

Entertainment Law

February 11, 2014

Curiosity Killed the Copycat: Supreme Court of Canada Releases *Cinar Corporation v. Claude Robinson*

The Supreme Court of Canada released its much-anticipated decision in *Cinar Corporation v. Claude Robinson* on December 23, 2013. The Court unanimously affirmed the Quebec Supreme Court's findings that Cinar and certain other defendants were liable for copyright infringement. The decision addresses several important issues in Canadian copyright law, including:

1. the distinction between elements in the public domain and elements protected under copyright law as original expressions of an author's skill and judgment;
2. the test to determine whether a substantial part of a work has been copied;
3. the role of expert evidence in a copyright infringement case, and
4. the assessment of damages in a copyright infringement case.

Background

The case involved a proposed television series and a running television series, each adapted from a novel in the public domain, Robinson Crusoe. In the early 1980s, Robinson conceived, developed and for many years sought financing for a proposed children's educational television show named *The Adventures of Robinson Curiosity* ("Curiosity"). He created various characters, storyboards, scripts, synopses and promotional materials for the proposed series. His lead character, Robinson Curiosity, like Robinson Crusoe,

was bearded, wore a straw hat, lived on a tropical island and interacted with various characters.

Robinson approached Cinar to help him solicit financing for Curiosity. Cinar was a leading Montreal-based producer of children's television programming. Robinson fully disclosed all the details of Curiosity to Cinar and its principals. Cinar was ultimately unsuccessful in soliciting financing for Curiosity and it was never produced or broadcast.

In 1995, Cinar produced a television series entitled *Robinson Sucroë* ("Sucroë") which aired in Quebec and was distributed around the world. Sucroë also featured a bearded, Robinson Crusoe-inspired lead character who wore glasses and a straw hat and resided on a tropical island. Robinson believed Sucroë to be a "blatant copy" of Curiosity and he and his production company sued Cinar, two of its key principals, various co-producers and distributors and certain other individuals for copyright infringement.

Trial Court Decision

At trial, the Quebec Superior Court held that Curiosity was an original work protected by copyright. It carefully evaluated the similarities and differences between Curiosity and Sucroë and held that a number of key features of Curiosity were substantially copied in Sucroë, including the lead character's appearance and traits, the personalities of various secondary characters and certain scenic and graphic elements. The Court held Cinar and the other defendants liable for copyright infringement.

Court of Appeal Decision

The Quebec Court of Appeal affirmed the trial court's holdings on all substantive issues except the finding of liability against one of the individual defendants. Both Robinson and the defendants appealed various aspects of the appellate judgment to the Supreme Court.

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Key Points from the Supreme Court Decision

Ideas Versus Expressions of Ideas

It is a well-known axiom of copyright law that copyright protects only the expression of an idea and not the idea itself. This was one of the key issues in the case because both *Curiosity* and *Sucroë* were adapted from the same public domain work and they shared several ideas and elements.

The Supreme Court affirmed the judgment of the Quebec Superior Court that *Curiosity* was sufficiently original and well delineated to be protected under the *Copyright Act*. It accepted the trial court's conclusion that, notwithstanding certain common elements derived from *Robinson Crusoe* or that were generic in nature, the development by *Robinson* of specific characters with identifiable personality traits, in a particular scenic and graphic setting required an exercise of skill and judgment by *Robinson* sufficient to render *Curiosity* an "original work" under Canadian copyright law.

Copying of a "Substantial Part"

Generally, copying a substantial portion of the original author's skill and judgment as expressed in the original work constitutes infringement under the *Copyright Act*. The Supreme Court upheld the trial judge's finding that *Cinar* copied a substantial part of *Robinson's* skill and judgment in creating *Curiosity*, namely the distinctive characters and their personality traits and the specific visual and graphic setting *Robinson* incorporated into *Curiosity*.

The Supreme Court also confirmed that infringement is not confined to a literal reproduction of a protected work but may also include non-literal copying. *Robinson's* claim against *Cinar* was largely based on *Sucroë* sharing many non-literal similarities with *Curiosity*, including the personality traits of the characters and the environment in which the characters interacted, rather than a literal copying of dialogue, plots or storylines *per se*.

The Test for Copyright Infringement

In the Supreme Court's view, the key issue in a copyright infringement case is the assessment of the similarities between the works in question and not a focus on the differences *per se*; a defendant cannot escape liability by simply adding new features to a work which is otherwise infringing.

The Supreme Court approved the "qualitative and holistic" approach to evaluating copyright infringement used by the Quebec Superior Court in comparing *Sucroë* to *Curiosity*. This approach required the Court to consider and compare the two works as a whole. The Supreme Court rejected *Cinar's* assertion that each of the parts of *Robinson's* work was to be individually evaluated, similar to the approach to copyright infringement taken by U.S. courts. It held that the cumulative effect of the features copied from the work were to be considered to determine whether those features amounted to a substantial part of *Robinson's* skill and judgment expressed in his work as a whole. The Supreme Court left open the possibility that in other cases such a reductive analysis might be appropriate (e.g., copyright disputes involving computer programs.)

The Role of Expert Evidence

The Supreme Court reaffirmed the test for admissibility of expert evidence from *R. v. Mohan*, requiring the evidence to: (i) be relevant, (ii) be necessary, (iii) not offend any exclusionary rule, and (iv) involve a qualified expert. The Supreme Court rejected *Cinar's* assertion that infringement should only be evaluated from the perspective of a "lay person in the intended audience for the work" and not on the latent similarities on which the expert relied.

The Supreme Court held that while the perspective of a "lay person" might be relevant in some cases, generally, the question of substantial similarity "should be answered from the perspective of a person whose sense and knowledge allow him or her to fully assess

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and appreciate all relevant aspects - patent and latent - of the works at issue.” That was especially appropriate in this case where the intended audience for Sucroë was young children whose perspective on the infringement issue would obviously not be fully informed.

Damages

On the quantum of damages, the Supreme Court said:

- A director or officer of a corporation that infringes copyright may be personally liable for the infringement if he or she deliberately, willfully and knowingly pursued conduct that infringed or was indifferent to such risk, but not if he or she was directing the business activities of the corporation in the ordinary course.
- In awarding Robinson a disgorgement of Cinar’s profits, the Quebec Superior Court correctly included the revenues from a soundtrack for Sucroë as there was no evidence that the soundtrack would have had any independent commercial value if not related to the infringing Sucroë television series.
- An individual defendant is not liable for profits that he or she does not receive in a personal capacity (for example, profits payable to a corporation of which the individual is a principal).
- An award of non-pecuniary damages (e.g., for loss of enjoyment of life and psychological suffering) resulting from an infringement is not subject to the judicial cap for non-pecuniary damages arising from bodily injury.

The Supreme Court adjusted the punitive damages award by increasing it to \$500,000 (the Quebec Superior Court awarded \$1,000,000 which the Court of Appeal reduced to \$250,000). It also reinstated the Quebec Superior Court’s original award of \$400,000 for non-pecuniary damages.

Conclusion

In Cinar, the Supreme Court of Canada has given us fresh guidance on several key aspects of copyright infringement. This important judgment will be studied carefully in the entertainment industry.

For more detailed information on the Supreme Court’s decision, please click **here** or contact any member of our Entertainment Law Group:

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