

Federal Court “Pipes” Up in Copyright Case Over Pipeline Drawing

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In the recent decision of *ITP SA v. CNOOC Petroleum North America ULC*, [2025 FC 684](#), the Federal Court dismissed a claim for copyright infringement involving a promotional image of pipeline technology, between parties to a contract for services relating to the construction of a pipeline. The decision comments on various procedural and substantive issues, including issues of particular importance to litigants in the industrial and construction industries, such as the evidence required to prove copyright in project deliverables and the potential right to reuse and adapt deliverables for ongoing repair and maintenance purposes.

Background

The decision relates to an application for copyright infringement brought by ITP SA, a corporation specializing in the design and manufacture of “pipe-in-pipe” systems for industrial projects (ITP), against CNOOC Petroleum North America ULC, a company that engages in pipeline projects (CNOOC). From 2012 to 2014, ITP contracted with CNOOC’s predecessor to supply it with pipe-in-pipe technology and related services for use in one of the predecessor’s pipeline projects. The contracts ended in January 2015.

ITP alleged that approximately one year later, one of its employees created an image of one of its pipe-in-pipe systems that it used for marketing purposes (the ITP Image).

In 2017, CNOOC commenced an action against ITP relating to alleged failures in the technology that ITP had supplied to CNOOC (the Alberta Action). In November 2020, as part of CNOOC’s discovery obligations in the Alberta Action, CNOOC produced a copy of presentation materials that it had submitted to the Alberta Energy Regulator with respect to another pipeline project. Those materials contained an image that was nearly identical to the ITP Image. ITP did not notice the inclusion of the ITP Image in the discovery productions at the time.

ITP eventually became aware that CNOOC had included an image closely resembling the ITP Image in its presentation materials, which led ITP to submit an access to information request to the Alberta Energy Regulator. In response, the Alberta Energy Regulator sent CNOOC’s presentation materials to ITP in January 2022. Based on that documentation, ITP commenced the application for copyright infringement against CNOOC in December 2023.

Procedural Issues

Before assessing the substance of ITP's copyright infringement claim, the Court first considered two procedural defences raised by CNOOC: (1) that ITP's application violated the implied undertaking rule because it was based on materials that were disclosed in the parties' Alberta litigation; and (2) that ITP commenced the application after the expiry of three-year limitation period set out in section 34.1 of the *Copyright Act*. The Court dismissed both arguments.

Implied Undertaking Rule Does Not Apply to Publicly Available Documents

As discussed in more detail in [another recent Cassels Comment](#), the implied undertaking rule provides that a party who receives documents as part of pre-trial discovery implicitly undertakes to use those documents only in the proceedings in which they were produced. CNOOC therefore argued that ITP's reliance on CNOOC's presentation materials — which were produced for discovery in the Alberta litigation — to support its copyright infringement claim violated that rule.

The Court concluded that ITP did not violate the implied undertaking rule. The presentation materials were outside the scope of the rule because they were publicly available. The Court noted that the rule applies only to documents or information that would have remained confidential but for their disclosure in pre-trial discovery. Therefore, the rule does not apply to a document that is available through other sources, such as an access to information request made to a public body. The fact that ITP may have first learned about the presentation because of the Alberta Action did not change the fact that the presentation documents were publicly available.

Discoverability Must Be Assessed Based on Reasonable Diligence

Section 43.1 of the *Copyright Act* sets out a three-year statutory limitation period for a claim under that statute. The discoverability clock starts upon actual or constructive knowledge of a potential liability. The Court noted that discoverability arises once the plaintiff knows, or reasonably ought to know, sufficient material facts to support a "plausible inference of liability."

CNOOC argued that ITP could reasonably have discovered the claim as early as November 2020 when the presentation materials were produced in the Alberta Action. ITP argued that it was reasonable for it to have only discovered the claim in January 2022, after the Alberta Energy Regulator responded to its access to information request.

The Court agreed with ITP, concluding that a reasonably diligent plaintiff reviewing CNOOC's discovery productions in November 2020 would not have reasonably discovered sufficient facts to ground ITP's copyright infringement claim. The Court emphasized the complexity and scope of the discovery in the

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Alberta Action, noting that the evidence of CNOOC's use of the ITP Image appeared on just one slide in one document among hundreds of lengthy documents that CNOOC had produced. The fact that ITP had received the presentation materials was insufficient to establish that it could have reasonably discovered the claim at that date.

Substantive Issues

Insufficient Proof of Authorship

With respect to the substance of the infringement claim, CNOOC did not dispute that it had used an image closely resembling the ITP Image. Instead, CNOOC argued that ITP had tendered insufficient evidence to establish that one of its employees had authored the ITP Image and therefore that ITP, as the employer, owned the copyright in the image.

ITP relied on the presumption of authorship under section 34.1(1) of the *Copyright Act*, which states that "copyright shall be presumed, unless the contrary is proved, to subsist in the work... and the author... shall, unless the contrary is proved, be presumed to be the owner of the copyright." The Court rejected that argument, concluding that a corporation cannot benefit from the presumption.¹ Therefore, ITP had the burden to prove that its employee had authored the ITP Image in the course of his employment with ITP.

The Court further held that ITP failed to satisfy that burden. ITP did not tender an affidavit directly from the alleged author; instead, it relied solely on affidavits from two of its senior corporate officers, both of whom stated that they understood the alleged author to have authored the ITP Image without providing any details as to who took the photograph underlying the ITP Image, when and how it was taken, and what specific work (if any) the alleged author had undertaken in relation to the creation of the image. Moreover, it was revealed during the hearing of the application that the alleged author was available to swear an affidavit, but ITP could not explain why he had not done so despite his availability. Based on the hearsay nature of the corporate officers' evidence and an adverse inference drawn from ITP's failure to tender evidence directly from the alleged author without explanation, the Court concluded that ITP had not demonstrated that the alleged author was in fact the author, which was sufficient to dispose of ITP's infringement claim.

Contract Did Not Contain an Express or Implied Right to Use the ITP Image

Despite dismissing the application based on ITP's failure to prove the authorship of the ITP Image, the Court considered and rejected CNOOC's argument that it had an express or implied licence to use the ITP Image.

CNOOC argued that its contract with ITP expressly allowed it to use all drawings "arising out of" the pipeline project that was the subject of the contract, which included the ITP Image because it illustrated

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underlying technology that was part of the original pipeline design. CNOOC argued that this includes a right to reuse or adapt the ITP Image for maintenance, repair, or legitimate operational changes. Alternatively, CNOOC argued that, as the manager of the pipeline project, it had an implied licence to use ITP's pipe-in-pipe visual materials for "legitimate operational purposes," which included its presentation to the Alberta Energy Regulator.

The Court rejected both arguments. Regarding the express licence argument, the Court held that the licence provisions of the contract could only be reasonably interpreted as applying to drawings produced as deliverables *within* the scope of the contract. Thus, it could not apply to the ITP Image because the ITP Image had only been created for separate marketing purposes after the contract had ended.

Regarding the implied licence argument, the Court canvassed caselaw which has recognized an implied right to reuse or adapt commissioned engineering designs and other such deliverables, under certain conditions, for necessary repair or modification purposes. However, the Court observed that the principle only for the "reuse of *original* project deliverables for genuine *repair or modification* purposes" and did not allow the "repurposing [of] independently created *marketing* images for use in a *new* pipeline project" (emphasis added).

Key Takeaways

Substantively, this decision provides an important reminder that a party pursuing a claim of copyright infringement must lead sufficient evidence to establish their chain of title in the copyright at issue. That includes evidence as to the authorship of a work and the plaintiff's ownership of the copyright. A corporate plaintiff or applicant should not expect to rely on a statutory presumption as to the authorship or ownership of copyright but should lead direct evidence from the author of the work.

The decision also provides guidance as to circumstances in which a contract for engineering or related services might permit the client to reuse or adapt the project deliverables for repair, maintenance, or other such purposes.

Parties operating in the construction, industrial, and related sectors should carefully consider these issues when contracting for services involving the creation and use of plans, drawings, and other deliverables.

¹ In reaching that conclusion, the Court relied on the decision of the Federal Court of Appeal in *P.S. Knight Co. Ltd. v Canadian Standards Association*, [2018 FCA 222](#) at para. 147.

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