

SUPREME COURT SAYS BROADCAST RIGHT DOESN'T INCLUDE RIGHT TO PRE-RECORD

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The right to broadcast a musical work does not include the incidental right to make a pre-broadcast "ephemeral" recording of the work, the Supreme Court of Canada held recently. The ruling establishes the principle that, in the absence of a clear provision in the Canadian Copyright Act, a composer or lyricist does not implicitly consent to the making of ephemeral recordings by granting a licence to broadcast a performance of the work. (*Télé-Métropole v. Michael Bishop*, August 16, 1990).

Télé-Métropole is a Montreal-based television broad-casting company. Michael Bishop is a musician who composed the words to the song "Stay". He sent a copy of the song to a British performing rights society (PRS), which was associated with a Canadian PRS. The Canadian PRS was legally entitled to collect fees for performing rights (i.e., broadcasting) and to pass them on to the copyright holder.

A singer named Martin Stevens (also known as Marcel Prud'homme), after trying unsuccessfully to obtain rights in the song from Bishop, recorded the song and arranged to appear on certain popular television shows.

Télé-Métropole broadcast two such performances, and used a pre-recorded tape in each case. However, the broadcaster did not know that Stevens was not the author of the song. Furthermore, Télé-Métropole paid the appropriate performing rights fees to the Canadian PRS for the broadcast. These fees were passed on to the British PRS and then to Bishop himself.

Additional Payment Sought. Bishop was, therefore, paid for the broadcast or performance of his work, but not for the recording. Acting through a Canadian Musical Reproduction Rights Agency, Bishop sued Télé-Métropole, alleging the infringement of his copyright in the song.

His basic assertion was that, although the performing rights for the song had been properly paid for, Télé-Métropole had infringed his copyright by recording the song without first obtaining his permission. Notwithstanding that the recording was intended to be used only to facilitate the broadcasts, for which Télé-Métropole paid the performance fees, Bishop insisted on the payment of what amounted to additional fees with respect to the recording.

The broadcaster replied that performance rights in the broadcasting domain include the right to make ephemeral recordings to facilitate the broadcast or performance. It invited the court to give this interpretation to the Act in light of technological advances in the industry that were not contemplated by the drafters of the original Act some 70 years earlier.

Unlike a "true" recording, which is made in order to be reproduced and widely propagated, Télé-Métropole argued that an "ephemeral" recording is made only with a view to reaching the same audience that would have been reached by a live broadcast or performance. Since the vast majority of television broadcasts are pre-recorded, Télé-Métropole urged that the right to pre-record is an accessory to the right to broadcast or perform, and that an author who grants a license to broadcast his or her work impliedly consents to the making of ephemeral recordings.

In its judgment, the court was obliged to comment on the distinction between two rights granted under the Act: the right to record and the right to perform. Their separate enumeration in the Act led the court to conclude that these are distinct rights both in theory and in practice. The rights are often treated separately in the contractual domain, the Honorable Justice McLachlin noted; it is common, for example, for performance and recording rights to be assigned separately.

The court further stated that, because a performance is public in nature, there is a greater likelihood that copying in such cases will come to the artist's attention. She distinguished this situation from that which prevails in the case of recordings, which are permanent and may be copied easily, privately, and precisely. As a result of these considerations, the court held that recording rights and performance rights merit separate treatment and separate schemes of protection.

Legislation Likely. This litigation, as mentioned above, resulted partly from the absence of a specific provision in the Canadian Copyright Act dealing with ephemeral recordings. Canada never adhered to the Brussels Convention on satellite signals and, therefore, never adopted an explicit legislative exemption authorizing such recordings.

Consequently, the Supreme Court opted for a literal interpretation of the Act on this question, while making clear its reluctance to rule on a matter of policy which, it concluded, falls within the legislature's purview. It is likely that Parliament will enact the appropriate exemption in the near future.

The *Télé-Métropole* decision, therefore, clarifies the question of copyright in ephemeral recordings in Canada. The court does not condemn or prohibit the practice, but simply advises broadcasters wishing to pre-record in Canada to "make the appropriate arrangements with the holder of the recording rights."

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