Copyright Board Canada

Commission du droit d'auteur Canada

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Regime	Public Performance of Musical Works *Copyright Act*, Section 67.2
Members	Michel Hétu, Q.C. Mrs. Adrian Burns Mr. Andrew E. Fenus
Proposed Tariffs Considered	TARIFF 22 – TRANSMISSION OF MUSICAL WORKS TO SUBSCRIBERS VIA A TELECOMMUNICATIONS SERVICE NOT COVERED UNDER TARIFF NOS. 16 OR 17 [PHASE I: LEGAL ISSUES]

Statement of Royalties to be collected for the performance or the communication by telecommunication, in Canada, of musical or dramatico-musical works

Reasons for decision

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I. INTRODUCTORY REMARKS

Pursuant to section 67 of the *Copyright Act* [the "*Act*"], the Society of Composers, Authors and Publishers of Music of Canada (SOCAN) filed with the Board statements of proposed royalties for the public performance, or the communication to the public by telecommunication, in Canada, of musical or dramatico-musical works for the years 1996 to 1998. The statements were published in the *Canada Gazette* on September 30, 1995, October 19, 1996 and October 18, 1997, respectively. The Board also gave notice to users of their right to file objections to the proposed tariffs.

The proposed tariffs included an item 22 (Transmission of Musical Works to Subscribers Via a Telecommunications Service Not Covered under Tariff Nos. 16 or 17). As drafted, Tariff 22 targets the communication of musical works by means of computers or other devices connected to a telecommunications network where the transmission of those works can be accessed by a person independently of any other person. "Telecommunications service" is defined as including operations that provide for or authorize the digital encoding, random access and/or storage of musical works for transmission via a telecommunications network, or that provide access to such a network. The tariff as drafted is therefore sufficiently broad to cover almost any computer network. However, the record of these proceedings deals almost exclusively with the Internet, which SOCAN says ought to be the primary target of the tariff. Accordingly, this is the primary focus of the decision.

Some of the objections to the proposed tariff raised issues of a preliminary nature. The Board opted to conduct the hearings in two phases. The first would determine which activities on the Internet, if any, constitute a protected use targeted in the tariff. The second would deal with who should pay the tariff as well as the tariff structure.

On November 12, 1996, the Board raised with participants a number of issues, including:

a. whether there is a communication by telecommunication to the public when a musical work is electronically transmitted, made available, uploaded, downloaded or browsed;

b. if there is a communication, who effects it, who is liable for it and whether anyone can claim the exemption in subsection 2.4(1)(*b*) [1] of the *Act*;

c. whether the answers would be different where a musical work is embedded in a radio or television signal;

d. whether any of the uses outlined above are covered by the retransmission regime;

e. whether a communication over a network for which access is restricted is a

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[1] Subsection 2.4(1)(*b*) of the *Act* reads as follows: "a person whose only act in respect of the communication of a work or other subject-matter to the public consists of providing the means of telecommunication necessary for another person to so communicate the work or other subject-matter does not communicate that work or other subject-matter to the public".

communication to the public;

f. the circumstances in which a communication occurs in Canada;

g. whether the Board may approve a tariff applicable to persons located outside of Canada; and

h. whether there are any tariff structures that the Board is prohibited from adopting.

The Canadian Motion Picture Distributors Association (CMPDA), the Canadian Recording Industry Association (CRIA), the Canadian Association of Internet Providers (CAIP), the Canadian Cable Television Association (CCTA), AT&T Canada, MCI Communications Corporation, ExpressVu, the Canadian Association of Broadcasters (CAB), Time Warner, Stentor Telecom Policy Inc. and the Canadian Broadcasting Corporation participated in the proceedings as objectors or intervenors. CMPDA and CRIA supported the tariff, while everyone else opposed it or argued that the people they represent should not be liable for it.

What follows are the Board's reasons on Phase I issues. The hearings dealing with this matter required eleven days which ended on May 15, 1998. Filing of arguments and replies was completed on October 13, 1998.

A. THE INTERNET PHENOMENON

The Internet is a worldwide network of interconnected computers. It evolved from a network originally designed to connect various computers operated by the military, defense contractors and universities conducting military-related research, and provided for redundant connections to allow communications to continue even if a part of the network was damaged in military action.

The Internet has developed into a mass communications system available to users located throughout the world, provided that they have a personal computer or other access device, the appropriate software and the ability to gain access to the system (sometimes referred to as "obtaining connectivity"). Its phenomenal growth has been made possible by a number of developments. These include technology that allows the digital conversion and storage of mass amounts of data; the increasing capabilities of access devices to download large quantities of data; the development of higher bandwidth distribution systems; the development of sophisticated routers that transmit information; and the advent of user-friendly software allowing access to information stored on any connected computer.

As a result, an ever-growing number of people use the Internet at work and at home for a wide variety of activities. These include sending electronic messages (or e-mail), obtaining information on virtually any topic, viewing on a computer screen documents that have the same look and feel as the printed version, and obtaining access to musical works, video games, audio-visual works and other entertainment products.

The use of the Internet to transmit musical works has not evolved as rapidly. Limiting factors include the relatively high bandwidth required to transmit audio files and the limited capabilities of access devices. These obstacles are being overcome progressively. Users may now obtain

information about a movie soundtrack, listen to clips, or place an order for a compact disc (CD) containing the soundtrack to be delivered to their homes. Users can also download musical works from servers on which they may have been placed either with or without the authorization of the rights holders.

The Internet also carries audio signals similar to conventional radio as well as the broadcast feed of traditional radio stations. Some independent performers use the technology to bypass traditional distribution channels and offer online access to their musical recordings. Arrangements have been made for the "netcasting" of live concerts.

Musical services available include pay radio, music videos on demand, "try and buy music" and services to allow users to download the song. Music is also used to add value to individual sites. Many sites on the World Wide Web (Web) offer information about musical works, clips, or the complete works themselves. As technology improves, users will increasingly use the Internet to obtain musical works in various forms and formats.

B. THE PARTIES' POSITIONS

SOCAN argues that a communication to the public occurs when the end user can access a musical work from a computer connected to a network. It also maintains that virtually everyone involved in the Internet transmission chain is liable for the communication, including those who provide transmission services, operate equipment or software used for transmissions, provide connectivity, provide hosting services or post content. SOCAN adds that no one is entitled to rely on the exemption set out in section 2.4(1)(*b*) of the *Act*. CMPDA and CRIA generally supported SOCAN.

Those who oppose Tariff 22 contend that Internet transmissions involve a reproduction of data, not a communication by telecommunication. They add that such transmissions are not simultaneous and occur on an on-demand basis; therefore, they argue they are not communications to the public. They further argue that what is communicated is not a musical work but packets of compressed data which, in any event, do not represent a substantial part of the work. Finally, even if there are communications to the public of musical works over the Internet, liability should not be imposed on Internet Service Providers (ISP) or other entities acting as intermediaries, who are entitled to rely on section 2.4(1)(*b*) of the *Act*.

CAB has taken the position that even if Internet transmissions trigger copyright liability, its members should not bear it either because they do not provide a telecommunications service or because they are already licensed to undertake such communications. CAB adds that any liability should be joint and several among all those involved in the chain of communication.

C. EVIDENCE

Testifying for SOCAN, Dr. David Clark, from the Laboratory for Computer Science at the Massachusetts Institute of Technology, described the technical workings of the Internet as a communications system, the actors involved, the operation of the World Wide Web, alternative delivery modes for Internet transmissions, such as multicasting and streaming, and how the Internet may be used to transmit music. With few exceptions, his analysis and conclusions were

not challenged by other witnesses.

Mr. Tom Jurenka, an engineer and consultant to the telecommunications industry, testified about the evolution of various business arrangements, relationships between business entities and pricing models and commented on future business trends. Professor Paul Hoffert of York University is executive director of CulTech, an organization which developed a prototype intellectual property management system to authenticate and authorize users and distributors and to account for the use of intellectual property on digital networks. He testified as to the various music file formats that are used and the availability of software allowing the tracking of music usage. He and Mr. Mark Walker, legal counsel for SOCAN, illustrated the use of music on the Internet, with particular attention to the manner in which embedded links can be used to create virtual sites out of a single home page. They also commented on the number of sites which may be using music. Mr. Walker also spoke to the difficulties in licensing Web sites as opposed to Internet Access Providers (IAP) and summarized SOCAN's position with respect to Tariff 22.

Messrs. Joseph DiMona and Bennett Lincoff, who are senior officials with Broadcast Music Inc. (BMI) and the American Society of Composers, Authors and Publishers (ASCAP), explained the experiences of these U.S. performing rights societies with their own Internet tariffs.

Testifying for the CMPDA, Dr. Thomas Dreier, from the Max-Planck Institute, reviewed international treaties and copyright legislation in several jurisdictions as they relate to new technologies and commented on possible answers to various legal issues arising from the tariff.

CAB presented Messrs. Josh Raphaelson, General Manager of a division of CHUM Ltd. that creates interactive entertainment for the Internet, and Chris Pandoff, General Manager of two radio stations that use the Internet. They testified about broadcasters' uses of the Internet, the extent, if any, that the Internet represents a source of revenue for broadcasters and the business arrangements between broadcasters and their service providers.

Testifying for CAIP, Mr. Albert Silverman, Vice-President, AT&T Canada, gave an overview of the Internet services provided by his company, commented on its position as to the imposition of liability on ISPs, and suggested some possible alternatives to Tariff 22. Ms. Lisa Balaban from MediaLinx, reviewed various services and business arrangements of that entity, using the Sympatico brand name. Messrs. Wayne McLaurin, Darren Widenmaier and Robert Lindstrom described the services offered by three smaller ISPs, with particular emphasis on how they may control the content being offered by their clients. Mr. Blair Buchanan, who teaches courses on the technical aspects of internetworking, commented on the consequences of the Internet being a layered model for inter-system communications, as well as on the role of routers and other Internet devices. Ms. Margo Langford, the Chair of CAIP, outlined the Association's position with respect to the role of the ISP industry, intellectual property matters in general and the proposed tariff in particular.

Testifying for CCTA, Mr. Eric Carroll of Tekton Internet Associates reviewed the Internet industry's evolution, trends and impacts. He focused on the roles and activities of Internet players, the manner in which those who post content may be located, differences between Internet and cable television and the availability of music over the Internet. Messrs. Guy Labelle, from *Le Groupe Vidéotron*, and Brian Beattie and Wayne Hatton, from Rogers Wave, described

the Internet services provided by Canadian cable companies, and commented on the differences between cable television and Internet access. Finally, Mr. David Silverman, an American lawyer with knowledge of developments in American copyright law as it relates to the Internet, commented on the licensing practices of American performing rights societies and the liability of service providers in that country.

D. THE OBJECT OF THIS DECISION

In a ruling made February 17, 1998 the Board described the distinction between Phase I and Phase II issues for the purposes of Tariff 22 as follows:

> "Phase I is meant to address a number of legal issues, ...
>
> Phase II will deal with the policy issues raised by Tariff 22, including the most appropriate tariff structure. Within the discussion of that structure, issues will be debated pertaining to the most appropriate target and whether blanket licensing is the most appropriate form of licence in the relevant market.
>
> Phase I will determine which actions trigger liability under the Act and which do not. At the end of that process, those who only act in a manner which does not trigger liability will be excused. The Board cannot target persons who are not users of copyright. Those whose actions trigger liability will want to participate in Phase II. It is only at that time that the Board may select among all persons who are liable at law and only among those persons a 'target' for the tariff.
>
> The question of who can legally be targeted by the tariff is a Phase I issue. The question of who should be the target of choice among more than one person who can legally be targeted is a Phase II issue."

Consequently, this decision focuses on activities relating to Internet transmissions that may give rise to liability under section 3(1)(*f*) of the *Act*; whether there may be any other basis of liability under the *Act* with respect to those activities (e.g., authorization of communication); the applicability of the exemption set out in section 2.4(1)(*b*) of the *Act*; and the circumstances in which any communications over the Internet may occur in Canada. Section II offers an overview of the Internet as a communications system, including a summary of the various activities involved in Internet transmissions, the manner in which the Internet is used for the transmission of musical works, and the relationships among the various players involved in Internet-related activities. Sections III and IV deal with the legal issues involved.

II. THE INTERNET

A. OVERVIEW

i. Introduction

The Internet is a network of computers and computer networks designed to receive and forward bytes of data grouped into packets between end nodes (the source and destination computers). It

supports a range of user-visible, high-level services or applications, depending on what software is loaded on the end nodes. The basic communication service of the Internet consists of two components: the addressing structure and the delivery model.

Each end node connected to the Internet is assigned a unique Internet Protocol or IP address [2], made up of integers. Users do not use addresses of this form when they invoke services. Instead, they use names (called domain names) that are a little more user-friendly, composed of characters. These names are translated back to their associated IP addresses by the Domain Name System (DNS) which all IAPs operate for the use of their subscribers. The domain names together constitute the Internet's addressing structure.

The delivery model represents what anyone may expect when sending information over the Internet. Originally, the parties undertook to do their best to deliver data, but would not provide commitments as to the quality of the service (e.g., commitments as to bandwidth or reliability) [3], although it is now possible to require assurances as to the quality of the service (e.g., that packets will be transferred within a specified period of time).

Persons involved in the Internet generally carry one of three broad categories of activities.

First, they provide the communication service. This service, in turn, involves two main activities: providing and servicing the "backbone" infrastructure and providing connectivity to subscribers. Providing communication services may involve other ancillary activities, such as allocating IP addresses or domain names, or developing and supplying products that implement protocols used for Internet transmissions.

Witnesses before the Board used different terminology to describe the persons involved in providing the Internet communication service. In this decision, ISP (Internet Service Provider) refers to an entity that provides any Internet communication service, including connectivity to subscribers. This is further divided into IAP (Internet Access Provider) for entities that provide connectivity to subscribers, and BSP (Backbone Service Provider) for entities that operate infrastructure components of the Internet.

Providing connectivity involves providing subscribers with an IP address, supplying and operating equipment and software to allow the subscriber to connect to the Internet, making arrangements with other ISPs to connect to the remainder of the Internet, and operating the routers and other equipment to forward information.

Second, persons involved in the Internet provide applications or high level services, including the World Wide Web, Internet e-mail and newsgroups which are described in greater detail below. Since many of these applications involve making information of any kind available to users, those who provide such information are commonly referred to as "content providers".

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[2] The address is *static* if it is permanently assigned to a component of the Internet, and *dynamic* if it is assigned only for the time of the connection. Each Internet Access Provider is assigned a range of addresses which it may use to give access to its subscribers on an "as needed" or permanent basis.

[3] This is sometimes described as a "best efforts" delivery model or "delivery contract".

Third, participants in the Internet receive or use information sent over it. End users include individual subscribers who connect to the Internet through a dial-up telephone line or a cable modem, and institutions that may buy a high-bandwidth connection to allow individuals within the organization to connect to the Internet.

Anyone may play different roles for various transmissions over the Internet. In some, an entity may provide connectivity, or may only operate the routers through which packets are transmitted. In others, it may make available content on its own servers. For still others, it may be an end user of information provided by others. Consequently, it is important to examine these roles separately in determining what activities may give rise to liability.

ii. The communication service of the Internet

The communication service of the Internet involves sending series of data items or packets across the network. Any digital communication is composed of bits that take on one of two values (one or zero) and are grouped into bytes. A packet consists of a series of bytes (typically no more than 1500). Each packet consists of a data portion containing the actual message or file, and the header containing the information necessary to carry the packet across the Internet.

Devices used to receive and forward packets are known as routers. A router retains information for as little time as possible before forwarding it to the next router or the destination computer.

The header portion of any packet contains port numbers. Different numbers are associated with different services such as the World Wide Web, e-mail and Internet telephony. The software in the routers can interpret the port numbers and direct the information. Thus, port information may be used to provide enhanced services for certain types of traffic (e.g., Real Audio or Internet telephony) or to block other types of traffic (e.g., games).

The Internet functions by means of conventions and standards (called “protocols”) that are implemented in the software and other products used in the operation of the Internet and that define how information is to be processed.

The Transmission Control Protocol (TCP) is implemented in software running in the end nodes. It opens and closes the connections necessary to allow the exchange of information; its function is to ensure that any message is sent, not to interpret the message. TCP software does this by numbering the packets being sent, keeping track of them as they arrive at the destination, demanding retransmission until all packets get through, and giving them to the user in the proper order upon receipt. TCP software at the source computer will continue to send any packet until the destination computer sends an acknowledgment of receipt. TCP software will also adapt to the speed with which data is being transmitted according to the amount of congestion on the network.

Another protocol on the Internet is Real Time Protocol (RTP). It is used to support streaming or transmissions that simulate real-time communications. RTP can skip packets while allowing subsequent ones to be transmitted so that the work as a whole continues to be received.

Connections across the Internet are accomplished through various bilateral relationships between

ISPs. The routing protocol ensures that packets flow only in accordance with the intended relationships between the various providers. An ISP must establish sufficient bilateral arrangements with other service providers to ensure that traffic from any point on the Internet to another point will actually flow.

An ISP may use caching to improve the efficiency and response time of transmissions. Specifically, when an ISP's end user requests information from a server that may be in a remote location, a temporary copy of the information may be retained on the ISP's local server (usually called a "proxy server"). This means that when another customer of that ISP requests the same information, it may be retrieved from the local server. Caching reduces the cost for the delivery of data by allowing the use of lower bandwidth than would otherwise be necessary.

A cache may be deployed at any point in the Internet (e.g., at a point where an undersea link is made to optimize transoceanic data transfers). The operator of the original server on which a site is located may prevent caching. The operator of a proxy server may also configure it to limit the time that information is retained (i.e., before a request goes back to the original server).

iii. Applications available on the Internet

The following is a description of some of the applications available on the Internet.

a. World Wide Web

The World Wide Web (Web) allows an end user to obtain access to information stored on a server. The files or Web pages are assigned character names known as Universal Resource Locators (URLs) which may be translated into the IP address of the server on which the files are stored. A Web site is a collection of pages available at the same general URL and under the control of the same entity. An end user will use a computer program known as a "browser" installed at the user's machine to request the information from a Web site.

The Web page itself is represented in a certain format, the most common of which is called HTML (Hypertext Mark-up Language). HTML can interpret the various characters on a Web page, where they should go and their form and colours. The browser software on the end user's machine reassembles the packets representing a Web page and causes the packets to be displayed in a form in which the page may be read or played by a user. The files located at the Web server may be stored in other file formats such as GIF (Graphics Interchange Format) or JPEG (Joint Photographic Experts Group); as long as the browser includes software that is capable of interpreting the applicable page format, the files can be accessed and downloaded by an end user.

b. Electronic Mail

Another service typically offered on the Internet is electronic mail (e-mail). It normally consists of alphanumeric text and may have other files attached to the message. The e-mail may be sent to one recipient or a group of recipients. An e-mail sent to an IAP's subscriber is received at a server (known as the Post Office Protocol or POP server) operated by the IAP. The subscriber may then use his/her mail reader program to download the e-mail from the server.

c. Newsgroups

"Usenet" consists of newsgroups or open forums on various topics. Newsgroups are either moderated (in which case a system administrator reviews any messages before they are posted) or unmoderated (in which case the messages are posted without being reviewed by any person).

The IAP determines which newsgroups will be hosted on its servers. Messages posted to a newsgroup server are replicated on a periodic basis onto all Usenet servers that carry the particular newsgroup. The messages are kept on the servers for a predetermined period of time before being deleted. A subscriber to a newsgroup may contribute to it or read messages posted by others. An IAP may decide to block a newsgroup on a certain topic, but the IAP's subscribers may still obtain access to the newsgroup from the server of another IAP.

iv. Continuing evolution of the Internet

It appears from the evidence presented to the Board that there will likely not be any significant changes in the near future in the basic activities involved in Internet transmissions. The major advances currently under way relate to increases in bandwidth. Cable modems can provide data at a much greater rate than other modems, and will allow the delivery of reasonable fidelity audio and entertainment quality video for Internet-based television, telephone and audio. Telephone companies are also providing higher speed services through technology such as ADSL (asynchronous digital subscriber loop), and through the use of optic fibre trunks as part of the backbone of the Internet. The objective is to match the speed of the network to the transmission and reception capabilities of the computer equipment.

B. MUSIC ON THE INTERNET

The following is an outline of the technical process whereby music is made available on the Internet and the various modes for the delivery of music. We also review various types of musical Web sites.

i. Technical processes for the transmission of music

When an audio file is sent over the Internet, it is generally converted into a digital form, compressed, transmitted, decompressed and reconverted into analog sound signals. Audio files come in various formats. For example, WAV is an uncompressed format designed for the storage and transfer of digital audio files. MIDI (Musical Instrument Digital Interface) is the most compact, and the most simplistic, format by which music is communicated on the Internet. An early standard that was used for transmitting digital music between computers, MIDI does not involve a translation from analog to digital, but rather is a notation system used to digitally store musical notes.

Other formats include Real Audio, currently the market leader for delivering real-time music. It uses a transfer protocol known as "Real Audio TCP": when the audio file is received, a special piece of software or "plug-in" recognizes the audio format of the file and plays it. As for Liquid Audio, it uses Liquid MusicPlayer. In addition to supporting the transmission of music, it allows

users to preview and purchase CD-quality music from the Internet. Other formats which provide very high compression ratios and were initially developed to distribute video files over digital networks are now being used to distribute music-only files. These include MPEG (standing for Motion Picture Experts Group), the current version of which is now commonly referred to as MP3.

ii. Delivery modes for the transmission of music

Generally speaking, information transmitted over the Internet is delivered in a unicast pull mode: pull, because the user requests or "pulls" the information when desired, and unicast, because packets go to only one recipient. Alternative delivery modes associated with audio files involve multicasting and the use of streaming software.

Multicasting occurs when a computer sends out a single set of packets which are replicated at a certain point in the network and then distributed to a number of recipients. The destination address for packets sent by multicast consists of a multicast group identifier. Any person who sends a message to join the group becomes part of a distribution tree to which the packets are distributed.

The delivery system for multicast is much the same as for unicast, except that the reproduction of the message and its subsequent routing to end users takes place at some intermediate stage rather than at the originating end node. Each recipient still receives its own individual set of packets.

An audio file may be downloaded onto a storage device from which it may later be played by software that interprets the file. However, audio files which are encoded and stored on a server may also be accessed by the use of a streaming program such as Real Audio, to create what appears to be a real-time experience. In this case, the material that is received at the user's computer is buffered or delayed a second or two before being played. However, the network will continue to deliver the remaining packets in the proper sequence to allow the user to continue to listen to the work in a manner that simulates real-time delivery. This can be achieved in part because routers can identify and service real-time traffic in a different way from other traffic.

iii. Some uses of the Internet for musical works

The Internet may be used for a netcast, in which a feed from a live concert is made available from a server. The number of users able to view the event is limited by the server and bandwidth capacity of the entity hosting it. Users have access to the event more or less simultaneously. However, unlike traditional forms of broadcasting, a user may receive a program in any part of the world.

The Internet may also be used to make available a radio station's broadcast feed. Real Audio software may be used as a plug-in to allow users to obtain access to the broadcast feed. Having said this, Canadian radio stations currently use the Internet largely for marketing purposes, by placing information about the stations on their Web sites and by allowing listeners to communicate with the station by e-mail. Internet activities of radio stations sometimes also include providing music excerpts for promotional purposes, and the netcasting of some live events.

Some television programming also is available on the Internet. Access to real-time television signals is usually facilitated in connection with special events. Archived extracts of television signals may also be made available on television stations' Web sites.

While the evidence presented to the Board indicates that there may be a great number of Web sites with music-related content, many of these sites may contain information about music or musical groups but not actual musical works. It was beyond the scope of Phase I to determine the extent to which musical works are available on the Internet, or whether they are made available with or without the authorization of copyright holders. However, the Board is satisfied that with ongoing improvements in technology, the Internet is becoming an increasingly important means for making musical works available to users, for listening as well as reproduction purposes.

C. ACTIVITIES OF CONTENT PROVIDERS

Making content available on the Internet involves having access to connectivity and to disk space on one or more servers. Internet content providers assemble and place a collection of files on a server to allow the files to be accessed. Sometimes, the person who has overall responsibility for its content (the site owner) also operates and maintains the server on which the site is located. This model is normally followed by larger and medium sized business enterprises. In other cases, the content provider may not own or control the server, and has to obtain access to disk space on someone else's server. This model is normally followed by individuals and smaller enterprises.

A single server can host sites that are owned and controlled by different entities. The owner of each site is then given the necessary password to post content to that part of the server allocated to the site. The owner of the server or someone acting for the owner will have a "root" password that gives unbridled access to the entire server.

Relationships with end users have evolved with the Internet. In the early stages, the end user made one payment to receive both connectivity and access to content. A direct relationship often now exists between the end user and the content provider. In particular, where the end user pays a subscription fee or uses the Internet for some form of electronic commerce, content revenues (as opposed to access revenues) flow directly to the content providers rather than remaining with the end user's IAP.

D. BUSINESS ARRANGEMENTS FOR PROVIDING CONTENT

Various types of business arrangements exist between entities that provide content over the Internet. These include the use of hyperlinks, the creation and operation of mirror sites and arrangements between content providers and server operators.

i. Use of hyperlinks

Understanding the legal issues arising from the use of hyperlinks requires considering the nature and operation of these links. We will also look at some Canadian business arrangements in which hyperlinks are used to make content available to end users, and consider how persons responsible for linked sites can be located.

a. Nature and operation of hyperlinks

Any page on a Web site may contain one or more hyperlinks to pages on the same or other Web sites, located on the same or different servers from the one that hosts the linking site. The files at the other site normally are under the control of another entity. However, hyperlinks may be made either with or without a business relationship with the owners of the sites to which links are made.

Hyperlinks can be automatic links or user-activated. A link is automatic when a code is embedded in the Web page which instructs the browser, upon obtaining access to the first site, to automatically download a file from the second site. The information from the second site is pulled without the need for further action on the part of the user. A link is user-activated when the user must click the mouse button over the hyperlink in order to obtain access to the information from the second site. If the linked files are located on another server, the user's browser makes a direct connection to the second server. The user-activated hyperlink may be made to the home page or a subpage located on the second site, in which case, the end user may have to take further action to access a particular file at that site. The link may also be made directly to a specific file, in which case the user will receive the content represented by that file without the need for further action.

b. Business arrangements involving hyperlinks

An entity that creates hyperlinks to sites owned by another entity may enter into a co-branding or co-marketing relationship in which the two entities are both shown to be responsible for the content service. For example, MediaLinx (operating under the Sympatico name) provides a feed of the Canadian Broadcasting Corporation (CBC) radio broadcast over the Internet, and has obtained permission to use CBC's logo on its site as a link to a server operated by the CBC.

Various Canadian cable companies have also established business relationships to provide an Internet content service through the use of hyperlinks. For example, Rogers Cable (Rogers) has established a relationship with a U.S. entity known as @Home Network. This relationship allows Rogers to provide unique content on Rogers' own sites and a package of links to other sites that are available only to a Rogers subscriber. In this case, the subscription fee covers both general Internet access services as well as access to content not otherwise available to the public.

The proprietary Web site for the @Home Network service provided by Rogers includes music as one category of information. This category contains links to various music sites (including sites with live audio programs). The @Home Network content service provides links to Real Audio servers and allows the downloading of music.

Le Groupe Vidéotron provides Internet access to its cable subscribers, while a division of that company (called Vidéotron.net) provides an Internet content service using the InfiniT trade mark. A subscriber to the Vidéotron Internet access service will normally first obtain access to the InfiniT Web site which may include links to other sites.

As noted above, a content provider may also establish links to sites owned by third parties without having a business or contractual relationship with the owners of such sites. In some

cases, the links may be accompanied by commentaries that describe what a user may find at the linked sites. MediaLinx provides such commentaries for some of its links. They are prepared either by MediaLinx's own personnel or by its subscribers, and in the latter case, are edited before being posted by MediaLinx. The music sites referred to on the MediaLinx's sites deal generally with the music industry, and include information about purchasing CDs.

c. Locating the person responsible for linked sites

Because of the way the addressing structure of the Internet is organized, it is not very difficult, where the owner of a site creates a link to other sites, to locate the person responsible for the linked site and the operator of the server on which it is located.

As already mentioned earlier, every device that is connected to the Internet, including any server hosting a Web site, has an IP address associated with it. Records are kept as to the name and address of any entity to which a particular IP address is assigned and the identity of any person who is assigned an URL associated with a Web site.

Moreover, some computer programs can trace the path taken by a packet in reaching a particular destination IP address. Thus, even if it may be difficult to ascertain directly who owns a Web site or operates a Web server, this can be done by tracing the ISPs who are connecting any Web server to the Internet. Accordingly, where a site has a set of links to other sites, it should be possible to locate both the person who has been assigned the URL associated with the linked site and the person who is responsible for the operation of the server on which the linked site is located.

ii. Mirroring arrangements

A "mirror site" involves an arrangement in which the owner of a Web site allows another entity to copy the content of that site onto another server. That server will be closer to a segment of users, who may obtain access to the materials without going back to the original site.

Mirroring arrangements are of two kinds. The first involves the owner of a Web site entering into a separate agreement to make a copy of the site available on a further server. The second occurs when the site owner grants a second party the right to operate a mirror site in its own name.

A Canadian example of the second type is the mirroring arrangement made between MediaLinx and various companies in the Stentor group (as the group was constituted at the time of the hearings). MediaLinx allowed these companies to create mirror sites containing copies of content from MediaLinx's sites and to make those sites available to their own customers under the Sympatico brand name. MediaLinx's content was also made available through other ISPs. The content of each company's mirrored site was customized so as to provide additional content to end users.

iii. Web hosting arrangements

AT&T Canada provides Web hosting services to residential and business customers. It owns the servers and the software required to do the hosting and merely gives the customer the right to

place information on the servers; the customer in this case will have a user identification and password, and a connection to allow the posting of content to the server located at AT&T Canada's premises.

Smaller Canadian ISPs also provide Web hosting services. Their contracts with their customers make the customers responsible for the content. If a complaint were made about certain types of material placed on an ISP's server by its customer (e.g., pirated software), the ISP could respond to the complaint in accordance with the CAIP Code of Conduct. This may include requiring the customer to remove the offending material through a "take down" notice.

Those who provide Web hosting services generally provide more than just disk space. Web server software may be used to provide various other services to customers such as authenticating users and reporting on the number of requests for information from the Web site located on the server. The operator of the server also usually retains the master password and the right to remove offending material uploaded to any Web site located on the server.

E. CONCLUSION

The essence of what the Internet is and what occurs on it can be stated in a few sentences. It is a telecommunications network. Its purpose is to transmit files containing data, including music as that term is commonly understood. In order for a transmission to occur, the following events must take place. First, the file is incorporated to an Internet-accessible server. Second, upon request and at a time chosen by the recipient, the file is broken down into packets and transmitted from the host server to the recipient's server, via one or more routers. Third, the recipient, usually using a computer, can reconstitute and open the file upon reception or save it to open it later; either action involves a reproduction of the file, again as that term is commonly understood.

It is on that basis that the Board will now proceed to analyse what occurs on the Internet from a legal perspective.

III. ANALYSIS

The Board's conclusions on the issues raised in these proceedings can be summarized as follows:

1. A musical work is not communicated when it is made available on a server.
2. A musical work is communicated by telecommunication when a server containing the work responds to a request and packets are transmitted over the Internet for the purpose of allowing the recipient to hear, see or copy the work.
3. The public or private character of a communication over the Internet can be determined according to established legal and jurisprudential principles.
4. A communication need not be instantaneous or simultaneous to be a communication to the public.
5. By making a work available, a person authorizes its communication.
6. The person who made a work available communicates it when it is transmitted from any server (host, cache, mirror).
7. Persons who can avail themselves of paragraph 2.4(1)(*b*) of the *Act* with respect to a

given communication of a work do not communicate the work. Generally speaking, this includes all entities acting as Internet intermediaries such as the ISP of the person who makes the work available, persons whose servers acts as a cache or mirror, the recipient's ISP and those who operate routers used in the transmission.

8. An entity cannot claim the benefit of paragraph 2.4(1)(*b*) with respect to a given communication of a work if the relationships it entertains with the person who made the work available are such that it can be said to act in concert with that person or if it does not confine itself to the role of an Internet intermediary.
9. The person that creates an embedded hyperlink to a work authorizes its communication. The person that merely supplies a link which must be activated by the user does not.
10. Communications occur at the site of the server from which the work is transmitted, without regard to the origin of the request or the location of the original Web site. Therefore, to occur in Canada, a communication must originate from a server located in Canada on which content has been posted. In the same vein, the communication triggered by an embedded hyperlink occurs at the site to which the link leads.

The foregoing conclusions flow from the answers the Board has given to the following questions:

1. What do "communication", "telecommunication", "public" and "musical work" mean in the context of Internet transmissions?
2. When does a communication to the public occur on the Internet?
3. Who communicates on the Internet? In particular, who can benefit from paragraph 2.4(1)(*b*) of the *Act*?
4. When does the act of authorizing a communication on the Internet occur?
5. When does a communication on the Internet occur in Canada?

Most of the answers to these questions can be derived from recent decisions of the Federal Court of Appeal dealing with the nature of television and cable transmissions.[4] A few other issues that were raised during the course of these proceedings are addressed at the end of these reasons.

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[4] For this reason, the Board did not find it necessary to rely on evidence relating to the American and European situations in reaching its decision. In any event, European precedents would have been of little use since legislation does not deal expressly with the Internet and jurisprudence appears to be non-existent. This explains why Dr. Dreier could only offer analogies with the situation for satellite broadcasting and cable distribution.

For their part, American precedents are numerous. However, the important distinctions that exist between American and Canadian copyright law on issues such as distribution rights and contributory infringement, coupled with the detailed statutory provisions that now address the liability of ISPs mean that American cases are of little relevance in determining the application of Canadian legal principles in these matters.

A. WHAT DO "COMMUNICATION", "TELECOMMUNICATION", "PUBLIC" AND "MUSICAL WORK" MEAN IN THE CONTEXT OF INTERNET TRANSMISSIONS?

i. Internet transmissions are communications

To communicate is to make known or convey information.[5] A musical work is information. It is communicated when it is conveyed or made known to someone. For example, a musical work is communicated when its notation is published in a newspaper. It is also communicated when packets of data [6] are transmitted over the Internet so that once reassembled, they allow the work to be performed, copied or otherwise conveyed or made known to the recipient.

Internet transmissions remain communications within the meaning of the *Act* even though they also involve, or result in, one or more transitory or permanent reproductions. A single activity may give rise to liability under more than one head of subsection 3(1) of the *Act*.[7] Thus, a facsimile transmission results in a communication even though it involves a reproduction.

ii. Internet transmissions are communications by telecommunication

Section 2 of the *Act* defines telecommunication as "any transmission of signs, signals, writing, images or sounds or intelligence of any nature by wire, radio, visual, optical or other electromagnetic system". Packets of information transmitted on the Internet meet that definition.

A distinction should be made between the words "communicate" and "by telecommunication". "Communicate" refers to the act of making known, while the term "by telecommunication" refers to the physical means used to communicate.

iii. The public or private character of a communication over the Internet can be determined according to established legal and jurisprudential principles

Most court decisions dealing with the meaning of "public" in the *Act* addressed the expression "performance in public", not "to communicate to the public". Nevertheless, since the Federal Court of Appeal has ruled that the expression "to the public" is broader than "in public",[8] it can safely be assumed that a telecommunication is to the public every time a performance would be public in similar circumstances. These decisions also make it clear that expressions such as "in public" and "to the public" are to be interpreted by taking a realistic view of the impact and effect of technological developments and in a manner consistent with their plain and usual

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[5] See definitions in the *Oxford Reference Dictionary*, *Black's Law Dictionary* and *Le Petit Robert*.
[6] Or, as is the case with broadcast or cable transmissions, radio waves or electric signals: *CTV Television Network v. Canada (Copyright Board)*, [1993] 2 F.C. 115 [hereafter *CTV 1993*]; *Canadian Cable Television Association v. Canada (Copyright Board)*, [1993] 2 F.C. 138 (C.A.) [hereafter *CCTA (C.A.)*]; [1991] 34 C.P.R. (3d) 521 [hereafter *CCTA (T.D.)*].
[7] *Bishop v. Stevens*, [1990] 2 S.C.R. 467 [hereafter *Bishop*].
[8] *CTV 1993*; *CCTA (C.A.)*.

meaning "that is to say openly, without concealment and to the knowledge of all".[9]

Consequently, a communication intended to be received by members of the public in individual private settings is a communication to the public.[10] The same holds true of a communication intended only for a segment of the public, whether it be through e-mail, to a newsgroup, a bulletin board service or a service offered on a subscription basis, or of a communication over a network for which access is restricted, as long as the transmission occurs outside a purely domestic setting [11], and even though only certain members of the public may be willing to pay a fee or take other steps to subscribe to the service.

For example, a newsgroup communication will be to the public if the newsgroup constitutes a public. If any customer of an IAP that carries the newsgroup can access it, then any transmission that occurs when a member of the newsgroup gains access to a work will ordinarily be a communication to the public.

Having said this, the person posting a file must intend it to be accessed by some segment of the public, and certainly more than a single recipient, in order for its transmission to constitute a communication to the public. Consequently, an e-mail communication between a single sender and a single recipient is not a communication to the public for the sole reason that it is sent outside the context of a domestic setting.

iv. A communication need not be instantaneous or simultaneous to be a communication to the public

Opponents of Tariff 22 argue that a communication to the public implies an immediacy of experience by the recipient which is necessary in order to distinguish it from reproduction. They contrast what occurs over the Internet with the broadcast radio and television, where signal reception and listening or viewing are simultaneous, and conclude from this that Internet transmissions are not communications to the public.

The Board disagrees. To communicate is to convey information, whether or not this is done in a simultaneous fashion. The private or public nature of the communication should be assessed as a function of the intended target of the act. In other words, the time frame within which the communication takes place is irrelevant; a facsimile transmission to ten thousand randomly selected persons is a communication to the public even though the transmission can only occur sequentially.

Musical works are made available on the Internet openly and without concealment, with the knowledge and intent that they be conveyed to all who might access the Internet. Accordingly, a

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[9] *CCTA (C.A.)* at 153.
[10] *CCTA (C.A.).*
[11] *Rank Film Production Ltd. v. Dodds* [1983] 2 IPR 113 at 115; *Australasian Performing Right Association Ltd. v. Commonwealth Bank of Australia*, [1992] 25 IPR 157; *Telstra Corporation Ltd. v. Australasian Performing Right Association Ltd.* [1997] 38 IPR 294 (H.C. Aust.) at 303-304; *Performing Rights Society v. Gillette Industries Ltd*., [1943] 1 All E.R. 413 at 416.

communication may be to the public when it is made to individual members of the public at different times, whether chosen by them (as is the case on the Internet) or by the person responsible for sending the work (as is the case with facsimile transmissions).[12]

Nothing in the *Act* requires that a communication be sent simultaneously to the intended recipients to be a communication to the public.[13] Nevertheless, opponents of Tariff 22 rely on a statement found in the Trial Division decision in *CCTA* [14], to the effect that "one may communicate to the public by a series of simultaneous individual communications to numerous people in different locations", to conclude that such a requirement exists.

For several reasons, the opponents' position is not supported by the above referenced passage. First, the only kinds of communication at issue in *CCTA* were simultaneous communications. Consequently, it is not surprising that the decision should focus on them. Second, the decision expressly refers to the possibility of communicating a work to the public by facsimile [15], something which necessarily involves a non-simultaneous transmission. Third, the decision on appeal is absolutely devoid of any reference to simultaneity. Fourth, both the Trial Division and the Court of Appeal clearly stated the need to "take a realistic view of the impact and effect of technological developments".[16] To require simultaneity would run contrary to this admonition.

Such an interpretation must also be set aside because it might render nugatory all Canadian copyright legislation in the world of telecommunications, by putting future advances in interactivity, addressability and transmission on demand outside of the realm of copyright protection. As was pointed out by proponents of Tariff 22, the fact that the Internet is interactive and fully addressable by members of the public who choose to access the work does not change its underlying purpose of allowing the transmission of the work to anyone who is provided with access to the Internet and who wishes to receive the work.[17]

v. Musical works can be communicated by telecommunication over the Internet

Opponents of Tariff 22 argue that the various operations and technologies involved in making music available over the Internet mean that musical works, within the meaning of the *Act*, are not

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[12] It goes without saying that a multicast Internet transmission runs an even higher chance of being a telecommunication to the public.
[13] By contrast, paragraphs 21(1)(c) and 31(2)(c) of the *Act* do impose such a requirement.
[14] *CCTA (T.D.)* at 537.
[15] *CCTA (T.D.)* at 540c.
[16] *CCTA (T.D.)* at 538f; *CCTA (C.A.)* at 153.
[17] Proponents of Tariff 22 also found some comfort for their position in the definition of the term "public" set out in Article 1721(2) of the *North America Free Trade Agreement* (NAFTA). Canada's international obligations can be used to interpret Canadian statutes: see *National Corn Growers Association v. Canada*, [1990] 2 S.C.R. 1324, at 1371; R. Sullivan, *Driedger on the Construction of Statutes*, (Butterworths, Toronto, 1994), (3d ed.), at 459. However, given the repeated refusals of the Federal Court of Appeal to rely on treaty obligations to interpret statutory provisions which had not been modified as a result of the treaty (*CTV 1993*; *CCTA (C.A.); Canadian Association of Broadcasters v. SOCAN* [1994] 58 C.P.R. (3d) 190 (F.C.A.) [hereafter *CAB 1994*]) and the fact that the NAFTA definition was not imported into the *Act*, any reliance on the NAFTA definition would be less than prudent.

communicated over the Internet. The Board disagrees.

Opponents of Tariff 22 state that the process of compression and decompression means that something other than a musical work is transmitted. Yet, the result of these operations is that information is provided that allows a lay recipient to recognize the work. That, in itself, is sufficient.[18] If such operations, or others such as modulation or encoding, could somehow change the nature of what is being communicated, then it would be impossible to communicate a musical work through a digital transmission. This would result in the rather absurd situation that commercial radio stations would no longer need to pay royalties to SOCAN as soon as they switched to digital technology.

The Board also disagrees with the argument that a communication of the work does not occur because the work is broken into packets, each of which may not contain a substantial part of a musical work. The work is so broken down solely to respond to the technical exigencies of the Internet. What is transmitted in response to a request is not one, but a series of packets of data resulting in a communication of the work. While some intermediaries may not be transmitting the entire work or a substantial part of a work, all of the packets required to communicate the work are transmitted from the server on which the work is located to the end user. Consequently, the work is communicated.

In the same vein, the fact that packets may be sent or received out of order is also irrelevant. A copy of a work is on a hard drive even if the relevant data is stored in separate sectors located throughout the hard drive.

Opponents of Tariff 22 also argue that what is transmitted over the Internet is not the work itself, but instructions that allow the end user to reconstitute the work. The Board's view is that what is transmitted is a musical work in various formats in accordance with the technological exigencies of the Internet. Be that as it may, the end result is the reconstitution on the end user's hardware of all that is required to view, play or store the work, and therefore a communication of the work. Again, any other interpretation would run contrary to the admonition of the Federal Court of Appeal and make the rights of authors dependent on the technology employed.[19]

Opponents of Tariff 22 rely on earlier decisions of the Federal and Supreme courts to argue that what is communicated over the Internet is not works, but performances of works.[20] This argument fails to take into account the legislative evolution that has taken place since these decisions were rendered, the cumulative effect of which is that musical works can be communicated by telecommunication.[21]

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[18] *Preston v. 20th Century Fox Canada Ltd*. [1990] 33 C.P.R. (3d) 242 (F.C.T.D.); appeal dismissed [1993] 53 C.P.R. (3d) 407 (F.C.A.).
[19] *CCTA (C.A.)* at 153.
[20] *CAPAC v. CTV*, [1968] S.C.R. 676 [hereafter *CTV 1968*]; *CTV 1993*; *CCTA (C.A.); CAB 1994*.
[21] A more detailed description of this evolution can be found in the Board's decision dealing with SOCAN's Tariff 17: *Public Performance of Music (Re)* [1994] Copyright Board Reports at 380; *SOCAN Statement of Royalties, 1990-1995 (Tariff 17) (Re)* [1996] 70 C.P.R. (3d) 501, at 505-506 (Cop. Bd.).

Thus paragraph 3(1)(*f*) of the *Act* has included since 1989 "the right [...] to communicate the work to the public by telecommunication". At the same time,"telecommunication" was defined as "any transmission of signs, signals, writings, images or sounds or intelligence of any nature by wire, radio, visual, optical or other electromagnetic system".

Notwithstanding these amendments, the Federal Court of Appeal, relying on the definition of musical work as "any combination of melody and harmony, or either of them, printed, reduced to writing or otherwise graphically produced or reproduced", ruled that the musical work exists in the form in which it is fixed.[22] Therefore, a communication to the public by telecommunication of musical works, as opposed to the communication of a performance thereof, occurred only if sheet music was shown in front of a camera or faxed to a segment of the public.

Parliament responded to this decision, by changing the definition of musical work to "any work of music or musical composition".[23] As a result, the transmission of music by cable operators (and others) was transformed from a public performance to a public telecommunication. Finally, on January 1, 1994, a provision came into force that made it clear that the person who communicates a work does not perform it.[24]

Consequently, it is no longer the case that a musical work exists in the form in which it is fixed, and *CTV 1968*, *CTV 1993* and *CCTA (C.A.)* are no longer authorities on this issue.[25] Furthermore, the ruling that musical works can be communicated over the Internet is the only one consonant with the rules of interpretation that earlier court decisions have applied when interpreting the *Act*.

B. WHEN IS A COMMUNICATION TO THE PUBLIC EFFECTED ON THE INTERNET?

i. A work is communicated not when it is made available, but when it is transmitted.

Those who argue that a work is communicated when it is made available, for example, by storing it on a host server where it can be accessed by members of the public, rely both on an international treaty and on Canadian court decisions.

They quote Article 8 of the World Intellectual Property Organization (WIPO) Copyright Treaty adopted in December 1996. It provides that the right to authorize the communication to the public of a work includes making it available in such a way that members of the public may access it from a place and at a time individually chosen by them. However, the Treaty is not binding in Canada since it has been signed but not ratified by the Canadian Government.

They also refer to the *CCTA (C.A.)* and *CAB 1994* decisions. Again, these are of little help as support for the argument put forward by proponents of Tariff 22.

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[22] *CTV 1993*; *CCTA (C.A.)*.
[23] S.C. 1993, ch. 23, s. 1.
[24] Subsection 3(4) of the *Act*, as enacted by S.C. 1993, ch. 44, s. 55(3), now section 2.3 of the *Act*.
[25] Significantly, in *CAB 1994*, the Court carefully avoided passing any judgment on the situation as of September 1, 1993: see p 197.

The first decision rejected the argument that cable operators do not perform musical works in public because subscribers must turn on their television sets before a work may be heard:

> "the appellant transmits directly to the public ... the fact that the subscriber has to turn on the television set in no way alters the nature of the transmission. The appellant is more than a mere facilitator of a public performance ... it is the actual performer through an innocent agent or with the assistance of a third party who completes the final and missing link by turning on the television set." [26]

The second decision endorsed the following statement by the Board:

> "The Federal Court of Appeal recently stated that 'the transmission of non-broadcast services by cable operators is a performance in public'. This statement, which the Board finds equally applicable to the transmission of a broadcast signal by a television station, highlights two further characteristics of a broadcaster's performance. First, it establishes that the performance occurs at the time of the transmission. As a result, the existence of the performance is not even dependent on anyone viewing the program: ..." [27]

These decisions do not state that a work is communicated when it is made available. Instead, they deal with the nature of what occurs when the signal of a cable operator or of a conventional television station is *transmitted*. Incidentally, they also clarify the fact that a protected act [28] can occur without the need to prove that any person actually viewed or heard the work being transmitted.

Consequently, a work is not communicated when it is made available.

Having said this, the *CCTA (C.A.)* and *CAB 1994* decisions are useful in deciding the time at which a communication occurs over the Internet in at least three respects.

First, given that the performance occurs at the time of transmission, it is easy to conclude by analogy that the communication of a work over the Internet occurs at the same time. As a result, a communication to the public occurs each time that any member of the public uses a browser to access the work from the source computer.

Second, a work is communicated to the public even if it is transmitted only once, as long as it is made available on a site that is accessible to a segment of the public. As was stated earlier, a communication is to the public if its intended target is a public. The degree to which the person wishing to communicate the work succeeds in doing so is irrelevant.

Third, the communication occurs at the time the work is transmitted whether or not it is played or viewed upon receipt, is stored for use at a later date or is never used at all. A communication by facsimile is no less a communication if the message is stored in computer memory for later

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[26] *CCTA (C.A.)* at 155.
[27] *CAB 1994*, para. 23, quoting the Board's decision then under review.
[28] Then, the right to perform, now the right to communicate.

retrieval rather than immediately printed to paper.

C. WHO EFFECTS COMMUNICATIONS ON THE INTERNET? IN PARTICULAR, WHO CAN BENEFIT FROM PARAGRAPH 2.4(1)(*B*) OF THE *ACT*?

i. When a work is transmitted, it is the person who posted it who communicates it

The person who posts a work (usually the content provider) does so for the sole purpose that it be accessed by others. Since Internet transmissions are communications, one should look at the source of the transmission to find out who is responsible for it. Any communication of a work occurs because a person has taken all the required steps to make the work available for communication. The fact that this is achieved at the request of the recipient or through an agent neither adds to, nor detracts from the fact that the content provider effects the communication.

The fact that the communication is automated is irrelevant. If the system is programmed to operate automatically once certain actions are taken by persons other that the content provider, it is because the Internet is so designed and because the person who posts content wishes to avail his/herself of the advantages inherent in that design. Returning again to our analogy, the person who programs a facsimile to transmit a message while he/she is asleep nevertheless effects the communication.

The fact that the hardware that actually transmits the work in any given communication may not be the hardware on which it was originally posted is just as irrelevant. The person who posted the work communicates it even if the transmission originates from a source, cache or mirror server. In the case of source or mirror sites, the responsibility is obvious: the work is being stored as a result of formal arrangements taken by the person posting the work. But the responsibility is just as clear in the case of transmissions originating from cache or proxy servers, even though these operations occur without the authorization of the person posting the work. These are part of the facilities of the Internet. The person posting content avails his/herself of these facilities. Indeed, he/she can prevent caching through the use of various devices such as meta-tags.

ii. Persons who can avail themselves of paragraph 2.4(1)(b) of the Act with respect to a given communication of a work do not communicate the work. Generally speaking, this includes all entities acting as Internet intermediaries such as the ISP of the person who makes the work available, persons whose servers acts as a cache or mirror, the recipient's ISP and those who operate routers used in the transmission

Paragraph 2.4(1)(*b*) of the *Act* provides that "a person whose only act in respect of the communication of a work ... to the public consists of providing the means of telecommunication necessary for another person to so communicate the work ... does not communicate the work ... to the public." Proponents and opponents of Tariff 22 view this provision in diametrically different ways.

Opponents of Tariff 22 argue that anyone who operates equipment or facilities used for Internet transmissions is not involved in the communication which may occur. These Internet intermediaries include, in their view, those who operate routers, provide equipment or software

that are used to provide connectivity, or operate a server on which another party posts content, anyone in fact, except the person responsible for the contents and the end user. In effect, their view is that only the sender and recipient are legally involved in the communication.

For their part, proponents of Tariff 22 contend that paragraph 2.4(1)(*b*) applies only to the provision of physical facilities used by others to communicate a work to the public. They contend that the expression "means of telecommunication" refers to the means of transmission, not to any service or other means of communication. They argue that "means of telecommunication" connotes equipment or physical systems or facilities, as opposed to a "service", being the provision of professional or other assistance.[29]

Proponents of Tariff 22 suggest that by contrasting the provision of means and that of services, one should be led to the conclusion, for example, that paragraph 2.4(1)(*b*) applies to a telephone company if it supplies lines and facilities for an ISP but not connectivity or other Internet services. They contend that these services are not necessary for a communication to occur and that, therefore, the exemption does not apply.

The interpretation favored by proponents of Tariff 22 is too narrow. "Means" has a broader meaning than "facilities". The "means" that are necessary to effect an Internet transmission and to which paragraph 2.4(1)(*b*) refers are not limited to routers and other hardware. They include all software connection equipment, connectivity services, hosting and other facilities and services without which such communications would not occur, just as much as the switching equipment, software and other facilities that are used as part of the infrastructure of a common carrier for the transmission of voice, data or other information.

Moreover, an Internet intermediary is not precluded from relying on paragraph 2.4(1)(*b*) simply because it provides services that are ancillary to providing the means of communication or because it performs certain steps or procedures (such as caching) to improve performance. Paragraph 2.4(1)(*b*) does not contain any wording excluding its applicability when "telecommunications" are provided as part of a service offering. Neither does the exemption cease to apply for the sole reason that the intermediary may have a contractual relationship with its subscribers. As long as its role in respect of any given transmission is limited to providing the means necessary to allow data initiated by other persons to be transmitted over the Internet, and as long as the ancillary services it provides fall short of involving the act of communicating the work or authorizing its communication,[30] it should be allowed to claim the exemption.

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[29] *R. v. McLaughlin*, [1982] S.C.R. 331. The decision interpreted the expression "telecommunication facility" in section 287.1 of the *Criminal Code,* which the proponents of Tariff 22 argue connotes much the same thing.

SOCAN also cites as authority for its interpretation of the term "service" the case of *Bartholomew Green 1751 Association Inc. v. A.G. Canada*, [1978] 2 F.C. 391 (F.C.T.D.), and various definitions from the *Telecommunications Act* S.C. 1993, c. 38, s. 23, in support of the distinction it draws between "means" and "services".

[30] As would be the case, for example, if an ISP offered a Web design service in which the designer offered a choice of protected musical works for inclusion into a Web page.

Proponents of Tariff 22 also argue that the *Michelin* decision [31] stands for the proposition that exceptions in the *Act* such as paragraph 2.4(1)(*b*) should be narrowly construed. This is incorrect. The proposition for which *Michelin* stands is that courts should not read exceptions into the *Act*. Furthermore, there is no reason to believe that any individual provision of the *Act* should be construed narrowly. Instead, recent decisions make it clear that the *Act* should be interpreted in accordance with the ordinary meaning of the words used in the statute,[32] in the context in which the particular language is found and consistent with the many related portions of the statute [33] and with the view to make it as technologically neutral as possible.

Much insistence was also put on the *Electric Despatch* decision.[34] In some way, the decision anticipated the rationale of paragraph 2.4(1)(*b*) of the *Act* in that it held that the party whose wires were used to send a message should not be held contractually liable for the transmission, and interpreted the notion of transmission as involving the person who sends the message and the one who received it, but not the technical intermediary. However, the decision is not otherwise relevant to the issue at hand, if only because it revolved around the interpretation of a clause in a contract according to the rules generally applicable to the interpretation of contracts.

In the end, each transmission must be looked at individually to determine whether in that case, an intermediary merely acts as a conduit for communications by other persons, or whether it is acting as something more. Generally speaking, however, it is safe to conclude that with respect to most transmissions, only the person who posts a musical work communicates it.[35]

iii. Internet intermediaries cannot always claim the benefit of paragraph 2.4(1)(b)

The liability of an entity participating in any Internet transmission must be assessed as a function of the role the entity plays in that transmission, and not as a function of what it generally does over the Internet. Consequently, Internet intermediaries can rely on paragraph 2.4(1)(*b*) of the *Act* only with respect to communications in which they limit themselves to acting as intermediaries. In some cases, as a result of business relationships or other factors, intermediaries will act in concert with others in a different manner. Such is the case where an ISP posts content, associates itself with others to offer content, creates embedded links or moderates a newsgroup. In these cases, these entities are no longer acting as intermediaries; their liability will be assessed according to the general rules dealing with copyright liability.[36] The same will hold true where

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[31] *Cie générale des Établissements Michelin – Michelin & Cie v. C.A.W. – Canada* [1996] 71 C.P.R. (3d) 348 (F.C.T.D.) at 379.

[32] *Bishop.*

[33] *Compo Co. v. Blue Crest Music, Inc.*, [1980] 1 S.C.R. 357 [hereafter *Compo*]; *Bishop*.

[34] *Electric Despatch Co. of Toronto v. Bell Telephone Co. of Canada* [1892] 20 S.C.R.

[35] Both the WIPO Treaty and the draft European directive contain provisions which have a similar effect to paragraph 2.4 (1)(*b*). American legislation now contains detailed requirements that ISPs must meet in order to claim immunity from liability, even though earlier decisions went some way to ensure that they would not be held liable in most cases. To date, the Canadian Parliament has given no indication that it intends to resort to such a detailed, *sui generis* regime.

[36] The fact that there may be multiple parties engaged in the transmission does not preclude a finding that each is communicating the work. Thus, where a site owner, through a mirroring arrangement, grants a second party the right to operate a mirror site in its own name, both the original site owner and the person who operates the mirror site

an ISP creates a cache for reasons other that improving system performance, modifies the contents of the cached material or interferes with any means of obtaining information as to the number of "hits" or "accesses" to the cached material.

Thus, entities whose routers handle only some of the transmitted packets will always be able to argue that they do not handle a substantial part of the work. By contrast, attempts at relying on notions of volition or causation to avoid liability will be met with the same scepticism as in other situations, as there is no "prerequisite of knowledge of the existence of the violated copyright or that the action in question amounts to infringement. Infringement is the single act of doing something which 'only the owner of the copyright has the right to do'".[37]

In the same vein, entities wishing to rely on decisions dealing with the notion of authorization to argue that they should not be held liable will probably find it difficult to do so, if only because their liability would flow not from their authorizing the communication, but from being an active and direct participant in it.

iv. Paragraph 2.4(1)(c) of the Act is of limited use, if any, with respect to Internet transmissions

Paragraph 2.4(1)(*c*) of the *Act* provide that "where a person, as part of ... any programming undertaking whose operations result in the communication of works ... to the public, transmits by telecommunication a work ... that is communicated to the public by another person ..., the transmission and communication of the work ... constitutes a single communication to the public for which those persons are jointly and severally liable."

Pursuant to subsection 2.4(2) the Governor in Council has defined the expression "programming undertaking" as:

> "... a network, other than a network within the meaning of the *Broadcasting Act*, consisting of
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> (*a*) a person who transmits by telecommunication all or part of the person's programs or programming directly or indirectly to the person referred to in paragraph (*b*); and
>
> (*b*) a person who communicates all or part of the programs or programming referred to in paragraph (*a*) to the public by telecommunication." [38]

SOCAN argued that musical works on a Web site come within the term "programs" or "programming" and that the provision applies:

a. when a Web site operator transmits programming to an IAP who then transmits it to its

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jointly communicate works that are posted on the original site when they are transmitted from the mirror site.

[37] See e.g., *Compo* at 375.

[38] Programming Undertaking Regulations (SOR/93-436), *Canada Gazette*, Part II, Vol. 127, Extra No. 1, August 31, 1993.

subscribers;

b. when the operator of a Web site transmits content which is mirrored or cached on an IAP server;
c. when one entity provides content for inclusion on the Web site of an IAP or on-line service which transmits the content to its subscribers.

Opponents of Tariff 22 correctly point out that paragraph 2.4(1)(*c*) imposes liability on the originator of a communication of a musical work in circumstances where the initial communication was not to the public. This provision is of little use, if any, in the context of the Internet. First, the provision is unnecessary to impose liability on the person who posts the work, since that person communicates the work. Second, so long as the "other persons" referred to in the provision can avail themselves of paragraph 2.4 (1)(*b*), they do not communicate and therefore, the conditions set out in the provision are not met.

Furthermore, paragraph 2.4(1)(*c*) is aimed only at programming undertakings as defined in the regulations. Whether this can be said to include anyone other than television and radio networks, specialty services and cable operators remains to be determined.

As to whether material transmitted over the Internet constitutes programming, the CRTC has determined that for purposes of the *Broadcasting Act*, various digital and video and audio services would come within the definition of programs and broadcasting under that Act. Whether this is sufficient also remains to be seen.

D. WHEN DOES THE ACT OF AUTHORIZING A COMMUNICATION ON THE INTERNET OCCUR?

i. By making a work available to the public on a server, a person authorizes its communication

A musical work is not communicated when it is made available, but only when it is transmitted. However, its communication is authorized as soon as the work is made available.

"Authorization" constitutes a separate protected use under the *Act*.[39] To authorize is to sanction, approve and countenance.[40] The person who makes a musical work available on an Internet-accessible site authorizes its communication. The work is posted for the sole purpose of being communicated and with full knowledge and intention that such a communication would occur. The person who makes the work available does more than merely provide the means to communicate the work; he/she either controls or purports to control the right to communicate it.

Viewed from another angle, by making a musical work available on a site, a person asks that his/her ISP (who is contractually required to comply with the request) transmit the work at the

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[39] See H.G. Fox, *The Canadian Law of Copyright and Industrial Designs*, (2d. ed.) 1967, Carswell, at 334.

[40] The leading Canadian authority on the issue is *Muzak Corp. v. Composers, Authors and Publishers Assoc. (Canada)*, [1953] 2 S.C.R. 182 [hereafter *Muzak*], which relied in this respect on *Falcon v. Famous Players Film Co.*, [1926] 2 K.B. 474 [hereafter *Falcon*]. See also *Underwriters' Survey Bureau Ltd. v. Massie & Renwick Ltd.*, [1938] 2 D.L.R. 31 at p. 46, quoted in *de Tervagne v. Beloeil (Town) (T.D.)*, [1993] 3 C.F. 227, at p. 237 h-i.

request of end users, thereby effecting the communication intended by the content provider. Under these circumstances, the person who supplies the work must be taken as purporting to have authority to put it to the use for which it is intended.

This is in clear contrast with decisions that have refused to find that the supply of equipment or facilities that may be used to infringe copyright does not constitute the act of authorization, which focussed on the lack of control exercised by the person alleged to have authorized a protected use.

Thus, in *Vigneux* [41], the Court found that the person renting out a record playing machine was not liable for authorizing musical performances in the restaurant where the machine was being used because it had no control over that use, and "no voice as to whether at any particular time it was to be available to the restaurant customers or not." [42] In *Muzak* , the defendant provided recordings of music to third parties who used them to perform musical works in public. Kellock J. equated the fact situation with that in *Vigneux,* and found that Muzak authorized the use of its recordings in performances, but did not authorize the performances. Similarly, in *de Tervagne*, the Court, having found that the person who leased a theatre in which an infringing performance had taken place exercised no control on the use of the theatre, had to conclude that the theatre operator did not authorize an infringing performance that had taken place in the theatre. The defendant had done nothing more than approve the use of the hall and was entitled to presume that the person renting it would present the play in a lawful manner. By contrast, where works are posted to a Web site, the content provider controls the choice of music, including whether that includes or not protected music.

English decisions are to the same effect. In *CBS Inc.*, [43] the Court concluded that the defendant retailer, who rented records and sold blank audio tapes which the customers used to make copies of the rented records, was not liable for authorizing infringement. The defendant had not provided recording equipment or facilities and had not purported to grant its customers permission to copy the records. The Court found that merely assisting a third party to undertake an act that is an infringement of copyright does not constitute authorization of the infringement. In *CBS Songs*,[44] the Court concluded that the manufacturer of twin-deck cassette recorders that conferred on the purchaser the ability to copy was nevertheless not liable because it had not sanctioned, approved or countenanced an infringing use of the cassette decks. The purchaser of the cassette deck decided whether to copy recorded cassette tapes and what to copy, and the supplier of the cassette decks had no control over the use of the machines.

As can be seen, these cases focus on supplying facilities or means by which another person infringes copyright. Under these circumstances, authorization occurs only when a person exerts a degree of actual or apparent control over the activities of "the grantee" sufficient for the person to be said to purport to have the authority to grant to another person the right to use the work in a

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[41] *Vigneux v. Canadian Performing Right Society* [1945] 4 C.P.R. 65 (P.C.) [hereafter *Vigneux*].
[42] *Vigneux,* at 77.
[43] *CBS Inc. v. Ames Records & Tapes Ltd.*, [1981] 2 All E.R. 812 (Ch.) [hereafter *CBS Inc.*].
[44] *CBS Songs Ltd. v. Amstrad Consumer Electronics TLC*, [1988] 2 All E.R. 484 (H.L.) [hereafter *CBS Songs*].

manner that comes within the exclusive rights of the copyright owner. The likelihood of such an occurrence increases with the extent to which the commercial interests of the parties are linked to the protected use and the actual or imputed knowledge of the probability of a protected use. That likelihood decreases when the tools or means can be used to use unprotected works or effect unprotected uses.

The situation at hand is in stark contrast with all situations contemplated in those cases. Content providers do not provide tools for the use to occur; they provide the work. They dictate content. They determine whether the site will contain musical works. They select those works, protected or unprotected. They know and expect that the materials they post will serve to effect a use which is protected if the work is not in the public domain, something which it is incumbent upon them to verify: their contractual arrangements with the person whose services they retain to ensure transmission of the work clearly contemplate that the sole use of the posted content is to be the production of audible and visual messages on the recipient's hardware.[45] In fact, once posted, the music, assuming it is protected, cannot be used without infringing copyright.

Moreover, it is the act of posting that constitutes authorization. By doing so, a person invites anyone with Internet access to have the work communicated to them. Consequently, when dealing with the Internet, authorization occurs before communication. This is not as surprising as it may seem. For example, SOCAN clearly authorizes a station to broadcast music when it issues a licence, and not when the broadcast takes place.[46]

Given what has been said with respect to paragraph 2.4 (1)(*b*) of the *Act*, there is no need to debate at length whether Internet intermediaries authorize. In fact, to do so would be to look at the issue from the wrong end of the telescope. Even knowledge by an ISP that its facilities may be employed for infringing purposes does not make the ISP liable for authorizing the infringement if it does not purport to grant to the person committing the infringement a license or permission to infringe.[47] An intermediary would have to sanction, approve or countenance more than the mere use of equipment that may be used for infringement.[48] Moreover, an ISP is entitled to presume that its facilities will be used in accordance with law.[49]

Having said this, other persons may be authorizing communications over the Internet. Where certain relationships exist between a person and the content provider, or where the person's conduct displays certain characteristics, an "authorization" will have occurred.[50] The question of whether someone other than a content provider may be liable for authorizing the communication of a work will require an analysis of whether in the particular circumstances, one party is granting or purporting to grant to another party the right to communicate the work. Thus, while a person who contributes material to a newsgroup may be liable both as authorizing the

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[45] See *CCTA (C.A.)* at 155e-156a.
[46] This interpretation is also in line with Article 8 of the WIPO Treaty, and the draft European directive. However, neither instruments states who would be held responsible for authorizing the communication.
[47] *Falcon*.
[48] *CBS Inc.; CBS Songs.*
[49] *de Tervagne*.
[50] *de Tervagne*, at 245g.

communication and effecting it, the entity acting as a moderator may be liable for either authorizing the communication of any message that it allows to reach the newsgroup or that it edits, or as jointly communicating it.[51]

ii. The person that creates an automatic or embedded hyperlink to a work authorizes the communication of the work from the site to which the link leads. The person that merely supplies a link which must be activated by the user does not.

In itself, the creation of hyperlinks does not involve a communication to the public of any works contained at the linked sites. In their simplest form, hyperlinks represent an electronic directory of addresses.

However, the content provider who includes into a Web page an automatic link which effects the transmission of a musical work to the recipient without the need for further action by the end user holds itself out as responsible for the material at the linked sites and therefore, authorizes its communication. This will be true even in the absence of a business relationship with the owner of the linked sites. By creating such automatic hyperlinks, the site owner makes itself "a party in interest to the [communication] by warranting the right to [communicate]." [52]

E. WHEN DOES A COMMUNICATION ON THE INTERNET OCCUR IN CANADA?

To occur in Canada, a communication must originate from a server located in Canada on which content has been posted. *CAB 1994* makes it clear that communications occur where the transmission originates. The place of origin of the request, the location of the person posting the content and the location of the original Web site are irrelevant.[53] As a result, the right to authorize must be obtained from the person administering the right in Canada only when the information is posted on a Canadian server, and the right to communicate must be obtained from that same person only when the transmission originates from a server located in Canada. Conversely, a foreign resident posting a musical work on a Canadian server requires a licence from that same person.

Posting includes not only posting to the original site, but also posting to any mirror site. A mirror site is but another site on which the content provider has posted content. Consequently, when a work is transmitted from a server operating as a mirror located in Canada, the communication occurs in Canada.

For the same reasons, communications triggered by an embedded hyperlink occur at the site to which the link leads. As a result, the person who creates an embedded link to a foreign site from

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[51] *CTV 1968* and *CTV 1993* are of no use in this respect. They do not address authorization as a separate use within the meaning of subsection 3(1) of the *Act*. They simply hold that a person cannot be held liable for facilitating a protected use already authorized by the owner of the rights in the work.

[52] *Muzak* at 189 (per Rand J.).

[53] Of course, it may be that a communication originating in Canada that is received elsewhere may constitute an infringement of the communication right in that other country.

a Canadian site does not require a licence from SOCAN. Conversely, the person who creates an embedded link to a site on a server located in Canada authorizes its communication in Canada, irrespective of where the person is.

By contrast, when a transmission involves a cache, the communication occurs at the location of the host or mirror site from which the cache originally obtained the information.[54] The cache, just as the router, is but an intrinsic element of the telecommunications system that is the Internet. Data resides in a cache only for a limited period of time, at the initiative of the person operating the equipment on which the cache is located. The information, and the means taken to communicate it, reside elsewhere. This is in contrast with mirror sites, which exist with the knowledge and consent of the content provider.

The previous analysis is subject to one proviso, however, since the issue of whether an entity that provides content outside Canada with the intention to communicate it specifically to recipients in Canada is communicating it in Canada remains open.[55]

IV. RELATED ISSUES

Participants raised other issues that are better addressed separately. They are concerned with who administers the right to authorize communications over the Internet, whether that right is subject to the regulatory regime set out in ss. 67 *et seq.* of the *Act,* the Board's jurisdiction to proceed with Tariff 22 given its findings on liability, differences that may exist as to the liability for the communication of works posted on the Internet and embedded on a broadcast signal, and any interaction that may exist between Internet transmissions and the retransmission regime. The issue of whether the Board is prevented from adopting certain tariff structures is not one that it is necessary to address here and that was, in any event, properly canvassed by participants. Consequently, it will not be dealt with.

A. THE RIGHT TO AUTHORIZE AND TO COMMUNICATE ON THE INTERNET

The *Act*, reason and the terms of SOCAN's own assignment contracts dictate the conclusion that SOCAN administers the right to authorize a communication as well as the right to communicate.

First, the *Act* itself contemplates a society such as SOCAN administering the right to authorize. Thus, according to the definition of a "collective society", such a society's business is to administer a licensing scheme with respect to certain uses "that it agrees to authorize". Section 2.7 provides that a licence is "an authorization to do any act" [our underline]. Finally, section 67

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[54] Unless the cache was created for reasons other than improving system performance or the cached material was modified or interfered with, in which case the cache operator becomes a joint communicator: see III C) 3), *supra*.

[55] *CAPAC v. International Good Music Inc.*, [1963] S.C.R. 136.

Difficulties in determining where protected activities take place for the purposes of copyright law are not unique to Canada. In Europe, it is generally thought that communications occur at the point of transmission, even though some European courts have held that communications occur in the country of destination where broadcasters specifically target an audience in that second country.

By contrast, the WIPO Treaty and the draft European directive that would implement it do not speak to the issue of the *locus* of the act of authorization.

of the *Act* provides that SOCAN is a society in the business of granting "licences", which are "authorizations to do an act".

Second, reason dictates that SOCAN must administer the right to authorize in order for the regime to operate satisfactorily. SOCAN itself has little use for the right to communicate since it rarely, if ever, communicates works itself. Instead, it grants to others the right to communicate, which is the essence of the act of authorizing a communication.[56] Furthermore, some of SOCAN's licensees require not the right to act, but the right to authorize. Such is the case of concert promoters, music suppliers and the like. Were SOCAN unable to grant the right to authorize, these people would be unable to obtain a proper licence.

Third, the assignments secured by SOCAN define the rights so assigned as including the right to authorize a performance or communication.[57] Moreover, since these assignments are exclusive, it is difficult to imagine in practice how assignors could somehow keep in reserve the right to authorize an act they no longer have the right to do themselves.

In the same vein, the internal logic of the *Act* dictates that the right to authorize an act subject to the SOCAN regime be itself subject to that regime. Any other interpretation would allow a performing rights society to do an end run on the legislation and deprive users of the protection afforded to them by these statutory requirements.

B. The Ability of the Board to Proceed with the Examination of the Tariff as Filed

The Board has concluded that where the role of Internet intermediaries in a given transmission is confined to providing the tools required for the transmission to occur, the only person liable for communicating a work is the person who posted it. Given that conclusion, is Tariff 22 as filed sufficient to seize the Board of the matter?

SOCAN contends that the Board must approve Tariff 22 provided that the tariff is filed by a properly authorized collective society, and applies to protected musical works that can be communicated to the public by telecommunication in connection with the activities of users contemplated by the tariff. It adds that the Board should refrain from certifying a tariff only if there is no possibility whatsoever of a licensing situation to which the tariff could relate, and that the Board has no authority to decide whether any person is or is not liable to SOCAN for the payment of royalties. In the end, SOCAN argues that the Board should certify a tariff if any of the contemplated activities constitutes a communication to the public by telecommunication or the authorization of such a communication.

For its part, CAIP's argument is articulated around four propositions. First, a tariff cannot simply target "communications to the public" and must target specific infringing activities. Second, Tariff 22 only targets activities included in the two-pronged definition of a "telecommunications

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[56] See e.g. *CTV 1968*.

[57] See eg. *Writer Membership Agreement and Assignment of Performing Rights*, para. 4.3. This contract has been so often discussed before the Board as to be within the Board's official knowledge.

service" (i.e., "providing for or authorizing digital encoding, random access and/or storage of musical works for transmission in digital form via a telecommunications network" and "providing access to a telecommunications network"). Third, those activities are non-infringing activities, carried on by entities that are not involved in communicating musical works over the Internet. Fourth, the Board cannot substitute other activities or entities for those targeted by SOCAN; if the activities targeted in the tariff do not constitute communications to the public of musical works, then the Board should reject the tariff in its entirety.

SOCAN is correct when it states that CAIP misreads the tariff as filed. The person who posted content "communicates ... by means of computers or other devices connected to a telecommunications network". The words "by a telecommunication service" refer not only (if at all) to the targeted user, but also to the means through which the communication is achieved. This is especially clear upon reading the French version of the tariff ("*Pour une licence permettant la communication à des abonnés par le biais d'un service de télécommunications à l'aide d'un ordinateur*" [our underline]).

Furthermore, Tariff 22 does not only target the two activities referred to in the definition of "telecommunications service" set out in the tariff. The definition of "telecommunications service" is disjunctive as well as inclusive; consequently, the two parts of the definition do not purport to represent an exhaustive definition of the term.

In any event, a tariff need not specify who shall pay it. It is sufficient that it specify the use being targeted and the price for that use. Here, this has been done satisfactorily.

C. MUSICAL WORKS, TELEVISION AND RADIO SIGNALS AND THE INTERNET

SOCAN is correct in stating that the transmission over the Internet of a musical work embodied in a radio or television broadcast signal is a separate communication.[58] Having said this, whether SOCAN is already properly compensated for that separate use is an issue that ought to be left for Phase II. Participants may wish to take into account what the Board has already said in the context of another tariff involving two separate uses for the delivery of a single service.[59]

D. RETRANSMISSION AND THE INTERNET

Again, the transmission over the Internet of a musical work embodied in a radio or television broadcast signal is a separate communication. If this is done by the broadcaster itself, it is not a retransmission. If it is done by someone else, it does not meet the conditions set out in the retransmission regime. Consequently, the SOCAN regime will apply to that separate communication, and the sole person responsible for it will be the person who makes the signal available on its site, so long again as the Internet intermediaries involved in the transmission confine themselves to providing the tools required for the transmission to occur.

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[58] *CAB 1994*.
[59] *SOCAN Statement of Royalties, 1994-1997 (Re)* [1996] 71 C.P.R. (3d) 196, at 217-218 (Cop. Bd.).

Claude Majeau
Secretary to the Board