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The Superior Court of Québec analyses the exception allowing the use of a work protected by copyright for the purpose of news reporting

November 6, 2017

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In *Cedrom-SNi inc.* v. *Dose Pro inc.* ("Cedrom-SNi"), the Superior Court of Québec rendered a decision which, although issued at the interlocutory stage, is of interest to Canada's media and entertainment industry since it is one of the rare decisions which analyses the criteria for applying the exception allowing the use of a work for the purpose of news reporting[1].

In Québec, the Court of Québec (small claims division) has discussed this issue a few times, although without going into an in-depth analysis of the applicable criteria.[2] *Cedrom-SNi* is the first case in which the Superior Court conducts such an analysis.

The facts

La Presse, Le Devoir and *Le Soleil* publish articles by their journalists online, making them available to the public. These three print media companies authorized Cedrom-SNi, under an exclusive licence, to reproduce and distribute their publications electronically for media monitoring purposes.

Without being authorized to do so and without paying the plaintiffs, *La Dose Pro* began offering its customers, for a fee, press reviews reproducing the full titles and beginning lines of articles published by *La Presse, Le Devoir* and *Le Soleil. La Dose Pro's* media review named the newspaper which had published the article as well as the date and time of publication, and provided a link allowing readers to access the complete article on the newspaper's website. However, according to the evidence, *La Dose Pro's* customers almost never visited the newspapers' websites. The names of the journalists were generally not indicated and *La Dose Pro* did not create any content.

Claiming that their copyright was being infringed, *La Presse, Le Devoir, Le Soleil* and Cedrom-SNi Inc. applied for an injunction to prevent *La Dose Pro* from reproducing and posting any article found

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on their respective websites.

The law

On July 24, 2017, Justice François P. Duprat issued a judgment regarding the application for an interlocutory injunction.[3] In it, he analysed two main issues of interest respecting copyright. The first was whether the title and beginning lines of the articles published by *La Presse, Le Devoir* and *Le Soleil* were protected by copyright.

The protection of a work under the *Copyright Act* (the "**Act**") gives the author the sole right to produce or reproduce the entire work or any substantial part of it.[4] Conversely, the author cannot claim the exclusive right to reproduce part of his work that is not substantial, which is what *La Dose Pro* argued in this case, claiming that the title and beginning lines of an article (which only include one to four sentences) do not constitute a substantial part of the work, which is the complete article.

Referring to the leading case of *Cinar Corporation* v. *Robinson*[5] ("**Cinar**"), the Court followed the teachings of the Supreme Court of Canada, which had ruled that what constitutes a substantial part of a work must be analysed according to a "qualitative" approach (based on originality) as opposed to a "quantitative" approach. As a general rule, a substantial part of a work is a part which represents a significant part of the author's skill and judgment as expressed in the work.

The Court held that the concept of "skill" includes relying on personal knowledge or an acquired aptitude or practice ability while the concept of "judgment" involves a capacity for discernment or ability to form an opinion or evaluation by comparing different possible options in producing the work, as described by the Supreme Court in *CCH*.[6] The combination of skill and judgment thus implies some intellectual effort.

Based on these principles, the Court ruled that the thought and work required to write the title and beginning lines of an article constitute creative work designed to catch the reader's attention and nothing is left to chance. In this sense, *La Dose Pro* reproduced a significant part of the work. The fact that *La Dose Pro's* clients almost never visit the *La Presse, Le Devoir* and *Le Soleil* websites confirms the importance of the title and beginning lines of the article, as they are generally enough to let the reader know what the article is about.

The second issue analysed by the Court was whether *La Dose Pro's* use of the title and beginning lines of the articles constituted fair dealing permitted under the Act.

The Act sets out many exceptions allowing the use of a work protected by copyright which would otherwise constitute infringement. These exceptions may apply where a significant part of a work is used for the purpose of research, private study, education, parody or satire, criticism, review or news reporting.[7]

To take advantage of an exception, the user must be able to demonstrate that the work is used for one of the exceptions under the Act, which are interpreted broadly, and that the use is fair. For the exception of fair dealing for the purpose of criticism or news reporting to apply, the person reproducing the work must also mention its source and author.

In this case, *La Dose Pro* argued that its actions constituted fair dealing of the works of *La Presse, Le Devoir* and *Le Soleil* for the purpose of news reporting under section 29.2 of the Act.

After analysing the facts, the Court held that *La Dose Pro* reproduced the titles and beginning lines of articles other than in a news reporting context. In doing so, *La Dose Pro* did not provide any comments or discussion for the purpose of making the facts described in the articles known.

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According to the Court, this did not constitute news reporting. The Court also noted that *La Dose Pro* only rarely named the authors of the articles which it reproduced and distributed electronically, although they were available on the newspapers' websites.

As to fair dealing, the Superior Court referred to the six factors applied by the Supreme Court in *CCH*[8] as a foundation for its analysis of the facts: the purpose of the dealing, the character of the dealing, the amount of the dealing, the nature of the work, available alternatives to the dealing, and the effect of the dealing on the work.

Regarding the first factor, the Superior Court held that *La Dose Pro's* true goal was to generate a profit, not to inform the public since the excerpts were only available to its customers and did not generate traffic to the *La Presse, Le Devoir* or *Le Soleil* articles.

As to the character of the dealing, multiple excerpts from the articles were broadly disseminated since many employees of the same customer could receive the media review. According to the Court, this constituted unfair dealing.

With respect to the third factor, the amount of the dealing, the Court noted that La Dose Pro reproduced only a minimal part of the works, i.e. the title and beginning lines. However, the Court reiterated its conclusion regarding the first part of the test that the title and beginning lines represent a substantial part of the works.

Regarding the fourth factor, the Court was of the view that there was an available alternative to the dealing since *La Dose Pro* could have created original content itself.

The fifth factor involves the nature of the work. According to this criterion, the Court must determine whether the use of the work helps to pursue the copyright purpose and aims. On this point, the Court was of the view that, although it is in the interest of the newspapers that the articles be widely distributed to the public, the distribution in question did not increase traffic to their websites.

Regarding the last criterion, the effect of the dealing on the work, the Court held that since the use did not generate additional traffic to the websites, it did not generate any revenues for the newspapers.

After analysing all the factors, the Court held that the use of the titles and beginning lines in this case was unfair dealing. In its opinion, *La Dose Pro's* main motivation was to make a profit through the use of the newspapers' business model of allowing free access to the works and their reproduction.

Conclusion

Many decisions discuss the issue of what constitutes the reproduction of a significant part of a work. Although the *Cedrom-SNi inc.* decision was rendered at the interlocutory stage and does not change the state of the law, it represents a relevant example of how this issue applies in the context of new technology.

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1. *Cedrom-SNI inc. v. Dose Pro inc.*, 2017 QCCS 3383.
2. Saad v. *Le Journal de Montréal,* 2017 QCCQ 122, para. 29 à 31*; Clinique de lecture et d'écriture de La Mauricie inc. v. Groupe TVA inc.,* 2008 QCCQ 4097 (CanLII), paras. 14 and 15.
3. An interlocutory judgment only settles the dispute pending a final judgment. It is based on the colour of right rather than the demonstration of a clear right, which will be made at the trial on the merits in this case.
4. R.S.C., 1985, c. C-42, s. 3.
5. *Cinar Corporation c. Robinson,* [2013] 3 SCR 1168, 2013 SCC 73.
6. *CCH Canadian Ltd. v. Law Society of Upper Canada,* [2004] 1 SCR 339, 2004 SCC 13.

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7. *Copyright Act,* supra, footnote 4, s. 29 to 29.2.
8. *CCH Canadian Ltd. v. Law Society of Upper Canada,* supra footnote 6.

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