

Federal Court



Cour fédérale

**Date: 20110318**

**Docket: T-1269-05**

**Citation: 2011 FC 340**

**Ottawa, Ontario, March 18, 2011**

**PRESENT: The Honourable Madam Justice Heneghan**

**BETWEEN:**

**HARMONY CONSULTING LTD.**

**Plaintiff**

**and**

**G.A. FOSS TRANSPORT LTD., GORDON A. FOSS,  
AND JOE CRISTELLO**

**Defendants**

**REASONS FOR JUDGMENT AND JUDGMENT**

**INTRODUCTION**

[1] This is an action about copyright in certain software computer programs. Harmony Consulting Ltd. (the “Plaintiff” or “Harmony”) claims to be the owner of the software programs and alleges that its copyright has been infringed by G.A. Foss Transport Ltd. (“Foss Transport”), Mr. Gordon A. Foss and Mr. Giuseppe (“Joe”) Cristello (sometimes referred to as the “Defendants”).

[2] The Plaintiff claims the following relief:

- a) a declaration that copyright subsists in the software, that the Plaintiff is the owner of that copyright and that the copyright has been infringed by the Defendants;
- b) a permanent injunction from further infringement;
- c) an order requiring delivery of all copies of the software, permanent deletion of all electronic versions, and an audit to determine the extent of the infringement;
- d) damages, an accounting of profits, and punitive damages; and
- e) solicitor-client costs.

[3] Harmony is an Ontario registered corporation that specializes in computer programming and support services. It was incorporated on March 16, 2000 by its sole shareholder and director, Mr. Sushil Chari, a computer programmer. Mr. Chari is the undisputed author of the software in question, but is not a party to this action.

[4] Foss Transport is an Ontario registered corporation that conducts a truck haulage business. In early 2000, Foss Transport hauled three lines of products. The first was described as dry bulk, including plastic resin and dry bulk cement. The second was “light oil” products, including gasoline, diesel fuel, jet fuel and varsol. The third was “heavy oil”, that is asphalt, bunker oil and waste boat, that is used motor oil. It also operated self-serve card lock diesel fuel stations and conducted limited retail sales of petroleum products.

[5] Mr. Foss is the President and principal shareholder of Foss Transport. Mr. Cristello is the Vice-President and a minority shareholder of Foss Transport.

[6] In early 2000, Foss Transport contemplated the modernization of the dispatching and invoicing programs of its petroleum haulage business. In the process, Mr. Foss was introduced to Mr. Chari and Foss Transport engaged the Plaintiff to implement an electronic dispatch and invoicing system. Foss Transport continued to pay the Plaintiff to modify this software for Foss Transport's purposes and to develop new applications.

[7] While the relationship between Foss Transport and Mr. Chari, and later Harmony, was initially positive and beneficial for all parties, it disintegrated in early 2004. It terminated after Mr. Chari planted two "time bombs" in the software of the Foss Transport computer system. In April 2004, the first time bomb prevented Foss Transport from invoicing its customers and, in May 2004 the second time bomb prevented it from dispatching products to its customers. These attacks negatively impacted on Foss Transport's ability to conduct its business.

[8] Foss Transport remedied the time bombs, and made other modifications to the software after its relationship with Harmony ended. Foss Transport continued to use some of the software authored by Mr. Chari until 2007.

[9] Harmony commenced this action for copyright infringement on July 22, 2005. It alleges that Foss Transport violated Harmony's copyright in the computer software that Foss Transport had

obtained through Mr. Chari. The Plaintiff further claims that Mr. Foss and Mr. Cristello copied the Plaintiff's software onto their personal computers, and that they directed and authorized Foss Transport to infringe the Plaintiff's copyright.

### **THE EVIDENCE AND FACTUAL FINDINGS**

[10] The evidence in this case consists of the testimony of six witnesses, the Defendants' answers to the Plaintiff's interrogatories, and documentary exhibits, including one expert report. The parties also submitted read-ins of excerpts from the transcripts of discovery examinations of Mr. Chari, Mr. Foss, and Mr. Cristello in the Federal Court action, and read-ins from the transcript of the discovery examination of Mr. Foss in an action commenced by Foss Transport in the Ontario Superior Court of Justice. The excerpts from these discovery examinations were deemed to have been read into the Trial Record pursuant to Rule 288 of the *Federal Courts Rules*, SOR/98-106 (the "Rules") and an Order was made in that regard.

[11] I will not refer to all of the evidence contained within the record. My conclusions are based upon that evidence which I found to be most relevant, credible and reliable. I have reviewed all of the evidence and have not ignored any evidence to which I do not explicitly refer.

### Witnesses

[12] Two witnesses testified on behalf of the Plaintiff, Mr. Chari and Mr. Shawn Reynolds.

[13] As indicated, Mr. Chari is the sole officer, director and shareholder of Harmony. It is undisputed that he is the author of the software in question.

[14] Mr. Reynolds is a former employee of Roy Curran Transport Limited (“RCT”) and Foss Transport. He introduced Mr. Foss to Mr. Chari.

[15] The Defendants called four witnesses, Mr. Foss, Mr. Cristello, Mr. Kevin Lo and Ms. Lydia Warth.

[16] Mr. Foss is the President and primary shareholder of Foss Transport.

[17] Mr. Cristello is the Vice-President and a minority shareholder of Foss Transport. He was responsible for Foss Transport’s information technology (“IT”), card lock system, and the administrative staff, in short for “most everything that wasn't truck related”.

[18] Mr. Kevin Lo was presented as an expert in forensic software analysis. After being questioned about his qualifications, he was accepted as an expert witness, pursuant to the Rules.

[19] As a forensic analyst, Mr. Lo’s expertise was engaged in examining the software, for which the Plaintiff alleges a copyright infringement, that was on the Foss Transport system. He provided evidence about the amount of computer code, and the complexity and nature of the programming which was created in order to operate specific functions within the software in question.

[20] Ms. Lydia Warth is a computer programmer. She gave fact evidence about computer programs, database programming techniques and practices.

[21] When Mr. Chari was unavailable in 2003 and when the Foss Transport system was attacked, Mr. Foss employed Ms. Warth to perform custom computer programming on the software in question. She testified with respect to the modifications that she had made, both to disable the time bombs in the system, and to allow Foss Transport to carry on business.

#### Demonstrative Evidence

[22] Prior to commencing the cross-examination of Ms. Warth, the Plaintiff attempted to provide a laptop and a copy of the computer software to the witness, in order to have Ms. Warth demonstrate searches of the software she had conducted. The Plaintiff wanted to adduce this evidence in order to contradict a “very serious allegation” made by Mr. Cristello, namely that Mr. Chari fabricated evidence. In that regard, I refer to the documents at Tab 140 of the Trial Book of Documents, formally entered as Exhibit 1 on January 29, 2010. More will be said about those documents later.

[23] Pursuant to Rule 287 of the Rules, I declined to allow the introduction of this demonstrative evidence due to my concern with regard to the risks of receiving the evidence from a party’s computer. No independent computer was available. The evidence of Mr. Cristello on re-examination was available to be weighed and considered.

[24] In my opinion, there was a substantial risk in allowing the demonstration of the program since the machine upon which it would be run would not be available as an exhibit. Further, in my view, this demonstrative evidence is not relevant to any issue in this proceeding.

### The Software

[25] The computer programs, which are the subject of this action, were all built upon the Microsoft Access database platform. Some of these programs were compilations of multiple modules organized according to function. The software in question consists of the following:

- a. Petro Dispatch 2000: This was the primary software package that was purchased by Foss Transport. It was used for order inputting, dispatching, post-order reconciliation, invoicing and forecasting delivery requirements. It included the following modules:
  - i. Main Dispatch Module;
  - ii. Post Order Module;
  - iii. Invoicing Module;
  - iv. Reporting Module; and
  - v. Dip Forecasting Module.
  
- b. Card Lock Invoicing Program: Card lock facilities are fuelling depots for commercial vehicles, usually unmanned, and are accessed through a credit

card and a PIN number. This program produced the invoices for the card lock customers.

- c. Railmaster Program: This program had two distinct sections; rail car management and dispatch. The rail car management section tracked inventory in rail cars, invoiced for time on rail sidings and dispatched bulk products. The dispatch module was for the dispatch of cement, heavy oil products, asphalt and waste oil.
- d. Payroll Module: This module was intended to perform payroll based on type of driver, type of load and buying agreements. While data entry of drivers' names and details were input, the module was never fully customized for Foss Transport, nor did Mr. Chari make the program operational for Foss Transport. In the end Foss Transport never used this program for payroll.
- e. Modifications: There were numerous modifications and "add-ons" to enable the software to function for Foss Transport. Many involved very minor changes to the program in order to make it work better for the Foss Transport administrative staff. Modifications included amending rates, and method of charging, to conform to the Foss Transport business model and industry practices. Regardless of the size or type of modification, the Plaintiff has



asserted that these modifications would be covered under a new licensing agreement and would be independently copyrighted.

[26] Mr. Chari personally programmed each of these pieces of software. He programmed the first four modules of Petro Dispatch 2000 before his involvement with Foss Transport, and he authored the remainder of the software at the request of Foss Transport. There is no dispute that Mr. Chari is the author of the software of which the copyright is alleged to be infringed.

[27] In 1998, Mr. Chari began development of Petro Dispatch 2000 (“Petro Dispatch”) for use by RCT. Mr. Chari’s primary contact at RCT was Mr. Reynolds.

[28] Invoices for the development of Petro Dispatch were billed to RCT by Atrimed Medical Supply Inc. (“Atrimed”). Atrimed is an Ontario registered corporation that was incorporated on December 2, 1994. The shareholders of Atrimed are Mr. Chari and his brother Mr. Santosh Chari. The first director was Mr. Swaroop Chari, another relative.

[29] In February or March of 2000, Mr. Foss was introduced to Mr. Chari by Mr. Reynolds. Mr. Reynolds contacted Mr. Foss and invited him to the RCT offices to see a demonstration of Petro Dispatch. Mr. Foss testified that Mr. Reynolds was “really proud of it” and that he had been talking about Petro Dispatch for about a year.

[30] In the demonstration shown to Mr. Foss, Petro Dispatch performed dispatch, post-order and invoicing.

[31] Mr. Foss testified that he was told that Atrimed was developing the software. He also testified that he was told, by Mr. Chari, that Petro Dispatch would handle all of the Foss Transport haulage products, not just the light oil products. He testified that he was buying a system that could dispatch, post-order and invoice all of his trucks for all of his products. At the time of the demonstration and introduction, the three lines of haulage were each roughly equal in business. They provided 50 percent of the Foss Transport revenue. The other 50 percent was derived from card lock petroleum sales.

[32] On the balance of probabilities, I find that Mr. Foss was in fact told that Petro Dispatch, when installed at Foss Transport, would handle the range of products that were transported by Foss Transport.

[33] The Petro Dispatch that was created for RCT was the same as that which was initially provided to Foss Transport. It was built around the RCT business which did not reflect the industry standard practices or the products that Foss Transport delivered. RCT did not deliver heavy oil products or dry bulk products. It also did not invoice customers a differential on gasoline or diesel. Further, RCT did not invoice for split loads. As well, RCT did not work in corrected litres, as was the industry standard. RCT used measured litres rather than corrected litres.

[34] A subsequent meeting was held between Mr. Chari and Mr. Foss to discuss the changes necessary to make the Petro Dispatch function in accordance with requirements of Foss Transport and industry standards. Among the differences discussed were minimum loads, split loads, and small drop rates.

[35] On March 16, 2000, Harmony was incorporated. Mr. Chari testified that upon the incorporation of Harmony he made a mental assignment of the copyright in Petro Dispatch to Harmony. His evidence in that regard, upon cross-examination, is found at pages 197 and 198 of the transcript as follows:

Q. You have given the answers that you have given to me about Atrimed. We can take it, then, that you didn't have any kind of document executed to transfer any copyright in this product, in this software, from Atrimed to Harmony?

A. No.

Q. The only one we have seen transferring an interest from you to Harmony is the one that we looked at this morning, the one that is –

...

is a company I own wholly. Obviously I made that transfer in my mind because it was executed by Harmony, not Sushil Chari. Obviously, back in 2000 I would have made that transfer in my mind, if I can say it like that.

[36] The first “Software License Agreement” (“SLA”) between Harmony and Foss Transport was signed on March 29, 2000. This agreement was for a perpetual license in Petro Dispatch. The agreement included a license for five users. There was no discussion as to whether the license would be for five concurrent users or specifically named users.

[37] The price for Petro Dispatch was \$40,000. The SLA that was presented to Mr. Foss divided the price into individual modules.

[38] The software was installed by Mr. Chari on the Foss Transport computer system. This system consisted of a Citrix server and external computers. A Citrix server is a central processor where all computer programs are stored and where they are run. External computers did not contain copies of the software; rather, external computers sent commands to the Citrix server and “watched” the software as it ran on the central server.

[39] Although installed in early 2000, Foss Transport did not begin using Petro Dispatch until February 2001. Substantial modifications were necessary to the software before it could be used within the Foss Transport business model and according to industry standard practices.

[40] Petro Dispatch replaced a largely paper-based dispatching, post-order and invoicing system. However, Petro Dispatch did not allow Foss Transport to carry out any business that it was not conducting before purchase and installation.

[41] Mr. Foss later introduced Mr. Chari to Mr. Cristello. Mr. Cristello was responsible for, among other things, Foss Transport’s computer systems. Mr. Foss introduced Mr. Chari to Mr. Cristello in order to determine if he, Mr. Chari, could address the outstanding issues with the pre-existing Foss Transport card lock program and the rail car management software. As software fell within Mr. Cristello’s duties, he became the primary contact between Foss Transport and Mr. Chari.

[42] Foss Transport had an existing program to invoice card lock customers. However, it was not Y2K compliant. Foss Transport also had a rail car management program under development that had never been completed, due to the untimely death of the programmer.

[43] Mr. Chari started work on the Card Lock Invoicing program in May 2000. It was operational in the summer of 2000. Foss Transport paid \$6,800 plus GST for this program.

[44] Following the development of the Card Lock Invoicing program, Mr. Chari was engaged to develop a rail car management program, later known as Railmaster. This software was completed, installed and operational in August 2000. Foss Transport paid \$32,400 for this program including \$15,400 for “extras”.

[45] Notwithstanding that the Card Lock Invoicing and Railmaster programs were completed, installed and operational in the summer of 2000, and that Harmony had been paid in full, Mr. Chari did not approach Foss Transport with the SLAs for these two programs until March 26, 2001.

[46] As with the SLA for Petro Dispatch, the SLAs for the Card Lock Invoicing and Railmaster programs granted Foss Transport perpetual licenses to use those software programs. The SLAs contemplated additional license fees in the event that Foss Transport and Harmony executed an addendum to one of the SLAs. No evidence was presented of an addendum to any of the SLAs.

[47] Clause 11 of each SLA is an identical termination clause. It provided that an SLA would terminate if Foss Transport failed to pay licensing fees, if either party committed a material breach of the SLA that was not remedied within 60 days of the other party providing notice, or if Foss Transport became bankrupt.

[48] There is no dispute that Foss Transport paid the specified licensing fees for Petro Dispatch, Card Lock Invoicing and Railmaster set out in the respective SLAs. The Plaintiff provided no evidence that Foss Transport went into bankruptcy, or that the Plaintiff provided notice to Foss Transport that the former was terminating an SLA due to a breach by the latter. As a result, I find that none of the three SLAs was terminated in accordance with clause 11.

[49] Each SLA indicated that the price for “Product Support and Maintenance” was “TBD”. Clause 7 of each SLA stated that if Foss Transport paid the applicable “Product Support, Maintenance or Subscription Fee”, Harmony agreed to provide Foss Transport with “all new releases, corrections, and enhancements and improvements” made to the software. Clause 7 also stipulated that new software products, or modifications not attributable to problems with the software, were to be sold separately.

[50] As of June 18, 2001 Foss Transport and Harmony entered into a weekly agreement whereby Foss Transport paid Harmony a fee of \$1000 per week (the “weekly agreement”). While operating under the weekly agreement, Mr. Chari made a number of fixes to Petro Dispatch, Card Lock Invoicing and Railmaster, made modifications to that software to conform to Foss Transport’s

business model, and created new modules for dip forecasting, demurrage, fuel surcharges, and payroll. The weekly agreement was in place between June 2001 and early 2004.

[51] The nature of the weekly agreement, and its impact on the subsistence of copyright in the fixes, modifications and new modules, is a central point of contention between the parties.

[52] In the list of programming completed during the weekly agreement, Mr. Chari included software that was the subject of two of the three SLAs between Foss Transport and Harmony. In this regard, I refer to the Card Lock Invoicing and Railmaster programs. In his direct examination, Mr. Chari stated that rail car management, including demurrage, dry bulk products and heavy oil products, that is the primary functions of Railmaster, and invoicing for card lock customers, which is the sole function of Card Lock Invoicing, were additional programming completed during the weekly agreement.

[53] Mr. Chari testified that changes were necessary to the software during the weekly agreement, in order to comply with the Foss Transport business model. His examples included rate differentials, minimum loads, split loads, flat rates, products delivered by Foss Transport that were not included in the original RCT modules, rail car management, and Card Lock Invoicing. He also testified that he added demurrage, fuel surcharge, electronic file retrieval, dip forecasting and Payroll Modules. As well, he said that he did custom programming to fix the flaws within his programs.

[54] Mr. Chari, on behalf of the Plaintiff, characterized the weekly agreement as an “Application Service Provider” agreement (“ASP”). According to him, this meant that the Plaintiff would provide additional software to Foss Transport on a rental basis. It also included, he explained, unlimited users on the existing software. He also testified that the \$1000 per week was a “break” for Foss Transport until business picked up, at which point the amount of weekly rental fees would be \$2000.

[55] Mr. Chari explained the consequences if the weekly agreement referred to as the ASP agreement were terminated, as follows at page 67 of the transcript:

Q. What was your understanding of the ASP agreement? What would happen if Foss decided to terminate the ASP agreement at some point? What would happen to their right to use your software?

A. They would not have the right to use any of the software created during the ASP period. They would not have the unlimited user seats for the original License Agreement. Essentially they would be scaled back to using the March 2000 and March 2001 software described in the License Agreements and scaled back to that number of users. We would just go back to March 2001.

[56] According to this evidence, the Plaintiff took the position that if the ASP agreement were terminated, then Foss Transport would have to return to using the software as it existed before the weekly agreement commenced.

[57] I acknowledge that Mr. Chari was confident that he could restore the software to its pre-weekly agreement state. However, his assertion is not believable in light of the evidence of Mr. Lo and Ms. Warth that Microsoft Access does not have that type of auditing or tracking function. Once



a modification was made it became integrated into the original. The Defendants would simply have to take Mr. Chari's word that the program had been restored and I so find.

[58] Mr. Chari kept no record of any changes and additions he made to the software during the weekly agreement. When the Defendants requested a copy of the software as it existed before the weekly agreement commenced, the Plaintiff was unable to produce the source code as it existed at that time.

[59] Further, Mr. Chari did not execute SLAs with respect to the fixes, modifications or additions made pursuant to the weekly agreement.

[60] The Plaintiff argued that its interpretation of the weekly agreement is supported by a "To Whom it May Concern" letter of April 9, 2002 and by the wording of the invoices which Harmony produced and that Foss Transport paid. Both the letter and the invoices refer to Harmony providing "Licensing and Professional Fees".

[61] I find that the wording of the "To Whom it May Concern Letter" was provided to Foss Transport by Mr. Chari. This letter is no more than confirmation of income. I also note that it was written one year after the agreement began. As such, I give that letter little weight as evidence of the terms of an agreement between the Plaintiff and the corporate Defendant.

[62] I also note that while the invoicing was for “Licensing and Professional Fees”, the invoices were created by Mr. Chari. Further, the invoices were entered in the Foss Transport accounts as professional fees. As such, I find that the wording of the invoices does little to clarify the meaning and purpose of the weekly agreement.

[63] The Defendants argued that the weekly agreement must be interpreted in a way that is consistent with the three SLAs, in which Harmony granted perpetual licenses to Foss Transport to use Petro Dispatch, Card Lock Invoicing, and Railmaster, including fixes and modifications made to that software.

[64] The Defendants’ evidence, provided by Mr. Foss and Mr. Cristello, was that the \$1000 weekly fee was for support including necessary modifications, updates and fixes. They testified that there were still substantial flaws in Petro Dispatch, Card Lock Invoicing and Railmaster and the support was necessary so that the programs they had purchased would operate as promised. Mr. Chari remedied a number of problems with the software on an ongoing basis, although some issues were never resolved.

[65] With respect to the modifications necessary to conform the software to Foss Transport’s business model, namely to account for rate differentials, minimum loads, split loads, and flat rates, Mr. Cristello testified that billing for these items was done before the introduction of Petro Dispatch. Mr. Foss and Mr. Cristello testified that these practices were the industry standard practices.

[66] Mr. Foss stated that the modifications to conform to the Foss Transport business model were discussed with Mr. Chari before Foss Transport purchased Petro Dispatch. Mr. Cristello also testified that rate differentials, minimum loads, split loads, and flat rates were included in Petro Dispatch before Foss Transport began using it in February 2001.

[67] The evidence of Mr. Foss and Mr. Cristello in this regard was consistent.

[68] Mr. Cristello testified that during the weekly agreement period, Mr. Cristello requested Mr. Chari to add functions to the existing software, namely dip forecasting, electronic file retrieval, demurrage, fuel surcharges, and payroll functions.

[69] According to Mr. Foss and Mr. Cristello, there was no “rental agreement” for these additions. Mr. Cristello testified that, during the course of the weekly agreement, there was no discussion of licensing fees, a rental agreement, or an ASP. He testified that Foss Transport was paying Harmony \$1000 a week so that Mr. Chari would fix software problems as they arose. As Mr. Cristello stated at page 809 of the transcript, Mr. Chari would do “any minor little things that we might have missed along the way that had to be done”.

[70] The Defendants point to the expert report and testimony of Mr. Lo, who characterized the modifications and additions as relatively minor alterations to the pre-existing software code.

[71] I do not accept the Plaintiff's interpretation of the weekly agreement. The Plaintiff has not proven that the weekly agreement was a "rental agreement" of all programming completed under the weekly agreement. In my opinion, Mr. Chari was simply trying to find an interpretation that is most favourable to the Plaintiff.

[72] I accept the submissions of the Defendants that the weekly agreement must be read in a manner that is consistent with the SLAs.

[73] As discussed, the Plaintiff argued that the primary functions of Card Lock Invoicing and Railmaster were programmed during the weekly agreement period. These programs were each the subject of an SLA between the Plaintiff and Foss Transport. These programs cannot be both additional programming under the weekly agreement and licensed by the Card Lock Invoicing and Railmaster SLAs. I find that these programs were included in the respective SLAs and were not additional programming.

[74] I note that for two years following the commencement of the weekly arrangement, Harmony, in the person of Mr. Chari, provided support in a manner consistent with the Defendants' understanding. This support included all additions, updates and modifications that were required.

[75] The Plaintiff's position is untenable when one considers the fact that a number of the problems, which Mr. Chari remedied, were inherent in the original program that he licensed to Foss Transport. Mr. Chari suggests that he would be entitled to "unfix" his own mistakes in the software

he had programmed. In effect, he would be able to provide Foss Transport a non-functional product in violation of the original software agreements.

[76] Further, the SLAs contemplate the payment of a “Product Support and Maintenance” fee at a rate “TBD”, and clause 7 of the SLAs obligates Harmony to deliver corrections and enhancements where such a fee is paid. In my opinion, the weekly agreement was such a payment, requiring Harmony to make corrections to the software, and granting Foss Transport a perpetual license to use the software as corrected.

[77] With respect to the modifications made to ensure the software functioned in accordance with Foss Transport’s business model, I do not accept that Foss Transport, in purchasing Petro Dispatch, intended to cease billing in the same advantageous manner as it had before purchasing that program, that is in accordance with its business model and the industry standard practices. Further, I do not accept that the Defendants would purchase software for \$40,000 that could not bill in this manner.

[78] As such, I find that rate differentials, minimum loads, split loads, and flat rates were included in the Petro Dispatch modules before the commencement of the weekly agreement. As a result, Foss Transport had a perpetual license to use these modifications under the Petro Dispatch SLA.

[79] As discussed above, both parties testified that Mr. Chari added functionality to the software at the request of Mr. Crisello, namely the Dip Forecasting Module, Petro Dispatch demurrage,

electronic file retrieval, fuel surcharges, and the Payroll Module, during the weekly agreement period.

[80] In the context of clause 7 of the SLAs, these additions may be viewed as “enhancements and improvements to the Software”, or as “new software products or options sold separately by Harmony”.

[81] As discussed above, the Defendants understood that they were paying Harmony \$1000 a week to provide software support, and to add functionality that they had previously overlooked. The parties did not discuss licenses to these new functions while the weekly agreement was in effect, and Mr. Chari did not suggest that the new functions ought to be subject to an additional SLA. Taken with Mr. Lo’s characterization of these functions as requiring relatively little programming vis-à-vis the existing programs, it is my opinion that these new functions are best characterized as enhancements and improvements rather than entirely new software.

[82] Given that the SLAs contemplated that Harmony would provide enhancements and improvements in the software to Foss Transport so long as the latter paid a “Product Support and Maintenance” fee, I find that the perpetual licenses to Petro Dispatch, Card Lock Invoicing and Railmaster granted in the SLAs extend to those programs as enhanced and improved during the weekly agreement.

[83] The most important modification provided during the weekly agreement was the Dip Forecasting Module of Petro Dispatch. This modification was made at the request of Foss Transport in order to fulfill a requirement of a request for proposals (“RFP”) issued by Suncor (“Sunoco”) in November 2002.

[84] The RFP presentation meeting was held on December 12, 2002. At this meeting, Foss Transport was represented by Mr. Foss, Mr. Cristello, Mr. Chari, Mr. Reynolds and Mr. Eddie Pagliaro. There was conflicting evidence as to whether or not Mr. Chari demonstrated his software to Sunoco during this meeting.

[85] Mr. Reynolds and Mr. Chari testified that a demonstration was made. Mr. Foss and Mr. Cristello testified that no demonstration was made. In my opinion, whether or not a demonstration was made is irrelevant to the determination of this action.

[86] Mr. Chari asserted that his Dip Forecasting Module of Petro Dispatch was the critical reason why Foss Transport won the Sunoco contract. However, in his testimony he acknowledged that this software was not created until after the contract was awarded. In my view, since it did not yet exist, the Dip Forecasting Module was not a contributing factor in the award of the Sunoco contract to Foss Transport.

[87] The Plaintiff further argued that the Petro Dispatch program, in general, was key to the award of the Sunoco contract to Foss Transport. In my opinion, this position is unfounded. The

Plaintiff has failed to acknowledge the importance of the long working relationship between Foss Transport and Sunoco, of road safety records, and of the ability to transport and deliver the fuel.

[88] Further, the suggestion by the Plaintiff that the entire compensation derived from the contract should be attributed to the use of the Petro Dispatch software fails to consider the basic facts.

[89] Simply put, the compensation provided for performance of the contract would not have been made without the delivery of fuel to Sunoco gas stations. Petro Dispatch did not deliver the fuel. There were drivers, administrative staff, yard staff, and operations staff involved in ensuring that the fuel was delivered. If Petro Dispatch were responsible for any advantage, I find that it was only in the improved accuracy of the accounting processes in the Foss Transport office. I also find that this was only a nominal financial advantage.

[90] Gradually the support provided by Harmony decreased and by the spring of 2003 the support was effectively non-existent.

[91] When Foss Transport required support in 2003 to keep the software functioning, Mr. Chari authorized Foss Transport to have the support provided by another programmer. Mr. Foss approached Ms. Warth to provide this support. She sub-contracted the support to Mr. Bill Benton, of BiLd Solutions.



[92] In early 2003, Mr. Chari became the owner of RCT. He then sought a merger between RCT and Foss Transport. He attempted to do so through two agreements, an Operational Services Agreement (“OSA”) and an Administrative Services Agreement (“ASA”). For various reasons, this merger did not occur. However, I find that the failure to conclude these agreements, in early 2004, was the catalyst for the breakdown in the relationship between Mr. Chari and the Defendants. That fact is highly relevant.

[93] Foss Transport continued to pay the Plaintiff \$1000 per week until March 23, 2004.

[94] On April 14, 2004, after the breakdown of the negotiations for the ASA, Mr. Chari sent a letter to Mr. Foss as President of Foss Transport. In this letter he alleged that Foss Transport was in arrears totalling \$17,762, including interest, from December 29, 2003 to April 19, 2004, and he demanded payment of the same. As well, he unilaterally changed the weekly fee from \$1000 per week to \$2000 per week. Included in the April 14 letter were invoices for the alleged period of arrears.

[95] In reviewing these invoices, and the evidence of Mr. Cristello, I conclude that the Plaintiff had never before sent these invoices to Foss Transport. I note that all of these invoices contain the same typographical error, an error that does not appear on any previous invoice. I conclude that the so-called “arrears” invoices were created at the same time, that is on or about April 14, 2004.

[96] The evidence of Mr. Cristello was that the Foss Transport accounting system showed that these invoices had not been previously received but rather arrived in a package with the April 14, 2004 letter. His evidence, found at pages 888 to 892 of the transcript, is as follows:

Q. If you go down to the third entry from the bottom of that page, there are two with invoice dates of February 1, 2004 and one of February 9, 2004. Do you know to what invoices those relate?

A. Yes, I do. These are the three invoices that Mr. Chari was waiting upon when he bombed us. Two of these invoices are dated February 1. Given that they arrived on March 23, I would have closed out my January accounting period and had to apply them to the next open period which would be February 1. The transactions again are all sequential, 68, 69, and 70, indicating to me that they were all delivered at the same time and all posted that way.

...

Q. There is a series of invoices there. Can you identify any of those invoices as being reflected in tab 126?

A. The first invoice, No. 4-0112F, is identified as transaction No. 139868, invoice input date is February 1, 2004. I explained why I couldn't input January 12. The dollar amount is \$2,140, and this was posted on March 23.

Q. Would you go to the next invoice dated 26, 2004. Can you identify from these records when that one was received?

A. It is Invoice No. 4-0126F. The transaction number is 139869. The invoice entry date is February 1, 2004. The posting date is March 23, and it is input for the amount of \$2,140.

Q. There is another invoice on the next page dated February 9, 2004. From your records can you identify when that was received?

A. Yes, I can. This one is also showing the date of February 9, 2004. The Invoice number is 4-0209F. It was posted on March 23. The dollar amount is \$2,140.

Q. There are five other invoices at that tab 86. Were any of those posted?

A. These have never been posted.

Q. Do you know why?

A. They arrived in a package sometime while I was in Florida. Upon my return from Florida on April 24 -- I was gone that week -- the bomb had hit the system and I didn't enter them.

Q. Just to clean something up, at tab 126, the first three pages, you indicated that the date posted is not something that is normally in this report.

A. That's correct.

Q. Did you add it to the report?

A. Yes, I did.

Q. Based on what?

A. Based on the Business Vision entry that I get from the General Ledger entry, 44405, where all the Harmony invoices are coded to.

Q. Is that the entries we looked at on those screens?

A. Yes, they are.

Q. Mr. Cristello, would you turn to tab 104, please. This is a copy of a letter dated April 14 from Harmony Consulting to G.A. Foss Transport. Did you become aware of this letter at some point?

A. At some point.

Q. Do you have any idea when in relation to April 14, 2004?

A. I would say after April 23 or 24 when I returned from Florida. Gord probably would have shown me the letter.

Q. Do you know if Foss ever received another invoice from Harmony Consulting after that time?

A. No, we did not receive one.

[97] I also note that the period for which Mr. Chari alleges arrears included future billing periods.

The evidence was that Foss Transport operates on a 30 - 60 day accounts payable and receivable.

Since the invoices had never been produced, the time had not yet passed and the period for payment of accounts payable had not come about, I find that Mr. Chari fabricated these arrears for the purpose of justifying his attacks on Foss Transport.

[98] There is no evidence that Harmony sent any more invoices to Foss Transport after the demand letter of April 14, 2004.

[99] On April 18, 2004, the invoicing module in Petro Dispatch stopped working. Every attempt to open the module resulted in the program simply closing or shutting down. Foss Transport employees attempted to contact Mr. Chari to fix the system but were unsuccessful in establishing contact.

[100] Furthermore, Mr. Cristello telephoned Mr. Chari in order to get this problem fixed. Mr. Chari refused to fix the problem.

[101] In light of the breakdown in the relationship with Mr. Chari, Mr. Foss contacted Ms. Warth for assistance. Ms. Warth went into the Foss Transport offices on April 24, 2004, in response to the call from Mr. Foss regarding the problems with the invoicing module.

[102] In reviewing the Petro Dispatch invoicing module, Ms. Warth examined the invoicing .mdb file, that is the database file. In that file she found code that prevented the program from running if the current date was after April 18, 2004. In essence, if the program were started after April 18, 2004 then this code told the program to quit immediately without allowing any other tasks to be performed.

[103] To resolve this problem Ms. Warth made the offending code a "comment". In other words, she told the computer not to run the code for the time bomb; rather the computer would treat the code as a non-operative programmer's "comment". This "comment" in effect bypassed the malicious code.

[104] On May 1, Ms. Warth was again called to the Foss Transport offices. On this occasion the problem was with the dispatching module of Petro Dispatch. The dispatching application was programmed to generate an error if any orders were entered after May 1, 2004.

[105] The malevolent programming in the dispatching application was not computer code *per se*. There was a “validation rule” placed on the order data table itself. This rule told the program that in order to be valid, all orders had to have a date of May 1, 2004 or earlier. Any order entered with a date later than May 1 would result in an error message, the program would not save the order and Foss Transport could not dispatch a truck.

[106] Ms. Warth used a back-up version of the dispatching module, dated 24 or 25 February, 2004, which did not have the validation rule and the errors in the system were resolved.

[107] Mr. Chari admitted inputting these time bombs in the Foss Transport system. He attempted to characterize them as “security features” input because he had a weekly arrangement for software. I reject that characterization.

[108] Mr. Chari added these features some time after February 24-25, 2004, almost four years after the initial installation on the Foss Transport computer system. It was almost three years after the weekly agreement commenced. He did not inform Foss Transport that they were in place. These so-called security measures were not implemented in a consistent manner and were only entered in

two of the many modules. The bombs were given effect by different methods, one by programming and the other within a database table. Further, Mr. Chari later fabricated the justification for attacking the computer system.

[109] I find that these attacks were motivated by Mr. Chari's disappointment with failure to conclude the OSA and ASA. He reacted by attacking the Foss Transport computer system.

[110] It also appears that Mr. Chari may have conducted a "practice run" in early April 2004.

[111] These attacks temporarily inhibited Foss Transport's ability to dispatch trucks and to invoice customers. Although I note that Foss Transport had been capable of performing these functions before the installation of the software, and in fact reverted to a pen and paper system while the dispatch module was inoperative, the sabotage created problems with cash flow, resulted in gas stations without any gas and essentially shutdown delivery operations temporarily.

[112] Following the repair of Petro Dispatch, Ms. Warth took over support for the Foss Transport computer system. As she was busy with other clients she sub-contracted to Mr. Benton. In July 2004, Ms. Warth began seeking new computer solutions for all of the existing software for dispatching, post-order and invoicing.

[113] During the period when Mr. Benton and Ms. Warth were providing support there were several minor fixes, modifications and updates that they performed on the Petro Dispatch software.

This support included fixing errors in Petro Dispatch, ensuring integrity in the databases, adding queries in Microsoft Access, changing screen colours, changing the GST rate, and utilizing integral Access tools to compact and reorganize the databases.

[114] Ms. Warth also upgraded the version of the underlying Microsoft Access software to Access 2000. Lastly, there were additional data tables, data entry forms and special invoices created for four existing customers in Petro Dispatch. These new invoices were necessary due to the transfer of these customers to Balmar Petroleum Ltd. (“Balmar”), a new company that Mr. Foss incorporated in order to purchase a similarly named corporation. Through a numbered company, Mr. Foss and Mr. Cristello owned eighty percent of Balmar.

[115] The Balmar changes were added to the Petro Dispatch screens. The actual addition of Access objects was made in the Foss Transport database files. The forms, buttons and objects were made using integral Access tools, for example the “forms wizard”.

[116] When working on the software, Ms. Warth testified that she used the Foss Transport Citrix server, since that program was embedded with the data. She explained that because the data is constantly changing it is not possible to take the software, work on it, and then re-install it later. In the result, I find that at no time was a copy of the Harmony software removed from the system except as required to prepare for this litigation.

[117] At some point during the changes to the Petro Dispatch software, the introductory screen of Petro Dispatch was changed. This screen attributed Petro Dispatch as a product of Mr. Benton's corporation BiLd Solutions. There is some conflict in the evidence as to who authorized this change, and if or when Mr. Foss or Mr. Cristello became aware of the change. Given my ultimate conclusion on the relevance of this change in the screen to the claim of copyright infringement, discussed below, it is unnecessary for me to make findings of fact as to who authorized the change and when the individual Defendants learned about the change.

[118] On January 21, 2005, Mr. Chari attempted to intimidate the Defendants. He recruited two off-duty RCMP officers to go to the Foss Transport offices in the guise of performing a computer audit, as authorized in the SLAs. There was no evidence that either of these off-duty police officers was a computer specialist. There is evidence that Mr. Chari knew that at least one of these officers, Mr. Sammy, was known to Mr. Cristello.

[119] Mr. Cristello and Mr. Reynolds recognized one of the men as an RCMP officer, and informed Mr. Foss when the individuals arrived. Once the two men left, a phone call by Mr. Foss to the RCMP confirmed that the second man was also an RCMP officer.

[120] On July 22, 2005, the Plaintiff commenced this action.

[121] Meanwhile, and thereafter, Foss Transport began using software that was not authored by Mr. Chari. Railmaster was phased out from the fall of 2001 to 2007. Foss Transport no longer



transported cement after the fall of 2001. It stopped transporting plastic resin in April 2004. It performed no rail car management after April 2004. It did not carry heavy oil produce after 2007.

[122] The Card Lock Invoicing program was replaced in 2006 by a new program built by Mr. Benton. After the Benton program was installed, Foss Transport no longer used the Card Lock Invoicing program.

[123] Petro Dispatch was replaced in 2007 with software created by a company named TMW Systems, Inc.

## **DISCUSSION**

### Issues

[124] In an action for copyright infringement, there are generally three issues to be addressed, all of which arise in this action, as follows:

- a) Does copyright subsist in the computer programs?
- b) Who owns the copyright in the computer programs?
- c) Was the copyright infringed?

### Burden of Proof

[125] This is a civil action where the burden of proof lies upon the Plaintiff. The burden of proof in a civil action is proof on the balance of probabilities, a burden that was discussed recently by the

Supreme Court of Canada in the decision *F.H. v. McDougall*, [2008] 3 S.C.R. 41 at paras. 46 and 49, where the Court said the following:

Similarly, evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But again, there is no objective standard to measure sufficiency. In serious cases, like the present, judges may be faced with evidence of events that are alleged to have occurred many years before, where there is little other evidence than that of the plaintiff and defendant. As difficult as the task may be, the judge must make a decision. If a responsible judge finds for the plaintiff, it must be accepted that the evidence was sufficiently clear, convincing and cogent to that judge that the plaintiff satisfied the balance of probabilities test.

...

In the result, I would reaffirm that in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.

### Credibility

[126] Credibility is to be assessed in accordance with the factors that have been identified in the Courts, as summarized in the seminal decision dealing with the assessment of credibility, *Faryna v. Chorny* (1951), 4 W.W.R. (N.S.) 171 (B.C.C.A.).

[127] In that case the Court said the following at page 174:

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the

preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial Judge to say "I believe him because I judge him to be telling the truth", is to come to a conclusion on consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind.

[128] Insofar as copyright is a creature of statute, pursuant to the *Copyright Act*, R.S.C. 1985, c. C-42, (the "*Copyright Act*") the issue of credibility does not necessarily arise in the same manner as in other types of litigation. For example, in cases involving personal injuries or negligence, clear findings of credibility are often necessary to reconcile different versions of events presented by the parties. The degree to which each party is legally responsible and the degree to which one must indemnify the other, will flow from those findings.

[129] Nonetheless, to the extent that it is necessary for the Court to make certain factual findings, the assessment of the credibility of the witnesses, even of exhibits, remains an essential part of the trial Court's mandate. In the present case, the issue of credibility in respect of alleged copyright infringement by one or more of the Defendants is most important in respect of the issue of ownership of the copyright. Accordingly, I have turned my mind to the credibility of all the evidence, including the testimony of the witnesses, in addressing the issues that are relevant to this action.

[130] Mr. Chari was an unsatisfactory witness. He frequently said that he did not remember or recall when asked about details of his interactions with representatives of Foss Transport, including the individual Defendants. His evidence at trial, at times, contradicted the evidence he gave at discovery. I refer in that regard to the testimony found at pages 181 to 185 of the transcript.

[131] In particular, Mr. Chari did not give clear and convincing evidence about his relationship with Atrimed, the so-called “billing” agent. He was an evasive witness.

[132] The documentary evidence submitted by the Plaintiff is also relevant to the assessment of Mr. Chari’s credibility. In particular, I refer to the demand letter sent by Mr. Chari to Mr. Foss dated April 14, 2004.

[133] As discussed, that letter demanded a payment of arrears on invoices that Mr. Chari created at the same time as the demand letter. He had never sent the invoices to Foss Transport. That letter portrays a non-existent state of affairs, that is that Foss Transport was in arrears on invoices submitted by Harmony, that Mr. Chari used to justify his subsequent actions. In my opinion, this demand letter negatively affects Mr. Chari’s credibility and undermines his other evidence. The fact that Mr. Chari made unjustified demands before the complete breakdown of his relationship with the Defendants calls into question the credibility of his perception of all the events that followed.

[134] Other documents submitted into evidence by the Plaintiff are questionable as well. During the cross-examination of Mr. Cristello, Counsel for the Plaintiff put certain documents in front of

Mr. Cristello. These documents were alleged to be invoices created using Petro Dispatch, used by Foss Transport to bill Balmar customers on behalf of Balmar. These documents are found at Tab 140 the Trial Book of Documents.

[135] In the course of his re-examination, Mr. Cristello testified that most of the invoices in Tab 140 were not created by Foss Transport. He pointed out several discrepancies between the content and form of the invoices at Tab 140 and the practices of Foss Transport, Balmar, and their customers. In particular, he said that many of the invoices were addressed to companies that were not among the four specific Balmar customers invoiced by Foss Transport, using Petro Dispatch, on behalf of Balmar. Those four customers were United Independent Operators, Zavcor Trucking Ltd., Mississauga Tire, and Chiovitti Banana. Tab 140 contains invoices, payable to Balmar, invoiced to companies such as Gazzola Paving, Halton Crushed Stone, and Bank of Montreal.

[136] The testimony of Mr. Cristello casts doubt on the authenticity of the documents at Tab 140. In my opinion, this doubt further undermines Mr. Chari's credibility and the credibility of the Plaintiff's case.

[137] Mr. Reynolds, a former employee of Foss Transport and periodic associate of Mr. Chari, was uncomfortable in his role as witness. His evidence was largely directed to the issue of damages. I find that his evidence was of limited reliability and relevance.

[138] Four witnesses testified on behalf of the Defendants. Mr. Foss testified both in his capacity as majority shareholder and President of Foss Transport. He also testified on his own behalf since he had been sued in his personal capacity for alleged copyright infringement.

[139] Mr. Foss impressed me for the most part, as credible. When he did not remember, he said so in a direct manner. I observe that he testified at times in a distracted manner, as if he were not fully engaged in the proceedings. Nonetheless, by and large I accept his evidence as being largely credible.

[140] Mr. Cristello testified both on behalf of Foss Transport and on his own behalf since he was personally sued for alleged infringement of copyright.

[141] Much of his evidence was directed to his dealings with Mr. Chari. Although his memory was not perfect, he gave his answers in a forthright manner. Furthermore, where the evidence of Mr. Cristello and Mr. Chari conflicts, I prefer the evidence of Mr. Cristello.

[142] Mr. Lo was called as an expert witness in the field of forensic analysis for the purpose of commenting on the suitability of the software for the business of Foss Transport. His evidence was credible. However, I am not highly persuaded as to its relevance.

[143] Ms. Lidia Warth was the last witness called on behalf of the Defendants. She is a computer programmer who testified about her involvement with Foss Transport, including the work that she

did to repair the damage that was wrought against the computer software in April and May 2004.

She also testified about her personal experience in working with computer software programs.

[144] Ms. Warth was a straightforward and impressive witness. She dealt with complicated subject matter in a forthright manner. I find her to be highly credible. Her evidence was useful, reliable and relevant to the issues, and of great assistance to the Court.

Does copyright subsist in the software?

[145] Copyright is a creature of statute. As such, it is necessary to find a basis in the *Copyright Act* for subsistence of copyright in a work, for ownership, and for infringement. If it cannot be grounded in the statute then there it is no issue of copyright.

[146] The applicability of copyright to computer programs is specifically addressed in sections 2 and 5 of the *Copyright Act*, which provide as follows:

Definitions

2. In this Act,

...

“computer program” means a set of instructions or statements, expressed, fixed, embodied or stored in any manner, that is to be used directly or indirectly in a computer in order to bring

Définitions

2. Les définitions qui suivent s’appliquent à la présente loi.

...

« programme d’ordinateur » Ensemble d’instructions ou d’énoncés destiné, quelle que soit la façon dont ils sont exprimés, fixés, incorporés ou emmagasinés, à être utilisé directement ou indirectement

about a specific result;	dans un ordinateur en vue d'un résultat particulier.
...	
“copyright” means the rights described in	« droit d'auteur » S'entend du droit visé :
(a) section 3, in the case of a work,	a) dans le cas d'une oeuvre, à l'article 3;
(b) sections 15 and 26, in the case of a performer's performance,	b) dans le cas d'une prestation, aux articles 15 et 26;
(c) section 18, in the case of a sound recording, or	c) dans le cas d'un enregistrement sonore, à l'article 18;
(d) section 21, in the case of a communication signal;	d) dans le cas d'un signal de communication, à l'article 21.
...	...
“literary work” includes tables, computer programs, and compilations of literary works;	« oeuvre littéraire » Y sont assimilés les tableaux, les programmes d'ordinateur et les compilations d'oeuvres littéraires.
Conditions for subsistence of copyright	Conditions d'obtention du droit d'auteur
5. (1) Subject to this Act, copyright shall subsist in Canada, for the term hereinafter mentioned, in every original literary, dramatic, musical and artistic work if any one of the following conditions is met:	5. (1) Sous réserve des autres dispositions de la présente loi, le droit d'auteur existe au Canada, pendant la durée mentionnée ci-après, sur toute oeuvre littéraire, dramatique, musicale ou artistique originale si l'une des conditions suivantes est



réalisée :

(a) in the case of any work, whether published or unpublished, including a cinematographic work, the author was, at the date of the making of the work, a citizen or subject of, or a person ordinarily resident in, a treaty country;

a) pour toute oeuvre publiée ou non, y compris une oeuvre cinématographique, l'auteur était, à la date de sa création, citoyen, sujet ou résident habituel d'un pays signataire;

[147] In this proceeding the Defendants have challenged the subsistence of the copyright.

Paragraph 34.1(1)(a) of the *Copyright Act* creates a presumption that copyright subsists in the work unless proven otherwise. Paragraph 34.1(1)(a) provides:

Presumptions respecting copyright and ownership

Présomption de propriété

34.1 (1) In any proceedings for infringement of copyright in which the defendant puts in issue either the existence of the copyright or the title of the plaintiff thereto,

34.1 (1) Dans toute procédure pour violation du droit d'auteur, si le défendeur conteste l'existence du droit d'auteur ou la qualité du demandeur :

(a) copyright shall be presumed, unless the contrary is proved, to subsist in the work, performer's performance, sound recording or communication signal, as the case may be; and

a) l'oeuvre, la prestation, l'enregistrement sonore ou le signal de communication, selon le cas, est, jusqu'à preuve contraire, présumé être protégé par le droit d'auteur;

[148] Nevertheless, copyright can only subsist in an original work. The Supreme Court of Canada explained “original” in *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339, at para. 25, where the Court said:

For these reasons, I conclude that an "original" work under the *Copyright Act* is one that originates from an author and is not copied from another work. That alone, however, is not sufficient to find that something is original. In addition, an original work must be the product of an author's exercise of skill and judgment. The exercise of skill and judgment required to produce the work must not be so trivial that it could be characterized as a purely mechanical exercise. While creative works will by definition be "original" and covered by copyright, creativity is not required to make a work "original".

[149] Computer programming that is dictated by the operating system or reflects common programming practices is not original expression and will not receive copyright protection; see *Delrina Corp. v. Triolet Systems Inc.* (2002), 58 O.R. (3d) 339 (C.A.), at paras. 52 - 55.

[150] Copyright may subsist in a compilation which includes non-copyrightable material. Where the form or expression of the compilation is original in presentation it will be given copyright protection. The impossibility of having copyright in the constituent parts does not prevent the compiled work from being protected by copyright. This does not give the author copyright in the individual parts, but rather a copyright in the compilation as a whole; see *CCH*, at paras. 33 - 36.

[151] In my opinion, the owner of the copyright in a computer program does not, as a matter of general principle, have copyright in the user's data, unless there is an agreement to the contrary.

[152] I note that in this case, the database files were created by Microsoft Access, the data belongs to the user, and the data is integrated in the same database files as the programming. In the particular circumstance of this case, I find that an author cannot have copyright in the database files in general, but rather only in his or her programming that is sufficiently original. The database files belong to the user, in this case Foss Transport.

[153] I will discuss the subsistence of copyright in respect of each computer program.

*(i) Petro Dispatch*

[154] As previously discussed, copyright is presumed to subsist in the work because the Defendants have challenged its existence. In my opinion, Petro Dispatch is properly seen as a compilation of program modules. Accordingly, it falls to the Defendants to prove that copyright cannot subsist in the compilation as a whole. I have no hesitation in concluding that the Petro Dispatch compilation is an original work in which copyright subsists.

[155] The Defendants' evidence raised significant concerns that some individual modules should not be capable of copyright. However, that is insufficient to show that copyright does not subsist in the compilation. The evidence demonstrates that the packaging together of the specific sets of user inputs, dispatching, forecasting, reconciling and invoicing tools is original and was compiled with a requisite degree of skill and judgment. I find that copyright subsists in Petro Dispatch.

[156] In my opinion, copyright subsists in the compilation, notwithstanding the evidence that there are numerous aspects of the programming of each module that cause concern, for example, the errors, sloppiness, simplicity of programming, reliance upon Microsoft Access mandated functionality and standard programming practices. Some modules are clearly so “trivial that it could be characterized as a purely mechanical exercise”, as per *CCH* at para. 25, and not capable of independent copyright. All of the modules contain multiple errors which suggest an absence of the requisite skill and judgment. However, the copyright in this computer program rests in the compilation as a whole.

[157] In *CCH*, at para. 33, the Supreme Court of Canada stated that:

Copyright protects originality of form or expression. A compilation takes existing material and casts it in a different form. The arranger does not have copyright in the individual components. However, the arranger may have copyright in the form represented by the compilation.

[158] Even though individual modules may not have individual copyright, it is sufficient in this case, as in *CCH*, that the compilation is original in form and therefore protected by copyright.

[159] As well, the Plaintiff alleged that every modification, “fix” and addition to Petro Dispatch would have a separate and independent copyright.

[160] In my opinion, the further additions, modifications or “fixes” that were made to Petro Dispatch, with the exception of the Dip Forecasting and Payroll Modules, do not have independent

copyright protection. I am satisfied on the balance of probabilities that the Defendants have overcome the presumption of copyright with respect to these additions, modifications and repairs.

[161] The modifications by which Mr. Chari altered prices, rates or units of measure were simple mechanical amendments and do not qualify for independent copyright protection.

[162] Modifications which are “fixes” to included features, allowing them to function in the manner originally intended, will not receive separate and additional copyright protection, in and of themselves, unless there is some element of originality that is of sufficient skill and judgment. On the facts of this case, I am satisfied that these “fixes” were trivial, not original and dictated by the Microsoft Access program and functionality.

[163] Likewise, the manner of reformatting of columns and changing text fields is dictated by the Microsoft Access. There was insufficient skill and judgment engaged in this work for it to be considered as original.

[164] The Plaintiff also alleged that rate differentials, minimum loads, split loads, and flat rates were added during the weekly agreement. I have found that these features were in fact included in the original product licensed to Foss Transport and installed before the weekly agreement commenced. Regardless of when they were created, it would not change my opinion that the modifications are not capable of independent copyright protection.

[165] These features functioned by having a Foss Transport employee click a “check box” and then enter the rate to be applied. Numerous objects, such as check boxes, are integral features of Microsoft Access. Mr. Lo testified at pages 1059 and 1060, about check boxes:

Q. First of all, what are checkboxes?

A. Checkboxes are meant for, as in a database, it is for a user to simply put a checkmark, to click on that box, either a checkmark or a no checkmark, to represent a data, either yes or no, and so on.

Q. What happens if a checkmark is checked off?

A. It should represent as yes; it could be yes.

Q. Does it give any information to any other part of the program?

A. No.

Q. Does MS Access permit a user to create checkboxes?

A. Yes, actually, that is one of the features, one of the selling points of Microsoft Access, it allowed the user or designer to simply drag a checkbox in, onto a form or the user interface without any programming input.

Q. With respect to the small-drop and flat-rate checkboxes in particular, did you make a finding regarding whether they included the addition of any source code?

A. We found that it comprises of four lines of source code, each, for each of the checkbox.

Q. Is that a significant amount?

A. No, not at all.

[166] The addition by Mr. Chari of a Microsoft Access button, a feature that was inherent to the operating system, to a Petro Dispatch screen was a mechanical operation that was performed in a manner dictated by the underlying operating program, that is, Microsoft Access.

[167] Further, it was the user who had to determine the correct rate to include and who had to enter it into the program. The effect of “checking” the box was only to include one additional value, a value that had been manually entered by the Foss Transport employee, in a very basic mathematical calculation.

[168] Copyright does not subsist in these additions, in and of themselves, as there is insufficient skill and judgment in this modification. The programming was exceptionally simple. Mr. Lo gave the following evidence at pages 1067 and 1068:

Q. Point 18, it references the minimum load charge and split load charge and load subtotal being summed, to arrive at a total charge. Did you find that in the function?

A. Yes, we did.

Q. One line of code, then?

A. That is right.

[169] The programming result could only be achieved through one process and the Plaintiff is attempting to attract copyright protection to a basic mathematical calculation.

[170] The same analysis applies to the fuel surcharge and demurrage added to Petro Dispatch. In my opinion, insufficient skill and judgment were required to ground separate copyright protection for making a modification using the integral tools of the underlying operating program and for making basic amendments to simple mathematical formulas.

[171] I also note that the demurrage buttons never functioned in Petro Dispatch. This is further evidence that the author had not exercised adequate skill and judgment.

*(ii) Dip Forecasting Module*

[172] As discussed earlier, I find that Foss Transport was licensed to use the Dip Forecasting Module pursuant to the Petro Dispatch SLA and the weekly agreement. That conclusion does not

mean that the module lacked sufficient originality, in relation to the original Petro Dispatch program, to be entitled to its own copyright. It only means that it was not “new software” for the purpose of that SLA.

[173] In reviewing the evidence with respect to the Dip Forecasting Module, I find that the Defendants have not displaced the presumption that copyright subsists in this module.

[174] The evidence is that this program electronically retrieved relevant data from Sunoco. It also forecast fuel requirements and an automatic stock-replenishment based on size of tank, average consumption and quantity of fuel remaining for 200 gas stations. Notwithstanding the fact that the safety stock element did not function perfectly, that there were challenges with printing, that the program was relatively simple, and the fact that it was interdependent on other aspects of Petro Dispatch, I am satisfied that it was sufficiently original and created with sufficient skill and judgment to be protected by copyright.

*(iii) Payroll Module*

[175] Similar to the Dip Forecasting Module, Foss Transport’s license to use the Payroll Module does not preclude that module from warranting independent copyright.

[176] The Payroll Module was intended to provide Foss Transport with the means to pay all its drivers and owner/operators for deliveries.



[177] The Defendants adduced evidence that establishes on a balance of probabilities that this software was never modified for the Foss Transport business and that it was never operational.

[178] In my opinion, this evidence is insufficient to displace the presumption that copyright subsists in the software. The fact that it had been developed for RCT and had not been modified for Foss Transport, and the fact that Mr. Chari never made the program operational on the Foss Transport computer system, nonetheless suggest that copyright should subsist in the work.

[179] In my view, a program may be installed on a user's computer system, that user may not have yet been able to use the software and nevertheless, the software is protected by copyright.

[180] I find that copyright subsisted in the Payroll Module.

[181] I find that copyright subsists in Petro Dispatch with its included modules as a compilation but cannot be asserted independently for the additions, modifications and fixes except for the Dip Forecasting and Payroll Modules.

*(iv) Card Lock Invoicing Program*

[182] In my opinion, the Card Lock Invoicing program lacks sufficient originality to be afforded copyright protection. I find that on the balance of probabilities the Defendants have displaced the presumption that copyright subsists in this work.

[183] This program functioned by having a user import data into Microsoft Access from a different database, a database that is independent of the software created by Mr. Chari. I accept the evidence of Mr. Cristello found at pages 795 to 797 of the transcript:

All the work was done in a program called Phoenix, and everything was recorded -- all the customer information, all the products. Everything was recorded in Phoenix, and that data was stored on a file called P4W. All the invoicing programs -- Mr. Chari's, Mr. Fitzgerald's, Ms Warth's -- extract the data from the P4W and drop that information into an invoice. The only thing that is in the invoice program is really the product and the pricing that has to be input. Everything else is drawn out of P4W.

I misspoke there. Lidia's program does not look at the P4W.

Q. Mr. Cristello, would you look at tab 14, please. Can you identify the first page of that tab?

A. This is an invoice produced using the Neil Fitzgerald program. It is a Cardlock invoice produced in the Neil Fitzgerald program.

Q. You talked about the Phoenix system and these systems taking information from there. There is a number of columns on this invoice. Is that the information you were talking about?

A. Yes. All of these columns with the exception of the pricing information is done in Phoenix.

Q. If you go over to the fifth page, there is an invoice dated July 5, 2000. Do you recognize that?

A. Yes, I do.

THE COURT: Just a minute. The date for that is down in the lower left-hand corner.

MR. STAPLES: It is up in the right-hand corner as well.

Q. Can you identify that, please?

A. Yes. This is a Cardlock invoice produced using the new Harmony Cardlock invoicing program.

Q. Is there any difference in the information that is included in this invoice and the one we just looked at?

A. No, this information is identical.

(Emphasis added)

[184] Mr. Chari testified that he had programmed electronic file retrieval into Card Lock Invoicing. This "feature" was not programming. The electronic file retrieval was really a series of

instructions, provided by Mr. Chari, that allowed a user to bypass the program and employ the underlying Microsoft Access commands. At pages 844 and 845, Mr. Cristello testified as follows:

A. No, at this time there is no programming part for the electronic retrieval.

This is in May 2001. He told me that you highlight the Cardlock invoicing icon, hit Shift Enter, and it would open a bunch of tables. I would then click in the upper left-hand corner the Microsoft Access data base that opened, hit "Get external data", and it would pop up a form. I would hit "advance, open, specs, ok, ok, finish." It would save it to this file called TestCFOS. Now I had imported something somewhere into his invoicing program.

Q. Did he write any kind of software program to allow you to do that?

A. No, he did not, to get it to that point.

[185] The evidence also shows that invoices are Microsoft Access forms. Forms are integral Microsoft Access objects. Forms are created through a "wizard" that does not require the programmer to write any code. In cross-examination, Mr. Lo gave the following evidence found at page 1126 of the transcript:

Q. You would agree with me there are more types of programming than just running source code; developing a query is also programming and creating a report or a table or a form is also programming?

A. "Programming", we are using as a very generic term here. In Microsoft Access, one of the selling points is that users do not have to understand programming to make use of this software. In fact, Microsoft Access has a lot of something called a wizard, where it simply goes through a bunch of procedures by answering very simple questions and the program itself will try to create a form for you, automatically, a table for sample, a query for you. Then the programming is all done by the software itself, without the user even understanding any of the programming.

[186] This evidence was consistent with the evidence of Ms. Warth, found at page 1494 of the transcript:

Back to the former-screen part of the bucket, you can say, "create a new form." There is a wizard there to help you create it; you don't have to write any code.

[187] I find that the data that was imported from Phoenix, specifically the P4W file, contained all necessary information except price. I infer that this information dictated the form and content of the invoice. Further, the program did not import data electronically; Microsoft Access did the importation when a user opened that program and used an inherent function of Microsoft Access. I also find that the user was required to enter the price manually. In the result, I find that the only original programming was the selection of the product.

[188] In my opinion, in these circumstances, copyright does not subsist in the Card Lock Invoicing program, as it was not original, its reliance on the integral objects of Microsoft Access means that there was little to no original programming and there was only one way to complete this process. If copyright is found to subsist in such products, it is tantamount to protecting the automated work product of Microsoft Access.

*(v) Railmaster*

[189] In my opinion, the Defendants have failed to rebut the presumption that copyright subsists in this work.

[190] Similar to Petro Dispatch, this program is a compilation of several different features, inputs and invoicing functions. Insofar as there are errors, shortfalls or flaws in the individual aspects of

this program, that is insufficient, as I have discussed above, to rebut the presumption with regard to the compilation as a whole.

[191] I have found that the order input forms for all of the Foss Transport products invoiced through Railmaster, were included in the original purchase of Railmaster. Regardless of when the subsequent data entry forms were created, they do not have sufficient originality to be capable of independent copyright. I find on the balance of probabilities, that any subsequent form was simply a copy of a pre-existing form with very trivial and mechanical modifications.

[192] In the result, I find that copyright subsists Railmaster as a compilation of features. I also find that copyright does not subsist in the individual order input forms for the various Foss Transport products invoiced through Railmaster.

*(vi) Modifications*

[193] I have already addressed the modifications that the Plaintiff argued were completed during the weekly agreement period. I have found that of all the modifications, copyright subsists in only the Dip Forecasting Module and the Payroll Module.

*(vii) Conclusion on subsistence of copyright*

[194] In my opinion, copyright subsists in Petro Dispatch, Railmaster, the Dip Forecasting Module and the Payroll Module. I do not find that Card Lock Invoicing or the other individual modifications, additions and “fixes” are sufficiently original to be protected by copyright.

Who owns the copyright in the computer software?

[195] In his reply submissions at trial, the Plaintiff argued that the Defendants should not be entitled to challenge ownership of the copyright, since they did not make that pleading in their Statement of Defence.

[196] I reject this argument. Ownership of the copyright was challenged by the Defendants in their pleadings and in the evidence obtained in the cross-examination of Mr. Chari, the representative of the Plaintiff. In any event, since copyright is a creature of statute, the Plaintiff must prove, on a balance of probabilities, each element of copyright infringement. One such element is that the Plaintiff owns the copyright alleged to have been infringed.

[197] The provisions of the *Copyright Act* regarding ownership, that are relevant to this proceeding, are found in sections 13 and 34.1 as follow:

Ownership of copyright	Possession du droit d'auteur
13. (1) Subject to this Act, the author of a work shall be the first owner of the copyright therein.	13. (1) Sous réserve des autres dispositions de la présente loi, l'auteur d'une oeuvre est le premier titulaire du droit d'auteur sur cette oeuvre.
Engraving, photograph or portrait	Gravure, photographie ou portrait
(2) ...	(2) ...
Work made in the course of employment	OEuvre exécutée dans l'exercice d'un emploi

<p>(3) Where the author of a work was in the employment of some other person under a contract of service or apprenticeship and the work was made in the course of his employment by that person, the person by whom the author was employed shall, in the absence of any agreement to the contrary, be the first owner of the copyright, but where the work is an article or other contribution to a newspaper, magazine or similar periodical, there shall, in the absence of any agreement to the contrary, be deemed to be reserved to the author a right to restrain the publication of the work, otherwise than as part of a newspaper, magazine or similar periodical.</p>	<p>(3) Lorsque l'auteur est employé par une autre personne en vertu d'un contrat de louage de service ou d'apprentissage, et que l'oeuvre est exécutée dans l'exercice de cet emploi, l'employeur est, à moins de stipulation contraire, le premier titulaire du droit d'auteur; mais lorsque l'oeuvre est un article ou une autre contribution, à un journal, à une revue ou à un périodique du même genre, l'auteur, en l'absence de convention contraire, est réputé posséder le droit d'interdire la publication de cette oeuvre ailleurs que dans un journal, une revue ou un périodique semblable.</p>
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#### Assignments and licences

#### Cession et licences

<p>(4) The owner of the copyright in any work may assign the right, either wholly or partially, and either generally or subject to limitations relating to territory, medium or sector of the market or other limitations relating to the scope of the assignment, and either for the whole term of the copyright or for any other part thereof, and may grant any interest in the right by licence, but no assignment or grant is valid unless it is in writing signed by the owner of the right in respect of which the</p>	<p>(4) Le titulaire du droit d'auteur sur une oeuvre peut céder ce droit, en totalité ou en partie, d'une façon générale ou avec des restrictions relatives au territoire, au support matériel, au secteur du marché ou à la portée de la cession, pour la durée complète ou partielle de la protection; il peut également concéder, par une licence, un intérêt quelconque dans ce droit; mais la cession ou la concession n'est valable que si elle est rédigée par écrit et signée par le titulaire du droit qui en fait</p>
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assignment or grant is made, or by the owner's duly authorized agent.

l'objet, ou par son agent dûment autorisé.

Presumptions respecting copyright and ownership

Présomption de propriété

34.1 (1) In any proceedings for infringement of copyright in which the defendant puts in issue either the existence of the copyright or the title of the plaintiff thereto,

34.1 (1) Dans toute procédure pour violation du droit d'auteur, si le défendeur conteste l'existence du droit d'auteur ou la qualité du demandeur :

...

...

(b) the author, performer, maker or broadcaster, as the case may be, shall, unless the contrary is proved, be presumed to be the owner of the copyright.

b) l'auteur, l'artiste-interprète, le producteur ou le radiodiffuseur, selon le cas, est, jusqu'à preuve contraire, réputé être titulaire de ce droit d'auteur.

[198] Paragraph 34.1(1)(b) of the *Copyright Act* provides that in any proceeding for infringement, where the defendant challenges the existence or title of the copyright, the author of the work is presumed to be the owner unless proven otherwise.

[199] It has been established on the balance of probabilities that Mr. Chari was the author of the software in question. No issue was taken with his authorship of the software in issue. In the interests of clarity and having regard to the evidence, I find that he, personally, is the author of the software that is the subject of this litigation.



[200] The Defendants in this action have clearly challenged the title of the copyright.

[201] Therefore, paragraph 34.1(1)(b) of the *Copyright Act*, creates a rebuttable presumption that Mr. Chari is the owner of the copyright of all the software in question.

*(i) Petro Dispatch*

[202] In the present case, the presumption in paragraph 34.1(1)(b) of the *Copyright Act* creates a fundamental difficulty for the Plaintiff with regards to Petro Dispatch. Mr. Chari is not a party to this action. Assuming that Mr. Chari is the owner, the Plaintiff cannot succeed unless there has been a valid assignment of the copyright in Petro Dispatch to the Plaintiff.

[203] The Plaintiff relies on a *nunc pro tunc* assignment to support its claim to ownership of Petro Dispatch. A copy of this assignment, dated June 10, 2009 is Tab 128 in Exhibit 1, Trial Book of Documents. This document merits some discussion.

[204] In the first place, I note that the *Copyright Act* recognizes that copyright can be assigned. The *Copyright Act* further provides, at sections 57 and 58, that an assignment can be registered. Subsection 53(2.1) provides that a certificate of registration of a copyright is “evidence that the right recorded in the certificate has been assigned and that the assignee registered is the owner of that right”.

[205] In my opinion, there are problems with the assignment now relied upon by the Plaintiff. Pursuant to subsection 13(4) of the *Copyright Act*, an assignment of copyright must be in writing. The requirement that an assignment be in writing is a substantial legal requirement, not merely a rule of evidence; see *Motel 6, Inc. v. N.o 6 Motel Ltd.*, [1982] 1 F.C. 638 at para. 26.

[206] The written assignment that was executed on June 10, 2009 is entitled “Nunc Pro Tunc Copyright Assignment”. In *Black’s Law Dictionary*, 6<sup>th</sup> ed., Bryan Gardner, ed., the term “*nunc pro tunc*” is defined as follows:

[Latin “now for then”] Having retroactive legal effect through a court’s inherent power <the court entered a *nunc pro tunc* order to correct a clerical error in the record>.

...

[207] While the *Copyright Act* does not specifically address *nunc pro tunc* assignments, such an assignment was considered by the Federal Court, Trial Division in the case of *Star-Kist Foods Inc. v. Registrar of Trade Marks et al.*, 3 C.P.C. (3d) 208, rev’d at 20 C.P.R. (3d) 46. In that case, the late Justice Rouleau heard an appeal from a decision of the Registrar of Trade Marks.

[208] In *Star-Kist*, an assignment, entitled “Assignment Nunc Pro Tunc”, was executed on September 23, 1980 and stated that it was effective August 8, 1979. The assignment was registered on February 4, 1981. In refusing to expunge the registration, the Registrar considered the doctrine of *nunc pro tunc*, as summarized by the trial judge at page 212 of his decision:

[The Registrar] concluded that the *nunc pro tunc* procedure is not a confirmation of what intentions of the parties were, but it is a procedure that allows the recording of an act which in fact did previously occur. It cannot be used for reasons of convenience to

provide retroactive effect to what may have been forgotten, intended, or neglected to be done. The procedure does not create rights per se, it only establishes that a right, created in the past, neglected to be registered, can be confirmed.

[209] Further, at page 212, the trial judge characterized the decision of the Registrar as a discretionary one, with respect to the sufficiency of evidence that a transfer of the trade mark had taken place and noted that “unless I have evidence to the contrary, I cannot substitute his finding of fact on the assignment”. The trial judge dismissed the appeal.

[210] Upon appeal to the Federal Court of Appeal, that Court allowed the appeal. It found that the Registrar was required to exercise his discretion according to law and the construction of the assignment in issue was a question of mixed fact and law. Justice Mahoney, writing for the Federal Court of Appeal, said the following at page 50:

In my respectful opinion, the Registrar clearly erred in ascribing the significance he did to *nunc pro tunc* in the present case. The use of the phrase in the title cannot alter the plain purport of the text. As of September 23, 1980, Debdonell assigned the registration to Menu Foods with retroactive effect to August 8, 1979. The registration of that assignment February 4, 1981, had the effect of recording a change of ownership as of September 23, 1980, but not as of August 8, 1979.

[211] Justice Mahoney went on to comment on the importance of evidence in addressing the effect of the purported assignment. He commented, as well, on the evidence that was on the record and questioned a lack of evidence that might tend to support the explanation that had been offered by Menu Foods Limited, the assignee. At page 51 he said the following:

... It is not for me to speculate on Green's motives, but his intentions seem clear. I really see no inference to be drawn from the evidence except that there was no intention, on or about August 8, 1979, that Menu Foods be registered as owner of the trade mark. In my respectful opinion, the contrary finding of fact is, in the circumstances, based on a palpable and overriding error, *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802 at p. 808.

[212] In my opinion, the Federal Court of Appeal instructed that reliance upon a *nunc pro tunc* assignment requires evidence as to the intention of the assignor as to the purpose and effect of such an assignment.

[213] In the present case, the "Nunc Pro Tunc Copyright Assignment" provides as follows:

1. I, SUSHIL CHARI, confirm that on March 16, 2000, I assigned to HARMONY CONSULTING LTD. ("Assignee") all of my rights throughout the world in and to the software called Petro Dispatch 2000 (the "Software"), including all copyright wherever the same subsists or shall subsist and any renewal, extension or reversion of copyright now or hereafter provided; all other intellectual property rights; all other rights of any nature whatsoever and including the right to bring action for past or future infringement or other misuse of any rights in the Software.

2. I also confirm that on March 16, 2000, I waived for the benefit of Assignee my moral rights and similar rights anywhere in the world in the Software, including without limitation the right to be associated with the Software, and the right to the integrity of the Software, including any right to restrain modification of the Software in any way, and any right to prevent use of the Software in association with any product, service, cause or institution.

[214] The only evidence concerning the circumstances of the March 2000 assignment came from Mr. Chari, the author of the Petro Dispatch software and the sole shareholder of the Plaintiff.

[215] In his evidence, Mr. Chari testified that he had assigned his copyright in Petro Dispatch to Harmony in March 2000. However, this was not a written assignment. At pages 197 to 198 of the trial transcript he said:

A. In writing, yes. Obviously, in my mind, I am the author of the software. This is a company I own wholly. Obviously I made that transfer in my mind because it was executed by Harmony, not Sushil Chari. Obviously, back in 2000 I would have made that transfer in my mind, if I can say it like that.

[216] The March 2000 assignment was performed solely in his mind. Pursuant to subsection 13(4) of the *Copyright Act*, all assignments must be made in writing. An assignment in one's mind is not a valid assignment. The only assignment in writing made by Mr. Chari, with respect to Petro Dispatch, occurred on June 10, 2009.

[217] I have already stated my views as to the credibility of Mr. Chari. He was not credible. On the basis of his evidence found at page 197 and 198 of the trial transcript, quoted above, I am not persuaded that there is sufficient credible evidence to support an inference that a valid assignment of copyright in the Petro Dispatch software was made on March 16, 2000.

[218] As in the *Star-Kist* case, there is insufficient evidence to support an inference that there was an intention, on or about March 16, 2000 to assign the copyright in Petro Dispatch to the Plaintiff. The evidence of Mr. Chari suggests that the assignment dated June 10, 2009 was purely a self-serving attempt to avoid the problems arising from the fact that Mr. Chari is not a party to this action and I so find.

[219] Furthermore, Mr. Chari's attempt to assign the moral rights to Petro Dispatch is invalid. As the author of Petro Dispatch, Mr. Chari holds the moral rights to that software, but those rights cannot be assigned; see subsection 14.1(2) of the *Copyright Act*. Pursuant to subsection 14.1(2) and subsection 14.1(4), it is possible to waive moral rights in favour of an owner or assignee of a copyright, allowing the owner or assignee to invoke the moral rights.

[220] Similar to the issue of the assignment of copyright, the Plaintiff has failed to adduce sufficient evidence to show that Mr. Chari had the intention to waive his moral rights in favour of the Plaintiff in March 2000. In any event, in the absence of a valid assignment to the Plaintiff, in March 2000 or *nunc pro tunc*, the waiver does not meet the criteria of the *Copyright Act*.

[221] In the result, the Nunc Pro Tunc Assignment dated June 10, 2009 is inoperative and ultimately, irrelevant to this action.

[222] As an aside, I accept the evidence of Mr. Foss and Mr. Cristello that, except for historical data retrieval, no aspect of the programs in question were used after the written assignment was made to Harmony.

[223] This alleged assignment is further complicated by the fact, as I have found above, that the Petro Dispatch software was created before the incorporation of Harmony. As such it is not possible for Harmony to own the Petro Dispatch copyright in the absence of an assignment that was made after the incorporation of the Plaintiff.

[224] The Plaintiff, relying on *A-One Accessory Imports Pty Ltd. v. Off Road Imports Pty Ltd* (1996), 34 I.P.R. 306 (Fed. Ct of Australia - Gen. Div.), argued that the software was created in contemplation of incorporating Harmony. This case does not assist the Plaintiff because it is distinguishable on its facts.

[225] Regardless, the software in the present case was created before the incorporation of Harmony. In *A-One Accessory*, the corporation already existed when the authors began to create the work. In my opinion, this is a fundamental difference. Harmony did not yet exist when Petro Dispatch was in fact developed for RCT.

[226] Further, in my opinion, the facts do not support a finding that Mr. Chari contemplated the incorporation of Harmony when he was operating through Atrimed from 1998-2000.

[227] In the result, in my opinion, any assignment of the Petro Dispatch copyright in 2000, regardless of form, would have been invalid as Mr. Chari was not the owner of the copyright.

[228] I have found that Mr. Chari was the author of all of the software at issue in this trial. Nevertheless, I find that the presumption created by paragraph 34.1(1)(b) of the *Copyright Act* is rebutted by the facts adduced at trial and through the operation of subsection 13(3) of the *Copyright Act*. For the reasons that follow, I find that the owner of the Petro Dispatch copyright was Atrimed.

[229] Subsection 13(3) of the *Copyright Act* provides that where the author of a work, under a contract of service, creates the work in the course of employment, it is the employer who is deemed to be the owner of the copyright unless there is an agreement to the contrary.

[230] This principle is also generally applicable to officers, directors, and key employees who create a work for the benefit of the corporation. Ownership normally vests in the corporation in the absence of an agreement to the contrary; see *Dubois v. Systèmes de Gestion et d'Analyse de Données Media* (1991), 41 C.P.R. (3d) 92 (Que. S.C.), *Setym International inc. c. Belout*, [2001] J.Q. no 3819 (Que. S.C.) (Q.L.) and *B & S Publications Inc. v. Max-Contacts Inc.*, [2001] 287 A.R. 201 (Q.B.).

[231] This principle has also been explained with respect to closely held corporations by Professor David Vaver, *Copyright Law* (Toronto: Irwin Law, 2000) at 85:

...Problems of copyright ownership also arise in cases involving senior officers of corporations especially presidents or chief executives of closely-held companies. These officers sometimes do not reduce to writing their status or obligations to the corporation which they often regard as their alter ego or instrument. The officer will also usually be an employee of the company whether or not a written contract of service exists. Copyright in most work produced for the company's benefit will therefore be owned by the company as is also true for comparable work done by lower-level employees.

[232] This explanation by Professor Vaver was accepted as a correct proposition of law by Justice Hutchinson of the Alberta Court of Queen's Bench in *B & S Publications Inc.*



[233] At trial, Mr. Chari testified that he was never an employee of Harmony or Atrimed, and that it was he, not Atrimed, who developed Petro Dispatch.

[234] Atrimed was a separate legal person in existence at the time the development of Petro Dispatch commenced. Mr. Chari was one of only two shareholders in Atrimed.

[235] Mr. Chari testified that he never actually turned his mind to the question of who was developing the software, he or Atrimed. This conflicts with his examination for discovery where he stated that “Atrimed had commenced the development of the software”.

[236] Mr. Foss testified that, during the initial demonstration of the Petro Dispatch, he was told that Atrimed was the company developing the software. That demonstration was performed by Mr. Chari at RCT. Counsel for Harmony, in cross-examination of Mr. Foss, did not challenge him on this point; counsel merely confirmed Mr. Foss’s evidence.

[237] Mr. Chari testified that Atrimed was not carrying on business with RCT. His evidence was that Atrimed was essentially non-functional at the time the software was developed. This evidence conflicts with his examination for discovery. When examined in discovery he stated that Atrimed was carrying on business with RCT.

[238] It is undisputed that Atrimed was billing RCT for the development and licensing of Petro Dispatch, and that RCT was paying Atrimed, not Mr. Chari, for a license to use the software. Mr.

Chari, personally, was not a party to any of these transactions. From this conduct, it is apparent that Mr. Chari carried on business as though Atrimed held the copyright in Petro Dispatch. Otherwise, Atrimed was licensing software to which it did not hold copyright.

[239] I find on the balance of probabilities that Atrimed was developing the software and carrying on business with RCT. Mr. Chari was a critical participant in this closely held corporation. Petro Dispatch development was the only source of income and business to Atrimed at the time of development.

[240] In accordance with subsection 13(3) of the *Copyright Act*, and having regard to the jurisprudence on the subject of officers and directors of closely-held corporations, I find that Mr. Chari was an employee of Atrimed when Petro Dispatch was developed.

[241] Where a work is created by an employee, absent an agreement to the contrary, the employer is the owner of the copyright. No written agreement between Mr. Chari and Atrimed, preserving Mr. Chari's copyright, was entered into evidence. In the result, I conclude and find that Atrimed owns the copyright of Petro Dispatch. As an employee Mr. Chari did not have any copyright to assign.

[242] The Petro Dispatch modules that were licensed to RCT are the same modules that were licensed to Foss. Since Atrimed is the owner of the Petro Dispatch copyright, Foss Transport cannot have infringed Harmony's rights because there was no assignment of rights in writing from Atrimed

to Harmony. Even if Mr. Chari did own the copyright, Harmony was not assigned the copyright in writing until the week before the trial. Harmony cannot succeed in its claim with respect to infringement of Petro Dispatch.

*(ii) Card Lock Invoicing Program*

[243] As I have concluded that copyright does not subsist in the Card Lock Invoicing program, there can be no infringement of this program.

*(iii) Railmaster, Dip Forecasting and Payroll Modules*

[244] As with Petro Dispatch, there is a presumption that the author is the owner of the copyright; see subsection 13(1) of the *Copyright Act*. Based on this presumption, the Defendants argued that Mr. Chari, not Harmony, is the owner of the copyright in Railmaster, the Dip Forecasting Module and the Payroll Module. In their submissions, the Defendants referred to the evidence of Mr. Chari that he was never an employee of Harmony, and they referred to the lack of a written assignment of copyright in these three programs from Mr. Chari to Harmony.

[245] In my opinion, Harmony is the owner of the copyright in Railmaster, the Dip Forecasting Module and the Payroll Module. Similar to his dealings with RCT through the corporation Attrimed, Mr. Chari developed these software programs at the request of Foss Transport through Harmony. He was the sole shareholder and operator of Harmony, and used that corporation to carry on his software development business. Harmony, not Mr. Chari, was remunerated by Foss Transport for

developing the software. As such, I conclude that Mr. Chari was an employee of Harmony when he authored Railmaster, the Dip Forecasting Module and the Payroll Module.

[246] Since Mr. Chari was an employee of Harmony at the time he authored the software, I find that Harmony is the owner of the copyright in Railmaster, the Dip Forecasting Module and the Payroll Module, pursuant to subsection 13(3) of the *Copyright Act*.

[247] Insofar as any of the modifications performed by Mr. Chari on the software purchased by Foss Transport are capable of receiving copyright protection, I find that the owner of the copyright is Harmony.

*(iv) Conclusion on Ownership*

[248] I find that the Plaintiff does not own the copyright of all of the software in question. It is my conclusion that Atrimed is the owner of the copyright in Petro Dispatch, and I so find.

[249] I conclude that Harmony is the owner of the copyright in the remaining software, that is, the Railmaster program, the Dip Forecasting Module and the Payroll Module.

Was the copyright infringed?

[250] The Plaintiff carries the evidentiary burden to prove infringement. No presumptions assist the Plaintiff in this regard.

[251] In my opinion, the Plaintiff has failed to meet its burden. After a review of the evidence, I find that there was no infringement. Further, assuming there was an infringement, the Plaintiff is not entitled to a remedy for any infringement of Petro Dispatch since it does not own the copyright, nor for any software in which copyright does not subsist, for example Card Lock Invoicing and most modifications.

[252] The remaining software programs to be considered are Railmaster, the Dip Forecasting Module, and the Payroll Module. Since the latter two programs are modules of Petro Dispatch, some of the Plaintiff's arguments regarding copyright infringement of Petro Dispatch are relevant to the issue of whether the copyright in the Dip Forecasting Module and the Payroll Module was infringed.

(i) *Petro Dispatch*

[253] I note that considerable time was spent discussing the modifications to Petro Dispatch with respect to invoicing for four pre-existing customers for Balmar. As I have found that the Plaintiff does not own the copyright to Petro Dispatch, I decline to make any findings with respect to these modifications, as they do not relate to the Dip Forecasting Module or the Payroll Module.

[254] In *CCH*, the Supreme Court of Canada held, at para. 9, that

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

Since those rights and remedies are exhaustive, any infringement of the Plaintiff's copyright must be found pursuant to the *Copyright Act*. Infringement of copyright is defined in subsection 27(1) of the *Copyright Act*, which provides:

<p>27. (1) It is an infringement of copyright for any person to do, <u>without the consent</u> of the owner of the copyright, anything that by this Act <u>only the owner of the copyright</u> has the right to do. (Emphasis added)</p>	<p>27. (1) Constitue une violation du droit d'auteur l'accomplissement, <u>sans le consentement</u> du titulaire de ce droit, d'un acte qu'en vertu de la présente loi <u>seul ce titulaire</u> a la faculté d'accomplir.</p>
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[255] Under the *Copyright Act*, the owner's rights with respect to copyright are defined in section 3, which provides:

Copyright in works	Droit d'auteur sur l'oeuvre
<p>3. (1) For the purposes of this Act, "copyright", in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof, and includes the sole right</p>	<p>3. (1) Le droit d'auteur sur l'oeuvre comporte le droit exclusif de produire ou reproduire la totalité ou une partie importante de l'oeuvre, sous une forme matérielle quelconque, d'en exécuter ou d'en représenter la totalité ou une partie importante en public et, si l'oeuvre n'est pas publiée, d'en publier la totalité ou une partie importante; ce droit comporte, en outre, le droit exclusif :</p>
<p>(a) to produce, reproduce, perform or publish any translation of the work,</p>	<p>a) de produire, reproduire, représenter ou publier une traduction de l'oeuvre;</p>
<p>(b) in the case of a dramatic work, to convert it into a novel</p>	<p>b) s'il s'agit d'une oeuvre dramatique, de la transformer</p>

or other non-dramatic work,	en un roman ou en une autre oeuvre non dramatique;
(c) in the case of a novel or other non-dramatic work, or of an artistic work, to convert it into a dramatic work, by way of performance in public or otherwise,	c) s'il s'agit d'un roman ou d'une autre oeuvre non dramatique, ou d'une oeuvre artistique, de transformer cette oeuvre en une oeuvre dramatique, par voie de représentation publique ou autrement;
(d) in the case of a literary, dramatic or musical work, to make any sound recording, cinematograph film or other contrivance by means of which the work may be mechanically reproduced or performed,	d) s'il s'agit d'une oeuvre littéraire, dramatique ou musicale, d'en faire un enregistrement sonore, film cinématographique ou autre support, à l'aide desquels l'oeuvre peut être reproduite, représentée ou exécutée mécaniquement;
(e) in the case of any literary, dramatic, musical or artistic work, to reproduce, adapt and publicly present the work as a cinematographic work,	e) s'il s'agit d'une oeuvre littéraire, dramatique, musicale ou artistique, de reproduire, d'adapter et de présenter publiquement l'oeuvre en tant qu'oeuvre cinématographique;
(f) in the case of any literary, dramatic, musical or artistic work, to communicate the work to the public by telecommunication,	f) de communiquer au public, par télécommunication, une oeuvre littéraire, dramatique, musicale ou artistique;
(g) to present at a public exhibition, for a purpose other than sale or hire, an artistic work created after June 7, 1988, other than a map, chart or plan,	g) de présenter au public lors d'une exposition, à des fins autres que la vente ou la location, une oeuvre artistique — autre qu'une carte géographique ou marine, un plan ou un graphique — créée après le 7 juin 1988;

<p>(h) in the case of a computer program that can be reproduced in the ordinary course of its use, other than by a reproduction during its execution in conjunction with a machine, device or computer, to rent out the computer program, and</p>	<p>h) de louer un programme d'ordinateur qui peut être reproduit dans le cadre normal de son utilisation, sauf la reproduction effectuée pendant son exécution avec un ordinateur ou autre machine ou appareil;</p>
<p>(i) in the case of a musical work, to rent out a sound recording in which the work is embodied,</p>	<p>i) s'il s'agit d'une oeuvre musicale, d'en louer tout enregistrement sonore.</p>
<p>and to authorize any such acts.</p>	<p>Est inclus dans la présente définition le droit exclusif d'autoriser ces actes.</p>

[256] An infringement is doing anything, without consent, that only an owner of the copyright has the right to do in accordance with the *Copyright Act*.

[257] In order to prove that infringement has occurred, it is necessary for the Plaintiff to prove that the Defendants performed, or authorized, any of the acts identified in section 3 of the *Copyright Act*. If there is no performance or authorization of a section 3 act then there is no infringement of copyright. The Plaintiff must also prove lack of consent to do the act that is alleged to be copyright infringement.

[258] In *Positive Attitude Safety System Inc. v. Albian Sands Energy Inc.*, [2006] 2 F.C.R. 50, the Federal Court of Appeal commented on the elements of copyright infringement pursuant to subsection 27(1) of the *Copyright Act* as follows, at para. 39:



... 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 the conduct can be defined as an infringement, the judge must find that the owner of the copyright did not consent to that conduct.

[259] According to the Plaintiff, infringement of its copyright occurred when the Defendants engaged in acts that would not have been copyright infringements if they had been licensed. As discussed above, the Plaintiff argued that since Foss Transport stopped making payments under the weekly agreement, it was only licensed to use the software as it existed before June 2001.

[260] The Plaintiff also argued that the Defendants had breached the SLAs, even though it is not seeking damages for breach of contract. In this regard, it argued that the licensing agreements, the SLAs and weekly agreement, prohibited certain conduct such as continued use of the software, exceeding user seats, decompiling, misattribution and modification of the software.

[261] In simple terms, the Plaintiff argued that any violation of the licensing agreements constituted a violation of copyright. This argument is inherently flawed and cannot succeed as "...copyright infringement does not arise out of a breach of contract"; see *Corel Corp. v. Guardian Insurance Co. of Canada* (2001), 26 C.C.L.I. (3d) 39 (O.S.C.J.) at para. 22. As I have explained, copyright is violated only if the defendant has performed, or authorized, an act that only the owner can do within the confines of the *Copyright Act*.

[262] I note that the computer equipment located at Foss Transport was a Citrix server. This means that there was only one copy of the software on the Foss Transport computer system. As a result, even if Foss Transport's license to use the software were terminated or expired, Foss Transport would not need to make a copy of the software to continue using it. In my opinion, use of a software program, without more, does not constitute copyright infringement.

[263] Similarly, assuming but without deciding, that the Defendants were in violation of an excess user limitation, excess user seats is not an infringement of copyright since it does not relate to an act that only the owner of the copyright can authorize pursuant to the *Copyright Act*. If this term of the SLAs were found to be breached, it would only constitute a breach of contract, not a violation of copyright.

[264] The Plaintiff argues that its copyright in Petro Dispatch was breached when the name Harmony was replaced by BiLd Solutions on the start-up screen. Relying on *Gemologists International Inc. v. Gem Scan International Inc. et. al.* (1986), 9 C.P.R. (3d) 255 (Ont. H.C.J.), the Plaintiff argued that the change to the start-up screen required a reproduction, which constitutes a violation of copyright.

[265] The facts in *Gemologists International* are distinguishable from the facts in this case. In *Gemologists International*, the defendants copied and modified the plaintiff's software, including the start-up screen menus, to create their own computer program. In this case, the Plaintiff has not alleged that the Defendants modified the start-up screen of Petro Dispatch to create their own

software. Instead, the Plaintiff argued that the modification was made to misattribute the author of Petro Dispatch as BiLd Solutions.

[266] The Plaintiff further argued that its copyright was breached when modifications to Petro Dispatch were made by programmers other than Mr. Chari. The Plaintiff characterized all modifications as inherently requiring reproduction.

[267] The Plaintiff argued that any modification is actually a copy of substantially all of the software. In my opinion, opening a file, making modifications and then saving that file does not make a reproduction within the scope of section 3 of the *Copyright Act*.

[268] The Supreme Court of Canada discussed the meaning of “reproduction” in *Théberge v. Galerie d’Art du Petit Champlain Inc.*, [2002] 2 S.C.R. 336 at para. 42, as follows:

The historical scope of the notion of “reproduction” under the Copyright Act should be kept in mind. As one would expect from the very word “copyright”, “reproduction” is usually defined as the act of producing additional or new copies of the work in any material form. Multiplication of the copies would be a necessary consequence of this physical concept of “reproduction”. In *Massie & Renwick, Ltd. v. Underwriters’ Survey Bureau, Ltd.*, [1940] S.C.R. 218, at p. 227, Duff C.J. viewed copyright law as essentially about protecting the right to multiply copies of a work:

I think there can be no doubt that material of that character was subject matter for copyright and, not being published, the exclusive right of multiplying copies of it, or of publishing it, was a right which the common law, prior to the statute of 1921, gave primarily to the authors of it. [Emphasis added.]

[269] In her testimony, Ms. Warth explained the process by which she performed modifications. She testified that before beginning a modification, or indeed the conversion to a newer version of Microsoft Access, she would make a backup copy. Such a backup copy was necessary in case there were an error or a failure in the process. The backup is necessary to restore the system to its prior state.

[270] In fact, Ms. Warth testified that everyone makes a backup. I infer from this evidence that it is the standard practice to backup a program file before making a modification and I so find.

[271] While making a copy could constitute an infringement of copyright, in these circumstances it does not. Making a single backup copy for the purpose of modifying the software is not equivalent to the concept of multiplication as discussed in *Théberge*.

[272] In any event, I find that the Defendants had the owner's consent to make backup copies of Petro Dispatch. I refer to the SLA for Petro Dispatch, which as discussed above, included a perpetual license to use Petro Dispatch, as modified under the weekly agreement. The SLA was not formally terminated by either Harmony or Foss Transport.

[273] The SLA authorizes copying for backup purposes; see clause 2(b) of the "Terms and Conditions" of the SLA. It does not limit the backups to daily backups, which also occur. I find that the making of a backup prior to making a modification was expressly consented to by the Plaintiff and as such does not constitute an infringement pursuant to subsection 27(1) of the *Copyright Act*.

[274] The Plaintiff also argued that any modification required decompiling its software. Since decompiling was prohibited by the licensing agreements, it argued that any decompiling was an infringement of copyright.

[275] The evidence does not persuade me, on the balance of probabilities, that decompiling, in the usage of Microsoft Access, constitutes an infringement of the owner's rights under section 3 of the *Copyright Act*.

[276] Decompiling relates to the difference between object code and source code. The difference is that source code is programming in a language that can be understood by a person. Object code is what source code becomes after it is compiled in computer language.

[277] "Decompiling" must be considered in the context of Microsoft Access. Other cases dealing with different programming languages or hardware are not relevant to the present case.

[278] There was evidence that decompiling, in the context of Microsoft Access, meant shifting to a different view of the program. This different view is called "design view". There was no evidence that the Plaintiff's computer program was compiled into an object code version that could not be read without decompiling into source code. There were discussions about generalities that did not rise to the level of proof on the balance of probabilities.

[279] In my opinion, the evidence demonstrates that using design view in Microsoft Access simply allows a user or programmer to see the Microsoft Access objects and programming. The Defendants, by using design view, were only using an integral feature of Microsoft Access to perform an act that is equivalent to looking at the Plaintiff's program. There is no copyright infringement in looking at the programming.

[280] In the result, the use of Microsoft Access design view does not in my opinion constitute an act that only the owner can authorize. Therefore, this act is not an infringement of copyright.

[281] Regardless, I find that the Plaintiff implicitly consented to the use of the integral features of Microsoft Access by the Defendants. It is critical to remember that Mr. Chari chose to program within Microsoft Access. The compiling and decompiling occur automatically as a function of Microsoft Access. At pages 1124 and 1125, Mr. Lo gave the following evidence:

Q. If I wanted to make a change to a display screen, could I make that change without decompiling the software?

A. You can go to design view and it automatically goes to the design view of that screen, yes.

Q. Right. In that case, the computer is doing the decompiling for you?

A. That is correct, yes.

[282] The Plaintiff chose to use Microsoft Access as the platform for the software and chose to integrate the data with the programming that was created by Mr. Chari. By doing so, the Plaintiff authorized and instructed the Defendants how to enter design view to make amendments, such as amendments to text boxes.

[283] Further, I have previously found that there is no copyright protection in the database files but only in the programming. A finding that accessing design view is an infringement would deny Foss Transport the right and ability to make changes to its database files. The evidence shows that there are many integral features and functions of Microsoft Access that can only be used by entering into design view. There is no evidence that the Defendants intended to give up the ability to use Microsoft Access, a separate program that they had purchased.

[284] In my opinion, use of design view does not constitute infringement or alternatively, was implicitly authorized by the Plaintiff.

[285] Furthermore, due to the operational functionality of Microsoft Access, it is necessary to perform this limited form of decompiling in order to effect any modification to the software.

[286] The Plaintiff further argued that upgrading to a newer version of Microsoft Access, the underlying operating program, can be an infringement.

[287] In my opinion, such an upgrade is not a modification. The upgrade was performed by simply opening the database modules or programs with the new version of Microsoft Access. The evidence showed that any incidental changes to the software, if there were any, were required and performed by the operating program. I do not accept that the Plaintiff can dictate to its customers that they cannot upgrade the underlying operating programs.

[288] The Plaintiff did not prove on the balance of probabilities that upgrading the version of Microsoft Access involved any infringement under subsection 27(1) of the *Copyright Act*.

[289] It is possible to characterize misattribution or modification of software as an infringement of the author's moral rights pursuant to subsection 28.1(1).

[290] Misattribution of a work can be an infringement of the author's moral rights; see *Guillmette v. Centre Cooperatif de Loisirs et de Sports du Mont Orignal* (1986), 15 C.P.R. (3d) 409 (F.C.T.D.). It may also be an infringement of the author's moral rights to violate the integrity of the work through modification. However, pursuant to subsection 28.2(1) of the *Copyright Act*, modifying a work can only constitute an infringement of the author's moral rights if the modification causes prejudice to the honour or reputation of the author.

[291] Moral rights belong to the author and not to the owner of the copyright. In accordance with subsection 14.2(2) of the *Copyright Act*, moral rights can be waived but cannot be assigned. The undisputed author of the software in question was Mr. Chari and he is not a party to this action. Further, the Plaintiff did not plead infringement of moral rights.

[292] In any event, an infringement of moral rights does not relate to anything which only the author has the right to do under section 3 of the *Copyright Act*. As a result, an infringement of moral rights is not tantamount to an infringement of copyright.



[293] I will now discuss alleged copyright infringement of Dip Forecasting Module, Payroll Module and Railmaster, individually.

*(ii) Dip Forecasting Module*

[294] In reviewing the evidence and considering my previous discussion, I find that the Plaintiff has not met its burden of proving that its copyright in the Dip Forecasting Module was infringed.

[295] As I have already addressed, the breach of a licensing agreement, even if found to have occurred, does not constitute infringement under subsection 27(1) of the *Copyright Act*.

[296] Further, in my opinion, any decompiling, or misattributing the Dip Forecasting Module is not infringement under subsection 27(1) of the *Copyright Act*.

[297] There was evidence that Foss Transport had upgraded its version of Microsoft Access. As discussed above, this is not an infringement of copyright. Further, it is unclear that the upgrading of the underlying software can be properly characterized as a modification. This was the only possible modification that was made to the Dip Forecasting Module.

[298] I conclude that the Plaintiff has not proven that the Defendants violated the copyright with respect to the Dip Forecasting Module.

*(iii) Payroll Module*

[299] I find that the Plaintiff never made the Payroll Module operational. I also find that the Defendants did not use, reproduce or rent out the Payroll Module. As discussed above, I am not persuaded that decompiling, modifying or misattributing the Payroll Module was an infringement under subsection 27(1) of the *Copyright Act*.

[300] In the result, I find that there was no infringement of the Plaintiff's copyright in the Payroll Module. The Plaintiff has not met its burden of proving infringement on the balance of probabilities.

*(iv) Railmaster Program*

[301] As previously discussed, simple use or exceeding of user licenses does not constitute infringement.

[302] It is clear that the modifications of Railmaster that occurred after termination of the relationship between Foss Transport and Harmony, were minor. For example Ms. Warth modified the GST rate within the Railmaster, when that tax rate was reduced by the Government of Canada.

[303] As with the modifications to Petro Dispatch, the modifications to Railmaster required Foss Transport to make a backup copy of that software. As discussed above, creating such a backup copy for the purpose of modification does not amount to a reproduction for the purpose of section 3 of the *Copyright Act*. Further, according to the Railmaster SLA, Harmony consented to Foss

Transport making backup copies. I refer to clause 2(b) of the “Terms and Conditions” of the SLA. The Railmaster SLA was not formally terminated by either party.

*(iv) Conclusion on infringement*

[304] In my opinion, the Plaintiff has not proven that any infringement occurred in software in which copyright subsists and where it owns the copyright.

[305] With respect to both Petro Dispatch, including its modules, and Railmaster, it is my opinion that the making of backup copies, before modifying the programs, was not an infringement of the Plaintiff’s copyright. In any event, making backup copies was authorized by the respective SLAs. Further, assuming that any decompiling, even in the limited, automated and integral nature of Microsoft Access, is an infringement, I find that the Plaintiff implicitly authorized those activities. There is no infringement in the presence of consent; see subsection 27(1), *Copyright Act*.

Liability of Mr. Foss and Mr. Cristello

[306] In its Statement of Claim, the Plaintiff alleges that Mr. Foss and Mr. Cristello used the software in question on their personal computers, thereby infringing its copyright.

[307] The Plaintiff also claims that Mr. Foss and Mr. Cristello used and directed Foss Transport, deliberately or recklessly, to infringe the copyright of the Plaintiff. In its closing argument, the Plaintiff further submitted that Mr. Cristello and Mr. Foss personally benefited from the infringing

modification made to Petro Dispatch because of their ownership of Balmar. In the Plaintiff's submissions, the infringing conduct warrants punitive damages.

[308] As I have determined that there was no infringement of the copyright owned by the Plaintiff, it is unnecessary for me to consider whether Mr. Foss or Mr. Cristello are personally liable for such infringement. Nonetheless, in my opinion, the allegations against them personally merit a brief discussion.

[309] First, no probative evidence was adduced at trial to show that Mr. Foss or Mr. Cristello used the software in question on their personal computers.

[310] Second, in *Montreal Trust Co. of Canada v. Scotia McLeod Inc.* (1995), 129 D.L.R. (4th) 711, the Ontario Court of Appeal held, at para. 25, as follows:

The decided cases in which employees and officers of companies have been found personally liable for actions ostensibly carried out under a corporate name are fact-specific. In the absence of findings of fraud, deceit, dishonesty or want of authority on the part of employees or officers, they are also rare. Those cases in which the corporate veil has been pierced usually involve transactions where the use of the corporate structure was a sham from the outset or was an afterthought to a deal which had gone sour.

[311] In my opinion, the Plaintiff has not established that Mr. Cristello or Mr. Foss acted fraudulently, deceitfully, dishonestly or with want of authority in their capacities as officers of Foss Transport when the Plaintiff's copyright was allegedly infringed. The Plaintiff has not proven that

the corporate structure of Foss Transport is a sham. As a result, even if the Plaintiff's copyright had been infringed, I find that neither Mr. Foss nor Mr. Cristello would be personally liable.

[312] The claims that Mr. Cristello and Mr. Foss are personally liable for copyright infringement require facts to support those allegations, on a balance of probabilities. Given the lack of probative evidence presented by the Plaintiff to support the claims against Mr. Cristello and Mr. Foss, personally, those claims fail. In any event, I question the *bona fides* of those allegations having regard to the totality of the evidence submitted.

## **CONCLUSION**

[313] I have found that copyright subsists in the Petro Dispatch program, Railmaster program, Dip Forecasting Module and Payroll Module.

[314] The copyright in Petro Dispatch is owned by Atrimed by virtue of Mr. Chari's status with that corporation. Similarly, Harmony owns the copyright in the Railmaster program, Dip Forecasting Module and the Payroll Module.

[315] There was no valid assignment of the copyright in Petro Dispatch to Harmony when any alleged infringing activity occurred. In the result, Harmony cannot recover a remedy for any infringement of Petro Dispatch.

[316] In my opinion, the Plaintiff has not proven, on a balance of probabilities, that its copyright was infringed. The Plaintiff's argument that any violation of a licensing agreement is an infringement of copyright is simply wrong. Infringement must be found pursuant to subsection 27(1) of the *Copyright Act*.

[317] I do not accept the Plaintiff's attempt to characterize every modification as an infringement of subsection 27(1) in this case. The backup copies necessary for those modifications did not amount to "reproductions" for the purposes of the *Copyright Act*, and such backups were authorized by the SLAs.

[318] After a thorough review of the evidence, I find the Plaintiff's allegations unfounded. In my opinion, the Plaintiff's claims fail because Harmony does not own the copyright in some of the software, Harmony was not properly assigned the copyright to those parts of the software that it does not own, copyright does not subsist in all of the software, or there was no copyright infringement proven.

[319] Furthermore, had an infringement of the Plaintiff's copyright been established, I find that Mr. Foss and Mr. Cristello would not be personally liable for the same.

[320] In the result, the action is dismissed with costs to the Defendants.

[321] The Defendants, in their Statement of Defence, seek costs on a solicitor-client scale. In that respect, the parties can make submissions on the matter of costs. A Direction will issue in that regard. A further Order will then issue with respect to costs.

**JUDGMENT**

**THIS COURT ORDERS AND ADJUDGES that** the action is dismissed with costs to the Defendants, submissions to be made relative to costs. A further Order will issue with respect to costs.

“E. Heneghan”  
\_\_\_\_\_  
Judge



**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** T-1269-05

**STYLE OF CAUSE:** HARMONY CONSULTING LTD. and  
G.A. FOSS TRANSPORT LTD., GORDON A. FOSS,  
and JOE CRISTELLO

**PLACE OF HEARING:** Toronto, ON

**DATE OF HEARING:** June 15, 16, 17, 18 and 19, 2009  
October 13, 14, 15 and 16, 2009 and  
January 27, 28 and 29, 2010

**REASONS FOR JUDGMENT  
AND JUDGMENT:** HENEGHAN J.

**DATED:** March 18, 2011

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