NO INFRINGEMENT IN MUSIC FILE SHARING, FEDERAL COURT OF CANADA RULES IN COPYRIGHT CASE

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Canada's Federal Court recently ruled that placing a copy of a downloaded song on a shared directory in a computer where that copy can be accessed via a peer-to-peer file sharing program does not amount to distribution of that copy so as to constitute infringement of copyright under Canada's *Copyright Act,* R.S.C., 1985, c. C-42. (*BMG Canada Inc. et al.* v. *John Doe*, 2004 FC 488 (March 31, 2004, von Finckenstein, J.; appeal filed on April 13, 2004)).

On March 12, 2004, members of Canada's recording industry brought a motion before Canada's Federal Court seeking disclosure from five Canadian internet service providers (ISPs) of the identity of individuals who, as alleged by plaintiffs, have "infringed copyright laws by illegally trading in music downloaded from the internet". According to plaintiffs, those individuals were 29 internet users operating under pseudonyms associated with the software they were using (for example Geekboy@KaZaA); these individuals also apparently used Internet Protocol addresses (IP addresses) registered with the aforementioned five ISPs. Through their motion against the respondent ISPs, plaintiffs thus sought an order to compel such ISPs to disclose the names of those individuals using those 29 IP addresses.

Plaintiffs further alleged that the 29 internet users had each downloaded more than 1,000 songs over which Plaintiffs claim rights under Canada's *Copyright Act,* onto their home computers. Moreover, those individuals allegedly used peer-to-peer file sharing programs (in this case, KaZaA and iMesh) which enable users to connect to a peer-to-peer network and make any shared files available for transfer to any other user that is currently connected to the same peer-to-peer network; the programs in question also provide a range of means through which a user may search through a pool

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of shared files (as such programs were described in *Metro-Goldwyn-Mayer Studios, Inc.* v. *Grokster*, 259 F. Supp.2d 1029 (C.D. Cal. 2003) and referred to by the Court). Plaintiffs alleged that this form of file sharing constituted an infringement of their rights over copyrighted music under Canada's *Copyright Act*.

In order to obtain their order against the ISPs, plaintiffs had to establish a *prima facie* case against the unknown alleged wrongdoers. In ruling that they failed to meet their case, the Court noted that there were many deficiencies in the *prima facie* case advanced by the plaintiffs. Firstly, the affidavit evidence was considered deficient by the Court as it constituted largely of hearsay. For example, the information regarding the alleged file sharing activities of the 29 unnamed internet users was not described by the individuals who carried out various investigations at the plaintiffs' request, but rather by their employer who described work carried out by others.

Secondly, the Court found that there was no evidence of a connection between the pseudonyms allegedly used by the 29 unnamed internet users and the IP addresses. The Court found that there was no clear evidence as to how the pseudonyms of the KaZaA users were linked to an IP address identified through plaintiffs' investigations. For example, the Court wanted to know how the pseudonym Geekboy@KaZaA was linked to IP address 24.84.179.98. The Court found no "reliable" answer to its question.

Thirdly, and most importantly, the Court ruled that plaintiffs did not provide any evidence of copyright infringement under the circumstances. In ruling as it did, the Court relied on the specific wording found in Canada's *Copyright Act*. As copyright law is statutory law in Canada, the Court reminded the parties that a plaintiff can claim copyright protection only to the extent that it is set forth in the statute (*Compo Co.* v. *Blue Crest Music Inc.*, (1980) 1 S.C.R. 357). Thus, section 80(1) of the *Copyright Act* provides 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. Thus, under the statute, downloading a song for personal use does not amount to infringement. In the Court's view, plaintiffs did not provide any evidence that the 29 unnamed individuals either distributed or authorized the reproduction of any sound recording. The evidence simply revealed that those individuals only placed personal copies into their shared directories which were accessible by another computer via a peer-to-peer service. This scenario did not amount to authorizing infringement. Like a library that places a photocopy machine in a room full of copyrighted material, the Court found that the computer user that places a personal copy of a song on a shared directory linked to a peer-to-peer service cannot be seen as authorizing infringement.

On the issue of authorization, Canada's Supreme Court recently wrote in *CCH Canada Ltd.* v. *Law Society of Canada*, 2004 SCC 13: ""Authorize" means to "sanction, approve and countenance": Muzak Corp. v. Composers, Authors and Publishers Association of Canada Ltd., (1953) 2 S.C.R. 182, at p. 193; De Tervagne v. Beloeil (Town), (1993), 3 F.C. 227 (F.C.T.D.). Countenance in the context of authorizing copyright infringement must be understood in its strongest dictionary meaning, namely, "give approval to, sanction, permit, favour, encourage": see The New Shorter Oxford English Dictionary (1993), vol. 1, at p. 526. Authorization is a question of fact that depends on the circumstances of each particular case and can be inferred from acts that are less than direct and positive, including a sufficient degree of indifference: CBS Inc. v. Ames Records & Tapes Ltd., (1981) 2 All E.R. 812 (Ch.D.), at pp. 823-24. However, a person does not authorize infringement by authorizing the mere

use of equipment that could be used to infringe copyright. Courts should presume that a person who authorizes an activity does so only so far as it is in accordance with the law: Muzak, supra. This presumption may be rebutted if it is shown that a certain relationship or degree of control existed between the alleged authorizer and the persons who committed the copyright infringement: Muzak, supra; De Tervagne, supra: see also, J. S. McKeown, Fox Canadian Law of Copyright and Industrial Designs, 4th ed. (looseleaf), at p. 21-104 and P. D. Hitchcock, "Home Copying and Authorization" (1983), 67 C.P.R. (2d) 17, at pp. 29-33."

The Court found that the "mere fact of placing a copy (of a song) on a shared directory in a computer where that copy can be accessed" via a peer-to-peer service does not amount to distribution. For distribution to occur, there must be a positive act by the owner of the shared directory (for example, sending out copies) which was found to be lacking here. Plaintiffs' motion was therefore rejected. In reaching its decision, the Court also raised privacy concerns.

The finding made by the Court as to the absence of evidence of copyright infringement under the circumstances is based on the wording of a statute. If Canada's *Copyright Act* does not specifically provide for a right, then none can be found or granted by a Court. The Court's decision should not be seen as a comment on the "morality" of the activities complained of by the plaintiffs but rather as an acknowledgement of the present-day limitations found in Canada's *Copyright Act*, regarding new technologies and the way they affect private use.