

MUSIC FILE SHARING ON THE INTERNET IS STILL LEGAL, AT LEAST FOR NOW

By

Bob H. Sotiriadis and France Lessard*

LEGER ROBIC RICHARD, Lawyers,

ROBIC, Patent & Trademark Agents

Centre CDP Capital

1001 Victoria Square - Bloc E – 8th Floor

Montreal, Quebec, Canada H2Z 2B7

Tel. (514) 987 6242 - Fax (514) 845 7874

www.robic.ca - info@robic.com

Whether you see it as an act of piracy or not, music file sharing on the Internet is a common practice. It is easily available and cheap for the time being, it is not illegal either. The Federal Court of Canada recently ruled that it was not a copyright infringement to place a copy of a downloaded song in a computer directory shared with others, even if that copy could be accessed via a peer-to-peer service. (*BMG Canada Inc. et al. v. John Dow* (2004) F.C. 488 (March 31, 2004, Finckenstein, J.))

The Plaintiffs in this case are all members of Canada's recording industry. They instituted an action against different unknown Defendants who allegedly infringed the copyright of the Plaintiffs' members by illegally trading music files downloaded from the Internet. The twenty-nine alleged infringers operated on the Internet under pseudonyms and Plaintiffs could not identify them. The Plaintiffs turned to different Internet service providers (ISPs) and asked the Court to force those ISPs to reveal the names and addresses of the account holders of specific Internet protocol addresses (I.P. addresses) apparently used to commit the infringement alleged by the Plaintiffs.

The 29 Internet users apparently each downloaded over 1000 songs onto their own computers. Those individuals apparently used peer-to-peer file sharing programs enabling users to connect to a peer-to-peer network and render available shared files to any other users connected to the same network. In other words, these Internet users basically downloaded their music files into a shared library also available to other users. The Plaintiffs argued that this form of music sharing constituted an infringement of their rights in copyrighted music under the *Canadian Copyright Act*.

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* Lawyer, Bob H. Sotiriadis is a senior partner in the lawfirm LEGER ROBIC RICHARD, g.p. and in the patent and trademark agency firm ROBIC, g.p.; Lawyer France Lessard is a member of the same firms. Published in the issue of July 2004 of *Montreal Business Magazine*. Publication 062.016E.

First of all, the Court considered that the evidence brought by the Plaintiffs was not conclusive and constituted largely of hearsay. The affidavits were provided by the president of a company which provides online and anti-piracy protection. The investigation was however not carried out by this president, but by the employees of the company who could have provided the evidence themselves based on their personal knowledge. Furthermore, the evidence was not clear as to how the pseudonyms of the Internet users were linked to the specific I.P. addresses identified by the Plaintiffs. Finally, it was questionable from the evidence brought by the ISPs that the information sought by the Plaintiffs, if the order was to be granted, would be reliable. The ISPs indicated that the information would not only be very difficult and time consuming to obtain, but there was no certainty as to the correct identity of the account holders identified, who could very well not be the actual computer users.

More importantly, the Court's decision turned on the definitions of the words "authorization" and "distribution" with respect to copyright infringement. In ruling that the Plaintiffs failed to provide any evidence of copyright infringement under the circumstances, the Court relied on the fact that the Copyright Law is a statutory law in Canada. Hence, a Plaintiff can claim copyright protection only to the extent provided for in the statute. More particularly, the Court turned to Section 80 (1) of the *Copyright Act* providing that the "*act of reproducing all or any substantial part of a musical work embodied in a sound recording... onto an audio recording medium for the private use of the person who makes the copy does not constitute an infringement of the copyright in the musical work, the performer's performance or the sound recording*". In other words, downloading a song for personal use is not copyright infringement under the Act.

The Court also concluded that the Plaintiffs did not provide evidence that the 29 Internet users either distributed or "authorized" the reproduction of any copyrighted work. All the evidence revealed was that the individuals had placed their own personal copies into a shared directory which also happened to be accessible by other users via a peer-to-peer service. The Court relied on the recent decision of the Canadian Supreme Court in *CCH Canada Ltd. v. Law Society of Canada*, (2004) S.C.C. 13 which defines the word "authorize" as : "sanction, approve and countenance". *CCH Canada* also established that setting up the facilities to allow copying was not equivalent to authorizing infringement.

The Court also concluded that the mere fact of placing a copy on a shared directory in a computer where that copy could be accessed was not "distribution" as contemplated by the *Copyright Act*. To constitute

distribution, there should have been a positive act by the owner of the shared directory. For example, sending out copies or advertising that the music files were available for copying could have been a form a distribution, but no evidence of such positive act was put forward by the Plaintiffs.

The Court also weighed the public interest in favour of disclosure of privacy information such as the names and addresses of Internet users and those Internet users' legitimate privacy concerns. Since the information about to be disclosed was not reliable, was difficult to obtain and there was a serious possibility of an innocent account holder being identified, the Court was of the view that the privacy concerns outweighed the public interests in favour of disclosure.

The Court's finding is deeply rooted in the wording of a statute, namely the *Canadian Copyright Act*. Its decision does not approve or disapprove of the activities complained of by the Plaintiffs, but rather acknowledges the limitations found in Canadian legislation regarding new technologies. The Court made a quick reference to the *World Intellectual Property Organization Performances and Phonograms Treaty*, but could not apply same since it had not been implemented in Canada and therefore did not form part of Canadian Copyright Law. There already is pressure exercised by lobbyists for a ratification of this International Convention and the Plaintiffs have already appealed the decision of the Federal Court.

Although, music file sharing has been found not to be illegal by the Federal Court, this is not the end of the story!

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