**Drynan v. Rostad**Between
James Drynan, plaintiff, and
Wayne Rostad and Canadian Broadcasting Corporation, defendants

[1994] O.J. No. 4253
Action No. 25192-93

**Ontario Court of Justice (General Division)
Small Claims Court - Ottawa, Ontario
House Deputy J.**
Oral judgment: October 17, 1994.
(43 pp.)

*Copyright — Infringement of copyright — Substantial similarity — Acts constituting an infringement — Music — Remedies — Damages.*

   Action by the plaintiff, Drynan, against the defendant, Rostad, for breach of copyright.   In 1989, Drynan composed a song for a family reunion.  There were a large number of guests in attendance. The grandchildren of the guests of honour had performed a dance routine to the song.  In addition, the song was played over the audio system several times during the day. Rostad was a musician hired to perform at the reunion.  In 1990, he composed a song which was used as the theme for his television series.  Drynan first became aware of Rostad's song in 1993.  Drynan found Rostad's song strikingly similar to his own and alleged copyright infringement. He called an expert witness who found the songs to be written in the same key, with the same time signature, with an eight bar refrain, having identical harmony and chord progression, and with virtually identical melody.  The expert observed that while many songs were similar in some aspects, it was unusual for two songs to be so similar in so many aspects.  Rostad's expert concluded that Rostad did not have to copy Drynan's song to write his own, and that both parties likely composed their songs independently.

   **HELD:**  Action allowed.  The evidence of Drynan's expert held up better on cross-examination than that of Rostad's expert. Drynan was the originator of his song and entitled to copyright in it.  Rostad had direct access to Drynan's song.  Based on the expert evidence and on listening to each song, Rostad's song was based upon and was a reproduction of Drynan's song.  Drynan was awarded damages for lost royalties in the amount of $6,000.

**Statutes, Regulations and Rules Cited:**

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|  |   Copyright Act, ss. 2, 3(2), 5(1), 13, 27(1).Courts of Justice Act, s. 29. |  |

**Counsel:**

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|  | D.W. Aitken, for the plaintiff.T.J. McManus, for the defendants.L. Saunders, for the C.B.C. |  |

       **HOUSE DEPUTY J.** (orally):—

1.  NATURE OF PROCEEDINGS

**¶** 1      The plaintiff brought this action for breach of copyright.  He alleged that in July of 1989, he composed a musical work entitled Filion Family Welcome and recorded it on an audio cassette.

**¶** 2      In the summer of 1990, the defendant composed a musical work entitled Here We Are On The Road Again.  This song became the opening theme for a television series hosted by him and produced by the Canadian Broadcasting Corporation, which was also joined as a party defendant in the action.

**¶** 3      The plaintiff heard the defendant's song in February of 1993 and now alleges that the defendant's song was strikingly similar to that of his own and therefore an infringement of his copyright.

**¶** 4      The defendant Rostad defends the action, alleging that he did not copy the plaintiff's song, that he composed his song independently to that of the plaintiff, and any similarities, if any, were coincidental.

2.  THE FILION FAMILY REUNION AS DESCRIBED BY PAUL FILION

**¶** 5      Mr. Paul Filion gave evidence on behalf of the plaintiff.  He stated that a gala celebration commemorating his 35th wedding anniversary took place at his home in North Augusta, Ontario, on the 26th of August 1989.  He testified that the plaintiff had composed a song, the Filion Family Welcome, and that the song was featured on numerous occasions during the festivities.  In fact, his grandchildren had choreographed and rehearsed a dance routine to Mr. Drynan's song and, in fact, that performance took place.

**¶** 6      Mr. Filion indicated that there was a large number of guests and relatives in attendance.  There had been tents constructed and there was recorded music in addition to the entertainment scheduled.  He stated that the sound system in place was loud enough to be heard by the guests.  This witness stated that the party ended with a fireworks display at approximately 9:30 p.m.

**¶** 7      He testified that Mr. Rostad, the defendant, had been retained to perform at the celebration under written contract.  His performances were to commence at 5:15 p.m. and 7:30 p.m.  Mr. Filion confirmed that Mr. Rostad arrived at the residence at approximately five o'clock p.m. and left shortly after the fireworks display at approximately ten p.m.

**¶** 8      Lastly, this court heard that the defendant Rostad spent some time inside the family home.

**¶** 9      I find that Mr. Filion was a most credible witness and I accept all of his evidence, which was unchallenged.

3.  THE PLAINTIFF'S EVIDENCE ON THE FILION FAMILY REUNION

**¶** 10      The plaintiff James Drynan had a diverse musical background.  As well as being a skilled performer, he was also a composer of musical works.  In July of 1989, he composed the Filion Family Welcome.  He recorded the song with accompaniment and committed it to an audio cassette.  The purpose of the song was to commemorate and honour Mr. and Mrs. Filion on their 35th wedding anniversary.  He stated he delivered the tape to Paul Filion prior to the planned celebration to be held on the 26th of August 1989 at the Filion residence in North Augusta, Ontario.  A dance routine to be performed by the Filion grandchildren incorporating the Filion Family Welcome was part of the entertainment.

**¶** 11      Mr. Drynan testified that he arrived at the party at three o'clock p.m.  He described the site as having a canopy, a stage, a dance floor, tables for guests and a good audio system - "lots of watts - loud".  He indicated that his song was played - he did not know how many times - "at least more than three times".

**¶** 12      He described with accuracy and detail his conversations with the defendant Rostad.  In a first conversation, he indicated that he spoke with him for five or ten minutes exchanging pleasantries.  He also inquired as to the wellbeing of this defendant relating to some arm trouble or ailment of the defendant about which the plaintiff had become aware.  Subsequently, he says he informed Mr. Rostad that he had written a song for the girls to dance to. Following the girls' performance, the plaintiff approached Mr. Rostad prior to he, Rostad, commencing his first performance, and that Rostad said to him "Nice song", which Drynan perceived to be a "thumbs-up kind of thing".

4.  MR. ROSTAD'S EVIDENCE ON THE FILION FAMILY REUNION

**¶** 13      The defendant Rostad, not unlike the plaintiff, also had a deep and diverse musical background.  He is a composer of musical works.  However, unlike the plaintiff, this defendant has gained wide popularity throughout Canada and the United States.  He hosts a television series which features as its theme his own musical work entitled Here We Are On The Road Again, the song which is in dispute in these proceedings.

**¶** 14      Mr. Rostad admitted to having been retained under written contract to entertain at the Filion family reunion. He was to perform twice, one show at 5:15 p.m. and the second show was to take place at 7:30 p.m.  He stated that he arrived at approximately five o'clock p.m. amidst a huge celebration, which he described in great detail.  "There were lots of warm happy people present."  He remembered the layout of the family home, the kitchen, the furnishings, the staircase and the basement.  He did not recall, however, meeting the plaintiff at that picnic.  He recalled nothing about the song Filion Family Welcome and maintained that he first heard the song in his solicitor's office when preparing for the defence of this action.  He did not recall whether he did one or two performances and did not recall speaking with Mr. Drynan in which he is alleged to have complimented him on his song.  Mr. Rostad admitted to circulating among the guests at the party at some time during the festivities and also signing autographs and allowing photographs to be taken.

5.  THE ROSTAD SONG - HERE WE ARE ON THE ROAD AGAIN

**¶** 15      The defendant stated that in the early summer or thereabouts of 1990, he composed his musical work Here We Are On The Road Again.  He went into vivid detail as to the manner and approach which he adopted while composing.  Part of his "doodling" notes were filed as exhibits.  He completed his composition in a very short period of time - perhaps even one day.  He eventually recorded the song with accompaniment, and it was approved by his superiors at the Canadian Broadcasting Corporation.  It became the theme song for the defendant's television series which went to air in the autumn of 1990 or thereabouts.  Mr. Rostad has hosted that show, it appears, up to at least February of 1993, at which time the song of the defendant was brought to the attention of the plaintiff.

6.  THE VIDEOS

**¶** 16      Copies of the videocassette recordings have been filed as exhibits to these proceedings.  For the most part, the videos portrayed and confirmed the evidence of Mr. Filion, Mr. Drynan and Mr. Rostad as regards the site and atmosphere of the Filion family reunion.  They show a beautiful home, pool, many guests and, as well, a dance floor and canopy.  One could hear clearly the sound system that has been described by the witnesses and also generally it records the ambience into which all those attended arrived.  The grandchildren and their choreographed dance appeared on the video.  There was also a scene in which Mr. Rostad appeared on stage with his guitar and enacted a musical duo with one of the guests.

7.  THE CATALYST

**¶** 17      In February of 1993, the plaintiff testified that he returned to live in the Edelweiss area near Ottawa.  Prior to that, he had resided in Oshawa, Ontario.  He stated that one evening, he received a telephone call from Mr. Paul Filion who inquired as follows, "Are you aware that Wayne Rostad is using the song you wrote for us?  He is using it on his television show."  Subsequently, after hearing Here We Are On The Road Again, the plaintiff retained counsel and instructed him to commence this action.

8.  THE WAKEFIELD COMMITTEE MEETING

**¶** 18      The plaintiff filed the affidavit of Ms. Anita Rutledge, which was accepted in evidence.  Both counsel explored this meeting at length in the examinations and cross-examinations of the parties.  Given that, it should not go unaddressed by this Court.  As a matter of fact, taken together with the other evidence of these proceedings, I find the event to be a significant one.

**¶** 19      The deponent stated in her affidavit that on the 30th day of May 1988, there was a meeting held at the Wunderbar Hotel in Wakefield, Quebec.  She set out that the Wakefield Bridge Committee had gathered on that day to discuss the prospects of raising funds for the reconstruction of the Wakefield Covered Bridge which had been destroyed by fire in 1984.  The defendant Mr. Rostad was the Honourary Chairman of that Committee.  She confirmed the attendance of the plaintiff who had discussed the possibility with the Committee that a song which he had written be used in the marketing for funds and, further, that the defendant Rostad sing it.  Ms. Rutledge also confirmed that an audio cassette of the song was played, whereafter Mr. Rostad thanked the plaintiff but retained the cassette and put it in his briefcase.  The song was entitled The Wakefield Train.

**¶** 20      The evidence in this affidavit corroborated independently the evidence given by the plaintiff in-chief.

**¶** 21      However, Mr. Rostad in his evidence had only a vague recollection of the events surrounding the meeting.  He could not recollect whether the plaintiff sang the song for him, played his guitar or had somebody singing harmony with him.  "I have no idea", he stated.  Moreover, he did not recall even meeting the plaintiff or knowing him prior to meeting him at the pre-trial of this action which was held in the late spring of 1994.

9.  THE EXPERTS

**¶** 22      The reports of Dr. Chartier and Posen have been filed as evidence for the plaintiff and defendants respectively.  Both of these witnesses qualified as experts, notwithstanding differences in their academic backgrounds and credentials.  Because the written reports are, in fact, entered as evidence, it is my intention only to highlight the salient features of the reports and my findings as a result of the cross-examination of each of these witnesses.

10.  THE PLAINTIFF'S EXPERT

**¶** 23      Dr. Chartier is a musicologist and professor of music.  He was retained to analyze the plaintiff's musical work as well as that of the defendant's.  Utilizing a scientific approach, he was handed two unmarked audio cassettes and instructed the plaintiff not to reveal which was which in order to enable him to complete an independent analysis.  He wanted, as a musicologist, to have a neutral opinion.  Dr. Chartier found the following similarities between the two songs, Filion Family Welcome and Here We Are On The Road Again:

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| a) |  | both songs were in the key of E major; |  |
| b) |  | each refrain comprised eight bars of music; |  |
| c) |  | both songs were in 2/4 time signature; |  |
| d) |  | the harmony over the eight bar refrain of each song was identical, following the identical chord progression E A E B(7) E; |  |
| e) |  | the melody was virtually identical.  The notes in each bar were identical in the first, second, third, fifth and sixth bars.  The notes in the seventh bar of Here We Are On The Road Again, although slightly different from those of the seventh bar of Filion Family Welcome, constituted a mere repeat of those in the first bar of Filion Family Welcome.  Of the 38 notes in the eight bars of the Filion Family Welcome refrain, 31 were reproduced in the eight bars of Here We Are On The Road Again (recognizing that the seventh was a mere repeat of the first bar). |  |

**¶** 24      Dr. Chartier continues:

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|  | "Many musical compositions are written in the same key. Many musical compositions have the same time signature. Many musical compositions have an eight bar refrain. Many compositions share a similar harmony or chord progression.  Some songs have a similar melody.  In my experience it is very rare that two musical compositions will be virtually identical in all these aspects.  In my opinion, (he says) Filion Family Welcome and Here We Are On The Road Again are virtually identical in all these respects." |  |

**¶** 25      In view of the similarities, this expert concluded that Here We Are On The Road Again had been based upon and substantially reproduced the song Filion Family Welcome.

**¶** 26      Dr. Chartier was subjected to a lengthy and exhaustive cross-examination which was well-designed to test his credentials, report and his general knowledge of music. From the cross-examination emerged some additional facts which are noteworthy.

**¶** 27      He spoke of "prosody", and the fact that words should be set to music, and not the reverse, which results in the text shaping the melody so that accentuations and alliterations can be properly addressed in the "shape" of the song or melody.  As an example, he referred to the charge initiated by the words Hello, bonjour and  Hello, neighbour which translated into similarity in the initial elements of the song.  The words, he said, dictate a general shape of the melodies in both works which, in his opinion, were similar.

**¶** 28      In comparing rhythm, he testified that there can be no music without it.  Rhythm can be described as the general flow - the recurrence of certain values according to certain patterns.  While there are occasional rhythmic differences in certain notes, these are attributable to the prosody or syllabic structure of the lyrics.  It does not change the fact that the melodies are virtually identical.

**¶** 29      Dr. Chartier conceded differences with respect to meter, the absence of the B(7) chord in the defendant's version, and a difference in the "riff", but concluded that these differences were not of such significance so as to impact on his final conclusions.

**¶** 30      As a final comment, he stated, when asked, that although he had not been called on to give testimony in court on any previous occasions, he, as a professor, had to face many cases of plagiarism in students's writings and even writings of colleagues.

**¶** 31      Dr. Chartier gave his opinion and defended it with vigour.  I found him to be an excellent witness whose testimony survived the heat of the most thorough challenge of cross-examination.

11.  THE DEFENDANT'S EXPERT

**¶** 32      Dr. Posen is by profession a folklorist.  He earned a Ph.D. in folklore from the University of Pennsylvania.  He has studied singing traditions, has written dissertations and, by his credentials, appears to be an accomplished performer of music.  His terms of reference were that he was asked to examine the chorus of the plaintiff's and defendant's musical works and was asked to give an opinion as to whether Mr. Rostad's song was so similar to the chorus of Mr. Drynan's that he would infer that Mr. Rostad could not have composed his song without using the plaintiff's song as a model.  He was given two audio cassettes, each containing versions of the songs which were the subject matter of this litigation.

**¶** 33      He testified that he conducted a minute analysis of both song segments at a technical level - strictly as pieces of music in terms of their melodic and rhythmic characteristics.  By way of cross-reference, he stated that both songs were part and product of a song-making culture which he referred to as the country music industry.  The results of his examination concluded that the defendant did not have to copy the plaintiff's song in order to write his own and that both composers could have, and likely did, compose their songs independently of each other.

**¶** 34      Dr. Posen's witness statement and report have been filed in evidence and, not surprisingly, most of his conclusions were polar to those of Dr. Chartier.  He did, in his technical analysis, set out the differences in the parties's musical works in addressing the components of lyrics, rhythm, key, harmony and melody.  The rationale for these conclusions can be found in his report.

**¶** 35      Dr. Posen was also subjected to a vigorous cross-examination, which is always the test of mettle and conviction.  From that cross-examination, there were some areas of Dr. Posen's report which were successfully challenged and even conceded to by this witness.

**¶** 36      He introduced in his evidence the proposition that the use of the note progression T(2)-5-6 found in lines A and C of the plaintiff's and defendant's musical works is, in essence, a musical cliché and therefore not necessarily indicative of copying.  Attached to his report were transcriptions of songs in which T(2)-5-6 appears, which included the works of the plaintiff and the defendant.  The other ones were Not Fade Away (Holly), Not Fade Away (Rolling Stones), Cripple Creek, Sail Away Ladies, Farmer's Curst Wife, Old Lady And The Devil, Charlie's Tune, My Sally Jo, Chattahoochie and Love Is A Rose.  In analyzing these transcriptions, Dr. Posen concluded that country musicians, as part of that culture, necessarily tap into the T(2)-5-6 reservoir and, accordingly, because of the generic nature of this note progression, the similarity between the plaintiff and the defendant's work should not be significant or surprising.

**¶** 37      Accepting this theory as a possibility only, it is very difficult to reconcile it with the ear.  An audio cassette recording, containing a "mix" of the songs referred to above (leaving aside the works in dispute) presented an audibly clearly distinct sound in each of the songs, brought on undoubtedly by the trademarks and style of the artists involved.  The accents and pauses, taken together with the contour, suggested to me that even though T(2)-5-6 was a note progression found in every song in the "mix", they were, to my ear, clearly distinct.  As noted above, I except the two disputed works from this observation.

**¶** 38      Counsel for the plaintiff analogized quite aptly when he submitted that the defendant was inferring:

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|  | "There are Chevrolets, Fords and Porsches out there and they're all the same.  This is not just a car, it is a specific kind of car, and if he (the defendant) wants to show that a Porsche is a hackney or a cliché, he (the defendant) can't put in evidence of Chevrolets and Fords, which is what he has attempted to do here (para-phrased)." |  |

**¶** 39      The T(2)-5-6 theory raised in evidence is interesting but, in my view, given the controlled selectivity of the material used, it has in these proceedings no empirical validity until it is more fully studied and researched.

**¶** 40      Dr. Posen found no similarity in the rhythm, according to his report.  He defines rhythm as rhythm of the words - rhythm as expressed in the key signature and the beat. Despite being confronted with the definition of rhythm as set out in the Concise Oxford Dictionary of Music, which encompassed much more than that defined by Dr. Posen, he maintained his position that there were no similarities in the rhythm of the plaintiff's and defendant's musical works.

**¶** 41      The definition of rhythm as set out in the Concise Oxford Dictionary of Music is as follows:

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|  | "Rhythm (in the full sense of the word) covers everything pertaining to the time side of music as distinct from the side of pitch, i.e. it includes the effects of beats, accents, measures (or bars), grouping of notes into beats, grouping of beats into measures, grouping of measures into phrases, etcetera.  When all these factors are judiciously treated by the performer (with due regularity yet with artistic purpose - an effect of forward movement - and not mere machine-like accuracy) we feel and say that the performer possesses 'a sense of rhythm'." |  |

**¶** 42      Having had this definition put to him by the plaintiff's counsel, Dr. Posen conceded similarities in rhythm in portions of the two disputed musical works which diluted, to a degree, his dogmatic statements in-chief.  This expert also did, on cross-examination, admit to substantial similarities in the harmony between the two songs.

**¶** 43      Some of the witnesses called to give evidence at this trial, the plaintiff, Mr. John Dooher, Mr. Louis Lasalle, and Dr. Chartier have commented on the "hook", which I understand gives most popular songs their identity.  A hook is defined as that portion of the song that tends to stick in a listener's mind or memory.  It can be part of the music, a portion of the lyrics or both.

**¶** 44      The plaintiff's evidence was that the "hook" in the two musical works was identical.  Hello, bonjour and Hello, neighbour or Hello, bonjour, comment allez-vous? and Hello, neighbour, hello, friend, have both been suggested. From what I have heard, I prefer the first and fifth in each refrain; in fact, they are remarkably similar.  However, it must be kept in mind that this is only one component which must be considered.  Unfortunately, Dr. Posen was not able to give any opinion as to the value or significance of the "hook" in these proceedings.

12.  THE LAW

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|  | (a) The Copyright Act states as follows: |  |
|  | Subject to this Act, the author of a work shall be the first owner of copyright therein, Copyright Act, s. 13. |  |
|  | Copyright shall subsist in Canada in every musical work if the author was, at the date of the making of the work, a British subject, Copyright Act s-s. 5(1). |  |
|  | Copyright in a work shall be deemed to be infringed by any person who, without the consent of the owner of the copyright, does anything that, by this Act only, the owner of the copyright has the right to do, Copyright Act, s. 27(1). |  |
|  | Musical work means any work of music or musical composition with or without words and includes any compilation thereof, Copyright Act, s. 3(2). |  |
|  | Performance means any acoustic representation of a work, including a representation made by means of any mechanical instrument, radio, receiving set or television set, Copyright Act, s. 2. |  |

**¶** 46      Given the guidelines set out by the legislation, there is no doubt that, on the evidence which I have heard, the plaintiff is the originator and therefore entitled to copyright in his musical work Filion Family Welcome.

(b) The Jurisprudence

**¶** 47      The tests for copyright infringement were clearly set forth in Francis Day & Hunter Ltd. et al. v. Bron  [1963] 2 All E.R. 16, and adopted by Denault J. in Grignon v. Roussel et al. [1991] 38 C.P.R. (3d) 4:

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|  | "It is well established that to constitute infringement of copyright in any musical work, there must be present two elements.  First, there must be sufficient objective similarity between the infringing work and the copyright work or a substantial part thereof for the former to be properly described not necessarily identical with, but as a reproduction or adaptation of the latter.  Secondly, the copyright work must be a source from which the infringing work is derived.  It need not be the direct source.  There must be a causal connection between the copyright work, i.e. the copyright work must be shown to be a causa sine qua non of the infringing work." |  |

**¶** 48      Further to this, in Grignon, the learned Trial Judge stated that:

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|  | "A defendant cannot be found to have infringed a copyright unless it is proven that he, in some way, has access to the plaintiff's work and that there is a cause and effect relationship between these two works." |  |

**¶** 49      And also in Grignon, there is one final point to consider:

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|  | "Was there a causal link between the two works?  Or, on the contrary, can these two refrains have been independently created by each of the two artists such that the similarity between the works are pure coincidence?" |  |

**¶** 50      The plaintiff in this case has positively established, as in Grignon, that he was the creator of the original work.  On this point, I cannot find, on the evidence, that Not Fade Away played any critical or even important role in the creation of the plaintiff's musical work.  In fact, the evidence of this plaintiff was to the effect that he could not recall hearing these compositions prior to writing the Filion Family Welcome.  Since he was only six years of age when Not Fade Away was released in 1954-1955, I have to accept this statement.  As well, I have already commented that Not Fade Away can be distinctly identified by the ear in the "mix" supra.

**¶** 51      In Francis Day, Diplock L.J. further set out as follows:

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|  | "The final question to be resolved is whether the plaintiff's work has been copied or reproduced, and it seems to me that the answer can only be reached by a judgment of fact on a number of composite elements:  the degree of familiarity with the plaintiff's work, particularly its qualities of impressing the mind and memory; the objective similarity of the defendant's work; the inherent probability that such similarity as found could be due to coincidence; the existence of other influences on the defendant composer; and not least the quality of the defendant composer's own evidence on the presence or otherwise in his mind of the plaintiff's work." |  |

**¶** 52      Apart from the U.S. authorities which have been cited, which I shall review in a moment, Carruthers J. in Gondos v. Hardy (1982) 64 C.P.R. (2d) 145 explored, but did not pursue, an additional argument to those taken in Francis Day and Grignon.  In dismissing the plaintiff's action in that case, he was severely critical of the credibility of the plaintiff.  He found, in fact, that the plaintiff's statement that the defendant Hardy had attended at the Sutton Place Hotel, heard his composition and copied it was false evidence. The defendant had amply and credibly accounted for his whereabouts on the date alleged.  Accordingly, he found that the defendant had no access to the plaintiff's musical works and, resultantly, there was no causal connection between the work in which the copyright was claimed to subsist and the alleged infringing work.

**¶** 53      Additionally, however, Carruthers J. was invited in Gondos to consider and perhaps even clarify the law in respect of unconscious copying.  Since it appears that there are no Canadian legal precedents in this complex area, reference was made, in the course of argument, to several American authorities and one English authority which relied on American authorities, but as a result of his findings on credibility, he did not, nor did he need to, address the elements and effects of unconscious copying.

**¶** 54      The plaintiff's counsel, as a reluctant alternative, has invited this court to perhaps break new ground and find for Mr. Drynan on the basis on unconscious copying.  Although referred to in Gondos, but abandoned because of his other findings, Carruthers J. referred to this theory which was commented on in Francis Day by Diplock L.J. and Upjohn L.J.

**¶** 55      Diplock L.J. stated:

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|  | "We know not whether it is rare or common, general or idiosyncratic, nor indeed whether it is possible to remember not a mere isolated phrase but a substantial part of the remembered work without remembering that one is remembering." |  |

**¶** 56      Upjohn L.J. said further:

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|  | "To my mind, the possibility that the defendant had heard it or even played it in his early youth is a quite insufficient ground on which it would be proper to draw the inference of subconscious copying.  It may be that in the future, medical evidence will be available to guide us on this point but in the absence of acceptable and probative medical evidence, I think that it requires strong evidence in a case such as this where independent composition is a real practical possibility to establish as a matter of probability that the composer's subconscious ego guided his hand." |  |

**¶** 57      I glean from these comments two cautions:

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| 1. |  | that the theory of unconscious copying has inherent practical problems in its application; and 2.  that for its application, there will be the requirement of acceptable medical evidence as a foundation for its consideration. |  |

**¶** 58      Some American authorities have recognized unconscious copying and copyright.  In Bright Tunes Music Corp. v. Harrisongs 420 F. Supp. 177 (S.D.N.Y. 1976), the plaintiff claimed that the musical work My Sweet Lord was copied from the 1962 song He's So Fine.  In finding infringement, Owen J. held that Harrison did not deliberately use the music of He's So Fine but, finding the requisites of similarity, concluded that it was subconscious copying.  The foundation for his conclusion appeared to be his acceptance that Harrison was aware of He's So Fine because of its extensive popularity in the United States and England so as to be indelibly imprest into the mind of the defendant.

**¶** 59      Noting the facts in the Harrison case, I conclude that the facts in these proceedings are bad facts on which to base an argument for unconscious copying.  I say this for a number of reasons - the brief chronology spanning the composition of the two musical works in dispute (approximately nine months), the actual physical presences and conduct of the two parties involved, and the fact that the plaintiff's song in this action had no long term or sustained public popularity.  The song initially was only of significance for the Filion family reunion, a party which lasted for only approximately seven or eight hours.

**¶** 60      There may be one day a proper case made out to support an allegation of infringement of copyright through unconscious copying.  This is not one of those days for the above reasons.

**¶** 61      By way of obiter only, I would raise the fact, not facetiously, that historically the theory of the subconscious (apart from the state of mind arising from a severe physical blow to the head) was developed by Sigmund Freud.  He used the unconscious and its exploration in the treatment of mental illnesses in the late 1800's and early 1900's.  Its study played a major role in shaping human behaviour.  The four major schools of psychology of the times gave Freud credit for demonstrating how the unconscious events influenced behaviour.

**¶** 62      How then does the unconscious become translatable into a part of Canadian jurisprudence?  I would venture, at this stage, with much difficulty.  The American authorities which have been cited in this action appear to have adopted a colloquialism which they have labelled the unconscious.  As the English authorities have pointed out, there is much more to be done in terms of the type of evidence to be adduced and accepted.

**¶** 63      In any event, it occurs that the law in Canada should be neither tranquillized nor galvanized by the results of the existing American decisions.  In time, by cultural lag, perhaps there will be an opportunity to consider infringement of copyright by unconscious copying, but not without, I suggest, a close examination of the guidelines suggested in Francis Day, which is still the beacon.

**¶** 64      I now turn to my formal findings and disposition.

13.  FINDINGS ON THE EXPERTS

**¶** 65      Dr. Chartier gave his evidence in a concise, precise and accurate manner.  He seemed adamant in his proposition that although musical works can be dissected into components, and notwithstanding that each component can in itself be further dissected, one must, in reaching an analytical conclusion, consider the whole of the composition or compositions, as in this case.  I accept this as being a crucial point of any analysis of two musical works where there is an allegation of copyright infringement.  Although his evidence in-chief was described as meagre, he was, as I have said, subjected to a vigorous and exhaustive cross-examination from which he emerged relatively unscathed.  His testimony was balanced and credible and I accept his evidence, opinion and conclusions with respect to the similarities of these two compositions.

**¶** 66      Dr. Posen, although duly qualified to give expert evidence, has not persuaded me, on the balance of probabilities, that his evidence should be preferred to that of Dr. Chartier's.  In making this finding, I turn to his responses on cross-examination.

**¶** 67      His concessions in the areas on which I have already commented pointed me in the direction of unsureness and uncertainty.  His technical analysis became dented and vulnerable as a result of answers given to questions put to him by the plaintiff's counsel.  Most importantly, his cassette "mix" of songs with the common T(2)-5-6 did not support his similarity findings on the documentary transcriptions attached to his report, says my ear.  This, of course, excepting the two songs in issue.  There is no doubt, as he suggests, that two individuals immersed in the country music culture could independently compose similar musical works.  However, this ignores a consideration of the conduct of this plaintiff and this defendant throughout a chronology from 1988 to 1993, about which we have heard in evidence, and to which I will refer in a moment.

**¶** 68      In summary, then, I accept Dr. Chartier's opinion and conclusions.  Given the fact that the two compositions share the same time signature, a similar eight bar refrain, a similar chord progression (less the B(7) chord in the Rostad version which I find not to be significant) and a similar melody, there is little question or doubt that Here We Are On The Road Again has been based upon and is a reproduction of the song Filion Family Welcome - not identical but strikingly similar.

14.  DISPOSITION

**¶** 69      I have already found, after reviewing the evidence of the expert witnesses, that there are striking similarities in the musical works of the plaintiff and the defendant supra.  Since I have also found the plaintiff to be the originator and possessor of copyright, the first test as set out in Francis Day & Hunter and adopted in Grignon has been met.  There is sufficient objective similarity between the defendant's work and the plaintiff's copyright work. Although not identical, the defendant's work can be properly described as a reproduction of the plaintiff's.  I attach a copy of Exhibit B of the plaintiff's statement which shall form part of my judgment.

**¶** 70      As to the causal connection and access test, it is clear to this court that on the balance of probabilities, Mr. Drynan's evidence as to the critical aspect concerning this component must be accepted.  He gave his evidence in a forthright and honest manner.  Much of his evidence was corroborated by unchallenged evidence of others such as Ms. Rutledge and Paul Filion.  He clearly and vividly recounted the events surrounding the circumstances at Wakefield, and particularly described almost word-for-word the conversations he had with the defendant Mr. Rostad at the Filion family reunion.  There is little dispute, moreover, that his musical work was played frequently during those festivities and the children danced to the song.  From the review of the videos, it is clear that this event was one of magnitude and significance.

**¶** 71      The defendant Mr. Rostad gave evidence equally credible in most matters, except the areas which are critical to a very main issue in this action.  He described in great detail his musical background and career path, was even painstaking in describing how he composes his music.  His recollections of the Filion family reunion, the house, the guests, the ambience, and atmosphere appeared accurate. Regrettably, however, he had no recollection of the Wakefield incident, no recollection of having heard the plaintiff's song at North Augusta (although admitting it to be a possibility), no recollection of having any conversations with the plaintiff whatsoever and, surprisingly, not even having a recollection of even meeting the plaintiff prior to the pre-trial of this action which was held in late spring of 1994.  He did admit to circulating among the guests at the party, giving autographs, allowing pictures to be taken, and he actually appeared on stage with one of those guests, as shown in the video filed.

**¶** 72      Given his propensity for some detail on the one hand, and his total lack of recall in the critical areas on the other which relates to access and causal connection, what alternative does this court have?  Further, it is remarkable that approximately nine months after the plaintiff's work was exposed to Mr. Rostad, it appears in a strikingly similar form to that of the plaintiff's on the television series on which he is a host.

**¶** 73      It is therefore this court's view that on a balance of probabilities, the defendant Rostad did in fact hear the plaintiff's musical work at the party in North Augusta and did substantially copy it when he composed Here We Are On The Road Again.  He had direct access and opportunity to the plaintiff's song and copied it - consciously.

**¶** 74      In the end, in the final analysis, it is for the Judge to decide whether, according to his own assessment, experience and judgment, an impression of similarity is created by the disputed musical works.  On the evidence adduced, and to my ear, but for James Drynan's song, Wayne Rostad's song would not have existed.  There will be judgment for the plaintiff.

15.  DAMAGES

**¶** 75      The evidence of the defendant was that he had received, I believe, royalties in excess of $12,000, which his composition Here We Are On The Road Again has earned.  By analogy, although perhaps circuitous, and given equal opportunity to the plaintiff to have marketed his composition, of which he has up to now been deprived, I would assess his damages at $6,000, the monetary limit of the Small Claims Court.

16.  COSTS

**¶** 76      The plaintiff shall have his costs fixed at $900 calculated at 15 percent of the aggregate of his judgment, as allowed by s. 29 of the Courts of Justice Act.  In addition, he will have the costs of his reasonable disbursements, on which I trust counsel can agree.  There will be a Counsel fee of $300, which is the maximum allowable under the tariff. These costs shall be payable by the defendant Rostad.

**¶** 77      The action as against the defendant Canadian Broadcasting Corporation shall be dismissed without costs.

**¶** 78      There remains for disposition the counterclaim of the defendant which, by agreement, was held in abeyance until the copyright issue was disposed of.  I shall await Counsel's directions in this regard.  Lastly, for the record, I would like to sincerely thank counsel for their assistance and the professional manner in which they have both conducted the trial of this action.

HOUSE DEPUTY J.

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