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Supreme Court Rules on ISP Copyright Liability

In the third of a trilogy of significant recent copyright decisions[1], the Supreme Court of Canada has ruled unanimously that Internet service providers (ISPs), when acting as intermediaries (i.e. conduits for Internet communication), are not liable for copyright infringement. The Court concluded that as long as an ISP deals with the medium instead of the message it does not risk liability for copyright infringement.

The Court also confirmed (by majority) that the *Copyright Act* is not limited in its application to Internet communications emanating from host servers located in Canada. The Court applied the jurisdictional test it developed in other contexts to copyright infringement over the Internet, while the minority would have adopted an Internet-specific jurisdictional test.

Given the narrow ambit of the appeal, the decision leaves important questions unanswered regarding the application of copyright law to the Internet. The decision therefore makes the current round of copyright law reform no less relevant and timely.

Background

The Court decided two issues in *CAIP* v. *SOCAN*: are ISPs liable for copyright infringement (the intermediary issue) and does Canadian copyright law extend to material transmitted from host servers located outside the country (the jurisdictional issue)?

In 1999 the Copyright Board addressed an application by the Society of Composers, Authors and Music Publishers of Canada for a tariff for the amount and allocation of a royalty payable to copyright owners for the communication of music on the Internet (Tariff 22). In the Tariff 22 Decision, the Board made a preliminary ruling restricting the application of Tariff 22, which on its face targeted all persons involved in the Internet chain of transmissions. It is that ruling which the Supreme Court of Canada addressed on appeal.

Copyright and the Internet

Writing for the Court, Mr. Justice Binnie noted that the Act is often presented as a "balance" between the rights of those who create works of art and those who wish to use such works. But he concluded that this balance was "only tangentially" at issue in the case before the Court because Parliament had expressed the view in Section 2.4(1)(b) that those who provide Internet infrastructure are not properly to be considered "users" of such works for purposes of the Act.

Nonetheless, and despite a ringing endorsement of the dynamic potential of Internet technology, the decision suggests that the Court's aim is to facilitate the use of the Internet while ensuring this is not paid for by creators:

> "The capacity of the Internet to disseminate "works of the arts and intellect" is one of the great innovations of the information age. Its use should be facilitated rather than discouraged, but this should not be done unfairly at the expense of those who created the works of arts and intellect in the first place."

Mr. Justice Binnie accordingly based his interpretation of the Act as excluding ISPs from liability on "[Parliament's] policy distinction between those who abuse the Internet to obtain 'cheap music' and those who are part of the infrastructure itself."

ISPs as Intermediaries

The intermediary issue was whether the role played by an ISP in communications over the Internet - and specifically, in respect of any caching it might do of websites on its servers - falls within Section 2.4(1)(b) of the Act. This provision states that "a person whose only act in respect of the communication of a work … consists of providing the

1. See *Théberge* v. *Galerie d'Art du Petit Champlain Inc.*, [2002] 2 S.C.R. 336 and *CCH Canadian Ltd.* v. *Law Society of Upper Canada,* [2004] 1 S.C.R. 339.

means of telecommunication necessary for another person to so communicate …" does not communicate the work. Accordingly, a person whose role falls within this provision is not liable for copyright infringement.

The Court rejected SOCAN's contention that this provision is an exemption from liability which should accordingly be read narrowly. Mr. Justice Binnie expressed his agreement with the Board's holding that the "means" of telecommunications are not limited to routers and other hardware, but include "all software connection equipment, connectivity services, hosting and other facilities and services without which such communications would not occur." He stated the general rule as follows: "[S]o long as an Internet intermediary does not itself engage in acts that relate to the content of the communication, i.e. whose participation is content neutral, but confines itself to providing "a conduit" for information communicated by others, then it will fall within [the section]."

Ultimately, the Court acknowledged that an ISP can play a number of roles. Specifically, an ISP may act as a content provider in addition to its function as an intermediary and accordingly, in such cases copyright liability may attach to the non-intermediary functions. However, the Court acknowledged those "normal facilities and services" which are "merely ancillary to the provision of disk space and do not involve any act of communication" include housing and maintaining servers, as well as monitoring "hits" on particular Web pages.

The Court's reasoning rested on the following interpretation of Section 2.4(1)(b) of the Act: "Parliament has decided that there is a public interest in encouraging intermediaries who make telecommunications possible to expand and improve their operations without the threat of copyright infringement." In the specific context of the use of caches, which it characterized as a "serendipitous consequence of improvements in Internet technology" and "content neutral", the Court therefore held this activity ought not to have any legal bearing on the communication.

The Court also considered the argument that an ISP, even acting as an intermediary, was liable for "authorizing" the communication. On this point, the Court made reference to its own decision in *CCH* in which it had held that the Law Society of Upper Canada's provision of photocopiers did not constitute authorization and noted:

> "The operation of the Internet is obviously a good deal more complicated than the operation of a photocopier, but it is true here, as it was in the *CCH* case, that when massive amounts of non-copyrighted material are accessible to the end user, it is not possible to impute to the Internet Service Provider, based solely on the provision of Internet facilities, an authority to download copyrighted material as opposed to non-copyrighted material."

However, the Court went on to find "that 'authorization' could be inferred in a proper case but all would depend on the facts".

Jurisdiction

On the jurisdictional issue, writing for the majority, Mr. Justice Binnie held, "The correct view is that a content provider is not immunized from copyright liability by virtue only of the fact it employs a host server outside the country." The Court was concerned that to hold otherwise would have serious consequences in other areas of law relevant to the Internet and was explicitly conscious of the need to determine the relatively narrow copyright issue against the much broader context of trying to generally apply national laws - including those relating to hate law, gambling, defamation, pornography and e-commerce - to a "fast-evolving technology that in essence respects no national boundaries."

The majority affirmed that a "real and substantial connection" to Canada is sufficient to support the application of the Act to international Internet transmissions. The majority noted that the Court has recognized situations where Canada is the country of transmission or the country of reception as a sufficient "connection" for taking jurisdiction. Beyond this, however, the Court provided relatively little guidance in respect of the factors that will, in a given case, establish a sufficient connection to Canada, stating:

> "In terms of the Internet, relevant connecting factors would include the *situs* of the content provider, the host server, the intermediaries and the end user. The weight to be given to any particular factor will vary with the circumstances and the nature of the dispute."

As a practical matter in the specific context of SOCAN's Tariff 22, it remains doubtful that SOCAN would pursue, or the Board would encourage, a tariff seeking to collect royalties from content providers posting music beyond Canada's borders.

Important Questions Left Unanswered

The Court's decision in *CAIP* v. *SOCAN* leaves important questions unanswered. For example, while the Court did articulate the application of the general jurisdictional principle (i.e., a real and substantial connection), it did not greatly advance understanding of when Canada's copyright laws might be held to apply to a communication emanating from beyond Canada's borders - a significant question considering the reach and importance of the Internet in the dissemination of copyrightable works.

Second, the Court strongly hinted at, yet left for another day, the possibility of an ISP's liability for authorizing a communication where it receives notice of infringing material, yet takes no steps to prevent access to this content. Perhaps the Court was conscious of the fact that this latter question, together with other issues affecting copyright and the Internet arising out of the World Intellectual Property Organization treaties, are being scrutinized in the Government of Canada's long-running copyright law reform process.

Overall, the Supreme Court of Canada, in confirming that copyright and jurisdictional principles from the off-line world will apply to the Internet, has put an end to SOCAN's attempt to target ISPs for the collection of on-line royalties for the time-being.

We invite you to contact any of the Goodmans lawyers listed below to discuss this issue in more detail.

Michael Koch
mkoch@goodmans.ca 416.597.5156

Peter Ruby
pruby@goodmans.ca 416.597.4184

David B. Zitzerman
dzitzerman@goodmans.ca 416.597.4172

Richard Naiberg
rnaiberg@goodmans.ca 416.597.4247

Amalia Trister
atrister@goodmans.ca 416.597.4296

Monique McAlister
mmcalister@goodmans.ca 416.597.4255