

Federal Court



Cour fédérale

Date: 20260114

Docket: T-3443-24

Toronto, Ontario, January 14, 2026

PRESENT: Case Management Judge John C. Cotter

BETWEEN:

**CAROL ROSENSTEIN,
IN HER PERSONAL CAPACITY
AND IN HER CAPACITY AS SOLE TRUSTEE OF
THE BRUCE GOWERS TRUST - 1990**

Plaintiff

and

**QUEEN PRODUCTIONS LIMITED,
SONY MUSIC ENTERTAINMENT, AND
SONY MUSIC ENTERTAINMENT CANADA INC.**

Defendants

ORDER

UPON motion by the defendants dated June 27, 2025, and filed on that date as part of the defendants' amended motion record, for:

1. AN ORDER pursuant to Rule 221(1)(a) of the *Federal Courts Rules*, striking the Plaintiff's Statement of Claim, without leave to amend, on the ground that the Federal Court lacks jurisdiction *simpliciter* over the Plaintiff's alleged claim and that the claim discloses no reasonable cause of action against the Defendants;
2. IN THE ALTERNATIVE to the relief sought at paragraph 1, AN ORDER pursuant to Rules 221(1)(c) and (f) of the *Federal*

Courts Rules, striking the Plaintiff's Statement of Claim, without leave to amend, on the grounds that the Plaintiff's claim is scandalous, frivolous, vexatious or otherwise an abuse of the process of this Court;

- 2.1. AN ORDER pursuant to Rule 151 of the Federal Courts Rules, ordering that answers to questions 76, 77, 78, 180 and 181 to the cross-examination of Ms. Matilda Beach held on June 19, 2025, be treated as confidential, ordering that these transcripts be filed under seal, and ordering that these answers be redacted from any version of these transcripts filed on the public record;
3. COSTS in favour of the Defendants; and
4. SUCH FURTHER AND OTHER ORDER as to this Court may seem just.

[Underlining from amended notice of motion not included]

AND UPON reviewing and considering the materials filed, including the defendants' amended motion record, and the amended responding motion record of the plaintiff filed July 9, 2025;

AND UPON considering the submissions of counsel for the parties made on the hearing of the motion on July 16, 2025, in person, in Toronto, Ontario;

AND UPON a decision being reserved;

AND UPON considering:

[1] For the reasons set out below, the defendants' motion to strike is granted, in part, with leave to amend. Specifically, the claims against the Sony Defendants (defined below) and the claims regarding secondary infringement are struck out, with leave to amend.

I. The Claim

[2] In addition to the allegations in the statement of claim, particulars were provided on two occasions:

- A. by letter dated February 26, 2025, from plaintiff's counsel to defendants' counsel [February Particulars], which also included documents pursuant to Rule 206; and
- B. by letter dated April 16, 2025, from plaintiff's counsel to defendants' counsel [April Particulars, and together with the statement of claim and February Particulars, the Claim].

[3] Stated generally, the Claim is for copyright infringement in certain music videos featuring the band Queen [Videos, or as referred to in the Claim, Gowers Videos]. The Videos are alleged to be available in Canada on YouTube. The Claim is against three defendants, Queen Productions Limited [QPL] and two Sony entities, Sony Music Entertainment and Sony Music Entertainment Canada Inc [together, the Sony Defendants].

[4] Regarding the creation of the Videos, the allegations include the following:

- 22. Gowers camera scripted, selected the crew and equipment, directed the filming, supervised the production, and controlled the editing to create the Gowers Videos. In making the Gowers Video, Gowers used his skill and judgment, including by using innovative visual techniques; creatively framing, staging, and choosing angles for the shots; and supervising the editing of the video. [...]
- 23. Having created the Gowers Videos through his exercise of significant skill and judgment, Gowers is their sole author. Gowers (and now the Plaintiff) also has a right to the integrity of the Gowers Videos, and a right to be associated with the Gowers Videos as their author by name.

[5] On ownership of copyright in the Videos by the plaintiff, and moral rights, the allegations in the Claim also include the following:

(statement of claim)

5. Gowers was the author of each of the Gowers Videos, as well as their first owner pursuant to section 13(1) of the *Copyright Act*. At the date of the making of each of the Gowers Videos, Gowers was a citizen, subject, or a person ordinarily resident in a treaty country, within the meaning of section 5(1)(a) of the *Copyright Act*.
7. The Trust, which Gowers set up by deed dated March 8, 1990, and amended on October 1, 2003, includes all the personal and real property, tangible and intangible, vested or contingent, including intellectual property, of Gowers. The Plaintiff, Gowers' widow, and is the sole residual beneficiary and trustee of the Trust.
8. As the sole residual beneficiary and trustee of the Trust, the Plaintiff is the owner of the Trust property, including all the intellectual property of Gowers.

(February Particulars)

1. With respect to paragraphs 1(a)(ii) and 38 of the Statement of Claim, which states the Plaintiff holds the moral rights over the Gowers Videos, Mr. Bruce Gowers bequeathed the entirety of his estate to the trustee of the Trust. As the sole residual beneficiary and trustee of the Trust, the Plaintiff is the beneficiary of all of Gowers' rights and properties, including copyrights and moral rights. Pursuant to s. 14.2(2) of the *Copyright Act*, the Plaintiff holds the moral rights over the Gowers Videos. A copy of Gowers' will is attached.

II. Grounds for the Motion

[6] The defendants advance three grounds in support of their request to strike out the statement of claim:

- A. under Rule 221(1)(a) on the ground that this Court lacks jurisdiction over the plaintiff's Claim (any reference to a Rule is to those in the *Federal Courts Rules*);
- B. under Rule 221(1)(a) on the ground that the Claim fails to disclose a reasonable cause of action; and
- C. under Rule 221(1)(c) and (f) on the ground that the Claim is scandalous, frivolous, vexatious or otherwise an abuse of the process of this Court.

III. Applicable Rule

[7] Rule 221 is the applicable Rule, which provides:

Motion to strike

221 (1) On motion, the Court may, at any time, order that a pleading, or anything contained therein, be struck out, with or without leave to amend, on the ground that it:

(a) discloses no reasonable cause of action or defence, as the case may be,

[...]

(c) is scandalous, frivolous or vexatious,

[...]

(f) is otherwise an abuse of the process of the Court, and may order the action be dismissed or judgment entered accordingly.

Requête en radiation

221 (1) À tout moment, la Cour peut, sur requête, ordonner la radiation de tout ou partie d'un acte de procédure, avec ou sans autorisation de le modifier, au motif, selon le cas :

a) qu'il ne révèle aucune cause d'action ou de défense valable;

[...]

c) qu'il est scandaleux, frivole ou vexatoire;

[...]

f) qu'il constitue autrement un abus de procédure. Elle peut aussi ordonner que l'action soit rejetée ou qu'un jugement soit enregistré en conséquence.

Evidence

(2) No evidence shall be heard on a motion for an order under paragraph (1)(a).

Preuve

(2) Aucune preuve n'est admissible dans le cadre d'une requête invoquant le motif visé à l'alinéa (1)a).

IV. General Principles – Motion to Strike Under Rule 221(a)

[8] The applicable principles on a motion to strike a statement of claim on the basis that it does not disclose a reasonable cause of action were effectively summarized by Associate Judge Horne (then Prothonotary Horne) in *Fox Restaurant Concepts LLC v 43 North Restaurant Group Inc*, 2022 FC 1149:

[6] The legal principles applying to motions to strike are well known. To strike a pleading, it must be plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action. It needs to be plain and obvious that the action is certain to fail because it contains a radical defect (*R v Imperial Tobacco Canada Ltd*, 2011 SCC 42, [2011] 3 SCR 45 at para 17).

[7] It is incumbent upon a plaintiff to plead the facts which form the basis of his or her claim as well as the relief sought. These facts form the basis upon which the success of a claim is evaluated. A plaintiff must plead with sufficient details the constituent elements of each cause of action or legal ground raised (*Pelletier v Canada*, 2016 FC 1356 at paras 8 and 10).

[8] To disclose a reasonable cause of action, a claim must: (a) allege facts that are capable of giving rise to a cause of action; (b) disclose the nature of the action which is to be founded on those facts; and (c) indicate the relief sought, which must be of a type that the action could produce and the Court has jurisdiction to grant (*Oleynik v Canada (Attorney General)*, 2014 FC 896 at para 5).

[9] To show a plaintiff has a reasonable cause of action, the statement of claim must plead material facts satisfying every element of the alleged causes of action. The plaintiff needs to explain the “who, when, where, how and what” giving rise to the

defendant's liability (*Al Omani v Canada*, 2017 FC 786 at para 14 (“*Al Omani*”)).

[10] On a motion to strike, the pleadings must be read as generously as possible, erring on the side of permitting a novel but arguable claim to proceed to trial (*Atlantic Lottery Corp Inc v Babstock*, 2020 SCC 19 at para 19).

[11] Striking a pleading without leave to amend is a power that must be exercised with caution. If a pleading shows a scintilla of a cause of action, it will not be struck out if it can be cured by amendment (*Al Omani* at paras 32-35).

[9] Although Rule 221(2) provides that no evidence shall be heard on a motion for an order under paragraph (1)(a), there are exceptions. One such exception is that evidence may be considered for the purposes of Rule 221(1)(a) if the issue concerns a jurisdictional question (*Berenguer v Sata Internacional - Azores Airlines, S.A.*, 2023 FCA 176 [*Berenguer*] at para 26).

[10] Rule 221(1)(a) may be applied if it is plain and obvious that the Federal Court lacks jurisdiction to hear a matter (*Berenguer* at para 24).

V. Rule 221(1)(a) – Jurisdictional Issue

[11] The essence of the defendants' argument on jurisdiction is that any allegedly infringing activities are not alleged to have occurred in Canada, and that based on the evidence on the motion, did not occur in Canada. Paragraph 1 of the defendants' amended notice of motion frames the jurisdictional issue as being “that the Federal Court lacks jurisdiction *simpliciter* over the Plaintiff's alleged claim”. One of the arguments the plaintiff makes in response is that the defendants have attorned to the jurisdiction of the Court by bringing this motion to strike. At the hearing of the motion, the defendants argued that attornment cannot apply when there is no subject matter jurisdiction, and that this is the case if the allegedly infringing activities occurred

outside of Canada. The plaintiff characterizes this last argument as a new ground in support of the motion that goes beyond the jurisdiction *simpliciter* issue and takes issue with it being raised. However, in the context of this motion, nothing turns on this, nor is it necessary to determine whether the defendants have attorned.

[12] Leaving aside the “subject matter jurisdiction” label used by the defendants, the basis for their argument is that this Court has no jurisdiction because the allegedly infringing activities are not alleged to have occurred in Canada, and did not occur in Canada. However, if such activities are sited in Canada, then there may be a real and substantial connection, and further, such activities may fall within the ambit of the *Copyright Act*, RSC 1985, c C-42 [Act, and any reference in this decision to a section is to those in the Act]. The “real and substantial connection” test is one way in which jurisdiction *simpliciter* can be established. As explained in *Pass Herald Ltd v Google LLC*, 2024 FC 1623 [*Pass Herald*], jurisdiction *simpliciter* can be established in the following ways:

[38] The Court may assert personal jurisdiction over a foreign party based on (i) its presence in Canada; (ii) its consent or attornment to the jurisdiction of this Court, or (iii) the “real and substantial connection” test: *Chevron Corp v Yaiguaje*, 2015 SCC 42 [*Chevron*] at para 82; *Club Resorts Ltd v Van Breda*, 2013 SCC 17 [*Van Breda*] at para 79. [,,]

[Emphasis added, bold in original]

[13] As noted above, evidence may be considered for the purposes of Rule 221(1)(a) if the issue concerns a jurisdictional question (*Berenguer* at para 26). However, before dealing with the evidence, I will first address whether, on the facts alleged in the Claim, it is plain and obvious that there are no infringing activities alleged to have occurred in Canada.

[14] The pertinent allegations in the statement of claim include the following:

- A. The defendants posted the Videos on YouTube, on the “Queen Official” YouTube channel, and the Videos are “currently available on the Defendants’ YouTube channel in Canada and to Canadian viewers (statement of claim at paras 26-34).
- B. “starting in or about August 2008, the Defendants made the Gowers Videos available on the “Queen Official” YouTube channel, and continue to do so with the last Gowers Video having been posted in November 2024” (statement of claim at para 35).

[15] The allegations set out immediately above must be read with the April Particulars, which include the following allegations:

- A. QPL authorized and/or induced YouTube to infringe the plaintiff’s copyrights in the Gowers Videos.
- B. QPL provided and uploaded, either directly or indirectly, infringing copies of the Gowers Videos to YouTube.
- C. QPL authorized YouTube to reproduce, perform in public, communicate to the public by telecommunication, sell, distribute, and/or offer for sale the infringing copies of the Gowers Videos to the Canadian public.
- D. By providing and uploading infringing copies of the Gowers Videos to YouTube,

- i. either directly or indirectly, QPL provided YouTube the means to enable infringement. Without the actions of QPL, the infringement would not have taken place.
- ii. QPL knew that their activities would result in infringement of the plaintiff's copyright in the Gowers Videos, including within Canada.

[16] Assuming the facts in the Claim to be true, including those referred to immediately above, on the issue of jurisdiction it is not plain and obvious that the Claim fails to disclose a cause of action for activities alleged to have occurred in Canada that would constitute:

- A. Copyright infringement of the reproduction and performance rights – As stated by the defendants (see the defendants' written representations at para 45), the reproduction right is engaged when a user permanently downloads a file, and the performance right is engaged when a work is streamed on the Internet (relying on *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34 at para 28; *Rogers Communications Inc. v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35 at paras 1 and 56). Where Canada is the country of reception of an Internet transmission, this can be a sufficient connection for jurisdiction in copyright matters even when the transmission originates from outside of Canada (*Society of Composers, Authors and Music Publishers of Canada v Canadian Assn. of Internet Providers*, 2004 SCC 45 at paras 60-63). On the performance right, the defendants are not arguing that there is no performance in Canada. The defendants' argument is not based on where the activities are taking place, but

who, on the evidence, is engaged in those activities. This is addressed later in this decision. As a result, it is not plain and obvious that there is no reproduction or performance in Canada.

- B. Copyright infringement for authorizing reproduction and performance – The defendants’ jurisdictional arguments on authorization focus on their position that any reproductions occurred outside of Canada, and that the authorization right is not engaged in that circumstance (relying on *Sirius Canada Inc. v CMRRA/SODRAC Inc*, 2010 FCA 348 at paras 46-47; *Maier Estate v Bulger*, 2024 FC 1267 [*Maier Estate*] at para 128). However, as it is not plain and obvious that there is no reproduction or performance in Canada, the defendants’ arguments on authorization fail for the same reason.
- C. Secondary infringement under section 27(2) - One of the defendants’ arguments on secondary infringement is that without primary infringement, in this case reproduction or performance in Canada, there can be no secondary infringement (relying on *CCH Canadian Ltd v Law Society of Upper Canada*, 2004 SCC 13 at para 82). As with the authorization issue discussed immediately above, as it is not plain and obvious that there is no reproduction or performance in Canada, this argument also fails.
- D. Moral rights infringement under section 28.1 – As per section 14.1(1), the right of association is tied to section 3 activities, in this case reproduction and performance. As it is not plain and obvious that there is no reproduction or

performance in Canada, it follows that it is not plain and obvious that there is no moral rights infringement in Canada.

[17] I will now address whether, having regard to the evidence on the issue of jurisdiction, it is plain and obvious that that the Claim fails to disclose claims over which this Court has jurisdiction.

[18] A key aspect of the defendants' argument on this point is that YouTube is based in the United States of America and therefore, any reproduction of the Queen Videos that occurs on YouTube's infrastructure takes place in the United States of America or, in any event, outside of Canada (*e.g.* para 68 of the defendant's written representations). The evidence in support of this is screenshots of pages stated to be taken from "the Google website" which are attached as exhibits to an affidavit from a paralegal in the office of defendants' counsel (see affidavit of Julie Morin affirmed April 30, 2025 at paras 21-22 and exhibits JM-15 and JM-16). The defendants argue, based on this evidence, that Google does not have any data centres in Canada, and therefore, no reproductions can occur in Canada. This evidence is clearly hearsay. The plaintiff argues that this type of evidence is inadmissible as hearsay evidence, but that if it is to be considered, they have put forward evidence of a similar nature. Specifically, an affidavit from a law clerk in the office of plaintiff's counsel which attaches as exhibits pages from YouTube and Google websites (see affidavit of Alisha Schell sworn June 4, 2025 at paragraphs 28-41 and exhibits "J" to "W"). Among other things, those exhibits describe Google's infrastructure and state that it includes more than data centres; it also includes "edge points of presence" and "edge nodes", some of which are located in Canada.

[19] The evidence of both sides described in the previous paragraph raises similar admissibility issues. There are many issues with this type of hearsay evidence, including whether it meets the requirements of Rule 81 and is otherwise admissible hearsay evidence (*Akme Poultry Butter & Eggs Distributors Inc v Canada (Public Safety and Emergency Preparedness)*, 2024 CanLII 30068 (FC) at paras 17, 21). However, these admissibility issues need not be determined. Either the evidence of both sides on this topic is inadmissible, in which case there is no evidence in support of the defendants' position or, if admissible, it is not plain and obvious that reproductions are not occurring in Canada in light of the plaintiff's evidence.

[20] As discussed above, the defendants' argument on jurisdiction as it relates to the reproduction right is that the reproductions are not occurring in Canada. On the performance right, the defendants are not arguing that there is no performance in Canada. The defendants' argument is not based on where the activities are taking place, but rather, on who is engaged in those activities. This can be seen in the following paragraph of their written representations, the basis for which is the affidavit of Matilda Beach, who identifies herself as Queen's manager:

71. With regard to the performance right, the Plaintiff alleges that QPL has directly or indirectly uploaded the Queen Videos on YouTube, amounting to an authorization to YouTube to infringe that right. While QPL, which is based in the United Kingdom, owns the rights in the Queen Videos, it does not directly operate the "Queen Official" YouTube channel, nor is it engaged in posting any content to that channel. The "Queen Official" YouTube channel has been operated by third parties for the entirety of the period relevant to this action.

[Emphasis in original not included]

[21] It is not appropriate on a preliminary motion such as this, under the rubric of a jurisdictional issue, to go beyond that and make factual findings on who did what.

[22] Similar to the situation regarding the performance right, the defendants argue that based on their affidavit evidence, the Sony Defendants are not involved in the allegedly infringing activity (*e.g.* para 78 of the defendants' written representations). However, this is not a jurisdictional issue. Rather, it is a question of whether those two defendants were actually involved in the allegedly infringing activities. As indicated above, it is not appropriate to make determinations on the merits as to what the Sony Defendants did or did not do.

[23] However, if it was appropriate to delve into the evidence on who did what, the following evidence is noteworthy:

A. Matilda Beach confirmed on cross-examination that:

- i. QPL is a profit sharer in the revenue stream from the Queen Official YouTube Channel, including from the Videos in Canada;
- ii. QPL has licensing agreements governing third party use of Queen content, including the Gowers Videos, on the Queen Official YouTube Channel; and
- iii. QPL has had, and still has, oversight as to the management of the Queen Official YouTube Channel.

B. All of the defendants' affiants confirmed they did not make any inquiries and took no steps to geoblock the Videos in Canada after receiving the statement of claim.

[24] In conclusion on the issue of jurisdiction, it is not plain and obvious that this Court lacks jurisdiction over the plaintiff's claim.

VI. Rule 221(1)(a) – Reasonable Cause of Action Issue

[25] The remaining issues under Rule 221(1)(a) concern the following, each of which is discussed below:

- A. Sony Defendants;
- B. secondary infringement;
- C. authorization;
- D. ownership of copyright and moral rights; and
- E. if some or all of the Claim is struck, whether leave to amend should be granted.

A. *Sony Defendants*

[26] The claims asserted against the Sony Defendants must be viewed in light of the particulars provided. Generally stated, the statement of claim alleges that “the Defendants”, which includes the Sony Defendants, posted the Videos to their YouTube channel and made them available to viewers in Canada (*e.g.* paras 26-36). The April Particulars say nothing about the Sony Defendants. Rather, they provide particulars of the activities that the plaintiff asserts QPL engaged in, such as:

- a) QPL provided and uploaded, either directly or indirectly, infringing copies of the Gowers Videos to YouTube.
- b) [...] QPL authorized YouTube to reproduce, perform in public, communicate to the public by telecommunication, sell, distribute, and/or offer for sale the infringing copies of the Gowers Videos to the Canadian public.

[27] The April Particulars include some reference to the plaintiff alleging “among other things”. However, that is not sufficient to ground a claim against the Sony Defendants. As stated by the Federal Court of Appeal, the “pleading must tell the defendant who, when, where, how

and what gave rise to its liability” (*Mancuso v Canada (National Health and Welfare)*, 2015 FCA 227 [*Mancuso*] at para 19). As a result, the claims against the Sony Defendants are struck for failing to plead sufficient material facts.

B. *Secondary Infringement*

[28] Like the claims against the Sony Defendants, the claims regarding secondary infringement lack the necessary particulars as described in *Mancuso* at paras 16-20, and are struck.

C. *Authorization*

[29] The defendants argue that authorizing someone else to authorize an activity that constitutes direct infringement is not actionable (relying on *Maier* at para 132). However, that is not what the Claim alleges. In any event, it is not plain and obvious that QPL authorizing the complained of activities of YouTube fails to disclose a cause of action for authorizing the reproduction or performance of the Videos.

D. *Ownership of Copyright and Moral Rights*

[30] The defendants argue that allegations regarding ownership of copyright and moral rights are bald, unsupported by material facts. I do not agree. Even if the copyright registrations are ignored, it is not plain and obvious that the Claim fails to allege sufficient material facts on ownership of copyright and moral rights having regard to the allegations in paragraphs 2-5, 7, 8, 14-17, 20-23 and 25 of the statement of claim, and paragraphs 1, 4 and 6 of the February Particulars along with the related documents.

E. *Whether Leave to Amend Should Be Granted*

[31] In order to strike a pleading without leave to amend, the defect must be incurable by amendment (*Collins v Canada*, 2011 FCA 140 at para 26; *Simon v Canada*, 2011 FCA 6 at para 8). It is not apparent that the failure to plead sufficient particulars of the allegedly infringing actions of the Sony Defendants, or the claim of secondary infringement, cannot be cured by amendment. Therefore, those claims are struck with leave to amend.

VII. Motion to Strike Under Rules 221(1)(c) and (f)

[32] The defendants argued the Rule 221(1)(c) and (f) grounds together, and I will deal with them together, as well.

[33] The defendants argue that the Claim is scandalous, frivolous, vexatious, and an abuse of process on two grounds, each of which is addressed below following a discussion of general principles on motions under Rules 221(1)(c) and (f):

- A. “the course of conduct through which the Plaintiff allegedly establishes her standing and ownership of the asserted rights in the Queen Videos” which focuses primarily on the timing of the copyright registrations obtained by the plaintiff (see defendants’ written representations at para 90); and
 - B. “the undue and prejudicial delay in bringing the action” (see defendants’ written representations at para 90).
- A. *General Principles – Rules 221(1)(c) and (f)*

[34] Regarding Rule 221(1)(c), and whether a claim is scandalous, frivolous or vexatious, Prothonotary Hargrave stated the following in *Premakumaran v Canada*, 2003 FCT 635:

[13] [...] A frivolous plea includes one so palpably bad that it requires no real argument to convince the court that it is bad and it includes a plea indicative of bad faith. Frivolous and vexatious pleas are those which are brought or carried on by a plaintiff who is not *bona fide* and indeed constitute a proceeding which will not lead to practical result. The terms frivolous and vexatious define an obviously unsustainable claim and include proceedings which are an abuse of process. In turn an abusive action is a proceeding which misuses or perverts a procedure of the Court and again is an action which can lead to no possible good. For further explanation of and authorities dealing with this proposition see *Larden v. Canada*, [1998] 145 F.T.R. 140 (F.C.T.D.). When an action is alleged to be scandalous, frivolous and vexatious or an abuse of process, under Rule 221(1)(c) and (f) the test for striking out is as stringent as, or even more stringent than, that which applies under Rule 221(1)(a) when testing for a reasonable cause of action: see for example *Waterside Ocean Navigation Co. v. International Navigation Ltd.*, [1977] 2 F.C. 257 at page 259 (F.C.T.D.), a decision of Associate Chief Justice Thurlow.

[35] In *Carten v Canada*, 2010 FC 857, Justice Gauthier (then of this Court) stated:

[32] The test under Rule 221(c) is as stringent as the one applicable to Rule 221(a). In *Creaghan Estate v. Canada* [1972] F.C. 732 (T.D.) Justice Pratte described it as follows:

(3) Finally, in my view, a statement of claim should not be ordered to be struck out on the ground that it is vexatious, frivolous or an abuse of the process of the Court, for the sole reason that in the opinion of the presiding judge, plaintiff's action should be dismissed. In my opinion, a presiding judge should not make such an order unless it be obvious that the plaintiff's action is so clearly futile that it has not the slightest chance of succeeding, whoever the judge may be before whom the case could be tried. It is only in such a situation that the plaintiff should be deprived of the opportunity of having "his day in Court".

[33] The term vexatious has been used in the jurisprudence to describe claims that do not sufficiently reveal the facts on which a

plaintiff bases its cause of action, such as that it is impossible for a defendant to answer it or for a Court to regulate the proceedings, *Murray v. Canada*, 21 N.R. 230, 1978 F.C.J. No. 406 (QL) (F.C.A.) at para. 10.

[34] Prothonotary Hargrave also defined the term “scandalous, frivolous and vexatious” as follows in *Steiner v. Canada*, [1996] F.C.J. No.1356:

16 A scandalous pleading includes one which improperly casts a derogatory light on someone, with respect to their moral character. A claim is a frivolous one where it is of little weight or importance or for which there is no rational argument based upon the evidence or law in support of the claim. A vexatious proceeding is one that is begun maliciously or without a probable cause, or one which will not lead to any practical result.

(see also *Kisikawpimootewin v. Canada*, [2004] F.C.J. No. 1709 (T.D.) at paras. 8-9).

[35] The following comments of Justice Henry in *Re Lang, Michener et al v. Fabian et al*, [1987] 59 O.R. (2d) 353 at para. 19, are also relevant and useful here:

d) it is a general characteristic of vexatious proceedings that grounds and issues raised tend to be rolled forward into subsequent actions and repeated and supplemented, often with actions brought against the lawyers who have acted for or against the litigant in earlier proceedings;

e) in determining whether proceedings are vexatious, the court must look at the whole history of the matter and not just whether there was originally a good cause of action.

[Footnoted omitted]

[36] Regarding Rule 221(1)(f), in *Suss v Canada*, 2024 FC 137, Associate Judge Duchesne (as he then was), stated:

[9] The law applicable to a motion to strike pursuant to Rule 221(1)(f) is the same as the law applicable to a motion to strike

pursuant Rule 221(1)(a). It must be plain and obvious that the claims advanced by the pleading are doomed to fail. Rule 221(2) does not apply with respect to a motion that seeks to strike a pleading on the basis that it is an abuse of the Court's processes pursuant to Rule 221(1)(f). Affidavit and other evidence is therefore admissible and may be considered by the Court in determining whether to strike the pleading because it constitutes an abuse of process.

[10] Abuse of process is a flexible doctrine that is rooted in the Court's power to control its own process. The doctrine aims to protect the integrity of the adjudicative process against abuses and to achieve fairness for all parties involved (*Toronto (City) v Canadian Union of Public Employees, Local 79*, 2003 SCC 63 at paras 37, 51).

B. *Copyright Registrations*

[37] There is no time limitation in the Act for filing an application to register copyright. However, obtaining a copyright registration immediately prior to, or during litigation, can greatly reduce the weight given to the presumption under section 53(2) (*Drolet v Stiftung Gralsbotschaft*, 2009 FC 17 at para 243). In the context of this case, even if the copyright registrations are ultimately given no weight, that does not mean there is no basis for the plaintiff's claims of copyright ownership in the Videos. The defendants argue that it is "impossible to establish the Plaintiff's standing and ownership of the Queen Videos on the basis of the allegations in the Statement of Claim" (defendants' written representations at para 121). I do not agree. As indicated earlier, even if the copyright registrations are given no weight, the plaintiff has alleged sufficient facts in the Claim, which if established on evidence at trial or other disposition, may be sufficient to establish ownership.

[38] In addition, this is not a situation where there is no factual basis at all for the assertion of copyright ownership. For example, it is not disputed that Bruce Growers, the individual alleged

in the Claim to be the “author” and “first owner” of the copyright in the Videos, had a role in the creation of them. What is disputed is whether that role was sufficient to result in him being the first owner of the copyright.

[39] It is not plain and obvious that the Claim is scandalous, frivolous, vexatious or an abuse of process based on the timing of the copyright registrations.

C. *Defendants’ Delay Argument*

[40] Although the Videos are stated to have been created in the 1970s, for the following reasons it is not plain and obvious that the Claim is scandalous, frivolous, vexatious or an abuse of process based on the timing of the commencement of the action:

- A. At least some of allegedly infringing activities are ongoing or recent, with certain activities alleged to have occurred at various points in 2024 (statement of claim at paras 31-35).
- B. The Claim alleges that Mr. Gowers was not aware until 2019 of the release of the Videos on the Internet (statement of claim at para 41).
- C. Regarding abuse of process:
 - i. Although abuse of process “engages the inherent power of the court to prevent misuse of its proceedings in a way that would be manifestly unfair to a party” (*Saskatchewan (Environment) v Métis Nation – Saskatchewan*, 2025 SCC 4 [*Saskatchewan (Environment)*] at para 33), “the primary focus of the doctrine of abuse of process is the integrity of the adjudicative functions of courts” and “the focus is less on the interest of parties and

more on the integrity of judicial decision making as a branch of the administration of justice” (*Toronto (City) v C.U.P.E., Local 79*, 2003 SCC 63 at para 43).

- ii. Where abuse of process has been established, the next question is the appropriate remedy (*Saskatchewan (Environment)* at para 32). Even if it were plain and obvious that the timing of the commencement of this action is an abuse of process (and it is not plain and obvious), in the particular circumstances of this case, the question of the appropriate remedy should not be decided on a preliminary motion.

D. Regarding possible limitation period issues:

- i. In cases of ongoing copyright infringement, each activity (*e.g.* performance) constitutes a separate act of infringement (*Sadhu Singh Hamdard Trust v Navsun Holdings Ltd.*, 2016 FCA 69 at para 10).
- ii. The defendants have not yet filed a statement of defence, and the three-year limitation period provided for in section 43.1 can only be applied if it is specifically pleaded (section 43.1(2); see also *Bohnet v Canada*, 2024 CanLII 45537 (FC) at para 11).
- iii. As stated by Justice Barnes, “[i]t is simply not the case that, on a motion to strike, the Court is entitled to resolve difficult issues about whether the asserted defence actually applies or when time begins to run” (*Whaling v Canada (Attorney General)*, 2018 FC 748 at para 12).

VIII. Amended Statement of Claim

[41] As noted earlier, the Claim is made up of three documents: the statement of claim, the February Particulars, and the April Particulars. This is not ideal, and the plaintiff shall serve and file an amended statement of claim (which plaintiff's counsel expressed a willingness to do). An amended statement of claim shall be served and filed regardless of whether the plaintiff amends to assert a claim against the Sony Defendants, or claims for secondary infringement.

IX. Confidentiality Request Regarding Matilda Beach Transcript

[42] The defendants seek to have the answers to questions 76, 77, 78, 180, and 181 to the cross-examination of Matilda Beach held on June 19, 2025, treated as confidential, and the applicable portions of the transcript filed under seal. The motion record filed by the defendants included a copy of that transcript with the above-noted answers redacted. An unredacted copy of the motion record was not submitted to the Court. At the hearing of the motions, defendants' counsel submitted to the Court an unredacted copy of the transcript in a sealed envelope. Plaintiff's counsel confirmed at the hearing that the plaintiff was amenable to the defendants' request as it related to those specific questions.

[43] The answers to the above noted questions on the cross-examination of Matilda Beach shall be treated as confidential, and the unredacted copy of that transcript which was accepted for filing under seal on July 16, 2025, shall remain confidential.

X. Costs

[44] The parties reached the following agreement on costs, which was submitted to the Court by letter from defendants' counsel dated July 25, 2025:

1- If the motion is granted and the Statement of Claim is struck without leave to amend: costs to the Defendants in the all-inclusive lump sum amount of \$10,000, payable in any event of the cause.

2- If the motion is dismissed in its entirety and the Statement of Claim remains as-is: costs to the Plaintiff in the all-inclusive lump sum amount of \$10,000, payable in any event of the cause.

3- In all other cases of divided success (e.g., the Statement of Claim is partially struck without leave to amend, the Statement of Claim is struck with leave to amend, etc.): without costs.

[45] As this disposition falls within the third category set out in the above-noted letter, there shall be no order as to costs.

[46] Therefore,

THIS COURT ORDERS that:

1. The claims against the Sony Defendants, and the claims relating to secondary infringement under section 27(2) of the *Copyright Act*, are struck with leave to amend.
2. Subject to any further Order or Direction on timing:
 - a) By February 16, 2026, the plaintiff shall serve and file a fresh amended statement of claim consistent with the reasons above.
 - b) Within 30 days after service of a fresh amended statement of claim, the parties shall confer and submit a joint letter to the Court setting out a proposed timetable for next steps in this action, and mutual availability for a case management

conference should the Court wish to schedule one. In the event that the parties are unable to agree on any aspect of a proposed timetable, and have discussed any outstanding issues by videoconference, telephone or in person, any points of disagreement shall be identified in the letter, along with a summary of the respective positions of the parties.

3. The answers to questions 76, 77, 78, 180, and 181 to the cross-examination of Matilda Beach held on June 19, 2025, shall be treated as confidential, and the unredacted copy of the transcript of that cross-examination which was accepted for filing under seal on July 16, 2025, shall remain confidential.

"John C. Cotter"

Case Management Judge