

Date: 20080521

Docket: T-2407-03

Citation: 2008 FC 636

Ottawa, Ontario, May 21, 2008

PRESENT: The Honourable Mr. Justice Hugessen

BETWEEN:

CANADIAN PRIVATE COPYING COLLECTIVE

Plaintiff

and

**FIRST CHOICE RECORDING MEDIA INC.,
M3 TECHNOLOGY INC.,
AM/FM MARKETING LTD., ION TECH LTD.,
SHI GUANG PHAN and HARRY CHEUNG**

Defendants

REASONS FOR ORDER AND ORDER

[1] This is a motion for default judgment. The defendants either have not filed statements of defence or such statements have been struck out.

[2] The plaintiff's claim alleges that the defendants have engaged in a corporate sham in order to avoid the payment of levies owed under the *Copyright Act*, which requires the payment of a tariff,

currently set at \$0.21 per CD-R or CD-RW, on the importation into Canada or manufacture in Canada of blank media, for the purpose of trade. In support of this allegation, the plaintiff has provided an affidavit of Laurie Gelbloom, general counsel for the plaintiff, who outlines the relationship between the defendants, and the facts that led up to the underlying action.

[3] The defendant Cheung was the sole director of First Choice and of M3 at all relevant times. Both companies have ceased operations, First Choice as of May 31, 2006, and M3 as of June 1, 2007. Mr. Cheung filed an Assignment in Bankruptcy on July 4, 2007, which resulted in this action being stayed pursuant to section 69.3 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3. However, the British Columbia Superior Court later granted the plaintiff leave to have the underlying action proceed against Mr. Cheung for the purpose of determining his liability to the plaintiff.

[4] Mr. Phan was the sole director of AM/FM and Ion at all relevant times. Both companies have been voluntarily dissolved by Mr. Phan, AM/FM on February 25, 2005, and Ion on July 12, 2005. However, no affidavit stating that the company being dissolved had no liabilities or has made adequate provision for the payment of its liabilities was provided, as is required by section 316 of the *Business Corporations Act*, S.B.C. 2002, c. 57. There was no response to an order from the Corporate Registrar requesting copies of these affidavits.

[5] The address for Ion is 8167, 156th Street, Surrey, B.C., which an investigator for the plaintiff determined was a residential address. This address is indicated on all of the invoices with respect to sales from Ion that have been produced.

First Choice and AM/FM

[6] In late 2000, a representative of First Choice contacted the Canadian Independent Record Production Association (CIRPA), stating that First Choice was thinking about importing blank media into Canada. CIRPA was the collective body which was responsible, at the time, for collecting levies under the *Copyright Act*. A representative of CIRPA contacted First Choice a few weeks later, and spoke to someone named “Henry”. The CIRPA representative told Henry that she understood that First Choice was importing CDs and that she would like to send him information concerning the levy. However, Henry hung up before giving a mailing address, and First Choice did not begin reporting its sales of blank media until 2003.

[7] The plaintiff retained Grant Thornton LLP (Grant Thornton) to conduct an audit of First Choice’s activities, and the conduct of the audit is described in the affidavit of Derek Malcolm, a partner who conducted the audit. On June 11, 2003, Alison McCluskey and Iinco Manisali, of Grant Thornton’s Vancouver office, attended at First Choice’s premises. Mr. Cheung told them that the laptop computer on which all of the accounting information was stored had been stolen the day before, and that he did not think he had a back-up of that information. Mr. Cheung also indicated that he did not know where much of the documentation requested by the auditors was, including bank statements and cancelled cheques, and that he did not keep the documents relating to the

purchases of CDs. Mr. Cheung also stated that First Choice was only engaged in the sale of DVD-Rs, so no longer needed to deal with the plaintiff.

[8] On September 10, 2003, Mr. Malcolm attended at First Choice's premises to attempt to complete the audit. At that time, Mr. Cheung reiterated that there was no documentation preceding June 2003, but stated that this was due to a virus attack that had destroyed the computer. Mr. Malcolm also affirms that Mr. Cheung provided other answers that contradicted his previous statements to Ms. McCluskey and Ms. Manisali. Mr. Cheung was unable to provide much of the information requested by Mr. Malcolm, including a list of all products offered for sale, a report summarizing all sales, any annual business financial statements, and a list, report or accounting extract detailing all purchases of media. Although Mr. Cheung stated that he would try to find some of the requested information, it was never provided, despite a further request by letter dated September 12, 2003.

[9] The preliminary results of the audit indicate that, between 2001 and 2004, 19,667,341 units of media were sold by First Choice, of which 17,681,563 units were blank media that would be potentially subject to the levy.

[10] The documentation concerning the purchase records appears to be incomplete, as the records only indicate the purchase of 15,943,116 units. A Request to Admit was delivered to First Choice on March 16, 2007, in which all of the suppliers of the blank media are identified to be non-

Canadian entities who supplied media from a location outside of Canada, with the exception of AM/FM and Trimex Marketing. There is no evidence that any response was ever received.

[11] Based on Grant Thornton's analysis, by deducting the units purchased from AM/FM, Trimex Marketing, and Jacsonic, First Choice appears to have purchased at least 9,143,958 units of blank media from suppliers outside of Canada.

[12] According to Grant Thornton, approximately 90.5% of the media sold was blank media, with the remaining sold in a duplicated format which would not attract the payment of levies. Therefore, First Choice would be liable for \$1,737,809.22 in levies (9,143,958 units x 90.5% sold as blank media x \$0.21 tariff per unit).

[13] However, First Choice did report certain sales of blank media that occurred in 2002 and 2003, totaling 57,890 units, and it paid \$3,756.69 in levies. This leaves the amount of \$1,734,052.53 in unpaid levies.

[14] The audit conducted by Grant Thornton also indicated that AM/FM supplied 6,796,100 units of blank media to First Choice, at prices varying from \$0.16 and \$0.20 per unit, between August 2003 and February 2004. According to Ms. Gelbloom, the plaintiff has reason to believe that this blank media was imported by AM/FM from sources outside of Canada. Some invoices were produced, of purchases totaling 3,751,712 units, originating from companies outside of Canada. Additionally, pursuant to an agreement between AM/FM and First Choice, signed on

August 4, 2004, AM/FM is indicated as an importer of various brands of blank media, and AM/FM undertook to report and to remit any levy due under the *Copyright Act*.

[15] AM/FM has not reported the sale of any blank media nor has it paid any levies owed. According to Ms. Gelbloom, this means that AM/FM owes levies in the amount of \$1,427,181.00 (6,796,100 units x \$0.21 tariff per unit).

M3 and Ion

[16] In the context of the underlying action, M3 produced some documents relating to its purchase and sale of blank media. However, it has not produced a complete affidavit of documents, nor has it produced all the requested documents.

[17] The documents that have been produced indicate that, between April 2004 and May 2005, Ion supplied 15,254,950 units of blank media to M3, of 17,368,650 units of blank media that M3 sold. Although the documents provided do not indicate where Ion obtained the blank media it provided to M3, Ms. Goldbloom affirms that:

based on my review of the invoices between Ion and M3, and my knowledge of the blank media industry, it is my view that it would be highly unlikely that any of the blank media which Ion supplied to M3 would have been manufactured in Canada and instead, the majority of these brands are manufactured by foreign parties.

[18] The unpaid levies on the blank media supplied by Ion amount to \$3,203,539.50 (15,254,950 units x \$0.21). Ion has never paid any levies to the plaintiff. Ms. Goldbloom does not state whether M3 ever paid any levies on the blank media it sold. However, an agreement between Ion and M3

was signed on August 4, 2004, in which Ion agreed to pay any levies on the blank media it was providing M3.

Relevant Legislation

[19] The following are the relevant provisions of the *Copyright Act*:

82. (1) Every person who, for the purpose of trade, manufactures a blank audio recording medium in Canada or imports a blank audio recording medium into Canada

(a) is liable, subject to subsection (2) and section 86, to pay a levy to the collecting body on selling or otherwise disposing of those blank audio recording media in Canada; and

(b) shall, in accordance with subsection 83(8), keep statements of account of the activities referred to in paragraph (a), as well as of exports of those blank audio recording media, and shall furnish those statements to the collecting body.

(2) No levy is payable where it is a term of the sale or other disposition of the blank audio recording medium that the medium is to be exported from Canada, and it is exported from Canada.

83. (1) Subject to subsection (14), each collective society

82. (1) Quiconque fabrique au Canada ou y importe des supports audio vierges à des fins commerciales est tenu:

a) sous réserve du paragraphe (2) et de l'article 86, de payer à l'organisme de perception une redevance sur la vente ou toute autre forme d'aliénation de ces supports au Canada;

b) d'établir, conformément au paragraphe 83(8), des états de compte relatifs aux activités visées à l'alinéa a) et aux activités d'exportation de ces supports, et de les communiquer à l'organisme de perception.

(2) Aucune redevance n'est toutefois payable sur les supports audio vierges lorsque leur exportation est une condition de vente ou autre forme d'aliénation et qu'ils sont effectivement exportés.

83. (1) Sous réserve du paragraphe (14), seules les

may file with the Board a proposed tariff for the benefit of those eligible authors, eligible performers and eligible makers who, by assignment, grant of licence, appointment of the society as their agent or otherwise, authorize it to act on their behalf for that purpose, but no person other than a collective society may file any such tariff.

[...]

88. (1) Without prejudice to any other remedies available to it, the collecting body may, for the period specified in an approved tariff, collect the levies due to it under the tariff and, in default of their payment, recover them in a court of competent jurisdiction.

(2) The court may order a person who fails to pay any levy due under this Part to pay an amount not exceeding five times the amount of the levy to the collecting body. The collecting body must distribute the payment in the manner set out in section 84.

(3) Where any obligation imposed by this Part is not complied with, the collecting body may, in addition to any other remedy available, apply to a court of competent jurisdiction for an order directing compliance with that

sociétés de gestion agissant au nom des auteurs, artistes-interprètes et producteurs admissibles qui les ont habilités à cette fin par voie de cession, licence, mandat ou autrement peuvent déposer auprès de la Commission un projet de tarif des redevances à percevoir.

[...]

88. (1) L'organisme de perception peut, pour la période mentionnée au tarif homologué, percevoir les redevances qui y figurent et, indépendamment de tout autre recours, le cas échéant, en poursuivre le recouvrement en justice.

(2) En cas de non-paiement des redevances prévues par la présente partie, le tribunal compétent peut condamner le défaillant à payer à l'organisme de perception jusqu'au quintuple du montant de ces redevances et ce dernier les répartit conformément à l'article 84.

(3) L'organisme de perception peut, en sus de tout autre recours possible, demander à un tribunal compétent de rendre une ordonnance obligeant une personne à se conformer aux exigences de la présente partie.

obligation.

(4) Before making an order under subsection (2), the court must take into account

(4) Lorsqu’il rend une décision relativement au paragraphe (2), le tribunal tient compte notamment des facteurs suivants :

(a) whether the person who failed to pay the levy acted in good faith or bad faith;

a) la bonne ou mauvaise foi du défaillant;

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

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

(c) the need to deter persons from failing to pay levies.

c) la nécessité de créer un effet dissuasif en ce qui touche le non-paiement des redevances.

[20] The relevant provisions of the *Private Copying Tariff* have not changed during the period covered by the action and read:

2. In this tariff,

2. Les définitions qui suivent s’appliquent au présent tarif.

[...]

[...]

“importer” means a person who, for the purpose of trade, imports a blank audio recording medium in Canada[.]

« importateur » Personne qui importe des supports audio vierges au Canada à des fins commerciales.

[...]

[...]

3. (1) Subject to subsection (2), the levy rates shall be

3. (1) Sous réserve du paragraphe (2), le taux de la redevance est de

[...]

[...]

(b) 21¢ for each CD-R or CD-

b) 21¢ par CD-R ou CD-RW[.]

RW;

[...]

4. CPCC is the collecting body designated pursuant to paragraph 83(8)(d) of the *Act*.

[...]

7. (1) Subject to subsection (2), the levy for a blank audio recording medium sold or otherwise disposed of in any given accounting period shall be due no later than the last day of the month following that accounting period.

[...]

12. Any amount not received by the due date shall bear interest from that date until the date the amount is received. Interest shall be calculated daily at a rate equal to one per cent above the Bank Rate effective on the last day of the previous month (as published by the Bank of Canada). Interest shall not compound.

[...]

4. La SCPCP est l'organisme de perception désigné en application de l'alinéa 83(8)d) de la *Loi*.

[...]

7. (1) Sous réserve du paragraphe (2), la redevance due à l'égard d'un support audio vierge vendu ou aliéné durant une période comptable donnée est payable au plus tard le dernier jour du mois suivant.

[...]

12. Toute somme non payée à son échéance porte intérêt à compter de la date à laquelle elle aurait dû être acquittée jusqu'à la date où elle est reçue. L'intérêt est calculé quotidiennement, à un taux de un pour cent au-dessus du taux officiel d'escompte de la Banque du Canada en vigueur le dernier jour du mois précédent (tel qu'il est publié par la Banque du Canada). L'intérêt n'est pas composé.

The Plaintiff's Submissions

[21] The plaintiff submits that the evidence demonstrates that the corporate defendants have engaged in the importation or manufacture of blank media into Canada without paying the levies as

required by Part VIII of the *Copyright Act*. It is clear that both First Choice and AM/FM imported blank media into Canada without reporting it or paying the required levies. Furthermore, the plaintiff submits that M3 should be liable for Ion's importation of blank media since the evidence indicates that Ion was merely acting as an agent for M3, which was the real importer. Alternatively, the plaintiff submits that M3 should be liable for Ion's imports through the Court's ability to pierce the "corporate veil" when corporate shams are being used improperly, and that M3 should be jointly liable with Ion, based on *Viacom Ha! v. Jane Doe* (2000), 199 F.T.R. 35, [2000] F.C.J. No. 2095 (T.D.) (QL) [*Viacom*]. According to the plaintiff, the individual defendants should also be held liable for the unpaid levies owed by the corporate defendants, since the evidence demonstrates that the individual defendants, principals of the four corporations in question, "acted with fraudulent intent to frustrate the CPCC's legitimate statutory rights." Finally, the plaintiff submits that the defendants should be required to pay a penalty in addition to the levies owed, along with interest on the amounts owed.

Analysis

(1) Are First Choice, AM/FM, and Ion liable for the amounts claimed by the plaintiff?

[22] Section 82 of the *Copyright Act* requires persons who import blank media into Canada, for the purposes of trade, to pay a levy to the plaintiff when the blank media is sold or otherwise disposed of. Since 2001, the levy has been set in the *Private Copying Tariff* at \$0.21.

[23] In this case, the evidence demonstrates on the balance of probabilities that First Choice purchased 9,143,958 units of CD-Rs and CD-RWs between April 2000 and June 2004, of which 90.5%, or 8,275,282 units, were sold as blank media, and that First Choice sold 19,667,341 units between 2001 and 2004. Since the levy becomes payable when the blank media is disposed of, the levy payable on each unit is \$0.21. Therefore, First Choice would be liable for \$1,737,809.22 in levies. Having already paid \$3,756.69, this leaves \$1,734,052.53 in unpaid levies.

[24] Similarly, the evidence indicates that, between August 2003 and February 2004, AM/FM provided 6,796,100 units of blank media to First Choice, of which at least some units were imported by AM/FM from outside Canada. There is no evidence indicating that any of the units supplied by AM/FM to First Choice originated from within Canada. No levies have been paid by AM/FM. This makes AM/FM liable for \$1,427,181.00.

[25] Finally, the evidence concerning Ion indicates that Ion supplied 15,254,950 units of blank media to M3 in 2003 and 2005, and that it is highly unlikely that these units originated from Canada, but rather that the majority of the manufacturers were located outside of Canada. Again, no levies have been paid by Ion. This makes Ion liable for \$3,203,539.50 in unpaid levies.

(2) Should M3 be liable for any amount for which Ion is liable?

[26] The plaintiff submits that M3 should be liable for any amount owed by Ion for levies relating to blank media supplied to M3 by Ion.

[27] The plaintiff argues that Ion should be considered to have acted as M3's agent, and that M3 is the true importer of the blank media that it purchased from Ion. As the plaintiff points out, "Ion had no business premises, was created and dissolved in a short period of time and it is unlikely that it ever took possession of the blank media given it operated from a residential address".

[28] The plaintiff points to a number of cases in support of its proposition, although none in the context of the *Copyright Act*. In my opinion, the cases relied on by the plaintiff are distinguishable, in that they originate from a context in which the concern was not with the payment of a tariff as such, but rather with the identity of the party paying the tariff. More particularly, the cases cited by the plaintiff relate to the identity of the importer in order to determine who is liable for the payment of an anti-dumping duty. As the Canadian International Trade Tribunal has pointed out, the word importer is defined in that context as "...the person who is in reality the importer of the goods" (*Re Artificial graphite electrodes*, [1987] C.I.T. No. 14 (QL)). The object in this context is not achieved if someone other than the importer pays the duty (*Re fresh garlic*, [1998] C.I.T.T. No. 62 (QL)).

[29] In the context of the levy on blank media, the term "importer" is not defined in the *Copyright Act*. However, it is defined in the *Private Copying Tariff*, as "a person who, for the purpose of trade, imports a blank audio recording medium in Canada". This definition does not demonstrate the concern that is present in the anti-dumping context. The concern in this case is with ensuring that a levy is in fact paid, in order to compensate the members of the collective body, in this case the CPCC, for copying of their works onto the blank media (see *Canadian Private*

Copying Collective c. Cano Tech Inc., 2006 FC 28, [2006] F.C.J. No. 170 (T.D.) (QL)). Therefore, I would conclude that the fact that M3 may have had some interest or involvement in the importation of the goods in question, does not make it the importer or render it responsible for the levies owed by Ion which was the importer of record.

[30] In the alternative, the plaintiff contends that M3 should be considered liable for the levies owed by Ion, on the basis that “the principle of separate corporate existence as between Ion and M3, generally referred to as the corporate veil should be pierced given the improper conduct engaged in by Ion and M3 in respect to these sales”.

[31] The “corporate veil” can be pierced when a Court concludes that it is necessary to do so in the presence of “fraud or improper conduct” (see *e.g. Canadian Copyright Licensing Agency (c.o.b. Access Copyright) v. Apex Copy Centre*, 2006 FC 470, [2006] F.C.J. No. 575 (T.D.) (QL); *Canadian Private Copying Collective v. Fuzion Technology Corp.*, 2006 FC 1284, [2006] F.C.J. No. 1598 (T.D.) (QL), *aff’d* [2007] F.C.J. No. 1410 (C.A.) [*Fuzion*]). However, in the cases cited by the plaintiff, the result of the piercing of the corporate veil is to look behind the corporation to determine who is really in control. Generally, the Court’s concern is to ensure that corporate structures are not being used improperly to conceal the identity of the real interests involved.

[32] In this case, the plaintiff has neither alleged nor proved that M3 is in fact in control of Ion or vice versa. Looking behind the corporate veil of Ion does not indicate that M3 has had any role in the direction of Ion. The only person potentially captured, based on the evidence before the Court, is

Mr. Phan, Ion's director. In a word, while the two corporations appear to be related, the evidence does not establish that one controls the other. They may be siblings but they are not parent and child. In my opinion, even if the corporate veil were lifted, this would not make M3 liable for the levies owed by Ion.

[33] Finally, relying on *Viacom*, above, the plaintiff submits that M3 should be jointly liable for the tariffs owed by Ion. In *Viacom*, the plaintiff sought default judgment against a number of defendants who had been engaged in the sale of counterfeit goods. According to the Court,

[11] In the circumstances of cases such as these where a number of persons are found to be engaged in a business which is selling counterfeit goods, and where it is not possible to distinguish the individual contribution to the harm caused, and in the absence of any exculpatory plea on the part of any of them, it does not seem unfair to assess liability on a joint and several basis. In any event, it seems fairer than finding each defendant individually liable for the full amount of the conventional award for nominal damages, when it appears that there is only one undertaking or business which is causing the damage.

[34] There is a clear difference in this case, in that here, the issue is not that it is unclear which corporation, Ion or M3, imported the blank media and failed to pay the levy. The evidence indicates that Ion is responsible for the payment of the levies. The issue, rather, is that Ion and M3 seem to have acted in concert in order to ensure that no one would pay the required levies. As much as I find this behaviour to be egregious, I cannot conclude that the principal enunciated in *Viacom* can be extended to cover this situation. Conspiracy has not been alleged here as a cause of action.

(3) Should the individual defendants be personally liable for the amounts owed by their respective corporations?

[35] The plaintiff further submits that this is an appropriate case to pierce the corporate veils of the corporate defendants and find the individual defendants personally liable for the amounts owed by their respective corporations.

[36] As discussed above, courts are willing to lift the “corporate veil” to determine who is actually responsible for the behaviour of a corporation, in cases where fraud or improper conduct is alleged. The facts of this case make it appropriate, in my opinion, to lift the corporate veil and hold the individual defendants liable for the behaviour of the corporations they each directed.

[37] The following facts support this conclusion:

- (a) Mr. Cheung was advised in 2000 that levies were due under the *Copyright Act*, yet failed to report any units until 2003, and then, only partially reported First Choice’s actual sales;
- (b) Throughout the 2003 audit, Mr. Cheung misled the plaintiff’s auditors. He indicated that First Choice did not have relevant documents (which documents were later determined to be in First Choice’s possession and produced in this Action) and that First Choice was no longer in the business of selling blank audio recording media (which was completely false) in an attempt to hide his activities from the plaintiff;
- (c) Mr. Cheung sought the assistance of AM/FM, and its principal Mr. Phan, to purchase Blank Media, apparently in an attempt to insulate First Choice from the Levies. It is reasonable to infer that Mr. Cheung knew that AM/FM was not paying the Levies, the prices AM/FM charged were below the value of the Levies;

- (d) Mr. Cheung and Mr. Phan then contracted, after the fact, to make AM/FM and Ion responsible for the Levies. Upon being added to the litigation, Mr. Phan caused AM/FM to be dissolved, improperly (contrary to corporate legislation) in that no provision was made for the payment of liabilities to the plaintiff, which AM/FM agreed to be responsible for. As a result, the Levies were never paid;
- (e) When the plaintiff applied to obtain copies of the corporate documents which were required to be prepared by Mr. Phan, no response was received, and Mr. Phan ignored a Registrar's Order requiring the documents be provided within 15 days;
- (f) Mr. Cheung decided to cease First Choice's operations and set up M3 with a view to transferring the businesses of First Choice to M3. He deposed that First Choice had ceased selling CD-Rs in the fall of 2003, the documents disclose sales into 2004, and then Mr. Cheung swore in his bankruptcy First Choice had ceased operations in May 2006;
- (g) Mr. Cheung was the sole director, officer and shareholder of both First Choice and M3, he exercised control over their activities;
- (h) Mr. Cheung, with his new business M3, engaged in a further levy avoidance scheme, this time involving Mr. Phan's company Ion, in a scheme similar to that which he had used in the past;
- (i) Mr. Phan purported, through Ion, to take on the obligations of M3 for the Levies, and then Mr. Phan dissolved the company (again improperly) failing to pay any unpaid Levies to CPCC.

[38] In *Fuzion*, above, a similar case, there was evidence that a new corporation had been established in a manner that was intended to blur the boundaries between the new and the old corporation, with the same stock, employees, phone number, lease, website and logo, although in that case there was evidence that this was possibly for a legitimate business purpose. The Court found that the result was that the CPCC's statutorily authorized aims of auditing had been defeated,

which constituted an “improper purpose”. The Court concluded that the new corporation, and the individual who was the sole shareholder, officer and director of the old and new corporations, were just as responsible for the private copying levies as the old corporation had been.

[39] In my opinion, the same must be true in this case. The evidence indicates that Mr. Cheung is the only person who ever acted as a director of First Choice, and that Mr. Phan is the only person who ever acted as a director of AM/FM and Ion. Failure to make the individual defendants liable for the conduct of their corporations would leave the plaintiff with essentially no remedy, as the corporate defendants have either stopped conducting business or been dissolved. Therefore, I would find that the individual defendants are liable for the amounts owed by their respective corporations.

(4) Should the defendants be required to pay a penalty in addition to the levies owed?

[40] The plaintiff also requests that the defendants be ordered to pay an amount equal to five times the amount of the levies owed, taking into account the bad faith demonstrated by the defendants throughout the course of their dealings with the plaintiff.

[41] Subsection 88(2) of the *Copyright Act* allows the Court to order a person who fails to pay the private copying levy to pay an amount not exceeding five times the amount of the levy to the collecting body. In making such an order, the Court is directed, by subsection 88(4) of the *Copyright Act*, to consider whether the person who failed to pay acted in good or bad faith, the

conduct of the parties before and during the proceedings, and the need to deter persons from failing to pay levies.

[42] Taking these three factors into account, I would conclude that this is an appropriate case in which to make such an order. The defendants have demonstrated, throughout their dealings with the plaintiff, an intention to avoid their obligations under the *Copyright Act* and to frustrate the plaintiff's statutory right to collect the levies, levies which amounted to over \$5,000,000 in this case. In my opinion, this conduct must receive a serious sanction.

(5) Should the defendants be required to pay interest on the amounts owed?

[43] The plaintiff further submits that the defendants should be required to pay interest on the amounts owed. The *Private Copying Tariff* establishes that interest is payable on overdue amounts, and is to be calculated in accordance with the Bank Rate published by the Bank of Canada. The plaintiff has calculated these amounts as follows:

- (a) interest owed by First Choice: \$390,404.16;
- (b) interest owed by AM/FM: \$150,606.56;
- (c) interest owed by Ion: \$281,637.01.

[44] Section 12 of the *Private Copying Tariff* states that interest is owed on any amount that is not paid by its due date. I see no reason to depart from the plaintiff's calculations in this case.

[45] The plaintiff is entitled to its costs to be assessed.

Conclusion

[46] I would allow this motion in part. The plaintiff has demonstrated that First Choice, AM/FM, and Ion have failed to report and pay private copying levies, although it has not demonstrated such a failure on the part of M3. The plaintiff has also demonstrated that the individual defendants should be personally liable for the amounts owed by their respective corporations, and that an order requiring the defendants to pay five times the amount of levies owed, along with interest on the levies owed, is appropriate.

ORDER

THIS COURT ORDERS that

1. The defendants, First Choice Recording Media, AM/FM Marketing Inc. and Ion Tech Ltd. have failed to report and pay to the plaintiff the private copying levies certified by the Copyright Board of Canada in accordance with the provisions of Part VIII of the *Copyright Act*, on account of the importation into Canada, and the sale or other disposition in Canada of blank audio recording media.
2. The defendant, First Choice Recording Media Inc. is ordered to pay to the plaintiff, private copying levies owed pursuant to the *Copyright Act* and the *Private Copying Tariff*, totalling \$1,734,052.53.
3. The defendant, First Choice Recording Media Inc. is ordered to pay to the plaintiff, interest pursuant to the *Private Copying Tariff* in the amount of \$390,404.16, calculated as of April 15, 2008, plus further interest calculated to the date of judgment.
4. The defendant, AM/FM Marketing Ltd. is ordered to pay to the plaintiff, private copying levies owed pursuant to the *Copyright Act* and the *Private Copying Tariff*, in the amount of \$1,427,181.00.

5. The defendant, AM/FM Marketing Ltd. is ordered to pay to the plaintiff, interest pursuant to the *Private Copying Tariff* in the amount of \$150,606.56, calculated as of April 15, 2008, plus further interest calculated to the date of judgment.
6. The defendant Ion Tech Ltd. is ordered to pay to the plaintiff, private copying levies owed pursuant to the *Copyright Act* and the *Private Copying Tariff*, on account of the importation and sale by them of blank audio recording media, in the amount of \$3,203,539.50.
7. The defendant Ion Tech Ltd. is ordered to pay to the plaintiff, interest pursuant to the *Private Copying Tariff* in the amount of \$135,225.94, calculated as of April 15, 2008, plus further interest calculated to the date of judgment.
8. The action is dismissed without costs and without prejudice as against the defendant M3 Technology Inc.
9. An Order that the individual defendants, Harry Cheung and Shi Guang Phan, be jointly liable for the unpaid levies and interest owed by the corporate defendants, First Choice Recording Media Inc., AM/FM Marketing Ltd., and Ion Tech Ltd. in the amount of \$6,364,773.03 plus interest in the amount of \$676,236.66, calculated as of April 15, 2008, as the directing minds of these entities given the use of the corporate defendants for an improper purpose.

10. An Order directing each of the defendants to pay to the plaintiff an amount equal to five (5) times the amount of the private copying levies due by them as outlined, pursuant to subsection 88(2) of the *Copyright Act*.

11. Post- judgment interest on all monetary relief granted herein pursuant to section 37 of the *Federal Court Act*.

12. The plaintiff's cost of this action to be assessed.

“James K. Hugessen”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-2407-03

STYLE OF CAUSE: CANADIAN PRIVATE COPYING COLLECTIVE
v. FIRST CHOICE RECORING MEIDA INC., et al

MOTION IN WRITING PURSUANT TO RULE 369

**REASONS FOR ORDER
AND ORDER:** HUGESSEN J.

DATED: May 21, 2008

WRITTEN SUBMISSIONS BY:

Randy C. Sutton FOR THE PLAINTIFF

SOLICITORS OF RECORD:

Ogilvy Renault FOR THE PLAINTIFF
Toronto, Ontario

Harry Cheung FOR THE DEFENDANT
Vancouver, British Columbia (SELF-REPRESENTED)