Court File No. 33800

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

B E T W E E N:

SOCIETY OF COMPOSERS, AUTHORS AND MUSIC PUBLISHERS OF CANADA

Appellant
(Applicant on Judicial Review)

- and -

BELL CANADA, THE CANADIAN RECORDING INDUSTRY ASSOCIATION, APPLE CANADA INC., ROGERS COMMUNICATIONS INC., ROGERS WIRELESS PARTNERSHIP, SHAW CABLESYSTEMS G.P., TELUS COMMUNICATIONS INC., ENTERTAINMENT SOFTWARE ASSOCIATION, ENTERTAINMENT SOFTWARE ASSOCIATION OF CANADA and CMRRA /SODRAC INC.

Respondents
(Respondents on Judicial Review)

-and-

SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY AND PUBLIC INTEREST CLINIC , CANADIAN ASSOCIATION OF UNIVERSITY TEACHERS, FEDERATION OF LAW SOCIETIES OF CANADA AND CANADIAN LEGAL INFORMATION INSTITUTE and COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION

Interveners

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Factum of the Intervener
THE COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION

PART I - STATEMENT OF FACTS

1. The previewing of 30 seconds of a song uniformly benefits copyright owners and consumers. It puts money into copyright owners' pockets rather than taking money out of those pockets. Enabling consumers to listen to music before they purchase it provides an obvious societal benefit and can help copyright owners. It is a legitimate form of research.

2. The Respondents' online outlets do not require a tariff because, as this Honourable Court has held, "research" is a right. Neither this Court nor the *Copyright Act* has limited the user right to "commercial" or "non-commercial", "profit" or "not for profit" research, nor is there any basis in the Berne Convention or the Agreement on Trade-Related Aspects of Intellectual Property Rights for such a distinction.

> *Copyright Act*, RSC 1985, c C-42, s. 29.
>
> *Berne Convention for the Protection of Literary and Artistic Works*, 9 September 1886, as last revised at Paris, 24 July 1971, 1161 UNTS 30 [*Berne*]; Appellant's Authorities Volume 3, Tab 17.
>
> *Agreement on Trade-Related Aspects of Intellectual Property Rights*, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 UNTS 299 [*TRIPS*]; CRIA Authorities, Tab 19.

3. The Appellant seeks to introduce distinctions between users that do not exist in Canadian law. The distinctions do not exist for good reasons. They are unworkable. In a knowledge-based economy, partnerships between entities of all kinds – public, profit, academic, commercial, non-commercial – form to share knowledge and advance innovation. There are no bright lines between these entities.

4. In an environment where online piracy is stated to be a scourge, a service that promotes and enables consumers to buy lawful copies should be encouraged through application of the fair dealing right.

5. The Copyright Board ("Board") and the Federal Court of Appeal were correct to consider fair dealing. The user right of "research" is always in play, whether or not expressly pleaded. Tariffs embody rights. If there is no creator-based right, there is no creator-based remedy.

6. The decisions of the Board and the Federal Court of Appeal are correct under Canadian law and are consistent with international copyright laws and treaties. First, neither *Berne* nor *TRIPS* - nor any other treaty - is self-executing in Canada. Second, this Honourable Court was aware of *Berne* and *TRIPS* when *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 SCR 339 [*CCH*] was decided. Research goes back millennia, but whatever form it takes, it, as with the accepted goals of intellectual property protection, has the purpose of increasing knowledge: not just knowledge that has a tariff, but all knowledge. Knowledge about the content of a copyrighted work before it is purchased is also ancient: when we read a book or music review, we are engaging in research.

7. The Intervener, the Computer and Communications Industry Association ("CCIA") is an association of members that enables the dissemination of works created by musicians, software developers, writers, publishers and others. CCIA promotes digital content as a user group. CCIA members- like the Appellant SOCAN – as well as the Respondents CRIA and CSI – are right holders. Each of the right holders enable creators to act through various forms of legal association.

8. CRIA and CSI rely heavily on *TRIPS* to supersede the plain meaning of the *Copyright Act*, and ignore the impact of this Court's own articulation of user rights.

9. Despite the inclusion of research-based rights/exceptions/limitations in their legislation, the U.S. was found by WIPO to be *Berne* compliant when Director Arpad Bogsch extended the invitation to join the Berne Union. Research is clearly not a "new" limitation demanding scrutiny for compliance with *TRIPS*. Dr. Bogsch provided a complete response to the Appellant's arguments in his letter concerning U.S. compliance with *TRIPS* without any criticism of "fair use". No complaint over the U.S. fair use provisions has ever been lodged under either *Berne* or *TRIPS*.

US, *Berne Convention Implementation Act of 1986: Hearing on S.2904 before the Committee on the Judiciary,* 99th Cong (1986) at 10, 15-18 (Dr Arpad Bogsch), which considered jukeboxes but no other sections as potentially in conflict with Berne.

10. Dictionary definitions for "re", "research" and "recherche" offer clarity to confront the expressions of ambiguity raised by SOCAN, CRIA and CSI to support their reliance on *TRIPS*. The words "commercial" and "for profit" appear nowhere in the *Copyright Act* with reference to "research". The ambiguity proposed is designed to shut down enablement of research and to deny users the ability to *browse* the Internet, to research and review its content.

Copyright Act, RSC 1985, c C-42, ss 3(1)(f), 29.

CCH, at para 50; Appellant's Authorities Volume 1, Tab 5.

Thomas Rogers & Andrew Szamosszegi, *Fair Use in the U. S. Economy: Economic Contribution of Industries Relying on Fair Use,* (Washington: CCIA, 2007).

Canada, Information Highway Advisory Council, *SubCommittee Report on Copyright and the Information Highway,* (Ottawa: Information Highway Advisory Council, 1995).

The Oxford English Dictionary, 2d ed, *sub verbis* "re" and "research".

Collins Robert French Dictionary, 9th ed, *sub verbo* "recherche".

PART II – ISSUES

11. The issues, as stated by the Appellant, are namely:

a. Whether the communication of previews of musical works by online music services constitutes fair dealing for the purpose of "research" within the meaning of section 29 of the *Copyright Act;* or, in the alternative,

b. If the communication of music previews falls within the meaning of "research", whether the online music services' dealing with the Appellant's musical works for that purpose is "fair."

12. For the reasons outlined in this factum, CCIA submits that the first question should be answered affirmatively. Concerning the second question, CCIA makes no submissions on what generally constitutes "fairness". That analysis depends on the facts. The facts here lead only in one direction, and thus the decisions of the Board and the Federal Court of Appeal were correct.

CCH, at para 50; Appellant's Authorities Volume 1, Tab 5.

Factum of appellant, SOCAN, at paras 78-79.

Factum of respondent, CSI, at para 77.

Factum of respondent, CRIA, at para 76.

PART III – ARGUMENT

A. Board's analysis of fair dealing is incidental to tariff certification

13. The right to fair dealing is implicitly pleaded by any objector to a proposed tariff. This is because it is the pre-requisite to determining whether a proposed tariff is based on a right which vests in the collective that proposes the tariff. The Board's finding on fair dealing is a matter of law, as failure to pay a certified tariff can result in a finding of infringement. The Board's assessment of factors that limit its jurisdiction to certify a tariff is well founded in this case. The Board's definition of "research" framed its assessment that it could not certify a tariff that extended beyond the reach of SOCAN's mandate. Fair dealing is an integral part of the scheme of copyright law. Because it is a user right, it must therefore always be taken into account to limit the scope of the Board's mandate, as defined in the *Copyright Act,* to certify a tariff.

CCH, at para 49; Appellant's Authorities Volume 1, Tab 5.

14. It is through the following analysis that a tariff generally derives its justification, pursuant to the Board's analysis in section 68(2) and 29 of the *Copyright Act*. In following the logical progression set out by the *Copyright Act*, the sequence of analysis becomes clear:

a. If tariffs are justified by the presence of otherwise infringing behaviour; and

b. Fair dealing is not an infringing behaviour, then

c. Fair dealing renders certification of a tariff unjustifiable as being outside the scope of a collective's mandate.

15. Whether or not fair dealing is raised by an objector, due to the fact that fair dealing is a right which vests in all users whether or not they object formally to a tariff, it is necessary for the Board to determine the fairness of a type of dealing. Advantageously the fair dealing analysis is undertaken *before certifying* a proposed tariff, as a finding of fair dealing would generally make that tariff inapplicable to the class of use that it seeks to legitimize.

16. Fair dealing is a catalyst for research and creativity. Research informs the first of two steps in assessing the presence of this user right.

17. The function of a tariff is to monetize copyright. The process leads to certification of a tariff. A fair value is one that will ensure the widest possible dissemination of ideas and products. The encouragement and enablement of research are integral to the tariff certification process.

18. Application of fair dealing here shows why a tariff is inapplicable. Public consultations before Parliament have been held concerning the role of fair dealing as an appropriate counterbalance to legitimize browsing of content over the Internet without which research could not be conducted.

> Canada, Information Highway Advisory Council, *SubCommittee Report on Copyright and the Information Highway,* (Ottawa: Information Highway Advisory Council, 1995).

B. Proper analysis of fair dealing: The Two-Step Process

19. Anyone may deal fairly with any subject matter for the purpose of research. Fair dealing applies across the board to all copyright subject-matter and to all users without distinction:

> D Vaver, *Intellectual Property Law*, 2d ed (Toronto: Irwin Law, 2011) at 233.

20. The two-step approach set out in s. 29 of the *Copyright Act* and reiterated in *CCH* is consistent with Canada's international obligations as set out in *TRIPS* and *Berne*. Fair dealing derives its balanced legitimacy from *Berne*, which pre-dates recent decisions in which this Honourable Court has codified user rights, the first such decision having been rendered in 2002 - *Théberge v. Galerie d'Art du Petit Champlain inc.*, 2002 SCC 34, [2002] 2 SCR 336. *Per* McLachlin CJC:

> We must stop thinking of intellectual property as an absolute and start thinking of it as a function — as a process, which, if it is to be successful, must meet diverse aims: the assurance of a fair reward to creators and inventors and the encouragement of research and creativity, on the one hand; and on the other hand, the widest possible dissemination of the ideas and products of which the world, and all the individuals in it, have such great need.
>
> > GF Henderson, ed, *Trade-Marks Law of Canada* (Toronto: Carswell, 1993) at 397, cited in *Pink Panther Beauty Corp. v. United Artists Corp.*, [1998] 3 FC 584 at 547 (CA), Linden JA for the majority.

21. SOCAN proposes to impose this tariff on private individuals doing research wherever they are located, anywhere in the world. This invites application of user rights to remove liability for allowable purposes in each and every location of use.

> *SOCAN v. Canadian Assn. of Internet Providers,* 2004 SCC 45, [2004] 2 SCR 42; CRIA Authorities, Tab 13.
>
> Factum of appellant, SOCAN, at para 60.

22. Enablement of the dealing, for an allowable purpose as set out by the *Copyright Act* - such as research - is likewise fair, wherever such enablement takes place.

CCH, at paras 50-53; Appellant's Authorities Volume 1, Tab 5.

Factum of appellant, SOCAN, at para 78 and in reply, at para 10.

23. There is no statutory basis whatsoever for confining the allowable purpose, research, to non-commercial.

24. The author's or other copyright owner's proprietary rights in a work are not absolute. The creator creates in the context of society, drawing from it inspiration and knowledge necessary in the creative process. The protection of the creator's interest cannot be absolute. It faces possible conflicts with the user's rights.

25. The Appellants raise the three step process in *TRIPS* as a smokescreen to obscure the plain meaning of "user rights". However, the economic contribution of users to the copyright community proves the importance of commercial research to fostering a culture of creation, dissemination and use.

26. Research is permitted because it satisfies the balance between creator right holders, user right-holders, and enablers of the research process.

Factum of appellant, SOCAN, at para 143

Factum of respondent, CRIA, at paras 44-47

Factum of respondent, CSI, at paras 32-35.

Berne, s 9(2); Appellant's Authorities Volume 3, Tab 17.

TRIPS, s 13; CRIA Authorities, Tab 19.

Factum of respondent, CSI, at para 56.

Hubbard v. Vosper (1971), [1972] 1 All ER 1023 (CA).

CCH, at paras 51, 54; Appellant's Authorities Volume 1, Tab 5.

C. "Commercial" status is irrelevant in the purpose analysis:

27. CCIA makes no submissions as to the specific application of the second prong of the test, the fairness of the dealing. The wording of the section is plain for all to see: there are no words preceding "research". The list of "no words" includes absence of "non-commercial", "not for profit" and "transformative".

28. This Court has stated, in *CCH*, that fair dealing is "always available. Any contrary interpretation seeks to roll back "user rights", and must be rejected as nostalgic anachronisms, ill suited to the advancement of research, innovation, and the function of a robust intellectual property law regime.

CCH, at paras 49, 54.

PART IV – COSTS

29. CCIA does not seek costs on this appeal.

PART V – ORDER SOUGHT

30. CCIA respectfully submits that the Appellant's appeal be dismissed, and requests the opportunity to make twenty minutes of oral submissions to the Court at the hearing of this appeal.

Dated at Toronto, Ontario, this 5th day of August, 2011.

SIGNED BY:

Andrea F. Rush

PART VI – TABLE OF AUTHORITIES

PART VII – LEGISLATIVE PROVISIONS

***Copyright Act,* RSC 1985, c C-42, s. 3, 27, 29, 68/**
***Loi sur le droit d'auteur,* LRC 1985, c C-42, art. 3, 27, 29, 68 :**

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 public or, if the work is unpublished, to publish the work or any substantial part thereof, and includes the sole right	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 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
[...]	[...]
(*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;
27. (1) It is an infringement of copyright for any person to do, without the consent of the owner of the copyright, anything that by this Act only the owner of the copyright has the right to do.	27. (1) Constitue une violation du droit d'auteur l'accomplissement, sans le consentement du titulaire de ce droit, d'un acte qu'en vertu de la présente loi seul ce titulaire a la faculté d'accomplir.
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.
68. [...]	68. [...]
(2) In examining a proposed tariff for the performance in public or the communication to the public by telecommunication of performer's performances of musical works, or of sound recordings embodying such performer's performances, the Board	(2) Aux fins d'examen des projets de tarif déposés pour l'exécution en public ou la communication au public par télécommunication de prestations d'oeuvres musicales ou d'enregistrements sonores constitués de ces prestations, la Commission:
[...]	[...]

(*b*) may take into account any factor that it considers appropriate.	*b*) peut tenir compte de tout facteur qu'elle estime indiqué.

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