BALANCING ACTS IN THE AGE OF DIGITAL MUSIC - A CANADIAN PERSPECTIVE

Katie Wang*
Marusyk Miller & Swain LLP
270 Albert Street, 14th Floor
Ottawa, Ontario Canada
K1P 5G8
Tel: (613)-567-0762
Fax: (613)-563-7671
Email: kwang@mbm.com
Website: http://www.mbm.com
Abstract

The Canadian approach with respect to private copying of digital music, which relies on levy of blank media, appears less aggressive compared to the US approach. From a practical point of view, a levy on blank recording media is relatively easily administered and/or enforced as well as possibly attract less public hostility when compared to its more litigious alternatives.

We provide the current state of law in Canada on this topic. We will first briefly introduce the statutory basis of Private Copying. Then we will provide an analysis of the recent Canadian courts' decisions on copying of digital music. Needless to say, in the day and age of the Internet, uploading, downloading, and other ever-evolving technologies present new challenges to an existing and somewhat arcade copyright legal regime.

1. INTRODUCTION

The downslopes of Napster and Kazaa, as well as RIAA (Recording Industry Association of America)’s aggressive legal campaigns trying to eliminate illegal file-sharing worldwide have generated much media attention over the recent years. In fact, RIAA’s subpoena of a grandmother’s AOL account information because her 16-year-old grandson, using her account, downloaded 500 songs from Kazaa as part of a school project has generated much negative publicity for the organization. When one removes the media gloss of these reports, a much more fundamental question remains, where do we draw the line in terms of protecting copyrights holders interests in the age of digital music?

In addressing this question, one has to keep in mind that in a consumer-driven market where music industry, which, in the eyes of the consumers, represents the copyrights holders’ rights and interests, however nevertheless relies on the sales to the consumers, rights cannot be extended for one party without constraining the other’s. At the same time, one also has to be mindful that copyrights have been traditionally difficult to monitor and enforce. So the question is - how far is too far in terms of the music industry pushing the boundary of protecting the copyright holders’ interests? In fact, in recent years, the sales figure in the music industry has dropped consistently. Therefore, in the days and age of digital music, a careful examination on the shift in the delicate balance between protecting the copyrights holders’ rights while not creating a chilling effect on the consumer interests may have long term ramification on the success of music industry.

In this context, this paper wishes to address the approach Canada has taken with respect to private copying of digital music, where the Canadian judicial system attempts to strike a balance between the copyrights holders’ rights and the consumers’ interests. Compared to the US approach, the Canadian approach, which relies broadly on the levy of blank media, appears less aggressive towards the consumers.

It is generally acknowledged that Canada and the US shares significant similarities with respect to language, culture, legal, technological and business infrastructures. The two countries, however, have adopted different and distinct approaches in dealing with copyrights in the age of digital media, particularly in the area of digital music. For example, the US has enacted fairly strong prohibitions against efforts in circumventing digital rights in the Digital Millennium Copyright Act while imposing a narrow levy under its Audio Home Recording Act. Canada, on the other hand, to date has not enacted any anti-circumvention legislation that is similar or equivalent to the US Digital Millennium Copyright Act. Rather, it has created a much broader levy structure to address the issue of private copying.

Below, we will discuss the current state of law in Canada on this topic. We will first briefly introduce the statutory basis of the “private copying” exemption in Canada. We then provide an analysis of the recent Canadian courts’ decisions on copying of digital music. In the day and age of the Internet, uploading, downloading, and other ever-evolving technologies present new challenges to an existing and somewhat arcade copyright legal regime.

2. STATUTORY BASIS

Copyrights in Canada are governed by the Canadian Copyright Act (hereinafter the Act). The “Private Copying” exemption is under sections 79-88 of the Act. Together, these sections established a regime through which certain rights ordinarily belong to copyright holders are removed in return for financial compensation by way of levy.

The meat of the exemption is in subsection 80(1) of the Act, where provides:

80. (1) Subject to subsection (2), the act of reproducing all or any substantial part of

(a) a musical work embodied in a sound recording,
(b) a performer’s performance of a musical work embodied in a sound recording, or
(c) a sound recording in which a musical work, or a performer’s performance of a musical work, is embodied
onto an audio recording medium for the private use of the person who makes the copy does not constitute an infringement of the copyright in the musical work, the performer’s performance or the sound recording.

(2) Subsection (1) does not apply if the act described in that subsection is done for the purpose of doing any of the following in relation to any of the things referred to in paragraphs (1)(a) to (c):

(a) selling or renting out, or by way of trade exposing or offering for sale or rental;
(b) distributing, whether or not for the purpose of trade;
(c) communicating to the public by telecommunication; or
(d) performing, or causing to be performed, in public.

There are three aspects of section 80(1) which together define the scope of the exemption:

Firstly, the section specifically refers to “a musical work”, “a musical work embodied in a sound recording”, or “a sound recording in which a musical work, or a performer’s performance of a musical work, is embodied”. For the purposes of our discussion, it is only necessary to make the point that other copyrighted materials such as computer software, video recordings or movies do not fall under the purview of the Private Copying exemption.

Secondly, the exemption applies only when musical works are copied onto an “audio recording medium”. An “audio recording medium” is defined as “a recording medium ... onto which a sound recording may be reproduced and that is of a kind ordinarily used by consumers for that purpose”. The Act, therefore, relies on a broad definition of what is meant by a “recording medium”. In 1999, the Canadian Copyright Board considered an application to establish a tariff on blank recording media. In its decision, the Board applied a broad interpretation and held that “‘audio recording media’ ought to be interpreted to include all non-negligible uses” [1]. Audio recording media that were clearly meant for other uses, such as Digital Audio Tapes, were not subject to a levy. Moreover, the Board emphasized that the definition was an “open one” and that “as markets evolve, new types may be identified if the Board is satisfied that consumers have found other ways to make private copies of their favourite music” [2].

Thirdly, it must be emphasized that the exemption created by the Act applies only to private copies. While “private copying” is not defined in the Act, subsection 80(2) spells out the types of activities that fall outside the scope of the exemption. Specifically, it sets out that making copies for the purpose of selling, renting, distributing, or communicating to the public by means of telecommunication or for the purpose of performing the music in public are all infringing acts of copyright.

In essence, the effect of subsection 80(1) is to subtract from the rights of the music copyright holders in the context of copying for private use in exchange for a right to receive remuneration from manufacturers and importers of blank audio recording media in respect of the reproduction for private use of the works. Further, subsection 82(1) stipulates that manufacturers and importers are liable to pay levy to the appropriate collecting body for selling or otherwise disposing of blank audio recording media ordinarily used for recording music.

Sections 83 to 88 deal with the more “administrative” aspects of the private copying regime. For example, sections 83 and 84 establish the process by which a collective body, representing the interests of authors, performers or manufacturers of music may apply for the tariff and how monies collected be distributed to their constituents promptly. Section 85 deals with tariff collection for foreign artists and manufacturers. Section 88 establishes the civil remedies available to a collecting body in the event that an individual liable for paying the tariff does not pay the imposed levy.

3. RECENT CANADIAN COURT DECISIONS

Having briefly canvassed the scope of the statutory provisions on private use exemption, we will turn our discussions on how these provisions are applied to the activities of an average consumer in Canada.

3.1 Background – A Primer of Computer Terms

While an in-depth exploration of the complexities of the Internet is beyond the scope of this paper, a basic discussion of key terms and phrases used in the Internet realm is helpful in order for the below analyses.
In the most fundamental sense, Internet can be considered as a vast network of computers connected by various telecommunication systems. For a consumer end user, access to the Internet is typically through a service provider. There are a number of ways this access may be provided, for example, cable, high speed or regular dial-up services. In addition, service providers may also provide "space" on the Internet where an end user can "post" or "house" its material (e.g., a web page), i.e., as a content provider. The actual process of making content available for others to view, use, or download is called uploading. Conversely, the process of copying content from an Internet web page onto one's own computer is known as downloading. It should be noted that the entities described herein need not to be distinct from each other. For example, some service providers may also be content providers. In addition, it is important to realize that both uploading and downloading result in copies being created, i.e., when a user uploads a file he creates a copy on the service provider while retaining a copy on his home personal computer. Similarly with downloading, the copy on the service provider remains available to other users after the download has occurred.

The process of exchanging music over the Internet is referred to as file sharing. File sharing can imply one of two things. Firstly, an end user can be said to be engaged in file sharing when he uploads a music file onto a service provider and thereby makes it available for others to download. File sharing also includes the use of peer-to-peer networks. Peer-to-peer networks are created when a multitude of users run software such as KaZaa (or its infamous predecessor Napster). These programs work by allowing each user to place files in a specified directory that may then be accessed by any other user who is also running the network software. It should be noted that communication within the network is still mediated by the individual users' service providers. As such, the files that the individual users exchange must still “pass through” the various service providers' systems during the exchange.

3.2 Copying

Based on a reading of the Act, it is clear that an end user is free to make copies of music without infringing the copyrights holder’s rights so long as they are for private use purposes. Perhaps the easiest way to understand the effect of the legislation is to describe it as a “forced buy-out”. That is to say, the legislation takes away the copyright holder’s right to restrict a person from making private copies in exchange for monetary compensation collected through levy from manufacturers and importers of blank audio recording media, which ultimately will be passed on to the end consumers.

What then, are considered as the “blank audio recording media” which levy can be collected on? The Canadian Copyright Board, an administrative body, makes the determination of what types of recording media constitute “ordinarily used for the purpose of recording media”.

In its recent decision on this subject [3], the Board determined that audio cassettes of over 40 minutes in length, CD-R and CD-RW, CD-R Audio and CD-RW Audio, and MiniDiscs fall under this category. In addition, the Board determined that memory contained within devices such as MP3 players (“Non-Removable Memory Permanently Embedded in a Digital Audio Recorder”) is also used for the purpose of recording music and thus should be subject to a levy.

This 2003 Copyright Board ruling was challenged in the Canadian Court in Canadian Private Copying Collective v. Canadian Storage Media Alliance (hereinafter CCPC) [4]. On the issue of the applicability of levy to MP3 players and the like, while the Federal Court of Appeal of Canada agreed with the Board that a digital audio recorder was ordinarily used for the purpose of copying music, it disagreed with the Board’s decision that the memory of a digital audio recorder be called “media”. The Court noted that the Board wished to get around the definition problem by applying the levy to the memory contained within the device. This is problematic as the exact same memory contained within other devices (e.g., digital cameras) was not subject to the levy.

In the end, the Court took the position that it is for the Canadian Parliament to decide whether digital audio recorders such as MP3 players ought to be brought within the class of items that can be levied. As it currently stands, there is no authority for certifying a levy on such devices or the memory embedded therein [5].

The Supreme Court of Canada, in August of 2005, declined to hear an appeal of the CPCC case on the subject of applying the levy to digital audio recording devices. The Canadian Parliament has been working on amendment to the current Act. It remains to be seen whether digital audio recording devices will be included in any future Private Copying regime.

It should be noted that the Canadian Copyright Board has adopted a flexible approach in determining what media should be subject to levy. Thus, emerging technologies and shifts in consumer preferences could
potentially alter the types of media subject to the levy. Moreover, it should be noted that the Private Copying exemption applies only to recording media that are subject to levy. While it may be a point of academic discussion, recording onto media not subject to levy (for example audio cassettes of less than 40 minutes in length) remains an infringement of copyright [6].

3.3 Distribution

The right to make private copies under the exemption is not, however, without limitations. Firstly, the legislation is explicit about the fact that the recording must be made for personal use. Thus, as stipulated in subsection 80(2)(a) of the Act, selling or renting out of copied music would be a violation of copyright.

What may be less obvious, however, is that subsection 80(2)(b) of the Act stipulates that "distribution of copied music whether or not it is for the purpose of trade" is not protected by the exemption of subsection 80(1). The Canadian Copyright Board took the position that "this means that making a copy of a CD of the latest release by the hottest star to give to one's friend is still an infringing action" [7].

One would presume, therefore, that the once common practice of making a mixed tape (or its modern successor, a mixed CD) for a friend is not covered by the exemptions of the Act. Sharing of music, however, remains unaffected by the provisions of the Act. Thus one is still free to allow a friend to borrow music from one's collection. If that friend in turn decided to make a copy of that music for himself he would be free to do so provided that his copy is made strictly for private, non-commercial use. It has been noted, however, that this type of distinction is more rhetorical than practical as in reality, it would be almost impossible to distinguish or enforce [8].

3.4 Evolving Issues - Internet File Sharing

3.4.1. Downloading

A curious aspect of the levy scheme is that it is indifferent as to the source of music (i.e., whether the source is an original or infringing copy). That is to say, once the music is in your possession you are free to make a copy of it so long as your copy is made for private use and adheres to the provisions of the Act.

As the Canadian Copyright Board writes, "The regime does not address the source of the material copied. There is no requirement ... that the source copy be a non-infringing copy. Hence, it is not relevant whether the source of the track is a pre-owned recording, a borrowed CD, or a track downloaded from the Internet" [9]. The position Copyright Board took was broadly interpreted in the Canadian press to mean that downloading music was no longer a violation of copyright.

What then, is the legal status of downloading music from the Internet for the purposes of copying? First, one must be mindful that the Copyright Board is an administrative body that has no prerogative to create law in Canada. Though its arguments can be persuasive, until adopted by a Canadian Court, the argument is merely a suggestive interpretation of the statute. It is for the court to give these arguments legal effect.

In BMG Canada Inc. et al v. John Doe et al. [10], the Federal Court of Canada was asked to decide on whether the plaintiffs, BMG Canada, should be granted an order compelling certain Internet service providers to disclose the names of customers who were allegedly involved in exchange of infringing music files. The Court denied the order and held that the Copyright Board's interpretation as supporting the idea that "downloading a song for personal use does not amount to infringement".

This interpretation remains a subject of debate. A plain reading of the words of the Copyright Board suggest it is making no comment on the legality of downloading. The Board writes, for example, "the liability of persons uploading, distributing or communicating music ... is not at issue ... we are only dealing here with the end copies [emphasis added]". Thus the Copyright Board is not concerned with how the music comes into the copier's possession. It could be interpreted that the Board is simply stating that one may make personal copies of recordings without violating copyright even if those recordings themselves are violations of copyright. For example, imagine the situation where a concert is recorded without authorization (bootlegging). The Copyright Board's position can be interpreted as that a personal copy made of this bootleg does not constitute a violation of copyright. The Board makes no comment on the legality of the act of bootlegging itself. Thus one interpretation of the Board's decision is simply that a song downloaded from the Internet may be copied onto a CD-R without legalizing the act of downloading itself. By choosing to deal only with "the end copies" the Copyright Board has generated significant uncertainty.

At the Federal Court of Appeal, the Federal Court's decision regarding the legitimacy of music downloading was ruled premature. The Court of Appeal writes further that the lower court "gave no
consideration to ... the circumstances in which the defence of 'private use' will not be available". Hence, it remains prudent to suggest that Canadian jurisprudence is in a state of limbo, awaiting a court ruling directly on the issue of Internet downloading.

3.4.2. Uploading

The issue on the legality of making music available to others through the Internet has yet to be settled by the Canadian Courts. Nevertheless, certain aspects are clear from the statutes. For instance, subsection 80(2)(c) makes explicit that communication to the public by way of telecommunication is outside the scope of the exemption.

In 1999, the Copyright Board considered an application made by SOCAN (Society of Composers, Authors and Music Publishers of Canada) for a proposed tariff (Tariff 22) on copyrighted musical works transmitted over the Internet [12]. The Copyright Board, when considering Internet communication, decided that "a musical work is communicated by telecommunication when a server containing the work responds to a request and packets are transmitted over the Internet for the purpose of allowing the recipient to hear, see, or copy the work" [13]. Thus, "transmission" occurs with the act of uploading the music file so long as the uploaded file is available for download, viewing, etc. Whether that file is ever subsequently downloaded, viewed, or otherwise accessed by another Internet user is irrelevant. The transmission is considered to be "to the public" when files are "made available on the Internet openly and without concealment, with the knowledge and intent that they be conveyed to all who might access the Internet" [14].

In SOCAN et al. v. CAIP et al. [15], the Supreme Court of Canada provided guidance on the degree to which an Internet service provider can be held liable when its users transmit files that constitute infringements of copyright. The Supreme Court of Canada affirmed that the Copyright Board's interpretation on the issue of when uploading a file will be considered a "transmission to the public". It follows, therefore, that anyone who uploads a file, for example onto a personal web page that may be accessed by any other user, is thereby creating a copy for the purpose of transmitting it to the public by way of telecommunication and as such, the act likely falls outside the scope of the private use exemption.

4. CONCLUSION

The Canadian approach with respect to private copying of digital music, which relies on levy of blank media, appears less aggressive compared to the US approach. From a practical point of view, a levy on blank recording media is relatively easily administered and/or enforced as well as possibly attract less public hostility when compared to its more litigious alternatives.

However, as noted above, in the day and age of the Internet, uploading, downloading, and other ever-evolving technologies present new challenges to an existing and somewhat arcane copyright legal regime. The Canadian judicial system's response remains to be seen.

5. REFERENCES

[2] Ibid at 32.
[5] Ibid., at 164.
[13] Ibid at 442.
[14] Ibid at 445.

*© Katie Wang, Marusyk Miller and Swain LLP, Ottawa, Canada, 2006. The author wishes to thank Graham McNeil, Student-at-Law, who provided research.