

Michal Kasprovicz Associate
michal.kasprovicz@dlapiper.com

Sangeetha Punniyamoorthy Partner
s.punn@dlapiper.com

DLA Piper, Toronto

Trader v. CarGurus

Superior Court of Justice,
Ontario (2017 ONSC 1841 (CanLII), 6 April 2017)

CarGurus utilised webcrawler technology to find and index vehicle listings on its website, which drew a complaint from Trader, the operator of a digital marketplace where users can list vehicles for sale; Trader claimed copyright in the contents of its websites and in the vehicle photos on such websites. In the ensuing case, CarGurus relied upon in defence *inter alia* a new exemption in the Canadian Copyright Act for providers of an ‘information location tool,’ making this the first case in Canada to judicially consider this defence.

Certain companies operating within Canada’s digital landscape, such as those who provide search engine services, utilise automated software sometimes referred to as ‘webcrawler’ software to browse the internet and identify information, which may then be indexed and subsequently searched. However, information identified by a webcrawler need not only be indexed, it may also be included with a company’s own content on its own website. Potentially problematic is the fact that webcrawlers generally carry out their data collection task indiscriminately, simply accessing third party websites and capturing content. What happens if the content captured in this manner is protected by copyright? This issue was put squarely before the Ontario Superior Court of Justice in *Trader v. CarGurus*, 2017 ONSC 1841.

Facts

The facts of the case are simple. Trader operates websites in Canada - ‘autotrader.ca’ and ‘autohebd.net’ - that provide users with a network or digital marketplace where they can list vehicles for sale. Trader also provides a ‘Capture’ service whereby Trader hires photographers to photograph vehicles for various dealers. These photos are then included alongside further information about the vehicle in sales listings on Trader’s website, and on the dealers’ websites.

CarGurus is a provider of a web-based marketplace in the US for new and used vehicles. In 2015, it entered Canada with its digital platform, in direct competition to Trader. CarGurus employed webcrawler software to comb websites of car dealers to capture vehicle listings, which it would then include on its website. If a dealer didn’t want their vehicle listing to appear on CarGurus’ website, they could put in a request to have it removed. CarGurus’ evidence was that they had been engaged in this practice in the US for years with no complaints. Apparently dealers in the US were quite happy with the increased publicity they received through the additional listings.

Copyright issues in dispute

Despite no apparent problems in the US, Trader alleged that it had received complaints from dealers in Canada, indicating that their vehicles were being listed by CarGurus without their permission. Trader informed CarGurus

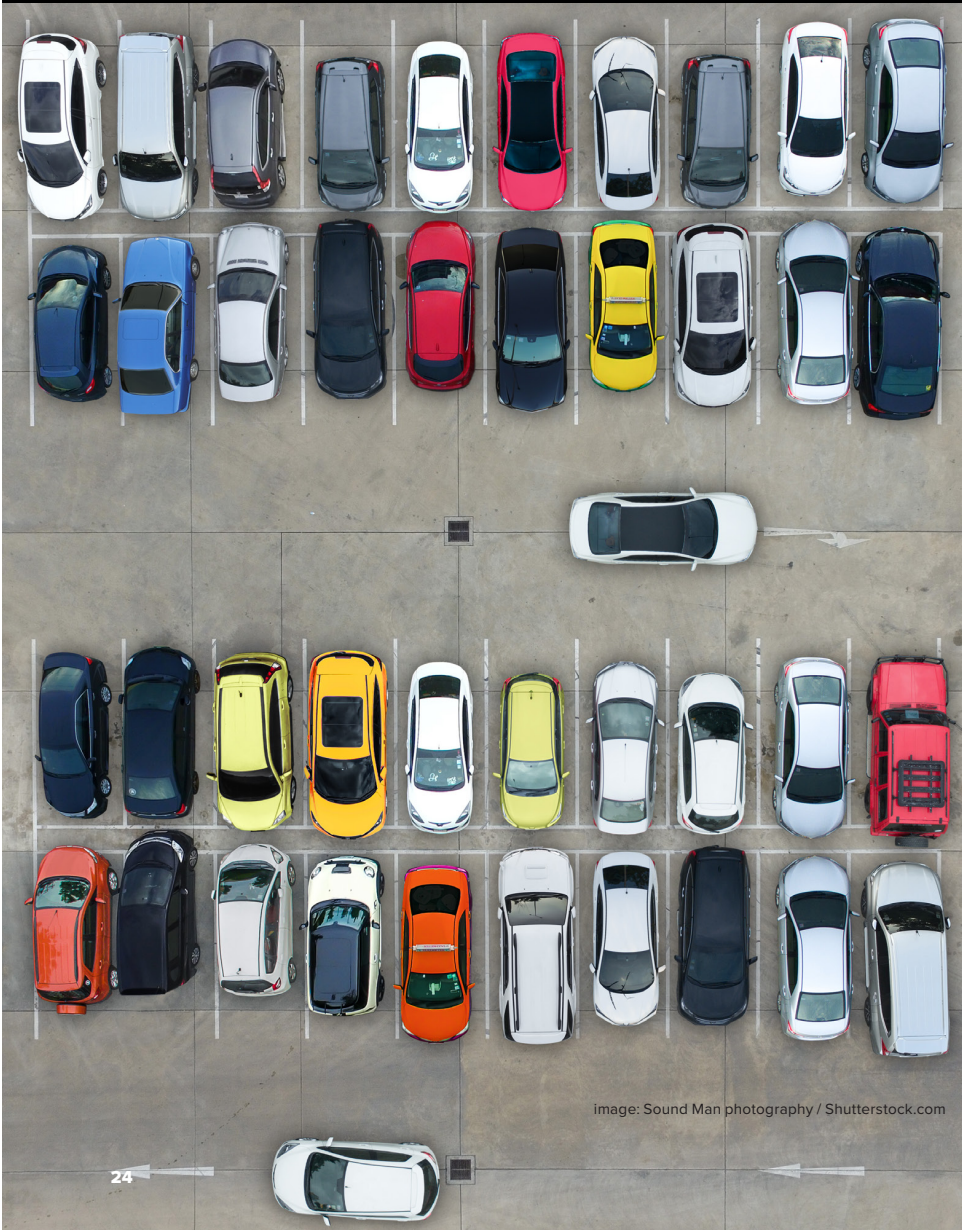


image: Sound Man photography / Shutterstock.com

that it held copyright in the contents of its websites and in the vehicle photos, which were purportedly displayed on CarGurus' website. Trader launched litigation in Ontario seeking a declaration that its copyright in these photos was infringed by CarGurus, a permanent injunction, and damages of almost \$100 million (comprising statutory damages of \$500 per photo).

Preliminary issues the Court had to decide were whether copyright actually subsisted in the allegedly infringed photos, and whether Trader owned the copyright. CarGurus argued that the photos were neither "original" nor were they "artistic works" because Trader's photographers were merely following Trader's standardised procedures when taking photos. No skill and judgment was applied in taking the photos as the entire exercise was merely mechanical. CarGurus also argued that the 'merger doctrine' should preclude copyright from applying to the photos as copyright should not apply to the expression of an idea if there are only a limited number of ways in which that idea may be expressed. Applying copyright in such cases would effectively provide a monopoly over the idea itself.

Ontario Court's analysis

Threshold for copyright

The Court rejected these arguments. The mere fact that the photographers were following a prescribed procedure did not necessarily eliminate the need for creativity when taking the photos. The evidence showed that the photographers had to choose correct angles, staging and proper framing for the photos. Accounting for these variables necessarily required an exhibition of skill and judgment. Without providing an opinion on the applicability of the merger doctrine, which is an American legal concept, the Court held that there are many ways in which photos of a vehicle may be taken, such that a finding of copyright would not give Trader a monopoly over vehicle photos generally. The Court also concluded that Trader was indeed the rightful owner of copyright in the photos at issue.

Infringement and defences of fair dealing and information location tool

The Court then turned its attention to infringement. CarGurus argued that it had never actually reproduced Trader's photos; rather, it merely 'framed' them. In other words, its webcrawler software

identified photos but these were never copied and never stored on a server administered by CarGurus. In effect, CarGurus' website merely pointed at images hosted elsewhere. However, when a user's browser accessed CarGurus' website, the browser would display Trader's photos to the user in the 'frame,' in a manner that made the image available to that user, albeit not from a file stored on the CarGurus server.

The Court rejected the argument that CarGurus had no liability because it had not copied and stored the images. The Court made reference to the Copyright Act, which provides that, in addition to the prohibition on copying, only a copyright owner may make a work available to the public by telecommunication. Despite purportedly not copying the photos, CarGurus did provide the public with access to them on its website, thereby making them available to the public by telecommunication, and thereby infringing copyright.

CarGurus also attempted to rely on two other defences to avoid liability: A defence in fair dealing for the purposes of research and a defence based on a new exemption in the Copyright Act for providers of an 'information location tool.' Under the new exemption, a copyright owner is precluded from seeking a remedy, other than an injunction, from a provider of an 'information location tool.' An information location tool is defined as a tool that enables a user to search and access information available on a digital network, such as the internet. This was the first case in Canada to judicially consider this defence.

The Court held that 'research' should be given a broad and liberal interpretation and accepted that, from the perspective of users, reviewing vehicle listings could amount to researching potential purchases. However, CarGurus' own purpose was purely commercial and it need not have used Trader's photos; it could have had its own taken. As such, the Court did not recognise that the dealing was fair and the defence of fair dealing, therefore, did not apply.

CarGurus tendered expert evidence to underpin its argument that its service was an 'information location tool' as it was in essence a search engine. The expert opinion was to the effect that a service that "refers or links users

to an online location on the World Wide Web" would be an information location tool and that this would include search engines, directories, indices, references, pointers, and hyperlinks.

The Court disagreed with CarGurus' argument, holding that, at its core, an information location tool is a tool that makes it possible to locate information available on the internet. The purpose of the defence is to exempt internet service providers and search engines from certain liability in so far as these entities act strictly as intermediaries in communicating, caching, and hosting information. The Court held that CarGurus was not strictly acting as an intermediary to facilitate user searches. Although CarGurus gathered and presented information regarding vehicles, it did not enable users to locate where on the internet this information originated and where it could be found. The only recourse available to a user who wanted such further information was to contact CarGurus directly and request it. Therefore, CarGurus was not a mere intermediary, but acted as a liaison between potential purchasers and dealers.

As CarGurus failed to establish any defence to copyright infringement, the Court moved to an assessment of damages. Here, the Court held that damages of \$500 per work, as sought by Trader, would yield an award that was "grossly out of proportion to the infringement in this case." The Court noted that CarGurus had removed all the photos at issue from its website as soon as possible, after being notified of Trader's allegations, and therefore limited the award to \$2 per work and declined to award a permanent injunction.

Conclusion

Although the remedies provided to Trader due to infringement were limited, this case should sound a warning bell to any company that utilises software to reference information from the internet. There is nothing to say that a different Court presented with slightly different facts would not order maximum statutory damages. Unless a company is acting strictly as an intermediary to help users locate information on the internet, it may be liable for copyright infringement in Canada if copyrighted works are collected or linked to autonomously by its software.