Federal Court of Appeal | Cour d'appel fédérale

CANADA

Date: 20100514

Docket: A-514-07

Citation: 2010 FCA 123

CORAM: **LÉTOURNEAU J.A.**
NADON J.A.
PELLETIER J.A.

BETWEEN:

SOCIETY OF COMPOSERS, AUTHORS AND MUSIC PUBLISHERS OF CANADA

Applicant

and

BELL CANADA, THE CANADIAN ASSOCIATION OF BROADCASTERS, THE CANADIAN BROADCASTING CORPORATION, THE CANADIAN RECORDING INDUSTRY ASSOCIATION, APPLE CANADA INC., THE NATIONAL CAMPUS AND COMMUNITY RADIO ASSOCIATION, THE ENTERTAINMENT SOFTWARE ASSOCIATION, THE ENTERTAINMENT SOFTWARE ASSOCIATION OF CANADA, ICEBERG MEDIA.COM, ROGERS COMMUNICATIONS INC., ROGERS WIRELESS PARTNERSHIP, SHAW CABLESYSTEMS G.P., TELUS COMMUNICATIONS INC., CMRRA/SODRAC INC., ESPRIT COMMUNICATIONS, CKUA RADIO NETWORK and THE RETAIL COUNCIL OF CANADA

Respondents

Hearing held in Montréal, Quebec, on May 3 and 4, 2010.

Judgment delivered in Ottawa, Ontario, on May 14, 2010.

REASONS FOR JUDGMENT BY: LÉTOURNEAU J.A.

CONCURRED IN BY: NADON J.A.
PELLETIER J.A.

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REASONS FOR JUDGMENT

LÉTOURNEAU J.A.

Issue

[1] This application for judicial review challenges an aspect of the decision rendered by the Copyright Board (the Board) on October 18, 2007. In this decision, the Board applied the exception in section 29 of the *Copyright Act*, R.S.C. 1985, c. C-42 (the Act) to the application to

certify a tariff submitted by the Society of Composers, Authors and Music Publishers of Canada (SOCAN) in respect of the offer made to consumers to listen by way of a preview to excerpts of musical works.

[2] The applicant challenges the Board's interpretation of this provision and the soundness of its application to the facts of this case.

[3] Section 29 provides that "[f]air dealing for the purpose of research or private study does not infringe copyright", and therefore does not require the payment of royalties.

[4] More specifically, the debate concerns the meaning of the word "research" and the issue of whether the offer made to the consumer to "preview" an excerpt of thirty (30) seconds or less of a musical work constitutes fair dealing for the purpose of research within the meaning of section 29 of the Act.

The relevant legislation

[5] I reproduce section 29 and part of section 3, which are central to the dispute:

Copyright in works	Droit d'auteur sur l'oeuvre
3. (1) For the purposes of this Act, "copyright", in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in	**3.** (1) Le droit d'auteur sur l'oeuvre comporte le droit exclusif de produire ou reproduire la totalité ou une partie importante de l'oeuvre, sous une forme matérielle quelconque, d'en exécuter ou d'en représenter la totalité ou une partie

public or, if the work is unpublished, to publish the work or any substantial part thereof, and includes the sole right

importante en public et, si l'oeuvre n'est pas publiée, d'en publier la totalité ou une partie importante; ce droit comporte, en outre, le droit exclusif :

(*a*) to produce, reproduce, perform or publish any translation of the work,

a) de produire, reproduire, représenter ou publier une traduction de l'oeuvre;

(*b*) in the case of a dramatic work, to convert it into a novel or other non-dramatic work,

b) s'il s'agit d'une oeuvre dramatique, de la transformer en un roman ou en une autre oeuvre non dramatique;

(*c*) in the case of a novel or other non-dramatic work, or of an artistic work, to convert it into a dramatic work, by way of performance in public or otherwise,

c) s'il s'agit d'un roman ou d'une autre oeuvre non dramatique, ou d'une oeuvre artistique, de transformer cette oeuvre en une oeuvre dramatique, par voie de représentation publique ou autrement;

(*d*) in the case of a literary, dramatic or musical work, to make any sound recording, cinematograph film or other contrivance by means of which the work may be mechanically reproduced or performed,

d) s'il s'agit d'une oeuvre littéraire, dramatique ou musicale, d'en faire un enregistrement sonore, film cinématographique ou autre support, à l'aide desquels l'oeuvre peut être reproduite, représentée ou exécutée mécaniquement;

(*e*) in the case of any literary, dramatic, musical or artistic work, to reproduce, adapt and publicly present the work as a cinematographic work,

e) s'il s'agit d'une oeuvre littéraire, dramatique, musicale ou artistique, de reproduire, d'adapter et de présenter publiquement l'oeuvre en tant qu'oeuvre cinématographique;

(*f*) in the case of any literary, dramatic, musical or artistic work, to communicate the work to the public by telecommunication,

f) de communiquer au public, par télécommunication, une oeuvre littéraire, dramatique, musicale ou artistique;

(*g*) to present at a public exhibition, for a purpose other than sale or hire, an artistic work created after June 7, 1988, other than a map, chart or plan,

g) de présenter au public lors d'une exposition, à des fins autres que la vente ou la location, une oeuvre artistique — autre qu'une carte géographique ou marine, un plan ou un graphique — créée après le 7 juin 1988;

(*h*) in the case of a computer program that can be reproduced in the ordinary course of its use, other than by a reproduction

h) de louer un programme d'ordinateur qui peut être reproduit dans le cadre normal de son utilisation, sauf la

during its execution in conjunction with a machine, device or computer, to rent out the computer program, and	reproduction effectuée pendant son exécution avec un ordinateur ou autre machine ou appareil;
(*i*) in the case of a musical work, to rent out a sound recording in which the work is embodied,	*i*) s'il s'agit d'une oeuvre musicale, d'en louer tout enregistrement sonore.
and to authorize any such acts.	Est inclus dans la présente définition le droit exclusif d'autoriser ces actes.
Research or private study	Étude privée ou recherche
29. Fair dealing for the purpose of research or private study does not infringe copyright.	**29.** L'utilisation équitable d'une oeuvre ou de tout autre objet du droit d'auteur aux fins d'étude privée ou de recherche ne constitue pas une violation du droit d'auteur.

The facts specific to this case

[6] This challenge brought by SOCAN is one of five applications for judicial review filed against the decision dated October 18, 2007, relating to Tariff No. 22.A.

[7] The initial tariff proposal submitted by SOCAN to the Board targeted the years 1996 to 2006 and the communication during that period of musical works "by means of Internet transmissions or similar transmission facilities". The tariff ultimately targeted the reproduction of musical works delivered over the Internet in permanent downloads, limited downloads and on-demand streams.

[8] An opportunity to preview the downloads may or may not be provided. As the Board wrote in paragraph 18 of its decision, "[a] preview is an excerpt (usually 30 seconds or less) of a

sound recording that can be streamed so that consumers are allowed to “preview” the recording to help them decide whether to purchase a (usually permanent) download”.

[9] Even if the applicant were not seeking a specific tariff for copyright in previews, it would seek compensation through the royalties charged for the downloads. In fact, the tariff proposal calls for a different and higher rate for downloads with previews than for downloads without previews.

[10] At no time did the parties raise before the Board the issue of whether the exception might apply to previews. The Board raised this of its own initiative, and the parties learned about it when they received the decision. They were unanimous in their protests that they were denied the opportunity to make submissions regarding the scope of the exception and its applicability to this case. They expressed disappointment that they were unable to submit evidence that allegedly would have rebutted some of the presumptions on which the Board based its findings. According to the applicant, the volume of previews is such that the Board could not have held that the use is “presumptively fair”: see paragraph 113 of the decision. While emphasizing the failure to respect the rules of natural justice, they are asking that we decide the issue rather than remit the file to the Board where they would repeat the submissions made here.

[11] It is surprising that, on such an important issue, the Board would come to a decision about the interpretation of the exception and its field of application without the benefit of

discussion with the affected parties. The parties submit that they should have been heard, and I agree in light of the socio-economic interests at stake.

Analysis of the Board's decision and the parties' allegations

[12] Relying on *CCH v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339, the Board adopted and applied the principle that the word "research" must be given a large and liberal interpretation in order to ensure that users' rights are not unduly constrained: see paragraph 104 of the Board's decision.

[13] Having determined that a preview constituted a dealing with a musical work for the purposes of research, the Board then asked itself whether it was fair. To do so, it methodically analyzed the following factors, proposed by Mr. Justice Linden of this Court and adopted by Chief Justice McLachlin of the Supreme Court in the *CCH* case, *supra*, to determine whether a dealing is fair: the purpose, the character and the amount of the dealing, alternatives to the dealing, the nature of the work and the effect of the dealing on the work.

[14] At paragraph 116 of its decision, it held as follows:

[116] We conclude that generally speaking, users who listen to previews are entitled to avail themselves of section 29 of the Act, as are those who allow them to verify that they have or will purchase the track or album that they want or to permit them to view and sample what is available online. Some users may use	[116] Nous concluons que, de manière générale, les usagers qui effectuent l'écoute préalable d'extraits peuvent se prévaloir de l'article 29 de la Loi, comme ceux qui permettent aux usagers de vérifier qu'ils ont ou vont acheter la piste ou l'album souhaités ou encore qui leur permettent d'examiner et d'essayer ce qui

previews in a manner that does not constitute fair dealing; this does not compromise the position of the services, so long as they are able to show "that their own practices and policies were research-based and fair".	est disponible en ligne. Certains usagers peuvent utiliser l'écoute préalable d'une manière non conforme à l'utilisation équitable; cela n'affecte pas la position des services, dans la mesure où ils peuvent établir que « [leurs] propres pratiques et politiques étaient axées sur la recherche et équitables ».

(a) The meaning of "research" in section 29

[15] Naturally, the applicant objects to the Board's interpretation of the concept of "research". The applicant considers the term to apply to activities involving investigation, systematic research, critical analysis, scientific inquiry and factual discoveries arising and being carried out in a formal setting. It submits that previews over the Internet have none of the characteristics required to fall within the concept of research.

[16] As is generally the case, one word can have many meanings. The word "research" is no exception. According to *Le Petit Robert* (2006), the primary and ordinary meaning is physical: [TRANSLATION] "Action of looking or searching, effort to find something". It also carries a secondary, intellectual meaning: [TRANSLATION] "Mental effort to discover new knowledge, truth".

[17] SOCAN recognizes that there are two meanings, citing the *Oxford Shorter English Dictionary*, the *Concise Oxford English Dictionary*, the *Canadian Oxford Dictionary* and the *Random House Webster's Unabridged Dictionary*: see paragraph 33 of its Memorandum of Fact

and Law, which refers to the following definitions: 1. The action or an instance of searching carefully for a specified thing or person. 2. A search or investigation undertaken to discover facts and research new conclusions by the critical study of a subject or by a course of scientific inquiry. However, it prefers the second meaning and submits that this is the one that should be applied for the purposes of section 29.

[18] The legislator chose not to add restrictive qualifiers to the word “research” in section 29. It could have specified that the research be “scientific”, “economic”, “cultural”, etc. Instead it opted not to qualify it so that the term could be applied to the context in which it was used, and to maintain a proper balance between the rights of a copyright owner and users’ interests.

[19] If, in essence, the legal research such as that referred to in *CCH* has a more formal and rigorous aspect, the same is not necessarily true for that conducted by consumers of a work subject to copyright, such as a musical work.

[20] In that context, it would not be unreasonable to give the word “research” its primary and ordinary meaning. The consumer is searching for an object of copyright that he or she desires and is attempting to locate and wishes to ensure its authenticity and quality before obtaining it. I agree with the Board that “[l]istening to previews assists in this investigation”.

[21] Here is how the Board deals with this subject at paragraph 109 of its decision:

[109] Section 29 of the Act only applies to research and private study. The Supreme Court of Canada has made it clear that "research is not limited to non-commercial or private contexts." 30 Planning the purchase of a download or CD involves searching, investigation: identifying sites that offer those products, selecting one, finding out whether the track is available, ensuring that it is the right version or cover and so on. Listening to previews assists in this investigation. If copying a court decision with a view to advising a client or principal is a dealing "for the purpose of research" within the meaning of section 29, so is streaming a preview with a view to deciding whether or not to purchase a download or CD. The object of the investigation is different, as are the level of expertise required and the consequences of performing an inadequate search. Those are differences in degree, not differences in nature.	[109] L'article 29 de la Loi s'applique exclusivement à la recherche et à l'étude privée. La Cour suprême du Canada a établi de manière claire que « la recherche ne se limite pas à celle effectuée dans un contexte non commercial ou privé ». 30 Planifier l'achat d'un téléchargement ou d'un CD requiert un effort pour trouver : identifier les sites offrant ces biens, en choisir un, établir si la piste est disponible, vérifier qu'il s'agit de la bonne version et ainsi de suite. L'écoute préalable contribue à cet effort pour trouver. Si copier un arrêt en vue de pouvoir conseiller un client ou un senior est une utilisation « à des fins de recherche » comme l'entend l'article 29, écouter au préalable un extrait en vue de décider d'acheter ou non un téléchargement ou un CD l'est aussi. L'objet de la démarche est différent, tout comme l'expertise qu'elle requiert ou les conséquences d'une recherche bâclée. Il s'agit là de différences de degré et non de nature.

[22] SOCAN argues that the primary purpose of previews is not research, but rather increased sales and, accordingly, increased profits. There is no doubt that, for the seller, this is an important objective, one which also benefits copyright holders through reproduction and performance rights. I agree. But this does not exclude other equally important purposes. We must consider previews from the point of view of the person for whom they are intended: the consumer of the subject-matter of the copyright. Their purpose is to assist the consumer in seeking and finding the desired musical work.

[23] In conclusion, I do not consider the contextual interpretation of the concept of research in section 29 applied by the Board to be unreasonable or in error. This brings me to the second step of the exception: is the dealing fair?

(b) Fair dealing and previews of musical works

[24] I do not intend to revisit the Board's analysis of the six factors that help determine whether a dealing is fair, except for the third, the amount of the dealing. I accept the Board's analysis of the remaining factors and its consequent findings.

[25] I referred to the third factor at the beginning of these reasons in relation with the frequency and volume of previews. At the hearing, SOCAN submitted confidential figures that were not before the Board, as the parties were not called upon to discuss or submit evidence on fair dealing.

[26] Here is the analysis of the third factor found at paragraph 113 of the decision:

[113] The third is the amount of the dealing. Streaming a preview to listen to it once is a dealing of a modest amount, when compared to purchasing the whole work for repeated listening. Helping the user to decide his course of action with respect to a purchase of the whole file is presumptively fair.	[113] Le troisième facteur est l'ampleur de l'utilisation. Transmettre un extrait pour en permettre une seule écoute préalable est une utilisation quantitativement modeste par rapport à l'achat de l'œuvre au complet pour écoute répétée. Aider l'usager à prendre une décision d'achat à l'égard du fichier au complet est une utilisation dont on peut présumer qu'elle est équitable.

[27] This passage shows that the Board found the amount of the dealing to be the length of each preview in proportion to the length of the complete work. In making this determination, it also considered the user's objective of researching a purchase.

[28] I consider this approach to be precisely what is called for in the circumstances; the Board has not erred in adopting it. However, SOCAN proposes a different yardstick. Rather than considering each preview individually, it suggests measuring the amount and determining the fairness of the dealing by considering the aggregate number of users and previews and the resulting hours of uncompensated music.

[29] The confidential data provided for the year 2006 for a single online music service are surprising. Unfortunately, and through no fault of SOCAN's, these could not be verified or subjected to the adversarial process. Furthermore, this new yardstick raises its own set of questions. For example, is it meant to replace the measure adopted by the Board, or simply add to it to provide a broader perspective for the analysis of the third factor? What weight should it be given? If it replaces the other measure, does this make the third factor the most important factor, possibly even the determinative factor, depending on the aggregate amounts in question?

[30] Without an enlightened debate on these questions, and given the fragmentary nature of the available information, it would be wiser to leave this issue for another day.

[31] In the circumstances, I cannot find that the Board's decision regarding fair dealing with respect to previews is unreasonable or in error.

Conclusion

[32] For these reasons, I would dismiss the application for judicial review, with costs to the respondents.

[33] This application for judicial review was set by order to be heard jointly with five other applications. For these six cases, the parties filed thirty-one (31) memoranda of fact and law.

[34] I would like to commend the parties' counsel for the quality of their written and oral submissions. They also filed solid, well-structured compendiums, which made the hearings considerably more efficient. Finally, they submitted a schedule for their oral representations, to which they strictly adhered. The hearings were long and covered a vast amount of content, but the experience and professionalism of counsel greatly facilitated their management.

"Gilles Létourneau"

J.A.

"I agree
M. Nadon J.A."

"I agree
J.D. Denis Pelletier J.A."

Certified true translation
Francie Gow, BCL, LLB

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET:	A-514-07
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DATED:	May 14, 2010

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