

COURT OF APPEAL FOR ONTARIO
WEILER, GILLESSE and BLAIR JJ.A.

B E T W E E N:

HEATHER ROBERTSON

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)
) **Michael McGowan,**
) **Ronald E. Dimock,**
) **Dorothy H. Fong,**
) **Gabrielle Pop-Lazic,**
) **and Pamela Adams,**
) **for the appellant,**
) **respondent by cross-appeal**

)
) **Plaintiff**
) **(Appellant, Respondent**
) **by cross-appeal)**

- and -

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)
) **THE THOMSON CORPORATION,**
) **THOMSON CANADA LIMITED,**
) **THOMSON AFFILIATES**
) **INFORMATION ACCESS COMPANY**
) **and BELL GLOBEMEDIA**
) **PUBLISHING INC.**

) **Sheila R. Block,**
) **Wendy M. Matheson**
) **and Andrew E. Bernstein,**
) **for the respondents,**
) **appellants by cross-appeal**

)
) **Defendants**
) **(Respondents, Appellants**
) **by cross-appeal)**

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) **Heard: February 23, 2004**

On appeal from the order of Justice Peter A. Cumming of the Superior Court of Justice dated October 3, 2001, reported at (2001), 15 C.P.R. (4th) 147.

WEILER J.A.:

I. Overview of the issues

[1] This appeal raises novel issues of copyright law. Heather Robertson, a well-known Canadian author and freelance writer, wrote two articles that were published in The Globe and Mail newspaper (the “Globe”) in 1995. Subsequently, the respondent owners of the newspaper, hereinafter referred to as the Globe, placed her articles in three databases: Info Globe Online, CD-ROM, and the electronic version of the Canadian Periodical Index (CPI.Q).

[2] The principal issue is whether the reproduction of a freelance author’s articles in two electronic databases and on a CD-ROM falls within the collective copyright of the Globe or whether the reproduction infringes the individual copyright that a freelance author has in her work. I agree with the motion judge that the Globe *prima facie* infringed the freelance author’s copyright. In order to fall within the Globe’s collective copyright, the reproduced database must have constituted the newspaper, “or any substantial part thereof in any material form whatever”. Since I conclude that a database is not a newspaper and that what the Globe reproduced did not have the qualitative aspects of a substantial part of its newspaper, the Globe’s cross-appeal on this issue must fail.

[3] A second issue raised in the litigation is whether the freelance author granted the Globe an implied licence to place her work in the databases or whether permission to do so should be implied as a term of the oral agreement between the freelance author and the publisher. The motion judge ordered the trial of an issue respecting this second issue and this aspect of his order has not been appealed. As a result, it is unnecessary for me to canvass this issue on the current appeal, and I will refrain from doing so.

[4] There is, however, a subsidiary issue raised in this appeal. That issue is whether the agreement between the freelance author and the publisher conveyed a proprietary interest in the author’s copyright to the publisher and therefore had to be in writing. I agree with the motion judge that the non-exclusive licence granted by the freelance author to the Globe did not convey a proprietary interest.

[5] Finally, I also agree with the motion judge that on the facts of this case the freelance author does not have standing to seek a restraining order against the Globe. The freelance author, as the representative plaintiff in a class action, seeks to overturn the motion judge’s decision that she lacked standing to seek an order restraining the publisher from placing the works of its employees in the databases. For the reasons given by the motion judge, I would also dismiss this part of the appeal.

[6] The very thoughtful and detailed reasons of the motion judge, Cummings J., are reported at (2001) 15 C.P.R. (4th) 147.

[7] In this judgment, I will first describe the databases and electronic edition of the Globe that are the subject of this appeal. Next, I will review the objectives and general copyright concepts contained in the *Copyright Act*, R.S.C. 1985, c. C-42 (“the Act”), and the appropriate standard of review. Finally, I will deal with the issues raised on this appeal in detail.

II. The Databases in Issue

A. Info Globe Online

[8] Prior to the availability of electronic databases, anyone who wished to do so could search the back issues of the Globe on microfiche and microfilm. In the 1970’s, the Globe began using computerized word processing and electronic layout and production. This move facilitated the creation of an electronic database for storing back issues of the Globe that could be accessed through computer terminals within the newspaper.

[9] In the Report on the Provisions and Operation of the *Copyright Act*, entitled, *Supporting Culture and Innovation* (“the Report”), a database is defined at A. 1.4, p. 13 as, “a collection of digitized information, fact, works or other material that has been arranged in such a way that a user can retrieve items having certain characteristics or meeting certain criteria”. See Industry Canada and Canadian Heritage, *Supporting Culture and Innovation* (Ottawa: Industry Canada and Canadian Heritage, 2002).

[10] The first database in issue in this case is “Info Globe Online”. In 1979, the Globe began to offer public access through a computer dial-in service called Info Globe Online. Since 1998, access to Info Globe Online has been possible through the Info Globe Dow Jones Interactive publications library. The Info Globe Dow Jones Interactive database is a subscription service that integrates a wide range of news and content from newspapers, including the full archive of the Globe back to 1977, magazines, newswires and television transcripts. The database is ever-expanding as new articles are added to it.

[11] The articles placed in the Info Globe Online database by the Globe come from the computer text files used for printing the newspaper. A software program identifies each article with an identifying code as well as the headline, by-line or author, section of the print edition of the Globe, page number on which the article began, and an indication of whether the article was accompanied by an illustration. Justice Cumming referred to this process at para. 65 as “an electronic deconstruction of the contents of the given newspaper edition into its constituent parts through the software programs and source code employed”. The Report, *supra*, refers to the process as “rights management information” and notes that the Act contains no protection for rights management information as such (p. 17).

[12] The advertisements, photos, photo captions, stock market and financial tables, birth and death notices, illustrations, cross references, “what’s inside”, teasers, and weather forecasts are excluded from the material placed on the Info Globe Online database. The masthead, size of the headline, fonts, column width and number columns are not visible.

[13] A person wishing to read the Globe's electronic edition from a particular date on Info Globe Online, in the section and page order presented in the newsprint edition, can do so. In addition, the contents of the Info Globe Online database can also be searched by key word. This keyword search function extends across the database to all publications archived in the system. A user-subscriber of Info Globe Online is allowed to make just one copy of an article and to store an e-copy for 90 days.

[14] The Info Globe Online database can be contrasted with the electronic edition of the Globe. The electronic edition of the Globe contains the day's news and is finite. Like the Info Globe Online database, it does not contain the advertising, photographs and artwork, birth and death notices, or some tables found in the printed version of the newspaper. The electronic edition of the newspaper contains a list of the articles beginning on the front page in that day's paper as well as a list of the sections of the newspaper, the top stories in each section, their authors and the page number where the article begins. When a story is chosen, the viewer can view the article in isolation from the rest of the newspaper. If there was an advertisement next to the article in the printed version of the newspaper, an indication that there was an advertisement is given. The motion judge found (at para. 67) that the electronic edition of the Globe contained a greater amount of the editors' contribution than Info Globe Online; that the full electronic edition preserved a substantial part of the collective work; and that the essence of the collective work was present (para. 119). Robertson acknowledges that the Globe had the right to print her articles in any edition of the newspaper on the day in question, including the electronic or Internet edition of the Globe.

B. CPI.Q

[15] The second database in issue is the Canadian Periodical Index in electronic form (the "CPI.Q"). The printed version of the Canadian Periodical Index ("CPI") is an author and subject index that indicates the location of selected newspaper articles and comment on or analysis of the news. Since 1921, the CPI enabled a researcher to determine the existence and location of a newspaper article on a given subject of interest. Although the CPI is available at libraries, the articles themselves are not available in the CPI. If the user of the CPI wishes to see the text of an article, the user must go to the library shelves to retrieve the material or microfiche or microfilm of the newspaper. No allegation of copyright infringement is made with respect to the CPI.

[16] In 1987, the CPI became available electronically through Info Globe Online, and the electronic form of the index, CPI.Q was introduced in 1995. Using CPI.Q, a computer user can do a search by keywords in various fields. The user can do a search by journal and narrow it to the Globe and Mail. In addition, the user can also search by date and obtain all articles from the Globe for a particular day. The information provided includes the date the article was published, the title of the Globe and Mail, the city, the page number of the newsprint edition, the language it was published in (English) and the number of words in the article.

[17] Using the CPI.Q, the user can click on one of the individual search results and obtain the full text of the article, or can click to search for publication holdings information in the library that the user is in. Once the user clicks on the article, the screen will show the number of the article and the number of other articles available for the same keywords, (e.g. 1 of 80), the title of the *Globe & Mail* (Toronto, Canada), date, page number and section of the newspaper, language of the article, the title of the article, the byline, with the author's name and additional information such as, "With a report from Associated Press" and the full text of the article. It is possible to print the full text of the article from the screen. The text is black and standard size, and there are no photos, illustrations or colour.

C. CD-ROM

[18] The third database in issue is the CD-ROM. Since 1991, the *Globe* and the "Report on Business Magazine" (a publication of the *Globe*) have been available on CD-ROM. One year's edition of the *Globe* and six other newspapers are produced on each CD-ROM.

[19] When the user inserts the CD-ROM into the computer, a screen appears with the title, *Canada's National Newspaper, The Globe and Mail*. The names of 5 newspapers are listed on the title page: The *Globe and Mail*, *Times Colonist* (Victoria), *Winnipeg Free Press*, *The Lethbridge Herald*, and *The Guardian* (Charlottetown).

[20] The user of the CD-ROM can view all of the articles from a day's edition of the *Globe*. The full text of an article will appear in the frame on the left side of the screen, while the list of all the articles from that day appears in the frame on the right. The information provided to the user includes: the title of the newspaper, the publication date, the title of the article, the city, a brief portion of the article (or the full text depending on which frame) and the page number and section that it appeared on in the newsprint edition. There are no pictures, advertisements or colour. Alternatively, the user can also search for specific articles across the group of newspapers. The database is finite in the sense that additions cannot be made to a particular CD-ROM.

III. General Copyright Concepts

A. Terms and Definitions

[21] In the Act, the subject matter protected by copyright is called a "work" and the person who creates a work is referred to as the "author" of the work.

[22] In general, copyright exists in every original literary or artistic work for a period of fifty years after the life of the author (see sections 5 and 6 of the Act). Only copyright owners have the right to copy or authorize copying of their work (see s. 3 of the Act). It is the work, or the expression of ideas, which is subject to copyright protection. The idea itself is not protected.

[23] The *Globe* has copyright in its newspaper because it is both a "collective work" and a "compilation".

[24] A “collective work” is defined in Section 2 of the Act as including a newspaper.

2. In this Act,

...

“collective work” means

(a) an encyclopaedia, dictionary, year book or similar work,

(b) a newspaper, review, magazine or similar periodical, and

(c) any work written in distinct parts by different authors, or in which works or parts of works of different authors are incorporated [emphasis added].

[25] The term “compilation” was added to the Act in 1993 as part of the amendments introduced in order to implement the North American Free Trade Agreement (NAFTA). Prior to these amendments, “compilations” were seen as literary works: see *Tele-Direct (Publications) Inc. v. American Business Information, Inc.* (1997), 76 C.P.R. (3d) 296 at 300-301 (Fed. C.A.), leave to appeal to the S.C.C. dismissed [1997] S.C.C.A. No. 660. Section 2 of the Act states a “compilation” is (a) a work resulting from the selection *or* arrangement of literary. ...or artistic works or parts thereof, *or* (b) a work resulting from the selection *or* arrangement of data” [emphasis added]. As noted in the recent decision of the Supreme Court of Canada, *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339, at para. 33:

A compilation takes existing material and casts it in a different form. The arranger does not have copyright in the individual components. However, the arranger may have copyright in the form represented by the compilation. “It is not the several components that are the subject of copyright, but the over-all arrangement of them which the plaintiff through his industry has produced” [citations omitted].

[26] When an employee of a newspaper creates a work as part of the course of his or her employment, the Act deems the employer to be the owner of the copyright in the work in the absence of any agreement to the contrary. The employee of a newspaper is, however, deemed to have a right to restrain publication of his work other than as part of a newspaper, magazine or similar periodical (see s. 13(3) of the Act).

[27] Inclusion of a work in a compilation does not affect the protection conferred by the Act in respect of the individual freelance author’s copyright in her article (see s. 2.1(2) of the Act).

[28] The terms “compilation” and “collective work” can be used interchangeably: see John S. McKeown, Harold G. Fox, *Canadian Law of Copyright and Industrial Design*, 3rd ed. (Toronto: Carswell, 2000) at 124.

[29] As suggested by the Act's definition of various media forms, the Act is media neutral. Section 2 of the Act defines the phrase "every original literary...work" as including "every original production in the literary... domain whatever may be the mode or form of its expression, such as compilations". Section 3, which defines copyright, also emphasizes media neutrality. Pursuant to section 3, "copyright" in a work, "means the sole right to produce or reproduce the work in any material form whatever". Section 3(1)(f) also gives the copyright owner the sole right to communicate a work to the public by telecommunication.

[30] Although "Internet" is not defined in the Act, this new media form was recently described as a decentralized, self-maintained telecommunications network made up of inter-linking small networks from all parts of the world: see *Barrick Gold Corporation v. Lopehandia and Chile*, [2004] O.J. No. 2329 per Blair J. A. at para. 30, adopting the definition in *Dow Jones & Co. Inc. v. Gutnik*, [2002] HCA 56 (December 10, 2002). Thus, the owner of copyright in a compilation or a collective work such as a newspaper has the right to communicate the collective work over the Internet as well as in print.

B. Objectives of the Act

[31] The Act recognizes that the author of a work generally creates the work in order to have it disseminated. The Act thus has two objectives, the provision of access to works and the recognition of the right of the person creating the work to control its use and to receive payment. In interpreting the Act, courts must strive to maintain an appropriate balance between the two objectives: see *Theberge v. Galerie d'Art du Petit Champlain Inc.*, [2002] 2 S.C.R. 336 at paras. 30 – 31; *C.C.H. Canadian*, *supra*, at paras. 10 and 23.

C. Requirements for Protection

[32] To be protected under copyright law, the work must be "original". Although there is no definition of the word "original" in the Act, the Supreme Court in *CCH Canadian*, *supra*, holds that a work will be "original" if the expressive element of the work is the product of a non-mechanical exercise of both skill and judgment that is more than trivial. On behalf of the court, McLachlin C.J.C. explained at para. 16:

By skill, I mean the use of one's knowledge, developed aptitude or practised ability in producing the work. By judgment, I mean the use of one's capacity for discernment or ability to form an opinion or evaluation by comparing different possible options in producing the work. This exercise of skill and judgment will necessarily involve intellectual effort. The exercise of skill and judgment required to produce the work must not be so trivial that it could be characterized as a purely mechanical exercise. For example, any skill and judgment that might be involved in simply changing the font of a work to produce "another"

work would be too trivial to merit copyright protection as an “original” work.

[33] In adopting the definition of original work that she did, McLachlin C.J.C. had regard to (1) the plain meaning of the word “original”; (2) the history of copyright law; (3) recent jurisprudence on the subject; (4) the purpose of the Act; and (5) the necessity for the definition to be a workable yet fair standard: see *CCH Canadian, supra*, at para. 17.

[34] The definition of original work chosen by the Supreme Court has both a labour component and a content component. This approach falls between U.K. law, which extends copyright to cover any work produced through one’s labour, and U.S. law, which requires an element of creativity for copyright to apply (a relatively higher standard than the requirement of judgment). The Supreme Court held that creativity, in the sense of novelty or uniqueness, is not required to make a work “original”.

[35] In addition to being original, a work must be “fixed” in a material form, that is, written down or recorded in some reasonably permanent form to attract copyright protection: see *CCH Canadian, supra*, at para. 8; *Theberge, supra*, at para. 25.

D. Key Concepts in the Act

[36] There are several key concepts underlying the Act, which are important to the functioning of the copyright regime. These key concepts include, types of rights (e.g. economic and moral); limitations (e.g. fair dealing, compulsory licence); exceptions (e.g. for non-profit institutions, broadcasters, persons with perceptual disabilities); and remedies (e.g. summary proceedings, statutory damages).

[37] “Moral rights” treat a work as an extension of the author’s personality and as such the work is seen to possess a dignity deserving of protection: see *Theberge, supra*, at para. 15. Moral rights cannot be assigned, and are infringed only if the author’s honour or reputation is prejudiced by modification of the work: see *Theberge, supra*, at para. 17. Moral rights are not the subject of this appeal.

[38] “Economic rights” include the sole right of copyright owners to copy or to reproduce their works or a substantial part thereof (see s. 3 of the Act) and to assign incidents of their rights to others or to licence them (see s. 13(4) of the Act). The economic rights of the Globe *vis a vis* freelance authors are directly at issue in this appeal.

[39] Where the author of a work has not assigned the copyright in his or her work, an “infringement of copyright” occurs when a work is used or copied without the copyright owner's permission. This prohibition applies unless the use or copying is covered by a specific exception or limitation in the Act. The limitations and exceptions in the Act are aimed at striking an appropriate balance between an author’s rights to control his work, with the social benefit of providing access to the works in schools, libraries,

communities, businesses, governments, and, in the case of electronic works, the world at large.

[40] One of the copyright “limitations” recognized by the Act is the limitation of “fair dealing”. Fair dealing allows a portion of a work to be reproduced for research or private study without the permission of the copyright owner, provided that the source of the work is acknowledged. Similarly, one of the exceptions recognized by the Act allows “non-profit institutions” such as libraries, archives and museums to make copies of copyright material for the maintenance or management of their permanent collection. A further exception exists for persons with perceptual disabilities (see ss. 27-32 of the Act.).

[41] If the copyright infringement is not covered by an exception or limitation, the possible remedies for infringement of copyright under the Act include injunctions ordering the infringing activities to stop and monetary damages to be paid to compensate rights holders for their losses (see ss. 34-42 of the Act). According to *C.C.H. Canadian, supra*, at para. 9, the rights and remedies provided by the Act are exhaustive.

[42] The limitation period for bringing an action for infringement of copyright is three years after the infringement or from the time the plaintiff could reasonably be expected to know that an infringement occurred.

IV. The Standard of Review

[43] The issues in this appeal and cross-appeal require the court to interpret various sections of the Act. Accordingly, the standard of review is that pertaining to a question of law and is one of correctness.

[44] The approach to be used in interpreting the Act has recently been stated in *CCH Canadian, supra*. The Supreme Court held at para. 9 that in interpreting the scope of the Act’s rights and remedies, “courts should apply the modern approach to statutory interpretation whereby ‘the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.’” These factors need not be canvassed separately in every case: see *Bell Expressvu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, at para. 31.

[45] The interpretation of the Act, however, presupposes an understanding and analysis of certain questions of fact, such as whether a substantial part of a work is reproduced: see *Edutile Inc. v. Automobile Protection Association*, [2000] 4 F.C. 195 at para. 22. On questions of fact, an appellate court should not interfere with the trial judge’s reasons unless the judge has committed a palpable and overriding error: see *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 at para. 1.

[46] While it is somewhat unusual to do so, I propose to deal first with the cross-appeal as it was the main focus of the motion for summary judgment.

V. The Cross-Appeal

Overview

[47] The central issues in the cross-appeal are the meaning of the words, “newspaper ...or similar periodical” used in the definition of a “collective work” in s. 2 as well as the interpretation of s. 3(1) of the Act. Pursuant to s. 3(1), the owner of copyright has the sole right to “...reproduce the work [the newspaper or similar periodical] or any substantial part thereof in any material form whatever” including the right in s. 3(1)(f) “...to communicate the work to the public by telecommunication.” As established above, the Internet is a form of telecommunication and so s. 3(1)(f) is relevant to this appeal.

[48] As a freelance author who wrote an article, Robertson created an original work and was the first owner of the copyright in that work. The Globe, however, is entitled to copyright in its collective work, the newspaper. The Globe’s copyright in its collective work does not extinguish Robertson’s copyright in her individual work; she retains the copyright to her individual work: see *Allen v. Toronto Star Newspapers Ltd.* (1997), 78 C.P.R. (3d) 115 at 118 (Ont. Ct. Gen. Div.). When the Act uses the term “collective work” the Act is referring to a totality in which copyright exists in addition to and apart from any copyright in its constituent parts.

[49] The motion judge held that the databases in issue were not “a newspaper...or similar periodical” because they lacked the defining unique characteristics of a newspaper. As a result, the production or reproduction of the articles written by the freelance authors in the databases *prima facie* infringed the copyright held by them in their individual work.

[50] On cross-appeal, the Globe submits that the motion judge made three errors of law: (1) he placed too much reliance on American case law because he concluded that the intent and underlying policy objectives of the respective statutes governing copyright in both countries are the same; (2) he failed to give effect to the express statutory mandate of media neutrality in his construction of the *Canadian Copyright Act*; and (3) he erred in ruling that the preservation of the essence of the Globe and Mail, that is the entirety of the selection of stories, was not a reproduction of a substantial part of the collective work. While I agree with the first two submissions made by the Globe I disagree with the third and would uphold the decision of the motion judge on that issue. I will address each of the submissions in turn.

A. The Object of the Act and American Case Law

[51] As I have indicated, the Act’s objective is to maintain a balance between the public interest in access to information and the right of the author to prevent others from appropriating the benefits generated from his or her work. Excessive control by authors that limits creative innovation is not in the long-term best interests of society as a whole: see *Theberge, supra*, at para. 32. At the same time, allowing powerful corporations to deprive authors of the fruits of their labour is unjust.

[52] The motion judge was of the opinion that in determining where the balance should be struck between the interests of the two copyright holders engaged in battle here, it would be helpful to review American caselaw because, despite the somewhat different wording between the two Acts, the “intent and underlying policy objectives of the respective statutes remain the same.” With respect, I think the motion judge erred in this regard. While the United States *Copyright Act* has some characteristics in common with the Canadian Act, there are some important differences between the two regimes.

[53] In the *C.C.H. Canadian* decision, the Supreme Court referred to the decision of O’Connor J. in *Feist Publications Inc. v. Rural Telephone Service Co.*, 499 U.S. 22 (1991). The court stated the following:

As this Court recognized in *Compo Co., supra*, at 367, U.S. copyright cases may not be easily transferable to Canada given the key differences in the copyright concepts in Canadian and American copyright legislation. This said, in Canada, as in the United States, copyright protection does not extend to facts or ideas but is limited to the expression of ideas.

[54] Thus, while the US and Canada both bar copyright protection for facts or ideas, there are several key divergences between the two statutes. In particular, under s. 201(c) of the United States *Copyright Act*, 17 U.S.C., the copyright owner in the collective work acquires only the “privilege” of reproducing the freelance articles “as part of that particular collective work, any revision of that collective work, and any later collective work in the same series.” The American Act does not give the publisher of a collective work full copyright and the right to independently reproduce “a substantial part of the work” in any material form whatever. In contrast, the Canadian Act does give the owner of a collective work this right although it cannot publish a revision: see *Theberge, supra*, at paras. 70-73.

[55] Under the United States legislation, the publisher’s “privilege” is less than the “rights” of the freelance author. In balancing the rights of the publisher in a collective work against the rights of the freelance author in an individual work, the balance is tilted towards the freelance author. Under Canadian legislation, however, a layered approach is used. The publisher of a collective work has a copyright in the collective while the author maintains her copyright in her individual work.

[56] Further, the Supreme Court’s decision in *C.C.H. Canadian, supra*, at para. 22, indicates that unlike the jurisprudence in the United States, a work is considered to be original and the subject of full copyright protection, even if creativity is not present. According to the court, the creativity standard of originality in the United States is too high. Instead, the requirement that skill and judgment be exercised helps to ensure that the public interest in access to information is fulfilled and that authors are not overcompensated for their work. As noted at para. 23 of *C.C.H. Canadian*, it is

important that “others are able to produce new works by building on the ideas and information contained in the works of others.”

[57] Thus, while the overall policy objectives between the respective Canadian and United States statutes may be similar, the balance between competing copyright interests is not. The Canadian Act more evenly balances the freelance writer’s ownership of copyright in her original work with the newspaper’s copyright in its compilation or collective work. As a result, when considering United States decisions in the copyright context, these decisions: “must be scrutinized very carefully because of some fundamental differences in copyright concepts that have been adopted in the legislation of that country:” *Compo v. Blue Crest Music, supra*, at p.367.

[58] Although the motion judge does not expressly say so, it is fair to say that the analysis employed in the case of *N.Y. Times Co. v. Tasini* 533 U.S. 483 (2001) informed his reasoning, and in particular, his balancing of the two copyright interests. The motion judge’s consideration of the law in the United States had to be taken with this caution in mind.

[59] In *Tasini*, six freelance authors sued three publishers: New York Times Company, Newsday Inc., and Time Inc. The dispute revolved around twenty-one articles written by freelance authors between 1990 and 1993. The issue was whether the articles, which the publishers had published in print and then reproduced in commercial databases, were “revisions” of the collective work in which the articles first appeared. The case turned on the application of s.201 (c) of the United States *Copyright Act* which, as stated, grants a publisher of a collective work the “privilege” of “reproducing” the individual author’s contribution “as part of that particular collective work, any revision of that collective work and any later collective work in the same series.” Justice Ginsberg for the majority in *Tasini* held that the databases reproduced and distributed articles standing alone and not in context. The databases were not part of the collective work or a “revision” of the collective work pursuant to s. 201(c).

[60] Justice Ginsburg’s decision is indicative of the absence in United States copyright law of the right of the owner of the collective copyright to reproduce “a substantial part of the work” in any material form whatever; a right enjoyed by the owner of the collective copyright under Canadian legislation. In adopting the analysis of *Tasini*, the motion judge was overlooking an important distinction between Canadian and United States notions of the content of the collective copyright interest, thereby tilting the balance toward the individual interest, as opposed to acknowledging a more layered approach.

B. Media neutrality

[61] In answering the question of whether the newspaper was produced or reproduced in the databases, the motion judge set out two opposing perspectives in his reasons. The motion judge held that the second, or alternative perspective was the correct legal one, and it is this conclusion that is the subject of the Globe’s second challenge.

[62] This second perspective is described at paras. 117-127 as follows:

[117] The alternative perspective is that the reproduction of individual articles from the newspaper is, in actuality, a reproduction of the “individual” work. This argument is as follows. As a starting point, it is clear that the defendant enjoys the statutory right to reproduce the *collective work* of its newspaper, or any substantial part thereof, in electronic media. Each of the plaintiff’s individual works is part of the collective work of the defendant’s published newsprint edition. However, if the defendant were to simply reproduce the individual articles, this would constitute an infringement of the freelancer’s copyright. The owner of the copyright in the collective work can only authorize the utilization by someone else of the collective work, or any substantial part thereof, as a discrete, identifiable work.

[118] As noted above, the words “substantial part thereof” in s. 3(1) of the Act are to be interpreted by applying a qualitative test rather than a quantitative test. The electronic archive includes all of the written news, articles and editorial components of the newspaper. That is the part that has significance for a reader. It tells the reader what is important and happening, as selected by the editorial staff in publishing the newspaper. Without it the newspaper could not be sold and would have virtually no value other than as a mere marketing function for advertisers. The electronic edition omits only advertising, some tables, photographs and art work and a small amount of other materials such as photo captions and birth and death notices.

[119] The electronic edition does not look like the newsprint version of the newspaper delivered to the door or purchased from a box on the street. But the electronic version does have the same content of news and articles. The definition of “compilation” looks to a work resulting from “the selection *or* arrangement” of literary works or parts thereof. The reproduction of the collectivity of the news and articles (i.e. omitting the advertising) would be a reproduction of a “substantial part” of the collective work. The electronic edition includes either all or substantially all of the articles from the newspaper. That is, the editors’ selection and editing of stories, central to the “essence” of the collective

work, is present in the first instance in creating the newspaper as a collective work in electronic form.

[120] The *Globe's* archive is a collection of newspapers in electronic format. In my view, its right to reproduce its newspaper in any material form includes the right to archive the work electronically and to make that archive available electronically to the public so long as it is the full electronic edition being made available. That is, it is permissible reproduction so long as it is the "collective work" that is being made available.

[121] However, a search of the database does not display the full "compilation". Rather, the indexing feature of the keyword search identifies that isolated part of the deconstructed compilation that is of specific interest to the user.

[122] Each individual article in the electronic database has its own unique name. This enables the database software to identify any individual article from the mass of articles in the database and to provide a stand-alone download of that article. Info Globe is a retrieval service for full-text individual articles by utilizing a number of various search parameters. The CD-ROM is a fixed content database and does provide access to the full electronic edition of each day's newspaper. However, it too allows for the retrieval of stand-alone articles across publications through a keyword search.

[123] Virtually all of the original arrangement and selection of the collective work is lost in the reproduction of an isolated, stand-alone article downloaded onto a computer, and shown on its monitor, from an electronic database as the result of a keyword search. The originality of the collective work through the editors' judgment, skill and labour, is dissipated. The stand-alone article is reproduced beyond the context of any collective work. The originality contained in the display of the search result in respect of a given freelance article is that of the author of the individual work. The essence of the search result is the individual freelancer's creative work.

[124] There may be some editing done to the individual work by the editors in creating the collective work. This does not lessen the fact that originality with respect to the individual

work remains with the individual author. *CCH Canadian Ltd. v. Law Society of Upper Canada, supra.*

[125] The electronic databases have substantial economic value in part because they are not merely reproductions of newspapers. Their value lies in speedy access to precise, particularized information through a keyword search facility. From this perspective, the *Globe* is engaged in a different economic activity in selling access to its electronic archive through Info Globe Online from that of selling newspapers in the form of newsprint. The *Globe* is selling access to stand-alone freelance articles.

[126] The “Info Globe Online” database and the CD-ROMs are systems of retrieving individual, stand-alone articles. The databases make available electronic reproductions of the freelance writers’ works as independent, isolated works. While the individual work is derivative from the collective work in electronic form (and is labeled with its provenance), it has no association with the collective work. A person making a keyword search is not even looking to the *Globe* as the source of articles. Rather, the user is simply looking for articles relating to the keyword in the search. The ever-expanding database will contain many thousands of articles originally published in a great many other newspapers, magazines, periodicals or wire services or the like, as well as the *Globe’s* articles.

[127] Databases such as “Info Globe On Line”, Info Globe Dow Jones and CPI.Q, and those located on CD-ROMs do not have the function, form or content of either a periodical or a newspaper. The reproduction is visually limited to the specific, isolated freelancer’s article. Is the reproduction of the freelance article so independent of the newspaper as a whole that the reproduction is properly to be considered that of the freelancer’s individual work? The freelancer is the person who is responsible for the creation of, or originality seen in, the article. On this view, the electronic database is simply a grouping of individual works.

[63] The *Globe* submits that in adopting this second perspective the motion judge failed to give full effect to the feature of the Act commonly referred to as media neutrality. This concept of media neutrality is based on s. 3 of the Act, which gives copyright owners the right to reproduce a work “in any material form whatever”.

[64] The Globe submits the motion judge made four errors in relation to media neutrality: (1) the motion judge erred by focusing on how the newspaper or magazine appeared on the computer screen thereby suggesting that the newspaper or magazine had to look the same as the print edition of the Globe; (2) the motion judge erred by focusing on the technological means of accessing the database, rather than the contents of the database itself; (3) the motion judge erred in concluding that the improved functionality of a search engine in the new technology detracts from the publisher's right to media neutrality as a copyright owner; and (4) the motion judge erred in concluding that the creation of a different economic activity detracts from the publisher's right to media neutrality as a copyright owner.

[65] In relation to the Globe's first objection, I do not read the motion judge's decision as saying that the electronic document must look the same as the original printed document. Although the motion judge observed at para. 119 that, "[t]he electronic edition does not look like the newsprint version of the newspaper delivered to the door or purchased from the box on the street," in the very next paragraph, he held that the Globe's right "to reproduce its newspaper in any material form includes the right to archive the work electronically and to make that archive available electronically to the public so long as it is the full electronic edition being made available." I read the motion judge's comment as saying that in order for the Globe to maintain the right to reproduce the articles, each individual article must be associated with the collective work or compilation irrespective of the form of media in which it is presented. I see no error in this interpretation and so would not give effect to the Globe's first objection.

[66] The motion judge's holding that the inclusion of the keyword search meant that virtually all of the original arrangement and selection of the collective work was lost are the bases for the Globe's second and third objections.

[67] With respect to these two objections, I would agree with the Globe in that the fact an electronic indexing feature can be used to identify an individual article does not in and of itself result in the violation of copyright. For example, the electronic version of the newspaper, which Robertson concedes does not violate copyright, has a similar electronic indexing or search feature. Although this electronic version of the newspaper is initially presented to the viewer as a collective work with a list of the titles of various articles and excerpts of stories all visible on the same screen, individual articles can easily be isolated. Thus, the fact one can isolate and view an article from the collective work by the use of electronic software, does not necessarily mean that the dominant or overall purpose of the collective work, a newspaper, is lost. This ability to isolate an individual article simply means the collective aspect of the work is not always visible, analogous to looking at a printed newspaper article through a magnifying glass. Similarly, the machine used to view microfilmed copies of the newspaper also has a zoom feature, and depending on the layout, the viewer may or may not be able to see the arrangement of other parts of the newspaper. What is happening in each of these analogous cases is that the user is engaging in a form of management of the newspaper, the collective work, through the use

of technology. As the Supreme Court held in *C.C.H. Canadian* at para. 38, “a person does not authorize copyright infringement by authorizing the mere use of equipment that could be used to infringe copyright.” The fact that an article can be isolated on a computer and a copy made of the article does not mean that the Globe is authorizing copyright infringement.

[68] I also agree with the Globe’s fourth objection, namely, the fact that the Globe is engaging in a different economic activity is not of itself a violation of individual copyright. For example, the production of the print copy of the CPI is a different economic activity than the sale of a newspaper. However, the printed copy of the CPI results from the collective works of newspapers and does not reproduce the individual freelance authors’ work. Thus, the fact the Globe is engaging in a different economic activity does not necessarily infringe the individual freelance authors’ copyright.

[69] In summary, I find that the motion judge’s construction of the Act did not take full account of the principle of media neutrality or of a copyright holder’s right to create a new collective work from its existing collective work. I would therefore give effect to this prong of the Globe’s arguments.

C. Reproduction of a Substantial Part of the Collective Work

i. Specific Comments about Info Globe Online

[70] Because the Act defines a “compilation” in s. 2 as the selection or arrangement of literary works or data, the Globe submits that the “selection” of all of the individual articles, from a day’s edition of the Globe for placement in Info Globe Online, is a reproduction of a substantial part of its newspaper.

[71] Although, the selection of articles may, alone, give the Globe copyright in its compilation, what is at issue here, is whether “the work” that is the “collective work”, the “newspaper...or similar periodical” or any substantial part thereof, is produced or reproduced pursuant to s. 3. The Globe’s submission begs the question of what constitutes the literary work in question, which is the newspaper in this case. Despite this problem, I will nevertheless address the Globe’s submission.

a. Regard to the Over-all Work

[72] Where copyright is claimed in a compilation it is the over-all work to which regard must be had. The correct approach is not to dissect the work: see *Slumber-Magic Adjustable Bed Co. v. Sleep-King Adjustable Bed Co.* (1984), 3 C.P.R. 81 at 84-85 (B.C.S.C.), per McLachlin J.

[73] The Globe submits that the selection of articles gives it copyright in the Globe and Mail newspaper and that this selection gives it the right to “archive” the articles in Info Globe Online. In essence, the Globe’s position asks us to dissect its copyright as opposed to considering the over-all work.

b. Newspaper's Arrangement Not Sufficiently Preserved

[74] Copyright in a compilation is based on the author's exercise of skill and judgment in creating the over-all work. In this case the over-all work is the product of selection and arrangement of the articles. While copyright in a compilation may be based on either selection or arrangement, the work itself, that is, the newspaper, will not be "reproduced" or copied unless both are preserved.

[75] The selection of the articles appearing in the Globe is preserved in Info Globe Online. The Globe submits that, as a result, a substantial portion of the arrangement of the newspaper, and hence its editors' skill and judgment, is also preserved. However, the motion judge recognized that only a portion of the editors' skill and judgment was preserved. He noted that although the headline of the article, byline, author's name, date, starting page reference of the Globe and editing were preserved, the Globe's selection of articles, even when coupled with the arrangement that was preserved, was not sufficient to extend the defining unique qualities of a newspaper to the Info Globe Online database.

[76] The motion judge's decision that the newspaper is not reproduced is supported by the Supreme Court's subsequent decision in *C.C.H. Canadian*. In *C.C.H. Canadian*, C.C.H., as the publisher of certain law reports, sued the Law Society of Upper Canada ("Law Society") for violating its copyright. The Law Society, which maintains the Great Library, runs a custom photocopy service reproducing legal material for members of the Law Society. In addition, the Law Society also maintains a photocopier in the Great Library for public use. A sign above the copier states that single copies only are to be made, but warns that the Law Society will not be liable for infringement of copyright. The Supreme Court held that the Law Society did not infringe copyright by making a single copy or allowing a single copy of a reported decision to be made on its photocopier for the purposes of research under the fair dealing exception in the Act.

[77] In that same case, the Law Society also counterclaimed against C.C.H., alleging that the publisher did not have copyright in different types of material: headnotes, case summaries, a topical index and reported judicial decisions. The Supreme Court held that the publisher was required to exercise skill and judgment in selecting specific elements of a judicial decision for the headnote and case note and to determine the legal ratio. Thus, the publisher had copyright in relation to the headnotes and case summaries of judicial decisions. Without the headnotes or case summaries, the publisher had no copyright in the edited judicial reasons themselves.

[78] Furthermore, the Supreme Court held that the changes made to judicial reasons were relatively trivial. The addition of the date of judgment, the court and the panel hearing the case, counsel for each party, lists of cases, statutes and parallel citations to the reasons were basic factual information. Any editing and correction of spelling mistakes in a judgment were too trivial to warrant copyright protection. The changes and additions were more properly characterized as a mere mechanical exercise. The court concluded that the reported reasons, when disentangled from the rest of the compilation, that is, the headnote, were not covered by the publisher's copyright. The effect of the court's

decision is that the selection of the decisions with the additional changes was insufficient to grant the publisher copyright in the decisions themselves.

[79] Similarly, in this case, when the individual articles are disentangled from the rest of the collective work they are not covered by the Globe's copyright because their arrangement or link with the collective work is lost. The selection of the articles and the changes made to an author's individual article are relatively minor and of a factual mechanical nature. These types of changes cannot grant the Globe collective copyright in the articles themselves.

c. Substantial Part of the Newspaper Not Reproduced

[80] By placing all the individual articles from the newspaper in Info Globe Online, approximately 50% of what has been printed in a day's edition of the newspaper is transferred into the database. In terms of quantity, there is no question that "a substantial part" of the printed newspaper is reproduced in Info Globe Online. Qualitatively, however, the content of the database does not substantially reflect that of the original compilation or collective work.

[81] A comparison of the electronic version of the Globe and the Info Globe Online database illustrates that the qualitative aspect of the newspaper is not preserved. In terms of function, the user's purpose in looking at the electronic version of the daily Globe is to read the news; the user's purpose in looking at a database is research. In terms of form, the content of the electronic version of the newspaper is limited to the events of a particular day, whereas the Info Globe Online database is ever expanding. In addition, while the parts of the electronic newspaper are initially presented in a collective context, the Info Globe Online database removes the context of the articles. The removal of the articles from their collective context coupled with the compilation of multiple periodicals into one database means that a substantial portion of the Globe newspaper is not reproduced on Info Globe Online. These changes in form and function mean that the effect of a newspaper is lost when articles are placed in the database.

[82] I agree with the motion judge, that when the form, function and effect of the newspaper and the database Info Globe Online are compared, a substantial part of the newspaper is not reproduced in the Info Globe Online database. The database is a subscription search service that relies on a group of individual articles not necessarily connected to the newspaper and extending beyond the Globe's content. In this vast storehouse of information, the collective work that is the Globe is fragmented, submerged, overwhelmed and lost. Therefore, it cannot be said that a "substantial part" of the *newspaper* was reproduced in the database.

ii. Specific Comments about the CPI.Q Database

[83] The *C.C.H. Canadian* decision is also of assistance with respect to whether the CPI.Q database infringes the freelance authors' individual copyright. In that case, McLachlin C.J.C. discussed whether a topical index of the part of the book, *Canada GST*

Cases, satisfied the originality requirement for copyright. In concluding that it did not, McLachlin C.J.C. held at para. 32:

The author of the index had to make an initial decision as to which cases were authorities on GST. This alone is a decision that would require the exercise of skill and judgment. The author also had to decide which headings to include and which cases should fall under which headings. He or she had to distill the essence of the decisions down to a succinct one-phrase summary. All of these tasks require skill and judgment that are sufficient to conclude that the topical index is an “original” work in which copyright subsists.

[84] Similarly, the publisher of the CPI and CPI.Q had to make an initial decision as to which headings or subjects to include and which articles fell under various headings. Between 1987, when the CPI became available electronically, and 1995 when the enhanced version CPI.Q was introduced, I infer that it would not have been possible to search individual articles and, if so, no infringement of the freelance authors’ copyright would have occurred during this time. With the release of CPI.Q in 1995, however, access to the electronic archives of some of the indexed periodicals and, therefore to the individual articles, became possible although the individual articles themselves were never published in the CPI.Q. Thus the articles cannot be a reproduction of the CPI.Q, and the publisher’s copyright in the CPI.Q cannot extend beyond what was published as part of that collective work or compilation.

iii. Specific Comments about the CD-ROM Database

[85] The CD-ROM is different from the Info Globe Online database and the CPI.Q in that it is a finite database. As mentioned, the content of the Globe over a period of one year is preserved on the CD-ROM along with five other newspapers. When the CD-ROM is played, the full text of an article appears on the left while the list of articles in that day’s newspaper appears on the right. The linkage of the articles to the collective work is preserved in this mode, and the selection and arrangement of the Globe on CD-ROM would appear to have the distinct traits of an archived version of the electronic newspaper.

[86] When a user switches to the search engine mode, however, the user can search individual articles beyond those that were published in the Globe by simultaneously searching articles that were published in all of the newspapers over one year, on the CD-ROM. In the search mode the CD-ROM has the form, function or effect of a database. As I have indicated earlier, the fact that one can use a search engine feature to isolate individual articles does not in itself mean that individual copyright is violated. However, in enabling the user to search for isolated articles that were never published in the Globe, the Globe went beyond its copyright in that newspaper. The CD-ROM is a hybrid and it is the effect of the CD-ROM as a whole that must be assessed.

[87] The motion judge found the CD-ROM, too, did not have the function, form or content of a newspaper. Having regard to the effect of the CD-ROM as a whole, I am not prepared to say that the motion judge committed a palpable and overriding error in making this finding.

[88] As I have indicated, while I have some reservations concerning the motion judge's comments respecting the objects of the Act and media neutrality, I would agree with him that "[a] substantial part" of the Globe *newspaper* is not "reproduced" in the databases.

[89] As a result, subject to any defence the Globe may have, the motion judge did not err in concluding that the Globe infringed Robertson's copyright when it included her work in the various databases. I would therefore dismiss the cross-appeal.

VI. The Appeal

A. The licence claimed by the Globe did not have to be in writing.

[90] The Globe also defended Robertson's action on the basis that if it had reproduced her individual work, it had not infringed her copyright because the Globe's agreement with Robertson had an implied term or licence allowing it to place the work in its databases. This defence of implied licence was raised with respect to two licensing agreements between the Globe and Robertson: one written and one oral. Finding there was conflicting evidence with respect to this defence, the motion judge held that it raised a genuine issue for trial and, accordingly, he directed a trial of the issue respecting the scope of the Globe's licence.

[91] With respect to the oral agreement, the motion judge held that the Globe's non-exclusive oral licence from Robertson was merely a permission to publish her article, and, pursuant to s. 13(4) of the Act, did not convey proprietary rights. Sections 13(4), (7) and s. 36(1) of the *Copyright Act* read as follows:

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 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.

(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.

36(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 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.

[92] Section 13(4) states that the owner of copyright in any work may assign the rights she has, either in whole or in part or with various limitations, and may “grant any interest in the right by licence”. According to this section, no assignment is valid unless it is in writing. Similarly, under s. 13(7), the grant of an exclusive licence in a copyright constitutes the grant of an interest by licence, and must also be in writing.

[93] Robertson claims that the motion judge erred in his interpretation of s. 13(7) as applied to the facts of this case. She submits that the rights asserted by the Globe, namely the right to republish the article in any form, are so broad as to amount to a proprietary interest as opposed to an oral licence or permission.

[94] Section 3 of the Act lists various incidents of copyright such as the sole right to produce or reproduce the work or any substantial part thereof; to perform the work; to publish the work; to produce any translation of the work; to make a sound recording of a literary work; to adapt it for the cinema; and to authorize any such acts. Robertson admits that she remains free to reproduce her work anywhere and to grant permission to others to reproduce it. Robertson does not assert that she has given up any of the other incidents respecting her copyright listed in s. 3 to the Globe.

[95] In addition, Robertson concedes that not all licences must be in writing. Courts have expressly endorsed oral licences, sometimes known as “bare licences” that are frequently entered into with freelance authors and that operate as a permission based on mutual understanding or established custom or practice: see *Cselko Associates Inc. v. Zellers Inc* (1992), 44 C.P.R. 56 at 581 (Ont. Gen Div.); *Sutherland v. Montykda* (1996), 73 C.P.R. (3d) 269 at 275 (N.S.C.A.); McKeown, Fox, *supra*, at pp. 390-391.

[96] Although Robertson objects to the publishing of her article in the database, she concedes that the Globe was entitled to publish her articles in its newspaper and to archive them on microfiche and microfilm. Since there was no agreement in writing with respect to one of the articles, Robertson must be taken to implicitly agree that the Globe had a valid oral licence at least for these purposes.

[97] There is a paucity of case law as to what constitutes the grant of an interest as opposed to a permission. The motion judge held that the distinction between the grant of an interest and a permission depended on whether the Globe had been granted an exclusive interest by the author. He held that as Robertson had not granted an exclusive interest to the Globe and continued to possess the copyright in her work, she had not granted a proprietary interest to the Globe.

[98] The motion judge based his conclusion in part on the wording of s. 13(7) of the Act, which provides that granting an exclusive licence constitutes the grant of an interest in the copyright. According to the motion judge, had Parliament intended s. 13(4) to cover non-exclusive licences, presumably s. 13(7) would have stated as such. The interpretation of s. 13(7) adopted by the motion judge is supported by McKeown, Fox, *supra*, at p. 389, cited by him, as well as by Sunny Handa, *Copyright Law in Canada* (Markham: Butterworths, 2002) at 337-338.

[99] Section 36(1) was also of assistance to the motion judge's interpretation of s. 13(7). Section 36(1) provides that the owner of copyright in a work, that is, the person having an exclusive proprietary interest in the work, or any person deriving any "right, title or interest by assignment or grant in writing from the owner" can sue to protect and enforce the right in his or her own name. By inference, a non-exclusive oral licence implies that the freelance author may licence other publishers to publish her work. The publishers would not be able to sue in their own name to protect an infringement of the freelance author's copyright in her work because the freelance author, who retains the ownership of the copyright, is the appropriate person to sue: see David Vaver, *Intellectual Property Law*, (Concord, Ontario: Irwin Law, 1997) at 243 and the decision in *Milliken & Co. v. Interface Flooring Systems (Canada) Inc.* (1998), 83 C.P.R. (3d) 470 at paras. 48-50.

[100] I would hold that the motion judge did not err in his interpretation of s. 13(7). The submission put forward by Robertson is inconsistent with: 1) the fact that freelance authors often enter into similar oral licences and that such oral licences have been endorsed in the jurisprudence; 2) the admitted fact that Robertson permitted the Globe to publish her article and to put the newspaper on microfiche and microfilm indicates that there was a valid oral licence between the parties; 3) the admitted fact that the Globe has a non-exclusive licence permitting it to publish the freelance authors' articles. When ss. 3, 13(4), 13(7), and 36(1) are read together, Robertson's submission as to the interpretation of s. 13(4) does not accord with the wording of the sections as a whole.

[101] I agree that the oral licence Robertson gave the Globe did not convey proprietary rights and, pursuant to s. 13(4) of the Act, did not have to be in writing. Robertson's attempt to eliminate the Globe's licence defence fails. I would dismiss this ground of appeal.

B. The representative plaintiff did not have standing to assert a claim for injunctive relief.

[102] At trial, Robertson had requested ancillary relief, namely, a restraining order on behalf of employees of the Globe with respect to the inclusion of their work in the electronic databases. Section 13(3) of the Act provides:

13(3) Where the author of a work was in the employment of some other person under a contract of service or apprenticeship and the work was made in the course of his

employment by that person, the person by whom the author was employed shall, in the absence of any agreement to the contrary, be the first owner of the copyright, but where the work is an article or other contribution to a newspaper, magazine or similar periodical, there shall, in the absence of any agreement to the contrary, be deemed to be reserved to the author a right to restrain the publication of the work, otherwise than as part of a newspaper, magazine or similar periodical.

[103] Pursuant to s. 13(3), the Globe is the first owner of the copyright in articles written by its employees. However, s. 13(3) provides a limited right for employees of the Globe to restrain publication of their works otherwise than as part of a newspaper, magazine or similar periodical.

[104] The motion judge held that the representative plaintiff did not have standing to assert a claim for injunctive relief on behalf of employees of the Globe who were writers because this remedy is a personal right that must be asserted by the employee. No employee has in fact sought an injunction from the Globe or complained about his works being made available on Info Globe Online.

[105] Although Cumming J. did not cite any authority for his conclusion that the right to restrain pursuant to s. 13(3) was a personal right, his conclusion accords with the decision in *Sun Newspapers v. Whippie* (1928), S.R.N.S.W. 473 at 478. The statutory provision at issue in this Australian case is identical to the current Canadian provision. In *Sun Newspapers*, Harvey C.J. commented:

I think the right which is reserved to the author when under a contract of service to a newspaper is the narrow limited right mentioned in the section; it is only a right to prevent publication, not a right to publish. It is a mere right of veto. The original provision gives the newspaper proprietor the copyright; the reservation is a proviso on that proviso and gives the author not “the” right to restrain publication but “a” right to restrain publication. It recognises the employer’s right to publish not only in his newspaper but in any newspaper or periodical. In other words it assumes that the employer is the only person with a right to publish by reason of the first proviso and then limits that right to this extent that if he wishes to publish anywhere but in a newspaper magazine or similar periodical he has to come to terms with the author who has a right of veto. The author cannot publish at all. The point may be left open for consideration when it arises whether the author’s right of veto is a right against the world or only against the employer.

[106] Although there appear to be no Canadian cases on point, Professor Handa in his text, *Copyright Law in Canada*, makes reference to s. 13(3) when discussing defences to an action for infringement of copyright. Professor Handa states at p. 277, “[a]nother defence consists of demonstrating that the plaintiff *does not have the right to sue* for the copyright in a work...For example, where the author was in the employment of some other person and the work was created in the course of his employment, the employer is presumed to be the first owner of copyright in the work” [emphasis added]. Thus, if an employee exercises his or her right to restrain and the employer publishes the work in any event, it appears that the employee cannot sue for breach of copyright because the employee has no copyright in the work itself. Professor Handa’s comment lends support to the idea that the employee’s right is a personal right, which, like a moral right, cannot be assigned.

[107] Robertson argues that the motion judge’s ruling undermines the goals of the *Class Proceedings Act*: access to justice, judicial economy and modification of behaviour. I do not read the decision of the motion judge as holding that a class action can never be brought by employees of a newspaper to restrain publication of their work. A representative plaintiff, just like any litigant, cannot put forward a hypothetical claim and seek judgment from the court. The motion judge’s comments respecting standing relate to the putting forward of a hypothetical claim by Robertson and in that respect reveals no error.

[108] Before us, the class members assert that as an alternative, s. 99 of the *Courts of Justice Act* provides the court may award damages in addition to, or instead of, injunctive relief. That submission was not before the motion judge and was not the subject of a ruling by him. It is therefore not properly a ground of argument on appeal.

[109] The question of whether a hypothetical employee complaint would come within the labour relations regime established by the collective agreement was also not before the motion judge. As a result, I am not prepared to definitively address this issue. I would observe, however, that in *C.C.H. Canadian*, at para. 9 McLachlin J. stated:

In Canada, copyright is a creature of statute and the rights and remedies provided by the *Copyright Act* are exhaustive [citations omitted].

[110] If the rights in the Act are exhaustive, the employee would not be able to convert a right to restrain under the Act into a right to sue for damages under the *Courts of Justice Act*.

[111] I also note that the right given to the employee in s. 13(3) is not a right to restrain “reproduction” but a right to restrain “publication”. Section 2.2(1) defines “publication” for the purposes of the Act and excludes “the communication to the public by telecommunication of a literary...work”. Since the Internet is a form of telecommunication, it is arguable that the Act does not give the employee the right to restrain communication of his or her work in an Internet database.

[112] In summary, I agree with the motion judge that the right to restrain granted to an employee under s. 13(3) of the Act is a personal right that cannot be invoked by Robertson in the circumstances of this case.

[113] Finally, I also agree with the motion judge on his interpretation of the scope of the right to restrain under s. 13(3). In their factum, the Globe states that the right to restrain according to s. 13(3) of the Act applies to any newspaper, magazine or periodical, and not merely the same newspaper, magazine or periodical. Although the appellant did not make any submissions on the issue, I would agree that on a plain reading of s. 13(3), the Globe's interpretation is correct. In holding on the cross-appeal, however, that the databases in issue are not a newspaper, and therefore by analogy, neither a magazine or similar periodical, it is irrelevant to the grounds of appeal whether or not the phrase "a newspaper, magazine or similar periodical" in s. 13(3) permits an employee to restrain publication in the same newspaper, magazine or similar periodical.

C. Additional Issue Relating to Fair Dealing

[114] Following the hearing of this appeal, the Supreme Court of Canada released its decision in *C.C.H. Canadian* and the parties were invited to make submissions in writing respecting the impact of this decision on the appeal. One of the submissions made by the Globe was that the three databases do not infringe copyright because the user is authorized to make only a single copy of the work for research purposes and thus the fair dealing limitation of the Act applies. Fair dealing was the subject of some oral submissions during the hearing of this appeal but did not form the thrust of this appeal. Fair dealing does not appear to have been argued before the motion judge. Robertson submits that the fair dealing limitation might give a third party user the right to make a copy but fair dealing does not allow the Globe to reproduce the freelance authors' articles in its databases. I would leave the issue of fair dealing for the parties at trial.

[115] I would therefore dismiss the appeal.

VII. Conclusion

[116] For the reasons I have given, I would dismiss both the appeal and the cross-appeal. In relation to the appeal, I would hold the motion judge did not err in his interpretation of s. 13(4) of the Act and in concluding that the licence claimed by the Globe did not have to be in writing because it did not convey proprietary rights. I would also hold that the motion judge did not err in his interpretation of s. 13(3) of the Act that the employee's right of restraint with respect to publication in a work other than a newspaper or periodical is a personal right, and that accordingly, the representative plaintiff did not have standing to assert a claim for injunctive relief in this case. With respect to the cross-appeal I agree with the motion judge that on a qualitative basis "any substantial part" of the Globe is not "reproduced" in the Info Globe Online, CPI.Q and CD-ROM databases. Subject to any defence the Globe may have, the motion judge did not err in concluding that the Globe *prima facie* infringed Robertson's copyright when it included her work in the various databases.

VIII. Costs

[117] The Court requested and received submissions in writing respecting costs from the parties and from the Law Foundation of Ontario. I would reserve the costs of both the appeal and the cross-appeal to the discretion of the trial judge to be disposed of following the trial of the issues.

RELEASED: October 6, 2004

“KMW”

“Karen M. Weiler J.A.”

“I agree E.E. Gillese J.A.”

BLAIR J.A. (Dissenting):

Overview

[118] This appeal involves a clash between the copyright of an individual author in an original work, published with the author's consent in a newspaper, and the copyright of the newspaper in its collective work or compilation. It is complicated by the fact that the clash arises in the context of today's computerized databases, where newspapers now archive their back issues in electronic form and to which they provide access to the public for a subscriber's fee.

[119] The publications that are relevant to these reasons were originally authored by the representative plaintiff in this class action, Heather Robertson. She wrote a book, *Driving Force: The McLaughlin Family and the Age of the Car*; an excerpt from that book was published in the October 1995 edition of the Globe and Mail's *Report on Business Magazine*, under the title *Dream Machine*. She also wrote a book review of *Saturday's Child: Memoirs of Canada's First Female Cabinet Minister* by Ellen Fairclough; the book review was published in the December 28, 1995 edition of the Globe. Both of these articles are included in the electronic version of the Globe (which, for these purposes, includes the *Report on Business Magazine*) found in three databases, namely, Info Globe Online, the Globe's CD-ROM, and the electronic version of the Canadian Periodic Index (CPI.Q).

[120] I have had the opportunity of reading the draft reasons of my colleague, Weiler J.A. I agree that the appeal should be dismissed, for the reasons she gives. With respect to the cross-appeal, however, I respectfully disagree with her conclusion that the Globe or "any substantial part" of the Globe is not reproduced in the databases.

[121] In my view, the databases contain a collection of back issues of the electronic version of the Globe, each edition of which comprises the "collective work" of the Globe, or a substantial part of that collective work. I would therefore allow the cross-appeal.

[122] Because I agree with the majority, except with respect to the one issue mentioned, it is only necessary for me to refer to the history of the litigation and the facts to the extent necessary to explain my reasons. In particular, the details of the databases in question have been carefully outlined in the reasons of my colleague, as well as in the reasons of the motion judge, and there is no need for me to elaborate further on those descriptions.

[123] Weiler J.A. has dealt with the standard of review applicable to this case, and the general concepts of copyright law that are pertinent. I agree with her reasons on those points.

[124] In terms of the cross-appeal, I also agree with my colleague's reasons and conclusions with respect to two of the three issues raised by the Globe, namely,

(b)that the motions judge placed too much reliance on American case law in assessing the underlying intent and policy objectives of Canadian copyright law, given the differences in the relevant statutory provisions in the two jurisdictions; and,

(c)that the motions judge failed to give effect to the principle of media neutrality in his construction of the Canadian *Copyright Act*, R.S.C. 1985, c. C-42.

[125] I accept the Globe's third argument as well, however, whereas my colleague does not. These reasons concentrate, therefore, on one issue only: does the reproduction of the articles in question – as found in the Info Globe Online or CD-ROM databases, or as accessed through the CPI.Q index – constitute a reproduction of the author's original work, or does it retain its character as a part of the Globe's collective work (or a substantial part thereof)?

[126] In my view, the latter is the case.

Analysis

The Motion Judge's Approach

[127] The motion judge framed the central question in this proceeding as follows (Reasons, para. 111):

Does the *Globe* have the copyright to freelance articles as reproduced from a search of its fixed content CD-ROM's and its continually growing databases on-line, being Info Globe Online, Info Globe Dow Jones and CPI.Q? The answer to this question depends upon how one conceptualizes the reproduction seen on the computer screen through a search of the electronic data base. There are two possible perspectives.

[128] He then went on to summarize, accurately and succinctly, the arguments of the two sides under the following two headings:

The first perspective – In reality, the electronic archive is a reproduction of the “collective” work

and

The alternative perspective – In reality, the reproduction of an article from the electronic archive is a reproduction of the “individual” work

[129] Weiler J.A. has cited in full that portion of the motion judge's reasons in which he sets out the second of these arguments, because it is the perspective that the motions

judge, and she, have adopted. For completeness, and because it is the perspective I accept, I reproduce here that portion of the motion judge's reasons outlining the *Globe's* position. At paras. 112 – 116, he wrote:

The first perspective – In reality, the electronic archive is a reproduction of the “collective” work

[112] One view of the situation is as follows. The content of the reproduction on the screen internal to the article is identical to the content published in the newsprint version of the newspaper. That is, the electronic reproduction of the article is identical in content to the article in newsprint and the electronic reproduction always so identifies its source as being the *Globe* (and reproduces the date of publication, the same headline for the article and its page number within the newsprint version, together with the name of the author).

[113] As well, the electronic reproduction is mechanically derived from the digitalized version of the deconstructed given edition of the newspaper. The *Globe* is responsible for the creation of, or originality in, the collective work of the newspaper. But for the editorial selection of the article, and editorial arrangement of the newspaper, the article would not exist in either the newsprint or the electronic form of the *Globe's* newspaper. The electronic form of the article is simply a stored copy of one part of the deconstructed newspaper published in newsprint.

[114] From this perspective, it is the *input* to the reproduction electronically that must be kept in mind. The plaintiff is the first owner of the copyright in her work as the author: s. 3(1). The plaintiff claims that *her* works are disseminated “through electronic media owned or operated by the defendants.” But this begs the question – in reality whose work is it that is disseminated? The emanation of the isolated freelancer's article on the computer screen results from the search engine employed to find a given topic within the database derived from the electronic text of the defendant's newspapers. The reproduction of the plaintiff's article emanates from, or is drawn from, that collective work.

[115] If someone went to a library and was interested in a given topic, say the inventor of the McLaughlin automobile, then through a periodicals index one could find a reference to Ms. Robertson's article. The researcher could then go to the

library's shelved materials and look at the article by either going to a hardcopy of the *Globe's* recent issues or by viewing the *Globe* on microfilm. With computer technology, this task is made much faster, easier and more efficient. But essentially, the search of the electronic media is engaging in the same process as the library search. The technology serves the same indexing and locating function as the reference materials found in hard copy in a library.

[116] The argument based upon this perspective proceeds as follows. The originality inherent to the compilation or collective work seen in the newspaper remains in the electronic database from which one article is drawn through the facility of a key word search. One cannot focus simply upon the narrow display or different form seen with a given *output*. The means of *access* to an article is different with the electronic form of the newspaper but the article is properly understood as being part of the underlying collective work. The facility of being able to see one article alone is simply an incident of the technology. How a reader chooses to read the content of a newspaper cannot be the deciding factor as to whether or not it is a collective work. Moreover, there remains only a one time use of the article because the electronic search retrieves the article from the single newsprint publication encoded in the electronic database. The fact of being able to only publish an article in the newspaper on a single occasion does not imply that the publisher cannot make available that single publication on a continuing basis [emphasis in original].

[130] While I acknowledge that the matter is not free from doubt, this perspective represents the correct view of the application of the principles of copyright law, as outlined in the majority decision, to the facts of this case, and I adopt it. I wish to add only the following comments.

[131] First, I would not frame the heading for this "first perspective" in the same fashion as did the motions judge. The issue is not whether "in reality *the electronic archive* is a reproduction of the 'collective work'". Rather, the issue is whether *the electronic version of the Globe* as found in the electronic archive, is a reproduction of the collective work (or a substantial part of it).

[132] Nor would I frame the question for determination precisely as the motions judge has done. The question is not whether the *Globe* "[has] the copyright *to the freelance articles as reproduced from a search of its [databases]*". To articulate the issue in this

fashion presupposes an answer in favour of the author. Secondly, it leads to the error of focussing on the search mechanism and the “look” of the end product resulting from the use of that search mechanism, instead of focussing on the substance of what is being accessed for reproduction. This error, in turn, leads to the failure to give effect to the principle of media neutrality.

The Central Issue for Determination

[133] Once an individual work is integrated into a collective work, the owner of the copyright in the individual work cannot restrict the reproduction of the collective work: *Allen v. Toronto Star*, (1997) 36 O.R. (3d) 201 (Ont. Div. Ct.). Like the author who has the copyright in the original work, the owner of the copyright in the collective work has the sole right (a) to produce or reproduce the collective work or any substantial part thereof, and (b) to do so in any material form whatever: *Copyright Act*, s. 3(1).

[134] The central issue, therefore, is whether the electronic version of the Globe, as found in the database, constitutes a reproduction of the Globe’s collective work or a substantial part thereof. Assuming it does, the record shows that the article appearing on the computer screen – through utilisation of the keyword search mechanism – emanates from that collective work. Once the article finds its way into the database as part of the Globe’s collective work, how it is located through the search mechanism, how it is deconstructed and identified in a technological sense for purposes of retrieval, and how it appears on the computer screen, are all matters relating to the manner or the material form in which the collective work is reproduced: s. 3(1). As the motion judge noted, in reciting the argument above, “the facility of being able to see one article alone is simply an incident of the technology”. It is no different in principle from someone going to a library, viewing a back issue of the Globe to find an article of interest, making a copy, and cutting out the article in isolation.

[135] I turn, then, to a discussion of whether the electronic version of the Globe, as entered into the database, constitutes the collective work of the Globe, or a substantial part thereof – the central issue as applied to the facts of this case.

The Database Version: Is it a Reproduction of the Globe’s “Collective Work”, or a Substantial Part Thereof?

[136] The electronic version of the Globe that is stored in the Info Globe Online and the CD-ROM databases does not contain the entire newspaper version.¹ It omits the advertisements, some tables, photographs and artwork, and other materials such as photo captions, birth and death notices, financial tables and weather forecasts. In addition, some of the design elements of the newspaper version are absent, as the motion judge noted: the size of the headline, the location of the headline and the article relative to other

¹ The CPI.Q database is different from Info Globe Online and the CD-ROM. The individual articles, as selected and edited by the Globe, are not themselves published on the CPI.Q. However, they can be accessed via the CPI.Q periodical search facility, as described by Weiler J.A.

parts of the newspaper, the size and style of fonts, spacing, columns, and things of that nature.

[137] However, the database version contains all the written news and stories, all the articles (including free lance articles), and all the editorial components of the newspaper edition. Each story, article, or editorial, when retrieved, shows clearly that it is from the Globe; it shows the date of the edition, the page number of the printed version on which the article began, the section of the newspaper in which it was contained, an indication of whether the article was accompanied by an illustration, the title or headline of the article, and the byline (including the author's credentials). In addition, as the appellant concedes, and as the motion judge found, the editors' *selection* of the stories, articles, and editorials, and the editors' *editing* of the stories and articles, as found in the printed newspaper, are all preserved in the electronic content of the databases. At least part of the arrangement created by the editorial staff is also maintained.

[138] The ability to search for and retrieve specific articles of interest is greatly enhanced and expedited by the modern computer key-word search engines that the subscriber to the databases is able to utilize. Nonetheless, a subscriber accessing the database can read the entirety of the newspaper, as found on the database, in the section and page order presented in the newspaper edition, if he or she so desires. As well, a subscriber may read the electronic version from the database selectively, or by a single story or article. In addition, although the authors' article – as selected and edited for purposes of the print version of the newspaper – may be retrieved separately, through the medium of modern computerized search technology, and although this exercise may be accomplished in a fashion that is infinitely easier and faster than could be done in the past, the article is only retrievable because it forms part of the selected works that comprise the Globe's collective work as contained in the data base. Finally, and importantly, the electronic version found in the database retains the heart of the newspaper – the portion that gives it its essence as a newspaper – namely, its editorial vision, as expressed through the editors' selection and editing of its news stories, its articles, and its editorial content.

[139] The electronic archives contain all of these features. In that respect, they represent the results of the exercise of the editors' skill and judgment, thus preserving the originality of the Globe's collective work: *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 S.C.R. 339, at para. 16.

[140] The motion judge recognized the importance of these central features of a newspaper, and accepted that the Globe has the right to archive its newspapers electronically and to provide the public with access to that electronic archive. At paras. 118 and 120 of his reasons, he said:

[118] As noted above, the words “substantial part thereof” in s. 3(1) of the Act are to be interpreted by applying a

qualitative test rather than an quantitative test. The electronic archive includes all of the written news, articles and editorial components of the newspaper. That is the part that has significance for a reader. It tells the reader what is important and happening, as selected by the editorial staff in publishing the newspaper. Without it the newspaper could not be sold and would have virtually no value other than as a mere marketing function for advertisers

[120] The *Globe's* archive is a collection of newspapers in electronic format. In my view, its right to reproduce its newspaper in any material form includes the right to archive the work electronically and to make that archive available electronically to the public so long as it is the full electronic edition being made available. That is, it is permissible reproduction so long as it is the "collective work" that is being made available.

[141] I agree with these remarks. However, the motion judge went on to find that the reproduction of the plaintiff's articles did not involve a reproduction of the *Globe's* collective work. Instead, he concluded that the electronic databases were "simply a grouping of individual works". I do not agree with that conclusion.

[142] In my opinion, Info Globe Online (Info Globe Dow Jones Interactive, since 1998) and the CD-ROM are databases – modern "libraries" with lightning-quick search facilities, if you will – that contain a selection of back issues of the electronic versions of the *Globe*, including the *Report on Business Magazine*, retained in electronic format. That they may also contain electronic versions of other newspapers, magazines or similar periodicals, does not change the essential nature of the version of the *Globe* that is found in them. Based on the characteristics of the electronic version, as described above, I am satisfied that each electronic version of the *Globe*, on a qualitative basis, constitutes a collective work of the *Globe*, or at least a substantial part thereof.

[143] The rationale of the motions judge focuses heavily on the key-word search capacity of the databases and the technical characteristics of the electronic text which facilitate that search capacity and result in the individual article appearing on the computer screen when the search is completed. My colleague has adopted a similar approach, concluding that the newspaper's arrangement is not sufficiently maintained, and that the effect of the newspaper is lost when articles are placed in the database because they are disassociated from their collective content in the printed version. In the end, she finds that in the "vast storehouse of information" that is the database, "the collective work that is the *Globe* is fragmented, submerged, overwhelmed and lost". Therefore it cannot be said that a substantial portion of the newspaper is reproduced in the database.

[144] Respectfully, I disagree with this approach as well.

[145] First, a “compilation” consists of either (a) a work resulting from the selection *or* arrangement of literary works, or (b) a work resulting from the selection *or* arrangement of data: *Copyright Act*, s. 2. The motion judge noted that the terms “compilation” and “collective work” are often used interchangeably. It is accepted that the electronic version of the Globe contained in the databases retains the editors’ selection of all the news, stories, articles and editorials as found in the printed newspaper. Since the terms “selection” and “arrangement” are disjunctive, rather than conjunctive, in the definition of “compilation” in the *Act*, it is not necessary that the electronic version retain the arrangement of the newsprint version in order to preserve its character as a compilation, and therefore as a collective work, or substantial part thereof.

[146] Second, the motion judge’s approach focuses too heavily on the search function analysis and in doing so fails to give effect to the fact that the *Copyright Act* is purposely designed to be technology neutral. The sole right of the copyright owner to reproduce his or her work “in any material form whatever” is intended to encompass technologies that were not in existence when the Act was drafted, and extends to new computer technologies: *Apple Computer Inc. v. Mackintosh Computers Ltd.* [1987] 1 F.C. 173 (T.D.); *aff’d* [1988] 1 F.C. 673 (C.A.); *aff’d* [1990] 2 S.C.R. 209. Weiler J.A. accepts the Globe’s argument that the motion judge erred in giving full effect to the media neutrality aspect of the Act, and I agree with her reasons on this point. Care must be taken, however, not to fall back into the same error by focussing on the *output* of the search process and the technological mechanics for arriving at that output, rather than on the *input* of the database and the *source* from which the article is retrieved. The former approach focuses too much on form and technology over the substance.

[147] The electronic version does not cease to be the Globe, or a substantial part of it, simply because modern technology permits a search and retrieval exercise that downloads the targeted article in a stand-alone fashion for viewing on the computer screen. With respect to the motions judge, the databases do not “make available electronic reproductions of the freelance writers’ works as independent, isolated works” (Reasons, para. 126). Rather, the databases enable articles to be retrieved from back issues of the Globe’s collective works, as selected and edited by the Globe’s editors, and with reference to the edition of the Globe from which they were retrieved, the section and page of the edition in which they were found, whether they were accompanied by illustrations or not, and the name of the author. This is not “simply a grouping of [the] individual works”, in my view. Nor is the collective work of the Globe lost, fragmented, submerged or overwhelmed, in this exercise. It is not the author’s work that is disseminated through the database; it is the article from the Globe’s collective work that is disseminated.

Newspaper, Magazine, or Similar Periodical

[148] Finally, there was an argument that the databases do not constitute a “newspaper, magazine or similar periodical” for purposes of s. 13(3) of the *Copyright Act*. The argument was raised by the appellants specifically in the context of the claim for

injunctive relief, based upon the articles written by Mr. Smith while he was an employee of the Globe. It was contended that because the databases are not a “newspaper, magazine or similar periodical”, employee-authors in the position of Mr. Smith retained the right to restrain a subsequent publication of their work. Weiler J.A. would uphold the decision of the motion judge rejecting the right to restrain in the circumstances of this case, and I agree with that conclusion.

[149] It confuses matters, however, when the notion of the databases not being a newspaper, magazine or similar periodical creeps into the analysis of the broader issue of copyright in the article reproduced from the database. Clearly, neither the Info Globe Online or CD-ROM databases, nor the CPI.Q index are, in themselves newspapers or magazines, or similar periodicals. They consist of a collection of archived materials, stored in electronic format, just as a traditional library consists of a collection of books, newspapers, journals, periodicals and a plethora of printed materials. No one suggests, however, that a library must be a newspaper before the copyright of a newspaper publisher in the newspapers found in the library is protected. The issue, for purposes of this appeal and cross-appeal, is whether the electronic version of the Globe, as found in the database, is a “newspaper, magazine, or similar periodical”. For the reasons outlined above, I am satisfied that it is.

Disposition

[150] In my opinion, the Globe does not infringe the original author’s copyright by making its collective work, or a substantial part thereof, available on an electronic database and providing a means by which the public may access an article from that collective work, view it on a computer screen and obtain a single copy of it. For the foregoing reasons, therefore, I would allow the cross-appeal and award costs of the cross-appeal to the respondents and appellants by cross-appeal on a partial indemnity basis.

[151] As indicated at the outset of these reasons, I agree with Weiler J.A. that the appeal should be dismissed, for the reasons she gives.

“R.A. Blair J.A.”