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LAWYERS, PATENT AND TRADEMARK AGENTS

## A COMPILATION OF THE CANADIAN COPYRIGHT CASES DECIDED IN 2013

LAURENT CARRIÈRE\*  
**ROBIC, LLP**  
LAWYERS, PATENT & TRADEMARK AGENTS

First, a general listing:

1. *1572704 Ontario Inc. (c.o.b. Sandie's Reading N' Greetings)*, [2013] O.L.A.T.D. 79, <http://canlii.ca/en/on/onlat/doc/2013/2013canlii21155/2013canlii21155.html> (Ontario Licence Appeal Tribunal; 2013-04-17)
2. *7716 v. Registrar of Alcohol and Gaming*, 2013 CanLII 21155, <http://canlii.ca/en/on/onlat/doc/2013/2013canlii21155/2013canlii21155.html> (Ont. - Licence Appeal Tribunal; 2013-04-17)
3. *Access Copyright (Educational Institutions) 2005-2009 – Redetermination*, [2013] C.B.D. 4; 2013 CarswellNat 58, available at <http://www.cb-cda.gc.ca/decisions/2013/Access-Redetermination-18-01-2013.pdf> (Cop. Bd.; 2013-01-18)
4. *Access Copyright (Educational Institutions) 2010-2015*, File: Reprographic Reproduction, 2010-2015, interim decision; 2013 CarswellNat 1656, [2013] C.B.D. 4; available at <http://www.cb-cda.gc.ca/decisions/2013/access2010-2015-29-05-2013.pdf> (Cop. Bd.; 2013-05-29)
5. *(AOM) NA Inc. v. Reveal Group*, 2013 ONSC 8014, <http://canlii.ca/en/on/onsc/doc/2013/2013onsc8014/2013onsc8014.html> (Ont. Sup. Ct.; 2013-12-30)
6. *Application to fix royalties for a licence and its related terms and conditions (SODRAC v. CBC/SRC) Interim Decision*, 2013 CarswellNat 43. [2013] C.B.D. 3, also available at <http://www.cb-cda.gc.ca/decisions/2013/sodrac-16012013.pdf> (Cop. Bd.; 2013-01-16)

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\* Lawyer and trade-mark agent, Laurent Carrière is a partner with ROBIC, LLP, a multidisciplinary firm of lawyers, patent and trademark agents. Published as part of a release to the *Canadian Copyright Act Annotated* (Carswell). Publication 432.

**ROBIC, LLP**  
www.robic.ca  
info@robic.com

**MONTREAL**  
1001 Square-Victoria - Bloc E - 8<sup>th</sup> Floor  
Montreal, Quebec, Canada H2Z 2B7  
Tel.: +1 514 987-6242 Fax: +1 514 845-7874

**QUEBEC**  
2828 Laurier Boulevard, Tower 1, Suite 925  
Quebec, Quebec, Canada G1V 0B9  
Tel.: +1 418 653-1888 Fax.: +1 418 653-0006

7. *Avery v. Royal Canadian Mounted Police*, 2013 CarswellNB 250, 2013 NBBR 152, 2013 NBQB 152, 1048 A.P.R. 290, 404 N.B.R. (2d) 290, [2013] NBJ 149, <http://canlii.ca/fr/nb/nbbr/doc/2013/2013nbbr152/2013nbbr152.html> (N.B. Q.B.; 2013-05-06)
8. *Banquise du golfe inc. c. Paulin*, 2013 CarswellQue 7815, EYB 2013-225342, J.E. 2013-1460, 2013 QCCQ 7997, <http://canlii.ca/fr/qc/qccq/doc/2013/2013qccq7997/2013qccq7997.html> (Que. Ct.; 2013-05-14)
9. *Bell Media inc. v. Société du droit de reproduction des auteurs compositeurs et éditeurs au Canada*, 2013 CarswellQue 10817, EYB 2013-228424, 2013 QCCS 5203, [2013] JQ 14340, <http://www.canlii.org/fr/qc/qccs/doc/2013/2013qccs5203/2013qccs5203.pdf> (Que. Sup. Ct.; 2013-10-23)
10. *Bibliothèque et Archives nationales du Québec (BAnQ) for the reproduction and communication to the public by telecommunication of monographs (Application by)*, file 2012-UO/TI-10, 2013 CarswellNat 3457, <http://www.cb-cda.gc.ca/unlocatable-introuvables/licences/273-f.pdf> (Cop. Bd.; 2013-08-21)
11. *Bibliothèque et Archives nationales du Québec (BAnQ), pour la reproduction et la communication au public par télécommunication de périodiques et de programmes de théâtre (Application by)*, file 2011-UO/TI-29, 2013 CarswellNat 2591, <http://www.cb-cda.gc.ca/unlocatable-introuvables/licences/271-f.pdf> (Cop. Bd.; 2013-05-23)
12. *Biocad Medical inc. v. Panthera Dentaire inc.*, 2013 CarswellQue 2344, EYB 2013-219605, 2013 QCCS 905, <http://canlii.ca/fr/qc/qccs/doc/2013/2013qccs905/2013qccs905.html> (Que. Sup. Ct; 2013-03-12)
13. *Boire v. Lefebvre*, 2013 QCCQ 921, <http://canlii.ca/fr/qc/qccq/doc/2013/2013qccq921/2013qccq921.html> (Que. Ct. Small Claims; 2013-01-10)
14. *Canada's History Society, for the reproduction, the making available and the communication to the public by telecommunication of three paintings [Application by]*, File: 2013-UO/TI-01, 2013 CarswellNat 2378, <http://www.cb-cda.gc.ca/unlocatable-introuvables/licences/268-e.pdf> (Cop. Bd.; 2013-02-13)
15. *Canadian Artists' Representation/Le Front des artistes canadiens (CARFAC) and Le regroupement des artistes en arts visuels du Québec (RAAV) v. National Gallery of Canada (NGC)*, File: 1330-08-001, Decision 58, [2012] C.A.P.P.R.T.D. 053, 2012 CarswellNat 4332 <http://www.capprt->

- tcrpap.gc.ca/eic/site/cappprt-tcrpap.nsf/eng/tn00626.html (CAPPRT; 2012-02-16); revd. *National Gallery of Canada v. Regroupement des artistes en arts visuels du Québec*, 2013 CarswellNat 507, 2013 CarswellNat 508, 226 A.C.W.S. (3d) 557, 443 N.R. 121, 2013 F64, 2013 CAF 64, [2013] FCJ 205. <http://decisions.fca-caf.gc.ca/en/2013/2013fca64/2013fca64.html> (FCA; 2013-03-04); leave to appeal to the Supreme Court of Canada granted, 2013 CarswellNat 2950, [2013] SC190(S.C.C.; 2013-08-15)
16. *Canadian Solar Solutions Inc. v. RA Solar Leasing Inc.*, 2013 CarswellOnt 955, 2013 ONSC 671, 97 C.B.R. (5th) 119, 225 A.C.W.S. (3d) 126, <http://www.canlii.org/en/on/onsc/doc/2013/2013onsc671/2013onsc671.html> (Ont. Sup. Ct. [Commercial List];2013-01-29); CarswellOnt 2787, 226 A.C.W.S. (3d) 971, 2013 ONSC 1573, [2013] OJ 390, <http://canlii.ca/en/on/onsc/doc/2013/2013onsc1573/2013onsc1573.html> (Ont. Sup. Ct. [Commercial List] - Costs; 2013-03-13)
17. *Chélin v. Girouard*, 2013 CarswellQue 12420, EYB 2013-229977, 2013 QCCQ 8742, <http://canlii.ca/fr/qc/qccq/doc/2013/2013qccq8742/2013qccq8742.html> (Que. Ct- Small Claims; 2013-08-16)
18. *Cojocar v. British Columbia Women's Hospital and Health Centre*, 2009 BCSC 494, 65 C.C.L.T. (3d) 75, [2009] BCJ 731, 2009 CarswellBC 91, <http://canlii.ca/en/bc/bcsc/doc/2009/2009bcsc494/2009bcsc494.html> (B.C.-S.C.; 2009-04-09); revd 2011 BC192, 17 B.C.L.R. (5th) 253, 303 B.C.A.C. 278, 512 W.A.C. 278, 44 Admin L.R. (5th) 231, 81 C.C.L.T. (3d) 183, [2011] 7 W.W.R. 82, [2011] B.C.J. No. 680 (QL), 2011 2011 CarswellBC 886,, <http://canlii.ca/en/bc/bcca/doc/2011/2011bcca192/2011bcca192.html> (B.C. C.A.; 2011-04-14), revd 2013 CarswellBC 1400, [2013] SCJ 30, 2013 SCC 30, <http://canlii.ca/en/ca/scc/doc/2013/2013scc30/2013scc30.html> (S.C.C.; 2013-05-24)
19. *Cormier v. R.*, 2013 QC2068, [2013] JQ 16785, <http://canlii.ca/fr/qc/qcca/doc/2013/2013qcca2068/2013qcca2068.html> (Que. C. A.; 2013-12-02)
20. *Delta Hotels v. Backus-Naur*, 2013 CarswellOnt 657 , 225 A.C.W.S. (3d) 33, 2013 ONSC 582, [2013] OJ 312, <http://www.canlii.org/en/on/onsc/doc/2013/2013onsc582/2013onsc582.pdf> (Ont.Sup. Ct; 2013-01-24)
21. *Desmarteau v Ontario Lottery and Gaming Corporation*, 2013 CarswellQue 12333, 2013 QC2090, <http://canlii.ca/fr/qc/qcca/doc/2013/2013qcca2090/2013qcca2090.html> (Que. C.A.; 2013-12-05)

22. *Distrimed inc. v. Dispill Inc.*, 2013 CarswellNat 3663, 2013 FCJ 1093, 2013 FC 1043, [2013] FCJ 1093, <http://canlii.ca/en/ca/fct/doc/2013/2013fc1043/2013fc1043.html> (F.C.; 2013-10-15)
23. *Éditions du Quartz*, pour la reproduction, la réédition et la distribution sur support papier du texte d'un livre (Application by Les), file 2013-UO/TI-08, 2013 CarswellNat 2590, <http://www.cb-cda.gc.ca/unlocatable-introuvables/licences/270-f.pdf> (Cop. Bd.; 2013-05-23)
24. *Éditions Québec-Amérique inc. v. Druide Informatique inc.*, 2013 CarswellQue 212, 2013 QCCS 82, EYB 2013-216810, <http://canlii.ca/fr/qc/qccs/doc/2013/2013qccs82/2013qccs82.html> (Que. Sup. Ct; 2013-01-21); 2013 QCCS 5693, [2013] JQ 15910, <http://canlii.ca/fr/qc/qccs/doc/2013/2013qccs5693/2013qccs5693.html> (Que. Sup. Ct; 2013-10-16)
25. *Filosofia Éditions inc. v. Entreprises Foxmind Canada Ltée*, 2013 CarswellQue 5393, EYB 2013-222959, J.E. 2013-1170, 2013 QCCS 2519, <http://www.canlii.org/fr/qc/qccs/doc/2013/2013qccs2519/2013qccs2519.html> (Que. Sup. Ct.; 2013-06-07); leave to appeal granted 2013 CarswellQue 8297, EYB 2013-225993, J.E. 2013-1575, 2013 QC1422, <http://canlii.ca/fr/qc/qcca/doc/2013/2013qcca1422/2013qcca1422.html> (Que.C.A. - Motion for leave to appeal; 2013-08-23)
26. *Gestion Reper inc. v. Brassard*, 2013 CarswellQue 11277, EYB 2013-228998, 2013 QCCS 5453, [2013] JQ 15141, <http://canlii.ca/fr/qc/qccs/doc/2013/2013qccs5453/2013qccs5453.html> (Que. Sup. Ct; 2013-11-06)
27. *Hernandez v. Purcell*, 2013 CarswellNS 708, 2013 NSSC 303, <http://canlii.ca/en/ns/nssc/doc/2013/2013nssc303/2013nssc303.html> (N.S. S.C.; 2013-09-25)
28. *Isle -Principia (USA) inc. v. Guimond*, 2013 CarswellQue 7711, 2013 QCCS 3730, <http://www.canlii.org/fr/qc/qccs/doc/2013/2013qccs3730/2013qccs3730.pdf> (Que. Sup. Ct.; 2013-07-03)
29. *Jenkins for the reproduction and communication to the public by telecommunication of a film (Application by Rebecca)*, file 2012-UO/TI-16, 2013 CarswellNat 3468, <http://www.cb-cda.gc.ca/unlocatable-introuvables/licences/274-E.pdf> (Cop. Bd.; 2013-08-21)
30. *Keatley Surveying Ltd. v. Teranet Inc.*, 107 CPR (4<sup>th</sup>) 237, 2012 CarswellOnt

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31. *KV 265, Chicago for the use of a literary work in public performances [Application by]*, File: 2013-UO/TI-02, 2013 CarswellNat 2379, <http://www.cb-cda.gc.ca/unlocatable-introuvables/licences/269-e.pdf> (Cop.Bd.; 2013-04-03)
32. *Layette Minimôme inc. v. Jarrar*, 2013 QCCS 6084, [2013] JQ 16948, <http://canlii.ca/fr/qc/qccs/doc/2013/2013qccs6084/2013qccs6084.html> (Que Sup. Ct; 2013-12-05)
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35. *Musée de Charlevoix for the reproduction and display of a poster (Application by)*, file 2013-UO/TI-10, <http://www.cb-cda.gc.ca/unlocatable-introuvables/licences/272-f.pdf> (Cop. Bd.; 2013-06-10)
36. *Musée de Charlevoix, La Malbaie (Québec) pour la reproduction et l'exposition d'une affiche (Application by)*, file 2013-UO/TI-10, 2013 CarswellNat 2594, <http://www.cb-cda.gc.ca/unlocatable-introuvables/licences/272-f.pdf> (Cop. Bd; 2013-06-10)
37. *Nadon et Sphère Média Plus inc.*, 2013 CarswellQue 9429, EYB 2013-227016, 2013 QCCS 4489, <http://canlii.ca/fr/qc/qccs/doc/2013/2013qccs4489/2013qccs4489.html> (Que. Sup. Ct.; 2013-09-18)
38. *National Film Board of Canada for the reproduction and the communication to the public by telecommunication of a photograph in a documentary film [Application by]*, File: 2012-UO/TI-18, 2013 CarswellNat 2370, <http://www.cb-cda.gc.ca/unlocatable-introuvables/licences/267-f.pdf> (Cop. Bd.; 2013-01-31)
39. *Nautical Data International, Inc. v. C-Map USA Inc.*, 2012 FC 300, 2012 CarswellNat 1055, 106 C.P.R. (4th) 341, <http://canlii.ca/en/ca/fct/doc/2012/2012fc300/2012fc300.html> (FC; 2012-

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42. *Open Government Initiative (Re)*, [Evaluating the Government of British Columbia Open Government Initiative, Investigation Report F13-03] 2013 BCIPC 19, [2013] B.C.I.P.C.D. No. 19, <http://canlii.ca/en/bc/bcipc/doc/2013/2013bcipc19/2013bcipc19.html> (2013-07-25)
43. *Pelchat c. Zone 3 inc.*, 2013 QCCS 78, [2013] JQ 197, <http://canlii.ca/fr/qc/qccs/doc/2013/2013qccs78/2013qccs78.html>, 2013 CarswellQue 216, EYB 2013-216815, J.E. 2013-506 Que. Sup. Ct; 2013-02-21)
44. *Pinto v. Bronfman Jewish Education Centre*, 2013 FC 945, 2013 FCJ 992, 2013 CarswellNat 3396, <http://canlii.ca/en/ca/fct/doc/2013/2013fc945/2013fc945.html> (F.C.; 2013-09-11)
45. *Planification-Organisation-Publications Systèmes (POPS) Ltée v. 9054-8181 Québec Inc.*, 2013 CarswellNat 1230, 2013 FC 427, 2013 CF 427, 227 A.C.W.S. (3d) 1146, 111 C.P.R. (4th) 1, 2013 FC 427, [2013] FCJ 479, <http://decisions.fct-cf.gc.ca/en/2013/2013fc427/2013fc427.html> (FC; 2013-04-25)
46. *Private Copying 2012, 2013 and 2014*, 112 C.P.R. (4<sup>th</sup>) 460, 2013 CarswellNat 3149, available at <http://www.cb-cda.gc.ca/decisions/2013/30082013.pdf> (Cop. Bd.; 2013-08-30)
47. *R. v. Dulac\**, 2013 QCCQ 8200, <http://www.canlii.org/fr/qc/qccq/doc/2013/2013qccq8200/2013qccq8200.html> (Que. Ct. – Crim. Div.; 2013-07-19)
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49. *R. v. Stowbridge*, 2013 CarswellNfld 334 2013, 109 W.C.B. (2d) 85 NL57, [2013] NJ 406, <http://canlii.ca/en/nl/nlca/doc/2013/2013nlca57/2013nlca57.html> (Nfld. C.A.; 2013-09-09)
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51. *Reprographic Reproduction 2011-2013, Re* 2010 CarswellNat 5028, 2010 CarswellNat 5029, 92 CPR (4th) 434, [http://www.cb-cda.gc.ca/decisions/2010/decision\\_of\\_the\\_board.pdf](http://www.cb-cda.gc.ca/decisions/2010/decision_of_the_board.pdf) (CopBd; 2010-12-23); var. 2011 CarswellNat 2254, 2011 CarswellNat 2253, 93 CPR (4th) 429, <http://www.cb-cda.gc.ca/decisions/2011/20110407.pdf> (CopBd-Application to vary an Interim Tariff; 2011-04-07); additional reasons at 2011 CarswellNat 2429, 2011 CarswellNat 2430, <http://www.cb-cda.gc.ca/decisions/2011/20110628.pdf> (CopBd: 2011-06-28) and 2011 CarswellNat 3708, <http://www.cb-cda.gc.ca/decisions/2011/20110923.pdf> (CopBd; 2011-06-28); *Access Copyright - Provincial and Territorial Governments Tariffs (2005-2014) Decision (Crown immunity application)*, 98 CPR (4<sup>th</sup>) 215, <http://www.cb-cda.gc.ca/decisions/2012/20120105-2.pdf> (CopBd; 2012-01-05); 2012 CarswellNat 7, 98 CPR (4th) 215, [http://www.cb-cda.gc.ca/decisions/2012/prov\\_reason\\_2012.pdf](http://www.cb-cda.gc.ca/decisions/2012/prov_reason_2012.pdf); additional reasons 2012 CarswellNat 609 (CopBd; 2012-03-15) 2012 F22, <http://www.canlii.org/en/ca/fca/doc/2012/2012fca22/2012fca22.html> (FCA-Motion to strike affidavit; 2012-01-23); affd 2012 CarswellNat 688, 2012 F96 (FCA; 2012-03-20); affd *sub nomine Manitoba v. Canadian Copyright Licensing Agency Operating (Access Copyright)*, 2013 CarswellNat 785, 2013 F91, 225 A.C.W.S. (3d) 1102, 358 D.L.R. (4th) 563, 444 N.R. 202, 112 C.P.R. (4th) 1, [2013] FCJ 358 <http://www.canlii.org/en/ca/fca/doc/2013/2013fca91/2013fca91.html>, <http://decisions.fca-caf.gc.ca/en/2013/2013fca91/2013fca91.pdf> (F.C.A.; 2013-04-03)
52. *Retransmission of Distant Television and Radio Signals*, File: Retransmission 2009-2013; also available at <http://www.cb-cda.gc.ca/decisions/2013/retrans->

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54. *Roué v. Nova Scotia*, 2013 CarswellINS 97, 225 A.C.W.S. (3d) 923, 1036 A.P.R. 346, 327 N.S.R. (2d) 346, 2013 NSSC 45, <http://canlii.ca/en/ns/nssc/doc/2013/2013nssc45/2013nssc45.html> (N.S. S.C.; 2013-02-06); 2013 CarswellINS 599, 2013 NSSC 254, 231 A.C.W.S. (3d) 636, 1055 A.P.R. 40, 333 N.S.R. (2d) 40, <http://canlii.ca/en/ns/nssc/doc/2013/2013nssc254/2013nssc254.html> (N.S. S.C.; 2013-08-09); leave to appeal refused CarswellINS 615, 2013 NS94, 42 C.P.C. (7th) 48, 232 A.C.W.S. (3d) 42, 1055 A.P.R. 327, 333 N.S.R. (2d) 327, <http://canlii.ca/en/ns/nsca/doc/2013/2013nsca94/2013nsca94.html> (N.S. C.A.; 2013-08-27)
55. *SOCAN Tariff 24 - Ringtones (2003-2005), Ringtones and Ringbacks (2006-2013) - Application to Vary*, 2013 CarswellNat 58, [2013] C.B.D. 5; available at <http://www.cb-cda.gc.ca/decisions/2013/SOCAN-Tariff-24-18-01-2013.pdf> (Cop. Bd.; 2013-01-18)
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57. *Spanski Enterprises, Inc. v. IMB+ Records Inc.*, 2013 CarswellOnt 12610, 2013 ONSC 5382, [2013] OJ 4113, <http://canlii.ca/en/on/onsc/doc/2013/2013onsc5382/2013onsc5382.html> (Ont. Sup. Ct.; 2013-09-11)
58. *Statement of Royalties to Be Collected by SODRAC for the Reproduction, in Canada, of Musical Works Embedded into Cinematographic Works for the Purpose of Distributing Copies of These Cinematographic Works for Private Use or for Theatrical Exhibition - Tariff No. 5 (2009-2012) [Redetermination]*, 2013 CarswellNat 2325, available at <http://www.cb-cda.gc.ca/decisions/2013/sodrac5-05-07-2013.pdf> (Cop. Bd.; 2013-07-05)
59. *Stoyanova v. Disques Mile End*, 2013 CarswellQue 11696, EYB 2013-229306, 2013 QCCS 5631, <http://canlii.ca/fr/qc/qccs/doc/2013/2013qccs5631/2013qccs5631.html> (Que. Sup. Ct.; 2013-11-13)



60. *Tency Music SAS v. Lefrançois*, 2013 CarswellQue 4285, 2013 QSCS 1947, <http://www.canlii.org/fr/qc/qccs/doc/2013/2013qccs1947/2013qccs1947.html> (Que. Sup. Ct; 2013-04-29)
61. *Tremblay v. Orio Canada Inc.*, 2013 CarswellNat 1145, 2013 FCJ 105, 2013 FC 109, <http://www.canlii.org/en/ca/fct/doc/2013/2013fc109/2013fc109.html> F.C.; 2013-01-31); affd. 2013 CAF 225, 2013 CarswellNat 3483 [2013] ACF 1031, <http://canlii.ca/fr/ca/caf/doc/2013/2013caf225/2013caf225.html> (F.C.A.; 2013-09-25)
62. *Trudeau v. AD 4 Distribution Canada inc.*, 2013 QCCS 2678, <http://canlii.ca/fr/qc/qccs/doc/2013/2013qccs2678/2013qccs2678.html> (Que. Sup. Ct.; 2013-06-17)

Now, a section by section analysis of those 2013 Canadian cases.

- **Section 1 – Short title**

The artists' professional services and terms of engagement under the *Status of the Artist Act* (SAA) do not include necessary matters relating to copyright.

*National Gallery of Canada v. Canadian Artists' Representation*, 2013 CarswellNat 507 (F.C.A.; 2013-03-04) Noël J. [reversing *Canadian Artists' Representation/Le Front des artistes canadiens (CARFAC) and Le regroupement des artistes en arts visuels du Québec (RAAV) v. National Gallery of Canada (NGC)*, 2012 CarswellNat 4332 (C.A.P.P.R.T.; 2012-02-16); leave to appeal to the Supreme Court of Canada granted, docket 35353, 2013 CarswellNat 2950 (S.C.C.; 2013-08-15)]

[99] This distinction is equally fundamental in the present case. Where a scale agreements pertains to commissioned works (“œuvres commandées”, to use the French phrase), no copyright is involved since the work does not exist at the time the agreement is signed. Consequently, the “provision of ... services” required to realize the commissioned work and the rights of use that an artist may assign with respect to the contemplated work do not entail any possible conflict with the *Copyright Act*. I note that the provision of artists services to produce commissioned works is a common practice in the art world, as is evidenced by Bill 90 [*Status of the Artist Act*, S.C. 1992, c. 33] and by the Act itself which applies to specified producers that “engage one or more artists to provide an artistic production” (paragraph 6(2)(a) of the Act).

**[100] Conflicts with the *Copyright Act* only arise where one seeks to extend scale agreements to works that are created otherwise than in the context of a commission, as the Tribunal did in this case.**

**[102] In extending the application of the Act to works made otherwise than in the context of a commission, the Tribunal distorted the words used by Parliament. No linguistic gymnastics can justify the assertion that the assignment of a copyright is a “provision of artists’ services”.**

**[115] I therefore conclude that matters relating to copyright, including the imposition of minimum fees for the use of existing works, do not come within the parameters of the Act [*Status of the Artist Act*, S.C. 1992, c. 33] and that therefore, the Tribunal had no authority to compel the parties to negotiate such matters. Beyond this, the National Gallery could not validly agree to a scale agreement affecting copyrights. [...]**

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

Even considered as an architectural work, a mausoleum is still a building and as such, its construction must obey to the provisions of the provincial construction legislation which governs work on construction sites for safety issues and to ensure that construction standards are followed for the purpose of public interest.

*Monuments Gibson inc v. Québec (Commission de la construction)*, 2013 QCCRT 68 (Que C.C.R.T.; 2013-02-11) Mireault J.

[Upon motion to determine if the construction of a mausoleum on a private lot in a cemetery falls under *An Act Respecting Labour Relations, Vocational Training and Workforce Management in the Construction Industry*]

[39] C'est la nature des travaux exécutés qui détermine l'assujettissement à la loi. Ainsi, les personnes qui exécutent ou font exécuter des travaux visés par la loi sont assujetties à ses dispositions indépendamment de leur qualité ou de leur statut.

[53] Aucune preuve n'a été soumise selon laquelle les personnes ayant travaillé à l'érection du mausolée de la famille Cossette étaient membres d'une association reconnue en vertu de la *Loi sur le statut professionnel des artistes des arts visuels, des métiers d'art et de la littérature et sur leurs contrats avec les diffuseurs* ou membres d'une association de restaurateurs reconnue et dont le nom a été publié à la *Gazette officielle du Québec*. Ils ne peuvent donc bénéficier de cette exception.

[54] En résumé, si les travaux sont compris dans une des activités énumérées au premier alinéa de l'article 1 f) de la Loi R-20, s'ils sont effectués sur un bâtiment ou un ouvrage de génie civil, sur un chantier de construction et qu'aucune des exceptions de l'article 19 de cette loi ne s'applique, ils seront assujettis.

[58] Il ressort de cette décision [*Commission de la construction du Québec c. Logis Décor J.G.S. inc.* 833, 2 juin 1994 (Commissaire de la construction)] que l'intervention d'un artiste peintre professionnel et d'autres intervenants de l'équipe de Monuments Gibson avant et pendant l'exécution des travaux ne doit pas être prise en compte et n'a pas de conséquence sur l'assujettissement des travaux.

**[70] Enfin, le fait que des travaux ou des matériaux puissent être couverts par des droits d'auteur ne fait pas obstacle à l'application de la Loi R-20. [*Loi sur les relations du travail, la***

*formation professionnelle et la gestion de la main-d'œuvre dans l'industrie de la construction]*

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

House plans are copyrightable – In 1988, the qualifier "of art" was dropped from the definition of "architectural work" in 1988.

*Oakcraft Homes Inc v. Ecklund*, 2013 CanLII 41981 (Ont. Sup. Ct. – Small Claims; 2013-07-02) Gilbert, J.

[40] **The Copyright Act clearly recognizes that house plans are subject to copyright protection** on the basis that "artistic work" includes "plans" and "architectural works". Case law has further confirmed that copyright exists in a house plan. *Hay and Hay Construction Co. v. Sloan*, 1957 Carswell Ont 27 (Ont. S.C.)

[41] It is to be noted that the *Copyright Act* was amended in 1988. Prior to that date, the *Copyright Act* covered "architectural work of art" instead of "architecture work", making it a requirement to confine the protection of the Act to the artistic character and design of the work. **This requirement was dropped with the amendment to the Act. Therefore, any cases dealing with a fact situation originating at the time where the previous version of the Act was in force must be examined with scrutiny.**

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

Copyright protects the tangible expression of an idea and not the visual approach/perception of an artist.

*Rains v. Molea*, 114 C.P.R. (4th) 161 (Ont. Sup. Ct.; 2013-08-15) Chiappetta J.

[22] **Further, in my view it would be unwise to extend copyright protection to the visual perception of an artistic work, which is intangible and subjective.** Copyright subsists in the expression of an idea in a fixed material form: *CCH*, at para. 8 [*CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13,]. There is good reason for this. The scale would be tipped in favour of the creator's rights if copyright were to protect an undefined and unarticulated feeling emoted from artistic works. There would be little room for the public domain to flourish. Others would be unable to produce new artistic works without fear of infringing a creator's self-imposed or critically-bequeathed imprecise evocation of his work's feeling or expression. Moreover, the protection would often extend to works not

yet created. This would be a perverse result considering the purpose of the *Act* as set out above.

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

The Board does not regulate collectives: it sets tariffs.

*SOCAN Tariff 24 - Ringtones (2003-2005), Ringtones and Ringbacks (2006-2013) - Application to Vary*, 2013 CarswellNat 75 (Cop. Bd.; 2013-01-18), the Board:

[21] [...] The applicants state that the Board supervises and regulates the collective administration of public performing rights in musical works. This is not entirely accurate. **The Board only sets tariffs and the related terms and applicable conditions.** [...]

- **Section 2 – Definition of "commercially available"**

If a work can be copied under a Tariff, this work is commercially available.

*Access Copyright (Educational Institutions) 2010-2015*, 2013 CarswellNat 58 (Cop. Bd.; 2013-01-18)

[19] Paragraph (a) of the definition of "commercially available" provides that a work is so available if it is available on the Canadian market under certain conditions (reasonable time, reasonable price, reasonable effort). Paragraph (b) of the definition provides in addition that a work also is commercially available if, under the same conditions, a licence is available from a collective society.

[20] It is not disputed that, for the purposes of these proceedings, **if a work can be copied pursuant to the Access Tariff, it is commercially available.**

[21] Only three provisions of the *Act*, as it stood before November 7, 2012, use the expression "commercially available": subsections 29.4(3), 30.1(2) and 32(3). Each provision creates a carve-out within a provision that otherwise creates a specific exception.

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

For a compilation to be protected some skill and judgment in the selection shall be demonstrated.

*Rains v. Molea*, 114 C.P.R. (4th) 161 (Ont. Sup. Ct.; 2013-08-15) Chiappetta J.

[17] The *Act* defines “artistic work” to include compilations of artistic works. In my view, the Classical Series is not a compilation as defined in the *Act*. There is no evidence that Rains exercised skill and judgment to select a crumpled paper image and arrange it with others in the Classical Series such that copyright subsists in the arrangement of the series itself. Rather, Rains chose a theme in 1991, a label for a series of paintings he intended to create to express his idea of painting still life crumpled paper. The label existed far before the many images he created; he also intends to add to the Classical Series by creating more images that properly fit within the theme. The Classical Series is not a complete independent work of carefully selected paintings. **Rather, it is a label common to existing and future Rains paintings, each individually created to express his idea of painting a realistic image of crumpled white paper. There is no originality in the label itself; there is no skillful organizational aspect of the Classical Series that warrants protection for the series as a whole**

[21] **Accordingly, I reject Rains’ submission that the Classical Series is a compilation because it evokes a feeling common to all his works, I conclude that the Classical Series is not a compilation as defined by the *Act* because “gestalt” or a “feeling” is insufficient to meet the test.**

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

For copyright to subsist in a compilation, the selection and arrangement of individual works must be original, involving the exercise of taste and discretion.

*Pinto v. Bronfman Jewish Education Centre*, 2013 CarswellNat 3396 (F.C.; 2013-09-11) Rennie J.

[151] **Accordingly, in addition to the copyright which attaches to individual works, there may be a second, concurrent copyright to the compilation as a whole. This second copyright does not extinguish the copyright over individual components of the collective work. Each exists simultaneously: *Robertson v Thomson Corp*, 2006 SCC 43 at para 31, [2006] 2 SCR 363.**

[152] **In order for there to be a copyright in the compilation, the selection and arrangement of individual works must be original, involving the exercise of taste and discretion: *Hughes on Copyright & Industrial Design*, ch 22 at 186; *Slumber-Magic***

*Adjustable Bed Co v Sleep-King Adjustable Bed Co*, [1984] BCJ No 3054 at para 6.

[153] I find that employees of BJEC did exercise substantial expertise and originality in selecting the compilation. Ms. Shimon, in particular, has expertise in pedagogy. Ms. Farkas explained that the music and songs were not created for artistic purposes: “if Barbara Streisand decides to produce music, she would go by, let’s say, her taste ... when you do a curriculum, then what determines what goes in is educational standards. Not -- and then how the music fits and is the music appropriate, is it age appropriate, is it content appropriate and so forth.”

[154] Ms. Shimon explained how different elements of TaL AM were selected to develop various intelligences, including the children’s creativity and logical reasoning. She explained that different characters and images were selected to establish connectivity with Israel and cohesion between the teaching tools and educational level, from the choice of colour, design, and graphics, to the lyrics and the overall pedagogical objectives.

[155] Accordingly, the question becomes whether the BJEC employees had Mr. Pinto’s consent to use his music in the compilation. If they did, subsection 3(1) of the *Act* grants BJEC (and now TaL AM) copyright over the compilation: *Slumber-Magic*, at para 7. If they did not, BJEC infringed Mr. Pinto’s copyright in creating the compilation.

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

To attract copyright protection a compilation must be original.

*Distrimed inc. v. Dispill Inc.*, 2013 CarswellNat 3663, (F.C; 2013-10-15) de Montigny J.

[321] **Compilations and forms, therefore, must be subject to the same threshold of originality as any other work.** The *CCH* [*CCH Canadian Ltd. v Law Society of Upper Canada*, 2004 SCC 13]] decision defined “compilation” as a form of expression that arises when an individual (the “arranger”) takes existing material and casts it in a different form. **It is not the individual components that are the subject of the copyright but the overall arrangement of them, which the arranger has produced:** see *CCH*, above, at para 33.

[323] It follows that the alignment of factual data in a non-original way is not sufficient to attract copyright protection: *Tele-Direct (Publications) Inc v American Business Information Inc.*, (1997), 76 CPR (3rd) 296 (FCA), leave to appeal refused, [1997] SCNo 660. Moreover, when an idea can be expressed in only a limited number of ways, then the expression of that idea is not protected, as protecting it would grant a monopoly on the idea itself. In those situations, therefore, the threshold of originality is not met and there is no copyright protection: *Delrina Corp v Triolet Systems Inc*, (2002), 17 CPR (4th) 289, at paras 48-52 (Ont CA), leave to appeal refused, (2002), 305 NR 398.

- **Section 2 – Definition of "computer program"**

Copyright cannot attach simply to what a computer program does.

(AOM) *NA Inc. v. Reveal Group*, 2013 ONSC 8014, <http://canlii.ca/en/on/onsc/doc/2013/2013onsc8014/2013onsc8014.html> (Ont. Sup. Ct.; 2013-12-30) Macleod, Master

[17] Copyright is a very specific right attaching to a “work”. I agree with the defendants that the pleading is vague about what it is that is subject to copyright and what it is alleged has been the breach of copyright giving rise to this cause of action. Copyright cannot attach to an idea such as a method. It can of course attach to the manuals or other material in which the method is described. **Similarly with computer software, copyright can attach to source code, to a graphic user interface, to manuals and to other material as defined in the Act. Copyright cannot attach simply to what a computer program does.** The plaintiff must specify what it is that is covered by copyright and what it alleges has been done that gives rise to the statutory remedies.

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

Copyright is an incorporeal form of property created by statute.

*Mobin v. Stephens*, 2013 ONCJ 53 (Ont. Sup. Ct.; 2013-02--6) Jones J.

[41] An individual who composes, performs or records an original musical work has a copyright in such work. “Copyright” is created by statute. Thus, a reference to “copyright” refers to the rights conferred by the legislation. [Fn2 *Copyright Act*, R.S.C. 1985, c. C-42 in Canada and the *U.S. Copyright Act*, Title 17 of the United States



Code.] **A copyright is an incorporeal form of property.** [Fn3 Sanderson, P., *Musicians and the Law in Canada – 3<sup>rd</sup> Ed.*, Carswell, Toronto, 2000, p.3.] **It has a conceptual, non-physical existence, and is comprised of the bundle of statutory rights that accrue to the creator of an original work.**

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

A television serie could be a dramatic work.

*Pelchat v. Zone 3 inc.*, 2013 CarswellQue 216 (Que. Sup. Ct; 2013-02-21) Payette J.  
[40] Une émission de télévision peut donc constituer une œuvre dramatique au sens de la Loi.

[68] Certes on peut, dans le langage commun, faire état d'une «œuvre» pour décrire «l'ensemble des différentes œuvres (d'un auteur), considéré dans sa suite, son unité et son influence» [Fn51 *Le Nouveau Petit Robert*, 2009, *sub verbo* «œuvre».] Mais lorsqu'il s'agit de réclamer la protection de la Loi, chaque expression d'une idée, chaque incarnation de cette idée constitue une œuvre susceptible d'être protégée pour autant qu'elle soit originale, encore qu'il soit possible qu'une œuvre donnée soit constituée de différentes parties elles-mêmes originales, formant un tout [Fn52 *Interbox Promotion Corp. c. 9012-4314 Québec Inc. (Hippo Club)*, [2003] F.C.J. No 1581, par. 22.]. Ainsi, chaque émission des *Looks* est susceptible de constituer une œuvre dramatique distincte [Fn53 *France Animation, s.a. c. Robinson*, 2011 QC1361, par. 27 et suiv., 58-60 (requête pour suspendre l'exécution d'un jugement accueillie en partie, C.A., 09-12-2011 (jugement rectifié le 19-12-2011), 500-09-020033-098, 500-09-020014-098 et 500-09-020035-093, 2011 QC2305) (requêtes pour autorisation de pourvoi à la Cour suprême accueillies, C.S.C., 24-05-2012, 34469, 34468, 34467 et 34466) ].

- **Section 2 – Definition of "every original literary, dramatic, musical and artistic work"**

Examinations and standardized tests could attract copyright protection.

*R. v. Rundle (Nec Plus Ultra)*, 2013 CarswellOnt 5920 (Ont. Sup. Ct; 2013-05-14) Beaudoin J. [supplementary reasons to 104 C.P.R. (4th) 190 (Ont. Sup. Ct.; 2012-09-14)]

[37] **What is required to attract copyright protection in the expression of an idea is an exercise of skill and judgment. I am**

satisfied that the SLE tests meet the definition of original work. Their authors exercise considerable skill and judgment in producing an evaluative tool to assess candidates' second language abilities. Producing SLE tests requires expertise, judgment and experience.

[38] Examinations and standardized tests are entitled to copyright protection. [...]

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

Copyright protects the original expression of ideas, specific and individualized

*Pelchat v. Zone 3 inc.*, 2013 CarswellQue 216 (Que. Sup. Ct; 2013-02-21) Payette J.  
[41] Cela dit, ce n'est pas faire preuve d'originalité de dire que le principe de base en matière de droit d'auteur est que la Loi ne protège pas les idées elles-mêmes, aussi novatrices soient-elles. **Elle n'en protège que l'expression originale, particulière et individualisée.** [Fn26 *France Animation, s.a. c. Robinson*, 2011 QC1361, par. 27 (requête pour suspendre l'exécution d'un jugement accueillie en partie, C.A., 09-12-2011 (jugement rectifié le 19-12-2011), 500-09-020033-098, 500-09-020014-098 et 500-09-020035-093, 2011 QC2305) (requêtes pour autorisation de pourvoi à la Cour suprême accueillies, C.S.C., 24-05-2012, 34469, 34468, 34467 et 34466); Normand TAMARO, *Loi sur le droit d'auteur, texte annoté*, 8<sup>e</sup> éd., Toronto, Éditions Carswell, 2009, p. 197; *Duff c. Québec (Procureur général)*, 2005 QC661 (CanLII), 2005 QC661, par. 43-44.]

[43] Ainsi, le seul fait de reprendre un thème ou une idée, de construire sur du terrain connu ne permet pas de conclure à plagiat sinon « il n'y aurait qu'un seul roman d'amour sur la seule tablette de nos bibliothèques » [Fn28 Normand TAMARO, *Loi sur le droit d'auteur, texte annoté*, 8<sup>e</sup> éd., Toronto, Éditions Carswell, 2009, p. 185; *Arbique c. Gabriele*, J.E. 99-352 (C.S.) (appel rejeté, C.A., 23-01-2003, 500-09-007641-996, J.E. 2003-297); *Fénollar c. PRB Média*, 2006 QCCS 1956, par. 46; *Nichols c. Universal Pictures Corporation et al*, 45 F.2d 119 (2nd Cir., 1930) p. 4-5.]

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

Originality has nothing to do with creativity, novelty or uniqueness.

*Pelchat v. Zone 3 inc.*, 2013 CarswellQue 216 (Que. Sup. Ct; 2013-02-21) Payette J.  
[87] Or, d'une part, le simple changement de support ne peut conférer à celui qui y a pensé le monopole sur l'idée qui est ainsi

exprimée [Fn60 Normand TAMARO, *The 2012 Annotated Copyright Act*, Toronto, Éditions Carswell, 2011, p. 257-258; Melville B. NIMMER and David NIMMER, *Nimmer on Copyright*, vol. 2, San Francisco, Lexis Nexis, 2012, par. 8.01 [B], p. 6-7; *Robertson c. Thomson Corp.*, [2006] 2 R.C.S. 363, par. 89.] et d'autre part, même s'ils avaient été les premiers à exploiter l'idée, cela n'aurait pas d'importance pour la solution du litige.

[88] En effet, **l'originalité requise pour qu'une œuvre puisse profiter de la protection de la Loi ne s'entend pas de son aspect créatif, novateur ou unique. L'élément essentiel à la protection d'une œuvre par le droit d'auteur est qu'elle soit le résultat de l'exercice du talent et du jugement de son auteur** [Fn61 *CCH Canadienne Ltée c. Barreau du Haut-Canada*, [2004] 1 R.C.S. 339, par. 16.]

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

"The scope for judicial creativity is narrow, but not non-existent."

*Cojocar v. British Columbia Women's Hospital and Health Centre*, 2013 CarswellBC 1400 (S.C.C.; 2013-05-24) McLachlin J. [reversing 2011 CarswellBC 886, (B.C. C.A.; 2011-04-14), which was reversing 2009 CarswellBC 917 (B.C.-S.C.; 2009-04-09)]

[32] **To set aside a judgment for failure to attribute sources or for lack of originality alone would be to misunderstand the nature of the judge's task and the time-honoured traditions of judgment-writing.** The conventions surrounding many kinds of writing forbid plagiarism and copying without acknowledgement. Term papers, novels, essays, newspaper articles, biographical and historical tomes provide ready examples. In academic and journalistic writing, the writer is faced with the task of presenting original ideas for evaluation by an instructor or by peers, or of engaging in principled debate in the press. The task of judgment-writing is much different. [...]

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

There is no copyright in idea.

*Isle-Principia (USA) inc. v. Guimond*, 2013 CarswellQue 7711 (Que. Sup. Ct.; 2013-07-03) Yergeau J.

[728] Qu'il soit l'auteur du concept original d'*USA* est un fait admis par Principia. **Mais une idée à elle seule ne confère aucun droit d'auteur en vertu de la LDA.** Ainsi que le souligne l'auteur Normand

Tamaro : «Comme l'œuvre est l'expression de la pensée originale de l'auteur, ne peut être considérée auteure, la personne qui se contente de fournir l'idée d'une œuvre: *Cuisenaire c. South West Imports Ltd.*, [1969] R.C.S. 208» [FN 204 Normand TAMARO, *Loi sur le droit d'auteur, Texte annoté*, 9<sup>e</sup> éd., Toronto, Carswell, 2012, p. 400].

[729] Guimond ne détient donc pas de droit d'auteur sur l'idée qu'il a eue de réaliser un documentaire sur la société américaine créé à partir de son travail d'artiste visuel.

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

Copyright cannot be asserted on an idea but only in the way this idea is rendered.

*Rains v. Molea*, 114 C.P.R. (4th) 161 (Ont. Sup. Ct.; 2013-08-15) Chiappetta J.

[14] **It is settled that copyright law protects the expression of ideas in works; it does not protect ideas in and of themselves** (See: *Moreau v. St. Vincent*, [1950] Ex.C.R. 198, at p.203). Molea submits that Rains is seeking to assert a copyright in the idea of painting a realistic image of crumpled white paper. He argues that the nature of the subject matter of realistic crumpled paper merges the idea in its possible expression. The merger doctrine emphasizes that "[i]f an idea can be expressed in only one or in a very limited number of ways, then copyright of that expression will be refused for it would give the originator of the idea a virtual monopoly on that idea. In such a case, it is said the expression merges with the idea and is thus not copyrightable" (See: *Delrina Corp. (c.o.b. Carolian Systems) v. Triolet Systems Inc.* 2002 CanLII 11389 (ON CA), (2002), 58 O.R. (3d) 339 at para 48, [2002] O.J. No.676 (C.A.), leave to appeal refused, [2002] S.C.C.A. no. 189).

[15] In my view, the merger doctrine as expressed by the Ontario Court of Appeal is not applicable to the facts of this case. The dichotomy between an idea and the expression of an idea does not apply to a painting in the same way the Court of Appeal applies it to a function of a computer program. As will be discussed below, for different reasons and with different intentions, Rains and Molea both had the idea of painting a realistic image of crumpled paper. **Their respective expressions of the idea are represented in the images themselves. The image is a product of diligent work. The artists spend hours exercising skill and judgment. They apply intellect and employ techniques learned through study, experience, talent, and influence to develop, explore, and perfect the expression of that idea in a painting. Both Rains and**

**Molea repeatedly express the idea through images. Each image is a different expression and that expression, if original, is subject to copyright.**

[99] This case involves two artists who had the same (and not unique) idea to paint crumpled paper in a realistic way using conventional painting techniques. **Their motivations are different. Their processes are different. Their resultant expressions are different. The Act protects each original Rains painting and each original Molea painting from infringement.** If any of Molea's 17 comparison works were substantial copies or colourable imitations of Rains' comparable images, Rains would be successful in his claim of copyright infringement. **However, simply because Rains expressed his idea before Molea and found commercial success and critical acclaim for doing so, does not mean that Molea or any other painter is forever prohibited from independently creating an expression of crumpled paper in still life form. In my view, to give Rains exclusive access to this territory would unfairly silence independent expressions of the idea and render absurd the very purpose of the Act.**

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

The law does not protect ideas but only their original expression, specific and individualized.

*Nadon v. Sphère Média Plus inc.*, 2013 CarswellQue 9429 (Que. Sup. Ct.; 2013-09-18) Casgrain J.

[74] Il est bien établi en jurisprudence que la loi ne protège pas les idées mais seulement leur expression originale, particulière et individualisée.

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

Industriousness or novelty are not criteria for a work to be original.

*Distrimedic inc. v. Dispill Inc.*, 2013 CarswellNat 3663 (F.C; 2013-10-15) de Montigny J.

[320] In coming to that conclusion, the Court purported to strike a middle ground between two prior competing views on the meaning of "original" in copyright law. According to some, an author deserved to have his or her efforts in producing a work recognized so long as it was not a mere copy of another work. Others favoured a more restrictive view, requiring a work to be creative to be original. The

Court decided to opt for a position that falls between these two extremes. In other words, it will not be sufficient, as suggested by the Plaintiff by Counterclaim, to demonstrate industriousness or “sweat of the brow” to make a work copyrightable: see, for example, *U & R Tax Services Ltd v H & R Block Canada Inc*, (1995), 62 CPR (3d) 257 (FCTD) [*U&R Tax Services Ltd*]. Conversely, the bar should not be set so high so as to exclude every work that is not creative in the sense of being novel or unique. **What is required, at the end of the day, is not creativity *per se*, but at least some sort of intellectual effort. For copyright to subsist, skill and judgment must be exercised in the expression of an idea:** see *CCH*, above, at para 18.

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

To be the first to express a new idea does not attract copyright protection on the idea itself, especially when the ways to render such idea are limited or when the expression of the idea is solely dictated by the function of the work.

*Distrimed inc. v. Dispill Inc.*, 2013 CarswellNat 3663 (F.C; 2013-10-15) de Montigny J.

[324] **Similarly, when the content and layout of a form is largely dictated by utility and/or legislative requirements, it is not to be considered original.** A good illustration of this principle is found in the case of *Bonnette c Entreprise Dominion Blueline Inc*, 2005 QC342 (CanLII) [*Bonnette*]. [...]

[337] In the case at bar, I have not been convinced that the selection of information and its arrangement in the DOS Dispill Label Form required of its author the type of skill and judgment deserving of copyright protection. It may be, as suggested by counsel for Richards, that Dispill was the first to create a method of generating the necessary patient information for printing on each cell of a pill dispenser. **This cannot be the subject of copyright protection, however, as it would amount to creating a monopoly on an idea or method, which the law does not permit.**

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

If the selection of information is dictated by the legislation and the arrangements is presented in a non original manner, then the resulting work will not attract copyright protection.

*Distrimed inc. v. Dispill Inc.*, 2013 CarswellNat 3663 (F.C; 2013-10-15) de Montigny J.

[342] If the original DOS Dispill Label Form is not original within the meaning of the *Copyright Act* because the selection of information is mostly dictated by legislation, utility and common sense, the same must be said for the Dispill section of the Windows Mentor program. The information that is specific to Dispill is minimal, and there is no greater originality in the layout or aesthetics of the third screen of the Windows Form. **The screen is no more than a list of legislatively required or common sense fields for printing, expressed in a non-original manner, and no evidence has been brought to suggest that it is the product of an author's exercise of skill and judgment.** I find, therefore, that neither the DOS nor the Windows version of the Dispill Label Form can be protected by copyright under the *Copyright Act*.

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

Copyright protects the expression of an idea, even if this expression is obsolete or was not substantially modified.

*Gestion Reper inc. v. Brassard*, 2013 CarswellQue 11277 (Que. Sup. Ct; 2013-11-06) Reimnitz J.

[146] La juge Trahan [in *Conexsys Systems inc. v. Aime Star Marketing inc.* 2003 CarswellNat 2003 (Que. Sup. Ct.; 2013-09-02)] rappelle par la suite que le droit d'auteur ne protège pas l'idée, mais l'expression de l'idée, soit la forme concrète qu'on donne à cette idée, sa « *manifestation externe* ». Comme le note la juge Trahan, « *la manifestation externe de l'idée est digne d'être protégée parce qu'elle est le fruit d'un travail, d'un labeur* ».

[147] Aussi, il faut que l'expression de l'idée constitue une œuvre originale, sinon elle n'est pas protégée par la *Loi sur le droit d'auteur*. Cette originalité a été amplement démontrée. Il s'agit du seul logiciel de cette nature existant au Canada, selon le point de vue de madame Brassard elle-même.

[148] **Selon le tribunal, il est clair que l'expression de l'idée qu'a eu madame Brassard a été clairement concrétisée dans [the computer program] 1 2 3 GoPMO.** Cette manifestation externe de l'idée doit être protégée et cette manifestation a été clairement faite au moment où madame est actionnaire de BLP et bien avant la faillite. Il y a de toute évidence similarité entre 1 2 3 GoPMO et Go PMO Système Expert.

[152] Les défendeurs plaident que depuis 2005, le logiciel est désuet. Le tribunal considère que l'idée ne l'est pas. **C'est le même concept, la même idée qui a été matérialisée dans le second logiciel, avec des améliorations certes, mais ces améliorations ne changent en rien l'idée à la base de la conception de 1 2 3 Go.**

[153] Même si le support 4 D est plus performant que le support Excel, cela ne change rien à l'idée de BLP conçue à l'époque et qui se retrouve sur le logiciel.

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

No copyright in ideas or elements from the public domain

*Cinar Corporation v. Robinson*, 2013 CarswellQue 12345 (S.C.C.; 2013-12-23)  
McLachlin J.

[23] The *Copyright Act* strikes “a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator”: *Théberge v. Galerie d'Art du Petit Champlain inc.*, 2002 SCC 34, at para. 30 [...] It seeks to ensure that an author will reap the benefits of his efforts, in order to incentivize the creation of new works. **However, it does not give the author a monopoly over ideas or elements from the public domain, which all are free to draw upon for their own works.** For example, “[t]he general stock of incidents in fiction or drama is free for all to use — a substantial part of everyone’s culture, not of any one individual’s work”: D. Vaver, *Intellectual Property Law: Copyright, Patents, Trade-marks* (2nd ed. 2011), at p. 182.

- **Section 2 – definition of "every original ... work"**

The development of characters could attract copyright protection.

*Cinar Corporation v. Robinson*, 2013 CarswellQue 12345 (S.C.C.; 2013-12-23)  
McLachlin J.

[46] **The development of a group of characters that have specific personality traits and whose interactions hinge on those personalities can require an exercise of skill and judgment sufficient to satisfy the *Copyright Act's* originality criterion:** see for example *Productions Avanti Ciné-Vidéo Inc. v. Favreau* 1999 CanLII 13258 (QC CA), (1999), 177 D.L.R. (4th) 568 (Que. C.A.), leave to appeal refused, [2000] 1 S.C.R. xi. *Sucroë* reproduces more



than generic elements which all are free to draw upon for inspiration. It reproduces *Curiosity's* particular combination of characters with distinct personality traits, living together and interacting on a tropical island — elements that represent a substantial part of the skill and judgment expressed in *Curiosity*.

[47] In essence, the aspects of the trial judge's reasons that the Cinar appellants take issue with are findings of mixed fact and law.

- **Section 2 – Definition of "infringing"**

Infringement involves a certain extent of copying.

*Pelchat v. Zone 3 inc.*, 2013 CarswellQue 216 (Que. Sup. Ct.; 2013-02-21) Payette J.

[74] Dans cette décision, la Cour ajoute que même si les deux œuvres sont similaires dans leurs principes essentiels et même si l'auteur de l'œuvre subséquente tient sa connaissance du système ou de l'arrangement développé dans l'œuvre du demandeur, **ce dernier n'aura gain de cause que s'il démontre que c'est l'œuvre elle-même, dans son expression originale, qui a été copiée** [Fn 58 *Moreau c. St-Vincent*, [1950] Ex. C.R. 198, p. 206-207].

- **Section 2 – Definition of "infringing"**

To determine what constitutes the substantial part of a copied work, is qualitative rather than quantitative and the copied work shall be considered as a whole.

*Pelchat v. Zone 3 inc.*, 2013 CarswellQue 216 (Que. Sup. Ct.; 2013-02-21) Payette J.

[91] **Pour prouver la contrefaçon, le demandeur doit prouver qu'il existe une ressemblance substantielle entre les deux œuvres et qu'il y a eu copie. Le test de la ressemblance substantielle est qualitatif et quantitatif** [Fn62 *Fénollar c. PRB Média*, 2006 QCCS 1956, par. 37; voir aussi *Hutton c. Canadian Broadcasting Corporation*, 1992 AB39, par. 4; *France Animation, s.a. c. Robinson*, 2011 QC1361, par. 59 (requête pour suspendre l'exécution d'un jugement accueillie en partie, C.A., 09-12-2011 (jugement rectifié le 19-12-2011), 500-09-020033-098, 500-09-020014-098 et 500-09-020035-093, 2011 QC2305) (requêtes pour autorisation de pourvoi à la Cour suprême accueillies, C.S.C., 24-05-2012, 34469, 34468, 34467 et 34466); *Édutile Inc. c. Assoc. pour la protection des automobilistes*, [2000] 4 C.F. 195 (C.A.F.), par. 21-22; *Preston v. 20th Century Fox Canada Ltd.*, [1990] F.C.J. No. 1011,

p. 26-27, conf. par *Preston v. 20th Century Fox Canada Ltd.*, [1993] A.C.F. No. 1259.]

[92] **Pour déterminer s'il y a reprise substantielle d'une œuvre, il faut considérer celle-ci dans sa globalité.** [Fn63 *France Animation, s.a. c. Robinson*, 2011 QC1361, préc., note 62, par. 43, 46.]

[93] **Cela implique qu'il n'y a pas lieu de la disséquer pour décider si les parties ainsi isolées pourraient être protégées par le droit d'auteur et voir si elles se retrouvent dans la copie.** [Fn64 *Ladbroke (Football) Ltd. c. William Hill (Football) Ltd.*, [1964] 1 W.L.R. 273, p. 276-277; *Fénollar c. PRB Média*, préc., note 62, par. 40; *Productions Avanti Ciné Vidéo inc. c. Favreau*, [1999] R.J.Q. 1939 (C.A.), 1944-1946; *Hutton c. Canadian Broadcasting Corp.*, 1989 CanLII 3311 (AB QB) par. 58, conf. par 1992 AB39.]

[94] **Cela signifie aussi qu'il n'y a pas lieu d'identifier a priori ce qui constitue la partie essentielle de la première œuvre pour voir si on la retrouve dans la seconde.** Cela biaiserait l'exercice et risquerait d'amener le Tribunal à examiner si les deux œuvres sont issues du même concept, ce qui est autorisé, plutôt que de décider si elles prennent la même forme pour l'exprimer [Fn65 *Hutton c. Canadian Broadcasting Corporation*, préc., note 62, par. 10; *Baigent & Leigh c. Random House Group Ltd*, [2007] EWCiv 247, par. 93, 99, 153-154.], ce qui est prohibé.

[95] **Par ailleurs, si les ressemblances permettent de déterminer s'il y a emprunt d'une partie substantielle d'une œuvre, leurs différences peuvent appuyer la thèse d'une création indépendante** [66] *France Animation, s.a. c. Robinson*, 2011 QC1361, par. 61 (requête pour suspendre l'exécution d'un jugement accueillie en partie, C.A., 09-12-2011 (jugement rectifié le 19-12-2011), 500-09-020033-098, 500-09-020014-098 et 500-09-020035-093, 2011 QC2305) (requêtes pour autorisation de pourvoi à la Cour suprême accueillies, C.S.C., 24-05-2012, 34469, 34468, 34467 et 34466).]

[96] En effet, comme l'indique le juge Buffoni dans *Thibault c. Importations Géocan inc.* [Fn67 J.E. 2004-1127, par. 37 (C.S.).]

(...) on ne peut déduire que l'accumulation de différences constitue forcément autant d'actes de déguisement. Autrement, l'argument devient circulaire : à la limite, il signifierait que plus un concurrent cherche à se démarquer par une expression différente d'une idée commune, plus il tente de « déguiser » son forfait.

[97] **La tâche de déterminer si l'œuvre attaquée reprend une partie substantielle de l'œuvre des demandeurs revient au Tribunal.** [Fn68] *Productions Avanti Ciné Vidéo inc. c. Favreau*, [1999] R.J.Q. 1939 (C.A.).] Le test à utiliser est celui de la personne ordinaire et raisonnable, à tout le moins celle à qui l'œuvre est destinée. [Fn69 *France Animation, s.a. c. Robinson*, préc., note 66, par. 72; *Cummings v. Global Television Network Quebec*, l.p. [2005] CanLII 17671, par. 50 (QC C.S.); *Preston v. 20th Century Fox Canada Ltd.*, [1990] F.C.J. No. 1011, p. 27, conf. par *Preston v. 20th Century Fox Canada Ltd.*, [1993] A.C.F. No. 1259.]

[98] S'agissant de séries d'émissions de télévision, le Tribunal portera attention, entre autres, à l'auditoire ciblé, aux thèmes spécifiques, à leur développement, à la structure, aux dialogues, à l'ambiance, au montage, au rythme, aux séquences, aux personnages [Fn70 *Fénollar c. PRB Média*, 2006 QCCS 1956, par. 48-49; *Preston v. 20th Century Fox Canada Ltd.*, préc., note 69, p. 26.] bref à la forme que les idées y prennent.

- **Section 2 – Definition of "infringing"**

Independent creation is a defence to infringement.

*Pelchat v. Zone 3 inc.*, 2013 CarswellQue 216 (Que. Sup. Ct.; 2013-02-21) Payette J. [211] Même si le Tribunal avait conclu à l'existence d'un nombre substantiel de similitudes entre les deux œuvres permettant de créer une présomption de plagiat, **les défendeurs pouvaient établir qu'ils n'ont pas contrefait l'œuvre des demandeurs en démontrant qu'ils n'y ont pas eu accès ou que *Métamorphose* est le résultat d'une création indépendante** [*Arbi que c. Gabriele*, 2003 CanLII 16298, par. 3, 5, 7 (QC C.A.); *Bonnette c. Dominion Blueline Inc.*, [2005] QC342, par. 69; *Thibault c. Importations Géocan inc.*, 2003 CanLII 54588, par. 41 (QC C.S.); *Fénollar c. PRB Média*, 2006 QCCS 1956, par. 43-45.].

- **Section 2 – Definition of "infringing"**

A plaintiff must show that a substantial part of his work has been copied.

*R. v. Rundle (Nec Plus Ultra)*, 2013 CarswellOnt 5920 (Ont. Sup. Ct; 2013-05-14) Beaudoin J. [supplementary reasons to 104 C.P.R. (4th) 190 (Ont. Sup. Ct.; 2012-09-14)]

[41] **The copying need not be direct to constitute copyright infringement.** The Ontario Court of Appeal held that "copying" in the

law of copyright “goes beyond copying from something that is physically before the person who copies. It includes copying from memory, even subconscious memory”. [Fn 17 *Delrina Corp. v. Triolet Systems* 58 O.R. (3d) 339 (C.A.), para 10.]. **It is also well established that it is immaterial whether the infringing article is derived directly or indirectly from the original work. A plaintiff must show, on an objective basis, that the original work - or a substantial part thereof - has been reproduced.** [Fn 18 *Great Canadian Oil Change v. Dynamic Ventures Corp.*, 2002 BCSC 1295, para 46.]

- **Section 2 – Definition of "infringing"**

Confusion is not the proper test to determine colourable imitation.

*Rains v. Molea*, 114 C.P.R. (4th) 161 (Ont. Sup. Ct.; 2013-08-15) Chiappetta J.

[28] Copyright infringement therefore is established when the defendant has produced a substantial copy, including a colourable imitation of the plaintiff’s work. **Infringement is not limited to an exact copy.**

[44] Moreover, **in my view it would be unwise to establish confusion as the test for colourable imitation of an artistic work. This test by its very nature lends itself to the subjective nuances of comparison by laypeople, those who enjoy an interest in art, and those who study art history and methods.**

- **Section 2 – Definition of "infringing "**

Minor variations are not sufficient to escape infringement.

*Banquise du golfe inc. v. Paulin*, 2013 CarswellQue 7815 (Que. Ct.; 2013-05-14) Rondeau J.

[37] Ainsi, la preuve établit, de manière prépondérante, qu'à travers la distribution et la vente effectuées par le défendeur à des fins commerciales, ce dernier viole le droit d'auteur de la demanderesse selon l'article 27 de la Loi.

[38] Manifestement, il est invraisemblable que le défendeur invente la même illustration que la demanderesse et qu'en plus, il la modifie de la même manière.

[39] **Le Tribunal retient que le défendeur utilise le concept de la demanderesse afin de mettre en vente le produit fini avec**

quelques modifications mineures, pensant ainsi pouvoir éviter d'être tenu responsable de plagiat.

- **Section 2 – Definition of "infringing"**

Similarities between two works will not ground a finding of infringement if these similarities are in the public domain.

*Distrimed inc. v. Dispill Inc.*, 2013 CarswellNat 3663, (F.C; 2013-10-15) de Montigny J.

[361] **In the case of works containing elements not protected by copyright, only similarities with respect to copyright-protected elements must be looked at, as it is not copyright infringement to copy ideas, arrangements or systems** (*Moreau*, above, at paras 14-15). In the same vein, **similarities between two works will not ground a finding of infringement if these similarities are in the public domain** (*Philip Morris Products S.A. v Marlboro Canada Ltd*, 2010 FC 1099, at para 320, aff'd on copyright issues at 2012 F201 [*Philip Morris Products S.A.*]). **Access to the work by the alleged infringer must also be established; if the second work was created independently, there will be no infringement** (*U&R Tax Services Ltd*, above, at 268; *Philip Morris Products S.A.*, above, at para 320). [...]

- **Section 2 – definition of "infringing"**

Substantial appropriation is to be analyzed from the plaintiff's work.

*Cinar Corporation v. Robinson*, 2013 CarswellQue 12345 (S.C.C.; 2013-12-23) McLachlin J.

[24] [...] Infringement consists of the unauthorized taking of that originality.

[39] **The question of whether there has been substantial copying focuses on whether the copied features constitute a substantial part of the plaintiff's work — not whether they amount to a substantial part of the defendant's work:** Vaver, at p. 186; E. F. Judge and D. J. Gervais, *Intellectual Property: The Law in Canada* (2nd ed. 2011), at p. 211. **The alteration of copied features or their integration into a work that is notably different from the 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: definition of “infringing”, s. 2.

[40] **This is not to say that differences are irrelevant to the substantiality analysis. If the differences are so great that the work, viewed as a whole, is not an imitation but rather a new and original work, then there is no infringement.** As the Court of Appeal put it, “the differences may have no impact if the borrowing remains substantial. Conversely, the result may also be a novel and original work simply inspired by the first. Everything is therefore a matter of nuance, degree, and context” (para. 66).

[41] **The trial judge engaged in a qualitative and holistic assessment of the similarities between the works, which took into account the relevant similarities and differences between the works.** [...] He concluded that, *despite any differences between the works*, it was still possible to identify in *Sucroë* features copied from *Curiosity* and that these features constituted a substantial part of Robinson’s work. The trial judge did not err in approaching the matter in this way.

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

Computer programs are protected as literary works.

*Tremblay v. Orio Canada Inc.*, 2013 CarswellNat 1145 (F.C.; 2013-01-31) Boivin J. [affd. 2013 F225 (F.C.A.; 2013-09-25)]

[29] The case law also states that copyright “protects the expression of ideas in these works; it does not protect ideas in and of themselves” (*CCH*, above, at para 8 [*CCH Canadian Ltd. v Law Society of Upper Canada*, 2004 SCC 13]). A work must therefore be in a fixed material form to attract copyright protection, as indicated, for example, by the definition of “computer program”. **The definition of a literary work in section 2 of the Act also expressly includes computer programs**, and a computer program is defined as “a set of instructions or statements, expressed, fixed, embodied or stored in any manner, that is to be used directly or indirectly in a computer in order to bring about a specific result”. In this case, it is clear and uncontested by the parties that copyright exists in the modified SAM program. The issue is who owns it.

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

Judicial writing is highly derivative.

*Cojocar v. British Columbia Women's Hospital and Health Centre*, 2013 CarswellBC 1400 (S.C.C.; 2013-05-24) McLachlin J. [reversing 2011 CarswellBC 886, (B.C. C.A.; 2011-04-14), which was reversing 2009 CarswellBC 917 (B.C.-S.C.; 2009-04-09)]

[33] The scope for judicial creativity is narrow, but not non-existent. It finds expression in the ordering of the reasons and the disposition of the arguments and issues, and in the occasional eloquent statement of the facts or restatement of the law. Nevertheless, it remains the case that judicial opinions, especially trial judgments, differ from the kind of writings that traditionally attract copyright protection, with the concomitant demands of originality and attribution of sources. Judgments are "usually collaborative products that reflect a wide range of imitative writing practices, including quotation, paraphrase, and pastiche" (Stern, at p. 2 [STERN (Simon), *Copyright Originality and Judicial Originality* (2013), 63:1 University of Toronto Law Journal 1]). Judgments routinely incorporate phrases and paragraphs from a variety of sources, such as decided cases, legal treatises, pleadings, and arguments of the parties. Appellate judges may incorporate paragraphs borrowed from another judge on the case or from a helpful law clerk. Often the sources are acknowledged, but often they are not. Whether acknowledged or not, they are an accepted part of the judgment-writing process and do not, without more, render the proceeding unfair.

**[65] As the previous discussion establishes, judicial writing is highly derivative and copying a party's submissions without attribution is a widely accepted practice. The considerations that require attribution in academic, artistic and scientific spheres do not apply to reasons for judgment. The judge is not expected to be original.**

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

Psychological tests could attract copyright protection as literary works.

*Hernandez v. Purcell*, 2013 CarswellINS 708 (N.S. S.C.; 2013-09-25) Bourgeois J. [Upon motions seeking the release of file materials of a psychologist and neuropsychologist]

[27] [...] There is no specific evidence before the Court as to the nature of the psychological tests in question, although in submissions, **there appears to be a broad acknowledgement that the tests are standardized testing instruments which are copyrighted.**

[28] As to the first prong of the test, I am satisfied that the materials in question, are such that special considerations on release should be considered. **Although I recognize the existence of copyright, and the professional obligations of the professionals involved as considerations, it is the sensitivity of the test materials to dissemination which is the most pressing concern.** Standardized psychological testing instruments are used widely for the diagnosis and assessment of individuals with a host of difficulties, and it is important that the integrity of the results be protected. It is a legitimate concern that if testing protocols, questions and answers entered into the public domain, the tests may become less reliable and ultimately, those who benefit from these materials would be negatively impacted.

[29] In the second prong, the Court must be satisfied, based upon the evidence before it, that there is a "real risk" that without added protections beyond the implied undertaking, that the testing material would be used for improper purposes.

- **Section 2 –Definition of "maker"**

The maker of a sound recording is the person who takes the financial risk as opposed to the director or the person who makes the arrangements for the production.

*Pinto v. Bronfman Jewish Education Centre*, 2013 CarswellNat 3396 (F.C.; 2013-09-11) Rennie J.

[143] Section 2 of the *Act* provides that the "maker" is "the person by whom the arrangements necessary for the first fixation of the sounds are undertaken." Section 2.11 explains that the necessary arrangements include "entering into contracts with performers, financial arrangements and technical arrangements required for the first fixation of the sounds for a sound recording."

[144] **Case law interpreting these provisions has emphasized the element of financial risk and payment for the recording. The maker is not necessarily the person who has personally undertaken the necessary arrangements, but instead the individual or corporation that bore the financial risk of doing so, such as a record company: *Hughes on Copyright & Industrial Design*, ch 24 at 219.**

[145] The evidence on this issue is mixed.



[146] Mr. Pinto engaged the services of the music studios and undertook to pay the studio's hourly charges for the use of the facilities and equipment. He hired and paid the female vocalist, selected children to sing and rehearsed the songs with them.

[147] However, it was BJEC that ultimately assumed the financial risk for the recording, as its payments to Mr. Pinto covered all of his costs, including paying the studio and vocalist. Additionally, Ms. Farkas had some involvement in the recording process, though she was not at the studio. She testified that "...if Mr. Pinto called me from the studio, how you do this and how you do that, then I was involved. So for sure I was involved. I wasn't involved in the singing. I wasn't involved -- I didn't play the keyboard. But for sure I was involved in what was done and I was abreast with what was done at every stage."

In my view, though he was not an employee, he was entitled to be reimbursed for his expenses and therefore did not assume the financial responsibility for the recording. It is significant that for fourteen years BJEC paid every invoice provided by Mr. Pinto, including all disbursements. Accordingly, I conclude that BJEC was the maker of the sound recording and owned the copyright.

- **Section 2 – definition of "musical work"**

Expert evidence may be helpful to determine similarities

*Cinar Corporation v. Robinson*, 2013 CarswellQue 12345 (S.C.C.; 2013-12-23)  
McLachlin J.

[52] To take an example, two pieces of classical music may, to the untrained ear, sound different, perhaps because they are played on different instruments, or at different tempos. An expert musician, however, might see similarities suggesting a substantial part has been copied — the same key signature, the same arrangement of the notes in recurring passages, or a recurrent and unusual harmonic chord. It will be for the judge to determine whether the similarities establish copying of a substantial part, to be sure. **But in making that determination, the judge may need to consider not only how the work sounds to the lay person in the intended audience, but also structural similarities that only an expert can detect.**

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

"A sound recording has "a life of its own," apart from the performance of a work."

*Pinto v. Bronfman Jewish Education Centre*, 2013 CarswellNat 3396 (F.C.; 2013-09-11) Rennie J.

[142] **A sound recording has "a life of its own," apart from the performance of a work.** As the Supreme Court of Canada explained, "[o]nce the composer has made or authorized a recording of his work, he has irrevocably given up much of his control over its presentation to the public": *Bishop v Stevens*, [1990] 2 SCR 467 at para 21.

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

Prior searches as to existing works is not warranted for a work to be original.

*Pelchat v. Zone 3 inc.*, 2013 CarswellQue 216 (Que. Sup. Ct.; 2013-02-21) Payette J.

[336] Deuxièmement, s'il est possible de s'inspirer carrément d'une œuvre pour en créer une nouvelle, on peut se demander à quoi il servirait d'entreprendre de telles recherches.

[337] **Troisièmement, à partir du moment où l'on convient que deux créateurs peuvent, à bon droit, créer la même œuvre pourvu qu'ils le fassent de façon indépendante, il serait illogique de restreindre le pouvoir créatif de l'un en exigeant qu'il recherche l'œuvre de l'autre.**

[338] En fait, cette proposition des demandeurs est le reflet de leur définition de ce que constitue leur œuvre en vertu de la Loi. **Elle n'a de sens que si on définit leur œuvre en fonction de son substrat conceptuel plutôt que par sa forme et si l'on transpose au droit d'auteur les principes propres au brevet. Or, la Loi ne le permet pas.**

- **Section 2 –Definition of "works of joint authorship"**

The combination of lyrics and music in a song creates a work of joint authorship. Each of the joint authors must authorize use of the work of joint authorship.

*Pinto v. Bronfman Jewish Education Centre*, 2013 CarswellNat 3396 (F.C.; 2013-09-11) Rennie J.

[139] Employees of BJEC's Curriculum Development Department wrote lyrics for the 58 songs for which Mr. Pinto composed the music. **The combination of Mr. Pinto's music with BJEC's lyrics created one artistic work, the TaL AM song. There is joint authorship and therefore joint copyright ownership, in this cohesive whole.**

[140] As a result, subject to the issue of consent the legal effect of which will be discussed below, **both Mr. Pinto and BJEC (now TaL AM) must authorize any recording or performance of the songs at issue.**

- **Section 3 – Copyright in works**

Copyright law prevents the unauthorized copying of a work, not its disclosure, especially to a court appointed receiver.

*Canadian Solar Solutions Inc. v. RA Solar Leasing Inc.*, 2013 CarswellOnt 955 (Ont. Sup. Ct. [Commercial List];2013-01-29) Brown, J. [2013 CarswellOnt 2787 (Ont. Sup. Ct. [Commercial List] - Costs; 2013-03-13)]

[38] I give no effect to RA Ltd.'s argument that because it may hold copyright in the Solstice Database software program, that program and the information stored on it, do not fall within the ambit of section 5 of the Appointment Order because the *Copyright Act*, R.S.C. 1985 contains statutory provisions which prohibit such disclosure. First, I have concluded that the evidence filed is not sufficient to make a finding as to which RA entity owns the software program or might enjoy copyright in it. Second, RA Ltd.'s interpretation of the closing language of paragraph 5 of the Appointment Order is flawed. That portion of the Appointment Order reads:

provided however that nothing in this paragraph 5 or in paragraph 6 of this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Receiver due to the privilege attaching to solicitor-client communication *or due to statutory provisions prohibiting such disclosure.*

RA Ltd. did not refer to any case law which has interpreted the phrase, "due to statutory provisions prohibiting such disclosure", as carving out from the obligation to disclose to a receiver Records which might constitute "works" in which copyright resides. Nor did RA Ltd. point to any provision in the *Copyright Act* which would prohibit disclosure of any such Record to a receiver. **Indeed, in general**

**terms copyright law prevents the unauthorized copying of a work, not its disclosure.** [Fn 8 David Vaver, *Intellectual Property Law* (Toronto: 2011, Irwin Law), at 59. Moreover, RA Ltd.'s proffered interpretation of the Model Order argument, if accepted, would seriously undermine the ability of receivers to access and copy electronic records relating to the operation of a debtor's business to the extent those records might constitute "works". In an age when most information is stored in electronic form, such an argument would deprive receivers of information necessary to perform their court-directed duties and enable debtors, or those related to them, to hold hostage vital information required by receivers. I see no basis in law, or in the practicalities of receiverships, for the argument advanced by RA Ltd.

- **Section 3 – Copyright in works**

Copyright is a set of rights.

*R. v. Rundle (Nec Plus Ultra)*, 2013 CarswellOnt 5920, , 228 A.C.W.S. (3d) 823, 2013 ONSC 2747 (Ont. Sup. Ct; 2013-05-14) Beaudoin J. [supplementary reasons to 2012 ONSC 5185, 104 C.P.R. (4th) 190 (Ont. Sup. Ct.; 2012-09-14)]

[39] Section 3 of the *Copyright Act* defines **copyright as a set of rights which belong exclusively to the copyright holder.** [...]

- **Section 3 – Copyright in works**

Copyright is a bundle of statutory rights.

*Mobin v. Stephens*, 2013 ONCJ 53 (Ont. Sup. Ct.; 2013-02-26)

[41] An individual who composes, performs or records an original musical work has a copyright in such work. "Copyright" is created by statute. Thus, **a reference to "copyright" refers to the rights conferred by the legislation.** [Fn 2 Copyright Act, R.S.C. 1985, c. C-42 in Canada and the U.S. Copyright Act, Title 17 of the United States Code.] A copyright is an incorporeal form of property. [Fn 3 Sanderson, P., *Musicians and the Law in Canada - 3rd Ed.*, Carswell, Toronto, 2000, p.3] **It has a conceptual, non-physical existence, and is comprised of the bundle of statutory rights that accrue to the creator of an original work.**

- **Section 3 – Copyright in works**

There could be a separate copyright in the music, lyrics and their combination

*Pinto v. Bronfman Jewish Education Centre*, 2013 CarswellNat 3396 (F.C.; 2013-09-11) Rennie J.

[130] There are multiple layers of copyright for the TaL AM music, songs, recordings and curriculum overall. **Each of these constitutes separate works for the purpose of copyright and will be considered in turn.**

- **Section 3 – Copyright in works**

Rights of authors and users must be balanced.

*Distrimed inc. v. Dispill Inc.*, 2013 CarswellNat 3663, (F.C; 2013-10-15) de Montigny J.

[315] Copyright in Canada is a creation of statute. **The Copyright Act has the dual objective of promoting the public interest in the encouragement and dissemination of works and obtaining a just reward for the creator.** In interpreting the Act, courts must strive to maintain an appropriate balance between these goals: *Théberge v Galerie d'Art du Petit Champlain Inc.*, [2002] 2 SCR 336, 2002 SCC 34, at paras 30-31.

- **Section 3 - Copyright in works**

What constitute an authorization must be interpreted restrictively.

*Distrimed inc. v. Dispill Inc.*, 2013 CarswellNat 3663, (F.C; 2013-10-15) de Montigny J.

[361] [...] **Finally, “to authorize”, for the purposes of copyright law, must be interpreted restrictively as “to sanction, approve and countenance”.** Accordingly, courts will presume that a person who authorizes something does so “only so far as it is in accordance with the law” (*CCH*, above at paras 37-38, 43 [*CCH Canadian Ltd v Law Society of Upper Canada*, 2004 SCC 13]).

- **Section 3 – Copyright in works**

What constitutes the substantial part of a work is a flexible notion.

*Cinar Corporation v. Robinson*, 2013 CarswellQue 12345 (S.C.C.; 2013-12-23) McLachlin J.

[25] However, the Act does not protect every “particle” of an original work, “any little piece the taking of which cannot affect the value of

[the] work as a whole”: Vaver, at p. 182. Section 3 of the *Copyright Act* provides that the copyright owner has the sole right to reproduce “the work or any substantial part thereof”.

[26] A substantial part of a work is a flexible notion. It is a matter of fact and degree. “Whether a part is substantial must be decided by its quality rather than its quantity”: *Ladbroke (Football), Ltd. v. William Hill (Football), Ltd.*, [1964] 1 All E.R. 465 (H.L.), at p. 481, *per* Lord Pearce. What constitutes a substantial part is determined in relation to the originality of the work that warrants the protection of the *Copyright Act*. As a general proposition, a substantial part of a work is a part of the work that represents a substantial portion of the author’s skill and judgment expressed therein.

[27] A substantial part of a work is not limited to the words on the page or the brushstrokes on the canvas. The Act protects authors against both literal and non-literal copying, so long as the copied material forms a substantial part of the infringed work.[...]

- **Section 3 – Copyright in works**

The issue of substantiality is one of mixed fact and law.

*Cinar Corporation v. Robinson*, 2013 CarswellQue 12345 (S.C.C.; 2013-12-23) McLachlin J.

[30] [...] The conclusion of the trial judge that a substantial part of a plaintiff’s work was copied is entitled to appellate deference. **The issue of substantiality is one of mixed fact and law.** Consequently, an appellate court should generally defer to the trial judge’s findings on substantiality, unless those findings are based on an error of law or palpable and overriding errors of fact [...]

[35] [...] **Canadian courts have generally adopted a qualitative and holistic approach to assessing substantiality.** “The character of the works will be looked at, and the court will in all cases look, not at isolated passages, but at the two works as a whole to see whether the use by the defendant has unduly interfered with the plaintiff’s right”: J.S. McKeown, *Fox on Canadian Law of Copyright and Industrial Designs* (loose-leaf), at p. 21-16.4 (emphasis added).

[36] **As a general matter, it is important to not conduct the substantiality analysis by dealing with the copied features piecemeal:** *Designers Guild*, at p. 705, *per* Lord Hoffman. The approach proposed by the Cinar appellants would risk dissecting Robinson’s work into its component parts. The “abstraction” of

Robinson's work to the essence of what makes it original and the exclusion of non-protectable elements *at the outset of the analysis* would prevent a truly holistic assessment. This approach focuses unduly on whether each of the parts of Robinson's work is *individually* original and protected by copyright law. **Rather, the cumulative effect of the features copied from the work must be considered, to determine whether those features amount to a substantial part of Robinson's skill and judgment expressed in his work as a whole.**

- **Section 3 – Copyright in works**

Rights of authors must be balanced with those of users.

*Cinar Corporation v. Robinson*, 2013 CarswellQue 12345 (S.C.C.; 2013-12-23) McLachlin J.

[28] **The need to strike an appropriate balance between giving protection to the skill and judgment exercised by authors in the expression of their ideas, on the one hand, and leaving ideas and elements from the public domain free for all to draw upon, on the other**, forms the background against which the arguments of the parties must be considered.

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

A work must be in a fixed material form to attract copyright protection. A work does not have to be registered to be protected by copyright.

*Tremblay v. Orio Canada Inc.*, 2013 CarswellNat 1145 (F.C.; 2013-01-31) Boivin J. [affd. 2013 F225 (F.C.A.; 2013-09-25)]

[29] The case law also states that copyright "protects the expression of ideas in these works; it does not protect ideas in and of themselves" (*CCH*, above, at para 8 [*CCH Canadian Ltd. v Law Society of Upper Canada*, 2004 SCC 13]). **A work must therefore be in a fixed material form to attract copyright protection**, as indicated, for example, by the definition of "computer program". The definition of a literary work in section 2 of the Act also expressly includes computer programs, and a computer program is defined as "a set of instructions or statements, expressed, fixed, embodied or stored in any manner, that is to be used directly or indirectly in a computer in order to bring about a specific result". In this case, it is clear and uncontested by the parties that copyright exists in the modified SAM program. The issue is who owns it.

[27] First, the Court notes that copyright law is statutory; its rights and remedies are therefore found in the Act (*CCH Canadian Ltd. v Law Society of Upper Canada* 2004 SCC 13 at para 9) **Although it is possible to register one's copyright, it is not necessary to do so in Canada: the author merely needs to be Canadian, or a citizen of any other signatory of the *Berne Convention for the Protection of Literary and Artistic Works* of September 9, 1886, and the work needs to have been first published in such a country, if publication is relevant.**

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

Use of electronic tools does not deprive a work of copyrightability.

*Oakcraft Homes Inc v. Ecklund*, 2013 CanLII 41981 (Ont. Sup. Ct. – Small Claims; 2013-07-02) Gilbert, J.

[47] First and foremost, the law grants copyright protection for house plans. In order for house plans to attract copyright protection, they must be original in the sense set out in the case law cited above [*Construction Denis Desjardins Inc. v. Jeanson*, 2010 Carswell Que 15614 (Que.CA)]. In order for the court to make a finding of originality, it must be shown that the author exercised skill and judgment. To put it another way the author creates copyright material by the use of intellectual effort so as not to be characterized as a purely mechanical exercise.

[48] **Secondly, the ideas themselves need not be original. Sometimes, the arrangements of components, that in and of themselves and standing alone as ideas may not be the subject of protection, in a unique way can make those components uniquely arranged copyrightable.**

[49] It is clear from the evidence and I so find that Thompson embarked upon a course of conduct over time that turned his visions intellectually applied and conceptually conceived into an exceptional work deserving of copyright protection. His plan as presented to the Ecklands and after consultation with them embodied his vision and was unique to that vision. The fact that the plan was sent to a draftsman who reduced it to technical standards commanded by planning authorities does not in any way diminish the intellectual exercise used to create the original plan nor does it shift ownership to the draftsman. Drafting for that purpose is a technical art using technical drawing tools. Today, that art has become a science by the



use of computer aided design (CAD). **Can it be said that the use of CAD thereby converts ownership in the original work to the computer software technician operating the machine or the computer software programmer who programmed the CAD software? The answer is obvious....NO!**

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

A work must be in a fixed material form to be protected.

*Distrimed inc. v. Dispill Inc.*, 2013 CarswellNat 3663, (F.C; 2013-10-15) de Montigny J.

[316] It is well established in Canadian law that what is protected by copyright is not the idea itself, but the expression of that idea [...]

[318] **Because copyright only protects the expression of ideas, a work must also be expressed in some way or be in a fixed material form, in order to attract copyright protection: CCH**, above [*CCH Canadian Ltd v Law Society of Upper Canada*, 2004 SCC 13], at para 8; *Goldner v Canadian Broadcasting Corp* (1972), 7 CPR (2d) 158 (FCTD). **Ideas or schemes per se are public property as soon as they are disclosed, however good and valuable they may be. [...]**

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

The documents evidencing the first fixation of a work are relevant to ascertain its creation.

*Desmarteau v Ontario Lottery and Gaming Corporation*, 2013 CarswellQue 12333 (Que. C.A.; 2013-12-05) Gascon J.

[36] Enfin, l'appelant soutient vouloir se servir de ces pièces pour faire la preuve de la création et de l'élaboration de son œuvre dans les années 2005 et 2006. Il insiste que cette preuve vise particulièrement à établir la fixation initiale de l'œuvre au sujet de laquelle il demande la reconnaissance de son droit d'auteur. Il veut aussi se servir des pièces pour étayer son développement de plusieurs types de jeux. Il veut enfin démontrer qu'à la suite du vol de son ordinateur, il a reconstitué son œuvre à partir de ces notes manuscrites et d'une version sur support informatique qu'il possédait sur disquette.

[37] Cela étant, au stade préliminaire d'une requête en radiation, alors qu'il faut aborder la question avec prudence et donner le

bénéfice du doute à l'allégation, je vois mal comment l'on peut évacuer cette preuve comme non pertinente.

[39] **Avec égards, j'estime que la difficulté que pourrait avoir l'appelant à prouver que son œuvre a été communiquée aux intimées ne rend pas pour autant non pertinente la preuve qui établirait la fixation initiale de cette œuvre et le moment de sa création dans le temps [...]**

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

Originality is required for copyright to subsist in a work

*Cinar Corporation v. Robinson*, 22013 CarswellQue 12345 (S.C.C.; 2013-12-23) McLachlin J.

[24] The Act protects *original* literary, dramatic, musical, and artistic works: s. 5. It protects the expression of ideas in these works, rather than ideas in and of themselves: *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339, at para. 8. **An original work is the expression of an idea through an exercise of skill and judgment:** *CCH*, at para. 16. Infringement consists of the unauthorized taking of that originality.

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

The conditions of subsistence of copyright in Canada must be pleaded.

(AOM) *NA Inc. v. Reveal Group*, 2013 ONSC 8014, <http://canlii.ca/en/on/onsc/doc/2013/2013onsc8014/2013onsc8014.html> (Ont. Sup. Ct.; 2013-12-30) Macleod, Master

[12] Damages for breach of copyright in in Canada are available as a statutory remedy under the provisions of the *Copyright Act*, RSC 1985, c. C.42 and in particular s. 41.23 of the *Act*. **For copyright that originated in the United Kingdom to be enforceable in Canada under the Act, the plaintiff must bring itself within the ambit of the statute.**

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

The Crown is bound by the *Copyright Act*.

*Manitoba v. Canadian Copyright Licensing Agency (Access Copyright)*, 112 C.P.R. (4th) 1, (F.C.A.; 2013-04-03) Gauthier J. [confirming 98 C.P.R. (4th) 215 (Cop. Bd.; 2012-01-05)]

[34] Having carefully examined the wording of section 12 in its overall context, including the structure of the *Act*, its legislative history and evolution, and other provisions, such as section 89, **I agree with the Board that the words “[w]ithout prejudice to any right or privilege of the Crown” set out in section 12 are intended to refer to and preserve the Crown’s rights and privileges of the same general nature as copyright that may not fall within the meaning of the rest of this provision. These rights and privileges could otherwise be excluded by the general principle set out in section 89 which provides that no person is entitled to copyright otherwise than under and in accordance with the *Act* or any other Act of Parliament.**

[47] In my view, the references in the *Act* to very strict conditions, to tariffs fixed by the Board, to the consent of the copyright owners, and to the power of the court when the defendant is an “educational institution”, including a federal or provincial government department, all point to only one logical and plausible conclusion as to the intent of Parliament: the Crown is bound.

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

Where a work was prepared for a government department, the copyright belongs to the Crown.

*R. v. Rundle (Nec Plus Ultra)*, 2013 CarswellOnt 5920 (Ont. Sup. Ct; 2013-05-14) Beaudoin J. [supplementary reasons to 2012 ONSC 5185, 104 C.P.R. (4th) 190 (Ont. Sup. Ct.; 2012-09-14)]

[34] Pursuant to section 12 of the *Copyright Act*, **where a work has been prepared or published under the direction or control of Her Majesty or any government department, the copyright in the work shall belong to Her Majesty [...]**

- **Section 13 – Ownership of copyright**

The signed writing requirement is a substantial legal requirement for the validity of an assignment of copyright.

*Tremblay v. Orio Canada Inc.*, 2013 CarswellNat 1145 (F.C.; 2013-01-31) Boivin J. [affd. 2013 F225 (F.C.A.; 2013-09-25)]

[38] The writing and signature requirements in this subsection have remained unchanged since its adoption in 1921 and its coming into force in 1924 (SC 1921, c 24; SC 1923, c 10, s 5). The purpose of this subsection has been considered in *Mensys Business Solution Centre Ltd v Drummond (Municipalité régionale de comté)*, [2002] RJQ 765, [2002] JQ no 169 (QL) [...]

[39] **The signed writing requirement is a substantial legal requirement and not a mere rule of evidence**, as indicated in *Motel 6, Inc v No 6 Motel Limited and John Van Edmond Beachcroft Hawthorne*, [1982] 1 FC 638 at para 26 [...]

[41] **In short, subsection 13(4) of the Act, which governs the assignment of copyright and the granting of licences, does not require any particular wording as a condition of validity; instead it sets out a copulative condition: writing and a signature.**

[48] In this case, the Court has no choice but to find that a signature is lacking. Although the parties have confirmed before this Court that the plaintiff submitted other bids to the defendant that include the same clause, there is nothing in the evidence to support a finding that the bids submitted after April 2007 were signed. Furthermore, the defendant has not filed any other evidence before this Court that could stand in for a signature (*Milliken & Co v Interface Flooring Systems (Canada) Inc*, [1998] 3 FC 103, 143 FTR 106).

[49] Had it not been for the absence of the plaintiff's signature, there would have been an assignment of the copyright under the Act, but in the circumstances, the Court can only find that, pursuant to subsection 13(4) of the Act, the plaintiff did not assign his copyright in the modified SAM program. Accepting the defendant's argument and making the opposite finding solely on the basis of the plaintiff's testimony would render meaningless the requirement imposed by Parliament. **This finding may appear rigid, but it complies with the formal requirements of the Act..** [...]

- **Section 13 – Ownership of copyright**

Assignment of a copyright is not a “provision of artists’ services”.

*National Gallery of Canada v. Canadian Artists’ Representation*, 2013 CarswellNat 507 (F.C.A.; 2013-03-04) Noël J. [reversing *Canadian Artists’ Representation/Le Front des artistes canadiens (CARFAC)* and *Le regroupement des artistes en arts visuels du Québec (RAAV) v. National Gallery of Canada (NGC)*, 2012 CarswellNat

4332 (C.A.P.P.R.T.; 2012-02-16); ); leave to appeal to the Supreme Court of Canada granted , docket 35353 (S.C.C.; 2013-08-15)]

[99] This distinction is equally fundamental in the present case. Where a scale agreements pertains to commissioned works (“œuvres commandées”, to use the French phrase), no copyright is involved since the work does not exist at the time the agreement is signed. Consequently, the “provision of ... services” required to realize the commissioned work and the rights of use that an artist may assign with respect to the contemplated work do not entail any possible conflict with the *Copyright Act*. I note that the provision of artists services to produce commissioned works is a common practice in the art world, as is evidenced by Bill 90 [*Status of the Artist Act*, S.C. 1992, c. 33] and by the Act itself which applies to specified producers that “engage one or more artists to provide an artistic production” (paragraph 6(2)(a) of the Act).

[100] Conflicts with the *Copyright Act* only arise where one seeks to extend scale agreements to works that are created otherwise than in the context of a commission, as the Tribunal did in this case.

**[102] In extending the application of the Act to works made otherwise than in the context of a commission, the Tribunal distorted the words used by Parliament. No linguistic gymnastics can justify the assertion that the assignment of a copyright is a “provision of artists’ services”.**

**[103] A copyright is not a “service” under any acceptance, be it at civil law, at common law, under the *Copyright Act*, or according to the plain meaning of the word be it in English or French. A copyright consists of rights recognized and protected by law owned by an artist in relation to his or her work (section 3 of the *Copyright Act*). The result is that the assignment of such rights gives rise to a transfer of property. No one would think of describing a transfer of property as a “provision of ... services”.**

- **Section 13 – Ownership of copyright**

A licence given for consideration cannot be revoked at will.

*Planification-Organisation-Publications Systèmes (POPS) Ltée v. 9054-8181 Québec Inc.*, 111 C.P.R. (4th) 1 (F.C.; 2013-04-25) Crampton J.

[128] As discussed in the immediately preceding section above, IDP provided substantial consideration in exchange for an explicit or implied licence to use and to continue to develop the Software. That

consideration was provided pursuant to an explicit or verbal agreement, and was further evidenced by a course of conduct pursued by the parties over the course of many years. **Accordingly, POPS was not entitled to unilaterally revoke that licence** (*Katz (Michael Katz Associates) v Cytrynbaum* (1983), 76 CPR (2s) 276, at para 19 (BCCA), citing H G Fox, *The Canadian Law of Copyright and Industrial Designs*, 2d ed (Toronto: Carswell, 1967), at pp 339-340); see also (J S McKeown, Fox, *Canadian Law of Copyright and Industrial Designs*, 4th ed, (Toronto: Carswell, 2009) at 19:4(e); and *Winter Garden Theatre v Millenium Products*, [1948] A.C. 173, at 193 and 198).

- **Section 13 – Ownership of copyright**

An assignment must be in writing but not a licence.

*Planification-Organisation-Publications Systèmes (POPS) Ltée v. 9054-8181 Québec Inc.*, 111 C.P.R. (4th) 1 (F.C.; 2013-04-25) Crampton J.

[50] [...] In addition, in addressing the scope of the rights granted under the agreement, Article II(1) states that “the authors expressly and exclusively cede to the promoter the rights to translate in all languages and all countries, to market, to adapt and to reproduce [Ceres] by all existing and future visual, audio [and] electronic means, without exception or reserve.” There is no language in that article which assigns the copyright in Ceres to POPS.

[54] Given all of the foregoing, I agree with the Defendants that even if Mr. Szendrovits owned the copyright in Ceres in 1985, **the 1985 Agreement did not transfer that ownership interest to POPS. However, it was effective in conferring upon POPS a very broad and exclusive licence to, among other things, distribute, adapt and sell Ceres.**

- **Section 13 – Ownership of copyright**

For works created by employee, the copyright is vested in the employer, without the necessity of a written assignment.

*Oakcraft Homes Inc v. Ecklund*, 2013 CanLII 41981 (Ont. Sup. Ct. – Small Claims; 2013-07-02) Gilbert, J.

[55] The Court has recognized over the years that when dealing with senior officers of corporations like presidents or other key officers, that these people are usually considered an employee of the company, whether or not a written contract of services exists and the

copyright will therefore be owned by the company. *B & S Publications Inc. v. Max-Contacts Inc.*, 2001 Carswell Alta 69 at para. 21.

**[56] On the issue of who owns the copyright in the plan and the allegation that the Plaintiff is not the rightful owner, the law is clear in that where an individual in the employ of a corporate entity is a principal/owner and senior officer thereof and he creates the work while in the corporation's employ, the ownership resides in the corporation and a formal assignment of one to the other is therefore unnecessary.**

- **Section 13 – Ownership of copyright**

A licence is the law of the parties.

*Isle -Principia (USA) inc. v. Guimond*, 2013 CarswellQue 7711 Que. Sup. Ct.; 2013-07-03) Yergeau J.

[382] Par contre, lorsque l'auteur cède ses droits par voie de licence, c'est la licence qui se substitue à la LDA, celle-ci ne prenant le relais que pour ce qui excède.

**[383] Dans la mesure où une licence de droits est octroyée sur une photographie ou un ensemble de photographies, c'est donc la licence qui fait la loi des parties à l'exclusion de la *Loi sur le droit d'auteur*. La licence est alors soumise aux règles générales d'interprétation des contrats [FN 124 *Leuthold c. Société Radio-Canada*, 2012 CF 748<sup>1</sup>**

[648] Par ailleurs, on a vu que le contrat de licence est venu se substituer au contrat de réalisation pour tout ce qui est compris dans le premier. Dans la mesure où les images, les photos et les photomontages de Guimond et les images tirées de ses Archives ont été utilisés dans *Les États inventés d'Amérique* conformément au contrat de licence, Guimond n'est donc pas fondé de plaider violation de son droit d'auteur. **A contrario, tout usage fait par Principia outrepassant le contrat de licence peut donner ouverture en tout ou en partie aux conclusions recherchées par Guimond.**

[649] Ainsi que le juge en a décidé dans *Éditions Hurtubise HMH Itée c. Cégep André-Laurendeau* [FN 182 [1989] R.J.Q. 1003], **si une licence permet uniquement la reproduction intégrale et non modifiée de l'œuvre, devient alors une violation de la licence et du droit d'auteur le fait de reproduire ou de rendre publique l'œuvre d'une manière partielle ou modifiée.** Mais le contrat de

licence ne comporte pas ici de restriction de ce type. Il n'y a pas de contrefaçon du droit d'auteur du seul fait d'avoir utilisé, par exemple, des photomontages inachevés de Guimond [Voir à ce propos, l'arrêt *Netupsky c. Dominion Bridge Company Ltd.*, [1972] R.C.S. 368.].

- **Section 13 - Ownership of copyright**

Only the owner of the copyright can assign it.

*Chélin v. Girouard*, 2013 CarswellQue 12420 (Que. Ct- Small Claims; 2013-08-16) Vadeboncoeur J.

[31] Il est donc légitime d'affirmer que la cession entre le photographe et la demanderesse n'a aucune valeur juridique puisque le photographe ne détenait pas de droit d'auteur sur la photo. Seul le journal l'Express d'Outremont aurait pu céder son droit d'auteur

[40] Tel que mentionné précédemment, la cession du droit d'auteur par le photographe en faveur de la demanderesse (P-12) a été signée sans droit et n'a aucune valeur juridique.

- **Section 13 – Ownership of copyright**

Consent of the co-owner of copyright is required to exploit a work of joint authorship.

*Pinto v. Bronfman Jewish Education Centre*, 2013 CarswellNat 3396 (F.C.; 2013-09-11) Rennie J.

[135] As a result [i.e., no employment nor assignment], BJEC required his consent, a licence, to use his music for TaL AM, including producing a sound recording and incorporating the music into the curriculum.

- **Section 13 – Ownership of copyright**

A copyright assignment must be in writing but the Court may consider the admission of an assignment by the assignor.

*Tremblay v. Orio Canada Inc.*, 2013 CAF 225, 2013 CarswellNat 3483 (C.A.F.; 2013-09-25) [affirming 2013 CarswellNat 1145 (F.C.; 2013-01-31)] Mainville J.

[15] Il ne fait aucun doute que l'intention des parties était que tout développement fait par l'appelant sur le logiciel SAM deviendrait la propriété exclusive d'Orio. La clause reproduite ci-haut et incluse aux



documents de soumission ne peut s'interpréter autrement que comme prévoyant la cession en faveur d'Orion du droit d'auteur dans le logiciel SAM modifié. Lorsque la « propriété exclusive » sur le développement d'un logiciel est cédée, cela comporte de soi la propriété du droit d'auteur dans ce développement.

[18] L'objet de la *Loi sur le droit d'auteur* est d'établir un juste équilibre entre la promotion, dans l'intérêt public, de la création et de la diffusion des œuvres artistiques et intellectuelles, d'une part, et l'obtention d'une juste récompense pour le créateur, d'autre part : *CCH Canadienne Ltée c. Barreau du Haut-Canada*, 2004 CSC 13, [2004] 1 R.C.S. 339 au par. 23. **C'est avec cet objectif à l'esprit que le législateur exige que la propriété du droit d'auteur ne puisse être cédée que par un écrit signé par le titulaire du droit d'auteur. Ce principe s'applique tant à la cession pure et simple du droit d'auteur (par. 13(4) de la Loi) qu'à une licence exclusive à l'égard de ce droit (par. 13(7) de la Loi).**

[19] En effet, ce qui caractérise une cession ou une licence exclusive par rapport à une licence non exclusive est le transfert d'un droit de propriété dans le droit d'auteur. [...] **Afin de protéger les titulaires du droit d'auteur, la loi exige donc que ces derniers doivent consentir de façon claire à la cession de la propriété de leur droit. C'est pourquoi la *Loi sur le droit d'auteur* exige que le titulaire du droit doive signifier son consentement éclairé au transfert de propriété au moyen d'un écrit portant sa signature.**

[21] [...] Ainsi, la jurisprudence prévoit de façon unanime qu'on ne peut opposer à un titulaire d'un droit d'auteur une cession ou une licence exclusive qui n'est pas constaté par un écrit signé par le titulaire du droit en cause [...]

[22] Cependant, ces décisions ne traitent pas d'un cas où le titulaire du droit d'auteur reconnaît devant le tribunal avoir consenti au transfert de propriété du droit en cause. Il m'apparaît d'un formalisme exagéré que de rendre inopposable à un cédant une clause de cession de droit d'auteur que celui-ci a lui-même rédigée et qu'il reconnaît devant le tribunal comme régissant ses rapports avec le cessionnaire, et ce pour la simple raison que celle-ci n'est pas signée. Comme je l'ai signalé plus haut, le but des paragraphes 13(4) et (7) de la *Loi sur le droit d'auteur* est de protéger le titulaire du droit d'auteur contre une cession de droit qui n'est pas consentie de façon claire. **Lorsque le cessionnaire reconnaît lui-même devant le tribunal la clause de cession qui régit ses rapports, le but recherché par la Loi est quant à moi rempli.**

[23] **Dans les circonstances particulières du présent litige, où le titulaire du droit reconnaît devant le tribunal chargé de trancher la question que la clause de cession de droit régit ses rapports avec le cessionnaire, la forme ne devrait pas l'emporter sur le fond.** Je note d'ailleurs que ce litige a pris naissance au Québec et que l'article 7 du *Code Civil du Québec*, L.Q. 1991, c. 64, prévoit qu' « [a]ucun droit ne peut être exercé en vue de nuire à autrui ou d'une manière excessive et déraisonnable, allant ainsi à l'encontre des exigences de la bonne foi. »

- **Section 13 – Ownership of copyright**

The context of an assignment is relevant in determining its scope.

*Distrimedic inc. v. Dispill Inc.*, 2013 CarswellNat 3663, (F.C; 2013-10-15) de Montigny J.

[350] [...] Of course, when interpreting an assignment or license, the Court may look at the context of the contract and the intent of the parties to determine its scope; however, care must be taken not to give too wide an interpretation to an assignment or a license, given the clear objective of copyright law to protect creators [...]

- **Section 13 – Ownership of copyright**

Copyright in the work done by an employee belongs to the employer.

*Cormier v. R.*, 2013 QC2068 (Que. C. A.; 2013-12-02) Gagnon J.

[80] Tout d'abord, tout comme mon collègue, j'écarte l'argument de l'appelant selon lequel il ne pouvait avoir volé les documents se rapportant au projet *Fil d'Ariane* [une démarche d'intervention visant à contrer l'absentéisme au travail] pour le seul motif qu'il détenait un droit d'auteur sur ce projet [Fn 33 *Loi sur le droit d'auteur*, L.R.C. (1985), c. C-42.]

[81] **Il ressort de la preuve que l'appelant s'est obligé vis-à-vis de son employeur, moyennant rémunération, à exécuter une prestation de travail consistant à développer avec l'aide d'autres collaborateurs un programme de prévention en vue de réduire le taux d'absentéisme dans les entreprises et les établissements publics.** Le contexte dans lequel le projet *Fil d'Ariane* a été réalisé est tout simplement incompatible avec la proposition selon laquelle l'appelant détenait un droit d'auteur sur ce projet. Il ne m'est pas nécessaire d'en dire davantage sur la valeur de ce moyen

- **Section 13 – Ownership of copyright**

The chain of title and the particulars of the grant must be pled: it cannot be merely inferred. A licence to sell and deliver is as such not a grant of interest in the copyright.

(AOM) *NA Inc. v. Reveal Group*, 2013 ONSC 8014, <http://canlii.ca/en/on/onsc/doc/2013/2013onsc8014/2013onsc8014.html> (Ont. Sup. Ct.; 2013-12-30) Macleod, Master

[14] S. 41.23 of the Act provides that “the owner of any copyright” or a person deriving any right, title or interest by “assignment or grant in writing from the owner” may “protect and enforce any right that he or she holds” and to the extent of that right, title or interest, “is entitled to the remedies provided by the Act.” In the decisions of the Federal court cited by the defendant the court has held that **the chain of title and the particulars of the “grant in writing” must be pled because they are a constituent part of the statutory right of action.** I agree.

[15] In this case it is pleaded that the authors of the “method” were Neil Bentley and Richard Jeffrey, the founders of AOMi. **Copyright normally attaches to the authors and though one might infer from this pleading that Bentley and Jeffrey assigned their copyright to AOMi the pleading does not state this.** Similarly WBSI which is said to be a subsidiary of AOMi is said to be the owner of the AOM Software but how copyright arose or was assigned is not pleaded.

[16] The pleading then states that AOMNA is licensed to sell and deliver the AOM method and software in North America. The amended pleading states that AOMi and WBSI have “conferred upon AOMna the authority to pursue the infringement and breaches described herein. I agree that it is not clear from this statement whether AOMna has a “right, title or interest” in specific copyright pursuant to an “assignment or grant in writing from the owner” as required by s. 41.23 and whether any such assignment is valid under s. 13 (4).

- **Section 14.1 – Moral Rights**

Moral rights cannot be assigned but they can be waived.

*Isle -Principia (USA) inc. v. Guimond*, 2013 CarswellQue 7711 (Que. Sup. Ct.; 2013-07-03) Yergeau J.

[655] **S'il peut y avoir cession du droit d'auteur, il ne peut y avoir cession des droits moraux, bien que l'auteur puisse y renoncer par contrat.** Il est fréquent que les contrats comportent maintenant une formule de renonciation aux droits moraux. Guimond n'a pas renoncé aux siens.

- **Section 27 – Infringement generally**

A licence may be implied.

*Tremblay v. Orio Canada Inc.*, 2013 CarswellNat 1145 (C.F. 2013-01-31) Boivin J. [affd. 2013 F225 (F.C.A.; 2013-09-25)]

[53] Therefore, in light of the evidence, the Court finds that the plaintiff granted the defendant an implied licence to use the modified SAM program. **It has been recognized in the case law that an implied licence can be inferred from the parties' conduct and need not be made in writing** (*Silverson v Neon Products Ltd* (1978), 39 CPR (2d) 234 (BCSC); *Cselko Associates Inc v Zellers Inc* (1992), 44 CPR (3d) 56 (Ont Ct Gen Div)). The Court is of the view that this is the case here.

[57] **As indicated above, the evidence in the record shows that the plaintiff implicitly consented to the defendant's use of the modified SAM program and granted it a user licence.** It follows that the plaintiff's claim that his copyright was infringed under section 27 of the Act for lack of consent on his part cannot be accepted, since there was consent on his part.

- **Section 27 – Infringement generally**

A licence cannot go beyond its terms, failing which there is infringement.

*Boire v. Lefebvre*, 2013 QCCQ 921 (Que. Ct. Small Claims; 2013-01-10) Le Reste J.

[42] La preuve prépondérante démontre que la défenderesse a fait imprimer à 500 exemplaires un document à des fins publicitaires sur lequel apparaît une sculpture imposante appartenant au demandeur.

[43] **La preuve non contredite démontre que la défenderesse n'avait pas l'autorisation préalable expresse du demandeur pour ce faire.**

[44] Que le demandeur ait donné son consentement à la demanderesse afin qu'elle utilise sur sa page web des informations du demandeur et deux photographies de ses œuvres est une chose. Cependant, l'utilisation commerciale photographique de la sculpture appartenant au demandeur est une autre chose bien distincte.

- **Section 27 – Infringement generally**

Independent creation is an absolute defence to copyright infringement.

*Rains v. Molea*, 114 C.P.R. (4th) 161 (Ont. Sup. Ct.; 2013-08-15) Chiappetta J.

[47] A plaintiff alleging infringement must establish that the defendant had access to the plaintiff's work. This requirement has been described as the causal connection: See e.g. *Atomic Energy of Canada Ltd. v. AREVA NP Canada Ltd.*, 2009 FC 980, 78 C.P.R. (4th) 113, at para. 35. Although I found insufficient similarities among the 17 comparison copyrighted images in Schedule A, I will nonetheless comment on access.

[48] Direct evidence of access to the copyrighted work is not required to satisfy the causal connection. The court will presume the existence of a causal connection where the defendant's work is sufficiently similar to the copyrighted work and it is shown the defendant had the reasonable possibility of access to the copyrighted work: *Atomic Energy*, at para 35.

**[68] Where a plaintiff establishes similarity with the defendant's work and the reasonable possibility of access, the burden then shifts to the defendant to prove the second work was created independently of the first. Independent creation of the impugned work is an absolute defence to a copyright infringement: *Philip Morris Products S.A. v. Marlboro Canada Ltd.*, 2010 FC 1099, [2010] F.C.J. No. 1385, aff'd with respect to copyright, 2012 F201, [2012] F.C.J. No. 878, at paras. 116-124, leave to appeal to S.C.C. refused, [2012] S.C.C.A. No. 413, [2012] C.S.C.R. No. 413.**

- **Section 27 – Infringement generally**

The burden is on the plaintiff to prove the absence of consent.

*Pinto v. Bronfman Jewish Education Centre*, 2013 CarswellNat 3396 (F.C.; 2013-09-11) Rennie J.

**[157] As the party seeking to establish infringement, Mr. Pinto bears the legal burden of proving that he did not consent [...]**

[159] Mr. Pinto has failed to make out this critical component of infringement. The evidence establishes that Mr. Pinto consented to, and indeed actively facilitated, BJEC's use of his music. This is not a case of uncertainty or ambiguity. The evidence is consistent with consent.

- **Section 27 – Infringement generally**

Contracts may be resorted to in order to ascertain infringement.

*Roué v. Nova Scotia*, 2013 CarswellNS 97 (N.S. S.C.; 2013-08-09) Rosinski J. [affd. 2013 CarswellNS 615 (N.S. C.A.; 2013-08-27)]

[106] To establish liability of any of the Respondents, the Roués must demonstrate on evidence that their copyright and/or moral rights subsisting in the Asserted Drawings have been violated or infringed, as the case may be, by reference to one of the following sections: 3(a), 14.1, 14.2, 27(1), 28.1, 34, 35, 38.1, 39 or 39.1 of the *Copyright Act*. **These are distinct claims and the contracts may be relevant to some and not others.**

- **Section 27 – Infringement Generally**

A licence can be implied.

*Tremblay v. Orio Canada Inc.*, 2013 CAF 225, 2013 CarswellNat 3483 (C.A.F.; 2013-09-25) [affirming 2013 CarswellNat 1145 (F.C.; 2013-01-31)] Mainville J.

[26] [...] **La licence implicite résultant de l'ensemble des rapports entre les parties permet donc à Orio de copier le code source du SAM modifié afin de le faire retravailler par des tiers.** Le juge de première instance n'a donc commis aucune erreur en décidant ainsi.

- **Section 27 – Infringement generally**

An implied licence could be transferred.

*Stoyanova v. Disques Mile End*, 2013 CarswellQue 11696 (Que. Sup. Ct.; 2013-11-13 Brossard J.

[32] Cela dit, des auteurs et une certaine jurisprudence reconnaissent qu'il existe, outre la cession du droit d'auteur, une forme de licence d'autorisation d'exploiter le droit ainsi licencié, dans la mesure permise par la licence. **Cette autorisation n'a pas à être écrite et peut être implicite** <sup>IFN</sup> 26 Stéphane GILKER, « Principes

généraux du droit d'auteur » dans Barreau du Québec, Congrès du Barreau, *Congrès annuel du Barreau du Québec (2009)*, p. 71, 75-77<sup>1</sup>. **Cette licence pourrait être transférée à un tiers, selon la portée de la licence implicite conférée au bénéficiaire original** <sup>[Fn</sup>  
<sup>27</sup> *Id*, p. 78<sup>1</sup>.

- **Section 28.1 – Infringement Generally**

Modification to a work must be to the prejudice of the honour or reputation of the author for infringement of his right to the integrity of the work to be found.

*Isle -Principia (USA) inc. v. Guimond*, 2013 CarswellQue 7711 (Que. Sup. Ct.; 2013-07-03) Yergeau J.

[655] S'il peut y avoir cession du droit d'auteur, il ne peut y avoir cession des droits moraux, bien que l'auteur puisse y renoncer par contrat. Il est fréquent que les contrats comportent maintenant une formule de renonciation aux droits moraux. Guimond n'a pas renoncé aux siens.

[656] En somme, Guimond, pour réussir, devait démontrer que **Principia a utilisé son travail d'une manière qui déborde le cadre du contrat de licence ou encore que le producteur, même à l'intérieur de ce cadre, a perverti le travail de Guimond en n'en respectant pas l'intégralité au point de porter atteinte à ses droits moraux sur son œuvre.**

[657] Dans le présent dossier, les deux questions suivantes se posent donc. L'usage que Principia fait des Archives et des Œuvres de Guimond dans *Les États inventés d'Amérique* est-il celui prévu au contrat de licence ? Principia a-t-elle porté atteinte aux droits moraux de Guimond sur son œuvre en altérant les images tirées de ses archives ou les photos et les photomontages créés dans le cadre de la réalisation du film au point de porter ombrage à sa réputation?

[681] À la lumière des enseignements de la jurisprudence dans l'arrêt *Carlton Illustrators c. Coleman & Co.* [[1911] 1 K.B. 771]. et, au Canada, dans l'arrêt *Snow* déjà cité [*Snow c. The Eaton Centre Ltd.*, (1982), 70 C.P.R. (2d) 105 (H.C.Ont.)], **le Tribunal en vient à la conclusion qu'on ne peut pas parler de mutilation des images d'une matière préjudiciable à l'honneur de l'artiste dans le fait d'avoir inclus dans le film des images offrant une résolution inférieure à celle souhaitée par Guimond. Pour conclure ainsi, le Tribunal s'en remet à la littérature spécialisée et à la jurisprudence.**

[684] Dans le cas présent, le Tribunal conclut que l'utilisation dans *Les États inventés d'Amérique d'images d'une résolution inférieure à celle souhaitée par Guimond n'a pas eu pour effet d'entraîner, même en admettant que l'intégrité des œuvres n'a pas été respectée, une atteinte à sa réputation. Encore une fois, Guimond n'a invité aucun expert en appui de ce qu'il avance, non plus qu'aucun de ses pairs.*

- **Section 29 – Research or private study**

The function of a Court is not to judge the artistic merit of a work.

*Trudeau v. AD 4 Distribution Canada inc.*, 2013 QCCS 2678 (Que. Sup. Ct.; 2013-06-17) Le Bel J.

[44] **Il n'appartient pas aux tribunaux d'adjudger du mérite artistique ou du simple mérite de l'œuvre produite par AD4 ou de distinguer les mauvaises caricatures des bonnes ou de sanctionner les parodies qui seraient de mauvais goût.**

[45] Dans la sphère publique, la liberté d'expression autorise et permet la critique, le commentaire, le débat, la contestation, par des procédures ou des manifestations ou par l'humour ou la caricature ou la parodie, des faits et gestes de ceux qui nous gouvernent ou qui, comme les policiers, se trouvent en position d'autorité.

[41] Dans ce contexte particulier, un policier ou un agent de la paix est un *fonctionnaire public*, quelqu'un qui est investi d'une autorité particulière et qui joue un rôle important dans notre société. Qu'on puisse prétendre soustraire une telle personne à la critique ou au commentaire, fut-ce sous la forme de la parodie ou de la caricature, en invoquant la notion de l'atteinte à la vie privée semble pour le moins étonnant.

- **29.4 – Reproduction for instruction**

Interim tariff is warranted to account for a legislative development.

*Access Copyright (Educational Institutions) 2010-2015*, 2013 CarswellNat 1656, (Cop. Bd.- interim decision; 2013-05-29)

[15] There remains but one reason to adopt a new interim tariff. As a result of recent amendments to section 29.4 of the Act, examination



copies that were compensable by the sole reason that Access offered a licence no longer attract royalties. The record of the proceedings that led to the certification of the 2005-2009 tariff shows that approximately 15 cents of the rate of \$4.81 was attributable to such copies [Fn6 6,995,451 photocopied pages for ministry examinations ÷ 246,001,462 photocopied pages triggering remuneration × 5.16 = 15¢ (FTE Rate certified in 2009): see Access K-12 (2009), Supra note 2, Table 2.]. Access proposes to cease collecting those 15 cents. This is precisely the sort of change in status quo that ought to be reflected in an interim decision: just as an interim tariff was required in *Interim Decision – SOCAN-NRCC Tariff 1.A (Commercial Radio) for the Years 2003 to 2007* [Fn7 (24 November 2006) Copyright Board Decision] **to adjust the royalty rate to account for jurisprudential developments, an interim tariff adjusting the royalty rate set in the 2005-2009 tariff is warranted to account for this legislative development.**

- **29.4 – Reproduction for instruction**

A collective licence to copy a work to a medium makes the work commercially available in that medium.

*Access Copyright (Educational Institutions) 2010-2015*, [2013] C.B.D. 4 (Cop. Bd. - interim decision; 2013-01-18)

[18] For the 29.4(3) carve-out to apply in respect of a test or examination, a work must be: (i) commercially available; and, (ii) in a medium that is appropriate for the purpose of that test or examination.

[23] In subsection 29.4(3), the carve-out applies if the work "is commercially available in a medium that is appropriate" for the purpose. In subsection 30.1(2), **the carve-out applies if the work "is commercially available in a medium and of a quality that is appropriate" for the purpose. To the extent the relevant parts of the wording of both subsections are identical, they must be interpreted in the same manner.**

[24] To interpret subsection 29.4(3) (and thus, by extension, subsection 30.1(2)) as the Objectors suggest would render paragraph (b) of the definition of "commercially available" meaningless. The Objectors admit as much when stating that "authorization to transfer a work to a particular medium simply does not make the work commercially available in that medium" and that "a licence does not make a work available in any medium". This is not tenable. If a licence does not make a work available in any

medium, the "appropriate medium" condition can never be satisfied through a licence being available within the meaning of paragraph (b). A work for which a collective's licence is available (and therefore, commercially available pursuant to paragraph (b) of the definition) will never trigger either carve-out even though, for the very reason that a licence is available, it is commercially available and even though the definition is used only in those two provisions that, both, create a carve-out. Paragraph (b) would be meaningless. The only way to avoid this absurdity is to conclude that if a work is commercially available because a licence is available, that work must sometimes (not always) be in an appropriate medium precisely because the licence is available.

**[25] Access submits that a licence to copy a work to a medium makes the work available in that medium. This interpretation does not lead to absurd results; on the contrary, it is the only one that gives meaning to paragraph (b) of the definition of "commercially available".**

**[26] A work for which a collective's licence is available is available in an appropriate medium if, and only if, the licence authorises the institution or teacher to use (copy, perform, communicate) the work in the medium that is appropriate to that particular test or examination.** A licence to copy a literary work makes the work available in an appropriate medium if it allows the teacher to copy the work onto the medium the teacher intends to use during the test or examination. A licence that allows only digital copies will trigger the carve-out if tests are administered digitally, but not if tests are administered on paper. A licence to perform a work does not make the work available in an appropriate medium if the teacher intends the student to sight read the score; it does if the teacher intends students to listen to a recorded performance of the work before criticizing it.

[27] Applying the same rule to the subsection 30.1(2) carve-out also yields logical results. A licence that allows a library to copy sheet music (but not a sound recording of music) does not trigger the carve-out if the library wishes to allow users to listen to a recording of the music. A licence that allows a library to reproduce a sound recording (but not sheet music) does not trigger the carve-out if the library wishes to display a transcription of the score.

[28] This interpretation is also valid if a work is available for sale in one medium and through licences in another. For example, if a test is available for sale on paper and an institution wishes to administer the test digitally, the institution may claim the benefit of the subsection

29.4(2) exception unless a collective also offers a licence allowing the institution to administer the test digitally.

[29] An amendment to the Act that came into force on November 7, 2012 confirms our interpretation. As of that date, subsection 29.4(3) reads as follows:

(3) Except in the case of manual reproduction, the exemption from copyright infringement provided by subsections (1) and (2) does not apply if the work or other subject-matter is commercially available, within the meaning of paragraph (a) of the definition "commercially available" in section 2, in a medium that is appropriate for the purposes referred to in those subsections. [our underlining]

[30] As has been the case with subsection 32(1) since 1997, the subsection 29.4(3) carve-out now applies only if the work is commercially available within the meaning of paragraph (a) of the definition. From now on, the availability of a licence no longer triggers the carve-out. If the Act as it stood before read as the Objectors suggest, that amendment was unnecessary.

**[31] Therefore, we conclude that a licence to copy a work to a medium makes the work available in that medium; if the medium on which the work can be copied is appropriate for the purposes of a test or examination, the work for which a licence is available also is available in a medium appropriate for the purposes of the test or examination.**

[32] All that remains is to apply this principle to the facts of the case. The parties agreed that the copies identified as examination copies during the volume survey should be deemed to be examination copies. All examination copies captured during the volume study and included in the calculation of the royalties were made on a medium the use of which the Access Tariff authorizes. The medium on which examination copies were made was necessarily appropriate, since each institution or teacher chose (or was required) to use that medium for the test or examination. The application conditions of the carve-out have been met.

- **Section 29.7 – Reproduction of broadcast**

The receipt by unlawful means of a communication to the public by telecommunication voids the educational reproduction broadcast exception.

*Manitoba v. The Canadian Copyright Licensing Agency Operating as "Access Copyright"*, 112 C.P.R. (4th) 1 F.C.A.; 2013-04-03) Gauthier J. [affirming 2012 CarswellNat 609 (Cop. Bd.; 2012-03-15)]

[42] Further on, the legislator provides that **the institution will not have the right to the exception set out in subsection 29.7(1) where the communication to the public by telecommunication was obtained by illegal means** (section 29.8 of the Act).

- **Section 30.1 – Management and maintenance of collections**

A collective licence to copy a work in the medium that is appropriate makes the work commercially available in that medium.

*Access Copyright (Educational Institutions) 2010-2015*, [2013] C.B.D. 4 (Cop. Bd. interim decision; 2013-01-18)

[23] In subsection 29.4(3), the carve-out applies if the work "is commercially available in a medium that is appropriate" for the purpose. In subsection 30.1(2), the carve-out applies if the work "is commercially available in a medium and of a quality that is appropriate" for the purpose. To the extent the relevant parts of the wording of both subsections are identical, they must be interpreted in the same manner.

[24] To interpret subsection 29.4(3) (and thus, by extension, subsection 30.1(2)) as the Objectors suggest would render paragraph (b) of the definition of "commercially available" meaningless. The Objectors admit as much when stating that "authorization to transfer a work to a particular medium simply does not make the work commercially available in that medium" and that "a licence does not make a work available in any medium". This is not tenable. If a licence does not make a work available in any medium, the "appropriate medium" condition can never be satisfied through a licence being available within the meaning of paragraph (b). A work for which a collective's licence is available (and therefore, commercially available pursuant to paragraph (b) of the definition) will never trigger either carve-out even though, for the very reason that a licence is available, it is commercially available and even though the definition is used only in those two provisions that, both, create a carve-out. Paragraph (b) would be meaningless. The only way to avoid this absurdity is to conclude that if a work is commercially available because a licence is available, that work must sometimes (not always) be in an appropriate medium precisely because the licence is available.

[25] **Access submits that a licence to copy a work to a medium makes the work available in that medium. This interpretation does not lead to absurd results; on the contrary, it is the only one that gives meaning to paragraph (b) of the definition of "commercially available".**

[26] A work for which a collective's licence is available is available in an appropriate medium if, and only if, the licence authorises the institution or teacher to use (copy, perform, communicate) the work in the medium that is appropriate to that particular test or examination. A licence to copy a literary work makes the work available in an appropriate medium if it allows the teacher to copy the work onto the medium the teacher intends to use during the test or examination. A licence that allows only digital copies will trigger the carve-out if tests are administered digitally, but not if tests are administered on paper. A licence to perform a work does not make the work available in an appropriate medium if the teacher intends the student to sight read the score; it does if the teacher intends students to listen to a recorded performance of the work before criticizing it.

[27] **Applying the same rule to the subsection 30.1(2) carve-out also yields logical results. A licence that allows a library to copy sheet music (but not a sound recording of music) does not trigger the carve-out if the library wishes to allow users to listen to a recording of the music. A licence that allows a library to reproduce a sound recording (but not sheet music) does not trigger the carve-out if the library wishes to display a transcription of the score.**

- **Section 30.3 – No infringement by educational institution, etc.**

For the actions of an educational institution, library, archive or museum's not to constitute infringement the conditions of subsection 30.2 must be strictly adhered to.

*Manitoba v. The Canadian Copyright Licensing Agency Operating as "Access Copyright"*, 112 C.P.R. (4th) 1 (F.C.A.; 2013-04-03) Gauthier J. [affirming 2012 CarswellNat 609 (Cop. Bd.; 2012-03-15)]

[46] Turning back to the 1997 additions to the *Act*, subsection 30.3(1) sets out another scenario where an educational institution, library, archive or museum's actions will not constitute infringement. **However, this scenario is subject to strict conditions set out in subsection 30.3(2) [...]**

- **Section 30.8 – Ephemeral recordings (Programming undertaking)**

If a collective licence is available to make the fixation or reproduction of a performer's performance, a sound recording or a work, the ephemeral recording exception does not apply.

*Application to fix royalties for a licence and its related terms and conditions (SODRAC v. CBC/SRC) Interim Decision, 2013 CarswellNat 43 (Cop. Bd.; 2013-01-16), the Board:*

[21] The last statement is even more relevant to CBC than to the rest of the broadcasting industry. Thus, the particular context in which CBC operates raises the possibility that it will not be able to rely on section 30.9 of the Act for a significant portion of its reproductions. For example, because of its nature and mandate, CBC regularly engages in live-to-tape broadcasting, broadcasting in multiple time zones, rebroadcasting, studio recordings, etc. It is arguable, at the very least, that copies made in the course of these activities do not meet the requirements of section 30.9. **It may well be that these same activities are targeted in section 30.8 of the Act; however, this exception is not applicable if a licence is available from a collective society** [Fn 6 Subsection 30.8(8) of the Act.]

- **Section 30.9 – Ephemeral recordings (Broadcasting undertaking)**

If a collective licence is available to make the fixation or reproduction of a performer's performance, a sound recording or a work, the ephemeral recording exception does not apply.

*Application to fix royalties for a licence and its related terms and conditions (SODRAC v. CBC/SRC) Interim Decision, 2013 CarswellNat 43 (Cop. Bd.; 2013-01-16), the Board:*

[21] The last statement is even more relevant to CBC than to the rest of the broadcasting industry. Thus, the particular context in which CBC operates raises the possibility that it will not be able to rely on section 30.9 of the Act for a significant portion of its reproductions. For example, because of its nature and mandate, CBC regularly engages in live-to-tape broadcasting, broadcasting in multiple time zones, rebroadcasting, studio recordings, etc. **It is arguable, at the very least, that copies made in the course of these activities do not meet the requirements of section 30.9. It may well be that these same activities are targeted in section 30.8 of the Act; however, this exception is not applicable if a licence is available from a collective society** [Fn 6 Subsection 30.8(8) of the Act.]

- **Section 32 – Reproduction in alternate format**

The availability of a collective licence cannot trigger the carve-out exception

*Access Copyright (Educational Institutions) 2010-2015*, File: Reprographic Reproduction, 2010-2015, interim decision [2013] C.B.D. 4 (Cop. Bd.; 2013-01-18)

[22] The subsection 32(3) carve-out only applies if the work "is commercially available [...] within the meaning of paragraph (a) of the definition of "commercially available"". **Thus, subsection 32(3) expressly provides that availability of a licence from a collective cannot trigger the carve-out; subsections 29.4(3) and 30.1(2) do not so provide.**

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

Government should create a separate category for records that are not published on the disclosure log due to concerns about copyright - Where it is determined that records may not be published due to copyright, government should publish a severed version of the record.

*Open Government Initiative (Re)*, [Evaluating the Government of British Columbia Open Government Initiative, Investigation Report F13-03. 2013 BCIPC 19 (2013-07-25) E. Denham, Information and Privacy Commissioner for B.C.

With the exception of copyright material discussed below, I am generally satisfied with government's approach to publication in the disclosure log. However, I intend to monitor how government applies its exemptions to publication to ensure it is keeping within the parameters it has established.

*A separate copyright category*

The issues relating to one aspect of the business exemption category is more complicated. We reviewed 70 business exemption files.

In about one quarter of the cases, the information in these files would disclose the identity of the applicant and information about their business, or information that might cause harm if revealed to the public. In that light, my previous comments about the appropriateness of government's approach to disclosure apply here.

However, with respect to the remaining almost three-quarters of these files, the decision not to publish the information was based on the fact the records contained portions of or entire copies of newspaper articles, or links to newspaper articles in emails, or reports with photographs or other content subject to copyright.

Government's position is that the publication of this material might violate copyright law. In my view, these "copyright" file exemptions are not aligned with the above-described legitimate concerns about harm. I consider that it is not appropriate to include copyright concerns under the business information exemption. Therefore, my first recommendation in respect of this issue is that government create a separate category for records that are not published on the disclosure log due to concerns about copyright.

#### **RECOMMENDATION 8 :**

**Government should create a separate category for records that are not published on the disclosure log due to concerns about copyright -.**

#### *Government's approach to the copyright exemption*

In reviewing the copyright exempted files, we observed that the records contained, unlike the other exempted records dealt with above, material of public interest, apart from material that may be copyright. My concern is that under government's current practice, a controversial response to an access request could be exempted from publication simply because it included a newspaper article relating to that issue. This would prevent publication of the entire response on the disclosure log. The government's blanket approach to this copyright issue is problematic because it could be used to defeat the purposes of open government.

It appears that government takes a very broad approach to what it considers copyright material. I express no view on copyright law, but suggest to government that it consider this issue in light of the common law and statutory framework relating to copyright and access to information. For instance, I observe that the following provisions of the federal *Copyright Act* state:

- 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 any like Act of the legislature of a province, like material;

It is arguable that the above section, read in concert with s. 71 of FIPPA, would authorize the government to publish copyrighted



material in general access request response packages. This is something on which government should obtain advice.

There is also case law that indicates that government could publish links to newspaper articles without infringing the *Copyright Act*.<sup>[Fn 44 *Richard Warman and National Post Company v. Mark Fournier and Constance Fournier*, 2012 FC 803.]</sup> Alternatively, should government prefer not to deal with any material it considers problematic, another option is to sever the copyright information from the response packages prior to publication to the disclosure log. As government itself says, it must limit the circumstances where it exempts access responses from disclosure log publication. It is important that government publish as much information as possible on the disclosure log, even when this means that the response package sent to an applicant is different from what is published on the disclosure log. Given the numbers of exemptions at issue, it does not seem unduly burdensome for government to review the files concerning copyright and institute a secondary severing process.

Any confusion that may result from this additional severing can be dealt with by a simple explanation of the reason for doing so on the government disclosure log website.

#### **RECOMMENDATION 9 :**

**Government should review its policy regarding the disclosure of copyright material to determine whether it is permissible to publish copyright material in response to access request. Where it is determined that records may not be published due to copyright, government should publish a severed version of the record.**

- **Section 32.1 – Reproduction in alternate format**

Copyright in a document is insufficient by itself to prevent its disclosure under an Access to information act.

*Ontario Power Authority (Re)*, 2013 CanLII 70436, (Ont. I.P.C.; 2103-10-25) L. Cropley, Commissioner

[64] In Order M-37, former Commissioner Tom Wright commented on the relationship between copyright protection and disclosure under the *Act*:

In its representations, the institution also states that the fact that the record is under copyright and was designed solely for use by a trained evaluating committee is evidence that it was "supplied in confidence". The affected party claims that "our

materials are copyright and as such are not to be reproduced without our expressed permission."

[65] I agree with these findings and conclude **that holding copyright in a document, on its own, is insufficient to establish that disclosure of the record at issue could reasonably be expected to result in any of the section 17(1) [of the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31,] harms.**

- **Section 34 – – Copyright [civil remedies]**

Costs – assessing costs must be guided by reasonableness.

*Keatley Surveying Ltd. v. Teranet Inc.*, 2013 CarswellOnt 2587 (Ont. Sup. Ct.-Costs; 2013-03-11) Horkins J.

Plaintiff's motion to certify action as class proceeding pursuant to s. 5 of Class Proceedings Act was dismissed [107 CPR (4<sup>th</sup>) 237 (Ont. Sup. Ct.; 2012-12-14)] - The defendant asks the court to award it \$496,617.67 for fees disbursements and applicable taxes. These costs represent about 40% of the actual costs that were incurred Novel point of Law – No public interest consideration – Costs to be fair and reasonable - Taxation at \$200,000.00

[27] **Fixing an amount for costs is not driven solely by a mathematical calculation. The court must be guided by the overriding principle of reasonableness** as the Court of Appeal directed in *Boucher* [*Boucher v. Public Accountants Council for the Province of Ontario*, [2004] O.J. No. 2634 (C.A.)]

[33] The fact that this action raises a novel point of law does not lead me to order no costs. First, the plaintiff failed to satisfy all of the remaining s. 5 criteria. In particular, there was no evidence of an identifiable class of two or more persons. To the extent that I found the pleading to raise a novel point of law raised by the pleading, there is no evidence that anyone other than the plaintiff has an interest in this point. **To be clear, the existence of the novel point of law is simply one of many factors that I have considered.**

[34] The defendant is entitled to fair and reasonable costs. Based on all of the above, I allow the defendant the amount of \$200,000 for all fees, disbursements and applicable taxes.

- **Section 34 – Copyright [civil remedies]**

Summary proceedings– Proceedings for infringement of copyright or moral rights may be taken by way of application or action.

*Roué v. Nova Scotia*, 2013 CarswellNS 97 (N.S. S.C.; 2013-02-06) Rosinski J. [affd. 2013 CarswellNS 615 (N.S. C.A.; 2013-08-27)]

[60] At this juncture, I should note that **s. 34 of the *Copyright Act* [infringement of copyright and moral rights] itself allows for both applications and actions as a means of proceeding.** Thus, copyright is not considered so inherently complex as to require an action to resolve the sometimes esoteric issues that arise.

- **Section 34 – Copyright [civil remedies]**

When alleging the civil tort of conspiracy, material facts pertaining to this tort ought to be pleaded.

*Roué v. Nova Scotia*, 2013 CarswellNS 97, 225 A.C.W.S. (3d) 923, 1036 A.P.R. 346, 327 N.S.R. (2d) 346, 2013 NSSC 45, <http://canlii.ca/en/ns/nssc/doc/2013/2013nssc45/2013nssc45.html> (N.S. S.C.; 2013-02-06) Rosinski J. [affd. 2013 CarswellNS 615 (N.S. C.A.; 2013-08-27)]

[95] In the case at Bar, **with its distinct pleadings, the Applicants do not necessarily allege the tort of conspiracy - the use of the words “conspired together” is found in a claim made against each of the Respondents based on the allegation that they took a part in the restoration of the Bluenose II knowing that the Applicants objected to the restoration proceeding without their agreement based on their copyright claims.** Mr. Belliveau, at the hearing herein, confirmed that the Applicants are not alleging the tort of conspiracy at this time.

[96] The Respondents herein rely on *CAT Productions Ltd. v. Macedo*, (1984), 1 C.P.R. (3d) 517 (FCTD), to argue that since the Applicants have in this copyright infringement case argued “civil conspiracy or something very akin to it” [p. 520], the material facts to support the elements of the tort of conspiracy must be pleaded. That case is distinguishable as I find there is no allegation of the tort of conspiracy here, and in *CAT Productions*, the court accepted that the Defendants were justified in not filing a Defence at all until particulars were provided since “clearly the case may be categorized as one requiring the delivery of particulars before pleading ...” - p. 518.

[97] I do not view the allegation as a claim of a tort of conspiracy, but rather a factual characterization of the collective, yet knowing,

dismissal by the Respondents of the existence of the Applicants' claims, which are for copyright related infringements, not conspiracy. **Therefore, since no "cause of action" herein is premised on the tort of conspiracy, it cannot be said that there is no reasonable cause of action regarding the tort of conspiracy.**

- **Section 34 – Copyright [civil remedies]**

Solicitor-client costs are exceptional.

*Planification-Organisation-Publications Systèmes (POPS) Ltée v. 9054-8181 Québec Inc.*, 2013 CarswellNat 1230 (F.C.; 2013-04-25) Crampton J.

[156] **Solicitor-client costs "are very rarely granted" and are generally only awarded if a party displays "reprehensible, scandalous, or outrageous conduct" or if such costs are justified by "reasons of public interest" (*Quebec (Attorney General) v Lacombe*, 2010 SCC 38, at para 67; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, at para 77; *Young v Young*, [1993] SCJ No 112, at para 251).**

[157] In addition to being exceptional, **Where it is determined that records may not be published due to copyright, government should publish a severed version of the record.**

(*Apotex Inc v Canada (Minister of National Health and Welfare)*, [2000] FCJ No 1919, at paras 7-8).

- **Section 34 – Copyright [civil remedies]**

Infringement entitles the copyright owner to seek injunctive reliefs.

*R. v. Rundle (Nec Plus Ultra)*, 2013 CarswellOnt 5920, (Ont. Sup. Ct; 2013-05-14) Beaudoin J. [supplementary reasons to 104 C.P.R. (4th) 190 (Ont. Sup. Ct.; 2012-09-14)]

[44] Where infringement has been established, the owner is *prima facie* entitled to an injunction restraining further infringement and for delivery-up of all infringing copies [...]

[45] **Case law indicates that the owner of a copyright who has demonstrated infringement can be granted a permanent injunction even if he or she has not proven or suffered damages.**

[46] **The onus is on the infringer to establish grounds against granting this relief. [...]**

- **Section 34 – Copyright [civil remedies]**

A request for an interim order shall not be used to gain leverage for negotiation.

*Éditions Québec-Amérique inc. v. Druide Informatique inc.*, 2013 CarswellQue 212 (Que. Sup. Ct; 2013-01-21) Gouin J.

[interim injunction denied]

[22] Or, loin de changer son constat de la situation, **l'audition a permis de confirmer ce que le Tribunal percevait, soit que l'ordonnance de sauvegarde recherchée s'inscrit dans une stratégie de négociation** qui, selon toute apparence, augmente considérablement la pression sur Druide, vu que sa commercialisation du logiciel Antidote 8 pourrait connaître une fin abrupte.

[23] Tel n'est pas et ne doit jamais être l'utilité et l'objectif d'une ordonnance de sauvegarde.

- **Section 34 – Copyright [civil remedies]**

An injunction could prohibit further use of the infringing material and delivery up for destruction of the infringing material.

*Tency Music SAS v. Lefrançois*, 2013 CarswellQue 4285 (Que. Sup. Ct; 2013-04-29) Blanchet J.

[39] En conséquence, les conclusions en injonction recherchées par la demanderesse seront accordées, mais à l'égard seulement des enregistrements sur lesquels elle détient ou pourrait détenir plus tard des droits d'auteur. **L'ordonnance interdira l'utilisation des enregistrements en cause, mais imposera aussi au défendeur (1) de détruire toute copie de ces enregistrements qu'il pourrait avoir en sa possession ou sous son contrôle et (2) de confirmer le tout par déclaration assermentée dans un délai de trente jours.**

- **Section 34 – Copyright [civil remedies]**

Damages for copyright infringement are suffered at the place where the head office is located.

*Filosofia Éditions inc. v. Entreprises Foxmind Canada Itée*, 2013 CarswellQue 5393 (Que. Sup. Ct.; 2013-06-07) Lalande J. [Leave to appeal granted 2013 CarswellQue 8297 (Que.C.A.; 2013-08-23)]

[40] Aussi, il y a lieu de conclure **que les violations de droit alléguées par Filosofia relativement à sa marque de commerce et ses droits d'auteurs lui causent préjudice au Québec.**

[41] Cette situation n'est pas sans rappeler celle décrite dans l'affaire *MP3 Networks* [Fn 10 *MP3 Networks et al. c. Pena et Hall*, 2009 QCCS 4531] dans laquelle le juge Castiglio conclut en ces termes le préjudice subi à la suite d'une violation de droits à l'égard d'une marque de commerce :

L'entreprise qui subit des dommages par suite de la violation de ses droits d'auteurs ou marques de commerce subit nécessairement un préjudice, tout au moins partiellement, à l'endroit où est situé son siège social.

- **Section 34 – Copyright [civil remedies]**

Whether a Quebec authority has jurisdiction to hear a case of copyright infringement against foreign infringer is an interesting question warranting granting leave to appeal.

*Foxmind Games NV v. Filosofia Éditions inc.*, 2013 CarswellQue 8297(Que.C.A.-Motion for leave to appeal; 2013-08-23) Morrissette J.

[4] L'intimée a longuement interrogé M. Capon après défense et, se fondant sur les renseignements ainsi obtenus, elle a amendé sa requête introductive d'instance pour ajouter trois défenderesses, requérantes devant moi. Celles-ci, qui sont exploitées à l'étranger, participeraient aux violations des droits de propriété intellectuelle de l'intimée. Les requérantes ont réagi en soulevant une exception déclinatoire fondée sur les articles 3148 et 3135 C.C.P. qui, comme je l'ai déjà mentionné, a été rejetée en première instance.

[5] Deux paragraphes des motifs livrés en Cour supérieure méritent mention ici car ils sous-tendent le dispositif du jugement:

[39] Les faits de la présente cause et l'interrogatoire de M. Capon permettent de constater qu'il existe un lien réel et substantiel entre la source de l'action et la juridiction du Québec. La structure corporative mise de l'avant par l'âme dirigeante des différentes entités de Foxmind ne devrait pas permettre de se soustraire à la compétence des tribunaux québécois.

[40] Aussi, il y a lieu de conclure que les violations de droit alléguées par Filosofia relativement à sa marque de commerce et ses droits d'auteurs lui causent préjudice au Québec.

[6] Il est possible que ces éléments suffisent pour fonder la compétence des tribunaux québécois en vertu du troisième paragraphe de l'article 3148 C.c.Q. Mais ce n'est pas certain.

[7] Une relecture attentive des arrêts *Quebecor Printing Memphis inc. c. Regenair inc.* [Fn2 2001 CanLII 27960 (QC CA), [2001] R.J.Q. 966 (C.A.)], *Banque de Montréal c. Hydro Aluminim Wells inc.* [Fn3 J.E. 2004-479 (C.A.)], *Option Consommateurs c. Infineon Technologies, a.g.* [Fn4 2011 QC2116.], *Federal Corporation c. Triangle Tires inc* [Fn5 2012 QC434.] et *Green Planet Technologies Ltd. c. Corporation Pneus Blackstone/OTR Blackstone Tire Corporation*, [Fn6 2013 QC56.] me convainc que la question telle qu'elle se présente ici mérite examen par une formation de la Cour. Les requérantes s'appuient sur cette jurisprudence. **Elles en font une lecture qui pourrait apporter de l'eau à leur moulin, si je puis dire. En revanche, les caractéristiques particulières de la propriété intellectuelle et l'expansion constante du commerce par internet appelleront peut-être quelques nuances additionnelles dans l'interprétation des dispositions sur la portée desquelles se prononcent ces arrêts.**

- **Section 34 – Copyright [civil remedies]**

Copyright infringement warrants a binding declaration of ownership.

*Rains v. Molea*, 114 C.P.R. (4th) 161 (Ont. Sup. Ct.; 2013-08-15) Chiappetta J.

[91] In my view, declaratory relief is appropriate if copyright subsists and infringement is established. Copyright vests rights exclusively in its owner. A misappropriation of those rights warrants a binding declaration of the rights determined to be properly vested: See the *Act*, s. 34(1); *Courts of Justice Act*, R.S.O. 1990, C.C. 43, s. 97; and *Operation Dismantle Inc. v. Canada*, 1985 CanLII 74 (SCC), [1985] 1 S.C.R. 441, at paras. 31-33.

- **Section 34 – Copyright [civil remedies]**

Damages are to be proven, even nominal ones.

*Rains v. Molea*, 114 C.P.R. (4th) 161 (Ont. Sup. Ct.; 2013-08-15) Chiappetta J.

[92] Rains seeks nominal damages for Molea's infringing works. Rains led no evidence on damages. There is no evidence that Rains suffered any negative financial consequences, mental anguish, or distress as a result of Molea's work. **While mathematical precision is not required to award damages, in this case there is simply no evidence from which to assess nominal damages and no basis to grant nominal damages as a remedy.**

- **Section 34 – Copyright [civil remedies]**

Successful plaintiff is entitled to injunctive relief.

*Rains v. Molea*, 114 C.P.R. (4th) 161 (Ont. Sup. Ct.; 2013-08-15) Chiappetta J.

[97] **A plaintiff that successfully establishes copyright is *prima facie* entitled to a permanent injunction. The defendant bears the onus to rebut the presumption in favour of granting a permanent injunction: *The Queen v. James Lorimer and Co.*, [1984] 1 F.C. 1065, 1983 CarswellNat 72, at para 10 (F.C.A.).** Molea provided no evidence to rebut the presumption. If infringement were found, I would order Molea permanently enjoined from infringing Rains' images of the 17 comparisons. I would limit the order for a permanent injunction to the 17 existing works. **I would not restrain Molea on future infringements; such a restraint would be tantamount to granting copyright protection to a fixed work prior to its creation.**

- **Section 34 – Copyright [civil Remedies]**

A successful plaintiff is entitled to delivery up of the infringing material.

*Rains v. Molea*, 114 C.P.R. (4th) 161 (Ont. Sup. Ct.; 2013-08-15) Chiappetta J.

[98] **A plaintiff that successfully establishes copyright infringement is presumptively entitled to have the defendant deliver up all infringing works in the defendant's possession. It is for the defendant to rebut the presumption: *L.S. Entertainment Group Inc. v. Formosa Video (Canada) Ltd.*, 2005 FC 1347, [2005] F.C.J. No. 1643, at paras. 69-70.** If infringement were found, I would order delivery up of the only remaining unsold image of the 17 comparisons, "Building With Light" (2005). Molea submits that Rains' conduct disentitles him to delivery up for destruction of Molea's painting. I disagree. I find no evidence from Molea sufficient to rebut the presumption in favour of granting an order to deliver up "Building With Light."



- **Section 34 – Copyright [civil remedies]**

Damages must be proven by a preponderance of evidence – Punitive damages will sanction the conduct of a defendant.

*Banquise du golfe inc. v. Paulin*, 2013 CarswellQue 7815 (Que. Ct.; 2013-05-14) Rondeau J.

[42] Bien que certains indices laissent croire au Tribunal que la demanderesse a pu subir un préjudice économique dû à la violation du droit d'auteur, elle n'a pas réussi à établir ce préjudice par preuve prépondérante. En effet, il y a absence complète de preuve que les ventes de la demanderesse ont diminué en raison du plagiat du défendeur.

[47] Ainsi, on peut retenir des principes jurisprudentiels que lorsque le Tribunal constate un cas de mauvaise foi, de comportement déloyal et de plagiat délibéré, cela peut justifier l'octroi de dommages moraux.

[48] **Compte tenu de la preuve soumise, qui démontre que le défendeur copie d'une façon presque identique le dessin de la demanderesse, le Tribunal conclut qu'il a agi de façon volontaire et qu'il ne s'agit pas d'une simple négligence. Au surplus, il a continué de prétendre être l'auteur de ce dessin même après avoir été avisé par la demanderesse, ce qui démontre un comportement malicieux et de mauvaise foi.** En conséquence, le Tribunal accorde 1 000 \$ à titre de dommages exemplaires.

- **Section 34 – Copyright [civil remedies]**

Proceedings for infringement of copyright or moral rights may be taken by way of application or action.

*Nova Scotia v. Roué*, 2013 NS94, 2013 CarswellNS 615, <http://canlii.ca/en/ns/nsca/doc/2013/2013nsca94/2013nsca94.html> (N.S. C.A.; 2013-08-27) [affirming 2013 NSSC 254, (N.S. S.C.I 2013-08-09)]

[Leave to appeal from a judgment on a preliminary motion refusing to change an application into a traditional action.]

**[13] In denying the appellants' conversion application, the judge was exercising discretion on an interlocutory matter.**

[46] Before concluding, I would like to acknowledge some practical challenges to be faced by the appellants as a result of this ruling. They raised primarily three in oral argument. Firstly, they will have to present their evidence by way of affidavit without first having had the benefit of the discovery process. In other words, if this matter were to proceed by way of an action, they would have the benefit of examining the respondents under oath before committing to their version of events. Secondly, they fear being denied the benefit of calling oral, direct evidence (although the judge has not ruled this out). In other words, given the fact that their reputations will be at stake, they fear that important nuances will be lost with written affidavits as opposed to being able to explain their position orally. Thirdly, they feel rushed in preparing their case because of the tight timelines prescribed by the judge.

[47] I acknowledge that, if time and cost were only incidental factors, then what the appellants characterize as these procedural safeguards for trial fairness might occupy their fullest scope. But time and cost clearly do pertain to the overall objective of access to justice. The motions judge's job under Rule 6.02 is to achieve a balance that shortens time and lessens cost, while ensuring that the proceeding at hand maintains the essential attributes of a fair fact-finding process.

[48] There are some proceedings where the classic trial procedures will be essential. For instance, it may be important that the judge hear the witnesses tell their stories in person, as direct evidence, instead of just reading the ink on the lawyer-assisted affidavits. Or it may be that important evidence rests with unfriendly witnesses, who will not sign affidavits, and must be required to testify by subpoena. These are just examples, not an all-inclusive list. It is for the motions judge, in weighing the criteria under Rule 6.02, to assess whether fairness steps to the fore on such matters, whether the application in court under Rule 5.07 can accommodate the concern with an adjustment to the procedure, or whether it is preferable, in the interests of fairness, that the matter be tried in the traditional manner.

- **Section 34 –Copyright [civil remedies]**

For the personal liability of directors to be engaged evidence of intentional infringement by these individual must be adduced.

*Pinto v. Bronfman Jewish Education Centre*, 2013 CarswellNat 3396 (F.C.; 2013-09-11) Rennie J.

[188] Mr. and Ms. Shimon have no personal liability. At all relevant times, they were officers and employers of BJEC and TaL AM. **A corporation has a separate legal existence, and accordingly, an individual will not be liable for the infringement of a corporation with which he or she is associated, absent evidence that the individual is guilty of intentional infringement:** *Fox Canadian Law of Copyright and Industrial Designs*, ch 24 at 16.2.

[189] The evidence falls well short of establishing that Mr. and Ms. Shimon deliberately or recklessly engaged in a course of conduct they knew was likely to constitute infringement.

- **Section 34 – Copyright [civil remedies]**

When all the acts constituting copyright infringement are committed outside Canada, Canadian courts do not have jurisdiction.

*Layette Minimôme inc. v. Jarrar*, 2013 QCCS 6084, (Que Sup. Ct; 2013-12-05) Roy J.

[63] Mais, les Défendeurs invoquent, avec raison, que la Loi n'a aucune application ici puisque les copies ont été fabriquées en Chine, à la demande d'un résident de Dubaï et ont été vendues dans les Émirats Arabes Unis. Comme la Cour suprême du Canada le souligne dans *Société canadienne des auteurs, compositeurs et éditeurs de musique c. Association canadienne des fournisseurs Internet*<sup>1</sup> [Fn 11 2004 CSC 45.], le Parlement du Canada a le pouvoir d'adopter une loi ayant une portée extraterritoriale, mais, en l'absence d'un libellé clair ou d'une déduction nécessaire à l'effet contraire, il est présumé ne pas avoir voulu le faire [Fn 12 *Id.*, par. 54]. **Rien ici ne permet de conclure que le législateur a voulu donner une portée extraterritoriale aux dispositions sur la contrefaçon et rien dans la preuve ne permet de conclure qu'un élément ou l'autre de la contrefaçon ait eu lieu au Canada.**

[70] Mais, le Tribunal a déjà conclu que **la Loi ne peut s'appliquer à une contrefaçon dont tous les éléments constitutifs surviennent à l'extérieur du Canada.** La réclamation basée sur une violation de la Loi est donc rejetée.

- **Section 34 – Copyright [civil remedies]**

Various remedies are available to sanction copyright infringement.

*Cinar Corporation v. Robinson*, 2013 CarswellQue 12345 (S.C.C.; 2013-12-23)  
McLachlin J.

[1] Canadian law protects the exclusive right of copyright owners to reproduce or to authorize the reproduction of their works. **The unauthorized reproduction of a substantial part of an original work constitutes copyright infringement, for which a copyright owner can seek various remedies. [...]**

- **Section 34 – Copyright [civil remedies]**

The personal liability of an officer does not flow from its title: he must be knowingly involved in the infringement.

*Cinar Corporation v. Robinson*, 2013 CarswellQue 12345 (S.C.C.; 2013-12-23)  
McLachlin J.

[64] **The evidence relied upon by the trial judge did not support a serious, precise and concordant presumption that Davin was personally, deliberately and knowingly involved in the copying of [plaintiff] Robinson’s work**, as required by *Mentmore*. [*Mentmore Manufacturing Co. v. National Merchandising Manufacturing Co.* (1978), 89 D.L.R. (3d) 195 (F.C.A.), at pp. 204-5, per Le Dain J.]. The trial judge inferred Davin’s knowing and deliberate participation from general circumstantial evidence. He observed that Davin was a [TRANSLATION] “Teflon man” who had participated in fraudulent schemes (para. 835). However, these schemes were unrelated to the copying of Robinson’s work. **Evidence of a dishonest and arrogant personality does not suffice to ground an inference of participation in copyright infringement.** He also relied on Davin’s position as Izard’s hierarchical superior. Yet, this alone does not establish personal participation in copyright infringement. **An officer of a corporation cannot be held personally liable for copyright infringement merely on the basis of his hierarchical status as officer.**

- **Section 34 – Copyright [civil remedies]**

Non pecuniary damages that do not stem from bodily injury are not capped – In the case of copyright infringement, they are analogous to those claimed by a victim of defamation.

*Cinar Corporation v. Robinson*, 2013 CarswellQue 12345 (S.C.C.; 2013-12-23)  
McLachlin J.

[97] However, the *Andrews* [*Andrews v. Grand & Toy Alberta Ltd.*, 1978 CanLII 1 (SCC), ] cap is inapplicable to non-pecuniary

damages that do not stem from bodily injury, such as those that result from defamation [...]

[100] On the second argument, I do not agree that Robinson's non-pecuniary damages can be characterized as stemming from bodily injury, within the meaning of art. 1607 of the CCQ. In Quebec civil law, an injury can only be characterized as a bodily injury ("*préjudice corporel*") if "some form of a breach of physical integrity" is made out: *Schreiber v. Canada (Attorney General)*, 2002 SCC 62, [2002] 3 S.C.R. 269, at para. 62. In making this characterization, it is important to look to whether the act that caused the injury was itself a breach of the victim's physical integrity, rather than to whether the act had an impact on the physical health of the victim: Gardner, at p. 17. Conversely, "interferences with rights properly characterized as being of a moral nature will not be included within this class of claims": *Schreiber*, at para. 64.

[101] The infringement of Robinson's copyright was not a breach of his physical integrity. The infringement caused severe shock resulting in deterioration of Robinson's physical health. However, as discussed, impact on a victim's physical health does not suffice to characterize the injury as a bodily injury, in the absence of a breach of physical integrity: see for example *Landry v. Audet*, 2011 QC535 (CanLII), at para. 107, leave to appeal refused, [2011] 3 S.C.R. v. The Court of Appeal, with respect, lost sight of this distinction.

[102] **It is more appropriate to characterize Robinson's psychological suffering as a non-pecuniary damage stemming from *material* injury. Indeed, the infringement of copyright was a breach of Robinson's property rights.** It is the initial breach, rather than the consequences flowing from that breach, which serves to characterize the type of injury suffered. [...] As discussed, the scope of application of the *Andrews* cap is limited; it does not apply to non-pecuniary damages stemming from material injury.

[108] I agree with the trial judge that [plaintiff] **Robinson's non-pecuniary damages are analogous to those claimed by a victim of defamation. The product of Robinson's artistic exertions was taken from him and the integrity of his personal creative process was violated, causing deep psychological suffering. These harms are similar to those suffered by a victim of defamation.**

- **Section 34 – Copyright [civil remedies]**

Copyright infringement is a violation to the Charter guaranteed right to the peaceful enjoyment of property (as well as an author's right to inviolability and dignity) and, if intentional, gives rise to punitive damages.

*Cinar Corporation v. Robinson*, 2013 CarswellQue 12345 (S.C.C.; 2013-12-23) McLachlin J.

[113] **In Quebec, punitive damages can only be awarded where they are provided for by a specific enabling enactment: art. 1621 CCQ.** The courts below did not fully examine the basis for the punitive damages awarded in this case, although the Court of Appeal alluded to the *Charter of human rights and freedoms*, R.S.Q., c. C-12 ("*Charter*").

[114] **Section 49 of the Charter provides that punitive damages may be awarded if there is an unlawful and intentional interference with any of the rights and freedoms that the Charter recognizes.** The evidence establishes unlawful and intentional interference with several of Robinson's *Charter* rights. **Copyright infringement is a violation of s. 6 of the Charter, which provides that "[e]very person has a right to the peaceful enjoyment and free disposition of his property, except to the extent provided by law": see *Construction Denis Desjardins inc. v. Jeanson*, 2010 QC1287 (CanLII), at para. 47. Additionally, the infringement of copyright in this case interfered with Robinson's personal rights to inviolability and to dignity, recognized by ss. 1 and 4 of the Charter.**

[115] An interference with the right to inviolability "must affect the victim's physical, psychological or emotional equilibrium in something more than a fleeting manner": *St-Ferdinand [Quebec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand*, 1996 CanLII 172 (SCC)], at para. 97.

[117] **Here, Cinar, Weinberg, Charest, and Izard consistently and contemptuously denied having access to Robinson's work, and disparaged Robinson's claims that they had copied his work. Their behaviour constitutes an interference with Robinson's Charter right to dignity, and provides an additional basis for the award of punitive damages.**

- **Section 34 – Copyright [civil remedies]**

Punitive damages are to be awarded with restraint.

*Cinar Corporation v. Robinson*, 2013 CarswellQue 12345 (S.C.C.; 2013-12-23)  
McLachlin J.

[118] The Court of Appeal was correct to conclude that only Cinar, Weinberg, Charest, and Izard could be found liable for punitive damages. **Under s. 49 of the *Charter*, punitive damages are only awarded if an interference with protected rights and freedoms is “intentional”. An interference is intentional “when the person who commits the unlawful interference has a state of mind that implies a desire or intent to cause the consequences of his or her wrongful conduct, or when that person acts with full knowledge of the immediate and natural or at least extremely probable consequences that his or her conduct will cause”**: *St-Ferdinand Quebec (Public Curator) v. Syndicat national des employés de l’hôpital St-Ferdinand*, 1996 CanLII 172 (SCC)],, at para. 121. The detailed findings of the trial judge establish intentional interference with protected rights by Cinar, Weinberg, Charest, and Izard.

[138] **This said, punitive damages must be awarded with restraint. [...]**

[139] In this case, the relevant factors point in different directions. **On the one hand, the gravity of the conduct suggests a high amount of punitive damages.** Cinar, Weinberg, Charest, and Izard engaged in **intentional and calculated copyright infringement, which they planned to keep secret all the while reaping profits from an internationally successful children’s television series.** They persistently denied having copied any portion of Robinson’s work throughout the lengthy legal proceedings. Conduct of this nature threatens one of the fundamental goals of Canadian copyright law, namely **“to prevent someone other than the creator [of a work] from appropriating whatever benefits may be generated”**: *Théberge*, at para. 30. The impact of this conduct on Robinson was equally serious. It deprived him not only of a source of revenue, but also of his sense of proprietorship over a project that had deep personal significance for him. He experienced profound anguish. Insult was added to injury by the callous denials of copying and by insinuations to the effect that Robinson was simply an attention-seeking eccentric.

- **Section 34 – Copyright [civil remedies]**

Punitive damages cannot be awarded on a solidarity (joint and several) basis.

*Cinar Corporation v. Robinson*, 2013 CarswellQue 12345 (S.C.C.; 2013-12-23)  
McLachlin J.

[120] In my view, punitive damages cannot be awarded on a solidary basis under the *Charter*. I come to this conclusion for two reasons.

[126] [...] Among the non-exhaustive list of factors that should be taken into account when assessing the quantum of punitive damages are “(1) the gravity of the debtor’s fault, (2) the debtor’s patrimonial situation, (3) the extent of the reparation for which the debtor is already liable to the creditor and (4), where such is the case, the fact that the payment of the damages is wholly or partly assumed by a third person” (e.g. an insurer): *ibid.*, at para. 199.

[127] **Both the objectives of punitive damages and the factors relevant to assessing them suggest that awards of punitive damages must be individually tailored to each defendant against whom they are ordered. This requirement of individualization militates against awarding punitive damages on a solidary basis.**

- **Section 34 – Copyright [civil remedies]**

Costs on a solicitor-client basis may be awarded to sanction a reprehensible litigation strategy.

*Cinar Corporation v. Robinson*, 2013 CarswellQue 12345 (S.C.C.; 2013-12-23)  
McLachlin J.

[152] I would award Robinson and Nilem costs throughout, in addition to the trial judge’s award of \$1,500,000 in solicitor-client costs for the proceedings at the trial level. The trial judge was well placed to observe the litigation strategy of the Cinar appellants, as well as all other factors relevant to exercising his discretion to award solicitor-clients costs under the *Copyright Act*. I would decline to award Robinson and Nilem costs on a solicitor-client basis for the appeals before the Court of Appeal and this Court. There were serious points of law to argue and it is not established that, on appeal, the Cinar appellants acted in bad faith or otherwise conducted themselves in a manner that warrants an award of costs on a solicitor-client basis.

- **Section 34 – Copyright [civil remedies]**

Expertise might be helpful to ascertain whether a the substantial part was copied.



*Cinar Corporation v. Robinson*, 2013 CarswellQue 12345 (S.C.C.; 2013-12-23) McLachlin J.

[51] **In my view, the perspective of a lay person in the intended audience for the works at issue is a useful one. It has the merit of keeping the analysis of similarities concrete and grounded in the works themselves, rather than in esoteric theories about the works.** However, the question always remains whether a substantial part of the plaintiff's work was copied. This question should be answered from the perspective of a person whose senses and knowledge allow him or her to fully assess and appreciate all relevant aspects — patent and latent — of the works at issue. In some cases, it may be necessary to go beyond the perspective of a lay person in the intended audience for the work, and to call upon an expert to place the trial judge in the shoes of “someone reasonably versed in the relevant art or technology”: Vaver, at p. 187.

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

In infringement proceedings, the existence of copyright and the title of the plaintiff are presumed.

*R. v. Rundle (Nec Plus Ultra)*, 2013 CarswellOnt 5920 (Ont. Sup. Ct; 2013-05-14) Beaudoin J. [supplementary reasons to 104 C.P.R. (4th) 190 (Ont. Sup. Ct.; 2012-09-14)]

[35] [...] In any proceedings for infringement of copyright in which the Defendant puts in issue either the existence of the copyright or the title of the Plaintiff thereto, **copyright is presumed, unless the contrary is proved** [...]

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

There is an onus upon defendant to rebut the presumption of the existence of copyright, even when the defence is based upon subsection 64(2).

*Layette Minimôme inc. v. Jarrar*, 2013 QCCS 6084 (Que Sup. Ct; 2013-12-05) Roy J.  
[69] Tout comme dans cette affaire [*Magasins Greenberg Itée c. Import-Export René Derhy (Canada) inc.*, J.E. 2004-749 (C.A.)] **les œuvres sont ici présumées protégées et il appartenait aux Défendeurs de prouver que les représentations graphiques, le matériel dont le motif est tissé ou tricoté et les représentations d'êtres, de lieux ou de scènes réels ou imaginaires ne sont pas protégés.** Ils n'ont pas apporté cette preuve. Au contraire, Layette a

expliqué tout le processus de création de ses vêtements, incluant les dessins, la confection du tissu, les différents éléments décoratifs, etc. L'article 64(3) de la Loi aurait donc pu protéger certains éléments de la collection.

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

Defendant has the burden to prove that copyright does not subsist in the infringed work.

*Cinar Corporation v. Robinson*, 2013 CarswellQue 12345 (S.C.C.; 2013-12-23) McLachlin J.

[21] [The defendant] **Weinberg bears the burden of proving the loss of copyright:** s. 34.1 of the *Copyright Act*, R.S.C. 1985, c. C-42. [...]

- **Section 35 – Liability for infringement**

Damages for copyright infringement are compensatory in nature – Royalties are income for for child support purposes.

*Mobin v. Stephens*, 2013 ONCJ 53 (Ont. Sup. Ct.; 2013-02-26) Jones J.

[45] **Damages for copyright infringement are compensatory in nature.** They are paid to compensate the owner for his or her loss arising from the infringement of a right. As well, where a defendant has profited from the infringement, the copyright owner may claim for such profits. [Fn 10 *Copyright Act*. s. 35(1)]

[52] A determination as to whether or not the father was operating a business would not end the inquiry into the nature of the settlement funds. If the funds are not business income, the question arises as to whether the damages paid to the father should be characterized as income from property, representing compensation for his loss of profits or royalties arising from the infringement of his copyright. **Royalties arising from copyright are just as much income from property, for tax purposes, as rental income from a rented duplex.**

[56] For the determination of the issue before this court, it is not necessary to make a finding as to whether the damages received by the father represent income to him for tax purposes. That decision is better left to another forum. What is relevant to this court is whether

the damages recovered by the father represent “income” to him for the purposes of the *Child Support Guidelines*.

[64] Accordingly, this court is of the view that, even if the damages settlement received by the father for copyright infringement is not taxable, these funds would nevertheless be “income” of the father for [*Child Support*] *Guidelines* purposes. The payment resembles royalties or profits that would have been paid for the performance or publication of the father’s original musical work or the licencing to another performer of the right to perform or publish the work. **As previously noted, royalties or profits represent the yield or the income from the copyright. When determining income for child support purposes, damages paid in compensation for these royalties or profits are analogous to the royalties or profits themselves.**

[65] Thus, even if the damages paid to the father for copyright infringement are not taxable to the father, the court would impute income to the father for the year 2010 in a sum equivalent to the damages received by him.

- **Section 35 – Liability for infringement**

The nature of the payment of an award of damages will be determined by what it intended to replace. Whether damages are taxable for income purpose is irrelevant to determine if an award of damages should constitute revenue for alimony purpose.

*Mobin v. Stephens*, 2013 ONCJ 53 (Ont. C.J.; 2013-02-11) Jones J.

[48] The Supreme Court of Canada [in *Tsiaprailis v. Canada*, 2005 SCC 8 (S.C.C.) Charron J, at par. 15] has stated **that in determining whether an award of damages is taxable, one must look to the nature and purpose of the payment to determine what it is intended to replace.** This approach is referred to as the *surrogatum* principle. The tax consequences of the damages payment will be determined according to this characterization.

[50] this case, the payment of damages to the father under the settlement agreement was for infringement of his copyright. He is being compensated for his claim for his loss suffered due to the infringing acts, including any loss of profits or royalties. The royalties that would have been payable from the performance or publication of the song represent the “yield” or the income arising from his property interest, namely his copyright.

**[51] The characterization of the damages as income is not dependent upon whether the father was in the music business or not.**

[71] The legal question posed to the court is therefore answered as follows:

- 1. The settlement funds paid to the father on account of the copyright infringement of one of his musical compositions, constitutes “income” to the father for the year 2010 for child support purposes pursuant to section 15 of the *Child Support Guidelines*;**
- 2. The reasonable expenses directly incurred by the father in order to recover the settlement funds may be deducted from the gross settlement amount in order to calculate his income for child support purposes for 2010.** The father has the onus of proof of the amount, reasonableness and actual payment of any such expenses.

- **Section 35 – Liability for Infringement**

The burden is upon defendant to prove every element of costs associated with the infringing copies. Profits are to be calculated on the differential method.

*Rains v. Molea*, 114 C.P.R. (4th) 161 (Ont. Sup. Ct.; 2013-08-15) Chiappetta J.

[93] If infringement was found in each of the 17 comparisons, there would be a basis to grant Rains recovery of Molea’s profits earned from his infringement. **Section 35(2)(b) of the Act requires that a defendant who is found to infringe must prove every element of cost associated with revenues received from the infringing activities. Profits should be calculated using the differential method: the “calculation of the revenues derived from infringement less those variable and fixed costs which contributed to the sums received as revenues”:** *Wellcome Foundation Ltd. v. Apotex Inc.* 1998 CanLII 8270 (FC), (1998), 82 C.P.R. (3d) 466, at para. 42 (F.C.T.D.), aff’d 2001 CanLII 22028 (FCA), [2001] 2 F.C. 618 (F.C.A.), leave to appeal to S.C.C. refused, [2001] S.C.C.A. No. 192.

- **Section 35 – Liability for infringement**

Disgorgement of profits is to the extent resulting from the infringement.

*Cinar Corporation v. Robinson*, 2013 CarswellQue 12345 (S.C.C.; 2013-12-23)  
McLachlin J.

[77] **Section 35 of the *Copyright Act* provides that a defendant can be ordered to “disgorge its profit to the extent that such profit is caused by the infringement. The requirement for a [causal] link between infringement and profit may require that the profit be apportioned between that which is attributable to the infringement and that which is not”**: McKeown, at p. 24-82.3 (emphasis added). The onus is on the infringer to “satisfactorily separate non-infringing from infringing activities”: Vaver, at p. 653; *Sheldon v. Metro-Goldwyn Pictures Corporation*, 106 F.2d 45 (2nd Cir. 1939), *per* Learned Hand J. In some cases, “an infringer may so interweave the right-holder’s work with its own as to make separation impossible”: Vaver, at p. 637.

[78] The apportionment of profits between infringing and non-infringing components of a work is essentially a **factual determination** which is subject to judicial discretion

[80] In my view, the Court of Appeal erred by interfering with the trial judge’s conclusion that the profits stemming from the soundtrack could not be dissociated from the profits derived from the infringing material. The “differential profit” approach on which the Court of Appeal relied is generally used in cases where an infringement allows the infringer to commercialize a good in a more profitable manner than he could have without the infringement. However, there is no evidence that the soundtrack could have been commercialized as a separate product if *Curiosity* had not been infringed in the first place. The soundtrack was only commercialized as a component of the television show *Sucroë*, which was itself created by copying a substantial part of Robinson’s work. The trial judge was entitled to conclude that the soundtrack had no stand-alone value, and that it generated profits only as an accessory to the television show. Consequently, he did not make a reviewable error in concluding that it was inappropriate to apportion profits to the soundtrack as a non-infringing component of the work.

- **Section 35 – Liability for infringement**

Disgorgement of profits is designed to prevent unjust enrichment and to serve as deterrence. Disgorgement does not call by itself for solidarity between defendants.

*Cinar Corporation v. Robinson*, 2013 CarswellQue 12345 S.C.C.; 2013-12-23)  
McLachlin J.

[85] The trial judge ordered disgorgement against all the parties that he found liable for infringement on a solidary basis. The Court of Appeal held that this misconstrued the disgorgement remedy under s. 35 of the *Copyright Act*. It held that a defendant can only be made to disgorge profits that it made, as opposed to the profits of other defendants with whom it participated in an infringement.

[86] I agree with the Court of Appeal. Section 35 of the *Copyright Act* provides a dual remedy for copyright infringement: damages for the plaintiff's losses and disgorgement of the profits retained by the defendant. **Disgorgement of profits under s. 35 is designed mainly to prevent unjust enrichment, although it can also serve a secondary purpose of deterrence:** Vaver, at p. 650. It is not intended to compensate the plaintiff. This remedy is not subject to the principles that govern general damages awarded under Quebec's law of extra-contractual liability, whose aim is compensatory. Consequently, solidarity of profits ordered disgorged under s. 35 of the *Copyright Act* cannot be inferred from art. 1526 of the CCQ, which makes co-authors of a fault solidarily liable for the "obligation to make reparation for injury caused to another".

[87] **Disgorgement under s. 35 of the *Copyright Act* goes no further than is necessary to prevent each individual defendant from retaining a wrongful gain. Defendants cannot be held liable for the gains of co-defendants by imposing liability for disgorgement on a solidary basis.**

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

Apart from a seizure before judgement, the Courts may order a party to submit any material evidence to an expert's appraisal.

*Biocad Medical inc. v. Panthera Dentaire inc.*, 2013 CarswellQue 2344 (Que. Sup. Ct; 2013-03-12) Ouellet J.

[1] Le 11 mars, le greffier, conformément à l'article 734(1) C.p.c., a autorisé la délivrance d'un bref de saisie avant jugement aux fins:

«De SAISIR une copie de tout logiciel, incluant les codes sources et/ou objet de toutes les versions d'un tel logiciel destiné à la Conception et Fabrication Assistées par Ordinateur de prothèses dentaires personnalisées, sous quelque forme matérielle que ce soit, qui sont en la possession, sous la garde ou le contrôle des défendeurs PANTHERA DENTAIRE INC., LABORATOIRE BODYCAD INC., JEAN ROBICHAUD,

GABRIEL ROBICHAUD et/ou BERNARD ROBICHAUD à l'une ou l'autre des adresses suivantes:»

[2] **Ce jour, les demandeurs me présentent, en tant que juge en son bureau, une requête pour mesures accessoires à la saisie avant jugement et recherchent les conclusions décrites dans les conclusions de cette requête entre autres aux fins d'encadrer la mise en œuvre de la saisie avant jugement, de permettre à des experts en informatique d'accompagner les huissiers et de prélever des copies de logiciels incluant le code source.**

[3] Considérant l'allégation de violation du droit d'auteur soutenu par des affidavits au soutien de la réquisition pour l'émission du bref de saisie avant jugement ainsi que de la requête qui m'est soumise.

[4] **Considérant les dispositions de l'article 38(1) de la *Loi sur le droit d'auteur* conférant au titulaire du droit d'auteur le droit de recouvrer la possession de l'œuvre contrefaite et de tout objet de ce droit d'auteur.**

[5] Considérant les dispositions du *Code de procédure civile* alléguées par les demandeurs dont l'article 402(2) et l'application qui en a été faite par nos tribunaux au Québec. [Fn1 2946-1993 Québec inc. c. Sysbyte Telecom Inc. et als., REJB 2001-24940; Barcana ltée c. Duparas, Alexandre, Tremblay et Associés inc. et al., EYB 1985-143696; D & G Enviro-Group inc. c. André-Martin Bouchard et als, 2000 CanLLII 10535 (QC CA).]

[6] Considérant le caractère raisonnable des conclusions recherchées de sorte que les défendeurs ne seront pas privés de la possession de leurs ordinateurs, des logiciels et des codes, et ce, d'ici la présentation de la requête pour ordonnance d'injonction interlocutoire le 28 mars 2013.

[7] Il y a lieu de faire droit à la requête des demandeurs selon les conclusions recherchées.

- **Section 38.1 – Statutory damages**

In special cases, the courts are entitled to reduce the minimal amount of statutory damages.

*Tency Music SAS v. Lefrançois*, 2013 CarswellQue 4285 (Que. Sup. Ct; 2013-04-29)  
Blanchet J.

[40] Plutôt que de s'aventurer dans l'exercice difficile d'établir la perte réelle résultant de la violation de son droit, la demanderesse a opté pour la compensation préétablie de l'article 38.1 de la *Loi*, en plus de réclamer 50 000 \$ en dommages punitifs, comme le permet l'article 38.1, et le remboursement de ses frais extrajudiciaires. S'agissant d'une violation commise à des fins commerciales, si modestes soient-elles, la compensation minimale de base devrait donc être fixée à 493 500 \$, soit 500 \$ pour chacune des 987 oeuvres en cause.

[41] Le Tribunal identifie toutefois dans la *Loi* deux dispositions dont il s'autorisera pour ramener cette compensation à des dimensions plus raisonnables, au regard de la preuve dans son ensemble.

[42] **D'abord, lorsque les oeuvres usurpées sont incorporées « dans un même support matériel », comme c'est le cas avec le site Internet « ti-diabre », le tribunal peut réduire le montant minimal prévu à l'alinéa (1) a) s'il est d'avis que le montant total des dommages-intérêts serait « extrêmement disproportionné à la violation ». Or, tel est indéniablement le cas en l'espèce.**

[48] Prenant en considération les facteurs énumérés ci-dessus, tout en ayant à l'esprit les objectifs visés par la *Loi sur le droit d'auteur*, le Tribunal estime équitable pour tous de fixer à 12 000 \$ la compensation payable à la demanderesse en l'instance, plus intérêts, indemnité additionnelle et les dépens judiciaires. Ce montant correspond, dans l'esprit du Tribunal, à environ 100 \$ pour chacun des quelque 120 enregistrements acquis par le défendeur auprès de la demanderesse, selon une estimation au prorata, après que cette dernière l'eut informé de ses droits pour la première fois, en mars 2011.

[52] **Enfin, si le Tribunal a jugé opportun de tempérer dans le présent cas la rigueur de la *Loi*, c'est précisément parce qu'il a conclu à l'entière bonne foi du défendeur et à sa méconnaissance de cette législation, fondamentale pour la protection des créateurs et inventeurs à l'échelle internationale.**  
[...]

- **Section 38.1 –Statutory damages**

Good faith and the need of deterrence are factors to consider when determining statutory damages.



*Pinto v. Bronfman Jewish Education Centre*, 2013 CarswellNat 3396 (F.C.; 2013-09-11) Rennie J.

[195] **There should be some relationship between the actual damages and statutory damages [...]**

[196] This, in turn, directs the inquiry to a broad range of factors, including whether or not the defendants acted in good or bad faith and the need for deterrence.

[197] **Bad faith refers to “conduct that is contrary to community standards of honesty, reasonableness or fairness. It is also conduct where a party acts in a manner that substantially nullifies the contractual objectives or causes significant harm to the other, contrary to the original purposes or expectations of the parties”:**

[202] Moreover, I also do not think deterrence is a relevant consideration in the present circumstances. BJEC and TaL AM have not demonstrated any reluctance to comply with the law. While the parties have not provided case law dealing specifically with statutory damages awarded against non-profit corporations, I consider this factor relevant to the question on what impact the award will have against the defendants. All revenue generated from the sales of TaL AM materials has been reinvested into the development of the curriculum. There is no profit motive.

- **Section 39 – Injunction only remedy when defendant not aware of copyright**

When a defendant receive a letter of demand, he can no longer argue his good faith.

*Tency Music SAS v. Lefrançois*, 2013 CarswellQue 4285 (Que. Sup. Ct; 2013-04-29) Blanchet J.

[34] Toutefois, à compter du 12 janvier 2011, le défendeur Lefrançois ne pouvait plus se retrancher derrière son ignorance des droits revendiqués par Tency Music, puisqu'il en avait été informé dans un courriel auquel il a d'ailleurs donné suite par une proposition d'entente. **Il ne fait donc aucun doute qu'en poursuivant ses activités au-delà de cette date, et surtout après la fermeture de son compte par Tency Music, il a usurpé les droits d'auteur de cette dernière en pleine connaissance de cause, donnant ainsi ouverture aux recours civils prévus par la Loi.**

[45] Or, s'il est vrai que le droit d'auteur existe de lui-même, par le seul effet de la *Loi*, sa publicité à l'égard des tiers requiert à certains égards l'enregistrement dont fait état l'alinéa (2) de l'article 39 (1). En l'instance, on ne trouve trace d'un tel enregistrement ni dans les allégations de la requête introductive d'instance, ni dans les pièces, ni dans les témoignages rendus à l'audience.

[46] **En l'instance, le Tribunal est convaincu qu'avant l'intervention de la demanderesse auprès de lui, en janvier 2011, il y avait chez le défendeur cette ignorance dont fait état le texte de la *Loi*. C'est dire que, selon une évaluation au *pro rata*, la très grande majorité des titres acquis de Tency depuis l'ouverture du site « *ti-diable* », en avril 2008, l'ont été par une personne qui, en raison du travail de transformation qu'elle exécutait sur chaque titre, croyait en toute bonne foi ne pas enfreindre la *Loi* ni porter atteinte aux droits de quiconque.**

- **Section 39 – Injunction only remedy when defendant not aware of copyright**

The absence of marking is irrelevant for copyright to subsist.

*Oakcraft Homes Inc v. Ecklund*, 2013 CanLII 41981 (Ont. Sup. Ct. – Small Claims; 2013-07-02) Gilbert, J.

[62] **The failure to mark ownership on the plan does not in law as set out above, defeat the right to copyright.** [...]. The Ecklunds cannot excuse their conduct in passing those plans onto Toscana merely because the ownership is not marked on the plans and merely because the Plaintiff did not specifically tell the Ecklunds they could not use them. It defies logic and common sense for the Ecklunds to use those factors as an excuse to escape liability for their actions. [...]

- **Section 39.1 –Wide injunction**

A wide injunction is not restricted to the infringed works.

*Tency Music SAS v. Lefrançois*, 2013 CarswellQue 4285 (Que. Sup. Ct; 2013-04-29) Blanchet J.

[35] [...] L'article 39.1 (1) dispose plus précisément que le tribunal peut interdire au défendeur de violer les droits d'auteur du demandeur non seulement sur les oeuvres en cause dans le litige,

mais aussi sur d'autres oeuvres sur lesquelles ce dernier est titulaire d'un droit d'auteur.

[36] Dès lors, en l'instance, la demanderesse est fondée à requérir une ordonnance d'injonction protégeant tous les enregistrements lui appartenant, incluant ceux à l'égard desquels il n'y avait pas encore eu contravention au moment de l'introduction de sa demande, de même que les nouveaux enregistrements qu'elle aurait réalisés depuis. **Il serait à la fois injuste et illogique, en effet, d'interdire au défendeur l'utilisation des titres acquis par lui, mais en lui laissant libre cours à l'égard de tout autre enregistrement qu'il pourrait se procurer à l'avenir sur le site Internet de la demanderesse.**

- **Section 41.23 – Protection of separate rights**

Equitable ownership is a novel question of law that will not be struck by a motion for summary judgment.

*Delta Hotels v. Backus-Naur*, 2013 CarswellOnt 657 (Ont.Sup. Ct; 2013-01-24) Abrams, Master

[4] The defendants also say that equitable ownership of copyright is an untenable plea and, as such, should be disallowed. Equitable ownership of copyright is a recognized principle in the United Kingdom. Ms. Zagar submits (and the excerpt cited by her from Professor Vaver's *Intellectual Property Law: Copyright, Patents, Trademarks*, 2d ed., at 140 appears to support her submission) that there is no *direct* discussion in Canadian jurisprudence in favour or against equitable ownership of copyright.

[5] Relying on *Succar v. Wawanesa Mutual Insurance Co.*, 2006 CarswellOnt (S.C.J.), at paras. 2, 8-9, Ms. Zagar says that “[c]laims should not be dismissed simply because they are novel. Even if it could be said that the proposed pleading raises an ‘arguable, difficult or important point of law’, such a finding would not justify striking out the claims”. **That is true. She also says that, having regard to the state of the law in Canada, it is not absolutely clear that a claim founded on equitable ownership of copyright is incapable of success (even if success is uncertain).** On the materials before me, I am inclined to agree with this submission, too. While I accept, as Mr. Seed has argued, that there is now no precedent in Canadian law for the alternative plea proposed, I cannot say that it *necessarily* follows that on the specific facts of any given case, or this case, there could never be. **To say that foreign copyright cases may not be**

easily transferable to Canada as the Supreme Court did in *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339, para. 22 is not to say that they are at no time and under any circumstances transferable.

- **Section 41.23 – Protection of separate rights**

As a rule copyright owners should be entered as parties.

*Spanski Enterprises, Inc. v. IMB+ Records Inc.*, 2013 CarswellOnt 12610 (Ont. Sup. Ct.; 2013-09-11) Master MacAfee

[5] The parties agree that the issue on this motion is whether, in accordance with section 41.23(2)(c) of the *Copyright Act*, the interests of justice do not require the copyright owner to be a party.

[6] **The onus is on the plaintiffs to show that it is in the interests of justice that the copyright owners are not added as parties** (*Entral Group International Inc. v. 1438762 Ontario Inc.*, [2005] O.J. No. 2140 (Master) at para 17)

[12] Having regard to the above-noted provisions and the fact that TVP is aware of this litigation and has chosen not to participate, I am satisfied that there is no reasonable prospect of future litigation for copyright infringement if the copyright owner is not added as a party

- **Section 41.23 – Protection of separate rights**

The right to use information is not a right or interest in the copyright.

*Nautical Data International, Inc. v. C-Map USA Inc.*, 110 C.P.R. (4th) 317 (F.C.A.; 2013-03-01) Nadon and Sharlow JJ. [reversing 106 C.P.R. (4th) 341 (F.C.; 2012-04-03); leave to appeal to the Supreme Court of Canada refused, docket 35345 (S.C.C.; 2013-08-15)]

[7] It is common ground that, according to subsection 36(1) [now s. 41.23] of the *Copyright Act*, NDI is entitled to sue in its own name for breach of the copyright in the CHS Works **if it has a right, title or interest in the Crown's copyright by virtue of the Licence**

[8] It is also common ground that subsection 36(1) of the *Copyright Act* is of assistance to NDI only if its rights under the Licence meet the definition of "exclusive licence" in section 2.7 of the *Copyright Act*, [...]

[9] So, the first question is simply this: Does anything in the Licence authorize NDI to do anything with respect to the CHS Works that is subject to copyright, to the exclusion of all others including the Crown?

[10] **The acts that are “subject to copyright” are those listed in section 3 of the *Copyright Act*. This is essentially a list of things that can be done in respect of a copyrighted work only by or with the consent of the copyright holder (necessarily including the consent of the copyright holder that is given by way of licence).**

[11] A problem for NDI is that the key provision of the Licence, section 2.1, authorizes NDI to make use of the CHS Data – the information – but there can be no copyright in information.

- **Section 41.23 – Protection of separate rights**

When a copyright owner shall be made a party, it could be as a defendant or a plaintiff.

(AOM) *NA Inc. v. Reveal Group*, 2013 ONSC 8014, <http://canlii.ca/en/on/onsc/doc/2013/2013onsc8014/2013onsc8014.html> (Ont. Sup. Ct.; 2013-12-30) Macleod, Master

[19] I will note that the defendant also objects to the amended pleading in which AOMi and WBSL are added as plaintiffs but “taking no part in the action”. I do not agree with that objection. S. 41.23 (2) of the Act requires that if proceedings under subsection (1) are taken by a person other than the copyright owner, the copyright owner must be made a party to the proceedings but the Act goes on to state that the copyright owner need not take any part in the action. **While it would certainly be possible to add the copyright owner as a defendant, there is nothing in the wording of the Act that requires it be done in that manner.**

- **Section 41.24 – Concurrent jurisdiction of Federal Court**

Whether certified tariffs issued on an erroneous principles are binding will be best decided by the courts rather than by an application to the Board for variation of its decision.

*SOCAN Tariff 24 - Ringtones (2003-2005), Ringtones and Ringbacks (2006-2013) - Application to Vary*, 2013 CarswellNat 75 (Cop. Bd.; 2013-01-18), the Board:

[39] **In our opinion, the courts, not the Board, are the best forum to deal with the issues raised. They are all questions of ordinary law which** include whether and if so, to what extent, the principle of finality requires that a certified tariff be binding on all concerned even though it relies on an interpretation of the law now known to be incorrect. In addition the question of whether the applicants are entitled to a royalty refund raises a number of legal issues including mistake of law or mistake of fact, restitution and unjust enrichment: see for example *Air Canada v. British Columbia*; [Fn 22 [1989] 1 S.C.R. 1161.] *R. v. Turigan* [FN 23 1988 AB333]. **A decision of a court would be more effective and would have more immediate and more general effect.**

- **Section 41.24 - Concurrent jurisdiction of Federal Court**

The Quebec Superior Court has jurisdiction to render a declaratory judgment in a matter of threatened copyright infringement but may decline jurisdiction when the issues may be more completely decided before another forum.

*Bell Media inc. v. Société du droit de reproduction des auteurs compositeurs et éditeurs au Canada*, 2013 CarswellQue 10817 (Que. Sup. Ct.; 2013-10-23) Roy J. [Motion to dismiss a request for Declaratory judgment before the Quebec Superior Court because a similar matter is pending between the parties before the Copyright Board]

[8] **La possibilité de procéder par jugement déclaratoire devant la Cour supérieure existe :**

- **l'article 41.24 de la Loi attribue compétence à la Cour fédérale et à la Cour supérieure pour connaître de toute procédure liée à l'application de la Loi;**
- **Bell Media a un intérêt né, actuel et immédiat à faire déterminer si son processus technologique, tel qu'opéré actuellement, constitue une violation des droits d'auteurs des œuvres utilisées;**
- **il existe une difficulté réelle** puisque la SODRAC estime quant à elle que la position de Bell Media est erronée;
- **l'existence d'un recours alternatif ne rend pas automatiquement le recours déclaratoire inapproprié** [Fn 5 *Ordre des optométristes du Québec c. Coastal Contacts inc.*, 2010 QCCS 6097, par 17 (appel rejeté, 2011 QC1820) (requête pour autorisation de pourvoi à la Cour suprême rejetée).<sup>1</sup>]
- **le seul fait que la poursuite de la demande devant la Commission pourrait s'avérer nécessaire pour fixer les redevances et leurs modalités, selon l'interprétation que la Cour supérieure donnerait aux nouvelles dispositions, n'empêche pas en soi l'exercice du recours déclaratoire.**

[9] Mais il est également vrai que la Commission, dans le cadre de l'exercice de sa compétence, est régulièrement appelée à se prononcer sur les droits qui sous-tendent un tarif ou une redevance et, par conséquent, à interpréter la Loi [*Fn6 Rogers Communications Inc. c. Société canadienne des auteurs, compositeurs et éditeurs de musique*, 2012 CSC 35, par. 12; *Alberta (Éducation) c. Canadian Copyright Licensing Agency (Access Copyright)*, , 2012 CSC 37; *Société canadienne des auteurs, compositeurs et éditeurs de musique c. Bell Canada*, 2012 CSC 36; *Ré:Sonne c. Fédération des associations de propriétaires de cinémas du Canada*, 2012 CSC 38; *Entertainment Software Association c. Société canadienne des auteurs, compositeurs et éditeurs de musique*, 2012 CSC 34; *Société canadienne des auteurs, compositeurs et éditeurs de musique c. Association canadienne des fournisseurs Internet*, 2004 CSC 45; *Sirius Canada inc. c. CMRRA/SODRAC Inc.*, 2010 CAF 348 (requête pour autorisation de pourvoi à la Cour suprême rejetée); *AVS Technology Inc. c. Canadian Mechanical Reproduction Rights Agency*, 2000 CanLII 15571 (C.A.F.).<sup>1</sup> Dans le cadre de l'établissement des redevances et modalités afférentes à la licence 2012-16, la Commission sera appelée à interpréter les nouvelles dispositions législatives eu égard aux reproductions effectuées par Bell Media.

[10] Généralement, la jurisprudence établit qu'il est préférable de laisser un tribunal spécialisé se prononcer sur une question sur laquelle il a compétence au lieu de rechercher un jugement déclaratoire devant une cour supérieure [*Fn 7 Conseil du patronat du Québec c. Commission de la construction du Québec*, 2009 QC209; *Syndicat canadien de la fonction publique, section locale 1450 c. Journal de Québec, division de Groupe Quebecor inc.*, [1996] R.J.Q. 299 (C.S.); *Poulin c. Commissaire au lobbyisme du Québec*, 2012 QCCS 2573 (appel rejeté, 2013 QC131); *Landry c. Fédération des producteurs acéricoles du Québec*, 2011 QCCS 6044; *Reza c. Canada*, [1994] 2 R.C.S. 394 Dans ces affaires, les tribunaux ont jugé que les tribunaux administratifs spécialisés étaient mieux placés pour décider de la question.]

**[11] Ici, la situation est un peu différente puisqu'à l'article 41.24 de la Loi, le législateur attribue directement compétence à la Cour supérieure pour connaître des litiges liés à l'application de la Loi. La Cour supérieure est donc aussi bien placée que la Commission pour interpréter la Loi. Il demeure néanmoins que la SODRAC a déjà saisi la Commission de ces questions le 4 février 2013, avant que Bell Media ne dépose sa requête en jugement déclaratoire. Il paraît approprié de laisser le processus devant la**

**Commission se poursuivre plutôt que de morceler le dossier devant des instances différentes. Il s'agit d'une saine administration de la justice et cette façon de procéder permet de limiter les coûts pour les parties et d'éviter la multiplication induite de procédures.**

- **Section 42 – Offences and punishment**

Prior conviction under the *Copyright Act* will negatively impact on the honesty required to hold a gaming licence.

*1572704 Ontario Inc. (c.o.b. Sandie's Reading N' Greetings)*, [2013] O.L.A.T.D. 79 (Ontario Licence Appeal Tribunal; 2013-04-17) Sproule, Vice-Chair

[Appeal from a decision to revoke a permit as a lottery retailer operator because of a two convictions under paragraph 42(1)b) of the *Copyright Act*.]

[15] In order to maintain the confidence of the public in the gaming industry it is important that registrants appear to have the utmost honesty and integrity. Based on the evidence presented by both parties, the Tribunal finds that the conviction of Mr. Song for selling infringing articles under the Copyright Act while a director of the Applicant, together with the inexplicable conduct of storing large sums of money unconnected to the legitimate business of the Applicant at its premises, provides reasonable grounds to believe that the Applicant will not act as a supplier in accordance with law or with integrity, honesty, or in the public interest.

- **Section 42 – Offences and punishment**

Prior conviction under the *Copyright Act* will negatively impact on the honesty required to hold a gaming licence.

*7716 v. Registrar of Alcohol and Gaming*, 2013 CanLII 21155 (Ont. - Licence Appeal Tribunal; 2013-04-17) Sproule, Adjudicator

[14] [...] In order to maintain the confidence of the public in the gaming industry it is important that registrants appear to have the utmost honesty and integrity. Based on the evidence presented by both parties, the Tribunal finds that the conviction of Mr. Song for selling infringing articles under the Copyright Act while a director of the Applicant, together with the inexplicable conduct of storing large sums of money unconnected to the legitimate business of the Applicant at its premises, provides reasonable grounds to believe that the Applicant will not act as a supplier in accordance with law or with integrity, honesty, or in the public interest.



- **Section 42 – Offences and punishment**

The validity of a search warrant shall be contested at the first opportunity and before the court who issued it rather than as a collateral attack in a subsequent claim for damages.

*Avery v. Royal Canadian Mounted Police*, 2013 CarswellNB 250 (N.B. Q.B.; 2013-05-06) Garnett J.

[MOTION for summary judgment by RCMP dismissing plaintiffs' action for breach of charter rights, false arrest, negligent investigation, malicious prosecution, misfeasance and invasion of privacy; MOTION by corporate defendant for summary judgment dismissing claims against it for false imprisonment.]

[26] A.G. [Attorney General] says the Plaintiffs cannot now challenge the validity of the search warrants or raise any of the allegations that their *Charter* rights were violated because they had the opportunity to do so before the Provincial Court and failed to exercise that opportunity. They say that permitting them to do so now amounts to a collateral attack.

**[28] In this case, the search warrant was issued by a Provincial Court judge. If the Plaintiffs wished to challenge it they could and should have done so in the Provincial Court proceedings. They did not do so.**

**[29] In addition, the Plaintiffs now say that the issuance of the Search Warrant and its subsequent execution amounted to violations of their *Charter* rights. Again they could have and should have raised these issues in the Provincial Court proceedings and did not do so.**

[30] I find that the Plaintiffs are attempting a collateral attack and that a trial judge would not permit them to do so.

- **Section 42 – Offences and punishment**

Whether prior criminal record justify imprisonment rather than fine is a question that deserve leave to appeal.

*R. v. Strowbridge*, 2013 CarswellNfld 334 (Nfld. C.A.; 2013-09-09) Barry J.

[2] He [Mr. Strowbridge] acknowledges a prison term of 9 months was fit for two frauds and three breaches of probation. However, he argues that (i) a 6 month consecutive prison term for copyright and trademark infringements was demonstrably unfit; (ii) the sentencing

judge erred in imposing restitution as part of probation instead of a restitution order under section 738(1) of the *Criminal Code*; and (iii) the sentencing judge erred by imposing a \$5,000.00 fine in light of the appellant's means to pay.

[5] The appellant's first ground of appeal is that the sentence does not fit within the appropriate range of sentence as established by prior cases with convictions for copyright and trademark infringements. The appellant notes that the usual disposition in such cases has been a fine with or without a conditional sentence but not a prison term.

[6] Crown agrees that the cases show a range from fines up to a twelve-month conditional sentence, with most of the cases imposing six-month conditional sentences. The Crown points out that none of the offenders in the prior cases had a criminal record comparable to that of Mr. Strowbridge nor were they actually serving a sentence in the community at the time of the offences as was the case here.

**[7] Without being shown a prior case with circumstances similar to Mr. Strowbridge where the sentence imposed involved a prison term, I am satisfied the appeal has arguable merit sufficient to warrant the granting of leave to appeal. See *R. v. Perrier*, 2009 NL1, 282 Nfld. & P.E.I.R. 171 (N.L. C.A.), at para. 13. Where no previous authoritative decision has established the need for a prison term and determined the range of sentence for a similar offence by a similar offender in similar circumstances, an appellant should not be prevented from proceeding with an appeal of a custodial sentence and making submissions as to the appropriate range.**

- **Section 42 – Offences and punishment**

Alleged copyright ownership is not a defence to theft or fraud.

*Cormier v. R.*, 2013 QCCA 2068 (Que. C. A.; 2013-12-02) Chamberland J.

**[52] Selon moi, il serait erroné de retenir l'argument de l'appellant voulant qu'il ne puisse être coupable de vol parce qu'il serait propriétaire des données en vertu d'un quelconque droit d'auteur. D'abord, il est clair que dans le contexte d'un procès criminel, la question de savoir si une chose peut faire l'objet d'un droit de propriété doit être tranchée ultimement en fonction du droit criminel et non du droit civil** [[Fn 11*R. c. Stewart* [988] 1 R.C.S. 963. P. 976. Il n'est donc ni nécessaire ni utile de recourir à la *Loi sur le droit d'auteur* pour trancher la question. Il me semble clair

ici que le Centre détient un intérêt propriétaire quelconque dans les données informatiques relatives au *Fil d'Ariane* une démarche d'intervention visant à contrer l'absentéisme au travail] et le fait que l'appelant y ait contribué – même beaucoup – en sa qualité d'employé, puis de consultant, n'y change rien. [...]

- **Section 43.1 – Limitation period for civil remedies**

The limitation period starts with each infringement.

*Rains v. Molea*, 114 C.P.R. (4th) 161 (Ont. Sup. Ct.; 2013-08-15) Chiappetta J.

[78] The parties agree that the applicable limitation period is three years from the time that the plaintiff knew or could reasonably have been expected to know of the infringement: *Copyright Modernization Act*, S.C. 2012, c. 20, ss. 49, 62, amending the *Act*, s. 43. **Further, they agree that each new infringement constitutes a fresh cause of action. A limitation analysis is required vis-à-vis each alleged infringement:** John S. McKeown, *Fox on Canadian Law of Copyright and Industrial Designs*, 4th ed. (Toronto: Carswell, 2003), at p. 24-9.

- **Section 54 – Register of Copyrights**

Copyright registration is not compulsory – Prior searches for conflicting works at the Copyright office are not required.

*Pelchat v. Zone 3 inc.*, 2013 CarswellQue 216 (Que. Sup. Ct.; 2013-02-21) Payette J.

[332] Il reste un dernier argument aux demandeurs: les défendeurs auraient dû faire des recherches pour vérifier si quelqu'un, quelque part, n'avait pas déjà produit une émission comme celle qu'ils s'apprêtaient à produire.

[333] Les demandeurs conviennent qu'il n'existe aucune autorité au soutien de leur proposition qu'ils appuient sur l'obligation générale d'agir de bonne foi.

[334] Cette proposition ne saurait être retenue.

[335] Premièrement, il n'existe aucun moyen fiable et pratique pour effectuer une telle recherche contrairement au nom d'une compagnie, par exemple. **En effet, même le registre des droits d'auteur n'est pas efficace à cet égard puisqu'il n'existe pas d'obligation d'y enregistrer une œuvre pour qu'elle soit**

protégée. De toute façon, l'œuvre, elle-même, n'y a pas été déposée.

- **Section 54 – Register of Copyrights**

The evidence created by a certificate of registration is rebuttable. Registration obtained after the launch of proceedings carries less weight.

*Pinto v. Bronfman Jewish Education Centre*, 2013 CarswellNat 3396 (F.C.; 2013-09-11) Rennie J.

[129] Dr. Goof-Li could arguably be considered one work. However, in my view, it is unnecessary to resolve this issue. **The certificates create only a presumption of ownership. As the certificates were registered after Mr. Pinto began these proceedings, the presumption has less weight: *CCH Canadian Ltd v Law Society of Upper Canada*, 2002 F187 at para 63. In any event, in this case, there is substantial additional evidence regarding copyright ownership, all of which pre-dates registration. As will be discussed below, this evidence rebuts any presumption created by registration, assuming that registration is valid.**

- **Section 66.51 – Interim decisions**

An interim decision aims to counteract the negative effects of delays.

*SODRAC Tariff No. 5 (2009-2012)*, [2013] C.B.D. 6 (Cop. Bd.; 2013-04-26), the Board

[17] As a general rule, the principle of finality requires that decisions made by bodies such as the Board may not be reopened, with certain exceptions.

[44] The purpose of an interim decision is to counteract the negative effects of delays between instituting a proceeding and making a final decision. ]...]

- **Section 66.51 – Interim decisions**

Application to vary may lead to interim tariff.

*SOCAN Tariff 24 - Ringtones (2003-2005), Ringtones and Ringbacks (2006-2013) - Application to Vary*, 2013 CarswellNat 75 (Cop. Bd.; 2013-01-18), the Board:

[45] Where the Board accepts to examine an application to vary, it generally transforms the relevant final tariff into an interim tariff.

- **Section 66.51 – Interim decisions**

Interim decisions serve to avoid legal vacuum or maintain status quo.

*Access Copyright (Educational Institutions) 2005-2009 – Redetermination*, available at 2013 CarswellNat 58 (Cop. Bd.; 2013-01-18), the Board:

**[17] An interim decision serves chiefly to avoid the negative consequences caused by the length of the proceedings and may serve to avoid the legal vacuums created when protected works are used without authorization.**

**[18] In general, the best way to achieve the objectives of an interim decision is to maintain the *status quo* while avoiding a legal vacuum.** The parties' claims may help to determine whether a change to the status quo is desirable on a balance of convenience.

- **Section 66.51 – Interim decisions**

Interim tariff is warranted to account for legislative or jurisprudential development.

*Access Copyright (Educational Institutions) 2010-2015*, 2013 CarswellNat 1656 (Cop. Bd.; 2013-05-29), the Board

**[14] To the extent that it seeks to secure enforcement rights that Access does not currently have, the application would accomplish nothing;** on that much, we agree with the Objectors. **We also conclude that the ancillary measures and declarations sought by Access are redundant.** Nothing is added by the Board stating that users subject to a tariff must comply with its terms and conditions, that interim payments may be revisited in the final decision, or that compliance with an interim tariff does not prevent a party from advancing positions that are incompatible with that tariff

**[15] There remains but one reason to adopt a new interim tariff.** As a result of recent amendments to section 29.4 of the Act, examination copies that were compensable by the sole reason that Access offered a licence no longer attract royalties. The record of the proceedings that led to the certification of the 2005-2009 tariff shows that approximately 15 cents of the rate of \$4.81 was attributable to such copies [Fn6 6,995,451 photocopied pages for ministry

examinations ÷ 246,001,462 photocopied pages triggering remuneration × 5.16 = 15¢ (FTE Rate certified in 2009): see Access K-12 (2009), Supra note 2, Table 2.]. Access proposes to cease collecting those 15 cents. This is precisely the sort of change in status quo that ought to be reflected in an interim decision: just as an interim tariff was required in *Interim Decision – SOCAN-NRCC Tariff 1.A (Commercial Radio) for the Years 2003 to 2007* [Fn7 (24 November 2006) Copyright Board Decision] to adjust the royalty rate to account for jurisprudential developments, **an interim tariff adjusting the royalty rate set in the 2005-2009 tariff is warranted to account for this legislative development.**

- **Section 66.52 – Variation of decision**

The powers of the Board are large and discretionary but not illimited.

*SOCAN Tariff 24 - Ringtones (2003-2005), Ringtones and Ringbacks (2006-2013) - Application to Vary*, 2013 CarswellNat 75 (Cop. Bd.; 2013-01-18), the Board:

[16] **Pursuant to this provision, the Board has the power to vary an earlier decision if it is of the opinion that there has been a material change in circumstances since the decision was made. Even where the material change is established, the Board retains discretion to decide whether the decision should be reopened and whether, if once reopened, the variance should be granted.** Whether the Board can vary tariffs for past transactions remains an open issue. Whether the Board can vary a “spent” tariff has never been decided

[23] Fourth, the applicants contend (and SOCAN agrees) that the power to vary contained in section 66.52 of the Act, having regard to the Board’s broader purpose and mandate, permits by necessary implication the Board to replace its initial decision with a new one effectively rescinding SOCAN tariff 24 as it applies to ringtones. We do not agree. Even if our Act is liberally interpreted, one cannot read into it powers that are not contained therein

[34] **The Board’s power to vary, while discretionary, is restricted to the power to vary the terms of the otherwise existing relationship between copyright owners and users when a material change in circumstances requires a modification. That power does not include or extend to the authority to end their relationship or to declare that such relationship no longer exists. The power to vary may include the power to substitute,**

but finding that there is no tariff is not a substitution. It is a rescission or repeal of the initial decision.

[36] We also conclude that the power to refuse to certify a tariff *ex ante* does not, of itself, imply that the power to vary such tariff will include the power to rescind it *ex post facto*. The power to deny a remedy in the first place does not imply the power to rescind the remedy already granted; as a rule, the second exists only if expressly granted.

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

The Board may correct its palpable errors.

*SODRAC Tariff No. 5 (2009-2012)*, [2013] C.B.D. 6 (Cop. Bd.; 2013-04-26), the Board:

[15] **To correct its error, the Board must have the authority to do so.** We conclude in this matter that it does have this authority, for two reasons. **First, the error is palpable, and the Board has the authority to correct such an error. Second, the error led to the certification of a tariff ultra petita, thereby resulting in a breach of procedural fairness.**

[27] The Board erred. **It believed it was using one tariff structure while it was actually certifying another. The decision is not appealable.** The error is of the type that *Munger* [*Munger v. Cité de Jonquière*, [1962] B.R. 381 (Que.)], *Fortin* [*Fortin v. Talbot*, (1931), 51 B.R. 124 (Que)] and *Jacques* [*Jacques v. Paré*, (1939), 66 B.R. 542 (Que)] make it possible to correct. Its source was inadvertence or distraction. It was also palpable: without doubt, what the Board thought CAFDE sought was not what CAFDE proposed. It follows that the Board has the authority to reopen its decision and to correct its error. This pragmatic conclusion is made all the more necessary by the fact that on judicial review, the Federal Court of Appeal would have no choice but to allow the application. Waiting for that to happen will result in a sub-optimal use of the time and resources of that jurisdiction.

[29] [...] Even a strict application of the principle of finality allows decision makers to correct errors in expressing their manifest intention. But that is not the issue here. **The Board made a palpable error** within the meaning of *Munger* [*Munger v. Cité de Jonquière*, [1962] B.R. 381 (Que)], based on the assumption that CAFDE was proposing one thing, while it was actually proposing another. In light

of Fortin, Jacques, Munger and Chandler, **this is enough to reopen the matter, even if the Board's intention** – the tariff structure it would have certified if it had properly understood CAFDE's position – **was not manifest. The Board must reopen the file and issue a new decision.**

- **Section 66.7 – General Powers, etc.**

The Board can correct its errors.

*Statement of Royalties to Be Collected by SODRAC for the Reproduction, in Canada, of Musical Works Embedded into Cinematographic Works for the Purpose of Distributing Copies of These Cinematographic Works for Private Use or for Theatrical Exhibition - Tariff No. 5 (2009-2012) [Redetermination]*, 2013 CarswellNat 2325 (Cop. Bd; 2013-07-05)

[1] [...] First, the November 2 decision contains **an error that the Board has the power to correct**. Second, since the decision was rendered in breach of procedural fairness, the 2009-2012 tariff is completely null and void.

- **Section 70.15 – Certification**

A Tariff will be certified even if for a restraint amount of users or uses.

*Statement of Royalties to Be Collected by SODRAC for the Reproduction, in Canada, of Musical Works Embedded into Cinematographic Works for the Purpose of Distributing Copies of These Cinematographic Works for Private Use or for Theatrical Exhibition - Tariff No. 5 (2009-2012) [Redetermination]*, 2013 CarswellNat 232 (Cop. Bd; 2013-07-05)

[31] We still agree with SODRAC that the tariff should extend to direct-to-video releases. **The fact that few Canadian audiovisual works are released in this manner is no reason for not certifying the tariff** [Fn 11 *Society for Reproduction Rights of Authors, Composers and Publishers in Canada v. Canadian Broadcasting Corp.* 2012 CarswellNat 4255 (Cop. Bd.; 2012-11-02), at paragraphe 178].

- **Section 70.6 – Filing of statement of royalties**

The reasons for decision shall be sufficient to lead to the decision rendered.



*Cojocar v. British Columbia Women's Hospital and Health Centre*, 2013 CarswellBC 1400 S.C.C.; 2013-05-24) McLachlin J.

[13] [...] Reasons need not be extensive or cover every aspect of the judge's reasoning; in some cases, the basis of the reasons may be found in the record. **The question is whether a reasonable person would conclude that the alleged deficiency, taking into account all relevant circumstances, is evidence that the decision-making process was fundamentally unfair**, in the sense that the judge did not put her mind to the facts, the arguments and the issues, and decide them impartially and independently.

[25] [...] **In the administrative law context, it has held that challenges to the reasoning or result of a decision do not attract an independent sufficiency analysis and should be dealt with within the overall reasonableness analysis:** *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 (CanLII), 2011 SCC 62, [2011] 3 S.C.R. 708.

- **Section 70.6 – Filing of statement of royalties**

Incorporating copied material in a decision is not by itself evidence of unfairness.

*Cojocar v. British Columbia Women's Hospital and Health Centre*, 2013 CarswellBC 1400 (S.C.C.; 2013-05-24) McLachlin J.

[30] The issue before us is not whether the practice of incorporating what others have written into judgments is a good thing. As we will see, judicial copying is a longstanding and accepted practice, yet one that, carried to excess, may raise problems. **Rather, the issue is when, if ever, copying displaces the presumption of judicial integrity and impartiality.**

[31] Approached from this perspective, a number of the criticisms advanced against copying fall by the wayside. One such criticism, made by the majority of the Court of Appeal in this case, is the judge's failure to attribute the incorporated material to the original author. This criticism is connected to the idea that the reasons should be the "original" product of the judge's mind, and that to the extent they are not, the judge should acknowledge her sources. Failure to attribute sources and lack of originality, without more, do not assist in answering the ultimate question — **whether a reasonable person would conclude from the copying that the judge did not put her mind to the issues to be decided, resulting in an unfair trial.** The fact that a judge attributes copied material to the author tells us nothing about whether she put her mind to the issues addressed in that copying. Nor is lack of originality alone a flaw in judgment-

writing; on the contrary, it is part and parcel of the judicial process. **It may not be best practice for judges to bulk up their judgments with great swaths of borrowed material. But the fact remains that borrowed prose, attributed or otherwise, does not, without more, establish that the judge has failed to come to grips with the issues required to be decided.**

- **Section 73 – Certification**

Forms to Tariffs are relevant but could be adapted on consent by the parties.

*Retransmission of Distant Television and Radio Signals*, File: Retransmission 2009-2013; also available at <http://www.cb-cda.gc.ca/decisions/2013/retrans-29112013.pdf> (Cop. Bd.; 2013-11-29)

[47] The principle is clear. **A delay in collecting royalties entails opportunity costs for the collective or its members. So does a delay in a collective receiving its full royalty allocation. In both cases, the collective cannot distribute amounts it does not have. In both cases, resulting losses must be compensated through the imposition of interest. Therefore, interest should be payable on allocation adjustments.**

[67] A question arose as to whether the forms attached to the tariffs were still required. The forms only ask information that is either expressly required by the tariff or implicitly necessary to support royalty calculations. Over the years, some retransmitters have developed their own ways of reporting the information required by the tariff, probably so that the reporting format dovetails with their own internal systems; the collectives have accepted or agreed to this

[68] **The collectives confirmed that the forms fulfil two important functions, whether or not they are actually used. First, retransmitters know precisely which information they must provide without having to interpret the tariff to determine what that information is. Second, the forms serve as a fallback position on which either the collective or the retransmitter can rely if both cannot agree on what should be provided and how.**

[69] **We accept these explanations and will continue to attach forms to the certified tariffs. A collective and a retransmitter remain free to agree to adapt the reporting obligations of the tariffs to their particular situation**

- **Section 77 - Owners who cannot be located**

Each acts referred to in section 3 request a specific licence – A licence cannot last longer than the term of copyright.

*National Film Board of Canada for the reproduction and the communication to the public by telecommunication of a photograph in a documentary film [Application by], 2013 CarswellNat 2370 (Cop. Bd.; 2013-01-31)*

1) La licence autorise la reproduction et la communication au public par télécommunication sur Internet d'une photographie parue dans le Soleil de Québec du 21 juin 1969, incorporée dans un documentaire intitulé « Mai en décembre : Godard en Abitibi ». Une licence fut délivrée par la Commission pour l'incorporation de la photographie dans le film le 3 mars 2000 (1999-UO/TI-25)

La licence autorise la reproduction et la communication au public par télécommunication sur Internet d'une photographie parue dans le Soleil de Québec du 21 juin 1969, incorporée dans un documentaire intitulé « Mai en décembre : Godard en Abitibi ».

Une licence fut délivrée par la Commission pour l'incorporation de la photographie dans le film le 3 mars 2000 (1999-UO/TI-25)

2) La licence expire lorsque l'œuvre relèvera du domaine public.

4) L'Office national du film du Canada versera 500 \$ à la Société du droit de reproduction des auteurs, compositeurs et éditeurs au Canada (SODRAC) [...]

- **Section 77 - Owners who cannot be located**

A licence could cover multiple uses of the work.

*Canada's History Society for the reproduction, the making available and the communication to the public by telecommunication of three paintings [Application by], 2013 CarswellNat 2378 (Cop. Bd.; 2013-02-13)*

(1) The licence authorizes the reproduction (in print and digital), the making available and the communication to the public by telecommunication of the following paintings by Claire Fauteux in the April-May issue of Canada's History magazine:

–Le Lavoir, Besançon, 1941;

–Corvée de vaisselle, Besançon, 1941;

–Chambre 96 B, Besançon, 1941.

(5) The licensee will pay the sum of \$565 (\$207 per image for the two images reproduced over half a page and \$151 for the image reproduced over a quarter of a page) to the Society for Reproduction Rights of Authors, Composers and Publishers in Canada (SODRAC) [...]

- **Section 77 - Owners who cannot be located**

A licence cannot be granted to the copyright owner. The licence could be terminated upon notice by the located owner.

*KV 265 for the use of a literary work in public performances [Application by], 2013 CarswellNat 2379 (Cop.Bd.; 2013-04-03)*

(2) The licence is valid provided that the applicant's representative, Anne (Phillip) Barlow or her successors, is not the copyright owner.

(5) The applicant undertakes to pay the sum of \$10.00 for every performance to any person who establishes, before April 31, 2023, ownership of the copyright in the work covered in this licence.

(6) 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 (5)

- **Section 77 - Owners who cannot be located**

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

*Éditions du Quartz, pour la reproduction, la réédition et la distribution sur support papier du texte d'un livre (Application by Les), 2013 CarswellNat 2590 (Cop. Bd.; 2013-05-23)*

(1) La licence autorise la reproduction, la réédition et la distribution sur support papier du texte de l'œuvre littéraire intitulée «Mon deuxième livre de lecture» de Marguerite Forest et Madeleine Ouimet et publiée par les Éditions Grangeret frères en 1959

(2) Le tirage ne devra pas dépasser 1000 exemplaires

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

- **Section 77 Owners who cannot be located**

A licence could cover multiple uses of the work. When issuing a licence, the Copyright Board may order to the bearer to identify the source of the work.

*Bibliothèque et Archives nationales du Québec (BAnQ), pour la reproduction et la communication au public par télécommunication de périodiques et de programmes de théâtre (Application by), 2013 CarswellNat 2591 (Cop. Bd.; 2013-05-23)*

(1) La licence autorise la reproduction des œuvres suivantes ainsi que leur communication au public par télécommunication et par d'autres méthodes (voir Annexe A pour les utilisations accordées) :

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

(7) Le titulaire doit clairement mentionner pour les œuvres utilisées la référence bibliographique selon les conventions d'usage: titre de l'œuvre, auteur, éditeur, lieu et date de publication.

(8) Le titulaire doit indiquer clairement la mention suivante: «Certaines œuvres sont utilisées en vertu d'une licence non exclusive délivrée par la Commission du droit d'auteur du Canada. Si vous croyez détenir les droits sur des œuvres reproduites sur ce site, veuillez communiquer avec la Société québécoise de gestion collective des droits de reproduction (COPIBEC)

#### Annexe A

Utilisations accordées par types d'œuvres

#### Périodiques:

- Reproduire l'œuvre sous forme numérique et la communiquer au public par télécommunication via le portail Internet de BAnQ.
- Permettre aux usagers du portail Internet de BAnQ d'utiliser l'œuvre diffusée à des fins éducatives, d'étude privée ou de recherche, à condition d'indiquer la source.
- Reproduire l'œuvre, sous quelque forme que ce soit, et la communiquer au public, par quelque moyen que ce soit, notamment dans tous médias, actuels et à venir, y compris les

médias sociaux dans le cadre d'activités ou de publications découlant des missions de BAnQ.

- Reproduire l'œuvre sous quelque forme que ce soit, à des fins non commerciales de promotion des activités mentionnées ci-dessus, et la communiquer au public, notamment dans tous médias, actuels et à venir, y compris les médias sociaux.

#### **Programmes de théâtre:**

- Reproduire l'œuvre sous forme numérique et la communiquer au public par télécommunication via le portail Internet de BAnQ, notamment dans son catalogue Iris.
- Permettre aux usagers du portail Internet de BAnQ d'utiliser l'œuvre diffusée à des fins éducatives, d'étude privée ou de recherche, à la condition d'en indiquer la source.
- Exposer et reproduire l'œuvre ou des parties de l'œuvre, sous quelque forme que ce soit, et la communiquer au public, par quelque moyen que ce soit, dans le cadre d'activités ou de publications découlant des missions de BAnQ.
- Reproduire l'œuvre ou des Parties de l'œuvre, sous quelque forme que ce soit, et la communiquer au public, par quelque moyen que ce soit, notamment dans tous médias, actuels et à venir, y compris les médias sociaux, à des fins non commerciales de promotion des activités mentionnées ci-dessus.

- **Section 77 - Owners who cannot be located**

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

*Musée de Charlevoix pour la reproduction et l'exposition d'une affiche (Application by), 2013 CarswellNat 2594 (Cop. Bd; 2013-06-10)*

1) La licence autorise la reproduction et l'exposition, à compter du 11 mai 2013, de l'œuvre suivante pour l'exposition « Fête populaires d'ici: on va avoir d'l'agrément! »:

- Festival des cantons, auteur inconnu, éditeur: Sherbrooke: Festival des cantons (entre 1974 et 1980)

2) La licence expire le 31 mai 2014. Les utilisations autorisées devront être complétées d'ici cette date.

4) Le Musée de Charlevoix versera 110\$ à la Société du droit de reproduction des auteurs, compositeurs et éditeurs au Canada (SODRAC) qui peut disposer de ce montant comme bon lui semble, pour le bénéfice général de ses membres. La SODRAC s'engage toutefois à rembourser toute personne qui établira, avant le 31 mai

2019, qu'elle détient le droitsur l'œuvre faisant l'objet de la présente licence.

- **Section 77 - Owners who cannot be located**

A licence could cover multiple uses of the work. When issuing a licence, the Copyright Board may order to the bearer to identify the source of the work. The licence could be terminated upon notice by the located owner.

*Bibliothèque et Archives nationales du Québec (BAnQ) for the reproduction and communication to the public by telecommunication of monographs (Application by), 2013 CarswellNat 3457 (Cop. Bd.; 2013-08-21)*

1. La licence autorise la reproduction des oeuvres suivantes ainsi que leur communication au public par télécommunication et par d'autres méthodes (voir Annexe A pour les utilisations accordées) [...] La licence autorise aussi la reproduction de l'oeuvre suivante ainsi que sa communication au public par télécommunication et par d'autres méthodes (voir Annexe A pour les utilisations accordées) dans la mesure où il s'agit d'une oeuvre au sens de la Loi sur le droit d'auteur :

5. Le titulaire de la licence versera 525,00 \$ à COPIBEC pour les cinq premières oeuvres, qui peut disposer de ce montant comme bon lui semble, pour le bénéfice général de ses membres. COPIBEC s'engage toutefois à rembourser toute personne qui établira dans un délai de cinq ans suivant l'expiration de la licence à l'égard d'une oeuvre, qu'elle détient le droit d'auteur sur une ou plusieurs oeuvres faisant l'objet de la présente licence.

6. Le titulaire de la licence versera la somme de 100,00 \$, pour la sixième oeuvre, dans la mesure où il s'agit d'une oeuvre au sens de la Loi, à toute personne qui établira qu'elle détient le droit d'auteur, dans un délai de cinq ans suivant l'expiration de la licence à l'égard de l'oeuvre.

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

8. Le titulaire doit clairement mentionner pour les oeuvres utilisées la référence bibliographique selon les conventions d'usage : titre de l'oeuvre, auteur, éditeur, lieu et date de publication.

## Annexe A

### Utilisations accordées

- Reproduire l'oeuvre sous forme numérique et la communiquer au public par télécommunication via le portail Internet de BAnQ;
- Permettre aux usagers du portail Internet de BAnQ d'utiliser l'oeuvre diffusée à des fins éducatives, d'étude privée ou de recherche, à condition d'indiquer la source;
- Reproduire l'oeuvre ou une ou plusieurs pages de l'oeuvre, sous quelque forme que ce soit, et la ou les communiquer au public, par quelque moyen que ce soit, notamment dans tous médias, actuels et à venir, y compris les médias sociaux dans le cadre d'activités ou de publications découlant des missions de BAnQ;
- Reproduire l'oeuvre sous quelque forme que ce soit, à des fins non commerciales de promotion des activités mentionnées ci-dessus, et la communiquer au public, notamment dans tous médias, actuels et à venir, y compris les médias sociaux.
  - La licence autorise la reproduction des oeuvres suivantes ainsi que leur communication au public par télécommunication et par d'autres méthodes (voir Annexe A pour les utilisations accordées) :  
[Our underlinings.]

- **Section 77 - Owners who cannot be located**

The bearer could be considered as a distributor. The licence could be terminated upon notice by the located owner.

*Jenkins for the reproduction and communication to the public by telecommunication of a film (Application by Rebecca), 2013 CarswellNat 3468 (Cop. Bd.; 2013-08-21)*

1. The licence authorizes the reproduction and communication to the public by telecommunication of a film entitled "Bye Bye Blues" for distribution through various means including, but not limited to, television (free, pay, cable, satellite, etc.) and Internet, in Canada.

5. For the purpose of this licence, the licensee is considered as the distributor of the film.

The licensee will pay the Producers Audiovisual Collective of Canada (PACC) a distribution fee of 50 percent of the licensee's gross receipts resulting from the distribution of the film. The licensee will also pay PACC a \$5,000 fully-recoupable advance; the advance is to be recouped out of the distribution fee otherwise payable to PACC.

The licensee will be responsible for negotiating and paying residuals.



Distribution expenses, including residuals, will be borne by the licensee.

Accounting statements and payment will be made annually to PACC within 60 days of the end of each calendar year.

PACC may audit the licensee's records at any time during the term of the licence and for two years following the expiry of the licence. The right to conduct an audit will be transferable to the copyright owner if located.

The licensee may enter into an agreement with a sub-distributor provided it does so under the same terms [sic] as those set out in the licence. The licensee will impose on any such sub-distributor the obligations that are incumbent to the licensee pursuant to the licence; the licensee will remain liable to PACC. The licensee will instruct its sub-distributor to direct accounting statements and payments directly to PACC. Any costs related to the entering into of a sub-distribution agreement will be borne by the licensee; for more clarity, there will be no deduction from PACC's distribution fee as a result of a sub-distribution agreement.

PACC may dispose of those amounts as it sees fit for the general benefit of its members. PACC undertakes, however, to reimburse the amount to any person who establishes, before August 31, 2028, ownership of copyright of the work covered by this licence.

7. 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 (5).

- **Section 79 – Definitions [Private copying]**

A blank CD is an audio recording medium subject to a private copy levy but microSD cards are not.

*Private Copying 2012, 2013 and 2014*, 112 C.P.R. (4<sup>th</sup>) 460, 2013 CarswellNat 3149, available at <http://www.cb-cda.gc.ca/decisions/2013/30082013.pdf> (Cop. Bd.; 2013-08-30)

[10] The *MicroSD Cards Exclusion Regulations* (Copyright Act) [Fn2 SOR/2012-226.] ("Regulations") were registered --and came into

force on October 18, 2012 and were published in the Canada Gazette on November 7, 2012. The Regulations exclude microSD cards from the definition of “audio recording medium” under section 79 of the *Act* from the date they came into force. As a result, microSD cards cannot be subject to a private copying levy from that date.

[22] We find therefore that a CD remains an audio recording medium as defined in section 79 of the *Act*.

- **Section 83 – Filing of proposed tariffs**

A microSD card is an audio recording medium. When a proposed Tariff is filed, the Copyright Board is bound to study it, irrespective of subsequent events as a regulation.

*Private Copying 2012, 2013 and 2014*, 112 C.P.R. (4<sup>th</sup>) 460 (Cop. Bd.; 2013-08-30)

[48] [...] Based on the record as it now stands, and without the benefit of evidence the Objectors might have filed in Phase II of these proceedings, we would conclude that a microSD card is an audio recording medium as defined in section 79 of the *Act*

[70] We disagree with RCC on the issue of jurisdiction, for the reasons CPCC offered. The Board remains seized of the current matter as it relates to microSD cards for the period from January 1 to October 17, 2012. We must now decide the matter.

[71] Whether the right to collect a levy vests only once a tariff is certified is irrelevant. This is not the right in issue here. What is at play is CPCC’s right to request that the Board decide whether or not it is entitled to a tariff. That right vested when CPCC filed a timely proposed statement of royalties.

[72] Pursuant to subsection 83(8) of the *Act*, the Board is required, upon concluding its consideration of a proposed private copying tariff, to set a levy and its related terms and conditions, to vary the tariff accordingly and to certify the tariff as the approved tariff. Subsection 83(9) also provides that, in exercising this function within the private copying regime, the Board “shall satisfy itself that the levies are fair and equitable

**[73] In this instance, dealing with microSD cards raises unique issues. These issues stem not from the content of the tariff proposal. They arise as a result of a single event triggered not**

by the Board or by any party, but by an agent external to this process: the authority that made the *Regulations*. In saying this, we look at the *Regulations* not as a legal instrument, but as a fact or event. This single event amplifies the relative importance and practical repercussions of both the process the Board would be required to follow before it could certify a tariff and the measures necessary to implement such a tariff.

- **Section 83 – Filing of proposed tariffs**

The Board is an economic regulator. When a proposed Tariff is filed, the Board shall study it but has discretion as to its certification. A Tariff can be short-lived and retroactive but must be fair and equitable.

*Private Copying 2012, 2013 and 2014*, available at <http://www.cb-cda.gc.ca/decisions/2013/30082013.pdf> (Cop. Bd.; 2013-08-30)

[85] Dealing with the costs and disruptions linked to establishing accounting and reporting mechanisms and structures is an inherent reality to all tariffs. However, in the case at hand, this reality is exacerbated by many factors. This is a tariff of first impression. The period over which to amortize associated costs is both very short and already past. It is very difficult to justify such disruptions when the tariff is short-lived, likely relatively modest and entirely retroactive.

[86] **Private parties are free to litigate even when this makes no economic sense. An application before the Board is not a civil cause of action. We must balance competing interests, some of which are not represented. As an economic regulator, we must heed economic considerations.** Any “friction” that may result from the retroactive collection of royalties is a relevant consideration in deciding whether it is possible to certify a fair and equitable tariff in the first place. A new tariff (or a rate increase) can be phased in to make it more acceptable. A completely retroactive tariff cannot be phased in.

[87] **We agree with CPCC that the decision not to collect royalties retroactively should rest with CPCC once a tariff is certified. This does not affect what we can or should do if we conclude that any tariff we may certify would be not fair and equitable. In this instance, the tariff would be short-lived and totally retroactive.** The difficulties and disruptions resulting from such a measure would not be simply greater than as in any past occurrence in the private copying market; they would be of a different order and nature.

[89] When taken as a whole, the circumstances of this case make any attempt at certifying a fair and equitable tariff for microSD cards impossible. **The determination, implementation and enforcement of any potential tariff will almost inevitably be largely futile, certainly unfair and considerably disruptive.** This is an exceptional situation, one that lends itself to the proper exercise of our discretion to refuse to certify a tariff not because of a lack of evidence, but because any tariff we would set would be, under these very special circumstances, manifestly unfair and inequitable.

- **Section 83 – Filing of proposed tariffs**

Foreign practices shall be viewed with caution.

*Private Copying 2012, 2013 and 2014*, available at <http://www.cb-cda.gc.ca/decisions/2013/30082013.pdf> (Cop. Bd.; 2013-08-30)

[43] The Board will continue its practice of viewing foreign rates with caution. [Fn22 SOCAN Tariff 24 (Ringtones), 2003-2005 (18 August 2006) Copyright Board Decision at para. 86] This example demonstrates why. We do not know how these rates were set. We know that only four are higher than the current Canadian rate. We also know that the rates vary by a factor of as much as 34 to 1. We do not know whether prices at the lower end were influenced by market or other (political) considerations that do not exist in Canada: for example, the imposition of levies on media (e.g. DVDs) that are not levied in Canada or on devices, which are not subject to the Canadian regime, may result in the overall burden of the levy being distributed more widely. **It would be imprudent to take those prices into account in setting the levy without knowing considerably more about them**

[45] The current levy is a reality in the marketplace. Leaving it unchanged both provides rights holders with some compensation until none is payable any longer, while avoiding some of the perverse effects that too rigid a calculation based on actual consumption may have on the pricing of a good at the end of its life cycle.

- **Section 83– Filing of proposed tariffs**

Tariffs could be certified for distinct years even if identical as their content.

*Private Copying 2012, 2013 and 2014*, available at <http://www.cb-cda.gc.ca/decisions/2013/30082013.pdf> (Cop. Bd.; 2013-08-30)

[96] On June 25, 2013, pursuant to paragraph 83(13)(b) of the *Act*, the Board made the Regulations Establishing the Periods Within Which Eligible Authors, Eligible Performers and Eligible Makers not Represented by Collective Societies Can Claim Private Copying Remuneration. [Fn29 SOR/2013-143, *Canada Gazette* Part II, Vol. 147, No. 15 at p. 199]. As required by this paragraph, the period within which an eligible rights holder who has not authorized a collective to file a proposed tariff is entitled to be paid a share of private copying royalties begins when a tariff ceases to be effective. For reasons outlined in the Regulatory Impact Analysis Statement (RIAS) published with the Regulations [Fn 30 *ibid.* at pp. 2000-2001.], CPCC is of the view that this requirement unduly complicates the allocation of royalties collected pursuant to a multi-year tariff. **To avoid such complications, and as the Board had indicated in the RIAS, we certify for 2012, 2013 and 2014 tariffs that are separate, though identical in all respects except for their effective period.**

- **Section 84 – Distribution by collecting body**

The Board is bound to apportion the levies.

*Private Copying 2012, 2013 and 2014*, available at <http://www.cb-cda.gc.ca/decisions/2013/30082013.pdf> (Cop. Bd.; 2013-08-30)

[95] Section 84 of the *Act* requires that we apportion the levy among authors, performers and makers. [...]

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

Copyright law is statutory.

*Tremblay v. Orio Canada Inc.*, 2013 CarswellNat 1145 (F.C.; 2013-01-31) Boivin J. [affd. 2013 F225 (F.C.A.; 2013-09-25)]

[27] First, the Court notes that **copyright law is statutory; its rights and remedies are therefore found in the Act** (*CCH Canadian Ltd. v Law Society of Upper Canada* 2004 SCC 13 at para 9, [2004] 1 SCR 339 [*CCH*]). Although it is possible to register one's copyright, it is not necessary to do so in Canada: the author merely needs to be Canadian, or a citizen of any other signatory of the *Berne Convention for the Protection of Literary and Artistic Works* of September 9, 1886, and the work needs to have been first published in such a country, if publication is relevant.

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

Copyright is statute law.

*Mobin v. Stephens*, 2013 ONCJ 53(Ont. Sup. Ct.; 2013-02-06) Jones J.

[41] An individual who composes, performs or records an original musical work has a copyright in such work. “Copyright” is created by statute. **Thus, a reference to “copyright” refers to the rights conferred by the legislation.** [Fn2 *Copyright Act*, R.S.C. 1985, c. C-42 in Canada and the *U.S. Copyright Act*, Title 17 of the United States Code.] **A copyright is an incorporeal form of property.** [Fn3 Sanderson, P., *Musicians and the Law in Canada – 3<sup>rd</sup> Ed.*, Carswell, Toronto, 2000, p.3.] **It has a conceptual, non-physical existence, and is comprised of the bundle of statutory rights that accrue to the creator of an original work.**

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

The Crown is not excluded from the application of the *Copyright Act*.

*Manitoba v. Canadian Copyright Licensing Agency (Access Copyright)*, 112 C.P.R. (4th) 1 (F.C.A.; 2013-04-03) Gauthier J. [affirming 2012 CarswellNat 609 (Cop. Bd.; 2012-03-15) and 98 C.P.R. (4th) 21 (Cop. Bd.; 2012-01-15)]

[34] Having carefully examined the wording of section 12 in its overall context, including the structure of the *Act*, its legislative history and evolution, and other provisions, such as section 89, I agree with the Board that the words “[w]ithout prejudice to any right or privilege of the Crown” set out in section 12 are intended to refer to and preserve the Crown’s rights and privileges of the same general nature as copyright that may not fall within the meaning of the rest of this provision. **These rights and privileges could otherwise be excluded by the general principle set out in section 89 which provides that no person is entitled to copyright otherwise than under and in accordance with the *Act* or any other Act of Parliament.**

[47] **In my view, the references in the *Act* to very strict conditions, to tariffs fixed by the Board, to the consent of the copyright owners, and to the power of the court when the defendant is an “educational institution”, including a federal or provincial government department, all point to only one logical and plausible conclusion as to the intent of Parliament: the Crown is bound.**

## And to conclude

*R. v. Dulac*, 2013 QCCQ 8200 (Que. Ct. – Crim. Div.; 2013-07-19) Charest J.

[217] En terminant, j'ajouterai que l'on ne peut pas tout faire ou tout dire au nom de la liberté d'expression et de la création artistique: ce qui est acceptable et compréhensible sur le plan artistique ne l'est pas toujours dans une société démocratique.

[218] Les normes peuvent être parfois différentes et on doit concevoir que l'expérience artistique a ses limites.



**ROBIC, LLP**  
www.robic.ca  
info@robic.com

**MONTREAL**  
1001 Square-Victoria - Bloc E - 8<sup>th</sup> Floor  
Montreal, Quebec, Canada H2Z 2B7  
Tel.: +1 514 987-6242 Fax: +1 514 845-7874

**QUEBEC**  
2828 Laurier Boulevard, Tower 1, Suite 925  
Quebec, Quebec, Canada G1V 0B9  
Tel.: +1 418 653-1888 Fax.: +1 418 653-0006