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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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THE FOOTBALL ASSOCIATION PREMIER :
LEAGUE LIMITED, BOURNE CO. (together :
with its affiliate MURBO MUSIC PUBLISHING, :
INC.), CHERRY LANE MUSIC PUBLISHING :
COMPANY, INC., CAL IV ENTERTAINMENT :
LLC, ROBERT TUR d/b/a LOS ANGELES :
NEWS SERVICE, NATIONAL MUSIC :
PUBLISHERS' ASSOCIATION, THE :
RODGERS & HAMMERSTEIN :
ORGANIZATION, STAGE THREE MUSIC :
(US), INC., EDWARD B. MARKS MUSIC :
COMPANY, FREDDY BIENSTOCK MUSIC :
COMPANY d/b/a BIENSTOCK PUBLISHING :
COMPANY, ALLEY MUSIC CORPORATION, :
X-RAY DOG MUSIC, INC., FÉDÉRATION :
FRANÇAISE DE TENNIS, THE MUSIC FORCE :
MEDIA GROUP LLC, THE MUSIC FORCE :
LLC, and SIN-DROME RECORDS, LTD. on :
behalf of themselves and all others similarly :
situated, :

Plaintiffs, :

v. :

YOUTUBE, INC., YOUTUBE, LLC and :
GOOGLE, INC., :

Defendants. :

----- X

ECF Case

07 Civ. 3582 (LLS)

**APPENDIX TO CLASS
PLAINTIFFS' OPPOSITION TO
YOUTUBE'S MOTION FOR
JUDGMENT ON THE
PLEADINGS REGARDING
CERTAIN MONETARY RELIEF
AVAILABLE FOR
UNREGISTERED "FOREIGN"
WORKS**

EXHIBIT 1



CANADA

OFFICE CONSOLIDATION

CODIFICATION ADMINISTRATIVE

Copyright Act

Loi sur le droit d'auteur

as if those copies or plates were the property of the copyright owner.

Powers of court

- (2) On application by
- (a) a person from whom the copyright owner has recovered possession of copies or plates referred to in subsection (1),
- (b) a person against whom proceedings for seizure before judgment of copies or plates referred to in subsection (1) have been taken, or
- (c) any other person who has an interest in those copies or plates,

a court may order that those copies or plates be destroyed, or may make any other order that it considers appropriate in the circumstances.

Pouvoirs du tribunal

- (2) Un tribunal peut, sur demande de la personne qui avait la possession des exemplaires et planches visés au paragraphe (1), de la personne contre qui des procédures de saisie avant jugement ont été engagées en vertu du paragraphe (1) ou de toute autre personne ayant un intérêt dans ceux-ci, ordonner la destruction de ces exemplaires ou planches ou rendre toute autre ordonnance qu'il estime indiquée.

Notice to interested persons

- (3) Before making an order under subsection (2), the court shall direct that notice be given to any person who has an interest in the copies or plates in question, unless the court is of the opinion that the interests of justice do not require such notice to be given.

Autres personnes intéressées

- (3) Le tribunal doit, avant de rendre l'ordonnance visée au paragraphe (2), en faire donner préavis aux personnes ayant un intérêt dans les exemplaires ou les planches, sauf s'il estime que l'intérêt de la justice ne l'exige pas.

Circumstances court to consider

- (4) In making an order under subsection (2), the court shall have regard to all the circumstances, including

- (a) the proportion, importance and value of the infringing copy or plate, as compared to the substrate or carrier embodying it; and
- (b) the extent to which the infringing copy or plate is severable from, or a distinct part of, the substrate or carrier embodying it.

Facteurs

- (4) Le tribunal doit, lorsqu'il rend une ordonnance visée au paragraphe (2), tenir compte notamment des facteurs suivants :

- a) la proportion que représente l'exemplaire contrefait ou la planche par rapport au support dans lequel ils sont incorporés, de même que leur valeur et leur importance par rapport à ce support;
- b) la mesure dans laquelle cet exemplaire ou cette planche peut être extrait de ce support ou en constitue une partie distincte.

Limitation

- (5) Nothing in this Act entitles the copyright owner to damages in respect of the possession or conversion of the infringing copies or plates.

R.S., 1985, c. C-42, s. 38; 1997, c. 24, s. 20.

Limite

- (5) La présente loi n'a pas pour effet de permettre au titulaire du droit d'auteur de recouvrer des dommages-intérêts en ce qui touche la possession des exemplaires ou des planches visés au paragraphe (1) ou l'usurpation du droit de propriété sur ceux-ci.

L.R. (1985), ch. C-42, art. 38; 1997, ch. 24, art. 20.

Statutory damages

- 38.1** (1) Subject to this section, a copyright owner may elect, at any time before final judgment is rendered, to recover, instead of damages and profits referred to in subsection 35(1), an award of statutory damages for all infringements involved in the proceedings, with respect to any

Dommages-intérêts préétablis

- 38.1** (1) Sous réserve du présent article, le titulaire du droit d'auteur, en sa qualité de demandeur, peut, avant le jugement ou l'ordonnance qui met fin au litige, choisir de recouvrer, au lieu des dommages-intérêts et des profits visés au paragraphe 35(1), des dommages-intérêts prééta-

one work or other subject-matter, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally, in a sum of not less than \$500 or more than \$20,000 as the court considers just.

Where defendant unaware of infringement

(2) Where a copyright owner has made an election under subsection (1) and the defendant satisfies the court that the defendant was not aware and had no reasonable grounds to believe that the defendant had infringed copyright, the court may reduce the amount of the award to less than \$500, but not less than \$200.

Special case

(3) Where

(a) there is more than one work or other subject-matter in a single medium, and

(b) the awarding of even the minimum amount referred to in subsection (1) or (2) would result in a total award that, in the court's opinion, is grossly out of proportion to the infringement,

the court may award, with respect to each work or other subject-matter, such lower amount than \$500 or \$200, as the case may be, as the court considers just.

Collective societies

(4) Where the defendant has not paid applicable royalties, a collective society referred to in section 67 may only make an election under this section to recover, in lieu of any other remedy of a monetary nature provided by this Act, an award of statutory damages in a sum of not less than three and not more than ten times the amount of the applicable royalties, as the court considers just.

Factors to consider

(5) In exercising its discretion under subsections (1) to (4), the court shall consider all relevant factors, including

(a) the good faith or bad faith of the defendant;

(b) the conduct of the parties before and during the proceedings; and

blis dont le montant, d'au moins 500 \$ et d'au plus 20 000 \$, est déterminé selon ce que le tribunal estime équitable en l'occurrence, pour toutes les violations — relatives à une œuvre donnée ou à un autre objet donné du droit d'auteur — reprochées en l'instance à un même défendeur ou à plusieurs défendeurs solidairement responsables.

(2) Dans les cas où le défendeur convainc le tribunal qu'il ne savait pas et n'avait aucun motif raisonnable de croire qu'il avait violé le droit d'auteur, le tribunal peut réduire le montant des dommages-intérêts préétablis jusqu'à 200 \$.

(3) Dans les cas où plus d'une œuvre ou d'un autre objet du droit d'auteur sont incorporés dans un même support matériel, le tribunal peut, selon ce qu'il estime équitable en l'occurrence, réduire, à l'égard de chaque œuvre ou autre objet du droit d'auteur, le montant minimal visé au paragraphe (1) ou (2), selon le cas, s'il est d'avis que même s'il accordait le montant minimal de dommages-intérêts préétablis le montant total de ces dommages-intérêts serait extrêmement disproportionné à la violation.

(4) Si le défendeur n'a pas payé les redevances applicables en l'espèce, la société de gestion visée à l'article 67 — au lieu de se prévaloir de tout autre recours en vue d'obtenir un redressement pécuniaire prévu par la présente loi — ne peut, aux termes du présent article, que choisir de recouvrer des dommages-intérêts préétablis dont le montant, de trois à dix fois le montant de ces redevances, est déterminé selon ce que le tribunal estime équitable en l'occurrence.

(5) Lorsqu'il rend une décision relativement aux paragraphes (1) à (4), le tribunal tient compte notamment des facteurs suivants :

a) la bonne ou mauvaise foi du défendeur;

b) le comportement des parties avant l'instance et au cours de celle-ci;

Cas particuliers

Cas particuliers

Société de gestion

Facteurs

	(c) the need to deter other infringements of the copyright in question.	c) la nécessité de créer un effet dissuasif à l'égard de violations éventuelles du droit d'auteur en question.	
No award	(6) No statutory damages may be awarded against (a) an educational institution or a person acting under its authority that has committed an act referred to in section 29.6 or 29.7 and has not paid any royalties or complied with any terms and conditions fixed under this Act in relation to the commission of the act; (b) an educational institution, library, archive or museum that is sued in the circumstances referred to in section 38.2; or (c) a person who infringes copyright under paragraph 27(2)(e) or section 27.1, where the copy in question was made with the consent of the copyright owner in the country where the copy was made.	(6) Ne peuvent être condamnés aux dommages-intérêts préétablis : a) l'établissement d'enseignement ou la personne agissant sous l'autorité de celui-ci qui a fait les actes visés aux articles 29.6 ou 29.7 sans acquitter les redevances ou sans observer les modalités afférentes fixées sous le régime de la présente loi; b) l'établissement d'enseignement, la bibliothèque, le musée ou le service d'archives, selon le cas, qui est poursuivi dans les circonstances prévues à l'article 38.2; c) la personne qui commet la violation visée à l'alinéa 27(2)e) ou à l'article 27.1 dans les cas où la reproduction en cause a été faite avec le consentement du titulaire du droit d'auteur dans le pays de production.	Cas où les dommages-intérêts préétablis ne peuvent être accordés
Exemplary or punitive damages not affected	(7) An election under subsection (1) does not affect any right that the copyright owner may have to exemplary or punitive damages. 1997, c. 24, s. 20.	(7) Le choix fait par le demandeur en vertu du paragraphe (1) n'a pas pour effet de supprimer le droit de celui-ci, le cas échéant, à des dommages-intérêts exemplaires ou punitifs. 1997, ch. 24, art. 20.	Dommages-intérêts exemplaires
Maximum amount that may be recovered	38.2 (1) An owner of copyright in a work who has not authorized a collective society to authorize its reprographic reproduction may recover, in proceedings against an educational institution, library, archive or museum that has reproduced the work, a maximum amount equal to the amount of royalties that would have been payable to the society in respect of the reprographic reproduction, if it were authorized, either (a) under any agreement entered into with the collective society; or (b) under a tariff certified by the Board pursuant to section 70.15.	38.2 (1) Le titulaire du droit d'auteur sur une œuvre qui n'a pas habilité une société de gestion à autoriser la reproduction par reprographie de cette œuvre, ne peut, dans le cas où il poursuit un établissement d'enseignement, une bibliothèque, un musée ou un service d'archives, selon le cas, pour avoir fait une telle reproduction, recouvrer un montant supérieur à celui qui aurait été payable à la société de gestion si, d'une part, il l'avait ainsi habilitée, et si, d'autre part, la partie poursuivie : a) soit avait conclu avec une société de gestion une entente concernant la reprographie; b) soit était assujettie au paiement de redevances pour la reprographie prévu par le tarif homologué en vertu de l'article 70.15.	Dommages-intérêts maximaux
Agreements with more than one collective society	(2) Where agreements respecting reprographic reproduction have been signed with more than one collective society or where more than one	(2) Si l'entente est conclue séparément avec plusieurs sociétés de gestion ou que les redevances sont payables conformément à différents	Cas de plusieurs ententes ou tarifs

thereof and perform such other duties as are assigned to him by the Governor in Council.

R.S., c. C-30, s. 35.

faïres de ce Bureau et exerce les autres fonctions que lui attribue le gouverneur en conseil.

S.R., ch. C-30, art. 35.

Register to be evidence

53. (1) The Register of Copyrights is evidence of the particulars entered in it, and a copy of an entry in the Register is evidence of the particulars of the entry if it is certified by the Commissioner of Patents, the Registrar of Copyrights or an officer, clerk or employee of the Copyright Office as a true copy.

53. (1) Le registre des droits d'auteur, de même que la copie d'inscriptions faites dans ce registre, certifiée conforme par le commissaire aux brevets, le registraire des droits d'auteur ou tout membre du personnel du Bureau du droit d'auteur, fait foi de son contenu.

Preuve

Owner of copyright

(2) A certificate of registration of copyright is evidence that the copyright subsists and that the person registered is the owner of the copyright.

(2) Le certificat d'enregistrement du droit d'auteur constitue la preuve de l'existence du droit d'auteur et du fait que la personne figurant à l'enregistrement en est le titulaire.

Titulaire du droit d'auteur

Assignee

(2.1) A certificate of registration of an assignment of copyright is evidence that the right recorded on the certificate has been assigned and that the assignee registered is the owner of that right.

(2.1) Le certificat d'enregistrement de la cession d'un droit d'auteur constitue la preuve que le droit qui y est inscrit a été cédé et que le cessionnaire figurant à l'enregistrement en est le titulaire.

Cessionnaire

Licensee

(2.2) A certificate of registration of a licence granting an interest in a copyright is evidence that the interest recorded on the certificate has been granted and that the licensee registered is the holder of that interest.

(2.2) Le certificat d'enregistrement de la licence accordant un intérêt dans un droit d'auteur constitue la preuve que l'intérêt qui y est inscrit a été concédé par licence et que le titulaire de la licence figurant au certificat d'enregistrement détient cet intérêt.

Titulaire de licence

Admissibility

(3) A certified copy or certificate appearing to have been issued under this section is admissible in all courts without proof of the signature or official character of the person appearing to have signed it.

R.S., 1985, c. C-42, s. 53; 1992, c. 1, s. 49; 1993, c. 15, s. 5; 1997, c. 24, s. 30.

(3) Les copies certifiées conformes et les certificats censés être délivrés selon les paragraphes (1) ou (2) sont admissibles en preuve sans qu'il soit nécessaire de prouver l'authenticité de la signature qui y est apposée ou la qualité officielle du signataire.

L.R. (1985), ch. C-42, art. 53; 1992, ch. 1, art. 49; 1993, ch. 15, art. 5; 1997, ch. 24, art. 30.

Admissibilité en preuve

REGISTRATION

Register of Copyrights

54. (1) The Minister shall cause to be kept at the Copyright Office a register to be called the Register of Copyrights in which may be entered

(a) the names or titles of works and of other subject-matter in which copyright subsists;

(b) the names and addresses of authors, performers, makers of sound recordings, broadcasters, owners of copyright, assignees of copyright, and persons to whom an interest in copyright has been granted by licence; and

ENREGISTREMENT

54. (1) Le ministre fait tenir, au Bureau du droit d'auteur, un registre des droits d'auteur pour l'inscription :

a) des noms ou titres des œuvres ou autres objets du droit d'auteur;

b) des noms et adresses des auteurs, artistes-interprètes, producteurs d'enregistrements sonores, radiodiffuseurs et autres titulaires de droit d'auteur, des cessionnaires de droit d'auteur et des titulaires de licences accordant un intérêt dans un droit d'auteur;

Registre des droits d'auteur

	(c) such other particulars as may be prescribed by regulation.	c) de tous autres détails qui peuvent être prévus par règlement.	
	(2) [Repealed, 1997, c. 24, s. 31]	(2) [Abrogé, 1997, ch. 24, art. 31]	
Single entry sufficient	(3) In the case of an encyclopaedia, newspaper, review, magazine or other periodical work, or work published in a series of books or parts, it is not necessary to make a separate entry for each number or part, but a single entry for the whole work is sufficient.	(3) Dans le cas d'une encyclopédie, d'un journal, revue, magazine ou autre publication périodique, ou d'une œuvre publiée en une série de tomes ou de volumes, il n'est pas nécessaire de faire une inscription distincte pour chaque numéro ou tome, mais une seule inscription suffit pour l'œuvre entière.	Une seule inscription suffit
Indices	(4) There shall also be kept at the Copyright Office such indices of the Register established under this section as may be prescribed by regulation.	(4) Sont aussi établis au Bureau du droit d'auteur, pour le registre tenu en vertu du présent article, les index prévus par règlement.	Index
Inspection and extracts	(5) The Register and indices established under this section shall at all reasonable times be open to inspection, and any person is entitled to make copies of or take extracts from the Register.	(5) Le registre et les index doivent être, à toute heure convenable, accessibles au public, qui peut les reproduire en tout ou en partie.	Accès
Former registration effective	(6) Any registration made under the <i>Copyright Act</i> , chapter 70 of the Revised Statutes of Canada, 1906, has the same force and effect as if made under this Act.	(6) Tout enregistrement effectué en vertu de la <i>Loi des droits d'auteur</i> , chapitre 70 des Statuts révisés du Canada de 1906, a la même valeur et le même effet que s'il était effectué en vertu de la présente loi.	Ancien enregistrement effectif
Subsisting copyright	(7) Any work in which copyright, operative in Canada, subsisted immediately before January 1, 1924 is registrable under this Act. R.S., 1985, c. C-42, s. 54; 1992, c. 1, s. 50; 1997, c. 24, s. 31.	(7) Est enregistrable, aux termes de la présente loi, toute œuvre sur laquelle existait un droit d'auteur, en vigueur au Canada, immédiatement avant le 1 ^{er} janvier 1924. L.R. (1985), ch. C-42, art. 54; 1992, ch. 1, art. 50; 1997, ch. 24, art. 31.	Droit d'auteur existant
Copyright in works	55. (1) Application for the registration of a copyright in a work may be made by or on behalf of the author of the work, the owner of the copyright in the work, an assignee of the copyright, or a person to whom an interest in the copyright has been granted by licence.	55. (1) La demande d'enregistrement d'un droit d'auteur sur une œuvre peut être faite par l'auteur, le titulaire ou le cessionnaire du droit d'auteur, ou le titulaire d'une licence accordant un intérêt dans ce droit, ou en leur nom.	Œuvres
Application for registration	(2) An application under subsection (1) must be filed with the Copyright Office, be accompanied by the fee prescribed by or determined under the regulations, and contain the following information: (a) the name and address of the owner of the copyright in the work; (b) a declaration that the applicant is the author of the work, the owner of the copyright in the work, an assignee of the copyright, or a	(2) Elle doit être déposée au Bureau du droit d'auteur avec la taxe dont le montant est fixé par les règlements ou déterminé en conformité avec ceux-ci, et comporter les renseignements suivants : a) les nom et adresse du titulaire du droit d'auteur; b) une déclaration précisant que le demandeur est l'auteur, le titulaire ou le cessionnaire de	Demande d'enregistrement

person to whom an interest in the copyright has been granted by licence;

(c) the category of the work;

(d) the title of the work;

(e) the name of the author and, if the author is dead, the date of the author's death, if known;

(f) in the case of a published work, the date and place of the first publication; and

(g) any additional information prescribed by regulation.

R.S., 1985, c. C-42, s. 55; 1997, c. 24, s. 32.

Copyright in
subject-matter
other than works

56. (1) Application for the registration of a copyright in subject-matter other than a work may be made by or on behalf of the owner of the copyright in the subject-matter, an assignee of the copyright, or a person to whom an interest in the copyright has been granted by licence.

Application for
registration

(2) An application under subsection (1) must be filed with the Copyright Office, be accompanied by the fee prescribed by or determined under the regulations, and contain the following information:

(a) the name and address of the owner of the copyright in the subject-matter;

(b) a declaration that the applicant is the owner of the copyright in the subject-matter, an assignee of the copyright, or a person to whom an interest in the copyright has been granted by licence;

(c) whether the subject-matter is a performer's performance, a sound recording or a communication signal;

(d) the title, if any, of the subject-matter;

(e) the date of

(i) in the case of a performer's performance, its first fixation in a sound recording or, if it is not fixed in a sound recording, its first performance,

(ii) in the case of a sound recording, the first fixation, or

(iii) in the case of a communication signal, its broadcast; and

ce droit ou le titulaire d'une licence accordant un intérêt dans celui-ci;

c) la catégorie à laquelle appartient l'œuvre;

d) le titre de l'œuvre;

e) le nom de l'auteur et, s'il est décédé, la date de son décès si elle est connue;

f) dans le cas d'une œuvre publiée, la date et le lieu de la première publication;

g) tout renseignement supplémentaire prévu par règlement.

L.R. (1985), ch. C-42, art. 55; 1997, ch. 24, art. 32.

Autres objets du
droit d'auteur

56. (1) La demande d'enregistrement d'un droit d'auteur sur une prestation, un enregistrement sonore ou un signal de communication peut être faite par le titulaire ou le cessionnaire du droit d'auteur, ou le titulaire d'une licence accordant un intérêt dans ce droit, ou en leur nom.

Demande
d'enregistrement

(2) Elle doit être déposée au Bureau du droit d'auteur avec la taxe dont le montant est fixé par les règlements ou déterminé en conformité avec ceux-ci, et comporter les renseignements suivants :

a) les nom et adresse du titulaire du droit d'auteur;

b) une déclaration précisant que le demandeur est le titulaire ou le cessionnaire de ce droit, ou le titulaire d'une licence accordant un intérêt dans celui-ci;

c) l'objet du droit d'auteur;

d) son titre, s'il y a lieu;

e) la date de la première fixation d'une prestation au moyen d'un enregistrement sonore, ou de sa première exécution si elle n'est pas ainsi fixée, la date de la première fixation dans le cas de l'enregistrement sonore et la date de l'émission dans le cas du signal de communication;

f) tout renseignement supplémentaire prévu par règlement.

L.R. (1985), ch. C-42, art. 56; 1993, ch. 15, art. 6; 1997, ch. 24, art. 32.

(f) any additional information prescribed by regulation.

R.S., 1985, c. C-42, s. 56; 1993, c. 15, s. 6; 1997, c. 24, s. 32.

Recovery of damages

56.1 Where a person purports to have the authority to apply for the registration of a copyright under section 55 or 56 on behalf of another person, any damage caused by a fraudulent or erroneous assumption of such authority is recoverable in any court of competent jurisdiction.

1997, c. 24, s. 32.

Registration of assignment or licence

57. (1) The Registrar of Copyrights shall register an assignment of copyright, or a licence granting an interest in a copyright, on being furnished with

(a) the original instrument or a certified copy of it, or other evidence satisfactory to the Registrar of the assignment or licence; and

(b) the fee prescribed by or determined under the regulations.

(2) [Repealed, 1992, c. 1, s. 51]

When assignment or licence is void

(3) Any assignment of copyright, or any licence granting an interest in a copyright, shall be adjudged void against any subsequent assignee or licensee for valuable consideration without actual notice, unless the prior assignment or licence is registered in the manner prescribed by this Act before the registering of the instrument under which the subsequent assignee or licensee claims.

Rectification of Register by the Court

(4) The Federal Court may, on application of the Registrar of Copyrights or of any interested person, order the rectification of the Register of Copyrights by

(a) the making of any entry wrongly omitted to be made in the Register,

(b) the expunging of any entry wrongly made in or remaining on the Register, or

(c) the correction of any error or defect in the Register,

and any rectification of the Register under this subsection shall be retroactive from such date as the Court may order.

56.1 Tout dommage causé par erreur ou par l'action frauduleuse d'une personne qui prétend pouvoir au nom de l'une des personnes visées aux articles 55 ou 56 faire une demande d'enregistrement peut être recouvré devant un tribunal compétent.

1997, ch. 24, art. 32.

Recouvrement

57. (1) Le registraire des droits d'auteur enregistre, sur production du document original ou d'une copie certifiée conforme ou de toute autre preuve qu'il estime satisfaisante et sur paiement de la taxe dont le montant est fixé par les règlements ou déterminé conformément à ceux-ci, l'acte de cession d'un droit d'auteur ou la licence accordant un intérêt dans ce droit.

Enregistrement d'une cession ou d'une licence

(2) [Abrogé, 1992, ch. 1, art. 51]

(3) Tout acte de cession d'un droit d'auteur ou toute licence concédant un intérêt dans un droit d'auteur doit être déclaré nul à l'encontre de tout cessionnaire du droit d'auteur ou titulaire de l'intérêt concédé qui le devient subséquentement à titre onéreux sans connaissance de l'acte de cession ou licence antérieur, à moins que celui-ci n'ait été enregistré de la manière prévue par la présente loi avant l'enregistrement de l'instrument sur lequel la réclamation est fondée.

Annulation de la cession ou de la concession

(4) La Cour fédérale peut, sur demande du registraire des droits d'auteur ou de toute personne intéressée, ordonner la rectification d'un enregistrement de droit d'auteur effectué en vertu de la présente loi :

a) soit en y faisant une inscription qui a été omise du registre par erreur;

b) soit en radiant une inscription qui a été faite par erreur ou est restée dans le registre par erreur;

c) soit en corrigeant une erreur ou un défaut dans le registre.

Rectification des registres par la Cour

Pareille rectification du registre a effet rétroactif à compter de la date que peut déterminer la Cour.

EXHIBIT 2

FOX
CANADIAN LAW
OF
COPYRIGHT
AND
INDUSTRIAL DESIGNS

JOHN S. McKEOWN, B. Comm., LL.B.
of the Ontario Bar

THIRD EDITION

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misconduct of the defendant so outrageous that punitive damages are rationally required to act as deterrence?’

16. STATUTORY DAMAGES

(a) General

Section 38.1,⁴³¹ in force October 1, 1999, was added to the Act by *An Act to Amend the Copyright Act*.⁴³² The *Charter of Rights for Creators*⁴³³ had recommended that a system of statutory damages should be introduced. The section is similar in a number of respects to pre-existing U.S. provisions and reference will no doubt be made to U.S. case law by Canadian courts in the future.⁴³⁴

Section 38.1 provides in part that

(1) Subject to this section, a copyright owner may elect, at any time before final judgment is rendered, to recover, instead of damages and profits referred to in subsection 35(1), an award of statutory damages for all infringements involved in the proceedings, with respect to any one work or other subject-matter, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally, in a sum of not less than \$500 or more than \$20,000 as the court considers just.

(2) Where a copyright owner has made an election under subsection (1) and the defendant satisfies the court that the defendant was not aware and had no reasonable grounds to believe that the defendant had infringed copyright, the court may reduce the amount of the award to less than \$500, but not less than \$200.

(3) Where

- (a) there is more than one work or other subject-matter in a single medium, and
- (b) the awarding of even the minimum amount referred to in subsection (1) or (2) would result in a total award that, in the court's opinion, is grossly out of proportion to the infringement,

the court may award, with respect to each work or other subject-matter, such lower amount than \$500 or \$200, as the case may be, as the court considers just.

(4) Where the defendant has not paid applicable royalties, a collective society referred to in section 67 may only make an election under this section to recover, in lieu of any other remedy of a monetary nature provided by this Act, an award of statutory damages in a sum of not less than three and not more than ten times the amount of the applicable royalties, as the court considers just.

⁴³¹ S.C. 1997, c. 24, s. 20(2)-(4).

⁴³² S.C. 1997, c. 24.

⁴³³ House of Commons, Standing Committee on Communications and Culture, *A Charter of Rights for Creators* (Ottawa: Minister of Supply & Services, 1985).

⁴³⁴ See *Nimmer on Copyright* (1987), 14.04, and see Chapter 7, section 15(b)(i) concerning U.S. decisions.

(5) In exercising its discretion under subsections (1) to (4), the court shall consider all relevant factors, including

- (a) the good faith or bad faith of the defendant;
- (b) the conduct of the parties before and during the proceedings; and
- (c) the need to deter other infringements of the copyright in question.

(b) The Election

In order to seek statutory damages, a copyright owner must elect, before final judgement is rendered, to seek such a recovery instead of damages and profits referred to in subsection 35(1). Since the section does not mention actual damages the plaintiff is not obliged to present evidence concerning the actual damages it has suffered.

(c) "one work or other subject-matter"

The award of statutory damages is for all infringements involved in the proceeding with respect to "one work or other subject matter". While these words are not defined for the purposes of the section, presumably they are simply a reference to that which is protected by the Act and include a performer's performance, sound recording and a communication signal.⁴³⁵

The section does not provide any specific direction as to whether collective works or compilations are considered in their entirety or by their components. Presumably, the identity of the plaintiff will be determinative. For example, the owner of the copyright in a collective work should not be entitled to statutory damages relating to the contribution of each contributing author.

(d) The Amount of Statutory Damages

The amount of statutory damages to be awarded for the infringement of one work or other subject-matter, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally, is a sum not less than \$500 and not more than \$20,000, as the court considers just.

Presumably, the number of infringements carried out affects the court's determination of the sum between \$500 and \$20,000 awarded but is not a direct multiplier. The award is for all infringements involved in the proceedings.

It remains to be seen what effect the plaintiff's actual damages will have on the determination. Presumably, there should be some correlation between the two although the section makes no reference to actual damages.

It would seem that if the defendant copies from several different works owned by the plaintiff, the plaintiff will be entitled to one award of statutory damages for each work infringed. However, if the defendant's work infringes

⁴³⁵ For a discussion of the term "work", see *U & R Tax Services Ltd. v. H & R Block Canada Inc.* (1995), 62 C.P.R. (3d) 257 (Fed. T.D.).

various parts of the plaintiff's work which is protected by a single copyright, only one award of statutory damages should be made.⁴³⁶ To the extent that such an approach leads to awards which are out of line, adjustments may be made by the court through the exercise of its discretion.

It remains to be seen what interpretation will be given to the phrase "all infringements involved in the proceedings". The Act does not expressly preclude a plaintiff from attempting to avoid this limitation by suing the same infringer in separate actions relating to separate instances of infringement and seeking a statutory damage award in each of the actions. To avoid such a result it could be argued that the doctrine of *res judicata* should apply⁴³⁷ or that proceeding in such a fashion was an abuse of the process of the court.

The determination of the amount of statutory damages is subject to a number of express statutory considerations. First, as set out above, the court may award a sum not less than \$500 or more than \$20,000 as it considers just.

Second, subsection 38.1(5) provides that in exercising its discretion the court shall consider all of the relevant factors including (a) the good or bad faith of the defendant; (b) the conduct of the parties before and during the proceeding; and (c) the need to deter other infringements of the copyright in question.

Third, pursuant to subsection 38.1(2) where the defendant satisfies the court that it was not aware and had no reasonable grounds to believe that it had infringed copyright, the court may reduce the amount of the award to less than \$500, but not less than \$200. Unlike subsection 39(2), the defendant's ability to take advantage of this subsection is not affected by the registration of the copyright under the Act. Conversely, the plaintiff does not have to register its copyright in order to seek statutory damages.⁴³⁸ However, it may be relatively difficult for a defendant to take advantage of this subsection since it is quite similar to subsection 39(1) which has been restrictively applied by the courts.⁴³⁹

Fourth, subsection 38.1(3) allows the court, as it considers just, to award statutory damages in an amount lower than the minimum amounts proscribed under subsections 38.1(1) and 38.1(2) where:

- (a) there is more than one work or other subject-matter in a single medium, and
- (b) the awarding of even the minimum amount referred to in subsections (1) or (2), would result in a total award that, in the court's opinion, is grossly out of proportion to the infringement.

⁴³⁶ For a review of U.S. cases involving multiple infringements, see *Nimmer on Copyright* (1987), 14.04 [E] and Henley, "A Case for Statutory Damages in Canadian Copyright Law", (1995) 12 C.I.P.R. 81.

⁴³⁷ See Spencer Bower and Turner, *The Doctrine of Res Judicata*, 2nd edition at paragraph 456. and for the U.S. position, see *Nimmer on Copyright* (1987), 14.04[E][2][b].

⁴³⁸ In the U.S. registration is required.

⁴³⁹ See section 6(c)(ii) of this chapter.

EXHIBIT 3

Copyright, Designs and Patents Act 1988

1988 CHAPTER 48

Thomson Reuters (Legal) Limited.

UK Statutes Crown Copyright. Reproduced by permission of the Controller of Her Majesty's Stationery Office.

An Act to restate the law of copyright, with amendments; to make fresh provision as to the rights of performers and others in performances; to confer a design right in original designs; to amend the Registered Designs Act 1949; to make provision with respect to patent agents and trade mark agents; to confer patents and designs jurisdiction on certain county courts; to amend the law of patents; to make provision with respect to devices designed to circumvent copy-protection of works in electronic form; to make fresh provision penalising the fraudulent reception of transmissions; to make the fraudulent application or use of a trade mark an offence; to make provision for the benefit of the Hospital for Sick Children, Great Ormond Street, London; to enable financial assistance to be given to certain international bodies; and for connected purposes.

[15th November 1988]

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

PART I

COPYRIGHT

CHAPTER I

SUBSISTENCE, OWNERSHIP AND DURATION OF COPYRIGHT

Introductory

1.— Copyright and copyright works.

(1) Copyright is a property right which subsists in accordance with this Part in the following descriptions of work—

- (a) original literary, dramatic, musical or artistic works,
- (b) sound recordings, films [or broadcasts]¹ and
- (c) the typographical arrangement of published editions.

¹ Words substituted subject to the savings specified in SI 2003/2498 reg.32 by Copyright and Related Rights Regulations 2003/2498 Pt 2 reg.5(2) (October 31, 2003: substitution has effect subject to the savings specified in SI 2003/2498 reg.32)

CHAPTER VI

REMEDIES FOR INFRINGEMENT

Rights and remedies of copyright owner

96.— Infringement actionable by copyright owner.

- (1) An infringement of copyright is actionable by the copyright owner.
- (2) In an action for infringement of copyright all such relief by way of damages, injunctions, accounts or otherwise is available to the plaintiff as is available in respect of the infringement of any other property right.
- (3) This section has effect subject to the following provisions of this Chapter.

97.— Provisions as to damages in infringement action.

- (1) Where in an action for infringement of copyright it is shown that at the time of the infringement the defendant did not know, and had no reason to believe, that copyright subsisted in the work to which the action relates, the plaintiff is not entitled to damages against him, but without prejudice to any other remedy.
- (2) The court may in an action for infringement of copyright having regard to all the circumstances, and in particular to—
 - (a) the flagrancy of the infringement, and
 - (b) any benefit accruing to the defendant by reason of the infringement,award such additional damages as the justice of the case may require.

[97A Injunctions against service providers

- (1) The High Court (in Scotland, the Court of Session) shall have power to grant an injunction against a service provider, where that service provider has actual knowledge of another person using their service to infringe copyright.
- (2) In determining whether a service provider has actual knowledge for the purpose of this section, a court shall take into account all matters which appear to it in the particular circumstances to be relevant and, amongst other things, shall have regard to—
 - (a) whether a service provider has received a notice through a means of contact made available in accordance with regulation 6(1)(c) of the Electronic Commerce (EC Directive) Regulations 2002 (SI 2002/2013); and
 - (b) the extent to which any notice includes—
 - (i) the full name and address of the sender of the notice;
 - (ii) details of the infringement in question.
- (3) In this section “service provider” has the meaning given to it by regulation 2 of the Electronic Commerce (EC Directive) Regulations 2002.

EXHIBIT 4

LADDIE PRESCOTT AND VITORIA

THE MODERN
LAW OF
COPYRIGHT
AND DESIGNS

THIRD EDITION

VOLUME ONE

LADDIE PRESCOTT & VITORIA SPECK & LANE



Butterworths

Chapter 1 Bird's eye view

'You may find it in the fragments of Gregorious' and Hermogenes' codes, and in all the codes from Justinian's down to the codes of Louis and Des Eaux, - That the sweat of a man's brows, and the exsudations of a man's brains, are as much a man's own property, as the breeches upon his backside.'¹

¹ Laurence Sterne *Tristram Shandy III*, c 34 (1761); quoted Gardiner 88 LQR 507.

INTELLECTUAL PROPERTY IS A RIGHT TO STOP OTHERS FROM DOING SOMETHING, NOT A POSITIVE RIGHT TO DO IT ONESELF

1.1

The productions of a man's brains may be protected if, and to the extent that, the law will recognise that they are private property. A thing cannot be described as property unless one has a legal right to stop others from using it, either absolutely or (at any rate) on condition that a suitable payment is made. Intellectual property is thus a purely negative right, and this concept is very important. Thus, if someone owns the copyright in a film he can stop others from showing it in public but it does not in the least follow that he has the positive right to show it himself. There may be other works incorporated in his film (the story line, the music, etc) the copyright in which belongs to others ('underlying rights'). He needs the permission of those others before he can show his film, although he does not need it in order to stop third parties from showing it.

RIGHTS TO STOP USE BY PLAGIARISM (DERIVATION)

1.2

There are two kinds of intellectual property.¹ In the first kind, of which copyright is an example, the right is merely to stop others copying. They are perfectly free to go and think up a work of their own, or otherwise obtain it from some independent source, if they can. This being so, the law is usually not too concerned with the merit (ie excellence) of what is protected, since nobody is forced to copy a poor work. Even a humdrum business letter gets copyright.² Nor does the law require registration of the right or vetting by a Patent Office. Thus a copyright springs into existence as soon as the work is written down or otherwise recorded in some reasonably permanent form ('fixated'). But, since thoughts multiply infinitely by travelling from mind to mind where they mingle with others and beget offspring of uncertain paternity the law does not permit *general*³ ideas or *broad* concepts to be protected by this kind of right, or life would become impossible. It therefore says that, for something to be protected in this way, it must possess a specific individuality⁴ (so as to be capable of being easily recognisable as somebody's potential property): for that to be so, the subject-matter must possess a certain minimum degree of luxuriance or copiousness of detail.⁵ Intellectual property rights which work on this principle are:

- (1) *Copyright*: this protects original literary, dramatic, musical and artistic works; and sound recordings, films, broadcasts, cable programmes, and typographical arrangements.
- (2) *Publication right*: this protects literary, dramatic, musical and artistic works and films which are published for the first time after copyright has expired. The publisher acquires a right akin to the economic rights of the copyright owner for a period of 25 years.
- (3) *Rights in performances*: these rights are designed to prevent 'bootlegging' (clandestine

- recording and unauthorised exploitation of the performances of actors, musicians etc).
- (4) *Moral rights*: this is a miscellaneous bundle of rights concerning artistic integrity or privacy.
 - (5) *Public lending right*: this is a right of authors to receive payment out of public funds in respect of copies of their books borrowed from libraries.
 - (6) *Design right (unregistered designs)*: this is a right not to have one's industrial designs copied. (Amongst many other things it includes the design of semiconductor topographies.)
 - (7) *Database right*: this right protects those who invest in gathering data or other materials for databases from unauthorised extraction or re-utilisation of their contents.
 - (8) *Miscellaneous rights to prevent unauthorised decrypting*: these rights are governed by ss 296-299 of the CDPA 1988 and are discussed elsewhere in this book.⁶
 - (9) *Plant breeder's rights*: A person who develops a new breed of plant has certain proprietary rights with respect to its seeds or other reproductive material.⁷
 - (10) *Confidential information*.⁸ If secret information is imparted in confidence for a limited purpose it cannot, as a rule, be used for a different purpose without the consent of the confider.

With the exception of plant breeder's rights and public lending right, none of the above things require to be registered. (The only reason the law requires property claims to new strains of plants to be registered is for the sake of definiteness: the right was invented before lines of descent could be characterised by DNA sequencing. Public lending right essentially consists of distributing public money to authors and so registration is required for reasons of administrative convenience.)

¹ Some would add a third kind, namely, trade marks, trade names, hallmarks, and the like. This is merely a matter of nomenclature. These things are not protected because of any intrinsic content as products of the human mind, but for a different reason entirely. They serve as symbols of trade origin or denote a particular class of product.

² *British Oxygen Co v Liquid Air Ltd* [1925] Ch 383.

³ *LB Plastics Ltd v Swish Products Ltd* [1979] RPC 551 at 629. Some systems of copyright law have lost sight of this point and have invented an 'idea/expression dichotomy'. If something is 'expression' it can be protected but if it is 'idea' it cannot be. There is and can be no such 'dichotomy' (the concept seems to derive from an obsolete branch of the philosophy of knowledge); and so courts in those jurisdictions are perpetually engaged in a hopeless quest: the unstoppable in pursuit of the unattainable.

⁴ Some kinds of works (eg mathematical tables, and street directories) are going to be, in theory, identical although independently compiled by two or more authors. However, British copyright law has never refused to protect such works (contrast American law: *Feist Publications Inc v Rural Telephone Service Co Inc* 111 S Ct 1282 (1991), 20 IPR 121). The reason is that it is only *in theory* that they are going to be identical. In practice they always contain tell-tale mistakes and proof of copying is normally very easy. But this is not just a matter of evidence and proof. It is, precisely, because mistakes are so easy to make, that the merit in such works turns on the painstaking care and accuracy the author must employ: that is what makes them 'original' in point of copyright law. However, civil law countries take a different view. This has recently found its way into UK law, in relation to databases only, by virtue of a European Directive. There is a special rule that applies to these - see ch 30.

⁵ Hence although a general idea cannot be protected by copyright an original *collection* of ideas may be.

⁶ These rights are dealt with in ch 35.

⁷ *Plant Varieties and Seeds Act 1964*; 1(2) *Halsbury's Laws* (4th edn) paras 868 ff.

⁸ Strictly, confidential information is probably not property, but more likely a right to bring a claim *in personam* for violation of the confidence.

RIGHTS WHICH ARE MONOPOLIES

1.3

In the second kind (patents and registered designs) the right is a monopoly: the concept protected by the right others cannot use at all, irrespective of its source: the reason for this distinction is essentially practical and turns on the nature of the protected subject matter. An invention is a useful technological improvement; but