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A COMPILATION OF THE CANADIAN COPYRIGHT CASES RENDERED IN 2017

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LAWYERS, PATENT & TRADEMARK AGENTS

First, a general listing

1. *907687 Ontario Inc. (International Institute of Travel) v. 1472359 Ontario Ltd (IBT College of Business Travel & Tourism Technology)*, 152 C.P.R. (4th) 203, 2017 CarswellNat 6175, 287 A.C.W.S. (3d) 741, [2017] F.C.J. 1053, 2017 FC 969, <https://www.canlii.org/fr/ca/cfpi/doc/2017/2017cf969/2017cf969.html> (FC; 2017-10-31).
2. *9107-0235 Québec inc. (Grattex) v. Duval*, 2017 QCCQ 13479, <https://www.canlii.org/fr/qc/qccq/doc/2017/2017qccq13479/2017qccq13479.html> (Que. Ct. – Small Claims; 2017-02-23).
3. *9284-7557 Québec inc. (Éditions Plume de pluie) c. Aouimeur (Samia Shariff (Auteure))*, 2017 QCCQ 5329, <https://www.canlii.org/fr/qc/qccq/doc/2017/2017qccq5329/2017qccq5329.html> (Que. Ct. – Small claims; 2017-05-15).
4. *1395804 Ontario Ltd. (Blacklock's Reporter) v. Canada (Attorney General)*, 2017 CarswellNat 4407, 2017 FCA 185, 283 A.C.W.S. (3d) 267, <https://www.canlii.org/en/ca/fca/doc/2017/2017fca185/2017fca185.html> (F.C.A.; 2017-09-12); affirming 2016 CarswellNat 7652 (F.C. - costs; 2016-12-21).
5. *Anderson v. Pieters*, 2017 CarswellBC 1522, 2017 BCSC 954, [2017] B.C.W.L.D. 4030, [2017] B.C.W.L.D. 4032, [2017] B.C.W.L.D. 4033, 280 A.C.W.S. (3d) 265, [2017] B.C.J. 1104, <https://www.canlii.org/en/bc/bcsc/doc/2017/2017bcsc954/2017bcsc954.html> (B.C. S.C.; 2017-06-08).
6. *Ankenman Associates Architects Inc. v. 0981478 B.C. Ltd.*, 145 C.P.R. (4th) 279, 2017 CarswellBC 547, 2017 BCSC 333, [2017] B.C.W.L.D. 2399, [2017] B.C.W.L.D. 2466, [2017] B.C.W.L.D. 2467, 278 A.C.W.S. (3d) 152, <http://www.canlii.org/en/bc/bcsc/doc/2017/2017bcsc333/2017bcsc333.html> (B.C. S.C.; 2017-03-01).
7. *Barreau du Québec (syndic ad hoc) c Brouillette*, 2017 QCCDBQ 85, 2017 LNQCCDBQ 75, <https://www.canlii.org/fr/qc/qccdbq/doc/2017/2017qccdbq85/2017qccdbq85.html> (Que. Conseil de discipline du Barreau du Québec; 2017-11-03).

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8. *Bégon Fawcett v Colas*, [2017] J.Q. 14542, 2017EXP-3359, 2017 QCCS 4835, <https://www.canlii.org/fr/qc/qccs/doc/2017/2017qccs4835/2017qccs4835.html> (Que. Sup. Ct.; 2017-10-23).
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14. *Canadian Imperial Bank of Commerce v. McDougald*, [2017] A.J. 166, 276 A.C.W.S. (3d) 847, 45 C.B.R. (6th) 241, 2017 CarswellAlta 289, 98 C.P.C. (7th) 181, 2017 ABQB 124, <https://www.canlii.org/en/ab/abqb/doc/2017/2017abqb124/2017abqb124.html> (Alta. Q.B.; 2017-02-24).
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38. *Éditions Québec Amérique inc. v. Druide informatique inc.*, 2017 CarswellQue 8069, 2017 QCCS 4092, 284 A.C.W.S. (3d) 609, [2017] J.Q. 12475, EYB 2017-284413, 2017EXP-3144, <https://www.canlii.org/fr/qc/qccs/doc/2017/2017qccs4092/2017qccs4092.html> (Que. Sup. Ct.; 2017-09-14) [leave to appeal granted. Partial stay ordered] 2017 CarswellQue 11485, 2017 QCCA 2060, EYB 2017-28862 (Que. C.A.; 2017-12-21)].
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70. *Shefa Franchises, Ltd. V. SilverBirch Hotels and Resorts Limited Partnership*, 2017 TMOB 49, [2017] T.M.O.B. 5049, 147 C.P.R. (4th) 34, 2017 CarswellNat 2578, <https://www.canlii.org/en/ca/tmob/doc/2017/2017tmob49/2017tmob49.html> (Opp. Bd.; 2017-04-28).
71. *Société québécoise de gestion collective des droits de reproduction (Copibec) v. Université Laval*, 2017 CarswellQue 1085, 2017 QCCA 199, 277 A.C.W.S. (3d) 255, EYB 2017-275968, <http://www.canlii.org/fr/qc/qcca/doc/2017/2017qcca199/2017qcca199.html> (Que. C.A.; 2017-02-08) [reversing 2016 CarswellQue 1651 (Que. Sup. Ct.; 2016-02-26)].
72. *Steen v. Dr. Seuss Enterprises, L.P.*, 2017 CarswellNat 6868, 2017 FC 172, 286 A.C.W.S. (3d) 338, <https://www.canlii.org/en/ca/fct/doc/2017/2017fc172/2017fc172.html> (F.C.; 2017-2-11).
73. *Stork Market Inc v. 1736735 Ontario Inc. (Hello Pink Lawn Cards Inc)*, 149 C.P.R. (4th) 287, 2017 CarswellNat 4088, [2017] F.C.J. 824, 2017 FC 779, 283 A.C.W.S. (3d) 822, <https://www.canlii.org/en/ca/fct/doc/2017/2017fc779/2017fc779.html> (F.C.; 2017-08-22).
74. *Sunnyside Historical Society, Re*, 2017 CarswellNat 5625, <http://www.cb-cda.gc.ca/decisions/2017/TI-14.pdf> (Cop. Bd.; 2017-10-04).
75. *Tightrope Books [Non-exclusive licence authorizing the reproduction and distribution of a book]*, Toronto, Ontario, 2017 CarswellNat 5624, <http://www.cb-cda.gc.ca/unlocatable-introuvables/licences/299-e.pdf> (Cop. Bd.; 2017-10-13).
76. *Toronto Real Estate Board v. Canada (Commissioner of Competition)*, 2017 CarswellNat 6861, 2017 FCA 236, [2017] F.C.J. 1155, <https://decisia.lexum.com/fca-caf/decisions/en/item/301595/index.do> (F.C.A.; 2017-12-01) [affirming 2016 CarswellNat 1506 (Comp. Trib.; 2016-04-27)].
77. *Trader v CarGurus*, 2017 CarswellOnt 5031, 2017 ONSC 1841, 145 C.P.R. (4th) 415, 137 O.R. (3d) 587, 278 A.C.W.S. (3d) 384,

<https://www.canlii.org/en/on/onsc/doc/2017/2017onsc1841/2017onsc1841.html> (Ont. Sup. Ct.; 2017-04-06).

78. *United Airlines, Inc. v. Cooperstock*, 2017 CarswellNat 2975, [2017] F.C.J. 649, 2017 FC 616, 147 C.P.R. (4th) 251, 281 A.C.W.S. (3d) 841, <https://www.canlii.org/en/ca/fct/doc/2017/2017fc616/2017fc616.html> (F.C.; 2017-06-23)
79. *Vancouver Aquarium Marine Science Centre v. Charbonneau*, 2017 CarswellBC 3149, 11 C.P.C. (8th) 1, 285 A.C.W.S. (3d) 841, 2 B.C.L.R. (6th) 266, [2018] 3 W.W.R. 317, [2017] B.C.J. 2275, 2017 BCCA 395, <https://www.canlii.org/en/bc/bcca/doc/2017/2017bcca395/2017bcca395.html> (B.C. C.A.; 2017-11-15) [reversing 2016 BCSC 625 (B.C. S.C.; 2016-04-04)].
80. *Vice Studio Canada Inc. for the reproduction of an artistic work [Non-exclusive application by]*, File 2017-UO/TI-06, <http://www.cb-cda.gc.ca/decisions/2017/TI-06.pdf> (Cop. Bd.; 2017-04-18).
81. *Voltage Pictures, LLC v John Doe*, 2017 CarswellNat 2130, [2017] F.C.J. 477, 2017 FCA 97, 146 C.P.R. (4th) 339, 279 A.C.W.S. (3d) 155, 410 D.L.R. (4th) 602, <https://www.canlii.org/en/ca/fca/doc/2017/2017fca97/2017fca97.html> (F.C.A.; 2017-05-09) [reversing 141 C.P.R. (4th) 136 (F.C.; 2016-07-28); leave to appeal to the Supreme Court of Canada granted 2017 CarswellNat 6597, 2017 CanLII 78701, <https://www.canlii.org/fr/ca/csc-a/doc/2017/2017canlii78701/2017canlii78701.html> (S.C.C.; 2017-11-23).
82. *Wesley (Mtlfreetv.com) v. Bell Canada*, 2017 CarswellNat 1491, 2017 CarswellNat 850, 2017 CAF 55, 2017 FCA 55, 278 A.C.W.S. (3d) 385, <https://www.canlii.org/en/ca/fca/doc/2017/2017fca55/2017fca55.html> (F.C.A.; 2017-03-20) [affirming 2016 FC 612 (F.C.; 2016-06-01)].
83. *Western Steel and Tube Ltd. v Technoflange Inc.*, [2017] O.J. 2202, 2017 ONSC 2697, <https://www.canlii.org/en/on/onsc/doc/2017/2017onsc2697/2017onsc2697.html> (Ont. Sup. Ct.; 2017-05-02).
84. *Wiseau Studio v. Harper*, 152 C.P.R. (4th) 87, 288 A.C.W.S. (3d) 145, 2017 CarswellOnt 16881, [2017] O.J. 5658, 2017 ONSC 6535, <https://www.canlii.org/en/on/onsc/doc/2017/2017onsc6535/2017onsc6535.html> (Ont. Sup. Ct.; 2017-11-01).

These 84 cases are divided as follows: Alberta: 4; British Columbia: 6; Nova Scotia: 1; Ontario: 11 (including 2 from administrative boards); Quebec 21: (including 10 from Small Claims and 1 from administrative boards); Federal Courts of Canada: 14; Copyright Board: 23 (including 1/ unlocatable copyright owner); Trade-marks and Opposition Board: 2.

- **Section 1 – Short title – Balancing author’s rights and public interest**

Voltage Pictures, LLC v John Doe, 146 C.P.R. (4th) 339 (F.C.A.; 2017-05-09) Stratas J. [reversing 141 C.P.R. (4th) 136 (F.C.; 2016-07-28); leave to appeal to the Supreme Court of Canada granted 2017 CarswellNat6597 (S.C.C.; 2017-11-23)]

[23] The protection and vindication of the rights of copyright owners is no small thing. That is a central feature of the *Copyright Act*. It is also a central feature of the *Copyright Modernization Act*, the statute that added the legislative regime to the *Copyright Act*. These

statutes don't just identify the purpose of protecting and vindicating the rights of copyright owners; they also tell us why this purpose matters.

[24] The preamble to the *Copyright Modernization Act* tells us, among other things, that it is to “update the rights and protections of copyright owners” and to “enhanc[e] the protection of copyright works or other subject-matter” in order to promote “culture and innovation, competition and investment in the Canadian economy.” Economic growth creates wealth and employment. The *Copyright Modernization Act* is needed because of “advancements in...information and communications technologies that...present...challenges that are global in scope.” Further, “the challenges and opportunities of the Internet” need to be addressed. **The preamble to the *Copyright Modernization Act* also reminds us that the *Copyright Act* is “an important marketplace framework law and cultural policy instrument that, through clear, predictable and fair rules, supports creativity and innovation and affects many sectors of the knowledge economy.”**

[25] **The *Copyright Act* itself aims at “a 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 v. Galerie d'Art du Petit Champlain Inc.*, 2002 SCC 34, 2 S.C.R. 336 at para. 30. Or as the Supreme Court also put it, “to prevent someone other than the creator from appropriating whatever benefits may be generated”: *ibid.*; see also *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, 1 S.C.R. 339 at para. 23.

[26] **The overall aim, then, is to ensure that in the age of the internet, the balance between legitimate access to works and a just reward for creators is maintained. The internet must not become a collection of safe houses from which pirates, with impunity, can pilfer the products of others’ dedication, creativity and industry. Allow that, and the incentive to create works would decline or the price for proper users to access works would increase, or both. Parliament’s objectives would crumble.** All the laudable aims of the *Copyright Act*—protecting creators’ and makers’ rights, fostering the fair dissemination of ideas and legitimate access to those ideas, promoting learning, advancing culture, encouraging innovation, competitiveness and investment, and enhancing the economy, wealth and employment—would be nullified.

[27] **Thus, to the extent it can, the legislative regime must be interpreted to allow copyright owners to protect and vindicate**

their rights as quickly, easily and efficiently as possible while ensuring fair treatment of all.

- **Section 1 – Short title – Balancing authors’ and users’ rights**

Bell Canada v. Canada (Attorney General), 2017 CarswellNat 7338 (F.C.A.; 2017-12-18) Near J. [leave to appeal to the Supreme Court of Canada granted 2018 CarswellNat 2186 and 2018 CarswellNat 2188 (S.C.C.; 2018-05-10)]

[45] **It is well established that the purpose of the Copyright Act is to balance authors’ and users’ rights** (*Théberge v. Galerie d’Art du Petit Champlain inc.*, 2002 SCC 34, [2002] 2 S.C.R. 336 (*Théberge*)). This purpose was affirmed in *Cogeco [Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168]*, 2012 SCC 68] at paragraph 64 citing *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13 at paras. 10, 23, [2004] 1 S.C.R. 339 [...]

- **Section 2 – Definition of “architectural work” – To be protected an architectural work does not longer have to posses an artistic character**

Lainco inc v. Commission scolaire des Bois-Francs, 2017 CarswellNat 5087 (F.C.; 2017-09-12) LeBlanc J. [appeal A-300-17]

[48] Je mentionne au passage que la Loi ne requiert plus, depuis 1988, que l'oeuvre architecturale, jusqu'alors libellée « oeuvre d'art architecturale » par le législateur, possède, pour atteindre la protection de la Loi, un « caractère ou aspect artistique ». **C'est donc dire qu'il n'y a plus lieu désormais d'être plus exigeant envers les oeuvres architecturales ou les plans de telles oeuvres qu'on ne l'est à l'égard des autres types d'oeuvres protégés par la Loi** (*Construction Desjardins*, au para 14) [*Construction Denis Desjardins inc. c. Jeanson*, 2010 QCCA 1287 (C.A. Que.)] Ceci n'est pas contesté d'ailleurs.

- **Section 2 – Definition of “architectural work” – For an architectural work to be protected, it must be original**

Lainco inc v. Commission scolaire des Bois-Francs, 2017 CarswellNat 5087 (F.C.; 2017-09-12) LeBlanc J. [appeal A-300-17]

[87] Ici, Lainco [the Plaintiff] ne prétend évidemment pas détenir de droits d'auteur sur les fermes maitresses prismatiques, les poutres de type Gerber ou les colonnes d'acier, des éléments qui, comme elle et son expert l'ont reconnu, n'ont rien de nouveau dans l'univers de l'ingénierie et de l'architecture. Ce qu'elle revendique c'est que lui soit reconnu des droits d'auteur dans l'arrangement, c'est-à-dire le choix et l'agencement, qu'elle en a fait et qui s'est matérialisé dans ce qui est devenu le Concept Lainco. Elle estime à cet égard avoir fait la preuve que cet arrangement est le fruit du talent et du jugement de ses deux actionnaires et dirigeants, les frères Lachapelle [the authors].

[101] Pour paraphraser la Cour d'appel du Québec dans *Construction Desjardins*, si l'agencement des arrêts dans un recueil (compilation) passe le test de l'originalité aux fins de la Loi, on voit mal comment ce pourrait ne pas être le cas du Concept Lainco, tant dans sa version « plan » que dans sa version « bâtie » (*Construction Desjardins*, au para 17) [*Construction Denis Desjardins inc. c. Jeanson*, 2010 QCCA 1287 (C.A. Que.)]. À mon avis, et paraphrasant toujours la Cour d'appel du Québec, **on peut dire tout autant du Concept Lainco qu'il est le fruit du travail personnel de son concepteur en ce sens qu'il agence divers éléments architecturaux et structuraux (volume, agencements, espacement, dimensionnement) repérés et assemblés grâce au talent et au jugement du concepteur** (*Construction Desjardins*, au para 16).

- **Section 2 – Definition of “architectural work” – Because of the physical constraints, the line is thin between what constitutes infringing and what does not**

Lainco inc v. Commission scolaire des Bois-Francs, 2017 CarswellNat 5087 (F.C.; 2017-09-12) LeBlanc J. [appeal A-300-17]

[141] Il y a lieu aussi de rappeler les problèmes particuliers que pose la contrefaçon d'oeuvres architecturales liée à la difficulté, souvent, de mettre en jeu la protection offerte par la Loi. Comme le souligne *Gilker*, il s'agit là d'un domaine « où des contraintes de nature tant physique qu'économique ou légale peuvent restreindre de façon sensible la latitude laissée au créateur en risquant, par le fait même, d'engendrer les répétitions de styles, forme ou dimension que l'on retrouvera entre les oeuvres de différents créateurs soumis aux mêmes contraintes » (*Gilker*, 2^e partie, à la p 27 [Stéphane Gilker, *La protection des oeuvres architecturales par le droit d'auteur au Canada*, (1991), 4:1 CPI 27]

[143] J'en comprends que l'auteur d'une oeuvre architecturale naviguera souvent, bien malgré lui, en « eaux troubles » (*Gilker*, 2^e partie, à la p 30) et que la ligne sera souvent mince en ce domaine entre ce qui constitue une contrefaçon d'une oeuvre et ce qui n'est pas défendu par le droit d'auteur. Je ne vois pas de raison de ne pas appliquer ce constat à l'oeuvre architecturale conçue par un ingénieur, particulièrement lorsque celle-ci comporte un caractère esthétique (*Netupsky*, à la p 214) [*Netupsky v. Dominion Bridge Co.* (1971), [1972] S.C.R. 368].

[206] Je rappelle une fois de plus que dans le domaine des oeuvres architecturales, la ligne sera souvent mince entre ce qui constitue une contrefaçon et ce qui ne l'est pas.

- **Section 2 – Definition of “artistic work” – Photographs are artistic works**
Saad v. Le Journal de Montréal, 2017 QCCQ 122 (Que. Ct. – Small Claims; 2017-01-19) Chalifour J.
 [15] **Les photographies** [portraits of an individual] de M. **Saad sont des « œuvres artistiques »**, au sens de l’article 2 de la Loi.
- **Section 2 – Definition of “artistic work” – Photographs are artistic works**
Point du jour aviation Itée v. Académie Aéronautique inc., 2017 QCCQ 500, (Que. Ct. – Small Claims; 2017-01-25) Cliche J.
 [65] Dans le présent cas, **la photographie en litige constitue une œuvre artistique protégée** en vertu de la *Loi sur les droits d’auteur*.
- **Section 2 – Definition of “artistic work” – Photographs are artistic works – Protection does not imply evaluation of the aesthetic nature of the work**
Trader v CarGurus, 145 C.P.R. (4th) 415 (Ont. Sup. Ct.; 2017-04-06) Conway J.
 [22] With respect to **the term “artistic works”, it is specifically defined** in s. 5(1) of the Act **as including “photographs”**. When applying this definition, Canadian courts do not evaluate the artistic or aesthetic nature of a photograph. [Fn7 Normand Tamaro, *The 2016 Annotated Copyright Act* (Toronto: Carswell, 2016), at 49]
- **Section 2 – Definition of “artistic work” – No minimal degree of creativity is required for work to be original**
Evans v. Upward Construction & Renovation Ltd., 2017 CarswellBC 2342 (B.C. Prov. Ct.; 2017-05-08) Merrick J.
 [11] **There is no issue that a house plan can be subject to copyright protection.** See Sections 2 and 5 of the *Copyright Act* R.S.C. 1985 c. C-42. See also *Hay and Hay Construction Co. v. Sloan*, [1957] O.J. No. 269.

 [12] In order to be subject to copyright protection, the renovation design plan must be original. “Originality” is the foundation stone of copyright (see *Robertson v. Thomson Corp.*, 2006 SCC 43 (CanLII), [2006] 2 SCR 363, at paragraph 35).

 [13] **To be original does not mean that the design renovation plan must be unique in the sense the elements in it have never been seen before** (see *Chancellor Management Inc. v. Oasis Homes Ltd.*, [2002] A.J. No. 702, at paragraph 35).

 [14] **No minimal degree of creativity is required for work to be original, nor does it need to display particular artistic quality. It is enough that it is a product of the author’s or designer’s skill and judgment.** See *Construction Denis Desjardins Inc. v. Jeanson*, [2010] Q.J. No. 6445, at paragraph 17.

[15] Moreover, **work resulting from the simple arrangement of components can in of itself be copyrighted** notwithstanding the fact that the author of the compilation holds no copyright over the components in question (see *Construction Denis Desjardins Inc. v. Jeanson*, at paragraph 10).

[16] Finally, intellectual property law does not protect ideas in their pure form. **Copyright law protects the expression of ideas: ideas that have been fixed in some physical or electronic form.** See *Overview of Intellectual Property*, Christopher S. Wilson, October 2008, at paragraph 1.1.2. See also *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13 (CanLII), [2004] 1 SCR 339, at paragraph 14.

[17] In light of the legal framework referred to, it is my judgment that **the renovation design drawings** created by Ms. Riley, the defendant's employee, **constitute original artistic work** within the meaning of Sections 2 and 5 of the *Copyright Act*, therefore, meriting the protection offered by the *Copyright Act* for the following reasons.

- **Section 2 – Definition of “artistic work” – Copyright subsists in plans of survey prepared by surveyors**

Keatley Surveying Ltd. v. Teranet Inc., 2017 CarswellOnt 14961 (Ont. C.A.; 2017-09-08) [affirming 2016 ONSC 1717 (Ont Sup. Ct.; 2016-05-16)] Doherty J.

[21] Before addressing the relevant provisions of the *Copyright Act*, four non-contentious but important points should be made. First, as acknowledged by the parties and the motion judge, **copyright subsists in plans of survey prepared by surveyors: Keatley 2016**, at paras. 26-27. **Plans of survey are “artistic works” as defined in s. 2 of the Copyright Act and attract the protection provided by s. 5: Keatley 2015**, at para. 15.

[29] Section 12 applies to “any work” that was “prepared or published by or under the direction or control of Her Majesty.” **As referenced above, a plan of survey is a work within the meaning of the Copyright Act.** s. 2.

- **Section 2 – Definition of “Board” – Decision of the Board in its field of expertise deserves deference**

Canadian Copyright Licensing Agency (Access Copyright) v. British Columbia (Education), 148 C.P.R. (4th) 13 (F.C.A.; 2017-01-27) Gauthier J. [varying in part 2016 CarswellNat 436 (Cop. Bd.; 2016-02-19)]

[39] It is the task of a tribunal or trial court to fulfil its mandate, despite the paucity or quality of the evidence before them. Such decision-

makers must determine if they are satisfied that a certain question of fact has been established. **This task is at the very core of the expertise of tribunals such as the Board. Inferences, like findings of facts, are owed considerable deference.**

[40] In my view, in the particular circumstances of this case, and considering the mandate of the Board under the Act, **it was not unreasonable for the Board to infer that the copying of one or two pages of a book did not constitute reproduction of a “substantial part of the work” within the meaning of section 3 of the Act.** It should be clear however that, in my view, such an inference would rarely be within the range of acceptable outcomes when there is evidence produced about each work at issue and would normally constitute an overriding and palpable error in the context of civil litigation proceedings where infringement is at issue.

- **Section 2 – Definition of “Board” – A panel is “differently constituted” if at least one member is not the same**

Public Performance of Musical Works, Re, 2017 CarswellNat 154 (Cop. Bd.; 2017-01-27), the Board

[19] **It is the Board’s opinion that the notion of a “differently constituted panel” includes any panel where the constituting members are not all the same rather than the more restricted view that it is limited to a panel composed entirely of different members.** More specific language is generally used by the courts when a completely different panel is required [Fn5 See *Dulmage v. Ontario (Police Complaints Commissioner)* (1994) 21 OR (3d) 356, 1994 CanLII 8773 (ON SCDC); see e.g. *Canadian Association of Broadcasters v. Society of Composers, Authors and Music Publishers of Canada*, 2006 FCA 337 at para 24]

[20] In any event, the doctrine of necessity [Fn6 *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1998] 1 SCR 3 at para 6.] would operate in these circumstances to permit a panel constituted of currently appointed members to redetermine the case even if the Chairman is the only one who did not participate in the original decision, in our opinion. **Necessity also stems from the fact that the Board is the only decision maker statutorily mandated to make the redetermination decision and is presently comprised of only three members.**

- **Section 2 – Definition of “Board” – The standard of review of decisions of the Board based on the interpretation of provisions of the *Copyright Act* is correctness - The standard of review of decisions of the Board for the setting of royalty rates is reasonableness**

Re:Sound v. Canadian Association of Broadcasters, 148 C.P.R. (4th) 91 (F.C.A.; 2017-06-28) Stratas J. [affirming 2014 CarswellNat 157 (Cop. Bd.; 2014-05-16)].

[23] However, this context is unusual. When it comes to interpreting many provisions in the *Copyright Act*, the Copyright Board shares jurisdiction with the courts. **Accordingly, the Board's interpretation of provisions in the *Copyright Act* that courts also interpret is reviewable for correctness:** *Canadian Broadcasting Corporation v. Sodrac 2003 Inc.*, 2014 FCA 84, [2015] 1 F.C.R. 509 at para. 27; *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35; [2012] 2 S.C.R. 283.

[28] Courts have long been familiar with the individual law of copyright through their jurisdiction over infringement actions. However, they have no similar knowledge of the statutory scheme for the collective administration of the right to equitable remuneration, a complex and technical matter that the *Copyright Act* entrusts almost exclusively to the Board: compare *Canadian Private Copying Collective v. Canadian Storage Media Alliance*, 2004 FCA 424, 247 D.L.R. (4th) 103 at para. 110.

[29] **The superior expertise of the Board in the setting of royalty rates for the collective administration of the right to equitable remuneration further supports the conclusion that the Court should apply a standard of reasonableness to the Board's interpretation of the aspects of the statutory scheme in question in this application for judicial review.**

[30] In my view, *Fitness Industry Council* [*Re:Sound v. Fitness Industry Council of Canada*, 2014 FCA 48.] and its reasoning bind this Court. This case deals with the interpretation of a similar regime and is not part of a shared jurisdiction with courts. Thus, this Court will engage in reasonableness review of the Board's interpretation of section 19 of the *Copyright Act*.

- **Section 2 – Definition of “Board” – The standard of review of decisions of the CRTC based on the interpretation of provisions of the *Copyright Act* is correctness**

Bell Canada v. Canada (Attorney General), 2017 CarswellNat 7338 (F.C.A.; 2017-12-18) Near J. [leave to appeal to the Supreme Court of Canada granted 2018 CarswellNat 2186 and 2018 CarswellNat 2188 (S.C.C.; 2018-05-10)]

[37] The appellant, the NFL, argues that the standard of review for the copyright issue is correctness. They argue that the CRTC's functions are those given to it in the *Broadcasting Act* and the *Telecommunications Act*, S.C. 1993, c. 38 and that Parliament never delegated powers relating to the *Copyright Act* to the CRTC.

[38] I agree with the NFL that **the applicable standard of review is correctness. The Copyright Act is not a ‘home statute’ of the CRTC and, in any case, it shares concurrent jurisdiction with the Copyright Board and the courts at first instance** (*Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35 at para. 15, [2012] 2 S.C.R. 283).

- **Section 2 – Definition of “collective society” – A collective society is authorized to institute legal proceedings on behalf of its members**

Société québécoise de gestion collective des droits de reproduction (Copibec) v. Université Laval, 2017 CarswellQue 1085 (Que. C.A.; 2017-02-08) Gagnon J. [reversing 2016 CarswellQue 1651 (Que. Sup. Ct.; 2016-02-26)]

[104] Toujours selon la même loi, Copibec, en sa qualité de société de gestion, a comme rôle de veiller à l’administration d’un système d’octroi de licences, d’établir des catégories d’utilisation et de fixer les redevances et les modalités afférentes (article 2). Elle doit aussi voir à la perception et à la répartition des redevances payables. **Bref, selon cette description de son mandat, Copibec a manifestement un intérêt pour faire valoir les réclamations des auteurs regroupées sous sa gestion commune.**

[105] **Copibec bénéficie également d’une habilitation législative l’autorisant à entreprendre des actions en justice pour ces mêmes auteurs et ayants droit. En ce sens, la LDA reconnaît aux sociétés de gestion le pouvoir de procéder à la perception des redevances dues aux auteurs** (article 2 b)).

[106] En raison de ce qui précède, même si Copibec ne détenait personnellement aucun droit d’auteur, il ne saurait faire de doute qu’elle possède l’intérêt suffisant pour agir pour le compte des membres du groupe aux fins de faire valoir leurs droits patrimoniaux.

- **Section 2 – Definition of “compilation” – Work resulting from the simple arrangement of components can in of itself be copyrighted**

Evans v. Upward Construction & Renovation Ltd., 2017 CarswellBC 2342 (B.C. Prov. Ct.; 2017-05-08) Merrick J.

[15] Moreover, **work resulting from the simple arrangement of components can in of itself be copyrighted** notwithstanding the fact that the author of the compilation holds no copyright over the components in question (see *Construction Denis Desjardins Inc. v. Jeanson*, at paragraph 10).

- **Section 2 – Definition of “compilation” – Selection or arrangement are the key work for copyright to subsist in a compilation**

Lapointe v. Broquet inc., 2017 QCCQ 13516 (Que. Ct. – Small Claims) 2017-09-15)
Dupuis J.

[35] **Dans le cas d'une compilation, l'accent est mis non sur les œuvres ou les données qui composent la compilation, mais plutôt sur le choix ou l'arrangement de ces œuvres ou données** [Fn3 Stéphane GILKER, *Principes généraux du droit d'auteur*, Congrès annuel du Barreau du Québec 2009, Barreau du Québec – Service de la Formation continue, Montréal 2009, p. 1].

- **Section 2 – Definition of “compilation” – Selection or arrangement of data may constitute a compilation**

Toronto Real Estate Board v. Canada (Commissioner of Competition), 2017 CarswellNat 6861 (F.C.A.; 2017-12-01) Nadon and Rennie JJ. [affirming 2016 CarswellNat 1506 (Comp. Trib.; 2016-04-27)].

[183] Copyright is a creature of statute. **The Copyright Act provides that copyright exists for “every original literary, dramatic, musical and artistic work” created by Canadians** (section 5). This phrase is defined at section 2 to include compilations, which is in turn defined to include works “resulting from the selection or arrangement of data”. **The classification of the database as a compilation is not contested on appeal.**

[184] The meaning of the word “original” in section 5 of the Copyright Act was considered by the Supreme Court in *CCH Canadian Ltd v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339 [CCH at par. 16]]

- **Section 2 – Definition of “compilation” – Selection or arrangement must be more than mechanical**

Toronto Real Estate Board v. Canada (Commissioner of Competition), 2017 CarswellNat 6861 (F.C.A.; 2017-12-01) Nadon and Rennie JJ. [affirming 2016 CarswellNat 1506 (Comp. Trib.; 2016-04-27)].

[185] **The point of demarcation between a work of sufficient skill and judgment to warrant a finding of originality and something less than that – a mere mechanical exercise – is not always self-evident.** This is particularly so in the case of compilations. It is, however, within the parameters of the legal test, a highly contextual and factual determination.

- **Section 2 – Definition of “compilation” – If the selection or arrangement or date is mechanical, then there is no originality**

Toronto Real Estate Board v. Canada (Commissioner of Competition), 2017 CarswellNat 6861 (F.C.A.; 2017-12-01) Nadon and Rennie JJ. [affirming 2016 CarswellNat 1506 (Comp. Trib.; 2016-04-27)]

[194] The Tribunal considered a number of criteria relevant to the determination of originality (paragraphs 737 - 738 and 740 - 745). Those included the process of data entry and its “almost instantaneous” appearance in the database. **It found that “TREB’s specific compilation of data from real estate listings amounts to a mechanical exercise” (TR at para. 740). We find, on these facts, that the originality threshold was not met.**

[195] In addition, we do not find persuasive the evidence that TREB has put forward relating to the use of the database. **How a “work” is used casts little light on the question of originality.** In addition, we agree with the Tribunal’s finding that while “TREB’s contracts with third parties refer to its copyright, but that does not amount to proving the degree of skill, judgment or labour needed to show originality and to satisfy the copyright requirements” (TR at para. 737).

- **Section 2 – Definition of “every original ... work” – Standardization of the format does not preclude a work to be original**

Trader v CarGurus, 145 C.P.R. (4th) 415 (Ont. Sup. Ct.; 2017-04-06) Conway J.

[24] In my view, **the fact that the photographers receive training and follow standardized procedures does not eliminate the use of their skill and judgment in taking the photos, nor does it reduce the exercise of taking the photos to a simple mechanical exercise.**

[Fn8 Commercial photographs appearing on websites and in catalogues have been protected by copyright in numerous cases: see, for example, *Century 21 Canada Ltd. Partnership v. Rogers Communications Inc.*, 2011 BCSC 1196 (CanLII); *Global Upholstery Co. v. Galaxy Office Furniture Ltd.* (1976), 29 C.P.R. (2d) 145; *Slumber-Magic Adjustable Bed Co. v. Sleep-King Adjustable Bed Co.* (1984), 1984 CanLII 54 (BC SC), 3 C.P.R. (3d) 8]

- **Use of knowledge deriving from the reading of copyrighted material does not constitute infringement**

Biosweep Canada Corporation v 2314515 Ontario Inc., 2017 CarswellOnt 1634 (Ont. Sup. Ct.; 2017-02-10) Dunphy J. [affd 2017 CarswellOnt 9143 (Ont. C.A.; 2017-06-16)]

[32] Obviously, intellectual property cannot be claimed over something as simple as the knowledge gained about how to use a piece of equipment lawfully owned and possessed by the defendant. **Copyright may preclude reproduction of the manual; it does not preclude making use of the knowledge gained by having read it still less from having absorbed the training in the use of the Biosweep Equipment received pursuant to s. 3(h) of the Licensing Agreements. I can find nothing in the defined term “Biosweep Services” that is capable of being the object of property rights beyond simple copyright.**

- **Section 2 – Definition of “every original ... work” – The exclusive rights in the photograph of an object does not give rights in the object itself**

Trader v CarGurus, 145 C.P.R. (4th) 415 (Ont. Sup. Ct.; 2017-04-06) Conway J.

[25] [...] Trader argues that the merger doctrine [as considered in *Delrina Corp. v. Triolet Systems Inc.*, 2002 CanLII 11389 (ONCA)] is a U.S. principle and does not apply in Canada. **Even if it does, I do not consider that there is such a limited number of ways to photograph vehicles for sale that affording Trader copyright protection would somehow give it a monopoly on photographing vehicles for sale.**

- **Section 2 – Definition of “every original ... work” – Originality is the foundation stone of copyright – Originality is not related to uniqueness but to personal authorship – Copyright protects the expression of ideas, not the ideas themselves**

Evans v. Upward Construction & Renovation Ltd., 2017 CarswellBC 2342 (B.C. Prov. Ct.; 2017-05-08) Merrick J.

[12] In order to be subject to copyright protection, the renovation design plan must be original. **“Originality” is the foundation stone of copyright** (see *Robertson v. Thomson Corp.*, 2006 SCC 43 (CanLII), [2006] 2 SCR 363, at paragraph 35).

[13] **To be original does not mean that the design renovation plan must be unique in the sense the elements in it have never been seen before** (see *Chancellor Management Inc. v. Oasis Homes Ltd.*), [2002] A.J. No. 702, at paragraph 35).

[14] **No minimal degree of creativity is required for work to be original, nor does it need to display particular artistic quality. It is enough that it is a product of the author’s or designer’s skill and judgment.** See *Construction Denis Desjardins Inc. v. Jeanson*, [2010] Q.J. No. 6445, at paragraph 17.

[15] Moreover, **work resulting from the simple arrangement of components can in of itself be copyrighted** notwithstanding the fact that the author of the compilation holds no copyright over the components in question (see *Construction Denis Desjardins Inc. v. Jeanson*, at paragraph 10).

[16] Finally, intellectual property law does not protect ideas in their pure form. **Copyright law protects the expression of ideas: ideas that have been fixed in some physical or electronic form.** See *Overview of Intellectual Property*, Christopher S. Wilson, October 2008, at paragraph 1.1.2. See also *CCH Canadian Ltd. v. Law Society*

of *Upper Canada*, 2004 SCC 13 (CanLII), [2004] 1 SCR 339, at paragraph 14.

[17] In light of the legal framework referred to, it is my judgment that **the renovation design drawings** created by Ms. Riley, the defendant's employee, **constitute original artistic work** within the meaning of Sections 2 and 5 of the *Copyright Act*, therefore, meriting the protection offered by the *Copyright Act* for the following reasons.

- **Section 2 – Definition of “every original ... work” – An original website could be protected by copyright**

United Airlines, Inc. v. Cooperstock, 147 C.P.R. (4th) 251 (FC; 2017-06-23) Phelan J. [103] In a copyright infringement claim, the plaintiff must establish that its copyrighted work is original, that the defendant has copied from that work, and that a substantial portion of the work has been reproduced. The first of these elements have clearly been met in this case: **the Defendant admitted that the development of a website design would require skill and judgment, and the United Website is therefore “original” within the meaning of the *Copyright Act*.** Similarly, it would have required skill and judgment to create the Globe Design and the United Logo. With respect to the second element, the Defendant admitted that he knew the Globe Design originated from the United Website and that the design of UNTIED.com was intended to humorously “mimic” that of the United Website. There would be no other purpose for the use of similar colours, fonts, layout, and other elements of the United Website on UNTIED.

- **Section 2 – Definition of “every original ... work” – When talent and judgment are involved, there is originality**

Cedrom-SNI inc. v. Dose Pro inc., 2017 CarswellQue 6386 (Que. Sup. Ct.; 2017-07-24) Duprat J.

[58] Le témoignage des éditeurs confirme que le titre, ainsi que l'amorce, sont pensés et travaillés par leurs auteurs et ce n'est pas le fruit du hasard, si le titre et l'amorce se retrouvent dans la publication du journal. **Il y a un travail de création dans la manière dont la nouvelle est présentée. Le talent et le jugement sont en cause**

- **Section 2 – Definition of “every original ... work” – Copyright protects the expression of ideas, not the ideas themselves**

Lainco inc v. Commission scolaire des Bois-Francs, 2017 CarswellNat 5087 (F.C.; 2017-09-12) LeBlanc J. [appeal A-300-17]

[43] **En ce sens, et comme l'ont souligné toutes les parties au présent litige, le droit d'auteur protège non pas les idées qui sous-tendent l'oeuvre mais strictement l'expression de celles-ci dans l'oeuvre (*CCH Canadian Ltd.*, au para 8). L'idée appartient donc à tous et son utilisation n'est assujettie à aucun monopole.**

C'est l'oeuvre, dans laquelle l'idée est incarnée, qui appartient à l'auteur et qui lui procure, pourvu qu'elle soit fixée sous une forme matérielle, les droits et protections prévus à la Loi (*CCH Canadian Ltd.*, au para 8, citant *Moreau v. St. Vincent*, [1950] Ex. C.R. 198 (Can. Ex. Ct.), p 203).

[44] Autrement dit, cette nécessité d'établir un juste équilibre entre la protection du talent et du jugement de l'auteur dans l'expression de ses idées et le fait de laisser des idées relever du domaine public de manière à ce que tous puissent s'en inspirer, constitue « la trame de fond » en fonction de laquelle la Loi doit être interprétée et les arguments des parties, examinés (*Robinson c. Films Cinar inc.*, 2013 SCC 73 (S.C.C.) au para 28, [2013] 3 S.C.R. 1168 (S.C.C.), [*Cinar CSC*]; *HCC*, au para 10).

- **Section 2 - Definition of “every original ... work” – Originality means that the work is not copied from another – To be original, a work does not have to be new or unique**

Lainco inc v. Commission scolaire des Bois-Francs, 2017 CarswellNat 5087 (F.C.; 2017-09-12) LeBlanc J. [appeal A-300-17]

[46] Toutefois, pour que le droit d'auteur existe à l'égard d'une oeuvre appartenant à l'une de ces quatre (4) catégories d'oeuvres, encore faut-il, suivant l'article 5 de la Loi, que l'oeuvre soit « originale ». **Le concept de l'originalité de l'oeuvre n'est pas défini dans la Loi, cette tâche ayant été laissée aux tribunaux.** Faisant l'objet d'une jurisprudence contradictoire jusqu'à ce que la Cour suprême du Canada tranche la question dans l'affaire *CCH Canadian Ltd.*, **l'oeuvre originale se veut, en termes généraux, celle qui émane d'un auteur et qui n'est pas la copie d'une autre oeuvre.** Toutefois, il ne suffira pas, pour franchir la barre de l'originalité, qu'elle émane de son auteur si elle n'est pas aussi le produit du talent et du jugement de celui-ci et si cet exercice de talent et de jugement est négligeable au point d'être purement mécanique (*CCH Canadian Ltd.*, au para 16). Le talent est affaire d'habileté, d'adresse, de savoir-faire, de connaissances et d'expérience pratique, et le jugement, de discernement et de capacité d'évaluer ou de comparer diverses possibilités pour faire un choix (*Construction Denis Desjardins inc. c. Jeanson*, 2010 QCCA 1287 (C.A. Que.) au para 6 [*Construction Desjardins*]).

[47] Par contre, cette barre sera franchie même si cet exercice de talent et de jugement ne produit pas une oeuvre novatrice et unique (*CCH Canadian Ltd.*, aux paras 16 et 25). **En effet, l'originalité envisagée par la Loi « ne vise ni n'exige aucunement du nouveau, de l'inédit, de l'unique ou de l'inventif »** (*Construction Desjardins*, au para 6).

[111] Je ne peux retenir cet argument [i.e. le Concept Lainco serait la copie d'oeuvres préexistantes.]. D'une part, comme on l'a vu, l'originalité envisagée par la Loi « ne vise ni n'exige aucunement du nouveau, de l'inédit, de l'unique ou de l'inventif » (*Construction Desjardins*, au para 6; *CCH Canadian Ltd. [CCH Canadian Ltd. v. Law Society of Upper Canada]*, 2004 SCC 13 (S.C.C.)), aux paras 16 et 25). D'autre part, la question n'est pas de savoir si les structures que l'on retrouve aux aéroports de Hambourg et de Calgary existaient avant le développement des plans du Concept Lainco. Elle est plutôt de savoir si Lainco a copié l'une ou l'autre de ces structures puisque, comme on l'a vu également, une oeuvre peut ne pas être originale parce qu'elle n'émane pas de son auteur, c'est-à-dire parce qu'elle a été copiée d'une autre oeuvre (*CCH Canadian Ltd.*, au para 25).

- **Section 2 - Definition of “every original ... work” – When there is skill or judgment in the arrangement of various architectural and structural elements, there is originality**

Lainco inc v. Commission scolaire des Bois-Francs, 2017 CarswellNat 5087 (F.C.; 2017-09-12) LeBlanc J. [appeal A-300-17]

[87] Ici, Lainco [the Plaintiff] ne prétend évidemment pas détenir de droits d'auteur sur les fermes maitresses prismatiques, les poutres de type Gerber ou les colonnes d'acier, des éléments qui, comme elle et son expert l'ont reconnu, n'ont rien de nouveau dans l'univers de l'ingénierie et de l'architecture. Ce qu'elle revendique c'est que lui soit reconnu des droits d'auteur dans l'arrangement, c'est-à-dire le choix et l'agencement, qu'elle en a fait et qui s'est matérialisé dans ce qui est devenu le Concept Lainco. Elle estime à cet égard avoir fait la preuve que cet arrangement est le fruit du talent et du jugement de ses deux actionnaires et dirigeants, les frères Lachapelle [the authors].

[101] Pour paraphraser la Cour d'appel du Québec dans *Construction Desjardins*, si l'agencement des arrêts dans un recueil (compilation) passe le test de l'originalité aux fins de la Loi, on voit mal comment ce pourrait ne pas être le cas du Concept Lainco, tant dans sa version « plan » que dans sa version « bâtie » (*Construction Desjardins*, au para 17) [*Construction Denis Desjardins inc. c. Jeanson*, 2010 QCCA 1287 (C.A. Que.)]. À mon avis, et paraphrasant toujours la Cour d'appel du Québec, **on peut dire tout autant du Concept Lainco qu'il est le fruit du travail personnel de son concepteur en ce sens qu'il agence divers éléments architecturaux et structuraux (volume, agencements, espacement, dimensionnement) repérés et assemblés grâce au talent et au jugement du concepteur** (*Construction Desjardins*, au para 16).

- **Section 2 – Definition of “every original ... work” – To be original, a work should not be the reproduction of another**

Lapointe v. Broquet inc., 2017 QCCQ 13516 (Que. Ct. – Small Claims) 2017-09-15)
Dupuis J

[42] Pour qu’une œuvre soit protégée par la LDA, elle doit être une production originale. Selon l’auteur Stéphane Gilker [Fn7 Stéphane GILKER, *Principes généraux du droit d’auteur*, Congrès annuel du Barreau du Québec 2009, Barreau du Québec – Service de la Formation continue, Montréal 2009, p. 3], **le terme « original » renvoie plutôt au fait que l’œuvre « origine » de son auteur, c’est-à-dire qu’il ne doit pas constituer une reproduction d’une autre œuvre lui étant antérieure et à laquelle l’auteur de l’œuvre postérieure considérée a eu accès.**

- **Section 2 – Definition of « every original ... work » – Copyright protects the expression of ideas, not the ideas themselves**

Bégon Fawcett v Colas, [2017] J.Q. 14542 (Que. Sup. Ct.; 2017-10-23) Pinsonnault J.
[59] Il s’agit d’une idée, elle n’est donc pas protégée par la LDA.

[153] **Le droit d’auteur ne protège pas les idées, aussi valables, créatrices et novatrices soient-elles.** Le droit d’auteur ne protège pas non plus les opérations commerciales, ni les entreprises communautaires.

[154] **Le droit d’auteur protège l’expression des idées.**

- **Section 2 – Definition of “every original ... work” – Compilation resulting from a mechanical process are not original**

Toronto Real Estate Board v. Canada (Commissioner of Competition), 2017 CarswellNat 6861 (F.C.A.; 2017-12-01) Nadon and Rennie JJ. [affirming 2016 CarswellNat 1506 (Comp. Trib.; 2016-04-27)].

[185] **The point of demarcation between a work of sufficient skill and judgment to warrant a finding of originality and something less than that – a mere mechanical exercise – is not always self-evident.** This is particularly so in the case of compilations. It is, however, within the parameters of the legal test, a highly contextual and factual determination.

- **Section 2 – Definition of “every original ... work” – Originality will not be found when observing industry standards amounts merely to “mechanical amendments” – Creativity is not required for a work to be original**

Toronto Real Estate Board v. Canada (Commissioner of Competition), 2017 CarswellNat 6861 (F.C.A.; 2017-12-01) Nadon and Rennie JJ. [affirming 2016 CarswellNat 1506 (Comp. Trib.; 2016-04-27)].

[189] Applying the guidance of the Supreme Court in *CCH [CCH Canadian Ltd v. Law Society of Upper Canada]*, 2004 SCC 13, [2004]

1 S.C.R. 339], it is important to view adherence to industry standards as, at best, one factor to be considered amongst many. In *Geophysical* [*Geophysical Service Inc. v Encana Corp.*, 2016 ABQB 230 at para. 105, 38 Alta. L.R. (6th) 48], Eidsvik J. explained there is no steadfast rule that “there is no entitlement to copyright protection ... where the selection or arrangement is directed by accepted and common industry practices” (at paras. 100–101).

[190] **However, if observing industry standards amounts merely to “mechanical amendments”, originality will not be found** (*Harmony FCA* at para. 37) [*Harmony Consulting Ltd. v. G.A. Foss Transport Ltd.*, 2011 FC 340].

[191] In *Distrimedic Inc. v. Dispill Inc.*, 2013 FC 1043, 440 F.T.R. 209, de Montigny J. (as he then was) wrote that “when the content and layout of a form is largely dictated by utility and/or legislative requirements, it is not to be considered original” (at para. 324). He continued and observed that compilations [at para. 325]

[192] In this context, TREB and CREA argue that the Tribunal wrongly required proof of creativity and went beyond the appropriate test for originality. After reviewing the MLS database, the Tribunal noted the “absence of a creative element” (TR at para. 732). Further, **while the Tribunal cited CCH for the correct originality test** in paragraph 733, **it then relied on Tele-Direct** [*Tele-Direct (Publications) Inc. v. American Business Information, Inc.*, [1998] 2 F.C.R. 22 (FCA)] **to invoke and apply the element of creativity which, post-CCH, is not the correct test** (*CCH* at para. 25).

[193] We agree with the appellants on this point. However, in view of the Tribunal’s findings of fact, applying the correct test, we reach the same result.

- **Section 2 – Definition of “every original ... work” – Compilation resulting from a mechanical process are not original**

Toronto Real Estate Board v. Canada (Commissioner of Competition), 2017 CarswellNat 6861 (F.C.A.; 2017-12-01) Nadon and Rennie JJ. [affirming 2016 CarswellNat 1506 (Comp. Trib.; 2016-04-27)]

[194] The Tribunal considered a number of criteria relevant to the determination of originality (paragraphs 737 - 738 and 740 - 745). Those included the process of data entry and its “almost instantaneous” appearance in the database. **It found that “TREB’s specific compilation of data from real estate listings amounts to a mechanical exercise” (TR at para. 740). We find, on these facts, that the originality threshold was not met.**

[195] In addition, we do not find persuasive the evidence that TREB has put forward relating to the use of the database. **How a “work” is used casts little light on the question of originality.** In addition, we agree with the Tribunal’s finding that while “TREB’s contracts with third parties refer to its copyright, but that does not amount to proving the degree of skill, judgment or labour needed to show originality and to satisfy the copyright requirements” (TR at para. 737).

- **Section 2 – Definition of “infringing” – Plagiarism is unethical**

Ontario College of Teachers v. Spence, 2017 ONOCT 11 (Ont College of Teachers Discipline Committee; 2017-02-23), the Committee

[42] **Plagiarism can reasonably be seen to be disgraceful, dishonorable and unprofessional conduct. The Member misled readers about the originality of his work.** The Committee agrees with College Counsel's submission that the Member "cloaked himself in the credibility of the teaching profession" to facilitate his actions of plagiarizing work without generating suspicion over the course of many years.

[47] The Member's plagiarism would reasonably be regarded by members of the profession as disgraceful, dishonorable, and unprofessional.

- **Section 2 – Definition of “infringing” – To ascertain infringement, the works should be examined globally with respect to the original parts of the copied one**

Génie Lutin inc. v. Leroux (Éditions Bambou), 2017 QCCQ 2685 (Que. Ct – Small Claims; 2017-03-14) Guimond J.

[21] Pour décider de la présente affaire, il y a lieu de déterminer s’il y a eu reproduction par M^{me} Leroux d’une partie importante de l’œuvre de M^{me} Perron et M. Tremblay.

[22] **C’est l’approche qualitative et globale qui se doit d’être examinée quant à l’originalité de l’œuvre.**

[23] Ce n’est pas l’importance des caractéristiques reproduites prises isolément qui se doivent d’être considérées.

[26] Il ressort donc de cette décision qu’il **ne faut pas se limiter à relever des extraits isolés, mais plutôt analyser les deux œuvres dans leur ensemble.**

- **Section 2 – Definition of “infringing” – Infringement is to be proven by overing evidence**

Génie Lutin inc. v. Leroux (Éditions Bambou), 2017 QCCQ 2685 (Que. Ct – Small Claims; 2017-03-14) Guimond J.

[28] **La preuve prépondérante et l'examen des ouvrages démontrent qu'il n'y a pas eu plagiat.**

[29] **Ce qui ressort des deux histoires relève à la base du domaine public.**

[30] Il y a en effet plus de 100 ans que des auteurs font référence à des lutins qui viennent espionner les maisons avant Noël, qu'il est fait référence à de la poudre magique, qu'il est fait référence à la possibilité d'attraper des lutins et qu'il s'agit d'être enjoués et gourmands.

[31] À la face même des deux ouvrages, on voit qu'ils ne s'adressent pas au même public.

[32] De façon qualitative et globale, il s'agit de deux œuvres originales et distinctes quant à leurs personnages, leur caractère, leur relation et leur environnement.

- **Section 2 – Definition of “infringing” – There is no plagiarism when an author uses own of his own previous work**

Cambie Surgeries Corporation v. British Columbia (Attorney General), 2017 CarswellBC 733 (B.C. S.C.; 2017-03-21) Steeves J.

[34] A related matter is that there are parts of the CIHR reports that were written by a researcher identified in the reports but not listed as an author. Some of these are literally a cut and paste from previous work of this researcher and his company. **This is not plagiarism because it is the use by an author of his own previous work.** As well, Dr. Masri testified that the researcher was retained because of his previous work. Any problems with this arrangement as an issue related to Dr. Masri's expert opinion are a matter of weight that can be developed in cross-examination and in argument. And, this issue of authorship, by itself, is not one that supports the exclusion of Dr. Masri's report. Likewise, any issues related to the extent to which Dr. Masri was involved in the design of the studies go to weight and are subject to cross-examination.

- **Section 2 – Definition of “infringing” – Verbatim plagiarism is infringement**

Kunuwanimano Child and Family Services v. S.L., 2017 CarswellOnt 11986 (Ont. Ct. J.; 2017-03-30) Kukurin J. at para 153

[153] Dr. Sroga, despite her refusal or reluctance to acknowledge it, could only have obtained this information from the “S.L. of Involvement” prepared by Shannon Lyttle. This document has the same references to birth weight and APGAR scores and placement

moves that found their way verbatim into Dr. Sroga's assessment. This is further corroborated by the psychological and psychiatric information Dr. Sroga included. Accordingly, I conclude that Dr. Sroga had available to her in the course of her assessments information from the NEOFACS society that was based on Shannon Lyttle's summary [Fn 59 N59An alternative source would be the same sources that Shannon Lyttle had available when she prepared the summary. **However, this is highly unlikely considering both the length of the document and the verbatim plagiarism of Dr. Sroga from it.** Moreover, why would Dr. Sroga go to these other sources when Shannon Lyttle had already done so. The end result would have been the same as the sources represented hearsay in any event. It also was not from Exhibit 13 (Summary of Involvement with L. Family) that Dr. Sroga received her historical information as much of what she recounted in her assessment was not included in Exhibit 13]. Unfortunately, this document was completely hearsay, and was incorrect and incomplete in many respects, in particular in its information regarding M.L. and her early life.

- **Section 2 – Definition of “infringing” – The factual findings of a trial judge as to infringement should not be disturbed easily in appeal**

MacNutt v. Acadia University, 147 C.P.R. (4th) 165 (N.S. C.A.; 2017-06-20) Van den Eynden J. [affirming on the merits and varying on costs]

[41] In my view, the allegation of copyright infringement has no merit and can be rejected summarily. The factual findings of the judge and his reasons for preferring and accepting Mr. Young's expert opinion are unassailable. There was overwhelming evidence on the record to underpin his determinations. They were his to make. I see no palpable and overriding error. Similarly, I see no error in law. The judge set out the applicable law in his decision, and I see no error in his application. Furthermore, **the decision below does not turn on whether the appellants' design is protected under the Copyright Act as the judge specifically found that regardless of whether it did, the respondents did not copy the design.** As noted, that factual finding was his to make.

- **Section 2 – Definition of “infringing” –For infringement to be found, a plaintiff must prove the originality of his work, and copy of a substantial part of this work**

United Airlines, Inc. v. Cooperstock, 147 C.P.R. (4th) 251 (FC; 2017-06-23) Phelan J. [103] In a copyright infringement claim, **the plaintiff must establish that its copyrighted work is original, that the defendant has copied from that work, and that a substantial portion of the work has been reproduced.** The first of these elements have clearly been met in this case: the Defendant admitted that the development of a website design would require skill and judgment, and the United

Website is therefore “original” within the meaning of the *Copyright Act*. Similarly, it would have required skill and judgment to create the Globe Design and the United Logo. With respect to the second element, the Defendant admitted that he knew the Globe Design originated from the United Website and that the design of UNTIED.com was intended to humorously “mimic” that of the United Website. There would be no other purpose for the use of similar colours, fonts, layout, and other elements of the United Website on UNTIED.

- **Section 2 – Definition of “infringing” – Infringement is determined by the quality of what is reproduced and not its quantity**

Cedrom-SNI inc. v. Dose Pro inc., 2017 CarswellQue 6386 (Que. Sup. Ct.; 2017-07-24) Duprat J.

[53] Les demandeurs soulignent avec justesse que ce n’est pas la partie quantitative de la reproduction qu’il faut analyser mais bien la partie qualitative.

- **Section 2 – Definition of “infringing” – Infringement may occur by copy of a work or colourable imitation thereof**

Labelle v. Brillant, 2017 QCCQ 12285 (Que. Ct. - Small Claims; 2017-07-28) Gibbens J.

[12] Pour établir la contrefaçon telle que définie à l’[article 2 LDA](#), M. Labelle doit démontrer que M. Brillant a reproduit dans la nouvelle chanson une partie substantielle de la Chanson Originale [FN10 Normand TAMARO, *Loi sur le droit d’auteur, texte annoté*, 9^e éd., Toronto, Carswell, 2012, p. 49 et suivantes.]. **Il doit exister une similarité importante entre les deux œuvres, sans nécessairement que le texte et la musique soient identiques.** Il faut aussi démontrer que M. Brillant a eu accès à l’œuvre d’origine [FN11 Marc BARIBEAU, *Principes généraux de la Loi sur le droit d’auteur*, Les publications du Québec, 2013, p. 78-79]

- **Section 2 – Definition of “infringing” – Similarities between two works do not lead necessary to infringement**

Stork Market Inc v. 1736735 Ontario Inc. (Hello Pink Lawn Cards Inc), 149 C.P.R. (4th) 287 (F.C.; 2017-08-22) Southcott J.

[80] The evidence establishes that the Defendants had access to the Stork Market Images before designing the New Hello Pink Images. Applying the presumption explained in *U&R Tax Services* could therefore result in a finding of infringement. However, as explained in that case, the question the Court is required to determine is one of fact. The Court must be convinced on a balance of probabilities that the Defendants have actually taken Mr. Fronte’s work to produce their own before finding them liable for infringement. As explained earlier in these Reasons, the Plaintiffs have provided the Court with no basis to challenge the credibility of Mr. Primicias’ testimony as to how the idea

of including a customizable baby resulted in the design choices underlying the development of the New Hello Pink Images. While the degree of resemblance between the parties' stork images is sufficient to support my earlier finding of trade-mark infringement, **I do not regard the similarities between the images to be so substantial as to cause me to reject Mr. Primicias' evidence or otherwise to support a finding of copyright infringement.**

- **Section 2 – Definition of “infringing” – Absent direct evidence the copyright owner must prove access by the defendant and similarities between the works – If so, the defendant must prove independent creation**

Lainco inc v. Commission scolaire des Bois-Francs, 2017 CarswellNat 5087 (F.C.; 2017-09-12) LeBlanc J. [appeal A-300-17]

[133] **Afin d'établir la contrefaçon d'une oeuvre sur laquelle existe un droit d'auteur, le titulaire du droit doit, faute d'une preuve directe, laquelle est souvent impossible à obtenir, démontrer que la partie qu'il tient responsable de la contrefaçon a eu accès à l'oeuvre et qu'il existe des similitudes entre celle-ci et l'oeuvre contrefaite. Si ce fardeau est rencontré, il y a renversement du fardeau de la preuve sur les épaules du défendeur qui doit alors démontrer, pour espérer repousser l'action du titulaire du droit d'auteur, que les similitudes que son oeuvre présente avec l'oeuvre présumée avoir été copiée, sont le fruit d'une création indépendante** (*Cinar CSQ*, aux para 246 à 249, citant les ouvrages *Canadian Copyright Act annotated*, vol 2, Toronto, Thomson Carswell, mise à jour continue, aux pp 27-7 et 27-8; Normand TAMARO, *La Loi sur le droit d'auteur annotée*, 7^e éd., Scarborough, Thomson Carswell, 2006, à la p 596, et MCKEOWN, *Fox on Canadian Law of Copyright and Industrial Designs*, 4^e éd, Scarborough, Thomson Carswell, Édition à feuilles mobiles, aux pp 24-54.5 et ss; *Robinson c. Films Cinar inc.*, 2011 QCCA 1361 (C.A. Que.), au para 104 [*Cinar CAQ*]; voir aussi *Gilker*, (1991), 4:1 CPI 7, 2^e partie, à la p 27). Il est à noter que dans *Cinar CSC* [*Robinson c. Films Cinar inc.* (2013 SCC 73)], la question de l'accès à l'oeuvre ne se posait pas puisque les appelantes ne la contestaient plus (*Cinar CSC*, au para 29).

[134] **La contrefaçon n'est pas limitée à la copie conforme de l'oeuvre puisqu'elle peut prendre la forme d'une imitation déguisée pour autant qu'elle reprenne sinon la totalité, à tout le moins, une partie substantielle ou importante de l'oeuvre** (*Cinar CAQ*, au para 57). Le concept de « partie importante » d'une oeuvre a été discuté en détail par la Cour suprême dans *Cinar CSC*. Toutes les parties au présent dossier s'y sont abondamment référées d'ailleurs.

Section 2 – Definition of “infringing” – For infringement to occur a substantial part of the protected work must have been taken or imitated

Lainco inc v. Commission scolaire des Bois-Francs, 2017 CarswellNat 5087 (F.C.; 2017-09-12) LeBlanc J. [appeal A-300-17]

[134] **La contrefaçon n'est pas limitée à la copie conforme de l'oeuvre puisqu'elle peut prendre la forme d'une imitation déguisée pour autant qu'elle reprenne sinon la totalité, à tout le moins, une partie substantielle ou importante de l'oeuvre** (*Cinar* CAQ, au para 57). Le concept de « partie importante » d'une oeuvre a été discuté en détail par la Cour suprême dans *Cinar CSC*. Toutes les parties au présent dossier s'y sont abondamment référées d'ailleurs.

- **Section 2 – Defintion of “infringing” – Infringement is a matter of fact and degree – Infringement must be determined globally with respect to the copied original part of the protected work - The cumulative effect of the reproduced characteristic will determine whether there is infringement or not**

Lainco inc v. Commission scolaire des Bois-Francs, 2017 CarswellNat 5087 (F.C.; 2017-09-12) LeBlanc J. [appeal A-300-17]

[135] **Ce concept est un concept « souple » et avant tout une question de fait et de degré**, nous dit la Cour suprême. On détermine, poursuit-elle, ce qui constitue une partie importante de l'oeuvre « en fonction de l'originalité de l'oeuvre qui doit être protégée par la [Loi] » (*Cinar CSC*, au para 26). **Une partie importante d'une oeuvre sera donc celle, règle générale, « qui représente une part importante du talent et du jugement de l'auteur exprimés dans l'oeuvre »** (*Cinar CSC*, au para 26). **Ce qui importe à cet égard, c'est l'importance qualitative, et donc quantitative, de la reproduction** (*Cinar CSC*, au para 26). **Cet exercice requiert une approche globale** (*Cinar CSC*, aux para 35-36).

[138] Il importe donc, selon la Cour suprême, non pas d'« analyser l'importance des caractéristiques reproduites en les examinant chacune isolément», mais bien plutôt **d'examiner « l'effet cumulatif des caractéristiques reproduites de l'oeuvre afin de décider si elles constituent une partie importante du talent et du jugement dont a fait preuve [l'auteur] dans l'ensemble de son oeuvre »**

- **Section 2 – Definition of “infringing” – Because of the physical constraints, the line is thin between what constitutes infringing and what does not**

Lainco inc v. Commission scolaire des Bois-Francs, 2017 CarswellNat 5087 (F.C.; 2017-09-12) LeBlanc J. [appeal A-300-17]

[141] Il y a lieu aussi de rappeler les problèmes particuliers que pose la contrefaçon d'oeuvres architecturales liée à la difficulté, souvent, de mettre en jeu la protection offerte par la Loi. Comme le souligne *Gilker*, il s'agit là d'un domaine « où des contraintes de nature tant physique qu'économique ou légale peuvent restreindre de façon sensible la latitude laissée au créateur en risquant, par le fait même, d'engendrer

les répétitions de styles, forme ou dimension que l'on retrouvera entre les oeuvres de différents créateurs soumis aux mêmes contraintes » (*Gilker*, 2^e partie, à la p 27 [*Stéphane Gilker, La protection des oeuvres architecturales par le droit d'auteur au Canada*, (1991), 4:1 CPI 27]

[143] J'en comprends que l'auteur d'une oeuvre architecturale naviguera souvent, bien malgré lui, en « eaux troubles » (*Gilker*, 2^e partie, à la p 30) et que la ligne sera souvent mince en ce domaine entre ce qui constitue une contrefaçon d'une oeuvre et ce qui n'est pas défendu par le droit d'auteur. Je ne vois pas de raison de ne pas appliquer ce constat à l'oeuvre architecturale conçue par un ingénieur, particulièrement lorsque celle-ci comporte un caractère esthétique (*Netupsky*, à la p 214) [*Netupsky v. Dominion Bridge Co.* (1971), [1972] S.C.R. 368].

[206] Je rappelle une fois de plus que dans le domaine des oeuvres architecturales, la ligne sera souvent mince entre ce qui constitue une contrefaçon et ce qui ne l'est pas.

- **Section 2 – Definition of “infringing” – Infringement could occur only if copyright subsist**

Bégon Fawcett v Colas, [2017] J.Q. 14542 (Que. Sup. Ct.; 2017-10-23) Pinsonnault J.
[118] **Pour qu’il y violation d’une œuvre protégée par la Loi sur le droit d’auteur, encore faut-il que l’œuvre invoquée soit effectivement visée et protégée par cette loi.**

- **Section 2 – Definition of “infringing” – the burden is upon the plaintiff to prove infringement**

907687 *Ontario Inc. (International Institute of Travel) v. 1472359 Ontario Ltd (IBT College of Business Travel & Tourism Technology)*, 152 C.P.R. (4th) 203 (FC; 2017-10-31) Fothergill J.

[40] I therefore conclude that IIT has not met **its burden of proving on the balance of probabilities** that Mr. Shokour or IBT improperly made use of IIT’s copyrighted materials, or that IIT sustained damages as a result.

- **Section 2 – Definition of “litterary work” – a training manual or course curriculum may benefit from copyright protection**

907687 *Ontario Inc. (International Institute of Travel) v. 1472359 Ontario Ltd (IBT College of Business Travel & Tourism Technology)*, 152 C.P.R. (4th) 203 (FC; 2017-10-31) Fothergill J.

[20] There is no serious dispute that IIT held copyright in the curriculum and other materials it developed to register its courses in travel and tourism with the Ministry. Mr. Nareen applied for and received a

certificate of copyright dated May 10, 1996 for the course outlines. Even if he had not obtained the certificate, the materials were subject to copyright to the extent that they contained original expressions of ideas. **It is well established that a training manual or course curriculum may benefit from copyright protection** (*École de Conduite Tecnic Aubé Inc v 1509 8858 Québec inc* (1986), 12 CIPR 284 (Qc Sup Ct); *Market Traders Institute Inc v Mahmood*, [2008] OJ No 5065(Ont Sup Ct)).

- **Section 2 – Definition of “photograph” – Photographs are artistic works**

Jomphe (Karjessy) v. Société St-Jean-Baptiste de Montréal, 2017 QCCQ 7303 (Que. Ct. – Small Claims; 2017-06-22) Gibbens J.

[12] Les **photographies** de M. Jomphe reproduites sur le site Internet de la SSJB **constituent des « œuvres artistiques »** au sens de l'article 2 de la *Loi sur le droit d'auteur* (la « **Loi** »)

- **Section 2 – Definition of “work” – The title and the leader are an important part of an article**

Cedrom-SNI inc. v. Dose Pro inc., 2017 CarswellQue 6386 (Que. Sup. Ct.; 2017-07-24) Duprat J.

[49] Le Tribunal est d'avis qu'il existe au dossier une preuve que **le titre et l'amorce sont une partie importante d'un article.**

[53] Les demandeurs soulignent avec justesse que ce n'est pas la partie quantitative de la reproduction qu'il faut analyser mais bien la partie qualitative.

- **Section 2 – Definition of “work” – Title by itself could be the subject-matter of copyright**

Cedrom-SNI inc. v. Dose Pro inc., 2017 CarswellQue 6386 (Que. Sup. Ct.; 2017-07-24) Duprat J.

[57] **Un titre, à lui seul, peut donc être l'objet d'un droit d'auteur.**

[58] Le témoignage des éditeurs confirme que le titre, ainsi que l'amorce, sont pensés et travaillés par leurs auteurs et ce n'est pas le fruit du hasard, si le titre et l'amorce se retrouvent dans la publication du journal. **Il y a un travail de création dans la manière dont la nouvelle est présentée.**

[59] À ce stade, le Tribunal retient de la preuve qu'autant **les titres que les amorces méritent la protection de la LDA et constituent une partie importante de l'œuvre.**

- **Section 2 Definition of WCT - The WCT provides latitude to members for its implementation**

Collective Administration of Performing and of Communication Rights [Online Music Services (CSI: 2011-2013; SOCAN: 2011-2013; SODRAC: 2010-2013)], 2017 CarswellNat 4235 (Cop. Bd.; 2017-08-25), the Board

[201] It is generally agreed by all parties that both the WCT and the WPPT provide broad latitude to member states for the implementation of the obligations contained therein within their domestic legislation. [Fn117 See e.g., Sam Ricketson, "Submissions of Bell Canada, Google, Rogers Communications, Shaw Communications, Quebecor Media, and Yahoo! (the "Networks") on the Making Available Amendment" at para 17; (Jeremy de Beer, "Expert Opinion on Canada's Compliance with the WIPO Copyright Treaty" at paras 7, 8, 13, 15, 16; Jane C. Ginsburg, "Opinion on Article 8 of the WIPO Copyright Treaty" (e-mail from SOCAN to Copyright Board, 2013-10-18). at paras 5, 15, 16; Mih ly Ficsor, "Expert opinion on the international norms on the right of making available to the public and on its application in countries where it has been implemented" (e-mail from SOCAN to Copyright Board, 2013-03-08) at 6-9; Silke von Lewinski, "Expert Opinion on the rights of making available and of reproduction under the WCT and WPPT" (e-mail to Copyright Board, 2013-08-21) at paras 90-104], We are of the same opinion.

- **Section 2 Definition of WPPT - The WPPT provides latitude to members for its implementation**

Collective Administration of Performing and of Communication Rights [Online Music Services (CSI: 2011-2013; SOCAN: 2011-2013; SODRAC: 2010-2013)], 2017 CarswellNat 4235 (Cop. Bd.; 2017-08-25), the Board

[201] It is generally agreed by all parties that both the WCT and the WPPT provide broad latitude to member states for the implementation of the obligations contained therein within their domestic legislation. [Fn117 See e.g., Sam Ricketson, "Submissions of Bell Canada, Google, Rogers Communications, Shaw Communications, Quebecor Media, and Yahoo! (the "Networks") on the Making Available Amendment" at para 17; (Jeremy de Beer, "Expert Opinion on Canada's Compliance with the WIPO Copyright Treaty" at paras 7, 8, 13, 15, 16; Jane C. Ginsburg, "Opinion on Article 8 of the WIPO Copyright Treaty" (e-mail from SOCAN to Copyright Board, 2013-10-18). at paras 5, 15, 16; Mih ly Ficsor, "Expert opinion on the international norms on the right of making available to the public and on its application in countries where it has been implemented" (e-mail from SOCAN to Copyright Board, 2013-03-08) at 6-9; Silke von Lewinski, "Expert Opinion on the rights of making available and of reproduction under the WCT and WPPT" (e-mail to Copyright Board, 2013-08-21) at paras 90-104], We are of the same opinion.

- **Section 2.2 – Definition of “publication” – Exhibition in public of an artistic work is not a publication**

Vice Studio Canada Inc. [Application for the reproduction of an artistic work [by], File 2017-UO/TI-06, <http://www.cb-cda.gc.ca/decisions/2017/TI-06.pdf> (Cop. Bd.; 2017-04-18)

[3] Par ailleurs, l'article 2.2 de la Loi définit la publication d'une œuvre comme étant « la mise à la disposition du public d'exemplaires de l'œuvre (...) ». **De plus, l'exposition en public d'une œuvre d'art est explicitement exclue de la définition de publication dans la Loi.**

[4] En l'espèce, la Commission a déterminé qu'il n'y a pas suffisamment de preuve que l'œuvre d'art que vous avez l'intention d'utiliser dans votre documentaire a été publiée. La Commission ne peut donc pas délivrer une licence.

- **Section 2.2 – Definition of “publication” – A mere communication of a work to the public by telecommunication is not a publication – Making a work available to the public does not necessary equate to its publication**

Hadley [Application for the reproduction of a post by], 2017 CarswellNat 2247 (Cop. Bd.; 2017-05-11), the Board

[5] As such, section 77 permits the Board to issue a licence only in respect of works that have been published.

[6] It is clear that, due to the exclusion in the above-mentioned paragraph [2.2(1)(c)], a mere communication of a work to the public by telecommunication is not a publication.

[9] It appears to us that the works for which a licence is sought was present on the CB's site, was being made available in the manner described in subsection 2.4(1.1) of the Act. **Since communication of a work by telecommunication—itself excluded from the definition of publication—includes this act of making available, the mere posting of a work on a website also appears to be excluded from publication** pursuant to paragraph 2.2(1)(c).

[11] Arguably, were it not for this provision, a sound recording that has been made available on the Internet would not be considered to have been published under the Act. Had it been otherwise, section 19.1 of the Act would not have been necessary, or would have used other language, such as “for greater certainty” instead of “despite

[12] More broadly, the Act contemplates the possibility that not all acts of making available to the public constitute publication.

Subsection 29.21(1) of the Act, which sets out an exception in relation to the use of existing works for the creation of new works, requires the source work to have been “published or otherwise made available to the public.”

[13] Lastly, there is little, if any, in this matter that would allow us to conclude that the owner of copyright that made the work available to the public on the Internet expected that reproductions will be made of it—and consented thereto. As such, we do not need to consider whether a work that is made available online for downloading is thereby “published” under the Act

[15] Presumably, **these provisions sought to maintain the right of publication even where the work was being otherwise exploited. As such, various forms of communication of the work were explicitly barred from constituting publication. The carve-out of communication by telecommunication from the definition of “publication” in the Act reflects this obligation.**

[16] It appears that section 77 of the Act was not intended to permit the broad distribution of works that had not been previously made public, such as private writings. However, since this provision was enacted well before the use of the Internet by the public at large, the possibility that there may be works that have been readily made available to the public, but not “published” according to the definition of the Act, was likely not contemplated

[17] In contrast, it is this exact possibility that appears to have been considered in the drafting of the “user-generated content” exception in section 29.21 of the Act, which permits the use of works that have been “published or otherwise made available to the public.”

- **Section 2.2 – Definition of “publication” – A mere communication of a work to the public by telecommunication is not a publication – The mere posting of a work on a website also appears to be excluded from publication - Making a work available to the public does not necessary equate to its publication**

Quichou [Application for the reproduction of three video excerpts by], 2017 CarswellNat 2245 (Cop. Bd.; 2017-05-11), the Board

[5] As such, section 77 permits the Board to issue a licence only in respect of works that have been published.

[6] It is clear that, due to the exclusion in the above-mentioned paragraph [2.2(1)(c)], a mere communication of a work to the public by telecommunication is not a publication.

[9] It appears to us that the works for which a licence is sought were made available in the manner described in subsection 2.4(1.1) of the Act. **Since communication of a work by telecommunication—itself excluded from the definition of publication—includes this act of making available, the mere posting of a work on a website also appears to be excluded from publication** pursuant to paragraph 2.2(1)(c).

[11] Arguably, were it not for this provision, a sound recording that has been made available on the Internet would not be considered to have been published under the Act. Had it been otherwise, section 19.1 of the Act would not have been necessary, or would have used other language, such as “for greater certainty” instead of “despite

[12] **More broadly, the Act contemplates the possibility that not all acts of making available to the public constitute publication.** Subsection 29.21(1) of the Act, which sets out an exception in relation to the use of existing works for the creation of new works, requires the source work to have been “published or otherwise made available to the public.”

[14] It is very likely that the main reason for the inclusion of this exception to the definition of “publication” is the presence of very similar exceptions in international treaties to which Canada is a party. Importantly, Article 3(3) of the Berne Convention for the Protection of Literary and Artistic Works,

[15] **Presumably, these provisions sought to maintain the right of publication even where the work was being otherwise exploited. As such, various forms of communication of the work were explicitly barred from constituting publication. The carve-out of communication by telecommunication from the definition of “publication” in the Act reflects this obligation.**

[16] It appears that section 77 of the Act was not intended to permit the broad distribution of works that had not been previously made public, such as private writings. However, since this provision was enacted well before the use of the Internet by the public at large, the possibility that there may be works that have been readily made available to the public, but not “published” according to the definition of the Act, was likely not contemplated

[17] In contrast, it is this exact possibility that appears to have been considered in the drafting of the “user-generated content” exception in section 29.21 of the Act, which permits the use of works that have been “published or otherwise made available to the public.”

- **Section 2.2 - Definition of “publication” – Making a work available to the public is distinct from its communication by telecommunication**

Collective Administration of Performing and of Communication Right [Online Music Services (CSI: 2011-2013; SOCAN: 2011-2013; SODRAC: 2010-2013)], 2017 CarswellNat 4235 (Cop. Bd.; 2017-08-25), the Board

[203] On the issue of merging, as defined herein, we find that that **the "making available" to the public is legally distinct from the transmission that may result from such "making available,"** and therefore subsequent resulting transmissions are to be evaluated on their own right.

- **Section 2.2 – Definition of “publication” – Availability of a literary work through Library and Archives Canada does not amount to making the work available to the public for the purpose of the definition of publication**

Sunnyside Historical Society, Re, 2017 CarswellNat 5625 (Cop. Bd.; 2017-10-04), the Board

[1] The Copyright Board has reviewed your licence application received on June 14, 2017, for the reproduction of the diary of Walter O'Hara and has determined **that although a copy of the diary is available to the public through Library and Archives Canada, this does not constitute publication of the work.** As such, the Board does not have jurisdiction to issue a licence in this case.

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

Collective Administration of Performing and of Communication Rights, [Online Music Services (CSI: 2011-2013; SOCAN: 2011-2013; SODRAC: 2010-2013)], 2017 CarswellNat 4233 (Cop. Bd.; 2017-08-25), the Board

[150] First, the protection for the act of making a work available in the manner contemplated in subsection 2.4(1.1) of the *Act* did not exist during the period prior to the *ESA* decision [*Entertainment Software Association and Entertainment Software Association of Canada v. Society of Composers, Authors and Music Publishers of Canada*. 2012 SCC 34]. The question of the relative bargaining power of the "right of making available" and the "pre-*ESA* communication right" is not one that can be addressed as a simple matter of "hold-up." [Fn 68 http://en.wikipedia.org/wiki/Hold-up_problem]

- **Section 2.4 – Communication to the public by telecommunication – When an Internet service provider furnishes "ancillary" services to a content provider or end user, it could still rely on paragraph 2.4(1)(b) of the *Act* as a defence to copyright infringement - Technological means of storing a work should not alter the liability of the person storing the work.**

Collective Administration of Performing and of Communication Rights, [Online Music Services (CSI: 2011-2013; SOCAN: 2011-2013; SODRAC: 2010-2013)], 2017 CarswellNat 4233 (Cop. Bd.; 2017-08-25), the Board

[172] While we agree with CSI that it is not only in the cases enumerated in subsections 31.1(5) and (6) of the *Act* that subsection 31.1(4) is no longer applicable, we are not convinced that the mere offering of other features creates a real risk that the provision is no longer applicable. While the exact phrase "by virtue of that act alone" is novel to this provision, it is similar to paragraph 2.4(1)(b) [...]

[173] In its consideration of this provision, **the Board has previously concluded that insofar as the Internet service provider furnishes "ancillary" services to a content provider or end user, it could still rely on paragraph 2.4(1)(b) of the *Act* as a defence to copyright infringement, provided any such "ancillary services" do not amount in themselves to communication or authorization to communicate the work.**[Fn81 *Society of Composers, Authors & Music Publishers of Canada v. Canadian Assn. of Internet Providers* [1999 CarswellNat 3173 (Copyright Bd.)] (27 October 1999) at 39 ("Neither does the exemption cease to apply for the sole reason that the intermediary may have a contractual relationship with its subscribers. As long as its role in respect of any given transmission is limited to providing the means necessary to allow data initiated by other persons to be transmitted over the Internet, and as long as the ancillary services it provides fall short of involving the act of communicating the work or authorizing its communication, it should be allowed to claim the exemption") This approach was later endorsed by the Supreme Court of Canada. [Fn82 *Society of Composers, Authors & Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45, [2004] 2 S.C.R. 427 (S.C.C.) at paras 95-103.]

[174] We also note that, even in situations where subsection 31.1(4) of the *Act* may not apply, there is some question as to whom actually effects a communication in the situation where a user stores music on a service providers' server or re-accesses music so stored.

[175] We conclude that **where the music was stored at the direction of the user, and it is the user who controls what is stored in the space allocated to that user, it cannot be said that an eventual retrieval of that music by the user is a communication by the service provider.** Furthermore, even if it could be said that the service provider authorizes the transmission, the communication would be one from the user to the user, not an instance where the communication is to the public. As such, the service provider would not be authorizing an activity contemplated in subsection 3(1) of the *Act*.

[176] This is so whether the music is stored as is, whether it is compressed, whether it is stored in a different format, or whether the copy is virtual (and simply points to a "master" copy). **Technological means of storing a work, such as data deduplication, should not alter the liability of the person storing the work. An interpretation whereby a service provider would have to adopt a less efficient and more costly means of storage solely to avoid incurring copyright liability, and likely passing such additional costs to the end user, would likely run contrary to the intention of parliament.** The principle of technological neutrality expressed by the Supreme Court of Canada in *ESA [Entertainment Software Association and Entertainment Software Association of Canada v. Society of Composers, Authors and Music Publishers of Canada]*, 2012 SCC 34], *Rogers [Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada]*, 2012 SCC 35], and recently in the *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.* [2015 SCC 57] decision, also strongly supports the approach we adopt here.

- **Section 2.4 – Communication to the public by telecommunication – The act of making a work available to the public remains a communication to the public by telecommunication - It remains distinct from any subsequent act of transmission**

Collective Administration of Performing and of Communication Rights, [Online Music Services (CSI: 2011-2013; SOCAN: 2011-2013; SODRAC: 2010-2013)], 2017 CarswellNat 4235 (Cop. Bd.; 2017-08-25), the Board

[12] As will be made clear from the reasons that follow, **subsection 2.4(1.1) of the Act deems the act of placing a work or other subject-matter on a server of a telecommunication network in a way that a request from a member of the public triggers the transmission of that work or subject-matter**, including in the form of a stream or download, whether or not such a request ever takes place, **to be a communication to the public by telecommunication**

[13] A more limited interpretation of subsection 2.4(1.1) of the Act, which would make this provision applicable only when a work is made available for streaming, would not comply with Canada's international obligations. The fundamental reason for the enactment of subsection 2.4(1.1) by Parliament was for Canada to comply with Article 8 of the WCT.

[14] **The interpretation of subsection 2.4(1.1) of the Act that it applies to the making available of both streams and downloads is consistent with Canada's obligations under Article 8 of the WCT and Articles 10 and 14 of the WPPT. It is also consistent with the technological neutrality interpretation principle.**

[16] The act of making a work available to the public remains a communication to the public by telecommunication regardless of whether the subsequent transmission is a download or a stream. It remains distinct from any subsequent act of transmission; the two acts do not merge and become a single, larger act.

[17] Subsections 2.4(1.1), 15(1.1) and 18(1.1) of the Act came into force on November 7, 2012. The effects of these provisions are entirely prospective from those dates; they are neither retroactive nor retrospective.

- **Section 2.4 – Communication to the public by telecommunication – making available of a work does not require any actual transmission to take place – Section 2.4 is a deeming clause**

Collective Administration of Performing and of Communication Right [Online Music Services (CSI: 2011-2013; SOCAN: 2011-2013; SODRAC: 2010-2013)], 2017 CarswellNat 4235 (Cop. Bd.; 2017-08-25), the Board

[113] The dictionary definition of the word "communicate," which in its ordinary meaning includes the successful transmission or conveyance of information from one person to another does not appear to fit the expression "making [...] available to the public by telecommunication" of subsection 2.4(1.1) of the Act. This is distinct from the ordinary, or more general, meaning of "communicate [...] to the public by telecommunication" in paragraph 3(1)(f), which includes the transmission of information from one person to another.

[115] Since the making available of a work does not require any actual transmission to take place, the ordinary meaning of the phrase "communicate [...] to the public by telecommunication" cannot bear the meaning ascribed to it by subsection 2.4(1.1) of the Act. The provision therefore has the effect of a deeming clause.

[116] The effect of a deeming clause was described in R. v. Verrette [Fn 70 R. v. Verrette, [1978] 2 SCR 838.] where the Supreme Court explained that for the purposes of the statute, a deeming clause performs the purpose of expanding a word beyond its ordinary meaning to achieve a special purpose. This is a statutory fiction that imports into a word or expression an additional meaning that it would not otherwise have. As the Supreme Court stated in Verrette, a deeming clause enlarges the words so that it shall be taken as if it were that thing although it is not, or there is a doubt as to whether it is. [Fn 71 Ibid at pp 845-846]

[117] In our opinion, the effect of the deeming provision in subsection 2.4(1.1) of the Act is to expand the meaning of the right of

communication to the public by telecommunication, by reason that no definition of "communication" includes the preparatory act--that is, the "making available" of content in and of itself. The word, in its grammatical and ordinary meaning, includes only the successful transmission or conveyance of information from one person to another. **Therefore, subsection 2.4(1.1) creates the legal fiction that the act of "making available" a work in the manner described is an act of communication to the public by telecommunication of that work. The previous interpretation of "communicate" in ESA focussed only on the transmission element of that right and is distinguishable; it does not restrict the interpretation of subsection 2.4(1.1).**

[118] As such, while many parties referred to the concept in subsection 2.4(1.1) of the Act as a "making available right" or MAR, it is probably more accurate to refer to it as a component of the right to communicate to the public by telecommunication.

[119] The attempt by some parties to limit or restrict the interpretation of subsection 2.4(1.1) of the Act to the on-demand provision of transmissions of streams adds restrictions to the clause which are not apparent from, and are inconsistent with, the language of that clause. [Fn 72 A similar concern was raised by the Supreme Court of Canada in *Rogers*, supra note 2 at para 38[Fn 72 *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35,]

- **Section 2.4 – Communication to the public by telecommunication – Section 2.4 should be given a technologically neutral interpretation**

Collective Administration of Performing and of Communication Rights [Online Music Services (CSI: 2011-2013; SOCAN: 2011-2013; SODRAC: 2010-2013)], 2017 CarswellNat 4235 (Cop. Bd.; 2017-08-25), the Board

[125] As Justice Rothstein, dissenting in *ESA*, pointed out, "technological neutrality is not a statutory requirement capable of overriding the language of the Act." [Fn 76 *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34 at para 49] It has been interpreted by the courts as meaning that the Act should be interpreted to apply or to extend to technologies that were not or could not have been contemplated at the time of the drafting. [Fn 77 *Robertson v. Thomson Corp.* 2006 SCC 43 at para 49]

[126] In our opinion, the principle of technological neutrality would suggest that the deeming language in subsection 2.4(1.1) of the Act should be given a technologically neutral interpretation whereby it applies both to streams and downloads "in different

media, including more technologically advanced ones."[Fn79 Robertson, supra **note 77** at para 49]

[129] We agree with Music Canada that the CMA specifically intended to change the Act to address digital challenges. Given the legislative history, the rationale for the WIPO Internet Treaties, and the legislative objective to fully implement those treaties using a "coordinated approach," **the principle of technological neutrality does not limit or restrict the meaning of subsection 2.4(1.1) of the Act.**

- **Section 2.4 – Communication to the public by telecommunication – The mere act of making available in a manner that permits the subsequent access by members of the public is sufficient to trigger the deeming clause of section 2.4**

Collective Administration of Performing and of Communication Rights [Online Music Services (CSI: 2011-2013; SOCAN: 2011-2013; SODRAC: 2010-2013)], 2017 CarswellNat 4235 (Cop. Bd.; 2017-08-25), the Board

[173] In its consideration of this provision, the Board has previously concluded that insofar as the Internet service provider furnishes "ancillary" services to a content provider or end user, it could still rely on paragraph 2.4(1)(b) of the *Act* as a defence to copyright infringement, **provided any such "ancillary services" do not amount in themselves to communication or authorization to communicate the work.**[Fn81 *Society of Composers, Authors & Music Publishers of Canada v. Canadian Assn. of Internet Providers* [1999 CarswellNat 3173 (Copyright Bd.)] (27 October 1999) at 39 ("Neither does the exemption cease to apply for the sole reason that the intermediary may have a contractual relationship with its subscribers. As long as its role in respect of any given transmission is limited to providing the means necessary to allow data initiated by other persons to be transmitted over the Internet, and as long as the ancillary services it provides fall short of involving the act of communicating the work or authorizing its communication, it should be allowed to claim the exemption") This approach was later endorsed by the Supreme Court of Canada. [Fn82 *Society of Composers, Authors & Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45, [2004] 2 S.C.R. 427 (S.C.C.) at paras 95-103.]

[189] There is no dispute among the parties that **the sole act of making a work or other subject-matter available** "in a way that allows a member of the public to have access to it from a place and at a time individually chosen by that member of the public"[Fn111 Copyright Act, s. 2.4(1.1).] **regardless of whether any subsequent transmission ever occurs, is enough to trigger the protection or liability afforded by subsection 2.4(1.1) of the Act. We agree with that position. The situation with respect to the rights afforded to**

performers' performances fixed in sound recordings and sound recordings by paragraphs 15(1.1)(d) and 18(1.1)(a) of the Act respectively, conveys the same notion even more so since these provisions create a stand-alone exclusive right. It is desirable to have the same principles apply equally to the making available to the public of works on the one hand, and the making available to the public of sound recordings and performers' performances on the other.

[190] The unambiguous language in subsection 2.4(1.1) of the Act deals solely with the act of posting of a work (or other subject-matter) online in a manner that makes it accessible by members of the public at a time and place of their choosing.

[191] Subsection 2.4(1.1) of the Act deems that the sole act of posting of a work (or other subject-matter) online in a manner that makes it accessible by members of the public is to be considered a communication to the public by telecommunication of that work or other subject-matter. There is no condition attached to the provision to suggest that access has to actually occur for the protection or liability to be triggered. It refers to "making it available to the public by telecommunication." [Fn112 *Ibid.*] **Thus, the mere act of making available in a manner that permits the subsequent access by members of the public is sufficient to trigger the deeming clause, and does not require the subsequent act resulting from the access, whichever form it takes.**

[192] The meaning of "communication to the public by telecommunication" as it pertains to transmissions of a protected work has not changed with the coming into force of the CMA. The legislator created a legal fiction effectively making an act that was arguably outside of the scope of the right of communication to the public by telecommunication now one clearly deemed to be within it.

- **Section 2.4 – Communication to the public by telecommunication – The "making available" to the public is legally distinct from the transmission that may result from such "making available,"**

Collective Administration of Performing and of Communication Right [Online Music Services (CSI: 2011-2013; SOCAN: 2011-2013; SODRAC: 2010-2013)], 2017 CarswellNat 4235 (Cop. Bd.; 2017-08-25), the Board

[203] On the issue of merging, as defined herein, we find that that **the "making available" to the public is legally distinct from the transmission that may result from such "making available,"** and therefore subsequent resulting transmissions are to be evaluated on their own right.

- **Section 3 – Copyright in works – There is a burden upon the copyright owner to prove that a substantial part of a protected work was copied**

Canadian Copyright Licensing Agency (Access Copyright) v. British Columbia (Education), 148 C.P.R. (4th) 13 (F.C.A.; 2017-01-27) Gauthier J. [varying in part 2016 CarswellNat 436 (Cop. Bd.; 2016-02-19)]

[32] Given that Access raises an issue with respect to the Consortium's burden of proof to establish the fairness of its dealing, it is worth mentioning that Access bore the legal burden of establishing that all copying in the volume study constituted potential violations of the copyright in the works of its repertoire. **In theory, this means that it had to satisfy the Board that each copying event involved a substantial part of a protected work within its repertoire.** As there were thousands of copying events involved, Access obviously could not produce a case by case qualitative assessment.

- **Section 3 – Copyright in works – Includes the exclusive right to reproduce and to communicate**

Saad v. Le Journal de Montréal, 2017 QCCQ 122 (Que. Ct. – Small Claims; 2017-01-19) Chalifour J.

[16] À titre d'auteur, selon l'article 3 de la Loi, M. Saad profite du droit exclusif de les [the photographs he took] reproduire et de les communiquer.

- **Section 3 – Copyright in works – Communication of work through the Internet is communicating a work by telecommunication**

Saad v. Le Journal de Montréal, 2017 QCCQ 122 (Que. Ct. – Small Claims; 2017-01-19) Chalifour J.

[17] Il est établi **que la transmission d'une œuvre par Internet, comme ce fut le cas en l'espèce pour les photographies reproduites sur la plateforme Web de JdM, est un acte de communication publique par télécommunication.** [Fn7 Voir *Association canadienne des fournisseurs Internet et als. c. Société canadienne des auteurs, compositeurs et éditeurs de musique et als.*, 2004 CSC 45 (CanLII), 2004 C.S.C., 45].

- **Section 3 – Copyright in works – Includes the exclusive right to reproduce, to communicate to the public or authorize such acts**

Point du jour aviation ltée v. Académie Aéronautique inc., 2017 QCCQ 500 (Que. Ct. – Small Claims; 2017-01-25) Cliche J.

[66] **Seule la demanderesse détenait, en vertu de l'article 3 de cette loi, le droit exclusif de reproduire, publier ou communiquer au public son œuvre et une partie importante de celle-ci, y compris d'autoriser ses actes.**

[67] La défenderesse s'est donc appropriée, sans droit, l'œuvre artistique de la demanderesse.

- **Section 3 – Copyright in works – Posting protected works is making those works available to the public by telecommunication**

Trader v CarGurus, 145 C.P.R. (4th) 415 (Ont. Sup. Ct.; 2017-04-06) Conway J.

[34] I find that CarGurus infringed the [152,532] Trader Photos **when it posted them on the CarGurus website and made them available to the public by telecommunication.**

- **Section 3 – Copyright in works – Includes the exclusive right to transfer the ownership of the tangible object containing the protected work**

Evans v. Upward Construction & Renovation Ltd., 2017 CarswellBC 2342 (B.C. Prov. Ct.; 2017-05-08) Merrick J.

[21] Having determined that the renovation design drawing formulated by the defendant is subject to copyright protection, was the defendant entitled to refuse to provide the claimants with the AUTOCAD file? It is almost certain that the claimants if they had the AUTOCAD file would have had another party make modifications to the defendant's renovation design drawing. **Pursuant to Section 3 of the Copyright Act, the defendant has the sole right to produce or reproduce the renovation design drawing or any substantial part thereof including the sole right to sell or otherwise transfer ownership of the AUTOCAD file.**

[23] While the claimants certainly had an implied licence to use the renovation design plan, any reproduction or modification requires the consent of the defendant. **By refusing to provide the claimants with the AUTOCAD file, the defendant was clearly not consenting to any reproduction or modification** as it was entitled to do pursuant to Sections 3 and 14.1 of the *Copyright Act*.

- **Section 3 – Copyright in works – Includes the exclusive right to authorize the communication by telecommunication of a work**

Chayer v. OVH inc., 2017 QCCQ 5596 (Que. Ct. – Small Claims; 2017-05-12) Hamel J.

[18] **La violation des droits d'auteur**, appartenant à [Plaintiff] Chayer, de la part de [Defendant] Antigny **concerne la mise à la disposition des utilisateurs du Web**, sans frais, par le biais du site Internet *Fuza.fr*, opéré par Antigny, **l'entière de toutes les pièces musicales** contenues sur les trois albums CD appartenant à Chayer, ainsi que l'utilisation des images afférents aux trois (3) CD, et ce, **sans l'autorisation** de Chayer.

- **Section 3 – Copyright in works – The manner in which an unauthorized publication occurs is not relevant to the exclusive rights of an owner**

Cedrom-SNI inc. v. Dose Pro inc., 2017 CarswellQue 6386 (Que. Sup. Ct.; 2017-07-24) Duprat J.

[46] Avant de poursuivre l'analyse, il convient de préciser que la forme sous laquelle la publication a lieu n'a pas vraiment d'importance; **la Loi s'applique sans égard au support utilisé [...]**

- **Section 3 – Copyright in works – Means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever**

Stork Market Inc v. 1736735 Ontario Inc. (Hello Pink Lawn Cards Inc), 149 C.P.R. (4th) 287 (F.C.; 2017-08-22) Southcott J.

[77] Section 3 of the *Copyright Act* provides in part that copyright, in relation to a work, **means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever**. Under s. 27(1) of the *Copyright Act*, it is in an infringement of copyright for any person to do, without the consent of the owner of the copyright, anything that by that statute only the owner of the copyright has the right to do.

- **Section 3 – Copyright in works – Downloads, whether limited or permanent, involve the reproduction right**

Collective Administration of Performing and of Communication Rights, [Online Music Services (CSI: 2011-2013; SOCAN: 2011-2013; SODRAC: 2010-2013)], 2017 CarswellNat 4233 (Cop. Bd.; 2017-08-25), the Board

[156] In *ESA [Entertainment Software Association and Entertainment Software Association of Canada v. Society of Composers, Authors and Music Publishers of Canada]*, 2012 SCC 34], the Supreme Court concluded **that permitting a person to download a musical work does not trigger the right to communicate to the public by telecommunication. It stressed the difference between streams and downloads, and that a download is more akin to a delivery of a copy**, [Fn71 *ESA* at paras 5, 12, 19, 32 and 43], **while a stream is more akin to a performance, being "impermanent in nature, and does not leave the viewer or listener with a durable copy of the work."**[*ESA* at para 35]

[157] In our opinion, the conclusions of the Supreme Court of Canada in the *ESA* decision apply to limited downloads just as they do to permanent downloads. The essential difference between these two types of downloads relates to the condition of retention and/or access of the resulting reproduction rather than the way such reproduction is transmitted or whether the work contained therein can be perceived or not during the transmission, an important element in *ESA*. Both limited and permanent downloads are intended to deliver a durable copy of the work to the customer. The subsequent restrictions that are placed on the use of that copy, be they technical or legal in nature, are not so

drastic in the fact scenario before us as to completely change the nature of the activity.

[158] To the extent the Supreme Court used the expression "permanent,"[ESA at paras 12, 19, 23, 32 and 43] we understand this to be synonymous with the expression "durable,"[ESA at paras 5, 10, 31 and 35.] and not directly comparable to the nomenclature used by the Parties in this matter. The reference to permanency in *ESA* was to distinguish such copies from ephemeral, transient, or other temporary copies. Under such a nomenclature, the downloads being referred to as "limited" in this matter are still permanent, in the sense given to that word in *ESA*.

[159] Therefore, **the downloads at issue in this matter, whether limited or permanent, involve the same right: the reproduction right.**

- **Section 3 - Copyright in works – Retrieval of music stored at the direction of the user is not a communication by the service provider – Ancillary services of storage by the service provider does not amount to an authorization of communication**

Collective Administration of Performing and of Communication Rights, [Online Music Services (CSI: 2011-2013; SOCAN: 2011-2013; SODRAC: 2010-2013)], 2017 CarswellNat 4233 (Cop. Bd.; 2017-08-25), the Board

[173] In its consideration of this provision, the Board has previously concluded that insofar as the Internet service provider furnishes "ancillary" services to a content provider or end user, it could still rely on paragraph 2.4(1)(b) of the *Act* as a defence to copyright infringement, **provided any such "ancillary services" do not amount in themselves to communication or authorization to communicate the work.**[Fn81 *Society of Composers, Authors & Music Publishers of Canada v. Canadian Assn. of Internet Providers* [1999 CarswellNat 3173 (Copyright Bd.)] (27 October 1999) at 39 ("Neither does the exemption cease to apply for the sole reason that the intermediary may have a contractual relationship with its subscribers. As long as its role in respect of any given transmission is limited to providing the means necessary to allow data initiated by other persons to be transmitted over the Internet, and as long as the ancillary services it provides fall short of involving the act of communicating the work or authorizing its communication, it should be allowed to claim the exemption") This approach was later endorsed by the Supreme Court of Canada. [Fn82 *Society of Composers, Authors & Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45, [2004] 2 S.C.R. 427 (S.C.C.) at paras 95-103.]

[175] **We conclude that where the music was stored at the direction of the user, and it is the user who controls what is stored in the space allocated to that user, it cannot be said that an eventual retrieval of that music by the user is a communication by the service provider.** Furthermore, even if it could be said that the service provider authorizes the transmission, the communication would be one from the user to the user, not an instance where the communication is to the public. As such, the service provider would not be authorizing an activity contemplated in subsection 3(1) of the *Act*.

- **Section 3 – Copyright in works – Cached copies are similar to download and involves the reproduction right**

Collective Administration of Performing and of Communication Rights, [Online Music Services (CSI: 2011-2013; SOCAN: 2011-2013; SODRAC: 2010-2013)], 2017 CarswellNat 4233 (Cop. Bd.; 2017-08-25), the Board [Footnotes omitted]

[271] Some online music services add functionality to their webcasting service by creating copies (or permitting the creation of copies) of sound recordings on the subscriber's device — typically a mobile device. The purpose of these copies is to serve as a cache in situations where the subscriber does not have access to an Internet connection, or where the connection is intermittent. In these situations, the subscriber would play the sound recordings from such a cache.

[272] **In terms of functionality, such cached copies are similar to limited downloads.** However, they differ from limited downloads by intention: while cache copies are made to supplement a webcasting service, limited downloads are meant as stand-alone sources of sound recordings. Furthermore, cache copies may be made automatically in some cases, to avoid an interruption in playback during interruptions in Internet connectivity.

- **Section 3 – Copyright in works – The act of reproduction is separate and distinct from the act of making a work available to the public**

Collective Administration of Performing and of Communication Rights [Online Music Services (CSI: 2011-2013; SOCAN: 2011-2013; SODRAC: 2010-2013)], 2017 CarswellNat 4235 (Cop. Bd.; 2017-08-25), the Board

[120] Some parties argue that concluding that the making available of a work for download amounts to a communication to the public by telecommunication would be contrary to the Supreme Court's interpretation of *Bishop v. Stevens* [Fn 73 *Bishop v. Stevens*, [1990] 2 SCR 467] in *ESA [Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada, 2012 SCC 34]*.

[121] It is important, however, to note precisely what the Supreme Court decided in *Bishop*. There, the Court found that since the rights

to perform a work and to record a work are distinct, the right to broadcast a performance under subsection 3(1) of the Act does not include the right to make ephemeral recordings for the purpose of facilitating the broadcast.

[122] In ESA, the Supreme Court found that Bishop does not stand for the proposition that a single activity (in that case, a download) can involve two separate rights at the same time. [Fn74 ESA, at para 41] **The difference between Bishop and ESA is that ESA dealt with a single activity. The acts of reproduction are separate and distinct in theory and in practice from the act of making a work or other subject-matter available to the public. An act of reproduction may precede the act of making a work available or it may follow such an act, or there may be no reproduction by the person making the work available to the public** [Fn75 Silke von Lewinski, "Expert Opinion on the rights of making available and of reproduction under the WCT and WPPT" (e-mail to Copyright Board, 2013-08-21). at paras 81-89.]

- **Section 3 – Copyright in works – For an "authorization" to be an infringement under the Act, a subsequent infringing act must actually occur** *Collective Administration of Performing and of Communication Rights [Online Music Services (CSI: 2011-2013; SOCAN: 2011-2013; SODRAC: 2010-2013)], 2017 CarswellNat 4235 (Cop. Bd.; 2017-08-25), the Board*

[172] More importantly, **for an "authorization" to be an infringement under the Act, a subsequent infringing act must actually occur.** In our opinion, this feature of the authorization right leaves an important gap in the protections required by the WCT.

[175] As discussed above, in our opinion, **for a party to be compliant with the WCT, an exclusive right must be triggered by the making available to the public of a work in such a way that members of the public may access these works from a place and at a time individually chosen by them.** By its very nature of requiring a subsequent act in order for liability to occur, the concept of authorization is deficient in this respect.

- **Section 3 – Copyright in works – The sole act of making a work available is enough to trigger the protection or liability afforded by section 2.4 of the Act - The deeming provision of section 2.4 created a legal fiction effectively making an act that was arguably outside of the scope of the right of communication to the public by telecommunication now one clearly deemed to be within it**

Collective Administration of Performing and of Communication Rights [Online Music Services (CSI: 2011-2013; SOCAN: 2011-2013; SODRAC: 2010-2013)], 2017 CarswellNat 4235 (Cop. Bd.; 2017-08-25), the Board

[189] There is no dispute among the parties that **the sole act of making a work or other subject-matter available** "in a way that allows a member of the public to have access to it from a place and at a time individually chosen by that member of the public"[Fn111 Copyright Act, s. 2.4(1.1).] regardless of whether any subsequent transmission ever occurs, **is enough to trigger the protection or liability afforded by subsection 2.4(1.1) of the Act. We agree with that position. The situation with respect to the rights afforded to performers' performances fixed in sound recordings and sound recordings by paragraphs 15(1.1)(d) and 18(1.1)(a) of the Act respectively, conveys the same notion even more so since these provisions create a stand-alone exclusive right. It is desirable to have the same principles apply equally to the making available to the public of works on the one hand, and the making available to the public of sound recordings and performers' performances on the other.**

[190] The unambiguous language in subsection 2.4(1.1) of the Act deals solely with the act of posting of a work (or other subject-matter) online in a manner that makes it accessible by members of the public at a time and place of their choosing.

[191] Subsection 2.4(1.1) of the Act deems that the sole act of posting of a work (or other subject-matter) online in a manner that makes it accessible by members of the public is to be considered a communication to the public by telecommunication of that work or other subject-matter. There is no condition attached to the provision to suggest that access has to actually occur for the protection or liability to be triggered. It refers to "making it available to the public by telecommunication." [Fn112 *Ibid.*] **Thus, the mere act of making available in a manner that permits the subsequent access by members of the public is sufficient to trigger the deeming clause, and does not require the subsequent act resulting from the access, whichever form it takes.**

[192] The meaning of "communication to the public by telecommunication" as it pertains to transmissions of a protected work has not changed with the coming into force of the CMA. **The legislator created a legal fiction effectively making an act that was arguably outside of the scope of the right of communication to the public by telecommunication now one clearly deemed to be within it.**

- **Section 3 – Copyright in works –**

Lainco inc v. Commission scolaire des Bois-Francs, 2017 CarswellNat 5087 (F.C.; 2017-09-12) LeBlanc J. [appeal A-300-17]

[130] Suivant le paragraphe 3(1) de la Loi, le droit d'auteur sur une oeuvre comporte le droit exclusif, pour la durée prévue par la Loi, de, notamment, produire ou reproduire la totalité ou une partie importante de l'oeuvre sous une forme matérielle quelconque, et celui, tout aussi exclusif, d'autoriser de tels actes. Ainsi, commet une violation du droit d'auteur, selon le paragraphe 27(1) de la Loi, celui qui, sans le consentement du titulaire du droit d'auteur, accomplit un acte que seul ce titulaire a la faculté d'exercer en vertu de la Loi.

- **Section 3 – Copyright in works – Knowledge is not required for an act of direct infringement**

Lainco inc v. Commission scolaire des Bois-Francs, 2017 CarswellNat 5087 (F.C.; 2017-09-12) LeBlanc J. [appeal A-300-17]

[139] Par ailleurs, pour qu'il y ait contrefaçon, il suffit qu'il y ait eu exécution d'un acte que, suivant l'article 3 de la Loi, seul le titulaire du droit d'auteur a la faculté d'exécuter. **Cela ne requiert pas la preuve de la connaissance, par le contrefacteur, de l'existence du droit d'auteur ou celle du fait que l'acte constitue une contrefaçon** (*Compo Co. v. Blue Crest Music Inc.* (1979), [1980] 1 S.C.R. 357 (S.C.C.), à la p. 375 [*Compo Co.*]; *Fox*, à la p. 21-5).

- **Section 3 – Copyright in works – Reproducing and authorizing a reproduction are distinct acts of infringement**

Lainco inc v. Commission scolaire des Bois-Francs, 2017 CarswellNat 5087 (F.C.; 2017-09-12) LeBlanc J. [appeal A-300-17]

[219] Par ailleurs, l'acte de reproduire la totalité ou une partie importante d'une oeuvre et celui d'autoriser cette reproduction, sans autorisation du titulaire du droit d'auteur, sont des délits distincts en matière de droit d'auteur « rendant chaque délinquant responsable envers le titulaire du droit d'auteur, indépendamment des actes et responsabilités de l'autre délinquant » (*Compo Co.*, à la p. 373) [*Compo Co. v. Blue Crest Music Inc.* (1979), [1980] 1 S.C.R. 357,]. Et comme on vient tout juste de le voir, la reproduction non-autorisée d'une oeuvre bidimensionnelle, comme des plans, sous une forme tridimensionnelle, comme un bâtiment, constitue un acte de contrefaçon. Le contraire est aussi vrai.

- **Section 3 – Copyright in works – Reproduction, adaptation, communication and translation of a protected work are reserved to the copyright owner – The reproduction could be in written or computer form**

Éditions Québec Amérique inc. v. Druide informatique inc., 2017 CarswellQue 8069 (Que. Sup. Ct.; 2017-09-14) Poisson J. [leave to appeal granted; partial stay ordered 2017 CarswellQue 11485 (Que. C.A.; 2017-12-21)]

[188] L'article 3 (1) de la *Loi sur le droit d'auteur (LDA)* prévoit que l'auteur d'une oeuvre a le droit exclusif de la produire ou reproduire, en tout ou en partie

[195] À titre de titulaire du droit d'auteur sur les Œuvres contenues dans le logiciel Le Visuel Multimédia (v4), Québec Amérique possède le droit exclusif de produire ou reproduire, la totalité ou une partie importante des Œuvres, sous une forme matérielle quelconque.

[196] En conséquence, **les reproductions, adaptations, représentations, télécommunications et traductions des Œuvres, sous forme écrite ou informatique**, dans Le Visuel Nano et Le Visuel intégré, **sont des actes réservés** à Québec Amérique [the Plaintiff], en sa qualité de titulaire des droits d'auteur sur les Œuvres.

[197] Québec Amérique est la seule à pouvoir autoriser les actes réservés au titulaire des droits d'auteur ou à consentir une cession de ses droits ou une licence.

- **Section 3 – Copyright in works – Includes the right to reproduce the work or any substantial part thereof**

Lapointe v. Broquet inc., 2017 QCCQ 13516 (Que. Ct. – Small Claims) 2017-09-15)
Dupuis J.

[36] Selon l'article 3 de la LDA, le droit d'un auteur comporte notamment le droit exclusif de produire ou de reproduire la totalité ou une partie importante de son œuvre.

- **Section 3 – Copyright in works – For infringement to occur, the reproduction must be of a substantial part of an original work**

Lapointe v. Broquet inc., 2017 QCCQ 13516 (Que. Ct. – Small Claims) 2017-09-15)
Dupuis J.

[46] **La violation du droit d'auteur peut être la reproduction non autorisée d'une partie importante seulement d'une œuvre originale** (art. 3 (1) LDA).

[47] Dans l'arrêt *Cinar Corporation et al c. Robinson et al* [Fn10 2013 CSC 73 (CanLII).], la Cour suprême précise le concept de « *partie importante* » et considère qu'en général, « *une partie importante d'une œuvre est une partie qui représente une part importante du talent et du jugement de l'auteur exprimés dans l'œuvre* [Fn10 2013 CSC 73 (CanLII) at par. 29.] ». La Loi ne protège pas chaque infime partie, chaque petit détail d'une œuvre.

[48] Selon la Cour suprême, le concept de partie importante est souple : il s'agit d'une question de fait et de degré, la question de savoir si une partie est importante est qualitative plutôt que quantitative.

- **Section 3 – Copyright in works – Ideas are not protected by copyright**

Lapointe v. Broquet inc., 2017 QCCQ 13516 (Que. Ct. – Small Claims) 2017-09-15)
Dupuis J.

[59] **Il s'agit d'une idée, elle n'est donc pas protégée par la LDA.**

[61] Cependant, les étapes de recherche qu'il propose sont la suite logique de l'idée de classer les oiseaux par couleur. Le fait que le livre de Mme Brulotte emprunte cette séquence tient toujours à une idée et non à l'expression d'une idée, seule protégée par la LDA.

[69] Par conséquent, **dans l'appréciation qualitative plutôt que quantitative de ce que M. Lapointe allègue être la partie importante ou l'essence de son œuvre, le Tribunal conclut que l'originalité de l'œuvre de M. Lapointe réside principalement dans ses textes**, ses photographies et le programme d'ordinateur ayant permis de le publier sur support informatique **et qu'en utilisant la méthode de classification par couleur et les étapes permettant d'identifier ainsi les oiseaux, le livre publié par Broquet Inc ne reproduit pas une partie importante et originale de l'œuvre de M. Lapointe.**

- **Section 3 – Copyright in works – Infringement occurs only if a substantial part of the protected work is reproduced**

Hunter, Re, 2017 CarswellNat 5642 (Cop. Bd.; 2017-10-13), the Board

[2] Section 77 of the *Copyright Act* (the "Act") provides, among other things, that the Board can issue a licence for the use of a published work protected by copyright if the owner cannot be located after reasonable efforts to do so have been made. **The introductory paragraph of subsection 3(1) of the Act provides that a licence is required to use a work protected by copyright only if a substantial part of the work is being used.**

[3] In this instance, the Board has determined that the excerpts you wish to reproduce do not constitute a substantial part of their respective original works. Consequently, the Board will not issue a licence for their reproduction.

- **Section 5 – Conditions for subsistence of copyright – Copyright registration is not required for a work to be protected – A work in which copyright subsist in the US will also be protected in cCanada**

Nintendo of America Inc. v. Go Cyber Shopping (2005) Ltd., 146 C.P.R. (4th) 369 (FC; 2017-03-01) Campbell J.

[26] **Copyrights in the remaining 368 Nintendo Games are not registered in Canada but are registered in the United States. By virtue of the *Berne Convention for the Protection of Literary and***

Artistic Works (1886), 828 UNTS 221 and s. 5 of the **Act**, these **copyrighted works are also subject to copyright protection in Canada** (Rhoads 1, Applicant's Record, pp. 98, 359-363).

- **Section 5 – Conditions for subsistence of copyright – Copyright registration is not required for a work to be protected**

Lapointe v. Broquet inc., 2017 QCCQ 13516 (Que. Ct. – Small Claims) 2017-09-15) Dupuis J.

[37] Il n'est pas nécessaire que l'œuvre soit enregistrée, puisque la protection provient du seul effet de la Loi [Fn4 *Productions Avanti Ciné Vidéo inc. c. Favreau*, 1999 CanLII 13258 (QC CA), REJB 1999-13719 (C.A.)].

- **Section 5 – Conditions for subsistence of copyright – Copyright – Infringement could occur only if copyright subsist**

Bégon Fawcett v Colas, [2017] J.Q. 14542 (Que. Sup. Ct.; 2017-10-23) Pinsonnault J.

[118] **Pour qu'il y violation d'une œuvre protégée par la *Loi sur le droit d'auteur*, encore faut-il que l'œuvre invoquée soit effectivement visée et protégée par cette loi.**

- **Section 5 – Conditions for subsistence of copyright – For a work to be original it must be more than a mere copy of another's work**

Toronto Real Estate Board v. Canada (Commissioner of Competition), 2017 CarswellNat 6861 (F.C.A.; 2017-12-01) Nadon and Rennie JJ. [affirming 2016 CarswellNat 1506 (Comp. Trib.; 2016-04-27)]

[183] **Copyright is a creature of statute.** The *Copyright Act* provides that copyright exists for "every original literary, dramatic, musical and artistic work" created by Canadians (section 5). This phrase is defined at section 2 to include compilations, which is in turn defined to include works "resulting from the selection or arrangement of data". The classification of the database as a compilation is not contested on appeal.

[184] **The meaning of the word "original" in section 5 of the Copyright Act was considered by the Supreme Court in *CCH Canadian Ltd v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339 [CCH at par. 16]]**

- **Section 6.1 – Anonymous and pseudonymous works – There is a special term of protection for anonymous works, depending of the publication or not of the work**

Diamond v. Montreal Gazette, 2017 QCCQ 1839 (Que. Ct. – Small Claims; 2017-01-19) Lewis J.

[24] Lorsque l'identité de l'auteur de l'œuvre n'est pas connue, le droit d'auteur subsiste jusqu'à la survenance de la première des

échéances suivantes : la fin de la cinquantième année suivant celle de la première publication de l'œuvre ou la fin de la soixante-quinzième année qui suit celle de la création de l'œuvre (art. 6.2) [sic].

- **Section 7 – Term of copyright in posthumous works – The 1999 amendments shorten the term of copyright in unpublished posthumous works**

Sunnyside Historical Society, Re, 2017 CarswellNat 5625 (Cop. Bd.; 2017-10-04), the Board

[2] Furthermore, the Board has determined that a licence is not required for the reproduction of the diary of Walter O'Hara since, for the following reasons, it is now part of the public domain:

1. The diary of Walter O'Hara was written prior to his death in 1874. To this day, it remains unpublished;
2. Prior to January 1, 1999, section 7 of the *Copyright Act* provided that unpublished works remained protected until their publication and for a period of fifty years following the end of the calendar year in which publication occurred. As such, up to that date, the diary of Walter O'Hara remained protected by copyright;
3. However, on January 1, 1999, certain amendments to the *Copyright Act* came into force. These include the introduction of **section 7(4) which provides that a work which was not published as of the coming into force of the provision and whose author died before January 1, 1949, is protected for a period of 5 years following the end of the calendar year in which the provision came into force.** Thus, the diary of Walter O'Hara remained protected up to December 31, 2004.

- **Section 12 – Where copyright belongs to Her Majesty – Section 12 applicable to the Federal and Provincial Crown**

Keatley Surveying Ltd. v. Teranet Inc., 2017 CarswellOnt 14961 (Ont. C.A.; 2017-09-08) [affirming 2016 CarswellOnt 7233 (Ont Sup. Ct.; 2016-05-16) Doherty J.

[27] Section 12, unchanged in its relevant parts, has been in the *Copyright Act* for almost 100 years and is closely modeled on the *Copyright Act 1911*, c. 46, s. 18 (UK): see *Copyright Act*, S.C. 1921, c. 24, s. 12. **The section applies to both the Federal and Provincial Crown:** *D. Vaver, Copyright Law (Toronto: Irwin Law, 2000)*, at p. 92; *D. Gervais and E. Judge, Intellectual Property: The Law in Canada, 2d ed.* (Toronto: Carswell, 2011), at p. 137; *Manitoba v. Canadian Copyright Licensing Agency (Access Copyright)*, 2013 FCA 91 (CanLII), 358 D.L.R. (4th) 563, at paras. 34, 48.

[28] The opening phrase in s. 12, “without prejudice to any rights or privileges of the Crown”, is a reference to the Crown’s ancient common

law copyright-like prerogative to control publication of a variety of materials, such as statutes. The exact meaning of the phrase appears to have been lost in history: see *D. Vaver, Copyright Law*, at pp. 93-94; *D. Vaver, "Copyright and the State in Canada and the United States"* (1996) 10 I.P.J. 1, at 188-192. Fortunately, it has no relevance to this case. It is not suggested that the Province gains any copyright under the opening phrase in s. 12 of the *Copyright Act*.

[29] Section 12 applies to "any work" that was "prepared or published by or under the direction or control of Her Majesty." As referenced above, a plan of survey is a work within the meaning of the *Copyright Act* s. 2.

- **Section 12 – Where copyright belongs to Her Majesty – - Publication must be under the control of the Crown – Publication is not limited to first publication – Statutory obligation for the Crown to deliver copies constitutes publication under Crown's control**

Keatley Surveying Ltd. v. Teranet Inc., 2017 CarswellOnt 14961 (Ont. C.A.; 2017-09-08) [affirming 2016 CarswellOnt 7233 (Ont Sup. Ct.; 2016-05-16) Doherty J.

[31] The question becomes whether the registered or deposited plans of survey are "published by or under the direction or control of the Crown." Publication is defined under the *Copyright Act* as including "making copies of a work available to the public": s. 2.2(1)(a)(i). Under the relevant statutory provisions, Teranet is obligated to provide copies of registered or deposited plans of survey to members of the public upon payment of the prescribed fee: *Registry Act*, s. 15(4); *Land Titles Act*, R.S.O. 1990, c. L.5, s. 165(4). **I have no doubt that under the statutory scheme, Teranet and hence, the Crown, "publish" those plans of survey when they make copies of those plans available to the public:** see *Copyright Agency Limited*, at para. 145.

[32] Mere publication by the Crown does not, however, trigger copyright in the Crown under s. 12 of the *Copyright Act*, as the motion judge acknowledged, at para. 37 of his reasons. Again, I agree with the motion judge. **The publication must be "by or under the direction or control of Her Majesty".**

[52] **Section 12 of the *Copyright Act* does not limit publication to "first publication" in Canada.** Instead, s. 12 refers to any work that is "published" under the direction or control of the Crown and provides for a period of copyright measured from the Crown's "first publication" of the work. **The question of whether the Crown has copyright under s. 12 of the *Copyright Act*, unlike its Australian counterpart, does not depend on whether the work has been previously published in Canada.**

- **Section 13 – Ownership of copyright – An assignment of copyright shall be in writing**

Diamond v. Montreal Gazette, 2017 QCCQ 1839 (Que. Ct. – Small Claims; 2017-01-19) Lewis J.

[22] Une cession, partielle ou totale, du droit d'auteur ne peut être qu'écrite et doit être signée par l'auteur ou son agent [Fn9 Normand TAMARO, *Loi sur le droit d'auteur, texte annoté*, 10^e éd., Carwell, 2015, p. 474-491], comme le prévoit l'article 13(4) de la Loi [...]

- **Section 13 – Ownership of copyright – In civil law, the proceeds of a sale of intellectual property rights during the marriage are acquests**

Droit de la famille — 171143, [2017] Q.J. 6656 (Que. Sup. Ct.; 2017-03-03) Monast J.

[167] Professor Brigitte Lefebvre has examined the context in which art. 458 C.C.Q. was adopted and has expressed the opinion **that the proceeds of a sale of intellectual property rights during the marriage are acquests.**

[168] The Court agrees with these findings. Hence, the net amount of \$3,5M that the Defendant received through related corporate entities ([Company D], [Company G], etc.) as a result of the sale of intellectual property, should be considered as an acquest.

- **Section 13 – Ownership of copyright – Online Newspapers are “Newspapers”**

John v. Ballingali, 2017 CarswellOnt 10611 (Ont. C.A.; 2017-07-07) Benotto J. [affirming 2016 CarswellOnt 5122 (Ont. Sup. Ct.; 2016-04-01); leave to appeal to the Supreme Court of Canada refused 2017 CarswellOnt 16696 (S.C.C.; 2017-09-27)]

[21] The appellant submits the online version of the article is not published “in a newspaper” because there is no paper. He argues that because it is not printed on physical paper, it is excluded from the *LSA*. Further, he submits the legislature clearly intended not to include online versions of a newspaper because there has been no amendment to the *LSA* to cover this point.

[22] I do not agree. In *Weiss v. Sawyer* (2002), 61 O.R. (3d) 526 (C.A.), this court considered the issue and concluded that **a newspaper does not cease to be a newspaper when it is published online.**

[23] I agree with the analysis in *Weiss* [I *Weiss v. Sawyer*, 2002 CarswellOnt 3003] *that* the word “paper” in the definition of “newspaper” is not restricted to physical paper. **To hold otherwise would be to ignore principles of statutory interpretation, which are flexible enough to achieve the intent of the legislature in the context of evolving realities.** As the Supreme Court of Canada held

in *Ontario v. 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 S.C.R. 575 (S.C.C.), at para. 38:

The intention of Parliament or the legislatures is not frozen for all time at the moment of a statute's enactment, such that a court interpreting the statute is forever confined to the meanings and circumstances that governed on that day. Such an approach risks frustrating the very purpose of the legislation by rendering it incapable of responding to the inevitability of changing circumstances. Instead, we recognize that the law speaks continually once adopted. Preserving the original intention of Parliament or the legislatures frequently requires a dynamic approach to interpreting their enactments, sensitive to evolving social and material realities. [Citations omitted.]

[24] The courts have interpreted legislation to apply to advances in technology that did not exist when the provision was enacted.

- **Section 13 – Ownership of copyright – the copyright in works created by employees belongs to the employer – An assignment must be in writing but not the authorization of the agent to sign on behalf of the assignor**

Cedrom-SNI inc. v. Dose Pro inc., 2017 CarswellQue 6386 (Que. Sup. Ct.; 2017-07-24) Duprat J.

[29] Précisons que les demanderesses ne recherchent l'intervention de la Cour que pour des articles rédigés par des employés de La Presse, Le Soleil et Le Devoir, par opposition à des articles préparés par des pigistes.

[34] Avec respect, le Tribunal ne considère pas, comme l'argumente les défenderesses, que le texte des conventions collectives privilégie le droit du public à l'information et la liberté de presse à tel point que le droit d'auteur est mis de côté. Ce litige ne touche pas le droit du public à l'information, ni la liberté de presse, mais plutôt de savoir si les demandeurs disposent d'un droit d'auteur et, le cas échéant, si les défenderesses peuvent utiliser un extrait des textes comme elles le font.

[35] Au regard des conventions précitées, il apparaît **que l'article 13(3) demeure et que La Presse, Le Devoir et Le Soleil conservent le droit de propriété et de reproduction des textes et photographies de leurs employés.**

[41] Au surplus, Le Tribunal a devant lui non seulement le cessionnaire du droit d'auteur mais également le cédant qui sont demandeurs et reconnaissent la cession.

[42] Enfin, la Cour d'appel a statué par le passé que **la LDA n'exige pas une autorisation écrite pour le mandataire** (*par son agent dûment autorisé*) **mais plutôt qu'il soit dûment autorisé** [Fn22 *Benjamin Distribution Ltd v. Éditions Flammarion Ltée*, EYB 1982-139764, (C.A.), paragr. 8.].

[43] Pour ces raisons, le Tribunal retient que Cedrom, au stade de l'injonction interlocutoire, possède une licence exclusive des droits de reproduction.

- **Section 13 – Ownership of copyright – The author is the first owner of the copyright**

Keatley Surveying Ltd. v. Teranet Inc., 2017 CarswellOnt 14961 (Ont. C.A.; 2017-09-08) [affirming 2016 CarswellOnt 7233 (Ont Sup. Ct.; 2016-05-16) Doherty J.

[22] Second, **the land surveyor who prepares a plan of survey is the author** of that “work” and, subject to the provisions in the *Copyright Act*, **the first owner of the copyright**: *Copyright Act*, s. 13(1).

- **Section 13 – Ownership of copyright – A writing is not required for a non-exclusive licence – A licence may be implied provided the extent of the consent is clear for both parties**

Éditions Québec Amérique inc. v. Druide informatique inc., 2017 CarswellQue 8069 (Que. Sup. Ct.; 2017-09-14) Poisson J. [leave to appeal granted; partial stay ordered 2017 CarswellQue 11485 (Que. C.A.; 2017-12-21)]

[218] **Le seul transfert de la possession de l'œuvre n'équivaut pas à une cession ou concession du droit d'auteur** [FN108 *Seggie c. Roofdog Games inc.*, 2015 QCCS 6462 (CanLII), par. 78.]. **La LDA exige un écrit pour la cession ou la concession d'une licence exclusive, par ailleurs, cette exigence ne s'applique pas à l'octroi d'une licence non exclusive** [FN109 *Robertson c. Thompson Corp.* 2006 CSC 43 (CanLII), [2006] 2 RCS 363, par. 54 à 58; *Planification-Organisation-Publications Systèmes (POPS) Ltée et al. c. 9054-8181 Québec inc. et al.*, 2013 CF 427 (CanLII), par. 120; *Pinto c. Centre Bronfman de l'Éducation Juive*, 2013 CF 945 (CanLII), par. 160, 162 et 169.].

[219] **La licence implicite présuppose**, par ailleurs, l'existence d'une preuve admissible, établissant, de manière prépondérante, **un échange de consentement entre le titulaire du droit d'auteur et l'utilisateur de l'œuvre, sur les éléments essentiels de la licence implicite alléguée** [FN110 *Netupsky et al. c. Dominion Bridge Co. Ltd.* 1971 CanLII 172 (CSC), [1972] RCS 368, p. 377; *Robertson c. Thompson Corp.* 2006 CSC 43 (CanLII), [2006] 2 RCS 363, par. 54 à 58; *Euro-Excellence Inc. c. Kraft Canada inc* 2007 CSC 37 (CanLII), [2007] 3 RCS 20, par. 30 à 42; *Lasanté c. Roulotte Prolite inc.*, 2015

QCCA 2053 (CanLII), par. 7 et 8; *Tremblay c. Orio Canada inc.*, 2013 CAF 225 (CanLII), par. 17 à 25; *Planification-Organisation-Publications Systèmes (POPS) Ltée et al. c. 9054-8181 Québec inc. et al.*, 2013 CF 427 (CanLII), par. 120; *Code civil du Québec*, art. 1385, [1386](#) et [1387](#); Pierre-Gabriel JOBIN et Nathalie VÉZINA, *Le schéma classique de l'accord de volonté*, dans *Les obligations*, 2013, 7^e éd. EYB2013OBL38, par. 182.].

[220] En l'espèce, le fardeau d'établir l'existence d'un contrat de licence implicite, non exclusive, à durée illimitée, repose sur Druide informatique [the defendant] [FN111 *Harmony Consulting Ltd. c. G.A. Foss Transport Ltd. et al.*, 2012 CAF 226 (CanLII), [LDA, art. 34.1 \(1\)](#); *Code civil du Québec*, art. 2803; Vincent KARIM, *Les obligations*, 4^e éd., Wilson & Lafleur, 2015, par. 669; Didier LLUELLES et Benoît MOORE, *Droit des obligations*, 2^e éd., Éditions Thémis, 2012, par. 170 à 172 et 275; *Ferme R. & B. Fafard inc. c. St-Basile-le-Grand (Ville de)*, C.S., 2004-07-28, N° AZ-50264359, par. 40 et 41; *Greenberg c. Capital d'Amérique CDPQ inc.*, 2011 QCCA 958 (CanLII), par. 29 et 30; *Singh c. Kohli*, 2015 QCCA 1135 (CanLII), par. 34 et 66.]

- **Section 13 – Ownership of copyright – The author is the first owner of the copyright**

Lapointe v. Broquet inc., 2017 QCCQ 13516.Que. Ct. – Small Claims) 2017-09-15) Dupuis J

[38] **L'auteur d'une œuvre est le premier titulaire du droit d'auteur sur celle-ci**, sous réserve des autres dispositions de la Loi (art. 13 (1) LDA).

- **Section 13 – Ownership of copyright – Not inquiring as to identity of the real copyright owner is faulty**

Barreau du Québec (syndic ad hoc) c Brouillette, 2017 QCCDBQ 85 (Que. Conseil de discipline du Barreau du Québec; 2017-11-03)

[306] **Le Conseil croit que Me Brouillette omet de prendre les mesures nécessaires pour connaître tous les faits relatifs à l'identification du véritable titulaire de la propriété intellectuelle avant d'émettre son opinion**, alors qu'il sait que M^e Frenière s'y fier.

- **Section 14.1 – Moral rights – Tight to be recognized as author and integrity of the work are the two facets of moral right**

Saad v. Le Journal de Montréal, 2017 QCCQ 122 (Que. Ct. – Small Claims; 2017-01-19) Chalifour J.

[32] En vertu de l'article 14.1 de la Loi, M. Saad [the Plaintiff] peut revendiquer un droit moral dans ses œuvres, **soit la paternité de celles-ci et le droit d'exiger que son statut d'auteur lui soit publiquement reconnu.**

- **Section 14.1 – Moral rights – The non-assignment of moral rights does not mean that their management could not be entrusted to a third party**

Société québécoise de gestion collective des droits de reproduction (Copibec) v. Université Laval, 2017 CarswellQue 1085 (Que. C.A.; 2017-02-08) Gagnon J. [reversing 2016 CarswellQue 1651 (Que. Sup. Ct.; 2016-02-26)]

[111] Il importe ici de **ne pas confondre l'incessibilité du droit moral de l'auteur avec sa capacité de confier à un tiers le soin d'obtenir en son nom une juste réparation pour une atteinte à ses droits moraux**. En l'espèce, le dossier d'appel ne fait pas voir que les membres du groupe ont cédé leur droit moral ou encore convenu que Copibec pourrait conserver les montants associés aux dommages subis pour la violation de leurs droits moraux.

- **Section 14.1 – Moral rights – The right of integrity is one facet of the moral right**

Evans v. Upward Construction & Renovation Ltd., 2017 CarswellBC 2342 (B.C. Prov. Ct.; 2017-05-08) Merrick J.

[22] Pursuant to Section 14.1 of the *Copyright Act*, **the defendant (subject to Section 28.2 of the *Copyright Act*) has the right to the integrity of its work**. Given the discrepancy regarding measurements, it is my judgment that prejudice to the defendant's reputation would occur if the plans were relied on and modified.

[23] While the claimants certainly had an implied licence to use the renovation design plan, any reproduction or modification requires the consent of the defendant. **By refusing to provide the claimants with the AUTOCAD file, the defendant was clearly not consenting to any reproduction or modification** as it was entitled to do pursuant to Sections 3 and 14.1 of the *Copyright Act*.

- **Section 15 – Copyright in performer's performance – Copyright subsist in a public performance – When a performer's performance is performed in public the copyright owner is only entitled to an equitable remuneration**

Re:Sound v. Canadian Association of Broadcasters, 148 C.P.R. (4th) 91 (F.C.A.; 2017-06-28) Stratas J. [affirming 2014 CarswellNat 157 (Cop. Bd.; 2014-05-16)].

[82] Re:Sound's members are not authors who create a musical work. They are performers and sound recording makers. **Parliament has granted exclusive reproduction rights in the sound recordings, but where those sound recordings are to be performed in public or communicated to the public by telecommunication**, the performer and makers are not entitled to exclude users from doing so. Under the *Copyright Act*, they are entitled only to equitable remuneration and, because of subsection 67.1(4) of the Act, must exercise this right by way of Board-certified tariffs.

- **Section 15 – Copyright in performer’s performance – The act of making a work available to the public remains a communication to the public by telecommunication**

Collective Administration of Performing and of Communication Rights, [Online Music Services (CSI: 2011-2013; SOCAN: 2011-2013; SODRAC: 2010-2013)], 2017 CarswellNat 4235 (Cop. Bd.; 2017-08-25), the Board

[12] As will be made clear from the reasons that follow, subsection 2.4(1.1) of the Act deems the act of placing a work or other subject-matter on a server of a telecommunication network in a way that a request from a member of the public triggers the transmission of that work or subject-matter, including in the form of a stream or download, whether or not such a request ever takes place, to be a communication to the public by telecommunication

[13] A more limited interpretation of subsection 2.4(1.1) of the Act, which would make this provision applicable only when a work is made available for streaming, would not comply with Canada's international obligations. The fundamental reason for the enactment of subsection 2.4(1.1) by Parliament was for Canada to comply with Article 8 of the WCT.

[14] **The interpretation of subsection 2.4(1.1) of the Act that it applies to the making available of both streams and downloads is consistent with Canada’s obligations under Article 8 of the WCT and Articles 10 and 14 of the WPPT. It is also consistent with the technological neutrality interpretation principle.**

[16] **The act of making a work available to the public remains a communication to the public by telecommunication regardless of whether the subsequent transmission is a download or a stream. It remains distinct from any subsequent act of transmission; the two acts do not merge and become a single, larger act.**

[17] Subsections 2.4(1.1), 15(1.1) and 18(1.1) of the Act came into force on November 7, 2012. **The effects of these provisions are entirely prospective from those dates; they are neither retroactive nor retrospective.**

- **Section 15 – Copyright in performer’s performance – Making the fixation of a performer’s performance available to the public by telecommunication is an exclusive right of the copyright owner**

Collective Administration of Performing and of Communication Rights [Online Music Services (CSI: 2011-2013; SOCAN: 2011-2013; SODRAC: 2010-2013)], 2017 CarswellNat 4235 (Cop. Bd.; 2017-08-25), the Board

[189] There is no dispute among the parties that **the sole act of making a work or other subject-matter available** "in a way that allows a member of the public to have access to it from a place and at a time individually chosen by that member of the public"[Fn111 Copyright Act, s. 2.4(1.1).] regardless of whether any subsequent transmission ever occurs, **is enough to trigger the protection or liability afforded by subsection 2.4(1.1) of the Act. We agree with that position. The situation with respect to the rights afforded to performers' performances fixed in sound recordings and sound recordings by paragraphs 15(1.1)(d) and 18(1.1)(a) of the Act respectively, conveys the same notion even more so since these provisions create a stand-alone exclusive right. It is desirable to have the same principles apply equally to the making available to the public of works on the one hand, and the making available to the public of sound recordings and performers' performances on the other.**

[190] The unambiguous language in subsection 2.4(1.1) of the Act deals solely with the act of posting of a work (or other subject-matter) online in a manner that makes it accessible by members of the public at a time and place of their choosing.

[191] Subsection 2.4(1.1) of the Act deems that the sole act of posting of a work (or other subject-matter) online in a manner that makes it accessible by members of the public is to be considered a communication to the public by telecommunication of that work or other subject-matter. There is no condition attached to the provision to suggest that access has to actually occur for the protection or liability to be triggered. It refers to "making it available to the public by telecommunication." [Fn112 *Ibid.*] **Thus, the mere act of making available in a manner that permits the subsequent access by members of the public is sufficient to trigger the deeming clause, and does not require the subsequent act resulting from the access, whichever form it takes.**

[192] The meaning of "communication to the public by telecommunication" as it pertains to transmissions of a protected work has not changed with the coming into force of the CMA. The legislator created a legal fiction effectively making an act that was arguably outside of the scope of the right of communication to the public by telecommunication now one clearly deemed to be within it.

- **Section 15 – Copyright in performer's performance – The WCT and the WPPT provide latitude to members for their implementation**

Collective Administration of Performing and of Communication Rights [Online Music Services (CSI: 2011-2013; SOCAN: 2011-2013; SODRAC: 2010-2013)], 2017 CarswellNat 4235 (Cop. Bd.; 2017-08-25), the Board

[201] It is generally agreed by all parties that both the WCT and the WPPT provide broad latitude to member states for the implementation of the obligations contained therein within their domestic legislation. [Fn117 See e.g., Sam Ricketson, "Submissions of Bell Canada, Google, Rogers Communications, Shaw Communications, Quebecor Media, and Yahoo! (the "Networks") on the Making Available Amendment" at para 17; (Jeremy de Beer, "Expert Opinion on Canada's Compliance with the WIPO Copyright Treaty" at paras 7, 8, 13, 15, 16; Jane C. Ginsburg, "Opinion on Article 8 of the WIPO Copyright Treaty" (e-mail from SOCAN to Copyright Board, 2013-10-18). at paras 5, 15, 16; Mih ly Ficsor, "Expert opinion on the international norms on the right of making available to the public and on its application in countries where it has been implemented" (e-mail from SOCAN to Copyright Board, 2013-03-08) at 6-9; Silke von Lewinski, "Expert Opinion on the rights of making available and of reproduction under the WCT and WPPT" (e-mail to Copyright Board, 2013-08-21) at paras 90-104], We are of the same opinion.

- **Section 15 – Copyright in performer’s performance – Making available to the public is not the same as making a transmission to the public**

Collective Administration of Performing and of Communication Right [Online Music Services (CSI: 2011-2013; SOCAN: 2011-2013; SODRAC: 2010-2013)], 2017 CarswellNat 4235 (Cop. Bd.; 2017-08-25), the Board

[203] On the issue of merging, as defined herein, we find that that the "making available" to the public is legally distinct from the transmission that may result from such "making available," and therefore subsequent resulting transmissions are to be evaluated on their own right.

- **Section 15 – Copyright in performer’s performance – For subsection 15(1.1) to apply, there must be a point of attachment to Canada**

Collective Administration of Performing and of Communication Rights [Online Music Services (CSI: 2011-2013; SOCAN: 2011-2013; SODRAC: 2010-2013)], 2017 CarswellNat 4235 (Cop. Bd.; 2017-08-25), the Board

[204] Pursuant to the Order Fixing Various Dates as the Dates on which Certain Provisions of the Act Come into Force, [Fn118 Order Fixing Various Dates as the Dates on which Certain Provisions of the Act Come into Force (P.C. 2012-1392 October 25, 2012; SI/2012-85 November 7, 2012)] subsection 2.4(1.1) of the Act came into force on November 7, 2012. Paragraphs 15(1.1)(d) and 18(1.1)(a) of the Act, providing for a "making available" right for performances fixed in sound recordings and sound recordings respectively, also came into force on that date.

[205] However, these rights only applied to sound recordings, and performances fixed in such sound recordings, that have a point of attachment to Canada, as described in subsections 15(2.1) and 18(2.1) of the Act.

The Order provided that the provisions extending these rights to WCT and WPPT member states, subsections 15(2.2) and 18(2.2), would come into force once Canada had ratified those Treaties.

[206] The Government of Canada filed instruments of ratification of the WPPT on May 13, 2014, and the Treaty came into force for Canada on August 13, 2014, triggering the coming into force of those provisions.

[207] Because of certain statements made by some of the parties in these proceedings, both during these proceedings, and during the development of the CMA, we believe it is important to note that the effect of these provisions is entirely prospective. They are neither retroactive, nor retrospective. Such a prospective effect is to be presumed unless it is possible to discern a clear legislative intent that it is to apply retrospectively. [Fn119 R. v. Dineley, 2012 SCC 58] In this case, there is no such intent discernible. Furthermore, unlike subsections 13(6) and 13(7) of the Act, for example, there is no language in the provision to suggest that it acts as a "clarification" or that the provision is deemed to always have been the way it reads after the amendment.

- **Section 18 – Copyright in sound recordings – Copyright subsist in a sound recording performance – When a sound recording is performed in public the copyright owner is only entitled to an equitable remuneration**

Re:Sound v. Canadian Association of Broadcasters, 148 C.P.R. (4th) 91 (F.C.A.; 2017-06-28) Stratas J. [affirming 2014 CarswellNat 157 (Cop. Bd.; 2014-05-16)].

[82] *Re:Sound's* members are not authors who create a musical work. They are performers and sound recording makers. **Parliament has granted exclusive reproduction rights in the sound recordings, but where those sound recordings are to be performed in public or communicated to the public by telecommunication**, the performer and makers are not entitled to exclude users from doing so. Under the *Copyright Act*, they are entitled only to equitable remuneration and, because of subsection 67.1(4) of the Act, must exercise this right by way of Board-certified tariffs.

- **Section 18 – Copyright in sound recordings – The act of making a work available to the public remains a communication to the public by telecommunication**

Collective Administration of Performing and of Communication Rights, [Online Music Services (CSI: 2011-2013; SOCAN: 2011-2013; SODRAC: 2010-2013)], 2017 CarswellNat 4235 (Cop. Bd.; 2017-08-25), the Board

[12] As will be made clear from the reasons that follow, subsection 2.4(1.1) of the Act deems the act of placing a work or other subject-matter on a server of a telecommunication network in a way that a request from a member of the public triggers the transmission of that work or subject-matter, including in the form of a stream or download, whether or not such a request ever takes place, to be a communication to the public by telecommunication

[13] A more limited interpretation of subsection 2.4(1.1) of the Act, which would make this provision applicable only when a work is made available for streaming, would not comply with Canada's international obligations. The fundamental reason for the enactment of subsection 2.4(1.1) by Parliament was for Canada to comply with Article 8 of the WCT.

[14] **The interpretation of subsection 2.4(1.1) of the Act that it applies to the making available of both streams and downloads is consistent with Canada's obligations under Article 8 of the WCT and Articles 10 and 14 of the WPPT. It is also consistent with the technological neutrality interpretation principle.**

[16] **The act of making a work available to the public remains a communication to the public by telecommunication regardless of whether the subsequent transmission is a download or a stream. It remains distinct from any subsequent act of transmission; the two acts do not merge and become a single, larger act.**

[17] Subsections 2.4(1.1), 15(1.1) and 18(1.1) of the Act came into force on November 7, 2012. **The effects of these provisions are entirely prospective from those dates; they are neither retroactive nor retrospective.**

- **Section 18 – Copyright in sound recordings – Making a sound recording available to the public by telecommunication is an exclusive right of the copyright owner**

Collective Administration of Performing and of Communication Rights [Online Music Services (CSI: 2011-2013; SOCAN: 2011-2013; SODRAC: 2010-2013)], 2017 CarswellNat 4235 (Cop. Bd.; 2017-08-25), the Board

[189] There is no dispute among the parties that **the sole act of making a work or other subject-matter available "in a way that**

allows a member of the public to have access to it from a place and at a time individually chosen by that member of the public"[Fn111 Copyright Act, s. 2.4(1.1).] regardless of whether any subsequent transmission ever occurs, **is enough to trigger the protection or liability afforded by subsection 2.4(1.1) of the Act. We agree with that position. The situation with respect to the rights afforded to performers' performances fixed in sound recordings and sound recordings by paragraphs 15(1.1)(d) and 18(1.1)(a) of the Act respectively, conveys the same notion even more so since these provisions create a stand-alone exclusive right. It is desirable to have the same principles apply equally to the making available to the public of works on the one hand, and the making available to the public of sound recordings and performers' performances on the other.**

[190] The unambiguous language in subsection 2.4(1.1) of the Act deals solely with the act of posting of a work (or other subject-matter) online in a manner that makes it accessible by members of the public at a time and place of their choosing.

[191] Subsection 2.4(1.1) of the Act deems that the sole act of posting of a work (or other subject-matter) online in a manner that makes it accessible by members of the public is to be considered a communication to the public by telecommunication of that work or other subject-matter. There is no condition attached to the provision to suggest that access has to actually occur for the protection or liability to be triggered. It refers to "making it available to the public by telecommunication." [Fn112 *Ibid.*] **Thus, the mere act of making available in a manner that permits the subsequent access by members of the public is sufficient to trigger the deeming clause, and does not require the subsequent act resulting from the access, whichever form it takes.**

[192] The meaning of "communication to the public by telecommunication" as it pertains to transmissions of a protected work has not changed with the coming into force of the CMA. The legislator created a legal fiction effectively making an act that was arguably outside of the scope of the right of communication to the public by telecommunication now one clearly deemed to be within it.

- **Section 18 – Copyright in sound recordings – The WCT and the WPPT provide latitude to members for their implementation**

Collective Administration of Performing and of Communication Rights [Online Music Services (CSI: 2011-2013; SOCAN: 2011-2013; SODRAC: 2010-2013)], 2017 CarswellNat 4235 (Cop. Bd.; 2017-08-25), the Board

[201] It is generally agreed by all parties that both the WCT and the WPPT provide broad latitude to member states for the implementation of the obligations contained therein within their domestic legislation. [Fn117 See e.g., Sam Ricketson, "Submissions of Bell Canada, Google, Rogers Communications, Shaw Communications, Quebecor Media, and Yahoo! (the "Networks") on the Making Available Amendment" at para 17; (Jeremy de Beer, "Expert Opinion on Canada's Compliance with the WIPO Copyright Treaty" at paras 7, 8, 13, 15, 16; Jane C. Ginsburg, "Opinion on Article 8 of the WIPO Copyright Treaty" (e-mail from SOCAN to Copyright Board, 2013-10-18).at paras 5, 15, 16; Mih ly Ficsor, "Expert opinion on the international norms on the right of making available to the public and on its application in countries where it has been implemented" (e-mail from SOCAN to Copyright Board, 2013-03-08) at 6-9; Silke von Lewinski, "Expert Opinion on the rights of making available and of reproduction under the WCT and WPPT" (e-mail to Copyright Board, 2013-08-21)at paras 90-104],We are of the same opinion.

- **Section 18 – Copyright in sound recordings – – Making available to the public is not the same as making a transmission to the public**

Collective Administration of Performing and of Communication Right [Online Music Services (CSI: 2011-2013; SOCAN: 2011-2013; SODRAC: 2010-2013)], 2017 CarswellNat 4235 (Cop. Bd.; 2017-08-25), the Board

[203] On the issue of merging, as defined herein, we find that that **the "making available" to the public is legally distinct from the transmission that may result from such "making available,"** and therefore subsequent resulting transmissions are to be evaluated on their own right.

- **Section 18 – Copyright in sound recordings – For subsection 18(1.1) to apply, there must be a point of attachment to Canada**

Collective Administration of Performing and of Communication Rights [Online Music Services (CSI: 2011-2013; SOCAN: 2011-2013; SODRAC: 2010-2013)], 2017 CarswellNat 4235 (Cop. Bd.; 2017-08-25), the Board

[204] Pursuant to the Order Fixing Various Dates as the Dates on which Certain Provisions of the Act Come into Force, [Fn118 Order Fixing Various Dates as the Dates on which Certain Provisions of the Act Come into Force (P.C. 2012-1392 October 25, 2012; SI/2012-85 November 7, 2012)] subsection 2.4(1.1) of the Act came into force on November 7, 2012. **Paragraphs 15(1.1)(d) and 18(1.1)(a) of the Act, providing for a "making available" right for performances fixed in sound recordings and sound recordings respectively, also came into force on that date.**

[205] However, these rights only applied to sound recordings, and performances fixed in such sound recordings, that have a point of attachment to Canada, as described in subsections 15(2.1) and 18(2.1) of the Act.

The Order provided that the provisions extending these rights to WCT and WPPT member states, subsections 15(2.2) and 18(2.2), would come into force once Canada had ratified those Treaties.

[206] The Government of Canada filed instruments of ratification of the WPPT on May 13, 2014, and the Treaty came into force for Canada on August 13, 2014, triggering the coming into force of those provisions.

[207] Because of certain statements made by some of the parties in these proceedings, both during these proceedings, and during the development of the CMA, we believe it is important to note that the effect of these provisions is entirely prospective. They are neither retroactive, nor retrospective. Such a prospective effect is to be presumed unless it is possible to discern a clear legislative intent that it is to apply retrospectively. [Fn119 R. v. Dineley, 2012 SCC 58] In this case, there is no such intent discernible. Furthermore, unlike subsections 13(6) and 13(7) of the Act, for example, there is no language in the provision to suggest that it acts as a "clarification" or that the provision is deemed to always have been the way it reads after the amendment.

- **Section 19 – Right to remuneration – Canada – Public performance and communication to the public by telecommunication of performer’s performances and sound recordings entitle the copyright owner to a remuneration The remuneration is to be allocated between the maker and the performers The Copyright Board determines the amount of the remuneration**

Re: Sound v. Canadian Association of Broadcasters, 148 C.P.R. (4th) 91 (F.C.A.; 2017-06-28) Stratas J. [affirming 2014 CarswellNat 157 (Cop. Bd.; 2014-05-16)].

[6] Under section 19, sound recording makers and performers have a right to be paid for the public performance or the communication to the public by telecommunication of published sound recordings embodying performers’ performances of musical works. Royalties for this right are allocated equally between the sound recording makers and the performers. The Copyright Board determines the amount in accordance with Part VII of the *Copyright Act*, discussed below.

[7] **Sometimes the rights of performers and sound recording makers are called “neighbouring rights”** because they are similar to, but not the same as, the copyright granted to authors in, for example, musical works. Instead of an exclusive copyright to perform in public and communicate to the public by telecommunication, performers and sound recording makers’ rights are non-exclusive rights to receive equitable remuneration. See the Copyright Board’s decision in *NRCC Tariff 1.A*, dated August 13, 1999, at p. 6.

- **Section 19 – Right to remuneration – Canada – The remuneration to be set must be equitable – The Copyright Board has a wide discretion in setting the amount of the remuneration**

Re:Sound v. Canadian Association of Broadcasters, 148 C.P.R. (4th) 91 (F.C.A.; 2017-06-28) Stratas J. [affirming 2014 CarswellNat 157 (Cop. Bd.; 2014-05-16)].

[39] For a number of reasons, **the Board enjoys a broad margin of appreciation when setting “equitable remuneration”** in a case like this.

[40] First, the statutory words in issue in this case are very broad indeed. The remuneration to be set is described in subsection 19(1) as “equitable.” The word “equitable” imports much discretion based on the Board’s fact-based sense of fairness in light of all of the circumstances.

[44] Indeed, the legislative history of subsection 68(2) shows that Parliament intended the discretion of the Board in setting equitable remuneration to be very broad.

- **Section 19 – Right to remuneration – Canada – The entitlement to equitable remuneration is different from the entitlement to exclude users that is contained in the exclusive rights given in section 3**

Re:Sound v. Canadian Association of Broadcasters, 148 C.P.R. (4th) 91 (F.C.A.; 2017-06-28) Stratas J. [affirming 2014 CarswellNat 157 (Cop. Bd.; 2014-05-16)].

[81] In my view, this submission is based on a misinterpretation of the *Copyright Act*. “Royalties” throughout the Act refers to the amounts that users pay and that Re:Sound and SOCAN receive under their tariffs. But “equitable remuneration” in section 19 refers to the type of right that has been granted to Re:Sound’s members. It is a counterpart to the “sole right” that is granted in section 3 of the Act. Put another way, **the entitlement to equitable remuneration is different from the entitlement to exclude users that is contained in the exclusive rights given to SOCAN in section 3 of the *Copyright Act*.**

- **Section 19.1 – Deemed publication – Canada – A mere communication of a work to the public by telecommunication is not a publication - A sound**

recording that has been made available on the Internet would not be considered to have been published

Quichou for the reproduction of three video excerpts [Licence denied to the application by], 2017 CarswellNat 2245 (Cop. Bd.; 2017-05-11), the Board

[5] As such, section 77 permits the Board to issue a licence only in respect of works that have been published.

[6] It is clear that, due to the exclusion in the above-mentioned paragraph [2.2(1)(c)], **a mere communication of a work to the public by telecommunication is not a publication.**

[9] It appears to us that the works for which a licence is sought were made available in the manner described in subsection 2.4(1.1) of the Act. Since communication of a work by telecommunication—itself excluded from the definition of publication—includes this act of making available, the mere posting of a work on a website also appears to be excluded from publication pursuant to paragraph 2.2(1)(c).

[11] Arguably, **were it not for this provision, a sound recording that has been made available on the Internet would not be considered to have been published under the Act. Had it been otherwise, section 19.1 of the Act would not have been necessary, or would have used other language, such as “for greater certainty” instead of “despite**

[12] More broadly, the Act contemplates the possibility that not all acts of making available to the public constitute publication. Subsection 29.21(1) of the Act, which sets out an exception in relation to the use of existing works for the creation of new works, requires the source work to have been “published or otherwise made available to the public.”

[14] It is very likely that the main reason for the inclusion of this exception to the definition of “publication” is the presence of very similar exceptions in international treaties to which Canada is a party. Importantly, Article 3(3) of the Berne Convention for the Protection of Literary and Artistic Works,

[15] Presumably, these provisions sought to maintain the right of publication even where the work was being otherwise exploited. As such, various forms of communication of the work were explicitly barred from constituting publication. The carve-out of communication by telecommunication from the definition of “publication” in the Act reflects this obligation.

- **Section 19.1 – Deemed publication – Canada – A mere communication of a work to the public by telecommunication is not a publication - A sound recording that has been made available on the Internet would not be considered to have been published**

Hadley for the reproduction of a post [Licence denied to the application by], File: 2016-UO/TI-42, 2017 CarswellNat 2247 (Cop. Bd.; 2017-05-11), the Board

[5] As such, section 77 permits the Board to issue a licence only in respect of works that have been published.

[6] It is clear that, due to the exclusion in the above-mentioned paragraph [2.2(1)(c)], a mere communication of a work to the public by telecommunication is not a publication.

[9] It appears to us that the works for which a licence is sought was present on the CB's site, was being made available in the manner described in subsection 2.4(1.1) of the Act. **Since communication of a work by telecommunication—itself excluded from the definition of publication—includes this act of making available, the mere posting of a work on a website also appears to be excluded from publication** pursuant to paragraph 2.2(1)(c).

[11] Arguably, were it not for this provision, a sound recording that has been made available on the Internet would not be considered to have been published under the Act. Had it been otherwise, section 19.1 of the Act would not have been necessary, or would have used other language, such as “for greater certainty” instead of “despite

[12] More broadly, the Act contemplates the possibility that not all acts of making available to the public constitute publication. Subsection 29.21(1) of the Act, which sets out an exception in relation to the use of existing works for the creation of new works, requires the source work to have been “published or otherwise made available to the public.”

[13] Lastly, there is little, if any, in this matter that would allow us to conclude that the owner of copyright that made the work available to the public on the Internet expected that reproductions will be made of it—and consented thereto. As such, we do not need to consider whether a work that is made available online for downloading is thereby “published” under the Act

[15] Presumably, these provisions sought to maintain the right of publication even where the work was being otherwise exploited. As such, various forms of communication of the work were explicitly barred from constituting publication. The carve-out of communication

by telecommunication from the definition of "publication" in the Act reflects this obligation.

- **Section 19.1 – Right to remuneration – Canada – The "making available" to the public is legally distinct from the transmission that may result from such "making available,"**

Collective Administration of Performing and of Communication Right [Online Music Services (CSI: 2011-2013; SOCAN: 2011-2013; SODRAC: 2010-2013)], 2017 CarswellNat 4235 (Cop. Bd.; 2017-08-25), the Board

[203] On the issue of merging, as defined herein, we find that **that the "making available" to the public is legally distinct from the transmission that may result from such "making available,"** and therefore subsequent resulting transmissions are to be evaluated on their own right.

- **Section 21 – Copyright in communication signals – The onus to prove infringement lies on the copyright owner**

Premium Sports Broadcasting Inc. v. 9005-5906 Québec Inc. (Resto-bar Mirabel), 2017 CarswellNat 3069 (F.C.; 2017-06-19) St-Louis J.

[61] The Court notes that Premium's [the Plaintiff] arguments, as very able as they may be, are designed to minimize the weakness of its own evidence and divert the Court's attention to certain weaknesses in the defendants' position. Premium behaves as if its burden was one of making a *prima facie* case, allowing the onus of proof to be shifted to the defendants. However, such is not the case. **The onus is not on the defendants to prove that they did not broadcast the fight, but on Premium to prove that they did.** Therefore, the gaps Premium raises in the defendants' evidence do not allow it to meet or reverse its own burden of proof.

- **Section 27 – Infringement generally – Whoever wishes to use a work has a duty to act actively to ensure that it does not infringe a copyright**

Saad v. Le Journal de Montréal, 2017 QCCQ 122 (Que. Ct. – Small Claims; 2017-01-19) Chalifour J.

[22] Dans la décision *Les salons Marcel Pelchat inc. c. Breton et als.* [Fn8 3 février 2004, 2004 CanLII 12792 (QC CS), 200-05-014537-018; voir aussi *Santo limousines inc. c. Simonetti*, C.Q. 2006 QCCQ 16908], la Cour supérieure explique que **celui qui souhaite utiliser une œuvre a le devoir d'agir activement pour s'assurer de ne pas violer un droit d'auteur.**

- **Section 27 – Infringement generally – Good faith is not enough to avoid a finding of infringement - He who wants to use a work must be diligent in ascertaining that he will not infringe upon the copyright of someone else**

Saad v. Le Journal de Montréal, 2017 QCCQ 122 (Que. Ct. – Small Claims; 2017-01-19) Chalifour J.

[26] Le Tribunal ne peut conclure que JdM [the defendant] était justifiée de se fier uniquement à Mme Di Capo [the person photographed by the plaintiff] sans contacter M. Saad. La situation décrite par M. Chevalier [one of defendant's representative] équivaut plutôt à de l'aveuglement volontaire; JdM a tourné le coin rond.

[27] Même de bonne foi, JdM n'a pas, dans ce cas, pris les mesures requises pour s'assurer de ne pas violer un droit d'auteur. JdM n'a pas fait preuve de la diligence raisonnable requise pour profiter du moyen d'exonération prévue à l'article 27 (2) de la Loi.

[28] D'ailleurs, il est révélateur de noter que, depuis le litige avec M. Saad, M. Chevalier a donné aux journalistes avec qui il collabore la directive d'être plus prudents avant l'emploi d'une photographie transmise par une personne interviewée et non par le photographe lui-même.

- **Section 27 – Infringement generally – He who want the use the work of another has an obligation to ascertain ascertaining that he will not infringe upon the copyright of someone else**

Diamond v. Montreal Gazette, 2017 QCCQ 1839 (Que. Ct. – Small Claims; 2017-01-19) Lewis J.

[31] The Gazette a été pour le moins insouciant, voire négligente, dans la gestion de l'affaire. Le Tribunal a bien compris qu'il n'était pas dans son intérêt d'identifier l'auteur de la photographie et de s'assurer qu'il l'autorisait à publier sa photographie : le temps nécessaire pour faire la démarche et arriver à une entente avec l'auteur ne lui aurait peut-être pas permis de publier son article à temps et aurait probablement impliqué qu'elle paie une redevance. Elle souhaite éviter les délais et les coûts associés à une telle démarche

[32] Qu'à cela ne tienne, la Loi impose une obligation de vérification à celui qui s'apprête à utiliser l'œuvre d'un autre [...]

[33] Or, comme elle l'a reconnu, payer des royalties à tous les auteurs dont elle publie les œuvres sans vérifier au préalable s'ils l'autorisent à le faire lui coûterait une somme considérable compte tenu du nombre d'œuvres qu'elle publie.

[34] Le Tribunal n'épiloguera pas sur l'argument de The Gazette voulant qu'elle pouvait utiliser la photographie de Diamond parce qu'elle l'a retrouvée sur des sites internet. Cet argument ne peut être retenu pour deux motifs : parce que The Gazette n'a pas

vérifié que les sites en question ne violaient pas la Loi et que le fait que d'autres violent la Loi ne constitue pas une licence pour elle de faire de même en toute impunité [Fn11 *Brosseau c. Baron, Lafrenière inc.*, 2016 QCCQ 3348 (CanLII), par. 33; Normand TAMARO, Normand TAMARO, *Loi sur le droit d'auteur, texte annoté*, 10^e éd., Carwell, 2015, p. 909.]

- **Section 27 – Infringement generally – The use the work of someone else must be authorized to avoid infringement**

Point du jour aviation ltée v. Académie Aéronautique inc., 2017 QCCQ 500 (Que. Ct. – Small Claims; 2017-01-25) Cliche J.

[62] La défenderesse a admis avoir utilisé une photographie de l'aéroport de Mascouche, prise d'un avion par la demanderesse et au bénéfice de cette dernière, **mais sans son autorisation préalable**.

[63] Or, l'utilisation qu'en a faite la défenderesse sur son site internet enfreint diverses dispositions de la *Loi sur les droits d'auteur* [Fn14 L.R.C. (1985) ch. C-42.].

- **Section 27 – Infringement generally – Reproducing a work without authorization constitutes infringement**

Société québécoise de gestion collective des droits de reproduction (Copibec) v. Université Laval, 2017 CarswellQue 1085 (Que. C.A.; 2017-02-08) Gagnon J. [reversing 2016 CarswellQue 1651 (Que. Sup. Ct.; 2016-02-26)]

[47] **La LDA présume aussi qu'une reproduction en totalité ou en partie d'une œuvre sans le consentement du titulaire du droit constitue une violation du droit d'auteur** [Fn25 *Loi sur le droit d'auteur*, L.R.C. 1985, ch. C-42, art. 27 (1)]. Il existe toutefois une exception à cette règle [Fn26 *CCH Canadienne ltée c. Barreau du Haut-Canada* [2004] 1 R.C.S. 339, 2004 CSC 13, paragr. 48.] et elle a d'ailleurs été soulevée par l'Université lors du débat sur la demande d'autorisation. Il s'agit, dans les circonstances prévues à la loi, de permettre la reproduction de certaines œuvres en application de la notion de « [l]'utilisation équitable » à des fins d'enseignement, et ce, sans pour autant enfreindre la protection d'originalité et d'intégrité accordée aux œuvres par la LDA :

- **Section 27 – Infringement generally – The nature of the infringement might have a bearing on the determination of the damages**

Société québécoise de gestion collective des droits de reproduction (Copibec) v. Université Laval, 2017 CarswellQue 1085 (Que. C.A.; 2017-02-08) Gagnon J. [reversing 2016 CarswellQue 1651 (Que. Sup. Ct.; 2016-02-26)]

[63] En dépit de cette similitude, le juge n'a pas suivi le jugement ontarien au motif que la question en litige devant cette instance portait sur « de fausses représentations et [sur] l'usurpation de droits d'auteurs » [Fn 43 Jugement entrepris, paragr. 129], ce qui est

différent des reproches allégués par Copibec contre l'Université. **Je conçois aisément que la nature de la violation revêt une certaine importance au moment d'identifier le dommage et de fixer le préjudice. Toutefois, sur le plan des principes, il n'existe pas de différence entre la violation d'un droit d'auteur par usurpation et celle liée à la reproduction d'une œuvre sans autorisation.** Les deux contreviennent à l'interdiction contenue à l'article 27 (1) LDA.

- **Section 27 – Infringement generally – Reproducing a work without authorization constitutes infringement**

Ankenman Associates Architects Inc. v. 0981478 B.C. Ltd., 145 C.P.R. (4th) 279 (B.C. S.C.; 2017-03-01) Burke J.

[19] As a result, there is little debate that Mr. Podhora and, by and large, the Newmark Group used the architectural designs and plans in the construction of Murray's Walk. **If done without permission, this is recognized as an infringement of copyright:** *Katz v. Cytrynbaum* (1983), 1983 CanLII 557 (BC CA), 48 B.C.L.R. 72 (C.A.) [*Katz*] at 78.

- **Section 27 – Infringement generally – An implied licence is non proprietary but does need to be in writing**

Ankenman Associates Architects Inc. v. 0981478 B.C. Ltd., 145 C.P.R. (4th) 279 (B.C. S.C.; 2017-03-01) Burke J.

[22] **I also point out the implied licence granted by AAI to MWDL is non-proprietary; that is, it does not grant an interest in a right but operates as a permission to do that which would otherwise be unlawful. Proprietary licences are required to be in writing:** see S.M. McKeown and H.G. Fox, *Fox on Canadian Law of Copyright and Industrial Design*, 4th ed. (Toronto: Carswell, 2011) [*Canadian Law of Copyright*] at 19-26; *Copyright Act*, R.S.C. 1985, c. C-42, s. 13(4).

[23] With respect to the revocation of a licence, AAI has cited *Canadian Law of Copyright* at 19–29. That text notes with respect to the question of revoking a licence, the following:

It appears that a non-propriety license, where consideration has not been given, may be revoked at will, even though expenses have been incurred by the licensee on the faith of the consent.

...

Where a license has been given for consideration, it may only be revoked in accordance with the contract under which it has been granted. The rights of the parties are determined by the wording of the contract.

[24] *Katz* [*Katz v. Cytrynbaum* (1983), 1983 CanLII 557 (BC CA)] confirms **that the consent to use copyrighted material that was not paid for can be revoked unilaterally by the holder of the copyright.**

The Court, quoting *The Canadian Law of Copyright and Industrial Designs*, 2nd ed, said at 77:

If the consent is given without consideration, it can be withdrawn at any time but if it is given for valuable consideration, it will be irrevocable and will convey an equitable interest in the copyright.

- **Section 27 – Infringement generally – Not fulfilling the conditions of the licence ends the licence – A terminated licence cannot be transferred**

Ankenman Associates Architects Inc. v. 0981478 B.C. Ltd., 145 C.P.R. (4th) 279 (B.C. S.C.; 2017-03-01) Burke J.

[34] Ultimately, I conclude that **the consent given to MWDL for the use of the drawings was conditional on payment of AAAI's fees in full. When payment was not provided, its licence ended.** The terminated licence was not capable of being transferred to the respondents, who as a result used the drawings without consent.

- **Section 27 – Infringement generally – AN implied licence cannot be transferred without the consent of the copyright owner**

Ankenman Associates Architects Inc. v. 0981478 B.C. Ltd., 145 C.P.R. (4th) 279 (B.C. S.C.; 2017-03-01) Burke J.

[51] In any case, *Netupsky* [*Netupsky v. Dominion Bridge Co.*, 1971 CanLII 172 (S.C.C.)] and *Blair* [*Blair v. Osborne & Tomkins*, [1971] 2 Q.B. 78 (Eng. C.A.)] are not fatal to AAAI's claim. **The case law can be reconciled by finding that an implied licence is not transferrable without the copyright holder's consent** (as per *Katz* [*Katz v. Cytrynbaum* (1983), 1983 CanLII 557 (B.C. C.A.)], *Kaffka* [*Kaffka v. Mountain Side Developments Ltd.*, [1982] B.C.J. No 163 B.C.(S.C.)]), except if payment in full has been made (as per *Netupsky*, *Blair*).

[52] Applying this principle, **the implied licence was not capable of being transferred, because AAAI never consented to the transfer.** AAAI was also not paid in full, which makes the exception to the rule from *Netupsky* and *Blair* unavailable.

- **Section 27 – Infringement generally – Knowledge of the infringement could be derived the authorization to do reproduction**

Nintendo of America Inc. v. Go Cyber Shopping (2005) Ltd., 146 C.P.R. (4th) 369 (FC; 2017-03-01) Campbell J.

[58] Thus, the **Respondent's authorization of infringing acts by providing its customers with instructions on how to copy the 3DS Header Data is sufficient to meet the first element of the secondary infringement test.**

[59] Further, by authorizing the infringing acts, it may be inferred that the Respondent had actual or constructive knowledge of the

infringement. **Alternatively, the Respondent had notice of such facts that would have led a reasonable person to think that a breach of copyright was being committed, which is sufficient to establish the second element of secondary infringement** (*Apple FC [Apple Computer Inc v Mackintosh Computers Ltd (1986)*, 10 CPR (3d) 1 (FCTD)] at pp. 47-48).

- **Section 27 – Infringement generally – There is no infringement if there is a legislative authorization permitting the reproduction**

Geophysical Service Incorporated v. EnCana Corporation, 2017 CarswellAlta 732 (Alta. C.A; 2017-04-28) Schutz J. [affirming 2016AQBD 230 (Alta Q.B.; 2016-04-21); **leave to appeal to the Supreme Court of Canada refused (S.C.C.; 2017-11-30)**]

[97] The Trial Court made the correct finding, which in our view was amply supported, that whether a data collector is operating under the federal Accord Act or the parallel provincial legislation, the extant legislation confers upon the provincial Boards, as regulators, sole authority to collect seismic data and authorize a data collector to acquire data on frontier land or offshore. The lawful participation of data collectors in these geographical areas has always had conditions attached; in particular, permission must be obtained to enter onto Crown interests to acquire sought-after data, the data collector must report data acquired under the Regulatory Regime, and the Boards thereunder **have legislated authority to release the reported data publicly after a period of time**, for use by the broader community.

[100] In our view, the statutory interpretation most consistent with the rational inferences drawn by the Trial Court, and **most compatible with common sense, is that there is to be free and unfettered dissemination of acquired and retained data following the requisite privilege period to encourage national and international academic and entrepreneurial engagement**. And, put in place to entice the broadest possible commitment of intellectual, technological, financial, and resource management assets from the widest potential pool of players, and ensure that development of Canadian resources from non-conventional sources would be to the economic benefits of all Canadians. **In short, the legislators intended that the data be disseminated to facilitate its use; “disclosure” must then be interpreted in a manner which readily allows the data to be used. Permitting the data to be copied, squarely meets with that intention.**

[102] In the result here, the Regulatory Regime confers on the Boards the unfettered and unconditional legal right after expiry of the privilege period to disseminate, in their sole discretion as they see fit, all materials acquired from GSI and collected under the Regulatory Regime. The correct interpretation of “disclose” also confers on these

Boards the legal right to grant to others both access and opportunity to copy and re-copy all materials acquired from GSI and collected under the Regulatory Regime. That the Boards have administratively decided to extend the time during which the statutory privilege period subsists, and have made other administrative decisions about dissemination of some types of seismic data (SEG-Y), is strictly within their regulatory and administrative prerogatives.

- **Section 27 – Infringement generally – An implied licence to use renovation plans does not authorize the reproduction or modification of those plans**

Evans v. Upward Construction & Renovation Ltd., 2017 CarswellBC 2342 (B.C. Prov. Ct.; 2017-05-08) Merrick J.

[23] **While the claimants certainly had an implied licence to use the renovation design plan, any reproduction or modification requires the consent of the defendant.** By refusing to provide the claimants with the AUTOCAD file, the defendant was clearly not consenting to any reproduction or modification as it was entitled to do pursuant to Sections 3 and 14.1 of the *Copyright Act*.

- **Section 27 – Infringement generally – The terms of a licence determine the authorized use of the licence material**

Geophysical Service Incorporated v Murphy Oil Company Ltd, 2017 CarswellAlta 1321 (Alta. Q.B.; 2017-07-26) Eidsvik J.

[61] It is possible that there was a breach of copyright in sharing licenced data. **The terms of the licence would have dictated the proper use of that data** however and without it being plead it is not possible to determine if indeed there was a breach of copyright, or not.

[62] In any event, again, this claim likely would be lapsed because it occurred over 10 years before GSI filed its Statement of Claim, and there is no basis on this record to find fraudulent concealment to suspend this limitation period. Accordingly, the claim would be dismissed on this basis as well, although I do not need to determine this issue at this point considering my findings above.

- **Section 27 – Infringement generally – Infringement occurs when something is done without the copyright owner’s consent**

Stork Market Inc v. 1736735 Ontario Inc. (Hello Pink Lawn Cards Inc), 149 C.P.R. (4th) 287 (F.C.; 2017-08-22) Southcott J.

[77] Section 3 of the *Copyright Act* provides in part that copyright, in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever. Under s. 27(1) of the *Copyright Act*, **it is in an infringement of copyright for any person to do, without the consent of the owner of the copyright, anything that by that statute only the owner of the copyright has the right to do.**

- **Section 27 – Infringement generally – Absent direct evidence the copyright owner must prove access by the defendant and similarities between the works – If so, the defendant must prove independent creation - Infringement is a matter of fact and degree – For infringement to occur a substantial part of the protected work must have been taken or imitated**

Lainco inc v. Commission scolaire des Bois-Francs, 2017 CarswellNat 5087 (F.C.; 2017-09-12) LeBlanc J. [appeal A-300-17]

[133] **Afin d'établir la contrefaçon d'une oeuvre sur laquelle existe un droit d'auteur, le titulaire du droit doit, faute d'une preuve directe, laquelle est souvent impossible à obtenir, démontrer que la partie qu'il tient responsable de la contrefaçon a eu accès à l'oeuvre et qu'il existe des similitudes entre celle-ci et l'oeuvre contrefaite. Si ce fardeau est rencontré, il y a renversement du fardeau de la preuve sur les épaules du défendeur qui doit alors démontrer, pour espérer repousser l'action du titulaire du droit d'auteur, que les similitudes que son oeuvre présente avec l'oeuvre présumée avoir été copiée, sont le fruit d'une création indépendante** (*Cinar CSQ*, aux para 246 à 249, citant les ouvrages *Canadian Copyright Act annotated*, vol 2, Toronto, Thomson Carswell, mise à jour continue, aux pp 27-7 et 27-8; Normand TAMARO, *La Loi sur le droit d'auteur annotée*, 7^e éd., Scarborough, Thomson Carswell, 2006, à la p 596, et MCKEOWN, *Fox on Canadian Law of Copyright and Industrial Designs*, 4^e éd, Scarborough, Thomson Carswell, Édition à feuilles mobiles, aux pp 24-54.5 et ss; *Robinson c. Films Cinar inc.*, 2011 QCCA 1361 (C.A. Que.), au para 104 [*Cinar CAQ*]; voir aussi *Gilker*, (1991), 4:1 CPI 7, 2^e partie, à la p 27). Il est à noter que dans *Cinar CSC* [*Robinson c. Films Cinar inc.* (2013 SCC 73)], la question de l'accès à l'oeuvre ne se posait pas puisque les appelantes ne la contestaient plus (*Cinar CSC*, au para 29).

[134] **La contrefaçon n'est pas limitée à la copie conforme de l'oeuvre puisqu'elle peut prendre la forme d'une imitation déguisée pour autant qu'elle reprenne sinon la totalité, à tout le moins, une partie substantielle ou importante de l'oeuvre** (*Cinar CAQ*, au para 57). Le concept de « partie importante » d'une oeuvre a été discuté en détail par la Cour suprême dans *Cinar CSC*. Toutes les parties au présent dossier s'y sont abondamment référées d'ailleurs.

- **Section 27 – Infringement generally – Infringement is a matter of fact and degree – Infringement must be determined globally with respect to the copied original part of the protected work - The cumulative effect of the reproduced characteristic will determine whether there is infringement or not**

Lainco inc v. Commission scolaire des Bois-Francs, 2017 CarswellNat 5087 (F.C.; 2017-09-12) LeBlanc J. [appeal A-300-17]

[135] **Ce concept est un concept « souple » et avant tout une question de fait et de degré**, nous dit la Cour suprême. On détermine, poursuit-elle, ce qui constitue une partie importante de l'oeuvre « en fonction de l'originalité de l'oeuvre qui doit être protégée par la [Loi] » (*Cinar CSC*, au para 26). **Une partie importante d'une oeuvre sera donc celle, règle générale, « qui représente une part importante du talent et du jugement de l'auteur exprimés dans l'oeuvre »** (*Cinar CSC*, au para 26). **Ce qui importe à cet égard, c'est l'importance qualitative, et donc quantitative, de la reproduction** (*Cinar CSC*, au para 26). **Cet exercice requiert une approche globale** (*Cinar CSC*, aux para 35-36).

[138] Il importe donc, selon la Cour suprême, non pas d'« analyser l'importance des caractéristiques reproduites en les examinant chacune isolément», mais bien plutôt **d'examiner « l'effet cumulatif des caractéristiques reproduites de l'oeuvre afin de décider si elles constituent une partie importante du talent et du jugement dont a fait preuve [l'auteur] dans l'ensemble de son oeuvre »**

- **Section 27 – Infringement generally – Skil and judgment to create a copy does not absolve the infringement**

Lainco inc v. Commission scolaire des Bois-Francs, 2017 CarswellNat 5087 (F.C.; 2017-09-12) LeBlanc J. [appeal A-300-17]

[207] En d'autres termes, le fait que Pluritec ait pu déployer talent et jugement dans la conception de la structure du Complexe Victoriaville n'avance pas sa cause si, utilement, ladite structure reproduit une partie importante de celle du Complexe Artopex. J'ai déjà conclu que c'était le cas. **On peut très bien imaginer le talent, le jugement et les moyens déployés par les contrefacteurs** de l'oeuvre de M. Robinson, dans *Cinar [Robinson c. Films Cinar inc. (2013 SCC 73)]*, **pour créer l'oeuvre contrefactrice, laquelle comportait des différences notables avec l'oeuvre** de M. Robinson et constituait un projet fini, déjà diffusé sur les écrans de télévision.

- **Section 27 – Infringement generally – It is up to the defendant to evidence any consent he wishes to rely on**

Éditions Québec Amérique inc. v. Druide informatique inc., 2017 CarswellQue 8069 (Que. Sup. Ct.; 2017-09-14) Poisson J. [leave to appeal granted; partial stay ordered 2017 CarswellQue 11485 (Que. C.A.; 2017-12-21)]

[206] Le Tribunal retient de ces enseignements qu'afin de démontrer la violation de ses droits d'auteur, [Plaintiff] Québec Amérique doit convaincre le Tribunal, selon la prépondérance des probabilités, qu'elle est titulaire du droit d'auteur sur les Œuvres et que les gestes posés par [Defendant] Druide informatique violent, sans son consentement, ses droits exclusifs.

[207] Il revient à **Druide informatique** [the defendant] **de prouver, selon la prépondérance des probabilités, les faits démontrant qu'elle a agi avec le consentement, explicite ou implicite, de Québec Amérique** [the plaintiff].

[208] Le consentement peut avoir été donné verbalement ou implicitement.

[210] Il importe de préciser que le consentement à poser certains actes n'emporte pas un consentement à toutes les violations reprochées [Fn 105 Normand TAMARO, *Loi sur le droit d'auteur, texte annoté*, 10^e édition, Carswell, p. 554-555]

- **Section 27 – Infringement generally – Absence of consent and copy are essential elements of infringement**

Lapointe v. Broquet inc., 2017 QCCQ 13516 (Que. Ct. – Small Claims) 2017-09-15) Dupuis J.

[45] **Pour qu'il y ait violation du droit d'auteur, il faut à la fois commission d'un acte telle la reproduction d'une œuvre sans l'autorisation du titulaire de ce droit, et que cette violation ne soit pas fortuite** mais découle du fait que le défendeur a eu accès, directement ou indirectement, à l'œuvre de l'auteur et qu'il ait reproduit celle-ci [Fn9 Stéphane GILKER, *Principes généraux du droit d'auteur*, Congrès annuel du Barreau du Québec 2009, Barreau du Québec – Service de la Formation continue, Montréal 2009, p. 79].

- **Section 28.1 – Infringement generally – Not attributing the authorship of a work is an infringement of the moral right of the author**

Saad v. Le Journal de Montréal, 2017 QCCQ 122 (Que. Ct. – Small Claims; 2017-01-19) Chalifour J.

[33] L'article 28.1 de la Loi précise qu'il y a **violation du droit moral en cas d'omission non autorisée, par exemple, lorsqu'on omet un crédit alors que l'auteur exige d'être identifié.**

[34] Il est admis qu'aucune mention de l'identité de M. Saad à titre d'auteur des photographies ne lui fut attribuée, et ce malgré la revendication de ce dernier.

[35] Ainsi, non seulement le droit d'auteur de M. Saad fut violé par la reproduction et la communication non autorisées de ses œuvres, mais son droit moral fut aussi bafoué.

- **Section 28.1 – Infringement generally – Reproducing a work without crediting the author constitutes an infringement of the author's moral right of authorship**

Jomphe (Karjessy) v. Société St-Jean-Baptiste de Montréal, 2017 QCCQ 7303 (Que. Ct. – Small Claims; 2017-06-22) Gibbens J.

[21] Il n'est pas question ici de transformation portant atteinte à l'intégrité de l'œuvre, mais puisque la reproduction des photographies a été effectuée avec omission de crédit de leur auteur, il y a eu violation des droits moraux de M. Jomphe.

- **Section 28.1 – Infringement generally – The fair dealing exception also applies to moral rights**

Wiseau Studio v. Harper, 2017 CarswellOnt 16881 (Ont. Sup. Ct.; 2017-11-01) Koehnen J.

[120] **The concept of moral rights is also subject to the user right of fair dealing** enshrined in the *Copyright Act*. As I have already found, *Room Full of Spoons* constitutes fair dealing with *The Room*.

- **Section 28.2 – Nature of right of integrity – The burden is on the plaintiff to prove a modification of his work**

Chayer v. OVH inc., 2017 QCCQ 5596 (Que. Ct. – Small Claims; 2017-05-12) Hamel J.

[20] Toutefois, le Tribunal rejette la réclamation en dommages moraux, **dans la mesure où la prépondérance de la preuve ne permet pas au Tribunal de conclure qu'il y a eu altération des fichiers sonores audio** appartenant à [Plaintiff] Chayer de la part de [Defendant] Antigny.

- **Section 29 – Research, private study, etc. – Not all the fairness factors are relevant in all cases nor is any one factor usually determinative**

Canadian Copyright Licensing Agency (Access Copyright) v. British Columbia (Education), 148 C.P.R. (4th) 13 (F.C.A.; 2017-01-27) Gauthier J. [varying in part 2016 CarswellNat 436 (Cop. Bd.; 2016-02-19)]

[45] In *Alberta [Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)]*, 2012 SCC 37, [2012] 2 S.C.R. 345], the Supreme Court focused on fair-dealing for the purpose of private study. The Court had to deal with the viewpoint from which fair dealing for this purpose is to be assessed – the teacher or the student, particularly when multiple copies are made for one or more classes. Shortly thereafter, the Act was amended to include “education” as another purpose in respect of which users could rely on section 29 of the Act. **In my view, this addition removed the dichotomy between teachers’ or students’ viewpoints under the section 29 analysis, when education is the relevant purpose.**

[46] It is also well-known and reiterated in *Alberta [Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)]*, 2012 SCC 37, [2012] 2 S.C.R. 345] that the factors set out in *CCH* originate

from the decision of Lord Denning in *Hubbard v. Vosper*, [1972] 1 All E.R.1023 (C.A.), at 1027. A review of these last two decisions makes it abundantly clear **that not all the fairness factors are relevant in all cases nor is any one factor usually determinative.**

- **Section 29 – Research, private study, etc. – What constitutes fair dealing is a question of fact – Aggregate volume of the total pages is not determinative of fairness**

Canadian Copyright Licensing Agency (Access Copyright) v. British Columbia (Education), 148 C.P.R. (4th) 13 (F.C.A.; 2017-01-27) Gauthier J. [varying in part 2016 CarswellNat 436 (Cop. Bd.; 2016-02-19)]

[91] As mentioned, Access argues that the Board ought to have followed the Supreme Court’s teachings in *CCH* [*CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339] and *Alberta* [*Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37, [2012] 2 S.C.R. 345], and ought to have considered evidence of the aggregate volume of the total pages copied - this is not the teaching of these cases.

[92] As discussed above, *CCH* merely teaches that what is to be examined under this factor is how works are dealt with, such as whether the copies are widely distributed. Moreover, in *Alberta* while the Supreme Court states **that the “quantification of the total number of pages copied” is considered under the “character of the dealing factor”** (*Alberta* at para. 29), **it goes on to say that the Board in that case had considered the quantification of total pages copied by looking at whether “multiple copies of the texts were distributed to entire classes”** (*Alberta* at para. 30). The Supreme Court did not find any error on the part of the Board in this regard.

[93] On my reading of these decisions, the Supreme Court does not restrict the manner in which the Board may assess this factor to solely looking at the aggregate volume of pages copied or otherwise. In explaining why looking at the aggregate volume of copies was not helpful to its assessment of whether the copies were widely distributed, the Board reasonably applied the Supreme Court’s teachings in *CCH* and *Alberta*. I find no reviewable error on the part of the Board in this respect. In fact, this finding is reasonable even if one were to consider that the overall number of copies represents approximately 90 pages per student per year. I agree with the Consortium that this figure does not support the view that this factor could only tend to a conclusion that the dealing was not fair. I thus cannot conclude that the Board erred in concluding that this factor, on the facts of this case, was not particularly useful to reach its ultimate conclusion on fairness. This is

why almost all exposures were classified in the neutral column for this factor (see also Reasons at para. 428).

- **Section 29 – Research, private study, etc. – Reproduction for education purpose is one of the fair dealing exception**

Société québécoise de gestion collective des droits de reproduction (Copibec) v. Université Laval, 2017 CarswellQue 1085 (Que. C.A.; 2017-02-08) Gagnon J. [reversing 2016 CarswellQue 1651 (Que. Sup. Ct.; 2016-02-26)]

[47] La LDA présume aussi qu'une reproduction en totalité ou en partie d'une œuvre sans le consentement du titulaire du droit constitue une violation du droit d'auteur [Fn25 *Loi sur le droit d'auteur*, L.R.C. 1985, ch. C-42, art. 27 (1)]. Il existe toutefois une exception à cette règle [Fn26 *CCH Canadienne Ltée c. Barreau du Haut-Canada* [2004] 1 R.C.S. 339, 2004 CSC 13, paragr. 48.] et elle a d'ailleurs été soulevée par l'Université lors du débat sur la demande d'autorisation. **Il s'agit, dans les circonstances prévues à la loi, de permettre la reproduction de certaines œuvres en application de la notion de « [l']utilisation équitable » à des fins d'enseignement**, et ce, sans pour autant enfreindre la protection d'originalité et d'intégrité accordée aux œuvres par la LDA :

- **Section 29 – Research, private study, etc. – The burden to show that a fair dealing applies lies on the shoulders of the one who wishes to benefit from it – The proof is more than a *prima facie* one**

Société québécoise de gestion collective des droits de reproduction (Copibec) v. Université Laval, 2017 CarswellQue 1085 (Que. C.A.; 2017-02-08) Gagnon J. [reversing 2016 CarswellQue 1651 (Que. Sup. Ct.; 2016-02-26)]

[67] Tout comme le juge de première instance, je reconnais que l'utilisation équitable est un droit à la portée de l'Université. **Toutefois, sur le plan de la procédure, il revient à l'Université qui soulève ce droit de démontrer qu'elle satisfait aux conditions d'application de cette mesure d'exception** [Fn45 *CCH Canadienne Ltée c. Barreau du Haut-Canada* [2004] 1 R.C.S. 339, 2004 CSC 13, paragr. 48-49-50.]

[68] Le juge a donc commis une erreur en mettant sur un même pied l'allégation de reproduction illégale soulevée par Copibec sujette au stade de l'autorisation à une simple démonstration *prima facie* et l'allégation de l'Université portant sur son droit à l'utilisation équitable des œuvres qui, elle, **devra être démontrée au fond selon la norme de la prépondérance de la preuve**.

- **Section 29 – Research, private study, etc. – There is a two step approach: purpose and fairness**

Trader v CarGurus, 145 C.P.R. (4th) 415 (Ont. Sup. Ct.; 2017-04-06) Conway J.

[36] There is a two-step test in determining whether this [fair dealing] defence has been established – **the first step is to determine whether the dealing is for the purpose of either “research” or “private study”**. **The second step assesses whether the dealing is “fair”** and looks at six factors: the purpose, character, and amount of the dealing; the existence of any alternatives to the dealing; the nature of the work; and the effect of the dealing on the work: *CCH, supra*, at para. 53. The onus of establishing this defence is on CarGurus.

- **Section 29 – Research, private study, etc. – Parody is one of the fair dealing exception – Parody involves the evocation and mockery**

United Airlines, Inc. v. Cooperstock, 147 C.P.R. (4th) 251 (F.C.; 2017-06-23) Phelan J.

[110] However, the legislation is silent as to the content, meaning, or scope of “parody”. Therefore, the words of the legislation must be “read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament” (Elmer Driedger, *Construction of Statutes*, 2d ed (Toronto: Butterworths, 1983) at 87, cited in *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at para 21).

[113] **In the Canadian context, parody was not an exception to copyright infringement prior to the introduction of the parody exception in s 29. Plaintiffs who attempted to argue that parody could be included within the realm of “criticism” were unsuccessful** – for example, in *Michelin [Cie générale des établissements Michelin-Michelin & Cie v CAW-Canada]* (1996), 71 C.P.R. (3d) 348 (F.C.T.D.), Justice Teitelbaum rejected the notion that criticism was synonymous with parody.

[119] I find that the definition of parody used by the European Court of Justice [in *Deckmyn v Vandersteen* (2014), Case C 201/13 (Court of Justice of the EU)] is consistent with the ordinary meaning of the term, the purpose and scheme of the fair dealing provisions in the *Copyright Act*, and the intention of Parliament. **Parody should be understood as having two basic elements: the evocation of an existing work while exhibiting noticeable differences and the expression of mockery or humour**. I would also note that the fair dealing exception for the purpose of parody in s 29 of the *Copyright Act* **does not require a user to identify the source of the work being parodied**. In addition, in my view, **parody does not require that the expression of mockery or humour to be directed at the exact thing being parodied**. It is possible, for example, for a parody to evoke a work such as a logo while expressing mockery of the source company, or

to evoke a well-known song while expressing mockery of another entity entirely.

- **Section 29 – Research, private study, etc. – Confusion may deny fairness of the dealing**

United Airlines, Inc. v. Cooperstock, 147 C.P.R. (4th) 251 (F.C.; 2017-06-23) Phelan J.

[123] **I would note that it is questionable whether the parody exception may successfully be invoked when there is confusion.** Parody depends on the recipient or viewer recognizing that the work in question is a spoof – therefore, **it will be difficult to establish that the true purpose of a given work is parody when it is confusingly similar to the original work.**

- **Section 29 – Research, private study, etc. – Parody requires humour**

United Airlines, Inc. v. Cooperstock, 147 C.P.R. (4th) 251 (F.C.; 2017-06-23) Phelan J.

[132] When considering parody, available alternatives to the dealing cannot be weighed too heavily. This is because although alternatives may be available, they may not be as effective in meeting the goals of parody (i.e., mocking or criticizing in a humorous manner). In this case, the appropriate question would seem to be this: would the Defendant's use of alternative logos and website design be as effective in mocking and criticizing the Plaintiff? In fact, the Defendant acknowledged that there were alternatives to the dealing, but argued that his criticism would be less humorous and less effective if he made use of such alternatives.

[133] However, in my view, alternatives to the current design of UNTIED.com would be effective in meeting the goals of the website, if the overall purpose of the website is to be properly understood as collating complaints about the Plaintiff, offering passengers a resource for understanding their rights, and pressuring the Plaintiff to provide more effective customer service. It is unclear why substantial copying of the United Website or the other copyrighted works was necessary in order to meet the parodic goal of humorously criticizing the Plaintiff; as discussed above, **parody requires humour, whereas the Defendant's website was simply mean-spirited. The minimal use of certain parodic elements in the past (i.e., "fly the unfriendly skies" and the wordplay between "united" and "untied") present an example of an alternative to the current dealing. Indeed, if the Defendant truly wished the best outcome for the Plaintiff's passengers, it is unclear why he would run any risk of confusing passengers.**

[134] Prior to the redesign of the website, UNTIED.com was able to fulfill its purpose without substantial copying of the United Website. Therefore, I find that this factor weighs against a finding of fairness.

- **Section 29 – Research, private study, etc. – the purpose of the dealing must be analysed to determine if it is fair**

United Airlines, Inc. v. Cooperstock, 147 C.P.R. (4th) 251 (F.C.; 2017-06-23) Phelan J.

[141] Parody is not simply a defence to copyright infringement – it is also an aspect of free speech. However, like all free speech, it is not unrestricted. The Defendant's website meets the first step of the *CCH* [*CCH Canadian Ltd v Law Society of Upper Canada*, 2004 SCC 13] test, as it is for the allowable purpose of parody, but it does not meet the second step of the test. **The questionable purpose of the dealing, amount of the dealing, and effect of the dealing all weigh in favour of the conclusion that this dealing is not fair.**

- **Section 29 – Research, private study, etc. – Fair dealing is a right for the user – The burden of establishing fair dealing lies on the user**

Canadian Copyright Licensing Agency v. York University, 149 C.P.R. (4th) 375 (F.C.; 2017-07-12) Phelan J.

[250] **The exceptions to copyright infringement enacted by Parliament serve to counterbalance the exclusive rights of copyright owners.** One of the most important exceptions to infringement is “fair dealing” as set forth in ss 29, 29.1, and 29.2 of the Act.

[251] Following the *Théberge* [(*Théberge v Galerie d'Art du Petit Champlain inc*, 2002 SCC 34] decision, the Supreme Court of Canada rendered the decision in *CCH* [*CCH Canadian Ltd v Law Society of Upper Canada*, 2004 SCC 13]. As the Supreme Court of Canada made clear, “fair dealing” **is a positive user right, not merely a defence to infringement. However, the burden of establishing fair dealing rests with the party asserting the right.**

- **Section 29 – Research, private study, etc. – This is a two-step analysis: whether the use is for an allowable purpose and then whether it is fair**

Canadian Copyright Licensing Agency v. York University, 149 C.P.R. (4th) 375 (F.C.; 2017-07-12) Phelan J.

[256] **The fairness assessment is only engaged if the Court is satisfied that the dealing was for an “allowable purpose” under s 29** (i.e., research, private study, education, parody, or satire). **It is a low threshold to meet** and there is no real issue that York has established that the dealing (copying) was for the allowable purpose of education. Having established an allowable purpose, the Court must turn to the second step in the analysis, which does not incorporate

considerations of “education” as being “fair” or of education being part of the fairness factor assessment

- **Section 29 – Research, private study, etc. – Convenience of the user is not a factor to be considered to ascertain the fairness of the use**

Canadian Copyright Licensing Agency v. York University, 149 C.P.R. (4th) 375 (F.C.; 2017-07-12) Phelan J.

[309] While arbitrary or bright line thresholds may be convenient, **convenience of the user is not a factor** that the Supreme Court of Canada had directed courts to consider. Even if it was, there must still be an acceptable rationale for such thresholds.

- **Section 29 – Research, private study, etc. – Analysis of the factors pertaining to the fairness of dealing is a question of fact – The burden to prove fairness lies on the defendant**

Cedrom-SNI inc. v. Dose Pro inc., 2017 CarswellQue 6386 (Que. Sup. Ct.; 2017-07-24) Duprat J.

[65] L’exception de l’utilisation équitable prévue à la *LDA* **établit un équilibre entre les droits des usagers et les droits du titulaire du droit d’auteur. Il appartient aux défenderesses d’établir que l’exception s’applique. Les exceptions identifiées dans la Loi sont exhaustives.**

[66] **L’analyse demeure une question de faits** et les tribunaux ont identifié les facteurs qui se retrouvent dans l’analyse de l’exception. Il s’agit d’une approche en deux étapes. Dans un premier temps, l’usager doit établir l’une des exceptions, soit l’usage à des fins d’étude privée, de recherche, d’éducation, de parodie ou satire, de critique ou compte rendu, ou pour la communication des nouvelles et, dans un second temps, justifier que l’usage est bel et bien équitable en fonction de six (6) facteurs spécifiques, en l’espèce, le but, la nature de l’utilisation, l’ampleur de l’utilisation, la nature de l’œuvre, les solutions de rechange à l’utilisation, et l’effet de l’utilisation sur l’œuvre.

[93] À la lumière de l’ensemble de ces facteurs, le Tribunal ne peut conclure que l’utilisation des titres et des amorces par les défendeurs est équitable. Accepter la position des défendeurs à l’effet qu’ils peuvent librement utiliser les titres et/ou les amorces et générer pour eux-mêmes un revenu, sans en créer pour les demandeurs, n’est pas, dans l’esprit du Tribunal, équitable. **Le véritable motif des défendeurs, c’est d’utiliser un modèle d’affaire où ils peuvent obtenir gratuitement l’œuvre et la reproduire pour générer un bénéfice.** Dans l’optique où le Tribunal doit maintenir un équilibre entre l’intérêt public et le droit des éditeurs, le présent litige favorise les demandeurs.

- **Section 29 – Research, private study, etc. – The burden to prove one of the fair dealing exceptions lies on the defendant**

Labelle v. Brillant, 2017 QCCQ 12285 (Que. Ct. - Small Claims; 2017-07-28) Gibbens J.

[18] **Aucune preuve n’a été apportée permettant de conclure que la Chanson Originale a été utilisée pour des fins d’étude privée, de recherche ou d’éducation.** Rappelons que la chanson des Batteux Slaques se trouve sur un album qui est vendu à des fins commerciales. Le Tribunal ne voit pas non plus en quoi il pourrait être question de parodie ou de satire.

- **Section 29.1 – Criticism or review – An objective assessment of the real purpose of the use is required**

Wiseau Studio v. Harper, 2017 CarswellOnt 16881 (Ont. Sup. Ct.; 2017-11-01) Koehnen J.

[61] Section 29.1 of the Copyright Act provides that fair dealing for the purpose of “criticism or review” does not infringe copyright if the source from which the material is taken is “mentioned”. Section 29.2 contains a similar exception for the purpose of “news reporting”.

[65] **To determine whether a particular use amounts to fair dealing, the court should attempt to make an objective assessment of the defendants’ real purpose or motive in using the copyrighted work:** *United Airlines Inc. v. Jeremy Cooperstock* 2017 FC 616 (CanLII), 2017 F.C. 616 (CanLII) at para. 122. **This should include an assessment of whether there is some sort of ulterior motive behind the dealing:** *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37 (CanLII) at para. 23, [2012] 2 S.C.R. 345.

[67] While that test [*Campbell v. Acuff– Rose Music, Inc.* 510 US 569 (1994) at 579] is phrased slightly differently than the test in *CCH* and *United Airlines*, its underlying purpose is similar: to determine if the copying has been done so the copier can appropriate for themselves the benefits associated with the original or whether the copying is done for some more socially constructive purpose.

[68] At the request of both parties I have viewed the entirety of *Room Full of Spoons* and am satisfied that its use of any copyrighted materials is for the purpose of criticism, review or news. While the defendants no doubt have a commercial purpose behind the creation and marketing of their documentary, that does not detract from its character as criticism, review or news.

[69] It is clear from watching *Room Full of Spoons* that the purpose of showing brief excerpts from *The Room* is not to reproduce the movie but to provide a base for commentary that the documentary provides on the clip in question. *Room Full of Spoons* follows a fairly consistent pattern in this regard. It introduces the excerpt through an interview with an actor, crewmember or fan of the movie who provides some sort of commentary. The clip is then shown to validate or amplify on the commentary. In some cases the order is reversed. In other cases, the clip is framed by both an introductory and conclusory comment. What is clear is that the clip is reproduced to provide analysis, not to reproduce the movie.

- **Section 29.1 – Criticism or review – The purpose of the dealing must first be analyzed and thereafter its fairness – The fairness of the amount copied may vary according to the genre**

Wiseau Studio v. Harper, 2017 CarswellOnt 16881 (Ont. Sup. Ct.; 2017-11-01)
Koehnen J.

[76] The fact that the use to which *Room Full of Spoons* puts copyrighted materials is for the purpose of review, critique or news does not end the inquiry. The court must still determine whether the use is fair.

[77] The copyright act does not define fair use.

[79] **The Purpose of the Dealing** has already been dealt with above. I find that the copyrighted material was used for the purpose of review, critique and news.

[80] **The character of the dealing:** It may, depending on the circumstances, be relevant to consider the custom and practice in a particular field to determine whether the dealing is fair: *CCH* at para. 55. The relevant practice to consider here is that of documentary filmmaking for the purposes of review, critique or news. It is common practice in documentary films to show a film clip of another event and then have people comment on the content of the clip. That is precisely the character of the dealing in *Room Full of Spoons*. Incorporating passages from published works or films for the purposes of commenting on them is a type of dealing that is fair: *Time Warner Entertainments Co. LP* at 14 [*Time Warner Entertainments Co. L P v. Channel Four Television Corporation PLC* [1994] E.M.L.R. 1,]. In *Room Full of Spoons*, the use of selected clips from *The Room* was consistent with this practice. The clips are used to support commentary about how the film was made, its artistic choices, the experience of actors and crew members and to explain how the movie became a cult phenomenon.

[81] **Amount of the dealing:** The documentary uses seven minutes of clips from the movie. The plaintiffs argue that the defendants have introduced no evidence of practice in the industry to show that this is a reasonable amount of dealing. While I acknowledge that the onus is on the defendants to establish fair dealing, I also note that the plaintiffs have not introduced any evidence to suggest that using seven minutes of excerpts is an unreasonable amount of dealing.

[82] **The amount copied may be more or less fair depending on the purpose [...]**

[83] **A serious film critique does, however, require that you spend sufficient time showing excerpts of the film itself**

- **Section 29.1 – Criticism or review – Credit shall be given for fair dealing to apply**

Wiseau Studio v. Harper, 2017 CarswellOnt 16881 (Ont. Sup. Ct.; 2017-11-01) Koehnen J.

[91] Sections 29.1 and 29.2 of the *Copyright Act* allow fair dealing for the purpose of criticism, review or news reporting **provided the source of the copyrighted material is “mentioned”**.

[99] On the authorities I was presented [[1997] 2 F.C.R. 306, 1996 CanLII 11755 (FC), and *Copyright and Fair Dealing Guidelines for Documentary Filmmakers prepared by the Documentary Organization of Canada* (Toronto: Centre of Social Innovation, 2010)], including a credit at the end of *Room Full of Spoons* should satisfy the attribution requirement.

- **Section 29.1 – Criticism or review – Fair dealing also applies to moral rights**

Wiseau Studio v. Harper, 2017 CarswellOnt 16881 (Ont. Sup. Ct.; 2017-11-01) Koehnen J.

[120] **The concept of moral rights is also subject to the user right of fair dealing enshrined in the *Copyright Act*.** As I have already found, *Room Full of Spoons* constitutes fair dealing with *The Room*.

- **Section 29.2 – News reporting – Credit shall be given for fair dealing to be found – The work reproduced is to be relevant to the new**

Saad v. Le Journal de Montréal, 2017 QCCQ 122 (Que. Ct. – Small Claims; 2017-01-19) Chalifour J.

[30] JdM [the defendant] est mal fondée d’invoquer cette exception [section 29.2 of the *Copyright Act*] pour deux motifs :

i) **les prescriptions requises pour profiter de l’exception n’ont pas été respectées puisqu’aucune mention n’identifiait M. Saad comme auteur;**

ii) l'utilisation des photographies n'était qu'accessoire à la nouvelle, donc non requise pour sa communication; M. Chevalier insiste d'ailleurs dans son témoignage pour souligner que les photographies de M. Saad furent reproduites en très petit format et avaient peu d'impact.

[31] **L'article 29.2 de la Loi est une exception et son application doit être appréciée en tant que tel.** Il ne s'agit pas en l'espèce d'un cas lui donnant ouverture.

- **Section 29.2 – News reporting – The reproduction must be done in the context of news reporting – When there is infringement there is prejudice**
Cedrom-SNI inc. v. Dose Pro inc., 2017 CarswellQue 6386 (Que. Sup. Ct.; 2017-07-24) Duprat J.

[72] Il demeure l'exception prévue à l'article 29.2 LDA soit l'utilisation pour la communication des nouvelles (*for the purpose of news reporting*).

[73] Pour les raisons qui suivent, le Tribunal est d'avis que les défendeurs n'établissent pas qu'il s'agit d'une telle utilisation. **Les défendeurs ne rapportent pas une nouvelle mais plutôt le titre ou l'amorce qui concerne cette nouvelle.** Ils ne reproduisent pas le titre ou l'amorce dans le contexte d'un reportage.

[93] À la lumière de l'ensemble de ces facteurs, le Tribunal ne peut conclure que l'utilisation des titres et des amorces par les défendeurs est équitable. Accepter la position des défendeurs à l'effet qu'ils peuvent librement utiliser les titres et/ou les amorces et générer pour eux-mêmes un revenu, sans en créer pour les demandeurs, n'est pas, dans l'esprit du Tribunal, équitable. Le véritable motif des défendeurs, c'est d'utiliser un modèle d'affaire où ils peuvent obtenir gratuitement l'œuvre et la reproduire pour générer un bénéfice. Dans l'optique où le Tribunal doit maintenir un équilibre entre l'intérêt public et le droit des éditeurs, le présent litige favorise les demandeurs.

[100] De ce qui précède, le Tribunal conclut qu'en apparence les conditions d'utilisation des sites web de La Presse, du Devoir et du Soleil empêchent l'utilisation commerciale de son contenu. La preuve établit que les défendeurs ont eu connaissance de ces conditions et elles ont poursuivies malgré tout leur reproduction. Il y a donc une apparence de droit clair en faveur des demanderesses sur cet aspect.

[102] Le Tribunal est en accord avec la proposition soumise par les demandeurs à l'effet qu'en matière de droit d'auteur, dès qu'il existe une constatation de la violation du droit, le préjudice est présent.

[105] En somme, le Tribunal est satisfait qu'il y a ici démonstration que si une injonction interlocutoire n'est pas accordée, les demandeurs en souffriront un préjudice irréparable et ceci en tenant compte de la violation du droit d'auteur, mais aussi de la perte d'achalandage sur les sites et de la perte de clientèle.

- **Section 29.2 – News reporting – For the fair dealing provisions to come into force, their conditions must be respected**

Cedrom-SNI inc. v. Dose Pro inc., 2017 CarswellQue 6386 (Que. Sup. Ct.; 2017-07-24) Duprat J. [footnote omitted]

[78] Les articles 29.1 et 29.2 exigent que le nom de l'auteur soit mentionné si ce renseignement figure dans la source. **Or, la preuve indique que le nom de l'auteur, c'est-à-dire le journaliste, n'est pas présent dans la reproduction**, sauf en de rares occasions, bien qu'il soit généralement disponible [...].

[79] En soi, ceci est suffisant pour mettre de côté l'exception sous les articles 29.1 et 29.2 puisque **l'utilisateur se doit de respecter les conditions propres à l'utilisation équitable**.

- **Section 29.2 – News reporting – Credit shall be given for fair dealing to apply**

Wiseau Studio v. Harper, 2017 CarswellOnt 16881 (Ont. Sup. Ct.; 2017-11-01) Koehnen J.

[91] Sections 29.1 and 29.2 of the *Copyright Act* allow fair dealing for the purpose of criticism, review or news reporting **provided the source of the copyrighted material is "mentioned"**.

[99] On the authorities I was presented [[1997] 2 F.C.R. 306, 1996 CanLII 11755 (FC), and *Copyright and Fair Dealing Guidelines for Documentary Filmmakers prepared by the Documentary Organization of Canada* (Toronto: Centre of Social Innovation, 2010)] including a credit at the end of *Room Full of Spoons* should satisfy the attribution requirement.

- **Section 29.21 – Non-commercial user-generated content – Not all acts of making available to the public constitute publication.**

Ouichou for the reproduction of three video excerpts [Licence denied to the application by], 2017 CarswellQue 2245 (Cop. Bd.; 2017-05-11), the Board

[12] More broadly, the Act contemplates the possibility that **not all acts of making available to the public constitute publication**. Subsection 29.21(1) of the Act, which sets out an exception in relation to the use of existing works for the creation of new works, requires the source work to have been "published or otherwise made available to the public."

[17] In contrast, it is this exact possibility that appears to have been considered in the drafting of the “user-generated content” exception in section 29.21 of the Act, which permits the use of works that have been “published or otherwise made available to the public.”

- **Section 29.21 – Non-commercial user-generated content – There is a requirement that the source work to have been “published or otherwise made available to the public**

Hadley for the reproduction of a post [Licence denied to the application by], 2017 CarswellNat 2247, (Cop. Bd.; 2017-05-11), the Board

[12] More broadly, the Act contemplates the possibility that not all acts of making available to the public constitute publication. **Subsection 29.21(1) of the Act, which sets out an exception in relation to the use of existing works for the creation of new works, requires the source work to have been “published or otherwise made available to the public.”**

[17] In contrast, it is this exact possibility that appears to have been considered in the drafting of the “user-generated content” exception in section 29.21 of the Act, which permits the use of works that have been “published or otherwise made available to the public.”

- **Section 31 – Retransmission of local and distant signals – This section does not deals with the right of remuneration for retransmission of a copyright program**

Bell Canada v. Canada (Attorney General), 2017 CarswellNat 7338 (F.C.A.; 2017-12-18) Near J. [leave to appeal to the Supreme Court of Canada granted 2018 CarswellNat 2186 and 2018 CarswellNat 2188 (S.C.C.; 2018-05-10)]

[44] **Article 2006(1) of the CUSFTA, however, is concerned with the copyright holder’s ability to be remunerated for its copyright where its program is retransmitted and not with simultaneous substitution of commercials.** As the respondent notes, Article 2006(1) of the CUSFTA provides a “right of equitable and non-discriminatory remuneration for any retransmission ... of the copyright holder’s program” and this right is protected by sections 71 to 74 of the *Copyright Act* which provide for tariffs. In support of its argument, the NFL relies extensively on *Cogeco Cogeco [Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168, 2012 SCC 68]*. That decision, however, supports the conclusion that non-discrimination in retransmission is concerned only with compensation:

[60] The CRTC’s proposed value for signal regime would enable broadcasters to negotiate compensation for the retransmission by BDUs of their signals or programming services, regardless of

whether or not they carry copyright protected “work[s]”, and regardless of the fact that any such works are carried in local signals for which the *Copyright Act* provides no compensation.
[emphasis added]

- **Section 31 – Retransmission of local and distant signals – For this section to apply several conditions are to be met**

Bell Canada v. Canada (Attorney General), 2017 CarswellNat 7338 (F.C.A.; 2017-12-18) Near J. [leave to appeal to the Supreme Court of Canada granted 2018 CarswellNat 2186 and 2018 CarswellNat 2188 (S.C.C.; 2018-05-10)]

[47] Second, the NFL argues that the Final Order conflicts operationally with the *Copyright Act*. It argues that the Final Order conflicts with subsection 31(2)(c) because it is not “required or permitted by or under the laws of Canada”. I disagree.

[48] **The Final Order complies with each of the enumerated requirements in subsection 31(2) of the *Copyright Act* and so meets the requirements of the exception to the exclusive transmission rights. This past February when the Super Bowl was broadcast without simultaneous substitution, the program was (a) retransmitted by a local or distant signal, (b) this transmission was lawful under the *Broadcasting Act*, (c) it was retransmitted simultaneously and without alteration, and (d) the retransmitter, Bell, had paid for its licence. Paragraph (e) was not applicable as the Governor in Council had not made any regulation.**

[49] The NFL’s argument that the Final Order conflicts operationally with paragraph 31(2)(c) specifically must fail following the Court’s conclusion above that the Final Order was within the CRTC’s jurisdiction. The NFL argued that “[i]f a BDU wishes to take the benefit of the user right in a manner permitted under s. 31(2)(c) of the *Copyright Act*, it must comply with any signal alteration requirements mandated under the ‘laws of Canada’, and the **only** such law of Canada that is applicable is the *Sim Sub Regulations*” [emphasis in original]. **Having found that the Final Order made pursuant to paragraph 9(1)(h), by way of subsection 4(3) of the Sim Sub Regulations—a law of Canada—was within the CRTC’s jurisdiction, there can be no operational conflict with paragraph 31(2)(c) of the *Copyright Act*.**

- **Section 31.1 - Network services – Solely providing Internet services is not an infringement of copyright**

Collective Administration of Performing and of Communication Rights, [Online Music Services (CSI: 2011-2013; SOCAN: 2011-2013; SODRAC: 2010-2013)], 2017 CarswellNat 4233 (Cop. Bd.; 2017-08-25), the Board

[172] While we agree with CSI that **it is not only in the cases enumerated in subsections 31.1(5) and (6) of the Act that subsection 31.1(4) is no longer applicable**, we are not convinced that the mere offering of other features creates a real risk that the provision is no longer applicable. While the exact phrase "by virtue of that act alone" is novel to this provision, it is similar to paragraph 2.4(1)(b) [...]

[173] In its consideration of this provision, the Board has previously concluded that insofar as the Internet service provider furnishes "ancillary" services to a content provider or end user, it could still rely on paragraph 2.4(1)(b) of the *Act* as a defence to copyright infringement, provided any such "ancillary services" do not amount in themselves to communication or authorization to communicate the work.[Fn81 *Society of Composers, Authors & Music Publishers of Canada v. Canadian Assn. of Internet Providers* [1999 CarswellNat 3173 (Copyright Bd.)] (27 October 1999) at 39 ("Neither does the exemption cease to apply for the sole reason that the intermediary may have a contractual relationship with its subscribers. As long as its role in respect of any given transmission is limited to providing the means necessary to allow data initiated by other persons to be transmitted over the Internet, and as long as the ancillary services it provides fall short of involving the act of communicating the work or authorizing its communication, it should be allowed to claim the exemption") This approach was later endorsed by the Supreme Court of Canada. [Fn82 *Society of Composers, Authors & Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45, [2004] 2 S.C.R. 427 (S.C.C.) at paras 95-103.]

[174] We also note that, even in situations where subsection 31.1(4) of the *Act* may not apply, there is some question as to whom actually effects a communication in the situation where a user stores music on a service providers' server or re-accesses music so stored.

- **Section 31.1 - Network services – This section is an exception to infringement of copyright**

Collective Administration of Performing and of Communication Rights, [Online Music Services (CSI: 2011-2013; SOCAN: 2011-2013; SODRAC: 2010-2013)], 2017 CarswellNat 4233 (Cop. Bd.; 2017-08-25), the Board

[179] We therefore exclude from the application of this tariff those services that allow a user to store and/or retrieve (or direct the service to store and/or retrieve) a sound recording, or a musical work or

performer's performance contained in such a sound recording. Whether the retrieval is in the form of a stream or download has no bearing on our conclusion, as **subsection 31.1(4) of the Act is not an exception solely for the communication to the public by telecommunication but rather an exception to infringement of copyright.**

- **Section 32.1 – No infringement – Specific legislated authority i that allows disclosure and copying prevails over the general rights afforded in the [Copyright Act](#).**

Geophysical Service Incorporated v. EnCana Corporation, 149 C.P.R. (4th) 1 (Alta. C.A.; 2017-04-28) Schutz J. [affirming 2016 CarswellAlta 742 (Alta Q.B.; 2016-04-21); **leave to appeal to the Supreme Court of Canada refused 2017 CarswellAlta 2245 (S.C.C.; 2017-11-30)]**

[21] The Trial Court further held that GSI's data copyright had not been breached by the Boards' disclosure to third parties by means other than the *Access to Information Act*, RSC 1985, c A-1 or its regulations; rather, the *Canada Petroleum Resources Act* created an exception to GSI's exclusive right under the *Copyright Act* to control, licence, and charge a fee for dissemination or copying of data acquired, submitted and retained under the Regulatory Regime (Decision, paras 293-294).

[22] Nonetheless, the Trial Court also determined that a conflict did exist as between GSI's rights under the *Copyright Act* and the disclosure provisions of the Regulatory Regime that allow disclosure without the owner's consent (in this instance, GSI):

[296] Here, the rights afforded to owners of copyrightable material created in the Canadian offshore conflict head on with the rights and obligations under the Regulatory Regime. In simple terms, it is the difference of a few decades of protection (approximately 50 years) under the *Copyright Act* versus 5 to 15 years under the Regulatory Regime (as it is presently applied).

The Trial Court reconciled this conflict by finding that the Regulatory Regime's imposition of a privilege period achieved "an internal balance between allowing for commercialization of the information and the public interest in the wider dissemination of the information", concluding that "Parliament made the logical decision to deal with disclosure of material filed under the Regulatory Regime exhaustively through provisions contained within the Regime itself." (Decision, para 298)

[23] Having decided that absurd results would occur if the copyright provisions were applied at the same time as the Regulatory Regime disclosure process, **the Trial Court found the solution in the rule of**

statutory interpretation that the more specific legislative regime must apply over the more general one (Decision, paras 299-300).

Accordingly, with respect to the disclosure provisions, the specific legislated authority in the Regulatory Regime that allows disclosure and copying . . . prevails over the general rights afforded to GSI in the [Copyright Act](#). The [[Canada Petroleum Resources Act](#)] creates a separate oil and gas regulatory regime wherein the creation and disclosure of exploration data on Canadian territory is strictly regulated and [in the Court's view], not subject to the provisions of the *Copyright Act* to the extent that they conflict. (Decision, para 304)

[24] In conclusion, the Trial Court explained that GSI's submissions ignored that the purpose and intention of the *Canada Petroleum Resources Act* "was to allow for public disclosure of seismic data after a period of time to allow for necessary oil and gas exploration of the Canadian offshore and frontier lands. The wording of the [*Canada Petroleum Resources Act*] properly interpreted, allowed for disclosure without restriction after a defined period of time." (Decision, para 319). **Thus, in the Trial Court's view, although GSI has copyright and other proprietary rights over its seismic data, "the Regulatory Regime applies to the extent that it conflicts with the *Copyright Act*; the Regulatory Regime, in effect, creates a compulsory licence over the data in perpetuity after the expiry of the confidentiality or privileged period."** (Decision, para 321) Moreover, the Trial Court confirmed that " . . . the Regulatory Regime has confiscated the seismic data created over the offshore and frontier lands and the [*Canada Petroleum Resources Act*] is not apologetic for it – indeed, it makes clear that there is no compensation for any confiscation under the Act (s 111(2))." (Decision, para 322)

- **Section 32.1 – No infringement – Specific legislation may override the general provisions of the *Copyright Act***

Geophysical Service Incorporated v. EnCana Corporation, 149 C.P.R. (4th) 1 (Alta. C.A.; 2017-04-28) Schutz J. [affirming 2016 CarswellAlta 742 (Alta Q.B.; 2016-04-21); **leave to appeal to the Supreme Court of Canada refused 2017 CarswellAlta 2245 (S.C.C.; 2017-11-30)**]

[103] The Trial Court correctly concluded that the *Canada Petroleum Resources Act* is both more specific and more recent legislation than the [Copyright Act](#); thus, to the extent that there is conflict between the two statutes, there exists rational and *intra vires* bases for that conflict. We agree with the Trial Judge that it is not necessary to read-down the *Canada Resources Petroleum Act* in deciding how to resolve this apparent conflict. **We are not aware of any binding authority standing for the proposition that it would be illegal for legislators**

to create the very sort of implied exception captured within the boundaries of the Regulatory Regime, nor would we endorse any such suggestion.

[104] As found by the Trial Judge, there is no breach of copyright in this matter by the Boards' disclosure of seismic data after the privilege period, including allowing data to be copied. **"The specific legislative authority of the [Canada Petroleum Resources Act] and the Federal Accord Act overrides the general rights contained in the Copyright Act.** Further, or in the alternative, the Regulatory Regime created a compulsory licencing system through which the Boards have authority to copy": Decision, para 318. Here, that means GSI's exclusivity to its seismic data ends, for all purposes including the *Copyright Act*, at the expiry of the mandated privilege period. Thereafter, GSI has no legal basis or lawful entitlement to interfere or object to any decisions made by the Boards relating to its collected data.

[105] The Trial Court's statutory interpretation of the Regulatory Regime and its conclusion that the legislated right *to disclose* was the legislated right *to copy*, was correct. This ground of appeal is dismissed.

- **Section 34 – Copyright [civil remedies] – Punitive damages shall take into consideration the real damages**

Côté-Drouin (Sucession de) v. Pepin, 2017 CarswellQue 47 (Que. Sup. Ct.; 2017-01-10) Lucas J.

[39] Enfin, concernant les dommages exemplaires ou extrajudiciaires, il y a lieu de faire une distinction entre la responsabilité et la quantification. Dans un premier temps, lors de la première étape, le Tribunal devra décider à la lumière des faits si la preuve démontre une conduite « *malveillante, opprimante et abusive [. . .] qui choque le sens de la dignité de la cour* » ou un abus de droit d'ester en justice [*Fn*19 34(2) L.d.a.; Laurent CARRIÈRE, *Voies et recours civils en matière de violation de droit d'auteur au Canada*, dans *Développements récents en droit de la propriété intellectuelle*, Cowansville, Éditions Yvon Blais, 2001, pp. 463-464; *Robinson c. Films Cinar inc.*, 2009 QCCS 3793, par. 1074 et ss., confirmé par la Cour suprême du Canada : *Cinar Corporation c. Robinson*, 2012 CSC 25, par. 152]. Puis, dans le cadre de la deuxième audition, le cas échéant, **les dommages punitifs devront être quantifiés en tenant compte des dommages compensatoires octroyés**, et ce, conformément à la jurisprudence à cet égard [*FN*20 *Hill c. Église de scientologie de Toronto*, [1995] 2 R.C.S. 1130; En matière de droit d'auteur, voir également : Hugues RICHARD, Laurent CARRIÈRE

(Léger Robic Richard), *Canadian Copyright Annotated*, volume 3, Toronto, Thomson Carswell, feuilles mobiles, mise à jour continue p. 34-15 et ss.] :

(...) Il importe de souligner que les dommages-intérêts punitifs ne devraient être accordés que dans les situations où les dommages-intérêts généraux et majorés réunis ne permettent pas d'atteindre l'objectif qui consiste à punir et à dissuader.

- **Section 34 – Copyright [civil remedies] – Liability for damages should be a first step and thereafter their quantification**

Côté-Drouin (Succession de) v. Pepin, 2017 CarswellQue 47 (Que. Sup. Ct.; 2017-01-10) Lucas J.

[73] SCINDE l'instance de manière à ce que le débat sur les droits d'auteur (**y compris sur la responsabilité des défendeurs quant aux dommages réclamés, incluant les dommages punitifs et les honoraires extrajudiciaires, le cas échéant**) soit entendu en une première étape, les questions relatives à la quantification des dommages et à la restitution d'actifs étant entendues par la suite et après que le premier jugement aura été rendu.

- **Section 34 – Copyright [civil remedies] – Evidence of damages is not always necessary to be compensated**

Diamond v. Montreal Gazette, 2017 QCCQ 1839 (Que. Ct. – Small Claims; 2017-01-19) Lewis J.

[36] Le juge André Wery rappelle dans *Setym International inc. c. Belout*, [Fn13 2001 CanLII 24941 (QC CS), par. 289.], que la *Loi sur le droit d'auteur* a une existence indépendante du *Code civil du Québec*, et **que celui dont le droit d'auteur a été violé n'a pas à faire la preuve du dommage subi pour avoir droit d'être indemnisé en relation avec la violation dont il a été victime.**

- **Section 34 – Copyright [civil remedies] – Carelessness will be taken into consideration in ascertain infringement**

Diamond v. Montreal Gazette, 2017 QCCQ 1839 (Que. Ct. – Small Claims; 2017-01-19) Lewis J.

[41] Comme mentionné précédemment, The Gazette a été négligente, voire insouciante dans sa façon de gérer la situation, tant avant d'utiliser la photographie de Diamond, qu'après qu'il ait fait connaître son insatisfaction face à la situation et réclamé d'être dédommagé. Même durant l'instruction elle ne reconnaît pas que Diamond est titulaire des droits d'auteur sur la photographie, alors qu'elle n'est pas en mesure d'établir qu'elle était autorisée à reproduire sa photographie. **Elle tente aussi de banaliser son geste en expliquant qu'elle aurait pu utiliser d'autres photographies en lieu et place de celle en litige.** La question se pose alors de savoir pourquoi The Gazette a choisi celle de Diamond. Un début de réponse

à cette question se trouve certainement dans le fait que la photographie qu'elle a utilisée au soutien de son article publié le 6 mars 2015 est magnifique et inédite.

- **Section 34 – Copyright [civil remedies] – Intent to infringe the proprietary rights of the copyright holder is required for an award of punitive damages under the *Quebec Charter of Human Rights and Freedom***

Diamond v. Montreal Gazette, 2017 QCCQ 1839 (Que. Ct. – Small Claims; 2017-01-19) Lewis J.

[47] La violation du droit d'auteur constitue une atteinte aux droits prévus aux articles 1, 4 et 6 de la *Charte des droits et libertés de la personne* [...]

[48] En vertu de l'article 49 de la Charte, l'octroi de dommages punitifs est conditionnel à ce que la preuve établisse que l'atteinte était intentionnelle.

[49] La négligence, voire la faute lourde, ne suffit pas à établir que l'atteinte était intentionnelle [Fn21 de *Montigny c. Brossard (Succession)*, 2010 CSC 51 (CanLII), par. 68]. À cet égard, faisant siens les propos qu'elle tenait dans *Québec (Curateur public) c. Syndicat national des employés de l'Hôpital St-Ferdinand* [Fn22 1996 CanLII 172 (CSC)], la Cour suprême rappelait dans *de Montigny c. Brossard (Succession)* [Fn23 de *Montigny c. Brossard (Succession)*, 2010 CSC 51 (CanLII), par. 68]. **que l'intentionnalité dans le contexte de la [Charte](#) relève non pas de la faute, mais de son résultat, de sorte que l'octroi de dommages punitifs est tributaire de la démonstration que l'auteur de l'acte fautif, The Gazette en l'instance, avait l'intention en publiant une photographie prise par Diamond en 1985, de porter atteinte à ses droits d'auteur.**

- **Section 34 – Copyright [civil remedies] – Acts made outside Canada will not necessarily prompt copyright infringement in Canada**

Steen v. Dr. Seuss Enterprises, L.P., 2017 CarswellNat 6868 (F.C.; 2017-02-11) LeBlanc J.

[21] As counsel for the Defendant, Random House of Canada, points out, the New Evidence, consisting of the version of the book "*Daisy-Head Mayzie*" published in July 2016, was clearly published and printed in the U.S., not Canada, by Penguin Random House LLC, not Random House of Canada, and has, as a result, no bearing on the Plaintiff's Canadian copyright infringement claim. The New Evidence is, according to the Plaintiff, further and confirmatory evidence that the Seuss Defendants and Defendant Joe Mathieu have conspired to steel [sic] his copyright work and in doing so, "have clearly exposed themselves to blatant copyright infringement". However, none of these Defendants have a direct connection to Canada, nor does the

publication of the new version of the book "*Daisy-Head Mayzie*" in July 2016.

- **Section 34 – Copyright [civil remedies] – Exemplary damages are required to punish some infringements – Numerous factors are to be considered, including awareness of the unlawfulness of the infringing acts**

Lam v. Chanel S. de R.L., 144 C.P.R. (4th) 465 (F.C.A.; 2017-02-21) [affirming 140 C.P.R. (4th) 397 (F.C.; 2016-08-23)]

[10] The challenge to the award of punitive and exemplary damages fails. The judge identified a number of factors arising from the conduct of the appellant which are supportive of a conclusion that **an award of punitive and exemplary damages was “rationally required to punish the defendant’s misconduct”**: *Whiten* [*Whiten v. Pilot Insurance Co.*, 2002 SCC 18] at para 107. I also find that the award is consistent with the objectives of punitive and exemplary damages - retribution, deterrence and denunciation.

[11] I note, amongst other considerations, the judge’s findings **that the defendants were motivated by profit; the vulnerability to, and erosion of, the plaintiffs trade-mark rights arising from counterfeiting and infringement; the defendants’ attempts to mislead the Court; the fraudulent transfer, after the filing of the Statement of Claim, of ownership of the defendants’ company to avoid liability; the defendants’ recidivist conduct in light of previous orders in respect of the same matter; the defendants’ awareness of the unlawful nature of the activity; the scope of the infringement; the sale of infringing articles after filing and service of the Statement of Claim; the defendants’ failure to produce any records; and, the judge’s conclusion that the infringement was continuous and deliberate**. The judge also situated the award in light of relevant judicial precedent.

- **Section 34 – Copyright [civil remedies] – There is no ratio between the amount of compensatory damages and punitive damages**

Lam v. Chanel S. de R.L., 2017 FCA 38 (F.C.A.; 2017-02-21) [affirming 140 C.P.R. (4th) 397 (F.C.; 2016-08-23)]

[12] **There is no merit to the appellant’s argument that there is a ratio between the amount of compensatory damages and punitive damages**. The Supreme Court has expressly rejected such an approach. In *Whiten*, at paragraph 73, Binnie J. noted that “[t]he proper focus is not on the plaintiffs’ loss but on the defendants’ conduct,” **and that a ratio between compensatory and punitive damages does not account for the many variables to be taken into account in calibrating the award**.

- **Section 34 – Copyright [civil remedies] – Unless a copyright action is abusive, the attorney who instituted the proceedings for his client is not liable for damages**

9107-0235 *Québec inc. (Grattex) v. Duval*, 2017 QCCQ 13479 (Que. Ct. – Small Claims; 2017-02-23) Labbé J.

[Action in damages against a lawyer for having instituted copyright infringement proceedings that were dismissed]

[26] Le fait que le Tribunal [Federal Court] a ordonné que chaque partie assume ses frais, de même que la lecture de l'ensemble du jugement, ne fait pas voir que le recours entrepris était abusif ou vexatoire. **Tenir un avocat responsable civilement parce qu'il a exercé un recours pour un client, impose un fardeau très lourd puisque l'avocat a le devoir de servir les intérêts de son client, en agissant comme un avocat prudent et diligent placé dans les mêmes circonstances.**

- **Section 34 – Copyright [civil remedies] – Plagiarism by a teacher is disgraceful, dishonorable and unprofessional conduct**

Ontario College of Teachers v. Spence, 2017 ONOCT 11 (Ont College of Teachers Discipline Committee; 2017-02-23), the Committee

[38] The Member breached these standards by plagiarizing work that was not his own without attributing credit to the original authors. This occurred repeatedly, over an approximately 11-year period, and across many forms of communication with the public, students, staff and parents. **The Member chose over and over to supplement his writing with the work of others without recognizing their authorship or expertise. The Member breached the trust of the members of the education community, and his actions tarnished the reputation of the teaching profession. The Member presented himself to be the author of a multitude of works which included material that was not his own, misrepresenting the work he put into them, and the originality of his thought. This repeated pattern of dishonesty is directly in contradiction with the trustworthiness and integrity the Member was required to show as a member of the profession**

[39] The Member's violation of the ethical standards of honesty and integrity was especially serious given the increased visibility and influence of his writing in his leadership role as Director of Education at the Board, which carries with it significant responsibility, authority and prestige. The Committee is of the view that students, staff and the public at large would be entitled to expect that the Member would act with integrity at all times. As remarked by Mr. Bird, a colleague of the Member, it was expected that the Member would provide him with accurate and honest writing. Mr. Bird stated "I never asked about his sources, I never asked about where the information came from. He

has a doctorate; he was the Director... it was not my place to challenge him." The Member breached the standards of the profession by violating the trust placed in him by students, staff and the public.

[40] [...] The Member published his works in his professional capacity as an educator, principal, superintendent and/or a director. His articles, blog posts, books and TEDx speech were misleading insofar as they presented content as solely the Member's personal thoughts and ideas, but which, in fact, included the work of other authors without attribution.

[41] [...] His conduct did not set a good example; nor did it encourage respect for truth, justice, and industry. The Member acted dishonestly, and by using the work of others without attribution, was given credit for their research, writing and analysis. Teachers are required to model respect for hard work, honesty and learning. The Member's actions in manipulating and misusing the work of other authors are contrary to the values the teaching profession seeks to promote.

[42] **Plagiarism can reasonably be seen to be disgraceful, dishonorable and unprofessional conduct. The Member misled readers about the originality of his work.** The Committee agrees with College Counsel's submission that the Member "cloaked himself in the credibility of the teaching profession" to facilitate his actions of plagiarizing work without generating suspicion over the course of many years.

[47] The Member's plagiarism would reasonably be regarded by members of the profession as disgraceful, dishonorable, and unprofessional.

- **Section 34 – Copyright [civil remedies] – Plagiarism by a teacher may lead to disciplinary action including revocation of his licence**

Ontario College of Teachers v. Spence, 2017 ONOCT 11 (Ont College of Teachers Discipline Committee; 2017-02-23), the Committee

[56] The Member's acts of plagiarism over an approximately 11-year period **were not mistakes; they were deliberate attempts to receive credit for the work of others, and served to bolster his reputation through writing he did not entirely author.**

[57] **Academic honesty is fundamental to the teaching profession**, and the Member violated this important value repeatedly. The Member himself, in his statement to the Toronto Star (January 9, 2013), emphasized the Board's own policy on student academic dishonesty and plagiarism, and after outlining the minimum consequences for plagiarism that would be meted out under that policy, stated that those

consequences are not "nearly enough" in his situation, as he was no longer a student, but rather an adult and an educator, and he "should know better." He further stated that he "must set a clear example for the 284,000 students enrolled at TDSB."

[58] As an educator, administrator and later Director of Education, the Member occupied positions of trust and responsibility, and he continued to engage in plagiarism at all levels. He betrayed the trust placed in him in these positions. The Member lost sight of his moral responsibility as an educator and leader in the system, and this is reflected in his multiple acts of plagiarism. The Committee notes that in neither the Member's statement posted online on the Board website (January 9, 2013), nor in his statement prepared for the College discipline hearing (December 19, 2016), did the Member make a direct apology to the authors whose work he used without attributing credit.

[59] Revocation of the Member's certificate denounces the Member's very serious conduct and sends a message to members and the public that this type of professional misconduct will not be tolerated.

- **Section 34 – Copyright [civil remedies] – Punitive damages are warranted when there is a strong need to deter and denounce infringing activities – Factors to consider**

Nintendo of America Inc. v Go Cyber Shopping (2005) Ltd., 146 C.P.R. (4th) 369 (F.C.; 2017-03-01) Campbell J.

[171] In this case, **the Respondent has shown callous disregard for the Applicant's rights. It is clear from the evidence that the Respondent knowingly and deliberately sold circumvention devices, and promoted such activities to its customers.** Its activities have gone on for years, and it offers a wide range of circumvention products. **The Respondent also operates under a misleading unregistered business name.** The evidence further suggests the Respondent intends to expand its activities, to market and sell TPM circumvention devices for the Applicant's next generation of game consoles (Rhoads 2, Applicant's Record, p. 925; Hunter, Applicant's Record, pp. 1095 and 1193-1195).

[172] **The Respondent's admissions of wrongdoing are of limited value, since they are calculated to limit liability rather than address the full nature and extent of its infringing activities.** This Court has previously awarded punitive damages notwithstanding such limited admissions of infringement (*Louis Vuitton Malletier S.A. v Singga Enterprises (Canada) Inc.*, above).

[173] Further, the fact that the Applicant did not issue a cease-and-desist letter to the Respondent prior to commencing this proceeding is of no moment. As noted, there is no evidence that doing so would have made any difference. Given the nature of the Respondent's business, the Applicant was reasonable in commencing this proceeding in the manner that it did.

[174] The Respondent's conduct justifies an award of punitive damages. **An award of \$1,000,000 is warranted in this case in view of the strong need to deter and denounce such activities. Such an award is also consistent with the scale of penalties available if this were a criminal proceeding under s. 42 of the Act.**

- **Section 34 – Copyright [civil remedies] – Delivery up of the infringing goods is a remedy available to the copyright holder**

Nintendo of America Inc. v. Go Cyber Shopping (2005) Ltd., 146 C.P.R. (4th) 369 (F.C.; 2017-03-01) Campbell J.

[178] **Delivery up of the infringing goods** (TPM circumvention devices) **is also a standard remedy** and is warranted in this case (*Microsoft*, above at para 102 [*Microsoft Corporation v 9038-3746 Quebec Inc.*, 2006 FC 1509]).

- **Section 34 – Copyright [civil remedies] – Interlocutory injunction granted – Factors to consider**

Wesley (Mtlfreetv.com) v. Bell Canada, 2017 CarswellNat 1491 (F.C.A.; 2017-03-20) Gauthier J. [affirming 2016 FC 612 (F.C.; 2016-06-01)]

[3] The Federal Court [2016 FC 612] found **that the respondents had established a strong *prima facie* case of copyright infringement and that an injunction at this stage would prevent irreparable harm without unduly inconveniencing the appellants.** To reach this conclusion, the Federal Court applied the well-known tripartite test set out by the Supreme Court of Canada in *RJR -- MacDonald Inc. v. Canada (Attorney General)*, 1994 CanLII 117 (SCC), [1994] 1 S.C.R. 311.

[5] Having carefully reviewed the evidentiary record, we are satisfied that it was open to the Federal Court to conclude as it did. In our view, in light of the uncontradicted evidence including the advertisement that these pre-loaded set up boxes are a way to access free tv content and avoid cable bills, the Federal Court was entitled to draw the inferences that it did. What the appellants are seeking is that this Court re-weighs the evidence and substitutes its own assessment to that of the Federal Court. It is not our role to do so, given that the appellants have not persuaded us that the Federal Court made an overriding and palpable error in evaluating the voluminous evidence before it.

- **Section 34 – Copyright [civil remedies] – Declaration of copyright ownership are *in rem* determination**

Western Steel and Tube Ltd. v Technoflange Inc., [2017] O.J. 2202 (Ont. Sup. Ct.; 2017-05-02) Myers J.

[11] **The declarations that the plaintiff has trade-marks and copyright are *in rem* determinations.**

[41] The plaintiff may file no more than five pages of submissions on costs, including costs thrown away to date, its costs outline, and any offers to settle on which it relies by May 12, 2017. The defendants may each file no more than five pages of submissions on costs, their costs outlines, and any offers to settle on which they rely by May 26, 2017. All materials will be filed in searchable pdf format as an attachment to an email to my Assistant. No case law or statutory material is to be delivered. **References to case law and statutory material, if any, shall be by hyperlink to CanLII embedded in the submissions.**

- **Section 34 – Copyright [civil remedies] – Union’s non-representation of one of its member for copyright infringement made outside Union’s covered activities is reasonable**

Chen v. University of Western Ontario Faculty Association, 2017 CarswellOnt 7263 (Ont. L.R.Bd.; 2017-05-09) Wilson J.

[70] The UWOFA’s decision not to represent Dr. Chen in respect to the copyright issue is entirely reasonable. It was an action commenced by the Foundation (not the employer) in regards to work performed outside of his employment. The fact that the collective agreement allows professors to perform work outside of their employment does not extend the UWOFA’s representational obligations.

[71] **A union’s duty of fair representation arises in matters where it enjoys exclusive rights of representation over the employee. It does not arise when the employee has the right to represent himself in a civil action or in other proceedings.**

- **Section 34 – Copyright [civil remedies] – Norwich orders are available in copyright infringement cases – Factors to consider**

Voltage Pictures, LLC v John Doe, 146 C.P.R. (4th) 339 (F.C.A.; 2017-05-09) Stratas J. [reversing 141 C.P.R. (4th) 136 (F.C.; 2016-07-28); leave to appeal to the Supreme Court of Canada granted, 2017 CarswellNat 6597 (S.C.C.; 2017-11-23)]

[16] Over four decades ago, courts found a solution to this problem: the equitable bill of discovery. **A party can use this mechanism to obtain a pre-litigation order against a third party compelling disclosure of identifying information and documents. Today, such an order is often called a *Norwich* order**, named after the House of Lords decision that fashioned it: *Norwich Pharmacal Co. v. Customs & Excise Commissioners*, [1973] UKHL 6, [1974] A.C. 133.

[17] In the Federal Courts system, *Norwich* orders can be obtained under Rule 233 of the *Federal Courts Rules*, SOR/98-106: *BMG Canada Inc. v. Doe*, 2005 FCA 193, [2005] 4 F.C.R. 81.

[18] ***Norwich* orders are by no means sure things to get. One must show a valid, *bona fide* or reasonable claim, the involvement of a third party in the impugned acts, necessity in the sense that the third party is the only practical source of the information, and desirability in the sense that the interests of justice favour the obtaining of disclosure from the third party.**

[19] And that is not all. **The court must balance the benefit to the applicant against the prejudice to the alleged wrongdoer in releasing the information. Factoring into the equation is the nature of the information sought, the degree of confidentiality associated with the information by the party against whom the order is sought, and the degree to which the requested order curtails the use to which the information can be put. Finally, the person from whom discovery is sought can be reasonably compensated for the expenses arising out of compliance with the discovery order.** See generally *BMG Canada Inc.*, above; *Straka v. Humber River Regional Hospital* (2000), 51 O.R. (3d) 1; 193 D.L.R. (4th) 680 (C.A.); *1654776 Ontario Limited v. Stewart*, 2013 ONCA 184, 114 O.R. (3d) 745.

[20] In seeking a *Norwich* order, complications can arise. What sort of information and documents is the moving party entitled to receive? Does notice have to be sent to the suspected wrongdoers? If so, what is the content of the notice? What sort of compensation is the holder of information and documents entitled to receive? How long must that party retain the information and records? Many other questions can arise.

- **Section 34 – Copyright [civil remedies] – The onus to prove the damages lies upon the plaintiff**

9284-7557 Québec inc. (Éditions Plume de pluie) c. Aouimeur (Samia Shariff (Auteure)), 2017 QCCQ 5329 (Que. Ct. – Small claims; 2017-05-15) Bouin J.

[17] En dommages, Plume réclame :

- 5 000 \$ des redevances versées lors du déplacement en Égypte
- 250 \$ de frais d'infographie
- 400 \$ en frais d'illustration des croquis du livre;
- 1 379 \$ en frais d'avocat pour la correction de l'amendement au Contrat
- 900 \$ frais de corrections débutées sur un manuscrit

- 7 000 \$ pour cinq semaines de travail de réécriture avant la découverte des textes plagiés pour lequel le Tribunal accordera 3 500 \$;

CONSIDÉRANT que la partie demanderesse a rencontré son fardeau de preuve jusqu'à concurrence d'une somme de 11 429 \$;

- **Section 34 – Copyright [civil remedies] – Plagiarism in an expert's report will affect the credibility of the expert and the related voir-dire costs**

Anderson v. Pieters, 2017 CarswellBC 1522 (B.C. S.C.; 2017-06-08) Saunders J.

[30] In addition, on April 13, 2016, the day after it was served, defence counsel discovered **that a substantial portion of Dr. Sank's second report had been plagiarized. This obviously had profound implications for evaluating the strength of the plaintiff's case.**

[48] Moreover, as I have indicated, Dr. Sank's second report was largely plagiarized from a suspect source. Furthermore, he substantially reformulated the theory advanced in that source, of there being a connection between cervical instability and VBI, changing it from a matter of postulation to a conclusion said by Dr. Sank to be "highly probable". None of this could reasonably have been known to the plaintiff's counsel initially; however, after being advised of the plagiarism by defence counsel, the plaintiff's counsel persisted in attempting to have Dr. Sank's second report admitted. This attempt was doomed to fail. **Further, I must observe that it was quite likely to the plaintiff's benefit that the report was not admitted; the effect on the jury, had the extent of Dr. Sank's evident bias and dishonesty become known to them, could have been devastating to the plaintiff's case.** The plaintiff is disallowed the costs associated with the one and one-half days of trial time devoted to the *voir dire* concerning Dr. Sank's second report.

[51] Despite the foregoing, I conclude that in the particular circumstances of this case, it would not be just to award the defence either the costs associated with the successful *voir dire* rulings, or the expenses incurred in obtaining the rebuttal reports.

- **Section 34 – Copyright [civil remedies] – The onus to prove infringement lies upon the plaintiff**

Premium Sports Broadcasting Inc. v. 9005-5906 Québec Inc. (Resto-bar Mirabel), 2017 CarswellNat 3069 (F.C.; 2017-06-19) St-Louis J.

[60] **The Court finds that Premium has failed to prove, on a balance of probabilities, that the defendants broadcast the fight.**

[61] The Court notes that Premium's [the Plaintiff] arguments, as very able as they may be, are designed to minimize the weakness of its

own evidence and divert the Court's attention to certain weaknesses in the defendants' position. Premium behaves as if its burden was one of making a *prima facie* case, allowing the onus of proof to be shifted to the defendants. However, such is not the case. **The onus is not on the defendants to prove that they did not broadcast the fight, but on Premium to prove that they did.** Therefore, **the gaps Premium raises in the defendants' evidence do not allow it to meet or reverse its own burden of proof.**

- **Section 34 – Copyright [civil remedies] – An award of solicitor-client costs is rare – Factors to consider**

Premium Sports Broadcasting Inc. v. 9005-5906 Québec Inc. (Resto-bar Mirabel), 2017 CarswellNat 3069 (F.C.; 2017-06-19) St-Louis J.

[67] As this Court recently noted, "[i]t has now been **well-established that solicitor-client costs are awarded only on very rare occasions**, for example **when a party has displayed reprehensible, scandalous or outrageous conduct or as a matter of public interest**" (*Stryker Corp. v. Umano Medical Inc.*, 2016 FC 378 (F.C.) at para 53).

- **Section 34 – Copyright [civil remedies] – Damages resulting from the infringement of moral rights are to be proven by the author**

Jomphe (Karjessy) v. Société St-Jean-Baptiste de Montréal, 2017 QCCQ 7303 (Que. Ct. – Small Claims; 2017-06-22) Gibbens J.

[28] De toute façon, M. Jomphe [plaintiff] **n'a pas prouvé que la violation de ses droits moraux lui ait causé un préjudice distinct de celui découlant de la publication des photographies et justifiant les dommages additionnels réclamés.**

- **Section 34 – Copyright [civil remedies] – A *bona fide* error will not give raise to punitive damages**

Jomphe (Karjessy) v. Société St-Jean-Baptiste de Montréal, 2017 QCCQ 7303 (Que. Ct. – Small Claims; 2017-06-22) Gibbens J.

[29] Au surplus, le Tribunal est d'avis que l'octroi de dommages punitifs et exemplaires pour atteinte illicite et intentionnelle n'est pas justifié. **Rien ne permet au Tribunal de conclure à un geste intentionnel d'un représentant de la SSJB ou de M. Meloche. La situation résulte manifestement d'une erreur de bonne foi.**

- **Section 34 – Copyright [civil remedies] - When there is infringement there is prejudice – Interlocutory injunction is to be granted to avoid further infringement**

Cedrom-SNI inc. v. Dose Pro inc., 2017 CarswellQue 6386 (Que. Sup. Ct.; 2017-07-24) Duprat J.

[102] Le Tribunal est en accord avec la proposition soumise par les demandeurs à l'effet **qu'en matière de droit d'auteur, dès qu'il**

existe une constatation de la violation du droit, le préjudice est présent.

[105] En somme, le Tribunal est satisfait qu'il y a ici démonstration que si une injonction interlocutoire n'est pas accordée, les demandeurs en souffriront un préjudice irréparable et ceci en tenant compte de la violation du droit d'auteur.

- **Section 34 – Copyright [civil remedies] – Interlocutory injunction granted – Factors to consider**

Cedrom-SNI inc. v. Dose Pro inc., 2017 CarswellQue 6386 (Que. Sup. Ct.; 2017-07-24) Duprat J.

[112] La Presse, Le Devoir, Le Soleil et Cedrom sont justifiés de prétendre que les défendeurs utilisent sans droit une partie importante des articles préparés par des employés de La Presse, du Devoir et du Soleil. **Cette utilisation est protégée par le droit d'auteur et les défendeurs n'ont pas montré que l'utilisation est équitable. Également, les défendeurs reproduisent le contenu des journaux en violation** des termes et conditions d'utilisation des sites internet des journaux. Le Tribunal conclut que la demande établit une apparence de droit clair et que les demanderesses souffriront d'un préjudice irréparable si l'injonction interlocutoire n'est pas accordée. Enfin, la balance des inconvénients favorise les demanderesses.

- **Section 34 – Copyright [civil remedies] – Prayer for relief shall not vague, unclear or subject to interpretation – Courts may tailored its order to take into consideration the evidence submitted**

Groupe environnemental Labrie inc. v. 9262-3594 Québec inc., (Kaiser Solutions), [2017] J.Q. 11571 (Que. Sup. Ct.; 2017-07-26) Parent J.

[46] Par ailleurs, plusieurs conclusions font référence à la « propriété intellectuelle [de Labrie], incluant ses droits d'auteur, et son information confidentielle » sans que leur contenu soit précisé. Les mêmes commentaires valent pour les « sous-traitants, fournisseurs, partenaires et clients de Labrie », dont aucune liste n'est fournie.

[47] Il incombe aux demanderesses de formuler des conclusions exécutoires, qui ne sont ni vagues, ni imprécises, ni assujetties à leur interprétation, de sorte que le défendeur visé par l'ordonnance puisse connaître de manière suffisamment précise les agissements qui lui sont interdits. Or, la plupart des conclusions de la demande sont affligées de ces lacunes.

[48] Le Tribunal peut pallier la situation en prononçant des ordonnances ciblées, en autant que la preuve le permette. C'est le cas en ce qui concerne les plans et dessins produits sous format papier au dossier et qui sont extraits du Disque.

- **Section 34 – Copyright [civil remedies] – Damages are one of the remedies available for copyright infringement**

Lainco inc v. Commission scolaire des Bois-Francs, 2017 CarswellNat 5087 (F.C.; 2017-09-12) LeBlanc J. [appeal A-300-17]

[131] **En cas de violation du droit d'auteur, le titulaire du droit est admis, aux termes du paragraphe 34(1) de la Loi, à exercer tous les recours que la Loi met à sa disposition, notamment le recours en dommages et intérêts.** Lorsque dans une procédure civile engagée à cette fin, comme c'est le cas ici, le défendeur conteste l'existence du droit d'auteur ou encore la qualité du demandeur, le paragraphe 34.1 de la Loi prévoit que jusqu'à preuve du contraire, l'oeuvre est présumée être protégée par le droit d'auteur et l'auteur, présumé être le titulaire de ce droit.

- **Section 34 – Copyright [civil remedies] – A Court has a wide discretion in ascertaining damages**

Lainco inc v. Commission scolaire des Bois-Francs, 2017 CarswellNat 5087 (F.C.; 2017-09-12) LeBlanc J. [appeal A-300-17]

[250] On dit qu'il est souvent difficile d'évaluer le préjudice pécuniaire résultant d'une violation du droit d'auteur. C'est la raison pour laquelle il n'y a pas de méthode spécifique pour ce faire. Le tout dépendra des circonstances particulières de chaque cas. **En ce domaine, la Cour dispose d'un large pouvoir discrétionnaire. Il lui est ainsi loisible, à cette fin, d'appliquer toute méthode qui lui paraît raisonnable** (*Leuthold v. Canadian Broadcasting Corp.*, 2012 CF 748 (F.C.), aux para 133 et 138; *Fox*, à la p. 24-71).

- **Section 34 – Copyright [civil remedies] – Intentional infringement of a proprietary rights may give rise to exemplary damages – What is intention – Seriousness of the infringement is often the most important factor to consider**

Lainco inc v. Commission scolaire des Bois-Francs, 2017 CarswellNat 5087 (F.C.; 2017-09-12) LeBlanc J. [appeal A-300-17]

[292] La Cour d'appel du Québec rappelle, dans *Constructions Desjardins*, **que bien que l'attribution de dommages punitifs ne soit pas prévue comme telle dans la Loi, la possibilité d'octroyer de tels dommages en cas de violation intentionnelle du droit d'auteur a été reconnue dans certains jugements** (*Constructions Desjardins*, au para 47) [*Construction Denis Desjardins inc. c. Jeanson* (2010), 2010 QCCA 1287]. Encore faut-il, cependant, qu'il soit démontré que le contrefacteur a enfreint le droit d'auteur « d'une manière délibérée et intentionnelle, empreinte de mauvaise foi » (*Constructions Desjardins*, au para 48). La seule désinvolture ne donnera pas ouverture à l'octroi de dommages punitifs (*Constructions Desjardins*, au para 47).

[293] **L'atteinte intentionnelle est celle où l'auteur de l'atteinte illicite au droit garanti par la Charte « a un état d'esprit qui dénote un désir, une volonté de causer les conséquences de sa conduite ou [...] agit en toute connaissance des conséquences, immédiates et naturelles ou au moins extrêmement probables, que cette conduite engendrera »** (*Cinar CSC*, au para 118, citant *Québec (Curateur public) c. Syndicat national des employés de l'hôpital St-Ferdinand*, [1996] 3 S.C.R. 211 (S.C.C.)). La gravité de la faute demeure le facteur le plus important à considérer (*Cinar CSC*, au para 137).

- **Section 34 – Copyright [civil remedies] – Award of costs is a matter of discretion – Offer to settle are to be consider**

1395804 Ontario Ltd. (Blacklock's Reporter) v. Canada (Attorney General), 2017 CarswellNat 4407 (F.C.A.; 2017-09-12) Stratas J. [affirming 2016 CarswellNat 7652 (F.C. – Costs; 2016-12-21)]

[7] **The Federal Court's discretionary costs award was based on the factors set out in the *Federal Courts Rules*, SOR/98-106** and was amply supported on the evidentiary record before it. The Federal Court considered, among other things, the respondent's success in the litigation and the one-sided nature of the outcome, the appellant's litigation strategy, the existence of a settlement offer, the complexity of the litigation, and the actual costs of the respondent. In relying on these permissible, well-recognized factors and in applying them to the facts before it, the Federal Court did not commit palpable and overriding error.

[8] In argument, the appellant submits that the Federal Court placed inordinate weight on the one-sided nature of the outcome. The appellant submits that the Federal Court said in effect that the case never should have been brought. Even accepting that characterization, under the standard of palpable and overriding error we cannot second-guess the weight the Federal Court accorded to the relevant factors, without more.

[9] Also in argument, the appellant submits that the Federal Court should not have relied upon the appellant's non-acceptance of the respondent's settlement offer because this was a test case designed to settle issues arising in related proceedings. Again, this seems to us to be an issue of weight. Further, to the extent this was a test case, this could have prompted a higher level of activity by the respondent and, thus, would have justified an elevated costs award.

[10] The Federal Court's use of the settlement offer was clearly authorized by Rule 420(2) and was supportable on these facts.

- **Section 34 – Copyright [civil remedies] – A court could delay the coming into force of an injunctive relief**

Éditions Québec Amérique inc. v. Druide informatique inc., 2017 CarswellQue 8069 (Que. Sup. Ct.; 2017-09-14) Poisson J. [leave to appeal granted; partial stay ordered 2017 CarswellQue 11485 (Que. C.A.; 2017-12-21)]

[319] En l'espèce, Druide informatique bénéficie plutôt d'un consentement à utiliser les Œuvres dans le cadre d'Antidote HD. **La seule question qui se pose consiste à déterminer s'il y a lieu d'émettre une ordonnance d'injonction permanente afin de protéger les droits d'auteur de Québec Amérique sur les Œuvres et selon quels paramètres.**

[320] La preuve démontre que Druide informatique commercialise une nouvelle édition du logiciel à tous les trois (3) ans. Le logiciel Antidote HD, lancé en 2009, a été remplacé par Antidote 8, lancé en 2012, lequel a été remplacé par Antidote 9, lancé en 2015. Si cette approche commerciale se poursuit, la prochaine édition d'Antidote devrait être lancée à l'automne 2018.

[321] Le Tribunal a déjà décidé que Druide informatique ne possède pas de droits lui permettant d'adapter, produire, reproduire ou télécharger les Œuvres dans le cadre de la promotion et la vente du logiciel Antidote 8 et 9, ou les versions ou éditions subséquentes.

[322] L'émission d'une ordonnance d'injonction visant à faire cesser la commercialisation, depuis 2015, d'Antidote 9, n'est pas le recours approprié dans les circonstances de l'espèce.

[323] Le Tribunal est d'avis que l'octroi de dommages-intérêts est susceptible de compenser adéquatement Québec Amérique pour le préjudice résultant de la violation de ses droits d'auteur suite au lancement d'Antidote 8 et 9.

[324] **Par ailleurs, le Tribunal émettra une ordonnance d'injonction permanente ordonnant à Druide informatique de cesser l'utilisation et toute forme d'exploitation des Œuvres, à compter de la première des deux dates suivantes : i) la date de lancement de la prochaine édition d'Antidote, laquelle devrait normalement survenir en 2018; ou ii) le 31 décembre 2018.**

- **Section 34 – Copyright [civil remedies] – Unlawful and intentional infringement give raise to punitive damages**

Éditions Québec Amérique inc. v. Druide informatique inc., 2017 CarswellQue 8069 (Que. Sup. Ct.; 2017-09-14) Poisson J. [leave to appeal granted; partial stay ordered 2017 CarswellQue 11485 (Que. C.A.; 2017-12-21)]

[355] Le Tribunal estime que l'utilisation des Œuvres dans le volet anglais de la version bilingue d'Antidote 9 et la « reprise » des définitions de Québec Amérique dans le dictionnaire de définitions d'Antidote **constituent des atteintes illicites et intentionnelles au droit d'auteur** de Québec Amérique par Druide informatique.

[356] Compte tenu de l'ensemble des circonstances du présent dossier, le Tribunal estime qu'un montant de vingt-cinq mille dollars (25 000 \$) [in exemplary damages] est approprié **pour satisfaire aux exigences de dissuasion propres à ce type de dommages.**

- **Section 34 – Remedies [civil] – Award of extra-judicial costs is a matter of discretion –**

Bégon Fawcett v Colas, [2017] J.Q. 14542 (Que. Sup. Ct.; 2017-10-23) Pinsonnault J.
[351] Exerçant la discrétion judiciaire que lui confère l'article 342 du *Code de procédure civile*, CONDAMNE la demanderesse Madeleine Bégon Fawcett et la demanderesse L'Autre TV inc. de verser solidairement aux défendeurs Fabienne Colas et Émile Castonguay la somme de 25 000 \$ **en compensation partielle des honoraires extrajudiciaires** qu'ils ont dû encourir dans la présente instance;

- **Section 34 – Copyright [civil remedies] – Full disclosure required for ex parte injunction - Injunction dissolved for failure to make a proper disclosure**

Wiseau Studio, LLC v. Harper, 152 C.P.R. (4th) 87 (Ont. Sup. Ct.; 2017-11-01) Koehnen J.

[40] *In Chitel et al. v Rothbart et al.*, 1982 CanLII 1956 (ON CA), [1982] O.J. No. 3540, 141 DLR (3d) 268, the Court of Appeal noted **that the duty on an ex parte motion included the obligation to disclose relevant facts which may explain the defendants' position, if known to the plaintiff. If disclosure falls short of that, or if the court is misled, the court will not exercise its discretion in favour of the plaintiff when asked to continue the injunction** (at para. 18).

[42] **A fact is material and should be disclosed if it is relevant to the balancing of interests involved in granting an injunction. It is not necessary that the fact affect the outcome of the motion:** *United States v. Friedland* at para. 36; *Fox v Fox*, 2012 ONSC 3842 (CanLII), [2012] O.J. No. 2959 at para. 32.

- **Section 34 [civil remedies] – Full disclosure required for ex parte injunction**

Wiseau Studio v. Harper, 152 C.P.R. (4th) 87 (Ont. Sup. Ct.; 2017-11-01) Koehnen J.
[52] **In my view it would have been material to the weighing of interests on the ex parte hearing to provide the court with a fair summary of the statements in the documentary to which Mr. Wiseau objected, if not to provide a verbatim transcript of the**

statements. In addition, it would have been equally material to disclose to the court: that Mr. Wiseau's and *The Room*'s cult status were based on what people perceived as the poor quality of the movie, that the allegations about a relationship with Mr. Sestero were at least suggested at in Mr. Sestero's book, that the concept of fair dealing may entitle the defendants to use 7 minutes of excerpts from the movie in the documentary and that the entire movie had been available on YouTube for years without the plaintiffs taking any steps to remove it. The plaintiffs failed in each of these obligations. The injunction should be lifted for that reason alone.

- **Section 34 – Copyright [civil remedies] – Interloctory injunction dissolved - Loss of exclusivity of copyright would constitute irreparable harm**

Wiseau Studio v. Harper, 152 C.P.R. (4th) 87 (Ont. Sup. Ct.; 2017-11-01) Koehnen J.
[142] **I am prepared to accept that loss of exclusivity of copyright would constitute irreparable harm** but the plaintiffs have produced no authority to suggest that the use of excerpts from *The Room* in the manner in which the defendants have done would lead to their loss of exclusivity of copyright in *The Room*. Particularly not in light of my finding that the defendants' use of the excerpts amounts to fair dealing.

[143] Where, as here, the plaintiffs seek a *quia timet* injunction, the evidence must be capable of supporting the inference that irreparable harm will occur if the alleged wrongful acts are carried out. The plaintiff need not show evidence that harm has actually occurred: *Operation Dismantle Inc. v Canada*, 1985 CanLII 74 (SCC), [1985] 1 SCR 441 at 457-58. **At the same time, proof of irreparable harm must be more than speculative. The plaintiffs must establish a meaningful risk of harm.**

- **Section 34 – Copyright [civil remedies] – Claiming excessive sums that can not be justified constitutes an ethical fault**

Barreau du Québec (syndic ad hoc) c Brouillette, 2017 QCCDBQ 85, <https://www.canlii.org/fr/qc/qccdbq/doc/2017/2017qccdbq85/2017qccdbq85.html> (Que. Conseil de discipline du Barreau du Québec; 2017-11-03)

[300] Or, l'évaluation des dommages en matière de propriété intellectuelle s'effectue selon des règles qui sont bien connues [Fn83 *Robinson c. Films Cinar inc.*, [2009 QCCS 3793 \(CanLII\)](#) (conf. par *Cinar Corp v. Robinson*, [2013] 3 S.C.R.); Laurent CARRIÈRE, « Voies et recours civils en matière de violation de droits d'auteur au Canada », ROBIC s.e.n.c.r.l., Montréal, 2001]. En l'espèce, les montants réclamés ne sont pas évalués en fonction de ces règles.

[301] **Le fait de réclamer des sommes exagérées qui ne peuvent se justifier compte tenu des circonstances propres au dossier**

constitue une faute déontologique, car « ce n'est pas le rôle d'un avocat de donner des leçons à des tiers en déposant contre eux, devant les tribunaux, des réclamations de plusieurs milliers de dollars dont il est incapable de soutenir le bien-fondé » [Fn84 *Barreau du Québec (syndic adjoint) c. Landry*, 2008 QCCDBQ 60 (CanLII), par. 222 et 228b. (inf. par 2011 QCTP 208 (CanLII) sur la question de la suffisance de la preuve; conf. par 2014 QCCS 5476 (CanLII); inf. par 2017 QCCA 238 (CanLII) sur l'opportunité de retourner le dossier concernant la sanction); *Barreau du Québec (syndic adjoint) c. Morand*, [2011 QCCDBQ 99 \(CanLII\)](#), 2011 QCCDBQ 099, par. 19, 20, 24-26, 32 et 33; Voir aussi : *Barreau du Québec (syndic adjoint) c. Dahan*, 2010 QCCDBQ 133 (CanLII), par. 72-79 et 124-126.]

- **Section 34 – Copyright [civil remedies] – Interlocutory injunction refused – Irreparable harm must be proven and not only speculative – Freedom of expression is to be weighted in ascertaining the balance of convenience**

Vancouver Aquarium Marine Science Centre v. Charbonneau, 2017 CarswellBC 3149 (B.C. S.C.; 2016-04-04)

[96] In this case I consider the balance does not favour the injunction for the reasons that are discussed by my colleague under her headings of irreparable harm and balance of convenience. **I agree with her that more was required to establish irreparable harm than was provided in this case, and that the value of freedom of expression should be a consideration in assessing the balance of convenience.** That freedom of expression affects not just the parties to this litigation but also the larger community whose interests are engaged by the application. **In my view, the balance of relevant factors does not favour the modest editing of the film in the manner ordered before trial.** As my colleague describes, the thrust of the film remains in the film even after elision, reducing the efficacy of the order.

- **Section 34.1 – Presumptions respecting copyright and ownership – The burden to contradict the presumptions lies on the party attacking same**

Diamond v. Montreal Gazette, 2017 QCCQ 1839 (Que. Ct. – Small Claims; 2017-01-19) Lewis J.

[21] L'article 34.1 (1) de la Loi établit une présomption de protection de l'œuvre par le droit d'auteur. **Il appartient donc à celui qui conteste cette présomption d'établir que le titulaire du droit n'en est plus propriétaire [...]**

- **Section 34.1 – Presumptions respecting copyright and ownership – There is a presumption that the infringed work is copyright protected**

Société québécoise de gestion collective des droits de reproduction (Copibec) v. Université Laval, 2017 CarswellQue 1085 (Que. C.A.; 2017-02-08) Gagnon J. [reversing 2016 CarswellQue 1651 (Que. Sup. Ct.; 2016-02-26)]

[78] De plus, pour toutes les procédures engagées en vertu de la *LDA*, **la loi crée une présomption selon laquelle l'œuvre visée par l'action judiciaire est présumée protégée par le droit d'auteur.**

- **Section 34.1 – Presumptions respecting copyright and ownership – There is a presumption that the author of a work is the owner of the copyright therein – This presumption could be rebutted**

Keatley Surveying Ltd. v. Teranet Inc., 2017 CarswellOnt 14961 (Ont. C.A.; 2017-09-08) [affirming 2016 CarswellOnt 7233 (Ont Sup. Ct.; 2016-05-16) Doherty J.

[56] Keatley also relies on s. 34.1 of the *Copyright Act*. That section creates a presumption **that the author of the work is the owner of the copyright in the work “unless the contrary is proved.”** Teranet has established the preconditions to Crown copyright under s. 12 of the *Copyright Act*. In doing so, Teranet has rebutted any presumption that may arise under s. 34.1.

- **Section 34.1 – Presumptions respecting copyright and ownership – The presumption could be rebutted**

Lainco inc v. Commission scolaire des Bois-Francs, 2017 CarswellNat 5087 (F.C.; 2017-09-12) LeBlanc J. [appeal A-300-17]

[131] En cas de violation du droit d'auteur, le titulaire du droit est admis, aux termes du paragraphe 34(1) de la Loi, à exercer tous les recours que la Loi met à sa disposition, notamment le recours en dommages et intérêts. **Lorsque dans une procédure civile engagée à cette fin, comme c'est le cas ici, le défendeur conteste l'existence du droit d'auteur ou encore la qualité du demandeur, le paragraphe 34.1 de la Loi prévoit que jusqu'à preuve du contraire, l'œuvre est présumée être protégée par le droit d'auteur et l'auteur, présumé être le titulaire de ce droit.**

- **Section 34.1 Presumptions respecting copyright and ownership – There is a presumption of originality – The onus to rebut this presumption lies on who is attacking it**

Lapointe v. Broquet inc., 2017 QCCQ 13516 (Que. Ct. – Small Claims) 2017-09-15) Dupuis J

[39] Jusqu'à preuve du contraire, il est présumé être le titulaire de ce droit d'auteur : [34.1(1)b)]

[40] **Cette présomption implique une présomption d'originalité de l'œuvre : il appartient à la partie qui prétend autrement de la renverser** [Fn5 *Fénollar et al c. PRB Média et al*, 2006 QCCS 1956 (CanLII).].

- **Section 35 – Liability for infringement – The plaintiff must establish the revenues and the defendant must prove every element of the deductible costs**

Côté-Drouin (Succession de) v. Pepin, 2017 CarswellQue 47 (Que. Sup. Ct.; 2017-01-10) Lucas J.

[34] Précisons qu'en matière de contrefaçon, aux fins du calcul des «profits» [Fn15 Art. 35 L.d.a] **le demandeur doit établir les revenus, mais c'est au défendeur que revient le fardeau de faire la preuve de tous les coûts déductibles** [FN16 Hugues RICHARD, Laurent CARRIÈRE (Léger Robic Richard), *Canadian Copyright Annotated*, volume 3, Toronto, Thomson Carswell, feuilles mobiles, mise à jour continue, p. 35-12.].

- **Section 35 – Liability for infringement – Damages could be the time and costs for the production of the original work**

Ankenman Associates Architects Inc. v. 0981478 B.C. Ltd., 145 C.P.R. (4th) 279 (B.C. S.C.; 2017-03-01) Burke J.

[80] In my view, the second approach provides a fair measure of damages for the Newmark Group. The Newmark Group used AAAI's plans without consent and therefore should be required to fairly compensate AAAI for that benefit. Therefore, I award AAAI damages in the amount the Newmark Group would have been required to pay AAAI in order for Mr. Podhora to provide services based on the drawings. That amount as of March 31, 2016, is set out in the material as \$52,527.07. **This is based on the time and expense incurred by AAAI in generating the drawings.**

- **Section 35 – Liability for infringement – The assessment of damages is a matter of broad evaluation**

Chayer v. OVH inc., 2017 QCCQ 5596 (Que. Ct. – Small Claims; 2017-05-12) Hamel J.

[19] Cela étant, **le Tribunal évalue et arbitre le montant des dommages** occasionnés à Chayer, à la suite de la violation de ses droits d'auteurs, à la somme de 10 000 \$ [Fn9 Pièce P-39].

- **Section 35 – Liability for infringement – Disgorgement of profits should not go further than preventing a defendant to making a profit out of the infringement**

Poonian v. British Columbia Securities Commission, 2017 CarswellBC 1433 (B.C. C.A.; 2017-05-31) MacKenzie J. [confirming 2015 BCSECCOM 78 (B.C. Securities Comm.; 2015-03-16)]

[120] More importantly, I read *Cinar* [*Robinson v. Films Cinar inc*, 2013 SCC 73] as standing for broader principles on the nature of the disgorgement remedy. **That a wrongdoer may not benefit from wrongdoing** (a theme first developed in equitable jurisprudence on

unjust enrichment) **is a basic legal principle. It is one of fairness and justice.** The Executive Director argues the copyright context does not admit of "any public interest" consideration. However, while the presence of public interest informs the Commission's decisions, it cannot expand the *Act's* permissible scope of what the Commission may do. The public interest is not unlimited. **In my opinion, disgorgement may not go further than required to prevent each wrongdoer from retaining an amount obtained, directly or indirectly, as a result of the wrongdoing. Nor does deterrence require more.**

- **Section 35 – Liability for infringement – Disgorgement of profits is additional to an award of damages**

Lainco inc v. Commission scolaire des Bois-Francs, 2017 CarswellNat 5087 (F.C.; 2017-09-12) LeBlanc J. [appeal A-300-17]

[246] Selon le paragraphe 35(1) de la Loi, quiconque viole le droit d'auteur se rend passible de payer au titulaire du droit qui a été violé, des dommages et intérêts **de même que la proportion, que le tribunal estime équitable, des profits que le contrefacteur a réalisés du fait de la violation et qui n'ont pas été pris en compte dans le calcul des dommages et intérêts.**

- **Section 35 – Liability for infringement – Disgorgement of profits could be joint and several**

Lainco inc v. Commission scolaire des Bois-Francs, 2017 CarswellNat 5087 (F.C.; 2017-09-12) LeBlanc J. [appeal A-300-17]

[287] Lainco aura donc droit de recouvrer des défenderesses, **conjointement et solidairement**, sa perte de profits en lien avec le Complexe Victoriaville, perte dont le montant est fixé à 722 996\$

- **Section 38.1 – Statutory damages – He who claims damages cannot also claim statutory damages – Factors to consider**

Saad v. Le Journal de Montréal, 2017 QCCQ 122 (Que. Ct. – Small Claims; 2017-01-19) Chalifour J.

[47] Ayant choisi d'utiliser cet article de la Loi, M. Saad ne peut réclamer en plus le paiement de sa facture P-2. **Les dommages préétablis servent en effet à le compenser entièrement.**

[48] Tenant compte de l'emploi en cause, du format des reproductions, de la durée de l'utilisation, du fait que les photographies ont été retirées de la plateforme Web et que de nouvelles directives plus précises sont maintenant données aux journalistes de JdM pour prévenir ce genre de situation, le Tribunal estime que M. Saad est bien fondé d'obtenir le minimum prévu par l'article 38.1 de la Loi, soit 500 \$

la photographie pour chaque utilisation, soit dans le journal papier et le format Web, pour un total de 2 000 \$.

- **Section 38.1 – Statutory damages – Statutory damage could be award even if the extent of the infringement was not established**

Point du jour aviation ltée v. Académie Aéronautique inc., 2017 QCCQ 500 (Que. Ct. – Small Claims; 2017-01-25) Cliche J.

[69] Lors de l'audition, monsieur Cossette n'a pas spécifié que la réclamation de son entreprise, au montant de 300,00 \$, était basée sur les dispositions prévues à l'article 38.1 de la *Loi sur les droits d'auteur* concernant les dommages préétablis.

Cependant, tenant compte que dans le cas contraire, **les dommages minimums accordés en cas de violation commise à des fins commerciales**, comme dans le présent cas, s'établissent à 500,00 \$, **le montant réclamé par la demanderesse est tout à fait raisonnable et approprié, et ce, quoique la durée de la violation commise par la défenderesse n'ait pas été établie avec précision.**

- **Section 38.1 – Statutory damages – Statutory damages are on a per work basis and not according to the number of infringing copies of a work – Proportionality is to be consider**

Nintendo of America Inc. v. Go Cyber Shopping (2005) Ltd., 146 C.P.R. (4th) 369 (F.C.; 2017-03-01) Campbell J.

[148] As for the first element, paragraph 38.1(3)(a) requires there to be “more than one work ... in a single medium”. This may apply, for example, to newspapers or anthologies, where multiple copyrights may exist in a single copied medium. **This does not apply here, as the Applicant asserts only a single copyright in respect of each Nintendo Game** (one copy of which is stored on a single medium on an authorized Nintendo game card).

[149] As for the second element, paragraph 38.1(3)(b) requires the Respondent to establish that the total award would be “grossly out of proportion to the infringement”. **To assess proportionality, the Court would need evidence of, among other things, the Respondent's revenues and profits. If any such evidence existed, it would plainly have been within the Respondent's power to adduce.** It did not do so. In the circumstances, it is reasonable to infer that such evidence either did not exist or would not have helped the Respondent.

[150] Conversely, the Applicant adduced evidence that each video game can take years and millions of dollars to develop, and that there are 585 copyrighted Nintendo Games at issue.

[151] In view of the foregoing, s. 38.1(3) does not apply. Accordingly, the range of statutory damages available is between \$500 and \$20,000 per work.

- **Section 38.1 – Statutory damages – Shifting the blame to copyright owner is not a convincing argument to exonerate one’s liability**

Nintendo of America Inc. v. Go Cyber Shopping (2005) Ltd., 146 C.P.R. (4th) 369 (F.C.; 2017-03-01) Campbell J.

[158] **This Court has previously taken a dim view of infringers who attempt to shift blame to rights holders** (*Adobe Systems Incorporated v Dale Thompson DBA Appletree Solutions*, 2012 FC 1219 at para 5, 420 FTR 55).

- **Section 38.1 – Statutory damages – The need of deterrence is a factor to consider**

Nintendo of America Inc. v. Go Cyber Shopping (2005) Ltd., 146 C.P.R. (4th) 369 (F.C.; 2017-03-01) Campbell J.

[162] **The need for deterrence further reinforces that a maximum award** of \$20,000 per work is warranted in the circumstances.

[163] **Damages should be significant enough to deter others who may wish to engage in similar illicit activities and also to deter the Respondent from resuming such activities.**

[164] In respect of the general need for deterrence, Parliament has clearly indicated its intention to protect investments made by the creative industry, including specifically the video game industry. TPMs are important tools to protect these investments. **An award of maximum statutory damages reflects the disproportionate harm that may be caused to copyright owners by those engaged in circumvention, as they provide access to entire libraries of copyrighted works while profiting from others’ investments.**

[165] In respect of the specific need to deter the Respondent, there is evidence of recidivism by the Respondent’s director Mr. King, who has been involved in similar activities in the past (Applicant’s Record, pp. 1203-1205). The Respondent’s business also appears to be dedicated to circumvention activities. Further, the Respondent continues to promote illegitimate activities such as piracy of television programs and circumvention devices for other platforms (Applicant’s Record, pp. 1193-1198). All of this demonstrates an acute need for deterrence.

- **Section 38.1 – Statutory damages – Statutory damages shall be claimed to be awarded**

Geophysical Service Incorporated v. NWest Energy Corp., 2017 CarswellAlta 565 (Alta. Q.B.; 2017-03-31) Nixon J.

[67] The Court acknowledges that GSI asserts that the name of the entities are relevant because it is making a statutory claim under the under the *Copyright Act*, RSC 1985, c C-45. The Court disagrees with that argument. While GSI has referred to the *Copyright Act* in the facts relied on, the remedy it has sought concerning the alleged infringement is focused on damages. **There is no remedy sought for statutory damages.** That being the case, disclosure of the names of the entity signing is not relevant. In any event, GSI knows the number of entities that signed the confidentiality agreements. If the statutory damages under the *Copyright Act* are relevant, the quantum of damages can still be calculated, notwithstanding the redaction of the names of the parties that signed the confidentiality agreements.

[68] **The Court comes to this conclusion notwithstanding section 38.1 of the *Copyright Act*. While that section does allow a copyright owner to elect to recover an award for statutory damages, no such election has been made in this case. Absent such an election, the Court will not consider the matter further.**

- **Section 38.1 – Statutory damages – There should be some correlation or proportionality between actual damages and statutory damages - Factors to consider**

Trader v CarGurus, 145 C.P.R. (4th) 415 (Ont. Sup. Ct.; 2017-04-06) Conway J.

[55] Section 38.1(5) provides that in exercising its discretion to reduce statutory damages pursuant to s. 38.1(1) to (4), the court shall consider “all relevant factors”, including:

- the good faith or bad faith of the defendant;
- the conduct of the parties before and during the proceedings;
- the need to deter other infringements of the copyright in question.

[56] **The purpose of statutory damages is intended to ease the evidentiary burden on a copyright owner, for whom it may be difficult, if not impossible, to prove the extent of the loss:** see Government of Canada’s “Fact Sheet on Copyright Remedies”. [Fn13 Industry Canada, *Fact Sheet on copyright Remedies* (26 November 2011), archived online: <<http://webarchive.bac-lac.gc.ca:8080/wayback/20131003064747/http://www.ic.gc.ca/eic/site/ippd-dppi.nsf/eng/ip00090.html>>.] **However, statutory damages are intended to compensate the copyright owner for its losses** (and, as well, to deter future infringements). The caselaw has held that there should be **some correlation or proportionality between actual damages and statutory damages** [Fn14 *Telewizja Polsat S.A. v. Radiopol Inc.*, 2006 FC 584 (CanLII), at para. 45; see also *Pinto v. Bronfman Jewish Education Centre*, 2013 FC 945 (CanLII), at para. 195; *Théberge v. Galerie d’Art du Petit Champlain Inc.*, 2002 SCC 34

(CanLII), at para. 31; *Royal Conservatory of Music v. MacIntosh (Novus Via Music Group Inc.)*, 2016 FC 929, at paras. 119-21].

- **Section 38.1 – Statutory damages – Proportionality is to be exercised – Infringement of multiple works in a single medium is to be considered**

Trader v CarGurus, 145 C.P.R. (4th) 415 (Ont. Sup. Ct.; 2017-04-06) Conway J.

[58] Trader also argues that there is no “single” medium because the Trader Photos can be accessed through both a desktop and a mobile application. In my view, the medium in this case is the CarGurus website. The desktop and mobile application are simply two user interfaces for accessing that website. **The Trader Photos are therefore in a single medium, meeting the first condition for reduced statutory damages in s. 38.1(3).**

[67] Considering the factors in s. 38.1(5), I am exercising my discretion under s. 38.1(3) to reduce the statutory damages to \$2.00 per Trader Photo, which is an amount that I consider just, for a total award of \$305,064. I have calculated this award taking into account the following: [...] **A deterrence factor is included to reflect the failure of CarGurus to conduct sufficient due diligence to ascertain the copyright owner for the photos on Dealer websites** and to confirm its assumption that its U.S. business model would work in the Canadian market.

- **Section 38.1 – Statutory damages – Good faith is one of the factors to be considered**

Jomphe (Karjessy) v. Société St-Jean-Baptiste de Montréal, 2017 QCCQ 7303 (Que. Ct. – Small Claims; 2017-06-22) Gibbens J.

[26] En l’espèce, le Tribunal est d’avis qu’une compensation de 1 000 \$ [as statutory damages under s. 38.1] est équitable, **en tenant compte de la bonne foi de la SSJB et de ses représentants**, de la période durant laquelle les photographies ont été affichées, du peu de consultation sur le site Internet durant cette période et de la conduite des parties avant et pendant l’instance.

- **Section 38.1 – Statutory damages – He who claims statutory damages cannot also claim damages or accounting – Factors to consider**

Labelle v. Brillant, 2017 QCCQ 12285 (Que. Ct. - Small Claims; 2017-07-28) Gibbens J.

[21] Puisque la violation du droit d’auteur de M. Labelle a été commise à des fins commerciales, le Tribunal doit établir une compensation équitable à l’intérieur d’une fourchette de 500 \$ à 20 000 \$ en tenant compte des facteurs énoncés au paragr. 38.1 (5) LDA.

[22] Le Tribunal est d’avis qu’une compensation de 3 000 \$ est équitable dans les circonstances. **Pour arriver à cette conclusion, le**

Tribunal retient que bien que M. Brillant n'ait pas fait de vérifications suffisantes pour retracer l'auteur de la chanson dont il voulait s'inspirer, il n'a pas agi de mauvaise foi. Le Tribunal retient également que M. Brillant a réagi rapidement pour éviter un éventuel dommage et qu'il n'y a pas de preuve que la chanson des Batteux Slaques ait rapporté quelque revenu ou profit à M. Brillant.

[27] Puisque M. Jomphe a choisi de réclamer des dommages préétablis, il ne peut réclamer de dommages additionnels, tel que prévu au paragr. 38.1 (1) de la Loi. Les dommages préétablis visent à le compenser entièrement.

- **Section 38.1 – Statutory damages – He who claims statutory damages cannot also claim damages or accounting**

Capitale en fête inc. v. Ouellet, 2017 QCCQ 8492 (Que.Ct.; 2017-08-24) Brunelle J.

[32] Cette loi [*Copyright Act*] accorde à la personne qui s'estime victime d'une violation de ses droits d'auteur la possibilité d'obtenir des dommages-intérêts *préétabli* [Fn 27 Voir par exemple : *Gagné c. Faguy*, 2015 QCCQ 11832 (CanLII), par. 35 et suivants en lieu et place des dommages-intérêts découlant, par exemple, de pertes de profits [Fn28 LRC 1985, c. C-42, srt 38.1(1)].

- **Section 39 – Injunction only remedy when defendant not aware of copyright – Ignorance is not a defense**

Jomphe (Karjessy) v. Société St-Jean-Baptiste de Montréal, 2017 QCCQ 7303 (Que. Ct. – Small Claims; 2017-06-22) Gibbens J.

[16] Il ne fait aucun doute à la lumière des dispositions reproduites plus haut que la SSJB a violé le droit d'auteur de M. Jomphe sur les photographies en les reproduisant sur son site Internet sans son consentement.

[17] **La SSJB plaide l'ignorance des droits de M. Jomphe, mais il ne s'agit pas d'un moyen de défense valable** [Fn3 *Salons Marcel Pelchat inc. c. Breton*, J.E. 2004-603 (C.S.), paragr. 55 et ss.; *Saad c. Le Journal de Montréal*, 2017 QCCQ 122 (CanLII), paragr. 19 à 24.], non plus que le fait que les photographies étaient disponibles sur d'autres sites Internet.

- **Section 39.1 – Wide injunction – Wide injunction to issue when a defendant is likely to continue infringing activities**

Nintendo of America Inc. v. Go Cyber Shopping (2005) Ltd., 146 C.P.R. (4th) 369 (F.C.;

2017-03-01) Campbell J.

[175] **An injunction is the normal remedy for infringement of copyright.** Here, the Applicant also seeks a wide injunction under s. 39.1(1) of the *Act* to prohibit the Respondent from infringing copyright in any other work owned by the Applicant and from trafficking in any circumvention devices that circumvent the Applicant's TPMs.

[176] **The Applicant has satisfied the burden of showing that the Respondent is likely to continue infringing copyright and circumventing TPMs absent an injunction.**

[177] Thus, the Respondent should be enjoined from infringing any of the Applicant's copyrights and circumventing any of the Applicant's TPMs.

- **Section 39.1 – Wide injunction – Absent any risk of recidivism, a wide injunction will not issue**

Trader v CarGurus, 145 C.P.R. (4th) 415 (Ont. Sup. Ct.; 2017-04-06) Conway J.

[69] CarGurus has removed all of the Trader Photos. It has ceased indexing Dealer websites. It has undertaken to Trader that it will not reproduce any future Trader photos obtained from CarGurus' feed providers, if Trader provides a means for CarGurus to identify those photos (such as the vehicle identification numbers associated with the photos). CarGurus submits that Trader has already instructed those feed providers not to syndicate any Trader photos to CarGurus and that it is unlikely that any future infringements will occur for photos obtained from feed providers.

[70] There is no need for the requested "wide injunction" that would enjoin CarGurus from reproducing all current and future Trader photos. Trader acknowledges that the practical effect of any such injunction would be for CarGurus to clear with Trader in advance the rights to any Canadian photos it wishes to use, or enter into a license agreement with Trader on mutually acceptable terms. As CarGurus points out, that would have the effect of forcing CarGurus to enter into Trader's syndication agreement or cease operating in Canada

[71] If there are any infringements in the future, Trader will be entitled to assert and enforce whatever intellectual property rights it has at that time.

- **Section 41 – Definitions [TPM] – The definition of "circumvent" for an access control TPM extends beyond descrambling and decryption – Technological barriers are not required for infringement by circumvention to occur**

Nintendo of America Inc. v. Go Cyber Shopping (2005) Ltd., 146 C.P.R. (4th) 369 (F.C.; 2017-03-01) Campbell J.

[80] It is evident from the wording and structure of the UK Act that it contemplates a narrower definition of “effective technological measure”, in that the “access control or protection process” is limited to encryption, scrambling or some “other transformation of the work”. Arguably, this implies that access control under the UK Act requires some barrier to copying.

[81] **The Canadian Act has no such limitation.** Under part (a) of the definition, a technological protection measure means “any effective technology, device or component that, in the ordinary course of its operation, (a) controls access to a work ...”. There is no suggestion that such effective technology requires transformation of the protected work.

[82] Consistent with the foregoing, **the definition of “circumvent” for an access control TPM extends beyond descrambling and decryption** (or other similar transformation) to anything else that otherwise avoids, bypasses, removes, deactivates, or impairs the technological protection measure. It is apparent that Parliament intended access control TPMs to extend beyond TPMs that merely serve as barriers to copying.

[83] Moreover, since part (b) of the definition for technological protection measure covers “any effective technology, device or component that, in the ordinary course of its operation [...] restricts the doing [...] of any act referred to in section 3”, for example copying, it would be redundant and inconsistent with the structure of s. 41 to require access control TPMs to employ a “barrier to copying”.

[84] **Thus, having regard to Parliament’s express intent to give copyright owners the power to control access to works, the principle of technological neutrality, the scheme of the Act, and the plain meaning of the definitions for TPM and “circumvent”, it is clear that access control TPMs do not need to employ any barrier to copying in order to be “effective”.**

- **Section 41.1 – Prohibition [TPM] – Circumventing and trafficking in circumvention devices are prohibited**

Nintendo of America Inc. v. Go Cyber Shopping (2005) Ltd., 2017 CarswellNat 650 (F.C.; 2017-03-01) Campbell J.

[1] In 2012, Parliament amended the *Copyright Act*, RSC 1985, c C-42 (the *Act*) **to add prohibitions against circumventing technological protection measures (TPMs) and trafficking in**

circumvention devices. In doing so, Parliament explicitly recognized the importance of TPMs for protecting copyrighted works, particularly in the video game industry. The present Application engages novel issues arising from this important legislation.

- **Section 41.1 – Prohibition [TPM] – Three steps analysis**

Nintendo of America Inc. v. Go Cyber Shopping (2005) Ltd., 146 C.P.R. (4th) 369 (F.C.; 2017-03-01) Campbell J.

[71] The framework of the *Act* therefore requires the Court to consider the following questions: (1) **whether the Applicant’s technology, device, or component is a TPM** within the definition of s. 41; (2) **whether the Respondent has engaged in circumvention activities** prohibited by s. 41.1(1); and, if raised, (3) **whether any exception applies.**

- **Section 41.1 – Prohibition [TPM] – Circumvention must be given a liberal interpretation in line with the intent of Parliament**

Nintendo of America Inc. v. Go Cyber Shopping (2005) Ltd., 146 C.P.R. (4th) 369 (F.C.; 2017-03-01) Campbell J.

[92] **For liability under s. 41.1(1)(c), the Applicant must establish that the Respondent has committed one of the prohibited acts** (e.g. selling Game Copiers, which is not disputed) and one of the conditions (i), (ii), or (iii). Each of these conditions incorporate the word “circumvent” as defined in s. 41: “to descramble a scrambled work or decrypt an encrypted work or to otherwise avoid, bypass, remove, deactivate or impair the technological protection measure, unless it is done with the authority of the copyright owner”. There is a dispute only about the meaning of “circumvent”.

[97] First, the Respondent’s **dictionary based approach to statutory interpretation ignores the scheme of the *Act* and purpose of the prohibition against circumvention.**

[98] Second, **there is no suggestion in the definition of “circumvent” that Parliament intended to exclude “replication” from the definition.**

[99] Third, the Respondent’s interpretation defies logic. **Replication is not incompatible with circumvention.** A burglar who uses an illicitly copied key to avoid or bypass a lock to access a house is no less of a burglar than one who uses a lock pick. Similarly, even if the Respondent’s Game Copiers replicate only a part of the TPM, that does not make their use any less of a circumvention.

- **Section 41.1 – Prohibition [TPM] – A device the only purpose of which is to descramble encrypted communication is a circumvention device**

Nintendo of America Inc. v. Go Cyber Shopping (2005) Ltd., 146 C.P.R. (4th) 369 (F.C.; 2017-03-01) Campbell J.

[109] The Respondent does not dispute that it has distributed, offered for sale, and sold Game Copier devices. The Respondent also admits that its Game Copiers are **“not commercially significant other than to circumvent the TPMs through the descrambling of encrypted communications from the DS Systems”** (Respondents’ Memorandum of Fact and Law, para. 82). The evidence also shows that the Respondent knew that its Game Copiers were used by its customers to play pirated Nintendo Games (Applicant’s Record, pp. 1185-1190). This is sufficient to satisfy s. 41.1(1)(c)(ii),

[110] The Respondent has therefore trafficked in circumvention devices contrary to s. 41.1(1)(c) of the *Act*.

- **Section 41.1 – Prohibition [TPM] – Offering the services of circumventing and circumbenting are two different prohibitions**

Nintendo of America Inc. v. Go Cyber Shopping (2005) Ltd., 146 C.P.R. (4th) 369 (F.C.; 2017-03-01) Campbell J.

[111] With respect to circumvention of Wii TPMs, the Respondent admits that it **provided services to circumvent the Wii TPMs through sale and providing installation services for mod chips**. The Respondent has therefore contravened s. 41.1(1)(b), subject only to its “interoperability defence” discussed below.

[112] The evidence also establishes that the Respondent **directly circumvented the Applicant’s Wii TPMs by installing a mod chip on a Wii console, thereby enabling a user to access unauthorized copies** of the Applicant’s video games. Therefore, the Respondent also contravened s. 41.1(1)(a) of the *Act*.

- **Section 41.1 – Prohibition [TPM] – interoperability might be a defense to the prohibition but it is up to the defenandt to prove the purpose**

Nintendo of America Inc. v. Go Cyber Shopping (2005) Ltd., 146 C.P.R. (4th) 369 (F.C.; 2017-03-01) Campbell J.

[117] In support of its defence, the Respondent makes much of the potential availability of “homebrew” software. “Homebrew” refers to third party software designed for use on the Applicant’s consoles, but which are not necessarily owned or licensed by the Applicant.

[118] The Respondent relies heavily on a report submitted by the Applicant regarding the relative prevalence of illicit software (e.g. pirated video games) versus “homebrew” software available on the internet (Applicant’s Record, pp. 150-346). The Respondent’s position appears to be that its sale of circumvention devices and installation

services are for the purpose of making the Applicant's game consoles "interoperable" with homebrew software.

[119] The Respondent's position is unfounded.

[120] First, **the Applicant's evidence establishes that the primary purpose of the Respondent's devices is to enable users to play pirated copies** of Nintendo Games (Rhoads 1, Applicant's Record, p. 98; Rhoads 2, Applicant's Record, p. 919).

[121] Second, **although homebrew software may be available on the internet and users of the Respondent's devices *could* theoretically be using them for homebrew, the scale of such activities is dwarfed by the market for illicit and infringing activities** (Applicant's Record, pp. 157-158, 294). Indeed, most of the websites purporting to make homebrew software available also offer (in far greater quantities) unauthorized copies of the Applicant's copyrighted games.

[122] Third, the Respondent's own website belies its submission. The only mention of "homebrew" on the Respondent's website states "no homebrew at the moment". Having effectively advised its customers that homebrew is unavailable, the Respondent is in no position to show that its products and services were for this purpose (Hunter, Applicant's Record, pp. 1186-1189).

[123] Fourth, **the Applicant's evidence establishes that there are legitimate paths for developers to develop software on its consoles without circumventing the Applicant's TPMs**. There is no need for any TPM circumvention to achieve interoperability.

[124] Fifth, **the Respondent failed to adduce any evidence that any users actually *did* use their services or devices for the purpose of making the Applicant's consoles interoperable with homebrew software**.

[125] In view of the foregoing, the Respondent has not met its burden of establishing that its activities fall within s. 41.12 of the *Act*.

- **Section 41.1 – Prohibition [TPM] – Actual infringement is not necessary for an award of statutory damages**

Nintendo of America Inc. v. Go Cyber Shopping (2005) Ltd., 146 C.P.R. (4th) 369 (F.C.; 2017-03-01) Campbell J.

[137] First, **actual infringement of copyright is not necessary for an award of statutory damages for TPM circumvention**. This proposition is self-evident from the scheme of the statute. Subsection

41.1(4) provides that the copyright owner is entitled to all remedies where “a technological protection measure has been or could be circumvented as a result of the contravention of paragraph (1)(b) or (c)”. **This implies that actual circumvention is not required. It logically follows that actual access or copying of a copyrighted work is also not required. Moreover, s. 41.1 does not limit damages for TPM circumvention to circumstances involving actual copyright infringement.** Had Parliament intended to make actual copyright infringement a necessary element for recovering damages, it easily could have done so as it did in s. 38.1(1.1) in respect of an infringement under s. 27(2.3).

[138] Second, a work-based award is more harmonious with the wording of the Act. Subsection 41.1(4) provides that the “owner of the copyright in a work” is entitled to all remedies. **If the owner of a single work may claim all remedies for infringement of that one work, it follows that the owner of multiple works is entitled to a separate remedy for each infringed work.** This is also consistent with the wording in s. 38.1(1), which provides remedies for infringement of “each work or other subject matter”.

[139] Third, the economic reality of copyright vis-à-vis TPM circumvention favours a work-based calculation. **The “market” for circumvention devices and services is driven by the value of the works to which access is illicitly gained.** A robber breaks a lock because of the value behind the lock, not because of the value of the lock(s). If the Applicant had not invested millions of dollars to create a library of valuable video games, the Respondent would have no market for its circumvention devices.

[140] Fourth, a TPM-based award of damages would likely be ineffective. Parliament recognized the importance of TPMs as tools to prevent piracy and to protect investments made by the creative industry. **In order to be effective, those legal tools must reflect the value of the works protected and act as a deterrent to the circumvention industry.** The Applicant’s consoles are each protected by 2 or 3 TPMs, whereas circumvention provides access to hundreds of the Applicant’s video games. In effect, a TPM-based award would become a fixed cost of business for trafficking in circumvention devices. Perversely, this would incentivize TPM circumvention for the most popular and valuable copyright libraries. That could not have been Parliament’s intention.

- **Section 41.12 – Interoperability of computer programs – Interoperability exception is an affirmative defense – The burden to show the application of the exception lies on the defendant**

Nintendo of America Inc. v. Go Cyber Shopping (2005) Ltd., 146 C.P.R. (4th) 369 (F.C.; 2017-03-01) Campbell J.

[113] The Respondent raises an affirmative defence under s. 41.12 of the *Act*, which is a section titled “interoperability of computer programs”. The Respondent also asserts a “homebrew” defence. However, as “homebrew” is not a recognized exception under the *Act*, it is assumed that the Respondent’s reference to “homebrew” is for the purpose of establishing the interoperability exception under s. 41.12.

[114] **The Respondent bears the burden of establishing that it meets one of the exceptions under the *Act*** (*CCH, [CH Canadian Ltd v Law Society of Upper Canada*, 2004 SCC 13] at para 48).

- **Section 41.23 – Protection of separate rights – For a collective society, ownership of a copyright interest is not required to take action on behalf its members**

Société québécoise de gestion collective des droits de reproduction (Copibec) v. Université Laval, 2017 CarswellQue 1085 (Que. C.A.; 2017-02-08) Gagnon J. [reversing 2016 CarswellQue 1651 (Que. Sup. Ct.; 2016-02-26)]

[104] Toujours selon la même loi, Copibec, **en sa qualité de société de gestion, a comme rôle de veiller à l’administration d’un système d’octroi de licences, d’établir des catégories d’utilisation et de fixer les redevances et les modalités afférentes** (article 2). Elle doit aussi voir à la perception et à la répartition des redevances payables. Bref, selon cette description de son mandat, Copibec a manifestement un intérêt pour faire valoir les réclamations des auteurs regroupées sous sa gestion commune.

[105] Copibec bénéficie également d’une habilitation législative l’autorisant à entreprendre des actions en justice pour ces mêmes auteurs et ayants droit. En ce sens, la *LDA* reconnaît aux sociétés de gestion le pouvoir de procéder à la perception des redevances dues aux auteurs (article 2 b)).

[106] En raison de ce qui précède, **même si Copibec ne détenait personnellement aucun droit d’auteur, il ne saurait faire de doute qu’elle possède l’intérêt suffisant pour agir pour le compte des membres du groupe aux fins de faire valoir leurs droits patrimoniaux.**

- **Section 41.24 – Concurrent jurisdiction of Federal Court – The Small Claims Division of the Quebec Court has jurisdiction over a copyright matter**

Farsi v. Georges, 2017 QCCQ 7268Que. Ct. – Small Claims; 2017-06-27) Hamel J.

[4] Or, il appert, entre autres, des paragraphes 1 et 4 de la *Demande introductive d'instance* que le recours vise, entre autres, mais non limitativement, à première vue, davantage l'utilisation non autorisée d'une ou de plusieurs photographies appartenant à Farsi [the plaintiff], ce qui peut constituer une atteinte au droit à l'image qui est lui-même une composante du droit à la vie privée ou une violation d'un droit d'auteur, selon la preuve présentée à la Cour lors de l'instruction de la présente affaire.

[5] **Ce faisant, le Tribunal est d'avis que la réclamation de Farsi, à première vue, peut faire l'objet d'une réclamation présentée à la Division des petites créances** [Fn5 *Auger c. Lopes* (Studio Orchidée), 2014 QCCQ 5486 (CanLII), paragraphes 7-10], dans la mesure où celle-ci ne constitue pas, à proprement parlé, une poursuite en diffamation, tel que précisé par la Cour d'appel dans l'arrêt *Société Radio-Canada c. Radio Sept-Îles inc.*[Fn6 1994 CanLII 5883 (QC CA), [1994] R.J.Q. 1811 (C.A.); *Levasseur c. Club Nautique de Havre St-Pierre inc.*, 2010 QCCQ 5184 (CanLII), paragraphe 7 tiret 13; *Somers c. Journal Plein Jour du Sur Manicouagan*, 2012 QCCQ 15216 (CanLII)].

- **Section 41.24 – Concurrent jurisdiction of Federal Court – The Quebec Court does not have jurisdiction to issue an injunction in copyright matters**

Lapointe v. Broquet inc., 2017 QCCQ 13516Que. Ct. – Small Claims) 2017-09-15) Dupuis J.

[29] **La Loi sur le droit d'auteur accorde aux tribunaux provinciaux une compétence concurrente avec la Cour fédérale pour disposer d'une procédure liée à cette loi, à son article 41.24.**

[32] Dans la procédure déposée au dossier de la Cour, M. Lapointe demandait au Tribunal d'ordonner à Broquet inc. de modifier la couverture de toutes les copies non vendues du guide de Mme Brulotte pour y ajouter la mention « *d'après une idée originale de Donald Lapointe* ». **Cette conclusion est de la nature d'une injonction, matière sur laquelle la Cour du Québec n'a pas compétence.** Le Tribunal le souligne à M. Lapointe, qui retire cette conclusion.

[33] Le Tribunal a donc compétence pour entendre la présente affaire, telle que modifiée.

- **Section 41.25 – Notice of claimed infringement – Copyright owners could seek information from Internet providers with respect to the identity of infringers**

Voltage Pictures, LLC v John Doe, 2017 CarswellNat 2130 (F.C.A.; 2017-05-09) Stratas J. [reversing 141 C.P.R. (4th) 136 (F.C.; 2016-07-28); leave to appeal to the Supreme Court of Canada granted 2017 CarswellNat 6597 (S.C.C.; 2017-11-23)]

[1] Under the cloak of anonymity on the internet, some can illegally copy, download, and distribute the intellectual property of others, such as movies, songs and writings. **Unless the cloak is lifted and identities are revealed, the illegal conduct can continue, unchecked and unpunished**

[3] Parliament has intervened to assist those in the position of the appellants. Under a relatively new legislative regime, **Parliament has allowed copyright owners, like the appellants, to seek information from internet service providers to lift the cloak of anonymity and reveal the identity of the suspected infringers so the copyright owners can act to protect their rights: Copyright Act**, R.S.C. 1985, c. C-42, sections 41.25 to 41.27 (added by the *Copyright Modernization Act*, S.C. 2012, c. 20, s. 47). The legislative regime regulates a number of matters, including the fee that an internet service provider may charge for the work it does.

- **Section 41.25 – Notice of claimed infringement – The Internet provider has an obligation to act upon receipt of a notice by the copyright owner**

Voltage Pictures, LLC v John Doe, 146 C.P.R. (4th) 339 (F.C.A.; 2017-05-09) Stratas J. [reversing 141 C.P.R. (4th) 136 (F.C.; 2016-07-28); leave to appeal to the Supreme Court of Canada granted 2017 CarswellNat 6597 (S.C.C.; 2017-11-23)]

[29] **The legislative regime imposes certain obligations upon internet service providers that have identifying information.** The legislative regime also regulates the fee that internet service providers can seek from copyright owners for their efforts.

[30] Here's how the legislative regime works. Under section 41.25 of the Act, the owner of a copyright in a work or other subject-matter, such as the appellants, sends a notice of infringed copyright to an internet service provider like Rogers. The notice sets out certain information that allows the internet service provider to review its records and identify the suspected infringer: see subsection 41.25(2) of the Act.

- **Section 41.26 – Obligations related to notice – Some obligations are incidental to the express ones**

Voltage Pictures, LLC v John Doe, 146 C.P.R. (4th) 339 (F.C.A.; 2017-05-09) Stratas J. [reversing 141 C.P.R. (4th) 136 (F.C.; 2016-07-28); leave to appeal to the Supreme Court of Canada granted 2017 CarswellNat 6597 (S.C.C.; 2017-11-23)]

[31] Subsection 41.26(1) of the Act sets out the obligations of the internet service provider upon receiving the notice of infringed copyright and upon the payment of any fee that can be “lawfully charged.”

[32] The internet service provider has two sets of obligations: **one set in paragraph 41.26(1)(a) and another set in paragraph 41.26(1)(b). Some obligations are express and are evident in the literal wording of these paragraphs. Other obligations are necessarily incidental to, implied from or bound up in the express obligations.** These other obligations must also exist—otherwise, the purposes underlying the legislative regime will be unfulfilled or, worse, frustrated.

- **Section 41.26 – Obligations related to notice – Amongst other, the Internet provider must retain records allowing a prompt disclosure and supply an answer to the notice in a readable form**

Voltage Pictures, LLC v John Doe, 146 C.P.R. (4th) 339 (F.C.A.; 2017-05-09) Stratas J. [reversing 141 C.P.R. (4th) 136 (F.C.; 2016-07-28); leave to appeal to the Supreme Court of Canada granted 2017 CarswellNat 6597 (S.C.C.; 2017-11-23)]

[39] **To the extent that the records are in a manner and form usable by the internet service provider to identify suspected infringers but are not in a manner and form usable by copyright owners and courts**—in other words, to the extent they must be translated or modified in some way—the internet service provider must perform that work as part of its 41.26(1)(b) obligations. An indecipherable jumble of randomly arranged records that copyright owners and courts cannot figure out will not, in the words of paragraph 41.26(1)(b), “allow [copyright holders and courts to determine] the identity of the person to whom the electronic location belongs.” **The records must also be retained in a manner that can be disclosed promptly.** Only the prompt provision of helpful, usable records to copyright owners and ultimately to the courts fulfils the purposes of the legislative regime and the broader purposes of the *Copyright Act*.

[40] Overall, putting the two sets of subsection 41.26(1) obligations together, the internet service **provider must maintain records in a manner and form that allows it to identify suspected infringers, to locate the relevant records, to identify the suspected infringers, to verify the identification work it has done (if necessary), to send the notices to the suspected infringers and the copyright owner, to translate the records (if necessary) into a manner and form that allows them both to be disclosed promptly**

and to be used by copyright owners and later the courts to determine the identity of the suspected infringers, and, finally, to keep the records ready for prompt disclosure.

- **Section 41.26 – Obligations related to notice – Absent any regulation, an Internet service provider cannot charge for the work it does**

Voltage Pictures, LLC v John Doe, 146 C.P.R. (4th) 339 (F.C.A.; 2017-05-09) Stratas J. [reversing 141 C.P.R. (4th) 136 (F.C.; 2016-07-28); leave to appeal to the Supreme Court of Canada granted 2017 CarswellNat 6597 (S.C.C.; 2017-11-23)]

[42] Under subsection 41.26(2), the responsible Minister, the Minister of Industry, may, by regulation, fix the maximum fee that an internet service provider like Rogers can charge for performing the subsection 41.26(1) obligations. But if no maximum fee is fixed by regulation, the internet service provider may not charge anything for performing the subsection 41.26(1) obligations.

[43] At present, no regulation has been passed. Thus, internet service providers such as Rogers cannot charge a fee for the discharge of their subsection 41.26(1) obligations, as significant as they are.

[47] Another way of putting this is that subsection 41.26(2) has been drafted in a way that makes “no fee” for the subsection 41.26(1) obligations the default position. Depending on everyone’s experience concerning the operation of the legislative regime, the Minister of Industry might later make a regulation setting a maximum fee. When in force, that regulation would displace the default position.

[48] The default position of “no regulation and, thus, no fee” for the 41.26(1) obligations is a legislative choice that, at least for the time being, prioritizes considerations of access to identifying information to allow copyright owners the ability to protect and vindicate their rights over the economic interests of internet service providers. This is no surprise given the purposes the legislative regime serves and the broader purposes of the *Copyright Act*.

[70] In my view, this holding was vitiated by legal error. Under the legislative regime, described and analyzed above, an internet service provider cannot charge a fee for the costs of discharging its subsection 41.26(1) obligations, enumerated and described in paragraph 40, above. Allowing an internet service provider at the point of disclosure to charge a fee for these costs would be an end run around the legislative decision that these activities should not be remunerated at this time.

- **Section 41.27 – Injunctive relief only – providers of information location tools – An ILT is a tool that it makes it possible to locate information that is available through the Internet**

Trader v CarGurus, 145 C.P.R. (4th) 415 (Ont. Sup. Ct.; 2017-04-06) Conway J.

[43] This [s. 41.27(1)] exemption was introduced in 2012 when the [Act](#) was modernized to, among other things, extend various “safe harbour” protections to providers of network services and information location tools, i.e. providers of services that enable the public to use and navigate the Internet. The term “information location tool” has not been judicially considered as yet.

[46] The crux of the defined term “information location tool” in the Act is the **locating of information – it is a tool that it “makes it possible to locate information that is available through the Internet.”** In my view, **Parliament intended to afford protection to intermediaries that provide tools that enable users to navigate and find information where it is located on the Internet.** It did not intend to afford that protection to providers like CarGurus that gather information from the Internet and make it available to the user on the provider’s own website.

- **Section 41.27 – Injunctive relief only – providers of information location tools – Search engines are exempt from liability when they act strictly as intermediary**

Trader v CarGurus, 145 C.P.R. (4th) 415 (Ont. Sup. Ct.; 2017-04-06) Conway J.

[47] The Background document released by the Government of Canada along with Bill C-11 (*The Copyright Modernization Act*) explained that “the bill will clarify that **Internet service providers (ISPs) and search engines are exempt from liability when they act strictly as intermediaries** in communication, caching, and hosting activities.” [Fn10] Government of Canada, News Release, “Harper Government Delivers on Commitment to Reintroduce Copyright Modernization Act” (Ottawa, September 29, 2011), archived online: <<https://www.canada.ca/en/news/archive/2011/09/harper-government-delivers-commitment-reintroduce-copyright-modernization-act.html>>.] (my emphasis added)

[48] This is reflected in the way that s. 41.27 works. **If the provider of an information location tool caches (i.e. temporarily stores) information and meets the other conditions of s. 41.27(2) in facilitating a user’s navigation to the location of that online information, the provider is protected from liability for copying that information.** [Fn11 See *SOCAN v. CAIP*, 2007 SCC 45, at paras. 113-116, in which the court recognized that “caching” is a

means of facilitating the communication between the user and the content provider. It is dictated by the need to deliver faster and more economic service and should not, when undertaken only for such technical reasons, attract copyright liability] **The rationale, in my view, is that the provider is enabling the user to get to the location of the online information and therefore should not be liable simply for acting as an intermediary.**

- **Section 41.27 – Injunctive relief only – providers of information location tools – The burden to establish an ILT is upon the party claiming safe harbor**

Trader v CarGurus, 145 C.P.R. (4th) 415 (Ont. Sup. Ct.; 2017-04-06) Conway J.

[51] I therefore cannot conclude that CarGurus acted as an intermediary as contemplated by s. 41.27 during the infringement period. **CarGurus has failed to establish that it was the provider of an “information location tool”** and is not entitled to protection from statutory damages.

- **Section 41.27 – Injunctive relief only – providers of information location tools – Injunctive relief is the only remedy against a n ITL provider strictly acting in that capacity**

Voltage Pictures, LLC v John Doe, 146 C.P.R. (4th) 339 (F.C.A.; 2017-05-09) Stratas J. [reversing 141 C.P.R. (4th) 136 (F.C.; 2016-07-28); leave to appeal to the Supreme Court of Canada granted 2017 CarswellNat 6597 (S.C.C.; 2017-11-23)]

[11] As mentioned above, the legislative regime consists of sections 41.25, 41.26 and 41.27 of the *Copyright Act*. **Section 41.27 provides for injunctive relief against a provider of an information location tool that is found to have infringed copyright. [...]**

- **Section 43.1 – Limitation or prescription period for civil remedies – Concealment must be proven to interrupt the limitation**

Geophysical Service Incorporated v Murphy Oil Company Ltd, 2017 CarswellAlta 1321 (Alta. Q.B.; 2017-07-26) Eidsvik J.

[62] In any event, again, this claim likely would be lapsed because it occurred over 10 years before GSI filed its Statement of Claim, and there **is no basis on this record to find fraudulent concealment to suspend this limitation period**. Accordingly, the claim would be dismissed on this basis as well, although I do not need to determine this issue at this point considering my findings above.

- **Section 43.1 – Limitation or prescription period for civil remedies – Reasonable diligence must be exercised to allege interruptive concealment**

907687 Ontario Inc. (International Institute of Travel) v. 1472359 Ontario Ltd (IBT College of Business Travel & Tourism Technology), 2017 CarswellNat 6175 (F.C.; 2017-10-31) Fothergill J.

[41] Subsection 43.1(1) of the *Copyright Act* provides that an action for copyright infringement must be commenced within three years of the time when a plaintiff first knew, or could reasonably have been expected to know, of an act or omission contrary to the *Act*. The **discovery of material facts involves an exercise of reasonable diligence** (*Central Trust Co v Rafuse*, [1986] 2 SCR 147 at 224). **The subsequent discovery of additional evidence that supports a claim does not extend the limitation period** (*Lindhorst v Cornwall*, 2010 ONSC 3882 at para 33).

- **Section 43.1 – Limitation or prescription period for civil remedies – It is Plaintiff’s burden to prove fraud interruptive of limitation**

907687 *Ontario Inc. (International Institute of Travel) v. 1472359 Ontario Ltd (IBT College of Business Travel & Tourism Technology)*, 2017 CarswellNat 6175 (F.C.; 2017-10-31) Fothergill J.

[46] IIT also says that it was entitled to rely on Mrs. Bharucha’s representation in 2002 that Mr. Shokour had not been given access to the copyrighted materials. **Reliance on a party’s good faith has been accepted in cases of fraud** (*Faye v Roumegous* (1918), 42 DLR 533 at 543 (Ont CA), citing *Betjemann v Betjemann*, [1895] 2 Ch 474 (CA)), and where there is evidence of willful concealment (*Underwriters’ Survery Bureau Ltd v Massie & Renwick Ltd*, [1938] 2 DLR 31 at 51 (FCTD)). However, there is no evidence in this case that Mr. Shokour or IBT ever engaged in fraud or willful concealment.

[47] **Where a limitations defence is raised, a plaintiff has the burden of proving that the cause of action arose within the prescribed limitation period** (*Clemens v Brown* (1958), 13 DLR (2d) 488 at 491 (Ont CA)). I am not persuaded that IIT has met this burden. The evidence adduced in this case, particularly the strongly-worded demand letter of August 12, 2002, demonstrates that the material facts were discoverable with reasonable diligence in 2002. This action is therefore statute-barred.

- **Section 56.1 – Recovery of damages – Participation to the registration of copyright when the ownership of the copyright is challenged might be considered as unethical**

Barreau du Québec (syndic ad hoc) c Brouillette, 2017 QCCDBQ 85 (Que. Conseil de discipline du Barreau du Québec; 2017-11-03)

[312] Finalement, au sixième sous-paragraphe du chef 1, le Syndic ad hoc **reproche à M^e Brouillette d’avoir participé « à l’inscription d’un droit de propriété intellectuelle au bénéfice personnel de ses clients alors qu’il savait ou ne pouvait ignorer que cette propriété intellectuelle faisait l’objet d’un litige fortement contesté notamment dans le dossier de Cour 500-17-045473-082 et qu’Éditions**

Tonality inc. se déclarait propriétaire de ces droits de propriété intellectuelle ».

[313] Bien que la preuve de ces faits allégués soit établie, le Conseil est d'avis qu'en posant ces gestes, M^e Brouillette ne commet pas les infractions qui sont reprochées en vertu des dispositions des rattachements invoquées au chef 1.

[314] De plus, il faut lire ce sixième sous-paragraphe avec la tête du chef 1. **La participation à l'inscription du droit de propriété intellectuelle en question, bien qu'elle puisse être possiblement reprochable sous un autre angle comme celui de la fabrication de preuve, ne constitue pas une des procédures « entreprises et continuées dans le dossier de Cour 500-17-045473-0820 » reprochées au chef 1.**

[315] C'est pourquoi le Conseil ne peut déclarer M^e Brouillette coupable d'avoir posé ce geste, en fonction du libellé du chef 1

- **Section 57 – Registration of assignment or licence – Only an interested person could apply for rectification**

Gemstone Travel Management Systems Inc. v. Andrews, 2017 CarswellNat 2270 (F.C.; 2017-05-10) Fothergill J.

[15] **An interested person may apply to the Registrar of Copyrights or to this Court for an order rectifying the Register in three circumstances. First, to add an entry wrongly omitted from the Register (Copyright Act, s 57(4)(a)). Second, to expunge an entry wrongly made or remaining on the Register (Copyright Act, s 57(4)(b)). And third, to correct an error or defect in the Register (Copyright Act, s 57(4)(c)).**

[16] **Applications to this Court under s 57(4) of the Copyright Act turn on their specific facts and the evidence presented.** They are brought for a variety of purposes, including to correct the name of the copyright holder (*Kennedy v Ruminski*, 2014 FC 526 at para 22 [*Kennedy*]), to reflect joint ownership of a copyright (*Kennedy* at para 32; *Suttie v Canada (Attorney General)*, 2011 FC 119 [*Suttie*]), to address privacy concerns (*Suttie*; *Jacobs v Canada (Attorney General)*, 2009 FC 628), or to address an invalid registration (*Winkler v Roy*, 2002 FCT 950 at para 62). In *Wing v Van Velthuisen*, [2000] FCJ No 1940 (TD), Justice Marc Nadon found that the respondent was not entitled to apply for the copyright in the first place (at para 77). Justice Nadon observed that “[t]he fact that the Respondent obtained the copyright registration does not in any way indicate that she was entitled to obtain it” (at para 78, citing *Circle Film Enterprises Inc v*

Canadian Broadcasting Corp., [1959] SCR 602 at 606), and ordered that the registration be expunged (at para 79).

- **Section 61 – Clerical errors do not invalidate – Correction to indicate the official name of the owner is permitted**

Gemstone Travel Management Systems Inc. v. Andrews, 2017 CarswellNat 2270 (F.C.; 2017-05-10) Fothergill J.

[26] The amendment sought with respect to registration No. 1114772 is intended only to correct a clerical error. Gemstone has submitted a historical corporate search of the Alberta Register of Corporations for Gemstone, as well as a current search dated July 20, 2016. In both documents, Gemstone is named as “Gemstone Travel Management Systems Inc”. **I am therefore satisfied that registration No. 1114772 should be amended to replace “Gemstone Travel Management Systems” with “Gemstone Travel Management Systems Inc”.**

- **Section 64.1 – Non-infringement re useful article features – Some acts will not constitute copyright infringement**

Lainco inc v. Commission scolaire des Bois-Francs, 2017 CarswellNat 5087 (F.C.; 2017-09-12) LeBlanc J. [appeal A-300-17]

[123] Le paragraphe 64.1(1) de la Loi, adopté en 1988, crée une exception particulière au régime de protection des droits d'auteurs. On retrouve cette disposition dans la partie VI de la Loi (« Divers » / « Miscellaneous Provisions »), plus particulièrement sous l'intertitre « Dessins industriels et topographies » / « Industrial Designs and Topographies ». Ce volet « Dessins industriels et topographies » comprend trois articles (64, 64.1 et 64.2). **Ces dispositions ont été insérées dans la Loi de manière à assurer un meilleur arrimage entre la Loi et la Loi sur les dessins industriels**, LRC 1985, c I-9. On jugeait à l'époque le régime de droits d'auteur trop généreux pour des articles présentant des caractéristiques purement fonctionnelles (*Débats de la Chambre des communes*, 33^e parl, 2^e sess, n^o 5, au pp 7669, 7689 et 7692).

[124] **Cette disposition permet donc l'accomplissement d'un nombre restreint d'actes qui autrement constitueraient une violation du droit d'auteur** (*Robic: Canadian Copyright Act Annotated (Carrière)*, Toronto (On), Thomson Reuters 2015, à 64.1§5.0).

- **Section 66 – Establishment – Decision of the Board in its field of expertise deserves deference**

Canadian Copyright Licensing Agency (Access Copyright) v. British Columbia (Education), 148 C.P.R. (4th) 13 (F.C.A.; 2017-01-27) Gauthier J. [varying in part 2016 CarswellNat 436 (Cop. Bd.; 2016-02-19)]

[39] It is the task of a tribunal or trial court to fulfil its mandate, despite the paucity or quality of the evidence before them. Such decision-makers must determine if they are satisfied that a certain question of fact has been established. **This task is at the very core of the expertise of tribunals such as the Board. Inferences, like findings of facts, are owed considerable deference.**

[40] In my view, in the particular circumstances of this case, and considering the mandate of the Board under the Act, **it was not unreasonable for the Board to infer that the copying of one or two pages of a book did not constitute reproduction of a “substantial part of the work” within the meaning of section 3 of the Act.** It should be clear however that, in my view, such an inference would rarely be within the range of acceptable outcomes when there is evidence produced about each work at issue and would normally constitute an overriding and palpable error in the context of civil litigation proceedings where infringement is at issue.

- **Section 66 – Establishment – The Board must balance public interest and the right of copyright holders**

Canadian Copyright Licensing Agency (Access Copyright) v. British Columbia (Education), 148 C.P.R. (4th) 13 (F.C.A.; 2017-01-27) Gauthier J. [varying in part 2016 CarswellNat 436 (Cop. Bd.; 2016-02-19)]

[47] **To fulfill its mandate, the Board had to balance the public interest in compensating the copyright owners** for the taking of substantial parts of their work against the public interest in giving certain users the right to reproduce such parts for certain purposes including education and private study.

- **Section 66 – Establishment – A panel is differently constituted if at least one member is different**

Public Performance of Musical Works, Re, 2017 CarswellNat 154 (Cop. Bd.; 2017-01-27), the Board

[19] **It is the Board’s opinion that the notion of a “differently constituted panel” includes any panel where the constituting members are not all the same rather than the more restricted view that it is limited to a panel composed entirely of different members.** More specific language is generally used by the courts when a completely different panel is required [Fn5See *Dulmage v. Ontario (Police Complaints Commissioner)* (1994) 21 OR (3d) 356, 1994 CanLII 8773 (ON SCDC); see e.g. *Canadian Association of*

Broadcasters v. Society of Composers, Authors and Music Publishers of Canada, 2006 FCA 337 at para 24]

[20] **In any event, the doctrine of necessity [Fn6 *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1998] 1 SCR 3 at para 6.] would operate in these circumstances to permit a panel constituted of currently appointed members to redetermine the case even if the Chairman is the only one who did not participate in the original decision**, in our opinion. Necessity also stems from the fact that the Board is the only decision maker statutorily mandated to make the redetermination decision and is presently comprised of only three members.

- **Section 66 – Establishment – Decision of the Board in its field of expertise deserves deference – A standard of reasonableness should be applied in its field of expertise**

Re:Sound v. Canadian Association of Broadcasters, 148 C.P.R. (4th) 91 (F.C.A.; 2017-06-28) Stratas J. [affirming 2014 CarswellNat 157 (Cop. Bd.; 2014-05-16)].

[23] However, this context is unusual. When it comes to interpreting many provisions in the *Copyright Act*, the Copyright Board shares jurisdiction with the courts. **Accordingly, the Board's interpretation of provisions in the *Copyright Act* that courts also interpret is reviewable for correctness:** *Canadian Broadcasting Corporation v. Sodrac 2003 Inc.*, 2014 FCA 84, [2015] 1 F.C.R. 509 at para. 27; *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35; [2012] 2 S.C.R. 283.

[28] Courts have long been familiar with the individual law of copyright through their jurisdiction over infringement actions. However, they have no similar knowledge of the statutory scheme for the collective administration of the right to equitable remuneration, a complex and technical matter that the *Copyright Act* entrusts almost exclusively to the Board: compare *Canadian Private Copying Collective v. Canadian Storage Media Alliance*, 2004 FCA 424, 247 D.L.R. (4th) 103 at para. 110.

[29] **The superior expertise of the Board in the setting of royalty rates for the collective administration of the right to equitable remuneration further supports the conclusion that the Court should apply a standard of reasonableness to the Board's interpretation of the aspects of the statutory scheme in question in this application for judicial review.**

[30] In my view, *Fitness Industry Council* [*Re:Sound v. Fitness Industry Council of Canada*, 2014 FCA 48,] and its reasoning bind this Court. This case deals with the interpretation of a similar regime and is not

part of a shared jurisdiction with courts. Thus, this Court will engage in reasonableness review of the Board's interpretation of section 19 of the *Copyright Act*.

- **Section 66 – Establishment – The *Copyright Act* is not a ‘home statute’ of the CRTC and the standard of review is correctness**

Bell Canada v. Canada (Attorney General), 2017 CarswellNat 7338 (F.C.A.; 2017-12-18) Near J. [leave to appeal to the Supreme Court of Canada granted 2018 CarswellNat 2186 and 2018 CarswellNat 2188 (S.C.C.; 2018-05-10)]

[37] The appellant, the NFL, argues that the standard of review for the copyright issue is correctness. They argue that the CRTC's functions are those given to it in the *Broadcasting Act* and the *Telecommunications Act*, S.C. 1993, c. 38 and that Parliament never delegated powers relating to the *Copyright Act* to the CRTC.

[38] I agree with the NFL that the applicable standard of review is correctness. **The *Copyright Act* is not a ‘home statute’ of the CRTC and, in any case, it shares concurrent jurisdiction with the Copyright Board and the courts at first instance** (*Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35 at para. 15, [2012] 2 S.C.R. 283).

- **Section 66.51 – Interim decisions – An interim licence could be extended until a final determination**

Collective Administration in Relation to Rights Under Sections 3, 15, 18 and 21 [Determination (2017-2018)], 2017 CarswellNat 2383 (Cop. Bd.; 2017-05-24), the Board

[1] SODRAC also requested that the interim licence issued by the Board in its decision dated June 27, 2016, **be extended until the Board's final determination of this matter.**

- **Section 66.51 – Interim decisions – An interim tariff is mandatory and enforceable**

Canadian Copyright Licensing Agency v. York University, 149 C.P.R. (4th) 375 (F.C.; 2017-07-12) Phelan J. [appeal A-259-17]

[7] **The Interim Tariff is mandatory and enforceable against York.** To hold otherwise would be to frustrate the purpose of the tariff scheme of the Act and the broad powers given to the Board to make an interim decision pursuant to s 66.51 of the Act, and to choose form over substance.

[11] In the final analysis, **I find that the Interim Tariff is mandatory, not voluntary. Many factors point to the mandatory nature of the Interim Tariff including the scheme of the Act, the Act's legislative history, and the ordinary meaning of the term “tariff”.**

- **Section 66.51 – Interim decisions – An interim tariff need not to be publish to be enforceable**

Canadian Copyright Licensing Agency v. York University, 149 C.P.R. (4th) 375 (F.C.; 2017-07-12) Phelan J.

[233] It was the Board which had the obligation, such as it was, to publish in the Canada Gazette. However, given the circumstances and the urgency (as expressed in the Board's decision) to prevent a vacuum, the Board apparently decided that publication was not practicable – a matter which is within its discretion to decide.

[234] The purpose of publication in the Canada Gazette is to give notice to affected parties. In this case, York had actual knowledge of the Interim Tariff. York's position, if accepted, would be a triumph of form over substance. That argument is unsustainable.

[235] Therefore, the Court dismisses York's arguments that the Interim Tariff is neither mandatory nor properly established. [because not published in the Canada Official Gazette].

- **Section 66.91 – Regulations – No regulations were yet made under this section**

Re:Sound v. Canadian Association of Broadcasters, 148 C.P.R. (4th) 91 (F.C.A.; 2017-06-28) Stratas J. [affirming 2014 CarswellNat 157 (Cop. Bd.; 2014-05-16)].

[16] Although there are no pre-set criteria that the Board must take into account when determining fair and equitable royalties, the Governor in Council has the power to make regulations establishing criteria. The power is found in section 66.91 of the *Copyright Act*.

[18] The Governor in Council has not made any regulations under this section. Accordingly, under the legislation as it stands, the Copyright Board has a broad discretion when it sets equitable remuneration.

- **Section 67.1 – Filing of proposed tariffs – The Board shall take into consideration the interest of all the users and not only of those participating in a Tariff**

Collective Administration of Performing and of Communication Rights (Re) [SOCAN Tariffs 13.A -- Public Conveyances—Aircraft 2011-2014 and 2015-2017], 2017 CarswellNat 2385 (Cop. Bd.; 2017-05-19), the Board

[18] Based on our analysis, we conclude that the interests of those not represented by NACC are not adversely affected by the Settlement Tariffs.

- **Section 67.1 – Filing of proposed tariffs – The analysis made by the Board depends of the evidence**

Collective Administration of Performing and of Communication Rights (Re), [Re: Sound Tariff 6.C - Use of Recorded Music to Accompany Adult Entertainment (2013-2018)], 2017 CarswellNat 3590 (Cop. Bd.; 2017-07-21), the Board

[10] Given the fact that Re:Sound seeks no separate rate for equitable remuneration for communication to the public, and given that there were no objectors to the proposed tariff, we include both activities in the certified tariff. However, we note that **our analysis regarding the appropriate benchmark, as well as consideration of the repertoire adjustment, are fundamentally based on a consideration of performance in public. Both the benchmark and repertoire can be significantly different in consideration of communication to the public by telecommunication.**

- **Section 67.1 – Filing of proposed tariffs – Tariffs could impose an obligation to report**

John v. Richards, 2017 CarswellOnt 16249 (Ont. Sup. Ct.; 2017-10-20) Trimble J.

[8] **Under s. 67.1 of the Act, SOCAN proposes tariffs to the Copyright Board, which sets them.** At the time of Mr. Richards' interview with Mr. John, SOCAN granted licences to those who wanted to use SOCAN's artists' artistic output. With licenced radio stations, each was assessed as to its level of use of SOCAN registered material, and based on that assessment, the station paid a royalty of a defined percentage of the station's gross monthly revenue. **The station was required by the Copyright Board to document which SOCAN registered songs it played, and maintain its financial records and song lists for defined periods.**

[10] As part of its business model, when an artist registers his work with SOCAN, it takes an assignment of copyright from the artist and protects the artist's copyright and work against those who seek to infringe those rights by using the work without paying the royalty: see *Society of Composers, Authors and Music Publishers of Canada v. 960122 Ontario Inc.*, 2003 FCA 256 (CanLII), para. 1 and 10

- **Section 68 – Board to consider proposed tariffs and objections – Adjustement of Tariffs to take into account inflation are permitted**

Collective Administration of Performing [CB-CDA 2017-038], 2017 CarswellNat 2120 (Cop. Bd.; 2017-05-05), the Board

[31] We agree with SOCAN and continue to believe, as the Board expressed in several past decisions, **that fixed-rate tariffs need to be adjusted for inflation from time to time. Otherwise, the rates**

would slowly and gradually become insignificant. That would not be fair and equitable.

- **Section 68 – Board to consider proposed tariffs and objections – The interest of prospective users should be taken into consideration – Tariffs are prospective and of general application**

Collective Administration of Performing and of Communication Rights, 2017 CarswellNat 2120 (Cop. Bd.; 2017-05-19), the Board

[13] In 2012, the Board set out a two-part framework for certifying tariffs pursuant to agreements:

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. [Fn5 Re:Sound Tariff 5–Use of Music to Accompany Live Events, 2008-2012 (Parts A to G) (25 May 2012) Copyright Board Decision at para 10]

- **Section 68 – Board to consider proposed tariffs and objections – The Board shall take into consideration the interest of all the users and not only of those participating in a Tariff**

Collective Administration of Performing and of Communication Rights (Re) [SOCAN Tariffs 13.A -- Public Conveyances—Aircraft 2011-2014 and 2015-2017], 2017 CarswellNat 2385 (Cop. Bd.; 2017-05-19), the Board

[18] Based on our analysis, we conclude that the interests of those not represented by NACC are not adversely affected by the Settlement Tariffs.

- **Section 68 – Board to consider proposed tariffs and objections – The Board cannot certify what was not asked for**

Collective Administration of Performing and of Communication Rights (Re) [SOCAN Tariff 19 - Physical Exercises and Dance Instruction (2013-2017)], 2017 CarswellNat 2620 (Cop. Bd.; 2017-06-02), the Board

[6] As explained in a recent decision of the Board pertaining to multiple tariffs, [Fn2 SOCAN Multiple Tariffs, 2007-2017 (May 5, 2017) Copyright Board Decision at paras 4-8.] SOCAN did not use the inflation-adjustment rule as most recently used by the Board, but rather a formula that the Board has established in its 2004 decision on multiple SOCAN tariffs [Fn3 SOCAN Multiple Tariffs, 1998-2007 (June

18, 2004) Copyright Board Decision at 45] **This resulted in rates lower than what SOCAN could have obtained had it used the most recent formula.** The Board nevertheless certifies the rates as proposed by SOCAN for the years 2013-2017.

- **Section 68 – Board to consider proposed tariffs and objections – The Board function is to certify Tariffs that are fair and equitable**

Re:Sound v. Canadian Association of Broadcasters, 148 C.P.R. (4th) 91, 20 Admin. L.R. (6th) 179, 282 A.C.W.S. (3d) 599 (F.C.A.; 2017-06-28) Stratas J. [affirming 2014 CarswellNat 157 (Cop. Bd.; 2014-05-16)].

[4] One of the Copyright Board's functions under the Copyright Act is to set fair and equitable rates in certifying the proposed tariffs filed by collective societies.

- **Section 68 – Board to consider proposed tariffs and objections – The Board is subject to three mandatory requirements**

Re:Sound v. Canadian Association of Broadcasters, 148 C.P.R. (4th) 91 (F.C.A.; 2017-06-28) Stratas J. [affirming 2014 CarswellNat 157 (Cop. Bd.; 2014-05-16)].

[14] Subsection 68(2) of the *Copyright Act* is a key provision in this process. When examining a proposed *Re:Sound* or SOCAN tariff, the Board is subject to three mandatory requirements. **The royalties paid must only cover eligible recordings, the Board must not place some users at a greater financial disadvantage than others by virtue of linguistic or content requirements and royalty payments must be made in a single payment.** Other than these requirements, the *Copyright Act* (in paragraph 68(2)(b) empowers the Board to take into account “any factor that it considers appropriate” in establishing the terms and conditions of a tariff.

- **Section 68 – Board to consider proposed tariffs and objections – The Board is entitled to significant leeway in setting the quantum of an equitable tariff**

Re:Sound v. Canadian Association of Broadcasters, 148 C.P.R. (4th) 91 (F.C.A.; 2017-06-28) Stratas J. [affirming 2014 CarswellNat 157 (Cop. Bd.; 2014-05-16)].

[50] A decision about the quantum of “equitable remuneration,” such as the one in this case, is not a simple one, arrived at by processing information objectively and logically against fixed, legal criteria. Rather, it is a complex, multifaceted decision involving sensitive weighings of information, impressions and indications using criteria that may shift and be weighed differently from time to time depending upon changing and evolving circumstances. Accordingly, the Board's decision on such an issue is entitled to considerable leeway. See, e.g., *Canada (Attorney General) v. Boogaard*, 2015 FCA 150; 474 N.R. 121 at para. 52.

[51] Previous decisions of this Court recognize the foregoing and acknowledge that the Board is entitled to considerable leeway in

decisions concerning the quantum of “equitable remuneration.” According to this Court, Parliament gave the Board “a very wide **royalty certification discretion**”: *Neighbouring Rights Collective of Canada v. Society of Composers, Authors and Music Publishers of Canada*, 2004 FCA 302, [2004] 1 F.C.R. 303.

[52] In finding that the Board was entitled to significant leeway in setting the quantum of an equitable tariff, I do not suggest for a moment that it is anything close to immune from review. Its **discretion is not absolute or untrammelled**. Even the broadest grant of statutory power must be exercised in good faith, in accordance with the purposes of the tariff regime and the *Copyright Act*.

- **Section 68 – Board to consider proposed tariffs and objections – Asymmetric treatment of overpayments and underpayments is refused**

Collective Administration of Performing and of Communication Rights (Re) [Re: Sound Tariff 6.C - Use of Recorded Music to Accompany Adult Entertainment (2013-2018)], 2017 CarswellNat 3590, [2017] C.B.D. 10, <http://www.cb-cda.gc.ca/decisions/2017/DEC-2017-SAT-21072017.pdf> (Cop. Bd.; 2017-07-21), the Board

[29] The asymmetry of no interest on overpayments but possible interest on underpayments is unreasonable. **The Board has consistently refused asymmetric treatment of overpayments and underpayments**, for example, in *Re:Sound 5*, 2008-2012, [Fn12 *Re:Sound Tariff 5 - Use of Music to Accompany Live Events*, 2008-2012 (Parts A to G) (May 25, 2012) Copyright Board Decision at paras 53, 61], *Access K-12 Redetermination*, 2005-2009, [Fn13 *Access Copyright (Educational Institutions) 2005-2009 - Redetermination* (18 January 2013) Copyright Board Decision at paras 39- 40], and *Commercial Radio*, 2016. [Fn14 *Commercial Radio Tariff (SOCAN: 2011-2013; Re:Sound: 2012-2014; CSI: 2012-2013; Connect/SOPROQ: 2012-2017; Artisti: 2012-2014)* (21 April 2016) Copyright Board Decision at para 409.]

[30] **To resolve the asymmetry, we either need to have interest on overpayments and underpayments, or no interest on either one. In our view, the latter is more appropriate.** A payment made one year later than the due date because information is being updated is not a late payment. In particular, if the estimates are made in good faith and based on the previous year's operation, there is no reason to have interest paid for either type of adjustment. As such, we reword subsection 5(3) to read "No interest is payable with respect to overpayments or underpayments."

- **Section 68 – Board to consider proposed tariffs and objections – Technological neutrality must be observed by the Board**

Collective Administration of Performing and of Communication Rights, [Online Music Services (CSI: 2011-2013; SOCAN: 2011-2013; SODRAC: 2010-2013)], 2017 CarswellNat 4233 (Cop. Bd.; 2017-08-25), the Board

[254] We consider that this rate-setting analysis comports with the Supreme Court of Canada's statements that the *Act* has a **fundamental requirement to recognize technological neutrality and balance between user and right holder interests**. [Fn102 *[Entertainment Software Association and Entertainment Software Association of Canada v. Society of Composers, Authors and Music Publishers of Canada*. 2012 SCC 34; *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35; *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57; *Society of Composers, Authors and Music Publishers of Canada, v. Bell Canada*, 2012 SCC 36] **The technologies used by commercial radio broadcasters and the ones used by non-interactive and semi-interactive webcasters to communicate music to their respective listeners are similar and their functions, although achieved differently, are equivalent.** We see no reason in the present case to implement a differential treatment, from a copyright valuation standpoint, between radio broadcasting and corresponding webcasting technologies.

- **Section 68 – Board to consider proposed tariffs and objections – The Board does not have jurisdiction to include late-filing penalty**

Collective Administration of Performing and of Communication Rights, [Online Music Services (CSI: 2011-2013; SOCAN: 2011-2013; SODRAC: 2010-2013)], 2017 CarswellNat 4233 (Cop. Bd.; 2017-08-25), the Board

[411] We reject the inclusion of the late-filing penalty provision for two reasons. First, the \$50-per-day penalty may be punitive in most situations; as such, including this penalty would be inappropriate. This is to be contrasted with the usual provisions that set interest to be paid for late payments, which are intended to be compensatory in nature, maintaining the time-value of money. Second, **the Board has declined to include such a provision in several of its tariffs, including on the grounds that it does not have the jurisdiction to include such an enforcement provision**. [Fn144 *Commercial Radio (2016)* at para 405; *Re: Sound Tariff 8 (2014)* at para 227; *Online Music Services (2012)* at paras 159-161.]

[412] For similar reasons, we do not include a provision that would deem a payment not to have been made until the accompanying report is filed. While we appreciate that a collective cannot readily distribute moneys received without sufficient information, it has the money, and can collect interest pending the receipt of a report. As such, the time value of money will have been respected.

- **Section 68 – Board to consider proposed tariffs and objections –Minimum fees are necessary**

Collective Administration of Performing and of Communication Rights, Re [Re:Sound Tariff 3.A – Background Music Suppliers (2010-2013); Re:Sound Tariff 3.B – Background Music (2010-2015)], 2017 CarswellNat 4290 (Cop. Bd.; 2017-09-01), the Board

[24] The Board agrees with Re:Sound that as a general rule, **a tariff based on capacity is easier to administer than a tariff based on admissions.**

[25] **In terms of minimum fees, we also agree with Re:Sound that, where applicable, such fees are necessary. [...]**

- **Section 68 – Board to consider proposed tariffs and objections – The Board should take into consideration the interest of all prospective users**

Collective Administration of Performing and of Communication Rights, Re [Re:Sound Tariff 3.A – Background Music Suppliers (2010-2013); Re:Sound Tariff 3.B – Background Music (2010-2015)], 2017 CarswellNat 4290 (Cop. Bd.; 2017-09-01), the Board

[54] As the Board explained in *Re:Sound Tariff 5 (2008-2012)*, [Fn16 *Public Performance of Sound Recordings, Re [2012 CarswellNat 1584 (Copyright Bd.)] (25 May 2012).*] at para 10 ff] **it is necessary to consider the extent to which the parties to the agreements represented the interests of all prospective users**, and whether relevant comments or arguments made by former parties had been taken into account.

- **Section 68 – Board to consider proposed tariffs and objections – Certification will obey to the evidence filed before the Board**

Collective Administration of Performing and of Communication Rights, Re [Re:Sound Tariff 3.A – Background Music Suppliers (2010-2013); Re:Sound Tariff 3.B – Background Music (2010-2015)], 2017 CarswellNat 4290 (Cop. Bd.; 2017-09-01), the Board

[74] **As a general rule, the Board will refuse to certify a tariff that could potentially have such a broad scope without proper evidence**, none of which was adduced in terms of "other," unidentified live events. [Fn21 See for example, *Public Performance of Musical Works, Re [2008 CarswellNat 4082 (Copyright Bd.)] (24 October 2008)* at para 108ff.] As such, we consider that Tariff 5.K should not be open-ended. We will therefore certify Tariff 5.K pursuant to the Settlement Tariffs with the following modified scope: theatrical, dance, acrobatic arts, integrated arts, contemporary circus arts or *other similar live performances*.

- **Section 68 – Board to consider proposed tariffs and objections – The role of the Board is not to enforce Tariifs but to set those Tariffs in the public interest – Interst of the prospective users is to be taken into consideration**
Collective Administration of Performing and of Communication Rights, Re [Re:Sound Tariffs 5.A to 5.G (2013-2015) and 5.H to 5.K (2008-2015) – Use of Music to Accompany Live Events], 2017 CarswellNat 4292 (Cop. Bd.; 2017-09-01), the Board [34] Agreements, such as settlements, filed in the context of a tariff proceeding serve as evidence of royalty rates and conditions that both the collective and certain users of the tariff are willing to accept. **As the Board previously stated, "the role of the Board is not to examine, enforce or ratify bargains between parties; it is to set fees in the public interest."**[FN6 [6](#) 1991-13, 1992-PM/EM-1 & 1994, Re [1994 CarswellNat 2983 (Copyright Bd.)] (12 August 1994) at 35. Therefore, such agreements are not determinative, but may be a useful proxy for market rates.

[38] However, as the Board explained in *Re:Sound 5.A-G (2008-2012)*, [Fn7 *Public Performance of Sound Recordings, Re* [2012 CarswellNat 1584 (Copyright Bd.)] (25 May 2012) at paras 10ff] **it is necessary to consider the extent to which the parties to the agreements represented the interests of all prospective users, and whether relevant comments or arguments made by former parties had been taken into account.** Furthermore, as the Federal Court of Appeal explained in *Netflix, Inc. v. Society of Composers, Authors and Music Publishers of Canada*, [2015 CAF 289]

[s]ince tariffs certified by the Board are of general application, the interests that must be considered are those of an industry as opposed to those of an individual or an entity. [2015 FCA 289 (F.C.A.) at para 43]

[39] We are of the view that the parties to the Settlement Tariffs adequately represent the interests of the prospective users. We have not identified elements of the Settlement Tariffs which are likely to be disproportionately favourable or prejudicial to a particular sub-group of licencees, nor has any person (party or non-party) raised such an issue.

- **Section 68 – Board to consider proposed tariffs and objections – A Tariff should not be certified for a non-existing right or for payment by one person to another**

Collective Administration of Performing and of Communication Rights, Re [Re:Sound Tariffs 5.A to 5.G (2013-2015) and 5.H to 5.K (2008-2015) – Use of Music to Accompany Live Events], 2017 CarswellNat 4292 (Cop. Bd.; 2017-09-01), the Board

[52] **We wish to avoid certifying a tariff in relation to a right that does not exist.** As such, the alternative wording is greatly preferable. [...]

[55] **As a general proposition, there would be little point certifying a tariff that merely provided that one person could pay for another. In most circumstances, such an arrangement does not require a tariff.** However, in this case, the payment is not being made for another — instead it is one payment (and associated reporting obligations) completely taking the place of another payment (and associated reporting obligations).

- **Section 68 – Board to consider proposed tariffs and objections – Establishment of minimum royalties is to be considered for each Tariff**

Collective Administration of Performing and of Communication Rights, Re [Re:Sound Tariffs 5.A to 5.G (2013-2015) and 5.H to 5.K (2008-2015) – Use of Music to Accompany Live Events], 2017 CarswellNat 4292 (Cop. Bd.; 2017-09-01), the Board

[74] **As we conclude below, the question of whether, and what, minimum royalties should be set needs to be considered for each tariff.** Given the general criteria we outline below which point to a "minimum profitable price" being more appropriate where the royalties are directly tied to the revenues from the sale of the copyrighted content, as they are in Tariff 3.A, and given that the parties have agreed to include minimum royalties, and their amount, we include them in the certified tariff.

- **Section 68 – Board to consider proposed tariffs and objections – Language harmonization should be sought between Tariffs**

Collective Administration of Performing and of Communication Rights, Re [Re:Sound Tariffs 5.A to 5.G (2013-2015) and 5.H to 5.K (2008-2015) – Use of Music to Accompany Live Events], 2017 CarswellNat 4292 (Cop. Bd.; 2017-09-01), the Board

[83] **To the extent possible, there should be language harmonization between related tariffs.** For this reason, we certify the same provision as that found in *Re:Sound 5.A-G (2008-2012)* [2012 CarswellNat 1584], *Re:Sound 6.B (2008-2012)* [2015 CarswellNat 3747] and *Re:Sound 8 (2009-2012)*. []

- **Section 68 – Board to consider proposed tariffs and objections – Enforcement and compliance issues are outside the jurisdiction of the Board**

Collective Administration of Performing and of Communication Rights, Re [Re:Sound Tariffs 5.A to 5.G (2013-2015) and 5.H to 5.K (2008-2015) – Use of Music to Accompany Live Events], 2017 CarswellNat 4292 (Cop. Bd.; 2017-09-01), the Board

[84] The parties have agreed that suppliers who fail to submit the reporting information on time and do not rectify their default within 30 days of receiving a default notice from Re:Sound, shall be subject to interest on their payment until the reporting is received. This provision is intended to provide an incentive for suppliers to comply with their

obligations under the tariff similar to the existing interest provision which applies to late payments.

[85] However, as the Board has recently noted in its decision in respect of commercial radio tariff, [FN20 *ee Collective Administration of Performing and of Communication Rights, Re* (April 21, 2016), at para 05] the issue of imposing penalties for late reporting is a compliance and enforcement issue rather than a tariff certification issue. **As the Board has noted, enforcement issues are outside the jurisdiction of the Board. As such, and even though parties have agreed, we will not set penalties for late reporting in the tariff we certify.**

- **Section 68 – Board to consider proposed tariffs and objections – Ajustement to take into account inflation are permitted**

Collective Administration of Performing and of Communication Rights, Re [Re:Sound Tariffs 5.A to 5.G (2013-2015) and 5.H to 5.K (2008-2015) – Use of Music to Accompany Live Events], 2017 CarswellNat 4292 (Cop. Bd.; 2017-09-01), the Board

[97] Over the years, various decisions of the Board have addressed questions related to inflation. For instance, in *CBC Radio (2006-2011)*, the Board explained that “failing to adjust those payments for inflation would allow inflation to erode the value of music.” [Fn22 *SOCAN-Re:Sound CBC Radio Tariff, 2006-2011* (8 July 2011) Copyright Board Decision at para 21]]We agree with this statement.

[98] In *CBC Radio (2006-2011)*, the Board discussed retrospective inflation adjustment. In that decision, the Board found as follows. First, inflation adjustments should be based on the CPI, not on any other index of inflation. Second, the inflation adjustments should be based on the inflation calculated from the CPI itself, rather than this amount less one percentage point. Finally, inflation for any given year should be calculated as the percentage change from January to December of that year. We reaffirm these three principles; they are as relevant to background music as they were to CBC radio.

[99] In *Re:Sound 3 (2003-2009)*, the Board set out a formula for inflation adjustment. The formula was described as follows:

[...] the annual inflationary adjustment corresponds to the annual percentage change in the CPI, minus 1 percentage point. This annual change is to be calculated over the most recent period of twelve consecutive months for which the CPI is available at the time the notice is being given to users. When the adjustment for a 12-month period is less than 3 per cent, the rates remain the same. The adjustment is cumulated with the adjustment for each subsequent 12-month period, until the cumulated adjustment is 3 per cent or more. This ensures that tariffs are not being constantly adjusted for very small amounts. To reduce further the

uncertainty facing users, we will allow inflationary adjustments to be made only at the beginning of a year, before January 31. [Fn23 *NRCC Tariff 3 – Use and Supply of Background Music, 2003-2009* (20 October 2006) Copyright Board Decision at para 154]

- **Section 68 – Board to consider proposed tariffs and objections – Certification of a tariff could not be made for a period outside the proposed statement**

Collective Administration of Performing and of Communication Rights, Re [Re:Sound Tariffs 5.A to 5.G (2013-2015) and 5.H to 5.K (2008-2015) – Use of Music to Accompany Live Events], 2017 CarswellNat 4292 (Cop. Bd.; 2017-09-01), the Board [108] **We cannot certify the parties' proposal as it pertains to a period outside of the period under consideration in this instance and for which the Board is not properly seized.** If the parties wish to apply the formula set out in *Re:Sound 3 (2003-2009)*, they may well do so. We cannot.

- **Section 68 – Board to consider proposed tariffs and objections – Filing of multiyear tariffs is to be preferred to single-year tariffs**

Collective Administration of Performing and of Communication Rights, Re [Re:Sound Tariffs 5.A to 5.G (2013-2015) and 5.H to 5.K (2008-2015) – Use of Music to Accompany Live Events], 2017 CarswellNat 4292 (Cop. Bd.; 2017-09-01), the Board [109] We wish, however, to reiterate what the Board said in an earlier decision on the issue of inflation adjustment. [Fn 24 *Collective Administration of Performing and of Communication Rights, Re [2017 CarswellNat 3590 (Copyright Bd.)]* (21 July 2017) at para 21] **As a general rule, we believe that efficiency is better served by the collectives filing multiyear tariffs, as opposed to filing successive single-year tariffs.** From time to time, the collectives could request an inflation adjustment and expect that such an adjustment reflect the fluctuations in inflation in all of years for which no adjustments were made. This is what SOCAN is currently doing. The "time-to-time" adjustment would thus cumulate inflation starting on the last year for which such an adjustment took place. In our view, this approach simplifies the life of all the parties involved, i.e., the collectives, the users and the Board.

- **Section 68 – Board to consider proposed tariffs and objections – Minimum royalties is appropriate**

Collective Administration of Performing and of Communication Rights, Re [Re:Sound Tariffs 5.A to 5.G (2013-2015) and 5.H to 5.K (2008-2015) – Use of Music to Accompany Live Events], 2017 CarswellNat 4292 (Cop. Bd.; 2017-09-01), the Board [126] **The question of whether minimum royalties are appropriate, and their quantum, may need to be considered case-by-case. We agree that, in general, it is appropriate to set minimum royalties**

such that a portion of the costs of administering the collection of royalties under a tariff are recovered. In some circumstances, it might also be appropriate to set minimum royalties based on some minimum intrinsic value.

[127] For instance, where a tariff sets royalties for the use of copyrighted content based on the revenues of a business engaged in selling a product or service consisting mainly of that copyrighted content, a risk may arise that a licensee could price their product or service so low such that they are no longer engaging in profit-maximization vis-à-vis the activity on which the royalties are based. **One example of this is where a licensee offers a product or service using the copyrighted content as a loss leader, and where the tariff does not include in its rate base revenues from the cross-subsidized offering.** In such situations, minimum royalties based on an estimate of some minimal reasonable price for the product (such as the price at which the activity has any prospect of being profitable) may be appropriate.

- **Section 68 – Board to consider proposed tariffs and objections – Information sharing between the collective is to be encouraged**

Collective Administration of Performing and of Communication Rights, Re [Re:Sound Tariffs 5.A to 5.G (2013-2015) and 5.H to 5.K (2008-2015) – Use of Music to Accompany Live Events], 2017 CarswellNat 4292 (Cop. Bd.; 2017-09-01), the Board [140] In *Re:Sound 5.A-G (2008-2012)* [2012 CarswellNat 1584], *Re:Sound 6.B (2008-2012)* [2015 CarswellNat 3747] and *Re:Sound 8 (2009-2012)* [] the Board certified a provision identical to that proposed here by Re:Sound. As the Board noted in *Re:Sound 5.A-G (2008-2012)*, **information sharing between collectives should be encouraged, whether or not they operate pursuant to joint tariffs.** This decision sets out the many potential advantages of such information sharing.

[141] While we would have preferred that Re:Sound provide some indicia that the potential advantages are actually being realized, **we continue to be of the view that such limited sharing of information can lead to efficiencies in collective administration.** Furthermore, we conclude that the prejudice to the Objectors is low: the information that could be shared with SOCAN is very similar to the information that the Objectors would already have to provide to SOCAN in application of its tariffs.

[142] Consequently, and consistent with Tariff 3.A, Tariff 3.B will provide **that Re:Sound may share with SOCAN information collected pursuant to the tariff, in connection with the collection of royalties and the enforcement of a tariff.**

- **Section 68 – Board to consider proposed tariffs and objections – Penalties for late-reporting is outside the jurisdiction of the Board**

Collective Administration of Performing and of Communication Rights, Re [Re:Sound Tariffs 5.A to 5.G (2013-2015) and 5.H to 5.K (2008-2015) – Use of Music to Accompany Live Events], 2017 CarswellNat 4292 (Cop. Bd.; 2017-09-01), the Board [147] As for Tariff 3.A, the parties to Tariff 3.B have agreed to provide that suppliers who fail to submit the reporting information on time and do not cure their default within 30 days of receiving a default notice from Re:Sound, shall be subject to interest on their payment until the reporting is received.

[148] As stated above in respect of Tariff 3.A, **imposing penalties for late reporting is an enforcement issue outside the jurisdiction of the Board**. As such, as for Tariff 3.A, we are not certifying penalties for late reporting in Tariff 3.B.

- **Section 68.2 – Effect of fixing royalties – Tariffs are to provide collectives with an effective enforcement mechanism**

Canadian Copyright Licensing Agency v. York University, 149 C.P.R. (4th) 375 (F.C.; 2017-07-12) Phelan J.

[204] I concur with Access’s view that the legislative history, and particularly the development of the modern enforcement provisions, **confirm the legislative intent to provide collectives with effective enforcement mechanisms against users who are not subject to an agreement and who reproduce, without authority from owners or without the benefit of an exception** (e.g. fair dealing), copyright protected works covered by the collectives, such as those works in Access’s repertoire.

- **Section 68.2 – Effect of fixing royalties – A Tariff is an imposed charge**

Canadian Copyright Licensing Agency v. York University, 149 C.P.R. (4th) 375 (F.C.; 2017-07-12) Phelan J.

[209] **While the word “tariff” is not defined in the Act, it is a word found in other contexts to indicate an imposed charge**, as discussed earlier.

[210] The use of the term “tariff” is consistent with the provisions of the Act directed at ensuring that copyright owners are paid for the reproduction of their works and is also consistent with the role of collectives, such as Access, in collecting the amounts which are due or become due. Section 68.2(1) indicates the mandatory nature of payment for copying.

- **Section 68.2 – Effect of fixing royalties – If the fees is paid under the Tariff no action for infringement lies**

John v. Richards, 2017 CarswellOnt 16249 (Ont. Sup. Ct.; 2017-10-20) Trimble J.

[9] **As a corollary of paying a licence fee, s. 68.2(2) of the Act says that no action for infringement lies against anyone who communicates the work by broadcasting it when the broadcaster has paid the royalty: see *E.S.A. v. SOCAN*, 2012 SCC 34 (CanLII), para. 12-25**

[43] Based on the admissible evidence about how the royalties system works under the *Copyright Act*, I find that the Defendants did all that was required of them to be allowed to play the song “The Dream Catcher”. CFRB was a licensee with SOCAN. It submitted its list of songs it played. It submitted its royalty calculated on the percentage assigned to it by SOCAN “light user” of SOCAN registered songs. I find that Mr. John is mistaken in his view of what CFRB was required to do in order for him to receive his royalty.

[44] Having found that CFRB did what was required of it to ensure that Mr. John was paid his royalty, it follows that there can be no theft or appropriation of his intellectual property, or violation of his or anyone else’s copyright in “The Dream Catcher”.

- **Section 70.1 – Collective societies – The Tariffs are compulsory - There is no opting out**

Canadian Copyright Licensing Agency v. York University, 149 C.P.R. (4th) 375 (F.C.; 2017-07-12) Phelan J.

[211] **The compulsory nature of a tariff is also evidenced by the nature of the tariff setting process.** Under s 70.12, either a tariff is filed or the relevant parties enter into an agreement. **The agreement option is voluntary and is in contrast to the mandatory nature of a tariff.**

[212] Further, under s 70, **where there is public notification of the tariff process, the provision for Board approval and certification of a tariff is also consistent with the mandatory nature of the result of the Board’s certification. There is no suggestion of “opting out” in these provisions.**

[218] The Court has concluded that an approved **tariff is a form of subordinate legislation which is mandatory and binding on any person to whom it pertains. There is no opting out.**

- **Section 70.12 – Tariff or agreement– The Agreements are voluntary but the Tariffs are compulsory**

Canadian Copyright Licensing Agency v. York University, 149 C.P.R. (4th) 375 (F.C.; 2017-07-12) Phelan J.

[211] The compulsory nature of a tariff is also evidenced by the nature of the tariff setting process. **Under s 70.12, either a tariff is filed or the relevant parties enter into an agreement. The agreement option is voluntary and is in contrast to the mandatory nature of a tariff.**

- **Section 70.13 – Filing of proposed tariffs – Prospective users only can object**

Collective Administration of Performing and of Communication Rights (Re), [Satellite Radio Services: Re:Sound (2011-2018); SOCAN (2010-2018)], 2017 CarswellNat 2387 (Cop. Bd.; 2016-06-02), the Board

[43] The Board underscores that the provision in the Act providing that "**prospective users** or their representatives" **may object to a proposed tariff** also applies to proposed tariffs **filed under section 70.13** of the Act. **This is in clear contrast with subsection 83(6) of the Act which provides that "any person" (our emphasis) may object to a proposed tariff for private copying levies.**

- **Section 70.15 – Certification – The Board must balance the public interest and the rights of users**

Canadian Copyright Licensing Agency (Access Copyright) v. British Columbia (Education), 148 C.P.R. (4th) 13 (F.C.A.; 2017-01-27) Gauthier J. [varying in part 2016 CarswellNat 436 (Cop. Bd.; 2016-02-19)]

[47] To fulfill its mandate, **the Board had to balance the public interest in compensating the copyright owners for the taking of substantial parts of their work against the public interest in giving certain users the right to reproduce such parts for certain purposes including education and private study.**

- **Section 70.5 – Definition of "Commissioner" – The exercise of a right derived from the *Copyright Act* is not *per se* an anti-competitive act**

Toronto Real Estate Board v. Canada (Commissioner of Competition), 2017 CarswellNat 6861 (F.C.A.; 2017-12-01) Nadon and Rennie JJ. [affirming 2016 CarswellNat 1506 (Comp. Trib.; 2016-04-27)].

[49] Once the Commissioner establishes each element of subsection 79(1), the person or persons against whom the Commissioner's proceedings are directed, in this case TREB, **can avoid sanction if they demonstrate that the impugned practice falls under one of the statutory exemptions.** The only provision relevant to this case is subsection 79(5) of the *Competition Act*, which states that "an act

engaged in pursuant only to the exercise of any right or enjoyment of any interest” derived under certain legislation pertaining to intellectual or industrial property, including the *Copyright Act*, R.S.C., 1985, c. C-42 (*Copyright Act*), **is not an anti-competitive act.**

- **Section 70.5 – Definition of “Commissioner” – Assertion of copyright is not an absolute shield against anti-competitive behavior: it must be only to exercise a copyright interest**

Toronto Real Estate Board v. Canada (Commissioner of Competition), 2017 CarswellNat 6861 (F.C.A.; 2017-12-01) Nadon and Rennie JJ. [affirming 2016 CarswellNat 1506 (Comp. Trib.; 2016-04-27)].

[179] Subsection 79(5) seeks to protect the rights granted by Parliament to patent and copyright holders and, at the same time, ensure that the monopoly and exclusivity rights created are not exercised in an anti-competitive manner. **The language of subsection 79(5) is unequivocal. It does not state, as is contended, that any assertion of an intellectual property right shields what would otherwise be an anti-competitive act.**

[180] Parliament clearly signaled, through the use of the word “only”, to insulate intellectual property rights from allegations of anti-competitive conduct in circumstances where the right granted by Parliament, in this case, copyright, is the sole purpose of exercise or use. **Put otherwise, anti-competitive behaviour cannot shelter behind a claim of copyright unless the use or protection of the copyright is the sole justification for the practice.**

[181] TREB attached conditions to the use of its claimed copyright rights in the disputed data. For the reasons given earlier, we see no error in the Tribunal’s findings as to the anti-competitive purpose or effect of the VOW Policy. The Tribunal found that the purpose and effect of those conditions was to insulate members from new entrants and new forms of competition. **The purpose, therefore, of any asserted copyright was not “only” to exercise a copyright interest.**

- **Section 71 – Filing of proposed tariffs – There is a right of equitable and non-discriminatory remuneration for any retransmission**

Bell Canada v. Canada (Attorney General), 2017 CarswellNat 7338 (F.C.A.; 2017-12-18) Near J. [leave to appeal to the Supreme Court of Canada granted 2018 CarswellNat 2186 and 2018 CarswellNat 2188 (S.C.C.; 2018-05-10)]

[44] Article 2006(1) of the CUSFTA, however, is concerned with the copyright holder’s ability to be remunerated for its copyright where its program is retransmitted and not with simultaneous substitution of commercials. As the respondent notes, Article 2006(1) of the

CUSFTA provides a “right of equitable and non-discriminatory remuneration for any retransmission ... of the copyright holder’s program” and this right is protected by sections 71 to 74 of the *Copyright Act* which provide for tariffs. In support of its argument, the NFL relies extensively on *Cogeco Cogeco* [Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168, 2012 SCC 68]. That decision, however, supports the conclusion that non-discrimination in retransmission is concerned only with compensation:

[60] The CRTC’s proposed value for signal regime would enable broadcasters to negotiate compensation for the retransmission by BDUs of their signals or programming services, regardless of whether or not they carry copyright protected “work[s]”, and regardless of the fact that any such works are carried in local signals for which the *Copyright Act* provides no compensation.
[emphasis added]

- **Section 77 - Circumstances in which licence may be issued by Board – A licence will not issue if the work is in the public domain**

Crawford for the reproduction of three photographs [Non-exclusive licence denied to], File: 2016-UO/TI-22, 2017 CarswellNat 1726 (Cop. Bd.; 2017-02-14), the Board

The Copyright Board has reviewed your licence application received December 2, 2016 and has

Determined that a licence is not required for the reproduction of three photographs from the World War I memoir, *Thrilling Stories of The Great War: A Comprehensive Story of Battles and Great Events of the World War: Including the Heroic Career of Earl Kitchener*, for the following reasons:

- 1.The photographs were taken between 1914 and 1916;
- 2.The term of protection afforded to photographs at the time of publication of the book was 50 years from the making of the original negative from which the photograph was directly or indirectly derived (An Act to amend and consolidate the Law relating to Copyright, 1911 (UK)1 & 2 Geo V, c. 46, s. 21);
- 3.The term of protection afforded to photographs in 1964 to 1966 was still 50 years from the making of the original negative, as such there was no extension of the term of protection applicable to the photographs (Copyright Act, R.S. 1952, c. C-32, s. 9);
- 4.The photographs Became part of the public domain between 1964 and 1966.

Since the photographs are part of the public domain, the Board cannot issue a licence.

- **Section 77 – Circumstances in which licence may be issued by Board – Proper reference as to the source should accompany the licensed use**

Dhavernas & Dupin the reproduction, the distribution and the communication to the public of a text in a book [Non-exclusive licence issued to 2017 CarswellNat 1794 (Cop. Bd. 2017-02-14), the Board

[1] 6) Le titulaire de la licence doit clairement mentionner pour l'œuvre utilisée la référence bibliographique selon les conventions d'usage: auteur, titre de l'œuvre, éditeur, lieu et date de publication.

- **Section 77 – Circumstances in which licence may be issued by Board – A licence could be granted retroactively and for a term ending before the issuance of the licence**

Productions J for the reproduction of a musical work [Non-exclusive licence issued to], File: 2016-UO/TI-07, <http://www.cb-cda.gc.ca/unlocatable-introuvables/licences/296-f.pdf> (Cop. Bd.; 2017-02-16), the Board

[1] 3) **La licence est rétroactive à la date de la première reproduction.** Elle expire le 10 février 2015.

- **Section 77 – Circumstances in which licence may be issued by Board – A licence will not issue if the work is unpublished**

Vice Studio Canada Inc. for the reproduction of an artistic work [Non-exclusive application by], 2017 CarswellNat 1795 (Cop. Bd.; 2017-04-18)

[3] Par ailleurs, l'article 2.2 de la Loi définit la publication d'une œuvre comme étant « la mise à la disposition du public d'exemplaires de l'œuvre (...) ». De plus, l'exposition en public d'une œuvre d'art est explicitement exclue de la définition de publication dans la Loi.

[4] En l'espèce, la Commission a déterminé qu'il n'y a pas suffisamment de preuve que l'œuvre d'art que vous avez l'intention d'utiliser dans votre documentaire a été publiée. La Commission ne peut donc pas délivrer une licence.

- **Section 77 – Circumstances in which licence may be issued by Board – A licence will not issue if the work is unpublished**

Quichou for the reproduction of three video excerpts [Licence denied to the application by], 2017 CarswellNat 2245 (Cop. Bd.; 2017-05-11), the Board

[5] As such, **section 77 permits the Board to issue a licence only in respect of works that have been published.**

[6] It is clear that, due to the exclusion in the above-mentioned paragraph [2.2(1)(c)], **a mere communication of a work to the public by telecommunication is not a publication.**

[16] **It appears that section 77 of the Act was not intended to permit the broad distribution of works that had not been previously made public, such as private writings.** However, since this provision was enacted well before the use of the Internet by the public at large, the possibility that there may be works that have been

readily made available to the public, but not “published” according to the definition of the Act, was likely not contemplated

[18] [...] **This is not a matter of discretion: the Board does not have the jurisdiction to issue a licence under section 77 of the Act in this matter.**

- **Section 77 – Circumstances in which licence may be issued by Board – A licence will not issue if the work is unpublished**

Hadley for the reproduction of a post [Licence denied to the application by], 2017 CarswellNat 2247 (Cop. Bd.; 2017-05-11), the Board

[5] **As such, section 77 permits the Board to issue a licence only in respect of works that have been published.**

[6] **It is clear that, due to the exclusion in the above-mentioned paragraph [2.2(1)(c)], a mere communication of a work to the public by telecommunication is not a publication.**

[9] It appears to us that the works for which a licence is sought was present on the CB’s site, was being made available in the manner described in subsection 2.4(1.1) of the Act. **Since communication of a work by telecommunication—itself excluded from the definition of publication—includes this act of making available, the mere posting of a work on a website also appears to be excluded from publication pursuant to paragraph 2.2(1)(c).**

[13] Lastly, there is little, if any, in this matter that would allow us to conclude that the owner of copyright that made the work available to the public on the Internet expected that reproductions will be made of it—and consented thereto. As such, we do not need to consider whether a work that is made available online for downloading is thereby “published” under the Act

[15] Presumably, these provisions sought to maintain the right of publication even where the work was being otherwise exploited. As such, various forms of communication of the work were explicitly barred from constituting publication. The carve-out of communication by telecommunication from the definition of “publication” in the Act reflects this obligation.

[16] **It appears that section 77 of the Act was not intended to permit the broad distribution of works that had not been previously made public, such as private writings.** However, since this provision was enacted well before the use of the Internet by the public at large, the possibility that there may be works that have been

readily made available to the public, but not “published” according to the definition of the Act, was likely not contemplated

[18] [...] **This is not a matter of discretion: the Board does not have the jurisdiction to issue a licence under section 77 of the Act in this matter.**

- **Section 77 – Circumstances in which licence may be issued by Board – The licence could be for part of work**

Dubois [Licence non-exclusive pour la reproduction d'une illustration, l'incorporation dans un livre et la distribution du livre], File 2017-UO/TI-12, <http://www.cb-cda.gc.ca/unlocatable-introuvables/licences/297-f.pdf> (Cop. Bd.; 2017-09-01), the Board

La licence autorise la reproduction d'une illustration qui figure dans le texte «L'œil en coulisse» d'André Lecompte (titulaire inconnu) publié dans «Le Petit Journal» le 29 août 1948. Elle autorise l'incorporation de l'illustration dans un livre et la distribution du livre.

- **Section 77 – Circumstances in which licence may be issued by Board – A licence could be retroactive**

Juke-Box, Cap-Chat [Licence non-exclusive pour la reproduction, la distribution et l'exécution en public d'une œuvre musicale], File 2017-UO/TI-09, <http://www.cb-cda.gc.ca/unlocatable-introuvables/licences/298-f.pdf> (Cop. Bd.; 2017-10-04), the Board

1) La licence autorise la reproduction, la distribution et l'exécution en public de l'œuvre musicale *Si tu veux revenir*, écrite par Suzanne Blundell et publiée par les Éditions Cactus.

3) **La licence est rétroactive à la date de la première reproduction**, soit le 15 mai 2017. La licence expire lorsque l'œuvre entre le domaine public.

- **Section 77 – Circumstances in which licence may be issued by Board – A licence will not issue if the work is unpublished – A licence will not issue for a work in the public domain**

Sunnyside Historical Society, Re, 2017 CarswellNat 5625 (Cop. Bd.; 2017-10-04), the Board

[1] The Copyright Board has reviewed your licence application received on June 14, 2017, for the reproduction of the diary of Walter O'Hara and has determined that although a copy of the diary is available to the public through Library and Archives Canada, **this does not constitute publication of the work. As such, the Board does not have jurisdiction to issue a licence in this case.**

[2] Furthermore, the Board has determined that a licence is not required for the reproduction of the diary of Walter O'Hara since, for the following reasons, it is now part of the public domain:

1. The diary of Walter O'Hara was written prior to his death in 1874. To this day, it remains unpublished;
2. Prior to January 1, 1999, section 7 of the *Copyright Act* provided that unpublished works remained protected until their publication and for a period of fifty years following the end of the calendar year in which publication occurred. As such, up to that date, the diary of Walter O'Hara remained protected by copyright;
3. However, on January 1, 1999, certain amendments to the *Copyright Act* came into force. These include the introduction of section 7(4) which provides that a work which was not published as of the coming into force of the provision and whose author died before January 1, 1949, is protected for a period of 5 years following the end of the calendar year in which the provision came into force. Thus, the diary of Walter O'Hara remained protected up to December 31, 2004.

- **Section 77 – Circumstances in which licence may be issued by Board – For a licence to issue, an important part of the work should be taken**

Hunter, Re, 2017 CarswellNat 5642 (Cop. Bd.; 2017-10-13), the Board

[2] Section 77 of the *Copyright Act* (the "Act") provides, among other things, that the Board can issue a licence for the use of a published work protected by copyright if the owner cannot be located after reasonable efforts to do so have been made. **The introductory paragraph of subsection 3(1) of the Act provides that a licence is required to use a work protected by copyright only if a substantial part of the work is being used.**

[3] In this instance, the Board has determined that the excerpts you wish to reproduce do not constitute a substantial part of their respective original works. Consequently, the Board will not issue a licence for their reproduction.

- **Section 77 – Circumstances in which licence may be issued by Board – Proper reference as to the source should accompany the licensed use**

Tightrope Books [Non-exclusive licence authorizing the reproduction and distribution of a book], Toronto, Ontario, 2017 CarswellNat 5624 (Cop. Bd.; 2017-10-13), the Board
Literary work 250\$ Canadian Copyright Licensing Agency exp 31 oct 2022

[1] Pursuant to the provisions of subsection 77(1) of the *Copyright Act*, the Copyright Board grants a licence to Tightrope Books as follows:
[...] (4) The licensee shall ensure that the following credit is prominently presented:

Citadel authored by Anna Minerva Henderson. Used with permission under a non-exclusive licence issued by the Copyright Board of Canada

- **Section 79 – Definitions [private copying] - "ordinarily used" is a matter of consistency rather than frequency, focuses on uses by individual consumers and is based on quantitative consideration**

Copying for Private Use [Tariff of Levies to be Collected by CPCC in 2018 and 2019], 2017 CarswellNat 7022 (Cop. Bd.; 2017-12-01).

[29] In *Private Copying 1999-2000, Re*, [Fn27 *Private Copying 1999-2000, Re* [(December 17, 1999), Mr. John H. Gomery J., Mr. Stephen J. Callary Member, Mrs. Sylvie Charron Member (Copyright Bd.)] (17 December 1999) Copyright Board Decision at 30] the Board first addressed the term "ordinarily used." **It explained that it should include all non-negligible uses, so long as it is used by more than a few eccentrics.** While the Canadian Storage Media Alliance (CSMA) preferred a different definition of "ordinarily used," [Fn28 *Ibid* at 28] the judicial review of the Board's decision found that the decision was not patently unreasonable. [Fn29 *Tariff of Levies to be Collected by CPCC, Re* [2000 CarswellNat 1304 (Fed. C.A.)], 2000 CanLII 15571 at para 11.

[33] We find once again that the Board's approach to "ordinarily used" as explained in *Private Copying 1999-2000, Re* is appropriate to use in these circumstances.

[34] This approach can be summarized as follows. **First, the definition emphasizes consistency rather than frequency.** [Fn33 *Private Copying 1999-2000, Re* at 30.] **Second, the definition focuses on uses by individual consumers rather than all uses.** **Finally, the application of the definition can draw on quantitative considerations but need not be exclusively quantitative.**

- **Section 83 – Filing of proposed tariffs – Levies are due by importers and manufacturers of blank media on their disposition**

Canadian Private Copying Collective v Redpact Impex Inc., 2017 CarswellOnt 7392 (Ont. Sup. Ct. – Div. Ct.; 2017-05-16) Kiteley J. [leave of appeal refused, 2017 CarswellOnt 203 (Ont. Sup. Ct. - Div. Ct.; 2017-05-16)]

[2] The *Copyright Act*, R.S.C. 1985, c. C-30 requires that **importers and manufacturers of blank media, ordinarily used by individuals to copy music, remit private copying levies to the plaintiff on the sale or disposition of blank media in order to compensate eligible rights holders for the private copying of their works.**

[7] I have difficulty with both of the motion judge's reasons. In terms of the first reason, I do not see any pleading of fraud in the statement of claim. Admittedly, a conspiracy is pleaded but that is not the same thing as pleading fraud. In any event, I am not aware of any authority that distinguishes fraud from the effect of deemed admissions contained in the default proceedings under the *Rules* and none was cited by the motion judge.

- **Section 83 – Filing of proposed tariffs – Any person may object to a proposed tariff**

Collective Administration of Performing and of Communication Rights (Re), [Satellite Radio Services: Re:Sound (2011-2018); SOCAN (2010-2018)], 2017 CarswellNat 2387, <http://www.cb-cda.gc.ca/decisions/2017/DEC-2017-SAT-02062017.pdf> (Cop. Bd.; 2017-06-02), The Board

[43] The Board underscores that the provision in the Act providing that "**prospective users** or their representatives" **may object to a proposed tariff** also applies to proposed tariffs **filed under section 70.13** of the Act. **This is in clear contrast with subsection 83(6) of the Act which provides that "any person"** (our emphasis) **may object to a proposed tariff for private copying levies.**

- **Section 83 – Filing of proposed tariffs – The Board may designate a collective body for the distribution of the levies**

Copying for Private Use [Tariff of Levies to be Collected by CPCC in 2018 and 2019], 2017 CarswellNat 7022 (Cop. Bd.; 2017-12-01), the Board [footnote omitted]

[4] **CPCC is an umbrella organization that represents songwriters, recording artists, music publishers and record companies through its four-member collectives:** the Canadian Musical Reproduction Rights Agency (CMRRA), Re:Sound Music Licensing Company (Re:Sound), the Society of Composers, Authors and Music Publishers of Canada (SOCAN) and the Society for Reproduction Rights of Authors, Composers and Publishers in Canada (SODRAC). **CPCC has been mandated by its constituent member collectives to collect and distribute private-copying levies on their behalf and has been designated as the collecting body** by the Copyright Board pursuant to paragraph 83(8)(d) of the *Act*.

- **Section 83 – Filing of proposed tariffs – A survey has a value limited in time**
Copying for Private Use [Tariff of Levies to be Collected by CPCC in 2018 and 2019], 2017 CarswellNat 7022 (Cop. Bd.; 2017-12-01), the Board

[70] Just because the Board found, in *Private Copying 2005, 2006 & 2007, Re*, [2007 CarswellNat 1314] that the Music Monitor Survey lead to reliable and valid results does not mean it would necessarily do so in all future private-copying proceedings. As an example, **assessing the reliability and validity of a survey requires the examination of**

certain facts, which may not be the same every time the evidence is introduced in a new proceeding.

- **Section 83 – Filing of proposed tariffs – Whether a Tariff should be filed is a matter to the collective body to decide, not the Board**

Copying for Private Use [Tariff of Levies to be Collected by CPCC in 2018 and 2019], 2017 CarswellNat 7022 (Cop. Bd.; 2017-12-01), the Board [footnote omitted]

[77] In our view, whether or not CPCC maximizes profits is not the relevant consideration. Facing constant costs and declining revenues, CPCC may well come to the decision that filing a tariff with the Board is no longer worthwhile. **That decision, however, is CPCC's alone, and not the Board's.**

[78] In response to the second principle, CPCC claims that the private copying levy has a public purpose. Presumably, the implication is that the public purpose overrides concerns of macroeconomic efficiency.

[79] **In our view, costs to the Board should not be part of the consideration whether or not to certify a tariff since this would lead to an aberrant result.** Otherwise, unopposed tariffs should always be certified since their costs are low. But the same logic would lead to the conclusion that the costliest tariffs (i.e., large tariffs with many objectors, that are sometimes sent back to the Board for redetermination from judicial reviews or appeals) should not be certified.

- **Section 89 – No copyright, etc., except by statute – The *Copyright Act* has an existence independent of the *Civil Code of Quebec***

Diamond v. Montreal Gazette, 2017 QCCQ 1839 (Que. Ct. – Small Claims; 2017-01-19) Lewis J.

[36] Le juge André Wery rappelle dans *Setym International inc. c. Belout*, [Fn13 2001 CanLII 24941 (QC CS), par. 289.], **que la *Loi sur le droit d'auteur* a une existence indépendante du *Code civil du Québec***, et que celui dont le droit d'auteur a été violé n'a pas à faire la preuve du dommage subi pour avoir droit d'être indemnisé en relation avec la violation dont il a été victime.

- **Section 89 – No copyright, etc., except by statute – Copyright is a creature of statute**

Keatley Surveying Ltd. v. Teranet Inc., 2017 CarswellOnt 14961 (Ont. C.A.; 2017-09-08) [affirming 2016 CarswellOnt 7233 (Ont Sup. Ct.; 2016-05-16) Doherty J.

[20] **Copyright is a creature of statute. The rights and remedies associated with copyright are primarily statutory in origin:** *Compo Co. v. Blue Crest Music Inc.*, 1979 CanLII 6 (SCC), [1980] 1 S.C.R. 357, at 372; *Théberge v. Galerie d'Art du Petit Champlain inc.*, 2002

SCC 34 (CanLII), [2002] 2 S.C.R. 336, at para. 5. The *Copyright Act*, R.S.C. 1985 c. C-42, sits at the centre of any inquiry into copyright claims.

- **Section 89 – No copyright, etc., except by statute – The *Copyright Act* is a statutory regime which provides exhaustive rights and remedies**

Lainco inc v. Commission scolaire des Bois-Francs, 2017 CarswellNat 5087 (F.C.; 2017-09-12) LeBlanc J. [appeal A-300-17]

[42] **Au Canada, les droits et recours de celui qui se prétend titulaire d'un droit d'auteur sont prévus à la Loi. Ce régime, d'origine statutaire, est exhaustif** (*Galerie d'art du Petit Champlain inc. c. Théberge*, 2002 SCC 34 (S.C.C.) au para 5, [2002] 2 S.C.R. 336 (S.C.C.) [*Théberge*]; *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13 (S.C.C.) au para 9, [2004] 1 S.C.R. 339 (S.C.C.) [*CCH Canadian Ltd.*]). Il est construit de manière à établir « un équilibre entre, d'une part, la promotion, dans l'intérêt public, de la création et de la diffusion des oeuvres artistiques et intellectuelles et, d'autre part, la juste récompense pour le créateur (ou, plus précisément, l'assurance que personne d'autre que le créateur ne pourra s'approprier les bénéfices qui pourraient être générés) » (*Théberge*, au para 30; *CCH*, au para 10).

- **Section 89 – No copyright, etc., except by statute – Negligence at Common Law is not covered by the *Copyright Act* statutory scheme**

John v. Richards, 2017 CarswellOnt 16249 (Ont. Sup. Ct.; 2017-10-20) Trimble J.

[45] The Defendants say, in effect, that the *Copyright Act* is a complete code and that Mr. John cannot seek a remedy in negligence when he has no remedy under the *Copyright Act*. They cite in support of this proposition *Compo v. Blue Crest Music*, 1979 CanLII 6 (SCC), [1980] 1 S.C.R. 357, wherein Estey, J. says at pp. 372 to 373 that copyright law is neither tort nor contract law, but is statutory law, and that it neither cuts across existing rights in property or conduct, nor falls between rights and obligations heretofore existing in the common law. Rather, it creates rights and obligations upon the terms of the statute.

[46] I disagree. Estey, J. does not say that the *Copyright Act* creates a complete code. Indeed, he declines to make such a broad statement. He says “*Courts in this technical field of copyright have found it prudent to make their judicial answers congruent with the legal issues raised in the proceeding at hand leaving, so far as possible, analogies, examples and hypothetical questions to another day. I propose to follow this principle....*”

[47] **Mr. John’s claim in negligence fails, rather, because he leads no admissible evidence that he sustained any damage or injury**

other than the loss of a royalty, which is a matter for the statute, not negligence law.

- **Section 91 – Adherence to Berne and Rome Conventions – International covenants and treaties have no binding effects on Canadian governments unless enacted into Canadian law**

Canadian Imperial Bank of Commerce v. McDougald, 2017 CarswellBC 289 (Alta. Q.B.; 2017-02-24) Schulz J.

[27] The July 15, 2016 ‘conditional acceptance’ also attaches a “Common La Copyright Notice” from the Get Out Of Debt Free website. This is the same document reproduced in *Rogozinsky* at Appendix “E”. In brief, the “Common Law Copyright Notice” purports to require anyone who uses Mr. McDougald’s name must pay him \$1 million per use. “Common Law Copyright” is also asserted over Mr. McDougald’s bodily characteristics, such as fingerprints, retinal image data, DNA, tissue samples, and even to his “semen, urine, faeces, excrement, other bodily fluids and matter of any kind”. Master Schlosser in *Rogozinsky* at paras 80-87 [*Bank of Montreal v Rogozinsky*, 2014 ABQB 771] rejected this “bizarre, inexplicable claim” as having no legal effect. In *Meads v Meads* Rooke ACJ at paras 501-504 [*Meads v Meads*, 2012 ABQB 571] rejects foisted unilateral copyright claims as having “an overwhelmingly juvenile character” and no effect in law. I agree with these conclusions.

[28] A fee schedule such as this which purports to foist penalties on other persons is a tool of intimidation and harassment: *Meads v Meads* at para 527; *Fearn v Canada Customs*, 2014 ABQB 114 (CanLII) at para 199, 94 Alta LR (5th) 318; *Rogozinsky*, at para 78; *Gidda v Hirsch*, 2014 BCSC 1286 ([CanLII](#)) at para 84; *R v Sands*, 2013 SKQB 115 (CanLII) at para 18; *R v Boxrud*, 2014 SKQB 221 (CanLII) at para 46, 450 Sask R 147; *Re Boisjoli*, 2015 ABQB 629 ([CanLII](#)) at paras 58-69, 29 Alta LR (6th) 334; *Gauthier v Starr*, 2016 ABQB 213 (CanLII) at para 39, 86 CPC (7th) 348; *Allen Boisjoli Holdings v Papadoptu*, 2016 FC 1260 (CanLII); *Pomerleau v Canada Revenue Agency*, 2017 ABQB 123 (CanLII) at para 135.

[42] The problem is that international covenants and treaties have no binding effects on Canadian governments and persons in Canada unless those treaties were enacted into Canadian law. I recently reviewed how OPCA litigants frequently and falsely impute supraconstitutional authority on international agreements: *Pomerleau v Canada Revenue Agency* [2017 ABQB 123], at paras 97-126. In fact these are nothing more than political agreements between countries. Canada is free to ignore and legislate in defiance of the treaties it signs.

[65] I do not know Mr. McDougald's personal financial circumstance. He may be having money issues. Many Albertans are. But there are better alternatives than websites that promise free money mantras and magic documents. I hope Mr. McDougald will choose better in the future. Doing otherwise can be very expensive.

- **BANKRUPTCY Section 83 – Copyright and manuscript to revert to author – The term “manuscript” is not limited to literature but applies also to sound recording – Reversion of the right is subject to the reimbursement of the expenses incurred**

DEP Distribution exclusive ltée (Syndic de), 2017 CarswellQue 2387 (Que. Sup. Ct; 2017-03-22) Corriveau J.

[31] Le Tribunal conclut que les conditions de l'article 83.1a) sont rencontrées. **L'article 83 LFI qui réfère aux manuscrits peut également s'appliquer aux œuvres sonores** [Fn5 *Song Corp., Re*, 2002 CanLII 49574 (ON SC)].

[32] Le matériel retourne à l'artiste qui peut dès lors reprendre ses droits quant à sa distribution.

[33] Selon l'interprétation jurisprudentielle précitée, **un artiste peut récupérer son œuvre sous réserve de compenser le distributeur des sommes encourues par ce dernier quant à la production de l'album.**

- **BANKRUPTCY Section 83 – Copyright and manuscript to revert to author – Warehousing costs are not reimbursable expenses**

DEP Distribution exclusive ltée (Syndic de), 2017 CarswellQue 2387 (Que. Sup. Ct; 2017-03-22) Corriveau J.

[37] Selon l'annexe C et les procédures, il semble qu'il y aurait actuellement plus de 10 000 albums de l'artiste entreposés chez la débitrice [Fn6 R-9] et qu'il serait possible pour le syndic éventuellement de réclamer un coût d'environ 0,20 \$ par copie pour l'entreposage en lien avec l'enlèvement des biens. **Ces frais ne constituent pas des coûts de production au sens de l'article 83 LFI et ne peuvent constituer un frein aux droits des requérants de récupérer leurs biens.**

[38] De plus, le Tribunal est d'avis que l'article 84.2 LFI ne peut mettre en échec la demande de résiliation de contrat issu de l'article 83, tel que l'y invite le syndic.

[39] Le Tribunal est convaincu qu'empêcher la déclaration d'inopposabilité du Contrat aura pour effet d'entraîner des difficultés

financières importantes aux requérants suivant l'alinéa 6 de l'article 84.2 LFI,

[40] En conclusion, le Tribunal prononce l'inopposabilité du Contrat et non pas la résiliation puisque la procédure présentée est de la nature d'une ordonnance de sauvegarde.

Aside : Copyright and Trade-marks before the Trade-marks Opposition Board

- **Not helped by a copyright notice dated after the relevant date.**

Shefa Franchises, Ltd. v. SilverBirch Hotels and Resorts Limited Partnership, 147 C.P.R. (4th) 34 (Opp. Bd.: 2017-04-28) N. de Paulsen

[13] **The evidence of both the Opponent and the Applicant raises a real doubt as to whether the Applicant was the person using the Mark as of the January 2005 date claimed in the application** with respect to Goods (1) and Services (1)-(4).

[14] The evidence of Ms. Stecyk, a trade-mark searcher employed by the agent for the Opponent, includes webpages for "AROMA Mediterranean Resto-Bar" in the Radisson Hotel. **These webpages include the copyright notice "© 2014 Radisson. All rights reserved."** (Stecyk affidavit, para 6, Exhibit E). The Site Usage Terms & Conditions for this website include the following notice "All trademarks, service marks, trade names and trade dress are proprietary to Carlson Hotels or its subsidiaries or affiliated companies and/or third party licensors." (Stecyk affidavit, para 6, Exhibit E).

[15] The evidence of Ms. Stenzel, the Manager, Customer Experience and Social Media for SilverBirch Hotels & Resorts, sets out that "Aroma Resto Bar is a restaurant located ... in the Radisson Hotel Saskatoon, one of the hotels operated by SilverBirch" and opened in 2004 (Stenzel affidavit, para 2). Ms. Stenzel also provides printouts from the Facebook pages of the Aroma Resto Bar which feature the Mark and the AROMA RESTO BAR & Design trade-mark prominently and include the following "Copyright ©2012 Aroma Mediterranean Resto Bar" (Exhibit A). Nowhere in the text of her affidavit does Ms. Stenzel name the Applicant, nor confirm that use of the Mark was by the Applicant or a licensee of the Applicant.

- **The name of a copyright owner on a notice is not inconsistent with the identity of the trade-mark owner**

Geox S.p.A. v De Luca, 2017 TMOB 124, 151 C.P.R. (4th) 390, 2017 CarswellNat 5912, [2017] T.M.O.B. 5124

<https://www.canlii.org/en/ca/tmob/doc/2017/2017tmob124/2017tmob124.html>

(Registrar; 2017-09-19) A. Robitaille

[36] Moreover, the fact that a copyright notice possibly referring to an entity other than the Owner or Chaussures De Luca appears at the bottom of the screen of the website *www.bottesanfibo.com* does not change anything in the way these labels and this box give notice of the connection between the Mark and the boots in question to the person to whom ownership or possession is transferred.

[46] Finally, the fact that a copyright notice possibly referring to an entity other than the Owner or Chaussures De Luca appears at the bottom of the screen of the website *www.bottesanfibo.com*, cannot be enough to call into question the evidence of use of the Mark by Chaussures de Luca, for the benefit of the Owner, in association with boots, as proved by the label and boot photos in Exhibit 2 and the invoices in Exhibit 3. Even if it were presumed from such a copyright notice that the Mark was used by a thirty party outside the framework established in section 50 of the Act, this could not annihilate the stream of evidence proved by the label and boot photos in Exhibit 2 and the invoices in Exhibit 3.

And three quotes to conclude:

Universally, a writer or speaker should endeavour to maintain the appearance of expressing himself, not, as if *he wanted to say something*, but as if *he had something to say* [...].

–Richard Whately, *Elements of Rhetoric comprising the substance of the article in the Encyclopedia Metropolitana : with additions, &c.*, 2nd ed. (Oxford, John Murray, 1828) at p. 271

Plagiarize, / Let no one else's work evade your eyes, / Remember why the good Lord made your eyes, / So don't shade your eyes, / But plagiarize, plagiarize, plagiarize, / Only be sure always to call it please "research".

–Tom Lehrer, *Lobachevsky*, in Songs by Tom Lehrer (Boston: Lehrer Records, 1953), Side 1, Song 6, Extract.

Publier ce que l'auteur a supprimé est donc le même acte de viol que censurer ce qu'il a décidé de garder. [To publish what the author has deleted is therefore the same act of rape as to censor what he has decided to keep.]

–Milan Kundera, *Les testaments trahis* (Paris: Gallimard/Folio, 1993) at p. 319.