

Blakes Bulletin

Intellectual Property

Supreme Court of Canada Deals Fair Blows to Copyright Owners

SHELDON BURSHTEIN

The Supreme Court of Canada (SCC) rendered two decisions on the fair dealing exception to liability for copyright infringement in the context of two collective tariffs. In both decisions, the SCC confirmed that fair dealing is a user's right to be balanced against the rights of copyright owners in the *Copyright Act* (the Act) and is to be liberally interpreted. The SCC also said that fair dealing is to be assessed from the perspective of the user of the work rather than the person who effects reproduction or communication of the work.

In *Society of Composers, Authors and Music Publishers of Canada (SOCAN) v. Bell Canada*, the SCC unanimously affirmed that the streaming of an online music preview for sampling by potential purchasers of a digital download of a musical work is fair dealing. In *Province of Alberta v. Canadian Copyright Licensing Agency (Access Copyright)*, a five-to-four majority of the SCC directed the Copyright Board (the Board) to reconsider its "unreasonable" conclusion that the photocopying by teachers of excerpts of textbooks for use by students for research and private study in schools is not fair dealing.

Determinations that these activities are fair dealing mean that they are exempt from the payment of royalties to the collectives. These decisions confirm a trend toward a broadening of users' rights, particularly fair dealing, at the expense of copyright owners, including music composers and book authors.

WHAT FAIR DEALING IS

The Act provides that fair dealing with a work for certain purposes does not infringe copyright. The enumerated purposes are: (i) research; (ii) private study; (iii) criticism; (iv) review; and (v) news reporting. To qualify for fair dealing under the last three purposes, certain attribution information relating to the author or other creator of the work and the source must be provided. Recent amendments to the Act have

extended fair dealing to the purposes of parody, satire and education, but these provisions are not yet in force. See our *Blakes Bulletin on Intellectual Property – All Things Come to Those Who Wait: Canadian Copyright Modernization Legislation Enacted*.

The SCC has stated on multiple occasions that copyright requires a balance between, on one hand, promoting the public interest in the encouragement and dissemination of works of the arts and intellect and, on the other hand, obtaining a just reward for creators. Earlier in *CCH Canadian v. Law Society of Upper Canada*, the SCC confirmed that the exceptions to infringement in the Act are users' rights and an essential part of copyright law. To maintain the proper balance between the rights of copyright owners and the interests of users, users' rights, including fair dealing, must not be interpreted restrictively.

In *CCH*, the SCC ruled that a custom copy service operated by the Ontario Bar, through which member lawyers can request copies of published legal materials, constitutes fair dealing for the purpose of research or private study. Research need not be non-commercial or private.

The SCC also set out a two-step test to assess fair dealing: (i) whether the activity is for one of the enumerated purposes; and (ii) whether the activity is "fair." Unlike the American approach to "fair use," a Canadian court does not engage in the fairness analysis until it is satisfied that the dealing is for one of the allowable purposes. In mandating a generous interpretation of the fair dealing purposes, *CCH* created a relatively low threshold for the first step so that, as the SCC said in *SOCAN*, "the analytical heavy-hitting is done in determining whether the dealing [is] fair."

The Act does not stipulate criteria to determine whether the dealing is fair. In *CCH*, the SCC set out six non-exhaustive factors to assess whether an activity is fair: (i) the purpose of the dealing; (ii) the character of the dealing; (iii) the amount of the dealing; (iv) alternatives to the dealing; (v) the nature of the work; and (vi) the effect of the dealing on the work. Whether an activity is fair, therefore, depends on the facts.

CONT'D ON PAGE 2

CONT'D FROM PAGE 1

SOCAN v. BELL CANADA

The *SOCAN* case considered fair dealing in the context of previews of musical downloads. SOCAN is a collective that represents composers, authors and music publishers in administering the rights to perform and communicate their musical works. Bell Canada, Apple and other online music service providers that sell digital downloads of musical works enable consumers to listen to free previews before making a purchasing decision. A preview is a 30- to 90-second lower-quality extract of the musical work that is streamed to a consumer's computer but cannot be stored, copied or disseminated because the file is automatically deleted after the preview is heard.

Underlying Decisions

SOCAN applied to the Board to certify a tariff for the reproduction of musical works downloaded on the Internet. The tariff proposed a higher rate for downloads with previews than for downloads without previews.

On its own initiative, the Board questioned whether a streamed preview that helps a consumer decide whether to purchase a download constitutes fair dealing for the purpose of research. Relying on *CCH*, the Board interpreted "research" liberally and determined that the purpose of a preview is research. The Board then analyzed the *CCH* factors and determined that most users who listen to previews, and those who allow them to sample music online, engage in fair dealing.

On review by the Federal Court of Appeal (FCA), SOCAN argued that "research" means investigation, systematic research, critical analysis, scientific inquiry and factual discovery conducted in a formal setting, and that previews have none of those characteristics. However, the FCA said that the Act does not add qualifiers such as "scientific" or "economic" to the term "research." The term may be applied in the context in which it is used. One must consider previews from the perspective of consumers who use them to assess a musical work prior to a purchase of a download. The FCA agreed with the Board that the streaming and sampling of the previews are fair dealing.

Supreme Court of Canada

The SCC unanimously dismissed an appeal by SOCAN and held that the streaming and sampling of previews are fair dealing. The SCC confirmed that fair dealing is a user's right and that the purpose of the fair dealing

analysis is to determine whether the proper balance has been achieved between protection of the exclusive rights of copyright owners and access to their works by the public. The SCC followed the *CCH* two-step analysis.

Is a Music Preview for the Purpose of Research?

In assessing whether the purpose of previews is research, the SCC confirmed that "research" must be given a large and liberal interpretation. The purpose of research should be analyzed from the perspective of the consumer as the ultimate user, not that of the service provider.

The SCC did not accept SOCAN's position that "research" requires "the systematic investigation into and study of materials and sources in order to establish facts and reach new conclusions" with the purpose of making a creative work. The SCC said that research need not be for creative purposes only. Limiting research only to creative purposes would ignore one of the objectives of the Act, namely the dissemination of works, and would also run counter to the ordinary meaning of "research," which includes many activities that do not require establishing new facts or conclusions.

Is Streaming a Music Preview Fair?

The SCC said that the Board properly concluded that streaming the previews is fair dealing.

Purpose. In considering the purpose of the dealing, an objective assessment is made of the real motive behind the use of the work. The guiding perspective is that of the ultimate user. The service providers facilitate the research purposes of consumers. Consumers use the previews in researching prospective purchases of music that result in compensation for the creators. There are reasonable safeguards in place to ensure that the previews are being used for this purpose.

Amount. The amount of the dealing should not be assessed on the basis of the aggregate number of previews that are streamed by consumers but, instead, by looking at the proportion of the preview in relation to the whole work. A preview of several seconds is a modest amount when compared to the whole work. The quantification of the aggregate dissemination is considered under the character of the dealing factor, which examines whether multiple copies of works are being widely distributed.

CONT'D ON PAGE 3

CONT'D FROM PAGE 2

Character. With respect to the character of the dealing, a particular dealing might be unfair if multiple copies of works are being widely distributed. The use of a single copy of a work for a specific allowable purpose, or the destruction of a copy after use, as is the case with the previews, favours a finding of fairness.

Alternative. There is no alternative to a preview that is as effective to demonstrate to a consumer what a musical work sounds like. A preview is probably the most practical, most economical and safest way for users to ensure that they purchase what they wish. Previews are, therefore, reasonably necessary to help consumers research what to purchase.

Nature of Work. Consideration of the nature of the work involves an assessment of whether the work is one that should be widely disseminated. Unless a consumer can identify the work, the work will not be disseminated.

Effect. Previews do not compete with, or adversely affect, the downloading of the works themselves because of their transient form and lower quality. Their effect is to increase the sale and dissemination of copyrighted musical works.

ALBERTA v. ACCESS COPYRIGHT

The Access Copyright case considered fair dealing in the context of the photocopying by teachers of excerpts from textbooks for use in schools. Access Copyright represents authors and publishers of printed literary and artistic works in administering the right to authorize copying of their works throughout Canada except the province of Quebec. For a number of years, Access Copyright had negotiated licence agreements with the ministries of education of all Canadian provinces and territories, other than Quebec, and school boards in the province of Ontario (collectively, the Coalition) relating to the copying of excerpts for use in elementary and high schools.

When the parties could not agree on another agreement after expiry of the previous one, Access Copyright applied to the Board to certify a tariff. The proposed tariff relates to, among other things, the photocopying of excerpts from textbooks for use in classroom instruction for students from kindergarten through high school. The Coalition objected to the proposed tariff on the basis that the activities constitute fair dealing for the purposes of private study and research.

Underlying Decisions

The Board found that, where at least one of the purposes of copies made by a student or at a student's request is research or private study, the predominant purpose is for research or private study. However, the predominant purpose of copies made for students on a teacher's initiative is usually instruction or non-private study, so those copies do not constitute fair dealing.

The Board found that the retention by students of copies distributed to entire classes for as long as originals are ordinarily kept weighed against the character of the dealing being fair. While teachers generally limit copies to relatively short excerpts, it is more than likely that numerous requests are made for the same excerpts, so the amount of the dealing is unfair. The Board also found that there is an alternative to the dealing in that schools can buy the original textbooks.

The Board distinguished the nature of the dealing in *CCH*, where there was a public interest in disseminating judicial opinions, from this case, where the works are private materials. Although the Board could not define the exact reason for the significant decline in textbook sales in the preceding 20 years, it concluded that the effect of the photocopying is unfair.

The Coalition sought review by the FCA. The parties agreed that the copies made by, or at the request of, students are for an allowable purpose. The FCA said that the conclusion of the Board that copies made by, or at the instruction of, a teacher do not qualify as fair dealing was reasonable. Such use is not private study because "private" is not to be equated with "non-commercial." "Private study" means individual study. When students study in a class, they do not engage in private study. The FCA said that the Board's findings with respect to the *CCH* factors were reasonable.

The Coalition also relied on a separate exemption that allows the reproduction of copyrighted works for certain educational purposes on the premises of an educational institution. This exemption does not require that the dealing be fair. However, the exemption does not apply if the work is commercially available in a medium that is appropriate for the purpose referenced in the relevant exemption. The FCA remitted the decision to the Board on this issue because, while the Board considered whether the works were commercially available, it did not determine the media in which the works were available and whether those media were appropriate.

CONT'D ON PAGE 4

CONT'D FROM PAGE 3

Supreme Court of Canada

The Coalition appealed only the fair dealing issue to the SCC, so the issue was limited to whether photocopies made by teachers to distribute to students for class instruction qualify as fair dealing. The SCC rendered a five-to-four split decision. A majority of five justices held that the Board's decision is to be reviewed on a reasonableness standard and concluded that the Board misapplied the *CCH* factors so that its decision was "unreasonable." As a result, the issue was remitted to the Board for reconsideration.

A minority of four justices said that while the *CCH* factors help assess whether a dealing is fair, they are not statutory requirements. Fair dealing is a matter of impression. The Board's application of the factors should be treated with deference and a reasonableness standard should be applied on judicial review. According to the minority, the Board made no reviewable error in principle. Other than in one relatively minor respect, the Board's decision was intelligible, transparent and justifiable and cannot be said to fall outside of a reasonable range of outcomes.

The whole court agreed on the test for fair dealing, as articulated in *CCH* and *SOCAN*. There also was no dispute that the first step of the test set out in *CCH* was satisfied because the photocopying was for the allowable purpose of research or private study. The majority and minority differed on whether the Board's decision that the making of the copies is unfair according to the factors set out in *CCH* was reasonable.

Is Photocopying Textbook Excerpts by Teachers Fair?

Purpose. The Board concluded that the predominant purpose of the copying was that of the teacher. However, the majority said that the relevant perspective for the determination of the purpose of the dealing is that of the user. The copier's purpose is relevant to the fairness analysis if the copier hides behind the shield of the user's allowable purpose to engage in a separate purpose, such as a commercial one, that can make the dealing unfair. Where teachers photocopy textbooks, they facilitate research and private study by students. "Private study" is not limited to study in isolation.

The minority said that it was neither artificial nor unreasonable for the Board to conclude that the relevant and predominant purpose of the photocopies

is for instruction by teachers. The Board did not err by equating instruction with non-private study. The word "private" cannot be stripped of meaning. A copy made on a teacher's own initiative may be for private study if, for example, the material is tailored to the particular learning needs or interests of a single student or a small number of students, but "private study" cannot include large quantities of copies made as part of an organized program of instruction.

Amount. The majority said that the Board's approach on the amount of the dealing was also flawed. Having found that teachers only copy short excerpts of each textbook, the Board was required to determine whether the proportion of each of the short excerpts in relation to the whole work is fair. This factor does not involve a quantitative assessment based on aggregate use.

The minority agreed that as a matter of analytical coherence, the amount of the dealing is concerned with the proportion of the excerpt to the entire work. The minority also agreed that it is important not to consider the same aspect of the dealing under more than one factor. However, the minority said that there is no basis to disturb the Board's assessment of this factor because its analysis of the amount of the dealing remained focused on the overall proportion of the copied pages of a work in relation to the entire work over a period of time.

Character. The majority said that the Board erroneously considered the facts applicable to the amount of the dealing to assess the character of the dealing.

The minority agreed that the number of copies and the extent of copying are properly considered under the character of the dealing. However, it said that, because the Board focused its analysis on the fact that multiple copies of the same excerpt are made to be disseminated to a class, its conclusion on this factor was reached independently and should not be disturbed.

Alternatives. On the alternatives to the dealing factor, the majority said that, contrary to the Board's conclusion, buying books for every student is not a realistic alternative to teachers copying short excerpts to supplement textbooks. Copying short excerpts is reasonably necessary to achieve the ultimate purpose of the students' research and private study.

CONT'D ON PAGE 5

CONT'D FROM PAGE 4

The minority said that the Board's analysis of alternatives to the dealing was not unreasonable. Where numerous short excerpts of the work are taken, the fact that there are non-copyright protected alternatives does not automatically render a dealing fair.

Nature of Work. Neither set of reasons discussed the nature of the works.

Effect. As for the effect of the dealing on the work, the majority said that there was no evidence of a link between photocopying short excerpts and a decline in textbook sales. There were several factors other than photocopying that were more likely to have contributed to any such decline.

The minority agreed with the majority that the Board's conclusion that the dealing competes with the original work to an extent that makes the dealing unfair is not supported by evidence and is unreasonable. However, the minority said that, because no one factor is determinative and the Board considered the purpose of the dealing and the amount of the dealing to be the most important factors, this error is not sufficient to render the Board's decision unreasonable.

Both decisions confirm a trend toward a broadening of user's rights, particularly fair dealing, at the expense of copyright owners.

For more information, please contact [Sheldon Bushtein](#) or any member of our [Intellectual Property Group](#), including:

<u>Montréal</u>	<u>Sunny Handa</u>	514-982-4008
	<u>Hélène Deschamps Marquis</u>	514-982-4042
<u>Ottawa</u>	<u>Daphne Maravei</u>	613-788-2244
<u>Toronto</u>	<u>Sheldon Burshtein</u>	416-863-2934
	<u>Anthony Prenol</u>	416-863-4292
	<u>Antonio Turco</u>	416-863-5261
<u>Calgary</u>	<u>Monica Sharma</u>	403-260-9782
<u>Vancouver</u>	<u>Francis Chang</u>	604-631-3332

Go to blakes.com/english/subscribe.asp to subscribe to other *Blakes Bulletins*.

NEW YORK	MONTRÉAL	OTTAWA	TORONTO	CALGARY	VANCOUVER			
	CHICAGO	LONDON	BAHRAIN	AL-KHOBAR*	BEIJING	SHANGHAI*		blakes.com
* Associated Office								