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Illustrator Wins Copyright Infringement Case at the Supreme Court



By Neil Kathol

The *Cinar v. Robinson* decision of the Supreme Court of Canada in late 2013 is of interest to Canada's creative community, and copyright owners generally including owners of industrial copyright.

The case makes it clear that Courts should and will consider two types of copying: "literal" infringement and "non-literal" infringement.

For visual works such as artworks, drawings, and photographs, the question this case addressed was when can the copyright owner successfully claim against a defendant who has been proven to use some elements, albeit non-literally. By that we mean they have not mechanically reproduced elements, but rather they have created new materials that closely resemble and have strong similarities to the original. An example of a literal infringement would be the use of a 3D printer, or mould, to reproduce an object, the resulting copy being almost indistinguishable from the first. Another example of literal infringement is a high resolution photograph of a first photograph or painting, or a photocopy of a diagram such as a machining drawing.

An example of non-literal copying would be placing a first artwork or drawing on the table, and making a hand-drawn, or machine drawn (for example, CAD) computer drawing containing elements with a striking similarity to elements in the first. Or, placing a photo of a painting in the studio and making a new painting that contains elements very similar to the original.

A famous example of this, and one that shows the copied work need not be in the same medium as the original, is *Rogers v. Koons*, a 1992 case of the U.S. Supreme Court. Below is a photograph on the left by a photographer (Rogers) which was found sufficiently original and copied to constitute copyright infringement by the international contemporary art figure Jeff Koons.



In *Cinar v. Robinson*, the original work was an illustrated outline for a television program about a man (Robinson) living on an island. Of

course it played off the 300 year old novel by Daniel Dafoe "Robinson Crusoe". However the TV program outline contained original, new representations of the character, secondary characters, and the setting. The Supreme Court of Canada came to the conclusion that the copied work (an actual long-running TV show Cinar made and produced) bore a striking similarity to the TV program outline, and found elements of the outline in the Cinar show. It found such copied elements to be original creations of the outline's author, rather than elements that could be found in the public domain. These included the graphic appearance of a makeshift village on the island, elements of the overall island setting, elements from characters (as well as their personality traits), and character ideas generally. They were not literally copied, but were there even with notable variations from their counterpart in the outline.

The Court also was careful to comment that it is not determinative and may be not significant at all whether the copyist's work contains elements that are different and not found in the original. Such may only be a factor in the first step of the examination process; namely the step whereby the works are compared as a whole, holistically, before looking more closely at constituent parts to determine whether original parts from the first work appear in the copy.

The Supreme Court of Canada concluded that, the plaintiff was entitled to an amount of money it would have made with the television show: over \$1 Million of profits earned by the corporate defendants plus \$500,000 of punitive damages (with Cinar to pay \$200,000 and senior members of Cinar and related companies to pay \$100,000 each). This was based largely on evidence that Cinar and these executives performed "intentional and calculated copyright infringement which they planned to keep secret, all while reaping profits from an internationally successful children's television series, and their persistent denial of having copied any portions of Robinson's work throughout the legal proceedings". As well, the plaintiff was awarded \$1.5 Million of solicitor-client legal costs, which likely exceeded the amount of legal bills generated, although that is difficult to determine as the proceedings took nearly 10 years.

For advice on copyright and the law applying to creative works, contact [Neil Kathol](#) in our [Intellectual Property and Technology Group](#).

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