Court File No. 29286

IN THE SUPREME COURT OF CANADA
(Appeal from the Federal Court of Appeal)

B E T W E E N :

CANADIAN ASSOCIATION OF INTERNET PROVIDERS, CANADIAN CABLE TELEVISION ASSOCIATION, BELL EXPRESSVU, TELUS COMMUNICATIONS INC., BELL CANADA, ALIANT INC. and MTS COMMUNICATIONS INC.

Appellants/Respondents
on Cross-Appeal
(Respondents)

- and -

SOCIETY OF COMPOSERS, AUTHORS AND MUSIC PUBLISHERS OF CANADA

Respondent/Appellant
on Cross-Appeal
(Applicant)

- and –

INTERNET COMMERCE COALITION, EUROPEAN TELECOMMUNICATIONS NETWORK OPERATORS' ASSOCIATION, EUROPEAN INTERNET SERVICE PROVIDERS' ASSOCIATION, AUSTRALIAN INTERNET INDUSTRY ASSOCIATION, TELECOM SERVICES ASSOCIATION, U.S. INTERNET INDUSTRY ASSOCIATION, CANADIAN RECORDING INDUSTRY ASSOCIATION and INTERNATIONAL FEDERATION OF PHONOGRAM INDUSTRY

Interveners

FACTUM OF THE APPELLANTS/RESPONDENTS ON CROSS-APPEAL

CANADIAN ASSOCIATION OF INTERNET SERVICE PROVIDERS, CANADIAN CABLE TELEVISION ASSOCIATION, BELL EXPRESSVU, TELUS COMMUNICATIONS INC., BELL CANADA, ALIANT INC. AND MTS COMMUNICATIONS INC.

McCarthy Tétrault LLP
Suite 4700, TD Bank Tower
Toronto-Dominion Centre
Toronto, ON M5K 1E6

Thomas G. Heintzman Q.C.
Barry Sookman
Susan L. Gratton
Tel: 416-601-7627
Fax: 416-868-0673

Solicitors for the Appellants/
Respondents on Cross-Appeal

McCarthy Tétrault LLP
The Chambers
Suite 1400, 40 Elgin Street
Ottawa, ON K1P 5K6

Gregory Tzemenakis

Tel: 613- 238-2182
Fax: 613-563-9386

Agents for the Appellants/
Respondents on Cross-Appeal

ORIGINAL TO: The Registrar
Supreme Court of Canada
Supreme Court of Canada Building
301 Wellington Street
Ottawa, ON K1A 0J1

Tel: 613-996-8666
Fax: 613-996-9138

AND TO: **Gowling Lafleur Henderson LLP**
Barristers & Solicitors
2600 – 160 Elgin Street
Ottawa, ON K1P 1C3

Y.A. George Hynna

Tel: 613-233-1781
Fax: 613-563-9869

Solicitors for the Respondent/Appellant on Cross-Appeal

AND TO:

Heenan Blaikie LLP
Suite 2600, P.O. Box 185
Royal Bank Plaza, South Tower
Toronto, ON M5J 2J4

Andrea Rush
David Stratas
Stephen Zolf

Tel: 416-360-3541
Fax: 416-360-8425

Counsel for the Interveners
ICC et al.

Heenan Blaikie LLP
81 Metcalfe Street
Suite 700
Ottawa, ON K1P 6K7

Joy Noonan

Tel: 613-236-6970
Fax: 613-236-9632

Ottawa Agent for Counsel for
the Interveners ICC et al.

AND TO: **Osler Hoskin & Harcourt LLP**
1500 – 50 O'Connor Street
Ottawa, ON K1P 6L2

Glen A. Bloom

Tel: 613-235-7234
Fax: 613-235-2867

Counsel for the Interveners CRIA and IFPI

I N D E X

PART I—STATEMENT OF FACTS

A. Introduction[1]

1. There are two primary issues in this Cross-Appeal. The first is whether Internet intermediaries communicate works to the public within the meaning of paras. 3(1)(f) and 2.4(1)(b) of the Act by providing end users with access to the Internet or by providing web hosting services to content providers. The second issue is whether they are liable for authorizing the communication of works to the public by providing such services.

2. The Board held that Internet intermediaries do not communicate works to the public, nor authorize the communication of works to the public, when they provide hosting or Internet services. None of the Board's factual findings were challenged before the Federal Court of Appeal (the "FCA"). In any event, the FCA held that these findings were amply supported by the evidence. The Respondents on Cross-Appeal submit that these findings were clearly correct and are dispositive of the issues in the Cross-Appeal.

3. SOCAN's theory of liability in the Cross-Appeal is fundamentally flawed. It is premised on the unsubstantiated argument that Internet intermediaries control the content which passes through their systems or which is stored on servers hosted by them; that in providing Internet access or web hosting services, they communicate musical works "for their own business purposes"; and that Internet intermediaries are "commercial partners" or "joint venturers" with content providers. This argument is simply not supported by the record of evidence before this Court.

4. SOCAN's Factum on the Cross-Appeal contains only scant references to the evidence. Furthermore, SOCAN attaches diagrams as Appendices to its Factum which are not contained in the record. These are misleading and inaccurate and should be stricken from the record or ignored by this Court.

5. The Respondents on Cross-Appeal will review the evidence and the law in some detail in order to place it within its proper context. However, the Respondents on Cross-Appeal submit that the concurrent findings of fact by the Board and FCA are sufficient to determine this Cross-Appeal.

6. The Respondents on Cross-Appeal submit that Internet intermediaries neither communicate nor authorize the communication of works to the public for the purposes of the Act when they

---

[1] Capitalized terms which are not defined herein have the meanings given to them in the Factum of the Appellants.

provide web hosting or Internet access services. Only content providers, who *cause* the communication to occur, are liable under para. 3(1)(f) of the Act. IAPs providing Internet access merely act as a passive automated conduit for works transmitted by content providers to end users. Host server providers simply make facilities available to be used by content providers to transmit works to end users. The plain meaning of para. 2.4(1)(b) of the Act demonstrates that it was intended by Parliament to protect Internet intermediaries from copyright liability. Nor do Internet intermediaries authorize communications since they do not sanction, control or approve of the communications effected by the content provider.

7. The Respondents on Cross-Appeal rely on the facts set out in the Factum of the Appellants in addition to the following facts.

B. Feasibility of Licensing Web Sites

8. SOCAN argues that it is not feasible for it to license content providers (*i.e.* web sites) and that, therefore, it should be permitted to impose a royalty on IAPs in respect of music transmissions over the Internet.[2] There is no basis for this argument for the following four reasons:

- **First**, SOCAN admitted to the Board that it had conducted no studies, economic or otherwise, that it would not be feasible to target web sites.[3]
- **Second**, SOCAN's foreign counterpart societies such as ASCAP and BMI in the United States do license web sites and do not seek to collect licence fees from Internet intermediaries.[4] In fact, there is no national precedent for imposing copyright liability on Internet intermediaries in relation to foreign music.[5]
- **Third**, the evidence before the Board demonstrated that it is relatively simple, and in fact commonplace, to determine the identity and physical location of content providers responsible for the music located on host servers. Much of this information is publicly available and can be accessed on-line. Tools for locating and identifying host servers may be automated to handle a large number of sites. In fact, BMI and ASCAP use these and other techniques to identify web sites that require a licence.[6] The Board found as a fact that, because of the way the addressing structure of the Internet is organized, it is not very difficult to locate the person responsible for a site and the

---

2 SOCAN Cross-Appeal Factum paras. 8 and 15.

3 Walker Evidence at pp. 1793-1794, 1775-1777, Record of the Appellants/Respondents on Cross-Appeal ("**RRCA**"), pp. 86-89.

4 Silverman Report, Respondents' Record ("**RR**"), pp. 106-107; Standard Licence Agreements Used by ASCAP and BMI, Exhibits 1 and 2 to Silverman Report, **RR**, pp. 109-139; DiMona Evidence, p. 866, **RRCA**, p. 34.

5 Lincoff Evidence, p. 1232, **RRCA**, p. 53.

6 Carroll Evidence, pp. 2406-2407, 2412-2414, 2417-2439, 2454-2455, 2577-2578, 2580-2581, **RRCA**, pp. 131-158, 166-167, 188-191; Balaban Evidence, pp. 1965-1966, **RRCA**, pp. 107-108; Dimona Evidence, pp. 880-882, Appellants' Record ("**AR**"), Vol. III, pp. 897-901; Lincoff Evidence, pp. 1207-1208, **RRCA**, pp. 48-49; Silverman Evidence, pp. 2696, 2698, **RRCA**, pp. 195-196.

operator of the server on which it is located.[7] These facts are not in issue in this Cross-Appeal.[8]

- **Fourth**, the vast majority of web sites which SOCAN would seek to license are commercial sites which are easy to locate in any event. As was noted by the Board during the proceedings, many such site owner/operators (such as radio/television broadcasters and Muzak) already have licensing relationships with SOCAN which could be easily expanded.[9]

9. Further, contrary to SOCAN's contention, requiring content providers to pay royalties based upon the location of their host servers would not deprive Canadian composers and authors of any royalties.[10] As a result of the international conventions to which Canada is a party, each composer and author also has copyrights to enforce in the country in which the host server is located.[11] Contrary to SOCAN's contention, there was no evidence before the Board of content providers moving to "copyright havens" to avoid paying royalties.[12]

10. SOCAN is correct in stating that the administration of musical works by collection societies is territorial only.[13] However, this merely begs the question of where the Internet communication takes place. The territoriality of their licences is determined by the location of the host server rather than the location where the communication is received. ASCAP and BMI in the United States collect royalties with respect to Internet communications originating in the United States even though they are received by end users in Canada or elsewhere.[14]

11. Royalties collected by ASCAP and BMI in relation to musical works licensed by SOCAN are then passed on to SOCAN through reciprocal collection and distribution agreements. This same scheme operates in reverse.[15] For this reason, the international administration of copyright, based on

---

7 Board Decision at pp. 23-24, **AR**, Vol. I, pp. 27-28. Information related to operators of web sites can be obtained from IAPs either voluntarily, or through the use of the equitable remedy of bill of discovery: *Norwich Pharmacal v. Customs & Excise Commissioners*, [1974] A.C. 133 at 175 (H.L.), Brief of Authorities of the Appellants/Respondents on Cross-Appeal ("**BARCA**"), Tab 7, *Glaxco Wellcome plc v. M.N.R.*, [1998] 4 F.C. 439 at 466 (C.A.), leave to appeal refused, [1998] S.C.C.A. No. 422, **BARCA**, Tab 3; *Totalise plc v. The Motley Fool Limited,* [2002] F.S.R. 50 at 782 (Eng. C.A.), **BARCA**, Tab 8; *Loblaw Companies Ltd. v. Aliant Telecom Inc. et al.*, 2003 NBQB 215, **BARCA**, Tab 5.

8 FCA Judgment at para. 9, **AR**, Vol. I, p. 72.

9 Walker Evidence, pp. 1096-1098, **RRCA**, pp. 44-46.

10 SOCAN Cross-Appeal Factum at paras. 8-10; SOCAN Appeal Factum, paras. 65-66, 79.

11 The national treatment principle mandated by the *Berne Convention* ensures that foreign authors are given the same rights as local authors. See para. 130 of the Factum of the Appellants.

12 DiMona Evidence at pp. 906-908, **RRCA**, pp. 40-42; Dreier Evidence at pp. 537-542, **RRCA**, pp. 23-28.

13 SOCAN Appeal Factum at paras. 8, 65-66.

14 Hoffert/Walker Evidence, at pp. 1808-1811, **AR**, Vol. IV, pp. 1843-1845, **RRCA**, pp. 91-93; Lincoff Evidence, at pp. 1237-1239, **RRCA**, pp. 57-59; BMI Web Site Music Performance Agreement, ss. 1(b), 2(a), 2(c), Exhibit 2 to Silverman Report, **RR**, pp. 125, 132; DiMona Evidence at pp. 877-880, **AR**, Vol. III, pp. 494-497.

15 SOCAN expressly acknowledges the existence of these reciprocal agreements for the collection and distribution of royalties internationally in its Appeal Factum, paras. 7-8. However, SOCAN refused to properly answer interrogatories in

the location of the host server, is ultimately a zero-sum game. There need be no gap in the collection of royalties owing to Canadian authors.[16]

C. What Host Server Providers Do

12. SOCAN makes misleading and inaccurate statements about the role of host server operators in providing web hosting services and the relationship between such entities and content providers. These are contrary to the findings of the Board and the FCA and are expressly denied by the Respondents on Cross-Appeal.[17]

13. Web hosting involves an entity (*i.e.*, an IAP) providing facilities (*i.e.*, a host server) on which is located content controlled by a content provider. While most IAPs offer web hosting services, it represents a small portion of their business and is provided as separate and distinct service from Internet access service.[18]

14. Content providers select the content (*i.e.* web sites and content <u>on</u> web sites) to be made available to end users. They upload this content for storage on a host server.[19] They update and maintain this content independently of the host server provider. They use equipment, bought or leased by them and located at the host server's facilities, to store the content and to transmit it to end users.[20]

---

the Board proceeding regarding the collection practices of foreign collection societies: see SOCAN's Response to Interrogatories Numbers 45 and 48(f), (CAIP) **RRCA**, pp. 209-211.

16 Lincoff Evidence at pp. 1228-1230, 1234-1237, **RRCA**, pp. 50-52, 54-57; Walker Evidence at pp. 1619-1621, **RRCA**, pp. 83-85.

17 SOCAN uses the term "host server" interchangeably as meaning either the physical server on which content is stored or the operator of a host server. This confusion in terminology creates the false impression that the activities carried out using the physical server are under the control of the host server operator. The confusion is exacerbated because SOCAN also sometimes uses the term "host server operator": SOCAN Cross-Appeal Factum, paras. 19, 20, 22, 23, 29, 30, 32, 38. The Respondents expressly deny the following allegations: SOCAN Cross-Appeal Factum, paras. 1, 14, 19, 22, 23, 30, 31, 37, 38 and 39; SOCAN Appeal Factum, paras. 12, 20 and 38.

18 Jurenka Evidence, pp. 1434, 1548, **RRCA**, pp. 68, 80; Carroll Evidence, pp. 2455, **AR**, Vol. IV, pp. 2516-2518, **RRCA**, pp. 179-181; Silverman Evidence, pp. 1925-1928, **RRCA**, pp. 95-98; p. 1987, **AR**, Vol. IV, p. 549; CAIP-15 at pp. 12-13, **AR**, Vol. V, pp. 751-752.

19 SOCAN asserts in para. 30 of the its Cross-Appeal Factum that host server providers establish "a website for the content provider on its servers in coordination with the content provider". This statement is misleading. Web site development and hosting are two separate activities. Either the content provider or any third party can develop the content provider's web site. Host server providers do not exercise or purport to exercise any control over what content providers upload: Carroll Evidence, pp. 2459-2462, 2499-2500, 2524, **RRCA**, pp. 168-171, 176-177, 182; Carroll Report, pp. 4, 5, 18, **AR**, Vol. V, pp. 682-684.

20 SOCAN asserts in para. 38 of its Cross-Appeal Factum that the hosting equipment "is not used by the content provider", but "by the host server operator to store and transmit content". This statement is inaccurate and misleading. The content provider alone is responsible for storing its data on host servers. Further, it is the computer program instructions which form part of the web site application ("html files") created by the content provider which determines what will be transmitted in response to an end user request and not actions of the host server operator, Clark Evidence,

15. In contrast, host server providers don't know what material is being posted on host servers. Nor do they know what access rights or restrictions end users may have to such materials. Some information may be made generally available to all end users. Some content may be password protected and be made available only to select persons.[21] Host server providers do not exercise or purport to exercise control over what is posted[22] or over what is transmitted,[23] to third parties.[24]

16. Hosting service providers may stipulate in their contracts with content providers that particular kinds of content, such as unlicensed copyright material, may not be posted on a server, and that offending material can be removed when it comes to the attention of the server operator. However, IAPs acting as host service providers do not monitor, exercise, or purport to exercise control over the content stored on hosted servers. Further, for technical, economic and privacy reasons it is a practical impossibility for them to do so. As a result, actions taken by IAPs to remove content from hosted servers are invariably prompted by a third party complaint.[25]

---

pp. 131-132, 134, **AR**, Vol. 2, pp. 293-294, 296; pp. 239-240, 317-319, 448-450, 456-457, **RRCA**, pp. 2-3, 14-16, 17, 19-21; Carroll Evidence, pp. 2406-2407, 2466-2467, 2499-2500, **RRCA**, pp. 131-132, 172-173, 176-177; Jurenka Evidence, pp. 1467-1469, **RRCA**, pp. 69-70; Balaban/Silverman Evidence, p. 1930, **RRCA**, p. 100. Also, hosting contracts do not make the host server provider responsible for transmitting content. See the Hosting Agreements, **RRCA**, at pp. 212-269 (relevant excerpts side-barred).

[21] The assertion made by SOCAN in para. 37 of its Cross-Appeal Factum that the "host server operator also knows that the content is available to anyone who has access to the Internet" is misleading. It wrongfully implies that host server operators know what content has been uploaded onto host servers and what rights of access third parties have.

[22] SOCAN asserts in para. 18 of its Cross-Appeal Factum that host server operators give "the customer the right to place content on the servers". Host server operators provide physical and security access to host servers to enable content providers to upload content. They do not, however, exercise or purport to exercise any control over what content providers upload: Carroll Evidence, pp. 2459-2462, 2499-2500, 2524, **RRCA**, pp. 168-171, 176-177, 182; Carroll Report, pp. 4, 5, 18, **AR**, Vol. V, pp. 682-684..

[23] SOCAN asserts in para. 18 of its Cross-Appeal Factum that host server providers "accept" content with "full knowledge and intention that the content will be stored on the host server and transmitted to anyone who requests it", and that their obligation to store and communicate content to end users is the "*raison d'etre*" of their contracts with content providers. No such findings of fact were made by the Board. The host server operator doesn't sanction or approve or "accept" the uploading of any particular type of content. The statement that IAPs 'communicate content to end users' begs the question which is the subject of this Cross-Appeal. The portion of the Board Decision referred to by SOCAN does, however, make clear that IAP contracts provide that customers, and not IAPs, are responsible for content.

[24] FCA Judgment paras. 14-15, **AR**, Vol. I, p. 74; Board Decision, pp. 20, 24-25, **AR**, Vol. I, pp. 24, 28-29; Langford Evidence, pp. 2384-2385, **RRCA**, pp. 126-127; Raphaelson Evidence, p. 1280, **RRCA**, p. 64; Silverman Evidence, pp. 1929-1932, 1936-1938, **RRCA**, pp. 99-102, 103-105; CAIP Business Panel, pp. 2170-2173, **RRCA**, pp. 110-113; Balaban Evidence, p. 1967, **RR**, p. 60; Clark Evidence, p. 228, **AR**, Vol. II, pp. 349; Beattie Evidence, pp. 2634-2636, **AR**, Vol. IV, pp. 620-622.

[25] Board Decision pp. 24-25, **AR**, Vol. I, pp. 28-29; FCA Judgment, pp. 47, 54-55; **AR**, Vol. I, pp. 115, 122-123; Factum of the Appellants, para. 28; Silverman Evidence, pp. 1929-1932, 1936-1938, **RRCA**, pp. 99-102, 103-105; Langford Evidence at pp. 2256-2258, 2384-2387, **RRCA**, pp. 123-125, 126-129; SOCAN's assertion in paras. 19-20 of its Cross-Appeal Factum that host server providers retain "the right to remove *any* content posted by the content provider" is misleading. The "right" to remove content, where it does exist, is usually limited to discreet circumstances where the content provider violates the terms of the hosting agreement by violating the law or breaching the IAP's Internet use policy. See Hosting Agreements **RRCA**, pp. 212-268 (relevant excerpts side-barred). SOCAN's statements at paras. 38-39 of the Cross-Appeal Factum are similarly inaccurate.

17. In its decision, the FCA acknowledged this "unchallenged evidence that, given current technology, it is not economically feasible to prevent the transmission of material on a server whenever it is requested: servers are programmed to transmit on-demand whatever is requested."[26] [emphasis added]

18. Contrary to SOCAN's submissions, IAPs performing hosting services are not "co-actors", "partners", "commercial partners" or "joint venturers" with content providers to place material on the Internet. They have no "joint intention" "common business purpose" or "common enterprise" with content providers "to make available and transmit musical works to the public upon request". In providing hosting services they do not use musical content "for their own business purposes". IAPs simply provide space and facilities which enable content providers to place content on host servers and to transmit such content to end users.[27] Content providers remain responsible for the content that is uploaded onto, and transmitted from, host servers.[28]

D. What IAPs Do

19. SOCAN makes misleading and inaccurate statements concerning the role played by IAPs in providing access to the Internet and the relationship between IAPs and end users. These are contrary to the findings of the Board and the Court of Appeal and are expressly denied by the Respondents on Cross-Appeal.[29] The Respondents on Cross Appeal rely on the facts contained in the Factum of the Appellants with respect to the role played by IAPs in providing Internet access services to end users.

20. The core business of IAPs involves providing the technical means to handle Internet traffic, entering into agreements with end users permitting connection to the Internet, providing Internet

---

[26] FCA Judgment at para. 145, **AR**, Vol. I, p. 122.

[27] SOCAN also asserts in para. 19 of its Cross-Appeal Factum that "it is the host server that proceeds to transmit the work in response to" end user requests. The sentence is misleading to the extent it suggests that the host server *operator* takes steps to transmit a work in response to a user request. The content provider controls what is to be transmitted and the transmission to the end user is a pre-programmed response developed by the content provider and is made without the intervention of the host server operator: FCA Judgment at para. 145, **AR**, Vol. I, p. 122; see footnote 20 above; The similar assertion in para. 38 is also misleading.

[28] Board Decision, p. 25, 38-39, **AR**, Vol. I, pp. 29, 42-43; Carroll Evidence, pp. 2601-2602, 2544, **RRCA**, pp. 192-193, 182.1; McLaurin Evidence, pp. 2170-2172, **RRCA**, pp. 110-112; Widenmaier Evidence, p. 2173, **RRCA**, p. 114; Host Server Agreements **RRCA**, p. 212-268; UUNet Acceptable Use Policy, **RRCA**, p. 262; Contrary to the suggestion in para. 30 of SOCAN's Cross-Appeal Factum, host server providers do not contract with content providers for the "specific purpose" of making content available on the Internet. Hosting providers do not share a common purpose with content providers. The content provider's purpose is to make content available on the Internet. The host server provider's purpose is merely to manage a server so that it is capable of functioning in the manner programmed by the content provider.

[29] The Respondents on Cross-Appeal expressly deny the allegations made by SOCAN in its Cross-Appeal Factum at paras. 43, 46 and 48, and in its Appeal Factum at paras. 24, 26-27, 82-84, 108 and 114

Protocol (IP) addressing, and providing the physical and logical means to enable end users to connect to the IAP. The IAP's role is simply to provide connectivity to the Internet. The IAP does not locate, select or determine the content which end users may wish to have transmitted to them, whether it be content made available on the web, through the use of Internet e-mail, newsgroups, or elsewhere on the Internet. Further, the IAP does not know what, if any, copyright material has been requested, accessed or downloaded.[30]

21. In providing Internet access services, IAPs neither make available musical works to end users, aggregate content,[31] nor make contractual commitments to end users or content providers[32] to transmit any particular content to end users.[33] IAPs do not have any actual or apparent right to control the actions of end users in the content they select, nor do they hold out that they have any authority to grant end users the right to access any content. In fact, the contracts between IAPs and end users expressly negate any such right or authority. Internet access agreements with end users require the end user to obtain whatever consents are required from copyright holders with respect to content they may desire to access.[34]

E. Findings of the Board and FCA that IAPs and Host Server Providers Do Not Communicate Works

22. SOCAN's main argument in this Cross-Appeal is that operators of host servers and IAPs effectively control the content stored on host servers, and transmitted to end users and, therefore, that their activities are not limited to the provision of the means of telecommunication for the purposes of

---

30 Factum of the Appellants, paras. 22, 28

31 IAPs sometimes make links available to other web sites, but unlike on-line service providers (OSPs) like AOL, whose business includes creating or compiling content, IAPs' business of providing Internet connectivity is different from the content creation/compilation business: Jurenka Evidence pp. 780-781, 832, 1520-1522, 1526-1530, 1547-1549, **RRCA**, pp. 30-32, 71-81; Carroll Report pp. 10, 13-14, **RRCA**, pp. 198, 202-204, pp. 20-21, **AR**, Vol. V. pp. 689-690; Clark Supplementary Report p. 15, **RR**; Clark Report p. 25, **AR**, Vol. V, p. 623.

32 SOCAN's statement at para. 46(c) of its Cross-Appeal Factum that IAPs have contractual duties to content posters to transmit their content to end users is also inaccurate and not supported by the evidence before the Board.

33 SOCAN asserts in para. 46(a) of its Cross-Appeal Factum that "the IAP makes a contractual commitment to the end user to transmit the requested works transmitted by the host server." The IAP's role in such communications is no different from the role of backbone service providers who merely pass on unaltered information transmitted by the content provider: Factum of the Appellants para. 28. The statement in the same paragraph that the IAP "itself communicates to its own subscribers for its own business purposes" begs the question as to whether the activities of the IAP involve a "communication". The reference to "its own business purposes" is misleading as it assimilates the business of providing the "means" to communicate works with the business of distributing content to end users.

34 Factum of the Appellants, para. 28; Rogers Agreement for Wave @ Home, s. 2, 7, 8, and 19; Shaw Wave Service Agreement, s. 8, 9; Agreement for Videon Wave, s. 7, 8, 9, 19; Sympatico Service Agreement, s. 2, 4, 5 and terms and conditions ("Internet Access Agreements"), **RRCA**, pp. 269-303 (relevant excerpts side-barred; The assertion made by SOCAN in para. 46(b) of its Cross-Appeal Factum that "the IAP enters into a contract with the subscriber for the purpose of accessing" content on the Internet is misleading to the extent it suggests that the IAP has this purpose. Its purpose is only to provide connectivity to the Internet.

para. 2.4(1)(b). The Board, however, made clear contrary findings of fact; findings that the FCA found were amply supported by the evidence.

23. The Board found that persons who can avail themselves of para. 2.4(1)(b) with respect to any given communication of a work do not communicate the work. This includes "all entities acting as Internet intermediaries such as the ISP of the person who makes the work available, persons whose servers act as cache or mirror, the recipient's ISP and those who operate the routers used in the transmission". The Board made clear findings of fact that IAPs providing Internet access service and hosting services merely provide the means that are necessary for others to effect an Internet transmission.[35]

24. The Board also held that as long as the role of the IAP 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, it should be allowed to claim the benefit of para. 2.4(1)(b). The Board also made clear findings of fact that the term "means" in para. 2.4(1)(b) includes the facilities and services used by Internet intermediaries to provide hosting and internet access services.[36]

25. After reviewing all of the facts, the Court of Appeal found that "It was far from unreasonable (let alone patently unreasonable) for the Board to conclude that the normal activities of host server operators and Internet access providers fall within para. 2.4(1)(b)". The Court of Appeal concluded that the Board was justified in finding that operators of host servers and IAPs do not effectively control the content of what is transmitted, that their role is passive and that their activities usually consist only of the provision of the means of telecommunication for the purpose of para. 2.4(1)(b).[37]

26. There is no basis for this Court to interfere with these concurrent findings of fact of the Board and the Federal Court of Appeal.[38]

---

35 Board Decision, pp. 26, 39, **AR**, Vol. I, pp. 30, 43.

36 Board Decision, pp. 39-40, **AR**, Vol. I, pp. 43-44.

37 FCA Judgment, p. 47, 53-55, **AR**, Vol. I, pp. 115, 121-123.

38 Sopinka & Gelowitz, *The Conduct of an Appeal*, 2d ed., 2000, at 50, **BARCA**, Tab 10; *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574 at 609, 614, **BARCA**, Tab 4; *Geophysical Engineering Ltd. v. M.N.R.*, [1977] 2 S.C.R. 1008 at 1011, **BARCA**, Tab 2.

F. Findings of the Board and FCA that IAPs and Host Server Providers Do Not Authorize the Communication of Works

27. The Board made clear findings of fact that Internet intermediaries do not authorize the communication of musical works:

> 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. An intermediary would have to sanction, approve or countenance more than the mere use of equipment that may be used for infringement.[39]

28. The FCA found that the issue of whether conduct amounts to authorization is largely a factual question and that there was sufficient evidence before the Board for it to conclude that the normal activities of the operators of host servers and IAPs did not "authorize" the communication of musical works.[40]

29. Dealing first with IAPs providing Internet access service, the FCA stated the following:

> I fail to see how an Internet access provider, who typically has no contractual or economic relationship with content providers, can be said implicitly to authorize them to communicate material requested from a host server operated by another, simply as a result of providing its customers with connectivity to the Internet.[41]

30. The FCA also found that host server operators do not authorize content providers to communicate material stored on their servers:

> …it seems counterintuitive to conclude that a person who supplies the means to enable another to communicate material thereby *authorizes*, as opposed, say, to facilitates, its communication by that other person…
>
> Since operators of host servers only provide the passive means for others to communicate, they are not in any real sense approving, consenting or claiming the right to permit content providers to communicate the material stored on their servers …Thus, since it cannot be inferred from their activities that Internet intermediaries "sanction, approve or countenance" … the communication of material stored by others on their servers, they normally cannot be said to authorize content providers to communicate infringing material.[42]

31. Again, there is no basis for this Court to interfere with these concurrent findings of fact of the Board and the FCA.[43]

---

39 Board Decision, p. 47, **AR**, Vol. I, p. 51.
40 FCA Judgment, pp. 60-61 **AR**, Vol. I, pp. 127-128
41 FCA Judgment, p.58 **AR**, Vol. I, p. 126
42 FCA Judgment, pp. 58-59, **AR**, Vol. I, pp. 126-127.
43 See footnote 38 above.

PART II—POINTS IN ISSUE

32. The points in issue in this Cross-Appeal are the following:

(1) What is the standard of review to be applied to the issues in the Cross-Appeal?

(2) Do IAPs communicate works to the public when they provide Internet access services?

(3) Do host server providers communicate works to the public when they provide hosting services?

(4) Do IAPs authorize the communication of works to the public when they provide internet access services or hosting services?

PART III—ARGUMENT

I. ISSUE 1: THE STANDARD OF REVIEW TO BE APPLIED TO ANY LEGAL ISSUES IN THE CROSS-APPEAL IS REASONABLENESS

33. The Respondents on Cross-Appeal submit that the unchallenged findings of fact by the Board mean that there is no basis for this Cross-Appeal. As the FCA held, the issues in the Cross-Appeal are based upon the Board's findings of fact or mixed fact and law arising from the technical evidence before the Board. However, even to the extent that legal issues are properly raised by the Cross-Appeal, it is submitted that applying the four factors of the pragmatic and functional test to the Board's decision leads to a standard of review of reasonableness *simpliciter*.[44]

II. ISSUE 2: IAPS DO NOT COMMUNICATE WORKS TO THE PUBLIC WHEN THEY PROVIDE INTERNET ACCESS SERVICES

34. Para. 3(1)(f) of the Act confers upon the owner of a musical work the exclusive right "to communicate the work to the public by telecommunication". Pursuant to ss.27(1) of the Act "It is infringement of copyright for any person to do, without the consent of the owner of the copyright, anything that by this Act only the owner of the copyright has the right to do."

35. Accordingly, for an IAP to be liable for infringement under para. 3(1)(f) of the Act: (1) the IAP must do something without consent that only the copyright owner has the right to do; and (2) para. 2.4(1)(b) of the Act must not apply. As will be submitted below, neither of these elements are satisfied.

---

[44] FCA Judgment, paras. 125, 144-147, 161, **AR**, Vol. I, pp. 115, 122-123, 128-129; Factual findings should not be interfered with absent a palpable and overriding error: *Housen v. Nikolaisen*, 2002 S.C.C. 33 at para. 23, **ABA**, Tab 48; Factum of the Appellants, paras. 52-59.

A. The IAP is not the Cause of a Communication

36. Para. 2.4(1)(b) is part of the definition of the phrase "communication to the public by telecommunication".[45] It is intended to clarify that intermediaries who provide the means to enable others to communicate do not themselves communicate within the meaning of para. 3(1)(f). However, even without this provision, an IAP who merely provides the means for another person to communicate a work would not be regarded as having caused such communication.

37. This Court in *Electric Dispatch Co. v. Bell Telephone Co.* rejected the contention that a telephone company causes the communication of orders transmitted over its telephone system:

> Doubtless the word "transmit" is an accurate expression to make use of in relation to every message which is sent from one subscriber...to another. Every message is transmitted from one person to another along the respondent's wires, but in such case the person who transmits the message is no other than the sender of it. The wires constitute the mode of transmission by which one lessee transmits the message along the wires to the other. It is the person who breathes into the instrument the message which is transmitted along the wires who alone can be said to be the person who "transmits" the message. The owners of telephone wires, who are utterly ignorant of the nature of the message intended to be sent, cannot be said...to transmit a message of the purport of which they are ignorant.[46]

38. The use of the word "do" in ss.27(1) of the Act implicitly imports the notion of causation.[47] It is a fundamental tenet of copyright law that a person is only liable for infringement if the person has caused the infringing activity to occur. This fundamental tenet has been applied in the copyright context both in England and in the United States.[48]

39. Recently, in *Sony Music Entertainment (U.K.) Ltd. v. Easy Internet Café Ltd*, the English Chancery Division noted that an Internet service provider is not liable merely because its computer stores a copy of the work being transmitted from one entity to another. In these circumstances, the Internet service provider has no control over the transmission through its systems.[49] The English court cited the following passage from Laddie, Prescott & Vitoria, *The Modern Law of Copyright and Designs*:

---

45 Factum of the Appellants, para. 62.

46 *Electric Dispatch Co. v. Bell Telephone Co.* (1891), 20 S.C.R. 83 at 91, **ABA**, Vol. 2, Tab 45.

47 Webster's *New World Dictionary* (Popular Library: New York, 1977), at 181, **BARCA**, Tab 12, defines the word "do" as follows: 1. To perform (an action, etc.), 2. To finish; complete, 3. To *cause*…, 4. To exert....(emphasis added). This is also underscored by the verbs used to describe the exclusive rights of the copyright holder e.g., "to produce or reproduce", "to perform", "to publish", to "adapt and publicly present", "to present", "to rent" "to authorize". ss 3(1) of the Act.

48 See the cases referred to in paras. 39 and 40 below.

49 [2003] EWHC 62 (Ch) at paras. 31-33, **ABA**, Vol. 2, Tab 85.

> 14.14 It is therefore submitted that a service-provider on the Internet does not infringe copyright by the mere storage of a work in the memory of his computer. Short of going out of business altogether, he has, in general, no control over the selection of those particular works which happen to be there. They are 'pulled in' from third party sources by members of the public who access his service. He is to all intents and purposes a mere conduit pipe, and not a primary actor.[50]

40. In the United States, although copyright is a strict liability statute, courts have held that there must be some element of volition or causation for a person to infringe. This requirement has been held to be lacking where IAP systems are used by a third party.[51] In *Religious Technology Center v. Netcom On-Line Communications Services Inc.*, the court recognized that "it does not make sense to adopt a rule that could lead to the liability of countless parties whose role in the infringement is nothing more than setting up and operating a system that is necessary for the functioning of the Internet". In that case the Court refused to "find workable a theory of infringement that would hold the entire Internet liable for activities that cannot reasonably be deterred".[52]

41. In the *1998 Annotated Copyright Act*, Normand Tamaro made a similar observation when commenting upon para. 2.4(1)(b):

> The right to communicate a work concerns the acts involved in actually communicating it to the public. Just as a letter carrier does not communicate a work to the public by delivering a sound recording by mail, a company which simply transmits signals to a broadcaster, without taking any part in the performance of any works transmitted, cannot be considered an infringer.[53]

42. These authorities are consistent with the *Berne Convention* pursuant to which the mere provision of physical facilities for enabling or making a communication does not itself amount to a communication.[54] They are also consistent with well-established law in Canada and elsewhere in the Commonwealth that merely supplying the means, including the facilities, which make an infringement possible is not sufficient to create liability for copyright infringement. Suppliers of equipment or persons who make facilities available to others who use them in an infringing way neither cause the infringement to occur nor authorize such infringement.[55]

---

[50] Laddie, Prescott & Vitoria, *The Modern Law of Copyright and Designs*, 3d ed., 2000, at 14.14 ("*The Modern Law of Copyright and Designs*"), **ABA**, Vol. 3, Tab 114; see also para. 34A.8, **BARCA**, Tab 9, from the same text where the authors apply this same principle to web caching.

[51] See the *Netcom*, *Playboy Enterprises, Marobie* and *ALS Scan*, cases referred to in footnote 88 of the Factum of the Appellants, **ABA**, Vol. 2, Tabs 80, 70, 59, Vol. 1, Tab 17.

[52] *Netcom* at p. 1553, **ABA**, Vol. 2, Tab 80.

[53] Tamaro, *The 1998 Annotated Copyright Act* (Carswell: Toronto, 1998) at 140 ("*The 1998 Annotated Copyright Act*"), **ABA**, Vol. 3, Tab 123.

[54] Factum of the Appellants, para. 95 and the authorities referred to in footnotes 86 to 88 therein

[55] See the cases cites in footnote 81.

43. A person may be liable for infringement of copyright whether or not the person knows that his or her actions infringe. However, there must still exist a causal connection for liability to be found. In determining the liability of IAPs, the function they play in the total process of web communications and the element of control which they have with respect to the causation of infringement must be central. A person that transmits works as a passive automated conduit for another cannot be considered to be the cause of the communication.[56]

44. The Board accepted this view when it stated that "it is safe to conclude that with respect to most transmissions, only the person who posts a musical work communicates it".[57] So did the FCA when it said in relation to para. 2.4(1)(b) that "Even without this paragraph, it could have been argued that the word 'communicate' implicitly excludes merely enabling another to communicate".[58]

45. The language of para. 3(1)(f) and ss.27(1) of the Act does not identify the person responsible for the act of infringement. Liability under the Act may be strict as SOCAN claims. However, all this means is that lack of knowledge that one's act amounts to infringement is not a defence. It does not create liability for the actions caused by another.[59]

46. The persons engaging in a "communication by telecommunication" were intended by Parliament to encompass the sender of the communication and its recipient. Intermediaries who act as a conduit have never been found to be infringing copyright in respect of information and messages which they carry in Canada. All witnesses before the Board, including SOCAN's own experts, agreed that it is the sender and recipient of Internet messages who are communicating with each other - not any intermediary between them. None of the facilities and services required to provide Internet access services (such as routers and agreements providing for interconnection to the Internet, IP addresses and the means of access) remotely resemble communication of copyright material to anyone. Further, the address which is used in an Internet packet to enable its delivery specifies the address of the end user recipient, and not the address of any of the intermediaries (such as the IAP) through which the message might pass.[60]

---

[56] Factum of the Appellants at para. 95 and footnotes therein.

[57] Board Decision p. 40, **AR**, Vol. I, p. 44.

[58] FCA Judgment p. 46; see also, *WIPO Workshop on Service Provider Liability* at p. 8, **ABA**, Vol. 3, Tab 113; *The 1998 Annotated Copyright Act* at 140, **ABA**, Vol. 3, Tab 123.

[59] *The Modern Law of Copyright and Designs*, at 14.14, **ABA**, Vol. 3, Tab 114.

[60] See paras. 20-21 and 22-26 above; Clark Evidence, pp. 102-103, **AR**, Vol. 2, pp. 271-272, pp. 302-305, **RRCA**, pp. 10-13, pp. 319, 374, **AR**, Vol. III, pp. 410, 430; Hoffert Evidence, p. 1348, **RRCA**, p. 66; Buchanan Evidence,

47. It is clear from the forgoing that IAPs do not communicate works by providing Internet access services. However, even if they do (which is denied), they do not communicate any works to the public.

48. For a communication to be infringing under para. 3(1)(f) the communication must be "to the public". For a communication to satisfy this requirement it must be aimed or targeted toward people in general, a community or an aggregation of individuals that comprise a segment of the public. It must be a communication which is made openly, without concealment and to the knowledge of all. It is submitted that transmissions of a musical work by an IAP to end users do not satisfy these requirements.[61]

49. The Board held that content providers are communicating musical works to the public when they post content on a web site because such communications are intended to be received by the public or by members of the public. The Board did not address whether IAPs or host server providers communicate to the public because it found that para. 2.4(1)(b) applied to them. Nor did the Court of Appeal address this issue. However, no liability can be imposed on IAPs or on host server providers for communications, including communications related to their use of cache servers, unless these are "to the public".[62]

50. The Board found that a person posting a file on a web site must intend it to be accessed by some segment of the public in order for the transmission to be a communication to the public. Applying this principle, it held that an e-mail between a single sender and a single recipient was not a communication to the public. Transmissions of content that pass through an IAP to an end user are no different.[63]

51. An IAP providing Internet access service does not aim or target a transmission of a music file toward anyone, let alone people in general, a community or an aggregation of individuals that comprise a segment of the public. The end user transmits a request to the host server to receive a particular file. That file is transmitted through the IAP's systems to the individual requesting the file.

---

pp. 2220-2221, 2231, 2245, **RRCA**, pp. 116-119, pp. 2378-2380, **AR**, Vol. IV, pp. 585-587; Carroll Evidence, pp. 2444-2445, **RRCA**, pp. 160-161.

61 *CCH Canadian Ltd. v. Law Society of Upper Canada* (2002), 18 C.P.R. (4th) 161 (Fed. C.A.) leave to appeal to SCC granted December 12, 2002 ("CCH") **BARCA**, Tab 13, *Canadian Cable Television Assn. v. Canada (Copyright Board)* (1993), 46 C.P.R. (3d) 359 (Fed. C.A.) at 370 ("CCTA"), **BARCA**, Tab 1.

62 Board Decision pp. 29-30, **AR**, Vol. I, pp. 33-34.

63 Board Decision pp. 29-30, **AR**, Vol. I, pp. 33-34. See also, *CCH* (transmission of a facsimile of a literary work to a single individual was not a communication "to the public"), **BARCA**, Tab 13.

The information is generally delivered in a unicast pull mode: pull because the user requests or "pulls" the information when desired, and unicast because packets go only to one recipient. Transmissions of content between an IAP and its end users are also private communications. They are not made openly, without concealment and to the knowledge of all.[64]

B. Para. 2.4(1)(b) of the Act applies to protect IAPs[65]

52. SOCAN's contention that IAPs cannot rely on para. 2.4(1)(b) when they provide Internet access service is based on the claim that, by providing such services, IAPs are doing more than providing the means of telecommunication necessary for another person to communicate works. SOCAN's contention in this regard is in direct conflict with factual findings made by the Board, findings which, as the FCA found, were amply supported by the evidence.[66]

53. SOCAN also argues that the FCA's interpretion of para.2.4(1)(b) in a manner which protects Internet intermediaries is in conflict with Article 13 of the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPs"). This is tantamount to suggesting that all of Canada's major trading partners (who are also members of TRIPS and who exempt Internet intermediaries from liability when they provide hosting and Internet access services) are currently in violation of TRIPS.[67]

54. Construing para. 2.4(1)(b) to protect Internet intermediaries is not inconsistent with Article 13 of TRIPS. TRIPS mandates that the protection and enforcement of intellectual property rights should contribute to the "mutual advantage of producers and users" "in a manner conducive to social and economic welfare, and to a balance of rights and obligations". It also recognizes that "measures and procedures to enforce intellectual property rights" should "not themselves become barriers to

---

64 Board Decision, pp. 17, 29-30 **AR**, Vol. I, pp. 21, 33-34; Clark Evidence pp. 290-294, **RRCA**, pp. 5-9. The Board held that transmissions of musical works by a content provider to individual members of the public could be a communication to the public even though received by members of the public in individual private settings. In *CCTA* the Court of Appeal held that a transmission of a work by cable tv to numerous individuals in a domestic setting constitutes a *performance in public*. Such a communication would only be a communication to the public with respect to communications to persons who occupy apartments, hotel rooms, or dwelling units in the same building transmitted by closed-circuit telecommunication: See Para. 2.4(1)(*a*) of the *Act* which overruled *Canadian Admiral Corporation Ltd. v. Rediffusion Inc. Ltd*., [1954] Ex. C. R. 382, **ABA**, Vol. 1, Tab 32, only for such communications; C. Brunet, "Copyright: The Economic Rights" in G. Henderson, *Copyright Law of Canada* (Toronto: Carswell, 1994) at page 194, **ABA**, Vol. 3, Tab 101. The position of content providers and cable tv operators are different from IAPs. The former intend to transmit content to a public consisting of individuals that may be located in a public place or in private settings like a home. In contrast, IAPs performing Internet access services do not aim or target to transmit any particular file to the public or to any segment thereof, whether located in private or public settings. See para. 68 below.

65 The Respondents on Cross-Appeal rely on the Factum of the Appellants for the proper construction of para. 2.4(1)(b) of the Act.

66 SOCAN Cross-Appeal Factum, paras. 29, 31,46(a). See paras. 26 and 33 above.

67 Factum of the Appellants paras. 95 and 103.

legitimate trade" and that appropriate measures "may be needed to prevent the abuse of intellectual property rights by right holders".[68] In fact, finding Canadian IAPs and hosting providers responsible for Internet communications would actually introduce a barrier to international trade in Internet access and hosting services.

55. SOCAN also argues that in view of the legislative history of para. 2.4(1)(b), it should be construed to exempt only intermediaries who provide the underlying physical communication infrastructure of the Internet and not those entities providing access services or hosting services to customers. SOCAN's construction of the provision would require this Court, contrary to principles of statutory interpretation, to read into the provision a restriction not written by Parliament. Further, para. 2.4(3) of the Act already does exactly what SOCAN contends para. 2.4(1)(b) should do. Parliament could not have intended para 2.4(1)(b) to be redundant.[69]

56. SOCAN's assertion that entities involved in the Internet "at the retail stage" are not "true intermediaries" because they don't "provide the underlying communication infrastructure" of the Internet is inaccurate and misinterprets the legislative history of para. 2.4(1)(b). It is inaccurate because the Board expressly found that infrastructure used by IAPs to provide Internet access service is part of the facilities of the Internet. It misinterprets the legislative history because Parliament did not intend to impose liability on any entity having a "retail" connection with an end user. The intent was to protect passive transmitters of data without regard to the stage at which they operate. However, as found by the Board, when an Internet intermediary does become a content provider, such as where it posts content or creates embedded links, para. 2.4(1)(b) will not apply and liability will be imposed.[70]

57. Contrary to SOCAN's suggestion, this case is not analogous to *Bishop v Stevens*. In *Bishop*, the Court refused to read an implied exception into the Act.[71] Para. 2.4(1)(b) is an express provision of the Act. Its plain and ordinary meaning protects IAPs and hosting providers for the activities that

---

68 TRIPS Agreement, **ABA** Vol. 1, Tab 9, Preamble and Articles 7 and 8; Factum of the Appellants paras. 95 and 103.

69 Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Toronto: Butterworths, 2002) at 158-59, 382-83, **BARCA**, Tab 11.

70 Board Decision pp 36-42, 49, **AR**, Vol. I, pp. 40-46, 53; paras. 88-96 Factum of the Appellants. The analogy made by SOCAN between the business carried on by IAPs and the business carried on by cable operators in paras. 98 of its Appeal Factum and para. 49 of its Cross Appeal Factum is inapposite and misleading. See para. 68 below. The Respondents object to the introduction of the new evidence being the diagrams in Appendices B and E to the SOCAN Cross- Appellant Factum.

71 SOCAN Appeal Factum paras. 100-103.

SOCAN claims are infringing. The provision already reflects Parliament's balancing of the rights of content owners with the rights of the public to the dissemination of content.[72]

58. SOCAN claims that if an Internet intermediary enters into a contract with an end user, or offers other services besides those related to providing Internet access or hosting services, that para. 2.4(1)(b) ceases to apply because the provision requires that the means of telecommunication be the "only act".[73] This interpretation of the provision would deprive it of any meaning in the real world of telecommunications. Entities providing telephony services, for example, would be unable to contract with their clients, offer white or yellow page listing services, rental or repair of handsets, or any other offering that is ancillary to providing the means of transmitting messages for its customers, without having to pay royalties in respect of the whole of their telephony services.

59. The words "whose only act in respect of a communication of a work to the public" are intended, as the Board determined, to express the distinction between persons who are responsible for (who are the cause of) the communication of works and those persons who provide the means to enable the works to be communicated. If an Internet intermediary's only act is to transmit works for, or on behalf of, another, para. 2.4(1)(b) will apply.[74]

60. The words "only act" require an analysis in each case of the character of the activity carried on by the Internet intermediary with respect to the work alleged to have been communicated. The central question must be, in each case, whether the Internet intermediary is responsible for the communication of the particular work in issue. This analysis must focus only on acts which are relevant for copyright purposes that relate to the communication of the work in issue. Engaging in normal business activities, such as contracting with customers or engaging in marketing and promotional efforts, does not constitute "an act" of "communicating the work to the public". Accordingly, the Board was right to find that an IAP 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".[75]

---

72 Factum of the Appellants, paras. 97-98.

73 SOCAN Appeal Factum paras. 30-32, 46(b).

74 Board Decision at p. 39, **AR**, Vol. I, p. 43.

75 See *Eastern Microwave, Inc. v. Doubleday Sports Inc*. 691 F. 2d 125 (2nd Cir. 1982), at 131 n. 15 **ABA**, Vol. II, Tab 42; *Hubbard Broadcasting Inc. v. Southern Satellite Systems, Inc.* 593 F.Supp. 808 (D.Minn. 1984) at 820, aff'd 777 F. 2d 393 (8th Cir. 1985) **BARCA**, Tab 14, which express this opinion in construing the common carrier exemption in ss. 111(a)(3) of United States Copyright Act , 17 U.S.C.

III. ISSUE 3: HOST SERVER PROVIDERS DO NOT COMMUNICATE WORKS TO THE PUBLIC WHEN THEY PROVIDE HOSTING SERVICES

A. The Host Server Provider is not the Cause of a Communication

61. SOCAN claims that a host server provider does not limit itself to providing the means of telecommunication necessary for content providers to communicate works. The factual allegations made by SOCAN to support this claim are not supported by the evidence and are contrary to the findings of the Board and the FCA.[76]

62. IAPs providing hosting services are not the cause of the communications between content providers and end users.[77]

B. Para. 2.4(1)(b) of the Act applies to protect Host Server Providers

63. SOCAN's contention that host server providers cannot rely on para. 2.4(1)(b) when they provide hosting services is based on the claim that, by providing such services, host server providers are doing more than providing the means of telecommunication necessary for another person to communicate works. SOCAN's contentions are in direct conflict with factual findings made by the Board, findings which, as the Court of Appeal found, were amply supported by the evidence.[78] For the reasons set out above, host server providers also do not lose the benefit of para. 2.4(1)(b) by contracting with customers and offering other services besides hosting services. Further, for the reasons set out above, even if host server providers are responsible for the transmission of content hosted by them, they would not be liable for the communication of musical works to the public.[79]

IV. ISSUE 4: IAPS DO NOT AUTHORIZE THE COMMUNICATION OF WORKS TO THE PUBLIC WHEN THEY PROVIDE INTERNET ACCESS SERVICES OR HOSTING SERVICES

64. SOCAN does not contend that either the Board or the FCA made any error of law in interpreting the meaning of the term "authorize" in the Act. Rather, SOCAN alleges that both the Board and FCA made a factual error in failing find that IAPs and host server providers authorize content providers to communicate musical works to the public. Again, this is a direct contradiction to

---

76 SOCAN Cross-Appeal Factum paras. 18-23. See paras. 12-18 and 22-26 above.
77 See paras. 36-45.
78 SOCAN Cross-Appeal Factum, paras. 24-29. See paras. 12-18 and 22-26 above.
79 See paras. 53-60 and 48-51 above.

the unchallenged findings of the Board. The allegations made by SOCAN to support its claim are not supported by the evidence and were properly rejected by the Board and the FCA.[80]

65. The term "authorize" has been judicially construed to include anyone who "sanctions, approves, or countenances" the infringing activity. To authorize infringement, the grantor must have some degree of actual or apparent right to control the actions of the grantee before he will be taken to have authorized the act. An act is not authorized by somebody who merely enables or possibly assists or even encourages another to do that act, but who does not purport to have any authority which he can grant to justify the doing of the act. Further, it is not infringement to merely supply a person with equipment or other means of infringing a copyright whether or not the person supplying the equipment knows that it will probably be used to infringe. In order to "authorize" within the meaning of the *Act*, a person must sanction, approve or countenance something more than the mere use of equipment that might possibly be used in an actual infringement of a copyright. As well, there is a presumption that a person who authorizes an activity, authorizes that activity only so far as the activity is in accordance with law.[81]

66. Further, there can be no liability for facilitating or even authorizing what one is legally entitled to do. Therefore, contrary to the holding of the FCA, an IAP or host server provider cannot be liable for authorizing a communication that is deemed by para. 2.4(1)(b) not to be a communication.[82]

67. The Board found that content providers, and not end users, are responsible for communicating musical works to the public. Accordingly, it is impossible to assert, as SOCAN does, that the relationship between the IAP and the end user can result in an authorization to the content provider to communicate musical works to the public. Further, other than providing hosting services, IAPs typically have no contractual or economic relationship with content providers. Accordingly, as the

---

[80] See paras. 12-21 and 27-31 above.

[81] *Vigneux v. Canadian Performing Rights Society Ltd*., [1945] A.C. 108 (P.C.), Respondent's Book of Authorities ("**RBA**"), Vol. II, Tab 35; *Muzak Corp. v. CAPAC Ltd*. (1953), 13 Fox Pat. Cas. 168 (S.C.C.), **RBA**, Vol. II, Tab 31; *de Tervagne v. Beloeil* (1993), 50 C.P.R. (3d) 419 (T.D.), **RBA**, Vol. 1, Tab 25, *Amstrad Consumer Electronics Plc v. British Phonographic Industry Ltd*., [1986] F.S.R. 159 (C.A.), **BARCA**, Tab 15; *CBS Songs Ltd. v. Amstrad Consumer Electronics Plc*, [1988] 2 All E.R. 484 (H.L.), **RBA**, Vol. 1, Tab 23; *CBS Inc. v. Ames Records & Tapes Ltd.*, [1981] 2 All E.R. 812 (Ch.D.), **RBA**, Vol. 1, Tab 22; McKeown J., *Fox: Canadian Law of Copyright and Industrial Designs*, 4th ed (Scarborough; Carswell, 2003), **RBA**, Vol. 1, Tab 39 at pp. 21-103-21-107.

[82] FCA Judgment p. 57, **AR**, Vol. I, p. 125; *Composers, Authors and Publishers Association of Canada Ltd.* v. *CTV Television Network Ltd*, [1968] S.C.R. 676, **ABA**, Vol. 1, Tab 36; *Performing Rights Organization of Canada Ltd.* v. *CTV Television Network Ltd.* (1993), 46 C.P.R. (3d) 343 (Fed.C.A.), **ABA**, Vol. 1, Tab 28.

FCA found, IAPs cannot be said to implicitly authorize content providers to communicate musical works to end users.[83]

68. The IAP's situation is not at all similar to that of cable television operators. Cable operators choose the channels (*i.e.* the content) which they feature on their service and have a direct contractual relationship with the operators of those channels. Cable operators therefore do act in concert with the content provider and are a party to the communication. By contrast, IAPs generally have no control over the content transmitted over the Internet and have no direct contact (much less any contractual relationship) with the vast majority of content providers making content available to the IAP's end users.[84]

69. Host server operators only facilitate communications between content providers and end users. Generally, host server providers do not control or influence and have no actual or apparent right to control or influence the content stored or transmitted from servers hosted by them. Host server providers do nothing more than approve the mere use of equipment by content providers that might possibly be used in an actual infringement of a copyright. Accordingly, since it cannot be inferred from their activities that host server providers sanction, approve or countenance the communication of material stored by others on their servers, they cannot be said to authorize content providers to communicate infringing material.[85]

PART IV—ORDER SOUGHT

70. The Respondents on Cross-appeal respectfully request that the Cross-Appeal be dismissed and that costs be awarded to the Respondents on Cross-Appeal.

---

83 FCA Judgment, p. 58, **AR**, Vol. I, p. 126.

84 Other differences include the following: IAPs are not providers of content-related services and products in the Internet. This is in contrast to cable TV, where the provider of the physical infrastructure (the cable system) is also the unique packager of the cable content -- the selection of television channels available to the cable customer. Information transmitted over the Internet is delivered in a unicast pull mode. Traditional media are "push" because they are widely available to the mass public: Board Decision p. 17, **AR**, Vol. I, p. 21; Clark Evidence p. 307, **AR**, Vol. III, p. 399; Carroll Evidence, pp. 2443-2445, 2448-2451, 2484-2485, 2549, 2552-2553, 2572, **RRCA**, pp. 159-165, 174-175, 183-185, 187; Ralphaelson Evidence pp. 1251-1252, **RRCA**, pp. 61.1-61.2.

85 FCA Judgment, pp. 58-59, **AR**, Vol. I, pp. 126-127.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated: October 14, 2003

Thomas G. Heintzman, Q.C. Of Counsel of the Appellants/ Respondents on Cross-Appeal	Barry B. Sookman	Susan L. Gratton

PART V—TABLE OF AUTHORITIES

Court File No. 29286

IN THE SUPREME COURT OF CANADA
(Appeal from the Federal Court of Appeal)

B E T W E E N :

CANADIAN ASSOCIATION OF INTERNET PROVIDERS, CANADIAN CABLE TELEVISION ASSOCIATION, BELL EXPRESSVU, TELUS COMMUNICATIONS INC., BELL CANADA, ALIANT INC. and MTS COMMUNICATIONS INC.

Appellants/Respondents
on Cross-Appeal
(Respondents)

- and -

SOCIETY OF COMPOSERS, AUTHORS AND MUSIC PUBLISHERS OF CANADA

Respondent/Appellant
on Cross-Appeal
(Applicant)

- and -

INTERNET COMMERCE COALITION, *et al*

Interveners

FACTUM OF THE APPELLANTS/ RESPONDENTS ON CROSS-APPEAL

CANADIAN ASSOCIATION OF INTERNET SERVICE PROVIDERS, CANADIAN CABLE TELEVISION ASSOCIATION, BELL EXPRESSVU, TELUS COMMUNICATIONS INC., BELL CANADA, ALIANT INC. AND MTS COMMUNICATIONS INC.

McCarthy Tétrault LLP
Suite 4700, TD Bank Tower
Toronto-Dominion Centre
Toronto, ON M5K 1E6

Thomas G. Heintzman, Q.C.
Barry Sookman
Susan L. Gratton
Tel: 416-601-7627
Fax: 416-868-0673

Solicitors for the Appellants/
Respondents on Cross-Appeal

McCarthy Tétrault LLP
The Chambers
Suite 1400, 40 Elgin Street
Ottawa, ON K1P 5K6

Gregory Tzemenakis
Tel: 613- 238-2182
Fax: 613-563-9386

Agents for the Appellants/
Respondents on Cross-Appeal

#3646262 MT2