



# Is Downloading Music Illegal?

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**I**s downloading music illegal? Before we talk about Canada, let's look at the United States.

## *What's Happening to People Who Download Music in the United States?*

The Recording Industry Association of America and major music labels have sued approximately 35,000 people for downloading music illegally over the internet. All of the cases reached settlements usually in the range of \$3,000 to \$5,000. That was until Jammie Thomas-Rasset refused to settle.

Ms. Thomas-Rasset was sued for illegally downloading twenty-four songs, including some all-time classics, such as Guns N' Roses – *Welcome to the Jungle*, Gloria Estefan – *Rhythm is Going to Get You*, Green Day – *Basket Case*, and Def Leppard – *Pour Some Sugar on Me*.

Ms. Thomas-Rasset was found liable for downloading the songs and consequently ordered to pay US\$1.92 million (or \$80,000 per song) in damages to six record companies.

Could this kind of justice ever come to Canada? It depends on whether downloading music is illegal in Canada.

## *Is Downloading Music Illegal?*

Is downloading music illegal? That question cannot be answered unequivocally in Canada. No Canadian court has made a definitive ruling on the issue. Moreover, the only decisions which have touched upon the issue of the legality of downloading music have raised more doubts than they have settled. This is how the uncertainty arose.

### *The Statute*

The *Copyright Act* protects a musical work automatically upon creation. Moreover, it is the owner of the musical work who has the sole right to produce or reproduce a musical work or any substantial part of it in any material form. A "musical work" for the purposes of the Act means any work of music or musical composition, with or without words, and includes any compilation thereof. If you are not the owner of the musical work, then you can only use it if you have permission of the owner, i.e. by way of license.

So, according to the statute, if you are not the owner of the copyright in the musical work and if you do not have a license from the owner of the musical work to download the musical work, then it may be illegal to download the musical work. However, this is not the whole story. The Act con-

tains exceptions to the general rule. Further, the Copyright Board and the courts have made rulings which raise questions about the legality of downloading music.

## *The Rulings of the Copyright Board and the Federal Court*

There are two cases which have contributed significantly to the debate on the legality of downloading music: (1) *Private Copying 2003-2004*<sup>1</sup>; and (2) *BMG Canada Inc. v. John Doe (F.C.)*<sup>2</sup>. Those titles don't mean much themselves. However, the decisions made in those cases are relevant. Let's discuss them.

### *Case 1: Private Copying 2003-2004*

In response to the widespread downloading of music over the internet, the Canadian Private Copying Collective asked the Copyright Board of Canada for the first time to apply a levy on DVDs, removable electronic memory cards, and non-removable memory permanently embedded in "digital audio recorders" (read: MP3 players). The Canadian Private Copying Collective is the "collecting body" designated by the Copyright Board under the Act to collect and distribute levies to rights holders.

It is contrary to the Act to produce or reproduce a musical work if you do not own the musical work or if you do not have the owner's permission to do so. However, there are exceptions. Parliament added one specific exception in the latter part of the 1990s to take account of the rampant copying of music onto blank cassettes and compact discs. In effect, the changes to the Act at section 80 state that it is not an infringement of copyright to reproduce a musical work embodied in a sound recording onto an audio

recording medium for the private use of the person who makes the copy. In consideration to the creators of musical works for this exemption from copyright infringement, a levy was placed on “blank audio recording mediums”, which at that time included cassettes and compact discs. So, you can make a copy of recorded music onto cassettes and compact discs because every time you buy blank cassettes or compact discs, you are paying a levy which is redistributed to the owners of musical works.

In *Private Copying 2003-2004* the Copyright Board of Canada ruled that “digital audio recorders” were “audio recording mediums”, meaning that, as MP3 players were now included in the same category as blank cassettes and compact discs, downloading music onto MP3 players did not

infringe copyright if the person doing the downloading did so for private use. Furthermore, as these MP3 players were now considered “audio recording mediums”, the Copyright Board could set a levy on them. Unsurprisingly, this case was appealed to the Federal Court of Appeal.

### ***What did the Federal Court of Appeal decide?***

The Federal Court of Appeal decided in 2004 that MP3 players and similar devices did not come within the definition of “audio recording medium” in the Act. Such devices were not mediums. The Copyright Board had no authority under the Act to apply the levy to the devices. The appeal court stated that it would be for Parliament to decide whether an MP3

player is an “audio recording medium” and therefore capable of having a levy applied to it.<sup>3</sup>

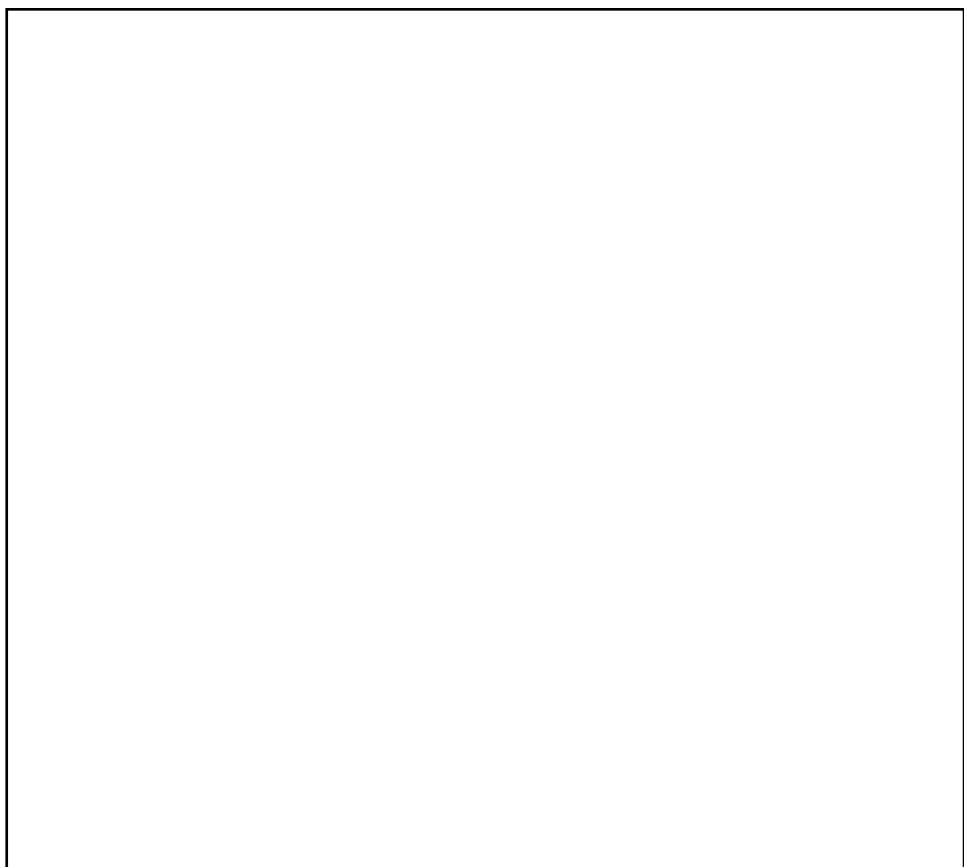
Therefore, according to the appeal court, the exemption from copyright infringement in the Act did not apply to copying music onto MP3 players or similar devices.<sup>3</sup>

### ***Case 2: BMG Canada Inc. v. John Doe***

What does this case say about downloading music? Well, this case generally involved the record companies suing “John Doe” for downloading music illegally. However, the record companies did not know the names of the people who had downloaded the music. So, they brought a motion to compel internet service providers to disclose to them the identities of the downloaders. As the court’s ruling on the motion would affect many parties, several interveners and non-party respondents spoke to the issue. (Our firm had the opportunity to address the court on behalf of our intervener client.)

The motions judge ruled that the court would only order the disclosure of the identities of the downloaders if the plaintiffs could satisfy the requirements for an equitable bill of discovery. As one of the requirements, the plaintiffs were required to establish a *prima facie* case against the unknown alleged wrongdoers. This is where the fun begins.

The motions judge decides to wade directly into the issue of music downloading. In relying on section 80 of the Act (which contains the exemption for private copying) and *Private Copying 2003-2004*, i.e. that a “digital audio recorder” is an “audio recording medium”, the motions judge states that “downloading a song



for personal use does not amount to infringement.”<sup>4</sup>

### ***What Did the Federal Court of Appeal Say?***

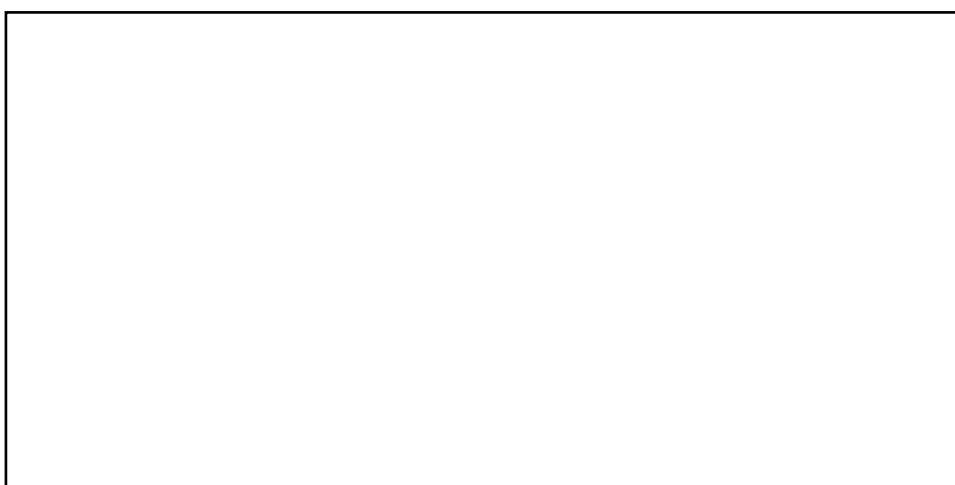
On appeal of the decision, the Federal Court of Appeal made no ruling on the issue of whether downloading music over the internet infringed copyright. Instead, the appeal court vacated the findings of the lower court that downloading a song for personal use does not constitute infringement.

### ***State of the Law on Downloading Music***

So, after all of that, what do we know? We know that it is the general rule that it is illegal to produce or reproduce a musical work if you are not the owner or if you do not have permission from the owner to do so. We know that the statute contains exceptions to the general rule. We also know that you are doing nothing illegal if you reproduce musical works, which have already been recorded, onto a blank cassette or compact disc for your own personal use.

We know that our courts have made no finding about whether downloading music off the internet is an infringement of copyright. Further, we know that the sections of the Act which make it permissible to copy music onto blank cassettes and compact discs in certain situations do not make it legal to copy music onto MP3 players and similar devices.

In conclusion, whether it is illegal to download music is uncertain. Even our courts have had difficulty ruling on the issue. Different decision-making bodies have arrived at markedly different conclusions. This leaves



Canada’s copyright laws regarding downloading music in a state of limbo. That being said, as reproducing a musical work without the permission of the owner is contrary to the Act and as the Federal Court of Appeal has stated that the private copying exemption in the Act does not permit the downloading of music onto MP3 players, it is likely that downloading music is not legal.

Once more, Canada has yet another pressing reason to amend its copyright laws, so that it is clear whether downloading music is legally permitted in Canada.

<sup>4</sup> This ruling was made prior to the judgment of the Federal Court of Appeal on the *Private Copying 2003-2004* case. ■

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<sup>1</sup> Copying for Private Use (Re) Copyright Act, subsection 83(8), Tariff of levies to be collected by CPCC in 2003 and 2004 on the sale of blank audio recording media, in Canada, in respect of the reproduction for private use of musical works embodied in sound recordings, of performer’s performances of such works and of sound recordings in which such works and performances are embodied.

<sup>2</sup> *BMG Canada Inc. v. John Doe (F.C.)*, [2004] 3 F.C.R. 241.

<sup>3</sup> I would be remiss if I did not mention round 2 between the Copyright Board and the Federal Court of Appeal. Regardless of the judgment of the Federal Court of Appeal in 2004, the Copyright Board authorized levies again on digital audio recorders in a decision dated July 19, 2007. The Federal Court of Appeal quashed such decision in six paragraphs.