

Date: 20080609

Docket: T-697-06

Citation: 2008 FC 718

Ottawa, Ontario, June 9, 2008

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

CANADIAN PRIVATE COPYING COLLECTIVE

Plaintiff

and

**PLUS MEDIA INC., PLUS MEDIA (CANADA) INC.,
CALVIN XU (A.K.A. QI XU)**

Defendants

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] The plaintiff, the Canadian Private Copying Collective (CPCC), is a non-profit corporation whose mandate is to collect and distribute levies imposed on the importation and sale of blank recording media, such as compact disks. The levies are intended to benefit artists whose works are frequently copied onto those disks. CPCC's mandate derives from the *Copyright Act*, R.S.C. 1985, c. C-30.

[2] CPCC began this action against the defendants, Mr. Calvin Xu, Plus Media Inc. and Plus Media (Canada) Inc., in order to collect levies that the defendants allegedly owe by virtue of their sales of blank CDs, as well as interest, penalties and costs. CPCC also seeks an order requiring the defendants to submit to an audit in order to determine the amount that is actually owed.

II. Statutory Framework

[3] Everyone who makes or imports blank recording media, including blank CDs, must pay a levy on the sales of those media according to Part VIII of the *Copyright Act* (s. 82(1)(a); relevant provisions are set out in an Annex). CPCC is the designated collecting body for the levies (pursuant to s. 83(8)(d) of the Act).

[4] Levies are established by the Copyright Board (s. 83(8)) and are set out in the *Private Copying Tariff, 2005-2007* (s. 83(10)). Section 3 of the Tariff sets the levy at 21 cents for each recordable compact disk (CD-R).

[5] If the CPCC believes a person has failed to pay levies, it can bring proceedings in Federal Court to recover them (s. 88(1)). If the Court finds that CPCC's claim is made out, it can order the person to pay an amount up to five times the amount of the levy due, taking into consideration the good faith (or lack thereof) of the person, the conduct of the parties before the Court, and the need to deter others from non-compliance (s. 88(2),(4)).

III. Factual Background

[6] In 2002, CPCC received information that a company called Linsmart was selling blank CD-Rs on eBay. Linsmart's eBay vendor information identified Mr. Xu as a contact person and gave its address as 247 Bur Oak Avenue in Markham, Ontario (which is also the current mailing address of Plus Media (Canada) Inc.).

[7] In 2003, CPCC contacted the defendant Plus Media Inc. (which I will refer to as "PM") asking it to comply with its obligations under the Tariff. PM denied that it was importing CD-Rs. CPCC contacted PM again the following year and, again, PM denied that it was importing CD-Rs. In 2005, after learning that PM was the Ontario distributor for a California company, CPCC once again communicated with PM. This time, the defendant Mr. Xu acknowledged that the company had been importing CD-Rs in 2004 and 2005 and made a payment of \$14,385.00 to CPCC. CPCC then reminded PM that it should have made reports and payments on a bi-monthly basis, and it asked PM to re-file accordingly. It also informed PM that its payment was late and that interest was owing. PM did not respond.

[8] At that point, in the autumn of 2005, CPCC decided to audit PM. The audit was postponed twice at PM's request. The delays were the result of claims by PM that Mr. Xu was away on a business trip and PM's accountant was on holiday. Neither claim was true. When the auditors arrived at PM's premises on the agreed date (December 14, 2005), they were told that PM no longer carried on business at that address. Rather, a new company, Plus Media (Canada) Inc. (which I will

call “PMC”), was the new occupant of the building. Mr Xu’s wife, Ms. Ping Lin, is the sole shareholder and director of PMC.

[9] CPCC asked PMC for an audit of its records and was turned down on the grounds that PMC was a separate entity from PM and did not import any blank recording media.

[10] PM claims that it ceased carrying on business on October 14, 2005. The following day, PMC started carrying on business at the same address. PM transferred its lease to PMC. PM’s employees became PMC employees. PMC started selling its wares to former PM customers. PMC obtained its stock from some of PM’s suppliers. PMC also used PM’s phone number, fax number and web-site. PM transferred some assets to PMC, for which no payment was made. It is unclear where PMC got its working capital. It was able to make purchases from suppliers shortly after starting up but had no credit line or any other apparent source of funds. No notice was given to PM’s customers of the change in companies. The only difference between the businesses of PM and PMC is that the latter does not import blank CD-Rs.

[11] Mr. Xu says that he obtained PM’s business records from the company’s accountant in late October 2005. Subsequently, the documents disappeared. At the time, they were on the premises of PMC.

IV. The Positions of the Parties

[12] CPCC seeks an order against PM allowing CPCC to conduct the audit that was frustrated in the fall of 2005. CPCC seeks a similar order against PMC on the grounds that PMC is the alter ego of PM.

[13] In addition, CPCC asks the Court to order the defendants to pay the levies due, once the amounts have been ascertained by way of the requested audits, as well as penalties, interest and legal costs. CPCC also contends that PM's payment to CPCC in 2005 was \$1512.00 short of what was actually owed. Other than that, CPCC has not been able, without a proper audit, to determine what other amounts are owed. However, based on PM's sales figures for 2005, CPCC estimates that PM owes about \$380,000 in levies. That calculation is based on PM's admission that its sales of blank CD-Rs amounted to about 20% of its total revenue (being \$2.4 million). Given that each CD-R sells for about 24 cents, CPCC estimates that PM sold about 2 million CD-Rs. There is some evidence indicating that PM purchased about 200,000 of those units locally, so about 1.8 million were imported and subject to the levy of 21 cents. The \$380,000 figure is the product of 1.8 million times 21 cents. PM submits that there is no physical evidence before the court showing that it imported or sold blank CD-Rs in the kind of volume alleged by CPCC.

[14] PM claims that since its records have unaccountably disappeared, an audit would be pointless. CPCC argues that, if this is so, PM, PMC and Mr. Xu should be ordered to produce whatever records they can find, whether in their possession or held by suppliers, customers, brokers or accountants. CPCC also submits that, if records cannot be found, PMC should be ordered to pay an amount representing an estimate of what PM probably owes in unpaid levies, given that PMC is,

at least for present purposes, the alter ego of PM. PMC argues that there is no legal basis for an order against it as it is a separate legal entity from PM and has not been involved whatsoever in the importation of CD-Rs.

[15] Finally, CPCC seeks an order requiring PM and PMC to pay the costs of an audit if it shows that they owe more than 10 percent more than what was paid in 2005 (pursuant to s. 9 of the Tariff).

V. Issue

[16] In my view, there is only one issue that is ripe for determination by the Court; that is, should the Court order an audit and, if so, against whom?

[17] All of the other issues depend on the results of the audit, that is:

- how much do the defendants owe in unpaid levies?
- should PMC be held liable for levies owed by PM?
- is it appropriate to impose penalties, interest and costs and, if so, upon whom and in what amount?
- should one or more of the defendants pay the cost of an audit?

[18] I am satisfied that all of the defendants should be subject to an audit. The Court will remain seized of the other issues, to be determined after the audit is completed, unless the parties are able to resolve matters between them.

VI. An Audit is Required

1. The Authority to Conduct an Audit

[19] As mentioned, persons who make or import blank recording media must keep records of those activities and provide them to CPCC (s. 82(1)(b)). This obligation is described in greater detail in the Tariff. With each payment of levies, which must be made every two months, a manufacturer or importer must provide CPCC the following information:

- its identity, that is, its trade name, corporate name, place of incorporation, the name of the proprietor, or the names of the principal officers;
- its address, telephone number, fax number and e-mail address; and
- the number and type of media made or sold. (Tariff, s. 8).

[20] In addition, manufacturers and importers must, for a period of six years, keep records permitting CPCC to determine the amounts payable under the Tariff. To determine the completeness and accuracy of those records, CPCC has the authority to audit them on reasonable notice during business hours, and to make reasonable inquiries of the person being audited and

others (Tariff, s. 9). Generally speaking, CPCC has a duty to keep confidential the information it receives from manufacturers and importers (Tariff, s. 10(1)).

2. An Audit of PM and Mr. Xu

[21] It is clear, indeed it is admitted, that PM was an importer of blank CD-Rs. Accordingly, PM had a duty to keep records of its imports and sales, pay the corresponding levies and provide relevant information to CPCC. In turn, CPCC had the legal authority to audit PM's records and make reasonable inquiries of Mr. Xu.

[22] However, the defendants argue that CPCC's investigation was improperly instituted because it relied on information it unlawfully obtained from third parties. In addition, the defendants submit that the information CPCC relied on cannot be introduced in these proceedings because doing so would violate the confidentiality requirements of the Tariff.

[23] CPCC's investigation of PM and Mr. Xu began as a result of information it obtained from companies who were doing business with PM. CPCC received this information after it contacted companies who were selling blank recording media. According to Ms. Laurie Gelbloom, CPCC's general counsel, CPCC frequently contacts companies to inform them of the obligations imposed on manufacturers and importers. Sometimes, CPCC asks companies to provide evidence that they obtained their wares from other Canadian companies and, therefore, are not liable for the levies imposed by the Tariff.

[24] Here, CPCC contacted companies called “Tomken Technology” and “U Computers”. Both supplied CPCC with copies of invoices showing that they purchased CD-Rs from PM.

[25] To my mind, there is nothing improper about CPCC’s making contact with companies and using the information it receives to carry out its mandate. The companies CPCC contacted appeared willing to provide the information CPCC was seeking. I see no basis for the suggestion that CPCC was exceeding its lawful authority or acting heavy-handedly. Nor do I accept the defendants’ argument that CPCC can only communicate with companies it already knows to be manufacturers or importers. It would make little sense to confine CPCC’s activities solely to those persons who voluntarily identified themselves as being governed by the Tariff. Indeed, I see nothing in the *Copyright Act* or the Tariff that would constrain CPCC in this way. In my view, CPCC is entitled to seek and act on information that helps identify importers and manufacturers.

[26] As for the argument about confidentiality, as I read the Tariff, CPCC is bound to keep confidential the information that importers and manufacturers are obliged to provide in compliance with their obligations under the Tariff. The Tariff states:

10.(1) Subject to subsections (2) to (5), CPCC shall treat in confidence information received from a manufacturer or importer **pursuant to this tariff**, unless the manufacturer or importer consents in writing to the information being treated otherwise. (Emphasis added.)

[27] In my view, the words “pursuant to this tariff” refer to the information contained in reports submitted by importers and manufacturers under s. 8 of the Tariff and the information CPCC obtains by way of audits under s. 9. It does not, as the defendants argue, extend to all information CPCC might obtain in discharging its mandate. Subsection 10(4) specifically provides that subsection 10(1) “does not apply to . . . information obtained from someone other than the manufacturer or importer, who is not under an apparent duty of confidentiality to the manufacturer or importer.” While I have no evidence before me as to whether Tomken Technology or U Computers is a manufacturer or importer, in my view, CPCC was not obliged to keep confidential the information it obtained those companies because it was not provided “pursuant to the tariff” and it was voluntarily offered by sources other than the particular importer CPCC was investigating, *i.e.* PM.

[28] The defendants raise a further argument about the admissibility of the invoices. They submit that the information that CPCC obtained is inadmissible hearsay. For its part, CPCC suggests that the documents are not being relied on for the truth of their contents and, therefore, that the hearsay rule does not apply. According to CPCC, the documents merely show that PM sent out invoices to other companies in relation to the sale of CD-Rs after the point in time when PM ceased carrying on business. One of the invoices is dated “11/09/05” indicating that PM was still in business on November 9, 2005, well after the date on which PM allegedly stopped operating (*i.e.* October 14, 2005).

[29] In my view, if CPCC had wished to rely on the contents of these invoices to prove particular sales of CD-Rs by PM to other companies, there would be a serious issue whether the documents would be admissible for that purpose. However, given that CPCC wishes to rely on the documents solely to prove that PM issued invoices in November 2005, I do not believe that a hearsay issue arises. The documents are not being tendered for the truth of their contents but, rather, simply to show that PM communicated with certain customers at a particular point in time. The documents are admissible for that purpose.

[30] Accordingly, CPCC has established that PM and Mr. Xu were bound by the requirements of the Tariff. CPCC had the authority to audit PM and to request Mr. Xu to produce records of PM's purchases, sales and revenues.

3. An Audit of PMC

[31] PMC is a separate corporation from PM. It does not import, and has never imported, blank recording media. As such, PMC argues that CPCC has no authority to conduct an audit of PMC or any legal basis on which to demand that PMC pay any levies that may be owed by PM.

[32] CPCC argues that PMC has a duty to submit to an audit and to assume PM's liabilities under the Tariff. CPCC points to the following circumstances as justifying the relief it seeks against PMC:

- In effect, PMC's operations were identical to those of PM. No effort was made to distinguish the two companies in any respect. The only difference was that PMC refrained from importing blank recording media;
- According to Mr. Xu, PMC was created for the improper purpose of helping PM avoid being audited and evade paying the levies it owed to CPCC;
- The principals behind the two companies, Mr. Xu and Ms. Lin, are spouses;
- When CPCC was trying to schedule its audit of PM, employees of PMC gave false grounds for delaying the audit and failed to mention that PM was no longer in business;
- PM issued invoices from PMC's premises after it had allegedly ceased operations;
- and
- PM's records were in PMC's custody at the point when they apparently went missing.

[33] In my view, these circumstances are strikingly similar to those in the case of *Canadian Private Copying Collective v. Fuzion Technology Corp.*, 2006 FC 1284; affirmed 2007 FCA 335. There, the Federal Court of Appeal upheld an order requiring the defendant to submit to an audit where there was evidence that it had been created primarily to assist a closely-connected predecessor company in avoiding its legal responsibilities under the Tariff.

[34] In *Fuzion*, the Court ordered an audit of a second company in circumstances where:

- The intention was to create a seamless and invisible transition from the first company;
- The second company acquired the customers, name, website, logos, phone and fax number of the first company;
- The second company used the premises of the first company;
- The individual defendant was the director, officer and shareholder of both companies; and
- The second company acquired the stock of the first company, but there was no record of any payment for it.

[35] PM notes that there are some differences between the facts in *Fuzion* and those in this case. Here, for example, the principal of PM is Mr. Xu and the principal of PMC is Ms. Lin. They are spouses, not the same person. In addition, there is no evidence here of a transfer of inventory, as there was in *Fuzion*. However, I am not persuaded that these distinctions make a difference. Further, here we have relevant factors that were not present in *Fuzion*: deception on the part of PMC employees and physical possession by PMC of PM's records. I am satisfied that the circumstances justify an order against PMC requiring it to submit to an audit by CPCC.

VII. Conclusion

[36] I will, therefore, issue an order against PM, PMC and Mr. Calvin Xu requiring them to obtain records of PM's sales of blank recording media and to submit to an audit by CPCC.

However, as was the case in *Fuzion*, I am of the opinion that any order with respect to the liability of PM or PMC for any levies is presently premature. As Justice Konrad von Finkenstein stated in *Fuzion*: “Without the debt being established, I am not prepared to order payment thereof, let alone the cost of the audit or arrears of interest”.

[37] If the audit discloses that levies are due and no suitable arrangement is arrived at between the parties, CPCC may request an appropriate order, supported by evidence of the outstanding levy, any interest payable and the cost of the audit. I shall remain seized of this matter in the event that such an order is requested.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. Within ninety (90) days of this judgment, the defendants, Plus Media Inc., Plus Media (Canada) Inc. and Mr. Calvin Xu shall procure and make available to the plaintiff's auditors, for the purpose of an audit, all of the business, accounting and financial records of Plus Media Inc. and Plus Media (Canada) Inc., whether in the possession of vendors, purchasers, accountants, customs brokers, or any other persons, as well as any other relevant financial records from which the plaintiff's auditors can readily ascertain:

i. the amounts payable, and

ii. the information required,

under the Private Copying Tariffs certified by the Copyright Board;

2. If the audit reveals any amounts payable and demand therefore is made by the plaintiff and no payment is made by the defendants within thirty (30) days of such demand, the applicant may bring the matter back before this Court on ten (10) days' notice to determine any unresolved issues of liability as between the parties;

3. Any renewed application under paragraph 2 above, may be accompanied by affidavit evidence, based on the results of the audit, demonstrating the outstanding levy debt, interest thereon and the cost of the audit;

4. I shall remain seized of this matter and will hear, if necessary, the renewed application referred to in paragraph 2 above; and

5. The plaintiff shall have their costs in this matter from the defendants.

“James W. O’Reilly”

Judge

Annex

Copyright Act, R.S.C. 1985, c. C-30

Loi sur le droit d'auteur, L.R.C. 1985, ch. C-30

Liability to pay levy

Obligation

82. (1) Every person who, for the purpose of trade, manufactures a blank audio recording medium in Canada or imports a blank audio recording medium into Canada

82. (1) Quiconque fabrique au Canada ou y importe des supports audio vierges à des fins commerciales est tenu :

(a) is liable, subject to subsection (2) and section 86, to pay a levy to the collecting body on selling or otherwise disposing of those blank audio recording media in Canada;

a) sous réserve du paragraphe (2) et de l'article 86, de payer à l'organisme de perception une redevance sur la vente ou toute autre forme d'aliénation de ces supports au Canada;

(b) shall, in accordance with subsection 83(8), keep statements of account of the activities referred to in paragraph (a), as well as of exports of those blank audio recording media, and shall furnish those statements to the collecting body.

b) d'établir, conformément au paragraphe 83(8), des états de compte relatifs aux activités visées à l'alinéa a) et aux activités d'exportation de ces supports, et de les communiquer à l'organisme de perception.

Filing of proposed tariffs

Dépôt d'un projet de tarif

[...]

...

Duties of Board

Mesures à prendre

83.(8) On the conclusion of its consideration of the proposed tariff, the Board shall

83.(8) Au terme de son examen, la Commission :

(a) establish, in accordance with subsection (9),

a) établit conformément au paragraphe (9) :

(i) the manner of determining the levies, and

(i) la formule tarifaire qui permet de déterminer les redevances,

(ii) such terms and conditions related to those levies as the Board considers

(ii) à son appréciation, les modalités afférentes à celles-ci, notamment en ce qui concerne leurs dates de versement, la forme, la teneur et la fréquence des états de compte visés au paragraphe

appropriate, including, without limiting the generality of the foregoing, the form, content and frequency of the statements of account mentioned in subsection 82(1), measures for the protection of confidential information contained in those statements, and the times at which the levies are payable,

(b) vary the tariff accordingly,

(c) certify the tariff as the approved tariff, whereupon that tariff becomes for the purposes of this Part the approved tariff, and

(d) designate as the collecting body the collective society or other society, association or corporation that, in the Board's opinion, will best fulfil the objects of sections 82, 84 and 86,

but the Board is not obligated to exercise its power under paragraph (d) if it has previously done so, and a designation under that paragraph remains in effect until the Board makes another designation, which it may do at any time whatsoever, on application.

Publication of approved tariffs

83.(10) The Board shall publish the approved tariffs in the *Canada Gazette* as soon as practicable and shall send a copy of each approved tariff, together with the reasons for the Board's decision, to the collecting body, to each collective society that filed a proposed tariff, and to any person who filed an objection.

Right of recovery

88. (1) Without prejudice to any other

82(1) et les mesures de protection des renseignements confidentiels qui y figurent;

b) modifie le projet de tarif en conséquence;

c) le certifie, celui-ci devenant dès lors le tarif homologué pour la société de gestion en cause;

d) désigne, à titre d'organisme de perception, la société de gestion ou autre société, association ou personne morale la mieux en mesure, à son avis, de s'acquitter des responsabilités ou fonctions découlant des articles 82, 84 et 86.

La Commission n'est pas tenue de faire une désignation en vertu de l'alinéa d) si une telle désignation a déjà été faite. Celle-ci demeure en vigueur jusqu'à ce que la Commission procède à une nouvelle désignation, ce qu'elle peut faire sur demande en tout temps.

Publication

83.(10) Elle publie dès que possible dans la *Gazette du Canada* les tarifs homologués; elle en envoie copie, accompagnée des motifs de sa décision, à l'organisme de perception, à chaque société de gestion ayant déposé un projet de tarif et à toutes les personnes ayant déposé une opposition.

Droit de recouvrement

88. (1) L'organisme de perception peut, pour la période mentionnée au tarif

remedies available to it, the collecting body may, for the period specified in an approved tariff, collect the levies due to it under the tariff and, in default of their payment, recover them in a court of competent jurisdiction.

Failure to pay royalties

(2) The court may order a person who fails to pay any levy due under this Part to pay an amount not exceeding five times the amount of the levy to the collecting body. The collecting body must distribute the payment in the manner set out in section 84.

Order directing compliance

(3) Where any obligation imposed by this Part is not complied with, the collecting body may, in addition to any other remedy available, apply to a court of competent jurisdiction for an order directing compliance with that obligation.

Factors to consider

(4) Before making an order under subsection (2), the court must take into account

(a) whether the person who failed to pay the levy acted in good faith or bad faith;

(b) the conduct of the parties before and during the proceedings; and

(c) the need to deter persons from failing to pay levies.

homologué, percevoir les redevances qui y figurent et, indépendamment de tout autre recours, le cas échéant, en poursuivre le recouvrement en justice.

Défaut de payer les redevances

(2) En cas de non-paiement des redevances prévues par la présente partie, le tribunal compétent peut condamner le défaillant à payer à l'organisme de perception jusqu'au quintuple du montant de ces redevances et ce dernier les répartit conformément à l'article 84.

Ordonnance

(3) L'organisme de perception peut, en sus de tout autre recours possible, demander à un tribunal compétent de rendre une ordonnance obligeant une personne à se conformer aux exigences de la présente partie.

Facteurs

(4) Lorsqu'il rend une décision relativement au paragraphe (2), le tribunal tient compte notamment des facteurs suivants :

a) la bonne ou mauvaise foi du défaillant;

b) le comportement des parties avant l'instance et au cours de celle-ci;

c) la nécessité de créer un effet dissuasif en ce qui touche le non-paiement des redevances.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-697-06

STYLE OF CAUSE: CANADIAN PRIVATE COPYING COLLECTIVE v.
PLUS MEDIA INC., ET AL

PLACE OF HEARING: Toronto, ON

DATE OF HEARING: Jan. 21-22, 2008

**REASONS FOR JUDGMENT
AND JUDGMENT:** O'REILLY J.

DATED: June 9, 2008

APPEARANCES:

David Collier

FOR THE PLAINTIFF

Sammy Lee
Stephen Edell

FOR THE DEFENDANTS

SOLICITORS OF RECORD:

OGILVY RENAULT LLP
Montreal, QC

FOR THE PLAINTIFF

METCALFE, BLAINEY & BURNS
LLP
Markham, ON

FOR THE DEFENDANTS