

## COURT FINDS THAT "INNOCENT PUBLISHER" VIOLATED COPYRIGHT LAW

by  
Barry Gamache  
**LEGER ROBIC RICHARD**, Lawyers  
**ROBIC**, Patent & Trademark Agents  
Centre CDP Capital  
1001 Square-Victoria - Bloc E – 8<sup>th</sup> Floor  
Montreal, Quebec, Canada H2Z 2B7  
Tel.: (514) 987 6242 - Fax: (514) 845 7874  
www.robic.ca - info@robic.com

A recent decision of the Trial Division of the Federal Court of Canada confirmed the strict guidelines in applying the defence afforded to the "innocent infringer" in copyright matters, under the *Copyright Act, 1985 R.S.C., c. C-42*, (91439 *Canada Ltée v. Les Éditions JCL Inc. and Louise Denis-Labrie*, No. T-311-88, January 24, 1992).

**THE FACTS.** Plaintiff 91432 Canada Ltée and Defendant Les Éditions JCL Inc. ("JCL"), are both publishers. The former sued the latter over alleged violations of copyright of which it was the assignee. Co-defendant and author Louise Denis-Labrie ("Denis-Labrie") filed for bankruptcy before the trial.

Plaintiff was the copyright owner of two literary works entitled "UN JOUR LA JUMENT VA PARLER..." (which could be translated as: "ONE DAY THE MARE WILL SPEAK...") and "J'ESPÈRE AU MOINS QU'Y VA FAIRE BEAU!" ("I HOPE AT LEAST THE WEATHER WILL BE NICE!"), first published in October 1983 and October 1985 respectively. The author of both these literary works, Marcelyne Claudais ("Claudais"), had previously assigned her copyrights to the Plaintiff, which obtained confirmation of its title in both works by registration with the Copyright Office.

Defendant JCL was the publisher of the literary work "ON M'A VOLÉ MON FILS" ("THEY STOLE MY SON") allegedly written in 1987 by co-defendant Denis-Labrie. In the publishing contract between the co-defendants, Denis-Labrie stated that her work was original and did not violate any existing copyright.

In November 1987, a few months after the publication of the Quebec best seller "ON M'A VOLÉ MON FILS", a journalist contacted JCL's president, Jean-Claude Larouche, and drew his attention on various similitudes existing between "ON M'A VOLÉ MON FILS" on the one side and "UN JOUR LA JUMENT VA PARLER..." and "J'ESPÈRE AU MOINS QU'Y VA FAIRE BEAU!" on the other. After comparing the works in question, JCL accepted voluntarily, even without having been requested to do so, to withdraw "ON M'A VOLÉ MON FILS" from the market place. The suit was initiated in 1988.

**THE PUBLISHER'S GOOD FAITH.** In his decision, the Court concluded that Defendant Denis-Labrie had reproduced, without authorization, substantial parts of the protected literary works entitled "UN JOUR LA JUMENT VA PARLER..." and "J'ESPÈRE AU MOINS QU'Y VA FAIRE BEAU!".

While the publisher had pleaded that he could not have violated the Plaintiff's copyrights because he was not aware of the nature of Denis-Labrie's actions, the Court concluded that by permitting the printing and reproduction of the infringing work "ON M'A VOLÉ MON FILS", the publisher had violated the Plaintiff's exclusive rights to reproduce its protected works. The Court further added that the publisher's knowledge (or lack thereof) concerning the nature of Denis-Labrie's actions was irrelevant. However, the publisher's good faith was considered important with respect to the sale and offering for sale of the infringing copies under Section 27.(4) of the *Copyright Act*, for which knowledge is an element.

The Court's decision is in line with the well established principle that innocent intention is not a defence in copyright matters and that ignorance as to the existence of copyright is not a defence in an infringement suit.

In Canada, the defence of the "innocent infringer" is outlined by strict guidelines, in Section 39 of the *Copyright Act*. Indeed, Section 39 provides for a limited defence, in cases where no copyright registration exists, in that an injunction is the only remedy available to a Plaintiff when the Defendant proves that, at the date of the infringement, he was not aware that copyright subsisted in the infringed work.

To successfully avail himself of the defence afforded by Section 39, a defendant must prove that he was not aware of the existence of the copyright in the infringed work at the date of the infringement. The element of awareness must concern solely the issue of existence of copyright in the infringed work and no other, such as whether or not the defendant thought his actions constituted infringement or whether or not the defendant thought he had authorization to copy the work. Knowledge relating to the identity of the actual owner of the copyright is also irrelevant.

**THE RIGHT TO CONVERSION OF THE INFRINGING WORKS.** The Court judged that JCL's good faith did not exclude the granting of relief requested by the Plaintiff. Thus, the Court condemned Defendant JCL to pay Plaintiff, in accordance with the choice made by the latter at trial, the value of the copies of the infringing literary work "ON M'A VOLÉ MON FILS" printed but not sold.

Under Section 38 of the *Copyright Act*, the owner of a copyright is considered the owner of all infringing copies and all plates used in the production of these copies. Accordingly, proceedings in recovery or conversion of the value thereof are available to the copyright owner, at his choice. As the Plaintiff elected to obtain damages for conversion, the Court followed the guidelines of Mr. Justice Anderson in *Tom Hopkins International Inc. v. Wall and Redekop Realty Ltd* (1985), 6 C.P.R. (3d) 475 (B.C.C.A.) who stated that "the formal measure of damages for conversion is to determine the value to the owner by ascertaining the market value of the goods converted" and not by calculating the costs of production of the converted good. In this instance, the Court granted 51,929.50 \$ for conversion damages (i.e. 4010 unsold copies at a retail price of 12.95 \$ each) on a global condemnation of 52,202.90 \$. The Court thus followed the reasoning often stated by Canadian caselaw that damages for conversion awarded under Section 38 of the *Copyright Act* should not "overlap" or "duplicate" damages that are awarded for infringement.

This decision of the Trial Division of the Federal Court of Canada confirms present law concerning the "innocent infringer". In this case, a publisher's good faith in printing and reproducing an infringing work written by a less than honest author was deemed irrelevant in the Court's final decision with respect to the illegal reproduction of the work.

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