Court File No.: 33800

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

BETWEEN:

SOCIETY OF COMPOSERS, AUTHORS AND MUSIC PUBLISHERS OF CANADA
APPELLANT
(APPLICANT)

- and -

BELL CANADA, THE CANADIAN RECORDING INDUSTRY ASSOCIATION, APPLE CANADA INC., ROGERS COMMUNICATIONS INC., ROGERS WIRELESS PARTNERSHIP, SHAW CABLESYSTEMS G.P., TELUS COMMUNICATIONS INC., ENTERTAINMENT SOFTWARE ASSOCIATION, ENTERTAINMENT SOFTWARE ASSOCIATION OF CANADA and CMRRA/SODRAC INC.
RESPONDENTS
(RESPONDENTS)

- and -

SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY AND PUBLIC INTEREST CLINIC, CANADIAN ASSOCIATION OF UNIVERSITY TEACHERS, FEDERATION OF LAW SOCIETIES OF CANADA AND CANADIAN LEGAL INFORMATION INSTITUTE and COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION
INTERVENERS

FACTUM OF THE INTERVENER, THE SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY AND PUBLIC INTEREST CLINIC (CIPPIC)

Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*

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PART I – OVERVIEW

1. Copyright and the *Charter of Rights and Freedoms* both concern themselves with rights in expression. It follows that the Copyright Act, statutory law, ought to be consistent with the values enshrined in the *Charter*, the supreme law of the land.

2. CIPPIC submits that, this Court's pronouncements on fair dealing, with respect to both the liberal interpretation of the categories of dealings that qualify for the defense and the fairness analysis itself, are consistent with an interpretation of the law guided by *Charter* values. Where a user's purposes underlying a dealing with a work revolve closely around the core of a *Charter* value, that dealing will tend to be fair.

PART II – QUESTIONS IN ISSUE

3. CIPPIC will address four aspects of the arguments advanced on this appeal:

   (a) why the "purposes" of copyright must be reconciled with the *Charter*;

   (b) how the *Charter* guides interpretation of both the categories of fair dealing and the fair dealing test itself;

   (c) why the Court should reject CRIA's invitation to overturn this Court's decision in *Law Society* on the basis of a restrictive interpretation of the "three-step test"; and

   (d) why the standard of review for this decision ought to be correctness.

PART III – STATEMENT OF ARGUMENT

A Reconciling the "Purposes" of Copyright with the *Charter*

4. This Court's decisions in *Théberge v. Galeries d'art du Petit Champlain* and *Law Society of Upper Canada v. CCH Canadian Limited* set the law of copyright on a rational foundation, laying bare the instrumental soul of copyright as a balancing of statutory entitlements amongst equally significant stakeholders. These stakeholders include authors, performers, distributors, and users of creative works. These categories are not mutually exclusive: users can become authors, building on the works of prior authors.

Théberge v. Galeries d'art du Petit Champlain, 2002 SCC 34 [Théberge]

Law Society of Upper Canada v. CCH Canadian Limited, 2004 SCC 13 [Law Society]

5. The majority decision in *Théberge* identified the purpose of copyright law as:

> A balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator.

Théberge at para. 30.

6. The majority in *Théberge* went on to observe that "it would be as inefficient to overcompensate artists and authors for the right of reproduction as it would be self-defeating to undercompensate them."

Théberge at para. 31.

7. What *Théberge* did not do was to answer the question, why? Why do we grant rights to authors in the fruits of their labours? Why do we reserve to users a sphere of activity unencumbered by copyright? Surely the law of copyright is not an end in itself, but rather instrumental in the pursuit of other ends – but what ends?

8. We invite the Court in this case to answer these questions. Copyright, by definition, balances rights in expression. Indeed, it is a cornerstone of copyright that it vests *only* in expression, and not facts or ideas. But expression is the domain of section 2(b) of the *Charter of Rights and Freedoms*, which guarantees freedom of expression. The Supremacy Clause dictates that the constitutional guarantee of freedom of expression "is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." The law of copyright ought, then, to be consistent with the values that underlie freedom of expression.

Canadian Charter of Rights and Freedoms, s. 2(b) and s. 52(1), Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c.11.

9. This Court has identified three purposes that lie at the core of freedom of expression:

(1) The pursuit of truth: "[S]eeking and attaining the truth is an inherently good activity."

(2) Participation in the community: "[P]articipation in social and political decision-making is to be fostered and encouraged."

(3) Individual self-fulfillment and human flourishing: "[T]he diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in an essentially tolerant, indeed

welcoming, environment not only for the sake of those who convey a meaning, but also for the sake of those to whom it is conveyed."

Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927 at 976.

10. These *Charter* values and the law of copyright are, indeed, generally consistent with one another. But we ought to aim for more than consistency. Copyright will serve us best when it *resonates* with the values of the *Charter*: courts ought to interpret both authors' and users' rights in a manner that serves the objects of freedom of expression. Grounding copyright on the firm foundation of the *Charter* will provide crucial guidance in the interpretation and mediation of the competing rights of copyright's myriad of stakeholders.

11. Interpretation of the *Copyright Act* largely achieves the objects of the *Charter's* guarantee of freedom of expression. Indeed, the *Copyright Act's* careful balancing of interests could be characterized as the very accommodation of expressive interests that the *Charter* demands. Copyright's grant of rights to authors serves as an incentive to expressive activity, while the limited nature of those rights, and copyright's additional grant of user rights, provides what the Appellant has called "breathing space" – or what could be considered a "safety valve". This ensures that the law of copyright, as a whole, facilitates expressive activity.

12. The United States, a jurisdiction with copyright laws similar to Canada's and a similar constitutional commitment to freedom of expression, takes precisely this view of the overlap between copyright and freedom of expression. In *Eldred* v. *Ashcroft*, the majority of the United States Supreme Court endorsed the view that copyright, taken as a whole, is an "engine of free expression."

Eldred v. Ashcroft, 537 U.S. 186 at 218-220 (2003).

B Fair Dealing

13. In the *Law Society* case, a unanimous decision, this Court embraced the vision of the majority in *Théberge* while illuminating the role the fair dealing exception plays in the scheme of Canadian copyright law:

> the fair dealing exception is perhaps more properly understood as an integral part of the *Copyright Act* than simply a defence. Any act falling within the fair dealing exception will not be an infringement of copyright. The fair dealing exception, like other exceptions in the *Copyright Act*, is a user's right. In order to maintain the proper balance between the rights of a copyright owner and users' interests, it must not be interpreted restrictively.

Law Society at para 48.

14. Quoting Professor Vaver, the Court concluded that

> "User rights are not just loopholes. Both owner rights and user rights should therefore be given the fair and balanced reading that befits remedial legislation."

Law Society at para 48.

15. This Court's purposive construction of fair dealing in *Law Society* ensured that fair dealing would continue to function as the most important of the "safety valves" that reconcile copyright with the *Charter*. The Appellant's arguments, however, strive to scale back the reach of that decision.

16. The Appellant's submissions that fair dealing ought to be interpreted in light of copyright's objective of providing incentives for the creation of new works is too narrow of an interpretation of the range of user interests protected by fair dealing. CIPPIC supports a broad interpretation of the categories of fair dealing to extend to transformative works. However, the Appellant's over-inclusive position ironically touches on one of the weaknesses of the Act: fair dealing has a difficult time accommodating many types of transformative works, ranging from parody to appropriation and to documentary film. Transformative dealings amount to authorship. When pursued in close proximity to the values enshrined in section 2(b) of the *Charter*, transformative dealings ought to enjoy the benefit of copyright's user rights. Indeed, this has been a staple of American fair use analysis since the US Supreme Court's seminal decision in *Campbell v. Acuff-Rose Music Inc.* But, as Justice Souter teaches at p. 579, transformative authorship cannot be and is not the only condition for qualifying for the fair use defense.

Campbell v. Acuff-Rose Music Inc., 510 U.S. 569 at 578-79 (1994)

17. Nor ought transformation to be the only condition qualifying for fair dealing. In this respect, the Appellant's position is under-inclusive. The Appellant's interpretation of fair dealing scales poorly to the other categories of fair dealing, as well as to past interpretation of the "research" category. For example, it is plain that the vast majority of "private study" is undertaken for purposes other than creating new works. In *Law Society*, much of the research activity at issue produced knowledge, but resulted in no new works. Yet this research plainly revolves tightly around all of the core values enshrined in s. 2(b) of the *Charter*. Legal

research facilitates the search for the truth and enables participation in the community. Indeed, the expansion of one's knowledge ought to enjoy substantial protection as promoting self-fulfillment and human flourishing.

Law Society.

18. These arguments are not undermined by the facts of this case, which involve "consumer research". The Appellants argue that "consumer research" is not the kind of research that ought to qualify for fair dealing. This argument suffers from a number of defects.

19. First, on the Appellant's argument, the consumer actually conducting the research completely disappears. The Appellant's argument focuses on the purposes of online service providers in the analysis of whether a service provider's activities fall within the "research" category of the fair dealing test.

20. Second, consumer research performed in the context of online previews facilitates a much deeper and richer research experience than that suggested by the Appellants, and one that occupies space within the core of values enshrined in s. 2(b). Online previews offer consumers a broader experience than merely facilitating commercial exchange. Online research of musical works allows consumers to experience new kinds of music, exposing them to new songs, artists, and even entire *genres* of music that a consumer might not otherwise discover. This research is not merely commercial in object. Music, after all, has a long and strong connection to political protest. Online previews offer consumers an opportunity to explore the political views expressed in music in a safe and relatively anonymous fashion. Similarly, music's connection to individual identity, and exploration of the self, cannot be denied. Such research transcends the account ledgers of the commercial parties to this appeal, diving deep into the values enshrined in s. 2(b).

21. Third, the fact that others use a service to conduct research ought not to taint the fairness of one's own research activities. The Appellant's argument that the fairness of a dealing ought to be assessed cumulatively threatens to transform the exercise of user rights into the creation of a new owner right. User rights are exercised because they have value to users. Copyright owners cannot claim that value by virtue of the common exercise of that right by many users.

22. Just as *Charter* values should guide the court in interpreting the content of the categories of dealings that qualify for fair dealing, so should the "fairness" test be guided by these same values.

23. The first of the elements of the fairness test identified by this Court in *Law Society* directs a reviewing court to examine the purposes of the dealing. The Court noted that this inquiry should be an "objective assessment of the user/defendant's real purpose or motive in using the copyrighted work." The Court noted that "the purpose of the dealing will be fair if it is for one of the allowable purposes under the *Copyright Act*."

Law Society at para. 54.

24. However, this framework invites a 2-step *evasion* of the fair dealing defense. A court's "objective assessment" of a user's "real purpose or motive" for a dealing may in many cases serve to frustrate the Court's direction to liberally construe the fair dealing defense. Few purposes for dealings are unstained by layers of meaning, some of which may not fall within the five categories of dealings. In the present case, for example, "consumer research" may qualify as "research" for the purposes of qualifying for the liberally construed qualifying category of "research" dealings, but under the fairness analysis, on an "objective assessment" of a user's "real purpose or motive", may be found merely to amount to "enjoyment" or "consumption". And so similarly legal research could be dismissed as the mere pursuit of economic self-interest, and educational research dismissed as classroom instruction.

25. We invite the Court to clarify the "purpose" branch of the fairness analysis. The Court's statement in *Law Society* that "the purpose of the dealing will be fair if it is for one of the allowable purposes" offers a useful *illustration* of fair purposes – each of these categories, in general, embrace dealings that fall close to the core of values enshrined in the *Charter* – but it is under-inclusive of all of the myriad dealings with works that society, as a whole, would characterize as "fair". CIPPIC submits that under the fairness test, the closer a user's "real purpose" for undertaking a dealing with a work revolves around the core of values enshrined in the *Charter*, the fairer the dealing will tend to be.

26. For example, on an objective assessment, one might be found to deal with a work for the purposes of "educating others". This is not one of the five enumerated categories of fair

dealing. Yet no one could possibly characterize as "unfair" the purpose of educating others. Indeed, education lies deep within the core of values enshrined in the *Charter*.

27. This does not mean that all dealings that lay claim to *Charter* values amount to fair dealing. Any dealing must undergo the full "fairness test", and may be disqualified for the defense for another reason – quantity of the dealing, competing in the marketplace with the original, etc.

C Three-Step Test

28. CRIA invites this Court to revisit the fair dealing analysis set out in *Law Society* under the cloak of an appeal to international obligations. CIPPIC submits that there is not conflict between the fair dealing defense and the so-called "three step test".

29. The *Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods* (the "TRIPS Agreement"), to which Canada is a party, came into force in 1995. Article 2 of the TRIPS Agreement affirms that its provisions shall not derogate from the obligations assumed by Member States under the Berne Convention. The Canadian fair dealing provision for the purpose of research was enacted in 1921, seven years before Canada became a party to the Berne Convention for the Protection of Literary and Artistic Works. Prior to the 1971 Paris revision, the Berne Convention did not contain a general provision recognizing authors' reproduction rights. Professor Ricketson notes that when Article 9(2) was adopted, great care was taken "to ensure that this provision did not encroach upon exceptions that were already contained in national legislation."

> ***Sam Ricketson, The Berne Convention for the protection of literary and artistic works:1886-1896 (London: Centre for Commercial Law Studies, Queen Mary College, 1987) at 479.***

30. Regardless, there is no conflict between fair dealing and the three step test. The test is facilitative, not restrictive. The first element of the three step test under the TRIPS Agreement, that limitations or exceptions be confined to certain special uses, is predicated on providing both copyright holders and users with a sufficient degree of legal certainty. Canadian fair dealing provisions fulfill this obligation by providing an exhaustive list of permissible uses. Moreover, a detailed reading of the WTO Panel's decision in *United States – Section 110(5) of the U.S. Copyright Act* indicates that the fair dealing analysis outlined in *Law Society* complies with the three step test and falls within the scope of discretion granted to Member States when implementing international obligations under TRIPS.

CRIA factum, paras 3, 42, 58.
United States – Section 110(5) of the U.S. Copyright Act(2000), WTO Doc WT/DS160/R (Panel Report), para 6.108.

31. For this Court to adopt the narrow interpretive framework advocated by CRIA, and effectively renounce its approach from *Law Society*, would actually lead to a greater degree of uncertainty for all stakeholders in Canadian copyright law. Moreover, the framework endorsed by CRIA would effectively narrow the defense to exclude core *Charter* values and limit copyright law's ability to avail itself of the "safety valves" that ensure its ultimate constitutionality.

D Standard of Review

32. The appropriate standard of review is that of correctness. This court emphasized in *Dunsmuir* that, where courts have already ascertained the standard for a particular category of question, it should not be redetermined.

Dunsmuir v. New Brunswick, [2008] 1 SCR 190 at para. 62.

33. Courts have already found that a standard of correctness is to apply where the Copyright Board deals with a question of law. In *SOCAN v. CAIP*, this Court found that a standard of correctness applied to the Board's ruling on whether copyright infringement occurs with respect to a communication originating outside of Canada. The standard was correctness because the question was of general application, addressing "a point of general legal significance beyond the working out of the details of an appropriate royalty tariff". Likewise, the present copyright question of whether consumer research constitutes fair dealing is also of general application, thus also subject to a standard of correctness.

Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers, [2004] 2 SCR 427 at para 49.

34. The policy reason for a standard of correctness in these cases is a matter of rule of law: like cases must be treated alike. Where questions of law have a much wider impact than the core of a tribunal's expertise, courts must treat them with a high degree of scrutiny to ensure consistency in the application of law between different courts and tribunals.

35. For this reason, the Federal Court of Appeal scrutinized the definition of an "audio recording medium" in *CPCC v. CSMA* to the standard of correctness. The court emphasized that this standard must apply because "decisions defining activities that infringe copyright have

implications that 'stray from the core expertise of the tribunal'". Referring to their previous decision in *SOCAN v. CAIP*, they noted that they "the Court should apply a standard of correctness to the Board's interpretation of those provisions of the *Copyright Act* that could also be the subject of infringement proceedings in the courts".

Canadian Private Copying Collective v. Canadian Storage Media Alliance, 2004 FCA 424 (CanLII) at para. 146;

36. This Court's determination of the scope of research activities, and the appropriate test for fair dealing, will similarly have wide-reaching implications for copyright infringement proceedings going far beyond the Board's certification of a SOCAN tariff.

37. Although this court held in *Dunsmuir* that "deference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity", the Copyright Board does not have a particular familiarity with fair dealing, nor with the *Copyright Act* as a whole. Rather, the statutory mandate of the Board is only found under Part VII, entitled "Copyright Board and Collective Administration of Copyright". As the Federal Court of Appeal stated in *SOCAN v. Sirius* – a case where they again applied a standard of correctness – "[t]he core of the Board's statutory mandate is the determination of an appropriate royalty tariff". In the present issue, the fair dealing sections set out under Part II of the *Act*, entitled "Infringement of Copyright and Moral Rights and Exceptions to Infringement", are well outside the Board's home provisions.

Dunsmuir v. New Brunswick, 2008 SCC 9, [2008] 1 SCR 190 at para. 54.
Sirius Canada Inc. v. CMRRA/SODRAC Inc., 2010 FCA 348 (CanLII) at para. 8.

38. The Respondent, Apple, submits that "the legal issue involved in this case is inseparable from the factual issues" and that the appropriate standard of review is therefore reasonableness. With respect, even if a standard of reasonableness were to apply to a question of mixed law and fact in this context, the legal issues here are easily disentangled from the factual ones.

Apple's Factum at para. 36.

39. Granted, it is not easy to draw distinctions between questions of law, fact, and mixed law and fact. This court has recognized the difficulty in cases such as *Pushpanathan*. However, the guidance from these cases remains helpful: a question of law is one "which will be of great, even determinative import for future decisions of lawyers and judges" (*Pushpanathan*). The

present questions on the scope of the research and fair dealing have clear implications for future decisions, setting the boundaries of fair dealing for research and possibly other uses of works.

> ***Pushpanathan v. Canada (Minister of Citizenship and Immigration), [1998] 1 SCR 982 at para. 37.***

40. In its reasons, the Copyright Board itself characterized the question as a "legal issue", as follows: "Is offering previews fair dealing for the purpose of research within the meaning of section 29 of the Act?". Apple also suggests later in its factum that it is possible to disentangle the question law and fact, acknowledging that the issue of the use of previews for the purpose of "research" could be a question of law.

> ***Decision of the Copyright Board, dated October 18, 2007 at 25.***

41. The disentangled question of fact in this case is only whether particular dealings are "fair" under the appropriate fair dealing test. The Board conducted this factual inquiry by applying the known facts to the *CCH* fair dealing test, considering factors such as how the Respondents stream previews to users, how much of a song they stream, and the lack of available alternatives for users. This question is distinct from any legal determination of the definition of research, or the shape of the fair dealing test. The court should review these latter questions on a standard of correctness.

PART IV – COSTS

42. CIPPIC does not seek costs and asks that no costs be awarded against it.

PART V – ORDER SOUGHT

43. CIPPIC respectfully requests that it be permitted to present oral arguments at the hearing.

August 5, 2011 ALL OF WHICH IS RESPECTFULLY SUBMITTED

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David Fewer

Counsel for the Intervener, Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic

PART VI – TABLE OF AUTHORITIES

Authority	Citing Paragraphs
Cases	
1. *Campbell* v. *Acuff-Rose Music Inc.*, 510 U.S. 569 (1994)	16
2. *Canadian Private Copying Collective* v. *Canadian Storage Media Alliance*, 2004 FCA 424	35
3. *CCH Canadian Ltd.* v. *Law Society of Upper Canada*, [2004] 1 S.C.R. 339, 2004 SCC 31	4, 13, 14, 17, 23, 25
4. *Dunsmuir* v. *New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9	32, 37
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8. *Sirius Canada Inc.* v. *CMRRA/SODRAC Inc.*, 2010 FCA 348	37
9. *Society of Composers, Authors and Music Publishers of Canada* v. *Canadian Assn. of Internet Providers*, [2004] 2 S.C.R. 427, 2004 SCC 45	33
10. *Théberge* v. *Galerie d'Art du Petit Champlain inc.*, [2002] 2 S.C.R. 336, 2002 SCC 34	4-6
11. *United States – Section 110(5) of the U.S. Copyright Act(2000), WTO Doc WT/DS160/R (Panel Report)*, para 6.108	30
Secondary Sources	
12. *Sam Ricketson, The Berne Convention for the protection of literary and artistic works:1886-1896 (London: Centre for Commercial Law Studies, Queen Mary College, 1987)*	29

PART VI – STATUTES RELIED ON

Copyright Act, R.S.C. 1985, c. C-42, s. 29

29. Fair dealing for the purpose of research or private study does not infringe copyright.

29. L'utilisation équitable d'une oeuvre ou de tout autre objet du droit d'auteur aux fins d'étude privée ou de recherche ne constitue pas une violation du droit d'auteur.

Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11, s. 2(b) and s. 52(1)

2. Everyone has the following fundamental freedoms: [...]

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

52.(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

2. Chacun a les libertés fondamentales suivantes : [...]

b) liberté de pensée, de croyance, d'opinion et d'expression, y compris la liberté de la presse et des autres moyens de communication;

52.(1) La Constitution du Canada est la loi suprême du Canada; elle rend inopérantes les dispositions incompatibles de toute autre règle de droit.