

**SUPREME COURT OF CANADA**

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| **Citation:** Cinar Corporation *v.* Robinson, 2013 SCC 73, [2013] 3 S.C.R. 1168 | **Date:** 20131223**Docket:** 34466, 34467, 34468, 34469 |

**Between:**

**Cinar Corporation and Les Films Cinar inc.**

Appellants

and

**Claude Robinson and Les Productions Nilem inc.**

Respondents

- and -

**France Animation S.A., Christophe Izard, Ravensburger Film + TV GmbH,**

**RTV Family Entertainment AG, Christian Davin, Ronald A. Weinberg, Ronald A. Weinberg, in his capacity as sole liquidator of the succession of the late Micheline Charest, BBC Worldwide Television, Theresa Plummer-Andrews, Hélène Charest, McRaw Holdings Inc., Videal Gesellschaft Zur Hertellung Von Audiovisuellen Produkten MHB, 3918203 Canada Inc. and Music Canada**

Interveners

**And Between:**

**Ronald A. Weinberg and Ronald A. Weinberg, in his capacity as**

**sole liquidator of the succession of the late Micheline Charest**

Appellants

and

**Claude Robinson and Les Productions Nilem inc.**

Respondents

- and -

**Christophe Izard, France Animation S.A., Ravensburger Film + TV GmbH,**

**RTV Family Entertainment AG, Cinar Corporation, Les Films Cinar inc., Christian Davin, BBC Worldwide Television, Theresa Plummer-Andrews, Hélène Charest, McRaw Holdings Inc., Videal Gesellschaft Zur Hertellung Von Audiovisuellen Produkten MHB, 3918203 Canada Inc. and Music Canada**

Interveners

**And Between:**

**Christophe Izard, France Animation S.A.,**

**Ravensburger Film + TV GmbH and RTV Family Entertainment AG**

Appellants

and

**Claude Robinson and Les Productions Nilem inc.**

Respondents

- and -

**Les Films Cinar inc., Cinar Corporation,**

**Ronald A. Weinberg, Ronald A. Weinberg, in his capacity as sole liquidator of the succession of the late Micheline Charest and Music Canada**

Interveners

**And Between:**

**Claude Robinson and Les Productions Nilem inc.**

Appellants

and

**France Animation S.A., Ravensburger Film + TV GmbH, Videal Gesellschaft Zur Hertellung Von Audiovisuellen Produkten MHB, RTV Family Entertainment AG, Christian Davin, Christophe Izard, Les Films Cinar inc., Cinar Corporation, 3918203 Canada Inc., Ronald A. Weinberg and Ronald A. Weinberg, in his capacity as sole liquidator of the succession of the late Micheline Charest**

Respondents

- and -

**Music Canada**

Intervener

**Coram:** McLachlin C.J. and LeBel, Fish, Abella, Rothstein, Cromwell and Moldaver JJ.

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| --- | --- |
| **Reasons for Judgment:**(paras. 1 to 152) | McLachlin C.J. (LeBel, Fish, Abella, Rothstein, Cromwell and Moldaver JJ. concurring) |

Claude Robinson and Les Productions Nilem inc., 2013 SCC 73, [2013] 3 S.C.R. 1168

Cinar Corporation and Les Films Cinar inc. Appellants

v.

Claude Robinson and Les Productions Nilem inc. Respondents

and

France Animation S.A., Christophe Izard,

Ravensburger Film + TV GmbH,

RTV Family Entertainment AG,

Christian Davin, Ronald A. Weinberg,

Ronald A. Weinberg, in his capacity as sole liquidator

of the succession of the late Micheline Charest,

BBC Worldwide Television, Theresa Plummer‑Andrews,

Hélène Charest, McRaw Holdings Inc.,

Videal Gesellschaft Zur Hertellung Von Audiovisuellen

Produkten MHB, 3918203 Canada Inc. and Music Canada Interveners

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Ronald A. Weinberg and Ronald A. Weinberg,

in his capacity as sole liquidator of the succession

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Christophe Izard, France Animation S.A.,

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Christophe Izard, France Animation S.A.,

Ravensburger Film + TV GmbH and

RTV Family Entertainment AG Appellants

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and

Les Films Cinar inc., Cinar Corporation, Ronald A. Weinberg,

Ronald A. Weinberg, in his capacity as sole liquidator

of the succession of the late Micheline Charest and

**Music Canada** Interveners

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Claude Robinson and Les Productions Nilem inc. Appellants

v.

France Animation S.A., Ravensburger Film + TV GmbH,

Videal Gesellschaft Zur Hertellung Von Audiovisuellen Produkten MHB,

RTV Family Entertainment AG, Christian Davin, Christophe Izard,

Les Films Cinar inc., Cinar Corporation, 3918203 Canada Inc.,

Ronald A. Weinberg and Ronald A. Weinberg,

in his capacity as sole liquidator of the succession

of the late Micheline Charest Respondents

and

Music Canada Intervener

**Indexed as: Cinar Corporation *v.* Robinson**

2013 SCC 73

File Nos.: 34466, 34467, 34468, 34469.

2013:  February 13; 2013:  December 23.

Present: McLachlin C.J. and LeBel, Fish, Abella, Rothstein, Cromwell and Moldaver JJ.

on appeal from the court of appeal for quebec

 *Intellectual property — Copyright — Infringement — Reproduction of a substantial part of an original work — Whether trial judge failed to follow correct approach in assessing whether a “substantial part” of a work was reproduced — Whether trial judge failed to give sufficient weight to differences between works at issue — Whether trial judge erred in finding that features of original work are protected by the Copyright Act — Whether trial judge erred by relying on inadmissible expert evidence.*

 *Intellectual property — Copyright — Infringement — Damages — Quantum — Disgorgement of profits — Whether Court of Appeal erred in interfering with trial judge’s assessment of profits — Whether liability for disgorgement of profits may be imposed on a solidary basis — Whether Andrews trilogy cap applies to non‑pecuniary damages that do not stem from bodily injury — Whether Court of Appeal erred in interfering with trial judge’s assessment of punitive damages — Whether punitive damages may be awarded on a solidary basis — Copyright Act, R.S.C. 1985, c. C‑42, s. 35 — Civil Code of Québec, S.Q. 1991, c. 64, art. 1621 — Charter of human rights and freedoms, R.S.Q., c. C‑12, s. 49.*

 R spent years developing an educational children’s television show, “The Adventures of Robinson Curiosity” (“*Curiosity*”). R drew his inspiration from Daniel Defoe’s novel *Robinson Crusoe*, as well as from his own life experiences. He developed characters, drew detailed sketches and storyboards, wrote scripts and synopses, and designed promotional materials for his *Curiosity* project.

 From 1985 to 1987, R and his company, Les Productions Nilem inc. (“Nilem”), undertook various initiatives to get the *Curiosity* project developed. In so doing, R gave a copy of his *Curiosity* work to W and C, who were directors and officers of Cinar Corporation (“Cinar”). During this same period, a presentation on *Curiosity* was given to I, a French creator of children’s television shows. Despite the various efforts undertaken by R and his partners, the project failed to attract investors and stalled.

 R shelved his project, but did not forget about it. On September 8, 1995, R watched on television the first episode of a new children’s television show, “Robinson Sucroë” (“*Sucroë*”). He was stunned to see that *Sucroë*, as he perceived it, was a blatant copy of *Curiosity*. R subsequently discovered that several parties who had been given access to his *Curiosity* project, namely Cinar, W, C and I, were also involved in the production of *Sucroë*.

 R and Nilem commenced an action for copyright infringement against Cinar, W, C, and I, and various co‑producers and distributors of *Sucroë*.

 The trial judge concluded that R’s *Curiosity* was an original work protected by copyright, that the creators of *Sucroë* had copied *Curiosity*, and that the features reproduced in *Sucroë* represented a substantial part of *Curiosity*. He found that Cinar, W, C, I, France Animation S.A., Ravensburger Film + TV GmbH and RTV Family Entertainment AG (collectively the “Cinar appellants”) were liable for infringement of copyright. He also held D, the chief executive officer of France Animation at the relevant time, personally liable for the infringement. Finally, the trial judge found that Cinar, W, and C were extra‑contractually liable towards R and Nilem for having violated their obligations of good faith and of loyalty.

 The trial judge awarded damages on a solidary basis (the equivalent of “joint and several” liability in the common law) and costs in the amount of $5,224,293: $607,489 in compensatory damages for R’s pecuniary losses stemming from the infringement; $1,716,804 to disgorge the profits earned as a result of the infringement; $400,000 for the psychological harm suffered by R; $1,000,000 in punitive damages; and $1,500,000 for costs on a solicitor‑client basis.

 The Court of Appeal upheld the trial judge’s findings on infringement. It confirmed the trial judge’s findings of personal liability for copyright infringement, except for D, against whom the evidence was insufficient in its view.

 The Court of Appeal also upheld the trial judge’s award of compensatory damages for R’s pecuniary losses, subject to a minor mathematical correction. It rejected the trial judge’s order for disgorgement of profits against W, C and I because those profits were retained by corporations. It also ordered disgorgement on a joint basis (the equivalent of “several” liability in the common law) rather than solidarily. In addition, the Court of Appeal excluded amounts incorrectly included by the trial judge in the calculation of profits, reducing the amount to be disgorged.

 The Court of Appeal held that the cap established in the *Andrews* trilogy was applicable to the award for psychological suffering and reduced the award to $121,350, which represents 50 percent of the cap’s value at the date of the summons.

 In addition, the Court of Appeal reduced the award for punitive damages from $1,000,000 to $250,000, on the ground that punitive damages in Quebec must be moderate, and held that they could not be awarded on a solidary basis. It held Cinar liable for $100,000 in punitive damages, and each of W, C and I liable for $50,000. It also affirmed the trial judge’s award of $1,500,000 for costs on a solicitor‑client basis, but declined to award additional costs on a solicitor‑client basis for the appeal.

 Four appeals have been brought from the Court of Appeal’s judgment (in files 34466, 34467, 34468, and 34469). The Cinar appellants appeal the finding of liability for infringement (in files 34466, 34467 and 34468). R and Nilem appeal the reduction in damages and disgorgement of profits ordered by the Court of Appeal (in file 34469).

 *Held*: The appeals in files 34466, 34467 and 34468 should be dismissed, and the appeal in file 34469 should be allowed in part.

 The need to strike an appropriate balance between giving protection to the skill and judgment exercised by authors in the expression of their ideas, on the one hand, and leaving ideas and elements from the public domain free for all to draw upon, on the other, forms the background against which the arguments of the parties must be considered.

 In the present case, the trial judge found that the Cinar appellants copied a number of features from R’s *Curiosity* and that, considered as a whole, the copied features constituted a substantial part of R’s work. The Cinar appellants argue that instead of applying a holistic approach, the trial judge should have applied a three‑step approach requiring him to (1) determine what elements of *Curiosity* were original, within the meaning of the *Copyright Act*; (2) exclude non‑protectable features of R’s work (such as ideas, elements drawn from the public domain, and generic elements commonplace in children’s television shows); and (3) compare what remains of *Curiosity* after this “weeding‑out” process to *Sucroë*, and determine whether a substantial part of *Curiosity* was reproduced.

 As a general matter, it is important to not conduct the substantiality analysis by dealing with the copied features piecemeal. The approach proposed by the Cinar appellants would risk dissecting R’s work into its component parts. The “abstraction” of R’s work to the essence of what makes it original and the exclusion of non‑protectable elements *at the outset of the analysis* would prevent a truly holistic assessment. This approach focuses unduly on whether each of the parts of R’s work is *individually* original and protected by copyright law. Rather, the cumulative effect of the features copied from the work must be considered, to determine whether those featuresamount to a substantial part of R’s skill and judgment expressed in his work as a whole. The trial judge accordingly did not err by failing to follow the three‑step approach advocated by the Cinar appellants.

 Likewise, the trial judge did not err by engaging in a qualitative and holistic assessment of the similarities between the works, which took into account the relevant similarities and differences between the works. The question of whether there has been substantial copying focuses on whether the copied features constitute a substantial part *of the plaintiff’s work* — not whether they amount to a substantial part *of the defendant’s work*. The alteration of copied features or their integration into a work that is notably different from the plaintiff’s work does not necessarily preclude a claim that a substantial part of a work has been copied.

 In essence, the aspects of the trial judge’s reasons that the Cinar appellants take issue with are findings of mixed fact and law. They invite this Court to embark on a fresh assessment of the features copied from *Curiosity*. However, they have failed to demonstrate palpable or overriding errors in the trial judge’s findings on substantiality.

 The Cinar appellants further argue that the trial judge based the bulk of his findings on the issue of substantial copying on inadmissible expert evidence. For expert evidence to be admitted at trial, it must (a) be relevant; (b) be necessary to assist the trier of fact; (c) not offend any exclusionary rule; and (d) involve a properly qualified expert. These criteria apply to trials for copyright infringement, as they do in other intellectual property cases.

 The Cinar appellants argue that the second criterion — necessity of the evidence — is not met in the case at hand. The expert evidence was not necessary to assist the court, they say, because the question of whether a substantial part has been copied must be assessed from the perspective of the lay person in the intended audience for the works at issue.

 The perspective of the lay person in the intended audience for the works at issue is a useful one. It has the merit of keeping the analysis of similarities concrete and grounded in the works themselves, rather than in esoteric theories about the works. However, the question always remains whether a substantial part of the plaintiff’s work was copied. This question should be answered from the perspective of a person whose senses and knowledge allow him or her to fully assess and appreciate all relevant aspects — patent and latent — of the works at issue. In some cases, it may be necessary to go beyond the perspective of a lay person in the intended audience for the work, and to call upon an expert to place the trial judge in the shoes of someone reasonably versed in the relevant art or technology. In the present case, the necessity criterion of the test for the admissibility of expert evidence is satisfied.

 With respect to damages, R and Nilem seek *inter alia* to have the trial judge’s entire award of profits reinstated. Regarding profits from the *Sucroë* soundtrack, they argue that there is a causal link between the infringement and the profits derived from the soundtrack and that the trial judge therefore correctly included them as part of his award of profits. The apportionment of profits between infringing and non‑infringing components of a work is essentially a factual determination which is subject to judicial discretion. An appellate court may only disturb the trial judge’s findings on apportionment if there are errors of law or palpable and overriding errors of fact. The trial judge did not make a reviewable error in concluding that it was inappropriate to apportion profits to the soundtrack as a non‑infringing component of the work. The Court of Appeal accordingly erred by interfering with the trial judge’s conclusion in this regard.

 As for the trial judge’s characterization of the payment from Ravensburger Film + TV GmbH to France Animation S.A. as revenue, there is agreement with the Court of Appeal that this characterization constitutes a palpable and overriding error and that this amount should be removed from the revenues taken into account when calculating the profits generated by *Sucroë*. However, in connection with the characterization of the payment due by Cinar to a partnership called Jaffa Road as revenue, the trial judge did not err in this regard and this amount should not be deducted as an expense when calculating the profits from *Sucroë*.

 On the issue of liability for disgorgement of profits under the *Copyright Act*, the Court of Appeal was correct in concluding that the trial judge erred in ordering disgorgement against all infringers on a solidary basis. Section 35 of the *Copyright Act* provides a dual remedy for copyright infringement: damages for the plaintiff’s losses and disgorgement of the profits retained by the defendant. The latter is not intended to compensate the plaintiff and is not subject to the principles that govern general damages awarded under Quebec’s law of extra‑contractual liability, whose aim is compensatory. Disgorgement under s. 35 of the *Copyright Act* goes no further than is necessary to prevent each individual defendant from retaining a wrongful gain. Defendants cannot be held liable for the gains of co‑defendants by imposing liability for disgorgement on a solidary basis. For the same reasons, W, C, and I are not personally liable to disgorge profits. In addition, the Court of Appeal’s apportionment with respect to the disgorgement of profits should be maintained.

 In connection with non‑pecuniary damages, and in particular whether the *Andrews* trilogy cap should be applied in the present case, the scope of application of the cap beyond non‑pecuniary damages stemming from bodily injury should not be extended. Furthermore, R’s non‑pecuniary damages cannot be characterized as stemming from bodily injury, within the meaning of art. 1607 of the *Civil Code of Québec*. It is more appropriate to characterize R’s psychological suffering as a non‑pecuniary damage stemming from *material* injury. Indeed, the infringement of copyright was a breach of R’s property rights. It is the initial breach, rather than the consequences flowing from that breach, which serves to characterize the type of injury suffered. The Court of Appeal accordingly erred in applying the *Andrews* trilogy cap in the present case.

 In terms of assessing quantum for this injury, there is agreement with the trial judge that R’s non‑pecuniary damages are analogous to those claimed by a victim of defamation. The trial judge had the advantage of observing R in court over a long period of time and was well placed to conduct a personalized evaluation of his non‑pecuniary damages. He made no palpable and overriding error in his assessment of R’s non‑pecuniary damages.

 As regards punitive damages, they cannot be awarded on a solidary basis. This Court has recognized that the punitive damages regime under the *Charter* is autonomous from the extra‑contractual civil liability regime established under the *Civil Code of Québec*. Article 1526 of the *Civil Code of Québec* applies to extra‑contractual fault causing injury and cannot ground the solidarity of punitive damages awarded under the *Charter*. Furthermore, awarding punitive damages on a solidary basis would be inconsistent with the principles set forth in art. 1621 of the *Civil Code of Québec*, which expressly requires that the objectives of punitive damages — prevention, deterrence (both specific and general), and denunciation of acts that are particularly reprehensible in the opinion of the justice system — be taken into account when awarding them. Both the objectives of punitive damages and the factors relevant to assessing them suggest that awards of punitive damages must be individually tailored to each defendant against whom they are ordered. This requirement of individualization militates against awarding punitive damages on a solidary basis.

 In addition, the Court of Appeal was correct to re‑assess the quantum of punitive damages, although it did not give sufficient weight to the gravity of the conduct in this case. Indeed, Cinar, W, C, and I consistently and contemptuously denied having access to R’s work, and disparaged R’s claims that they had copied his work. The impact of this conduct on R was equally serious. It deprived him not only of a source of revenue, but also of his sense of proprietorship over a project that had deep personal significance for him. This said, punitive damages must be awarded with restraint. Article 1621 of the *Civil Code of Québec* expressly provides that the award of punitive damages “may not exceed what is sufficient to fulfil their preventive purpose”. An amount of $500,000 reaches an appropriate balance between the overarching principle of restraint that governs these damages, on the one hand, and the need to deter conduct of this gravity, on the other. The Court of Appeal held Cinar liable for two‑fifths of the amount of punitive damages, and each of W, C, and I liable for one‑fifth, and this represents a reasonable apportionment in the circumstances.

**Cases Cited**

 **Distinguished:** *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229; *Thornton v. School District No. 57 (Prince George)*, [1978] 2 S.C.R. 267; *Arnold v. Teno*, [1978] 2 S.C.R. 287; **referred to:** *Massie & Renwick Ltd. v. Underwriters’ Survey Bureau Ltd.*, [1940] S.C.R. 218; *Théberge v. Galerie d’Art du Petit Champlain inc.*, 2002 SCC 34, [2002] 2 S.C.R. 336; *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36, [2012] 2 S.C.R. 326; *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34, [2012] 2 S.C.R. 231; *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 S.C.R. 283; *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339; *Ladbroke (Football), Ltd. v. William Hill (Football), Ltd.*, [1964] 1 All E.R. 465; *Designers Guild Ltd. v. Russell Williams (Textiles) Ltd.*, [2001] 1 All E.R. 700; *Nichols v. Universal Pictures Corporation*, 45 F.2d 119 (1930); *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Baigent v. The Random House Group Ltd.*, [2007] EWCA Civ 247, [2007] F.S.R. 24; *Delrina Corp. v. Triolet Systems Inc.* (2002), 58 O.R. (3d) 339; *Computer Associates International, Inc. v. Altai, Inc.*, 982 F.2d 693 (1992); *Productions Avanti Ciné‑Vidéo Inc. v. Favreau* (1999), 177 D.L.R. (4th) 568, leave to appeal refused, [2000] 1 S.C.R. xi; *R. v. Mohan*, [1994] 2 S.C.R. 9; *Masterpiece Inc. v. Alavida Lifestyles Inc.*, 2011 SCC 27, [2011] 2 S.C.R. 387; *Preston v. 20th Century Fox Canada Ltd.* (1990), 33 C.P.R. (3d) 242, aff’d (1993), 53 C.P.R. (3d) 407; *Arbique v. Gabriele*, [1998] J.Q. no 3794 (QL), aff’d 2003 CanLII 16298; *Mentmore Manufacturing Co. v. National Merchandising Manufacturing Co.* (1978), 89 D.L.R. (3d) 195; *Longpré v. Thériault*, [1979] C.A. 258; *Sheldon v. Metro‑Goldwyn Pictures Corporation*, 106 F.2d 45 (1939); *Wellcome Foundation Ltd. v. Apotex Inc.*, [2001] 2 F.C. 618; *Lubrizol Corp. v. Imperial Oil Ltd.*, [1997] 2 F.C. 3; *Monsanto Canada Inc. v. Schmeiser*, 2004 SCC 34, [2004] 1 S.C.R. 902; *Quebec (Public Curator) v. Syndicat national des employés de l’hôpital St‑Ferdinand*, [1996] 3 S.C.R. 211; *Lindal v. Lindal*, [1981] 2 S.C.R. 629; *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130; *Snyder v. Montreal Gazette Ltd.*, [1988] 1 S.C.R. 494; *Schreiber v. Canada (Attorney General)*, 2002 SCC 62, [2002] 3 S.C.R. 269; *Landry v. Audet*, 2011 QCCA 535 (CanLII), leave to appeal refused, [2011] 3 S.C.R. v; *Gauthier v. Beaumont*, [1998] 2 S.C.R. 3; *Stations de la Vallée de Saint‑Sauveur inc. v. M.A.*, 2010 QCCA 1509, [2010] R.J.Q. 1872; *Société Radio‑Canada v. Gilles E. Néron Communication Marketing inc.*, [2002] R.J.Q. 2639, aff’d 2004 SCC 53, [2004] 3 S.C.R. 95; *Construction Denis Desjardins inc. v. Jeanson*, 2010 QCCA 1287 (CanLII); *Markarian v. Marchés mondiaux CIBC inc.*, 2006 QCCS 3314 (CanLII); *Genex Communications inc. v. Association québécoise de l’industrie du disque, du spectacle et de la vidéo*, 2009 QCCA 2201, [2009] R.J.Q. 2743; *Solomon v. Québec (Procureur général)*, 2008 QCCA 1832, [2008] R.J.Q. 2127; *de Montigny v. Brossard (Succession)*, 2010 SCC 51, [2010] 3 S.C.R. 64; *Richard v. Time Inc.*, 2012 SCC 8, [2012] 1 S.C.R. 265; *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595.

**Statutes and Regulations Cited**

*Charter of human rights and freedoms*, R.S.Q., c. C‑12, ss. 1, 4, 6, 49.

*Civil Code of Québec*, S.Q. 1991, c. 64, arts. 1525, 1526, 1607, 1618, 1619, 1621, 2846, 2849.

*Copyright Act*, R.S.C. 1985, c. C‑42, ss. 2 “infringing”, 3, 5, 27(1), 34 [am. 2012, c. 20, s. 43], 34.1, 35.

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 APPEALS from a judgment of the Quebec Court of Appeal (Thibault, Morin and Doyon JJ.A.), 2011 QCCA 1361, [2011] R.J.Q. 1415, 108 C.P.R. (4th) 165, [2011] Q.J. No. 9469 (QL), 2011 CarswellQue 15414, SOQUIJ AZ‑50771854, setting aside in part a decision of Auclair J., 2009 QCCS 3793, [2009] R.J.Q. 2261, 83 C.P.R. (4th) 1, [2009] R.R.A. 1135, [2009] J.Q. no 8395 (QL), 2009 CarswellQue 8380, SOQUIJ AZ‑50572488. Appeals in files 34466, 34467 and 34468 dismissed. Appeal in file 34469 allowed in part.

 *William Brock* and *Cara Cameron*, for the appellants (34466)/respondents (34469) Cinar Corporation and Les Films Cinar inc. and for the respondent (34469) 3918203 Canada Inc.

 *Guy Régimbald*, *Normand Tamaro*, *Gilles M. Daigle* and *Marie‑Catherine Deschênes*, for the respondents (34466, 34467, 34468)/appellants (34469) Claude Robinson and Les Productions Nilem inc.

 *Pierre Y. Lefebvre* and *Alain Y. Dussault*, for the appellants (34468)/respondents (34469) Christophe Izard, France Animation S.A., Ravensburger Film + TV GmbH and RTV Family Entertainment AG and for the respondent (34469) Videal Gesellschaft Zur Hertellung Von Audiovisuellen Produkten MHB.

 *Guy J. Pratte*, *Daniel Urbas* and *Marc‑André Grou*, for the respondent (34469) Christian Davin.

 *Raynold Langlois*, *Q.C.*, *Dimitri Maniatis*, *Jean‑Patrick Dallaire* and *Fabrice Vil*, for the appellants (34467)/respondents (34469) Ronald A. Weinberg and Ronald A. Weinberg, in his capacity as sole liquidator of the succession of the late Micheline Charest.

 *Barry B. Sookman* and *Daniel G. C. Glover*, for the intervener Music Canada.

 The judgment of the Court was delivered by

1. The Chief Justice — Canadian law protects the exclusive right of copyright owners to reproduce or to authorize the reproduction of their works. The unauthorized reproduction of a substantial part of an original work constitutes copyright infringement, for which a copyright owner can seek various remedies. The present appeals require this Court to determine whether a substantial part of a work has been reproduced, to examine the role of expert evidence in infringement cases, and to assess whether the trial judge committed reviewable errors in his award of damages.
2. I conclude that copyright was infringed and would order compensatory damages, disgorgement of profits, and punitive damages.
3. Background
4. Claude Robinson was a dreamer. He spent years meticulously crafting an imaginary universe for an educational children’s television show, “The Adventures of Robinson Curiosity” (“*Curiosity*”). Robinson drew his inspiration from Daniel Defoe’s novel *Robinson Crusoe*, as well as from his own life experiences. He developed a character ― Robinson Curiosity ― who lives on a tropical island and must learn to interact with its other inhabitants. From 1982 onwards, he drew detailed sketches and storyboards, wrote scripts and synopses, and designed promotional materials. In October 1985, the Copyright Office issued a registration certificate identifying Robinson as the author of *Curiosity* and Les Productions Nilem inc. (“Nilem”) ― a corporation of which Robinson is the sole director and shareholder ― as the owner of the rights to the literary work.
5. From 1985 to 1987, Robinson and Nilem undertook various initiatives to get the *Curiosity* project developed. Of particular relevance to this appeal, in 1986 Cinar Corporation (“Cinar”) was retained by one of Robinson’s production partners, Pathonic International Inc. (“Pathonic”), as a consultant to promote the project in the United States and to offer general production advice. Ronald Weinberg and his late wife Micheline Charest, who were directors and officers of Cinar, became involved in the project. Robinson gave Weinberg and Charest a copy of his *Curiosity* work. Ultimately, nothing came of Cinar’s efforts to find financial partners for the project in the United States.
6. In 1987, Robinson partnered with Les Productions SDA ltée(“SDA”) to produce the television show. Nilem and SDA set up two corporations, Curious Island Productions Inc.and Curious Island Enterprises Inc., which they intended to use as vehicles for the production.
7. During that same year, Robinson and SDA participated in a television industry convention held at Cannes, in France. At this convention, they allegedly gave a presentation on *Curiosity* to Christophe Izard, a French creator of children’s television shows.
8. Despite the various efforts undertaken by Robinson and his partners, the project failed to attract investors and stalled. Curious Island Productionsand Curious Island Enterprises were dissolved on December 12, 1990.
9. Robinson shelved his project, but did not forget about it. In 1995, he explored the possibility of converting his *Curiosity* project into interactive educational software for children. However, these fresh efforts were cut short when, on September 8, 1995, Robinson watched on television the first episode of a new children’s television show, “Robinson Sucroë” (“*Sucroë*”). He was stunned to see that *Sucroë*, as he perceived it, was a blatant copy of *Curiosity*.
10. In Robinson’s view, the characters and environment depicted in *Sucroë* closely tracked his work. Like *Curiosity*, *Sucroë* features a bearded, Robinson Crusoe-inspired protagonist who wears glasses and a straw hat. In both works, the protagonist lives on an island and interacts with other characters. There are however notable differences between the works. Many of the “side-kicks” in *Curiosity* are animals, whereas in *Sucroë* they are predominantly humans. Also, *Sucroë*,unlike *Curiosity*,features a band of marauding pirates as “villains”.
11. Robinson discovered that several parties who had been given access to his *Curiosity* project, namely Cinar, Weinberg, Charest, and Izard, were also involved in the production of *Sucroë*. He concluded that *Sucroë* was not an independent creation, but rather had been developed by copying *Curiosity*. He and Nilem commenced an action for copyright infringement against Cinar, Weinberg, Charest, Izard, and various co-producers and distributors of *Sucroë*. They also claimed damages under the rules of extra-contractual liability, contending that Cinar, Weinberg, and Charest had breached their obligations of good faith and loyalty under the contract for services that they concluded with Pathonic, and that in doing so they knowingly caused damages to Robinson and Nilem.
12. The trial lasted 83 days and resulted in the production of a voluminous evidentiary record. After considering the testimony of over 40 witnesses and 4 experts, as well as extensive documentary and audio-visual evidence, the trial judge concluded that Robinson’s *Curiosity* was an original work protected by copyright, that the creators of *Sucroë* had copied *Curiosity*, and that the features reproduced in *Sucroë* represented a substantial part of *Curiosity*. He found that Cinar, Weinberg, Charest, Izard, France Animation S.A., Ravensburger Film + TV GmbH and RTV Family Entertainment AG (collectively referred to as the “Cinar appellants” in these reasons) were liable for infringement of copyright. He also held Christian Davin, the chief executive officer of France Animation at the relevant time, personally liable for the infringement. Finally, the trial judge found that Cinar, Weinberg, and Charest were extra-contractually liable towards Robinson and Nilem for having violated their obligations of good faith and of loyalty: 2009 QCCS 3793, [2009] R.J.Q. 2261.
13. The trial judge awarded damages on a solidary basis (the equivalent of “joint and several” liability in the common law) and costs in the amount of $5,224,293: $607,489 in compensatory damages for Robinson’s pecuniary losses stemming from the infringement; $1,716,804 to disgorge the profits earned as a result of the infringement; $400,000 for the psychological harm suffered by Robinson; $1,000,000 in punitive damages; and $1,500,000 for costs on a solicitor-client basis.
14. The Court of Appeal upheld the trial judge’s findings on infringement. It confirmed the trial judge’s findings of personal liability for copyright infringement, except for Davin, against whom the evidence was insufficient in its view: 2011 QCCA 1361, 108 C.P.R. (4th) 165.
15. The Court of Appeal upheld the trial judge’s award of compensatory damages for Robinson’s pecuniary losses, subject to a minor mathematical correction. It rejected the trial judge’s order for disgorgement of profits against Weinberg, Charest, and Izard because those profits were retained by corporations. It also ordered disgorgement on a joint basis (the equivalent of “several” liability in the common law) rather than solidarily. In addition, the Court of Appeal excluded amounts incorrectly included by the trial judge in the calculation of profits, reducing the amount to be disgorged.
16. The Court of Appeal held that the cap established in the *Andrews* trilogy (*Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229, *Thornton v. School District No. 57 (Prince George)*, [1978] 2 S.C.R. 267, and *Arnold v. Teno*, [1978] 2 S.C.R. 287) was applicable to the award for psychological suffering and reduced the award to $121,350, which represents 50 percent of the cap’s value at the date of the summons.
17. The Court of Appeal reduced the award for punitive damages from $1,000,000 to $250,000, on the ground that punitive damages in Quebec must be moderate, and held that they could not be awarded on a solidary basis. It held Cinar liable for $100,000 in punitive damages, and each of Weinberg, Charest, and Izard liable for $50,000.
18. The Court of Appeal held that interest and the additional indemnity (arts. 1618 and 1619 of the *Civil Code of Québec*, S.Q. 1991, c. 64 (“*CCQ*”)) on the award of compensatory damages should be computed as of July 16, 1996, and as of July 1, 2001, for the award of profits. It also affirmed the trial judge’s award of $1,500,000 for costs on a solicitor-client basis, but declined to award additional costs on a solicitor-client basis for the appeal.
19. Four appeals have been brought from the Court of Appeal’s judgment (in files 34466, 34467, 34468, and 34469). The Cinar appellants appeal the finding of liability for infringement. Robinson and Nilem appeal the reduction in damages and disgorgement of profits ordered by the Court of Appeal.
20. Issues
21. The appeals raise a number of issues, which I will address as follows:

A. The Standing of Robinson and Nilem

B. The Infringement of Copyright

C. The Personal Liability of Weinberg, Charest, and Davin for Infringement

D. The Extra-contractual Liability of Cinar, Weinberg, and Charest

E. Disgorgement of Profits

F. Non-pecuniary Damages

G. Punitive Damages

1. Analysis
	1. The Standing of Robinson and Nilem
2. The appellant Weinberg argues that neither Robinson nor Nilem has standing to bring an action for copyright infringement because Robinson assigned all of his rights in *Curiosity* to Nilem, and Nilem thereafter assigned those rights to Curious Island Enterprises. He argues that, as a result of these assignments, neither Robinson nor Nilem retains any rights in *Curiosity*.
3. Weinberg bears the burden of proving the loss of copyright: s. 34.1 of the *Copyright Act*, R.S.C. 1985, c. C-42 (“*Copyright Act*” or “Act”) (s. 34 at the time this action was commenced); *Massie & Renwick Ltd. v. Underwriters’ Survey Bureau Ltd.*, [1940] S.C.R. 218, at pp. 233-34. In my view, he has failed to discharge this burden. On the record before this Court, I would not interfere with the conclusion of the courts below that Robinson and Nilem were co-owners of the rights to *Curiosity*. And I agree with the courts below that any rights transferred by Nilem to Curious Island Enterprises reverted to Nilem. The 1987 shareholders’ agreement by which Nilem transferred its rights to Curious Island Enterprises contained a resolutory clause pursuant to which the rights would revert back to Nilem if Curious Island Enterprises was dissolved, and Curious Island Enterprises was indeed dissolved on December 12, 1990.
4. Consequently, Robinson and Nilem have standing to bring their action.
	1. The Infringement of Copyright
		1. The Scope of the Protection Afforded by the *Copyright* *Act*
5. The *Copyright Act* strikes “a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator”: *Théberge v. Galerie d’Art du Petit Champlain inc.*, 2002 SCC 34, [2002] 2 S.C.R. 336, at para. 30; see also *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36, [2012] 2 S.C.R. 326, at paras. 8-11; *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34, [2012] 2 S.C.R. 231, at paras. 7-8; *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 S.C.R. 283, at para. 40. It seeks to ensure that an author will reap the benefits of his efforts, in order to incentivize the creation of new works. However, it does not give the author a monopoly over ideas or elements from the public domain, which all are free to draw upon for their own works. For example, “[t]he general stock of incidents in fiction or drama is free for all to use ― a substantial part of everyone’s culture, not of any one individual’s work”: D. Vaver, *Intellectual Property Law: Copyright, Patents, Trade-marks* (2nd ed. 2011), at p. 182.
6. The Act protects *original* literary, dramatic, musical, and artistic works: s. 5. It protects the expression of ideas in these works, rather than ideas in and of themselves: *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339, at para. 8. An original work is the expression of an idea through an exercise of skill and judgment: *CCH*, at para. 16. Infringement consists of the unauthorized taking of that originality.
7. However, the Act does not protect every “particle” of an original work, “any little piece the taking of which cannot affect the value of [the] work as a whole”: Vaver, at p. 182. Section 3 of the *Copyright Act* provides that the copyright owner has the sole right to reproduce “the work or any substantial part thereof”.
8. A substantial part of a work is a flexible notion. It is a matter of fact and degree. “Whether a part is substantial must be decided by its quality rather than its quantity”: *Ladbroke (Football), Ltd. v. William Hill (Football), Ltd.*, [1964] 1 All E.R. 465 (H.L.), at p. 481, *per* Lord Pearce. What constitutes a substantial part is determined in relation to the originality of the work that warrants the protection of the *Copyright Act*. As a general proposition, a substantial part of a work is a part of the work that represents a substantial portion of the author’s skill and judgment expressed therein.
9. A substantial part of a work is not limited to the words on the page or the brushstrokes on the canvas. The Actprotects authors against both literal and non-literal copying, so long as the copied material forms a substantial part of the infringed work. As the House of Lords put it,

the “part” which is regarded as substantial can be a feature or combination of features of the work, abstracted from it rather than forming a discrete part. . . . [T]he original elements in the plot of a play or novel may be a substantial part, so that copyright may be infringed by a work which does not reproduce a single sentence of the original.

(*Designers Guild Ltd. v. Russell Williams (Textiles) Ltd.*, [2001] 1 All E.R. 700, at p. 706, *per* Lord Hoffmann; see also *Nichols v. Universal Pictures Corporation*, 45 F.2d 119 (2d Cir. 1930), *per* Learned Hand J.)

1. The need to strike an appropriate balance between giving protection to the skill and judgment exercised by authors in the expression of their ideas, on the one hand, and leaving ideas and elements from the public domain free for all to draw upon, on the other, forms the background against which the arguments of the parties must be considered.
	* 1. The Issue on Appeal
2. The Cinar appellants no longer contest the trial judge’s findings that Robinson’s work as a whole was original, that several of the appellants had access to the work, and that *Sucroë* and *Curiosity* share common features.Rather, they argue that the trial judge made several errors in his assessment of whether a substantial part of *Curiosity* is reproduced in *Sucroë*, giving rise to a remedy for copyright infringement.
	* 1. The Standard of Review
3. The conclusion of the trial judge that a substantial part of a plaintiff’s work was copied is entitled to appellate deference.The issue of substantiality is one of mixed fact and law. Consequently, an appellate court should generally defer to the trial judge’s findings on substantiality, unless those findings are based on an error of law or palpable and overriding errors of fact: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Designers Guild*, at p. 707, *per* Lord Hoffman, and p. 708, *per* Lord Millett; *Baigent v. The Random House Group Ltd.*, [2007] EWCA Civ 247, [2007] F.S.R. 24, at paras. 125-26; *Delrina Corp. v. Triolet Systems Inc.* (2002), 58 O.R. (3d) 339 (C.A.), at para. 81; Vaver, at p. 182.
	* 1. Did the Trial Judge Err in Finding That a Substantial Part of Robinson’s Work Was Reproduced in *Sucroë*?
4. The trial judge, upheld by the Court of Appeal, found that the Cinar appellants infringed Robinson’s copyright by copying a substantial part of his original work without his or Nilem’s authorization: see ss. 3(1) and 27(1) of the *Copyright Act*.
5. The Cinar appellants contend that the trial judge (a) failed to follow the correct approach to assessing substantiality; (b) failed to give sufficient weight to the significant differences between *Sucroë* and *Curiosity*; (c) made an error in finding that the features of *Curiosity* reproduced in *Sucroë* were protected by the *Copyright Act*; and (d) based his findings on inadmissible expert evidence. I will address each of these arguments in turn.
	* + 1. Did the Trial Judge Fail to Follow the Correct Approach to Assessing Whether a “Substantial Part” of a Work Was Reproduced?
6. The trial judge found that the Cinar appellants copied a number of features from Robinson’s *Curiosity*, including the visual appearance of the main protagonist, the personality traits of the main protagonist and of other characters, visual aspects of the setting, and recurring scenographic elements. He concluded that, considered as a whole, the copied features constituted a substantial part of Robinson’s work.
7. The Cinar appellants argue that instead of applying a holistic approach, the trial judge should have applied a three-step approach requiring him to (1) determine what elements of *Curiosity* were original, within the meaning of the *Copyright Act*; (2) exclude non-protectable features of Robinson’s work (such as ideas, elements drawn from the public domain, and generic elements commonplace in children’s television shows); and (3) compare what remains of *Curiosity* after this “weeding-out” process to *Sucroë*, and determine whether a substantial part of *Curiosity* was reproduced.
8. The approach proposed by the Cinar appellants is similar to the “abstraction-filtration-comparison” approach used to assess substantiality in the context of computer software infringement in the United States: see *Computer Associates International, Inc. v. Altai, Inc.*, 982 F.2d 693 (2d Cir. 1992); B. Clermont, “Les compilations et la *Loi sur le droit d’auteur*: leur protection et leur création” (2006), 18 *C.P.I.* 219, at p. 237; B. Tarantino, “‘I’ve Got This Great Idea for a Show. . .’ ― Copyright Protection for Television Show and Motion Picture Concepts and Proposals” (2004), 17 *I.P.J.* 189, at pp. 199-200. It has been discussed, though not formally adopted, in Canadian jurisprudence: *Delrina Corp.*, at paras. 43-47. I do not exclude the possibility that such an approach might be useful in deciding whether a substantial part of some works, for example computer programs, has been copied. But many types of works do not lend themselves to a reductive analysis. Canadian courts have generally adopted a qualitative and holistic approach to assessing substantiality. “The character of the works will be looked at, and the court will in all cases look, not at isolated passages, but at the two works as a whole to see whether the use by the defendant has unduly interfered with the plaintiff’s right”: J. S. McKeown, *Fox on Canadian Law of Copyright and Industrial Designs* (loose-leaf), at p. 21-16.4 (emphasis added).
9. As a general matter, it is important to not conduct the substantiality analysis by dealing with the copied features piecemeal: *Designers Guild*,at p. 705, *per* Lord Hoffman. The approach proposed by the Cinar appellants would risk dissecting Robinson’s work into its component parts. The “abstraction” of Robinson’s work to the essence of what makes it original and the exclusion of non-protectable elements *at the outset of the analysis* would prevent a truly holistic assessment. This approach focuses unduly on whether each of the parts of Robinson’s work is *individually* original and protected by copyright law. Rather, the cumulative effect of the features copied from the work must be considered, to determine whether those featuresamount to a substantial part of Robinson’s skill and judgment expressed in his work as a whole.
10. I thus conclude that the trial judge did not err by failing to follow the three-step approach advocated by the Cinar appellants.
	* + 1. Did the Trial Judge Fail to Give Sufficient Weight to the Differences Between Sucroë and Curiosity?
11. The Cinar appellants contend that the trial judge focused almost exclusively on the similarities between *Sucroë* and *Curiosity*, and failed to consider the differences between the works. They point to significant differences between the works: the secondary characters in *Sucroë* are humans, whereas in *Curiosity* several of those characters are animals; *Sucroë* prominently features as its “villains” a band of marauding pirates, whereas *Curiosity* does not seem to have any villains; and the protagonist in *Sucroë* is not particularly curious, whereas curiosity is the dominant personality trait of the protagonist in *Curiosity*.
12. The question of whether there has been substantial copying focuses on whether the copied features constitute a substantial part *of the plaintiff’s work ―* not whether they amount to a substantial part *of the defendant’s work*: Vaver, at p. 186; E. F. Judge and D. J. Gervais, *Intellectual Property: The Law in Canada* (2nd ed. 2011), at p. 211. The alteration of copied features or their integration into a work that is notably different from the plaintiff’s work does not necessarily preclude a claim that a substantial part of a work has been copied. As the *Copyright Act* states, infringement includes “any colourable imitation” of a work: definition of “infringing”, s. 2.
13. This is not to say that differences are irrelevant to the substantiality analysis. If the differences are so great that the work, viewed as a whole, is not an imitation but rather a new and original work, then there is no infringement. As the Court of Appeal put it, “the differences may have no impact if the borrowing remains substantial. Conversely, the result may also be a novel and original work simply inspired by the first. Everything is therefore a matter of nuance, degree, and context” (para. 66).
14. The trial judge engaged in a qualitative and holistic assessment of the similarities between the works, which took into account the relevant similarities and differences between the works. For example, he gave little weight to similarities that were due to the generic island setting of both works: the fact that beaches, luxuriant vegetation, and bananas are present in both works was, at best, a “minor” similarity (paras. 621 and 631). He also gave little weight to the alleged similarities between Gladys, a female character in *Sucroë*, and Gertrude, a character in *Curiosity* (paras. 577-81). He examined whether Robinson Sucroë could be said to be as curious as Robinson Curiosity, and recognized that curiosity was a less predominant personality trait in Sucroë than it was in Curiosity (paras. 529-31). He concluded that, *despite any differences between the works*, it was still possible to identify in *Sucroë* features copied from *Curiosity* and that these features constituted a substantial part of Robinson’s work. The trial judge did not err in approaching the matter in this way.
	* + 1. Did the Trial Judge Err in Finding That the Features of Curiosity Reproduced in Sucroë Are Protected by the Copyright Act?
15. The Cinar appellants contend that, by failing to follow their three-step approach and to give sufficient weight to differences between the works, the trial judge characterized as a substantial part of the work a series of features that are not protected by copyright law. They argue that, at most, *Sucroë* reproduced the ideas embodied in *Curiosity*, elements drawn from the public domain (such as the protagonist of Daniel Defoe’s nearly 300-year-old novel), and other elements that are not original within the meaning of the *Copyright Act*.
16. I turn first to the argument that *Sucroë* merely reproduced the idea of a children’s television show about a *Robinson Crusoe*-inspired character living on a tropical island, as opposed to Robinson’s expression of that idea.I cannot accept this contention. The trial judge clearly grounded his finding of copying of a substantial part not in the idea behind *Curiosity*, but in the way Robinson expressed that idea. He concluded that the overall architecture of Robinson’s submission for a television show was copied. He found that the graphic appearance and several aspects of the personality of *Curiosity*’s protagonist were copied; the personalities of the secondary characters that gravitate around *Curiosity*’s protagonist were copied; and the graphic appearance of the makeshift village that these characters inhabit was also copied in part (paras. 685 and 824-26). These findings are not confined to the reproduction of an abstract idea; they focus on the detailed manner in which Robinson’s ideas were expressed.
17. This leaves the second argument ― the suggestion that to the extent that the characters and setting of *Sucroë* replicated those found in *Curiosity*,these are generic elements that are not protected by copyright law. The story of a man marooned on an island interacting with animals, native inhabitants, and the environment is archetypal and has been reproduced for centuries, the Cinar appellants assert.
18. Again, the trial judge’s findings refute this contention. He found that *Curiosity* was an original work, within the meaning of the *Copyright Act*.He based this not on the generic nature of the characters, but on their distinct visual appearance and particular personalities, which were the product of Robinson’s skill and judgment. Nor was *Curiosity*’s island an entirely generic island; the trial judge cited particular visual elements of the setting that Robinson had conceived and that the Cinar appellants had copied.
19. The development of a group of characters that have specific personality traits and whose interactions hinge on those personalities can require an exercise of skill and judgment sufficient to satisfy the *Copyright Act*’s originality criterion: see for example *Productions Avanti Ciné-Vidéo Inc. v. Favreau* (1999), 177 D.L.R. (4th) 568 (Que. C.A.), leave to appeal refused, [2000] 1 S.C.R. xi. *Sucroë* reproduces more than generic elements which all are free to draw upon for inspiration. It reproduces *Curiosity*’s particular combination of characters with distinct personality traits, living together and interacting on a tropical island ― elements that represent a substantial part of the skill and judgment expressed in *Curiosity*.
20. In essence, the aspects of the trial judge’s reasons that the Cinar appellants take issue with are findings of mixed fact and law. They invite this Court to embark on a fresh assessment of the features copied from *Curiosity*. I would decline to do so. They have failed to demonstrate palpable or overriding errors in the trial judge’s findings on substantiality.
	* + 1. Did the Trial Judge Err by Relying on Inadmissible Expert Evidence?
21. The Cinar appellants argue that the trial judge based the bulk of his findings regarding substantial copying on inadmissible expert evidence ― the evidence of a semiologist, Dr. Charles Perraton. Semiology is the study of signs and symbols and how they convey meaning. Dr. Perraton offered evidence that, quite apart from the surface meaning of the works at issue, there were latent similarities in how the two works used atmosphere, dynamics, motifs, symbols, and structure to convey meaning. The trial judge relied on this evidence in concluding that the Cinar appellants had copied a substantial part of Robinson’s work.
22. For expert evidence to be admitted at trial, it must (a) be relevant; (b) be necessary to assist the trier of fact; (c) not offend any exclusionary rule; and (d) involve a properly qualified expert: *R. v. Mohan*, [1994] 2 S.C.R. 9. These criteria apply to trials for copyright infringement, as they do in other intellectual property cases: *Masterpiece Inc. v. Alavida Lifestyles Inc.*,2011 SCC 27,[2011] 2 S.C.R. 387, at para. 75.
23. The Cinar appellants argue that the second criterion ― necessity of the evidence ― is not met in the case at hand. The expert evidence was not necessary to assist the court, they say, because the question of whether a substantial part has been copied must be assessed from the perspective of the lay person in the intended audience for the works at issue: see *Preston v. 20th Century Fox Canada Ltd.* (1990), 33 C.P.R. (3d) 242 (F.C.T.D.), aff’d (1993), 53 C.P.R. (3d) 407 (F.C.A.); *Arbique v. Gabriele*, [1998] J.Q. no 3794 (QL) (Sup. Ct.), aff’d 2003 CanLII 16298 (Que. C.A.). They argue that trial judges are well placed to understand a lay person’s point of view and that the assistance of an expert is unnecessary to help them grasp this perspective.
24. In my view, the perspective of a lay person in the intended audience for the works at issue is a useful one. It has the merit of keeping the analysis of similarities concrete and grounded in the works themselves, rather than in esoteric theories about the works. However, the question always remains whether a substantial part of the plaintiff’s work was copied. This question should be answered from the perspective of a person whose senses and knowledge allow him or her to fully assess and appreciate all relevant aspects ― patent and latent ― of the works at issue. In some cases, it may be necessary to go beyond the perspective of a lay person in the intended audience for the work, and to call upon an expert to place the trial judge in the shoes of “someone reasonably versed in the relevant art or technology”: Vaver, at p. 187.
25. To take an example, two pieces of classical music may, to the untrained ear, sound different, perhaps because they are played on different instruments, or at different tempos. An expert musician, however, might see similarities suggesting a substantial part has been copied ― the same key signature, the same arrangement of the notes in recurring passages, or a recurrent and unusual harmonic chord. It will be for the judge to determine whether the similarities establish copying of a substantial part, to be sure. But in making that determination, the judge may need to consider not only how the work sounds to the lay person in the intended audience, but also structural similarities that only an expert can detect.
26. In the present case, the necessity criterion of the test for the admissibility of expert evidence is satisfied. First, the works at issue are intended for an audience of young children. A rigid application of the “lay person in the intended audience” standard would unduly restrict the court’s ability to answer the central question, namely whether a substantial part of Robinson’s work was copied. It would shift the question to whether the copied features are apparent to a five-year-old.
27. Second, the nature of the works at issue makes them difficult to compare. The trial judge was faced with the task of comparing a sprawling unrealized submission for a television show to a finished product that had aired on television. These are not works that are easily amenable to a side-by-side visual comparison conducted by a judge without the assistance of an expert.
28. Finally, the works at issue had both patent and latent similarities. Or, as Dr. Perraton explained it, they shared “perceptible” and “intelligible” similarities. “Perceptible” similarities are those that can be directly observed, whereas “intelligible” similarities ― such as atmosphere, dynamics, motifs, and structure ― affect a viewer’s experience of the work indirectly. Expert evidence was necessary to assist the trial judge in distilling and comparing the “intelligible” aspects of the works at issue, which he would not otherwise appreciate. Consequently, the trial judge did not err in admitting the expert evidence of Dr. Perraton.
	* 1. Conclusion
29. The Cinar appellants have failed to establish that the trial judge erred in concluding that they copied a substantial part of Robinson’s work.
	1. The Personal Liability of Weinberg, Charest, and Davin for Infringement
30. France Animation, Cinar, Ravensburger, and RTV Family Entertainment no longer argue that they cannot be found liable in their capacity as producers of *Sucroë*. Nor does Izard argue that he cannot be found liable in his personal capacity. However, Weinberg, Charest, and Davin contend that they cannot be found personally liable for copyright infringement.
	* 1. Weinberg and Charest
31. The trial judge found that Weinberg and Charest were personally liable for the infringement of Robinson’s copyright, since they deliberately and knowingly engaged in the infringement.
32. Weinberg argues that Robinson failed to establish on a balance of probabilities that he and Charest knowingly engaged in copyright infringement, contending that they had little direct involvement in the creative process of *Sucroë*.
33. For a director and/or officer to be held liable for his or her company’s infringement of a copyright, “there must be circumstances from which it is reasonable to conclude that the purpose of the director or officer was not the direction of the manufacturing and selling activity of the company in the ordinary course of his relationship to it but the deliberate, wilful and knowing pursuit of a course of conduct that was likely to constitute infringement or reflected an indifference to the risk of it”: *Mentmore Manufacturing Co. v. National Merchandising Manufacturing Co.* (1978), 89 D.L.R. (3d) 195 (F.C.A.), at pp. 204-5, *per* Le Dain J.
34. The trial judge concluded from the whole of the evidence that Weinberg and Charest deliberately, wilfully, and knowingly infringed Robinson’s copyright. This conclusion was supported by the evidence. The trial judge accepted testimony to the effect that Weinberg and Charest personally had access to and actively consulted Robinson’s drawings during the development of *Sucroë* (paras. 786-99). He drew adverse inferences from Weinberg and Charest’s persistent denials that they had access to Robinson’s work, despite the fact that they were given copies of the work and even made comments on it in the course of their consultations with Pathonic (paras. 254-58). The findings of personal liability are supported by the evidence and should not be set aside.
	* 1. Davin
35. The trial judge found Davin, the chief executive officer of France Animation at the relevant time, personally liable for copyright infringement. He relied on evidence that Davin was involved in schemes orchestrated by Cinar in order to fraudulently obtain royalties and government subsidies, and noted that Davin was the hierarchical superior of Izard, who was personally involved in the copying of Robinson’s work. The Court of Appeal overturned this finding of personal liability on the ground that it was not supported by the evidence. I agree with the Court of Appeal’s conclusion.
36. The trial judge established Davin’s liability by presumption, i.e. by the inductive process of inferring an unknown fact (Davin’s personal participation in copyright infringement) from known facts (Davin’s hierarchical position within France Animation and his participation in other fraudulent schemes): art. 2846 *CCQ*. Courts may only rely on presumptions that are “serious, precise and concordant”: art. 2849 *CCQ*; see also *Longpré v. Thériault*, [1979] C.A. 258, at p. 262.
37. The evidence relied upon by the trial judge did not support a serious, precise and concordant presumption that Davin was personally, deliberately and knowingly involved in the copying of Robinson’s work, as required by *Mentmore*. The trial judge inferred Davin’s knowing and deliberate participation from general circumstantial evidence. He observed that Davin was a [translation] “Teflon man” who had participated in fraudulent schemes (para. 835). However, these schemes were unrelated to the copying of Robinson’s work. Evidence of a dishonest and arrogant personality does not suffice to ground an inference of participation in copyright infringement. He also relied on Davin’s position as Izard’s hierarchical superior. Yet, this alone does not establish personal participation in copyright infringement. An officer of a corporation cannot be held personally liable for copyright infringement merely on the basis of his hierarchical status as officer.
38. Robinson also argues that Davin “authorized” the copying of Robinson’s work, within the meaning of s. 3 of the *Copyright Act*. “Under s. 27(1) of the *Copyright Act*, it is an infringement of copyright for anyone to do anything that the Act only allows owners to do, including authorizing the exercise of his or her own rights”: *CCH*,at para. 37. As stated in *CCH*:

“Authorize” means to “sanction, approve and countenance” . . . . Countenance in the context of authorizing copyright infringement must be understood in its strongest dictionary meaning, namely “[g]ive approval to; sanction, permit; favour, encourage” . . . . Authorization is a question of fact that depends on the circumstances of each particular case and can be inferred from acts that are less than direct and positive, including a sufficient degree of indifference . . . . [References omitted; para. 38.]

1. There is no evidence that Davin actively or passively authorized the copying of Robinson’s work in this sense. Indeed, the record fails to establish that Davin even knew or should have known that *Sucroë* was developed by copying Robinson’s work.
2. Finally, Robinson argues that Davin is liable as a producer of *Sucroë*. His name appears as [translation] “executive producer” in the show’s credits in Canada, and as “*producteur délégué*” in France. This alone is insufficient to hold Davin personally liable. As executive producer, he was acting as an officer of France Animation. It is France Animation, as a corporate entity distinct from its directors and officers, that reproduced a substantial part of Robinson’s work by commissioning and commercializing *Sucroë*. As the Court of Appeal correctly noted, various contracts establish that it is France Animation and its co-producers, Cinar and Ravensburger, who hired the production staff and assumed financial as well as artistic responsibility for the production of *Sucroë* (para. 141).
3. I accordingly agree with the Court of Appeal that Davin cannot be held personally liable for copyright infringement on any of the grounds argued by Robinson.
	1. The Extra-contractual Liability of Cinar, Weinberg, and Charest
4. Having concluded that Cinar, Weinberg, and Charest are liable for copyright infringement, it is unnecessary to examine whether they can be found liable under Quebec’s regime of extra-contractual liability. This form of liability was only argued in the alternative by Robinson and Nilem.
	1. Disgorgement of Profits
5. Pursuant to s. 35 of the *Copyright Act*, the trial judge awarded both compensatory damages to account for Robinson’s losses (including non-pecuniary damages, discussed below) and 50 percent of the profits made by the infringers, against all the Cinar appellants, on a solidary basis.
6. The Court of Appeal took issue with the trial judge’s award of profits and made several corrections. First, it excluded $1,117,816 in profits derived from *Sucroë*’s soundtrack, on the ground that there was no causal link between the infringement and the soundtrack. Second, it found that the trial judge erred in characterizing a payment of $684,000 from Ravensburger to France Animation (the “Ravensburger amount”) as revenue, and excluded the amount from the calculation of profits. Third, it found that a payment of $1,111,201 made by Cinar to a partnership called Jaffa Road (the “Jaffa Road amount”) should have been characterized as an expense and deducted from the calculation of profits. Fourth, it held that only the corporate defendants should have been ordered to disgorge profits, and that under s. 35 of the *Copyright Act* profits can only be ordered disgorged on a joint basis. Finally, it modified the date from which to calculate interest and the additional indemnity on the award of profits.
7. Having concluded that under s. 35 of the *Copyright Act* profits cannot be disgorged on a solidary basis, the Court of Appeal apportioned the total amount of profits between France Animation (60 percent), Ravensburger (15 percent), and Cinar (25 percent).
8. Robinson and Nilem now seek to have the trial judge’s entire award of profits reinstated. No appeal is brought against the award of compensatory damages ordered by the trial judge under s. 35 of the *Copyright Act* for Robinson’s pecuniary losses.
9. The trial judge refused to order an accounting of profits, a decision which has not been appealed. Instead, he calculated the net profits made from *Sucroë* on the basis of documentary evidence produced by the parties. As a result, this Court does not have the benefit of the type of detailed record that typically results from a taking of accounts, and must confine itself to the trial judge’s findings of fact and the documentary evidence on the record before it.
10. I will deal in turn with each of the alleged defects in the trial judge’s award of profits.
	* 1. Profits From the *Sucroë* Soundtrack
11. The soundtrack to *Sucroë* is the result of an independent creative process. It was not copied from Robinson’s work, but rather was incorporated into the materials that were copied. Robinson argues that there is nevertheless a causal link between the infringement and the profits derived from the soundtrack. In his view, the soundtrack is an inextricable component of a television show that was created through a process of copyright infringement. The Cinar appellants, for their part, argue that since the soundtrack results from independent creation, there can be no causal link between the infringement and the profits related to musical rights.
12. Section 35 of the *Copyright Act* provides that a defendant can be ordered to “disgorge its profit to the extent that such profit is caused by the infringement. The requirement for a [causal] link between infringement and profit may require that the profit be apportioned between that which is attributable to the infringement and that which is not”: McKeown, at p. 24-82.3 (emphasis added). The onus is on the infringer to “satisfactorily separate non-infringing from infringing activities”: Vaver, at p. 653; *Sheldon v. Metro-Goldwyn Pictures Corporation*, 106 F.2d 45 (2d Cir. 1939), *per* Learned Hand J. In some cases, “an infringer may so interweave the right-holder’s work with its own as to make separation impossible”: Vaver, at p. 637.
13. The apportionment of profits between infringing and non-infringing components of a work is essentially a factual determination which is subject to judicial discretion: *Wellcome Foundation Ltd. v. Apotex Inc.*, [2001] 2 F.C. 618 (C.A.), at para. 23; *Lubrizol Corp. v. Imperial Oil Ltd.*, [1997] 2 F.C. 3 (C.A.), at para. 9. An appellate court may only disturb the trial judge’s findings on apportionment if there are errors of law or palpable and overriding errors of fact (*Housen*).
14. In the case at hand, the trial judge found that [translation] “the music revenues cannot be disassociated from the overall . . . work” (para. 1016). The Court of Appeal disagreed and asked itself what profits would have been generated if the soundtrack had been commercialized as a separate product, independently of the infringing material (para. 196). It relied on the “differential profit” approach used in patent infringement cases, in which a comparison is made “between the defendant’s profit attributable to the invention and his profit had he used the best non-infringing option”: *Monsanto Canada Inc. v. Schmeiser*, 2004 SCC 34, [2004] 1 S.C.R. 902, at para. 102.
15. In my view, the Court of Appeal erred by interfering with the trial judge’s conclusion that the profits stemming from the soundtrack could not be dissociated from the profits derived from the infringing material. The “differential profit” approach on which the Court of Appeal relied is generally used in cases where an infringement allows the infringer to commercialize a good in a more profitable manner than he could have without the infringement. However, there is no evidence that the soundtrack could have been commercialized as a separate product if *Curiosity* had not been infringed in the first place. The soundtrack was only commercialized as a component of the television show *Sucroë*, which was itself created by copying a substantial part of Robinson’s work. The trial judge was entitled to conclude that the soundtrack had no stand-alone value, and that it generated profits only as an accessory to the television show. Consequently, he did not make a reviewable error in concluding that it was inappropriate to apportion profits to the soundtrack as a non-infringing component of the work.
	* 1. The Ravensburger Amount
16. The Ravensburger amount represents $684,000 that Ravensburger paid to France Animation. The trial judge characterized this as a form of revenue stemming from *Sucroë*. I agree with the Court of Appeal that this characterization constitutes a palpable and overriding error.
17. The trial judge calculated the net profits stemming from *Sucroë* on a global basis, taking into account the revenue and expenses of all the co-producers. However, he treated the Ravensburger amount in isolation, looking only to the fact that it constituted a form of revenue for one of the co-producers, France Animation. This treatment of the Ravensburger amount was inconsistent with the global approach adopted elsewhere. The amount also represented an outlay of capital for another co-producer, Ravensburger. It was a contribution by Ravensburger to the financing of *Sucroë*, and its net effect was simply to partially shift the burden of the production expenses from France Animation to Ravensburger. The amount did not constitute a form of revenue for the group of co-producers *taken as a whole*. The Court of Appeal was correct to remove this amount from the revenues taken into account when calculating the profits generated by *Sucroë*.
	* 1. The Jaffa Road Amount
18. Pursuant to a distribution agreement, Cinar sold an interest in *Sucroë* to Jaffa Road for $1,853,333. It is not contested that this amount was collected by Cinar and constitutes revenue stemming from *Sucroë*. In a later agreement, Jaffa Road transferred back to Cinar the distribution rights for Canada and the United States. That agreement provided that a minimum payment of $1,111,201 as part of a “revenue guarantee” would be due unconditionally by Cinar about a year after the execution of the agreement. The trial judge did not characterize this amount as an expense incurred by Cinar, whereas the Court of Appeal did.
19. The substance of the trial judge’s finding was that the Cinar appellants had not proven the actual occurrence of a transfer of $1,111,201 from Cinar to Jaffa Road (para. 1022). The document submitted to establish this payment provided only for a “revenue guarantee” to be paid a year from the moment of execution. No evidence was tendered to demonstrate that this guarantee was executed when it actually became due. The trial judge was entitled to conclude that this document did not constitute proof of payment of the amount. Contrary to the suggestion of the Court of Appeal, he had no obligation to take this evidence at face value. Consequently, I would not deduct this amount as an expense when calculating the profits from *Sucroë*.
	* 1. Ordering Disgorgement Against All Infringers on a Solidary Basis
20. The trial judge ordered disgorgement against all the parties that he found liable for infringement on a solidary basis. The Court of Appeal held that this misconstrued the disgorgement remedy under s. 35 of the *Copyright Act*. It held that a defendant can only be made to disgorge profits that it made, as opposed to the profits of other defendants with whom it participated in an infringement.
21. I agree with the Court of Appeal. Section 35 of the *Copyright Act* provides a dual remedy for copyright infringement: damages for the plaintiff’s losses and disgorgement of the profits retained by the defendant. Disgorgement of profits under s. 35 is designed mainly to prevent unjust enrichment, although it can also serve a secondary purpose of deterrence: Vaver, at p. 650. It is not intended to compensate the plaintiff. This remedy is not subject to the principles that govern general damages awarded under Quebec’s law of extra-contractual liability, whose aim is compensatory. Consequently, solidarity of profits ordered disgorged under s. 35 of the *Copyright Act* cannot be inferred from art. 1526 of the *CCQ*, which makes co-authors of a fault solidarily liable for the “obligation to make reparation for injury caused to another”.
22. Disgorgement under s. 35 of the *Copyright Act* goes no further than is necessary to prevent each individual defendant from retaining a wrongful gain. Defendants cannot be held liable for the gains of co-defendants by imposing liability for disgorgement on a solidary basis.
23. For the same reasons, Weinberg, Charest, and Izard are not personally liable to disgorge profits. The profits from *Sucroë* were retained by the corporate entities that acted as co-producers. Weinberg, Charest, and Izard should not be required to disgorge profits that they did not retain in their personal capacity.
24. Having concluded that disgorgement must be ordered on a joint basis, I would maintain the Court of Appeal’s apportionment. France Animation must disgorge 60 percent of the profits; Ravensburger, 15 percent; and Cinar, 25 percent.
	* 1. Interest and Additional Indemnity
25. The trial judge applied interest and the additional indemnity (arts. 1618 and 1619 *CCQ*) to the award of profits from the date of the letter of demand, i.e. December 5, 1995.
26. The Court of Appeal held that this amounted to imposing interest on the profits before they were earned. The profits ordered disgorged were earned during a period of over a decade, largely after December 5, 1995. Since the trial judge refused to order an accounting, it is impossible to apply the interest with precision. Consequently, the Court of Appeal applied interest and the additional indemnity from a date situated roughly at the halfway point of the period during which *Sucroë* generated revenue, i.e. July 1, 2001.
27. The Court of Appeal’s solution was fair in the circumstances of this case. The parties ordered to disgorge profits should not pay interest from a date clearly prior to the period during which the bulk of the profits were earned.
	1. Non-pecuniary Damages
28. The trial judge awarded Robinson $400,000 in non-pecuniary damages as compensation for his psychological suffering. He analogized Robinson’s psychological suffering to the injury sustained by a victim of defamation.
29. The Court of Appeal reduced this award of damages to $121,350. It reasoned that Robinson’s physical symptoms of shock and depression stemmed from a bodily injury. Therefore, the trial judge should have applied the cap on non-pecuniary damages established by this Court in the *Andrews* trilogy.
	* 1. Applicability of the *Andrews* Cap
30. In the *Andrews* trilogy, this Court set a cap of $100,000 on the non-pecuniary losses that can be recovered following catastrophic bodily injury. Non-pecuniary loss is a broad category that covers elements such as “loss of enjoyment of life, esthetic prejudice, physical and psychological pain and suffering, inconvenience, loss of amenities, and sexual prejudice”: *Quebec (Public Curator) v. Syndicat national des employés de l’hôpital St-Ferdinand*, [1996] 3 S.C.R. 211, at para. 63; *Andrews*, at p. 264. In cases where the cap applies, it is adjusted to account for inflation during the time that has elapsed since the trilogy was decided in 1978: *Lindal v. Lindal*, [1981] 2 S.C.R. 629, at pp. 640-41.
31. Although the cap was articulated by this Court in the context of appeals from common law provinces, it is applied by Quebec courts when assessing non-pecuniary damages stemming from bodily injury: J.-L. Baudouin and P. Deslauriers, *La responsabilité civile* (7th ed. 2007), vol. I, at pp. 481-84; D. Gardner, *Le préjudice corporel* (3rd ed. 2009), at pp. 376-77. This is consistent with the concern, expressed in *Andrews*, that the amounts of these non-pecuniary damages awards “should not vary greatly from one part of the country to another. Everyone in Canada, wherever he may reside, is entitled to a more or less equal measure of compensation for similar non-pecuniary loss” (p. 263).
32. However, the *Andrews* cap is inapplicable to non-pecuniary damages that do not stem from bodily injury, such as those that result from defamation: *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at para. 168; see also *Snyder v. Montreal Gazette Ltd.*, [1988] 1 S.C.R. 494, in which Lamer J. failed to attract a majority with his proposition that damages in civil law defamation cases should be capped.
33. The Cinar appellants argue (i) that a cap should be imposed on all non-pecuniary damages, regardless of whether they stem from bodily injury, and alternatively (ii) that the non-pecuniary damages in this case do in fact stem from bodily injury.
34. On the first argument, I would decline to extend the scope of application of the *Andrews* cap beyond non-pecuniary damages stemming from bodily injury. In *Hill*, this Court refused to apply the cap to non-pecuniary damages stemming from defamation. The Court reasoned that the policy concerns specific to bodily injury cases identified in the *Andrews* trilogy ― namely the socially burdensome inflation of the amounts awarded as non-pecuniary damages ― had not been made out in the field of defamation law. Likewise, the Cinar appellants have not persuaded me that there is an imminent risk of a burdensome upward trend in non-pecuniary damages awarded in copyright infringement cases.
35. On the second argument, I do not agree that Robinson’s non-pecuniary damages can be characterized as stemming from bodily injury, within the meaning of art. 1607 of the *CCQ*. In Quebec civil law, an injury can only be characterized as a bodily injury (“*préjudice corporel*”) if “some form of a breach of physical integrity” is made out: *Schreiber v. Canada (Attorney General)*, 2002 SCC 62, [2002] 3 S.C.R. 269, at para. 62. In making this characterization, it is important to look to whether the act that caused the injury was itself a breach of the victim’s physical integrity, rather than to whether the act had an impact on the physical health of the victim: Gardner, at p. 17. Conversely, “interferences with rights properly characterized as being of a moral nature will not be included within this class of claims”: *Schreiber*,at para. 64.
36. The infringement of Robinson’s copyright was not a breach of his physical integrity. The infringement caused severe shock resulting in deterioration of Robinson’s physical health. However, as discussed, impact on a victim’s physical health does not suffice to characterize the injury as a bodily injury, in the absence of a breach of physical integrity: see for example *Landry v. Audet*, 2011 QCCA 535 (CanLII), at para. 107, leave to appeal refused, [2011] 3 S.C.R. v. The Court of Appeal, with respect, lost sight of this distinction.
37. It is more appropriate to characterize Robinson’s psychological suffering as a non-pecuniary damage stemming from *material* injury. Indeed, the infringement of copyright was a breach of Robinson’s property rights. It is the initial breach, rather than the consequences flowing from that breach, which serves to characterize the type of injury suffered. As Professor Gardner states it, [translation] “the appropriation of Claude Robinson’s work is, for him, a material injury with pecuniary consequences (the profits generated by using it) and non-pecuniary consequences (the stress, emotional distress or, in other words, psychological injury that results from it)”: “Revue de la jurisprudence 2011 en droit des obligations” (2012), 114 *R. du N.* 63, at p. 70. As discussed, the scope of application of the *Andrews* cap is limited; it does not apply to non-pecuniary damages stemming from material injury.
38. Consequently, I conclude that in this case the Court of Appeal erred in applying the *Andrews* cap.
	* 1. Quantum
39. The Cinar appellants contend that even if the *Andrews* cap is inapplicable to Robinson’s non-pecuniary damages, the trial judge nevertheless committed a palpable and overriding error by awarding a grossly disproportionate amount under this head of damages.
40. In Quebec, the quantum of non-pecuniary damages is generally assessed by combining a conceptual approach, a personal approach, and a functional approach: *St-Ferdinand*, at paras. 72-73, 75 and 77; *Gauthier v. Beaumont*, [1998] 2 S.C.R. 3, at para. 101. The conceptual approach measures loss “based on an appreciation of the objective seriousness of the injury”: *Stations de la Vallée de Saint-Sauveur inc. v. M.A.*, 2010 QCCA 1509, [2010] R.J.Q. 1872, at para. 83, *per* Kasirer J.A. The personal approach “seeks to evaluate, from a subjective point of view, the pain and inconvenience resulting from the injuries suffered by the victim”: *St-Ferdinand*, at para. 75, citing A. Wéry, “L’évaluation judiciaire des dommages non pécuniaires résultant de blessures corporelles: du pragmatisme de l’arbitraire?”, [1986] R.R.A. 355. The functional approach seeks to calculate the cost of measures that could provide solace to the victim: *Andrews*, at p. 262. These approaches “apply jointly, and thereby encourage a personalized evaluation” of non-pecuniary damages: *St-Ferdinand*, at para. 80.
41. In addition to applying these approaches, courts assessing non-pecuniary damages should compare the case at hand to other analogous cases in which non-pecuniary damages were awarded: *Stations de la Vallée*, at para. 83. They must attempt to treat “like cases alike” (*ibid.*), by giving roughly similar compensation to victims whose injuries are alike when assessed from the point of view of the combined approaches discussed above. However, it is not helpful to compare cases where non-pecuniary damages are capped to those where they are not. Arguments to the effect that a victim of copyright infringement should not receive more compensation for non-pecuniary damages than an accident victim rendered quadriplegic carry no weight, since the *Andrews* cap applies as binding precedent in one case but not in the other.
42. In this case, the trial judge relied heavily on the personal approach, emphasizing the subjective impact of the infringement of copyright on Robinson’s mental state and personal life. He bolstered his analysis by comparing Robinson’s anguish to the similar level of anguish experienced by the plaintiff in the defamation case *Société Radio-Canada v. Gilles E. Néron Communication Marketing inc.*, [2002] R.J.Q. 2639 (C.A.), aff’d 2004 SCC 53, [2004] 3 S.C.R. 95. In *Néron*, the Court of Appeal confirmed an award of non-pecuniary damages in the amount of $300,000. The trial judge also looked to the *Hill* case, in which this Court awarded $300,000 in general damages to a victim of defamation. He correctly took into account the fact that *Hill* had been decided over a decade before the case at hand, and that a valid comparison required the amount awarded to be adjusted for inflation.
43. I agree with the trial judge that Robinson’s non-pecuniary damages are analogous to those claimed by a victim of defamation. The product of Robinson’s artistic exertions was taken from him and the integrity of his personal creative process was violated, causing deep psychological suffering. These harms are similar to those suffered by a victim of defamation.
44. The trial judge had the advantage of observing Robinson in court over a long period of time and was well placed to conduct a personalized evaluation of his non-pecuniary damages. He made no palpable and overriding error in his assessment of Robinson’s non-pecuniary damages.
	1. Punitive Damages
45. In addition to compensatory damages and disgorgement of profits, the trial judge awarded $1,000,000 in punitive damages on a solidary basis, against Cinar, Weinberg, Charest, Izard, Davin, and France Animation. He justified this award largely by referring to the persistently dishonest behaviour of these parties: they had engaged in fraudulent schemes to obtain royalties and government subsidies, had lied repeatedly about their involvement in these schemes, had lied to the court about their access to Robinson’s work, and had treated Robinson with callous disregard.
46. The Court of Appeal reduced the award to $250,000, and apportioned jointly: $100,000 against Cinar, and $50,000 against each of Weinberg, Charest and Izard. It held that the other defendants had not intentionally and deliberately violated Robinson’s rights, and were thus not liable for punitive damages; that the nature of punitive damages requires them to be assessed and awarded on an individualized basis, which precludes solidarity; and that the award of punitive damages in Quebec is governed by a spirit of moderation.
47. Robinson and Nilem submit that the trial judge’s award of punitive damages is not in error and that the Court of Appeal should not have interfered with it.
	* 1. Statutory Basis for Punitive Damages
48. In Quebec, punitive damages can only be awarded where they are provided for by a specific enabling enactment: art. 1621 *CCQ*. The courts below did not fully examine the basis for the punitive damages awarded in this case, although the Court of Appeal alluded to the *Charter of human rights and freedoms*, R.S.Q., c. C-12 (“*Charter*”).
49. Section 49 of the *Charter* provides that punitive damages may be awarded if there is an unlawful and intentional interference with any of the rights and freedoms that the *Charter* recognizes. The evidence establishes unlawful and intentional interference with several of Robinson’s *Charter* rights. Copyright infringement is a violation of s. 6 of the *Charter*, which provides that “[e]very person has a right to the peaceful enjoyment and free disposition of his property, except to the extent provided by law”: see *Construction Denis Desjardins inc. v. Jeanson*, 2010 QCCA 1287 (CanLII), at para. 47. Additionally, the infringement of copyright in this case interfered with Robinson’s personal rights to inviolability and to dignity, recognized by ss. 1 and 4 of the *Charter*.
50. An interference with the right to inviolability “must affect the victim’s physical, psychological or emotional equilibrium in something more than a fleeting manner”: *St-Ferdinand*, at para. 97. The trial judge made detailed findings of fact to the effect that Robinson’s psychological and emotional equilibrium was deeply affected as a result of the infringement and the ensuing legal proceedings (paras. 981-82).
51. An interference with the right to dignity is a violation of “the respect to which every person is entitled simply because he or she is a human being and the respect that a person owes to himself or herself”: *St-Ferdinand*, at para. 105. In *Markarian v. Marchés mondiaux CIBC inc.*,2006 QCCS3314 (CanLII), the Quebec Superior Court found that

[translation] [a] lack of respect, contempt and degrading treatment constitute interference with dignity. They must reach a certain degree to be sanctioned under the Charter. [para. 589]

1. Here, Cinar, Weinberg, Charest, and Izard consistently and contemptuously denied having access to Robinson’s work, and disparaged Robinson’s claims that they had copied his work. Their behaviour constitutes an interference with Robinson’s *Charter* right to dignity, and provides an additional basis for the award of punitive damages.
	* 1. The Parties Liable for Punitive Damages
2. The Court of Appeal was correct to conclude that only Cinar, Weinberg, Charest, and Izard could be found liable for punitive damages. Under s. 49 of the *Charter*, punitive damages are only awarded if an interference with protected rights and freedoms is “intentional”. An interference is intentional “when the person who commits the unlawful interference has a state of mind that implies a desire or intent to cause the consequences of his or her wrongful conduct, or when that person acts with full knowledge of the immediate and natural or at least extremely probable consequences that his or her conduct will cause”: *St-Ferdinand*, at para. 121. The detailed findings of the trial judge establish intentional interference with protected rights by Cinar, Weinberg, Charest, and Izard.
3. As discussed, the same cannot be said of Davin. The record does not support the contention that he had or should have had knowledge of the actions that gave rise to an interference with Robinson’s *Charter* rights. Nor can France Animation be said to have engaged in an intentional interference with Robinson’s rights as a result of its employer-employee relationship with Izard, who personally engaged in infringement. I agree with the Court of Appeal that Izard was a relatively low-level employee of France Animation and that the employer-employee relationship is not sufficient to hold France Animation liable for his intentional interference with Robinson’s rights under the *Charter*. In order to establish that an employer shares its employee’s intent to interfere with *Charter* rights, there must be evidence of factors such as “[o]rders given by the employer, knowledge of or failure to prohibit the unlawful acts, failure to order that the acts cease”, or the employee’s relatively elevated hierarchical position within the organization: *Gauthier*, at para. 111. These factors are not present here.
	* 1. Solidarity of Punitive Damages
4. In my view, punitive damages cannot be awarded on a solidary basis under the *Charter*. I come to this conclusion for two reasons.
5. First, there is no statutory basis, whether in the *Civil* *Code* or the *Charter*, for the solidarity of punitive damages. In Quebec civil law, solidarity of obligations between debtors is the exception, rather than the norm: D. Lluelles and B. Moore, *Droit des obligations* (2nd ed. 2012), at p. 1524. Article 1525 of the *CCQ* provides that “[s]olidarity between debtors is not presumed; it exists only where it is expressly stipulated by the parties or imposed by law.” Consequently, [translation] “[i]n the absence of a contractual stipulation, solidarity is . . . available only if it is clearly provided for in a legislative provision”: J.-L. Baudouin and P.-G. Jobin, *Les obligations* (7th ed. 2013), by P.-G. Jobin and N. Vézina, at p. 710.
6. The Quebec Court of Appeal’s jurisprudence is divided on the issue of whether there is a statutory basis for the solidarity of punitive damages awarded under the *Charter*. In *Genex Communications inc. v. Association québécoise de l’industrie du disque, du spectacle et de la vidéo*, 2009 QCCA 2201, [2009] R.J.Q. 2743, the court, *per* Dalphond J.A., held that art. 1526 of the *CCQ* provides a statutory basis for solidarity. It reasoned that the co-authors of an intentional interference with rights protected by the *Charter* are essentially in the same position as co-authors of an extra-contractual fault, who would be liable solidarily under art. 1526 of the *CCQ*.
7. However, in *Solomon v. Québec (Procureur général)*, 2008 QCCA 1832, [2008] R.J.Q. 2127, the court, *per* Pelletier J.A., found that art. 1526 of the *CCQ* does not provide a basis for awarding punitive damages on a solidary basis under the *Charter*. It noted that the provision applies to “[t]he obligation to make reparation for injury”. This wording suggests that solidarity between co-authors of a fault only applies to compensatory damages, the purpose of which is to repair injury. The purpose of punitive damages, by contrast, is not to repair injury, but rather to achieve prevention, deterrence, and denunciation.
8. I prefer the reasoning and result in *Solomon*. The wording of art. 1526 of the *CCQ*, which emphasizes its application to the obligation to repair injury, does not extend to the *Charter*’s punitive damages regime. Moreover, in the years since both *Solomon* and *Genex* were decided, this Court has recognized that the punitive damages regime under the *Charter* is autonomous from the extra-contractual civil liability regime established under the *Civil Code*: *de Montigny v. Brossard (Succession)*, 2010 SCC 51, [2010] 3 S.C.R. 64, at para. 44, *per* LeBel J. In my view, art. 1526 of the *CCQ* applies to extra-contractual fault causing injury and cannot ground the solidarity of punitive damages awarded under the *Charter*.
9. The second reason for concluding that punitive damages cannot be awarded on a solidary basis is that this would be inconsistent with the principles set forth in art. 1621 of the *CCQ*, which provides:

**1621.** Where the awarding of punitive damages is provided for by law, the amount of such damages may not exceed what is sufficient to fulfil their preventive purpose.

Punitive damages are assessed in the light of all the appropriate circumstances, in particular the gravity of the debtor’s fault, his patrimonial situation, the extent of the reparation for which he is already liable to the creditor and, where such is the case, the fact that the payment of the damages is wholly or partly assumed by a third person.

1. Article 1621 of the *CCQ* expressly requires that the objectives of punitive damages — prevention, deterrence (both specific and general), and denunciation of acts that are particularly reprehensible in the opinion of the justice system — be taken into account when awarding them: *Richard v. Time Inc.*, 2012 SCC 8, [2012] 1 S.C.R. 265, at para. 155, *per* LeBel and Cromwell JJ. Among the non-exhaustive list of factors that should be taken into account when assessing the quantum of punitive damages are “(1) the gravity of the debtor’s fault, (2) the debtor’s patrimonial situation, (3) the extent of the reparation for which the debtor is already liable to the creditor and (4), where such is the case, the fact that the payment of the damages is wholly or partly assumed by a third person” (e.g. an insurer): *ibid.*,at para. 199.
2. Both the objectives of punitive damages and the factors relevant to assessing them suggest that awards of punitive damages must be individually tailored to each defendant against whom they are ordered. This requirement of individualization militates against awarding punitive damages on a solidary basis.
3. As art. 1621 of the *CCQ* makes clear, punitive damages “may not exceed what is sufficient to fulfil their preventive purpose”. Whether the quantum of damages is sufficient to ensure prevention is determined by looking to factors that, by their very nature, are specific to each individual defendant against whom punitive damages are awarded: V. Karim, *Les obligations* (3rd ed. 2009), vol. 2, at pp. 801-2. The gravity of the conduct of several co-defendants may vary from one defendant to the other (*ibid.*). As well, the patrimonial situation of co-defendants, the extent of the reparation for which they are already liable, and the assumption of payments by a third party are all factors that are specific to each defendant.
4. It has been argued that awarding punitive damages on a solidary basis against the co-authors of an intentional interference with *Charter* rights would contribute to the preventive purpose of these damages. [translation] “In some cases, such a condemnation cannot help but encourage individuals to refuse to participate in civil faults such as this for fear of having to pay punitive damages in the place of a co‑author”: *Genex*, at para. 135, *per* Dalphond J.A.
5. I agree that the possibility of being ordered to pay punitive damages on a solidary basis may have a deterrent effect. However, a properly tailored award of punitive damages, which takes into account the factors enumerated by art. 1621 of the *CCQ* and all other appropriate circumstances, will already achieve sufficient deterrence. Adding solidarity to a properly tailored award will only create a risk that the amount of punitive damages exceeds what is sufficient to ensure prevention. This would be the case where one of the defendants is insolvent, which would prevent co-defendants from recovering that defendant’s share of the damages and effectively increase the punitive damages for which they are liable: Jobin and Vézina,at p. 716.
6. I add this. In *St-Ferdinand*, this Court awarded punitive damages on a solidary basis. L’Heureux-Dubé J. (writing for the Court), held that “nothing . . . would prevent joint and several liability [from] operating” in the context of an award of punitive damages, “as it does in respect of other kinds of damages” (para. 131). However, *St-Ferdinand* was decided under the provisions of the *Civil Code of Lower Canada*. In my view, the legislative and jurisprudential developments since that ruling, in particular the introduction of art. 1621 of the *CCQ*, justify departing from the precedent set in that case.
7. For these reasons, I conclude that the trial judge erred by awarding punitive damages under the *Charter* on a solidary basis.
	* 1. Quantum of Punitive Damages
8. The Court of Appeal reduced the award of punitive damages from $1,000,000 to $250,000. In my view, the Court of Appeal was correct to re-assess the trial judge’s award of damages. However, it gave too little weight to the gravity of Cinar, Weinberg, Charest, and Izard’s conduct. I would award an amount of $500,000 in punitive damages.
9. In *Richard*, this Court held that an appellate court may only interfere with a trial judge’s assessment of punitive damages (1) if there is an error of law; or (2) if the amount is not rationally connected to the purposes for which the damages are awarded, namely prevention, deterrence (both specific and general), and denunciation (see para. 190).
10. The Court of Appeal was justified in reducing the trial judge’s award for punitive damages because the trial judge considered factors that were not relevant to the assessment. The trial judge took into account the fact that the Cinar appellants engaged in fraudulent schemes to obtain royalties and government subsidies to which they were not entitled. Here, punitive damages are being awarded because of an intentional interference with several of Robinson’s rights under the *Charter*. Fraudulent schemes perpetrated against third parties may attract distinct remedies at civil law or sanctions at criminal law, but they are not relevant to the purposes pursued by this award of punitive damages. In light of this error of law, it is necessary to re-assess the quantum of punitive damages awarded by the trial judge: *Richard*, at para. 198.
11. As discussed, punitive damages are assessed by looking to the purposes they serve — prevention, deterrence, and denunciation. Factors to be considered include the gravity of the debtor’s fault; the debtor’s patrimonial situation; the extent of the reparation for which the debtor is already liable to the creditor; and the fact that the payment of damages will be wholly or partly assumed by a third person: art. 1621 *CCQ*. I also note that, in Quebec civil law, “it is perfectly acceptable to use punitive damages, as is done at common law, to relieve a wrongdoer of its profits where compensatory damages would amount to nothing more than an expense paid to earn greater profits while flouting the law”: *Richard*, at para. 206.
12. In addition, particular attention must be paid to the gravity of the debtor’s fault, which “is undoubtedly the most important factor”: *Richard*,atpara. 200. The gravity is assessed from two perspectives: “. . . the wrongful conduct of the wrongdoer and the seriousness of the infringement of the victim’s rights” (*ibid.*).
13. This said, punitive damages must be awarded with restraint. Article 1621 of the *CCQ* expressly provides that the award of punitive damages “may not exceed what is sufficient to fulfil their preventive purpose”. The typical range for punitive damages in Quebec is between $5,000 and $250,000: see review of the case law in the reasons of the Court of Appeal, at para. 249. However, in cases where the gravity of the conduct warrants it, punitive damages reaching $1,000,000 or more have been awarded: *Markarian*; *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595.
14. In this case, the relevant factors point in different directions. On the one hand, the gravity of the conduct suggests a high amount of punitive damages. Cinar, Weinberg, Charest, and Izard engaged in intentional and calculated copyright infringement, which they planned to keep secret, all the while reaping profits from an internationally successful children’s television series. They persistently denied having copied any portion of Robinson’s work throughout the lengthy legal proceedings. Conduct of this nature threatens one of the fundamental goals of Canadian copyright law, namely “to prevent someone other than the creator [of a work] from appropriating whatever benefits may be generated”: *Théberge*, atpara. 30. The impact of this conduct on Robinson was equally serious. It deprived him not only of a source of revenue, but also of his sense of proprietorship over a project that had deep personal significance for him. He experienced profound anguish. Insult was added to injury by the callous denials of copying and by insinuations to the effect that Robinson was simply an attention-seeking eccentric.
15. On the other hand, Cinar, Weinberg, Charest, and Izard have already been found liable towards Robinson for substantial amounts of money. As the Court of Appeal noted, they will be largely deprived of any benefits they may have gained from the infringement.
16. I would award $500,000 in punitive damages. The amount of $1,000,000 awarded by the trial judge is too high. It was awarded on the basis of irrelevant factors and did not give sufficient weight to the substantial amounts awarded under other heads of damages. On the other hand, the amount of $250,000 awarded by the Court of Appeal fails to fully reflect the gravity of the conduct and the need to deter others from engaging in similar conduct. The offending conduct was extremely lucrative; the penalties associated with it must be proportionally significant. An amount of $500,000 reaches an appropriate balance between the overarching principle of restraint that governs these damages, on the one hand, and the need to deter conduct of this gravity, on the other.
17. Since I have found that these damages cannot be awarded on a solidary basis, I must apportion them among the parties. The Court of Appeal held Cinar liable for two-fifths of the amount of punitive damages, and each of Weinberg, Charest, and Izard liable for one-fifth. This appears to be reasonable, considering that Cinar drew greater financial benefit from the infringement than Weinberg, Charest, or Izard.
18. Conclusion
19. I conclude that the copyright in *Curiosity* was infringed. The trial judge committed no reviewable errors in finding that *Sucroë* reproduced a substantial part of *Curiosity*. The Cinar appellants incorrectly argue for an approach that dissects Robinson’s work into its constituent parts. Rather, a qualitative and holistic approach must be adopted. In order to determine whether a substantial part of Robinson’s work was copied, the features that were copied by the Cinar appellants must be considered cumulatively, in the context of Robinson’s work taken as a whole. This is precisely the approach adopted by the trial judge. In addition, the expert evidence relied upon by the trial judge in his analysis was admissible.
20. On the issue of liability, I agree with the Court of Appeal that the record does not ground a finding of personal liability against Davin. As for Weinberg, Charest, and Izard, their personal liability for infringement is engaged. I also find Cinar, France Animation, Ravensburger, and RTV Family Entertainment liable for infringement.
21. My conclusions on the issue of infringement make it unnecessary to examine the extra-contractual liability of Cinar, Weinberg, and Charest.
22. With respect to damages, I agree with the Court of Appeal that profits cannot be ordered disgorged on a solidary basis under s. 35 of the *Copyright Act*. I also agree that a payment made by Ravensburger to France Animation could not be treated as revenue for the purpose of calculating profits. However, unlike the Court of Appeal, I would include in the calculation of profits those profits associated with the soundtrack of *Sucroë*. I would also refrain from deducting from the profits a payment that was allegedly made by Cinar to Jaffa Road. Finally, I would maintain the Court of Appeal’s apportionment with respect to the disgorgement of profits.
23. On the issue of non-pecuniary damages, the Court of Appeal erred in applying the *Andrews* trilogy cap to damages that did not stem from bodily harm. I find that the trial judge committed no palpable and overriding error in his assessment and would reinstate the award of $400,000.
24. As regards punitive damages, I agree with the Court of Appeal that they cannot be awarded on a solidary basis. In addition, the Court of Appeal was correct to re-assess the quantum of damages, although it did not give sufficient weight to the gravity of the conduct in this case. I would award an amount of $500,000. Cinar is liable for two-fifths of that amount, and each of Weinberg, Charest, and Izard are liable for one-fifth.
25. Finally, I agree with the Court of Appeal’s solution with respect to the computation of interest and the additional indemnity.
26. It follows that I would dismiss the appeals in files 34466, 34467, and 34468.
27. With respect to file 34469, I would allow the appeal in part. Specifically, I would reinstate the profits from the *Sucroë* soundtrack and the Jaffa Road amount in the trial judge’s calculation of profits; reinstate the trial judge’s order of non-pecuniary damages; and award $500,000 in punitive damages, subject to apportionment on a joint basis as discussed in these reasons.
28. I would award Robinson and Nilem costs throughout, in addition to the trial judge’s award of $1,500,000 in solicitor-client costs for the proceedings at the trial level. The trial judge was well placed to observe the litigation strategy of the Cinar appellants, as well as all other factors relevant to exercising his discretion to award solicitor-client costs under the *Copyright Act*. I would decline to award Robinson and Nilem costs on a solicitor-client basis for the appeals before the Court of Appeal and this Court. There were serious points of law to argue and it is not established that, on appeal, the Cinar appellants acted in bad faith or otherwise conducted themselves in a manner that warrants an award of costs on a solicitor-client basis.

 *Appeals 34466, 34467 and 34468 dismissed. Appeal 34469 allowed in part with costs throughout.*

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