

CANADA / JUDGMENT

Interbox Promotion Corp. v. 9012-4314 Québec Inc.

2003 FC 1254

COURT

Federal Court

DECIDED

27 October 2003

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Date: 20031027

Docket: T-1788-99

Citation: 2003 FC 1254

OTTAWA, ONTARIO, THE 27th DAY OF OCTOBER 2003

Present: THE HONOURABLE MR. JUSTICE MARTINEAU

BETWEEN:

INTERBOX PROMOTION CORPORATION

Plaintiff

-and-

9012-4314 QUÉBEC INC. (HIPPO CLUB),

BANK-O-BAR,

BAR DU ZOO,

BAR LE VERSATILE INC.,

2548-8024 QUÉBEC INC. (BAR L'ÉTRIER),

BRASSERIE LA BROUE LIB 80,

LA QUEUE DE BILLARD

Defendants

REASONS FOR JUDGMENT AND JUDGMENT

[1] The second Hilton-Ouellet fight was memorable: it was May 28, 1999, a Friday

night at the Molson Centre in Montréal.

[2] The evening began at 6:00 p.m. with an amateur boxing segment, followed at 7:30 p.m. by the presentation of other professional fights (the event). At 10:30 p.m., everyone was eagerly awaiting the Hilton-Ouellet fight. After his defeat in 1998 (when the fight had to be stopped in the twelfth round), would Ouellet be able to reclaim the Canadian Middleweight Championship title?

[3] Hilton and Ouellet climbed into the ring.

[4] The crowd was bubbling with excitement, as were thousands of television viewers in Canada and the United States. The event was broadcast live on the English and French language Canadian pay-per-view programming services, Indigo and Viewers' Choice, as well as on ESPN 2, the American-owned English language specialty program channel. The plaintiff was the producer of the event. The defendants operate licensed establishments in Québec. The plaintiff alleges that the defendants presented the televised event to their clientele. But let's get back to the Hilton-Ouellet fight.

[5] Until now the boxers had been studying one another.

[6] The bell rang, marking the beginning of the third round. Everybody held their breath. Ouellet attacked. Everything seemed to be going well for him but - surprise - in the final moments, Hilton delivered a series of hooks. Ouellet crumpled to the mat. K.O.

[7] Some were disappointed, others jubilant - the match had lasted less than twelve minutes. The plaintiff now had to present other fights in order to complete its television programming which would end at 11:30 p.m.

[8] As fans know, we will have to await a third engagement between Hilton and Ouellet before we know the final verdict in this round of events. . . . Today, the only issue is the alleged infringement of the copyright that the plaintiff claims to have on the programs that were broadcast on the evening of May 28, 1999, on Canal Indigo, Viewers' Choice and ESPN 2. Specifically, the plaintiff alleges that on the evening in question the defendants, without right and without its permission, presented the televised event to their clientele. Consequently, the plaintiff is requesting that a permanent injunction be issued and is claiming compensatory and exemplary damages against each of the defendants.

SIGNAL PIRACY

[9] There is also the issue of "pirating" a signal, something that is denied by the defendants. Before addressing the alleged infringement of the plaintiff's copyright, a few preliminary remarks are in order with respect to this tangential matter.

[10] The Radiocommunication Act, R.S.C. 1985, ch. R-2, as amended, specifically provides, at paragraph 9(1)(c), that it is forbidden to "decode an encrypted subscription programming signal . . . otherwise than under and in accordance with an authorization from the lawful distributor. . . ." On this subject, we can refer to the words of Iacobucci J. of the Supreme Court of Canada in *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559 at page 588 (*Bell ExpressVu*), where he states that paragraph 9(1)(c), *supra*

[...] prohibits the decoding in Canada of any encrypted subscription programming signal, regardless of the signal's origin, unless authorization is received from the person holding the necessary lawful rights under Canadian law.

[emphasis added]

[11] In *Bell ExpressVu*, *supra*, Iacobucci J. also describes the manner in which satellite signal distributors maintain a certain control over the distribution of their signals. Thus, satellite signal distributors proceed to encrypt the signals intended for their subscribers in order to ensure that non-subscribers do not have access to the

same signals without paying subscription fees. The subscribers of these distributors are able to decode the signals sent to them with the help of a decoder with a unique code that is owned by their distributor.

[12] Further, Iacobucci J. in *Bell ExpressVu*, supra at page 592, reaffirms the very broad character of the protection afforded by paragraph 9(1)(c):

[Paragraph 9(1)(c) of the Radiocommunications Act] extends protection to the holders of the copyright in the programming itself, since it would proscribe the unauthorized reception of signals that violate copyright, even where no retransmission or reproduction occurs.

[emphasis added]

[13] With respect to Canadian pay-per-view programming services offered by Canal Indigo and Viewers' Choice, only a cable affiliate (cable, DTH or MDS) holding a distribution licence issued by the Canadian Radio-television and Telecommunications Commission (CRTC) pursuant to the Broadcasting Act, S.C. 1991, c. 11, is legally authorized to retransmit the signals of these two services and to allow them to be decoded. Further, Iacobucci J. in *Bell ExpressVu*, supra, points out at page 586 that in the event that a subscription programming signal does not have a lawful distributor in Canada, no one is legally authorized to permit decoding. This is precisely the case with the ESPN 2 service. In effect, this foreign service cannot be legally distributed in Canada by a licenced distributor, quite simply because it is not registered on the Revised Lists of Eligible Satellite Services (see Public Notice CRTC 1998-7).

[14] The parties did not submit any specific evidence on the subject of signal piracy. Thus, the Court is not in a position to determine whether the signals of Canal Indigo, Viewers' Choice and ESPN 2 were encrypted or not and, if so, whether they could be captured, unimpeded, by the defendants. That said, it is not necessary to determine whether there was signal piracy. It is in fact possible to determine the merit of this action on the basis of the exclusive rights that the Copyright Act, R.S.C. 1985, c. C-42 (Act), as amended, confers to a copyright owner in relation to a work.

THE PLAINTIFF'S COPYRIGHT

[15] Subsection 27(1) of the Act sets out what constitutes copyright infringement: i.e. to do, without the consent of the owner of the copyright, anything that by the Act only the owner of the copyright has the right to do. Insofar as there is an infringement of the copyright the owner may, inter alia, apply to the Federal Court to obtain an injunction as well as damages (see sections 35 to 37 as well as subsection 39(1) and section 39.1 of the Act). The provisions referred to in these reasons are reproduced in a schedule hereto.

[16] It should be pointed out that the Act confers distinct rights to a copyright owner in relation to a work, on the one hand, and to a broadcaster with respect to the communication signal that it transmits, on the other.

[17] Subsection 3(1) of the Act sets out the prerogatives that a copyright owner has in relation to his work. In this respect, the copyright includes inter alia the exclusive right to produce or reproduce the work or a substantial part thereof, in any material form, and to perform the work or any substantial part thereof in public. In this case, as set out in section 2 of the Act, the "... visual representation of a work ... or communication signal, including a representation made by means of ... [a] television receiving set" is a "performance". Further, paragraph 3(1)(f) expressly confers to the owner the sole right to communicate his work to the public by telecommunication. The exclusive right to authorize any of the aforementioned acts is also included in the definition of copyright in relation to the work (subsection 3(1) in fine of the Act).

[18] Section 21 of the Act gives the broadcaster copyright in its communication signals including the compilation of all the programs, advertisements and other content that make up the signal transmitted by the broadcaster. It is evident that the broadcaster's copyright in the communication signal is more limited than the copyright in relation to a work defined in section 3 of the Act.

[19] Pursuant to subsection 34.1(1) of the Act, unless the contrary is proved: (1) copyright shall be presumed to subsist in the work and communication signal; 2) the maker is deemed to be the owner of the copyright in the work, while the broadcaster is deemed to be the owner of the copyright in the communication signal. As stated by John S. McKeown, in his work entitled *Fox Canadian Law of Copyright and Industrial Designs*, the infringement of either right may give rise to distinctive remedies: The subsistence of copyright in a communication signal does not affect any of the copyright subsisting in the material which is broadcast, such as the copyright in a film or sound recording, the owners of copyright in these works will have rights which are independent of the copyright in the communication signal. (McKeown, John S. *Fox Canadian Law of Copyright and Industrial Designs*. 3rd ed. Scarborough: Carswell, 2000 at page 289.)

[20] In this action, the plaintiff's interest is based on the exclusive right given to the owner of the copyright in relation to the work, namely, to authorize its performance in public and its communication to the public through telecommunication. But is there a "work" to protect in this case?

[21] The courts have consistently held that it is difficult to characterize a sports event as a "work" within the meaning of the Act (*FWS Joint Sports Claimants v. Copyright Board* (1991), 36 C.P.R. (3d) 483 at pages 489-90 (F.C.A.)). Consequently, the event produced by the plaintiff cannot as such be the subject-matter of a copyright. Nevertheless, the television reproduction of the event (whether or not accompanied by audio commentary) is comparable to a "cinematographic work" as set out in section 2 of the Act. The television production of a sporting event whose outcome is unpredictable gives it an element of originality. See McKeown, *Fox Canadian Law of Copyright and Industrial Designs*, supra, at pages 174-75; *Canadian Admiral Corp. v. Rediffusion Inc.*, [1954] Ex. C.R. 382, at pages 394-95; *Re Royalties for Retransmission Rights of Distant Radio and Television Signals* (1990), 32 C.P.R. (3d) 97 at page 138 (Copyright Board).

[22] In this case, three programs were produced. They were broadcast on the evening of May 28, 1999 on Canal Indigo, Viewers's Choice and ESPN 2. The content (images, sounds, animation and costumes) differs. Consequently, under the Act, each program is a distinct work. In the context of these reasons, the terms "the works" or "the programs" will be used to designate the three different programs collectively.

[23] In light of the evidence, each of these programs was first "fixed" on videotape. It should be noted that in the context of communication to the public by telecommunication of a work (whether it be a literary, dramatic, musical or artistic work) the work is "fixed" even if the "fixing" is only effected at the time of its communication (paragraph 3(1)(f) and subsection 3(1.1) of the Act). In this case, in order to broadcast the work on television, a distinct signal for each program was created from the mobile studios at the Molson Centre. Each signal was sent to Teleport Canada, a cable operator supplier, for retransmission by cable or by satellite to subscribers to Canal Indigo and Viewers' Choice. The signal for ESPN 2 was retransmitted by satellite.

[24] Under section 2 of the Act, the maker is the person who undertakes the arrangements necessary for the making of the work. In this case, it is clear from the uncontradicted testimony of the plaintiff's representative, Mr. Yvon Michel, that it

was the plaintiff that assumed the direction and the coordination of all the arrangements necessary to the production and logging of programs in both English and French that were broadcast on May 28, 1999, on the Indigo and Viewers' Choice networks, respectively. The plaintiff also assumed all production costs (exhibit P-2). Consequently, unless the contrary is proved (given the presumption established in paragraph 34.1(1)(b) of the Act) the plaintiff is the only owner of the copyright in these two programs as provided by section 3 of the Act.

[25] The situation is somewhat different in the case of the program that was broadcast at 9:00 p.m. on ESPN 2. According to the evidence, it is ESPN 2 that produced the program. It is also clear, in the agreement signed on April 20, 1999 between the plaintiff and ESPN, that ESPN was responsible for producing the two-and-a-half-hour program that was broadcast on ESPN 2 on the evening of May 28, 1999. Consequently, it was ESPN that controlled the content of the program. Nevertheless, the presumption that ESPN 2, as producer of the program, is the only owner of the copyright in the work is rebutted in this case by proof to the contrary. [26] Thus, according to the documentary evidence in the record, outside Canada ESPN 2 has an exclusive right of ownership in the work; in Canada, however, the plaintiff has an exclusive right of ownership in the work. For example, the agreement dated April 20, 1999, between the plaintiff and ESPN contains the following two clauses:

IN CANADA INTERBOX IS THE SOLE AND EXCLUSIVE OWNER OF THE RIGHTS. ALL RIGHTS GRANTED TO ESPN APPLY ONLY TO OUTSIDE CANADA

(BASIC PROVISIONS, section 3)

(. . .) OUTSIDE OF CANADA ESPN shall be the sole owner of the Program and any recordings and shall have the right to affix to each recording a notice designating ESPN as owner of the copyright of the program embodied thereon (. . .)

(GENERAL TERMS AND CONDITIONS, Paragraph 3(b), extract)

[27] In his testimony, the plaintiff's representative explained the scope and the purpose of the words reproduced above in boldface (in the agreement, they are handwritten and initialled by the parties). He emphasized that the plaintiff intended "[Translation] that for Canada . . . it be clear and precise that Interbox was the sole and exclusive owner of these rights". Given that ESPN 2 had already entered into "package deals for trading content" with TSN and RDS (two Canadian specialty programming services), the plaintiff therefore wanted to be certain that its written agreement with ESPN 2 would have precedence. The plaintiff was therefore able to negotiate directly with TSN and RDS in order to establish its own distribution contracts in Canada.

[28] However, irrespective of whether the clauses of the agreement reproduced above are declaratory of ownership or whether they constitute an assignment of rights to the plaintiff (subsection 13(4) of the Act), the Court is of the opinion that the result is the same: the unauthorized public performance in Canada of the program broadcast on ESPN 2 clearly amounts to an infringement of the plaintiff's copyright. See, inter alia, *NFL Enterprises L.P. v. 1019491 Ontario Ltd.* (1998), 85 C.P.R. (3d) 328, at page 331 (F.C.A.); *Titan Sports Inc. v. Mansion House (Toronto) Ltd.* (1989), 28 C.P.R. (3d) 199, at pages 203-4 (F.C.T.D.). Similarly, the unauthorized public performance in Canada or elsewhere in the world of the other two programs produced by the plaintiff also constitutes an infringement of the plaintiff's copyrights (*NFL Enterprises L.P.*, supra, and *Titan Sports Inc.*, supra). According to the evidence in the record, the plaintiff, in fact, granted only limited broadcasting rights to Canal Indigo and Viewers' Choice (see, for example, clause 1.1(a) of the licence agreement between the plaintiff and Canal Indigo, exhibit P-3).

[29] Consequently, the plaintiff has the requisite interest, under subsection 36(1) of the Act, to institute proceedings against the defendants in its own name for infringement of the exclusive rights that are given to it under section 3 of the Act. The Court is also satisfied that the condition under paragraph 5(1)(b) of the Act has been met and that the plaintiff's copyright in the three works in question is protected until May 28, 2049, pursuant to section 11.1 of the Act.

[30] In light of the evidence, it is clear that the plaintiff did not authorize the public performance on the evening of May 28, 1999, of the works upon which it has exclusive rights with the obvious exception of those cases in which the interested parties ordered, through pay-per-view, any of the programs exclusively distributed in Canada via Canal Indigo and Viewers' Choice and paid the relevant royalty fees to the cable affiliate. With respect to the program broadcast on ESPN 2 on the evening of May 28, 1999, the plaintiff did not authorize its distribution or its public performance in Canada.

[31] According to the uncontradicted evidence, the residential subscribers of the cable affiliates at Canal Indigo and Viewers' Choice could obtain the full program for the evening (from 7:30 p.m. to 11:30 p.m.) on pay-per-view through payment of subscription fees (before rebate) of up to \$59.95 (plus taxes). The signal of either service (Canal Indigo and Viewers' Choice) was made accessible to interested subscribers by the cable affiliates (for example, Vidéotron, Bell ExpressVu and Star Choice).

[32] Licensed commercial establishments that had already entered into an agreement with a cable affiliate could also present the program to their clientele via the same channels. In this case, the royalties payable would vary according to the capacity of the establishment (calculated according to the number of seats allowed by the applicable alcohol permit). The amount of \$12.50 (before rebate) for each "legal seat" was therefore billed to the establishment. The same rate was applicable in the event that the establishment ordered only the Hilton-Ouellet fight (beginning at 10:30 p.m.).

[33] The plaintiff's representative explained at the hearing that the receipts for pay-per-view subscriptions collected by cable affiliates were shared by the concerned services, i.e. between the plaintiff's cable operators and the plaintiff according to a predetermined formula. Thus, for residential services, the plaintiff received 40% on the first 10,000 sales and 45% thereafter. Further, the plaintiff received 60% of the commercial subscribers' receipts. The royalties paid to the plaintiff as a result of the broadcast of the programs were in addition to the admission revenues (ticket sales at the Molson Centre), sponsorship revenues and other receipts related to the event.

[34] Together with Canal Indigo and Viewers' Choice, the plaintiff advertised the event as well as the applicable rates for both residential subscribers and commercial establishments. In a news release from Canal Indigo dated April 22, 1999, it is specifically provided that "[Translation] to encourage commercial establishments who present sporting events in which Canal Indigo holds broadcasting rights to continue to do so legally, control procedures will be implemented on the day of the event." The release also includes the following warning: "[Translation] anyone who contravenes this broadcasting policy could be fined and any offences could even result in prosecution". The lists of establishments that had placed an order with a cable affiliate were transmitted to the plaintiff some time before the event.

[35] On the evening of May 28, 1999, pursuant to instructions from the plaintiff, Chartrand-Laframboise, an investigative firm, visited 236 licensed commercial establishments in Quebec in order to determine if there were "offenders" among them. According to Chartrand-Laframboise, 71 establishments were found to be "in

violation". During the summer of 1999, the plaintiff sent claims to the owners of the establishments that had not paid the applicable royalty. In October 1999, this action was brought against 49 establishments. As a result of numerous out-of-court settlements, there are only seven defendants remaining to the action.

[36] The Court is convinced that none of the defendants subscribed to the previously described pay-per-view service or paid royalties for them. In this case, it must be determined therefore whether the defendants presented any of the protected works to their clientele.

ACTION AGAINST HIPPO CLUB

[37] Having considered all of the evidence, including the testimony, the Court does not accept the plaintiff's version of the facts alleged against the Hippo Club. The Court quite simply does not believe that the Hippo Club presented the ESPN 2 broadcast to its clientele on the evening of May 28, 1999. It is more probable that the performance reported to the plaintiff by Chartrand-Laframboise occurred at the Club de billard Le Tux, one of the establishments adjacent to the Hippo Club. Consequently, the action against the Hippo Club is dismissed.

[38] At the hearing, contradictory accounts were given by two sets of witnesses.

[39] On the one hand, the two investigators, Messrs. Le Siège and Forget (the investigators), who went to the Hippo Club's establishment located at 3675 Tricentenaire in Pointe-aux-Trembles in Montréal East, recounted that they reached the premises at 10:30 p.m. At that time they say there were three or four waiters and 70 clients in the establishment. They say that among the 27 television sets that were on, ten were tuned to boxing, specifically on ESPN 2. The investigators say that fewer than 10 clients were watching the boxing match. The versions submitted by the investigators differ somewhat in terms of how long they remained in the establishment: 20 minutes according to Mr. Le Siège, 15 minutes according to Mr. Forget.

[40] On the other hand, Messrs. Charest, Francoeur and Thibodeau were also present in the establishment at the same time on the evening of May 28, 1999. At the time, Mr. Charest was a director and shareholder of the Hippo Club; Mr. Francoeur, a manager; and Mr. Thibodeau a regular client of the establishment. The three witnesses are also adamant: no television in the Hippo Club establishment was tuned to boxing that night. All of the sets were tuned to horse races.

[41] Who to believe in this case?

[42] In assessing the credibility of the witnesses all the relevant factors were considered: interest in the case, memory, coherence of the story, context, specific details, prior statements, etc. In light of these factors, the Court favours the depositions of Messrs. Charest, Francoeur and Thibodeau.

[43] First, the Court observes that the two investigators did not have any precise recollection of stopping at the defendant's establishment on the evening of May 28, 1999. They were, however, able to give a fairly accurate description of the premises and of the outdoor parking lot. This is explained by the fact that they visited the premises a few days before the hearing.

[44] Second, the investigators allege that they were at the Hippo Club for a relatively long time, despite the fact that the establishment's premises are rather small. What did they do during all of this time? After making their observations (or was it while they made them?) they decided to have a drink. This, they say, explains why they might have spent much more time at the Hippo Club than at the other five establishments that they had visited earlier (they stayed in some for less than five minutes). The Court does not accept this explanation, which seems implausible in the circumstances. It is much more likely that the investigators went to the bowling

alley and then to the pool hall, which are part of the same sports complex, and this would explain why they were there for about twenty minutes.

[45] In fact, it is conceded that the Hippo Club is adjacent to the Salon de Quilles Excellence, 3655 Tricentenaire Boulevard, which in turn is adjacent to the Club de billard Le Tux, 3635 Tricentenaire Boulevard. These two establishments are operated by two different companies that are not defendants in this case. The three establishments have distinct leases with the owner of the sports complex. Inside each establishment there are numerous television sets and alcohol is served. Further, each establishment has its own liquor licence. Finally, even though the Hippo Club and the Tux have the same management, each establishment has its own staff and is operated separately.

[46] In his examination-in-chief, the investigator, Mr. Le Siège, insisted that the Hippo Club's premises are closed. His colleague explained that there is an interior glass door isolating the Hippo Club from the bowling alley and that this door is locked. Consequently, in order to get to the two adjacent establishments it is necessary to use the Hippo Club by the outside door. It is true that the interior door has been locked for some time but it was not locked at the time that the investigators made their observations. This is an important detail that the two investigators failed to mention in their examination-in-chief, and it affects the credibility of their testimony.

[47] Mr. Charest, a former shareholder in the defendant company, explained why and when the doors between the three establishments were locked (because of the number of video poker machines authorized by the Régie). In 1999, once one was in the Hippo Club it was relatively easy to move from one establishment to the other, all the while remaining inside. Cross-examined on this point, the two investigators did not exclude the possibility that they had been able to go through the interior door and that they had entered the other two establishments. Mr. Le Siège said that he could not "[Translation] remember anything". Mr. Forget admitted that if the inside door had been open he would "[Translation] most probably" have crossed through to see if there were television sets in the adjacent establishments. He subsequently tried to minimize the impact of this admission by stating that he had not been instructed to investigate the adjacent establishments, which greatly undermines his credibility. Simply put, this Court does not believe that the investigators remained in the Hippo Club for the entire time of their visit.

[48] Plaintiff's counsel emphasized in his submissions that the investigators had no reason to lie and that their report is proof of its contents. It is true that they are salaried employees of Chartrand-Laframboise and that they have no personal interest in the case. Nevertheless, under cross-examination, Mr. Michel, the plaintiff's representative, did not exclude the possibility that the total amount of the fees paid by the plaintiff to Chartrand-Laframboise may have depended on the number of establishments found "in violation". Whatever the case, even the manner in which the investigative report (exhibit P-8) was prepared raises serious doubts about the reliability of its contents. In this respect, the Court points out that the report in question, in the form of a questionnaire, was not filled out at the very moment that the investigators made their observations in the establishment. They did not take any notes or any photos, and they did not address any specific questions to the clients or to the defendant's representatives.

[49] About 15 or 20 minutes went by before the investigators left the sports complex to go to their respective vehicles. They then went to another establishment, Le Scratch, in Repentigny. They should have arrived before 11:30 p.m. The evidence indicates that there was an average (between each targeted establishment) of 10 to 15

minutes driving time. Therefore, time was pressing.

[50] So when and where exactly did Mr. Forget prepare his report?

[51] The testimony of the investigators is evasive on this crucial element. Here, we can be certain only of the fact that Mr. Forget was alone when he filled out his report. He explains that in his car he was able to communicate by walkie-talkie with Mr. Le Siège and that they then compared their observations. Mr. Le Siège spoke of "communications" but he was vague about when and where they took place. The investigators left the establishment together. Why then would they wait until they were in their cars before having this exchange? Mr. Le Siège admits that he signed the report at the end of the evening while Mr. Forget confirms that it was only a few days later, when the report was handed in to his supervisor. Accordingly, after having assessed the evidence in the record, the Court does not believe that the report was prepared at 8:40 p.m. when Mr. Forget left the defendant's establishment.

[52] Moreover, the report contains many inconsistencies that remain unresolved despite the explanations provided by the investigators. We know that the Hilton-Ouellet fight began at 10:30 p.m. The investigators entered the establishment at 10:20 p.m., yet in the report the names "Hilton Ouellet" appear under the heading "[Translation] featured boxers". Mr. Forget explains in his examination-in-chief that "[Translation] . . . it was the advertisements, the upcoming fight, the preliminaries to the Hilton-Ouellet fight". However, the report contains a specific heading "advertising" where the word "US" appears.

[53] During the examination-in-chief, the plaintiff's counsel asked the following question: "[Translation] But you say that this was Hilton-Ouellet advertising. What does that mean, exactly?", Mr. Forget then answers:

"[Translation] Well, what we saw on television, which was coming from Montréal, there were advertisements for the casino and there was a fight but I do not remember what boxers were there, but in the advertising was mostly for Hilton-Ouellet. Not in the advertising, the commercials that come from the United States, there, but it's, you know, it's at the Molson Centre".

[54] These confused explanations do not satisfy the Court and seem to have been invented by the witness.

[55] The Court also notes that under the heading "[Translation] Number of clients watching the boxing" Mr. Forget put a question mark "?" followed by the annotation "[Translation] - less than 10". Why so vague? Yet, when it concerned the number of vehicles in the parking lot and television sets in the establishment, the witness is categorical: if he indicated that there were 115 vehicles in the parking lot and 27 televisions in the establishment, he must have taken the time to count them one by one.

[56] The Court also observes that according to the investigative report there were 70 clients and 10 sets televising boxing on that evening. This is not plausible when we consider the particular context in which the Hippo Club operates. In this respect, the Court prefers the corroborating testimony of Messrs. Charest, Francoeur and Thibodeau that it considers more credible in the circumstances.

[57] In evaluating the evidence, this Court specifically considered the interest that Mr. Charest might have in the case as a former shareholder and director of the Hippo Club, and Mr. Francoeur's interest, as manager. Similarly, this Court noted that Mr. Charest is a boxing fan and that he had considered the possibility of presenting the event via Star Choice to the clientele of the Salon de billard Le Tux, in which he was also a shareholder and director. Nevertheless, the consistency in the stories of the witnesses, Messrs. Charest and Francoeur, as well as the variety of details provided, together with the contextual and operational aspects, outweigh the negative factors

emphasized by the plaintiff's counsel. Nor can I dismiss the deposition of Mr. Thibodeau, a regular client of the establishment, solely on the basis of gratuitous insinuations or stereotypes that can be attributed to "gamblers". Generally speaking, the Court did not detect any contradictions regarding the major aspects of this testimony, which is also corroborative.

[58] More particularly, the Court finds that the Hippo Club is a betting room. Horse races are presented live on television screens. The clients can then bet on the races as they can also do at the Hippodrome de Montréal. In fact, the defendant is connected with the Hippodrome de Montréal. However, the bets are not only placed on the races taking place in Montréal; the players can also bet on races taking place elsewhere in Canada and the world. The Court also notes that the event took place on a Friday night, one of the busiest nights of the week. Most of the clients who frequent the Hippo Club do so primarily in order to bet on the horse races. And, the number of clients in the establishment, 70, indicated in the investigative report is not realistic. According to the credible evidence submitted by the defendant, there are usually at least 125 clients there every Friday night.

[59] It was also established that there are about 25 television sets in the Hippo Club. While one television screen broadcasts a race, another screen indicates the odds. Because of the particular layout of the establishment, which is L-shaped, a single race will therefore be shown on 10 screens at a time. Furthermore, races from a number of different places may be shown simultaneously and occupy all of the screens. This is usually the case on Friday nights.

[60] Moreover, according to the uncontested evidence, three satellite dishes on the roof of the establishment pick up the signals that broadcast races from all over the world. These signals are decoded and rebroadcast on a closed circuit within the establishment. The decoders are located in a closed area that is only accessible by employees of the Hippodrome de Montréal. The employees or representatives of the defendant do not normally have access to this area. And Mr. Charest states that he did not enter the premises on the evening in question.

[61] It was also established that three of the 25 or so television sets located in the Hippo Club could on occasion (if they were available because there were fewer races) be hooked up to the services distributed by Star Choice, to enable the clientele to watch sports programs in particular. However, the ESPN 2 signal is not distributed in Canada by Star Choice. Consequently, the Court rules out the possibility that 10 television sets in the Hippo Club could have been connected to the signal from ESPN 2 on the evening of May 28, 1999, as the investigators claim.

[62] The Court therefore favours the version of the facts given by the three witnesses for the defendant, i.e. that the event broadcast on ESPN 2 was actually televised at the Salle de billard Le Tux. The Court does not believe that Mr. Charest's failure to mention this particular fact at the examination after defence which preceded the hearing is sufficient to discredit him and to exclude the corroborating testimony of Messrs. Francoeur and Thibodeau.

[63] Consequently, the action against Hippo Club is dismissed with costs. The Hippo Club's counsel requested that these costs be awarded on a solicitor-client basis. Given the absence of special circumstances or of evidence of reprehensible conduct, this request is denied.

ACTION AGAINST THE OTHER DEFENDANTS

[64] The other defendants did not appear at the trial (although a notice of hearing was properly sent). These defendants are as follows (the capacity of each establishment according to the liquor licence issued by the Régie des alcools du Québec is also indicated) :

- (a) Les Placements GRMS Inc., carrying on business as BANK-O-BAR (144 persons);
- (b) Transport Wilfrid Dionne Inc., carrying on business as Bar du Zoo (75 persons);
- (c) Bar Le Versatile Inc. (172 persons);
- (d) 2548-8024 Québec Inc., carrying on business as Bar L'Étrier (301 persons);
- (e) Brasserie Broue Lib (1980) Inc., carrying on business as Brasserie La Broue Lib 80 (100 persons); and
- (f) Piscines Varennes Inc., carrying on business as La Queue de Billard (80 persons) (Collectively, the other defendants).

[65] The plaintiff's action against these parties is allowed in part. The Court accepts in this respect the uncontradicted evidence of infringement of the copyright submitted at the hearing by the plaintiff. Nevertheless, the amounts claimed by the plaintiff have been reduced by the Court.

[66] For example, it was established that on the evening of May 28, 1999, the Bar l'Étrier, the Brasserie La Broue Lib 80 and La Queue de Billard presented the program broadcast on Canal Indigo to their clientele. Further, it was established that on the evening of May 28, 1999, Bank-O-Bar, Bar du Zoo and Bar Le Versatile presented the program broadcast on ESPN 2 to their clientele. According to the evidence, which is also uncontradicted, the other defendants did not subscribe to Canal Indigo or Viewers' Choice pay-per-view services and they did not pay the royalty payable. Accordingly, the Court finds that they infringed the plaintiff's copyright in presenting the works in question to their clientele.

[67] On the one hand, it would be warranted to issue a permanent injunction against the other defendants in order to prevent them from communicating to the public and publicly performing the three works mentioned previously (sections 27, 34 and 39.1 of the Act; see also McKeown, *Fox Canadian Law of Copyright and Industrial Designs*, supra, at page 646). However, the plaintiff has not satisfied the Court that the defendants are likely to infringe the copyright that the plaintiff might have in other programs. Consequently, broad injunctive relief is not necessary in this respect.

[68] On the other hand, the plaintiff is entitled to compensatory damages against the other defendants (sections 27, 34, 35 and 39 of the Act; see also *NFL Enterprises L.P.*, supra, at page 331). In fact, the Court notes that they did not prove that they were not aware and had no reasonable grounds to believe that these works were protected by law when they presented any of the works to their clientele. To the contrary, the admissions contained in their proceedings make it clear that they were aware that the works were protected by copyright. Further, the conditions for public performance of the works were made public before they were broadcast (documents filed collectively as exhibit P-1). The presumption of knowledge derived from paragraph 34.1(a) of the Act (to the effect that the broadcast works were prima facie protected by copyright) is fully binding on the other defendants.

[69] Further, in light of the uncontradicted testimony of Mr. Michel, the plaintiff's representative, the Court agrees to determine the amount of these compensatory damages according to the plaintiff's lost profits. In this regard, see the authorities cited in McKeown, *Fox on Canadian Law of Copyright and Industrial Designs*, supra, at page 656 and in Hugues Richard; Laurent Carrière; Georges T. Robic; and Jacques A. Léger, *Canadian Copyright Act Annotated*, Vol. 2, (Toronto: Carswell, 2003) at pages 35-36, and see *MCA Canada Ltd. v. Gillberry and Hawke Advertising Agency Ltd.* (1976), 28 C.P.R. (2d) 52 at page 56 (F.C.T.D.).

[70] In this respect, the amount of compensatory damages has been calculated at the rate of \$12.50 per "legal seat" in accordance with what was charged by the cable affiliates. This figure was then reduced by 40%. For example, the amount of damages

against the defendant Bank-O-Bar was calculated as follows:

Capacity in accordance with the liquor licence issued by the Régie des alcools du Québec

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Price per legal seat

\$12.50

TOTAL

\$1,800.00

Less 40%

\$720.00

\$1,080.00

[71] The 40% reduction is warranted by the fact that the amount of the royalty to which the plaintiff was entitled under the agreement on the division of receipts with the relevant services and the cable affiliates is 60%. The Court notes that the relevant services and the cable affiliates are not parties to this action. In this case, the plaintiff is not entitled to claim, on the behalf of third parties, the 40% share that would have been apportioned among the cable affiliates and the services involved. They have a separate cause of action. No written assignment in favour of the plaintiff was filed. In this regard, Mr. Michel's testimony cannot be considered. The conditions provided in the Act have therefore not been met (subsections 13(4) and (6) and subsections 36(2) and (4) of the Act; see also *Motel 6 Inc. v. No. 6 Motel Ltd. et al.* (1981), 56 C.P.R. (2d) 44 at page 53 (F.C.T.D.); *Télé-Métropole Inc. v. Bishop* (1985), 4 C.P.R. (3d) 349 at page 356 (F.C.T.D.) upheld [1990] 2 S.C.R. 467; *Jeffrey Rodgers Knitwear Productions Ltd. et al. v. R.D. International Style Collections Ltd.* (1988), 19 C.P.R. (3d) 217 at pages 219-20 (F.C.T.D.)).

[72] Consequently, the Court dismisses the plaintiff's request for the total amount (including QST and GST) of the royalties which otherwise would have been collected by the cable affiliates (invoices exhibit P-7), in damages. Given that the amounts awarded to the plaintiff by the Court constitute damages, these are net figures (without QST and GST).

[73] Finally, the plaintiff asks that each defendant be ordered to pay it \$5,000 in exemplary damages. The Court has examined the authorities cited by the plaintiff and considered the special reasons for which the courts have generally agreed to award exemplary damages. See, for example, the following: *Profekta International Inc. v. Lee* (1997), 75 C.P.R. (3d) 369 at page 372 (F.C.A.); *Pro-Arts, Inc. v. Campus Crafts Holding Ltd. et al.* (1980), 50 C.P.R. (2d) 230 at page 251 (O.H.C.J.); *Jelin Investments Ltd. v. Singtech Inc.* (1990), 34 C.P.R. (3d) 171 at pages 173-74; *Morton v. Ecoglass Installations Ltd.* (1991), 36 C.P.R. (3d) 355 at page 359 (B.C.S.C.); and *Kaffka v. Mountainside Developments Ltd.* (1982), 62 C.P.R. (2d) 157 at page 163 (B.C.S.C.).

[74] The preceding caselaw indicates that exemplary damages may be awarded by the Court when the amount of compensatory damages does not have the desired deterrent effect. In *Profekta*, supra, Justice Linden of the Federal Court of Appeal correctly summarized the Court's approach when a similar request was made to him. Referring to the remarks of Cory J. in *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at pages 1208-09, he writes:

On the issue of exemplary damages, the Supreme Court of Canada has held in *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at 1208-1209 (per Cory J.), that such damages should only be awarded in cases "where the combined award of general damages and aggravated damages would be insufficient to achieve the goal of punishment and deterrence". This approach has been recently followed in this Court (see *Lubrizol Corp. v. Imperial Oil Ltd.* (1996), 197 N.R. 241, 67 C.P.R. (3d) 1).

According to Cory J. in Hill, the question which this Court must ask, in reviewing the Motions Judge's refusal to award exemplary damages, is: "was the misconduct of the defendant so outrageous that punitive damages were rationally required to act as deterrence?"

[75] In this case, the plaintiff invested time and effort in protecting its right. Here, the infringement of the plaintiff's copyright is blatant. Given, in particular, the fact that the plaintiff, the services involved as well as the cable affiliates had informed the would-be offenders in advance that they risked legal proceedings (see the various statements submitted in exhibit P-1), exemplary damages are appropriate in the circumstances. Otherwise, other establishments could be tempted to engage in the same kind of behaviour in order to avoid paying the necessary royalties.

[76] What should be the amount of these exemplary damages?

[77] The Court notes in this respect that the infringement was for a limited period of time and that there is no evidence in the record of repeated infringements by the defendants. Consequently, the Court believes that a nominal amount of \$500 for exemplary damages payable by each of the defendants will be sufficient in the circumstances to achieve the desired deterrent effect.

[78] Consequently, the action against the other defendants is allowed in part. The plaintiff will be entitled to costs against each of the other defendants. The plaintiff asked that they also be ordered to pay double costs. This request is denied in view of the end result, the absence in the record of offers to settle as well as the conditions provided in subsection 420(1) of the Federal Court Rules, 1998, SOR/98-106.

JUDGMENT

FOR THE REASONS STATED ABOVE, THE COURT ORDERS that the action against the defendant 9012-4314 Québec Inc. (Hippo Club) be dismissed with costs to the Hippo Club. The action against the other defendants is allowed in part, in accordance with the terms hereunder, the other conclusions sought by the applicant being dismissed as well. IT IS DIRECTED that each of the other defendants as well as their directors, officers and employees refrain from infringing in any way the copyright that the plaintiff owns in the three programs pertaining to the boxing matches presented at the Molson Centre in Montréal on May 28, 1999 (the works), and, without limiting the generality of the foregoing, that they refrain from communicating to the public or publicly performing the works, by any means. THE COURT ORDERS the other defendants to pay to the plaintiff, as compensatory damages, the amounts indicated below:

- a) Les Placements GRMS Inc., carrying on business as BANK-O-BAR, the amount of \$1,080.00;
- b) Transport Wilfrid Dionne Inc., carrying on business as Bar du Zoo, the amount of \$562.50;
- c) Bar Le Versatile Inc., the amount of \$1,290.00;
- d) 2548-8024 Québec Inc., carrying on business as Bar L'Étrier, the amount of \$2,257.50;
- e) Brasserie Broue Lib (1980) Inc., carrying on business as Brasserie La Broue Lib 80, the amount of \$750.00; and

- f) Piscines Varennes Inc., carrying on business as La Queue de Billard, the amount of \$600.00. THE COURT ORDERS each of the other defendants to pay the amount of \$500.00 to the plaintiff as exemplary damages. WITH COSTS against each of the other defendants. "Luc Martineau" Judge Certified true translation Kelley A. Harvey, BA, BCL, LLB ANNEXE I - Copyright Act, R.S.C.985, ch. C-42, as amended
2. In this Act, "copyright" « droit d'auteur » "copyright" means the rights described in
- (a) section 3, in the case of a work, (...)
2. Les définitions qui suivent s'appliquent à la présente loi. « droit d'auteur » "copyright" « droit d'auteur » S'entend du droit visé :
- a) dans le cas d'une oeuvre, à l'article 3; [...] "work" « oeuvre » "work" includes the title thereof when such title is original and distinctive; « oeuvre » "work" « oeuvre » Est assimilé à une oeuvre le titre de l'oeuvre lorsque celui-ci est original et distinctif. "cinematographic work" « oeuvre cinématographique » "cinematographic work" includes any work expressed by any process analogous to cinematography, whether or not accompanied by a soundtrack; « oeuvre cinématographique » "cinematographic work" « oeuvre cinématographique » Y est assimilée toute oeuvre exprimée par un procédé analogue à la cinématographie, qu'elle soit accompagnée ou non d'une bande sonore. "dramatic work" « oeuvre dramatique » "dramatic work" includes (...) (b) any cinematographic work (...) « oeuvre dramatique » "dramatic work" « oeuvre dramatique » Y sont assimilées [...] les oeuvres cinématographiques [...] "maker" « producteur » "maker" means
- (a) in relation to a cinematographic work, the person by whom the arrangements necessary for the making of the work are undertaken, or (...) « producteur » "maker" « producteur » La personne qui effectue les opérations nécessaires à la confection d'une oeuvre cinématographique, [...] "performance" « représentation » ou « exécution » "performance" means any acoustic or visual representation of a work, (...) or communication signal, including a representation made by means (...) [a] television receiving set; « représentation » ou « exécution » "performance" « représentation » ou « exécution » Toute exécution sonore ou toute représentation visuelle d'une oeuvre, ou d'un signal de communication, selon le cas, y compris l'exécution ou la représentation à l'aide [...] d'un appareil récepteur de télévision. "communication signal" « signal de communication » "communication signal" means radio waves transmitted through space without any artificial guide, for reception by the public; « signal de communication » "communication signal" « signal de communication » Ondes radioélectriques diffusées dans l'espace sans guide artificiel, aux fins de réception par le public. "telecommunication" « télécommunication » "telecommunication" means any transmission of signs, signals, writing, images or sounds or intelligence of any nature by wire, radio, visual, optical or other electromagnetic system; « télécommunication » "telecommunication" « télécommunication » Vise toute transmission de signes, signaux, écrits, images, sons ou renseignements de toute nature par fil, radio, procédé visuel ou optique, ou autre système électromagnétique.

3. (1) For the purposes of this Act, "copyright", in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in public (...), and includes the sole right (...)
- (f) in the case of any literary, dramatic, musical or artistic work, to communicate the work to the public by telecommunication, (...) and to authorize any such acts. (1.1) A work that is communicated in the manner described in paragraph (1)(f) is fixed even if it is fixed simultaneously with its communication.
3. (1) Le droit d'auteur sur l'oeuvre comporte le droit exclusif de produire ou reproduire la totalité ou une partie importante de l'oeuvre, sous une forme matérielle quelconque, d'en exécuter ou d'en représenter la totalité ou une partie importante en public [...]; ce droit comporte, en outre, le droit exclusif : [...]
- f) de communiquer au public, par télécommunication, une oeuvre littéraire, dramatique, musicale ou artistique; [...] Est inclus dans la présente définition le droit exclusif d'autoriser ces actes. (1.1) Dans le cadre d'une communication effectuée au titre de l'alinéa (1)f), une oeuvre est fixée même si sa fixation se fait au moment de sa communication.
5. (1) Subject to this Act, copyright shall subsist in Canada, for the term hereinafter mentioned, in every original literary, dramatic, musical and artistic work if any one of the following conditions is met: (...)
- (b) in the case of a cinematographic work, whether published or unpublished, the maker, at the date of the making of the cinematographic work,
- (i) if a corporation, had its headquarters in a treaty country, or (ii) if a natural person, was a citizen or subject of, or a person ordinarily resident in, a treaty country; or (...)
5. (1) Sous réserve des autres dispositions de la présente loi, le droit d'auteur existe au Canada, pendant la durée mentionnée ci-après, sur toute oeuvre littéraire, dramatique, musicale ou artistique originale si l'une des conditions suivantes est réalisée : [...]
- b) dans le cas d'une oeuvre cinématographique - publiée ou non -, à la date de sa création, le producteur était citoyen, sujet ou résident habituel d'un pays signataire ou avait son siège social dans un tel pays; [...] 11.1 Except for cinematographic works in which the arrangement or acting form or the combination of incidents represented give the work a dramatic character, copyright in a cinematographic work or a compilation of cinematographic works shall subsist
- (a) for the remainder of the calendar year of the first publication of the cinematographic work or of the compilation, and for a period of fifty years following the end of that calendar year; or

- (b) if the cinematographic work or compilation is not published before the expiration of fifty years following the end of the calendar year of its making, for the remainder of that calendar year and for a period of fifty years following the end of that calendar year. 11.1 Sauf dans le cas d'oeuvres cinématographiques auxquelles les dispositifs de la mise en scène ou les combinaisons des incidents représentés donnent un caractère dramatique, le droit d'auteur sur une oeuvre cinématographique ou une compilation d'oeuvres cinématographiques subsiste :
- a) soit jusqu'à la fin de la cinquantième année suivant celle de sa première publication;
 - b) soit jusqu'à la fin de la cinquantième année suivant celle de sa création, dans le cas où elle n'a pas été publiée avant la fin de cette période.
13. (4) The owner of the copyright in any work may assign the right, either wholly or partially, and either generally or subject to limitations relating to territory, medium or sector of the market or other limitations relating to the scope of the assignment, and either for the whole term of the copyright or for any other part thereof, and may grant any interest in the right by licence, but no assignment or grant is valid unless it is in writing signed by the owner of the right in respect of which the assignment or grant is made, or by the owner's duly authorized agent. (...)
- (6) For greater certainty, it is deemed always to have been the law that a right of action for infringement of copyright may be assigned in association with the assignment of the copyright or the grant of an interest in the copyright by licence. (...)
13. (4) Le titulaire du droit d'auteur sur une oeuvre peut céder ce droit, en totalité ou en partie, d'une façon générale ou avec des restrictions relatives au territoire, au support matériel, au secteur du marché ou à la portée de la cession, pour la durée complète ou partielle de la protection; il peut également concéder, par une licence, un intérêt quelconque dans ce droit; mais la cession ou la concession n'est valable que si elle est rédigée par écrit et signée par le titulaire du droit qui en fait l'objet, ou par son agent dûment autorisé. [...]
- (6) Il est entendu que la cession du droit d'action pour violation du droit d'auteur est réputée avoir toujours pu se faire en relation avec la cession du droit d'auteur ou la concession par licence de l'intérêt dans celui-ci. [...]
21. (1) Subject to subsection (2), a broadcaster has a copyright in the communication signals that it broadcasts, consisting of the sole right to do the following in relation to the communication signal or any substantial part thereof:
- (a) to fix it,
 - (b) to reproduce any fixation of it that was made without the broadcaster's consent,
 - (c) to authorize another broadcaster to retransmit it to the public simultaneously with its broadcast, and

- (d) in the case of a television communication signal, to perform it in a place open to the public on payment of an entrance fee, and to authorize any act described in paragraph (a), (b) or (d). (...)
- 21. (1) Sous réserve du paragraphe (2), le radiodiffuseur a un droit d'auteur qui comporte le droit exclusif, à l'égard du signal de communication qu'il émet ou de toute partie importante de celui-ci :
 - a) de le fixer;
 - b) d'en reproduire toute fixation faite sans son autorisation;
 - c) d'autoriser un autre radiodiffuseur à le retransmettre au public simultanément à son émission;
 - d) d'exécuter en public un signal de communication télévisuel en un lieu accessible au public moyennant droit d'entrée. Il a aussi le droit d'autoriser les actes visés aux alinéas a), b) et d). [...]
- 27. (1) It is an infringement of copyright for any person to do, without the consent of the owner of the copyright, anything that by this Act only the owner of the copyright has the right to do. (...)
- (5) It is an infringement of copyright for any person, for profit, to permit a theatre or other place of entertainment to be used for the performance in public of a work or other subject-matter without the consent of the owner of the copyright unless that person was not aware, and had no reasonable ground for suspecting, that the performance would be an infringement of copyright. (...)
- 27. (1) Constitue une violation du droit d'auteur l'accomplissement, sans le consentement du titulaire de ce droit, d'un acte qu'en vertu de la présente loi seul ce titulaire a la faculté d'accomplir. [...]
- (5) Constitue une violation du droit d'auteur le fait, dans un but de profit, de permettre l'utilisation d'un théâtre ou d'un autre lieu de divertissement pour l'exécution en public d'une oeuvre ou de tout autre objet du droit d'auteur sans le consentement du titulaire du droit d'auteur, à moins que la personne qui permet cette utilisation n'ait ignoré et n'ait eu aucun motif raisonnable de soupçonner que l'exécution constituerait une violation du droit d'auteur. [...]
- 34. (1) Where copyright has been infringed, the owner of the copyright is, subject to this Act, entitled to all remedies by way of injunction, damages, accounts, delivery up and otherwise that are or may be conferred by law for the infringement of a right. (...)

34. (1) En cas de violation d'un droit d'auteur, le titulaire du droit est admis, sous réserve des autres dispositions de la présente loi, à exercer tous les recours - en vue notamment d'une injonction, de dommages-intérêts, d'une reddition de compte ou d'une remise - que la loi accorde ou peut accorder pour la violation d'un droit. [...]
- (3) The costs of all parties in any proceedings in respect of the infringement of a right conferred by this Act shall be in the discretion of the court.
- (3) Les frais de toutes les parties à des procédures relatives à la violation d'un droit prévu par la présente loi sont à la discrétion du tribunal. 34.1 (1) In any proceedings for infringement of copyright in which the defendant puts in issue either the existence of the copyright or the title of the plaintiff thereto,
- (a) copyright shall be presumed, unless the contrary is proved, to subsist in the work, performer's performance, sound recording or communication signal, as the case may be; and
- (b) the author, performer, maker or broadcaster, as the case may be, shall, unless the contrary is proved, be presumed to be the owner of the copyright. (...) 34.1 (1) Dans toute procédure pour violation du droit d'auteur, si le défendeur conteste l'existence du droit d'auteur ou la qualité du demandeur :
- a) l'oeuvre, la prestation, l'enregistrement sonore ou le signal de communication, selon le cas, est, jusqu'à preuve contraire, présumé être protégé par le droit d'auteur;
- b) l'auteur, l'artiste-interprète, le producteur ou le radiodiffuseur, selon le cas, est, jusqu'à preuve contraire, réputé être titulaire de ce droit d'auteur. [...]
35. (1) Where a person infringes copyright, the person is liable to pay such damages to the owner of the copyright as the owner has suffered due to the infringement and, in addition to those damages, such part of the profits that the infringer has made from the infringement and that were not taken into account in calculating the damages as the court considers just.
- (2) In proving profits,
- (a) the plaintiff shall be required to prove only receipts or revenues derived from the infringement; and
- (b) the defendant shall be required to prove every element of cost that the defendant claims.
35. (1) Quiconque viole le droit d'auteur est passible de payer, au titulaire du droit qui a été violé, des dommages-intérêts et, en sus, la proportion, que le tribunal peut juger équitable, des profits qu'il a réalisés en commettant cette violation et qui n'ont pas été pris en compte pour la fixation des dommages-intérêts.
- (2) Dans la détermination des profits, le demandeur n'est tenu d'établir que ceux provenant de la violation et le défendeur doit prouver chaque élément du coût qu'il allègue.

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. (...)
36. (1) Sous réserve des autres dispositions du présent article, le titulaire d'un droit d'auteur, ou quiconque possède un droit, un titre ou un intérêt acquis par cession ou concession consentie par écrit par le titulaire peut, individuellement pour son propre compte, en son propre nom comme partie à une procédure, soutenir et faire valoir les droits qu'il détient, et il peut exercer les recours prévus par la présente loi dans toute l'étendue de son droit, de son titre et de son intérêt. [...]
- (2) Where proceedings referred to in subsection (1) are taken by a person other than the copyright owner, the copyright owner must be made a party to those proceedings, except
- (a) in respect of proceedings taken under section 44.1, 44.2 or 44.4;
- (b) in respect of interlocutory proceedings unless the court is of the opinion that the interests of justice require the copyright owner to be a party; and
- (c) in any other case, if the court is of the opinion that the interests of justice do not require the copyright owner to be a party. (...)
- (2) Lorsque des procédures sont engagées en vertu du paragraphe (1) par une personne autre que le titulaire du droit d'auteur, ce dernier doit être constitué partie à ces procédures sauf :
- a) dans le cas de procédures engagées en vertu des articles 44.1, 44.2 et 44.4;
- b) dans le cas de procédures interlocutoires, à moins que le tribunal estime qu'il est dans l'intérêt de la justice de constituer le titulaire du droit d'auteur partie aux procédures;
- c) dans tous les autres cas où le tribunal estime que l'intérêt de la justice ne l'exige pas. [...]
- (4) Where a copyright owner is made a party to proceedings pursuant to subsection (2), the court, in awarding damages or profits, shall, subject to any agreement between the person who took the proceedings and the copyright owner, apportion the damages or profits referred to in subsection 35(1) between them as the court considers appropriate.
- (4) Le tribunal peut, sous réserve d'une entente entre le demandeur et le titulaire du droit d'auteur visé au paragraphe (2), répartir entre eux, de la manière qu'il estime indiquée, les dommages-intérêts et les profits visés au paragraphe 35(1).
37. The Federal Court has concurrent jurisdiction with provincial courts to hear and determine all proceedings, other than the prosecution of offences under section 42 and 43, for the enforcement of a provision of this Act or of the civil remedies provided by this Act.

37. La Cour fédérale, concurremment avec les tribunaux provinciaux, connaît de toute procédure liée à l'application de la présente loi, à l'exclusion des poursuites visées aux articles 42 et 43.
39. (1) Subject to subsection (2), in any proceedings for infringement of copyright, the plaintiff is not entitled to any remedy other than an injunction in respect of the infringement if the defendant proves that, at the date of the infringement, the defendant was not aware and had no reasonable ground for suspecting that copyright subsisted in the work or other subject-matter in question.
- (2) Subsection (1) does not apply if, at the date of the infringement, the copyright was duly registered under this Act. 39.1 (1) When granting an injunction in respect of an infringement of copyright in a work or other subject-matter, the court may further enjoin the defendant from infringing the copyright in any other work or subject-matter if
- (a) the plaintiff is the owner of the copyright or the person to whom an interest in the copyright has been granted by licence; and
- (b) the plaintiff satisfies the court that the defendant will likely infringe the copyright in those other works or subject-matter unless enjoined by the court from doing so.
39. (1) Sous réserve du paragraphe (2), dans le cas de procédures engagées pour violation du droit d'auteur, le demandeur ne peut obtenir qu'une injonction à l'égard de cette violation si le défendeur prouve que, au moment de la commettre, il ne savait pas et n'avait aucun motif raisonnable de soupçonner que l'oeuvre ou tout autre objet du droit d'auteur était protégé par la présente loi.
- (2) Le paragraphe (1) ne s'applique pas si, à la date de la violation, le droit d'auteur était dûment enregistré sous le régime de la présente loi. 39.1 (1) Dans les cas où il accorde une injonction pour violation du droit d'auteur sur une oeuvre ou un autre objet, le tribunal peut en outre interdire au défendeur de violer le droit d'auteur sur d'autres oeuvres ou d'autres objets dont le demandeur est le titulaire ou sur d'autres oeuvres ou d'autres objets dans lesquels il a un intérêt concédé par licence, si le demandeur lui démontre que, en l'absence de cette interdiction, le défendeur violera vraisemblablement le droit d'auteur sur ces autres oeuvres ou ces autres objets. II - Loi sur la radiocommunication, L.C. 1991, ch. 11 et ses modifications
9. (1) No person shall (...)
- (c) decode an encrypted subscription programming signal or encrypted network feed otherwise than under and in accordance with an authorization from the lawful distributor of the signal or feed; (...)
9. (1) Il est interdit : [...]

- c) de décoder, sans l'autorisation de leur distributeur légitime ou en contravention avec celle-ci, un signal d'abonnement ou une alimentation réseau; [...] FEDERAL COURT SOLICITORS OF RECORD DOCKET: T-1788-99 STYLE OF CAUSE: INTERBOX PROMOTION CORPORATION v. 9012-4314 QUÉBEC INC. (HIPPO CLUB), BANK-O-BAR, BAR DU ZOO, BAR LE VERSATILE INC., 2548-8024 QUÉBEC INC. (BAR L'ÉTRIER), BRASSERIE LA BROUE LIB 80, LA QUEUE DE BILLARD PLACE OF HEARING: MONTRÉAL, QUEBEC DATE OF HEARING: SEPTEMBER 15, 2003 REASONS FOR JUDGMENT AND JUDGMENT: THE HONOURABLE MR. JUSTICE MARTINEAU DATE OF REASONS: OCTOBER 27, 2003 APPEARANCES: Daniel Artola FOR THE PLAINTIFF Jacques S. Darche FOR THE DEFENDANTS SOLICITORS OF RECORD: MCCARTHY TÉTRAULT FOR THE PLAINTIFF Montréal, Quebec BORDEN LADNER GERVAIS FOR THE DEFENDANTS Montréal, Quebec

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