

April 12, 2017

On April 6, 2017, the words "information location tool", as they appear in s. 41.27 of the Copyright Act, R.S.C. 1985, c. C-42 (the Act), were given their first judicial interpretation. S. 41.27(1) provides that a copyright owner is not entitled to a remedy other than an injunction against a provider of an "information location tool" that is found to have infringed copyright by making a reproduction of a work. As noted in *Trader Corporation v. CarGurus*¹, this exemption was introduced in 2012 to extend various protections to providers of network services and information location tools. As set out below, the court gave "information location tool" a narrow definition.

Background

Trader Corporation (Trader) commenced an action against CarGurus, Inc. (CarGurus), alleging that it had infringed Trader's copyright in 197,740 photos taken by Trader through its "Capture" service (Trader's photographers take photos of vehicles at various dealerships to include in their online listings). Trader sought a declaration that CarGurus had infringed its copyright in the photos, a permanent injunction and statutory damages under the Act in the amount of \$98,370,000 (being \$500 per photograph).

Trader and CarGurus are competitors in the digital marketplace for new and used vehicles in Canada. CarGurus entered the Canadian market for these services in 2015. In order to obtain photos for its listings, CarGurus indexed (or scraped) car dealerships' websites for photos (unlike Trader, it did not retain its own photographers). This "involves using computer software to 'crawl' an online data source to identify data of interest and then extract the data from that source."²

The court found that the photos were protected by copyright as they were original artistic works. While CarGurus argued that the photos were neither "original" nor "artistic works" because Trader's photographers are trained in Trader's methods and are required to take the photos in accordance with standardized procedures, the court found otherwise. The photographers exercise skill in taking photographs of the vehicles: "They apply their judgment in selecting among the various options for taking photographs, taking into account variables such as the subject matter, angles, staging and framing."³ Further, commercial photographs that appear on websites and in catalogues have previously been protected by copyright.⁴ The court also found that Trader owned the copyright in 152,532 of the photographs. There was insufficient evidence to support Trader's claim that it owned the remaining 44,208.

The court found that CarGurus had infringed Trader's copyright in the 152,532 photos, rejecting CarGurus' argument that it did not reproduce them (but merely "framed" them) because the images were not located on CarGurus' server, but rather on other servers hosting the dealerships' websites. CarGurus was nonetheless making the photos available to the public. The court also rejected the fair dealing defence asserted by CarGurus.

Defining “information location tool”

Having found that CarGurus had infringed Trader’s copyright and that the defence of fair dealing did not apply, the court considered whether CarGurus was protected by s. 41.27(1) of the Act from an award of damages against it, as a provider of an “information location tool”. That section reads as follows:

In any proceedings for infringement of copyright, the owner of the copyright in a work or other subject-matter is not entitled to any remedy other than an injunction against a provider of an information location tool that is found to have infringed copyright by making a reproduction of the work or other subject-matter or by communicating that reproduction to the public by telecommunication.

The term “information location tool” is defined in s. 41.27(5) as “any tool that makes it possible to locate information that is available through the Internet or another digital network”. However, as the court noted, the term “information location tool” had not yet been judicially considered.⁵

The exemption set out in s. 41.27 was introduced in 2012 when the Act was modernized in order to provide additional protections to providers of network services and information location tools, which the court explained (in layman’s terms) are “providers of services that enable the public to use and navigate the Internet.”⁶

CarGurus tendered expert evidence to support its position that it is a provider of an “information location tool” on the basis that CarGurus operates a search engine. However, the court rejected this broad definition of “information location tool”.

It explained: “Parliament intended to afford protection to intermediaries that provide tools that enable users to navigate and find information where it is located on the Internet. It did not intend to afford that protection to providers like CarGurus that gather information from the Internet and make it available to the user on the provider’s own website [emphasis original]”.⁷

The court also relied on a document released by the Government of Canada along with Bill C-11 (the bill that led to the 2012 updates to the Act), which explained that the bill was intended to protect search engines (and Internet service providers) when they “act strictly as intermediaries”.⁸ In this case, CarGurus was found not to be acting strictly as an intermediary. When displaying the photographs in question, the listings did not contain the name or address of the dealer or any hyperlink to that dealer’s site. Simply put: “While CarGurus may have located information about a vehicle and provided it to the user through its website, it did not enable the user to find this information where it was located on the Internet...⁹; Although the CarGurus website later added additional information about the dealerships that would have allowed consumers to contact them more easily, CarGurus was still not providing a tool that would enable the user to get to the online location of that vehicle information.

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Statutory Damages

The final point worth mentioning about this case is the assessment of damages. Trader claimed the minimum statutory damages of \$500 per work, which would have entitled it to damages in the amount of \$98,370,000 (for 196,740 photos) or \$76,266,000 (for the 152,532 photos that were found to be owned by Trader).

However, the court exercised its discretion to award damages in amount lower than \$500 per work, under s. 38.1(3) of the Act, on the grounds that there was more than one work in a single medium and that the awarding of the minimum amount would result in a total award that was grossly out of proportion to the infringement. (In this case, the single medium was CarGurus' website, which was considered to be a single medium, even though the site could be accessed on both a desktop and mobile application.)¹⁰

Further, the court did not find any bad faith on the part of CarGurus, which had obtained legal advice before entering the Canadian market and which had (incorrectly) assumed that the dealerships owned the copyright in the photos.¹¹ The court also considered Trader's conduct. Despite the correspondence between the parties prior to the litigation, Trader never told CarGurus about its Capture service or about the fact that it owned the copyright in the photos in issue.¹² Given the role that this omission played in the assessment of damages, claimants would be well served by being upfront and clear at the outset about the scope and nature of the copyright in issue and the nature of the alleged infringement.

The court ultimately awarded statutory damages in the amount of \$2 per photo, resulting in damages in the total amount of \$305,064. The result is that, while Trader succeeded on its application, its damages award was only a fraction of the amount sought.

Takeaways

This case provides lessons to both claimants and respondents in copyright matters, confirming that conduct matters in the assessment of damages. While not the sole basis for reducing the quantum of damages, both Traders' and CarGurus' conduct factored into the court's decision to reduce damages from \$76 million to \$305,000.

This case also serves as a warning to businesses that operate websites that index or search other websites for data to be used on their own websites that do not enable users to find the original location of that information. Such websites will not be considered providers of "information location tools" and therefore will not be afforded the protection against damages awards available to such providers under s. 41.27 of the Act.

1. 2017 ONSC 1841.↵
2. Ibid. at para. 5. ↵
3. Ibid. at para. 23. ↵
4. Ibid. at footnote 8, para. 24.↵
5. Ibid. at para. 43.↵
6. Ibid.↵
7. Ibid. at para. 46.↵
8. Ibid, citing Government of Canada, News Release, “Harper Government Delivers on Commitment to Reintroduce Copyright Modernization Act” (Ottawa, September 29, 2011), archived here: ↵
9. Ibid. at para. 49.↵
10. Ibid. at para. 58.↵
11. Ibid. at paras. 61-62.↵
12. Ibid. at paras. 63-64.↵

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