

COPYRIGHT & NON-LITERAL COPYING: *Cinar Corporation v. Robinson*, 2013 SCC 73

On December 23, 2013, the Supreme Court of Canada released yet another important decision in copyright law. This decision confirms that the non-literal copying of select features from an original work and their integration into a new work can constitute infringement under Canadian law.

Background

The scenario presented to the court is familiar to lawyers practicing in the field of entertainment law. Mr. Robinson “spent years” developing material for an animated children’s television show which he called “The Adventures of Robinson Curiosity” (*Curiosity*). Although he drew inspiration from the 300 year old novel “Robinson Crusoe” which is in the public domain, he did develop his own original material, including unique characters, detailed sketches, storyboards, scripts, synopses and promotional material. In the entertainment industry, this type of material is often referred as “proposals” or “treatments”. In 1985, he registered copyright in this material with the Canadian Intellectual Property Office.

From 1985 to 1987, Mr. Robinson then distributed copies of his material to various parties in the industry for possible production and retained a consultant to promote the project, but the project was not picked up and Mr. Robinson shelved the project for several years. However, his former business partners later developed and produced a successful new animated children’s television show called “Robinson Sucroë” (*Sucroë*) which premiered in 1995 and continued for ten years. To his mind, *Sucroë* was a blatant copy of his project, *Curiosity*. Unfortunately, it was not a literal copy.

On the facts as described in the decision, the

defendants copied a number of features from *Curiosity*, including both patent and latent features. The patent or “perceptible” features which could be directly observed included the visual appearance of the protagonist and visual aspects of the setting. The latent or “intelligible” features which indirectly affect a viewer’s experience of the work included the “overall architecture” of the works and the personality traits of the characters.

Mr. Robinson’s claim falls squarely within a “grey” area of copyright law known as the idea/expression dichotomy and his claim was not a simple one to advance. Indeed, it took almost 20 years to resolve and the Supreme Court of Canada was again forced to address the critical balance between the exclusive rights of the authors and the public domain.

Substantial Reproduction

In the unanimous decision written by Chief Justice McLachlin, the Supreme Court of Canada critically recognized that copyright can subsist in the sometimes “sprawling” and unpolished material developed for a film or television “proposal” and that such material can be infringed by the actual production of a finished film or television program that copies features of the proposal without literally copying any individual element. Such non-literal copying is also known as a ‘colourable imitation’.

While the court acknowledges that copyright protects only the “expression of ideas” in a work rather than the ideas “in and of themselves”, the court asserts a series of propositions that come very close to granting protection to the ideas themselves, namely:

- a. an original work is the expression of an idea through an exercise of skill and judgment; and
- b. copyright infringement consists of the unauthorized taking of that originality.

Finally, citing section 3 of the *Copyright Act* which stipulates that the copyright owner has the sole right to reproduce a work “or any substantial part thereof”, the court concludes that “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”. Taken at face value, these legal propositions come very close to granting authors an opportunity to assert a monopoly over their ideas, albeit only their original, well-developed and well-documented ideas.

For example, the court found that *Sucroë* reproduced the combination of characters originally developed by Mr. Robinson even though the appearance of these characters had been altered significantly and new characters added. In this regard, the court found that:

- a. the development of a group of characters whose interactions hinge on their distinct personality traits “can require an exercise of skill and judgment” sufficient to attract copyright protection; and
- b. that the reproduction of those elements in *Sucroë* “represent a substantial part of the skill and judgment expressed in *Curiosity*”.

Qualitative and Holistic Evaluation

The court recommends a “qualitative and holistic” approach to evaluating whether the impugned work is a substantial copy of another original work. In doing so, the court declines to apply the so-called “abstraction-filtration-comparison” test developed by US courts to assess substantiality in the context of copyright infringement involving computer software.

As described by the court, the “abstraction-filtration-comparison” test would require a three-step evaluation, namely:

- a. identify the elements of *Curiosity* that were original and therefore eligible for copyright protection;
- b. identify and exclude the elements of *Curiosity* that were generic to children’s television programs or drawn from the

- public domain; and
- c. compare only the original elements remaining after this “weeding out process” to *Sucroë* to determine whether a substantial part of *Curiosity* was reproduced.

While the court admits that the “abstraction-filtration-comparison” test may be useful in the context of evaluating computer software programs, it expresses concern that such an approach would result in “dealing with copied features piecemeal” and risk “dissecting [a] work into its component parts” at the outset and thereby prevent a “truly holistic assessment” or an evaluation the “cumulative effect” of the copied features “as a whole”.

Of course, the “qualitative or holistic” evaluation recommended by the court is unsettlingly vague. It reminds me of the notoriously unpredictable “I know it when I see it” community standards test for obscenity which was discredited by the Supreme Court of Canada in 1992 in *R v. Butler* (para 58). My own opinion is that the court simply feels more comfortable evaluating literature than software because the medium is more familiar. It therefore prefers flexibility over the restrictions of a well-defined legal test. However, without such a test, advising clients on the relative merits of a claim will remain a challenge as the success or failure of any particular claim will depend in large part on the sensibilities of the trial judge.

Integration of Features into New Work

Finally, the court notes that in determining whether the impugned work is a substantial copy of the original work, the question is “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*.”

In other words, the fact that the defendants had altered some features and integrated the copied features from *Curiosity* with additional material to create *Sucroë* did not preclude a finding of infringement:

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”.

Unfortunately, this discussion again provides little substantive direction to trial courts and leaves counsel without any real criteria with which to advise artists and authors as to the dividing line between inspiration and infringement.

Issues Related to Damages

Finally, the Supreme Court also addressed several issues related to the calculation of damages in its decision. In particular, it confirmed that the victim of copyright infringement may be entitled to:

- a. both compensatory damages and award requiring the defendant to disgorge a portion of its profits even if those profits are only indirectly derived from the infringement;
- b. non-pecuniary damages for psychological suffering akin to those awarded to the victim of defamation and that such damages are NOT capped like those for personal injury; and
- c. an award of damages as against the producers in their personal capacity where there is either: (i) direct evidence that they “deliberately, wilfully and knowingly” engaged in a course of conduct that was likely to constitute infringement; or (ii) a presumption of such conduct can be drawn from known facts that are “serious, precise and concordant” and not simply inferred from their title or hierarchical position in a business.

Finally, the court observed that punitive damages must individually tailored to each defendant against whom they are awarded and that co-defendants cannot be “jointly” liable for an award of punitive damages under Quebec law.

Conclusion

This case appears to be one of the increasingly few in our justice system where a “david” defeats a “goliath”. While gratifying in this regard, it is unfortunate that the Supreme Court did not use the occasion to provide more concrete guidance to trial courts and counsel in this difficult area of copyright law. This decision does little to resolve the uncertainties and inconsistencies that arise when addressing allegations that a work is colourable imitation.

It is especially unfortunate that there is no discussion at all about the moral rights of the author or the obligations that may arise when an author shares their proposal or treatment with a potential producer in the absence of a non-disclosure agreement. The author’s moral rights and the former relationship between the parties must have influenced the outcome at some level, but the legal implications of that relationship receive no attention at all. Of course, the lack of discussion on these latter points may arise from the choices of counsel and not the court.

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