Recording Industry Takes Aim at Fair Dealing

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The Canadian Recording Industry Association (CRIA)Â is asking the Supreme Court of Canada to substantially limit the scope of fair dealing. In their factum filed this month in the appeal of SOCAN v Bell Canada, CRIA is asking the court to significantly scale back the scope of fair dealing as it had been enunciated by the court in the unanimous 2004 decision in CCH v Law Society of Upper Canada.

CRIA is being represented by Glen Bloom of Osler, Hoskin & Harcourt LLP, who had represented the plaintiffs/appellants in CCH and who is also now representing the Association of Universities and Colleges of Canada (AUCC), the lead objectors to the Access Copyright proposed tariff now before the Copyright Board.Â

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Last year, the Federal Court of AppealÂ upheld a decision of the Copyright Board that the provision of 30 second previews of songs which could be purchased by online customers constituted research within the meaning of section 29 and that the dealing was fair. (SOCAN v Bell Canada, 2010 FCA 123).

The Supreme Court had granted SOCAN's application for leave to appeal and the case is scheduled to be heard on December 6, 2011. The Court has also scheduled the appeal in Alberta v Access Copyright, the K-12 Access Copyright Tariff case, the next day.

A similar position seeking to narrow fair dealing is also being advanced by the collective CMRRA-SODRAC Inc.(CSI), which like CRIA was a respondent in the proceedings below. They are supporting SOCAN's position on fair dealing in the Supreme Court of Canada, and they all maintain that the Copyright Board erred in finding that previews fall within fair dealing as the previews are neither â€œresearchâ€• nor â€œfair.â€•

CSI and CRIA are arguing that the application of the CCH test by the Board and the Federal Court of Appeal is inconsistent with Canadaâ€™s international copyright obligations and should be reversed. They point to the â€œThree-Step Te under the TRIPS agreement where exceptions to copyright are to be limited to certain special cases that do not conflict with the normal exploitation of a work and do not unreasonably prejudice the legitimate interests of rights-holders.

CRIA is advancing the general propositions that in order to comply with this TRIPS requirement: Â (1) the broad allowance in CCH to "look through" to the end user needs to be scaled back; (2) the broad definition of research in the CCH case needs to be scaled back; and (3) more emphasis must be placed on the sixth factor (effect of the dealing on the work).

Readers are encouraged to carefully review the text of the factum to discern the extent to which CRIA is seeking to limit the effect of the CCH decision and thereby scale back fair dealing.

While these positions are being advanced in the context of for-profit music services and their customers, the claims are based more generally on the imperatives of the TRIPS three part test. Getting an acknowledgment from the SCC that this position is correct would certainly have a negative impact on the scope and vitality of the fair dealing doctrine more generally.

None of these arguments are at all surprising, as they are in keeping with the stands that copyright collectives like SOCAN and Access Copyright and industry trade groups like CRIA have consistently advanced. Since the 2004 CCH decision, the scope of fair dealing, and its role in Canadian copyright law has been a persistent and contentious dispute, one around which the sides have been clearly drawn. This dispute had only become more obvious in the course of the debate over the inclusion of "education" as a fair dealing category in Bill C-32.Â

What is raising more than a few eyebrows however is the fact that CRIA is now being represented by Glen Bloom (of Osler, Hoskin & Harcourt LLP) who substituted into the case for CRIA on May 31st. Mr. Bloom, who also represented the plaintiffs in the CCH v LSUC litigation, is currently representing the Association of Universities and Colleges of Canada (AUCC), the lead objector in the tariff proceedings brought by Access Copyright now pending before the Copyright Board. Â Without doubt, the breadth and scope of fair dealing will be a central dispute in that proceeding and will be a determinative factor in the amount of the tariff ultimately set by the Board.Â Should the attempt by SOCAN, CRIA and CSI to limit the applicability of fair dealing be successful, there will be a profound impact on the direction and outcome of the Access Copyright Tariff proceedings. Â [See additional commentary from Meera Nair, Michael Geist and Howard Knopf] Â Â