
CANADIAN BROADCAST STANDARDS COUNCIL

NATIONAL SPECIALTY SERVICES PANEL

APTN re a report on *APTN National News* (boundary marker YouTube clip)

(CBSC Decision 09/10-0509)

Decided April 1, 2010

R. Cohen (Chair), A. Cardozo (Vice-Chair, Public), H. Pawley (Vice-Chair, Public),
D. Braun (*ad hoc*), J. Macdonald (*ad hoc*), F. Niemi, D. Ward

THE FACTS

On multiple occasions on November 17, 2009, the specialty service APTN aired a report about the removal of a boundary marker in St. Regis. St. Regis forms part of a Mohawk reservation that straddles the border between the Province of Quebec and New York State. The area is also known as Akwesasne. One of the newscasts was anchored by Patrice Mousseau who spoke with reporter Nigel Newlove about the incident. The following is a transcript of the segment.

Mousseau: In St. Regis, part of the greater Akwesasne Mohawk territory, it appears that local police may have willingly dropped the ball. Last month, a YouTube video emerged showing an international boundary marker being removed from its place and hauled away into the community that straddles both New York State and Quebec. Now with more on the incident we're joined by APTN's Nigel Newlove. So Nigel, can you tell us exactly what happened here?

Newlove: Well Patrice, you can see in this YouTube video shot in St. Regis last month, um, a group digging up this international marker that, uh, that indicates the boundary between Canada and the US. Uh, this is all happening in broad daylight. As a matter of fact, you can see, uh, a large group of people watching this all happen. Um, the video has become pretty popular. I think it's had, uh, over fifty-eight hundred hits, um, so far. But what's interesting here, I think, is what exactly the police did.

[Portions of the YouTube video air as Newlove speaks. The video shows a pointed stone marker located near a house with a garage situated on what appears to be a residential street. A yellow backhoe construction vehicle is digging a hole in the ground near the marker. There is then a close up of the backhoe in the hole and the marker lying on its side near the hole. The viewer can see the legs and shovels of two people standing beside the hole. That is followed by a shot of the marker lying on its side on a flatbed trailer. There are three or four people in the distance watching the event, one of whom is holding what appears to be a video camera. The next scene shows a police car with its lights on parked behind the flatbed trailer.]

Mousseau: And what exactly was the police response?

Newlove: Well, essentially they didn't do a whole lot. Um, throughout the video you can hear somebody saying that this is a political matter and not a police matter. Um, and the police essentially backed down. Um, you, you do see them pull over the vehicle which was carrying the marker, but eventually the vehicle just goes on and, and nothing happens, so.

Mousseau: Okay, so what does the leadership of the community have to say about this incident?

Newlove: Well it has been quite a challenge getting people to talk about this, this matter. Um, after speaking with the police chief, he told me that, because this was a federal monument, that he basically cleaned his hands of it. He, uh, passed it along to other authorities. Um, I did manage to speak with, uh, Chief, uh, Monica Jacobs who oversees policing and law enforcement and, uh, she had this to say about it.

Chief Monica Jacobs, St. Regis Mohawk Tribe: [on the phone, photograph of Jacobs on screen] There's been some discussions with council, but not really pinpointing as to who's responsibility is, it is to go forward on this. Everyone's walking, um, carefully on this. Um, because, you know, needless to say, uh, Akwesasne's always in the news more often than not in a negative light. They don't talk about all the positive things we do, but they certainly like to focus on the negative issues we have here.

Newlove: So as you can see, this is kind of a, uh, a hot potato that, that nobody really wants to touch.

Mousseau: Now is there any, any information out there as to where the marker is now?

Newlove: Well, so far nobody has really come forward claiming responsibility for this, although there have been rumours that, uh, it may be the Mohawk Warrior Society. But even that is, is, is not for sure. People have, uh, disputed the fact that they even exist. I spoke with the producer of the video who said, um, the Mohawk Warrior Society no longer exists. And the file has been passed on to the FBI in the United States. Um, and after speaking with them, all they can do is confirm that, uh, there's an ongoing investigation.

Mousseau: Okay. Very good, Nigel. Thank you for joining us today.

Newlove: Thank you.

The CBSC received a complaint via its webform on December 2, 2009 about the use of the YouTube video (the full text of all correspondence can be found in the Appendix to this decision). The complainant, the creator of the video, objected to its use in the

report without her permission. She wrote that Nigel Newlove had telephoned her home on November 10 and she informed him that he did not have her permission to use the material. She alleged that he became “verbally abusive” and stated that he could use whatever video he wanted from the internet without the copyright owner’s permission. She insisted that she had “an exclusive right to [her] own videos” and that both the reporter and APTN were infringing her copyright by airing the videos without her permission and by “removing [her] copyright ownership statements from [her] videos.”

APTN responded to the complainant on December 11 with the following explanation:

APTN apologizes for any miscommunication that may have occurred between yourself and our news correspondent. We strive to provide our viewers with the highest standard of service and broadcast excellence.

The footage used during this news story was taken from YouTube which is a public domain and available to anyone. It was verbally introduced by our news reporter as having come from YouTube and reference was even made to the number of views this footage had received to date. At no time did APTN take credit for this footage or even allude to having shot this particular story.

Again, I offer our sincere apologies for this miscommunication and encourage you to contact APTN directly if you ever have any questions or concerns. We have a dedicated viewer liaison on staff to handle all inquiries and/or complaints within a 48 hour period.

The complainant wrote back to the CBSC on December 11, indicating her dissatisfaction with APTN’s response:

The letter from APTN does not acknowledge the actions of APTN and Nigel when they used my video to promote themselves after I specifically told APTN/Nigel that he DOES NOT have my permission to use any of my work.

YouTube also did not give APTN/Nigel permission to use any of my videos to promote their own stories and corporation.

YouTube copyright policies are clearly stated online at http://www.youtube.com/t/howto_copyright where they tell viewers to ask for and receive permission from the copyright owner to use videos for any purpose.

The complainant wrote again on March 16, 2010 to state that another APTN reporter was repeatedly trying to contact her, demanding that she help him and answer his questions.

THE DECISION

The National Specialty Services Panel examined the complaint under Article 11 (Intellectual Property) of the Radio Television News Directors Association of Canada’s

(RTNDA – The Association of Electronic Journalists) *Code of (Journalistic) Ethics*, which reads as follows:

Plagiarism is unacceptable. Broadcast journalists will strive to honour the intellectual property of others, including video and audio materials.

The Panel Adjudicators read all of the correspondence and viewed the report in question. The Panel concludes that APTN violated Article 11 for its failure to identify the creator of the video clip.

Off-Line Actions: What's Understood

The CBSC frequently states that it is not a finder of fact and that it does not seek witnesses or evidence in order to make determinations about off-air events. (This is, of course, apart from the Council's mandate to administer the *Journalistic Independence Code*, which fixes the Council with some of those very responsibilities.) That said, the CBSC may rely on agreed upon facts, obvious or very likely circumstantial evidence, or uncontradicted factual assertions. In the matter at hand, the complainant has been extremely specific about her contact with reporter Nigel Newlove and APTN did not contradict any of her assertions in its reply of December 11 to her webform filing of December 2. Moreover, it did acknowledge that there was communication "that [...] occurred between yourself and our news correspondent." This does not mean that the Panel will probe or reach any conclusions regarding the complainant's assertions that the reporter was "verbally abusive, rude, and even stated that he was talking with police and that he can steal any video he wants from the internet WITHOUT the copyright owner's permission." It does, however, leave the Panel comfortable with its conclusion that the reporter *was aware* of the complainant as the author of the YouTube video that APTN used as a part of its news report.

The Delicate Implications of YouTube as a Resource

There are, of course, risks associated with the reliance on YouTube as a credible resource, but that is not the issue in the matter at hand. It is on this occasion the question of attribution regarding the use made of a YouTube video in a television news report. In its first decision in this area, namely, *CablePulse 24 re a CityNews report ("Attempted Burglary")* (CBSC Decision 06/07-1408, November 29, 2007), this Panel dealt with a CablePulse 24 report about an attempted burglary at a Toronto residence. The would-be burglar had been startled by the home owner and had fallen from a second-storey deck, breaking his leg. Police and paramedics were then called to the scene. The report showed video footage of the paramedics and police officers

attending to the man, as well as three still photographs of the scene. The CBSC received a complaint from the home owner, who explained that he had taken the still photographs which the station had taken off his page on a photo-sharing website without his permission and without crediting him as the photographer. Although the broadcaster argued that the complainant had verbally given them permission to use the photographs when its news team had been at his home filming the story, the complainant said that he had not done so. In the circumstances, this Panel was unable to draw a factual determination about whether the permission had been granted or not. That did not end up being a material consideration, as the issue was not related to the use of the photographs as much as to the service's failure to credit the complainant as the source of the photographs. Since the Panel was dealing with Article 11 of the *RTNDA Code of (Journalistic) Ethics* for the first time, it took the opportunity to review its terms, as well as the important related issue of fair dealing under the *Copyright Act*. The Panel said:

This case turns on the Panel's appreciation of Article 11 of the *RTNDA Code of (Journalistic) Ethics*. It should also be noted that this is the first occasion on which a CBSC Panel has been called upon to deal with this Article. The Panel begins by acknowledging that Article 11 differs in its approach from the corresponding text of the *Code of Ethics* of the related entity, the American RTNDA – The Association of Electronic Journalists, which deals with the same issue, namely, the identification of copyrighted works, differently. Under the heading "Truth", that Code provides: "Professional electronic journalists should [...] [c]learly disclose the origin of information and label all material provided by outsiders." While the Canadian RTNDA did not choose *that* approach to resolution of the issue of usage of copyrighted material when it revised its Code in 2000, the Panel considers that the Canadian *Code of (Journalistic) Ethics* is of a similar effect in responding to the issue raised by the challenged newscast.

Article 11 begins with the underlying and unqualified principle that "Plagiarism is unacceptable." That absolute statement is followed by what the Panel sees as a tempering sentence, which reads "Broadcast journalists will strive to honour the intellectual property of others, including video and audio materials." The question for it to determine is the extent of the *striving*. Does it mean that a broadcaster can "try really hard" and fail? Or does it mean that a broadcaster may, by certain actions, mitigate the absolute prohibition included in the first sentence of the Article? The Panel considers that the latter interpretation is the only reasonable one. It may be that there will be circumstances which do not permit a broadcaster to *know*, even with the exercise of due diligence, the identity of a creator of video or audio materials. That is not, of course, the case at hand. The broadcaster knew full well the identity of the photographer whose still shots were used in the news report, and the Panel's decision should be read as being limited to such an instance. It should also be understood that this decision does not purport in any way to be dealing with litigious or pecuniary issues.

The Panel begins with an appreciation of the purpose of copyright, namely, the encouragement of creative work by assuring the protection of the rights of the creator, in this case, of the photographs. It also understands that, for the purpose of *news reporting* (and other matters not of relevance here), an exception exists to the restrictive demands of copyright protection. It is that exception that falls within the category of "fair dealing". The exception ought not, however, to be misunderstood; it does not provide the news reporting entity with an absolute exemption from copyright rules, or a free ride. It would be more accurate to observe that the use of copyright material for news reporting

purposes opens the door for the user. But it is not flung open. Those who wish to pass through it must do so *fairly*. Indeed, fairness is the essence of the exception to the total protection that copyright would otherwise afford. And the definition of what is fair, what, in terms of the RTNDA Code, will “honour the intellectual property of others”, must, at the very least, and consistent with Section 29.2 of the *Copyright Act*, mention the source, including the name of the author, of the photographic work. It seems to the Panel to be the opposite of honouring the intellectual property of a creator to take his or her work without acknowledgment and to, in effect, pass that work off as the broadcaster’s own. Although that may not be the *intention* of the broadcaster, it is the inevitable effect of the failure to accord credit, particularly where, as in the present matter, the identity of the photographer was known.

Insofar as the oblique discussion of the granting of permission is concerned, the Panel reiterates its frequently stated position that the CBSC is not customarily a finder of fact. Consequently, it does not take a formal position on the differing versions of the complainant and the broadcaster as to whether or not permission was granted. Nor does it consider that it needs to do so, since it finds that, unless the broadcaster is in a position to establish that permission was granted *and* that that permission extended to the *non-inclusion of credit* for the creator, the use made of photographic works for purposes of Article 11 of the *RTNDA Code of (Journalistic) Ethics* would be unfair.

The Panel concludes that the failure of CablePulse 24 to establish in any way that permission was granted by the photographer to *not* provide credit to the complainant for its use of his photographs, and the subsequent failure to provide the necessary credit to a known photographer constitutes a breach of Article 11 of the *RTNDA Code of (Journalistic) Ethics*.

One difference between the APTN news story and that in the CablePulse 24 broadcast is that APTN did not leave any sense that *it* was at the origin of the video clip. It attributed it to YouTube. As APTN’s Director of Creative Services & Scheduling said in her response of December 11 to the complainant: “At no time did APTN take credit for this footage or even allude to having shot this particular story.” While that was undeniably a step in the right direction, in the view of the Panel, the credit given was insufficient. As this Panel said in the CablePulse 24 decision, “the definition of what is fair, what, in terms of the RTNDA Code, will ‘honour the intellectual property of others’, must, at the very least, and consistent with Section 29.2 of the *Copyright Act*, mention the source, including the name of the author, of the photographic work [...] particularly where, as in the present matter, the identity of the photographer was known.” In the matter at hand, the Panel is of the view that the broadcaster had the legitimate option of using the complainant’s real name, which was known to Nigel Newlove, the reporter, *or* the handle that she used on the YouTube video. APTN did not, however, have the option of using neither. Consequently, the Panel finds APTN in breach of Article 11 of the *RTNDA Code of (Journalistic) Ethics* for its failure to identify the creator of the video, when that information was available to it.

Broadcaster Responsiveness

In all CBSC decisions, the Council's Panels assess the broadcaster's responsiveness to the complainant. In the present instance, the Panel finds that the response of the APTN representative was short, but focussed on the issues associated with copyright and attribution, which is fundamentally what is required as a component of CBSC membership requirements. The Panel considers that APTN has fully met its CBSC membership responsiveness responsibilities in this instance.

ANNOUNCEMENT OF THE DECISION

APTN is required to: 1) announce the decision, in the following terms, once during prime time within three days following the release of this decision and once more within seven days following the release of this decision during the time period in which this report was broadcast, but not on the same day as the first mandated announcement; 2) within the fourteen days following the broadcasts of the announcements, to provide written confirmation of the airing of the statement to the complainant who filed the Ruling Request; and 3) at that time, to provide the CBSC with a copy of that written confirmation and with air check copies of the broadcasts of the two announcements which must be made by APTN.

The Canadian Broadcast Standards Council has found that APTN breached Article 11 of the Radio-Television News Directors Association – The Association of Electronic Journalists' *Code of Ethics* in its broadcast of a news report of November 17, 2009 on the removal of an international boundary marker at Akwesasne. As a part of its coverage of the story, APTN included a video clip taken from YouTube, which it acknowledged, but it failed to provide the name or whose identity was known to the broadcaster. By failing to provide that accreditation, the broadcaster has failed to honour the intellectual property rights of the photographer, contrary to the provisions of Article 11 of the *RTNDA Code of (Journalistic) Ethics*.

This decision is a public document upon its release by the Canadian Broadcast Standards Council.

APPENDIX

CBSC Decision 09/10-0509 APTN re a report on *APTN National News* (boundary marker YouTube clip)

The Complaint

The CBSC received the following complaint via its webform on December 2, 2009:

station: APTN
program: Nigel Newlove
date: Tuesday, November 17, 2009
time: 12pm, 1pm, 2pm, 3pm, 4pm, 5pm, 6pm, 11:30pm
concern: Subject: Notice of Copyright Infringement

The copyrighted work at issue is my video that appeared on APTN website and National Television on the following dates and locations:

- Tuesday November 17, 2009 12pm, 1pm, 2pm, 3pm, 4pm, 5pm, 6pm, 11:30pm (8 times total)
- <http://www.aptn.ca/pages/news/index.php>
- National Television Networks at [sic]
- International Television Networks at [sic]
- Local Television Networks at [sic]

The URLs where my copyrighted material is located include

- [http://www.youtube.com/\[xxxxxxx\]](http://www.youtube.com/[xxxxxxx])
- [http://www.\[xxxxxxx\].com](http://www.[xxxxxxx].com)

You can reach me at [xxxxx]@[xxxxx].com for further information or clarification.

The email address of the APTN Ottawa Bureau Reporter, Nigel Newlove, who has used my video illegally, is [xxxx]@[xxxxx].com.

I specifically told APTN's Nigel Newlove, that he does NOT have permission to use any of my copyrighted materials described above when he phoned my home on November 10th, 2009. He responded by becoming verbally abusive, rude, and even stated that he was talking with police and that he can steal any video he wants from the internet WITHOUT the copyright owner's permission. I asked him where did he learn that, and he responded by stating that he has been working for APTN for longer than 3 years.

From APTN website: "Nigel: Originally from Iqaluit, Nigel took both T.V. Broadcasting and Journalism in college, and later worked for the CBC and Eye Steel Film before arriving here at APTN."

APTN's Nigel Newlove is willfully and purposefully infringing copyright laws.

I am the copyright owner of all the videos mentioned above. I have an exclusive right to my own videos, and that is clearly shown in all of my videos. APTN's Nigel Newlove is willfully infringing upon my exclusive right to my own copyright materials.

APTN is infringing upon my exclusive right to my own copyright materials by showing my videos on APTN without my permission, and by removing my copyright ownership statements from my videos.

Broadcaster Response

APTN responded to the complainant on December 11:

Thank you for bringing forward your concerns regarding an *APTN National News* story broadcast on November 17th, 2009.

APTN apologizes for any miscommunication that may have occurred between yourself and our news correspondent. We strive to provide our viewers with the highest standard of service and broadcast excellence.

The footage used during this news story was taken from YouTube which is a public domain and available to anyone. It was verbally introduced by our news reporter as having come from YouTube and reference was even made to the number of views this footage had received to date. At no time did APTN take credit for this footage or even allude to having shot this particular story.

Again, I offer our sincere apologies for this miscommunication and encourage you to contact APTN directly if you ever have any questions or concerns. We have a dedicated viewer liaison on staff to handle all inquiries and/or complaints within a 48 hour period.

Additional Correspondence

The complainant wrote back to the CBSC on December 11:

The letter from APTN does not acknowledge the actions of APTN and Nigel when they used my video to promote themselves after I specifically told APTN/Nigel that he DOES NOT have my permission to use any of my work.

YouTube also did not give APTN/Nigel permission to use any of my videos to promote their own stories and corporation.

YouTube copyright policies are clearly stated online at http://www.youtube.com/t/howto_copyright where they tell viewers to ask for and receive permission from the copyright owner to use videos for any purpose.

The complainant wrote to the CBSC again on March 16, 2010. She re-submitted the above Ruling Request letter and added the following paragraph at the end:

Today, March 16th, 2010, APTN has the nerve to send another reporter to email/phone me, every 10 minutes, demanding that I help him, answer his questions & respond to his rude accusations.