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Supreme Court Reaches Decisions in Copyright Cases

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On July 12, 2012 the Supreme Court of Canada released decisions in five appeals on copyright cases. Each of the appeals stem from the Federal Court of Appeal’s judicial review of the Copyright Board of Canada decisions on issues arising out of the collective administration of copyright. In each case, the Supreme Court decided in favour of objectors to copyright tariffs that had been certified by the Board¹. The copyright collectives were unsuccessful in all four of the five appeals, and only partially successful in the fifth appeal.

The five decisions have three common themes: 1) the Court reaffirmed the principle that the Copyright Act seeks to balance between protecting the interests of copyright owners and providing access to, and dissemination of, owners’ creations; 2) the Court has also reaffirmed the importance of technological neutrality in construing the Copyright Act. The Act is to be applied equally to technologically different forms of media; and 3) decisions in foreign jurisdictions, including in the United Kingdom and Australia, must be viewed with caution due to the differences in statutory provisions and the scope of copyright protection.

In Entertainment Software Association v. SOCAN, 2012 SCC 34, SOCAN, the collective representing the Canadian performing rights of millions of Canadian and international music composers and publishers, had obtained certification by the Copyright Board of a tariff for the communication to the public by telecommunication of musical works as a result of the downloading of video games which include such works from online services. The appellants claimed that the downloading of video games did not involve a communication. In a five to four split decision the Supreme Court agreed. A download is merely a more efficient means of delivering copies of games to consumers than traditional means. The communication right has historically been associated with the right to perform a work and not the right to reproduce a work. The download of a video game is a single activity that delivers a durable copy to an end user. That one activity does not also involve a communication. As a result of the Supreme Court’s decision, no public performance royalties are payable for downloading video games that include musical works.

In Rogers Communications Inc. v. SOCAN, 2012 SCC 35, SOCAN had obtained certification of a tariff for the communication to the public by telecommunication of musical works as a result of permanent downloads, limited downloads and on-demand streams of sound recordings of musical works. The appellants claimed that a point-to-point Internet transmission was not “to the public” and that therefore...
the communication right did not apply to downloads or streams. The decision in the *Entertainment Software* case disposed of the appeal in respect of downloads as they are not communications. The Supreme Court held that, for point-to-point communications of the same work to an aggregation of individuals, it did not matter whether or not those individuals received the communication at the same or different places or the same or different times. By making the musical works available through on-demand streams to anyone with Internet access, online music services communicate the musical works to the public. As a result of the Supreme Court decision, no public performance royalties are payable for downloading musical works. They are however payable by online music services for on-demand streams.

In *Alberta v. Access Copyright*, 2012 SCC 37, Access Copyright had obtained certification of a tariff for the reproduction of published works by K-to-12 schools. In calculating the royalty payments the Copyright Board included, as compensable copies, copies of short extracts made by teachers and provided to students as required reading, complementing their main textbooks. The Board had rejected a claim that the copying was fair dealing for the purpose of research or private study on the grounds that the true purpose was instruction or non-private study and that therefore the fair dealing factors denied fair dealing. In another five to four split decision the Supreme Court endorsed its prior landmark fair dealing decision in *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13 and provided further guidance on applying fair dealing. As fair dealing is a user’s right, the allowable purpose of the dealing is that of the user. Teachers have no separate purpose of instruction; they facilitate students’ research and private study. Studying and learning are essentially personal, whether engaged in with others or in isolation. Buying books for each student was not a realistic alternative to reproducing short extracts to supplement student textbooks. Balancing all the factors, the Supreme Court concluded that the making of copies of short extracts constituted fair dealing. The Supreme Court’s decision broadens the scope of fair dealing, particularly in the context of non-profit education. Although K-to-12 schools will have to pay royalties for their reproduction of published works, their payments will not include payments for making copies of short extracts for required reading by students.

In *SOCAN v. Bell Canada*, 2012 SCC 36, SOCAN sought a tariff for communicating 30-second previews of musical works made available by online music services for consumers. The Copyright Board concluded that the use of previews constituted fair dealing for research purposes and that previews would not be included in a tariff targeting online music services. The Supreme Court agreed. Research is to be given a generous interpretation and is a low threshold in the first step of the two step fair dealing analysis. Consumers used previews for conducting research to identify what music to purchase. There were reasonable safeguards in place to ensure that consumers were in fact using previews for that purpose. The previews were streamed, shorter, and often lesser quality than the works available for purchase. These safeguards prevented the previews from replacing the works. SOCAN argued the quantity of music heard through previews was significant. Although the quantity in the aggregate was significant, when analysing fair dealing the amount should be assessed on an individual use.

In *Re:Sound v. Motion Picture Theatre Associations of Canada*, 2012 SCC 38, Re:Sound had sought a tariff, on behalf of performers and record labels, for the public performance and communication to the public by telecommunication of sound recordings embodied in soundtracks of motion pictures exhibited at cinemas and television programs broadcast over television. The Copyright Board had concluded that the definition of “sound recording” in the *Copyright Act* excluded any sound recording embodied in a soundtrack when it accompanied the motion picture or television program. The Supreme Court agreed, finding that a reading of the words in the definition in their entire context and in their grammatical and ordinary sense supported the Board’s conclusion. The Court also found that the language of comparable
provisions in United Kingdom and Australian copyright legislation is fundamentally different than the Canadian definition. Therefore the decision of the High Court of Australia on which the appellant relied on was not followed. Finally, the Court concluded that the Board’s interpretation was consistent with the scheme of the Act, the intention of Parliament and Canada’s international obligations under the Rome Convention (International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations).

In Alberta v. Access Copyright, 2012 SCC 37, Marcus Klee was counsel for the intervenors, Association of Universities and Colleges of Canada and Association of Canadian Community Colleges.

In SOCAN v. Bell Canada, 2012 SCC 36, Glen Bloom was counsel for the appellant, Canadian Recording Industry Association.

In Re:Sound v. Motion Picture Theatre Associations of Canada, 2012 SCC 38, Mahmud Jamal, Glen Bloom, Marcus Klee and Jason MacLean were counsel for the appellant, Re:Sound Music Licensing Company.

If you have any questions about these decisions or wish to discuss further, for guidance please contact any one of the authors or your trusted legal advisor at the firm.

1 Although in Rogers Communication Inc. v. SOCAN the Court found in favour of the collective on the principal legal issue, the appeal was allowed in part.

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