

Federal Court



Cour fédérale

Date: 20100712

Docket: T-949-05

Citation: 2010 FC 741

Ottawa, Ontario, July 12, 2010

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

FREDERICK L. NICHOLAS

Plaintiff

and

**ENVIRONMENTAL SYSTEMS
(INTERNATIONAL) LIMITED;
BRIAN G. COOK; REIF WINERY INC.
(c.o.b. as “REIF ESTATE WINERY”);
KLAUS REIF;
and RE/DEFINING WATER INC.**

Defendants

REASONS FOR JUDGMENT AND JUDGMENT

THE CLAIMS

[1] The Plaintiff originally sought a range of relief for breach of copyright and breach of moral rights by the Defendants in a document entitled “Technical Evaluation and Report on the Patented ESIL Process” which the Plaintiff authored between May 30 and June 3, 2003 (Report).

[2] The Report is an evaluation of the patented water purification technology of the Defendant Environmental Systems (International) Limited (ESIL) and was prepared by the Plaintiff for Mr. Charles Vollmer and VII Inc., neither of whom is a party to this action.

[3] The Plaintiff says that the Defendants ESIL and/or Cook have copied, published and distributed the original and/or modified versions of the Report as part of information packages sent to prospective investors and licensees of ESIL's water purification technology.

[4] The Plaintiff also initially alleged that Defendants Cook and/or ESIL have modified the original Report by changing the Plaintiff's personal opinions, making some minor changes to the text, and substituting non-standard and unknown chemical terminology for standard chemical nomenclature. He says that because he has continued to be identified as the author of the Report and the modified versions of it, these changes have caused, or will cause, knowledgeable readers to question his technical competence to the prejudice of his honour and reputation. At trial, however, the Plaintiff acknowledged that there was no evidence to support this aspect of his claim.

[5] The Plaintiff also says that the Defendants Reif and the Braun Group (The Braun Group being Defendants Reif, Reif Estate, Sabine Reif, Braun Estate Winery and Alfred Braun of Germany) have reproduced and distributed original and modified versions of the Report.

[6] As regards Defendant Re-defining Water Inc. (Re-defining Water), the Plaintiff says it has been publishing and making available on its website the original Report to support its sales of

technology sub-licences as well as sales of bottled water that is treated, bottled and distributed at its place of business in St. Catherines, Ontario.

[7] Finally, the Plaintiff says that all of the Defendants have illegally used his Report, as well as modifications, to successfully sell their licensed patented water purification systems and related technology to buyers for sums in excess of \$23,000,000.00 (USD), or the Canadian equivalent of \$27,000,000.00.

[8] As a result of the alleged infringing activity by the Defendants, the Plaintiff began by seeking the following relief:

- i. Permanent injunctions restraining the Defendants, their employees, agents, officers, directors or assigns, as the case may be, by themselves or in combination with any other person, from directly or indirectly:
 - i. infringing copyright in the Report; and
 - ii. producing, reproducing, publishing, communicating to the public by telecommunication, using or distributing the Report, or any substantial part thereof, in any material form whatsoever, or authorizing any other person to do so;
- ii. A declaration that copyright subsists in the Report and that the Plaintiff is the owner thereof;
- iii. A declaration that by copying, reproducing, distributing, distorting, and modifying the Report, without the permission, consent, or license of the Plaintiff, the

Defendants Cook and ESIL have infringed the Plaintiff's copyright and moral rights in the Report;

- iv. A declaration that in reproducing and distributing the Report or any modified versions of the Report without leave or license and in association with the Plaintiff's name, Defendant Reif Estate and Defendant Reif have infringed the Plaintiff's copyright and moral rights in the Report;
- v. A declaration that by reproducing, distributing, making available, and communicating to the public by telecommunication the Report in association with the Plaintiff's name, the Defendant Re/defining Water Inc. has infringed the Plaintiff's copyright and moral rights in the Report;
- vi. Damages for copyright infringement and moral rights infringement;
- vii. An accounting of the Defendant's profits;
- viii. Delivery up to the Plaintiff of all copies of the Report and any modified versions;
- ix. Statutory damages pursuant to the *Copyright Act* at the election of the Plaintiff;
- x. Punitive, aggravated and exemplary damages;
- xi. Pre and post-judgment interest;
- xii. Goods and services tax on monetary awards as appropriate;
- xiii. Costs of this action; and
- xiv. Such further and other relief as this Court may deem just.

[9] During the course of the trial, however, the Plaintiff elected to claim statutory damages under section 38.1 of the *Copyright Act* in lieu of damages and profits which he could not prove. In addition, instead of claiming damages for breach of moral rights, the Plaintiff asked the Court to take into account the modifications to the Report made by the Defendants when assessing punitive damages.

CONCESSIONS AND ELECTIONS

[10] For the purposes of this action, the Defendants have conceded that:

- a. The Report attracts copyright protection;
- b. The Plaintiff is the owner of the copyright in the Report; and
- c. Insofar as moral rights adhere to the Report, the Plaintiff is the owner of those moral rights.

[11] During the course of the trial the Plaintiff conceded that, as far as moral rights were concerned, he could not adduce evidence to show that any reputation he might enjoy as a consultant has been damaged or prejudiced by the modifications made to the Report by any of the Defendants. Consequently, he withdrew his claim for damages for breach of moral rights but asked the Court to take into account the conduct of the Defendants in modifying the Report when assessing any punitive damages to which he might be entitled.

[12] The Plaintiff also failed to adduce evidence at trial to show that he had suffered any damage as a result of breach of copyright, or that any profits had been earned by the Defendants as a result of any breach of the copyright in the Report. Consequently, the Plaintiff elected to pursue statutory damages under section 38.1 of the *Copyright Act*.

EVIDENCE OF INFRINGEMENT OF COPYRIGHT

[13] Generally speaking, the evidence adduced concerning infringement of copyright suggests that the Plaintiff's claims are disproportionate and opportunistic.

[14] Based upon modifications made to the Report by Mr. Cook and ESIL, the Plaintiff initially alleged a breach of his moral rights but was unable to demonstrate or prove how any reputation he might enjoy as a consultant has been, or could be, prejudiced by those modifications. He merely asserted that any technically competent person reading the modified Report would question his technical competence. However, the evidence is clear that the version of the Report that went on Re-defining Water's website was the original, so that there could be no prejudice to the Plaintiff's reputation as a result of anyone seeing the original Report, unless that damage was caused by what the Plaintiff had himself put in the original Report. As regards any modified version of the Report, the evidence from the Plaintiff himself is that no one has contacted him to question his technical competence and he was at a loss to show the Court how his reputation has been prejudiced or affected in any way. This is hardly surprising, given the evidence of an extremely restricted distribution of any modified version of the Report.

[15] In relation to breach of copyright, the Plaintiff entered the trial seeking \$27,000,000.00 (CD) as compensation for acts that, even if proved, would be fairly contained and/or inconsequential forms of infringement. He says that the Defendants have used his Report without his consent to raise significant sales and investment receipts but, once again, he has failed to adduce evidence to show how, even if his allegations of infringement are accepted, the Defendants have caused him any damage or have made a profit from the unauthorized exploitation of his copyright in the Report. As with his allegations of breach of moral rights, the Plaintiff has not placed his assertions in their full context or provided the Court with the evidence it needs to fully assess the compensation and other relief he seeks. As a consequence, the Plaintiff modified this aspect of his claim at the trial to a claim for statutory damages under section 38.1 of the *Copyright Act* in the amount of \$20,000, which he then sought to supplement by an inflated and unsubstantiated claim for \$750,000 by way of punitive damages to punish conduct on the part of the Defendants that has, by and large, been a fairly conventional response to the Plaintiff's opportunistic demands for large and disproportionate sums of money.

[16] Behind the claims, there are suggestions in the evidence of a former business and personal relationship between the Plaintiff and Mr. Cook that has gone sour. Mr. Cook was the person who secured for the Plaintiff the opportunity to produce the Report and to form a contact with Mr. Vollmer of VII Inc. In order to secure Mr. Vollmer's assistance in raising investment dollars for ESLIN, Mr. Cook recommended that Mr. Vollmer use the Plaintiff to produce the Report that dealt with ESLIN's water purification technology. But the relationship between the Plaintiff and Mr.

Cook turned confrontational and, by the time of the trial, it was apparent that the breach of copyright and breach of moral rights allegations were symptomatic of a deeper frustration and disappointment that goes well beyond the facts and legal concepts invoked by the Plaintiff. The other Defendants have been caught in the fallout from a failed relationship that has not yielded the rewards to which the Plaintiff believes he is entitled. The Plaintiff may or may not have good grounds for his complaints about Mr. Cook, but breach of moral rights and breach of copyright in the Report cannot be exaggerated in order to cover the Plaintiff's general grievances, whatever they may be. This is why, at the trial, the Plaintiff was reduced to asking the Court to punish the Defendants for conduct towards him that he perceives as high-handed and unconscionable but which, in reality, is little more than an attempt by the Defendants to resist and defend themselves against the excessive nature of the Plaintiff's claims.

[17] My review of the evidence suggests the following limited dealings with the Report by the Defendants:

- a. The Plaintiff provided a copy of the Report to ESIL/Mr. Cook upon its completion in June, 2003;
- b. In February 2004, Mr. Cook contacted the Plaintiff to advise that he needed another copy of the Report and the Plaintiff obliged by sending Mr. Cook an electronic copy by e-mail;
- c. Mr. Cook made modifications to the text of the Report he received from the Plaintiff in February 2004;

- d. Shortly after making modifications to the Report in February 2004, Mr. Cook provided a modified copy of the Report to Mr. Klaus Reif, one of the Defendants who, at the time, was an existing investor in ESIL and who was considering an additional investment in ESIL that did not occur. Mr. Cook originally thought that Mr. Reif forwarded this copy of the Report to Germany, but Mr. Reif clarified that he had not done this;
- e. Mr. Reif made one copy of the modified Report and provided it to his friend and business contact, Mr. Wayne Cardiff, another investor in ESIL who wished to identify possible additional investors. There is no evidence that Mr. Cardiff made any copies of the Report and it seems clear that the copy provided to Mr. Cardiff was returned to Mr. Reif within a very short space of time and was eventually returned to the Plaintiff. Mr. Reif says he also downloaded on June 3, 2005 a copy of the Report from the Re-defining Water website after the litigation started. He says he did not use this copy and retained it to show, after the law suit began, that the Report was “in public domain”;
- f. In 2004, Re-defining Water, one of the Defendants and a company that licences ESIL technology to produce and distribute bottled water products, posted the original Report (without modifications) on its Internet website where it remained until it was removed upon commencement of this litigation. There is no evidence that the Report on Re-defining’s website was ever downloaded by anyone or was even viewed during the time it remained on the website, except by Mr. Reif.

[18] The Plaintiff speculates that further use was made of the Report but there is no evidence before me to support anything more than the limited uses outlined above. For example, I can find no evidence to suggest that Reif Winery Inc. (c.o.b. Reif Estate Winery) did anything with the Report that could be construed as an infringing act.

[19] Also, I can find no evidence that multiple copies of the Report were made and disseminated. Those that were made were either returned to Plaintiff by Mr. Reif when the Plaintiff demanded (except for the copy that Mr. Reif downloaded for purpose of the lawsuit) or were produced as part of the discovery process. The Plaintiff has pointed to and read into evidence a portion of Mr. Cook's examination for discovery where Mr. Cook says that "ESIL or I made, about four, five something like that," but it is clear to me that, when these remarks are read in full context, Mr. Cook is here referring to "modifications to one report," not multiple reports.

[20] The only action that could have resulted in broader dissemination occurred when Redefining Water placed the original version of the Report on its website, but there is no evidence before me, apart from Mr. Reif's downloading of a single copy for purposes of this lawsuit, that anyone either viewed the Report on the website or downloaded it.

[21] I can find no evidence that any of the Defendants made any money, or gained any other advantage, from either copying or using the Report or any modified version of the Report, or that they have deprived, or could deprive, the Plaintiff of any profits that the Plaintiff might earn from the Report. In fact, the Plaintiff does not even allege that the Defendants sold copies of the Report or

that the conduct of the Defendants prevented him from selling or otherwise exploiting the Report with someone else, and it is difficult to see how the Plaintiff might make money from any such activities given the limited purpose of the Report and the context in which it was produced.

[22] There is no evidence to demonstrate that either ESIL or Mr. Cook were able to use the Report to sell licences in the ESIL technology or to sell the ESIL patent portfolio. The negotiations with the Braun Group, for instance, did not result in a sale of the portfolio.

[23] Re-defining Water posted the original Report on its website but there is no evidence before the Court that anyone reviewed the Report or made decisions to invest in, or otherwise deal with Re-defining Water and/or ESIL, in reliance on the Report, or that Re-defining Water and/or ESIL or Mr. Cook earned any revenues or sold rights in the ESIL technology in connection with the Report. The Plaintiff speculated at trial that Re-defining Water had been able to secure investments and loans as a result of posting the Report on its website, but no evidence was offered to show that anyone reviewed the Report on the Re-defining Water website or made investment decisions in reliance on the Report, or that Re-defining Water earned any revenue or profits as a result of anyone reviewing and/or relying upon the Report.

[24] From the foregoing, it appears to me, with breaches of moral rights no longer in the picture, that the possible infringing acts proved that fall within the scope of the claims are as follows::

- a. Re-defining Water's posting of the Report on its website;
- b. Mr. Cook's giving a modified version of the Report to Mr. Reif;

c. Mr. Reif's making of one copy of the Report to give to Mr. Cardiff.

[25] Mr. Reif eventually returned the modified version of the Report he had provided to Mr. Cardiff to the Plaintiff.

[26] Restricted as these uses of the Report are, the Plaintiff still alleges infringement of his copyright. In order to succeed in this regard, it is necessary for him to show that the copying of the Report by Mr. Cook and Mr. Reif, as well as the posting of the Report by Re-defining Water on its website, occurred without the Plaintiff's consent. The Defendants say that both the copying of the Report and the website posting were done with the Plaintiff's consent. The Plaintiff denies this.

CONSENT

Mr. Cook and Mr. Reif

[27] The issue of consent is complicated in this case by the indirect way in which the Report was produced originally for Mr. Vollmer and VII Inc. and by the fact that, in the contemporaneous documentation, the Plaintiff did not assert or make clear any restrictions he wished to place upon the use of the Report. He says that his intentions in this regard were "understood," but an examination of the documentation and the full context suggests otherwise. As the lawsuit has preceded both sides have staked out their positions on this issue. However, the Court has paid close attention to the contemporaneous documentation and the context within which the Report was created and made available to both Mr. Vollmer and Mr. Cook by the Plaintiff.

[28] The Plaintiff initially produced the Report for Mr. Charles Vollmer of VII Inc. Mr. Vollmer lives in Virginia, U.S. VII Inc. is Mr. Vollmer's consulting firm and some time in 2003 he became interested in ESIL's water purification technology.

[29] Mr. Vollmer's evidence is that he decided to work with Mr. Cook "to find out if the U.S. Government would be interested in this technology." Mr. Vollmer "also had some contacts in the Middle East that were in desperate need of water ... purification, and this might be a possibility for them as well."

[30] Mr. Vollmer says he needed the Report for fairly obvious reasons:

I was preparing a package to go to potential clients, both investors, U.S. Government, and – and overseas. And I needed to have a – an engineering analysis that verified that this – this technology was what it was, and from an engineering viewpoint then it was what it said it advertised to be and it was in fact as unique as Mr. Cook had represented it to be.

[31] Mr. Cook referred Mr. Vollmer to the Plaintiff, who was then engaged by Mr. Vollmer and/or VII Inc. to provide the Report for \$500. Mr. Vollmer never met the Plaintiff but they spoke once or twice on the phone and communicated through e-mail.

[32] The Plaintiff says he produced the Report for Mr. Vollmer and VII Inc. for the sole purpose of facilitating Mr. Vollmer's possible investment in ESIL. Mr. Vollmer's evidence is that this is not so:

- a. [Mr. Vollmer] Well, he had sent me the statement of work electronically that I – that is one that is a faxed copy of it, and then he sent it to me on the e-mail. I responded, I said: Please go ahead and start with this effort. As we discussed, I'm looking for a compelling story to tell my investors why ESIL is unique, you know, is good and why isn't it in the field already and mobile applications, and then I'd like to have this document in a – week or two and – because I was scheduled to tell my story to investors.

And when I say investors, I also mean the U.S. Government. We were looking to invest in the program as well, you know, from a bargaining point of view.

Q. In -- in addition to private companies.

A. Uh-huh.

Q. Okay.

A. But this – this thing is – it was telling him that I needed – I'm going to – I'm going to shop this information around. I'm going to give it around to a lot of people.

Q. And in your discussions with him did you ever discuss what you were going to do with the Report?

A. It was on the e-mail that I was going to use it to – it was a due diligence and I was going to use this to – with investors and different groups to see if I could raise funding for – for this – for this technology.

[33] Mr. Vollmer used the Report, along with other information about ESIL from other sources, as part of his power-point briefing to potential investors who might be interested in the ESIL water purification technology and/or investing in ESIL.

[34] The Plaintiff now says that he made it clear to Mr. Vollmer that he was not to show the Report to anyone else. Mr. Vollmer is clear that this was not the case:

Q. And did Mr. Nicholas ever tell you that you could not show the report to anyone else?

a. Absolutely not. I mean, he – when he sent me the report it came with no proprietary, no confidentiality, no copyright markings. It was explicitly said by me in the thing that I needed this to give out to people as a – a document, you know, verifying the integrity of – of the system and – and a little technical description of what it really – what does electrolysis really mean.

Q. No restrictions in terms of – of making copies?

A. Of copies or – or any restrictions whatsoever.

Q. Okay.

A. He provided me the – the thing in the Word document, and the indication about him providing that thing is that I was free to – to do what – I mean, I said in my statement of work that I would distribute this to many people, and – but I never edited any of his – other than deleting those seven paragraphs. It – it went as – as he – as we agree.

[35] Although the Plaintiff now says otherwise, the Court accepts Mr. Vollmer's account of the arrangements for various reasons:

- a. He is not a party to this lawsuit and there is no suggested reason why he would not be truthful;
- b. There is no contemporaneous documentation that supports the Plaintiff's position. Mr. Vollmer is correct in stating that there were no copyright, confidential, proprietary or other restrictions evidenced in the written exchanges with the Plaintiff. The Plaintiff now says that his copyright in the Report is a "cherished asset," but he failed at the material time to take even the most basic precautions of claiming copyright, confidentiality and restricted use in writing;
- c. The whole context renders it highly implausible that Mr. Vollmer was expected not to use the Report in his package to shop around to investors. Investors require information from independent sources;
- d. If the Plaintiff's account were correct, then Mr. Vollmer would be in breach of both copyright and contract and, although the Plaintiff threatened to sue him, he has not done so;
- e. The Plaintiff declined to attend Mr. Vollmer's commission evidence examination to test the truthfulness or accuracy of Mr. Vollmer's evidence. The Plaintiff has consistently declined to meet with Mr. Vollmer face to face.

[36] Mr. Vollmer did not succeed in selling any licences for ESIL technology and did not invest in ESIL. Nor is there any indication that anyone else did as a result of his efforts.

[37] Although Mr. Vollmer is not a party to this lawsuit and although the Report was initially produced for him and VII Inc., for the reasons given his testimony has a significant bearing upon the way the Report was used by Mr. Cook, ESIL and Re-defining Water.

[38] Although moral rights are no longer an issue, except in so far as they might have a bearing upon the Plaintiff's claim for punitive damages, Mr. Vollmer makes it clear in his evidence that the Plaintiff authorized him to make modifications to the Report and sent the Report to him electronically in Word so that this could be done.

[39] It is also clear from Mr. Vollmer's testimony that the Plaintiff's assertions of copyright, confidentiality and other restrictions were only made after-the-fact and were not part of the contractual arrangements.

[40] In addition, after the Plaintiff had voluntarily provided Mr. Cook with a copy of the Report in February 2004 and had later threatened Mr. Cook and ESIL with a lawsuit over their use of the Report, Mr. Cook contacted Mr. Vollmer to ascertain whether Mr. Cook had misused the Report. Here is what Mr. Vollmer says he advised Mr. Cook:

Q. I'm going to show you [Mr. Vollmer] a copy of what looks to be an e-mail from you to Klaus Reif at Reif Winery, Inc. Have you seen this before?

a. Yes.

Q. And what is this document?

A. After some period of time that – that I got a call from Brian Cook, said that Fred Nicholas was going to sue him and – and he asked me if I had given him permission to use this package of stuff including this. So I said yes. I gave it to – I gave it to investors. I gave it to you. And he said would you send an e-mail to Klaus, who I have not met, saying that – that I authorized using – the electro capital that I – that I either both developed or bought.

[41] The e-mail from Mr. Vollmer to Mr. Reif (D-10) is dated March 15, 2004 and reads as follows:

Brian Cook asked me to send you this e-mail. You are free to use all or in part the report written by Fred Nichols [in his evidence he says he meant Nicholas] under contract to VII Inc.

[42] It is clear from Mr. Vollmer's evidence that he was of the view that his contractual arrangements with the Plaintiff gave him full scope to use the Report to raise money from investors who might be interested in ESIL and its technology and to authorize Mr. Cook and Mr. Reif to use it for the same purpose.

[43] For reasons already given, other than the Plaintiff's assertions to the contrary after the fact, there is nothing to suggest that Mr. Vollmer's understanding of the arrangements and the permissible uses of the Report was not correct. At the very least, then, this accounts for Mr. Cook's and Mr. Reif's understanding that Mr. Vollmer did have the right to authorize their use of the Report with potential investors and that the Plaintiff had no proprietary or contractual rights that stood in the way of their doing this.

[44] Mr. Vollmer reiterates in his evidence what he told Mr. Cook:

When Mr. Cook queried me about – about my understanding of the restrictions on this document, he asked for information I sent and said here’s the invoice that I just – we just talked about that I sent to him, and I told him that I told Mr. Nicholas specifically that I wanted to use the technology for – to market the system to a number of my clients and that it was not marked proprietary or any terms or conditions restricted or mentioned on its uses. There was no markings on the report of any kind of restrictions, and it – and I intended to use it marketing without conditions or restrictions.

[45] Mr. Vollmer’s evidence, which the Plaintiff declined to cross-examine him on, suggests the following conclusions:

- a. That the Plaintiff was fully aware that in producing the Report for Mr. Vollmer and/or VII Inc. it would be used widely and shown to potential investors to try and raise money for investment in ESIL and/or the ESIL technology;
- b. That the Plaintiff placed no restrictions on its use for this purpose;
- c. That Mr. Vollmer was of the view that he could authorize Mr. Cook and Mr. Reif to use the Report for the same purpose and that he did so;
- d. That once the Plaintiff threatened to sue Mr. Cook, Mr. Cook took the precaution of checking with Mr. Vollmer to ensure that his and Mr. Reif’s use of the Report in relation to ESIL and the ESIL technology was contemplated by the arrangements that Mr. Vollmer had entered into with the Plaintiff at the time when the Report was produced.

[46] On September 18, 2006, the Plaintiff sent an e-mail to Mr. Vollmer in which he asked Mr. Vollmer to sign a document which, in part, read as follows:

Mr. Nicholas did not signed (*sic*) over his copyright to the above referenced report through any written agreement of contract for services. In fact, a signed written agreement between Mr. Nicholas and myself for services does not exist.

I did not provide Brian G. Cook, or any of the defendant named in Mr. Nicholas's copyright infringement action (Federal Court of Canada, File No.: T-949-05), with a copy of the above referenced report.

[47] Mr. Vollmer refused to sign this document. In retrospect, its contents are non-controversial. The Defendants now agree that the Plaintiff does own the copyright in the Report and the Plaintiff himself provided Mr. Cook with a copy of the Report. But this does not qualify Mr. Vollmer's evidence that the Plaintiff was fully aware of the way the Report was to be used and that Mr. Vollmer authorized Mr. Cook and Mr. Reif to use the Report in ways that were consistent with that use.

[48] In return for the confirmation that the Plaintiff asked from Mr. Vollmer (and which Mr. Vollmer refused to give), the Plaintiff threatened as follows:

In return for receipt of the above letter, I will provide you with a letter releasing you from any civil or criminal liability with respect to this report.

In the absence of the above letter, I will have no choice but to act on my attorney's advice and amend the claim to include VII Inc. and yourself as defendants in the above named Federal Court of Canada copyright infringement action. Of course, you aware (*sic*) based on our previous discussions that my intention was/is not to involve you.

[49] Mr. Vollmer did not provide the letter requested by the Plaintiff, and the Plaintiff did not follow through on this threat. In this regard the Plaintiff has revealed that he is quite capable of

taking up legal positions as a matter of expediency in order to try and secure a particular result. As I shall point out, this is also revealed at other places in the evidence. Mr. Vollmer and VII Inc. were not joined as defendants in this lawsuit. If what the Plaintiff alleges about the limitations he placed upon the use of the Report is true, then there is no satisfactory reason why Mr. Vollmer and VII Inc. are not also defendants in this claim or in some claim made in the U.S.. In fact, when Mr. Vollmer was examined for commission evidence the Plaintiff declined to attend to cross-examine him. The Plaintiff has still never met Mr. Vollmer. The Plaintiff's conduct shows a marked reluctance to follow through on his threats or to confront and challenge Mr. Vollmer to his face about Mr. Vollmer's account of their arrangements and his understanding of how the Report would be used. The Plaintiff has simply denied in Court that he consented to any such use. The Court cannot accept the Plaintiff as credible on this issue. Mr. Vollmer's account of the arrangements and his understanding of how the parties contemplated that the Report would be used are to be preferred. This suggests that any use Mr. Cook and Mr. Reif made of the Report to raise investment monies was within the contemplation of the Plaintiff and Mr. Vollmer when the Report was produced and the Plaintiff was paid \$500 for his work. The Plaintiff did not assign his copyright in the Report but he cannot now say he did not consent to the uses of the Report made by Mr. Cook and Mr. Reif in their dealings to find investors and/or arrive at a deal for the ESIL patent portfolio. And even if the Plaintiff did not consent to the use of the Report by Mr. Cook and Mr. Reif, Mr. Vollmer's evidence makes it clear that there was no high-handed or unconscionable use of the Report by Mr. Cook or Mr. Reif that would justify a significant award of statutory damages in accordance with the criteria laid down in subsection 38.1(5) of the *Copyright Act*, or an award of punitive damages.

[50] The Plaintiff says that Mr. Vollmer's and Mr. Cook's version of how the Report was to be used is belied by the fact that, on February 27, 2004, Mr. Cook revealed that ESIL was negotiating to sell its patent portfolio to "the Braun Group of Germany" and offered to pay the Plaintiff a significant sum of money if the sale went through (P-9). Mr. Cook wrote to the Plaintiff as follows:

Although the documents are not signed yet, they are well into the due diligence phase which includes a "slightly" modified version of your June 3, 2003 independent report on the ESIL Technology.

Fred, you and I have been friends for a long time and you of all people know that I have tried my best to bring this technology to the world. I am out of money, health and everything else it takes.

If and when this patent sale happens, I will pay to you the sum of \$225,000.00 U.S.D. plus the \$25,000.00 U.S.D. that I feel I owe you, for a total of \$250,000.00.

I was going to do this anyway, but this letter makes it official.

[51] In discovery, which the Plaintiff read into evidence, Mr. Cook explained that he made this offer for purposes of "goodwill" and "for the purpose of bringing to an end, the Plaintiff's interference with the potential deal."

[52] So the offer to pay the Plaintiff money at this time is not an acknowledgment that Mr. Cook's use of the Report in relation to the Braun Group or other investors was outside of what was contemplated when the Report was produced. The Plaintiff became assertive about his copyright upon learning that Mr. Cook was negotiating with the Braun Group to sell the ESIL patent portfolio for a significant sum of money. Mr. Cook's offer to buy the Plaintiff off "[i]f and when this patent sale happens" makes sense for someone in his position. \$25,000.00 of the offer related to some old debt and the \$225,000.00 is an obvious attempt to placate someone who could interfere with

negotiations at a crucial stage. This can hardly be seen as an acknowledgment by Mr. Cook that he knew he was not legitimately using the Report or that Mr. Vollmer's account of his arrangements with the Plaintiff is either untrue or incorrect.

[53] The Plaintiff's own re-draft of Mr. Cook's offer and his attempt to secure better terms for himself (P-11) make this clear:

If and when this patent sale happens, (or the patent sale to any of the party occurs) immediately upon receipt of the funds from the buyer I will pay you the sum of \$225,000.00 (United States Dollars) for technical services, expertise and advice provided by you over the past ten years or so plus the \$25,000.00 (United States Dollars) for payment of the outstanding note that I owe you for a total lump sum payment of \$250,000.00 (Two Hundred and Fifty Thousand United States Dollars) payable by bank draft, certified check or cashiers check. The transaction of funds shall occur in a Caribbean country of your choice.

[54] Mr. Cook did not accept this counter-offer and withdrew his original offer. However, the Plaintiff's re-drafting of the original offer makes it clear that he was fully aware that the monies offered by Mr. Cook were "for technical services, expertise and advice provided...over the past ten years or so" The Report is not even mentioned and the Plaintiff reveals that, at this time, with Mr. Cook trying to find a buyer for the ESIL technology, his focus is not upon copyright in the Report, but in securing compensation for services rendered over 10 years. All of this supports the Defendants' contention that the copyright and moral rights issues surrounding the Report were only raised by the Plaintiff as a pretext for leveraging monies out of Mr. Cook or ESIL from any deal they struck to sell the ESIL technology.

[55] Mr. Cook was not called to testify at the trial but the Plaintiff chose to read-in as part of the Plaintiff's own evidence a portion of Mr. Cook's examination for discovery in which Mr. Cook says clearly that the Plaintiff authorized him to make any changes he wanted to the original report that the Plaintiff had prepared for Mr. Vollmer and VII Inc. The Plaintiff's position is that he gave no such authorization and merely forwarded copies of the Report to Mr. Cook in 2003 and 2004 for use by Mr. Cook and ESIL in their negotiations with Mr. Vollmer and VII Inc. The Plaintiff was closely cross-examined on this issue.

[56] It is clear from the Plaintiff's own testimony that at the times when he provided original copies of the Report to Mr. Vollmer and to Mr. Cook he did not impose any restrictions in writing on the use of the Report. There were no copyright notices on the Report, no confidentiality requirement was asserted, and there were no written limitations regarding its use. The Plaintiff simply asserts that all such restrictions and limitations were understood and that it is the ownership of copyright in the Report that grants him complete control over its uses:

Q. You believe copyright prevents somebody from showing a document that you created to someone else?

A. It depends on the purpose of it, of showing that.

Q. It is not the copyright law *per se*, it is the other aspects of the agreement that you might have with somebody?

A. No, it is the copyright, and I don't know what you mean by the other aspects of the agreement.

[57] So the Plaintiff appears not to fully understand that if he wanted to impose confidentiality restrictions and/or limit the people to whom Mr. Vollmer and Mr. Cook might show the Report he needed to do so at the time when he provided them with copies of the Report. His position now is that he did not do this at the time because confidentiality and use restrictions were understood and/or are an inherent part of his copyright in the Report. This is a significant problem for the Plaintiff in this lawsuit because neither Mr. Vollmer nor Mr. Cook (at least by the time of the trial) now dispute the Plaintiff's copyright in the Report, but they say that when they were provided with copies of the Report it was clear then, both as a result of what the Plaintiff said and the necessary inferences demanded by the whole context and the purpose for which the Report was produced and copies provided to Mr. Vollmer and Mr. Cook, that they were free to use the Report in the way they used it.

[58] The Plaintiff says that the actual exchanges and the context make it clear that the Report provided to VII Inc. could only be used by VII Inc. to do due diligence prior to a possible investment in ESIL. As far as other investors are concerned, the Plaintiff says that Mr. Vollmer could only use the Report to "tell a compelling story," by which he seems to mean that Mr. Vollmer could not show other people the Report, or any extract from the Report, but was limited to giving investors his own story about ESIL and its technology. Mr. Vollmer says otherwise and I have already given reasons why the Court prefers Mr. Vollmer's account concerning the authorization of changes to the Report and the understanding that he would shop the Report around to possible investors.

[59] Mr. Cook's position (from the evidence read in by the Plaintiff) appears to be the same as that of Mr. Vollmer. He says the Plaintiff authorized him to make modifications to the Report and to use it, not only in negotiations with VII Inc., but as a general tool to find investors in ESIL or purchasers of ESIL technology.

[60] It is clear from the record that, as with Mr. Vollmer, the Plaintiff did not clearly claim copyright, or impose a confidentiality or limited use requirement when he provided Mr. Cook with copies of the Report.

[61] In cross-examination, the Plaintiff asserted the following:

- a. That on or about June 6, 2003 the Plaintiff sent Mr. Cook and ESIL a corrected version of the Report;
- b. That prior to sending the Report on June 6, 2003 he "probably" had a discussion with Mr. Cook about the Report on June 3, 2003;
- c. The only thing he recalls about the conversation was that "It was probably about design parameters and that type of thing";
- d. He discussed with Mr. Cook the fact that he was preparing the Report;
- e. He made it clear to Mr. Cook that he could only use a copy of the Report in discussions with VII Inc.

[62] The Plaintiff says that he did not know that Mr. Cook, apart from his dealings with Mr. Vollmer, was out shopping licences around to other people:

Q. You didn't think he was out shopping licences around to other people?

A. No.

Q. You had no idea that he was trying to sell licences to various individuals and companies?

A. No, no. I knew just about VII Inc. I live in Texas, Mr. Wilcox; I don't live in St. Catherine.

[63] In order to sustain this position, the Plaintiff attempted at trial to minimize the extent of his dealings with Mr. Cook and his knowledge of what Mr. Cook was trying to do with ESIL and its technology. But his position became increasingly disingenuous:

Q. You were aware that Mr. Cook was talking to a lot of people about his technology in order to try to promote the technology, correct?

A. Yes, and so –

Q. I mean, that is why he has the intellectual property. The purpose of that was to try and get people interested in the technology so that they could buy a licence, correct?

A. You would have to ask Mr. Cook that.

Q. You don't have any understanding of why he was talking to people about his technology?

A. No. My understanding was - - well, let's just leave that.

Q. You have no idea of why he would be talking to people about his technology?

A. No, I don't, not at this point.

[64] It does not follow, of course, that because the Plaintiff knew that Mr. Cook was attempting to licence and otherwise exploit the ESIL technology he consented to Mr. Cook using his Report to do so outside of the contemplated VII Inc. negotiations. But it seems highly implausible and disingenuous for the Plaintiff to say that he has known for 20 years that Mr. Cook has been promoting the ESIL technology but he has no idea why Mr. Cook was talking to people about the same technology.

[65] The same sense of implausibility and disingenuousness creeps in when the Plaintiff's attention is drawn to what he himself wrote in the Report (P-5) and what this shows about his knowledge of Mr. Cook's efforts to exploit the ESIL technology:

Q. All right. At the time you wrote this, you believed that Mr. Cook and ESIL were out there trying to make a deal, and make some money off of this technology, correct?

A. With Mr. Vollmer. That is all the knowledge I had.

[66] The contents of the Report, the evidence of Mr. Vollmer, and the Plaintiff's previous association and dealings with Mr. Cook all suggest otherwise. The Plaintiff could have said that he was aware of Mr. Cook's efforts to exploit the ESIL technology, but he still did not authorize the use of his Report for that purpose outside of the VII Inc. negotiations. But he does not say this. He argues, in effect, that he could not have consented to Mr. Cook's use of his Report to exploit the ESIL technology because he did not know what Mr. Cook was trying to do with that technology apart from the negotiations with VII Inc. In the full context of the Record, this is just not believable,

and it raises a general concern of the extent to which the Plaintiff has trimmed his evidence to suit the particular stand he has taken in this lawsuit: that he only provided the Report to Mr. Vollmer so that Mr. Vollmer could use it as part of his due diligence for a possible investment in ESIL and could not show the Report, or any excerpt from it, to other investors, and that he only provided a copy of the Report to Mr. Cook to be used in conjunction with the VII Inc. deal. After all, why would Mr. Cook need a copy of the Report for this purpose? He already knew about the ESIL technology. As the Plaintiff himself agreed, he knew that Mr. Cook had been “talking to a lot of people about his technology in order to try to promote the technology”

[67] In the Report itself the Plaintiff wrote that “He [Mr. Cook] has been offered numerous deals from the Middle East and large engineering firms, but indicates he will not sell the technology out from under him.” This does not suggest that the Plaintiff’s knowledge of Mr. Cook’s attempts to exploit the ESIL technology is as narrow as the Plaintiff now claims.

[68] The same note of implausibility and disingenuousness recurs throughout the Plaintiff’s answers in cross-examination:

Q. It doesn’t say “Confidential” on there, does it?

A. No.

Q. It doesn’t say “Private, for your use only,” does it?

A. No.

Q. It doesn’t say, “Don’t distribute the report”?

A. No, because there was already the understanding, based on the discussions, that it was used only to facilitate discussions with VII Inc., as pleaded by the defendants.

Q. You didn't write it here that this is strictly for the purposes of discussions with Vollmer, did you?

A. I didn't have to. It was agreed during discussions.

[69] The Plaintiff is exceptionally vague about what was said during his conversation with Mr. Cook on June 3, 2003 prior to his providing a copy of the Report to Mr. Cook on June 6, 2003, and yet at this point in his evidence he asserts that there was a definite agreement arrived at "during discussions" that the Report could only be used for discussions with Mr. Vollmer.

[70] So the Plaintiff's answers shift from there being an understanding (based upon his copyright) to there being an agreement: "I didn't have to. It was agreed during discussions."

[71] His answers to other questions raise similar concerns:

Q. If you were so concerned, though, about the confidentiality, wouldn't it make sense for you to put a confidentiality notice on the report?

A. Mr. Wilcox, general industry and business practices, there is supposed to be honesty.

Q. You have nothing in your communications with either Mr. Vollmer or Mr. Cook that have any indication that there were any restrictions whatsoever, even though you were writing to both of them, correct?

A. It wasn't necessary.

Q. You believe that there is actually an agreement between you and Mr. Cook that Mr. Cook would not disclose the contents of your report to anyone other than Chuck Vollmer, is that your testimony?

A. I know there was.

Q. Have you sued him for breach of confidence?

A. No.

[72] It is also noteworthy that the Plaintiff has taken no legal action against Mr. Vollmer and/or VII Inc. for disclosing the Report to potential investors and/or for using the Report outside of the confines of the ESIL due diligence that VII Inc. undertook, and/or for authorizing Mr. Cook and Mr. Reif to use the Report for investment purposes.

[73] The Plaintiff eventually had to admit that he did not place written restrictions upon the use of the Report:

Q. I am asking you about the words on the page.

A. That is correct, yes.

Q. There are no restrictions?

A. You are correct.

Q. There are no restrictions in any of the e-mails or letters that you sent about it either, is there?

A. That is right. It wasn't necessary.

[74] So the Plaintiff concedes that he did not explicitly attempt to restrict the use of his Report when copies were delivered to Mr. Vollmer and Mr. Cook by using the usual precautions: copyright markings; confidentiality notices; restrictions on use. In the end, all he can say is that his present version of restrictive use was simply "understood" by Mr. Vollmer and by Mr. Cook, or agreed to in prior conversations which he cannot recall in any detail. Against this position, we have the evidence of Mr. Vollmer that there were no such restrictions and the Plaintiff understood perfectly well that the Report would be shopped around and that he authorized Mr. Cook and Mr. Reif to use the Report in their dealings because that is why the Report was produced. In addition, we have evidence read in by the Plaintiff that Mr. Cook says the Plaintiff authorized the changes that were made by the Report that were required to use it in other dealings. Obviously, no changes would be required if the Report was simply to be used in relation to VII Inc. In fact, it is difficult to see how if Mr. Cook was only supposed to use the Report in dealings with VII Inc. he needed a copy of the Report at all.

[75] Even on the issue of modifications to the Report, the Plaintiff's evidence is not convincing.

He begins with a clear enough statement of his position:

Q. On February 23, 2004 you spoke with Brian Cook, right?

A. Brian Cook called me, yes.

Q. He called you about the report, didn't he?

A. Yes.

Q. He asked you if you would modify the report?

A. No. He called me and said he needed the report for discussions with VII Inc. and he didn't know where to find a copy of the report because his administrative assistant Collin Noonan, was out of the office.

Q. You say that he asked you if he could modify the report, correct?

A. Yes.

Q. You said no, you can't modify it?

A. That is right.

Q. It was only because he said "I agree, I won't modify it," that you agreed to send him another copy of the report?

A. That is correct.

[76] Mr. Cook, however, made modifications to the Report and sent them to the Plaintiff. The Plaintiff responded by e-mail in the morning of Friday, February 27 (P-7):

Q. You say, "Will not have time to review the modifications you [Mr. Cook] made to the VII Inc. report," correct?

A. That is right.

Q. You didn't say, "Holy cow, how did you make modifications to my encrypted Word version," did you?

A. It doesn't say that in the letter.

Q. You didn't say, "I didn't tell you you could make modifications," did you?

A. Yes, if you read the next sentence, yes.

Q. The next sentence says:

Just for the record, I have not given anyone authorization to use my name on any report or other materials that I did not write or modify."

Correct?

A. Yes, Mr. Wilcox, at this time, I was kind of in shock, to be quite honest with you.

[77] So the Plaintiff's evidence is that he had an agreement with Mr. Cook that if he provided Mr. Cook with a copy of the Report, Mr. Cook agreed there would be no modifications and that he had specifically forbidden any modification to the Report.

[78] And yet, Mr. Cook proceeded to make modifications to the Report and forwarded them to the Plaintiff. The Plaintiff's reaction was not to question how the modifications were made or to complain that he had expressly forbidden any modifications. He said that he did not have time to review the modifications and he pointed out that he did not want his name used "on any report or other materials that I did not write or modify."

[79] His explanation as to why he did not make the obvious objection to the fact that modifications had been made (and Mr. Cook obviously made no secret of this) is that he was “kind of in shock.” Given the degree of explicitness with which the Plaintiff says he forbade modifications, this response is hardly consistent or believable. What it suggests is that the modifications may have been acceptable but the Plaintiff needed time to review them, and he wanted to make it clear that he had not authorized, as yet, the use of his name to any such modifications.

[80] What this also suggests is that the Plaintiff must have known full well before he provided Mr. Cook with a copy of the Report that Mr. Cook wanted to modify it and use it in dealings other than those involving VII Inc. This issue was explored during cross-examination:

Q. Right, and that is Exhibit P-8. Can you look at that? Then you reiterate that you don't want your name associated with a modified report, correct?

A. Yes.

Q. Right. Your concern, as expressed in two e-mails to Mr. Cook isn't, don't make modifications, it is, “I don't want my name associated with a modified version”?

A. Mr. Cook was free to make modifications for his own purpose. But once Mr. Cook took that modification out of his own sight and distributed it, then it became a problem.

Q. You knew he had distributed it at this time?

A. No, I didn't.

Q. Why didn't you say, "Please cease and desist from distributing a modified version"?

A. Because, obviously, that is what he was going to be doing with it now.

Q. He intended to distribute a modified version? That is what he told you when he called you on February 23, 2004, didn't he?

A. No, he did not.

Q. That is why you didn't say -- you didn't send him a version that he couldn't modify, you sent him a version that he could modify?

A. No, it was my understanding that it was encrypted and it couldn't be changed.

Q. Yet here, even though you have had a chance to calm down, you don't say, "How did you possibly do that? How did you modify my encrypted report?"

A. It wasn't a lesson in understanding IT, Mr. Wilcox. It was, "Stop what you are doing."

Q. Yes. But you didn't know he had done anything other than send you a modified version of the report under cover of an e-mail that says, "Attached is a slightly modified version of your report."

A. That is right. Now I am giving you a heads-up that, "you seem to have modified my report. It better end there. Don't distribute it to anybody."

Q. Don't distribute the modified version to anybody?

A. That is right.

Q. Right. You didn't say, "I am just reminding you you had agreed not to modify it," right?

A. I wasn't interested in writing a two-page letter. I think that cease and desist is all that is really needed in there, or at that time, that was the driving force or purpose of this letter, was to stop it.

Q. Let's look, though. On February 23, you had a conversation with Mr. Cook, right?

A. Yes.

Q. You say that he agreed not to modify the report despite the fact that he had indicated his intention to modify the report, correct?

A. He had agreed not to.

Q. Right. He had first said, "I would like to modify it," and you said no, according to you, correct?

A. Yes.

Q. Then he agreed not to, according to you?

A. Yes.

Q. You sent him a nice e-mail that said, "It sounds like you need this right away, so here it is."

A. For discussions with my client, again.

Q. That is not what the e-mail says. The e-mail says, "It sounds like you need it right away. Here it is." Right?

A. Yes, but you are discounting the conversation that happened.

Q. I am talking about the writing.

A. Okay.

- Q. At this point in time now, you have sent him it, you didn't say you have agreed not to modify it, and you send it to him, right?
- A. Yes.
- Q. He sends you back a modified version on February 23?
- A. Yes.
- Q. You say you looked at it the 26th/27th, right?
- A. Yes, I was working on my software.
- Q. At that point, even whether your 2:16 a.m. one or your 8:47 a.m. one, instead of saying, "Wait a second, Brian, we had an agreement you weren't going to modify it." You didn't say that?
- A. I didn't need to.
- Q. You didn't need to?
- A. No. That was not the purpose of this e-mail. The purpose was, "Stop what you are doing."
- Q. But you didn't know he had done anything other than send you back a modified report?
- A. Yes, and I wasn't going to let him do anything. It was clear that he wasn't going to be using this for VII Inc., at this point.
- Q. It was clear that he wanted to distribute to others when he asked you to modify it.
- A. No, I mean on this date. After I opened it, it was clear that he was not going to be using it in discussions with VII Inc –
- Q. Because he had modified it?

A. Yes.

Q. Because they already had the original version, right?

A. Yes.

Q. So what would be the point?

A. Yes.

Q. That was clear to you when you saw the modified version, correct?

A. Yes. It was at this point that I figured out that it wasn't for discussions with VII Inc.

Q. Likewise, when he told you on February 23 that he wanted to modify it, you knew that he wanted to modify it for distribution to others, because there would be no point in him modifying it and talking to VII Inc. about it, right?

A. That is incorrect.

Q. What is the difference? You just said it was obvious when you saw a modified report that he wasn't going to use it for VII Inc. only. But when he told you on February 23 that he wanted to modify it, it would have been equally obvious to you that he wanted to distribute it to others?

A. No. No, it just showed the ridiculousness of his request. That is, again, why I didn't think that he was going to modify it, because it didn't make sense, and then he –

Q. What didn't make sense?

A. The fact that he would want to modify to use with VII Inc. when VII Inc. already had a copy, and they had already discussed it.

- Q. Right, that is why. It made no sense because he, in fact, told you, “I want to modify it so that I can distribute to others.”
- A. No, that is not what he told me.
- Q. Because it would have made no sense for him to modify it, to show to VII Inc., would it?
- A. I never realized that at the time. As I said, when he called, I was working on my software; my head was not into ESIL.
- Q. You don’t actually recall the conversation?
- A. No, I recall the conversation.
- Q. You recall that he said, “I want to modify it,” and then you said no, and he agreed?
- A. Yes.
- Q. But the light didn’t go on?
- A. No, it didn’t.
- Q. The light didn’t go on, saying, “Why do you want to modify it”?
- A. The light was almost all extinguished at that time. I don’t know if you have ever worked on software.

[81] In other words, if Mr. Cook wanted modifications to the Report in 2004, the Plaintiff must have known that Mr. Cook would not be using the Report in his dealings with VII Inc. and was contemplating some other use. The Plaintiff’s only explanation is that this did not occur to him at the time. I cannot accept this explanation. If Mr. Cook asked for modifications, the Plaintiff must

have been aware that Mr. Cook and ESIL wanted to use the Report for dealings other than those involving VII Inc. and Mr. Vollmer. No other explanation makes sense.

[82] What is less clear is whether, in sending the modifications to the Plaintiff for review, Mr. Cook knew that he required the Plaintiff's consent to the changes before he could proceed to use the modified Report, or whether he was free to modify the Report and use it, provided the Plaintiff's name was removed from any modified version he did not approve.

[83] The Plaintiff has not presented evidence on this issue because he has taken the position that he forbade any modifications to the Report and only forwarded a copy of the original Report to Mr. Cook for use in dealing with VII Inc. and Mr. Vollmer. This position, in my view, cannot be reconciled with the admitted request from Mr. Cook for modifications, Mr. Cook's sending the modifications to the Plaintiff, and the Plaintiff's immediate reaction upon receiving a copy of Mr. Cook's modifications.

[84] The Plaintiff himself has placed on record Mr. Cook's evidence that the Plaintiff authorized him to make any changes to the Report that he wanted to.

[85] Hence, although the situation is not entirely clear for reasons given above, I cannot accept the Plaintiff's present version of his discussions with Mr. Cook on this matter. Also, I think I have to find on the general evidence that the Plaintiff has not proved lack of consent to either the changes

made to the Report by Mr. Cook and ESIL or to the limited uses to which they put the Report when dealing with potential investors.

[86] There are other places in cross-examination where the Plaintiff resists obvious answers and conclusions and where the position he takes up is disingenuous. This occurs, for example, in the discussion surrounding Mr. Cook's letter of February 27, 2009 (P-9) and the Plaintiff's response to that letter (P-11). I have already discussed the significance of these exhibits and what they reveal about the relative positions of the parties. During cross-examination it was evident to me that the Plaintiff simply does not wish to acknowledge obvious inferences from the documents or explain why he sent back P-11. In the end, the Plaintiff's only real response to counsel's questions is that the Plaintiff "went on the advice of my attorney..." This does not explain away the anomalies in the Plaintiff's position and, in any event, there is no suggestion that the Plaintiff's attorney was doing anything other than what the Plaintiff wanted him to do, or that the Plaintiff truly did not understand the significance of his actions. All of this tends to support the Defendants' position that the Plaintiff was fully aware of the pending portfolio sale and had to be appeased or bought off by a promise of payment if the sale closed. There is no suggestion that Mr. Cook was trying to licence the use of the Report for purposes of the sale or that Mr. Cook placed a \$225,000.00 USD value upon a licence or consent for the use of the Report.

Re-defining Water Inc.

[87] Re-defining Water placed a copy of the original Report on its website. It remained there for about a year. There is no evidence that, apart from Mr. Reif's downloading a copy for purposes of this lawsuit, anyone ever reviewed the Report on the website or invested in Re-defining Water, or purchased its products and/or services, as a result of the Report.

[88] However, nowhere in Mr. Vollmer's evidence is there an indication that the use made of the Report by Re-defining Water on its website to sell products and services was part of the arrangements when the Plaintiff produced the Report for Mr. Vollmer and VII Inc.. It was Mr. Cook who provided the Report to Re-defining Water for posting on its website. Mr. Cook appears to have been of the view that in paying the Plaintiff \$500 for the Report Mr. Vollmer or VII Inc. had acquired the copyright in the Report and the right to authorize to Mr. Cook and ESIL to make use of the Report in any way they pleased. There is nothing to suggest that Mr. Cook did not genuinely believe this but, as a matter of law, it clearly was not the case and there is nothing in Mr. Vollmer's evidence to suggest that, in producing the Report, either he or the Plaintiff would have contemplated that Re-defining Water would put it on its website and use it in conjunction with the sale of its products and services. The Report was produced to ship around to parties who might be interested in investing in ESIL and/or its technology.

[89] The issue is complicated because Re-defining Water appears to operate under sub-licence from ESIL and/or Mr. Cook.

[90] The Plaintiff says that Re-defining Water posted the Report on its internet website in support of its sales of bottled water and technology sub-licences. There is no evidence to suggest that this is not the case.

[91] Mr. Cook has admitted that he provided Re-defining Water with a copy of the Report to post on its website.

[92] The Plaintiff sent a cease and desist notification to Re-defining Water in February 2005 after becoming aware that the company was displaying his Report on its Internet website. However, the company only removed the Report from its website after being served with the Plaintiff's statement of claim.

[93] It seems to me that, although the Plaintiff cannot prove a connection between Re-defining Water's use of his Report and its revenues or profits, a technical infringement occurred in this instance that was encouraged, facilitated and authorized by Mr. Cook. I also think the evidence shows there was no consent (explicit or implied) from the Plaintiff for the use that Re-defining Water made of his Report on its website in relation to the sale of its products and services, or for the encouragement, facilitation or authorization that came from Mr. Cook. Mr. Cook may well have believed that he was at liberty to act in this way but I think such usage went beyond what could, reasonably speaking, have been contemplated when the Report was produced for Mr. Vollmer or when the Plaintiff himself provided Mr. Cook with a copy of the Report on February 23, 2004 (P-2).

Infringement

[94] As the Federal Court of Appeal made clear in *Positive Attitude Safety Systems Inc. v. Albion Sands Energy Inc.* (2005), 43 C.P.R. (4th) 418 (FCA), at paragraphs 39 and 40, proof of copyright infringement requires proof of lack of consent:

39 However, even if one assumes that the motion judge was right to consider the question, the difficulty is that copyright is defined in terms of the absence of the consent of the owner of the copyright:

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. [Emphasis added.]

* * *

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. [Non souligné dans l'original.]

Consequently, proof of copyright infringement requires proof of lack of consent. It is therefore illogical to conclude that there has been infringement, subject to the effect of a purported license. It may be that a party has done something which, by the terms of the Copyright Act, R.S.C. 1985, c. C-42, only the owner of the copyright may do. But, before that conduct can be defined as infringement, the judge must find that the owner of the copyright did not consent to that conduct.

40 As a result, the motion judge was not in a position to conclude, as he did, that the appellants infringed the respondents' copyright subject to the effect of a purported license. Until the issue of consent was dealt with, there could be no finding of infringement.

[95] It is also clear that the kind of licence that arises on the present facts does not need to be formulized in writing and can arise from the oral agreement of the parties as viewed in the general

context. *Ritchie v. Sawmill Creek Gold & Country Club Ltd. et al.* (2004), 35 C.P.R. (4th) 163 (Ont. Div. Ct.) provides the following helpful summary of the law on this issue:

18 As a matter of law, a license that is a mere permission to do a certain thing, as opposed to a license that gives an ownership interest, need not be in writing. The Appellant hinges his argument on s. 13(4) of the *Copyright Act* which provides:

(4) Assignments and licenses. 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 or 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 license, 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.

19 It is significant that the licensing referred to is limited to licenses where there has been a "grant of an interest". Some licenses, such as an exclusive license, can grant a property interest. Non-exclusive licenses do not transfer a property interest but rather give permission to do certain things: see Sunny Handa, *Copyright Law in Canada* (Markham: Butterworths, 2002 at p. 337).

20 The "grant of an interest" referred to in s. 13(4) is the transfer of a property right as opposed to a permission to do a certain thing. The former gives the licensee the capacity to sue in his own name for infringement, the latter provides only a defence to claims of infringement. To the extent there was any uncertainty as to the meaning of "grant of an interest" and whether this section applied to non-exclusive licenses, the issue was resolved in 1997 when the *Copyright Act* was amended to include s. 13(7):

(7) For greater certainty, it is deemed always to have been the law that a grant of an exclusive license in a copyright constitutes the grant of an interest in the copyright by license.

21 The oral license granted to Sawmill Creek to use the photographs as it saw fit was a license operating as a permission to do certain things. This type of license does not fall within the ambit of s. 13(4). There is no requirement that such a license be in writing: see John S. McKeown, *Fox Canadian Law of Copyright and Industrial Designs*, 4th ed., looseleaf (Toronto: Thomson

Canada Ltd., 2003) at pp. 19-26; *Robertson v. Thomson Corp.* (2001), 15 C.P.R. (4th) 147 at 186 (Ont.S.C.J.).

22 Non-exclusive licenses, such as the one granted to Sawmill Creek, may be in any form, including oral. There is no requirement that non-exclusive licenses be signed or in writing: see *Handa, supra*, at p. 338. The trial judge found that there was an express license between the Appellant and Sawmill Creek. The license granted by the Appellant to Sawmill Creek was a permission, which constitutes a defence to an infringement action. The trial judge made no error in law in finding that the license granted to Sawmill Creek constituted a defence to infringement.

[96] *Netupsky v. Dominion Bridge Co.*, [1972] S.C.R. 368 at pages 377-378 is also helpful on the facts of this case:

Judicial consideration of the precise point in issue in this appeal has not been extensive. I adopt the statement of principle of the Supreme Court of New South Wales in *Beck v. Montana Constructions Pty. Ltd.* [(1963), 5 F.L.R. 298.], at p. 304-5:

... that the engagement for reward of a person to produce material of a nature which is capable of being the subject of copyright implies a permission or consent or licence in the person making the engagement to use the material in the manner and for the purpose in which and for which it was contemplated between the parties that it would be used at the time of the engagement.

And further:

... the payment for sketch plans includes a permission or consent to use those sketch plans for the purpose for which they were brought into existence, namely, for the purpose of building a building in substantial accordance with them and for the purpose of preparing any necessary drawings as part of the task of building the building.

* * *

There then remains the question whether there should be any implied right to transfer it and here I think that it must inevitably be implied that the owner, having commissioned the sketch plan and having obtained the right to use it for the purpose of erecting on that site a building in substantial accordance with it, should have the right to transfer that right to a new owner of the land.

The Beck case has been followed in a recent decision of the English Court of Appeal, *Blair v. Osborne and Tomkins* [[1971] 2 W.L.R. 503.].

[97] It is clear from Mr. Vollmer's evidence that the Report was produced and paid for so that it could be used to secure investors in ESIL and the ESIL technology. No limitations were placed upon the way this was to be done at the material time when the contract for the Report was entered into. Also, the Plaintiff was willing to allow Mr. Vollmer to make changes to the Report for the purpose of attracting investors. There is evidence before the Court that the Plaintiff consented to Mr. Cook making alterations for the same purpose. This evidence was placed on the record by the Plaintiff in the form of a read-in from Mr. Cook's discovery and an unsent letter composed by Mr. Cook confirming that the Plaintiff had authorized him to make any changes to the Report that he wanted to make. The Plaintiff denies having given his consent to the changes made by Mr. Cook but, as I have discussed above, this denial is not convincing given his willingness to allow Mr. Vollmer to make changes, the Plaintiff's failure to specify any restrictions in writing and his failure to object to Mr. Cook's modifications when they were brought to his attention. The contemporaneous evidence suggests that the Plaintiff wanted time to review those modifications so that he could decide whether to take his name off the modified report. It does not show him

objecting outright to the modifications *per se* or to Mr. Vollmer or Mr. Cook and ESIL using the Report to attract investors.

[98] Hence, I have to conclude that the Defendants had a licence, or at the very least implied consent, to use the Report in the way they used it other than the use that was made of the Report by Re-defining Water when it placed the Report on its website and attempted to use it in conjunction with the sale of its goods and services. The evidence does not suggest to me either a licence or implied consent for that particular use by Re-defining Water so that I believe the Plaintiff has proved infringement for that particular use by Re-defining Water and by Mr. Cook who authorized and instigated such use.

Statutory Damages

[99] The Plaintiff has elected to seek statutory damages under section 38.1 of the *Copyright Act* which reads as follows:

38.1 (1) Subject to this section, a copyright owner may elect, at any time before final judgment is rendered, to recover, instead of damages and profits referred to in subsection 35(1), an award of statutory damages for all infringements involved in the proceedings, with respect to any one work or other subject-matter, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and

38.1 (1) Sous réserve du présent article, le titulaire du droit d'auteur, en sa qualité de demandeur, peut, avant le jugement ou l'ordonnance qui met fin au litige, choisir de recouvrer, au lieu des dommages-intérêts et des profits visés au paragraphe 35(1), des dommages-intérêts préétablis dont le montant, d'au moins 500 \$ et d'au plus 20 000 \$, est déterminé selon ce que le tribunal estime équitable en

severally, in a sum of not less than \$500 or more than \$20,000 as the court considers just.

l'occurrence, pour toutes les violations — relatives à une oeuvre donnée ou à un autre objet donné du droit d'auteur — reprochées en l'instance à un même défendeur ou à plusieurs défendeurs solidairement responsables.

[100] In assessing statutory damages the Court must address the factors set out in subsection 38.1(5) :

(5) In exercising its discretion under subsections (1) to (4), the court shall consider all relevant factors, including

(5) Lorsqu'il rend une décision relativement aux paragraphes (1) à (4), le tribunal tient compte notamment des facteurs suivants :

(a) the good faith or bad faith of the defendant;

a) la bonne ou mauvaise foi du défendeur;

(b) the conduct of the parties before and during the proceedings; and

b) le comportement des parties avant l'instance et au cours de celle-ci;

(c) the need to deter other infringements of the copyright in question.

c) la nécessité de créer un effet dissuasif à l'égard de violations éventuelles du droit d'auteur en question.

[101] Even if all of the potentially infringing acts identified above took place without consent, the jurisprudence surrounding subsection 38.1(5) suggests that the present case is not one where a substantial damage award is warranted. As I have already made clear, the Plaintiff has failed to prove either infringement or a lack of consent for anything other than Re-defining Water's posting of the Report on its website. If all the uses he made of the Report were not consented to, there

appears to have been genuine confusion on the part of Mr. Cook concerning the extent to which he could use the Report and why, initially, he even denied the Plaintiff's copyright.

[102] If I examine the section 38.1(5) factors against the evidence in this case, I come to the following conclusions:

- i. Mr. Cook may have been mistaken in his belief that the Plaintiff had parted with his copyright in the Report to Mr. Vollmer or VII Inc., but there is no evidence to suggest that he held this view in bad faith. The Plaintiff has to bear some responsibility for any confusion on the part of Mr. Cook because the Plaintiff, at the material times when he provided copies of the Report to Mr. Vollmer and Mr. Cook, did not impose the usual restrictions in writing and did not take the usual precaution of using written notices;
- ii. The Defendant's denial of the Plaintiff's copyright in the pleadings is not bad faith or anything other than a conventional response the Plaintiff's opportunistic attempt to claim \$27,000,000.00 from them;
- iii. There has been no high-handed or otherwise reprehensible conduct before and during the proceedings on the part of the Defendants. They have simply defended themselves as best they can in the face of an obviously dubious claim for a substantial sum of money;
- iv. There is no evidence to suggest that the use of the Report by Re-defining Water has resulted in any damage to the Plaintiff.

[103] This is not a case where Re-defining Water has sold multiple copies of the Report or earned significant revenues or profits from the breach. Even without consent as found by the Court, the combined acts of infringement are not, on the evidence before me and taking into account the criteria specified in subsection 38.1(5) of the *Copyright Act*, sufficient to justify a substantial award of statutory damages.

[104] The Defendants have asked that I apply subsection 38.1(2) to the facts of this case and award no more than \$200 in statutory damages for any infringement that I find. This would require me to find that Mr. Cook and Re-defining Water were “not aware and had no reasonable grounds to believe” they had infringed the Plaintiff’s copyright in the Report. Mr. Cook and Re-defining Water may have believed in good faith that Mr. Vollmer and VII Inc. held the copyright in the Report and had authorized them to use it in the way it was used on the website. However, I cannot see any reasonable grounds for such a belief. Mr. Vollmer did not say he had acquired the copyright, there was no licence or implied consent to use it in this way, and the Plaintiff did object to such use and sent a cease and desist letter which went unheeded. That being said, however, for reasons already given, I do not think that statutory damages can be any more than \$500 on these facts.

[105] I say this because there is no evidence here that the Plaintiff has suffered any damages or that the Defendants have made any profit as a result of the infringing act. This is simply a technical breach and does not warrant the Plaintiff receiving a substantial windfall . Statutory damages require an assessment of the reality of the case and a just result. See *Telewizja Polsat S.A. v. Radiopol Inc.*, 2006 FC 584, [2007] 1 F.C.R. 444 (T.D.), at paragraphs 37 and 41-45.

[106] There is no evidence of any market for the Report and the conduct of the Defendants during the proceedings has been consistent with parties simply trying to resist the Plaintiff's inflated demands for \$27,000,000.00. The Defendants have acknowledged the Plaintiff's copyright in the Report, the Report has been removed from Re-defining Water's website, and there is no evidence of conduct that requires deterrence.

[107] Consequently, I think the Plaintiff is entitled to no more than \$500 in statutory damages and only as against Mr. Cook and Re-defining Water, jointly and severally.

Punitive Damages

[108] The Plaintiff also claims \$750,000.00 as punitive damages. He bases this upon 3 x \$250,000.00, (\$250,000 being the sum that Mr. Cook offered him on February 27, 2004 (P-9)). That offer, however, and its context have nothing to do with punitive damages.

[109] The purpose of punitive damages is to punish high-handed conduct worthy of condemnation. See *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] S.C.J. No. 19. I can find no such conduct on the facts of this case.

[110] The Plaintiff has failed to prove copyright infringement except for the technical breach committed by Mr. Cook and Re-defining Water in posting the Report on the website. The Plaintiff complains about Mr. Cook denying he had copyright in the Report and Re-defining Water's failure

to remove the Report from the website until this action was commenced. This is not the kind of outrageous conduct that attracts punitive damages. There is no evidence that Mr. Cook and/or Re-defining Water did not believe in good faith at the material time that Mr. Vollmer and VII Inc. held the copyright in the Report and, once the lawsuit commenced there is nothing in the Defendants' conduct that was outrageous and high-handed given the size of the Plaintiff's claim. In addition, the Plaintiff has failed to prove that any changes made to the Report were not authorized and that they affected his honour or reputation in any way.

[111] Taking into account the high-handed and shocking conduct that is required to justify an award of punitive damages, the Plaintiff has come nowhere near justifying such an award in this case against any of the Defendants. This would also be the case even if a lack of consent, as found by the Court, did not exist. Consequently, the Court declines to award any punitive damages.

Aggravated Damages

[112] The Plaintiff has also raised aggravated damages but has failed to explain or justify such an award on the facts at hand. Consequently, the Court declines to award aggravated damages.

[113] While punitive damages are penal and exemplary in nature, aggravated damages aim to compensate for intangible injury. See *McKinley v. BC Tel*, 2001 SCC 38, [2001] 2 S.C.R. 161. According to the Supreme Court of Canada in *Vorvis v. Insurance Corp. of British Columbia*, [1989] 1 S.C.R. 1085, [1989] S.C.J. No. 46, aggravated damages will “frequently cover conduct

which could also be the subject of punitive damages, but the role of aggravated damages remains compensatory.” The Supreme Court in *Vorvis*, above, then relies on Waddams, *The Law of Damages* (2nd ed. 1983) at p. 562 which states that

Aggravated damages describes an award that aims at compensation, but takes full account of the intangible injuries, such as distress and humiliation, that may have been caused by the defendant’s insulting behaviour.

[114] Aggravated damages were also considered by the Supreme Court of Canada in *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, [1995] S.C.J. No. 64 at paragraph 188 (QL) where it noted that “aggravated damages may be awarded in circumstances where the defendants’ conduct has been particularly high-handed or oppressive, thereby increasing the plaintiff’s humiliation and anxiety.” *Hill*, above, also noted that “if aggravated damages are to be awarded, there must be a finding that the defendant was motivated by actual malice, which increased the injury to the plaintiff.”

[115] It is clear that the Plaintiff in this instance has not made out a valid claim for aggravated damages, since he has failed to show that the Defendants’ conduct was motivated by malice, or was particularly high-handed.

Other Relief Claimed

[116] The Plaintiff has claimed a range of other relief. Much of it is now inapplicable given the way this lawsuit has evolved and the concessions and elections made by the parties.

[117] The Defendants have fully acknowledged that the Plaintiff retains any copyright and moral rights that exist in the Report. Re-defining Water has removed the Report from its website. All other activities with the Report either fall within the purpose for which it was produced or have, in any event, ceased. The Plaintiff has conceded that there is no evidence of damages to his reputation or honour. No damage or profits have been proved and the Plaintiff has, in any event, elected to seek statutory damages.

[118] Consequently, there is no basis upon which to grant the declaratory or injunctive relief requested by the Plaintiff. The sole appropriate remedy is statutory damages in the amount of \$500.00 against Mr. Cook and Re-defining Water Inc. jointly and severally.

[119] The parties shall make written submissions to the Court on the issue of costs which will be decided in a subsequent order for costs.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The Defendants Brian Cook and Re-defining Water Inc. shall, jointly and severally, pay the Plaintiff \$500.00 (Canadian) in statutory damages together with post-judgment interest at 5 % per annum from the date of the judgment.
2. The Plaintiff's claim is otherwise dismissed.
3. The parties will make submissions on costs to the Court in writing.

“James Russell”

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: T-949-05

STYLE OF CAUSE: Frederick L. Nicholas v. Environmental Systems (International) Limited; Brian G. Cook; Reif Winery Inc. (c.o.b. as “Reif Estate Winery”); Klaus Reif; and Re/Defining Water Inc.

PLACE OF HEARING: TORONTO

DATE OF HEARING: April 12-16, 2010

REASONS FOR Judgment And Judgment: RUSSELL, J.

DATED: JULY 12, 2010

APPEARANCES:

Mr. Frederick L. Nicholas FOR PLAINTIFF

Mr. Peter Wilcox
Ms. Sarah Huggins FOR DEFENDANTS

SOLICITORS OF RECORD:

Mr. Frederick L. Nicholas FOR PLAINTIFF
Friendswood, Texas, U.S.A.

Mr. Peter Wilcox FOR DEFENDANTS
Ms. Sarah Huggins
TORYS LLP
Toronto, Ontario