

CarGurus Enters Canada – Suit Ensues For Statutory Damages under the Canadian Copyright Act

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The plaintiff in a copyright infringement action has the option to choose to receive statutory damages rather than to establish its actual quantum of damages it has suffered. Statutory damages range from a minimum of \$500 to a maximum of \$20,000 for the infringements related to a given work. A plaintiff might choose statutory damages when the amount of its loss is difficult to quantify, particularly when works are downloaded in large quantities from the internet. The Canadian *Copyright Act* provides for various remedies for copyright infringement, including statutory damages as an alternative to compensatory damages and/or profits.

CarGurus is the second largest digital marketplace provider for new and used vehicles in the United States. In 2015, it entered the Canadian market and became a direct competitor of the Canadian

company, Trader Corporation, which operates “digital marketplaces” for new and used vehicles in Canada through its websites “autotrader.ca” and “autohebdo.net” and related mobile applications.

In this litigation (Trader v. CarGurus, 2017 ONSC1841 dated April, 2017), Trader alleged that CarGurus infringed Trader’s copyright in 196,740 photos taken pursuant to its Capture Service. Trader sought a declaration of copyright infringement and a permanent injunction restraining CarGurus from using Trader’s photos. Trader also claimed statutory damages under the Copyright Act in the amount of \$98,370,000 (\$500 per infringing photo) and punitive damages of \$1 million.

CarGurus displayed the Trader photos on its website and therefore was “making it available” to the public by telecommunication (in a way that allowed a member of the public to have access to it from a place and at a time individually chosen by that member), regardless of whether the photo was actually stored on CarGurus’ server or on a third party’s server. The Court found that CarGurus infringed the Trader Photos when it posted them on the CarGurus website and made them available to the public by telecommunication.

Section 41.27(1) of the Copyright Act provides that a copyright owner is not entitled to any remedy other than an injunction against a provider of an “information location tool”, so long as the provider satisfies certain conditions in the Act. CarGurus argued that it was exempt from Trader’s statutory damages claim as the provider of an “information location tool”. The term “information location tool” is defined in s. 41.27(5) of the Act as any tool that makes it possible to locate information that is available through the Internet or another digital network. The term “information location tool” had not been judicially considered in Canada, prior to this case.

CarGurus tendered expert evidence that CarGurus operates a search engine and, as such, is an “information location tool”. This expert opinion was based on the U.S. *Communications Decency Act of 1996*, which defines the term “Internet information location tool” as “a service that refers or links users to an online location on the World Wide Web. Such term includes directories, indices, references, pointers, and hypertext links. Therefore, it was argued, any search engine (such as CarGurus) is an “information location tool”.

The crux of the defined term “information location tool” is the locating of information – it is a tool that “makes it possible to locate information that is available through the Internet.” In the Court’s view, this exception is intended to afford protection to intermediaries that provide tools that enable users to navigate and find information where it is located on the Internet. It does not afford that protection to providers like CarGurus that gather information from the Internet and make it available to the user on the provider’s own website.

CarGurus was not acting as an intermediary to facilitate the user’s navigation to the location of online information. While CarGurus may have located information about a vehicle and provided it to the user through its website, it did not enable the user to find this information where it was located on the Internet (i.e. the Car Dealer’s webpage for that vehicle listing). If the user was interested in a particular vehicle, the user was required to contact CarGurus, which in turn acted as a liaison between the user and the Car Dealer.

The Court found that it could not conclude that CarGurus acted as an intermediary as contemplated by s. 41.27 of the Act. CarGurus failed to establish that it was the provider of an “information location tool” and was not entitled to protection from statutory damages. The Court ordered the following:

(a) a declaration that CarGurus infringed Trader’s copyright in 152,532 Trader Photos;

(b) an award of statutory damages payable by CarGurus to Trader in the amount of \$2.00 per photo, for a total statutory damages award in the amount of \$305,064;

(c) Trader's request for punitive damages against CarGurus was dismissed; and

(d) Trader's request for a permanent injunction against CarGurus was dismissed (since the photos had been removed from the site and the parties had entered an agreement).

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