Previews of Music as Fair Dealing (Threedux)

August 13, 2010 by Bob Tarantino

A further development (see our earlier posts on the topic: Previews of Music as Fair Dealing and Previews of Music as Fair Dealing (Redux)) in the *SOCAN v Bell Canada, et al* case - where the Federal Court of Appeal recently held that "previews" of songs offered by online music services constituted "fair dealing" for the purposes of research. SOCAN has filed a motion for leave to appeal the Federal Court's decision to the Supreme Court of Canada. SOCAN's motion can be found here (hat tip: Sookman). The Memorandum of Argument begins on page 104 of 133.

SOCAN's primary argument is subtle, one which trades on the enriching of the fair dealing defence prompted by the Supreme Court of Canada's decision in *CCH v LSUC* (2004 SCC 13). In essence, the argument is premised on the notion that a purposive approach to interpreting fair dealing necessarily involves a taking a highly fragmented approach to that interpretive exercise; in short, the argument seems to be, if you want to understand whether a particular activity constitutes "fair dealing" you must investigate that activity with full immersion in its factual circumstances - and if you do that, then the notion that an online preview constitutes "research" in the sense that the Copyright Act is intended to facilitate falls apart. Put a different way, the argument is that the finding in *CCH* arose in very particular circumstances, which don't translate to the online exploitation of music. From paragraphs 7-9 of the Memorandum of Argument:

The Applicant submits that in finding that the actions of the Respondents constitute fair dealing, the Court below has created a very significant and unwarranted expansion in the scope of the defence. This expansion disrupts the balance between creators and users that the Act was intended to strike and results in the complete removal of the Applicant’s rights over a significant use of its music repertoire on the Internet in a manner that is incompatible with the object, spirit and purpose of the Act.

The defence of fair dealing is intended to further the central purpose of copyright law, that is, to strike a balance between the public interest in the creation and dissemination of creative works and the interest of creators in obtaining a just reward for their efforts. The Act imposes two conditions on the availability of the fair dealing defence: the dealing must be for an allowable purpose as enumerated by the Act and the dealing must be, in fact, fair. The allowable purposes listed in section 29 of the Act are “research and private study.” In light of the purpose of the Act, the use of music previews by the Respondents cannot be considered either research or private study and the volume of previews transmitted by the Respondents is too large to be considered fair.

The decisions below imperil the balance between protecting the interest of creators and promoting the development of creative works by expanding the definition of the term “research” to include activities that do not encourage the creation and dissemination of new works and by failing to consider the amount of the dealing in the aggregate.

Because any eventual Supreme Court decision in this case would be one of the first opportunities for the Court to authoritatively describe the contours of fair dealing following *CCH v LSUC*, whether Court agrees to hear the appeal, almost as much as the decision itself, will be important.
