



A PROVISIONAL INJUNCTION GRANTED TO STOP UNAUTHORIZED USE OF A *CIRQUE DU SOLEIL*'S PHOTOGRAPH

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PRECIS : In the matter of *Cirque du Soleil inc. v. Transit Éditeur inc.*, [2009 QCCS 4671], the Superior Court of Québec granted plaintiff *Cirque du Soleil* the provisional injunction it was seeking in order to have defendants Transit Éditeur inc. and Agence du livre ADL_(of whom Transit took up the interest) cease their unauthorized use of the plaintiff's photograph.

The facts are fairly simple: defendant Transit Éditeur inc. edited a book about internationally-renowned *Cirque du Soleil* and equally famous founder Guy Laliberté, a book which displayed, on its cover, a photograph of *Cirque*'s gymnast Maria Silaeva. This photograph appeared on *Cirque*'s website where it was explicitly identified as the plaintiff's property, even though its use was permitted under stipulated conditions. The defendant's use of this picture did not meet these conditions and was therefore unauthorized. Consequently, after sending the defendant a formal notice that remained unanswered, the plaintiff sought a provisional injunction in order to put an end to the defendant's unlawful use of its photo.

Despite the defendant's contentions that it had contractually acquired the right to use the picture from a third party, Justice Journet found *Cirque du Soleil* to be the sole owner of the work at issue. To come to this conclusion, the judge took note of Transit's judicial admission to the effect that the picture fell within the plaintiff's property and hence, was the object of the latter's copyrights. On this matter, it is worth mentioning that pursuant to Canada's *Copyright Act*, the owner of the initial photograph at the time the said photograph was taken is deemed to be its author:

Author of photograph

10. (2) The person who

(a) was the owner of the initial negative or other plate at the time when that negative or other plate was made, or

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(b) was the owner of the initial photograph at the time when that photograph was made, where there was no negative or other plate, is deemed to be the author of the photograph and, where that owner is a body corporate, the body corporate is deemed for the purposes of this Act to be ordinarily resident in a treaty country if it has established a place of business therein.”

The tribunal went on by stating that the book bearing the photograph was at the time out of stock, and its reprinting was thus imminent, creating a risk of further illegal use of the *Cirque's* picture. Consequently, Justice Journet expressed the view that it was urgent to protect the plaintiff's rights by means of a provisional injunction. In support of this finding was the fact that since the matter was one of copyrights, the plaintiff did not have to prove the prejudice it would have been subjected to had the injunction been denied. The Court here relied on the decision *Gestion Radisson Design inc. v. Structure marine Amarco inc.* [2007 QCCS 243].

It is to be noted that the plaintiff was also seeking an order providing that an Ontario distributor of the book published by Transit, although not a party to the case at bar, be nevertheless forced to give back the copies in its possession. Here, Justice Journet held that the Court had no jurisdiction to order a third party to do or cease to do something. In other words, a Court's order, by nature, could only reach the parties directly involved in the proceedings.

The Judge consequently granted the provisional injunction, ordering the defendants to definitively cease the infringement of the *Cirque's* copyrights. More precisely, the Court ordered the defendants to destroy the picture's original and immediately stop the reproduction or publication of the said picture, as well as its diffusion by any means. The order for destruction is quite harsh and unusual since the proceedings were only at a provisional level and not on the merits.

The Court also ordered the defendants to immediately cease selling the book at issue as well as recall the copies already distributed to bookshops and similar establishments.

Furthermore, Justice Journet ordered that the defendants hand over all copies of the book in their possession at the time the judgement was rendered as well as after the literary work's recall would have taken place. With this last finding, the Judge granted the plaintiff a remedy specific to Québec's law, that is, the seizure before judgement. Section 734(1) of the *Code of civil procedure* provides that

The plaintiff may also seize before judgment:

1° the movable property which he has a right to re vendicate; [...]

This provision was not meant to create a recourse for copyright matters but, ingenious lawyers link this procedural provision with Section 38(1)(b) of the *Copyright Act*, which reads as follows:

38. (1) Subject to subsection (2), the owner of the copyright in a work or other subject-matter may (...)
(b) take proceedings for seizure of those copies or plates before judgment *if, under the law of Canada or of the province in which those proceedings are taken*, a person is entitled to take such proceedings, as if those copies or plates were the property of the copyright owner.
[emphasis added]

This way to proceed was even discussed in *Théberge v. Galerie d'Art du Petit Champlain inc.*, 2002 SCC 34 and qualified as a “draconian procedure” and an “exception to the ordinary rules of law”.

By the deeming provision of Section 38 of the *Copyright Act*, the owner of an infringed copyright work is deemed the owner of the infringing copy and, as such, through the mechanism of the seizure before judgment, can recover the possession, as owner, of the infringing copies. This remedy could even be obtained without a Court order.

A provisional injunction being valid for a maximum of ten days pursuant to Section 753 of the *Code of Civil Procedure*, Justice Journet also issued an order to safeguard the rights of the parties, so that the provisional injunction be in full force and effect until the hearing of the interlocutory injunction.

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