

Canadian Broadcasting Corp. v. SODRAC 2003 Inc.

Technological neutrality a key issue in upcoming royalty case

BY SHANNON KARI
Law Times

The concept of technological neutrality will again be in front of the Supreme Court of Canada in an upcoming appeal over the royalties owed for music in "broadcast-incidental copies" made for TV or Internet-based programming.

In a case framed as a choice between permitting unfair "royalty stacking" practices imposed by the music industry and limiting the rights of creators to take advantage of technological changes to create new business models, there are likely millions of dollars at stake depending on how the top court rules following hearings set for March 16.

The CBC is appealing a Federal Court of Appeal ruling in *Canadian Broadcasting Corporation v. SODRAC 2003 Inc.* that

upheld a Copyright Board decision providing for royalties on every copy made in the production of a broadcast.

SODRAC is a collective society that represents a significant majority of French-language music titles in the country.

When a TV program uses a musical work, there are royalty agreements to synchronize it within the show as well as to broadcast it. Broadcasters also make numerous digital copies from the master copy for purposes such as timing or closed captioning. "Their use is internal and non-remunerative," argues the CBC in its written arguments filed with the Supreme Court.

"It is incidental to the main economic activity. Nothing changes except they make more copies," says Marek Nitowski, lead counsel for the CBC in its appeal and a partner at Fasken Martineau DuMoulin LLP.

The Federal Court of Appeal, however, agreed with the reproduction rights organization that "incidental copies" do add value to the final product. "If technological advances require the making of more copies of a musical work in order to get an audiovisual work that incorporates it to market, those additional copies add value to the enterprise," wrote Justice Denis Pelletier on behalf of the unanimous three-judge panel.

The Federal Court of Appeal relied on a 1990 decision by the Supreme Court in *Bishop v. Stevens* that stemmed from a dispute over prerecorded musical performances. In the CBC case, the Federal Court of Appeal declined to address technological neutrality or the idea that copyright holders should neither gain nor lose in a digital environment in part because it said the Supreme Court hadn't been sufficiently clear in defining the concept.

But the series of copyright decisions by the top court in 2012 "has clearly paved the way for the argument that *Bishop* is no longer good law, at least on the particular issues at play here," says Carys Craig, a professor at Osgoode Hall Law School. This argument is the "most bold" made by CBC but it may also be its most successful, says Craig, a founding member of Osgoode's intellectual property law and technology program.

"It was unfortunate the Court of Appeal did not more fully embrace technological neutrality as a guiding principle in its ruling on *SODRAC*," says Craig. "I would expect the Supreme Court to restate its importance as a tool in judicial interpretation."

The finding that incidental copies attract royalties has quadrupled the annual fees the CBC must pay to SODRAC to \$2.3 million, according to the broadcaster's lawyers. As well, they note that

the Canadian Musical Reproduction Rights Agency has estimated the potential for annual revenues of \$50 million in this area outside of Quebec.

The Federal Court of Appeal made a "fundamental error in law, namely the rejection of technological neutrality as a guiding principle in the interpretation and application of the Copyright Act," wrote Nitowski on behalf of the CBC.

"The decisions below allow SODRAC to double-dip by collecting multiple royalties at different stages of the same economic activity," says the CBC, also describing the practice as royalty stacking.

A number of groups are seeking intervenor status in the Supreme Court hearing, including Music Canada. In its written arguments seeking leave, Music Canada and a number of other organizations warn against accepting the CBC's arguments.

The suggestion that technological neutrality should maintain the status quo for copyright holders would mean there couldn't be any new rights in the digital world, they argue. "Such a result would undermine new business models and create uncertainty that would affect both the licensing and enforcement of rights in digital settings," wrote Barry Sookman, a partner at McCarthy Tétrault LLP who's representing Music Canada and four other proposed intervenors. **LT**

Dissent cites s. 8 windfall

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allegation, including the invalidity allegations made by Teva and Riva."

In dissenting, Justice Robert Mainville agreed, in part, with Sanofi-Aventis. "In my view, the trial judge's construction of a hypothetical market in which Apotex enters the market free of the regulatory constraints of the *NOC Regulations*, while the market entry of other potential generic manufacturers is impeded by these Regulations, almost invariably ensures that there will be a windfall for Apotex and the other generic manufacturers availing themselves of section 8 of the Regulations in their respective proceedings," he wrote.

"This is particularly clear in this case."

In its examination of the case, the Supreme Court will decide what the necessary framework is to make the calculations for damages. And that guidance, says Mowatt, will lay the foundation for all s. 8 cases that follow. **LT**

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