

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)**

BETWEEN:

SOCIETY OF COMPOSERS, AUTHORS AND MUSIC PUBLISHERS OF CANADA

APPELLANT
(Respondent)

-and-

**ENTERTAINMENT SOFTWARE ASSOCIATION, ENTERTAINMENT SOFTWARE
ASSOCIATION OF CANADA, APPLE INC., APPLE CANADA INC., BELL CANADA,
QUEBECOR MEDIA INC., ROGERS COMMUNICATIONS, SHAW
COMMUNICATIONS AND PANDORA MEDIA INC.**

RESPONDENTS
(Applicants)

[Style of cause continued on next page]

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(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*, S.O.R./2002-156)

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PART I - OVERVIEW AND FACTS

A. Overview

1. The central issue on appeal is what Parliament achieved by enacting s. 2.4(1.1) of the *Copyright Act*.¹

2. Parliament enacted ss. 2.4(1.1), 15(1.1)(d) and 18(1.1)(a) in the 2012 *Copyright Modernization Act*² (“**CMA**”) for the stated purpose of fully implementing two 1996 World Intellectual Property Organization (“**WIPO**”) treaties signed by Canada: the *Copyright Treaty* (“**WCT**”) and the *Performances and Phonograms Treaty* (“**WPPT**”) (together, “**WIPO Treaties**” or “**WIPO Internet Treaties**”).³ These treaties brought international copyright standards into the digital era by creating exclusive, technologically neutral rights to “make available” works and other subject-matter “in such a way that members of the public *may* access [them] from a place and at a time individually chosen by them.”⁴

3. Before the *CMA*’s enactment, the Government stated that the *CMA* would “implement the rights and protections set out in the WIPO Internet treaties. ... All copyright owners will now have a ‘making available right,’ which is an exclusive right to control the release of copyrighted material on the Internet.”⁵ In doing so, the *CMA* would “update the rights and protections of copyright owners to better address the challenges and opportunities of the Internet,” including the growing threat of digital piracy, “so as to be in line with international standards.”⁶ Consistent with the WIPO Treaties, the *CMA* was designed to be “technologically neutral,” “flexible enough to evolve with changing technologies and the digital economy.”⁷

4. After carefully examining the evidence of Parliament’s intent, the WIPO Treaties and expert evidence and authoritative writings on the WIPO Treaties, the language of the amendments, and the Court’s copyright jurisprudence, the Copyright Board of Canada (the “**Board**”) interpreted

¹ [R.S.C. 1985, c. C-42](#) [Act]. Unless otherwise indicated, all section references are to the Act.

² [S.C. 2012, c. 20](#) (assented to June 29, 2012) [CMA].

³ [2186 U.N.T.S. 121](#) (adopted December 20, 1996, in force March 5, 2002) [WCT]; [2186 U.N.T.S. 203](#) (adopted December 20, 1996, in force March 19, 2002) [WPPT].

⁴ WCT, Art. [8](#) [emphasis added]; WPPT, Arts. [10](#), [14](#).

⁵ Govt. of Can., “[What the Copyright Modernization Act Means for Owners, Artists and Creators.](#)”

⁶ *CMA*, summary, [\(a\)](#).

⁷ Govt. of Can., “[Copyright Modernization Act – Background](#)”, (Appellant’s Record [AR], V. III, Tab 38(F)).

s. 2.4(1.1) to expand the meaning of the word “communication” in the Act to include the act of making available, regardless of the means of transmission, if any.⁸

5. Without offering any alternative interpretation that would achieve Parliament’s objectives, the Federal Court of Appeal rejected the Board’s interpretation as unreasonable and quashed its decision without sending the matter back.⁹ In doing so, the Court of Appeal misapplied the approach to reasonableness review set out in *Vavilov*,¹⁰ failed to apply the interpretive principle confirmed in *Balev* that domestic provisions intended to implement international treaty obligations “must” be interpreted in a manner consistent with those obligations,¹¹ and, contrary to Parliament’s expressly stated intention, put Canada in breach of its international treaty obligations.

6. As the Board correctly concluded, s. 2.4(1.1) expands the meaning of “communication” in the Act to trigger on the initial act of making a work available to the public, even before any transmission occurs. The expert evidence confirms that this expanded communication right also covers any subsequent transmission(s), regardless of the technology employed, including transmissions of downloads to the public. This interpretation gives full effect to the language of the *CMA*, Parliament’s intent, the principle of technological neutrality, and the expert evidence, foreign court decisions, the authoritative writings on the WIPO Treaties, and the methodology for interpreting the communication right applied in *ESA*. It also affords the full protection intended by Parliament and the WIPO Treaties against digital piracy. The Court’s 2012 decision in *ESA*¹² does not determine the meaning of s. 2.4(1.1). *ESA* interpreted the meaning of the word “communicate” under the language of the 1988 Act, long before Parliament turned its mind to the complexities of the Internet and implemented a new treaty right designed to address those complexities. *ESA* cannot be viewed as reflecting or circumscribing Parliament’s intent in 2012. The appeal should be allowed.

⁸ [Scope of Section 2.4\(1.1\) of the Copyright Act – Making Available](#) (25 August 2017), CB-CDA 2017-085 [**Board Reasons**], ¶[12-16, 117](#) (AR, V. I, Tab 1).

⁹ [2020 FCA 100](#) [**CA Reasons**] (AR, V. I, Tab 2).

¹⁰ *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019 SCC 65](#) [**Vavilov**].

¹¹ *Office of the Children’s Lawyer v. Balev*, 2018 SCC 16 [**Balev**], ¶[31](#).

¹² *ESA v. SOCAN*, [2012 SCC 34](#) [**ESA**].

B. The Board’s Decision

7. On November 7, 2012, s. 2.4(1.1) took effect.¹³ Shortly thereafter, the Society of Composers, Authors and Music Publishers of Canada (“SOCAN”) asked the Board to rule on the meaning of s. 2.4(1.1) in the context of Tariff 22.A, including whether the MAR “renders moot the conclusion that the communication right does not apply to downloads of musical works.” Recognizing the significance of this issue beyond SOCAN’s tariff, the Board convened a separate proceeding. More than 30 organizations participated and filed extensive submissions, legislative history, and expert evidence.¹⁴

8. After carefully examining the extensive materials before it, the Board interpreted s. 2.4(1.1) as expanding the meaning of the word “communication” in the Act to include the act of making available, regardless of the means of transmission, if any. It found that s. 2.4(1.1)’s purpose was to implement the WIPO Treaties. It observed that interpreting s. 2.4(1.1) as applying to the making available of both streams and downloads would be consistent with Canada’s treaty obligations and with the principle of technological neutrality, whereas interpreting s. 2.4(1.1) as applying only to the making available of streams would not. It found no conflict with *ESA*’s interpretation of the 1988 Act. It also concluded that the act of making available and any subsequent act of transmission do not merge into a single act.¹⁵

C. The Court of Appeal’s Decision

9. On judicial review, the Court of Appeal assumed that the reasonableness standard applied. Without engaging with the evidence supporting the Board’s interpretation, and without offering any alternative interpretation that would achieve Parliament’s objectives, it rejected the Board’s interpretation as unreasonable. It quashed the Board’s decision without sending the matter back, reasoning that doing so would serve no purpose because the Board had, in a separate decision,¹⁶ concluded that it lacked sufficient evidence to approve a tariff for making available. Despite the ample evidence and submissions before it, the Court of Appeal concluded that a declaration on s. 2.4(1.1)’s meaning was “not possible.”¹⁷

¹³ *Canada Gazette*, Part II, Vol. 146, No. 23 (7 November 2012), [OIC P.C. 2012-1392](#).

¹⁴ Board Reasons, ¶¶6-8 (AR, V. I, Tab 2); Board Notice (Dec. 7, 2012) (AR, V. I, Tab 1).

¹⁵ Board Reasons, ¶¶12-16 (AR, V. I, Tab 1).

¹⁶ *Online Music Services* (CB-CDA 2017-086), application dismissed [2020 FCA 101](#).

¹⁷ CA Reasons, ¶¶21, 49-50, 66, 95-97, 102, 107-09 (AR, V. I, Tab 2).

PART II - ISSUES

10. This appeal raises the following issues:

- (a) Does s. 2.4(1.1) expand the meaning of “communication” in the Act to include the initial act of making available to the public, regardless of the means of transmission (if any), and any subsequent transmission(s)? Yes.
- (b) Do any subsequent transmission(s) merge with the initial act of making available? No. The expanded communication right is first triggered by the initial act of making content accessible, and extends to all subsequent transmissions if they occur, irrespective of the timing or technological means of transmission.
- (c) What is the effect of s. 2.4(1.1) on *ESA*? *ESA* did not assess Parliament’s intent in enacting the *CMA* and does not override Parliament’s intent. The term “communication” must now include providing access to a work (whether a stream or a download and whether it is transmitted or not, something not considered in *ESA*) and is no longer restricted to the transmissions of performances of works.

PART III - ARGUMENT

A. Interpretive Principles

11. The modern principle of statutory interpretation requires that the words of a statute be read “in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.”¹⁸

12. Legislative intent is the central focus of the interpretive analysis.¹⁹ In ascertaining legislative intent, “all evidence of legislative intent [may] be considered, provided that it is relevant and reliable.”²⁰ This evidence may include legislative debates, materials generated in the course of preparing and enacting the legislation (e.g., public explanatory materials prepared by the government), and any relevant international treaties.²¹

¹⁸ *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 [*Rizzo*], ¶21.

¹⁹ *Krayzel Corp. v. Equitable Trust Co.*, 2016 SCC 18, ¶15; R. Sullivan, *Statutory Interpretation*, 3rd ed., at 185 (Music Canada’s Book of Authorities [*BOA*], Tab 17).

²⁰ *Francis v. Baker*, [1999] 3 S.C.R. 250, ¶35. See also *Bristol Myers Squibb Co. v. Canada (Attorney General)*, 2005 SCC 26, ¶156, per Bastarache J., dissenting on other grounds.

²¹ Sullivan, at 259-60 (*BOA*, Tab 17).

13. In a long line of cases, the Court has consistently held that “legislation is presumed to operate in conformity with Canada’s international obligations.”²² This presumption can be rebutted only where the legislation “clearly” compels a different result.²³ As the Court explained in *B010*:

[T]o interpret a Canadian law in a way that conflicts with Canada’s international obligations risks incursion by the courts in the executive’s conduct of foreign affairs and censure under international law. ... [The presumption of conformity] is not peculiar to Canada. It is a feature of legal interpretation around the world.²⁴

14. Most recently, in *Quebec v. 9147-0732 Québec inc.*, the Court reaffirmed this presumption and observed that “when we fail to uphold our obligations, we undermine the respect for law internationally,” and that this “provides the rationale for the traditional common law presumption of conformity with Canada’s international obligations.” *Quebec* reaffirmed that “international law that is binding on Canada ... is not only potentially persuasive but also obligatory.”²⁵

15. Canada’s obligations under an international treaty are central to the contextual analysis of domestic provisions intended to implement the treaty. In *B010*, the Court observed, “The contextual significance of international law is all the more clear where the provision to be construed ‘has been enacted with a view towards implementing international obligations’.”²⁶ In *Balev*, the Court went further and held that when “the purpose of [a statutory provision] is to implement the underlying convention, th[e] [c]ourt *must* adopt an interpretation consistent with Canada’s obligations under it.”²⁷

²² *Vavilov*, ¶114. Also see *Zingre v. The Queen*, [1981] 2 S.C.R. 392, at 409-10; *National Corn Growers Assn. v. Canada*, [1990] 2 S.C.R. 1324, at 1371-72; *R. v. Hape*, 2007 SCC 26 [*Hape*], ¶53-54; *Németh v. Canada*, 2010 SCC 56, ¶34; *B010 v. Canada*, 2015 SCC 58 [*B010*], ¶47-48; *R. v. Appulonappa*, 2015 SCC 59, ¶40; *Vavilov*, ¶114; *Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32 [*Quebec*], ¶25, 31-39; Sullivan, at 311-14 (BOA, Tab 17).

²³ *Hape*, ¶53.

²⁴ *B010*, ¶47-48.

²⁵ *Quebec*, ¶25, quoting Brunnée & Toope, “A Hesitant Embrace: The Application of International Law by Canadian Courts” (2002) 40 *Can. Y.B. Int’l Law* 3, at 41 (BOA, Tab 11).

²⁶ *B010*, ¶47.

²⁷ *Balev*, ¶31 [emphasis added]; also see ¶32-33 (referring to *Vienna Convention* obligations).

16. The Court has consistently interpreted the Act in light of international copyright treaties to which Canada is a contracting party.²⁸ This interpretive approach ensures Canadian copyright law remains consistent with international copyright standards agreed to and adopted by Canada.

17. The doctrine of *contemporanea expositio* requires that “[t]he words of a statute must be construed as they would have been the day after the statute was passed.”²⁹ In other words, “the meaning of legislation is fixed at the time of enactment.”³⁰

18. Finally, the *Interpretation Act* provides that “[e]very enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.”³¹ Thus, a liberal interpretation that promotes Parliament’s objectives should be preferred over a restrictive one that does not promote those objectives.³²

B. Parliament Enacted the CMA to Fully Implement the WIPO Treaties

19. As the Board noted,³³ in explaining the CMA’s legislative purpose, both Parliament and the Government stated their intent to fully implement the WIPO Treaties, including the new making available right (the “**MAR**”), in a manner consistent with international norms so as to strengthen protections against digital piracy and enable Canadians to realize the full potential of digital marketplaces for copyrighted content.

20. The CMA’s preamble confirms Parliament’s intent to bring Canadian copyright law into harmony with international copyright standards reflected in the WIPO Treaties:

... Whereas advancements in and convergence of the information and communications technologies that link communities around the world present opportunities and challenges that are global in scope for the creation and use of copyright works or other subject-matter;

²⁸ See, e.g., *CAPAC v. CTV*, [1968] SCR 676 at 681; *Re:Sound v. MPTAC*, 2012 SCC 38 at 52, *Bishop v. Stevens*, [1990] 2 S.C.R. 467 [*Bishop*], at [473-75](#), [479](#), [482-83](#); *Théberge v. Galerie d’Art du Petit Champlain inc.*, 2002 SCC 34 [*Théberge*], ¶[6](#); *SOCAN v. CAIP*, 2004 SCC 45, ¶[97](#); *Robertson v. Thomson Corp.*, 2006 SCC 43, ¶[94-97](#), per Abella J. (dissenting); *ESA*, ¶[13-20](#); *Rogers v. SOCAN*, 2012 SCC 35 [*Rogers*], ¶[41-49](#).

²⁹ *Perka v. The Queen*, [1984] 2 S.C.R. 232 [*Perka*], at [264-65](#), quoting *Sharpe v. Wakefield* (1888), 22 Q.B.D. 239, at 242 (BOA, Tab 6).

³⁰ *Felipa v. Canada (Citizenship and Immigration)*, 2011 FCA 272 [*Felipa*], ¶[71](#).

³¹ *Interpretation Act*, R.S.C. 1985, c. I-21, s. [12](#).

³² *Rizzo*, ¶[22-23](#); Sullivan, at 227-28 (BOA, Tab 17).

³³ Board Reasons, ¶[96-103](#), [128-29](#) (AR, V. I, Tab 1).

Whereas in the current digital era copyright protection is enhanced when countries adopt coordinated approaches, based on internationally recognized norms;

Whereas those norms are reflected in the [WCT and WPPT], adopted in Geneva in 1996;

Whereas those norms are not wholly reflected in the *Copyright Act*; ...

21. This intent is also reflected in the legislative summary of the *CMA*, which states that the *CMA* “update[s] the rights and protections of copyright owners to better address the challenges and opportunities of the Internet, so as to be in line with international standards.”³⁴

22. The legislative debate on the *CMA* reflects this intent. As one majority MP stated: “The [*CMA*] would implement the rights and protections of the Internet treaties of [WIPO]. These include a making available right.” The Minister of Industry stressed the objective of strengthening protections against digital piracy: “Cracking down on those who are destroying wealth by use of the Internet, by flouting copyright laws, that is consistent with WIPO. ... [W]e have WIPO-tested every provision of the bill and we find it to be WIPO compliant.”³⁵

23. The materials generated in the course of preparing and enacting the *CMA* express Parliament’s intent. In announcing the *CMA*, the Government confirmed its intent to implement the full rights and protections of the WIPO Treaties, including the MAR:

The [WIPO Treaties] establish *new rights and protections* for authors, performers and producers. Canada signed the treaties in 1997. The proposed Bill will implement the associated rights and protections to pave the way for a future decision on ratification. All copyright owners will *now* have a “making available right”, which is an *exclusive right to control the release of copyrighted material on the Internet. This will further clarify that the unauthorized sharing of copyrighted material over peer-to-peer networks constitutes an infringement of copyright.*³⁶

³⁴ *CMA*, summary, [\(a\)](#).

³⁵ [Bill C-60](#), (introduced June 2005, died on the order paper Nov. 2005); [Bill C-32](#), (introduced June 2010, died on the order paper March 2011); [Bill C-11](#), (identical to its predecessor) (introduced Sept. 2011, Royal Assent 29 June 2012); House of Commons, *Official Report (Hansard)*, 41st Parl., 1st Sess., Vol. 146, No. 124 (May 15, 2012), at [8116](#) (Hon. R. Moore); House of Commons, *Official Report (Hansard)*, 40th Parl., 3rd Sess., Vol. 145, No. 92 (November 2, 2010), at [5645](#) (Hon. T. Clement).

³⁶ Govt. of Can., “[What the Copyright Modernization Act Means for Owners, Artists and Creators.](#)” See also Govt. of Can., “[What We Heard During the 2009 Consultations](#)”; Govt. of Can., “[Copyright Modernization Act – Background](#)” [emphasis added], (AR, V. IX, Tab 54(P)).

24. In a legislative summary prepared for parliamentarians, the Library of Parliament explained the purpose of s. 2.4(1.1): “the bill adds a new subsection to section 2.4 of the Act, clarifying that the definition ‘communication of a work or other subject-matter to the public by telecommunication’ includes making a work available by telecommunication, at a place and time chosen by the public, *in order to implement the making available right* for intangibles.”³⁷

25. The materials prepared in the course of ratifying the WIPO Treaties reinforce Parliament’s intent. An explanatory memorandum on the WCT and WPPT tabled before the House of Commons in June 2013 stated that the *CMA* “was developed with a view to implementing the rights and protections of the WIPO Copyright Treaty,” and that ratification will “send a strong signal to Canada’s trading partners, and the world community, that Canada’s intellectual property regime is *now fully in line* with international standards regarding copyright protection in the digital economy.” Canada completed this process in May 2014.³⁸

26. As the Board noted, Parliament and the Government also stated their intent to implement the WIPO Treaties in a *technologically neutral* way.³⁹ The legislative summary of the *CMA* states that it is intended to “ensure that [the Act] remains technologically neutral.”⁴⁰ This objective featured prominently in the legislative debates. As one majority MP described:

[N]ew technologies have fostered new ways to create and use copyrighted material, as well as new distribution models and consumer products. ... All this has created a new world that the *Copyright Act* must adjust to and reflect.

Just some 15 years ago, many of the works protected by copyright were primarily available in physical formats such as paper for printed books, VHS cassettes for movies, or cartridges for video games; today, creative works are becoming increasingly available to consumers in digital formats over the Internet. Consumers can buy an e-book, *stream* a movie or *download* a game directly to their game console. Given this new reality, it is

³⁷ Library of Parliament, *Legislative Summary of Bill C-32: An Act to amend the Copyright Act*, 40th Parl., 3rd Sess. (20 July 2010), Pub. No. 40-3-C32-E, at [9](#) [emphasis added]. It went on to note that “[t]he WPPT provides this right as a ‘right of making available to the public’ while the WCT includes it in the provision on a general right of communication to the public” (p. 5).

³⁸ WCT Explanatory Memorandum (tabled before the House of Commons in June 2013), at 3-5 (AR, V. VIII, Tab 54(I)) [emphasis added]; WIPO, “[WCT Notification No. 81 – Ratification by Canada](#),” WIPO, “[WPPT Notification No. 86 – Ratification by Canada](#).”

³⁹ Board Reasons, ¶[128-29](#) (AR, V. I, Tab 1).

⁴⁰ *CMA*, summary, ([g](#)).

important to pass the [CMA]. The [CMA] includes provisions that are *technology-neutral* and reflect the reality of an ever-evolving media and technological landscape.⁴¹

27. Similarly, the Minister of Industry explained that the intent was not to focus on specific technologies, but to create a seamless right responsive to all existing and future technologies:

[T]he purpose of this bill is to be as *technologically neutral* as possible, to not specifically put in clauses dealing with iPods, PVRs or other technology that could change in five years, in two years. Who knows what will happen? Therefore what we tried to do with this bill was to make it principle-based and technologically neutral, so that the principles can be applied not only to the present technology but also the future technology. That is an important principle of the bill, so it can *stand the test of time*.⁴²

28. The principle of technological neutrality also features prominently in the materials generated in the course of preparing and enacting the CMA. In a backgrounder prepared for the public, the Government stated that the CMA is intended to “establish rules that are *technologically neutral*, so they are flexible enough to evolve with changing technologies and the digital economy.” A Government-prepared copyright glossary explained that the technologically neutral MAR would cover, *inter alia*, the making available of works or other subject-matter on platforms such as iTunes that allow downloads.⁴³

29. In sum, Parliament enacted the CMA to fully implement the WIPO Treaties. Accordingly, s. 2.4(1.1) “must” be interpreted in a manner fully consistent with those treaties.⁴⁴

C. The Making Available Right under the WIPO Treaties

1. The History of the WIPO Treaties

30. By the early 1990s, countries around the world were increasingly recognizing that the existing rights and protections established in international copyright conventions and treaties, such as the *Berne Convention for the Protection of Literary and Artistic Works*,⁴⁵ were insufficient to

⁴¹ House of Commons, *Official Report (Hansard)*, 41st Parl., 1st Sess., Vol. 146, No. 124 (May 15, 2012), at [8082](#) (Hon M. Adler).

⁴² House of Commons, *Official Report (Hansard)*, 40th Parl., 3rd Sess., Vol. 145, No. 92 (Nov. 2, 2010), at [5645](#) (Hon. T. Clement); House of Commons, *Official Report (Hansard)*, 41st Parl., 1st Sess., Vol. 146, No. 124 (May 15, 2012), at [8116](#) (Hon. R. Moore) and [8126](#) (Hon. R. Cannan).

⁴³ Govt. of Can., “[Copyright Modernization Act – Backgrounder](#)”, “[What We Heard During the 2009 Consultations](#)”, “Balanced Copyright Glossary” (AR, V. IX, Tab 54(P)).

⁴⁴ *Balev*, ¶[31](#); *Pushpanathan v. Canada*, [1998] 1 S.C.R. 982 [*Pushpanathan*], ¶[51](#).

⁴⁵ [828 U.N.T.S. 221](#) (as amended on September 28, 1979) [*Berne Convention*].

support the creative activities and protect against piracy in the digital era.⁴⁶ Leading copyright experts had identified “significant and obvious gaps in substantive protection” in those international instruments that left copyright owners exposed to piracy of a nature and scale that could scarcely have been imagined in the pre-Internet era.⁴⁷

31. One such gap was the absence of any “satisfactory and readily enforceable basis for the liability of those who make available to the public works and objects of related rights in [Internet-type] networks.”⁴⁸ This gap left copyright owners exposed to the risk that their copyrighted content could be made available on online platforms without their authorization, such that they could be accessed on a massive scale, without any recourse.

32. A related gap was the lack of adequate protection against unauthorized interactive digital transmissions, which “scramble” or “blur” the traditional distinction between copy-related rights (e.g., the reproduction and distribution rights) and non-copy-related rights (e.g., the public performance right). For example, new hybrid technologies had emerged that permitted users to obtain a transient copy.⁴⁹

33. The *Berne Convention* rights required modernization because, among other things:

- (a) The “traditional” concept of “communication to the public” required “clarification” so that it was “accepted and clarified that this concept extends not only to the acts that are carried out by the ‘communicators’ themselves [...] but also to the acts which only consist of

⁴⁶ Ficsor, “Copyright in the Digital Environment,” WIPO/CR/KRT/05/7 (2005), ¶[15-16](#) [**“Digital Environment”**]; Expert Report of Silke von Lewinski [**von Lewinski Report**], ¶26 (AR, V. VI, Tab 50(A)); *House Reports*, 105th Cong., 2nd Sess., No. 551, Pt. 1 (22 May 1998), at [9](#).

⁴⁷ Ricketson & Ginsburg, *International Copyright and Neighbouring Rights*, 2nd ed., at 4.06-4.11, 12.17, 12.43-12.52, 12.56 (BOA, Tab 18); Ficsor Report, at 6 (AR, V. III, Tab 38(B)); Reinbothe & von Lewinski, *The WIPO Treaties 1996*, at 104 (BOA, Tab 12); Goldstein & Hugenholtz, *International Copyright*, 2nd ed., at 328 (BOA, Tab 15).

⁴⁸ Ficsor, “Digital Environment,” ¶[45](#).

⁴⁹ Ficsor, “Digital Environment,” ¶[50-52](#); Ficsor Report, at 5, 8 (AR, V. III, Tab 38(B)); Ficsor, *The Law of Copyright and the Internet* [**Ficsor, Copyright and the Internet**], at C8.08 (BOA, Tab 14); Ginsburg, “Recent Developments in US Copyright Law – Part II,” *Rev. Int’l du Droit d’Auteur* (October 2008) [**Ginsburg, “Recent Developments”**], at [12](#), [27](#).

making the work accessible to the public.” It was also unclear whether the right covered on-demand communications.⁵⁰

- (b) Neither the distribution right nor the communication right fully covered making available of streams or copies on an on-demand basis, nor interactive distribution of copies through transmissions. Additionally, coverage of these rights differed in national laws.⁵¹
- (c) The reproduction right did “not correspond to the extremely dynamic nature of Internet-type networks,” and “it alone would not offer a satisfactory and readily enforceable basis for the liability of those who make available to the public works and objects of related rights in such networks.”⁵²

34. Courts worldwide were increasingly facing problems in applying the copyright framework adopted for the radio and television era:

Before the adoption of the WIPO Treaty, online dissemination (to use a legally neutral word) of copyright works created conceptual difficulties for judges as definitions and terms of art that were apt earlier in the previous century do not make sense in a digital environment. The reproduction of a work, the publication of a work, the distribution of a work, and the broadcasting of a work are the four cornerstones of liability, but their late 20th century relevance was problematical.⁵³

35. Against this backdrop, the WIPO Treaties were adopted in 1996. They brought international copyright law into the digital era by establishing new rights for authors, performers, and makers of sound recordings that would keep pace with advances in technology, including subscription-based, on-demand streaming and download delivery business models.⁵⁴ As part of this, the WIPO Treaties strengthened legal protections against digital piracy, including on peer-to-

⁵⁰ Ricketson & Ginsburg, at 12.01, 12.04-12.06; WIPO, *Guide to the Copyright and Related Rights Treaties Administered by WIPO* (2004) [*WIPO Guide*], at [CT-8.7](#); Ficsor Report, at 6 (AR, V. III, Tab 38(B)); *WIPO Guide*, at [CT-8.6](#); Goldstein & Hugenholtz, at 318, 328-29 (BOA, Tab 15); *Rogers*, ¶[34](#), [43](#), citing Ricketson & Ginsburg, at 12.48 (BOA, Tab 18).

⁵¹ Ficsor Report, at 6 (AR, V. III, Tab 38(B)); *WIPO Guide*, at [CT-8.6-CT-8.7](#); WIPO, *The WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)*, ¶[23-26](#); Board Reasons, ¶[152](#) (AR, V. I, Tab 1).

⁵² Ficsor, “Digital Environment,” ¶[45](#).

⁵³ *Ortmann v. U.S.A.*, [2017] NZHC 189, ¶[171](#), quoting R. Clark, “Sharing Out Online Liability: Sharing Files, Sharing Risks and Targeting ISPs” in A. Strowel, ed., *Peer-to-Peer File Sharing and Secondary Liability in Copyright Law* (Edward Elgar, 2009), at [199](#).

⁵⁴ Reinbothe & von Lewinski, at 104, 109-11, 337-41, 368-73 (BOA, Tab 12); von Lewinski Report, ¶[26](#) (AR, V. VI, Tab 50(A)); Ficsor, *Copyright and the Internet*, at 4.146 (BOA, Tab 14).

peer (“P2P”) file-sharing networks that enabled millions of users worldwide to share copyrighted content without authorization via the Internet.⁵⁵

2. The Text of the Making Available Right

36. The “centerpiece”⁵⁶ of the WCT is Art. 8, which updated the scope of the communication right and included the MAR:

Article 8 – Right of Communication to the Public

... 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 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. [Emphasis added.]

37. Articles 10 and 14 of the WPPT afford the same right to performers and makers (producers) of sound recordings (“phonograms”):

Article 10 – Right of Making Available of Fixed Performances

Performers shall enjoy the exclusive right of authorizing the making available to the public of their performances fixed in phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.

Article 14 – Right of Making Available of Phonograms

Producers of phonograms shall enjoy the exclusive right of authorizing the making available to the public of their phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.

3. Expert Evidence and Authoritative Writings on the Making Available Right

38. Leading experts and authoritative writings on the WIPO Treaties, including expert reports in evidence before the Board, agree that the MAR is an exclusive, technologically neutral right that covers the initial act of making available of copyrighted content so that the public may access it at a time and place of their choosing, as well as any subsequent transmission(s), irrespective of the technological means employed, should they occur.

⁵⁵ Ficsor, “Digital Environment,” ¶15-16; von Lewinski Report, ¶51 (AR, V. VI, Tab 50(A)).

⁵⁶ Ricketson & Ginsburg, at 4.25 (BOA, Tab 18).

39. The Board considered evidence filed in the form of detailed reports authored by the leading worldwide experts on international copyright treaty rights. Dr. Mihály Ficsor, former Assistant Director General of WIPO and the person responsible for preparing the WIPO Treaties, described the nature and scope of the right as being:

an exclusive right in order to control the decisive act of uploading and making accessible for interactive use of protected works and objects of related rights on the Internet ***irrespective of the nature/purpose of the transmissions that may take place*** in the course of such use. The relevant provisions of the WCT and the WPPT were adopted by the 1996 Diplomatic Conference on the basis of a unanimous understanding that the making available right is applicable both where the resulting interactive use takes the form of transmissions only allowing ***perception of and*** where they may result in ***downloading*** of the works (performances and/or phonograms) ***thus made available***. ... [T]he concept of “making available to the public” is broader than making available the works through distributing copies, it equally covers non-copy-related acts, such as public performance, broadcasting or other communication to the public.⁵⁷

40. In the same vein, Dr. Silke von Lewinski – co-author of *The WIPO Treaties 1996*, author of *International Copyright Law and Policy*, and a participant in the WIPO Treaty negotiations – described the scope of the right as follows:

The making available right under the WCT and WPPT applies as soon as a work, performance, or phonogram, which is stored on a server, is rendered accessible to the public through an internet or other network or connection that ***may*** be used by members of the public in such a way that they then may access these works, performances or phonograms at a time and from a place individually chosen.⁵⁸

41. Dr. von Lewinski added that the MAR “covers ***all*** of the elements of the transmission to the end user’s terminal, where it occurs.” In other words, it covers every link in the chain:

While the offer for access as such is sufficient to trigger the making available right, the ***actual access***, which follows a transmission of the work or other subject matter[,] still ***represents a form of communication***, without which the work etc. would not be “available” to the end user. ***Systematically, the making available right is part of the communication right, and “communication” covers the entire act up to the user. Therefore, the transmission itself is also covered by the making available right.***⁵⁹

42. Dr. Jane Ginsburg, co-author of *International Copyright and Neighboring Rights* and other authoritative works on copyright, agreed that the MAR targets the making available of copyrighted

⁵⁷ Ficsor Report, at 3, 9 [emphasis added] (AR, V. III, Tab 38(B)).

⁵⁸ von Lewinski Report, ¶11 [footnotes omitted; emphasis added] (AR, V. VI, Tab 50(A)).

⁵⁹ von Lewinski Report, ¶15, 50 (AR, V. VI, Tab 50(A)); See also ¶15, 33-34, 51, 61.

content so that the public *may* access it at a time and place of their choosing and covers the making available of both streams and downloads:

The making available right targets on-demand transmissions (whether by wire or wireless means), for it makes clear that the members of the public may be separated both in space and in time. The technological means of ‘making available’ are irrelevant; the right is expressed in technologically neutral terms. ... As is clear from the formulation “such a way that members of the public *may* access” ..., the right is triggered when the public is invited to access, rather than when any member of the public in fact *has* accessed. Equally importantly, the right applies to the “work”; it is not limited to “performances” of the work. Thus it covers making the work available both as download and as a stream.⁶⁰

43. Dr. Ginsburg also expressed the opinion that the MAR covers both the initial act of making available and any subsequent transmission(s), irrespective of the means: “Compliance with the WCT requires a member state to cover both kinds of access (streaming and downloading), and to cover not only actual transmissions of streams and downloads, but also the offering to communicate the work as a stream or a download.”⁶¹ The evidence on this point was undisputed and accepted by the Board.⁶²

44. The authoritative *WIPO Guide*, published by WIPO itself, confirms that the purpose of Article 8 is to permit rights holders to control both the availability of copyright content in digital networks as well as all subsequent transmissions through such networks (should there be any):

... it was agreed that the inclusion of works and objects of related rights in, ***and their transmission through***, the Internet and in similar possible future networks should be subject to an exclusive right of authorization of authors. ...

... a compromise solution was worked out which contained the following elements: (i) the act of interactive transmission should be described in a neutral way, free from specific legal characterization (for example, as making available a work to the public by wire or by wireless means, for access by members of the public); (ii) such a description should not be technology-specific and, at the same time, it should express the interactive nature of digital transmissions in the sense that it should go along with a clarification that a work or an object of related right is considered to be made available “to the public” also when the members of the public may access it at a time and at a place freely chosen by them.⁶³

⁶⁰ Ginsburg, at [37](#) [footnotes omitted; emphasis in original].

⁶¹ Expert Report of J.C. Ginsburg dated September 10, 2013 [**Ginsburg Report**], ¶5; also see ¶14 (AR, V. X, Tab 61(A)).

⁶² Board Reasons, ¶[164\(ii\)](#).

⁶³ *WIPO Guide*, at [CT-8.1](#), [CT-8.9](#) [emphasis added]. Also see Ficsor, “Digital Environment,” ¶[60](#) and Basic Proposal, Notes [10.10-10.11](#), [10.14](#), [10.20](#).

45. The expert evidence confirms that the MAR for works (Art. 8 of the WCT) and the MAR for performances and sound recordings (Arts. 10 and 14 of the WPPT) have an equally broad scope.⁶⁴ The latter rights were cast as standalone rights to preserve signatory states’ ability to have traditional broadcasting and public performance activities trigger a remuneration right, rather than an exclusive right.⁶⁵

4. The Making Available Right in WIPO Treaty States

46. The chief architect of the WIPO Treaties, Dr. Ficsor, developed an “umbrella solution” whereby signatory states would be permitted to implement the MAR through their preferred rights vehicle, so long as it affords the full protection required by the new right.⁶⁶ As Dr. Ficsor describes, “The idea was to leave it to Contracting Parties to decide through the recognition of which existing or newly established right they would implement the exclusive [making available] right ... (such as the right of distribution, the right of communication to the public, a combination thereof, or a new interactive ‘making available’ right).”⁶⁷

47. Over 100 countries have ratified or acceded to the WIPO Treaties.⁶⁸ Among them, the dominant mode of implementation has been a technologically neutral communication right that extends to all acts of making available.⁶⁹ No signatory state has attempted to implement the new right through a communication right that is limited to performance-based transmissions (e.g., streams) coupled with a reproduction right.⁷⁰ Indeed, the Board had before it and relied on expert explanations of why such a combination would fall well short of the WIPO Treaty standard.⁷¹

⁶⁴ von Lewinski Report, ¶38, 42-43 (AR, V. VI, Tab 50(A)).

⁶⁵ von Lewinski Report, ¶42 (AR, V. VI, Tab 50(A)); WPPT, Art. [15](#) (covering non-interactive communications).

⁶⁶ Ficsor Report, at 2, 6-11 (AR, V. III, Tab 38(B)); von Lewinski Report, ¶19, 94 (AR, V. VI, Tab 50(A)); *WIPO Guide*, at [CT-8.9-CT-8.13](#); Ficsor, “Digital Environment,” ¶[60](#); Reinbothe & von Lewinski, at 108 (BOA, Tab 12).

⁶⁷ Ficsor, *Copyright and the Internet*, at C8.06 (BOA, Tab 14).

⁶⁸ WIPO, [WCT – Contracting Parties](#); WIPO, [WPPT – Contracting Parties](#).

⁶⁹ Ficsor Report, at 4, 22 (AR, V. III, Tab 38(B)); von Lewinski Report, ¶103 (AR, V. VI, Tab 50(A)).

⁷⁰ von Lewinski Report, ¶102-03 (AR, V. VI, Tab 50(A)); Ficsor, “Digital Environment,” ¶[45](#).

⁷¹ Decision, ¶148-182; von Lewinski Report, ¶90-126 (AR, V. VI, Tab 50(A)); Ginsburg Report, ¶6-10, 15-20 (AR, V. X, Tab 61(A)); Ficsor, “Digital Environment,” ¶[44-45](#).

48. Courts in WIPO Treaty states have interpreted the new right and domestic provisions implementing it. They have consistently interpreted the right to provide copyright owners a means to authorize the making available of their copyright materials including against piracy sites and services including by providing unauthorized access to and/or transmissions of both streams⁷² and downloads,⁷³ and providing access to copyrighted content materials through indexing or linking, which does not fall neatly within the stream/download dichotomy.⁷⁴ They have also consistently held that the act of making available engages the right, irrespective of whether a subsequent transmission takes place.⁷⁵ These courts have considered the WIPO Treaties as part of a statutory contextual analysis, and have endeavored to construe the MAR consistently with the WIPO

⁷² See, e.g., *SGAE v. Rafael Hoteles*, [2007] IP & T 521 (Case C-306/05) (CJEU) [*SGAE*], ¶[43-47](#) and *Phonographic Performance (Ireland) v. Ireland*, ECLI:EU:C:2011:432 (Case C-162/10) (CJEU) [*Phonographic Performance*], ¶[25](#), [40](#), [46-47](#) (making available a signal to TV sets or radios); *ITV Broadcasting v. TVCatchup*, [2013] IP & T 607 (Case C-607/11) (CJEU), ¶[36-40](#) (making available of a stream of a terrestrial TV broadcast); *Premier League v. British Telecommunications*, [2017] EWHC 480 (Ch.) [*Premier League #2*], ¶[15](#), [32](#), [34-35](#) (streaming servers communicate make content available to the public); *Reti Televisive Italiane v. Megavideo* (Rome Court of First Instance, No. 14279/2016) (BOA, Tab 4).

⁷³ See, e.g., *Stichting Brein v. Ziggo BV*, ECLI:EU:C:2017:456 (No. C-610/15) (CJEU) [*Ziggo*], ¶[9-12](#), [16](#), [21-22](#), [31](#), [35-45](#) and *1967 Ltd. v. British Sky Broadcasting*, [2014] EWHC 3444 (Ch.) [*1967 Ltd.*], ¶[6-8](#), [18](#), [20](#) (operators of P2P file-sharing websites liable for making copies of copyrighted content available to the public); *Polydor v. Brown*, [2005] EWHC 3191 (Ch.), ¶[6-9](#), *Dramatico v. British Sky Broadcasting*, [2012] EWHC 268 (Ch.) [*Dramatico #1*], ¶[69-71](#) and *EMI Records v. British Sky Broadcasting*, [2013] EWHC 379 (Ch.) [*EMI*], ¶[39](#) (users of a P2P network makes recordings available to the public); *APRA v. Telstra*, [2019] FCA 751 (Aust.) [*APRA*], ¶[4](#), [6](#), [30](#), [35](#), [39](#), [42](#) (operators of stream-ripping sites liable for making available copies of sound recordings).

⁷⁴ See *supra* notes 72-73 and *Twentieth Century Fox v. Newzbin*, [2010] EWHC 608 (Ch.), ¶[125](#) and *Twentieth Century Fox v. British Telecommunications*, [2011] EWHC 1981 (Ch.) [*Twentieth Century Fox #1*], ¶[113](#) (a catalogue/index that allows users to search links and download copyrighted content makes it available to the public); *Svensson v. Retriever Sverige* (CJEU No. C-466/12, 13 Feb. 2014) [*Svensson*], ¶[20](#), [31](#) (the provision of links to works which have access restrictions is an act of making available to the public); *Rebecka Jonsson v. Les Éditions de L'Avenir* (Attunda Dist. Ct., 13 Oct. 2016) (BOA, Tab 3) (a site providing links to infringing content makes it available to the public); *Roadshow Films v. Telstra*, [2017] FCA 965 (Aust.) [*Roadshow*], ¶[13](#), [34-39](#) (sites providing indexes of links to content infringe copyright).

⁷⁵ See, e.g., *SGAE*, ¶[43](#); *Svensson*, ¶[19](#); *Ziggo*, ¶[19](#), [31](#); *M.I.C.M.*, [2021] EUECJ C-597/19, ¶[47](#). See also see *SOCAN v. CAIP*, ¶[151](#), [154](#), *per* LeBel J., concurring (interpreting the MAR to apply once a work is posted on a host server).

Treaties, to which EU members are bound.⁷⁶ This interpretive method is well accepted in Canada.⁷⁷

49. These foreign decisions merit the Court’s serious consideration. The central purpose of international treaties is “to harmonize parties’ domestic laws around agreed-upon rules, practices, and principles.” That purpose “would be seriously weakened if the courts of every country interpreted [the treaty at issue] without any regard to how it was being interpreted and applied elsewhere.” Accordingly, “domestic courts should give serious consideration to decisions by the courts of other contracting states on [a treaty’s] meaning and application.”⁷⁸

50. The Court’s copyright decisions echo this harmonious approach. As this Court stated in *Théberge*, “In light of the globalization of the so-called ‘cultural industries’, it is desirable, within the limits permitted by our own legislation, to harmonize our interpretation of copyright protection with other like-minded jurisdictions.”⁷⁹

5. The Making Available Right’s Role in Stemming Digital Piracy

51. Digital piracy erodes the health and vitality of the creative industries, including the music industry. The music industry relies on copyright as an essential framework law that enables industry participants to invest in artists and recordings and to earn a return on those investments through licensing agreements and other means, to the benefit of all participants in the ecosystem. Studies confirm that “digital piracy causes statistically and economically significant harm to creators by cannibalizing sales in legal channels, and ... can harm consumers by reducing the economic incentives creators have to invest in high-quality entertainment projects.”⁸⁰

52. A stated purpose of the *CMA* was to strengthen legal protections against digital piracy. Before the *CMA*’s enactment, the Government stated that the *CMA* would “give copyright owners

⁷⁶ See, e.g., *SGAE*, ¶¶7-10, 43, 45, 50-51; *Phonographic Performance*, ¶¶3-5, 12; *Dramatico #1*, ¶¶31-33; *Ortmann*, ¶¶171-78. EU copyright law must be construed consistent with treaties to which EU members are bound: G. Betlem & A. Nollkaemper, “Giving Effect to Public International Law and European Community Law before Domestic Courts” (2003), 14 *E.J.I.L.* 569, at 571.

⁷⁷ Sullivan, at 280 (BOA, Tab 17).

⁷⁸ *Balev*, ¶33. See also ¶49.

⁷⁹ *Théberge*, ¶6; *SOCAN v. CAIP*, ¶¶56, 60, 63-78; *Rogers*, ¶49.

⁸⁰ Smith & Danaher, “[The Digital-Piracy Dilemma](#),” *Harvard Business Review* (19 Oct. 2020) (summarizing the conclusion of 29 of 33 peer-reviewed papers).

the tools they need to combat piracy.”⁸¹ The legislative debates reinforce this core purpose. As one majority MP explained:

Right holders will finally have stronger legal tools to pursue online pirate sites that facilitate copyright infringement. ... The legislation would ... bring our country in line with the 1996 [WIPO] Treaties, including ... the making available right to ensure control of material over the Internet. We are ensuring that we protect copyright holders and are giving them the ability to defend themselves ... This bill will finally give more freedom to consumers while enforcing a hard line against organized piracy.⁸²

53. As the Minister of Industry stressed: “Cracking down on those who are destroying wealth by use of the Internet, by flouting copyright laws, that is consistent with WIPO.”⁸³

54. As Parliament and the Government understood, the need to stem the rising tide of digital piracy was a driving force behind the WIPO Treaties. As the authoritative *WIPO Guide* describes, in the years leading up to the WIPO Treaties, “piracy had become a phenomenon that was undermining the whole system of the protection of copyright and related rights.”⁸⁴ As Dr. Ficsor writes, the WIPO Treaties were designed to respond to this growing threat:

Works and objects of related rights become very much vulnerable to infringing and piratical activities when they are included in, and transmitted through, interactive digital networks. This and the questions relating to the legal characterization of the acts involved raised serious challenges to copyright and related rights. These challenges have been responded [to] by the two WIPO “Internet treaties”⁸⁵

55. The MAR provided the legal basis necessary to respond to this vulnerability effectively and efficiently. As the Board correctly observed, “The new protection for the act of making a work available by telecommunication was intended to provide rights holders with a basis to hold liable those who make copyrighted works available to the public online even where no evidence of reproduction or actual communication to the public was present.”⁸⁶

⁸¹ Govt. of Can., “Balanced Copyright – Questions and Answers” (AR, V. III, Tab 38(G)).

⁸² House of Commons, *Official Report (Hansard)*, 41st Parl., 1st Sess., Vol. 146, No. 124 (May 15, 2012) (Part A), at [8093-94](#) (Hon. J. Carmichael).

⁸³ House of Commons, *Official Report (Hansard)*, 40th Parl., 3rd Sess., Vol. 145, No. 92 (November 2, 2010), at [5645](#) (Hon. T. Clement).

⁸⁴ *WIPO Guide*, ¶[25](#).

⁸⁵ Ficsor, “Digital Environment,” ¶[11](#).

⁸⁶ Board Reasons, ¶[111](#) (AR, V. I, Tab 1).

56. Experience internationally and in Canada⁸⁷ shows that the MAR provides an essential tool for stemming digital piracy at its source. It has been used successfully to obtain injunctions, blocking orders, and damages against digital piracy platforms, including stream-ripping sites⁸⁸ (which create unauthorized downloads from content licensed only for streaming, the most common form of music copyright infringement today⁸⁹), P2P file-sharing platforms⁹⁰ (which allow users to share encrypted files in a highly decentralized fashion), indexing/hyperlinking sites⁹¹ (which provide an index and enable the searching of infringing content available online), streaming servers⁹² (which allow access to streams of copyrighted content), and cyberlockers⁹³ (through which users make files available for widespread downloading and sharing of pirated content). The right also provides a legal basis for copyright owners to obtain blocking orders against Internet service providers and de-indexing orders against search engines to prevent access to piracy sites and services.⁹⁴ In *Stichting Brein v. Ziggo*,⁹⁵ the right was used against piracy platforms that index copyrighted content shared in “swarms” and downloaded on a massive scale.⁹⁶

57. As these illustrate, sites, platforms, and services that facilitate stream ripping, P2P file sharing, and other forms of digital piracy make copyrighted content available to be accessed by the public without authorization. In such cases, the only reasonably practicable relief is against the site, platform, or service provider that makes the content available. Seeking relief against individual infringers individually or via class action proceedings is impracticable because the

⁸⁷ See *infra* notes 128-131.

⁸⁸ *RetighedsAlliancen v. Telenor A/S* (Case BS-8065/2018-FRB) (BOA, Tab 5); [APRA](#).

⁸⁹ IFPI, *Music Listening 2019*, at 21 [**IFPI, Music Listening**] (BOA, Tab 10). See also *APRA*, ¶[46](#).

⁹⁰ See, e.g., M.I.C.M., ¶[30-32](#), [40-59](#); [Dramatico #1](#); *Dramatico v. British Sky Broadcasting*, [[2012](#)] EWHC 1152 (Ch.); [1976 Ltd.](#); [Ziggo](#).

⁹¹ See, e.g., [Twentieth Century Fox #1](#); *Twentieth Century Fox Film Corp. v. British Telecommunications Plc*, [[2011](#)] EWHC 2714 (Ch.); [Premier League #1](#); [Paramount](#); [EMI](#).

⁹² See, e.g., [Premier League #2](#).

⁹³ See, e.g., [Roadshow](#); *UPC Telekabel Wien v. Constantin Film Verleih* (CJEU case no. C-314/12).

⁹⁴ *Teksavvy v. Bell Media.*, 2021 FCA 100, ¶[23-25](#), [38-39](#), aff’ing *Bell Media v. GoldTV.Biz*, 2019 FC 1432, ¶[2](#), [23-24](#), [29-30](#); *Google v. Equustek*, [2017 SCC 34](#).

⁹⁵ [Ziggo](#). See also E. Rosati, “The CJEU Pirate Bay Judgment and Its Impact on the Liability of Online Platforms” (2017) [39 E.I.P.R. 737](#).

⁹⁶ *Ziggo*, ¶[31](#), [35-39](#), [48](#); M.I.C.M., ¶[30-34](#), [40-59](#).

anonymity of the Internet makes it difficult to identify and sue individual infringers,⁹⁷ and the time and cost of suing such infringers will often exceed the benefits: “chasing individual consumers is time consuming and is a teaspoon solution to an ocean problem.”⁹⁸ From an enforcement perspective, it is much more effective and efficient to stem digital piracy at its source, which is what the MAR enables.

58. The MAR is also preferable from an evidentiary perspective. Absent such a right, copyright owners would generally have to prove a transmission to establish liability. This would require gathering evidence of individuals’ online activities, which raises privacy concerns. The MAR, however, obviates the need for such evidence, because it need only be proven that content has been made available such that it *may* be accessed. As noted by Justice LeBel, this feature of the MAR facilitates copyright protection while avoiding privacy concerns related to monitoring of personal data gleaned from Internet-related activity in the home.⁹⁹

59. As the digital marketplace continues to be increasingly important to copyright holders, so too is the MAR. Today, digital piracy is both serious and commonplace.¹⁰⁰ Moreover, digital piracy is evolving rapidly, with new forms emerging at an alarming rate. For example, since the Board issued its decision, stream ripping has become the most common form of online music copyright infringement: a staggering 23% of Internet users in the world’s leading music markets engage in music piracy by stream ripping.¹⁰¹ As the Federal Court of Australia recently observed, “[stream-ripping] websites are responsible for piracy of music from music videos on an industrial scale,” and “[t]here were 66.5 million visits to Convert2mp3.net in January 2019 and 112.4 million to Flvto.biz in January 2019 alone.”¹⁰²

⁹⁷ *Rogers Communications Inc. v. Voltage Pictures*, 2018 SCC 38 [*Voltage*], ¶1; *BMG Canada Inc. v. Doe*, [2005 FCA 193](#); *Voltage Pictures, LLC Canada v. Salna*, [2019 FC 1412](#); *ME2 Productions, Inc. v. Doe*, [2019 FC 214](#); *TBV Productions, LLC v. Doe*, [2021 FC 181](#).

⁹⁸ *Re: Aimster Copyright Litigation*, [334 F.3d 643](#) (7th Cir. 2003), quoting Picker, “Copyright as Entry Policy: The Case of Digital Distribution” (2002) 47 *Antitrust Bull.* 423, at 442.

⁹⁹ *SOCAN v. CAIP*, ¶[153-154](#) (per LeBel J.).

¹⁰⁰ *Voltage*, ¶1; *Voltage v. John Doe*, 2015 FC 1364, ¶[52](#); *FairPlay Coalition – Application to disable online access to piracy websites* (CRTC, 2018-384), ¶[1](#), [72](#); *CMA*, [preamble](#).

¹⁰¹ IFPI, *Music Listening*, at 21 (BOA, Tab 10) (23% of people between ages 16-64 in a sample of 19 countries engage in music piracy by stream ripping).

¹⁰² *APRA*, ¶[3-6](#), [46](#).

60. Cyberlockers are another leading digital piracy model. The New Zealand High Court’s 2017 decision in *Ortmann v. U.S.A.* examined one example: Megaupload. That site enabled users to upload files for storage on servers leased by Megaupload, obtain unique links to those files, and publicize those links on third-party sites. Megaupload offered financial rewards and incentives to users who uploaded files that attracted high numbers of views or downloads. The site attracted over 60 million registered users, and was said to be the 13th most frequently visited site on the Internet, attracting an average of 50 million visits daily and more than one billion visitors in total. Without having produced any of the content on the servers, and without having made any reproductions themselves, Megaupload generated an estimated US\$175 million in illegal revenues and cost copyright owners an estimated US\$500 million.¹⁰³

61. As the High Court of England and Wales recently observed, copyright infringers are increasingly turning to set-top boxes, media players, and mobile device apps to access, stream, and copy infringing content available on streaming servers. The skill and effort required to acquire and use these devices and apps have fallen dramatically. They create significant enforcement challenges, as they do not rely on a specific website to make infringing content available.¹⁰⁴

62. Emerging forms of digital piracy increasingly blur the line between downloads and streams. For example, the app examined in *Twentieth Century Fox v. Sky UK* enabled users to browse, search, and locate films and TV programs, and to stream that content as it was downloading.¹⁰⁵ Such technologies defy the traditional download/stream dichotomy.

63. As Dr. Ficsor observes, “creators and intellectual property rights holders need to feel sure that they can protect their property from piracy and control its use, before they will be willing to make it available online.”¹⁰⁶ The MAR is intended to provide creative industry participants with the legal protection they need to realize the full potential of digital marketplaces and pursue efficient and effective remedies against those who make their copyrighted content available to the public without authorization. As the tide of digital piracy continues to rise, this right – a right of enforcement – is needed now more than ever.

¹⁰³ *Ortmann*, ¶1, 11-13, 411. See also *Rapidshare #1* and *Rapidshare #2* (both involving another prominent cyberlocker).

¹⁰⁴ *Premier League #2*, ¶11-12, 31, 34.

¹⁰⁵ *Twentieth Century Fox v. Sky UK*, [2015] EWHC 1082 (Ch.), ¶17-21.

¹⁰⁶ Ficsor, “Digital Environment,” ¶15.

D. Parliament’s Chosen Means of Implementing the Making Available Right

1. The Implementing Provisions

64. Parliament chose to implement the new MAR for works by expanding the existing communication right via s. 2.4(1.1). Thus, Parliament chose the implementation solution expressly contemplated by Art. 8 of the WCT and adopted by most of Canada’s WIPO Treaty peers. There is no legislative history evidence suggesting that Parliament considered any other implementation solution, let alone the unprecedented patchwork theory adopted by the Objectors before the Board.

65. Parliament chose to implement Arts. 10 and 14 of the WPPT by creating standalone MARs relating to performances and sound recordings via ss. 15(1.1)(d) and 18(1.1)(a). Those sections provide that a performer or sound recording maker’s copyright includes an exclusive right “to make [the performance or sound recording] available to the public by telecommunication in a way that allows a member of the public to have access to [it] from a place and at a time individually chosen by that member of the public and to communicate [it] to the public by telecommunication in that way.” This language tracks Arts. 10 and 14 of the WPPT and was clearly intended to establish an exclusive MAR identical in scope to the equivalent right for works.

2. The Deeming Effect of Section 2.4(1.1)

66. As the Board correctly concluded, s. 2.4(1.1) is a classic deeming provision. Such a provision creates a “statutory fiction” that “artificially imports into a word or an expression an additional meaning which [it] would not otherwise convey.”¹⁰⁷ A deeming provision “enlarge[s]” the meaning of a word, as it “implicitly admits that a thing is not what it is deemed to be but decrees that for some particular purpose it shall be taken as if it were.”¹⁰⁸

67. As the Court stated in *SOCAN v. CAIP*, and as the Board noted, the ordinary and grammatical meaning of “communicate” is to “impart” or “transmit” information to another.¹⁰⁹ Section 2.4(1.1) expands the meaning of “communication” beyond this ordinary and grammatical meaning. The “making available” of content requires only its accessibility, not its transmission.

68. The ordinary and grammatical meaning of “making available” is confirmed by s. 2.4(1.1)’s requirement that the work or other subject-matter be made available “in a way that *allows* a

¹⁰⁷ Board Reasons, ¶116 (AR, V. I, Tab 1); *R. v. Verrette*, [1978] 2 S.C.R. 838 [*Verrette*], at 845.

¹⁰⁸ *Verrette*, at 845-46.

¹⁰⁹ Board Reasons, ¶114 (AR, V. I, Tab 1); *SOCAN v. CAIP*, ¶46; *ESA*, ¶72-74.

member of the public to have access to it” (emphasis added). This language imposes no requirement to prove that any particular member of the public actually did access it, much less in a technology-specific way.

69. This is how the term has been interpreted in the context of s. 163.1(3) of the *Criminal Code* (making available child pornography). That offence is committed when a person has “made child pornography available to others via a file sharing program over the internet. No other steps or actions to distribute it are required.”¹¹⁰

70. The Court’s copyright jurisprudence is consistent with this understanding of “making available.” In his concurring reasons in *SOCAN v. CAIP*, LeBel J. observed that copyrighted works are “made available” once, for example, “they are posted on a host server” so that they are “available to the public,” irrespective of whether they are subsequently accessed.¹¹¹ In *Rogers*, Rothstein J. quoted approvingly from the *WIPO Intellectual Property Handbook*, confirming that the “WCT ... clarifies that that right also covers transmissions in interactive systems.”¹¹²

71. This interpretation is consistent with the text of ss. 15(1.1)(d) and 18(1.1)(a). As noted, those provisions each create a standalone right to make a performer’s performance or sound recording “available to the public by telecommunication in a way that allows a member of the public to have access to [it] from a place and at a time individually chosen by that member of the public and to communicate [it] to the public by telecommunication in that way.” Like s. 2.4(1.1), ss. 15(1.1)(d) and 18(1.1)(a) impose no requirement to prove a transmission, much less a particular form of transmission.

72. This interpretation is consistent with the ordinary and grammatical meaning of “making available”, which encompasses a variety of acts including making something “accessible, acquirable, attainable, obtainable” and related acts such as “provided” and “supplied.”¹¹³

¹¹⁰ *R. v. Spencer*, 2011 SKCA 144, ¶81, aff’d [2014 SCC 43](#), ¶83. See also *R. v. Benson*, 2012 SKCA 4, ¶26-30; *R. v. Bichsel*, 2014 BCCA 251, ¶19, 24.

¹¹¹ *SOCAN v. CAIP*, ¶151, 154.

¹¹² *Rogers*, ¶46-47 [emphasis in original].

¹¹³ *Diamond Robinson Building Ltd. v. Conn*, 2010 BCSC 76, ¶72 (citing the *Concise Oxford* and *Merriam-Webster* dictionaries).

3. Parliament’s Intent to Fully Implement the WIPO Treaties

73. As noted, Parliament enacted the *CMA* for the stated purpose of fully implementing the WIPO Treaties. The interpretation above is fully consistent with that intent and the presumption of conformity (though no presumption is needed, because Parliament’s intent is clear) because it affords the full protection required by the WIPO Treaties.

74. The Court of Appeal, by contrast, failed to interpret the Act in light of Parliament’s stated intent, and turned the presumption of conformity on its head. It erroneously distinguished *Balev* on the basis that the provision in *Balev* “adopted and incorporated [an international convention], explicitly, wholesale and without modification,” whereas s. 2.4(1.1) does not, and speculated that Parliament “may have done something completely different.”¹¹⁴ This distinction ignores the evidence of Parliament’s intent and the Board’s unchallenged finding that the *CMA* was intended to “fully implement” the WIPO Treaties,¹¹⁵ overlooks the fact that s. 2.4(1.1) contains language taken practically verbatim from Art. 8 of the WCT, and bypasses the clear applicability of *Balev*.

75. *Balev* held that domestic provisions intended to implement international treaty obligations “must” be interpreted in a manner consistent with those obligations.¹¹⁶ This is no less the case where, rather than adopting the treaty wholesale, the domestic provisions weave those obligations into the fabric of an existing domestic statute, as is the case here. Such an approach may be preferred in order to preserve existing domestic legal frameworks or terminology.¹¹⁷ This approach does not, however, signal an intent *not* to comply with the international treaty obligations the statute is implementing, or otherwise detract from the presumption of conformity. Absent an express indication to the contrary, the legislature must be presumed to have intended to enact legislation that conforms with Canada’s international obligations. Speculation that the legislature “may have done something completely different,”¹¹⁸ without identifying what or why, cannot justify a departure from this longstanding presumption.

76. The Court of Appeal’s assertion that “when domestic law and international law both potentially bear upon a legal problem, one must always start by discerning the authentic meaning

¹¹⁴ CA Reasons, ¶73 (AR, V. I, Tab 2).

¹¹⁵ Board Reasons, ¶129 (AR, V. I, Tab 1). See also *ibid.*, ¶13, 98-99 (AR, V. I, Tab 1).

¹¹⁶ *Balev*, ¶31. See also *Pushpanathan*, ¶51.

¹¹⁷ Sullivan, at 278-79 (BOA, Tab 17).

¹¹⁸ CA Reasons, ¶74 (AR, V. I, Tab 2).

of the domestic law”¹¹⁹ overlooks that the “authentic meaning” of domestic law must be ascertained in the context of, and consistent with, binding international law, particularly when Parliament expressly intends to implement it. As the Court stated in *Quebec*, “international law that is binding on Canada ... is not only potentially persuasive but also *obligatory*.”¹²⁰

77. The repercussions of the Court of Appeal’s erroneous decision are significant. It puts Canada in breach of its WIPO Treaty obligations and singularly out of step with its WIPO Treaty peers. This is contrary to the stated purpose of the *CMA*. It also puts Canada in breach of other treaties – the *Canada-United States-Mexico Agreement* and the *Canada-EU Comprehensive Economic and Trade Agreement* – that require Canada to implement a WIPO Treaty-compliant MAR.¹²¹ This exposes Canada to international censure, retaliation, and other serious consequences.¹²² Parliament explained in the preamble to the *CMA* that it was adopting “coordinated approaches, based on internationally recognized norms ... [that] are reflected in [the WIPO Treaties].”¹²³ It cannot have intended to expose Canada to such consequences.

4. Parliament’s Intent to Strengthen Legal Protections Against Digital Piracy

78. Parliament also enacted the *CMA* for the stated purpose of strengthening legal protections against digital piracy. The interpretation above is fully consistent with this intent. Indeed, it is essential to ensuring copyright owners have the legal tools they need to effectively and efficiently pursue relief against the sites, platforms, and others who, without authorization, make their copyrighted content available to the public so that it can be accessed on a massive scale.

79. The Court of Appeal’s decision, by contrast, re-opens a gap that s. 2.4(1.1) was intended to fill. The absence of a properly interpreted MAR in Canada leaves a serious gap in

¹¹⁹ CA Reasons, ¶78 (AR, V. I, Tab 2).

¹²⁰ *Quebec*, ¶25 [emphasis added], quoting Brunnée & Toope, at 41 (BOA, Tab 11); *Rogers*, ¶49 (explaining that a ratified and legislatively adopted WCT would be “binding”). *Vienna Convention on the Law of Treaties* (23 May 1969) [*Vienna Convention*], Art. 26 (every treaty binding on its parties, who must perform in good faith) and 27 (parties may not invoke internal law as justification for failure to perform a treaty).

¹²¹ *Canada-United States-Mexico Agreement* (30 Nov. 2018) [*CUSMA*], Arts. 20.58, 20.61.3(a); *Canada-EU Comprehensive Economic and Trade Agreement* (30 Oct. 2016) [*CETA*], Art. 20.7.1.

¹²² See, e.g., *CUSMA*, Art. 31.19 (permitting retaliation in the event of non-compliance); *CETA*, Art. 29.14 (permitting retaliation and/or compensation in the event of non-compliance); *Vienna Convention*, Art. 60 (permitting termination or suspension of a treaty following a material breach).

¹²³ *CMA*, preamble, paras. 3-4. Also see *CMA*, summary, (a).

enforcement.¹²⁴ It leaves creators and other copyright owners exposed, with inadequate protection and difficult enforcement mechanisms against digital pirates seeking to appropriate and exploit their work. As a result, it stifles creativity and innovation, to the detriment of all Canadians. Digital pirates may even come to view Canada as a “piracy haven” – an unprotected jurisdiction in which to conduct their operations. This could lead to “catastrophic consequences.”¹²⁵

5. Parliament’s Intent to Maintain Technological Neutrality

80. As the Board noted, Parliament enacted the *CMA* with the intent to maintain the principle of technological neutrality, which recognizes that, “absent parliamentary intent to the contrary, the [Act] should not be interpreted or applied to favour or discriminate against any particular form of technology.”¹²⁶ The interpretation above is fully consistent with this principle. It ensures that copyright protection does not turn on the technological means of transmission, if any.

81. By contrast, interpreting s. 2.4(1.1) in a way that treats identical acts of making available differently depending on the means of transmission would violate the principle of technological neutrality. Such an interpretation would leave numerous acts of making available unaddressed under Canadian law and result in fragmented rights that depend on the vagaries of ever-changing technologies and business models, contrary to the Court’s caution in *Rogers* that copyright protection must not depend “merely on the business model that the alleged infringer chooses to adopt rather than the underlying communication activity.”¹²⁷

82. Canadian federal and provincial courts have interpreted s. 2.4(1.1) as covering the act of making available, irrespective of the means of transmission, if any, and has been used to combat digital piracy. In *Lackman*,¹²⁸ the MAR was used by creators and distributors of television programs to enjoin the hosting and distribution of add-ons that provided access to infringing

¹²⁴ *BMG Canada Inc. v. John Doe*, 2004 FC 488, ¶28, aff’d [2005 FCA 193](#).

¹²⁵ Ficsor, *Copyright and the Internet*, at C8.23 (BOA, Tab 14).

¹²⁶ Board Reasons, ¶127-28 (AR, V. I, Tab 1); *CBC v. SODRAC*, 2015 SCC 57 [*SODRAC*], ¶66.

¹²⁷ *Rogers*, ¶40.

¹²⁸ *Bell Canada v. Lackman*, 2018 FCA 42 [*Lackman*], ¶22 (“There is clearly a strong *prima facie* case that the respondent, by hosting and distributing infringing add-ons, is making the appellants’ programs and stations available to the public by telecommunication in a way that allows users to access them from a place and at a time of their choosing, thereby infringing paragraph 2.4(1.1) and section 27 of the *Copyright Act*.”)

streaming channels and programming. In *iTVBox.net*,¹²⁹ the MAR was used to enjoin the sale of set-top boxes which provided access to unauthorized IPTV streaming services. In *GoldTV*,¹³⁰ the MAR was used to obtain an injunction requiring ISPs to block access to servers that provided access to infringing IPTV streams and downloads. In *Beast IPTV*,¹³¹ the MAR was used to obtain injunctive relief against operators of an IPTV service that made infringing streams and downloads available to the public. The Court of Appeal’s decision, which rejected the Board’s conclusion that s. 2.4(1.1) covers the act of making available for download,¹³² is an outlier. In fact, in *Beast IPTV*, relying on the “clearly strong authority” of the Court of Appeal’s decision in *Lackman*, the Federal Court stated that the Court of Appeal’s decision was limited to the issue of whether the act of making available “was an event for which a tariff was payable,” and that the Court of Appeal did not reverse pre-existing law on the meaning of s. 2.4(1.1).¹³³

E. Alternative Theories of Implementation Are Unsupported and Would Leave Gaps

83. As noted, the WIPO Treaties require signatory states to implement an exclusive right to make available and/or transmit copyrighted content so that members of the public may download, stream, or otherwise access that content at a time and place of their choosing. As the Board found, to fully comply with this requirement, signatory states must leave no gaps in protection.¹³⁴

84. As the Board also found, Parliament passed the *CMA* to fully implement the WIPO Treaties.¹³⁵ Consistent with Parliament’s intent, the presumption of conformity, and the *Interpretation Act*, the Court should favour an interpretation that affords the full protection

¹²⁹ *Bell Canada v. 1326030 Ontario Inc. (iTVBox.net)*, 2016 FC 612, ¶[21-22](#), aff’d 2017 FCA 55, ¶[3](#) (“Sections 2.4, 3 and 21 of the *Copyright Act* give the Plaintiffs the exclusive rights to communicate their programs to the public by telecommunication via television broadcast, including the right to make these programs available in a way that allows a member of the public to access them at a time and place chosen by him or her.”)

¹³⁰ *Bell Media Inc. v. GoldTV.Biz*, 2019 FC 1432, ¶[57](#), aff’d [2021 FCA 100](#).

¹³¹ *Warner Bros. Entertainment v. White (Beast IPTV)*, 2021 FC 53 [*Beast IPTV*], ¶[99-104](#), [109-10](#). See also *Trader v. CarGurus*, 2017 ONSC 1841, ¶[30-34](#) (providing access to photographs on a third-party site infringes s. 3(1)(f) by virtue of s. 2.4(1.1)).

¹³² CA Reasons, ¶[66](#), [68](#), [70-71](#) (AR, V. I, Tab 2).

¹³³ *Beast IPTV*, ¶[99-104](#), [109-10](#), reaffirming *Lackman*, ¶[22](#).

¹³⁴ von Lewinski Report, ¶[19](#), 100 (AR, V. VI, Tab 50(A)); Ginsburg Report, ¶[17](#) (AR, V. X, Tab 61(A)); Reinbothe & von Lewinski, at 108 (BOA, Tab 12); Ficsor, *Copyright and the Internet*, at C8.06 (BOA, Tab 14); Board Reasons, ¶[138](#), [162](#) (AR, V. I, Tab 1).

¹³⁵ Board Reasons, ¶[129](#) (AR, V. I, Tab 1).

required by the WIPO Treaties over one that leaves gaps that place Canada in breach of its international treaty obligations.

85. The evidence shows, and the Board found, that Parliament intended to – and did – fully implement the MAR for works solely under the rubric of the existing communication right. In a legislative summary of Bill C-32 prepared for parliamentarians, the Library of Parliament noted that “the bill adds a new subsection to section 2.4 of the Act, clarifying that the definition ‘*communication* of a work or other subject-matter to the public by telecommunication’ includes making a work available by telecommunication, at a place and time chosen by the public, *in order to implement the making available right* for intangibles.”¹³⁶ Further, in tabling the WCT before Parliament on June 11, 2013 as part of the ratification process, the Government explained that:

Parties to the Treaty must provide three exclusive rights (beyond those explicitly required by the Berne Convention) for certain copyright owners, specifically: 1) the right of distribution ... 2) the right of rental ... and 3) *the right of communication to the public, including the act of making available to the public* (to enable them to *control the transmission* of copyrighted material via wire or wireless means or the release of that material on the internet).¹³⁷

86. Despite this clear intention, the Objectors argued before the Board that Canada might fulfil its WIPO Treaty obligations through some combination of other rights, such as the reproduction right, the authorization right, and/or the distribution right. After assessing the expert evidence, the Board concluded correctly that these theoretical alternatives would defeat Parliament’s intent by leaving gaps in protection.¹³⁸

87. The Objectors filed two expert reports on the theoretical availability of the reproduction, authorization, and/or distribution rights as potential candidates for fulfilling Canada’s WIPO Treaty obligations.¹³⁹ Yet neither report considers the suitability of these theoretical alternatives against the backdrop of Canadian law. For example, Professor de Beer went no further than opining that if content “is made available for downloading, the person making it available *might* be liable for reproducing, distributing or authorizing the reproduction or distribution.”¹⁴⁰ The word “might”

¹³⁶ Library of Parliament, at [9](#) [emphasis added].

¹³⁷ WCT Explanatory Memorandum at 2, 5 [emphasis added] (AR, V. VIII, Tab 54(I)).

¹³⁸ Board Reasons, ¶[164-82](#) (AR, V. I, Tab 1).

¹³⁹ de Beer Report (AR, V. IV, Tab 34(C)); Ricketson Report (AR, V. IV, Tab 39(B)).

¹⁴⁰ de Beer Report, ¶[33](#) (AR, V. IV, Tab 39(C) [emphasis added]).

is telling. In Professor de Beer’s prior academic writings, he stated that accessing a digital work only “*usually* involves making a copy, albeit ephemeral.”¹⁴¹ In another article, he concedes that there is a “lack of statutory or principled grounds to suggest that merely making a work available might constitute reproduction.”¹⁴² These statements are at odds with the contention in his report that the reproduction right covers the act of making available.

88. While the Objectors’ experts suggested that WIPO Treaty signatory states could implement the MAR however they choose, neither of them, nor the Objectors, provided any evidence that Canada intended to, or did, implement the new right in a way that distinguished between downloads and streams. Tellingly, neither expert could point to a single country out of the more than 100 signatory states that has implemented the right in the way they say could theoretically be done.¹⁴³ The absence of any such evidence engages the principle in *Balev* that domestic courts should give “serious consideration” to how a treaty has being interpreted and applied elsewhere.¹⁴⁴ Given the absence of any evidence that Parliament intended to depart from internationally accepted norms of implementation and compliance, the Court should reject an interpretive theory that would put Canada out of step with the rest of the WIPO Treaty world.

89. Moreover, as described below and as explained in the expert opinions of the renowned experts Dr. Ficsor, Dr. von Lewinski, and Professor Ginsburg relied on by the Board, the reproduction, authorization, and distribution rights do not provide an adequate solution for implementing Canada’s WIPO Treaty obligations, since each leaves gaps in protection.

1. Gaps in the Reproduction Theory

90. The reproduction right was not even recognized by the international community as a potential candidate for implementing the MAR. Objector expert Professor Ricketson’s own text (co-authored with Professor Ginsburg) does not identify the reproduction right as a potential candidate. Rather, that text identifies the communication right and, in countries such as the U.S.,

¹⁴¹ de Beer, “Constitutional Jurisdiction Over Paracopyright Laws” in Geist, ed., *In the Public Interest* 89, at [89-90](#), [96](#), [107-08](#) [emphasis added].

¹⁴² de Beer, “Copyright Royalty Stacking” in Geist, *The Copyright Pentology*, 335, at [372, n. 101](#).

¹⁴³ von Lewinski Report, ¶97-98, 102-03 (AR, V. VI, Tab 50(A)) (explaining that the chief outlier for implementation models is the U.S., whose different copyright system necessitated Dr. Ficsor’s “umbrella solution,” and that the U.S. does not use the reproduction right in respect of the making available of downloads, but rather a digital distribution right that has no equivalent in Canada).

¹⁴⁴ *Balev*, ¶33.

a specialized *digital* distribution right.¹⁴⁵ Similarly, Dr. Ficsor identifies “two main candidates”: the communication right and the digital distribution right.¹⁴⁶

91. The reproduction right, by contrast, does not offer a viable mechanism for implementation, as “[i]t would not correspond to the extremely dynamic nature of Internet-type networks, and, furthermore, it alone would not offer a satisfactory and readily enforceable basis for the liability of those who make available to the public works and objects of related rights in such networks.”¹⁴⁷

92. The reproduction right and the MAR have many fundamental differences. These differences include the prohibited act (the act of making a copy in a material form, versus the act of making content available),¹⁴⁸ its timing (when a copy is made, versus when a work is made available),¹⁴⁹ its frequency (a copy may be made once, but a work may be made available many times and to many members of the public),¹⁵⁰ the purpose (controlling the reproduction of a work, versus controlling its availability), the infringer (the copier may not be the person who makes a work available),¹⁵¹ the extent of loss (a single copy made in a single place, versus the potential for countless copies made globally), the territorial reach (the place the copy is made, versus the location of the server or other means of making available, as well as the location of the users to whom access is provided),¹⁵² and the applicability of exceptions (since different exceptions apply, a copyright owner may not be able to control access by relying on the right of reproduction).¹⁵³ These differences, and the gaps in protection that result, illustrate why the reproduction right has

¹⁴⁵ Ginsburg, “Recent Developments,” at [37](#); von Lewinski Report, ¶97 (AR, V. VI, Tab 50(A)); Ricketson & Ginsburg, at 12.59 (BOA, Tab 18). See also *WIPO Guide*, at [CT-8.6 and 8.10](#) (identifying the communication right, the digital distribution right, and a new MAR as the candidate rights); WIPO, *Understanding Copyright and Related Rights*, 2nd ed., at [12](#).

¹⁴⁶ Ficsor, “Digital Environment,” ¶[44](#).

¹⁴⁷ Ficsor, “Digital Environment,” ¶[45](#). See also von Lewinski Report, ¶101-02 (AR, V. VI, Tab 50(A)).

¹⁴⁸ *Théberge*, ¶[42](#); von Lewinski Report, ¶109 (AR, V. VI, Tab 50(A)).

¹⁴⁹ von Lewinski Report, ¶110 (AR, V. VI, Tab 50(A)).

¹⁵⁰ *Roadshow Films v. iiNet*, [2011] FCAFC 23, ¶[151-58](#), [328-29](#), [669](#); *Dramatico #1*, ¶[71](#); von Lewinski Report, ¶109 (AR, V. VI, Tab 50(A)).

¹⁵¹ von Lewinski Report, ¶111, 115 (AR, V. VI, Tab 50(A)).

¹⁵² von Lewinski Report, ¶112-13 (AR, V. VI, Tab 50(A)).

¹⁵³ See, e.g., ss. 29 (fair dealing), 29.24 (backup copy), 29.4 (reproduction for instruction), 30.04 (work made available through the Internet).

never been considered by any WIPO Treaty signatory state as an adequate vehicle for implementing the MAR.

93. As the Board pointed out, one illustrative gap in the reproduction theory arises where the act of reproduction (e.g., copying content onto a server) is done by a person who has authority, while a subsequent act of making available (e.g., configuring a server so that the content is available to the public) may be done by another person who does not. The reproduction right would not cover the latter act.¹⁵⁴

2. Gaps in the Authorization Theory

94. Like the reproduction right, the authorization right was not contemplated by the international community as a potential candidate for implementing the MAR because it would leave gaps in protection.

95. Under Canadian law, for an authorization to be infringing, the authorized act must be infringing (e.g., an infringing reproduction or communication), although the authorized act of infringement need not occur.¹⁵⁵ Requiring proof that the authorized act is infringing, as a precondition to engaging the MAR, would undermine a key purpose of the right: to remove the onus on rights holders to prove that their works not only have been made available, but have been (or may be) accessed in an infringing manner by violating another right conferred by the Act.¹⁵⁶

96. Canadian law also requires proof that a person has “sanction[ed], approve[d] and countenance[d]” the making of an infringing copy.¹⁵⁷ Authorization is a question of fact that depends on the particular circumstances and requires consideration of the specific relationship between the person who authorizes and the person who makes the copy.¹⁵⁸ An act is not authorized by somebody who merely enables, assists, or even encourages another to do that act but does not purport to have any authority that they can grant to justify the doing of the act.¹⁵⁹ Moreover, courts presume that “a person who authorizes an activity does so only so far as it is in accordance with

¹⁵⁴ Board Reasons, ¶169 (AR, V. I, Tab 1).

¹⁵⁵ *Columbia Pictures v. Gaudreault*, 2006 FCA 29, ¶24, 32; *CCH v. Law Society of Upper Canada*, 2002 FCA 187, ¶112, distinguished, 2004 SCC 13.

¹⁵⁶ See, *CAPAC v. CTV*, [1968] S.C.R. 676, at 680.

¹⁵⁷ *CCH v. Law Society of Upper Canada*, 2004 SCC 13 [*CCH*], ¶37-38, quoting *Muzak Corp. v. CAPAC* [1953] 2 S.C.R. 182, at 193.

¹⁵⁸ *CCH*, ¶38.

¹⁵⁹ *CCH*, ¶38.

the law.”¹⁶⁰ The MAR, by contrast, is constrained by none of these strictures. All that is required is a showing that copyrighted content was made available to the public.

3. Gaps in the Distribution Theory

97. The distribution right also leaves gaps in protection. To fully accommodate the MAR, the distribution right must cover “distribution through reproduction through transmission – that is, making available copies by making such copies, through transmission of electronic signals, in the receiving computers and/or in their terminals.”¹⁶¹ The USA has a “digital distribution right” for this purpose.¹⁶² The Canadian distribution right, contained in s. 3(1)(j) of the Act, offers no such coverage. It applies only to “a work that is in the form of a *tangible* object,” such as a paperback or a poster. Further, it applies only where a distribution has taken place, not where a distribution *could* take place because the work has been made available.

4. Conclusion

98. There is no evidence that Parliament intended to, or did, splinter the MAR. Rather, as the expert evidence and legislative history show, Parliament used s. 2.4(1.1) to extend the s. 3(1)(f) communication right as a comprehensive and technologically neutral means of implementing all MAR obligations for works under the WCT, including making accessible streams and downloads of works and any transmission to the public resulting from any act of making available.

F. The Merger Theory Is Unsupported and Would Leave Gaps

99. Before the Board, certain participants suggested, either implicitly or explicitly, that the making available of content and its subsequent transmission “constitute one protected transaction, giving rise to a performance royalty in the context of a stream, and a mechanical royalty in the context of a download.” As the Board correctly concluded, this novel merger theory finds no support in the Act’s text or history, the WIPO Treaties’ text or history, or the expert evidence, and would leave gaps in protection.¹⁶³

100. Section 2.4(1.1) deems the act of making a work available to be a communication to the public. There is no basis for partially annulling s. 2.4(1.1) retroactively through an assertion of

¹⁶⁰ *CCH*, ¶[38](#).

¹⁶¹ Ficsor Report, at 6 (AR, V. III, Tab 38(B)); *WIPO Guide*, at [CT-8.6](#).

¹⁶² Ginsburg Report, ¶[21-30](#) (AR, V. X, Tab 61(A)).

¹⁶³ Board Reasons, ¶[185-203](#) (AR, V. I, Tab 1).

“merger”. The Act contains no provision that could reasonably be read to convert this act of communication into something else. The merger theory assumes, without any basis in the Act’s text or history, that Parliament intended to transform an act of communication into a different act based on subsequent events potentially outside the initial actor’s control.¹⁶⁴

101. The “merger theory” was concocted by an Objector based on a statement made by Dr. Ficsor in his treatise on Internet law discussing Japanese law and concluding that the act of making available and any subsequent transmission could be considered together as a single communication so long as the law is able to track “whether or not on-demand transmissions ... are actually carried out and how many times, in which way and with what consequences,” since such considerations are “very relevant, for example, for the calculation of damages.”¹⁶⁵ The discussion deals solely with the Japanese right of “making transmittable.” There is no suggestion in Dr. Ficsor’s treatise or elsewhere that the WIPO Treaties contemplated that a communication could be retroactively transformed into a reproduction and fused into a single act.

102. The merger theory is also inconsistent with the evidence of Parliament’s intent in enacting the *CMA*. An explanatory memorandum on the WCT tabled before the House of Commons in June 2013 notes that, by implementing the WCT, the *CMA* was intended “to enable [copyright owners] to control the transmission of copyrighted material ... on the internet” under the rubric of “the right of communication to the public, including the act of making available to the public.”¹⁶⁶ There is no suggestion that some other right might be engaged based on the type of transmission, if any.

103. Since nothing in the Act, its legislative history, or its context (including the WIPO Treaties) suggests that Parliament intended that communications could be retroactively transformed into reproductions or merged into a single act, the only potential impact of a subsequent transmission is at the valuation stage, not while construing the scope of the right.¹⁶⁷ To suggest otherwise puts the cart before the horse. While the Objectors may prefer a different outcome based on policy grounds, they cannot ask the Court to “develop its own theory of what it considers appropriate policy.”¹⁶⁸

¹⁶⁴ Board Reasons, ¶[193](#) (AR, V. I, Tab 1).

¹⁶⁵ Ficsor, *Copyright and the Internet*, at C8.23 (BOA, Tab 14). Also see Ficsor Report, at 21 (discussing Japan, with no mention of a “merger” theory) (AR, V. III, Tab 38(B)).

¹⁶⁶ WCT Explanatory Memorandum, at 2 [emphasis added] (AR, V. VIII, Tab 54(I)).

¹⁶⁷ *SODRAC*, ¶[65-79](#).

¹⁶⁸ *SODRAC*, ¶[55](#).

G. ESA Does Not Determine the Meaning of Section 2.4(1.1)

104. As noted, the doctrine of *contemporanea expositio* requires that “[t]he words of a statute must be construed as they would have been the day after the statute was passed.”¹⁶⁹ In other words, “the meaning of legislation is fixed at the time of enactment.”¹⁷⁰

105. When the *CMA* received Royal Assent in late June 2012, it was settled law that the communication right covered streams and downloads.¹⁷¹ As the Board noted, this settled law was reflected in *SOCAN v. CAIP*, where this Court held that a work has been “communicated” when, “[a]t the end of the transmission, the end user has a musical work in his or her possession that was not there before,” including a music download.¹⁷² Hence, when Parliament, which is presumed to know the law,¹⁷³ enacted s. 2.4(1.1) in June 2012, it would have understood and intended that the term “communicate” applied to any type of transmission to the public, including streams and downloads, and that making works or other subject-matter available to the public would apply irrespective of whether the work or subject-matter made available to the public is transmitted via stream, download, a peer-to-peer swarm, a hybrid technology, or not at all.

106. After the *CMA* received Royal Assent in June 2012, but before its material provisions came into force in November 2012, the Court released *ESA*. *ESA* interpreted the 1988 Act against the backdrop of the *Berne Convention* and the *Canada-US Free Trade Agreement*, each addressing much older technologies.¹⁷⁴ A five-member majority held, in this specific context, that a download (a copy), unlike a stream (a performance),¹⁷⁵ did not qualify as a communication under s. 3(1)(f) of the 1988 Act. This conclusion flowed from the historical distinction between performance rights and reproduction rights,¹⁷⁶ the fact that the word “communicate” in s. 3(1)(f) of the 1988 Act had historically been linked to the performance right, the texts and purposes of the relevant

¹⁶⁹ *Perka*, at [264-65](#).

¹⁷⁰ *Felipa*, ¶[71](#).

¹⁷¹ *CWTA v. SOCAN*, 2008 FCA 6, ¶[19-30](#); *Shaw v. SOCAN*, 2010 FCA 220, ¶[6-15](#); *ESA v. SOCAN*, 2010 FCA 221, ¶[13](#).

¹⁷² *SOCAN v. CAIP*, ¶[1, 45](#); Board Reasons, ¶[85](#) (AR, V. I, Tab 1).

¹⁷³ *Canada (CHRC) v. Canada (Attorney General)*, 2011 SCC 53, ¶[45](#).

¹⁷⁴ *Berne* addressed performances by radio and the *Canada-US Free Trade Agreement* addressed live cable retransmissions of free over-the-air signals.

¹⁷⁵ *Rogers*, ¶[2](#).

¹⁷⁶ *Bishop*, at [477-79](#).

international treaties, and the principle of technological neutrality.¹⁷⁷ In reaching this conclusion, *ESA* overturned settled law interpreting s. 3(1)(f) to cover streams and downloads.

107. As the Board found, *ESA* did not deal with s. 2.4(1.1), which had not yet entered into force, or the WIPO Treaties, which Canada had not yet ratified.¹⁷⁸ Nor did *ESA* deal with the act of making available; *ESA* dealt exclusively with whether “communicate” in s. 3(1)(f) of the 1988 Act was restricted to transmissions of performances. Applying the modern approach to statutory interpretation, the Court considered the 1988 Act in its entire context, including its legislative history, the relevant international treaties, and the principle of technological neutrality, and held that Parliament intended to depart from the ordinary meaning of “communication” set out in the *Tariff 22* decision and *SOCAN v. CAIP* to limit that term to the transmission of performances.

108. The same interpretive methodology used in *ESA*, when applied to the 2012 *CMA*, leads to a different conclusion. As noted, Parliament enacted the *CMA* to fully implement the WIPO Treaties, including the new MAR, which covers both the initial act of making available and any subsequent transmission(s), irrespective of technological means used. The *CMA* thus significantly altered the meaning of the right to communicate a work to the public. The *CMA* extended the meaning of “communicate to the public” to include the act of making available by streams, downloads, or other means, regardless of whether the work is ever transmitted or received. By implementing the WIPO Treaties, the *CMA* must also be presumed to have intended that all transmissions to the public, whether of streams or downloads, are also communications to the public, and thereby also close the gaps in the *Berne Convention* which did not fully cover such transmissions.¹⁷⁹ It thus erased any legal distinction between streams and downloads for the purposes of the communication right.¹⁸⁰

109. While the Board stated that it was not revisiting the “transmission component” of the right of communication to the public, the Board incorrectly suggested that the introduction of s. 2.4(1.1)

¹⁷⁷ *ESA*, ¶13-32.

¹⁷⁸ Board Reasons, ¶130, 135-36 (AR, V. I, Tab 1).

¹⁷⁹ See the authorities cited at *supra* note 51.

¹⁸⁰ This interpretation is fully consistent with the structure of s. 3(1), which includes both public performance and reproduction rights, including subsections that cover **both** sets of basic rights, e.g., (a), (d), and (e), and rights that are *sui generis*, such as (i) (see *ESA*, ¶91-92).

may not have changed the “transmission component” of the communication to the public right.¹⁸¹ The Board’s suggestions in this regard were inconsistent with the overwhelming expert evidence that the WIPO Treaties were intended to encompass all communications to the public that resulted from making streams and downloads available to the public and Parliament’s intention to fully implement the WCT.¹⁸²

110. In short, s. 2.4(1.1) did not “reverse” *ESA*; rather it *overtook* *ESA*. It did so because, in 2012, it is clear Parliament intended to enact a WIPO Treaties-compliant communication right that triggered on the act of making available, and then cover *all* resulting transmissions in a technologically neutral fashion. There was no evidence before the Board that Parliament meant – notwithstanding this Court’s broad interpretation of s. 3(1)(f) in *SOCAN v. CAIP* – to *anticipate* *ESA* and read down the communication right in a technologically non-neutral way so as to give lesser protections to transmissions of downloads than transmissions of streams. In this small respect, the Board failed to apply the modern and purposive approach by incorrectly limiting the scope of the MAR contrary to Parliament’s intentions.

111. *ESA* construed a radio- and television-focused version of the Act from a time in which “hybrid” technologies did not “blur” the old distinctions between reproduction rights and performance rights. The 1988 Act had different provisions, a different legislative history, a different set of legislative objectives, and a different international context. While the word “communicate” was read in *ESA* to conform to Parliament’s intent to implement its *Berne Convention* obligations, that term must now, employing the same principles of statutory construction used in *ESA*, be read more broadly to conform to Parliament’s intent to fully implement its WIPO Treaty obligations in a technologically neutral manner.

H. The Board’s Interpretation Is Reviewable on the Correctness Standard

1. The Meaning of Section 2.4(1.1) Is a Question of Law Subject to Concurrent First-Instance Jurisdiction

112. In a line of pre-*Vavilov* cases, the Court held that the correctness standard applies to questions of law over which courts and administrative decision makers have concurrent first-

¹⁸¹ Board Reasons, ¶15, 130-136 (AR, V. I, Tab 1). Since the Board stated at ¶136 that it was *not* revisiting the *ESA* “transmission component”, the Board’s *dicta* were in *obiter*.

¹⁸² See paras. 19-29, 36-45 and accompanying footnotes above.

instance jurisdiction.¹⁸³ In *Rogers*, Rothstein J. offered a two-fold rationale for this approach. First, it would be inconsistent to apply different standards of review depending on the forum in which the legal issue is first raised. Second, the legislature’s decision to create a scheme with concurrent first-instance jurisdiction over a legal question suggests that it did not consider the administrative decision maker as having superior expertise over the matter.¹⁸⁴

113. *Vavilov* established a presumption of reasonableness review that may be rebutted in five situations, none of which is the one reaffirmed in *Rogers*. However, *Vavilov* did not expressly overrule *Rogers*. Nor did it “definitively foreclose the possibility that another category could be recognized as requiring a derogation from the presumption of reasonableness review in a future case.” Rather, it held that the recognition of any correctness category must “be consistent with the framework and the overarching principles set out in these reasons.” In particular, any correctness category based on legislative intent “require[s] a signal of legislative intent as strong and compelling as those identified in these reasons.”¹⁸⁵

114. That “strong and compelling” signal is found in a legislature’s decision to give courts and administrative decision makers concurrent first-instance jurisdiction over a question of law. This institutional design choice signals the legislature’s intent *not* to “leave [the] question[] with administrative bodies rather than with the courts,” thereby negating the rationale for the presumption of reasonableness review. Consistent with the principles articulated in *Vavilov*, courts must respect that institutional design choice and apply the correctness standard, treating the administrative decision maker’s decision as if it were a court’s.¹⁸⁶

115. This approach is consistent with *Vavilov*’s emphasis on the need to maintain consistency, coherence, and certainty in judicial review.¹⁸⁷ First, it would be incoherent for courts to apply the presumption of reasonableness review where the rationale for that presumption is absent. Second, it would be inconsistent to apply different standards of review depending on the forum in which the legal issue is first raised. Third, the consistent application of the correctness standard across judicial and administrative contexts provides future litigants with greater interpretive certainty.

¹⁸³ *SOCAN v. CAIP*, ¶[49-50](#); *Rogers*, ¶[10-20](#); *SODRAC*, ¶[35](#).

¹⁸⁴ *Rogers*, ¶[14-15](#).

¹⁸⁵ *Vavilov*, ¶[69-70](#).

¹⁸⁶ *Vavilov*, ¶[8](#), [12](#), [24](#), [26](#), [30](#), [33](#), [36](#), [46](#).

¹⁸⁷ *Vavilov*, ¶[10](#), [22](#), [38](#), [46](#), [88](#).

116. The Court does not overrule its own precedents lightly.¹⁸⁸ Although the consideration of relative expertise cited in *Rogers* no longer has a role in determining the standard of review post-*Vavilov*,¹⁸⁹ the other justifications identified above demonstrate that the correctness category reaffirmed in *Rogers* remains consistent with the core principles endorsed in *Vavilov*. Both decisions are premised on the need for consistency, coherence, and certainty in judicial review. The Court should therefore confirm that *Rogers* remains good law.

2. The Interpretation of a Provision Intended to Implement an International Treaty Is a General Question of Law of Central Importance

117. General questions of law of central importance to the legal system have “significant legal consequences for the justice system as a whole or for other institutions of government” and hence require “uniform and consistent answers.”¹⁹⁰ The interpretation of a provision intended to implement an international treaty, such as s. 2.4(1.1), is precisely such a question.

118. An erroneous interpretation of a provision intended to implement an international treaty can expose Canada and its institutions to significant consequences, including censure, retaliation, and other consequences. As a leading expert in international law explains, these significant consequences “should incline our courts to be less indulgent of the international law errors of Canadian tribunals” and “strongly recommend[]” application of the correctness standard.¹⁹¹

119. This approach is consistent with *Vavilov*’s focus on legislative intent. The *Vavilov* framework is “rooted in legislative intent.”¹⁹² As noted, legislatures are presumed to have intended to comply with Canada’s international treaty obligations. This presumption provides a sound basis for reviewing an administrative decision maker’s interpretation of a provision intended to implement an international treaty on the correctness standard.¹⁹³

120. The need to promote uniformity and consistency in the interpretation of international

¹⁸⁸ *Canada v. Bedford*, 2013 SCC 72, ¶38; *Carter v. Canada*, 2015 SCC 5, ¶44.

¹⁸⁹ *Vavilov*, ¶31.

¹⁹⁰ *Vavilov*, ¶59.

¹⁹¹ G. van Ert, *Using International Law in Canadian Courts*, 2nd ed. (Toronto: Irwin Law, 2008), at 294-95 (BOA, Tab 9).

¹⁹² *Vavilov*, ¶34.

¹⁹³ van Ert, at 295 (BOA, Tab 9).

treaties and domestic provisions implementing them strengthens the case for correctness review.¹⁹⁴ As the Court recognized in *Balev*, “[a] clear purpose of multilateral treaties is to harmonize parties’ domestic laws around agreed-upon rules, practices, and principles.”¹⁹⁵ The correctness standard better achieves this objective. It provides the uniformity and consistency necessary to ensure Canadian law remains in harmony with uniform international standards adopted by Canada. While it permits the Court to perform a *de novo* analysis, it also permits the Court to take the Board’s reasons, including its assessment of the expert evidence, into account.¹⁹⁶

I. If the Reasonableness Standard Applies, the Court of Appeal Misapplied *Vavilov*

121. Applying the correctness standard will ensure s. 2.4(1.1) is interpreted uniformly and consistently in the future. In the alternative, if the reasonableness standard applies, the appeal should be allowed on the basis that the Court of Appeal misapplied the approach to reasonableness review set out in *Vavilov*.

122. *Vavilov* affirmed that reasonableness review requires courts to pay “respectful attention” to the administrative decision maker’s reasons and to “seek[] to understand the reasoning process followed by the decision maker.”¹⁹⁷ The Court of Appeal did neither. Instead, it rejected the Board’s interpretation outright, failed to consider evidence relied on by the Board, groundlessly asserted that the Board “skewed its analysis” with “a desired result in mind,” unjustifiably criticized the Board for providing “no meaningful reasons,” engaged in impermissible reweighing and reassessing of the extensive evidence considered by the Board, offered no alternative interpretation that would fulfil Parliament’s objectives, and disregarded that the Board was deciding the interpretation of the MAR as part of a separate proceeding and not exclusively in setting a SOCAN tariff.¹⁹⁸ This approach was inconsistent with the “sensitive and respectful, but robust, evaluation of administrative decisions” called for in *Vavilov*.¹⁹⁹

¹⁹⁴ *Jayasekara v. Canada*, 2008 FCA 404, ¶4; *Febles v. Canada*, 2012 FCA 324, ¶24, aff’d 2014 SCC 68; *T. v. Secretary of State for the Home Dept.*, [1996] 2 All E.R. 865 (H.L.), at 891.

¹⁹⁵ *Balev*, ¶33. See also *ibid.*, ¶49.

¹⁹⁶ *Vavilov*, ¶54, 96, 103.

¹⁹⁷ *Vavilov*, ¶84, citing *Dunsmuir v. New Brunswick*, 2008 SCC 9, ¶48.

¹⁹⁸ CA Reasons, ¶49, 52, 59-60, 95 (AR, V. I, Tab 2).

¹⁹⁹ *Vavilov*, ¶12.

123. The Board approached this case with care and attention, and its key findings and conclusions were strongly supported by expert evidence. If the reasonableness standard applies, the Board’s decision should be shown considerable deference. Even if the correctness standard applies, the Board’s findings on an extensive record should not be lightly set aside.²⁰⁰

J. Conclusion

124. Parliament enacted the *CMA* to fully implement Canada’s obligations under the WIPO Treaties. To that end, it enacted s. 2.4(1.1) to expand the meaning of the word “communication” in the Act to include the act of making available and any subsequent transmission(s). The Court should give effect to Parliament’s stated intent, to ensure Canada’s laws remain consistent with internationally accepted tools to fight digital piracy, and to restore clarity, consistency, and common sense in Canadian copyright law.

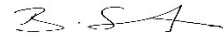
PART IV - COSTS

125. Consistent with the Court’s usual practice, costs should be granted in the cause.

PART V - ORDER SOUGHT

126. Music Canada asks the Court to allow the appeal with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 20th day of July, 2021.



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²⁰⁰ *Vavilov*, ¶54.

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