"Does That TV Program or Film Copy That Book?" The Limits of ‘Colourable Imitation’ in Canada

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A recent summary judgment of the Federal Court of Canada highlights the fundamental principle that copyright protection does not extend to ideas or facts. The decision illustrates the limits of the concept of colourable imitation at Canadian copyright law. It is also a reminder that ‘access’ to a work is a necessary element of infringement, and that independent creation is a full defence to copyright infringement.

In *Evans v. Discovery Communications LLC*,[1] the defendant broadcaster Discovery Communications LLC was granted summary judgment dismissing a copyright infringement claim by self-represented plaintiff Dean Evans. The plaintiff alleged that episodes from a television show broadcast by the defendant infringed copyright in Evans’ novel, *Glimpses of a Black Ops*. Evans’ novel explored how certain modern and near future technologies impact the lives of individuals as well as society in general; similarly, the TV show, *Futurescape*, examined the scientific bases and ethical implications of new and emerging technologies. Evans alleged that the TV show infringed copyright in his novel by exploring the same topics and themes, albeit without copying any specific portions or passages from the novel.

Even's claim was essentially one of infringement by ‘colourable imitation’, involving ‘non-literal copying’. In a similar claim regarding fictional animation, the Supreme Court of Canada has previously said creators are protected from *"both literal and non-literal copying, so long as the copied material forms a substantial part of the infringed work … [T]he “part” which is regarded as substantial can be a feature or combination of features of the work, abstracted from it rather than forming a discrete part ... [T]he original elements in the plot of a play or novel may be a substantial part, so that copyright may be infringed by a work which does not reproduce a single sentence of the original."*[2]

The Court in *Evans* considered the plaintiff’s allegations of non-literal infringement and found that his claims were outside the scope of copyright protection. Although Evans identified six episodes of the TV show he alleged infringed copyright in his novel, he did not claim that any specific portions of the episodes reproduced or were substantially similar to any expressions in his novel. Instead, the plaintiff claimed that the TV show episodes were “semantically similar” to his novel in terms of their “bonded expression”, and supplied percentage breakdowns of the topical and thematic similarities between the works.

In dismissing the action, the Court observed that Evans’ claims were at odds with a number of core tenets of copyright law. Most fundamentally, the Court observed the principle that “Copyright law protects the expression of ideas in … works; it does not protect ideas in and of themselves.”[3] The Court found that the plaintiff’s allegations of “non-literal copyright infringement” in the “scientific content” of the novel amounted to a claim that the defendant had copied Evans’ ideas, and so fell outside the scope of copyright protection. By way of example, the Federal Court has noted in *Andrews v. McHale,* “the category of ideas, methods, procedures, algorithms or other categories of contributions which, while perhaps valuable, fall outside the type of intellectual effort protected by copyright law.”[4]

Further, the plaintiff had offered no evidence that anyone involved in the production of the TV show was aware of or had access to the novel prior to the litigation. A key element of copyright infringement claims is the requirement that the plaintiff either prove the defendant accessed the infringed work, or else demonstrate sufficient evidence for a court to presume such access. Here there was no evidence of access, and the two works at issue were dissimilar enough that the Court could not presume that the authors of the TV show must have accessed the novel. The possibility that the two works were

independently created was bolstered by the defendant's expert witness, who testified that "the themes and topics in both works are common to science fiction, speculation, and science journalism."

The Court found there was no genuine issue for trial and granted the defendant's summary judgment motion. The ideas set out in Evans' novel are not the subject of copyright protection, and even if they had been, the Court was unable to find or presume that the defendant accessed the novel.

Notwithstanding that Evans' claims were ultimately unsuccessful, as noted above, when it comes to film and television productions, there is precedent at Canadian law for colourable imitation to be actionable. The seminal Supreme Court of Canada decision in *Cinar Corporation v. Robinson* is an example of a successful infringement action by the author of scripts and storyboards against the producers of an animated TV series. The plaintiff in that case had presented works to a production company as part of an unsuccessful pitch for a TV show, and then later brought a claim for infringement when the production company launched an extremely similar TV series. Given the plaintiff's pitch to the production company, the Supreme Court found that the defendant clearly had access to the plaintiff's works. Further, the Court held that the defendant had engaged in non-literal copying of a substantial part of those works by reproducing certain visual elements and the "particular combination of characters with distinct personality traits, living together and interacting on a tropical island."[5]

The decision in *Evans* demonstrates the other side of the coin. It is a good reminder of the limits of colourable imitation, and shows that just because two works may share similarities doesn't necessarily mean there is a basis for infringement.

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[1] 2018 FC 1153 [*Evans*].

[2] *Cinar Corporation v. Robinson*, 2013 SCC 73 [*Cinar*], at para 27, citing *Designers Guild Ltd. v. Russell Williams (Textiles) Ltd.*, [2001] 1 All E.R. 700, at p. 706.

[3] *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13at para 8

[4] *Andrews v. McHale*, 2016 FC 624, at para 88.

[5] *Cinar* at para 46.