



## THE LEGAL INSIDER

of Mr. Alain P. Lecours

### CANADIAN INTELLECTUAL PROPERTY LAW:

#### Internet File-Sharing of Copyright-Protected Works: A Canadian Perspective

In Canada as in the rest of the world, downloading copyright-protected works via Internet is a common, although controversial, practice. Peer-to-Peer ("P2P") file-sharing is the most commonly used mean of downloading. The working principle of P2P file-sharing is as follows: individual users connect to each others directly (without passing through a central server, as it was the case with the Napster site) using a certain software program; a user can download the files offered by others (usually music, but also movies, pictures, software programs, etc.), but in exchange that user must make accessible (upload) to the other users his own files collection.

Is this practice legal under Canadian law? In Canada, the *Copyright Act* protects all works and prohibits the confection of copies or the communication to the public without authorization. Thus, as a general rule, Internet file-sharing is illegal. An individual who infringes upon the copyright of a protected work is liable to a fine and possibly a jail sentence. If that individuals profits commercially from this infringement, he must also give financial compensation to the copyright's owner. However, the *Copyright Act* provides a regime of exception for musical works. The *Act* allows copies of a musical work inasmuch as said copies are for strictly personal use, considering that royalties are received from the sale of blank audio recording media. Thus, following this classical interpretation, would the copy of a musical file obtained via Internet file-sharing for personal use be allowed?

#### General Protection Afforded to Works

According to the *Copyright Act*, any original work (be it of a literary, dramatic, musical, or artistic nature) is protected by copyright. Notably, no one may reproduce, present in public, or communicate to the public a work without the consent of the owner of that work's copyright.

Thus, the user of a peer-to-peer file-sharing program infringes upon the *Copyright Act's* dispositions in two manners. Firstly, he is making illegal copies when he downloads files protected by copyright. Secondly, he is communicating protected works to the public by uploading his own files so that in turn other users may access them.

In cases of copyright infringement, the *Copyright Act* allows both civil and penal recourses. The party responsible for infringement may be condemned to pre-established damages (ranging from 500\$ to 20,000\$, or 200\$ if the infringement was involuntary), but may also be condemned to pay to the copyright's owner a reasonable portion of any profits made (when the infringement was perpetrated in a profit-making aim) plus an indemnity for any prejudice sustained. In certain cases where the copyright infringement was perpetrated in a commercial aim, a penal condemnation may be imposed, with a fine of up to 1 million dollars and a maximal prison sentence of five years.

It is apparent that the protection afforded to works is serious, and the consequences of infringement severe. However, in the context of peer-to-peer file-sharing, the application of these rules is difficult. Indeed, the nature of the Internet itself hardly allows tracking down Internet users that infringe upon copyrights. Indeed, only costly efforts would allow the identification individuals responsible for such infringement in order to retain their culpability: arduous, cost-deficient enterprise. As to the liability of Internet service providers ("ISP"), a recent decision from the Supreme Court of Canada (the country's highest judiciary instance) declared that ISPs are not responsible for acts of copyright infringement perpetrated through the Internet services they provide, as they have no control over the contents of communications between users.

## An Exception: Copy for Private Use of Musical Works

It has always been difficult to control the copying of musical works by individuals for their personal use (for instance: a compilation of favorite songs or a copy of a CD borrowed from a friend). Rather than trying to control this phenomenon, the Canadian legislator has decided in 1997 to recognize and take into account this common practice. It thus adjoined to the *Copyright Act* the dispositions regarding "Copying for Private Use".

This new regime authorizes individuals to copy musical works on a audio recording medium for strictly personal use. In consideration thereof, the *Copyright Act* now provides that royalties must be collected upon all blank audio recording media fabricated or imported in Canada. These royalties are claimed by an organization representing all persons (Canadian as well as foreign) holding a copyright on a musical work in Canada. That organization then redistributes the collected royalties to the copyright holders themselves.

In 1997, in which year the *Copyright Act* was amended, existing technology did not allow large-scale copying. Considering the evolution of the Internet, our law regime and the previous interpretation thereof are no longer adapted, raising numerous questions and debates. These emerging questions being submitted to them, Canadian courts appear to currently favor a restrictive interpretation, enforcing copyright protection in the Internet context. Still, many questions remained unanswered.

The following can be affirmed with certitude. Peer-to-peer file-sharing presupposes that its users make available (upload) their files for communication to other Internet users. This is illegal as it constitutes communication of protected works to the public, which is not allowed under the private copy regime. A user that allows access to protected files infringes upon their copyright. However, concerning downloaded music works, the answer is less definitive. Indeed, the *Copyright Act* does not make distinctions regarding the origin (legal or not) of a copied music file. Downloading music files would thus constitute a valid copy for private use. However, this interpretation is contested by some doctrinal authors and the question has not been debated before the Courts. Also, this further consideration must be taken into account.

Indeed, it is held by some that the "Copy for Private Use" exception finds its sole justification in the royalties payable for audio recording media. Traditionally, these are audio tapes and recordable audio-numeric disks (CD-R, CD-RW, etc.). With recent technological innovations, new recording media, such as DVD disks, audio-numeric (MP3) players and computer hard disks, are gaining in popularity. In a recent ruling, the Federal Appeal Court rejected the application of royalties for private use copies to MP3 players, stating that these items are "devices" rather than "audio recording media". It is most probable that a similar ruling would apply to computer hard disks. The difference is important: many people hold that a copy for private use is not legal when it is made on a recording medium for which no royalties are payable. Yet, the jurisprudence on this question, on which two currents of thoughts are opposed, is still evolving.

## Conclusion

Thus, downloading or uploading works of any kind is illegal, under penalty of sanctions. However, the *Copyright Act* permits the copy of musical works for private use, yet this authorization has not been crafted to take into account newer technologies useable for mass copying. A liberal interpretation of the private copy regime would permit the download of musical works as long as the downloaded works are recorded on audio recording media for which royalties were paid. Furthermore, it is quite unlikely that downloading musical works on recording media not subject to royalties (such as DVDs, MP3 players and other such large-capacity hard disks) would be construed as authorized private copying. Also, the technology behind peer-to-peer file-sharing presupposes that users offer access to their collection of music files; the use of this technology thus remains illegal under at least one of its aspects.

Still, one must not hold for absolute, in the future, the legality or illegality of music file-sharing. Indeed, the last word on Internet file-sharing of musical works has not yet been stated by the Canadian Courts. The existing rulings have only scratched the surface of that subject. The debate remains not only before the justice system, but also in the contentions of the industry's various interest groups. An intervention from the legislator may be required.

The Copyright Act, including its dispositions regarding copy for private use of musical works, begins to show its age. Indeed, having being envisioned in a day and age in which the Internet (as a mean of information transfer) was still in its infancy, the Act does not provide for peer-to-peer file-sharing and other technologies for large-scale information recording (DVD, MP3 and computer memories). These emergent phenomena shall have to be taken into account.

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