

**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)

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**FACTUM OF THE APPELLANT,  
SOCIETY OF COMPOSERS, AUTHORS AND MUSIC PUBLISHERS OF CANADA  
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)**

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*[Style of cause continued from previous page]*

AND BETWEEN:

**MUSIC 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.**

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SOCIETY OF COMPOSERS, AUTHORS AND MUSIC PUBLISHERS OF CANADA  
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## PART I – OVERVIEW AND STATEMENT OF FACTS

### A. Overview

1. Digital technology and the Internet have made it possible to make content available for users to access on demand—whenever, wherever, and however they wish. This has created new opportunities for Canadians to discover, access, and enjoy music, movies, and other content. And it has created opportunities for online platforms like Apple, Spotify, and Netflix to attract users – and earn revenue – by making available vast catalogues of content at the ready, to be accessed instantly as streams, downloads, or both.

2. It has also created new challenges. Existing rights under historic international copyright treaties did not adequately cover on-demand activities. With inadequate protections, creators were unable to share in any value associated with “making available.”

3. Canada enacted the *Copyright Modernization Act (CMA)* in 2012 to “update the rights and protections of copyright owners to better address the challenges and opportunities of the Internet.”<sup>1</sup> The *CMA* was intended to implement Canada’s obligations under the *WIPO Copyright Treaty (WCT)*<sup>2</sup> and the *WIPO Performances and Phonograms Treaty (WPPT)*,<sup>3</sup> commonly known as the WIPO Internet Treaties, which had been adopted decades earlier to update international copyright norms for the digital age.

4. As part of that modernization, the WIPO Internet Treaties required that states parties introduce protection for the act of making works, sound recordings, and performers’ performances available on demand. To that end, the *CMA* introduced subsection 2.4(1.1) of the *Copyright Act*,<sup>4</sup> which states that

2.4(1.1) For the purposes of this Act, communication of a work or other subject-matter to the public by telecommunication includes making it available to the public by telecommunication in a way that allows a member of the public to have access to it

2.4(1.1) Pour l’application de la présente loi, constitue notamment une communication au public par télécommunication le fait de mettre à la disposition du public par télécommunication une oeuvre ou un autre objet du droit d’auteur de manière que

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<sup>1</sup> [Copyright Modernization Act](#), SC 2012, c 20, summary, (a) [*CMA*].

<sup>2</sup> [2186 UNTS 121](#) (adopted December 20, 1996, in force March 5, 2002) [*WCT*].

<sup>3</sup> [2186 UNTS 203](#) (adopted December 20, 1996, in force March 19, 2002) [*WPPT*].

<sup>4</sup> *Copyright Act*, RSC 1985, c C-42, [*Act*] s. 2.4(1.1).

from a place and at a time individually chosen by that member of the public.

chacun puisse y avoir accès de l'endroit et au moment qu'il choisit individuellement.

5. The issue in this appeal is what Parliament achieved by enacting s. 2.4(1.1).
6. The text, context, and purpose of s. 2.4(1.1) all support the interpretation reached by the Copyright Board of Canada: the provision expands the communication right in s. 3(1)(f) by deeming the initial act of making a work available for on-demand access, without more, to be a “communication to the public by telecommunication,” whether the work is later transmitted as a stream, as a download, or not at all.
7. The Board reached its conclusion following a textual and purposive analysis of s. 2.4(1.1), which it then validated by examining relevant treaty obligations. In overturning the Board’s decision, however, the Federal Court of Appeal (FCA) chose not to interpret s. 2.4(1.1) at all. Instead, it held that the provision is constrained by the approach to “communicate” in *ESA*,<sup>5</sup> which held that a download was not a “communication” within the meaning of s. 3(1)(f), and it criticized the Board for using international treaty history to confirm its interpretation.
8. This Court’s decision in *ESA* does not constrain the meaning of s. 2.4(1.1). *ESA* did not consider that provision, which was not even in force at the time of the decision. *ESA* also considered a different treaty and legislative history: the decision relied on the *Berne Convention*, which contained gaps in protection that the WIPO Internet Treaties – and the *CMA* – were designed to fill. Constraining s. 2.4(1.1) to the historical meaning of “communicate,” as interpreted in *ESA*, would reopen those gaps, contrary to the intention of Parliament in enacting the *CMA*.
9. The Board also found, correctly, that the act of making a work available, on one hand, and any transmission of the work that might follow, on the other, are distinct activities that may give rise to separate licence fees that reflect their respective value to the user. As this Court made clear in *SODRAC*, there is no prohibition against recognizing distinct activities that may give rise

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<sup>5</sup> [\*Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada\*, 2012 SCC 34 \[ESA\]](#).

to distinct royalty obligations. There is only a prohibition against creating layers of protections or fees that were not intended by Parliament.<sup>6</sup>

10. Here, the text, context, and purpose of s. 2.4(1.1) all demonstrate that Parliament intended to afford protection to both activities. That is consistent with the fact that making a work available for on-demand access creates economic value for the platform that makes it available. Determining that value is not at issue here – it is for the market or the Board to decide. But, by dismissing making available as a mere “preparatory step” that does not even engage a protected right, the FCA contradicted the teaching of this Court in *SODRAC*, applying interpretive principles in a way that overrides the express terms of the *Copyright Act*.<sup>7</sup>

## **B. Treaty, Legislative, and Procedural History**

### **1. The WIPO Internet Treaties and the making available right**

11. The *CMA* was enacted in 2012 to bring the *Copyright Act* up to date with the unique circumstances of Internet communication and into compliance with the WIPO Internet Treaties. The *CMA* was the latest in a series of amendments made to conform the *Act* to international norms that have evolved to address technological developments.

12. The *Copyright Act* itself was “based on, and designed to implement, the *Berne Convention*”<sup>8</sup>, which was adopted in 1886 and signed by Canada in 1921.<sup>9</sup> It has since been amended to implement both changes to *Berne* and new requirements imposed by other international treaties,<sup>10</sup> many of which were adopted in response to new technologies.

13. With the advent of digital technology and the Internet, the international copyright community recognized that the exclusive rights set out in *Berne* were insufficient to cover new

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<sup>6</sup> [Canadian Broadcasting Corp. v SODRAC 2003 Inc](#), 2015 SCC 57, ¶63 [*SODRAC*].

<sup>7</sup> *SODRAC*, ¶71.

<sup>8</sup> *ESA*, ¶13; [Bishop v Stevens](#), [1990] 2 SCR 467 at 473-474 [*Bishop*].

<sup>9</sup> *Berne Convention for the Protection of Literary and Artistic Works*, 828 UNTS 221 (as amended on September 28, 1979) [*Berne*].

<sup>10</sup> *ESA*, ¶13ff; [Re:Sound v. Motion Picture Theatre Associations of Canada](#), 2012 SCC 38, ¶28 [*Re:Sound*]; [Composers, Authors and Publishers Assoc. of Canada Limited v. CTV Television Network Limited et al.](#), [1968] SCR 676 at 681 [*CAPAC*].

technologies that allowed users to make works available for others to access on demand – whenever, wherever, and however they wish.<sup>11</sup>

14. In response, Canada, along with other member states of the World Intellectual Property Organization (WIPO), negotiated and adopted the WIPO Internet Treaties to update international copyright norms to address digital technology and the Internet.<sup>12</sup>

15. The making available right in the WIPO Internet Treaties was intended to fill “gaps” in the exclusive rights set out in *Berne*.<sup>13</sup> Article 8 of the *WCT* states that “authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works” for on-demand access.<sup>14</sup> Articles 10 and 14 of the *WPPT* require domestic legislation to provide similar making available rights for sound recordings and performers’ performances.

16. Canada signed the WIPO Internet Treaties in 1997 but did not implement them until Parliament enacted the *CMA* in 2012. In the interim, decisions of both the Copyright Board and various courts made clear the pressing need to amend the *Copyright Act* to address the challenges of the Internet. Those decisions held that the communication right, as it was then formulated, did not afford independent protection to the act of making available and that a communication to the public by telecommunication occurred only when a work was actually transmitted to an end user.<sup>15</sup> To comply with the WIPO Internet Treaties, Canada would have to amend the *Copyright Act*.

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<sup>11</sup> Expert Report of Dr. Mihály Ficsor [Ficsor Report] at 5 (Joint Record of the Appellants [JRA], Vol. III, Tab 38B), citing WIPO, *Guide to the Copyright and Related Rights Treaties Administered by WIPO* (2004) [WIPO Guide], at [CT-8.5 - CT-8.7](#); Ricketson & Ginsburg, *International Copyright and Neighbouring Rights*, 2d ed (New York, NY: Oxford University Press, 2006) at 4.19 (BOA, Tab 4); [Scope of Section 2.4\(1.1\) of the Copyright Act – Making Available](#) (25 August 2017), CB-CDA 2017-085 [Board Decision] (JRA, Vol. I, Tab 1), ¶141.

<sup>12</sup> *WCT*, [preamble](#); *WPPT*, [preamble](#); WIPO Guide, [CT-Pr.5](#).

<sup>13</sup> [Board Decision](#), ¶¶140-142, 152; Ficsor, *The Law of Copyright and the Internet: The 1996 WIPO Internet Treaties, their Interpretation and Implementation* (Oxford: Oxford University Press, 2002) [Ficsor, *The Law of Copyright*] at 4.84 (BOA, Tab 1).

<sup>14</sup> *WCT*, article 8.

<sup>15</sup> [SOCAN - Tariff 22 \(Transmission of Musical Works to Subscribers via a Telecommunications Service Not Covered Under Tariff Nos. 16 or 17\) \[Phase I: Legal Issues\]](#) (October 27, 1999), Copyright Board [Tariff 22 (1999)], at 34-36; [Society of Composers, Authors and Music](#)

## 2. The *Copyright Modernization Act*

17. The *CMA* was the culmination of more than 10 years of public consultations, four bills,<sup>16</sup> and dozens of Parliamentary committee hearings that heard from over 100 witnesses.<sup>17</sup>

18. An express purpose of the *CMA* was to implement the WIPO Internet Treaties, including the making available right. Its preamble states that “copyright protection is enhanced when countries adopt coordinated approaches, based on internationally recognized norms,” that “those norms are reflected in the [WIPO Internet Treaties],” and that “those norms are not wholly reflected in the *Copyright Act*.” It cites challenges, “global in scope,” that are presented by “advancements in and convergence of the information and communications technologies that link communities around the world,” and emphasizes Parliament’s commitment to “enhancing the protection of copyright works or other subject-matter ... in a manner that promotes culture and innovation, competition and investment in the Canadian economy.”<sup>18</sup>

19. These purposes were also reflected in the summary included with the *CMA*,<sup>19</sup> in the legislative summary prepared by the Library of Parliament,<sup>20</sup> and in government statements that accompanied the introduction of the bill.<sup>21</sup> Those statements explained, for example, that the *CMA* would “implement the associated rights and protections” set out in the WIPO Internet Treaties and that “[a]ll copyright owners will now have a ‘making available right,’ which is an

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*Publishers of Canada v Canadian Assn of Internet Providers*, 2004 SCC 45, ¶42 [*SOCAN v CAIP*]; *BMG Canada v John Doe*, [2004] 3 FCR 241, ¶28 [*BMG*].

<sup>16</sup> [Board Decision](#), ¶97; [Bill C-60](#) (introduced June 2005, died on the order paper Nov. 2005); [Bill C-61](#) (introduced June 2008, died on the order paper Sept. 2008); [Bill C-32](#), (introduced June 2010, died on the order paper March 2011); [Bill C-11](#), (introduced Sept. 2011, Royal Assent 29 June 2012).

<sup>17</sup> D Lithwick, M-O Thibodeau, [Legislative Summary – Bill C-11: An Act to amend the Copyright Act](#), Library of Parliament, 2011, (Revised 20 April 2012) [*Legislative Summary – Bill C-11*], pp. 8-10.

<sup>18</sup> *CMA*, [preamble](#).

<sup>19</sup> *CMA*, [summary](#).

<sup>20</sup> [Legislative Summary – Bill C-11](#), at 1.

<sup>21</sup> [Board Decision](#), ¶¶100-102.

exclusive right to control the release of copyrighted material on the Internet,”<sup>22</sup> including on platforms like Apple iTunes that allow downloads.<sup>23</sup>

20. The CMA implemented the exclusive making available right in works by introducing s. 2.4(1.1). This definitional provision expands the meaning of “communicate to the public by telecommunication,” wherever that phrase appears in the *Act*, to include the act of making a work available for on-demand access. It combines with the communication right in s. 3(1)(f) to create a technologically-neutral form of protection for on-demand access that applies to the initial act of making a work available for on-demand transmission, regardless of the form of the subsequent transmission, if any. And it does so in language almost identical to Article 8 of the *WCT*:

*Communication to the public by  
telecommunication*

2.4(1.1) For the purposes of this Act, communication of a work or other subject-matter to the public by telecommunication includes making it 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.

*Communication au public par  
télécommunication*

2.4(1.1) Pour l’application de la présente loi, constitue notamment une communication au public par télécommunication le fait de mettre à la disposition du public par télécommunication une oeuvre ou un autre objet du droit d’auteur de manière que chacun puisse y avoir accès de l’endroit et au moment qu’il choisit individuellement.

*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.

*Droit de communication au public*

... les auteurs d’œuvres littéraires et artistiques jouissent du droit exclusif d’autoriser toute communication au public de leurs œuvres par fil ou sans fil, y compris la mise à la disposition du public de leurs œuvres de manière que chacun puisse y avoir accès de l’endroit et au moment qu’il choisit de manière individualisée.

[Emphasis added]

<sup>22</sup> Govt. of Can., *What the Copyright Modernization Act Means for Owners, Artists and Creators* (JRA, Vol. IX, Tab 54O).

<sup>23</sup> Govt. of Can., *Balanced Copyright Glossary* (JRA, Vol. VII, Tab 54B).

21. The *CMA* received Royal Assent on June 29, 2012. It was proclaimed into force on November 7, 2012.<sup>24</sup>

### 3. The *ESA* decision

22. Coincidentally, just two weeks after the *CMA* received Royal Assent, this Court released its decision in *ESA*. Those events passed like ships in the night. When debating the *CMA*, Parliament obviously did not have the *ESA* decision and, in *ESA*, this Court did not consider the *CMA*, which was not yet in force, or the WIPO Internet Treaties, which were not yet ratified.<sup>25</sup>

23. The issue in *ESA* was whether SOCAN, which at the time controlled the communication right in musical works on behalf of its members, but not the reproduction right, was entitled to collect royalties for downloads. *ESA* overruled three previous FCA decisions<sup>26</sup> – as well as this Court’s own decision in *SOCAN v. CAIP*<sup>27</sup> – by holding that the transmission of a download was not a “communication to the public” within the meaning of s. 3(1)(f): because it was not a “performance-based” activity, it could not be a *communication* of the work.<sup>28</sup> As a result, SOCAN was not entitled to royalties for downloads.

24. However, *ESA* did not address whether or how SOCAN’s entitlement to royalties would be affected by the introduction of s. 2.4(1.1).

### 4. The Copyright Board decision

25. One month after the *CMA* was proclaimed into force, the Copyright Board initiated a proceeding to determine the meaning and application of s. 2.4(1.1). The Board considered written submissions from dozens of parties and reports from five experts in international copyright law, including several involved directly in the drafting of the WIPO Internet Treaties.

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<sup>24</sup> *CMA*, s. 63; [SI/2012-85](#).

<sup>25</sup> WCT Notification No. 81, [Ratification by Canada](#).

<sup>26</sup> [Canadian Wireless Telecommunications Assn. v. Society of Composers, Authors and Music Publishers of Canada](#), 2008 FCA 6 [*CWTA v SOCAN*]; [Shaw Cablesystems G.P. v. Society of Composers, Authors and Music Publishers of Canada](#), 2010 FCA 220 [*Shaw*]; and [Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada](#), 2010 FCA 221.

<sup>27</sup> *SOCAN v CAIP*, ¶45; [Board Decision](#), ¶85.

<sup>28</sup> *ESA*, ¶¶32-39.

26. The Copyright Board decision is detailed, spanning some 207 paragraphs. The Board began by reviewing the history of the communication right, including *ESA*. It then turned to the legislative history of s. 2.4(1.1), including the preamble to the *CMA*, relevant government statements, and the context and grammatical and ordinary sense of s. 2.4(1.1).

27. The Board concluded that s. 2.4(1.1) is a deeming provision: it expands the meaning of “communication” – which in its ordinary meaning requires a completed transmission – so that the mere act of making a work available for on-demand access, even without any subsequent transmission, is deemed an act of communication.<sup>29</sup>

28. The Board found that its interpretation of s. 2.4(1.1) did not conflict with *ESA*, noting the “vast difference” in the legislative and treaty history between the 1988 amendments that led to s. 3(1)(f) (which were at issue in *ESA*) and the 2012 amendments that added s. 2.4(1.1) (which were not). It also observed that *ESA* did not consider the *WCT*, which had not yet been implemented, and dealt only with the “transmission component” of s. 3(1)(f), which was unaffected by s. 2.4(1.1).<sup>30</sup>

29. The Board then confirmed that its interpretation was consistent with international copyright norms and Canada’s international obligations. It recognized that any interpretation should be “in harmony” with Parliament’s stated intention to implement the WIPO Internet Treaties. It concluded that, because the *WCT* requires states parties to protect the act of making available regardless of the nature or existence of subsequent transmissions, any interpretation of s. 2.4(1.1) that did not cover a “mere” making available would not comply.<sup>31</sup> It also rejected the argument that any subsequent transmissions “merge” with the initial act of making available.<sup>32</sup>

## 5. The Federal Court of Appeal decision

30. Writing for the FCA, Stratas J.A. commented that *Vavilov* “casts a cloud” over previous decisions in which this Court held that Copyright Board decisions are reviewable on the standard

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<sup>29</sup> [Board Decision](#), ¶¶115-118, 136.

<sup>30</sup> [Board Decision](#), ¶¶15, 109-112, 130-136.

<sup>31</sup> [Board Decision](#), ¶¶137-182.

<sup>32</sup> [Board Decision](#), ¶¶156-203.

of correctness.<sup>33</sup> As a result, the FCA assumed that reasonableness applied and left the issue for another day.

31. In overruling the decision of the Board, the FCA mounted an unusually harsh attack on the Board’s impartiality and competence: the Board had “a desired result in mind,” “skewed its analysis in favour of one particular result,” “provided no meaningful reasons to support” its interpretation, and “asserted its view” of the meaning of Article 8 “without any supporting reasoning, and then made subsection 2.4(1.1) conform to its view.”<sup>34</sup>

32. The FCA held that the “proper methodology was to explain the meaning of ‘communication to the public by telecommunication’” – that is, the term *defined* in s. 2.4(1.1), as opposed to the *actual definition* in that provision.<sup>35</sup>

33. According to the FCA, the Board had set aside this Court’s “all-important decision” in *ESA* because it predated the *WCT*, and then ignored everything else in favour of the treaty: “on any rational analysis,” *ESA* “speaks to the authentic meaning of subsection 2.4(1.1) and constrains the Board.”<sup>36</sup> It held that Parliament could depart from the *ESA* construction of “communication to the public” only by clear legislative text, but that the Board ignored that constraint.

34. It also criticized the Board as having “provided no meaningful reasons to support the idea” that “the act of making a work available to the public is a ‘communication by telecommunication’ that exists apart from any later act of transmission.”<sup>37</sup> That interpretation, it held, runs counter to technological neutrality, as articulated in *ESA*, and the principle that duplicate layers of regulation and fees should be avoided.<sup>38</sup>

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<sup>33</sup> *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2020 FCA 100, ¶¶16-18 [FCA Decision].

<sup>34</sup> FCA Decision, ¶49, ¶59, and ¶91.

<sup>35</sup> FCA Decision, ¶64 [emphasis added].

<sup>36</sup> FCA Decision, ¶59, ¶65.

<sup>37</sup> FCA Decision, ¶¶51-52.

<sup>38</sup> FCA Decision, ¶¶66-67 citing *ESA* and *Théberge v Galerie d’Art du Petit Champlain Inc.*, 2002 SCC 34 [*Théberge*].

35. The FCA also criticized the Board for relying on the *WCT*. In the view of the FCA, the role of international instruments is limited to resolving ambiguities in the statute.<sup>39</sup> Indeed, the FCA disagreed that the presumption of conformity should be applied in this case. In its view, “the Board went to Article 8 of the [*WCT*], asserted its view of that article’s meaning without any supporting reasoning, and then made subsection 2.4(1.1) conform to its view.”<sup>40</sup>

36. Despite its criticisms, the FCA offered no guidance on the “authentic meaning” of s. 2.4(1.1). It simply concluded that s. 2.4(1.1) “does not create a new exclusive right.” Making available, in its view, is a mere “preparatory act” that cannot be disaggregated from any stream that may follow or trigger licensing or payment obligations on its own. In the FCA’s view, there is “only one right at stake,” namely the right to stream a work, and there was “no basis for the Board’s conclusion that a stream does not merge with the making-available which preceded it.”<sup>41</sup>

## PART II – QUESTIONS IN ISSUE

37. Does s. 2.4(1.1) make the act of making a work available to the public for on-demand access a “communication to the public by telecommunication,” whether the work is subsequently transmitted as a stream, as a download, in some other format, or not at all, such that the act of making available itself may attract a licence fee?

38. For the following reasons, SOCAN submits that the answer is “yes.”

- a) The text, context, and purpose of s. 2.4(1.1) all support that interpretation.
- b) The Board properly held that this interpretation is consistent with the treaty obligations that the provision was enacted to implement. That was consistent with this Court’s use of international instruments in interpreting the *Copyright Act*.
- c) Making a work available for on-demand access is a distinct act; it does not and cannot “merge” with a subsequent stream or download.

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<sup>39</sup> FCA Decision, ¶[85](#).

<sup>40</sup> FCA Decision, ¶[93](#), see also ¶¶[70-71](#).

<sup>41</sup> FCA Decision, ¶¶[95-97](#).

- d) This interpretation is technologically neutral. The provision applies equally to all types of on-demand technology, which has no “bricks and mortar” equivalent.
- e) The Board’s interpretation does not result in an impermissible layering of fees and protections. The act of making available is distinct from any subsequent transmissions that might follow. Each distinct activity may give rise to a separate licence fee that reflects its unique value.

### **PART III – STATEMENT OF ARGUMENT**

#### **A. The Standard of Review**

39. The FCA commented that *Vavilov* “casts a cloud” over previous decisions of this Court, which held that Copyright Board decisions are reviewable on the standard of correctness, and assumed that reasonableness applied instead.<sup>42</sup>

40. The impact of *Vavilov* on Board decisions will need to be determined at some point. For the purposes of this appeal, however, SOCAN takes no position on this issue, especially since the FCA scrutinized the Board’s decision on a standard closer to correctness than to reasonableness.

#### **B. Section 2.4(1.1) Affords Independent Protection to the Act of Making Available**

41. Like any statute, the *Copyright Act* must be interpreted in accordance with the general rules of statutory interpretation, which require consideration of the text, context, and purpose.<sup>43</sup>

42. The FCA, however, did not consider the text, context, or purpose of s. 2.4(1.1). In fact, it did not interpret s. 2.4(1.1) at all. Instead of considering the impact of s. 2.4(1.1) on the meaning of “communication to the public by telecommunication,” the FCA did the opposite: in its view, the “proper methodology” was first to “explain the meaning” of *communication to the public by*

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<sup>42</sup> FCA Decision, ¶16, ¶¶20-21.

<sup>43</sup> *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, ¶40; *CCH Canadian Ltd. v Law Society of Upper Canada*, 2004 SCC 13, ¶9 [CCH], citing E.A. Driedger, *Construction of Statutes* (2nd ed. 1983) at 87; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27, ¶21.

*telecommunication* – that is, the concept *defined* by s. 2.4(1.1) – and then to constrain s. 2.4(1.1) to that meaning.<sup>44</sup>

43. In short, the FCA looked at s. 2.4(1.1) through the wrong end of the telescope. As a result, its analysis began and ended with the interpretation of “communicate” in *ESA*, which, it incorrectly held, constrained the interpretation of s. 2.4(1.1).<sup>45</sup>

44. As set out below, the text, context, and purpose of the provision all support the proposition that s. 2.4(1.1) expands “communicate” to include the act of making available.

### 1. Making available is a distinct activity

45. Making a work available for on-demand access is a distinct activity. It is the act of rendering a work that is stored on a computer or server accessible to the public, usually through the Internet, in a way that allows members of the public to access the work at a time and from a place individually chosen by them.<sup>46</sup> That act is separate from the act of copying the work onto the computer or server from which it is made available, any later transmission of the work as a stream, as a download, or in some hybrid or other format, and any reproduction of the work that might result.<sup>47</sup>

46. A work can be made available without ever being transmitted. It can also be transmitted without first being made available for on-demand access.<sup>48</sup>

### 2. *ESA* does not constrain the meaning of s. 2.4(1.1)

47. The *ESA* decision does not constrain the meaning of s. 2.4(1.1) for three reasons.

48. First, nowhere does *ESA* so much as *mention* s. 2.4(1.1), much less purport to speak to or constrain its interpretation. Nor could it. When this Court heard argument in *ESA*, the *CMA* was at the First Reading stage. It received Royal Assent just days before *ESA* was released and was

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<sup>44</sup> FCA Decision, ¶64.

<sup>45</sup> FCA Decision, ¶50, ¶65.

<sup>46</sup> [Board Decision](#), ¶144, citing Expert Report of Dr. Silke von Lewinski [von Lewinski Report], ¶11 (JRA, Vol. VI, Tab 50A).

<sup>47</sup> [Board Decision](#), ¶16, ¶122, ¶168, and ¶203.

<sup>48</sup> [Board Decision](#), ¶122.

proclaimed in force several months later. As a result, *ESA* could not have interpreted s. 2.4(1.1), and Parliament obviously did not have the *ESA* decision when debating the *CMA*.

49. In effect, the FCA applied *ESA* as if *ESA* constrained Parliament’s ability to legislate. As this Court held in *SODRAC*, however, the interpretive principles in *ESA* cannot override the express terms of the *Copyright Act*.<sup>49</sup> If s. 2.4(1.1) expands the definition of “communicate” in a way that is inconsistent with *ESA*, then it is *ESA* that must yield, not Parliament.

50. Second, *ESA* considered a different treaty and legislative history. The *Copyright Act* as it stands today is markedly different from what was before this Court in *ESA*: it includes the *CMA* amendments that implement important new treaties.

51. *ESA* held that a download was not a communication for purposes of s. 3(1)(f), based on the “historical connection between communication and performance” reflected in *Berne* and the *Canada-U.S. Free Trade Agreement (CUFTA)*.<sup>50</sup> But it did not consider s. 2.4(1.1)’s treaty progenitor, Article 8 of the *WCT*.

52. Article 8 was intended to fill an “undeniable gap” in *Berne*. Existing *Berne* rights did not cover all types of works, and none of the existing reproduction, communication, or distribution rights<sup>51</sup> was adequate to address on-demand digital transmissions, which blur, scramble, and confuse the traditional bright-line borders between performance- and copy-related rights.<sup>52</sup> In response, the *WCT* framed the making available right in a neutral way that was intended to cover the “initial act of making available ... whether copies are available for the user [a download] or whether the work is simply made perceptible to, and thus usable by, the user [a stream].”<sup>53</sup>

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<sup>49</sup> *SODRAC*, ¶47.

<sup>50</sup> *ESA*, ¶12, ¶27.

<sup>51</sup> Ficsor, *Copyright in the Digital Environment*, WIPO/CR/KRT/05/7 (2005), ¶45 [Ficsor, *Digital Environment*]; Ricketson & Ginsburg, at 12.43, 12.48-12.51 (BOA, Tab 4); WIPO Guide, [CT-8.6](#).

<sup>52</sup> Ficsor, *Digital Environment*, ¶50-51; Ficsor Report at 5 & 8 (JRA, Vol. III, Tab 38B), citing WIPO Guide, [CT-8.2](#), [CT-8.3](#); Expert Report of Dr. Jane Ginsburg, ¶¶12-13 [Ginsburg Report] (JRA, Vol. X, Tab 61A); Ficsor, *The Law of Copyright* at 4.84 (BOA, Tab 1).

<sup>53</sup> Ficsor Report at 12 (JRA, Vol. III, Tab 38B); WIPO, *Basic Proposal for the Substantive Provisions of the Treaty on Certain Questions Concerning the Protection of Literary and Artistic*

53. Constraining s. 2.4(1.1) to the historical performance-based meaning of “communicate,” as observed in *ESA*, would reopen gaps in *Berne* that were filled by the *WCT*. This would thwart Canada’s attempt to update copyright law for the digital age. Indeed, the *CMA* and the *WCT* shared the express purpose of responding to the challenges posed by the “convergence of the information and communications technologies.”<sup>54</sup> That convergence includes a blurring of lines between performance- and copy-related rights that is unique to on-demand digital transmissions.

54. Third, the interpretive task before the Court in *ESA* was different from the task here.

55. The question in *ESA* was the meaning of “communicate” in s. 3(1)(f), a term that was then not defined in the *Copyright Act* and had not yet been expanded to include the act of making available.<sup>55</sup> This Court noted that Parliament had not changed the “fundamental nature of the communication right” in over 50 years, including in the 1988 amendments to the *Act*, but had focused instead on expanding the “*means of transmitting* a communication.”<sup>56</sup>

56. That is no longer true. Parliament has now changed the nature of communication, for the purposes of s. 3(1)(f), by expanding the meaning of “communicate to the public by telecommunication,” wherever it appears in the *Act*, to include the act of making a work available for on-demand access. The task in this appeal is to interpret and apply the new definition supplied by Parliament in s. 2.4(1.1).

3. **The text of s. 2.4(1.1) says that “making available” is a “communication to the public by telecommunication”**

57. Paragraph 3(1)(f) of the *Copyright Act* grants the owner of copyright in every original literary, dramatic, musical, and artistic work the exclusive right to communicate the work to the public by telecommunication. The text of s. 2.4(1.1) expands the scope of s. 3(1)(f) by deeming the act of making a work available for on-demand access, on its own, to be a “communication to

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*Works to be Considered by the Diplomatic Conference*, CRNR/DC/4, Note [10.10](#) [*Basic Proposal*].

<sup>54</sup> *CMA*, [preamble](#); *WCT*, [preamble](#); [Board Decision](#), ¶98.

<sup>55</sup> *ESA*, ¶4.

<sup>56</sup> *ESA*, ¶25.

the public by telecommunication.” That is true whether the work is later transmitted as a stream, as a download, in some other format, or not at all.

*a) Subsection 2.4(1.1) deems making available to be a communication to the public*

58. Subsection 2.4(1.1) defines “communication to the public by telecommunication” to include the act of making available. But for this new definition, making a work available to the public would not be a communication of that work to the public. Indeed, until s. 2.4(1.1) came into force, the Copyright Board, the FCA, and this Court all consistently interpreted “communication” as requiring a completed transmission from a sender to receiver.<sup>57</sup>

59. But s. 2.4(1.1) does not require a completed transmission: on its plain text, it addresses the act of making a work available for on-demand access, not any transmission that might follow. All that is required is that the work be *made available* in a way that *allows* a member of the public to have *access* to it, on demand, through some form of telecommunication.

60. The terms “allows” and “access” speak to the *potential* for a person to obtain a work on demand. They do not require that anyone *actually* access the work, only that access be *possible*.

61. In that way, s. 2.4(1.1) expands “communication” to include something that its ordinary meaning does not bear. A work is communicated to the public under s. 3(1)(f) the moment it is made available in the manner described in s. 2.4(1.1), even if it is never transmitted. It follows, as the Board found, that s. 2.4(1.1) is a deeming provision: it “implicitly admits”<sup>58</sup> that making available is not actually “communication,” but decrees that, for the purposes of the *Act*, it be taken as if it were. In other words, it “artificially imports into a word or an expression an additional meaning which [it] would not otherwise convey.”<sup>59</sup>

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<sup>57</sup> *SOCAN v CAIP*, ¶42, ¶45; *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, ¶56 [*Rogers*]; *Shaw*, ¶66; *Sirius Canada Inc. v. CMRRA/SODRAC Inc.*, 2010 FCA 348, ¶44 [*Sirius*]; *Tariff 22 (1999)*, at 36.

<sup>58</sup> *R v Verrette*, [1978] 2 SCR 838 [*Verrette*] at 845.

<sup>59</sup> *Verrette* at 845.

62. The provision’s deeming character is evident from both official versions of the statute.

2.4(1.1) For the purposes of this Act, communication of a work or other subject-matter to the public by telecommunication includes making it 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.

2.4(1.1) Pour l’application de la présente loi, constitue notamment une communication au public par télécommunication le fait de mettre à la disposition du public par télécommunication une oeuvre ou un autre objet du droit d’auteur de manière que chacun puisse y avoir accès de l’endroit et au moment qu’il choisit individuellement.

63. In the English version, the word “includes” enlarges the meaning of the defined term (communication to the public by telecommunication) to encompass a concept (making available) not found within its plain meaning.<sup>60</sup> In the French version, which is equally authoritative,<sup>61</sup> “constitue notamment” serves the same function, with the adverb “notamment” indicating that the definition expands, rather than limits, the defined term.<sup>62</sup>

64. Thus, “includes” and “constitue notamment” are synonymous with “is”; the act of making available *is* a communication to the public by virtue of this definition.

65. This reading is consistent with similar definitions in other federal legislation. Two other provisions use “includes” and “constitue notamment” in much the same way as s. 2.4(1.1).<sup>63</sup> Another uses “shall include” and “constitue également.”<sup>64</sup> “Includes” is also used alongside “s’entend notamment”<sup>65</sup> or “vise notamment”,<sup>66</sup> while “constitue” has been paired with “is.”<sup>67</sup> Notably, the *Security of Information Act* defines communicate to “include” (“s’entend

<sup>60</sup> R Sullivan, *Sullivan on the Construction of Statutes*, 6th Ed. (LexisNexis Canada, 2014), §4.38, 8.78 (BOA, Tab 5); *Dilworth v Commissioner of Stamps* [1899] AC 99 (PC) at 105–106; *R. v. McLeod*, 1950 CanLII 409 (BCCA) at [371-372](#); *R. v. Hauser*, [1979] 1 SCR 984 per Dickson CJ at [1009](#).

<sup>61</sup> *Official Languages Act*, RSC, 1985, c 31 (4th Supp.), [s. 13](#).

<sup>62</sup> Canada, *Guide fédéral de jurilinguistique législative française*, [Définitions](#).

<sup>63</sup> *Income Tax Act*, RSC, 1985, c1 (5th Supp.)) [s. 248\(1\)](#) [*Income Tax Act*]; *Public Sector Compensation Act*, s. 2(1) “[régime de remuneration / compensation plan](#)”

<sup>64</sup> *Income Tax Act*, [s. 66.8\(3\)\(b\)](#).

<sup>65</sup> *Copyright Act*, s. 2 “[country / pays](#)”, [29.22\(2\)](#); *Patent Act*, RSC 1985, c P-4 s. 2 “[rule / règle](#)”, “[regulation / règlement](#)” [*Patent Act*]; *Competition Act*, RSC 1985, c C-34, [s. 45\(8\)](#).

<sup>66</sup> *Trademarks Act*, RSC 1985, c T-13, s. 2 “[sign / signe](#)” [*Trademarks Act*].

<sup>67</sup> *Patent Act*, [s. 27\(5\)](#), [s.55.11\(2\)](#), [\(4\)\(b\)](#), [\(5\)](#), [\(6\)](#), [\(7\)](#); *Income Tax Act*, [s. 6\(23\)](#).

notamment”) “to make available.”<sup>68</sup> In intellectual property statutes, “constitue” has been used as an equivalent to “deemed.”<sup>69</sup> What these terms all have in common is that they define one thing *to be, to be an instance of, or to be a member of*, a term, concept, or category of things.

66. Here, on the text of s. 2.4(1.1), “making available” is deemed to be one of a category of acts that the *Copyright Act* defines as a “communication to the public by telecommunication.” The result is that, wherever the latter term appears in the *Copyright Act*,<sup>70</sup> it includes the act of making available.

67. Consequently, s. 3(1)(f) must now be understood to confer upon the owner of a work the exclusive right to make it available to the public for on-demand access. The right is engaged as soon as the work is made available for on-demand access, regardless of what – if anything – follows.

***b) Making available does not depend on the form of any subsequent transmission***

68. Because s. 2.4(1.1) expands the communication right to protect the initial, decisive act of making available, whether or not it leads to a completed transmission, the protection cannot depend on the form of any transmission that may follow.

69. Nothing in the text of s. 2.4(1.1) distinguishes between a stream, a download, or any other type of on-demand transmission. Instead, it is drafted in a neutral manner that applies whenever a work is made available in a way that allows a member of the public to “have access” to it by any means of “telecommunication.”

70. In turn, the *Copyright Act* defines “telecommunication” in a broad and neutral fashion as “any *transmission* of signs, signals, writing, images or sounds or intelligence of any nature by wire, radio, visual, optical or other electromagnetic system.”<sup>71</sup> In *ESA*, this Court acknowledged that “transmission” includes both streams and downloads.<sup>72</sup>

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<sup>68</sup> *Security of Information Act*, RSC 1985, c O-5, s. 2 “[communicate](#) / [communiquer](#)”.

<sup>69</sup> *Trademarks Act*, [s. 68](#); *Patent Act*, [s. 20\(16\)](#).

<sup>70</sup> *Interpretation Act*, RSC 1985, c I-21, [s. 15](#) [*Interpretation Act*].

<sup>71</sup> *Copyright Act*, s. 2 “[telecommunication](#)” [emphasis added].

<sup>72</sup> *ESA*, ¶[28](#).

71. In the result, Parliament’s use of the term “by telecommunication” in s. 2.4(1.1) means that the provision applies whether the work is later transmitted as a stream, as a download, in some other format, or not at all. Indeed, the neutral language would extend just as readily to other means of on-demand transmission yet to be invented. While the work must be made available by telecommunication, as opposed to in physical form, nothing restricts s. 2.4(1.1) to any one *type* of telecommunication.

72. In any event, the FCA’s apparent conclusion, based on *ESA*, that s. 2.4(1.1) applies only where the subsequent transmission is a stream, but not where that transmission results in a download, is unworkable.<sup>73</sup> On that premise, the legal characterization of the act of making available – that is, whether or not the act is captured by s. 2.4(1.1) and protected under s. 3(1)(f) – would be determined solely by, and perhaps even altered retroactively by, the conduct of the end user(s), rather than the person who makes the work available.

73. If that were the case, either the legal characterization of the act would remain in limbo until a later transmission crystallizes it, or a later transmission could change the initial characterization retroactively. For example, if the first transmission of a work were a download, it would cause the act of making available never to have been a communication to the public. But if that work were streamed at some later time – whether to the same user or multiple different users – the same act of making available would somehow be recharacterized again as a communication.

74. This unworkable scenario is not hypothetical; it describes how digital content has in practice been made available and consumed online. For example, when a major on-demand service like Netflix or Spotify makes movies or music available on its platform, a consumer can choose to access the content as a stream, a download, or even in a hybrid format that allows the consumer to watch or listen to the content as a stream while it is being downloaded onto a personal device to be enjoyed again later.<sup>74</sup> The same consumer can make a different choice

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<sup>73</sup> FCA Decision, ¶¶66-67, ¶¶96-97.

<sup>74</sup> [Online Music Services \(CSI: 2011-2013; SOCAN: 2011-2013; SODRAC: 2010-2013\) \(August 25, 2017\)](#), Copyright Board, CB-CDA 2017-086, ¶¶271-275 [Tariff Decision].

later, in relation to the same content. Of course, after browsing the catalogue, the consumer can also choose not to access the content at all.

75. On the FCA's approach, the legal character of the act of making available could not be known *at the time* of making available or by *the person* who makes it available. That would make it impossible for the copyright owner to control the act of making the work available on the Internet. It would also make it impossible for whoever makes the work available (Netflix, for example) to know, at the time they do so, whether the act is infringing or requires payment.

76. Such an inchoate or contingent legal right would be antithetical to the *CMA*'s description of the *Copyright Act* as an "important marketplace framework law and cultural policy instrument that, through *clear, predictable and fair rules*, supports creativity and innovation."<sup>75</sup>

#### 4. **The domestic context of s. 2.4(1.1) supports independent protection for the act of making available**

77. The domestic context of s. 2.4(1.1) supports the conclusion that the provision protects the act of making available independently of any step that may follow. The provision is the latest in a long series of amendments that modify the scope of the performance and communication rights to respond to advances in technology. That history, as well as the location of the provision within the *Copyright Act*, related provisions dealing with acts of making available, and the neutral use of the term "telecommunication" in other provisions enacted by the *CMA*, all support that interpretation.

##### *a) Parliament has repeatedly updated the communication right*

78. Parliament has repeatedly updated the rights of public performance and communication to the public to respond to new technologies. The performance right, which originally presupposed a live audience, was expanded in 1931 to include the right of communication to the public by radio communication. That was made necessary by amendments to *Berne*, following the advent of radio broadcast technology, that required that authors have the "exclusive right of authorizing the communication of their works by radiocommunication."<sup>76</sup>

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<sup>75</sup> *CMA*, [preamble](#).

<sup>76</sup> *ESA*, ¶16; Ricketson & Ginsburg at 12.22ff (BOA, Tab 4).

79. The performance right was expanded again in 1988 to include communication to the public “by telecommunication.” That was required by *CUFTA*, which recognized the modernization of television broadcasting.<sup>77</sup>

80. By adding s. 2.4(1.1), the *CMA* further expanded the communication right to address the advent of on-demand Internet distribution. In contrast to a live performance or a broadcast, which occurs at a set time and place, the Internet allows users to make works available for others to access whenever, wherever, and however they wish.<sup>78</sup>

81. The provision is collocated in s. 2.4 with other deeming provisions that modify the meaning of “communication” to accommodate technologies that were, at one time, as new as the Internet. For example, s. 2.4(1)(a) expands “communication to the public” to include transmissions to residents of apartment buildings and hotels, which might otherwise be considered private dwellings. Similarly, under s. 2.4(1)(b) certain Internet intermediaries “are deemed *not* to be communicators.”<sup>79</sup>

***b) Other CMA provisions afford independent protection to the act of making available***

82. Other provisions that the *CMA* added to the *Copyright Act* to implement the making available right confirm Parliament’s intent to afford protection to the act of making available separately from any act that might follow.

83. Sections 15(1.1)(d) and 18(1.1)(a) grant the exclusive right to make a performer’s performance or a sound recording, as the case may be,

... 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;

... à la disposition du public et de le lui communiquer, par télécommunication, de manière que chacun puisse y avoir accès de l’endroit et au moment qu’il choisit individuellement;

[Emphasis added]

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<sup>77</sup> *ESA*, ¶[24](#).

<sup>78</sup> *Rogers*, ¶[34](#).

<sup>79</sup> *SOCAN v. CAIP*, ¶¶[87-88](#).

84. These provisions are drafted differently from s. 2.4(1.1) because it was necessary to make clear that, for sound recordings and performers' performances, both the act of making available and any subsequent acts of communication are protected. In the case of a work, the communication right in s. 3(1)(f) already protected subsequent communications to the public, so Parliament only needed to recognize and protect the act of making available to implement Article 8 of the *WCT*. By contrast, before the enactment of ss. 15(1.1) and 18(1.1), there was no separate exclusive right over the communication of a performer's performance or a sound recording, only an entitlement to equitable remuneration.<sup>80</sup>

85. Section 19.1 uses the same structure: it deems a sound recording to have been published (for purposes of s. 19(1)) if it has been made available to the public for on-demand access *or* communicated to the public by telecommunication "in that way." Here again, Parliament understood making available and any later communication to be distinct activities.

***c) Other uses of "telecommunication" can encompass both streams and downloads***

86. Like s. 2.4(1.1), additional provisions of the *Copyright Act*, which were also introduced by the *CMA*, use the term "telecommunication" in a neutral fashion that encompasses any form of digital transmission, including streams and downloads.

87. Subsection 31.1(2) exempts Internet service providers from liability when they create "cache" copies of a work "to make the *telecommunication* [of a work] more efficient" over the Internet. The word "telecommunication" in that exception must include the transmission of the work as either a stream or a download; otherwise, ISPs would be at risk of liability for caching works that are transmitted as downloads (for example, over peer-to-peer services).

88. Subsection 31.1(4) creates an exception for "hosting" providers, who provide digital storage in which another person stores a work, "for the purpose of allowing the telecommunication of a work ... through the Internet or another digital network." Here too, the word "telecommunication" must include the transmission of the work as either a stream or a download; otherwise, hosting providers would be at risk of liability for providing storage space for works that are later accessed as downloads. That risk would be incompatible with

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<sup>80</sup> *Copyright Act*, [s. 19\(1\)](#), [\(1.1\)\(a\)](#), [\(1.2\)](#).

government statements that described the *CMA* as “allow[ing] users to *download* material they have stored in online personal storage space they control.”<sup>81</sup>

89. In any event, if these exceptions were to apply only where a work is cached or stored to facilitate its telecommunication as a stream, not as a download, it would result in different copyright protections based solely on the method of delivery of the work to the end user. Because there is no evidence that Parliament intended that result, that interpretation would violate the principle of technological neutrality.<sup>82</sup>

**5. The international context and purpose of s. 2.4(1.1) support independent protection for the act of making available**

90. This Court routinely relies on international instruments to inform its interpretation of the *Copyright Act*, which was enacted and has been amended repeatedly to give effect to Canada’s international treaty obligations. Contrary to the FCA’s holding, no ambiguity is required to consider those instruments as part of the context for provisions that implement them.

91. In this case, the Board properly considered the *WCT*, which the *CMA* was expressly enacted to implement, as part of the context for s. 2.4(1.1) – and only after considering the text and domestic context of the provision. It committed no error in doing so.

**a) *Relevant international instruments are used at the context stage of statutory interpretation***

92. The FCA reserved some of its harshest criticism of the Board for having “exalted international law over domestic law” in its use of Article 8 of the *WCT* to validate its analysis of s. 2.4(1.1).<sup>83</sup> It outlined an approach that would represent a return to the requirement that international instruments only be used to identify and resolve ambiguities in the statute. In the FCA’s view, if there is no ambiguity, the court must determine and apply the “authentic meaning” of the statute, seemingly without reference to the international context.<sup>84</sup>

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<sup>81</sup> Govt. of Canada, *What the Copyright Modernization Act Means for Internet Service Providers, Search Engines and Broadcasters* (JRA, Vol. IX, Tab 54Q) [emphasis added].

<sup>82</sup> *Rogers*, ¶40.

<sup>83</sup> FCA Decision, ¶93.

<sup>84</sup> FCA Decision, ¶¶83-84, ¶87, and ¶91.

93. The FCA’s approach to international instruments is inconsistent with this Court’s jurisprudence – particularly when the domestic statutory provision is suffused with international context. In *B010*, this Court held that the interpretive presumption of conformity with international law directs the inquiry “to relevant international instruments at the context stage of statutory interpretation.”<sup>85</sup> It added that “[t]he 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.’”<sup>86</sup>

94. Following the presumption of conformity, statutes are to be interpreted consistently with Canada’s international treaty obligations where possible.<sup>87</sup> Indeed, in *Quebec v. 9147-0732 Québec inc.*, this Court emphasized that “international law that is binding on Canada ... is not only potentially persuasive but also obligatory.”<sup>88</sup>

95. Of course, the presumption of conformity is rebuttable; courts must give effect to an “unequivocal legislative intent to default on an international obligation.”<sup>89</sup> But this occurs only where the statute is not capable of being interpreted consistently with the treaty (as in *Németh*). The FCA also referred to *Kazemi*, but that case deals with developments in customary international law, not the use of a convention to interpret a statute that implements it.<sup>90</sup>

**b) The presumption of conformity applies to the Copyright Act**

96. The case for considering an international treaty is all the more obvious where, as here, the *Copyright Act* as a whole, the *CMA*, and the particular amendment at issue were all enacted to give effect to international treaty obligations.<sup>91</sup>

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<sup>85</sup> *B010 v. Canada (Citizenship and Immigration)*, 2015 SCC 58, ¶¶48-49 [*B010*]; see also *R v Hape*, 2007 SCC 26, ¶53 [*Hape*]; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 ¶114, ¶182 [*Vavilov*].

<sup>86</sup> *B010*, ¶47.

<sup>87</sup> *B010*, ¶¶47-48; *Németh v. Canada (Justice)*, 2010 SCC 56, ¶34.

<sup>88</sup> *Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32, ¶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.

<sup>89</sup> *Hape*, ¶53.

<sup>90</sup> *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62.

<sup>91</sup> *B010*, ¶47.

97. The *Copyright Act* was originally “based on, and designed to implement, the *Berne Convention*.”<sup>92</sup> It has since been amended to implement both changes to *Berne* itself<sup>93</sup> and new requirements imposed by other treaties, including the *Rome Convention*, *CUFTA*, *NAFTA*, the *Canada-U.S.-Mexico Agreement (CUSMA)* and the *WIPO Internet Treaties*.<sup>94</sup>

98. As a result, this Court routinely considers international conventions in interpreting the *Copyright Act* – particularly where new technologies are at issue.<sup>95</sup>

99. In *CAPAC*, this Court considered it “obvious” that s. 3(1)(f) was “inspired by” a certain provision of the *Rome Convention* and referred extensively to that treaty in its analysis.<sup>96</sup> In *Re:Sound*, again referring to the *Rome Convention*, this Court expressly applied the presumption of conformity to the *Copyright Act*.<sup>97</sup> In *Rogers*, it observed that a broad interpretation of s. 3(1)(f) was “not out of step with Article 8 of the *WCT* and international thinking on the issue,” even though the *WCT* was not yet binding in Canada.<sup>98</sup>

100. In *Théberge*, this Court commented:

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.<sup>99</sup>

101. There is good reason to apply the presumption of conformity. It is a long-established interpretive rule that balances treaty-making by the executive with law-making by the legislature.

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<sup>92</sup> *Bishop* at [473](#).

<sup>93</sup> *ESA*, ¶¶[13-25](#).

<sup>94</sup> *ESA*, ¶[13ff](#); *Re:Sound*, ¶[28](#); *Rogers*, ¶[37](#), ¶¶[41-49](#); *CAPAC* at [681](#); *CWTA v SOCAN*, ¶¶[25-27](#); *Canada–United States–Mexico Agreement Implementation Act*, SC 2020, c1, [s. 23](#).

<sup>95</sup> *Théberge*, ¶[6](#); ¶[114](#), and ¶[116](#); *Bishop*, at [473-475](#); *SOCAN v. CAIP*, ¶[56](#), ¶[63](#), and ¶[97](#) (per McLachlin C.J. for the majority) and ¶¶[150-151](#) (per Lebel J. in dissent); *CCH*, ¶[19](#); *Robertson v Thomson Corp.*, 2006 SCC 43 ¶[50](#) (per Lebel and Fish JJ. for the majority) and ¶¶[94-97](#) (per Abella J. dissenting in part on a cross-appeal) [*Robertson*]; *ESA*, ¶¶[13-24](#); *Rogers*, ¶¶[36-37](#), ¶¶[41-49](#).

<sup>96</sup> *CAPAC* at [681](#).

<sup>97</sup> *Re:Sound*, ¶[52](#).

<sup>98</sup> *Rogers*, ¶¶[41-49](#).

<sup>99</sup> *Théberge*, ¶[6](#).

Treaties are negotiated and concluded by the elected executive branch of government, not by “unelected functionaries abroad,” as the FCA dismissively claimed.<sup>100</sup> Treaties are made only with cabinet approval, after a long, complex, and serious process of internal policy-making and negotiation with treaty partners. These extensive efforts ought not to be readily undone based upon judicial assessments of only domestic values and principles.<sup>101</sup>

102. Failure to apply the presumption here would leave Canada in breach of its treaty obligations and at risk of censure under international law.<sup>102</sup> An exclusive making available right is mandatory not only under the WIPO Internet Treaties,<sup>103</sup> but also under *CUSMA* and the *Canada-European Union Comprehensive Economic and Trade Agreement (CETA)*.<sup>104</sup> Nothing in s. 2.4(1.1) “clearly compels” a construction that would cause Canada to violate its international obligations. This Court should “strive to avoid” that result.<sup>105</sup>

**c) *The interpretative approach in ESA supports using the WCT to interpret s. 2.4(1.1)***

103. Although *ESA* does not constrain the interpretation of s. 2.4(1.1) for reasons set out above, *ESA*’s approach to the use of international conventions – in that case, *Berne* and *CUFTA* – supports the approach taken by the Board, in this case, to the use of the *WCT*.

104. The majority decision in *ESA* was based almost entirely on an analysis of relevant international treaties and their implementation in the *Copyright Act*. Specifically, *Berne* was central to the majority’s interpretation of “communicate” for purposes of s. 3(1)(f).<sup>106</sup>

105. The Court traced the legislative history of the communication right, noting that Parliament first enacted that right in 1931 to implement a “new” right that had been added to *Berne* in 1928.<sup>107</sup> The Court cited legislative debates in which the Minister responsible

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<sup>100</sup> FCA Decision, ¶[79](#).

<sup>101</sup> *B010*, ¶[47](#).

<sup>102</sup> *B010*, ¶[47](#).

<sup>103</sup> *WCT*, [Articles 8 and 14](#). *WPPT*, [Articles 10, 14, and 23](#).

<sup>104</sup> [Canada-United States-Mexico Agreement \(CUSMA\)](#), 30 November 2018, Ch 20, Sec H, Art [20.58](#) and [20.61.3\(a\)](#); [Comprehensive Economic and Trade Agreement \(CETA\)](#) between Canada and the EU and its Member States, 30 October 2016, Ch 20, Sec B, Sub-sec A, [Art 20.7.1](#).

<sup>105</sup> *Hape*, ¶[53](#).

<sup>106</sup> *ESA*, ¶[13ff](#).

<sup>107</sup> *ESA*, ¶[17](#).

confirmed that the amendment “was intended to bring the *Copyright Act* into conformity with the Rome Revision of *Berne*.”<sup>108</sup> It noted that Parliament subsequently amended – and expanded – the communication right to implement other international treaty obligations that were adopted in response to new technologies.<sup>109</sup> Indeed, the Court distinguished its interpretation of “communicate” in earlier decisions on the basis that they had *not* “examined the legislative history behind” that term in the same way.<sup>110</sup>

106. This Court’s consideration of international conventions in *ESA* confirms that the *WCT* should be used here to interpret a provision of the *Copyright Act* that implements it. Just as the communication right at issue in *ESA* had its roots in *Berne*, s. 2.4(1.1) is derived directly from the making available right in the *WCT*. In fact, it is drafted in nearly identical language.

***d) The CMA modernized the Copyright Act by implementing the WIPO Internet Treaties***

107. The *WCT* can – and should – be used in the interpretation of s. 2.4(1.1) because this provision was enacted to implement Article 8 of the *WCT*. The Board understood that. The FCA erred in doubting that finding.

108. The *CMA* amended the *Copyright Act* for the express purpose of implementing the WIPO Internet Treaties. Its preamble, which is “part of the enactment intended to assist in explaining its purpose and object,”<sup>111</sup> refers to enhancing copyright protection in the current digital era through international norms that are reflected in the WIPO Internet Treaties but “are not wholly reflected in the *Copyright Act*.”

109. That language mirrors the preamble of the *WCT*, which cites a “need to introduce new international rules and clarify the interpretation of certain existing rules in order to provide adequate solutions to the questions raised by new economic, social, cultural and technological developments” and the “profound impact of the development and convergence of information and communication technologies on the creation and use of literary and artistic works.”<sup>112</sup>

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<sup>108</sup> *ESA*, ¶[20](#).

<sup>109</sup> *ESA*, ¶¶[22-26](#).

<sup>110</sup> *ESA*, ¶[30](#), distinguishing *SOCAN v CAIP* and *CWTA v SOCAN*.

<sup>111</sup> *Interpretation Act*, [s. 13](#).

<sup>112</sup> *WCT*, [preamble](#).

110. The summary included with the *CMA* states that it amends the *Copyright Act* to “update 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*.”<sup>113</sup> An explanatory memorandum tabled before the House of Commons stated that the *CMA* was developed “with a view to implementing” the *WCT*, 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.”<sup>114</sup>

111. The Legislative Summary expands on that theme, noting that “[m]uch of the rationale for copyright reform is to enable ratification and implementation of” the WIPO Internet Treaties. Recognizing the rights of authors, performers, and producers to authorize online transmission – that is, requiring “*exclusive rights* to authorize the making available of their works, performances ... and phonograms” – is “perhaps one of the most significant contributions” of the WIPO Internet Treaties.<sup>115</sup>

*e) The WIPO Internet Treaties and the making available right fill the gaps in Berne*

112. The making available right was adopted to fill “undeniable gaps” in *Berne* in relation to the use of content on the Internet.<sup>116</sup> That was heralded as a “main achievement” of the WIPO Internet Treaties – and, by one account, their “centrepiece.”<sup>117</sup> The FCA decision effectively leaves open the very “gaps” that s. 2.4(1.1) was intended to fill.

113. By the time the WIPO Internet Treaties were adopted, it was widely recognized that existing norms under *Berne* did “not correspond to the extremely dynamic nature of Internet-type

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<sup>113</sup> *CMA*, [summary](#). And see [Legislative Summary – Bill C-11](#) at 1.

<sup>114</sup> *WCT* Explanatory Memorandum (tabled before the House of Commons in June 2013), at 3-5 (JRA, Vol. VIII, Tab 54I [emphasis added]).

<sup>115</sup> [Legislative Summary – Bill C-11](#) at 1.2.2 [emphasis added].

<sup>116</sup> Ficsor, *The Law of Copyright* at 4.84 (BOA, Tab 1). See also: [Board Decision](#), ¶141; Ficsor Report at 5 (JRA, Vol. III, Tab 38B), citing WIPO Guide at [CT-8.5 - CT-8.7](#); Ficsor, *Digital Environment*, ¶45, ¶¶55-58; Ricketson & Ginsburg at 4.19 (BOA, Tab 4).

<sup>117</sup> Reinbothe & von Lewinski, *The WIPO Treaties 1996*, (Dayton, Ohio: LexisNexis, 2002) at 104 (BOA, Tab 3); Ricketson & Ginsburg at 4.25 (BOA, Tab 4).

networks, and... 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.”<sup>118</sup>

114. Among the largest gaps was that existing rights – including the communication, distribution, and reproduction rights – were inadequate to address on-demand digital transmissions.<sup>119</sup> On-demand offerings “blur,” “scramble,” and “confuse” the “traditionally arranged, dogmatically duly characterized” borders between copy-related and non-copy-related rights: the nature of a potential transmission is not known when the content is made available, or by the person who makes it available, and some hybrid forms of making available do not respect traditional distinctions between different types of rights.<sup>120</sup>

115. To address those gaps and challenges, the delegates to WIPO settled on an “umbrella solution” for the drafting of the making available right in the WIPO Internet Treaties and its implementation in national legislation. This solution provided that the act of making available should be defined in a neutral way, free from specific legal or technological characterization. States parties are free to choose under which rights to implement the making available right, or to establish a new stand-alone right, so long as all acts required to be protected are protected.<sup>121</sup>

116. The fact that the making available right is within the rubric of the communication right in Article 8 does not imply that it applies to acts of making available only when they result in a stream. This was a drafting choice made principally as a matter of convenience: after unresolved debate over where best to situate this unique protection, “the countries which preferred the right of communication to the public as a general option seemed to be more numerous ... .”<sup>122</sup> However, Article 8 was intended to protect *all* acts of making available for on-demand access, regardless of the form of any subsequent transmission. As Professor Ginsburg explained,

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<sup>118</sup> Ficsor, *Digital Environment*, ¶45, ¶¶55-58.

<sup>119</sup> Ficsor Report at 5 (JRA, Vol. III, Tab 38B); WIPO Guide at [CT-8.5 - CT-8.7](#); Ficsor, *Digital Environment*, ¶45, ¶¶55-58; Ricketson & Ginsburg at 4.19.

<sup>120</sup> Ficsor, *Digital Environment*, ¶51; Ficsor Report at 5, 8 (JRA, Vol. III, Tab 38B); Ficsor, *Copyright and the Internet*, at 4.84 (BOA, Tab 1); Ginsburg Report, ¶13 (JRA, Vol. X, Tab 61A).

<sup>121</sup> [Board Decision](#), ¶140, ¶152; Ficsor Report at 6-11 (JRA, Vol. III, Tab 38B); von Lewinski Report, ¶¶99-104 (JRA, Vol. VI, Tab 50A).

<sup>122</sup> Ficsor Report at 10 (JRA, Vol. III, Tab 38B), citing WIPO Guide at [CT-8.10](#).

[w]hat matters is not the label any national law confers, but rather its actual coverage. In one way or another, or in combination, member states must ensure that authors enjoy the right to control the offering and provision of on-demand access by the public, whether that access takes the form of a stream or of a download.<sup>123</sup>

117. Similarly, deeming the act of making available to be a communication to the public in the *Copyright Act* does not limit the scope of the making available right. At the time the *CMA* was enacted, both the *FCA* and this Court had accepted that a transmission that resulted in a download was a “communication to the public” for the purposes of s. 3(1)(f).<sup>124</sup> It is not surprising that Parliament – which could not have anticipated the later narrowing of the communication right by *ESA* – adopted the structure of the *WCT*, framing the protection in substantially the same language to ensure comprehensive coverage.

*f) The acts requiring protection in the implementation of the making available right*

118. There was no dispute before the Board that, to comply with Article 8 of the *WCT*, domestic legislation must at minimum, through one or more rights, protect the act of making available in a way that (a) affords independent protection to that act; and (b) applies whether any subsequent transmission results in a stream or in a download.<sup>125</sup>

119. The first requirement is evident from the plain text of Article 8. It is also confirmed by the Notes to the Basic Proposal for what became Article 8, which stated that “[t]he relevant act is the making available of the work by providing access to it. What counts is the initial act of making the work available.”<sup>126</sup> Leading up to the Basic Proposal, delegates had clarified that

under the proposal, for the completion of the act of communication to the public, it would not be required that an actual transmission take place; for this, the mere making available of works to the public

<sup>123</sup> Ginsburg Report ¶15 (JRA, Vol. X, Tab 61A); [Board Decision](#), ¶159, ¶162.

<sup>124</sup> [Board Decision](#), ¶84; *SOCAN v CAIP*, ¶42, ¶45; *Rogers*, ¶56; *Shaw*, ¶66; *Sirius*, ¶44.

<sup>125</sup> [Board Decision](#), ¶138, ¶146, ¶164, and ¶189. See also: Ficsor Report at 4 (JRA, Vol. III, Tab 38B); Ginsburg Report ¶14 (JRA, Vol. X, Tab 61A); von Lewinski Report ¶11, ¶13, ¶¶44-45, and ¶49 (JRA, Vol. VI, 50A); Expert Report of Prof. Sam Ricketson, ¶¶37-38 (JRA, Vol. IV, Tab 39B).

<sup>126</sup> Ficsor Report at 12, 14 (JRA, Vol. III, Tab 38B), citing the *Basic Proposal* at [10.10](#).

(for example, the uploading a work to a bulletin board) for subsequent transmission would be sufficient).<sup>127</sup>

120. This is reinforced by the text of the making available right in sound recordings and performer’s performances in Articles 10 and 14 of the *WPPT*. In those articles, the making available right is protected independently as a stand-alone, exclusive right that is neither conditional on the existence of a completed transmission nor merged with any other right.<sup>128</sup>

121. The second requirement, that Article 8 requires protection for the act of making a work available irrespective of whether a subsequent transmission is a stream or a download, is also made clear in the *travaux préparatoires*.

122. For example, in a paper presented to the WIPO committee during preparatory sessions that led to the *WCT*, Dr. Ficsor wrote that the making available right “should cover all cases of making available, irrespective of the purpose of the act, namely irrespective of whether it is for the purpose of perceiving, studying, watching, listening to (with only at most a transient reproduction that may be necessary for such purposes) and/or it is for the purpose of making copies (permanent or temporary).”<sup>129</sup>

123. As well, the notes added to the draft of Article 8 of the *WCT* in the Basic Proposal stated: “It is irrelevant whether copies [downloads] are available for the user or whether the work is simply made perceptible [streamed] to, and thus usable by, the user.”<sup>130</sup> The making available right applies in either case.<sup>131</sup> The drafters also understood that the “actual extent of the use is not necessarily determined at the moment of making available of a work or object of related rights and by the person or entity alone who or which carries out the act of ‘making available.’”<sup>132</sup>

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<sup>127</sup> Ficsor Report at 14 (JRA, Vol. III, Tab 38B). See also Ficsor, *The Law of Copyright* at 4.140.

<sup>128</sup> [Board Decision](#), ¶¶199-200; WIPO Guide at [PPT-10.2-10.4](#); von Lewinski Report ¶¶42-43 (JRA, Vol. VI, 50A).

<sup>129</sup> Ficsor, *Copyright and the Internet*, at 4.87 (BOA, Tab 1).

<sup>130</sup> Ficsor Report at 12, 14 (JRA, Vol. III, Tab 38B), citing the *Basic Proposal* at [10.10](#).

<sup>131</sup> Ficsor Report at 12 (JRA, Vol. III, Tab 38B); von Lewinski Report, ¶¶57-64 (JRA, Vol. VI, 50A).

<sup>132</sup> Ficsor, *Digital Environment*, ¶[51](#).

124. That is reflected in the “umbrella solution,” which involved describing the act of making available in a neutral way, free from specific legal or technical characterization. Dr. Ficsor explained that, in Article 8, “the expression ‘making available to the public’ was the key” because it avoided characterizing on-demand digital transmissions “exclusively as acts of distribution or exclusively as acts of communication to the public.” That was important for on-demand transmissions because, unlike with traditional modes of exploitation, “the borderline between copy-related acts and non-copy-related acts is blurred and both of those aspects are always present even if with differing significance.”<sup>133</sup>

125. Professor Ginsburg explained that Article 8 of the *WCT* “is designedly ‘technology neutral’ in order to avoid obsolescence .... The WIPO ‘Internet Treaties’ acknowledged and anticipated the overlapping nature of ‘performance’ and ‘copy’ in digital communications, and, seeking a technologically neutral solution, therefore aimed to cover both.”<sup>134</sup>

***g) The Board’s interpretation promotes compliance with Canada’s treaty obligations***

126. The Board took the same approach to interpreting s. 2.4(1.1) as this Court took to s. 3(1)(f) in *ESA*: it considered the international treaty on which the provision was based.

127. Having examined the text and domestic context of s. 2.4(1.1), the Board turned to the *WCT* to ensure that its interpretation was consistent with Canada’s international obligations.<sup>135</sup> In doing so, the Board faithfully followed the model set out by this Court in *B010* and re-affirmed in *Vavilov* on how a tribunal is to interpret a domestic statute that implements an international standard:<sup>136</sup> it referred to the relevant international law; it inquired into Parliament’s purpose in enacting the provision; and it responded to the parties’ submissions, including the reports of five experts in international copyright law, some of whom participated in the drafting of the *WCT*.<sup>137</sup>

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<sup>133</sup> Ficsor Report at 8 (JRA, Vol. III, Tab 38B) [emphasis added].

<sup>134</sup> Ginsburg Report, ¶13 (JRA, Vol. X, Tab 61A). See also: Ginsburg, “The (new?) right of making available to the public,” Columbia Law School, Public Law & Legal Theory Working Paper Group, Paper Number 04-78, at 5 (Pirates-R-Us), (BOA, Tab 2).

<sup>135</sup> [Board Decision](#), ¶137ff.

<sup>136</sup> *B010*, ¶¶30-71; *Vavilov*, ¶182.

<sup>137</sup> [Board Decision](#), ¶¶94-155.

128. The Board’s interpretation of s. 2.4(1.1) ensures that Canada protects the act of making available and complies with its international treaty obligations. The interpretations advocated by the respondents in this appeal would place Canada in violation of those obligations, since none of the other rights in the *Copyright Act*, even when taken together, would provide the comprehensive coverage required to fully implement those obligations.

129. The reproduction right, for example, is insufficient because the act of making a copy of a work on a digital storage device is distinct from the act of configuring that device to make the work available to the public for on-demand access.<sup>138</sup> The two acts might be carried out by different actors, at different times, for different purposes, and a different number of times. Simply put, the reproduction right governs the making of copies, not the act of making works available to the public for on-demand access.

130. The authorization right is also insufficient as it would leave gaps in protection. To engage the authorization right, a person must “sanction, approve and countenance” an activity that would infringe copyright if undertaken without the consent of the copyright owner.<sup>139</sup> Both requirements impose factual and evidentiary requirements that go well beyond the question of whether a work has been made available for on-demand access.<sup>140</sup>

**6. There is no “merger,” no violation of technological neutrality, and no impermissible layering of fees and protections**

131. The Board concluded that the principle of technological neutrality did not prevent s. 2.4(1.1) from capturing all acts of making available, whether they result in streams, downloads, or no transmissions at all. Subsection 2.4(1.1) is limited to acts of making available on digital networks, but is neutral in respect of the digital technologies involved.<sup>141</sup>

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<sup>138</sup> [Board Decision](#), ¶¶168-170; von Lewinski Report, ¶¶102-103, ¶¶109-116 (JRA, Vol. VI, 50A); Ginsburg Report, ¶19 (JRA, Vol. X, Tab 61A).

<sup>139</sup> [Board Decision](#), ¶¶171-176; [Columbia Pictures Industries Inc. v. Gaudreault](#), 2006 FCA 29 at ¶24; [CCH](#), ¶38, ¶43, ¶45.

<sup>140</sup> von Lewinski Report, ¶¶120-126 (JRA, Vol. VI, 50A); [SOCAN v CAIP](#), ¶127.

<sup>141</sup> [Board Decision](#), ¶123ff.

132. The Board also held that a subsequent transmission of a work or other subject matter does not “merge” with the initial act of making available for on-demand access.<sup>142</sup> It based that on a close review of the *Copyright Act* provisions that involve making available, namely ss. 2.4(1.1), 15(1.1)(d), and 18(1.1)(a), and their relationship to the WIPO Internet Treaties and *Berne*.<sup>143</sup>

133. The FCA rejected that careful analysis. Instead, it held, dismissively, that it was contrary to “the policy of the *Act*” – specifically, the principle of technological neutrality – because “it would constitute disaggregating rights for the purpose of adding an additional layer of royalties.”<sup>144</sup> The FCA’s conclusion is incorrect. It is based on a misunderstanding and misapplication of the applicable interpretive principles, and – heedless of this Court’s warning in *SODRAC* – “reads *ESA* too broadly.”<sup>145</sup>

**a) *Making available does not merge with a subsequent transmission***

134. There is nothing in the text, context, or purpose of s. 2.4(1.1) to suggest that Parliament intended the act of making a work available to merge with a subsequent transmission of that work as a stream or a download to become a single protected act that is subject to a single right.

135. The notion of merger is also illogical. If the act of making available and a subsequent download of a work were to merge into a single act, covered by a single right, the result would be an impossible dilemma. The merged act could not *only* be a communication because the download results in the creation of an additional, durable copy, which will always engage the reproduction right.<sup>146</sup> Nor could it *only* be a reproduction because that would be inconsistent with the plain language of the statute, which deems the act of making available to be an act that engages the communication right.

136. Either outcome would deny the rightsholder an exclusive right under the *Copyright Act*. That would be untenable: as this Court held in *Euro-Excellence*, it is impermissible for a court to “read down” rights afforded by the *Act* or “substitute [its] policy preferences for those of

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<sup>142</sup> [Board Decision](#), ¶185ff.

<sup>143</sup> [Board Decision](#), ¶¶189-203.

<sup>144</sup> FCA Decision, ¶¶66-67, ¶96.

<sup>145</sup> *SODRAC*, ¶63.

<sup>146</sup> *Théberge*, ¶27, ¶42; *SODRAC*, ¶¶49-51, ¶55.

Parliament”<sup>147</sup> under the guise of statutory interpretation. *SODRAC* contained an even stronger admonition against allowing interpretive principles to “override express statutory terms.”<sup>148</sup>

137. The fact that the making available and subsequent downloads are sometimes carried out at different times, by different actors,<sup>149</sup> further illustrates why these distinct acts cannot merge.

138. Since the act of making available cannot merge with a subsequent transmission of a download, neither can it merge with the subsequent transmission of a stream in a way that fails to recognize that the later transmission is a distinct protected activity. To find otherwise would be to withhold copyright protection “based solely on the *method of delivery* of the work to the end user,” where there is no evidence that Parliament intended to override the principle of technological neutrality as between streams and downloads.<sup>150</sup>

139. As well, if a stream merges with the making available, neither would be independently protected. That would be contrary to Article 8 of the *WCT*, which requires protection for the act of making available “without prejudice to” the communication right in *Berne*.<sup>151</sup>

140. In attacking the Board’s conclusion that there is no merger, the FCA stated:

If there is no new exclusive right, there is no basis for the Board’s conclusion that a stream does not merge with the making-available which preceded it so as to justify payment of two separate fees. Since there is only one right at stake, the only issue is whether the right has been triggered, and the only fees payable are those payable for the exercise of the right.<sup>152</sup>

141. This statement reflects a basic confusion between two distinct concepts: a protected activity and the exclusive right it engages. As this Court confirmed in *SODRAC*, two activities, carried out successively – in that case, the creation of a synchronization copy, followed later by a broadcast-incidental copy – can trigger the same exclusive right twice.<sup>153</sup> Similarly here, the

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<sup>147</sup> *Euro-Excellence Inc. v. Kraft Canada Inc.*, 2007 SCC 37, ¶3, ¶8 [*Euro-Excellence*].

<sup>148</sup> *SODRAC*, ¶47.

<sup>149</sup> [Board Decision](#), ¶193.

<sup>150</sup> *ESA*, ¶9.

<sup>151</sup> *WCT*, [article 8](#).

<sup>152</sup> FCA Decision, ¶97.

<sup>153</sup> *SODRAC*, ¶59-63.

initial act of making available and a stream that follows later are separate exercises of the communication right. Each requires a licence and will justify payment in accordance with its value to the user.

***b) The Board correctly applied the principle of technological neutrality***

142. Section 2.4(1.1) is technologically neutral in that it covers all forms of on-demand activity. On the other hand, it is expressly *not* technologically neutral in that it applies exclusively to *on-demand* activity, which can only be carried out using digital technology and not in a physical, “bricks-and-mortar” setting.

143. The FCA made two errors in its approach to technological neutrality.

144. First, by concluding that s. 2.4(1.1) applies only when a work is made available for streaming but not for downloading, the FCA adopted an interpretation that was *not* technologically neutral, without evidence that Parliament intended that result.

145. In fact, s. 2.4(1.1) on its face *is* technologically neutral: it applies to all forms of on-demand activity. That includes both streams and downloads. The Board correctly found that “Parliament did not intend that the principle of technological neutrality limit the scope of subsection 2.4(1.1).”<sup>154</sup> Accordingly, it held, citing *ESA*, that the provision “should be given a technologically neutral interpretation whereby it applies both to streams and downloads ‘in different media, including more technologically advanced ones.’”<sup>155</sup>

146. Apart from accurately reflecting the text of the provision, that interpretation is also consistent with technological reality: today, many platforms, such as Apple Music, Netflix, and Spotify, make vast catalogues of works available for users to access as *both* streams and downloads. The availability of that content attracts end users, who can choose to access the content in whichever format best suits their needs at any given time.<sup>156</sup> In many cases, a user is able to watch or listen to a file at the same time as it is being downloaded for later use.<sup>157</sup>

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<sup>154</sup> [Board Decision](#), ¶127.

<sup>155</sup> [Board Decision](#), ¶126.

<sup>156</sup> [Tariff Decision](#), ¶¶271-275.

<sup>157</sup> *Twentieth Century Fox v. Sky UK*, [2015] EWHC 1082 (Ch.), ¶17-21.

147. Indeed, when it introduced the *CMA*, the government stated that its purpose was to “establish *rules that are technologically neutral*, so they are flexible enough to evolve with *changing technologies* and the *digital economy*, while ensuring appropriate protection for both creators and users.”<sup>158</sup>

148. By contrast, the FCA would apply the provision differently (or not at all) depending on whether the work is subsequently streamed or downloaded, even though there is no evidence that Parliament intended that result. Contrary to the FCA’s criticism,<sup>159</sup> the Board’s interpretation of the provision was technologically neutral; the FCA’s, ironically, was not.

149. Second, the FCA failed to recognize that Parliament intended to depart from technological neutrality by limiting s. 2.4(1.1) to on-demand technologies, for which there is no “bricks and mortar” equivalent.

150. In *ESA*, this Court concluded that the transmission of a download did not attract separate protections and fees for SOCAN because it is a digital substitute for the experience of acquiring a physical copy of a recording in a store or by mail.<sup>160</sup> However, by enacting s. 2.4(1.1), Parliament intended to respond to the unique circumstances of the digital age by expanding the scope of the communication right to apply specifically – and only – to on-demand transmission.

151. The act of making a work available in a way that allows a user “to have access to it from a place and at a time individually chosen” is unique to the digital context. Making a physical copy of a work available in a store does not make it available for access at a *place* of the user’s choosing (for example, from their sofa or office), while making it available by mail does not make it available for access at a *time* of the user’s choosing. Neither does broadcasting a work through traditional means which is on the broadcaster’s schedule rather than the user’s.<sup>161</sup> Instant digital access to a vast catalogue of works, over a worldwide information network, has no analog equivalent. Even same-day delivery is not the same as on-demand access.

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<sup>158</sup> [Board Decision](#), ¶128, citing Govt of Canada, *Copyright Modernization Act – Background*, (JRA, Vol. III, Tab 38F).

<sup>159</sup> FCA Decision, ¶¶66-67.

<sup>160</sup> *ESA*, ¶5, ¶9.

<sup>161</sup> Reinbothe & von Lewinski at 109 (BOA, Tab 3).

152. In effect, the FCA elevated the principle of technological neutrality to constrain even Parliament’s freedom to legislate. As this Court has made clear, the *Copyright Act* should be interpreted in a technologically neutral manner “absent evidence of Parliamentary intent to the contrary.”<sup>162</sup> However, where that intent is evident, technological neutrality cannot supplant Parliament’s choice.<sup>163</sup> Here, Parliament, consistent with Canada’s international obligations, chose to apply s. 2.4(1.1) only to on-demand technologies. The FCA failed to respect that choice.

**c) *Protection for making available is not an impermissible “layering of royalties”***

153. The FCA correctly observed that the Board’s recognizing the act of making available as distinct from any later stream or download “means that two tariffs can be applied: one for the making available to the public and a later one for transmission over the Internet.”<sup>164</sup> But it was wrong to characterize that outcome as a gratuitous “layer of royalties.”<sup>165</sup>

154. Indeed, the FCA’s characterization reflects a profound misunderstanding of *SODRAC*. In the very paragraph the FCA cited for that proposition, this Court stated explicitly that there is *no* prohibition in the *Copyright Act* against recognizing distinct activities that give rise to distinct licensing and royalty obligations. There is nothing “gratuitous” about it. To the contrary, the divisibility of rights – the notion that a rightsholder may deal with exclusive rights separately from one another – is recognized as a “hallmark” of copyright law.<sup>166</sup>

155. In impugning the Board’s conclusion, the FCA relied on the majority holding in *ESA* that “the principle of technological neutrality requires that, absent evidence of Parliamentary intent to the contrary, we interpret the *Copyright Act* in a way that avoids imposing an additional layer of protections and fees based solely on the method of delivery of the work to the end user.”<sup>167</sup>

156. In *SODRAC*, however, the majority of this Court made clear that technological neutrality cannot “displace the words Parliament has used,” or “override express statutory terms” of the

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<sup>162</sup> *ESA*, ¶9; *SODRAC*, ¶66; *Robertson*, ¶¶48-49.

<sup>163</sup> *SODRAC*, ¶17, ¶47, and ¶51.

<sup>164</sup> FCA Decision, ¶51.

<sup>165</sup> FCA Decision, ¶96.

<sup>166</sup> D. Vaver, *Intellectual Property Law*, 2d ed (Toronto: Irwin Law, 2011) at 558 (BOA, Tab 6); *Euro-Excellence*, ¶117 per Abella J. (dissenting on other grounds). See also: *SODRAC*, para. 62.

<sup>167</sup> *ESA*, ¶9; FCA Decision, ¶67.

*Act*.<sup>168</sup> Purposive construction “is not a stand-alone basis for the Court to develop its own theory of what it considers appropriate policy.”

157. Yet, that is precisely what the FCA did, stating that it would “be contrary to the policy of the Act to establish a tariff on a preparatory step.”<sup>169</sup>

158. The FCA’s conclusion flatly contradicts the decisions of this Court in *Bishop* and *SODRAC*. In both cases, the Court held that broadcasters required licences to make broadcast-incident copies of works, which are made to facilitate broadcasts of those works.<sup>170</sup> Contrary to the FCA’s approach, both cases make clear that the separate licensing of fundamentally-distinct activities in a single process – even when one of those activities is “preparatory” to another – is not a gratuitous layering of fees and protections:

Nor does technological neutrality stand for the proposition, as CBC urges, that the Copyright Act prohibits the creation of “additional layers of royalties at the behest of collective societies” such that disaggregating synchronization and broadcast-incident copying is legally impermissible: A.F., at para. 105. This argument reads *ESA* too broadly. The difference between synchronization copies and broadcast-incident copies is tied to the fundamentally distinct activities of production and broadcasting. They are different functions. This difference is not based on particular technological details; it would exist regardless of the technologies used either to produce or to broadcast. Thus, a decision recognizing production and broadcasting as distinct activities, and thus as the valid subject of disaggregated licences, does not offend the principle that “an additional layer of protections and fees” not be imposed based solely on technological change.<sup>171</sup>

159. In fact, *ESA* makes the same distinction. In that case, this Court distinguished *Bishop* on the basis that it involved two different activities, the making of a copy and the subsequent broadcast, whereas *ESA* involved only one: downloading a copy of a video game.<sup>172</sup>

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<sup>168</sup> *SODRAC*, ¶47, ¶52.

<sup>169</sup> FCA Decision, ¶96.

<sup>170</sup> *SODRAC*, ¶55; *Bishop* at 484-485.

<sup>171</sup> *SODRAC*, ¶63 [emphasis added]

<sup>172</sup> *ESA*, ¶41.

160. Similarly, *SODRAC* involved *three* different activities: the making of a synchronization copy, the making of broadcast incidental copies, and subsequent broadcasting activities. As this Court recognized, notwithstanding *ESA*, each of those activities engages an exclusive right and warrants an appropriate licence fee.<sup>173</sup>

161. Here, just as in *Bishop* and *SODRAC*, there are separate activities at issue: the initial act of making a work available to the public for on-demand access and any subsequent transmission of the work to an end user as a stream, as a download, or in some other format. The Board was correct to recognize that each of these acts is distinct and should attract a licence fee commensurate with its value to the user.

162. This Court held in *SODRAC* that, “[f]rom the moment the right is engaged, licence fees will necessarily follow. The amount of the fee will depend on the Board’s consideration of the evidence in each case, always having regard to the principles of technological neutrality and balance and any other factors it considers relevant.”<sup>174</sup> Indeed, the act of making available, and its economic value, remain at issue in a number of proposed tariffs that are to be considered by the Board in future hearings.<sup>175</sup>

163. Recognizing that s. 2.4(1.1) results in separate protection for the act of making available for on-demand access is consistent with the fact that the activity creates greater value for both online platforms and their users. As this Court recognized in *SODRAC*, a copyright holder is entitled to a greater royalty from a user who obtains greater value from using a technology.<sup>176</sup> Equally, the principle of balance promoted by the *Copyright Act* requires the Board, in setting a tariff, to take into consideration the unique value generated by on-demand access.<sup>177</sup>

164. The FCA decision creates imbalance by allowing online platforms to appropriate<sup>178</sup> all additional value generated by making works available for on-demand access. At best, it fails to

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<sup>173</sup> *SODRAC*, ¶¶62-64.

<sup>174</sup> *SODRAC*, ¶77.

<sup>175</sup> For example, [SOCAN, Proposed Tariff No 22.A \(2021-2023\)](#); [Access Copyright, Proposed Tariff – Post-Secondary Educational Institution Tariff \(2021-2023\)](#).

<sup>176</sup> *SODRAC*, ¶71.

<sup>177</sup> *SODRAC*, ¶71, ¶75, ¶77, ¶79; *Théberge*, ¶30.

<sup>178</sup> *Théberge*, ¶30.

recognize that s. 3(1)(f) is engaged the moment a work is made available for on-demand access and defers a rightsholder's entitlement to licence fees until the occurrence of some later event. At worst, it eliminates that entitlement completely by denying that the right has been engaged at all.

165. In either case, the FCA decision deprives rightsholders of the full protection intended by Parliament under s. 2.4(1.1). It prevents them from deriving a just reward for the use of their works on the Internet, including by licensing the right to make their works available for on-demand access, directly or through a collective society.

166. In the digital age, consumers value and expect the ability to access vast catalogues of works, at a time, from a place, and in a format of their choosing, without leaving their homes, waiting for delivery trucks, or clearing their schedule to tune in to a television or radio show on the specific day and time that it is broadcast. Digital services derive economic value from the ability to offer those catalogues without the costs of maintaining retail stores or distributing physical products.<sup>179</sup> Just as Parliament intended, those who create and invest in the creation of works, and rely on copyright for their livelihoods, must be able to secure fair compensation, as determined by the market or set by the Board, for the valuable act of making those works available on demand.

#### **PART IV – SUBMISSION ON COSTS**

167. SOCAN requests its costs in this Court and in the proceeding before the FCA.

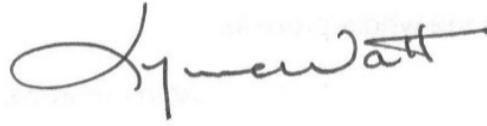
#### **PART V – ORDERS SOUGHT**

168. SOCAN requests that this Court allow the appeal, set aside the order of the FCA, and confirm the decision of the Copyright Board.

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<sup>179</sup> [Tariff 22.A \(Internet – Online Music Services\) 1996-2006](#) (October 18, 2007), Copyright Board, ¶148, ¶153, ¶154.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 20<sup>th</sup> day of July, 2021



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D. Lynne Watt



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Matthew Estabrooks



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Casey M. Chisick



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Eric Mayzel

Counsel for the Appellant SOCAN

**PART VI – SUBMISSIONS ON CONFIDENTIAL INFORMATION**

169. There are no sealing or confidentiality orders, publication bans or restrictions on public access to information in the file which would have an impact on the Court's reasons in this appeal.

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