



FULL STEAM AHEAD FOR APPLE CLASS ACTION OVER IPOD LEVY

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In *St-Germain v Apple Canada* the Superior Court of Quebec has allowed a class action suit against Apple Canada Inc in order for customers to recover sums collected by the company to compensate for royalties paid to the Canadian Private Copying Collective (CPCC) pursuant to the sale of its iPods and iPods shuffle.

In its decision of December 12 2003 the Copyright Board determined that a permanently integrated memory or an irremovable incorporated memory in an audio-numerical device, such as an iPod or iPod shuffle, was an 'audio recording medium' in accordance with Section 79 of the Copyright Act, and thus subject to the private copying levy set out in Section 82(1)(a). Following the board's decision Apple included this levy in the price it charged for its iPods.

However, on December 14 2004 the Federal Court of Appeal ruled against the board's decision to impose such a levy. On July 28 2005 the Supreme Court of Canada refused leave to appeal this decision, making it illegal to charge private copying levies on iPods. The CPCC duly reimbursed Apple for the royalties paid and Apple in turn set up a reimbursement programme of iPod royalties for its Canadian customers.

On August 5 2005 Jimmy St-Germain filed a motion for authorization to instigate a class action suit against Apple and asked to be named representative of the group described as follows:

"All persons having purchased an iPod or an iPod shuffle in Quebec between December 12 2003 and December 14 2004, with the exception of those having been reimbursed by Apple before February 28 2006."

In its decision, the court addressed three questions:

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- Did members of the group pay C\$15 or C\$25 as royalties when purchasing the iPod or iPod shuffle?
- Should the defendant reimburse the members of the group for the sums paid as royalties?
- Should the court take into account Apple's reimbursement programme and if so, how?

The court established that there was no dispute over the first question since Apple admitted that it raised iPod prices to compensate for the royalties it had to pay. The act stipulates that the manufacturer or distributor shall pay the royalties, but does not prohibit this being recouped from consumers.

As regards the second question, the court estimated that since the royalties were deemed illegal, those who paid them should be reimbursed. Apple did not dispute this fact. In fact, Apple was proud of its reimbursement programme.

The issue lay with the remainder of the sum given back to Apple by the CPCC: this was C\$2,791,122 minus the amount given to the 6,889 customers who were reimbursed C\$15 or C\$25, depending on the type of iPod they had purchased. Apple promised to donate this to charity, while St-Germain argued that a portion of that sum should be given to the members that were part of the class action. Although Apple had put in place a reimbursement programme, this had not been widely publicized, consequently most customers were not reimbursed.

The court stated that although the issue at hand originated from the Copyright Act, the resulting issue – the royalties wrongfully paid by Quebec customers to Apple – concerned the judicial relationship between a customer and a manufacturer, which is a provincial matter and falls within the jurisdiction of the province where the transaction took place. Thus, for the province of Quebec the Civil Code of Quebec regulates questions of property and civil law and the proper course of action – in this case a class action, stems from the Quebec Civil Code of Procedure.

Apple argued that since it had put in place a reimbursement programme, the class action was a useless and abusive proceeding and should be rejected. St-Germain countered that since the programme was put into place after the proceedings were instigated, Apple would then escape the consequence of its actions and evade its responsibility. The court stated that according to the evidence, 18,000 iPod units were sold to customers in Quebec by Apple during the pertinent period and only 1,013 reimbursement claims had been filed. Apple estimates that it reimbursed 5.6% of the customers who bought iPods in Quebec. The court concluded that the class action was not useless or abusive.

The court ruled that the remaining sums should be given to the members of the class action. However, this should be conditional on further representation from the parties concerning the methods of calculating the sum to be paid. It should also be

determined if the cost of Apple's reimbursement programme should be deducted from those sums.

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