

## **Free-lancers' summary judgment motion dismissed against Globe and Mail**

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A summary judgment motion was recently dismissed in a class action by free-lance writers against the Globe and Mail for copyright infringement (*Robertson v. Thomson Corp.* ([2001] O.J. No. 3868).

The members of the plaintiff class argue their copyright was infringed because they did not grant the Globe permission to reproduce their articles in electronic form in the Globe's on-line archive Info Globe Online or in CD-ROMs. The representative plaintiff on behalf of the class is Heather Robertson, a free-lance writer.

The Robertson case interests me partly because I have a number of weird, admittedly remote, personal connections with the case. I spent two years in the early eighties as a regular Globe free-lance cartoonist, so I initially thought maybe there be millions in it for me (well, okay, maybe ten bucks). But it seems even if the free-lancers eventually win, I won't get a nickel because cartoons aren't included in Info Globe Online.

The summary judgment motion was dismissed by Mr. Justice Cumming of the Ontario Superior Court on October 3, 2001, on the grounds a trial of an issue was required. Still, the decision was nevertheless a partial victory for the free-lancers because Justice Cumming disposed of a key defence asserted by the Globe, and commented that its other defences were "problematic."

The Globe argued that it had copyright in what the Act defines as a "collective work," namely "a newspaper, review, magazine or similar periodical." As such, it had the "sole right to ... reproduce the work in any material form whatever." Therefore, it argued, it could reproduce the newspaper in database form, if it chose.

Mr. Justice Cumming rejected this, because each article can be retrieved from the database individually. "The Globe is selling access to stand-alone free-lance articles," he wrote. He discussed at some length the *Tasini* decision of the United States Supreme (*New York Times Co. v. Tasini*, [2001] SCT-QL 139), in which the majority decision by

Justice Ginsburg reached much the same result, albeit arising out of the somewhat different language of the US statute.

In *Tasini* the defendant, the New York Times, did not argue that free-lancers had given permission, implied or otherwise, to reproduce their articles in electronic form.

But in *Robertson*, the Globe argued it had an implied license from free-lancers to reproduce the works in electronic form (relying in part on a case I argued years ago, *Cselko Associates v. Zellers Inc.* (1992), 44 C.P.R. (3d) 56, in which an implied license to use a free-lancer's work was found to arise from industry practice.) The Globe also argued that the free-lancers had acquiesced in the reproduction of their articles in the database.

There was conflicting evidence before Mr. Justice Cumming about the practice in the free-lance writing trade.

The plaintiffs' evidence included that of Cameron Smith, a former managing editor of the *Globe and Mail*, (who, as it happens, enlisted me as a free-lancer in 1981) and also the evidence of veteran journalist June Callwood, who said the Globe's arrangement with free-lancers were usually oral, but that the newspaper invariably obtains only a one-time publication right.

The defendants filed the evidence of Robert Fulford, another well-known Toronto journalist, who said essentially the opposite: the practice in the trade, from the late 1970s on, he said, was that the Globe purchased the right to use free-lancers' article in the on-line database, as well as the newspaper.

Justice Cumming concluded there was conflicting evidence on "whether these agreements, which were generally oral contracts, included a right to publish materials on the electronic databases," requiring a trial.

Incidentally, the claim names two representative articles by Heather Robertson, both published in the *Globe*. One is an excerpt from Ms. Robertson's excellent 1995 book *Driving Force: The McLaughlin Family and the Age of the Car*. I remember when the excerpt appeared; I rushed out to buy the book to give to my grandmother, who in her youth was a great friend of the McLaughlin family. Her husband, my grandfather, proposed at their house in Oshawa.

My grandmother, now a spry 94, tells me she enjoyed the book, and is surprised to hear it's involved in a lawsuit.