Federal Court of Appeal | Cour d'appel fédérale

Date: 20100902

Dockets: A-519-07
A-520-07

Citation: 2010 FCA 220

Docket: A-519-07

BETWEEN:

SHAW CABLESYSTEMS G.P.

Applicant

and

SOCIETY OF COMPOSERS, AUTHORS AND MUSIC PUBLISHERS OF CANADA

Respondent

and

CMRRA-SODRAC INC.

Intervener

A-520-07

BETWEEN:

BELL CANADA, ROGERS COMMUNICATIONS INC., PURETRACKS INC., AND TELUS COMMUNICATIONS COMPANY

Applicants

and

SOCIETY OF COMPOSERS, AUTHORS AND MUSIC PUBLISHERS OF CANADA

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and

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Intervener

Heard at Montréal, Quebec, on May 3, 2010.

Judgment delivered at Ottawa, Ontario, on September 2, 2010.

REASONS FOR JUDGMENT BY: PELLETIER J.A.

CONCURRED IN BY: LÉTOURNEAU J.A.
NADON J.A.

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REASONS FOR JUDGMENT

PELLETIER J.A.

INTRODUCTION

[1] These applications are among a number of applications for judicial review arising out of the Copyright Board's (the Board) decisions relating to the Society of Composers, Authors and Music Publishers of Canada's (SOCAN) application for a tariff with respect to, broadly speaking, the performance and communication of musical works on, or by means of, the Internet. The issue in this application is, simply put, whether the transmission of a musical work to an individual by an on-line music service is a communication of that work to the public by telecommunications within the meaning of paragraph 3(1)(*f*) of the *Copyright Act*, R.S.C. 1985, c. C-42 (the Act). The Board found that they were, a reasonable conclusion, in my view, and as a result, I would dismiss each application for judicial review.

[2] Substantially the same arguments as to whether downloads or streams were communications to the public were made in each of these applications. These reasons will apply to each application and a copy will be placed on each file.

THE FACTS

[3] The applicants, Shaw Cablesystems G.P., Bell Canada, Rogers Communications Inc. and TELUS Communications Company are all Internet service providers, that is, they provide consumers with a means of becoming part of the network of networks which is the Internet. Persons who have an Internet account with the applicants are able to access online music

services' web sites from which they can download music files (or streams) to their computers. The applicant Puretracks Inc. is a musical download service.

[4] The respondent SOCAN is a collective society which administers in Canada performing rights and right to communicate musical works to the public by telecommunication. The intervener, (CMRRA-SODRAC INC.) is a collective society which administers the right to reproduce protected musical works in Canada. For all intents and purposes, the intervener supports the position taken by SOCAN. As a result, references to SOCAN should be taken as a reference to the respondents and the intervener.

[5] The basic facts which underlie the legal issue raised by this case are not in dispute. It is common ground that online music services operate web sites on servers which are accessible from the Internet from which consumers can download music files or streams from those sites to their own computers or mobile devices. A download is transmission of a file which is reconstituted on the hard drive of the recipient computer and which may then be played, while a stream is a download which is meant to be played as it is received and then erased from the computer's hard drive. The Supreme Court has held that such a file is communicated when it is recreated on the recipient computer and that such a communication is a communication by telecommunication: see *Society of Authors, Composers and Music Publishers v. Canadian Association of Internet Providers*, 2004 SCC 45, [2004] 2 S.C.R. 427, (*SOCAN v. CAIP*) at paragraphs 42 and 45. The only question is whether such a communication is a communication of the work to the public by telecommunication.

THE DECISION UNDER REVIEW

[6] The decision under review was issued October 18, 2007 under the title of Reasons for the decision certifying SOCAN Tariff 22.A (Internet-Online Music Services) for the years 1996 to 2006. I shall refer to it as the Tariff 22.A Decision.

[7] The Tariff 22.A Decision was the second part of a two stage process arising out of SOCAN's request for the certification of a tariff for the communication of musical works over the Internet. The Board decided to issue a first decision which was limited to certain legal and jurisdictional issues which it was called upon to decide in dealing with SOCAN's application. That first decision was issued on October 27, 1999 (the Tariff 22 Decision). In that decision, the Board dealt at length with questions such as whether downloading a file from the Internet was a communication, whether such communications were communications by telecommunication and whether those communications were communications to the public.

[8] While the Tariff 22 Decision was challenged in this Court (*Society of Composers, Authors and Music Publishers of Canada v. Canadian Association of Internet Providers*, (*SOCAN v. CAIP*), 2002 FCA 166, [2002] 4 F.C. 3 and in the Supreme Court, 2004 SCC 45, [2004] 2 S.C.R. 427, the issues raised by this application were not considered in those proceedings even though many of the applicants in the present application, or their proxies, were parties to the challenge to the Tariff 22 Decision.

[9] In its Tariff 22.A Decision, the Board returned to some of the issues considered in the Tariff 22 Decision when it identified the following question as the first issue which it must decide:

> Is the transmission of a download a communication to the public by telecommunication within meaning of paragraph 3(1)(*f*) of the [Copyright] Act.?
>
> Tariff 22.A Decision, page 25.

In disposing of this question, the Board articulated a number of propositions found in the jurisprudence. First, it said, the transmission of a download over the Internet communicates the content of download, and the content is communicated even if it is not used or heard at the time of the transmission: see Tariff 22.A Decision at paragraph 94.

[10] The Board went on to declare that there was no valid distinction, for purposes of this question, between downloads and streams. It follows, then, that the download of a stream is also a communication of the content of the stream: see Tariff 22.A Decision at paragraph 96.

[11] Second, the Board held that the transmission of a download to a member of the public is a communication to the public. The Board's conclusion is stated as follows: "One or more transmissions of the same work, over the Internet, by fax or otherwise, to one or more members of the public each constitutes a communication to the public": see Tariff 22.A Decision at paragraph 97. The Board noted that downloads are "targeted at an aggregation of individuals", a phrase drawn from this Court's decision in *CCH Canadian v. Law Society of Upper Canada*, 2002 FCA 187, [2004] 4 F.C. 213, (*CCH (FCA*)) at paragraph 100. The Board then referred to comments made by this Court and by the Supreme Court that "a series of repeated fax transmissions of the same work to numerous different recipients might constitute communication

to the public in infringement of copyright": see *CCH Canadian Ltd v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339 (*CCH(SCC)*) at paragraph 78 and, to the same effect, *CCH(FCA)* at paragraph 101. The Board relied on these comments to conclude that a download of a file from an online music service was a communication of that file to the public: see Tariff 22.A Decision at paragraph 97.

[12] The Board rejected the argument that a communication to the public required an element of simultaneity, that is, the recipients of the communication must receive it at the same time. The Board held that the requirement of simultaneity was inconsistent with the Supreme Court's position that a series of transmissions of a work to multiple recipients might constitute a communication to the public.

[13] Third, the Board refused to credit the argument that Internet transmissions are just another form of delivery on the basis that "paragraph 3(1)(*f*) of the Act targets communications *by telecommunication*": see Tariff 22.A Decision at paragraph 99. Thus the "delivery" of a musical work by telecommunication differs from the sale of a CD of the same work because the Act treats the two transactions differently.

[14] Finally, the Board rejected the argument that imposing a tariff on the communication of a work to the public by telecommunication amounted to double compensation. The rights of reproduction, performance and communication by telecommunication are distinct rights and subject to separate regimes.

[15] In summary, the Board found that downloads of music files from an internet server to an individual computer amounted to the communication of that file to the public by telecommunication and thus were the proper subject for a tariff setting out the royalties payable for such communications.

THE POSITIONS OF THE PARTIES

[16] The applicants' position, briefly stated, is that each download of a music file is a private communication between the operator of the online music service and an individual consumer. They say that such a private communication cannot become a communication to the public simply because, in an unrelated transaction, other consumers download the same work.

[17] Basing themselves on *CCH(SCC)*, they argue that this Court's decision in *Canadian Wireless Telecommunications Association v. Society of Composers, Authors and Music Publishers of Canada*, 2008 FCA 6, [2008] 3 F.C.R. 539, (*CWTA* or the Ringtones case) is, in effect, wrongly decided.

[18] The *CCH* case dealt with a range of issues in the law of copyright arising out of the Law Society of Upper Canada's operation, through its Great Library, of a "custom photocopy service" by which legal materials were reproduced and provided to members of the Law Society and other qualified recipients. Some of the works reproduced were copies of judicial decisions which had been supplemented by materials prepared by the publishers, e.g. headnotes. In some cases, the copied materials were forwarded to the requesting party by facsimile transmission. One of the issues in the case was whether such transmissions amounted to a communication to the

public by telecommunication, within the meaning of paragraph 3(1)(*f*) of the Act which, for ease of reference I reproduce below:

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;

[19] Both the Federal Court, at paragraph 167 of its reasons reported at [2000] 2 F.C. 451, [1999] F.C.J. No. 1647) and this Court, at paragraph 100 (Linden J.A.) and paragraph 242 (Rothstein J.A.) of its reasons, concluded that a communication emanating from a single point and intended to be received at a single point was not a communication to the public. The Supreme Court, at paragraph 78 of its reasons, agreed with the conclusion that "The fax transmission of a single copy [of a work] to a single individual is not a communication to the public."

[20] The applicants' case rests entirely upon this finding in the *CCH* decision. SOCAN also relies upon the *CCH* case, as well as this Court's decision *CWTA*, in support of its position that downloads of a work are a communication of that work to the public.

[21] SOCAN relies upon the caveat which the Supreme Court added to the statement quoted above with respect to point to point communications. To put matters in context, I reproduce the entire paragraph with the portion upon which SOCAN relies highlighted:

> 78. I agree with these conclusions. The fax transmission of a single copy to a single individual is not a communication to the public. This said, *a series of repeated fax transmissions of the same work to numerous different recipients might constitute communication to the public in infringement of copyright*. However, there was no evidence of this type of transmission having occurred in this case.

[22] The passage relating to repeated fax transmissions of the same work to numerous different individuals was given effect in the *CWTA* case. In that case, the issue was whether the download of ringtones from the wireless carrier's server to a consumer's telephone constituted a communication to the public of the ringtones, and was therefore subject to a tariff. This Court found that the transmission of the ringtones to the consumer was a communication, and that it was a communication to the public.

[23] Dealing with the Supreme Court's decision in *CCH(SCC)*, and in particular the paragraph quoted above, this Court said, at paragraph 35 of its reasons:

> 35 Based on this reasoning, it seems to me that in determining whether paragraph 3(1)(*f*) applies to the transmission of a musical work in the form of a digital audio file, it is not enough to ask whether there is a one-to-one communication, or a one-to-one communication requested by the recipient. The answer to either of those questions would not necessarily be determinative because a series of transmissions of the same musical work to numerous different recipients may be a communication to the public if the recipients comprise the public, or a significant segment of the public.

[24] This Court then adopted the Board's reasoning in the decision under review to the effect that:

> Wireless carriers are trying to sell as many copies of every single musical ringtone as possible to maximize sales and profit. They intend, indeed they wish for, a series of repeated transactions of the same work to numerous recipients. This, in our opinion, amounts to a communication to the public.
>
> *CWTA* at paragraph 36.

[25] This Court distinguished the holding in the *CCH(SCC*) case with respect to one to one transmissions by saying that there was no reason to believe that the Court had in mind a series of one to one communications to individuals who together comprise "a group that may fairly be described as the public, as in this case": see *CWTA* at paragraph 39.

[26] SOCAN relies upon this reasoning in supporting the Board's decision in the Tariff 22.A Decision.

THE STANDARD OF REVIEW

[27] The Board is a specialist tribunal which deals extensively with copyright matters. The Act is its home statute. It is therefore entitled to deference with respect to its interpretation of that Act: see *Dunsmuir v New Brunswick,* 2008 SCC 9, [2008] 1 S.C.R. 190, at paragraph 54. The question in issue here is one of mixed fact and law. If the Board is entitled to deference on pure questions of laws, and it is entitled to deference with respect to findings of fact, it must necessarily be entitled to deference on questions of mixed fact and law involving the application of its home statute to the facts of a case.

ANALYSIS

[28] Two preliminary observations are in order before beginning my analysis.

[29] The first observation concerns a small body of jurisprudence dealing with what is a performance in public. Certain comments made in this jurisprudence recur in cases dealing with the nature of a communication to the public. In my view, reliance upon that jurisprudence is not helpful.

[30] The jurisprudence includes cases such as *Composers Authors and Publishers Association of Canada Ltd. v. CTV Television Network Ltd*, [1968] S.C.R. 676, [1968] S.C.J. No. 47, (*CAPAC*); *CTV Television Network Ltd v. Canada (Copyright Board)*, [1993] 2 F.C. 115, [1993] F.C.J. No.2 (F.C.A.) (*CTV*); *Canadian Cable Television Association v. Canada (Copyright Board)*, [1993] 2 F.C. 138, [1993] F.C.J. No. 3 (F.C.A.) (*CCTA*). These cases were decided at a time when the definition of musical work was "any combination of melody and harmony, or either of them, printed or reduced to writing, or otherwise graphically produced or reproduced". In simplistic terms, a musical work was the sheet music in which the work was described in musical notation. As a result, the Supreme Court decided in *CAPAC* that the microwave transmission of an audible version of a musical work was not a communication of the musical work by radio communication but rather a performance of the work. The issue then became whether such a performance was a performance in public. The Court found that it was not.

[31] This line of jurisprudence was pursued in *CTV* and in *CCTA*. In *CTV*, the issue was whether the communication of programs containing musical works by CTV to its affiliates who

then broadcast them to the public amounted to a communication to the public by CTV. Since the Act had been amended since *CAPAC* was decided to substitute “communicate to the public by telecommunication” for “by radio communication”, SOCAN argued that the *CAPAC* decision was no longer good law. This Court disagreed since the definition of musical work had not changed so that the issue remained whether the transmission was a performance in public. This Court followed the Supreme Court’s decision in *CAPAC* and held that it was not.

[32] In *CCTA*, the issue was whether the transmission of non-broadcast services containing music (i.e. programming which does not originate from regular television broadcasting stations) to cable subscribers was a communication of the programming to the public. Following the same reasoning as *CTV*, this Court held that the transmission of the music contained in the programming was not a communication to the public of the musical work because the definition of musical work remained unchanged. This then left the issue of whether such transmissions amounted to a performance in public of those works.

[33] The difference between the *CTV* and *CCTA* cases is that in *CTV* as in *CAPAC* the transmissions in question were from CTV to its affiliated stations while in *CCTA* the transmissions were from the cable company’s head end to the homes of its many subscribers. This Court adopted the reasoning found in foreign jurisprudence which took “a realistic view of the impact and effect of technological developments”. It found that the transmission of programs directly to the homes of the cable subscribers was consistent with the plain and usual meaning of “in public” that is to say “openly, without concealment and to the knowledge of all”: see *CCTA* at p. 153.

[34] As noted, even though this jurisprudence deals with the meaning of “performance in public” as opposed to “communication to the public”, it has been invoked, by the Board and others, in cases involving the meaning of communication to the public. Two concepts have recurred with some frequency. The first is that of simultaneity, that is, a communication cannot be a communication to the public unless all recipients receive it more or less at the same time, as is the case in conventional broadcasting. This is drawn, by analogy, from the nature of a performance in public in which all member of the audience experience the work at the same time. The second recurring concept is that a communication to the public must be made “openly and without concealment and to the knowledge of all”.

[35] The transposition of the characteristics of a performance in public to a communication to the public is not helpful. The limited utility of the prior jurisprudence was the subject of comment in both sets of reasons in this Court’s decision in *CCH*. At paragraph 99 of his reasons, Linden J.A. wrote:

> 99. Although two decisions of this Court have interpreted the current version of paragraph 3(1)(*f*), the reasons in those cases only discussed the communication right briefly, since the definition of a "musical work" resolved the issues … Both CCTA and CTV 1993 dealt largely with the right to perform a work in public, and mentioned only that the phrase "to the public" is broader than "in public" (CTV 1993 at paras. 32-33; CCTA at paras. 17-18; see also Telstra Corporation Ltd. v. Ausralasian Performing Right Association Ltd. (1997), 38 I.P.R. 294 (Aust. H.C.)). The Trial Judge accepted this proposition (at paras. 165-7), however, the phrase "in public" is not at issue in this case. The fact that a communication made "in public" is likely also a communication made "to the public" is not determinative of the whether the Law Society communicates to the public.

At paragraph 243, Rothstein J.A. expressed a similar opinion:

> 243. Earlier versions of paragraph 3(1)(*f*) have been considered by Canadian courts, but these decisions are of little assistance because of significant amendments to this provision pursuant to S.C. 1988, c.65, brought into force February 13, 1989, by SI/89-70. Prior to these amendments, the exclusive right set out in paragraph 3(1)(*f*) was to reproduce "in public" and was limited to communication by radio. The provision now applies to communications to the public by telecommunication. The few cases decided

> since 1989 only go so far as to conclude that "to the public" is a broader concept than the previous phrase "in public". …Thus, the jurisprudence both before and after 1989 is not materially helpful in interpreting the current meaning of "to the public" in paragraph 3(1)(*f*).

[36] As a result, I do not believe it is necessary to dwell on the concepts derived from this jurisprudence which continue to appear in discussions of the nature of a communication to the public.

[37] My second preliminary observation is that neither the Federal Court of Appeal, nor the Supreme Court decided in *CCH* that “a series of repeated fax transmissions of the same work to numerous different recipients”, in and of itself, amounts to a communication to the public. The Supreme Court simply left this possibility open and this Court specifically declined to decide the question because it did not arise on the evidence: see *CCH(FCA)* at paragraphs 101 and 253. It is therefore an error to treat as settled law the proposition that a series of transmissions of a single work to multiple recipients amounts, in and of itself, to a communication to the public.

[38] Before dealing with the Supreme Court’s decision in *CCH*, it is perhaps useful to attempt to provide a framework to assist in the analysis of the jurisprudence relied on by the parties.

[39] In my view, there is authority to support the proposition that whether or not a communication is a communication to the public is a function of two factors: the intention of the communicator, and the reception of the communication by at least one member of the public. If those two conditions are met, then there has been a communication to the public.

[40] The Board recognized the role of the communicator's intention in the Tariff 22 Decision when it wrote:

> Consequently, a communication *intended to be received by members of the public* in individual private settings is a communication to the public.
>
> Tariff 22 Decision at page 29 (emphasis added).
>
> To communicate is to convey information, whether or not this is done in a simultaneous fashion. The private or public nature of the communication should be assessed as a function of *the intended target of the act.*
>
> Tariff 22 Decision at page 30 (emphasis added).

[41] This has also been recognized in this Court's jurisprudence. At paragraph 100 of this Court's reasons in *CCH*, Linden J.A. wrote:

> The Trial Judge held (at para. 167) that a single telecommunication emanating from a single point and intended to be received at a single point is typically not a communication to the public. I agree. In my view, the ordinary meaning of the phrase "to the public" indicates that a communication *must be aimed or targeted* toward "people in general" or "the community" (see the New Oxford Dictionary of English, s.v. "public" (Oxford: Clarendon Press, 1998). … Thus, to be "to the public" a communication must *be targeted at* an aggregation of individuals, which is more than a single person but not necessarily the whole public at large.
>
> [Emphasis added].

[42] A communication is "to the public" when the communicator intends the communication to be received by the public. The exact number of persons who actually receive the communication is not relevant so long as one member of the public receives it. Without at least one actual recipient, the communicator has not communicated to the public, he has merely had the intention of doing so. But beyond a single recipient, the number of recipients is not relevant to determining whether the communication is made to the public though it may be very relevant to the determination of the appropriate royalty structure.

[43] This leads to my next point. While the Supreme Court held, on the facts before it in *CCH*, that a point to point communication was not a communication to the public, I do not take this to foreclose the possibility that one could communicate to the public one person at a time. This is best understood by an analogy. The concept of selling to the public is generally understood as meaning that the vendor will sell his product to anyone who is interested in buying it. But each sale is a sale to an individual, involving an individual contract of sale between the vendor and the purchaser. If one focuses too closely on the individual sales, the notion of selling to the public fades from view. But if one steps back, it is more apparent that the vendor is selling to the public by selling to each of those members of the public who wishes to purchase his product.

[44] This analogy is also helpful in understanding the relationship between volume of sales and the intention to sell to the public. One would not say that a vendor was not selling to the public simply because, despite his best efforts, only one member of the public chose to buy his goods. To put the point a different way, volume of sales distinguishes only between those who sell to the public, and those who sell to the public successfully. The nature of the enterprise is the same.

[45] In the same way, nothing precludes communications to the public by telecommunications from occurring one transmission at a time, each transmission being a discrete transaction which occurs within the framework of an intention to communicate the work to the public.

[46] The idea of communication to the public by means of a series of private communications is not new. In the Federal Court, Trial Division decision in *CCTA* [1991] F.C.J. No. 24, 34

C.P.R. (3rd) 521, Strayer J. had to deal with the argument that cable transmissions to individual homes were not communications to the public. His initial reaction to this argument was a follows:

> *It is entirely conceivable to me that one may communicate to the public by a series of simultaneous individual communications to numerous people in different locations.* I cannot regard as being other than members of "the public" the 6.3 million subscribers to the cable systems of CCTA's members (or that portion who receive non-broadcast services), together with the families, guests, and friend of those subscribers who happen to be within earshot of their television sets. One must take into account modern reality.
>
> [Emphasis added.]

[47] CCTA was decided on other grounds but the passage quoted above is a recognition that a series of individual communications could nevertheless amount to a communication to the public. The reference to "simultaneous" individual communications does not, in my view, make simultaneity a condition of a communication to the public. In referring to simultaneous individual communications, Strayer J. was doing nothing more than describing the facts of his case which involve cable transmissions to individual homes.

[48] The same idea was expressed in *Telstra Corporation Ltd. V. Australasian Performing Right Association Ltd.*, (1997), 38 I.P.R. 294 (Aust. H.C.), where a majority of the Court found that:

> If anything, the use of the words "to the public" conveys a broader concept than the use of the words "in public" since it makes clear that the place where the relevant communication occurs is irrelevant. That is to say, there can be a communication to individual members of the public in a private or domestic setting which is nevertheless a communication to the public.

[49] As a result, there is a basis in the jurisprudence for the proposition that a private communication is not inconsistent with an intention to communicate to the public.

[50] With this framework in mind, I turn to the Supreme Court's decision in *CCH*.

[51] The Supreme Court held there that, in the context of the fax transmissions by the Great Library staff to individuals who had requested copies of certain materials, the fax transmission of a single copy to a single individual was not a communication to the public. In the preceding paragraph of its reasons, the Supreme Court quoted from the reasons of the trial judge that the fax communications 'emanated from a single point and were *each intended* to be received at a single point": see *CCH(SCC)* at paragraph 77 (emphasis added). While, as noted above, this is not inconsistent with an intention to communicate to the public, the trial judge did not find such an intention. This is apparent from the trial judge's discussion of this issue at paragraph 167 of his reasons, reproduced below:

> 167. Both of the foregoing authorities arise from factual situations where the person transmitting the telecommunication could reasonably be expected to have intended the communication to be received by multiple persons at diverse locations. They involved telecommunications directed to a relatively broad public, albeit not the public at large. They could be described to be telecommunications that were from a single point, intended as in the case for example of subscription or pay-per-view television, to be received and capable of being received at multiple points. That is not the situation before me. Here, the telecommunications, by facsimile, emanated from a single point and were each intended to be received at a single point. Indeed, as I understand the technology, each would only have been receivable at a single point barring a malfunction or some form of unanticipated interception. I am satisfied that the telecommunications here in question were not telecommunications "to the public".

[52] The Supreme Court's decision is consistent with the trial judge's conclusion, implicit if not explicit, that there was no intention to communicate the work to the public. In the absence of such an intention, there cannot be a communication to the public by the communicator. To that extent, I believe that the Supreme Court's decision is narrower than was suggested in argument.

[53] It does not follow from this that one cannot find an intention to communicate to the public where there is only evidence of single transmissions. As was suggested earlier in the discussion of the analogy of selling to the public, a focus on individual transactions tends to minimize the vendor's intention with respect to the public. In *CCH*, a focus on communicating to the public might have produced a different result.

[54] In fact, the Supreme Court's caveat with respect to multiple transmissions of a work to multiple recipients is best understood as an indication that numerous transmissions to multiple recipients could be evidence of an intention to communicate to the public. This does not mean that volume alone is determinative of whether a communication is a communication to the public, but it does suggest that volume of transmissions can be evidence of the communicator's intention.

[55] That said, the argument that volume of transmissions, in and of itself, can transform private communications into a communication to the public is fundamentally flawed. SOCAN's reliance upon the Supreme Court's caveat in *CCH(SCC)* and this Court's decision in *CWTA* rest on this argument.

[56] If the private nature of a point to point communication precludes it from being a communication to the public, it is difficult to see how other private communications, between the original communicator and other parties, could alter the nature of the original private communication.

[57] An approach based on volume of communications alone also raises the difficult question of the determination of the point at which private communications become a communication to the public. To use the example of the Great Library, if the first transmission of a copy of the Supreme Court's decision in *Dunsmuir* is a private communication, at what point would subsequent transmissions become a communication to the public? The 25th transmissions? The 50th transmission? The 200th transmission? How is the Great Library to know, as it responds to individual requests, when it is about to infringe the rights protected by paragraph 3(1)(*f*)? Once the threshold is crossed, do the preceding communications cease to be private communications?

[58] At first glance, this Court's decision in *CWTA*, upon which SOCAN relies, adopts a numerical test for determining when a communication is a communication to the public. In discussing the Supreme Court's decision in *CCH*, the Court wrote at paragraph 35:

> …it is not enough to ask whether there is a one-to-one communication, or a one-to-one communication requested by the recipient. The answer to either of these questions would not necessarily be determinative because a series of transmissions of the same musical work to numerous different recipients may be a communication to the public if the recipients comprise the public, or a significant segment of the public.

[59] The question of whether the recipients comprise the public or a significant segment of the public suggests that that determination depends upon the number of persons who receive the communication, as opposed to the intention of the communicator. As indicated above, this is problematic. That said, the proposition quoted above is sound if it is understood to refer to the intended recipients of the communication. There is some reason to believe that this is what the Court had in mind when one considers the portion of the Board's reasons which it found persuasive:

> Wireless carriers are trying to sell as many copies of every single musical ringtone as possible to maximize sales and profit. They intend, indeed they wish for, a series of

> repeated transactions of the same work to numerous recipients. This, in our view, amounts to a communication to the public.
>
> *CWTA* at paragraph 36.

[60] It is clear from this passage that the Board's focus is on the wireless carriers' intention in making ringtones available for download. The Board's use of the phrase "repeated transaction of the same work to numerous recipients" while suggestive of a quantitative test, is not inconsistent with the view that multiple sales to multiple recipients may be evidence of an intention to communicate the work to the public. Intention alone, however, is not sufficient since paragraph 3(1)(*f*) refers to communications and not merely an intention to communicate.

[61] I would note, in passing, that the fact that communications occur in a commercial context, like volume of communications, is not determinative of the communicator's intent. Some activities where there is clearly an intention to communicate to the public, such as peer to peer file sharing, are not commercial activities and yet consist in making the musical works on one user's hard drive available to all other users who use the same file sharing software.

[62] I would summarize my conclusions as follows. The Supreme Court's conclusion in *CCH* that a single transmission of a single copy to a single individual is not a communication to the public was made in a context where there was no evidence of an intention to communicate to the public. As a result, it is not authority for the proposition that no "point to point" communication can ever amount to a communication to the public. The Supreme Court's caveat to the effect that a series of repeated transmissions of the same work to numerous different recipients might constitute a communication to the public is best understood as a recognition that multiple transmissions of the same work could constitute evidence of an intention to communicate to the

public and, if they did, such transmissions would indeed constitute a communication to the public. This Court's decision in *CWTA* is not inconsistent with these conclusions because in that case, the Court appears to have found that there was evidence of an intention to communicate musical works to the public. Thus, I believe that *CCH(SCC)* can be reconciled with this Court's decision in *CWTA*. Finally, if there is an intention to communicate a work to the public, every communication of the work, starting with the first, is a communication to the public.

[63] Returning to the decision under review, the Board's reasoning on the issue in this application is found at paragraph 97 of its decision which reads as follows:

> [97] Second, the transmission of a download to a member of the public is a communication to the public. Downloads are "targeted at an aggregation of individuals" (citation omitted). They are offered to anyone with the appropriate device who is willing to comply with the terms dictate by the person who supplies the downloads. One or more transmissions of the same work, over the Internet, by fax or otherwise, to one or more members of a public each constitute a communication to the public. Any files iTunes offers to its clients is communicated to the public as soon as one client "pulls the file".

[64] It is clear from this passage that the Board has correctly identified intention as a critical factor by identifying the target group for the downloads as the public, defined as "an aggregation of individuals". It is not necessary, in order to dispose of this application, to define "the public" any further. It is also clear that, given the online music service's intended market, every transmission is a communication to the public, beginning with the first one. As a result, the vexing problem of attempting to define quantitatively the boundary between private communications and communications to the public does not arise.

[65] As a result, I am of the view that the Board's conclusion that a download of a musical file from an online music service to a single user is a communication of the musical work to the

public by telecommunication is reasonable. The Board's reasons are transparent and intelligible and the result is one which falls within the range of possible, acceptable outcomes, defensible in respect of the facts and the law: see *Dunsmuir* at paragraph 47.

[66] This leaves only the applicants' argument that the Board erred in equating the online music services' making works available to the public with communicating those works to the public. I agree with SOCAN that the applicants' argument is based upon a misinterpretation of the Board's reasons. The finding that a completed transmission was necessary in order to constitute a communication to the public is a complete answer to this argument. The Board made such a finding in paragraph 97 of its decision, quoted above.

CONCLUSION

[67] I would therefore dismiss the application for judicial review with one set of costs in each file to the respondents, payable jointly by the applicant(s) in each file. The intervener shall bear its own costs.

"J.D. Denis Pelletier"
J.A.

"I agree.
Gilles Létourneau J.A."

"I agree.
M. Nadon J.A."

FEDERAL COURT OF APPEAL
NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-519-07
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PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	May 3, 2010
REASONS FOR JUDGMENT BY:	Pelletier J.A.
CONCURRED IN BY:	Létourneau J.A. Nadon J.A.
DATED:	September 2, 2010

APPEARANCES:

Gerald L. Kerr-Wilson Anne Ko	FOR THE APPLICANT
Gilles Daigle D. Lynne Watt	FOR THE RESPONDENT
Casey M. Chisick Tim Pinos	FOR THE INTERVENER

SOLICITORS OF RECORD:

Fasken Martineau DuMoulin LLP Ottawa, Ontario	FOR THE APPLICANT
Gowling Lafleur Henderson LLP Ottawa, Ontario	FOR THE RESPONDENT
Cassels Brock & Blackwell LLP Toronto, Ontario	FOR THE INTERVENER

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