

Federal Court of Appeal



Cour d'appel fédérale

Date: 20120831

Docket: A-166-11

Citation: 2012 FCA 226

**CORAM: LAYDEN-STEVENSON J.A.*
GAUTHIER J.A.
STRATAS J.A.**

BETWEEN:

HARMONY CONSULTING LTD.

Appellant

and

G.A. FOSS TRANSPORT LTD., GORDON A. FOSS AND JOE CRISTELLO

Respondents

Heard at Ottawa, Ontario, on February, 14, 2012.

Judgment delivered at Ottawa, Ontario, on August 31, 2012.

REASONS FOR JUDGMENT BY:

GAUTHIER J.A.

CONCURRED IN BY:

STRATAS J.A.

NOT TAKING PART IN THE JUDGMENT:

LAYDEN-STEVENSON J.A.*

* Layden-Stevenson J.A. was unable to participate in the Court's deliberations and died on June 27, 2012. This judgment and the reasons are issued under subsection 45(3) of the *Federal Courts Act*, R.S.C. 1985, c. F-7.

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REASONS FOR JUDGMENT

GAUTHIER J.A.

[1] Harmony Consulting Ltd. (Harmony) appeals from the decision of the Federal Court, reported at 2011 FC 340, dismissing its action for copyright infringement with regard to computer programs licensed to G.A. Foss Transport Ltd. (Foss). Foss and its two shareholders, Gordon A. Foss and Joe Cristello, were defendants to the action.

[2] At paragraph 25 of her Reasons (the Reasons), the trial judge describes the various computer programs at issue before her as follows:

...

a. Petro Dispatch 2000: This was the primary software package that was purchased by Foss Transport. It was used for order inputting, dispatching, post-order reconciliation, invoicing and forecasting delivery requirements. It included the following modules:

- i. Main Dispatch Module;
- ii. Post Order Module;
- iii. Invoicing Module;
- iv. Reporting Module; and
- v. Dip Forecasting Module

b. Card Lock Invoicing Program: Card lock facilities are fuelling depots for commercial vehicles, usually unmanned, and are accessed through a credit card and a PIN number. This program produced the invoices for the card lock customers.

c. Railmaster Program: This program had two distinct sections; rail car management and dispatch. The rail car management section tracked inventory in rail cars, invoiced for time on rail sidings and dispatched bulk products. The dispatch module was for the dispatch of cement, heavy oil products, asphalt and waste oil.

d. Payroll Module: This module was intended to perform payroll based on type of driver, type of load and buying agreements. While data entry of drivers' names and details were input, the module was never fully customized for Foss Transport, nor did Mr. Chari make the program operational for Foss Transport. In the end Foss Transport never used this program for payroll.

e. Modifications: There were numerous modifications and "add-ons" to enable the software to function for Foss Transport. Many involved very minor changes to the program in order to make it work better for the Foss Transport administrative staff. Modifications included amending rates, and method of charging, to conform to the Foss Transport business model and industry practices. Regardless of the size or type of modification, the plaintiff has asserted that these modifications would be covered under a new licensing agreement and would be independently copyrighted.

[3] In my view, although the Reasons contain some mistakes, a number of the trial judge's findings stand. Taken together, these findings are sufficient to uphold the result she reached. Therefore, I would dismiss Harmony's appeal.

[4] Harmony raises numerous issues on appeal. They can be grouped as follows:

- i) Who owns the Petro Dispatch 2000 copyrights?
- ii) Were any of Harmony's copyrights infringed?
- iii) Are the individual respondents personally liable for such infringements?

BACKGROUND

[5] Harmony was incorporated by Sushil Chari on March 16, 2000. Harmony's business was to provide computer programming and support services. Foss operates truck hauling, self-serve diesel fuel, and petroleum businesses. Gordon Foss and Joe Cristello are the President and Vice-President, respectively, of Foss.

[6] In early 2000, Foss sought to modernize its business operations by implementing electronic invoicing and dispatching systems. It had worked with solo programmers in the past but this was not a positive experience. In this case, Foss retained a programmer to build the predecessor to one of the programs in issue in this case, Railmaster. But, unfortunately, that programmer passed away before completing the task. In the case of the program related to its Card Lock business, Foss discovered that it was not Y2K compliant. But Foss could not get help from the author of this program because he had moved to the West Coast.

[7] The trial judge held that the program, Petro Dispatch 2000 (Petro), is a compilation of multiple modules organized according to function. Many of its parts are not original and not protected by copyrights. However, as such, the compilation is original and thus a copyrightable work. Like all the other programs at issue Petro was built upon the Microsoft Access Database platform owned by Foss. This is no longer in dispute. A large portion of Harmony's claim was based on infringement of the copyright in such compilation.

[8] Foss entered into three licensing agreements (licensing agreements) with Harmony. The first licensing agreement, dated March 29, 2000, covered the Petro software. The second licensing agreement covered the Railmaster program, while the third applies to the Card Lock Invoicing program. These last two licensing agreements are both dated March 26, 2001. The three licensing agreements provide for perpetual licenses to Foss, and Foss paid the fees for these licenses in full. The trial judge found that the licensing agreements were never properly terminated, and that Foss was entitled to use the programs until they were replaced at different dates before the trial.

[9] In addition to the above-mentioned licensing agreements, Foss and Harmony entered into a support and maintenance agreement whereby Foss paid Harmony \$1,000 per week to make any fixes, additions, modifications, or updates to the licensed programs. On appeal, the trial judge's interpretation of the various contracts between the parties is no longer in dispute.

[10] The trial judge found that the licensed programs under review were authored by Mr. Chari, the sole shareholder, officer, and director of Harmony.

[11] Prior to Harmony's incorporation, Mr. Chari engaged in computer programming (as well as the sale of medical supplies) through another company owned by him and his brother, Atrimed Medical Supply Inc. (Atrimed). Mr. Chari began working on Petro in 1998.

[12] The trial judge found that Atrimed was developing Petro for Roy Curran Transport (RCT). The main contact at RCT was Mr. Reynolds, who later introduced Mr. Chari to Foss in early 2000 by inviting Mr. Foss and Mr. Cristello to a demonstration of this software at RCT's office in early 2000.

[13] The trial judge's finding that Petro was fully developed prior to Harmony Inc.'s incorporation, but had to be adapted to fit Foss' business model, is not disputed. There is still, however, some dispute on appeal as to whether the modifications required to meet Foss's needs before it started using Petro in February, 2001 (or August 2001 as argued by Harmony) were such as to justify distinct copyrights.

[14] At Foss' request, Mr. Chari developed Card Lock Invoicing and Railmaster sometime after Harmony was incorporated in 2000. The Dip Forecasting module was developed later in 2002.

[15] The trial judge found that the only modifications that were original and in which distinct copyrights subsisted, within the meaning of the *Copyright Act*, R.S.C., 1985, c. C-42 (the Act), were the Dip Forecasting, the Railmaster and the Pay Roll program modules. However, as mentioned by the trial judge, Foss never used the Payroll module.

[16] As noted by the trial judge, the parties' relationship was initially amicable. Mr. Chari provided services through the support agreement, and Foss promptly paid all invoices. By March 2003, however, the relationship had somewhat deteriorated, given that the support provided by Harmony to Foss under the support agreement had reduced..., Mr. Chari granted Foss permission to hire another programmer to support the licensed programs. Foss hired Ms. Warth, who later subcontracted Foss' account to Bill Benton and his company, BiLd Solutions. Nevertheless, Foss continued to pay Harmony the \$1,000 weekly fee under the support agreement until March 23, 2004.

[17] In 2003, Mr. Chari acquired RCT and sought to merge it with Foss. They could not reach an agreement on the merger. The trial judge found that this was the catalyst for the complete breakdown of the relationship. Several things happened upon the breakdown. The trial judge found that Mr. Chari unilaterally increased the fees under the support agreement to \$2,000. Mr. Chari alleged that Foss was in arrears under the support agreement of nearly \$20,000 after the failed merger. The trial judge found that the arrears and the unpaid invoices supporting them were fabricated by Mr. Chari to justify his later behaviour. The trial judge also found, and it is not disputed, that Mr. Chari added two so-called "time bombs" to the invoicing and dispatching modules. Mr. Chari described these as specific code and a validation rule added to the modules to ensure that they would not be illegally used by Foss after certain dates. In his view, they were security measures and were not designed to damage Foss' operating system. But, as the trial judge found, they caused much havoc. On April 18, 2004, the first "time bomb" went off, causing Foss'

computer system to fail. On May 1, 2004, the second “time bomb” went off, disrupting Foss’ operations.

[18] Mr. Chari was unavailable to reactivate the programs, and later, when asked, he refused to do so. Ms. Warth was called in. She was able to correct the situation and reactivate the affected modules. It is in that context that Foss terminated the Support Agreement and retained BiLd to support Foss’ licensed software.

[19] Most of the alleged copyright infringements occurred after these events. Although this will be discussed in more detail when dealing with the second question at issue mentioned in paragraph 4 above, namely whether any of Harmony’s copyrights were infringed, at this stage it is worth noting that Harmony mainly relies on the following to support its allegations of copyright infringement:

- Modifications to the programs by Ms. Warth and Mr. Benton (paragraphs 113-115 of the Reasons)
- Modifications to the Petro start up screen (flash screen) to remove Harmony’s name and replace it with BiLd.
- Use of the licensed programs by a larger number of users than that provided for in the licensing agreements.

[20] Harmony alleges that each of these involves the reproduction of the copyrighted work and constitutes a copyright infringement. It must be noted, however, that Harmony argued before the

trial judge that a breach of the licence agreements or the support agreement necessarily resulted in a violation of its copyrights (paragraphs 260-261 of the Reasons).

[21] Neither Mr. Chari nor Atrimed were plaintiffs in the proceedings before the Federal Court. Nor had they assigned in writing any rights they may have had with respect to Petro back in March, 2000. In fact, as part of its evidence in chief, Harmony filed a *nunc pro tunc* assignment to it from Mr. Chari dated June 10, 2009 (a week before the trial). This assignment purports to assign, among other things, all of Mr. Chari's rights in Petro, an assignment that was allegedly made "in Mr. Chari's mind" on March 16, 2000. It includes a waiver of Mr. Chari's moral rights in Petro for the benefit of Harmony.

[22] To avoid repetition, the most relevant findings of the trial judge with respect to ownership and infringement will be discussed when those issues are reviewed, below. At this stage, however, it is important to note a series of basic credibility findings made by the trial judge that affected many of her other findings and her overall view of the case. She found that the testimony of Mr. Chari, the main witness for Harmony, was not credible. She rejected most of his evidence, especially where it contradicted the evidence of Mr. Cristello. The trial judge was also unimpressed with Mr. Reynolds, the only other witness presented by Harmony, primarily on damages issues. On the other hand, she accepted most of the evidence of Foss' fact witnesses. The trial judge noted that Ms. Warth, presented as a fact witness only, was a particularly useful and credible witness. I consider each of these credibility findings to be unimpeachable on appeal.

[23] Mr. Lo was the only expert presented to the court. Foss relied on his evidence mostly with respect to the suitability of the software for its business. Although the trial judge found this evidence credible, she expressed concern as to its relevance. Mr. Lo also made various observations as to the nature and extent of the source code he reviewed with respect to various functionalities. The trial judge refers to this evidence to some extent and relies upon it when examining whether copyrights subsisted in the works alleged to have been infringed.

ANALYSIS

Standard of Review

[24] The standard of review for all these questions is not disputed. It is correctness for questions of law and palpable and overriding error with respect to questions of mixed fact and law that are primarily factual in nature and questions of fact (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (*Housen*)).

[25] In my view, it is particularly important in this case to reiterate what my colleague Stratas J.A. said in *South Yukon Forest Corporation v. Canada*, 2012 FCA 165, 431 N.R. 286 at paragraphs 46 and 51:

[46] Palpable and overriding error is a highly deferential standard of review: *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401; *Peart v. Peel Regional Police Services* (2006) 217 O.A.C. 269 (C.A.) at paragraphs 158-59; *Waxman, supra*. “Palpable” means an error that is obvious. “Overriding” means an error that goes to the very core of the outcome of the case. When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall.

[51] Sometimes appellants attack as palpable and overriding error the non-mention or scanty mention of matters they consider to be important. In assessing this, care must be taken to distinguish true palpable and overriding error on the one hand, from the legitimate by-product of distillation and synthesis or innocent inadequacies of expression on the other.

[26] With respect to findings of fact, including findings relating to credibility, the following statement in *Waxman v. Waxman* (2004), 186 O.A.C. 201, 44 B.L.R. (3d) 165 (O.C.A.) at paragraph 297 is also apposite:

An “overriding” error is an error that is sufficiently significant to vitiate the challenged finding of fact. Where the challenged finding of fact is based on a constellation of findings, the conclusion that one or more of those findings is founded on a “palpable” error does not automatically mean that the error is also “overriding”. The appellant must demonstrate that the error goes to the root of the challenged finding of fact such that the fact cannot safely stand in the face of that error: *Schwartz v. Canada*, [1996] 1 S.C.R. 254 at 281.

[27] In paragraph 277 of *Waxman*, the Ontario Court of Appeal wrote, “The detailed and uncompromising credibility assessments made by the trial judge raise a very high hurdle for the appellants on these appeals.” In my view, those words are apposite when it comes to most of the trial judge’s findings of fact and findings of mixed law and fact in this case.

Burden Of Proof

[28] The trial judge found that, in order to succeed in its action, Harmony had to establish all of the elements set out in subsection 27(1) of the Act (all the relevant provisions of the Act are set out in Appendix “A” to my reasons).. Thus, she said that Harmony had to persuade her, on a balance of probabilities, that:

- It owned the copyrights in the computer programs at issue;

- Foss' actions constituted an infringement of its exclusive rights (subsection 3 (1)); and
- Such actions were done without its consent.

[29] Harmony argues that the trial judge misplaced the burden of proof with respect to the element of consent. Relying on the decision of the Federal Court in *Aga Khan v. Tajdin*, 2011 FC 14, 329 D.L.R. (4th) 521, (*Aga Khan*), aff'd 2012 FCA 12, 426 N.R. 190 (*Aga Khan F.C.A.*), Harmony says that consent is a defence and, as such, the burden of establishing it rests on Foss. It submits that the trial judge misconstrued an earlier decision of this Court: *Positive Attitude Safety System Inc. v. Albian Sands Energy Inc.*, 2005 FCA 332, [2006] 2 F.C.R. 50 (*Positive*). In its view, this Court never intended to shift the burden of proof to the plaintiff in that case. I cannot agree.

[30] In *Aga Khan F.C.A.*, this Court confirmed the Federal Court decision in *Aga Khan*, noting expressly that the Federal Court's statements with respect to the burden of proof would not constitute an overriding error in the particular circumstances of that case. It is now important, in my view, to reaffirm an earlier statement of this Court on this question.

[31] Writing for the Court in *Positive*, Justice Pelletier held that infringement is defined in the Act in terms of the absence of consent and, consequently, proof of infringement requires proof of lack of consent (see paragraph 39). In my view, this statement can only mean that the plaintiff bears the burden of persuasion with respect to the lack of consent. This is in line with the general principle that a plaintiff must establish on a balance of probabilities all the necessary elements of its claim.

[32] The following extract from a brief article published by David Vaver in reaction to the Federal Court decision in *Aga Khan* summarizes perfectly my thoughts on the matter:

Burden of proof rules allocate the costs and risks of gathering and presenting evidence, and help filter good cases from the bad. They should not be “impractical and unduly burdensome” on plaintiffs and should advance the purposes of the law involved. The *Copyright Act* has special burden of proof rules that give a plaintiff the benefit of presumptions on authorship, copyright and title if the defendant contests them, and presumptions of copyright subsistence and ownership where the right is registered. The latter presumptions satisfy the plaintiff’s initial burden to produce some evidence on the issue; they do not shift his legal burden of proof. There is no presumption about consent and no reason to imply one, let alone a more draconian reversal of the legal onus of proof. It is rarely a chore for a plaintiff to prove he gave no express consent: he knows best whether he did or not. And even if it is a chore, that is a small price to pay for a right that stops people for sometimes over a century from doing what they would otherwise be free to do.

A defendant who says he has the plaintiff’s *implied* consent equally puts this point in issue, but then it seems reasonable for the defendant to plead and prove the facts on which he relies, and the inferences to be drawn from them. The plaintiff can then produce whatever tends to rebut this case. That does not change the ultimate legal burden of proof, which remains on the plaintiff throughout. Only the evidentiary burden shifts to the defendant: he needs to produce some evidence of consent or the plaintiff’s *prima facie* case succeeds. If, on weighing the evidence, the court is satisfied the plaintiff gave no implied consent, he wins. If the defendant does show implied consent, the plaintiff fails to discharge his onus and loses. In theory, if the evidence is left in a state where the court is unsatisfied that the plaintiff did *not* grant implied consent, the plaintiff also loses. Few cases ever stand on that knife-edge but some can, as this Note later shows.

David Vaver, “Consent or No Consent: The Burden of Proof in Intellectual Property Infringement Suits”, (2001) 23 I.P.J. 147 at 148-149.

Originality

[33] As mentioned, the trial judge found that distinct copyrights subsisted in the Dip Forecasting, the Railmaster, and in the Payroll programs. She also held that Foss had displaced the presumption that copyrights subsist in the Card Lock Invoicing Program (see paragraph 182 of the Reasons).

[34] The trial judge found that none of the other modifications completed after the installation of Petro at Foss in March, 2000 met the criteria of originality required to be protected by copyrights under the Act.

[35] It appears that Harmony only contests the trial judge's finding relating to the lack of originality of the "other modifications" made to adapt Petro to the Foss business model and the industry standards between March, 2000 and February, 2001 (or up to August, 2001 according to Harmony). Its argument rests basically on the fact that there is an alleged contradiction between the judge's findings at paragraph 39 and her finding that these modifications were not protected by copyright.

[36] In my view, there is no contradiction between paragraph 39 of the Reasons, where these modifications are described as "substantial", and the judge's analysis of the skill and judgment required to conclude that the modifications at issue here are original and, as such, protected by copyright.

[37] One can easily describe the modifications as substantial when one considers that Foss could not dispatch or issue invoices without, for example, the proper prices, rates, or units of measure in place. This does not mean, however, that such modifications were anything other than mechanical amendments that did not involve any significant skill and judgment as found by the judge.

[38] It is not disputed that the judge used the proper test in her analysis (the principles are summarized at paragraph 147-143 of the Reasons) and I have not been persuaded that she made a palpable and overriding error in applying it to the facts before her.

[39] That said, I will now address Harmony's arguments with respect to the trial judge's finding that Harmony is not the owner of the copyrights in Petro.

Ownership

Preliminary Objection

[40] As a preliminary matter, Harmony argues that the trial judge erred by allowing Foss to present a "new" argument that was not in its statement of defence as particularized. It notes that Foss never pleaded that Atrimed or Mr. Chari owned the copyrights in Petro.

[41] Although the purpose of pleadings (and this includes particulars) is to narrow the scope of issues to be decided at trial so that the opposite party can prepare for trial, pleadings are also intended to deal only with the material facts upon which the parties rely to establish their legal

positions. As indicated in paragraph 175 of the *Federal Courts Rules*, SOR/98-106 (the Rules), a party may include allegations as to the law, but they never bind the Court on such issues. Further, a court is bound to decide questions of law on the basis of all the evidence presented or entered on the record without any objections.

[42] In this case, notwithstanding Harmony's complaint about the pleadings, it was always understood that Foss was contesting Harmony's ownership of the copyrights, if any, in Petro (see paragraph 12 of the Statement of Defence). In fact, Harmony relies on this to support its argument that the Court should have applied subsection 34.1(2) of the Act (see paragraph 50 below).

[43] However, Harmony says that the particulars it received from Foss' counsel early on in the proceedings in October, 2005 only disclosed the following facts:

- In 1998, Shawn Reynolds, then operating manager of RCT contracted with Atrimed, a company controlled by Mr. Chari, to develop a computer program to specifications required for use by RCT. This turned out to be the program licensed to Foss (Petro).
- All industry expertise required for the program was provided by Mr. Reynolds and several programmers from Atrimed worked on the design.
- The agreement between RCT and Atrimed provided that Atrimed would build a program at a reduced cost, and RCT and Reynolds would own the program and all codes. In exchange, Atrimed would be entitled to sell the software to other parties and support it for its own benefit. Mr. Reynolds and Atrimed also agreed

that the former would introduce Mr. Chari to other potential clients including Foss.

- Mr. Reynolds was never paid, and he advised Foss that he intended to pursue recovery of amounts owing to him.

[44] Harmony does not argue that it suffered prejudice. A simple review of Mr. Chari's answers during the cross-examination indicates that he was fully prepared to deal with questions regarding his relationship with Atrimed and ownership issues. Ownership was on the table and Harmony was prepared to deal with.

[45] Evidence was adduced at trial as to who effectively contracted with RCT to develop Petro, and the nature of the relationship between Mr. Chari, Atrimed and Harmony. Mr. Chari testified in chief as to his assignment of his copyrights in Petro to Harmony and the execution of the *nunc pro tunc* assignment dated June 10, 2009. During cross examination, he was asked about his relationship with Atrimed and Harmony and was asked further details as to how the alleged assignment to Harmony had been made back in March, 2000 (Dip Forecasting, Railmaster, and Payroll programs). Harmony did not raise any objection whatsoever when this evidence was adduced.

[46] In the end, Harmony had to prove its ownership. Regardless of the pleadings issue, Harmony by its own actions in raising the *nunc pro tunc* assignment placed the relationship between Mr. Chari and Atrimed in issue.

The trial judge's findings on ownership of the various copyrighted programs

[47] The trial judge's findings with respect to the ownership of the various copyrighted programs can be summarized as follows:

- Pursuant to subsection 13(3) of the Act, Atrimed owned the copyright in Petro because Mr. Chari made that work pursuant to a contract of service.
- The application of subsection 13(3) is sufficient to rebut the presumption set out at paragraph 34.1 (1)(b) of the Act in favour of the author.
- Based on the same reasoning and pursuant to subsection 13(3) of the Act, Harmony owns the copyrights in the original programs written after March 16, 2000 (the Dip Forecasting, the Railmaster and the Payroll).
- Even if as argued, Mr. Chari owned the copyrights in Petro in 2000, Harmony failed to establish on a balance of probabilities the facts necessary to support its arguments that those rights were held in trust for its benefit prior to its incorporation or that it can rely on the *nunc pro tunc* assignment as of March 16, 2000.

Ownership of Copyright in Petro

[48] Harmony contests the validity of the judge's finding that Mr. Chari did not own the copyrights in Petro (except for the moral rights), but that Atrimed did. It argues that she ignored compelling evidence in reaching the conclusion that Mr. Chari performed his work under a contract of service and so subsection 13(3) of the Act applied here to make Atrimed the owner.

[49] Harmony adds that the judge erred in law in rejecting Harmony's argument that Mr. Chari was holding the copyright in Petro in trust for Harmony prior to its incorporation, and vested them in Harmony upon its incorporation. According to Harmony, the trial judge erred in finding that the assignment dated June 10, 2009 (mentioned in paragraph 21, above) could not be effective as of March 16, 2000. Harmony notes that the judge's conclusion in that respect was illogical, considering some of the undisputed evidence on the record such as the licenses.

[50] It further says that the trial judge erred in law by failing to consider and apply the presumption set out in paragraph 34.1(2)(b) of the Act. This presumption provides that, in the absence of registration of an assignment and when, among other things, the title of the plaintiff is at issue, the person whose name appears on the software as owner shall, unless the contrary is proved, be presumed to be the owner of the copyright in that software.

[51] In the alternative, Harmony's final argument is that it necessarily co-owns the copyright in Petro given that the judge accepted that "substantial modifications were necessary to the software before it could be used within Foss Transport business model and according to industry standard practices" (see paragraph 39 of the Reasons).

[52] Dealing first with her findings based on subsection 13(3) of the Act, I note that the reasoning adopted by the trial judge was proposed by Harmony in its final oral arguments in reply (pages 03588-03593 of Appeal Book vol. 11 at tab 11) to support its position that it owned all programs written by Mr. Chari after March 16, 2000.

[53] This may explain why Harmony does not challenge the legal test or approach taken by the judge. Instead, Harmony says that she wrongly applied subsection 13(3) of the Act to Atrimed when it is evident that the factual situation with respect to the relationship between Mr. Chari and Atrimed was very different from the one between Mr. Chari and Harmony. In particular, Harmony says that apart from Mr. Chari's testimony that he was a principal of Atrimed, there is no evidence that he was in fact an officer of that company. Further, he was only one of two shareholders in Atrimed while he was the sole owner and the only officer of Harmony. All the licensing agreements made after March, 2000 are in Harmony's name.

[54] Hence, basically, Harmony invites this Court to substitute its own evaluation of the evidence for the trial judge's evaluation of the evidence (see paragraphs 21 and 22 of the Appellant's Memorandum of Fact and Law). But we are not free to substitute our view of the evidence for that of the trial judge. The test is palpable and overriding error.

[55] Harmony has not convinced me that there is a palpable and overriding error in the judge's finding that Mr. Chari was an employee of Atrimed (see paragraph 240 of the Reasons). The judge might have been clearer about why she came to that conclusion, as opposed to finding that Mr. Chari was an independent contractor by using the common law test developed for that purpose. However, reliable evidence as to the exact nature of the working relationship between Mr. Chari and Atrimed (and later on, with Harmony) was scant, particularly because of Mr. Chari's lack of credibility. In my view, it was open to her to reach this conclusion on the evidence before her.

[56] In *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.* 2001 SCC 59, [2001] 2 S.C.R. 983, (*Sagaz Industries*), the Supreme Court of Canada acknowledged that there is no universal test to establish the existence of an employment relationship. The central question is whether the person has been performing the services as a person in business for his or her own account (*Sagaz Industries* at paragraph 47). I am satisfied that the judge considered this question. I understand her finding on this point to be that Mr. Chari developed Petro on Atrimed's behalf (see paragraphs 234-239 of the Reasons).

[57] The judge also appears to have applied reasoning akin to the analysis used in some cases involving shareholders, officers, and directors of closely held corporations. This means, in my view, that she was satisfied that, in the particular circumstances of this case, she could find an implied contract of service between Mr. Chari and Atrimed. Obviously, that is not to be understood as meaning that subsection 13(3) of the Act always applies in such cases.

[58] Aside from Harmony's alternate argument that it at least jointly owns the copyright in Petro, this would be sufficient to deal with the first question regarding ownership. Nevertheless, I will add three brief comments before addressing the alternate argument of joint ownership.

[59] First, I do not believe that this is an appropriate case to deal with the question of whether copyright can be held in equitable trust prior to incorporation of a company. As found by the judge, the facts in this case do not support a finding that Mr. Chari contemplated Harmony's incorporation when he was "operating" through Atrimed from 1998-2000 (see paragraph 226 of the Reasons). Again, her finding here is buttressed by her credibility assessment of Mr. Chari. As well, absent an

indication to the contrary, the judge is presumed to have considered all the evidence on the record (*Housen* at paragraph 46). She was very aware of the licensing agreements. Harmony has not rebutted this presumption, and in my view has not established any reviewable error that would justify this Court's intervention.

[60] Further, the trial judge held that she was not persuaded that there was sufficient credible evidence to support an inference that Mr. Chari had assigned the copyrights (if he had any) to Harmony on March 16, 2000, the date mentioned in the June 10, 2009 assignment. She found that Mr. Chari's evidence in fact suggested that the written assignment was purely a self serving document (paragraphs 217-218 of the Reasons). Again, in my view, it has not been established that the judge made a palpable and overriding error in this respect.

[61] I would add that in relying upon this Court's decision in *Star-Kist Foods Inc. v. Registrar of Trade Marks et al.* (1988), 90 N.R. 310, 19 C.I.P.R. 60 (F.C.A.), the trial judge considered the most favourable view of the law with respect to *nunc pro tunc* assignments. , *Star-Kist* is a case involving an assignment of a trademark, not a copyright. The trial judge did not consider whether the differences between copyright and trademark statutes with respect to assignments might make a difference. Certainly, she did not consider the decision of Sharlow J. (as she then was) in *J.L. De Ball Canada Inc. v. 421254 Ontario Ltd.* (1999), 179 F.T.R. 231 (F.C.T.D.), 94 A.C.W.S. (3d) 738 at paragraphs 23-24, as it seems that the parties did not cite this case to her.

[62] Finally, although it would have been preferable for the judge to refer to the presumption set out in subparagraph 34.1(2)(b)(ii) of the Act, this presumption, like the one in favour of the author set out in subsection 34.1(1)(b) to which the judge refers, is easily rebutted when, like here, the

party for whose benefit it is intended provides direct evidence of the legal basis on which its name appears on the copyrighted work as owner, and the judge holds that basis to be untenable. The trial judge discarded the presumption in favour of the author based on the evidence before her, and found that subsection 13(3) of the Act applied.

[63] I have no doubt that the presumption in favour of Harmony was also implicitly rebutted by the trial judge's other findings discussed above with respect to Atrimed and *the nunc pro tunc* assignment. In other words, the failure to expressly refer to this presumption in her Reasons could not have had any material effect on her ultimate finding that Harmony did not own the copyrights in Petro prior to June 10, 2009 (see paragraph 248-249 of the Reasons).

[64] I shall now address Harmony's last argument on the issue of ownership – its joint ownership of the copyright in Petro. At paragraph 49 of its Memorandum of Fact and Law, Harmony states:

[Harmony] submits that if Justice Heneghan is correct with respect to her findings as to the ownership of the software, pursuant to her factual finding at paragraph 39 of the Judgment, the ownership of copyright in those elements of Petro Dispatch authored by Chari after March 16, 2000 must necessarily vest with the Plaintiff. Other courts have accepted the proposition that software may be partially owned by different parties, in particular changes and additions made after a particular date, see for example *Star Data Systems Inc. v. Quasimodo Consulting Services Ltd.*, 1996 CarswellOnt 4256 (ONCJ).

[65] Having reviewed the arguments presented to the trial judge, it appears that Harmony did not raise this alternate argument before her. It also appears that this argument rests on Harmony's interpretation that the judge's mention in paragraph 39 of her Reasons that substantial modifications were required to adapt Petro to Foss' business model (see paragraphs 33-39 above) necessarily means that these modifications are protected under the Act. However, as mentioned before, the

modifications referred to in said paragraph 39 were not found to be original, and thus confer no copyrights to Harmony. Therefore, they cannot vest Harmony with any rights in Petro.

[66] Finally, it is worth noting that the only case cited by Harmony: *Star Data Systems Inc. v. Quasimodo Consulting Services Ltd.* (1996), 18 O.T.C. 42, 67 A.C.W.S. (3d) 55 (Ont. Gen. Div.), did not involve a compilation such as Petro. Generally, copyright in a compilation are independent and distinct from the copyright that may subsist in its individual parts (*CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339; *Robertson v. Thomson Corp.*, 2006 SCC 43, [2006] 2 S.C.R. 363).

Infringement

[67] With respect to Harmony's allegations of infringement (and excluding those relating to Balmar on which she did not comment because of her findings regarding ownership), the trial judge found that:

- The only copies made by Ms. Warth or Mr. Benton were made as backup copies in case of corruption or errors occurring while they worked on the minor "fixes" and modifications (paragraph 113 of the Reasons) as requested by Foss on the original copy of the licensed programs located on the Citrix server (see paragraphs 262, 305 of the Reasons).
- Making a single backup copy is not equivalent to the concept of multiplication (see paragraph 271 of the Reasons).

- Even if it were, these copies were not done without the consent of the copyrights owner (article 2(b) of the licensing agreements allows Foss to make copies for backup purposes) (see paragraphs 272-273 and 305 of the Reasons).
- Modifications to the licensed programs that do not involve the multiplication of the copyrighted work, that is, any reproductions, do not constitute infringement under the Act, though they may constitute breaches of the licensing agreements (see paragraphs 255, 261, 267-268 of the Reasons).
- Considering that both the object code and the source code were made available to Foss on the original copy of the licensed programs Mr. Chari installed, and the scant evidence adduced with respect to what actual decompiling, if any, of the licensed object code occurred, Harmony did not establish on a balance of probabilities any infringement in that respect (see paragraphs 274-278 and 305 of the Reasons).
- Foss had the permission to use the design view integrated in its Microsoft Access platform to make certain amendments, such as changes to check boxes and to its database files (see paragraphs 279 and 281-284 of the Reasons).
- The only possible modification carried out on the Dip Forecasting Module is the upgrading of the Foss Microsoft Access Platform from the 1997 version to the 2000 version. The evidence indicated that this was done simply by opening the database modules with the new version of this Microsoft program. Harmony did not establish, on a balance of probabilities, that such upgrading “involved” an

infringement of its exclusive rights under section 3(1) of the Act (see paragraphs 287-288 and 297 of the Reasons).

- The modification of the start-up screen (misattribution) and all the other modifications which were not proven to involve reproduction as part of the modification process, but which impact on the integrity of the protected works, can be infringements of the author's moral rights. However, there was no need to determine this question given that the owner of the moral rights was not a party to the proceeding (see paragraphs 289-292 of the Reasons).
- There is no exclusive of right to use included in the bundle of rights set out in section 3 of the Act and use *per se* does not constitute an infringement (see paragraph 262 of the Reasons).
- Based on the evidentiary record, and assuming without deciding that Foss was in violation of the number of users set out in the SLAs, Harmony did not establish that use by more than five users constituted a violation of the Act (see paragraph 263 of the Reasons).

[68] Harmony only raises two issues on appeal. First, it submits that the trial judge fundamentally misconstrued subsection 30.6(b) of the Act and the copies made by Ms. Warth were not copies for backup purposes within the meaning of the license agreements. Second, it argues that the judge failed to appreciate “the nature of copyrights in a ‘screen’ within the context of software” (paragraph 57 of the Appellant’s Memorandum of Fact and Law). As there are copyrights in the screens of software, and any visual reproduction on more than five users’ monitors was done

without consent, this necessarily constituted infringement (paragraphs 60-61 of the Appellant's Memorandum of Fact and Law).

Copies for Backup

[69] According to Harmony, although the trial judge makes no specific reference to subsection 30.6(b) of the Act in her Reasons, she implicitly applied it to conclude that a single backup copy of the software was not a reproduction.

[70] In my view, the copies referred to in paragraph 271 of the Reasons can constitute infringing reproductions (section 3 of the Act) of the licensed programs, if done without consent. On the basis of the facts found by the trial judge and set out in the Reasons, I agree that subsection 30.6(b) of the Act had no application.

[71] That said, Harmony has not persuaded me that the judge was also wrong in concluding that it had not met its burden of establishing the absence of consent (section 27(1) of the Act). She accepted Ms. Warth's evidence that these copies were strictly for backup purposes (paragraph 269 of the Reasons). There are no limitations in the license agreements as to the number of backup copies Foss could make. In fact, Mr. Cristello was making at least one daily. I note that the license agreements were described as "boiler plate wording" used by Mr. Chari.

[72] There was no expert evidence establishing that the expression "for backup purposes" had any technical meaning other than its ordinary meaning of something kept in reserve for emergency

replacement. Nor is there any such evidence that “emergency” has a specific meaning in that industry restricting it to certain events and excluding corruption or errors while working on the software.

[73] There was no evidence that these copies were used for any other purposes. The judge may have used the wrong turn of phrase in paragraph 271 (“making a single backup copy for the purpose of modifying the software” instead of “before modifying”), but this does not affect the validity of her findings at paragraphs 269 and 273 of the Reasons.

[74] I have not been persuaded that the trial judge made a palpable and overriding error in concluding that Harmony had not establish that modification of the start-up screen necessarily involved making an unauthorised reproduction . Thus, in such circumstances, the change in the name appearing on that screen (alleged misattribution of the work) could only be challenged by the owner of the moral rights in Petro. Such rights cannot be assigned and are vested in the author.

Screen Display and the Number of Users

[75] The trial Judge says in her Reasons that she does not need to decide if Foss exceeded the number of users allowed in the license agreements because such breach would not, in her view, constitute an infringement of a right protected pursuant to subsection 3(1) of the Act.

[76] I agree with the trial judge that the Act does not give the owner of the copyrights an exclusive right to use the copyrighted work. In that respect, the rights of a copyright owner differ from those granted to the owner of a patent or a trademark.

[77] The trial judge does not discuss the two cases relied upon by Harmony when it says that she erred in dismissing its argument that screen displays on more than five users' monitors is an unauthorized reproduction of its copyrighted works: *Delrina Corp v Triolet Systems Inc.* (1993), 9 B.L.R. (2d) 140, 47 C.P.R. (3d) 1 (Ont. Gen. Div.), (*Delrina* Ont. Gen. Div.), aff'd (2002), 58 O.R. (3d) 339, 156 O.A.C. 166 (O.C.A.), (*Delrina* O.C.A.), and the Federal Court decision of *Équipe de recherche opérationnelle en santé Inc. v. Conseillers en gestion & informatique C.G.I. Inc.*, 2004 FC 178, 258 F.T.R. 172, (*Eros*).

[78] Obviously, I am dealing here with the arguments regarding Harmony's copyrighted programs that were actually used by Foss (the Dip Forecasting and the Railmaster).

[79] Though the arguments were not put very clearly either orally or in writing (see paragraphs 59-62 of Appellant's Memorandum of Fact and Law), I understand Harmony to be saying that, based on *Delrina* O.C.A., the screen display is a reproduction of the copyrighted object code of the licensed programs in a different material form (visual display) (*Eros*).

[80] Harmony's counsel also referred to the screen displays as works of art (presumably artistic works) at the hearing. Thus, I understand Harmony to also argue on appeal that the reproduction on

the user's monitor at Foss is a reproduction of the copyrighted forms (distinct artistic works) included in its computer programs.

[81] Having reviewed the transcripts of the arguments before the trial judge, I could find only two relevant passages, albeit exceedingly brief, dealing with these issues :

In chief

On the issue of display screens, I've included two cases in our Book of Authorities, tabs 13 and 14, where Justices of the Ontario High Court of Justice held that copyright subsists in display screens and software (page 03278 of Appeal Book vol. 10 at tab10).

In reply

My lady, any change in the display screen is a reproduction. There is copyright in display screens. Gemologists, the Del Rena (sic) cases, make that clear. Every time you make a change to a computer program you are replacing the former program with the new one. That's a reproduction (page 03641 of Appeal Book vol. 11 at tab 11).

[82] I mention this because the issue of copyrights in screen displays has never been addressed by this Court. It is a subject of importance that may have far reaching implications. A single example will suffice to illustrate the point. It is now common for individual users to have multiple screens connected to their computer open at the same time. Should these consumers buy more than one license for the programs that they use?

[83] In my view, this Court should be careful not to address anything more than is absolutely necessary where such matter was not fully argued before either court and there is clearly a lack of evidence and findings supporting the argument, as in this case.

[84] Certainly, the argument based on *Eros* that forms included in these programs qualify as distinct artistic works was not made before the judge, and she made no findings in that respect. Harmony did not refer to any particular evidence on this point in its Memorandum of Fact and Law. In my view, this argument should not be entertained by this Court.

[85] I shall now address briefly Harmony's argument based on *Delrina* Ont. Gen. Div., particularly paragraph 28 therein.

[86] It is worth noting that the Ontario Court of Appeal overtly declined to express any opinion with respect to the statements that Harmony now relies upon. The Court of Appeal did not opine on these statements essentially because they were *obiter*, considering the judge's findings of fact (*Delrina* O.C.A. at paragraph 6).

[87] The passage highlighted by Harmony in the *Delrina* Ont. Gen. Div. decision reads as follows:

By using the instructions in the manual, and touching the required keys on the terminal keyboard, the user of the program causes the computer to create a screen display in form and content dictated by the way it was programmed by the object code. The screen display so produced is the reproduction of the object code in a different "material form". I am here talking about the style and format of the screen display, not the individual numbers the computer may fill in on the screen when asked to do so by the operator of the program.

[88] With respect, I cannot agree that a screen display is simply a reproduction of the object code. A computer program is defined in section 2 of the Act as:

“computer program” means a set of instructions or statements, expressed, fixed, embodied or stored in any manner, that is to be used directly or indirectly in a computer in order to bring about a specific result;

[89] In my view, the screen display on a user monitor is the result of such a set of instructions rather than a reproduction of the set of instruction in another form. To use the analogy of the Supreme Court of Canada in *Cuisenaire v. South West Imports Ltd.*, [1969] S.C.R. 208, 2 D.L.R. (3d) 430, the screen display is the rabbit pie rather than the recipe (the recipe being the set of instructions).

[90] This distinction between the two is especially clear when one considers that Mr. Chari explained, in the course of his cross examination (see pages 01887-01889 of Appeal Book vol. 7 at tab 2), that what goes on behind the screen display is quite different, even though particular screen displays for each product are very similar in that essentially the same form is used.

[91] In the circumstances, there is no need to discuss the second prong of Harmony’s argument – whether a visual display *per se* is a reproduction in a material form.

[92] In my view, Harmony has not established that the trial judge committed an error that warrants this Court’s intervention.

[93] I would add that it is essential to provide the trial judge with precise and clear technical evidence supporting one’s argument that reproduction is necessarily involved in carrying out certain actions in infringement actions involving computer programs. Findings made in other cases cannot

replace actual evidence in the case at bar. Harmony did not present any expert evidence and it attempted to make its case through the testimony of Foss' witnesses. This is always risky. In fact, the trial judge found that Harmony had produced insufficient evidence to establish infringement on a balance of probabilities.

[94] In the circumstances, it is not necessary to deal with the issues raised in appeal with respect to the personal liability of the individual respondents.

Demonstrative Evidence

[95] As its last issue on appeal, Harmony argues that it is entitled to a new trial because the decision of the judge as a whole is vitiated by an evidentiary ruling she made which ultimately had an impact on her assessment of Mr. Chari's credibility. The judge briefly refers to it at paragraphs 22-24 of the Reasons.

[96] During Ms. Warth's cross-examination, Harmony's counsel sought to use his computer, on which a copy of the Petro program had been loaded, in order to ask this fact witness to carry out searches which had not been done before to address a "very serious allegation" made by Mr. Cristello during his re-examination. More particularly, some invoices found at tab 140 of the Trial Book of Documents discussed during his cross-examination did not appear to all be accurate invoices payable to Balmar, as the Petro invoicing module was never used to invoice anybody other than the four customers listed by Mr. Cristello.

[97] It appears that, at the time, Harmony's counsel was not even sure that this would be necessary as he had put the "screen shots" at tab 156 (page 03122 of Appeal Book vol. 10 at tab 8) of the Trial Book of documents. The CD-ROM used had not been filed as an exhibit. First, a concern was raised that this witness was not presented as an expert, and could not be used by Harmony to adduce reply evidence about something Ms. Warth had never done before. In my view, this is what prompted the trial judge to refer to Rule 287. Despite the contrary view expressed by Harmony's counsel, this was not a proper subject for cross-examination of that witness.

[98] I note that before this Court Harmony's counsel said that he wanted Ms. Warth to perform the searches that had been done by Mr. Chari. It is not even clear that Mr. Chari had testified as to how these invoices had been obtained.

[99] In any event, the judge asked if an independent computer would be available so that it could be filed as an exhibit if need be. None was available, and Harmony did not seek a brief adjournment to satisfy this requirement, nor did it seek one the next day when the cross-examination continued. Several questions were asked of the witness about the invoices and the system at Foss, including whether the wrong data could have been entered in the database by mistake.

[100] At no time did Harmony indicate to the trial judge that the demonstrative evidence was important to its case. It did not seek to present any reply evidence with respect to Mr. Cristello's allegation which the judge had indicated would have to be weighed on its own merits. Harmony has not explained to this Court why this evidence was not or could not have been adduced in reply.

[101] The judge weighed the risk of allowing such a demonstration (prejudicial effect) against its probative value. This was the correct test. She ruled against the use of the demonstrative evidence. Having considered the whole context, her exercise of discretion based on the facts before her, using the correct legal test, must stand. This is even more so when one considers that the “doubt” raised by Mr. Cristello about these invoices is the very last element mentioned by the trial judge in her list of factors which affected Mr. Chari’s testimony (see paragraph 26 above). I would add in this regard that the trial judge had many reasons to support her finding that Mr. Chari was not credible, and those reasons stand undisturbed on appeal.

CONCLUSION

[102] In view of the foregoing, I would dismiss this appeal with costs.

“Johanne Gauthier”

J.A.

« I agree
Stratas J.A. »

APPENDIX “A”

Copyright Act, R.S.C. 1985, c. C-42.

Loi sur le droit d’auteur, L.R.C. (1985), c. C-42.

2. In this Act,

2. Les définitions qui suivent s’appliquent à la présente loi.

...

[...]

“compilation” means

“*compilation*”

(a) a work resulting from the selection or arrangement of literary, dramatic, musical or artistic works or of parts thereof, or

« compilation » Les œuvres résultant du choix ou de l’arrangement de tout ou partie d’œuvres littéraires, dramatiques, musicales ou artistiques ou de données.

(b) a work resulting from the selection or arrangement of data

[...]

“literary work” includes tables, computer programs, and compilations of literary works;

« œuvre littéraire » Y sont assimilés les tableaux, les programmes d’ordinateur et les compilations d’œuvres littéraires.

...

[...]

“computer program” means a set of instructions or statements, expressed, fixed, embodied or stored in any manner, that is to be used directly or indirectly in a computer in order to bring about a specific result;

« programme d’ordinateur » Ensemble d’instructions ou d’énoncés destiné, quelle que soit la façon dont ils sont exprimés, fixés, incorporés ou emmagasinés, à être utilisé directement ou indirectement dans un ordinateur en vue d’un résultat particulier.

...

[...]

3. (1) For the purposes of this Act, “copyright”, in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to

3. (1) Le droit d’auteur sur l’œuvre comporte le droit exclusif de produire ou reproduire la totalité ou une partie importante de l’œuvre, sous une forme matérielle quelconque, d’en

perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof,

exécuter ou d'en représenter la totalité ou une partie importante en public et, si l'œuvre n'est pas publiée, d'en publier la totalité ou une partie importante;

(a) to produce, reproduce, perform or publish any translation of the work,

a) de produire, reproduire, représenter ou publier une traduction de l'œuvre;

(b) in the case of a dramatic work, to convert it into a novel or other non-dramatic work,

b) s'il s'agit d'une œuvre dramatique, de la transformer en un roman ou en une autre œuvre non dramatique;

(c) in the case of a novel or other non-dramatic work, or of an artistic work, to convert it into a dramatic work, by way of performance in public or otherwise,

c) s'il s'agit d'un roman ou d'une autre œuvre non dramatique, ou d'une œuvre artistique, de transformer cette œuvre en une œuvre dramatique, par voie de représentation publique ou autrement;

(d) in the case of a literary, dramatic or musical work, to make any sound recording, cinematograph film or other contrivance by means of which the work may be mechanically reproduced or performed,

d) s'il s'agit d'une œuvre littéraire, dramatique ou musicale, d'en faire un enregistrement sonore, film cinématographique ou autre support, à l'aide desquels l'œuvre peut être reproduite, représentée ou exécutée mécaniquement;

(e) in the case of any literary, dramatic, musical or artistic work, to reproduce, adapt and publicly present the work as a cinematographic work,

e) s'il s'agit d'une œuvre littéraire, dramatique, musicale ou artistique, de reproduire, d'adapter et de présenter publiquement l'œuvre en tant qu'œuvre cinématographique;

(f) in the case of any literary, dramatic, musical or artistic work, to communicate the work to the public by telecommunication,

f) de communiquer au public, par télécommunication, une œuvre littéraire, dramatique, musicale ou artistique;

(g) to present at a public exhibition, for a purpose other than sale or hire, an artistic work created after June 7, 1988, other than a map, chart or plan,

g) de présenter au public lors d'une exposition, à des fins autres que la vente ou la location, une œuvre artistique — autre qu'une carte géographique ou marine, un plan ou un graphique — créée après le 7 juin 1988;

(h) in the case of a computer program that can be reproduced in the ordinary course of its use, other than by a reproduction during its execution in conjunction with a machine,

h) de louer un programme d'ordinateur qui peut être reproduit dans le cadre normal de son utilisation, sauf la reproduction effectuée pendant son exécution avec un ordinateur ou

device or computer, to rent out the computer program, and

(i) in the case of a musical work, to rent out a sound recording in which the work is embodied,

and to authorize any such acts.

...

13. (1) Subject to this Act, the author of a work shall be the first owner of the copyright therein.

...

(3) Where the author of a work was in the employment of some other person under a contract of service or apprenticeship and the work was made in the course of his employment by that person, the person by whom the author was employed shall, in the absence of any agreement to the contrary, be the first owner of the copyright, but where the work is an article or other contribution to a newspaper, magazine or similar periodical, there shall, in the absence of any agreement to the contrary, be deemed to be reserved to the author a right to restrain the publication of the work, otherwise than as part of a newspaper, magazine or similar periodical.

(4) The owner of the copyright in any work may assign the right, either wholly or partially, and either generally or subject to limitations relating to territory, medium or sector of the market or other limitations relating to the scope of the assignment, and either for the whole term of the copyright or for any other part thereof, and may grant any interest in the right by licence, but no assignment or grant is valid unless it is in writing signed by the owner of the right in respect of which the assignment or grant is made, or by the owner's duly

autre machine ou appareil;

i) s'il s'agit d'une œuvre musicale, d'en louer tout enregistrement sonore.

Est inclus dans la présente définition le droit exclusif d'autoriser ces actes.

[...]

13. (1) Sous réserve des autres dispositions de la présente loi, l'auteur d'une œuvre est le premier titulaire du droit d'auteur sur cette œuvre.

[...]

(3) Lorsque l'auteur est employé par une autre personne en vertu d'un contrat de louage de service ou d'apprentissage, et que l'œuvre est exécutée dans l'exercice de cet emploi, l'employeur est, à moins de stipulation contraire, le premier titulaire du droit d'auteur; mais lorsque l'œuvre est un article ou une autre contribution, à un journal, à une revue ou à un périodique du même genre, l'auteur, en l'absence de convention contraire, est réputé posséder le droit d'interdire la publication de cette œuvre ailleurs que dans un journal, une revue ou un périodique semblable.

(4) Le titulaire du droit d'auteur sur une œuvre peut céder ce droit, en totalité ou en partie, d'une façon générale ou avec des restrictions relatives au territoire, au support matériel, au secteur du marché ou à la portée de la cession, pour la durée complète ou partielle de la protection; il peut également concéder, par une licence, un intérêt quelconque dans ce droit; mais la cession ou la concession n'est valable que si elle est rédigée par écrit et signée par le titulaire du droit qui en fait l'objet, ou par son agent

authorized agent.

dûment autorisé.

...

[...]

27. (1) It is an infringement of copyright for any person to do, without the consent of the owner of the copyright, anything that by this Act only the owner of the copyright has the right to do.

27. (1) Constitue une violation du droit d'auteur l'accomplissement, sans le consentement du titulaire de ce droit, d'un acte qu'en vertu de la présente loi seul ce titulaire a la faculté d'accomplir.

...

[...]

30.6 It is not an infringement of copyright in a computer program for a person who owns a copy of the computer program that is authorized by the owner of the copyright to

30.6 Ne constituent pas des violations du droit d'auteur :

(a) make a single reproduction of the copy by adapting, modifying or converting the computer program or translating it into another computer language if the person proves that the reproduced copy is

a) le fait, pour le propriétaire d'un exemplaire — autorisé par le titulaire du droit d'auteur — d'un programme d'ordinateur, de produire une seule copie de l'exemplaire par adaptation, modification ou conversion, ou par traduction en un autre langage informatique s'il établit que la copie est destinée à assurer la compatibilité du programme avec un ordinateur donné, qu'elle ne sert qu'à son propre usage et qu'elle est détruite dès qu'il n'est plus propriétaire de l'exemplaire;

(i) essential for the compatibility of the computer program with a particular computer,

(ii) solely for the person's own use, and

(iii) destroyed immediately after the person ceases to be the owner of the copy; or

(b) make a single reproduction for backup purposes of the copy or of a reproduced copy referred to in paragraph (a) if the person proves that the reproduction for backup purposes is destroyed immediately when the person ceases to be the owner of the copy of the computer program.

b) le fait, pour le propriétaire d'un exemplaire — autorisé par le titulaire du droit d'auteur — d'un programme d'ordinateur, de produire une seule copie de sauvegarde de l'exemplaire ou de la copie visée à l'alinéa a) s'il établit qu'elle est détruite dès qu'il n'est plus propriétaire de l'exemplaire.

34.1 (1) In any proceedings for infringement of copyright in which the defendant puts in issue either the existence of the copyright or the title

34.1 (1) Dans toute procédure pour violation du droit d'auteur, si le défendeur conteste l'existence du droit d'auteur ou la qualité du

of the plaintiff thereto,

(a) copyright shall be presumed, unless the contrary is proved, to subsist in the work, performer's performance, sound recording or communication signal, as the case may be; and

(b) the author, performer, maker or broadcaster, as the case may be, shall, unless the contrary is proved, be presumed to be the owner of the copyright.

(2) Where any matter referred to in subsection (1) is at issue and no assignment of the copyright, or licence granting an interest in the copyright, has been registered under this Act,

(a) if a name purporting to be that of

- (i) the author of the work,
- (ii) the performer of the performer's performance,
- (iii) the maker of the sound recording, or
- (iv) the broadcaster of the communication signal

is printed or otherwise indicated thereon in the usual manner, the person whose name is so printed or indicated shall, unless the contrary is proved, be presumed to be the author, performer, maker or broadcaster;

(b) if

- (i) no name is so printed or indicated, or if the name so printed or indicated is not the true name of the author, performer, maker or broadcaster or the name by which that person is commonly known, and

demandeur :

a) l'œuvre, la prestation, l'enregistrement sonore ou le signal de communication, selon le cas, est, jusqu'à preuve contraire, présumé être protégé par le droit d'auteur;

b) l'auteur, l'artiste-interprète, le producteur ou le radiodiffuseur, selon le cas, est, jusqu'à preuve contraire, réputé être titulaire de ce droit d'auteur.

(2) Dans toute contestation de cette nature, lorsque aucun acte de cession du droit d'auteur ni aucune licence concédant un intérêt dans le droit d'auteur n'a été enregistré sous l'autorité de la présente loi :

a) si un nom paraissant être celui de l'auteur de l'œuvre, de l'artiste-interprète de la prestation, du producteur de l'enregistrement sonore ou du radiodiffuseur du signal de communication y est imprimé ou autrement indiqué, de la manière habituelle, la personne dont le nom est ainsi imprimé ou indiqué est, jusqu'à preuve contraire, présumée être l'auteur, l'artiste-interprète, le producteur ou le radiodiffuseur;

b) si aucun nom n'est imprimé ou indiqué de cette façon, ou si le nom ainsi imprimé ou indiqué n'est pas le véritable nom de l'auteur, de l'artiste-interprète, du producteur ou du radiodiffuseur, selon le cas, ou le nom sous lequel il est généralement connu, et si un nom paraissant être celui de l'éditeur ou du titulaire du droit d'auteur y est imprimé ou autrement indiqué de la manière habituelle, la personne dont le nom est ainsi imprimé ou indiqué est, jusqu'à preuve contraire, présumée être le

(ii) a name purporting to be that of the publisher or owner of the work, performer's performance, sound recording or communication signal is printed or otherwise indicated thereon in the usual manner,

the person whose name is printed or indicated as described in subparagraph (ii) shall, unless the contrary is proved, be presumed to be the owner of the copyright in question; and

(c) if, on a cinematographic work, a name purporting to be that of the maker of the cinematographic work appears in the usual manner, the person so named shall, unless the contrary is proved, be presumed to be the maker of the cinematographic work.

89. No person is entitled to copyright otherwise than under and in accordance with this Act or any other Act of Parliament, but nothing in this section shall be construed as abrogating any right or jurisdiction in respect of a breach of trust or confidence.

titulaire du droit d'auteur en question;

c) si un nom paraissant être celui du producteur d'une œuvre cinématographique y est indiqué de la manière habituelle, cette personne est présumée, jusqu'à preuve contraire, être le producteur de l'œuvre.

89. Nul ne peut revendiquer un droit d'auteur autrement qu'en application de la présente loi ou de toute autre loi fédérale; le présent article n'a toutefois pas pour effet d'empêcher, en cas d'abus de confiance, un individu de faire valoir son droit ou un tribunal de réprimer l'abus.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-166-11

APPEAL FROM A JUDGMENT OF THE HONOURABLE MADAM JUSTICE HENEGHAN OF THE FEDERAL COURT, DATED MARCH 18, 2011, DOCKET NO. T-1269-05

STYLE OF CAUSE: Harmony Consulting Ltd. v. G.A. Foss Transport Ltd., Gordon A. Foss and Joe Cristello

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: February 14, 2012

REASONS FOR JUDGMENT BY: Gauthier J.A.

CONCURRED IN BY: Stratas J.A.

NOT TAKING PART IN THE JUDGMENT: Layden-Stevenson J.A.

DATED: August 31, 2012

APPEARANCES:

Anthony Prenol FOR THE APPELLANT

Christopher J. Staples FOR THE RESPONDENT

SOLICITORS OF RECORD:

BLAKE, CASSELS & GRAYSON LLP FOR THE APPELLANT
Toronto, Ontario

CHAITONS LLP FOR THE RESPONDENT
Toronto, Ontario