

Federal Court of Appeal



Cour d'appel fédérale

Date: 20130611

**Dockets: A-394-12
A-395-12**

Ottawa, Ontario, June 11, 2013

Present: SHARLOW J.A.

BETWEEN:

RICHARD WARMAN and NATIONAL POST COMPANY

Appellants

and

MARK FOURNIER and CONSTANCE FOURNIER

Respondents

ORDER

UPON the motion of:

- the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic (CIPPIC) for leave to intervene, and having considered the motion record of CIPPIC filed May 2, 2013, the responding motion record of the appellant National Post Company filed May 13, 2013, and the reply of CIPPIC filed May 17, 2013; and
- the Computer and Communications Industry Association (CCIA) for leave to intervene, and having considered the motion record of CCIA filed May 14, 2013, the responding motion

record of the appellant National Post Company filed May 27, 2013, and the reply of CCIA filed May 31, 2013;

And having considered the following:

A. The Appeal

- (1) Mr. Warman is appealing the judgment of Justice Rennie dismissing his application for remedies against Mark Fournier and Constance Fournier under the *Copyright Act* for infringement of the copyright held by or licensed to Mr. Warman.
- (2) Mr. Warman filed the application in the Federal Court on May 9, 2011, naming National Post Company as an applicant because of subsection 36(2) of the *Copyright Act*.
- (3) National Post Company claims that it had no notice of the application until receiving the judgment under appeal.
- (4) National Post Company took no part in the proceedings in the Federal Court but has filed its own appeal of the judgment.
- (5) Mr. Warman's application alleged that Mark Fournier and Constance Fournier breached Mr. Warman's copyright in the following works by posting them on a website they operated:
 - a) the text of a speech by Mr. Warman posted in 2007, copyright in which is held by Mr. Warman;
 - b) an article authored by Jonathan Kay in 2008 while employed by National Post Company (the copyright in which is held by National Post Company and was

licensed to Mr. Warman in 2010), which was posted in its entirety on the website in 2008, then replaced by excerpts in 2010; and

- c) a photograph of Mr. Warman (the copyright in which is held by Mr. Warman), for which a link was included in a posting on the website in 2010.

(6) Justice Rennie dismissed the application based on the following conclusions:

- a) *Prima facie* infringement is established for the text of Mr. Warman's speech. Mr. Warman knew of the infringement in 2007 but did not seek a remedy until 2011, more than 3 years after the posting. No remedy may be granted for the infringement because of the 3 year limitation period in subsection 41(1) of the *Copyright Act*.
- b) With respect to the Kay article, only the posting of the excerpted portion is relevant because the copyright was not licensed to Mr. Warman while the full article appeared on the website. The posting of the excerpted portion is not a breach of copyright because the excerpted portion does not constitute a substantial part of the work. In the alternative, the posting constituted fair dealing for the purposes of news reporting pursuant to section 29.2 of the *Copyright Act*.
- c) The claim in respect of the photograph fails because its reproduction on the website was authorized by Mr. Warman when he posted it on his own website.

(7) The appellant National Post Company raises the following issues in its memorandum of fact and law with respect to the Kay article:

- a) The judge erred in finding that the excerpted portion of the Kay article is not a substantial part of the work, and in failing to consider whether the posting of the full article in 2008 was an infringement of the copyright holder, National Post Company.
- b) The judge erred in finding that the posting of the Kay article on the website was fair dealing for the purpose of news reporting, because (1) the statutory pre-conditions for that finding were not met, (2) there is no evidence that the purpose of the publication was news reporting, and (3) the judge misapplied the fairness factors established by the jurisprudence.
- c) The statutory time limitation does not bar a remedy for an ongoing or continuous infringement, such as a website posting while it subsists.

(8) The issues raised by the appellant Richard Warman relate to the statutory limitation period. He submits, among other things, that where a website posting is an infringement of copyright, the infringement is continuous and subsists until the posting is removed, so that for the purpose of determining the beginning of the statutory limitation period, a new and ongoing infringement occurs on each day while the posting is accessible.

(9) The respondents dispute each of the legal submissions of National Post Company and Richard Warman, and make a number of legal submissions in response. Among their submissions are the following points:

- a) The judge was not asked to consider whether the publication of the entire Kay article was an infringement and therefore cannot be held to have erred in failing to do so.

- b) The “continuous infringement” argument (in relation to the statutory limitation period) was not raised in the Federal Court.
- c) Mr. Warman’s speech was an exhibit in proceedings before the Canadian Human Rights Tribunal and the Ontario Superior Court of Justice, and the posted excerpts from the Kay article previously appeared in a statement of claim filed by Mr. Warman in the Ontario Superior Court of Justice. As such, they are court documents, the publication of which cannot be barred except in accordance with the principles applicable to publication bans.

B. The Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic (CIPPIC)

(10) CIPPIC is a public interest legal clinic founded by the University of Ottawa, Faculty of Law with funding from the Ontario Research Network on Electronic Commerce, an Amazon.com *Cy Pres* fund, and the Samuelson-Glushko Foundation. Its mandate includes the encouragement of public policy debates on technology law issues and providing legal assistance to under-represented organizations and individuals on matters involving the intersection of law and technology. It provides its services *pro bono* to clients, and is the only public interest legal clinic in Canada devoted to the practice of internet law. It is well staffed with lawyers with specialized knowledge of the subject matter of this case, and it has been accepted as an intervener in a number of Canadian cases.

(11) The proposed intervention of CIPPIC generally supports the position of the respondents Mark Fournier and Constance Fournier, and they have consented to the intervention.

(12) The appellant Richard Warman has filed no submissions in respect of the motion of CIPPIC to intervene.

(13) The appellant National Post Company does not oppose the intervention of CIPPIC provided its intervention is limited to addressing issues raised by the parties, and CIPPIC's written and oral submissions are limited in length and duration. National Post Company submits that CIPPIC's proposed list of issues, as stated in its initial submissions in support of its motion, are overly broad and could lead CIPPIC to make arguments that are not addressed by Justice Rennie in his reasons for judgment and are not raised by the parties.

(14) The issues now proposed to be addressed by CIPPIC, as set out in its reply (which modifies the original list of issues in response to some but not all of the concerns raised by the appellant National Post Company), are as follows:

- a) the application of the statutory limitation period set out in subsection 41(1) of the *Copyright Act* to works published on the internet;
- b) the scope of copyright liability that an intermediary can incur for a work posted to its site by an arm's length party;
- c) the interpretation of "distinctive", as stated in the definition of "work" in section 2 of the *Copyright Act*;
- d) what constitutes "substantial" reproduction as stated in subsection 3(1) of the *Copyright Act*;

- e) the interpretation of statutory conditions precedent to the fair dealing exceptions, as listed in sections 29 and sections 29.1 and 29.2 of the *Copyright Act*; and
- f) the circumstances in which the reproduction of an excerpt for the purpose of news reporting or criticism should be considered “fair” dealing.

(15) This revised statement of proposed issues sets out questions of law that appear to arise in this appeal and are appropriate for the CIPPIC intervention, provided its submissions respect the factual conclusions stated by Justice Rennie and are consistent with the evidentiary record.

(16) I am satisfied that the intervention of CIPPIC will assist the Court in determining the issues under appeal.

C. The Computer and Communications Industry Association (CCIA)

(17) CCIA is an international, nonprofit trade organization that promotes open markets, open systems and open networks. It represents a wide range of companies in the computer, internet, information technology and telecommunications industries. The issues raised in this appeal are important to some of its members, who routinely display excerpts of news articles online, or enable their users to do so, on an enormous scale (for example, Google News). CCIA has intervened in many court cases in Canada and the United States.

(18) The objective of CCIA in seeking to intervene in this matter, is to “inform the Court of the potential negative consequences of a narrow interpretation of fair dealing for the purpose of news reporting, or of a restriction of the users’ right to copy insubstantial parts of news articles”.

(19) CCIA argues that the respondents, as self-represented litigants, are unable to adequately address the issues raised by National Post Company, and it seeks to supplement the respondents' submissions on the following issues:

- a) the reasons why the copying in issue was insubstantial;
- b) the reasons why the copying in issue was fair dealing; and
- c) why, according to the law of copyright, a work is not posted online each day it is available on a website.

(20) In addition, CCIA seeks to raise issues of international law that were not raised in the Federal Court and have not been raised in this Court, including the effect of Canada's international law commitments under the Article 10(1) of the *Berne Convention* and Articles XVI and XVII on the *General Agreement on Trade in Services*.

(21) Although CCIA claims to have no interest in the outcome of this matter, its proposed intervention generally supports the position of the respondents Mark Fournier and Constance Fournier, and they have consented to its intervention.

(22) The appellant Richard Warman has filed no submissions in respect of the motion of CCIA to intervene.

(23) The appellant National Post Company opposes the intervention of CCIA on the following grounds:

- a) The interest of CCIA in this matter, and the interests of its members, are purely jurisprudential.

- b) The intervention of CCIA is not necessary if CIPPIC is permitted to intervene, because they propose to make submissions on the same points.
- c) CIPPIC is better positioned than CCIA to represent the public interest in these proceedings (if any exists, which is denied).

(24) The issues listed above on which CCIA proposes to supplement the submissions of the respondent are questions of law that appear to arise in this appeal and are appropriate for the CCIA intervention, provided its submissions respect the factual conclusions stated by Justice Rennie and are consistent with the evidentiary record.

(25) I am satisfied that the intervention of CCIA is not motivated solely by the jurisprudential interests of its members, and that its intervention will assist the Court in determining the issues under appeal (except its proposed submissions on international law, international conventions and international agreements). I am also satisfied that any possibility of unnecessary duplication is avoidable with the reasonable cooperation of both interveners.

THIS COURT ORDERS as follows:

1. The applications of CIPPIC and CCIA for leave to intervene are granted, subject to the following conditions:
 - (a) Each intervener will have the right of a party to be served with documents in this matter.
 - (b) No intervener will have the right to appeal the judgment of this Court.

(c) The interveners are bound by the record and may not introduce new evidence.

(d) The interveners may address only issues that have been raised by the parties.

Specifically, CCIC is not granted leave to make any submissions on international law, international conventions or international agreements.

(e) Each intervener may, no later than July 15, 2013, serve and file a memorandum of fact and law not exceeding 20 pages.

(f) Any party who wishes to respond to an intervener's memorandum of fact and law may do so by serving and filing, no later than August 15, a supplementary memorandum of fact and law not exceeding 20 pages.

(g) Each intervener may make oral submissions at the hearing, limited to 30 minutes for each intervener, subject to any directions made by the panel hearing this appeal, and also subject to any agreement between the respondents and the interveners to share their total time allocation in a way that gives the interveners more than 30 minutes each.

(h) The interveners must co-ordinate their written and oral submissions to avoid unnecessary duplication.

(i) No costs will be awarded to an intervener, and no costs will be awarded against an intervener except for a breach of the conditions of intervention.

2. The style of cause will be amended to read as follows:

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Respondents

and

**SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY
AND PUBLIC INTEREST CLINIC**

Intervener

and

**COMPUTER AND COMMUNICATIONS
INDUSTRY ASSOCIATION**

Intervener

3. There will be no costs of these motions.

“K. Sharlow”

J.A.