Can an Idea, Style or Method Be Protected Under the Copyright Act?

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Ahead of the 2021 holiday season, as children dream about the toys that Santa Claus will bring them, let's take a look back at a landmark decision that reviews what is copyrightable under the *Copyright Act*.

As visual artist Claude Bouchard ("Bouchard") learned from the outcome of her legal action against Ikea Canada ("Ikea"),[1] the *Copyright Act*[2] does not protect the ideas, styles or methods developed and used by artists to create their works, even if their work is exhibited in museums and marketed internationally.

From 1994 to 2005, Bouchard sold in a Montreal's Unicef store soft toys that she designed based on children's drawings. In September 2014, Ikea held a drawing competition for children and made 10 soft toys from the winning entries, marketed as part of the "Sogoskatt" collection. A portion of the profits were donated to UNICEF.

Originally, Bouchard was seeking a monetary award against UNICEF and Ikea for copying her toys, alleging that they had used, in particular, her idea, her original style and her methods.

In 2018, the Superior Court ruled on the case for the first time, dismissing the legal action against UNICEF based on the privileges and immunities of the United Nations.[3] UNICEF's immunity from suits is in this case absolute since Bouchard's legal action is directly related to the organization's mission.[4]

In January 2021, Justice Patrick Buchholz of the Superior Court put an end to the dispute between Bouchard and Ikea, dismissing the legal action for infringement of Bouchard's works based on the *Copyright Act* as being ill-founded, destined to fail and unreasonable, thus opening the door to its [5]

dismissal for abuse of process.

Why was Bouchard's infringement action ill-founded?

The Court first examined the arguments put forward by Ikea to the effect that two essential elements giving rise to the infringement action[6] could not be demonstrated by Bouchard:

1. There is no evidence that Ikea had access to Bouchard's work.[7]
2. There is no evidence that Ikea reproduced a substantial part of the plaintiff's work.

Therefore, Ikea argues that there was no infringement of the copyright of Bouchard, who was seeking a monopoly on an idea, style or method, which is not protected under the *Copyright Act*[8]

1. Lack of access to Bouchard's works

   The Court did not accept Ikea's first argument that there was a lack of access to Bouchard's works. It ascertained that the proceedings were at a too preliminary stage to make a determination.[9] The Honourable Justice Buchholz pointed out that section 51 of the *Code of Civil Procedure* is not [our translation] "a free pass to bypass the judicial process and prematurely set aside otherwise allowable claims" when the evidence is still incomplete.[10]

   The Court also noted the seriousness of the links between Ikea and UNICEF, which may have made access to Bouchard's works possible and likely.[11] In this context, only a hearing on the merits could have clarified the question of access to Bouchard's works by making it possible to test, more precisely, the credibility of the witnesses at trial.[12]

2. Lack of reproduction of a substantial part of the work

   Bouchard alleged that the toys designed by Ikea incorporate eight essential features of her soft toy concept, namely [our translation]:

   > Round eyes cut from non-fraying fabrics and sewn around the edges;
   > Thinly cut linear mouths sewn into non-fraying fabrics;
   > iii. Polyester fibre stuffing;
   > iv. The toy is proportionate to the size of children's hands;
   > v. Soft toy faithful to the child's drawing;
   > vi. Child's name and age on the tag;
   > vii. Everything is solid (head, body, legs, and tail), in the same plane and stuffed;
   > viii. Use of textiles, plush, and the original colours of the drawings."[13]

However, the Court accepted Ikea's second argument that Ikea's soft toys did not reproduce a substantial part of Bouchard's work. Since Bouchard's works and Ikea's works did not share a resemblance, this means that a substantial part of the works was not reproduced.[14]

How to determine if a "substantial part" of a work has been reproduced?

Under the *Copyright Act*, copyright, "in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof".[15] The Supreme Court defined "substantial part" of the work in the Cinar decision,[16] stating that it is a flexible notion to be interpreted based on the facts.

The assessment is holistic and qualitative in nature. The criteria to be used by the courts to determine whether there has been a reproduction of a "substantial part" of a work are as follows:

> The originality of the work, which must be protected under the *Copyright Act*;[17]
> The part "represents a substantial portion of the author's skill and judgment";[18]
> The nature of the two works as a whole, without looking at isolated passages;[19]

> “[T]he cumulative effect of the features copied from the work”.[20]

Although there are some similarities between the Bouchard and Ikea soft toys, the soft toys are completely different and do not look the same because they are designed from the drawings of different children. Bouchard even admitted that [our translation] “a toy made from a unique child’s drawing is in itself a unique toy”.[21]

Can the *Copyright Act* protect an idea, a concept or a body of work?

Bouchard instead claimed that Ikea illegally reproduced her idea, concept, style or methods.[22] She ultimately argued that Ikea did not copy a specific work, but instead copied her “work” in a broader sense.[23]

Bouchard’s arguments highlight issues that often come up in the court system and demonstrate a misunderstanding of what is protected by copyright.

> Copyright of an idea, concept, style or method

In 2004, the Supreme Court pointed out that copyright protects the expression of ideas in a work and not the ideas themselves.[24]

Justice Buchholz rightly pointed out that an artist can be inspired by another artist without infringing the rights protected by the *Copyright Act*. He noted, for example, that if styles were protected, Monet could not have painted in the Impressionist style.[25]

The Court also noted that the soft toys made by Bouchard correspond to a generic style dictated by safety standards for the manufacture and sale of toys.[26] Thus, the *Copyright Act* does not offer any protection for ideas, concepts, styles or manufacturing methods and techniques.

> Copyright of an artistic legacy, corpus, or collection

The Court specified that the *Copyright Act* does not protect a body of work or an artistic legacy, but rather each individual work.[27]

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1. *Bouchard* c. *Ikea Canada*, 2021 QCCS 1376.
2. R.S.C. 1985, c. C-42.
3. *Bouchard* c. *Ikea Canada*, 2018 QCCS 2690.
4. *Idem*, para. 24–25.
5. Section 51, *Code of Civil Procedure*, CQLR c. C-25.01.
6. Section 2, “infringing”, *Copyright Act*.
7. *Bouchard* c. *Ikea Canada*, supra, note 1, para. 16–17.
8. *Idem*, para. 15.
9. *Idem*, para. 34.
10. *Idem*, para. 28.
11. *Idem*, para. 37–39.
12. *Idem*, para. 40.
13. *Idem*, para. 49.
14. *Idem*, para. 55.
15. Section 3, *Copyright Act*.
16. *Cinar Corporation* v. *Robinson*, 2013 SCC 73, para. 26, 35–36.
17. *Idem*, para. 26.
18. *Idem*.
19. *Idem,* para. 35.
20. *Idem*, para. 36.
21. *Bouchard* c. *Ikea Canada*, supra, note 1, para. 53.
22. *Idem*, para. 56.
23. *Idem*, para. 69.
24. *CCH Canadian Ltd.* v. *Law Society of Upper Canada*, 2004 SCC 13, para. 8.
25. *Idem*, para. 67.

26. *Toys Regulations*, SOR/2011-17, adopted under the *Canada Consumer Product Safety Act*, S.C. 2010, c. 21, s. 29, 31–32.
27. *Bouchard* c. *Ikea Canada*, supra, note 1, para. 69–71.