



THE BENCHMARK IN
IP SINCE 1892

ROBIC, LLP
INFO@ROBIC.COM
ROBIC.COM

A COMPILATION OF THE CANADIAN COPYRIGHT CASES DECIDED IN 2019*

LAURENT CARRIÈRE*

ROBIC, LLP

LAWYERS, PATENT & TRADEMARK AGENTS

First, a general listing:

1.	<i>9157-4335 Québec inc. v. 9180-3577 Québec inc.</i> , 2019 CarswellQue 1180, 2019 QCCA 292, EYB 2019-307524, [2019] J.Q. 1086, < https://www.canlii.org/fr/qc/qcca/doc/2019/2019qcca292/2019qcca292.html > (Que. C.A.; 2019-02-20).
2.	<i>9286-3075 Québec inc. v. Québec Ville du Rock inc.</i> , 2019 CarswellQue 3558, 2019 QCCS 1517, 306 A.C.W.S. (3d) 38, EYB 2019-310561, [2019] J.Q. 3210, < https://www.canlii.org/fr/qc/qccs/doc/2019/2019qccs1517/2019qccs1517.html > (Que. Sup. Ct.; 2019-04-05).
3.	<i>A v. Watch Tower Bible and Tract Society of Canada*</i> , 2019 CarswellQue 1512, 2019 QCCS 729, EYB 2019-308071, [2019] J.Q. 1540, < https://www.canlii.org/fr/qc/qccs/doc/2019/2019qccs729/2019qccs729.html > (Que. Sup. Ct.; 2019-02-27); leave to appeal 500-09-028239-192 granted 2019 CarswellQue 4858, 2019 QCCA 968, 306 A.C.W.S. (3d) 703, EYB 2019-312357, [2019] J.Q. 4611, < https://www.canlii.org/fr/qc/qcca/doc/2019/2019qcca968/2019qcca968.html > (Que. C.A.; 2019-06-03).
4.	<i>Albo v. The Winnipeg Free Press</i> , 2019 CarswellMan 164, 2019 MBQB 34, 163 C.P.R. (4th) 126, 303 A.C.W.S. (3d) 532, [2019] M.J. 52, < https://www.canlii.org/en/mb/mbqb/doc/2019/2019mbqb34/2019mbqb34.html > (Man. Q.B.; 2019-02-22).
5.	<i>Barreau du Québec (syndic ad hoc) v. Brouillette*</i> , 2019 QCCBDQ 20, < https://www.canlii.org/fr/qc/qccdbq/doc/2019/2019qccdbq20/2019qccdbq20.html > (Conseil de discipline – Barreau du Québec; 2019-04-12) [re-rectifying <i>Barreau du Québec (syndic ad hoc) v. Brouillette</i> , 2017 QCCDBQ 085 (Conseil de discipline – Barreau du Québec; 2017-11-03); appeals 500-07-001033-194 and 500-07-001034-192.
6.	<i>Bell Canada v. Canada (Attorney General)</i> , 2019 SCC 66, 2019 CarswellNat 788, [2019] S.C.J. 66, 312 A.C.W.S. (3d) 228, < https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/18079/index.do >, < https://www.canlii.org/fr/ca/csc/doc/2019/2019csc66/2019csc66.html > (S.C.C.; 2019-12-19) [reversing 154 C.P.R. (4th) 85 (F.C.A.; 2017-12-18)].

© CIPS, 2020.

* Lawyer and trademark agent, Laurent Carrière is a partner with ROBIC, LLP, a multidisciplinary firm of lawyers, patent and trade-mark agents. Published as part of a release to the *Canadian Copyright Act Annotated* (Thompson Reuters). Publication 486.

7.	<i>Bell Canada v. Red Rhino Entertainment Inc.</i> , 2019 CarswellNat 7834, 2019 FC 1460, [2019] F.C.J. 1464, < https://decisions.fct-cf.gc.ca/fc-cf/decisions/en/item/454456/index.do >, < https://www.canlii.org/en/ca/fct/doc/2019/2019fc1460/2019fc1460.html > (F.C. - Contempt; 2019-11-19) [from T-759-16 <i>Canada v. 1326030 Ontario Inc. (iTVBox.net)</i> , 2016 CarswellNat 4944 (F.C.; 2016-06-01); affd 2017 CarswellNat 850 (F.C.A.; 2017-03-20) <i>sub nomine Wesley (Mtlfreetv.com) v. Bell Canada</i>].
8.	<i>Bell Media Inc. v. GoldTV.Biz</i> , 2019 CarswellNat 6733, 2019 FC 1432, [2019] F.C.J. 1331, < https://decisions.fct-cf.gc.ca/fc-cf/decisions/en/item/424753/index.do >, < https://www.canlii.org/en/ca/fct/doc/2019/2019fc1432/2019fc1432.html > (F.C.; 2019-11-15); appeal A-440-19.
9.	<i>Bibliothèque québécoise Inc (Re)</i> , 2019 CarswellNat 160, < https://cb-cda.gc.ca/decisions/2018/TI-20.pdf > (Cop. Bd.; 2019-01-17) <i>sub nomine Labonté, Re</i> .
10.	<i>Bockarova, Re*</i> , 2019 CarswellOnt 14100, < https://www.toronto.ca/wp-content/uploads/2019/08/8de5-TLAB_17-275185-S53-23-TLAB_14-Grantbrook-St_Decision_SGopikrishna.pdf >, -St_Decision_SGopikrishna.pdf (Toronto Local Appeal Body; 2019-08-30); affd 2019 CarswellOnt 19612, < https://www.toronto.ca/wp-content/uploads/2019/11/90f4-17-275185-S53-23-TLAB_14-Grantbrook-St_Review-Decision_October-28-2019_Reviewed-by-I.-Lord.pdf > (Toronto Local Appeal Body; 2019-10-28).
11.	<i>Burke v. Red Barn at Mattick's Ltd.</i> , 2019 CarswellBC 93, 2019 BCSC 69, 301 A.C.W.S. (3d) 476, [2019] B.C.J. 75, < https://www.canlii.org/en/bc/bcsc/doc/2019/2019bcsc69/2019bcsc69.html > (B.C. S.C.; 2019-01-24).
12.	<i>Canada (Society of Composers, Authors and Music Publishers) v. Bano Inc. (Green Bean Java Bistro)</i> , 2019 FC 1011, < https://www.canlii.org/en/ca/fct/doc/2019/2019fc1011/2019fc1011.html > (F.C.; 2019-07-26).
13.	<i>Canada (Society of Composers, Authors and Music Publishers) v. NLH Investments Inc. (Cowboy Ranch)</i> , 2019 CanLII 73165, < https://www.canlii.org/en/ca/fct/doc/2019/2019canlii73165/2019canlii73165.html > (F.C.; 2019-08-06).
14.	<i>Canada (Society of Composers, Authors and Music Publishers) v. Shakers Roadhouse Ltd.</i> , 2019 FC 1010, < https://www.canlii.org/en/ca/fct/doc/2019/2019fc1010/2019fc1010.html > (F.C.; 2019-07-26).
15.	<i>Capital JPEG inc. v. Corporation Zone B4 Itée*</i> , 2019 CarswellQue 6683, EYB 2019-314173, 2019 QCCS 2986, [2019] J.Q. 6105, < https://www.canlii.org/fr/qc/qccs/doc/2019/2019qccs2986/2019qccs2986.html > (Que. Sup. Ct.; 2019-07-16).
16.	<i>Capitale en fête inc. v. Ouellet</i> , 2019 CarswellQue 4570, EYB 2019-311705, 2019 QCCQ 2607, [2019] J.Q. 4044, < https://www.canlii.org/fr/qc/qccq/doc/2019/2019qccq2607/2019qccq2607.html > (Que. Ct.; 2019-05-01).

17.	<i>Carpentier v. Fabricville Co. inc.</i> , 2019 CarswellQue 2867, 2019 QCCQ 1515, EYB 2019-309956, < https://www.canlii.org/fr/qc/qccq/doc/2019/2019qccq1515/2019qccq1515.html > (Que. Ct. – Small Claims; 2019-02-08).
18.	<i>Chartered Professional Accountants of Ontario v Chartered Institute of Management Accountants*</i> , 2019 CarswellNat 7315, [2019] TMOB 5104, 2019 TMOB 104, < https://www.canlii.org/en/ca/tmob/doc/2019/2019tmob104/2019tmob104.html >, < https://decisia.lexum.com/tmob-comc/decisions/en/item/453730/index.do > (T.M. Opp. Bd.; 2019-10-01).
19.	<i>Chen v. Canada (Citizenship and Immigration)*</i> , 2019 CarswellNat 1896, 2019 CanLII 42210, [2019] I.A.D.D. 162, < https://www.canlii.org/fr/ca/cisr/doc/2019/2019canlii42210/2019canlii42210.html > (C.A. I.R.B.; 2019-01-25).
20.	<i>Church of Atheism of Central Canada v. Canada (National Revenue)*</i> , 2019 CarswellNat 7174, 2019 FCA 296, [2019] F.C.J. 1401, < https://decisions.fca-caf.gc.ca/fca-caf/decisions/en/item/453673/index.do >, < https://www.canlii.org/en/ca/fca/doc/2019/2019fca296/2019fca296.html > (F.C.A.; 2019-11-29).
21.	<i>Collective Administration in Relation to Rights under Sections 15 and 19 Copyright Act (Re)</i> , 2019 CarswellNat 8151, [2019] C.B.D. 4, < https://cb-cda.gc.ca/decisions/2019/DEC-2019-SAT-11122019.pdf > (Cop. Bd.; 2019-12-11).
22.	<i>Constellation Brands US Operations v. Société de vin internationale ltée</i> , 2019 CarswellQue 7681, 2019 QCCS 3610, EYB 2019-315686, [2019] J.Q. 7355, < https://www.canlii.org/en/qc/qccs/doc/2019/2019qccs3610/2019qccs3610.html > (Que. Sup. Ct.; 2019-08-21); appeal 500-09-028594-190.
23.	<i>Copying for Private Use (Re)</i> , 2019 CarswellNat 9041, [2019] C.B.D. 5, < https://cb-cda.gc.ca/decisions/2019/DEC-2019-RES-20191213.pdf > (Cop. Bd.; 2019-12-13).
24.	<i>Corus Radio Inc v Harvard Broadcasting Inc</i> , 2019 CarswellAlta 2449, 2019 ABQB 880, [2019] A.W.L.D. 4510, [2019] A.W.L.D. 4511, [2019] A.W.L.D. 4512, [2019] A.J. 1543, < https://www.canlii.org/en/ab/abqb/doc/2019/2019abqb880/2019abqb880.html > (Alta Q.B. - Int. inj.; 2019-11-18).
25.	<i>Côté Chabot Morel Architectes v. Assemblée nationale*</i> , 2019 CarswellQue 10113, EYB 2019-321816, 2019 LNQCCAI 298, 2019 QCCAI 297, < https://www.canlii.org/fr/qc/qccai/doc/2019/2019qccai297/2019qccai297.html > (Que. Comm. Acc. Inf.; 2019-09-19).
26.	<i>Dhillon v. Bernier</i> , 2019 CarswellNat 1518, 305 A.C.W.S. (3d) 838, 2019 FC 573, [2019] F.C.J. 498, < https://www.canlii.org/fr/ca/cfpi/doc/2019/2019cf573/2019cf573.html >, < https://decisions.fct-cf.gc.ca/fc-cf/decisions/en/item/405250/index.do > (F.C.; 2019-05-03) [motion to extend the time to appeal refused 19-A-34 (F.C.A.; 2019-07-23); action dismissed on procedural grounds 2019 FC 1194, 2019 CarswellNat 4913, [2019] F.C.J. 1079,

	< https://www.canlii.org/en/ca/fct/doc/2019/2019fc1194/2019fc1194.html > (F.C.; 2019-09-20); appeal A-403-19].
27.	<i>Droit de la famille — 19884*</i> , 2019 CarswellQue 4198, EYB 2019-311572, 2019 QCCS 1905, [2019] J.Q. 3993, < https://www.canlii.org/fr/qc/qccs/doc/2019/2019qccs1905/2019qccs1905.html > (Que. Sup. Ct.; 2019-05-14).
28.	<i>Drouin (Succession de Côté-Drouin) v. Pepin</i> , 2019 CarswellQue 1922, 2019 QCCS 848, 304 A.C.W.S. (3d) 450, EYB 2019-308642, [2019] J.Q. 2036, < https://www.canlii.org/fr/qc/qccs/doc/2019/2019qccs848/2019qccs848.html > (Que. Sup. Ct.; 2019-03-13).
29.	<i>Eberhard Von Huene & associés inc. v. Salzman</i> , [2019] J.Q. 10868, 2019 QCCS 5321, < https://www.canlii.org/fr/qc/qccs/doc/2019/2019qccs5321/2019qccs5321.html > (Que. Sup. Ct.; 2019-11-07).
30.	<i>Farsi v. Georges</i> , 2019 QCCQ 2721, < https://www.canlii.org/fr/qc/qccq/doc/2019/2019qccq2721/2019qccq2721.html > (Que. Ct.; 2019-05-07).
31.	<i>Geophysical Service Incorporated v. Falkland Oil and Gas Limited</i> , 2019 CarswellAlta 585, 2019 ABQB 162, [2019] A.W.L.D. 1839, 304 A.C.W.S. (3d) 744, < https://www.canlii.org/en/ab/abqb/doc/2019/2019abqb162/2019abqb162.html > (Alta. Q.B.; 2019-03-07); add. reasons 2019 CarswellAlta 938, 2019 ABQB 314, [2019] A.W.L.D. 2785, [2019] A.W.L.D. 2867, 307 A.C.W.S. (3d) 707, 95 Alta. L.R. (6th) 80 (Alta. Q.B. – Costs; 2019-05-02); affd 2020 CarswellAlta 67, 2020 ABCA 21, < https://www.canlii.org/en/ab/abca/doc/2020/2020abca21/2020abca21.html > (Alta. C.A.; 2020-01-20).
32.	<i>G.G. v. Québec (Travail, Emploi et Solidarité sociale)*</i> , 2019 CanLII 100760, < https://www.canlii.org/fr/qc/qcta/doc/2019/2019canlii100760/2019canlii100760.html > (Que. Adm. Trib.; 2019-10-22).
33.	<i>Groupe Innovamper Inc.</i> , 2019 CarswellNat 631, < https://cb-cda.gc.ca/decisions/2018/TI-21.pdf > (Cop. Bd.; 2019-02-18).
34.	<i>Henni v. Food Network Canada Inc.</i> , 2019 CarswellBC 1138, 2019 BCSC 660, 305 A.C.W.S. (3d) 277, [2019] B.C.J. 750, < https://www.canlii.org/en/bc/bcsc/doc/2019/2019bcsc660/2019bcsc660.html > (B.C. S.C.; 2019-04-29).
35.	<i>Infinite Media Ltd. v. remBrand Sports Inc.</i> , 166 C.P.R. (4th) 304, 2019 CarswellOnt 11164, 307 A.C.W.S. (3d) 880, 2019 ONSC 3940, [2019] O.J. 3657, < https://www.canlii.org/en/on/onsc/doc/2019/2019onsc3940/2019onsc3940.html > (Ont. Sup. Ct.; 2019-07-10).
36.	<i>Keatley Surveying Ltd v. Teranet Inc.</i> , 2019 SCC 43, [2019] S.C.J. 43, 2019 CarswellOnt 15110, 309 A.C.W.S. (3d) 388, 437 D.L.R. (4th) 567, 5 R.P.R. (6th) 1, < https://www.canlii.org/en/ca/scc/doc/2019/2019scc43/2019scc43.html > (S.C.C.; 2019-09-26) [affirming 2016 CarswellOnt 7233 (Ont. C.A.; 2017-09-08), which was affirming 2017 CarswellOnt 14961 (Ont. Sup. Ct.; 2016-02-19)].

37.	<i>Knowmadics v. Cinnamon</i> , 2019 CarswellOnt 18811, 2019 ONSC 6549, [2019] O.J. 5796, < https://www.canlii.org/en/on/onsc/doc/2019/2019onsc6549/2019onsc6549.html > (Ont. Sup. Ct. – Int. inj.; 2019-11-18).
38.	<i>Koch, Re</i> , 2019 CarswellNat 5889, < https://cb-cda.gc.ca/unlocatable-introuvables/licences/305.pdf > (Cop. Bd.; 2019-10-10).
39.	<i>Kuch, Re</i> , 2019 CarswellNat 773, < https://cb-cda.gc.ca/unlocatable-introuvables/licences/304.pdf > (Cop. Bd.; 2019-02-07).
40.	<i>Lawrence, Re</i> , 2019 CarswellNat 5890, < https://cb-cda.gc.ca/decisions/2019/TI-08.pdf > (Cop. Bd.; 2019-09-16).
41.	<i>Leclerc v. Brodeur (Éditions du Carnet)</i> , 2019 QCCQ 1613, < https://www.canlii.org/fr/qc/qccq/doc/2019/2019qccq1613/2019qccq1613.html > (Que. Ct. – Small Claims; 2019-02-05).
42.	<i>Lépine v. Municipalité de Sainte-Marcelline-de-Kildare</i> , 2019 QCCQ 5182, < https://www.canlii.org/fr/qc/qccq/doc/2019/2019qccq5182/2019qccq5182.html > (Que. Ct. – Small Claims; 2019-07-23).
43.	<i>Louis Vuitton Malletier S.A. v. Wang</i> , 2019 CarswellNat 6912, 2019 FC 1389, [2019] F.C.J. 1352, < https://www.canlii.org/en/ca/fct/doc/2019/2019fc1389/2019fc1389.html >, < https://decisions.fct-cf.gc.ca/fc-cf/decisions/en/item/424936/index.do > (F.C.; 2019-11-15).
44.	<i>Lukits v. Treasury Board (Department of National Defence)*</i> , 2019 CarswellNat 1680, 2019 CarswellNat 1681, 140 C.L.A.S. 5, [2019] LNFPSLREB 29, < https://www.canlii.org/en/ca/pslreb/doc/2017/2017pslreb6/2017pslreb6.html > (Fed. Pub. Sect. Lab. Rel. Emp. Bd.; 2019-01-13).
45.	<i>Luxme International Ltd v. Lasnier</i> , 2019 CarswellQue 1940, [2019] J.Q. 2484, 2019 QCCS 1180, < https://www.canlii.org/fr/qc/qccs/doc/2019/2019qccs1180/2019qccs1180.html > (Que. Sup. Ct.; 2019-03-27).
46.	<i>Madail Monzon v. Aptitude X inc.</i> , 2019 QCCQ 871, < https://www.canlii.org/fr/qc/qccq/doc/2019/2019qccq871/2019qccq871.html > (Que. Ct. – Small Claims; 2019-02-20).
47.	<i>McMillan LLP v. Forbes*</i> , 2019 CarswellNat 5965, 2019 TMOB 114, [2019] T.M.O.B. 5114, < https://www.canlii.org/en/ca/tmob/doc/2019/2019tmob114/2019tmob114.html >, < https://decisia.lexum.com/tmob-comc/decisions/en/item/423936/index.do > (T.M Opp. Bd. - Registrar; 2019-10-18).
48.	<i>McNab v. Burton</i> , 2019 CarswellOnt 19631, 2019 ONSC 6927, [2019] O.J. 6082, < https://www.canlii.org/en/on/onsc/doc/2019/2019onsc6927/2019onsc6927.html > (Ont. Sup. Ct.; 2019-11-29).
49.	<i>ME2 Productions, Inc. v. Doe</i> , 2019 CarswellNat 405, 2019 FC 214, 302 A.C.W.S. (3d) 157, EYB 2019-307691, 164 C.P.R. (4th) 401, [2019] F.C.J. 187, < https://decisions.fct-cf.gc.ca/fc-cf/decisions/en/item/363655/index.do >, < https://www.canlii.org/en/ca/fct/doc/2019/2019fc214/2019fc214.html > (F.C.; 2019-02-21; appeal A-106-19 discontinued 2019-09-06, appeals A-107-19 and A-108-19 discontinued on 2019-09-13).

50.	<i>MédiaQMI inc. v. Murray-Hall</i> , 2019 CarswellQue 4291, 307 A.C.W.S. (3d) 392, EYB 2019-311701, 2019 QCCS 1922, [2019] J.Q.4040, < https://www.canlii.org/fr/qc/qccs/doc/2019/2019qccs1922/2019qccs1922.html > (Que. Sup. Ct.; 2019-05-21); appeal 500-09-028399-194 discontinued (Que. C.A.; 2019-10-24).
51.	<i>Menard v. The Centre for International Governance Innovation*</i> , 2019 CarswellOnt 1437, 2019 ONSC 858, 302 A.C.W.S. (3d) 766, [2019] O.J. 534, < https://www.canlii.org/en/on/onsc/doc/2019/2019onsc858/2019onsc858.html > (Ont. Sup. Ct.; 2019-02-04).
52.	<i>Miller Thomson v. Groupe Modulo Inc*</i> , 2020 CarswellNat 341, 2019 TMOB 118, < https://www.canlii.org/fr/ca/comc/doc/2019/2019comc118/2019comc118.html >, < https://decisia.lexum.com/tmob-comc/decisions/en/item/461385/index.do > (T.M. Registrar; 2019-10-31).
53.	<i>Morin v. Boizette (Asahi Photo)</i> , 2019 QCCQ 3800, < https://www.canlii.org/fr/qc/qccq/doc/2019/2019qccq3800/2019qccq3800.html > (Que. Ct. – Small Claims; 2019-06-25).
54.	<i>N.G. v. Québec (Travail, Emploi et Solidarité sociale*)</i> , 2019 CanLII 55514, 2019 LNQCTAQ 1815, < https://www.canlii.org/fr/qc/qctaq/doc/2019/2019canlii55514/2019canlii55514.html > (QC T AQ; 2019-06-10).
55.	<i>O'Hara v. Picard</i> , 2019 QCCQ 3302, < https://www.canlii.org/fr/qc/qccq/doc/2019/2019qccq3302/2019qccq3302.html > (Que. Ct. – Small Claims; 2019-04-10).
56.	<i>Pablo Enterprise pte. Ltd. v. Tang*</i> , 2019 CarswellNat 3229, [2019] T.M.O.B. 5054, 2019 TMOB 54, < https://www.canlii.org/en/ca/tmob/doc/2019/2019tmob54/2019tmob54.html >, < https://decisia.lexum.com/tmob-comc/decisions/en/item/418126/index.do > (T.M. Opp. Bd.; 2019-06-13).
57.	<i>Paletta v. The Queen*</i> , 2019 CarswellNat 5136, 2019 TCC 205, [2019] T.C.J. 171, < https://www.canlii.org/en/ca/tcc/doc/2019/2019tcc205/2019tcc205.html > (Tax Ct.; 2019-10-01); appeal A-418-19.
58.	<i>PIPEDA Report of Findings No. 2019-001*</i> , 2019 CarswellNat 5550, [2019] C.P.C.S.F. 1, 2019 CanLII 35618 (<i>sub nomine Investigation into Equifax Inc. and Equifax Canada Co.'s compliance with PIPEDA in light of the 2017 breach of personal information</i>), < https://www.canlii.org/en/ca/pcc/doc/2019/2019canlii35606/2019canlii35606.html > (Can. P.C.C.; 2019-04-09).
59.	<i>Pointe-à-Callière, cité d'archéologie et d'histoire de Montréal, Re</i> , 2019 CarswellNat 589, < https://cb-cda.gc.ca/decisions/2018/TI-26.pdf >1 (Cop. Bd.; 2019-08-23) <i>sub nomine Aubut-Robitaille, Re</i> .
60.	<i>Popsockets LLC v. Case World Enterprises Ltd</i> , 2019 CarswellNat 5165, 2019 FC 1154, 311 A.C.W.S. (3d) 162, [2019] F.C.J. 1133, < https://www.canlii.org/en/ca/fct/doc/2019/2019fc1154/2019fc1154.html >, < https://decisions.fct-cf.gc.ca/fc-cf/decisions/en/item/422675/index.do > (F.C.; 2019-09-10).

61.	<i>Portraits Rembrandt ltée v. Interdonato (Ikono)</i> , 2019 QCCQ 5878, < https://www.canlii.org/fr/qc/qccq/doc/2019/2019qccq5878/2019qccq5878.html > (Que. Ct. – Small Claims; 2019-07-26).
62.	<i>Pourshian v. Walt Disney Company</i> , 2019 CarswellOnt 16536, 2019 ONSC 5916, 311 A.C.W.S. (3d) 160, [2019] O.J. 5242, < https://www.canlii.org/en/on/onsc/doc/2019/2019onsc5916/2019onsc5916.htm > (Ont. Sup. Ct.; 2019-10-15).
63.	<i>Proline Pipe Equipment Inc v. Provincial Rentals Ltd</i> , 169 C.P.R. (4th) 247, [2019] J.Q. 1752, 2019 CarswellAlta 2805, [2019] A.B.Q.B. 983, [2020] A.W.L.D. 376, [2020] A.W.L.D. 377, [2020] A.W.L.D. 394, 313 A.C.W.S. (3d) 818, < https://www.canlii.org/en/ab/abqb/doc/2019/2019abqb983/2019abqb983.html > (Alta. Q.B.; 2019-12-19).
64.	<i>Pyrrha Design Inc. v. Plum and Posey Inc.</i> , 162 C.P.R. (4th) 406, 2019 CarswellNat 210, 2019 FC 129, EYB 2019-306811, 303 A.C.W.S. (3d) 161, [2019] F.C.J. 115 < https://www.canlii.org/en/ca/fct/doc/2019/2019fc129/2019fc129.html > (F.C.; 2019-01-30); appeal A-98-19.
65.	<i>Rallysport Direct LLC v. 2424508 Ontario Ltd</i> , 2019 FC 1524, < https://decisions.fct-cf.gc.ca/fc-cf/decisions/en/item/461712/index.do >, < https://www.canlii.org/en/ca/fct/doc/2019/2019fc1524/2019fc1524.html > (F.C.; 2019-11-28).
66.	<i>Ranchman's Holding Inc v. Bull Bustin' Inc</i> , 2019 CarswellAlta 610, [2019] A.W.L.D. 1686, [2019] A.W.L.D. 1687, [2019] A.W.L.D. 1688, 304 A.C.W.S. (3d) 161, 84 Alta. L.R. (6th) 55, 2019 ABQB 220, [2019] A.J. 393, < https://www.canlii.org/en/ab/abqb/doc/2019/2019abqb220/2019abqb220.html > (Alta. Q.B.; 2019-03-28).
67.	<i>Reprographic Reproduction, in Canada, of Works in its repertoire (Re)</i> , 2019 CarswellNat 9042, [2019] C.B.D. 3, < https://cb-cda.gc.ca/decisions/2019/DEC-2019-SAT-06122019.pdf > (Cop. Bd.; 2019-12-06).
68.	<i>Retransmission of Distant Television Signals, Re [Interim Tariff for the Retransmission of Distant Television Signals (2019-2023)]</i> , 2019 CarswellNat 499, [2019] C.B.D. 1, < https://cb-cda.gc.ca/decisions/2019/DEC-2019-SAT-22022019-interim.pdf > (Cop. Bd.; 2019-02-22).
69.	<i>Retransmission of Distant Television Signals, Re</i> , 2019 CarswellNat 4088, [2019] C.B.D. 2, < https://cb-cda.gc.ca/decisions/2019/DEC-2019-SAT-02082019.pdf > (Cop. Bd.; 2019-08-02).
70.	<i>Retransmission of Distant Television Signals, Re</i> , 2019 CarswellNat 499, [2019] C.B.D. 1, < https://cb-cda.gc.ca/decisions/2019/DEC-2019-SAT-02082019.pdf > (Cop. Bd.; 2019-02-08).
71.	<i>Robillard v. 91439 Canada ltée (Éditions de Mortagne)</i> , 2019 CarswellQue 7544, EYB 2019-315471, 2019 QCCS 3529, [2019] J.Q. 7194, 310 A.C.W.S. (3d) 170, < https://www.canlii.org/fr/qc/qccs/doc/2019/2019qccs3529/2019qccs3529.html > (Que. Sup. Ct.; 2019-08-19) (Que. Sup. Ct.; 2019-08-19); leave to appeal 500-09-028561-199 granted 2019 CarswellQue 11411, EYB 2019-334969 2019 QCCA 2167,

	https://www.canlii.org/fr/qc/qcca/doc/2019/2019qcca2167/2019qcca2167.html > (Que. C.A.; 2019-12-09).
72.	<i>Rowan Williams Davies & Irwin Inc. v. ProWise Engineering Inc.</i> , 2019 CarswellNat 4914, 168 C.P.R. (4th) 95, 310 A.C.W.S. (3d) 606, 2019 FC 1199, [2019] F.C.J. 1086, < https://www.canlii.org/en/ca/fct/doc/2019/2019fc1199/2019fc1199.html >, < https://decisions.fct-cf.gc.ca/fc-cf/decisions/en/item/421960/index.do > (F.C.; 2019-09-23); appeal A-404-19 dismissed on consent (F.C.A.; 2020-01-10).
73.	<i>Samson v. Deputy Head (Department of Justice)*</i> , 2019 CarswellNat 2214, 140 C.L.A.S. 141, 2019 FPSLREB 40, [2019] FPSLREB 34, < https://canlii.org/en/ca/pslreb/doc/2019/2019fpslreb40/2019fpslreb40.html > (Fed. Pub. Sect Lab Rel. Emp. Bd.; 2019-04-19); appeal A-147-19.
74.	<i>Sandhu Singh Hamdard Trust v. Navsun Holdings Ltd</i> , 2019 CarswellNat 7175, 2019 FCA 295, [2019] F.C.J. 1400, 313 A.C.W.S. (3d) 605, < https://decisions.fca-caf.gc.ca/fca-caf/decisions/en/item/453695/index.do >, < https://www.canlii.org/en/ca/fca/doc/2019/2019fca295/2019fca295.html > (F.C.A.; 2019-12-02) [varying 160 C.P.R. (4th) 282 (F.C.; 2018-10-19); the name of Plaintiff should be <i>Sadhu Singh Hamdard Trust</i>].
75.	<i>SOCAN-Re:Sound – Pay Audio Services Tariffs</i> , 2007-2016, file CB-CDA 2019-017 (Unreported), < https://cb-cda.gc.ca/avis-notice/2019/NOT-2019-04-03-CB-CDA-2019-017.pdf > (Cop. Bd.; 2019-04-03).
76.	<i>Strassburger Holdings Limited v XCG Consultants Ltd</i> , 2019 CarswellOnt 18751, 2019 ONSC 6578, [2019] O.J. 5763, < https://www.canlii.org/en/on/onsc/doc/2019/2019onsc6578/2019onsc6578.html > (Ont. Sup. Ct.; 2019-11-14).
77.	<i>Sullivan v. Northwood Media Inc.</i> , 2019 CarswellOnt 7681, 2019 ONSC 9, [2019] O.J. 3833, 308 A.C.W.S. (3d) 271, < https://www.canlii.org/en/on/onsc/doc/2019/2019onsc9/2019onsc9.html > (Ont. Sup. Ct.; 2019-07-18).
78.	<i>Syndicat de copropriété du 5366, 10e avenue v. Développement P10 inc.*</i> , 2019 CanLII 96091, < https://www.canlii.org/fr/qc/qcoagbrn/doc/2019/2019canlii96091/2019canlii96091.html > (Que. O.A.G.B.R.N.; 2019-09-24).
79.	<i>Thomson v. Afterlife Network Inc</i> , 2019 CarswellNat 1479, [2019] F.C.J. 483, 305 A.C.W.S. (3d) 252, 2019 FC 545, 2019 FC 545, [2019] F.C.J. 483, < https://www.canlii.org/en/ca/fct/doc/2019/2019fc545/2019fc545.html > (F.C.; 2019-05-01).
80.	<i>Tremblay v. Brisson*</i> , File D-2018-01-001, < https://conseildepresse.qc.ca/decisions/d2018-01-001/ > (Que. Conseil de presse; 2019-02-01).
81.	<i>Tremblay v. Fonds d'assurance responsabilité professionnelle du Barreau du Québec*</i> , 2019 CarswellQue 11270, [2019] J.Q. 10773, 2019 QCCS 5267, < https://www.canlii.org/fr/qc/qccs/doc/2019/2019qccs5267/2019qccs5267.html > (Que. Sup. Ct.; 2019-09-06).
82.	<i>Unidisc musique inc v. Agence du revenu du Québec</i> , 2019 CarswellQue 2647, EYB 2019-310426, 2019 QCCQ 1818, [2019] J.Q. 3095,

	< https://www.canlii.org/fr/qc/qccq/doc/2019/2019qccq1818/2019qccq1818.html > (Que. Ct.; 2019-04-02); appeal 500-09-028299-196.
83.	<i>University of Western Ontario (Re)*</i> , [2019] O.I.P.C. 271, 2019 CanLII 120754, < https://www.canlii.org/en/on/onipc/doc/2019/2019canlii120754/2019canlii120754.html > (Ont. I.P.C.; 2019-12-10).
84.	<i>Vandergoot (Re)</i> , 2019 CarswellSask 182, 2019 CanLII 29087, < https://www.canlii.org/en/sk/skipc/doc/2019/2019canlii29087/2019canlii29087.html > (Sask. I.P.C.; 2019-04-05).
85.	<i>Voltage Pictures, LLC v. Salna</i> , 2019 CarswellNat 4147, 2019 FC 1047, [2019] F.C.J. 964, 309 A.C.W.S. (3d) 268, < https://decisions.fct-cf.gc.ca/fc-cf/decisions/en/item/419915/index.do >, < https://www.canlii.org/en/ca/fct/doc/2019/2019fc1047/2019fc1047.html > (F.C.; 2019-08-06); appeal A-291-19 discontinued on 2019-11-15.
86.	<i>Voltage Pictures, LLC v. Salna</i> , 2019 FC 1412, < https://decisions.fct-cf.gc.ca/fc-cf/decisions/en/item/458741/index.do > (F.C.; 2019-11-12); appeal A-439-19.
87.	<i>Wilton v. Myhr*</i> , 2019 CarswellOnt 2748, 2019 ONSC 77, [2019] O.J. 980, CFLG 27520, 306 A.C.W.S. (3d) 132, 23 R.F.L. (8th) 383, < https://www.canlii.org/en/on/onsc/doc/2019/2019onsc77/2019onsc77.html > (Ont. Sup. Ct.; 2019-02-26).
88.	<i>Young v. Alberta Assessors' Association Practice Review Committee</i> , 2019 CarswellAlta 2006, 2019 ABQB 740, [2019] A.W.L.D. 3691, [2019] A.W.L.D. 3756, 310 A.C.W.S. (3d) 451, < https://www.canlii.org/en/ab/abqb/doc/2019/2019abqb740/2019abqb740.html > (Alta. Q.B.; 2019-09-24).
89.	<i>Young v. Thakur</i> , 2019 CarswellNat 2971, 2019 FC 835, 307 A.C.W.S. (3d) 169, [2019] F.C.J. 739, < https://decisions.fct-cf.gc.ca/fc-cf/decisions/en/item/417445/index.do >, < https://www.canlii.org/en/ca/fct/doc/2019/2019fc835/2019fc835.html > (F.C.; 2019-06-20).

These 89 cases are divided as follows: Alberta: 5; British Columbia: 2; Manitoba: 1; Ontario: 11 (including 1 from the Supreme Court and 2 from administrative boards); Quebec: 28 (including 7 from Small Claims and 6 from administrative boards); Saskatchewan: 1; Federal Courts of Canada: 19 (including 1 from the Supreme Court, 2 from the Federal Court of Appeal and 16 from the Federal Court); Supreme Court of Canada: 2 (already included in the Ontario and Federal Courts count)¹; Copyright

¹ Excluding refused motions for leave to appeal to the Supreme Court of Canada [*P.S. Knight Co. v. Canadian Standards Association*, [2019] S.C.C.A. 37, 2019 CanLII 45263, 2019 CarswellNat 2072 (S.C.C.; 2019-02-05); *Stoyanova v. Litwin Boyadjian inc., in its capacity as trustee in bankruptcy of Les Disques Mile End inc.*, 2019 CanLII 32859, 2019 CarswellQue 2648 (S.C.C.; 2019-04-18); *Geophysical Service Incorporated v. Murphy Oil Company Ltd* and *Geophysical Service Incorporated v. Encana Corporation.*, 2019 CanLII 45275, 2019 CarswellAlta 1008, [2019] S.C.C.A. 32 (S.C.C.; 2019-05-23), which were all denied]. Note also *Rochon v. Télé-Université*, 2019 QCCA 1956, <<https://www.canlii.org/fr/qc/qcca/doc/2019/2019qcca1956/2019qcca1956.html>> (Que. C.A.; 2019-10-

Board: 13 (including 6 unlocatable copyright owners); Tax Court of Canada: 1; Trademarks and Opposition Board: 4; Federal Public Sector Labour Relations Board: 2; Immigration Board: 1; Privacy Commissioner: 1. The * denotes a non-copyright case.

Now, a section by section analysis of those 2019 Canadian copyright cases.

- **Section 2 – Definition of “artistic work” – Jewellery could be an artistic work.**

Pyrha Design Inc. v. Plum and Posey Inc., 2019 CarswellNat 210 (F.C.; 2019-01-30) Phelan J. [appeal A-98-19].

[84] The Pyrrha Designs are artistic works and are similar to engravings which, like etchings, lithographs, woodcuts and prints, are reproductions of previously created images yet in a different medium. The Pyrrha Designs are to some extent also like a sculpture which uses a cast or model.

[85] While there is limited authority in Canada on the issue of whether jewellery is an “artistic” work, Canadian courts have generally broadly interpreted the types of “works” protectable under the Act, including “artistic works” (see *DRG Inc v Datafile Ltd* (1987), 18 CPR (3d) 538 at 546, [1988] 2 FC 243, (FCTD), aff’d (1991), 25 ACWS (3d) 711 (FCA) [DRG].)

[86] The Defendants have not challenged the Plaintiff on this point of wax seal jewellery as an artistic work.

- **Section 2 – Definition of “artistic work” – Drawing made for a fabric is an artistic work.**

Carpentier v. Fabricville Co. inc., 2019 CarswellQue 2867 (Que. Ct. – Small Claims; 2019-02-08) Nolet J.

[38] Lors de son témoignage, madame Carpentier a bien exposé les diverses étapes requises à la création du dessin JYLG. **L’ensemble de ces démarches établit que ce dessin possède une originalité qui lui est propre et qui découle directement du talent et du jugement artistique de la demanderesse.** Il y a donc lieu de conclure que le dessin JYLG constitue une œuvre artistique.

- **Section 2 – Definition of “artistic work” – Drawing made with computer could be artistic work.**

Madail Monzon v. Aptitude X inc., 2019 QCCQ 871 (Que. Ct. – Small Claims; 2019-02-20) Zoar J.

25) [affirming 2017 QCCS 5202 (Que. Sup.; 2017-11-15), which was affirming 2016 CarswellQue 8003, 2016 QCTAT 4389 (Que. Trib. Adm.; 2016-07-21)].

[22] En l'espèce, l'examen du recours des demandeurs s'effectue au regard de la *Loi sur le droit d'auteur* [Fn7 L.R.C. 1985, c. C-42.] (« LDA ») puisque **les dessins par ordinateur** [dessin figuratif numérique (art conceptuel)] réalisés par MM. Monzon et Truong **constituent des œuvres artistiques** [Fn8 LDA, art. 2 et 41.24.], soit une des quatre catégories d'œuvre protégée [*sic*] au sens de cette loi.

- **Section 2 – Definition of “artistic work” – A photograph is an artistic work.**

O'Hara v. Picard, 2019 QCCQ 3302 (Que. Ct. – Small Claims; 2019-04-10) Paradis J.

[25] Il convient de rappeler **qu'une photographie constitue une œuvre artistique** au sens de l'article 2 de la Loi et qu'elle est ainsi protégée par le droit d'auteur prévu à cette même Loi.

- **Section 2 – Definition of “artistic work” – Copyright in drawings does not extend to the resulting machines – Industrial machines are not artistic works.**

Proline Pipe Equipment Inc v. Provincial Rentals Ltd, 169 C.P.R. (4th) 247 (Alta. Q.B.; 2019-12-19) Ackert J.

[16] **I do not accept that copyright in the Proline drawings extends to the pipe bending machines themselves.** The definition of “artistic works” in section 2 of the *Copyright Act* includes “paintings, drawings, maps, charts, plans, photographs, engravings, sculptures, works of artistic craftsmanship, architectural works, and compilations of artistic works.” **Industrial machines are not included in this definition.**

- **Section 2 – Definition of “artistic work” – Paintings are artistic works.**

Farsi v. Georges, 2019 QCCQ 2721 (Que. Ct. – Small Claims; 2019-05-07) Croteau J.

[12] La *Loi sur le droit d'auteur* [Fn6 L.R.C., 1985, c. C-42.] (Loi) établit les principes généraux qui doivent guider le Tribunal dans le cadre de l'analyse d'un recours basé sur la violation des droits d'auteur et des droits moraux:

- **Les peintures, dessins, sculptures, œuvres architecturales, gravures ou photographies sont considérés comme des «œuvres artistiques» au sens de la Loi** [Fn7 Article 2 de la Loi.]. [...]

- **Section 2 – Definition of “Board” – Board does not provide legal advice.**

Lawrence, Re, 2019 CarswellNat 5890 (Cop. Bd.; 2019-09-16), the Board.

[5] However, as the **Board cannot provide legal advice to the public, we encourage you to obtain legal advice from a lawyer specialized in the field.**

- **Section 2 — Definition of “broadcaster” — A physical person cannot be a broadcaster.**

Dhillon v. Bernier, 2019 CarswellNat 1518 (F.C.; 2019-05-03) Lafrenière J. [motion to extend the time to appeal refused 19-A-34 (F.C.A.; 2019-07-23); action dismissed on procedural grounds 2019 CarswellNat 4913 (F.C.; 2019-09-20); appeal A-403-19].

[38] The Plaintiffs submit that Mr. Dhillon, by electronically sharing the Times of Canada article which mentions the words “People’s Party of Canada”, acted as a broadcaster. **On the basis of the record before me, I am not satisfied that Mr. Dhillon is a broadcaster within the meaning of section 2 of the *Copyright Act* or that the work claimed in the certificate of registration is even a communication signal.** The entire premise of the Plaintiffs’ claim of copyright is nonsensical.

- **Section 2 — Definition of “collective society” — It is the responsibility of the collective society to seek and obtain the authorization to manage the copyrights of authors — Implied agency could be assumed if the proper circumstances are proven.**

Reprographic Reproduction, in Canada, of Works in its repertoire (Re), 2019 CarswellNat 9042 (Cop. Bd.; 2019-12-06)), the Board.

[152] [...] **Second, the theory approaches the issue from the wrong angle: the reproduction right accorded to authors under the Act is an exclusive right, and it is therefore the responsibility of Access to seek and obtain the authorizations required to manage reproduction rights and not the responsibility of the rights holders to advise Access they do not wish it to manage those rights.**

[153] The foregoing decisions of the Board serve to illustrate how a finding of implied agency is rooted very firmly in the factual context in which it arises.

[154] We do not say, therefore, that agency can never be implied or retroactive. Nonetheless, it is well-established that a collective society must establish that it has valid authorizations regarding the rights holders it is claiming to represent. [Fn59 See *Re:Sound v Fitness Industry Council of Canada and Goodlife Fitness Centres Inc*, 2014 FCA 48] **In the circumstances of these proceedings, given Access’ practices and distribution methodology, as described above, we are not satisfied that that a relationship of implied agency as between Access and its non-affiliates has been established to support its authorization to represent the non-affiliates for purposes of the collective administration of their works.**

- **Section 2 – Definition of "collective work" – A separate right is attached to the collection, independently of the various rights likely to be attached to the contributions brought together in the collection.**

Drouin (Succession de Côté-Drouin) v. Pepin, 2019 CarswellQue 1922 (Que. Sup. Ct.; 2019-03-13) Lucas J.

[211] Le DNCF se qualifie de «*recueil*» au sens de la LDA, comme dictionnaire ou comme œuvre analogue à une encyclopédie [Fn 192 Définition d'ENCYCLOPÉDIE : «Ouvrage où l'on expose méthodiquement ou alphabétiquement l'ensemble des connaissances universelles (encyclopédie générale) ou spécifiques d'un domaine du savoir (encyclopédie spécialisée).» : Dictionnaire Larousse, en ligne.], telle une anthologie [Fn193 Définition d'ANTHOLOGIE : «*Recueil de morceaux choisis d'œuvres littéraires ou musicales*», Dictionnaire Larousse, en ligne; Art. 2 «*recueil*» LDA; Normand Tamaro, *Loi sur le droit d'auteur – Texte annoté*, 10^e éd., Scarborough, Carswell, 2015 p. 174 et ss]. Il regroupe plusieurs œuvres distinctes, certaines œuvres littéraires sont rédigées à l'interne, mais plusieurs autres se trouvent puisées un peu partout, notamment parmi les œuvres du domaine public (photographies anciennes, armoiries, signatures authentiques des plus importantes figures de notre histoire, cartes géographiques, portraits des pionniers, tableaux historiques, notamment.) **Ainsi, la loi reconnaît expressément qu'«un droit distinct est rattaché au recueil, indépendamment des différents droits susceptibles d'être rattachés aux apports réunis dans le recueil** [Fn 194 Normand Tamaro, *Loi sur le droit d'auteur – Texte annoté*, 10^e éd., Scarborough, Carswell, 2015 pp. 174].»

[212] Gabriel Drouin est l'instigateur de cette nouvelle forme de généalogie en 1957; il en décide la composition «sur un plan tout à fait pratique pour le chercheur [Fn 195 Rapport d'expertise, Sylvie Tremblay, 26 janvier 2017, p. 56].» Sans être nécessairement l'auteur des œuvres qui composent le tome 3, on comprend qu'il prend une part active dans la réalisation de sa compilation, que les choix et les décisions définitives dans la préparation relèvent de lui. Il se trouve donc, comme personne physique, à être l'auteur du recueil que constitue le tome 3 du DNCF.

- **Section 2 – Definition of "compilation" – A compiler does not have a copyright in the individual components of a compilation – A compiler may have copyright in the form represented by the "compilation".**

Albo v. The Winnipeg Free Press, 163 C.P.R. (4th) 126 (Man. Q.B.; 2019-02-22) Saull J.

[63] Counsel provided me with numerous authorities respecting principles of copyright law that are relevant to this matter. A synthesis of these authorities is provided below: [...]

g) The *Act* recognizes that there can be a copyright in the collection and organization of other's works. In this regard, s. 2 of the *Act* defines "compilation" as:

(a) A work resulting from the selection or arrangement of literary, dramatic, musical or artistic works or of parts thereof; or

(b) A work resulting from the selection or arrangement of data.

h) A "compilation" takes existing material and casts it in a different form. **Although the arranger does not have a copyright in the individual components, he or she may have copyright in the form represented by the "compilation"** (*CCH* at para. 33 [*CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13]).

j) **In cases where an interview is the target of concern, it is the interviewer who reduces an interview into a fixed material form who acquires copyright in the interview, not the person being interviewed.**

[69] As stated above, although Dr. Albo may very well have copyright in Exhibit "7" as a "compilation", he does not have copyright in the individual elements of the "compilation". Had the Press simply republished Exhibit "7", Dr. Albo would have a claim for copyright infringement but this did not happen.

- **Section 2 – Definition of "compilation" – Copyright in the arrangement does not extend to copyright in the parts constituting the compilation.**

Albo v. The Winnipeg Free Press, 163 C.P.R. (4th) 126 (Man. Q.B.; 2019-02-22) Saull J.

[76] Again, **although Dr. Albo may hold copyright in the arrangement of the individual elements of Exhibits "13" and "14" as "compilations", he has not satisfied me that he holds copyright in the individual elements comprising these two documents** (see: *CCH* at para. 33 [*CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13]) and *Maltz* at para. 26 [*Maltz v. Witterick*, 2016 FC 524]).

- **Section 2 – Definition of "compilation" – Selection or arrangement is required for copyright to subsist in a compilation.**

Drouin (Succession de Côté-Drouin) v. Pepin, 2019 CarswellQue 1922 (Que. Sup. Ct.; 2019-03-13) Lucas J.

[151] **La LDA précise que la compilation protégée par le droit d'auteur résulte du choix ou de l'arrangement de tout ou partie d'œuvres ou de données** [Fn112 Art, 2, définition de «*compilation*», LDA.].

- **Section 2 – Definition of "compilation" – Talent and judgment are still required for copyright to extend to compilation.**

Drouin (Succession de Côté-Drouin) v. Pepin, 2019 CarswellQue 1922 (Que. Sup. Ct.; 2019-03-13) Lucas J.

[152] La Cour d'appel fédérale dans l'arrêt *Télé-Direct (Publications) Inc. c. American Business Information, Inc.* [Fn113 74 C.P.R. (3d) 72, p. 92 (CF), confirmé : 1997 CanLII 6378 (CAF)], cité dans *CCH [CCH Canadienne ltée c. Barreau du Haut-Canada 2004 CSC 134]*, juge de l'originalité requise dans le cadre de la compilation :

Essentiellement, la compilation, pour être originale, doit être une œuvre que son auteur a créée de façon indépendante et qui, par les choix dont elle résulte et par son arrangement, dénote un degré minimal de talent, de jugement et de travail. Ce n'est pas une haute exigence, mais c'en est une. S'il en était autrement, n'importe quel type de choix ou d'arrangement suffirait, puisque ces opérations supposent un certain effort intellectuel. Toutefois, la Loi est claire: seules les œuvres originales sont protégées. Il se peut donc que certaines compilations ne satisfassent pas à ce critère. [Nos soulignés.]

[153] La Cour d'appel fédérale souligne qu'«une somme importante de travail alliée à un degré négligeable de talent et de jugement ne suffirait pas la plupart du temps, à conférer un caractère original à une compilation [Fn114 *Télé-Direct (Publications) Inc. c. American Business Information, Inc.*, 74 C.P.R. (3d) 72, p. 92 (CF), confirmé : 1997 CanLII 6378 (CAF)].»

[154] **Force est de constater qu'il n'est pas facile de tracer la ligne entre l'exercice de suffisamment de talent et de jugement pour justifier une conclusion d'originalité et ce qui constitue une entreprise purement mécanique** [Fn115 *Édutile Inc. c. Assoc. pour la protection des automobilistes*, 2000 CanLII 17129 (CAF), par. 13; *Toronto Real Estate Board c. Commissaire de la concurrence*, 2017 CAF 236 (CanLII), par. 185 et 186]. En 2017, la Cour d'appel fédérale dans son arrêt *Toronto Real Estate Board c. Commissaire de la concurrence* [Fn116 *Toronto Real Estate Board, id.*, par. 187 à 191.] fait ressortir les «repères» de la jurisprudence pour décider si le seuil de l'originalité est atteint, dont notamment :

- **lorsqu'une idée ne peut être exprimée que d'un nombre restreint de façons, son expression n'est donc pas protégée, car on n'a pas satisfait au critère de l'originalité** [Fn117 *Red Label Vacations inc. c. 411 Travel Buys Limited*, 2015 CF 18 (CanLII), par. 98 ; *Delrina Corp. (cob Carolian Systems) c. Triolet Systems Inc.*, 2002 CanLII 11389

(ON CA), par. 48–52, autorisation de pourvoi à la C.S.C. refusée, 29190 (28 novembre 2002)).];

- **les normes du domaine peuvent être pertinentes dans l'analyse servant à décider si une œuvre est originale est légitime** et demeure [Fn118 *Télé-Direct (Publications) Inc. c. American Business Information, Inc.*, 74 C.P.R. (3d) 72, p. 92 (CF), confirmé : 1997 CanLII 6378 (CAF) par. 6-7; *Harmony Consulting Ltd. c. G.A. Foss Transport Ltd.*, 2011 CF 340 (CanLII), par. 34, 39, 65, 77, 182–188, conf. 2012 CAF 226 (CanLII), par. 37–38, (*Harmony CAF*); *Geophysical Service Inc. v. Encana Corp.*, 2016 ABQB 230 (CanLII), par. 105, 38 Alta. L.R. (6th) 48 (*Geophysical*)];
- **il n'y a pas de droit à la protection du droit d'auteur lorsque le choix ou l'arrangement est dicté par des pratiques acceptées et courantes du domaine** [Fn119 *Geophysical Service Inc. v. Encana Corp.*, 2016 ABQB 230, par. 100–101.];
- **lorsque le contenu et la présentation d'une formule sont largement tributaires de son utilité et/ou des exigences de la loi, elle ne peut être considérée comme une œuvre originale.** Le cas échéant, seul l'aspect visuel de la compilation est susceptible d'être protégé par le droit d'auteur s'il est original [Fn120 *Distrimed Inc. c. Dispill Inc.*, 2013 CF 1043 (CanLII), par. 324 et 325].

- **Section 2 – Definition of "compilation" – Talent and judgment are still required for copyright to extend to compilation – The analysis shall consider the type of work.**

Drouin (Succession de Côté-Drouin) v. Pepin, 2019 CarswellQue 1922 (Que. Sup. Ct.; 2019-03-13) Lucas J.

[155] **C'est à la lumière de l'ensemble de ces critères liés à l'exercice du talent et du jugement que le caractère original d'une œuvre s'apprécie en prenant en considération le type d'œuvre et le processus ayant conduit à sa création.**

[162] **En droit, l'originalité d'une compilation est évaluée en fonction du choix ou de l'arrangement** [Fn126 Art, 2, définition de «*compilation*», LDA.], et avec égards, le Tribunal constate que la préparation et présentation d'une fiche ne résulte [*sic*] ni de l'un, ni de l'autre.

- **Section 2 – Definition of "compilation" – Mere mechanical transcription does not amount to an exercise of talent and judgment.**

Drouin (Succession de Côté-Drouin) v. Pepin, 2019 CarswellQue 1922 (Que. Sup. Ct.; 2019-03-13) Lucas J. [References to evidence omitted.]

[166] En somme, la fiche correspond à une version abrégée de l'acte de mariage, une copie de certaines informations prédéterminées, dictées par les besoins de la généalogie.

[167] Ainsi, les employés de l'IGD n'exercent aucune discrétion sur les données à colliger; il leur faut systématiquement retranscrire les noms des conjoints, les noms des parents, le lieu et la date du mariage. Il n'est pas contesté que «c'est toujours le même principe», soit «la même méthode de travail d'extraction d'informations». **Avec égards, le Tribunal est d'opinion que le travail intellectuel requis peut être aisément assimilé à une entreprise purement mécanique visant à repérer les informations requises dans l'acte de mariage et à les retranscrire sur une fiche, sans plus de discernement.**

[168] Certes, pour certains actes anciens (seulement), le talent du généalogiste et ses connaissances en paléographie s'avèrent nécessaires afin de lire l'écriture ancienne et les abréviations utilisées dans le but d'extraire les informations requises. Cependant, cela ne répond pas davantage au second critère. Dans tous les cas, **le Tribunal constate que la sélection et l'agencement des données sont essentiellement fonctionnels et que le travail d'extraction requis ne demande pas l'exercice du jugement** au sens de l'arrêt *CCH* [*CCH Canadienne Ltée c. Barreau du Haut-Canada* 2004 CSC 134] et de la jurisprudence subséquente.

[169] **En l'absence d'option et de choix, compte tenu des possibilités restreintes de présentation, s'agissant d'une opération évidente qui demande un exercice négligeable de talent et de jugement, le Tribunal est d'avis que le travail requis en l'espèce se distingue de celui que nécessite un sommaire ou un index analytique, œuvres reconnues par la Cour suprême dans l'arrêt *CCH*.**

- **Section 2 – Definition of "compilation" – Minor corrections does not amount to the exercise of skill and judgment**

Drouin (Succession de Côté-Drouin) v. Pepin, 2019 CarswellQue 1922 (Que. Sup. Ct.; 2019-03-13) Lucas J.

[171] **Quant aux corrections manuscrites dans les volumes du Kardex noir, le Tribunal estime que le talent et le jugement susceptibles d'être mis à contribution pour apporter ces modifications et ces ajouts mineurs sont trop banals pour justifier la protection du droit d'auteur** [Fn135 *CCH Canadienne Ltée c. Barreau du Haut-Canada*, 2004 CSC 134 (par. 35)].

[172] **Enfin, le classement par ordre alphabétique s'avère être une méthodologie classique** [Fn136 Définition de DICTIONNAIRE :

«Ouvrage didactique constitué par un ensemble d'articles dont l'entrée constitue un mot, indépendants les uns des autres et rangés dans un ordre déterminé, le plus souvent alphabétique.»[Nos soulignés.], Dictionnaire Larousse, en ligne.], utilisée par les premiers compilateurs de données provenant des registres de l'état civil. En effet, plusieurs registres contenaient déjà des indexes réalisés par les prêtres à la fin de chaque année, pour présenter en ordre alphabétique les baptêmes, mariages et sépultures inscrits dans le registre au cours de l'année, avec le numéro de page correspondant, leur permettant de s'y retrouver [Fn137 Rapport additionnel d'expertise, Sylvie Tremblay, 18 avril 2018, p. 2; Témoignage de Sylvie Tremblay, 6 juin 2018; Dictionnaire Manseau, pièce D-30]

- **Section 2 – Definition of "compilation" – Classification according to the norms of an industry will not amount to skill and judgment sufficient to warrant originality.**

Drouin (Succession de Côté-Drouin) v. Pepin, 2019 CarswellQue 1922 (Que. Sup. Ct.; 2019-03-13) Lucas J. [References to evidence omitted.]

[199] De l'avis du Tribunal, la situation qui nous occupe s'associe à l'affaire *Télé-Direct* [*Télé-Direct (Publications) Inc. c. American Business Information, Inc.*, 74 C.P.R. (3d) 72, p. 92 (CF), confirmé : 1997 CanLII 6378 (CAF)], soit de renseignements génériques classés suivants [*sic*] des normes courantes de l'industrie. En effet, dans le domaine de la généalogie, le classement des microfilms par paroisses et par années de registres n'a rien d'exceptionnel et s'avère plutôt représentatif du système d'enregistrement des registres paroissiaux de l'époque, sans plus. Rappelons qu'une fiche regroupe les références de tous les registres d'une même paroisse et l'ensemble des fiches permet en quelque sorte de reconstituer ce que l'on retrouve sur le terrain, dans les paroisses. Y a-t-il d'autres options? La preuve ne le dit pas.

[200] **En réalité, rien dans les faits ne permet au Tribunal de conclure que le système de fiches d'index relève d'une approche originale, d'un effort intellectuel pour optimiser l'efficacité du classement ou est autrement le fruit de l'exercice du talent et du jugement de Gabriel Drouin ou des employés de l'IGD. Au contraire, l'organisation des données apparaît évidente pour répondre aux besoins de la généalogie.**

[201] En somme, le Tribunal juge que les étiquettes et les fiches d'index ne possèdent pas le degré d'originalité requis pour bénéficier de la protection de la LDA.

Section 2 – Definition of “communication signal” – A title shared electronically is not a communication signal.

Dhillon v. Bernier, 2019 CarswellNat 1518 (F.C.; 2019-05-03) Lafrenière J. [motion to extend the time to appeal refused 19-A-34 (F.C.A.; 2019-07-23); action dismissed on procedural grounds 2019 FC 1194, 2019 CarswellNat 4913 (F.C.; 2019-09-20); appeal A-403-19].

[38] The Plaintiffs submit that Mr. Dhillon, by electronically sharing the Times of Canada article which mentions the words “People’s Party of Canada”, acted as a broadcaster. **On the basis of the record before me, I am not satisfied that Mr. Dhillon is a broadcaster within the meaning of section 2 of the Copyright Act or that the work claimed in the certificate of registration is even a communication signal.** The entire premise of the Plaintiffs’ claim of copyright is nonsensical.

- **Section 2 – Definition of “copyright” — “copyright” and “droits d’auteur” do not intellectually convey the same meaning.**

Robillard v. 91439 Canada ltée (Éditions de Mortagne), 2019 CarswellQue 7544 (Que. Sup. Ct.; 2019-08-19) Langlois J. [leave to appeal granted 2019 CarswellQue 11411 (Que. C.A.; 2019-12-09)].

[71] La Cour suprême **déplore d’ailleurs l’usage dans la L.D.A., à titre d’équivalents, de l’expression « droits d’auteur » dans sa version française, laquelle englobe tout un ensemble de droits, tant économiques et moraux et de l’expression « copyright » dans sa version anglaise qui est surtout étroitement liée aux droits économiques** [Fn32 *Théberge c. Galerie d’Art du Petit Champlain inc.*, 2002 CSC 34, at para. 62], ce qui peut porter à confusion.

- **Section 2 – Definition of “engravings” — engravings are artistic works.**

Pyrrha Design Inc. v. Plum and Posey Inc., 2019 CarswellNat 210 (F.C.; 2019-01-30) Phelan J. [appeal A-98-19].

[84] The Pyrrha Designs **are artistic works and are similar to engravings which, like etchings, lithographs, woodcuts and prints, are reproductions of previously created images yet in a different medium. The Pyrrha Designs are to some extent also like a sculpture which uses a cast or model.**

- **Section 2 – Definition of “engravings” — Copyright may subsist in an engraving based on another work.**

Pyrrha Design Inc. v. Plum and Posey Inc., 2019 CarswellNat 210 (F.C.; 2019-01-30) Phelan J. [appeal A-98-19].

[100] **A further consideration is that the Act defines an “artistic work” to include an engraving.** As commented upon in John S McKeown, *Fox on Canadian Law of Copyright and Industrial Designs*, 4th ed (Toronto: Thomson Reuters, 2003) (loose-leaf updated 2018),

ch 10 at 10:11(d) [*Fox on Copyright*], “[t]he fact that an engraving is based on another work does not preclude copyright in the engraving”.

[101] As stated earlier, the “artistic works” in this case - the wax seal jewellery designs - are much like an engraving; the jewellery is based on another work, the wax seal or wax seal tool.

- **Section 2 – Definition of “every original ... work” – Copyright cannot be claimed in a method or an idea.**

Pyrrha Design Inc. v. Plum and Posey Inc., 2019 CarswellNat 210 (F.C.; 2019-01-30) Phelan J. [appeal A-98-19].

[94] I have concluded that **the Pyrrha Designs are a fixed expression since the Plaintiff is claiming copyright in each of the Pyrrha Designs, which are specific expressions of a certain wax seal image in metal, finished in a certain way.** The Plaintiff’s claim in their Further Amended Statement of Claim that it developed the method and idea for creating wax seal jewellery cannot be accepted. **The Plaintiff cannot claim copyright in the method of lost wax casting or in the idea of creating jewellery from certain wax seals. The method and idea are in the public domain.**

- **Section 2 – Definition of “every original ... work” – Copyright does not cover facts – Skill and judgment are required to attract copyright protection.**

Albo v. The Winnipeg Free Press, 163 C.P.R. (4th) 126 (Man. Q.B.; 2019-02-22) Saull J.

[63] Counsel provided me with numerous authorities respecting principles of copyright law that are relevant to this matter. A synthesis of these authorities is provided below: [...]

e) **Copyright only protects “original” works. The copyrighted work must involve an exercise of skill and judgment.**

k) **Copyright does not cover facts** (*Hager v. ECW Press Ltd.*, 1998 CanLII 9115 (FC), [1999] 2 F.C. 287 (“*Hager*”) and *Maltz v. Witterick*, 2016 FC 524 (CanLII), [2016] F.C.J. 484 (“*Maltz*”)).

l) **The use of common words and short phrases, which are generic, does not constitute copying** (*Tomas v. Boaden Catering Ltd.*, [1995] F.C.J. No. 1778).

[84] Moreover, the authorities are clear that **the level of skill and judgment that is required to produce a work that acquires copyright protection must not be so trivial that it involves “a purely mechanical exercise”** (see: *CCH* at para. 16 [*CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13]). The

amortization of the value of the gold leaf in question is, in my view, a purely mechanical exercise.

- **Section 2 – Definition of "every original... work" – Mere annotations without some significant intellectual effort or discernment will not be sufficient to attract copyright protection.**

Drouin (Succession de Côté-Drouin) v. Pepin, 2019 CarswellQue 1922 (Que. Sup. Ct.; 2019-03-13) Lucas J. [References to evidence omitted.]

[192] Force est de constater que cela ne lui demandait pas davantage d'exercer son jugement. Il n'est pas question ici de se faire une opinion ou de procéder à une analyse en comparant différentes options possibles pour produire la fiche. L'employé voit les paroisses concernées sur l'étiquette de la bobine, **retranscrit les informations dans les fiches des bonnes paroisses, sans effort intellectuel significatif ou discernement.**

[193] Par ailleurs, des annotations, des modifications et des phrases complètes ont été inscrites sur certaines fiches au fil du temps. Éparses, il s'agit d'informations relatives au contenu du microfilm ou concernant le dépouillement des données par les employés qui vraisemblablement n'appellent pas un degré suffisant de talent et de jugement. Ces annotations ne touchent pas une majorité des fiches produites et elles s'avèrent largement tributaires de l'utilité de l'index. De l'avis du Tribunal, **ces annotations sont accessoires et insuffisantes à elles seules pour justifier la protection du droit d'auteur sur l'ensemble des fiches d'index** [Fn169 *CCH Canadienne Ltée c. Barreau du Haut-Canada* 2004 CSC 134 par. 3].

- **Section 2 – Definition of "every original ... work" – The threshold to constitute originality in a work is low and creativity is not required.**

Thomson v. Afterlife Network Inc., 2019 CarswellNat 1479 (F.C.; 2019-05-01) Kane J.

[34] The evidence establishes that the Applicant and other Class Members personally authored the obituaries using their own skill and judgment, choosing their own words to convey the appropriate message about the life of the deceased person and their funeral arrangements and adding a photograph taken by them or by another Class Member. Class Members also exercised their skill and judgment in taking the photographs of the deceased person. **The obituaries and photographs fall within the term "original work" as it has been interpreted by the Supreme Court of Canada. As noted, the threshold to constitute originality in the work is low and creativity is not required.**

- **Section 2 – Definition of "every original ... work" – Cropping of a photograph may be sufficient to attract copyright protection.**

Capitale en fête inc. v. Ouellet, 2019 CarswellQue 4570 (Que. Ct.; 2019-05-01) Boutin J.

[58] Pour obtenir une photographie détournée, il faut, outre une photographie d'origine, faire le choix du logiciel informatique, utiliser les outils adéquats ainsi qu'un certain niveau de connaissances, de talent et de jugement, lesquels s'acquièrent de par l'expérience. C'est le mélange de ces éléments qui permet d'obtenir le résultat recherché, **la création des photographies détournées ne découlant pas d'une simple opération mécanique** tel que l'indique, au surplus, l'expert Vachon [Fn 12 À la page 10 *in fine* de son Rapport, M. Vachon mentionne ce qui suit : « Il faut cependant être un retoucheur habile et d'expérience pour que l'illusion ne soit pas détectable ».]. Dit autrement et empruntant les termes employés par l'auteur Me Jean Goulet [Fn 13 Jean GOULET, *Grand angle sur la photographie et la loi*, Montréal, Wilson et Lafleur, 2010, pages 86 et 87.], les **photographies détournées ainsi obtenues ont « requis de [leur] auteur pour sa facture finale la maîtrise des paramètres techniques et esthétiques nécessaires »**.

- **Section 2 – Definition of “every original ... work” – Copyright will subsist in a photograph by the choice, the arrangement and the pose of the subject, the choice of the angle of view and the lighting, and finally by the artistic work and the personal effort of the photographer.**

Portraits Rembrandt ltée v. Interdonato (Ikono), 2019 QCCQ 5878 (Que. Ct. – Small Claims; 2019-07-26) Choquette J.

[23] **Une photographie est une œuvre artistique au sens de l'article 2 de la Loi.**

[25] **En matière de photographie, en particulier, on en reconnaît le caractère original notamment par le choix, l'aménagement et la pose du sujet, le choix de l'angle de prise de vue et de l'éclairage, enfin par le travail artistique et l'effort personnel du photographe** [Fn12 *Ateliers Tango Argentin inc. c. Festival d'Espagne et d'Amérique latine inc.*, 1997 CanLII 8852 (QCCS)].

[26] [The photograph made by Plaintiff] Les 3 pots de sauces «Saveurs du Sud» sont placés de façon quasi linéaire, sur fond blanc. La photographie montre en évidence le logo et les étiquettes conçus par le défendeur.

[27] De l'avis du Tribunal, il s'agit de la reproduction purement mécanique – la copie d'une autre œuvre, celle du défendeur. Il ne s'agit pas d'une œuvre artistique originale.

- **Section 2 – Definition of “every original ... work” – Some intellectual effort is required for a work to be original.**

Corus Radio Inc v Harvard Broadcasting Inc, 2019 CarswellAlta 2449 (Alta Q.B. - Int. inj.; 2019-11-18) Dilts J.

[30] For a work to be entitled to copyright protection, it must be an original artistic work. **This means that there must be some intellectual effort applied to produce the work:** *Distrimedic Inc. v Dispill Inc.*, 2013 FC 1043 (CanLII) at para 319 citing *CCH Canadian Ltd. v Law Society of Upper Canada*, 2004 SCC 13 (CanLII) at para 16. [...]

- **Section 2 – Definition of “every original ... work” – A work does not have to be overly creative to attract copyright protection**

Rallysport Direct LLC v. 2424508 Ontario Ltd, 2019 FC 1524 (F.C.; 2019-11-28) Fuhrer J.

[48] Based on the above, I conclude that the photographs and product descriptions attract copyright protection; I am satisfied based on the evidence provided that RSD employees originally created them. **RSD’s employees were required to acquire, situate, and photograph individual automotive parts and accessories - in some instances arranging them into “kits” - and to select the most appealing photos.** This, as recognized in *Trader [Trader v CarGurus*, 2017 ONSC 1841], inherently involves the judgment and skill to the level required by *CCH [CCH Canadian Ltd. v Law Society of Upper Canada*, 2004 SCC 13]. Similarly, and as surmised in *Century 21 [Century 21 Canada Limited Partnership v Rogers Communications Inc.]*, 2011 BCSC 1196], **the impugned product descriptions also meet this threshold; while the product descriptions are not overly creative, they are not required to be. What is important is they are an exercise of skill and judgment (i.e. not merely trivial changes made to another work) and they involve intellectual effort, not the mere collation of data: CCH**, above at para 16. This was the case here; the product descriptions themselves explain the products in such a way as to incentivize buyers to purchase them over others. **While they were created for marketing purposes (or what the Defendants would characterize as “business interests”), this does not diminish the creativity required to produce, or the originality of, the works themselves.**

- **Section 2 – Definition of “infringing” – Absent direct evidence of copying, infringement may be proven by access and similarity.**

Pyrrha Design Inc. v. Plum and Posey Inc., 2019 CarswellNat 210 (F.C.; 2019-01-30 Phelan J. [appeal A-98-19].

[120] Subsection 27(1) of the Act provides that it is an infringement for any person to do anything that the owner of the copyright has the right to do. One of those rights is the sole right to produce or reproduce the work or any substantial part thereof in any material form (s 3(1)).

Infringement will also occur where there is a colourable imitation of the work (s 2).

[121] In this case, Pyrrha had **to establish either direct proof of copying – of which there is no evidence - or two elements of infringement:**

- 1. Similarity – sufficient similarity between the infringing work and the copyright work or of a substantial part of the copyright work; and**
- 2. Access – evidence of access to the work or a connection between the two works, showing that the copyright work is the source for the infringing work.**

(See *Phillip Morris Products S.A. v Marlboro Canada Ltd*, 2010 FC 1099 (CanLII) at para 315, 195 ACWS (3d) 237, aff'd re copyright 2012 FCA 201 (CanLII) at para 119, leave to appeal to SCC refused [2012] SCCA No 413 [*Phillip Morris*].)

[122] **A showing by the Plaintiff of sufficient similarity and access to the work would raise a *prima facie* case of infringement. However, a showing by the Defendants that the infringing work is the result of work from a common source or that it is an independent creation, means no infringement could be found (*Phillip Morris* at para 320).**

[123] As noted earlier and confirmed in *DRG* [*DRG Inc v Datafile Ltd* (1987), 18 CPR (3d) 538, affd (1991), 25 ACWS (3d) 711 (FCA)] at **548, the infringing work must copy a substantial part of the copyright work and the simpler the copyrighted work, the greater the need to establish exact copying in order to establish infringement.**

- **Section 2 – Definition of “infringing” – For a work to be infringing the similarities must represent a significant part of the protected work as a whole and not of the protected parts – Infringement is not a matter of confusion.**

Pyrrha Design Inc. v. Plum and Posey Inc., 2019 CarswellNat 210 (F.C.; 2019-01-30 Phelan J. [appeal A-98-19].

[127] Decisions such as *Delrina* [*Delrina Corp v Triolet Systems Inc*, 2002 CanLII 11389 (ON CA)] and *Rains* [*Rains v Molea*, 2013 ONSC 5016 (CanLII)] took a less holistic approach. In *Cinar* [*Cinar Corporation v Robinson*, 2013 SCC 73 at para 36], unlike in *Delrina*, the Court held that a trial judge should not eliminate the non-protected elements of the works and compare the leftover similarities. **Instead, a court should make a holistic comparison and determine whether the similarities represent a substantial part of the originality in the protected work as a whole.**

[128] This holistic and qualitative approach allows for non-original elements to form part of the substantial part of an author's skill and judgment where the specific combination of these elements has been copied by the alleged infringer.

[129] **Slight differences between the works do not necessarily prevent a successful claim of similarity where such differences are colourable imitation** (*Cinar* at para 39; Act, s 2).

[130] **Unlike trademark confusion cases, the substantial similarity analysis is grounded in whether a substantial part of the work has been copied – not necessarily whether a layperson could identify the similarities.** This is not a situation of the “hurried (or harried) consumer” often referred to in trademark confusion cases.

[131] **Substantial similarity is to be assessed from the perspective of someone who can assess and appreciate all the relevant aspects of the work** (*Cinar* at para 51). This is the task of the trial judge possibly assisted by expert evidence on the relevant art, but based on the evidence available to the judge as to the relevant aspects of the work.

- **Section 2 – Definition of “infringing” – Assessment of infringement is an holistic qualitative matter.**

Pyrrha Design Inc. v. Plum and Posey Inc., 2019 CarswellNat 210 (F.C.; 2019-01-30) Phelan J. [appeal A-98-19].

[146] In completing this assessment, I adopted the holistic qualitative approach stipulated in *Cinar* [*Cinar Corporation v Robinson*, 2013 SCC 73]. **I considered all of the similarities and then determined whether those similarities represented a substantial portion of the author's skill and judgment.** In this second step, the similarities in the imagery did not form a substantial part of the author's skill and judgment as the imagery is in the public domain (see also the discussion of the selection of imagery in paragraph 109). The imagery is only considered in assessing whether the overall expression of the wax seal imagery with the borders and finishing are substantially similar.

- **Section 2 – Definition of “infringing” – Similarities between works could be explained from the sources used.**

Pyrrha Design Inc. v. Plum and Posey Inc., 2019 CarswellNat 210 (F.C.; 2019-01-30) Phelan J. [appeal A-98-19].

[147] Further, I have not found Plum and Posey's Designs to be a “colourable imitation” of the Pyrrha Designs. The differences do not appear to be added superficially or in a way that suggests Hardy was

camouflaging her alleged imitation. **The differences are more plausibly the result of using similar (but not identical) imagery from separate sources (each party's own collection) but choosing to modify and finish the jewellery in a slightly different way.**

- **Section 2 – Definition of “infringing” – Access does not on its own establish infringement.**

Pyrrha Design Inc. v. Plum and Posey Inc., 2019 CarswellNat 210 (F.C.; 2019-01-30) Phelan J. [appeal A-98-19].

[153] **However, access does not on its own establish infringement.** There is no doubt that Pyrrha showed Plum and Posey and potentially others what can be done with wax seals. In fact, Pyrrha may well have inspired Hardy to move in the direction of wax seal jewellery **but Pyrrha does not have copyright in either the idea of wax seal jewellery or in the process used to create such jewellery – only in the expression found in each piece.**

[154] There is insufficient evidence to convince me that the changes in the Plum and Posey website in 2015 and the catalogue in 2017 constitute copying as alleged by the Plaintiff. Without evidence to the contrary, the use of a white background to display jewellery appears to be a common modern way to display on websites. The use of pictures of women outdoors in a catalogue selling jewellery primarily to women is common and cannot be protected. Moreover, the models are displayed, posed and dressed differently.

- **Section 2 – Definition of “infringing” – Works dealing with the same subject matter could be similar in substance.**

*Tremblay v. Brisson**, File D-2018-01-001, <<https://conseildepresse.qc.ca/decisions/d2018-01-001/>> (Que. Conseil de presse; 2019-02-01)

Bien que le plaignant estime que la journaliste a repris « presque mot pour mot » la nouvelle du *Journal Saint-François*, le Conseil n'a pas constaté de plagiat. **Sur le fond, les deux articles se ressemblent, puisqu'ils traitent du même sujet, mais pas sur la forme**, Jessica Brisson n'ayant copié aucun passage du texte du *Journal Saint-François*, observe le Conseil.

Dans le dossier D2017-09-108, le Conseil a rejeté un grief pour plagiat en expliquant que le fait pour un journaliste de lire, de se documenter ou de s'inspirer d'une information déjà rendue publique n'est pas synonyme de plagiat. En comparant les extraits en cause aux articles de la plaignante, le Conseil avait constaté que « l'information présentée pouvait parfois être similaire, mais que les passages n'étaient pas écrits de la même façon et n'étaient pas non plus

paraphrasés ». Il avait aussi constaté que « plusieurs des extraits visés par la plainte faisaient état de jugements [qui] étaient publics au moment de la diffusion des reportages ».

De façon similaire, dans le cas présent, le Conseil relève que l'article en cause ne contient pas d'information que seul un journaliste présent à l'audience aurait pu obtenir et que les faits rapportés dans le texte de Jessica Brisson sont de nature publique.

- **Section 2 – Definition of “infringing” – Use of common sources may lead to the creation of an original work.**

Albo v. The Winnipeg Free Press, 163 C.P.R. (4th) 126 (Man. Q.B.; 2019-02-22) Saull J.

[63] Counsel provided me with numerous authorities respecting principles of copyright law that are relevant to this matter. A synthesis of these authorities is provided below: [...]

d) **A person is free to use common source material and ideas to make his or her own work, which may be similar to another** (see: *Moreau v. St. Vincent*, 1950 CanLII 248 (FC), [1950] 12 C.P.R. 32).

- **Section 2 – Definition of “infringing” – Non-literal copying results from the substantial taking of the expressive elements of the copyrighted work.**

Albo v. The Winnipeg Free Press, 163 C.P.R. (4th) 126 (Man. Q.B.; 2019-02-22) Saull J.

[63] Counsel provided me with numerous authorities respecting principles of copyright law that are relevant to this matter. A synthesis of these authorities is provided below: [...]

t) Establishing a non-literal copyright infringement requires much more than establishing the copying of an “idea”. **To find non-literal copying, the Court must be satisfied that there has been substantial taking of the expressive element(s) of the copyrighted work** (*Cinar Corporation v. Robinson* 2013 SCC 73 (CanLII) and *Maltz* at paras. 28, 30 and 32 [*Maltz v. Witterick*, 2016 FC 524]).

- **Section 2 – Definition of “infringing” – Absent the sharing of any features, there will be no infringement.**

Albo v. The Winnipeg Free Press, 163 C.P.R. (4th) 126 (Man. Q.B.; 2019-02-22) Saull J.

[97] It is clear that **the Works in comparison do not share any features or combination of features to support a conclusion that the Book is even a non-literal copy of any material in which Dr. Albo can claim copyright**. That which Dr. Albo described as his original concept is far from the “narrative arc” provided by Turner.

- **Section 2 – Definition of “infringing” – The copying must be related to a substantial part of plaintiff’s work and not of defendant’s work – Differences in the type of works do not prevent a finding of infringement.**

Sullivan v. Northwood Media Inc., 2019 CarswellOnt 7681 (Ont. Sup. Ct.; 2019-07-18) Short, Master.

[43] Thus, it would seem that the question of **whether there has been substantial copying focuses on whether the copied features constitute a substantial part of Plaintiff’s work and not whether they amount to a substantial part of Defendant’s work.**

[44] **The alteration of copied features or their integration into a work, that is notably different from Plaintiff’s work does not necessarily preclude a claim that a substantial part of a work has been copied.** As the *Copyright Act* states, infringement includes “any colourable imitation” of a work.

- **Section 2 – Definition of “infringing” – Proof of similarity and copying is required for a finding of infringement.**

Ranchman’s Holding Inc v. Bull Bustin’ Inc, 2019 CarswellAlta 610 (Alta. Q.B.; 2019-03-28) Eamon J.

[158] **The essential elements for the claim of infringement are proof of substantial similarity and copying** (*Hutton v Canadian Broadcasting Corporation*, 1992 ABCA 39 (CanLII) at paras 4-5).

[165] I do not discern any serious issue that the Snyders took the Plaintiffs’ work or a substantial portion thereof. Some of the ideas in the brochures are the same, but the presentations are substantially different. Look and feel is a relevant consideration, but having reviewed colour copies of the brochures together, I concluded there is not a serious issue that these brochures meet the test for infringement.

- **Section 2 – Definition of “infringing” – “The similarity that results from “adoption” needs to be distinguished from “plagiarism” through the application of a rigorous legal test”.**

*Bockarova, Re**, 2019 CarswellOnt 14100 (Toronto Local Appeal Body; 2019-08-30) Gopikrishna, Chair [affd 2019 CarswellOnt 19612 (Toronto Local Appeal Body; 2019-10-28)].

[Adopting as hers the report of another planner for a similar lot does not discredit the report of the planner, especially it results from the use of a common template.]

[116] When a Witness Statement is “adopted”, one should not be surprised if the original, and adopted statements correspond a 100% to each other, because “adopting” means agreeing with the previous planner’s analysis, and conclusions, and *inter alia*, possible use of the same sentences and words. **To reiterate, the similarity between the concepts, and words, if not fulsome paragraphs, between the**

Staff reports for 14 Grantbrook, and 116 Bogert, may be explained by the fact that they were written by the same planner, and that the second planner, agreed with the findings of the first planner, and "adopted" the formers statement.

[117] The similarity that results from "adoption" needs to be distinguished from "plagiarism" through the application of a rigorous legal test. Since the TLAB does not have the jurisdiction, nor the expertise, to determine the test for plagiarism, I asked Ms. Stewart to assist with jurisprudence on this matter, and was advised that none existed, "probably because nobody has plagiarized before". I am highly skeptical of this answer, since it is not backed up by research, not to mention the underlying circular logic (i.e. no instances of prior plagiarism translates into no pre-existing jurisprudence, while the fact that no jurisprudence is available is interpreted to mean that there are no previous cases of plagiarism). It may be noted that the guidelines from Oxford University, are mere guidelines, and do not rise to the level of jurisprudence on plagiarism.

[118] The lack of jurisprudence on determination of plagiarism, means that there is no methodology to distinguish Ms. Choi's Witness Statement as plagiarism, which is distinct from adoption.

[119] I find that the charges of so called plagiarism make a mountain of a molehill, when not exemplifying what Shakespeare referred to as "much ado about nothing". No weight is assigned to the allegations of plagiarism.

- **Section 2 – Definition of “infringing” – Striking similarities is a circumstance to consider in establishing infringement.**

Popsockets LLC v. Case World Enterprises Ltd, 2019 CarswellNat 5165 (F.C.; 2019-09-10) Southcott J.

[38] The Plaintiff recognizes that there are minor differences between its copyrighted works and the drawings on the Defendant's packaging, principally in the use or absence of colour. **Copyright infringement can be established in the case of reproduction of all or any substantial part of a copyrighted work, or in a circumstance where the reproduction is strikingly similar to the copyrighted work** (see, e.g., *Stork Market Inc v. 1736735 Ontario Inc. (Hello Pink Lawn Cards Inc)*, 2017 FC 779 at para 78). After comparing the drawings on the Defendant's packaging with the copyrighted works, including taking into account the differences, I find that the drawings are strikingly similar to the Plaintiff's works with Canadian registration numbers 1147462, 1147465, 1147466 and 1147467 and therefore represent infringement of the Plaintiff's rights, contrary to under section 27 of the *Copyright Act*.

Section 2 – Definition of “infringing” – Similarities, identical wording, typographical errors and mistakes could help to prove infringement.

*Young v. Alberta Assessors' Association Practice Review Committee**, 2019 CarswellAlta 2006 (Alta. Q.B.; 2019-09-24) Shelley J.

[66] **I do not accept the Applicants' submission that they could not answer the complaints because the terms "copying/ and/or plagiarism" are "too vague" and it was therefore impossible for them to know what was acceptable and what was not. These are common terms which are generally understood by post-secondary students.** Most importantly, as was pointed out by the Respondents, the BUSI 499 Workbook and the Declaration signed by the Applicants made it very clear that this was not permitted and could result in sanctions from the students' professional association. It seems self-evident that this type of behaviour would be prohibited, not only by the Association, but by the vast majority of self-regulating professional or occupational groups.

[70] Rather, the investigative team, in its manual review, and the Committees in their consideration of the allegations of misconduct, focused their attention on those aspects of the Reports where individual wording would be expected and similar or identical wording could not reasonably be accounted for on the basis of references to common source materials, such as standard definitions, textbook formulas, etc. They rightly concluded that the identical or highly similar wording contained in those sections of the Reports where analysis and application of concepts were required, coupled with common typographical errors and common mistakes, could only be reasonably accounted for by copying or plagiarism. **Given where the similarities and identical wording were contained, and given that the typographical errors and obvious mistakes would be unlikely to be found in a textbook or other student resource, the overwhelming inference is that plagiarism/copying had occurred in relation to the Reports of Ms. Young and Ms. Skolney.**

- **Section 2 – Definition of “infringing” – Substantial similarity and copying are requirements for infringement.**

Corus Radio Inc v Harvard Broadcasting Inc, 2019 CarswellAlta 2449 (Alta Q.B. - Int. inj.; 2019-11-18) Dilts J.

[30] [...] **In a claim of copyright infringement, the plaintiff must prove substantial similarity and copying:** *Ranchman's Holding Inc v Bull Bustin' Inc*, 2019 ABQB 220 (CanLII) at para 158 citing *Hutton v Canadian Broadcasting Corporation*, 1992 ABCA 39 (CanLII).

- **Section 2 – Definition of “infringing” – Saving time and effort is a factor to consider in determining infringement.**

Corus Radio Inc v. Harvard Broadcasting Inc, 2019 CarswellAlta 2449 (Alta Q.B. - Int. inj.; 2019-11-18) Dilts J.

[42] **One factor that may be regarded in determining whether a particular work is substantially similar to another work is whether the respondent intentionally appropriated the applicant's work to save time and effort and whether the work is used in the same or similar fashion as the applicant's work:** *Warman v Fournier*, 2012 FC 803 (CanLII) at para 23 citing *U & R Tax Services Ltd v H&R Block Canada Inc*, [1995] FCJ No 962. Mr. Hall testified that he looked at the POWER 92 Logo as well as other design marked logos in the radio space when Harvard planned its rebrand of the 107.1 station. In addition, Mr. Hall's evidence was that Harvard saw value in using a name already associated with a pop music station. The existence of this evidence supports my conclusion that there is a serious issue to be tried with respect to Corus' copyright claim.

- **Section 2 – Definition of “infringing” – Copyright and trademark infringement are not the same.**

Sandhu Singh Hamdard Trust v. Navsun Holdings Ltd, 2019 CarswellNat 7175 (F.C.A.; 2019-12-02) Laskin J. [varying 160 C.P.R. (4th) 282 (F.C.; 2018-10-19)].

[29] The Federal Court also erred, in my view, in relying in part on whether Navsun's modified mark was sufficiently different to avoid liability for infringement of copyright. **The criteria for copyright infringement and trademark infringement are not the same. ...[...]**

- **Section 2 – Definition of “infringing” – To rebut the inference of infringement flowing from substantial similarity, evidence of independent creation must be adduced.**

*Pablo Enterprise pte. Ltd. v. Tang**, 2019 CarswellNat 3229 (T.M. Opp. Bd.; 2019-06-13) C.R. Folz, Member.

[26] With respect to the question of whether the Applicant's Mark constitutes a substantial copying of the Opponent's Artistic Work, I am satisfied **that the Opponent has demonstrated a prima facie case of copyright infringement.** In particular, the design component of the Applicant's Mark is identical to that shown in the Opponent's Artistic Work, as is the font used for the word "PABLO". **There is no evidence from the Applicant to suggest anything other than a substantial copying, such as evidence of independent creation of the Mark by the Applicant.**

- **Section 2 – Definition of “infringing” – Evidence of infringement must not be speculative.**

Infinite Media Ltd. v. remBrand Sports Inc., 166 C.P.R. (4th) 304 (Ont. Sup. Ct.; 2019-07-10) Glustein J.

[109] **There was no evidence to support any claim of breach of copyright.** Sellors acknowledged that he only knew that two representatives of tracky.com had access to the Infinite site. He could not say for what purpose, for how long, or what aspects of the Infinite system, if any, were accessed.

[110] Such an evidentiary base cannot support a claim for breach of copyright.

[111] **The speculative comments** in the closing submissions that “Mr. Steele enabled David Longnecker and other staff members at Tracky, to access and view the proprietary InfiniteKM iteration so that Mr. Longnecker could copy or replicate portions of the Infinite KM software for the VIKTRE Tracky Configuration” **had no evidentiary support.** Similarly, Infinite’s submission that remBrand obtained funding because “they allowed prospective investors to view the proprietary Infinite KM iteration” was also not supported by any evidence.

[112] In any event, there is no evidence of damages.

[113] For the above reasons, I dismiss Infinite’s “to be determined” claim for damages for breach of copyright.

Section 2 – Definition of “lecture” – A lecture is a literary work – For a lecture to be protected, it must be expressed in some material form.

Albo v. The Winnipeg Free Press, 163 C.P.R. (4th) 126 (Man. Q.B.; 2019-02-22) Saull J.

[63] Counsel provided me with numerous authorities respecting principles of copyright law that are relevant to this matter. A synthesis of these authorities is provided below: [...]

f) Section 5(1) of the *Act* provides that copyright subsists in Canada, in every original literary, dramatic, musical and artistic work, provided certain conditions are met. It can include lectures. **If a lecture is fixed in a material form, it will be protected as a literary work, but a lecture delivered without written notes or other written evidence of the lecture, will not.**

- **Section 2 – Definition of “literary work” – Obituaries are protected literary works.**

Thomson v. Afterlife Network Inc, 2019 CarswellNat 1479 (F.C.; 2019-05-01) Kane J.

[34] The evidence establishes that **the Applicant and other Class Members personally authored the obituaries using their own skill and judgment, choosing their own words to convey the appropriate message about the life of the deceased person and**

their funeral arrangements and adding a photograph taken by them or by another Class Member. Class Members also exercised their skill and judgment in taking the photographs of the deceased person. The obituaries and photographs fall within the term “original work” as it has been interpreted by the Supreme Court of Canada. As noted, the threshold to constitute originality in the work is low and creativity is not required.

- **Section 2 – Definition of “photograph” – Microfilming of documents, without choice, arrangement, or intellectual or personal effort, is purely mechanical and does not attract copyright protection.**

Drouin (Succession de Côté-Drouin) v. Pepin, 2019 CarswellQue 1922 (Que. Sup. Ct.; 2019-03-13) Lucas J. [References to evidence omitted.]

[178] On insiste sur les ajustements de la lumière et de la distance focale, propres à toute photographie. Si le simple ajustement du départ de l'appareil photo permet de qualifier la photographie d'une œuvre, toutes les photographies mériteraient protection. En l'occurrence, l'ajustement nécessaire apparaît d'autant plus négligeable alors que le photographe se trouve toujours dans les mêmes conditions du «*studio mobile*» de son camion, aménagé pour ce faire.

[179] Autrement, **aucun choix ou aménagement ou effort intellectuel ou personnel n'est requis dans le travail effectué lors du microfilmage**. En fait, le photographe prend quelques secondes pour faire les photographies subséquentes, ce qui amène le Tribunal à conclure **que son travail relève davantage de l'automatisme, une entreprise purement mécanique que la LDA ne protège pas**.

- **Section 2 – Definition of “photograph” – A photograph can be an artistic work.**

Capitale en fête inc. v. Ouellet, 2019 CarswellQue 4570 (Que. Ct.; 2019-05-01) Boutin J.

[46] L'article 2 de la *Loi sur le droit d'auteur* définit l'expression « **œuvre artistique** » et prévoit qu'une photographie peut constituer une telle œuvre [...]

- **Section 2 – Definition of “photograph” – A photograph can be an artistic work – Originality results from the choice and the pose of the subject, the choice of the angle and the lighting, the artistic work and the personal effort of the photographer.**

Portraits Rembrandt ltée v. Interdonato (Ikono), 2019 QCCQ 5878 (Que. Ct. – Small Claims; 2019-07-26) Choquette J.

[23] **Une photographie est une œuvre artistique au sens de l'article 2 de la Loi.**

[25] **En matière de photographie, en particulier, on en reconnaît le caractère original notamment par le choix, l'aménagement et la pose du sujet, le choix de l'angle de prise de vue et de l'éclairage, enfin par le travail artistique et l'effort personnel du photographe** [Fn12 *Ateliers Tango Argentin inc. c. Festival d'Espagne et d'Amérique latine inc.*, 1997 CanLII 8852 (QCCS)].

[26] [The photograph made by the Plaintiff of] Les 3 pots de sauces «Saveurs du Sud» sont placés de façon quasi linéaire, sur fond blanc. La photographie montre en évidence le logo et les étiquettes conçus par le défendeur.

[27] De l'avis du Tribunal, il s'agit de la reproduction purement mécanique – la copie d'une autre œuvre, celle du défendeur. Il ne s'agit pas d'une œuvre artistique originale.

- **Section 2 – Definition of “photograph” – A photograph can be an artistic work.**

Farsi v. Georges, 2019 QCCQ 2721 (Que. Ct. – Small Claims; 2019-05-07) Croteau J.

[13] Le Tribunal conclut que **la Photographie constitue une «œuvre artistique» au sens de la Loi**. M. Farsi est à la fois l'auteur de la Photographie et l'auteur des quatre œuvres qui y figurent. À ce titre, il détient le droit exclusif de reproduire la Photographie et de la communiquer au public.

- **Section 2 – Definition of “photograph” – Some skill and judgment are required for a photograph to be copyright protected.**

Rallysport Direct LLC v. 2424508 Ontario Ltd, 2019 FC 1524 (F.C.; 2019-11-28) Fuhrer J.

[48] Based on the above, I conclude that the photographs and product descriptions attract copyright protection; **I am satisfied based on the evidence provided that RSD employees originally created them. RSD's employees were required to acquire, situate, and photograph individual automotive parts and accessories - in some instances arranging them into “kits” - and to select the most appealing photos.** This, as recognized in *Trader* [*Trader v CarGurus*, 2017 ONSC 1841], inherently involves the judgment and skill to the level required by *CCH* [*CCH Canadian Ltd. v Law Society of Upper Canada*, 2004 SCC 13]. [...] **While they were created for marketing purposes (or what the Defendants would characterize as “business interests”), this does not diminish the creativity required to produce, or the originality of, the works themselves.**

- **Section 2 – Definition of “sculpture” – A cast falls within the definition of sculpture.**

Pyrrha Design Inc. v. Plum and Posey Inc., 2019 CarswellNat 210 (F.C.; 2019-01-30) Phelan J. [appeal A-98-19].

[84] **The Pyrrha Designs are artistic works and are similar to engravings which, like etchings, lithographs, woodcuts and prints, are reproductions of previously created images yet in a different medium. The Pyrrha Designs are to some extent also like a sculpture which uses a cast or model.**

Section 2 – Definition of “work of joint authorship” – The input of co-authors does not have to be equivalent but each must be substantial.

Leclerc v. Brodeur (Éditions du Carnet), 2019 QCCQ 1613, (Que. Ct. – Small Claims; 2019-02-05) Cliche J.

[41] En effet, les principes permettant de conclure à l'existence d'une telle œuvre sont les suivants :

1. **L'«œuvre conjointe est ainsi qualifiée à la lumière de la loi et des faits.**
2. **La part des coauteurs n'a pas besoin d'être équivalente, mais la part de chacun doit être substantielle.**
3. **Une certaine collaboration doit s'établir entre les coauteurs dans la poursuite d'un dessein commun.**
4. Il faut prouver plus que des idées et des suggestions.
5. Une certaine jurisprudence considère également pertinente l'intention commune des parties de créer ou non un [sic] œuvre en collaboration.» [Fn 6 *Seggie c. Roofdog Games inc.*, 2015 QCCS 6462 (CanLII), paragraphe 59; Voir aussi : H.G. RICHARD et L. CARRIÈRE, *Canadian Copyright Act Annotated*, volume 1. Toronto, Carswell, éd. feuilles mobiles, p. 2-655 à 2-658; *Neugebauer c. Labieniec*, 2009 CF 666 (CanLII) (appel rejeté, 2010 CAF 229 (CanLII)); *Drapeau c. Girard*, 2003 CanLII 5575 (QC CA), [2003] R.J.Q. 2539 (C.A.) (requête pour autorisation de pourvoi à la C.S. Can rejetée); *Pinto c. Centre Bronfman de l'éducation juive*, 2013 CF 945 (CanLII); *Atlantic Canada Regional Council of Carpenters, Millwrights, and Allied Workers v. Maritime Environmental Training Institute Ltd.*, 2014 NSSC 64 (CanLII).]

[42] Dans le présent cas, la preuve prépondérante démontre que le travail réalisé par madame Leclerc s'est limité à la rédaction du chapitre 10 de *Mémento*.

[43] Par conséquent, **le Tribunal ne peut conclure que sa participation à la rédaction de l'ensemble de l'œuvre fut substantielle.**

- **Section 2.2 – Definition of “publication” – Making a work available to the may constitute publication.**

Drouin (Succession de Côté-Drouin) v. Pepin, 2019 CarswellQue 1922 (Que. Sup. Ct.; 2019-03-13) Lucas J.

[253] En effet, **la publication est définie par la LDA comme étant «la mise à la disposition du public d'exemplaires de l'œuvre [Fn229 Art. 2.2 (1) a) LDA.]»**. Comme l'auteur Normand Tamaro l'explique dans son ouvrage : «[l]a publication passe par la distribution ou la diffusion autorisée d'une œuvre» et même : **«il peut suffire que l'œuvre soit proposée au public et que celui-ci puisse en prendre connaissance [Fn230 Normand Tamaro, *Loi sur le droit d'auteur – Texte annoté*, 10^e éd., Scarborough, Carswell, 2015 p. 247 et 248]»**. En l'occurrence, l'IGD commercialise les généalogies. En faisant la vente même à une seule personne à la fois, l'IGD rendait intentionnellement ces œuvres accessibles au public.

- **Section 2.2 – Definition of “publication” – Consent to the publication is required for a work to be published.**

Capitale en fête inc. v. Ouellet, 2019 CarswellQue 4570 (Que. Ct.; 2019-05-01) Boutin J.

[52] Il découle par ailleurs du droit exclusif précité et prévu au paragraphe 13 (1) de la Loi **que le consentement préalable du titulaire du droit d'auteur est requis afin que la publication d'une œuvre artistique soit possible** (art. 2.2 (3) de la Loi).

- **Section 2.2 – Definition of “publication” – Mere availability for consultation, even on the Internet, does not constitute publication.**

Pointe-à-Callière, cité d'archéologie et d'histoire de Montréal, Re, 2019 CarswellNat 5891 (Cop. Bd.; 2019-08-23), the Board.

[5] En l'espèce, la Commission a déterminé qu'il n'y a pas suffisamment de preuves que la photographie que vous désirez reproduire et exposer a fait l'objet d'une publication. **La disponibilité de la photographie dans le fond d'archives de Claude Meunier à la BAnQ, bien qu'accessible par le public en ligne, ne constitue pas une publication de l'œuvre au sens de la Loi**. De plus, **vous n'avez pas été en mesure de démontrer que des copies de la photo avaient été faites avec le consentement du titulaire de droit d'auteur et mises à la disposition du public**.

- **Section 3 – Copyright in works – Copyright is the sole right to do or authorize some acts.**

Albo v. The Winnipeg Free Press, 163 C.P.R. (4th) 126 (Man. Q.B.; 2019-02-22) Saull J.

[63] Counsel provided me with numerous authorities respecting principles of copyright law that are relevant to this matter. A synthesis of these authorities is provided below: [...]

b) **Section 3 of the Act provides 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, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof.**

n) **Section 3(1) of the Act defines those things which only the copyright owner has the right to do.** The owner has the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof.

- **Section 3 — Copyright in works — Copyright in a work does not mean copyright in the sound recording encompassing this work.**

Unidisc musique inc v. Agence du revenu du Québec, 2019 CarswellQue 2647 (Que. Ct.; 2019-04-02) Gouin J. [appeal 500-09-028299-196].

[21] Ainsi, la question en litige à laquelle le Tribunal doit répondre consiste à déterminer si les biens (*master recordings*) incluant les droits protégés par le droit d'auteur doivent être considérés comme des biens amortissables de la catégorie 8 de l'annexe B du *RI* ou comme des immobilisations incorporelles au sens de la *Loi sur les impôts (LI)* [Fn17 RLRQ, ch. I-3.].

[54] Ainsi, Unidisc, agissant par l'entremise de M. Cucuzella, son président, était parfaitement consciente qu'elle n'achetait pas l'ensemble des droits associés aux œuvres. **Le prix de vente fut établi en conséquence, sachant que la commercialisation des œuvres enregistrées sur les bandes maîtresses allait requérir des déboursés subséquents, payables non pas à l'ancien propriétaire des bandes maîtresses mais aux auteurs, compositeurs, interprètes et producteurs (« publishers »), conformément à la LDA.**

- **Section 3 — Copyright in works — Physical disposition of sound recordings does not mean assignment of the copyright in those sound recordings or in the works so recorded.**

Unidisc musique inc v. Agence du revenu du Québec, 2019 CarswellQue 2647 (Que. Ct.; 2019-04-02) Gouin J. [appeal 500-09-028299-196].

[59] L'article 18 de la *LDA* prévoit les droits directement liés à un enregistrement sonore [...]

[60] En vendant les bandes maîtresses, les vendeurs pouvaient ainsi céder les droits ci-dessus. Et c'est ce qu'ils ont fait mais pas plus.

[61] Dans la lettre d'interprétation [Fn39 Pièce P-4, p. 3] qui constitue la base des cotisations, on réfère à l'article 18 de la *LDA*. Toutefois, en raison de l'omission de référer aux autres droits protégés par d'autres articles – les droits qui ne sont pas liés à l'enregistrement sonore lui-même, mais plutôt à l'œuvre et à ses créateurs, il s'ensuit que la lettre d'interprétation est juridiquement incorrecte et incomplète.

[62] Les articles 3, 13 et 15 de la *LDA* encadrent les droits des auteurs-compositeurs-interprètes, lesquels droits sont indépendants de l'enregistrement sonore et, par conséquent, ne sont pas cédés par la simple cession d'une bande maîtresse.

- **Section 3 – Copyright in works – Physical ownership of sound recordings does not equate to copyright in those sound recordings or in the works embedded in those sound recordings.**

Unidisc musique inc v. Agence du revenu du Québec, 2019 CarswellQue 2647 (Que. Ct.; 2019-04-02) Gouin J. [appeal 500-09-028299-196].

[67] La lettre d'interprétation [Fn41 Pièce P-4.] assimile erronément les droits d'auteur applicables à une œuvre musicale aux droits intimement liés à l'enregistrement sonore. Le témoignage de M. Cuccuzella, président d'Unidisc est cohérent avec la législation canadienne sur le droit d'auteur.

[68] En effet, Unidisc sait ce qu'elle achète et ce qu'elle n'achète pas : elle achète les bandes maîtresses et les droits inextricables des bandes maîtresses protégés par l'article 18. Elle est consciente de ce qu'elle devra déboursier et à qui au moment de mettre en marché les CD ou les compilations électroniques tirées des bandes maîtresses.

[69] En achetant des bandes maîtresses, elle achète la meilleure qualité de l'enregistrement sonore à partir de laquelle les copies vont pouvoir être tirées et ainsi mises en marché.

[70] La qualité de l'enregistrement sonore n'a rien à voir avec les droits protégés aux articles 3, 13 et 15, ni même 18 de la *LDA*. En fait, la qualité de l'enregistrement sonore a tout à voir avec la qualité du support physique, soit sa conservation dans des conditions optimales, sa protection contre les altérations et les vols, et finalement sa manipulation par des professionnels consciencieux selon les règles de l'art lors de la confection des copies.

[71] Unidisc, conformément aux contrats [Fn42 Pièces P-1, D-6 (également P-2), D-7, D-8.], n'achète donc ni les droits d'auteurs-compositeurs-interprètes, ni ceux des producteurs (« *publishers* ») au sens de la *LDA*.

[72] **Quand l'ARQ affirme que les bandes maîtresses n'ont aucune valeur sans les droits associés aux oeuvres, ce qui est incorrect, ceci équivaut à confondre l'ensemble des droits protégés aux articles 3, 13, 15 et 18 de la *LDA*.**

[73] Quand l'ARQ conclut qu'Unidisc a acquis, par l'acquisition des bandes maîtresses, les droits des auteurs-compositeurs-interprètes et producteurs, ceci est contraire à la *LDA*, au libellé même des contrats et à la commune intention des parties, de même qu'au témoignage non contesté et non contredit de M. Cucuzella.

- **Section 3 — Copyright in works — Copyright is the sole right to do or authorize some acts.**

Young v. Thakur, 2019 CarswellNat 2971 (F.C.; 2019-06-20) Kane J.

[26] Subsection 3(1) provides that copyright means the sole right to produce or reproduce; perform in public; or, if unpublished, publish a work. **Copyright also includes the right to authorize such acts.** The Act further describes the rights included in the copyright in relation to musical works or sound recordings.

- **Section 3 — Copyright in works — Performance is impermanent in nature.**

Young v. Thakur, 2019 CarswellNat 2971 (F.C.; 2019-06-20) Kane J.

[28] The Applicants allege only that the Respondents “performed” the works for the public. However, the Applicants have used imprecise language to describe the Respondents’ actions which underlie their allegations. **“Performance”, as defined in the Act, is impermanent in nature and, unlike reproduction, does not involve making copies** (*Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34 at paras 35-38, [2012] 2 SCR 231). “Performance” does not accurately describe the Respondents’ actions in posting the music video, including the Sound Recording embodying the Musical Work. The Respondents made copies of the Musical Work and Sound Recording by uploading the music video online. The Applicants’ allegation is in essence that the Respondents reproduced the Musical Work and Sound Recording.

- **Section 3 — Copyright in works — Going beyond what is permitted by a limited authorization constitutes infringement.**

Young v. Thakur, 2019 CarswellNat 2971 (F.C.; 2019-06-20) Kane J.

[30] The evidence also establishes on a balance of probabilities that the Applicants did not authorize anyone else reproduce the Musical Work or Sound Recording. The Applicants provided the Sound Recording to the Respondents only for the purpose of producing the music video. Mr. Thakur asserts that he thought he had permission to use, or at least had not been prohibited from using, the Sound Recording with the music video in his portfolio. However, his affidavit, which appends as an exhibit a draft agreement regarding the film footage, suggests that he is aware of basic copyright principles. Although the evidence conflicts in several respects and there was confusion about who was the point person for this project, **the evidence does not establish that the Respondents were authorized to perform the Musical Work or Sound Recording.** Moreover, upon receiving the cease and desist letter in January 2018, Mr. Thakur was clearly made aware that he did not have permission to use the Musical Work or Sound Recording and he did not take down the music video at that point.

- **Section 3 — Copyright in works — Technological neutrality is a principle of interpretation of the *Copyright Act*.**

Retransmission of Distant Television Signals, Re, 2019 CarswellNat 4088 (Cop. Bd.; 2019-08-02), the Board.

[253] **The principle of technological neutrality is a recognition that, absent parliamentary intent to the contrary, the Act should not be interpreted or applied to favour or discriminate against any particular form of technology.** It results from the balancing of user and right-holder interests discussed by the Supreme Court of Canada in *Théberge*, 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.” [Fn162 *Théberge v. Galerie d’Art du Petit Champlain inc.*, 2002 SCC 34 at para 30.] Because this long-standing principle informs the Act as a whole, it must be maintained across all technological contexts: “The traditional balance between authors and users should be preserved in the digital environment.” [Fn163 *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57, [2015] 3 S.C.R. 615 at para 66; *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34, [2012] 2 S.C.R. 231 at para 8.]

- **Section 3 — Copyright in works — Consent to publication is required from the copyright owner.**

O'Hara v. Picard, 2019 QCCQ 3302 (Que. Ct. – Small Claims; 2019-04-10) Paradis J.

[27] **Ce droit d’auteur exclusif fait en sorte que la publication, incluant la distribution ou l’utilisation des photographies, n’est**

pas possible sans le consentement préalable du titulaire du droit d'auteur.

[46] L'utilisation des photographies sur la plateforme Airbnb n'a pas été autorisée par M. O'Hara et a été faite en violation de ses droits.

- **Section 3 — Copyright in works — The exclusive rights include the right to authorize.**

Farsi v. Georges, 2019 QCCQ 2721 (Que. Ct. – Small Claims; 2019-05-07) Croteau J.

[12] La *Loi sur le droit d'auteur* [Fn6 L.R.C., 1985, c. C-42.] (Loi) établit les principes généraux qui doivent guider le Tribunal dans le cadre de l'analyse d'un recours basé sur la violation des droits d'auteur et des droits moraux: [...]

- **L'auteur d'une œuvre artistique détient le droit exclusif de produire ou de reproduire la totalité ou une partie importante de son œuvre, de même que de la communiquer au public. Il détient également le droit exclusif d'autoriser ces mêmes actes** [Fn8 Article 3 de la Loi.]. [...]

- **Section 3 — Copyright in works — To avoid copyright infringement, the protected work should not be attached to the published decision.**

*Syndicat de copropriété du 5366, 10e avenue v. Développement P10 inc.**, 2019 CanLII 96091 (Que. O.A.G.B.R.N.; 2019-09-24) Gagné, Arbitrator.

[267] Enfin, **puisque les décisions sont publiques et diffusées sur plusieurs sites internet** [Fn 104 À tout le moins : sites internet de la Régie du Bâtiment, jugements.qc.ca (Soquij), de l'Organisme d'arbitrage CCAC et de la GCR (Administrateur).], **le Tribunal d'arbitrage, ne voulant contrevenir à aucun copyright de l'ASTM ni faire de frais pour une recherche à ce sujet**, envoie copie de la norme ATSM E 336-05 (11 pages) directement aux procureurs des parties au dossier avec cette décision arbitrale, au lieu de la fusionner en annexe au même fichier contenant la présente décision.

- **Section 3 — Copyright in works — Section 3 defines the rights of a copyright owner in a work.**

Pourshian v. Walt Disney Company, 2019 CarswellOnt 16536 (Ont. Sup. Ct.; 2019-10-15) Graham, Master.

[13] As stated, the plaintiff's action is for damages for infringement of copyright under Canada's *Copyright Act*, RSC 1985, c. C-42. **The applicable sections of the Act are s. 3, which defines "copyright" and particularizes the sole rights of the owner of the copyright in a work**, s. 27(1) which defines primary infringement of a copyright, and s. 27(2) which defines secondary infringement.

- **Section 3 — Copyright in works — Copyright protects an owner against copying of the work.**

Corus Radio Inc v. Harvard Broadcasting Inc, 2019 CarswellAlta 2449 (Alta Q.B. - Int. inj.; 2019-11-18) Dilts J.

[29] Protection of works under the *Copyright Act*, RSC 1985, c. C-42 has the dual objective of promoting the public interest in the encouragement and dissemination of original work and ensuring that any benefit from or value in the work is retained by the author of the work: *Théberge v Galerie d'Art du Petit Champlain Inc*, 2002 SCC 34 (CanLII) at paras 30-31. **To achieve that end, copyright laws place in the hands of the owner of the work the sole right to produce and reproduce the work, and they protect the owner against the work being copied by others.**

- **Section 3 — Copyright in works — Reproduction and authorization to reproduce belong to the copyright owner.**

Louis Vuitton Malletier S.A. v. Wang, 2019 CarswellNat 6912 (F.C.; 2019-11-15) Roy J.

[195] **Only the owner of the copyright in the Copyrighted Works can produce and reproduce such works, in whole or in substantial part (s. 3 of the *Copyright Act*). No authorization was ever given by Louis Vuitton to the defendants.** In fact the defendants did not challenge the infringement of the plaintiff's copyright in the two copyrighted works, relying instead on their argument that they have not infringed trade-marks, an argument the Court has already concluded does not have an air of reality.

- **Section 3 — Copyright in works — Fabricating the parts or assembling the machines depicted in the drawings is not reproduction of the work.**

Proline Pipe Equipment Inc v. Provincial Rentals Ltd, 169 C.P.R. (4th) 247 (Alta. Q.B.; 2019-12-19) Ackerl J.

[17] To “produce or reproduce the work or any substantial part thereof in any material form whatever,” the thing being produced/reproduced must be *the work* – not the *idea* contained in the work. In this case, the “work” is the drawings themselves. An example of reproducing the work in a different material form would be to create an electronic copy of the paper drawings, or vice versa. **Conversely, fabricating the parts or assembling the machines depicted in the drawings is not reproduction of the work.**

- **Section 3 — Copyright in works — A work cannot be reproduced without the consent of the owner unless the reproduction falls within an exception.**

Eberhard Von Huene & associés inc. v. Salzman, [2019] J.Q. 10868 (Que. Sup. Ct; 2019-11-07) Rogers J.

[24] Les modifications dont il est question ajoutent des allégations quant à la protection offerte par le droit d'auteur sur le design et le

droit de fabrication du mur *Beyond* en vertu de la *Loi*. **Sommairement, cette *Loi* interdit, entre autres, qu'une « œuvre » assujettie à un droit d'auteur soit produite, reproduite ou vendue par une personne, à moins qu'elle ne détienne les droits d'auteurs [sic], que celle qui les détient y consent ou que l'œuvre fasse l'objet d'une exception.**

- **Section 3 – Copyright in works – Copying from an article is presumed to be substantial.**

Reprographic Reproduction, in Canada, of Works in its repertoire (Re), 2019 CarswellNat 90423 (Cop. Bd.; 2019-12-06), the Board.

[258] In the most recent case relating to copying in elementary and secondary schools, the Board used the following approximations: **any copying from an article, whether from a newspaper, magazine, or journal, was presumed to be substantial; copying of one or two pages from a book (or consumable) was presumed not to be substantial; any other such copying is presumed to be substantial.** [Fn128 *Access Copyright (Educational Institutions) 2010-2015* (19 February 2016) Copyright Board at paras 225-226].

- **Section 3— Copyright in works —The copyright owner may use the work as he sees fit.**

Rallysport Direct LLC v. 2424508 Ontario Ltd, 2019 FC 1524 (F.C.; 2019-11-28) Fuhrer J

[49] [...] **Why it chose to do so is irrelevant for the purposes of the *Copyright Act*.** Having created the original works, it was within RSD's rights to decide who could reproduce them: *Copyright Act* s 3(a).

- **Section 5 – Conditions for subsistence of copyright – Creativity, novelty, or uniqueness are not required for a work to be original – Originality requires judgment beyond a trivial or purely mechanical exercise.**

Pyrrha Design Inc. v. Plum and Posey Inc., 2019 CarswellNat 210 (F.C.; 2019-01-30) Phelan J. [appeal A-98-19].

[96] Although subsection 5(1) of the Act requires a work to be original in order for copyright to subsist, the Act does not define an “original” work. However, the Supreme Court in *CCH* [*CCH Canadian Ltd v Law Society of Upper Canada*, 2004 SCC 13] at para 28 set out the three (3) elements required for an original work:

1. The work must have originated from the author;
2. The work must not be copied; and
3. The work must be the product of the exercise of skill and judgment that is more than trivial.

[97] In accordance with *CCH* [*CCH Canadian Ltd v Law Society of Upper Canada*, 2004 SCC 13] at para 16, skill refers to the “use of one’s knowledge, developed aptitude or practical ability in producing the work” and judgment refers to the “use of one’s capacity for determining or ability to form an opinion or evaluation by comparing different possible options in producing the work”.

[98] **As such, a work does not have to be creative, novel, or unique to be original but the effort put into creating it must be more than a trivial or purely mechanical exercise.** *CCH* is an example of this non-creative original and effort to create tension in holding that headnotes, case summaries, indices and compilations of original decisions are original while the actual judgments reflected in these headnotes *et al.* are in the public domain and not copyrightable.

[99] **A work can still be original if it takes existing material and casts it in a different form as long as sufficient judgment is exercised** (see *CCH* at para 33; *Lainco* at para 84 [*Lainco Inc v Commission scolaire des Bois-francs*, 2017 FC 825]; *Beach* at para 101 [*Beach v Toronto Real Estate Board* [2009] OJ 5227]).

- **Section 5 — Conditions for subsistence of copyright — Creativity, novelty, or uniqueness are not required for a work to be original.**

Pyrrha Design Inc. v. Plum and Posey Inc., 2019 CarswellNat 210 (F.C.; 2019-01-30) Phelan J. [appeal A-98-19].

[113] **Contrary to the Defendants’ position, the Pyrrha Designs do not need to be novel, unique or created through innovative methods to be held as original.** The final expressions of the Pyrrha Designs are original because Wilmore and Papin exercised sufficient skill and judgment in choosing to create the particular borders and finishing to express a specific image in metal.

- **Section 5 — Conditions for subsistence of copyright — Skill and judgment are required for a work to be original.**

Pyrrha Design Inc. v. Plum and Posey Inc., 2019 CarswellNat 210 (F.C.; 2019-01-30) Phelan J. [appeal A-98-19].

[102] **What takes the jewellery based on another work into the realm of copyright protection is the skill and judgment used to make the jewellery beyond the mere replication of the imagery.** As held in *Interlego AG v Tyco Industries Inc and others*, [1988] 3 All ER 949 at 971, [1989] AC 217 (PC), a small material alteration or embellishment can convert a substantially copied work into an original work.

[106] The Pyrrha Designs are not merely a copy of an antique wax seal. Although the imagery is copied from an antique seal, the

expression of the seal's image in metal is different from merely copying a drawing or photograph from another drawing or photograph. The Designs are more than a replica of the wax seal or a mere reproduction. **Skill and judgment was [sic] used to display the imagery in metal.**

[107] Particularly, Wilmore exercised skill in knowing how to work with wax to modify the borders of wax seal impressions and judgment in designing the borders. **She used skill and judgment in deciding how to finish the pieces by oxidizing with blackening chemicals and polishing. The fact that employees have to be trained over months to perform these functions (both at Pyrrha and Plum and Posey) suggest some element of skill is involved.**

[108] However, I do not accept that Wilmore and Papin used sufficient skill and judgment in the selections of the seals to be used. In particular, there is little evidence to show how these nine seals were selected out of the 300-400 antique seals that Pyrrha produces nor how, of the whole of Pyrrha's collection of seals, these seals were chosen. Furthermore the selection process is too closely aligned with trying to copyright an idea.

[109] **Copyright subsists in each individual Pyrrha Design to the extent that Pyrrha took the imagery of a wax seal and expressed it in metal in a specific way.**

[110] As recognized in *Rains v Molea*, 2013 ONSC 5016 (CanLII) at paras 13-16, 231 ACWS (3d) 787 [*Rains*], the use of common techniques and methods can still result in an original work. The Defendants' expert Cornelius acknowledged that there are a variety of finishing options for silver jewellery and that oxidization and polishing are very common techniques.

- **Section 5 – Conditions for subsistence of copyright — For copyright to exist, a work must be in some material form — No copyright in ideas or methods.**

Pyrrha Design Inc. v. Plum and Posey Inc., 2019 CarswellNat 210 (F.C.; 2019-01-30) Phelan J. [appeal A-98-19].

[90] **For copyright to subsist in a work, a work must be a fixed expression of an idea (CCH at para 8). To determine whether a work is fixed, as held in *Canadian Admiral Corp v Rediffusion, Inc.*, [1954] Ex CR 382 at 394, 20 CPR 75, it must be expressed in “some material form, capable of identification” and have some “permanent endurance”.**

[91] Therefore, copyright does not protect ideas, concepts or methods in and of themselves.

- **Section 5 – Conditions for subsistence of copyright – Copyright protects the expression of ideas – The originality requirement applies to the expression of the ideas, not the idea itself.**

Albo v. The Winnipeg Free Press, 163 C.P.R. (4th) 126 (Man. Q.B.; 2019-02-22) Saull J.

[63] Counsel provided me with numerous authorities respecting principles of copyright law that are relevant to this matter. A synthesis of these authorities is provided below: [...]

c) **“Copyright law protects the expression of ideas ...; it does not protect ideas in and of themselves”.** It flows from this that a work must also be in a fixed form to attract copyright protection (*CCH* at para. 8) [*CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13].

i) **In view of the fact that copyright limits protection to the expression or form of ideas, not the ideas themselves “...the originality requirement must apply to the expressive element of the work and not the idea”** (*CCH* at para. 14 [*CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13])).).

- **Section 5 – Conditions for subsistence of copyright – Fixation of the work is a requirement for copyright protection – No copyright in facts or ideas.**

Albo v. The Winnipeg Free Press, 163 C.P.R. (4th) 126 (Man. Q.B.; 2019-02-22) Saull J.

[63] Counsel provided me with numerous authorities respecting principles of copyright law that are relevant to this matter. A synthesis of these authorities is provided below: [...]

f) Section 5(1) of the Act provides that copyright subsists in Canada, in every original literary, dramatic, musical and artistic work, provided certain conditions are met. It can include lectures. **If a lecture is fixed in a material form, it will be protected as a literary work, but a lecture delivered without written notes or other written evidence of the lecture, will not.**

- **Section 5 – Conditions for subsistence of copyright – Fixation of the work is a requirement for copyright protection.**

Albo v. The Winnipeg Free Press, 163 C.P.R. (4th) 126 (Man. Q.B.; 2019-02-22) Saull J.

[70] **The law is clear that conversations or answers to oral questions that are not works reduced to a fixed, material form are not copyright protected** (*CCH* at para. 8) [*CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13]). In fact, where a reporter or interviewer records the answers given by a source, copyright flows

to the benefit of the reporter or interviewer, not the subject of the interview, in this case the Press (see: *Hager* at paras. 27 – 30) [*Hager v. ECW Press Ltd.*, 1998 CanLII 9115]. To my mind, the discussion between Dr. Albo and Turner regarding “DNA” that led to the subtitle of the Book falls into this category especially since, based on the evidence given at this trial and the manner in which it was given, I am unable to conclude who first brought up the DNA metaphor.

[71] The quotations from Dr. Albo that appear in the articles and later the Book came largely, if not entirely, from statements Dr. Albo made during his conversation with Turner on February 13, 2014. It follows that, since Dr. Albo does not hold copyright in these statements, the quotations from Dr. Albo in the articles and later the Book do not infringe any copyright.

[72] Some of the facts and ideas Dr. Albo discussed with Turner are referred to by Turner and his other sources for the article and the Book. **Dr. Albo does not hold copyright in such facts or ideas** (see: *CCH* paras. 8 and 22) [*CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13].

- **Section 5 – Conditions for subsistence of copyright – Skill and judgment are required for a work to be original.**

Drouin (Succession de Côté-Drouin) v. Pepin, 2019 CarswellQue 1922 (Que. Sup. Ct.; 2019-03-13) Lucas J.

[148] **L’originalité est une construction jurisprudentielle, bâtie sur les textes des articles 2 et 5 LDA**, stipulant qu’une œuvre «s’entend de toute production originale du domaine littéraire, scientifique ou artistique quels qu’en soient le mode ou la forme d’expression, telles les compilations, livres, brochures et autres écrits, les conférences, les œuvres dramatiques ou dramatico-musicales, les œuvres musicales, les traductions, les illustrations, les croquis et les ouvrages plastiques relatifs à la géographie, à la topographie, à l’architecture ou aux sciences.»

[149] Depuis l’arrêt *CCH Canadienne Ltée c. Barreau du Haut-Canada* en 2004 [Fn109 2004 CSC 134 (CanLII), [2004] 1 R.C.S. 339.], **il n’y a plus de controverse sur la détermination du caractère original qui repose désormais sur les caractéristiques retenues par la Cour suprême, soit l’exercice du talent et du jugement [...]**

- **Section 5 – Conditions for subsistence of copyright – Only a natural person can be the author of a work, not a corporation.**

Drouin (Succession de Côté-Drouin) v. Pepin, 2019 CarswellQue 1922 (Que. Sup. Ct.; 2019-03-13) Lucas J.

[248] En réalité, l'«auteur» ne peut être qu'une personne physique qui, suivant le libellé même de l'article 83 LFI [*Bankruptcy and Insolvency Act*], est vouée à la mort, suscite l'ouverture d'une succession par son décès et le transfert des droits à ses héritiers [Fn 222 Art. 5(1), 6, 7, 9, 13(1), 13 (3) et 14.2 (2) LDA; *Piscines Nautika inc. c. Fibre Design inc.*, 2018 QCCS 3875 (CanLII), par. 29]. De l'analyse des dispositions de la LDA [Fn 223 Art. 5(1), 6, 7, 9, 13(1), 13 (3) et 14.2 (2) LDA; *Piscines Nautika inc. c. Fibre Design inc.*, 2018 QCCS 3875 (CanLII), par. 29.], de la doctrine et de la jurisprudence en matière de droit d'auteur [Fn224 Notamment : Pierre-Yves Gautier, *Propriété littéraire et artistique*, préc., note 93, no. 34; *CCH Canadienne ltée c. Barreau du Haut-Canada* 2004 CSC 134, par. 16 et ss.; *Robertson c. Thomson Corp.*, 2006 CSC 43 (CanLII), [2006] 2 R.C.S. 363, par. 30 et ss.; Florence, Lucas, «*Propriété intellectuelle et titularité*», dans *Jurisque Québec*, coll. « Propriété intellectuelle », *Droits intellectuels*, fasc. 2. Montréal, LexisNexis Canada, feuilles mobiles, nos. 2 et ss., à jour au 18 novembre 2014.], le Tribunal retient et réitère que l'«auteur» d'une œuvre s'avère être la personne physique «qui donne l'empreinte de sa personnalité à une œuvre, qui exerce son talent et son jugement pour créer une œuvre originale [Fn225 Florence, Lucas, «*Propriété intellectuelle et titularité*», dans *Jurisque Québec*, coll. « Propriété intellectuelle », *Droits intellectuels*, fasc. 2. Montréal, LexisNexis Canada, feuilles mobiles, no. 2., à jour au 18 novembre 2014.]».

- **Section 5 — Conditions for subsistence of copyright — No copyright in ideas — Originality applies to the expression of the ideas.**

Ranchman's Holding Inc v. Bull Bustin' Inc, 2019 CarswellAlta 610 (Alta. Q.B.; 2019-03-28) Eamon J.

[157] It is well established law that there is no copyright in ideas (CCH at para 8) [CCH Canadian Ltd. v. Law Society of Upper Canada, [2004] 1 S.C.R. 339, 2004 SCC 13]. The expression of the idea might be copyright [sic] provided the work is original, and that requirement applies to the expressive element of the work and not the idea (*ibid* at paras 8, 14). What is required to attract copyright protection in the expression of an idea is a non-trivial exercise of skill and judgment (*ibid* at para 16).

- **Section 5 — Conditions for subsistence of copyright — Originality is a requirement to copyright protection.**

Henni v. Food Network Canada Inc., 2019 CarswellBC 1138 (B.C. S.C.; 2019-04-29) Baker J.

[31] Paragraph 13 in which the plaintiffs allege that if the Food Network accepted the Food Factories concept, the copyright in the demo reel would be assigned from the personal plaintiffs to the corporate plaintiff and the corporate plaintiff would produce the show.

This paragraph is found in the existing claim. **To be protected by copyright, a work must be original.** Therefore this paragraph also supports the claim in breach of confidence.

- **Section 5 – Conditions for subsistence of copyright – The threshold of originality is low – Creativity is not required for a work to be original.**

Thomson v. Afterlife Network Inc., 2019 CarswellNat 1479 (F.C.; 2019-05-01) Kane J.

[34] The evidence establishes that the Applicant and other Class Members personally authored the obituaries using their own skill and judgment, choosing their own words to convey the appropriate message about the life of the deceased person and their funeral arrangements and adding a photograph taken by them or by another Class Member. **Class Members also exercised their skill and judgment in taking the photographs of the deceased person. The obituaries and photographs fall within the term “original work” as it has been interpreted by the Supreme Court of Canada. As noted, the threshold to constitute originality in the work is low and creativity is not required.**

- **Section 5 – Conditions for subsistence of copyright – Copyright protection is automatic.**

*Pablo Enterprise pte. Ltd v. Hai Lun Tang**, 2019 CarswellNat 3229 (T.M. Opp. Bd.; 2019-06-13) C.R. Folz

[23] However, **it is well established under Canadian law that copyright protection arises automatically upon the making of a work** and a copyright registration is not required in order for there to be a finding of infringement under the *Copyright Act*, though the registration entitles the owner to certain rebuttable presumptions as discussed above [see *Moreau v. St. Vincent* 1950 CanLII 248 (FC), [1950] Ex CR 198, 12 CPR 32; see also John S. McKeown, *Fox on Canadian Law of Copyright and Industrial Designs*, 4th Edition, Chapter 20:2]. [...]

- **Section 5 – Conditions for subsistence of copyright – Copyright protection is for the expression of the ideas and not the ideas themselves.**

Portraits Rembrandt ltée v. Interdonato (Ikono), 2019 QCCQ 5878 (Que. Ct. – Small Claims; 2019-07-26) Choquette J.

[21] Au Canada, **la Loi sur le droit d’auteur protège toute œuvre originale fixée sur un support** [Fn8 Art.5. LDA]. **La Loi protège l’expression d’une idée et non l’idée elle-même.**

- **Section 5 – Conditions for subsistence of copyright – Ownership of a screenplay does not equate to ownership of the copyright in the resulting film.**

Paletta v. The Queen, 2019 CarswellNat 5136 (Tax Ct.; 2019-10-01) Hogan J. [appeal A-418-19].

[201] At that time, Fox only owned the screenplay for the Six Iron Film, **it did not own the copyright in the completed film as the film was not yet fully produced and completed.**

- **Section 5 – Conditions for subsistence of copyright – Copyright protection is automatic.**

Rallysport Direct LLC v. 2424508 Ontario Ltd, 2019 FC 1524 (F.C.; 2019-11-28) Fuhrer J.

[44] Copyright automatically exists “in every original literary, dramatic, musical and artistic work”: *Copyright Act*, s 5(1)(a).

- **Section 5— Conditions for subsistence of copyright – Copyright protection does not discriminate between primary and secondary use of the works.**

Rallysport Direct LLC v. 2424508 Ontario Ltd, 2019 FC 1524 (F.C.; 2019-11-28) Fuhrer J.

[50] I agree with the BCSC that “works [created and] used for commercial purposes are also entitled to copyright protection” so long as the works themselves meet the threshold for attracting copyright protection in the first place: *Century 21* [*Century 21 Canada Limited Partnership v Rogers Communications Inc.*, 2011 BCSC 1196], above at paras 183-184; *TREB* [*Toronto Real Estate Board v Commissioner of Competition*, 2017 FCA 236], above at para 195. This was the approach followed by the 5-4 majority of the Supreme Court in *Euro-Excellence* [*Euro-Excellence Inc. v Kraft Canada Inc.*, 2007 SCC 37]. In categorically rejecting the “incidental works” approach proposed by Bastarache J., **the Supreme Court held all artistic works receive copyright protection if they meet the required standards of ‘skill’ and ‘judgment’ set out in CCH: Euro-Excellence**, above at paras 4-6, 111. **The Supreme Court rejected the “incidental works” approach explicitly because it would be too difficult to determine consistently primary and secondary use.**

- **Section 6 – Term of copyright – The duration of copyright in a photograph was 50 years from the remainder of the year of the making of the initial photograph – After the expiration of the term, a work falls in the public domain.**

Bibliothèque québécoise Inc (Re), 2019 CarswellNat 160 (Cop. Bd.; 2019-01-17), the Board.

[1] [...] elle [the Board] ne peut vous délivrer une licence puisqu’aucune licence n’est requise pour la reproduction de la photographie faisant l’objet de votre demande:

1. La photo d’Andrée Maillet a été prise entre 1944 et 1945;
2. **La durée de la protection accordée aux photos à ce moment était de 50 ans suivant la fin de l’année de la**

confection du cliché initial ou de la planche dont la photo a été directement ou indirectement tirée, ou de l'original lorsqu'il n'y a pas de cliché ou de planche (art.9 RS 1927, c. C-32);

3. La durée de la protection accordée aux photos entre 1994 et 1995 était toujours de 50 ans suivant la fin de l'année de la création du négatif original (Loi de mise en œuvre de l'accord de libre-échange nord-américain, SC 1993, c. 44, art. 60 (1));

4. La photo est donc entrée dans le domaine public au plus tard le 1^{er} janvier 1996.

[3] À la lumière de ce qui précède, la Commission ne peut donner suite à votre demande de licence. Il ne s'agit pas d'une question de pouvoir discrétionnaire: la Commission n'a pas compétence pour délivrer une licence en l'espèce, puisqu'elle ne peut délivrer de licences pour l'utilisation d'œuvres du domaine public.

- **Section 6 — Term of copyright — After the expiration of the term, a work falls in the public domain.**

Groupe Innovamper Inc, Re, 2019 Carswell 631 (Cop. Bd.; 2019-02-18), the Board.

[1] La Commission a analysé votre demande de licence déposée le 26 juillet 2018 et conclu, pour les motifs qui suivent, qu'aucune licence n'est requise pour l'utilisation de l'œuvre littéraire faisant l'objet de votre demande : 1. L'œuvre « Aus den letzten Jahren der Kaiserin Elisabeth » de la Comtesse Irma Sztaray a été publiée en 1909; 2. **La Loi sur le droit d'auteur prévoit que le droit d'auteur pour une œuvre littéraire subsiste pendant la vie de l'auteur, puis jusqu'à la fin de la cinquantième année suivant celle de son décès** (art. 6 LR (1985), ch. C-42); 3. L'auteur est décédée en 1940, soit il y a plus de 78 ans; 4. **L'œuvre est donc du domaine public** depuis le 1^{er} janvier 1991.

- **Section 6 — Term of copyright — After the expiration of the term, a work falls in the public domain and is no longer protected by copyright.**

Drouin (Succession de Côté-Drouin) v. Pepin, 2019 CarswellQue 1922 (Que. Sup. Ct.; 2019-03-13) Lucas J. [References to evidence omitted.]

[220] Les parties conviennent que les généalogies de Joseph Drouin décédé en 1937, font partie du domaine public au plus tôt depuis 1998, mais au plus tard depuis 2003, par le jeu des articles 6 et 7 LDA.

[221] Par ailleurs, **toute exploitation actuelle et future des généalogies de Joseph Drouin par les défendeurs est permise puisque ces œuvres ne sont plus protégées par la LDA.**

- **Section 6 — Term of copyright — Trademark protection may be available for a work (or part thereof) fallen in the public domain.**

Sullivan v. Northwood Media Inc., 2019 CarswellOnt 7681 (Ont. Sup. Ct.; 2019-07-18) Short, Master.

[37] Having regard to that history, is it nevertheless possible for a different interpretation to be made with respect to that story based upon the work of Ms. Montgomery, which is no longer subject to copyright protection by virtue of the lapse of time from the original publication. The Anne brand is however still subject to protection with respect to various trademarks.

- **Section 12 — Where copyright belongs to Her Majesty — The Crown prerogative is with respect to a monopoly in publishing.**

Keatley Surveying Ltd v. Teranet Inc., 2019 CarswellOnt 15110 (S.C.C; 2019-09-26) Abella J. (majority) [affirming 2016 CarswellOnt 7233 (Ont. C.A.; 2017-09-08), which was affirming 2017 CarswellOnt 14961 (Ont. Sup. Ct.; 2016-02-19)].

[48] The opening language of s. 12 — “[w]ithout prejudice to any rights or privileges of the Crown” — reflects the historical Crown prerogative over publishing. **The prerogative power is characterized not as “copyright”, but rather as a “property right” which grants the Crown a monopoly on printing certain works in perpetuity** (Elizabeth F. Judge, “Crown Copyright and Copyright Reform in Canada”, in Michael Geist, ed., *In the Public Interest: The Future of Canadian Copyright Law* (2005), 550, at p. 557 (“Crown Copyright”)).

- **Section 12 — Where copyright belongs to Her Majesty — Direction or control of the Crown over the preparation or publication of the work is required.**

Keatley Surveying Ltd v. Teranet Inc., 2019 CarswellOnt 15110 (S.C.C; 2019-09-26) Abella J. (majority) [affirming 2016 CarswellOnt 7233 (Ont. C.A.; 2017-09-08), which was affirming 2017 CarswellOnt 14961 (Ont. Sup. Ct.; 2016-02-19)].

[63] Section 12 states that the Crown will have copyright when a work is prepared or published by or under its direction or control. Critical to the assessment of whether Crown copyright subsists, is the notion and extent of government direction or control in relation to a work. As it is in the *Copyright Act* generally, the “work” is the lynchpin of s. 12. **While it is true that s. 12 has two parts — the prepared prong and the published prong — these two “prongs” are different only to the extent that preparation and publication are different processes. The goal of the s. 12 inquiry in its entirety is to determine whether the degree of direction and control of the Crown over the preparation or publication of the work is sufficient to vest copyright in the Crown.** While the manner of assessing whether the requisite degree of direction or control is present will necessarily vary depending on whether Crown copyright is asserted on the basis of preparation or publication, the overarching

question remains: has the Crown exercised sufficient direction or control, consistent with the purposes of Crown copyright, that it can be said that Crown copyright subsists?

[64] Considering first when it can be said that a work was *prepared* by the Crown within the meaning of s. 12, it seems to me that two circumstances are broadly captured. A work will be prepared by the Crown when an agent or servant of the Crown brings the work into existence for and on behalf of the Crown in the course of his or her employment. In such circumstances, the Crown — including its agents and employees — has ultimate direction and control over the creation of a work.

[65] Similarly, a work will be prepared under the Crown's direction or control within the meaning of s. 12 when the Crown essentially determines whether and how a work will be made. In such circumstances, Crown copyright will subsist even though the Crown is not the "author" of the work because the Crown exercises direction or control over the work's creation. In this way, works produced by independent contractors who complete Crown commissions in which the Crown exercises the direction or control over the creation of the work will be subject to Crown copyright. As the reasons of Belobaba J. and Doherty J.A. note, the "prepared" branch of s. 12 does not extend to situations in which the Crown merely lays down formal requirements or guidelines for how a work should be made. I agree with Professor Vaver: a work will only be prepared under the Crown's direction or control if "the production of the work [is] . . . the principal object, not a peripheral consequence, of the government's direction or control" (*Intellectual Property Law*, at p. 134 [Vaver, David. *Intellectual Property Law: Copyright, Patents, Trade-marks*, 2nd ed. Toronto: Irwin Law, 2011.]).

[66] This interpretation of what "prepared" means coheres with the general principles surrounding the ownership of copyright set out elsewhere in the *Act*, in particular, s. 13(3), which gives employers the copyright in works produced by employees in the course of their employment. While the Crown would already own the copyright in the works produced by its employees in the course of their employment, the "prepared" branch of s. 12 extends Crown copyright to works produced by independent contractors in circumstances where sufficient direction or control is present. In these two circumstances, the Crown exercises direction and control over both the person preparing the work and the work that is ultimately prepared.

- **Section 12 — Where copyright belongs to Her Majesty — Crown’s interest in the work at the time of the publication is relevant — Crown’s control must be sufficient.**

Keatley Surveying Ltd v. Teranet Inc., 2019 CarswellOnt 15110 (S.C.C; 2019-09-26) Abella J. (majority) [affirming 2016 CarswellOnt 7233 (Ont. C.A.; 2017-09-08), which was affirming 2017 CarswellOnt 14961 (Ont. Sup. Ct.; 2016-02-19)].

[67] The evaluation of the Crown’s direction or control takes on a heightened importance in determining if a work was *published* by the Crown within the meaning of s. 12. Merely making someone else’s work available to the public is insufficient. This is because, unlike the “prepared” prong, the “published” prong — if interpreted expansively — profoundly derogates from the general scheme of the *Act* wherein the author of a work owns the copyright in it. The proper scope, therefore, should be conceptually symmetrical with the approach to “prepared”. **Just as the Crown must cause the work to come into existence for the prepared branch to apply, a work will only be published by or under the direction or control of the Crown when it can be said that the Crown exercises direction or control over the publication process**, including both the person publishing the work and the nature, form and content of the final, published version of a work.

[68] Like Doherty J.A. [2015 ONCA 248], I am of the view that determining whether a work was published with sufficient governmental direction or control to comply with s. 12 necessitates an inquiry into **the Crown’s interest in the works at the time of publication since this interest will demonstrate the degree of direction or control exercised by the Crown over the publication process. As with the “prepared” prong, the Crown must wield direction or control over the publication process, regardless of whether the works are published “by” the Crown itself, or by a third party under the Crown’s “direction or control”.**

- **Section 12 — Where copyright belongs to Her Majesty — *Indicia* exist to ascertain whether a work is published by the Crown.**

Keatley Surveying Ltd v. Teranet Inc., 2019 CarswellOnt 15110 (S.C.C; 2019-09-26) Abella J. (majority) [affirming 2016 CarswellOnt 7233 (Ont. C.A.; 2017-09-08), which was affirming 2017 CarswellOnt 14961 (Ont. Sup. Ct.; 2016-02-19)].

[69] In determining whether a work was published “by” the Crown for the purposes of s. 12, **relevant *indicia* of governmental direction or control may include the presence of a statutory scheme transferring property rights in the works to the Crown; a statutory scheme which places strict controls on the form and content of the works; whether the Crown physically possesses the works; whether exclusive control is given to the government to modify the works; the opt-in nature of the statutory scheme;**

and the necessity of the Crown making the works available to the public. It is only when it can be said that the Crown has sufficient governmental direction or control over the publication process that Crown copyright will subsist within the meaning of s. 12.

- **Section 12 — Where copyright belongs to Her Majesty — measuring the degree of control of the Crown is paramount.**

Keatley Surveying Ltd v. Teranet Inc, 2019 CarswellOnt 15110 (S.C.C; 2019-09-26) Abella J. (majority) [affirming 2016 CarswellOnt 7233 (Ont. C.A.; 2017-09-08), which was affirming 2017 CarswellOnt 14961 (Ont. Sup. Ct.; 2016-02-19)].

[71] Under both the prepared and published prongs of s. 12, therefore, the inquiry will always **be whether the extent of the government's direction or control over the preparation or publication of the work are sufficiently extensive to vest copyright in the Crown.** The prepared and published prongs of the s. 12 inquiry cohere: both necessitate an examination into the level of the Crown's direction or control over the person preparing or publishing the work and the work that is being prepared or published. While the inquiry may vary, the overarching task is the same — to measure the degree of direction or control exercised by the Crown in bringing about the creation or dissemination of a work.

- **Section 12 — Where copyright belongs to Her Majesty — The Crown is vested with the [economic] rights of the author — [Quaere: what about the moral rights?].**

Keatley Surveying Ltd v. Teranet Inc, 2019 CarswellOnt 15110 (S.C.C; 2019-09-26) Abella J. (majority) [affirming 2016 CarswellOnt 7233 (Ont. C.A.; 2017-09-08), which was affirming 2017 CarswellOnt 14961 (Ont. Sup. Ct.; 2016-02-19)].

[79] Viewed in its entirety, the scheme demonstrates the extent of the Crown's direction or control over the publication process. **The rights normally given to the creator of the work, including the right to amend the work and make copies, are instead given to the Crown. The Crown directs and controls every aspect of the publication** of the registered and deposited plans of survey. Because of the extent of this direction and control, copyright vests in the Crown by operation of s. 12 of the *Act* when the registered or deposited plans of survey are published. When it is the Crown that publishes the works by making them available through the Land Registry offices, the works are published “by” the Crown within the meaning of s. 12.

- **Section 12 — Where copyright belongs to Her Majesty — Technological neutrality is a principle of interpretation of the *Copyright Act*.**

Keatley Surveying Ltd v. Teranet Inc, 2019 CarswellOnt 15110 (S.C.C; 2019-09-26) Abella J. (majority) [affirming 2016 CarswellOnt 7233 (Ont. C.A.; 2017-09-08), which was affirming 2017 CarswellOnt 14961 (Ont. Sup. Ct.; 2016-02-19)].

[87] **This Court’s jurisprudence has repeatedly emphasized that technological neutrality is a fundamental tenet of copyright law.** It “seeks to have the *Copyright Act* applied in such a way that operates consistently, regardless of the form of media involved, or its technological sophistication” (SOCAN, at para. 43, citing *Robertson v. Thomson Corp.*, 2006 SCC 43 (CanLII), [2006] 2 S.C.R. 363, at para. 43). **Technological neutrality requires “that the *Copyright Act* apply equally between traditional and more technologically advanced forms of the same media”** (*Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34 (CanLII), [2012] 2 S.C.R. 231, at para. 5 (ESA) (emphasis added)).

[88] In other words, **the *Copyright Act* should not be interpreted or applied to either favour or discriminate against any form of technology** (ESA, at para. 5; *Robertson v. Thomson Corp.*, 2006 SCC 43 (CanLII), [2006] 2 S.C.R. 363, at para. 49; *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57, [2015] 3 S.C.R. 615, at para. 66). In ESA, for example, this Court relied on the principle of technological neutrality to conclude that there was “no practical difference between buying a durable copy of the work in the store, receiving a copy in the mail, or downloading an identical copy using the Internet. The Internet is simply a technological taxi that delivers a durable copy of the same work to the end user” (para. 5).

- **Section 12 — Where copyright belongs to Her Majesty — Updating of this provision is left to Parliament.**

Keatley Surveying Ltd v. Teranet Inc., 2019 CarswellOnt 15110 (S.C.C; 2019-09-26) Abella J. (majority) [affirming 2016 CarswellOnt 7233 (Ont. C.A.; 2017-09-08), which was affirming 2017 CarswellOnt 14961 (Ont. Sup. Ct.; 2016-02-19)].

[90] A final note on s. 12. This provision is a century old. Since this is the first time this Court has reviewed its scope, our approach has taken into deliberative account the jurisprudential developments in copyright law in recent decades. **Parliament is of course free to consider updating the provision in its current review as it sees fit.**

- **Section 12 — Where copyright belongs to Her Majesty — For this section to operate, the work must be a government work.**

Keatley Surveying Ltd v. Teranet Inc., 2019 CarswellOnt 15110 (S.C.C; 2019-09-26) Côté and Brown JJ (minority) [affirming 2016 CarswellOnt 7233 (Ont. C.A.; 2017-09-08), which was affirming 2017 CarswellOnt 14961 (Ont. Sup. Ct.; 2016-02-19)].

[99] We would interpret “prepared or published by or under the direction or control” of the Crown according to its ordinary meaning. To avoid the absurd result from interpreting *all* of s. 12 literally, however, we would adopt an interpretation whereby the copyright in a

work is vested in the Crown where the work is “prepared or published by or under the direction or control” of the Crown, **and where the work is a government work. A government work is a work that serves a public purpose and in which vesting the copyright in the Crown furthers that purpose.** This interpretation properly respects the language of s. 12, the purposes of Crown copyright and the balance which Parliament struck by enacting the *Copyright Act*.

[127] It follows that, once a court is satisfied that a work was “prepared or published by or under the direction or control” of the Crown, it must then consider whether, at the time of preparation or publication, the work is a “government work”. **This entails examining the character and purpose of the work. The work will be a “government work” where the work serves a public purpose and Crown copyright furthers the fulfillment of that purposes [sic].** These will be works in which the government has an important interest concerning their accuracy, integrity, and dissemination.

- **Section 12 — Where copyright belongs to Her Majesty — Ascertaining if the Crown is at the origin of the preparation or publication of the work may avoid difficulties.**

Keatley Surveying Ltd v. Teranet Inc, 2019 CarswellOnt 15110 (S.C.C.; 2019-09-26) Côté and Brown JJ (minority) [affirming 2016 CarswellOnt 7233 (Ont. C.A.; 2017-09-08), which was affirming 2017 CarswellOnt 14961 (Ont. Sup. Ct.; 2016-02-19)].

[113] We would avoid these serious difficulties by asking simply whether the Crown brought about the preparation or publication of the work, either by its own agents and servants or by exercising direction or control over a third party, because inquiring into the identity of the preparer or publisher of the work and that person’s relationship to the Crown will generate findings of fact, proceeding thusly provides far more certainty and predictability to all parties.

- **Section 12 — Where copyright belongs to Her Majesty — Section 12 applies to works that served a public purpose.**

Keatley Surveying Ltd v. Teranet Inc, 2019 CarswellOnt 15110 (S.C.C.; 2019-09-26) Côté and Brown JJ (minority) [affirming 2016 CarswellOnt 7233 (Ont. C.A.; 2017-09-08), which was affirming 2017 CarswellOnt 14961 (Ont. Sup. Ct.; 2016-02-19)].

[132] Fourthly, an interpretation that restricts Crown copyright to government works is harmonious with the objectives of s. 12. This interpretation ensures that Crown copyright is extended to works only where doing so furthers the underlying purposes of Crown copyright. Those purposes have been identified as ensuring accuracy and integrity of works. (E. Judge, “Crown Copyright and Copyright Reform in Canada” in M. Geist, ed., *In the Public Interest: The Future of Canadian Copyright Law* (2005), at pp. 551 and 554; Vaver (1996)

[Vaver, David. "Copyright and the State in Canada and the United States" (1996), 10 *I.P.J.* 187.], at pp. 199-200 and 211-12). [...]

[135] Further, these purposes inform what works are government works covered by s. 12, by clarifying that s. 12 applies to works of a public character — that is, where they serve a *public purpose*. These will be works for which accuracy, integrity and dissemination will be important for the works to effectively fulfill their public purposes. In determining whether a particular work is a government work, then, the purpose of the work must be considered. Section 12 gives the Crown copyright in works where it would be detrimental to the public interest to have multiple versions available, containing potentially different and contradictory information. It applies to works which the public will rely upon, such that there is a public interest in knowing where to obtain copies of the work and receiving authentic versions. Additionally, it covers works to which many people may need access, such that limited dissemination would not be in the public interest, and works to which access may be restricted in the public interest.

[136] **The mere fact that the government has a work prepared or published is not itself conclusive that the work serves a public purpose.** For s. 12 to apply, the court must be satisfied that the work serves such a purpose, and that giving the Crown copyright to allow it to ensure the accuracy, integrity and appropriate dissemination of the work assists the work in fulfilling that purpose.

- **Section 13 — Ownership of copyright — The author of a work is generally the first owner of the copyright therein.**

Burke v Red Barn at Mattick's Ltd., 2019 CarswellBC 93 (B.C.S.C.; 2019-01-24) MacKenzie J.

[This application stems from a proposed class action for breach of privacy involving the non-consensual capture of explicit images in a workplace washroom]

[38] Intellectual property rights in photographs and video recordings are determined under the *Copyright Act*, R.S.C. 1985, c. C-42. Under s. 13(1), the author of a work — not its subject — normally becomes “the first owner of the copyright therein.” Under s. 3, the owner of the copyright in a work has the sole right to produce, reproduce, or publish that work or any substantial part thereof, unless they authorize others to do so. **Although the subjects of photographs and video recordings have privacy rights that may limit what a copyright-holder can do with works created without the subjects’ consent** (see *Aubry v. Éditions Vice-Versa inc.*, 1998 CanLII 817 (SCC), [1998] 1 S.C.R. 591), those subjects do not own the intellectual property in those media. **As a result, I am unable to agree with the plaintiffs’ contention that the images at issue “were rightly their property.”**

- **Section 13 — Ownership of copyright — The copyright in a work created by an employee belong to the employer.**

Pyrrha Design Inc. v. Plum and Posey Inc., 2019 CarswellNat 210 (F.C.; 2019-01-30) Phelan J. [appeal A-98-19].

[83] Pyrrha is the owner of any copyright in Pyrrha Designs under subsection 13(3) of the Act as **Wilmore and Papin created the Pyrrha Designs in the course of their employment with Pyrrha.** Wilmore and Papin are both Canadian citizens.

- **Section 13 — Ownership of copyright — Royalties qualify as income — Royalties are a business asset that is subject to net family property equalization.**

*Wilton v. Myhr**, 2019 CarswellOnt 2748 (Ont. Sup. Ct.; 2019-02-26) Dietrich J.

[44] Royalties are traditionally understood as a form of remuneration, rather than a form of intangible property (such as a copyright or patent), the value of which would be subject to equalization. However, the royalties could also be considered a contingent interest for the purposes of the *Family Law Act* and therefore property for the purposes of equalization. In the case of *Clarke v. Clarke*, 2014 BCSC 1617 (CanLII) ("*Clarke*"), royalties were included in the division of family property consideration. However, the royalties arose from an oil and gas lease rather than a catalogue of original work, such as a musical composition, as is the case here.

[45] At trial, Mr. Myhr and his expert, Mr. Sperti, used the term "royalties" to reference both the husband's income and the property that generated the income. Mr. Sperti provided two calculations of Mr. Myhr's income. One includes the royalty income earned in the year and the other does not. In valuing Ken Myhr Music, Mr. Sperti capitalized the more lucrative royalties and included this capitalized amount as property for the purposes of calculating the equalization payment (as discussed in more detail below).

[46] **Whether royalties qualify as property is not a straightforward analysis. It is well-established in the jurisprudence that royalties qualify as income:** *Mobin v. Stephens*, 2013 ONCJ 53 (CanLII) at para. 52. The parties were not able to point to any jurisprudence in which royalties from musical composition qualified as property for the purpose of s. 5(1) of the *Family Law Act*. Likewise, I was not provided with any jurisprudence in which the inclusion of such royalties as property for the purposes of equalization of net family properties is specifically rejected. As noted, in the *Clarke* case, royalties were included in the property division calculation, though, in that case, the royalties arose from a lease and not from musical composition.

[54] In the case at bar, based on the evidence before the court, **I find that, in addition to generating income, Mr. Myhr's royalties are a business asset, or property, that is subject to net family property equalization.**

[55] I also find that the principle against double recovery or double-dipping does not apply in this case. **Following the separation, Mr. Myhr retained his business in its entirety and it remains the principal source of the family's income.** As in *Mason* [*Mason v. Mason*, 2014 ONSC 429], **an equalization of the value of this asset should not disentitle the spouse to support;** and it should not, in this case, reduce the amount of support that might otherwise be available to her. Accordingly, **I find that Mr. Myhr's total income, including the royalty income, shall be taken into account for the purposes of spousal support.**

- **Section 13 – Ownership of copyright – Interpretation of contracts should also be governed by good business sense.**

Geophysical Service Incorporated v. Falkland Oil and Gas Limited, 2019 CarswellAlta 585, (Alta. Q.B.; 2019-03-07) [add. reasons 2019 CarswellAlta 938 (Alta. Q.B. – Costs; 2019-05-02); affd 2020 CarswellAlta 67 (Alta. C.A.; 2020-01-20)].

[91] During the FOGL and BHP joint venture both had use-licenses with GSI covering all of the Seismic Data that contained substantially similar terms – that is, those of the MDLA [Master Seismic Data License Agreement]. BHP retained a third party to create Reprocessed Seismic Data from the Seismic Data to which it had a use-license. BHP provided the Reprocessed Seismic Data to FOGL and neither BHP nor FOGL entered into additional use-licenses or paid additional fees to GSI for the transfer of that Reprocessed Seismic Data.

[92] FOGL acknowledges that it had access to Reprocessed Seismic Data created by BHP and that it did not enter into a separate license for the use of that data. GSI submits that this violated the terms of the MDLA even though the Reprocessed Seismic Data was created from Seismic Data to which FOGL had a license. GSI submits that parties could only create Reprocessed Seismic Data themselves or through their own arrangement with a third party. Any other access to Reprocessed Seismic Data, even if created from Seismic Data to which the party had a license, required an additional use-license.

[93] In my view FOGL has shown that GSI's claim in relation to the BHP Reprocessed Seismic Data has no merit, and GSI had not shown any triable issue with respect to that claim. **Specifically, the provisions of the MDLA, properly interpreted in light of their factual matrix, mean that it was not a violation of the MDLA for FOGL to access and**

use Reprocessed Seismic Data created by BHP from Seismic Data to which both BHP and FOGL had use-licenses.

[99] It seems unduly technical to say that FOGL could have retained the third party to create this identical Reprocessed Seismic Data, but that it is required to purchase a license simply because the request was made by its joint venture partner BHP rather than by FOGL itself. It would mean that FOGL could ask BHP to create the Reprocessed Seismic Data, or FOGL could ask a third party to create the Reprocessed Seismic Data, but if BHP asks the third party to create the Reprocessed Seismic Data then FOGL has to purchase an additional license. That interpretation makes no business sense.

- **Section 13 – Ownership of copyright – A right to use does not transpose a right of ownership.**

Luxme International Ltd v. Lasnier, 2019 CarswellQue 1940 (Que. Sup. Ct.; 2019-03-27) Bachand J.

[79] Deuxièmement, **la preuve n'établit pas**, selon la prépondérance des probabilités, **que [the Plaintiff] Luxme ou Luxme Tech est devenue propriétaire de cette technologie, ou encore que Schrage leur a cédé des droits de propriété intellectuelle.** Il ressort plutôt de la preuve que Luxme a seulement acquis de Schrage un droit d'utilisation de cette technologie dans les marchés canadien et américain.

- **Section 13 – Ownership of copyright – An assignor should be the owner of the right it assigned – Circumstantial evidence on the origin of the assigned works should be satisfactory on a balance of probabilities.**

Luxme International Ltd v. Lasnier, 2019 CarswellQue 1940 (Que. Sup. Ct.; 2019-03-27) Bachand J.

[69] Le problème ne se situe pas au niveau de la cession des droits de propriété intellectuelle de [Plaintiff] Luxme à Luxme Tech: en vertu de l'entente de décembre 2014, Luxme a clairement cédé à Luxme Tech tous les droits de propriété intellectuelle qu'elle possédait relativement à ses activités de commercialisation de systèmes de convoyeurs tubulaires, y compris ses droits d'auteur. **Le problème est plutôt dû à l'insuffisance de la preuve tendant à démontrer que, avant que cette cession ne survienne, Luxme était bel et bien titulaire de droits d'auteur à l'égard des dessins techniques que M. Lasnier et Axis ont utilisés afin de fabriquer des systèmes de convoyeurs tubulaires.**

[81] En somme, l'on ne peut tenir pour acquis que les dessins dont se sont servis M. Lasnier et Axis ont été préparés par des employés de Luxme et qu'il s'agit d'œuvres originales au sens des dispositions

pertinentes de la *L.d.a.* Pour avoir gain de cause, il aurait fallu que Luxme Tech offre une preuve beaucoup plus précise sur l'origine de ces dessins ainsi que sur la nature et la teneur du partenariat qu'elle a conclu avec Schrage en 1996. **La preuve circonstancielle à laquelle elle a choisi de se limiter ne suffit donc pas pour conclure**, selon la prépondérance des probabilités, **qu'elle est titulaire de droits d'auteur à l'égard des dessins techniques** dont se sont servis M. Lasnier et Axis.

- **Section 13 – Ownership of copyright – Ownership must be proven.**

Ranchman's Holding Inc v. Bull Bustin' Inc, 2019 CarswellAlta 610 (Alta. Q.B.; 2019-03-28) Eamon J.

[167] **In the case of photographs, there is no evidence whether copyright in any photographs subsisted in the photographer or the Plaintiffs**, or about the relationship of the photographer to the Plaintiffs or the terms under which the photographs were given to the Snyder Defendants.

- **Section 13 – Ownership of copyright – There is no specific wording for a copyright assignment – An assignment could be implicit – The common intent of the parties should be ascertained.**

Drouin (Succession de Côté-Drouin) v. Pepin, 2019 CarswellQue 1922 (Que. Sup. Ct.; 2019-03-13) Lucas J.

[229] De toute évidence, **le libellé de la LDA ne requiert pas, comme condition de validité, que la cession soit rédigée en des termes exprès**. Dans l'arrêt *Turgeon c. Michaud* [Fn210 *Turgeon c. Michaud*, 2003 CanLII 4735 (QC CA)], la Cour d'appel exprime les considérations suivantes :

[71] Il me paraît, par ailleurs, déraisonnable d'invalider une cession écrite pour le simple motif qu'elle n'utilise pas une formulation expresse, alors qu'il ressort de l'écrit que l'intention des parties était de procéder à une telle cession. À mon avis, pour qu'une cession soit valide, il suffit d'être en présence d'un écrit signé par le titulaire du droit et qu'il en ressorte clairement que la véritable intention de celui-ci était de céder ce droit. [Nos soulignés.]

[230] Cet arrêt présente ensuite une analyse complète de l'état du droit à cet égard qui se résume ainsi :

- Le contrat est soumis au droit civil québécois qui demande qu'on recherche **qu'elle [sic] a été la commune intention des parties**;
- **«Il n'existe pas de formule miracle pour déterminer si un contrat transfère un droit d'auteur exclusif.** Dans toutes les situations qui lui sont soumises, un tribunal analyse les stipulations du contrat et se demande s'il laisse voir un véritable transfert de droit de propriété sur l'un ou l'autre des droits exclusifs. [Fn211

Normand Tamaro Tamaro, *Le droit d'auteur: fondements et principes*, Montréal, Presses de l'Université de Montréal, 1994, p. 187]»;

- **Une cession écrite n'a pas à être explicite, étant entendu que la validité de celle-ci n'est tributaire que de l'intention des parties.**

[231] La Cour d'appel retient enfin les enseignements de la Cour suprême dans *Massie & Renwick Ltd. c. Underwriter's Survey Bureau Ltd.* [Fn212 *Massie & Renwick Ltd. c. Underwriter's Survey Bureau Ltd.*, 1940 CanLII 1 (SCC)1 940 CanLII 1 (SCC), , [1940] R.C.S. 218, p. 229, 231, 237, 238 et 239.], ayant «conclu **qu'une cession écrite pouvait être implicite en jugeant qu'un contrat de vente d'entreprise pouvait entraîner la cession des droits d'auteur à l'égard des œuvres protégées contenues dans cet actif** [Fn 213 *Turgeon c. Michaud*, 2003 CanLII 4735 (QC CA)], par. 82.]»

- **Section 13 — Ownership of copyright — In an asset purchase agreement, copyright does not have to be specifically mentioned to be transferred.**

Drouin (Succession de Côté-Drouin) v. Pepin, 2019 CarswellQue 1922 (Que. Sup. Ct.; 2019-03-13) Lucas J.

[233] Cette Convention d'achat d'actifs ne fait peut-être pas expressément référence aux droits d'auteur, mais la conjugaison de tous les actes signés ce jour-là confirme cette intention.

- **Section 13 — Ownership of copyright — Author is not defined in the Copyright Act — Author and first owner are distinct concepts.**

Drouin (Succession de Côté-Drouin) v. Pepin, 2019 CarswellQue 1922 (Que. Sup. Ct.; 2019-03-13) Lucas J.

[246] Ensuite, **la notion d'«auteur» n'est pas spécifiquement définie par le législateur fédéral**, ni dans la LFI ni même dans la LDA. Cependant, on comprend tout de suite du libellé de l'article 14 LDA précité **qu'il y a une distinction importante à faire entre l'«auteur» et le «premier titulaire».**

- **Section 13 — Ownership of copyright — An employer is not an author**

Drouin (Succession de Côté-Drouin) v. Pepin, 2019 CarswellQue 1922 (Que. Sup. Ct.; 2019-03-13) Lucas J.

[247] En règle générale, l'«auteur» est le premier titulaire du droit d'auteur sur une œuvre [Fn221 Art. 13(1) LDA.]. Une exception se retrouve à l'article 13 (3) LDA, lorsqu'une œuvre est exécutée dans l'exercice d'un emploi. L'employeur est alors le premier titulaire du droit d'auteur, à moins d'une stipulation contraire dans le contrat. **Si bien que l'employeur n'est jamais l'«auteur» d'une œuvre au sens de la LDA.**

- **Section 13 — Ownership of copyright — Copyright may be transferred by will.**

Drouin (Succession de Côté-Drouin) v. Pepin, 2019 CarswellQue 1922 (Que. Sup. Ct.; 2019-03-13) Lucas J. [References to evidence omitted.]

[254] Par conséquent, **c'est l'alinéa 2 de l'article 83 qui s'applique en l'espèce. Ainsi, les recueils et les droits d'auteur doivent retourner à l'auteur Gabriel Drouin**, et dans les circonstances de son décès, à la Succession et aux héritiers dûment représentés par le demandeur dans le présent recours.

[255] En effet, il y a lieu de reconnaître que la succession des droits d'auteur sur les œuvres est d'abord dévolue à Jeanne-Côté-Drouin (toujours vivante au moment de la faillite en 1987) en vertu du legs universel stipulé dans le testament de Gabriel Drouin. Depuis son décès, ils font partie de la Succession de celle-ci.

[256] En somme, **si le recours de la Succession est prescrit pour les actes qui ont eu lieu avant le 20 mai 2012, il reste que le DNCF (tome 3) et les généalogies familiales par Gabriel Drouin se trouvent actuellement exploités sur les sites Internet des défendeurs et dans ces circonstances particulières, sans autorisation de la Succession qui détient les droits.** Par conséquent, le Tribunal doit prononcer à ce stade les conclusions recherchées en matière d'injonction.

- **Section 13 — Ownership of copyright — Master recordings *per se* are eligible capital property and not depreciable property.**

Unidisc musique inc v. Agence du revenu du Québec, 2019 CarswellQue 2647 (Que. Ct.; 2019-04-02) Gouin J. [appeal 500-09-028299-196].

[21] Ainsi, la question en litige à laquelle le Tribunal doit répondre consiste à déterminer **si les biens (*master recordings*) incluant les droits protégés par le droit d'auteur doivent être considérés comme des biens amortissables** de la catégorie 8 de l'annexe B du *RI* ou **comme des immobilisations incorporelles** au sens de la *Loi sur les impôts* [Fn17 RLRQ, ch. I-3.] (*LI*).

- **Section 13 — Ownership of copyright — Ownership of sound recordings does not imply a license to use them without clearing the rights of the copyright owners in same.**

Unidisc musique inc v. Agence du revenu du Québec, 2019 CarswellQue 2647 (Que. Ct.; 2019-04-02) Gouin J. [appeal 500-09-028299-196].

[54] Ainsi, Unidisc, agissant par l'entremise de M. Cucuzella, son président, était parfaitement consciente qu'elle n'achetait pas l'ensemble des droits associés aux œuvres. Le prix de vente fut établi en conséquence, **sachant que la commercialisation des œuvres enregistrées sur les bandes maîtresses allait requérir des**

déboursés subséquents, payables non pas à l'ancien propriétaire des bandes maîtresses mais aux auteurs, compositeurs, interprètes et producteurs (« publishers »), conformément à la LDA.

[59] L'article 18 de la LDA prévoit les droits directement liés à un enregistrement sonore [...]

[60] En vendant les bandes maîtresses, les vendeurs pouvaient ainsi céder les droits ci-dessus. Et c'est ce qu'ils ont fait mais pas plus.

[61] Dans la lettre d'interprétation [Fn39 Pièce P-4, p. 3] qui constitue la base des cotisations, on réfère à l'article 18 de la LDA. Toutefois, en raison de l'omission de référer aux autres droits protégés par d'autres articles – les droits qui ne sont pas liés à l'enregistrement sonore lui-même, mais plutôt à l'œuvre et à ses créateurs, il s'ensuit que la lettre d'interprétation est juridiquement incorrecte et incomplète.

[62] Les articles 3, 13 et 15 de la LDA encadrent les droits des auteurs-compositeurs-interprètes, lesquels droits sont indépendants de l'enregistrement sonore et, par conséquent, ne sont pas cédés par la simple cession d'une bande maîtresse.

- **Section 13 – Ownership of copyright – The first owner of the copyrights may assign or license them.**

Unidisc musique inc v. Agence du revenu du Québec, 2019 CarswellQue 2647 (Que. Ct.; 2019-04-02) Gouin J. [appeal 500-09-028299-196].

[64] Les paragraphes 13 (1) et (4) de la LDA encadrent les droits du premier titulaire du droit d'auteur (auteur-compositeur) sur une œuvre et de la possibilité de le céder ou de concéder une licence

- **Section 13 – Ownership of copyright – Acquisition of sound recordings does not include the copyrights in them.**

Unidisc musique inc v. Agence du revenu du Québec, 2019 CarswellQue 2647 (Que. Ct.; 2019-04-02) Gouin J. [appeal 500-09-028299-196].

[67] La lettre d'interprétation [Fn41 Pièce P-4.] assimile erronément les droits d'auteur applicables à une œuvre musicale aux droits intimement liés à l'enregistrement sonore. Le témoignage de M. Cuccuzella, président d'Unidisc est cohérent avec la législation canadienne sur le droit d'auteur.

[68] En effet, Unidisc sait ce qu'elle achète et ce qu'elle n'achète pas : elle achète les bandes maîtresses et les droits inextricables des bandes maîtresses protégés par l'article 18. Elle est consciente de ce

qu'elle devra déboursier et à qui au moment de mettre en marché les CD ou les compilations électroniques tirées des bandes maîtresses.

[69] En achetant des bandes maîtresses, elle achète la meilleure qualité de l'enregistrement sonore à partir de laquelle les copies vont pouvoir être tirées et ainsi mises en marché.

[70] La qualité de l'enregistrement sonore n'a rien à voir avec les droits protégés aux articles 3, 13 et 15, ni même 18 de la LDA. En fait, la qualité de l'enregistrement sonore a tout à voir avec la qualité du support physique, soit sa conservation dans des conditions optimales, sa protection contre les altérations et les vols, et finalement sa manipulation par des professionnels consciencieux selon les règles de l'art lors de la confection des copies.

[71] Unidisc, conformément aux contrats [Fn42 Pièces P-1, D-6 (également P-2), D-7, D-8], n'achète donc ni les droits d'auteurs-compositeurs-interprètes, ni ceux des producteurs (« *publishers* ») au sens de la LDA.

[72] Quand l'ARQ affirme que les bandes maîtresses n'ont aucune valeur sans les droits associés aux oeuvres, ce qui est incorrect, ceci équivaut à confondre l'ensemble des droits protégés aux articles 3, 13, 15 et 18 de la LDA.

[73] Quand l'ARQ conclut qu'Unidisc a acquis, par l'acquisition des bandes maîtresses, les droits des auteurs-compositeurs-interprètes et producteurs, ceci est contraire à la LDA, au libellé même des contrats et à la commune intention des parties, de même qu'au témoignage non contesté et non contredit de M. Cucuzella.

- **Section 13 — Ownership of copyright — Documents evidencing ownership are relevant in a copyright infringement action and shall be produced.**

9286-3075 Québec inc. v. Québec Ville du Rock inc., 2019 CarswellQue 3558 (Que. Sup. Ct.; 2019-04-05) Bellavance J.

[10] Après avoir examiné ces demandes de production, le Tribunal rejette l'objection et ordonne la production des documents en question pour les motifs qui sont exposés par les demandereses, aux paragraphes suivants de leur document intitulé "Notes et autorités -- Demandereses" :

- 8. Tel qu'admis aux paragraphes 23 à 25 et 28 de la défense et demande reconventionnelle, le défendeur Sébastien Girard était employé par la demanderesse 9220-8883 Québec inc. entre 2010 et 2012 ;

- 9. Les demanderesse soumettent que les engagements "Pré-ENG-1, Pré-ENG-6, Pré-ENG-7, Pré-ENG-13" concernent expressément les négociations intervenues entre les parties concernant l'exploitation du concours "Lévis, ville du Rock" et les droits de propriété intellectuelle en découlant ;
- 10. Ces demandes sont pertinentes en ce que la question de titularité des droits de propriété intellectuelle entourant le concours "Lévis, ville du Rock" sont [sic] au coeur du litige ;

[11] Le Tribunal conclut également que la demande est suffisamment précise pour permettre aux défendeurs d'y donner suite et se justifie en regard des dispositions de la *Loi sur les droits d'auteur* exposée précédemment.

- **Section 13 – Ownership of copyright – Assignment of the employee to the employer is not required – Authorship and ownership are two different concepts.**

Capitale en fête inc. v. Ouellet, 2019 CarswellQue 4570 (Que. Ct.; 2019-05-01) Boutin J.

[49] Au terme de ce paragraphe [13(3)], point n'est besoin que l'employé cède son droit puisque son employeur en est titulaire d'emblée de façon statutaire.

[50] **L'auteur, qui crée l'œuvre, et le titulaire, qui possède la propriété ou la titularité du droit d'auteur sur l'œuvre, recouvrent donc deux notions différentes** [Fn 11 Stéphane GILKER, *Congrès annuel du Barreau du Québec (2009)*, Principes généraux du droit d'auteur, Barreau du Québec – Service de la formation continue, Cowansville, Yvon Blais, 2013, pages 60, 61, 62.]

- **Section 13 – Ownership of copyright – Works are not acquests but private property – Works sold are proceeds and acquests.**

*Droit de la famille — 19884**, 2019 CarswellQue 4198 (Que. Sup. Ct.; 2019-05-14) Turcotte J.

[43] L'épouse demande le partage de la valeur des œuvres exécutées pendant le mariage mais non encore vendues. Elle désire obtenir l'équivalent de la moitié du prix auquel elles sont offertes en vente, moins la commission à laquelle le galeriste a droit.

[44] Pour sa part, l'époux plaide que les œuvres en question sont des propres et que seuls les revenus qui sont perçus au cours du régime sont des acquêts, conformément à l'article 458 du *Code civil du Québec* [...]

[45] L'auteur Brigitte Lefebvre [Fn 4 Brigitte LEFEBVRE, « Droit d'auteur, droit matrimonial et droit successoral », dans *Un cocktail de*

droit d'auteur = *A Copyright Cocktail*, Montréal, Les Éditions Thémis, 2007.] enseigne que **les modalités d'exploitation d'une œuvre appartiennent à l'auteur, qui seul détient un droit de regard quant à la disposition de sa création. Elle écrit que ce lien intime entre l'auteur et son œuvre justifie de qualifier cette dernière à titre de bien propre [...]**

[49] Le Tribunal est d'opinion que l'on ne peut assimiler les œuvres au produit du travail de l'époux. Le mot « *produit* » utilisé à l'article 449 C.c.Q. désigne les diverses sources de revenus gagnés en raison d'un travail tels le salaire, les honoraires, les commissions, les avantages sociaux, une indemnité tenant lieu de préavis et une compensation monétaire pour congés de maladie non utilisés [Fn 7 Alain ROY, « Commentaire sous l'article 449 », dans Benoît MOORE (dir.), *Code civil du Québec : Annotations – Commentaires*, 3^e éd., Montréal, Éditions Yvon Blais, 2018, p. 422.]. En somme, ce ne sont que les revenus perçus de la vente des œuvres, au cours du régime, qui sont des acquêts.

[50] Les œuvres qui n'ont pas été vendues au cours du mariage sont demeurées des propres puisque seul l'auteur, en l'occurrence l'époux, a le droit de les exploiter comme il l'entend.

[51] Elles ne sont pas sujettes à partage.

- **Section 13 — Ownership of copyright — Copyright royalties are income resulting from work performance.**

*N.G. v Québec (Travail, Emploi et Solidarité sociale)**, 2019 CanLII 55514 (QC TAQ; 2019-06-10) Gouveia and Dieudonné JJ.

[102] La partie intimée a déposé la décision L.S. [Fn22 2018 CanLII 67566 (QC TAQ), 2018 QCTAQ 03458], avec l'objectif d'établir que les droits d'auteur ne peuvent être considérés comme des revenus de travail. Le Tribunal semblait être d'accord avec la position que « la prestation de travail doit alors être exécutée dans la même période où les prestations d'aide de dernier recours lui sont versées ».

[103] Dans le cas spécifique de Madame L.S., le Tribunal a basé son raisonnement sur le ratio decendi [*sic*] de la décision de la formation dans l'affaire d'I.G. c. Québec (Emploi et Solidarité sociale) [Fn23 2006 CanLII 75268 (QC TAQ), SAS-Q-111031-0409].

[127] Dans l'affaire C.B. et R.B. c Québec (Emploi et Solidarité sociale) [Fn 28 SAS-Q-050729-9907/SAS-Q-050783-9907], les requérants ne contestaient pas qu'ils aient perçu des redevances de droit d'auteur. Ils estimaient que l'intimé aurait dû étaler les montants

sur une période de douze mois. Au sujet de la nature de ces avantages pécuniaires, le Tribunal a écrit :

« ... il est indéniable que les argents ici perçus ne sont pas le fruit d'activités ponctuelles : ils sont l'expression de ventes réalisées tout au long d'une année, consécration d'une œuvre passée. Les modalités d'attribution de telles redevances (versements semestriels) ne sauraient altérer cette réalité, cela tombe sous le sens »

[128] Le Tribunal a conclu que les redevances de droit d'auteur étaient des revenus de travail.

[131] Dans la cause de P.V. c. Québec (Emploi et Solidarité sociale) [Fn30 SAS-Q-104531-0401], les revenus en cause référaient surtout à des droits d'auteur [Fn31 Page 4 de la décision SAS-Q-104531-0401, paragraphe 5]. Le Tribunal indique d'emblée que les montants sont « assimilés à des revenus de travail qui sont répartis sur une période de douze mois et bénéficient de l'exemption applicable aux revenus de travail. »

[132] Quant à l'argument du requérant que le travail a été fait antérieurement à la période en litige, il est écrit que :

« Le Tribunal ne peut non plus souscrire à l'argumentation du requérant à l'effet que les droits d'auteur ont été versés pour du travail fait antérieurement à la période en litige et que pour ce motif il n'y a pas lieu de les comptabiliser.

Avec déférence pour l'opinion contraire, cette interprétation est contraire à l'esprit de la Loi et à l'interprétation jurisprudentielle.

L'article 27 de la Loi précitée applicable en l'espèce précise en effet que la situation d'un prestataire est analysée mensuellement afin de déterminer l'aide à verser et le calcul est effectué en fonction des besoins prévalant au dernier jour du mois précédent desquels sont soustraits les revenus ou avantages possédés par le prestataire ce jour. »

[133] En 2009, le Tribunal est encore appelé à répondre à la question de savoir comment qualifier des revenus de redevance de la Société canadienne des auteurs, compositeurs et éditeurs de musique (SOCAN) dans l'affaire M.-A.B. c G.G. c Québec (Emploi et Solidarité sociale) [Fn32 SAS-M-134168-0707, 2009 CanLII 14954 (QC TAQ), 2009 QCTAQ 03742]. Le requérant était auteur-compositeur-interprète. L'intimé considérait le versement du montant de 119.35 \$ comme une ressource financière. Le requérant considérait ce paiement comme un revenu de travail. Après avoir examiné les

articles 27 et 100 de la *Loi sur le soutien du revenu et favorisant l'emploi et la solidarité sociale* [Fn33 L.R.Q., c.S-32.001.], relativement à la notion de revenu de travail, et l'article 88 du Règlement, le Tribunal conclut que :

« La notion de revenu de travail n'est définie ni dans la Loi ni dans le Règlement. Le sens commun de ces mots amène le Tribunal à conclure qu'il s'agit d'un revenu que l'on reçoit en contrepartie d'une prestation de travail. »

[134] Dans cette affaire de M.-A.B., le banc dit être en accord avec la décision du Tribunal dans l'affaire *G.G. c Québec (Emploi et Solidarité sociale)* et ajoute que :

« le montant de la redevance de droits d'exécution publique versé au requérant par la SOCAN découle d'une prestation de travail du requérant qui constitue bel et bien un revenu de travail qu'il a reçu à titre d'éditeur de ses propres chansons. »

[147] Selon la définition prévue à l'article 44 du Règlement, l'expression « revenus de travail » vise toute rémunération accordée pour l'exécution d'un travail. **Si le législateur avait voulu attacher une limite temporelle, en édictant que la prestation doit être effectuée de manière contemporaine au versement de l'aide financière, il avait le loisir de le faire, lorsqu'il a procédé aux modifications législatives, ou à n'importe quel autre moment.**

- **Section 13 — Ownership of copyright — The owner of the initial negative is no longer considered as the author of the photograph — Copyright ownership does not trump privacy considerations.**

Morin v. Boizette (Asahi Photo), 2019 QCCQ 3800 (Que. Ct. — Small Claims; 2019-06-25) Guénard J.

[Plaintiffs displeased with the quality of the wedding photographs]

[49] Certes, la *Loi sur le droit d'auteur* ne prévoit plus, en effet, comme le défendeur semble l'avoir plaidé après le mariage, que le client est le «premier titulaire du droit d'auteur» dans des circonstances comme celles de l'espèce. En effet, l'ancien article 13 (2) de ladite Loi, qui le prévoyait, fut abrogé en 2012.

[50] Ceci dit, cette abrogation de l'article 13 (2) de ladite Loi n'a pas fait en sorte d'abroger le principe à l'effet que les parties à un contrat sont tenues de respecter ce qui a été valablement conclu – bref, de respecter les obligations valablement convenues entre celles-ci.

[51] Or, en l'espèce, la preuve claire et non contredite établit **que les parties ont convenu, spécifiquement, que le défendeur n'allait pas utiliser, à moins d'un consentement exprès, les photos des demanderesses**, et ce, pour les motifs mentionnés au présent

Jugement, tel qu'explicité en plus amples détails par les demanderesses lors du Procès.

- **Section 13 — Ownership of copyright — A copyright assignment does not constitute a waiver of the moral rights.**

Lépine v. Municipalité de Sainte-Marcelline-de-Kildare, 2019 QCCQ 5182 (Que. Ct. — Small Claims; 2019-07-23) Choquette J.

[26] Mais le titulaire du droit d'auteur, **le demandeur en l'instance peut conférer des restrictions particulières lorsqu'il cède son droit** [Fn4 *Jac Mat inc. c. Gaz Métropolitain* 2006 QCCQ 14757]. Et c'est le cas en l'espèce alors qu'il n'accepte aucun ajout ou retrait.

- **Section 13 — Ownership of copyright — Copyright could be assigned in whole or in part, with restrictions or not.**

Robillard v. 91439 Canada ltée (Éditions de Mortagne), 2019 CarswellQue 7544 (Que. Sup. Ct.; 2019-08-19) Langlois J. [leave to appeal granted 2019 CarswellQue 11411 (Que. C.A.; 2019-12-09)].

[66] **Les droits économiques sont fondés sur une conception des œuvres artistiques et littéraires qui les considèrent essentiellement comme des objets de commerce** [Fn28 *Théberge c. Galerie d'Art du Petit Champlain inc.*, 2002 CSC 34, at para. 12].

[67] Conformément à cette conception, **ces droits peuvent être achetés et vendus en totalité ou en partie, d'une façon générale ou avec des restrictions** [Fn29 *Théberge c. Galerie d'Art du Petit Champlain inc.*, 2002 CSC 34, at para. 13].

[69] Règle générale, sous le régime de la L.D.A., qui est de tradition anglaise et contrairement à la tradition civiliste, les droits économiques sur une œuvre une fois cédés, ne permettent donc pas au titulaire du droit d'auteur de conserver le contrôle sur les usages ultérieurs de son œuvre par des tiers acquéreurs de copies autorisés [Fn30 *Théberge c. Galerie d'Art du Petit Champlain inc.*, 2002 CSC 34, at para. 65].

[70] La tradition civiliste quant à elle confère à l'auteur un droit de destination, c'est-à-dire de contrôler dans une large mesure l'utilisation ultérieure des copies autorisées de son œuvre [Fn31 *Théberge c. Galerie d'Art du Petit Champlain inc.*, 2002 CSC 34, at para. 63].

- **Section 13 — Ownership of copyright — To ascertain if the author is an employee of a freelancer, recourse could be made to labour law principles.**

Keatley Surveying Ltd v. Teranet Inc., 2019 CarswellOnt 15110 (S.C.C; 2019-09-26) Abella J. (majority) [reference omitted] [affirming 2016 CarswellOnt 7233 (Ont. C.A.;

2017-09-08), which was affirming 2017 CarswellOnt 14961 (Ont. Sup. Ct.; 2016-02-19)].

[60] It is worth noting that s. 13(3) of the *Act* states that an employer will be the first owner of the copyright of a work produced by an employee in the course of their employment, or some other person under a contract of service. This means that the Crown will own copyright in works produced by its employees created in the course of their employment. **Because s. 13(3) generally only applies if the author is an employee and not a freelancer or independent contractor, a determination of whether the employer owns the copyright requires recourse to labour law principles.** The relationship between the parties must be analysed to determine if the author is an independent contractor or under the control of whoever is paying him or her (*Intellectual Property Law*, at p. 125 [Vaver, David. *Intellectual Property Law: Copyright, Patents, Trade-marks*, 2nd ed. Toronto: Irwin Law, 2011]).

- **Section 13 – Ownership of copyright – Royalties are work.**

*G.G. c Québec (Travail, Emploi et Solidarité sociale)**, 2019 CanLII 100760 (Que. Adm. Trib.; 2019-10-22) Gill J.

[14] La preuve contemporaine démontre que la somme reçue équivaut à des droits d’auteur tel qu’indiqué dans le contrat d’utilisation et d’exclusivité [Fn8 2019 CanLII 55514 (QC TAQ), 2019 QCTAQ 064, à la page 9].

[15] La jurisprudence du Tribunal considère **qu’un droit d’auteur est un revenu de travail** au sens de la réglementation [Fn9 [2005] T.A.Q. 771, paragraphes 5 et 44; SAS-M-074968-0203, paragraphe 16 et 2019 CanLII 55514 (QC TAQ), 2019 QCTAQ 0645 paragraphes 149] La soussignée partage cet avis.

- **Section 13 – Ownership of copyright – The sale of an operating business includes all the assets, including copyright, to continue the business.**

Corus Radio Inc v Harvard Broadcasting Inc, 2019 CarswellAlta 2449 (Alta Q.B. - Int. inj.; 2019-11-18) Dilts J.

[35] **Both under the *Copyright Act* and at common law, the author of a work is the owner of the copyright in the work:** *Copyright Act* section 13(1). For Corus to own the copyright, either the original author must have been an employee of WIC, or WIC must have been assigned ownership in the work by the original author. Section 34.1(b) of the *Copyright Act* provides that in any civil proceedings taken under the *Copyright Act* in which the defendant puts in issue the plaintiff’s claim to the copyright, the author of the work shall be presumed to be the owner of the copyright unless otherwise proved.

[36] The evidence I have is that Corus acquired WIC's radio broadcasting business as an operating business. While the Master Agreement forming part of the WIC Transaction **does not specify all of the intellectual property acquired by Corus, in the absence of evidence to the contrary it is reasonable to conclude that the sale of the operating business included all of the authorities needed to operate that business, including the authorities relating to intellectual property.** That expectation is reinforced by the uncontroverted evidence both from the trademark registry and Mr. Phillip's evidence that the POWER 92 Logo was in use as early as 1991 in respect of the operation and promotion of a radio station.

- **Section 13 – Ownership of copyright – Assignment are to be interpreted purposively and in a commercially reasonable manner.**

McNab v. Burton, 2019 CarswellOnt 19631 (Ont. Sup. Ct.; 2019-11-29) Nishikawa J.

Should the Respondent be Required to Provide the Code?

[16] The Applicants rely on s. 5.8 of the First SHA to argue that the Flow Tracker 2.0 and FT Cryptor are the property of FTI. Section 5.8 states:

Inventions

Each Shareholder/Employee, Shareholder and Nominee agrees that if he shall develop any product, derivative, concept, process, system or improvement related in any way to the business of the Corporation of any kind, he shall promptly notify all the Directors of the Corporation and shall provide the Corporation with all necessary information or documentation related thereto without compensation of any kind whatsoever. Each Shareholder/Employee, shareholder and nominee acknowledges that any such product, derivative, concept, process, system or improvement shall become the exclusive property of the Corporation without compensation or reservation of rights of any kind whatsoever.

[17] The Respondent opposes on the basis that s. 5.8 applies to inventions, as indicated by the heading, which are items that may be patented. The Respondent submits that s. 5.8 was not intended to apply to software, which would be protected by copyright. The Respondent also points to a patent held by Mr. McNab's over the first version of Flowtracker, which is held by a corporation owned wholly by him, to argue that it was not intended that a shareholder's innovation would become the property of FTI. The Respondent further argues that s. 5.8 is prospective, and he performed the bulk of the work on FTCryptor before becoming a shareholder of FTI.[18] **In my view, s. 5.8 cannot be read as narrowly as the Respondent suggests. The reference to “product, derivative, concept,**

process, system or improvement” was intended to be broad and to cover intellectual property developed by employees or shareholders. This broad interpretation is further supported by the words “related in any way to the business of the Corporation of any kind[.]”

[19] Moreover, FTI has only one product, Flowtracker 2.0. FTCryptor is an integral part of that software. Interpreting s. 5.8 purposively, and in a commercially reasonable manner, [Fn1 *GATX Corp. v. Hawker siddeley Canada Inc.* (1996), 1996 CanLII 8286 (ON SC), 27 B.L.R. (2d) 251, at para. 38] FTI would be expected to maintain ownership over the software that is at the core of its business. An interpretation that would find that FTI did not own such software, or elements essential to its functioning, would not be commercially reasonable. The Respondent appears to have recognized this when in August 2016, he published FTCryptor with a copyright notice in FTI's name. While the Applicants developed a work-around after the Respondent refused to return the Code, this does not mean that it was not necessary to FTI's business.

[20] Based on my interpretation of s. 5.8, the Code is the property of FTI and must be returned to it by the Respondent

- **Section 14 — Limitation where author is first owner of copyright — Reversion does not apply to collective works — For reversion to apply, the author must be the first owner of the copyright.**

Drouin (Succession de Côté-Drouin) v. Pepin, 2019 CarswellQue 1922 (Que. Sup. Ct.; 2019-03-13) Lucas J.

[241] De toute évidence, l'article 41(1) [sic, should read 14(1)] ne s'applique pas aux œuvres reconnues en l'instance, le DNCF (tome 3) et les généalogies de Gabriel Drouin, lesquelles [sic] se qualifient de recueils au sens de la LDA et tombent sous l'exception du paragraphe 2 [de l'article 14].

[242] Subsidiairement, soulignons que pour toutes les collections ou œuvres du Fonds Drouin, le cas échéant, la Succession se heurte au fait que l'IGD est le premier titulaire des droits sur les œuvres de ses employés [Fn218 Art. 13(3) LDA].

[243] En tout état de cause, on ne peut donc parler de réversibilité.

- **Section 14.1 — Moral rights — Moral rights include the right to claim authorship of a work — Moral rights include the right to the integrity of a work.**

Farsi v. Georges, 2019 QCCQ 2721 (Que. Ct. – Small Claims; 2019-05-07) Croteau J.

[12] La *Loi sur le droit d'auteur* [Fn6 L.R.C., 1985, c. C-42] (Loi) établit les principes généraux qui doivent guider le Tribunal dans le cadre de l'analyse d'un recours basé sur la violation des droits d'auteur et des droits moraux: [...]

- La Loi consacre également des droits moraux sur l'œuvre. **Ainsi, l'auteur d'une œuvre artistique a le droit à l'intégrité de son œuvre, de même que le droit d'en revendiquer la création** [Fn9 Article 14.1 de la Loi]. [...]

- **Section 14.1 — Moral rights — Moral right include the right to the integrity of a work — Moral rights include the right to claim authorship of a work or to remain anonymous.**

Young v. Thakur, 2019 CarswellNat 2971 (F.C.; 2019-06-20) Kane J.

[32] Subsection 14.1(1) of the Act provides that **the author of a work has the right to the integrity of the work, to be associated with the work as its author, and to remain anonymous**. Subsection 17.1(1) provides equivalent rights, specifically in association with a performer's performance. Section 28.1 provides that any act or omission that is contrary to any of the moral rights of the author or performer without their consent is an infringement.

- **Section 14.1 — Moral rights — Subjective evidence as to the attempt to the honour or reputation of an author is acceptable — Objective evidence of the prejudice will also have to be adduced — The burden of proving the prejudice lies on the author.**

Young v. Thakur, 2019 CarswellNat 2971 (F.C.; 2019-06-20) Kane J.

[34] **The jurisprudence has established that there is both a subjective and objective aspect to the test to establish infringement of moral rights. The author or performer of the works may provide evidence to establish subjectively how their honour or reputation has been affected, but there must also be objective evidence of the prejudice** (*Collett v Northland Art Company Canada Inc*, 2018 FC 269 at para 22, [2018] FCJ No 349 (QL); *Maltz v Witterick*, 2016 FC 524 at para 49, [2016] FCJ No 484 (QL); *Prise de parole Inc v Guérin Éditeur Ltée* (1995), 66 CPR (3d) 257, 104 FTR 104 (TD), aff'd (1996), 73 CPR (3d) 557, [1996] FCJ No 1427 (QL) (CA)).

[35] **The burden of proof lies on the party seeking to establish an infringement of moral rights.** The Applicants provided no evidence

or argument to support their allegation of infringement of their moral rights.

- **Section 14.1 – Moral rights – Partial reproduction of a literary work may constitute infringement of the moral right to integrity.**

Lépine v. Municipalité de Sainte-Marcelline-de-Kildare, 2019 QCCQ 5182 (Que. Ct. – Small Claims; 2019-07-23) Choquette J.

[15] Bien qu'aux yeux de plusieurs le monument soit de bon goût et les mots du demandeur parfaitement à propos, André M. Lépine est surpris et choqué, n'ayant jamais consenti à l'utilisation d'un seul quatrain sur 16, ce qui, selon lui, dénature l'œuvre.

[28] De l'avis du Tribunal, il s'agit d'une violation des droits moraux de l'auteur lesquels subsistent même lors d'une cession des droits d'auteur sur l'œuvre [Fn5 Art. 14(3) *Loi sur le droit d'auteur*].

- **Section 15 – Copyright in performer's performance – Copyright in a performer's performance is distinct from the rights in musical work – Physical ownership of the support for musical works or performer's performances does not include the copyright therein.**

Unidisc musique inc v. Agence du revenu du Québec, 2019 CarswellQue 2647 (Que. Ct.; 2019-04-02) Gouin J. [appeal 500-09-028299-196].

[59] **L'article 18 de la LDA prévoit les droits directement liés à un enregistrement sonore [...]**

[60] En vendant les bandes maîtresses, les vendeurs pouvaient ainsi céder les droits ci-dessus. Et c'est ce qu'ils ont fait mais pas plus.

[61] Dans la lettre d'interprétation [Fn39 Pièce P-4, p. 3] qui constitue la base des cotisations, on réfère à l'article 18 de la LDA. Toutefois, en raison de l'omission de référer aux autres droits protégés par d'autres articles – les droits qui ne sont pas liés à l'enregistrement sonore lui-même, mais plutôt à l'œuvre et à ses créateurs, il s'ensuit que la lettre d'interprétation est juridiquement incorrecte et incomplète.

[62] **Les articles 3, 13 et 15 de la LDA encadrent les droits des auteurs-compositeurs-interprètes, lesquels droits sont indépendants de l'enregistrement sonore et, par conséquent, ne sont pas cédés par la simple cession d'une bande maîtresse.**

- **Section 15 – Copyright in performer's performance – Ownership *per se* of sound recordings does not include the rights of the makers or of the performers.**

Unidisc musique inc v. Agence du revenu du Québec, 2019 CarswellQue 2647 (Que. Ct.; 2019-04-02) Gouin J. [appeal 500-09-028299-196].

[67] La lettre d'interprétation [Fn41 Pièce P-4] **assimile erronément les droits d'auteur applicables à une oeuvre musicale aux droits intimement liés à l'enregistrement sonore**. Le témoignage de M. Cuccuzella, président d'Unidisc est cohérent avec la législation canadienne sur le droit d'auteur.

[68] En effet, Unidisc sait ce qu'elle achète et ce qu'elle n'achète pas : elle achète les bandes maîtresses et les droits inextricables des bandes maîtresses protégés par l'article 18. Elle est consciente de ce qu'elle devra déboursier et à qui au moment de mettre en marché les CD ou les compilations électroniques tirées des bandes maîtresses.

[69] En achetant des bandes maîtresses, elle achète la meilleure qualité de l'enregistrement sonore à partir de laquelle les copies vont pouvoir être tirées et ainsi mises en marché.

[70] La qualité de l'enregistrement sonore n'a rien à voir avec les droits protégés aux articles 3, 13 et 15, ni même 18 de la *LDA*. En fait, la qualité de l'enregistrement sonore a tout à voir avec la qualité du support physique, soit sa conservation dans des conditions optimales, sa protection contre les altérations et les vols, et finalement sa manipulation par des professionnels consciencieux selon les règles de l'art lors de la confection des copies.

[71] Unidisc, conformément aux contrats [Fn42 Pièces P-1, D-6 (également P-2), D-7, D-8], n'achète donc ni les droits d'auteurs-compositeurs-interprètes, ni ceux des producteurs (« publishers ») au sens de la *LDA*.

[72] Quand l'ARQ affirme que les bandes maîtresses n'ont aucune valeur sans les droits associés aux oeuvres, ce qui est incorrect, ceci équivaut à confondre l'ensemble des droits protégés aux articles 3, 13, 15 et 18 de la *LDA*.

[73] **Quand l'ARQ conclut qu'Unidisc a acquis, par l'acquisition des bandes maîtresses, les droits des auteurs-compositeurs-interprètes et producteurs, ceci est contraire à la LDA, au libellé même des contrats et à la commune intention des parties**, de même qu'au témoignage non contesté et non contredit de M. Cucuzella.

- **Section 17.1 — Moral rights — Performers in their performance benefit of moral rights.**

Young v. Thakur, 2019 CarswellNat 2971 (F.C.; 2019-06-20) Kane J.

[32] Subsection 14.1(1) of the Act provides that the author of a work has the right to the integrity of the work, to be associated with the work as its author, and to remain anonymous. **Subsection 17.1(1) provides equivalent rights, specifically in association with a performer's performance.** Section 28.1 provides that any act or omission that is contrary to any of the moral rights of the author or performer without their consent is an infringement.

- **Section 17.1 — Moral rights — Subjective evidence as to the attempt to the honour or reputation of an author is acceptable — Objective evidence of the prejudice will also have to be adduced — The burden of proving the prejudice lies on the author.**

Young v. Thakur, 2019 CarswellNat 2971 (F.C.; 2019-06-20) Kane J.

[34] The jurisprudence has established that there is both a subjective and objective aspect to the test to establish infringement of moral rights. The author or performer of the works may provide evidence to establish subjectively how their honour or reputation has been affected, but there must also be objective evidence of the prejudice (*Collett v Northland Art Company Canada Inc*, 2018 FC 269 at para 22, [2018] FCJ No 349 (QL); *Maltz v Witterick*, 2016 FC 524 at para 49, [2016] FCJ No 484 (QL); *Prise de parole Inc v Guérin Éditeur Ltée* (1995), 66 CPR (3d) 257, 104 FTR 104 (TD), aff'd (1996), 73 CPR (3d) 557, [1996] FCJ No 1427 (QL) (CA)).

[35] The burden of proof lies on the party seeking to establish an infringement of moral rights. The Applicants provided no evidence or argument to support their allegation of infringement of their moral rights.

- **Section 18 — Copyright in sound recordings — Copyright in a sound recording does not include *per se* the copyright in the musical work or in the performer's performance embedded in the sound recording.**

Unidisc musique inc v. Agence du revenu du Québec, 2019 CarswellQue 2647 (Que. Ct.; 2019-04-02) Gouin J. [appeal 500-09-028299-196].

[59] L'article 18 de la LDA prévoit les droits directement liés à un enregistrement sonore [...]

[60] En vendant les bandes maîtresses, les vendeurs pouvaient ainsi céder les droits ci-dessus. Et c'est ce qu'ils ont fait mais pas plus.

[61] Dans la lettre d'interprétation [Fn39 Pièce P-4, p. 3] qui constitue la base des cotisations, on réfère à l'article 18 de la LDA. **Toutefois, en raison de l'omission de référer aux autres droits protégés par d'autres articles – les droits qui ne sont pas liés à**

l'enregistrement sonore lui-même, mais plutôt à l'œuvre et à ses créateurs, il s'ensuit que la lettre d'interprétation est juridiquement incorrecte et incomplète.

[62] Les articles 3, 13 et 15 de la LDA encadrent les droits des auteurs-compositeurs-interprètes, lesquels droits sont indépendants de l'enregistrement sonore et, par conséquent, ne sont pas cédés par la simple cession d'une bande maîtresse.

- **Section 18 – Copyright in sound recordings – Copyright in musical works shall not be confused with copyright in the sound recording in which they are incorporated.**

Unidisc musique inc v. Agence du revenu du Québec, 2019 CarswellQue 2647 (Que. Ct.; 2019-04-02) Gouin J. [appeal 500-09-028299-196].

[67] La lettre d'interprétation [Fn41 Pièce P-4] assimile erronément les droits d'auteur applicables à une oeuvre musicale aux droits intimement liés à l'enregistrement sonore. Le témoignage de M. Cuccuzella, président d'Unidisc est cohérent avec la législation canadienne sur le droit d'auteur.

[68] En effet, Unidisc sait ce qu'elle achète et ce qu'elle n'achète pas : elle achète les bandes maîtresses et les droits inextricables des bandes maîtresses protégés par l'article 18. Elle est consciente de ce qu'elle devra déboursier et à qui au moment de mettre en marché les CD ou les compilations électroniques tirées des bandes maîtresses.

[69] En achetant des bandes maîtresses, elle achète la meilleure qualité de l'enregistrement sonore à partir de laquelle les copies vont pouvoir être tirées et ainsi mises en marché.

[70] La qualité de l'enregistrement sonore n'a rien à voir avec les droits protégés aux articles 3, 13 et 15, ni même 18 de la LDA. En fait, la qualité de l'enregistrement sonore a tout à voir avec la qualité du support physique, soit sa conservation dans des conditions optimales, sa protection contre les altérations et les vols, et finalement sa manipulation par des professionnels consciencieux selon les règles de l'art lors de la confection des copies.

[71] Unidisc, conformément aux contrats [Fn42 Pièces P-1, D-6 (également P-2), D-7, D-8], n'achète donc ni les droits d'auteurs-compositeurs-interprètes, ni ceux des producteurs (« publishers ») au sens de la LDA.

[72] Quand l'ARQ affirme que les bandes maîtresses n'ont aucune valeur sans les droits associés aux oeuvres, ce qui est

incorrect, ceci équivaut à confondre l'ensemble des droits protégés aux articles 3, 13, 15 et 18 de la *LDA*.

[73] Quand l'ARQ conclut qu'Unidisc a acquis, par l'acquisition des bandes maîtresses, les droits des auteurs-compositeurs-interprètes et producteurs, ceci est contraire à la *LDA*, au libellé même des contrats et à la commune intention des parties, de même qu'au témoignage non contesté et non contredit de M. Cucuzella.

- **Section 21 — Copyright in communication signals — Only a broadcaster may have rights in a communication signal.**

Dhillon v. Bernier, 2019 CarswellNat 1518 (F.C.; 2019-05-03) Lafrenière J. [motion to extend the time to appeal refused 19-A-34 (F.C.A.; 2019-07-23); action dismissed on procedural grounds, 2019 FC 1194 (F.C.; 2019-09-20); appeal A-403-19].

[36] At paragraphs 22 and 23 of the Statement of Claim, the Plaintiffs claim that copyright subsists in a communication signal first broadcast on July 1, 2015 and that Mr. Dhillon has been using and broadcasting the communicating signal since that time. If I understand the claim correctly, Mr. Dhillon is asserting the exclusive right to produce or reproduce the words "People's Party of Canada" in any material because the words appeared in an article about him and he has shared the article with others by e-mail or other electronic means.

[37] There are special rules for subject matter other than works as defined in the *Copyright Act*. **With regard to communication signals, only a "broadcaster" may have a copyright in a communication signal.** Section 21 gives a broadcaster copyright in its communication signals including the compilation of all the programs, advertisements and other content that make up the signal transmitted by the broadcaster: *Interbox Promotion Corp v 9012-4314 Québec Inc*, 2003 FC 1254 at paragraph 18.

Section 21 — Copyright in communication signals — Broadcasters' copyright in communication signals does not include the right to authorize their retransmission by broadcast distribution undertakings.

Retransmission of Distant Television Signals, Re, 2019 CarswellNat 4088 (Cop. Bd.; 2019-08-02), the Board.

[165] Thus, subsection 31(2) of the Act does not create an exception to the rights associated with the signals themselves, nor a corresponding right to receive royalty payments with respect to the retransmission of the signals themselves. **The copyright held by broadcasters in communication signals under section 21 of the Act is limited and does not create the right to authorize or prohibit the retransmission of communication signals by BDUs.**

[Fn140 *Reference re Broadcasting Regulatory Policy*, *supra* note 135 at paras 50, 59].

- **Section 27 – It is an infringement to do an act that only the copyright owner has the right to do.**

Pyrrha Design Inc. v. Plum and Posey Inc., 2019 CarswellNat 210 (F.C.; 2019-01-30) Phelan J. [appeal A-98-19].

[120] Subsection 27(1) of the Act provides that it is an infringement for any person to do anything that the owner of the copyright has the right to do. One of those rights is the sole right to produce or reproduce the work or any substantial part thereof in any material form (s 3(1)). Infringement will also occur where there is a colourable imitation of the work (s 2).

- **Section 27 – Infringement generally – Copyright infringement occurs when someone does something absent an authorization from the copyright owner.**

Madail Monzon v. Aptitude X inc., 2019 QCCQ 871 (Que. Ct. – Small Claims; 2019-02-20) Zoar J

[25] Cette situation de faits porte à conséquence **puisque la règle cardinale de la LDA veut qu'une œuvre protégée par le droit d'auteur ne puisse être utilisée sans autorisation [...]**

- **Section 27 – Infringement generally – An authorization must be clear.**

Madail Monzon v. Aptitude X inc., 2019 QCCQ 871 (Que. Ct. – Small Claims; 2019-02-20) Zoar J

[42] **Aptitude ne peut en effet prétendre avoir une autorisation valide en se limitant à demander « Can I show your art on the website of the company? ». Ici, il aurait fallu informer M. Truong que six œuvres dûment identifiées seraient utilisées pour diffusion sur différentes plateformes, à différentes fins et pour une période déterminée.** Encore plus essentiel, M. Truong devait savoir qu'il ne tirerait aucun bénéfice de cette utilisation puisque son nom n'apparaîtrait nulle part.

[43] En l'absence de ces informations, Aptitude ne peut certainement pas soutenir avoir reçu une autorisation libre et éclairée de M. Truong.

- **Section 27 – Infringement generally – Posting of a literary work is reproduction – Reproduction of a work requires authorization.**

Thomson v. Afterlife Network Inc., 2019 CarswellNat 1479 (F.C.; 2019-05-01) Kane J.

[37] **The postings on Afterlife's website provide evidence that it reproduced the original works.** The evidence provided by the Applicant and Class Members establishes that they did not give permission to Afterlife to do so. The evidence also establishes that

some Class Members asked Afterlife to remove their original works. Afterlife removed some but refused to remove others. **Afterlife did not take any steps to remove all the content or to seek permission from the authors once concerns were brought to its attention.** Afterlife shut down the website only after the Applicant launched this Application. The evidence also establishes that the director of Afterlife then set up another obituary website.

- **Section 27 – Infringement generally – Inclusion without authorization of a protected photograph on a website is infringement.**

Farsi v. Georges, 2019 QCCQ 2721 (Que. Ct. – Small Claims; 2019-05-07) Croteau J.

[12] La *Loi sur le droit d’auteur* [Fn6 L.R.C., 1985, c. C-42] (Loi) établit les principes généraux qui doivent guider le Tribunal dans le cadre de l’analyse d’un recours basé sur la violation des droits d’auteur et des droits moraux: [...]

- Enfin, la Loi définit ce qui constitue une violation des droits d’auteur et des droits moraux:
 - De façon générale, il s’agit de l’accomplissement d’un acte que seul le titulaire du droit d’auteur a la faculté d’accomplir en vertu de la Loi et pour lequel il n’a pas consenti[Fn10 Article 27.1 de la Loi]. [...]

[19] Ainsi, à la lumière de la preuve prépondérante, le Tribunal conclut que M. Georges **a violé les droits d’auteur de M. Farsi en intégrant, sans son consentement, la Photographie sur la plateforme Wixsite dont il se servait pour diffuser son *curriculum vitae*.**

- **Section 27 – Infringement generally – Reproduction or communication of a protected work requires authorization from the copyright owner.**

Portraits Rembrandt ltée v. Interdonato (Ikono), 2019 QCCQ 5878 (Que. Ct. – Small Claims; 2019-07-26) Choquette J.

[22] Les droits d’auteur appartiennent de manière exclusive au titulaire de droits. **Une autorisation est donc nécessaire pour reproduire, présenter ou communiquer une œuvre** tels une photographie, un livre, ou un article de journal [Fn9 Art.3. LDA]. La Loi prévoit également certaines exceptions qui permettent d’utiliser une œuvre protégée ou une partie de celle-ci sans le consentement préalable du titulaire de droits [Fn10 Art. 29 L’utilisation équitable d’une œuvre aux fins d’étude privée, de recherche, d’éducation, de parodie ou de satire ne constitue pas une violation du droit d’auteur].

- **Section 27 – Infringement generally – Subsection 27(1) relates to primary infringement while subsection 27(2) relates to secondary infringement.**

Pourshian v. Walt Disney Company, 2019 CarswellOnt 16536 (Ont. Sup. Ct.; 2019-10-15) Graham, Master.

[13] As stated, the plaintiff's action is for damages for infringement of copyright under Canada's *Copyright Act*, RSC 1985, c. C-42. The applicable sections of the *Act* are s. 3, which defines "copyright" and particularizes the sole rights of the owner of the copyright in a work, **s. 27(1) which defines primary infringement of a copyright, and s. 27(2) which defines secondary infringement.**

- **Section 27 – Infringement generally – The *Copyright Act* is territorially limited to Canada – Distribution, exposing, offer for sale or rental, importation into Canada constitute secondary infringement**

Pourshian v. Walt Disney Company, 2019 CarswellOnt 16536 (Ont. Sup. Ct.; 2019-10-15) Graham, Master.

[39] I accept that Pourshian's claims are exclusively under **the *Copyright Act*, which has no application outside Canada** (SOCAN, *supra* [Society of Composers, Authors and Music Publishers of Canada v. Canadian Association of Internet Providers, 2003 SCC 45]). However, as concluded above, **the alleged conduct of Walt Disney Pictures Inc. in distributing *INSIDE OUT* for release in Canada, or importing the film into Canada for the purpose of distributing or exhibiting it, would amount to secondary infringement in Canada of Pourshian's copyright** under s.27(2)(b) and (e) of the *Act*. Further, the conduct of both Pixar and Walt Disney Pictures Inc. in carrying on business in Ontario by allowing *INSIDE OUT* to be shown in Ontario theatres, such as to "expose or offer [it] for sale or rental, or exhibit [it] in public", would constitute secondary infringement in Canada under s.27(2)(c) of the *Act*.

[41] In summary, **the production of *INSIDE OUT* by Pixar and Walt Disney Pictures Inc., in part for the purpose of carrying on business in Ontario, and the release of *INSIDE OUT* by Walt Disney Pictures Inc. for distribution to theatres in Canada, do create a good arguable case of a real and substantial connection between the claims against those defendants and Ontario.** This conduct on the part of the defendants Pixar and Walt Disney Pictures Inc. would constitute secondary infringement of Pourshian's copyright in his *Inside Out* in Ontario, such that the presumptive connecting factors are not rebutted.

- **Section 27 – Infringement generally – Secondary infringement necessitates three elements: primary infringement, knowledge and sale or distribution.**

Voltage Pictures, LLC v. Salna, 2019 FC 1412 (F.C.; 2019-11-12) Boswell J. [appeal A-439-19].

[70] CIPPIC maintains that Voltage has not pleaded the facts necessary to make out a case of secondary infringement under section 27(2) of the *Copyright Act*. **It says the three elements that must be proven to establish secondary infringement are: (i) a primary infringement; (ii) a secondary infringer should have known that he or she was dealing with a product of infringement; and (iii) the secondary infringer sold, distributed, or exposed for sale the infringing goods.** According to CIPPIC, since Voltage has not pleaded any of these facts, it does not meet the plain and obvious test.

- **Section 27 – Infringement generally – Subsection 27(1) relates to primary infringement while subsection 27(2) relates to secondary infringement – Secondary infringement necessitate three elements: primary infringement, knowledge and sale or distribution.**

Voltage Pictures, LLC v. Salna, 2019 FC 1412 (F.C.; 2019-11-12) Boswell J. [appeal A-439-19].

[75] Subsection 27(1) of the *Copyright Act* describes what is known as "primary infringement" (*Excellence Inc. v Kraft Canada Inc.*, 2007 SCC 37 at para 17 [*Excellence*]). It provides that it is an infringement of copyright for any person, without the copyright owner's consent, to do anything that only the owner has the right to do under the *Copyright Act*. Section 3 of the *Copyright Act* sets out the catalogue of rights that a copyright owner possesses under the *Copyright Act*. These rights include the sole right to produce and reproduce copies of the copyrighted work, and to communicate the work to the public by telecommunication.

[76] With respect to secondary infringement, the Supreme Court of Canada has held that **three elements must be proven to establish this cause of action under subsection 27(2) of the *Copyright Act*: (i) a primary infringement; (ii) the secondary infringer should have known that he or she was dealing with a product of infringement; and (iii) the secondary infringer sold, distributed or exposed for sale the infringing good** (*CCH Canadian Ltd. v Law Society of Upper Canada*, 2004 SCC 13 at para 81 [*CCH*]; *Excellence* at para 19).

- **Section 28.1 – Infringement generally [moral rights] – Absence of authorization is required for infringement of moral rights to occur – Reproduction without credit to the author infringes author's moral right to be associated with the work.**

Farsi v. Georges, 2019 QCCQ 2721 (Que. Ct. – Small Claims; 2019-05-07) Croteau J.

[12] La *Loi sur le droit d'auteur* [Fn6 L.R.C., 1985, c. C-42] (Loi) établit les principes généraux qui doivent guider le Tribunal dans le cadre de l'analyse d'un recours basé sur la violation des droits d'auteur et des droits moraux: [...]

- Enfin, la Loi définit ce qui constitue une violation des droits d'auteur et des droits moraux: [...]
- En outre, **tout acte ou omission non autorisé et contraire aux droits moraux de l'auteur constituera une violation au sens de la Loi** [Fn11 Article 28.1 de la Loi].

[20] De plus, le Tribunal conclut que M. Georges a aussi violé les droits moraux de M. Farsi. **Il n'est pas question ici d'une transformation de la Photographie portant atteinte à son intégrité, mais plutôt d'une reproduction effectuée avec omission de crédit de son auteur**, violant ainsi les droits moraux de M. Farsi.

- **Section 28.2 — Nature of right of integrity — There is both a subjective and an objective aspect to the test to establish infringement of moral rights — Use of a work in association with a product infringe the right to integrity.**

Thomson v. Afterlife Network Inc, 2019 CarswellNat 1479 (F.C.; 2019-05-01) Kane J.

[41] The interpretation of section 28.2 has been the subject of more recent jurisprudence [Ed. : *Maltz v Witterick*, 2016 FC 524 and *Collett v Northland Art Company Canada Inc*, 2018 FC 269], including in this Court, which highlights **that there is both a subjective and objective aspect to the test to establish infringement of moral rights**.

[45] The evidence establishes that Afterlife associated the original works with a product or service, even though there was little connection between the two, by adding the sale of ads, flowers and candles to the pages displaying obituaries. **Clearly the original works have been used in association with these products.**

[47] The Applicant argued that honour is based on self-perception, while reputation is adjudged by others, and noted that section 28.2 speaks to prejudice to honour *or* reputation. The Applicant also argued that significant weight should be given to the author's view whether prejudice has occurred. However, the jurisprudence has established that there is both a subjective and objective element to establishing that the author's honour *or* reputation has been prejudiced. In other words, **it is not only prejudice to reputation that requires objective evidence. The author of the original works must, therefore, establish not only their own subjective view that their honour or reputation has been prejudiced but also provide objective evidence of the prejudice.** Although the Applicant is sincere in her belief that both her honour and reputation have been prejudiced, no

objective evidence has been provided, such as public opinion or expert evidence. All the evidence describes the Class Members' own view of the impact on their dignity and the dignity of their deceased loved ones. I have not been directed to any authority, **nor have I found any, that suggests that the Court can make its own determination regarding prejudice to honour or reputation without objective evidence.**

- **Section 28.2 — Nature of right of integrity — Absence of authorization is required for infringement of moral rights to occur.**

Lépine v. Municipalité de Sainte-Marcelline-de-Kildare, 2019 QCCQ 5182 (Que. Ct. — Small Claims; 2019-07-23) Choquette J.

[32] Il [the Defendant] **lui appartenait de s'assurer et non de présumer qu'elle possédait les autorisations requises d'utiliser l'œuvre du demandeur de la façon dont elle le fut** alors qu'il a clairement exprimé la condition d'aucun ajout – aucun retrait, ce qui va de l'essence même de l'œuvre en acrostiche. Rien ne permet au public, observateur de la stèle, de comprendre l'essence de l'œuvre du demandeur au vu des deux séries de deux lignes inscrites dans le marbre.

- **Section 28.2 — Nature of right of integrity — The integrity of a work is attacked only if the use causes prejudice to the honour or reputation of the author — The sale of tired or damaged books does not amount to an infringement of the moral right of integrity.**

Robillard v. 91439 Canada ltée (Éditions de Mortagne), 2019 CarswellQue 7544 (Que. Sup. Ct.; 2019-08-19) Langlois J. [leave to appeal granted 2019 CarswellQue 11411 (Que. C.A.; 2019-12-09)].

[100] Robillard fait valoir que la vente des exemplaires sous forme abimée et à vil prix a pour conséquence que l'Œuvre est autrement déformée, ce qui porte atteinte d'une manière préjudiciable à l'honneur et à la réputation de l'auteur et viole le droit à l'intégrité de l'Œuvre.

[101] Il est vrai que contrairement aux droits économiques « les droits moraux restreignent de façon permanente l'utilisation que les acheteurs ... peuvent faire d'une œuvre une fois que son auteur s'en est départi » [Fn43 *Théberge c. Galerie d'Art du Petit Champlain inc.*, 2002 CSC 34, at para. 22].

[102] **Toutefois, l'article 28.2(1) prévoit qu'il y a violation du droit moral de l'auteur à l'intégrité de l'œuvre que si celle-ci est, d'une manière préjudiciable à l'honneur ou à la réputation de l'auteur, déformée, mutilée ou autrement modifiée.**

[103] Les contrats définissent l'oeuvre comme étant le manuscrit du tome visé par le contrat d'édition.

[104] **Or, il n'y a eu aucune déformation, mutilation ou modification du manuscrit lequel est demeuré intact, la vente de livres abimés étant celle de livres dont la mise en forme seulement est modifiée.**

- **Section 29 — Research, private study, etc. — An act falling within the fair dealing exception does not constitute infringement — The onus to prove that the dealing is fair is upon the defendant.**

Albo v. The Winnipeg Free Press, 163 C.P.R. (4th) 126 (Man. Q.B.; 2019-02-22) Saull J.

[63] Counsel provided me with numerous authorities respecting principles of copyright law that are relevant to this matter. A synthesis of these authorities is provided below: [...]

o) Sections 29 and 29.2 of the *Act* provide that the reproduction of a work will not be an infringement of copyright if it constitutes “fair dealing”.

p) Where “fair dealing” is raised, **“the onus is on a defendant to prove that his or her dealing with a work has been fair. Any act falling within the “fair dealing” exception will not be an infringement of copyright.** The “fair dealing” exception, like other exceptions in the *Act*, is a user’s right” (*CCH* at para. 48) [*CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13].

- **Section 29 — Research, private study, etc — Liberal interpretation is to be given to the exception — Fair dealing is a user’s right.**

Albo v. The Winnipeg Free Press, 163 C.P.R. (4th) 126 (Man. Q.B.; 2019-02-22) Saull J.

[63] Counsel provided me with numerous authorities respecting principles of copyright law that are relevant to this matter. A synthesis of these authorities is provided below: [...]

q) **“Research” and “news reporting” must be given a large and liberal interpretation in order to ensure that users’ rights are not unduly constrained. The words must be considered from the perspective of the user or consumer** (*Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36 (CanLII) (“SOCAN”) at para. 11, *CCH* at para. 51 [*CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13]), and *Warman v. Fournier*, 2012 FC 803 (CanLII) (“*Warman*”) at para. 31).

- **Section 29 — Research, private study, etc. — Research can be piecemeal, informal, exploratory, or confirmatory — The threshold for the categorization of the activity is low.**

Albo v. The Winnipeg Free Press, 163 C.P.R. (4th) 126 (Man. Q.B.; 2019-02-22) Saull J.

[63] Counsel provided me with numerous authorities respecting principles of copyright law that are relevant to this matter. A synthesis of these authorities is provided below: [...]

r) “Research” can include activities that do not demand the establishment of new facts or conclusions. It can be piecemeal, informal, exploratory, or confirmatory. **It can in fact be undertaken for no purpose except personal interest. The first step in the “fair dealing” analysis (identifying which category applies) is a low threshold** (SOCAN at paras. 22 and 27 [*Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36]).

- **Section 29 — Research, private study, etc. — Research is to be given a liberal interpretation — For the fair dealing exception to apply, there are two prongs: characterization of the activity and a dealing which is fair — The threshold for the categorization of the activity is low.**

Albo v. The Winnipeg Free Press, 163 C.P.R. (4th) 126 (Man. Q.B.; 2019-02-22) Saull J.

[100] A “fair dealing” analysis implicates two stages.

[101] At the first stage, the Court must determine if the use of the materials falls within either of the “fair dealing” provisions in the *Act*, i.e. if the use of the materials by the Press constitutes “research” or “news reporting” (see: Sections 29 and 29.2 of the *Act*). As noted in SOCAN (at para. 27) [*Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36]), **the terms “research” and “news reporting” are to be given a broad and liberal interpretation and the threshold for meeting the requirements is low.**

[102] The second stage of the analysis requires the Court to consider if the dealing was “fair”. [...]

- **Section 29 — Research, private study, etc. — In the analysis of the fairness of the dealing, consideration must be given to i) the purpose, ii) the character, iii) the amount, iv) the alternatives, v) the nature of the work, and vi) effect.**

Albo v. The Winnipeg Free Press, 163 C.P.R. (4th) 126 (Man. Q.B.; 2019-02-22) Saull J.

The purpose of the dealing

[103] Provided that the dealing is for one of the allowable purposes of the Act, i.e. research, private study, criticism, review or news reporting, it will be considered fair. **The Court must undertake an objective assessment of the user's real purpose (or motive) in using the copyrighted work** (*CCH* at para. 54) [*CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13].

[104] Here, the quotations were used by the Press in its research and writing of articles that were later republished as the Book. The publications were for the “purpose” of circulating information to the general public to read and learn about the development of the City of Winnipeg.

The character of the dealing

[105] As to the “character” of the dealing, the Court must consider **whether the dealing was fair in the context of the custom or practice of the particular trade or industry** i.e. the media industry (see: *CCH* at para. 55) [*CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13]. Here, the quotations were obtained by Turner, an experienced journalist and feature writer, who used the quotations to help develop the articles that later were released as the Book. The quotations were used for no other purpose. In my view, therefore, the character of the dealing weighs in favour of fairness.

The amount of the dealing

[106] **The “amount” of the dealing must be considered within the context of the purpose of the dealing** (see: *CCH* at para. 56) [*CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13]. As noted above, Dr. Albo was quoted along with many, many other sources. In fact in this case, one of Dr. Albo's complaints is that the Press only used a “snippet” of his research and then “took the project in its own direction”. In that circumstance, it can hardly be said that Dr. Albo was quoted too much.

Alternatives to the dealing

[107] Nor is there any indication in this case that the Press acted unfairly by not using an “alternative” to the quotes from Dr. Albo. Dr. Albo was paid for his research and time he spent assisting Turner. In addition, Dr. Albo was clearly seeking exposure himself.

The nature of the work

[108] With respect to the “nature of the work”, in *CCH* (at para. 58 [*CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13])) the Supreme Court of Canada stated “... if a work has not been published, the dealing may be more fair in that its reproduction with

acknowledgement could lead to a wider public dissemination of the work – one of the goals of copyright law”.

[109] Here Dr. Albo had not published anything himself on the City Beautiful Movement. Dr. Albo was acknowledged by the Press as the source of the quotations within the articles and the Book. The articles and later the Book were publicly disseminated thereby leading to a wider public dissemination of his Work. To my mind, this tips the scales towards finding that the dealing was fair.

The effect of dealing on the work

[110] The last consideration is the effect that the dealing will have on the work. **In that regard “if the reproduced work is likely to compete with the market of the original work” that may tend to suggest that the dealing is not fair.** That is not the case here. Dr. Albo has no publication on the market that is capable of competing with the Book.

[111] All of these factors, taken together, lead me to conclude that, even if Dr. Albo held copyright in the statements quoted from him, the use of the quotations fall comfortably within the compass of “fair dealing” and would not be an infringement of Dr. Albo’s copyright.

- **Section 29 – Research, private study, etc. – There is no exception for satire in the *Trademarks Act* – Commercial use, existence of alternatives, colourable imitation in style and presentation, competition for the same market are factors to be considered.**

MédiaQMI inc. v. Murray-Hall, 2019 CarswellQue 4291 (Que. Sup. Ct.; 2019-05-21) Perreault J. [appeal 500-09-028399-194 discontinued (Que. C.A.; 2019-10-24)].

[63] D’abord, le recours de QMI se fonde sur la LMC et sur son enregistrement de la marque de commerce *Le Journal de Montréal* et non sur le droit d’auteur. **L’exception de satire et de parodie n’existe pas sous le régime de la LMC.** De plus, le nouveau logo du *Journal de Montréal* n’a pas fait l’objet d’un enregistrement de droit d’auteur.

[64] Quoi qu’il en soit, l’utilisation faite par Murray-Hall ne rencontre pas le test établi par la Cour suprême dans l’arrêt *CCH Canadienne Ltée c. Barreau du Haut-Canada* [Fn 42 *CCH Canadienne Ltée c. Barreau du Haut-Canada*, 2004 CSC 13 (CanLII), [2004] 1 R.C.S. 339, par. 52-59] afin de déterminer ce qu’il faut entendre par «équitable» [...]

[65] Qu’en est-il en l’espèce?

- 1) La reproduction par Murray-Hall est **faite à des fins commerciales**,

- 2) *Le Journal de Mourréal* **reproduit la façon** dont *Le Journal de Montréal* traite la nouvelle, y compris son graphisme caractéristique dans la présentation visuelle de ses publications,
- 3) Il s'agit d'une **reproduction continue** sur plusieurs années de manière régulière et non d'une reproduction unique et isolée comme dans le cas du magazine *Croc* ou de *RBO*,
- 4) De **nombreuses autres alternatives existent**. En effet, la publication de nouvelles fictives issues ou non de l'actualité peut se faire sans créer de confusion avec la marque *Le Journal de Montréal*. D'ailleurs, c'est ce que fait Murray-Hall avec sa publication anglophone *WNDR*,
- 5) Le critère concernant la nature de l'œuvre ne s'applique pas dans le cas présent,
- 6) *Le Journal de Montréal* et *Le Journal de Mourréal* **tentent tous deux d'attirer un lectorat sur les réseaux sociaux**.

- **Section 29 — Research, private study, etc. — Plagiarism is not covered by the fair use exception.**

*Samson v. Deputy Head (Department of Justice)**, 2019 CarswellNat 2214 (Fed. Pub. Sect Lab Rel. Emp. Bd.; 2019-04-19) M.-C. Perreault, Member [appeal A-147-19].

[244] Section 29 creates the exception of fair dealing to infringement and reads as follows: "29 Fair dealing for the purpose of research, private study, education, parody or satire does not infringe copyright."

[245] The case [*CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13] was concerned with whether copyright fees had to be paid for photocopying. **The Supreme Court ruled that as long as the materials were used for research or study purposes, no fees were owed the publishers.**

[246] **From that, the grievor somehow extrapolated that the Supreme Court of Canada allowed copying in the context of providing advice. She did not seem to understand that photocopying has nothing to do with providing a memo for which the employer pays an employee to make a legal analysis.**

[247] The grievor argued before me that all the respondent's decision makers had largely ignored her arguments about plagiarism, namely, Mr. Fothergill (who imposed the written reprimand), Ms. Moore (who imposed the one-day suspension), Mr. Bickert (who imposed further suspensions and the termination), and Johanne Bernard, the assistant deputy minister and chief financial officer (who wrote the final-level responses for all the grievances).

[248] On the contrary, I find that those decision makers did indeed consider the grievor's arguments but found that they had no basis in law. I agree.

- **Section 29 — Research, private study, etc. — Fair dealing illustrates the balance between the rights of authors and those of the users.**

Keatley Surveying Ltd v. Teranet Inc, 2019 CarswellOnt 15110 (S.C.C; 2019-09-26) Abella J. (majority) [affirming 2016 CarswellOnt 7233 (Ont. C.A.; 2017-09-08), which was affirming 2017 CarswellOnt 14961 (Ont. Sup. Ct.; 2016-02-19)].

[46] **Fair dealing is, of course, only one component of Canada's copyright law.** It is, however, an emblematic one as it presents a clear snapshot of the general approach to copyright law in Canada — an approach which balances the rights of creators of works and their users. As Professor Michael Geist has noted, the users' rights framework, so integral to Canadian copyright law, is "increasingly cited as the paradigm example for emphasizing both creator and user rights" (Michael Geist, "Introduction", in Michael Geist, ed., *The Copyright Pentalogy: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (2013), iii, at p. iv). All provisions of the *Copyright Act*, including s. 12, must be interpreted with this balance in mind so that the *Copyright Act* continues to further the public interest.

- **Section 29.2 — News reporting — News reporting must be given a liberal interpretation.**

Albo v. The Winnipeg Free Press, 163 C.P.R. (4th) 126 (Man. Q.B.; 2019-02-22) Saull J.

[63] Counsel provided me with numerous authorities respecting principles of copyright law that are relevant to this matter. A synthesis of these authorities is provided below: [...]

q) "Research" and **"news reporting" must be given a large and liberal interpretation** in order to ensure that users' rights are not unduly constrained. The words must be considered from the perspective of the user or consumer (*Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36 (CanLII) ("SOCAN") at para. 11, *CCH at para. 51* [*CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13]), and *Warman v. Fournier*, 2012 FC 803 (CanLII) ("Warman") at para. 31).

- **Section 29.2 — News reporting — Includes recounting information taken elsewhere.**

Albo v. The Winnipeg Free Press, 163 C.P.R. (4th) 126 (Man. Q.B.; 2019-02-22) Saull J.

[63] Counsel provided me with numerous authorities respecting principles of copyright law that are relevant to this matter. A synthesis of these authorities is provided below: [...]

s) “News reporting” by a media outlet includes activities by that outlet which promulgate information recounted elsewhere (*Warman* at para. 31 [*Warman v. Fournier*, 2012 FC 803], *CCH* at para. 51 [*CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13]), *SOCAN* at para. 11) [*Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36].

- **Section 31 – Interpretation [Retransmission] – BDU are authorized to simultaneously retransmit the work carried in a local signal without authorization by the copyright owner – Royalties are payable by the BDU in the case the simultaneous retransmission of the works in a distant signal.**

Retransmission of Distant Television Signals, Re, 2019 CarswellNat 4088 (Cop. Bd.; 2019-08-02), the Board.

[161] **Retransmitters**, in this case referred to as BDUs [broadcast distribution undertakings], **are required to pay the retransmission tariff to compensate for the communication to the public by telecommunication of the copyright-protected works carried by distant signals.** These works include the programs carried by the signals and the “broadcast day” compilations created by the broadcasters. As a matter of law, **the BDUs are not required to compensate broadcasters for the retransmission of the signals themselves.**

[162] The retransmission right contained in section 31 of the Act was enacted in 1988 pursuant to the *Canada-United States Free Trade Agreement Implementation Act* to give effect to Article 2006 of the Canada-United States Free Trade Agreement. [Fn 133 Act, *supra* [R.S.C., 1985, c. C-42, hereinafter the “Act”] note 2; *Canada-United States Free Trade Agreement Implementation Act*, SC 1988, c 65, ss. 61-65; *Canada-United States Free Trade Agreement*, 1987[CUFTA].] [...]

[163] The Supreme Court of Canada has stated that the *Copyright Act’s* objectives – of “encouraging creativity and providing reasonable access to the fruits of creative labour” – are furthered through “a carefully balanced scheme that creates exclusive economic rights for different categories of creators” while giving due weight to the limited nature of these rights through specific exemptions. [Fn 135 *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, [2012] 3 SCR 489 [*Reference re Broadcasting*

Regulatory Policy] at para 36]. **Section 31 of the Act maintains this careful balance by creating a class of users' rights applicable to BDUs in conjunction with a compulsory licence regime that compensates the owners of copyright for use of their works.** [Fn136 *Ibid* at paras 54-56; Act, *supra* note 2].

[164] The copyright owner's right to communicate the work to the public by telecommunication pursuant to paragraph 3(1)(f) of the Act captures the activity of retransmission. [Fn137 *Reference re Broadcasting Regulatory Policy*, *supra* note 135 at paras 53-54, 58.] The Supreme Court of Canada, in *Reference re Broadcasting Regulatory Policy CRTC 2010-167*, stated that subsection 31(2) is directed at narrowing the scope of the owner's right under paragraph 3(1)(f), by "circumscrib[ing] the right of copyright owners to control the retransmission of literary, dramatic, musical or artistic works carried in signals." [Fn138 *Ibid* at para 54 (emphasis in original)] **Subsection 31(2) of the Act entitles BDUs to simultaneously retransmit the literary, dramatic, musical or artistic works carried in a local signal, without authorization by or payment to the copyright owner, and in the case of distant signals, allows simultaneous retransmission of the works contained in the signals subject to the payment of royalties.** [Fn139 *Ibid* at paras 54, 56-57; Act, *supra* note 2]

[166] The Supreme Court of Canada has distinguished the respective scope and function of sections 21 and 31 of the Act by noting that the "*Copyright Act* seeks to regulate the economic rights in communication signals, as well as the retransmission of works by BDUs." [Fn141 *Ibid* at para. 52] **As such, the retransmission regime only engages the rights of broadcasters in their capacity as owners of copyright in the works contained in distant signals.** [Fn142 *Ibid* at paras 51, 59.]

- **Section 31 – Interpretation [Retransmission] – CRTC's objectives cannot conflict with the purpose of the *Copyright Act*.**

Bell Canada v. Canada (Attorney General), 2019 CarswellNat 788 (S.C.C.; 2019-12-19) [reversing 154 C.P.R. (4th) 85 (F.C.A.; 2017-12-18)].

[The majority is of the view that it was not necessary to discuss this point raised by the dissenting judges Abella and Karakatanis JJ.].

[96] Finally, Bell and the NFL argue that the CRTC's [Canadian Radio-Television and Telecommunications Commission] interpretation of s. 9(1) (h) [of the *Broadcasting Act*, S.C. 1991, c11] conflicts with the operation and purpose of the *Copyright Act*. **It is well established that the purpose of the *Copyright Act* is to balance authors' and users' rights and that the CRTC may not choose to pursue its objectives in ways that are incompatible with the purposes of the**

Copyright Act or which operationally conflict with its specific provisions: *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, at para. 45. But given the NFL's repeated submission that "[U.S.] advertising is not even part of the Super Bowl game or covered by the NFL's copyright, much less integral to the Super Bowl", it can hardly come as a surprise that the CRTC adopted the same position: A.R., vol. II, at p. 115 (emphasis added). We agree with Near J.A. that there is no operational conflict with the *Copyright Act*. The NFL submits that the Super Bowl Order conflicts with s. 31(2) (c) of the *Copyright Act* because it is not "required or permitted by or under the laws of Canada". As the Court of Appeal pointed out, however, this submission ignores that the Order was validly made pursuant to s. 9(1)(h) of the *Broadcasting Act* and by way of s. 4(3) of the *Simultaneous Substitution Regulations*. Finally, we see nothing wrong with the CRTC's conclusion that the international treaties raised by the parties are permissive and do not *require* simultaneous substitution. There is therefore no conflict of purpose.

- **Section 32.1 – No infringement – Disclosure of copyrighted material pursuant to a provincial access to information scheme is not infringing.**

*Vandergoot (Re)**, 2019 CarswellSask 182 (Sask. I.P.C.; 2019-04-05) Kruzeniski, Commissioner

[38] Additionally, Dr. Vandergoot's response to the Applicant's request and submission also took the position that the test question booklets could not be released due to 'copyright laws.' In Review Report 052-2017 [*Saskatchewan Power Corporation (Re)*, 2018 CanLII 5138, <https://www.canlii.org/en/sk/skipc/doc/2018/2018canlii5138/2018canlii5138.html> (Sask. I.P.C.; 2018-02-08)], my office considered the application of the federal *Copyright Act* to information that the government institution had identified as containing third party information:

[30] Although the term "copyright" is not contemplated under FOIP [*The Freedom of Information and Protection of Privacy Act*], the third party has put forward arguments of copyright and that the appraisal firm has copyright of the report. The third party asserts, "...that the intentional and/or forced release of the appraisal will infringe on [third party's] copyright to the integrity of its work in accordance with the *Copyright Act*, RSC 1985 c. C-42...."

[31] Subsection 32.1(1)(a) of the *Copyright Act* provides:

32.1(1) It is not an infringement of copyright for any person
(a) to disclose, pursuant to the Access to Information Act,
a record within the meaning of that Act, or to **disclose**,

pursuant to a like Act of the legislature of a province,
like material;

[32] In Saskatchewan, FOIP and The Local Authority Freedom of Information and Protection of Privacy Act (LA FOIP) would both constitute, "...a like Act of the legislature of a province..." Whether or not the third party holds copyright of the appraisal is irrelevant because the release of it under FOIP is not an infringement of copyright.

[40] I find the same analysis would apply to HIPA [*Health Information Protection Act*], as such release of the records in response to an access to information request pursuant to HIPA would not be an infringement of copyright.

- **Section 32.1 – No infringement – A copyright notice has a limited purpose.**

*PIPEDA Report of Findings No. 2019-001, Re**, 2019 CarswellNat 1076 (Off. Priv. Comm. Can.; 2019-04-09) Therrien, Commissioner.

[103] Equifax Canada notes that its affiliation with Equifax Inc. is also signaled to consumers by a copyright note in the footer of all Equifax.ca websites, including pages describing both products delivered directly by Equifax Canada, and those delivered through Equifax Inc, that says: "Copyright [date] Equifax Inc. All rights reserved. Equifax and the Equifax marks used herein are trademarks of Equifax Inc." **However, consumers would not reasonably expect or look to a copyright notice in a footer for notice of a transfer of information to a third party.**

- **Section 32.1 – No infringement – As a result of academic freedom, professor's material is not under the control of the educational institution and is exempt from production under an access to information request.**

*Lukits v. Treasury Board (Department of National Defence)**, 2019 CarswellNat 1680 (Fed. Pub. Sect. Lab. Rel. Emp. Bd.; 2019-01-13) Jaworski, Member

[Right of federal military college to request production of professor's course notes under the *Access to Information Act*. – Not a record under the control of a federal institution.]

[143] Article 5 of the collective agreement sets out in very broad language the common law principles ascribed to the concept of academic freedom. I agree and accept that the relationship between a university and its academic staff is different in some respects from the standard employer-employee relationship because of the concept of academic freedom, **recognizing that academic freedom is not an umbrella and catch-all for everything and anything done by a university's teaching staff.**

[144] Broadly speaking, the difference is marked by those documents and materials that are largely administrative. Documents that would be covered by academic freedom, as set out in the jurisprudence, have been identified as documents and records created by teaching staff related to their teaching and research.

[145] Given my finding that the course notes are in the grievor's control and not the College, **if the College attempted to force the production of them, it would be a breach of article 5 of the collective agreement, as it would be an attempt by the employer to force the production of material created for and in the course of teaching and research that is otherwise protected by the principle of academic freedom.**

[150] The course notes were entered into evidence. The whole purpose of the grievance and the issue before me was whether they constitute a record under the control of a government institution. The purpose of the grievance was to state that they are in the grievor's control and so not subject to the AIA. Not sealing them would in essence defeat the purpose of the grievance process by putting them in the public domain, where they would be accessible to anyone.

- **Section 32.1 – No infringement – Disclosure of copyrighted material pursuant to a provincial access to information scheme is not infringing.**

*Côté Chabot Morel Architectes v. Assemblée nationale**, 2019 CarswellQue 10113 (Que. Comm. Acc. Inf.; 2019-09-19) Khuong, Member.

[15] D'ailleurs, l'article 32.1 (1) a) de la *Loi sur le droit d'auteur* [Fn3 L.R.C. (1985), c. C-42] prévoit que **la communication d'un document en vertu d'une loi d'accès provinciale ne constitue pas une violation du droit d'auteur.** L'article 12 [of the *Access to Information Act*] ne vise donc pas à restreindre l'accès à un document, mais plutôt à rappeler que son utilisation par le demandeur doit se faire dans le respect des droits de propriété intellectuelle applicable [Fn4 *Juneau c. Québec (Ville de)*, [1989] C.A.I. 245].

- **Section 32.1 – No infringement – Reasonable prospect of copyright litigation may prevent the disclosure of documents requested under the *Freedom of Information and Protection of Privacy Act*.**

*University of Western Ontario (Re)**, [2019] O.I.P.C. 271 (Ont. I.P.C.; 2019-12-10) Loukidelis, adjudicator

[26] Whether the appellant is a "copyright troll" is not at issue, states Western in reply; what matters, the university says, is that its legal counsel was aware the appellant was enforcing copyright through litigation against other parties and the appellant's dealings with the university matched the facts in those litigated cases. Western adds that the

intent of the appellant to sue the university is not relevant, **because the legal test is whether it was reasonable to contemplate litigation in the circumstances and the evidence establishes that it was so.**

[32] If litigation does not already exist, more than a vague or general apprehension of litigation is required to satisfy the requirement that the preparation have [sic] been “in contemplation of litigation.” [Fn11 Orders PO-2323, MO-2609 and MO-3161.] As the university submits, relying on *Carlucci* [*Carlucci v Laurentian Casualty Co. of Canada*, 1991 CarswellOnt 444 (Ont. Sup. Ct.)], *supra*, there need be only a “reasonable prospect” that goes beyond a “suspicion.” Based on all of the evidence, I am satisfied that litigation was reasonably contemplated at the time the records at issue were created. While the appellant says, now, that he has not, and indeed could not, sue Western under the *Copyright Act*, the relevant time to assess the reasonableness of the contemplation of litigation is the time at which the records were created. **I find, therefore, that at the material time, the information available to Western’s lawyer was such that copyright infringement litigation by the appellant against the university was reasonably contemplated.**

- **Section 32.2 – Permitted acts – What are charitable activities.**

*Church of Atheism of Central Canada v. Canada (National Revenue)**, 2019 CarswellNat 7174 (FCA; 2019-11-29) Rivoalen J.

[8] Because the Act does not define “charitable activities”, we must turn to the common law to answer this question. At common law, there are four recognized charitable purposes, the two relevant to this appeal being “the advancement of religion” and “certain other purposes beneficial to the community” (*A.Y.S.A. Amateur Youth Soccer Association v. Canada (Revenue Agency)*, 2007 SCC 42, [2007] 3 S.C.R. 217, at paragraph 26 [A.Y.S.A]).

[9] **The common law has established specific requirements for both the “advancement” and the “religion” portions of that head of charity. “Advancement” requires active promotion; it is not enough that an organization create space for independent worship** (*Fuaran Foundation v. Canada (Customs and Revenue Agency)*, 2004 FCA 181, 324 N.R. 78, at paragraph 14). The present appeal is concerned more with the definition of the word “religion”.

[10] For something to be a “religion” in the charitable sense under the *[Income]* Act, either the Courts must have recognized it as such in the past, or it must have the same fundamental characteristics as those recognized religions. These fundamental characteristics are not set out in a clear “test”. **A review of the jurisprudence shows that fundamental characteristics of religion include that the followers have a faith in a higher power such as God, entity, or Supreme Being; that followers worship this higher power; and that the religion consists of a particular and comprehensive system of faith and worship** (*Syndicat Northcrest v. Amseleum*, 2004 SCC 47, [2004] 2 S.C.R. 551, at paragraph 39).

[26] One further word on the registration of an organization as a charity under the Act. There is no dispute that such registration is a privilege, not a right (*Many Mansions Spiritual Center, Inc. v. Canada (National Revenue)*, 2019 FCA 189, at paragraph 6). The privilege of registration as a charity functions as an indirect tax subsidy to encourage the work of registered charities. The Supreme Court of Canada has found that, **in reviewing applications, the Minister is obliged to look at the substance of the purpose and activities of the applicant to ensure they comply with the requirements in the Act** (*Canadian Magen David Adom for Israel v. Canada (Minister of National Revenue)*, 2002 FCA 323, 293 N.R. 144, at paragraphs 2-3; *A.Y.S.A.* at paragraph 42). That is precisely what the Minister had done in this case.

- **Section 34 – Remedies [civil] —Malicious intent of a copyright owner is no defense but may be considered in awarding costs.**

Pyrrha Design Inc. v. Plum and Posey Inc., 2019 CarswellNat 210 (F.C.; 2019-01-30) Phelan J. [appeal A-98-19].

[76] **Bad faith/malicious intent of the copyright owner is not a defence to infringement or a bar to the recognition of copyrights.** The vigour with which the Plaintiff pursued Hardy can equally be attributed to an honest belief that Hardy was infringing the Plaintiff's rights which negates bad faith or malice. The Plaintiff's record on this issue is spotty in light of its shifting position on which designs had been infringed and its use of Notices to gain a 10-day online delisting of Plum and Posey's products. On balance I conclude that the Plaintiff was motivated by a reasonable belief in their dispute against the Defendants. **Some of these matters may go toward the level of costs awarded but not to the core issues in this litigation.**

- **Section 34 – Remedies [civil] — A person seeking to assert a right shall prove the facts on which his claim is based, the defences are to be examined.**

Carpentier v. Fabricville Co. inc., 2019 CarswellQue 2867 (Que. Ct. – Small claims; 2019-02-08) Nolet J.

[25] L'article 2803 C.c.Q. indique que « Celui qui veut faire valoir un droit doit prouver les faits qui soutiennent sa prétention. [...] ». Ainsi, sous réserve de la compétence d'attribution de la Division des petites créances à entendre le litige, **il revient à madame Carpentier de prouver que le dessin des tissus vendus par Beau-Fab est un dessin contrefait de son dessin JYLG**. À cette fin, pour autant que son dessin soit une œuvre au sens de la LDA, elle bénéficiera de la présomption légale prévue à celle-ci.

[26] Si madame Carpentier s'acquitte de son fardeau de preuve, il y aura lieu d'analyser les moyens de défense de Fabricville et de Beau-Fab.

- **Section 34 – Remedies [civil] – Moral damages may result from copyright infringement.**

Carpentier v. Fabricville Co. inc., 2019 CarswellQue 2867 (Que. Ct. – Small claims; 2019-02-08) Nolet J.

[45] De plus, **la situation a causé des dommages moraux à madame Carpentier dont le fait de constater que l'on s'est approprié son œuvre unilatéralement et sans son consentement**. Elle a mentionné en avoir été affectée d'autant plus qu'il est difficile de gagner sa vie en tant qu'artiste. Ainsi, le fait d'utiliser son travail artistique sans lui en reconnaître le mérite l'a blessée. Cette violation de son droit d'auteur lui a également causé de nombreux troubles et inconvénients.

- **Section 34 – Remedies [civil] – Norwich orders are not governed by the Copyright Act.**

ME2 Productions, Inc. v. Doe, 2019 CarswellNat 405 (F.C.; 2019-02-21) Pentney J. [appeal A-106-19 discontinued 2019-09-06, appeal A-107-19 discontinued 2019-09-13 and appeal A-108-19 discontinued 2019-09-13].

[112] I find this is in error in several respects. First, the question of whether TekSavvy is prejudiced by this evidence may be pertinent, but it is far from determinative of the essential question. As is made clear in *BMG [BMG Canada Inc v Doe, 2005 FCA 193]*, and resoundingly affirmed in *Rogers Communications [Rogers Communications Inc v Voltage Pictures, LLC, 2018 SCC 38]*, **the Court must consider the interests of the copyright owner, but it must also be concerned to protect the interest of the individual subscribers whose names are subject to disclosure**.

[113] Second, while a “purposive” interpretation of the [*Copyright*] Act is undoubtedly important, **that legislation does not govern the granting of a *Norwich* order**. The two regimes must operate “in

tandem,” but the ultimate protection against wrongful disclosure of subscribers’ names, and the breach of privacy and public exposure that may be associated with it, rests with the Court. This is reflected in the final element of the test in *BMG*: “... the public interest in favour of disclosure must outweigh the legitimate privacy concerns of the person sought to be identified if a disclosure order is made” (para 36).

[114] These are weighty matters and the Court is entitled to demand the best available evidence to be filed in support of a motion seeking the extraordinary equitable relief of a *Norwich* order.

- **Section 34 – Remedies [civil] – In an application to a *Norwich* order all the relevant information must be disclosed.**

ME2 Productions, Inc. v. Doe, 2019 CarswellNat 405 (F.C.; 2019-02-21) Pentney J. [appeal A-106-19 discontinued 2019-09-06, appeal A-107-19 discontinued 2019-09-13 and appeal A-108-19 discontinued 2019-09-13].

[73] I will say more on this issue later, but at this stage I would simply note that it is incumbent on an applicant seeking a *Norwich* order to ensure that it has disclosed all relevant information to the Court, and that its material is organized in a manner which can be easily understood and verified. While I accept Prothonotary Aalto’s [the Case Management Judge] finding that the errors here reflect the growing pains associated with implementing a new regime, I note that all of the parties have now had several years to adjust. Materials from copyright owners seeking *Norwich* orders should now be organized and complete. The Court, the subscribers whose privacy interests are affected by such extraordinary orders, and the ISPs to whom the order will be directed, deserve no less.

- **Section 34 – Remedies [civil] – Being the foreign copyright owner of material used in Quebec may subject this owner to the jurisdiction of Quebec Courts.**

*A v. Watch Tower Bible and Tract Society of Canada**, 2019 CarswellQue 1512 (Que. Sup. Ct.; 2019-02-27) Corriveau J. [leave to appeal granted 2019 CarswellQue 4858 (Que. C.A.; 2019-06-03)].

[26] La société WTPA publie de la littérature et les ouvrages bibliques dont elle détient les droits d’auteur qui sont diffusés à travers le monde, incluant au Canada.

[27] Pour le Tribunal, le fait que la société WTPA détienne les droits d’auteur et agisse comme organisme qui élabore la documentation et assure sa diffusion, crée un lien entre cette société américaine et les membres de la communauté des *Témoins de Jéhovah* qui adhèrent aux dictats qui y sont inscrits, y compris au Canada. Les *Anciens*, les membres et les victimes

alléguées d'agression sexuelle au Canada suivent ces enseignements de façon stricte.

[29] Cette documentation contient les règles qui lient les *Anciens* et les membres. **Les fautes alléguées sont issues des règles diffusées et imposées aux membres. Cela est suffisant pour établir un lien d'attachement** au sens de l'article 3148(3) C.c.Q.

- **Section 34 — Remedies [civil remedies] — It is unethical for a lawyer to draft proceedings claiming unfounded amounts in damages.**

*Barreau du Québec (syndic ad hoc) v. Brouillette**, 2019 QCCBDQ 20 (Conseil de discipline – Barreau du Québec; 2019-04-12), the Board [re-rectifying *Barreau du Québec (syndic ad hoc) v. Brouillette*, 2017 QCCDBQ 085 (Conseil de discipline – Barreau du Québec; 2017-11-03); appeals 500-07-001033-194 and 500-07-001034-192].

[Under count 1, the respondent was reckless and interfered with the proper administration of justice by participating in and allowing proceedings denoting a propensity for overbidding out of all proportion to the actual litigation between the parties and / or delaying tactics and / or for the purpose of harming or adopting an attitude which goes against the requirements of good faith are undertaken and continued]

[296] Le troisième sous-paragraphe du chef 1 de la plainte reproche à M^e Brouillette de réclamer au nom de ses clients la somme de 500 000 \$ en violation du droit de la propriété intellectuelle de ces derniers sans fondement juridique apparent.

[297] Comme le remarque le juge Castonguay, les sommes réclamées sont « considérables » à ce chapitre.

[298] La preuve présentée devant le Conseil par M^e Brouillette n'explique toujours pas de quelle manière la réclamation de 500 000 \$ a été évaluée et déterminée.

[299] Aussi, M^e Brouillette ne démontre pas comment les Turgeon pouvaient alléguer être les détenteurs de la propriété intellectuelle. Les allégués de la requête introductive d'instance sont très minces à ce chapitre et son témoignage à cet égard devant le Conseil est imprécis, peu convaincant.

[300] **Or, l'évaluation des dommages en matière de propriété intellectuelle s'effectue selon des règles qui sont bien connues** [FN 559 *Robinson c. Films Cinar inc.*, 2009 QCCS 3793 (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 »** [Fn 560 *Barreau du Québec (syndic adjoint) c. Landry*, 2008 QCCDBQ 60, par. 222 et 228b. (inf. par 2011 QCTP 208 sur la question de la suffisance de la preuve; conf. par. 2014 QCCS 5476; inf. par 2017 QCCA 238 sur l'opportunité de retourner le dossier concernant la sanction); *Barreau du Québec (syndic adjoint) c. Morand*, 2011 QCCDBQ 099, par. 19, 20, 24-26, 32 et 33; Voir aussi : *Barreau du Québec (syndic adjoint) c. Dahan*, 2010 QCCDBQ 133, par. 72-79 et 124-126].

- **Section 34 — Remedies [civil remedies] — An injunction is a normal remedy for copyright infringement.**

Thomson v. Afterlife Network Inc., 2019 CarswellNat 1479 (F.C.; 2019-05-01) Kane J.

[49] **An injunction is a normal remedy for copyright infringement, in accordance with section 34 of the *Copyright Act*.** An injunction is warranted to stop Afterlife from continuing to infringe the Class Members' rights in the original works. Afterlife refused some families' requests to remove obituaries and did not take the website down until this Application was filed. I agree that the injunction should also name Mr. Leclerc, who is the director of Afterlife and has continued to post obituaries at his new website, Everhere.

- **Section 34 — Remedies [civil remedies] — Damages are a remedy for infringement — Assessing damages is a matter of discretion for the Courts.**

Thomson v. Afterlife Network Inc., 2019 CarswellNat 1479 (F.C.; 2019-05-01) Kane J.

[55] Section 34 of the *Copyright Act* provides that damages are a remedy for infringement. In class proceedings, Rule 334.28 of the *Federal Courts Rules*, SOR/98-106 provides that a judge may make any order in respect of the assessment of monetary relief due to a class, **including aggregate assessments.**

[59] **The Court has discretion in assessing how damages should be aggregated.** Compensatory damages may be a combination of damages for copyright infringement, damages for moral rights infringement, and aggravated damages. Aggregate damages are appropriate in this case given that assessing the individual damages of the Class Members, which may include over one thousand people, would be impractical, among other reasons.

- **Section 34 — Remedies [civil] — A reprehensible behavior does not always warrant punitive damages.**

Thomson v. Afterlife Network Inc, 2019 CarswellNat 1479 (F.C.; 2019-05-01) Kane J. [77] I agree with the Applicant that **Afterlife's conduct, aptly characterized as "obituary piracy", is high-handed, reprehensible and represents a marked departure from standards of decency.** The factors noted in *Bauer Hockey [Bauer Hockey Corp v Sport Masko Inc*, 2014 FCA 158] with respect to the blameworthiness of Afterlife's conduct suggest that punitive damages should be imposed. However, punitive damages are exceptional and the high threshold for their imposition has not been met in this case. The injunction, coupled with the imposition of a \$20,000,000 award against Afterlife (representing statutory damages of \$10,000,000 and aggravated damages of \$10,000,000) should be sufficient to denounce and deter Afterlife's conduct.

- **Section 34 — Remedies [civil] — Costs on a motion should follow the event — Departure is warranted when an application is baseless.**

Dhillon v. Bernier, 2019 CarswellNat 1518 (F.C.; 2019-05-03) Lafrenière J. [motion to extend the time to appeal refused 19-A-34 (F.C.A.; 2019-07-23); action dismissed on procedural grounds, 2019 FC 1194 (F.C.; 2019-09-20); appeal A-403-19].

[57] At the hearing, counsel for the Defendants requested that costs be fixed to the successful party on a solicitor and client basis in the fixed amount of \$40,000. Plaintiffs' counsel countered that costs should be in the range of \$5,000 to \$7,000, plus disbursements.

[58] **The general rule is that costs should follow the event.** The "event" in this case is the disposition of the motion. This is because the discrete issue to be determined is whether to grant an interlocutory injunction. This is not the issue at trial. The Court is concerned only to assess whether the Plaintiffs have a claim or a right that ought to be protected until trial.

[59] **Given that the Defendants were entirely successful in resisting the confusing and essentially baseless motion, I conclude that costs should be awarded at an elevated scale. Further, the Plaintiffs' alleged urgency was unjustified.** Costs are hereby fixed in the amount of \$20,000, inclusive of disbursements and taxes, payable by the Plaintiffs in any event of the cause, but not forthwith.

- **Section 34 — Remedies [civil] — Even in an undefended proceeding, an applicant must prove infringement and entitlement to the reliefs sought — The burden of proof is on a balance of probabilities.**

Young v. Thakur, 2019 CarswellNat 2971 (F.C.; 2019-06-20) Kane J.

[23] Although the Respondents have not defended this Application, **the Applicants still must establish the infringement and entitlement to the relief sought on a balance of probabilities.**

[24] As I found in *Thomson v Afterlife Network Inc*, 2019 FC 545 at paras 31-32, [2019] FCJ No 483, the Respondents' failure to participate makes the application analogous to a default judgment. As noted by Justice Rennie in *Cuzzetto v Business in Motion International Corporation*, 2014 FC 17 at para 4, 445 FTR 261:

On a motion for default judgment where no defence has been filed, every allegation in the statement of claim must be taken as denied. Evidence must be led that enables the Court to find, on a balance of probabilities, that there is liability and that the plaintiff is entitled to the remedies sought.

- **Section 34 – Copyright [Remedies] – Punitive damages are exceptional.**

Young v. Thakur, 2019 CarswellNat 2971 (F.C.; 2019-06-20) Kane J.

[52] This muddles two different concepts regarding damages. Punitive damages have not been sought, nor would they be warranted. **Punitive damages are exceptional. They are awarded where a party's conduct has been malicious, oppressive and highhanded and offends the court's sense of decency and where other remedies are not sufficient to accomplish the objectives of retribution, deterrence, and denunciation** (*Whiten v Pilot Insurance Co*, 2002 SCC 18 at paras 36, 123, [2002] 1 SCR 595). In the present case, the injunction and the statutory damages are sufficient to deter and denounce the Respondents' infringing conduct.

- **Section 34 – Copyright [Remedies] – Costs are awarded to the successful party – Costs are at the Court's discretion – When claiming outside the Tariff, evidence as to the costs shall be adduced.**

Young v. Thakur, 2019 CarswellNat 2971 (F.C.; 2019-06-20) Kane J.

[67] **Generally, costs are awarded to the successful party.** The Applicants have been partly successful. The Applicants' Counsel submitted orally that Ms. Young had incurred \$25,000 in legal costs. **However, no supporting evidence has been provided to the Court. The amount of costs is within the Court's discretion.** Taking into account all the circumstances, including the relief sought by the Applicants and the relief awarded, I find that \$2,500 is a more appropriate amount.

- **Section 34 – Copyright [Remedies] – Accounting of profits is an available remedy.**

Canada (Society of Composers, Authors and Music Publishers) v. Bano Inc. (Green Bean Java Bistro), 2019 FC 1011, (F.C.; 2019-07-26) St-Louis J.

[9] THIS COURT ORDERS that:

3. The Defendant shall permit a full and complete accounting of all such licence fees due and an audit of the Defendant's books and records

- **Section 34 – Copyright [Remedies] – Accounting of profits is an available remedy.**

Canada (Society of Composers, Authors and Music Publishers) v. Shakers Roadhouse Ltd., 2019 FC 1010 (F.C.; 2019-07-26) St-Louis J.

[9] THIS COURT ORDERS that: .

3. The Defendant shall permit a full and complete accounting of all such licence fees due and an audit of the Defendant's books and records.

- **Section 34 – Copyright [Remedies] – Accounting of profits is an available remedy.**

Canada (Society of Composers, Authors and Music Publishers) v. NLH Investments Inc. (Cowboy Ranch), 2019 CanLII 73165 (F.C.; 2019-08-06) Gascon J.

[7] THIS COURT'S JUDGMENT is that:

3. The Defendant shall permit a full and complete accounting of all such license fees due and an audit of the Defendant's books and records.

- **Section 34 – Copyright [Remedies] – Plagiarism is a misconduct and may warrant a reprimand.**

*Samson v. Deputy Head (Department of Justice)**, 2019 CarswellNat 2214 (Fed. Pub. Sect. Lab. Rel. Emp. Bd.; 2019-04-19) M.-C. Perreault, Member [appeal A-147-19].

[249] The issue in plagiarism is not the act of copying per se. The issue is taking credit for work that one has not done. The grievor does not seem to understand the importance of a lawyer providing her own opinion, after doing her own research, and indicating clearly that she or he is not the author of ideas borrowed from someone else.

[255] I find it curious that in cross-examination, the grievor strenuously denied copying the "Who wins" paper for the purposes of her confidentiality memo. After all, the gist of her arguments to the respondent, to the Board in the submissions filed with the grievance, and again in her oral argument, had been that plagiarism no longer exists and that both the Supreme Court of Canada and the *Copyright Act* allow for it, as explained earlier.

[256] **As stated by the respondent through the grievor's managers, plagiarism does exist, and it is wrong. Stealing is wrong. Taking credit for another's work, without proper attribution, is wrong. Providing legal analysis as one's own, when it has been copied from an unidentified (and unverified)**

source, is wrong. With a degree in law, after six years of university studies, the grievor should know that.

[257] The written reprimand was warranted, to sanction the misconduct.

- **Section 34 — Copyright [Remedies] — Arbitration and mediation are available in cases of copyright disputes.**

*Capital JPEG inc. v. Corporation Zone B4 Itée**, 2019 CarswellQue 6683 (Que. Sup. Ct.; 2019-07-16) Barin J.

[27] Tout comme en négociation, dans un processus de médiation les parties peuvent discuter d'un vaste éventail de sujets ou de domaines, les considérer, les régler ou transiger, tant et aussi longtemps qu'il ne s'agit pas de certaines matières considérées fondamentales au sein de l'ordre juridique québécois, ce que confirme d'ailleurs l'article 2632 C.c.Q. [Fn5_Ouellette c. Société de récupération, d'exploitation et de développement forestiers du Québec (Rexfor), EYB 1997 – 02082 C.A.]

[28] **Même si l'inverse n'est pas toujours vrai, ce qui peut être l'objet d'un arbitrage peut aussi devenir l'objet d'une médiation. Par exemple, les parties peuvent transiger sur les droits d'auteur incluant les droits moraux, comme ils peuvent les soumettre à l'arbitrage.**

- **Section 34 — Copyright [Remedies] — Recklessness does not in itself justify an award of punitive damages.**

Constellation Brands US Operations v. Société de vin internationale Itée, 2019 CarswellQue 7681 (Que. Sup. Ct.; 2019-08-21) Bachand J. [appeal 500-09-028594-190].

[38] In sum, the circumstances of the present case are far removed from the instances of plagiarism, [Fn30 *Cinar Corporation v. Robinson*, 2013 SCC 73 (CanLII); *Setym International inc. c. Belout*, 2001 CanLII 24941 (QC CS).] willful wrongdoing, [Fn31 *Microsoft Corporation v. PC Village Co. Ltd.*, 2009 FC 401 (CanLII); *Société Radio-Canada c. Amberola les disques, s.e.n.c.*, 2001 CanLII 25236 (QC CS)], deliberate confusion, [Fn32 *2703203 Manitoba Inc. v. Parks*, 2007 NSCA 36 (CanLII); *I.T. Logistics inc. c. Jitlogistic inc.*, 1999 CanLII 10882 (QC CS); *Diesel, s.p.a. c. Benisti Import-Export inc.*, 2016 QCCS 1085 (CanLII) (aff'd 2016 QCCA 997 (CanLII))], malice [Fn33 *Ateliers Tango Argentin inc. c. Festival d'Espagne et d'Amérique latine inc.*, 1997 CanLII 8852 (QC CS)] and bad faith [Fn34 *Centre de Location Ravary (Laval) Itée c. Télé-Direct (Publications) Inc.*, [1995] J.Q. No. 3309 (QC CS)] at issue in the cases Constellation sought to rely upon. The most that could be said, based on the record as it stands, is that SVI was reckless in its use of

Constellation-owned trade-marks and copyrighted materials. But, as was mentioned earlier, **“recklessness, however wild and foolhardy,” does not in itself justify an award of punitive damages.** [Fn35 *Centre de Location Ravary (Laval) ltée c. Télé-Direct (Publications) Inc.*, [1995] J.Q. No. 3309 (QC CS), para. 30]

- **Section 34 – Copyright [Remedies] – Copyright infringement entitles a plaintiff to several remedies.**

Popsockets LLC v. Case World Enterprises Ltd, 2019 CarswellNat 5165 (F.C.; 2019-09-10) Southcott J.

[39] Having found infringement under both the *Trademarks Act* and the *Copyright Act*, the Plaintiff is entitled to remedies against the Defendant. [...]. Similarly, **section 34(1) of the Copyright Act provides that, where copyright has been infringed, the owner of the copyright is, subject to the Act, entitled to all remedies** by way of injunction, damages, accounts, delivery up and otherwise that are or may be conferred by law for the infringement of a right.

- **Section 34 – Copyright [Remedies] – Costs are at the Court’s discretion.**

Constellation Brands US Operations v. Société de vin internationale ltée, 2019 CarswellQue 7681 (Que. Sup. Ct.; 2019-08-21) Bachand J. [appeal 500-09-028594-190].

[45] Constellation first invokes section 34(3) of the *Copyright Act*, which provides that the parties’ **costs in matters of copyright infringement are left to the Court’s discretion.** While a copyright infringement has been conceded by SVI, Constellation has failed in its main claim for the recovery of SVI’s profits as well as in its claim for punitive damages. For that reason, it will not be awarded its solicitor-client fees on the basis of section 34(3) of the *Copyright Act*.

- **Section 34 – Copyright [Remedies] – Admissible evidence shall be entered properly and in a timely fashion.**

Rowan Williams Davies & Irwin Inc. v. ProWise Engineering Inc., 168 C.P.R. (4th) 95 (F.C.; 2019-09-23) O’Reilly J. [appeal A-404-19 dismissed on consent (F.C.A.; 2020-01-10)].

[3] In my view, this case turns on the evidence or, more accurately, the lack of it. **I agree with ProWise that RWDI has not properly supported its application with admissible evidence.** RWDI attempted to remedy that situation by requesting leave to file supplementary evidence on the eve of the hearing of its application. However, RWDI did not justify its failure to provide that evidence on a timely basis. I have, therefore, denied RWDI’s request. In the end, there is insufficient admissible evidence before me in support of RWDI’s application. I must, therefore, dismiss it.

- **Section 34 – Copyright [Remedies] – Plagiarism may lead to the expulsion from a professional order.**

Young v. Alberta Assessors' Association Practice Review Committee, 2019 CarswellAlta 2006 (Alta. Q.B.; 2019-09-24) Shelley J.

[67] While UBC made it clear that copying and plagiarism were not permitted in the preparation of assignments, it also contemplated that the discovery of these practices could attract sanction from a professional association. This would clearly extend to copying/plagiarism discovered post-course completion.

[75] It is left, then, to determine whether copying/plagiarism constitute a breach of s 19. In that regard, I am satisfied that copying and plagiarism mean the same in this context. It is true that neither s 24 of the *Regulation*, nor s 19 of *POARA*, refer to copying or plagiarism. The Executive Committee's reasoning in relation to this issue, as set out in para 63 of these Reasons, is sound. Students enrolled in the BUSI 499 course were expressly told that copying or plagiarism was prohibited and could result in sanctions from the students' professional association. The Applicants signed a declaration acknowledging those prohibitions and warnings. The *Code of Conduct* requires its members to perform their duties with honesty and integrity. **Not only was copying or plagiarising prohibited under the terms of the course that was required as a condition of membership, copying another's work and holding it out to be one's own would generally be considered an act of dishonesty and a lack of integrity. Permitting this type of conduct — specifically permitting students to pass off other's work as their own in the context of obtaining accreditation/membership in a professional organisation — might well result in a diminishing of public confidence in that professional group.**

- **Section 34 – Remedies [civil] – By releasing its film in Ontario, the foreign company subjects itself to the jurisdiction of the Ontario Courts.**

Pourshian v. Walt Disney Company, 2019 CarswellOnt 16536 (Ont. Sup. Ct.; 2019-10-15) Graham, Master.

[25] Even considering the matter with the caution mandated by *Van Breda [Club Resorts Ltd. v. Van Breda]*, 2012 SCC 17, the release of a film in Canada, which would include Ontario, presumably so that people would go to a movie theatre and pay to see it, is precisely the sort of actual presence in the jurisdiction contemplated by the Court. Pourshian's pleading that Walt Disney Pictures Inc. released *INSIDE OUT* in Canada creates a "good arguable case" that that defendant carried on business in Canada in relation to the subject matter of the action.

[26] Similarly, Pourshian pleads in paragraph 30 of the statement of claim that the defendants Pixar and Walt Disney Pictures Inc. are the producers of *INSIDE OUT*. The court can reasonably infer that these defendants made the film in the expectation that people would pay to see it, which required that it be shown in movie theatres. Pixar, by releasing *INSIDE OUT* to be shown in theatres in Ontario, even if through another entity, was in substance offering it for sale to the province's movie-going public, thus creating at least a "good arguable case" that Pixar was carrying on business in Ontario.

[27] Accordingly, by producing *INSIDE OUT* and releasing it for distribution to Ontario movie theatres, the defendants Pixar and Walt Disney Pictures Inc. were carrying on business in Ontario. The presumptive connecting factor of carrying on business in Ontario is therefore established.

- **Section 34 – Copyright [Remedies] – Accounting of profits and costs are available remedies.**

Eberhard Von Huene & associés inc. v. Salzman, [2019] J.Q. 10868 (Que. Sup. Ct; 2019-11-07) Rogers J.

[25] En cas de contravention, cette loi [*Copyright Act*] **prévoit la possibilité pour la personne lésée de réclamer le remboursement de tous les profits récoltés par le tiers, en plus des frais juridiques pour intenter le recours.**

[26] Dans les modifications visées, deux conclusions sont ajoutées afin de réclamer le remboursement des profits et réserver les droits de la demanderesse quant aux frais de justice.

- **Section 34 – Copyright [Remedies] – If individual issues are predominant, class action may not be the proper way to proceed.**

Voltage Pictures, LLC v. Salna, 2019 FC 1412 (F.C.; 2019-11-12) Boswell J. [appeal A-439-19].

[145] First, I agree with the respondents and CIPPIC [intervener] that a class proceeding is not the preferable procedure because Voltage's application predominantly raises individual issues within the proposed class. The resolution of these issues would require a complex, individually-tailored, fact-finding process for each potential class member. Consequently, judicial economy and fairness would not be achieved.

- **Section 34 – Copyright [Remedies] – Website blocking orders are available remedies.**

Bell Media Inc. v. GoldTV.Biz, 2019 CarswellNat 6733 (F.C.; 2019-11-15) Gleeson J. [appeal A-440-19]

[8] Despite the issuance of the interim and interlocutory injunctions against the Defendants some of the GoldTV Services remain in operation and the alleged infringement continues. The Plaintiffs now seek an order that will compel the Third Party Respondents to block access to the websites and Internet services operated by the Defendants. **An order of this nature has not previously issued in Canada but has in other jurisdictions, including the United Kingdom, where it has been referred to as a “website-blocking order”** (*Cartier International AG v. British Sky Broadcasting Ltd.*, [2016] EWCA Civ 658 [*Cartier CA*] at para 5 and *Cartier International AG v. British Telecommunications plc*, [2018] UKSC 28 [*Cartier SC*] at para 5). The parties to this motion refer to the order sought as a “site-blocking order”.

THIS COURT ORDERS that

Within fifteen (15) days of the issuance of this Order, the Third Party Respondents shall block or attempt to block access by at least their residential wireline Internet service customers to the websites or online services identified at Schedule 1 to this Order (the “Target Websites”), by blocking or attempting to block access to all of the Target Websites’ domains, subdomains and IP addresses identified therein. For clarity, the GoldTV.ca Service is a Target Website for the purpose of this Order. Schedule 1 to this Order is empty for the GoldTV.ca Service as of the date of issuance of this Order, and may be supplemented by the Plaintiffs if and when appropriate in accordance with paragraph 2 of this Order.

- **Section 34 – Copyright [Remedies] – Issuing a website blocking order is within the equitable jurisdiction of the Federal Court.**

Bell Media Inc. v. GoldTV.Biz, 2019 CarswellNat 6733 (F.C.; 2019-11-15) Gleeson J. [appeal A-440-19]

A. Does this Court have jurisdiction to issue a site-blocking order?

[26] I am satisfied that this Court’s equitable jurisdiction does encompass the authority to issue an injunction in the nature sought by the Plaintiffs.

[29] **Parliament’s choice not to adopt a site-blocking regime does not equate to Parliament prohibiting this Court from exercising its equitable jurisdiction to issue a site-blocking order.** Furthermore, **subsection 34(1)** of the *Copyright Act* recognizes that, subject to that Act, a copyright owner is “entitled to all remedies by way of injunction [...] that are or may be conferred by law for the

infringement of a right”. This includes the right to seek relief against a non-party in circumstances where that non-party facilitates, albeit innocently, the harm being complained of (*Equustek Inc. v. Google Inc.*, 2017 SCC 34] at para 31).

- **Section 34 — Copyright [Remedies] — Balance of convenience and proportionality are to be considered when issuing a website blocking order.**

Bell Media Inc. v. GoldTV.Biz, 2019 CarswellNat 6733 (F.C.; 2019-11-15) Gleeson J. [appeal A-440-19]

[51] The fundamental question to be asked where an injunction is sought is **whether the granting of the injunction is just and equitable** in all of the circumstances (*Equustek* at para 25 [*Google Inc. v. Equustek Solutions Inc.*, 2017 SCC 34]). The balance of convenience prong of the test best represents this balancing of equities and has been described as a determination of which of the parties will suffer the greater harm from the granting or refusal of the injunction (*Metropolitan Stores* at p. 129 [*Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, [1987] 1 SCR 110]).

[52] In *Cartier CA* [*Cartier International AG v. British Sky Broadcasting Ltd.*, [2016] EWCA Civ 658] the EWCA endorsed **a number of principles or factors as being relevant in determining if a site-blocking order is proportional**. The factors are:

- A. Necessity – a consideration of the extent to which the relief is necessary to protect the plaintiff’s rights. The relief need not be indispensable but the court may consider whether alternative and less onerous measures are available;
- B. Effectiveness – a consideration of whether the relief sought will make infringing activities more difficult to achieve and discourage Internet users from accessing the infringing service;
- C. Dissuasiveness – a consideration of whether others not currently accessing the infringing service will be dissuaded from doing so;
- D. Complexity and Cost – a consideration of the complexity and cost of implementing the relief sought;
- E. Barriers to legitimate use or trade – a consideration of whether the relief will create barriers to legitimate use by unduly affecting the ability of users of ISP services to access information lawfully;
- F. Fairness – a consideration of whether the relief strikes a fair balance between fundamental rights of the parties, the third parties and the general public;
- G. Substitution – a consideration of the extent to which blocked websites may be replaced or substituted and whether a blocked website may be substituted for another infringing website; and
- H. Safeguards – a consideration of whether the relief sought includes measures that safeguard against abuse.

[53] **The necessity factor is, in my view, closely linked to the irreparable harm branch of the test.** I will consider arguments relating to the availability of alternative and less onerous measures under this branch of the test and not as part of the balance of convenience analysis.

- **Section 34 — Copyright [Remedies] — Even if there is a strong *prima facie* case, plaintiff must prove irreparable harm for an interlocutory injunction to issue.**

Bell Media Inc. v. GoldTV.Biz, 2019 CarswellNat 6733 (F.C.; 2019-11-15) Gleeson J. [appeal A-440-19]

[55] Where copyright infringement has been alleged and a strong *prima facie* case of substantial or complete copying is demonstrated the jurisprudence recognizes that the allegations warrant special consideration. **However, such consideration does not relieve the plaintiffs of the burden of establishing irreparable harm** (*Bell Canada v. 1326030 Ontario Inc. (iTVBox.net)* 2016 FC 612 at para 28 [*iTVBox.net*], upheld on appeal by *Wesley (Mtlfreetv.com) v. Bell Canada*, 2017 FCA 55, citing *Somerville House Books Ltd v Tormont Publications Inc* (1993), 50 CPR (3d) 390 (FCTD) at para 10).

[56] As recognized by Justice Danièle Tremblay-Lamer in *iTVBox.net* **the three prongs of the injunction test are not to be treated as individual silos. A strong finding in respect of one of the prongs of the test may lower the threshold on the other two.**

- **Section 34 — Copyright [Remedies] — Declaratory is a remedy available to a successful plaintiff.**

Louis Vuitton Malletier S.A. v. Wang, 2019 CarswellNat 6912 (F.C.; 2019-11-15) Roy J.

[201] The plaintiffs also ask that there be a declaration concerning two copyrighted works of Louis Vuitton to the effect that the defendants have infringed or are deemed to have infringed the copyright. The two copyrighted works, a Multicolored Monogram-White Print and a Multicolored Monogram-Black Print are shown at schedule G to the judgment. The Court has already dealt with the issue of the statutory damages available under the *Copyright Act*. **There was an infringement and the plaintiffs are entitled.**

- **Section 34 — Copyright [Remedies] — Previous judgments against defendants, defying court orders and indirectly pursuing the infringement are factors to be considered in awarding punitive damages.**

Louis Vuitton Malletier S.A. v. Wang, 2019 CarswellNat 6912 (F.C.; 2019-11-15) Roy J.

[192] Nevertheless, the level of blameworthiness that justified punitive damages of \$250,000 in *Lam Chan Kee* may be sufficiently inferior in the case at hand to, on account of proportionality and restraint, assess punitive damages at a slightly inferior level. **First, there had been many court orders and judgments against the defendants in that case** (*Lam Chan Kee*, 2016 FC 987 (CanLII), paras 46 to 48). Second they were already subject to an injunction permanently restraining them from further infringing the Chanel Trade-marks. **The defendants were in fact defying orders directly applicable to them.** They had been taken to court before, and more than once. Third, the business assets of the original corporate defendant were sold to a numbered company after a number of court proceedings had been launched against the corporate defendants. **But the Lam spouses continued to operate the business venture after a new corporate entity was formed.** In that case, the Court allowed the substitution of corporate defendant after the action was filed. There have not been those kinds of prior court proceedings and possible deceptions in this case. The level of blameworthiness is marginally inferior to that in *Lam Chan Kee*, an appropriate comparator in my estimation. An amount of \$225,000 in punitive and exemplary damages is therefore **awarded to the plaintiffs, to be payable jointly and severally** by the defendants.

- **Section 34 – Copyright [Remedies] – Interlocutory injunction is a matter of discretion – An injunction can be territorially limited.**

Knowmadics v. Cinnamon, 2019 CarswellOnt 18811 (Ont. Sup. Ct. – Int. inj.; 2019-11-18) Hackland J.

[28] As the evidence establishes that the defendants have not obtained any customers for LDX's FireCat software in the United States, **I would exercise the court's discretion to limit the application of the interlocutory injunction to the Canadian market.**

- **Section 34 – Copyright [Remedies] – Injunction is a remedy when there is copyright infringement.**

Rallysport Direct LLC v. 2424508 Ontario Ltd, 2019 FC 1524 (F.C.; 2019-11-28) Fuhrer J.

[69] Finally, RSD seeks an injunction restraining the Defendants from reproducing any of its copyrighted works on the website www.subiedepot.ca. **An injunction related to the infringed copyrighted works before this Court is a common remedy, and warranted in this case:** *Thomson v Afterlife Network Inc.*, 2019 FC 545 at para 49. [...]

- **Section 34 – Copyright [Remedies] – Damages are available for copyright infringement.**

Rallysport Direct LLC v. 2424508 Ontario Ltd, 2019 FC 1524 (F.C.; 2019-11-28) Fuhrer J.

[58] The *Copyright Act* permits **the copyright owner to seek damages, either provable or statutory, against infringements.** RSD's ownership of copyright in these photographs and product descriptions is not at issue in this action, and hence this motion [for summary judgment].

- **Section 34 — Copyright [Remedies] — Application for copyright infringement shall be determined in a summary way.**

Proline Pipe Equipment Inc v. Provincial Rentals Ltd, 169 C.P.R. (4th) 247 (Alta. Q.B.; 2019-12-19) Ackerl J.

[12] Sections 34(4)-(5) of the *Copyright Act* state **that copyright infringement proceedings that are commenced by way of application shall be determined in a summary way**, governed by the civil procedure rules of the court where the proceedings are commenced. This section, in conjunction with section 34.1, allows me to determine summarily whether Proline holds copyright in the drawings at issue in this application.

- **Section 34.1 — Presumptions respecting copyright and ownership — Affixing author's pseudonym or business name will support the presumption of authorship.**

Carpentier v. Fabricville Co. inc., 2019 CarswellQue 2867 (Que. Ct. — Small claims; 2019-02-08) Nolet J.

[39] D'autre part, madame Carpentier a également témoigné à l'effet **que son dessin JYLG est accompagné de son nom d'auteur, soit « by juliesfabrics ».** Ainsi, cette œuvre artistique bénéficie de la présomption prévue à l'article 34.1 (1) de la LDA [...]

- **Section 34.1 — Presumptions respecting copyright and ownership — Section 34.1 provides for presumptions of ownership.**

Capitale en fête inc. v. Ouellet, 2019 CarswellQue 4570 (Que. Ct.; 2019-05-01) Boutin J.

[62] Une présomption de propriété est par ailleurs prévue à l'article 34.1 de la Loi.

- **Section 34.1 — Presumptions respecting copyright and ownership — The author of the work is presumed to be the copyright owner.**

Corus Radio Inc v. Harvard Broadcasting Inc, 2019 CarswellAlta 2449 (Alta Q.B. - Int. inj.; 2019-11-18) Dilts J.

[35] Both under the *Copyright Act* and at common law, the author of a work is the owner of the copyright in the work: *Copyright Act* section 13(1). For Corus to own the copyright, either the original author must have been an employee of WIC, or WIC must have been assigned

ownership in the work by the original author. **Section 34.1(b) of the Copyright Act provides that in any civil proceedings taken under the Copyright Act in which the defendant puts in issue the plaintiff's claim to the copyright, the author of the work shall be presumed to be the owner of the copyright unless otherwise proved.**

[37] In the *Distrimedic Inc.* case [*Distrimedic Inc. v Dispill Inc.*, 2013 FC 1043], there was a direct contest between the plaintiff by counterclaim and the defendant by counterclaim regarding who created the alleged work. The plaintiff by counterclaim produced documents respecting certain corporate transactions that it argued demonstrated a transfer of the copyright, but it did not call the person it claimed to be the author of the alleged work despite that person's availability to testify. The court drew an adverse inference against the plaintiff by counterclaim for failing to do so. **In the case before me, no party asserts a contrary claim of ownership, although I note that is not required under section 34.1(1)(b).**

- **Section 34.1 — Presumptions respecting copyright and ownership — Copyright is presumed to subsist in a work.**

Corus Radio Inc v. Harvard Broadcasting Inc, 2019 CarswellAlta 2449 (Alta Q.B. - Int. inj.; 2019-11-18) Dilts J.

[40] In my view, particularly in light of Harvard's own evidence as to how the POWER 107 logo was designed, it would be a presumptuous and imprudent conclusion that the POWER 92 Logo [of the Plaintiff] was not an original work or that its creation did not require more than trivial skill and judgment. Corus need not put forward the author of the work for this Court to recognize that the graphic art form itself requires creative effort.

- **Section 34.1 — Presumptions respecting copyright and ownership — To rebut the presumption of the existence of copyright admissible, evidence must be must tendered.**

Proline Pipe Equipment Inc v. Provincial Rentals Ltd, 169 C.P.R. (4th) 247 (Alta. Q.B.; 2019-12-19) Ackerl J.

[13] I conclude for the purposes of this proceeding, pursuant to the section 34.1 presumption, that copyright in the drawings subsists in Proline. Provincial Rentals has not proven the contrary. **The former Proline employee's statement that the drawings are copies is inadmissible hearsay, and without this hearsay statement, I have only Mr. Shipway's bare assertion that the Proline drawings are not original works. Such an assertion is not sufficient to rebut the section 34.1 presumption.**

- **Section 35 — Liability for infringement — Damages assessed to the lost commissions on the sale of copies of the infringing work.**

Carpentier v. Fabricville Co. inc., 2019 CarswellQue 2867 (Que. Ct. – Small Claims; 2019-02-08) Nolet J.

[44] En ce qui concerne les dommages réclamés par madame Carpentier, Fabricville a vendu pour 8 865 \$ de tissus imprimés du dessin contrefait. Selon la preuve prépondérante, le pourcentage de la commission de madame Carpentier concernant ses ventes de dessins varie de 10 % à 15 %. **Considérant les circonstances de l'affaire, le pourcentage de 15 % réclamé dans sa mise en demeure pour la commission dont elle a été privée sera retenu.** Madame Carpentier a ainsi droit, à ce titre, à 1 329,75 \$.

[46] Ainsi, vu le témoignage de madame Carpentier, le Tribunal fixe le montant des dommages moraux réclamés à 2 750 \$.

[49] CONDAMNE Fabricville Co. Inc. à payer à Julie Carpentier la somme de 4 079 \$ avec intérêts au taux légal, plus l'indemnité additionnelle prévue à l'article 1619 du *Code civil du Québec*, à compter du 27 janvier 2017, ainsi que les frais de justice de 300\$.

- **Section 35 — Liability for infringement — Infringer may be condemned to pay damages and part of its illegal profits.**

Capitale en fête inc. v. Ouellet, 2019 CarswellQue 4570 (Que. Ct.; 2019-05-01) Boutin J.

[63] S'agissant des dommages, **la règle générale que l'on retrouve à l'article 35 de la Loi est à l'effet que celui qui viole le droit d'auteur est passible de payer au titulaire de celui-ci des dommages-intérêts ainsi que la proportion, considérée équitable par le Tribunal, des profits qu'il a réalisés en commettant pareille violation.**

[64] Cela étant, le titulaire du droit d'auteur peut néanmoins choisir, aux termes de l'article 38.1 de la Loi, de recouvrer, en lieu et place des dommages et profits dont il est question à l'article 35, les dommages-intérêts préétablis par la Loi. [...]

- **Section 35 — Liability for infringement — Infringer bears the burden of proving its costs and expenses — Profits that can be reclaimed are those resulting from the infringement — The plaintiff shall prove the increase in the infringer's revenues resulting from the infringement.**

Constellation Brands US Operations v. Société de vin internationale Itée, 2019 CarswellQue 7681 (Que. Sup. Ct.; 2019-08-21) Bachand J. [appeal 500-09-028594-190].

[10] Throughout the trial, Constellation pressed the point that, after having proved a violation of either the *Copyright Act* or the *Trade-marks Act*, its burden was limited to proving [Defendant] SVI's revenues during the relevant period, and that it was subsequently incumbent on SVI to prove costs and expenses that could legitimately be deducted from those revenues in order to determine the profits to be awarded.

[11] **Constellation was right to emphasize that the infringer bears the burden of proof with respect to the costs and expenses to be considered in the calculation of the amount of profits to which the copyright or trade-mark holder may be entitled.** This proposition finds ample support in the case law. [Fn11 See e.g. *Diesel, s.p.a. c. Benisti Import-Export inc.*, 2016 QCCS 1085 (CanLII) (aff'd 2016 QCCA 997 (CanLII)), para. 129.]

[12] However, Constellation's position overlooks two key points.

[13] The first is that **the holder of a copyright or trade-mark is only entitled to recover profits made as a result of an infringement of its intellectual property rights.** That is clear from the text of section 35 of the *Copyright Act*, [Fn12 Section 35 reads as follows: [...]] See also *Cinar Corporation v. Robinson*, 2013 SCC 73 (CanLII), para. 77] but the point is equally valid in the context of an action seeking to recover profits based on section 53.2(1) of the *Trade-marks Act*. [Fn 13 See e.g.: *Philip Morris Products S.A. v. Marlboro Canada Ltd.*, 2015 FC 364 (aff'd 2016 FCA 55 (CanLII)), para. 25; *Halsbury's Laws of Canada: Trade-marks, Passing Off and Unfair Competition*, 2016 Reissue (contributed by Roger T. Hughes, Toni Polson Ashton, Patrick Cotter, Sanjukta Tole), Toronto, LexisNexis, 2016, para. HTM-110 ("[a]n accounting of profits is an equitable remedy whereby the owner of the trade-mark is entitled to receive the entire benefit that the infringer has improperly gained through the use of the trade-mark" [emphasis added]). A similar approach is followed in patent matters: *Monsanto Canada Inc. v. Schmeiser*, 2004 SCC 34 (CanLII), para. 101 ("[i]t is settled law that the inventor is only entitled to that portion of the infringer's profit which is causally attributable to the invention" [emphasis added]).]

[14] The second key point is that, in an action seeking the recovery of profits, **it is the plaintiff who bears the burden of proving the increase in the defendant's revenues resulting from the infringement of its intellectual property rights.** [Fn14 See e.g.: section 35(2)(a) of the *Copyright Act*; 3925928 *Manitoba Ltd. v. 101029530 Saskatchewan Ltd.*, 2005 FC 1465 (CanLII), para. 9; *Philip Morris Products S.A. v. Marlboro Canada Ltd.*, 2015 FC 364

(aff'd 2016 FCA 55 (CanLII)), para. 25; Daniel S. Drapeau, "La compensation pécuniaire en litige de marques de commerce", in *Service de la formation continue du Barreau du Québec, Développements récents en droit de la propriété intellectuelle (2018)*, Cowansville, Yvon Blais, 2018, 1, p. 92.] The burden only shifts to the defendant, with respect to costs and expenses, upon proof of revenues resulting from the infringement.

- **Section 35 — Liability for infringement — A plaintiff has the burden of proving the relation between the infringing activities and the revenues of the infringer.**

Constellation Brands US Operations v. Société de vin internationale Itée, 2019 CarswellQue 7681 (Que. Sup. Ct.; 2019-08-21) Bachand J. [appeal 500-09-028594-190].

[18] The situation here is different. Constellation is claiming profits derived not from the sale of the allegedly infringing items (SVI's leaflets), but rather from the sale of products which, in and of themselves, cannot possibly be said to infringe on its intellectual property rights (SVI's wine bottles). **In other words, we are not dealing here with a revenue-generating product some components of which are said to infringe on the plaintiff's intellectual property rights — thus raising an issue as to whether the profits were at least partially attributable to other, non-infringing components of that product.** The case law relied upon by Constellation would only have been relevant had SVI argued that any profits actually shown to have derived from the use of the leaflets were only partially attributable to the presence, on those leaflets, of Constellation-owned trade-marks and copyrighted materials.

[19] **Constellation's mistaken belief that it did not have to prove that the profits sought related to revenues resulting from SVI's use of the leaflets is fatal to its claim.** The record contains no evidence tending to demonstrate such causation, and one cannot simply assume that the use of the leaflets led to an increase in SVI's revenues. And even if one could reasonably assume that the leaflets had some positive impact on SVI's revenues, quantifying that impact in a non-arbitrary manner would be impossible given the current state of the record. [Fn19 Significantly, Constellation's representative Ms. Jaymie A. Schoenberg admitted during the trial that the company had no idea how many people were exposed to SVI's leaflets].

- **Section 35 — Liability for infringement — A copyright owner may claim the profits made by the infringer.**

Eberhard Von Huene & associés inc. v. Salzman, [2019] J.Q. 10868 (Que. Sup. Ct; 2019-11-07) Rogers J.

[25] En cas de contravention, cette loi [*Copyright Act*] **prévoit la possibilité pour la personne lésée de réclamer le remboursement de tous les profits récoltés par le tiers**, en plus des frais juridiques pour intenter le recours.

[26] Dans les modifications visées, deux conclusions sont ajoutées afin de réclamer le remboursement des profits et réserver les droits de la demanderesse quant aux frais de justice.

- **Section 38 – Recovery of possession of copies, plates – The recovery of possession is with respect to the infringed work – Deterrence, commerciality of the infringement and experience of the infringer are to be taken into consideration.**

Young v. Thakur, 2019 CarswellNat 2971 (F.C.; 2019-06-20) Kane J.

[66] The Applicants also seek an order requiring the Respondents to deliver up “all materials in the Respondents’ possession, custody, control or power”, pursuant to section 38. The Applicants’ Counsel clarified that the Applicants are seeking the raw footage from the music video shoot. **Section 38 provides for the recovery of infringing copies of works. The only thing the Applicants are entitled to is the Musical Work and Sound Recording. The Applicants have not established that they have any rights to the film footage.** The Applicants cannot obtain a remedy which is not related to the infringement.

- **Section 38.1 – Statutory damages – The determination of the amount of statutory damages shall be just and may be reduced at the discretion of the Court.**

Madail Monzon v. Aptitude X inc., 2019 QCCQ 871 (Que. Ct. – Small Claims; 2019-02-20) Zoar J

[49] **Le montant final est déterminé par le Tribunal suivant ce qu’il estime équitable** dans les circonstances et en tenant compte des facteurs énoncés au sous-paragraphe 5 de l’article 38.1 de la LDA.

[50] **Le Tribunal peut aussi réduire le montant minimal** de 500 \$ de l’article 38.1 (1)a) lorsque, comme ici, plusieurs œuvres sont incorporés dans un même support matériel [...]

[51] En l’espèce, le Tribunal considère que :

- bien que la preuve prépondérante a démontré que la défenderesse a agi de manière insouciant et négligente, il n’a pas pour autant été démontré chez elle un état d’esprit empreint d’un désir ou d’une volonté de causer les conséquences immédiates ou extrêmement probables découlant de sa

conduite fautive. En effet, sauf les impressions et les conclusions que tirent les demandeurs de cette mésaventure, la preuve administrée en demande n'est pas suffisante pour permettre au Tribunal de faire droit aux prétentions juridiques des demandeurs;

- la violation s'est matérialisée sur plusieurs supports numériques (site web, page Facebook et vidéo promotionnelle);
- même si Aptitude a retiré rapidement les œuvres sur simple demande des demandeurs à cet effet, il appert qu'au jour du procès, un dessin de M. Truong est toujours utilisé comme arrière-plan de la lettre X du nom Aptitude X sur le site web de cette dernière [Fn18 P-15];
- la violation du droit d'auteur commise par la défenderesse a été effectuée à des fins commerciales;
- sans être un comportement généralisé au vu des accords obtenus de différents artistes [Fn 19 Voir les déclarations écrites pour valoir témoignage de Ying Ding, Qiang Zhang et Adrien Lelièvre], la preuve démontre qu'Aptitude X n'a pas non plus requis le consentement préalable de M. Monfette à la publication de ses dessins;
- **à titre de studio d'externalisation spécialisé dans la production d'objets 3D et le développement d'applications, la défenderesse doit être dissuadée de commettre une telle violation dans le futur.**

[52] Suivant l'ensemble de cette analyse, le Tribunal fixe à 7 500 \$ (soit 750 \$ par œuvre) les dommages intérêts dont les demandeurs sont en droit d'être indemnisés suite à la violation de leur droit d'auteur commis par la défenderesse.

- **Section 38.1 – Statutory damages – The conduct of the parties is a factor to be considered.**

Thomson v. Afterlife Network Inc, 2019 CarswellNat 1479 (F.C.; 2019-05-01) Kane J.

[62] Subsection 38.1(5) sets out factors for the Court to consider in exercising its discretion to award statutory damages. **The relevant factors to consider in this case include the good faith or bad faith of the respondent, the conduct of the parties before and during the proceedings**, and the need to deter other infringements of the copyright in question. These factors fully support an award of statutory damages. The infringements were for a commercial purpose. Afterlife's goal is to profit by using the obituaries without the owners' permission. Afterlife refused to remove some obituaries upon requests to do so and shut down the website only after this Application was served and filed.

- **Section 38.1 – Statutory damages – The court may reduce the statutory**

damages when the amount would be unreasonable.

Thomson v. Afterlife Network Inc, 2019 CarswellNat 1479 (F.C.; 2019-05-01) Kane J.
 [63] In this case, if the Court were to award the lowest amount of \$500 per infringement and apply this amount to the estimate of approximately two million infringements—which is based on the only evidence before the Court, Afterlife’s own statement regarding its archives—the statutory damages would amount to \$1 billion. **In these circumstances, such an amount would be grossly disproportionate. A more reasonable amount must be determined** in accordance with paragraph 38.1(3)(b).

[64] The Applicant seeks \$10,000,000, which reflects a much lesser amount per work infringed. The Applicant submits that this amount is reasonable and conservative relative to the amounts to which each Class Member may be entitled. The total amount of damages to be paid by Afterlife must still yield a just result (*Colette [sic] [Collett v Northland Art Company Canada Inc*, 2018 FC 26] at para 59, citing *Telwizja Polsat SA v Radiopol Inc*, 2006 FC 584 at para 37, [2006] FCJ No 738 (QL)). The Court agrees with the Applicant’s submission that \$10,000,000 is a just and appropriate amount of statutory damages in the particular circumstances.

- **Section 38.1 – Statutory damages – The factors set in subsection 38.1(5) are non exhaustive.**

Capitale en fête inc. v. Ouellet, 2019 CarswellQue 4570 (Que. Ct.; 2019-05-01) Boutin J.

[66] Enfin, le paragraphe 38 (5) [*sic* it should read 38.1(5)] prévoit les facteurs qui peuvent alors être considérés par le Tribunal, **le Législateur ajoutant, par la présence du mot « notamment », que celle-ci n’est pas exhaustive** : la bonne ou mauvaise foi du défendeur, le comportement des parties avant l’instance ou au cours de celle-ci, la nécessité de créer un effet dissuasif à l’égard de violations éventuelles du droit d’auteur en question.

- **Section 38.1 – Statutory damages – The award of statutory damages is a matter of the Court’s discretion.**

Young v. Thakur, 2019 CarswellNat 2971 (F.C.; 2019-06-20) Kane J.

[60] **The Court has discretion to award statutory damages** and must determine what amount of statutory damages will yield a just result. A just result is fair and proportionate based on the factors set out in subsection 38.1(5) and the jurisprudence which the Court has considered.

- **Section 38.1 – Statutory damages – The assessment of statutory damages shall be reasonable.**

Young v. Thakur, 2019 CarswellNat 2971 (F.C.; 2019-06-20) Kane J.

[55] The basic principle is that in assessing statutory damages, the Court should reach a reasonable assessment based on all of the circumstances in order to yield a just result: *Telewizja Polsat SA v Radiopol Inc*, 2006 FC 584 at para 37, [2007] 1 FCR 444 [Telewizja].

- **Section 38.1 — Statutory damages — Statutory damages are assessed on a per work infringed basis.**

Young v. Thakur, 2019 CarswellNat 2971 (F.C.; 2019-06-20) Kane J.

[41] Contrary to the Applicant's submission, the jurisprudence has established that **statutory damages are assessed on a per work infringed basis. In other words, statutory damages are awarded based on the number of works infringed. They are assessed with respect to "all infringements involved in the proceedings for each work"**.

[65] As explained above, statutory damages are awarded per work infringed. Two works were infringed: the Musical Composition, the copyright of which belongs to Ms. Young and Mr. Tasker, and the Sound Recording, the copyright of which belongs to Melxdie. Therefore, statutory damages in an amount of \$2000 are warranted.

- **Section 38.1 — Statutory damages — When there is an approved tariff, statutory damages awarded to a collective society are assessed on the basis of the applicable royalties.**

Canada (Society of Composers, Authors and Music Publishers) v. Bano Inc. (Green Bean Java Bistro), 2019 FC 1011 (F.C.; 2019-07-26) St-Louis J.

[9] THIS COURT ORDERS that:

2. The Defendant shall pay to the Plaintiff statutory damages in accordance with the *Copyright Act*, **in the amount of \$1,715.37, which is six (6) times the estimated licence fees** of \$283.53, and \$14.19 GST owed by the Defendant to the Plaintiff under Tariff 15A for the years 2017 through to 2019.

4. The Defendant shall pay to the Plaintiff statutory damages in accordance with the *Copyright Act*, in the amount of six (6) times any additional licence fees found payable under Tariff 15A for the years 2017 to 2019 pursuant to the Defendant's full and complete accounting of all such licence fees due and an audit of the Defendant's books and records.

- **Section 38.1 — Statutory damages — When there is an approved tariff, statutory damages awarded to a collective society are assessed on the basis of the applicable royalties.**

Canada (Society of Composers, Authors and Music Publishers) v. Shakers Roadhouse Ltd., 2019 FC 1010 (F.C.; 2019-07-26) St-Louis J.

[9] THIS COURT ORDERS that:

2. The Defendant shall pay to the Plaintiff statutory damages in accordance with the *Copyright Act*, **in the amount of \$23,958.00, which is six (6) times the estimated licence fees** of \$3,960.00, and \$198.00 GST owed by the Defendant to the Plaintiff under Tariff 3A for the years 2017 through to 2019.

4. The Defendant shall pay to the Plaintiff statutory damages in accordance with the *Copyright Act*, in the amount of six (6) times any additional licence fees found payable under Tariff 3A for the years 2017 to 2019 pursuant to the Defendant's full and complete accounting of all such licence fees due and an audit of the Defendant's books and records.

- **Section 38.1 – Statutory damages – When there is an approved tariff, statutory damages awarded to a collective society are assessed on the basis of the applicable royalties.**

Canada (Society of Composers, Authors and Music Publishers) v. NLH Investments Inc. (Cowboy Ranch), 2019 CanLII 73165 (FC; 2019-08-06) Gascon J.

[7] THIS COURT'S JUDGMENT is that:

2. The Defendant shall pay to the Plaintiff statutory damages in accordance with the *Copyright Act*, RSC 1985, c C-42, **in the amount of \$22,957.97, which is six (6) times the estimated license fees** of \$3,788.92, plus GST of \$189.45 plus NSF fee of \$35.00, owed by the Defendant to the Plaintiff under Tariff 3A (live music), Tariff 18 (recorded music for dancing) and Tariff 20 (karaoke) for the years 2016 to 2019.

4. The Defendant shall pay to the Plaintiff statutory damages in accordance with the *Copyright Act*, RSC 1985, c C-42, in the amount of six (6) times any additional license fees found payable under Tariffs 3A, 18 and 20 for the years 2016 to 2019 pursuant to the Defendant's full and complete accounting of all such license fees due and an audit of the Defendant's books and records.

- **Section 38.1 – Statutory damages – Even if the infringer did not make any profits, statutory damages may be awarded.**

O'Hara v. Picard, 2019 QCCQ 3302 (Que. Ct. – Small Claims; 2019-04-10) Paradis J.

[50] Conséquemment, **même si Mme Picard et M. Boisvert n'ont pas tiré de profit de la publicité faite pour la location de leur résidence, la Loi doit s'appliquer au présent dossier.**

- **Section 38.1 – Statutory damages – Self-promotion of the infringer is a commercial purpose to consider – The factors set in subsection 38.1(5) are non exhaustive – The court can reduce the statutory damages for their award to be equitable.**

Portraits Rembrandt ltée v. Interdonato (Ikono), 2019 QCCQ 5878 (Que. Ct. – Small Claims; 2019-07-26) Choquette J.

[35] En publiant les photographies sur son site web et sur les réseaux sociaux, Monsieur Interdonato ne fait pas que promouvoir les produits de Madame Vargas mais il illustre également sa propre expertise dans le domaine de la mise en marché et création de logo et d'étiquettes. **Il ne peut donc se prévaloir des dispositions relatives aux violations pour des fins non commerciales** [Fn 13 Art. 38.1 (1) b) LDA].

[37] Le paragraphe 38(5) [should read 38.1(5)] de la Loi prévoit les facteurs qui peuvent alors être considérés par le Tribunal, **le Législateur ajoutant, par la présence du mot «notamment», que ceux-ci ne sont pas exhaustifs**: la bonne ou mauvaise foi du défendeur, le comportement des parties avant l'instance ou au cours de celle-ci, la nécessité de créer un effet dissuasif à l'égard de violations éventuelles du droit d'auteur en question [Fn14 *Capitale en fête inc. c. Ouellet* 2019 QCCQ 2607].

[38] En l'occurrence, le Tribunal considère la bonne foi du défendeur, sa croyance raisonnable que les photographies ont été prises pour la commercialisation des produits de Madame Vargas, ce qui était au cœur de sa mission, l'absence de profit qu'il tire de leur publication et le fait que le défendeur a retiré les photographies sur réception de la mise en demeure. L'ensemble des circonstances milite pour l'imposition du minimum prévu à la fourchette, soit 500 \$.

[39] Mais il n'en demeure pas moins que la photographie No 3 illustre Madame Vargas portant un tablier au logo conçu par le défendeur et les 3 pots «Saveurs du Sud» dont il a conçu le logo et les étiquettes.

[41] Il y a donc lieu d'appliquer les dispositions de l'article 38.1 3) de la Loi. Le Tribunal estime qu'il est équitable en l'occurrence de réduire, à l'égard de chaque œuvre ou autre objet du droit d'auteur, le montant minimal visé à l'alinéa (1)a) ou au paragraphe 2 et d'attribuer à titre de dommages préétablis, la somme de 200 \$.

- **Section 38.1 — Statutory damages — Subsection 38.1(5) sets the factors the Court can consider in the award of punitive damages.**

Popsockets LLC v. Case World Enterprises Ltd, 2019 CarswellNat 5165 (F.C.; 2019-09-10) Southcott J.

[46] Section 38.1(1) of the *Copyright Act* provides for the payment of statutory damages, at a claimant's election, in the range of \$500.00 to \$20,000.00 in cases of infringement for commercial purposes. The Plaintiff is seeking statutory damages in the total amount of \$5000.00 in respect of all wrongful conduct related to the packaging of the Defendant's goods.

[47] Section 38.1(5) of the *Copyright Act* provides a list of relevant factors for the Court to consider in exercising its discretion in awarding statutory damages. Those factors include the good or bad faith of the defendants, the conduct of the parties before and during the proceedings, and the need to deter other infringements of the copyright in question. While the Defendant has not participated substantively in these proceedings, Mr. Gill's January 2019 letter **does not demonstrate willingness to take responsibility for the Defendant's acts of infringement. Nor did the acts of copyright infringement cease following the Defendant's receipt of the cease-and-desist letters:** the item purchased by Mr. Lambie on October 2, 2018 still displays on its packaging the drawings that infringe the Plaintiff's copyrights.

[48] Taking into account those circumstances in the context of the factors prescribed by section 38.1(5), I am satisfied that the Plaintiff is not overreaching with a claim for \$5000.00 in statutory damages, particularly given the multiple acts of infringement.

- **Section 38.1 — Statutory damages — Liability of infringers can be joint and several — Bad faith is one important factor to consider.**

Louis Vuitton Malletier S.A. v. Wang, 2019 CarswellNat 6912 (F.C.; 2019-11-15) Roy J.

[196] As a result, they are liable to damages for the violation of the *Copyright Act*. **Plaintiff Louis Vuitton elected to seek statutory damages as allowed under section 38.1 of the *Copyright Act*.** In *Singga* [*Louis Vuitton Malletier S.A. v Singga Enterprises (Canada) Inc*, 2011 FC 776], the Court ordered damages at the maximum of the statutory scale. That is also appropriate in this case. The Court noted in that case that relevant factors in the exercise of discretion are the good or bad faith of defendants, the conduct during and before the proceeding and the need for deterrence. I find myself in complete agreement with the rationale expressed by the Court in *Singga* [*Louis Vuitton Malletier S.A., Louis Vuitton Canada, Inc, Burberry Limited and Burberry Canada Inc v Singga Enterprises (Canada) Inc et al*, 2011 FC 776] which, in my view applies, with equal strength, in a case where there is overwhelming evidence, over a period of a few years, of continuous infringement of the *Trade-marks Act* and the *Copyright Act*.

[198] **The infringements are equally egregious and the defendants have acted in bad faith throughout.** In my view, plaintiff Louis Vuitton Malletier S.A. is entitled to these damages on account of the violation of the two copyrighted works. Accordingly, they are awarded damages of \$40,000 (2x 20000), **with the defendants being jointly and severally liable for the damages.**

- **Section 38.1 — Statutory damages — In ascertaining the award of statutory damages, the situation of each infringer must be assessed individually.**

Voltage Pictures, LLC v. Salna, 2019 FC 1412 (F.C.; 2019-11-12) Boswell J. [appeal A-439-19].

[123] The respondents say questions eight and nine are not common issues. In the respondents' view, Voltage's proposal for a **"one size fits all" damages award would side-step the mandatory language in subsection 38.1(5) of the Copyright Act, which requires the Court to consider all the enumerated factors as they relate to each individual respondent.** As to injunctive relief, the respondents note that such relief is equitable and discretionary, and it is a fact-driven assessment based on each individual class member's unique circumstances.

- **Section 38.1 — Statutory damages — The Court may lower the amount of statutory damages but shall consider the factors enumerated in the section.**

Rallysport Direct LLC v. 2424508 Ontario Ltd, 2019 FC 1524 (F.C.; 2019-11-28) Fuhrer J.

[64] RSD has elected to pursue statutory damages for infringements for commercial purposes in the minimum amount of \$500.00/work: *Copyright Act*, s 38.1(1)(a). **The Copyright Act governs statutory damages assessments by setting the outside parameters for each award, listing what factors the Court must assess when coming to a range within these parameters, and under what circumstances a Court may wish to consider to justify lowering the payment outside the statutory parameters:** *Copyright Act* ss 38.1(1), 38.1(5), and 38.1(3) respectively.

[65] **Whether to lower the minimum amount of statutory damages from \$500.00/work remains at this Court's discretion:** *Copyright Act* s 38.1(3). The factors listed in the *Copyright Act* as justification for doing so - a single medium or grossly disproportionate to the infringement - are not exhaustive nor determinative of this matter. Instead, this Court must reasonably assess "all of the circumstances in order to yield a just result": *Telewizja [Telewizja Polsat SA v Radiopol Inc.]*, 2006 FC 584], above at paras 34, 37.

- **Section 39 — Injunction only remedy when defendant not aware of copyright — Awareness is a matter of common sense.**

*Menard v. The Centre for International Governance Innovation**, 2019 CarswellOnt 1437 (Ont. Sup. Ct.; 2019-02-04) Gray J.

[88] While I accept, with some reservations, Mr. Menard's evidence that he did not know that copyright material was being downloaded, I

think his evidence should be taken with a grain of salt. Any reasonable person would likely agree, if asked, that there is copyright in a current television program such as “Game of Thrones”. **Any reasonable person would know that one can purchase, in electronic form, a movie, a television program, or music, and if one can obtain it through computer software without paying for it there is likely a problem.**

- **Section 39.1 — Wide injunction — Wide injunction may issue when there is a likelihood of continued infringement.**

Thomson v. Afterlife Network Inc, 2019 CarswellNat 1479 (F.C.; 2019-05-01) Kane J.

[50] Section 39.1 of the *Copyright Act* expands the scope of injunctions. Subsection 39.1(1) provides that when granting an injunction for copyright infringement, **the court may also grant a wide injunction to enjoin the defendant from infringing the copyright in any other works** if (a) the plaintiff is the copyright owner and (b) the plaintiff satisfies the court that the defendants will likely infringe the copyright in those other works without such an injunction.

[51] The onus is clearly on the party seeking the injunction to demonstrate that the infringer will likely infringe the copyright in other works. **Wide injunctions have been awarded where the likelihood of continued infringement was demonstrated** (*Nintendo of America Inc v King*, 2017 FC 246 at paras 175-177, [2018] 1 FCR 509) and refused where the Court was not satisfied of the likelihood (*Interbox Promotion Corp v 9012-4314 Québec Inc*, 2003 FC 1254 at para 67, 2003 FCT 1254).

- **Section 39.1 — Wide injunction — Wide injunction could aim works that are not yet in existence but they must be works of the same plaintiff.**

Thomson v. Afterlife Network Inc, 2019 CarswellNat 1479 (F.C.; 2019-05-01) Kane J.

[53] **Section 39.1 permits the Court to enjoin the same defendant from infringing other works, including works that did not exist when the proceedings commenced. However, those other works must be the works of the same plaintiff.** In this case, a wide injunction would only enjoin Afterlife and Mr. Leclerc from infringing other works of the Applicant and Class Members. The Court has no evidence that there are other works by the same Class Members or that there will be other works by the same Class Members. The Court must also be satisfied that Afterlife is likely to infringe the other works of the Class Members. **While Mr. Leclerc’s creation of another obituary website suggests that he is inclined to repeat a similar type of conduct, whether he will likely infringe the works of Class Members remains speculative, as does the notion that the same Class Members will author obituaries in the future.**

[54] The Court is not satisfied that a wide injunction is justified or would be practical. The injunction ordered pursuant to section 34, which is also directed against Mr. Leclerc, coupled with the award of statutory damages and aggravated damages should provide a sufficient deterrent.

- **Section 39.1 – Wide injunction – Wide injunction could cover other works of a plaintiff.**

Canada (Society of Composers, Authors and Music Publishers) v. Bano Inc. (Green Bean Java Bistro), 2019 FC 1011 (F.C.; 2019-07-26) St-Louis J.

[9] THIS COURT ORDERS that:

6. The Defendant, itself or through its officers, servants, agents, employees or otherwise, either directly or indirectly, shall be restrained from performing, authorizing or causing to be performed on the premises under its control musical **works in which the Plaintiff owns the performing rights** unless the Defendant has first obtained from the Plaintiff a performing rights licence authorizing such acts.

7. The Defendant, itself or through its officers, servants, agents, employees or otherwise, either directly or indirectly, shall be restrained from permitting, for profit, a place of entertainment to be used for the performance of musical works in which the Plaintiff owns the performing rights unless the Defendant has first obtained from the Plaintiff a performing rights licence authorizing such acts.

- **Section 39.1 – Wide injunction – Wide injunction could cover other works of a plaintiff.**

Canada (Society of Composers, Authors and Music Publishers) v. Shakers Roadhouse Ltd., 2019 FC 1010 (F.C.; 2019-07-26) St-Louis J.

[9] THIS COURT ORDERS that:

6. The Defendant, itself or through its officers, servants, agents, employees or otherwise, either directly or indirectly, shall be restrained from performing, authorizing or causing to be performed on the premises under its control **musical works in which the Plaintiff owns the performing rights** unless the Defendant has first obtained from the Plaintiff a performing rights licence authorizing such acts.

7. The Defendant, itself or through its officers, servants, agents, employees or otherwise, either directly or indirectly, shall be restrained from permitting, for profit, a place of entertainment to be used for the performance of musical works in which the Plaintiff owns the performing rights unless the Defendant has first obtained from the Plaintiff a performing rights licence authorizing such acts.

- **Section 39.1 – Wide injunction – Wide injunction may issue when there is a likelihood of continued infringement.**

Rallysport Direct LLC v. 2424508 Ontario Ltd, 2019 FC 1524 (F.C.; 2019-11-28) Fuhrer J.

[69] Finally, RSD seeks an injunction restraining the Defendants from reproducing any of its copyrighted works on the website www.subiedepot.ca. An injunction related to the infringed copyrighted works before this Court is a common remedy, and warranted in this case: *Thomson v Afterlife Network Inc.*, 2019 FC 545 at para 49. **To further extend this injunction to all of RSD's other copyrighted images (a "wide injunction"), I must be satisfied the Plaintiff is the owner of the copyright, and that the Defendants will likely infringe the copyright in the Plaintiff's other works or subject-matter unless enjoined by the Court from doing so: Copyright Act s 39.1(1).** Without weighing on whether the additional infringements which continue to be identified emanate from additional uploads or infringements which occurred at the same time but have not yet been discovered, I believe in these circumstances a wide injunction is appropriate.

THIS COURT ORDERS that: [...]

2) Without limiting I above, that the Defendants remove, from their website www.subiedepot.ca and any other website which the Defendants control directly or indirectly, and refrain from posting, or assisting or permitting any 3rd party to post on such website(s), all or any of the infringed copyrighted works and **other original photographic works and product descriptions in which the Plaintiff holds copyright**

- **Section 41.24 — Concurrent jurisdiction of Federal Court — The Quebec Small Claims Court has jurisdiction to adjudicate on a copyright matter.**

Carpentier v. Fabricville Co. inc., 2019 CarswellQue 2867 (Que. Ct. – Small Claims; 2019-02-08) Nolet J.

[30] Ces quelques principes étant énoncés, il y a lieu, dans un premier temps, de répondre à la question soulevée par Beau-Fab : la Division des petites créances a-t-elle la compétence d'attribution afin de trancher le présent litige?

[31] La LDA [Fn10 *Loi sur le droit d'auteur*, L.R.C. (1985), ch. C-42, art. 41.24.] prévoit que la Cour fédérale, concurremment avec les tribunaux provinciaux, entend les demandes civiles liées à l'application de celle-ci. En ce qui concerne la compétence de la Division des petites créances, ce sont les articles 536 et 537 du *Code de procédure civile* qui précisent ce qui constitue une petite créance et les exceptions.

[33] Dans l'affaire *Paré c. Taxis Coop de la Mauricie* 1992 [Fn11 2015 QCCQ 11581 (CanLII)]. Voir aussi à ce sujet : *Lapointe c. Broquet*,

2017 QCCQ 13516 (CanLII).] le juge Pierre Labbé de notre Cour a analysé cette question et conclut que le Tribunal a la compétence d'attribution pour entendre un litige de la nature de celui opposant les parties. [...]

[34] En l'espèce, madame Carpentier réclame une créance inférieure à 15 000 \$ concernant des dommages à la suite d'une contravention par les défendeurs à son droit d'auteur du dessin JYLG. **Cette créance n'en n'étant [sic] pas une incluse dans les exceptions de l'article 537 C.p.c. et considérant les décisions précitées, il y a lieu de conclure que le Tribunal a la compétence d'attribution pour entendre le présent litige.**

- **Section 41.24 —Concurrent jurisdiction of Federal Court — The Federal Court has jurisdiction to issue a website blocking order.**

Bell Media Inc. v. GoldTV.Biz, 2019 CarswellNat 6733 (F.C.; 2019-11-15) Gleeson J. [appeal A-440-19].

[41] Having concluded above that the Court may bind the Third Party Respondents in the exercise of its equitable jurisdiction, I agree with and adopt the Plaintiffs' submissions in this regard. **Section 36 of the Telecommunications Act cannot be interpreted or applied in a manner that would allow the CRTC to interfere with an order of the Court aimed at impeding further infringement of rights under the Copyright Act (Reference re Broadcasting Act SC 1991 (Canada), 2012 SCC 68 at paras 39 and 45).**

[42] In summary, **the Court has jurisdiction to grant the relief sought** [a Website blocking order]. I am not convinced that any of the provisions of the *Telecommunications Act*, nor the fact that there is ongoing debate about the role of site blocking in Canada's telecommunications regulatory regime, support the view that the Court should decline to exercise its discretion in this case.

- **Section 41.25 — Notice of claimed infringement — The notice is meant to serve as a warning — The ISP is a conduit between the copyright owner and the subscriber/infringer.**

ME2 Productions, Inc. v. Doe, 2019 CarswellNat 405 (F.C.; 2019-02-21) Pentney J. [appeal A-106-19 discontinued 2019-09-06, appeal A-107-19 discontinued 2019-09-13 and appeal A-108-19 discontinued 2019-09-13].

[36] **The notice and notice regime enables a copyright owner who has reason to believe that an ISP's customers are breaching its copyright to send a notice to the ISP, and this in turn obligates the ISP to forward that notice to its customer(s), and to maintain certain records regarding the matter. The notice is meant to serve as a warning, to allow the customer to take steps to cease**

the allegedly infringing activity (*Rogers Communications* at para 23 [*Rogers Communications Inc v Voltage Pictures, LLC*, 2018 SCC 38]). The notice can also serve as a precursor to the launch of a claim for copyright infringement. **In this regime, the ISP is viewed as merely a conduit between the copyright owner and the subscriber – it is not, itself, liable for the infringement. However, an ISP that fails to fulfil its obligations under the Act may be subject to statutory damages.**

[37] The objectives of the statutory reform are discussed at length in *Rogers Communications*, which finds that **the notice and notice regime serves “two complementary purposes: (1) to deter online copyright infringement; and (2) to balance the rights of interested parties”** (at para 22).

- **Section 41.25 – Notice of claimed infringement – Privacy rights are not to be discarded when enforcing the Copyright Act – ISP can participate in the hearing for the issuance of a Norwich order.**

ME2 Productions, Inc. v. Doe, 2019 CarswellNat 405 (F.C.; 2019-02-21) Pentney J. [appeal A-106-19 discontinued 2019-09-06, appeal A-107-19 discontinued 2019-09-13 and appeal A-108-19 discontinued 2019-09-13].

[87] In *Rogers Communications* [*Rogers Communications Inc v Voltage Pictures, LLC*, 2018 SCC 38] the SCC goes further, noting **that one of the main purposes of the notice and notice regime is to balance the interests of all stakeholders in the copyright regime**, including copyright owners, Internet users, and intermediaries such as ISPs. The Court finds that the notice and notice regime was designed, in part, to account for the interests of Internet subscribers “by maintaining the presumption of innocence and allowing them to monitor their own behaviour (and, more specifically, to avoid continued copyright infringement)” (para 26). It also finds that the deterrence objective of the regime is advanced by giving the subscriber the opportunity to cease the infringing activity, and thereby possibly avoid a claim for copyright infringement.

[88] **If these two regimes are to operate “in tandem,” it only makes sense that a court must consider the privacy rights of individual subscribers in deciding whether to grant a Norwich order.** While it is true that such individuals will have every right to defend their interests if their identities are disclosed and they are subject to a claim of copyright infringement, I find that their interests are not limited to that stage of the proceeding. This is the teaching of *BMG* [*BMG Canada Inc v Doe*, 2005 FCA 193], and it is consistent with the objectives of the notice and notice regime as found by the SCC in *Rogers Communications*.

[89] [...] **While it is entirely the choice of an ISP whether or not to participate in such applications, consistent with *BMG* and *Rogers Communications*, I find that where the ISP chooses to become an active participant, it should not be barred at the courthouse door.**

- **Section 41.25 — Notice of claimed infringement — ISPs are not liable for the infringement of their subscribers.**

ME2 Productions, Inc. v. Doe, 2019 CarswellNat 405 (F.C.; 2019-02-21) Pentney J. [appeal A-106-19 discontinued 2019-09-06, appeal A-107-19 discontinued 2019-09-13 and appeal A-108-19 discontinued 2019-09-13].

[140] **Parliament chose to insulate ISPs from any liability for copyright infringement by their subscribers and instead it imposed a regime of statutory damages in order to ensure compliance with the notice and notice regime.** This is consistent with the deterrence and balancing of interests objectives identified by the SCC in *Rogers Communications* [*Rogers Communications Inc v Voltage Pictures, LLC*, 2018 SCC 38]. The amendments do not prescribe any particular procedure for such claims. The CMJ in this case adopted a sensible and practical approach, drawing on the analogous situation of a contempt of court proceeding.

- **Section 41.25 — Notice of claimed infringement — A Norwich order is a discretionary remedy — Copyright owner must act with diligence.**

ME2 Productions, Inc. v. Doe, 2019 CarswellNat 405 (F.C.; 2019-02-21) Pentney J. [appeal A-106-19 discontinued 2019-09-06, appeal A-107-19 discontinued 2019-09-13 and appeal A-108-19 discontinued 2019-09-13].

[150] **It is equally important, however, to remember that “a Norwich order is an equitable, discretionary and flexible remedy. It is also an intrusive and extraordinary remedy that must be exercised with caution”** (*GEA Group* at para 85 [*GEA Group AG v Ventra Group Co* (2009), 96 OR (3d) 481 (CA)]). When Parliament adopted the notice and notice regime, it sought to balance the interests of copyright owners, individual subscribers, and Internet intermediaries such as ISPs. **Achieving that balance requires copyright owners to act with diligence in preparing their material and meeting the normal standards of evidence by way of affidavit.** It also requires ISPs to deliver the notice to their subscriber and to maintain associated records, or to face a claim of statutory damages for breach of these obligations. Finally, it requires courts to play their role in granting – or refusing – *Norwich* orders, and then dealing with claims of copyright infringement.

- **Section 41.25 — Notice of claimed infringement — Upon receipt of a notice of claimed infringement, the ISP shall forward the notice to its subscriber.**

Voltage Pictures, LLC v. Salna, 2019 CarswellNat 4147 (F.C.; 2019-08-06) Boswell J. [appeal A-291-19 discontinued on 2019-11-15].

[5] Sections 41.25 and 41.26 of the *Copyright Act*, RSC 1985, c C-42 [the Act], establish the so-called “notice and notice” [N&N] regime. The N&N regime imposes two explicit obligations upon an internet service provider [ISP] such as Rogers.

[6] **First, after a copyright owner has sent a notice of a claimed infringement to an ISP in accordance with section 41.25 of the Act, the ISP must forward the notice electronically to the person to whom the IP address is assigned by virtue of paragraph 41.26(1)(a).** The second obligation is contained in paragraph 41.26(1)(b).

- **Section 41.25 — Notice of claimed infringement — The notice and notice regime is not a comprehensive framework to combat online infringement.**

Voltage Pictures, LLC v. Salna, 2019 FC 1412 (F.C.; 2019-11-12) Boswell J. [appeal A-439-19].

[148] The notice-and-notice regime was enacted to serve two complementary purposes: to deter online copyright infringement and to balance the rights of interested parties, including copyright owners, internet users, and ISPs (*Rogers* at paras 22 and 23 [*Rogers Communications Inc v Voltage Pictures, LLC*, 2018 SCC 38]). **It was not intended to establish a comprehensive framework by which instances of online infringement could be eliminated altogether.** By relying on the notice-and-notice regime, Voltage is diverting Parliament’s purpose and intention for its own purposes. [...]

- **Section 41.26 — Obligations related to notice — The ISP shall keep a record of the identity of the IP subscriber for six months after the receipt of the notice — Absent any regulations, no fees can be charged by an ISP to comply with this bookkeeping obligation.**

Voltage Pictures, LLC v. Salna, 2019 FC 1047 (F.C.; 2019-08-06) Boswell J. [appeal A-291-19 discontinued on 2019-11-15].

[5] Sections 41.25 and 41.26 of the *Copyright Act*, RSC 1985, c C-42 [the Act], establish the so-called “notice and notice” [N&N] regime. The N&N regime imposes two explicit obligations upon an internet service provider [ISP] such as Rogers.

[6] First, after a copyright owner has sent a notice of a claimed infringement to an ISP in accordance with section 41.25 of the Act, the ISP must forward the notice electronically to the person to whom the IP address is assigned by virtue of paragraph 41.26(1)(a). **The second obligation is contained in paragraph 41.26(1)(b). It requires an ISP to retain records allowing the identity of the**

person to whom the IP address is assigned to be determined, and to do so for six months beginning on the day on which the notice of claimed infringement was received by the alleged infringer. If the copyright owner commences proceedings relating to the claimed infringement and notifies the ISP before the end of those six months, the ISP must retain such records for one year after the day on which the alleged infringer received notice of the claimed infringement.

[7] Subsection 41.26(2) of the Act addresses whether an ISP may charge a fee for complying with these obligations [...]

[8] The Minister has not yet fixed a fee, so **no fee may be charged by an ISP for complying with its obligations** under subsection 41.26(1) of the Act.

- **Section 41.26 — Obligations related to notice — ISP's obligations are limited.**

Voltage Pictures, LLC v. Salna, 2019 FC 1047 (F.C.; 2019-08-06) Boswell J. [appeal A-291-19 discontinued on 2019-11-15].

[52] In my view, Voltage confuses **an ISP's obligations stemming from subsection 41.26(1) of the Act, which are: (1) determining, for the purposes of forwarding notice electronically, who was assigned the IP address at the time of the alleged infringement; (2) taking all steps necessary to verify the ISP has done so accurately; and (3) taking all steps necessary to verify the accuracy of records to permit the ISP to identify the name and physical address of the person to whom notice was forwarded.**

[53] The N&N regime requires a copyright holder to identify the IP address allegedly connected to infringement of their copyright and the time at which the infringement occurred. The ISP has to electronically forward the notice to the account holder of the IP address. If the account holder provides an incorrect email - whether it was incorrect from the beginning or changed, or if the email is found through an automated or manual system - this affects the account holder's ability to receive the notice but it does not affect a *Norwich* order. **Taking the steps necessary to verify the accuracy of records to permit an ISP to identify the name and physical address of the person to whom a notice was forwarded could be met in various ways, including the use of information stored outside an N&N system** (in this case, Rogers' Remedy system).

[54] **Paragraph 41.26(l)(b) of the Act does not require an ISP to retain records in a specific form useable by copyright holders** (*Rogers SCC* at paras 42 and 43) [*Rogers Communications Inc. v Voltage Pictures, LLC*, 2018 SCC 38]. From the information stored in

its N&N system an ISP must be able to use this information, or use the information to link to other systems, to find a customer's name and address. The link does not have to be found in one step, but the steps required must be reasonable.

- **Section 41.26 — Obligations related to notice — ISP cannot recover the costs associated with their statutory obligations — ISP can recover their costs for other services rendered pursuant to a Norwich order.**

Voltage Pictures, LLC v. Salna, 2019 FC 1047 (F.C.; 2019-08-06) Boswell J. [appeal A-291-19 discontinued on 2019-11-15].

[59] The third step overlaps with Rogers' obligations as an ISP under subsection 41.26(1) of the *Act*. **The time Rogers takes to complete this step is not compensable because it is a procedure mandated by subsection 41.26(1). Rogers' obligations under this subsection include: (1) determining, for the purpose of forwarding notice electronically, who was assigned the impugned IP address at the time of the alleged infringement; (2) taking all steps necessary to verify that the ISP has done so accurately; and (3) taking all steps necessary to verify the accuracy of records to permit the ISP to identify the name and physical address of the person to whom notice was forwarded.**

These obligations arise prior to Roger's obligations arising under a *Norwich* order and it should not be permitted to recover the cost of carrying out these obligations (*Rogers SCC* at para 51) [*Rogers Communications Inc. v Voltage Pictures, LLC*, 2018 SCC 38].

[59] Rogers is not in the business of replying to *Norwich* orders. It has established a system which applies equally to law enforcement requests for disclosure as well as *Norwich* orders. The time saved for the holder of a *Norwich* order when Rogers uses the Remedy system does not make up for the inconvenience of Rogers having to process *Norwich* orders differently. As noted above, *Norwich* orders comprise a minority of requests for disclosure. It is not, in my view, unreasonable for Rogers to use the DHCP look up method over the Remedy look up method to complete this step; the difference in time between the two methods is not substantial.

[60] **In any event, the time associated with completing the fourth step is compensable. This step does not overlap with Rogers' obligations as an ISP under subsection 41.26(1) of the *Act*. The time Rogers takes to fulfill its obligation under a *Norwich* order to actually identify a person from its records is compensable.**

- **Section 41.26 — Obligations related to notice — ISP cannot recover the costs associated with their statutory obligations.**

Voltage Pictures, LLC v. Salna, 2019 FC 1047 (F.C.; 2019-08-06) Boswell J. [appeal A-291-19 discontinued on 2019-11-15].

[63] An ISP is in the best position to understand who is accessing an IP address. This falls squarely in what the Supreme Court identified as an ISP's obligations to determine, for the purposes of forwarding a notice electronically, who was assigned the impugned IP address at the time of the alleged infringement, and to take all steps necessary to verify that it has done so accurately (*Rogers [Rogers Communications Inc. v Voltage Pictures, LLC]*, 2018 SCC 38] at para 37). **These obligations arise by virtue of paragraph 41.26(1)(a) of the Act, and the time Rogers takes to fulfill them should not be included in the amount of time for which Rogers should be compensated.** The final step Rogers says it must take to verify the identity of a person in response to a *Norwich* order involves, in effect, verifying the accuracy of the very records it was required to retain under subsection 41.26(1) and is not compensable (*Rogers SCC* at para 52). [*Rogers Communications Inc. v Voltage Pictures, LLC*, 2018 SCC 38].

Section 42 — Offences — Not disclosing a prior criminal conviction is to be considered in the examination of a permanent resident visa application — Copyright infringement is a serious offence.

*Chen v. Canada (Citizenship and Immigration)**, 2019 CarswellNat 1896 (CA I.R.B.; 2019-01-25) A. Jung, Member [footnotes omitted].

[6] The applicant was convicted of three offences in Canada. On November 14, 2007 the applicant was convicted of selling an infringing copy of a work in which copyright subsists, contrary to section 42(1)(b) of the *Copyright Act*, and failure to comply with appearance notice or promise to appear, contrary to section 145(5) of the *Criminal Code of Canada*. Both offences are liable to conviction on indictment or summary conviction.

[16] The nature of the misrepresentation and the failure to provide truthful answers is a serious consideration and the submission of inaccurate and untruthful information undermines the integrity of Canada's immigration system. Accurate information pertaining to criminal history and immigration history is vital to immigration officials in assessing the risk to Canada and in ensuring the security of Canadian society. **With respect to the nature of the applicant's criminal acts, while fraud and copyright violations are serious offences that undermine Canada's economy, I find the seriousness of the offences in this respect is mitigated by the fact that the applicant's offences do not involve the element of violence or physical harm.**

- **Section 43.1 — Limitation or prescription period for civil remedies — Each act of infringement runs its own limitation period — The passage of time does not allow the infringer to continue an act of infringement.**

Drouin (Succession de Côté-Drouin) v. Pepin, 2019 CarswellQue 1922 (Que. Sup. Ct.; 2019-03-13) Lucas J.

[125] Rappelons qu'en matière de droit d'auteur, **chaque acte de contrefaçon fait courir sa propre période de prescription**. Par conséquent, une partie du recours peut s'avérer prescrite concernant certains actes de violation, alors que l'action est maintenue pour d'autres qui sont postérieurs à la période de prescription :

The plain meaning of section 43.1 dictates that each distinct act of infringement will set in motion its own limitation period of three years. Proceedings taken outside the three year period are barred. However, if the proceedings so taken cover distinct acts of infringement falling both inside and outside the limitation period, the action will be receivable with respect to acts having occurred less than three years before the action was commenced and be considered stale in respect of the earlier acts.

The filing of proper legal proceedings in the competent court will have the effect of interrupting the prescription [...] [Fn85 Hugues RICHARD, Laurent CARRIÈRE (Léger Robic Richard), *Canadian Copyright Act – Annotated Robic*, volume 3, Toronto, Thomson Carswell, feuilles mobiles, mise à jour continue, S. 43.1§5.3.2 et §5.5; Laurent Carrière, *Prescription et propriété intellectuelle ou La prescription extinctive comme fin de non-recevoir en matière de propriété intellectuelle* (1993), 10 : 2 Canadian Intellectual Property Review, 357, p. 371 et ss.].

[126] **Cette prescription de trois ans pour les recours civils en contrefaçon constitue une prescription extinctive, soit un moyen d'opposer une fin de non-recevoir à une action** [FN86 Art. 2921 C.c.Q.], par opposition à la prescription acquisitive, un moyen d'acquérir le droit de propriété [Fn87 Art. 2910 C.c.Q.]. **Ainsi, l'écoulement du temps ne donne aucun droit au contrefacteur, aucune propriété sur l'œuvre d'autrui lui permettant de poser ou de continuer un acte de contrefaçon dans le futur** [Fn88 *Canadian Copyright Act – Annotated Robic*, préc., note 85 S. 43.1§ 5.5].

[127] Ainsi, il y a une distinction importante à faire entre la contrefaçon qui perdure dans le temps, de celle qui «a eu lieu» dans le passé.

- **Section 43.1 — Limitation or prescription period for civil remedies — A separate limitation period will apply to each act of infringement — In the case of a continuous act, the limitation period will start from each act.**

Drouin (Succession de Côté-Drouin) v. Pepin, 2019 CarswellQue 1922 (Que. Sup. Ct.; 2019-03-13) Lucas J.

[128] L'auteur Normand Tamaro écrit que le délai de prescription «vaut pour les actes de contrefaçon passés, en interdisant notamment l'attribution de dommages intérêts [Fn89 Normand Tamaro, *Loi sur le droit d'auteur – Texte annoté*, 10^e éd., Scarborough, Carswell, 2015, p. 990].» A bon droit, il s'agit d'une interprétation restrictive [FN90 «Les dispositions relatives à la prescription extinctive, parce qu'elles portent atteinte aux droits individuels en posant des limites au droit d'agir en justice, doivent être interprétées restrictivement » : Laurent Carrière, *Prescription et propriété intellectuelle ou La prescription extinctive comme fin de non-recevoir en matière de propriété intellectuelle* (1993), 10 : 2 Canadian Intellectual Property Review, 357, p. 371; Hugues RICHARD, Laurent CARRIÈRE (Léger Robic Richard), *Canadian Copyright Act – Annotated Robic*, volume 3, Toronto, Thomson Carswell, feuilles mobiles, mise à jour continue S. 43.1§ 5.6.1] de l'article 43.1 LDA, libellé au passé, qui fait référence notamment au moment où l'acte ou l'omission «a eu lieu» («occurred» en anglais).

[129] Dans le même esprit, selon l'analyse des auteurs Hugues Richard et Laurent Carrière dans le *Canadian Copyright Act – Annotated*, **une violation qui perdure dans le temps se trouve assimilée à une infraction continue, dont le délai de prescription ne commence à courir qu'au moment où la violation cesse** [Fn91 Hugues RICHARD, Laurent CARRIÈRE (Léger Robic Richard), *Canadian Copyright Act – Annotated Robic*, volume 3, Toronto, Thomson Carswell, feuilles mobiles, mise à jour continue S. 43.1 p. 43.1-6 et 43.1-7:

Therefore, «[w]here the offence is a continuing one, and continues up to within less than the statutory limitation period before institution of proceedings, it is [immaterial] [Fn92 Erreur dans la loi annotée corrigée: *Regina v. Belgal Holdings Ltd.*, 1966 CanLII 190 (ON SC)] if it was first committed at a time anterior to the period»: see *R. v. Belgal Holdings Ltd.* (1966), 1966 CanLII 190 (ON SC), [1967] 3 C.C.C. 34, Stewart J. at p. 36.

However, if the infringement is on-going but consists of a series of discrete acts, a separate limitation period will apply to each such act. It remains open to the person whose copyright has been infringed by a continuous act of infringement to file a timely claim within three years of the completion of the act.

[130] En d'autres mots, «[l]a prescription ne court pas tant que l'œuvre contrefaisante fait l'objet d'une exploitation directe et immédiate par l'auteur de la contrefaçon [...]» [Fn93 Dans un contexte similaire en droit français, voir les considérations intéressantes dans : Pierre-Yves Gautier, *Propriété littéraire et artistique*, 10^e édition, collection Droit fondamental, Paris, P.U.F., 2017, nos. 778 à 780.].» À ne pas confondre cependant avec l'effet de l'écoulement du temps sur la réclamation du dommage continu [Fn94 Il n'y a pas lieu d'approfondir cette question en l'instance, considérant la scission d'instance. Jean-Louis Baudouin et Patrice Deslauriers, *La responsabilité civile*, 7^e édition, Cowansville, Éditions Yvon Blais. 2013, vol 1, no. 1-1324].

- **Section 43.1 — Limitation or prescription period for civil remedies — A copyright owner may sue for subsequent or continuing infringements committed within the limitation period.**

Drouin (Succession de Côté-Drouin) v. Pepin, 2019 CarswellQue 1922 (Que. Sup. Ct.; 2019-03-13) Lucas J.

[135] En somme, il y a lieu de retenir que la prescription prévue à l'article 43.1 LDA s'applique aux actes passés et achevés, qui ont «*eu lieu*» («occurred»), et que la computation du délai de trois ans de la prescription d'un recours en contrefaçon commence à courir au moment où la violation cesse. **Par conséquent, un recours dénonçant des actes de violation en cours ou posés à l'intérieur du délai de trois ans n'est pas frappé de la prescription extinctive de la LDA.**

[136] En l'espèce, le Tribunal estime que le recours du demandeur n'est pas prescrit en ce qui concerne l'exploitation actuelle sur les sites Internet des défendeurs, et ce pour les collections du Fonds Drouin qui se qualifient d'œuvres au sens de la LDA, dont l'analyse fait l'objet de la section suivante (3.4). Cela donne ouverture aux recours civils de l'article 34 LDA, et notamment à l'injonction pour les fins qui nous occupe à cette étape [FN100 Il n'y a pas lieu d'approfondir cette question en l'instance, considérant la scission d'instance. Jean-Louis Baudouin et Patrice Deslauriers, *La responsabilité civile*, 7^e édition, Cowansville, Éditions Yvon Blais. 2013, vol 1, no. 1-1324.].

- **Section 43.1 — Limitation or prescription period for civil remedies — An action could be partially prescribed — Reasonable diligence could be expected from a copyright owner in the discovery of infringement.**

Drouin (Succession de Côté-Drouin) v. Pepin, 2019 CarswellQue 1922 (Que. Sup. Ct.; 2019-03-13) Lucas J.

[147] Le Tribunal conclut que les droits et faits supportant le recours de la Succession en l'espèce pouvaient être découverts bien avant le 20 mai 2012, soit trois ans avant l'introduction du présent recours, et

ce, en faisant preuve de diligence raisonnable. **Par conséquent, la présente action est en partie frappée de prescription, pour les actes de contrefaçon antérieurs à cette date.** Sous réserve de la section 3.4, cela touche la première publication (mise à la disposition du public [Fn107 Art. 2.2 et 7 LDA.] la reproduction, la vente de la collection des microfilms avec l'Inventaire Drouin format papier (1998 à 2004), la vente des répertoires La Masculine et La Féminine format papier (1998 à 2000), la vente des derniers exemplaires du DNCF (1998), et la numérisation de toutes les collections du Fonds Drouin (2002 à 2006) [Fn108 Témoignage de Jean-Pierre Pepin, 14 juin 2018.].

- **Section 43.1 — Limitation or prescription period for civil remedies — Limitation for past activities is not a bar for injunctive relief for the future.**

Drouin (Succession de Côté-Drouin) v. Pepin, 2019 CarswellQue 1922 (Que. Sup. Ct.; 2019-03-13) Lucas J.

[256] En somme, **si le recours de la Succession est prescrit pour les actes qui ont eu lieu avant le 20 mai 2012, il reste que le DNCF (tome 3) et les généalogies familiales par Gabriel Drouin se trouvent actuellement exploités sur les sites Internet des défendeurs et dans ces circonstances particulières, sans autorisation de la Succession qui détient les droits.** Par conséquent, le Tribunal doit prononcer à ce stade les conclusions recherchées en matière d'injonction.

- **Section 43.1 — Limitation or prescription period for civil remedies — A separate limitation period will apply to each act of infringement.**

Henni v. Food Network Canada Inc., 2019 CarswellBC 1138 (B.C. S.C.; 2019-04-29) Baker J.

[12] The three new defendants which the plaintiffs seek to add are: Cineflix (Food Factory 5) Inc., Cineflix (Food Factory 6) Inc., and Cineflix (Food Factory USA 2) Inc. These companies have all been created since the notice of civil claim was last amended, and are simply the current incarnations of the existing defendants. **The alleged breaches of copyright continue each year with each successive incarnation of the Cineflix companies.** The defendants concede that these three new companies are properly added to the action in relation to the original claims.

- **Section 53 — Register of Copyrights — The presumption of ownership is rebuttable.**

Dhillon v. Bernier, 2019 CarswellNat 1518 (F.C.; 2019-05-03) Lafrenière J. [motion to extend the time to appeal refused 19-A-34 (F.C.A.; 2019-07-23); action dismissed on procedural grounds, 2019 FC 1194 (F.C.; 2019-09-20); appeal A-403-19].

[35] As evidenced by a Certificate of Registration of Copyright, Mr. Dhillon is the owner of copyright in a communication signal for "People's Party of Canada" and "The People's Party of Canada". **However, the fact that Mr. Dhillon is shown on the Canadian Copyright Register as owner of the communication signal merely creates a rebuttable presumption in his favour:** *Jules Jordan Video Inc v Elmaleh*, 2009 FC 488 at paragraph 16.

- **Section 53 — Register to be evidence — Registration does not include a copy of the work but could be cross-referenced by the evidence.**

Pablo Enterprise pte. Ltd. v. Tang, 2019 CarswellNat 3229 (T.M. Opp. Bd.; 2019-06-13) C.R. Folz, Member.

[19] With respect to the Opponent's ownership of copyright in the Artistic Work, the Opponent has included as part of its evidence a certified copy of the registration certificate for Canadian copyright registration No. 1135183. **While Canadian copyright registrations do not include a copy of the work itself, in this case, the Hughes Affidavit identifies the Artistic Work as the work which is the subject of copyright registration No. 1135183;** Ms. Hughes being the individual that filed the application for the copyright registration on behalf of the Opponent. Ms. Hughes was not cross-examined on her affidavit, and so her evidence that it is the Artistic Work that is the subject of the Opponent's copyright registration is uncontroverted.

- **Section 53 — Register to be evidence — Registration creates presumptions — These presumptions are rebuttable.**

*Pablo Enterprise pte. Ltd v. Hai Lun Tang**, 2019 CarswellNat 3229 (T.M. Opp. Bd.; 2019-06-13) C.R. Folz, Member.

[20] **A Canadian copyright registration entitles the owner of that registration to certain rebuttable presumptions under the Copyright Act.** In particular, section 53 of the *Copyright Act* reads in part as follows: [...]

[21] In view of the above provisions, the certified copy of Canadian copyright registration No. 1135183, together with the Hughes Affidavit, constitutes evidence of the particulars entered in that registration, and constitutes **evidence that copyright subsists** in the Artistic Work and that the Opponent **is the owner of copyright** in the Artistic Work. **I note that it is certainly possible for a responding party to rebut the presumptions that arise from a copyright registration under section 53 of the Copyright Act.** However, in the present case, the Applicant has not filed any evidence to rebut these presumptions that arise from the Opponent's copyright registration.

- **Section 53 — Register to be evidence — A certified copy of the registration is evidence of the particulars set out in the registration.**

*Pablo Enterprise pte. Ltd v. Hai Lun Tang**, 2019 CarswellNat 3229 (T.M. Opp. Bd.; 2019-06-13) C.R. Folz, Member.

[23] However, it is well established under Canadian law that **copyright protection arises automatically upon the making of a work and a copyright registration is not required in order for there to be a finding of infringement under the *Copyright Act*, though the registration entitles the owner to certain rebuttable presumptions as discussed above** [see *Moreau v. St. Vincent* 1950 CanLII 248 (FC), [1950] Ex CR 198, 12 CPR 32; see also John S. McKeown, *Fox on Canadian Law of Copyright and Industrial Designs*, 4th Edition, Chapter 20:2]. In the present case, the particulars of Canadian copyright registration No. 1135183 indicate that the Artistic Work was first published in Osaka, Japan on August 1, 2011, over four years prior to the filing date of the Application. **As mentioned above, section 53(1) of the *Copyright Act* provides that the certified copy of the registration certificate is evidence of the particulars set out in the registration, which would include the first publication date.** The Applicant has filed no evidence to contest the date of first publication of the Artistic Work identified in the Opponent's copyright registration, and the Applicant does not contest that date in its Written Argument.

- **Section 53 — Register of Copyrights — The production of a certificate of copyright registration creates a rebuttable presumption of title and ownership — Absent any evidence to the contrary, the chain of title may well be irrelevant.**

Sullivan v. Northwood Media Inc., 2019 CarswellOnt 7681 (Ont. Sup. Ct.; 2019-07-18) Short, Master.

[63] [...] In my opinion, therefore, **by the production of this certificate and in the absence of any evidence to the contrary, the plaintiff in this case has satisfied the burden of proof**, both the primary burden -- that which rests upon a plaintiff as a matter of substantive law and is sometimes referred to as the risk of non-persuasion -- and also the secondary burden, that of adducing evidence (...)

- **Section 55 — Copyright in works — Registration of a copyright while the rights are contested may constitute participation to forgery of evidence.**

*Barreau du Québec (syndic ad hoc) v. Brouillette**, 2019 QCCBDQ 20 (Conseil de discipline – Barreau du Québec; 2019-04-12), the Board [re-rectifying *Barreau du Québec (syndic ad hoc) v. Brouillette*, 2017 QCCDBQ 085 (Conseil de discipline – Barreau du Québec; 2017-11-03); appeals 500-07-001033-194 and 500-07-001034-192].

[Under count 1, the respondent was reckless and interfered with the proper administration of justice by participating in and allowing proceedings denoting a propensity for overbidding out of all proportion to the actual litigation between the parties and / or delaying tactics and / or for the purpose of harming or adopting an attitude which goes against the requirements of good faith.]

[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 55 — Copyright in works — A copyright notice has a limited scope.** *PIPEDA Report of Findings No. 2019-001**, 2019 CarswellNat 5550 (Can. P.C.C.; 2019-04-09) Therrien, Commissioner.

FN 103 Equifax Canada notes that its affiliation with Equifax Inc. is also signaled to consumers by a copyright note in the footer of all Equifax.ca websites, including pages describing both products delivered directly by Equifax Canada, and those delivered through Equifax Inc, that says: "Copyright [date] Equifax Inc. All rights reserved. Equifax and the Equifax marks used herein are trademarks of Equifax Inc." **However, consumers would not reasonably expect or look to a copyright notice in a footer for notice of a transfer of information to a third party.**

- **Section 66.51 — Interim decisions — An interim Tariff can be varied by another interim tariff.**

Retransmission of Distant Television Signals, Re [Interim Tariff for the Retransmission of Distant Television Signals (2019-2023)], 2019 CarswellNat 499 (Cop. Bd.; 2019-02-22), the Board.

[4] In light of the agreement regarding royalty allocations, the application to vary the Interim Television Retransmission Tariff, 2019-2023 is granted. The interim tariff is amended [...]

- **Section 66.91 — Regulations — Board has a broad discretion in establishing equitable tariffs.**

Retransmission of Distant Television Signals, Re, 2019 CarswellNat 4088 (Cop. Bd.; 2019-08-02), the Board.

[172] For the reasons that follow, despite the seeming ambiguity in the effect of the legislative changes in question, **we are of the view that the continuing operation of the Retransmission Regulations is not inconsistent with the new enactment when read as a whole.** Even if we were to accept that the Retransmission Regulations were no longer in effect, **it is well-established that the Board has a broad discretion to take into account factors that it deems relevant and appropriate in establishing fair and equitable royalties and tariffs** in any event.

[183] While we do not view the 1997 modifications to the Act as “minor”, we do agree with the BDUs that the Retransmission Regulations made under the now repealed s. 70.63 are not inconsistent with the new ss. 73(1) and 66.91, which must be read together and interpreted in a manner that gives the new enactment a large and liberal, and purposive, meaning. [Fn147 See *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at paras 21-22 and *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559 at para 26, both quoting E. Driedger, *Construction of Statutes* (2nd ed. 1983) at 87, for a discussion on the modern approach to statutory interpretation. Recent cases which have also adopted the modern approach include *R. v. Myers*, 2019 SCC 18 at para 19, *Canada (Attorney General) v. Thouin*, [2017] 2 S.C.R. 184 at para 26, and *Cuthbertson v. Rasouli*, [2013] 3 SCR 341 at para 32.]

[185] It makes sense to us that the Board should have regard to the criteria set out in the Retransmission Regulations, and even if not required to do so, could, and in appropriate cases would, take them into account in any event. Their application is therefore in keeping with the purpose of the Act.

[189] For the foregoing reasons, we conclude that the Retransmission Regulations are “not inconsistent with the new enactment”, have not been “repealed or others made in their stead”, and therefore “remain

in force and are deemed to have been made under the new enactment”: Interpretation Act, s. 44(g).

- **Section 67 — Public access to repertoire — Collective societies must establish their repertoire.**

SOCAN-Re:Sound – Pay Audio Services Tariffs, 2007-2016, file CB-CDA 2019-017 (Unreported), <https://cb-cda.gc.ca/avis-notice/2019/NOT-2019-04-03-CB-CDA-2019-017.pdf> (Cop. Bd.; 2019-04-03), the Board.

[2] As the Board has previously stated, and the Federal Court has confirmed, **collective societies have an obligation to establish that they actually represent the repertoire in relation to which they are making a claim.**

[5] Accordingly, and having in mind **Re:Sound’s onus to establish its repertoire**, the Board orders that Re:Sound shall:

(1) Identify the person or persons referred to in paragraph (a) above [For each of the 300 sound recordings selected for audit (the sound recordings in the “Audit Spreadsheet”, as that term is defined in the Objectors’ Letter to the Board dated September 19, 2018), the identity of the person or persons that, in Re:Sound’s view, would be in the best position to provide documentary information that would provide support for any of the following propositions: i. that the person identified as the maker by Re:Sound is the maker of the sound recording; ii. that the maker’s nationality is that identified by Re:Sound; iii. that the maker was a citizen or permanent resident of —or, if a corporation, had its headquarters in—the country identified by Re:Sound; iv. that all the fixations done for the sound recording occurred in the country identified by Re:Sound; v. that the first fixation of the sound recording occurred in the year identified by Re:Sound; and vi. that the member authorizing Re:Sound to collect equitable remuneration for that sound recording has the authority to do so], and provide that information to the Board by no later than Friday, April 12, 2019 [...]

- **Section 67 — Public access to repertoire — The collective society has the onus to obtain the authorizations to manage the rights of the copyright owners — Implied agency must be adequately proven.**

Reprographic Reproduction, in Canada, of Works in its repertoire (Re), 2019 CarswellNat 9042 (Cop. Bd.; 2019-12-06), the Board.

[152] [...] Second, the theory approaches the issue from the wrong angle: **the reproduction right accorded to authors under the Act is an exclusive right, and it is therefore the responsibility of Access to seek and obtain the authorizations required to manage reproduction rights and not the responsibility of the rights**

holders to advise Access they do not wish it to manage those rights.

[153] The foregoing decisions of the Board serve to illustrate how a finding of implied agency is rooted very firmly in the factual context in which it arises.

[154] We do not say, therefore, that agency can never be implied or retroactive. **Nonetheless, it is well-established that a collective society must establish that it has valid authorizations regarding the rights holders it is claiming to represent.** [Fn59 See *Re: Sound v Fitness Industry Council of Canada and Goodlife Fitness Centres Inc*, 2014 FCA 48] In the circumstances of these proceedings, given Access' practices and distribution methodology, as described above, we are not satisfied that that a relationship of implied agency as between Access and its non-affiliates has been established to support its authorization to represent the non-affiliates for purposes of the collective administration of their works.

- **Section 68.2 — Publication and notification — The Board can publish a notice related to a proposed tariff in the manner it sees fit.**

Collective Administration in Relation to Rights under Sections 15 and 19 Copyright Act (Re), 2019 CarswellNat 8151 (Cop. Bd.; 2019-12-11), the Board.

[16] Under s. 68.2 of the Act, **the Board can publish or distribute a notice related to a proposed tariff and objections thereto in the manner it sees fit.** This constitutes a shift from the notice publication requirements in the Canada Gazette under the Act prior to the April 2019 changes. As explained in a government explanatory note on Copyright Board reform, these changes are meant to "[...] empower the Board to publish proposed tariffs by any means it sees fit rather than mandatorily in the Canada Gazette, as at present. This flexibility in publication could reduce the length of proceedings by a few months." [Fn2 Innovation, Science and Economic Development Canada, Fact Sheet: Copyright Board Reform, available at: <http://www.ic.gc.ca/eic/site/693.nsf/eng/00168.html>]

- **Section 69 — Request to withdraw or amend — Sufficient notice is to be given.**

Collective Administration in Relation to Rights under Sections 15 and 19 Copyright Act (Re), 2019 CarswellNat 8151 (Cop. Bd.; 2019-12-11), the Board.

[15] **The Act does not stipulate what constitutes "sufficient public notice" of a collective's intention to make the application to withdraw a proposed tariff under s. 69.** It does, however, provide some helpful benchmarks.

[17] There is no reason [those provided by s. 68.2] why these considerations should not apply equally to circumstances involving a notice of withdrawal of a proposed tariff in our view. There is nothing in the Act that would require a different approach to be taken. **In the circumstances here, we are satisfied that publication of the withdrawal notice on both the Collective's and the Board's website constitutes adequate public notice of the proposed withdrawal.** [Fn3 While Artisti claims that it has directly or indirectly notified current or former participants in the proceedings, the fact that it may not have directly or indirectly contacted all such participants via counsel would not invalidate the public notice in the form of publications on Artisti's and CB's websites.]

[18] We also note that the notice of intent to withdraw was posted online for more than 30 days. We believe that the above reasoning may be applied to the duration of a proposed tariff withdrawal notice, as well: if 30 days (or 60 days before April 2019) is adequate time for objecting to a tariff proposal under subsection 68.3(2), the same minimum notice period is adequate and sufficient for notifying an intention to withdraw it. That minimum is more than met here.

- **Section 69.1 – Approval by Board – Tariffs are to be fair and equitable – The Board does not have to act as counsel for the absents – The collective societies shall not bear a heavier burden because there is no contestation.** *Reprographic Reproduction, in Canada, of Works in its repertoire (Re)*, 2019 CarswellNat 9042 (Cop. Bd.; 2019-12-06), the Board.

[184] Here, the lack of participation by institutional objectors has left us without the benefit of an opposing party's evidence, analysis and arguments to counterbalance those of Access and its evidence. [FN82 We do not suggest that Mr. Maguire's participation was not helpful; however, it is not a substitute for institutional input] **Because we are required to approve a tariff that is fair and equitable**, [Fn83 The Board's duty to certify a fair and equitable tariff has been dealt with in numerous decisions; see for example *Society of Composers, Authors and Music Publishers of Canada v Bell Canada Inc*, 2010 FCA 139 at paras 32-34.] **and because we also considered the public interest, we were required to examine the record with utmost care, and even to ask questions to supplement it where appropriate.** This we have done. However, that is where our role ends. **From a procedural standpoint, Access should not have to bear a heavier burden than it normally would have, had the educational institutions decided to participate, nor should the Board have to assume the mantle of counsel for the educational institutions. In the end, it is the institutional users that chose not to take part.**

- **Section 69.1 — Approval by Board — Tariffs are of general application — The board could consider third-party representations after the closing of the hearing.**

Reprographic Reproduction, in Canada, of Works in its repertoire (Re), 2019 CarswellNat 9042 (Cop. Bd.; 2019-12-06), the Board.

[288] As a procedural matter, we could have decided not to consider the universities' letters of comment given that they were sent after the hearing had ended. We have chosen to consider them nonetheless, given the particular circumstances of these proceedings.

[289] Since there are no institutional objectors in this instance and because **these tariffs are of general application**, the letters of comment assist us in considering the public interest by permitting us to take into account the views of those who are not before us but who will be affected by our decision.

- **Section 69.1 — Approval by Board — A license could be modified by the Board.**

Reprographic Reproduction, in Canada, of Works in its repertoire (Re), 2019 CarswellNat 9042 (Cop. Bd.; 2019-12-06), the Board.

[231] Fourth, it may be argued that extending the copying limit to 20 per cent of a work has a considerable amount of value to the licensee and we should account for this in some way. In general, we agree. **Whenever a licence [sic] is used as a proxy for a tariff, the terms of the proxy need to be compared to those of the tariff.** Where they differ in a material way, the Board has two options. It can make modification [sic] to the proxy to account for differences between the proxy and the tariff. Or it can reject the proxy altogether. We adopt the first option here.

- **Section 69.1 — Approval by Board — A fair dealing policy should be backed up by evidence of enforcement.**

Reprographic Reproduction, in Canada, of Works in its repertoire (Re), 2019 CarswellNat 9042 (Cop. Bd.; 2019-12-06), the Board [footnotes omitted].

[255] In its responses, Access made the following points. **First, publication of a fair dealing policy without tendering evidence that the policy is enforced is insufficient to find that copies made pursuant to the policy are fair.** Second, the rates proposed by Access include a fair-dealing discount. As Access explains:

Access Copyright has proposed to the Board a tariff rate that incorporates a discount for fair dealing for educational purposes, as well as other exceptions under the Copyright Act. The Benchmark Licences are the result of arms' [sic] length negotiated licences for the bundle of rights licensed by the

Proposed Tariff, including all exceptions available to the users of the tariff.

[256] We agree. [...]

- **Section 69.1 — Approval by Board — For a proposed tariff to be withdrawn certain conditions are to be met.**

Collective Administration in Relation to Rights under Sections 15 and 19 Copyright Act (Re), 2019 CarswellNat 8151 (Cop. Bd.; 2019-12-11), the Board.

[2] In April 2019, new provisions governing the collective administration of copyright came into force. Among these, section 69.1 of the *Copyright Act* (the "Act") **mandates that the Board grant an application for tariff withdrawal made under section 69 of the Act if certain conditions are met [...]**

[6] On July 10, 2019, Artisti requested that the Board post on its website a notice that would serve the purpose of meeting the requirement set out in s. 69.1(1)(a) of the Act.

[7] In granting this request, the Board issued Notice [CB-CDA 2019-052] on July 26, 2019, which read as follows: [...]

- **Section 70 — Approval — Reference to the Federal Court is not warranted if the question is not one before the Board.**

Reprographic Reproduction, in Canada, of Works in its repertoire (Re), 2019 CarswellNat 9042 (Cop. Bd.; 2019-12-06), the Board.

[28] The Board had received, and on December 9, 2013, dismissed an application by Professor Katz in which he asked the Board to refer a question of law to the Federal Court of Appeal, in accordance with subsections 18.3(1) and 28(2) of the *Federal Courts Act*. Professor Katz' proposed question related to whether a single copying event by an educational institution would be sufficient to trigger the tariff, or "trigger" liability under it. **The Board dismissed his application, holding, among other things, that the issue raised was not a proper matter for a reference because it was not a question that the Board was required to answer in order to exercise its jurisdiction and certify the proposed tariffs.**

- **Section 70 — Approval — The Board will not include requirements for additional information if their relevance is not established.**

Reprographic Reproduction, in Canada, of Works in its repertoire (Re), 2019 CarswellNat 9042 (Cop. Bd.; 2019-12-06), the Board.

[337] A survey of previous decisions of the Board shows that –in general –for-profit entities whose main activities relate directly to the

copyrighted subject matter at question typically have more extensive reporting requirements than non-commercial entities, or commercial entities whose main activities are not so directly related to the copyrighted subject matter. The more central the subject matter was to an entity's activity, and the greater its capacity to carry out that reporting (either financial, technical, or otherwise) the more extensive such requirements tend to be. **However, where a collective society could not demonstrate how certain usage information was to be used for distribution, the Board has declined to include reporting for that information in the approved tariff.**

- **Section 71 — Filing of proposed tariffs — A Tariff must be filed as least nine months before its effective date.**

Retransmission of Distant Television Signals, Re, 2019 CarswellNat 4088 (Cop. Bd.; 2019-08-02) (Cop. Bd.; 2019-08-02), the Board.

[237] There is a related consideration as well [not to permit a significant amendment to a proposed tariff]. **Under subsection 71(2) of the Act, a tariff proposal must be filed at least nine months before its effective date.** In practice, this results in a notice period to potential users of a tariff of nine months from the proposed tariff's filing, and approximately 7 months from the proposed tariff's publication in the Canada Gazette. One of the functions of this notice period is to permit potential users (whether they submit objections or not) to arrange their affairs in order to protect themselves with respect to the accrued liabilities associated with potential retroactive tariffs. Generally they do so by collecting additional amounts from their customers or otherwise setting aside necessary funds, or by altering their business activities or pricing structures.

- **Section 73 — Certification — The Board shall take into account the prescribed general criteria when approving a tariff.**

Retransmission of Distant Television Signals, Re, 2019 CarswellNat 4088 (Cop. Bd.; 2019-08-02) (Cop. Bd.; 2019-08-02), the Board.

[176] In 1997, section 70.63 of the Act was repealed as part of the Bill C-32 reform of the Act. Its functional replacement, s. 73, does not require that the Board "have regard" to any particular prescribed criteria when establishing "a manner of determining the royalties to be paid [...] by retransmitters within the meaning of subsection 31(1)." At the same time, however, the 1997 amendments also enacted s. 66.91, a substituted regulatory-making power for the Governor in Council, which continued the Governor in Council's authority to establish general criteria to which the Board must have regard. [...]

- **Section 73 — Certification — The Board can modify a proposed tariff — A tariff is prospective but may have retroactive effects — Filing of substantially revised tariff by collective societies should be frowned upon.**

Retransmission of Distant Television Signals, Re, 2019 CarswellNat 4088 (Cop. Bd.; 2019-08-02), the Board.

[234] **The Board has the authority under section 73 of the Act to modify or vary a proposed tariff and impose terms and conditions as it considers appropriate.** That section empowers the Board to “establish [...] such terms and conditions related to those royalties as the Board considers appropriate [...] and] vary the [proposed] tariffs accordingly.” **While this is not an unlimited power, and must be exercised carefully, there are circumstances in which such a modification or variation – an “amendment” – will be called for.** Indeed, in many instances the Board varies tariffs that are proposed in some fashion. In doing so, and in determining whether it should approve rates other than those originally proposed and published in the Canada Gazette, however, **the Board must attempt to ensure that doing so would not unfairly prejudice interested or affected persons or give rise to some other procedural or substantive unfairness or violation of the principles of natural justice.**

[236] As noted, the revised rates are significantly higher than those contained in the initial proposed tariff. **Although a tariff can have a retroactive effect when it is approved by the Board, a proposed tariff always operates prospectively from the start of its effective date**, which runs no earlier than from January 1st following its proper filing. There is no mechanism in the Act whereby a tariff proposal may take effect prior to such effective date, and certainly not prior to its filing with the Board. Permitting the Collectives to file significantly “revised rates” in the fashion they have in the present case would enable them to benefit retroactively as if the amendment were made at the original filing date more than two years earlier, once approved – an advantage to which they would not otherwise be entitled. **Generally speaking, we do not think the Board’s broad power to amend should be interpreted in a manner that would permit a party, in effect, to substitute for an initial proposed tariff another substantially different proposed tariff, in the guise of an “amendment”, after consideration of the initially proposed tariff is already substantially underway.** The Board must have regard to the potential impact of such an initiative on the parties and other interested or affected persons.

- **Section 77 — Circumstances in which licence may be issued by the Board — Mechanical reproduction licensed for a limited time.**

Kuch, Re, 2019 CarswellNat 773 (Cop. Bd.; 2019-02-07), the Board.

[1] The licence authorizes the recording and mechanical reproduction of the musical work entitled Four String Polka by Graham Townsend. No more than 1000 copies of the work will be reproduced on CD. The issuance of the licence does not release the applicant from the obligation to obtain permission for any other use not covered by this licence.

[2] The licence is valid as of January 1, 2018, and expires January 1, 2023. **The authorized uses must therefore be completed by that date.**

- **Section 77 — Circumstances in which licence may be issued by the Board — No licence required when the work is in the public domain.**

Groupe Innovamper Inc, Re, 2019 CarswellNat 631 (Cop. Bd.; 2019-02-18), the Board.

REFUS

[1] La Commission a analysé votre demande de licence déposée le 26 juillet 2018 et conclu, pour les motifs qui suivent, **qu'aucune licence n'est requise pour l'utilisation de l'œuvre littéraire** faisant l'objet de votre demande : 1. L'œuvre « Aus den letzten Jahren der Kaiserin Elisabeth » de la Comtesse Irma Sztaray a été publiée en 1909; 2. La *Loi sur le droit d'auteur* prévoit que le droit d'auteur pour une œuvre littéraire subsiste pendant la vie de l'auteur, puis jusqu'à la fin de la cinquantième année suivant celle de son décès (art. 6 LR (1985), ch. C-42); 3. **L'auteur est décédée en 1940, soit il y a plus de 78 ans; 4. L'œuvre est donc du domaine public depuis le 1er janvier 1991.**

- **Section 77 — Circumstances in which licence may be issued by the Board — The Board cannot deliver a licence for a work in the public domain.**

Bibliothèque québécoise Inc, Re, 2019 CarswellNat 160 (Cop. Bd.; 2019-01-07), the Board.

REFUS

[2] À la lumière de ce qui précède, la Commission ne peut donner suite à votre demande de licence. Il ne s'agit pas d'une question de pouvoir discrétionnaire: **la Commission n'a pas compétence pour délivrer une licence en l'espèce, puisqu'elle ne peut délivrer de licences pour l'utilisation d'œuvres du domaine public.**

- **Section 77 — Circumstances in which licence may be issued by the Board — Mechanical reproduction licensed for a limited time.**

Kuch, Re, 2019 CarswellNat 773 (Cop. Bd.; 2019-02-07), the Board.

[1] (1)The licence authorizes the recording and mechanical reproduction of the musical work entitled Four String Polka by Graham Townsend. No more than 1000 copies of the work will be

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

(2) The licence is valid as of January 1, 2018, and expires January 1, 2023. **The authorized uses must therefore be completed by that date.**

- **Section 77 – Circumstances in which licence may be issued by the Board**
– An applicant must prove that the work was published.

Pointe-à-Callière, cité d'archéologie et d'histoire de Montréal, Re, 2019 CarswellNat 5891 (Cop. Bd.; 2019-08-23), the Board.

[5] En l'espèce, **la Commission a déterminé qu'il n'y a pas suffisamment de preuves que la photographie que vous désirez reproduire et exposer a fait l'objet d'une publication.** La disponibilité de la photographie dans le fond d'archives de Claude Meunier à la BAnQ, bien qu'accessible par le public en ligne, ne constitue pas une publication de l'œuvre au sens de la Loi. De plus, vous n'avez pas été en mesure de démontrer que des copies de la photo avaient été faites avec le consentement du titulaire de droit d'auteur et mises à la disposition du public.

- **Section 77 – Circumstances in which licence may be issued by the Board**
– For a licence to be granted, the work must be a published one.

Lawrence, Re, 2019 CarswellNat 5890 (Cop. Bd.; 2019-09-16), the Board.

[4] **Given that the 12 [old-time radio drama] scripts you wish to reproduce have not been published within the meaning of section 2.2 of the Act, the Copyright Board cannot issue a licence. The fact that the Board cannot issue a licence should not be interpreted as meaning that the reproductions you wish to make are, or are not, an infringement of copyright.**

- **Section 77 – Circumstances in which licence may be issued by the Board**
– A copyright owner can terminate a licence granted by the Board.

Koch, Re, 2019 CarswellNat 5889 (Cop. Bd.; 2019-10-10), the Board.

[1] (1) The licence authorizes the reproduction (on CDs and digital), the distribution (on CDs) by selling or other transfer of ownership, the making available and the communication to the public by telecommunication of musical works consisting of two psalm refrain melodies (refrains #143 by William G. Smith and #148 by Irene Brustle) published in the Catholic Book of Worship II (CBWII) by the Canadian Conference of Catholic Bishops' Publications office in 1980. The issuance of the licence does not release the applicant from the obligation to obtain permission for any other use not covered by this licence.

(2) The licence expires October 31, 2024. The authorized uses must therefore be completed by that date.

(4) The applicant undertakes to pay the sum of \$10.00 for each work to anybody who establishes, before October 31, 2029, ownership of the copyright in the work covered in this licence.

(5) **The copyright owner can terminate the licence by presenting a written notice to this effect to the applicant.** The applicant will cease using the work for the uses granted in this licence, no later than 30 days after the receipt of the notice. The copyright owner who terminates the licence is still entitled to the royalties described in paragraph (4).

- **Section 79 – Definitions [Private copying] – Only an “audio recording medium” can be subject to a levy.**

Copying for Private Use (Re), 2019 CarswellNat 9041 (Cop. Bd.; 2019-12-13), the Board.

[24] Not all types of media used to copy music can attract a levy. Pursuant to the Act, only an “audio recording medium” can be subject to a levy. Section 79 of the Act defines an “audio recording medium” **as a recording medium onto which a sound recording may be reproduced and that is of a kind ordinarily used by individual consumers for that purpose.**

- **Section 79 – Definitions [Private copying] – Only those media clearly not being used to copy music would not be subject to a levy.**

Copying for Private Use (Re), 2019 CarswellNat 9041 (Cop. Bd.; 2019-12-13), the Board.

[28] After having reviewed dictionaries and court decisions and taken into consideration principles of statutory interpretation, including the purpose of the regime, **the Board concluded that “ordinarily” bore a connotation of consistency and regularity rather than quantity or frequency.** As such, for an activity to be ordinary, it did not have to be a person’s main activity, as long it was an activity that was not rare, abnormal or minimal. [Fn22 *Private Copying 1999-2000* (18 December 1999) Copyright Board at p. 29]

[29] Applying this broad interpretation to the context of the Act, **the Board concluded that ordinary use, as referred to in the definition of audio recording medium, meant that only those media clearly not being used to copy music would not be subject to a levy; consequently, the notion of ordinariness, as used in the definition of audio recording medium, had to be interpreted as including all non-negligible uses.** [Fn23 *Private Copying 1999-2000* (18 December 1999) Copyright Board at p. 30]

[30] The Board added that since the definition of audio recording medium referred to ordinary use by individual consumers, the analysis

had to focus on those who use the medium rather than on those who use other media to copy music. [Fn24 *Private Copying 1999-2000* (18 December 1999) Copyright Board at p. 31]

[46] As mentioned earlier, it is the usage by individual consumers that must be ordinary, not the use of the product generally.

- **Section 80 — Where no infringement of copyright — Reproducing for private use a sound recording on an audio recording device is not an infringement.**

Copying for Private Use (Re), 2019 CarswellNat 9041 (Cop. Bd.; 2019-12-13), the Board.

[22] The private copying regime came into force in 1998. Part VIII of the Act sets forth its legislative scheme. **It provides that it is not an infringement of copyright to reproduce a sound recording onto an “audio recording medium” for the private use of the person who makes the copy.** [Fn17 Copyright Act, s. 80]

- **Section 81 — Right of remuneration — Manufacturers and importers of blank audio recording media are subject to a levy.**

Copying for Private Use (Re), 2019 CarswellNat 9041 (Cop. Bd.; 2019-12-13), the Board.

[23] In return, the regime provides that **eligible authors, performers and makers of sound recordings have a right to receive remuneration from manufacturers and importers of blank audio recording media in respect of the reproduction onto an “audio recording medium”**, for private use, of sound recordings and the musical works and performers’ performances embodied therein. [Fn18 Copyright Act, s. 81] This compensation takes the form of a levy set by the Board following the filing of a proposed tariff by CPCC, to be paid in respect of each blank audio recording medium disposed of in Canada. [Fn19 Copyright Act, s. 82]

- **Section 82 — Liability to pay levy — Eligible copyright holders are compensated by a levy fixed by the Board.**

Copying for Private Use (Re), 2019 CarswellNat 9041 (Cop. Bd.; 2019-12-13), the Board.

[23] In return, the regime provides that eligible authors, performers and makers of sound recordings have a right to receive remuneration from manufacturers and importers of blank audio recording media in respect of the reproduction onto an “audio recording medium”, for private use, of sound recordings and the musical works and performers’ performances embodied therein. [Fn18 Copyright Act, s. 81] **This compensation takes the form of a levy set by the Board**

following the filing of a proposed tariff by CPCC, to be paid in respect of each blank audio recording medium disposed of in Canada. [Fn19 Copyright Act, s. 82]

- **Section 84 – Distribution by collecting body – Levy must be apportioned by the Board among authors, performers and makers.**

Copying for Private Use (Re), 2019 CarswellNat 9041 (Cop. Bd.; 2019-12-13), the Board.

[52] **Section 84 of the Act requires that we apportion the levy among authors, performers and makers.** The percentage applicable to each college of rights holders corresponds to that college's share of all private copies of the qualifying repertoire.

- **Section 89 – No copyright, etc., except by statute – Copyright is a creature of statute.**

Pyrrha Design Inc. v. Plum and Posey Inc., 2019 CarswellNat 210 (F.C.; 2019-01-30) Phelan J. [appeal A-98-19].

[89] As held in *Théberge v. Galerie d'Art du Petit Champlain Inc.*, 2002 SCC 34 (CanLII) at para 5, [2002] 2 SCR 336, and *Bishop v. Stevens*, 1990 CanLII 75 (SCC), [1990] 2 SCR 467 at 477, 22 ACWS (3d) 568, **copyright law in Canada is a creature of statute with exhaustive rights and remedies provided for in the Act.**

- **Section 89 – No copyright, etc., except by statute – The rights and remedies under the Copyright Act are exhaustive.**

Albo v. The Winnipeg Free Press, 163 C.P.R. (4th) 126 (Man. Q.B.; 2019-02-22) Saull J.

[63] Counsel provided me with numerous authorities respecting principles of copyright law that are relevant to this matter. A synthesis of these authorities is provided below: [...]

a)... **“copyright is a creature of statute and the rights and remedies provided by the Copyright Act are exhaustive”** (*CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13 (CanLII) (“CCH”) at para. 9).

- **Section 89 – No copyright, etc., except by statute – The rights and remedies under the Copyright Act are exhaustive.**

Keatley Surveying Ltd v. Teranet Inc., 2019 CarswellOnt 15110 (S.C.C.; 2019-09-26) Abella J. (majority) [affirming 2016 CarswellOnt 7233 (Ont. C.A.; 2017-09-08), which was affirming 2017 CarswellOnt 14961 (Ont. Sup. Ct.; 2016-02-19)].

[40] **Copyright in Canada is a creature of statute and the rights and remedies afforded by the Copyright Act are exhaustive** (*Théberge v. Galerie d'Art du Petit Champlain inc.*, 2002 SCC 34 (CanLII), [2002] 2 S.C.R. 336, at para. 5; *CCH Canadian Ltd. v. Law*

Society of Upper Canada, 2004 SCC 13 (CanLII), [2004] 1 S.C.R. 339, at para. 9).

- **Section 89 — No copyright, etc., except by statute — The rights and remedies under the *Copyright Act* are exhaustive.**

Voltage Pictures, LLC v. Salna, 2019 FC 1412 (F.C.; 2019-11-12) Boswell J. [appeal A-439-19].

[81] I agree with CIPPIC that Voltage has not pleaded the necessary facts for its "advertising the work for download" claim. **Without any material facts pleaded on a legal foundation under the *Copyright Act*, it is plain and obvious that the claim of advertising the films for download must fail.** Voltage's claim – that each member of the proposed class advertised by way of the BitTorrent protocol that a film was available for download – is not a recognized cause of action under the *Copyright Act*.

- **83 BIA — Section 83 of the *Bankruptcy and Insolvency Act* should be given a liberal interpretation.**

Drouin (Succession de Côté-Drouin) v. Pepin, 2019 CarswellQue 1922 (Que. Sup. Ct.; 2019-03-13) Lucas J.

[245] D'abord, l'auteure Louise Lalonde dans le *Jurisclasseur Québec – Faillite, insolvabilité et restructuration* nous rappelle qu'il y a lieu de donner **une interprétation large, libérale et pratique et non excessivement formaliste à cet article, afin d'éviter un résultat absurde et de remédier, de l'opinion de certains, à sa désuétude** [Fn 219 Louise Lalonde, « *Biens du failli et dessaisissement en faveur du syndic* », dans *JurisClasseur Québec*, coll. « Droit des affaires », *Faillite, insolvabilité et restructuration*, fasc. 4, Montréal, LexisNexis Canada, feuilles mobiles, no 168, à jour au 30 mai 2014; *Syndic de DEP Distribution exclusive ltée*, 2017 QCCS 1186 (CanLII), par. 31]. **Ainsi, les œuvres reconnues par le jugement, soit le DDCF (tome 3) et les généalogies familiales par Gabriel Drouin, se qualifient aisément de manuscrits** [Fn220 Définition de MANUSCRIT : «Ouvrage écrit à la main avant la découverte de l'imprimerie. Original (ou copie) d'un ouvrage destiné à être imprimé (qu'il soit écrit à la main ou dactylographié).» Dictionnaire Larousse, en ligne].

- **83 BIA — Section 83 of the *Bankruptcy and Insolvency Act* refers to an author as a physical person.**

Drouin (Succession de Côté-Drouin) v. Pepin, 2019 CarswellQue 1922 (Que. Sup. Ct.; 2019-03-13) Lucas J.

[248] **En réalité, l'«auteur» ne peut être qu'une personne physique qui, suivant le libellé même de l'article 83 LFI, est vouée à la mort, suscite l'ouverture d'une succession par son décès et le transfert des droits à ses héritiers** [Fn 222 Art. 5(1), 6, 7, 9, 13(1), 13 (3) et

14.2 (2) LDA; *Piscines Nautika inc. c. Fibre Design inc.*, 2018 QCCS 3875 (CanLII), par. 29]. De l'analyse des dispositions de la LDA [Fn 223 Art. 5(1), 6, 7, 9, 13(1), 13 (3) et 14.2 (2) LDA; *Piscines Nautika inc. c. Fibre Design inc.*, 2018 QCCS 3875 (CanLII), par. 29.], de la doctrine et de la jurisprudence en matière de droit d'auteur [Fn224 Notamment : Pierre-Yves Gautier, *Propriété littéraire et artistique*, préc., note 93, no. 34; *CCH Canadienne Ltée c. Barreau du Haut-Canada* 2004 CSC 134, par. 16 et ss.; *Robertson c. Thomson Corp.*, 2006 CSC 43 (CanLII), [2006] 2 R.C.S. 363, par. 30 et ss.; Florence, Lucas, « *Propriété intellectuelle et titularité* », dans *Jurisclasseur Québec*, coll. « *Propriété intellectuelle* », *Droits intellectuels*, fasc. 2. Montréal, LexisNexis Canada, feuilles mobiles, nos. 2 et ss., à jour au 18 novembre 2014.], le Tribunal retient et réitère que l'«auteur» d'une œuvre s'avère être la personne physique «qui donne l'empreinte de sa personnalité à une œuvre, qui exerce son talent et son jugement pour créer une œuvre originale [Fn225 Florence, Lucas, « *Propriété intellectuelle et titularité* », dans *Jurisclasseur Québec*, coll. « *Propriété intellectuelle* », *Droits intellectuels*, fasc. 2. Montréal, LexisNexis Canada, feuilles mobiles, no. 2, à jour au 18 novembre 2014]».

- **83 BIA — Section 83 of the *Bankruptcy and Insolvency Act* applies to the author and his heirs.**

Drouin (Succession de Côté-Drouin) v. Pepin, 2019 CarswellQue 1922 (Que. Sup. Ct.; 2019-03-13) Lucas J.

[250] En l'espèce, à l'issue de l'analyse du présent jugement, les manuscrits en cause sont le DNCF (tome 3) et les généalogies familiales produites par Gabriel Drouin, recueils dont ce dernier est personnellement l'auteur [Fn 227 Sections 3.4.6 et 3.4.7 du présent jugement]. **À ce titre, l'article 83 LFI s'applique à lui et à ses héritiers pour ces œuvres** [Fn 228 *A contrario*, même si les autres collections du Fonds Drouin avaient bénéficié de la protection de la LDA, la preuve révèle que Gabriel Drouin n'en était pas personnellement l'auteur (fiches de mariages, Kardex noir, fiches d'index, étiquettes, microfilms). Elles sont plutôt le fruit du travail des généalogistes et employés de l'IGD, **et comme employeur, l'entreprise était le premier titulaire des droits d'auteur, et non Gabriel Drouin**. Ainsi, le cas échéant, l'article 83(2) LFI n'aurait pas permis à la Succession de revendiquer des droits d'auteur dans le présent recours.].

- **83 BIA — Section 83 of the *Bankruptcy and Insolvency Act* — When a work is published, a trustee is not entitled to transfer a grant of interest in the copyright without the consent of the heirs.**

Drouin (Succession de Côté-Drouin) v. Pepin, 2019 CarswellQue 1922 (Que. Sup. Ct.; 2019-03-13) Lucas J. [References to evidence omitted.]

[254] Par conséquent, **c'est l'alinéa 2 de l'article 83 qui s'applique en l'espèce. Ainsi, les recueils et les droits d'auteur doivent retourner à l'auteur Gabriel Drouin**, et dans les circonstances de son décès, à la Succession et aux héritiers dûment représentés par le demandeur dans le présent recours.

[255] En effet, il y a lieu de reconnaître que la succession des droits d'auteur sur les œuvres est d'abord dévolue à Jeanne-Côté-Drouin (toujours vivante au moment de la faillite en 1987) en vertu du legs universel stipulé dans le testament de Gabriel Drouin. Depuis son décès, ils font partie de la Succession de celle-ci.

Aside: other cases of interest – trademark notices.

- **Betrayed by a copyright notice.**

*Chartered Professional Accountants of Ontario v Chartered Institute of Management Accountants**, 2019 CarswellNat 7315 (T.M. Opp. Bd.; 2019-10-01) J. Carrière, Member.

[143] The Opponent's main argument under this ground of opposition is the fact that there are clear inconsistencies in the Applicant's evidence concerning the claimed date of first use of the Mark. **Mr. Ratnayake claims that the Applicant launched "an accounting tool called CIMA STRATEGIC SCORECARD in February 2004" while Mr. Harding, in his affidavit, states that it was in 2005 that CIMA introduced the "CIMA STRATEGIC SCORECARD product" and he attached a report filed as Exhibit I-1 to his affidavit that was published in 2005 [see copyright notice at the end of the report]** which described the CIMA Strategic Scorecard in the following terms:

(...) is a tool that is being developed by CIMA. A trial of the concept has been undertaken within CIMA and pilots are being initiated in a small number of major organisations. The aim of this preliminary paper is to provide an overview of the scorecard concept and its current state of development (...)

[152] Given that the Opponent has met its initial burden, the Applicant had the burden to provide evidence that it first used the Mark in Canada as early as February 29, 2004 in association with each of the Goods and Services. It failed to do so.

- **Saved by a copyright notice.**

*McMillan LLP v. Forbes**, 2019 CarswellNat 5965 (T.M. Registrar; 2019-10-18) A. Bene, Member.

[9] Mr. Forbes attests that, since 1999, he has operated a website at *cannibal.com.au* through which customers, including Canadian customers, order items from the Owner. Attached as Exhibit A to his affidavit are 17 pages of screenshots from this website, showing for sale various clothing items and cycling accessories displaying the Mark. **I note that the copyright notice on some of the pages is dated 2016, and Mr. Forbes attests that Exhibit A includes a screenshot of the website as it appeared on April 10, 2016.**

- **A copyright notice only indicates the date of creation of a work, not the dates of circulation.**

Miller Thomson v. Groupe Modulo Inc, 2020 CarswellNat 341 (Registrar; 2019-10-31)
O. Osadchuk, Member

[31] The Requesting Party also notes that the copyright notices for “MANUEL-CAHIER 1” and “MANUEL-CAHIER 2” date from 2005 and 2006 respectively. However, these notices merely indicate the year from which copyright is claimed and are not necessarily inconsistent with distribution of the works in later years. Indeed, the invoice entries from the relevant period include ISBNs matching those of the publications at Exhibit P-1. Moreover, the printouts at Exhibit P-2, dated February 27, 2017, show the Mark displayed on publications’ cover pages in the same manner, suggesting continuity in the manner of display. Indeed, Mr. Lutzky’s declaration confirms that the Mark was displayed in the same manner during the relevant period.

- **Betrayed by a copyright notice.**

Strassburger Holdings Limited v XCG Consultants Ltd, 2019 CarswellOnt 18751 (Ont. Sup. Ct.; 2019-11-14) Taylor J.

[Application by plaintiff to add another defendant in an action for damages - Granted.]

[4] The thrust of the plaintiffs’ position on this motion is that during the currency of this proceeding, New XCG was incorporated and the business and assets of Old XCG were transferred to it for the purpose of defeating the plaintiffs’ claims.

[7] A review of the website of Old XCG from 2013 and the website of New XCG from February 2019 discloses significant similarities. Both refer to XCG (without disclosing that it was Old XCG) being founded in 1990. At the top of both websites, in bold letters, are the letters “XCG” with smaller script below stating “Environmental Engineers & Scientists”. **In small script at the bottom of the webpage of Old XCG are the words “Copyright 2011 XCG Consultants Ltd.”. In small script at the bottom of the webpage of New XCG are the words “Copyright 2019 XCG Consulting Limited”.**

[8] The proposed amended Statement of Claim alleges that New XCG was incorporated for the purpose of acquiring and continuing the business of Old XCG. It is further alleged that New XCG acquired the assets of Old XCG for the purpose of avoiding, defeating, hindering, or delaying the payment of damages to which the plaintiffs are entitled.

- **Section 69 of the *Bankruptcy and Insolvency Act* provides for a stay of proceedings against a creditor having a recovery claim; it does not apply to stay contempt proceedings.**

Bell Canada v. Red Rhino Entertainment Inc., 2019 CarswellNat 7834 (F.C. - Contempt; 2019-11-19) Norris J. [from T-759-16 *Canada v 1326030 Ontario Inc. (iTVBox.net)*, 2016 CarswellNat 4944 (F.C.; 2016-06-01); affd 2017 CarswellNat 850 (F.C.A.; 2017-03-20) *sub nomine Wesley (Mtlfreetv.com) v Bell Canada*].

[26] Section 69 of the *BIA* is found under the heading “Stay of Proceedings.” Paragraph 69(1)(a) in particular provides that, upon the filing of a notice of intention under section 50.4 by an insolvent person, “no creditor has any remedy against the insolvent person or the insolvent person’s property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy.”

[27] Under the *BIA*, “creditor” means “a person having a claim provable as a claim under this Act” (*BIA*, s 2). The assertion that the plaintiffs are currently “creditors” of Red Rhino and Mr. Adwokas as a result of the underlying action is spurious. More to the point, whether or not they are or might one day become creditors with respect to Red Rhino Entertainment Inc. or Mr. Adwokas, this is not the capacity in which the plaintiffs have brought the present motion. They have brought this motion so that the Court may determine whether Red Rhino or Mr. Adwokas were in contempt of the interlocutory injunction. **The present proceeding is not, in any way, shape or form, a proceeding “for the recovery of a claim provable in bankruptcy,”** as paragraph 69(1)(a) of the *BIA* contemplates (see *Recycling Worx Solutions Inc v Hunter*, 2018 ABQB 395 at paras 136-37 and the cases cited therein). **It is a proceeding brought to safeguard the administration of justice.** Paragraph 69(1)(a) of the *BIA* simply does not apply. It therefore does not pose any impediment to the present matter proceeding.

And others:

- **Firing an employee for illegal downloading may be a disproportionate measure.**

Menard v. The Centre for International Governance Innovation, 2019 CarswellOnt 1437 (Ont. Sup. Ct.; 2019-02-04) Gray J.

[Firing an officer for illegal downloading of copyright material, without warning or other form of progressive discipline, is disproportionate and constitutes a dismissal without cause.]

[26] Mr. Menard acknowledged that he did not secure authorization from artists, creators, and/or copyright holders to view and download the material, but he testified that he was unaware as to whether any of this material had copyright. He acknowledged that one can purchase this material, and he did not pay for any of the downloaded material.

[32] Mr. Medhora [employer's president] believed that downloading unauthorized copies of copyright material was probably unlawful. Furthermore, this activity might harm CIGI's reputation and goodwill if it were to be discovered. This would include potentially offending Copyright Collective of Canada which had provided the research grant referred to earlier [\$300,000].

[86] With respect to the use of peer-to-peer software and downloading material, at the end of the day this does not constitute cause for dismissal without notice.

[89] However, it is well known that this sort of software is ubiquitous, and indeed Mr. Miller acknowledged that he had used it himself on his home computer.

[90] Even in cases of dishonesty, it is necessary to determine whether the misconduct is compatible with a continuation of the employment relationship [...]

[92] I agree with Mr. Monkhouse that if Mr. Menard had been spoken to about using peer-to-peer software on his computer and keeping corporate documents at home, there is little doubt that Mr. Menard would have complied. I am not persuaded that Mr. Menard's delinquencies were incompatible with a continuation of the employment relationship.

[93] While not determinative, it is also relevant to note that the interests of the employer were not, in fact, affected. There is no evidence of any financial loss. CIGI's reputation has not been affected. The relationship with Copyright Collective of Canada has not been harmed.

- **Non-respect of the *Consumers Protection Act* could not be the subject matter of a cross-demand to a copyright infringement claim.**

9157-4335 *Québec inc. v. 9180-3577 Québec inc.*, 2019 CarswellQue 1180 (Que. C.A.; 2019-02-20) Hamilton J.

[14] En l'espèce, la demande principale a pour objet la concurrence déloyale des requérants par l'utilisation de noms similaires à ceux des intimés et le plagiat d'un ou de plusieurs manuels de formation. La demande reconventionnelle porte, quant à elle, sur l'absence de permis de l'intimée 9180-3577 Québec inc. pour exercer des activités de commerçant itinérant au sens de la *Loi sur la protection du consommateur*. **Les deux recours n'ont certainement pas la même source. Par ailleurs, ces sources ne sont pas connexes**, ou le sont de façon très ténue, en ce qui concerne le mouvement de la clientèle par des pratiques alléguées déloyales.

[15] De plus, le juge conclut que permettre le dépôt d'une telle demande reconventionnelle à la veille de l'inscription du dossier n'aura que pour effet de retarder indûment l'inscription de la demande principale. Je suis d'avis que ce facteur est pertinent dans l'application du principe directeur de proportionnalité et justifie le rejet de la demande reconventionnelle.

- **Copyright infringement is a ground for trademark opposition.**

*Pablo Enterprise pte. Ltd. v. Tang**, 2019 CarswellNat 3229 (T.M. Opp. Bd.; 2019-06-13) C.R. Folz, Member.

[17] In determining whether an opponent has met its initial evidential burden for a ground of opposition based on section 30(i) of the Act in conjunction with non-compliance with a federal statute, this Board in the past has considered whether the opponent has made out a prima facie case of contravention of the federal statute, as opposed to determining that there has actually been contravention. **For example, section 30(i) grounds of opposition were successful** in *E Remy Martin & Co SA v Magnet Trading Corp (HK) Ltd* (1988), 23 CPR (3d) 242 (TMOB) ("E Remy Martin") and *Ace Cafe London Ltd v Ace Cafe Toronto Ltd*, [2012] T.M.O.B. No. 219, 107 CPR (4th) 427 **after a prima facie case of copyright infringement under the Copyright Act was found**. Oppositions by Canada Post Corporation have succeeded under section 30(i) after a finding of prima facie contravention of the *Canada Post Corporation Act* [see for example, *Canada Post Corp v Metromail Corp* (1997), 84 CPR (3d) 511 (TMOB)]. In addition, prima facie contravention of the *Food and Drugs Act* supported the success of a section 30(i) ground of opposition in *Institut National des Appellations d'Origine v Brick Brewing Co* (1995), 66 CPR (3d) 351 (TMOB).

[18] Thus, in the present case with the Opponent's section 30(i) ground of opposition, the first issue is whether the Opponent has met its initial evidential burden of demonstrating a prima facie case of

copyright infringement. **In order to do so, an opponent must establish (i) copyright in the work, and (ii) that the trade-mark applied for is a substantial copying of the work** [see *Jones v Dragon Tales Production Inc* (2002), 27 CPR (4th) 369 at para 13 (TMOB)].

- **Loosing plaintiff cannot sue former lawyer for not prevailing.**

Tremblay v. Fonds d'assurance responsabilité professionnelle du Barreau du Québec, 2019 CarswellQue 11270 (Que. Sup. Ct.; 2019-09-06) Dallaire J.

[280] Si nous pouvons comprendre la déception de Tremblay [*Tremblay v Orio Canada Inc*, 2013 CarswellNat 1145 (F.C.; 2013-01-31); affd 2013 CarswellNat 3483 (F.C.A.; 2013-09-25)] à l'issue de tout ce processus judiciaire, notre sympathie pour le travail acharné qu'il a accompli et le sentiment d'injustice qu'il a de n'avoir pas pu récupérer ce qui aurait dû lui revenir pour le fruit de son travail, [cela] ne justifie pas de rendre l'avocat qui s'est démené pour l'aider responsable des aléas propre [sic] à toute procédure judiciaire, en l'absence de négligence de la part de cet avocat dans l'exécution du mandat accompli.