THE ONTARIO COURT OF APPEAL UPHOLDS TRIAL JUDGE'S RULING IN A FACT DRIVEN CASE ON COPYRIGHT INFRINGEMENT

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The Ontario Court of Appeal recently refused to overturn a trial judge's ruling on the issues of copying and copyrightability in a case pertaining to infringement of a software program. The Court of Appeal dismissed the appeal as it found no overriding or palpable error of fact on the part of the trial judge (*Delrina Corp.* v. *Triolet Systems Inc.*, (2002) O.A.C. TBEd. MR.003, March 1, 2002, Morden, Carthy and MacPherson JJ.A.).

The facts

Brian Duncombe (hereinafter "Duncombe") was an employee of Delrina Corp. (hereinafter "Delrina") for a period of approximately two years. He was hired by Delrina in order to improve a computer software program designed to allow the operator of a certain type of computer to assess the operational efficiency of the said computer. Subsequent to the termination of his employment at Delrina, Duncombe proceeded to design a second software program which was to compete directly with the software program he had previously designed for Delrina.

Delrina instituted an action for copyright infringement of its software against Duncombe and Triolet Systems Inc. (hereinafter "Triolet"). After a detailed and careful consideration of the facts and evidence, including expert reports, the trial judge ruled that there was no copyright infringement of Delrina's software program. In his judgement, the trial judge concluded that Duncombe had not copied Delrina's software program, and that, in any event, various elements of Delrina's software program, which Delrina alleged were copied

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by Duncombe, were either not copied or not copyrightable. Delrina appealed the trial judge's decision.

The Court of Appeal judgement

The Court was seized of four grounds of appeal.

The first ground set out by Delrina was that the trial judge had erred in his definition of "copying". According to Delrina, the trial judge's definition was too restrictive since he had used the term in the literal sense, i.e. copying would result only if the copy was made from something that is physically before a person. The Court agreed with Delrina's argument, namely that copyright infringement may result not only from literal copying, but also from copying from memory, even subconscious memory. However, the Court dismissed Delrina's first ground of appeal since it was of the view that the error had not affected the trial judge's essential findings.

Delrina's second ground of appeal was based on the trial judge's consideration of a number of factors to excuse the similarities between the two computer software programs and which Delrina deemed irrelevant in copyright law. For example, the trial judge had concluded that many of the similarities between the software programs could be explained by the fact that Duncombe was the author of both programs, and that the software programs were similar because Duncombe had designed both of them to perform the same functions. The Court could find no error in the trial judge's conclusions: functional similarities between the software programs could not readily be construed as evidence of copying. The Court accepted the trial judge's reasons, as follows:

> " (…) Similarities attributable to the nature of the product, the limited ways in which an idea can be expressed, stock devices and common tools of the trade, the use of common sources, knowledge and information, constraints imposed by the nature of the product, are not indicators of copying or of substantial similarity between the copyright and allegedly infringing work (…)"

The Court therefore dismissed Delrina's second ground of appeal.

Delrina's third ground of appeal was based on the trial judge's ruling on copyrightability and the standard or originality required under copyright law. Under Canadian law, the work in suit must first be examined as a whole in order to determine if it is copyrightable. In the affirmative, then the individual elements of the work, which are allegedly reproduced in the infringing work, can be examined in order to determine if there is a substantial reproduction

of the elements from one work to the other. The trial judge had found Delrina's software program to be copyrightable, but he also found that the various individual elements allegedly reproduced by Duncombe were either not copied, or not entitled to copyright protection.

Under Canadian copyright law, a particular arrangement of elements not entitled to copyright protection may be subject to copyright if the said arrangement is original. The Court agreed with the trial judge's assessment that the similarities between Delrina and Duncombe's software programs were either the result of functional considerations, and/or simply not subject to copyright. The arrangement of elements was not deemed original to warrant copyright protection.

Delrina further argued that the trial judge erred in his application to the case at bar of the standard for originality. The Court reiterated that the guiding principle in copyright law applicable in Canada, and in other countries, such as the United States and the United Kingdom, is that that copyright law "protects only original expression. It does not protect the idea underlying the expression." The Court stated that:

> "(…) Clearly, if there is only one or a very limited numbers of ways to achieve a particular result in a computer program, to hold that way or ways protectable by copyright could give the copyright holder a monopoly on the idea or function itself."

Since the trial judge had concluded, based on the evidence before him, including an expert's report, that the similarities between the computer programs were a result of the use of similar sources of reference and programming practices, the Court agreed that the elements common to both software programs were not the "original" expression of ideas. Consequently, the Court dismissed Delrina's third ground of appeal.

The fourth ground of appeal set forth by Delrina was based on the adverse inference drawn by the trial judge resulting from the fact that Delrina did not produce an expertise report it considered unfavourable. The Court ruled that, although the trial judge should not have drawn a negative inference, the error was not a factor in the final determination of whether or not Duncombe had copied the software. Consequently, the fourth ground of appeal was dismissed.

Since the case at bar was "fact driven", that the trial judge had clearly accepted the evidence of the Defendants Duncombe and Triolet, the Court refused to re-examine the trial judge's findings of fact since it could find no overriding or palpable error of fact.

This case therefore constitutes an example of how our Appellate Courts are reticent to overturn a trial judge's judgement on a question of fact. In addition, this case underlines the importance for a Plaintiff to make its case before the trial judge, especially in copyright infringement cases where the trial division's ruling may be determined by the quality of the evidence adduced before it.

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