

Federal Court of Appeal



Cour d'appel fédérale

Date: 20130301

**Dockets: A-115-12
A-116-12**

Citation: 2013 FCA 63

**CORAM: NADON J.A.
SHARLOW J.A.
DAWSON J.A.**

BETWEEN:

Docket: A-115-12

NAUTICAL DATA INTERNATIONAL, INC.

Appellant

and

C-MAP USA INC., and DOE CO.

Respondents

and

HER MAJESTY IN RIGHT OF CANADA

**Copyright Owner added
pursuant to s. 36(2) of *Copyright Act***

AND BETWEEN:

Docket: A-116-12

NAUTICAL DATA INTERNATIONAL, INC.

Appellant

and

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Heard at Toronto, Ontario, on December 6, 2012.

Judgment delivered at Ottawa, Ontario, on March 1, 2013.

REASONS FOR JUDGMENT BY:

NADON and SHARLOW J.J.A.

CONCURRED IN BY:

DAWSON J.A.

Federal Court of Appeal



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REASONS FOR JUDGMENT

NADON AND SHARLOW JJ.A.

[1] Nautical Data International Inc. (“NDI”) brought actions in the Federal Court against C-Map USA Inc. and Navionics Inc for copyright infringement. The actions dealt with the same copyright claims and they proceeded together. C-Map and Navionics submitted a joint motion for summary judgment dismissing both claims. By the time the motion was heard, the only outstanding issue was whether NDI had standing to sue C-Map and Navionics under the *Copyright Act*, R.S.C. 1985, c. 42, for certain acts they took between June 24, 2001 and March 30, 2007 in respect of what the parties have referred to as the “CHS Works”. In an order dated April 3, 2012, Justice Zinn granted the summary judgment motion and dismissed the actions (2012 FC 300). NDI now appeals that order. For the reasons that follow, we would allow the appeal.

[2] The undisputed factual background to this case is well summarized by Justice Zinn in paragraphs 3 to 6 of his reasons, which are reproduced here:

[3] Canadian Hydrographic Service (CHS), a federal government agency in the Science Sector of the Department of Fisheries and Oceans, produces hydrographic charts in paper format, containing data that is owned by Canada and maintained by the CHS (the CHS Works). CHS also produces electronic navigation charts in S-57 compliant digital vector format, containing data that is owned by Canada and maintained by the CHS (the Additional CHS Works).

[4] In 1993 NDI entered into an agreement with CHS with respect to the data used to produce these navigation charts. In 1998 and 2000, CHS and NDI revised their agreement. The agreement between NDI and CHS will be referred to in these reasons as the Agreement or the Licence.

[5] By virtue of the Licence, CHS provided the raw data and data source materials used in the preparation of the CHS Works and the Additional CHS Works for conversion into electronic charts and updates. After CHS verified the accuracy of its electronic charts, NDI would reproduce them in a variety of digital formats (the NDI Works) which it licensed directly to end-users, and indirectly to end-users through distributors, value-added licensees, and resellers.

[6] The defendants sell electronic hydrographic charts in proprietary data and media formats for use in their equipment. Specifically, they produce electronic vector charts and charting systems for use in marine, aeronautical, and land navigation. The defendants admit to using CHS Works to produce their digital charts and recognize that CHS has the authority to produce hydrographic charts in Canada.

[3] As indicated in this excerpt, the phrase “CHS Works” is used by the parties to refer to nautical charts in paper form produced by the Canadian Hydrographic Service (which for convenience I will refer to as the “Crown”). Only the CHS Works – the paper nautical charts – are the subject of this litigation. The copyright in the CHS Works belongs to the Crown. The information (the “CHS Data”) embodied in the CHS Works is held and maintained by the Crown.

[4] The rights of NDI that are the subject of the dispute in this case are embodied in an agreement – the Licence – the terms of which are set out in a document entitled “Canada-NDI Consolidated Agreement – Version 1.3 as amended on January 21, 2002 for Marketing and Distribution of Electronic Charts and Other Digital Nautical Products”. The relevant provisions read as follows:

[RECITALS]

1. The Canadian Hydrographic Service (CHS) of the Department of Fisheries and Oceans has the sole authority in Canada to produce nautical charts for Canadian territorial waters. CHS is responsible for providing nautical charts which meet the regulatory standards for safe navigation, and for providing an adequate supply of such charts under the *Charts and Nautical Publications Regulations 1995* of the *Canada Shipping Act*.
2. CHS produces paper nautical charts and sells them through a network of authorized dealers in and outside Canada.
3. CHS is interested in supplementing its standard paper chart with electronic navigation charts and other digital data products and for that purpose has developed and continues to develop methodologies and standards designed to produce these products.
4. Canada owns the exclusive right to the paper charts and digital data products produced by the CHS.
5. CHS is interested in meeting its digital data product marketing and distribution requirements through licensing arrangements.

6. NDI is interested in acquiring the marketing and distribution rights to CHS electronic charts and other digital data products, and in cooperating with CHS in the production and quality control of these products.

[...]

DEFINITIONS

[...]

“CHS” means the Canadian Hydrographic Service, Science Sector of the Department of Fisheries and Oceans.

“CHS Certified Products” shall describe any product that is certified by CHS to meet its data product standards.

“CHS Data” means any data owned by Canada and maintained by CHS.

“ENC” means an IMO compliant Electronic Navigational Chart.

“IHO” means the International Hydrographic Organization.

“IMO” means the International Maritime Organization.

[...]

“Product” means any digital data product based on CHS Data (including CHS Certified Products), the definitive list of which [...] is to be agreed upon by the Parties and set out in Schedule 1 and including but not limited to:

- Vector Charts, such as ENCs, and
- Raster Charts, such as a raster version of CHS paper charts and any copies thereof.

“Product Update” means a digital file, based on CHS Data (including CHS Certified Products), the definitive list of which [...] is to be agreed upon by the Parties and set out in Schedule 1 and containing data that is required to update a corresponding Product.

[...]

2. LICENSE

- 2.1 Subject to the rights reserved in Sections 2.4 and 2.5 below, Canada grants to NDI a sole worldwide right and license (the “License”) to use the CHS Data to produce Products and Product Updates, to integrate

these Products with other products or services (provided that such integrated offerings do not derogate in any respect from the availability or reliability of the Products or Product Updates) and to distribute same directly or through third parties to whom a sublicense is granted in accordance with the terms hereof. Except as expressly set out herein, CHS shall have no right to distribute the Products or Product Updates to any person.

- 2.2 NDI may not transfer to other parties CHS Data, Products, and Product Updates unless such parties have been granted the appropriate sublicense by NDI, in accordance with either Schedule 3: End-user License, or Schedule 4: Value Added Remarketer License or any other type of distribution arrangements with third parties approved by NDI and CHS. Any such sublicense shall hereinafter be referred to as “NDI License”, and any NDI sublicensee shall hereinafter be referred to as “NDI Licensee”. A transfer of any data and data products shall be deemed to have occurred under the Revised Agreement whenever a third party shall have access to such data and data products.
- 2.3 The License may not be assigned by NDI without CHS’ prior written authorization.
- 2.4 CHS may provide CHS Data, Products that are CHS Certified, and Product Updates that are CHS Certified directly, for non-commercial purposes, to any Canadian (Federal or Provincial) Government Department or Agency, to any Canadian university or other educational institution, to any Hydrographic Office with which CHS has bilateral arrangements, or, in case of a national emergency, as defined in the *Emergencies Act*, to any other third party. CHS will use its best efforts to ensure that all requests for CHS Data, Products, and Product Updates are routed through NDI.
- 2.5 In the event of a national emergency, as defined in the *Emergencies Act*, and on written notification from CHS, NDI will immediately cease, to the extent and under any conditions specified in the notification, the distribution of any CHS Data, Products that are CHS certified, or Product Updates that are CHS Certified. NDI will not renew distribution of any CHS Data, Products that are CHS Certified, or Product Updates that are CHS Certified without written notification from CHS. In this Section, notification shall come from the Director General of CHS or any supervisory officer of the Director General of CHS.

[...]

6. COPYRIGHT

6.1 NDI agrees that the copyright in the CHS Data, Products that are CHS Certified and Product Updates that are CHS Certified is and shall remain the property of Canada. Where NDI has developed a Product or Product Update, the ownership of same shall be assigned to CHS if it is CHS Certified provided that NDI receives commercially reasonable compensation for its investment in such development. NDI shall ensure that, for all Products that are CHS Certified and Product Updates that are CHS Certified the following copyright notice is displayed in accordance with accepted industry practices related to copyright notices pertaining to published and licensed data:

© Her Majesty in right of Canada, Canadian Hydrographic
(year) Service/

Sa majesté en Chef du Canada, Service Hydrographique du
Canada

[5] It appears from section 2.1 of the Licence that the Crown furnished NDI with CHS Data, not CHS Works. If section 2.1 is read literally, it would be only the CHS Data that NDI has been licensed to use to make the digital products it sells. However, NDI is asserting against C-Map and Navionics a claim for damages for breach of copyright in the CHS Works, which are not specifically mentioned in section 2.1.

[6] C-Map and Navionics admit that they use CHS Works to produce their own digital charts. However, the basis of their summary judgment motion is that as a matter of law, NDI has no right to claim damages against them under the *Copyright Act* in respect of the CHS Works, because the copyright in the CHS Works belongs to the Crown alone.

[7] It is common ground that, according to subsection 36(1) of the *Copyright Act*, NDI is entitled to sue in its own name for breach of the copyright in the CHS Works if it has a right, title or

interest in the Crown's copyright by virtue of the Licence. Subsection 36(1) of the *Copyright Act* which reads as follows:

36. (1) Subject to this section, the owner of any copyright, or any person or persons deriving any right, title or interest by assignment or grant in writing from the owner, may individually for himself or herself, as a party to the proceedings in his or her own name, protect and enforce any right that he or she holds, and, to the extent of that right, title and interest, is entitled to the remedies provided by this Act.

36. (1) Sous réserve des autres dispositions du présent article, le titulaire d'un droit d'auteur, ou quiconque possède un droit, un titre ou un intérêt acquis par cession ou concession consentie par écrit par le titulaire peut, individuellement pour son propre compte, en son propre nom comme partie à une procédure, soutenir et faire valoir les droits qu'il détient, et il peut exercer les recours prévus par la présente loi dans toute l'étendue de son droit, de son titre et de son intérêt.

[8] It is also common ground that subsection 36(1) of the *Copyright Act* is of assistance to NDI only if its rights under the Licence meet the definition of "exclusive licence" in section 2.7 of the *Copyright Act*, which reads as follows:

2.7 For the purposes of this Act, an exclusive licence is an authorization to do any act that is subject to copyright to the exclusion of all others including the copyright owner, whether the authorization is granted by the owner or an exclusive licensee claiming under the owner.

2.7 Pour l'application de la présente loi, une licence exclusive est l'autorisation accordée au licencié d'accomplir un acte visé par un droit d'auteur de façon exclusive, qu'elle soit accordée par le titulaire du droit d'auteur ou par une personne déjà titulaire d'une licence exclusive; l'exclusion vise tous les titulaires.

[9] So, the first question is simply this: Does anything in the Licence authorize NDI to do anything with respect to the CHS Works that is subject to copyright, to the exclusion of all others including the Crown?

[10] The acts that are “subject to copyright” are those listed in section 3 of the *Copyright Act*.

This is essentially a list of things that can be done in respect of a copyrighted work only by or with the consent of the copyright holder (necessarily including the consent of the copyright holder that is given by way of licence). Section 3 reads in relevant part as follows:

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 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, and includes the sole right

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

[...]

and to authorize any such acts.

3. (1) Le droit d’auteur sur l’oeuvre comporte le droit exclusif de produire ou reproduire la totalité ou une partie importante de l’oeuvre, sous une forme matérielle quelconque, d’en exécuter ou d’en représenter la totalité ou une partie importante en public et, si l’oeuvre n’est pas publiée, d’en publier la totalité ou une partie importante; ce droit comporte, en outre, le droit exclusif :

a) de produire, reproduire, représenter ou publier une traduction de l’oeuvre;

[...]

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

[11] A problem for NDI is that the key provision of the Licence, section 2.1, authorizes NDI to make use of the CHS Data – the information – but there can be no copyright in information. More importantly, section 2.1 does not expressly authorize NDI to produce or reproduce, or do anything at all, with respect to the CHS Works – the paper nautical charts – to which the Crown copyright attaches. That the subject of the Licence is the CHS Data and not the CHS Works is underscored by section 2.2, 2.4 and 2.5. If section 2.1 were read literally and in isolation, NDI could not succeed in this action.

[12] However, section 2.1 must be read in its context. And when the Licence is considered in its entirety, an ambiguity becomes apparent because of section 6.1.

[13] Section 6.1 is intended to be a formal acknowledgement of Crown copyright, but it refers to copyright in the CHS Data. Either the parties were unaware that copyright could not subsist in information (which we would not presume), or they understood the phrase “CHS Data” by necessary implication to mean or at least include the CHS Works, even though the definition of “CHS Data” in the Licence seems to limit its meaning to “data”.

[14] NDI’s statements of claim allege that the Crown “owns” the CHS Data. That allegation presents the same ambiguity. If it is intended to mean that data can be owned in the same way as property can be owned, then there is some question as to whether it is correct as a matter of law. Generally speaking, data – mere information – cannot be “owned” as though it were property. It can be kept confidential by its creator or the person who is in possession of it, and a legal obligation can be imposed on others by contract or by legislation to keep the information confidential. However, there is no principle of property law that would preclude anyone from making use of information displayed in a publicly available paper nautical chart, even if the information originated with the Crown or is maintained by the Crown.

[15] On the other hand, a reproduction in digital form of a paper nautical chart produced by CHS might be a breach of the Crown’s copyright pursuant to section 3 of the *Copyright Act*. It may be that the parties to the Licence contemplated that the products NDI would produce using the CHS Data – the information – would necessarily be copies of the CHS Works or such a substantial part of

the CHS Works that they would infringe the Crown copyright but for the Crown's consent to the reproduction. On that basis, section 2.1 could plausibly be read as authorizing NDI to reproduce the CHS Works in digital form. That interpretation of section 2.1 appears to be consistent with the definition of "Product" in the Licence, which suggests that NDI could produce "Raster Charts" that would be reproductions of CHS paper charts.

[16] That may be what NDI was trying to convey in its argument that section 2.1 authorized it to "integrate" the CHS Works into its products. Justice Zinn notes at paragraph 22 of his reasons that NDI submits that it was given three "permissions" under the Licence, namely "the right to produce, to integrate and to distribute". Then, at paragraph 23, Justice Zinn concludes, without analysis:

[23] CHS having permitted NDI to produce and integrate CHS Works as protected by the *Copyright Act*, one must next ask whether CHS promised not to give anyone else permission to produce or integrate the CHS Works for the duration of the licence.

As we read this paragraph, Justice Zinn interpreted section 2.1 of the License as granting NDI the right to produce digital copies of the CHS Works. We are not sure that interpretation is correct, because in our view the record does not contain enough evidence of the relevant factual matrix to make that determination. However, for the moment we will assume it is correct.

[17] Having interpreted section 2.1 of the Licence as he did, Justice Zinn was obliged to consider whether the rights granted to NDI under that provision fell within the statutory definition of "exclusive licence" in section 2.7 of the *Copyright Act*. As mentioned above, it is undisputed that if NDI did not have an exclusive licence, it does not have standing to sue C-Map and Navionics for copyright infringement.

[18] C-Map and Navionics did not argue that the Crown could have given another party the right to produce digital copies of the CHS Works for the duration of the License. Therefore, the issue was whether the License precluded the Crown from making such digital copies itself.

[19] Section 2.1 of the Licence opens with words of reservation (“subject to the rights reserved in Sections 2.4 and 2.5”). However, sections 2.4 and 2.5 do not reserve to the Crown any right to make digital copies of the CHS Works. Section 2.4 gives the Crown the right to provide CHS Data and certain NDI products to specified parties for certain purposes, and section 2.5 provides for the termination of the authorization in the event of a national emergency.

[20] There is no other provision in the Licence that says expressly that the Crown reserved to itself the right to make digital copies of the CHS Works. That would tend to support the argument of NDI that the Licence was intended to be an exclusive licence. However, Justice Zinn concluded the contrary, primarily because he relied on the evidence given by a Crown official in an examination for discovery that the Crown did not consider NDI to have an “exclusive licence in the paper charts” and that “paper charts were excluded from the definition of Products and Product Updates”.

[21] We agree with NDI that Justice Zinn erred in law in relying on this evidence to determine the parties’ contractual intention (*Eli Lilly & Co. v. Novopharm Ltd.*, [1998] 2 S.C.R. 129, at paragraph 54). (We would also note that if the discovery evidence of the Crown official were relevant, it would tend to contradict the conclusion that the Licence authorized NDI to make digital copies of the CHS Works – the paper charts.)

[22] Disregarding the discovery evidence of the Crown official leaves only the Licence itself as the basis for determining whether NDI's licence was exclusive. In our respectful view, the lack of any express provision that permits the Crown to make digital copies is consistent with the position of NDI that its licence was exclusive.

[23] That does not conclude the matter, however. As indicated above, the apparent inconsistency between section 2.1 and section 6.1 of the Licence leaves open a question as to the subject of the Licence itself. That is, it remains unclear whether NDI was licensed only to use the CHS Data (the information) to make its digital products, or whether it was licensed to make digital copies of the CHS Works. In our view, the record on the summary judgment motion does not provide a basis for resolving that ambiguity, and therefore C-Map and Navionics have not met the burden of proving that there is no genuine issue for trial. We conclude, therefore, that the motion for summary judgment should have been dismissed.

[24] For these reasons, we would allow the appeal with costs in this Court and in the Federal Court. We would set aside the judgment under appeal and, making the order that should have been made, we would dismiss the summary judgment motion.

“M. Nadon”

J.A.

“K. Sharlow”

J.A.

“I agree.

Eleanor R. Dawson J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-115-12

**APPEAL FROM AN ORDER OF THE HONOURABLE JUSTICE ZINN DATED
APRIL 3, 2012 DOCKET NUMBER T-1219-04**

STYLE OF CAUSE: Nautical Data International, Inc. v.
C-Map USA Inc. et al

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: December 6, 2012

REASONS FOR JUDGMENT BY: NADON, SHARLOW J.J.A.

CONCURRED IN BY: DAWSON J.A.

DATED: March 1, 2013

APPEARANCES:

James Mills
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FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-116-12

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APRIL 3, 2012, DOCKET NUMBER T-1220-04**

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PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: December 6, 2012

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CONCURRED IN BY: DAWSON J.A.

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