Goodmans LLP Update

Entertainment Law

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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. In a unanimous decision written by Chief Justice Beverly McLachlin, the Supreme Court affirmed the Quebec Supreme Court's findings that Cinar Corporation and certain other defendants were liable for copyright infringement and increased the monetary relief awarded to the plaintiff, Claude Robinson, by the Quebec Court of Appeal. The decision deals with several important issues in Canadian copyright law, including:

1. distinguishing between elements in the public domain and elements protected under copyright law as original expressions of an author's skill and judgment;
2. the proper test to determine whether a substantial part of a work is 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 one proposed and one actual television series, each adapted from the well-known public domain novel, *Robinson Crusoe* by Daniel Defoe, first published in 1719. In the early 1980s, Robinson, a Quebec-based artist, conceived, developed and for many years sought financing for a proposed children's educational television show adapted from *Robinson Crusoe* 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 Defoe's Robinson Crusoe, was bearded, wore a straw hat, lived on a tropical island and interacted with various characters.

Cinar was a leading Montreal-based producer of children's television programming. Robinson approached Cinar in the mid-1980s to assist him in soliciting financing for Curiosity. At the time, Robinson fully disclosed all the details of Curiosity to Cinar and its principals, Ron Weinberg and Micheline Cherest. Cinar was unsuccessful in soliciting financing and Curiosity was never produced or broadcast.

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

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 appearance and traits of the key lead character, the personalities of various secondary characters and various scenic and graphic elements. It held Cinar and the other defendants liable for copyright infringement, found that they had violated extra-contractual obligations of good faith and loyalty to Robinson and awarded him more than $5,000,000 in damages and costs on a joint and several basis against the defendants, including $400,000 for the

psychological harm he suffered, $1,000,000 in punitive damages and disgorgement of profits.

On appeal, the Quebec Court of Appeal affirmed the trial court's holdings on all the substantive issues except for the finding of liability against one of the individual defendants. The Court of Appeal also modified and reduced the damages award and held that joint and several liability was not applicable to profits and punitive damages under applicable Quebec law. Both Robinson and the defendants appealed to the Supreme Court on various aspects of the Quebec Court of Appeal's judgment.

Key Points from the Supreme Court of Canada Decision

Idea v. Expression of an Idea

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, Robinson Crusoe, and they shared several ideas and elements. The expression vs. idea dichotomy was discussed by the Chief Justice as follows:

> *The Act protects original literary, dramatic, musical, and artistic works: s.5. It protects the expression of ideas in these works, rather than ideas in and of themselves…. An original work is the expression of an idea through an exercise of skill and judgement…. Infringement consists of the unauthorized taking of that originality….*
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> *The need to strike an appropriate balance between giving protection to the skill and judgment exercised by authors in the expression of their ideas, on the one hand, and leaving ideas and elements from the public domain free for all to draw upon, on the other, forms the background against which the arguments of the parties must be considered. (Citations omitted.)*

The Supreme Court affirmed the Quebec Superior Court's decision 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 which 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 which was sufficient to make Curiosity an "original work" under Canadian copyright law. Madam Justice McLachlin affirmed the trial court's finding that the overall architecture of Robinson's children's television show was copied and noted the trial court's findings were "not confined to the reproduction of an abstract idea; they focus on the detailed manner in which Robinson's ideas were expressed".

Copying a "Substantial Part"

Under the *Copyright Act*, copying a work or a "substantial part" of a work without the copyright owner's authorization is *prima facie* copyright infringement. The Supreme Court discussed what constitutes a "substantial part" of a work for copyright purposes. It noted that this is a "flexible notion" and "a matter of fact and degree" and that substantiality is measured by the quality rather than the quantity of the original work, determined in relation to the originality of the work that warrants the protection. In general, copying a substantial portion of the original author's skill and judgment as expressed in the original work constitutes infringement. As the Chief Justice put it, "as a general proposition, a substantial part of the work is a part of the work that represents a substantial portion of the author's skill and judgment expressed therein." The trial judge held that Sucroë 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.

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*. According to the Supreme Court:

> *A substantial part of a work is not limited to the words on the page or the brushstrokes on the canvas. The Act protects authors against both literal and non-literal copying, so long as the copied material forms a substantial part of the infringed work. As the House of Lords put it,…the "part" which is regarded as substantial can be a feature or combination of features of the work, abstracted from it rather than forming a discrete part…[T]he original elements in the plot of a play or novel may be a substantial part, so that copyright may be infringed by a work which does not reproduce a single sentence of the original.*

The Test for Copyright Infringement

The Supreme Court considered the proper standard of review or test to evaluate copyright infringement and approved of the "qualitative and holistic' approach used by the Quebec Superior Court in comparing Sucroë to Curiosity. This approach requires the Court to consider and compare the two works as a whole. Chief Justice McLachlin observed that the trial judge was correct in finding that Cinar "copied a number of features from Robinson's Curiosity, including the visual appearance of the main protagonist, the personality traits of the main protagonist and the other characters, visual aspects of the setting, and recurring scenographic elements" and that "considered as a whole, the copied features constituted a substantial part of Robinson's work."

On appeal, the defendants argued that the trial judge had erred in applying a holistic approach to evaluating the alleged infringement and that he should have applied a three-step approach (referred to in the US as the "abstraction-filtration-comparison" approach) which, as described by the Chief Justice, would have required the judge to "(1) determine what elements of Curiosity were original, within the meaning of the [Act]; (2) exclude non-protectable features of Robinson's work (such as ideas, elements drawn from the public domain, and generic elements commonplace in children's television shows); and (3) compare what remains of Curiosity after this 'weeding-out' process to Sucroë, and determine whether a substantial part of Curiosity was reproduced." This is the approach used by U.S. Courts to assess substantial similarity in the context of computer software infringement (see: *Computer Associates International, Inc. v. Altai, Inc.*, 982 F. 2d 693 (2nd Cir. 1992)) and which had been referred to by certain Canadian courts.

The Supreme Court disagreed with the defendants, noting that many types of works do not readily lend themselves to such a reductive three-step analysis. It stated that, in the case of Curiosity:

> *The approach proposed by the Cinar appellants is similar to the "abstraction-filtration-comparison" approach used to assess substantiality in the context of computer software infringement in the United States…. It has been discussed, though not formally adopted, in Canadian jurisprudence…. I do not exclude the possibility that such an approach might be useful in deciding whether a substantial part of some works, for example computer programs, has been copied. But many types of works do not lend themselves to a reductive analysis. Canadian courts have generally adopted a qualitative and holistic approach to assessing substantiality….*
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> *The approach proposed by the Cinar appellants would risk dissecting Robinson's work into its component parts. The "abstraction" of Robinson's work to the essence of what makes it original and the exclusion of non-protectable elements at the outset of the analysis would prevent a truly holistic assessment. This approach focuses unduly on whether each of the parts of Robinson's work is individually original and protected by copyright law. Rather, the cumulative effect of the features copied from the work must be considered, to determine whether those features amount to a substantial part of Robinson's skill and judgment expressed in his work as a whole. (Citations omitted.)*

The Supreme Court did not entirely reject the use of the "abstraction-filtration-comparison" approach, however, suggesting that it may be apt in certain other cases, for example, in deciding whether a substantial part of a computer program had been copied.

The Role of Expert Evidence

The Supreme Court also addressed the proper role of expert evidence in a copyright infringement case. It reaffirmed the proper test for admissibility of expert evidence from *R. v. Mohan* which provides that the evidence must (a) be relevant, (b) be necessary, (c) not offend any exclusionary rule, and (d) involve a qualified expert.

At trial, an expert witness, Dr. Perraton, testified for Robinson and described the latent similarities between Curiosity and Sucroë including their similar atmospheres, dynamics and structures. This evidence was relied upon by the Quebec Superior Court in finding copyright infringement. On appeal, Cinar argued that infringement should only be evaluated from the perspective of a "lay person in the intended audience for the work" and, therefore, that the expert evidence supporting Robinson's case should not have been relied upon by the Quebec Superior Court. This position was rejected by the Supreme Court which held that, while the perspective of a "lay person" might be relevant in some cases, in general, 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 and appreciate all relevant aspects - patent and latent - of the works at issue.

The Supreme Court therefore held that it was appropriate for the trial judge to admit and rely upon expert evidence, particularly in evaluating less obvious latent similarities between the two works. The Supreme Court further pointed out that the intended audience for Sucroë was young children, whose perspective on the infringement issue would obviously not be fully informed. It stated:

> *In the present case, the necessity criterion of the test for the admissibility of expert evidence is satisfied. First, the works at issue are intended for an audience of young children. A rigid application of the "lay person in the intended audience" standard would unduly restrict the court's ability to answer the central question, namely whether a substantial part of Robinson's work was copied. It would shift the question to whether the copied features are apparent to a five-year-old.*
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> *Second, the nature of the works at issue makes them difficult to compare. The trial judge was faced with the task of comparing a sprawling unrealized submission for a television show to a finished product that had aired on television. These are not works that are easily amenable to a side-by-side visual comparison conducted by a judge without the assistance of an expert.*
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> *Finally, the works at issue had both patent and latent similarities. Or, as Dr. Perraton explained it, they shared "perceptible" and "intelligible" similarities. "Perceptible" similarities are those that can be directly observed, whereas "intelligible" similarities - such as atmosphere, dynamics, motifs, and structure - affect a viewer's experience of the work indirectly. Expert evidence was necessary to assist the trial judge in distilling and comparing the "intelligible" aspects of the works at issue, which he would not otherwise appreciate. Consequently, the trial judge did not err in admitting the expert evidence of Dr. Perraton.*

Differences between Works vs. Similarities

At trial and on appeal, Cinar argued that there were substantial differences between Sucroë and Curiosity which the trial judge should have taken into account. However, in the Supreme Court's view, the key issue in a copyright infringement case is the similarities between the works in question, rather than differences *per se*. A defendant cannot escape liability by simply adding new features to a work which is otherwise infringing. Chief Justice McLachlin noted that:

> *The question of whether there has been substantial copying focuses on 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. The alteration of copied features or their integration into a work that is notably different from the plaintiff's work does not necessarily preclude a claim that a substantial part of a work has been copied. As the Copyright Act states, infringement includes "any colourable imitation" of a work: definition of "infringing", s.2.*
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> *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. (Citations omitted.)*

Damages

The Supreme Court evaluated both the adequacy of the damages and the issue of joint and several liability. The latter was largely based on an application of Quebec legislation including the Quebec *Charter of Human Rights and Freedoms*. In determining the quantum of damages, the Court made a number of interesting findings:

- A director or officer of a corporation that infringes copyright may be held personally liable for the infringement in the case of his or her deliberate, willful and knowing pursuit of conduct that constitutes infringement or indifference 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 the profits received by the defendants from Sucroë, the Quebec Superior Court was correct in including the revenues from a soundtrack based on Sucroë as there was no evidence that the soundtrack would have had any independent commercial value had it not been 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 (i.e., for loss of enjoyment of life and psychological suffering) as a result of an infringement is not subject to the judicial cap for non-pecuniary damages arising from bodily injury.
- An award of punitive damages for copyright infringement may be justified in appropriate circumstances (for example, in this case, because Robinson's rights under the Quebec Charter of Human Rights and Freedoms had been contravened) and the quantum of the damages is directly tied to the gravity of the conduct.

The Supreme Court increased the punitive damages award to $500,000 (the Quebec Superior Court had awarded $1,000,000, which the Quebec Court of Appeal reduced to $250,000). It also reinstated the Quebec Superior Court's original award of $400,000 for non-pecuniary damages. Since joint and several liability among the defendants was rejected based on Quebec provincial law, the Supreme Court affirmed the apportionment of damages between Cinar (25%), a co-producer of Sucroë (60%) and its distributor (15%).

Conclusion

There are several key aspects to the Supreme Court's decision. As the Chief Justice pointed out, Curiosity was not a television series *per se* but rather an assortment of development materials created by Robinson for a *proposed* television series and expressly adapted by him from a well-known public domain novel. Nevertheless, the Quebec Superior Court held that these development materials were sufficiently well delineated (i.e., with particular characters having specific personality traits and with storyboards and graphic elements) by *Robinson* to constitute an "original work" protected under the *Copyright Act*. The Supreme Court of Canada expressly approved of this determination.

Another key takeaway from the case is the proper perspective for evaluating an alleged infringement. Cinar had argued that the alleged infringement should be evaluated strictly from the perspective of a "lay person

in the intended audience" and, as a corollary, that expert evidence on infringement was therefore unnecessary. However, the Supreme Court held that 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 and appreciate all relevant aspects - patent or latent - of the works at issue" and that expert evidence was properly admitted and relied upon by the Court.

Finally, the Supreme Court outlined the proper test for evaluating copyright infringement, namely a "qualitative and holistic" approach comparing the two works as a whole rather than the three-step "abstraction-filtration-comparison" approach used by U.S. Courts, which involves first "weeding out" the elements in the original work not protected under copyright law and only then comparing what is left.

In the Cinar case, the Supreme Court of Canada has provided us with fresh guidance on several key aspects of copyright infringement. This important judgment will be studied carefully by entertainment lawyers and copyright law practitioners.

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