

Intellectual Property

News aggregators: 'Fair dealing' exception doesn't apply to headlines and leads

By Jean-François De Rico and Pascal Archambault

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(September 29, 2017, 8:37 AM EDT) -- In a recent case (*Cedrom-SNI inc. v. Dose Pro inc.*), the Quebec Superior Court issued an interlocutory injunction prohibiting a news aggregation service from reproducing the titles and lead paragraphs of news articles published by three Quebec newspapers: *La Presse*, *Le Devoir* and *Le Soleil* (the newspapers).

In short, the court found that such are a "substantial part" of a news article and that the "fair dealing" exceptions provided for in the *Copyright Act* (the act) — including the one for "news reporting" — did not apply.

We summarize the case and the decision below.

The defendants (La Dose) operate a web-based news aggregation service and a website that publishes daily digests of political news content. For a fee, subscribers receive a digest reproducing the titles and lead paragraphs of news articles from various sources, along with a link to the website where the full article was originally published.

The plaintiffs are the newspapers and their exclusive licensee, Cedrom-SNI. They argue that a news article's title and lead paragraph reveal most of the information sought by the reader and should therefore be regarded as significant parts of the work that may not be reproduced without their consent, which La Dose had not obtained. They also based their judicial application on the terms and conditions of use of their respective sites, which prohibit content reproduction or distribution.

In defence, La Dose argued that its use of the plaintiffs' content was permitted under the fair dealing exceptions provided for by the Act.

The exclusive rights granted to a copyright owner are stated as follows in the act: "For the purposes of this Act, copyright, in relation to a work, means the sole right to produce or reproduce *the work or any substantial part thereof* in any material form whatever, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof, and includes the sole right (...)."

As employers of the articles' authors, the newspapers own the copyright, and La Dose had indeed not obtained their consent to reproduce anything.

The main issue that remained to be decided by the court was whether the titles and lead paragraphs of news articles constitute a "substantial part" of such work. From the evidence adduced, the court found that titles and lead paragraphs aim to hook the reader, but also to provide the gist of the news.

Citing the Supreme Court's decision in *Cinar v. Robinson*, the court reaffirmed the now settled principle that what is a "substantial part" must be assessed on a qualitative rather than quantitative basis and concluded that the titles and lead paragraphs of news articles constitute a substantial part thereof. In fact, the evidence produced at the interlocutory stage revealed that La Dose clients almost never used the links provided by La Dose to consult the newspapers' sites and read the full article.

La Dose contended that the reproduction of the newspapers' content fell within the "fair dealing" exceptions provided for in the act and pertaining to research, private study, criticism, review and news reporting, all of which aim to balance the rights of copyrights owners and those of users.

The court rejected La Dose' fair dealing defense, concluding that the reproduction of the titles and lead paragraphs in this case was not intended for the purpose of research, private study, criticism, review or news reporting — although it considered this last exception in more detail.

Ultimately, the court found that La Dose's use of the content could not be qualified as fair dealing, noting that the defendants "are undoubtedly financially motivated and the purpose of the reproduction is to generate income and not to report news". The evidence also showed that the authors of the news articles were generally not given any credit in the defendants' press reviews.

The court further held that the use of the content by La Dose was in breach of the newspapers' website terms and conditions.

The thrust of this case is the qualification of titles and lead paragraphs as being substantial parts of news articles for the purposes of copyright law. If upheld on the merits or reiterated by other tribunals, this will certainly give authors and editors of original news content greater sway and aggregation sites and services will become a trickier business, subject to increased scrutiny and legal compliance risks.

This case also serves as an important reminder that fair dealing exceptions should be closely analyzed by any party intending to rely on them to justify the reproduction of copyrighted material.

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