

## Copyright Law: Front and Centre at the Supreme Court of Canada

Dec 5, 2011

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On December 6 and 7, 2011, Canada's highest court will hear five separate appeals involving copyright law. All five appeals arise from decisions of the Copyright Board of Canada (the Board) and have the potential to fundamentally impact Canadian copyright law.

### **SOCAN Tariff 22.A Appeals: Use of Music Over the Internet**

Three of the appeals involve the decision of the Board in proceedings commenced in 1995 concerning a proposed tariff covering music use over the Internet (Tariff 22.A) filed by the Society of Composers, Authors and Music Publishers of Canada (SOCAN). The Board heard the matter in two phases. The first phase dealt with jurisdictional issues and internet service provider (ISP) liability and resulted in the 2004 Supreme Court decision, *SOCAN v. Canadian Assn. of Internet Providers*, [2004] 2 S.C.R. 427. The second phase dealt with, among other things, the quantification of the tariff itself and has resulted in a number of applications for judicial review and three of the five appeals that will be heard by the Supreme Court.

In its Tariff 22.A decision, on one issue the Board held that SOCAN was not entitled to compensation for previews of musical works offered by online music retailers (such as Apple's iTunes Store). The Board held that previews constitute "fair dealing" for the purpose of research pursuant to section 29 of the *Copyright Act*. The test for fair dealing – as set out in *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339 – requires that the use of the work fall within one of the purposes enumerated in the Act and also be "fair". The Federal Court of Appeal upheld the Board's decision, stating that the relevant purpose is that of the end consumer, which in the case of previews is "research". SOCAN contends that the purpose of previews is purely commercial shopping and does not fall under the meaning of "research". In *SOCAN, et al. v. Bell Canada, et al.* (Case Number 33800), the Supreme Court will hear from numerous parties to decide whether the purpose of previews is for research, and if so, whether the use of previews is fair.

The second of the Tariff 22.A appeals concerns the Board's ruling that the transmission of a single download to a member of the public is a communication to the public by telecommunication under section 3(1)(f) of the *Copyright Act*. The Board's categorization of downloads requires royalties to be paid for downloads of musical works via the Internet. The Federal Court of Appeal upheld the Board's interpretation. In *Rogers Communications Inc., et al. v.*

SOCAN (Case Number 33922), the Supreme Court is being asked to review this decision and establish a clear and consistent approach to determining when a transmission of a copyright-protected work over the Internet is a communication of that work to the public by telecommunication. The appellants, telecommunications companies that routinely transfer files to individuals via downloads, contend that since downloads are discrete transactions to individuals, they cannot constitute communication “to the public” under section 3(1)(f). The third Tariff 22.A appeal, *Entertainment Software Association, et al. v. SOCAN* (Case Number 33921), raises similar issues concerning Internet downloads. The Supreme Court will review the Federal Court of Appeal’s decision that a download of a video game that includes music constitutes a communication of that music to the public by telecommunication. The Entertainment Software Association (ESA), which represents the majority of video game publishers in North America, equates the download of a game with a purchase from a retail store. ESA contends that a sale of a game should not attract an additional tariff because a musical work is not perceptible, and therefore not communicated, in a download.

## **Fair Dealing in Education**

The fourth appeal, *Province of Alberta as represented by the Minister of Education, et al. v. Canadian Copyright Licensing Agency Operating as “Access Copyright”* (Case Number 33888), will address the issue of “fair dealing” in the context of elementary and high schools. The main issue is whether the photocopying of excerpts of copyrighted materials by teachers for use in classroom instruction constitutes fair dealing. Similar to *SOCAN v. Bell Canada, et al.*, the Supreme Court will consider whose purpose is relevant and whether the use of the copyrighted materials falls within one of the fair dealing enumerated purposes. The Federal Court of Appeal held that the true purpose of the photocopying was instructional or non-private study, and as a result, the fair dealing exception did not apply. Ministries of Education for each of the affected provinces, together with all Ontario school boards, have appealed this decision, arguing that the purpose of the photocopying is “private study”, an allowable purpose under fair dealing.

## **Sound Recordings in Soundtracks**

Finally, the Supreme Court will determine the appropriate interpretation of “sound recording” as defined in section 2 of the *Copyright Act* in *Re:Sound v. Motion Picture Theatre Associations of Canada, et al.* (Case Number 34210). The definition contains an exclusion of “any soundtrack of a cinematographic work where it accompanies the cinematographic work”. The Board and the Federal Court of Appeal held that no remuneration is required for sound recordings used as part of the soundtrack accompanying movies or television programs. The Supreme Court has been asked to clarify the application of the exclusion and determine whether performers and makers of sound

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recordings are entitled to equitable remuneration under section 19 of the *Copyright Act* when a published sound recording is used as part of a soundtrack that accompanies a movie shown in a cinema or broadcast over television.

Osler, Hoskin & Harcourt LLP is representing parties in three of the five appeals before the Supreme Court of Canada:

- Glen Bloom will represent Music Canada (formerly the Canadian Recording Industry Association), an appellant in *Society of Composers, Authors and Music Publishers of Canada, et al. v. Bell Canada, et al.*
- Marcus Klee will represent the Association of Universities and Colleges of Canada and the Association of Canadian Community Colleges, joint interveners in *Province of Alberta as represented by the Minister of Education, et al. v. Canadian Copyright Licensing Agency Operating as "Access Copyright"*.
- Mahmud Jamal, Glen Bloom, Marcus Klee, and Jason MacLean will represent the appellant in *Re:Sound v. Motion Picture Theatre Associations of Canada, et al.*

If you have any questions on the implications of the subject matter of this Osler Update, or you wish to discuss further, please contact [Glen Bloom](#) or [Marcus Klee](#).