

HARPER VS. THE SCC – COPYRIGHT CAGE MATCH?

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Though most people don't give much thought to copyright law on a day to day basis, we are continuously interacting with it, when we create, copy, buy, and download all manner of things we can see, hear and use. The price we pay for most entertainment and business commodities includes the cost of compensating the copyright owner for allowing the reproduction and distribution of the copyright in everything from software to music, pictures, books, instruction manuals and research papers.

These copyright-related aspects of our daily lives are about to get a legal makeover – the Harper government has reintroduced Bill C-11, “The Copyright Modernization Act” to significantly amend the *Copyright Act* of Canada this fall; and coincidentally, the Supreme Court of Canada (the “SCC”) has given leave to hear appeals of 6 different copyright-related cases at once, in December 2011.

BILL C-11

The Harper government's last, unsuccessful attempt to introduce this legislation, as Bill C-32, received wide publicity, and Bill C-11 is virtually identical. Now with a Conservative legislative majority, Bill C-11 is almost certain to become law. Its key changes to copyright law will be:

- making it an offence (including fines up to \$5000) to circumvent digital locks on copyright material such as music, software, video and e-books;
- enhancing rights to prosecute those who “enable” infringements (e.g. websites supporting illegal file sharing);
- making explicitly legal a number of personal copying activities that were technically copyright infringement, but that everyone was doing anyway, such as making personal YouTube videos with popular music or video clips included; copying legally-obtained music and video files onto different computers and players; and PVR'ing TV for time-shifting, provided digital locks are not broken or circumvented;
- confirming that internet service providers and search engines are not liable for infringing material circulated by their

users; however, a copyright owner will now be able to notify an ISP of an infringing website, and the ISP must notify the website owner, and maintain records of the identity of the website owner in the event of an infringement lawsuit;

- broadening the “fair dealing” right, by adding “education” to “personal study”, “research”, “criticism and review” and “news reporting” as categories where certain amounts of copyright material can be reproduced without permission;
- confirming it is not infringement or circumvention of digital locks to copy existing copyright products (like software) for technological innovation purposes, e.g. ensuring compatibility between products.

The Bill C-11 provisions are supposed to balance the rights of individual Canadians to be able to make certain uses of copyright material without infringing, against the rights of copyright owners and copyright-based businesses to restrict “free” access, and therefore generate more revenue from their copyright property. The bigger gain from the new legislation is for business interests, as the net change in individual rights will likely be more restrictive than the existing *Copyright Act*.

THE SCC CASES

The six cases the SCC will hear also review the balance between individual and business copyright interests, in several different contexts. Technically, the six cases are about the scope of the authority of the administrative bodies that regulate rights and royalties for distribution of copyright materials in Canada. Specifically, whether those bodies were right or wrong in assessing the application of royalties to Canada's largest telecommunications, broadcasting, and video-game companies, and to educational institutions across Canada, for the sale, distribution, streaming and copying of copyright music, video, video-games, and text-books. Several important definitions in the *Copyright Act* affecting broadcasting, telecommunication, and internet use in the digital era will be interpreted, possibly affecting millions or billions of dollars in business

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revenues for the foreseeable future, with the resultant effect on consumer prices and rights.

One of the SCC's likely objectives is to provide new interpretative principles for copyright use, and copyright royalty issues, in a digital and internet context.

How the SCC's decisions will interact with the new laws enacted by Bill C-11 is another question. The SCC will hear the appeals, and write their decisions knowing the "new rules" of the amended *Copyright Act*, though technically deciding the cases under the pre-amendment Act. If the SCC sees the balance between competing individual and business interests in their cases differently than the balance chosen by the Harper government in Bill C-11, the SCC could have a significant influence in altering how the Bill C-11 provisions will be applied by Canadian courts for years to come. This may also have the effect of creating further confusion at a time when clarity is needed. If the Harper government thinks the SCC went too far, it may legislate a rematch. ▲

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