



## INFRINGEMENT WORK ON PROTEST BANNER IS STRUCK OUT

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PRECIS: A Quebec court has granted an interlocutory injunction to refrain two divisions of the Canadian Union of Public Employees from using a modified version of an artistic work owned by Sun Media Corporation on a protest banner. The judge concluded that the *Copyright Act* does not restrict the defendants' right to freedom of expression.

In *Corporation Sun Média v Syndicat canadien de la fonction publique* the Quebec Superior Court has granted an interlocutory injunction to refrain two divisions of the Canadian Union of Public Employees (CUPE) from further infringing an artistic work owned by Sun Media Corporation. Judge Raymond W Pronovost concluded that the *Copyright Act* does not restrict the defendants' right to freedom of expression, protected by the *Canadian Charter of Rights and Freedoms* of the *Canada Act*.

On April 22 2007 Sun announced a lock-out against two Quebec divisions of the CUPE. This was followed by a strike by the CUPE on the same day. During the strike, the defendants started picketing with the help of a banner on which was placed Sun's copyrighted artistic work, without Sun's authorization. Defendants also placed the copyrighted work on their website, again without permission. Sun therefore claimed injunctive relief from the defendants, as a result of the breach of its copyrights.

Sun is the owner of an artistic work, consisting of a drawing of a red rectangle, on which are inscribed the words "le journal de québec", in white, followed by the words "No 1" in yellow. Defendants admitted that this drawing was protected by Section 13(1) of the *Copyright Act*, and also admitted that Sun was in fact the legal holder of the copyrights vested in this artistic work.

During trial, the defendants contested the claimed injunction. First, they argued that there was no evidence of infringement since the work had been modified by the

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addition of various texts and logos representing each of the unions on strike. Second, the modifications were to be considered as fair dealing for the purpose of criticism, and thus fell under Section 29 of the Copyright Act, which provides for an exception to infringement. Finally, the defendants claimed that their picketing was done in a peaceful manner and the message sent out by the banners was not libellous or hateful. Hence, an injunction would wrongly prevent them from enjoying their freedom of expression, as per Section 2b of the charter, and that the Copyright Act could not go so far as limiting the provisions of the charter.

Based on the definition of ‘infringing’ set out in Section 2 of the act, the judge concluded that the defendants had indeed infringed Sun’s copyrighted work. Moreover, he reiterated that according to Section 3(1), Sun had the sole right to produce or reproduce the copyrighted work and to authorize such acts. Also, it was inadmissible to consider the additions to the work as rendering it a new artistic work or a form of criticism as permitted by the act. On the contrary, the defendants reproduced a substantial part of the copyrighted work, which confirmed the fact that there was infringement, since Sun never authorized such use of the work.

The judge explained that the defendants’ freedom of expression (set out in Section 2b of the charter and Section 3 of the *Charter of Human Rights and Freedoms*) should be exercised with caution by respecting the limits set out in various civil and criminal laws. The right to express a message during a labour dispute, as recognized in labour law, cannot be used as a justification to use the copyrighted work of another.

The court also reviewed the three basic criteria applied to interlocutory injunction applications, established in Section 752 of the *Code of Civil Procedure* in order to assess if Sun should succeed:

- Is there an appearance of right?
- Does the balance of convenience unfairly favour one party?
- Will the plaintiffs suffer irreparable harm if the injunction is not granted?

The judge decided that Sun had demonstrated a clear right, since its copyrighted work was being infringed and it had every right to ask the court for the discontinuance of such illegal use, as per Section 34(1) of the *Copyright Act*.

In regards to the balance of convenience, the judge found it irrelevant to analyze this question further, since Sun’s right had clearly been established. Nevertheless, he mentioned that the defendants would not suffer any prejudice by being forced to stop using the copyrighted work: they would still be able to send out the same message during their strike, even if they were unable to access Sun’s copyrighted work. Finally, the judge concluded that Sun would suffer irreparable harm if the injunction was not granted, since it would lose control over the use of its copyrighted

work. As a result of this analysis, the judge granted an interlocutory injunction to Sun, to be in force until the rendering of the final judgment.

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