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## COURT DISMISSES INFRINGEMENT ACTION

LAURENT CARRIÈRE AND MARIE-MICHÈLE MCDUFF\*  
**LEGER ROBIC RICHARD, LLP**  
LAWYERS, AND PATENT AND TRADE-MARK AGENTS

In *Smith v. Hayden*, [2008 CanLII 64395 (ON S.C.)], the Superior Court of Justice of Ontario dismissed plaintiff's Action for damages for the infringement of his copyright. In this action the plaintiff, Andrew James Smith, alleged that the defendant, Micheal Hayden, infringed his copyright in drawings consisting of a series of polygons. The defendant created a neon sculpture entitled "All Things Being Equal" and the plaintiff claims that the idea for that sculpture came from his drawings which he alleges he showed to the defendant in the early 1970s.

The issue of this Action comes down to four questions:

1. Did the defendant use the plaintiff's drawings as the basis for his sculpture?
2. When did the plaintiff become aware of the defendant's alleged infringement of copyright or when could the plaintiff reasonably have known of the alleged infringement?
3. If the defendant's sculpture was based on the plaintiff's polygon drawings, is it an infringement of copyright?
4. If the defendant's sculpture is an infringement of the plaintiff's copyright, what are the plaintiff's damages?

The plaintiff claim that in the early 1970s the defendant was very interested in his polygon drawings. When he met him in his studio, the defendant asked for a permission to keep one of the drawings because that drawing gave him an idea. Also, the plaintiff testified that the defendant told him he would come back to him about the idea of creating a neon sculpture using as its basis, the plaintiff's polygon drawings. According to the defendant, that meeting never too place.

The plaintiff alleged that he only became aware of the existence of the sculpture in late year 2002 and not in the 1980's like the defendant witness, Micheal Sowdon (hereinafter Sowdon), testified. The plaintiff claim that he did have a conversation with Sowdon but Sowdon misconstrued what he said. The conversation was not

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\* Lawyer and trade-mark agent, Laurent Carrière, is a senior partner with LEGER ROBIC RICHARD, LLP a multidisciplinary firm of lawyers, and patent and trademark agents. Marie-Michèle McDuff is an articling student with the firm. Published in the 2009-01-15 issue of World Media Law Report. Publication 328.058.

about the Sculpture of the defendant but about another contract that occurred between them.

Moreover, the defendant alleged that the plaintiff is not entitled to copyright protection over the idea embodied in his drawings.

First, the Court found odd that the plaintiff was unable to describe the location of the meeting with the defendant. Further, he never asked for the return of the polygon drawings he supposedly left even if he said they were very important for him. The Court therefore rejected the argument that the defendant based his sculpture on the plaintiff's drawings.

Second, the Court preferred Sowdon's testimony. According to the Judge, it follows that the plaintiff either knew about the defendant sculpture and its similarities to his polygon drawings or he should reasonably have been expected to have known by the time of his conversation with Sowdon in the late 1980s. Section 41 of the Copyright Act prevents a court from awarding a remedy in relation to an infringement unless proceedings for infringement are commenced within three years after the infringement occurred, or if the plaintiff did not know and could not reasonably have been expected to know of the infringement, unless proceedings for infringement are commenced within three years from the time the plaintiff became aware of the infringement or could reasonably have been expected to know of the infringement. The proceeding was commenced by Notice of Action issued December 31, 2003. Therefore, pursuant to Section 41 of the Copyright Act, the Court cannot award the plaintiff a remedy.

Third, Taylor J, observed that there can be no suggestion that the defendant imitated the plaintiff's work as the two works are so dissimilar in form. At best, the defendant's sculpture used plaintiff's idea of a polygon progression to create a three dimensional neon sculpture. To the judge's mind, to find that the defendant has infringed the plaintiff's copyright in his drawings of polygon progressions would in effect give him a monopoly over the use anyone could make of a polygon progressions of any form. As a result, the defendant's sculpture does not infringe the plaintiff's copyright in his drawings of polygon progressions.

Finally, the Court points out that the plaintiff did not leave evidence that he had suffered any damages as a result of the alleged infringement and the defendant didn't made any significant profit from his sculpture. Therefore, the plaintiff failed to prove any damages arising from the alleged infringement. The Court also analyzed the question of punitive damages and found that in this case, it was not appropriate even if the Court had found that the defendant had infringed the plaintiff's copyright.

Plaintiff did not meet its burden in the present case regarding the alleged infringement, nor did it prove that the defendant had committed any fault whatsoever. Thus, its claim was dismissed.

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