Unofficial English Translation of the Judgment of the Court

|  |  |
| --- | --- |
| Druide Informatique inc. c. Éditions Québec Amérique inc. | 2020 QCCA 1197 |
| COURT OF APPEAL  |
|  |
| CANADA |
| PROVINCE OF QUÉBEC |
| DISTRICT OF |  MONTRÉAL |
| No.: | 500-09-027119-171 |
| (500-17-073308-127) |
|  |
| DATE: |  September 18, 2020 |
|  |
|  |
| CORAM: | THE HONOURABLE | YVES-MARIE MORISSETTE, J.A.JOCELYN F. RANCOURT, J.A.MICHEL BEAUPRÉ, J.A. |
|  |
|  |
| DRUIDE INFORMATIQUE INC. |
| APPELLANT – Defendant/Cross-Plaintiff  |
| v. |
|  |
| LES ÉDITIONS QUÉBEC AMÉRIQUE INC. |
| respondent – Plaintiff/Cross-Defendant |
|  |
|  |
| JUDGMENT  |
|  |
|  |

1. The Appellant appeals from a judgment rendered on September 14, 2017, by the Superior Court, District of Montreal (the Honourable Élise Poisson), granting the respondent’s originating application and ordering the appellant to cease reproducing, representing, remotely communicating, selling, or using in any way the literary and artistic works belonging to the respondent; to return the respondent’s works in its possession to the respondent; to destroy any copies in its possession; and finally, condemning the appellant to pay $100,000 in material damages and $25,000 in exemplary damages.[[1]](#footnote-1)
2. For the reasons expressed by Rancourt J.A., with which Morissette and Beaupré JJ.A. agree, **THE COURT**:
3. **ALLOWS** the appeal;
4. **REVERSES** the trial judgment;
5. **SETS ASIDE** the condemnation to pay material damages in the amount of $100,000;
6. **SETS ASIDE** the condemnation to pay exemplary damages in the amount of $25,000;
7. **THE WHOLE**, with legal costs.

|  |  |
| --- | --- |
|  |  |
|  | YVES-MARIE MORISSETTE, J.A. |
|  |  |
|  |  |
|  | JOCELYN F. RANCOURT, J.A. |
|  |  |
|  |  |
|  | MICHEL BEAUPRÉ, J.A. |
|  |
| Mtre Benoît BourgonMtre Ann-Julie Auclair |
| Robinson Sheppard Shapiro |
| For the appellant  |
|  |
| Mtre Francine Martel |
| Gowling WLG (Canada) |
| For the respondent  |
|  |
| Mtre Daniel Payette |
| Cabinet Payette |
| Legal counsel for the respondent  |
|  |
| Date of hearing:  | January 28, 2020 |

|  |
| --- |
|  |
|  |
| REASONS OF RANCOURT, J.A.  |
|  |
|  |

# BACKGROUND

1. The appellant, Druide Informatique Inc. (“Druide”), is a company known for the design and great success of the writing assistance software Antidote, launched in 1996.
2. The respondent, Les éditions Québec Amérique Inc. (“QA”), founded in 1974, is a book publishing company, well-known both in Quebec and internationally. It designed and published *Le Visuel*, a printed thematic dictionary that makes it possible to find words on the basis of an illustration or theme. Its originality, the rigour of its terminology, and the richness of its illustrations explain the immediate commercial success of this reference work. A computer-based version of this dictionary called Le Visuel Multimedia was launched in 1996.
3. In addition to the illustrations and the terminology in French and in English, there is sound pronunciation, all of which constitutes, for the present purposes, the protected literary and artistic works (“the Works”) in the QA software.[[2]](#footnote-2)
4. In 1997, the leaders of the two companies met to promote their respective products, given their obvious complementarity. These meetings resulted in the creation, the following year, of a “computer bridge” between the new versions of the two parties’ software, Le Visuel Multimedia 2 and Antidote 98. Concretely, this bridge took the form of a two-way button between the two software programs by means of which users were invited to acquire the software of the other company. By purchasing the second software program, the user could take advantage of both products and their complementarity. The agreement between the parties was not in the form of a written contract; it was verbal.
5. This agreement marked the beginning of a business partnership that lasted more than a decade. In addition to the cross-promotion of their respective software programs, Druide and QA agreed to participate together in the major Quebec book fairs. Druide subsequently entrusted QA with the publishing contract for the publication of its thesauruses *Grand Druide* and *Petit Druide*. Druide also ensured the distribution of the QA software.
6. In 2004, Druide and QA launched new versions of their respective software programs, namely Antidote Prisme 5 and Le Visuel Multimedia 3.
7. Le Visuel Multimedia 3 contained an index called l’Index du Visuel, which included French terminology as well as icons of the illustrations associated with the terminology. The parties agreed to develop the “computer bridge” by integrating l’Index du Visuel into the Antidote Prisme 5 software. The integration made it possible to illustrate 32,000 of the 117,000 words in the Antidote Prisme 5 software program. Thus, the Antidote user could know if an image from Le Visuel Multimedia 3 was associated with a word selected in Antidote. By acquiring Le Visuel Multimedia 3, the “computer bridge” between the two software programs allowed the Antidote user to access the image in question. This integration not only improved the Antidote software, but also served to promote the QA software in a more attractive way. Revenues from sales of Le Visuel Multimedia 3 generated from the Antidote Prisme 5 software program were shared equally between Druide and QA.
8. This agreement between the parties was also verbal. Although a draft contract was prepared the same year to precisely define the conditions for integrating l’Index du Visuel into Antidote Prisme 5, the draft was not signed.[[3]](#footnote-3) During this period, the parties continued to maintain an excellent business relationship, and they trusted each other.
9. In 2005, the parties noted that the integration of l’Index du Visuel into the Antidote Prisme 5 software was not providing the expected visibility to QA’s Le Visuel Multimedia 3 software. In fact, the small size of the illustrations contained in l’Index du Visuel encouraged very few Antidote users to purchase Le Visuel Multimedia 3. The parties then began reflecting on how to integrate larger illustrations in future versions of Antidote to provide increased visibility for QA without Antidote becoming, on its own, an illustrated dictionary.
10. This reflection gave rise to the creation of the **Visuel Nano** and **Visuel Intégré** interfaces, designed and developed by Druide at its own expense.
11. The **Visuel Nano** and **Visuel Intégré** interfaces were rolled out on October 20, 2009, during the highly publicized launch of the new version of the Antidote HD software. Several members of the QA team attended the launch, and a member of management spoke at the event.[[4]](#footnote-4)
12. One week later, on October 27, 2009, QA launched the new version of its software Le Visuel Multimedia 4.
13. **Visuel Nano** replaced l’Index du Visuel. It was automatically integrated into Antidote HD without the user having to obtain any other software. The illustrations of Le Visuel Multimedia 4 were, however, presented in a larger format to encourage Antidote users to buy **Visuel Intégré**.
14. **Visuel Intégré** was offered by Druide to Antidote HD users. It was sold separately. It offered all the features of **Visuel Nano** as well as some other complementary features, such as larger illustrations and their placement in the dictionaries of definitions and of phrases.[[5]](#footnote-5) This interface fully integrated the QA Works into Antidote HD. Revenues generated from the sales of **Visuel Intégré** were shared equally between Druide and QA.
15. As was the case in 1998 and 2004, there was no written contract to ratify the agreement reached between the parties regarding the launch of the **Visuel Nano** and **Visuel Intégré** interfaces.
16. In 2010, QA underwent an internal reorganization. Its main contact with Druide, Luc Roberge, was demoted. Caroline Fortin took his place. Druide expressed its strong disagreement with this decision.
17. During the same period, QA withheld certain invoices to be paid to Druide. The bond of trust between them weakened, and their business relationship deteriorated considerably.
18. After conducting due diligence, Druide decided in February 2011 to legally terminate the following agreements that it had with QA: (1) the publishing contracts for the *Grand Druide* and *Petit Druide* thesauruses, which had been providing substantial revenue to QA; (2) the distribution of QA software; and (3) their partnership at Quebec book fairs.
19. Angered by the termination of these agreements, QA raised the possibility of withdrawing Druide’s right to use its Works in the **Visuel Nano** and **Visuel Intégré** interfaces in the Antidote HD software, given the absence of a formal contract. It then demanded that Druide sign a written contract providing for the use of its Works.
20. From March until June 2011, the parties held discussions in the hope of settling their dispute regarding the use of QA’s Works. Their efforts proved to be in vain.
21. On June 26, 2011, QA sent Druide a [translation] “notice of termination of authorization” whereby it [translation] “terminated any non-exclusive authorization that may have been granted to Druide”.[[6]](#footnote-6) QA ordered Druide to remove its Works from the Antidote HD software.
22. QA initially set September 28, 2011, as the date for termination of its authorization. The date was postponed to November 25, 2011,[[7]](#footnote-7) and then to January 13, 2012.[[8]](#footnote-8) The parties had discussions and exchanged several draft contracts, without, however, reaching a formal agreement.[[9]](#footnote-9)
23. In August 2012, QA filed an action in the Superior Court. It sought an order requiring Druide to immediately cease [translation] “reproducing, representing, remotely communicating, selling, or using, in any way, the Works and the software in which it held the copyright”.[[10]](#footnote-10) Druide brought a cross-application.
24. On January 21, 2013, Louis J. Gouin J. of the Superior Court dismissed QA’s application for a safeguard order to prevent Druide from marketing Antidote 8.[[11]](#footnote-11)
25. Between the time the proceedings were instituted in August 2012 and the issuance of the Superior Court judgment on September 14, 2017, Druide launched two updates to its software: a first one in 2012 with Antidote 8, and a second one in 2015 with Antidote 9.
26. There are currently three versions of the Antidote products in circulation (Antidote HD, Antidote 8, and Antidote 9) that incorporate QA’s Works by means of the **Visuel Nano** and **Visuel Intégré** interfaces.

# THE JUDGMENT UNDER APPEAL

1. The judge provided a meticulous outline of the facts.
2. Before answering the question of whether Druide infringed QA’s copyright, the judge established the burden of proof applicable to each party. QA had to convince her that it owned the copyright in the Works and that the actions taken by Druide infringed its exclusive copyright without its consent.[[12]](#footnote-12) To rebut QA’s allegations of copyright infringement, Druide had to establish that it took the alleged actions with the consent of QA.[[13]](#footnote-13)
3. The judge then considered Druide’s contention that not only had it obtained QA’s consent for the use of its Works, but also that it held an implied irrevocable licence of unlimited duration granted free of charge.[[14]](#footnote-14) The judge analyzed subsection 13(4) of the *Copyright Act*[[15]](#footnote-15) (“*CA*”), which deals in particular with the granting of an interest in a copyright by licence.[[16]](#footnote-16)
4. The judge determined that Druide was not the holder of an [translation] “irrevocable non-exclusive implied licence” that would have authorized it to [translation] “adapt, produce, reproduce, represent, and download” QA’s Works in all versions of Druide’s Antidote software.[[17]](#footnote-17)
5. The judge specified that QA gave Druide its consent for the integration of its Works for the Antidote HD software.[[18]](#footnote-18) However, this consent did not apply to the subsequent versions of the software, Antidote 8 and Antidote 9.[[19]](#footnote-19) According to the judge, there was no agreement on the essential elements of an irrevocable non-exclusive licence of unlimited duration.[[20]](#footnote-20) The judge determined that any agreement to be entered into for the use of the QA Works remained [translation] “conditional on the writing of a document because the parties had agreed that their discussions and agreements would be recorded in writing”.[[21]](#footnote-21) That led the judge to conclude that:

[translation]

[307] Accordingly, Druide Informatique did not infringe the copyright of Québec Amérique by taking the alleged actions in respect of Antidote HD. It did infringe Québec Amérique’s copyright by taking the alleged actions with respect to Antidote 8 and 9.[[22]](#footnote-22)

1. The infringement of QA’s copyright thus established, the judge then considered whether Druide should be ordered to stop using QA’s Works, and if so, under what conditions.
2. Before doing so, the judge noted that the parties had debated at length the need to give Druide a reasonable period of time to create a replacement product.[[23]](#footnote-23) However, the judge considered that this was a false argument, because the parties [translation] “are not bound by an agreement for an indeterminate term, which would have required the granting of such notice”.[[24]](#footnote-24) The judge reiterated that Druide had instead been given consent to use QA’s Works in Antidote HD.[[25]](#footnote-25)
3. The judge ordered Druide to cease the use and all forms of exploitation of QA’s Works, but nevertheless granted it a period of time equivalent to a prior notice to comply, i.e., on the earlier of the following two dates: (1) the launch date of the next version of Antidote scheduled for 2018; or (2) December 31, 2018.[[26]](#footnote-26) This injunctive order was accompanied by [translation] “fair compensation” valued at $100,000 for the unlawful use of the Works in the Antidote 8 and 9 editions.[[27]](#footnote-27)
4. Last, the judge concluded that the use of QA’s Works in the English section of the bilingual version of Antidote 9 as well as the plagiarism by Druide of some of QA’s definitions constituted unlawful and intentional interference with QA’s copyright. The judge therefore awarded QA $25,000 in punitive damages.[[28]](#footnote-28)

# ISSUES

1. The dispute raises the following issues:

1. Did the judge make a reviewable error in concluding that QA merely [translation] “consented” to the use of its Works in **Visuel Nano** and **Visuel Intégré** in the Antidote HD software?

2. Did the judge make a reviewable error in awarding exemplary damages to QA?

# 4. ANALYSIS

## 4.1. Did the judge make a reviewable error in concluding that QA merely [translation] “consented” to the integration of its Works in Visuel Nano and Visuel Intégré in the Antidote HD software?

### **4.1.1 Preliminary remarks on the standard of review and the burden of proof**

1. Before dealing with the substantive issue, it is necessary to specify the applicable standard of review and to establish whether the judge erred in assigning the burden of proof in a copyright infringement matter.

#### 4.1.1.1 The standard of review

1. The dispute between the parties mainly concerns the characterization of the contract between them. Druide maintains that it holds an irrevocable non-exclusive licence allowing it to use QA’s Works for an unlimited period. As for QA, it initially argued that it had never consented to the use of its Works by Druide. Before the Court, it alleged that there existed a work of joint authorship with Druide that required the assignment by QA of its copyright by means of a written document, as provided for in subsection 13(4) of the *CA*. It then argued that that no such written document exists.
2. The Supreme Court of Canada and this Court have confirmed that the characterization of a contract can be considered a question of mixed fact and law in certain circumstances, particularly when it is necessary to consider the parties’ common intention.[[29]](#footnote-29) In that case, the applicable standard of review is that of palpable and overriding error:

[translation]

[64] When the characterization of a contract is limited to the sole analysis of a question of law, the standard of correctness is applied to the judgment under review. But when the characterization of a contract involves the analysis of a question of fact and law, “a more stringent standard” applies.

[65] Indeed, “where the issue on appeal involves the trial judge’s interpretation of the evidence as a whole, it should not be overturned absent palpable and overriding error”.[[30]](#footnote-30)

[Emphasis added; references omitted]

1. The characterization of the agreement between the parties here calls for an analysis of the parties’ common intention, such that the applicable standard of review is that of palpable and overriding error.

#### 4.1.1.2 The burden of proof

1. Druide submits that the judge erred in placing the burden on it to show that it held a licence or that it had obtained QA’s consent. According to Druide, it is QA that has to demonstrate the absence of consent.
2. The judge stated the following on the burden of proof:

[translation]

[206] The Court accepts from these teachings that to demonstrate infringement of its copyright, Québec Amérique must convince the Court, on a balance of probabilities, that it is the owner of the copyright in the Works and that the actions taken by Druide Informatique infringe its exclusive rights without its consent.

[207] It is up to Druide Informatique to prove, on a balance of probabilities, the facts demonstrating that it acted with the consent, express or implied, of Québec Amérique.[[31]](#footnote-31)

[Emphasis added.]

1. Subsection 27(1) of the *CA* requires the owner of the copyright to prove that (1) the person did something that only the owner of the copyright has the right to do, and (2) the person did this thing without the consent of the owner of the copyright.
2. The legal burden rests with the copyright owner, which is “in line with the general principle that a plaintiff must establish on a balance of probabilities all the necessary elements of its claim”.[[32]](#footnote-32)
3. Author David Vaver states that copyright owners are certainly in the best position to establish that they did not give their consent:

It is rarely a chore for a plaintiff to prove he gave no express consent: he knows best whether he did or not. And even if it is a chore, that is a small price to pay for a right that stops people for sometimes over a century from doing what they would otherwise be free to do.[[33]](#footnote-33)

1. On the other hand, the party claiming to have obtained the consent of the copyright owner must prove the facts on which he or she relies and the conclusions drawn from them:

A defendant who says he has the plaintiff’s implied consent equally puts this point in issue, but then it seems reasonable for the defendant to plead and prove the facts on which he relies, and the inferences to be drawn from them.[[34]](#footnote-34)

1. According to the author Vaver, this does not imply a change of the burden of proof:

That does not change the ultimate legal burden of proof, which remains on the plaintiff throughout. Only the evidentiary burden shifts to the defendant: he needs to produce some evidence of consent or the plaintiff’s prima facie case succeeds.[[35]](#footnote-35)

[Emphasis added.]

1. The judge established that it was up to QA to demonstrate its copyright in the Works and Druide’s infringement thereof without its consent. Then, Druide had to prove the facts demonstrating that it acted with QA’s consent.
2. The trial judge’s reasoning is consistent with the teachings of the commentary and the case law. It is free from error.

### **4.1.2 The applicable law**

1. Before answering the question of whether the judge made a reviewable error in characterizing the agreement between the parties, it seems to me that it is important to briefly outline the legal framework for the characterization of a contract, to categorize the main types of contracts found in copyright law, and to consider the rules specific to their interpretation.

#### 4.1.2.1 Characterization of contracts

1. In *Uniprix v. Gestion Gosselin et Berube inc.*,[[36]](#footnote-36) the Supreme Court of Canada specified that the characterization of a contract serves to determine what object the parties intended to give to their agreement.[[37]](#footnote-37) The exercise of characterizing the contract by the judge is carried out by seeking to identify the common intention of the parties as regards the content of their agreement.[[38]](#footnote-38) It includes consideration of the obligations and other effects of the contract that the parties have stipulated, as well as the circumstances of its formation and how they have applied it.[[39]](#footnote-39) The essential object of characterization is the linking of the contract at issue to a legal category.[[40]](#footnote-40)

#### 4.1.2.2 Characterization of copyright contracts

1. In copyright, there are basically three types of contracts: assignment, grant of exclusive licence, and grant of non-exclusive licence.
* **Assignment**
1. Assignment constitutes a transfer of the right of ownership or a sale of the copyright to which it relates; the assignor then ceases to be the owner of the copyright assigned to the assignee, who acquires ownership thereof.[[41]](#footnote-41) The assignee takes the place of the original owner with respect to the assigned rights and has full ownership rights in the copyright.[[42]](#footnote-42) Because the assignee receives a right of ownership, they enjoy rights against all third parties, which allows them in particular to sue others for infringement of their property rights.[[43]](#footnote-43) The assignee is therefore on equal footing with the original copyright owner.[[44]](#footnote-44) The assignment must be evidenced in writing and be signed.[[45]](#footnote-45)
* **Grant of licence**
1. A licence is similar to an “authorization”.[[46]](#footnote-46) Author David Vaver points out that “licence” and “consent” are used interchangeably in some jurisdictions.[[47]](#footnote-47) It is a term generally referring to a consent of the holder that takes a contractual form, as opposed to a unilateral act.[[48]](#footnote-48) This approach is consistent with subsection 27(1) of the *CA*, which defines copyright infringement as “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”.[[49]](#footnote-49) Proof of a licence covering the acts of alleged infringement is therefore [translation] “an absolute defence to infringement”.[[50]](#footnote-50)
2. Essentially, a licence obligates the copyright owner, the licensor, not to pursue a claim for copyright infringement against its beneficiary, the licensee, when the latter exploits the copyright covered by the licence [translation] “within the area of exploitation permitted by this licence”.[[51]](#footnote-51) In other words, “[t]he licence is only a permission to do what would otherwise be an infringement of the right of ownership”.[[52]](#footnote-52) A licence does not confer any property rights on the licensee; it is only a permission to do something, which is not subject to any requirements as to form or content.[[53]](#footnote-53) Since the rights of the licensee are contractual in nature, the licensee can only sue the copyright owner for breach of contract, and not for infringement of a property right.[[54]](#footnote-54)
3. A licence is exclusive or non-exclusive.[[55]](#footnote-55)
4. An exclusive licence is “an authorization to do any act that is subject to copyright”.[[56]](#footnote-56) The licensor is not only prohibited from granting licences in respect of the rights granted to any others, but is also prohibited from exploiting these same rights *itself*.[[57]](#footnote-57) The Supreme Court explained the requirements for an exclusive licence as follows in *Kraft*:

26 … An exclusive licence under copyright law exists when the following conditions are met: (a) the copyright owner (the licensor) permits another person (the licensee) to do something within the copyright; (b) the licensor promises not to give anyone else the same permission for the duration of the licence; and (c) the licensor itself promises not to do those acts that have been licensed to the licensee for the duration of the licence: [*Copyright Act*, s. 2.7](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-42/latest/rsc-1985-c-c-42.html#sec2.7_smooth); see also D. Vaver, “The Exclusive Licence in Copyright” (1995), 9 *I.P.J*. 163, at pp. 164-65.[[58]](#footnote-58)

[Emphasis added.]

1. An exclusive licence does not grant a *right* of ownership in the same way as an assignment, but rather “a limited property *interest* in the copyright”.[[59]](#footnote-59) Subsection 13(7) of the *CA* makes this clear: “It is deemed always to have been the law that a grant of an exclusive licence in a copyright constitutes the grant of an interest in the copyright by licence”. The exclusive licensee therefore has a “limited property interest in the copyright”, which enables it to sue third parties for copyright infringement, but not the owner-licensor.[[60]](#footnote-60)
2. The main distinction between assignment and exclusive licence therefore lies in the fact that the first entails a transfer of ownership of the copyright, while the second involves only an authorization to perform acts that are reserved for the copyright owner.
3. Like assignment, an exclusive licence must be evidenced in writing and signed.[[61]](#footnote-61) This formality aims in particular to protect the interests of the author and “to balance the public interest in promoting the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator”.[[62]](#footnote-62) However, this formalism governing assignment and exclusive licence has been watered down occasionally by the courts.[[63]](#footnote-63)
4. A non-exclusive licence does not confer any rights or property interest in the copyright: the non-exclusive licensee enjoys only contractual rights vis-à-vis the owner-licensor.[[64]](#footnote-64) The *CA* in effect elevates exclusive licensees “above [non-exclusive] ‘mere licensees’”.[[65]](#footnote-65) The non-exclusive licensee becomes the beneficiary of a “personal” right granted by the owner-licensor allowing it to exploit the licensed right(s) [translation] “to the fullest extent permitted by law (but only to that extent)”.[[66]](#footnote-66) The non-exclusive licensee therefore has no power to sue for copyright infringement.[[67]](#footnote-67) In this case, competing rights exist with respect to the work concerned. There is no particular requirement as to form; the licence can be verbal.[[68]](#footnote-68)
5. Not being subject to any requirement as to form, the non-exclusive licence is often wrongly characterized, both by the courts and by authors, as an “implied licence”.[[69]](#footnote-69) Use of the expression “non-exclusive licence” is the most accurate, as an implied licence refers to a different reality.[[70]](#footnote-70)
6. In sum, assignment confers a *right* of ownership (or a “full property interest”[[71]](#footnote-71)); an exclusive licence confers a limited property *interest*,[[72]](#footnote-72) and a non-exclusive licence does not confer any property right or interest.

#### 4.1.2.3 Interpretation of the contract

1. Once the exercise of characterizing the contract is completed, the judge interprets it. Interpretation makes it possible for the judge to “establish the term of the contract and the procedure for renewing it”.[[73]](#footnote-73)
2. The first step in interpreting a contract is to determine whether its words are clear or ambiguous.[[74]](#footnote-74) In the case of a verbal contract, which by its very nature does not allow for a preliminary study of its words, the judge proceeds immediately to the second step,[[75]](#footnote-75) i.e., the actual interpretation. At this step, the judge seeks to determine the common intention of the parties by considering intrinsic and extrinsic aspects of the contract, such as the factual circumstances in which it was agreed upon and how the parties have interpreted it in the past.[[76]](#footnote-76)
3. In general, the purpose of interpreting a contract is to determine what meaning the parties seem to have intended to give to a part of their agreement.[[77]](#footnote-77) If the judge identifies an ambiguity, he or she then looks for the common intention of the parties, which makes it “possible to establish the term of the contract and the procedure for renewing it”.[[78]](#footnote-78)
4. In copyright, assignment, exclusive licence, and non-exclusive licence constitute contracts for the protection of a work within the meaning of the *CA.* These contracts must be analyzed in accordance with the rules specific to that *Act*, but remain subject to the rules governing contracts in civil law.[[79]](#footnote-79) The *CA* contains provisions on the duration ofthe copyright as such, but does not deal with the question of the duration of assignments or grants of licences for these rights. It is thus necessary to refer to the rules of interpretation of contracts in civil law[[80]](#footnote-80) and focus on the parties’ original common intention, “at the time of formation of the contract”.[[81]](#footnote-81)
5. A **fixed-term contract** is one whose duration is fixed in advance. This duration is generally explicitly stipulated by the contracting parties themselves, but it can also be implicit.[[82]](#footnote-82) It is valid until the end of the extinctive term limiting its duration. A contracting party cannot unilaterally revoke this contract without justifying a breach of the obligations of the other party. Such a revocation is contrary to article 1439 CCQ and therefore void.[[83]](#footnote-83) Authors Lluelles and Moore consider that [translation] “[t]he co-contracting party who is the victim of this breach can legitimately consider the contract as still in force”.[[84]](#footnote-84)
6. The parties can also agree on a contract of unlimited duration. This **perpetual contract** includes [translation] “the absolute and definitive revocation of the ability to terminate a contractual relationship during a period of time that exceeds the limits of a physical or professional life”.[[85]](#footnote-85) This type of contract, although rare, is not contrary to public order. This is what the Supreme Court clarified in *Uniprix*: “nothing in the *Code* prohibits contracts … from having effects that could be perpetual”.[[86]](#footnote-86) No express stipulation is required for a contract to have potentially perpetual effects, but the intention to potentially bind oneself in perpetuity must be inferred from the terms of the contract.[[87]](#footnote-87)
7. The perpetual contract should not be confused with the **contract for an indeterminate term**, i.e., the contract for which “the parties have fixed no extinctive term for their obligations”.[[88]](#footnote-88) Like a fixed-term or unlimited term contract, the indeterminate term contract is irrevocable. This is a consequence of its binding force which assumes the parties’ compliance with its duration, as codified in article 1439 CCQ.[[89]](#footnote-89) The Supreme Court has recognized that this principle also applies to contracts for an indeterminate term.[[90]](#footnote-90) Copyright, however, recognizes an exception to this principle by recognizing that a licence granted free of charge can be unilaterally revocable, whereas a licence for consideration is only unilaterally revocable if the parties have so agreed.[[91]](#footnote-91)
8. The principle of irrevocability does not mean that the contract for an indeterminate term binds “eternally”, because each contracting party can get out of it by giving sufficient notice.[[92]](#footnote-92) Indeed, [translation] “it would be unreasonable to say that the parties to a commercial agreement wish, or expect, when entering into the agreement, that it will last indefinitely, particularly when their relationship is one that requires trust and collaboration”.[[93]](#footnote-93) A party to such a contract cannot, however, unilaterally terminate it [translation] “in an anarchic manner”.[[94]](#footnote-94) There can be [translation] “no question of a contracting party revoking the contract suddenly, brutally, and immediately”.[[95]](#footnote-95) Moreover, this right to terminate an agreement, even when it is provided for in the contract, must be exercised in good faith.[[96]](#footnote-96) Indeed, it is necessary [translation] “to strongly discourage erratic behaviour that abruptly ends – or jeopardizes – a solidly established contractual relationship”.[[97]](#footnote-97)
9. This Court has clarified that the reasonable notice required to terminate a contract for an indeterminate term [translation] “is not intended to remedy a default”; rather, its objective is [translation] “to allow the other party to take note of the termination and to benefit from a period necessary to reorient its commercial activities”.[[98]](#footnote-98)
10. The reasonable nature of the notice is assessed in light of the circumstances, such as the nature of the prestations, the length of the commercial relationship,[[99]](#footnote-99) and its importance for the parties.[[100]](#footnote-100) Financial profitability, that is to say the objective for the contractor to recover its investments as well as to make a legitimate profit, is one criterion among others for evaluating a reasonable notice period, but it is not sufficient on its own.[[101]](#footnote-101) There is therefore no absolute criterion for determining the length of this notice; the Court must balance a number of criteria.[[102]](#footnote-102) The case law indicates that the length of this notice rarely exceeds one year.[[103]](#footnote-103)
11. Revocation of a contract without notice, or without sufficient notice, may therefore give rise to damages.[[104]](#footnote-104)

### **4.1.3 Application of the law to the facts**

#### 4.1.3.1 Characterization of the contract by the judge

1. The judge characterized the agreement between the parties as one of [translation] “consent”. She limited its term by determining that it applied only to the Antidote HD version launched in October 2009.
2. In so doing, the judge made a reviewable error with regard to both the characterization of the contract entered into between the parties and its interpretation. Here is why.
3. After having examined the circumstances surrounding the creation of the **Visuel Nano** and **Visuel Intégré** interfaces, the judge concluded that QA gave its [translation] “consent” to Druide only for the use of its Works, without however linking this consent to one of the normative categories of copyright contracts.
4. The judge’s decision to find this [translation] “consent” as limited to the Antidote HD version basically conveyed the idea of the existence of a contract between the parties, a contract which, within the meaning of article 1385 CCQ, is formed by the sole exchange of consents between persons having capacity to contract.
5. But again, since we are dealing with copyright law, what kind of contract is it? Is this an assignment contract, an exclusive licence contract, or a non-exclusive licence contract? The story does not say, because the judge omitted to characterize the nature of the consent, which she was necessarily required to do, given the circumstances of the case.
6. Let us rule out right away the notion that the contract entered into between the parties could be an assignment of copyright in QA’s Works. The evidence shows that QA never transferred the ownership of its Works to Druide and never intended to do so.[[105]](#footnote-105)
7. At the hearing before us, QA faulted the judge for having failed to characterize the work designed by Druide by integrating QA’s Works. QA argued that the **Visuel Nano** and **Visuel Intégré** interfaces constitute works of joint authorship and that the consent given to Druide to use its Works corresponds to what QA describes as [translation] “tacit authorization”.
8. I do not share this view.
9. In addition to the fact that QA did not appeal the judge’s decision on this subject, the recognition of a work of joint authorship requires satisfaction of two conditions: it must be created by at least two authors, and the part of each author must not be distinct from that of the other author or authors.[[106]](#footnote-106) Here, the facts put into evidence clearly demonstrate that **Visuel Nano** and **Visuel Intégré** were created by Druide by integrating the QA Works. The parties did not together create these two interfaces in which the part of one is indistinct from that of the other. The evidence shows that each party’s part is clearly distinct.
10. Add to this the fact that if there were a work of joint authorship in the creation of the **Visuel Nano** and **Visuel Intégré** interfaces, Druide would own the copyright in the Works in the same way as QA.[[107]](#footnote-107) The latter has always considered itself, rightly, to be the sole owner of the copyright in these Works[[108]](#footnote-108) and furthermore, Druide has never claimed such co-ownership of QA’s Works.
11. Last, and still addressing the hypothesis of the existence of a work of joint authorship, Druide would never have needed to demonstrate, as it has done since the beginning of the dispute, that it had been granted a licence. It would only have had to demonstrate the existence of a work of joint authorship.
12. As for the [translation] “tacit authorization” given by QA to Druide for the use of its Works, this concept does not exist in copyright. The Court’s decision on which QA bases its argument, *Stoyonova v. Syndic de Disques Miles End inc*.,[[109]](#footnote-109) established no new normative category of contract in copyright.
13. Let us also eliminate the idea that the contractual agreement between the parties corresponds to an exclusive licence. QA never granted Druide a property interest in its Works. QA never prohibited itself from exploiting its Works.[[110]](#footnote-110) Finally, there was never any question throughout their business relationship of the existence of an exclusive licence, which, moreover, requires a written document and a signature, two essential characteristics that are absent in this case.
14. This then leaves the non-exclusive licence, which should have been the judge’s conclusion when characterizing the agreement between the parties. It could not be otherwise, as Druide rightly pointed out in its brief:

[translation]

31. The appellant has never claimed that the respondent granted it any property right or interest by way of assignment or exclusive licence. The only right it has invoked is that of being able to reproduce, and therefore use, the respondent’s works in Visuel Nano and Visuel Intégré within Antidote. A “licence” or “non-exclusive licence” is precisely a simple authorization to do something (i.e., reproduce), which would otherwise constitute an infringement of copyright, without the licensee being able to claim any right of ownership over the copyright. **It is not subject to any requirement as to form or content.** As the Supreme Court noted in *Kraft*, the non-exclusive licensee “enjoys only contractual rights *vis-à-vis* the owner-licensor”, whether the agreement is express or implied.

[Bold in original; references omitted.]

1. The [translation] “consent“ found by the judge corresponds in all respects to a non-exclusive licence. QA did not grant Druide any property right or property interest in its Works. Druide thus held contractual rights allowing it to use the QA Works in its **Visuel Nano** and **Visuel Intégré** interfaces. Finally, the contract was based on a verbal exchange of consents whose origin dates back to 2004 when QA and Druide agreed to integrate l’Index du Visuel, containing the QA Works, into Antidote Prisme 5.
2. In addition to failing to characterize the contract between the parties, the judge erred in deciding that the agreement between the parties was conditional on the drafting of a written document and that essential elements were missing for her to find that there existed a non-exclusive licence.

## The judge erred in finding that any agreement between the parties was conditional on the drafting of a written document

1. The judge wrote in paragraph 299 of the judgment that [translation] “any agreement to be reached remained conditional on the drafting of a written document, because the parties had agreed that their discussions and agreements would be recorded in writing”.[[111]](#footnote-111)
2. While it is fair to say that the parties had expressed a desire to put their agreement in writing, it is wrong to say that any agreement depended on a written document.
3. In fact, the parties never made the requirement of a written document a *sine qua non* condition for the existence of a contract.
4. As evidence, the absence of a written document never prevented them from establishing a solid business relationship for over ten years. The integration of the two-way bridge in 1998, the integration of l’Index du Visuel in Antidote Prisme 5, and the integration of the **Visuel Nano** and **Visuel Intégré** interfaces in Antidote HD, all significant commercial events, were never preceded by a written document to formalize a contract. Moreover, the absence of a written document did not prevent the judge from recognizing the existence of a [translation] “consent” in the nature of a contract with respect to the Antidote HD software.
5. It is also relevant to point out that the parties never made it a priority to draft a document to solidify their business relationship. The following evidence attests to this.
6. In 2004, a draft contract was prepared to govern the conditions of use of l’Index du Visuel, without a contract being signed by the parties.[[112]](#footnote-112) When asked about this, Luc Roberge of QA did not remember that the contract had not been signed. He added that there was [translation] “a lot of laxity” between the parties regarding the contracts between them since they trusted each other.[[113]](#footnote-113)
7. When the launch of Antidote HD was planned for the fall of 2009, Caroline Fortin wrote to André d’Orsonnens on December 9, 2008, to tell him that [translation] “it would be good to draft an agreement”.[[114]](#footnote-114) André d’Orsonnens immediately offered to prepare a first draft.[[115]](#footnote-115) During a meeting in March 2009, he suggested that Caroline Fortin assign the responsibility for drafting the contract to Mtre Marie-Claude Germain of QA, who had then returned from maternity leave. Five months later, Caroline Fortin decided to give the drafting mandate to Mtre Germain and confirmed this to André d’Orsonnens.[[116]](#footnote-116) During her testimony, Caroline Fortin clarified that in October 2009, [translation] “it was probably not a priority for [Mtre Germain] at that time” to draft the contract.[[117]](#footnote-117) In fact, the launch of Antidote HD took place on October 20, 2009, without any contract formalizing the parties’ relationship.[[118]](#footnote-118)
8. André d’Orsonnens testified about a meeting with Caroline Fortin on September 15, 2010. There they established an order of priority of things to be done until the release of Antidote HD. Although it was a topic that was covered, the drafting of a contract was not on the priority list.[[119]](#footnote-119)
9. In short, the parties never made the drafting of a written document an essential condition to mark their contractual commitment.

## The judge erred in deciding that several essential elements were missing to find that there existed a non-exclusive licence

1. The judge wrote in paragraph 300 of her judgment that several elements essential to the granting of a non-exclusive licence remained to be agreed upon at the time of the launch of the Antidote HD software. She listed them as follows:
* The identification of works protected by the copyright of Québec Amérique in Visuel Nano and Visuel Intégré and the copyright credits in the appropriate places;
* The scope of the interests granted by Québec Amérique to Druide Informatique with respect to the protected works;
* The territories subject to the licence and the language restrictions;
* The duration of the interests granted; and
* The royalties payable for use of the protected works.
1. However, this did not prevent her from ignoring these missing elements that she considered [translation] “essential” for the recognition of the existence of a [translation] “consent” regarding the use of the Works in Antidote HD; a [translation] “consent” which I will otherwise refer to as a non-exclusive licence contract.
2. The evidence further establishes that subsequent versions of Antidote 8 and 9 contained exactly the same **Visuel Nano** and **Visuel Intégré** interfaces. In fact, the architecture of these interfaces did not undergo any changes over the years and was identical in all respects to that of Antidote HD.
3. In any event, if the missing essential elements for Antidote HD did not prevent the judge from recognizing the existence of a [translation] “consent”, the same should have been true for Antidote 8 and 9, which have identical architecture.

#### 4.1.3.2 The judge’s interpretation of the term of the contract

1. By failing to characterize the [translation] “consent” as a non-exclusive licence, which was an overriding error, the judge consequently failed to analyze the parties’ common intention to determine its duration.
2. In fact, in concluding that QA had granted Druide a [translation] “consent” limited solely to Antidote HD, she equated this [translation] “consent” to a fixed-term contract.
3. This conclusion is quite simply not supported by the evidence, as the parties never agreed, explicitly or implicitly, that their agreement would be limited in time to the sole edition of Antidote HD.
4. The evidence established that discussions frequently took place regarding the setting of a term, without, however, any agreement being reached between the parties on this subject.
5. Thus, discussions were underway at the time of the integration of l’Index du Visuel, the predecessor of **Visuel Nano**. The 2004 draft agreement, which was never finalized or signed, provided for an agreement that was valid for three years and automatically renewable.[[120]](#footnote-120) In May 2008, at the time of designing the **Visuel Nano** interface, QA confirmed that Druide could continue to offer this new interface in the Antidote HD software [translation] “for a period of 10 years following a possible withdrawal” by QA from this partnership.[[121]](#footnote-121) In January 2009, Druide announced to QA that it was abandoning [translation] “the initial idea of a 10-year contract”, favouring instead a term described as [translation] “unlimited”.[[122]](#footnote-122) Following the launch of Antidote HD in October 2009, QA agreed to the use of its Works for almost two years, as their negotiations to reach a written agreement had extended until June 22, 2012.[[123]](#footnote-123) In April 2011, Luc Roberge sent an email to Jacques Fortin. In it he wrote:

[translation]

However, I do not recall that we had agreed on the duration of the contract. As I wrote to you, there has always been a historical irritant around the duration at each negotiation. I have always wanted to put a fixed duration on the agreements, and André has always insisted on agreements of unlimited duration.[[124]](#footnote-124)

1. In the absence of an accord limiting the term of the agreement entered into for the Antidote HD edition or providing for an extinctive term or even for an unlimited term,[[125]](#footnote-125) it must be concluded that the parties were bound by a contract for an indeterminate term.
2. In these circumstances, QA could not terminate this contract without giving reasonable notice to Druide to allow it [translation] “to benefit from a period necessary to reorient its commercial activities”.[[126]](#footnote-126)
3. Recall that the judge rejected the idea that the agreement between the parties was for an indeterminate term. Despite this determination, she nevertheless granted Druide a period of time akin to prior notice to cease using QA’s Works, i.e., until the earlier of the following two dates: the launch date of the next edition of Antidote, which was to be Antidote 10, or December 31, 2018.
4. Considering the nature of the business relationship between the parties, the duration of this relationship, and the period necessary to allow Druide to reorient its commercial activities, the date of December 31, 2018, accepted by the judge constituted reasonable notice in the circumstances.
5. Because the contract binding the parties was for an indeterminate term, and the period of time granted by the judge served as reasonable notice to terminate it, the use by Druide of QA’s Works in Antidote 8 and 9, launched in 2012 and 2015 respectively, did not infringe the copyright of QA. Accordingly, I propose to set aside the condemnation to pay damages of $100,000.

## 4.2 Did the judge make a reviewable error in awarding punitive damages to QA?

1. The judge awarded QA punitive damages of $25,000. She explained this as follows:

[translation]

[354] Moreover, Druide Informatique launched a bilingual version of Antidote 9, even though the rights it invoked applied only to the French language version of the Antidote software. In addition, the evidence shows that it [translation] “repeated” definitions, without entitlement, for Antidote’s dictionary of definitions. Should exemplary damages be awarded to sanction these infringements?

[355] The Court finds that the use of the Works in the English section of the bilingual version of Antidote 9 and the [translation] “repetition” of the definitions of Québec Amérique for Antidote’s dictionary of definitions constitutes unlawful and intentional interference with the copyright of Québec Amérique by Druide Informatique.

[356] Taking into account all of the circumstances of this case, the Court considers that an amount of twenty-five thousand dollars ($25,000) is appropriate to satisfy the deterrence requirement specific to this type of damages.[[127]](#footnote-127)

1. Punitive damages were awarded firstly on the basis of Druide’s use of QA’s Works in the English section of the bilingual version of Antidote 9.
2. The judge made an error that QA recognized before this Court in determining that the Works were used in the English section of the bilingual version of Antidote 9. In fact, the Works were used only in the French section of this version, as explained by witness Bertrand Pelletier of Druide at trial.[[128]](#footnote-128) As the factual premise adopted by the judge was inaccurate, she could not therefore base the award of punitive damages on it.
3. Next, the judge faulted Druide for having transplanted definitions from the QA dictionary and reproducing them in its own dictionary of definitions, without being entitled to do so.
4. I find it difficult to see in these actions an intentional infringement evidencing malicious and oppressive conduct by Druide.
5. It should be emphasized that the judge had previously found that she would not award punitive damages for Druide’s use of QA’s Works in Antidote 8 and 9, as she wrote: [translation] “The dispute between the parties stems from a complex factual and legal situation. The position put forward by Druide Informatique to justify the use of the Works in the Antidote 8 and 9 software is not wholly unsupported, although the Court does not entirely accept it”.[[129]](#footnote-129) She added more in the next paragraph by stating that [translation] “Druide Informatique did not infringe Québec Amérique’s copyright in a deliberate and intentional way, marked by bad faith in opposing Québec Amérique’s proceedings”.[[130]](#footnote-130)
6. Moreover, the explanations provided by Druide at trial to justify the use of the Visuel Multimedia definitions in its dictionary were not wholly unsupported, to use the words of the judge. The purpose of integrating the definitions was to create a link between an illustration and a phrase in Antidote, and the minor changes made to these definitions were only intended to adapt them to the technological environment and terminology specific to Antidote.[[131]](#footnote-131) This explanation in no way suggests “a state of mind that implies a desire or intent to cause the consequences of [its] wrongful conduct, or when that person acts with full knowledge of the immediate and natural or at least extremely probable consequences that [its] conduct will cause”.[[132]](#footnote-132) On the contrary, Druide’s explanations are credible and sensible. Its conduct in this regard shows at most a certain negligence or casualness, which does not satisfy the exacting criteria authorizing the judge to award punitive damages.[[133]](#footnote-133)
7. For these reasons, I would allow the appeal, reverse the trial judgment, and set aside the condemnation to pay damages of $100,000 and the condemnation to pay punitive damages of $25,000, the whole with legal costs.

|  |
| --- |
|  |
|  |  |
| JOCELYN F. RANCOURT, J.A. |

1. *Éditions Québec Amérique inc. c. Druide informatique inc.,* 2017 QCCS 4092[Judgment under appeal]. [↑](#footnote-ref-1)
2. Judgment under appeal at para. 312. [↑](#footnote-ref-2)
3. Exhibit P-16, Draft distribution agreement, 2004. [↑](#footnote-ref-3)
4. Exhibit P-24J, Email from Caroline Fortin to André d’Orsonnens (6 October 2009). [↑](#footnote-ref-4)
5. Judgment under appeal at para. 15. [↑](#footnote-ref-5)
6. Exhibit P-11, Notice of revocation of licence (26 June 2011). [↑](#footnote-ref-6)
7. Exhibit P-12, Letter extending the licence end date (27 September 2011). [↑](#footnote-ref-7)
8. Exhibit P-13, Notice extending the licence end date (8 December 2011). [↑](#footnote-ref-8)
9. Exhibit P-28 a) to f), Draft contracts (11 May to 22 June 2012). [↑](#footnote-ref-9)
10. Re-amended originating application (22 December 2016). [↑](#footnote-ref-10)
11. *Éditions Québec-Amérique inc. c. Druide Informatique inc*., 2013 QCCS 82. [↑](#footnote-ref-11)
12. Judgment under appeal at para. 206. [↑](#footnote-ref-12)
13. *Ibid*. at paras. 207–209. [↑](#footnote-ref-13)
14. *Ibid*. at para. 211. [↑](#footnote-ref-14)
15. *Copyright Act*, R.S.C. 1985, c. C-42. [↑](#footnote-ref-15)
16. Judgment under appeal at paras. 217–221. [↑](#footnote-ref-16)
17. *Ibid*. at paras. 224, 306. [↑](#footnote-ref-17)
18. *Ibid*. at paras. 226, 279, 290,301, 303, and 306. [↑](#footnote-ref-18)
19. *Ibid*. at paras. 227, 304–306. [↑](#footnote-ref-19)
20. *Ibid*. at paras. 279, 294, 298, and 300. [↑](#footnote-ref-20)
21. *Ibid*. at para. 299. [↑](#footnote-ref-21)
22. *Ibid*. at para. 307. [↑](#footnote-ref-22)
23. *Ibid*. at para. 317. [↑](#footnote-ref-23)
24. *Ibid*. at para. 318. [↑](#footnote-ref-24)
25. *Ibid*. at para. 319. [↑](#footnote-ref-25)
26. *Ibid*. at para. 324. [↑](#footnote-ref-26)
27. *Ibid*. at para. 348. [↑](#footnote-ref-27)
28. *Ibid*. at paras. 355–356. [↑](#footnote-ref-28)
29. *Uniprix inc. v. Gestion Gosselin et Bérubé inc*., 2017 SCC 43 at para. 42; *Station Mont-Tremblant c. Banville-Joncas*, 2017 QCCA 939 at paras. 63–65; *Administration portuaire de Québec c. Fortin*, 2017 QCCA 315 at para. 12; *Compagnie canadienne d'assurances générales Lombard c. Promutuel Portneuf-Champlain, société mutuelle d'assurances générales*, 2016 QCCA 1903 at para. 17; *Mercille c. 9221-8247 Québec inc*., 2016 QCCA 49 at para. 38; *Montréal, Maine & Atlantique Canada Cie/Montreal, Maine & Atlantic Canada Co. (M.M.A.) (Arrangement relatif à),* 2014 QCCA 2072 at para. 20. This is also what the Federal Court of Appeal held in the copyright context: *Planification-Organisation-Publications Systèmes (POPS) Ltée v. 9054-8181 Québec Inc*., 2014 FCA 185 at para. 43. [↑](#footnote-ref-29)
30. *Station Mont-Tremblant c. Banville-Joncas*, *supra* note 29 at paras. 64–65. See also *Uniprix inc. v. Gestion Gosselin et Bérubé inc*., *supra* note 29 at para. 44; *Samen Investments Inc. c. Monit Management Ltd.*, 2014 QCCA 826 at para. 52; *Régie de gestion des matières résiduelles de la Mauricie c. Serres du St-Laurent inc*., 2013 QCCA 1607 at para. 64; *Primmum, compagnie d'assurances c. Société d'assurances collective Sodaco*, 2013 QCCA 1516; *Compagnie canadienne d'assurances générales Lombard c. CIT Financial Ltd*., 2012 QCCA 1811 at para. 18; *Compagnie de chemin de fer du littoral nord de Québec et du Labrador inc. c. Sodexho Québec ltée*, 2010 QCCA 2408 at para. 81. [↑](#footnote-ref-30)
31. Judgment under appeal at paras. 206–207. [↑](#footnote-ref-31)
32. *Harmony Consulting Ltd. v. G. A. Foss Transport Ltd*., 2012 FCA 226 at para. 31. See also Jean‑Philippe Mikus, “Recours en contrefaçon” in *JurisClasseur Québec*, vol. *Recours en contrefaçon de droits d'auteur* (Montreal: Lexis Nexis, 2018) at 1/58. [↑](#footnote-ref-32)
33. David Vaver, “Consent or No Consent: The Burden of Proof in Intellectual Property Infringement Suits” (2001) 23 I.P.J. 147 at 150 [Vaver, “Consent or No Consent”]; *Harmony Consulting Ltd. v. G. A. Foss Transport Ltd.*, *supra* note 32 at para. 32. [↑](#footnote-ref-33)
34. *Ibid*. at 148–149; *Harmony Consulting Ltd. v. G. A. Foss Transport Ltd.*, *supra* note 32 at para. 32. [↑](#footnote-ref-34)
35. *Ibid*. [↑](#footnote-ref-35)
36. *Uniprix inc. v. Gestion Gosselin et Bérubé inc*., *supra* note 29. [↑](#footnote-ref-36)
37. *Ibid.* at para. 37. [↑](#footnote-ref-37)
38. *Ibid.* at para. 29. [↑](#footnote-ref-38)
39. *Ibid*. [↑](#footnote-ref-39)
40. *Ibid.* at para. 38, citing on this point authors Lluelles and Moore in Didier Lluelles and Benoît Moore, *Droit des obligations*, 2nded. (Montreal: Thémis, 2012) at Nos. 1727 and 1729. [↑](#footnote-ref-40)
41. Stéphane Gilker, “Principes généraux du droit d’auteur” in Service de la formation continue, Barreau du Québec, *Congrès annuel du Barreau du Québec 2009* (Montreal, 2009) at 71. See also *Electric Fireproofing Co. of Canada v. Electric Fireproofing Co*., (1910) 43 SCR 182, 1910 CanLII 66; Camille Aubin, “Les licences implicites de droit d’auteur en matière de logiciels” (2017) 29 C.P.I. 1 at 6; John S. McKeown, *Fox on Canadian Law of Copyright and Industrial Design*, 4th ed., vol. 1 (Toronto: Thomson Reuters, 2003) (looseleaf updated 2013) at 19-17; David Vaver, *Intellectual Property Law: Copyright, Patents, Trade-marks*, 2nd ed. (Toronto: Irwin Law, 2011) at 563 [Vaver, *Intellectual Property Law*]: “An assignment changes ownership in the right from assignor to assignee”. [↑](#footnote-ref-41)
42. *Euro-Excellence Inc. v. Kraft Canada Inc*., 2007 SCC 37 at paras. 27–29. [↑](#footnote-ref-42)
43. *Ibid.* at paras. 27 and 32. [↑](#footnote-ref-43)
44. Subsection 13(5) *CA*; *Euro-Excellence Inc. v. Kraft Canada Inc*., *supra* note 42 at para. 29. [↑](#footnote-ref-44)
45. Subsection 13(4) *CA*. [↑](#footnote-ref-45)
46. Section 2.7 *CA*; *Euro-Excellence Inc. v. Kraft Canada Inc*., *supra* note 42 at para. 27. [↑](#footnote-ref-46)
47. Vaver, “Consent or No Consent”, *supra* note 33 at 150: “Some laws say “licence” instead of “consent” but the two words here mean the same” [emphasis added]. See also Vaver, *Intellectual Property Law*, *supra* note 41 at 575: “While an assignment changes ownership in the right from assignor to assignee, a licence is just a consent, permission, or clearance (the terms are all interchangeable) to use [intellectual property] on the terms specified by the licensor …” [emphasis added]. [↑](#footnote-ref-47)
48. Mikus, *supra* note 32 at 1/60; McKeown, *supra* note 41 at 19–27. [↑](#footnote-ref-48)
49. Subsection 27(1) *CA*; McKeown, *supra* note 41 at 19–27. [↑](#footnote-ref-49)
50. Mikus, *supra* note 32 at 1/60. See also *Albian Sands Energy Inc. v. Positive Attitude Safety System Inc.*, 2005 FCA 332 at paras. 39–40. [↑](#footnote-ref-50)
51. Gilker, *supra* note 41 at 71. [↑](#footnote-ref-51)
52. Bruce Ziff, *Principles of Property Law*, 7thed. (Toronto: Thomson Reuters, 2018) at 354; McKeown, *supra* note 41 at 19–27. [↑](#footnote-ref-52)
53. *Euro-Excellence Inc. v. Kraft Canada Inc*., *supra* note 42 at para. 27; McKeown, *supra* note 41 at 19–27. [↑](#footnote-ref-53)
54. *Euro-Excellence Inc. v. Kraft Canada Inc*., *supra* note 42 at para. 27. [↑](#footnote-ref-54)
55. Vaver, *Intellectual Property Law*, *supra* note 41 at 576. [↑](#footnote-ref-55)
56. Section 2.7 *CA*; *Euro-Excellence Inc. v. Kraft Canada Inc*., *supra* note 42 at para. 39. [↑](#footnote-ref-56)
57. *Euro-Excellence Inc. v. Kraft Canada Inc*., *supra* note 42 at para. 40; Gilker, *supra* note 41 at 71; Aubin, *supra* note 41 at 6. [↑](#footnote-ref-57)
58. *Euro-Excellence Inc. v. Kraft Canada Inc*., *supra* note 42 at para. 26. [↑](#footnote-ref-58)
59. *Ibid.* at para. 28 [italics added]. [↑](#footnote-ref-59)
60. *Ibid.* [emphasis added]. [↑](#footnote-ref-60)
61. Subsection 13(4) *CA*; *Robertson v. Thomson Corp*., 2006 SCC 43 at para. 56. [↑](#footnote-ref-61)
62. *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13 at para. 23; *Tremblay v. Orio Canada Inc*., 2013 FCA 225 at para. 18; Aubin, *supra* note 41 at 7. [↑](#footnote-ref-62)
63. In *Seggie c. Roofdog Games inc.*, 2015 QCCS 6462 at para. 80, the Superior Court recognized that an email or text message on a mobile phone could be considered a writing within the meaning of the *CA*. In *Tremblay v. Orio Canada Inc*., *supra* note 62 at paras. 22–23, the assignor had acknowledged before the Court that he consented to the transfer of the copyright and acknowledged that the clause, written but unsigned, governed his relationship with the assignee. The Federal Court of Appeal concluded that in such circumstances, the purpose sought by the *CA* is fulfilled. See also Aubin, *supra* note 41 at 7. [↑](#footnote-ref-63)
64. *Euro-Excellence Inc. v. Kraft Canada Inc*., *supra* note 42 at para. 28; *Tremblay v. Orio Canada Inc*., *supra* note 62 at para. 19. [↑](#footnote-ref-64)
65. *Euro-Excellence Inc. v. Kraft Canada Inc*., *supra* note 42 at para. 31. [↑](#footnote-ref-65)
66. Gilker, *supra* note 41 at 71. [↑](#footnote-ref-66)
67. *Euro-Excellence Inc. v. Kraft Canada Inc*., *supra* note 42 at para. 28. [↑](#footnote-ref-67)
68. *Robertson v. Thomson Corp.,* *supra* note 61 at para. 56; Normand Tamaro, *Loi sur le droit d’auteur, texte annoté*, 11th ed. (Toronto: Thomson Reuters, 2019) at 524; Gregory Hagen *et al*., *Canadian Intellectual Property Law: Cases and Materials*, 2nd ed. (Toronto: Emond Montgomery, 2018) at 147. [↑](#footnote-ref-68)
69. *Netupsky et al. v. Dominion Bridge Co. Ltd.,* [1972] SCR 368 at paras. 378–379; *Tremblay v. Orio Canada Inc*., *supra* note 62 at para. 25; Aubin, *supra* note 41. [↑](#footnote-ref-69)
70. “Implied licence” and “non-exclusive licence” are often wrongly considered interchangeable expressions, since the consent giving rise to the non-exclusive licence can be implicit. However, an implied licence, as described by the Supreme Court in *Netupsky et al. v. Dominion Bridge Co. Ltd.,* *supra* note 69, refers instead to terms that are not explicitly covered by an assignment or a grant of licence, but are implicitly authorized. [↑](#footnote-ref-70)
71. *Euro-Excellence Inc. v. Kraft Canada Inc*., *supra* note 42 at para. 29. [↑](#footnote-ref-71)
72. *Ibid.* at para. 37. [↑](#footnote-ref-72)
73. *Uniprix inc. v. Gestion Gosselin et Bérubé inc*., *supra* note 29 at paras. 38–39. [↑](#footnote-ref-73)
74. *Ibid.* at para. 34. [↑](#footnote-ref-74)
75. See e.g., *Northern Quebec Inuit Association c. Chait*, [1984] R.D.J. 288, 1984 CanLII 2863 (C.A.); *Demers c. Garnier*, [1970] J.Q. no 58 (C.A.); *Asselin c. 9214-2462 Québec inc. (Asi Énergie),* 2016 QCCS 5289 at paras. 34–36; *C. Ricci & Fils Construction inc. c. Station de services Nick et Frank ltée*, [1996] R.L. 1, 1994 CanLII 10618 (QC CS) at paras. 1–2 and 14; *Trépanier c. 9205-5862 Québec inc. (MCRB Construction),* 2016 QCCQ 4612 at paras. 49–50; *9017-2453 Québec inc. c. Gestion du maître inc.,* 2013 QCCQ 4784 at paras. 50 and 57–60; *8 PDC inc. c. MBCO Nuns Island Inc.,* 2009 QCCQ 4526 at paras. 5–6*; Dembri c. CSSS des Pays d'En-Haut*, 2010 QCCQ 11277 at paras. 9–10; *Max Shrier & Associates Ltd. c. Stern*, 2007 QCCQ 11654 at paras. 31–32; *Séguin c. Alutrec inc.,* 2004 CanLII 30419 (QC CQ) at para. 7. [↑](#footnote-ref-75)
76. *Uniprix inc. v. Gestion Gosselin et Bérubé inc*., *supra* note 29 at para. 37. [↑](#footnote-ref-76)
77. *Ibid.* at para. 38. [↑](#footnote-ref-77)
78. *Ibid*. [↑](#footnote-ref-78)
79. *Turgeon c. Michaud*, J.E. 2003-1299, 2003 CanLII 4735 (QC CA) at para. 72. See also *Electric Fireproofing Co. of Canada v. Electric Fireproofing Co*., *supra* note 41 at 193–194; *Planification-Organisation-Publications Systèmes (POPS) Ltée v. 9054-8181 Québec Inc*., *supra* note 29 at paras. 39 and 42. [↑](#footnote-ref-79)
80. Tamaro, *supra* note 68 at 530. See e.g., *Diffusion YFB inc. c. Disques Gamma (Québec) ltée*, J.E. 99-1139, 1999 CanLII 11215 (QC CS) at para. 27: [translation] “In the absence of a provision on the subject in the *Copyright Act*, the Court has recourse to the principles of civil law, which can supplement federal law where there is a legal void”. [↑](#footnote-ref-80)
81. *Union Carbide Canada Inc. v. Bombardier Inc*., 2014 SCC 35 at para. 59 [underlining added]. [↑](#footnote-ref-81)
82. Didier Lluelles & Benoît Moore, *Droit des obligations*, 3rd ed. (Montreal: Thémis, 2018) at 1190, No. 2043. [↑](#footnote-ref-82)
83. *Ibid*. at 1193, No. 2046. [↑](#footnote-ref-83)
84. *Ibid*. [↑](#footnote-ref-84)
85. *Ibid*. at 1255, No. 2143. [↑](#footnote-ref-85)
86. *Uniprix inc. v. Gestion Gosselin et Bérubé inc*., *supra* note 29 at para. 70. [↑](#footnote-ref-86)
87. *Ibid.* at para. 71. [↑](#footnote-ref-87)
88. *Ibid.* at para. 58. See also Lluelles & Moore, *supra* note 82 at 1240, No. 2122. [↑](#footnote-ref-88)
89. Lluelles & Moore, *supra* note 82 at 1189, No. 2040; Jean-Louis Baudouin, Pierre-Gabriel Jobin & Nathalie Vézina, *Les obligations*, 7th ed. (Cowansville, QC: Yvon Blais) at 532, No. 440. [↑](#footnote-ref-89)
90. *Québec (Commission des normes du travail) v. Asphalte Desjardins inc*., 2014 SCC 51 at para. 29. See also *E. & S. Salsberg inc. c. Dylex Ltd*., 1992 CanLII 3409 (QC CA), [1992] R.J.Q. 2445 at 2451; Lluelles & Moore, *supra* note 82 at 1189, No. 2041 and at 1240, No. 2120. [↑](#footnote-ref-90)
91. *Planification-Organisation-Publications Systèmes (POPS) Ltée v. 9054-8181 Québec Inc*, 2013 FC 427 at para. 128, aff’d *Planification-Organisation-Publications Systèmes (POPS) Ltée v. 9054-8181 Québec Inc.,* *supra* note 29 at para. 45; *Pinto v. Bronfman Jewish Education Centre*, 2013 FC 945 at para. 179; *Katz (c.o.b. Michael Katz Associates) v. Cytrynbaum*, [1983] B.C.J. No. 2421, 1983 CanLII 557 (BC CA) at para. 19–21; Vaver, *Intellectual Property Law*, *supra* note 41 at 582–583; McKeown, *supra* note 41 at 19–30. [↑](#footnote-ref-91)
92. *9077-0801 Québec inc. c. Société des loteries vidéo du Québec inc*., 2012 QCCA 885 at para. 30; *Meubles Canadel inc. c. Ameublement 640 inc.,* 2006 QCCA 1547 at para. 6; *BMW Canada inc. c. Automobiles Jalbert inc*., 2006 QCCA 1068 at paras. 103–109, leave to appeal to SCC refused, 31685 (22 February 2007); *S.M.C. Pneumatiques (Canada) ltée c. Dicsa inc.,* B.E. 2003BE-208, AZ-03019049 (C.A.); *E. & S. Salsberg inc. c. Dylex Ltd*., *supra* note 90; Lluelles & Moore, *supra* note 82 at 1255, Nos. 2140 and 2143. [↑](#footnote-ref-92)
93. *BMW Canada inc. c. Automobiles Jalbert inc*., *supra* note 92 at para. 108, leave to appeal to SCC refused, 31685 (22 February 2007). [↑](#footnote-ref-93)
94. Lluelles & Moore, *supra* note 82 at 1240, No. 2120. [↑](#footnote-ref-94)
95. *Québec (Commission des normes du travail) v. Asphalte Desjardins inc*., *supra* note 90 at para. 29. See also Lluelles & Moore, *supra* note 82 at 1240, No. 2120. [↑](#footnote-ref-95)
96. *9077-0801 Québec inc. c. Société des loteries vidéo du Québec inc*., *supra* note 92 at para. 30; *Centre commercial Innovation inc. c. Lafleur*, 2009 QCCA 845 at para. 14. [↑](#footnote-ref-96)
97. Lluelles & Moore, *supra* note 82 at 1147, No. 1996. [↑](#footnote-ref-97)
98. *Toshiba Business Equipment, Division of Toshiba of Canada Ltd. c. Admaco Business Machines Ltd*., 2007 QCCA 125 at para. 38. [↑](#footnote-ref-98)
99. *Richman c. Adidas Sportchuhfabriken*, J.E. 97-480, 1997 CanLII 10405 (C.A.); *E. & S. Salsberg inc. c. Dylex Ltd*., *supra* note 90. [↑](#footnote-ref-99)
100. *E. & S. Salsberg inc. c. Dylex Ltd*., *supra* note 90. [↑](#footnote-ref-100)
101. *BMW Canada inc. c. Automobiles Jalbert inc.,* *supra* note 92. [↑](#footnote-ref-101)
102. *Ibid.* at para. 116. [↑](#footnote-ref-102)
103. See e.g., *9077-0801 Québec inc. c. Société des loteries vidéo du Québec inc*., *supra* note 92 at para. 53; *Toshiba Business Equipment, Division of Toshiba of Canada Ltd. c. Admaco Business Machines Ltd.,* *supra* note 98 at para. 35; *BMW Canada inc. c. Automobiles Jalbert inc.,* *supra* note 92; *Meubles Canadel inc. c. Ameublement 640 inc*., *supra* note 92 at para. 8; *Bonavista Fabrics Ltd. c. Zellers Ltd*., J.E. 2003-1312, REJB 2003-43087 (Sup. Ct.) at para. 33, aff’d *Zellers Ltd. c. Bonavista Fabrics Ltd*., 2005 QCCA 130; *S.M.C. Pneumatiques (Canada) ltée c. Dicsa inc.*, J.E. 2000‑1448, AZ-50076603 (Sup. Ct.) at para. 79, aff’d *S.M.C. Pneumatiques (Canada) ltée c. Dicsa inc*., *supra* note 92; *Richman c. Adidas Sportchuhfabriken*, *supra* note 99; *E. & S. Salsberg inc. c. Dylex Ltd*., *supra* note 90. [↑](#footnote-ref-103)
104. *Bonavista Fabrics Ltd. c. Zellers Ltd.,* *supra* note 103, aff’d *Zellers Ltd. c. Bonavista Fabrics Ltd.,* *supra* note 103; Lluelles & Moore, *supra* note 82 at 1253, No. 2141. [↑](#footnote-ref-104)
105. Exhibit P-24N, Email exchange between Marie-Claude Germain and André d’Orsonnens (14 and 15 October 2009); Judgment under appeal at para. 189. [↑](#footnote-ref-105)
106. Section 2 *CA*. See also Tamaro, *supra* note 68 at 124. [↑](#footnote-ref-106)
107. Marc Baribeau, *Principes généraux de la Loi sur le droit d'auteur*, 2013 ed. (Québec, Les publications du Québec: 2013) at 34. See also Tamaro, *supra* note 68 at 130. [↑](#footnote-ref-107)
108. Judgment under appeal at para. 189. [↑](#footnote-ref-108)
109. *Stoyanova c. Syndic de Disques Mile End inc.*, 2018 QCCA 1788, aff’g *Stoyanova c. Disques Mile-End* *inc*., 2016 QCCS 5093. [↑](#footnote-ref-109)
110. *Euro-Excellence Inc. v. Kraft Canada Inc*., *supra* note 42 at paras. 26 and 40. [↑](#footnote-ref-110)
111. Judgment under appeal at para. 299. [↑](#footnote-ref-111)
112. *Ibid*. at para. 65 and 234; Exhibit P-16, Unsigned letter of agreement, 2004. [↑](#footnote-ref-112)
113. Testimony of Luc Roberge (16 January 2017) at 256–257. [↑](#footnote-ref-113)
114. Exhibit P-19, Email from Caroline Fortin to André d’Orsonnens (9 December 2008). [↑](#footnote-ref-114)
115. Exhibit P-24B, Email from André d’Orsonnens to Caroline Fortin (18 December 2008). [↑](#footnote-ref-115)
116. Testimony of André d’Orsonnens (17 January 2017) at 147–152; Testimony of Marie-Claude Germain (5 January 2017) at 221–222. [↑](#footnote-ref-116)
117. Testimony of Caroline Fortin (6 January 2017) at 207, lines 7–8. [↑](#footnote-ref-117)
118. Exhibit P-81, Joint chronological table of the parties’ books and software filed by consent in the Court record (10 January 2017). [↑](#footnote-ref-118)
119. Testimony of André d’Orsonnens (17 January 2017) at 232–234. [↑](#footnote-ref-119)
120. Exhibit P-16, Draft distribution agreement, 2004. [↑](#footnote-ref-120)
121. Exhibit D-6, Email from Luc Roberge to André d’Orsonnens (9 May 2008). [↑](#footnote-ref-121)
122. Exhibit P-24B, Email from André d’Orsonnens to Caroline Fortin (27 January 2009). [↑](#footnote-ref-122)
123. Exhibit P-27, Draft contract (17 November 2011); Exhibit P-28, Draft contracts exchanged between Félix Moreau and André d’Orsonnens (11 May to 22 June 2012). [↑](#footnote-ref-123)
124. Exhibit P-70, emails from Luc Roberge, *en liasse* (7 April 2008). [↑](#footnote-ref-124)
125. In *Uniprix inc. v. Gestion Gosselin et Bérubé inc*., *supra* note 29 at para. 71, the Supreme Court emphasized that the will of the parties to bind themselves potentially in perpetuity must be inferred from the terms of the contract in question. Here, only one email from Druide to QA (Exhibit P-24B, Email from André d’Orsonnens to Caroline Fortin (27 January 2009)) mentions an unlimited duration of their agreement, which is insufficient in itself to infer an intention shared by both parties to enter into a contract of such duration. [↑](#footnote-ref-125)
126. *Toshiba Business Equipment, Division of Toshiba of Canada Ltd. c. Admaco Business Machines Ltd*., *supra* note 98 at para. 38. [↑](#footnote-ref-126)
127. Judgment under appeal at paras. 354–356. [↑](#footnote-ref-127)
128. Testimony of Bertrand Pelletier (13 January 2017) at 133–136. [↑](#footnote-ref-128)
129. Judgment under appeal at para. 352 [emphasis added]. [↑](#footnote-ref-129)
130. *Ibid*. at para. 353 [emphasis added]. [↑](#footnote-ref-130)
131. Testimony of Éric Brunelle (16 January 2017) at 66–69. [↑](#footnote-ref-131)
132. *Quebec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand*, [1996] 3 SCR 211 at para. 121. See also *Cinar Corporation v. Robinson*, 2013 SCC 73 at para. 118. [↑](#footnote-ref-132)
133. *Magasins Greenberg ltée c. Import-Export René Derhy (Canada) inc*., J.E. 2004-749, AZ-50226747 (C.A.) at para. 68. [↑](#footnote-ref-133)