Copyright Board decision deals with copyright and the internet

IP column published in *The Lawyers Weekly* December 17, 1999

Edward Hore
Hazzard & Hore
141 Adelaide Street West, Suite 1002
Toronto, ON M5H 3L5
(416) 868-1340
edhore@ hazzardandhore.com

A recent Copyright Board on music and the internet is probably Canada's funkiest intellectual property decision for quite a while.

Readers of hip publications like The Lawyers Weekly will want to make sure they're fully briefed, and ready to mention it at their next cocktail party.

Here's your indispensable primer.

In a nutshell, what happened is that the Canadian music industry wanted internet service providers (ISPs) to hand over a percentage of their revenues to Canadian song-writers and authors, represented by the Society of Composers, Authors and Publishers of Music of Canada (SOCAN), a collective.

But the Copyright Board said no, a victory for the ISPs (get these acronyms down, if you want to be with the program here).

There may be judicial review of the Board's decision to the Federal Court of Appeal. As well, the federal government may at some point make amendments to the Copyright Act dealing with hi-tech internet issues like this.

The issue at the hearing before the Board was about Tariff 22, submitted by SOCAN.

SOCAN is a collective under the Copyright Act. Individual copyright-owners may be represented by collectives when enforcing or licensing their rights. Collectives submit draft "tariffs" to the Copyright Board. If approved, the tariff imposes an obligation to pay, usually in the form of a percentage of revenues.

Tariff 22, “Transmission of Musical Works to Subscribers Via a Telecommunications Service Not Covered under Tariff Nos. 16 or 17” was aimed primarily at ISPs.

In effect, the tariff proposed to make ISPs pay 25 cents per subscriber from ISPs not earning revenue from advertising, or 3.2 of gross revenues or 25 cents per subscriber,

whichever is higher, from ISPs that do. That is, ISPs would have to fork over a portion of their revenues on a regular basis to SOCAN. The idea was that ISPs would pass this on to their subscribers in the form of higher interconnection fees.

SOCAN' argued ISPs should pay a percentage of their revenues, just as commercial radio stations and TV broadcasters do, because the nature of the internet makes it virtually impossible to collect money any other way.

Music is becoming easily available on the web. Technologies such as MP3, for example, allow anyone to go to a site such as shoutcast.com and download music. But most of the music sites are in the US, and therefore not subject to the Board's jurisdiction. That's why SOCAN was interested in nailing ISPs, which it saw as the only way it was likely to get any significant internet revenue.

The Board decided hearings on the issued raised by Tariff 22 would be in two "phases". Phase I dealt with the threshold question whether ISPs were an appropriate target for the proposed tariff. Phase II will deal with the detailed issues of how much would be paid.

The hearing on Phase 1 was in May, 1998. The decision was released October 27, 1999 ([1999] C.B.D. No. 5.).

At the hearing, the Canadian Association of Internet Providers (CAIP), representing ISPS, argued Tariff 22 was improper. CAIP claimed posting music on a website was not communicating within the Act, and that in any event, even if it was communicating, ISPs were exempt under the "common carrier" exemption, s. s. 2.4(1)(b) of the Act.

The Board disagreed in part. The Board said that operators of music webs-sites are transmitting musical works, and therefore are potentially liable under the Act.

But the Board also said a typical ISPs is within the common carrier exemption, provided "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…." That is, so as long as it's just connecting people to the internet, the ISP is okay, but as soon as it starts communicating music or "authorizing" communication (whatever that might mean exactly), it steps over the line, and becomes liable.

ISPs like the decision. They saw the tariff as the thin end of the wedge. If liable for music transmission on the net, ISPs might also be liable for written works on the web, opening them up to potentially much larger liability, since most material on the web is in written form.

In the US, ISPs do not pay copyright tariffs to music collectives, provided they fulfill certain obligations under the Digital Millenium Copyright Act (there's no equivalent in Canada). Under that Act, ISPs in effect are exempt provided they agree to unplug any site

that's playing unauthorized music, if requested. US music collectives collect money direct from music website operators.

But since few if any such websites are in Canada, a similar arrangement in Canada might mean little internet money for Canadian songwriters and authors, with possibly dire implications for the Canadian music industry.