Who gets the profit from copyrighted material on the net?

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The Copyright Board, an administrative tribunal, is now dealing with issues that may profoundly affect how the internet develops in Canada. The question is how should copyright owners collect get revenue for copyright content on the internet.

In 1998, there was a hearing before the Board on an arcane piece of verbiage called proposed Tariff 22, filed by a copyright collective, the Society of Composers, Authors and Music Publishers of Canada (SOCAN).

The proposed tariff purports to force internet service providers (ISPs) to remit money to SOCAN for music content on the internet (SOCAN's proposed Tariff 22 for 1999, similar to the tariffs for earlier years at issue at the hearing, can be found at Canada Gazette Part 1, June 13, 1998, p. 26).

No decision has yet been released by the Board. The decision will undoubtedly be appealed to the Federal Court of Appeal. The hearing was bifurcated; it dealt only with liability, and not with quantum.

Before getting into the details, let's first discuss what a collective and a tariff are. The Copyright Act, section 70.1 allows "collective societies" to be set up which represent all holders of a particular right under the Copyright Act. SOCAN, for example, represents all English-language composers, authors (i.e. lyricists) and their music publishers. It would impractical for any single composer to go around trying to collect money from, say, every radio stations or movie studio for every use of that composer's song. Similarly, it would be impractical for a large broadcaster or movie studio to make individual deals with each composer. Instead, the collective files a "tariff" with the Copyright Board. If the Board approves it, the tariff becomes law, and creates a legal obligation to pay.

A tariff now in force says, for example, that all TV broadcasters must pay 1.8 % of their gross revenues to SOCAN, in return for a "blanket license" allowing the broadcasters to play anything in SOCAN's repetoire. The collective then distributes the money internally among their members, depending on estimates as to how often each composers work is played.

This system has been in place for many decades. Now SOCAN wants to extend it to the internet. But the question is, who should be on the receiving end of the tariff? This is in turn tied to the tricky question, what activity on the internet constitutes an infringement of copyright?

The Copyright Act, section 3(1)(f) gives the owner of copyright the sole right to "communicate the work to the public by telecommunication". "Telecommunication" has broad and somewhat fuzzy definition. These subsections were added to the Act in the eighties, before the internet became a widely-used form of communication.

SOCAN argues that ISPs are in effect in the telecommunication business like cable TV operators. Therefore, says SOCAN, it should collect money from ISPs under a tariff, just as it does from cable operators and broadcasters. SOCAN also claims that there is no other practical way for copyright owners to collect revenues for distribution of musical works on the internet.

Proposed Tariff 22 asks for .25 cents per subscriber from ISPs that do not earn revenue from advertising (which would presumably be passed on to the ISP's subscriber), or 3.2 percent of gross revenues or .25 cents per subscriber, whichever is higher, from ISPs that do earn revenue from advertising, (i.e. SOCAN's model, if the ISP earns revenue from advertising, is similar to that in broadcasting: you earn money from advertising, our content helps you attract eyeballs, therefore you pay us.)

The internet service providers (ISPs) vigorously oppose this. They say they have no control over or knowledge of what their subscribers are doing, and are not themselves communicating to the public. They claim to be common carriers, like phone companies, exempt from copyright liability under the common carrier exemption in the Act (s. 2.4 (1)(b)).

ISPS claim have extremely thin margins, and can't afford to pay the tariff. If ISP's have to collect money for musical works, a minor relatively minor part of the content on the internet, they will have to collect for other kinds of content, the most significant, obviously being literary works i.e. words.

Therefore SOCAN should collect from websites that distribute music for downloading. But SOCAN claims this is impractical because most such sites are outside Canada or otherwise unlocatable.

In the US, the Digital Millenium Copyright Act was recently passed, which limits to some extent the copyright liability of ISPs, but no such legislation has been passed in Canada. Another issue is therefore to what extent Canada can or should have laws in this area which differ from those of the US, given that most popular sites are in the US, and internet traffic ignores borders.

No one knows how this controversy plays out, but it will be interesting to watch.