Tariff 22 Saga Continues — Copyright Board Issues Second Part of Tariff on Internet Music Use

Continuing a saga that has lasted for 13-plus years, the Copyright Board has delivered its reasons in *Tariff 22.B-G*. This decision sets tariffs for a variety of online music services, including webcasting, simulcasting, Internet radio and game sites, with royalties applying from 1996 to 2006. As with its predecessors, *Tariff 22.B-G* has been challenged in the courts and is unlikely to be settled in the near future.

Tariff 22.B-G is the latest instalment of a dispute that began in 1995, when the Society of Composers, Authors and Music Publishers of Canada (SOCAN) first sought a tariff for transmissions of music over the Internet. In 1996, the Copyright Board decided to simplify matters by dealing with legal and jurisdictional issues separately in a "Phase I" proceeding. In hindsight, nothing involving Tariff 22 has been simple or straightforward.

Over the next eight years, SOCAN and a coalition of Internet Service Providers contested Phase I through the Copyright Board, the Federal Court of Appeal and the Supreme Court of Canada. The Supreme Court's 2004 decision in *SOCAN* v. *Canadian Association of Internet Providers (CAIP)* resolved several uncertainties regarding the application of copyright in the digital age. Crucially, the court decided that Canada had jurisdiction over Internet communications with a "real and substantial connection" to Canada, and that Internet intermediaries acting as innocent disseminators of communications were protected by Section 2.4(1)(b) of the *Copyright Act*. However, *SOCAN* v. *CAIP* left unresolved a significant number of legal and factual issues that are only slowly working their way through the board and the courts.

Following the Supreme Court decision, the Copyright Board initiated Phase II of Tariff 22 to deal with the various ways in which music is communicated to the public over the Internet. After reviewing a vast amount of evidence and conducting a 13-day hearing, the board delivered a partial decision in October 2007. In that decision, entitled *Tariff 22.A*, the board ruled that both downloads and streams fell under the tariff governing communication to the public. It deferred addressing all other uses of music over the Internet until a later date.

More than a year later, the board delivered a second decision, *Tariff 22.B-G*, which adopted the legal reasons of *Tariff 22.A*. The new tariffs use a royalty base calculated on the number of users of the websites, rather than the uses of music on the websites. Specifics of the tariffs are set out below:

- Tariff 22.B — *Commercial radio stations* will pay a rate of 1.5 per cent of their Internet-related revenues if they are a low music use station. For others, the rate is set at 4.2 per cent. The rate bases are reduced by at least 50 per cent to account for the fact that not all radio stations' web pages contain sounds.
- Tariff 22.C — *Non-commercial radio stations* pay a rate of 1.9 per cent of their Internet operating costs, subject to the same reduction noted above.
- Tariff 22.D — *Commercial, pay and speciality television* rates are 1.9 per cent of Internet-related revenues, while *pay audio services* rates are 12.35 per cent, subject to reductions in the rate base. The rate for satellite radio has yet to be set.
- Tariff 22.E — *CBC, TVO and Télé-Québec* will pay a proportion of 10 per cent of the amounts they already pay to SOCAN, with a reduction of at least 85 per cent.

- Tariff 22.F — *Audio websites* will pay between 1.5 per cent and 5.3 per cent of their revenues depending on the amount of music used. The base will be discounted by at least 50 per cent for pages without sound. Certain Canadian sites can remove from their rate base 95% of the visits from outside of Canada. Non-Canadian sites can remove all non-Canadian visits.
- Tariff 22.G — *Game sites* will start at a rate of 0.8 per cent of the site's Internet-related revenues.

The board declined to fix a tariff covering the uses of music on websites not included in Tariffs 22A to 22G, such as social networking sites (e.g., Facebook and MySpace) and user-generated content video sharing sites (e.g., YouTube).

McCarthy Tétrault Notes:

As expected, both of the Copyright Board's Phase II decisions are under review at the Federal Court of Appeal. The court will likely to deal with them jointly in a hearing to take place in late 2009. The key issues to be considered will be:

- *The distinction between the reproduction right and the communication right* — A number of the content providers who objected to Tariff 22 are expected to argue that the rights holders who stand behind reproduction and communication rights collectives are "double dipping" by collecting royalties for both rights in respect of the same transactions over the Internet. Although Canadian courts have thus far rejected this argument, other countries such as the United States have accepted that these rights cannot both apply to acts such as downloading over the Internet. While this issue may be downplayed at the Federal Court of Appeal, it is expected to come alive should the Supreme Court of Canada agree to hear an appeal from the Federal Court of Appeal's decision.
- *The extent of the fair dealing right* — In its Tariff 22.A ruling, the board decided that previews allowing consumers to decide whether to purchase music fell within the fair dealing right, as previewing served as a tool to "facilitate the research of others." This conclusion is contested by SOCAN and will be closely watched by rights holders, intermediaries and users, as a judicial ruling on this issue will shed light on whether the fair dealing right shelters numerous "information location tools" used by an increasing number of Canadians.
- *The liability of social networking sites* — In 1995, when SOCAN published the tariff proposal that started these proceedings, sites such as Facebook, MySpace or YouTube could barely be envisioned. However, in Phase II, SOCAN attempted to claim royalties for the use of music over these sites by arguing that the board should set a tariff for "uses, not users." In its *Tariff 22.B-G* ruling, the board preferred a user-based tariff and concluded that it did not have enough information on these other sites to set a tariff. SOCAN will be contesting this result.
- *The territorial application of the tariff* — The board's conclusion on the rate discounts for non-Canadian page visits was "based on an assumption that all

> communications ending in Canada are communications in Canada, while only a small proportion of communications that end outside Canada nevertheless are communications in Canada." This point may be contested on the basis of the Supreme Court's fact-sensitive test in *SOCAN* v. *CAIP* requiring a given transmission to have a "real and substantial connection" to Canada for the purposes of copyright jurisdiction.

Given the importance of these issues to the conduct of business over the Internet, it is certain that any decision made by the Federal Court of Appeal will be appealed to the Supreme Court, leaving the resolution of this long-running dispute uncertain for some time to come.

Contact:

Barry B. Sookman in Toronto at bsookman@mccarthy.ca

or

Daniel G.C. Glover in Toronto at dglover@mccarthy.ca