

FEDERAL COURT OF APPEAL

BETWEEN:

RICHARD WARMAN AND NATIONAL POST COMPANY

Appellants

-and-

MARK FOURNIER AND CONSTANCE FOURNIER

Respondents

-and-

THE COMPUTER AND COMMUNICATIONS INDUSTRY ASSOCIATION

Intervener

-and-

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

Intervener

**SUBMISSIONS OF THE INTERVENER, THE COMPUTER AND COMMUNICATIONS
INDUSTRY ASSOCIATION**

Pursuant to Rules 346 and 348 of the Federal Court Rules

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**MEMORANDUM OF FACT AND LAW OF THE INTERVENER, THE COMPUTER
AND COMMUNICATIONS INDUSTRY ASSOCIATION**

(Pursuant to the Court's Order of June 11, 2013, made in accordance with Rule 109 of the
Federal Courts Rules)

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Overview

1. This case calls upon the Court to apply well-established fair dealing principles to innovative forms of news reporting, criticism, and comment made possible by online technology. The Court's ruling will thus have an impact on broad segments of the public and on technology businesses.
2. The Computer and Communications Industry Association (the "CCIA"), along with the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic ("CIPPIC"), applied for leave to intervene in this appeal. They were each granted leave in an Order of this Court dated June 12, 2013. Pursuant to that Order, they are permitted to make submissions regarding the issues raised by the parties, and the substance of their submissions may not overlap.
3. This is the CCIA's submission, which discusses the issues of fair dealing, the sufficiency of a hyperlink to the original source in satisfying the source citation requirement under sections 29.1 and 29.2 of the *Copyright Act*, and the National Post's assertion that a work is reproduced each day it resides on a server to which it has been posted.

Copyright Act, RSC 1985, c C-42 [the "Act"], ss. 29.1, 29.2

4. In 2012, Parliament introduced several new provisions in the *Copyright Act* that exempt the activities of network service providers and search engines from copyright liability. The CCIA submits that this action reflects an important policy decision made by Parliament not to interfere with the basic operation of the Internet. The National Post's arguments, if accepted, would contravene this policy.

See, e.g., *Copyright Act*, ss. 31.1 (Network services) and 41.27 (Information location tools)

Part I - Facts

5. The CCIA relies upon the facts as they have been described by the parties to this case in their memoranda of fact and law.

6. The CCIA's submissions concern the Respondents' use of the newspaper article written by Jonathan Kay entitled "Jonathan Kay on Richard Warman and Canada's Phony-Racism Industry" (the "Kay Work").

Part II - Points in Issue

7. The CCIA submits that this case raises the following issues:
 - (a) How should this Court conduct its analysis of whether the Respondents' copying of excerpts of the Kay Work was done for an enumerated fair dealing purpose under section 29.1 or 29.2 of the *Copyright Act*?
 - (b) How should this Court determine whether the Respondents' copying of excerpts of the Kay Work was fair under section 29.1 or 29.2 of the *Copyright Act*?
 - (c) Is a hyperlink to the original news article on the newspaper's website a sufficient indicator of source for the purposes of sections 29.1 and 29.2 of the *Copyright Act*?
 - (d) Is the National Post correct in its assertion that a work that has been posted online is reproduced "each day"?
 - (e) How should this Court approach the issue of the liability of intermediaries who operate services on which third party users post works online?
 - (f) How should this Court determine whether the Respondents' copying of excerpts of the Kay Work was substantial?
8. The CCIA makes substantive legal submissions with respect to issues (a) to (d), and understands that the Intervener CIPPIC will make legal submissions with respect to issues (e) and (f).

Part III - Submissions

A. The enumerated fair dealing purposes must be interpreted largely and liberally

9. The National Post, in its memorandum, makes several submissions regarding the enumerated purpose analysis, urging this Court to take a narrow and restrictive approach when interpreting the enumerated fair dealing purposes.

10. Such a narrow and restrictive approach would run directly counter to the clear guidance provided by the Supreme Court of Canada in 2004 and 2012 in its decisions *CCH Canadian Ltd. v. Law Society of Upper Canada*, and *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*.

CCH Canadian Ltd. v. Law Society of Upper Canada, 2004 SCC 13 [“CCH”]; *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36 [“SOCAN v. Bell”]; see also *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37 [“Access Copyright”]

11. In *CCH*, the Supreme Court made its approach to fair dealing clear when it found that:

[T]he fair dealing exception is perhaps more properly understood as an integral part of the *Copyright Act* than simply a defence... 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.

CCH at para. 48

12. The Supreme Court also found in that decision that even if there is a more specific exception in the Act that may apply, fair dealing is always available.

CCH at para. 49

13. Importantly, the Supreme Court held that the enumerated fair dealing purpose of “research” “must be given a large and liberal interpretation in order to ensure that users’ rights are not unduly constrained.”

CCH at para. 51

14. The Supreme Court strongly affirmed this finding in its recent decision in *SOCAN v. Bell*, and explained that the reason the enumerated purposes are to be interpreted largely and liberally is to create a low threshold for the first step of the fair dealing analysis. The Supreme Court found that:

In mandating a generous interpretation of the fair dealing purposes, including “research”, the Court in *CCH* created a relatively low threshold for the first step so that the analytical heavy-hitting is done in determining whether the dealing was fair.

SOCAN v. Bell at para. 27

15. The Supreme Court endorsed its statement in *CCH* by finding that this low threshold helps to ensure that “in maintaining [the] balance [between owners’ and users’ rights], users’ rights are not unduly constrained.” The Supreme Court’s finding also confirms that the most important part of the Court’s inquiry is the determination of whether the dealing is fair, at the second step of the analysis.

SOCAN v. Bell at para. 27

16. The Supreme Court, in *SOCAN v. Bell*, also made the important comment that fair dealing is meant to enable the dissemination of works, which is in the public interest: “the dissemination of works is also one of the Act’s purposes, which means that dissemination too, with or without creativity, is in the public interest.”

SOCAN v. Bell at para. 21

17. The National Post submits in its memorandum that the application judge erred in finding that the copy of excerpts of the Kay Work on the Respondents’ website was made for the fair dealing purpose of news reporting, which is set out in section 29.2 of the *Copyright Act*. In support of this argument, the National Post advances several propositions that this Court should not accept.

Copyright Act, s. 29.2; National Post Memorandum at paras. 79-89

Users claiming fair dealing are not required to submit factual evidence of their fair dealing purposes

18. The National Post argues that the party claiming fair dealing is required to adduce factual evidence of its purpose in using the work, and that if the party does not adduce such evidence, then the Court cannot find that the work was used for a fair dealing purpose.

National Post Memorandum at paras. 81, 82

19. Such a requirement would be untenable and it is not supported in law.
20. It would be untenable because evidence of a copyright user’s purpose will often not exist, and there is no reason to assume that it should. Fair dealing is a legal categorization that is applied after the dealing has already taken place. The court that is asked to determine

whether the use was for a fair dealing purpose does so by examining the circumstances of the use, and by determining whether the use falls within the ordinary meaning of the enumerated purpose. For example, in *SOCAN v. Bell*, the Supreme Court of Canada approved of the Copyright Board of Canada’s finding that the short streaming previews of musical works provided by online music services were provided for the purpose of “research” by looking at the way previews were used by consumers in identifying what music to purchase. The Court did not find that specific evidence of purpose was required in order to find that the dealing was for the purpose of research.

***SOCAN v. Bell* at paras. 15-18**

21. Indeed, in that proceeding, the Copyright Board did not hear arguments or receive evidence from the parties regarding whether the music previews were provided for a fair dealing purpose. Its analysis, which was upheld by both this Court and the Supreme Court, was undertaken independently of what the parties had argued and was applied to the facts *ex post facto*.

***Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2010 FCA 123 at para. 10**

22. If this Court were to accept the requirement proposed by the National Post, any copyright user intending to engage in fair dealing would be required to document his or her purpose. This would not be practical, and as it would merely be a record of the user’s own opinion of his or her purpose, it would not be particularly useful in conducting the analysis.
23. The National Post is unable to point to any relevant case law in support of its novel assertion. In its memorandum, it cites one copyright case, *CCH*, and one patent law case, *Pfizer Canada Inc. v. Apotex Inc.*

National Post Memorandum at paras. 80-81; *Pfizer Canada Inc. v. Apotex Inc.*, 2007 FC 971 at para. 109

24. The National Post relies on paragraph 54 of *CCH* in support of its argument. However, paragraph 54 of *CCH* concerns the wrong part of the fair dealing analysis. In that paragraph, the Supreme Court found that in conducting its analysis of the “purpose of the dealing” fairness factor—i.e., the second step of the fair dealing analysis—courts should

make an objective assessment of the user's real purpose. The determination of whether the work was used for a fair dealing purpose is the first step.

CCH at para. 54

25. Finally, the need for the Court to conduct an objective assessment of the user's real purpose or motive in using the work does not logically lead to a requirement that the user submit evidence of his or her purpose.

Users can have more than one fair dealing purpose at the same time

26. The National Post submits that because the Respondents admitted that the Warman Work was used to "critique" Mr. Warman's activities, and because freedomion.ca is a discussion board, that the use of excerpts of the Kay Work on that discussion board could not have been for the purpose of news reporting. "Critique" is a form of criticism, which under section 29.1 of the *Copyright Act* is a fair dealing purpose. The National Post's argument implies that a user cannot engage in an activity that falls under more than one enumerated fair dealing purpose. The National Post cites no case law in support of this assertion.

National Post Memorandum, at paras. 83-84, 86; Copyright Act, s. 29.1

27. This assertion is untenable. There is no reason or law that would explain why a user could not have more than one fair dealing purpose at the same time. It is perfectly reasonable that users engaging in an activity for more than one fair dealing purpose should be found to be dealing fairly.
28. Indeed, in *SOCAN v. Bell*, the Supreme Court found that an activity done for both a fair dealing purpose and a non-fair dealing purpose was fair dealing. The online music services in that case provided music previews in order to increase sales of music downloads and to enable consumers' research into which downloads to purchase. The consumers' research was an enumerated fair dealing purpose, while the increasing of sales was not.

SOCAN v. Bell at para. 34

29. The requirement proposed by the National Post would force a user who has multiple fair dealing purposes in performing one activity to restrict his or her defence to only one of those purposes. This would be an odd requirement in light of *SOCAN v. Bell*. From a policy perspective, there is no reason why, on the one hand, a user who made use of a work for both a fair dealing and a non-fair dealing purpose should be able to avail himself of the exception, while on the other, a user who engaged in a dealing for two fair dealing purposes should not. A defendant should be able to avail himself of any potentially applicable defence.
30. Further, potential overlap is written into the enumerated purposes in the Act. There are certainly acts that could be considered both research and private study, or both criticism and review, and there is no reason to believe that Parliament intended to exclude those from the ambit of fair dealing.
31. If the National Post's argument were accepted, where a user has more than one fair dealing purpose, his use would be less likely to be found to be fair dealing than if he had one fair dealing purpose and one non-fair dealing purpose. This cannot be what Parliament intended and it would not be in line with recent Supreme Court jurisprudence.

The fact that users can post their opinions does not negate a finding that the work was used for news reporting

32. The National Post submits that because freedomion.ca allows members "to post their own opinion[s] directly" to the message board, the purpose of the freedomion.ca website is not news reporting. It submits that "[a] message board that permits anonymous users to 'discuss' issues of importance to them is not news reporting any more than a book club, where members discuss a literary work, is news reporting."

National Post Memorandum at paras. 85-86

33. The National Post's argument ignores both the history of news reporting and the nature of online journalism. Readers are permitted to comment on articles on every major Canadian newspaper's website, including on the National Post's website, and newspapers have published letters to the editor for decades. The fact that users can post or publish their own opinions has never meant that news was not being reported.

34. A large and liberal interpretation of the fair dealing purpose of news reporting leaves room for news reporting on discussion boards to be considered fair dealing. The important question for this Court should be whether excerpts of the Kay Work were used for the purpose of reporting news.
35. The Internet has opened up the field of news reporting beyond the traditional newspaper to several new forms, including discussion boards, blogs, and individualized news searches such as Google Alerts. If the *Copyright Act* is to be applied in a technologically neutral manner, as required by the Supreme Court of Canada, the use of these new forms to report news must be considered to be “news reporting”. They are a digital form of the town square where people used to gather to report, and discuss, recent events.

Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada, 2012 SCC 34 [“ESA”] at paras. 2, 5-6, 9-10

36. A message board may or may not be used for news reporting, depending on what is posted. If the content posted pertains to news or current events, the message board is being used for news reporting.
37. In this case, there were multiple ‘news’ items being reported to freedomion.ca’s readers with the posting of excerpts of the Kay Work: the fact that the article was published in the National Post; the fact that Richard Warman obtained an exclusive licence to the work in order to restrain its publication, and sent a cease-and-desist letter to the Respondents; and the actual facts that were reported in the Kay Work. The concept of “news reporting”, largely and liberally interpreted, is certainly broad enough to encompass the Respondents’ posting of excerpts of the Kay Work.

The fair dealing purpose of “criticism” also encompasses the posting of excerpts of the Kay Work

38. Section 29.1 of the *Copyright Act* permits users to deal fairly with works for the purpose of “criticism”. While the posting of excerpts of the Kay Work on freedomion.ca could be considered to have been for the purpose of news reporting, it could equally have been done for the purpose of criticism.

39. The National Post argues that there is a requirement that the fair dealing purpose of criticism requires the work itself to be the thing being criticized. There is no basis in law or common sense for such a requirement.

National Post Memorandum at para. 84

40. As a legal matter, the National Post's proposed restriction on the meaning of "criticism" would be out of line with the longstanding interpretation of fair dealing and with the words of the *Copyright Act*.
41. First, in *Hubbard v. Vosper*, a foundational fair dealing decision of the United Kingdom Queen's Bench, Lord Denning noted that if a work is "used as a basis for comment, criticism or review, that may be a fair dealing." In that case, excerpts from materials written by L. Ron Hubbard were reproduced in a book that criticized the Mr. Hubbard's Church of Scientology, a use that was found to be fair dealing.

***Hubbard and Another v. Vosper and Another*, [1972] 2 Q.B. 84 at p. 94
[*"Hubbard v. Vosper"*] (emphasis added); cited with approval in *CCH* at
para. 52**

42. Lord Denning went on to specifically reject the argument that the criticism must be made of the literary style of the work itself, as opposed to the ideas contained in the work, finding that:

[Counsel] said that the defence of "fair dealing" only avails a defendant when he is criticising or reviewing the plaintiff's literary work. It does not avail a defendant, said [counsel], when he is criticising or reviewing the doctrine or philosophy underlying the plaintiff's work. [...]

I do not think that this proviso is confined as narrowly as [counsel] submits. A literary work consists, not only of the literary style, but also of the thoughts underlying it, as expressed in the words. Under the defence of "fair dealing" both can be criticised. Mr. Vosper is entitled to criticise not only the literary style, but also the doctrine or philosophy of Mr. Hubbard as expounded in the books.

***Hubbard v. Vosper* at p. 94 (emphasis added)**

43. Lord Denning’s approach was supported by the Federal Court of Canada (the “Federal Court”) in *Hager v. ECW Press Ltd.*, a case in which the defendants claimed that their use of excerpts had been fair dealing for the purpose of criticism.

Hager v. ECW Press Ltd., [1999] 2 F.C. 287, [1998] F.C.J. No. 1830

44. In its decision, the Federal Court noted that the fair dealing purpose of “criticism” encompasses both criticism of the text and the ideas contained in the original work:

The jurisprudence has established that it is not merely the text or composition of a work that may be the object of criticism but also the ideas set out therein. *Hubbard v Vosper*, [1972] 1 All ER 1023 (C.A.) is most often cited as setting out the relevant tests.

Despite [the defendants’] efforts to characterize the use made of [the plaintiff’s] work as being for the purpose of research or for the purpose of criticism, it simply does not come within those definitions. The use made of the quotations and paraphrases from [the plaintiff’s] work was not for the purpose of doing research, nor was it for the purpose of criticizing either the text or the ideas in [the plaintiff’s] book.

Hager v. ECW Press Ltd., [1998] F.C.J. No. 1830 at paras. 58-59

45. Further, as discussed above, the Supreme Court has been very clear in recent decisions that the fair dealing purposes are to be interpreted generously.

SOCAN v. Bell at para. 27

46. There is only one case, the widely criticised *British Columbia Automobile Assn. v. Office and Professional Employees’ International Union, Local 378* decision of the British Columbia Supreme Court, that could be argued to support the National Post’s assertion.

British Columbia Automobile Assn. v. Office and Professional Employees’ International Union, Local 378, 2001 BCSC 156 [“BCAA v. OPEIU”]; for criticism see, e.g., Teresa Scassa, “Intellectual Property on the Cyber-Picket Line: A Comment on *British Columbia Automobile Assn. v. Office and Professional Employees’ International Union, Local 378*”, (2002) 39 Alta. L. Rev. 934-962 at paras. 40-47

47. In that decision, the British Columbia Supreme Court found, without discussion, that:

It is not necessary for me to discuss the scope of this statutory provision for fair dealing for the purpose of criticism or review. I

do not think the defendant's use satisfies the fair dealing defence for the simple reason that the website contains no criticism of the BCAA website and it does not, as required by the statute, mention the source and author of the BCAA website.

***BCAA v. OPEIU* at para. 205 (emphasis added)**

48. The Supreme Court, in *CCH*, also seems to have assumed offhand, without discussion and in *obiter*, that criticism should, in certain circumstances, be of the work itself:

For example, if a criticism would be equally effective if it did not actually reproduce the copyrighted work it was criticizing, this may weigh against a finding of fairness.

***CCH* at para. 57**

Here, the Court was not setting a rule, but noting that if the work did not need to be reproduced in order to be criticized, the dealing may be less fair.

49. *BCAA v. OPEIU* and *CCH* were decided prior to *SOCAN v. Bell* and do not discuss why the criticism must be of the work itself. *SOCAN v. Bell* points strongly in favour of a large and liberal interpretation of the purpose of criticism.
50. A large and liberal interpretation of “criticism” is supported by the words of the *Copyright Act*. Section 29.1 of the Act permits, simply, “fair dealing for the purpose of criticism” as long as the source and author are mentioned. The Act does not say, for example, that only fair dealing for the purpose of criticising the work itself, and not the facts reported in the work, is permitted. Presumably, if Parliament had intended such a restriction, it would have said so in the Act.

***Copyright Act*, s. 29.1**

51. Indeed, from a policy and common sense perspective, it seems unlikely that Parliament would have seen any value in restricting the concept of criticism to criticism of the work itself. For example, Parliament should not be assumed to have restricted criticism involving a news article to criticism of the writing style in that news article, as opposed to criticism of the facts in the article itself.

52. Further, the Supreme Court has found that at this step of the fair dealing analysis, the relevant perspective from which to determine the allowable purpose is that of the ultimate user. This should be a key point in this Court's analysis of the allowable purpose in this case. Intermediaries such as discussion boards must be able to avail themselves of their users' fair dealing purposes so that their facilitation of those users' fair dealing is permitted.

SOCAN v. Bell at paras. 28-30

53. This Court should find that the purpose of "criticism" can encompass the copying of excerpts of news articles for the purpose of criticizing the ideas reported in them.

B. The National Post makes several arguments regarding the fairness factors in the second step of the CCH test that should not be accepted

54. This Court has been asked to determine whether the Respondents' copying of excerpts of the Kay Work was fair dealing for the purpose of news reporting under section 29.2 of the *Copyright Act*. The CCIA submits that the Respondents' copying may also be considered fair dealing for the purpose of criticism under section 29.1 of the Act.
55. The determination of whether a use is fair dealing is a two-step analysis. The first question, discussed above, is whether the use was done for an enumerated fair dealing purpose. The second step, discussed in this section, is an analysis of whether the use was "fair". The Supreme Court in *CCH* set out a non-exhaustive list of factors to be considered in the second step. These are often referred to as the "fairness factors".
56. The National Post has made several assertions regarding the interpretation and application of the fairness factors that this Court should not accept.

The application of the fairness factors

57. The National Post makes several comments throughout section 3.2 of its Memorandum regarding which fairness factors are and are not determinative or relevant. It is important to note, however, that this Court may take into account any appropriate factor in determining fairness, and that fairness is a matter of first impression. The list of six

fairness factors the Supreme Court set out in *CCH* is not exhaustive, and it does not form a ‘test’ consisting of six requirements that must be met in order for a dealing to be found fair.

CCH at paras. 52-53, 60

“Purpose of the dealing”

58. The National Post argues that the application judge erred in failing to determine whether the fair dealing purpose of “news reporting” was the Respondents’ predominant purpose in copying excerpts of the Kay Work.

National Post Memorandum at para. 94

59. This argument presupposes a legal requirement that does not exist. There is no legal requirement that the judge consider whether the fair dealing purpose was predominant; it is simply an element that can be assessed when the judge considers the “real purpose or motive” of the dealing. The Supreme Court, in describing this factor in *CCH*, provided the example that if the purpose of the use was commercial as opposed to charitable, this factor may weigh against a finding of fairness.

CCH at para. 54

“Character of the dealing”

60. The National Post argues that the presence of the article excerpts on the Internet (and accompanying 35,770 views) tends toward unfairness under the “character of the dealing” fairness factor.

National Post Memorandum at paras. 97-98

61. If this argument were accepted, it would have dangerous implications. According to the National Post, the use of a work online for a fair dealing purpose would always tend to be unfair. This would likely violate the twin principles of media neutrality and technological neutrality, both of which the Supreme Court of Canada have recently found are fundamental in interpreting the *Copyright Act*.
62. The Supreme Court found in its 2006 decision in *Robertson v. Thomson Corp.* that the principle of media neutrality “means that the *Copyright Act* should continue to apply in

different media, including more technologically advanced ones.” That case concerned the reproduction of newspaper articles into an electronic database. The Supreme Court found that media neutrality “precludes a finding of copyright infringement merely because it is possible to search with more efficient tools than in the past.” The same principle should apply here.

***Robertson v. Thomson Corp.*, 2006 SCC 43 [“*Robertson v. Thomson*”] at paras. 48-49**

63. In 2012, the Supreme Court found that the principle of technological neutrality “requires that the *Copyright Act* apply equally between traditional and more technologically advanced forms of the same media.” It considered this principle to be fundamental to the interpretation of the *Copyright Act*.

***ESA* at paras. 2, 5-6, 9-10; see also, e.g., *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35 [“*Rogers v. SOCAN*”] at para. 39**

64. The Supreme Court applied these principles to the fair dealing analysis in its *SOCAN v. Bell* decision regarding online music previews, finding that a focus on the aggregate amount of the dealing, where the work is in digital form, could render dealings with digital works disproportionately unfair:

Further, given the ease and magnitude with which digital works are disseminated over the Internet, focusing on the “aggregate” amount of the dealing in cases involving digital works could well lead to disproportionate findings of unfairness when compared with non-digital works. If, as SOCAN urges, large-scale organized dealings are inherently unfair, most of what online service providers do with musical works would be treated as copyright infringement. This, it seems to me, potentially undermines the goal of technological neutrality, which seeks to have the *Copyright Act* applied in a way that operates consistently, regardless of the form of media involved, or its technological sophistication.

***SOCAN v. Bell* at para. 43 (emphasis added)**

65. Further, it would be perverse to consider a large quantity of views as leaning toward unfairness. If more public attention made a dealing less fair, then the law would only protect trivial uses, and penalize significant ones. The character of the dealing should not be prejudiced by the fact that the reproduction occurred online.

“Amount of the dealing”

66. The National Post argues that the fact that a third of the work was used tends toward unfairness.

National Post Memorandum at paras. 99-103

67. The National Post is correct to state that, quantitatively, the appropriate examination under this factor is how much of the original work was used and not how much, in the aggregate, of all original works were used.

***SOCAN v. Bell* at para. 41; *Access Copyright* at para. 29**

68. However, the National Post also argues that this factor does not entail a qualitative assessment of the amount used. This is not correct. Whether or not the amount used was fair will depend on why the work is being used and the nature of the work, as the Supreme Court found in *CCH*:

It may be possible to deal fairly with a whole work. As Vaver points out, there might be no other way to criticize or review certain types of works such as photographs: see Vaver, *supra*, at p. 191. The amount taken may also be more or less fair depending on the purpose. For example, for the purpose of research or private study, it may be essential to copy an entire academic article or an entire judicial decision. However, if a work of literature is copied for the purpose of criticism, it will not likely be fair to include a full copy of the work in the critique.

National Post Memorandum at para. 100; *CCH* at para. 56

“Alternatives to the dealing”

69. The National Post argues that the Respondents had the alternative of summarizing the Kay Work instead of posting excerpts of it.

National Post Memorandum at paras. 105-106

70. However, it appears from the evidence that the Respondents’ purpose in reproducing the relevant excerpts was so that readers would be able to see the actual words that were published and that were the subject of Richard Warman’s legal action. That, in itself, was news that was being reported on freedomion.ca.

71. This is consistent with the Supreme Court's statement in *CCH*, discussed above in paragraph 48, that a criticism may or may not be equally effective if it actually reproduces the original work, and demonstrates that there was a need to reproduce from the copyrighted work. As U.S. Court of Appeals judge and fair use scholar Pierre Leval wrote in his oft-cited Harvard Law Review article:

If the secondary writer has legitimate justification to report the original author's idea, whether for criticism or as a part of a portrait of the subject, she is surely permitted to set it forth accurately. Can ideas be correctly reported, discussed, or challenged if the commentator is obliged to express the idea in her own different words? The subject will, of course, reply, 'That's not what I said.' Such a requirement would sacrifice clarity, much as a requirement that judges, in passing on the applicability of a statute or contract, describe its provisions in their own words rather than quoting it directly.

Pierre Leval, "Toward A Fair Use Standard", 103 Harv. L. Rev. 1105 at 1114 (1990)

It is likely that in this case, reproduction of the actual article was necessary in order to fairly criticize Mr. Warman's activities.

"Nature of the work"

72. The National Post does not discuss this factor in its Memorandum, but it is worth considering that the work at issue in this case is a news article. As news articles are primarily composed of facts, and copyright protects the original expression in works as opposed to the facts found in those works, news articles have been traditionally considered to attract "thinner" copyright protection. The "nature of the work" factor should therefore tend toward fairness in this case.

***CCH* at paras. 8, 14; see also, e.g., *Tele-Direct (Publications) Inc. v. American Business Information, Inc.*, [1998] 2 FC 22 (FCA), online: <http://www.canlii.org/en/ca/fca/doc/1997/1997canlii6378/1997canlii6378.html>**

73. Further, it is appropriate to examine under this factor whether the work is of such a nature that it should be publicly disseminated. The Kay Work is a news article and as such is designed to be widely publicly disseminated. This is also a consideration that weighs in favour of fairness.

“Effect of the dealing on the work”

74. This factor is also not discussed in the National Post’s Memorandum, but is worth this Court’s consideration. It entails an examination of “whether the dealing adversely affects or competes with the work.” Any dealing that adversely affects the original work, or that serves as a market substitute for the original work, will be less fair than a dealing that does not. In this case, a link that pointed directly to the original work was provided. Discussion board readers were encouraged to click the link and comment on the original article.

SOCAN v. Bell at para. 48; Respondents’ Memorandum at para. 80

75. The excerpts of, and link to, the original article provided on freedomion.ca did not harm the work or serve as a market substitute for it. Similarly, a search result that provides an excerpt of a news article and a link to the original simply provides easier access to the original. This does not have a harmful impact on the work and should therefore weigh in favour of a finding of fairness.

C. A hyperlink to the original article is sufficient to satisfy the attribution requirement in sections 29.1 and 29.2 of the Act

76. Sections 29.1 and 29.2 of the *Copyright Act*, which say that fair dealing for the purposes of criticism and news reporting, respectively, do not infringe copyright, require the user to mention the source of the work used, and if given in the source, the name of the author.

Copyright Act, ss. 29.1, 29.2

77. The National Post submits that the source-citation requirement was not met in this case because the author Jonathan Kay’s name was mentioned in the freedomion.ca post, but the National Post was not.

National Post Memorandum at para. 77

78. However, at the end of the article there was a link, “SOURCE”, that, according to the Respondents, directed visitors to the National Post’s website. Anyone rolling his or her mouse over this link would have seen the web address to which it pointed (which would

have included “www.nationalpost.com”). It is well-understood among Internet users that rolling one’s mouse over a link enables the user to see the web address to which it points. Anyone who clicked the link would have been taken directly to the article on the National Post’s website.

Respondents’ Memorandum at paras. 80-81

79. Indeed, providing a link not only provides information on the source, which fulfills the source-citation requirement, but it actually goes beyond that requirement by providing direct access to the original work. Providing a link provides the information required by the Act as well as all other information that is available when viewing the original. From the copyright owner’s perspective, a link is preferable to mere attribution, as it provides access to not only the names of the source and author, but also the work itself.
80. Indeed, the National Post itself seems to admit that a link would be satisfactory at paragraph 77 of its Memorandum, in which it argues that “there is no reference to the National Post or www.nationalpost.com as the source of the Kay Work [...]”

National Post Memorandum at para. 77 (emphasis added)

81. This Court should therefore find that linking directly to the source satisfies the source-citation requirement.

D. A work is not “posted” or “reproduced” “each day” it is available online

82. The National Post makes the following statement at paragraph 36 of its Memorandum:

Each day from February 18, 2008 until April 18, 2010, a full-text reproduction of the Kay Work was posted on the Free Dominion website. That clearly constituted reproduction of the work within the meaning of subsection 3(1) of the *Copyright Act*.

National Post Memorandum at para. 36

83. National Post claims that the full article, which was posted to freedomion.ca, was “reproduced” “each day” it appeared on the site. The National Post’s claim is arbitrary and technologically incorrect. Accepting this deeply problematic assertion could

indefinitely extend the limitation period in any case regarding the reproduction of a copyright work that was posted online.

84. A work is “posted”, an act of reproduction, when it is copied onto a server in order to place it online. This act of copying occurs once, and the same copy persists until deleted. The fact that a user may cause the work to subsequently be communicated to the user’s web browser, however, is independent of the posting. In this case, the relevant act occurred when the Kay Work was posted on February 18, 2008. The Kay Work was reproduced once. It was not repeatedly reproduced each day that it was available online.
85. The National Post’s claim is arbitrary and incorrect. It is not clear why the National Post has chosen each day as the period of time in which a new copy is made, but this assertion is simply technically wrong and cannot be accepted.

E. Intermediary liability

86. The CCIA understands that CIPPIC is making submissions on this issue.

F. Insubstantial copying

87. The CCIA understands that CIPPIC is making submissions on this issue. Additionally, the CCIA submits the following.
88. The National Post expresses the test for substantial copying as whether the author’s “skill and time and talent” or “skill and judgment” were reproduced.

National Post Memorandum at paras. 56, 61

89. The National Post’s proposed test cannot be the test for substantial copying because it is identical to the test for originality. As only original works are protected by copyright, the test for originality determines whether a work receives copyright protection at all.

***CCH* at para. 14; see also paras. 15-25 for discussion of the meaning of “originality” in Canadian copyright law**

90. The test for substantial copying must require more than that; otherwise the word “substantial” in the Act would have no meaning.
91. The correct test was summarized in *U & R Tax Services Ltd. v. H & R Block Canada Inc.* and entails the consideration of several factors.

U & R Tax Services Ltd. v. H & R Block Canada Inc., [1995] F.C.J. No. 962,
62 C.P.R. (3d) 257 at para. 35

92. The National Post also claims that a reproduction that conveys the “ideas” and “conclusions” contained in the original work is a substantial reproduction.

National Post Memorandum at para. 57

93. This test for substantiality would fly in the face of the idea/expression dichotomy at the heart of copyright law. Copyright protects original expression, not ideas and conclusions. If the National Post’s statement were accepted by this Court, copyright protection would be greatly expanded and the balance between owners’ and users’ rights would be upset.

Idea/expression dichotomy: see *CCH* at para. 8; balance between owners’ and users’ rights: see *Robertson v. Thomson* at para. 69; *Rogers v. SOCAN* at para. 40; *SOCAN v. Bell* at paras. 8-11; *ESA* at paras. 7-8

Part IV - Order Sought

94. Although the CCIA has made several submissions as to the law that this Court should take into account in making its decision, it is neutral as to the outcome of this case and so does not seek any particular order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15th day of July, 2013,



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Part V - List of Authorities

LEGISLATION

1. *Copyright Act*, RSC 1985, c C-42.

JURISPRUDENCE

1. *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37, [2012] 2 SCR 345.
2. *British Columbia Automobile Assn. v. Office and Professional Employees' International Union, Local 378*, 2001 BCSC 156, [2001] 4 WWR 95.
3. *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 SCR 339.
4. *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34, [2012] 2 SCR 231.
5. *Hager v. ECW Press Ltd.*, [1999] 2 FC 287, [1998] FCJ No. 1830.
6. *Hubbard and Another v. Vosper and Another*, [1972] 2 QB 84, [1972] 1 All ER 1023 (CA).
7. *Pfizer Canada Inc. v. Apotex Inc.*, 2007 FC 971, 61 CPR (4th) 305.
8. *Robertson v. Thomson Corp.*, 2006 SCC 43, [2006] 2 SCR 363.
9. *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 SCR 283.
10. *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36, [2012] 2 SCR 326.
11. *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2010 FCA 123 (available on CanLII).
12. *Tele-Direct (Publications) Inc. v. American Business Information, Inc.*, [1998] 2 FC 22, 154 DLR (4th) 328 (FCA).
13. *U & R Tax Services Ltd. v. H & R Block Canada Inc.*, [1995] FCJ. No. 962, 62 CPR (3d) 257 (FC).

PERIODICALS

1. Leval, Pierre. "Toward A Fair Use Standard" (1990) 103 Harv L Rev 1105.

2. Scassa, Teresa. "Intellectual Property on the Cyber-Picket Line: A Comment on *British Columbia Automobile Assn. v. Office and Professional Employees' International Union, Local 378*" (2002) 39 Alta LR 934.