

## Entertainment and Technology

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### Statutory Damages for Copyright Infringement on the Internet

Canada's statutory damages regime for copyright infringement was enacted to bring greater certainty with respect to the infringement of relatively low value works, to reduce the cost of litigation and facilitate settlement, among other reasons. However, in the internet context, the courts have been loath not to use the usual approach to making a monetary award, limiting the benefits of the statutory damages regime.

For each work infringed in the commercial context, Canada's *Copyright Act* provides for statutory damages of \$500 to \$20,000. Where the infringer was not aware and had no reasonable grounds to believe that it had infringed copyright, the lower end of this range goes down to \$200 per work infringed. Unlike in the United States, to make a claim for statutory damages an owner need not have registered its copyrights.

However, where there is more than one work in a "single medium" and the total award (multiplying the number of works infringed by the per work figure within the dollar range) is grossly out of proportion to the infringement, the court can make a lower per work award. Notably, the courts are not authorized to award more than \$20,000 per work infringed even if the total award would be disproportionately low.

In April 2017, the Ontario Superior Court of Justice ruled upon a claim by Trader Corporation, the operator of the AutoTrader.ca website, against the U.S. company CarGurus, Inc., the operator of a competing website.<sup>1</sup>

Trader asserted that CarGurus had infringed its copyright in tons of thousands of photographs of vehicles taken by Trader staff. CarGurus obtained many of the photos by scraping vehicle dealers' websites and then made them available on the CarGurus website. For each infringing photograph, Trader claimed statutory damages. In a landmark ruling addressing several provisions of the *Copyright Act* that had not previously been judicially considered, the Court found CarGurus had mass infringed Trader's photos and awarded statutory damages.

Interestingly, despite CarGurus having made available Trader's photos on its website and mobile application, the Court found these photos were in a "single medium", which gave it the jurisdiction to go below the \$500 minimum award per photo infringed. This approach resulted in an award far below the statutory range mandated by Parliament, with the Court taking into account many of the factors typically considered in a normal damages analysis.

As a result, one lesson for victims of mass internet infringement is that they should not assume that statutory damages are an option that does not require the extensive damages evidence of other copyright disputes, and victims should weigh in their unique circumstances the advantages and disadvantages of claiming statutory damages as compared to traditional damages and an accounting of profits.

For further information, please contact any member of our Entertainment or Technology Groups.

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<sup>1</sup> Goodmans LLP acted for the successful applicant, Trader, in this litigation.