

2012 Canadian Developments in Copyright Law Bill C-11 and 5 Supreme Court Judgements

Background

- 1997: Phase 2 of copyright revision – internet issues not addressed
- Previous attempts: 2005 Bill C-60; 2008 Bill C-61; 2010 Bill C-32
- Bill C-11: tabled in 2011; adopted June 29, 2012 with royal assent; regulations needed for coming into force; WIPO treaties to be ratified
- July 12, 2012: 5 decisions by SCC

1. Photographs, portraits, and engravings

- Loss of special status existing since 1911
- Corresponding exception for private use of photographs and portraits

2. WIPO Internet treaties

- Connecting factors introduced as required
- Performers' and phonogram producers' economic rights expressed accordingly
- Moral rights for performers

3. Making available right

- Included in “communication by telecommunication to public” (comm by telecom)
- New secondary infringement: enabling internet infrg't *IF* primary infrg't occurs

4. Distribution right

- Introduced in the Act
- International exhaustion

5. *Entertainment Software Association v. SOCAN* 2012 SCC 34 (majority decision 5-4)

- Seeking payment for music in online delivered computer games
- Technological neutrality as governing principle
- Internet akin to delivery by technological taxi
- Downloading not comm by telecom, but distribution of copies
- Streaming is comm by telecom

6. *Rogers Communications Inc. v. SOCAN* 2012 SCC 35 (unanimous decision)

- Confirmation of notion of public when user in different places, different times; and whether push or pull technologies
- Given *ESA* decision, applies only to streaming

7. Remedies

- Statutory damages: distinction between purposes of infringers: commercial (\$500-\$20,000) and non-commercial (\$100-\$5,000); may still be lowered at discretion of court
- 1st action by copyright owner (in context of enabling provision) seeking statutory damages in non-comm context precludes further actions by same or other copyright owner against same defendant

8. Safe harbor; notice regime

- Providing services, caching, similar acts to be more efficient: no infrg't unless enabler (as per point 3)
- Hosting infringing work not actionable unless aware of court decision that work is infringing
- Notice system: "notice and notice"
- Providers of information location tools: subject to injunctions only

9. TPM and RMI

- TPM protection for access control and exercise of rights; no statutory damages for circumventing for access for private purposes
- RMI : remedy for knowing removal or alteration of information

EXCEPTIONS

10. *SOCAN v. Bell Canada* 2012 SCC 36 (unanimous decision)

- Previews of music: fair dealing for research

11. Parody and satire

- Added to fair dealing purposes

12. Perceptual disabilities

- Additional rules for print disabilities; exportation of copies allowed under several conditions

13. Time-shifting

- Allowed under complex conditions

14. Back-up copies and other computer uses

- Security of systems; encryption research
- Again, several conditions

15. Technological processes; broadcasting

- Temporary reproductions exempted if essential part of process and facilitate non-infringing use; only for duration of process
- Destruction of copies necessary in broadcasting context

16. User Generated Content (UGC)

- For non-comm purpose; must produce no substantial adverse effect (financial or otherwise) on existing or potential market
- Source and name to be mentioned if reasonable

17. Private copying

- Existing regime for musical works not extended beyond CD-rom technology
- Additional exception: from non-infringing copy obtained by means other than borrowing or lending ; on licit medium; no circumvention of TPM; copy not given away
- Does not affect existing (declining) private copying regime for musical works

18. Educational and archival uses

- Existing specific exceptions for educational institutions extended to digital uses; many conditions
- Internet-available work can be copied, communicated, or performed if source mentioned, unless protected by TPM or clearly visible notice (beyond copyright symbol) that prohibits acts
- Education added to fair dealing purposes

19. *Alberta (Education) v. Access Copyright* 2012 SCC 37 (majority decision 5-4)

- Copies of short excerpts made at teachers' initiative for students to complement main textbook
- Exceptions are users' rights; to be analysed from perspective of user, not copier
- Use comes under fair dealing for research or private study: "symbiotic relationship" between teacher and students enables characterisation
- 6 factors from *CCH* decision reiterated; "amount of dealing" refers to excerpt in light of its work, not quantitative assessment based on aggregate use; "effect of the dealing on work" would require evidence of decline in textbook sales; short excerpts cannot compete with full books
- Case sent back to Copyright Board for reappraisal: Board confirms that copies are fair

20. Standard of review of Copyright Board decisions

- *Alberta*: reasonableness *Rogers*: correctness

21. *Re:Sound v. Motion Picture Theatre Association of Canada* 2012 SCC 38 (unanimous decision)

- Sound recording in soundtrack of cinematographic work loses sound recording status and thus no basis for performing right