

Blacklock's v. Canadian Vintners Association et al.

Court File No. 14-SC-00130509-0000

**SUPERIOR COURT OF JUSTICE
OTTAWA SMALL CLAIMS COURT**

BETWEEN:

1395804 Ontario Limited c.o.b. Blacklock's Reporter

PLAINTIFF

- and -

**Canadian Vintners Association
and
Dan Paszkowski**

DEFENDANTS

**REASONS FOR JUDGMENT
and JUDGMENT**

DELIVERED BY DEPUTY JUDGE LYON GILBERT,
ON FRIDAY, OCTOBER 16, 2015
AT THE COURT HOUSE, 161 ELGIN STREET, OTTAWA.

Heard at Ottawa: March 31, 2015 and May 6, 2015

Appearances:

For the Plaintiff: Yavar Hameed

For the Defendants: Sandra LeBrun

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PART I
BACKGROUND and OVERVIEW

1. This is a copyright case in which the Plaintiff alleges that its copyright was breached. Compensatory damages are claimed for the value attributable to the work along with general damages for intentional interference with economic relations including inducing a breach of contract together with punitive damages.
2. The Plaintiff is a news corporation providing subscription based material to its customers. The corporate Defendant is an association representing approximately 90% of all Canadian wine producers with its mission to advocate on public policy issues on behalf of its members. The personal Defendant is the corporate Defendant's President and Chief Executive Officer.
3. The Plaintiff alleges that an article it published on December 13, 2013 and available online to its subscription customers only was obtained without colour of right by the corporate Defendant through the efforts made by the personal Defendant.
4. The Plaintiff periodically publishes an online news letter with "teaser" articles. It simply consists usually of a headline along with several sentences designed to catch the curiosity of the reader who if interested in reading further is asked to click on a link to the full article. In this case, the link is available to subscribers only.

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5. It is the Plaintiff's position that its publication is protected by copyright, that the Defendants illegally obtained and made use thereof thereby depriving the Plaintiff of its economic value. In addition to copyright breach it also alleges that the Defendants are liable on the basis of their having committed the tort of intentional interference with economic relations including inducement of breach of contract. The range of damages being sought are the value of the cost for a personal subscription up to the subscription charge for a corporate subscription the size of the Defendant corporation. The Plaintiff also claims that this is a case for punitive damages.
6. The Defendants in their defence take the position that they accessed the full article using a third party which had a subscription, that the Defendants were not breaching Copyright, that their purpose in seeking out the full text was for educational purposes coupled with the desire to correct misstatements and inaccuracies in both the teaser and the full article and that in law their actions constitute "fair dealing", which is an exemption under the Copyright Act (the "Act").
7. The Defendants also deny that the evidence supports a finding that they interfered with the plaintiff's economic interests and that it does support an award of punitive damages.

PART II

THE EVIDENCE

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8. The managing editor, Tom Korski, testified for the plaintiff. He described the Plaintiff's business as an electronic daily which delivers its content through a website and email. It earns its money by selling subscriptions to persons and corporations interested in its material. Pricing to individuals is fixed whereas if you are an institution looking for wide distribution you must contact the Plaintiff for rates. A single-use subscription costs \$157.00 and a typical institutional membership is charged out at \$11,470.00. The terms and conditions for access are posted on the website and those terms and conditions contained limitations with regard to use and distribution. The terms and conditions are found on a link in the footer of each page of the website.
9. The teaser and the full story published on December 13, 2013 represents an accurate depiction of the facts according to Mr. Korski. The personal Defendant had been testifying that day before a Commons committee and this was a report on his testimony. An electronic bulletin was sent to the personal Defendant both as a courtesy and an advisory given he had been quoted in the story. After finding out that the personal Defendant had obtained personal access to the full story, he sent a letter to him advising there had been a breach of copyright and given it had been distributed to another person, Beth McMahon, employed within the corporate Defendant's organization, included with the letter an invoice for \$314.00 plus HST, which was the minimum chargeable for 2 individual subscriptions. It was his hope that the invoice would be paid and that would have put the matter at an end. For him, the result was this action in order to protect the copyright and the paywall which is the source of the Plaintiff's revenue. The

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Defendants maintained their position that they had done nothing wrong, refused to pay and refused to advise who was their source to obtain the article until an order of this Court was made.

10. Holly Doan is the publisher. The company was launched two years ago. The material is available online and there is no free copy available. Six stories are published daily. If you wish to purchase a subscription, the terms and conditions are available online on a separate page accessed through a link. If you intend on buying an individual subscription, a pop up tells you how to do so. On a daily basis she has conversations with potential institutional clients who ask typical questions such as what can they do with the subscription, are there any freebies or promotional rates, and what they can do with the material. In these discussions, the potential clients advise whether it is for personal reading or for use of its members. There is no way of knowing whether they are really subscribing for themselves or intend on distributing it more widely. The subscription is based upon trust.

11. After the story was published, the personal Defendant contacted her and wanted to talk about it. She asked him where he obtained a copy but she did not recall whether he told her the source. Her main concern was in relation to the breach of the paywall, which she considers to be a serious threat to her company. She found out he was speaking on behalf of the corporate Defendant. She also discovered through their email exchange on December 17, 2013 that that he had copied Beth McMahon in the Defendant's organization and that he recognized that the Plaintiff had a very broad subscription base. She had also asked him to

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disclose the name of the subscriber (which he did not) after he had written her stating "Yes, a colleague with a subscription sent it to us around the same time as your email". In a postscript to his email to her he made it a point of stating "the terms and conditions link on the [Blacklocks.ca](#) website is broken". In her response right after, she advised him that she had just checked the online link to the "terms and conditions" and confirmed it was working. She advised that a single subscription invoice would be forwarded to him by email.

12. It was the day after that, namely on December 18, 2013, that Mr. Korski sent a letter to the Defendants advising them of the Plaintiff's position with respect to breach of copyright and including an invoice for two individual subscriptions each in the sum of \$157.00 given that a copy had been distributed to Miss McMahon. The Defendants' response to that letter is dated January 17, 2014 taking the position that it did nothing wrong and at which time it quoted from the Terms and Conditions posted on the website as follows: "reproduction, duplication, or distribution of Blacklock's Reporter and/or all or any part of its content for anything other than your personal, non-commercial use is a violation not only of these Terms and Conditions but also of copyright laws....".

13. He went on to state: "I did not reproduce, duplicate nor distribute the article in question".

14. Dan Pazskowski testified for himself and on behalf of the Corporation. He is the Pres. and Chief Executive Officer of the Defendant. There are three full-time staff and a bookkeeper. The organization consists of 44 members, four associations and 55 wineries in Canada. At the board level, a strategic plan is developed and

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a material part of their mandate is to work with government whereby credibility is very important within the industry. In March 2013 they started receiving taglines and digests from the Plaintiff along with seven copies of teasers.

15. On one occasion as he had become aware, Miss McMahon did have a conversation with Miss Doan about their not being happy with an article that had been published but nothing came of it. He recounted that in September 2013 after a discussion with his vice president he advised her that it was not a very valuable publication worthy to subscribe to.

16. He did not dispute the exchange he had with Miss Doan other than to point out that he only became aware of the Terms and Conditions after the exchange with her. Given his concern about what he perceived to be inaccuracies etc. with relation to the content of the teaser, he set out to determine what else was in the full article. He was aware of another subscriber, which in this case was Beer Canada, through one of its employees, Brittany Moorcroft, who was asked to cut and paste the article to see if there were other untruthful facts contained therein. Miss McMahon received it but he testified he did not remember whether he reviewed it with her. He stated that no one else saw the article and it was not discussed with anyone else and he did nothing to set the record straight thereafter despite his view the article was full of errors.

17. In cross-examination, he admitted that since he could not get access to the article itself that there was a reason for that. On the other hand, knowing that the full article was blocked, he stated he did not understand it to mean it was not accessible. He further admitted that knowing someone who had a subscription

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meant that along with that there was a paid arrangement of some kind, although he had no knowledge of the details. He acknowledged that he was circumventing the paywall by obtaining the full article but likened it to reading a magazine in a doctor's office. When asked if it crossed his mind why he could not get access he answered by stating he had no knowledge of copyright in the article and no knowledge of the terms and conditions of being a subscriber but at the same time stating that he clicked on the link to the Terms and Conditions but it did not come up. His answer as to why the Defendants refused to disclose who gave them access to the full article until they were ordered to do so by an order of this Court was that they believed they had not violated the Act. He reiterated the sole purpose in obtaining the full article was to further delve into the inaccuracies in the teaser catch lines and yet took no further action was taken after that.

18. Elizabeth McMahon is the VP of Government and Public affairs for the corporate Defendant. Her first encounter with the Plaintiff was in April 2013 when she provided an interview with one of its reporters. At that time, she received an email from Miss Doan with advice as to how to sign up. She stated that the content of the article did not reflect what she had been interviewed on. Thereafter she received further teasers and got more content copies. She reported the foregoing to the personal Defendant.

19. As for the article in question, it came to her attention from the personal Defendant sending her the headline on December 17, 2013. She had also received it directly as well. She thought the teaser was sensational and counter to the point of what was being made at the committee. It was discussed and at

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which point she wrote Beer Canada through Brittany Moorcroft asking for a cut-and-paste of the full article, which she received 15 minutes thereafter. She was aware that Beer Canada was a subscriber. The Board of Directors was made aware of the article at the next board meeting. Although she wasn't clear as to the timing, she tried to obtain access to the Terms and Conditions but was unable to do so. These Terms and Conditions are part of a footer that comes up on each page of the website. After getting in touch with Miss Doan, she went to the front page and was able to access the Terms and Conditions on its link.

PART II THE ISSUES

20.

- A. Have the Defendants breached the Plaintiff's copyright?
- B. If so, is the defence of fair dealing applicable in this case such as to relieve the Defendants of liability?
- C. If not, what is the measure of damages for breach of copyright in this case?
- D. Alternatively, have the Defendants intentionally interfered with economic relations by inducing breach of contract and/or breach of the contract?
- E. If so, are additional or other damages available to be awarded for the breach?
- F. Are punitive damages warranted in this case?

PART III THE LAW

21.

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A. The relevant and therefore applicable sections of the Act are set out below.

22. Copyright is defined in Section 2 of the Act in the case of a work as the rights described in Section 3.

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,
- (b) in the case of a dramatic work, to convert it into a novel or other non-dramatic work,
- (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,
- (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,
- (e) in the case of any literary, dramatic, musical or artistic work, to reproduce, adapt and publicly present the work as a cinematographic work,
- (f) in the case of any literary, dramatic, musical or artistic work, to communicate the work to the public by telecommunication,
- (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,
- (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, device or computer, to rent out the computer program,
- (i) in the case of a musical work, to rent out a sound recording in which the work is embodied, and
- (j) in the case of a work that is in the form of a tangible object, to sell or otherwise transfer ownership of the tangible object, as long as that ownership has never previously been transferred in or outside Canada with the authorization of the copyright owner,

and to authorize any such acts.

23. Section 41 states in part:

41.1 (1) No person shall

- (a) circumvent a technological protection measure within the meaning of paragraph (a) of the definition “*technological protection measure*” in section 41;

24. A technological protection measure is defined in Section 41 as follows:

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“*technological protection measure*” means any effective technology, device or component that, in the ordinary course of its operation,

- (a) controls access to a work, to a performer’s performance fixed in a sound recording or to a sound recording and whose use is authorized by the copyright owner; or
- (b) restricts the doing — with respect to a work, to a performer’s performance fixed in a sound recording or to a sound recording — of any act referred to in section 3, 15 or 18 and any act for which remuneration is payable under section 19.

25. The leading case on the law of copyright is CCH Canadian Ltd. v. Law Society of Upper Canada, (2004) 1 S.C.R. 339 (SCC), which clearly sets out the basic legal principles associated with copyright law, amongst which are the following statements:

“Copyright law in Canada protects a wide range of works including every original literary, dramatic, musical and artistic work, computer programs, translations and compilations of works: see ss. 5, 2 and 2.1 of the *Copyright Act*. Copyright law protects the expression of ideas in these works; it does not protect ideas in and of themselves.” (at para. 8).

“In Canada, copyright is a creature of statute and the rights and remedies provided by the *Copyright Act* are exhaustive.” (at para. 9)

“In interpreting the scope of the *Copyright Act’s* rights and remedies, courts should apply the modern approach to statutory interpretation whereby “the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament”: *Bell Express Vu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42, at para. 26, citing E. A Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87. (at para. 9)

“Part III of the *Copyright Act* deals with the infringement of copyright and exceptions to infringement. Section 27(1) states generally that “[i]t 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.” More specific examples of how copyright is infringed are set out ins. 27(2) of the Act. The exceptions to copyright infringement, perhaps more properly understood as users’ rights, are set out in ss. 29 and 30 of the Act. The fair dealing exceptions to copyright are set out in ss. 29 to 29.2. In general terms, those who deal fairly with a work for the purpose of research, private study, criticism, review or news reporting, do not infringe copyright. Educational institutions, libraries, archives and museums are specifically exempted from copyright infringement in certain circumstances: see ss. 29.4 to 30 (educational institutions), and ss. 30.1 to 30.5. Part IV of

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the *Copyright Act* specifies the remedies that may be awarded in cases where [page 351] copyright has been infringed. Copyright owners may be entitled to any number of different remedies such as damages and injunctions, among others.” (at para. 12)

26. It should be noted that a good part of the controversy and discussion in that case centered around whether copyright existed and if so, whether it had been breached. The court had to determine whether the plaintiff had copyright in the work and if so, to what extent. This is not an issue in this case and if it had been, this Court would not have the jurisdiction to make that finding and issue a declaratory order.

27.

B. The defence of “fair dealing” is set out in Section 29 of the Act. It states:

29. Fair dealing for the purpose of research, private study, education, parody or satire does not infringe copyright.

29.1 Fair dealing for the purpose of criticism or review does not infringe copyright if the following are mentioned:

- (a) the source; and
- (b) if given in the source, the name of the
 - (i) author, in the case of a work,
 - (ii) performer, in the case of a performer’s performance,
 - (iii) maker, in the case of a sound recording, or
 - (iv) broadcaster, in the case of a communication signal.

28. What constitutes fair dealing was discussed in the CCH case. The Court stated the following:

“Before reviewing the scope of the fair dealing exception under the *Copyright Act*, it is important to clarify some general considerations about exceptions to copyright infringement. Procedurally, a defendant is required to prove that his or her dealing with a work has been fair; however, the fair dealing exception is perhaps more properly understood as an integral part of the *Copyright Act* than simply a defence. Any act falling within the fair dealing exception will not be

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an infringement of copyright. The fair dealing exception, like other exceptions in the *Copyright Act*, is a user's right. In order to maintain the proper balance between the rights of a copyright owner and users' interests, it must not be interpreted restrictively." (at para. 48)

"In order to show that a dealing was fair under s. 29 of the *Copyright Act*, a defendant must prove: (1) that the dealing was for the purpose of either research or private study and (2) that it was fair."

"Research" must be given a large and liberal interpretation in order to ensure that users' rights are not unduly constrained. I agree with the Court of Appeal that research is not limited to non-commercial or private contexts. The Court of Appeal correctly noted, at para. 128, that "[r]esearch for the purpose of advising clients, giving opinions, arguing cases, preparing briefs and factums is nonetheless research. "Lawyers carrying on the business of law for profit are conducting research within the meaning of s. 29 of the *Copyright Act*." (at para. 51)

"The *Copyright Act* does not define what will be "fair"; whether something is fair is a question of fact and depends on the facts of each case."

"But, after all is said and done, it must be a matter of impression. As with fair comment in the law of libel, so with fair dealing in the law of copyright. The tribunal of fact must decide." (at para. 52) (Lord Denning in *Hubbard v. Vosper*, [1972] 1 All E.R. 1023 (C.A.), at p. 1027)

29. The SCC reiterated that there is no set test for fairness but rather outlined a set of factors to be taken into consideration in assessing whether a dealing is indeed fair. According to the SCC in the *CCH* case, the Court should keep in mind and consider the following:

- I. the purpose of the dealing;
- II. the character of the dealing;
- III. the amount of the dealing;
- IV. alternatives to the dealing;
- V. the nature of the work; and
- VI. the effect of the dealing on the work.

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- i. The purpose of the dealing will be fair if it is for a purpose cited under the Act. The court should make an effort to uncover the real purpose or motive in using the copyrighted work.
- ii. In assessing the character of a dealing, courts must examine how the works are dealt with.
- iii. Both the amount of the dealing and importance of the work allegedly infringed should be considered in assessing fairness.
- iv. Alternatives to dealing with the infringed work may affect the determination of fairness.
- v. The nature of the work in question should also be considered by courts assessing whether a dealing is fair.
- vi. Finally, the effect of the dealing on the work is another factor warranting consideration when courts are determining whether a dealing is fair. (as set out in paras. 53 to 59)

30.

- C. Provided there is a finding of breach of copyright and the defence of fair dealing is not applicable on the facts of the case, how is the measure of damages to be assessed?

31. Section 41.1 (2) sets out the following:

“The owner of the copyright in a work, a performer’s performance fixed in a sound recording or a sound recording in respect of which paragraph (1)(a) has been contravened is, subject to this Act and any regulations made under section 41.21, entitled to all remedies — by way of injunction,

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damages, accounts, delivery up and otherwise — that are or may be conferred by law for the infringement of copyright against the person who contravened that paragraph.”

32. Section 35 (1) sets out the following:

“Where a person infringes copyright, the person is liable to pay such damages to the owner of the copyright as the owner has suffered due to the infringement and, in addition to those damages, such part of the profits that the infringer has made from the infringement and that were not taken into account in calculating the damages as the court considers just.”

33. Section 38.1 (1) sets out the following:

“Subject to this section, a copyright owner may elect, at any time before final judgment is rendered, to recover, instead of damages and profits referred to in subsection 35(1), an award of statutory damages for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally,

(a) in a sum of not less than \$500 and not more than \$20,000 that the court considers just, with respect to all infringements involved in the proceedings for each work or other subject-matter, if the infringements are for commercial purposes; and

(b) in a sum of not less than \$100 and not more than \$5,000 that the court considers just, with respect to all infringements involved in the proceedings for all works or other subject-matter, if the infringements are for non-commercial purposes.”

34. In examining these sections and giving the words contained therein their ordinary sense harmoniously with the scheme of the Act, this Court can determine based upon the evidence in this case the actual economic loss suffered by the Plaintiff should the Defendants be found liable for breach of copyright.

35. As part of the Court's consideration on the assessment of damages, the Court may take into account the following factors as set out in Section 38.1 (5) of the Act.

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“In exercising its discretion under subsections (1) to (4), the court shall consider all relevant factors, including

- (a) the good faith or bad faith of the defendant;
- (b) the conduct of the parties before and during the proceedings;
- (c) the need to deter other infringements of the copyright in question; and
- (d) in the case of infringements for non-commercial purposes, the need for an award to be proportionate to the infringements, in consideration of the hardship the award may cause to the defendant, whether the infringement was for private purposes or not, and the impact of the infringements on the plaintiff.”

D.& E.

36. Alternatively, if this is not a case of breach of copyright, have the defendants intentionally interfered with economic relations by inducing breach of contract and/or breach of the Act? What principles of law are applicable to define this tort?

37. The Plaintiff has sought damages alleging alternatively that this is a case for a finding that the Defendants have committed the tort of intentional interference with economic relations including inducing a breach of contract. It is not clear whether this is a pleading that there has been committed the tort of intentional interference with economic relations or that the Defendants have committed the tort of inducing a breach of contract, the elements of which are confusing but according to the cited case law are somewhat different.

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38. The elements necessary to make out a case for the tort of inducement of breach of contract are as set out in SAR Petroleum v. Peace Hills Trust Company, 2010 NBCA 22 at para. 40, cited in the case of Gravelle v. A1 Security 2014 ONSC 5472 at para. 25:

- (a) there must be a valid, subsisting contract between the plaintiff and a third party;
- (b) the third party must have breached its contract with the plaintiff;
- (c) the breach must have been caused by the defendant;
- (d) the defendant must have been aware of the contract;
- (e) the defendant must have known it was inducing the breach of contract;
- (f) the defendant must have intended to procure the breach of contract; and,
- (g) the plaintiff must prove that it suffered damage as a result of the breach.

39. The elements necessary to make out a case for the tort of intentional interference with economic relations are set out in the case of EnerWorks Inc. v. Glenbarra Energy Solutions Inc. 2012 ONSC 414 at para. 80, cited in Gravelle at para. 31.

- (a) intent to injure and cause loss to the plaintiff;
- (b) interference with the plaintiff's business or livelihood by illegal or unlawful means;
- (c) the unlawful means are directed at a third party who has an actionable claim or an actionable claim but for the absence of having suffered a loss; and,
- (d) the plaintiff suffers an economic loss as a result of the unlawful means.

40. The criteria to establish this tort has been enunciated somewhat differently by the Ontario Court of Appeal in Alleslev-Krofchak v. Valcolm Ltd., 2010 ONCA 557 at para. 55 where it stated that the Plaintiff must prove that the Defendants intended to cause the loss to the Plaintiff and interfered with the Plaintiff's economic interests by illegal or

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unlawful means. In order to establish unlawful means according to the Supreme Court of Canada in Bram Enterprises Ltd. v. A. I. Enterprises Ltd. 2014 SCC 12 at para. 76, the Court concluded that: "...in order for conduct to constitute 'unlawful means' for this tort, the conduct must give rise to a civil cause of action by the third party or would do so if the third party had suffered loss as a result of that conduct." The third party must have suffered damages from the defendant's conduct and the third party could have brought its own action against the same defendant(s).

41. Damages for inducing breach of contract are discretionary and may encompass pecuniary and non-pecuniary damages such as injured feelings, and loss of reputation, as well as considering the nature of the defendant's conduct, and punishment: Drouillard v. Cogeco Cable Inc., 2007 ONCA 322, O.J. No. 1664, at para. 42. Damages can be assessed at large: Waxman v. Waxman, [2002] O.J. No. 2528, O.T.C. 443 (S.C.J.), at para. 1804, and may overlap with damages for breach of contract. (para. 27 of the Gravelle decision)

F.

42. Are punitive damages warranted in this case if the Defendants are found liable? It is unnecessary to cite the cases well establishing the applicable principles of law to be considered if an award of punitive damages is to be made. Suffice it to say that the evidence must disclose conduct of such a nature so as to be deserving of punishment because of its harsh, vindictive, reprehensible and malicious nature. The element or factor of deterrence may also be taken into account.

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PART IV

ANALYSIS AND CONCLUSIONS

A.

Have the Defendants breached the Plaintiff's copyright?

43. As stated earlier, the Court does not have to decide if the publication has the protection of copyright. That issue is conceded. The main issue for consideration and disposition is whether that copyright has been breached by the actions taken by the Defendants.

44. What is evidentially clear is that access to the full article was obtained without colour of right and without permission from the author or publisher. It must be kept in mind that the Defendants embarked upon a course of conduct explicitly designed and coupled with the intent of obtaining an article which was not available openly, transparently and without taking steps otherwise open only to subscribers. Accepting for the moment that the intention of obtaining the article was for the sole purpose of determining whether statements made therein were truthful and accurate, and if necessary, taking steps to challenge, debate and correct, or alternatively for educational purposes, such steps were not taken. Instead, the Defendants took steps which they knew or ought to have known were contrary to the process required by the paywall and to the terms and conditions which were extant and applicable.

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45. The evidence discloses a course of conduct which logically amounts to an effort to obtain access to material they could not have obtained without either having their own subscription or using someone else who possessed subscriber rights. Prior to the event at issue, they had exchanges with the Plaintiff on content to which they had objected to and for which they knew full access was subscriber based. In point of fact, they had considered a subscription and had rejected subscribing opining that it was not a very valuable publication worthy to subscribe to.

46. The Defendants chose to bypass the paywall. They did so by engaging the assistance of Brittany Moorcroft and Beer Canada, who they knew possessed subscriber access. The personal Defendant instructed Elizabeth McMahon to obtain the full article. She did so on his instruction. He represented to Ms. Doan that he obtained the article from another colleague and through his words quoted above, one would logically lead the recipient to believe that the article came to him independently and without his intervention. In point of fact, the email exchange belies that and it is clear that he instructed Ms. McMahon to obtain it from Ms. Moorcroft knowing full well that Beer Canada had a subscription.

47. With respect to disclosing the name of the subscriber who sourced the material for the Defendants, it should be noted that he embarked upon a course of conduct designed to protect that source or not disclose that source until forced to do so by an order of this Court. This course of conduct was taken despite

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taking the position that the Defendants had done nothing wrong and in particular had not breached the Plaintiff's copyright in the material.

48. He read the article and although he stated no one else obtained access to it, Miss McMahon did state in her evidence that the Board of Directors was made aware of the article at the next board meeting.

49. Did the Defendants know that access to the website and through the paywall was subject to Terms and Conditions? It is clear that at the very least the Defendants came to know at some point in time that there were Terms and Conditions. The question is when did they come to know that. Their evidence and particularly that of Mr. Paszkowski was that it only came to his attention after Ms. Doan advised him in their email exchange of December 17, 2015 at which point he impliedly admitted attempting to access the Terms and Conditions because he stated in his email to Ms. Doan on December 17, 2013 that he tried but could not access the applicable link. Ms. Doan denied that the link was not working when she tested it. Interestingly enough, Ms. McMahon stated that after getting in touch with Miss Doan, she went to the front page and was able to access the Terms and Conditions on its link.

50. The question is then who should be believed on the issue of whether the Terms and Conditions link was working or not as of December 17, 2013. I have considered all of the evidence on this point and have come to the conclusion that because of the inconsistencies in the Defendants witnesses' version of events

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and coupled with their efforts to circumvent the paywall, their evidence lacks credibility on this point.

51. On the whole of their evidence, credibility is an issue given the fact that their ultimate reason for obtaining the material in the first place was to challenge statements made therein and the alleged importance in so doing, once received, nothing came of it. Their stated objective therefore is disingenuous.

52. Applying the law to the foregoing findings of fact relating to the basic question as to whether the Defendants have breached the Plaintiff's copyright, section 41.1 (1) is clear and applicable. You are prohibited from circumventing a technological protection which uses an effective technology to control access to a work. What the Defendants did is just that. They knew there was limited access to the full article. They knew that access was subscription based only and that subscriptions cost money. They knew that there was a technological barrier to that access. They knew that unless they paid they could not get it. They knew and chose another way around it. Having breached that prohibition, they have obtained copyrighted material belonging to the Plaintiff illegally.

B.

Having concluded that the Defendants obtained the copyrighted material illegally, is the defence of fair dealing applicable in this case such as to relieve the Defendants of liability?

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53. Notwithstanding the foregoing conclusion that the Defendants have illegally obtained the Plaintiff's copyrighted material, can they still avail themselves of the protection afforded of fair dealing under the Act?

54. Having reviewed the case law authorities cited to me and considering the scheme and policy objectives of the Act and most importantly section 41.1 (1) thereof, it is patently clear that unless you have obtained the material legally, you cannot avail yourself of the defence of fair dealing for the purpose of education, criticism or review. The facts in CCH and the law cited therein make it perfectly clear that you must first obtain the material legally and with colour of right.

55. The Defendants do not meet the test set out in section 29.1. in that the source of the material was not mentioned along with the other particulars required to be stated.

56. The CCH case describes what constitutes fair dealing. Fair dealing under section 29 of the Act requires that the dealing is either for research or private study, and that it is fair. Research is to be given a broad meaning and so must the term "private study". Although the facts do not support a finding that the Defendants genuine purpose was for research or for private study given they did not carry through with that purpose once they received the article, and giving them the benefit of the doubt, can it be said that their dealings were "fair"? As stated by the SCC, whether something is fair is a question of fact and depends on the facts of each case. Nonetheless the SCC has guided the Court's

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consideration of this question by outlining a set of factors to be taken into account as stated in paragraph 29 supra.

57. As stated above, it cannot be said that the purpose here was genuine given the fact that nothing came of the research (obtaining the full article) once obtained. Giving the Defendants the benefit of the doubt here that the intention was genuine, the follow through was not. The character of the dealing is not favourable to the Defendants. They obtained the material illegally and persisted until the court Order was made in keeping the source hidden from the Plaintiff. They were given an opportunity to pay for the work even after accessing it illegally and chose not to do so. They had alternative processes available to them to challenge the accuracy of the statements but chose not to use them or engage the Plaintiff in a discussion thereof. They knew that the publication had economic value upon which the Plaintiff relied and bypassed the paywall to obtain it. The nature of the work was important to the Plaintiff nonetheless because of its economic value to the Plaintiff. The effect of the dealing was to deny the Plaintiff due consideration for its time, cost and effort in publishing the work, making it in the eyes of the Plaintiff an economic and commercial venture. Although the Defendants did not disseminate the work widely, it came to the attention of the organization's governance leaving it open to wider distribution. It must be remembered that the corporate Defendant had in mind its own economic and commercial value in accessing the material as it was seeking to maintain its

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credibility as a lobbyist with government, and to protect its member's financial interests.

58. In conclusion and for the foregoing reasons, the defence of fair dealing is not available to the Defendants.

C.

Having found breach of copyright and that the defence of fair dealing is not applicable on the facts of the case, how are damages to be assessed?

59. The cumulative approach that the law cited above takes on the measure of damages to be awarded allows the Court to assess damages in a variety of ways including (1) such damages as the owner has suffered along with a disgorgement of any profits the infringer may have made provided there is no overlap or duplication, or (2) statutory damages of a range between \$500.00 and \$20,000.00 that the Court considers just provided the infringements are for commercial purposes. The election is made before final judgment is rendered. In this case, no such specific election has been made but the Plaintiff is submitting that damages be calculated on what an institutional subscription would have cost the Defendants. In either case, where infringement is by more than one person, the liability is joint and several.

60. Firstly, on the issue of joint and several, I find on the evidence that the Defendant Paszkowski was acting as authorized agent in his capacity as

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President and Chief Executive Officer for the Corporate Defendant. As such he felt he owed a duty to it to do something about the publication which he considered objectionable and for which he sought to protect the reputation and financial wellbeing of its constituent members who all seek maximization of their commercial value. For that reason alone, he had authority to speak for the organization and bind it to decisions he made and actions he took on its behalf. There is no doubt that his actions were also the organization's actions and accordingly there is a sound basis for a finding of joint and several liability.

61. Secondly, on the issue of whether the infringement is or is not for commercial purposes, which affects the measure of damages that might be awarded, I find that the Corporate Defendant's mandate is to lobby and protect the economic interests of its membership, of which there are over 60 members, 55 of which are wineries in Canada who operate for commercial purposes. As stated earlier, the evidence supports a commercial purpose in obtaining the full article. It therefore cannot be said that the damages assessable should not factor that into account. Once the full article was obtained, it was in the hands of the Corporate Defendant's organization and the evidence discloses that it was brought to the attention of its Board of Directors following its publication and its receipt by the Defendants.

62. As part of its discretion, the Court is mandated to consider all relevant factors, including but not limited to, the good faith or bad faith of the defendant, the conduct of the parties before and during the proceedings and the need to

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deter other infringements of the copyright in question. The factors to be considered are not closed.

63. I do not see a material reason to factor in deterrence if the other factors are of greater significance in this case and if the award is more than nominal in and of itself. As for the other cited factors in the Act, the good faith of the Defendants can best be described as lacking. The stated intention for their obtaining the full article turned out to be disingenuous given that nothing came of their objections to it once they obtained it. It became much ado about nothing. The manner in which they obtained the article was surreptitious and as found, illegal. They exposed a third party to potential consequences for breaching copyright. They continuously refused to disclose their source. They were given an opportunity by the Plaintiff to make things right by simply paying for 2 individual subscriptions costing \$314.00 plus HST. They also had other means available to them to challenge the statements made in the article and chose not to exercise those rights and options.

64. In light of the foregoing, and keeping in mind that the Plaintiff operates as a commercial venture for profit and that the Corporate Defendant would have had to subscribe as an institutional licensee paying at the rate of \$11,470.00 plus HST, should that be the measure of damages? The Plaintiff argues that with a membership of over 50 in number, the majority of which are wineries, that nominal damages would not serve as adequate compensation for breach of copyright in this case given the conduct of the Defendants. In this case, I agree

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that nominal damages such as the cost of 2 individual memberships would not be adequate compensation. It also factors in the Defendants' overall attitude throughout as demonstrated in their written exchange with the Plaintiff that they viewed the Plaintiff's position as trivial and the value of its copyright as worthy of circumvention. A prime example of this is highlighting and arguing those portions of the Terms and Conditions which they considered to be justification for what they did not do once they obtained the full article, and stating: "I did not reproduce, duplicate nor distribute the article in question". The Defendants never resiled from their position despite being given several opportunities to do so. They continued to stand steadfast to the notion that they had done nothing wrong while knowing that they had taken steps to bypass the paywall.

F.

Are punitive damages warranted in this case?

65. Do their actions meet the test for an award in punitive damages? The Plaintiff submits that punitive damages are appropriate in this case. The test to determine if punitive damages are appropriate is to determine if any of the Defendants' conduct amounts to being high-handed, malicious, vindictive and oppressive. They are intended to be compensatory. They reflect the court's view that compensatory damages will not achieve sufficient deterrence thereby forming a basis for punishing the defendant's actions. There is precedent for awarding punitive damages in copyright infringement cases. (see SOCAM v. 348803

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Alberta Ltd., 1997 CanLII 5389 and Louis Vutton Malletier S.A. et al. v. Lin Pi-Chu Yang et al. 2007 FC 1179.)

66. I agree with the Plaintiff's submissions that this is a case where punitive damages are appropriate taking into account amongst which are the following factors: the Defendants' attitude trivializing the value of the Plaintiff's work and its efforts at protecting its copyrighted material; the manner in which the copyright was illegally obtained; asserting that the purpose in obtaining the material was for educational and research purposes when ultimately neither was engaged in; refusing to reveal the source of the material until ordered to do so and involving a third party exposing it to an action for infringement. In this case, an appropriate amount for punitive damages is in the sum of \$2000.00.

D & E.

Alternatively, have the Defendants intentionally interfered with economic relations by inducing breach of contract and/or breach of the contract?

If so, are additional or other damages available to be awarded for the breach?

67. Having decided that the Defendants have breached the Plaintiff's copyright, that the defense of fair dealing does not apply and that both compensatory and punitive damages are to be awarded, there is no reason for me to address the alternative legal basis for damages submitted by the Plaintiff.

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PART V

DISPOSITION

68. The Plaintiff shall have judgment against both Defendants in the sum of \$11,470.00 plus prejudgment interest thereon at the rate of 1.3% calculated from January 19, 2014 to date plus the sum of \$2000.00 for punitive damages. Costs to the Plaintiff against the Defendants to be agreed upon within 15 days of this date failing which the parties may make written submissions of no more than 5 pages in length to be filed by no later than November 15, 2015.

Dated at Ottawa on October 16, 2015

Lyon Gilbert
Deputy Judge

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