

FEDERAL COURT OF APPEAL

BETWEEN:

RICHARD WARMAN and NATIONAL POST COMPANY

APPELLANTS

- and -

MARK FOURNIER and CONSTANCE FOURNIER

RESPONDENTS

- and -

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

INTERVENER

- and -

COMPUTER AND COMMUNICATIONS INDUSTRY ASSOCIATION

INTERVENER

**MEMORANDUM OF FACT AND LAW OF THE INTERVENER
SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY AND PUBLIC INTEREST
CLINIC**

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INTRODUCTION

1. This appeal raises important issues concerning the interpretation of users' rights under the *Copyright Act*. It provides the Court with an opportunity to provide clarity and guidance on the liability of platforms for third party content, on what amounts to 'substantial' reproduction and on the proper application of fair dealing. An overzealous interpretation of what constitutes a substantial part of a reproduced work – or a narrow interpretation of the fair dealing provisions – would stifle the public availability of news content and have direct and far-reaching implications for Internet-based discourse and online research.

PART I – FACTS

2. The facts in this matter are ably presented in the factum of the Respondent. The appeal concerns two individual works. The first is a newspaper article authored by Jonathan Kay, a journalist with the National Post Company (National Post), and initially published in the National Post (the "Kay Work"). The National Post appellant granted the Warman appellant an exclusive licence to copyright in the Kay Work on January 13, 2010. The second work is a literary piece authored by the appellant, Richard Warman (the "Warman Work"). CIPPIC's intervention is primarily concerned with legal issues arising from the Kay Work.

Appeal Book, Vol. 1, Tab 7B, p. 103; Vol. 5, Tab 5, p. 72

PART II – ISSUES

3. CIPPIC has been granted leave to intervene by this Honourable Court on the following issues: This appeal raises important issues concerning the interpretation of users' rights under the *Copyright Act*. The case provides the Court with an opportunity to provide clarity and guidance on the proper application of fair dealing for news reporting, and to uphold a user's right to access and reproduce insubstantial copies of a publicly available news reports for commentary and criticism. An overzealous interpretation of what constitutes a substantial part of a reproduced work – or a narrow interpretation of the fair dealing provisions – would undermine innovative online platforms and stifle the public availability of important content an discourse.
4. By order of this Honourable Court, the Samuelson-Glushko Canadian Internet Policy and Public

Interest Clinic (CIPPIC) has sought and been granted leave to intervene on the six following issues:

- (i) What constitutes a ‘substantial’ reproduction under the *Copyright Act*;
- (ii) The interpretation of “distinctive”, as stated in the definition of “work” in section 2 of the *Copyright Act*;
- (iii) The scope of copyright liability that an intermediary can incur for a work posted to its site by an arm’s length party;
- (iv) Whether minor excerpting for the purpose of news reporting or criticism should be considered ‘fair’ dealing;
- (v) The interpretation of statutory conditions precedent to the fair dealing exceptions, as listed in section 29 and sections 29.1 and 29.2 of the *Copyright Act*; and
- (vi) The proper application of the statutory limitation period set out in subsection 41(1) of the *Copyright Act*, to works published on the Internet.

Order of the Federal Court of Appeal, dated June 11, 2013, Sharlow, L.A.

- 5. CIPPIC’s written representations focus on the question of substantial reproduction, the scope of intermediary liability and the scope of remedies available after a limitation period is exhausted. In addition, CIPPIC has read and supports the position of the Intervener, the Computers and Communications Industry Association (CCIA) in respect of issues concerning fair dealing; the sufficiency of hyperlinking for attribution under the *Copyright Act*; and the proper application of the statutory limitation period for works available online.

PART III – SUBMISSIONS

- 6. CIPPIC will first address the proper test for substantial reproduction, followed by issues arising from attempts to impose liability onto platforms for the allegedly infringing acts of third parties. Finally, we will briefly address the scope of available remedies after the expiry of a limitation period.

A. THE COURT BELOW APPLIED THE APPROPRIATE TEST FOR SUBSTANTIAL REPRODUCTION

7. Copyright law includes an inherent de minimis limitation – the reproduction right is only engaged if a work is substantially reproduced. The National Post appellant proposes an expansive definition of the ‘substantial reproduction’ requirement which will have severe repercussions for online innovation, by burdening user-generated platforms with potential liability for minor acts of excerpting.
8. The court below applied the appropriate legal test when holding that the copying in question failed to reproduce the ‘essence’ of the original work and, therefore, was not substantial. In addition, the National Post Appellant overstates the conditions under which copyright may consist in a title, as well as the impact reproduction of a title might have when assessing substantiality.

(a) Copyright law offers sparse protection to titles

9. Copyright law generally protects original works. However, the *Copyright Act* requires that titles be *independently* original *and* distinctive before they can be considered part of a protected work. These two additional hurdles to protection mirror a general aversion found in many common law jurisdictions against awarding copyright protection to titles:

The argument of the appellant company would be the same, it seems, if the application of the title complained of had been to a picture or a statue. On this reasoning, it would be said that the title "Adam" applied to a work of statuary would be infringed if that title were used as that of a novel. These and other anomalous consequences justify the broad principle that in general a title is not by itself a proper subject-matter of copyright. As a rule, a title does not involve literary composition, and is not sufficiently substantial to justify a claim to protection.

Copyright Act, R.S.C. 1985, c. C-42, section 2, “Work”; *Fairfax Media Publications v. Reed International Books Australia*, [2010] FCA 984 (Australian Federal Court of Appeal), paras. 115-117; *Francis, Day & Hunter Ltd. v. Twentieth Century Fox Corp. Ltd.*, [1939] 4 All E.R. 192, 4 D.L.R. 353 (U.K. Privy Council), per Wright, L.J., pp. 197-198

10. The term ‘distinctive’, in this context, must be defined with caution. As noted by the Privy Council in *Francis, Day and Hunter v. Twentieth Century Fox*: “It is, however, difficult to define

satisfactorily the word "distinctive," since it cannot mean merely that the title is used to identify the particular work.” Canadian courts have suggested that ‘distinctive’ should be defined as it is under Canadian trade-mark law, implying that confusion between the two works must be proven as a pre-condition to finding ‘distinctiveness’.

National Post, **Appellant’s Memorandum of Fact and Law**, March 8, 2013, para. 64; *Francis, Day & Hunter Ltd. v. Twentieth Century Fox Corp. Ltd.*, [1939] 4 All E.R. 192, 4 D.L.R. 353 (U.K. Privy Council), per Wright, L.J.; *Flamand v. Société Radio-Canada*, [1967] 53 C.P.R. 217 (Que. S.C.)

(b) Even where a title is ‘original and distinctive’, its impact on substantial reproduction is minimal

11. Even where a title is found to be distinctive and independently original, its reproduction is not automatically deemed ‘substantial’. The impact of such a finding merely means that the title can be considered part of a work and not ‘in the public domain’: “That is to say, the title is to be treated as part of the work, provided that it is original and distinctive, whatever those words may connote. When that definition is read with s 3, the result is that to copy the title constitutes infringement only when what is copied is a substantial part of the work.” Given the minimal protection attracted by titles generally, the mere addition of a title (even one that is distinctive and independently original) to an excerpt should not greatly alter the substantiality analysis.

Francis, Day & Hunter Ltd. v. Twentieth Century Fox Corp. Ltd., [1939] 4 All E.R. 192, 4 D.L.R. 353 (U.K. Privy Council), per Wright, L.J.

(c) The Substantial Reproduction Test Must Not be Unduly Expanded

12. The test for substantial reproduction includes the following factors:
 - (a) the quality and quantity of the material taken;
 - (b) the extent to which the respondent's use adversely affects the applicant's activities and diminishes the value of the applicant's copyright;
 - (c) whether the material taken is the proper subject-matter of a copyright;
 - (d) whether the respondent intentionally appropriated the applicant's work to save time and effort; and

(e) whether the material taken is used in the same or a similar fashion as the applicant's.

Overly expansive interpretations of the reproduction right should be avoided, as they grant copyright holders excessive control while disregarding user's rights.

Fairfax Media Publications v. Reed International Books Australia, [2010] FCA 984 (Australian Federal Court of Appeal), para. 49; *Ice TV v. Nine Network Australia*, [2009] HCA 14 (High Court of Australia), para. 52; *Théberge v. Galerie d'Art du Petit Champlain Inc.*, 2002 SCC 34, per Binnie, J., paras. 27-28; *U & R Tax Services Ltd. v. H & R Block Canada Inc.*, [1995] 97 F.T.R. 259, 62 C.P.R. (3d) 257 (F.C.T.D.)

13. The Court below applied the proper legal test in assessing substantiality. The National Post appellant proposes an expansive legal test for substantial reproduction that overstates many elements of this analysis, while disregarding critical concerns properly relied upon by the court below. The Intervener does not take a position on whether the Court below committed a palpable and overriding error on the facts of this case.
14. **Quantitative.** With respect to the requisite quantitative analysis, the National Post Appellant argues the court below erred in considering 'percentages or proportions' in its analysis. Courts have confirmed that the substantial reproduction analysis is driven by qualitative factors. This means, on the one hand, that a proportionately large amount of reproduction may not engage owner's rights if qualitatively insubstantial, while, on the other hand, a proportionately small amount might be deemed 'substantial' if it includes the 'essence' of the work.

Ice TV v. Nine Network Australia, [2009] HCA 14 (High Court of Australia) (amount reproduced is large but not the original 'essence' of the work); *Fairfax Media Publications v. Reed International Books Australia*, [2010] FCA 984 (if a headline does not qualify for copyright protection independently, copying a large quantity of headlines is not substantial reproduction); National Post, **Appellant's Memorandum of Fact and Law**, March 8, 2013, para. 53

15. In spite of this qualitative focus, consideration of the quantitative amount copied (in proportion to the amount not copied) remains one factor in the assessment of substantial reproduction. Therefore, it is no error of law to consider the amount reproduced, in proportion to the work as a whole, when assessing whether reproduction is substantial or not.

Preston v. Twentieth Century Fox Canada, [1990] 38 F.T.R. 183, 33 C.P.R. (3d) 242 (F.C.T.D.) ("Substantial similarity is not to be measured only by the quantity of matter reproduced from a copyrighted work, though that may be a significant factor"); *Hutton v.*

Canadian Broadcasting Corporation, 1992 ABCA 39, para. 10; *Tomas Boaden Catering Ltd.*, [1995] 115 F.T.R. 236, 68 C.P.R. (3d) 275 (F.C.T.D.), paras. 3-6 (58% of two pages in defendant's work copied from the plaintiff's is not substantial reproduction if it consists primarily of generic terms not protected by copyright)

16. In addition, the National Post appellant argues that *any* reproduced elements that are “the expression of the intellectual creation of their author” should constitute an impermissible amount of reproduction. This would conflate the right to “reproduce *the work or any substantial part* thereof” granted to copyright holders by the *Copyright Act*, with the right to authorize or prohibit “reproduction by any means and in any form, *in whole or in part*”, which Article 2(a) of Directive 2001/29 grants to copyright holders under European Union law.

Council Directive **2001/29/EC**, [2001] O.J. L. 167/10, *on the harmonization of certain aspects of copyright and related rights in the information society*, Article 2(a) (E.U.); *Infopaq International A/S v. Danske Dagblades Forening*, 2009 ECR I-06569 (E.C.J.), paras. 9, 33, 36-45, 47; National Post, **Appellant's Memorandum of Fact and Law**, March 8, 2013, para. 54

17. **Qualitative.** The National Post Appellant also overstates the test for ‘qualitative’ substance by introducing new criteria into the substantial reproduction test. It argues that a reproduction will be substantial based on whether it is “an appropriation by the reproduction party of the skill and time and talent of the author”; whether it exhibits “distinct traits” that are “clearly identifiable” of the original publication; and whether the reproduction replicates the ‘purpose’ or ‘objective’ of the original work. This would effectively remove the ‘substantial’ component of the reproduction analysis, which should focus on whether the ‘essence’ of the work has been taken, and replaces it with ‘similarity’ and ‘originality’. This proposed test will, in many scenarios, unjustifiably reduce the ‘substantial’ element of the reproduction obligation.
18. The National Post appellant seeks to effectively reduce the test for substantial reproduction to a mere assessment of originality. It argues that *any* appropriation of the original skill and judgment of the author amounts to ‘substantial’ reproduction:

Even if a relatively small amount of a work is reproduced, the reproduction may amount to infringement if, qualitatively, it constituted an appropriation by the reproducing party of the skill and time and talent of the author. [...]

Rather, the correct approach is to compare the reproduction to the work as a whole, assess the similarities between the two, and determine qualitatively whether the excerpt discloses an exercise of the author's skill and judgment.

In doing so, it seeks to expand the substantial reproduction test and, by extension, the scope of control awarded to rights holders over elements of their works. While the independent originality of excerpts from a work is an important factor – if not a pre-requisite – for establishing substantial reproduction, originality is not in and of itself sufficient.

National Post, **Appellant's Memorandum of Fact and Law**, March 8, 2013, paras. 56, 61

19. Originality of an excerpt is an important factor in assessing whether substantial reproduction has occurred. An excerpt from an original work which, in and of itself, is not an original display of skill and judgment cannot be deemed 'substantial'. As Professor Vaver explains:

One should first screen out what cannot in law be a substantial part. "Part" means portion, not "particle". A copyright owner cannot therefore control every particle of her work as a whole...More generally, something that is insubstantial in itself—and therefore unlikely to have copyright—will not become substantial simply by being included in a larger original work...two or three seconds from a three-minute recording is a mere particle; the sound, while perhaps of value to the taker, should not affect the value of the source work as a whole and so should be outside the copyright owner's control. Performers and record companies nevertheless continue to make such risible claims, sometimes successfully, sometimes not.

Referring to a recent Australian decision, J.S. McKeown explains: "A finding that one party has 'appropriated' skill and labour is not determinative of the issue of whether a reproduction of a substantial part of a work has occurred. The legislation in Australia like the Canadian Act does not refer to 'misappropriation'." If 'substantial reproduction' were to include excerpts that were *not* independently original, it would expand copyright control to excessive lengths.

D. Vaver, "**Intellectual Property Law: Copyright, Patents, Trade-Marks**", 2nd Ed., (Toronto: Irwin Law, 2011), pp. 182-183; J.S. McKeown, "**Fox on Canadian Law of Copyright and Industrial Design**", Digital Edition, (Toronto: Thomson Reuters Canada, 2013), Section 21:2(c)

20. Where a compilation exhibits skill and judgment in the arrangement of elements that, in and of themselves, could not be protected by copyright, it is the arrangement itself that cannot be substantially reproduced, not the constituent elements:

Whether a part is substantial must be decided by its quality rather its quantity. The reproduction of a part which by itself has no originality will not normally be a substantial part of the copyright and therefore will not be protected. For that which would not attract copyright except by reason of its collocation will, when robbed of that collocation, not be a substantial part of the copyright and therefore the courts will not hold its reproduction to be an infringement. It is this, I think, which is meant by one or two judicial observations that "there is no copyright" in some unoriginal part of a whole that is copyright. They afford no justification, in my view, for holding that one starts the inquiry as to whether copyright exists by dissecting the compilation into component parts instead of starting it by regarding the compilation as a whole and seeing whether the whole has copyright. It is when one is debating whether the part reproduced is substantial that one considers the pirated portion on its own.

Simply reproducing an element of a work that, in and of itself, cannot sustain copyright protection is not 'substantial' reproduction: "If the author would not have copyright in the part standing alone, the part reproduced will not be a substantial part."

Ladbroke (Football) v. William Hill (Football) Ltd., [1964] 1 All ER 465 (U.K. H.L.), p. 481, per Pearce, L.J.; *Warwick Film Productions v. Eisinger*, [1969] 1 Ch. 508, (U.K. Ch. Div.), pp. 532-533; *Fairfax Media Publications v. Reed International Books Australia*, [2010] FCA 984 (AU. F.C.A.), para. 116; *Prism Hospital Software Inc. v. Hospital Medical Records Institute*, [1994] 57 C.P.R. (3d) 129 (B.C.S.C.), para. 600; *Preston v. Twentieth Century Fox Canada*, [1990] 38 F.T.R. 183, 33 C.P.R. (3d) 242 (F.C.T.D.), pp. 24-25

21. It is important to assess whether a given excerpt is at *least* capable of exhibiting original skill and judgment independently. The qualitative aspect of the substantial reproduction test cannot, however, be reduced to an assessment of original skill and judgment in the excerpt. An excerpt that exhibits independent original skill and judgment will not qualify as substantial reproduction if it does not capture the 'essence' of the original work.

Robertson v. Thomson Corp., 2006 SCC 43, paras. 38-41

22. A newspaper contains "much originality", including "...the arrangement of articles, the arrangement of advertisements and pictures, and the fonts and styles used." However, a newspaper is only substantially reproduced if its "true essence" is copied and this 'true essence' lies in "the selection of stories...that resonate in the hearts and minds of readers."

Robertson v. Thomson Corp., 2006 SCC 43, paras. 38-41

23. Titles, for example, are only included as part of a work if they are independently original and

distinctive. However, as the Privy Council explained in *Francis, Day & Hunter v. Twentieth Century Fox*, even where the title is independently original, its reproduction is not automatically deemed ‘substantial’:

The definition (v.) does not, in their Lordships' judgment, mean that the title of a work is to be deemed to be a separate and independent "work." Work is to include "the title thereof," that is to say, the title is to be treated as part of the work, provided that it is original and distinctive whatever these words may connote. When that definition is read with s. 3, the result is that to copy the title constitutes infringement only when what is copied is a substantial part of the work.

An original string of words, indicative of skill and judgment, can be freely reproduced unless it is reproduced alongside a substantial part of the original work.

Francis, Day & Hunter Ltd. v. Twentieth Century Fox Corp. Ltd., [1939] 4 All E.R. 192, 4 D.L.R. 353 (U.K. Privy Council), per Wright, L.J., pp. 198-199

24. In *King Features Syndicate, Inc. v. Lechter*, the defendant had reproduced a character from the well-known comic strip ‘Popeye’ along with the word ‘Popeye’ itself on a line of watches. The court held that the name “Popeye” was, in and of itself, ‘original’. However, its reproduction can only be ‘substantial’ when presented in combination with reproductions of other elements of the work – namely, a graphical representation resembling the character ‘Popeye’. Reproduction of ‘Popeye’ in absence of the graphical representations was found to be insubstantial.

King Features Syndicate Inc. v. Lechter, [1950] 12 C.P.R. 60 (Ex. Ct.), paras. 12-13, 21

25. To avoid conferring copyright protection on elements of a work that would not normally be protected, it is important to ensure that an allegedly infringing reproduction is *capable* of exhibiting independent skill and judgment. Where independent skill and judgment exist, however, the proper focus of the substantial reproduction analysis is on whether the ‘essence’ of the work has been reproduced, not on whether skill and judgment has been misappropriated. Australia’s highest court recently emphasized the “dangers when applying the Act of adopting the rhetoric of ‘appropriation’ of ‘skill and labour’” when the proper focus of the substantial reproduction analysis is the relevant original work of the author, and whether its ‘essence’ has been reproduced.

Ice TV v. Nine Network Australia, [2009] HCA 14 (High Court of Australia), per Gummow, Hayne and Heydon, JJ., paras 131-132; 155-157

26. In seeking to distinguish between the ‘essence’ of the work – its “commentary and original thought as expressed by the author” – and non-essential elements such as the introductory and background factual recitation on which the commentary was based, the court below applied the correct legal standard for qualitatively assessing reproduction. The ‘essence’ of a work does not, as the National Post appellant claims, hinge on the original skill and judgment found in an excerpt. Nor can it be reduced to whether the reproduced elements are “clearly identifiable as the original work” or whether the excerpts in question convey the *purpose* of the original work (in this case, “to criticize Mr. Warman”).

Warman v. Fournier, 2012 FC 803, para. 25; National Post, **Appellant’s Memorandum of Fact and Law**, March 8, 2013, paras. 57-58

27. The need for identifiability is important to establish an evidentiary question in cases where it is not clear that direct copying occurred. In such cases, where the reproduction in question only resembles the original, an assessment of identifiability, focusing on substantial similarity and distinctive traits common to the two works is important to assessing whether the excerpt in question was, in fact, inspired by the original work. Even where similarities between two works exist and direct copying can be presumed, plaintiffs must still establish that the reproduction in question *substantially* reproduces the original. However, in a case such as this, where the excerpt in question is directly and purposefully taken from the original work, factors such as ‘identifiability’, ‘similarity’ and distinctive traits’ can do little to advance the analysis, as the causal connection between the original and the excerpt is not in doubt.

Atomic Energy of Canada Limited v. AREVA NP Canada Ltd., 2009 FC 980, paras. 35-37; *Prism Hospital Software Inc. v. Hospital Medical Records Institute*, [1994] 57 C.P.R. (3d) 129 (B.C.S.C.), para. 599; *U & R Tax Services Ltd. v. H & R Block Canada Inc.*, [1995] 97 F.T.R. 259, 62 C.P.R. (3d) 257 (F.C.T.D.), para. 35; National Post, **Appellant’s Memorandum of Fact and Law**, March 8, 2013, para. 57

28. The National Post appellant also seeks to reduce the ‘essence’ of a work to any element of that work which conveys the objective or purpose of the work (“The ‘essence’ and ‘principal features’ of the Kay Work, which are to criticize Mr. Warman...are reproduced entirely, notwithstanding the fact that not all of the words of the original work are reproduced.”). To the contrary, the

substantial reproduction test is formulated precisely to *avoid* conferring copyright protection over high-level ideas and purposes. The “true essence of the originality” in a work comprises those elements of its original expression that “resonate in the hearts and minds of readers”, not mere introductory comments and background facts.

Robertson v. Thomson Corp., 2006 SCC 43, para. 39; National Post, **Appellant’s Memorandum of Fact and Law**, March 8, 2013, para. 58

29. Courts have held that the essential element of a work cannot be generic, and must include what is truly at the core of the work in question. While a headline, for example, typically “encapsulates the whole of the story, comes first in the story and is prominent in the literary construction of the story”, its copying will not typically be deemed ‘substantial’. (*Fairfax*) While there are many original elements in a newspaper, for example, the “true essence” of its originality lies in its selection of stories. (*Robertson*) Copying two entire scenes directly from a play does not capture the ‘essence’ of that play if the reproduction was only “in the nature of dramatic situations or scenic effects.” (*Chatterton*) The literary ‘essence’ of a song is not its ‘opening slogan’ or ‘hook’ unless, at minimum, the musical accompaniment is reproduced in addition to the words themselves. (*Shewan*) Copying *many* words directly from one menu to another does not capture the ‘essence’ of the original work if the words taken are ‘generic’. (*Tomas*) Copying one sentence, even one ‘embodying’ an important and central idea, does not constitute substantial copying. (*JHP*)

Fairfax Media Publications v. Reed International Books Australia, [2010] FCA 984 (AU. F.C.A.), paras. 113-117; ***Robertson v. Thomson Corp.***, 2006 SCC 43, para. 39; ***Chatterton v. Cave*** (1878), 3 App. Cas. 483 (U.K. H.L.), per Blackburn, L.J., p. 503; ***Shewan v. Canada (Attorney General)***, [1999] 87 C.P.R. (3d) 475 (ON S.C.), paras. 104-110; ***Tomas Boaden Catering Ltd.***, [1995] 115 F.T.R. 236, 68 C.P.R. (3d) 275 (F.C.T.D.), paras. 3-6; ***JHP Ltd. v. BBC Worldwide Ltd.***, [2008] EWHC 757 (U.K. Ch.), paras. 49-50(a)

30. In identifying those elements of the work’s original expression that are its ‘essence’, the court below properly attempted to focus on the elements that actually expressed the objective of the article (the “commentary and original thought as expressed by the author”) not the “opening ‘hook’” and background factual summary which formed the precursor to this analysis. The article in question was written “to criticize Mr. Warman”. While specific demarcation lines will differ depending on the specific facts from one article to another, where the point of an article is to

‘criticize’, the ‘essence’ of that article must include some of that criticism and not only the introductory ‘hook’ and factual background.

Warman v. Fournier, 2012 FC 803, para. 25; National Post, **Appellant’s Memorandum of Fact and Law**, March 8, 2013, para. 58

31. **Use Adversely Affects Plaintiff’s Legitimate Activities.** While not definitive, another factor in assessing substantial reproduction is whether the reproduction in question will impact on the plaintiff’s legitimate activities. Courts have defined ‘legitimate’ interests, within the context of the *Copyright* Act, as pertaining to economic rights. Where a given reproduction occurs in the absence of *any* prospect of commercial competition with the original work, this will weigh against a finding of substantial reproduction.

Edutile Inc. v. Automobile Protection Assn. (C.A.), [2000] 4 F.C. 195, 6 C.P.R. (4th) 211 (F.C.A.), para. 23 (reproduction is substantial because it reproduces element that is of consumer value); ***Francis, Day & Hunter Ltd. v. Twentieth Century Fox Corp. Ltd.***, [1939] 4 All E.R. 192, 4 D.L.R. 353 (U.K. Privy Council), per Wright, L.J., pp. 199 (author of title of musical work should not be permitted to prevent use of title for completely unrelated motion picture); ***U & R Tax Services Ltd. v. H & R Block Canada Inc.***, [1995] 97 F.T.R. 259, 62 C.P.R. (3d) 257 (F.C.T.D.), para. 36 (adverse affect on original work is party of the test for substantial reproduction)

32. The Supreme Court of Canada has stated that the (substantial) reproduction right is most properly and legitimately directed at activities that are ‘economic’ in character. As stated by Justice Binnie in *Théberge*:

Generally speaking, Canadian copyright law has traditionally been more concerned with economic than moral rights...The principal economic benefit to the artist or author was (and is) the "sole right to produce or reproduce the work or any substantial part thereof in any material form whatever" (s. 3(1)) for his or her life plus fifty years (s. 6). The economic rights are based on a conception of artistic and literary works essentially as articles of commerce.

In the context of the reproduction right, then, ‘legitimate’ activities will tend to be commercial or economic activities.

Théberge v. Galerie d’Art du Petit Champlain Inc., 2002 SCC 34, per Binnie, J., para. 12

33. Courts have applied this general principle in the context of assessing whether a given reproduction is ‘substantial’ or not. A given reproduction is less likely to be ‘substantial’ if it is

unlikely to conflict with the legitimate economic or commercial interests of the rights holder. The principle is stated by McKeown:

The absence of competition may affect the determination. In *Chappell & Co. v. D.C. Thompson & Co.*, the plaintiff was the owner of copyright in a song entitled, "Her Name Is Mary". The defendants published a serial story in their paper under the same title and at the head of each installment they printed the first four lines of the song. After pointing out that the *Copyright Act* was not to be used as an instrument of oppression and extortion, Farwell J. said:

Can I say in those circumstances, these words being taken for a totally different purpose from any purpose for which the plaintiff's work was published, and being used in a way which really, in my judgment, cannot compete with the plaintiffs in the sense of depriving the plaintiffs of anything to which they would have been properly entitled as owners of the copyright in the musical work, that the defendants have really taken a substantial part of the plaintiff's work? In my judgment, I ought not to come to that conclusion.

The absence of competition or commercial gain is not a defence to an action relating to the making of infringing copies.

J.S. McKeown, "**Fox on Canadian Law of Copyright and Industrial Design**", Digital Edition, (Toronto: Thomson Reuters Canada, 2013), Section 21:2(c)(ii)

34. The court below was therefore right to consider the lack of any potential conflict between the reproduction in question, and any legitimate economic activity of the author:

Most of the other factors are not directly relevant in this case given the circumstances in which the applicant obtained the copyright: he does not appear to "use" the subject matter of the copyright in the sense of reproducing or publishing the Kay Work. It is a highly critical article about the applicant and it appears he sought the exclusive license to the Kay Work in order to prevent its further publication.

Similarly, the National Post appellant is no longer publishing the Kay Work, the article having been removed from its website in settlement of a defamation lawsuit. In such contexts, the absence of any ongoing economic or commercial interest in the work argues against a finding of substantiality.

Affidavit of Richard Warman, Affirmed June 6, 2011, Exhibit F, p. 58, Appeal Book, Tab 7E; *Warman v. Fournier*, 2012 FC 803, para. 26

35. **Saving Time & Effort.** A final element of the substantial reproduction test is whether the work

was reproduced for the purpose of ‘saving time and effort’. Where an element of a work is reproduced merely to save time and effort, it is more likely to be treated as ‘substantial’. On the other hand, where a work is reproduced for a different purpose – in this case, to include an excerpt of a work in order to preserve a discussion thread that had been analyzing that work – courts are *less* likely to deem such a reproduction to be ‘substantive’.

U & R Tax Services Ltd. v. H & R Block Canada Inc., [1995] 97 F.T.R. 259, 62 C.P.R. (3d) 257 (F.C.T.D.), para. 35; *Warman v. Fournier*, 2012 FC 803, para. 27

B. PLATFORMS ARE NOT PRIMARILY LIABLE FOR THE INFRINGING CONDUCT OF THIRD PARTY USERS OF THEIR SERVICES

36. The National Post appellant seeks to impose liability on the respondents for the independent acts of third party users of the respondents’ online discussion platform. Specifically, the National Post appellant argues that, prior to receiving any direct knowledge or notification that the full Kay Work had been published to their online discussion platform in violation of the appellant’s copyright, the respondents were liable for its reproduction on their site by a third party user of that site. The full-text reproduction of the Kay Work on the Respondents’ online discussion platform was concluded on February 18, 2008 by an anonymous visitor to the site who posted it under the pseudonym ‘styky’. Upon receiving notification from the Warman appellant on April 18, 2010, that the full-text reproduction had been posted to their site in alleged violation of the Warman appellant’s copyright, the respondents removed the article and replaced it with excerpts of the Kay Work.

National Post, **Appellant’s Memorandum of Fact and Law**, March 8, 2013, para. 44 and Tab A; **Affidavit of Richard Warman**, Affirmed June 6, 2011, Exhibit F, p. 58, Appeal Book, Tab 7E; *Warman v. Fournier*, 2012 FC 803, para. 7

37. Canadian copyright law does not impose liability on platforms for merely facilitating the infringing acts of reproduction of third parties. A platform must first be held to have authorized such reproduction. Absent specific knowledge of the infringing act of reproduction, an online platform cannot be held to have either committed or authorized that act. The basic principle upon which the concept rests is intuitive: we do not, at law, make one responsible for the activities of another. More specifically, merely authorizing the use of equipment or platforms by others does not, in and of itself, amount to liability for all wrongful acts conducted by its use. This principle

was summarized long ago by Justice Rand: “It would be as if a person who lets a gun to another is to be charged with "authorizing" hunting without a game license” and, more recently and succinctly, by Justice Binnie: “Don’t shoot the messenger!”

CCH Canadian Ltd. v. Law Society of Upper Canada, 2004 SCC 13, per McLachlin, C.J., para. 38 [CCH]; *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45, per Binnie, J., para. 92 [SOCAN]; *Muzak Corp. v. Composer, Authors & Publishers Association of Canada Ltd.*, [1953] 2 S.C.R. 182, per Rand, J., p. 189

38. There are numerous Canadian cases limiting primary liability for the mere provision of equipment or services *capable* of being abused to infringe copyright. In *CCH*, the Supreme Court of Canada held that libraries providing photocopying machines for use by their visitors are not liable for specific acts of reproduction conducted on those machines in violation of third party copyright. This freedom from liability persists even in the presence of general knowledge (para. 44) that patrons of the library *could* use the machines for infringing purposes: “...a person does not authorize infringement by authorizing the mere use of equipment that could be used to infringe copyright.”

CCH Canadian Ltd. v. Law Society of Upper Canada, 2004 SCC 13, per McLachlin, C.J., paras. 38, 41, 44 [CCH]; *Muzak Corp. v. Composer, Authors & Publishers Association of Canada Ltd.*, [1953] 2 S.C.R. 182, per Rand, J., p. 189; *Vigneux v. Canadian Performing Right Society*, [1945] 1 All ER 432 (P.C.), p. 439

39. An Internet service provider is not held liable if some of its customers use its services to procure unauthorized copies of musical works over the Internet. The Court held that Internet Service Providers and online content hosting services cannot be held to have authorized these infringing activities simply by providing internet access. It did not matter that “Internet intermediaries *know* that material (including copyright material) placed on their facilities by content providers will be accessed by end users.” Nor was it relevant that ISPs *profit*, in a general and indirect way, from this infringing activity, as access to infringing content is a motivator for some to obtain Internet access.

Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers, 2004 SCC 45, per Binnie, J., para. 121

40. Similarly, selling audio recording equipment (tape recorders) that, once purchased by members of

the general public, can be used to reproduce audio works onto blank media in violation of copyright is not a violation of copyright law. While tape recorders certainly facilitate infringing activity, vendors of these recorders do not ‘authorize’ their customers to use such equipment at home in ways that infringe copyright. Even if the vendor of audio recording equipment expressly advertises the “increased efficiency of a facility capable of being employed to break the law”, this does not amount to ‘authorization’ as it is the ultimate customer alone who can “decide whether to record or play and what material is to be recorded.” Likewise, merely providing the electronic transcriptions and program schedules necessary for a third party to perform certain musical works live does not make the provider of these transcripts liable where the third party in question then misuses these transcripts to perform those songs in violation of their author’s performance rights.

Muzak Corp. v. Composer, Authors & Publishers Association of Canada Ltd., [1953] 2 S.C.R. 182, per Rand, J., p. 189; *Vigneux v. Canadian Performing Right Society*, [1945] 1 All ER 432 (P.C.), p. 439; *CBS Songs Ltd. v. Amstrad Consumer Electronics*, [1988] 2 All ER 484 (U.K. H.L.), p. 492

41. This is in keeping with broader trends, in Canada and abroad, that consistently treat the merely facilitative acts of platforms and Internet intermediaries as legally ‘neutral’, ‘innocent’ or ‘passive’. With the increasing growth of usage-based services, a range of intermediaries have been recognized as mere ‘facilitators’ of the activities of others:

At the same time, the issue of liability for third-party content or activities became a major concern not just for the traditional ISP community, but also for Internet hosts such as universities, traditional media organisations online, such as the BBC or the Times, software providers, libraries, chat rooms and blog sites, individuals with their own websites and emerging social networking sites. Potential liability also affected communications intermediaries such as Internet backbone providers, cable companies and mobile phone operators. Providers of telecommunications services, such as mobile operators, began providing content and value-added services such as geolocational data. This showed the need for an online intermediary liability regime that was practical, uniform, acceptable to industry and also protective of consumers, citizens, institutions and businesses.

OECD, “**The Role of Internet Intermediaries in Advancing Public Policy Objectives**”, June 2011, DSTI/ICCP(2010)11/FINAL; L. Edwards, “**Role and Responsibilities of Internet Intermediaries in the Field of Copyright and Related Rights**”, 2011, Report, WIPO

42. This general immunity from direct or primary liability is not absolute. It often terminates once the

intermediary in question ceases to act as a ‘mere conduit’ or ‘facilitator’ for the infringing activities of others and can be taken to ‘authorize’ these. The touchstones for remaining a ‘mere facilitator’ are specific knowledge and control. Put another way, for Internet intermediaries immunity ends and liability starts when knowledge of the infringing nature of a specific third party act is gained and the intermediary is capable of (but fails to) take adequate remedial action upon receipt of such knowledge. Vaver explains:

So knowing of or suspecting infringement is different from authorizing it. Providing equipment that can be used for either lawful or unlawful purposes is not authorization either, any more than sale of a firearm implies the seller’s authorization to the buyer to commit crimes with it. Authorization implies control, and neither a firearms seller nor a library controls what people do with equipment that is made available to them.

Similarly, without knowledge of the infringing nature of a specific act, the intermediary is unable to exert control over that act: “While knowledge of the infringing nature of a work is not a defence to copyright actions generally, nevertheless the presence of such knowledge would be a factor in the evaluation of the ‘conduit’ status of an Internet Service Provider.”

Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers, 2004 SCC 45, per Binnie, J., para. 99; *isoHunt Web Technologies Inc. v. EMI Group Canada Inc.*, 2009 BCSC 1837, para. 6, affirmed 2009 BCCA 618; D. Vaver, “**Intellectual Property Law: Copyright, Patents, Trade-Marks**”, 2nd Ed., (Toronto: Irwin Law, 2011), p. 178

43. Most frequently, secondary liability for intermediaries manifests as ‘notice-takedown’ liability, where an intermediary becomes liable upon receiving notice of a specific third-party infringing content within its control and failing to take down this content within a reasonable time thereafter. This is explained, cautiously, in *SOCAN v. CAIP*:

The knowledge that someone *might* be using neutral technology to violate copyright...is not necessarily sufficient to constitute authorization, which requires a demonstration that the defendant did ‘(g)ive approval to; sanction, permit; favour, encourage’ (*CCH*, at para 38) the infringing conduct...notice of infringing content, and a failure to respond by "taking it down" may in some circumstances lead to a finding of "authorization".

Notice-takedown liability has been employed in a number of contexts, most notably, as a means of mediating secondary liability for those who merely ‘facilitate’ defamatory publication.

Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers, 2004 SCC 45, per Binnie, J., para. 127; *isoHunt Web Technologies Inc. v. EMI Group Canada Inc.*, 2009 BCSC 1837, paras. 6 and 12, affirmed 2009 BCCA 618; *Crookes v. Newton*, 2011 SCC 47, per Abella, J., paras. 16-21

44. While notice-takedown liability is the most rigorous and common form of secondary liability, some courts have raised concerns about potential adverse effects that may result from imposing this form of liability onto the activities of third parties. This has led some courts to question what might constitute effective ‘notice’ as well as what remedial action should be required upon receiving such notice. In *SOCAN v. CAIP*, for example, on the issue of authorization, the Court warned:

...notice of infringing content, and a failure to respond by "taking it down" may in some circumstances lead to a finding of "authorization". However, that is not the issue before us. Much would depend on the specific circumstances. An overly quick inference of "authorization" would put the Internet Service Provider in the difficult position of judging whether the copyright objection is well founded, and to choose between contesting a copyright action or potentially breaching its contract with the content provider. A more effective remedy to address this potential issue would be the enactment by Parliament of a statutory "notice and take down" procedure as has been done in the European Community and the United States.

Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers, 2004 SCC 45, per Binnie, J., para. 127

45. Courts in some jurisdictions have held that some parties are *so* passive with respect to some third party infringing activity, that they should not be liable at all (*Crookes v. Newton*: “Recently, jurisprudence has emerged suggesting that some acts are so passive that they should not be held to be [defamatory] publication...considering the potential liability of an Internet service provider, the court held that in order to hold someone liable as a publisher, ‘[i]t is not enough that a person merely plays a passive instrumental role in the process’; there must be ‘knowing involvement in the process of publication of the relevant words’”). Other courts have held that, in some contexts, imposing ‘takedown-like’ obligations is extreme and leads to adverse impact on fundamental rights of users. In *Scarlet Extended v. SABAM*, the European Court of Justice rejected a remedy that would have obligated a Belgian ISP to block all of its customers from accessing a particular infringing site on the basis that this would be costly for the ISP, and would impact on the privacy and free expression rights of its customers.

Scarlet Extended SA v. Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM), [2011] Case C-70/10, ECR 00000 (E.C.J.), paras. 48, 50-53; *Crookes v. Newton*, 2011 SCC 47, per Abella, J., para. 21

46. Canadian legislatures have recently enacted ‘notice-notice’ liability for Internet Service Providers, hosting sites and search engines within the *Copyright Act*. Such entities need not ‘take down’ allegedly infringing content upon receiving notice, but must forward notice of the infringement allegation to the third party subscriber accused of having committed it (recently codified in sections 41.25-41.27 of the *Copyright Act*). Other courts have stated that intermediaries should be liable even if they have *no* notice of specific infringing activity. For example, where an online platform is provided *primarily* to enable infringing acts, and where the operators of such a platform have direct knowledge of this, a platform might be held liable even in the absence of ‘notice-based’ liability (recently codified in section 27(2.3)-(2.4) of the *Copyright Act*).

Copyright Act, R.S.C., 1985, c. C-42, ss. 27(2.3)-(2.4) and 41.25-41.27; *isoHunt Web Technologies Inc. v. EMI Group Canada Inc.*, 2009 BCSC 1837, affirmed 2009 BCCA 618, para. 6

47. While intermediary liability should be articulated only with great caution, on the facts of this case, none of these issues are raised, as the respondents took down the full-text Kay Work upon receiving notice from the Warman appellant claiming reproduction of the work on the respondents’ site infringed his copyright. However, it would be an error in law to impose direct liability onto the respondents for a work reproduced on their online discussion platform by a third party user of that site.

C. INJUNCTIVE RELIEF NOT AVAILABLE AFTER STATUTORY LIMITATIONS EXPIRE

48. CIPPIC supports the submissions made by the CCIA intervener to the effect that a work is not ‘reproduced’ every day it remains on the Internet. We note, in addition, that the limitation provision found in the *Copyright Act* applies to *all* remedies available for copyright infringement, including injunctions. While exceeding a limitation period is not a bar to injunctions against *future* acts of infringement, there is no such act contemplated in the context of online publication. An article is reproduced when first ‘posted’ much as a book is reproduced when first published.

The fact that a book remains in circulation does not, in and of itself, amount to a distinct act of infringement and, hence, does not trigger the availability of equitable remedies (although publication of future copies may be prevented). Similarly, the ongoing circulation of an online work does not extend the availability of injunctive relief indefinitely.

Copyright Act, R.S.C. 1985, c. C-42, section 43.1; *Wall v. Horn Abbot Ltd.*, 2007 NSSC 197, para. 455

PART IV – ORDER SOUGHT

49. CIPPIC asks that the court take its submission into account in determining this appeal CIPPIC does not seek costs in this matter and asks that costs not be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 17th day of July, 2013

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PART V – LIST OF AUTHORITIES

AUTHORITY	FACTUM REFERENCE
<u>Statutes</u>	
1. <i>Copyright Act</i> , R.S.C., 1985, c. C-42	9, 46, 48
2. Council Directive 2001/29/EC, [2001] O.J. L. 167/10, <i>on the harmonization of certain aspects of copyright and related rights in the information society</i> , (E.U.), Article 2(a)	16
<u>Jurisprudence</u>	
3. <i>Atomic Energy of Canada Limited v. AREVA NP Canada Ltd.</i> , 2009 FC 980	27
4. <i>CBS Songs Ltd. v. Amstrad Consumer Electronics</i> , [1988] 2 All ER 484 (U.K. H.L.)	40
5. <i>CCH Canadian Ltd. v. Law Society of Upper Canada</i> , 2004 SCC 13	37-38
6. <i>Chatterton v. Cave</i> (1878), 3 App. Cas. 483 (U.K. H.L.)	29
7. <i>Crookes v. Newton</i> , 2011 SCC 47	43, 45
8. <i>Edutile Inc. v. Automobile Protection Assn.</i> (C.A.), [2000] 4 F.C. 195, 6 C.P.R. (4 th) 211 (F.C.A.)	31
9. <i>Fairfax Media Publications v. Reed International Books Australia</i> , [2010] FCA 984 (Australian Federal Court of Appeal)	9, 12, 14, 20, 29
10. <i>Francis, Day & Hunter Ltd. v. Twentieth Century Fox Corp. Ltd.</i> , [1939] 4 All E.R. 192, 4 D.L.R. 353 (U.K. Privy Council)	9-11, 23, 31
11. <i>Flamand v. Société Radio-Canada</i> , [1967] 53 C.P.R. 217 (Que. S.C.)	10
12. <i>Hutton v. Canadian Broadcasting Corporation</i> , 1992 ABCA 39	15
13. <i>Ice TV v. Nine Network Australia</i> , [2009] HCA 14 (High Court of Australia)	12, 14, 25

14.	<i>Infopaq International A/S v. Danske Dagblades Forening</i> , 2009 ECR I-06569 (E.C.J.)	16
15.	<i>isoHunt Web Technologies Inc. v. EMI Group Canada Inc.</i> , 2009 BCSC 1837, affirmed 2009 BCCA 618	42-43, 46
16.	<i>JHP Ltd. v. BBC Worldwide Ltd.</i> , [2008] EWHC 757 (U.K. Ch.)	29
17.	<i>King Features Syndicate Inc. v. Lechter</i> , [1950] 12 C.P.R. 60 (Ex. Ct.)	24
18.	<i>Ladbroke (Football) v. William Hill (Football) Ltd.</i> , [1964] 1 All ER 465 (U.K. H.L.)	20
19.	<i>Muzak Corp. v. Composer, Authors & Publishers Association of Canada Ltd.</i> , [1953] 2 S.C.R.	37-38, 40
20.	<i>Preston v. Twentieth Century Fox Canada</i> , [1990] 38 F.T.R. 183, 33 C.P.R. (3d) 242 (F.C.T.D.)	15, 20
21.	<i>Prism Hospital Software Inc. v. Hospital Medical Records Institute</i> , [1994] 57 C.P.R. (3d) 129 (B.C.S.C.)	20, 27
22.	<i>Robertson v. Thomson Corp.</i> , 2006 SCC 43	21-22, 28-29
23.	<i>Scarlet Extended SA v. Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)</i> , [2011] Case C-70/10, ECR 00000 (E.C.J.)	45
24.	<i>Shewan v. Canada (Attorney General)</i> , [1999] 87 C.P.R. (3d) 475 (ON S.C.)	29
25.	<i>Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers</i> , 2004 SCC 45	37, 39, 42-44
26.	<i>Théberge v. Galerie d'Art du Petit Champlain Inc.</i> , 2002 SCC 34	12, 32
27.	<i>Tomas v. Boaden Catering Ltd.</i> , [1995] 115 F.T.R. 236, 68 C.P.R. (3d) 275 (F.C.T.D.)	15, 29
28.	<i>U & R Tax Services Ltd. v. H & R Block Canada Inc.</i> , [1995] 97 F.T.R. 259, 62 C.P.R. (3d) 257 (F.C.T.D.)	12, 27, 31, 35

29. *Vigneux v. Canadian Performing Right Society*, [1945] 1 All ER 432 (P.C.) 38, 40
30. *Wall v. Horn Abbot Ltd.*, 2007 NSSC 197 48
31. *Warman v. Fournier*, 2012 FC 803 26, 30, 34-36
32. *Warwick Film Productions v. Eisinger*, [1969] 1 Ch. 508, (U.K. Ch. Div.) 20

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34. J.S. McKeown, “Fox on Canadian Law of Copyright and Industrial Design”, Digital Edition, (Toronto: Thomson Reuters Canada, 2013), Excerpt, Section 21:2(c) – Production or Reproducing a Substantial Part of a Work 19, 33
35. OECD, “The Role of Internet Intermediaries in Advancing Public Policy Objectives”, June 2011, DSTI/ICCP(2010)11/FINAL, Excerpt, pp. 10-24 41
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