# ASCAP, SOCAN, Public Performances and Telecommunications

September 30, 2010 by Bob Tarantino

The US Federal Court of Appeals for the Second Circuit decision in *US v ASCAP* (sometimes referred to as *ASCAP v RealNetworks*) (text of decision is available here) has generated a surprising amount of commentary - particularly from practitioners and academics outside of the United States. The two cruxes (cruxii?) of the decision are that the downloading of a digital song file does not constitute a "public performance" for purposes of US copyright law - and so entities (such as RealNetworks and Yahoo!, who were applicants and appellees in the case) who offer music downloading services to end-users are not liable to make payment to performing rights organizations such as ASCAP - and that the district court charged with setting the royalty which ASCAP could charge to online service providers made some analytical errors in deciding on a rate. For purposes of this post, only the first issue, that relating to public performances, will be discussed.

As Barry Sookman has noted (in a comprehensive post on the matter), the decision highlights differences between Canadian and US copyright law. Ben Chaliss, writing at the 1709 Copyright Blog (and from a UK perspective), also provides a useful review of the decision in "Internet rates, rights (and wrongs)". As Barry notes,

[t]he decision highlights a significant difference between US and Canadian law on whether copyright owners of the performance rights in musical works are entitled to royalties when a copy of a music file is transmitted over a network

I'd like to explore how that "significant difference" arises, because I think it's worth highlighting the fact that it stems from fundamental differences in how our respective copyright legislation conceptualizes the "bundle of rights" which comprise copyright, and not from divergence about how to interpret the same right. In short, the same activities (selling a song for download over the internet) are treated differently on either side of the border because our copyright legislation characterizes the rights which are engaged in completely different ways.

In the United States, as has now been confirmed by the 2nd Circuit Court of Appeals, the downloading of a song does not constitute a "public performance" - an exclusive right of the copyright owner accorded by Section 106(4) of the US *Copyright Act* - and so no royalty is payable to ASCAP (or, presumably, BMI or SESAC, the other public performance collectives).

In Canada, by contrast, the federal appeals courts appear to have determined that SOCAN (the Canadian equivalent of ASCAP, BMI and SESAC) *is* entitled to a royalty when a song is downloaded - but *not* because the song has been "publicly performed". Instead, under Canadian law, a royalty is payable because the composition has been "communicated to the public by telecommunication", a right which is exclusively controlled by SOCAN (see the Tariff 24 Ringtones Decision (2008 FCA 6) and the *SOCAN v Bell* Canada decision (released September 2, 2010)).

Compare the wording of the relevant pieces of legislation:

- in the US *Copyright Act*: "the owner of copyright under this title has the exclusive rights to do and to authorize ... in the case of ... musical ... works ... to **perform the copyrighted work publicly**" (Section 106(4))
- in the Canadian Copyright Act: "“copyright”, in relation to a work, means the sole right to ... **perform the work or any substantial part thereof in public** ... and **includes** the sole right ... in the case of any ... musical ... work, **to communicate the work to the public by telecommunication**" (Section 3(1))

ASCAP is not entitled to a royalty when a song is downloaded because that song has not been "publicly performed". Under Canadian law, however, whether the song has been "performed" or not (whether publicly or otherwise) is largely irrelevant - SOCAN is entitled to receive a royalty when a song is downloaded because the song has been "communicated to the public by telecommunication". Canadian courts are not relying on an expansive concept of "performance" (whether public or not) when affirming the right of SOCAN to collect a royalty for downloads - they are recognizing the existence of a distinct, separate (even if logically subordinate) right.

The foregoing isn't to say that the decision which the Canadian courts have reached about downloads and communications to the public is unimpeachable. While it's difficult to find fault with the US 2nd Circuit's ruminations on the nature of a "performance" and its conclusion that downloading a song doesn't resemble anything we would normally think of as a performance (as the court rather drily noted, "a download plainly is neither a 'dance' nor an 'act'"), the conclusion of the Canadian Federal Court that a download constitutes a communication to the public seems somewhat less secure. The Federal Court in the *SOCAN v Bell* decision notes that there is a distinction between the concepts of a "performance in public" and a "communication to the public", but focuses its analysis only on the latter - and ends with the conclusion that one can communicate to the public "by means of a series of private communications" (supplemented by the notion that it is mostly the intention to communicate to the public which is conclusive, even if you only succeed in being "heard" (or downloaded) by one person). The Court used an apt metaphor to describe its reasoning: a store sells goods "to the public" even if it only sells items one at a time. That being said, the stability of that analysis, being heavily dependent on context, is open to question, and, as Sookman alludes, a Supreme Court confirmation would be welcome.

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