

Federal Court



Cour fédérale

Date: 20210119

Docket: T-885-19

Citation: 2021 FC 63

Ottawa, Ontario, January 19, 2021

PRESENT: Mr. Justice Pentney

BETWEEN:

**TRIMBLE SOLUTIONS CORPORATION
and BULIDINGPOINT CANADA INC.**

Plaintiffs

and

**QUANTUM DYNAMICS INC. and
SHARBEL TANNUS**

Defendants

JUDGMENT AND REASONS

I. Overview

[1] Trimble Solutions Corporation (Trimble) is a Finnish company that sells a number of technology solutions. One of its leading software offerings is Tekla Structures, a program for three-dimensional modelling and design of complex structures used in the construction industry. Trimble has registered copyright in Canada for various versions of this software.

[2] The Tekla Structures software is sold in Canada by BuildingPoint Canada Inc. (BuildingPoint) under a confidential re-seller agreement and licence with Trimble. A customer wishing to use the software will generally purchase a perpetual licence as well as a maintenance subscription, which are arranged with BuildingPoint in Canada.

[3] The Plaintiffs in this action, Trimble and BuildingPoint, brought an *ex parte* motion for default judgment against the Defendants, claiming breach of copyright by virtue of unauthorized use of the Tekla Structures software. The means by which the Plaintiffs discovered this and their evidence of unauthorized use is described in more detail below. The question is whether the evidence before the Court meets the test for default judgment in this Court, and if so, what remedies the Plaintiffs should receive.

[4] For the reasons that follow, I am granting the Plaintiffs' motion for default judgment.

II. Background

[5] Trimble's head office is located in Finland, but it has offices in 40 countries; it is in the business of developing positioning-related technology, such as GPS, laser, optical, and inertial technologies. It also integrates positioning-related technology with application software. One of its leading software products is a Building Information Modelling software program for intelligent three-dimensional modelling and design of complex structures, sold under the brand name "Tekla Structures." This program is used in the construction industry, particularly in connection with modelling structures made of steel and concrete, from initial conception to fabrication.

[6] As is customary in the software business, Trimble provides its customers with new versions (or “releases”) of its Tekla Structures software on a regular basis, as well as regular intermediary updates (or “sub-releases”) between its main releases. Version 20.0 of Tekla Structures and its associated documentation was released to the public in March 2014. Trimble released Version 20.1 (a sub-release of Version 20.0) in 2014 and then released Version 21.0 of the software in March 2015. Both the main releases (Version 20.0 and Version 21.0) and the sub-release (Version 20.1) involve changes to the software code as well as updates to the associated documentation for each version. All of these were authored by a team of Trimble employees located mainly in Finland, with one member located in Great Britain.

[7] Trimble has registered Canadian copyright for Version 20.0 (Canadian Registration No. 1154535), as well as for Version 21.0 (Canadian Registration No. 1154540). It does not register copyright on each sub-release because they are modifications and improvements built entirely on the base code and documentation for the previous release. Therefore, Trimble considers the pre-existing registration of Version 20.0 to cover its respective sub-releases, including Version 20.1 in issue here.

[8] In 2016, Trimble entered into an arrangement with BuildingPoint, a federally incorporated Canadian company, for the sale of its product in Canada. BuildingPoint has an exclusive reseller and licensing agreement with Trimble by which it can set the Canadian price for Trimble products and licences. At the time of this proceeding, BuildingPoint charged a one-time fee of \$30,000 CAD for a perpetual licence, as well as a maintenance fee of \$6,150 CAD per year for the Tekla Structures software. This entitled the customer to download and use the latest version of the software and to take the benefit of any sub-releases during the year.

[9] Once BuildingPoint obtains a signed contract and payment from a customer, it provides login information that allows the customer to download executable files for the Tekla Structures program from the Trimble web site. It also provides a licence certificate for the customer's copy of the Tekla Structures software. With these elements, the customer can then download and use the software to design structures.

[10] When the customer initiates the Tekla Structures program and runs the executable files associated with the Tekla Structures program, a local copy of the software (the usable, object code version) is created on the user's device thereby allowing the user to open the program and begin to use it.

[11] Trimble is aware that parties can download unauthorized copies of the Tekla Structures software from certain web sites. To protect its copyright Trimble has integrated two products directly in the Tekla Structure program that allow it to detect unauthorized use of its software.

[12] The first is the Flexera licencing tool, which operates when a customer initiates the Tekla Structures program and is used to facilitate software license compliance. The Flexera tool is programmed to make an inquiry as to whether the copy of the Tekla Structures software being opened is associated with a valid licence or not. If the Flexera tool verifies that the customer has a valid licence, it will enable the Tekla Structures software to operate and the customer can begin to use the program.

[13] However, some sophisticated hackers have managed to reverse-engineer the Tekla Structures software and alter certain .dll files embedded in the program in order to bypass the Flexera licence verification process. By tampering with the .dll files, the Flexera system will not

properly perform its verification function, and so an unlicensed version of the Tekla Structures software will be executable and can be used in the same manner as a properly licensed version.

[14] To overcome this problem, a second software is also embedded in the Tekla Structures Program. This second software is an anti-piracy program from SmartFlow Compliance Solutions Ltd. (SmartFlow) that provides precise telemetry data to ensure that the use of its client's products is properly authorized and licenced. SmartFlow's customers can decide which events will trigger the SmartFlow software to begin collecting information of unlicensed software usage events directly from the device and network of an unlicensed user.

[15] The SmartFlow software integrated into the Tekla Structures program has been configured to execute when it detects that certain .dll files embedded in the Tekla Structures program have been tampered with. Trimble has also customized the SmartFlow software to verify each unlicensed use event against every active license Trimble has issued in order to confirm that the detected unlicensed use event is indeed an unlicensed copy of the Tekla Structures program.

[16] In Version 20.1 of the Tekla Structures program, where a tampered .dll file is identified, this unlicensed event triggers the SmartFlow software to execute and to automatically collect certain data and information from the device and network of the user. This information includes the time and date of the unlicensed use event, the IP address associated with the user, the unique MAC identifier associated with the user's device, and information about the user's Wi-Fi signal. This information is then sent to the SmartFlow servers.

[17] With this data, and certain other information that is layered on top, the SmartFlow software generates an infringement report. These reports are customizable, and the SmartFlow software has been configured for the Tekla Structures program to generate an infringement report every time it detects an unlicensed use event.

[18] In February 2018, Trimble and BuildingPoint became aware of a series of unlicensed use events of Version 20.1 of the Tekla Structures software. An infringement report generated in December 2019 and filed in this proceeding shows 335 unlicensed use events of Tekla Structures Version 20.1 between January 30, 2015, and March 27, 2019, originating from six discrete devices (Infringement Report).

[19] The Plaintiffs have filed an affidavit by Theodore Miracco, SmartFlow's Chief Executive Officer. Mr. Miracco explains that the Infringement Report shows that the infringing events originated from six different devices. He states that he was able to connect these devices to the Defendants from the unique MAC identifier associated with the devices, the IP address generated by the gateway server, the Wi-Fi broadcast information from the site of each unlicensed use event, as well as the SmartFlow "geolocation enrichment process."

[20] As an example, Mr. Miracco explains that in relation to an unlicensed use event on March 24, 2019, the Infringement Report shows the Wi-Fi broadcast information (determined using Wi-Fi geolocation), which is recorded as geographical latitude and longitude coordinates. He then explains that he entered those coordinates into Google Maps and took a screenshot of the location displayed. This image shows an address for a business location with signage that indicates it is the premises of Quantum Dynamics.

[21] Another instance in the Infringement Report shows the latitude and longitude coordinates for the home address of Sharbel Tannus. His home address appears on the corporation profile for Quantum Dynamics and in his LinkedIn profile.

[22] The web site of Quantum Dynamics states that it is in the business of fabrication, design, installation, and integration of structural steel components and offers services relating to 3D modelling and detailing. Mr. Tannus is and has been a director and officer of Quantum Dynamics since its incorporation in 2015.

[23] In addition to the Wi-Fi broadcast information in geographical latitude and longitude coordinates, the Infringement Report details other key information associated with each unlicensed use event, including the hostname, username, and client e-mail address of the infringing account using Version 20.1 of the Tekla Structures software.

[24] With this information, the Infringement Report links the infringing activities to e-mail addresses associated with Mr. Tannus' e-mail at Quantum Dynamics, as well One Shot Studio, another business that his LinkedIn profile shows him as owning. The One Shot Studio web site shows its address as the same location as the home of Mr. Tannus.

[25] Based on this information, in February 2018, an employee of BuildingPoint contacted Mr. Tannus to provide him with a quote for two perpetual licences and two maintenance subscriptions for Tekla Structures software. Subsequently, the BuildingPoint employee made further unsuccessful attempts to contact Mr. Tannus.

[26] Following BuildingPoint's unsuccessful efforts, on February 11, 2019, a representative of the IT Compliance Association (ITCA) sent a letter to Quantum Dynamics to the attention of Mr.

Tannus about the ongoing unlicensed usage of the Tekla Structures software. BuildingPoint works with the ITCA as it is a business that specializes in globalized software licencing compliance.

[27] On February 20, 2019, ITCA received an e-mail from Mr. Tannus, stating:

I do apologize for the used of an unlicensed copies [*sic*] of your software in my company. This was done without my knowledge as we hire engineers and drafts people to do our fabrication drawings and sometimes they work in our office and so someone have [*sic*] installed it without our permission. Nevertheless, I would like to notify you that all copies of the Tekla structures used by Quantum Dynamics thus far were completely deleted and will monitor this matter very closely to avoid this from happening again.

The e-mail also stated that Mr. Tannus was “interested to get a quotation for one licence.”

[28] Later that day, an ITCA representative replied to Mr. Tannus, stating that they were aware of BuildingPoint’s prior efforts regarding the unlicensed usage, and that “[t]his is the final attempt to resolve this with your firm amicably.” The message enclosed a Customer Order and Software Licensing Agreement (Agreement), which Mr. Tannus was asked to sign and return with the necessary payment.

[29] On February 22, 2019, the ITCA received an e-mail from Mr. Tannus, stating “[m]y intentions were always to resolve this matter in a professional manner” and enclosing a signed version of the Agreement. This e-mail also stated that Quantum Dynamics was not in a position to pay for the invoice in a single installment, and inquired about arranging a payment plan.

[30] Following this, there is no evidence of any further communication from Mr. Tannus or Quantum Dynamics. BuildingPoint has no record of ever receiving a payment from Mr. Tannus or anyone else associated with Quantum Dynamics.

[31] The Plaintiffs issued the Statement of Claim in this matter on May 28, 2019, and the Defendants were served on June 14, 2019. Proof of service was filed with the Court on June 24, 2019. The Plaintiffs seek a declaration of copyright infringement, an interlocutory and permanent injunction to restrain the Defendants from continuing the breach, plus damages and an accounting of profits, as well as exemplary, aggravated and punitive damages, costs, and pre- and post-judgment interest.

[32] The Statement of Defence of the Defendants was due 30 days later, but none had been filed as of the date of the hearing.

[33] On January 17, 2020, the Plaintiffs filed their *ex parte* Notice of Motion for Default Judgment, as they were permitted to do pursuant to Rule 210 of the *Federal Courts Rules*, SOR/98-106 [*Rules*].

III. Issues

[34] The only issue in this matter is whether the Plaintiffs have met the test for default judgment in accordance with the jurisprudence of this Court and, if so, what relief they are entitled to receive.

IV. Analysis

A. *Legal Principles – Default Judgment*

[35] On a motion for default judgment pursuant to Rule 210, all of the allegations in the Statement of Claim are to be taken as denied (*Ragdoll Productions (UK) Ltd v Doe*, 2002 FCT 918 at paras 23-24). A plaintiff must first establish that the defendant was served with the Statement of Claim and has not filed a Statement of Defence within the deadline specified in Rule 204. Second, the evidence must enable the Court to find on a balance of probabilities that the plaintiff has established its claim (*Louis Vuitton Malletier SA v Yang*, 2007 FC 1179 at para 4 [*Louis Vuitton 2007*]). This is often summarized in two questions: (1) is the defendant in default? and (2) is there evidence to support the plaintiff’s claim? (See, for example *Canada v Zielinski Brother’s Farm Inc*, 2019 FC 1532 at para 1).

[36] It must be emphasized that granting default judgment is never automatic; it is a discretionary order (*Johnson v Royal Canadian Mounted Police*, 2002 FCT 917 at para 20; *Chaudhry v Canada*, 2008 FC 356 at para 17). As in all civil cases, and particularly where the matter is *ex parte*, the “evidence must be scrutinized with care by the trial judge” and that evidence “must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test” (*FH v McDougall*, 2008 SCC 53 at paras 45-46, cited with approval in *NuWave Industries Inc v Trennen Industries Ltd*, 2020 FC 867 at para 17).

[37] The plaintiff’s burden is to establish its case on a balance of probabilities, based on sufficiently clear, convincing, and cogent evidence. I agree with the Plaintiffs that setting a higher standard would require the judge to do for the Defendants that which they have declined

to do for themselves (see *Louis Vuitton 2007* at para 4; *Microsoft Corp v PC Village Co Ltd*, 2009 FC 401 at para 12 [*Microsoft*]).

B. *Applying the Principles*

(1) Are the Defendants in default?

[38] The first element is easily dealt with. The Plaintiffs have proven that the Defendants were served with the Statement of Claim and that they have not filed a Statement of Defence within the 30-day time limit prescribed by Rule 204. The first element of the test for default judgment has been established: the Defendants are in default (*Chase Manhattan Corp v 3133559 Canada Inc*, 2001 FCT 895 at para 5).

(2) Have the Plaintiffs established breach of their copyright?

[39] Turning to the second element, the question is: does the Plaintiffs' evidence demonstrate on a balance of probabilities that the Defendants have infringed their copyright in Version 20.1 of the Tekla Structures software? This, in turn, involves two further questions: (a) have the Plaintiffs established that copyright subsists in Version 20.1 of the Tekla Structures software; and if so, (b) does their evidence demonstrate that the Defendants have infringed it?

(a) *Does copyright subsist in the software?*

[40] The Plaintiffs have filed evidence showing that Trimble has registered copyright in Canada for Versions 20.0 and 21.0 of the Tekla Structures software and associated user documentation:

Registration No.	Title	Publication Date	Registration Date
1154535	Tekla Structures release 20.0 and User Documentation	March 12, 2014	November 7, 2018
1154540	Tekla Structures release 21.0 and User Documentation	March 12, 2015	November 7, 2018

[41] They say that in addition to the registered copyright in their main releases, their sub-release, Tekla Structures Version 20.1 software and related materials, qualifies for copyright protection as original literary works pursuant to the *Copyright Act*, RSC 1985, c C-42 [Act]. Version 20.1 contains various new features, updates, modifications and additions that build on the code and documentation for Version 20.0, which has been registered for copyright protection in Canada.

[42] The Plaintiffs submit that the *Act* defines “literary work” to include computer programs and this has been found to include both source code and object code, as explained in *Matrox Electronic Systems Ltd v Gaudreau*, [1993] RJQ 2449, [1993] QJ No 1228 (QL) (Qc Sup Ct):

With respect to computer software, the keystone to programming is the algorithm which is transformed by a programmer into computer language. The program is first “translated” into a source code and then (in order for the computer to function) the source code is “translated” into object code (a machine readable language). The source code and the object code both embody a set of instructions or statements in a computer. The jurisprudence is consistent in identifying source codes and object codes as being ideas expressed (on disk or in a chip) in a particular form and, therefore, protectable under copyright.

[Footnotes omitted].

[43] The Plaintiffs argue that in this case Version 20.1 of the Tekla Structures software meets this definition, and that it meets the definition of originality set out in the jurisprudence (see *CCH Canadian Ltd v Law Society of Upper Canada*, 2004 SCC 13 at paras 16, 25 [CCH]).

[44] Trimble asserts that its copyright in Version 20.1 subsists because that version of the software was developed and written by the same authors who developed Version 20.0. These authors are all employees of Trimble located in Finland and the United Kingdom, which are Berne Convention countries (subsection 5(1) of the *Act*; see also section 2 of the *Act*). Trimble submits that it owns copyright in the program developed by its employees, pursuant to subsection 13(3) of the *Act*.

[45] The Plaintiffs assert that these elements are sufficient to establish that Trimble's copyright subsists in Version 20.1 of the Tekla Structures program.

[46] I agree. The evidence establishes that Trimble owns the copyright in Version 20.1 of the Tekla Structures program and that its copyright subsists and is enforceable.

[47] The evidence shows that Version 20.1 is an original work that is the product of skill and judgment (*CCH* at para 25), and that it fits within the definition of "literary work" set out in the *Act*.

(b) *Have the Plaintiffs proven the Defendants breached their copyright?*

[48] The next question is whether the Plaintiffs' evidence establishes an infringement of Trimble's copyright. As the Plaintiffs acknowledge, it is often difficult to establish infringement where the alleged wrongful use of software occurs entirely within the confines of another company. In many cases, infringement is proven by evidence that the product was copied for sale in the open market. Not so here. The alleged infringement occurred entirely within the Defendants' premises.

[49] Nevertheless, the Plaintiffs submit that the combination of the evidence generated by the SmartFlow software as well as the admissions made by the Defendant Sharbel Tannus are sufficient to demonstrate copyright infringement in this case.

[50] I agree.

[51] The most basic right of a copyright-holder protected under the *Act* is the “sole right to produce or reproduce the work or any substantial part thereof in any material form whatever...” (subsection 3(1)). This originally involved physical copies of a work, but it has been extended to include “virtual copies in electronic formats” (*Théberge v Galerie d’Art du Petit Champlain inc*, 2002 SCC 34 at para 47).

[52] In the case of computer programs, it has been found that copyright is infringed when a copy of a program is installed on the user’s computer, which generally occurs when a person opens a computer program and the object code of the program is then copied into the internal memory of the computer (see *Apple Computer Inc v Mackintosh Computers Ltd*, [1987] 1 FC 173 at 8 (FCTD); affirmed [1990] 2 SCR 209).

[53] In this case, the affidavit of Stephen Binch, a Licence Compliance Specialist/Licence Compliance Manager for Trimble states:

20. When a user initiates the Tekla Structures program (including version 20.1 of Tekla Structures), and specifically when the user runs the executable files associated with the Tekla Structures program, a local copy of the Tekla Structures software (the usable, object code version thereof) will be created on the user’s machine and the user will be able to use the program to create and modify models of structures, among other features.

[54] Therefore, based on this, when an unlicensed copy of Version 20.1 of the Tekla Structures program is initiated on a user's device (for example, a computer, laptop, or tablet) a local copy of the software will be made on that person's device and copyright will thereby be infringed.

[55] The key question is whether the Plaintiff's evidence establishes on a balance of probabilities that the Defendants are responsible for any unlicensed use. The evidence of this is, in part, the Infringement Report generated by the SmartFlow software, summarized above.

[56] As noted earlier, the Infringement Report links the unlicensed use events with devices located on the Defendants' premises. In addition, a review of the hostnames and usernames associated with the recorded entries in the Infringement Report shows a significant number of events associated with a hostname of "eng-office" and "quantum home," and many of these show a username of "sharbel" or "sharb," as well as an e-mail address for the Defendant Sharbel Tannus at Quantum Dynamics. Others show the usernames of "qdl-recep" or simply "user." The Plaintiffs submit that each of these events would have involved the making of a copy of the Tekla Structures software on the user's device.

[57] The Plaintiffs argue that the data and information collected from the Infringement Report proves on a balance of probabilities that it was the Defendants that infringed Trimble's copyright in Version 20.1 in the recorded events. They argue that this is confirmed by the February 20, 2019 e-mail from Mr. Tannus to the ITCA, in which he acknowledged "the used of an unlicensed copies [*sic*] of your software in my company." They note that the wrong is compounded because in that e-mail Mr. Tannus also stated that "all copies of the Tekla structures used by Quantum

Dynamics thus far were completely deleted,” but the Infringement Report shows a number of unlicensed use events after that date, continuing until March 27, 2019.

[58] The Plaintiffs also point to the evidence from both BuildingPoint and Trimble to the effect that neither company has any record of Quantum Dynamics having paid for a licence to use this software. This is evidence that each of the use events in the Infringement Report constitutes a breach of its copyright in this software.

[59] Having carefully reviewed the evidence, I am satisfied that the Plaintiffs’ evidence shows, on a balance of probabilities, that the Defendants have repeatedly infringed Trimble’s copyright in the Tekla Structures Version 20.1 software.

[60] While it is, from a practical perspective, impossible to know who was using the devices at the precise times indicated in each incident report, there is more than sufficient identifying information to connect these devices with the individual and corporate Defendants. This includes the hostnames and usernames, as well as the e-mail addresses associated with these events, together with the geolocation evidence that connects the Wi-Fi locations for these events to the addresses of the individual and corporate Defendants. There is no doubt that the devices used for the infringing activities were under the control of the Defendants and located at their premises. That is sufficient (*CCH* at para 38).

[61] I find that the evidence establishes that devices owned or used by Quantum Dynamics and/or Sharbel Tannus were repeatedly used to execute and open Version 20.1 of the Tekla Structures software although neither Defendant had a proper licence for its use. The e-mail from Mr. Tannus to the ITCA confirms this. I further find that each of these unauthorized use

incidents constitute a breach of Trimble's copyright in that program, because every time the unlicensed software was opened a copy of it was made on the Defendants' device.

C. *What Remedies are appropriate?*

[62] Subsection 34(1) of the *Act* provides that where copyright has been infringed, the owner is "entitled to all remedies by way of injunction, damages, accounts, delivery up and otherwise that are or may be conferred by law for the infringement of a right."

[63] The Plaintiffs seek a declaration that their copyright has been infringed and an injunction restraining the Defendants from continuing their infringing activities, as well as general damages, punitive and exemplary damages, costs, and pre- and post-judgment interest. They submit that the individual Defendant, Sharbel Tannus, should be held jointly and severally liable for his personal actions and the actions of Quantum Dynamics, because the evidence shows that at all relevant times he has been a controlling and directing mind of Quantum Dynamics and that he was personally engaged in infringing activities.

[64] I agree that the evidence shows that Sharbel Tannus has been intimately involved in the infringing activities. A significant number of the infringing incidents shown in the Infringement Report generated by the SmartFlow software show his username or relate to his e-mail address, and all of the 335 incidents occurred at either the location of the company that he controls or at his home location. This is sufficient to support an order that Sharbel Tannus is jointly and severally liable for the infringing activities.

[65] The Plaintiffs are entitled to a declaration of copyright infringement by virtue of the findings I have made in this case. I therefore declare that the Plaintiff Trimble Solutions

Corporation is the owner in Canada of copyright for Version 20.1 of the Tekla Structures program and its associated user documentation and that its copyright in that program subsists (the Copyrighted Works). A declaration will also issue that the Defendants have infringed the Plaintiff Trimble Corporation's copyright in Version 20.1 of its Tekla Structures software.

[66] In addition, where copyright infringement has been established, the jurisprudence confirms that “the copyright owner is *prima facie* entitled to an injunction restraining further infringement” (*R v James Lorimer & Co*, [1984] 1 FC 1065 at 1073, 180 NR 351 (FCA) cited in *Wing v Van Velthuisen* (2000), 197 FTR 126, [2000] FCJ No 1940 (QL) at para 69 (FCTD)). In light of my finding of infringement, and in the absence of any evidence of reasons to not grant such equitable relief, I therefore further order that the Defendants, by themselves or through employees, partners, agents, officers, and directors, are permanently restrained and enjoined from, directly or indirectly, doing any of the following acts without the Plaintiffs' explicit permission or authorization:

- i. further infringing the Copyrighted Works, or authorizing any such acts;
- ii. producing or reproducing the Copyrighted Works or any substantial part thereof, in any material form whatever, or authorizing any such acts;
- iii. selling or renting out a copy of the Copyrighted Works; and
- iv. distributing a copy of the Copyrighted Works to such an extent as to prejudicially affect the Plaintiff, Trimble Solutions Corporation.

[67] Turning to the claim for general damages, the law is clear that where copyright infringement is established the copyright owner is presumptively entitled to damages for the losses suffered as a result of the wrongdoing (*Video Box Enterprises Inc v Peng*, 2004 FC 482 at

para 7 [*Video Box*]). The difficulty of establishing the precise losses is not a bar to recovery, nor should it lead to an award of nominal damages. The Court is to assess damages based on a practical and realistic assessment of the losses based on the evidence that is available (*Video Box* at para 7; *Leuthold v Canadian Broadcasting Corporation*, 2012 FC 748 at para 131 [*Leuthold*]).

[68] Where the practice of a plaintiff, or the custom in an industry, is to grant licences for the use of a product, “the court may award damages in the amount that a defendant would have paid for a licence had the defendant been acting legally rather than illegally” (*Video Box* at para 7; see also *Leuthold* at paras 120-121 and 136).

[69] Based on this jurisprudence, the Plaintiffs seek general damages reflecting the cost of six perpetual licences and annual subscriptions for the period during which unlicensed copies were executed on each of the six discrete devices (subject to the applicable limitations period, discussed below). As the Plaintiffs point out, it is impossible to estimate how many designs may have been produced when the program was opened, and thus to determine what profits the Defendants may have earned through their infringing activities. All that the Infringement Report shows is that the software was downloaded and opened on a particular device at a particular time. Furthermore, the Plaintiffs submit that the Defendants’ decision to not participate in this proceeding has denied them the opportunity to obtain more specific evidence about the extent of profit that the Defendants may have generated through their infringing activities.

[70] In the circumstances of this case, I find that a general damages award based on the notional licensing fee that the Defendants would have paid had they chosen to comply with the law is appropriate. Several factors support this approach. The Plaintiffs regularly licence their products and a detailed pricing arrangement is in place based on this approach. This is reinforced

by the fact that the individual Defendant inquired about the cost of obtaining a licence when he was contacted about his infringing activities, and he completed and returned the Agreement.

[71] This gives rise to the question of the appropriate approach to calculating these damages. The perpetual licensing fee of \$30,000 has remained constant throughout the relevant period, but the annual maintenance fee has risen slightly, from \$6,060 per year when the Plaintiffs provided a quote to the Defendants in 2018, to the amount of \$6,150 per year as of the time of the litigation. It should be noted, however, that BuildingPoint offered a discounted price of \$3,659 per year on the maintenance fee in the 2018 quote and it also offered to seek a deeper discount if the Defendants wanted to obtain more than two licenses.

[72] In considering the appropriate measure of damages, several factors are relevant. First, the starting point is that where copyright infringement is established, the wrongdoer is liable to pay damages to the owner of the copyright to compensate for any loss or injury caused by the infringement. The licensing fee is a proxy for this amount, where the evidence does not permit a calculation based on evidence of profits earned by the wrongdoer. A relevant consideration in assessing damages is the amount the copyright owner quoted the wrongdoer to license the infringing works (see *Profekta International Inc v Lee (Fortune Book & Gift Store)* (1997), 75 CPR (3d) 369, 1997 CanLII 16699 (FCA) [*Profekta*]).

[73] In addition, the evidence shows a lengthy period of copyright infringement dating back to 2015 and there is no way to assess the profits earned by the Defendants. The reality is that while the Infringement Report shows when an infringing copy of the Tekla Structures software was downloaded and opened on one of the six devices, there is no means of determining how long the use continued or what projects were advanced or completed during that time, and thus there is no

accurate means of assessing the true losses suffered by the Plaintiffs. In any event, the damage award is limited by the three-year limitation period set out in section 43.1 of the *Act*, as the Plaintiffs have pled their damages in accordance with this limitation period (subsection 43.1(2) of the *Act*).

[74] A further consideration is what is a just and appropriate remedy, viewing the totality of the award including punitive damages discussed below (see *Profekta*).

[75] Taking all of these considerations into account, I find that the Plaintiffs' damages should be assessed on the basis of the \$30,000 perpetual licensing fee and the \$3,659 annual maintenance fee quoted to the Defendants in 2018, for the six devices that were used for the copyright infringement. This totals \$212,931:

Device	Discrete Device #1	Discrete Device #2	Discrete Device #3	Discrete Device #4	Discrete Device #5	Discrete Device #6
Licence Fee	\$30,000	\$30,000	\$30,000	\$30,000	\$30,000	\$30,000
First Event	2016-11-24	2018-01-03	2016-10-23	2015-01-30	2016-12-14	2017-06-27
Last Event	2017-06-28	2019-03-26	2016-10-24	2019-03-27	2017-11-27	2017-07-06
Maintenance Fee	\$3,659	\$7,318	\$3,659	\$10,977 (3 yr. limitation period)	\$3,659	\$3,659
Total Fee	\$33,659	\$37,318	\$33,659	\$40,977	\$33,659	\$33,659

[76] The Plaintiffs seek punitive and exemplary damages on the basis of the Defendants' admission that copyright infringement occurred, their failure to delete the infringing copies of the copyrighted software despite their promise to do so, and their failure to participate in the litigation thereby making it impossible to determine the actual extent of losses caused by the infringement.

[77] Punitive damages may be awarded where a party's conduct has been malicious, oppressive, and high-handed, such that it offends the Court's sense of decency and represents a

marked departure from ordinary standards of decent behaviour (*Whiten v Pilot Insurance Co*, 2002 SCC 18 at para 36 [*Whiten*]; *Louis Vuitton Malletier SA v Singga Enterprises (Canada) Inc*, 2011 FC 776 at para 163 [*Louis Vuitton 2011*]). If all other penalties are inadequate to accomplish the objectives of retribution, deterrence, and denunciation, punitive damages may be found to be appropriate (*Whiten* at para 123; *Louis Vuitton 2011* at para 164). Where compensatory damages would amount to nothing more than a licencing fee to earn greater profits through complete disregard for the rights of others, punitive damages may be awarded (*Whiten* at para 72, *Louis Vuitton 2007* at para 49).

[78] In this case, I find that punitive damages are appropriate in light of the individual Defendant's admission of copyright infringement, his failure to delete the infringing programs despite its promise to do so, as well as his failure to pay the fees quoted even after it completed and returned the Agreement. This last fact clearly demonstrates that the Defendants were aware of what was required to lawfully use the Plaintiffs' software, yet there is no evidence they made any attempt to pay the amount required in order to comply with the law, even though they continued to use the Plaintiffs' software. In addition, the fact that the Defendants decided not to participate in this proceeding is also a relevant consideration and has made it impossible to determine the Plaintiffs' losses in a more accurate manner.

[79] In all of the circumstances, I find that a punitive damage award of \$50,000 is appropriate, taking into account the precedents that have awarded punitive damages between \$15,000 to \$1 Million (see *Mitchell Repair Company LLC v Long*, 2014 FC 562 at paras 14-17; *Collette v Northland Art Company Canada Inc*, 2018 FC 269 at para 76; *Louis Vuitton (2011)* at para 180;

Microsoft at para 47; *Nintendo of America Inc v King*, 2017 FC 246 at para 172, *Rallysport Direct LLC v 2424508 Ontario Ltd*, 2020 FC 794 at paras 44-52).

[80] The Plaintiffs also seek pre- and post-judgment interest. While in the motion for default judgment, the Plaintiffs focused on post-judgment interest, the claim for pre-judgment interest is clearly set out in the Statement of Claim. In my view, in light of the circumstances of this case and recognizing that a plaintiff is entitled to be fully and fairly compensated for any losses suffered as a consequence of the copyright infringement, I am satisfied that both pre- and post-judgment interest should be awarded (see *Apotex Inc v Wellcome Foundation Ltd*, [2001] 1 FC 495 at para 119, 10 CPR (4th) 65).

[81] In this case, the Plaintiff is located in British Columbia, but the Defendants' infringing activities occurred in Ontario. Therefore, pre-judgment interest is to be fixed in accordance with the provisions set out in subsections 36(2) to (5) of the *Federal Courts Act*, RSC 1985, c F-7 [FCA]. The guiding principle is to set an interest rate that the Court "considers reasonable in the circumstances" (subsection 36(2)). Pre-judgment interest shall not be awarded on exemplary or punitive damages or an award of costs (subsection 36(4)).

[82] The options for fixing the interest rate include the rates fixed under the applicable provisions that govern pre-judgment interest in British Columbia (*Court Order Interest Act*, RSBC 1996, c 79) or Ontario (the *Courts of Justice Act*, RSO 1990, c C43), or the federal *Interest Act*, RSC, 1985, c I-5. The provincial rates for the relevant time frame range from 0.70% to 2.0 %, while the federal statute sets the rate at 5%. In view of the prevailing commercial interest rates during the relevant period, and considering the circumstances of the case, I find that the Plaintiffs are entitled to pre-judgment interest on the general damages award, at an annual

rate of 1.5%, not compounded, commencing when the Plaintiffs first gave notice in writing to the Defendants (subsection 36(2)(b)), which in this case occurred at the latest when the ITCA letter was sent to Mr. Tannus on February 11, 2019.

[83] The Plaintiffs also seek post-judgment interest, which is governed by subsection 37(2) of the *FCA*. The governing principles are identical to those that apply to pre-judgment interest, but the same exceptions do not apply. Once again, it is relevant that the British Columbia rate for post-judgment interest as of January 2021 is fixed at 2.45%, while the Ontario rate is set at 2.0%. In exercising my discretion to award a remedy that is just and reasonable in all of the circumstances, I award post-judgment interest on these amounts at the rate of 2.0%, not compounded.

[84] Finally, the Plaintiffs seek their costs. There is no reason to depart from the usual rule that costs should follow the cause in this case. The Plaintiffs seek a lump sum award of \$5,000. In exercise of my discretion under Rule 400 of the *Rules* and considering the time and effort needed to assemble and present the evidentiary record and the legal submissions in this matter, I find that a lump sum award of \$5,000 is appropriate (see *Nova Chemicals Corporation v Dow Chemical Company*, 2017 FCA 25 at paras 10-13). The Plaintiffs are entitled to post-judgment interest on this amount, also at the rate of 2.0%, not compounded.

V. Conclusion

[85] Based on the analysis set out above, I find that the Defendants have infringed the Plaintiff Trimble Corporation's copyright in Version 20.1 of the Tekla Structures software on a repeated basis since 2015. I further find that the Defendant Sharbel Tannus acknowledged this breach, and

that he was aware of the requirement to obtain a license from the Plaintiffs to lawfully use the software. However, the evidence shows that despite this knowledge, the Defendants never paid for any license for the software, although they continued to use it after having received notice of the infringement.

[86] For these reasons, I am granting a declaration of copyright infringement and a permanent injunction against the Defendants to prevent them from continuing to infringe the Plaintiffs' copyright in this software. I am also granting general damages in the amount of \$212,931 as well as punitive damages in the amount of \$50,000. The Defendants shall also pay to the Plaintiffs costs in the lump-sum amount of \$5,000. Pre-judgment interest on the general damages award is fixed at 1.5% annually, not compounded, to commence as of February 11, 2019. Post-judgment interest on all of these amounts shall be paid, at a rate of 2.0%, not compounded. The Defendants are jointly and severally liable for the infringing activities.

JUDGMENT in T-885-19

THIS COURT'S JUDGMENT is that:

1. A declaration is issued that the Plaintiff Trimble Corporation owns the copyright in Version 20.1 of its Tekla Structures software and the associated documentation for this software (the Copyrighted Works), that its copyright still subsists, and that the Defendants have infringed the Plaintiff Trimble's copyright in Version 20.1 of its Tekla Structures software.
2. The Defendants, by themselves or through employees, partners, agents, officers, and directors, are permanently restrained and enjoined from, directly or indirectly, doing any of the following acts without the Plaintiff's explicit permission or authorization:
 - i. further infringing the Copyrighted Works, or authorizing any such acts;
 - ii. producing or reproducing the Copyrighted Works or any substantial part thereof, in any material form whatever, or authorizing any such acts;
 - iii. selling or renting out a copy of the Copyrighted Works; and
 - iv. distributing a copy of the Copyrighted Works to such an extent as to prejudicially affect the Plaintiff, Trimble Solutions Corporation.
3. The Plaintiffs are awarded general damages in the amount of \$212,931.
4. The Plaintiffs are awarded punitive damages in the amount of \$50,000.

5. The Defendants shall pay the Plaintiffs' costs in this matter in the lump-sum amount of \$5,000.
6. Pre-judgment interest on the general damages award shall be paid at the rate of 1.5%, not compounded, commencing on February 11, 2019.
7. Post-judgment interest on all of these amounts is awarded at the rate of 2.0%, not compounded.
8. The Defendants are jointly and severally liable for the infringing activities.

“William F. Pentney”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-885-19

STYLE OF CAUSE: TRIMBLE SOLUTIONS CORPORATION AND
BULIDINGPOINT CANADA INC v QUANTUM
DYNAMICS INC. AND SHARBEL TANNUS

PLACE OF HEARING: VANCOUVER, BRITISH COLUMBIA

DATE OF HEARING: JANUARY 31, 2020

**JUDGMENT AND
REASONS:** PENTNEY J.

DATED: JANUARY 19, 2021

APPEARANCES:

Nelson Godfrey

FOR THE PLAINTIFFS

SOLICITORS OF RECORD:

Gowlings WLG (Canada) LLP
Barristers and Solicitors
Vancouver, British Columbia

FOR THE PLAINTIFFS