



NO SUMMER HOLIDAY FOR THE SUPREME COURT WITH FIVE COPYRIGHT DECISIONS

ADAM MIZERA^{*}
ROBIC, LLP
LAWYERS, PATENT AND TRADE-MARK AGENTS

The issue of copyright took front stage in December 2011 at the Supreme Court of Canada as five appeals were heard over a two day period. In July 2012, the Supreme Court rendered its judgments in these cases. The cases mainly arose from appeals of Canadian Copyright Board decisions and considered a variety of issues in copyright law, ranging from communications to the public, movie soundtracks, to online music previewing. As the number of decisions can be counted on the fingers of a hand, it appears appropriate to provide a quick “rule of thumb” summarizing the general conclusions of each decision. The dollar sign (\$) means an additional royalty must be paid and a Ø means there is no additional royalty to pay

Rogers Communications Inc. v. SOCAN (2012 SCC 35)

($\$$) Rule of thumb: Royalties must be paid for online streaming services providing musical works over the Internet, on-demand to consumers. A stream of a musical work from the Internet to multiple individuals can be considered to be a “communication to the public” and not a private transaction deriving from a download of a work to a single individual.

Entertainment Software Association v. SOCAN (2012 SCC 34)

(Ø) Rule of thumb: An extra royalty cannot be imposed for music contained in downloaded video games for which a royalty has already been paid to the copyright holder. The fact that the content is delivered over the Internet, rather than through stores or by mail, does not warrant a separate “communication” tariff. The Copyright Act should apply equally to traditional and more technologically advanced forms of the same media, and thus ensure a principle of technological neutrality.

SOCAN v. Bell Canada (2012 SCC 36)

(Ø) Rule of thumb: Online 30 to 90 second previews of musical works that are streamed to potential customers of Internet music providers constitute “fair dealing”, for the purpose of research. The test for fair dealing was articulated in CCH Canadian

© CIPS, 2012.

^{*}From ROBIC, LLP, a multidisciplinary firm of Lawyers, and Patent and Trade-mark Agents. Published in the Summer 2012 (Vol. 16, no. 2) Newsletter of the firm. Publication 068.151E.

ROBIC, LLP
www.robic.ca
info@robic.com

MONTREAL
1001 Square-Victoria - Bloc E - 8th Floor
Montreal, Quebec, Canada H2Z 2B7
Tel.: +1 514 987-6242 Fax: +1 514 845-7874

QUEBEC
2828 Laurier Boulevard, Tower 1, Suite 925
Quebec, Quebec, Canada G1V 0B9
Tel.: +1 418 653-1888 Fax.: +1 418 653-0006

Ltd. v. Law Society of Upper Canada, and involves two steps. The first step is to determine whether the dealing is for the purpose of either “research” or “private study”. The second step assesses whether the dealing is “fair”. The consumers’ use of the previews can be considered to be research for the purposes of their online purchase. The fairness analysis is highly fact-specific and, examines six factors, including: the purpose, character, and amount of the dealing; the existence of any alternatives to the dealing; the nature of the work; and the effect of the dealing on the work. In the present case, the dealing was deemed fair.

Alberta (Education) v. Access Copyright (2012 SCC 37)

(Ø) Rule of thumb: A photocopying royalty imposed on school boards should be overturned. Photocopies made by teachers for their students as part of their instruction can be considered to be fair dealing for the purposes of research or private study, according to the test detailed in SOCAN v. Bell Canada and presented above. The teacher/copier shares a common purpose with the student/user who is engaged in research or private study.

Re:Sound v. Motion Picture Theatre Associations of Canada (2012 SCC 38)

(Ø) Rule of thumb: A published pre-existing sound recording that accompanies a film as part of its soundtrack is not subject to a separate tariff imposed on “sound recordings” when the film is shown in theatres or on TV. The definition of a “sound recording” in section 2 of the Copyright Act is rather explicit as it “excludes any soundtrack of a cinematographic work where it accompanies the cinematographic work.”

Hopefully, courts will not be “all thumbs” when applying these rules to future decisions, particularly in light of the recent amendments made to the Copyright Act in Canada. However, at the date of publication of the present article, these amendments are not yet in force. It will be interesting to see whether these decisions and amendments will prove to be coherent. This will be the subject of a future article



ROBIC, LLP
www.robic.ca
info@robic.com

MONTREAL
1001 Square-Victoria - Bloc E - 8th Floor
Montreal, Quebec, Canada H2Z 2B7
Tel.: +1 514 987-6242 Fax: +1 514 845-7874

QUEBEC
2828 Laurier Boulevard, Tower 1, Suite 925
Quebec, Quebec, Canada G1V 0B9
Tel.: +1 418 653-1888 Fax.: +1 418 653-0006