

Federal Court



Cour fédérale

Date: 20160510

Docket: T-500-14

Citation: 2016 FC 524

Ottawa, Ontario, May 10, 2016

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

**JUDY MALTZ, BARBARA BIRD
AND RICHIE SHERMAN**

Applicants

and

**JENNIFER L. WITTERICK
AND PENGUIN CANADA BOOKS INC.**

Respondents

JUDGMENT AND REASONS

[1] Francizska Halamajowa and her daughter, Helena, lived in the town of Sokal, Poland, during World War II when the town was occupied by German forces. She harboured and hid three Jewish families for nearly two years as well as a German soldier who had deserted as the war neared an end. Mrs. Halamajowa's story forms the basis of a documentary film, titled *No. 4 Street of Our Lady*, which the Applicants have produced and directed. This documentary is based

in part on the diary of Moshe Maltz, who was one of those hidden by Mrs. Halamajowa and was also the grandfather of Judy Maltz, one of the three Applicants in this proceeding.

[2] The Applicants contend that Jennifer Witterick and the publisher of her book, Penguin Canada Books Inc., have infringed their copyright and moral rights in the documentary. They say Ms. Witterick's novel, titled *My Mother's Secret*, impermissibly copied from their documentary and, consequently, they are asking the Court, among other things, to award them damages totalling \$6,000,000 as against Ms. Witterick and Penguin Canada.

I. Background

[3] Ms. Maltz was teaching journalism at Pennsylvania State University in May 2006 when she approached the other two Applicants, Richie Sherman and Barbara Bird, about making a documentary regarding a Polish-Catholic woman, Franciszka Halamajowa, who had rescued members of her family during the Holocaust. Her evidence shows that the documentary [the Documentary] cost approximately \$100,000 to make, took some three years to produce, and premiered on March 1, 2009 in Pennsylvania. DVD copies of the Documentary went on sale to the public in early September 2009. The Documentary has been screened at dozens of film festivals and other venues, won several awards, and generated approximately \$25,000 in revenue.

[4] Ms. Witterick first viewed the Documentary when she attended a screening in November 2011, during Holocaust Education Week in Toronto. She says Franciszka Halamajowa's story and her courageous acts inspired her to write *My Mother's Secret* [the Book]. She characterizes

her Book as a fictionalized version of Mrs. Halamajowa's story. She says she targeted the Book at young adults, and that she was influenced in the style of the Book by novels such as *The Hunger Games*. She states she used the real names of the Halamajowas and several facts from the Documentary; notably, the location of the story, where Mrs. Halamajowa and her daughter hid people (i.e., a loft above a pigsty, under the kitchen floor, and in the attic of her house), that Mrs. Halamajowa had left her husband, and that she had a son and a daughter. According to Ms. Witterick, the characters and personalities in the Book are fictional, drawn from her own experiences and imagination.

[5] Ms. Witterick admits she used certain facts as she recalled them from the Documentary and worked them into her Book. The Book is comprised of five sections, each with a different narrator. The record includes a more or less finished draft of the Book dated June 19, 2012. It also includes evidence that sometime in July 2012 Ms. Witterick downloaded a copy of the Documentary and watched certain sections of it to confirm the historical accuracy of some facts in the Book, notably as to what rewards were being given for turning in Jews in Sokal at the time. Ms. Witterick's Book was first published in March 2013 by iUniverse, a self-publishing company. The Globe and Mail placed the Book on its bestsellers list for the first time on April 20, 2013.

[6] Ms. Maltz says she first learned of Ms. Witterick's Book on April 2, 2013, when she received an email from a woman named Sue Kaplan. On April 3, 2013, she contacted Ms. Witterick by email and, following their exchange of emails over the next two days, Ms. Witterick

sent Ms. Maltz several copies of the Book. Ms. Maltz says she was distressed by the situation and did not read the Book until sometime after she received the copies.

[7] Sometime in May or June 2013, GP Putnam's Sons, an imprint of the Penguin Group in the United States, acquired worldwide publishing rights for the Book. On August 11, 2013, Ms. Maltz emailed Alex Gigante, counsel for Penguin Group (USA) LLC, raising various concerns about the Book. Mr. Gigante's reply to Ms. Maltz on August 12, 2013, stated that there was no copyright in facts and invited her to provide examples of inappropriate copying from the Documentary. In September 2013, Penguin published the Book in Canada and in the United States. Subsequently, the Applicants' legal counsel sent a cease and desist letter dated October 31, 2013, to Penguin Canada, Ms. Witterick, Penguin USA and iUniverse.

[8] The parties agree there was an offer from Ms. Witterick to Ms. Maltz to include "something" from Ms. Maltz in the Book. Ms. Maltz characterizes this as Ms. Witterick looking for an endorsement; Ms. Witterick characterizes this as offering Ms. Maltz an opportunity to include her views in the Book, after Ms. Witterick learnt that Ms. Maltz was upset by the Documentary not being mentioned in the Book. In any event, there is no mention of the Documentary in the copies of the Book placed in the record for this matter.

[9] Ms. Maltz states that, as of March 27, 2014, there has been no attribution to the Documentary in newer editions of the Book or in any other publicity material authorized by Ms. Witterick and her publishers. However, the record does contain an article from the Canadian Jewish News dated April 2, 2013, in which the reporter who had interviewed Ms. Witterick

noted that she had found out about the story of Mrs. Halamajowa and her daughter while watching the Documentary during Holocaust Education Week in Toronto in 2011.

[10] Ms. Maltz alleges that the Book copies personal family stories as well as the structure and narrative devices of the Documentary. Accordingly, on February 27, 2014, she and the other two Applicants filed a Notice of Application pursuant to subsection 34(4) of the *Copyright Act*, RSC 1985 c. C-42 [the *Act*], requesting, among other things, a declaration that the Respondents have, contrary to the *Act*, infringed the Applicants' copyright and moral rights in the Documentary.

II. Issues

[11] The various issues raised by the parties boil down to these three questions:

1. Has there been substantial taking from the Documentary by the Respondents such that there is copyright infringement?
2. Have the Applicants' moral rights been infringed? and
3. If there is copyright infringement or if the Applicants' moral rights have been infringed, are the Applicants entitled to damages or any other remedy?

III. The Experts' Evidence

[12] The Applicants and the Respondents each filed an affidavit from an expert witness. The Respondents engaged Professor Sara Horowitz, a Professor of Comparative Literature at York University with specialties in the Holocaust and Jewish studies. Her affidavit focuses on the use of various themes and elements in Holocaust literature; she deposes that various elements in the

Book, such as a massacre at a factory, aktionens or raids in Jewish ghettos, and hiding in attics and lofts, are common themes in Holocaust literature.

[13] For their part, the Applicants filed an affidavit from Jack Granatstein, a former director and CEO of the Canadian War Museum and an emeritus professor of History at York University. His affidavit speaks to “large” versus “small” facts as well as plagiarism and plagiarism policies at universities amongst academics. He draws a distinction between a “large” fact, such as “the Second World War began when Germany invaded Poland,” and a “small” fact, such as a soldier’s diary entry that he had “looted the post office at Danzig on September 4, 1939.” In his opinion, it was inappropriate for the Book not to credit the Documentary.

IV. The Parties’ Submissions

[14] The Applicants assert that Ms. Maltz’s email letter to Mr. Gigante was in effect a “red flag” alert about the infringement, and that there is no other book or similar story covering the numerous elements which the Applicants say are shared between the Documentary and the Book. They also highlight the fact that Ms. Witterick has not denied watching the Documentary. They suggest that Ms. Witterick copied passages and small details from the Documentary as well as “various storytelling devices and choices used by the filmmakers in their creative expression” of Mrs. Halamajowa’s story.

[15] The Applicants point to what they allege are at least 30 similarities between the Documentary and the Book. They acknowledge that although well-known historical facts are open to use by anyone, the 30 examples in their chart listing “verbatim or almost verbatim

copying” are “small facts” not documented anywhere but in the Documentary. They contend that these small facts have been plagiarized in the Book and were elicited by the Applicants’ time, skill, and judgment. According to the Applicants, the Documentary relays these small facts through the lens of a particular family, and that Ms. Witterick uses this same mechanism in the Book. It makes no sense, the Applicants say, that Ms. Witterick would look to the Documentary for historical accuracy, yet also disregard historical accuracy about other matters such as her use of non-Jewish names for Jewish characters in the Book. The Applicants submit that Ms. Witterick used various storytelling devices from the Documentary, including the framing question of why Mrs. Halamajowa took the actions she did. Because the Book was at times on the Globe and Mail’s bestsellers list for non-fiction, the Applicants say this undermines the claim that the Book is a fictional story.

[16] The Applicants rely upon *Anne of Green Gables Licensing Authority Inc. et al. v Avonlea Traditions Inc.*, [2000] OJ No 740, 4 CPR (4th) 289 [*Anne of Green Gables*], for the proposition that there can be copyright in “well-delineated characters.” They also submit, on the basis of *Hager v ECW Press Ltd. et al.*, [1998] FCJ No 1930, 85 CPR (3d) 289, that there can be copyright in interview material. The Applicants further cite and rely on the Supreme Court of Canada’s decision in *Cinar Corporation v Robinson*, 2013 SCC 73, [2013] 3 SCR 1168 [*Cinar*], arguing that the cumulative features of a work must be considered, and that substantial taking can include intelligible similarities such as themes.

[17] The Respondents acknowledge that the Documentary is a dramatic work protected by copyright. However, according to the Respondents, the only similarities between the Book and

the Documentary are the facts, and they do not relate to copyrighted expression. The protected expression, the Respondents argue, is the Applicants' skill and judgment used to shoot, compile and arrange the Documentary. Mrs. Halamajowa and the other persons involved in her story are factual, historical persons in respect of whom the Applicants do not have a monopoly.

[18] The Respondents say there is no copyright in facts, regardless of whether they are small or large. The Respondents submit there is no legal basis for the "small facts" theory advanced by the Applicants on the basis of Professor Granatstein's affidavit. They submit that the Applicants' plagiarism arguments do not apply in copyright law because plagiarism protects ideas, while copyright protects only the expression of ideas. According to the Respondents, only originality is protected by copyright, and whether a substantial part of a work has been copied is a determination that must be made "holistically and qualitatively."

[19] The Respondents recognize that the Applicants used their skill and judgment to put together and edit archival material, film footage, music, and conduct interviews for the Documentary; these elements give the Documentary a "distinct feel" involving contemporary recollection and history. The Book, however, has a completely different feel, the Respondents say, because it is a fictional story aimed at young readers. The Respondents argue that the Applicants have failed to consider the Book as a whole, including what makes the Book an original work.

[20] The question at issue, the Respondents submit, is whether a substantial part of the Applicants' protected original expression has been reproduced. The Respondents rely on the UK

case of *Baigent v The Random House Group*, 2007 EWCA Civ 247, for the proposition that when there is a claim of infringement of factual material by a work of fiction, the facts, ideas, and themes cannot be monopolized. According to the Respondents, historical facts and interpretations do not count towards substantial similarity (citing *Effie Film LLC v Pomerance*, 909 F.Supp.2d 273 (SDNY 2012) [*Effie Film*]).

[21] The Respondents contend that the Applicants have not shown that a substantial part of the Documentary has been reproduced. Contrary to the Applicants' allegations, there is no verbatim copying. The Applicants, the Respondents argue, have failed to identify this alleged copying and none of the items they point to is original expression. In this case, the Respondents say the Applicants cannot argue similarities between the characters in the Book and the "real life characters" in the Documentary since these are or were real people whom the Applicants cannot own. According to the Respondents, copyright can only exist in a fictional character such as Anne of Green Gables.

[22] As to the storytelling devices, the Respondents submit that the framework of multiple narrators in the Book and in the Documentary is similarity at such an abstract level so as to be meaningless. Also, in beginning and ending with the question of whether others would have taken actions similar to those of Mrs. Halamajowa, the Respondents rely upon Professor Horowitz's affidavit to show that this is a common theme to all stories of Holocaust rescuers, not only in the Documentary.

V. Analysis

A. *The scope of the Applicants' copyright in the Documentary*

[23] In assessing whether any infringement has occurred in this case, it is first necessary to consider the scope of the Applicants' copyright in the Documentary because the Respondents cannot infringe in ways which do not fall under copyright protection.

[24] The Applicants have obtained a copyright registration under the *Act* for a "dramatic" work titled *No. 4 Street of Our Lady*, being registration number 1107763 dated September 18, 2013. Ms. Maltz alone holds a copyright registration for her grandfather's diary which was privately published in New York on December 22, 1993 under the title *Years of Horror - Glimpse of Hope*; this registration was assigned to Ms. Maltz by her father in 2014 after it was registered on September 23, 2013.

[25] By virtue of subsection 3(1) of the *Act*, the Applicants have the sole right to produce or reproduce the Documentary or any substantial part thereof in any material form whatever, and to authorise use of the Documentary in the manner and ways contemplated by such subsection.

[26] The Respondents do not dispute that the Applicants have copyright in the Documentary: both parties agree that, fundamentally, there is copyright in originality and in the Applicants' compilation and overall arrangement of the elements in the Documentary. In this regard, the observations of Justice McLachlin (as she then was) in *Slumber-Magic Adjustable Bed Co. Ltd. v Sleep-King Adjustable Bed Co. Ltd.* (1984), 3 CPR (3d) 81, [1985] 1 WWR 112, warrant note:

17 ... It is well established that compilations of material produced by others may be protected by copyright, provided that the arrangement of the elements taken from other sources is the product of the plaintiff's thought, selection and work. It is not the several components that are the subject of the copyright, but the overall arrangement of them which the plaintiff through his industry has produced. The basis of copyright is the originality of the work in question. So long as work, taste and discretion have entered into the composition, that originality is established. In the case of a compilation, the originality requisite to copyright is a matter of degree depending on the amount of skill, judgment or labour that has been involved in making the compilation: *Ladbroke (Football) Ltd. v. William Hill (Football) Ltd.*, [1964] 1 W.L.R. 273, [1964] 1 All E.R. 465 (H.L.). Where copyright is claimed in a compilation it is not the correct approach to dissect the work in fragments and, if the fragments are not entitled to copyright, then deduce that the whole compilation is not so entitled; rather, the court should canvas the degree of industry, skill or judgment which has gone into the overall arrangement: *Ladbroke*, supra; see also *T.J. Moore Co. v. Accessoires de Bureau de Que. Inc.* (1973), 14 C.P.R. (2d) 113 (Fed. Ct.); *Jarrold v. Houlston* (1857), 3 K. & J. 708, 69 E.R. 1294 (Ch. Div.); *MacMillan & Co. v. Cooper* (1923), L.R. 51 Ind. App. 109, 40 T.L.R. 186 (P.C.).

[27] It should also be noted that the so-called "sweat of the brow doctrine" has been rejected as the test for originality. A protected work must be an exercise of skill and judgment. As the Supreme Court stated in *CCH Canadian Ltd. v Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 SCR 339 [*CCH*]:

24 Requiring that an original work be the product of an exercise of skill and judgment is a workable yet fair standard. The "sweat of the brow" approach to originality is too low a standard. It shifts the balance of copyright protection too far in favour of the owner's rights, and fails to allow copyright to protect the public's interest in maximizing the production and dissemination of intellectual works. On the other hand, the creativity standard of originality is too high. A creativity standard implies that something must be novel or non-obvious — concepts more properly associated with patent law than copyright law. By way of contrast, a standard requiring the exercise of skill and judgment in the production of a work avoids these difficulties and provides a

workable and appropriate standard for copyright protection that is consistent with the policy objectives of the *Copyright Act*.

[28] More recently, Chief Justice McLachlin, speaking for the Supreme Court in *Cinar*, noted that:

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

[25] However, the Act does not protect every “particle” of an original work, “any little piece the taking of which cannot affect the value of [the] work as a whole”: *Vaver*, at p. 182. Section 3 of the *Copyright Act* provides that the copyright owner has the sole right to reproduce “the work or any substantial part thereof”. [Emphasis in original]

[29] The Documentary as a whole is undoubtedly protected by copyright. However, the Applicants must grapple with the overarching principles noted above as well as the long standing principle that “there can be no copyright in facts” (see: *CCH Canadian Ltd. v Law Society of Upper Canada*, 2002 FCA 187 at para 212, [2002] 4 FC 213; also see: *Deeks v Wells*, [1931] 4 DLR 533, 1931 CarswellOnt 247 (CA), per Orde, J.A.).

[30] Mrs. Halamajowa’s story is not in and of itself covered by the Applicants’ copyright in the Documentary. The factual details of her story are also not covered by the Applicants’ copyright. It is not the story that the Applicants’ copyright protects but, rather, the Applicants’ specific expression of it through the exercise of their skill and judgment.

[31] The Applicants' arguments based on differences between "small" and "large" facts, with the former deserving of protection in this case and the latter not so deserving, are without merit. Copyright law recognizes no such difference or distinction. Facts are facts; and no one owns copyright in them no matter what their relative size or significance. Any alleged distinction between small and large facts is an artificial division, one which obscures what is protected by the Applicants' copyright in the Documentary. The particular means, method, and manner the Applicants used to tell Mrs. Halamajowa's story is protected. Their particular phrasing of the words which tell her story is also protected, such that instances of verbatim copying – i.e. transcription of the Documentary – may well constitute copyright infringement.

[32] However, using an actual fact from the Documentary is not infringement no matter how large or small, significant or insignificant, such a fact may be. There can be no copyright, for example, in the fact that during the Second World War Mrs. Halamajowa afforded refuge to three Jewish families and a German soldier, or that there was a massacre at the brickyard in Sokal during the war. As noted above, there can be no copyright in facts or ideas, but only in their expression through an exercise of skill and judgment.

B. *Was there a substantial taking?*

[33] The central question to be addressed is whether the originality of the Documentary, such as its structure, tone, theme, atmosphere and dialogue, has been improperly copied by the Respondents and amounts to a substantial taking from the Documentary.

[34] Upon comparison of the essential elements of originality in the Documentary with those of the Book and considering each of the Documentary and the Book holistically and each as a whole, I find, for the reasons that follow, that the Book does not amount to a substantial taking from the Documentary.

[35] The Supreme Court stated in *Cinar* that:

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

[36] Since facts are not protected by copyright, they are not part of a work’s originality. Consequently, any facts copied or taken by Ms. Witterick and used in her Book should not form part of the assessment as to whether a substantial part of the Documentary was taken by her (see: *Effie Film*). Making this assessment requires a holistic approach, one which looks to the cumulative effect of any copied features. In this regard, the Supreme Court offers the following guidance in *Cinar*:

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

[36] As a general matter, it is important to not conduct the substantiality analysis by dealing with the copied features piecemeal: *Designers Guild*, at p. 705, per Lord Hoffman. . . . Rather, the cumulative effect of the features copied from the work must be considered, to determine whether those features amount to a substantial part of Robinson's skill and judgment expressed in his work as a whole.

[37] *Cinar* further teaches (at para 39) that a substantiality analysis should focus on whether the copied elements are a substantial part of the Documentary, not whether they are a substantial part of the Book. This being so, the entire romantic subplot of the Book between Helena and Casimir, which the Respondents say differentiates the two works, is not of substantial importance. However, as the Supreme Court cautioned in *Cinar*:

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

[38] In determining whether a substantial part of the Applicants' work has been taken, the quality and quantity of material taken should be considered along with the importance and originality of that material. The extent to which the infringement has adversely affected the Applicants' activities and diminished the value of their copyright should also be considered. Whether the material taken is properly the subject of copyright, whether the Respondents intentionally took the material to save time and effort, and whether the material was used in the same or similar fashion as it was in the copyrighted work, are also questions to address in a substantiality analysis.

[39] As to the quality and quantity of material taken, the core story about Mrs. Halamajowa is clearly taken from the Documentary. However, that story is based on historical facts in respect of which there is no copyright. The framing of the story and certain phrases or words might have been taken from the Documentary into the Book but, unlike a fictional story, this is not a copying of fictional characters brought to life in the Documentary. It is apparent upon comparison of the Book with the Documentary that the place and people and some occurrences are at least recognizably similar between the Book and the Documentary. But these are also all facts.

[40] The Applicants claim infringement by the Respondents in respect of the well-delineated characters in the Documentary, and rely on *Anne of Green Gables*, arguing that the characters in the Book are clearly based on and are virtually identical to the individuals in the Documentary. The Applicants' reliance upon *Anne of Green Gables* is misguided, however, because there are no fictional characters in the Documentary; there are only real people or references to and recollections of once real persons, and there cannot be copyright over a real person, whether dead or alive.

[41] Furthermore, although the Applicants insist there is an abundance of verbatim or nearly verbatim copying, this is merely one aspect to assess in a substantiality assessment because "copyright may be infringed by a work which does not reproduce a single sentence of the original" (see: *Cinar* at para 27).

[42] In this case, there is little, if any, verbatim copying of any dialogue from the Documentary into the Book. At most, there is but one instance where the Book uses some exact

words from the Documentary; that is, where Fay Malkin, one of the Jewish children hidden by Mrs. Halamajowa, says her aunt told her that a German soldier said: “It doesn’t matter. We’ll get the mother later anyway” after the soldier and a Jewish policeman had taken the mother’s baby. The Book uses the following words: “ ‘Doesn’t matter,’ says the German soldier. ‘We’ll get the mother later.’ ” At worst, this is but a “particle” from the Documentary. This copying is of a *de minimus* nature, and clearly unlike that in *Icotop Inc. v Ferrand*, 2005 QCCS 59672, 146 ACWS (3d) 540, where the court found (at para 147) that the defendant, who had been involved in the production of a documentary film and later wrote a book which reproduced about 75 percent of the lines in the film, had infringed the copyright in the film. In any event, the parties’ disagreement over exactly how many words were or were not copied verbatim is of less importance than the consideration of the two works each as a whole.

[43] As to the extent to which the alleged infringement has adversely affected and diminished the value of the Applicants’ copyright, the Applicants allege that the Book is being mistaken as the true story, that the Documentary is now used less for learning and education in favour of the Book, that they are receiving less speaking engagements, and that the number of screenings of the Documentary has declined. However, the evidence in the record shows that the number of speaking engagements and screenings were declining even before publication of the Book, a fact which casts some doubt on the cause of this decline.

[44] As noted, the material that is properly the subject of the Applicants’ copyright is *their expression* of Mrs. Halamajowa’s story, not the story itself. It is difficult to see how the Applicants’ copyright has in fact been infringed at all by the Book. Although there is little

evidence either way regarding any time and effort saved by Ms. Witterick, she clearly used the Documentary for reference and, while taking material from the Documentary saved her the time and effort of re-creating the research efforts performed by the Applicants, this is not sufficient to find that she has infringed the *originality* of the Applicant's work. The originality of the Documentary remains intact despite the fact the Book has taken historical facts as recounted in the Documentary.

[45] The Book uses the facts in a way similar to that in the Documentary; that is, to tell the story of Franciszka Halamajowa and to bring attention to this particular story. That being said, there is a significant and material change in medium in the telling of the story, from the audio-visual of the Documentary to the written words and fictionalized characters of the Book, and the change from a documentary to a fictionalized story, both of which are substantial changes from the original use of the facts by the Applicants.

[46] Considering the significant differences in expression, content, form, feel, and experience from the Documentary, it is apparent, on a qualitative and holistic view, that the Book is not a mere imitation of or substantial taking from the Documentary. On the contrary, the Book in its own right constitutes a new and original work of fiction emanating from historical facts; as a whole, it does not infringe the Applicants' copyright. The Documentary is a non-fiction film; it is set in the present but reflects on the past to tell a story through a visual and auditory medium; near the end of the Documentary, there is a stirring statement that the Jewish families rescued by Mrs. Halamajowa "altogether, they have more than 100 descendants alive today." In contrast, the Book is a fictional novel originating from historical facts; it is targeted specifically to young

people, told in the first person from the perspectives of four characters, and employs a fictional character not based on any real person from the Documentary.

[47] Although the Documentary and the Book each recount some of the same facts of Francziska Halamajowa's story, there is no substantial taking or use by the Respondents of anything owned by the Applicants because the use of common historical facts is not copyright infringement. The Respondents have not appropriated or taken a substantial portion of the Documentary's originality. It is difficult to identify a single element taken that is not either something generic or merely a fact.

C. *Have the Applicants' moral rights been infringed?*

[48] An author of a work has moral rights in the work under section 14.1 of the *Act*:

14.1 (1) The author of a work has, subject to section 28.2, the right to the integrity of the work and, in connection with an act mentioned in section 3, the right, where reasonable in the circumstances, to be associated with the work as its author by name or under a pseudonym and the right to remain anonymous.

14.1 (1) L'auteur d'une oeuvre a le droit, sous réserve de l'article 28.2, à l'intégrité de l'oeuvre et, à l'égard de tout acte mentionné à l'article 3, le droit, compte tenu des usages raisonnables, d'en revendiquer, même sous pseudonyme, la création, ainsi que le droit à l'anonymat.

[49] Section 28.2 of the *Act* provides that an author's right to the integrity of a work is infringed "only if" the work is, to the prejudice of its author's honour or reputation, (a) "distorted, mutilated or otherwise modified" or, absent authorization from the author, (b) "used in association with a product, service, cause or institution." The courts have acknowledged that

the concept of moral rights has not only a highly subjective aspect, which in practice only the author can prove, but an objective one as well. In *Prise de parole Inc. v Guérin Éditeur Ltée*, (1995), 66 CPR (3d) 257 (appeal dismissed (1996), 73 CPR (3d) 557 (FCA)), Justice Denault stated (at para 26) that, in addition to an author's own subjective evidence as to how his or her honour or reputation has been affected: "the assessment of whether a distortion, mutilation or other modification is prejudicial to an author's honour or reputation also requires an objective evaluation of the prejudice based on public or expert opinion."

[50] In this case, there is negligible, if any, relevant evidence of how the Applicants' honour and reputation has been affected by the Book. This is not a case where, for example, the Respondents have created a collage of stills from the Documentary without permission or authorization. Although an author has the right to be associated with his or her work, there is no evidence of prejudice to the honour or reputation of the Applicants, such that this aspect of their claim for infringement of moral rights also does not succeed (see: *Galerie d'art du Petit Champlain Inc. c Théberge*, 2002 SCC 34 at 17).

[51] Moreover, there is no expert or public opinion evidence in the record which would satisfy the objective aspect of assessing whether the Applicants' moral rights have been infringed or otherwise violated. The Applicants' claim for infringement of moral rights fails on this basis alone.

[52] The Applicants seek \$2,000,000 in damages for the alleged infringement of their moral rights by the Respondents. They claim that their rights to be associated with the Book and to the

integrity of the Documentary have each been infringed. Yet, the Applicants cite no case law in support of their claims of moral rights infringement. Indeed, the Applicants' Memorandum of Fact and Law scarcely mentions their claims in this regard and moral rights were hardly mentioned at all at the hearing of this matter. Furthermore, and in any event, the Applicants could not reasonably expect that the Book would attribute anything at all to the Documentary because Ms. Maltz did not pursue Ms. Witterick's offer to include "something" about the Documentary in the Book.

[53] The Applicants argue that the story has been distorted by Ms. Witterick. Even if that may be true to a certain extent, that is of no consequence because the only copyright in Mrs. Halamajowa's story lies in the Applicants' *expression of it* and *not in* its facts. Several aspects of the Book may be objectionable to Ms. Maltz, notably the fictionalized character of Bronek's father in the Book who resembles Ms. Maltz's great-grandfather who dies from a fall from a roof after having had too much to drink the night before, but any such objections do not amount to an infringement of any moral rights.

D. *Damages and Remedies*

[54] In view of my findings and conclusions noted above, that the Applicants have not established that their copyright and moral rights in the Documentary have been infringed by the Respondents, it is unnecessary to consider any issues with respect to what remedies or damages should be granted.

VI. Conclusion

[55] In conclusion, the Applicants' application pursuant to subsection 34(4) of the *Act* is dismissed. They have failed to establish that their copyright and moral rights in the Documentary have been infringed by the Respondents.

[56] The Respondents are entitled to their costs of this proceeding in such amount as may be agreed to by the parties. If the parties are unable to agree as to the amount of such costs within 15 days of the date of this judgment, either party shall thereafter be at liberty to apply for an assessment of costs in accordance with the *Federal Courts Rules*.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The Applicants' application pursuant to subsection 34(4) of the *Copyright Act* is dismissed; and
2. The Respondents shall have their costs of this application in such amount as may be agreed to by the parties. If the parties are unable to agree as to the amount of such costs within 15 days of the date of this judgment, either party shall thereafter be at liberty to apply for an assessment of costs in accordance with the *Federal Courts Rules*.

“Keith M. Boswell”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-500-14

STYLE OF CAUSE: JUDY MALTZ, BARBARA BIRD AND RICHIE
SHERMAN v JENNIFER L. WITTERICK AND
PENGUIN CANADA BOOKS INC.

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: JANUARY 11-13, 2016

JUDGMENT AND REASONS: BOSWELL J.

DATED: MAY 10, 2016

APPEARANCES:

Howard Knopf
Jaimie M. Bordman

FOR THE APPLICANTS

Peter Jacobson
Tae Mee Park
Andrew W. MacDonald

FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Macera & Jarzyna, LLP
Barristers and Solicitors
Ottawa, Ontario

FOR THE APPLICANTS

Bersenas Jacobsen Chouest
Thomson Blackburn LLP
Barristers and Solicitors
Toronto, Ontario

FOR THE RESPONDENTS