

## **No Copyright in Facts**

A recent decision of the Federal Court has found that a novel did not infringe the copyright in a documentary.

### **The Facts**

The plaintiff made a documentary regarding the courageous actions of a Polish-Catholic woman during the Second World War in a town occupied by German forces. She harboured and hid three Jewish families for nearly two years as well as a German soldier who had deserted as the war neared its end. The plaintiff was a descendant of one of the families who had been rescued. It cost approximately \$100,000 to make the documentary. The documentary had been screened at film festivals and other venues and won several awards and generated some revenue.

The defendant author viewed the documentary. She testified that the story and the courageous acts shown in it inspired her to write a book entitled *My Mother's Secret*. The defendant author characterized the book as a fictionalized version of the story shown in the documentary. However, she used some of the real names from the documentary and some of its facts, notably the location and the place where the refugees were hidden. However, the book was targeted at young adults and she was influenced in writing the book by the style of novels such as *The Hunger Games*.

The book was initially self-published but when it became popular the publishing rights were acquired by Penguin Books who re-published the book.

When the plaintiff became aware of the book, she was distressed and a demand was sent to Penguin Books. Counsel, on their behalf, responded by stating that there was no copyright in facts and refused to cease publishing it.

## **The Proceedings**

The plaintiff brought an application in the Federal Court alleging that the book copied personal family stories as well as the structure and narrative devices of the documentary.

Both parties filed affidavits of expert witnesses. The plaintiff's expert drew a distinction between large facts such as the "Second World War began when Germany invaded Poland" and a small facts such as a soldier's diary entry. In his opinion it was inappropriate for the book not to credit the documentary concerning the use of small facts. The defendants' witness specialized in Holocaust and Jewish studies. Her evidence was that the various elements of the book were common themes in Holocaust literature.

## **The Scope of the Copyright in the Documentary**

It was accepted by all concerned that copyright subsisted in the documentary but the judge pointed out that copyright protects the expression of ideas rather than the ideas in and of themselves. The copyright in the documentary protected the expression of the stories that it depicted through the exercise, skill or judgment. The actual story itself and related factual details were not covered by the copyright in the documentary.

The judge categorized the argument based on a difference between small and large facts as without merit. Copyright law does not recognize any such difference or distinction. Facts are facts and no one owns copyright in them no matter what their relative size or significance. The copyright only subsists in the expression of those facts as reflected in the documentary as a whole.

## **Substantial Taking**

The judge said that the central question was whether the originality of the documentary, such as its structure, tone, theme, atmosphere and dialogue had been copied by the defendants and whether such actions amounted to a substantial taking.

The judge referred to a recent decision of the Supreme Court of Canada that confirmed that a substantial part of a work was a flexible notation and was a matter of fact and degree. What is substantial must be decided by its quality rather than its quantity.

In addition, what constitutes a substantial part is determined in relation to the originality of the work. Since the facts were not protected by copyright they were not part of the documentary's originality. As a result any facts copied or taken by the defendant author and used in her book did not form part of the assessment as to whether a substantial part of the documentary had been taken by her. In this regard, the judge said that the character of the works is determined by looking at the works as a whole not isolated passages, in order to determine whether the defendant author had unduly interfered with the plaintiff's rights (citing J.S. McKeown's *Fox on Canadian Law of Copyright and Industrial Designs*).

The judge was not convinced that any infringement had taken place. Considering the significant differences in expression, content, form, feel and experience from the documentary it was apparent, on a qualitative and holistic view, that the book was not an imitation or a substantial taking from the documentary.

## **Comment**

It is curious that no direct reference seems to have been made to the plot of the dramatic work in issue and the dialogue and working out of the dramatic work.

Traditionally these matters should be considered in order to determine whether a dramatic work has been infringed.

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