

Yvon Drolet (*Plaintiff/Defendant to counterclaim*)

v.

Stiftung Gralsbotschaft and Foundation of the Grail Movement – Canada (*Defendants/Plaintiffs by counterclaim*)

INDEXED AS: DROLET V. STIFTUNG GRALSBOTSCHAFT (F.C.)

Federal Court, Justice de Montigny—Montréal, April 14–24, 2008; Ottawa, January 6, 2009.

Trade-marks — Expungement — Application to have the defendants' entries in the Trade-marks Register struck out pursuant to s. 57 of the Trade-marks Act — By counterclaim, the defendants asked the Court to issue a permanent injunction ordering the plaintiff to cease using their trade-marks — The plaintiff had reproduced the defendants' registered trade-marks in his books — The registered marks were a pseudonym, a logo and the title of a work — The plaintiff submitted that the trade-marks were descriptive of the wares sold by the defendants — The pseudonym in issue is not a name or a surname and was registrable under s. 12 of the Act — The logo does not enjoy universal and historical recognition and was also registrable — The plaintiff infringed that mark — The title of a book is inherently descriptive because it is the only way to identify a work and cannot be dissociated from it — The registered mark of the title was therefore invalid — Application allowed in part; counterclaim allowed in part.

Trade-marks — Infringement — Counterclaim aimed at obtaining an injunction ordering the plaintiff to cease using the defendants' trade-marks — The plaintiff had reproduced the defendants' registered trade-marks in his books — The registered marks were a pseudonym, a logo and the title of a work — The plaintiff contravened s. 19 of the Act by reproducing the defendants' logo — The defendants were entitled to a permanent injunction against the plaintiff prohibiting him from using the logo of the Stiftung in connection with any publication whatsoever — However, the reproduction of the pseudonym did not cause confusion with the registered mark under s. 20 of the Act — People knew they were buying a different version — The defendants' action in passing off also had to be dismissed — The plaintiff had not attempted to pass off his book as that of the defendants.

Construction of Statutes — Application to have the defendants' entries in the Trade-marks Register struck out pursuant to s. 57 of the Trade-marks Act — The definition of "wares" in s. 2 of the Act does not mean that the registration of the title of a written publication as a trade-mark is permitted — Trade-marks cannot have the effect of circumventing the provisions of the Copyright Act — Granting the right to register a trade-mark for the title of a book would defeat Parliament's intention to make literary works that have passed into the public domain available to the general public.

Copyright — Infringement — Counterclaim alleging that the plaintiff infringed the defendants' copyright by publishing excerpts of a translation belonging to them — The plaintiff argued that the translation was not an original work and that the defendants did not hold copyright to it — The translation in this case is not a mere copy of another work but reflects the exercise of the translator's skill and judgment — The translator made more than cosmetic changes — To counter an action in copyright infringement, it is not enough to change the order of the chapters or to add to the plagiarized text — It is the extent to which the original work is reproduced that must be assessed — However, although the defendants held the copyright to the translation, their action was time-barred under s. 41(1) of the Copyright Act.

This was an application to have the defendants' entries in the Trade-marks Register struck out in accordance with section 57 of the *Trade-marks Act*.

The Grail Message is a collection of spiritual thoughts written and published in German between 1923 and 1937 in the form of speeches by Oskar Ernst Bernhardt. The defendant Stiftung Gralsbotschaft (the Stiftung) is a publishing house that disseminates and publishes the work of Oskar Ernst Bernhardt and holds a copyright certificate for the French translations of the Grail Message done by Paul Kaufmann. In 1998, it registered the following trade-marks related to the work of Oskar Ernst Bernhardt with the Canadian Intellectual Property

Office: the author's pseudonym ABD-RU-SHIN; the A & SERPENT DESSIN logo; and the title IN THE LIGHT OF TRUTH. In 2000, the plaintiff learned of the existence of two French translations of the original work of Oskar Ernst Bernhardt, published in 1931. Basing himself on those two translations, on the original work in German, and on the translation by Paul Kaufmann, the plaintiff tried to reconstitute the author's original work. He concluded that the edition published around 1949 in German and considered by the defendants as the definitive version differed from the original edition, owing, among other things, to the removal of several speeches and passages. In 2001, the plaintiff published three volumes of a French version of the Grail Message and reproduced the defendants' registered trade-marks. In his application, the plaintiff submitted that the defendants' trade-marks were descriptive of the wares they sold. By counterclaim, the defendants asked the Court to issue a permanent injunction ordering the plaintiff to cease using their trade-marks. In 2007, the defendants modified their counterclaim to include an action in infringement of their copyright and to seek an injunction barring the plaintiff from publishing or selling any publication containing excerpts of the translations by Paul Kaufmann. In his defence to counterclaim, the plaintiff argued that Paul Kaufmann's translations were not sufficiently original to give rise to a copyright.

The issues in this case were of two kinds. The first set of issues concerned mainly the validity of the trade-marks registered by the defendants. The second set of issues concerned the question of whether the translation by Paul Kaufmann was an original work and, if so, whether the plaintiff had infringed the defendants' copyright.

Held, the application must be allowed in part; the counterclaim must be allowed in part.

To be registrable, a trade-mark must be distinctive and not fall within an exception set out in section 12 of the *Trade-marks Act*. For the trade-mark ABD-RU-SHIN, it was necessary to apply the test of paragraph 12(1)(a), which provides that one cannot register as a trade-mark the name or surname of a person who is living or has died within the preceding thirty years. The word Abd-ru-shin is not the name or surname of a person who is living or recently deceased, and is not likely to be found in a telephone directory. Moreover, even if Abd-ru-shin could be deemed a name for the purposes of paragraph 12(1)(a), the legal consequences of that provision expired in 1971, that is, thirty years after the author's death. The word Abd-ru-shin was therefore registrable.

The legal scheme of official marks differs from that of trade-marks. Thus, an applicant does not have to demonstrate the distinctive nature of a proposed official mark. Rather, the main requirement is recognition as a public authority. In *Canadian Jewish Congress v. Chosen People Ministries* (F.C.), Justice Blais wrote that "[i]t would be counterproductive to prohibit Jewish organizations and associations from using and adopting a mark such as the menorah, since it has always been historically associated with the Jewish culture". The plaintiff relied on that incidental opinion to argue that the defendants could not appropriate the A & SERPENT DESSIN logo through a trade-mark. However, the A & SERPENT DESSIN logo does not enjoy the same universal and historical recognition as an official emblem of the Grail Movement as does the menorah for members of the Jewish community. Accordingly, the A & SERPENT DESSIN was also registrable.

The mark IN THE LIGHT OF TRUTH is invalid. The title of a literary work is inherently descriptive because it is the only way to identify the work. In that sense, the title cannot be dissociated from the work itself. The definition of "wares" in section 2 of the Act as including "printed publications" should not be interpreted to mean that registration of the title of a written publication as a trade-mark is permitted. The words "printed publications" are vague and appear to have been added to counter the case law holding that a newspaper cannot be considered a manufactured object, product or item. Assuming that, as a printed publication, a book could be considered a ware, its title would still have to meet the requirements of section 12 of the Act. Furthermore, trade-marks cannot have the effect of thwarting or skirting the provisions of the *Copyright Act*. Granting the right to register a trade-mark on the title of a literary work that was formerly copyrighted and is now in the public domain would defeat Parliament's intention of making such works available to the general public. It was not Parliament's intention to extend the scope of copyright indirectly by allowing the title of a work to be appropriated.

The defendants' action based on section 19 of the *Trade-marks Act* in connection with the A & SERPENT DESSIN logo had to be allowed. The plaintiff infringed the defendants' rights by reproducing the logo of the Stiftung on the title pages of his book. The defendants were entitled to a permanent injunction prohibiting the plaintiff from using the Stiftung's logo in connection with any publication whatsoever. With respect to the author's pseudonym, its reproduction by the plaintiff (Abdruschin) had to cause confusion with the defendant's registered trade-mark (ABD-RU-SHIN) under section 20 of the Act. Although a slight variation in the spelling of the pseudonym is not sufficient to conclude that there is no confusion, other factors such as their different appearances argued for the finding that the plaintiff's book was not likely to be confused with those of the defendants. Moreover, the plaintiff published his books only in limited editions, derived no profit from them and

did not advertise them. People knew they were buying a different version from the one sold by the defendants. The defendants' action in passing off had to be dismissed. The plaintiff had not attempted to pass off his book as that of the defendants. Rather, he dissociated himself from the defendants by asserting that their version of the work of Oskar Ernst Bernhardt was inconsistent with the original Grail Message.

With respect to the copyrights in this case, the translation of the work of Oskar Ernst Bernhardt done by Paul Kaufmann is not a mere copy of another work, but reflects the exercise of the translator's skill and judgment. Paul Kaufmann did not make merely cosmetic changes to a previous translation, but substantially modified the work of Oskar Ernst Bernhardt to make it more literary and less literal. The presumption set out in paragraph 34.1(2)(b) of the Act and the contract it entered into with Paul Kaufmann favour the Stiftung's contention that it holds the copyrights to all French translations produced by Paul Kaufmann. The plaintiff's work is essentially identical to that of the edition published and distributed by the defendants and, despite the rearrangement of the speeches, is not original. It is not sufficient to change the order of the chapters or to add to the plagiarized text to counter an action in copyright infringement. It is the extent to which the original work was reproduced that must be assessed. However, the defendants' counterclaim based on infringement of their copyrights was time-barred under subsection 41(1) of the Act. The defendants had amended their counterclaim to add an action in copyright infringement six years after becoming aware of the plaintiff's work and more than three years after the institution of proceedings before this Court.

STATUTES AND REGULATIONS CITED

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Canadian Charter of Rights and Freedoms, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, (U.K.) 1982, c. 11 [R.S.C., 1985, Appendix II, No. 44], s. 2.

Charter of human rights and freedoms, R.S.Q., c. C-10, s. 3.

Civil Code of Québec, S.Q. 1991, c. 64, Art. 1457.

Copyright Act, R.S.C., 1985, c. C-42, s. 2 "infringing" (as enacted by S.C. 1997, c. 24, s. 1), "copyright" (as enacted *idem*), "moral rights" (as enacted by R.S.C., 1985 (4th Supp.), c. 10, s. 1), "every original literary, dramatic, musical and artistic work" (as am. by S.C. 1993, c. 44, s. 53), 3(1) (as am. by S.C. 1988, c. 65, s. 62; 1993, c. 44, s. 55; 1997, c. 24, s. 3), 5 (as am. by S.C. 1993, c. 15, s. 2, c. 44, s. 57; 1994, c. 47, s. 57; 1997, c. 24, s. 5; 2001, c. 34, s. 34), 6 (as am. by S.C. 1993, c. 44, s. 58), 13(1), (4) (as am. by S.C. 1997, c. 24, s. 10), 14(1), 14.1 (as enacted by R.S.C., 1985 (4th Supp.), c. 10, s. 4), 14.2 (as enacted *idem*; S.C. 1997, c. 24, s. 13), 27 (as am. *idem*, s. 15), 28.1 (as enacted by R.S.C., 1985 (4th Supp.), c. 10, s. 6), 28.2 (as enacted *idem*), 29 (as am. by S.C. 1997, c. 24, s. 18), 34(1) (as am. *idem*, s. 20), 34.1 (as enacted *idem*), 35(1) (as am. *idem*), 36(1) (as am. *idem*), 37 (as am. *idem*), 38.1(1) (as enacted *idem*), 39(1) (as am. *idem*), 41 (as am. *idem*, s. 22), 49 (as am. by S.C. 1993, c. 15, s. 4), 53 (as am. *idem*, s. 5; 1997, c. 24, s. 30), 55(1) (as am. *idem*, s. 32).

Federal Courts Rules, SOR/98-106, rr. 1 (as am. by SOR/2004-283, s. 2), 75, 210, 222, 225, 255, 400(3), 407, Tariff B, Column IV.

Trade-marks Act, R.S.C., 1985, c. T-13, s. 2 "wares", "trade-mark", "distinctive", 6, 7, 9(1)(j), (n)(iii), 12 (as am. by S.C. 1990, c. 20, s. 81; 1993, c. 15, s. 59(F); 1994, c. 47, s. 193; 2007, c. 25, s. 14), 13(1)(b), 19 (as am. by S.C. 1993, c. 15, s. 60), 20 (as am. by S.C. 1994, c. 47, s. 196), 53.2 (as enacted by S.C. 1993, c. 44, s. 234), 57.

Trade Marks Act, S.C. 1952-53, c. 49, s. 2(w) "wares".

Trade-marks and Design Act, R.S.C. 1927, c. 201.

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International Covenant on Civil and Political Rights, December 19, 1966, [1976] Can. T.S. No. 47, Arts. 18, 19.

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F.C. 173, (1986), 28 D.L.R. (4th) 178; 8 C.I.P.R. 153 (T.D.); *McCutcheon v. Haufschild* (1998), 146 F.T.R. 28 (F.C.T.D.); *Apotex Inc. v. Canada (Minister of Health and Welfare)* (2000), 194 D.L.R. (4th) 483, 9 C.P.R. (4th) 289, 265 N.R. 90 (F.C.A.); *Microsoft Corp. v. Cerrelli*, 2007 FC 1364.

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APPLICATION to have the defendants' entries in the Trade-marks Register struck out in accordance with section 57 of the *Trade-marks Act*. Application allowed in part; counterclaim allowed in part.

APPEARANCES

Claudette Dagenais for the plaintiff.

Pascal Lauzon for the defendants.

SOLICITORS OF RECORD

Dagenais Jacob, Montréal, for the plaintiff.

BCF LLP, Montréal, for the defendants.

The following is the English version of the reasons for judgment and judgment rendered by

[1] DE MONTIGNY J. This case involves complex and unusual intellectual property issues. But possibly even (more) importantly to the parties and to those who hold the beliefs underlying this dispute, these issues have major repercussions on what they most profoundly believe and what is therefore at the very core of their lives. The sincerity of the many witnesses who testified in Court leaves no doubt as to the intensity of their convictions.

[2] That said, this Court must not intervene in a sphere that is not under its jurisdiction. It is not up to a civil court to rule on metaphysical and spiritual issues. Even if the legal issues that must be decided are sometimes inextricably linked with issues of another nature, we must try to separate them, as far as possible, and deal with only those aspects that have a legal dimension. It is therefore with this caution in mind that I will now deal with the dispute between the parties.

FACTS

[3] The plaintiff, Yvon Drolet, is a retired manager and teacher. He read the Grail Message for the first time in 1976.

[4] To properly understand the ensuing events, it is important to digress somewhat and say a few words about this work and its author. The Grail Message was written by Oskar Ernst Bernhardt, born in Germany in 1875. From 1923 to 1937, under the pen name Abd-ru-shin, he published numerous lectures that were the fruit of his own spiritual thinking in the *Gralsblätter (Grail Leaflets)* and in the periodicals *Der Ruf (The Call)* and *Die Stimme (The Voice)*.

[5] Considered by followers to be a work of even greater importance than the Bible, the Grail Message claims to answer the existential questions with which all religions are concerned and places considerable importance on the teachings of Christ. In fact, the author considers himself a messenger from God, following Moses and Christ. Adherence to the principles of the Message can be formalized in an official ceremony called “sealing”.

[6] In 1926, Oskar Ernst Bernhardt published a first book, in German, entitled *Im Lichte der Wahrheit (In the Light of Truth)*. In 1931, under the same title, he published the Grail Message in one volume, including 91 of the author’s essays, God’s Ten Commandments, and, as an appendix, an essay entitled “Life”.

[7] In 1934, Oskar Ernst Bernhardt published a collection of 61 essays, also in German, entitled *Echo I to the Grail Message*.

[8] From 1934 to 1936, Oskar Ernst Bernhardt published 38 other separate lectures under the imprint of *Der Ruf*. Then, in 1937, he published his last 40 lectures in *Die Stimme*. He died on December 6, 1941.

[9] In 1949, a book entitled *Ermahnungen (Exhortations)* was published posthumously. It included 22 lectures given by Oskar Ernst Bernhardt in the years 1934–1937. Twenty of those lectures had already appeared between 1934 and 1936 in *Echo I to the Grail Message* and the periodical *Der Ruf*, and two were previously unpublished.

[10] I will return to these different publications, which are at the heart of this dispute, when I analyse the actual legal issues involved. First, however, it is important to describe the activities of Mr. Drolet that led to the main action and counterclaim, and to say a few words about the two organizations that are also parties to this dispute.

(a) Mr. Drolet’s activities and the causes of this dispute

[11] As the leader of the Grail Circle in the Québec City area, Mr. Drolet organized various activities for spreading the Grail Message. Mr. Drolet stated that from 1982 to 1995, he gave more than 200 speeches on a voluntary basis in several regions of Quebec.

[12] In 1997, Mr. Drolet withdrew from the Foundation of the Grail Movement because he was uncomfortable with the way the Foundation was doing things. Nevertheless, he continued to give speeches on a personal basis until 1999, without assistance from any organization. It seems that during those years there was a rift within the Grail Movement in Germany and this rift spread to Canada and various other countries. Although the rift may have had significant consequences for members, it is not relevant for the purposes of this case because the Movement is not one of the parties of record.

[13] In 2000, the plaintiff learned of the existence of what he believed was the original work of the author of the Grail Message, Oskar Ernst Bernhardt, in its 1931 edition, as translated into French by Jean-François Roudaut. It is important to note that this translation had existed only in the form of photocopies.

[14] Mr. Drolet subsequently learned that a disciple of Oskar Ernst Bernhardt, Lucien Siffred, had translated part of Bernhardt’s work into French during the author’s lifetime. Based on the translations

by Mr. Roudaut and Mr. Siffrid of the original German work, as well as the French translation by Mr. Kaufmann distributed by the Foundation, Mr. Drolet undertook research to try to reconstitute what he believed to be the original work of Oskar Ernst Bernhardt.

[15] As a result of this research, the plaintiff concluded that the version published around 1949/1950 in German and considered by the Foundation to be the definitive version of the Grail Message was different from the original edition and from the writings published during Oskar Ernst Bernhardt's lifetime in several respects: 14 essays or lectures were withdrawn, a significant number of passages were withdrawn and the order in which the essays appeared was reversed.

[16] After noting these numerous discrepancies and after checking that the copyright to the original work had lapsed in 1991 (that is to say 50 years following the author's death as specified in section 6 [as am. by S.C. 1993, c. 44, s. 58] of the *Copyright Act*, R.S.C., 1985, c. C42), in May 2001 the plaintiff published one hundred copies in three volumes of what he considered to be the French version of the Grail Message as published during the author's lifetime, at least as far as the first two volumes were concerned. Mr. Drolet's books bore the following titles: *Dans la lumière de la vérité*, édition de 1931 (*In the Light of Truth*, 1931 edition); *Résonances au message du Graal*, tome 1 (*Echoes to the Grail Message*, Volume 1), and *Résonances au message du Graal*, tome 2 (*Echoes to the Grail Message*, Volume 2).

[17] Because the first edition sold out quite quickly, Mr. Drolet let it be known in early 2002 that he would be publishing a second edition to meet the demand of other persons wanting to read his work.

[18] On March 14, 2002, the Foundation of the Grail Movement – Canada sent Mr. Drolet a formal demand that he immediately cease disseminating, distributing or communicating in any form whatsoever any book, work or publication containing trade-marks registered in 1999 by the Stiftung Gralsbotschaft. I will deal with the registration of these trade-marks later. For now, suffice it to say that the registered trade-marks concern the name Abd-ru-shin, the title *Dans la lumière de la vérité/In the Light of Truth/Im Lichte Der Wahrheit*, and the logo including the letter A in a circle formed by a snake swallowing its tail.

[19] Following an exchange of letters between counsel for both parties, and faced with the impossibility of reaching an agreement, on September 14, 2004, the plaintiff instituted an action under section 57 of the *Trade-marks Act*, R.S.C., 1985, c. T-13 [the Act], to have the registrations of the defendants/plaintiffs by counterclaim struck from the trade-marks register.

[20] In a counterclaim, the defendants alleged that their trade-marks were valid and consequently that the plaintiff had infringed paragraphs 7(b) and (c) of the *Trade-marks Act*. The defendants also asked the Court to issue a permanent injunction ordering the plaintiff to cease using the defendants' trade-marks as well as offering for sale, selling, manufacturing, distributing, writing or announcing any literary work, publication, public presentation of the work or lecture in connection with the trade-marks of the defendants. Lastly, the defendants asked the Court to order the plaintiff, at the defendants' election, either to pay damages to them or to report the profits resulting from his illegal activities.

[21] On October 21, 2007, the defendants/plaintiffs by counterclaim brought a motion under rule 75 *in seq.* and rule 210 of the *Federal Courts Rules* [SOR/98-106, r. 1 (as am. by SOR/2004-283, s. 2)] to amend their defence to include infringement of copyright as a new cause of action against the plaintiff. The defendants basically alleged that Mr. Drolet's work was a substantial copy of the translation of the original work done by and for the defendant Stiftung Gralsbotschaft and for which copyright subsisted.

[22] By order dated December 5, 2007 [2007 FC 1276], Prothonotary Morneau dismissed the motion because it was brought too late. However, my colleague Mr. Justice Yvon Pinard set that decision aside on December 20, 2007 [2007 FC 1347]. While stating that he agreed with the Prothonotary that the defendants/plaintiffs by counterclaim were negligent in acting so late, he was of

the opinion that the interests of justice would be better served by holding a single trial in which the same judge could consider both facets of the intellectual property issue raised in this dispute. Following that judgment, the defendants amended their defence and counterclaim to request that the Court declare that the publication, marketing, offering for sale and selling of the Grail Message by the plaintiff/defendant by counterclaim is an infringement of copyright contrary to section 27 [as amended by S.C. 1997, c. 24, s. 15] of the *Copyright Act*. The defendants also asked for a permanent injunction to be issued ordering the plaintiff not to publish, market, offer for sale, import and possess for the purpose of publishing, marketing, offering for sale or selling, any publication containing excerpts of the translations done by Paul Kaufmann for the Stiftung until November 20, 2044.

(b) Who are the defendants?

[23] The Stiftung Gralsbotschaft is a recognized public service corporation (a charity and not-for-profit corporation) founded at the very beginning of the fifties by Maria Bernhardt, the widow of Oskar Ernst Bernhardt. This foundation was registered by the Department of Religion and Public Education of the province of Baden-Württemberg on April 2, 1951.

[24] The articles of incorporation of the Stiftung specify that its mission is to protect, promote and disseminate (including through translations) the work of Oskar Ernst Bernhardt and other works based on it. The Stiftung is thus basically a publishing house and must not be confused with the International Grail Movement, the mission of which is essentially spiritual.

[25] The Stiftung distributes its books worldwide in 17 languages, including French and English. The royalties it collects from these sales represents a significant portion of its funding. During his testimony, the managing director of the Stiftung, Michael Oort, mentioned that more than 1 300 000 copies of the Grail Message had been sold since 1931.

[26] The Stiftung distributes these products outside Germany by working closely with national organizations such as the Foundation of the Grail Movement – Canada and supports these organizations financially and/or materially when necessary.

[27] On April 27, 1998, the Stiftung filed applications with the Canadian Intellectual Property Office for the registration of the following trade-marks:

- ABD-RU-SHIN
- A & SERPENT DESSIN
- DANS LA LUMIÈRE DE LA VÉRITÉ
- IN THE LIGHT OF TRUTH
- IM LICHT DER WAHRHEIT

[28] Since no opposition was made to these applications, they were registered in 1999 under the following respective numbers:

- TMA519470
- TMA519469
- TMA520520
- TMA519477

- TMA519476

[29] Some minor details aside, these registrations concerned the following wares: literary works and all publications, namely: leaflets, pamphlets and posters in connection with the distribution and/or the promotion of these works. The services concerned are public presentations of the works and lectures.

[30] On January 16, 2008, before the deadline set by order of the Court for filing documents concerning the authorized amendment to add a counterclaim for infringement of copyright, the Canadian Intellectual Property Office issued copyright registration certificate 1055266 to the Stiftung for the French translations of the Grail Message by Paul Kaufmann.

[31] The Foundation of the Grail Movement – Canada is a not-for-profit corporation incorporated under Part II of the *Canada Corporations Act* [R.S.C. 1970, c. C-32], and its letters patent mirror the articles of incorporation of the Stiftung. The Foundation is a registered charitable organization authorized to issue receipts for tax purposes.

[32] The Foundation is the Stiftung's exclusive distributor in Canada. It distributes the Stiftung's various books to bookstores, libraries and other stores where the books can be sold. The books are also sold on the Foundation's Web site. Lastly, the Foundation organizes lectures on the work of Oskar Ernst Bernhardt and publicizes those lectures in the media.

ISSUES

[33] As a result of pre-trial conferences held on June 27 and October 11, 2006, the Prothonotary noted that the parties did not agree on all the issues in this dispute. As he mentioned in his order dated November 3, 2006, the plaintiff submitted several issues in the form of arguments and which in any event seem to me to be included in the more general issues on which the parties agreed. I note also that in his written submissions, the plaintiff dropped several issues he had raised and to which the defendants had objected. Based on the testimony at the hearing and the written and oral submissions of counsel, I would frame the issues to be decided as follows:

- Trade-marks:

(a) Are the registered trade-marks "distinctive" from the wares and services sold by the defendants/plaintiffs by counterclaim within the meaning of section 2 of the *Trade-marks Act*?

(b) Are the registered trade-marks descriptive of the wares and services sold by the defendants/plaintiffs by counterclaim within the meaning of paragraph 12(1)(b) [as am. by S.C. 1993, c. 15, s. 59(F)] of the *Trade-marks Act*?

(c) Are the registered trade-marks, in connection with the wares and services sold, deceptively misdescriptive of the work of Oskar Ernst Bernhardt to the extent that the work published by Éditions Françaises du Graal is not the complete version of the work of Oskar Ernst Bernhardt, within the meaning of paragraph 12(1)(b) of the *Trade-marks Act*?

(d) Should the registered trade-marks be struck because they consist of the name, the title in a language and the symbol of the work of Abd-ru-shin in connection with which they are used, pursuant to paragraph 12(1)(c) of the *Trade-marks Act*?

(e) Does the use by the defendants of the name, title and logo as trade-marks in connection with the work of Oskar Ernst Bernhardt infringe the plaintiff's right to freedom of belief and expression, contrary to section 2 of the *Canadian Charter of Rights and Freedoms* [being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44]], section 3 of the *Quebec Charter of human rights and freedoms* [R.S.Q., c. C-12] and

articles 18 and 19 of the *International Covenant on Civil and Political Rights* [December 19, 1966, [1976] Can. T.S. No. 47]?

(f) If the Court finds that the defendants' trade-marks are valid, is Mr. Drolet's publication of his work an infringement of the defendants' rights under sections 19 [as am. by S.C. 1993, c. 15, s. 60] and 20 [as am. by S.C. 1994, c. 47, s. 196] of the *Trade-marks Act*?

(g) If the Court finds that the defendants' trade-marks are valid, is Mr. Drolet's publication of his work unfair competition within the meaning of paragraphs 7(b) and (c) of the *Trade-marks Act*?

(h) If either of the two preceding questions is answered in the affirmative, what damages or profits are the defendants/plaintiffs by counterclaim entitled to claim?

- Copyright

(i) Was the translation done by Paul Kaufmann an original work within the meaning of subsection 5(1) [as am. by S.C. 1994, c. 47, s. 57; 1997, c. 24, s. 5] of the *Copyright Act*?

(j) Is the defendant/plaintiff by counterclaim the Stiftung the owner of the copyright of the translation by Paul Kaufmann of the work of Oskar Ernst Bernhardt?

(k) If both preceding questions are answered in the affirmative, is the work prepared by Mr. Drolet a reproduction of the translation done by Paul Kaufmann?

(l) Do the allegations of the defendants/plaintiffs by counterclaim come up against the limitation period under section 41 [as am. by S.C. 1997, c. 24, s. 22] of the *Copyright Act*?

(m) If Mr. Drolet did infringe the copyright of the defendants/plaintiffs by counterclaim, what is the appropriate remedy? Can Mr. Drolet rely on subsection 39(1) [as am. *idem*, s. 20] of the *Copyright Act* and claim that he was not aware of the Stiftung's copyright?

[34] Before examining the issues mentioned above, I should note that no evidence was adduced having regard to damages and to the profits that Mr. Drolet may have made from the sale of his work. It was agreed at the hearing that this issue would be dealt with later, if necessary, depending on the answers to the substantive issues.

[35] Likewise, the motion brought by the defendants/ plaintiffs by counterclaim to be dispensed from filing certain documents was not decided. The requested documents were mentioned in a subpoena sent on March 17, 2008 to Serge Thivierge, president of the Foundation of the Grail Movement – Canada. The documents included financial statements, assets, statements of revenues and expenditures and evaluation and purchase contracts for the buildings of the Foundation and the Stiftung. Since the purpose of that information was merely to establish the defendants' ability to pay in the event that exemplary damages were awarded to Mr. Drolet, I stated at the hearing that this motion would be taken under advisement and a ruling would be made only if it became appropriate in view of my findings on the merits of this case.

EVIDENCE

[36] Both parties called several witnesses in support of their respective submissions. Mr. Drolet split his evidence, first calling his witnesses in support of his trade-mark action and then in defence concerning the copyright counterclaim. The defendants/plaintiffs by counterclaim chose instead to present their evidence together in a single block. Given how closely the trade-mark evidence and the copyright evidence are related, I will summarize the testimony not necessarily in chronological order but overall for each of the two parties.

- Evidence adduced by Mr. Drolet

[37] Mr. Drolet first called three followers of the Grail Message who told the Court how much this work was at the heart of their lives and how important the opportunity to read the “original” version published by Mr. Drolet was to them. They also explained at length the content of the Message, its basic principles and foundations, and how they had come into contact with the work distributed by the Foundation and subsequently with Mr. Drolet’s version. Although I do not for a moment doubt their great sincerity, their testimony is of little assistance in resolving the legal issues to be decided in this case.

(i) Raymond Lefebvre

[38] The first witness, Raymond Lefebvre, owns a business and works in marketing. He was a member of the Circle of the Grail Foundation for the Québec City area with Mr. Drolet until the latter withdrew from it. He stated that when he read the version of the Message published by Mr. Drolet, he had the impression of reading the “real” message because it was more logical in the way it unfolded. He stressed the necessity of making the version published by Mr. Drolet available, saying that he was convinced it was the “right” one and that it conveyed the original Message.

[39] Mr. Lefebvre is one of the signatories (numbering 100 or so) of a statement in support of Mr. Drolet. In this statement, the signatories demand that the defendants’ trade-marks be struck from the register and claim the right to have access to the original and complete Message of Oskar Ernst Bernhardt, which the Foundation would deny them.

[40] On cross-examination, Mr. Lefebvre confirmed that the books distributed by the Foundation and the Stiftung were available at lectures sponsored by the Foundation. He also identified the logo and copyright notice in each of the four volumes (*In the Light of Truth*, volumes I, II, and III, and *Exhortations*) published by the Stiftung.

(ii) Alexis Langlois

[41] The second witness, Alexis Langlois, is a student. Mr. Langlois was also involved in the Foundation and gave lectures at the end of the 1990s. During his testimony he described the internal dissension that shook the organization in Germany, based on letters that he, like all members of the Foundation, received at the time. As already mentioned, the conflict in question has no bearing on this case.

[42] Although Mr. Langlois was raised by a mother who was a believer, he had an inquiring mind and wanted answers to his questions. He said that he had done extensive research on the life and work of Oskar Ernst Bernhardt, and that the version distributed by the Foundation left him unsatisfied, did not answer all of his questions, was not consistent, and that he had had doubts about the order in which the essays were presented in that version even before reading Mr. Roudaut’s translation based on the 1931 edition. He added that after reading that edition in the original German, he can assert that the work is not the same as the one distributed by the Foundation. Not only does the order of the essays differ, but entire pages were withdrawn. He also noted that several lectures appearing in the book entitled *Exhortations* were originally published in *Echoes I* and therefore accessible to everyone and not only to members having received the “sealing”.

[43] Mr. Langlois also added that he was never able to see the manuscript of the version published by the Stiftung and he claimed that the author had never given any indication that he would alter his work. Moreover, the witness claimed that the author identified himself as the Son of Man and

Emmanuel in the original work, whereas these references have disappeared completely in the version published by the Stiftung.

[44] Mr. Langlois also gave a long explanation that tended to show that Oskar Ernst Bernhardt could not have revised his message because he had said, in a written statement made while he was under house arrest and Gestapo control in October 1939, that he had not made any changes to his Message (Exhibit P-6, page 11). Because they were repeated and commented on by numerous witnesses, it is worth reproducing the relevant paragraphs of that statement:

[TRANSLATION] Fortunately, however, my own case is different because everything I said is printed, therefore my complete Works, which are discussed in general terms, and because of which human beings have found {their Way} to me and also {as a result} made of themselves all that they have, and therefore also granted the loans that served the ideal Goals {resulting} from the earthly requirement of this spiritual Activity.

Now, of these *Words that are mine*, not the *slightest* {word} has been changed. They are, even today, to be read exactly as in the beginning and can stand as the proof and basis of my Answer.

As they presently are, so were they from the beginning. Therefore, should the personal conviction of any human being be shifted or altered because of other influences or intentions, I could not be criticized for having any intent to mislead!

As far as *I am concerned*, nothing else happened or was changed, but on the contrary, everything remained the same, *word for word*. And these Words are my unchanged and complete Belief of which I never wanted to persuade another human being because I have nothing but Joy in the Work itself and care not {to know} who and how many human beings say that this is also their Belief.

[45] The defendants objected to the admissibility of this statement on the ground that nothing established that it had been given freely and willingly. Even though I am aware that this case does not involve the principles applicable to criminal law, it nevertheless seems prudent to me not to give this text too much probative weight without knowing in what circumstances it was written. But there is more.

[46] Several interpretations may be given to the excerpt reproduced above and it does not seem to me to establish beyond any doubt that the author did not make any changes to his text. It must be borne in mind that this excerpt is part of a larger essay in which the author answers his critics and stands by everything he has written. Therefore, this excerpt must not be interpreted literally and taken to mean that the original text was never altered, however slightly, especially since we are dealing with a translation of the original statement, with all the risks that entails.

[47] In any event, and even supposing that this statement clearly establishes that the author had not revised his work when he made the statement, it cannot be inferred that he made no changes to it in the following two years (until his death in December 1941).

[48] Lastly, the witness tried to cast doubt on the completeness of the Message as published by the Stiftung and distributed by the Foundation by pointing out that the passage from the statement reproduced at paragraph 44 of these reasons was not quoted in its entirety in a work on the life of Oskar Ernst Bernhardt published by the Éditions Françaises du Graal with the blessing of the Stiftung. *Et la lumière luit dans les ténèbres et les ténèbres ne l'ont pas comprise* [TRANSLATION]: *And the Light shineth in Darkness and the Darkness Comprehended it Not* by Herbert Vollmann, Exhibit P-19. This argument strikes me as very tenuous and based on conjecture rather than solid evidence. Moreover, Mr. Langlois did not testify as an expert on the life and work of Oskar Ernst Bernhardt and did not establish that he had any literary or philosophical knowledge that would allow him to make a scientific judgment. At most he can claim that he conducted personal research. Therefore, his interpretation of the works of Oskar Ernst Bernhardt and other writings about the author can only be his own opinion.

[49] When cross-examined, Mr. Langlois confirmed that the version of the Grail Message distributed by the Foundation was available in general bookstores in Quebec and in some municipal libraries. He also admitted that the documents he had received and to which he referred in describing the conflict within the International Grail Movement did not come from the International Grail Foundation (the Stiftung) but actually from the International Grail Movement.

[50] In his testimony, Mr. Langlois relied on a letter sent to Irmingard Bernhardt on March 6, 1976 by a disciple of Oskar Ernst Bernhardt, Hellmuth Muller, in which the latter cast doubt on the fact that Oskar Ernst Bernhardt could have substantially revised his text during the last two years of his life (joint list of admissions, Tab 16). On cross-examination, counsel for the defendants drew attention to a notarized statement dated May 15, 1956 by Irmingard Bernhardt (joint list of admissions, Tab 15) in which she wrote:

[TRANSLATION] The correction method applied by Mr. Oskar Ernst Bernhardt was the following: on a copy of the Grail Message used for this purpose, he wrote his instructions with a pencil, he removed passages and he marked reference points where he wanted to make changes or additions. He noted each of those changes or additions on a separate sheet of paper. Then, because these pencilled notes could be easily erased or become illegible, I typed them onto strips of paper, I erased the pencilled corrections on the copy of the Grail Message used for correction purposes and I glued the typewritten strips onto that copy.

As for the pages of the Grail Message on which longer paragraphs had been crossed out, I covered them by sticking paper over the hatching or I re-typed the whole page, making the changes, and glued the new page into place.

Because the order of the lectures was also changed, a lecture would sometimes have to be moved and inserted in another place.

I made all the changes exactly according to the instructions of the author of the Grail Message. He checked each of these corrections.

This process explains why only a few pages of the original manuscript written by Mr. Oskar Ernst Bernhardt still exist.

[51] In another statement dated December 1, 1985, made at the request of the Foundation of the Grail Message in Germany (also enclosed at Tab 15 of the joint list of admissions), she repeated that the changes made to the original work were by Oskar Ernst Bernhardt himself. She also stated that she had granted a licence to the Stiftung for all of Oskar Ernst Bernhardt's works in the following terms:

[TRANSLATION] As owner of the copyright of the Grail Message, I granted to the Foundation of the Grail Message in Stuttgart (Stiftung Gralsbotschaft) a general and exclusive licence for the printing, translation into all living languages and distribution of the work, on the basis of the final edition.

Therefore, the versions of the Grail Message that it publishes are, both in their content (text) and in the division and order of the lectures, the "only authorized editions" of this work.

[52] Counsel for the defendants also had the witness admit that *The Grail Message* had been extensively revised between the first edition of 1926 and the edition of 1931 that he claimed was final and definitive. Not only was the order of the lectures changed, but the number increased from 43 to 9. However, the witness added that Oskar Ernst Bernhardt had himself announced these changes, which he did not do after 1931.

(iii) Yves Malépart

[53] The third witness, Yves Malépart, is retired from the federal Public Service. He also read the Grail Message in the 1980s and he joined the Movement in the 1990s. He stated that he had learned from Mr. Drolet in 1999 that the work he had access to had been revised. He therefore acquired Mr.

Roudaut's translation and then that of Mr. Drolet in 2001. It was then that he realized that the order of the lectures in the 1931 edition was not the same as in the edition published by the Stiftung. In his opinion, the 1931 edition as translated by Mr. Drolet was much more logical and easy to read. He said that he did not know why the Stiftung did not publish the original version and voiced the opinion that perhaps it wanted to control the Message.

[54] He stressed the importance of making the original work of Oskar Ernst Bernhardt as published in 1931 available to everyone because it was more complete and more readable. He repeated that the 1931 edition contained a dozen more lectures than the edition distributed by the Stiftung, that the order of the lectures had been changed and that more than 300 passages were different. This is why, according to him, it was essential that Mr. Drolet be able to publish his own translation, which was more faithful to the German edition of 1931.

[55] On cross-examination, Mr. Malépart said that he had bought *The Grail Message* published by the Stiftung in a general bookstore after having previously borrowed it from a municipal library. As for Mr. Roudaut's translation, he had read a mimeographed copy of it. Lastly, he confirmed that Mr. Drolet's version and the Stiftung edition were easier to read than Mr. Roudaut's version.

(iv) Jean-François Roudaut (expert witness)

[56] Jean-François Roudaut, a French citizen, testified as an expert on the life of Oskar Ernst Bernhardt. Holder of bachelor's and master's degrees in literature, he has conducted research on Oskar Ernst Bernhardt since 1976, when he himself embraced the Grail Message. He published several books on the work of Oskar Ernst Bernhardt, which he distributed to followers of the Message. Some of those books were translated into German but none of them was copyrighted. In addition to studying the author's work, he also met a number of Oskar Ernst Bernhardt's disciples who had known him personally. Lastly, he gave public lectures in some 20 French cities on the Grail Message and Oskar Ernst Bernhardt.

[57] In addition to writing about the work of Oskar Ernst Bernhardt, he also translated some of his unpublished writings. Having read the original version of the Message (1931 edition) in 1979 and being dissatisfied with the French translation done by one Lucien Siffred in 1933, he personally undertook the translation of the work of Oskar Ernst Bernhardt (*In the Light of Truth, Echoes I and Echoes II*) in 1991. He worked on the translation until 2001 and he continued to correct it until 2005. This translation (which is at Exhibit P-32) was intended only for the followers of the Message and was therefore not copyrighted, publicized or distributed by a publisher.

[58] Counsel for the defendants objected to the Court's recognition of Mr. Roudaut as an expert on the ground that he was merely giving his personal opinion based on certain texts. It was also argued that the issue of whether the original version had been revised and by whom was not relevant to the case. At the hearing I reserved my decision on this objection.

[59] Now that I have heard the testimony and cross-examination of Mr. Roudaut and read his report, I am of the opinion that the witness does have in-depth and extensive knowledge of the life and work of Oskar Ernst Bernhardt and that he can help the Court by shedding light at least on the context of this dispute. It is true that the expertise that Mr. Roudaut may have acquired on the philosophy of Oskar Ernst Bernhardt does not result from his academic training but from his in-depth study of the writings in their original German version. However, the fact that Mr. Roudaut is largely self-taught in this subject does not disqualify him as an expert. As the authors Sopinka, Lederman and Bryant wrote in a passage cited with approval by the Supreme Court (*The Law of Evidence in Canada*, Toronto: Butterworths, 1992, at pages 536-537) in *R. v. Marquard*, [1993] 4 S.C.R. 223 (at page 243):

The admissibility of such [expert] evidence does not depend upon the means by which that skill was acquired. As long as the court is satisfied that the witness is sufficiently experienced in the subject-matter at issue, the

court will not be concerned with whether his or her skill was derived from specific studies or by practical training, although that may affect the weight to be given to the evidence.

[60] On the other hand, the defendants are right to point out that Mr. Roudaut is not a perfectly neutral and objective witness, since he not only joined the Grail Movement but also published what he feels is a more faithful French version of the work of Oskar Ernst Bernhardt, on which in fact Mr. Drolet based his own work. Although this does not prevent the Court from recognizing Mr. Roudaut as an expert and from admitting his testimony, I nevertheless consider this a factor which will have to take into consideration when the time comes to assess the probative value of his testimony.

[61] Mr. Roudaut delivered a learned analysis, admittedly sometimes difficult for the uninitiated to follow, of the work of Oskar Ernst Bernhardt. As I mentioned in my introductory comments, it is not up to this Court to rule on the true meaning and import of the writings of Oskar Ernst Bernhardt and even less to arbitrate the doctrinal quarrels that may divide the followers of the Message. Therefore, I will consider only those aspects of the testimony of Mr. Roudaut that may have a bearing on the legal issues before this Court.

[62] First, Mr. Roudaut claimed that the author had never wanted his work to be marketed or publicized. On the contrary, he wanted it to be transmitted orally and difficult to obtain and intended it only for those persons wishing to embark on a personal quest.

[63] He also mentioned that in all the works published by the author between 1923 and 1936, his pen name was spelled in the German manner (Abdruschin) whereas in subsequent editions a different spelling (Abd-ru-shin) was used without any explanation.

[64] Mr. Roudaut also discussed the genealogy of Oskar Ernst Bernhardt and of his wife Maria Freyer (this genealogy is found at Exhibit P-30). Oskar Ernst Bernhardt had two children from his first marriage, Herbert (died 1918) and Edith (died 1970). His second wife also had three children from a first marriage, Irmgard, Alexander and Maria Elisabeth. Oskar and Maria never had any children together and Oskar never adopted Maria's children.

[65] Because Oskar Ernst Bernhardt died intestate, his daughter Edith was his principal heir. Under German law at the time, she inherited three quarters of the estate and his widow Maria inherited one quarter (see Exhibit P-29).

[66] On January 20, 1942, Edith and Maria agreed on a new division of the estate. Edith received a claim Oskar Ernst Bernhardt had against a third party while Maria became the owner of the [TRANSLATION] "intellectual property rights, as well as the rights to the publishing company and all other patrimonial assets belonging to the estate" (Exhibit P-4). The witness questioned the authenticity of this agreement, especially because the claim that Edith allegedly inherited would have been of little value. However, there is no evidence on this point. In any event, a letter sent to Ms. Nagel by the family's attorney on January 14, 1942, mentioned that the copyright belonged to Maria because Oskar Ernst Bernhardt had made a gift of it to her while he was alive (Exhibit P-35).

[67] Mr. Roudaut also referred to a first statement written by Oskar Ernst Bernhardt when he was detained by the Nazis on July 19, 1938 (his second statement is reproduced at paragraph 44 of these reasons). In this first statement, found at Tab 11 of the joint list of admissions, Oskar Ernst Bernhardt apparently revoked all mandates that he had previously given. The statement reads as follows:

[TRANSLATION] I point out that all possible foreign organizations still in existence and which are based on the teachings of the Grail must confine any possible continuation of their activities strictly within the framework of their country's laws so that I myself will no longer have anything to do in any way with those organizations and so that any such mandate given by me – whether commercial in nature or in connection with the organization – is to be considered, as far as I am concerned, to have expired. No one is authorized any longer to use any power of attorney whatsoever given by me:

1. All commercial and private mandates given by me are expired. Only the power of attorney granted to the lawyer Doctor Karl Polaczek remains in force and he is authorized to make arrangements as instructed by me.

2. I demand that my former supporters cease any community, collective work and activity that would lead to the conclusion that the Movement directed by me is continued.

3. In particular, it is my wish that all former members of the "Gralssiedlung" ["City of the Grail"] on the Vomperberg leave this Community or its environs as soon as possible.

4. It is also necessary to avoid giving even the impression that the Movement is continuing in any form whatsoever. Anyone acting counter to my wishes expressed here is acting against me and under his own responsibility.

[68] If Mr. Roudaut is to be believed, there is no reason to doubt the authenticity of this document, even if it is only a copy of the original that was destroyed at the end of the war. Mr. Roudaut also claimed that this statement was not written under duress and that Oskar Ernst Bernhardt would never have written something that he did not believe, even under duress.

[69] Counsel for the defendants obviously objected to this document being admitted into evidence for the same reasons he gave regarding the second statement made by Oskar Ernst Bernhardt during his detention (irrelevant and not given freely and voluntarily).

[70] Like Mr. Langlois before him, Mr. Roudaut also wondered why Mr. Vollmann, the husband of Maria Elizabeth and for many years the head of the international Movement, did not reproduce the excerpts of the 1939 statement quoted above (at paragraph 44 of these reasons) in a work he published in 1987 ([TRANSLATION] *And the Light Shineth in Darkness and the Darkness Comprehended it Not*, Tab 19 of the joint list of admissions). In fact, Mr. Roudaut sent a letter to Mr. Vollmann in which he pointed out several differences between the [TRANSLATION] "Comprehensive Edition" of 1931 and subsequent editions published by the Stiftung and expressed the opinion that these numerous changes could not have been made by Oskar Ernst Bernhardt himself (Exhibit P-17). At the hearing Mr. Roudaut embarked on a long and (at least to the uninitiated) obscure explanation of the reasons why he believed that Oskar Ernst Bernhardt could not have made the changes to the 1931 edition.

[71] Mr. Vollmann answered Mr. Roudaut in a letter dated October 14, 1989 (Exhibit P-16). He mentioned first of all that he had not included the missing paragraphs in the 1939 statement because they were not necessary for the subject-matter dealt with. Here is how he explained this:

[TRANSLATION] Abd-ru-shin's Words were a reply to the attacks by renegades at that time during the great criminal trial in the years 1938 to 1941 instituted against Abd-ru-shin for a major fraud by the N.S. Gauleiter (regional chief) Hofel. Opponents tried to show that Abd-ru-shin was a liar and a con man and they said the same things about His Grail Message. They presented the matter as if Abd-ru-shin had written His Message for His own personal gain. At that time I was heard as a witness twice and I knew the acts and charges in this trial which, following an extensive investigation beforehand by the investigating judge of the trial court at Innsbruck, were dismissed on February 26, 1941 because no grounds for continuing the prosecution could be found.

It was in these circumstances that Abd-ru-shin made the statement in question on October 22, 1939, which is still valid today concerning the Grail Message that he recently wrote. Once again, he did not change anything in the meaning of His Words or in their concepts.

He revised the first editions of His Message (the comprehensive 1931 edition, Echoes "Nachklänge" 1934 and isolated lectures until 1937) during His stay in Kipsdorf (Erzgebirge) by removing lectures, by abridging, by expanding and finally by changing the order of the lectures, that was his absolute right as the author of his work. Through all those changes, even if you notice major differences, the Truth of His Message remained untouched. Therefore, the change only concerned the form in which the Word was given. The "Living Word", that is to say the meaning and content of the Word, was obviously untouched because Truth always remains Truth, no matter what form it is given.

[72] Mr. Vollmann added that Oskar Ernst Bernhardt informed several people during his life that he was revising his message, as it appeared from several letters, photocopies of which he enclosed with his reply to Mr. Roudaut. Oskar Ernst Bernhardt allegedly even confirmed directly to Mr. Vollmann that he was in the process of revising his lectures and putting them in a new order to make them more comprehensible. This letter basically repeated the content of a circular sent to all cross-bearers (as followers of the Message are called) by Mr. Vollmann in May 1978 (Exhibit P-17).

[73] Needless to say, Mr. Roudaut disputed this version of the facts. In his opinion, Mr. Vollmann had no choice but to stick to the Movement's official version because he was the son-in-law of the wife of Oskar Ernst Bernhardt, who was herself deeply involved in the organization. Moreover, he said that despite his repeated requests, he had never been able to see the original manuscript of the version that Oskar Ernst Bernhardt allegedly revised himself. According to Irmingard herself, any evidence of the author's handwritten annotations that might have existed was allegedly erased after being typewritten.

[74] In fact, Mr. Roudaut did not dispute that Oskar Ernst Bernhardt could have had the intention of revising the Message, but he submitted that he did not have time to do so and that he did not authorize anyone to publish a revised text. He claimed that the numerous inconsistencies in the posthumous version of his works were evidence of this. The revised version published by the Stiftung (to which it refers as the [TRANSLATION] "final" version) would thus be the result at most of an interpretation based on annotations that the author may have left in his desk drawers.

[75] Mr. Roudaut also tried to file in evidence a few photocopied pages of what was allegedly the revised version of the manuscript sent to him by a Slovakian correspondent. The defendant objected to this evidence, first because the exact origin of these pages and the identity of the correspondent were not known, but also because Mr. Roudaut had no expert knowledge of graphology and could not give an opinion about the authenticity of the signatures on this document. At the hearing I reserved my decision on this objection. I must now allow it in the absence of any additional information on the exact origin of this document.

[76] Finally, Mr. Roudaut referred to legal proceedings instituted in Brazil by Ms. Irmingard, the Foundation of the Grail Message (Stiftung) and the Grail Society of Brazil against an organization that had made unauthorized reprints of the work of Oskar Ernst Bernhardt (Exhibit P-2). The allegations concerned copyright infringement, conversion of symbols (Grail Cross and a representation of a snake), use of the pseudonym Abd-ru-shin, reproduction of complete texts and spreading distortion of information contained in the original work. The defendants neither denied the existence of the judgment, rendered in 1989 and dismissing the suit, nor did they question the quality of the translation. On the other hand, they expressed doubts about the relevance of that judgment to this case in view of the fact that under Brazilian law, copyright lapses on the death of the immediate heir (child, parent or surviving spouse of the deceased author) and not, as in Canada, 50 years after the death of the author.

[77] On cross-examination, Mr. Roudaut admitted that Oskar Ernst Bernhardt did not leave any written instructions forbidding a third party or an heir from doing anything official following his death. He also admitted that his was a minority opinion and acknowledged that there were far more people who confirmed the Stiftung's version than who disputed it. Lastly, he reiterated that Oskar Ernst Bernhardt had intended to revise his message and that he had made a few minor changes before his death but had not had the time to finish the job.

[78] The witness also acknowledged that he reached an agreement with the Stiftung in 1996. This agreement was subsequently confirmed by a French court following an action for copyright infringement and forgery resulting from the publication and distribution of his unauthorized translation of the work *In the Light of Truth* (see exhibit D-22). The parties agreed, *inter alia*, to the following:

[TRANSLATION]

ARTICLE 1 – Mr. Jean-François Roudaut acknowledges that the work “Im Lichte der Wahrheit – Gralsbotschaft” of Oskar Ernst Bernhardt, known under the pseudonym Abd-ru-shin, and his French translation “Dans la lumière de la vérité – Message du Graal” are not in the public domain and are protected under copyright laws at least until April 30, 2000.

ARTICLE 3 – Mr. Jean-François Roudaut will not reproduce or distribute the work mentioned in article 1 above for as long as the rights to that work, which belong to the Gralsbotschaft foundation, are protected by law.

ARTICLE 4 – In consideration of the undertakings by Mr. Jean-François Roudaut in articles 2 and 3 of this agreement, the Gralsbotschaft foundation waives the damages it is entitled to claim from Mr. Roudaut for the publishing and distribution acts committed before the signing of this agreement.

[79] During his testimony, Mr. Roudaut claimed that Oskar Ernst Bernhardt wished to reach only serious seekers and was against publicizing the Grail Message. When questioned about one of the excerpts on which he based this conclusion (answers to questions 10/00 Exhibit P-32), Mr. Roudaut admitted that the German verb “*werben*” used by Oskar Ernst Bernhardt can be translated not only as “*faire de la publicité*” (“to publicize”) but also as “*recruter*” (“to recruit”) as confirmed by the *Robert & Collins Dictionnaire Français-Allemand/ Allemand-Français* (Exhibit D-25).

[80] Mr. Roudaut returned to testify briefly about copyright. His explanations of the legal provisions applicable in Switzerland are not of much relevance in settling this dispute under Canadian law. The same is true of Mr. Roudaut’s dissertation on the content of the book entitled *Exhortations* and the origin of the lectures it contains.

[81] The affidavits sworn by André Fischer (Exhibit P-37) and Luce Lafeuillade (Exhibit D-45) are of greater interest. Counsel for both parties agreed that they be filed in evidence despite their respective concerns about their probative value and their authenticity. Mr. Lauzon, counsel for the defendants, submitted that Mr. Fischer’s affidavit contained a great deal of hearsay. Ms. Dagenais, counsel for Mr. Drolet, was concerned by the fact that Ms. Lafeuillade had refused to speak to her and that Mr. Lauzon had never personally contacted her. Of course, these factors will be considered when the time comes to weigh the probative value of these affidavits.

[82] Mr. Fischer is 97 years old and the only living person who knew Oskar Ernst Bernhardt personally. In his affidavit, he stated that he was convinced that the author himself did not revise his message as published in 1931, not only because he declared that his message was unchangeable but because the version distributed by the Stiftung was inconsistent. He also noted that numerous passages had been changed, removed or added and that the order of the lectures had been turned upside down, resulting in a weakened Message. However, I note that Mr. Fischer was expelled from the Movement at the end of the 1980s.

[83] Ms. Lafeuillade is a trained translator and a graduate of the Sorbonne. Since 1972 she has done many translations from German to French within the Grail Movement and she worked closely with Mr. Kaufmann on a large number of them. Contrary to what Mr. Drolet stated, she claimed that Mr. Kaufmann’s translations were entirely original. On that point, she wrote:

[TRANSLATION]

Having personally assisted Paul Kaufmann in his translation of *Im Lichte der Wahrheit* and *Ermahnungen* by Oskar Ernst Bernhardt, I can assert that he did indeed translate these books directly from German into French. At most, Paul Kaufmann and I occasionally consulted one of the previous translations, including the 1933 translation by Lucien Siffrid, for verification only.

(v) Yvon Drolet

[84] Mr. Drolet first explained how he learned about the Message, his association with the Canadian division of the Grail Movement (subsequently replaced by the Grail Foundation), how he gradually distanced himself from the Movement and finally, how he discovered the original 1931 version through the translation by Mr. Roudaut.

[85] He then explained at length the reasons that led him to believe that the order in which the lectures were presented in the original work made the Message less stern and easier to understand. He said that he had wanted to reproduce the cover page as it had appeared in the original German version.

[86] Mr. Drolet claimed that his version was more complete than the "revised" version published by the Stiftung. In the latter version, 13 lectures were allegedly missing as well as more than 340 passages that added up to approximately 10 additional lectures if placed end to end. In his opinion, those elisions were important not only quantitatively but also qualitatively because they altered the Message considerably.

[87] In writing his work, Mr. Drolet claimed that he based himself on Mr. Roudaut's translation, which he modified however because he found it too literary and too difficult to read. He also used the translation of the "revised" version that Mr. Kaufmann had done for the Stiftung, which had been given to him by Mr. Thivierge (the president of the Foundation in Canada) on diskettes at the time when he was still giving lectures for the Foundation.

[88] On cross-examination, Mr. Drolet confirmed that the "revised" version of the Message in French was sold when he gave lectures for the Foundation. He also acknowledged that he had requested and received funds from the Foundation to continue his lectures (exhibits D-28, D-29).

[89] Mr. Drolet also acknowledged including in his affidavit of documents a [TRANSLATION] "Chronology of Events" that he had based on information provided to him by Mr. Roudaut (Exhibit D-27). In this chronology, he wrote the following for the year 1945: [TRANSLATION] "Copyright belongs to Maria". For the year 1957 the following notation was made: [TRANSLATION] "Copyright is transferred to Alexander (Maria's son)". For 1968, the following appears: [TRANSLATION] "Herr Alexander had specified in his will that Fräulein Irmingard was the sole heiress of his entire estate, including his copyright". Finally, he wrote the following for 1990: [TRANSLATION] "In her will, Fräulein Irmingard bequeathed the copyright to the Stiftung Gralsbotschaft (The Foundation of the Grail Message in Stuttgart, directed by Jürgen Sprick). However, this will did not mention the original 1931 comprehensive edition of the Grail Message, (In the Light of Truth) but rather the new 1949/51 edition of the Grail Message in three volumes".

[90] Re-examined by Ms. Dagenais on this point, Mr. Drolet specified that he did not know that Maria had a will when he wrote this chronology and that he believed moreover that Irmingard was not the owner of the copyright because of the Brazilian judgment in 1989. He also mentioned that his only goal was to publish the original version of the Message and that he had no commercial or profit motive. He said lastly that he could not change the title of his work because he would have the impression of misleading the reader.

[91] Mr. Drolet returned to testify in the context of the copyright infringement counterclaim. He took that opportunity to mention that he did not know that the logo featured on the Stiftung's publications and which is a registered trade-mark (the letter A encircled by a snake swallowing its tail) was used by the Foundation on all of its official documents. In addition, he realized when reading the original 1931 edition that the author used this logo to represent himself. Oskar Ernst Bernhardt actually

used a rather different logo that featured (according to Mr. Drolet) the eye of God with a representation of alpha

and omega in its iris . Given what he now knows, he considers it unthinkable and disgraceful to use this logo.

[92] Mr. Drolet also compared the German editions of each of the four books (*In the Light of the Truth*, volumes I, II and III, and *Exhortations*) published by Maria (exhibits P-42A, 43A, 44A and 45A) and by Irmingard (exhibits P-42B, 43B, 44B and 45B) and said that he noted numerous differences between the two versions, which he circled in exhibits P-42C, 43C, 44C and 45C. Counsel for the defendants objected to this evidence on the ground that these differences were not relevant to the dispute inasmuch as it was the copyright to the translation done by Mr. Kaufmann that was alleged to have been infringed. Counsel for the plaintiff replied that it had not been proven that Mr. Kaufmann had received authorization from the holder of the copyright to do his translation and it was not known exactly what he translated (that is, the “revised” work of Oskar Ernst Bernhardt or his “final” work). This issue is clearly central to the dispute and I will return to it in my analysis.

[93] Mr. Drolet also reiterated that at the time he published his work he believed that the copyright had lapsed in 1991 and that the same was necessarily true of the copyright to the translation. He also did not know that the diskettes given to him by Mr. Thivierge to prepare his lectures contained the translation done by Mr. Kaufmann and that the material had been published. Still on this point, Mr. Drolet testified that he met Paul Kaufmann, who told him that he had not done a translation but had revised translations done by others. Although this is hearsay, I thought that Mr. Drolet should be allowed to report what was said in view of the fact that Mr. Kaufmann was now dead. Mr. Drolet tried to corroborate his testimony by referring to the comments allegedly made to him by Ms. Lafeuillade, who was present during these conversations with Mr. Kaufmann. However, since Ms. Lafeuillade is still alive and she signed an affidavit claiming the contrary, this hearsay cannot be admitted in evidence. Mr. Lauzon submitted lastly that the word “revision” can mean several things and refer to minor or substantial changes.

[94] During the weekend between the two weeks of hearing, Mr. Drolet compared part of his version (*Résonances I*) with the equivalent portion of the translation done by Mr. Kaufmann (Exhibit P-63). He highlighted in yellow the changes he had made and in blue what he had added and what was not in Mr. Kaufmann’s translation. The defendant did not challenge the accuracy of this work. However, Mr. Lauzon pointed out that what had been added by Mr. Drolet (therefore highlighted in blue) is not at issue because there can be no copyright on text that was not part of the original work.

- Evidence adduced by the defendants/plaintiffs by counterclaim

- Michael Oort

[95] Michael Oort was the first witness called by the defendants. Mr. Oort was born in the Netherlands and studied Dutch and German literature. At the age of 22 he joined the Stiftung Gralsbotschaft publishing house in Stuttgart, Germany, and he has worked there for close to 25 years now.

[96] The Stiftung is the publishing house founded by Maria Bernhardt, the widow of Oskar Ernst Bernhardt. It publishes the Grail Message in its original German version and in the 17 languages into which it has been translated to date. It also publishes other books, videos and DVDs concerning the Grail Message.

[97] M. Oort is the managing director of the Stiftung. It is a small publishing firm with only eight employees. Mr. Oort is specifically in charge of translations and everything that that involves (finding translators, drawing up contracts and keeping track of their work). He is also in charge of production (choice of paper, graphic design, cover, number of pages, etc.). Finally, because of his

excellent command of the French language, he is the contact person for French-speaking countries. He is the person who deals with publishers and distributors in those countries.

[98] Mr. Oort said that the International Grail Movement oversees the cultural and spiritual aspects of things, while the Stiftung handles the dissemination of the work through books, translations and lectures. The Movement has its headquarters in Austria while the Stiftung is based in Stuttgart, Germany. They are two separate legal entities, although they are currently headed by the same person, Jürgen Sprick.

[99] Mr. Oort said that copyright is of vital importance to any publishing house, and certainly to his. To date, approximately 1 300 000 copies of the Grail Message have been sold around the world in its various translations. The Stiftung currently publishes some fifty books, not to mention CDs and DVDs.

[100] Based on an excerpt of the author's writings ([TRANSLATION] Questions and Answers, 1924–1937, page 30; Tab 18 of the joint list of admissions), Mr. Oort submitted that Oskar Ernst Bernhardt had personally stated that the logo of the snake around the letter A was the logo of the publisher. In fact, the logo appears on all books published by the Stiftung, on its Web sites, on its business cards (Exhibit D-40), etc.

[101] As for Mr. Vollmann, about whom much has been said, he not only married one of the daughters of Maria, the wife of Oskar Ernst Bernhardt, and directed the Grail Movement, but also wrote many books published by the Stiftung. Mr. Oort knew him personally from a young age, since Mr. Oort was raised in a family of Grail Message followers.

[102] Mr. Oort discussed the agreement between Oskar Ernst Bernhardt's wife (Maria) and his daughter (Edith Nagel) concerning the division of the estate. The translation of this agreement filed in evidence by the defendants (Exhibit D-2) is essentially to the same effect as the translation presented by the witness Roudaut (Exhibit P-4). As holder of the copyright, Maria had a say in the appointment of the president of the Stiftung and she was very involved in the operations of the publishing house.

[103] Mr. Oort then produced the alleged last will and testament written by Maria (Exhibit D-3), which named her son Alexander as her sole heir. Ms. Dagenais objected to the admissibility of this document because it was not an original and because it was produced late. The witness retorted that he had been unable to track down the original document but that this was a copy certified by a German court. As for the claim that it was produced late despite Ms. Dagenais' repeated requests to obtain a copy since the beginning of the dispute, Mr. Lauzon said that it had been filed in the supplementary affidavit of documents dated January 25, 2008, following the decision by my colleague Justice Pinard [2007 FC 1347] granting leave to file the counterclaim on the issue of copyright.

[104] Before the trial, Mr. Lauzon had asked Ms. Dagenais to acknowledge the authenticity of this will, in accordance with rule 255 of the *Federal Courts Rules*. Ms. Dagenais had refused on the grounds that there was no wills search to prove that this was actually Maria's last will, that there was reason to question her mental state since she did not even mention her two daughters, that there was no document on record equivalent to a declaration of transmission of a decedent's property to his heirs (Exhibit P-5) when Irmingard had allegedly added some pages to this document in the context of the trial in Brazil, and that Maria could not have transmitted her copyright to her son because she knew that Oskar Ernst Bernhardt did not want to assign his copyright to anyone.

[105] At the hearing this objection was taken under advisement. Having examined these documents closely and heard the explanations given by the parties, I am now in a position to dismiss the objection for the following reasons. First of all, the [TRANSLATION] "answer" filed as Exhibit P-5 clearly refers to Maria's will dated August 9, 1954. Further, I accept the explanation given by Mr. Oort that this answer confirms an agreement between Alexander and Irmingard on the division of real

property and that its purpose was merely to have that property recorded in the land register. It is only normal, therefore, that no mention was made of any copyright. And lastly, it is not surprising that the Stiftung does not have an original of Maria's will inasmuch as it was not mentioned anywhere in that will. It is quite plausible that the direct heirs were the only persons to have an original of this will.

[106] In a will dated March 20, 1965, Alexander subsequently made his sister Irmingard his sole heir. She thereby inherited the copyright to the work of Oskar Ernst Bernhardt. The plaintiff did not challenge the authenticity of this will.

[107] Irmingard in turn bequeathed her copyright to the books of Oskar Ernst Bernhardt to the Stiftung (Exhibit D-5). In a codicil to her will dated April 18, 1990, one month before her death, she wrote the following (Exhibit D-5):

I bequeath by will the "Stiftung Gralsbotschaft" the condition and oblige the Stiftung, also following expiry of the copyrights, to continue printing and distributing the texts of Abd-ru-shin in their present form, especially his Grail Message "In the Light of the Truth" in the current "last edition", and not to be tempted to incorporate lectures and essays into the publishing programme, which are not contained in this edition of the Grail Message and in the other texts of Abd-ru-shin as they currently exist.

I do however transfer the responsibility to the board of management of the "Stiftung Gralsbotschaft", if it, following careful consideration, deems necessary to publish these lectures and other texts through the Stiftung, also texts which have been previously published, especially with the intention to ward off falsified texts, in a text separate from the Grail Message.

[108] Thus, until 1990 the Stiftung was not the holder of the copyright and published the work of Oskar Ernst Bernhardt under a licence that had been granted to it by Alexander on December 30, 1967 (Exhibit D-6). The first article of this licence agreement reads as follows:

[TRANSLATION] When the Foundation of the Grail Message was created, Maria Bernhardt, as holder of the copyright and the publication rights to the works of Abd-ru-shin and to other works published by it, granted it a licence to translate, print and distribute these works. The drafting of this licence was reserved for the future in order to permit the Foundation to gain experience in the actual use of these rights.

The time has now come to put this licence in writing.

As the present holder of the copyright and publication rights, I therefore propose to the Stiftung Gralsbotschaft of Stuttgart that this licence be put in writing in the form of the following contract:

[109] The French-language rights were excluded from this licence agreement because they had already been granted to the Editions Françaises du Graal. That exception was cancelled by Irmingard in 1969 so that as of that date the Stiftung became the licensee authorized to translate, print and distribute the work of Oskar Ernst Bernhardt in French as well. The history of the copyright and licence for the French edition can be found at Tab 8 of the joint list of admissions.

[110] Ms. Dagenais objected to the filing of these two documents (the licence and its amendment) on the ground that this was not the best evidence because they were not originals, Alexander's signature on these documents was different from the signature found on another document and the copy of the licence certified by a notary was dated 10 years after the original document. I reserved my decision on this objection at the hearing. After examining all of the evidence, I can now dismiss this objection. There is no reason for me to doubt that this is indeed a certified true copy of the original. In any event, the period in question was before the arrival of the books on the Canadian market and in registering their trade-marks the defendants only claimed use in Canada since 1968.

[111] Mr. Oort stressed the fact that for it to become known, the work of Oskar Ernst Bernhardt had to be advertised and marketed. In his opinion this had nothing to do with recruitment, to which the author objected.

[112] Mr. Oort then discussed the various translations of the Grail Message. The first French translation of the 1931 edition was done by Lucien Siffrid. According to Mr. Oort, this first translation, which was completed in 1934, was in Alsatian French, difficult to read and very literal.

[113] Paul Kaufmann was subsequently asked to produce a new translation. On this point the witness adduced several registration certificates from the United States Copyright Office while acknowledging that these certificates could have no legal value in Canada. However, it was argued that they were nevertheless relevant in establishing Mr. Kaufmann's authorship of the translations that were allegedly copied by Mr. Drolet, the connection between Mr. Kaufmann and the Stiftung, and the nature of the work performed by Mr. Kaufmann.

[114] The first three certificates deal with the copyright to the first French translations done by Mr. Kaufmann of the following works: [TRANSLATION] "In the Light of Truth, The Grail Message", volumes I, II and III, as well as [TRANSLATION] "Abd-Ru-Shin, Exhortations" (exhibits D-8 to D-10). The registrations were dated 1956, 1960 and 1962, respectively, and accompanied by renewals dated 1983, 1987 and 1990. On each of the original certificates the names of Oskar Ernst Bernhardt and Paul Kaufmann (as translator) appeared under "Author". The following appeared under the heading "For New Version of Previously Published Book": "This is a complete revision newly translated. New lectures have been added and the whole subject matter has been rearranged in three volumes instead of one. This application is for Volume I [II or III] of these". In the renewals, only the name of Mr. Kaufmann, as translator, appeared under "Author". In the certificate issued in 1973 for the work entitled [TRANSLATION] "Abd-ru-shin, Exhortations", the names of Oskar Ernst Bernhardt and Paul Kaufmann (as translator) appeared under "Author".

[115] Three other certificates were registered in 1986, 1988 and 1989 for each of the three volumes of [TRANSLATION] "In the Light of Truth" (exhibits D-12 to D-14). This time, Irmgard was identified as the author of these works. However, her name was followed by the notation "employer for hire". A headnote reads: "Under the law, the 'author' of a 'work made for hire' is generally the employer not the employee". Mr. Oort testified that Mr. Kaufmann was actually the author of this new translation. Ms. Dagenais objected, claiming that this was hearsay.

[116] In answer to this objection, Mr. Oort produced a translation contract between the Stiftung and Mr. Kaufmann dated July 7, 1969 (Exhibit D-16). The contract includes the following clauses:

[TRANSLATION]

2. Grant of right of use

(1) The Stiftung Gralsbotschaft, as licensee, hereby grants Paul Kaufmann a sub-licence authorizing him to translate into French all of the works of the publisher Alexander Bernhardt mentioned in point 1, the owner of which is Irmgard Bernhardt.

Book printing and distribution rights are expressly excluded from this contract.

(2) The licensee declares that the holder of the copyright of the works mentioned in point 1 approves this sub-licence.

3. Content of the sub-licence

(1) The translation of these works into French must be accurate and free of errors. It must be strictly faithful to the definitive German original and must avoid any change to the structure of the work, the order of the lectures, the paragraphs and all other characteristics of the original works. Mr. Kaufmann will ensure that the translators do not add their own interpretation of the text and adhere closely to the meaning and content of the original.

...

(3) In any case where the translator is of the opinion that, owing to the nature of the French language, an exact translation of the original is impossible and the translation would alter the meaning of the original work, an agreement must be reached with the Stiftung Gralsbotschaft on the translation to be chosen. This also applies in all cases where a direct translation of the original work appears impossible and it is necessary to describe what is said in order to preserve the meaning and content of the original work.

(4) The parties to the contract mutually agree that the translation must not depart from the meaning, style or content of the author's work.

...

(6) Mr. Kaufmann agrees to allow his translation to be checked and, if necessary, to be changed, shortened or completed.

5. Compensation

(1) Mr. Kaufmann waives any right, for himself and his heirs, to compensation for translation or the use of his translation. Mr. Kaufmann will bear the cost of materials needed for the translation work (paper, office supplies, etc.).

(2) Mr. Kaufmann waives any right to have his name mentioned as translator in the books or other reproductions of his translations.

(3) Mr. Kaufmann hereby assigns to the Stiftung Gralsbotschaft all present and future rights in connection with his translation. This assignment is made free of charge.

6. Final clauses

(5) This translation contract with Mr. Kaufmann terminates on his death. Mr. Kaufmann will ensure that all documents resulting from the translation work are given free of charge to the Stiftung Gralsbotschaft by his heir.

[117] It seems to me that this contract fully answers the objection made by Ms. Dagenais. She made another objection, however, arguing that the work submitted with the application for a certificate was not filed in Court and therefore it cannot be presumed that the works mentioned in the certificates correspond to Mr. Kaufmann's translations to which copyright was allegedly infringed by Mr. Drolet.

[118] It is true that Mr. Kaufmann seems to have done several translations of the works of Oskar Ernst Bernhardt. In fact, during his testimony Mr. Oort mentioned that Mr. Kaufmann had done a first translation of [TRANSLATION] "In the Light of Truth" in the 1950s, another one in the 1960s and a last one in the mid-1980s. The first three certificates seem to correspond to the first set of translations while the last three apparently correspond to the last series of translations. The second objection made by Ms. Dagenais must therefore also be dismissed. While some doubt may remain as to the specific version of the translations covered by a certificate of registration in the United States, I consider that the defendants have established that the French translations of the works in issue in this case (that is to say [TRANSLATION] "In the Light of the Truth", volumes I, II and III) were all done by Mr. Kaufmann from 1955 onward.

[119] Mr. Kaufmann died in 1994 (Exhibit D-17). He apparently supervised one last translation done by a man named Ernest Schmidt in the early 1990s. However, only the first volume was completed because Mr. Kaufmann died before Mr. Schmidt had time to work on the second and third volumes.

[120] Mr. Oort then tendered the registration certificate issued under sections 49 [as am. by S.C. 1993, c. 15, s. 4] and 53 [as am. *idem*, s. 5; 1997, c. 24, s. 30] of the *Copyright Act* of Canada for the [TRANSLATION] "French translation of the books Im Lichte der Wahrheit, volumes 1 to 3, and

Ermahnungen (In the Light of Truth, Volumes 1 to 3, and Exhortations)”. It is indicated on the certificate that the translation was first published in France in 1990, that the owner of the copyright is the Stiftung Gralsbotschaft and that the author is Paul André Aloyse Kaufmann. This certificate was issued on January 16, 2008. This was therefore the last French translation done (for volumes I and III) and supervised (for volume I) by Mr. Kaufmann.

[121] Mr. Oort also filed the articles of incorporation of the Stiftung (Exhibit D-19). The logo of the publishing house (the A encircled by a snake) appears on the cover page. The articles of incorporation describe the activities of this organization, which consist essentially in disseminating the writings of Oskar Ernst Bernhardt, as well as other related works.

[122] Mr. Oort then explained his role and that of the Stiftung in Canada. He said that he was in regular contact with the directors of the Foundation in Canada. The Stiftung controls the use of the books in Canada and the organization of lectures, but it is the Foundation of the Grail Movement – Canada that is the official distributor in Canada. The Stiftung also publishes a magazine, *Grail World*, in several languages, a copy of which is at Tab 28 of the joint list of admissions. The magazine promotes the various books published by the Stiftung and the publisher’s logo is found on each one of them. The Stiftung also operates a Web site; its home page is at Exhibit D-29.

[123] Mr. Oort first learned of Mr. Drolet’s book in 2001 from Mr. Thivierge, the president of the Foundation in Canada. He then asked Mr. Thivierge to warn Mr. Drolet that he was using trademarks belonging to the Stiftung. He also learned that Mr. Drolet had used the diskettes given to him by Mr. Thivierge. These diskettes are not official, are not copyrighted and were made by a member without the knowledge or authorization of the Stiftung.

[124] Mr. Oort concluded his testimony by rebutting the plaintiff’s theory that Oskar Ernst Bernhardt could not have intended to change his Message. Specifically, he read an excerpt of a letter sent by Oskar Ernst Bernhardt to a correspondent in Switzerland requesting that as long as the Nazis were in power, one page be removed from the copies of his work so that his Message would be easier to spread and more difficult to attack (joint list of admissions, Tab 20). Even though he believed that it was not up to the Court to decide whether or not the author changed his Message, Mr. Oort nevertheless wanted to make the point that there were two possible versions of the facts. In his opinion, this example showed that Oskar Ernst Bernhardt could indeed have wanted to make changes to his work.

[125] On cross-examination, Mr. Oort admitted that the example of a change made by the author given in the preceding paragraph concerned only the caution page and the author never explicitly said that he would make other changes. However, based on a statement made by the president of the Stiftung in 1998 (Exhibit D-52), he reiterated that Oskar Ernst Bernhardt did indeed make a revised version which is in the Stiftung’s archives, although Mr. Oort admitted that he had neither personally seen it nor done any research to find it.

[126] Counsel for the plaintiff then questioned Mr. Oort about certain American registration certificates for the German version of the book *In the Light of Truth*. In the section for indicating changes made to the previously published version of the book, the following information was entered: “1) Brief alterations in some of the lectures made by the author himself; 2) A new sequence of the lectures; 3) Division of book into three volumes”. When asked whether he had seen the works that should normally have accompanied these applications for registration and that would help to establish that Oskar Ernst Bernhardt did indeed revise his text, Mr. Oort answered again that he had not seen what had been sent with the applications for registration and in any event it was not the Stiftung that made these applications but Maria, who held the copyright at the time.

[127] Mr. Oort also reaffirmed his conviction that Mr. Kaufmann was the author of the translations covered by the American registration certificates. Mr. Oort said that Mr. Kaufmann was not paid for his translation of the work of Oskar Ernst Bernhardt. As mentioned previously, it was Mr. Schmidt

who did the translation beginning in 1990. However, the most recent translation published in January 2008 was done by a team of five people.

[128] Lastly, Mr. Oort reiterated that he did not object to Mr. Drolet publishing the lectures from the original work that were not included in the revised version and in the translation done by Mr. Kaufmann.

- Richard Nagel (expert witness)

[129] Richard Nagel testified as an expert. At Mr. Lauzon's request, Mr. Nagel wrote a report jointly with Irmgard Lochmann. Mr. Nagel holds a bachelor's degree in translation from a German university and is a member of the Ordre des traducteurs, terminologues et interprètes agréés du Québec (OTTIAQ). His main clients are the governments of Quebec and Canada, the Montréal Urban Community and various public and private corporations. Ms. Lochmann also holds a bachelor's degree in translation and is a member of OTTIAQ. Both of them are native German speakers.

[130] Their mandate was to determine whether the books published by Mr. Drolet under the titles *Dans la lumière de la vérité* and *Résonances au message du Graal*, volumes I and II, were at least in part copies of the translations done by Paul Kaufmann and published under the titles *Dans la lumière de la vérité*, volumes I to III and *Exhortations*.

[131] Mr. Nagel explained how they went about performing their task. They took samples from six chapters on the premise that their conclusions concerning those chapters could be extrapolated to all of the other chapters. Based on the six chapters of Mr. Drolet's publications, the corresponding chapters in German written by Oskar Ernst Bernhardt and the translations done by Paul Kaufmann, and using three chapters translated by Mr. Schmidt for comparison, they reached the following conclusions:

[TRANSLATION]

37. Everything in our analysis leads us to believe that Yvon Drolet used Paul Kaufmann's translation to produce his own version. In our opinion, he revised it and then took and incorporated substantial sections of it in his text.

38. Judging from the chapters we compared, it is very likely that any other chapter of the Drolet version with the same degree of similarity is at least a substantial copy of the Kaufmann translation.

39. Furthermore, having compared the Drolet version with the significant differences in style, choice of words and expressions that are found in the Schmidt version, we are all the more convinced that the Drolet version is not an independent translation.

[132] On cross-examination, Mr. Nagel said that he did not know which specific German version he had been given for comparison purposes. He also admitted that frequent reading of a text (for example the French version of the Lord's Prayer) can lead a translator to use the same terms when doing a new translation.

- Serge Thivierge

[133] The defendants' last witness, Serge Thivierge, has been president of the Foundation of the Grail Movement in Canada since 2001. According to the Québec Enterprise Register (joint list of admissions, Tab 1), the Foundation, created in 1973, is incorporated under Part II of the *Canada Corporations Act*. It has approximately 30 members and can count on the support of some 200 volunteers. The Foundation's main role is to spread knowledge of the work of Oskar Ernst Bernhardt. The Foundation has approximately 1 000 members in Canada.

[134] Mr. Thivierge explained that the Foundation was closely connected with the Stiftung and distributed only its books. These books are sold to libraries and bookstores and are distributed

through seminars, at book fairs and on the Internet. He said that approximately 15 000 copies of the first three volumes of the work of Oskar Ernst Bernhardt (the subject of this case) had been sold in Canada since the creation of the Foundation.

[135] Mr. Thivierge then filed the first pages of the four books published by the Éditions Françaises du Graal in Strasbourg (Exhibit D-21). These four volumes are titled, respectively: *Dans la lumière de la vérité – Message du Graal* volumes I, II and III, and *Exhortations*. The first and last volumes, published respectively in 1986 and 1973, show the copyright as belonging to Irmingard Bernhardt, while the second and third, published in 1990, mention that the Stiftung is the owner of the copyright. All of them are marked [TRANSLATION] “Sole Authorized Edition”.

[136] Mr. Thivierge then referred to the various catalogues of Grail publications in different languages found at tabs 24, 25 and 26 of the joint list of admissions. He drew the Court’s attention to the fact that the publisher’s logo appears in each one of those brochures.

[137] Mr. Thivierge also filed a certain number of exhibits to illustrate the activities of the Foundation in Canada (joint list of admissions, tabs 24–71). They included a newsletter of Grail publications, *Grail World* magazine published by Éditions Françaises du Graal and distributed in Canada by the Foundation, the Foundation’s Internet portal, copies of invoices for the rental of halls and space at book fairs, and copies of invoices for advertising in various media, displays, posters, etc.

[138] Mr. Thivierge then tendered the French translation of the so-called final version published by the Stiftung, taking care to rearrange the chapters so that the order in which they appear is the same as in Mr. Drolet’s work. The passages that were changed in Mr. Drolet’s work were highlighted in yellow, while the passages that did not appear in Mr. Drolet’s work were highlighted in green, and a blue line indicated where Mr. Drolet made additions (Exhibit D-41). The witness noted that there were few differences between the two versions, except possibly in the very first chapters. However, Ms. Dagenais argued that this visual presentation did not give a true indication of the extent of the work performed by Mr. Drolet inasmuch as a simple blue line could represent the addition of several paragraphs.

[139] Mr. Thivierge also filed copies of trade-mark registrations for the title of a work and the name of a historical figure. In one, LES MISÉRABLES was registered as a trade-mark in connection with “theatrical and show business services” (Exhibit D-42). In the other, the words LORD GOD jESUS & design were trade-marked in connection with clothing and accessories for men, women and children (Exhibit D-43).

[140] On cross-examination, Mr. Thivierge acknowledged that a search in the trade-mark database of the Canadian Intellectual Property Office did not yield any registration for the name “Mahomet” (“Mohammed”) or for the various French spellings of “Buddha”: “Bouddha”, “Boudha” and “Boudda” (exhibits P-57 to P-60).

[141] Mr. Thivierge said that the great majority of followers of the Grail Message were in Quebec (out of 1 000 followers in Canada, approximately 800 live in Quebec). The Foundation organizes some 50 lectures annually in Quebec and sells approximately 250 copies of the Message, mostly in French.

[142] Mr. Thivierge added that the Foundation also sold a book entitled *Bouddha*, for which however it had not registered a trade-mark. If trade-marks were registered for the titles and author’s name in issue here, it was to protect the container and not the content. Mr. Thivierge acknowledged that the original version of the books in issue is now part of the public domain. However, the aim was to avoid confusion with other publications on which the author’s name, the titles of his books and the logo he used might appear. The trade-marks were therefore intended, according to Mr. Thivierge, to protect the use of the author’s name, the titles and the logo and not to secure a monopoly on the Message itself.

[143] Mr. Thivierge also reiterated that the 1931 edition had never been hidden and that the Message disseminated by the Foundation was based on changes made to the original work by the author himself.

[144] A long discussion ensued about the existence of the famous version of his work allegedly revised by the author himself. As he did during his examination for discovery, Mr. Thivierge objected to this question on the ground that it was not relevant to the case, and this objection was not challenged. Ms. Dagenais' request to see this document was therefore never granted. Like Mr. Oort before him, Mr. Thivierge mentioned that neither the Stiftung nor the Foundation had a copy of this document and that he did not know where it was. At the same time he admitted that a number of people dispute the fact that Oskar Ernst Bernhardt personally made changes to his work before he died.

[145] Mr. Thivierge said that he did not see any significant difference in terms of content between the work published by Mr. Drolet and the version distributed by the Stiftung and the Foundation, despite the many differences in form between them. He acknowledged that Mr. Drolet's work contained 14 lectures and approximately 340 pages that were no longer found in the work distributed by the Stiftung. He also admitted that the order of presentation was not the same in Mr. Drolet's work as in the Stiftung's version. However, he reiterated that this was not relevant in that, for the purposes of this dispute, Mr. Drolet's work must be compared with the translation done by Mr. Kaufmann. Any additions that Mr. Drolet may have made to this translation, based on the original text of 1931, are not in issue here. This applies, for example, to the 13 or 14 essays from the 1931 edition that Mr. Drolet reproduced in his book but that are not found in the final version distributed by the Stiftung.

ANALYSIS

I – Trade-marks

[146] It has been said that the aim of trade-marks is to strike a balance between free competition and fair competition. Indeed, trade-marks serve two purposes: they allow a merchant to protect the public awareness and reputation he acquires in marketing his products and services and at the same time they give consumers valuable information on the quality and provenance of what they are buying. In a world in which supply is increasingly varied, trade-marks are a kind of shortcut for consumers allowing them to choose the goods and services they are seeking on the basis of their past experience.

[147] The definition of "trade-mark" in the *Trade-marks Act* confirms that the distinctive nature of a trade-mark is its rationale and essential characteristic. Thus, as the case may be:

2. ...

"trade-mark" means

- (a) a mark that is used by a person for the purpose of distinguishing or so as to distinguish wares or services manufactured, sold, leased, hired or performed by him from those manufactured, sold, leased, hired or performed by others,
- (b) a certification mark,
- (c) a distinguishing guise, or
- (d) a proposed trade-mark;

[148] In fact, it may not be an exaggeration to say that the legal rules governing trade-marks are to some extent a form of consumer protection. By granting a merchant a monopoly on the use of a sign, a symbol or words, they also allow buyers in a hurry to associate a product with a manufacturer and therefore make their buying decisions easier by helping them to identify the origin of a product or service. The Supreme Court has summarized the essence of trade-marks in the following terms (*Mattel, Inc. v. 3894207 Canada Inc.*, 2006 SCC 22, [2006] 1 S.C.R. 772, at paragraph 21)

Trade-marks are something of an anomaly in intellectual property law. Unlike the patent owner or the copyright owner, the owner of a trade-mark is not required to provide the public with some ~~new~~ benefit in exchange for the monopoly. Here, the trade-mark is not even an invented word like “Kodak” or “Kleenex”. The appellant has merely appropriated a common child’s diminutive for Barbara. By contrast, a patentee must invent something new and useful. To obtain copyright, a person must add some expressive work to the human repertoire. In each case, the public through Parliament has decided it is worth encouraging such inventions and fostering new expression in exchange for a statutory monopoly (i.e. preventing anyone else from practising the invention or exploiting the copyrighted expression without permission). The trade-mark owner, by contrast, may simply have used a common name as its “mark” to differentiate its wares from those of its competitors. Its claim to monopoly rests not on conferring a benefit on the public in the sense of patents or copyrights but on serving an important public interest in assuring consumers that they are buying from the source from whom they think they are buying and receiving the quality which they associate with that particular trade-mark. Trade-marks thus operate as a kind of shortcut to get consumers to where they want to go and in that way perform a key function in a market economy. Trade-mark law rests on principles of fair dealing. It is sometimes said to hold the balance between free competition and fair competition.

[149] However, Parliament has set certain limits on what can be registered as a trade-mark. Of course, it is not absolutely necessary to register a mark with the Registrar of Trade-marks to be able to use it. However, the regulatory scheme enacted by Parliament offers the owner of a registered trade-mark (that is to say, a trade-mark that is in the register) more effective rights against third parties and makes it easier to prove ownership. The registration of a trade-mark gives the owner the exclusive right to use it anywhere in Canada (section 19) and to obtain relief by way of injunction or by the recovery of damages or profits (section 53) [as enacted by S.C. 1993, c. 44, s. 234].

[150] To be registrable, a trade-mark must obviously be distinctive. This is the very essence of a “trade-mark” as defined in section 2 of the Act. Moreover, the trade-mark must not fall under one of the exceptions provided for in section 12 [as am. by S.C. 1990, c. 20, s. 81; 1993, c. 15, s. 59(F); 1994, c. 47, s. 193; 2007, c. 25, s. 12] of the Act. This provision reads as follows:

12. (1) Subject to section 13, a trade-mark is registrable if it is not

(a) a word that is primarily merely the name or the surname of an individual who is living or has died within the preceding thirty years;

(b) whether depicted, written or sounded, either clearly descriptive or deceptively misdescriptive in the English or French language of the character or quality of the wares or services in association with which it is used or proposed to be used or of the conditions of or the persons employed in their production or of their place of origin;

(c) the name in any language of any of the wares or services in connection with which it is used or proposed to be used;

(d) confusing with a registered trade-mark;

(e) a mark of which the adoption is prohibited by section 9 or 10;

(f) a denomination the adoption of which is prohibited by section 10.1;

(g) in whole or in part a protected geographical indication, where the trade-mark is to be registered in association with a wine not originating in a territory indicated by the geographical indication;

(h) in whole or in part a protected geographical indication, where the trade-mark is to be registered in association with a spirit not originating in a territory indicated by the geographical indication; and

(i) subject to subsection 3(3) and paragraph 3(4)(a) of the *Olympic and Paralympic Marks Act*, a mark the adoption of which is prohibited by subsection 3(1) of that Act.

(2) A trade-mark that is not registrable by reason of paragraph (1)(a) or (b) is registrable if it has been so used in Canada by the applicant or his predecessor in title as to have become distinctive at the date of filing an application for its registration.

[151] In the case at bar, the plaintiff submitted that the trade-marks registered by the defendants are not distinctive of the wares sold and on the contrary are descriptive of those wares. The plaintiff also alleged that the trade-marks in issue infringe paragraph 13(1)(b) of the *Act* inasmuch as they unreasonably restrict the development of an art and thereby infringe the plaintiff's right to freedom of belief and expression, contrary to section 2 of the *Canadian Charter of Rights and Freedoms*, section 3 of the *Quebec Charter of human rights and freedoms* and articles 18 and 19 of the *International Covenant on Civil and Political Rights*. These last provisions read as follows:

ARTICLE 18

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

ARTICLE 19

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

[52] These are complex issues that appear not to have come before Canadian courts until now. On the other hand, the registrability of the name of an author and the title of a work has been considered by foreign courts, notably in the United States. Although the solutions found abroad are not binding on this Court, they may be of considerable help in the analysis of the respective claims of the two parties.

[153] Before going any further, it is important to underline the fact that the defendants' registered trade-marks are presumed to be valid and that the onus is therefore on the plaintiff to show the contrary. Under section 19 of the Act, the registration of a trade-mark gives rise to a presumption of validity. As Justice Joyal wrote in *Santana Jeans Ltd. v. Manager Clothing Inc.* (1993), 52 C.P.R. (3d) 472 (F.C.T.D.), at page 475:

The second issue to consider is the validity of the respondent's registered trade mark. The onus to prove such invalidity is on the applicant. In *California Fashion Industries, Inc. v. Reitmans (Canada) Ltd.* (1990), 38 C.P.R. 439 (F.C.T.D.) at p. 443..., Cullen J. stated that:

... registration of a trademark confers certain rights and benefits to the owner, including prima facie proof of these rights and ownership of the trademark. Thus, when a trademark is registered there is a presumption of validity and therefore the party seeking the expungement of the trademark has the onus of proving its invalidity.

The applicant set itself to prove that the said stitch belongs to the public domain, that it was not or is not distinctive from any other goods bearing the same stitch, and that it served and still serves a functional purpose in that it is decorative. The burden on the applicant is heavy:

... a decision from such an expert official as the Registrar of Trade Marks ought not to be disturbed lightly. The onus on the appellant is heavy. He must show that the decision of the Registrar is so wrong as to warrant interference by this Court.

(*I.V.G. Rubber Canada Ltd. v. Goodall Rubber* (1980), 48 C.P.R. (2d) 269 at p. 270, [1981] 1 F.C. 143 (F.C.T.D.), per Dubé J.).

See also: *Unitel Communications Inc. v. Bell Canada* (1995), 61 C.P.R. (3d) 12 (F.C.T.D.), at page 27; *WCC Containers Sales Ltd. v. Haul-All Equipment Ltd.*, 2003 FC 962, 28 C.P.R. (4th) 175, at paragraph 15; *Hughes on Trade Marks*, loose-leaf Toronto: Butterworths, 1984, page 556.

[154] That said, the Federal Court of Appeal recently made it clear that this presumption was weak. A party seeking to have a trade-mark expunged from the register must at most submit evidence showing that the trade-mark was not registrable: see *Emall.ca Inc. v. Cheaptickets and Travel Inc.*, 2008 FCA 50, [2009] 2 F.C.R. 43, at paragraphs 10–12.

[155] Let us first consider the registered trade-mark ABD-RU-SHIN. Under paragraph 12(1)(a) of the Act, a trade-mark cannot be registered if it is a word that is primarily merely the name or the surname of an individual who is living or has died within the preceding 30 years. The plaintiff claimed that this provision applied here because Abd-ru-shin was the name of the author of the Grail Message. I cannot accept this argument.

[156] During the oral submissions, vague reference was made to the origin of the word Abd-ru-shin, which was apparently an Arabic or Persian expression meaning [TRANSLATION] "son of the Holy Spirit" or [TRANSLATION] "servant of light". Whatever the precise historical origin of this name, the evidence shows that the author Oskar Ernst Bernhardt used it as a pen name for his various works. Therefore, it is not a name or a surname.

[157] Even supposing that a pen name may be likened to a name for the purposes of paragraph 12(1)(a), the legal effects of this provision ended in 1971, that is to say, 30 years after the death of Oskar Ernst Bernhardt.

[158] Finally, under paragraph 12(1)(a) of the *Trade-marks Act* a trade-mark cannot consist "primarily" of merely the name or the surname of an individual who is living or has died within the preceding 30 years. The applicable test is therefore to ask if a person living in Canada, of average intelligence and having a standard education in English or in French, would react to the trade-mark by thinking mainly of a name or a surname: see *Registrar of Trade Marks v. Coles Book Stores Ltd.*, [1974] S.C.R. 438; *Galanos v. Registrar of Trade Marks* (1982), 69 C.P.R. (2d) 144 (F.C.T.D.).

[159] This test was subsequently modified slightly, not to change its substance but only to split the analysis into two steps: *Gerhard Horn Investments Ltd. v. Registrar of Trade Marks*, [1983] 2 F.C. 878 (T.D.). Accordingly, it must first be determined whether the word for which an application for registration is made corresponds to the name or surname of a living person or a person who has died recently. If this preliminary condition is met, it must be determined whether the proposed trade-mark is “primarily merely” a name or a surname.

[160] In this case it is obvious to me that the word “Abd-ru-shin” is not the name or surname of a living person or of someone who has died recently. Even though no evidence was adduced on this point, it is clearly not a name likely to be found in a telephone directory in Canada. It is therefore not even necessary to ask whether a person of average intelligence would assume that this was primarily a person’s surname. For these reasons, I am of the opinion that the word “Abd-ru-shin” was registrable.

[161] Now, what about the A & SERPENT DESSIN logo? The plaintiff alleged that this logo could not belong to a single organization because it was a symbol shared by the cross-bearers or followers of the Grail Message. According to Mr. Drolet and the witnesses who testified in support of his claim, use of this logo was scandalous, shocking and misleading to followers. They said this was so because this logo represented the quest for the infinite and was sacred to those who believed in the Grail Message, just as the cross was to Christians and the menorah to Jews.

[162] Without denying the spiritual value of the logo, the defendants submitted that it was the distinctive sign of their publishing house and that they used it on all of their business stationery. In fact, they claimed, this was the same logo that was used in the 1930s in Austria and Germany by Oskar Ernst Bernhardt’s publishing firm, Der Ruf.

[163] The plaintiff relied heavily on this Court’s decision in *Canadian Jewish Congress v. Chosen People Ministries, Inc.*, 2002 FCT 613, [2003] 1 F.C. 29, affirmed by the Federal Court of Appeal at 2003 FCA 272, 213 D.L.R. (4th) 309. In that case, Justice Blais found that the Registrar of Trade-marks had erred in giving public notice of the adoption and use of a menorah design as an official mark by the respondent, Chosen People Ministries, under subparagraph 9(1)(n)(iii) of the *Trade-marks Act*. An official mark grants extraordinary protection to its holder because he obtains exclusive use of it that, unlike a trade-mark, is not tied to specific wares or services, and all others are prohibited from adopting a mark that resembles it. On application for judicial review, Justice Blais set aside the Registrar’s decision because the respondent was not a public authority and could therefore not be granted an official mark.

[164] It is true that in what appears to be an *obiter*, Justice Blais went on to say that the menorah has been an official emblem of the Jewish faith and its people since Antiquity and that “[i]t would be counterproductive to prohibit Jewish organizations and associations from using and adopting a mark such as the menorah, since it has always been historically associated with the Jewish culture” (at paragraph 64). The plaintiff cited this *obiter* to argue that the defendants cannot appropriate the A & SERPENT DESSIN logo through a trade-mark. However, this reasoning strikes me as faulty for several reasons.

[165] First of all it is important to underline the fact that the legal rules applying to official marks are different from those applying to trade-marks. It is not necessary for an applicant to demonstrate the distinctiveness of a proposed official mark or to establish any secondary meaning, and there is no requirement that public notice be given of a request to the Registrar. The main requirement is that the applicant be recognized as a “public authority”, which is why Justice Blais devoted the major part of his reasons to this point. Therefore, the fact that it is futile to prohibit use of the menorah cannot be considered a basis of his decision and the Federal Court of Appeal actually made no mention of that point in its judgment. It chose rather to affirm Justice Blais’ decision on the limited ground that the Chosen People Ministries could not be considered a public authority.

[166] Moreover, I do not see how the A & SERPENT DESSIN logo could be compared to the menorah. While it may hold significant spiritual value for the followers of the Grail Message, which is not in issue here, the evidence did not satisfy me that it enjoys the same universal and historical recognition as the official emblem of the Grail Movement as does the menorah for the Jewish community. Nor am I satisfied that the use of this logo would be obscene, scandalous or immoral within the meaning of paragraph 9(1)(j) of the *Trade-marks Act*, even if it may outrage those who, like Mr. Drolet, believe that the defendants are not spreading the original message of Oskar Ernst Bernhardt. For these reasons, I am of the opinion that the A & SERPENT DESSIN trade-mark was registrable.

[167] We must now deal with the title IN THE LIGHT OF TRUTH in its French, English and German versions. It was mainly the registrability of these three trade-marks that the plaintiff challenged, alleging that they were not distinctive, that they were descriptive, that they were deceptively misdescriptive and that they limited the development of an art industry. I will now examine each of these arguments.

[168] The very essence of a trade-mark is to be distinctive. This is in fact the basic reason for Parliament's decision to protect trade-marks and it is not surprising that the definition of "trade-mark" in section 2 of the Act stresses this characteristic. The first paragraph of that definition specifies that it is "a mark that is used by a person for the purpose of distinguishing or so as to distinguish wares or services manufactured, sold, leased, hired or performed by him from those manufactured, sold, leased, hired or performed by others". The same section also defines a "distinctive" trade-mark as one "that actually distinguishes the wares or services in association with which it is used by its owner from the wares or services of others or is adapted so to distinguish them".

[169] To be distinctive, a trade-mark must meet three tests: (1) the trade-mark must be associated with a product; (2) the owner must use this association between the trade-mark and his product and sell this product or service; and (3) this association must allow the owner of the trade-mark to distinguish his product from those of other owners: see *Philip Morris Inc. v. Imperial Tobacco Ltd.* (1985), 7 C.P.R. (3d) 254 (F.C.T.D.). It is in relation to the Canadian market that these three tests must be applied: see *Tommy Hilfiger Licensing Inc. v. Produits de Qualité I.M.D. Inc.*, 2005 FC 10, 37 C.P.R. (4th) 1.

[170] The courts have held that the distinctiveness of a trade-mark can be inherent or acquired. A trade-mark is inherently distinctive when it does not refer consumers to a multitude of possible sources but only to one. This is the case, for instance, when the trade-mark is a fictitious and invented name. However, a trade-mark may also acquire a distinctiveness it initially lacked as a result of continual use. This Court addressed this possibility in *Tommy Hilfiger Licensing Inc.*, above, at paragraph 53:

There are two types of distinctiveness: inherent distinctiveness and acquired distinctiveness. A mark is distinctive when nothing about it refers the customers to a multitude of sources. Consequently, when a mark is a unique or invented name, such that it could only refer to one thing, it is possible to conclude that it is inherently distinctive. When a trade-mark does not have inherent distinctiveness, it may still acquire distinctiveness through continual use in the marketplace. However, to establish that distinctiveness has been acquired, it must be shown that the mark has become known to consumers as originating from one particular source.

See also: *Community Credit Union Ltd. v. Canada (Registrar of Trade-marks)*, 2006 FC 1119, 53 C.P.R. (4th) 296; *Cross-Canada Auto Body Supply (Windsor) Ltd. v. Hyundai Auto Canada*, 2007 FC 580, 60 C.P.R. (4th) 406, affirmed at 2008 FCA 98, 65 C.P.R. (4th) 121. See also *Hughes on Trade Marks*, 2nd ed., loose-leaf, Markham: LexisNexis Canada Inc., 2005, at page 649.

[171] The title of a work can certainly not be considered inherently distinctive and can therefore only have acquired distinctiveness through its use and the connection that consumers have come to make between this trade-mark and the work published and distributed by the defendants. In her

written and oral submissions, counsel for the plaintiff argued at length that there could be no confusion between the book that Mr. Drolet published and the works of the defendants in view of the differences in their covers and content. It seems to me that this argument must be considered in terms of a trade-mark infringement and not at the preliminary stage of trade-mark registrability.

[172] The plaintiff also submitted that the title “In the Light of Truth” could not be considered distinctive inasmuch as it was not original. Not only was it used by Oskar Ernst Bernhardt personally in connection with his work, but these words would be found in all literature of the same type. On this point, counsel for the plaintiff referred to certain excerpts from the Bible in which light and truth are associated. Therefore, she argued, the trade-mark IN THE LIGHT OF TRUTH is not distinctive but rather generic, having regard to the vagueness of the words and their frequent use.

[173] Relying on paragraph 12(1)(b) of the Act, the plaintiff also submitted that far from being distinctive, the title was descriptive of the content of the book published by the Stiftung. However, not much was said about the information conveyed by this title, except to assert that it told the reader that the book was about the truth and origin of creation.

[174] The case law has developed a certain number of principles concerning the descriptiveness of a trade-mark. First of all, it is the first impression that determines whether a trade-mark is clearly descriptive. Secondly, the adverb “clearly” used in paragraph 12(1)(b) of the Act is not tautological; it is not necessary for the description to be precise, but it must be “easy to understand, self-evident or plain”. And lastly, it is not necessary to conduct a detailed and critical examination of the words used to determine if they have other connotations, alone or when used in connection with certain wares, in order to determine whether a trade-mark is descriptive. It is more important to determine what meaning the general public may ascribe to those words in the context in which they are used: *GWG Ltd. v. Registrar of Trade Marks* (1981), 55 C.P.R. (2d) 1 (F.C.T.D.), at pages 2–3; *Labatt (John) Ltd. v. Carling Breweries Ltd.* (1974), 18 C.P.R. (2d) 15 (F.C.T.D.), at page 19; *American Home Products Corp. v. Drackett Co. of Canada Ltd., The*, [1968] 2 Ex. C.R. 89.

[175] The expression “In the Light of Truth” definitely has a Christian religious connotation. Anyone vaguely familiar with the Bible can easily draw that conclusion. Despite the absence of any evidence in this regard, it is reasonable to believe that the average consumer who sees this title on a publication will associate it with a religious, philosophical or at least esoteric work. But is this information in itself or together with the name “ABD-RU-SHIN” and the “A & SERPENT DESSIN” logo sufficient to conclude that the trade-mark is descriptive? I do not believe so.

[176] The general scope of paragraph 12(1)(b) of the Act has been summarized by the authors Gill and Jolliffe in the following terms:

There is no prohibition contained in s. 12 against trade-marks that are descriptive or suggestive. The wording of s. 12(1)(b) contemplates the acceptance to some descriptive connotation.... The only prohibition is against trade-marks that are “clearly” descriptive or “clearly” deceptively misdescriptive.

...

To be descriptive a word must be descriptive of the character or quality of the wares or services in association with which it is used and not merely some collateral feature. Thus, where the Registrar objected to registration of the word “Gro-Pup” as applied to dog food on the ground of descriptiveness, Angers J. allowed the application to proceed, observing, “I do not think that the word Gro-Pup is descriptive of the article to which it is to be applied, namely, dog food; it is at the utmost suggestive of the result which it is liable to produce.

...

In order to run afoul of s. 12(1)(b) the mark must be “clearly” descriptive or “clearly” misdescriptive. The word “clearly” was introduced into s. 12(1)(b) to preserve the registrability of suggestive trade-marks. The word “clearly” means “self-evident, plain, easy to understand” rather than “accurate”. It is the first impression of the

mark as a whole that must be analysed and the mark must not be dissected into its component parts. The impression is to be evaluated from the point of view of the ordinary everyday purchaser or user of the wares or services. [Footnotes omitted.]

Gill and Jolliffe, *Fox on Canadian Law of Trade-marks and Unfair Competition*, 4th ed., loose-leaf, Carswell: Toronto, 2007, at pages 5-24, 5-25, 5-26.

[177] The plaintiff had the onus of proving that the trade-mark IN THE LIGHT OF TRUTH gives a clear description of the nature or quality of the book published and distributed by the defendants. However, no attempt was even made to adduce such evidence, by way of a survey or otherwise. The case law on this point shows that the title of a publication must do more than evoke an idea or refer vaguely to a philosophy or doctrine for it to be concluded that it clearly describes that publication. It may well be that the “Grail Message”, the more generic name of Oskar Ernst Bernhardt’s major work, may be considered sufficiently descriptive to infringe paragraph 12(1)(b) of the Act, but this is not the issue here. The Stiftung chose to adopt IN THE LIGHT OF TRUTH as the trade-mark in Canada to identify, *inter alia*, some of its publications, including part of its edition of the *Grail Message* (the book entitled *Exhortations* completes the *Grail Message* but is not identified by the trade-mark IN THE LIGHT OF TRUTH).

[178] In my opinion, *Association of Professional Engineers of the Province of Ontario v. Registrar of Trade Marks*, [1959] Ex. C.R. 354, gives a good illustration of the type of title that cannot be registered as a trade-mark because it is descriptive within the meaning of [what is now] paragraph 12(1)(b) of the Act. In that case the plaintiffs challenged the registration of the trade-mark “Finishing Engineer”, used as the title of a periodical. After reviewing the relevant case law, Justice Fournier found that these words were clearly descriptive because they necessarily referred to the nature of the periodical. In addition, the registration of these words would have prevented anyone who wanted to publish a book or magazine on the same subject from using a variation of these words as a title. The following passage summarizes the Judge’s reasoning [at page 362]:

In the present instance the trade mark “Finishing Engineer”, at the date of the application for registration, comprised two English words used to describe persons who were trained and engaged in the engineering field and specialized in the finishing arts. The use of these two words as the title of a publication is sufficient to impart the knowledge that it will contain ideas, data, information to executives and engineers to whom new methods and new materials for finishing are of interest. In other words, “Finishing Engineer” describes clearly one who deals with the science of engineering and the finishing arts. That is exactly what the publication does. It is not distinctive of the applicant’s publication but a clear description of its contents. Grammatically and in ordinary language, the use of these two words as the title of a periodical call immediately to my mind (and, I believe, to the mind of those who read them) the quality or character of the publication. I do not see any other purpose for which the words could be used of any other significance which could be attached to them.

See also, similarly, *Mannison v. Sir Isaac Pitman & Sons Ltd.* (1930), 47 R.P.C. 541 (Ch. D.), in which the Court found that the trade-mark “How to Appeal Against your Rates” used as the title of a book was descriptive. Also: *Canadian Jewish Review Ltd. v. Registrar of Trade Marks* (1961), 37 C.P.R. 89 (Ex. Ct.)

[179] It seems obvious to me that the title *In the Light of Truth* has nothing in common with the types of titles that the courts have found to be descriptive. First of all, this title strikes me as much less explicit and it conveys much less information than the titles for which trade-mark registration was refused. It is indeed difficult to argue that the average consumer will see in this title a clear indication of the content of the work and that there can be no ambiguity regarding not only the type of book in question, but also its content. Moreover, the trade-mark in issue here does not have the generic quality of the expressions that have been deemed unregistrable in the past.

[180] That said, I am nevertheless of the opinion that the title of a literary work is inherently descriptive not because it conveys information on the content of the work but because it is the only way to identify the book in question. Thus the title cannot be dissociated from the work itself. Indeed, how could a publishing house identify a book it publishes other than by its title?

[181] For precisely that reason, U.S. courts have long held that the title of a book cannot be registered as a trade-mark. In one of the first decisions on this issue, the Court of Customs and Patent Appeals found in *In re Cooper*, 254 F.2d 611 (1958), that the title of a book cannot be used as a trade-mark because it is the only way to identify the book. In an article published in 2004 (“Single Literary Titles and Federal Trademark Protection: The Anomaly between the USPTO and Case Law Precedents” (2004), 45 *Idea* 77, at page 86), Professor James E. Harper summarized the Court’s reasoning as follows:

The petitioner claimed the PTO examiner erred in its finding that a title of a book cannot function as a mark because there is no other way of asking for the book. Comparing a request for the book TEENY-BIG to a request for SUNKIST oranges, the petitioner argued single titles are capable of functioning as trademarks to differentiate among the millions of books, just as brand names such as SUNKIST differentiate between the various brands of oranges. Dismissing that argument, the Court held the petitioner’s analogy was erroneous. The Court reasoned that a request for one book out of millions is more like a request for one type of food rather than a request for a specific brand of one particular type of food. In the Court’s opinion, the more accurate analogy would involve someone asking for food, and in response to the question “What kind of food?” saying, “A can of chicken noodle soup.” The Court went on to say that titles of single literary works, no matter how arbitrary, novel or nondescriptive of a book’s contents the title may be, still describe the book. “How else would you describe it—what else would you call it? If the name or title of a book were not available as a description of it, an effort to denote the book would sound like the playing of the game ‘Twenty Questions.’” [Footnotes omitted.]

[182] This decision was subsequently upheld on many occasions: see J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition*, Vol. 2, Chapter 10 (4th ed., loose-leaf, St Paul, Minn.: West, 1998). At most the owner of the title of a literary work can bring an action in unfair competition if he can establish that the use of the same title by someone else is likely to create confusion, provided of course that he can prove that the original title has acquired a secondary meaning. Although it has been criticized in some circles, this approach continues to be favoured by U.S. courts as in, *inter alia*, the decision of the United States Court of Appeals, Federal Circuit in *Herbko International, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156 (Fed. Cir. 2002). The witness Michael Oort, director of the Siftung, testified that Canada was in fact the only country in which the defendant had succeeded in registering its trade-marks.

[183] Counsel for the defendants submitted that no legal principle prohibited the adoption and registration of the title of a written publication as a trade-mark. As proof of this he pointed to the fact that Parliament specifically provided for this possibility in the definition of “wares” in section 2 of the *Trade-marks Act*, which states that “‘wares’ includes printed publications.”

[184] This argument calls for a number of comments. First, I have to say that the parties did not submit any judgment bearing on this issue and I did not find any myself. Furthermore, the words “printed publications” (“*publications imprimées*” in the French version) are quite vague at best and this provision was not really discussed much when it was added to the *Trade Marks Act* in 1953 (S.C. 1952-53, c. 49 [paragraph 2(w)]). It can of course be argued that a book is a printed publication in the broad sense of the term. However, it seems that this amendment was made to counter the case law under which a newspaper could not be considered a “manufactured object, product or article” within the meaning of the *Trade-marks and Design Act*, R.S.C. 1927, c. 201 (see Gill and Jolliffe, *Fox on Canadian Law of Trade-marks and Unfair Competition*, 4th ed., loose-leaf, at page 4-51). The title of a magazine, newspaper or circular has very little to do with the title of a literary work, however, if only because the title of a periodical shows that each issue is from the same source. As already pointed out, that is the fundamental purpose of a trade-mark.

[185] Even supposing that a book may be considered a “printed publication”, the title for which trade-mark registration is sought must meet the requirements of the Act, and specifically section 12. For the reasons given above, I find that the title of a book is inherently descriptive to the extent that it is the most certain way of identifying it. Therefore, the fact that a book may be considered a ware is not sufficient for its title to be considered a registrable trade-mark.

[186] To these arguments against the right to register a trade-mark for the title of a literary work must be added a third, which is that trade-marks cannot defeat or circumvent the provisions of the *Copyright Act*. Under section 6 of this Act, copyright subsists for “the life of the author, the remainder of the calendar year in which the author dies, and a period of fifty years following the end of that calendar year.” When it lapses, the work covered by the copyright becomes part of the public domain and anyone may do what was previously reserved for the owner of the copyright, including reproduce the work in whole or in part. Allowing a person to register a trade-mark for the title of such a work would in effect defeat Parliament’s intention to make a work that has passed into the public domain available to the general public so that anyone may make use of it, base other works on it and even alter it as they see fit.

[187] The plaintiff submitted at length that his right to freedom of expression, as protected by the Canadian and Quebec charters of rights and freedoms and by international conventions, supported his argument based on the expiry of the copyright. I do not think it is necessary to cite fundamental rights to resolve this dispute. The Court must avoid dealing with such a complex issue when it is not absolutely necessary in order to make a determination in the case at bar, especially when the issue was not fully argued by the parties with supporting evidence. I would note also that this Court has already found that the purpose or effect of the *Copyright Act* is not to restrict freedom of expression and that any restrictions it may include are reasonable limits in a free and democratic society: see *Compagnie Générale des Établissements Michelin—Michelin & Cie v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada)*, [1997] 2 F.C. 306 (T.D.).

[188] That said, I agree with the plaintiff when he submits that the *Trade-marks Act* must not be used to thwart and skirt the provisions of the *Copyright Act*. From the moment copyright lapses, any person is entitled to reproduce the work that has entered the public domain, including its title. Parliament’s intention cannot have been to indirectly broaden the scope of copyright by allowing someone to appropriate the title of a work. How would it be possible to market a book without referring to its title? Such a result strikes me as absurd, and the U.S. Federal Court reached the same conclusion in *Herbko International, Inc.*, above, when it dealt with the same problem and wrote (at paragraph 20):

Even when a title bears little or no relation to the book contents, however, another reason forecloses trademark rights in the title to a single book, at least beyond expiration of the book’s copyright. That reason results from the interplay between copyright and trademark law. Specifically, while trademarks endure as long as the mark is used, copyrights eventually expire. Upon expiration of the copyright, others have the right to reproduce the literary work and to use the title to identify the work.... For example, once the copyright to *Gone with the Wind* expires, a variety of publishers may wish to market copies of the work. A trademark in the title to this single book would compromise the policy of unrestricted use after expiration of the copyright because a book with a trademarked title, of course, could be published only under a different title. *Gone with the Wind* would perhaps become *That Book About Scarlett O’Hara and Rhett Butler* or *My Life With Tara, 1864*. The policy against proprietary rights in the titles to single books therefore finds additional support in the interface with copyright law.

See also, *Comedy III Productions, Inc. v. New Line Cinema*, 200 F.3d 593 (9th Cir. 2000).

[189] For these reasons, I am of the opinion that the trade-mark DANS LA LUMIÈRE DE LA VÉRITÉ (and its English and German equivalents) is not valid. The defendants submitted that they had registered their trade-marks so that consumers could recognize the quality of the translations they published and distinguish them from the other versions that might be on the market. This argument is not sufficient to make a trade-mark registrable under the Act. In any event, there are other means for the defendants to achieve their objective. The Stiftung could first of all advise potential readers of the quality of its translation by a note on the cover page. It could also achieve its aim through advertising so that consumers would associate the Stiftung with a certain level of quality. And lastly, the defendants could bring an action in unfair competition under Article 1457 of the *Civil Code of Québec* [S.Q. 1991, c. 64] or “passing off” as (partly) codified by section 7 of the *Trade-marks Act*. Although the underlying requirements for such a remedy are much more stringent than those for

succeeding in an action in trade-mark infringement, they are not impossible to meet and do not leave the defendants in a position of utter vulnerability.

[190] I will now deal with the defendant's allegations concerning infringement of its trade-marks, including both those that were validly registered (ABD-RU-SHIN and A & SERPENT DESSIN) and those that do not meet the tests of valid registration (DANS LA LUMIÈRE DE LA VÉRITÉ, IN THE LIGHT OF TRUTH and IM LICHTE DER WAHRHEIT).

[191] First, the defendants claimed that the plaintiff had infringed their trade-marks and thereby contravened sections 19 and 20 of the *Trade-marks Act*, which read as follows:

19. Subject to sections 21, 32 and 67, the registration of a trade-mark in respect of any wares or services, unless shown to be invalid, gives to the owner of the trade-mark the exclusive right to the use throughout Canada of the trade-mark in respect of those wares or services.

20. (1) The right of the owner of a registered trade-mark to its exclusive use shall be deemed to be infringed by a person not entitled to its use under this Act who sells, distributes or advertises wares or services in association with a confusing trade-mark or trade-name, but no registration of a trade-mark prevents a person from making

- (a) any *bona fide* use of his personal name as a trade-name, or
- (b) any *bona fide* use, other than as a trade-mark,
 - (i) of the geographical name of his place of business, or
 - (ii) of any accurate description of the character or quality of his wares or services,

in such a manner as is not likely to have the effect of depreciating the value of the goodwill attaching to the trade-mark.

(2) No registration of a trade-mark prevents a person from making any use of any of the indications mentioned in subsection 11.18(3) in association with a wine or any of the indications mentioned in subsection 11.18(4) in association with a spirit.

[192] The confusion referred to in section 20 is defined in section 6 of the Act:

6. (1) For the purposes of this Act, a trade-mark or trade-name is confusing with another trade-mark or trade-name if the use of the first mentioned trade-mark or trade-name would cause confusion with the last mentioned trade-mark or trade-name in the manner and circumstances described in this section.

(2) The use of a trade-mark causes confusion with another trade-mark if the use of both trade-marks in the same area would be likely to lead to the inference that the wares or services associated with those trade-marks are manufactured, sold, leased, hired or performed by the same person, whether or not the wares or services are of the same general class.

(3) The use of a trade-mark causes confusion with a trade-name if the use of both the trade-mark and trade-name in the same area would be likely to lead to the inference that the wares or services associated with the trade-mark and those associated with the business carried on under the trade-name are manufactured, sold, leased, hired or performed by the same person, whether or not the wares or services are of the same general class.

(4) The use of a trade-name causes confusion with a trade-mark if the use of both the trade-name and trade-mark in the same area would be likely to lead to the inference that the wares or services associated with the business carried on under the trade-name and those associated with the trade-mark are manufactured, sold, leased, hired or performed by the same person, whether or not the wares or services are of the same general class.

(5) In determining whether trade-marks or trade-names are confusing, the court or the Registrar, as the case may be, shall have regard to all the surrounding circumstances including

- (a) the inherent distinctiveness of the trade-marks or trade-names and the extent to which they have become known;
- (b) the length of time the trade-marks or trade-names have been in use;
- (c) the nature of the wares, services or business;
- (d) the nature of the trade; and
- (e) the degree of resemblance between the trade-marks or trade-names in appearance or sound or in the ideas suggested by them.

[193] Finding as I have that the registration of the trade-mark IN THE LIGHT OF TRUTH (and its French and German equivalents) is not valid, I must obviously dismiss the action based on sections 19 and 20 in connection with this trade-mark. The invalidity of a registration is a full answer and defence to such an action: *PVR Co. v. Decosol (Can.) Ltd.* (1972), 40 C.P.R. (2d) 203 (F.C.T.D.); *Adidas (Canada) Ltd. v. Colins Inc.* (1978), 38 C.P.R. (2d) 145 (F.C.T.D.).

[194] What of the trade-marks (ABD-RU-SHIN and A & SERPENT DESSIN)? Did the plaintiff infringe these trade-marks by reproducing them on the cover page of his book as the defendants claim? It is not disputed that Mr. Drolet printed on the cover of his book and on the title page of the first volume of his edition of the *Grail Message* the name of the author spelled somewhat differently from the spelling used by the trade-mark (“ABDRUSCHIN”) as well as the logo of the A encircled by a snake.

[195] He also printed the name of the author using the same spelling on the cover of the second and third volumes of his edition and inserted the logo of the A encircled by a snake on the title page of the two volumes. In doing so, did he infringe the exclusive rights conferred on the defendants by the registration of their trade-marks Nos. TMA 519469 and TMA 519470?

[196] For the purposes of an action in trade-mark infringement, it is not necessary to establish malicious or fraudulent intent: see *88863 Ontario Ltd. v. Landover Enterprises Inc.* (1991), 35 C.P.R. (3d) 399 (F.C.T.D.). On the other hand, the party alleging infringement of its rights bears the burden of proof. A good summary of the distinction between sections 19 and 20 of the Act is given by the authors Gill and Joffe (*Fox on Canadian Law of Trade-marks and Unfair Competition, op. cit.*, at pages 7-3 and 7-4):

Infringement actions may be brought in respect of registered trade-marks pursuant to both ss. 19 and 20. The action under s. 19 has a smaller ambit than s. 20; it captures use by a defendant of a trade-mark identical to the plaintiff's registered trade-mark, as a trade-mark, in association with the identical wares or services for which the mark is registered. Section 20 is broader in scope, and captures use by a defendant of trade-marks or trade names that are confusing with the plaintiff's registered trade-mark, but is not limited to the exact marks, wares, and services of the plaintiff. The s. 20 action, like that of s. 19, requires the defendant to use the confusing trade-mark or trade name for purposes of indicating origin. In other words, such use must also be use as a trade-mark. [Footnote omitted.]

[197] Because the spelling of the author's pseudonym used by Mr. Drolet is slightly different from that used in the trade-mark registered by the defendants, they can rely only on section 20 to assert their right to the ABD-RU-SHIN trade-mark. On the other hand, the logo used by Mr. Drolet on the title page of each of the three volumes of his work is identical to the defendants' trade-mark and nothing in principle prevents them from citing both sections 19 and 20 on this point.

[198] Given the clear language of section 19 of the Act and the fact that the defendants had only to prove, other than the validity of their trade-mark A & SERPENT DESSIN, that the plaintiff used this trade-mark in connection with the same products as the defendants, I have no difficulty finding that Mr. Drolet did indeed infringe the rights of the defendants by reproducing the Stiftung's logo on the title pages of each of the three volumes of his book.

[199] With respect to the reproduction of the author's pseudonym on the cover page of the three volumes of Mr. Drolet's book, the defendants had to prove under section 20 of the Act that "Abdrushin" caused confusion with their trade-mark ABD-RU-SHIN. As already noted, section 6 of the Act spells out the factors that must be taken into consideration to determine if there is confusion.

[200] It must be said on this point that confusion must be assessed in terms of the average consumer and not of a specialist who is already familiar with the Grail Message. The evidence showed that the books marketed by the defendants are sold in general bookstores and are also available in several municipal libraries and displayed at book fairs. In addition, the books and lectures offered in connection with the defendants' trade-marks are publicized in the mass media and the lectures are also advertised in universities and colleges. We must therefore turn to the mythical consumer located somewhere between the "careful and diligent purchaser" and the "woman in a hurry", to repeat the terms used by the Supreme Court in *Mattel, Inc.*, above (at paragraph 56). In this case, I am of the opinion that the reference population is made up of the reading public likely to be interested by the type of books sold by the defendants. It seems to me that they are the "likely buyers" of wares of this type (see *Baylor University v. Governor and Co. of Adventurers Trading into Hudson's Bay* (2000), 8 C.P.R. (4th) 64 (F.C.A.), at paragraph 27. See also: *Vibe Ventures LLC v. 3681441 Canada Inc.*, 2005 FC 1650, 45 C.P.R. (4th) 17). They are neither people with no interest in reading and who never go to bookstores, libraries or even book sections in large department stores, nor, at the other end of the spectrum, scholars with an interest in philosophy, theology or esoteric works. However, confusion must be not merely possible but likely: see *Veve Cliquot Ponsardin v. Boutiques Cliquot Ltée*, 2006 SCC 23, [2006] 1 S.C.R. 824, at paragraph 37; *Remo Imports Ltd. v. Jaguar Cars Ltd.*, 2007 FCA 258, [2008] 2 F.C.R. 132, at paragraph 38.

[201] The defendants did not adduce any evidence in support of their allegation that Mr. Drolet's use of the pseudonym of Oskar Ernst Bernhardt on the covers of his books created confusion with their own trade-mark. At most, the distinctiveness of the trade-marks in question was alleged by establishing that the Stiftung sold its publications in various bookstores and advertised them in various publications as well as displaying them at book fairs and promoting them at lectures organized by the Foundation. It was also claimed that more than 15 000 copies of the Grail Message had been sold in Canada, mainly in Quebec.

[202] The determination of whether a trade-mark creates confusion is a question of fact: *Benson and Hedges (Canada) Limited v. St. Regis Tobacco Corporation*, [1969] S.C.R. 192, at page 199. I am prepared to acknowledge the inherent distinctiveness of the ABD-RU-SHIN trade-mark, having regard to its use by the defendants for nearly 40 years, as well as the uniqueness and non-descriptiveness of this word. I also agree with the defendants that merely introducing a slight variation in the spelling of the author's pseudonym as compared with the spelling used in the trade-mark is not sufficient to conclude that there is no confusion. "Abdrushin" and ABD-RU-SHIN are sufficiently similar to lead consumers, who often have only a vague memory of the registered trade-mark, to conclude that the plaintiff's book is edited and published by the Stiftung.

[203] Nevertheless, it is necessary to examine all of the circumstances before concluding that the plaintiff's mark creates confusion with that of the defendants. Other factors lead me to conclude that the plaintiff's book is not likely to be confused with the defendants' publications. In the first place, I note that the appearance of the books published by Mr. Drolet is very different from that of the Stiftung books. While the former are essentially mimeographed copies, the Stiftung's publications are more elegant in appearance and bound in cloth or paper as befits a publishing firm worthy of the name. Also, and perhaps even more importantly, Mr. Drolet had only some 100 copies of his book printed and he sold it only to people he knew or to members who requested it. He stated that he did

not make any profit from the sale of his book and charged only enough to cover his costs. Because it was a limited edition, he did not advertise it or sell it in bookstores. He did not deposit it at the National Library and the title is therefore not catalogued. All of these factors lead me to believe that there can be no confusion between Mr. Drolet's book and those of the Stiftung. Not only is his distribution very limited (in fact it has been sold out for several years) but the people who buy it know exactly what they are buying and are looking precisely for a version that is different from the one sold by the defendants. Here again, the defendants adduced no evidence suggesting that consumers may have been misled into buying Mr. Drolet's book by thinking that it was published by the Stiftung.

[204] For all of these reasons, I would dismiss the action of the defendants having regard to an alleged infringement of the ABD-RU-SHIN trade-mark.

[205] What of the defendants' action in passing off based on paragraphs 7(b) and (c) of the Act? These provisions read as follows:

7. ...

(b) direct public attention to his wares, services or business in such a way as to cause or be likely to cause confusion in Canada, at the time he commenced so to direct attention to them, between his wares, services or business and the wares, services or business of another;

(c) pass off other wares or services as and for those ordered or requested;

[206] It must first be noted that contrary to sections 19 and 20, the application of this provision does not require the existence of a registered trade-mark; see *Kirkbi AG v. Ritvik Holdings Inc.*, 2005 SCC 65, [2005] 3 S.C.R. 302, at paragraphs 25–26. Therefore, the defendants could sue the plaintiff for passing off his book by citing all of their trade-marks. However, in my opinion they are up against two obstacles that cannot be overcome.

[207] Whether under paragraph 7(b) or 7(c), the defendants had to adduce evidence that the plaintiff had made false representations, either intentionally or by his own negligence. The defendants also had to establish that the conduct of the plaintiff had the effect of confusing the public. This is what Roger T. Hughes (now a member of this Court) referred to as the “conduct test” and the “confusion test” in his treatise on trade-marks (*Hughes on Trade Marks*, 2nd ed., loose-leaf, at page 989). In *Kirkbi*, above, the Supreme Court described the second component necessary for a valid action in passing off as follows (at paragraph 68):

The second component is misrepresentation creating confusion in the public. Misrepresentation may be wilful and may thus mean the same thing as deceit. But now the doctrine of passing off also covers negligent or careless misrepresentation by the trader (*Ciba-Geigy*, at p. 133; *Consumers Distributing Co. v. Seiko Time Canada Ltd.*, [1984] 1 S.C.R. 583, at p. 601, *per* Estey J.).

[208] However, the evidence did not show that Mr. Drolet wilfully or negligently tried to pass off his book as a Stiftung publication. Quite the contrary, he disassociated himself from the Stiftung and the Foundation and cried for all to hear that the version of the work of Oskar Ernst Bernhardt distributed by the defendants was not consistent with the “original” Message. What is more, he did not advertise his book, he had a very limited number of copies printed and he sold them only to friends and members who approached him. Someone who engages in misrepresentation does not act that way.

[209] For the reasons already set out above in the context of the analysis concerning section 20 of the Act, I consider that the use by the plaintiff of the author's pseudonym, of the logo of an A encircled by a snake and of the title [TRANSLATION] *In the Light of Truth* is not confusing. In fact, the logo on the cover of Mr. Drolet's first volume is somewhat different from the one registered by the Stiftung (see above, at paragraph 194 for the logo used by Mr. Drolet and at paragraph 27 for the logo

registered as a trade-mark by the Stiftung). Moreover, the logo is not on the cover of Mr. Drolet's second and third volumes.

[210] As for the title, Mr. Drolet used [TRANSLATION] *In the Light of Truth* only on the cover of his first volume. The titles appearing on the second and third volumes are [TRANSLATION] *Echoes of the Grail Message 1* and *Echoes of the Grail Message 2*. In the Stiftung edition, the title *In the Light of Truth* appears on the covers of all three volumes, which are distinguished only by their spines (the numbers I, II and III appear under the title).

[211] Lastly, I note that in each of Mr. Drolet's volumes immediately after the title page there is a [TRANSLATION] "Foreword" clearly indicating that this is a private edition, with a printing of 100 copies, and bearing the author's initials and the publishing date.

[212] Having regard to all of these factors and the lack of any evidence to the contrary, I must find that the defendants did not meet one of the conditions for an action in passing off, as they did not show that in publishing his book Mr. Drolet had confused those likely to purchase the Stiftung books. More specifically, I am not satisfied that Mr. Drolet drew public attention to his book so as to cause confusion with the works published by the Stiftung and distributed by the Foundation, or that Mr. Drolet passed off his book as the defendants'. Accordingly, I dismiss the action of the plaintiffs by counterclaim based on section 7 of the Act.

II – Copyright

[213] As previously mentioned, the defendants (with leave from my colleague Justice Pinard) [2007 FC 1347], filed a counterclaim in which they alleged that Mr. Drolet infringed their copyright to the French language translation of the *Grail Message* done by Mr. Kaufmann. According to the Stiftung, the work published by Mr. Drolet is to a degree greater than 90 percent a reproduction of this translation, thereby constituting an obvious infringement under section 27 of the *Copyright Act*.

[214] For easier reference, the most relevant provisions of this Act are reproduced here [ss. 2 "copyright" (as enacted by S.C. 1997, c. 24, s. 1), "every original literary, dramatic, musical and artistic work" (as am. by S.C. 1996, c. 44, s. 53), "infringing" (as am. by S.C. 1997, c. 24, s. 1), "moral rights" (as enacted by R.S.C. 1985 (4th Supp.), c. 10, s. 1), 3(1) (as am. by S.C. 1988, c. 65, s. 62; 1993, c. 44, s. 55; 1997, c. 24, s. 3), 5(1) (as am. by S.C. 1994, c. 47, s. 57; 1997, c. 24, s. 5), 6 (as am. by S.C. 1993, c. 44, s. 58), 13(1), 14(1), 14.1(1) (as enacted by R.S.C., 1985 (4th Supp.), c. 10, s. 4), 27 (as am. by S.C. 1997, c. 24, s. 15), 28.1 (as enacted by R.S.C., 1985 (4th Supp.), c. 10, s. 6), 28.2(1) (as enacted *idem*), 29 (as am. by S.C. 1997, c. 24, s. 18), 34(1) (as am. *idem*, s. 20), 34.1 (as enacted *idem*), 35(1) (as am. *idem*), 36(1) (as am. *idem*), 37 (as am. *idem*), 38.1(1) (as enacted *idem*), 39(1) (as am. *idem*), 41(1) (as am. *idem*, s. 22), 53(1) (as am. by S.C. 1993, c. 15, s. 5), 55(1) (as am. by S.C. 1997, c. 24, s. 32)]:

2. In this Act,

"copyright" means the rights described in

- (a) section 3, in the case of a work,
- (b) sections 15 and 26, in the case of a performer's performance,
- (c) section 18, in the case of a sound recording, or
- (d) section 21, in the case of a communication signal;

...

“every original literary, dramatic, musical and artistic work” includes every original production in the literary, scientific or artistic domain, whatever may be the mode or form of its expression, such as compilations, books, pamphlets and other writings, lectures, dramatic or dramatico-musical works, musical works, translations, illustrations, sketches and plastic works relative to geography, topography, architecture or science;

...

“infringing” means

(a) in relation to a work in which copyright subsists, any copy, including any colourable imitation, made or dealt with in contravention of this Act,

...

“moral rights” means the rights described in subsection 14.1(1);

...

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

(a) to produce, reproduce, perform or publish any translation of the work,

(b) in the case of a dramatic work, to convert it into a novel or other non-dramatic work,

(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,

(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,

(e) in the case of any literary, dramatic, musical or artistic work, to reproduce, adapt and publicly present the work as a cinematographic work,

(f) in the case of any literary, dramatic, musical or artistic work, to communicate the work to the public by telecommunication

(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,

(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

(i) in the case of a musical work, to rent out a sound recording in which the work is embodied,

and to authorize any such acts.

...

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:

(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;

(b) in the case of a cinematographic work, whether published or unpublished, the maker, at the date of the making of the cinematographic work,

(i) if a corporation, had its headquarters in a treaty country, or

(ii) if a natural person, was a citizen or subject of, or a person ordinarily resident in, a treaty country; or

(c) in the case of a published work, including a cinematographic work,

(i) in relation to subparagraph 2.2(1)(a)(i), the first publication in such a quantity as to satisfy the reasonable demands of the public, having regard to the nature of the work, occurred in a treaty country, or

(ii) in relation to subparagraph 2.2(1)(a)(ii) or (iii), the first publication occurred in a treaty country.

...

6. The term for which copyright shall subsist shall, except as otherwise expressly provided by this Act, be the life of the author, the remainder of the calendar year in which the author dies, and a period of fifty years following the end of that calendar year.

...

13. (1) Subject to this Act, the author of a work shall be the first owner of the copyright therein.

14. (1) Where the author of a work is the first owner of the copyright therein, no assignment of the copyright and no grant of any interest therein, made by him, otherwise than by will, after June 4, 1921, is operative to vest in the assignee or grantee any rights with respect to the copyright in the work beyond the expiration of twenty-five years from the death of the author, and the reversionary interest in the copyright expectant on the termination of that period shall, on the death of the author, notwithstanding any agreement to the contrary, devolve on his legal representatives as part of the estate of the author, and any agreement entered into by the author as to the disposition of such reversionary interest is void.

...

14.1 (1) The author of a work has, subject to section 28.2, the right to the integrity of the work and, in connection with an act mentioned in section 3, the right, where reasonable in the circumstances, to be associated with the work as its author by name or under a pseudonym and the right to remain anonymous.

...

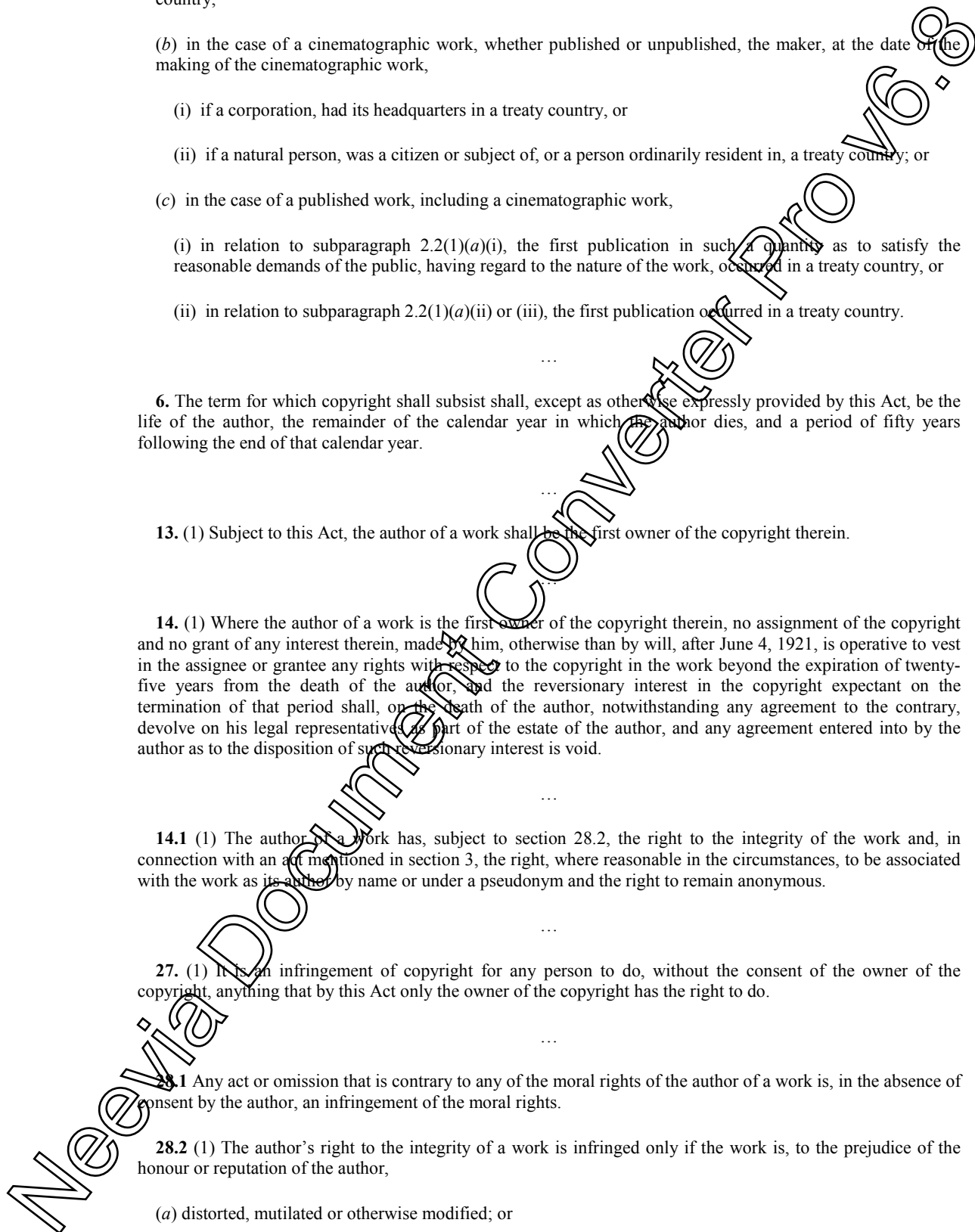
27. (1) It is an infringement of copyright for any person to do, without the consent of the owner of the copyright, anything that by this Act only the owner of the copyright has the right to do.

...

28.1 Any act or omission that is contrary to any of the moral rights of the author of a work is, in the absence of consent by the author, an infringement of the moral rights.

28.2 (1) The author's right to the integrity of a work is infringed only if the work is, to the prejudice of the honour or reputation of the author,

(a) distorted, mutilated or otherwise modified; or



(b) used in association with a product, service, cause or institution.

...

29. Fair dealing for the purpose of research or private study does not infringe copyright.

...

34. (1) Where copyright has been infringed, the owner of the copyright is, subject to this Act, entitled to all remedies by way of injunction, damages, accounts, delivery up and otherwise that are or may be conferred by law for the infringement of a right.

...

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,

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

(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.

...

35. (1) Where a person infringes copyright, the person is liable to pay such damages to the owner of the copyright as the owner has suffered due to the infringement and, in addition to those damages, such part of the profits that the infringer has made from the infringement and that were not taken into account in calculating the damages as the court considers just.

...

36. (1) Subject to this section, the owner of any copyright, or any person or persons deriving any right, title or interest by assignment or grant in writing from the owner, may individually for himself or herself, as a party to the proceedings in his or her own name, protect and enforce any right that he or she holds, and, to the extent of that right, title and interest, is entitled to the remedies provided by this Act.

...

37. The Federal Court has concurrent jurisdiction with provincial courts to hear and determine all proceedings, other than the prosecution of offences under section 42 and 43, for the enforcement of a provision of this Act or of the civil remedies provided by this Act.

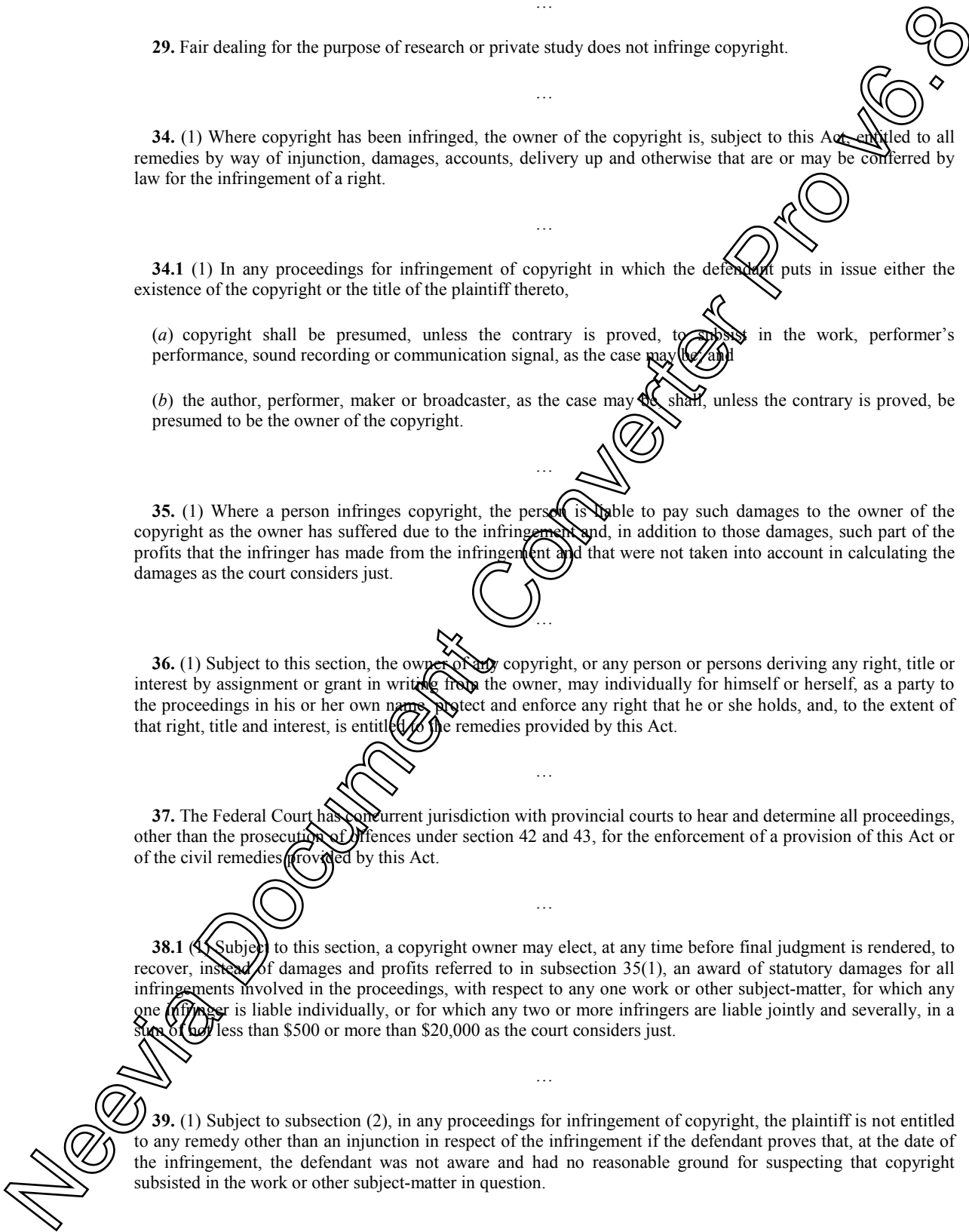
...

38.1 (1) Subject to this section, a copyright owner may elect, at any time before final judgment is rendered, to recover, instead of damages and profits referred to in subsection 35(1), an award of statutory damages for all infringements involved in the proceedings, with respect to any one work or other subject-matter, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally, in a sum of not less than \$500 or more than \$20,000 as the court considers just.

...

39. (1) Subject to subsection (2), in any proceedings for infringement of copyright, the plaintiff is not entitled to any remedy other than an injunction in respect of the infringement if the defendant proves that, at the date of the infringement, the defendant was not aware and had no reasonable ground for suspecting that copyright subsisted in the work or other subject-matter in question.

...



41. (1) Subject to subsection (2), a court may not award a remedy in relation to an infringement unless

(a) in the case where the plaintiff knew, or could reasonably have been expected to know, of the infringement at the time it occurred, the proceedings for infringement are commenced within three years after the infringement occurred; or

(b) in the case where the plaintiff did not know, and could not reasonably have been expected to know, of the infringement at the time it occurred, the proceedings for infringement are commenced within three years after the time when the plaintiff first knew, or could reasonably have been expected to know, of the infringement.

53. (1) The Register of Copyrights is evidence of the particulars entered in it, and a copy of an entry in the Register is evidence of the particulars of the entry if it is certified by the Commissioner of Patents, the Registrar of Copyrights or an officer, clerk or employee of the Copyright Office as a true copy.

55. (1) Application for the registration of a copyright in a work may be made by or on behalf of the author of the work, the owner of the copyright in the work, an assignee of the copyright or a person to whom an interest in the copyright has been granted by licence.

[215] Copyright is governed in Canada by legislation that tries to strike a balance between the economic and moral rights of authors and the importance of encouraging the publication of all types of works for the advancement of the arts and sciences. See *Théberge v. Galerie d'Art du Petit Champlain inc.*, 2002 SCC 34, [2002] 2 S.C.R. 326, at paragraphs 30–31; *Euro-Excellence Inc. v. Kraft Canada Inc.*, 2007 SCC 37, [2007] 3 S.C.R. 20, at paragraph 76. The main economic benefit that the *Copyright Act* confers on authors is “the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever” (subsection 3(1)) for the duration of the author’s life and for a period of 50 years following his death (section 6). This commercial conception of authorial rights, which is borrowed from English law and centred on the right to reproduce works, no doubt explains why the term used in English is “copyright”.

[216] The *Copyright Act* also recognizes that an author has moral rights, which spring from the civil law tradition. These rights, which appeared relatively late in Canadian law (S.C. 1988, c. 15 [now R.S.C., 1985 (4th Supp.) c. 10], are enshrined in sections 14.1 [as enacted by R.S.C., 1985 (4th Supp.), c. 10, s. 4], 14.2 [as enacted *idem*; S.C. 1997, c. 24, s. 13], 28.1 and 28.2 [as enacted by R.S.C., 1985 (4th Supp.) c. 10, s. 4]. They focus on the artist’s right to preserve the integrity of his work by allowing him to refuse any change that would be prejudicial to his honour or his reputation, as well as the right to claim authorship or to remain anonymous. The author retains these moral rights even when he assigns his economic interest in the work (subsection 14.1(3)) and they are non-transferable (although the author or his estate may waive these rights), contrary to economic rights, which may be bought or sold in whole or in part and for the whole or partial term of the copyright: see subsection 14.1(2) for moral rights and subsection 13(4) [as am. by S.C. 1997, c. 24, s. 10] for economic rights.

[217] Because Canada is a signatory of the Berne Convention [*Berne Convention for the Protection of Literary and Artistic Works* (Paris Act of July 24, 1971 as amended on September 28, 1979), [1988 Can. T.S. No. 18], the legal protection afforded by copyright takes effect as soon as the work is created. Registering the copyright with the Copyright Office is therefore not mandatory although it creates a certain number of presumptions. More specifically, subsection 53(2) provides that “[a] certificate of registration of copyright is evidence that the copyright subsists and that the person registered is the owner of the copyright.” This means that the person challenging the existence of a copyright bears the burden of proof and must provide credible evidence to rebut this presumption: see *Grignon v. Roussel* (1991), 38 C.P.R. (3d) 4 (F.C.T.D.), at page 7; *Wall v. Horn Abbot Ltd.*, 2007 NSSC 197, 256 N.S.R. (2d) 34, at paragraph 481.

[218] Of course, the first requirement for claiming copyright is the originality of the work for which it is claimed. While it has always been clear that copyright does not protect ideas as such but only the form in which they are expressed (what is called the “fixation” of the work) the concept of originality is much less clear. Although it is at the very heart of copyright, this concept is not defined in the *Copyright Act*. The Supreme Court dealt with this issue in *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339. After examining the history of copyright, the case law and the purpose of the *Copyright Act*, the Chief Justice, writing for a unanimous bench, came to the following conclusion (at paragraph 16):

I conclude that the correct position falls between these extremes. For a work to be “original” within the meaning of the *Copyright Act*, it must be more than a mere copy of another work. At the same time, it need not be creative, in the sense of being novel or unique. What is required to attract copyright protection in the expression of an idea is an exercise of skill and judgment. By skill, I mean the use of one’s knowledge, developed aptitude or practised ability in producing the work. By judgment, I mean the use of one’s capacity for discernment or ability to form an opinion or evaluation by comparing different possible options in producing the work. This exercise of skill and judgment will necessarily involve intellectual effort. 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. For example, any skill and judgment that might be involved in simply changing the font of a work to produce “another” work would be too trivial to merit copyright protection as an “original” work.

[219] In the case at bar, Mr. Drolet challenged both the existence of a copyright and, if it did exist, the Stiftung’s claim that it was the owner. Mr. Drolet further submitted that in any case he did not infringe any copyright that the Stiftung might own in Mr. Kaufmann’s translation of the *Grail Message*.

[220] I will now analyse these submissions having regard to the evidence adduced by the parties. It is important to specify at the outset that the work in issue here is the French translation of the *Grail Message* done by Mr. Kaufmann and published by the Stiftung, and not the original work of Oskar Ernst Bernhardt, which has clearly been in the public domain since 1991 and is no longer covered by copyright.

(a) Subsistence of copyright

[221] Section 5 [as am. by S.C. 1993, c. 15, s. 2, c. 44, s. 57; 1994, c. 47, s. 57; 1997, c. 24, s. 5; 2001, c. 34, s. 34] of the *Copyright Act* sets out the conditions that must be met for copyright in a work to subsist. The plaintiff did not dispute the fact that Mr. Kaufmann was, at the time he did his translation, ordinarily resident in a treaty country in accordance with paragraph 5(1)(a) of the *Copyright Act*. It is also settled law that a translation may be an original literary work, as Parliament has expressly provided (see the definition of “every original literary, dramatic, musical and artistic work” in section 2 of the *Copyright Act*).

[222] The plaintiff argued that Mr. Kaufmann’s translations were merely a revision of previous translations and not an original translation of the work of Oskar Ernst Bernhardt. In other words, Mr. Drolet claimed that the work performed by Mr. Kaufmann was not sufficiently original to give rise to a copyright in his work.

[223] The plaintiff further alleged that no valid authorization had been given to Mr. Kaufmann to proceed with his translation. Paragraph 3(1)(a) provides that copyright includes the right to produce, reproduce, perform or publish any translation of the work. Accordingly, Mr. Kaufmann had to obtain from the owner of the copyright an authorization to translate his work. Without such an authorization, he himself could not be called an author within the legal meaning of the term. The plaintiff submitted that the Stiftung did not hold the copyright in the *Grail Message* when it authorized Mr. Kaufmann to translate it. Moreover, the text that it authorized him to translate was allegedly not the text written or revised by Oskar Ernst Bernhardt himself, but rather a version revised after his death. Therefore, in the plaintiff’s submission, it is not known what Mr. Kaufmann translated, from what source he translated it, and by what authority.

[224] The first objection can be dealt with quite rapidly. The plaintiff's claim is based solely on a conversation he allegedly had with Mr. Kaufmann, during which Mr. Kaufmann said that he had not translated the *Grail Message* but only revised the translation that had been done by others before him. While admissible in the circumstances, this is obviously hearsay and its reliability may be questioned in view of Mr. Drolet's interest in the outcome of this case. What is more, the concept of revision is open to several interpretations and cannot in itself allow a definitive conclusion to be drawn about the originality of Mr. Kaufmann's work.

[225] Moreover, the testimony of Mr. Drolet was contradicted by the affidavit of Ms. Lafeuillade in which she stated that Mr. Kaufmann had indeed directly translated *In the Light of Truth* and *Exhortations* and used previous translations only for verification purposes. It is true that Ms. Lafeuillade refused to speak with counsel for the plaintiff and that counsel for the defendants said that he had never contacted her, thereby casting doubt on the authenticity of her testimony. On the other hand, her declaration was corroborated to some extent by the U.S. copyright certificates filed in evidence and which identify Mr. Kaufmann as the translator of the work of Oskar Ernst Bernhardt. Having regard to the evidence adduced and my reasons at paragraphs 113 to 119 above, I am of the opinion that the U.S. certificates, even without benefit of the presumption extended under the *Copyright Act* to certificates registered in Canada, confirm the defendants' claim that Mr. Kaufmann was indeed the translator of the *Grail Message* and that he did produce a new translation. Nothing points to the conclusion that these certificates were registered more than 50 years ago for the sole purpose of enabling the Stiftung to prepare evidence for possible future litigation.

[226] Mr. Oort also testified that he had been in regular contact with Mr. Kaufmann and he explained how Mr. Kaufmann had spent some 40 years perfecting his translation. Lastly, I note that Mr. Drolet himself admitted at least implicitly in his written and oral submissions that Mr. Kaufmann was the author of the translations at the centre of this dispute.

[227] Finally, Mr. Drolet relied on the report drafted by Denis Brassard to support his theory that Mr. Kaufmann's work was only a revision of previous translations. However, this report calls for caution on two counts. First, Mr. Brassard did not testify at the hearing and therefore could not be cross-examined by counsel for the defendants. And second, I note that Mr. Brassard studied literature and education and taught French for 33 years. Therefore, he never worked as a translator and does not appear to have a working knowledge of German.

[228] Mr. Brassard compared five excerpts from Mr. Kaufmann's French versions with the same excerpts from the version published in 1955 under Maria Bernhardt's copyright. He concluded that Mr. Kaufmann's translation was merely the result of one or more revisions of a previous translation. However, he did admit that Mr. Kaufmann's translation showed that he had revised the vocabulary extensively and that the result was a more fluid, clear and literary version. He even went so far as to say that Mr. Kaufmann's version was a [TRANSLATION] "serious reworking" of the 1959 version of the Message (see his report, at page 13).

[229] In light of the above, I am willing to acknowledge that Mr. Kaufmann's work is not a mere copy of another work, but shows the exercise of skill and judgment, to repeat the expression of the Supreme Court in *CCH*, above. The fact that Mr. Kaufmann may have drawn on previous translations in writing his own does not detract from the originality of his work. He did not simply repeat a previous translation by making only cosmetic changes, but substantially altered its style to make it more literary and less literal. That is undoubtedly a sign of creative work.

[230] In any event, as correctly pointed out by the defendants, ownership of the copyright in the so-called "original" translations referred to by Mr. Brassard also passed to the Stiftung, for the reasons set out in the paragraphs that follow. If that is so, the Stiftung is still the owner of all of the alleged rights and Mr. Brassard's opinion has no bearing on the issue of subsistence of copyright in Mr. Kaufmann's translation. Therefore, I consider that the plaintiff did not succeed in rebutting the presumption of originality under section 34.1 [as enacted by S.C. 1997, c. 24, s. 20] of the *Copyright Act*, which provides that a work is presumed to be covered by copyright unless the contrary is proved.

[231] With regard to the validity of the authorization given by the Stiftung and Irmingard Bernhardt to Mr. Kaufmann to translate the *Grail Message*, the plaintiff's entire theory is based on the assignment that Oskar Ernst Bernhardt allegedly made of his copyright to the publishing house that originally published his work, the Verlag der Ruf. If this assignment had indeed been made, the author's legal heirs would have recovered his rights only in 1966, or 25 years after his death, in accordance with subsection 14(1) of the *Copyright Act*. Because Oskar Ernst Bernhardt's wife, Maria Bernhardt, died in 1957, it was his only biological daughter Edith who would have inherited his rights, as Maria's children had never been legally adopted by Oskar Ernst Bernhardt. Consequently, Maria would never have inherited her husband's copyright and could not have bequeathed it to her son Alexander, who could not have bequeathed it to his sister Irmingard, who in turn could not have transmitted the copyright to the Stiftung.

[232] This theory, however interesting it may be, is not supported by the evidence before the Court. As already explained at paragraphs 102 to 110 of these reasons, I consider that the title chain filed by the Stiftung shows that Maria Bernhardt, her son Alexander and her daughter Irmingard Bernhardt were indeed the owners of the copyright in the work of Oskar Ernst Bernhardt at the time Mr. Kaufmann received the authorization to translate it into French, and that the Stiftung has held the licence since 1967. The plaintiff's claim that the Verlag der Ruf was granted copyright in the original edition of the *Grail Message* was based only on a publishing contract between Oskar Ernst Bernhardt and Verlag der Ruf for one of his works (Exhibit P-55), on the fact that this publishing firm was the first to publish the author's works and on the fact that the Verlag der Ruf is indicated as the copyright holder in the 1931 edition of *In the Light of Truth* and in the 1934 edition of *Echoes* (Tab 4) as well as on the manuscripts of certain lectures that were the basis of essays subsequently included in his works (P-53 and P-64). It was also alleged that labels were placed on the French version of *In the Light of Truth* published in the author's lifetime so that the note "Copyright Maria Bernhardt" replaced the original note "Copyright Verlag Der Ruf".

[233] This seems to me a flimsy basis on which to conclude that copyright was assigned to Verlag der Ruf. It is true that the defendants did nothing to clarify the situation and admitted that they had not conducted any search for contracts that might have tied the author to the publishing house, other than the one filed during the cross-examination of Mr. Roudaut to show that the author was not opposed to all forms of marketing. However, I cannot hold this against them. Counsel for the defendants explained that the contracts between the publisher Verlag der Ruf and the author did not seem to them to be relevant or likely to adversely affect their case or to support the plaintiff's case and that accordingly his clients were not required to disclose them under rule 222 [of the *Federal Courts Rules*]. Counsel for the plaintiff did not request these documents as she was entitled to do under rule 225.

[234] This said, the evidence does not allow me to infer, as Ms. Dagenais invited me to do, that the Verlag der Ruf was the owner of the copyright until 1966. For one thing, the publishing contract filed in evidence concerns only the first volume of the work *In the Light of Truth*. For another, Mr. Bernhardt delegated to the publisher [TRANSLATION] "the reproduction and distribution" of this work. In other words, the author authorized Verlag der Ruf to reproduce and distribute his work but he did not assign his copyright to that publishing house. Therefore, this contract cannot take precedence over the division of the author's estate between Maria Bernhardt and Edith Nagel (the author's daughter) which clearly specifies that [TRANSLATION] "Maria Bernhardt receives the intellectual property rights as well as the rights to the publishing house and all other assets belonging to the estate" (book of plaintiff's exhibits, Tab 4). The effect of this clause is clearly to transfer the copyright in the author's complete works to his wife Maria, who acquired not only the intellectual property rights but also the reproduction and distribution rights that the publisher Verlag der Ruf may have had. As for the labels, it is quite possible that they were affixed after the author's death and after his rights were acquired by his wife through her agreement with his daughter Edith. Even more importantly, however, the various wills that transferred Oskar Ernst Bernhardt's copyright do not appear to have been contested to this day, either by the Verlag der Ruf or its successors or by the biological daughter of Oskar Ernst Bernhardt or her heirs. It therefore seems to me rather late to be

challenging this title chain, especially since the plaintiff's allegations, I repeat, are based solely on conjecture and unpersuasive evidence. I conclude that Mr. Kaufmann received valid authorization from the Stiftung to translate Oskar Ernst Bernhardt's *Grail Message*.

[235] What of the allegation that the work translated by Mr. Kaufmann was not that of Oskar Ernst Bernhardt himself, but that it had been revised after his death? This hypothesis, since that is what it is, is based on the testimony of two disciples (Mr. Fischer and Mr. Muller), on analysis of the text itself, on the statements made by the author to the Gestapo when he was detained or under house arrest, and on the absence of any trace of the manuscript that the author allegedly revised himself.

[236] As previously mentioned, this controversy has taken on considerable proportions and turned into an ideological conflict between the Stiftung, the Foundation and its various chapters throughout the world on one side, and on the other the "dissidents" like Mr. Drolet who claim that the work distributed through official channels is a truncated version that is nothing like the original work. It is not up to this Court to step into the debate which is tearing apart the followers of the *Grail Message*, not only because this is not a legal issue but also because the evidence adduced would not allow me to decide the matter in any case.

[237] It may indeed seem suspicious that nobody has been able to find a manuscript that is so precious to the followers of the Movement and that would moreover put an end to the dissension that can only harm the Movement. On the other hand, the version of the facts that Irmingard always maintained (that she erased changes pencilled in by the author after typing them up) is entirely plausible. It must also be noted that the author made several changes between the first draft of his lectures and their publication in 1931. As for the testimony of Mr. Muller and Mr. Fischer, they merely gave their reasons for thinking it unlikely that the author revised his text before his death. Finally, the statements made to the Gestapo and the text of the work itself are obviously open to several interpretations. In short, the Court can only note that this trial does not allow light to be shed on this issue and, to say the least, it would be risky on my part to come down in favour of either party.

[238] In any case, it is not necessary for me to do so in order to settle this dispute. Even if the work of Oskar Ernst Bernhardt had been revised after his death, this would not have prevented Irmingard and the Stiftung from giving Mr. Kaufmann valid authorization to translate it into French. The changes made (whether in terms of the order of the essays or the removal of some essays or passages) do not appear to me to transform the work into something unrecognizable and distinct from the work covered by the original copyright.

[239] Of course, I realize that to the followers of the *Grail Message*, the discrepancies between the original and the posthumous versions may be significant and have major spiritual repercussions. Their reading of the work is naturally different from a layperson's and their frame of reference is not the same. Does this mean that the Court must adopt a similar viewpoint in its legal interpretation of the evidence? I do not think so.

[240] Subsection 3(1) of the *Copyright Act* specifies that copyright includes the sole right to "produce or reproduce the work or any substantial part thereof in any material form whatever". This provision therefore specifically contemplates the possibility for the owner of the copyright not to reproduce the complete work and to remove certain limited portions of it. Using the same reasoning, I consider that the copyright owner may make minor changes to the protected work as long as it is not distorted as a result. This is a question of fact that must be assessed objectively and not from an ideological perspective. When the changes are considered too substantial, it may be concluded that this is a new work distinct from the original work protected by copyright.

[241] In short, the issue of whether the work translated by Mr. Kaufmann was the very one to which the Stiftung held a licence and subsequently a copyright must be assessed objectively from the standpoint of a reasonable person studying the matter without being influenced by his own convictions. Of course, this does not exclude the possibility that the author himself (or his estate) may

complain that his moral rights were infringed if he considers that the change made to his work causes prejudice to his honour or reputation.

[242] After carefully examining the different versions of the *Grail Message* published under the name Oskar Ernst Bernhardt, I have come to the conclusion that they are one and the same work. In fact, the question would probably not even arise if it were certain that the versions were all by the same author. The version translated by Mr. Kaufmann is admittedly not identical to the version published in the author's lifetime. However, I consider that the removal of certain passages and the changed order of the essays are insufficient to radically transform the original work to the point where a reasonable and objective person would conclude that this was a new work. Here again, I realize that this view is not necessarily shared by the followers of the *Grail Message* and more specifically by those who, like Mr. Drolet, attach great importance to what they believe is the author's only authentic version; however, that is not the view that the judge must take. The issue before this Court is legal and not spiritual in nature and it is therefore through the prism of the law and not of faith that it must be decided, it being understood that the legal answer may not win over those who approach this issue from a different angle.

[243] Having found that the Stiftung validly granted a sublicense to Mr. Kaufmann to translate the work of Oskar Ernst Bernhardt, I must now determine whether the Stiftung is indeed the owner of the rights in the translations done by Mr. Kaufmann at its request. In support of its position, the Stiftung first cited subsection 53(2) of the *Copyright Act*. This provision states that the copyright registration certificate "is evidence that the copyright subsists and that the person registered is the owner of the copyright." This presumption appears to me to be quite weak in the circumstances, however, as the defendants registered their copyright certificate very late. In fact, as I have already pointed out, the defendants registered this certificate only after being granted leave by Justice Pinard to amend their defence and to file a counterclaim in copyright infringement. In such a context, the presumption loses much of its weight. As the Court of Appeal held in *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2002 FCA 187, [2002] 4 F.C. 216, at paragraph 63:

Generally, the weight to be afforded to these certificates should not be minimized by the fact that the Copyright Office assumes no responsibility for the truth of the facts contained in the application and conducts no examination (see *Circle Film Enterprises Inc. v. Canadian Broadcasting Corporation*, [1959] S.C.R. 602, at pages 606–607). However, the Trial Judge pointed out that nearly all of the registrations were obtained within the few months preceding the trial of this matter. To me, the fact that these certificates were obtained seemingly only in contemplation of litigation diminishes their persuasiveness. Therefore, although these certificates may support a finding that copyright subsists in the Publishers' works as described on the certificates, I do not find them particularly compelling.

[244] The books published by the Stiftung in 1990 under the titles *In the Light of Truth*, volumes II and III, contain the usual copyright notice and logo (©) indicating that the Stiftung is the owner of the copyright:

[TRANSLATION]

ISBN 2-960811-21-X

SOLE AUTHORIZED EDITION

© 1990 BY STIFTUNG GRALSBOOTSCHAFT, STUTTGART

[245] These two books therefore have the benefit of an additional presumption in accordance with paragraph 34.1(2)(b) of the *Copyright Act*. Because no name which would appear to be that of the author is indicated in the usual manner, it is the name of what appears to be the publisher or the copyright owner that is presumed to be the owner of the copyright in question.

[246] As for the Paul Kaufmann translations published in 1986 under the title *In the Light of Truth*, Volume I, and in 1973 under the title *Exhortations*, the usual copyright notice referred instead to

Irmgard Bernhardt, who bequeathed her copyright to the Stiftung on her death in 1990. The presumption under paragraph 34.1(2)(b) therefore also favours the Stiftung for these two works.

[247] In addition to these presumptions, the Stiftung can also refer to the contract of sublicense it signed with Paul Kaufmann on July 7, 1969. One of the clauses of this contract, reproduced in part at paragraph 116 of these reasons, clearly stipulates that Mr. Kaufmann assigns all rights in his translations to the Stiftung. There is therefore no doubt in my mind that the Stiftung is the owner of the copyright in all of the French translations of the works of Oskar Ernst Bernhardt done by Mr. Kaufmann.

(b) Copyright infringement

[248] Under subsection 27(1) of the *Copyright Act*, “[i]t is an infringement of copyright for any person to do, without the consent of the owner of the copyright, anything that by this Act only the owner of the copyright has the right to do.” As mentioned previously, section 3 of the *Copyright Act* provides that one of the main rights conferred exclusively on the owner of a copyright in a work is the right to produce or reproduce the work or any substantial part thereof.

[249] Therefore, in order to show that its copyright had been infringed, the Stiftung had to establish (1) that the work or a substantial part of it had been copied and (2) that the plagiarist had had access to the work protected by copyright. While still of this Court, Justice Richard (now Chief Justice of the Federal Court of Appeal) noted these two requirements and specified the factors that could be taken into consideration to determine whether the copied part was “substantial” (*U & R Tax Services Ltd. v. H & R Block Canada Inc.* (1995), 62 C.P.R. (3d) 257 (F.C.T.D.), at page 268):

In order to find copyright infringement, a plaintiff must prove copying of the work or a substantial part thereof and access to the copyright protected work. In this instance, the defendant has admitted to copying a portion of U&R’s form and the enquiry is therefore directed to whether the copying was “substantial” within the meaning given to that term by the courts: “[w]hat constitutes a ‘substantial part’ is a question of fact and, in this respect, the courts have given more emphasis on the quality of what was taken from the original work rather than the quantity.” Some of the matters that have been considered by Courts in the past include:

- (a) the quality and quantity of the material taken;
- (b) the extent to which the defendant’s use adversely affects the plaintiff’s activities and diminishes the value of the plaintiff’s copyright;
- (c) whether the material taken is the proper subject-matter of a copyright;
- (d) whether the defendant intentionally appropriated the plaintiff’s work to save time and effort; and
- (e) whether the material taken is used in the same or a similar fashion as the plaintiff’s. [Citation omitted.]

[250] The first of the two requirements does not seem to me to be a problem in this case. The plaintiff did not seriously dispute the fact that he had had access to Mr. Kaufmann’s translation. He admitted both in his statement of claim (paragraph 18(b)) and in his examination in chief before the Court that Mr. Thivierge had given him the diskettes of the complete text of the translations done by Mr. Kaufmann when he was giving lectures for the Foundation. And as a “cross-bearer” he obviously had access to the fourth volume entitled *Exhortations*, which apparently is not available for general sale. Therefore he clearly had in his possession the work that the defendants now allege that he copied.

[251] On the other hand, Mr. Drolet claimed to have based his work not only on Mr. Kaufmann’s translation but also on the translation done by Mr. Roudaut as well as on the original German edition and its first French translation by Mr. Siffrid. Because he wanted to reproduce in French the *Grail Message* as published while Oskar Ernst Bernhardt was alive, Mr. Drolet also inverted the order of

the chapters as found in Mr. Kaufmann's translation and also added 14 essays and certain passages that do not appear any longer in the version published by the Stiftung.

[252] The additions made by Mr. Drolet to the last edition are not the issue here. The Stiftung does not claim copyright in these portions of the original work, which are no longer included in the edition it publishes.

[253] Of course copying may be inferred from the similarities between the two works. The Foundation made a comparison between Mr. Drolet's work and the Stiftung edition (Exhibit D-41). The result is striking: except possibly for the first essays, the content of the two works is essentially identical. In many cases, whole paragraphs and even complete pages are exactly the same.

[254] Mr. Drolet did not deny that this comparison was accurate, but he tried to argue that the additions he made to the Stiftung version must also be taken into account. He also submitted that the rearrangement of the essays to better reflect the author's original intention made his work original. I cannot accept this argument.

[255] To counter an action in copyright infringement, it is not enough to change the order of the chapters or even to add to the plagiarized text. What must be assessed for the purposes of such a proceeding is the extent to which the original work was reproduced. What may have been added to it or the order in which its components are reproduced is of little consequence. In fact, these additions or modifications may in themselves be an infringement of an author's (in this case Mr. Kaufmann's) moral rights, to the extent that they may be a distortion of his work that is prejudicial to his honour or his reputation. However, because these rights are non-transferable and therefore cannot be claimed except by the author or his estate, they are not in issue here (nor, for that matter, are the moral rights of Oskar Ernst Bernhardt).

[256] In their experts' report, Richard Nage and Irmgard Lochmann, who are both certified German-to-French translators, concluded on the basis of six chapters chosen at random in Mr. Drolet's work that it could not be considered the result of an independent translation. How could it be otherwise? Mr. Drolet did not establish that his knowledge of German was such that he had the expertise required to personally translate a work as complex as that of Oskar Ernst Bernhardt. Therefore, he could only rely on previous translations.

[257] As for the argument that he may have involuntarily used wording similar to that found in Mr. Kaufmann's translation, it is insufficient to counter a lack of originality. The courts have held that while an independent creation is not an infringement of copyright, an "unconscious" reproduction must on the contrary be considered a copy: *Gondos v. Hardy et al.* (1982), 38 O.R. (2d) 555 (H.C.J.); *Francis Day & Hunter, Ltd. and Another v. Bron and Another*, [1963] 2 All E.R. 16 (C.A.).

[258] The plaintiff also argued that the defendants had tacitly consented to his reproduction of Mr. Kaufmann's work. This authorization, he submitted, followed from the fact that Mr. Thivierge gave him the diskettes containing Mr. Kaufmann's translation and that Mr. Thivierge was aware of his work because he saw it when he went to pick up the burial accessories at Mr. Drolet's home in the summer of 2001. Subsection 27(1) of the *Copyright Act* clearly states that the reproduction of a work without the consent of the owner of the copyright is an infringement.

[259] This argument seems to me quite tenuous and Ms. Dagenais did not advance it with much conviction. The courts have held that the concept of authorization implies consent, approval, encouragement: see *Apple Computer Inc. v. Mackintosh Computers Ltd.*, [1987] 1 F.C. 173 (T.D.), at page 208; *McCutcheon v. Haufschild* (1998), 146 F.T.R. 28 (F.C.T.D.), at paragraphs 11-13. Authorization must also be given by the person who is actually entitled to give it, that is to say the owner of the copyright.

[260] Simply giving Mr. Drolet the diskettes containing Mr. Kaufmann's translation cannot constitute an authorization to reproduce the work. Mr. Thivierge testified that when he gave the diskettes to Mr. Drolet, his only aim was to help him in his work as a lecturer. Not only could he not suspect that he would use them to do his own translation, but it certainly cannot be inferred from his gesture that he meant to encourage Mr. Drolet to do so.

[261] Furthermore, Mr. Thivierge is not the owner of the copyright in Mr. Kaufmann's work, nor is the Foundation of the Grail Movement – Canada. Copyright belongs to the Stiftung and it alone could give this authorization. Accordingly, the defence of authorization cannot succeed.

[262] What of the defence of fair dealing? The plaintiff tried to rely on section 29 of the *Copyright Act* by claiming that his sole aim was to do justice to the author by reproducing his true work. He also submitted that his good faith was evident from the fact that he had published his work under the author's name, or rather his pseudonym (Abdrushin), and that he had never tried to claim it as his own. In short, his intention was utterly disinterested and he sought only to spread the author's true thought.

[263] Unfortunately, good faith is not a relevant test for determining whether the fair dealing exception applies. As the Supreme Court stated in *CCH Canadian Ltd. v. Law Society of Upper Canada*, above (at paragraph 50), the person claiming the benefit of this exception must prove (1) that the dealing was for the purpose of either research or private study and (2) that it was fair.

[264] Even broadly interpreting the concept of "research" as suggested by the Supreme Court, it is obvious that Mr. Drolet's publication cannot be likened to a mere research activity. No matter how laudable Mr. Drolet's intentions may be, a factor that must certainly be taken into consideration when determining damages, he cannot reasonably claim that this exception applies to him. It is not even necessary to deal with the question of whether this was fair dealing, because it was not for the purpose of research or private study. In fact, the plaintiff never tried to show how the publication of his work could be considered one of the purposes contemplated by section 29.

[265] What remains is the defence based on limitation. Subsection 41(1) of the *Copyright Act* provides for a limitation period of three years after the infringement occurred where the plaintiff knew, or could reasonably have been expected to know, of the infringement at the time it occurred. In the case where the plaintiff did not know, and could not reasonably have been expected to know, of the infringement at the time it occurred, the three-year limitation period begins to run when the plaintiff first knew, or could reasonably have been expected to know, of the infringement.

[266] It is important to point out right away that the decision by my colleague Justice Pinard granting the defendants leave to amend their pleadings to add a counterclaim in infringement of their copyright cannot be interpreted as a final judgment to the effect that the limitation period has not expired. This issue can be decided only by the trial judge.

[267] The plaintiff submitted that the Stiftung knew or should have known of the infringement as of 2001 because the plaintiff began selling and distributing his book that year. He also alleged that Mr. Thivierge had known since the summer of 2001 that he had published his work. Finally, he added that the defendants were negligent and lacking in diligence in not amending their pleadings until three years and three months after the plaintiff filed his claim in Federal Court and by registering their copyright only on January 16, 2008.

[268] Although the evidence is not entirely clear as to the exact time when Mr. Thivierge first became aware of Mr. Drolet's book, there seems to be no doubt that it was before the end of 2001. Mr. Oort testified that Mr. Thivierge informed him of the existence of Mr. Drolet's book in 2001 and he then asked Mr. Thivierge to warn Mr. Drolet that he was making illegal use of the trade-marks registered by the Stiftung (see paragraph 123 of these reasons). Mr. Oort also admitted that Mr. Thivierge informed him that diskettes containing Mr. Kaufmann's translation had been given to Mr. Drolet. Even though the Stiftung had not authorized the making of those diskettes, they were

nevertheless supplied by the Foundation, with whose representatives Mr. Oort was in regular contact. It was therefore reasonable to expect that the Stiftung, with the help of the Foundation, would inquire about the exact content of Mr. Drolet's book.

[269] I am quite willing to acknowledge that detecting a copyright infringement in a work of several hundred pages is a more laborious task than identifying an illegal use of trade marks. However, I find it difficult to believe that more than six years were necessary for the Stiftung to spot an infringement of their copyright. It is even more surprising that the defendants did not raise this matter during the 3 years and 2 months that followed the plaintiff's institution of proceedings in Federal Court. If as Mr. Oort submitted, copyright is such a vital aspect of the Stiftung's operation, which is easily understandable, how is one to interpret the defendants' slowness in examining Mr. Drolet's book to determine whether he had infringed that copyright? If Mr. Drolet was able to compare several essays over the course of a few days during the trial, can one seriously believe that the Stiftung was unable to do the same thing in at most a few months for the whole book published by Mr. Drolet?

[270] I must find, therefore, that the defendants did not succeed in countering the defence of limitation made by the plaintiff. In amending their counterclaim to add an action in copyright infringement more than six years after learning of Mr. Drolet's book and more than three years after proceedings were instituted in this Court, the defendants did not comply with the limitation period provided for in subsection 41(1) of the *Copyright Act*. Accordingly, the defendants' counterclaim based on infringement of their copyright is time-barred and must be dismissed.

Conclusion

[271] Having found that Mr. Drolet infringed trade-mark TMA519469, registered by the defendants for the A & SERPENT DESSIN logo, I must now determine the appropriate remedy. The *Trade-marks Act* provides for the possibility of issuing an injunction and awarding damages for the losses sustained by the owner of the trade-mark or for the profits made by the offender through the illegal use of the trade-mark.

[272] I do not think that the circumstances warrant awarding damages above a nominal amount. Mr. Drolet used the defendants' logo in good faith. His intention was merely to reproduce the cover page of the original work and he testified that he did not know that the Stiftung used the logo on all of its official documents. Moreover, Mr. Drolet did not make any profit from the sale of his work and there was no possible confusion as to its source for the persons who bought it. Accordingly, I would award the defendants a symbolic amount of \$500 on this point.

[273] I am also willing to issue a permanent injunction against Yvon Drolet prohibiting him from using the Stiftung's logo in connection with any publication whatsoever.

[274] On the other hand, I would deny all other remedies sought by the defendants. The trade-marks registered on the French, English and German titles of the books in issue here were found to be invalid while the trade-mark registered on the author's pseudonym was not infringed by Mr. Drolet. As far as the Stiftung's copyrights are concerned, no compensation may be awarded for their infringement on the ground that the defendants' action was time-barred.

[275] Counsel for the plaintiff submitted that exemplary damages corresponding to the amount of the legal costs should be awarded in view of the defendants' abuse of trade-mark law and the resulting restriction of freedom of expression. She also cited a whole series of attempts to conceal information to the effect that the author had not changed his Message.

[276] It is not up to me to rule on these allegations, which clearly fall outside the legal frame of this case. As for allegation that the defendants' intent was to register trade-marks merely to restrict the freedom of expression of those who want to spread a different version of the author's Message, it is not supported by the evidence before me. The issue of whether a trade-mark may be registered on a title and an author's name had never come before a Canadian court and the Registrar of Trade-Marks had agreed to register the defendants' trade-marks. Mr. Oort gave sincere and frank testimony and he certainly did not give me the impression of pursuing a hidden agenda by registering the trade-marks and copyright in the work of Oskar Ernst Bernhardt with the appropriate Canadian authorities. Accordingly, no exemplary damages need be awarded.

[277] I also do not consider this a case where awarding costs on a solicitor-client basis would be warranted. Such costs are awarded only in exceptional circumstances where one of the parties engaged in outrageous conduct contrary to the interests of justice during the proceedings: *Apotex Inc. v. Canada (Minister of National Health and Welfare)* (2000), 194 D.L.R. (4th) 483 (F.C.A.), at paragraphs 7, 8, 11 and 12; *Microsoft Corporation v. Cerelli*, 2007 FC 1364. Nothing of the sort occurred in the case at bar. Counsel for the defendants vigorously defended his clients' claims but he did so within the bounds specified in the Rules of this Court.

[278] Under rule 407, unless the Court orders otherwise, party and party costs shall be assessed in accordance with column III of the table to Tariff B. However, the Court may take the factors in subsection 400(3) of the Rules into consideration to award costs according to a different column of the Tariff. Given the scope and complexity of the issues in this case, the increased workload they entailed and the lateness of the amendment filed by the defendants, which raised the issue of copyright infringement, I consider that costs must be awarded to the plaintiff in accordance with the higher scale of column IV of Tariff B.

JUDGMENT

THE COURT:

1. ALLOWS the plaintiff's action in part;
2. ALLOWS the defendants' counterclaim in part;
3. STRIKES the trade-marks TMA520520, TMA519477 and TMA519476 from the Register of Trade-marks;
4. DECLARES that the plaintiff did not infringe trade-mark TMA519470;
5. DECLARES that the plaintiff infringed trade-mark TMA519469;
6. DECLARES that the defendants' counterclaim is time-barred;
7. ORDERS the plaintiff to pay to the defendants an amount of \$500 in damages;
8. ISSUES a permanent injunction ordering the plaintiff not to infringe trade-mark TMA519469 in connection with any publication he may make in future;
9. ORDERS the defendants to pay costs to be determined in accordance with the upper scale of column IV of Tariff B.