Court File No.: A-262-17

FEDERAL COURT OF APPEAL

B E T W E E N :

JEREMY COOPERSTOCK

Appellant

- and -

UNITED AIRLINES, INC.

Respondent

- and -

SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY & PUBLIC INTERNET CLINIC (CIPPIC) and CANADIAN CIVIL LIBERTIES ASSOCIATION (CCLA)

Interveners

MEMORANDUM OF FACT AND LAW OF THE INTERVENER, CANADIAN CIVIL LIBERTIES ASSOCIATION

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PART I – FACTS

A. Overview

1. Expressive freedom is a cornerstone value of our society. The law of copyright has traditionally been understood as encouraging the creation and dissemination of expressive works by protecting their creators from unauthorized copying. At the same time, copyright is, by its nature, a statutory restriction of expressive freedom. Unless balanced by a liberal and robust users' rights regime, copyright can become a tool of censorship in the hands of rights owners, suppressing creativity, knowledge, debate, criticism, and, ultimately, expression.

2. In the Court below, Phelan J. found that the appellant's website criticizing the respondent did not amount to fair dealing as a "parody" under the *Copyright Act* and therefore constituted an infringement. CCLA's submissions respond primarily to this finding by Phelan J. but will also briefly address his findings with respect to the *Trade-Marks Act.* Intellectual property rights are designed to benefit society by encouraging the creation and dissemination of expression and the communication of information. They are not intended - and should not be used - as tools of censorship and suppression of criticism.

3. CCLA's position can be summarized as follows:

(a) The contemporary analysis and application of copyright law requires a "balance between promoting the public interest in the encouragement and dissemination of works of art and intellect and obtaining a just reward for the creator". [1]

(b) Users' rights are an essential part of furthering the public interest objectives of the *Copyright Act*. "Fair dealing", which allows users to engage in some activities that might otherwise amount to copyright infringement "must not be interpreted restrictively". [2].

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[1] *Théberge v. Galérie d'Art du Petit Champlain Inc.*, [2002] 2 SCR 336, para. 36
[2] *Socan v. Bell Canada* [2012] 2 SCR 326, para. 11

(c) The *Charter* value of expressive freedom must be considered in interpreting and applying the fair dealing provision because of the nature of the interests that the *Copyright Act* protects, and the purposes of the provision itself,

(d) The fair dealing provision provides no definition of its listed categories, creating interpretive ambiguity which requires consideration of *Charter* values.

(e) In interpreting parody and the fair dealing factors, Phelan J. failed to read the "fair dealing in parody" provision in its entire context, harmoniously with the scheme of the *Act* and the intention of Parliament and particularly, in light of *Charter* values. [3]

(f) Phelan J.'s statutory interpretation errors result in an artificial, overly restrictive interpretation of parody and fair dealing which favours the rights of copyright owners over the public interest, stifles free expression, hinders cultural growth, and turns copyright into an instrument of censorship.

(g) Phelan J.'s approach to the plaintiff's claims under the *Trade-Marks Act* also fails to consider how the relevant subject matter and policy rationales underlying the Act require consideration of *Charter* values and, in particular, expressive freedom.

B. Statement of Facts

4. The CCLA accepts the appellant's statement of facts. It draws particular attention to the following facts, illustrating the parodic nature and intent of the website:

(a) The appellant titled his website "UNTIED" to highlight what he perceived to be the disconnection and disorganization of the respondent;[4]

(b) From the launch of his website in 1997 through 2011, the appellant updated the design of his website and its logo on several occasions to parody the appearance of the respondent's website and logo, which was found not to violate the respondent's intellectual property rights;[5]

(c) The appellant redesigned his website and its logo to again mirror the placement of the respondent's logo on its website following the respondent's August 2010 unveiling of its new brand name and logo. The redesigned logo added a "frowny face" onto the respondent's globe logo;[6]

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[3] *CCH v. Law Society of Upper Canada*, [2004] 1 SCR 339, para. 9
[4] Memorandum of Fact and Law of the Moving Party/Appellant, Jeremy Cooperstock ("Appellant's Memorandum") at para 12.
[5] Appellant's Memorandum at paras 14, 16.
[6] Appellant's Memorandum at paras 17-18.

(d) The appellant again redesigned his website and its logo in June 2012 in response to the redesign of the respondent's website;[7]

(e) In October 2012, the appellant altered his website by (i) changing the colour of the "T" and "I" in the word "UNTIED", as well as the "frowny face" on the logo, to red (from blue, like the remainder of the name and logo), (ii) adding a disclaimer at the top of the webpage in black font reading "(This is **not** the website of United Airlines)", and (iii) adding a pop-up dialogue box requiring a first-time visitor to acknowledge that he or she understands the website is not the website of the respondent.[8]

C. Phelan J.'s Decision

5. Phelan J. found that the appellant's website infringed the respondent's copyrighted logos and webpage design. In particular, in the context of a fair dealing analysis, he concluded that while the appellant's website constituted dealing for an allowable purpose - parody - the dealing itself was not "fair".[9]

PART II – ISSUES

6. The stated questions on this application engage a fundamental issue: to what extent should *Charter* values inform the interpretation and application of Canadian intellectual property statutes, and in particular, the fair dealing in parody provision of the *Copyright Act*?

7. CCLA submits that *Charter* values – particularly expressive freedom – lie at the core of the development and interpretation of Canadian intellectual property law. Expressive freedom should be given significant weight in applying the *Copyright Act*'s fair dealing provisions both because of the nature of copyright, and as a matter of statutory interpretation.

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[7] Appellant's Memorandum at para 19.
[8] Appellant's Memorandum at para 24.
[9] *United Airlines, Inc. v Cooperstock*, 2017 FC 616 at para 141 ("Reasons").

PART III – LAW AND ARGUMENT

A. Expressive Freedom is a Core Value of the *Copyright Act*

8. In the court below, Phelan J. suggested that freedom of speech is not at issue in this litigation.[10] This statement reflects a fundamental misunderstanding of copyright law, the development of the *Copyright Act,* and the contemporary understanding of fair dealing.

9. Expressive freedom is clearly an important concept for understanding the policy framework of the *Copyright Act.* The *Charter* value of expressive freedom informs and accords with the legislative scheme, object, and intention of the *Copyright Act*, the purpose of which is to reward authors who create works of original expression and to encourage the creation and dissemination of such works in the public interest. As Carys Craig has explained: "Copyright...encourage[s] the kinds of communicative activity that lie at the heart of the rationale for freedom of expression [11] This requires courts to carefully balance the rights of those who have been granted copyright with the rights of users (which includes the right to free expression) whose communicative actions are restricted by virtue of the grant of copyright. The Supreme Court of Canada recently commented on this delicate balance in *Canadian Broadcasting Corp. v SODRAC 2003 Inc.*:

> The *Copyright Act* strikes a careful balance between promoting the public interest in the encouragement and dissemination of creative works and obtaining a just reward for creators: *Théberge v. Galerie d'Art du Petit Champlain inc.*, 2002 SCC 34 (CanLII), [2002] 2 S.C.R. 336, at para. 30. To tilt the balance too far towards protection of creators' rights would undermine the right of users to access and work with creative materials. To tilt it too far towards access, on the other hand, would fail to provide a just reward to creators, leading authors and their supporters to under-invest in

[10] *United Airlines, Inc. v Cooperstock*, 2017 FC 616 at para 16.

[11] (Carys J. Craig, "Putting the Community in Communication: Dissolving the Conflict between Freedom of Expression and Copyright (2006) 56 University of Toronto Law Journal 75 at 110. See also David Fewer, "Constitutionalizing Copyright: Freedom of Expression and the Limits of Copyright in Canada" (1997) 55:2 U Toronto Fac L Rev 175; Jane Bailey, "Deflating the Michelin Man" in Michael Geist (ed), In the Public Interest (Irwin Law 2005); Bita Amani, "Copyright and Freedom of Expression: Fair Dealing Between Work and Play" in Rosemary J Coombe, Darren Wershler & Martin Zellinger (eds), Dynamic Fair Dealing: Creating Canadian Culture Online (Toronto: University of Toronto Press, 2013).

> producing and distributing their works. At both ends of the spectrum, the public loses some of the benefit of creative works: David Vaver, *Intellectual Property Law: Copyright, Patents, Trade-marks* (2nd ed. 2011), at p. 60; *Théberge*, at para. 31.[12]

10. The need for such care in interpreting the *Copyright Act* is evident in light of the nature of copyright. Inherently, by granting a certain level of exclusivity of use to the copyright owner, copyright infringes on the expressive freedom of everyone else. Freedom of expression is thus inextricably wound up in the interpretation and application of copyright law, as those who might otherwise wish to express themselves in a certain manner may be restricted from doing so where a copyright exists over that manner of expression. This give-and-take informs the balance reflected in the *Copyright Act* and the balance that must inform its interpretation and application.

B. The Fair Dealing Provisions Codify Users' Rights

11. Fair dealing has been an important part of Canada's copyright scheme since its earliest codification. The *Copyright Act* of 1921 included the following provision for fair dealing:

> 16. (1) Copyright in a work shall be deemed to be infringed by any person who, without the consent of the owner of the copyright, does anything the sole right to do which is by this Act conferred on the owner of the copyright:
>
> Provided that the following acts shall not constitute an infringement of copyright:
>
> (i) Any fair dealing with any work for the purposes of private study, research, criticism, review, or newspaper summary;

12. *In CCH, supra,* the Supreme Court of Canada described fair dealing as an integral part of the *Copyright Act,* not a "loophole" or even merely a defence, but a *user's right.* In order to maintain the proper balance between the rights of a copyright owner and users'

[12] *Canadian Broadcasting Corp. v SODRAC 2003 Inc.*, 2015 SCC 57 at para 145.

rights, fair dealing must not be interpreted restrictively, but rather given the fair and balanced reading that befits remedial legislation.[13]

13. In *SOCAN v. Bell Canada* the Court clarified that the analytic framework for understanding copyright was no longer the "earlier, author-centric view which focused on the exclusive right of authors and copyright owners to control how their works were used in the marketplace", where "any benefit the public might derive from the copyright system was only 'a fortunate by-product of private entitlement'."[14] Instead, the modern focus is on furthering the public interest through a proper balance. The users' right of "fair dealing," interpreted liberally, is one of the tools the Court identified for achieving that balance.[15]

14. Parliament began to address the issue of expanding the fair dealing provisions in 2010 in Bill C-32, *The Copyright Modernization Act*. Bill C-32 included parody and satire, as well as education, as new categories of fair dealing.[16] In the textbook *Radical Extremism to Balanced Copyright*, edited in response to Bill C-32, Graham Reynolds commented on the then-proposed amendments as follows:

> Acts relating to the transformative use of existing expression provide significant benefits to Canadian society. Perhaps most notably they promote values underlying the constitutionally protected right to freedom of expression.[17]

15. In *RJR Macdonald Inc. v. Canada (Attorney General)* the Supreme Court of Canada noted that "the search for political, artistic and scientific truth, the protection of individual autonomy and self-development, and the promotion of public participation in the democratic process" are at the heart of our right to freedom of expression.[18]

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[13] *CCH, supra,* para. 48
[14] [2012] 2 SCR 326 para 9
[15] *SOCAN, supra,* para 11
[16] Bill C-32, *An Act to amend the Copyright Act*, Third Session, Fortieth Parliament (first reading 2 June 2010)
[17] Graham Reynolds, "Towards a Right to Engage in the Fair Transformative Use of Copyright Protected Expression", in Michael Geist ed, *Radical Extremism to Balanced Copyright* (Toronto: Irwin Law, 2010) 395 at 397.
[18] *RJR Macdonald Inc. v Canada (Attorney General),* [1995] 3 SCR 199 at para 72.

Expansion of fair dealing purposes to include parody, satire and education supports these values.

16. Though Bill C-32 did not pass due to the change of government, the very similar Bill C-11, the *Copyright Modernization Act*, was passed in 2012.[19] Bill C-11 replaced s. 29 of the *Copyright Act* with the following, which remains the operable fair dealing provision:

> 29. Fair dealing for the purpose of research, private study, education, parody or satire does not infringe copyright.[20]

17. Parliamentary discussions about the addition of the parody and satire categories of fair dealing were, on the whole, uncontroversial and received positively. Generally, the exceptions for parody and satire were accepted as beneficial to artists.[21] They were largely praised as supporting creators and empowering individuals to engage in the creative process without fear of being sued,[22] and heralded as ensuring that "creativity and innovation continue to contribute to our lively Canadian cultural life and Canada's economic future".[23] The parody and satire provisions were viewed as an acknowledgement of the "importance of these acts in the creative process."[24] Moreover, there was concern that, without these provisions, the uncertainty about what satirical use could be made of copyrighted material would cause a chilling effect on free speech, and specifically on political speech.[25]

18. These observations about the anticipated public interest benefits of the new categories of fair dealing are entirely in line with the Supreme Court's characterization of fair dealing as a user's right. They also reflect the Court's comments about the public

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[19] Bill C-11, *Copyright Modernization Act*, SC 2012, c 20 (assented to 29 June 2012).
[20] *Ibid*, s 21. This provision is identical to that proposed in the 2010 Bill C-32 and, therefore, Hansard and committee discussions with respect to the fair dealing provisions from both bills are relevant here.
[21] *House of Commons Debates,* 41st Parl, 1st Sess, Vol 146 No 51 (22 November 2011) at 3417.
[22] *Legislative Committee on Bill C-32*, 40th Parl 3rd Sess, CC32, No 005 (1 December 2010) at 9
[23] *House of Commons Debates,* 41st Parl, 1st Sess, Vol 146 No 76 (8 February 2012) at 5036.
[24] *House of Commons Debates,* 41st Parl, 1st Sess, Vol 146 No 78 (10 February 2012) at 5149.
[25] *Legislative Committee on Bill C-32*, 40th Parl 3rd Sess, CC32 No 13 (10 February, 2011) at 12 (Mr. John Barrack (Chief Operating Officer and Chief Legal Officer, Canadian Media Production Association)).

interest benefits of users' rights, including in its decisions in *SOCAN,* supra and *Alberta (Education) v. Canadian Copyright Licensing Agency*[26] which were released at about the same time as the legislation was before Parliament.

C. Interpreting Fair Dealing Requires Consideration of *Charter* Values

i) Parody is an inherently expressive act

19. *Charter* values – particularly, in this context, expressive freedom – and the general legislative context are highly relevant to the interpretation and application of the parody category of fair dealing. Phelan J. does not adequately consider these interpretive factors in his decision. As a result of his failure to give due consideration to *Charter* values and the purpose and intent of the *Copyright Act* and fair dealing in particular, Phelan J. arrived at an interpretation of parody that guts the purpose and rationale behind fair dealing. It restrictively interprets parody, fails to respect the legislative intent to balance the rights of copyright owners with those of users, and chills critical commentary.

20. While this appeal does not involve a *Charter* challenge to the *Copyright Act,* the fact that parody is an expressive act must inevitably form part of the interpretive context that a court considers. As Phelan J. correctly observes, the interpretive task is to construe statutory provisions "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament."[27] At a minimum this would require a court to ask itself how the public interest values attached to copyright that are identified in the jurisprudence are advanced by the user right of parody, requiring meaningful consideration of parody's distinctive expressive characteristics.

21. Phelan J. discusses whether the web site constitutes "parody" and whether it constitutes "fair dealing" within the meaning of the *Copyright Act.* However, he fails to consider how his interpretation affects the broader purposes of the *Act* (in terms of the

[26] [2012] 2 SCR 345
[27] Reasons para. 110

creation and dissemination of expression), or the role of parody as a balance to the power of owners of copyright.

22. These issues should have been inherent in the interpretive exercise undertaken in the court below because of the nature of copyright and the rights – of both creators and users – that it grants. By granting a certain level of exclusivity of use to the copyright owner, copyright necessarily limits the expressive freedom of the rest of the public. The breadth or narrowness of the interpretation of "parody" and "fair dealing" will inevitably have an impact on the ambit of the expression promoted by the *Copyright Act.* It is no accident that discussions at the Parliamentary Committee considering Bill C-11 linked the parody exception to free speech and specifically political speech. [28]

ii) The Ambiguity of the Fair Dealing Provision Requires Consideration of Charter Values

23. The Supreme Court of Canada set out the role of *Charter* values in statutory interpretation in *Bell ExpressVu Limited Partnership v R*ex. There, the Court held that where legislation permits two different, yet equally plausible, interpretations, each of which is equally consistent with the apparent purpose of the statute, it is appropriate to prefer the interpretation that accords with *Charter* principles:

> *Statutory enactments embody legislative will. They supplement, modify or supersede the common law. More pointedly, when a statute comes into play during judicial proceedings, the courts (absent any challenge on constitutional grounds) are charged with interpreting and applying it in accordance with the sovereign intent of the legislator. In this regard, although it is sometimes suggested that "it is appropriate for courts to prefer interpretations that tend to promote those [*Charter*] principles and values over interpretations that do not" (Sullivan,* supra*, at p. 325), it must be stressed that, to the extent this Court has recognized a "*Charter *values" interpretive principle, such principle can only receive application in circumstances of genuine ambiguity, i.e., where a statutory provision is subject to differing, but equally plausible, interpretations.*[29]

[28] *Supra*. footnote 24
[29] *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42 at para 62

24. Recently, in *Quebec (Commission des normes, de l'équité, de la santé et de la sécurité du travail) v Caron*, the Supreme Court of Canada confirmed the application of the *Charter* as an interpretive principle:

> *As this Court explained in* Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 (CanLII), [2002] 2 S.C.R. 559, the "*Charter *values" interpretive principle serves a narrow purpose: when faced with two interpretations — one compliant with the* Canadian Charter of Rights and Freedoms *("Canadian* Charter*"), the other infringing it — courts can apply the presumption of compliance with the Canadian* Charter *to read the statute in a manner respectful of the* Charter *value in question. This allows the statute to remain in force — untouched — and interpreted such that it complies with the Canadian* Charter*. This principle, however, does not allow the courts to generate in the name of* Charter *values an interpretation unsupported by the text of the statute (*Bell ExpressVu*, at para. 62,* R. v. Clarke*, 2014 SCC 28 (CanLII), [2014] 1 S.C.R. 612, at para. 12).*[30]

25. Phelan J. should have considered the impact of his interpretation of "fair dealing in parody" on expressive freedom even without needing to consider the issue of ambiguity, since, as noted above, the issue arises from the very nature of balance under the *Copyright Act* and from the fundamental character of parody as an act of mockery or criticism. However, to the extent that ambiguity is required to unlock Charter values as an interpretive tool, ambiguity in s. 29 of the *Act* abounds.

26. The *Copyright Act* contains no definition for parody or satire. It merely lists these terms among the other categories of fair dealing:

> 29. Fair dealing for the purpose of research, private study, education, parody or satire does not infringe copyright.[31]

27. This lack of definition results in ambiguity as to the meaning of the categories of fair dealing. Phelan J. acknowledged the ambiguity inherent in the fair dealing provision, stating that the legislation is silent as to the content, meaning, or scope of parody. He

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[30] *Quebec (Commission des normes, de l'équité, de la santé et de la sécurité du travail) v Caron*, 2018 SCC 3 at para 61.

[31] *Copyright Act*, RSC 1985, c C-42, s 29.

then went on to make numerous findings about the nature of parody that are not grounded in the text of the statutory provision on its face.

28. First, relying on a decision of the European Court of Justice that concerned a specific parody exception in Belgian copyright law, Phelan J. found that parody should be understood as having two basic elements: the evocation of an existing work while exhibiting noticeable differences and the expression of mockery or humour.[32] He also found that parody does not require the expression of mockery or humour to be directed at the exact thing being parodied.[33] Neither of these findings arises out of the text of the statutory provision or is otherwise self-evident or without plausible alternative. Both require the judge to engage in statutory interpretation with reference to relevant interpretive factors outside the text. There can be no doubt that s. 29 is ambiguous.

29. This ambiguity engaged the requirement to consider *Charter* values in coming to an appropriate interpretation and application of s. 29. At the very least, in giving the section a proper contextual reading, Phelan J. should have considered what parody does and how that advances the goals of the *Copyright Act*. He did not. Instead he opted to interpret s. 29 in a narrow and decontextualized manner that gave undue weight to the interests of copyright owners at the expense of users' rights. This resulted in a conclusion inconsistent with *Charter* values, the *Act's* scheme and object, and Parliament's intention.

iii) Interpretive Errors Below

30. Although as a matter of *form* the trial judgment sets out the relevant case law, including the relevant tests and the factors to be considered, *substantively* the analysis fails entirely to preserve the balance required by the Supreme Court's precedents and in the process allows copyright to become a tool to suppress rather than to encourage critical expression.

31. The reasons from the Court below cite the relevant passages from the leading cases and adopt the two-stage analysis suggested in *CCH*, first formulating a definition

[32] Reasons at para 119.
[33] Reasons at para 119.

of parody to determine whether the website fits within its parameters and then examining the website in light of the six non-exclusive factors set out in *CCH* as a possible framework for determining whether a specific example of a permitted category of dealing is "fair."[34]

32. However, the Court in *CCH* explicitly warned that each fair dealing case is different and not all factors will arise in all cases. Further, at the time of the decision in *CCH,* parody was not as yet a permitted category of dealing. The types of factors that would govern whether use of copyrighted material in a parody on a website was "fair" are by their nature different from those that would govern whether use of a copyrighted legal decision for research by photocopying was "fair."

(a) The Six Factors: Purpose

33. The first of the six factors considered by Phelan J. was "purpose," or as he characterized it, the "true purpose or intent" of the website. Remarkably, in that discussion, he never asked himself what was the purpose of parody itself or of the parody provision in s. 29. This is all the more remarkable because in defining parody, Phelan J. relied in part on the European Union Court of Justice case of *Deckmyn v. Vandersteen*.[35] *Deckmyn* explicitly stated that one of the values underlying the parody exception was freedom of expression[36] and further stated:

> "The interpretation of the concept of parody must in any case enable the effectiveness of the exception thereby established to be safeguarded and its purpose to be observed." (at para 23)

34. Rather than considering the nature or purpose of parody, Phelan J.'s discussion of the purpose of the website turns instead on his own subjective view of humour:

> As the Defendant pointed out during the trial, UNTIED.com has long claimed to be a "parody" website. However, the Defendant did not satisfy the Court that there was ever any intent for humour – rather, the Defendant's intent was to embarrass and punish United for its perceived wrongdoings. As discussed above, parody must include

[34] Reasons paras. 109-140

[35] *Deckmyn v. Vandersteen*

[36] *Deckmyn,* para. 25

> some element of humour or mockery – if extended too far, what may be designed in jest as parody may simply become defamatory.[37]

35. Not only is this conclusion inconsistent with Phelan J.'s own adopted definition of parody as involving humour *or* mockery, it flat out contradicts the accepted understanding of the aspect of the Deckmyn case upon which his definition is based:

> As to the meaning of 'parody', the Court said that a parody must 'evoke an existing work while being noticeably different from it', and must 'constitute an expression of humour or mockery'. **The reference to 'mockery' will presumably make up for any humour deficit in putative parodies: often cruel mockery can be decidedly unfunny.**[38] [emphasis added]

36. More fundamentally, Phelan J.'s focus on humour only, represents a restrictive interpretation of parody that is inconsistent with the policy behind fair dealing. The purpose of adding parody as a category of fair dealing was to promote cultural growth and free speech – particularly, political speech – which can only occur when individuals are able to comment on and critique the *status quo* without fear of retaliation and suppression. Requiring parody to meet a subjective characterization of "humour" effectively removes from the protection of fair dealing any biting commentary, causing a chilling effect on any criticism of existing political or commercial structures. Such a restrictive approach to parody stifles free expression and hinders cultural growth, in direct opposition to the policy goals of fair dealing.

37. Similarly, in taking the restrictive view that the appellant's "real purpose or motive in appropriating the copyright works was to defame or punish the [respondent]" and that this could not constitute parody,[39] Phelan J. effectively turns copyright into a tool for censorship. He appears to assume that parody cannot malign or otherwise treat harshly or harm a copyright owner, a notion for which there is no basis within the parameters of Canada's copyright regime. Indeed, it is in precisely such cases that a copyright owner is most likely to object to a particular use, and so least likely to license it. If speech is

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[37] Reasons at para 124.
[38] Graeme W. Austin, "EU and US Perspectives on Fair Dealing for the Purpose of Parody or Satire" (2016) 39(2) UNSW LJ 684 at 695-696.
[39] Reasons at para 125.

otherwise lawful (e.g. non-defamatory, not hate speech or obscenity, etc.), then refusing to find fair dealing where use may be harsh or otherwise hurtful forecloses lawful speech. Copyright should not be used as a tool of censorship to silence lawful criticism. Such an approach is completely contrary to the public purposes of copyright as articulated by the Supreme Court of Canada (i.e. encouraging the creation and dissemination of works) and disregards the public's right to free expression.

(b) The Six Factors: Other Factors"

38. Phelan J's treatments of the *CCH* categories of "amount of dealing" and "character of dealing" take an abstract perspective, unrelated to the nature of parody or the purpose of copyright. In both cases Phelan J. found that the character of the dealing and the amount taken were substantial. The colours, layout and logos were copied and the website was widely distributed over the internet.

39. These factors were both deemed very important by Phelan J, though he never considered either factor in light of either the characteristics of parody or the nature of communication over the Internet. It is the nature of parody to appropriate a substantial amount of the copyrighted material being parodied and it is the nature of communication over the Internet that it is circulated widely. In both respects that is the whole point of the exercise. To insist on a parody that does not closely resemble the original or that is not widely distributed is to negate the very purpose of the exception and render it all but illusory, particularly in the digital age. Moreover, to find that a parody is less likely to be fair simply because it is available online would be to restrict fair dealing for parodies in digital media, contrary to the principle of technological neutrality endorsed by the Supreme Court. [40]

40. Particular factors that are sensible indicia of fair dealing in the context of research by photocopying a court case become inconsistent with the very purpose of the exception

[40] *SOCAN v. Canadian Association of Internet Providers* [2004] 2 SCR 427, para. 8; *Bell v. SOCAN, supra*. para. 43

and with the Charter value of expressive freedom when applied in mechanical fashion to the very different use of parody on the internet.

41. A further factor from *CCH* considered by Phelan J was "alternatives to dealing." Under this rubric, he found that the defendant could have conveyed his messages about the plaintiff by means other than substantially copying the copyrighted material.[41] Once again, this is an analytic category whose relevance depends on the nature of the work being analyzed. Where the issue is a work that reduces demand for the copyrighted material by competing with it, the question of alternatives to the copying is meaningful. Where the work in question is transformative, as in the case of parody, the considerations are decidedly different.

42. Fair dealing for the purpose of parody is not a defence, but a right, and must be balanced against the limited rights of copyright owners. As such, owners must not be in a position to censor a user's chosen mode of expression. The effect of Phelan J's finding that there were alternative means to make the Defendant's points is to turn parody into a means of communication of last resort.

43. The final factor considered by Phelan J was "effect of the dealing on the work" [42]. Under this rubric Phelan J. found that the effect of the work was not in its criticism of the Plaintiff, but in the confusion it caused in the minds of customers who might believe they were interacting with the Plaintiff. Whatever the substantive merits of this observation, it is submitted that it is entirely irrelevant to a discussion of harm to any interest protected under the *Copyright Act.* Others have responded with respect to specific findings in the Reasons regarding trade marks and passing off. This particular finding cannot be sustained under a copyright analysis.

D. Proper Interpretation of Fair Dealing

44. Courts have consistently emphasized the importance of applying a broad, liberal interpretation to fair dealing provisions as a whole to ensure that users' rights are not

[41] Reasons paras. 131-134
[42] Reasons paras. 137-140

unduly restrained and are appropriately balanced with the rights of copyright owners. This approach properly considers *Charter* values – namely, freedom of expression – on the "users' rights" side of the equation, thereby giving due weight to what Théberge recognized were limited rights granted by copyright. Phelan J.'s failure to consider *Charter* values resulted in an approach to fair dealing generally, and parody in particular, that destroys its principled basis.

45. Moreover, mere lip service to the rhetoric of users' rights fails to accord due weight to judicial recognition of these rights, and falls short of acknowledging the role that they play in service of the purpose of copyright law.

46. Phelan J. also fails to consider the purposes and goals of the copyright scheme more broadly or the public interest. In discussing the interests of users, Phelan J. gives no consideration to the public's interest in the appellant's expressive activities – both in the parody itself, and in the information that it conveys. The purpose of copyright is to balance the rights of users and creators. Society, in a general sense, is a "user" in this approach, which imports the public interest as a relevant contextual factor in the interpretive exercise. Phelan J.'s overly restrictive approach to fair dealing, which favours the copyright owner over the user, harms the public at large, not only the appellant. *Charter* values are the key to effecting the goals of the copyright scheme and adequately protecting the public interest.

47. A proper exercise of statutory interpretation, in accordance with *Charter* values, legislative intent and precedent, would have resulted in a broad interpretation of fair dealing generally, and parody in particular. It would also allow for an assessment of fairness that leaves room for critical and mocking parody and does not give undue preference to the commercial interests of copyright owners. Had Phelan J. properly interpreted the parody category of fair dealing, the appellant's website – which uses parody in order to sharply criticize a large commercial entity, without obtaining any commercial gain itself – would have qualified as "mockery" that was fair in light of all the relevant factors and would therefore have been protected as fair dealing.

48. With the purpose of the dealing properly defined, it would have been clear that the character and amount of the dealing was fair in light of that purpose; that the nature of the relevant works as commercial source-indicators made them apt for that purpose; that any available alternatives would have been a less effective means to communicate the critique; that effect of the parodic dealing, while potentially harmful to commercial reputation, would cause no relevant harm to the market for the copyright works as such. In short, the defendant's use would and should have been held to be fair dealing—a finding consistent with *Charter* values and the defendant's right to free expression.

49. Such an interpretation would also be consistent with the *ejusdem generis* principle of statutory construction. *Ejusdem generis* provides that where a statutory provision lists a series of particular items that share a common characteristic of some kind, including or followed by a general term, the scope of that general term is limited by the common characteristics of the class or genus of the particularized items that precede or surround it. In such a list, the class first mentioned is regarded as the most comprehensive expression of the class, and the general words that follow should be given a more limited meaning consistent with the common characteristic uniting or defining the class or genus. In short, items listed together should be read together as a class, and any one ambiguous phrase should be interpreted with reference to its specific context.[43]

50. Here, parody was added to a list of existing categories of fair dealing. It should therefore be read together with the other listed categories, including notably, criticism and review, and should be interpreted with reference to the other items with which it is listed. Judicial interpretation of other categories of fair dealing, and fair dealing more generally, therefore apply equally to an interpretation of parody. It should similarly be interpreted broadly and liberally, with a view to protecting the delicate balance users' rights and copyright owners' rights. Phelan J. failed to interpret parody in this manner. He therefore failed to arrive at a conclusion consistent with *Charter* values and the protection of free expression.

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[43] *Persaud v Suedat*, 2012 ONSC 5232 at para 34; *Ontario (Ministry of Labour) v Magna Seating Inc.*, 2015 ONCJ 7 at para 108. See also *Ermineskin Indian Band and Nation v Canada*, 2009 SCC 9 at para 109

E. Interpretation of the *Trade-Marks Act*

51. With respect to Phelan J.'s findings in relation to the trademark infringement claims, CCLA submits that the Court's analysis similarly ignores the *Charter* value of expressive freedom and fails to consider that trademarks are protected only because and to the extent that they serve a particular communicative function, namely the communication of accurate information to consumers about the source of a good or service.

52. 52. As a result of the communicative function that trademarks serve, and the limits on expressive activity that their protection inherently imposes, judicial interpretation of concepts such as "use", "services" and "confusion" must be considered in their full context and in light of the importance of expressive freedom as a *Charter* right and value. By failing to do so, Phelan J. erred in finding infringements under the *Trade-Marks Act*, unduly limiting critical speech without regard to the rights and interests of the Defendant, consumers and the public.

PART IV – ORDER SOUGHT

53. The CCLA respectfully requests that this court allow the appeal and declare that the appellant's website constitutes fair dealing, and therefore does not infringe the respondent's copyright. The CCLA as a public interest litigant, represented by counsel acting *pro bono publico*, does not ask for costs against any party and asks that no costs be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 3rd day of July, 2018.

Mark Freiman
Lerners LLP

Rebecca Shoom
Lerners LLP

Solicitors for the Intervener

PART V: LIST OF AUTHORITIES

CASES

1. *Théberge v. Galérie d'Art du Petit Champlain Inc.*, [2002] 2 SCR 336
2. *SOCAN v. Bell Canada* [2012] 2 SCR 326
3. *CCH v. Law Society of Upper Canada*, [2004] 1 SCR 339
4. *United Airlines, Inc. v. Cooperstock*, 2017 FC 616
5. *RJR Macdonald Inc. v. Canada (Attorney General)*, [1995] 3 SCR
6. *Alberta (Education) v. Canadian Copyright Licensing Agency* {f.n. [2012] 2 SCR 345
7. *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57
8. *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 at para 62
9. *Deckmyn v. Vandersteen*, Court of Justice of the European Union, Grand Chamber, Case C-201/13 (3 September 2014)
10. *SOCAN v. Canadian Association of Internet Providers* [2004] 2 SCR 427
11. *Persaud v. Suedat*, 2012 ONSC 5232
12. *Ontario (Ministry of Labour) v. Magna Seating Inc.*, 2015 ONCJ 7
13. *Ermineskin Indian Band and Nation v. Canada*, 2009 SCC 9

OTHER AUTHORITIES

1. Bill C-32, An Act to amend the *Copyright Act*, Third Session, Fortieth Parliament (first reading 2 June 2010)

2. Graham Reynolds, “Towards a Right to Engage in the Fair Transformative Use of Copyright Protected Expression”, in Michael Geist ed, Radical Extremism to Balanced Copyright (Toronto: Irwin Law, 2010) 395 at 397.

3. Bill C-11, Copyright Modernization Act, SC 2012, c 20 (assented to 29 June 2012).

4. House of Commons Debates, 41st Parl, 1st Sess, Vol 146 No 51 (22 November 2011) at 3417.

5. Legislative Committee on Bill C-32, 40th Parl 3rd Sess, CC32, No 005 (1 December 2010) at 9

6. House of Commons Debates, 41st Parl, 1st Sess, Vol 146 No 76 (8 February 2012) at 5036.

7. House of Commons Debates, 41st Parl, 1st Sess, Vol 146 No 78 (10 February 2012) at 5153

8. House of Commons Debates, 41st Parl, 1st Sess, Vol 146 No 78 (10 February 2012) at 5149.

9. Legislative Committee on Bill C-32, 40th Parl 3rd Sess, CC32 No 13 (10 February, 2011) at 12 (Mr. John Barrack (Chief Operating Officer and Chief Legal Officer, Canadian Media Production Association)).

10. Quebec (Commission des normes, de l’équité, de la santé et de la sécurité du travail) v Caron, 2018 SCC 3 at para 61.

11. Graeme W. Austin, “EU and US Perspectives on Fair Dealing for the Purpose of Parody or Satire” (2016) 39(2) UNSW LJ 684 at 695-696.

STATUTES

The Copyright Act, 1921, s 16(1)

> 16. (1) Copyright in a work shall be deemed to be infringed by any person who, without the consent of the owner of the copyright, does anything the sole right to do which is by this Act conferred on the owner of the copyright:
>
> Provided that the following acts shall not constitute an infringement of copyright:
>
> (i) Any fair dealing with any work for the purposes of private study, research, criticism, review, or newspaper summary;

Copyright Act, RSC 1985, c C-42

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

Loi sur le droit d'auteur **(L.R.C. (1985), ch. C-42)**

Utilisation équitable

Étude privée, recherche, etc.

29 L'utilisation équitable d'une oeuvre ou de tout autre objet du droit d'auteur aux fins d'étude privée, de recherche, d'éducation, de parodie ou de satire ne constitue pas une violation du droit d'auteur.