

**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**

**AND**

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

**RESPONDENTS**

**AND**

**SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY AND  
PUBLIC INTEREST CLINIC, CANADIAN ASSOCIATION OF  
UNIVERSITY TEACHERS, FEDERATION OF LAW SOCIETY OF  
CANADA, CANADIAN LEGAL INFORMATION INSTITUTE,  
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## PART I STATEMENT OF FACTS

### A. Overview

1. This appeal is from a decision of the Federal Court of Appeal dismissing the Appellant's ("SOCAN") application for judicial review of a decision of the Copyright Board of Canada (the "Board") concerning a proposed SOCAN copyright tariff.

2. The Board committed a breach of natural justice in raising, and deciding on its own, the application of the fair dealing exception to the use of previews of musical works. The breach arose because the Board in effect denied the parties the opportunity to lead evidence and make submissions on the issue of fair dealing. This Court must consider whether the Federal Court of Appeal was correct in its review of the Board's decision.

3. The Canadian Recording Industry Association ("CRIA") submits that the Federal Court of Appeal committed three errors of law. First, it gave effect to the purpose of the use of previews from the perspective of consumers who listened to the previews, and not from the perspective of the commercial services who used the previews to increase their sale of downloads of sound recordings of musical works. Second, the Federal Court of Appeal erred in concluding, in the context of the fair dealing exception, that consumer's shopping activities in seeking and finding a sound recording of a musical work to purchase constituted "research". Third, the Federal Court of Appeal failed to take into account the effect of the Service's dealing on the previews. Each of the Federal Court of Appeal's findings on these issues is contrary to the three step test and puts Canada in breach of its obligations under Article 13 of the agreement on *Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods* (the "TRIPS Agreement").

4. CRIA submits that, as a result of the errors committed by the Federal Court of Appeal, this appeal should be allowed.

### B. CRIA

5. CRIA is a not-for-profit corporation that promotes the objectives of the Canadian record industry. CRIA's members create, promote, market and distribute recorded music.

CRIA's members are major contributors of Canadian content and actively seek out and nurture Canadian talent, which they market to the world.

**Coalition Statement of Case, para 18; Appellant's Record, p 182**

6. CRIA was one of the objectors who filed evidence before the Board challenging the proposed royalties sought by SOCAN pursuant to a Tariff filed in accordance with subsections 67.1(2) of the *Copyright Act* (the "*Act*"), for the years 1996-2006 entitled "Statement of Royalties to be Collected by SOCAN for the communication to the Public by Telecommunication, in Canada, of Musical or Dramatic-Musical Works" ("Tariff 22.A").

**Coalition Statement of Case, para 1; Appellant's Record, p 179**

### **C. Online Music Services and Previews**

7. The respondents Bell Canada, Rogers Communications Inc., Rogers Wireless Partnership, Shaw Cablesystems G.P., Telus Communications Inc. and Apple Canada Inc. operate services that enable consumers to purchase sound recordings of musical works over the Internet. The respondents and others who operate such services (collectively the "Services") supply the sound recordings to consumers by permitting consumers to download the sound recordings offered on their websites.

**Appellant's Factum, dated April 18, 2011 ("SOCAN Factum"), para 13**

8. As a marketing tool for the sale of sound recordings, Services make previews of sound recordings available on their websites for consumers to listen to and help them decide whether to purchase the sound recordings ("Previews"). Previews are usually 30 seconds or less excerpts of sound recordings.

**Reasons for Decisions of the Copyright Board, dated October 18, 2007 ("Board Decision"), para 18; Appellant's Record, p 14**

### **D. The Board Decision**

9. In its decision, the Board certified Tariff 22.A for the communication of musical works to the public by telecommunication through on-demand streams and limited and permanent downloads.

**Copyright Board, Statement of Royalties to be Collected by SOCAN for the Communication to the Public by Telecommunications, in Canada, of Musical or Dramatico-Musical Works, Tariff 22.A: Internet-Online Music Services (1996-2006) ("Tariff 22.A"), section 3; Appellant's Record, p 5**

10. None of the parties before the Board claimed that the exception for fair dealing applied to the Previews. Nevertheless, the Board ruled on the fair dealing exception without putting the parties on notice or allowing the parties an opportunity to lead evidence or to make submissions on the issue.

**Board Decision, para 102; Appellant's Record, p 39**

11. In its reasons for certifying Tariff 22.A, the Board concluded that users who listen to Previews were entitled to avail themselves of the exception for fair dealing under section 29 of the *Act*. The Board concluded that listening to Previews constituted "research" and that Previews assisted users in planning the purchase of a download of a sound recording.

**Board Decision, paras 109 and 116; Appellant's Record, p 42 and 44**

12. In reliance on the decision of this Court in *CCH Canadian Ltd. v. Society of Upper Canada* ("*CCH*"), the Board concluded that "streaming a preview with a view to deciding whether or not to purchase a download" was for the purpose of research.

**Board Decision, para 109; Appellant's Record, p 42**

13. Although the Board decided that Services that supply Previews do not conduct research, the Board found that they supply Previews to facilitate the "research" of consumers. The Board focused its analysis on the purpose of the consumers in listening to previews and attributed the consumers' purpose to the Services in reliance on the *CCH* decision.

**Board Decision, paras 108, 109 and 112; Appellant's Record, p 41-43**

14. The Board then applied the six fair dealing factors outlined in *CCH* to the circumstances and decided that the communication of Previews was fair dealing. With respect to the first factor (the purpose of fair dealing), the Board concluded that the purpose of the dealing was for the purpose of research.

**Board Decision, para 111; Appellant's Record, p 42-43**

15. With respect to the third fair dealing factor (the amount of the dealing), the Board concluded that the amount of the dealing was modest. Previews are generally 30 seconds or less.

**Board Decision, para 113, Appellant's Record, p 43**

16. With respect to the fifth and six factors (the nature of the work and the effect of the dealing of the work, respectively) the Board stated:

[115] The last two factors are the nature of the work and the effect of the dealing on the work. Musical downloads offered by services are objects of commerce. Anything that is done to increase the profitability of sales accords with the nature of the work. Offering previews encourages sales of downloads, which in turns benefits copyright owners.

**Board Decision, para 115; Appellant's Record, p 43**

17. Based upon the economic evidence and arguments before it, the Board established a royalty rate that did not include an incremental amount for Previews. The Board concluded that Services that provide Previews “usually can avail themselves of the fair dealing exception”.

**Board Decision, para 159; Appellant's Record, p 55-56**

#### **E. The Federal Court of Appeal Decision**

18. Before the Federal Court of Appeal, CRIA claimed that SOCAN's application for judicial review was moot because it would have no practical effect on the rights of the parties, namely, the Board separately decided it would not adjust the royalty rate for Previews based upon its economic analysis. CRIA claimed that SOCAN had sought judicial review only of a legal issue and did not challenge the Board's findings on the economic value of Previews.

19. All of the parties before the Federal Court of Appeal protested the Board's denial of their opportunity to make submissions on the scope of the fair dealing exception. CRIA claimed that the Board's failure to hear the parties on the legal question constituted a breach of procedural fairness and the parties' right to be heard. CRIA advised the Court that it did not accept the conclusion of the Board on fair dealing, and if it had been invited to do so, it would have argued against the Board's conclusion.

***SOCAN v. Bell Canada*, 2010 F.C.A. 123 (the “FCA Decision”), para 10; Appellant's Record, p 80**

20. The Federal Court of Appeal expressed surprise that the Board had reached an interpretation of fair dealing without the benefit of discussion with the parties. The Court agreed that the parties should have been heard, impliedly acknowledging that there had been a breach of natural justice. The Court then heard the parties on the interpretation of fair dealing and, at the hearing, permitted SOCAN to submit confidential figures that were not before the Board because the parties had not been called upon to discuss or submit evidence on fair dealing.

**FCA Decision, paras 10, 11 and 25; Appellant's Record, p 80-81 and 85**

21. The Federal Court of Appeal affirmed the Board's decision finding that the use of Previews constituted fair dealing. It found that the Board's interpretation of research was not unreasonable or in error. It accepted the Board's analysis of 5 of the 6 fair dealing factors outlined in *CCH* and merely commented on the third factor relating to the amount of the dealing. The Court concluded that the Board's decision that the dealing was fair was not unreasonable or in error. In effect, the Court considered the issue of fair dealing *de novo* and reached its decision on a standard of correctness.

**FCA Decision, paras 10, 20, 23 and 24 to 31; Appellant's Record, p 80, 83, 85-87**

22. With respect to the construction of research, the Court stated:

[20] In that context, it would be unreasonable to give the word "research" its primary and ordinary meaning. The consumer is searching for an object of copyright that he or she desires and is attempting to locate and wishes to ensure its authenticity and quality before obtaining it. I agree with the Board that "[l]istening to previews assists in this investigation".

**FCA Decision, para 20; Appellant's Record, p 83**

23. With respect to whose purpose the research must be for fair dealing to apply, the Court stated:

[22] SOCAN argues that the primary purpose of previews is not research, but rather increased sales and, accordingly, increased profits. There is no doubt that, for the seller, this is an important objective, one which also benefits copyright holders through reproduction and performance rights. I agree. But this does not exclude other equally important purposes. We must consider

previews from the point of view of the person for whom they are intended: the consumer of the subject-matter of the copyright. Their purpose is to assist the consumer in seeking and finding the desired musical work.

**FCA Decision, para 22; Appellant's Record, p 84**

24. CRIA submits that the Board and the Court below erred in construing research in the context of fair dealing in section 29 of the *Act*, in concluding that the purpose of the Previews must be considered from the point of view of the consumer and in concluding that the dealing with Previews was fair.

#### **F. The Implication of the Decisions of the Board and the Federal Court of Appeal**

25. The decisions of the Board and the Federal Court of Appeal have broad application beyond the facts in this case. CRIA's members are makers of sound recordings of musical works. They are entitled to the exclusive right of reproduction in their recordings. This right includes the right to reproduce Previews. In addition, together with performers, CRIA's member makers have a right of equitable remuneration for the public performance and communication to the public by telecommunication of their published sound recordings.

*Copyright Act, RSC 1985, c C-42 ("Copyright Act"), sections 18(1)(b) and 19(1); Appellant's Authorities Volume III, Tab 16*

26. The decisions of the Board and the Federal Court of Appeal on fair dealing will impact makers of sound recordings in negotiations for the exploitation of their reproduction rights and any steps that makers of sound recordings and performers may take to collectively administer their right of equitable remuneration. The decisions below will also have broad implication on copyright owners of works other than musical works that are used for "research" purposes.

#### **PART II POINTS IN ISSUE**

27. Whether in applying fair dealing, the purpose to be considered is the purpose of consumers in listening to Previews or the purpose of Services in communicating Previews to consumers. CRIA submits that the purpose must be that of Services.

28. Whether the purpose of consumers listening to Previews is “research” within the meaning of section 29 of the *Act*. CRIA submits that the purpose is not research.
29. Whether the communication of Previews is fair. CRIA submits that it is not fair.
30. As a result, CRIA submits that the fair dealing exception under section 29 of the *Act* does not apply to Previews and that therefore this appeal must be allowed.

### PART III STATEMENT OF ARGUMENT

31. Section 29 provides for fair dealing for research and private study. The section reads as follows:

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

*Copyright Act* section 29; Appellant’s Authorities Volume III, Tab 16

32. CRIA agrees with SOCAN that the communication of Previews is not for the purpose of research and that the communication of Previews is not fair.

SOCAN Factum, paras 39 and 40

#### A. Standard of Review

33. The Copyright Board raised *sua sponte* the issue of whether the fair dealing exception applied to previews, and then proceeded to decide the issue without hearing from the parties.

FCA Decision, paras 10-11, 25 and 29-30; Appellant’s Record, p 80-81 and 85-86

*Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42, paras 59-61 and 70; Respondent/CRIA Authorities (“CRIA Authorities”), Tab 9

34. The standard of review by the Federal Court of Appeal of the Board’s interpretation of the meaning of “research” and whether the purpose of the person providing the communication or the purpose of the person receiving the communication governs, is correctness. Existing jurisprudence of this Court states that the Board’s interpretations of

provisions of the *Act* which are of general application are reviewable on a standard of correctness.

***Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, paras 34, 55, 57 and 64; CRIA Authorities, Tab 4**

***SOCAN v. Canadian Association of Internet Providers* (2002), 19 C.P.R. (4<sup>th</sup>) 289 (F.C.A.) at para 36; aff'd (2004), 32 C.P.R. (4<sup>th</sup>) 1 (S.C.C.) at para 35; CRIA Authorities, Tab 13**

35. The exception for fair dealing in section 29 of the *Act* is of general application. It is not a matter that is within the expertise of the Board. The general application of the fair dealing exception is illustrated by the decision of this Court in *CCH*. In *CCH*, an action for infringement of copyright, one of the central issues in the action was the application of the fair dealing exception. This Court opined on the fair dealing exception and the application of fair dealing to the facts in *CCH*.

***CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339 (“*CCH 2004*”), para 51; Appellant’s Authorities Volume 1, Tab 5**

36. The standard of review of the Federal Court of Appeal, and the Board, of the construction of “research” in section 29 of the *Act* and whether the purpose to be considered is that of consumers listening to Previews or that of Services communicating the Previews must therefore be correctness. A correctness standard is also applicable because by failing to allow the parties an opportunity to be heard, the Board breached the principles of natural justice. The Federal Court of Appeal therefore reviewed the Board’s decision on a correctness basis. The Supreme Court of Canada, upon reviewing the decision of an intermediate appellate court, is to determine if the standard of review was correctly determined by the Court below, and then to decide “whether the standard of review was applied correctly” by the Court below. In “practical terms”, this means that this Court itself reviews the tribunal decision on the correct standard of review.

***Prairie Acid Rain Coalition v. Canada (Minister of Fisheries and Oceans)*, 2006 FCA 31, paras 13-14; CRIA Authorities, Tab 10**

***Zenner v. Prince Edward Island College of Optometrists*, 2005 SCC 77, [2005] 3 S.C.R. 645, paras 29-45, per Major J.; CRIA Authorities, Tab 14**

*Canada Revenue Agency v. Telfer*, 2009 FCA 23, para 19; CRIA Authorities, Tab 1

37. CRIA submits that both the Federal Court of Appeal and the Board were incorrect in their construction of research and erred in law in the selection of the purpose of consumers who use Previews, and in ignoring an important element of the test for fair dealing. In addition, the Court below and the Board erred in finding the Services' dealing with Previews was fair.

**B. The Construction of the *Copyright Act***

38. CRIA submits that a principled approach must be adopted in construing the fair dealing exception. The principled approach must take into account the object and purpose of the *Act* and Canada's international treaty obligations. Both the Federal Court of Appeal and the Board failed to adopt a principled approach in construing fair dealing. Neither the Court nor the Board referred to Canada's obligations under the TRIPS Agreement nor applied the sixth factor of the effect of the dealing of the work.

39. This Court has affirmed the following approach to statutory construction:

Today there is only one principle or approach, namely, the words of an *Act* are to be read in their entire context and in their grammatical and ordinary sense harmoniously within the scheme of the *Act*, the object of the *Act*, and the intentions of Parliament.

*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, para 21; CRIA Authorities, Tab 11

**(i) The Object of the Act**

40. This Court has stated the object of the *Act* as follows:

[30] The *Copyright Act* is usually presented 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 (or, more accurately, to prevent someone other than the creator from appropriating whatever benefits may be generated). [...]

[31] The proper balance among these and other public policy objectives lies not only in recognizing the creator's rights but in giving due weight to their limited nature. In crassly economic terms it would be as inefficient to overcompensate artists and

authors for the right of reproduction as it would be self-defeating to undercompensate them. Once an authorized copy of a work is sold to a member of the public, it is generally for the purchaser, not the author, to determine what happens to it.

[32] Excessive control by holders of copyright and other forms of intellectual property may unduly limit the ability of the public domain to incorporate and embellish creative innovation in the long-term interests of society as a whole, or create practical obstacles to proper utilization. This is reflected in the exceptions to copyright infringement enumerated in ss. 29 to 32.2, which seek to protect the public domain in traditional ways such as fair dealing for the purpose of criticism or review and to add new protection to reflect new technology, such as limited computer program reproduction and “ephemeral recordings” in connection with live performances.

*Théberge v. Galerie D’Art du Petit Champlain Inc.*, 2002 SCC 34, [2002] 2 S.C.R. 336, paras 30 to 32; Appellant’s Authorities Volume 2, Tab 14

41. In *CCH* this Court directed courts to interpret the *Act* to strive to maintain a balance between obtaining a just reward for creators and encouraging the dissemination of works of the arts and intellect.

*CCH* 2004, para 10; Appellant’s Authorities Volume 1, Tab 5

42. As a result, the proper approach to the construction of the *Act* is to focus upon a construction that achieves the appropriate balance. A large and liberal construction of the *Act* that unduly constrains the rights of owners or users should be avoided. In weighing the balance a court must also give consideration to Canada’s obligations under the TRIPS Agreement discussed below. A court does not have an open ended discretion in determining where the balance lies.

(ii) *The TRIPS Agreement*

43. Canada’s ability to establish exceptions to the exclusive rights of copyright is limited by its international treaty obligations. The three step test, which originated in the *Berne Convention*, has now become the international norm for defining the scope of copyright exceptions. The three step test, in combination with the object and purpose of the *Act*, establishes a framework for courts to apply in construing the exception in the *Act*, including, in particular, the fair dealing exception.

44. The three step test was first set out in the *Berne Convention* as a limitation on the scope of permissible exceptions to the reproduction right. Article 9(2) of the *Berne Convention* provides as follows:

(2) It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

*The Berne Convention for the Protection of Literary and Artistic Works, 1886* (“*Berne Convention*”), Article 9(2); Appellant’s Authorities Volume 3, Tab 17

45. The three step test requires that the exception apply in special cases (first step), that the reproduction not conflict with a normal exploitation of the work (second step) and that the reproduction not unreasonably prejudice the legitimate interests of the author (third step).

*Guide to the Berne Convention*, paras 9.6 and 9.11; CRIA Authorities, Tab 17

46. The TRIPS Agreement adopted the three step test with minor alterations and made it applicable to exceptions to all exclusive rights of copyright. Article 13 of the TRIPS Agreement set out the three step test in language drawn from Article 9(2) of the *Berne Convention*. Article 13 reads as follows:

Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.

TRIPS Agreement, Article 13; CRIA Authorities, Tab 19

Sam Ricketson, “WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment”, Report to the Standing Committee on Copyright and Related Rights in the Digital Environment, WIPO Doc. SCCR/9/7 (5 April 2003), online: WIPO <[http://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=16805](http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=16805)>, p 47; CRIA Authorities, Tab 28

47. The TRIPS Agreement was adopted on April 15, 1994, as Annex IC of the Agreement Establishing the World Trade Organization (the “WTO Agreement”). The TRIPS Agreement established standards or minimal levels of intellectual property protection, including

copyright. Canada has adopted the TRIPS Agreement and is therefore bound by the provisions of that Agreement.

**WTO Agreement, Preamble and List of Annexes; CRIA Authorities, Tab 24**

**Daniel Gervais, *The TRIPS Agreement: Drafting History and Analysis*, 3<sup>rd</sup> ed., (Toronto: Sweet & Maxwell, 2008), (“Gervais TRIPS Agreement”), para 1.30; CRIA Authorities, Tab 26**

**Myra J. Tawfik, “Is the WTO/TRIPS Agreement User-Friendly?”, Final Report to the International Trade Treaties Committee of the Canadian Library Association (30 January 2005), online: Canadian Library Association <<http://www.cla.ca>>, (“Tawfik”), p 8 and 28; CRIA Authorities, Tab 27**

***World Trade Organization Agreement Implementation Act*, S.C. 1994, c. 47, preamble and s. 56 to 69; CRIA Authorities, Tab 23**

48. The significance of the enshrinement of the three step test in the TRIPS Agreement is the fact that the WTO Agreement, unlike the *Berne Convention*, establishes a means by which the obligations under the *TRIPS Agreement* can be enforced against contracting states. This mechanism set out in Annex 2 to the WTO Agreement is through a proceeding brought before a panel struck by the World Trade Organization (a “WTO Panel”).

**Gervais TRIPS Agreement, para 2.119; CRIA Authorities, Tab 26**

**Tawfik, p 8 and 9; CRIA Authorities, Tab 27**

49. The three step test has also been adopted in subsequent treaties established by the World Intellectual Property Organization, and has been adopted in a regional trade agreement (the *North America Free Trade Agreement*) which extended the three step test to exceptions in relation to sound recordings.

***WIPO Copyright Treaty*, Article 10; CRIA Authorities, Tab 21**

***WIPO Performances and Phonograms Treaty*, Article 16; CRIA Authorities, Tab 22**

***North American Free Trade Agreement*, Article 1706(3); CRIA Authorities, Tab 18**

**Tawfik, p 9; CRIA Authorities, Tab 27**

50. The three step test is now the international norm for assessing exceptions to copyright infringement. Professor Tawfik has stated:

Whatever the technical limits of the scope of Article 13, it would appear to be only a matter of time before the “Three Step Test” “becomes the prevailing normative principle to which domestic legislators will turn in assessing the validity of existing or proposed copyright exceptions to exclusive rights. Noted Berne scholar, Sam Ricketson has characterized this ubiquitous test as having achieved ‘holy writ’ status. In fact, provisions embodying the “Three-Step Test” are being included as a matter of course in all new trade and copyright treaties such that it has become the guiding principle of choice within the international copyright environment. [footnotes omitted]

**Tawfik, p 25; CRIA Authorities, Tab 27**

51. The U.K. High Court of Justice has adopted the three step test in its guidelines for fair dealing.

***Fraser-Woodward Ltd. v. British Broadcasting Corp.*, [2005] F.S.R. 36 (Ch. Div.) p. 793-794; CRIA Authorities, Tab 5**

52. The three step test in Article 13 of the TRIPS Agreement was considered by a WTO Panel in *United States – Section 110(5) of the U.S. Copyright Act* (“U.S. Section 110(5)”). The WTO Panel was constituted as a result of a request by the European Commission regarding section 110(5) of the U.S. *Copyright Act* which was enacted on October 27, 1998. Section 110(5) permitted the playing of music on the radio or over television in public places (including bars and restaurants) without compensation for the owner of copyright in the music. In support of section 110(5) the United States claimed that the section complied with the standards established by Article 13 of the TRIPS Agreement. The WTO Panel disagreed.

***United States Copyright Act*, section 110(5); CRIA Authorities, Tab 20**

**Gervais TRIPS Agreement, para 2.125 to 2.127; CRIA Authorities, Tab 26**

53. In its general comments on Article 13 of the TRIPS Agreement the WTO Panel stated that distinct meaning had to be given to each of the three conditions of the three step test and that the failure to comply with any of the three conditions would result in an exception being disallowed.

**WTO Panel, para 6.97; CRIA Authorities, Tab 25**

54. With respect to the first condition (that an exception be confined to certain special cases) the WTO Panel concluded that an exception in national legislation should be clearly defined and should be narrow in its scope and reach. The Panel stated:

6.108 The ordinary meaning of “certain” is “known and particularised, but not explicitly identified”, “determined, fixed, not variable, definitive, precise, exact”. In other words, this term means that, under the first condition, an exception or limitation in national legislation must be clearly defined. However, there is no need to identify explicitly each and every possible situation to which the exception could apply, provided that the scope of the exception is known and particularised. This guarantees a sufficient degree of legal certainty. [footnotes omitted]

6.109 We also have to give full effect to the ordinary meaning of the second word of the first condition. The term “special” connotes “having an individual or limited application or purpose”, “containing details; precise, specific”, “exceptional in quality or degree; unusual; out of the ordinary” or “distinctive in some way”. This term means that more is needed than a clear definition in order to meet the standard of the first condition. In addition, an exception or limitation must be limited in its field of application or exception in its scope. In other words, an exception or limitation should be narrow in quantitative as well as qualitative sense. This suggests a narrow scope as well as an exceptional or distinctive objective. To put this aspect of the first condition into the context of the second condition (“no conflict with a normal exploitation”), an exception or limitation should be the opposite of non-special, i.e., a normal case. [footnotes omitted]

**WTO Panel, paras 6.108, 6.109 and 6.112; CRIA Authorities, Tab 25**

55. With respect to the second condition (no conflict with a normal exploitation of a work) the Panel considered what would constitute a normal exploitation of a work with which a derogation in an exception was not supposed to conflict. It reached the following conclusion:

6.183 We believe that an exception or limitation to an exclusive right in domestic legislation rises to the level of a conflict with a normal exploitation of the work (i.e. the copyright or rather the whole bundle of exclusive rights conferred by the ownership of the copyright), if uses, that in principle are covered by that right but exempted under the exception or limitation, enter into economic competition with the ways that right holders normally extract

economic value from that right to the work (i.e., the copyright) and thereby deprive them of significant or tangible commercial gains.

**WTO Panel, paras 6.164, 6.165 and 6.183; CRIA Authorities, Tab 25**

56. Finally, with respect to the third condition (no unreasonable prejudice to the legitimate interests of the right holder) the Panel first defined the interests of the right holder at stake and those attributes which made them legitimate. It then developed an interpretation of “prejudice” and the level of prejudice at which the prejudice became unreasonable. The crucial question under the third condition is the level at which the prejudice becomes unreasonable. The Panel identified this level as follows:

6.229 The crucial question is which degree or level of “prejudice” may be considered as “unreasonable”, given that, under the third condition, a certain amount of “prejudice” has to be presumed justified as “not reasonable”. In our view, prejudice to the legitimate interests of right holders reaches an unreasonable level if an exception or limitation causes or has the potential to cause an unreasonable loss of income to the copyright owner. [footnotes omitted]

**WTO Panel, paras 6.222, 6.223, 6.224 and 6.229; CRIA Authorities, Tab 25**

57. This Court has held that a court should strive to interpret a statute in a way that is consistent with Canada’s international treaty obligations. The Federal Court of Appeal and the Board should therefore have considered the fair dealing exception having regard to the three step test. Because of Canada’s obligations under the TRIPS Agreement, the effect of a dealing upon the work must always be considered in a fair dealing analysis, and a court must be satisfied that any effect on the work is not such that either the second or third condition of the three step test is breached.

***National Corn Growers Association v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324, p 29; CRIA Authorities, Tab 8**

***Harvard College v. Canada (Commission of Patents)*, 2002 SCC 76 [2002] 4 S.C.R. 45, per Binnie J. (dissenting), para 205; CRIA Authorities, Tab 6**

**(iii) *A Framework for the Construction of Exceptions***

58. Considered together, the object of the *Act* and the three step test embodied in Article 13 of the TRIPS Agreement establish a framework for the construction of exceptions to copyright infringement including, the fair dealing exception. That framework is as follows:

- (a) exceptions form a balance to protect against excessive control of copyright holders that would limit the ability to incorporate and embellish creative innovation on the public domain;
- (b) exceptions should be clearly defined and narrow in scope and reach;
- (c) exceptions should not permit uses which enter into economic competition with the ways that copyright holders normally extract economic value and thereby deprive copyright holders of significant or tangible commercial gains; and
- (d) exceptions should not cause or have the potential to cause an unreasonable loss to the copyright holder.

**C. The Services do not Conduct Research**

59. CRIA agrees with the finding of the Board that Services that provide Previews do not conduct research. In making this finding, the Board distinguished the purely commercial dealing of the Services from the conduct of research contemplated by the fair dealing exception. The Services merely appropriate substantial parts of sound recordings of musical works to market the sale of downloads. The Board's finding in this regard is consistent with a decision of the High Court Auckland wherein the court stated:

I too think that fair dealing for the purposes of research or private study does not encompass an activity in which the material concerned is simply appropriated and passed on to others for commercial profit of the appropriator. It seems to me that the section draws a line between the paid conduct of research and an employee of a commercial organisation in the course of employment and a paid appropriation of material which is then sold to someone else for the purposes of research or private study.

*Television New Zealand Ltd. v. Newsmonitor Services Ltd.* [1994], 2 NZLR 91, para 106; CRIA Authorities, Tab 14

60. The Federal Court of Australia has also addressed the distinction between a purely commercial dealing and research activity contemplated by fair dealing under the Australian *Copyright Act, 1968*. The Federal Court stated:

In my opinion, Jeffress' dealing with the work is not something done for the purpose of research. Although the retrieval of the material may be a complicated exercise, it does not follow that the purpose of Jeffress is research. Its purpose, which is purely commercial, is to supply a photocopy of material already published in return for a fee. This is an activity engaged in by Jeffress in the ordinary course of trade, which, in my view, is in the nature of an information audit and should be distinguished from research activity of the kind contemplated by s. 40.

*De Garis v. Neville Jeffress Pidler Pty. Ltd.* (1990), 37 F.C.R. 99 (F.C. Aust.) (“*De Garis*”), p 105; CRIA Authorities, Tab 3

#### **D. Whose Purpose May be Relied Upon**

61. The Federal Court of Appeal concluded that, despite the commercial nature of the Services' activities, the purpose of the Previews had to be considered from the point of view of the consumer. This conclusion endorsed the Board's finding that the Services were entitled to rely on the purpose of consumers because the Services facilitated consumers' research.

**FCA Decision para 22; Appellant's Record, p 84**

**Board Decision, para 108; Appellant's Record, p 41-42**

62. In considering the purpose of consumers as the purpose of the Services that make Previews available on their websites, the Board misapplied the decision of this Court in *CCH*.

63. In *CCH*, on the facts of the case, the Federal Court of Appeal distinguished U.K., Australian and New Zealand jurisprudence holding that the purpose to be considered for fair dealing is the purpose of the person dealing with the work. The Court distinguished that jurisprudence on grounds of the very special relationship between the Law Society of Upper Canada (the “Law Society”) and patrons of the Great Library. That very special relationship existed because the Law Society had no purpose for copying the legal publications at issue other than to facilitate the purpose of the persons requesting the copies. The Law Society's only aim was to assist users of the Great Library in conducting research or private study.

***CCH Canadian Ltd. v. Law Society of Upper Canada, 2002 FCA 187 (“CCH 2002”), paras 130 to 132; Appellant’s Authorities Volume 1, Tab 4***

64. In *CCH*, in applying the law of fair dealing to the facts in the case, this Court stated:

Although the retrieval and photocopying of legal works are not research in and of themselves, they are necessary conditions of research and thus part of the research process. The reproduction of legal works is for the purpose of research in that it is an essential element of the legal research process. There is no other purpose for the copying; the Law Society does not profit from this service. Put simply, its custom photocopy service helps to ensure that legal professionals in Ontario can access the materials necessary to conduct the research required to carry on the practice of law.

***CCH 2004, para 64; Appellant’s Authorities Volume 1, Tab 5***

65. Another important distinction between the facts in *CCH* and the facts in this case is that the Great Library is a “library, archive or museum” as that term is defined in the *Act*. By reason of section 30.2(1) of the *Act*, the Law Society is entitled to rely on the purpose of patrons of the Great Library in making copies. It should also therefore be entitled to rely on the purpose of patrons of the Great Library under the fair dealing exception.

***CCH 2002, paras 135 to 141; Appellant’s Authorities Volume 1, Tab 4***

66. In this case, Services appropriate musical works in SOCAN’s repertoire. They do so for a commercial purpose. Furthermore, although the communication of Previews is initiated by consumers, the Services decided to make the Previews available to consumers on their own initiative. Even if it is accepted that Services are entitled to rely on the “research” purpose of consumers, the Services only purpose in dealing with Previews is not to facilitate that research. The Services also use Previews for their own economic benefit in marketing the sale of downloads of sound recordings and that is their predominate purpose for using Previews.

67. The Services are not therefore in a relationship with consumers comparable to the very special relationship between the Law Society’s Great Library and library patrons. Services profit in providing Previews through enhanced sales of downloads. The purpose of Services in providing Previews is not confined to facilitating “research” by consumers. In providing Previews, Services have objectives other than to assist consumers in conducting “research”.

68. The relationship between the Services and consumers is however comparable with the relationship between parties in U.K., Australian and New Zealand jurisprudence. In the U.K. case of *Sillitoe v. McGraw-Hill Book Company*, a publisher published a series of notes on the published works of well-known authors. The publications were used by students studying for literature examinations. In an action for infringement of copyright brought against the U.K. distributor of the notes, the distributor claimed fair dealing for the purpose of private study. This was the purpose of students who purchased and read the notes. In rejecting the distributor's claim to fair dealing, Justice Mervyn Davis stated:

Here, [the defendant] said, the dealing was for the purpose of private study by the examinees who would acquire the notes. I do not accept that argument. To my mind section 6(1) authorizes what would otherwise be an infringement if one is engaged in private study or research. The authors of the Notes, when writing the Notes and thus "dealing" with the original work, were not engaged in private study or research.

*Sillitoe v. McGraw-Hill Book Company (U.K.) Ltd.*, [1983] FSR 545 (Ch. Div.), p 558; CRIA Authorities, Tab 12

*University of London Press Ltd. v. University Tutorial Press, Ltd.*, [1916] 2 Ch 601, p 613; CRIA Authorities, Tab 15

69. In Australia, in an action for copyright infringement brought against a publisher of a news-clipping service, the publisher claimed fair dealing for the purpose of research, based on the purpose of the publisher's customers who subscribed to the clipping service. The court rejected fair dealing because the relevant purpose was that of the publisher, not the publisher's customers.

*De Garis*, p 105; CRIA Authorities, Tab 3

70. Similarly, in New Zealand, in obiter, a court rejected a fair dealing claim by the compiler of a publication used by students on grounds that the compiler could not rely on the fair dealing purpose of students using its publication.

*Longman Group Ltd. v. Carrington Technical Institute Board of Governors*, [1991] 2 NZLR 574 (Auckland H.C.), p 588; CRIA Authorities, Tab 7

*Copyright Licensing Ltd. v. University of Auckland*, [2002] 3 NZLR 76 (Auckland H.C.), paras 35 and 36; CRIA Authorities, Tab 2

71. In each of the U.K., Australia and New Zealand decisions, a publisher or compiler of a publication claimed fair dealing based on the person who acquired a copy of the publication at issue. The relationship between the publisher/compiler and the person who acquired the publication was a commercial relationship. This relationship is comparable to the commercial relationship between the Services and consumers who are prospective purchasers of downloads. The distinction between the foreign jurisprudence drawn by the Federal Court of Appeal in the *CCH* case, based on the very special relationship between the Law Society and patrons of its Great Library, does not apply to the circumstances in this case.

72. If the framework for the construction of exceptions developed above were applied, the purpose of consumers who use Previews in conducting a fair dealing analysis would also be rejected. The framework provides two reasons for rejecting the consumers' purpose. First, there is no need to protect against excessive control of copyright owners. The Services are appropriating the musical works for a commercial advantage in selling downloads. Permitting the Services to rely on the purpose of their customers would tip the balance in favour of users to gain a free ride on the works of the copyright owners, and there is no public policy reason that Services could advance that would support their reliance on the "research" purpose of their customers. Second, the three step test requires that exceptions be clearly defined. Permitting the Services to rely upon the purpose of consumers in conducting their shopping activities would open the fair dealing exception to an ill-defined activity. There are a myriad of ways in which a consumer can deal with a copyright work with a view to deciding whether or not to purchase the work. If the purpose to be relied upon is that of the consumer, the fair dealing exception would breach the first condition of the three step test and put Canada in breach of its obligations under the TRIPS Agreement.

#### **E. Consumers and Research**

73. In the event that this Court determines that the purpose of consumers who listen to Previews is relevant to a fair dealing analysis, this Court must consider whether consumers searching for a sound recording to download constitutes "research" in the context of the fair dealing exception.

74. CRIA concurs with SOCAN, for the reasons given by SOCAN that the definition given to “research” by the Federal Court of Appeal in the context of the fair dealing exception is in error. That definition creates an exception of enormous scope which is in conflict with the object and purpose of the *Act*.

**SOCAN Factum, paras 67 to 82 and 91 to 101**

75. The definition advanced by SOCAN:

the systematic investigation into the study of materials and sources  
in order to establish facts and reach new conclusions

is consistent with Australian jurisprudence. In Australia, “research” in the context of fair dealing is defined as:

diligent and systematic enquiry or investigation into a subject in  
order to discover facts or principles

**SOCAN Factum, para 96**

***De Garis*, p 105; CRIA Authorities, Tab 3**

76. Furthermore, if the framework for the construction of exceptions developed above is applied, permitting fair dealing to extend to consumers engaged in shopping activities would also be rejected. As stated above, there are a myriad of ways in which consumers can deal with a copyright work with a view to deciding whether or not to purchase the work. A consumer could copy a large extract of literary works to enable the consumer to read the extract for the purpose of deciding whether or not to purchase the work. A consumer could make a full scale photograph of an artistic work to hang in the consumer’s home for the purpose of deciding whether or not to purchase the work. These and countless other examples show the ill-defined nature of construing “research” to include shopping activities. The three step test requires that “research” be more clearly defined. Furthermore, these shopping activities could easily have a serious effect on the dealing of a work to amount to the breach of the second and third conditions of the three step test. The example given above of the photograph of the artistic work is one which could clearly conflict with a normal exploitation of the artistic work and unreasonably prejudice the legitimate interests of the right holder.

**F. Was the Dealing Fair?**

77. The Federal Court of Appeal applied a correctness standard to the Board's application of the fair dealing exception and heard the parties where the Board had failed to do so. In its review, the Federal Court of Appeal adopted as its own the findings of the Board on the six *CCH* factors. As submitted above, this Court should review the decision of the Federal Court of Appeal on the standard of correctness.

78. The Federal Court of Appeal erred in applying three of the six factors set out in *CCH*, namely the first, third and sixth factors.

79. The first factor, the purpose of the dealing, is, for the reasons expressed above, the commercial purpose of Services to market their sale of downloads. Both the need for balance and the three step test require that the purpose to be considered be that of the Services. The Federal Court of Appeal's adoption of the Board's research purpose was in error. The Services' commercial purpose is a factor against a finding of fair dealing.

80. The third factor is the amount of the dealing. CRIA agrees with SOCAN's submissions on this factor. As the purpose to be considered in applying fair dealing is, as submitted above, the purpose of Services and not that of consumers, the aggregate of music use by Services must be considered under the third factor. The magnitude of that amount clearly demonstrates that the third factor weighs heavily against a finding of fair dealing. The Federal Court of Appeal was in error in failing to take into account the magnitude of the aggregate amount of music used.

**SOCAN Factum, paras 109 to 128**

81. CRIA submits that the Federal Court of Appeal erred in failing to take into account the sixth factor: the effect of the dealing on the work. The Court agreed with the findings of the Board on this factor. The Board merely bundled the fifth and sixth factor into one and concluded that Previews increase the probability of the sale of downloads which in turn benefits copyright owners. The Board, and therefore the Federal Court of Appeal, failed to consider the effect of the dealing on Previews. The effect of the dealing on Previews is clearly to eliminate a commercial market for Previews. This is contrary to the expectation that copyright owners would

normally extract economic value from Previews. This is illustrated in the decision in *United States v. ASCAP*, cited by SOCAN in its factum, which recognized that there is a market for Previews.

*United States v. ASCAP*, 599 F Supp 2d 415 (2009); Appellant's Authorities  
Volume III, Tab 16, p 10-11

SOCAN Factum, paras 86 to 90

82. The failure of the Federal Court of Appeal to correctly take into account the effect of the dealing on the market for Previews is of particular importance having regard to Canada's obligations under the TRIPS Agreement and the three step test. The *CCH* factor that incorporates the second and third conditions of the three step test is a consideration of the effect of the dealing on the work. Failure to properly consider that factor in construing the fair dealing exception results in an interpretation which is in breach of Canada's obligations under the TRIPS Agreement.

83. Since the effect of the Service's dealing with Previews is to eliminate a commercial market for Previews, the dealing is in conflict with a normal exploitation of Previews. The sixth factor therefore does not support a finding of fair dealing. Moreover, the magnitude of the effect is to breach the second condition of the three step test. CRIA submits that, because of the magnitude of the effect under the sixth factor, in view of Canada's obligations under the TRIPS Agreement, the Federal Court of Appeal should have rejected the finding of fair dealing. This Court may, for this reason alone, allow this appeal. Furthermore, taking into account the first, third and sixth factors, which CRIA submits, in the circumstances of this case, are the most important fair dealing factors, the Services' dealing with Previews is not fair and thus the fair dealing exception does not apply.

#### **PART IV SUBMISSIONS REGARDING COSTS**

84. CRIA requests the costs of this appeal.

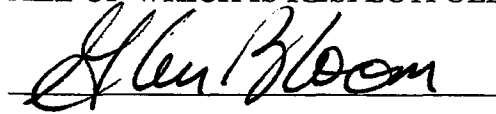
#### **PART V ORDER REQUESTED**

85. CRIA seeks an order:

- (a) Setting aside the decision of the Federal Court of Appeal; and

- (b) Declaring that the Internet communication of Previews of musical works does not constitute fair dealing pursuant to section 29 of the *Act*.

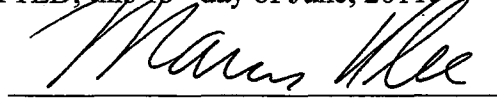
ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 13<sup>th</sup> day of June, 2011.



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17. *Guide to the Berne Convention.* paras 9.6 and 9.11
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20. *United States Copyright Act*, 17 U.S.C. section 110(5)
21. *World International Property Organization Copyright Treaty.* Article 10
22. *World International Property Organization Performances and Phonograms Treaty.* Article 16
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28. Sam Ricketson, "WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment", Report to the Standing Committee on Copyright and Related Rights in the Digital Environment, WIPO Doc. SCCR/9/7 (5 April 2003), online: WIPO <[http://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=16805](http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=16805)>. p 47