

## REFLECTIONS ON TARIFF 22 AND COMMUNICATION TO THE PUBLIC.

This decision is important or has implications for Sections 2.3, 2.4(1) and 3(1)(f) of the Canadian Copyright Act (hereinafter the Act). The implications include how section 2.3 is to be applied or interpreted and whether the current interpretation is in keeping with advances in technology and more so with International Treaties. The international treaties include Article 11 of the Berne Convention of 1886 and Article 8 of the World Intellectual Property Organisation Copy Right Treaty 1996. The latter incorporates the provisions of the former and as such they are read together. Article 8 so far as relevant provides that the author of a work which would include a musical work have the exclusive right to make it available to the public by wire or wireless means so that the members of the public can access the work from a place and at a time that is convenient to them. The question is whether the communication to the public right created in section 2.3 should be interpreted to accord with this treaty. The Board in Tariff 22 felt that it should not on the basis that the Canadian government had not ratified the treaty. Nevertheless I am of the view that this should not have prevented them from adopting a more progressive approach to the interpretation of the statute, if that is necessary to deal with issues arising in the digital

environment and I submit that it was necessary. In fact they did, save on the issue of when the work is communicated which I submit is where they fell into error. They did so by finding that a communication intended to be to the public does not change by virtue of it being executed in a private setting. This is an acceptance of the time and place of access definition of the treaty. There is therefore no basis for not accepting the interpretation of 'making available' to the public as per the treaty.

Section 2.3 provides that "a person communicates a work or other subject-matter to the public by means of telecommunications does not by that act alone perform it in public, nor by that act alone is deemed to have authorized its performance in public." This section must be read together with Section 2.4, which delimits or defines the circumstances in which a communication occurs and includes a safe harbour for intermediaries such as those persons who perform a telecommunication service.

Section 2.3 appears to be what I will call a minimalist exclusion clause. It is defined as such because it simply tells you what is not within the Act. This is cause for concern because it is unclear in terms of what is within the scope of the Act. It seems to leave room for a broad

interpretation of what comes within the section. In other words, what is required for a communication to be a performance in public? What is meant "*by that act alone*"? Does it mean that something else needs to be done? Or does it mean that that is only one of several ways or one of many actions by which an act can be regarded as a performance in public? Tariff 22 seems to proceed on the latter basis. If that is correct then the section can be regarded as technology neutral and is meant to cover a wide range of circumstances made possible by changes in technology.

Technological neutrality is not always a good thing however. This decision illustrates this point although it is not *prima facie* obvious. The legislation may be able to cover various technologies but definitional considerations may create problems such as not being relevant to the technology in issue. This is so because the means of achieving a particular end vary according to the technology in issue. This is clear from the problems by the use of the broadcast analogy to interpret Internet 'transmissions'.

Technological neutrality is significant in the sense that the 'minimalist' exclusion makes the statute apply to a wider cross-section of activities including new situations arising on account of technological advances.

Technological advances, for example, threaten to render definitions in terms of when performance rights have been breached redundant. Performance usually contemplates a public performance, example turning on a radio, performance in a theatre or live concert. This right normally belongs to the owner or creator of the work. In the analog world it was easy to define when a performance occurred in public. It would normally connote a physical presence and is more in keeping with commercial entertainment activities in the analog world, a concert or a theatrical performance - something other than a private setting. In the digital era this changed and a performance intended for the public could be enjoyed even in a domestic setting. The question is whether communication to the public by telecommunication adequately covers both situations. This decision acknowledged previous authority that defined *to the public* as being much broader and is meant to cover anything that would have been *in public* or something that was intended to be to the public even though it took place in a private setting. This makes sense in that in the digital environment it is possible to reach the public without going *in public* so that people can view or take advantage of copyrighted material, for infringing and non-infringing uses from the comfort of their homes. In fact it seems that this is what the World

Intellectual Property Organisation's Copy Right Treaty (WCT) is intended to capture. The Treaty seems to make time shifting permissible so that the right to authorize a communication to the public includes making it available in such a way that members of the public may access it from a place and at a time that is individually chosen by them.

The communication to the public right relates to moral rights. The question therefore is whether each aspect of a moral right is capable of fitting within the definition in this case of communication to the public in the Internet setting. This case defines communication to the public in the Internet setting in relation to a musical work as occurring 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."

Section 3(1)(f) grants the sole right to the owner of the copyright in a "literary, dramatic, musical or artistic work to communicate the work to the public by telecommunication." A *musical work* is defined in the Act as "any work of music or musical composition, with or without words, and includes any compilation thereof".<sup>[1]</sup> The decision summarises that "by making a work available, a person authorises its communication and further that the person who made a work available communicates it

when it is transmitted from any server (host, cache, mirror).”

It is important to note that the telecommunication to the public infringement does not include a sound recording. Is this a realisation that compression changes the nature of the recording so that even if a sound recording were downloaded played and transferred via the Internet it would not constitute a public performance? This seems to suggest that the Napster decision to the extent that it relates to sound recording would not be an infringement under Section 3(1)(f). This point was not addressed in Tariff 22 decision as they were concentrating on musical works.

As aforesaid the board declined to adopt the formulation WCT formulation of when a work is communicated and instead used the broadcast analogy to say that the work is communicated when it is transmitted. This it is submitted is wrong. To communicate means to convey or to make known. To convey is normally suggestive of a forward movement not a pull. Broadcasting conveys and therefore pushes and is appropriately regarded as a push technology. Transmit also bears a similar meaning. It means to convey or to send from one person or place to another.<sup>[2]</sup> On this definition a recipient cannot transmit. In fact transmission may have no relevance to the Internet

setting in terms of when a work becomes available and in this context it is important to examine what is involved in communicating or making a work available on the Internet.

Posting a work on the Internet involves uploading content onto a server for hosting. It is submitted that when this action is complete the work becomes available. It is there for those who want to see or access it.

From this it can be seen that making available has a much wider meaning, transmitting. In order to access the work the recipient has to pull down the work, which in Internet terms is called downloading. The Internet is therefore a pull technology. The recipient is not in the process of transmitting. He/she is on the receiving end. To make a recipient the transmitter muddles even the natural and ordinary meaning of the word transmit which while relevant to broadcast technology has no relevance to the Internet. This is especially so when considered with the fact that in order to be made available the content has to be posted on a website or server. Once it is posted it becomes immediately available to those who will have it unless there is some restriction such as fee or age. This is so whether anyone chooses to *immediately gain access to it or not*. The very examples used by the Board supports this contention as in the case of the fax transmission

which is communicated *whether it is read by anyone or not*. The board gave a restricted meaning to communication. They defined communication as to make known or to convey. They seemed to have focussed on the latter meaning however, that is to convey which involves movement from the sender to a recipient. After a web page or site has been posted, it is available and does not require a further conveyance on the part of the up - loader for it to be made known to someone else. In fact by divesting himself of the information, placing it on a server the up loader has conveyed.

The interpretation adopted however, leaves in doubt the liability of the person who posts the content. This led the board into further error because it then says that the person who posts the content authorises its communication. This made it necessary to create authorization as a separate breach or infringement under the Act. This being so the anomalous situation is created of a person being able to authorize himself. This can arise where the up loader also downloads at a later date from a site posted by him. In this case he would be liable for authorizing a communication to himself as well as for the communication. Downloading does not seem to fit in well with transmitting and it seems to me that this would be an important area for

reform. This means that a deeming or other provision could be included in the act to determine who makes the communication as has been done in Australia.

If the intent of the section were to take into account new technologies or digital technologies then this interpretation by Tariff 22 panel has muddied the waters and this is one area of reform that Canada would need to prioritize. It seems to me that given the nature of the Internet, the WCT formulation that is of making available is more appropriate.

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[1] Section 2

[2] Random House Webster's Dictionary 3 edn.