board, to decide.** To the extent Montage believes that the amounts claimed are improperly calculated, it should submit to Re:Sound a different calculation: a change to the transitional provisions of the tariff would not settle this issue. To the extent Re:Sound asked to be paid two weeks early, Montage's remedy consisted in simply waiting until royalties were due. **Finally, the amounts at play for any user under this tariff are so trivial that they would not justify the Board's intervention in any event.**

- **Section 66.52 – Variation of decisions**

Legislative amendments may warrant the variation of an earlier interim decision.

SOCAN (2008-2010), RE:SOUND (2008-2011), CSI (2008-2012), AVLA/SOPROQ (2008-2011), ARTISTI (2009-2011) *Re Interim decision*, <http://www.cb-cda.gc.ca/decisions/2012/radio-21122012.pdf> (Cop. Bd.; 2012-12-21)

[15] We now turn to the application to vary the tariff in respect of CSI for the period from November 7 to December 31, 2012. **The Board will need to deal with it, since a legislative amendment may justify varying a decision: *Interim Decision* (s. 66.52 of the Copyright Act) on the Application to Vary the Television Retransmission Tariff, 1992-1994 [(29 February 1994) Copyright Board, Decision. [*Retransmission (Interim) 1994*]]**

- **Section 66.7 - General powers, etc.**

Jurisdictional issues are to be raised *proprio motu* by the Copyright Board.

Access Copyright - Provincial and Territorial Governments Tariffs (2005-2014) Decision (Crown immunity application) 2012 CarswellNat 609 (Cop. Bd.; 2012-03-15)

[71] **Furthermore, Crown immunity is a jurisdictional issue. The Board is obliged to raise such issues *proprio motu*. Were the claim of Crown immunity to succeed in this case, the Board would be obliged to reject of its own motion any tariff filed in respect of any emanation of the Crown unless immunity had been waived.**

- **Section 66.7 - General powers, etc.**

"Splitting up the examination of the substantive issues raised in a single matter should be the exception."

SOCAN (2008-2010), RE:SOUND (2008-2011), CSI (2008-2012), AVLA/SOPROQ (2008-2011), ARTISTI (2009-2011) *Re Interim decision*, <http://www.cb-cda.gc.ca/decisions/2012/radio-21122012.pdf> (Cop. Bd.; 2012-12-21)

[12] Second, it is preferable to dispose of the application on the merits at the same time as for all of the proposed tariffs for commercial radio, rather than as part of a process dealing solely with CAB's claims. **Splitting up the examination of the substantive issues raised in a single matter should be the exception. Singling out for treatment an issue at a preliminary stage is justified, for example, if it can be conveniently isolated, if the evidence required to decide it does not overlap with the rest of the evidence on the merits, and if deciding it first may avoid the need to engage other controversial issues.** Such is not the case here. Deciding the application requires substantial evidence that relates to the very core of the debate, namely the scope (and hence,

the value) of the protected reproduction activities that stations engage in.

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

The only section 19 collectives targeted in sections 67 to 68.2 are those that collect the remuneration for sound recordings of musical works..

Re:Sound Tariff No. 6B – Use of Recorded Music to Accompany Physical Activities, 2008-2009, http://www.cb-cda.gc.ca/tariffs-tarifs/certified-homologues/2012/ReSound6_B_reasons.pdf (Cop. Bd.; 2012-07-06)

[73] **Section 67 provides that the only section 19 collectives targeted in sections 67 to 68.2 are those that collect the remuneration for sound recordings of musical works.** If, as Re:Sound argues, it represents all eligible sound recordings of musical works, then the words [in subsection 67.1(4) of the Act] “with respect to the [...] sound recording in question” (note the singular) are redundant. The eligible repertoire would be either “all in” or “all out”.

[74] Third, **the 68(2)(a)(i) requirement that remuneration flow only to eligible recordings does not require that remuneration flow to all such recordings. It is just as reasonable to conclude that the requirement exists to ensure that no remuneration flow to non-eligible recordings, whether or not remuneration flows to all eligible recordings.**

[75] Re:Sound is entitled to collect equitable remuneration only in regard to recordings that were brought into its repertoire. **Given the wording of subsection 67.1(4) of the Act, users are entitled to use eligible recordings that are not in Re:Sound’s repertoire for free**, unless the Minister responsible for the *Act* authorizes an action for recovery of royalties.

[140] The misinterpretation of the tariff is worrisome; if users accidentally or deliberately misinterpret our tariffs in a biased way, the amounts generated are much lower than they would otherwise be.

- **Section 67.1 - Filing of proposed tariffs.**

Recap of the principles upon which the Copyright Board is intervening to set a tariff.

Society for Reproduction Rights of Authors, Composers and Publishers in Canada v. Canadian Broadcasting Corp. 2012 CarswellNat 4255 (Cop. Bd.; 2012-11-02)

[58] A few principles that generally form the basis for the Board's decisions are worth repeating here

[59] First, copyright **owners generally are free to structure their dealings with users as they wish**. SODRAC members are free to decide how (and to whom) to licence their copyrights in any given market. This general principle is subject to exceptions, some of which we will address later. **Users who do not wish to deal with owners must avoid making protected uses of the owners' copyrights**.

[60] Second, **owners who ask a collective to administer their rights are no longer free to structure their copyright dealings as they wish**. When the Board is asked to decide how a collective will deal with users, the collective no longer can refuse to licence uses in that market. **Owners can regain full control over their dealings only if the relevant rights cease being administered collectively**.

[61] Third, **once the Board sets the terms and conditions of a licence, concerned users can insist that the collective deal with them accordingly**. Users remain free to clear rights through other channels, to the extent this is possible. As a result, **the prices the Board sets will tend to act as a cap on royalties**.

[62] Fourth, **the Board cannot impose liability where the Act does not or remove liability where it exists**. [Fn 20 *Reproduction of Musical Works, Re* [2007 CarswellNat 623 (Copyright Bd.)] (16 March 2007) Copyright Board *Decision* at para. 119. [*CSI — Online Music Services (2007)*] **Consequently, the Board cannot decide who should pay, only what should be paid for which uses, and only to the extent that the envisaged use requires a licence**.

[63] **Fifth, an important distinction exists between a tariff proceeding and an arbitration conducted pursuant to section 70.2 of the Act**. In the first, the Board imposes obligations on absent users as a matter of course: a tariff is a prospective norm of general application. By contrast, an arbitration concerns only the parties involved. The licences we issue here bind only CBC and Astral, not any other broadcaster. *A fortiori* it is not possible for us to impose through arbitration obligations on copyright users who operate upstream or downstream from the transactions for which we set a price: we cannot force producers to sign through-to-the-viewer licences. Neither can we, through these proceedings, force SODRAC to deal with them.

- **Section 67.1 - Filing of proposed tariffs.**

Using interest factor is a practice that should be generalized where retroactive payments are obtained through an homologated tariff.

Public Performance of Musical Works, Re 2012 CarswellNat 2221, http://www.cb-cda.gc.ca/decisions/2012/Decision_SOCAN_Various_Tariffs.pdf (Cop. Bd.; 2012-06-29)

[43] In a recent decision, the Board wrote that "the practice of using interest factors should be generalized" where retroactive payments obtain. [F Fn 8 *SOCAN-Re:Sound CBC RadioTariff, 2006-2011* (8 July 2011) Copyright Board Decision at para. 131.] We agree. That being said, we are reluctant to disturb the agreement negotiated between SOCAN and the users of its tariff. As such, we decline to add an interest factor clause to the tariff where none has been proposed.

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

Apart from the retransmission right and private copying, a collective can only collect royalties for their repertoire.

Re:Sound Tariff No. 6B – Use of Recorded Music to Accompany Physical Activities, 2008-2009, http://www.cb-cda.gc.ca/tariffs-tarifs/certified-homologues/2012/ReSound6_B_reasons.pdf (Cop. Bd.; 2012-07-06)

[71] First, in most regimes the Board administers, a clear distinction exists between what is eligible and what attracts royalties pursuant to a tariff. **Generally speaking, a collective can only collect royalties for what its repertoire contains.** The retransmission and private copying regimes are the only exceptions to this rule. In these regimes, copyright owners who have not joined a collective (sometimes referred to as "orphans") can claim their share from a collective society the Board designates. For that reason, the amount of royalties is set at a level sufficient to compensate all eligible copyright subject matters.

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

Tariffs are both prospective and of general application and the Copyright Board may invite interested third parties to make representations.

Re: Sound Tariff 5 – Use of Music to Accompany Live Events, 2008-2012 (Parts A to G), File Public Performance of Sound Recordings, <http://www.cb-cda.gc.ca/decisions/2012/20120430.pdf> (Cop. Bd.; 2012-05-25)

[10] **Before certifying a tariff based on agreements, it is generally advisable to consider (a) the extent to which the**

parties to the agreements can represent the interests of all prospective users and (b) whether relevant comments or arguments made by former parties and non-parties have been addressed. These are not hard and fast rules: prospective users who did not file a timely objection no longer have a right to air their views before the Board. **Yet because tariffs are both prospective and of general application, some account must be taken of the interests of those who are not before us and who will be affected by our decision, especially with tariffs of first impression.** This is why subsection 68(1) of the *Act* allowed the Board to raise objections of its own. This is also why we allowed the objectors to intervene as late in the day as we did.

[24] The Board is generally concerned with internal tariff coherence when more than half of users pay the minimum fee or when too few qualify for the minimum. [...]

[41] We remain convinced that as a rule, sharing information among collectives dealing with the same clients, and using the same rate base, is both efficient and desirable. The Sports Objectors did not provide any evidence or argument that might lead us to disallow such information sharing in this instance.

[47] **Generally speaking, Board approved tariffs are substitutes to market negotiated licences.** [...]

- **Section 70.2 – Application to fix amount of royalty**

In arbitration matters, the Copyright Board is seized when a notice of application is filed and will remain seized until a decision is made or the application withdrawn.

Society for Reproduction Rights of Authors, Composers and Publishers (Canada) v. Canadian Broadcasting Corporation (Interactive Kiosks; Explora; Blanket Licence 2012-2016), Files 70.2-2011-03 and 70.2 2012-01; available at <http://www.cb-cda.gc.ca/decisions/2012/20120430.pdf> (Cop. Bd.; 2012-04-30)

[10] We agree with SODRAC. The application is not premature. The conditions set out in section 70.2 of the *Act* have been met. **In arbitration matters, the Board is seized when a notice of application is filed, as long as parties are unable to agree and that the person who filed the notice advised the other of its intention to do so. The fact that the inability to agree may result from the absence of a final decision in another, earlier matter is simply not relevant.**

[11] Neither is the application unnecessary. The March 2009 interim decision does provide that it applies until the Board disposes of the

matter under advisement. However, interim measures cannot achieve more than what is sought in the main application. That application targets uses ending on March 31, 2012. The date has passed. It is therefore possible, if not probable, that the March 2009 interim licence has ceased to be in effect.

- **Section 70.2 – Application to fix amount of royalty**

An arbitration concerns only the parties involved while a tariff is of general application.

Society for Reproduction Rights of Authors, Composers and Publishers in Canada v. Canadian Broadcasting Corp. 2012 CarswellNat 4255 (Cop. Bd.; 2012-11-02)

[63] Fifth, **an important distinction exists between a tariff proceeding and an arbitration conducted pursuant to section 70.2 of the Act. In the first, the Board imposes obligations on absent users as a matter of course: a tariff is a prospective norm of general application. By contrast, an arbitration concerns only the parties involved.** The licences we issue here bind only CBC and Astral, not any other broadcaster. *A fortiori* it is not possible for us to impose through arbitration obligations on copyright users who operate upstream or downstream from the transactions for which we set a price: we cannot force producers to sign through-to-the-viewer licences. Neither can we, through these proceedings, force SODRAC to deal with them.

- **Section 71 – Fixing of proposed tariffs**

Royalties for retransmission are determined within the scheme provided for by homologation, when applicable.

Reference re Broadcasting Regulatory Policy 2010-167 and Broadcasting Order CRTC 2010-168, 2012 SCC 68 (S.C.C.; 2011-09-29) Rothstein J. [reversing 91 C.P.R. (4th) 389 (F.C.A.; 2011-02-28)]:

[57] In the case of works carried in distant signals only, the section provides copyright owners with a right to receive royalties as payment for the simultaneous retransmission of those works by a BDU. The royalties are determined by the Copyright Board, on the basis of tariffs filed by collective societies, pursuant to the regime detailed in ss. 71 to 74 of the *Copyright Act*. Under s. 31(2), works carried in local signals attract no royalty when retransmitted in accordance with all conditions of that section. [...]

- **Section 76 – Claims by non-members**

Reference re Broadcasting Regulatory Policy 2010-167 and Broadcasting Order CRTC 2010-168, 2012 SCC 68 (S.C.C.; 2011-09-29) Rothstein J. [reversing 91 C.P.R. (4th) 389 (F.C.A.; 2011-02-28)]:

[58] It bears underlining that, in the case of works carried in both local and distant signals, **the copyright owner has *no right to prohibit* the simultaneous retransmission of the work; recourse is limited to receiving through a collective society the prescribed royalty, but only for the simultaneous retransmission of works carried in distant signals** (ss. 76(1) and 76(3) of the *Copyright Act*). [...]

- **Section 77 – Circumstances in which licence may be issued by the Board [Owners who cannot be located]**

A licence will not issue if a valid consent was provided or if the work is in the public domain.

Cloutier (Carol) for the reproduction of 362 photographs and album covers in a book [Re application by] File 2007-UO/TI-20, 2012 CarswellNat 94 (Cop. Bd.; 2012-01-03)

[1] La licence autorise la reproduction de 362 photographies et pochettes de disques, incluses dans le livre intitulé *Le Discographe des années 50-59*, **dans la mesure où une permission qui fut donnée à l'égard d'une œuvre n'est pas valable** (voir Annexe A) **et/ou dans la mesure où l'œuvre ne fait pas partie du domaine public** (voir Annexes A et B).

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

- **Section 77 – Circumstances in which licence may be issued by the Board [Owners who cannot be located]**

A retroactive licence may be granted.

National Film Board of Canada for the reproduction and incorporation of a photograph in a documentary film [Re application by] File 2011 U)/TI-25. 2012 CarswellNat 597 (Cop. Bd.; 2012-02-10)

[1] [...] La photographie est en noir et blanc et fait partie d'un collage fait par M^{me} Baillargeon à l'époque.

L'image cinématographique de la photographie durera au plus 22 secondes dans le film documentaire de 75 minutes.

La licence autorise aussi l'exécution en public et la communication au public par télécommunication de la photographie ainsi incorporée ainsi que la reproduction du film documentaire sur tout support à des fins de distribution pour représentation privée, comme partie de l'exploitation du film documentaire

[2] La licence expire à l'égard de l'œuvre lorsque celle-ci relèvera du domaine public.

[4] **La licence est rétroactive** à la date de la première reproduction de l'image dans le film documentaire mentionné au paragraphe 1). [starting October 2011]

- **Section 77 – Circumstances in which licence may be issued by the Board [Owners who cannot be located]**

When issuing a licence, the Copyright Board may set a limit to the print runs.

Éditions du Quartz, Rouyn-Noranda for the reproduction and the republication on hard copy of the text in a book [Re application by] File: 2011-UO/TI-10, 2012 CarswellNat 991; also available at <http://www.cb-cda.gc.ca/unlocatable-introuvables/licences/261-f.pdf> (Cop .Bd.; 2012-04-04)

[1] La licence autorise la reproduction et la réédition sur support papier du texte de l'œuvre littéraire intitulée « Mon premier livre de lecture » de Marguerite Forest et Madeleine Ouimet et publiée par les Éditions Granger et frères en 1951.

[2] Le tirage ne devra pas dépasser 1000 exemplaires.

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

- **Section 77 – Circumstances in which licence may be issued by the Board [Owners who cannot be located]**

Licence issued by the Copyright Board are non-exclusive and restricted to Canada.

La Presse Télé III Ltée, Montreal, QC, for the synchronization, reproduction and communication to the public by telecommunication of an excerpt of a musical work [Re application by]. File: 2012-UO/TI-06, available at <http://www.cb-cda.gc.ca/unlocatable-introuvables/licences/262-f.pdf> (Cop. Bd.; 2012-05-28]

[1] La licence autorise la synchronisation, la reproduction et la communication au public par télécommunication d'un extrait de 2 minutes de l'œuvre musicale *Le temps est bon*, écrite par Stéphane Venne et publiée par JFM Investments Inc., diffusée à la télévision

[2] La licence expire le 31 mai 2014. Toute utilisation visée au paragraphe (1) devra être complétée d'ici cette date.

[3] **La licence est non exclusive et valide seulement au Canada.** Pour les autres pays, c'est la loi du pays qui s'applique.

- **Section 77 – Circumstances in which licence may be issued by the Board [Owners who cannot be located]**

Licence issued by the Copyright Board are limited to the specific rights and/or use referred to in the application; located copyright owner may end the licence granted by the Copyright Board

Bibliothèque et Archives nationales du Québec (BAnQ) for the reproduction and communication to the public by telecommunication of posters, periodicals and monographs [Re application by], file 2010-UO/TI-14]; also available at <http://www.cb-cda.gc.ca/unlocatable-introuvables/licences/263-f.pdf> (Cop. Bd.; 2012-07-19)

[1] La licence autorise la reproduction de 40 affiches, 6 périodiques et 2 monographies (voir Annexe A pour la liste des oeuvres) ainsi que leur communication au public par télécommunication (voir Annexe B pour les utilisations spécifiques accordées).

[2] **La délivrance de cette licence ne libère pas le titulaire de la licence de l'obligation d'obtenir une autorisation pour toute utilisation non visée par cette licence.**

[3] La licence expire à l'égard d'une oeuvre lorsque cette dernière rejoint le domaine public.

[4] La licence est non-exclusive et valide seulement au Canada. Pour tout autre pays, la loi interne du pays s'applique.

(6) **Le titulaire du droit d'auteur peut mettre fin à la présente licence en remettant un avis écrit à cet effet à BAnQ.** Cette dernière met fin aux utilisations que permet la présente licence au plus tard 30 jours après avoir reçu l'avis. Le titulaire qui met fin à la licence a néanmoins droit aux redevances prévues au paragraphe (5).

- **Section 77 – Circumstances in which licence may be issued by the Board [Owners who cannot be located]**

Licence issued by the Copyright Board are non-exclusive and restricted to Canada.

Canadian Institute of Natural and Integrative Medicine (CINIM) for the digital reproduction and the communication to the public by telecommunication of two jokes. [Re application by] File: 2012-UO/TI-05, 2012 CarswellNat 3073 (Cop. Bd.: 2012-07-24)

[1] The licence authorizes the digital reproduction and the communication to the public by telecommunication of the following published jokes, *provided they are not in the public domain.*

- The Clever Little Girl
- The Young Businessman

[2] The licence expires December 31, 2015.

[3] **The licence is non-exclusive and valid only in Canada.** For other countries, it is the law of the country that applies.

[4] The issuance of the licence does not release the licensee.
[Our italics.]

- **Section 77 – Circumstances in which licence may be issued by the Board [Owners who cannot be located]**

When issuing a licence, the Copyright Board may order to the bearer to identify the source of the work.

Éditions du Quartz, Rouyn-Noranda, Quebec, for the reproduction and the republication on hard copy of the text in a book [Re application by], File: 2011-UO/TI-10, also available at <http://www.cb-cda.gc.ca/unlocatable-introuvables/licences/266-f.pdf> (Cop. Bd.; 2012-10-22)

(1) La licence autorise la reproduction et la réédition sur support papier du texte de l'oeuvre littéraire intitulée « Mon premier livre de lecture » de Marguerite Forest et Madeleine Ouimet et publiée par les Éditions Granger et frères en 1951.

(2) Le tirage ne devra pas dépasser 3000 exemplaires.

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

(4) La licence expire le 31 octobre 2017.

(5) **La licence est non-exclusive et valide seulement au Canada.**
Pour tout autre pays, la loi interne du pays s'applique.

(6) **Le titulaire de la licence doit indiquer clairement pour l'oeuvre utilisée la référence bibliographique selon les conventions d'usage : titre de l'oeuvre, auteur, éditeur, lieu et date de publication.**

- **Section 77 – Circumstances in which licence may be issued by the Board [Owners who cannot be located]**

The Copyright Board will not issue a licence if the work is in the public domain.

Frontier School Division, Winnipeg, Manitoba, for the mechanical reproduction and public performance of the musical work entitled "Road to Fort Coulonge" written by Harry Reginald (Reg) Hill and published by Melbourne Musi [Re application] File 2012-UO/TI-04, also available at <http://www.cb-cda.gc.ca/unlocatable-introuvables/licences/265-e.pdf> (Cop. Bd.; 2012-10-16

(3) **The licence is valid provided that the musical work is not in the public domain.**

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

The *Copyright Act* is exhaustive.

Waldman v. Thomson Reuters Corporation, 2012 ONSC 1138 (Ont. Sup. Ct.; 2012-02-21) Perell J.

[54] **Copyright is a creature of the *Copyright Act*, R.S.C. 1985, c. C-42, and the rights and remedies it provides are exhaustive:**
Théberge v. Galerie d'Art du Petit Champlain inc., 2002 SCC 34 at para. 5.

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

When submitting a building plan to a public authority for permit purposes, there is no expectation of confidentiality

Corporation of the City of London (Re), 2012 CanLII 28372 (Ont. I.P.C.; 2012-05-18)
Beamish, Assistant Commissioner

[Summary: The city received a request from a member of the public for building plans that were prepared by the appellant. The city's Building Division disclosed the building plans to the third party upon payment of a fee. The appellant claims that the city should have notified it in accordance with section 21(1)(a) of the *Act* [*Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56] because the city knew or ought to have known that the disclosure of the plans would cause harm to the appellant under the third party information exemption in section 10(1) of the *Act*. This order upholds the city's disclosure of the building plans, as the records were not supplied to the institution in confidence, either explicitly or implicitly, as required by section 10(1) of the *Act*.]

[29] While I appreciate that the building plans were submitted as part of the building permit application process, the expectation that the plans would be used for this purpose alone is not equivalent to a reasonable expectation of confidentiality. In addition, the city provided evidence that it is its practice to make building plans available to the public upon request, for a fee. Such a practice is contrary to a reasonable and objective expectation of confidentiality on the part of the appellant. Had the appellant or property owner made inquiries of the city, they would have been informed that building plans are routinely disclosed to third parties on request. Furthermore, as the plans were not submitted directly by the appellant, the city could not reasonably have known that the appellant expected that the plans would be kept confidential. Finally, the building plans were not stamped "Confidential" or otherwise noted as having been provided in confidence. Instead, the notation on the building plans only states that the "Copyright Act applies to use and production" of the plans. **While the lack of a "Confidential" stamp or notation is not necessarily determinative, in my view, the circumstances of this appeal, the city's routine practices and the plans themselves lead me to conclude that they were not supplied with a reasonable expectation of confidentiality.**

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

The exhaustivity referred to in section 89 only applies to copyright, not any other rights or recourses.

Access Copyright - Provincial and Territorial Governments Tariffs (2005-2014) Decision (Crown immunity application) 2012 CarswelNat 609 (Cop. Bd.; 2012-03-15)

[52] Certain inferences can be drawn by reading section 12 together with section 89. **As a result of section 89, all copyright is exclusively contained within the legal structure of the Act.** Without the opening phrase of section 12, section 89 would operate to eliminate all remaining

common law copyright held by the Crown. This seems to confirm that the terms “without prejudice to any rights or privileges of the Crown” are necessary to maintain the Crown prerogative in its copyright and that those words must be read to mean such a prerogative.

[55] **Moreover, section 89 targets copyright exclusively.** As a result, the opening words of section 12 fully serve their purpose by preserving the Crown’s prerogatives relating to Crown copyright, not other forms of prerogatives such as Crown immunity. This is where section 17 of the *Interpretation Act* comes into play: it is under that provision that any claim of Crown immunity must be made. If section 12 also fulfills that purpose, as is argued by the Objectors, then the opening words of section 12 are largely redundant. This cannot be Parliament’s intent.

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

The rights and remedies provided under the *Copyright Act* are exhaustive.

Leuthold v. Canadian Broadcasting Corporation, 2012 FC 748 (F.C.; 2012-06-14) Scott J.

[132] **The Court must first underline the fact that in Canada, copyright “is a creature of statute and the rights and remedies it provides are exhaustive”** (see *Théberge v Galerie d'Art du Petit Champlain inc.*, [2002] 2 SCR 336, 2002 SCC 34, at para 5; *Bishop v Stevens*, [1990] 2 SCR 467, at page 477; *Compo Co v Blue Crest Music Inc.*, [1980] 1 SCR 357, at page 373).

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

A right to copyright must be found in the *Copyright Act* itself and cannot be created by subordinate legislation.

Reference re Broadcasting Regulatory Policy 2010-167 and Broadcasting Order CRTC 2010-168, 2012 SCC 68 (S.C.C.; 2011-09-29) Rothstein J. [reversing 91 C.P.R. (4th) 389 (F.C.A.; 2011-02-28):

[80] There is one final point to be made. Section 89 of the *Copyright Act* provides:

89. No person is entitled to copyright otherwise than under and in accordance with this Act or any other Act of Parliament, but nothing in this section shall be construed as abrogating any right or jurisdiction in respect of a breach of trust or confidence.

The deliberate use of the words “this Act or any other Act of Parliament” rather than “this Act or any other enactment”

means that the right to copyright must be found in an Act of Parliament and not in subordinate legislation promulgated by a regulatory body. “Act” and “enactment” are defined in s. 2 of the *Interpretation Act*, R.S.C. 1985, c. I-21, where

“Act” means an Act of Parliament;

And

“enactment” means an Act or regulation or any portion of an Act or regulation.

The definitions confirm that Parliament did not intend that a subordinate regulatory body could create copyright by means of regulation or licensing conditions.

[82] [...] Describing this new right granted to broadcasters under the value for signal regime as a series of regulatory changes does not alter the true character of the right being created. **Not calling it copyright does not remove it from the scope of s. 89. If that type of repacking was all that was required, s. 89 would not serve its intended purpose of restricting the entitlement to copyright to grants under and in accordance with Acts of Parliament.**

- **Section 91 – Adherence to Berne and Rome Conventions**

If the *Copyright Act* has to be interpreted, it should be in accordance with the international obligations of Canada,

Re: Sound v. Motion Picture Theatre Association of Canada, 2012 SCC 38, (S.C.C.; 2012-07-12) Lebel J. [affirming 2011 CarswellNat 429 (F.C.A.; 2011-02-25) which was affirming 78 CPR (4th) 64 (Cop. Bd.; 2009-00-16)]

[51] As this Court noted in *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324: . . . **where the text of the domestic law lends itself to it, one should also strive to expound an interpretation which is consonant with the relevant international obligations**” (p. 1371). In the case at bar, the Board’s interpretation is consonant with Canada’s obligations under the *Rome Convention*.

- **Section 83 - -- Copyright and manuscript to revert to author [Bankruptcy and Insolvency Act]**

The onus is on a claimant to prove his claim in the bankrupt and, absent any evidence to the contrary, the author will be deemed the owner of the copyright.

Sapient Grid Corp. (Re), 2012 ABQB 357 (Alta. Q.B.; 2012-05-28) Schlosser, Registrar

[20] Both Kobler and Renneberg have advanced section 81 claims. Section 81 provides that the person claiming property in possession of the Bankrupt should provide a sufficiently particularized Proof of Claim (subsection 81(1), (2)). Section 81(3) puts the onus on the claimant to establish their property claim. (Re Melnitzer, (1991) 9 CBR (3d) 30, 87 Alta. LR (4th) 696).

[21] The starting point for intellectual property claims is the federal Copyright Act, R.S.C. 1985, C-42. The author (of a computer program) is the owner of the program in issue (section 13(1)), unless ownership is displaced by employment, or agreement. *Massie and Renwick Limited v. Underwriters Survey Bureau Limited et al*, [1940] SCR 218. (There is a similar provision with respect to author's manuscripts in section 83 of the Bankruptcy and Insolvency Act).

[22] In this case, the evidence does not disclose any clear agreement displacing ownership.

[23] That leaves employment. Among many decided cases on the topic, 671122 *Ontario Ltd. v. Sagas Industries Canada Inc.*, 2001 SCC 59 and, more recently (for example), *Alberta Permit Pro v. Booth*, 2007 ABQB 562, per Reid, J. at paras. 129-147, set out the considerations for determining whether a person is an employee. The tests in those cases are not satisfied on the evidence before me. The gist of the evidence in the present case is that Renneberg and Kobler were more like joint venturers with the Bankrupt, than employees.

[24] **It is also not for the claimant to disprove potential exceptions to ownership.** On balance, the evidence does not demonstrate that one of the exceptions should apply. Applying the standard of correctness to the section 81 claims, the appeals of the Trustee's disallowances of the property claims are also allowed.

And to conclude:

1115038 Alberta Ltd. v. 1163256 Alberta Ltd., 2012 CarswellAlta 947 (Alta. Q.B.; 2012-05-18) Gill J.

[78] The liquidation approach did not generate any value because the company did not own significant tangible assets such as trademarks or copyright. [The underlining is ours.]

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