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# Making Available:

## Existential Inquiries

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## A. INTRODUCTION

On 10 February 2004, the major foreign music labels filed a lawsuit in the Federal Court of Canada against twenty-nine unnamed and unidentified individuals.[1] The labels, referring to themselves as CRIA — the Canadian Recording Industry Association — claimed the John and Jane Does had "uploaded" numerous tunes over the Internet using peer-to-peer technologies, and in so doing infringed the labels' copyrights in those recordings. Along with the statement of claim, CRIA filed an application requesting non-party Internet Service Providers ("ISPs") to disclose the identities of customers corresponding to the 29 Does. The Federal Court heard the application on 12 and 15 March 2004, and delivered its decision on 31 March 2004.[2]

The Court refused to order the ISPs to turn over the identities of its customers on the basis of CRIA's allegation of file-sharing. The Federal Court Judge hearing the case, Justice Konrad von Finckenstein, concluded that CRIA's evidence was incomplete on key points, imprecise on others, and was, in any event, largely inadmissible. However, Justice von Finckenstein

1 *BMG Canada Inc. et al. v. John Doe*, F. C. Docket No. T-292-04.

2 *BMG Canada Inc. v. John Doe* (F.C.), 2004 FC 488, <www.canlii.org/ca/cas/fct/2004/2004fc488.html>, [2004] 3 F.C.R. 241, (2004), 32 C.P.R. (4th) 64 [*BMG* cited to FC].

went beyond the evidence to consider the procedural aspects of the application. Holding that CRIA needed to establish a *prima facie* case of copyright infringement to succeed, Justice von Finckenstein successively demolished each element of CRIA's claim. A reproduction? Downloading a song for personal use is not an infringement.[3] Authorizing infringing reproductions? Placing a personal copy of a sound recording in a shared directory does not amount to authorization.[4] A distribution in violation of section 27(2)(b)? No evidence, and, regardless, placing files in a shared directory does not amount to distribution.[5] Secondary infringement? No evidence of knowledge on the part of the Does.[6] At the heart of CRIA's claim, the Judge concluded, lay a complaint of a different sort: peer-to-peer uploaders make songs available to members of the public. The WIPO Internet Treaties[7] provided for a "making available" right; however, Canada had yet to incorporate the Treaties' substantive requirements into Canadian law. In the absence of a making available right, the Judge reasoned, CRIA had no case.[8]

A year later, a cautious Court of Appeal affirmed the Federal Court decision, taking CRIA to task for the quality of its evidence, and articulating a test for disclosure of ISP customer identities that contained appropriate privacy safeguards.[9] However, in so doing, the Court of Appeal also reworked the test for disclosure, setting aside the *prima facie* case requirement in favour of a lower *bona fide* intention to bring a claim.[10] Consideration of the merits of the copyright infringement claim would have to await trial. The Court of Appeal faulted the lower court for its hurried account of the copyright issues; however, the Court of Appeal offered its own speedy overview of those issues in order to highlight considerations that the lower court had not necessarily worked into its reasoning, and to address recent case law that potentially complicated the copyright analysis.

The Court of Appeal defused the making available bomb over the short term, but bluntly refused to address the issue smoldering under the surface of the Federal Court's 2004 decision: is peer-to-peer music file-sharing

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3 *Ibid*. at para. 25, citing *Copyright Board's Private Copying 2003–2004 Decision*, 12 December 2003, at 20.

4 *Ibid*. at para. 27.

5 *Ibid*. at paras. 26 & 28.

6 *Ibid*. at para. 29.

7 **See notes 13 & 14, below.**

8 *BMG*, above note 2 at para. 28.

9 *BMG Canada Inc. v. John Doe,* 2005 FCA 193, <www.fca-caf.gc.ca/bulletins/whatsnew/A-203-04.pdf>, [2005] F.C.J. No. 858.

10 *Ibid*. at paras. 32–34.

legal in Canada?[11] And to the extent that music file-sharing may be further broken down into "uploading" and "downloading," are those activities legal? Those are the $100 million dollar questions,[12] and the Federal Court of Appeal left them unanswered — indeed, unaddressed.

Enter the federal government's copyright proposals of 24 March 2005.

## B. THE GOVERNMENT PROPOSAL

On March 24, 2005, the federal government proposed to revise the *Copyright Act* to implement Canada's obligations under a pair of international treaties, the World Intellectual Property Organization *("WIPO") Copyright Treaty*[13] and the *WIPO Performances and Phonograms Treaty*,[14] collectively referred to as the WIPO Internet Treaties. The WIPO Internet Treaties represent the fruit of a Diplomatic Conference at Geneva in the waning days of 1996.[15] The Conference was convened in order to address "minimum standards" of protection across a number of areas of intellectual property, including neighbouring rights, database rights, and copyright issues. The problem of "on-demand" services number among the many issues addressed in the WIPO Internet Treaties: how should nations address rights holder interests in controlling rights of access to and use of content offered and delivered over digital networks at a time and in a manner chosen by the user?

The solution proposed by the WIPO Internet Treaties is the "making available" right. The *WIPO Copyright Treaty* provides in Article 8 that:

> authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of

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11 *Ibid*. at paras. 34 & 46–54.

12 The Canadian Private Copying Collective has earned its members approximately $100 million since 1999 under a levy administered pursuant to Part VIII of the *Copyright Act*: Canadian Private Copying Collective, *Financial Highlights* (available at <http://cpcc.ca/english/finHighlights.htm>) (figure attained by calculating total declared receipts between 1999 and 2002 and very conservatively adding less than 50 percent of the 2003 revenues collected to account for revenues from January 2004 to the present).

13 *WIPO Copyright Treaty*, 20 December 1996, (entered into force 6 March 2002), online: WIPO <www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html> [*WCT*].

14 *WIPO Performances and Phonograms Treaty*, 20 December 1996, (entered into force 20 May 2002), online: WIPO <www.wipo.int/treaties/en/ip/wppt/trtdocs_wo034.html> [*WPPT*].

15 World Intellectual Property Organization, "The WIPO Internet Treaties," <www.wipo.int/freepublications/en/ecommerce/450/wipo_pub_l450in.pdf>.

> their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.[16]

The *WIPO Performances and Phonograms Treaty* provides for similar rights in respect of performances (Article 10) and phonograms (Article 14), with a small difference: neither performers' nor sound recording makers making available rights specifically mention a general right of communication to the public.[17]

The Canadian government is a signatory to these two treaties. Should it decide to ratify the Treaties, it is obliged to implement the rights and obligations the Treaties impose; however, the government faces a number of options in how it chooses to do so. What would be captured by this right? How would the right interact with existing rights of different classes of rights holders?

The government's March 2004, proposal to implement the WIPO Internet Treaties involved amending the *Copyright Act* to (a) "clarify" that authors' existing exclusive communication right includes "control over the making available of their material on the Internet," but to (b) create a new identical right for sound recording makers and performers.[18] Sound recording makers and performers already have a communication right under the Act, but it is a right to remuneration, not an exclusive right.[19] The proposal accordingly raised as many questions as it answered. Why treat authors differently than sound recording makers and performers? Would the right to remuneration change as a result of this proposal? What is the doctrinal basis for the making available right in Canada?

The government was true to its word. Bill C-60, *An Act to Amend the Copyright Act*,[20] contains two provisions relevant to the making available right, as well as a few surprises. First, clause 2 of Bill C-60 would insert a new paragraph 2.4(1)(a), providing that:

> a person who makes a work or other subject-matter available to the public in a way that allows members of the public to access it through

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16 *WCT*, above note 13.

17 *WPPT*, above note 14.

18 Government of Canada, Backgrounder, <www.ic.gc.ca/cmbwelcomeic.nsf/261ce500dfcd725985256482006 8dc6d/85256a5d006b972085256fcd0078718c!OpenDocument>.

19 *Copyright Act*, R.S.C. 1985 c. C-42, <http://laws.justice.gc.ca/en/C-42/>, ss. 19(1).

20 **Bill C-60,** *An Act to Amend the Copyright Act,* 1st Sess., 38th Parl., 2005, <www.parl.gc.ca/PDF/38/1/parlbus/chambus/house/bills/government/C-60_1.PDF> [Bill C-60].

> telecommunication from a place and at a time individually chosen by them communicates it to the public by telecommunication.[21]

Bill C-60 provides for similar rights in respect of performers' performances and sound recordings. Sub-section 8(1) of Bill C-60 provides that a new paragraph 15(1.1)(e) shall give performers the sole right:

> to make a sound recording of [a performance] available to the public in a way that allows members of the public to access it through telecommunication from a place and at a time individually chosen by them.[22]

Section 10 of Bill C-60 provides a similar right to sound recording makers in a new paragraph 18(1.1)(b).[23] All the making available rights thus created include the exclusive right to authorize any such making available.

On a related point, Bill C-60 also creates for rights holders a general right of first distribution, and a right to authorize such distribution. The Bill provides that "copyright … includes the sole right:

> (j) in respect of a tangible, material form of the work the ownership of which has never previously been transferred, to sell it or otherwise transfer ownership of it for the first time.[24]

The making available right has been hailed as the content industry's legal answer to the phenomenon of file-sharing.[25] In an announcement at this year's Juno Awards ceremony at Winnipeg, the Minister of Canadian Heritage, Liza Frulla, characterized the proposal as "addressing the peer-to-peer issue. It will give the tools to companies and authors to sue."[26] In a "Frequently Asked Questions" released by the Department of Canadian Heritage along with the Bill, Canadian Heritage states that:

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21 *Ibid*., s. 2.

22 *Ibid*., ss. 8(1).

23 *Ibid*., s. 10.

24 *Ibid*., s. 3.

25 The Heritage FAQ states that "This will clarify that the unauthorized posting or the peer-to-peer file-sharing of material on the Internet will constitute an infringement of copyright." Canadian Heritage, Copyright Policy Branch FAQ, online: <www.canadianheritage.gc.ca/progs/ac-ca/progs/pda-cpb/reform/faq_e.cfm> [Heritage FAQ].

26 "Heritage minister pledges anti-downloading law" *Toronto Star* (4 April 2005), online: Toronto Star <www.thestar.com/NASApp/cs/ContentServer?pagename=thestar/Layout/Article_Type1&c=Article&cid=1112612464877>.

> The bill will provide creators and other rights holders with additional tools to seek legal recourse against individuals engaged in peer-to-peer file-sharing or unauthorized posting of copyright material. Specifically, rights holders will have the right to control the making available of their copyright material on the Internet. It will also be made clear that private copies of sound recordings cannot be uploaded or further distributed.[27]

The link between the making available right and peer-to-peer sharing of music is so strong that the Bill proposes to create a new series of infringements in respect of downstream uses of copies made pursuant to the private copying provisions of subsection 80(1), which include making it an "infringement to communicate [a private copy] by telecommunication to the public or to one or more persons in particular."[28]

Despite this full court press, no one on Parliament Hill suggests that the making available right will put a halt to Canadians' use of peer-to-peer networks. The Canadian Heritage FAQs caution "[that] file-sharing has remained a challenge in other countries that have implemented the WIPO Treaties obligations in this respect."[29] Moreover, downloading music remains firmly subject to the Act's private copying provisions.[30]

At this point, we have the answer to at least one of our questions. What is the nature of the making available right? Where the March 24 announcement was vague, Bill C-60 is precise: for each of authors, performers, and sound recording makers, the making available right is an aspect of the

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27 Heritage FAQ, above note 25.

28 Bill C-60, above note 20, s. 15.

29 Heritage FAQ, above note 25.

30 In the author's view, a download to a computer hard drive is a download to an audio recording medium. It is indisputable that hard drives are "ordinarily used" by consumers to record music sound recordings. It has been argued that the Federal Court of Appeal's decision in *Private Copying 3* [*Private Copying 2003-2004, Tariff of Levies to be Collected by CPCC (Re)* (2003), 28 C.P.R. (4th) 417, <www.cb-cda.gc.ca/decisions/c12122003-b.pdf>], that personal audio devices such as iPods are devices rather than media for the purposes of the Act, suggests that hard drives are also devices (as they are a functional element of computers); the author suggests that the better view is that hard drives are media, not devices. This accords with the commodity-like nature of hard drives, is consistent with consumer uses and dealings with hard drives, and fulfills the purpose of the private copying provision — which is, after all, to compensate rights holders for private copying of music.

communication right.[31] The logical corollary is that if the making available right is an aspect of the communication right, it is *not* a distribution or public performance.

This view is clouded somewhat by section 11 of Bill C-60, which replaces the existing subsection 19(1) of the Act with the following:

> If a sound recording has been published, the performer and maker are entitled, subject to section 20, to be paid equitable remuneration for its performance in public or its communication to the public by telecommunication, *except for any making available referred to in paragraph 15(1)(e) or 18(1.1)(b)*.[32]

One might interpret this clause two ways: (1) rights holders lack a right to remuneration for communications to the public via on-demand services, or (2) rights holders lack a right to remuneration for either communications to the public or performances where the rights holder utilizes an on-demand service. This in turn leads to a more general inquiry: how does the Act treat dealings with works and other subject matter which may touch upon a number of exclusive and remunerative rights of rights holders? A single dealing by a consumer may touch upon many different rights under the Act, and on the rights of multiple rights holders.

What does the government intend for the application of the making available right? At bottom, this is a question of statutory interpretation. Where the meaning of the text of the statute is not clear, one may turn to international statutes for interpretational guidance.[33] Accordingly, to sort out this confusion, we turn to the source: how did the WIPO Internet Treaties characterize these rights? Surprisingly, the Treaties offer less assistance than one might expect.

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31 Bill C-60, above note 20, s. 2 ("a person who makes a work or other subject-matter available to the public in a way that allows members of the public to access it through telecommunication from a place and at a time individually chosen by them communicates it to the public by telecommunication").

32 *Ibid*., s. 11 [emphasis added].

33 *WCT,* above note 13, and *WPPT,* above note 14.

## C. THE WIPO WORLD VIEW

The foundations of the WIPO Internet Treaties lie in the *Berne*[34] and *Rome Conventions*,[35] the international treaties governing global minimum rights for authors and neighbouring rights holders, respectively. It turns out that those foundations are somewhat porous; in fact, their short-comings created much of the impetus for the development of the making available right.

Signatories to the Conventions perceived gaps in the Conventions' coverage. These gaps resulted largely from historical accident and from the Conventions' habits of assigning rights according to subject matter and technology. For example, the *Berne Convention* treats literary works in Article 11, dramatic and musical works in Article 11*ter*, and cinematographic works in Article 14. For each, the Convention distinguishes between the modes of communication: broadcasting is not rebroadcasting, and neither is communication by wire. An entirely separate treaty deals with satellite transmissions.[36] Given this kludge of rights, the first question that one must ask in considering the making available right is whether it is already captured in existing treaties' matrix of rights. To answer that, one must consider a further question, and it is the same question this Chapter asks: what is the nature of the making available right?

Surprisingly, WIPO delegates went into the 1996 Diplomatic Conference with an answer to the first question, but without agreement on the second. Delegates agreed that while one could argue that on-demand services *may* fall within an existing treaty right, the better view was that gaps amid in the Treaties' coverage offered incomplete protection to rights holders.[37] Accordingly, delegates entered the Diplomatic Conference with the goal of patching these gaps and of capturing on-demand services.

The second question, characterizing the nature of the making available right, proved more vexing. Several candidate rights presented themselves: distribution rights, communication rights, performance rights and

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34 *Berne Convention for the Protection of Literary and Artistic Works,* 9 September 1886, <www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html>.

35 *Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations,* 26 October 1961, <www.wipo.int/treaties/en/ip/rome/trtdocs_wo024.html#P24_262>.

36 *Brussels Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite*, 6 May 1974, <www.wipo.int/treaties/en/ip/brussels/trtdocs_wo025.html>.

37 **Mihaly Ficsor,** *The Law of Copyright and the Internet: The 1996 WIPO Treaties, Their Interpretation and Iimplementation* (Oxford; New York: Oxford University Press, 2002) at 494–95 [Ficsor].

broadcasting rights all to a greater or lesser extent offered the capacity to accommodate on-demand services. In the end, two camps emerged: the American delegation characterized on-demand services as a distribution right,[38] while the European Union delegation and most Commonwealth nations (including Canada) treated those services as a communication to the public.[39] Both views have merit, and reflect both contrasting historical treatments of communications right and the Internet's innate flexibility in content delivery.

A download is plainly a distribution of sorts: both the source and the target of the download retain copies of the downloaded work on completion of the interaction. In this sense, a download is every inch a distribution of copies. Streaming, however, is much more akin to broadcasting or a performance than to physical distribution. Streaming in essence communicates a performance from the source to the target, but ordinarily leaves no copy with the target of the stream — "ordinarily," because the target can take extraordinary efforts to record the stream, just as one might take steps to record a broadcast or performance. On this characterization, a stream looks more like a secondary right — a dealing with a work — than a core right addressing dealings with copies of the work.

Technological and teleological considerations aside, practical considerations likely had more to do with the different approaches adopted by the United States and other signatories to the treaties. Simply, different nations had developed economic structures for administering copyright based upon characterization of the same dealing as either a distribution or a communication to the public. It would prove extremely disruptive to those structures to characterize on-demand services in a different manner.[40]

Delegates went into the Conference with a consensus that the characterization of on-demand services should fall into an existing right, rather than into a new, unique right.[41] Surprisingly, delegates emerged from the

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38 This characterization was consistent with the US domestic treatment of on-demand services articulated in the "White Paper," Report of the Working Group on Intellectual Property Rights, *Intellectual Property and the National Information Infrastructure* (Information Infrastructure Task Force, 1995), <www.uspto.gov/web/offices/com/doc/ipnii/> at 213.

39 This treatment was consistent with the EU Green Paper, Commission of the European Communities, *Follow-Up to the Green Paper on Copyright and Related Rights in the Information Society* (Commission of the European Communities, 1996), <www.eblida.org/ecup/lex/com96586.html>.

40 Ficsor, above note 37 at 206–7.

41 *Ibid*. at 241–45.

Conference with treaties that did not settle the categorization of the making available right into an existing economic right. In what has been called the "umbrella solution,"[42] conference participants compromised in focusing the making available right on the acts covered by the right, rather than on the legal characterization of the right itself. Effectively, WIPO left the task of fleshing out the legal character and scope of the making available right to domestic legislatures.

For sound recording makers and performers, the making available right reflects this amorphous nature. Nothing in Articles 10 or 14 directs that treaty signatories implement the making available right for neighbouring rights through either the distribution or communication right — or, for that matter, through a new, *sui generis* right.[43]

The WIPO solution characterized the making available right for authors as an aspect of the communication right.[44] However, this characterization does not in fact dispose of the question of the nature of the right under Canadian law. The doctrine of relative freedom of characterization of acts covered by international copyright obligations permits signatories to a copyright treaty to implement a right provided for in a treaty in national legislation through the application of any right, so long as the implementation covers the substance of the treaty right.[45] In fact, on the floor of the Diplomatic Conference, the United States issued a statement which stressed this understanding of the making available right.[46]

The *WIPO Treaties*, far from giving guidance as to the intended implementation of the making available right, in fact reinforce the inherent ambiguity of the right. The treaties by design leave the question of juridical identity to the legislatures of implementing nations. In fact, we see that different nations have already adopted very different schemes for implementing the right. The United States has taken the position that its right of distribution and right of public performance (which corresponds with Canada's communication right, rather than its public performance right) combine to implement the making available right.[47] The European Union,

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42 *Ibid*. at 208, 501.

43 *WPPT*, above note 14, Arts. 10 & 14.

44 Article 8 of the *WCT* provides that authors shall have "the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works …"; above note 13.

45 Ficsor, above note 37 at 497–98.

46 *Ibid*. at 497.

47 *Ibid*. at 503.

in contrast, has taken the view that the making available right is simply a subset of the broad communication right.[48] To complicate this neat bifurcation, Japan has taken the view that the making available right is a new right — the "right of making transmittable" — distinct from other rights under Japanese law.[49]

## D. BILL C-60: MORE QUESTIONS THAN ANSWERS

The WIPO Internet Treaties shed little interpretive light on the nature of Bill C-60's making available rights in Canada. Neither do they illuminate the scope of the right itself. Bill C-60's making available provisions pose more questions than they answer, but they are questions that merit analysis.

### 1) What is the Making Available Right?

This Chapter first questioned the nature of the making available right. Bill C-60 addresses making available rights for each of authors, performers, and sound recording makers. The *WIPO Copyright Treaty* suggests that the author's right is a communication right,[50] but interpretative rules clarify that national legislatures are free to determine the juridical right that will in fact implement the substantive right. Bill C-60 directs that the Canadian version of the making available right is an aspect of the rights holder's exclusive right to communicate a work to the public by telecommunications.[51]

The juridical character of the right matters. The making available right (for sound recording makers and performers, at least) is a new exclusive right inserted amidst the tangle of remunerative and exclusive rights the Act already provides. Characterization of the making available right as independent of existing rights, or a new right unto itself, risks artificially dissecting transactions and so multiplying royalties payable, and — the

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48 See Information Society Directive, Article 3(1), and Recitals (23) & (25).

49 Ficsor, above note 37 at 506–7, citing "Copyright System in Japan," prepared by the Japanese Copyright Office (JCO), Agency for Cultural Affairs, Government of Japan, 2001 edition, published by the Copyright Research and Information Centre, and on a translation of the Copyright Law by Y Oyama *et al.*, published by the Copyright Research and Information Center (CRIC), February 2001.

50 Above note 13 at Art. 8.

51 Bill C-60, above note 20 at s. 2.

other side of the same coin — complicating the allocation of liability among actors where a claimant establishes liability.[52]

To state the issue from a consumer's perspective, it is a simple case of allocative justice: consumers should only need to pay once for a single dealing. Download a song, retrieve a podcast interview, or access a streamed recording of a radio show — each is a single action. From a copyright perspective, however, each such action potentially touches upon a number of different rights, each of which may be separately administered by different entities under the Act. For example, a simple download from an on-demand service such as Apple's iTunes may involve:

- a reproduction (an exclusive right, often administered by a licensing agent on the author's behalf),
- a making available (a communication to the public by telecommunication — an exclusive right under Bill C-60),
- a communication to the public by telecommunication (a remunerative right typically administered by a collective, and unavailable to the rights holder under Bill C-60), and
- a public performance (a remunerative right typically administered by a collective, and, on at least one interpretation of section 11 of Bill C-60, unavailable to the rights holder).

On some readings of the Bill, the author gets as few as two and as many as four kicks at the dealing. How many times should the consumer have to pay for any one of those dealings? Clearly, the consumer should pay each rights holder — the composers, performers, and sound recording makers. But should each of those rights holders get paid for each right potentially affected by the dealing?

This problem particularly plagues on-demand services over the Internet. Such services include what might be catalogued as both on-demand performances, such as "streaming" music, and on-demand reproductions — downloads such as iTunes. The streamcast radio show, for example, potentially involves a reproduction, a communication (in the form of being made available to the public), and a performance, and does so for each of the (at least) three rights holders with interests in musical sound recordings. Does that constitute nine separate heads of payment for the single dealing?

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52 **See Ysolde Gendreau,** *Authorization Revisited* (2001) 48 Journal of the Copyright Society of the USA 341 at 358.

Part of the problem is that the Bill — and the Act — does not take pains to disentangle the rights associated with different transactions. Ordinarily, we think of copyright as comprising a group of core rights that deal with variations of sending copies to third parties — reproduction, distribution, translation, etcetera. Each of these activities ultimately produces a new copy of the protected subject matter. Canada's reproduction right is plainly this sort of right, and the Act would presumably catch downloading copies of protected works under one of these rights. Peripheral to those core copy-based rights are the secondary economic rights which touch upon dealings with the work that do not result in the creation of additional copies. These sorts of dealings include public performances and broadcasts. Again, the Act would presumably capture streaming works over the Internet under these sorts of rights. Yet the making available right, at least in respect of performers and sound recording makers, seems to conflate these different categories of rights.

Perhaps in Bill C-60 the Canadian government is seeking to leave the juridical basis of any particular transaction to the parties' negotiations. There is a certain intuitive pull to allowing the market to sort it all out. Streamed content looks a lot like radio, so let's call it a public performance. Download services look more like communications to the public by telecommunication, so let's treat it as such. Podcasting — well, how about calling it a communication to the public by telecommunication? Then charge $2,400 a year for the privilege of using our back-catalogue.[53] All of which nonetheless constitutes a making available — so let's tack on a few extra dollars on the front end. If it is all too much, well, the market will correct. That's how markets work, right? Perhaps — but it is very difficult to characterize the manner in which copyright is administered as reflecting a functional market. Multiple collectives administer multiple rights for multiple rights holders, without regard for what each is doing. Regulation of anti-competitive behavior is minimal.[54]

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53 SOCAN Proposal, *Statement of Proposed Royalties to Be Collected by SOCAN for the Public Performance or the Communication to the Public by Telecommunication, in Canada, of Musical or Dramatico-Musical Works*, Tariffs No. 1.B, 1.C, 2.D, 8, 9, 12.A, 12.B, 13.A, 13.B, 13.C, 15.A, 15.B, 16, 19, 22, 23, 24, 25 (2006), Tariffs No. 4.A, 4.B.1, 4.B.3, 5.B (2006-2008).

54 The *Copyright Act*'s regulated industry provisions exempt key rights holders organizations from review under the *Competition Act*: *Copyright Act*, above note 19, s. 70.5 – 70.6 (exempting licensing agencies and collectives from liability for conspiracy under s. 45 of the *Competition Act*, R.S.C. 1985, c. C-34 <http://laws.justice.gc.ca/en/C-34/> (as amended).

Rights holders have already begun characterizing "making available"-type activities as falling under present heads of compensation.[55] Recall that Bill C-60 requires activities subject to the making available right to be pulled out of section 19's right to be paid equitable remuneration. The introduction of the making available right will require some adjustment to existing tariff structures — or, to consumers' dismay, not.

### 2) When Is it Made Available and Who Makes it Available?

Bill C-60 is silent on who infringes the making available right, and on when it is infringed. When an individual pulls a work or sound recording from a website, when is the work made available? There are many possibilities. Consider a typical Internet-based "on-demand" transaction: first, party A possesses a digital copy of a work of sound recording. Second, that party employs an Internet connection to "upload" the work or sound recording to a server. At that point, the work or sound recording is "made available" to other persons for download, but it is not yet "made available" for use by other persons — that cannot happen until one possesses a copy, either by accessing (if available on the server if a format that permits use) or by actually downloading a copy of the work or sound recording and accessing it on one's own machine.

Recall, Bill C-60's making available rights relate to making available "to the public in a way that allows members of the public to access it through telecommunication from a place and at a time individually chosen by them."[56] The key condition is access. On the preceding interpretation, the right is only infringed when the work or sound recording is actually accessible to the downloader. The competing view, of course, is that the work or sound recording is accessible as soon as it is available to the public on a web server.[57]

The act is similarly silent on who makes a work or sound recording available. Again, a range of possibilities exist. Clearly, the uploader bears some responsibility for the making available. But what about the owner of

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55 See note 53, above.

56 Bill C-60, above note 20, s. 2, ss. 8(1), & s. 10.

57 IFPI, the industry organization representing the global record industry, suggests that the making available right covers both the offer of the protected material and the subsequent transmission of that material: *The WIPO Treaties: 'Making Available' Right* (March 2003), <www.ifpi.org/site-content/library/wipo-treaties-making-available-right.pdf> [IFPI].

the server? What about the Internet search tool provider — the Googles and Yahoo!s of the world — who index the 'net and make content findable? What about owners of caches and other tools to enhance the usability of the 'net? Don't all of these entities to some degree contribute to making content accessible to Internet users? Just how far does liability stretch? Some have called for the imposition of liability on both the uploader and the service provider.[58] However, the agreed statement to Article 8 of the *WIPO Copyright Treaty* states that "[i]t is understood that the mere provision of physical facilities for enabling or making a communication does not in itself amount to a communication."[59] Further, Bill C-60's proposals on liability for "Internet Service Providers" and "Information Location Tools,"[60] coupled with the existing exception[61] for those who provide the "means" of telecommunication and the Supreme Court's application of that defence to Internet Service Providers in the *Tariff 22* decision,[62] suggest that the intent would be to limit liability for primary infringement to the person making the upload. A future expansion of liability for authorizing infringement, or the importation of an expansive "inducement" theory of liability, could reverse this state of affairs.[63]

Finally, there is the question of the liability of the downloader. Downloading has not been addressed by Bill C-60, and, accordingly, the private copying regime continues to apply. But for every download, someone uploads. Does a download amount to an authorization of an upload, and so violate the authorization right?[64] This interpretation should be rejected out of hand as an evisceration of the right of private copying and as inconsistent with the Supreme Court of Canada's recent characterization of

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58 See for example Queen Mary Intellectual Property Research Institute, *B3: Draft Protocol on Interpretation of the WIPO Treaties 1996*, (February 2004), <www.qmipri.org/piwt.html>.

59 *WCT,* above note 13. IFPI suggests that nothing in the WIPO Internet Treaties does not exclude treating a service that transmits a signal over "physical facilities" as an act of communication to the public: IFPI, above note 57.

60 Bill C-60, above note 20, s. 29.

61 *Copyright Act*, above note 19, para. 2.4(1)(b).

62 *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45, <www.canlii.org/ca/cas/scc/2004/2004scc45.html>, [2004] 2 S.C.R. 427, (2004), 32 C.P.R. (4th) 1 [*Tariff 22* cited to S.C.R.].

63 Ficsor, above note 37 at 509, noting the possible application of theories of contributory or vicarious liability under national laws.

64 Daniel Gervais suggests the contrary is true: making a file available constitutes at least a "passive authorization" of a reproduction: Daniel Gervais, "Canadian Copyright Law Post-*CCH*" (2004) 18 I.P.J. 131 at 150.

"authorization" as requiring a defendant to "sanction, approve and countenance" the infringing activity.[65] A downloader's "approval" is irrelevant to an uploader's course of conduct. Moreover, to find downloads an infringing authorization would unfairly deprive rights holders of the opportunity for compensation for private copying occurring over the Internet.

### 3) Does Making Available Require Intent?

Related to the question of who is liable is that of whether the right imports a mental component. Internet users often fail to appreciate that certain applications such as peer-to-peer file-sharing programs automatically make content available to others. Similarly, intrusive spyware programs such as screen scrapers and Trojan horse applications incorporating root kits and other potentially unwanted technologies can have the effect of making content on an individuals' computer available over the Internet. In these cases, the law ought to impose liability only in those cases where the defendant knew or ought to have known that the content was made available to others. This is the standard for violation of the existing secondary liability provisions of subsection 27(2) of the Act. Unfortunately, Bill C-60 describes the making available right as a "sole right," suggesting that liability will be strict.[66]

### 4) Where Does Making Available Occur?

Where does a making available occur? Again, a number of options are available. First, consider the site of the upload. In most cases, the uploader will have been the person who committed the infringing act. It makes a certain amount of sense to look to the site of the upload for liability. This suggestion is complicated by the fact that it is often impossible to ascertain the identity of an uploader, much less the location of the uploading. Second, consider the point of making available. Earlier, this Chapter suggested that, at the earliest, the making available should only occur once the content is in fact available for access on a server accessible to the public. This suggests that the site of the server is also a logical place to locate liability. However, this is more troublesome than it sounds. Many servers may intervene between the initial server receiving the upload and the

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65 See *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, <www.canlii.org/ca/cas/scc/2004/2004scc13.html>, [2004] 1 S.C.R. 339, (2004), 236 D.L.R. (4th) 395 at para. 38 [*CCH* cited to S.C.R.].

66 **Bill C-60, above** note 20, ss. 2, 8(1), & 10.

final end user, downloading the material. Is the location of each server an appropriate site for a lawsuit? Moreover, does that option make sense given the government's policy of deflecting liability away from Internet Service Providers and those who provide the means of telecommunications? A third option is the site of the download itself. This, again, has a certain attraction, as it marks the end point of the transaction. Finally, there is the possibility that each site of the transaction is an appropriate location for a making available claim.[67] This approach is consistent with existing jurisprudence on the location of a communication to the public by telecommunications under Canada's *Copyright Act*,[68] and gives the Canadian making available right extraterritorial effect both outward — in the sense that making works and sound recordings available to the public outside Canada infringes the Canadian right — and inward — in the sense of exposing to liability in Canada those in other countries who make works and sound recordings available to Canadians. Query whether this same approach will apply to the making available of a sound recording, particularly if the neighbouring right is ultimately found to have a juridical basis other than the communication right.

### 5) Transition and Other Questions

Finally, transitional issues complicate the introduction of the right. What will be the temporal effect of the right? Will past acts of making available be actionable? What about continuing acts? The intent should be to capture only those acts which make protected material available to the public only after the coming into force of the right. Past acts of making available should not be actionable if they were not actionable prior to the date the right comes into force. That said, it seems reasonable to characterize the act of making available as a continuing act. Placing an infringing work on a server the day before the making available right comes into force should not insulate one from liability if the work continues to be available over Internet. The trickier question involves those cases in which the material propagates throughout the Internet. One might remove material from a server only to find it still available through caches, mirror sites, and other

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67 **Reinbothe & von Lewinski,** *The WIPO Treaties 1996* (London: Reed Elsevier (UK) Ltd., 2002) at 111.

68 *Tariff 22,* above note 62 at para. 59: "a telecommunication from a foreign state to Canada, or a telecommunication from Canada to a foreign state, 'is both here and there'."

features of the Internet. This fact scenario again raises the question of intent.

## E. CONCLUSION

In many ways, the making available right is unprecedented. Never before in Canadian copyright history has a new right come into force with so little known about it. Is it a communication right? Is it a performance right? How does it interact with the existing right of remuneration under the Act? Bill C-60 does not really answer these questions, nor does it address more fundamental questions, such as where does a making available occur, who is liable for a making available, and how far does that liability stretch up the transactional chain? For answers to these questions, we will need to await judicial consideration of the making available right.

With its uncertain station within the broad embrace of the communication right, the making available right highlights the current Act's administrative complexity. The Act splinters rights administration among distributed holders and across multiple rights, creating the risk — the likelihood — of multiple recoveries for consumers' dealings with content, and does so through the artificial construct of a "market" created by statute, and administered by a bureaucracy away from effective oversight from Canada's competition regulator.

In their 2002 report on the *Copyright Act*, *Supporting Culture and Innovation*, the Departments of Canadian Heritage and Industry Canada jointly set out a timetable for revising the Act, identifying short, medium, and long-range objectives.[69] The Departments included "clarifying and simplifying the Act" among their long-range objectives.[70] Given the uncertainty associated with the introduction of the making available right, one cannot help but suspect that the government would better serve the public by making this objective a higher priority.

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69 **Industry Canada,** *Supporting Culture and Innovation: Report on the Provisions and Operation of the Copyright Act* (Ottawa: Industry Canada, 2002) <http://strategis.ic.gc.ca/pics/rp/section92eng.pdf>.

70 *Ibid*. at 45–46.