

Federal Court



Cour fédérale

Date: 20160812

Docket: T-172-15

Citation: 2016 FC 929

Ottawa, Ontario, August 12, 2016

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

**ROYAL CONSERVATORY OF MUSIC
AND THE FREDERICK HARRIS MUSIC CO.,
LIMITED**

Applicants

and

**CLARKE MACINTOSH DOING BUSINESS
AS NOVUS VIA MUSIC GROUP INC.
AND CONSERVATORY CANADA**

Respondents

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is an application brought under the summary judgment proceedings provision in paragraph 34(4)(a) of the *Copyright Act*, RSC 1985, c C-42 [the Act] and pursuant to Rule 300(b) of the *Federal Court Rules*, SOR/98-106. The Applicants allege that they own or control

the copyright to 21 musical works and the Respondents have published those works without permission. The Applicants also assert the Respondents made a number of changes to the look of their publications to make those publications confusingly similar to those of the Applicants, improperly passing off their wares.

[1] The Respondents deny both claims and allege that this application was brought with an ulterior motive.

[2] For the reasons below, I agree with the Applicants that the Respondents have infringed their copyright. I do not agree, however, that there has been any passing off.

II. Facts

[3] The Royal Conservatory of Music [the Royal Conservatory] is a registered charity under the *Income Tax Act*, RSC 1985, c 1 (5th Supp), with its principal place of business in Toronto. It was originally incorporated in 1886 as the Toronto Conservatory of Music, and assumed its current form as an independent legal entity in 1991 by a special act of the Ontario legislature (*Royal Conservatory of Music Act, 1991*, SO 1991, c Pr17, as amended by *Royal Conservatory of Music Act, 2013*, SO 2013, c Pr4). The Royal Conservatory is one of the largest music education institutions in the world; among several other activities, it publishes various series of graduated instructional music books for a variety of instruments. The Royal Conservatory has overall revenues of approximately \$35 to \$40 million per year.

[4] Frederick Harris Music Co., Limited [Frederick Harris] is a non-profit Ontario corporation, first incorporated in 1940. The Royal Conservatory is Frederick Harris's sole registered shareholder, and Frederick Harris is the Royal Conservatory's exclusive publisher for its series of instructional music books.

[5] Clarke MacIntosh is the former President and CEO of Frederick Harris. Mr. MacIntosh began working for Frederick Harris in 1992 as Director of Marketing. He was promoted to Vice President in 1999 and then President and CEO from 2002 to 2006.

[6] While Mr. MacIntosh was at Frederick Harris, the Applicants developed a colour-coded system for their graduated music books. Mr. MacIntosh, however, states that he was not directly involved with this process. He left the company on February 28, 2006, and on September 1, 2006, incorporated Novus Via Music Group Inc. [Novus].

[7] Not long thereafter, Frederick Harris brought suit against Mr. MacIntosh and Novus, alleging that Mr. MacIntosh had breached his contractual and fiduciary obligations to Frederick Harris in publishing a series of level-based piano books that were similar to another series developed, but never published, by Frederick Harris during his tenure there. That suit was ultimately discontinued on July 26, 2007.

[8] Novus was dissolved on June 30, 2014, for failure to file corporate tax returns. Nonetheless, Mr. MacIntosh continues to carry on business under the name. He alleges that the current proceedings have prevented him from reinstating Novus's corporate status.

[9] Conservatory Canada is a registered charity and a not-for-profit corporation incorporated under the *Canada Not-for-Profit Corporations Act*, SC 2009, c 23. Conservatory Canada's first predecessor organization, the London Conservatory, was founded in 1891, and Conservatory Canada assumed its current form in 1997.

[10] Conservatory Canada, like the Royal Conservatory, is a musical education institution that, among other things, develops series of graduated instructional music books. Unlike the Royal Conservatory, Conservatory Canada is a small institution, with only three administrative staff, a Board of Directors composed of volunteers, and annual revenues of just over \$500,000. Conservatory Canada, in developing musical study programs, compiles syllabi and materials and then finds a publisher to manage those materials. It does not have a dedicated publisher like Frederick Harris.

[11] In 1999, Conservatory Canada published an eleven-level series of graduated musical books for the piano under the name "The New Millennium Series" [the Series]. It chose Waterloo Music Company Ltd [Waterloo] to be the publisher of the Series. As will be explained, over time, other publishers became involved in the printing of the series, and two subsequent editions of the series were published – one in 2012, and one in 2014.

[12] The Series consists of approximately 450 musical pieces. Twenty-one of these pieces – about 5% of the total – were licensed from Frederick Harris, pieces for which Frederick Harris had either obtained an assignment of the copyright or retained the exclusive publishing rights in

Canada. These works, which form the basis of this litigation, and their composers, are appended as Schedule B to these Reasons.

[13] Negotiation for the permission to publish these 21 pieces took place between Mr. MacIntosh, who was at the time employed by Frederick Harris, and Waterloo, Conservatory Canada's publisher at the time. The Respondents allege that Waterloo undertook these negotiations on behalf of Conservatory Canada, but unfortunately, neither the Applicants nor the Respondents were able to locate a physical copy of this agreement [the 1999 Agreement] which was therefore not in evidence before the Court.

[14] Included in the record, on the other hand, are certain royalty reports and payments to Frederick Harris from Waterloo, for the publication of the works. The last one of these payments was made by Waterloo for \$1,405.81 in April 2006 for the 2005 calendar year. Under cross-examination, Debbie Morrissey, the controller responsible for accounting and financial records for both Royal Conservatory and Frederick Harris admitted that the Applicants were aware that they had not been paid royalties for the works since 2006, but did not act to collect further royalties owing.

[15] According to Patricia Frehlich, Chair of Conservatory Canada's Board of Directors, Waterloo was acquired by St. John's Music Ltd. [St. John's], another music publisher, in or around 2004. St. John's continued to publish the Series on Conservatory Canada's behalf until 2007, when Mayfair Music Publications [Mayfair] became Conservatory Canada's publisher. Mayfair continued to publish the Series until 2014, when Novus took over. As with the original

1999 Agreement, the Respondents have been unable to locate any agreement between Conservatory Canada and Mayfair.

[16] In 2011, Conservatory Canada began planning for a “120th Anniversary Edition” of the Series [the Anniversary Edition]. Conservatory Canada decided to change the cover of the Series from the original 1999 design, which had featured a black border, an open grand piano, and a colour surrounding the piano, corresponding to particular grade levels. The new covers featured a reference to Conservatory Canada’s 120th anniversary and replaced the black border cover with a fully coloured one, corresponding to different grades.

[17] The Anniversary Edition, published by Mayfair, was released for sale in 2012. Like the first edition of the Series published in 1999, the Anniversary Edition also contained the 21 musical works.

[18] By the spring of 2014, Conservatory Canada and Mayfair were on strained terms. Conservatory Canada took the position that it was owed a considerable amount in unpaid royalties.

[19] On May 20, 2014, Steven Loweth, General Manager of Mayfair, acknowledging “that there is an outstanding debt of royalties owed to Conservatory Canada”, put forward a proposal to maintain the publishing relationship, offering, among other measures, to assign to Conservatory Canada “all rights for Conservatory Canada related books currently copyrighted under Waterloo Publications”.

[20] Conservatory Canada rejected this offer, stating in a reply letter that “Conservatory Canada is the author of said publications, and through moral rights, authors always have the claim to their creations. Mayfair Music Publications was our publisher, but is in breach of contract for failure to pay royalties. When a publisher fails to pay royalties for any protracted period, rights typically revert to the author”.

[21] In April 2014, Mr. MacIntosh became a “special advisor” to Conservatory Canada’s Board and a member of its Executive Committee. In July 2014, after the relationship between Conservatory Canada and Mayfair disintegrated, Novus, Mr. MacIntosh’s company, became Conservatory Canada’s publisher. Novus then published a new 2014 edition of the Series [the 2014 Edition]. The Respondents assert that the 2014 Edition is unchanged from the 2012 Anniversary Edition, because it simply comprises a digitized scan of the earlier 2012 Edition with very minor, non-material changes.

[22] In August 2014, the Applicants learned that Conservatory Canada’s Series was going to be published by Novus. On November 17, 2014, Elaine Rusk, Vice President of the Royal Conservatory and Publisher of Frederick Harris, emailed Victoria Warwick, Executive Director of Conservatory Canada, to advise her that Frederick Harris had not been contacted to reproduce the 21 works in the most recent edition, stating as follows:

Are the contents the same as previous edition? If so, you should know we have not yet been contacted regarding permission to reprint FHMC [Frederick Harris] copyrights that appear in the series.

[23] Ms. Rusk received no response from Ms. Warwick or Conservatory Canada. She wrote to Ms. Warwick again on December 9, 2014, forwarding a copy of her earlier November 17 email.

In this December 9 follow-up email, Ms. Rusk added:

Just so you know, nobody has contacted us regarding permission to reprint Frederick Harris copyrighted pieces in the Millenium [sic] Series to be published by Novus Via.

[24] On December 10, 2014, Derek Oger, the new Executive Director of Conservatory Canada, stated that he would investigate and provide clarification to Frederick Harris, explaining the situation as follows in his email reply to Ms. Rusk:

My name is Derek Oger and I have taken over as Executive Director of Conservatory Canada. Victoria [Warwick] is no longer with us. I will take this up with our new publisher and get back to you as soon as I get clarification on what needs to happen here.

[25] There were no further communications between the parties regarding the matter, until the Applicants filed this application on February 5, 2015.

A. *The Missing 1999 Agreement*

[26] As noted above, none of the parties were able to locate a copy of the 1999 Agreement between Frederick Harris and Waterloo. Without this key document, the Court has been left to reconstruct, on the best available evidence, the financial and contractual arrangements that took place between the parties.

[27] Mr. MacIntosh, who was involved in the negotiations at the time as an employee of Frederick Harris, asserts that Waterloo negotiated the 1999 Agreement on behalf of

Conservatory Canada. In his affidavit before this Court, he asserts that there is a distinction in the music publishing industry between “compilers” and “publishers”: Conservatory Canada is a compiler, which he states typically retains the grant or permission for the copyrighted work, while the publisher (Waterloo at the relevant time) typically negotiates and administers the various rights involved in publishing the compiler’s works, but, unlike the “compiler”, does not acquire rights in the work(s).

[28] Mr. MacIntosh also asserts that the 1999 Agreement was for the life of the publication on a pro-rata royalty basis. He interprets this to mean that “as long as a publisher maintains a reasonable inventory of the publication for sale, it is considered to be ‘in print’, it is considered to be ‘alive’ for the purposes of any contract commitments”.

[29] The Respondents note that the last royalty payment that Waterloo sent to Frederick Harris was a “Pro-rata royalty for 2005” and contend that this confirms Mr. MacIntosh’s interpretation of the contract.

[30] The Applicants, by contrast, draw the Court’s attention to a 1999 permission agreement between Waterloo and a composer, Beverly Porter [the Porter Agreement], in which Ms. Porter granted Waterloo, the then-publisher, the right to publish and use her piece ‘Chromatic Rag’, “in all editions of [the Series] repertoire currently in production”. The Porter Agreement makes no mention of Conservatory Canada and states that “[c]opyright owners will receive an equal share of a pro-rata royalty based on the annual sales of the series over a period of 10 years”.

B. *The Passing Off Claim*

[31] In 1987, the Royal Conservatory began publishing an instructional series for piano, the “Celebration Series Perspectives” [the Celebration Series]. The Celebration Series has eleven levels of increasing difficulty. Each level is composed of repertoire books and technical (studies) books. The covers of those books are designed so that each level is associated with a specific colour.

[32] The colour-code system for the 4th edition of the Celebration Series, from Preparatory to Level 10, is as follows: yellow (0), orange (1), red (2), light purple (3), light blue (4), green (5), navy (6), dark red (7), dark purple (8), light brown (9), and dark green (10). This colour-coding system was developed in 2001 by Frederick Harris’s marketing team, which was, at that time, led by Mr. MacIntosh, and has since been applied to other Royal Conservatory series and publications. Ms. Rusk (of Frederick Harris) states that this colour scheme is distinctive to the Royal Conservatory and “makes it easy for teachers and students to simply look for the colour they want and easily select all the necessary books for a particular level”.

III. Parties’ Positions

[33] As will be explained in greater detail below, the Applicants raise two issues in this application, claiming that (i) the Respondents did not have permission to publish the 21 works controlled by Frederick Harris in the 2014 Edition; and (ii) the Edition infringes Royal Conservatory’s rights per subsection 7(b) of the *Trade-marks Act*, RSC 1985, c T-13 [the *Trade-*

marks Act] on the basis of passing off. The Respondents reject both of these claims. They raise an additional issue, namely that this application was brought with an ulterior motive, and is abusive.

A. *The Applicants*

[34] The Applicants contend that there is no legal basis to conclude that the permission granted to Waterloo under the 1999 Agreement could apply to the 2014 Edition for the following reasons.

[35] First, the Applicants argue that each of the 1999, Anniversary, and 2014 Editions of the Series required separate permission.

[36] Second, they submit that the original permission in the 1999 Agreement was granted to Waterloo and not to Conservatory Canada. Waterloo then passed those rights to St. John's Music, which then passed them to Mayfair, and when Conservatory Canada terminated its relationship with Mayfair in 2014, the chain of permission connecting Conservatory Canada and the Applicants was broken.

[37] Either way, the bottom line for the Applicants is that all Waterloo acquired in 1999 was permission to publish the 21 works in the 1999 Edition of the Series, and since Frederick Harris granted permission to Waterloo, and not Conservatory Canada, Conservatory Canada acquired nothing. The Porter Agreement, the Applicants assert, is consistent with this position. They contend that it is the "one and only piece of physical evidence we have that gives us an idea

what the permission might have looked like” (Hearing Transcript at 25 [Transcript]) and that the 1999 Agreement would have contained exactly the same terms of permission (Transcript at 28).

[38] The Applicants also argue that the Respondents were aware that they lacked the necessary permission to publish the 2014 Edition. When they realized they were owed money from Mayfair but that they lacked any documentation of the Mayfair publishing agreement, they should have realized that they did not have the authorization to publish the new edition. Beyond that, Conservatory Canada was formally put on notice by Ms. Rusk’s emails of November and December 2014 that they had neither sought, nor secured, permission to reproduce the 21 impugned works in the 2014 Edition.

[39] As for the claim under subsection 7(b) of the *Trade-marks Act*, the Applicants allege that Conservatory Canada adopted the Celebration Series colour-coding scheme for the 2014 Edition of the Series. They also note that their books are staple-bound and that Conservatory Canada shifted from spiral binding in the 1999 Edition of the Series to staple binding when the Anniversary Edition was published. The Applicants cite *Iona Appliances Inc v Hoover Canada Inc* (1988), 32 CPR (3d) 304 for the proposition that the changes to the appearance of the Anniversary Edition make it so similar to the 2008 Edition of the Celebration Series that it is reasonable to infer the intent was to deceive and that it leads to a likelihood of confusion.

[40] As for remedies, the Applicants claim statutory damages under subsection 38.1(a) of the Act. They assert that the copying of their 21 musical works was for commercial purposes and

thus they should receive somewhere between \$500 and \$20,000 in damages for each of the pieces. In justifying their request, they note that the Respondents, despite notice that they lacked the requisite permission to publish, nonetheless continued to market and promote the works anyway. They drew the Court's attention in particular to Mr. MacIntosh's attendance at the March 2015 Music Teachers National Association [MTNA] Conference in Las Vegas, where, shortly after these proceedings were commenced, he marketed the 2014 Series.

[41] In addition to statutory damages, the Applicants seek the following:

- A. A declaration that the Respondents have directed public attention to the Series in such a way as to cause or be likely to cause confusion between their wares and the wares of the Applicants;
- B. A declaration that the Respondents have infringed their copyright in each of the 21 works;
- C. An injunction restraining the Respondents from passing off;
- D. Delivery up of any copies of the 2014 Edition of the Series;
- E. Prejudgment interest on the requested statutory damages; and
- F. Costs for bringing this application.

B. *The Respondents*

[42] The Respondents offer various arguments as to why this application should be denied, including three procedural objections: (i) this claim is barred by the three-year limitation period set out in subsection 43.1(1) of the Act; (ii) the Applicants lack the standing to sue for at least 5 of the 21 works at issue; and (iii) this Court lacks the jurisdiction to hear this matter since this case is in reality about an unintentional breach of contract.

[43] As for their substantive arguments, the Respondents contend that the Applicants have not validly revoked their permission and are thus estopped from doing so. Because there was consideration for the permission, it cannot be revoked unilaterally. Revocation would have had to have been explicit and with reasonable notice, and neither were provided.

[44] The Respondents deny the passing off claim and object to the Applicants' submission of actual copies of the Celebration Series books at issue as evidence, arguing that parties cannot adduce physical evidence in an application.

[45] On remedies, the Respondents assert that if there is any merit to the infringement claim, it is worth at most \$1,405.81 – the amount listed in the last royalty payment from Waterloo to Frederick Harris in 2006.

[46] Finally, the Respondents submit that that this application is abusive, in that it was brought for ulterior motives relating to residual hostility towards Mr. MacIntosh. The Respondents assert

that it was only after the Applicants learned that Mr. MacIntosh was associated with Conservatory Canada that they took issue with the 2014 Edition of the Series. The Respondents also argue that the decision to litigate against Conservatory Canada was made in mid-January to cause maximum disruption at Conservatory Canada's offices. They contend that the combined effects of the ulterior motive, the high quantum of damages sought, and the lack of due diligence, militate in favour of a significant costs award to them.

IV. Analysis

A. *Procedural objections*

(1) Can this Court accept physical evidence if this is an application?

[47] The Applicants requested leave from the Court to introduce certain hard copies of the 2008 Edition of the Celebration Series and hard copies of the 1999 and Anniversary Editions of the Series. They contended that these physical books would assist the Court in its deliberations.

[48] The Respondents objected to this request, arguing that (a) the books were not provided with the documentation that was properly and timely filed, and (b) since this is an application, not an action, there are no witnesses through whom to introduce the various books as exhibits.

[49] The Court granted the Applicants' request to introduce the materials at the hearing, rather than simply rely on the photocopies of the books that had been earlier provided in the Record. The Court so ruled for three reasons.

[50] First, the *Federal Court Rules*, SOR/98-106 [the Rules] make clear that bringing physical exhibits is entirely possible. Rule 309(2)(g), for example, states that “[a]n applicant’s record shall contain, on consecutively numbered pages and in the following order... a description of any physical exhibits to be used by the applicant at the hearing”.

[51] While the Applicants did not technically comply with Rule 309(2)(g), the Rules also permit this Court to identify such errors and rectify them. Rule 60 states that “[a]t any time before judgment is given in a proceeding, the Court may draw the attention of a party to any gap in the proof of its case or to any non-compliance with these Rules and permit the party to remedy it on such conditions as the Court considers just”.

[52] Second, the Applicants had already adduced photocopies of all the books they wished to present to the Court in hardcopy in advance of the hearing. Submitting the books as separate evidence therefore did not fundamentally change the Court record in any way.

[53] Finally, it is in the interests of all parties that the Court examines physical copies of the books to acquire an accurate sense of the degree of similarity between the works at issue. Since the colours of the covers of the books are directly at issue for the passing off claim, I see no reason to rely on potentially unfaithful printouts.

(2) Do the Applicants have standing to bring this application for all of the works?

[54] The Respondents submit that, with respect to at least 5 of the 21 pieces at issue – “Bozo’s Flippity-Flop”, “Butterflies”, “Peacock”, “Masquerade”, and “Sneaky” (see Schedule B to these

Reasons) – the Applicants were never assigned an interest in the copyright but only a grant of an exclusive licence. They thus lack the standing to bring an infringement claim under subsection 41.23(1) of the Act.

[55] I also disagree with the Respondents about this procedural objection. The language of each of the agreements for those five pieces states that “[b]y this letter you grant and assign to us exclusively the right to publish (i.e. print, publish and sell) the Work throughout the world”. While this language is different from the language in the agreements for the other 16 works (see Schedule B), the agreements at issue nonetheless convey the necessary interest to bring this application: subsection 13(7) of the Act makes it clear that “a grant of an exclusive licence in a copyright constitutes the grant of an interest in the copyright by licence”.

[56] Furthermore, per subsection 13(5) of the Act, “[w]here, under any partial assignment of copyright, the assignee becomes entitled to any right comprised in copyright, the assignee, with respect to the rights so assigned, and the assignor, with respect to the rights not assigned, shall be treated for the purposes of this Act as the owner of the copyright, and this Act has effect accordingly”.

[57] The Applicants therefore (i) have standing to bring this application for all 21 pieces, and (ii) having received at least partial assignment of copyright, are considered “owners” for the purpose of publishing due to their assigned rights. They need not have added any other parties to properly bring the claims against the five pieces. In having negotiated exclusive licenses (i.e. grants of an interest from the copyright holder), the Applicants had more than simply obtained

permission to publish. As the Supreme Court held in *Robertson v Thomson Corp*, 2006 SCC 43 at para 56, quoting with approval the Ontario Superior Court in *Ritchie v Sawmill Creek Golf & Country Club Ltd* (2004), 35 CPR (4th) 163:

The “grant of an interest” referred to in s. 13(4) is the transfer of a property right as opposed to a permission to do a certain thing. The former gives the licensee the capacity to sue in his own name for infringement, the latter provides only a defence to claims of infringement. To the extent there was any uncertainty as to the meaning of “grant of an interest” and whether this section applied to non-exclusive licences, the issue was resolved in 1997 when the *Copyright Act* was amended to include s. 13(7).

(3) Jurisdiction of this Court

[58] The Respondents suggest that since what is ultimately at issue is a “purely contractually based permission whereby whoever was the third party publisher at the time would make required permission payments to Frederick Harris”, this Court lacks the jurisdiction to hear that element of this dispute. The Respondents rely on *Netbored Inc v Avery Holdings Inc*, 2005 FC 490 at para 24 [*Netbored*], where Justice Gibson upheld a prothonotary’s order striking a number of provisions in the plaintiff’s Statement of Claim for the following reasons:

This is an action for infringement of the plaintiff’s copyright. The plaintiff’s allegations in the impugned paragraphs of the Statement of Claim relating to breach of contract and breach of fiduciary duty and the like are not advanced for the purpose of establishing infringement. Rather, they are advanced for the purpose of obtaining relief in respect of those breaches themselves. As such, this Court lacks jurisdiction to entertain them.

[59] As Justice Gibson noted in para 12 of *Netbored*, however, subsection 20(2) of the *Federal Courts Act*, RSC 1985, c F-7 is clear that:

The Federal Court has concurrent jurisdiction in all cases, other than those mentioned in subsection (1), in which a remedy is sought under the authority of an Act of Parliament or at law or in equity respecting any patent of invention, copyright, trade-mark, industrial design or topography referred to in paragraph (1)(a).

[60] The Applicants are seeking statutory damages under section 38.1 of the Act, as well as remedies listed in subsection 34(1). They are seeking these damages because they allege that their copyright over the 21 works has been infringed. They are not claiming that the Respondents breached the terms of the 1999 Agreement in publishing the Anniversary Edition (i.e. that the pieces were published and that they are, per the terms of the 1999 Agreement, owed compensation). Rather, they are claiming that the publication of the Anniversary Edition took place without their permission – in other words, that there was no contract in place to be breached in the first place.

[61] I consequently find that this Court has the jurisdiction to hear the copyright infringement claim.

[62] Having dispensed with all three procedural objections, I now turn to the substantive merits of the application.

B. *Copyright Infringement*

[63] Copyright is the sole right to produce or reproduce a work or any substantial part of it (section 3 of the Act). A copyright holder may assign the copyright entirely to someone else, or grant an interest in it and retain the copyright. Either way, the Act requires that the grant or

assignment be made in writing (subsection 13(4) of the Act). As stated in subsection 27(1), “[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.”

[64] With respect to the 21 works in question, Frederick Harris either owns the copyright to, or has an exclusive licence to publish, each of the pieces in issue. Thus, for the purposes of the Act, Frederick Harris owns their copyright, insofar as publication is concerned. Per the Act, then, Frederick Harris’ consent was necessary for another entity – whether that was Waterloo, St. John’s, Mayfair, Novus, Mr. MacIntosh, or Conservatory Canada itself – to publish the works in question. To do otherwise constituted an infringement.

[65] It is accepted by all parties that, in the 1999 Agreement, the Applicants gave their consent to publish those works in the Series. Beyond that, there is no consensus. Since neither the Applicants nor the Respondents could find a copy of the 1999 Agreement, each offered the Court their interpretation of what that Agreement most likely said.

[66] The Applicants contend that it is reasonable to assume that the 1999 Agreement contained equivalent terms to those in the Porter Agreement – a grant of permission to publish for 10 years, and an annual royalty payment.

[67] The Applicants also argue that there is no suggestion that the 1999 Agreement was negotiated on behalf of Conservatory Canada. Instead, the permission was granted to Waterloo,

transferred to St. John's Music, and then transferred again to Mayfair. At no point did Conservatory Canada, Mr. MacIntosh, or Novus have any rights over the work.

[68] The Respondents, by contrast, rely on Mr. MacIntosh's recollections of the 1999 Agreement's contents. Mr. MacIntosh states that the 1999 Agreement was a grant of permission for "the life of the publication" on a "pro-rata royalty basis", explaining that:

[...] as long as a publisher maintains a reasonable inventory of the publication for sale, it is considered to be "in print". As long as a publication is "in print", it is considered to be "alive" for the purposes of any contract commitments.

[69] Since the Respondents assert that all three Editions –1999, 2012 and 2014 – constitute one continuous publication of the Series, and that that publication has been for sale from 1999 until today, the permission granted in the original 1999 Agreement remains alive and active.

[70] As for the Porter Agreement, the Respondents interpret that document as a grant for "all editions of the New Millennium Series of piano repertoire currently in production", meaning that the grant extends to cover the entire series, regardless of which edition is in production. Since the 1999, 2012, and 2014 printings of the Series have identical content, the permission thus remained in force.

[71] The Respondents also argue that the 1999 Agreement was a grant to Conservatory Canada, negotiated on its behalf by Waterloo. Consequently, the grant extended from Conservatory Canada to any publisher it may have been working with for any given printing of the Series, rather than to Waterloo specifically.

[72] Mr. MacIntosh states that while it is typically the responsibility of the author/compiler to obtain the necessary permissions, the publisher will assist with the administrative work involved in that task:

[Conservatory Canada] has changed its publisher three times since 1999. It is not uncommon for an author to use multiple publishers, sometimes splitting their catalogue of works across several publishers, sometimes moving everything they're authored from one to another. In or around 2004, the publisher of [Conservatory Canada] materials changed from Waterloo Music to St. John's Music. In or around 2007, the publisher of [Conservatory Canada] materials changed again, this time from St. John's Music to Mayfair Music. Most recently, in August 2014, the publisher of [Conservatory Canada] materials changed from Mayfair Music to [Novus]. There is nothing unusual or inappropriate in this. All permissions to use copyrighted works in the New Millennium Series for piano were granted to [Conservatory Canada], as the compiler. And as negotiated by Waterloo Music, [Conservatory Canada] retains those permissions for the life of the publication, irrespective of the publisher they choose to do business with to print, distribute and sell their materials.

[73] The Respondents also point out that Ms. Rusk of the Royal Conservatory, in cross-examination, testified on three occasions that the 1999 and 2014 Editions are "identical", in that they have the same content.

[74] Finally, Conservatory Canada asserts that it, rather than any of the four publishers, held copyright through the compiling of the works in the Series.

[75] Assessing both the Applicants' and Respondents' interpretations of the 1999 Agreement and in the absence of any physical evidence of this central document, I find the Applicant's interpretation – that the grant was to Waterloo, and not Conservatory Canada – to be more persuasive for three reasons.

[76] First, the copyright notices throughout all three editions of the Series list Waterloo, and not Conservatory Canada, as the copyright owner.

[77] Second, Ms. Porter's agreement with Waterloo makes no mention whatsoever of Conservatory Canada. Rather, the Porter Agreement purports to grant to Waterloo permission to reprint her work (Chromatic Rag) for a period of 10 years in the New Millennium Series, a permission through which Copyright owners will receive an equal share of a pro-rata royalty rate based on the annual sales of the series over a period of 10 years, covering the territory of Canada. It seems entirely plausible – and there is nothing before me to suggest otherwise – that these terms would naturally also appear in the 1999 Agreement between Waterloo and Frederick Harris.

[78] Third, when the relationship between Mayfair and Conservatory Canada began to deteriorate, Mayfair made it clear that it, and not Conservatory Canada, retained the grant to publish the works. See, for example, its 2014 proposal to Conservatory Canada, where Mayfair suggested that it would transfer “all rights for Conservatory Canada related books currently copyrighted under Waterloo Publications” if Conservatory Canada would continue to use Mayfair as its publisher. This is entirely in keeping with the Applicants interpretation of what the 1999 Agreement said – that the rights went to Waterloo, and not to Conservatory Canada: by the time of the publication of the 120th Anniversary Edition, the 1999 Agreement had lapsed.

[79] Even if the 10 year validity presumption is incorrect, as explained above, the 1999 Agreement was between Frederick Harris and Waterloo. The grant outlined in the 1999

Agreement then moved from Waterloo to St. John's to Mayfair. As such, Conservatory Canada's decision to terminate their publishing relationship with Mayfair terminated any contractual link between them and Frederick Harris and its works. Conservatory Canada thus had no right to negotiate with Mr. MacIntosh and/or Novus to publish the works, and neither Mr. MacIntosh nor Novus had any right to publish them.

[80] Indeed, I assign low probative value to Mr. MacIntosh's recollections of the contents of the 1999 Agreement. As the Respondents have noted several times in their submissions, Frederick Harris and the Royal Conservatory had significant yearly revenues of which the income from this contract would play only a miniscule role. It is not clear how Mr. MacIntosh, who was employed by Frederick Harris at the relevant time, could remember so specifically the terms of an agreement negotiated approximately 18 years ago for a sum of money his employer at the time clearly did not think was particularly important.

[81] Furthermore, The Respondents contend that the Applicants were aware that they had not been paid by Waterloo since 2006 and that their decision not to take action and demand payment amounts to an "implied permission" to the Respondents to continue publishing.

[82] I do not find this to be the case. As noted above, the 1999 Agreement was between Waterloo and Frederick Harris. If there were any implied permission resulting from the Applicants' inaction, it would have accrued to the benefit of Waterloo (or its successors) and not the Respondents.

[83] The Respondents also argue that there is ample evidence to suggest that it was Mayfair's responsibility to pay these royalties, not Conservatory Canada's. Further, the Respondents point out that the Applicants continued to conduct business with Mayfair throughout the eight and a half years of default, paying Mayfair on other unrelated permissions issues. The Respondents suggest that, since the Applicants were aware of the default, they could have set off the unpaid annual royalties from the Series from the amounts they owed Mayfair.

[84] However, it is important to note that the Applicants, in this proceeding, do not take issue with the unpaid royalties. Their claim lies in the publication of the works without permission – not any contractual breach that may have occurred in relation to the 1999 Agreement.

[85] Finally, the Respondents argue that there is no evidence that the permission granted in the 1999 Agreement has ever been revoked. The November and December 2014 emails sent by Ms. Rusk to Victoria Warwick, and subsequently to Derek Oger, merely state that she had not been contacted “regarding permission” – not that the permission had been denied.

[86] I find it difficult to interpret Ms. Rusk's email statements as the Respondents would like. Why would Ms. Rusk contact Conservatory Canada regarding permission if she believed nonetheless that permission had been granted? It seems unreasonable to require that she say something to the effect of “I revoke Conservatory Canada's permission to the works in question” if she did not believe there was any underlying grant in the first place. The emails, in my view, are quite clear that no permission exists for the printing: Ms. Rusk, on behalf of the Royal Conservatory, did not approve of the status quo.

(1) Limitation period

[87] The Respondents submit that the last royalty payment was made by Waterloo in 2006 and that, while the Applicants were aware that they were owed payments for the series, made no effort to address this issue until 2014. As such, if the infringing act giving rise to the remedy at issue is the continued publication of the works without the Applicants' permission, then the Applicants should have pursued this litigation by 2009 at the very latest, pursuant to paragraph 43.1(1)(b) of the Act.

[88] The Applicants, by contrast, reiterate that this application concerns only the 2014 Edition, and since each edition constitutes a new publication, the limitation period does not apply.

[89] I do not, however, need to decide whether each edition constitutes a new publication for the purposes of paragraph 43.1(1)(b), because as explained in *Wall v Horn Abbott Ltd*, 2007 NSSC 197 at para 474:

[A]lthough claims relating to breaches that occurred more than three years preceding the commencement of this proceeding are barred, ongoing breaches within the three years and following the commencement of this proceeding are not.

[90] Therefore, regardless of whether the publication of the 2014 Edition was a separate infringement from the publication of the Anniversary Edition, there is no limitation period issue. Either the Anniversary and 2014 Editions are considered part of one continuous publication of the Series and hence one ongoing breach, bringing this application within the limitation period,

or else the 2014 Edition, which the Applicants have stated clearly is the infringement they take issue with, is a separate publication, and has been addressed in a timely manner.

C. *Abusive Claim Allegation*

[91] The Respondents allege that the Applicants have engaged in copyright abuse, for which they primarily rely on *Euro-Excellence Inc. v Kraft Canada Inc.* 2007 SCC 37, [2007] 3 SCR 20 [Toblerone], and *Access International Automotive Ltd v Volkswagen Canada Inc.*, [2001] 3 FC 311, 2001 FCA 79 [Volkswagen].

[92] I do not agree with the Respondents that the Applicants have engaged in copyright misuse, or abuse. I neither find *Toblerone* nor *Volkswagen* helpful to their case: the theory of copyright misuse is not well-developed in Canada, and more importantly, even if it were, the facts simply do not support any malfeasance or wrongdoing on the Applicants' part.

[93] As for the Respondents' argument that the Applicants unduly delayed in bringing the application, the Applicants provided notice in a reasonable amount of time after Ms. Rusk, their VP, received a Conservatory Canada email regarding an upcoming edition with a new publisher. She first saw the physical evidence of the 2014 Edition some four months later at Remenyi House of Music, a store across from the Respondents' premises in Toronto.

[94] Ms. Rusk then twice attempted to contact the person she believed to be the Respondents' Executive Director, Ms. Warwick, in the fall of 2014, to provide notice of lack of permission for the 2014 Edition. After the new Executive Director, Mr. Oger, replied to the said notice, he

failed to follow-up, and the Applicants ultimately filed this application approximately two months later. I do not find this timeline, and/or the notice given, to be abusive.

[95] Indeed, in previous litigation involving some of the same parties, Justice van Rensburg of the Ontario Superior Court denied to issue the remedy sought by the same Applicants, due in part to a delay of three months in bringing that matter.

[96] In the present case, the applicants acted more expeditiously, and they can hardly be faulted for their conduct, particularly in light of the previous litigation: see *The Frederick Harris Music Co Ltd v Clarke MacIntosh and Novus Via Music Group Inc*, Court File NO CV-07-00000-383-00, 200/03/22, RR at 213.

[97] There was some question in discoveries and then references during the hearing by the Respondents as to why the 1999 Agreement was never found. The Applicants pointed out, on the other hand, that Justice van Rensburg raised similar concerns vis-à-vis Mr. MacIntosh at para 19 of her decision:

While Mr. MacIntosh has offered explanations of those communications which might suggest an innocent motive, he has refused at this stage to provide access to his email communications from and to his personal email address during that timeframe, notwithstanding that such records would be relevant to the issues, and would either corroborate or contradict the assertions in his affidavit about what he was discussing. In addition, there is evidence that, prior to his departure from Frederick Harris, Mr. MacIntosh shredded a large volume of his files and attempted to delete most of his computer files.

[98] I see no evidence of bad faith by either party on the issue of deliberate misplacement or spoliation of evidence, because there is simply no conclusive evidence before the Court. By the same token I have no evidence on which to base a finding that the Applicants engaged in any abuse or misuse of their copyright. As the Federal Court of Appeal held in *Levi Strauss & Co v Roadrunner Apparel Inc*, 76 CPR (3d) 129, at para 16, “the difficulties for a defendant of proving a misuse or perversion of the process on the part of a plaintiff seeking to enforce its trademark through the legal process cannot be underestimated.”

[99] In sum, while the Respondents made best efforts to assert their defence of abuse of process or misuse of copyright, there is insufficient evidence in either regard.

D. *Implied Permission*

[100] The Respondents rely on *Pinto v Bronfman Jewish Education Centre*, 2013 FC 945 [*Pinto*] for the proposition that they had implied permission to continue with the publication rights granted to them in 1999, and the Applicants failed to prove otherwise.

[101] I am not swayed by this line of attack. To quote Justice Rennie in *Pinto* at para 158, citing Professor Vaver whose article Respondents’ counsel also relied on:

In *Harmony Consulting*, the Federal Court of Appeal quoted with approval from an article by David Vaver, “Consent or No Consent: The Burden of Proof in Intellectual Property Infringement Suits” (2011) 23 IPJ 147 at 148-49:

It is rarely a chore for a plaintiff to prove he gave no express consent: he knows best whether he did or not ... If, on weighing the evidence, the court is satisfied the plaintiff gave no implied consent, he wins. If the defendant does show implied consent,

the plaintiff fails to discharge his onus and loses. In theory, if the evidence is left in a state where the court is unsatisfied that the plaintiff did *not* grant implied consent, the plaintiff also loses. [emphasis in original]

[102] Here, I have neither seen evidence that the Applicant gave any implied consent to publish the works in the 2014 Edition, nor that the Respondents showed evidence of implied consent. Rather, the Applicants made it clear, shortly after learning about the 2014 Edition, that there was no permission to publish.

E. *Passing Off*

[103] At the hearing, Applicants' counsel conceded that they would not focus on this issue, because the infringement issue constituted "99.99%" of their focus. Nonetheless, they assert that since the colour-coding scheme for levels one to five of the 2014 Edition of the Series is identical to the colour-coding scheme for levels one to five of the 2008 Edition of the RCM Celebration Series, and since the 2014 Edition of the Series uses saddle-stitch binding (like their Celebration Series but unlike the 2012 Anniversary Edition of the Series), the Respondents are trying to pass off their books as the Applicants'.

[104] The Respondents make the following observations by way of rebuttal:

- A. there is no evidence that the colour scheme or the binding used by the Applicants for the Celebration Series Perspectives have been used as a trade-mark by the Applicants in any way;

- B. the Applicants have varied their colour schemes over the years;
- C. the colour scheme that appears to be in question was developed in 2008, not before;
- D. the colour scheme is functional in nature, permitting students and teachers to identify which books form a set and which set to purchase once a student has advanced. The colours, then, refer not to source but to levels, and are used by several other publications;
- E. there is no evidence to suggest that the Applicant's colour scheme has anything to do with the Applicants' goodwill among music students and teachers;
- F. there is no evidence that anyone could be confused or deceived by the covers. Instead, there is evidence that music stores frequently separate different series out when selling them in-store to ensure that students and teachers do not confuse them;
- G. there is no evidence of damage to the Applicants arising from the Respondents' use of a colour scheme;
- H. there is no evidence of confusion over the saddle-stitch binding that the Applicants have adopted. Binding is a functional choice and no student would make a purchase based on binding – millions of other publications use staples as binding;

- I. “Conservatory Canada” is a registered trade-mark and that this appears prominently on all publications in question, further reducing the possibility of confusion; and
- J. the Series actually underwent its “face lift” in the 2012 Anniversary Edition, rather than in the 2014 Edition, as is alleged by the Applicants. In other words, the changes to the appearance of the cover took place more than two years before Mr. MacIntosh and Novus got involved. The Respondents argue that this demonstrates a fundamental lack of due diligence by the Applicants.

[105] The test for passing-off comes from *Kirkbi AG v Ritvik Holdings Inc*, 2005 SCC 65 at para 66: “The three necessary components of a passing-off action are: the existence of goodwill, deception of the public due to a misrepresentation and actual or potential damage to the plaintiff.”

[106] It is clear that this part of the claim should be denied. The Applicants provided no evidence of deception of the public, nor any evidence of the existence of goodwill associated with their colour-coded scheme. Without proof of these two necessary components, the Applicants have not established that any passing off occurred.

F. *Remedy*

(1) Damages

[107] The Applicants, in their submissions, stressed the commercial nature of the Respondents' book sales, noting that their books are sold at retail outlets at prices ranging from \$17.95 to \$24.95. They argue, as a result, that this is a commercial venture, the Respondents have profited from the infringement, and thus they should be ordered to pay the upper end of the \$500-\$20,000 per work range stipulated for commercial infringement by paragraph 38.1(1)(a) of the Act.

[108] The Respondents, by contrast, stress the fact that Conservatory Canada is an educational institution, a not-for-profit, and a registered charity. Since the sales of the Series are intrinsic to Conservatory Canada's educational and charitable activities, they are inherently non-commercial in nature, and should be evaluated under paragraph 38.1(1)(b) of the Act. Furthermore, the Respondents argue that since the Applicants are only claiming infringement since 2014, or approximately one year before the filing of this application, the actual amount owing could be no more than \$1,405.81, the amount paid by Waterloo for all of 2005.

[109] When determining statutory damages under the Act, the first question to answer is whether the infringement at issue was commercial in nature or not, given the lower statutory range for non-commercial activities, of between \$100 and \$5000 per infringement (see subs. 38.1(1) of the Act), as opposed to the much higher range for commercial activities.

[110] Once the proper range of potential damages is identified under subs. 38.1(1) of the Act, the Court must then determine the appropriate level of damages per work. To make this determination, subs. 38.1(5) of the Act stipulates that the Court must consider:

<p>(5) In exercising its discretion under subsections (1) to (4), the court shall consider all relevant factors, including</p>	<p>(5) Lorsqu’il rend une décision relativement aux paragraphes (1) à (4), le tribunal tient compte notamment des facteurs suivants :</p>
<p>(a) the good faith or bad faith of the defendant;</p>	<p>a) la bonne ou mauvaise foi du défendeur;</p>
<p>(b) the conduct of the parties before and during the proceedings;</p>	<p>b) le comportement des parties avant l’instance et au cours de celle-ci;</p>
<p>(c) the need to deter other infringements of the copyright in question; and</p>	<p>c) la nécessité de créer un effet dissuasif à l’égard de violations éventuelles du droit d’auteur en question;</p>
<p>(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.</p>	<p>d) dans le cas d’une violation qui est commise à des fins non commerciales, la nécessité d’octroyer des dommages-intérêts dont le montant soit proportionnel à la violation et tienne compte des difficultés qui en résulteront pour le défendeur, du fait que la violation a été commise à des fins privées ou non et de son effet sur le demandeur.</p>

[111] I find, as a starting point for this analysis, that the infringement was commercial in nature, as the books were being sold commercially, presumably to as wide and large an audience as possible – even if the ultimate sales may have been modest. I come to this conclusion notwithstanding Conservatory Canada’s status as a not-for-profit entity, for the following reasons.

[112] First, there is no question that Novus and Mr. MacIntosh were operating for profit, unlike Conservatory Canada. Furthermore, there was a substantial change in the 2014 Edition – other than the change in publishers from Mayfair to Novus – namely that Hal Leonard took over its distribution. The testimony before this Court situates Hal Leonard among the largest – if not the largest – of international sheet music distributors and publishers in the world (AR at 498-499). No comparable international distributor had been involved in any of the prior editions. Moreover, the 2014 Edition was unique in Conservatory Canada's Series, being the first of the publications to list the price in both American and Canadian dollars (the latter listing naturally being higher, given the exchange rate).

[113] As I indicated to the parties at the hearing, the present circumstances, when considered in their totality, weigh in favour of damages at the low end of para. 38.1(1)(a) spectrum.

[114] On the first factor in subs. 38.1(5), I do not find that the Respondents acted in bad faith, despite the Applicants' assertions to the contrary – for instance their allegations of poor conduct such as Mr. MacIntosh's attendance at the MTNA Conference in Las Vegas. However, the evidence indicates that this attendance was nothing unusual: Mr. MacIntosh has attended and taken a booth at MTNA annually for approximately a decade. Therefore, there was nothing untoward in his attendance at the 2015 Conference.

[115] Regarding the conduct of the parties -- the second factor under subs. 38.1(5) -- the Applicants erroneously insinuated that Mr. MacIntosh was involved in Conservatory Canada's decision to change its Series' colour-scheme and binding format; in reality, these changes

occurred before Mr. MacIntosh and Conservatory Canada began their publishing relationship. I do not find that the allegations of impropriety have held up to scrutiny.

[116] Third, in evaluating the subs. 38.1(5) deterrence factor, it is unclear what effect a large damages award would have in deterring further copyright infringement, when the infringement at issue here appears to be the product of poor record-keeping and rights management on the part of both parties. If anything, this case is instructive that the failure to keep crucial contracts muddies the waters around rights, and any resulting infringement claims. The Respondents should not alone bear the brunt of this laxity, because the Applicants played an equal part in the inability to provide to the Court the key document at issue.

[117] For these reasons, per work damages will be set at the lowest end of the commercial range, or \$500 per work, for a total award of \$10,500 in damages, in addition to pre-judgment interest. As also discussed at the hearing, there was very limited evidence of sales presented to the Court, namely sales figures of both the Applicants' and Respondents' publications from one Vancouver store. These sales figures did not provide an accurate picture of sales across Canada, or internationally (if any). According to this limited sales data, the Respondents appeared to have a small fraction of the music book sales relative to the Applicants' sales of its Celebration Series.

In short, while not formally required under subs. 38(1) of the Act, the Applicants provided no statements accounting for profits, or any other financial data as to the actual or probable impact of the infringements on the Applicants. By way of *obiter*, I provide some brief observations about evidence in the area of statutory damages.

[118] In *Telewizja Polsat SA v Radiopol Inc*, 2006 FC 584 at para 45, Justice Lemieux, citing John S. McKeown, *Fox on Canadian Law of Canadian Copyright and Industrial Design*, 4th ed (Scarborough: Thomson Carswell, 2003 at 24.77), noted that “[t]here should be some correlation between actual damages and statutory damages even though section 38.1 does not speak of actual damages”. (See also *Nicholas v Environmental Systems (International) Ltd*, 2010 FC 741 at para 105: “[s]tatutory damages require an assessment of the reality of the case and a just result”; and *Pinto* at para 195: “[t]here should be some relationship between the actual damages and statutory damages.” In this matter, no such relationship or guidance on damages was provided to the Court.

[119] Commenting on the inherent difficulty in the realm of statutory damages, Ronald E. Dimock, in *Intellectual Property Disputes: Resolutions & Remedies* (Toronto, ON: Thomson Reuters Canada, 2016) (loose-leaf revision 5), ch 3 at 3-38, noted that a correlation between probable and statutory damages is helpful in ensuring fairness and proportionality:

While statutory damages are meant to compensate a party for losses that are difficult to quantify, the Court in *Telewizja Polsat S.A. v. Radiopol Inc.* stated that, in attempting to establish the amount of any statutory damages award, the amount of actual damages the plaintiff would have probably received should be considered. In looking at probable losses, Justice Lemieux was guided by American jurisprudence and commentary in *Fox on Canadian Copyright and Industrial Design*. On first glance, this focus on probable losses blurs the distinction between statutory damages and damages at large, which are otherwise available. However, any estimation of probable damages is not determinative and the use of such estimates in determining statutory damages is likely intended as one means of ensuring that any damages award is fair and proportionate. [emphasis added]

[120] Most recently, Justice Labbé of the Superior Court of Québec, commented on the statutory damages quandary in *Paré c Taxis Coop de la Mauricie 1992*, 2015 QCCQ 11581 at paras 35-36, noting:

L'article 38.1 LDA mentionné plus haut prévoit des dommages préétablis qui se situent entre 500 \$ et 20 000 \$ que le Tribunal doit fixer de façon équitable. Le Tribunal peut donc exercer une certaine discrétion, mais évidemment de façon judiciaire selon la preuve faite.

C'est de cette disposition [art 38.1] dont se prévaut le demandeur de sorte qu'il n'a pas le fardeau d'établir des dommages réels. Le minimum prévu dans le cas de violation à des fins commerciales est de 500 \$.

[121] In short, the more evidence of probable damages, the easier it will be for the Court to arrive at a fair and proportionate award.

(2) Other remedies

[122] Given the finding of infringement, the Court's Judgment will also contain the following:

- i. An injunction, enjoining the Respondents and/or their publisher from publishing any of the 21 pieces - at least until such time as the appropriate authorization has been granted by the Applicants; and
- ii. Delivery up, such that the Respondents shall, at their cost, ensure that all physical or digital copies of any infringing volumes of the 2014 Edition currently for sale in any channels of distribution are returned to the Respondents, and then delivered to the Applicants.

G. *Costs*

[123] The Respondents request that this Court award them costs on a solicitor-and-client basis. They present several grounds in asking for this exceptional cost award.

[124] First, the Respondents submit that the Applicants were aware that they were owed royalties for eight and a half years, but made no effort throughout that period to seek payment. Instead, it was only after they became aware of the relationship between Mr. MacIntosh and Conservatory Canada that they took action, most likely because of lingering hostilities over his departure from Frederick Harris, and the litigation that ensued several years ago.

[125] Second, the Respondents contend that the Applicants pursued this litigation in an unfair fashion – that they were aware that Ms. Warwick had been dismissed, and that this had caused major disruptions within Conservatory Canada, for instance they brought this application notwithstanding the fact that Conservatory Canada’s employees had left for December holidays during the exchange with Mr. Oger. Since the decision to litigate was made in mid-January 2015 and the litigation was commenced “without further notice or warning” on February 5, 2015, the Applicants put the Respondents at a considerable disadvantage.

[126] Third, the Respondents allege that because this litigation was rushed, due diligence was not done – the Applicants “assumed” without verifying that a new publication had taken place, rather than a new edition of an existing publication, and didn’t take steps to check previous editions of the Series to ascertain whether the contents were substantively the same or not.

[127] While I have sympathy for the Respondents' position at large, and while there is undeniably bad blood between the parties, I do not see any basis for providing costs to the Respondents, let alone on a solicitor-and-client basis. I agree that the passing off claim is weak, but that was not the main thrust of this application as counsel for the Applicants made eminently clear at the hearing, where the focus was almost exclusively on infringement.

[128] In short, I do not see any reason to take the unusual step of ordering costs against the winning party. As the Applicants' conduct was not abusive, they should not be penalized because one or some of the points they advanced failed to persuade the Court (*Johnson & Johnson Inc v Boston Scientific Ltd*, 2008 FC 817 at para 3).

[129] Furthermore, I do not find any merit in the Respondents' contention that there were exceptional circumstances that would justify costs on a solicitor-and-client basis (see *Canada (Attorney General) v Chrétien*, 2011 FCA 53 at para 3).

V. Conclusion

[130] This application should be granted in part. The Respondents have reproduced the 21 works without the Applicants' permission. Statutory damages for infringement are set at the lowest end of the range for commercial infringement.

[131] The passing off claim is denied. The Applicants have provided no evidence to suggest that the particular colour-coding scheme used by the Celebration Series is sufficiently distinct,

nor have they demonstrated that the Celebration Series and the Anniversary Edition are similar enough to lead to confusion.

[132] Despite the valiant efforts of Respondents' counsel to convince the Court otherwise, I see no reason to depart from the normal rule that the Applicants should be entitled to costs.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. this application pursuant to paragraph 34(4)(a) of the Act is granted, in part;
2. the Applicants' copyright has been infringed with respect to the 21 musical works listed in Schedule B to these Reasons, and an injunction will issue, restraining the respondents with their officers, directors, servant and agents, from infringing the rights of Frederick Harris in these 21 works; the injunction restrains the Respondents from distributing or publishing any of the 21 pieces – at least until such time as the appropriate authorization has been granted by the Applicants;
3. the Respondents must deliver up any 2014 Edition books to the Applicants, at their cost, that are for sale or in distribution channels (but not including any already sold to students or music programs, or otherwise in the hands of end users);
4. under para 38.1(1)(b) of the Act, statutory damages of \$500 per work, for a total of \$10,500 are to be paid by the Respondents to the Applicants;
5. prejudgment interest on those statutory damages; and
6. costs to the Applicants.

"Alan S. Diner"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-172-15

STYLE OF CAUSE: ROYAL CONSERVATORY OF MUSIC, AND THE
FREDERICK HARRIS MUSIC CO, LIMITED v
CLARKE MACINTOSH DOING BUSINESS AS NOVUS
VIA MUSIC GROUP INC, AND CONSERVATORY
CANADA

PLACE OF HEARING: TORONTO, ONTARIO

DATES OF HEARING: FEBRUARY 9 & 10, 2016

JUDGMENT AND REASONS: DINER J.

DATED: AUGUST 12, 2016

APPEARANCES:

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SCHEDULE A

Copyright Act, RSC, 1985, c C-42

[...]

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,

[...]

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;

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

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

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

- mécaniquement;
- (e) in the case of any literary, dramatic, musical or artistic work, to reproduce, adapt and publicly present the work as a cinematographic work, e) s'il s'agit d'une oeuvre littéraire, dramatique, musicale ou artistique, de reproduire, d'adapter et de présenter publiquement l'oeuvre en tant qu'oeuvre cinématographique;
- (f) in the case of any literary, dramatic, musical or artistic work, to communicate the work to the public by telecommunication, f) de communiquer au public, par télécommunication, une oeuvre littéraire, dramatique, musicale ou artistique;
- (g) to present at a public exhibition, for a purpose other than sale or hire, an artistic work created after June 7, 1988, other than a map, chart or plan, g) de présenter au public lors d'une exposition, à des fins autres que la vente ou la location, une oeuvre artistique — autre qu'une carte géographique ou marine, un plan ou un graphique — créée après le 7 juin 1988;
- (h) in the case of a computer program that can be reproduced in the ordinary course of its use, other than by a reproduction during its execution in conjunction with a machine, device or computer, to rent out the computer program, h) de louer un programme d'ordinateur qui peut être reproduit dans le cadre normal de son utilisation, sauf la reproduction effectuée pendant son exécution avec un ordinateur ou autre machine ou appareil;
- (i) in the case of a musical work, to rent out a sound recording in which the work is embodied, and i) s'il s'agit d'une oeuvre musicale, d'en louer tout enregistrement sonore;
- (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 j) s'il s'agit d'une oeuvre sous forme d'un objet tangible, d'effectuer le transfert de propriété, notamment par vente, de l'objet, dans la mesure où la propriété de celui-ci n'a jamais été transférée au Canada ou à l'étranger avec l'autorisation

authorization of the copyright owner, du titulaire du droit d'auteur.

and to authorize any such acts. Est inclus dans la présente définition le droit exclusif d'autoriser ces actes.

(1.1) A work that is communicated in the manner described in paragraph (1)(f) is fixed even if it is fixed simultaneously with its communication. (1.1) Dans le cadre d'une communication effectuée au titre de l'alinéa (1)f), une oeuvre est fixée même si sa fixation se fait au moment de sa communication.

[...]

[...]

13(4) The owner of the copyright in any work may assign the right, either wholly or partially, and either generally or subject to limitations relating to territory, medium or sector of the market or other limitations relating to the scope of the assignment, and either for the whole term of the copyright or for any other part thereof, and may grant any interest in the right by licence, but no assignment or grant is valid unless it is in writing signed by the owner of the right in respect of which the assignment or grant is made, or by the owner's duly authorized agent. 13(4) Le titulaire du droit d'auteur sur une oeuvre peut céder ce droit, en totalité ou en partie, d'une façon générale ou avec des restrictions relatives au territoire, au support matériel, au secteur du marché ou à la portée de la cession, pour la durée complète ou partielle de la protection; il peut également concéder, par une licence, un intérêt quelconque dans ce droit; mais la cession ou la concession n'est valable que si elle est rédigée par écrit et signée par le titulaire du droit qui en fait l'objet, ou par son agent dûment autorisé.

(5) Where, under any partial assignment of copyright, the assignee becomes entitled to any right comprised in copyright, the assignee, with respect to the rights so assigned, and the assignor, with respect to the rights not assigned, shall be treated for the purposes of this Act as the (5) Lorsque, en vertu d'une cession partielle du droit d'auteur, le cessionnaire est investi d'un droit quelconque compris dans le droit d'auteur, sont traités comme titulaires du droit d'auteur, pour l'application de la présente loi, le cessionnaire, en ce qui concerne les droits cédés, et le

owner of the copyright, and this Act has effect accordingly.

cédant, en ce qui concerne les droits non cédés, les dispositions de la présente loi recevant leur application en conséquence.

[...]

[...]

(7) For greater certainty, it is deemed always to have been the law that a grant of an exclusive licence in a copyright constitutes the grant of an interest in the copyright by licence.

(7) Il est entendu que la concession d'une licence exclusive sur un droit d'auteur est réputée toujours avoir valu concession par licence d'un intérêt dans ce droit d'auteur.

[...]

[...]

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

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

[...]

[...]

34 (1) Where copyright has been infringed, the owner of the copyright is, subject to this Act, entitled to all remedies by way of injunction, damages, accounts, delivery up and otherwise that are or may be conferred by law for the infringement of a right.

34 (1) En cas de violation d'un droit d'auteur, le titulaire du droit est admis, sous réserve des autres dispositions de la présente loi, à exercer tous les recours — en vue notamment d'une injonction, de dommages-intérêts, d'une reddition de compte ou d'une remise — que la loi accorde ou peut accorder pour la violation d'un droit.

[...]

[...]

(4) The following proceedings may be commenced or proceeded with by way of application or action and shall,

(4) Les procédures suivantes peuvent être engagées ou continuées par une requête ou une action :

in the case of an application, be heard and determined without delay and in a summary way:

(a) proceedings for infringement of copyright or moral rights;

(b) proceedings taken under section 44.12, 44.2 or 44.4; and

(c) proceedings taken in respect of

(i) a tariff certified by the Board under Part VII or VIII, or

(ii) agreements referred to in section 70.12.

[...]

38.1 (1) 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

a) les procédures pour violation du droit d'auteur ou des droits moraux;

b) les procédures visées aux articles 44.12, 44.2 ou 44.4;

c) les procédures relatives aux tarifs homologués par la Commission en vertu des parties VII et VIII ou aux ententes visées à l'article 70.12.

Le tribunal statue sur les requêtes sans délai et suivant une procédure sommaire.

[...]

38.1 (1) Sous réserve des autres dispositions du présent article, le titulaire du droit d'auteur, en sa qualité de demandeur, peut, avant le jugement ou l'ordonnance qui met fin au litige, choisir de recouvrer, au lieu des dommages-intérêts et des profits visés au paragraphe 35(1), les dommages-intérêts préétablis ci-après pour les violations reprochées en l'instance à un même défendeur ou à plusieurs défendeurs solidairement responsables :

a) dans le cas des violations commises à des fins commerciales, pour toutes les violations — relatives à une

all infringements involved in the proceedings for each work or other subject-matter, if the infringements are for commercial purposes; and

oeuvre donnée ou à un autre objet donné du droit d'auteur —, des dommages-intérêts dont le montant, d'au moins 500 \$ et d'au plus 20 000 \$, est déterminé selon ce que le tribunal estime équitable en l'occurrence;

(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.

b) dans le cas des violations commises à des fins non commerciales, pour toutes les violations — relatives à toutes les oeuvres données ou tous les autres objets donnés du droit d'auteur —, des dommages-intérêts, d'au moins 100 \$ et d'au plus 5 000 \$, dont le montant est déterminé selon ce que le tribunal estime équitable en l'occurrence.

[...]

[...]

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

38.1 (5) (5) Lorsqu'il rend une décision relativement aux paragraphes (1) à (4), le tribunal tient compte notamment des facteurs suivants :

(a) the good faith or bad faith of the defendant;

a) la bonne ou mauvaise foi du défendeur;

(b) the conduct of the parties before and during the proceedings;

b) le comportement des parties avant l'instance et au cours de celle-ci;

(c) the need to deter other infringements of the copyright in question; and

c) la nécessité de créer un effet dissuasif à l'égard de violations éventuelles du droit d'auteur en question;

(d) in the case of infringements for non-commercial purposes, the need for an award to be proportionate to the

d) dans le cas d'une violation qui est commise à des fins non commerciales, la nécessité d'octroyer des dommages-

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.

intérêts dont le montant soit proportionnel à la violation et tienne compte des difficultés qui en résulteront pour le défendeur, du fait que la violation a été commise à des fins privées ou non et de son effet sur le demandeur.

[...]

[...]

41 The following definitions apply in this section and in sections 41.1 to 41.21.

41 Les définitions qui suivent s'appliquent au présent article et aux articles 41.1 à 41.21.

circumvent means,

contourner

(a) in respect of a technological protection measure within the meaning of paragraph (a) of the definition technological protection measure, to descramble a scrambled work or decrypt an encrypted work or to otherwise avoid, bypass, remove, deactivate or impair the technological protection measure, unless it is done with the authority of the copyright owner; and

a) S'agissant de la mesure technique de protection au sens de l'alinéa a) de la définition de ce terme, éviter, supprimer, désactiver ou entraver la mesure — notamment décoder ou déchiffrer l'oeuvre protégée par la mesure — sans l'autorisation du titulaire du droit d'auteur;

(b) in respect of a technological protection measure within the meaning of paragraph (b) of the definition technological protection measure, to avoid, bypass, remove, deactivate or impair the technological protection measure. (contourner)

b) s'agissant de la mesure technique de protection au sens de l'alinéa b) de la définition de ce terme, éviter, supprimer, désactiver ou entraver la mesure. (circumvent)

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. (technological protection measure)

[...]

41.23 (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

mesure technique de protection Toute technologie ou tout dispositif ou composant qui, dans le cadre normal de son fonctionnement :

a) soit contrôle efficacement l'accès à une oeuvre, à une prestation fixée au moyen d'un enregistrement sonore ou à un enregistrement sonore et est autorisé par le titulaire du droit d'auteur;

b) soit restreint efficacement l'accomplissement, à l'égard d'une oeuvre, d'une prestation fixée au moyen d'un enregistrement sonore ou d'un enregistrement sonore, d'un acte visé aux articles 3, 15 ou 18 ou pour lequel l'article 19 prévoit le versement d'une rémunération. (mesure technique de protection)

[...]

41.23 (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

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.

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.

(2) If proceedings under subsection (1) are taken by a person other than the copyright owner, the copyright owner shall be made a party to those proceedings, except

(2) Lorsqu'une procédure est engagée au titre du paragraphe (1) par une personne autre que le titulaire du droit d'auteur, ce dernier doit être constitué partie à cette procédure sauf :

(a) in the case of proceedings taken under section 44.12, 44.2 or 44.4;

a) dans le cas d'une procédure engagée en vertu des articles 44.12, 44.2 ou 44.4;

(b) in the case of interlocutory proceedings, unless the court is of the opinion that the interests of justice require the copyright owner to be a party; and

b) dans le cas d'une procédure interlocutoire, à moins que le tribunal estime qu'il est dans l'intérêt de la justice de constituer le titulaire du droit d'auteur partie à la procédure;

(c) in any other case in which the court is of the opinion that the interests of justice do not require the copyright owner to be a party.

c) dans tous les autres cas où le tribunal estime que l'intérêt de la justice ne l'exige pas.

(3) A copyright owner who is made a party to proceedings under subsection (2) is not liable for any costs unless the copyright owner takes part in the proceedings.

(3) Le titulaire du droit d'auteur visé au paragraphe (2) n'est pas tenu de payer les frais à moins d'avoir participé à la procédure.

(4) If a copyright owner is made a party to proceedings under subsection (2), the court, in awarding damages or

(4) Le tribunal peut, sous réserve de toute entente entre le demandeur et le titulaire du droit d'auteur visé au

profits, shall, subject to any agreement between the person who took the proceedings and the copyright owner, apportion the damages or profits referred to in subsection 35(1) between them as the court considers appropriate.

[...]

43.1 (1) Subject to subsection (2), a court may award a remedy for any act or omission that has been done contrary to this Act only if

(a) the proceedings for the act or omission giving rise to a remedy are commenced within three years after it occurred, in the case where the plaintiff knew, or could reasonably have been expected to know, of the act or omission at the time it occurred; or

(b) the proceedings for the act or omission giving rise to a remedy are commenced within three years after the time when the plaintiff first knew of it, or could reasonably have been expected to know of it, in the case where the plaintiff did not know, and could not reasonably have been expected to know, of the act or omission at the time it occurred.

paragraphe (2), répartir entre eux, de la manière qu'il estime indiquée, les dommages-intérêts et les profits visés au paragraphe 35(1).

[...]

43.1 (1) Sous réserve du paragraphe (2), le tribunal ne peut accorder de réparations à l'égard d'un fait — acte ou omission — contraire à la présente loi que dans les cas suivants :

a) le demandeur engage une procédure dans les trois ans qui suivent le moment où le fait visé par le recours a eu lieu, s'il avait connaissance du fait au moment où il a eu lieu ou s'il est raisonnable de s'attendre à ce qu'il en ait eu connaissance à ce moment;

b) le demandeur engage une procédure dans les trois ans qui suivent le moment où il a pris connaissance du fait visé par le recours ou le moment où il est raisonnable de s'attendre à ce qu'il en ait pris connaissance, s'il n'en avait pas connaissance au moment où il a eu lieu ou s'il n'est pas raisonnable de s'attendre à ce qu'il en ait eu connaissance à ce moment.

Federal Courts Rules, SOR, 98-106

[...]

60 At any time before judgment is given in a proceeding, the Court may draw the attention of a party to any gap in the proof of its case or to any non-compliance with these Rules and permit the party to remedy it on such conditions as the Court considers just.

[...]

300 This Part applies to

(a) applications for judicial review of administrative action, including applications under section 18.1 or 28 of the Act, unless the Court directs under subsection 18.4(2) of the Act that the application be treated and proceeded with as an action;

(b) proceedings required or permitted by or under an Act of Parliament to be brought by application, motion, originating notice of motion, originating summons or petition or to be determined in a summary way, other than applications under subsection 33(1) of the Marine Liability Act;

[...]

60 La Cour peut, à tout moment avant de rendre jugement dans une instance, signaler à une partie les lacunes que comporte sa preuve ou les règles qui n'ont pas été observées, le cas échéant, et lui permettre d'y remédier selon les modalités qu'elle juge équitables.

[...]

300 La présente partie s'applique :

a) aux demandes de contrôle judiciaire de mesures administratives, y compris les demandes présentées en vertu des articles 18.1 ou 28 de la Loi, à moins que la Cour n'ordonne, en vertu du paragraphe 18.4(2) de la Loi, de les instruire comme des actions;

b) aux instances engagées sous le régime d'une loi fédérale ou d'un texte d'application de celle-ci qui en prévoit ou en autorise l'introduction par voie de demande, de requête, d'avis de requête introductif d'instance, d'assignation introductive d'instance ou de pétition, ou le règlement par procédure sommaire, à l'exception des demandes faites en vertu du paragraphe 33(1) de la Loi sur la responsabilité en matière maritime;

(c) appeals under subsection 14(5) of the Citizenship Act;	c) aux appels interjetés en vertu du paragraphe 14(5) de la Loi sur la citoyenneté;
(d) appeals under section 56 of the Trade-marks Act;	d) aux appels interjetés en vertu de l'article 56 de la Loi sur les marques de commerce;
(e) references from a tribunal under rule 320;	e) aux renvois d'un office fédéral en vertu de la règle 320;
(f) requests under the Commercial Arbitration Code brought pursuant to subsection 324(1);	f) aux demandes présentées en vertu du Code d'arbitrage commercial qui sont visées au paragraphe 324(1);
(g) proceedings transferred to the Court under subsection 3(3) or 5(3) of the Divorce Act; and	g) aux actions renvoyées à la Cour en vertu des paragraphes 3(3) ou 5(3) de la Loi sur le divorce;
(h) applications for registration, recognition or enforcement of a foreign judgment brought under rules 327 to 334.	h) aux demandes pour l'enregistrement, la reconnaissance ou l'exécution d'un jugement étranger visées aux règles 327 à 334.
[...]	[...]
(2) An applicant's record shall contain, on consecutively numbered pages and in the following order,	(2) Le dossier du demandeur contient, sur des pages numérotées consécutivement, les documents suivants dans l'ordre indiqué ci-après :
[...]	[...]
(g) a description of any physical exhibits to be used by the applicant at the hearing; and	g) une description des objets déposés comme pièces qu'il entend utiliser à l'audition
[...]	[...]

Federal Courts Act, RSC, 1985 c.F-7

[...]

20 (2) The Federal Court has concurrent jurisdiction in all cases, other than those mentioned in subsection (1), in which a remedy is sought under the authority of an Act of Parliament or at law or in equity respecting any patent of invention, copyright, trade-mark, industrial design or topography referred to in paragraph (1)(a).

[...]

20 (2) Elle a compétence concurrente dans tous les autres cas de recours sous le régime d'une loi fédérale ou de toute autre règle de droit non visés par le paragraphe (1) relativement à un brevet d'invention, un droit d'auteur, une marque de commerce, un dessin industriel ou une topographie au sens de la Loi sur les topographies de circuits intégrés.

Trade-marks Act, RSC, 1985, C. T-13

[...]

7 No person shall

[...]

(b) direct public attention to his goods, services or business in such a way as to cause or be likely to cause confusion in Canada, at the time he commenced so to direct attention to them, between his goods, services or business and the goods, services or business of another;

[...]

7 Nul ne peut :

[...]

b) appeler l'attention du public sur ses produits, ses services ou son entreprise de manière à causer ou à vraisemblablement causer de la confusion au Canada, lorsqu'il a commencé à y appeler ainsi l'attention, entre ses produits, ses services ou son entreprise et ceux d'un autre;

SCHEDULE B: 21 WORKS

Type 1 Rights-Assignment of copyright including exclusive publication rights throughout the world

Composer	Title
1. Stephen Chatman	Katherine
2. Stephen Chatman	Celebration
3. Anne Crosby	Starfish at Night
4. Anne Crosby	Little Elves and Pixies
5. Anne Crosby	Robots
6. Anne Crosby	Can't Catch Me
7. Alexina Louie	Shooting Stars
8. Alexina Louie	Blue Sky I
9. Alexina Louie	Moonlight Tocata
10. Linda Niamath	Spider's Web
11. Linda Niamath	It's Raining
12. Lorna Patterson	Doves
13. Clifford Poole	Mist
14. Chee-Hwa Tan	Pirate Story
15. arr. Nancy Telfer	A Great Big Sea
16. arr. Nancy Telfer	Alouette

Type 2 Rights - Exclusive publishing right throughout the world

<u>Composer</u>	<u>Title</u>
17. Stephen Chatman	Bozo's Flippity-Flop
18. Stephen Chatman	Sneaky
19. Linda Niamath	Butterflies
20. Linda Niamath	Peacock
21. Linda Niamath	Masquerade