

## IP monitor

### Broadcast incidental copying requires a license

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**Communications, media and entertainment**

**Copyright and entertainment**

In *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57, once again the Supreme Court has had to consider an appeal from a decision of the Copyright Board. The basic question this time was whether the Copyright Board ought to have imposed royalty fees on the CBC for the creation of incidental copies that arise as a technical part of the digital broadcasting process.

The majority, citing technological neutrality and balance, upheld the decision of the Copyright Board on this point. The minority, also citing technological neutrality and balance, would have reversed the decision of the Copyright Board and held that no royalties were to be paid for such incidental copies.

There could no question that copies were being made. The question before the court was whether they were incidental to the broadcasting (for which royalties were already being paid to SOCAN) or a separate reproduction for which additional royalties should be paid to SODRAC. and if royalties were required the amount of such royalties.

The majority held that the standard of review for the question of whether incidental copying was an infringement was correctness, but that the standard of review for the valuation question was reasonableness.

In the end SODRAC has won by virtue of the conclusion that such use required payment but potentially has lost on the question of the amount of such payment. The majority held that the Copyright Board had failed to consider the correct application of technological neutrality in arriving at the royalty amount and referred the matter back to the Board for further consideration.

The case indicates yet again the difficulty of applying a technological neutrality test: both on the question of infringement and on valuation. The court split on both questions. On infringement the majority said that the incidental reproduction was a fundamentally different reproduction than the reproduction for broadcast, and that the fact that it was done for technical reasons did not change the requirement for a license. On the other hand the minority held that technological neutrality required that there be no requirement for a license where the copying was part of the same functional task of broadcasting.

On the amount of the royalty, the majority held that neutrality required that account be taken of the value that the reproductions of the copyright-protected work contribute in the digital as compared to the analog technology, and of the relative contributions of the incidental reproductions as well as the user's investment and risk in providing the new technology.

On the other hand the minority held as on the valuation point also that the focus should be on the functional result created by the technology, not on the value created by improvements to the technology developed by the user.

In the end this saga is far from over as the Copyright Board will have to review its rate setting decision again (possibly with new hearings?) in an effort to apply the Supreme Court's directives. This will further delay the establishment of a rate on a matter which has been pending since 2012 in respect of the license period 2008-2012.

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