

# Layered Rights: *Robertson v. Thomson*

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In *Robertson v. Thomson Corp.*,<sup>1</sup> the Supreme Court of Canada (“the Court”) considered “whether newspaper publishers are entitled as a matter of law to republish in electronic databases freelance articles they have acquired for publication in their newspapers — without compensation to the authors and without their consent”.<sup>2</sup> Curiously, while deciding that publishers are *not* entitled to reproduce the individual articles without the consent of the freelancers,<sup>3</sup> it also held that the publishers *do* have a right to reproduce the articles in a CD-ROM database “as a part of those collective works — their newspapers . . .” independently of whether the scope of authorization of the freelancers extends to reproduction in electronic databases.<sup>4</sup> The Court observed that, at its core, the case concerned competing layered rights of publishers in their newspaper, and freelancers in their articles contained in the newspaper.<sup>5</sup> In this comment, however, the author argues that by grounding the right of publishers to reproduce newspaper articles in their right to reproduce their newspapers — independently of the scope of the authorization to reproduce the articles — the Court wrongly abandons layered rights as they are ordinarily understood in the *Copyright Act*.<sup>6</sup>

The layering of copyrights is illustrated by the case of the relationship between rights in works and rights in other subject matter (the latter being so-called “related” or “neighbouring rights”).<sup>7</sup> Rights exist in works under section 3 of the *Copyright Act* and also in other subject matter, namely, performers’ performances (ss. 15 & 26), sound recordings (s. 18), and communications signals (s. 21).

The layered nature of rights in copyright law results from the fact that some subject matter of copyright is layered. Subject matter is layered when its existence depends upon the existence of other subject matter. For example, the existence of a sound recording of a performance of a musical work obviously depends upon the existence of the performance and of the work embodied in it. Thus, one can think of the sound recording as, metaphorically, layered over the work and the performer’s performance of the work.

Given the layering of subject matter, the exercise of rights in sound recordings, performers’ performances, and communications signals often necessarily involves

exercising other rights in the *Copyright Act*. For example, when the sound recording of a musical work is reproduced, the underlying work is also reproduced. When that sound recording is performed in public, as background music, for example, there is also a performance of the underlying work.<sup>8</sup>

Layered copyrights are generally considered to be independent of each other in the sense that the existence of a right in one person does not imply the existence of another right in that same person. Put another way, copyrights at one layer are subject to copyrights at another layer. For example, a maker’s right as specified in section 18 of the *Copyright Act* to reproduce a sound recording does not imply that the maker has the right under section 3 of the *Copyright Act* to reproduce the underlying work that is embodied in the sound recording. As a result, the maker of the sound recording cannot reproduce the sound recording, despite the maker’s right of reproduction, without the authorization of the owner of the right to reproduce the musical work embodied in the sound recording.<sup>9</sup>

*Robertson* can be understood as being about whether the result regarding sound recordings analogously holds with respect to newspapers and the articles contained in them; namely, whether a newspaper publisher can reproduce its newspaper in an electronic database without the authorization of the owners of the copyright in any articles contained in it.<sup>10</sup> The issue arose because Robertson, a freelance writer, wrote two articles that were published in the *Globe and Mail* and later reproduced in three databases: Info Globe Online, CPIQ, and a CD-ROM.<sup>11</sup> No explicit terms regarding copyright were agreed upon, either orally or in writing, but it was conceded that Robertson authorized the publication of the articles in the print newspaper.<sup>12</sup> Robertson objected to the reproduction of her articles in the databases, however, and instituted a class action on behalf of all contributors to the *Globe and Mail* from 1944 and thereafter.<sup>13</sup> From the perspective of the *Globe and Mail*, the reproduction of the articles in electronic databases was grounded in the right to reproduce its newspaper, which contained the articles. From the perspective of the freelance authors of the articles, the reproduction of the newspaper was a reproduction of the articles, which was an infringement of the right to

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reproduce the articles held by the freelancers, such as Robertson.<sup>14</sup>

The Court found that a reproduction of the articles in a CD-ROM was *not* an infringement<sup>15</sup> while the reproduction of the articles in the other databases was an infringement.<sup>16</sup> Importantly, the Court found that it was the *Globe and Mail's* right to reproduce its newspaper (containing the articles) in the CD-ROM,<sup>17</sup> irrespective of whether the reproduction of the articles in the CD-ROM was within the scope of Robertson's authorization.<sup>18</sup> In arriving at this judgment, however, the Court appears to have abandoned the idea that copyright in newspapers is layered in the manner described above.

This abandonment of layering can be explained as an attempt to reconcile the possession of copyrights in the newspaper and copyrights in the articles contained in the newspaper by distinct persons. The explanation begins, first, by noting that the Court recognized the existence of the two rights at issue:

Plainly, freelance authors have the right to reproduce, and authorize the reproduction of, their articles. Similarly, as the holders of the copyright in their newspapers, the Publishers are entitled to "produce or reproduce the work or any substantial part thereof in any material form whatever".<sup>19</sup>

Second, the rights in newspapers are layered. This is because a newspaper is both a collection and a compilation of the articles that it contains. "Compilation" is defined as:<sup>20</sup>

(a) a work resulting from the selection or arrangement of literary, dramatic, musical or artistic works or of parts thereof, or (b) a work resulting from the selection or arrangement of data.

"Collective work" is defined as:

(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.<sup>21</sup>

Since newspapers are collections and compilations of articles, arguably, the reproduction of the whole newspaper reproduces its articles. In fact, the Court recognized the layering of rights in newspapers and their articles as follows:

The *Copyright Act* establishes a regime of layered rights. Freelance authors who write newspaper articles retain the copyright in their work while the publisher of the newspaper acquires a copyright in the newspaper.<sup>22</sup>

While this statement says merely that both authors and newspaper publishers *possess* rights in their respective works, clearly, the notion of layering suggests something about the *relationship* between rights. Indeed, the Court referred to the distinct rights in compilations and their contents as "overlapping".<sup>23</sup> It is suggested that rights in the newspaper and articles "overlap" or are "layered" because there cannot be a reproduction of the whole newspaper without the reproduction of each of its article parts. Hence, the right to reproduce the entire newspaper cannot be exercised without also reproducing the articles

— which may be an exercise of a right held by someone other than the publisher.

Third, the independence of copyrights holds that the possession of one right does not imply the possession of another right. Independence holds, for example, with respect to the relationship of related rights and works. Indeed, the independence of the rights in articles and the newspaper in which they are contained is confirmed by the Court:

Pursuant to the *Copyright Act*, R.S.C. 1985, c. C-42, newspaper publishers own the copyright in their newspapers and have a right to reproduce a newspaper or a substantial part of that newspaper but *do not* have the right, without the consent of the author, to reproduce individual freelance articles.<sup>24</sup>

It follows from the principle of independence that the right of the publisher to reproduce the newspaper does not imply the right to reproduce the articles contained in it, despite the fact that the articles must necessarily be reproduced when the newspaper is reproduced (as a result of layering). The reproduction of the newspaper by the *Globe and Mail* without the authorization of the owners of the underlying articles is, therefore, an infringement of the rights of the owners of the copyrights in the articles. Nevertheless, the Court did not draw this conclusion, for it also said that newspaper publishers *do* have a limited right to publish the articles in electronic databases included in their right to publish the newspapers, irrespective of whether the authorization extends to reproduction in the databases:

Their copyright over the newspapers they publish gives them no right to reproduce, *otherwise than as part of those collective works — their newspapers — the freelance articles that appeared in them.*<sup>25</sup>

How can this finding be reconciled with the principles of layering and independence? It might appear that the Court gives up the independence of layered rights. On that account, the right to reproduce the underlying articles is part of the right to reproduce the newspaper.<sup>26</sup> Yet, at the same time, the Court appears to give up the principle of layered rights in the sense that, while there may be a reproduction of the underlying articles when reproducing the newspaper, it is not a reproduction that is an exercise of the rights of the owners of the underlying articles. Hence, on this view, there is no violation of independence of rights after all.

Not only does the judgment confirm the independence of rights,<sup>27</sup> but also, for much of the judgment the Court describes how the right of reproduction is limited by the form of reproduction. It follows on the Court's reasoning that a reproduction of the articles is not necessarily a reproduction, *in any material form whatever*, of the newspaper. (Likewise, the reproduction of a newspaper may not be a reproduction in any material form of the underlying articles.) If there can be a reproduction of a work without it being a reproduction *in any material form*, then there is an issue as to whether the databases are a reproduction in any material form of the articles

and/or of the newspaper. This is close to the fundamental question posed by the Court:

The real question then is whether the electronic databases that contain articles from the *Globe* reproduce the newspapers or merely reproduce the original articles.<sup>28</sup>

The answer given by the Court is that it depends upon whose originality is reproduced:

The answer to this question lies in the determination of whose “originality” is being reproduced: the freelance author’s alone or the Publishers’ as a collective work?<sup>29</sup>

The notion of originality was recently clarified by the Court in *CCH Canadian Limited v. Law Society of Upper Canada*.<sup>30</sup> There it said that originality was a quality of works that existed when they were produced with the exercise of skill and judgment.<sup>31</sup> Further, originality in a compilation, such as a newspaper, exists only in its *form* as an edited work rather than in the works that it contains:

Copyright protects originality of *form* or expression. A compilation takes existing material and casts it in 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.<sup>32</sup>

While there is clearly skill and judgment both in the underlying articles and in the newspaper (since copyright subsists in both), the Court held that, in the case of the Info Globe Online and CPI.Q databases, the originality of the newspaper had *not* been reproduced, but that the originality of the articles *had* been reproduced.<sup>33</sup> The reason the originality of the newspaper is reproduced in the case of the CD-ROM is that it preserves a linkage to the original newspaper. The Court said:

In our view, the CD-ROMs are a valid exercise of the *Globe’s* right to reproduce its collective works (or a substantial part thereof) pursuant to s. 3(1) of the *Copyright Act*. The CD-ROMs, like Info Globe Online and CPI.Q, do not contain advertisements, pictures or colour and are presented in a different medium and format than the print edition. The critical distinction, however, is that the CD-ROMs preserve the linkage to the original daily newspaper.<sup>34</sup>

As noted, in determining whether there was a substantial reproduction in this case, the Court placed importance upon the fact that section 3 of the *Copyright Act* defines “copyright” in a work as the “... sole right to produce or reproduce the work or any substantial part thereof in any material form whatever ...”. The Court interpreted “in any material form” as denying that *anything* can be done with the work once converted into electronic form. Thus, instead of interpreting the reproduction right as unlimited, it imposed limits on it:

Media neutrality is reflected in s. 3(1) of the *Copyright Act* which describes a right to produce or reproduce a work “in any material form whatever”. Media neutrality means that the *Copyright Act* should continue to apply in different media, including more technologically advanced ones. But it does not mean that once a work is converted into electronic data anything can then be done with it. The resulting work must still conform to the exigencies of the *Copyright Act*. Media neutrality is not a license to override the rights of authors — it exists to protect the rights of authors and others as technology evolves.<sup>35</sup>

Specifically, the Court limited the right of reproduction to those reproduced articles that are not decontextualized to the point that they are no longer presented in a manner that maintains their “intimate connection with the rest of [the] newspaper”.<sup>36</sup> This “intimacy”, “nature”,<sup>37</sup> or “essence”<sup>38</sup> must be preserved in order for the right of reproduction to be applicable.<sup>39</sup> It argued that the decontextualization of the articles in the Info Globe Online and CPI.Q made them more like a collection of *individual articles*, a collection of a different nature than a reproduction in the *form* of a newspaper:

We again agree with the Publishers that their right to reproduce a substantial part of the newspaper includes the right to reproduce the newspaper without advertisements, graphs and charts, or in a different layout and using different fonts. But it does not follow that the articles of the newspaper can be decontextualized to the point that they are no longer presented in a manner that maintains their intimate connection with the rest of that newspaper. In Info Globe Online and CPI.Q, articles from a given daily edition of the *Globe* are stored and presented in a database together with thousands of other articles from different periodicals and different dates. And, these databases are expanding and changing daily as more and more articles are added. These products are more akin to databases of individual articles rather than reproductions of the *Globe*. Thus, in our view, the originality of the freelance articles is reproduced; the originality of the newspapers is not.<sup>40</sup>

The Court found, in contrast, that the reproduction of the newspaper in the CD-ROM did preserve the essence of the work, since it is essentially a compendium of daily newspaper editions.<sup>41</sup>

This analysis may explain why, according to the Court, the originality of the newspaper was not reproduced in the Info Globe and CPI.Q databases but was reproduced in the CD-ROM. It does *not* explain, however, why the originality of the *articles* is not reproduced in the CD-ROM, while it was reproduced in the case of the Info Globe and CPI.Q databases. Yet the Court said that the “real question” in *Robertson* was whose originality was being reproduced rather than whether there was authorization to reproduce the articles in the databases.<sup>42</sup> A finding that the originality of the articles is not reproduced in the case of the CD-ROM would be problematic, however, because it indicates that the Court does not view the rights in newspapers as being layered over the rights in works. For, in the majority’s view, the reproduction of the newspaper does not necessarily reproduce *in any material form whatever*, the underlying articles. This would save the independence of copyright, but how can it be?

Of course, there are situations where one could reproduce a substantial part of the newspaper but not the underlying articles, as in the case where the layout of the newspaper is produced without the articles. There could also be circumstances where a substantial part of the newspaper is reproduced, but only an insubstantial part of one or more articles is reproduced. But how could it be said that the *entire* newspaper was reproduced (minus, perhaps, as in this case, some advertise-

ments, graphic elements, daily information, birth and death notices, and some design elements) but that the originality of the articles was not reproduced? Given layered rights, doesn't the reproduction of a compilation necessarily involve reproducing the original underlying works?

The minority believed that it did:

The right of reproduction adheres equally to the benefit of authors of individual works and to those of collective works or compilations. In considering the publisher's right of reproduction, the majority says that the line between the rights of individual authors and the rights of authors of collective works should be drawn on the basis of whose originality is being reproduced. This suggests that the databases in question reproduce only one group's originality. This, with respect, seems to me to contradict the essence of collective works and compilations, which inherently contain the "originality" of both the authors of individual works as well as of the creator of the collective work or compilation. Any reproduction of a collective work will necessarily involve the reproduction of *both* sets of originality.<sup>43</sup>

The majority did not directly respond to the minority counter-argument apart from its assertion that the originality of the newspaper was not reproduced in *any material form whatever* in the Info Globe and CPI.Q databases. This is not surprising, since the skill and judgment embodied in the articles is necessarily reproduced when the entire newspaper is reproduced. Interpreting the majority's reasoning charitably, however, one could maintain that the fact that the originality of the newspaper was not reproduced in the case of the Info Globe and CPI.Q databases was the reason there was no exercise of the right of reproduction with respect to the newspapers, but that the same reason does not account for the determination that there was no exercise of the right of reproduction with respect to the underlying articles in the CD-ROM.

To attempt to explain the determination that there is no exercise of the reproduction right with respect to the articles on such an account, one could apply the Court's interpretation of "in any material form whatever" to limit the reproduction right in the articles. On such an

account, it might be said that the right of reproduction of the freelancers in their articles could be narrowed in a different way than is the right of reproduction of publishers in their newspapers and other collective works and compilations. One view is that only the *initial* reproduction of the individual articles in a newspaper would be an exercise of the right to reproduce the articles. *Subsequent* reproduction of a newspaper would be an exercise only of the publisher's right to reproduce, and not the right of the owner of the copyright in an article. Hence, the publisher's right to reproduce the newspaper with the articles contained in it does not exercise a freelance author's right to reproduce the articles since that right had already been exercised by the author. Unfortunately, this result is unsatisfactory. While it may preserve the independence of rights of newspaper publishers and the owner of the copyright in the articles, it does so at the expense of the layering of rights as ordinarily understood.<sup>44</sup>

There is a better rationale for why the reproduction of the articles in the CD-ROM in *Robertson v. Thomson* was not an infringement than the one just considered. It is this. Robertson impliedly authorized the *Globe and Mail* to reproduce her articles in its newspaper.<sup>45</sup> The issue, then, is whether the scope of the authorization extended to reproduction in the electronic databases.<sup>46</sup> Since the *Globe and Mail* in the CD-ROM is a newspaper, or at least retains the nature or essence of the *Globe and Mail* newspaper,<sup>47</sup> and Robertson authorized reproduction of her articles in the *Globe and Mail* newspaper, by implication she authorized the reproduction of her articles in the CD-ROM. In short, the *Globe and Mail's* right to reproduce its newspaper does not include the right to reproduce the articles contained in it, but there has been no infringement because the reproduction of the articles was authorized by Robertson. This solution to the issue in *Robertson* does not depend upon a supposed failure of the originality of the articles to be reproduced in the CD-ROM and maintains both the independence of copyrights and their layered nature.

## Notes:

<sup>1</sup> 2006 SCC 43 (CanLII) [*Robertson*].

<sup>2</sup> *Ibid.* at para 1.

<sup>3</sup> *Ibid.* at paras. 1-2.

<sup>4</sup> *Ibid.* at para. 1. See *infra* note 18 for a discussion of the scope of authorization.

<sup>5</sup> *Ibid.* at para. 6.

<sup>6</sup> R.S.C. 1985, c. C-42.

<sup>7</sup> It should be noted that the terminology in Canada is inconsistent with respect to "neighbouring rights". The *Copyright Act* does not distinguish between neighbouring rights and copyrights. The rights in works, performers' performances, sound recordings, and communications signals are defined to be copyrights in s. 2 of the Act. Sometimes, the rights of remuneration of performers and makers of sound recordings provided for in s. 19 are called "neighbouring rights" because those are not copyrights, but this usage is not consistent either. See "Tariff No. 3 — Use and Supply

of Background Music (2003–2009)". Copyright Board, online: <<http://www.cb-cda.gc.ca/decisions/m20061020-b.pdf>>, at 25 [Tariff No. 3].

<sup>8</sup> While there is no copyright to perform either a sound recording in public or to perform a performer's performance fixed in that recording in public, there are rights of equitable remuneration under s. 19 of the *Copyright Act* belonging to the performer and the maker attached to the performance of the sound recording in public and its communication to the public by telecommunication (not including a retransmission). Interestingly, starting in 1924, makers of sound recordings did hold the right to perform their recordings in public. In 1971, the Copyright Appeal Board certified tariffs for such performances but that right was ended with subsequent amendments to the *Copyright Act*. Only in 1997 did makers of sound recordings and performers obtain the right to be remunerated. The royalties for the performance of sound recordings and their communication to the public by telecommunication are collected by the Neighbouring Rights Collective of Canada (NRCC). The Society of Com-

- posers, Authors, and Music Publishers of Canada (SOCAN) collects royalties for the performance of the work in public under a number of separate tariffs. See “Tariff No. 3”, *ibid.* at 1-2, 4-5, 59.
- <sup>9</sup> As it is put in “Mechanical Licensing Brochure”, Canadian Musical Reproduction Rights Agency, online: <<http://www.cmrra.ca/cmrradocs/mlbe06.pdf>> at 4 (emphasis in original), “[e]very recording of a copyrighted composition actually represents a blend of two copyrights: first, the copyright in the musical composition itself—that which is represented by the music publisher. Secondly, the *recording* of the musical work is separately copyrighted. . . if you plan to reproduce a master owned by another party, you must obtain the permission of the owner of that recording, in addition to the necessary mechanical licenses”.
- <sup>10</sup> An analogous result does hold in patent law with respect to pioneering inventions and improvements thereto. Under s. 32 of the *Patent Act*, R.S.C., 1985, c. P-4, “[a]ny person who has invented any improvement on any patented invention may obtain a patent for the improvement, but he does not thereby obtain the right of making, vending or using the original invention, nor does the patent for the original invention confer the right of making, vending or using the patented improvement”.
- <sup>11</sup> *Robertson*, *supra* note 1 at paras. 11–18.
- <sup>12</sup> *Ibid.* at note 1 at para. 11. The Ontario Court of Appeal said at para. 96 that “[a]lthough Robertson objects to the reproduction 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”. See *Robertson v. Thomson Corp.* (2004), 72 O.R. (3d) 481 (C.A.).
- <sup>13</sup> *Robertson*, *supra* note 1 at paras. 11–18.
- <sup>14</sup> These two perspectives are discussed by Cumming J. of the Motions Court, *Robertson v. Thomson Corp.* (2001), 15 C.P.R. (4th) 147 (Ont. Sup. Ct. J.), at paras. 111–128, and by the Ontario Court of Appeal, *supra* note 12 at paras. 61–69.
- <sup>15</sup> *Robertson*, *supra* note 1 at paras. 4, 51–52.
- <sup>16</sup> *Ibid.* at para. 3.
- <sup>17</sup> *Ibid.* at para. 4, the Court says that “. . . we believe the CD-ROMs are a valid exercise of the *Globe’s* right to reproduce its collective work”. At paragraph 52 it notes: “Nevertheless, the Court’s conclusion was reached solely on the basis of the s. 3 rights of the *Globe and Mail*. It said at para. 51 that, “[i]n our view, the CD-ROMs are a valid exercise of the *Globe’s* right to reproduce its collective works (or a substantial part thereof) pursuant to s. 3(1) of the *Copyright Act*”.
- <sup>18</sup> *Ibid.* at paras 57–58, the Court noted that “[t]here was conflicting evidence before the motions judge regarding the scope of such an alleged implied license. The content of these licenses is a live issue that should go to trial, as ordered by the motions judge. If it is determined that freelance authors have in fact impliedly licensed the *Globe* the right to republish their articles in the electronic databases, this decision will, of course, be of less practical significance”.
- <sup>19</sup> *Ibid.* at para. 33.
- <sup>20</sup> *Copyright Act*, *supra* note 6, s. 2.
- <sup>21</sup> *Ibid.*
- <sup>22</sup> *Robertson*, *supra* note 1 at para. 6.
- <sup>23</sup> *Ibid.* at para. 31.
- <sup>24</sup> *Ibid.* at para. 2 (emphasis added).
- <sup>25</sup> *Ibid.* at para. 1 (emphasis added).
- <sup>26</sup> This interpretation is suggested by *Robertson*, *ibid.* at para. 7, where the Court said: “[i]t is undisputed that freelance authors have the right to reproduce their individual works. The extent and scope of a publisher’s right to reproduce those same articles as part of its right to reproduce its newspaper is less clear”.
- <sup>27</sup> *Robertson*, *supra*, note 1 at paras. 2, 34.
- <sup>28</sup> *Ibid.* at para. 34.
- <sup>29</sup> *Ibid.*
- <sup>30</sup> [2004] 1 S.C.R. 339 [CCH].
- <sup>31</sup> *Ibid.* at para. 16.
- <sup>32</sup> *Ibid.* at para. 33 (emphasis in original), cited in *Robertson*, *supra* note 1 at para. 36.
- <sup>33</sup> *Robertson*, *ibid.* at para. 41.
- <sup>34</sup> *Ibid.* at para. 51.
- <sup>35</sup> *Ibid.* at para. 49. It is odd that the majority did not explicitly refer to the balance between owners and users in this context while the minority does at para. 69. Moreover, in considering the balance of the rights of owners and users in interpreting “in any material form”, it would *not* have limited reproduction in the way that the majority did since a broader reproduction right would benefit the public’s interest in access to newspapers. At para. 76, the minority points out that “[t]he words ‘any material form whatever’ in s. 3(1) should be taken to mean what they say: the author’s exclusive right to reproduce a ‘substantial part’ of a copyrighted work is not limited by changes in form or output made possible by a new medium”.
- <sup>36</sup> *Ibid.* at para. 41.
- <sup>37</sup> *Ibid.* at para. 47.
- <sup>38</sup> *Ibid.* at paras. 38, 52.
- <sup>39</sup> *Ibid.* at para. 52, where the Court says that “[t]o pass muster, a reproduction does not need to be a replica or a photographic copy. But it does need to remain faithful to the essence of the original work. And, in our view, the CD-ROM does so by offering users, essentially, a compendium of daily newspaper editions”.
- <sup>40</sup> *Ibid.* at para. 41. The Court also noted at para. 47, that “[v]iewed ‘globally’, to use the language of this Court in *CCH*, Info Globe Online and CPI.Q are different selections than the selections that they incorporate. They are compilations of individual articles presented outside of the context of the original collective work from where they originated. The resulting collective work presented to the public is not simply each of the collective works joined together—it has become a collective work of a different nature”. This finding is reminiscent of *Hanstaengl v. Empire Palace* [1894] 2 Ch. 1 at 4–10 (C.A.) in which *tableaux vivants* of persons positioned and dressed exactly like the persons in a painting was presented at an exhibition. The Court found there that there was no reproduction of the painting “by any means” because the reproduction was by “totally different means” such that it did not compete in the marketplace with the original. This contrasts with a finding of infringement in *Rogers v. Koons*, 960 F. 2d 301 (2d Cir. 1992), where a sculpture of puppies created by Koons incorporated the composition, poses, and the expressions from a photograph of puppies whose copyright was owned by Rogers.
- <sup>41</sup> *Ibid.* at para. 52.
- <sup>42</sup> *Ibid.* at para. 34.
- <sup>43</sup> *Ibid.* at para. 82 (emphasis in original). As in the case of the majority, however, the minority appears to endorse the idea that the right of the *Globe and Mail* to reproduce its collective works under s. 3 implies the right to reproduce the underlying works irrespective of the authorization of owners of the copyright in the articles. Despite the fact that the originality of the underlying works is necessarily copied when the collective work is itself copied, the minority said, at para. 83, that “. . . this does not bar the creator of a collective work, such as a newspaper, from reprinting the newspaper. On the contrary, creators of collective works, like authors of individual works, have the ‘sole right’ under s. 3 to produce and reproduce their works, which in the case of the former will necessarily include the originality of contributing authors . . .”. The minority adds that no unfairness would be created since the “ability to produce a collective work in the first place depends on the individual authors’ authorization to use the materials that form the compilation”.
- <sup>44</sup> Moreover, part of this understanding is that the nature of the rights in works does not depend upon whether the works are part of a newspaper. As the Court itself noted in *Robertson*, at para. 30, s. 2.1(2) of the *Copyright Act* confirms that “[t]he mere fact that a work is included in a compilation does not increase, decrease or otherwise affect the protection conferred by this Act in respect of the copyright in the work”.
- <sup>45</sup> *Robertson* at para. 11. See also the discussion at *supra* note 12.
- <sup>46</sup> There was conflicting evidence on the scope of any license and the case was decided independently of the scope of any license. See *Robertson*, at para. 57.
- <sup>47</sup> *Robertson* at para. 63. The Court decided that it was not necessary to determine whether the electronic databases constituted a newspaper notwithstanding that it believed that CPI.Q and Info Globe Online were not newspapers since the databases were of a different nature than the print newspaper. It could have quite easily inferred, thought it did not, that the CD-ROM was a newspaper given that the essence of the newspaper was preserved in the CD-ROM (at para. 53).