

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,
ALIAN T 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 -

COPYRIGHT BOARD OF CANADA

Intervener

FACTUM OF THE APPELLANTS

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CANADIAN CABLE TELEVISION ASSOCIATION,
BELL EXPRESSVU, TELUS COMMUNICATIONS INC.,
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PART I—STATEMENT OF FACTS

IA. Introduction

1. This is an appeal from the Judgment of the Federal Court of Appeal (the “Court of Appeal”) dated May 1, 2002. In that Judgment, the Court of Appeal reversed in part the decision of the Copyright Board of Canada (the “Board”) in connection with a series of proposed tariffs (“Tariff 22”) filed by the Respondent, the Society of Composers, Authors and Music Publishers of Canada (“SOCAN”). In Tariff 22, SOCAN proposes to collect royalties under the *Copyright Act* (the “*Act*”) for the communication of musical works over the Internet.¹

2. There are two primary issues in this Appeal. The first is whether Internet service providers who provide customers with access to the Internet (“Internet access providers” or “IAPs”), communicate works to the public within the meaning of para. 2.4(1)(b) (the “intermediary provision”) and para. 3(1)(f) of the *Act* when they use devices known as “cache servers”. The intermediary provision states that a person who provides only the “means of telecommunication necessary for another person to so communicate” does not communicate under the *Act*.

3. The second issue is what criteria are appropriate to determine the location of Internet communications for the purpose of applying the *Act*.

4. On the first issue, the Appellants submit that the Board correctly held that IAPs do not communicate musical works to the public by virtue of their use of cache servers. The role of IAPs is to act as a conduit for communications made by content providers and, as such, the intermediary provision applies.

5. In rejecting the applicability of the intermediary provision, the majority of the Court of Appeal held that a cache server is not a “practical necessity for communication”. This finding contradicts key findings of fact made by the Board that were fully supported by the evidence. It

¹ Judgment, Federal Court of Appeal, May 1, 2002 (the “FCA Judgment”), Appellants’ Record (“AR”), Vol. I, p. 66; Decision of the Copyright Board, October 27, 1999 (the “Board Decision”), AR, Vol. I, p. 2; SOCAN Statement of Proposed Royalties, Public Performances of Musical Works, 1996, 1997, 1998, AR, Vol. I, p. 143; *Copyright Act*, R.S.C. 1985, c. C-42, Book of Authorities (“ABA”), Vol. I, Tab #3.

ignores the practical and economic challenges faced by IAPs in handling in a cost-effective manner the millions of packets of data flowing through their systems each day.

6. As the Court of Appeal recognized, IAPs do not, and for technical, economic and privacy reasons cannot, effectively control the content of information passing through their systems. The majority's decision could expose IAPs to copyright infringement actions in relation to the activities of third parties that IAPs can neither detect nor deter. The decision would also discourage IAPs from adopting, as part of their network infrastructure, the modern and cost-effective tools that are key to the continued evolution of the Internet.

7. The majority's decision was made with almost no analysis of the intermediary provision and no reference to the legislative history and international context in which paras. 3(1)(f) and 2.4(1)(b) were enacted. Parliament's intent was to create a technologically neutral right for copyright holders to communicate works to the public while at the same time avoiding unnecessary layering of copyright liability. The intermediary provision was intended, and is properly interpreted, to mean that communication intermediaries using facilities to enable the communication of a work by a content provider to the public do not themselves communicate the work to the public under para. 3(1)(f).

8. On the second issue, the Appellants submit that the Board correctly found on the evidence that an Internet communication occurs at the location of the host server and, accordingly, that communications originating from Canadian host servers are subject to the *Act*. The Court of Appeal erred in disregarding this finding and in applying the real and substantial connection test resulting in an extra-territorial application of the *Act*. The Court of Appeal's decision is contrary to the territoriality principle inherent in the *Act* and the treaties in relation to copyright to which Canada has adhered, and it offends international comity. It will lead to the uncertain, overlapping and unpredictable application of Canadian copyright laws.

IB. The Provisions of the *Act*

9. The provisions of the *Act* directly in issue in this appeal are as follows:

3. (1) For the purposes of this Act, "copyright", in relation to a work...includes the sole right...
- (f) in the case of any literary, dramatic, musical or artistic work, to communicate the work to the public by telecommunication... and to authorize any such acts.

2.4 (1) For the purposes of communication to the public by telecommunication...
(b) a person whose only act in respect of the communication of a work or other subject-matter to the public consists of providing the means of telecommunication necessary for another person to so communicate the work or other subject-matter does not communicate that work or other subject-matter to the public;...

IC. The Parties

10. The Appellant Canadian Association of Internet Providers (“CAIP”) represents Canadian IAPs collectively providing over 80% of Internet connections to Canadians. CAIP members include independent IAPs, telecommunications companies and cable service providers. The Appellant Canadian Cable Television Association (“CCTA”) represents Canadian cable broadcasting distribution undertakings. CCTA members use their cable facilities to deliver high speed Internet access to consumers. The Appellants TELUS Communications Inc., Bell Canada, MTS Communications Inc. and Aliant Inc. are major Canadian telephone companies that provide a full range of communication services, including Internet access, to customers across Canada. The Appellant Bell ExpressVu is a Canadian direct-to-home satellite television company that provides Internet access by satellite.

11. The Respondent SOCAN is a collective society which administers in Canada the performing and communication rights of its members and foreign composers, authors and publishers.²

ID. What is Tariff 22?

12. Each collective society in Canada that carries on the business of granting licences or collecting royalties for the communication to the public of musical works by telecommunication must file with the Board proposed tariffs of all royalties to be collected by that collective society. The Board is required pursuant to Part VII of the *Act* to consider the proposed tariffs and any objections thereto.³

13. Tariff 22 was first filed by SOCAN in 1995. In Tariff 22, SOCAN proposed a tariff for all communications to the public in Canada of musical works contained in Internet transmissions.

² FCA Judgment at para. 4, **AR**, Vol. I, p. 71.

³ *Act*, ss. 67.1, 68, **ABA**, Vol. I, Tab #3.

The proposed tariff would make entities including content providers, hosting service providers and telecommunication carriers, as well as IAPs, liable to pay SOCAN royalties.⁴

14. Despite the breadth of the proposed tariff, SOCAN in fact intends to collect royalties only from IAPs. It targets IAPs almost entirely for reasons of its own convenience and administrative ease. It seeks to collect from IAPs, to the extent that it is able, a royalty that reflects the value of the music to all users in the communication chain. IAPs are targeted even though they do not charge their clients for music made available by content providers over the Internet or know the content of data passing through their facilities.⁵

15. Tariff 22 makes no mention of caching and does not expressly seek any royalty arising from caching.⁶

IE. The Proceedings Before the Copyright Board

16. Objections were raised to the proposed Tariff and the Board ordered a two-part hearing. The first phase of the hearing was directed at determining whether IAPs, among others, “communicate to the public by telecommunication” musical works posted on the Internet or whether they only provide the “means of telecommunication necessary” for others to communicate. Only if IAPs communicate musical works can they be subject to the royalties contemplated by Tariff 22.⁷

17. In support of the proposed Tariff was SOCAN, the Canadian Motion Picture Distributors Association and the Canadian Recording Industry Association. Opponents to the proposed Tariff included the Appellants as well as AT&T Canada, MCI Communications Corporation, the

⁴ SOCAN Statement of Proposed Royalties, Public Performances of Musical Works, 1996, 1997, 1998, **AR**, Vol. I, p. 143.

⁵ SOCAN Statement of Proposed Royalties, Public Performances of Musical Works, 1996, 1997, 1998, **AR**, Vol. I, p. 143; Opening Statement made by counsel for SOCAN to the Board, October 18, 1997, at pp. 41-42, **AR**, Vol. II, p. 222-223; paras. 28, 37 and 102 *infra*; FCA Judgment at para. 7, **AR**, Vol. I, p. 72; Clark Report at p. 26, **AR**, Vol. V, p. 654; Clark Evidence at pp. 433-434, **AR**, Vol. III, pp. 440-441; Langford Report at p. 9, **AR**, Vol. V, p. 719; Jurenka Evidence at pp. 797-798, 837-839, 1585, **AR**, Vol. III, pp. 485-486, 487-489 and **AR**, Vol. IV, p. 518; Balaban/Silverman Evidence at pp. 1954-1959, **AR**, Vol. IV, pp. 533-538; Lee and Peters Report at p. 12, **AR**, Vol. V, p. 758.

⁶ SOCAN Statement of Proposed Royalties, Public Performances of Musical Works, 1996, 1997, 1998, **AR**, Vol. I, p. 143.

⁷ Board Decision at pp. 1-2, 8-9, **AR**, Vol. I, pp. 5-6, 12-13; *Act*, ss. 2.4(1)(b), **ABA**, Vol. I, Tab #3.

Canadian Association of Broadcasters, Time Warner and the Canadian Broadcasting Corporation.⁸

18. The parties submitted to the Board a great deal of expert and technical evidence on the functioning of the Internet and the role played by IAPs. The hearing process took almost two years with eleven days of oral testimony and submissions.⁹

19. The Board made comprehensive findings about the nature of the Internet, the role of the various Internet participants and, in particular, about the role of IAPs and their use of caching. These findings are summarized below in Section H. None of the factual findings of the Board was challenged before the Court of Appeal. The Appellants rely on the Board's factual findings and submit that there was no basis for the Court of Appeal to have disregarded those findings.¹⁰

IF. Structure of the Internet and the Various Roles Played in Communicating Works

20. The Internet is a worldwide network of computers and networks. Participants in Internet communications fall into three categories: content providers, end users and intermediaries. Content providers make content available on "host servers" linked to the Internet. End users link to the Internet, through a telephone line, cable modem or other means provided by intermediaries, and request and receive the content available over the Internet.¹¹

21. Internet communications occur between the computers of content providers and the computers of end users ("client computers"). Content passes from the content provider to the end user through a number of specialized devices called "routers". These and other facilities such as fibre optic cable and telephone lines, provide the Internet "backbone" over which communications are sent.¹²

22. Intermediaries are the entities that operate this infrastructure component of the Internet. Some intermediaries provide a connection to the Internet for end users. They are called Internet

⁸ Board Decision at pp. 2-3, **AR**, Vol. I, pp. 6-7.

⁹ Board Decision at pp. 2-3, 6-8, **AR**, Vol. I, pp. 6-7, 10-12.

¹⁰ Board Decision at pp. 10-27, **AR**, Vol. I, pp. 14-31; FCA Judgment at paras. 26-27, **AR**, Vol. I, pp. 78-79.

¹¹ Board Decision at pp. 3, 10-12, **AR**, Vol. I, pp. 7, 14-16; Clark Evidence at pp. 60-64, **AR**, Vol. II, pp. 229-233.

¹² Board Decision at pp. 10-12, **AR**, Vol. I, pp. 14-16; Clark Report at pp. 6-10, **AR**, Vol. V, pp. 634-638.

Access Providers, or IAPs. 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 Protocol (IP) addressing, and providing the physical and logical means to connect to the IAP.¹³

23. The Board found that the same entity may play different roles in Internet communications. In one communication, it may provide the connection for the end user to the Internet. In another, it may only operate the routers through which information is transmitted. In another, it may make content available on its servers or enable a content provider to do so. For yet another, it may be an end user of information provided by others. Consequently, in determining the liability of an IAP in respect of any particular communication, the role played by the IAP in that communication must be examined.¹⁴

24. The Internet uses a series of protocols that enable higher level applications such as the world wide web to operate. The most common protocol, transmission control protocol (“TCP”), controls most of the applications used on the Internet today. TCP resides in the host and client computers and it controls the sending and receipt of packets transmitted over the Internet. Routers and other intermediate points on the Internet have no involvement in TCP operation.¹⁵

25. In order for a transmission of content over the Internet to occur, the following events must take place. First, a file (such as a “web page”) is delivered to a host server by a content provider. Second, upon request and at a time chosen by the end user, the file is broken down into packets and transmitted from the host server to the client computer via one or more routers. Third, using the client computer, the end user reconstructs and opens the file upon reception or saves it to open it later.¹⁶

¹³ Board Decision at p. 11, **AR**, Vol. I, p. 15; FCA Judgment at para. 16, **AR**, Vol. I, p. 75; Clark Evidence at pp. 302-305, **AR**, Vol. III, pp. 394-397.

¹⁴ Board Decision at p. 12, **AR**, Vol. I, p. 16; Clark Evidence at pp. 271-272, 305-311; **AR**, Vol. III, pp. 368-369, 397-403; Carroll Evidence at pp. 2567-2569, **AR**, Vol. IV, p. 614-616.

¹⁵ Board Decision at p. 13, **AR**, Vol. I, p. 17; Clark Report at pp. 10-15, **AR**, Vol. V, pp. 638-643; Clark Evidence at pp. 70-72, 91-105, 121, **AR**, Vol. II, pp. 239-241, 260-274, 290; Buchanan/Langford Evidence at pp. 2237-2241, **AR**, Vol. IV, pp. 572-576.

¹⁶ Board Decision at p. 25, **AR**, Vol. I, p. 29; FCA Judgment at para. 21, **AR**, Vol. I, pp. 76-77.

26. Each packet contains two parts: a header and a data portion. The header has several components, each of which identifies specific delivery information about the packet. The data portion of the packet contains the content being transmitted in the packet. By looking at the packet header the router performs computations to determine the most efficient way to transmit each packet. The router does not access the data portion of the packet. It simply passes the packet along with the data portion unchanged.¹⁷

27. An end user may search for information on the Internet using a “web browser”, such as Netscape or Internet Explorer. On finding the desired information, the browser opens a TCP connection to the host server. The browser then sends a retrieval request, using a protocol called hypertext transfer protocol (“HTTP”), to the Internet address of the desired web page. The host server retrieves the matching file using HTTP. It passes that file to the host computer that uses TCP/IP to break the file into packets and sends the packets across the Internet. The packets are ultimately received by, and reassembled at, the client computer.¹⁸

28. End users locate, select and determine the content that they wish to have transmitted to them. The IAP acts as a communication utility, a mere conduit between the content provider and end user. It provides the facilities by which content is sent, unaltered, from the content provider in response to the request from the end user. The transmission process is automatic. The IAP does not know what, if any, copyrighted material has been requested, accessed, or downloaded. Because of the volume of information, as well as technical, economic and privacy factors, it is a practical impossibility for IAPs to monitor the content of information passing through their facilities.¹⁹

¹⁷ Board Decision at p. 12, **AR**, Vol. I, p. 16; Clark Evidence at pp. 77-78, 87-90, 290-293, **AR**, Vol. II, pp. 246-247, 256-259, Vol. III, pp. 386-389; Clark Report at pp. 4, 6, 16, **AR**, Vol. V, pp. 632, 634, 644

¹⁸ Board Decision at p. 14, **AR**, Vol. I, p. 18; Clark Report at p. 17, **AR**, Vol. V, p. 645; Clark Evidence at pp. 96-97, 102-103, 118-119, 247, 275, 318-321, **AR**, Vol. II, pp. 265-266, 271-272, 287-288, 361, Vol. III, p. 371, 409-412.

¹⁹ Board Decision at pp. 11-12, **AR**, Vol. I, pp. 15-16; FCA Judgment at paras. 15, 17, 145-146, 154, **AR**, Vol. I, pp. 74, 75, 122-123, 126; Clark Evidence at pp. 190, 192-194, 198-200, 232, 236-237, 275, 283-284, 289, 311-315, 318, 322-323, 346-347, 429-430, 436-438, **AR**, Vol. II, pp. 334, 336-338, 339-341, 350, 354-355, Vol. III, pp. 371, 379-380, 385, 403-407, 409, 413-414, 423-424, 438-439, 443-445; Clark Report at p. 16, **AR**, Vol. V, p. 644; Buchanan/ Langford Evidence at p. 2245, **AR**, Vol. IV, p. 577; Labelle/Hatton/Beattie Evidence at pp. 2632-2636, **AR**, Vol. IV, pp. 618-622; Carroll Report at pp. 3-4, 18-19, **AR**, Vol. V, pp. 684-685, 687-688; Carroll Evidence at pp. 2455-2456, 2500-2506, **AR**, Vol. IV, pp. 598-599, 606-612; Balaban/Silverman Evidence at p.1929, **AR**, Vol. IV, p. 531.

29. The present appeal involves cache servers used by IAPs. However, cache servers are simply one innovation among many that have made the Internet functional. The Internet has evolved through such incremental innovations that have improved its performance and usefulness in disseminating a massive amount of information to millions of users around the world. The phenomenal growth of the Internet has been made possible by innovations being gradually adopted by content providers, end users and intermediaries alike. Like all other forms of telecommunications, the original Internet is now hardly recognizable. The Internet of today is heavily dependent on these formerly “unnecessary” innovations.²⁰

IG. What is Caching ?

30. “Caching” is a term that computer scientists use to refer to the storage of computer information for future reference. Web caching expedites end users’ requests for content from a content provider’s website. The cache achieves this by keeping a temporary copy of the content on computers with large amounts of memory and high speed storage called “proxy servers” or “cache servers” (“cache servers”). The end user’s request is satisfied from the temporary copy of the content kept on the cache server.²¹

31. Cache servers may be deployed at any point in the Internet. For example, a cache server may be located close to an undersea link to overcome delays in the transmission of data from overseas.²²

²⁰ Board Decision at pp. 3-4, 16-19, 37, 49; **AR**, Vol. I, pp. 7-8, 20-23, 41, 53; Langford Report at p. 9, **AR**, Vol. V, p. 719; Clark Report at pp. 3-4, 11, 15-16, 28, 32, **AR**, Vol. V, pp. 630-631, 639, 643-644, 656, 660; Clark Evidence at pp. 68, 137-139, 151-153, 207-208, 246-247, 280-281, 391, 443-446, **AR**, Vol. II, pp. 237, 299-301, 307-309, 344-345, 360-361, Vol. III, pp. 376-377, 435, 446-449; Carroll Evidence at pp. 2423-2424, 2480-2481, **AR**, Vol. IV, pp. 594-595, 601-602; Balaban/Silverman Evidence at pp. 1897-1899, 1974-1977, 1986-1987, 2004-2006, **AR**, Vol. IV, pp. 528-530, 542-545, 548-549, 551-553; Jurenka Evidence at pp. 696-701, 713, 725-726, 745-746, 1428-1431, **AR**, Vol. III, pp. 464-469, 473, 478-479, 480-481, Vol. IV, pp. 514-517; Walker/Hoffert Evidence at pp. 1035-1036, **AR**, Vol. III, pp. 505-506; Buchanan/Langford Evidence at pp. 2371-2382, **AR**, Vol. IV, pp. 578-589; *Consultation Paper on Digital Copyright Issues* June 22, 2001, Industry Canada (the “*Consultation Paper*”) at pp. 14-15, **ABA**, Vol. III, Tab #111; Barry Leiner “A Brief History of the Internet” Version 3.31, August 4, 2000, Internet Society, at 9, 18, **ABA**, Vol. III, p. 115.

²¹ Board Decision at p. 14; **AR**, Vol. I, p. 18; FCA Judgment at paras. 18-19, **AR**, Vol. I, pp. 75-76; Clark Evidence at pp. 160-163, **AR**, Vol. II, pp. 314-317; Carroll Evidence at pp. 2506-2507, **AR**, Vol. IV, pp. 612-613; Carroll Report at p. 20, **AR**, Vol. V, p. 689; Buchanan Report at p. 16, **AR**, Vol. V, p. 708; Balaban/Silverman Evidence at pp. 2015-2016, 2093-2094, **AR**, Vol. IV, pp. 562-563, 566-567.

²² Board Decision at pp. 14, **AR**, Vol. I, p. 18; FCA Judgment at para. 19, **AR**, Vol. I, p. 76.

32. IAPs use cache servers for a number of reasons. First, cache servers accelerate the response time for end users, particularly during periods of heavy use. Second, the cache server reduces congestion and delays in the transfer of web pages. Third, caching optimizes the efficiency and performance of networks and transmissions. In some situations, IAPs use caching because it is the only commercially viable way to provide acceptable performance for content delivered through its infrastructure. It is also employed as an economically efficient alternative to acquiring additional bandwidth to speed up network performance. Speed, performance and response times are not just “nice to haves” but are essential to competitive Internet services.²³

33. For the Internet at large, caching helps to reduce the overall load on the network. A cache that satisfies a request from an end user leaves the rest of the Internet free to carry traffic for others. Caches can be used to prevent servers that host particularly popular websites from “crashing”, and thereby making content unavailable to any user of the Internet. For this reason, operators of some websites desperately want their webpages to be cached.²⁴

34. There are a number of ways to implement caching. One method involves configuring an end user browser so that requests are sent initially to a cache server maintained by the IAP. The cache server examines the request to see if the requested data already resides on the cache server. If it does, it fulfills the request from the cache server. If not, the cache server establishes a TCP connection to the content provider’s host server. The host server transmits the information to the cache server. The information is then sent back to the end user. At the same time, the cache server saves the information in the cache server for a subsequent inquiry. In general, the end user does not know that a cache server is being used by the IAP. However, end users can set their browsers to request that material is taken from the host server and not from a cache maintained by his or her IAP.²⁵

²³ Board Decision at pp. 14, **AR**, Vol. I, p. 18; FCA Judgment at paras. 17-19, **AR**, Vol. I, pp. 75-76; Clark Evidence at pp. 160-175, 288-289, 371-374, **AR**, Vol. II, pp. 314-329, Vol. III, pp. 384-385, 427-430; Balaban/Silverman Evidence, at pp. 2013-2017; **AR**, Vol. IV, pp. 560-564; Carroll Report at p. 20, **AR**, Vol. V, p. 689; Langford Report at p. 21, **AR**, Vol. V, p. 731.

²⁴ Clark Evidence at pp. 163-169, 174-175, **AR**, Vol. II, pp. 317-323, 328-329.

²⁵ Clark Report at pp. 21-22, Figures 5 and 6, **AR**, Vol. V, pp. 649-650, 667-668; Clark Evidence at pp. 158-163, **AR**, Vol. II, pp. 312-317; Jurenka Report at pp. 10-11, **AR**, Vol. V, pp. 679-680; FCA Judgment at para. 18, **AR**, Vol. I, pp. 75-76.

35. Another method of deploying cache servers relies on a network element to intercept traffic from the end user. The traffic is automatically diverted to a cache server which keeps a copy of pages recently retrieved by end users. If a second end user asks for the same page, this request can be satisfied more quickly from the copy on the cache. End users cannot disable this sort of caching.²⁶

36. When properly implemented, the cache only retains in memory web pages that are current and not out of date. End users and content providers influence what content is stored on a cache server at any particular moment in time. End users do so because caching is triggered by an initial end user request for particular content. Content providers do so because they can prohibit caching or control the length of time that content is cached.²⁷

37. By contrast, there is little control that an IAP exerts over what is cached. As SOCAN has admitted, a cache is a tool that operates automatically and without human intervention. The operation of the cache server is subject to preset rules. For example, a rule may be established to “cache all pages with x or more user requests”, “or cache the last x pages requested by all users”, or to dispose of “old” web pages. While it is conceptually possible to place some content controls on a cache, most caching products permit little, if any, control at the content level. As SOCAN has also admitted, the practice of the industry is to use a cache in an automated fashion purely to enhance the customer’s perception of the Internet and to save costs of procuring extra transmission capacity.²⁸

²⁶ Clark Report at pp. 21-22, Figures 5 and 6, **AR**, Vol. V, pp. 649-650, 667-668; Carroll Report at pp. 20-21, **AR**, Vol. V, pp. 689-690.

²⁷ Board Decision at pp. 14, 37, 49, **AR**, Vol. I, pp. 18, 41, 53; FCA Judgment at para. 18, **AR**, Vol. I, pp. 75-76; Clark Evidence at pp. 164-168, 176, 266, 276, 283-289, 369-371, **AR**, Vol. II, pp. 318-322, 330, 364, Vol. III, pp. 372, 379-385, 425-427; Carroll Evidence at pp. 2506-2507, **AR**, Vol. IV, pp. 612-613; Labelle/Hatton/Beattie Evidence at pp. 2673-2674, **AR**, Vol. IV, pp. 626-627; Buchanan/Langford Evidence at p. 2382, **AR**, Vol. IV, p. 589.

²⁸ SOCAN Response to CCTA Interrogatory 7, **AR**, Vol. V, pp. 738-739; Phase I Argument of SOCAN to the Board at p. 24, para. 84, **AR**, Vol. V, p. 765A; Clark Evidence at pp. 283-289, **AR**, Vol. III, pp. 379-385; Carroll Report at pp. 20-21, **AR**, Vol. V, pp. 689-690; Jurenka Report at pp. 10-11, **AR**, Vol. V, pp. 679-680; Jurenka Supplementary Report at p. 10, **AR**, Vol. V, p. 737; Langford Report at p. 21, **AR**, Vol. V, p. 731; Labelle/Hatton/Beattie Evidence at p. 2644-2645, **AR**, Vol. IV, pp. 623-624; Carroll Evidence at pp. 2506-2507, **AR**, Vol. IV, pp. 612-613; FCA Judgment at para. 18, **AR**, Vol. I, pp. 75-76.

III. Findings of the Board

38. The Board made a number of findings about the nature and operation of the Internet, including the following:

- A musical work is communicated by telecommunication not when it is made available but 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. A musical work need not be played or heard by the end user in order to be communicated.
- A musical work is communicated to the public where it is made available on the Internet and is targeted to a segment of the public even though it is intended to be received in individual private settings. The communication need not be instantaneous nor simultaneous.
- By making a work available, a person authorizes its communication.
- The person who makes a work available (usually the content provider) communicates it when it is transmitted from any server (host, cache, mirror).
- Generally speaking, all entities acting as Internet intermediaries, including those who cache works, do not communicate works and are exempt from paying royalties under the intermediary provision.
- Internet intermediaries who act in concert with content providers or otherwise take an active role in a communication cannot claim the benefit of the intermediary provision.
- Communications occur at the site of the server from which a work is transmitted regardless of the location of the content provider or the end user. Therefore, those communications that originate from a server located in Canada occur in Canada.²⁹

39. The Board also made several findings about the operation of cache servers. It found that cache servers are “part of the facilities of the Internet” and that “the cache, just as the router, is an intrinsic element of the telecommunications system that is the Internet.”³⁰

40. The Board further held that “one should look at the source of transmission to find out who was responsible for” a transmission over the Internet.³¹ The Board held that content providers are responsible for communications originating from host servers and from cache

²⁹ Board Decision at pp. 26-30, 36-37, 39-41 44, 46-49, **AR**, Vol. I, pp. 30-34, 40-41, 43-45, 48, 50-53.

³⁰ Board Decision at pp. 37, 49, **AR**, Vol. I, pp. 41, 53; Balaban/Silverman Evidence at pp. 2093-2094, **AR**, Vol. IV, pp. 566-567.

³¹ Board Decision at pp. 36-37, **AR**, Vol. I, pp. 40-41.

servers. It made a clear finding of fact that, so long as the role of the IAP is to act as a conduit for communications by other persons, it has the protection of the intermediary provision.³²

The person who posted the work communicates it even if the transmission originates from a source, cache or mirror server. ... the responsibility is just as clear in the case of transmissions originating from cache or proxy servers, even though these operations occur without the authorization of the person posting the work. **These are part of the facilities of the Internet.** The person posting content avails his/herself of these facilities. Indeed, he/she can prevent caching through the use of various devices such as meta-tags.³³ [emphasis added]

Moreover, an Internet intermediary 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 or because it performs certain steps or procedures (such as caching) to improve performance... As long as its role 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 exemption.³⁴

In the end, each transmission must be looked at individually to determine whether in that case, an intermediary merely acts as a conduit for communications by other persons, or whether it is acting as something more. Generally speaking, however, it is safe to conclude that with respect to most transmissions, only the person who posts a musical work communicates it.³⁵

41. The Board concluded that the term “means of communication” in the intermediary provision is to be given a broad interpretation to include the use of cache servers. The Board held that the term “means” is not limited to router or other technology. It held that “means” includes “all software connection equipment, connectivity services, hosting and other facilities and services without which such communications would not occur, just as much as the switching equipment, software and other facilities that are used as part of the infrastructure of a common carrier for the transmission of voice, data or other information”. The Board also interpreted the intermediary provision to apply to steps or procedures such as caching which are used to improve performance.³⁶

³² Board Decision at pp. 36-42, 49, **AR**, Vol. I, pp. 40-46, 53.

³³ Board Decision at p. 37, **AR**, Vol. I, p. 41.

³⁴ Board Decision at p. 39, **AR**, Vol. I, p. 43.

³⁵ Board Decision at p. 40, **AR**, Vol. I, p. 44.

³⁶ Board Decision, at p. 39, **AR**, Vol. I, p. 43.

42. The Board found that an Internet communication occurs at the site of a host server from which the work is transmitted. Applying the *Act* territorially, the Board held that the *Act* applies to Internet communications originating from a host server located in Canada. The Board left open the application of the *Act* to Internet communications from host servers located outside Canada where those communications are targeted at the Canadian public.³⁷

II. Court of Appeal Decision

43. The hearing before the Court of Appeal occurred pursuant to an application for judicial review under s.28 of the *Federal Court Act*. The Court of Appeal held that it was entitled to review the Board's decision on the basis of correctness in relation to the interpretation of para. 2.4(1)(b) and the territorial reach of the *Act*, and on the basis of simple reasonableness in relation to the application of the *Act*.³⁸

44. The Court of Appeal agreed with the Board's interpretation of the words "means of telecommunication", stating:

In my opinion, the Board was correct to conclude that the word, "means", is capable of describing a wider range of services and equipment than those provided by traditional common carriers. Accordingly, it should not be given the narrow interpretation urged by SOCAN. An important indicator that a person is providing the means to enable others to communicate by telecommunication is that the person lacks the practical ability to control and monitor content, and hence plays only a passive role in the communication.³⁹

45. Next, the majority of the Court (Evans J.A. and Linden J.A.) undertook an analysis of the word 'necessary'. The majority performed a "cursory examination of some dictionaries" and found that the words "necessary" and "nécessaire", used in the French version of the *Act*, had a range of meanings including "indispensable", "essential", "reasonably useful", "of greater or lesser benefit or convenience", "useful", or "of benefit".⁴⁰

46. Having found that the word "necessary" was susceptible of different interpretations and could be used in a less stringent sense "depending on the particular legal context in which it

³⁷ Board Decision at pp. 26-27, 36, 48-49, **AR**, Vol. I, pp. 30-31, 40, 52-53.

³⁸ FCA Judgment at paras. 36, 104-107, **AR**, Vol. I, pp. 83, 108-109.

³⁹ FCA Judgment at para. 124, **AR**, Vol. I, p. 115.

⁴⁰ FCA Judgment at paras. 127-129, **AR**, Vol. I, p. 116.

appears”, the majority stated that “the statute must be consulted for an indication of the particular shade of meaning in which Parliament used the words”. However, the majority did no analysis to determine “the particular shade of meaning” Parliament had intended in the *Act*. It did not analyze the phrase “person...providing the means of telecommunication necessary for another person to so communicate the work” either in the context of the section or in the context of the *Act* as a whole. Instead, the majority gave the word “necessary” a narrow, technical and static interpretation.⁴¹

47. The majority held that the words “necessary” or “nécessaire” were to be read synonymously with the words, “would not be practical or, in all probability, would not have occurred”. The sole reason given by the majority for this strict interpretation was to enable SOCAN to recover a royalty on behalf of authors and composers:

An argument for adopting a more permissive interpretation is that, given the rapid and recent development of Internet communication, the *Act* should not be interpreted in a way that would obstruct improvements in the quality of Internet communication, or reductions in the price at which data can be made available, made possible by rapid and fundamental technological advances. On the other hand, a relatively strict interpretation of “necessary” may be indicated by the fact that paragraph 2.4(1)(b) reduces the range of potential sources from whom authors and composers can recover a royalty for the unauthorized communication of their work by removing entities that benefit commercially from the availability on the Internet of copyright music, virtually free of charge to the end user.

On the basis of all these considerations, I have concluded that the words “necessary” and “nécessaire” are normally understood in ordinary speech in a relatively strict sense, but that in some contexts they can bear a more relaxed meaning. In my opinion, the context of paragraph 2.4(1)(b), including the existence of the competing policy considerations outlined above, does not justify interpreting “necessary” in paragraph 2.4(1)(b) in a sense that is at odds with its most familiar meaning. Hence, a person provides only the means of telecommunication necessary for another person to communicate when, without that person’s activity, communication in that medium of telecommunication would not be practicable or, in all probability, would not have occurred.⁴²

48. The majority then embarked on an analysis as to whether caching, hosting and transmission activities met this test. Hosting and transmission activities were held to be necessary to providing the means of telecommunication. Caching, on the other hand, was held to

⁴¹ FCA Judgment at paras. 127-135, **AR**, Vol. I, pp. 116-119.

⁴² FCA Judgment at paras. 131-132, **AR**, Vol. I, pp. 117-118.

be unnecessary on the basis that: (1) a cache is used to improve Internet performance and its operation by an intermediary is ancillary to the communication; (2) the evidence did not indicate that, without a cache, the transmission of music from websites would have been so slow that users were unlikely to have requested the music or so expensive that transmission costs were economically unfeasible; and (3) end users could always configure their browsers to ensure that content was transmitted from the original host server and not the cache. The majority stated:

In my opinion, however, the fact that the cache enhances the speed of transmission and reduces the cost to the Internet access provider does not render the cache a practical necessity for communication. Desirable as these features may be, they do not justify giving the word “necessary” a broader meaning than it normally bears, especially when this would further erode copyright holders’ right to be compensated for the use of their works by others...

...The evidence did not indicate that, without a cache, the transmission of music from certain Web sites would have been so slow that end users were unlikely to have requested that the music be communicated to them, or so expensive that the cost to Internet access providers of transmitting material from them would have made the communication of music from some sites economically unfeasible...

Finally, the operation of a cache could not be a practical necessity for communication by others, because, even after frequently requested material has been cached, an end user can always set the browser on his or her computer to ensure that material requested from a Web site is transmitted directly from the original host server, and not the cache. End users may do this to ensure that they have the most up-to-date information; when new information is added to a Web page, the cache is not necessarily also updated.⁴³

49. In dissent, Sharlow J.A. held that the word “necessary” in legislation that is intended to describe the technology of communication must be interpreted flexibly to recognize incremental technological improvements. She stated:

It seems to me that in the context of paragraph 2.4(1)(b) of the *Copyright Act*, something should be considered necessary for communication if it makes communication practicable or more practicable, which is the meaning that the Board has implicitly adopted. To insist, as Evans J.A. does in paragraph 135 of his reasons, that something is necessary for a communication only if it is something without which the communication probably would not occur, is to set the bar too high.

⁴³ FCA Judgment at paras. 133-137, **AR**, Vol. I, pp. 118-120.

Sharlow J.A. agreed with the Board that caching, which simply enhances the speed and efficiency of Internet communications, does not involve the communication of any work to the public under the *Act*.⁴⁴

50. The Court of Appeal also found that the Board had erred in law by applying the proposed tariff solely to Internet communications originating from servers located in Canada. The Court of Appeal held that a royalty “may” be payable in Canada in respect of an Internet communication originating from servers located outside Canada if the communication has a real and substantial connection with Canada, and that the Board was obliged to set a tariff using this test.⁴⁵

PART II—POINTS IN ISSUE

51. The points in issue in this appeal are the following:

- (1) What is the standard of review to be applied to the Board Decision?
- (2) Does para. 2.4(1)(b) of the *Act* apply to IAPs when they cache musical works?
- (3) If para 2.4(1)(b) does not apply, do IAPs communicate to the public musical works stored in cache servers within para. 3(1)(f) of the *Act*?
- (4) Is the use of the real and substantial connection test appropriate to determine the location of Internet communications for the purpose of the *Act*?

PART III—ARGUMENT

I. ISSUE 1: WHAT IS THE STANDARD OF REVIEW TO BE APPLIED TO THE BOARD DECISION?

52. The Appellants submit that applying the four factors of the pragmatic and functional test to the Board’s decision in this case leads to a standard of review of reasonableness *simpliciter*. This standard is appropriate in light of: (1) the specialized expertise of the Board in matters of applying the *Act* to new technologies; (2) the absence of any statutory right of appeal in the *Act*;

⁴⁴ FCA Judgment at paras. 196-197, **AR**, Vol. I, pp. 141-142.

⁴⁵ FCA Judgment, at paras. 163-192, **AR**, Vol. I, pp. 129-140.

(3) the purpose of the *Act* to balance the public interest in the dissemination of works and the right of creators to a just reward; and (4) the fact-specific nature of the issues before the Board.⁴⁶

53. In particular, the Board's expertise is an important factor pointing to a deferential standard of review in this case. The Board has technical expertise in regulating royalty payments for the collective administration of performing and communication rights under the *Act*. Parliament's intent to provide the Board with broad discretion in setting tariffs is demonstrated in several provisions of the *Act*. For example, ss.68(2) provides, *inter alia*, that in setting tariffs, the Board is to take into account "any factor that it considers appropriate".⁴⁷

54. The Court of Appeal held that, while questions of the general statutory interpretation of the *Act* were reviewable on a correctness standard, "issues of statutory application to the facts as found are better left to the Board and made subject to a more deferential standard of review". It is submitted that the Court of Appeal was entirely correct in adopting a reasonableness standard to questions of applying the *Act* to the facts as found. However, the Court of Appeal failed to properly apply this reasonableness standard to the Board's findings of fact and mixed fact and law. Instead, the Court of Appeal incorrectly characterized such findings as findings of pure law.⁴⁸

55. Most of the Board's findings were findings of fact and mixed fact and law arising from the technical evidence before the Board on the nature of Internet communications. Such findings included the following:

- (a) The person who makes a work available on the Internet (usually the content provider) communicates the work;
- (b) The operation of a cache server does not, by itself, amount to a communication;
- (c) Cache servers are part of the facilities of the Internet and an intrinsic element of the telecommunication system that is the Internet; and

⁴⁶ *Dr. Q v. College of Physicians and Surgeons of B.C.*, 2003 SCC 19 at paras. 26-35, **ABA**, Vol. II, Tab #41; *Law Society of New Brunswick v. Ryan*, 2003 SCC 20 at paras. 21-27, 41-56 ("*Law Society of New Brunswick*"), **ABA**, Vol. II, Tab #54; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982 at paras. 26-38, **ABA**, Vol. II, Tab #75; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 at paras. 28-62 ("*Southam*"), **ABA**, Vol. I, Tab #30.

⁴⁷ FCA Judgment, at paras 70-76, **AR**, Vol. I, pp. 95-97; *Réseaux Premier Choix Inc. v. Canadian Cable Television Assn.* (1997), 80 C.P.R.(3d) 203 (Fed.C.A.) at para. 15 ("*Réseaux*"), **ABA**, Vol. II, Tab #82; *Act*, ss. 66.51, 66.52, 66.6, 66.7, 68, **ABA**, Vol. I, Tab #3.

⁴⁸ FCA Judgment at paras. 36, 77-83, 107, 134, 170-171; **AR**, Vol. I, pp. 83, 97-100, 109, 118, 132.

(d) An Internet communication occurs at the place of the host server.⁴⁹

56. These findings were **not** a matter solely of interpreting the *Act*. They were findings about the nature of Internet communication and whether the facts satisfied the language of paras. 3(1)(f) and 2.4(1)(b) of the *Act*. Therefore, these findings were clearly findings of fact, or mixed fact and law. In particular, finding (c) was a pure finding of fact about the nature of cache servers and their role as part of the facilities of the Internet.⁵⁰

57. In making these findings, the Board considered a wealth of complex evidence on Internet technology and the impact of technology on the evolution of the Internet and, more generally, the communications industry. It is submitted that the Board appropriately weighed all of this evidence and applied the correct legal concept of a communication. The Board had extensive exposure to the evidence, heard the witnesses *viva voce* and was more familiar with the case as a whole. Therefore, the Board's findings were not to be ignored, and, at the very least, were deserving of considerable deference by the Court of Appeal.⁵¹

58. In fact, at the hearing before the Board, SOCAN did not argue that caching operations were not "necessary" within the meaning of the intermediary provision. Nor did it do so in its Notice of Application for Judicial Review or in its Factum to the Court of Appeal. In its Factum, SOCAN argued that para. 2.4(1)(b) referred to equipment and facilities of, and not services provided by, IAPs, and to intermediaries carrying on backbone or router functions; it did not argue that caching was not "necessary". It is submitted that the Court of Appeal erred in diverging from the findings of the Board, as well as the arguments of the parties, in holding that caching was not necessary under para. 2.4(1)(b).⁵²

⁴⁹ Board Decision at pp. 26-27, 36-37, 39-40, 44, 48-49, **AR**, Vol. I, pp. 30-31, 40-41, 43-44, 48, 52-53.

⁵⁰ *Southam*, at 766-771, **ABA**, Vol. I, Tab #30; *Housen v. Nikolaisen*, 2002 SCC 33 at para. 28 ("*Housen*") **ABA**, Vol. II, Tab #48; *Law Society of New Brunswick*, at paras. 41-42, **ABA**, Vol. II, Tab #54.

⁵¹ *Southam*, at 770-771, **ABA**, Vol. I, Tab #30; *Housen*, at paras. 25, 32, 37, **ABA**, Vol. II, Tab #48; *Réseaux*, at para. 15, **ABA**, Vol. II, Tab #82.

⁵² SOCAN Argument to the Board, pp. 1-3, 56-62 (Answer to Question 2(c)), **AR**, Vol. V, pp. 762-773; Notice of Application for Judicial Review, **AR**, Vol. I, p. 201; SOCAN Factum to Federal Court of Appeal, pp. 21-25, **AR**, Vol. V, pp. 777-782; see *Pfizer Company Limited v. Canada (Deputy Minister of National Revenue for Customs and Excise)*, [1977] 1 S.C.R. 456 at 463, **ABA**, Vol. II, Tab #68; *Cronk v. Canadian General Insurance Co.* (1995), 25 O.R. (3d) 505 at 517-518 (C.A.), **ABA**, Vol. I, Tab #38; *Kalkinis (Litigation Guardian of v. Allstate Insurance Co. of Canada)* (1998), 41 O.R. (3d) 528 at 533 (C.A.), **ABA**, Vol. II, Tab #53; *Poirier v. Canada (Minister of Veterans Affairs)*, [1989] 3 F.C. 233 at 247 (C.A.), **ABA**, Vol. II, Tab #71; *Tetrault-Gadoury v. Canada Employment and Immigration Commission*, [1991] 2 S.C.R. 22 at 37-38, **ABA**, Vol. III, Tab #88.

59. Given the fact-intensive nature of the findings made by the Board and its expertise in setting tariffs according to the policy underlying the *Act*, it is submitted that the appropriate standard of review of the Board's decision was reasonableness. Therefore, the Court of Appeal erred in interfering with the Board's findings that caching is "necessary" for the purposes of para. 2.4(1)(b) of the *Act* and that a communication occurs in Canada when it originates from a host server located in Canada.

II. ISSUE 2: DOES PARA. 2.4(1)(B) OF THE ACT APPLY TO IAPS WHEN THEY CACHE MUSICAL WORKS?

60. The proper approach to the interpretation of a statute is to read the words "in their entire context and in a grammatical and ordinary sense harmoniously with the scheme of the *Act*, the object of the *Act*, and the intention of Parliament".⁵³ In particular, the interpretation of copyright legislation related to telecommunications must occur in the real world of telecommunications, and not in a vacuum, taking into account the practical consequences of the suggested interpretations in the real business world.⁵⁴ The factual matrix in which the legislation was enacted must also be considered.⁵⁵

61. The Appellants submit that, properly interpreted, para. 2.4(1)(b) means that intermediaries will not be liable for communicating works to the public under the *Act* when they use any technical method or process, or use any technology or service to enable another person, such as a content provider, to communicate a work to the public. This interpretation of the intermediary provision is supported by a reading of its words, its legislative history and its purpose.

IA. The Grammatical and Ordinary Sense of Para. 2.4(1)(b)

⁵³ *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559 at paras. 26-30, ("*Bell Express Vu*"), **ABA**, Vol. I, Tab #23; See also *Harvard College v. Canada (Commissioner of Patents)*, 2002 SCC 76 at para 11, ("*Harvard College*"), **ABA**, Vol. II, Tab #47; *Compo Co. v. Blue Crest Music, Inc.*, [1980] 1 S.C.R. 357 at 360, ("*Compo Co.*"), **ABA**, Vol. II, Tab #35.

⁵⁴ *Hubbard Broadcasting Inc. v. Southern Satellite Systems, Inc.* 777 F. 2d 393 (8th Cir. 1985), at 400 ("*Hubbard Broadcasting*") **ABA**, Vol. II, Tab #49; *Eastern Microwave, Inc. v. Doubleday Sports Inc.* 691 F. 2d 125 (2nd Cir. 1982), at 132 ("*Eastern Microwave*") **ABA**, Vol. II, Tab #42; *N.F.L. v Insight Telecommunications Corp.* 158 F.Supp.2d 124 (D.Mass.2001) at 132, **ABA**, Vol. II, Tab #66.

⁵⁵ Sullivan, *Sullivan and Dreiger on the Construction of Statutes*, 4th ed., 2002, at 457-458, ("Sullivan"), **ABA**, Vol. III, Tab #122.

62. Para. 2.4(1)(b) is part of the definition of the phrase “communication to the public by telecommunication” and, as the Court of Appeal held, is “intended to clarify what might otherwise be an uncertainty about the scope of the word ‘communicate’”. The paragraph should be regarded as definitional, rather than as an exemption, as is suggested by its location in the interpretation section of the *Act*.⁵⁶

63. Whether construed as a definition or as an exemption, the intermediary provision should be given such fair, large and liberal construction and interpretation as best ensures the attainment of the purposes of the *Act*.⁵⁷ Exceptions from infringement are not to be construed narrowly. They are an indispensable complement to an author’s exclusive rights. Together, they form an important balance between authors’ rights and the interests of the community.⁵⁸

64. The Appellants submit that a plain reading of each of the individual words within the intermediary provision supports the conclusion that IAPs were not intended to be regarded as communicating for the purposes of the *Act* regardless of whether or not they employ cache servers.

(a) “person...providing the means”

65. The phrase “person...providing the means” refers to the intermediary, in this case an IAP, and all the facilities and services it provides. The intent is to provide protection for a “person” providing the means, not for a particular “means”.

66. The relevant question is whether an IAP is providing the means to enable the content provider to communicate his or her works to the public; **not** whether a particular piece of equipment used by the IAP is doing so. On the evidence and the Board’s findings, IAPs are clearly “persons...providing the means”.

⁵⁶ FCA Judgment at para. 116, **AR**, Vol. I, p. 112. See *CTV Television Network Ltd. v. Canada (Copyright Board)* (1993), 46 C.P.R. (3d) 343 at 356-357 (Fed. C.A.) interpreting section 2.4 (1) (c) (formerly section 3(1.4) also as an “interpretive provision” (“*CTV Television Network*”), **ABA**, Vol. I, Tab #28.

⁵⁷ *Interpretation Act* R.S. 1985, c. I-21, Section 10, **ABA**, Vol. I, Tab #7.

⁵⁸ *Théberge v. Galerie d'Art du Petit Champlain inc.*, [2002] 2 S.C.R. 336 at paras. 30-31, (“*Théberge*”), **ABA**, Vol. III, Tab #89; Copyright Law Review Committee, *Copyright and Contract* (Australia, October 8, 2002) at para. 3.06, **ABA**, Vol. III, Tab #102.

(b) “means of telecommunication”

67. The phrase “**means of telecommunication**”, as both the Board and Court of Appeal found, is a broad and encompassing one. It refers to any technical method or process, and any technology or service, which is employed in the communication of any information. This interpretation follows from the plain and ordinary meaning of the word “means” which, in the section itself, and in related provisions of the *Act* is used in a broad unrestricted sense.⁵⁹ It also follows from the meaning of the word “telecommunication” which is defined in the *Act* as “any transmission of signs, signals, writing, images or sounds or intelligence of any nature by wire, radio, visual, optical or other electromagnetic system”.⁶⁰

68. Therefore, the “means of telecommunication” includes all facilities and services used by an intermediary, such as an IAP, when that intermediary enables another person to communicate works to the public. The Board made a clear factual finding that cache servers are “an intrinsic element of the telecommunications system that is the Internet” and “are part of the facilities of the Internet”. It is submitted that the Court of Appeal erred in ignoring these findings.⁶¹

(c) “necessary”

69. As the Court of Appeal pointed out, the word “necessary” is a word susceptible of various meanings. The term is defined in *Black’s Law Dictionary* as follows:

This word must be considered in the connection in which it is used, as it is a word susceptible of various meanings. It may import absolute physical necessity or inevitability, or it may import that which is only convenient, useful, appropriate, suitable, proper or conducive to the end sought. It is an adjective expressing degrees, and may express mere convenience or that which is indispensable or an absolute physical necessity. It may mean something which in the accomplishment of a given object cannot be dispensed with, or it may mean something reasonably useful and proper, and of greater

⁵⁹ See, for example, the definition of the term “performance” in s.2 of the *Act* which “means any acoustic or visual representation of a work... made by *means* of any mechanical instrument, radio receiving set or television receiving set”. See also the exclusive right conferred on copyright owners pursuant to s.3(1) of the *Act* which gives the copyright owner the sole right “in the case of a literary, dramatic or musical work, to make any sound recording, cinematographic film or other contrivance by *means* of which the work may be mechanically reproduced or performed”, *ABA*, Vol. I, Tab # 3.

⁶⁰ *Act*, s.2 definition of “telecommunication”, *ABA*, Vol. I, Tab # 3.

⁶¹ Board Decision at p. 39, *AR* Vol. I, p. 43.

or lesser benefit or convenience, and its force and meaning must be determined with relation to the particular object sought.⁶²

This definition has been applied in Canadian cases.⁶³

70. The Appellants submit that, in the context of para. 2.4(1)(b), “necessary” means that which is convenient, useful or proper to enable others to communicate works to the public.⁶⁴

71. Numerous cases have given the term “necessary” a comparable interpretation in other legislative contexts.⁶⁵ The term is also used elsewhere in the *Act* in a manner demonstrating that Parliament did not intend a strict sense of the term in the intermediary provision.⁶⁶

72. The Court of Appeal itself implicitly recognized that the word “necessary” means “to enable others” or “of enabling others” to communicate by telecommunication. This is demonstrated elsewhere in the Judgment where the term “enables” has been used in place of the word “necessary”.⁶⁷

⁶² *Black’s Law Dictionary*, 6th ed. (St. Paul: West Publishing Co., 1990), **ABA**, Vol. III, Tab #99; also see *West’s Legal Thesaurus/Dictionary: A Resource for the Writer and the Computer Researcher*, West Publishing Company, Minnesota, 1985, at 512, **ABA**, Vol. III, Tab #120.

⁶³ *Mageau v. Mageau* (1978), 22 O.R. (2nd) 179 at 181 (H.C.J.), **ABA**, Vol. II, Tab #58; *Re G.* (1984), 51 Nfld. & P.E.I.R. 263 at 267 (Nfld.S.C., Unified Family Ct.), **ABA**, Vol. II, Tab #78; *AirBC v. C.A.W. Canada, Local 2213* (1997), 61 L.A.C. (4th) 406 at 422-424, **ABA**, Vol. I, Tab #18.

⁶⁴ See M. Racicot, *The Cyberspace is Not a “No Law Land”*: A Study of the Issues of Liability for Content Circulating on the Internet, (Ottawa: Industry Canada, 1997) (*Cyberspace is Not a “No Law Land”*) at 272-274, **ABA**, Vol. III, Tab #116.

⁶⁵ *Re: An Inquiry under the Companies Securities (Insider Dealing) Act 1985*, [1988] AC 660 at 704 (H.L.), **ABA**, Vol. II, Tab #77; *Saskatchewan (Human Rights Commission) v Saskatoon (City)*, [1989] S.C.R. 1297 at 1311, **ABA**, Vol. II, Tab #83; *Prince Albert (City) v. Canadian Northern Railway* (1913), 10 D.L.R. 121 at 125 (Sask. S.C.), **ABA**, Vol. II, Tab #72; *Re Haggert Brothers Manufacturing Co.*, 20 O.A.R. 597 at 602, (C.A.), **ABA**, Vol. II, Tab #79; *Lewis v. Weston-Super-Mare Local Board* (1889), 40 Ch. D. 55 at 67, **ABA**, Vol. II, Tab #55; *MGN Pension Trustees Limited v. Bank of America National Trust and Saving Association*, [1995] 2 All E.R. 355 at 361-362 (Ch.D.), **ABA**, Vol. II, Tab #57; Also see *Words and Phrases*, Permanent Edition, Vol.28, West Group, 2003 at 208, 212, 217, 219, 221, 236 (quoting from *Clerk, Supreme Court*, 361 So.2d 361; *Chicago, M. & St. P. Ry. Co. v. Kootenai County*, 192 P. 562; *City of Baltimore v. Chesapeake & P. Tel. Co.*, 48 A. 465; *Marshall County v. Rokke*, 159 N.W. 791; *In re Application A-16642*, 463 N.W.2d 591; and *Minneapolis St. P. & S.S.M. Ry. Co. v. Douglas County*, 150 N.W. 422), **ABA**, Vol. III, Tab #124.

⁶⁶ See s.2 definition of “maker”, s.30.1(1)(b)-(f) which addresses management and maintenance of information in libraries, archives and museums, s.34(5) which addresses practice and procedure, s.45(1) dealing with evidence, s.66.4(1) dealing with Copyright Board staff, s.66.7(1) dealing with the general powers of the Board, s.68(3) which deals with certification of tariffs, s.70.15(1) which deals with certification of tariffs, and s.91 which addresses adherence to the *Berne* and *Rome* Conventions, **ABA**, Vol. I, Tab #3. See also, s.27 of the Transitional Provisions of R.S.C. 1985 c. 10 (4th Supp) dealing with continuation in office of members of the Copyright Appeal Board, **ABA**, Vol. I, Tab #1.

⁶⁷ FCA Judgment at paras. 124-125, **AR**, Vol. I, p. 115.

73. The Internet is, in effect, a utility which provides communication services between content providers and end users. In the context of utilities, the word “necessity” has not been interpreted as importing indispensable or physical necessity. Nor has the word “necessity” been restricted to present needs, but instead has been interpreted to include provision for the future. In the context of utilities, this Court has repeatedly held that necessity is a matter of opinion to be determined by the expert tribunal and not reviewed by appellate courts.⁶⁸

74. In using the word “necessary” in para. 2.4(1)(b), it is submitted that Parliament’s intent was clearly not to focus on the particular means used to communicate, but rather on whether the actual means of telecommunication used are necessary for another person (the content provider) to communicate the work to the public.

75. The restrictive interpretation of “necessary” adopted by the majority of the Court of Appeal requires that a communication “not be practicable”, or “in all probability would not have occurred”, without the use of any particular component of an intermediary’s facilities. This interpretation creates a standard which is impossible to apply given the manner in which services are provided in the real world of telecommunications.⁶⁹

76. Some components of an IAP’s facilities may be unnecessary for some communications but necessary for others. Under the majority’s interpretation of the intermediary provision, an IAP would have to show that each component of its system was “necessary” for a particular communication. It is submitted that such a piecemeal approach to the application of para. 2.4(1)(b) could not have been intended by Parliament.

77. The phrase “means of telecommunication necessary for another” could not have been intended to require proof that, without the use of any particular item of equipment, the transmission of content would be slow or uneconomic. Any such condition would discourage IAPs from upgrading their facilities until such facilities had degraded to the point where all

⁶⁸ *Union Gas Co. v. Sydenham Gas & Petroleum Co.* [1957] S.C.R. 185 at 188, **ABA**, Vol. III, Tab #92; *Memorial Gardens Assn. (Can.) Ltd. v. Colwood Cemetery Co.*, [1958] S.C.R. 353 at 356, **ABA**, Vol. II, Tab #60; *Canada (Canadian Transport Commission) v. Worldways Airlines Ltd.*, [1976] 1 S.C.R. 751 at 760-761, **ABA**, Vol. I, Tab #29.

⁶⁹ FCA Judgment at para. 132, **AR**, Vol. I, pp. 117-118.

copyrighted works being communicated could not practically occur without the technological upgrade.

78. Even SOCAN's expert, Dr. Clark, one of the founders of the Internet, admitted to the Board that the term "necessary" in the context of any particular Internet technology is a relative term. He was very uncomfortable in expressing opinions on whether any particular technology was "necessary".⁷⁰

79. It is submitted that the determination of whether or not a particular means of telecommunication is "necessary" was intended by Parliament to be left to the intermediary rather than the courts. If an intermediary determines that the use of a cache server results in improved Internet performance and reduced costs (a fact acknowledged by the Court of Appeal), and the cache server is in fact used by the intermediary, then the cache server thereby becomes, in fact and in law, part of the necessary means by which the communication is made to the public.⁷¹

80. The Court of Appeal's holding that the operation of a cache could not be a practical necessity for communication by others because "an end user can always configure his or her computer to receive content from the original host server, and not the cache" also misconstrues the person for whom the means of telecommunication is necessary. Para. 2.4(1)(b) requires that the matter be looked at from the perspective of the content provider who is communicating, **not** the end user. From the content provider's perspective, the IAP's facilities, however configured, are "necessary" to enable the content provider to communicate a work to an end user. It is irrelevant whether an end user can control material directly from a website and not the cache.⁷²

81. It is also submitted that the Court of Appeal erred in considering whether the transmission in question could occur through another IAP, or through the same IAP if it abandoned caching. Hypothetical considerations about how the communication could have been made are irrelevant. If the communication was in fact made through the IAP using a cache, then the question is whether that IAP qualifies for the protection of the intermediary provision. Since

⁷⁰ Clark Evidence at pp. 149-150, 188-190, **AR**, Vol. II, pp. 305-306, 332-334.

⁷¹ FCA Judgment at paras. 135-136, **AR**, Vol. I, pp. 118-119.

⁷² FCA Judgment at para. 137, **AR**, Vol. I, pp. 119-120.

the IAP in fact provided the means necessary for the communication to be made, then the intermediary provision applies.⁷³

82. The Court of Appeal was also incorrect to conclude that caching is not a practical necessity because it is “an activity that is ancillary to communication by the content provider”. This holding misconstrues the decision of the Board. The Board held that an IAP is not precluded from relying on the intermediary provision “simply because it provides services that are ancillary to providing the means of communication **or** because it performs certain steps or procedures such as caching to improve performance”.⁷⁴

83. However, if a cache server is only “ancillary” to the communication of a work, as suggested by the Court of Appeal, then its use cannot amount to a communication of a work within the meaning of para. 3(1)(f) of the *Act*. Hence, its use by an Internet intermediary could not be infringing. If, however, it is viewed as a device used to communicate works then the intermediary provision must apply to its use. It cannot reasonably be contended that the word communicate is to be given a meaning different in para. 3(1)(f) of the *Act* than in para. 2.4(1)(b) thereof.⁷⁵

84. Further, if the intermediary provision is construed so as to permit IAPs to take steps to improve performance of their facilities as the Board had held, then any particular means of doing so cannot be excluded because it is “unnecessary” for a communication to occur without also excluding all other available means. For example, if the use of a cache server is not “necessary” to communicate a work, because steps to improve performance can be solved with other available means such as more bandwidth, then the acquisition of additional bandwidth to improve performance should also not be “necessary” because there are other available means of solving the performance problem, such as the use of caching technology.

85. The Court of Appeal’s decision also ignores the evidence and the findings of the Board relating to the evolution of the Internet. Its history has been one of technological innovation

⁷³ FCA Judgment at para. 136, **AR**, Vol. I, p. 119.

⁷⁴ [emphasis added] Board Decision at p. 39, **AR**, Vol. I, p. 43.

⁷⁵ *Canadian Assn. of Broadcasters v. Society of Composers, Authors and Music Publishers of Canada* (1994), 58 C.P.R. (3d) 190 (Fed.C.A.) at 197-198 (“*Canadian Assn. of Broadcasters*”), **ABA**, Vol. I, Tab #33.

gradually progressing from not being strictly necessary in its day to becoming essential to modern Internet telecommunications. Dr. Clark testified that, theoretically, the Internet would work with two tin cans connected by a string. Dr. Clark also pointed out that there are “kids on street corners” who put modems in their bedrooms and offer internet access service. He went on, however, to acknowledge that such kids are not successful in attracting many customers.⁷⁶

86. If the reasoning of the majority were to have been applied in an earlier age, none of the developments in Internet communications used by intermediaries could have occurred without subjecting them to liability. There would be no “need” for satellites, facsimile machines, or, for that matter, the Internet. In each case, the existing means of communicating works were available such that new technologies would not have been strictly “necessary” to effect a communication.

87. In summary, it is submitted that, on a plain reading of the words of para. 2.4(1)(b), an IAP who uses any means of telecommunication, including a caching server, to enable another person (such as a content provider) to communicate works to the public is thereby providing the means necessary for that person to communicate and is, therefore, not itself communicating to the public.

IB. Legislative History of Para. 2.4(1)(b)

88. The above plain language interpretation of the intermediary provision is supported by the legislative history of the provision. Its history shows that it was intended to clarify that intermediaries do not communicate works and to promote the dissemination of works to the public.

89. Until 1989, para. 3(1)(f) of the *Act* created a mere right to “communicate by radio-communication”. That right was added to the *Act* after Canada became a party to the *Berne Convention for the Protection of Literary and Artistic Works* (the *Rome Copyright Convention*, 1928). Under the law as it stood at that time, a cable transmission of works was not protected by copyright since it was not considered a “radio-communication”, or a “public performance”.

⁷⁶ See para. 29 above ; Clark Evidence at pp. 77-79, 302, **AR**, Vol. II, pp. 246-248, Vol. III, p. 394.

Canadian cable or satellite transmission systems were not required to pay copyright owners for the uses of their works.⁷⁷

90. In 1987, Canada entered into the *Free Trade Agreement* with the United States. Article 2006 thereof required each party's copyright law to provide a copyright holder of the other party with a right of equitable and non-discriminatory remuneration for certain retransmissions to the public of broadcast television signals.⁷⁸ When the legislation was enacted, the Canadian government recognized that technology could evolve in unpredictable ways. Accordingly, Parliament decided to enact a technologically neutral retransmission right to cover both the originating broadcast and any retransmission over any kind of telecommunications medium.⁷⁹

91. In 1988, the *Act* was amended to implement Canada's obligations under the *Free Trade Agreement*.⁸⁰ The amendment replaced the phrase "communicate the work by radio-communication" with "communicate the work to the public by telecommunication". The definition of "telecommunication" was added to the *Act* to clarify that all telecommunications to the public, including communications by wire, are subject to copyright.⁸¹

92. The 1988 amendments also added a number of interpretative provisions to the *Act*.⁸² Two of the interpretative provisions were designed to protect communication intermediaries when they act as passive carriers in the communication of works. It is submitted that that Parliament's intent in enacting such provisions was to avoid "unnecessary layering of copyright

⁷⁷ *Canadian Admiral Corporation Ltd. v. Redifusion Inc. Ltd.*, [1954] Ex. C. R. 382 at 407-410, **ABA**, Vol. I, Tab #32; Keyes et al *Copyright in Canada: Proposals for a Review of the Law*, Consumer and Corporate Affairs Canada (April 1977) ("Keyes Copyright in Canada") at 130, **ABA**, Vol. III, Tab #112; Erola et al, *From Gutenberg to Telidon: A White Paper on Copyright* (Ottawa: Consumer and Corporate Affairs Canada, 1984) ("From Gutenberg to Telidon") at 91-94, **ABA**, Vol. III, Tab #105; Sub-Committee on the Revision of Copyright, *A Charter of Rights for Creators*, (Ottawa: Supply and Services Canada, 1985) ("Charter of Rights for Creators") at 77-78, **ABA**, Vol. III, Tab #121.

⁷⁸ *The Canada-U.S. Free Trade Agreement*, December 10, 1987, Article 2006, **ABA**, Vol. I, Tab #11.

⁷⁹ *Charter of Rights for Creators* at 79-80, **ABA**, Vol. III, Tab #121.

⁸⁰ *Canada-United States Free Trade Agreement Implementation Act*, ss. 61-65, 149, 150, proclaimed in force February 13, 1989, **ABA**, Vol. I, Tab #2.

⁸¹ The amendments also created a special compulsory licence regime with respect to simultaneous retransmission of broadcast signals: s.28.01(2) of the *Act* (now s.31), **ABA**, Vol. I, Tab #3; *CTV Television Network*, at 355-356 (Fed. C.A.), **ABA**, Vol. I, Tab #28.

⁸² Sections 3(1.1), (1.2), 3(1.3), 3(1.4), and 3(1.5) created by s.62 of the *Canada-United States Free Trade Agreement Implementation Act* (now ss. 2.4(1)(a)-(c) and 2.4(3)) of the *Act*), **ABA**, Vol. I, Tab #2.

liability”.⁸³ The first provision was intended to protect passive retransmitters who retransmit signals carrying works to a person who is a retransmitter under the *Act* (the “retransmitter provision”).⁸⁴

93. The second interpretive provision, para. 2.4(1)(b), recognizes that an intermediary has no practical ability to deter infringement with respect to the gigantic volume of information of every description flowing through its facilities every day. The intermediary provision, like the retransmitter provision, ensures that works protected by copyright will be broadly disseminated to the public using the facilities and services of intermediaries. It also ensures that such dissemination will not be frustrated by claims of copyright holders that cannot practically be deterred by intermediaries.

94. Para. 2.4(1)(b) was introduced at the same time as para. 3(1)(f). While the latter provision created liability for the communication of musical works, the former clarified that no such liability applied to intermediaries. The net effect was to maintain the existing absence of liability of intermediaries for copyright infringement. Except as expressly stated, the *Act* is not to be interpreted as changing that law.⁸⁵

95. The interpretative provisions introduced into the *Act* in 1988 also reflect the principle, well accepted under the *Berne Convention*, that the mere provision of physical facilities for enabling or making a communication does not itself amount to a communication.⁸⁶ The word

⁸³ *Charter of Rights for Creators* at 80, **ABA**, Vol. III, Tab #121; Standing Committee on Communications and Culture, *Government Response to the Report of the Sub-Committee on Revision of Copyright*, (Ottawa: 1986) (“*Government Response on the Revision of Copyright*”) at 15, **ABA**, Vol. III, Tab #119.

⁸⁴ Section 2.4(3) of the *Act* states “a work is not communicated in the manner described in paragraph (1)(c) or (1)(f) where a signal carrying the work is retransmitted to a person who is a retransmitter within the meaning of subsection 31(1). S.C.2002, c.26, s.1; see C. Brunet, “Copyright: the Economic Rights” in G. Henderson, *Copyright and Confidential Information Law of Canada* (Toronto: Carswell, 1994) (“*Brunet Copyright: Economic Rights*”) 129 at 151, **ABA**, Vol. III, Tab #101; *Copyright Act of 1976*, 17 U.S.C. Section 111-(a)(3)(c)-(d), **ABA**, Vol. I, Tab #4; *Hubbard Broadcasting*, at 396, 400, 402-403, **ABA**, Vol. II, Tab #49; *Eastern Microwave*, at 130, 132-133, **ABA**, Vol. II, Tab #42.

⁸⁵ Sullivan, at 395-396, **ABA**, Vol. III, Tab #122.

⁸⁶ *WIPO Copyright Treaty* and the *Agreed Statements of the Diplomatic Conference* that adopted the Treaty (“*WIPO Copyright Treaty 1996*”), Article 8 at pp. 4, 28, **ABA**, Vol. I, Tab #15; The *Agreed Statements* states: “It is understood that the mere provision of physical facilities for enabling or making a communication does not itself amount to communication within the meaning of this Treaty or the *Berne Convention*...” (emphasis added). The *Berne Convention* can be used to construe the *Act* where it is ambiguous. See, *Composers, Authors and Publishers Association of Canada Limited v. CTV Television Network*, [1968] S.C.R. 676 at 682 (“*Composers, Authors and Publishers Association of Canada*”), **ABA**, Vol. I, Tab #36; *Bishop v. Stevens*, [1990] 2 S.C.R. 467 at 473-475 (“*Bishop*”), **ABA**, Vol. I, Tab #24; *Delrina Corp. v. Triolet Systems Inc.* (2002), 58 O.R. (3d) 339 at 349 (Ont. C.A.) (“*Delrina*”), **ABA**, Vol. II, Tab #40; *Zamacois v. Douville*, [1943] 2 D.L.R. 257 at 271 (Ex. Ct.), **ABA**, Vol. III,

“communicate”, as the Court of Appeal pointed out, “implicitly excludes merely enabling another to communicate”.⁸⁷ The interpretative provisions thus give effect to the principle that, to infringe the right to communicate a work to the public, a person must be the cause of the communication. They also reflect the principle that passive conduits of information, that merely enable another to communicate, do not themselves “communicate” the information passing through their facilities.⁸⁸

96. In summary, the legislative history establishes that para. 2.4(1)(b) was intended to foster the dissemination of works by clarifying that intermediaries who provide facilities or services to enable others to communicate works to the public are not liable for such communications. Para. 2.4(1)(b) was enacted the same time as para. 3(1)(f) and was intended to maintain the pre-existing absence of liability of intermediaries. The Court of Appeal’s strict construction of the word “necessary” in the intermediary provision is inconsistent with the history and objects of the provision.

IC. The Purpose of the Act

97. The *Act* strikes a balance between promoting the public interest in the encouragement and dissemination of works and providing an incentive for creators to produce works by giving creators a just reward.⁸⁹ Courts in this country have long recognized the important policy

Tab #96; *Canadian Cable Television Assn. v. Canada (Copyright Board)* (1993), 46 C.P.R. (3d) 359 at 366-367 (Fed. C.A.), leave to appeal to S.C.C. refused (1993), 51 C.P.R. (3d) v (note) (S.C.C.) (“*Canadian Cable Television Assn.*”), **ABA**, Vol. I, Tab #34; *Canadian Assn. of Broadcasters*, at 197-198, **ABA**, Vol. I, Tab #33.

⁸⁷ FCA Judgment at para. 116, **AR**, Vol. I, p. 112.

⁸⁸ *Electric Despatch Co. v. Bell Telephone Co.* (1891), 20 S.C.R. 83 at 90-91, **ABA**, Vol. II, Tab #45; N. Tamaro, *The 1998 Annotated Copyright Act* (Carswell: Toronto, 1998) at 140, **ABA**, Vol. III, Tab #123; H. Laddie et al, *The Modern Law of Copyright and Designs*, 3rd ed. (London: Butterworths, 2000) at 619, 664-665, **ABA**, Vol. III, Tab #114; *Sony Music Entertainment (U.K.) Limited v. Easy Internet Café Limited*, [2003] E.W.H.C. 62 at paras. 31-34 (Ch), **ABA**, Vol. II, Tab #85; *Religious Technology Centre v. Netcom On-Line Communication*, 37 USPQ.2d 1545 at 1553 (N.D. Cal., 1995) (“*Netcom*”), **ABA**, Vol. II, Tab #80; *Playboy Enterprises, Inc. v. Hardenburgh, Inc.*, 982 F.Supp. 503 at 512-513 (N.D. Ohio, 1997), **ABA**, Vol. II, Tab #70; *Marobie-FL Inc. v. National Association of Fire Equipment and Distributors*, 45 USPQ.2d 1236 at 1245 (N.D. Ill., 1997), **ABA**, Vol. II, Tab #59; *ALS Scan, Incorporated v. Remarq Communities, Incorporated* 239 F.3d 619 (4th.Cir. 2001) at 622 (“*ALS Scan*”), **ABA**, Vol. I, Tab #17; *Costar Group Inc. v. Loopnet, Inc.* 164 F.Supp. 2d 688 (D.Mary.2001) at 695-696, **ABA**, Vol. I, Tab #37; Kamiel Koleman et al, *Workshop on Service Provider Liability*, (Geneva: World Intellectual Property Organization, 1999) at 8, **ABA**, Vol. III, Tab #113.

⁸⁹ *Théberge*, at para. 30, **ABA**, Vol. III, Tab #89.

objective of construing copyright and other intellectual property legislation in order to produce the widest possible dissemination of ideas and products.⁹⁰

98. The public policy behind copyright lies not only in recognizing the author's rights, but also the limited nature of these rights. In *Théberge*, this Court noted that “in crassly economic terms, it would be as inefficient to overcompensate artists and authors as it would be self-defeating to under compensate them”. Further, this Court admonished that “excessive control by holders of copyrights and other forms of intellectual property may unduly limit the ability of the public domain to incorporate and embellish creative innovation in the long-term interests of society as a whole or create practical obstacles to proper utilization.”⁹¹

99. The *Act* establishes a system designed to organize the economic management of intellectual property.⁹² Accordingly, it should be interpreted to encourage intermediaries to implement available, economically feasible technology. It should be construed in a manner that will permit it to adapt to changing technologies and it should be technologically neutral in its application.⁹³ The *Act* should also not be interpreted to make it an oppressive instrument by imposing liability on countless parties for acts that cannot reasonably be deterred.⁹⁴

100. The *Act* is also to be construed to take into account “the principle of interpretation that presumes a harmony, coherence, and consistency between statutes dealing with the same subject

⁹⁰ *Pink Panther Beauty Corp. v. United Artists Pictures Inc.*, [1998] 3 F.C. 534 at 547 (Fed. C.A.), leave to appeal allowed [1998] SCCA No. 273, but Notice of Discontinuance filed June 21, 1999 (S.C.C.), **ABA**, Vol. II, Tab #69; *CCH Canadian Ltd. v. Law Society of Upper Canada* (2002), 18 C.P.R. (4th) 161, at 182-183 (Fed. C.A.) (“*CCH Canadian*”), **ABA**, Vol. I, Tab #27; *Apple Computer Inc. v. Mackintosh Computers Ltd.* (1986), 28 D.L.R. (4th) 178 at 213 (Fed. T.D.), varied (1987) 44 D.L.R. (4th) 74 (Fed. C.A.), affirmed [1990] S.C.R. at 209, **ABA**, Vol. I, Tab #21; *Prism Hospital Software Inc. v. Hospital Medical Records Institute* (1994), 57 C.P.R. (3d) 129 at 268 (B.C.S.C.), **ABA**, Vol. II, Tab #73.

⁹¹ *Théberge*, at paras. 31-32, **ABA**, Vol. III, Tab #89.

⁹² *Éditions Chouette 1987 (Inc.) v. Desputeaux*, 2003 S.C.C. 17 at paras. 57-58, **ABA**, Vol. II, Tab #43.

⁹³ *Composers, Authors and Publishers Association of Canada*, at 682-683, **ABA**, Vol. I, Tab #36; *Canadian Cable Television Assn.*, at 368-369, **ABA**, Vol. I, Tab #34; *Canadian Assn. of Broadcasters*, at 199, **ABA**, Vol. I, Tab #33; *Hubbard Broadcasting* at 399, **ABA**, Vol. II, Tab #49; *Infinity Broadcasting Corp. v. Kirkwood* 63 F.Supp.2d 420 (S.D.N.Y.1999) at 423, **ABA**, Vol. II, Tab #52.

⁹⁴ *Canadian Assn. of Broadcasters*, at 196, **ABA**, Vol. I, Tab #33. In *Netcom*, at 1553 a U.S. District Court stated: “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... The court does not find workable a theory of infringement that would hold the entire Internet liable for activities that cannot reasonably be deterred. Billions of bits of data flow through the Internet and are necessarily stored on servers throughout the network and it is thus practically impossible to screen out infringing bits from noninfringing bits.”, **ABA**, Vol. II, Tab #80.

matter”.⁹⁵ In particular, the *Act* should be construed consistently with the policy objectives set out in s.7 of the *Telecommunications Act*. Those objectives affirm that telecommunications performs an essential role in the maintenance of Canada’s identity and sovereignty and that Canada’s telecommunications policy has as its objects, *inter alia*, “to render reliable and affordable telecommunications services of high quality accessible to Canadians”, “to enhance the efficiency and competitiveness... of Canadian telecommunications”, and “to stimulate research and development in Canada in the field of telecommunications services”.⁹⁶

101. In this regard, Canada’s policy objectives for the use and development of the Internet are highly relevant. One of Canada’s key priorities is to foster the development of a network-based economy that connects Canadians to each other and that facilitates the dissemination of content by and for Canadians. The achievement of this objective requires a cost-competitive Internet sector operating under clear, simple-to-adhere-to, rules that take into account the rules under which Internet intermediaries operate in other jurisdictions.⁹⁷

102. It is submitted that the majority of the Court of Appeal disregarded these policy objectives in construing the intermediary provision. The majority decision gives no weight to the efficiencies, economies and service improvements that caching provides, all of which are consistent with the objects of the *Telecommunications Act* and with Canadian policies respecting the Internet. The decision threatens IAPs with incalculable copyright liability if they adopt new technologies, as every copyright owner of content communicated through IAPs’ systems could sue for infringement. It creates liability for infringement that cannot practically be detected or deterred.⁹⁸ It imposes liability in a way which is not technologically neutral and it discourages

⁹⁵ *Bell ExpressVu*, at para. 27, **ABA**, Vol. I, Tab #23.

⁹⁶ *Telecommunications Act*, S.C. 1993, c.38 as amended, **ABA**, Vol. I, Tab #8

⁹⁷ *Consultation Paper* at 6, 12, 31, 35-37, **ABA**, Vol. III, Tab #111; Courts in the United States have broadly construed exemptions from infringement enacted to protect IAPs from liability to promote rather than impede the continued development and use of the Internet: *Smith v Intercosmos Media Group, Inc.* 2002 WL 31844907 (E.D.La.2002) at 1-3, **ABA**, Vol. II, Tab #84, interpreting s.230 of the *Communications Decency Act*, 47 U.S.C. 230 (the “CDA”), **ABA**, Vol. I, Tab #4A; *Batzel v. Smith*, 2003 WL 21453358 (9th Cir. 2003) at 7, **ABA**, Vol. I, Tab #22; courts in this country and in the United States have recognized the importance of the Internet to the dissemination of information: *R. v. Guignard*, 2002 SCC 14 at para. 25, **ABA**, Vol. II, Tab #46; *Vancouver Regional FREE-Net Association v. Canada (Minister of National Revenue - MNR)*, [1996] 3 F.C. 880 (C.A) at 892, **ABA**, Vol. III, Tab #93; *Reno v. American Civil Liberties Union*, 521 U.S. 844 at 849, **ABA**, Vol. II, Tab #81; *American Library Association v. Pataki*, 969 F.Supp. 160 (S.D.N.Y. 1997) (“*Pataki*”) at 164, **ABA**, Vol. I, Tab #20; *ACLU v. Reno (Reno II)*, 31 F.Supp. 2d 473 (E.D. Pa. 1999) at 476, **ABA**, Vol. I, Tab #16.

⁹⁸ IAPs are unable to avoid claims made by rights holders for content that is simply transmitted in unaltered form through their systems as it is a practical impossibility for IAPs to monitor the content of information passing

innovation and improvements in transmitting information over the Internet. Ultimately, it will inhibit the efficient and effective dissemination of copyright works.

103. This Court has also pointed out that the “mobility of capital and technology makes it desirable that comparable jurisdictions with comparable intellectual property legislation arrive (to the extent permitted by their own laws) at similar legal results”.⁹⁹ In this regard, the copyright legislation of Canada’s major trading partners, including the United States, European Union and Australia, all provide that, when IAPs act as mere conduits for the transmission of information or provide caching, they are immune from liability. Properly construed, Canada’s intermediary provision similarly protects Canadian IAPs from liability when they use caching as part of the provision of Internet services to their customers.¹⁰⁰

104. The Court of Appeal stated that the intermediary provision should be interpreted to strike an appropriate balance between the interests of authors and the encouragement and dissemination of works to the public. The Court of Appeal also observed that “[w]here its language and underlying rationale permit, legislation should be interpreted in a way that takes account of technological developments”.¹⁰¹ However, when construing the meaning of the term “necessary” the majority disregarded these very principles as well as the other principles set out above. It chose an interpretation rewarding authors and composers over an interpretation that would not “obstruct improvements in the quality of Internet communication”.¹⁰² This narrow

through their facilities. See Para. 28 above; *Netcom*, at 1553, **ABA**, Vol. II, Tab #80; See also *Consultation Paper* at 36, **ABA**, Vol. III, Tab #111.

⁹⁹ *Harvard College*, at para. 13, **ABA**, Vol. II, Tab #47; *Théberge*, at para. 6, **ABA**, Vol. III, Tab #89.

¹⁰⁰ See *Workshop on Service Provider Liability*, at 14-16, 34-35, **ABA**, Vol. III, Tab #113; *Consultation Paper* at 35, **ABA**, Vol. III, Tab #111; *Supporting Culture and Innovation: Report on the Provisions and Operation of the Copyright Act* Government of Canada, 2002 (“*Supporting Culture*”) at 27-28, **ABA**, Vol. III, Tab #109; Australia’s *Copyright Amendment (Digital Agenda) Act, 2000*, No. 110, 2000, **ABA**, Vol. I, Tab #5; *European Union (Copyright) Directive 2001/29/EC of the European Parliament and of the Council of 22 May, 2001 on the harmonization of certain aspects of copyright and related rights in the information society*, Official Journal L.167, 22/06/2001 at 0010-0019, **ABA**, Vol. III, Tab #106; Recital 27 thereof states, consistent with the WIPO Copyright Treaty that “the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Directive”; Article 5 thereof immunizes Internet intermediaries for “temporary acts of reproduction”. *European Union E-Commerce Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (the EU Directive on E-Commerce)*; Recital 42 and 47 and Articles 12 and 13 immunize access providers for liability when using proxy cache technologies, **ABA**, Vol. III, Tab #107; Section 512 of the U.S. *Digital Millennium Copyright Act*, 17 U.S.C.A. (“DMCA”) also immunizes service providers when they act as passive carriers and when they perform system caching, **ABA**, Vol. I, Tab #6.

¹⁰¹ FCA Judgment at paras. 119-122, **AR**, Vol. I, pp. 113-114.

¹⁰² FCA Judgment at paras. 131-132, **AR**, Vol. I, pp. 117-118.

construction of the intermediary provision is inconsistent with the purposes and policy objectives of the *Act*.

105. In light of all of the above, the Appellants submit that the statutory and policy context of the *Act* strongly supports the Board's interpretation of para. 2.4(1)(b); namely, that an IAP who uses means of telecommunication, including cache servers, to enable others to communicate works to the public, is entitled to rely on the intermediary provision.

III. ISSUE 3: IF PARA 2.4(1)(B) DOES NOT APPLY, DO IAPS COMMUNICATE TO THE PUBLIC MUSICAL WORKS STORED IN CACHE SERVERS WITHIN S.3(1)(F) OF THE *ACT*?

106. Because the Court of Appeal held that Internet caching is not protected by para. 2.4(1)(b) of the *Act*, it had to consider whether the operator of a cache server "communicates by telecommunication" within para. 3(1)(f) when content is transmitted from the cache. The Court of Appeal held that a cache operator does communicate by telecommunication "because the cache operator selects which material will be cached, and programmes the computer to transmit it from the cache when it is requested. The operator of the cache is thus not merely a passive transmitter of data." This portion of the Court of Appeal's decision is contrary to the Board's decision and rests upon a fundamental misapprehension of the evidence related to caching.¹⁰³

107. The Court of Appeal's factual finding that a cache operator selects material to be cached (which constituted the entire basis for its conclusion that caching constitutes a separate communication) is incorrect. This finding also contradicts an earlier finding made by the Court of Appeal that "material requested from a host server by a subscriber may be automatically cached" on the IAP's server. The unchallenged evidence adduced before the Board was that cache operators do not select content to be cached and that caching operates automatically and without human intervention. These facts were specifically admitted by SOCAN in its answers to interrogatories. IAPs do not select or review the content to be cached, either to ascertain copyright status or for any other reason.¹⁰⁴

¹⁰³ FCA Judgment at para. 138, **AR**, Vol. I, p. 120.

¹⁰⁴ Para. 37, above. FCA Judgment at para. 18, **AR**, Vol. I, pp. 75-76; SOCAN Response to CCTA Interrogatory 7, **AR**, Vol. V, pp. 738-739.

108. But for its error in finding that IAPs select content to be cached, the Court of Appeal had no basis whatsoever to overrule the Board's factual determinations and to find that IAPs operating cache servers communicate to the public within para. 3(1)(f). An error of this nature by an appellate court engaged in judicial review of a decision of a specialized tribunal constitutes an error of law which cannot be allowed to stand.¹⁰⁵

109. However, even if the Court of Appeal had not erred in its factual determination as to whether IAPs select content to be cached, for the Court of Appeal to have found that IAPs communicate musical works to the public from cache servers, the court would have had to consider whether the transmission of information from a cache constituted a communication to the public of musical works within the meaning of para. 3(1)(f). It did not undertake any such analysis.

IV. ISSUE 4: IS THE USE OF THE REAL AND SUBSTANTIAL CONNECTION TEST APPROPRIATE TO DETERMINE THE LOCATION OF INTERNET COMMUNICATIONS FOR THE PURPOSE OF THE *ACT*?

110. The question of the territorial application of the *Act* in a particular case is an issue of mixed fact and law informed by the proper interpretation of the *Act* and Canada's treaty obligations with respect to copyright. It is not a question of personal jurisdiction. Nor is it an issue of where an Internet transaction takes place for purposes of tort law. Case law addressing those issues has little, if any, relevance to the application of the *Act*.¹⁰⁶

111. The issue involves two questions: (a) where does an Internet communication occur for the purposes of copyright?; and (b) what territorial application is intended by the *Act*?

112. Each of these questions was addressed by the Board. In response to the first question, the Board held that an Internet communication occurs at the location of the host server from which the communication is transmitted. This finding by the Board was one of fact or mixed fact and

¹⁰⁵ *Moreau-Bérubé v. New Brunswick (Judicial Council)*, 2002 SCC 11 at 282, **ABA**, Vol. II, Tab #63.

¹⁰⁶ *Unifund Assurance Co. v. Insurance Corp. of British Columbia*, 2003 SCC 40 at paras. 54-56, 58-59, 80 (“*Unifund Assurance*”), **ABA**, Vol. III, Tab #91; *Compo Co.*, at 373, **ABA**, Vol. I, Tab #35: “...copyright law is neither tort law nor property law in classification, but is statutory law... It does not assist the interpretive analysis to import tort concepts. The legislation speaks for itself...”.

law based on extensive expert evidence before the Board. The Court of Appeal did not overturn this finding, nor did it have any authority to do so.¹⁰⁷

113. The Board did not make any finding about whether the *Act* might have some extra-territorial implications. In response to the second question, the Board concluded that the *Act* has application within Canada. However, it left open the possibility that the *Act* may apply to a content provider that specifically targets communications to Canadian end users.¹⁰⁸

114. The Court of Appeal ignored the Board's finding of where an Internet communication occurs. It collapsed the two questions into one and used a personal jurisdiction concept, the real and substantial connection test, to answer both questions.

115. It is submitted that the Court of Appeal erred in at least four respects:

- (a) The Court of Appeal confused the preliminary issue of the location of Internet communications with the secondary issue of the territorial application of the *Act*.
- (b) The Court of Appeal erred in adopting the real and substantial connection test.
- (c) The Court of Appeal erred in holding that para. 3(1)(f) of the *Act* has extra-territorial application in view of the objects of the *Act*, the territoriality rules inherent in the *Berne Convention* and the other treaties respecting copyright to which Canada has adhered, and principles of international comity.
- (d) The Court of Appeal erred in adopting the location of the end user as "a particularly important" factor in applying the real and substantial connection test.

ID. The Board's Determination of the Location of Internet Communications Was a Finding of Mixed Fact and Law

116. The Board found as a fact that an Internet communication occurs at the time and place that a work is transmitted from the host server, whether or not it is played or viewed upon receipt, is stored for use at a later date or is never used at all.¹⁰⁹

117. It is submitted that the Board's finding is reasonable and, indeed, correct. The finding of the location of an Internet communication is consistent with a previous holding of the Court of

¹⁰⁷ Board Decision at pp. 48-49, **AR**, Vol. I, pp. 52-53. The questions raised by the Board included the following: (f) the circumstances in which a communication occurs in Canada; and (g) whether the Board may approve a tariff applicable to persons located outside of Canada: Board Decision at p. 2, **AR**, Vol. I, p. 6.

¹⁰⁸ Board Decision at p. 49, **AR**, Vol. I, p. 53.

¹⁰⁹ Board Decision at p. 36, **AR**, Vol. I, p. 40; FCA Judgment, at para. 29; **AR**, Vol. I, p. 80.

Appeal in the broadcast context that a performance occurs at the time of transmission whether or not it is ultimately viewed. The Board's finding was not challenged on appeal and nowhere in its decision does the Court of Appeal purport to overturn this finding.¹¹⁰

118. With that finding, the Court of Appeal's application of the real and substantial connection test was unnecessary and, indeed, contradicted the Board's conclusion.

IE. The Real and Substantial Connection Test is Primarily Applied To Jurisdictional Issues

119. The territorial application of the *Act* is not a personal jurisdiction issue. The decisions of this Court adopting the real and substantial connection test in the context of whether a court may assert jurisdiction over a foreign defendant are simply not appropriate to determining the territorial application of the *Act*.¹¹¹

120. This case is more analogous to the decisions of this Court in *Unifund Assurance Co. v. Insurance Corp. of British Columbia* and *Tolofson v. Jensen*. In *Unifund Assurance*, this Court distinguished the jurisdictional cases from the case of the territorial application of provincial legislation. It held that the principles of order and fairness required that Ontario's *Insurance Act* not be given extra-territorial application. Similarly, in *Tolofson* this Court rejected the application of the real and substantial connection test in favour of the law governing the place of the tort (the *lex loci delicti*). The real and substantial connection test was rejected in order to achieve certainty, ease of application and predictability in determining the substantive law to be applied to the dispute.¹¹²

121. It is submitted that order and fairness, as well as certainty, ease of application and predictability, are similarly goals to be considered in determining the territorial application of the

¹¹⁰ *Canadian Assn. of Broadcasters*, at 198, **ABA**, Vol. I, Tab #33.

¹¹¹ *Unifund Assurance* at paras. 54-55, 58-59, 80, **ABA**, Vol. III, Tab #91; *Moran v. Pyle National (Canada) Ltd.*, [1975] 1 S.C.R. 393 at 408-409, **ABA**, Vol. II, Tab #62; *Morguard Investments Ltd. v. De Sayoye*, [1990] 3 S.C.R. 1077 at 1095-1097 ("Morguard"), **ABA**, Vol. II, Tab #64; *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897 at 934-938, ("Amchem") **ABA**, Vol. I, Tab #19; *Hunt v. T&N plc*, [1993] 4 S.C.R. 289 at 315-317 ("Hunt"), **ABA**, Vol. II, Tab #50. See, in contrast, *Williams v. Canada*, [1992] 1 S.C.R. 877, at 891-892, **ABA**, Vol. III, Tab #94; *British Columbia (Director of Trade Practices) v. Ideal Credit Referral Services Ltd.* (1997), 72 C.P.R.(3d) 289 at 293 (B.C.C.A.), **ABA**, Vol. I, Tab #25.

¹¹² *Unifund Assurance Co.* at paras. 54-91, **ABA**, Vol. III, Tab #91; *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022 at 1061-1062, **ABA**, Vol. III, Tab #90.

Act to Internet communications. These goals cannot be met by using the real and substantial connection test.¹¹³

122. This Court did apply the real and substantial connection test in determining the territorial application of the *Criminal Code* in *Libman v. R.* where a cross-border transaction could not be localized in one place. However, this Court was very aware in *Libman* of the importance of international comity. It is submitted that the result in *Libman* was largely driven by the difficulty in localizing the criminal offence in any single country and by the absence of any applicable international rules governing trans-border criminal offences.¹¹⁴

123. This Court referred to the real and substantial connection test in *Canada (Human Rights Commission) v. Canadian Liberty Net*. The result in that case turned largely on the fact that the hate messages in issue were advertised in Canada so that the communication was held to take place in Canada for the purpose of s.13 of the *Human Rights Act*.¹¹⁵

IF. The Territorial Application of the *Act*

124. Copyright legislation in comparable jurisdictions, as with intellectual property legislation in general, is intended to have territorial effect only and the *Act* is no different.¹¹⁶

125. Unlike some legislation, the *Act* does not contain any provisions that expressly operate beyond the boundaries of Canada. Although the territorial limit of the *Act* is not made explicit in section 3 (setting out the scope of authors' exclusive rights) or in subsection 27(1) (defining what constitutes infringement of copyright), there are clear indications throughout the *Act* that it is

¹¹³ *Pataki* at 168, 171, 173, 182, **ABA**, Vol. II, Tab #20.

¹¹⁴ *Libman v. R.*, [1985] 2 S.C.R. 178 at 214, ("*Libman*") **ABA**, Vol. II, Tab #56.

¹¹⁵ *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626 at para. 52, **ABA**, Vol. I, Tab #31.

¹¹⁶ Handa, *Copyright Law in Canada*, 2002, at 277, **ABA**, Vol. III, Tab #110; Garnett et al., *Copinger and Skone James on Copyright*, 14th ed., 1999, Vol. 1, at 16, **ABA**, Vol. III, Tab #108; *Pearce v. Ove Arup Partnership Ltd.*, [2000] Ch. 403 at 438, **ABA**, Vol. II, Tab #67; *Def Lepp Music v. Stuart-Brown*, [1986] R.P.C. 273 (Ch.D.) at 275, **ABA**, Vol. II, Tab #39; *Pro-C Ltd. v. Computer City Inc.* (2001), 149 O.A.C. 190 at 193 (Ont. C.A.) reversing on other grounds (2000) 7 C.P.R. (4th) 193 (Ont. S.C.J.) at 218, **ABA**, Vol. II, Tab #74. In the United States, see *Subafilms Ltd. v. MGM – Pathe Communications*, 24 F.3d 1088 (9th Cir. 1994) ("*Subafilms*"), **ABA**, Vol. II, Tab #87; *Micro Data Base Systems v. State Bank of India*, 177 F.Supp.2d 881 (N.D.Ind. 2001) at 886, **ABA**, Vol. II, Tab #61. This Court raised but left open the issue of whether the *Act* may have some extra-territorial application in the broadcast context in *C.A.P.A.C. v. International Good Music Inc.*, [1963] S.C.R. 136 at 143-144, **ABA**, Vol. I, Tab #26.

intended to have effect only within Canada and critical aspects of its application would have unintended and problematic consequences if it was construed in any other way.¹¹⁷

126. For example, section 2 and para. 5.1(c) of the *Act* provide that copyright in published works only subsists once published (or “made available”) in a treaty country. These provisions are intended to localize the publication within a treaty country. If the *Act* were to be given the extra-territorial application proposed by the Court of Appeal, then a work made available from a host server located anywhere in the world (including from a non-treaty country) would meet this test.¹¹⁸

127. If the *Act* were given extra-territorial effect, it would also significantly change the traditional roles of collective societies in Canada by giving them, in effect, unprecedented rights to claim royalties from foreign entities anywhere in the world that use works or other subject matter over the Internet. Collectives generally operate territorially. This territoriality is bolstered by reciprocal representation agreements entered into with foreign societies. The extraterritorial application of the *Act* would undermine this regime and could result in multiple collectives seeking compensation for the same acts. It was never contemplated that the *Act* would have this scope.¹¹⁹

128. Canada has sought to harmonize its concepts of intellectual property with other like-minded jurisdictions and Canadian laws are interpreted, where possible, consistently with Canada’s international obligations. Harmonization and comity are particularly important given the “mobility of capital and technology” in the modern global economy.¹²⁰ In this regard, Canada adheres to multilateral and bilateral treaties that regulate the protection of copyright territorially. The principal treaties include the *Berne Convention*, the *Universal Copyright Convention*, the *International Convention for the Protection of Performers, Producers of*

¹¹⁷ *Act*, ss. 3 and 27(1); Also see ss. 27(2)(e), 31, 34, 42 and the definition of “infringing” in s.2, **ABA**, Vol. I, Tab #3.

¹¹⁸ *Act*, ss. 2 and 5(1)(c), **ABA**, Vol. I, Tab #3.

¹¹⁹ *Act*, ss.19, 26, 67.1(5), 68(4), 68.2, 38.1(4), **ABA**, Vol. I, Tab #3; Sanderson, *Musicians and the Law in Canada*, 1992, at 36-42, **ABA**, Vol. III, Tab #118; Doutrelepon “Raison d’être Economic Importance and Expansion of Collective Management Societies” in *ALAI Congress 97*, 1998, at 517-518, 531-533, **ABA**, Vol. III, Tab #104.

¹²⁰ *Harvard College*, at paras. 12-13, **ABA**, Vol. II, Tab #47; *Théberge*, at para. 6, **ABA**, Vol. III, Tab #89; also see *Bishop*, at 473-475, **ABA**, Vol. I, Tab #24; see also paras. 88 to 103 above.

Phonograms and Broadcasting Organizations (the Rome Convention), the Free Trade Agreement, the North American Free Trade Agreement, and the World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs).

129. The territorial application of the *Act* to activities that take place only in Canada is mandated as a result of international comity having regard to these treaties. The principle of comity has particular force where other jurisdictions have developed regulatory regimes governing the activity.¹²¹

130. The international law regime established by the treaties which Canada has adhered to is founded on two central principles: “national treatment” and “minimum rights”. The national treatment principle implies a territorial approach to choice of law, pursuant to which the applicable law is the law of the place where the conduct in question occurs. This principle is needed precisely because each nation’s intellectual property laws are assumed not to apply extraterritorially. Indeed, extraterritorial application of a nation’s copyright laws would subvert the national treatment principle. The minimum rights principle is also inconsistent with extraterritorial application of a nation’s copyright laws. The right to choose the particular standards of local law, over and above the minimum standard, would be undermined if other nations could override that choice through extraterritorial application of their own standards.¹²²

131. The decision of the Board localizes the copyright infringement in Internet communications at the place of the host server from which files are transmitted. This decision permits a simple and certain application of the *Act* consistent with the territoriality principle inherent in the *Act* and the treaties to which Canada has adhered. By applying only one copyright law to a communication of a musical work, the Board established a principle that enables content providers to settle all aspects of rights acquisition under one national copyright law. This result

¹²¹ *Libman*, at 214, **ABA**, Vol. II, Tab #56; *Hunt*, at 295-296, **ABA**, Vol. II, Tab #50; *Morguard*, at 1096, **ABA**, Vol. II, Tab #64; *Amchem*, at 913-914, **ABA**, Vol. I, Tab #19; *Spar Aerospace Ltd. v. American Mobile Satellite Corp.*, 2002 SCC No. 51, at para. 19, **ABA**, Vol. II, Tab #86; *In the matter of World Stock Exchange et al.* (2000), 9 A.S.C.S. 658 (Alta. Securities Comm.) at 33-36, **ABA**, Vol. II, Tab #51.

¹²² *Berne Convention*, Article 5, **ABA**, Vol. I, Tab #10; Bradley, “Territorial Intellectual Property Rights in An Age of Globalism” (1997) 37 Va. J. Int’l L. 505 at 16-17, 28, **ABA**, Vol. III, Tab #100; Austin, “Domestic Laws and Foreign Rights: Choice of Law in Transnational Copyright Infringement Litigation” (1999) 23 Colum.-VLA J.L. & Arts 1 at 11-12, **ABA**, Vol. III, Tab #97; Austin, “Social Policy Choices and Choice of Law of Copyright Infringement in Cyberspace” (2000) 79 Or.L.Rev. 575 at 4, **ABA**, Vol. III, Tab #98; Reindl “Choosing Law in Cyberspace: Copyright Conflicts on Global Networks”, 19 Mich.J. Int’L 799 at 5-6, 11-14, **ABA**, Vol. III, Tab #117.

is consistent with the goal underlying the *Act* to facilitate the dissemination and exploitation of works protected by copyright. It is also consistent with the goals of order and fairness, as well as certainty, ease of application, and predictability, as applied in *Unifund Assurance* and in *Tolofson* in determining the substantive law to be applied to a dispute.¹²³

132. The Court of Appeal's decision conflicts with the territoriality underpinnings inherent in the treaties to which Canada has adhered including the national treatment and minimum standards territorial principles in the *Berne Convention*.¹²⁴ The real and substantial connection test would subject content providers to potentially conflicting copyright and moral rights regimes around the world in respect of the same communication.¹²⁵ Acts in relation to a work which are lawful and non-infringing in one country might be unlawful and infringing in other countries.¹²⁶ Content providers would be subject to the copyright regimes that confer the broadest exclusive rights on copyright owners and the narrowest exemptions from infringement, anywhere in the world in which the content could be accessed.¹²⁷ Content could never be cleared for use in any particular territory; it would have to be cleared worldwide. Content providers would have no way of determining in advance their potential liability for royalties. The cost of such regulatory uncertainties would undermine economic efficiency.¹²⁸ Further, a rule that would permit

¹²³ The approach is also consistent with the European Community's satellite broadcasting directive. Council Directive 93/83/EEC, 1993 O.J. (L 248) which requires member states to apply only the copyright law of the country of uplink to the satellite broadcast, **ABA**, Vol. III, Tab #103.

¹²⁴ *Subafilms*, at 1097-1098, **ABA**, Vol. II, Tab #87; *Murray v. British Broadcasting Corp.*, 81 F.3d 287 (2nd Cir. 1996) at 290, **ABA**, Vol. II, Tab #65.

¹²⁵ *Unifund Assurance* at paras. 71-72, **ABA**, Vol. III, Tab #91; *Pataki* at 168, 171, 173, 182, **ABA**, Vol. I, Tab #20.

¹²⁶ For example, the term of protection of copyright differs from country to country so works might be in the public domain in one country but subject to copyright in others: *Eldred v. Ashcroft*, 123 S. Ct. 769 at 772, **ABA**, Vol. II, Tab #44. Moral rights vary in scope internationally. The conditions for subsistence of copyright including the standard of originality may vary from country to country: *CCH Canadian Ltd.*, **ABA**, Vol. I, Tab #27. The scope of rights conferred on copyright owners also varies from state to state: *Compo Co.*, at 367, **ABA**, Vol. I, Tab #35; *Théberge*, at paras. 48-50, 70-71, **ABA**, Vol. III, Tab #89. The methodology for determining infringement may be different from country to country: *Delrina*, at 349, **ABA**, Vol. II, Tab #40. Remedies for infringement such as those in Part IV of the *Act* also vary from country to country: *Yahoo! Inc. v. La Ligue Contre Le Racisme*, 169 F.Supp.2d 1181 (N.D. Cal. 2001) at paras. 5, 8, **ABA**, Vol. III, Tab #95.

¹²⁷ Each country's copyright legislation has a series of exemptions from infringement such as those in ss. 29-30 of the *Act*, **ABA**, Vol. I, Tab #3; These exemptions can vary from country to country: *Pataki* at 183, **ABA**, Vol. I, Tab #20.

¹²⁸ *Unifund Assurance* at para. 71, **ABA**, Vol. III, Tab #91.

Canadian collectives to collect royalties from foreign content providers could result in content providers paying twice.¹²⁹

133. It is submitted that departing from the territoriality norms inherent in the *Act* will impede the dissemination and use of works to and by the public. It will also adversely impact the ability of Canada, or indeed any country, to enact legislation to promote the use of the Internet and the dissemination of content over it since the protected activities inside that country may still infringe copyright in any country into which content is transmitted. It is submitted that any such departure should only be made by Parliament.¹³⁰

PART IV—COSTS

134. The Appellants request their costs of this Appeal, including the costs of the Application for Leave to Appeal.

PART V—ORDER SOUGHT

135. The Appellants respectfully requests that this Honourable Court allow the appeal, set aside the Judgment of the Federal Court of Appeal, and restore the decision of the Board.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated: July 24, 2003

Thomas G. Heintzman, Q.C.
Of Counsel of the Appellants

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¹²⁹ Dreier Evidence at pp. 553-555, **AR**, Vol. III, pp. 453-455. U.S. collectives collect royalties from content providers solely on the basis of Internet communications originating from U.S. servers: Walker/Hoffert Evidence at pp. 1808-1811, **AR**, Vol. IV, pp. 522-525; Lincoff Evidence at pp. 1236-1239, **AR**, Vol. IV, pp. 509-512; DiMona Evidence at pp. 875-882, **AR**, Vol. III, p. 492-499.

¹³⁰ Industry Canada recently recognized that the choice of law problems inherent in cross-border Internet transactions are best addressed not through the extra-territorial application of our domestic *Act* but through Canada's participation in the efforts of the World Intellectual Property Organization: *Consultation Paper*, at 14-15, **ABA**, Vol. III, Tab #111; *Supporting Culture* at p. 43, **ABA**, Vol. III, Tab #109.

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<i>In the matter of World Stock Exchange et al.</i> (2000), 9 A.S.C.S. 658 (Alta. Securities Comm.)	37
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<i>Kalkinis (Litigation Guardian of) v. Allstate Insurance Co. of Canada</i> (1998), 41 O.R.(3d) 528 (C.A.)	18
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<i>Playboy Enterprises, Inc. v. Hardenburgh, Inc.</i> , 982 F.Supp. 503 (N.D. Ohio, 1997)	28
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<i>Smith v Intercosmos Media Group, Inc.</i> 2002 WL 31844907 (E.D.La., 2002)	30
<i>Sony Music Entertainment (U.K.) Limited v. Easy Internet Café Limited</i> , [2003] EWHC 62 (Ch), 28 Jan. 2003, online: < http://www.courtservice.gov.uk/ judgmentsfiles/j1528/sony_v_easyinternetcafe.htm >	28
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<i>Unifund Assurance Co. v. Insurance Corp. of British Columbia</i> , 2003 SCC 40	33,35,38,39
<i>Union Gas Company of Canada Limited v. Sydenham Gas and Petroleum Company Limited</i> , [1957] S.C.R. 185	22

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<i>Vancouver Regional FREE-Net Association v. M.N.R.</i> , [1996] 3 F.C. 880 (C.A)	30
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<i>Zamacois v. Douville</i> , [1943] 2 D.L.R. 257 (Ex. Ct.)	27
 <u>Secondary Sources</u>	
G. W. Austin, “Domestic Laws and Foreign Rights: Choice of Law in Transnational Copyright Infringement Litigation” (1999) 23 Colum.-VLA J.L & Arts 1	38
G. W. Austin, “Social Policy Choices and Choice of Law of Copyright Infringement in Cyberspace” (2000) 79 Or.L.Rev. 575	38
H. C. Black, <i>Black’s Law Dictionary</i> , 6 th ed. (St. Paul: West Publishing Co., 1990)	21
C. A. Bradley, “Territorial Intellectual Property Rights in An Age of Globalism” (1997) 37 Va. J. Int’l L 505	38
C. Brunet, “Copyright: the Economic Rights” in G. Henderson, <i>Copyright and Confidential Information Law of Canada</i> (Toronto: Carswell, 1994)	27
Copyright Law Review Committee (Australia), <i>Copyright and Contract</i> (Australia, October 8, 2002), online: < http://www.law.gov.au/www/clrHome.nsf/AllDocs/RWP092E76FE8AF2501CCA256C44001FFC28?OpenDocument >	19
The Council of the European Communities, Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, 1993 O.J. (L 248). Online: < http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&numdoc=31993L0083&model=guichett >	38
C. Doutrelepon “Raison d’etre Economic Importance and Expansion of Collective Management Societies” in <i>ALAI Congress 97</i> , ed. by Ghislain Roussel, (Les Editions Yvon Blais Inc., 1998)	37
J. Erola & F. Fox, <i>From Gutenberg to Telidon: A White Paper on Copyright</i> (Ottawa: Consumer and Corporate Affairs Canada, 1984)	26
<i>European Union (Copyright) Directive 2001/29/EC of the European Parliament and of the Council of 22 May, 2001 on the harmonization of certain aspects of copyright and related rights in the information society</i> , Official Journal L.167, 22 June 2001	31

	Page(s)
<i>European Union E-Commerce Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market</i> , Official Journal L. 178, 17 July 2000.	31
K. Garnett et al., <i>Copinger and Skone James on Copyright</i> , Vol. 1, 14th ed., (London: Sweet & Maxwell, 1999)	36
Government of Canada, <i>Supporting Culture and Innovation: Report on the provisions and Operation of the Copyright Act</i> , 2002. Online: < http://strategis.ic.gc.ca/pics/rp/section92eng.pdf >	31,39
Handa, <i>Copyright Law in Canada</i> (Markham: Butterworths Canada Ltd., 2002)	36
Industry Canada & Canadian Heritage, <i>Consultation Paper on Digital Copyright Issues</i> June 22, 2001. Online: < http://strategis.ic.gc.ca/epic/internet/incrp-prda.nsf/vwapj/digital.pdf/\$FILE/digital.pdf >	8,30,31,39
A.A. Keyes & C. Brunet, <i>Copyright in Canada: Proposals for a Revision of the Law</i> , (Ottawa: Consumer and Corporate Affairs Canada, 1977)	26
K. Koleman & B. Hugenholtz, <i>Workshop on Service Provider Liability</i> , (Geneva: World Intellectual Property Organization, 1999). Online: < http://www.wipo.org/eng/meetings/1999/osp/pdf/osp_lia1.pdf >	28,31
H. Laddie et al, <i>The Modern Law of Copyright and Designs</i> , 3 rd ed. (London: Butterworths, 2000)	28
B. Leiner et al., <i>A Brief History of the Internet, Version 3.31</i> , August 4, 2000, Internet Society, online: < http://www.isoc.org/internet/historybrief.shtml >	8
M. Racicot et al., <i>The Cyberspace is Not a “No Law Land” : A Study of the Issues of Liability for Content Circulating on the Internet</i> , (Ottawa: Industry Canada, 1997)	21
A. P. Reindl “Choosing Law in Cyberspace: Copyright Conflicts on Global Networks”, (1998) 19 Mich.J. Intl’L 799	38
Sanderson, <i>Musicians and the Law in Canada</i> (Canada: Carswell Thompson Professional Publishing, 1992)	37
Standing Committee on Communications and Culture, <i>Government Response to the Report of the Sub-Committee on Revision of Copyright</i> , (Ottawa: 1986)	27
W. P. Statsky, <i>West’s Legal Thesaurus/Dictionary: A Resource for the Writer and the Computer Researcher</i> (Minnisota: West Publishing Company, 1985)	21

	Page(s)
Sub-Committee on the Revision of Copyright, <i>A Charter of Rights for Creators</i> , (Ottawa: Supply and Services Canada, 1985)	26,27
R. Sullivan, <i>Sullivan and Driedger on the Construction of Statutes</i> , 4 th ed. (Markham: Butterworths, 2002)	19,27
N. Tamaro, <i>The 1998 Annotated Copyright Act</i> (Toronto: Carswell, 1998)	28
West Group, <i>Words and Phrases</i> , Volume 28, Permanent Edition, (West Group, 2003)	21

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<i>Canada-United States Free Trade Agreement</i> , 10 December 1987. Articles 2004, 2005, 2006, 2103, 2104, 2105 and 2106.	26,37
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<i>North American Free Trade Agreement</i> . Part Six, Intellectual Property.	37
<i>Universal Copyright Convention</i> (1971 and 1952 Texts). As revised at Paris July 24, 1971.	37
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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 -

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Intervener

FACTUM OF THE APPELLANTS

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