

**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.

RESPONDENT
(Applicants)

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.

RESPONDENTS
(Applicants)

FACTUM

(Pandora Media Inc., Respondent)
(Rule 42 of the Rules of the Supreme Court of Canada)

McMillan LLP

2000 - 45 O'Connor Street
Ottawa ON K1P 1A4

David Kent / Jonathan O'Hara

Tel: 613-691-6176

Fax: 613-231-3191

Email: david.kent@mcmillan.ca / jonathan.ohara@mcmillan.ca

Counsel for the Respondent, Pandora Media Inc.

TO: The Registrar
Supreme Court of Canada
301 Wellington Street
Ottawa ON K1A 0J1

COPIES TO:

Gowling WLG (Canada) LLP
2600 - 160 Elgin Street
Ottawa ON K1P 1C3

D. Lynne Watt / Matthew Estabrooks

Tel: 613-786-8695
Fax: 613-788-3509
Email: lynne.watt@gowlingwlg.com

-and-

Cassels Brock & Blackwell LLP
2100 - 40 King Street
Toronto ON M5H 3C2

Casey M. Chisick / Eric Mayzel
Tel: 416-869-5403 / 416-860-6448
Fax: 416-644-9326 / 416-642-7144
Email: cchisick@cassels.com / emayzel@cassels.com

Counsel for the Applicant,
Society of Composers, Authors and Music Publishers of Canada

McCarthy Tétrault LLP

PO Box 48, Suite 5300, TD Bank Tower
Toronto-Dominion Centre
Toronto ON M5K 1E6

Barry B. Sookman / Daniel G. C. Glover

Tel: 416-601-8200
Fax: 416-868-0673
Email: bsookman@mccarthy.ca

Counsel for the Applicant,
Music Canada

Fasken Martineau DuMoulin LLP

1300 – 55 Metcalfe Street
Ottawa ON K1P 6L5

Gerald Kerr-Wilson / Stacey Smydo

Tel: 613-236-3882
Fax: 613-230-6423
Email: jkerrwilson@fasken.com

Counsel for the Respondents,
Entertainment Software Association
Entertainment Software Association of Canada
Bell Canada
Quebecor Media Inc.
Rogers Communications
Shaw Communications

Goodmans LLP

3400 – 333 Bay Street
Toronto ON M5H 2S7

Michael Koch / Julie Rosenthal

Tel: 416-979-2211
Fax: 416-979-1232
Email: mkoch@goodmans.ca

Counsel for the Respondents,
Apple Inc.
Apple Canada Inc.

Juristes Power

1103 – 130 Albert Street
Ottawa ON K1P 5G4

Darius Bossé

Tel: 613-702-5566
Fax: 613-702-5566
Email: dbosse@juristespower.ca

Ottawa Agent for the Applicant,
Music Canada

Supreme Advocacy LLP

340 Gilmour Street
Ottawa ON K2P 0R3

Marie-France Major

Tel: 613-695-8855 x102
Fax: 613-695-8580
Email: mfmajor@supremeadvocacy.ca

Ottawa Agents for the Respondents,
Apple Inc.
Apple Canada Inc.

TABLE OF CONTENTS

PART I - Overview and Statement of Facts	1
A. Overview	1
B. The Facts	4
i. On-demand Services	4
ii. The WCT and WPPT	5
iii. The CMA and MAP	6
iv. The Board’s Making Available and Online Music Services Decisions	7
v. The FCA Decision.....	9
PART II - Questions in Issue	10
PART III - ARGUMENT	11
A. Standard of Review	11
B. When “Right” is Wrong: The MAP Is Not a Right.....	11
C. The MAP Does Not Create Anything “Independent”	15
i. Introduction	15
ii. The Text of the WCT and MAP.....	16
iii. Protection of Never-Streamed Works Does Not Mean Independence.....	16
iv. The MAP Creates an “Earlier”, Possibly “Longer”, But Still “Continuing” Communication Right	18
v. Balance, Layering of Rights and Technological Neutrality.....	24
vi. Efficiency	27
vii. Conclusion.....	28
D. The MAP Does Not Imply Additional Royalties	29
i. Introduction	29
ii. The MAP was Not Introduced to Increase SOCAN’s Royalties	29
iii. Balance, Layering of Fees and Technological Neutrality	30
E. Conclusion.....	35
PART IV - Costs.....	36
PART V - Order Sought	36
PART VI - Table of Authorities	37

PART I - OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. This Court has dealt with a series of foundational copyright issues in the 30 years since its decision in *Bishop*.¹ The notion of balance has been revised, affirmed and refined. Technological neutrality has been confirmed as a guiding principle of interpretation and valuation. The price-setting powers of the Copyright Board (“**Board**”) have been reaffirmed as a consumer protection device. And the undue layering of rights, imposition of gratuitous costs and royalty double-dipping have all been called out and rejected.
2. These appeals now deal with a provision in the *Copyright Modernization Act*² (“**CMA**”) meant to implement obligations under the *WIPO Copyright Treaty*³ (“**WCT**”). In particular, they deal with the “making available” provision (“**MAP**”) introduced by the CMA as subsection 2.4(1.1) of the *Copyright Act*⁴ (“**Act**”):

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.

¹ *Bishop v. Stevens*, [\[1990\] 2 SCR 467](#), 1990 CanLII 75 (SCC) (“**Bishop**”). Since then, for example, *Théberge v. Galerie d’Art du Petit Champlain inc.*, [\[2002\] 2 S.C.R. 336](#), 2002 SCC 34 (CanLII) (“**Théberge**”); *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, [\[2012\] 2 SCR 231](#), 2012 SCC 34 (CanLII) (“**ESA**”); *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, [\[2012\] 2 SCR 283](#), 2012 SCC 35 (CanLII) (“**Rogers**”); *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, [\[2015\] 3 SCR 615](#), 2015 SCC 57 (CanLII) (“**SODRAC**”); and *York University v. Canadian Copyright Licensing Agency (Access Copyright)*, [2021 SCC 32](#) (CanLII) (“**Access Copyright**”)

² *Copyright Modernization Act*, [SC 2012, c 20](#)

³ [2186 UNTS 121](#) (adopted December 20, 1996, in force March 5, 2002)

⁴ *Copyright Act*, [RSC 1985, c C-42](#)

3. The appeals address two related issues with respect to the MAP. The first issue, raised by both Appellants, deals with whether the MAP extends to works made available for *download*, as opposed to on-demand *streaming*. The second issue, raised by the Appellant SOCAN, deals with whether the MAP affords “independent”⁵ or “separate”⁶ protection for a “distinct activit[y]”,⁷ “giv[ing] rise to separate licence fees”.⁸

4. What connects these issues, from the perspective of legitimate fee-paying online services, is economics. Put bluntly, the first issue reflects SOCAN’s desire to collect a royalty from download services, after being told that it could not do so by this Court in *ESA*, while the second issue expresses SOCAN’s wish to collect two royalties for on-demand streaming, where in the past it collected only one.

5. This Respondent, Pandora, operates a group of streaming services. Some are “on-demand”⁹ meaning that, as envisioned by the MAP, subscribers can access specific songs in Pandora’s catalogue “from a place and at a time” chosen by the subscriber. Other Pandora services are only “semi-interactive”, meaning that a subscriber can influence the choice and sequence of songs that are streamed (for example by skipping them or “liking” them) but cannot select a specific song to be played at a given time. These latter services are therefore beyond the ambit of the MAP on any party’s interpretation.

⁵ See, for example, Factum of the Appellant Society of Composers, Authors and Music Publishers of Canada (“**SOCAN Factum**”), ¶16 and 118 and sections III.B.4.b, III.B.5

⁶ See, for example, SOCAN Factum, ¶9, 82 and 163

⁷ SOCAN Factum, ¶7 and 153 et seq.

⁸ SOCAN Factum, ¶9

⁹ On-demand services have sometimes been referred to as “fully interactive” – see, for example, Copyright Board Decision re Online Music Services (CSI: 2011-2013; SOCAN: 2011-2013; SODRAC: 2010-2013) dated August 25, 2017, [[CB-CDA 2017-086](#)] (“**Board OMS Decision**”) ¶218, 220, 222 and at titles IV.F and H

6. As it does not offer download services, Pandora does not address the first issue – whether the MAP applies to works made available for download.

7. As for on-demand *streaming*, and as noted by the Board, the parties before it acknowledged that the MAP applied,¹⁰ and Pandora acknowledges that the MAP applies to its own on-demand streaming services. The issue here – which Pandora does address - is whether the MAP creates some sort of separate or independent right that triggers separate or doubled-up licence fees. As discussed below, Pandora submits that it does not.

8. SOCAN’s argument goes off course from the beginning with its misdescription of the MAP as a “right”. In fact, the MAP does nothing more than indirectly augment the existing communication right by folding the act of making available into the definition of the act of communicating. SOCAN’s suggestion of incremental rights and royalties ignores the admonitions in *ESA* against layering, is unsupported by *SODRAC* or *Bishop*, turns technological neutrality on its head, and is entirely unsupported by either the text of the CMA or the purpose of the WCT.

9. On this issue, the Board was wrong and the Federal Court of Appeal (“FCA”) was right. The MAP *broadens* the communication right, to address an ambiguity as to “pull” transmissions that was contemporaneously resolved by this Court in *Rogers*. Its effect is to trigger the communication right one step earlier in the operation of an on-demand streaming service. But

¹⁰ Copyright Board Decision re Communication to the Public by Telecommunication - Scope of Section 2.4(1.1) of the Copyright Act – Making Available, dated August 25, 2017 [[CB-CDA 2017-085](#)] (“**Board MAP Decision**”) at 189

the MAP creates neither a new and separate “right”, nor a new and incremental entitlement to remuneration.

B. The Facts

10. Pandora accepts the basic facts set out in the Appellants’ factums, though not the editorial comments that accompany them. The facts on which Pandora relies are provided below.

i. On-demand Services

11. It is useful to identify what “making available” consists of, within the scope of the MAP, and how it fits within the activities of the online services that stand to be affected. Otherwise, the discussion is too abstract to fully engage with the context and purpose of the provision. This is particularly true of the “rights and royalties” issue raised by SOCAN. While the Music Canada appeal is focused on protection from piracy, SOCAN’s effort to add rights and royalties requires examination through the lens of legitimate, fee-paying, online services.

12. As noted above, the MAP applies only to on-demand services. Semi-interactive streams (that have some consumer influence) and non-interactive streams (like Internet delivered radio) provide public “access” to works by telecommunication, but only at the time of transmission and not on demand.¹¹

13. The defining prerequisite for the application of the MAP, therefore, is the on-demand nature of the online services in question. And what defines an on-demand service is the existence of a catalogue of available works that can be accessed by a potential recipient at their

¹¹ [Rogers](#) at 34, 46

discretion. Whether they are audiovisual (like Netflix or Disney+), or audio (like Pandora or Spotify), on-demand services provide at-will access to a collection of works.¹² This collection may be accompanied by suggestions as to what the user might enjoy, but is ultimately searchable and available to be selected from by the user.

14. There is nothing new in this. Neither on-demand services, nor the fact that they make works available for on-demand access, is a result of the MAP. Instead, the MAP engages pre-existing conduct that is a defining element of providing an on-demand service. It does so to resolve a perceived ambiguity as to whether “pull” technologies constituted communications “to the public”, though *Rogers* also resolved that ambiguity as a matter of jurisprudence.¹³ As is discussed further below, the MAP simply broadens the communication right so that it attaches to the activities of online on-demand streaming services one pre-existing step earlier in their process. This can be contrasted with situations of technological change, where pre-existing rights are engaged by new activities.

ii. The WCT and WPPT

15. The WCT deals with works. Article 8 provides:

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.

¹² *Ibid.*

¹³ [Rogers](#) at 36-49

16. The *WIPO Performances and Phonograms Treaty*¹⁴ (“**WPPT**”) deals with performers’ performances and “phonograms” (known as “sound recordings” in the Canadian legislation), which are part of the category of “other subject matter” in the Act:

Article 10 – Right of Making Available of Fixed Performances

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

Article 14 – Right of Making Available of Phonograms

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

iii. The CMA and MAP

17. Music Canada asserts an anti-piracy objective behind the MAP and Article 8 of the WCT.¹⁵ Whatever the truth in that, it is telling that the various government summaries, parliamentary speeches and legislative preambles speak of piracy and protection, but not about more or greater royalties. In fact, as will be discussed further below, there is nothing about any pursuit of anti-piracy objectives that requires, or even suggests, that legitimate users should face higher or duplicative licence fees for doing what they have always done in providing on-demand online services.

¹⁴ [WPPT](#) (adopted December 20, 1996, in force March 19, 2002)

¹⁵ Factum of the Appellant, Music Canada (“**MC Factum**”), ¶30-35 and Part III.C.5 and sources cited therein

iv. **The Board’s Making Available and Online Music Services Decisions**

18. The Board hived off its examination of the MAP from the Online Music Services proceeding that was underway when the CMA was implemented. The two proceedings continued in parallel: the former considered the scope and meaning of the MAP,¹⁶ in the abstract, while the latter considered the communication and reproduction tariffs proposed by SOCAN and CMRRA-SODRAC Inc. (“CSI”) respectively for services offering both downloads and non-interactive, semi-interactive and interactive (on-demand) streams of music over the Internet.¹⁷

19. The Board MAP Decision dealt largely with the download issue. However, with respect to the incremental rights and royalties issue now being advanced by SOCAN, the Board held as follows:¹⁸

The act of making a work available to the public remains a communication to the public by telecommunication regardless of whether the subsequent transmission is a download or a stream. **It remains distinct from any subsequent act of transmission;** the two acts do not merge and become a single, larger act.

[....]

On the issue of merging, as defined herein, we find that that **the “making available” to the public is legally distinct from the transmission that may result from such “making available,”** and therefore **subsequent resulting transmissions are to be evaluated on their own right.** [emphasis added]

20. In the companion Board OMS Decision, released together with the Board MAP decision, the Board declined to set royalties for making available due to deficiencies in the evidence

¹⁶ [Board MAP Decision](#)

¹⁷ [Board OMS Decision](#)

¹⁸ [Board MAP Decision](#) at 16 and 203

tendered in support.¹⁹ However, the Board indicated its intent to establish a making available royalty in the future, if proper evidence could be provided.²⁰

We anticipate and hope that there will be substantially more and better evidence for **the Board’s next opportunity to set such a rate**. Evidentiary elements that could be useful in the future might include whether there should be a link between the value of the act of making available and the value of a subsequent resulting transmission, whether the price for the act of making available should differ with the type of subsequent resulting transmission, how to value the act of making a work (or other subject-matter) available where no subsequent resulting transmission occurs in a relevant period, and whether the price for the act of making available should have an effect on the price of other activities or royalty apportionment between rights holders whose rights are involved in the operation of an online music service. [emphasis added]

21. With respect more generally to communication royalties for streaming services, the Board laid down two principles that are relevant to these appeals.

22. First, it held that on-demand (“interactive”) services should not pay higher percentage of revenue royalty rates than less interactive services, notwithstanding that the additional functionality of on-demand services might make them more valuable. The Board adopted the analysis of Pandora expert Dr. Reitman, and held that what mattered was the value perceived by subscribers – if they valued on-demand services more than less interactive alternatives, they would contribute more revenues (from greater usage and/or higher fees) which would generate higher royalty *payments* without raising the royalty *rate*.²¹ Put differently, the ability of subscribers to access a service’s works on-demand, which is the defining difference between on-demand and other services, did not warrant a different royalty rate.

¹⁹ [Board OMS Decision](#) at 144-155

²⁰ [Board OMS Decision](#) at 155

²¹ [Board OMS Decision](#) at 233-238

23. Second, the Board applied similar reasoning to so-called “hybrid” services. These are streaming services with additional functionality that permits a subscriber to temporarily “cache” a song on their device, such as a mobile phone, for offline listening when an Internet connection is unavailable. Here the Board agreed with SOCAN and CSI that caching a streamed work involved both a communication and a reproduction. However, recalling its analysis of interactivity, the Board concluded that this change in functionality should not change the *overall* royalty rate. If subscribers valued hybrid services more than alternatives without caching, revenues would rise and royalty payments would rise with them. To raise rates as well would amount to a “double premium”. All the Board did was reallocate the total royalty between SOCAN and CSI.²²

24. SOCAN and others sought judicial review of the Board OMS Decision as to the interactive and hybrid streaming tariffs, among other matters. Their applications were dismissed by the FCA.²³ No party sought leave to appeal to this Court.

v. The FCA Decision

25. The FCA dealt with the incremental rights and royalties issue in several places. In the result, it held that the Board’s approach was in error, and set it aside.

The Board’s interpretation also runs counter to constraints imposed by previous Supreme Court rulings. **The Supreme Court has warned against duplicate layers of regulation and fees that would cause inefficiency and needless costs.** In *Théberge v. Galerie d’Art du Petit Champlain Inc.*, 2002 SCC 34, [2002] 2 S.C.R. 336 at para. 31, the Supreme Court ruled that **the proper balance between copyright owners and users requires a consideration of regulatory efficiency.** It added to this line of thinking in *Entertainment Software Association* when it found that **the Act should be interpreted to avoid**

²² [Board OMS Decision](#) at 271-296

²³ *CMRRA-SODRAC Inc. v. Apple Canada Inc.*, [2020 FCA 101](#) (CanLII)

imposing “an additional layer of protections and fees based solely on the method of delivery of the work to the end user”. To do otherwise is to “impose a gratuitous cost for the use of more efficient Internet-based technologies”: at para. 9.

[...]

On the submissions made, this much can be said. **Subsection 2.4(1.1) does not create a new exclusive right.** The Board used a “deeming provision” to create a right which, simultaneously, was and was not part of the communication right. When the deeming provision is set aside, all that is left is what the Board itself described (at para. 117) as a “preparatory act”. This is consistent with Parliament’s use of the word “includes” in subsection 2.4(1.1). **It would be contrary to the policy of the Act to establish a tariff on a preparatory step as this would constitute disaggregating rights for the purpose of adding an additional layer of royalties:** *C.B.C.* at para. 63; *Entertainment Software Association* at para. 9.

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.**²⁴ [emphasis added]

PART II - QUESTIONS IN ISSUE

26. The issue addressed by Pandora in this factum is whether the MAP gives rise to separate or independent rights that trigger separate and additional licence fees.

27. Pandora’s answer to this question is “no”. The MAP expands the communication right in a way that makes it apply earlier in the process of on-demand streaming, and to conduct that was not previously considered to have been a “communication”, but it is *not* a separate right, does *not* offer independent protection and does *not* trigger separate or additional royalties.

²⁴ *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, [2020 FCA 100](#) (CanLII) (“**FCA Decision**”), at 67 and 96-97

PART III - ARGUMENT

A. Standard of Review

28. Pandora agrees with Music Canada’s and the Respondents ESA/Networks’ conclusion that the Board’s interpretation of the MAP was reviewable on the correctness standard.²⁵

Pandora agrees, in particular, with the reasoning of ESA/Networks. The application of the correctness standard flows from this Court’s reasoning in *Rogers*,²⁶ which is consistent with the principles articulated in *Vavilov*²⁷ and which should be reaffirmed.

B. When “Right” is Wrong: The MAP Is Not a Right

29. SOCAN and Music Canada refer, repeatedly, to the MAP as the making available “right” or “MAR”.²⁸ In doing so the appellants deliberately misdescribe the MAP in a way designed to skew the analysis in their favour. It is important to start with the right nomenclature; starting on the wrong foot risks ending up there too.

30. Whatever its other weaknesses, the Board MAP Decision got this much right: the CMA did *not* create a making available “right”:

...while many parties referred to the concept in subsection 2.4(1.1) of the Act as a “making available right” or MAR, it is probably more accurate to refer to it as a component of the right to communicate to the public by telecommunication.²⁹

²⁵ MC Factum, ¶112-120 and, in particular, ¶112-116

²⁶ [Rogers](#) at 14-15

²⁷ *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019 SCC 65](#) (CanLII) (“*Vavilov*”)

²⁸ See, for example, SOCAN Factum, ¶15, 18, 19, 20, 52, 102, 106, 112, 115, 116 etc. and s. I.B.1; MC Factum, ¶3, 7, 19, 22, 23, 28, 36, 38, 41, 42 etc and s. III.C.2, 4 and 5.

²⁹ [Board MAP Decision](#) at 118

31. There is nothing in the WCT or the CMA to suggest that a making available right was being created. Each certainly envisaged the protection of the act of making available for on-demand access. But not by creating a new “right”. Instead, as the text of s. 2.4(1.1) makes clear, and as the Board observed, the act of making available is simply tucked into the pre-existing communication right by augmenting the concept of “communicating to the public by telecommunication” to “include” making available.

32. A textual, contextual and purposive³⁰ reading of the MAP and other provisions in the Act makes this clear.

33. First, the mechanism of “including” additional conduct within an activity that the copyright owner is already exclusively entitled to do is the antithesis of creating a new right. The MAP means that there is a communication right that applies to the act of making available, not a making available right. The act of making available triggers the communication right, not some new right. That communication right is potentially now triggered earlier in the process of providing on-demand streams - when a work is posted, rather than when it is streamed - but what is triggered is still the communication right established by section 3(1)(f) of the Act.³¹

34. Second, this Court’s conclusion in *ESA* that section 3(1)(f) of the Act does not create a *sui generis* right, but is instead simply an “illustration“ of the performing right found in section 3(1), confirms that the structural solution Parliament chose for protecting the act of making available does not rise to the level of creating a new right.³² If the use of the word “including” in

³⁰ *Vavilov* at 118

³¹ Section 3(1)(f) provides: “3(1) For the purposes of this Act, copyright, in relation to a work, means the sole right to perform the work...in public..., and includes the sole right to...(f)...communicate the work to the public by telecommunication”

³² *ESA* at 42

section 3(1) means that the “sole right” to communicate is not a *sui generis* right, then making available, which is not even described in the legislation (or the WCT) as a “right”, can hardly be more exalted.

35. Finally, the notion of a making available “right” for works - like songs or movies - is entirely inconsistent with a consideration of how Parliament (and WIPO) dealt with the protection of making available “other subject matter”, such as performers’ performances and sound recordings. For these, the relevant CMA provisions implement the WPPT (as opposed to the WCT). The legislative solution here is materially, and importantly, different from the solution for works.

36. A comparison of the provisions for performances and sound recordings in the WPPT versus works in the WCT is set out below, followed by a similar comparison of the analogous provisions of the Act, amended pursuant to the CMA.

WIPO Treaties

WPPT – Performances and Sound Recordings	WCT - Works
<p>Article 10 – Right of Making Available of Fixed Performances</p> <p>Performers shall enjoy the exclusive right of authorizing the making available to the public of their performances fixed in phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.</p>	<p>Article 8 – Right of Communication to the Public</p> <p>... authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them. [emphasis added]</p>
<p>Article 14 – Right of Making Available of Phonograms</p> <p>Producers of phonograms shall enjoy the exclusive right of authorizing the making available to the public of their phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.</p>	

Copyright Act

CMA/Act – Performances and Sound Recordings	CMA/Act - Works
<p>Copyright in performer’s performance</p> <p>15 (1.1) ...a performer’s copyright in the performer’s performance consists of the sole right to do the following acts in relation to the performer’s performance...and to authorize any of those acts</p> <p>(d) to make a sound recording of it available to the public by telecommunication in a way that allows a member of the public to have access to the sound recording from a place and at a time individually chosen by that member of the public and to communicate the sound recording to the public by telecommunication in that way;....</p>	<p>Communication to the Public by Telecommunication</p> <p>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. [emphasis added]</p>
<p>Copyright in sound recordings</p> <p>18 (1.1) ...a sound recording maker’s copyright in the sound recording also includes the sole right to do the following acts in relation to the sound recording...and to authorize any of those acts:</p> <p>(a) to make 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 and to communicate it to the public by telecommunication in that way;....</p>	

37. The key difference between the provisions for performances and sound recordings, on the one hand, and the MAP for works, on the other, is that performers and makers are expressly given an “exclusive right” (WPPT) or a “sole right” (CMA/Act) to make available. There is no such language in s. 2.4(1.1). Moreover, the provisions for performances and sound recordings in the Act list the protection as extending both to making available for on-demand telecommunication and to on-demand communications themselves. This contrasts with the structure of s. 2.4(1.1), in which making available is merely included within the act of communicating by telecommunication.

38. Accordingly, whatever one makes of the “right” to make performances and sound recordings available and to communicate them on demand, it is clearly described as a right, and no corresponding right was created for works. This is a deliberate and telling omission by Parliament. To paraphrase this Court’s observation in *Access Copyright*, Parliament is well aware of how to create new rights when that is its intent.³³

C. The MAP Does Not Create Anything “Independent”

i. Introduction

39. SOCAN repeatedly describes the protection afforded to the making available of works as “independent”³⁴ and “separate”.³⁵ To the extent that these adjectives, found nowhere in the CMA or WCT, are meant to convey the idea that the protection begins at the moment a work is made available for on-demand access, regardless of whether it is ever accessed and transmitted, they are inoffensive. But SOCAN goes farther, stating that the so-called independence and separation of the MAP reflect a stand-alone right or protection entitling the copyright owner to an additional or greater royalty.³⁶ To that extent, SOCAN is overreaching and wrong.

40. The integrated nature of the MAP is discussed below, and the untenable layering of rights and royalties arising from SOCAN’s arguments are addressed in the section that follows.

³³ [Access Copyright](#) at 40

³⁴ See, for example, SOCAN Factum ¶¶10, 16, 118 and titles III.B.4.b and III.B.5

³⁵ See, for example, SOCAN Factum ¶¶82 and 163

³⁶ SOCAN Factum, ¶163

ii. The Text of the WCT and MAP

41. There is nothing in the language of the WCT or the CMA to suggest independent or separate protection. Article 8 of the WCT provides that, in the usual way, an author's communication right (which includes making available) shall be an "exclusive" right, but that only means to the exclusion of all other actors, not all other acts.

42. Similarly, s. 2.4(1.1) simply inserts making available into the envelope of communication, saying nothing about separation or independence. Indeed, the notion of including one thing within a larger concept is, as discussed above, antithetical to the idea of the former being separate or independent from the latter. Again, the contrast with the structure of the arrangements made for performers' performances and sound recordings is instructive.

iii. Protection of Never-Streamed Works Does Not Mean Independence

43. SOCAN appears to have been led astray by assuming, incorrectly, that the protection of the act of merely making available required something separate or independent.

44. Pandora acknowledges two related effects of the MAP: the communication right is triggered at the time a work is "made available" and, as a result, the right is engaged regardless of whether the work is ever actually accessed by the public. But the significance of these effects requires careful scrutiny.

45. First, SOCAN materially overstates what was not in dispute before the Board. In its Factum, SOCAN asserts that there was no dispute that Article 8 of the WCT required signatories to protect 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.”³⁷ That assertion is correct as to protection regardless of later transmission (leaving aside, of course, the contentious question of whether the MAP or other provisions are to protect works made available for *download*).

46. But SOCAN is wrong to claim that there was no dispute as to whether the requisite protection was to be “independent”. None of SOCAN’s citations to the Board’s MAP Decision say any such thing.³⁸ In fact, what the Board *actually* said on this topic (in a paragraph cited but embellished by SOCAN) is as follows, and makes no reference to “independence”:³⁹

There is no dispute among the parties that the sole act of making a work or other subject-matter available “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” regardless of whether any subsequent transmission ever occurs, is enough to trigger the protection or liability afforded by subsection 2.4(1.1) of the Act. We agree with that position.

47. Second, the appropriate scrutiny of the effects of the MAP requires continuing care in the use of the language of the MAP. The practical effect of the MAP is simply to pull the communication right forward for on-demand streaming services so that it attaches to a work when it is made available rather than if, and when, it is streamed. Put differently, the communication of a work to the public by an on-demand streaming service now starts, for copyright purposes, one step earlier in the process of operating that service. Accordingly, contrary to SOCAN’s submission, section 3(1)(f) of the Act does not “confer...the exclusive

³⁷ SOCAN Factum, ¶118

³⁸ SOCAN Factum, footnote 125, citing Board MAP Decision [CB-CDA 2017-085](#) ¶138, 146, 164 and 189

³⁹ [Board MAP Decision](#) ¶189

right to make [a work] available to the public”,⁴⁰ but rather clarifies the communication right to include the preparatory act⁴¹ of making the work available for on-demand access. The fact that this clarified communication right does not require any actual access neither implies nor creates either a new right or separate or independent protection.

iv. The MAP Creates an “Earlier”, Possibly “Longer”, But Still “Continuing” Communication Right

48. SOCAN rails against a putative “merger” theory that, it says, fuses two independent rights.⁴² Music Canada takes a similar stance.⁴³ However each, to some extent, attacks a straw person of their own creation. The better way of thinking about the on-demand stream of a work is as a communication that continues from when the work was made available and the right was first engaged.

49. The term “merger theory” comes from the Board, which used it to describe an analytical approach with which it disagreed.⁴⁴ However, in a portion of its analysis on which SOCAN now relies,⁴⁵ the Board went off track in two important ways that coloured the balance of its analysis.

50. First, the Board misunderstood the significance of the structural differences between the CMA’s provisions for protecting works as opposed to performances and sound recordings that were made available for on-demand access. As noted above, works made available are protected by including that act within the activity of communicating.⁴⁶ Performances and sound

⁴⁰ SOCAN Factum, ¶67

⁴¹ The Board used this description - [Board MAP Decision](#) at 117

⁴² SOCAN Factum, Section III.B.6.a – “Making Available Does Not Merge With a Subsequent Transmission”

⁴³ MC Factum, Section III.F

⁴⁴ [Board MAP Decision](#) at 185 et seq.

⁴⁵ SOCAN Factum, ¶132 and footnotes 142 and 143

⁴⁶ S. 2.4(1.1) of the [Act](#)

recordings, on the other hand, are protected by creating express new rights.⁴⁷ But rather than give effect to the different approaches deliberately taken by Parliament to these types of protected matter, the Board chose to ignore and to obliterate the distinctions:

....The situation [whereby making available is protected regardless of whether a subsequent transmission occurs] with respect to the rights afforded to performers' performances fixed in sound recordings and sound recordings by paragraphs 15(1.1)(d) and 18(1.1)(a) of the Act respectively, conveys the same notion even more so since these provisions create a stand-alone exclusive right. **It is desirable to have the same principles apply equally to the making available to the public of works on the one hand, and the making available to the public of sound recordings and performers' performances on the other.**⁴⁸ [emphasis added]

51. The Board, upon which SOCAN relies, got its interpretive approach backwards.

Differences (and similarities) in legislative language, structure and approach are to be read as deliberate, and the differences (or similarities) honoured and given effect. The Board was not entitled to ignore the different approaches employed by Parliament, and to eliminate them by conforming the approach taken for works to that taken for performances and sound recordings, whether because the Board thought it “desirable” or otherwise.

52. The Board's analytical error is part of what led it to treat making available as something distinct. And that “distinctiveness” is what led the Board, and SOCAN, into error when considering whether the preparatory step of making available triggers a communication that continues if the work is subsequently streamed.

53. Second, both SOCAN and the Board misunderstand the significance of the “without prejudice” language at the beginning of Article 8 of the WCT:

⁴⁷ S. 15(1.1)(d) and s. 18 (1.1)(a) respectively, [Act](#)

⁴⁸ [Board MAP Decision](#) at 189

Without prejudice to the provisions of Articles 11(1)(ii), 11bis(1)(i) and (ii), 11ter(1)(ii), 14(1)(ii) and 14bis(1) of the Berne Convention, 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.⁴⁹ [emphasis added]

54. SOCAN claims that this language requires copyright protection for making available without prejudice to the *Berne Convention* (“**Berne**”) communication right and, as a result, requires making available to be separately protected.⁵⁰ However the WCT requires, and Parliament did, no such thing.

55. It is important, first, to note that Article 8 does *not* say that protection for making available shall be without prejudice to the listed Berne rights, but rather that the entire communication right (now expanded to include making available) shall be without prejudice to those rights. It is incorrect to suggest that the act of making available was singled out for without prejudice treatment.

56. It is also important to note the very specific provisions of Berne that were not to be prejudiced by the WCT communication right. They are:

- (a) the original Berne right to authorize the public performance of certain works and any communication to the public of the performance of such works;⁵¹
- (b) the exclusive right to authorize the broadcasting of certain works or the communication thereof to the public by any other means of wireless diffusion,

⁴⁹ [WCT](#), Article 8

⁵⁰ SOCAN Factum, ¶139

⁵¹ [Berne Convention for the Protection of Literary and Artistic Works](#) (as amended on September 28, 1979) (“**Berne**”), Article 11(1)(i) and (ii)

and any communication to the public by wire or by rebroadcasting of the broadcast of the work;⁵²

- (c) the exclusive right to authorize any communication to the public of the recitation of certain works;⁵³
- (d) the exclusive right to authorize the public performance and communication to the public by wire of certain works adapted or reproduced by cinematography;⁵⁴ and
- (e) the recognition of cinematographic works as original works entitling the owner of copyright in a cinematographic work shall enjoy the same rights as the author of an original work.⁵⁵

57. Thus the WCT communication right, by wire or wireless means, and including the act of making available for on-demand access, is not to prejudice these earlier rights dealing largely with communication and performances.⁵⁶ Contrary to SOCAN’s assertion, there is nothing about treating the act of making available as protected within the communication right, rather than independently, that is capable of prejudicing the Berne rights in question. Nor is there anything prejudicial about treating the preparatory act of making available as part of a continuously protected event if the work in question is subsequently streamed.

58. The context of the Act supports this reading of the WCT. When “neighbouring rights” relating to performers’ performances and sound recordings were first introduced into the Act,

⁵² [Berne](#), Article 11(bis)(1)(i) and (ii)

⁵³ [Berne](#), Article 11(ter)(1)(ii)

⁵⁴ [Berne](#), Article 14(1)(ii)

⁵⁵ [Berne](#), Article 14(bis)(1)

⁵⁶ Note that the listed Berne rights do not require the MAP to be without prejudice to *reproduction* rights found, for example, at Article 8 of Berne

they were accompanied by a provision that expressly provided how they were to affect (or not affect) pre-existing “traditional” rights:

90. No provision of this Act relating to

(a) copyright in performer’s performances, sound recordings or communication signals, or

(b) the right of performers or makers to remuneration

shall be construed as prejudicing any rights conferred by Part I or, in and of itself, as prejudicing the amount of royalties that the Board may fix in respect of those rights.

59. Accordingly, even if the “without prejudice” language in the WCT suggested the independent protection of making available under Article 8, which it does not, it was not imported into the Act in relation to the MAP. As noted earlier, Parliament knows how to incorporate “without prejudice” language to accompany new provisions when it sees fit, and it clearly did not see fit to do so in this case.

60. Instead, what the MAP does, is extend the communication right for on-demand online services to begin, or be triggered, one step earlier in the process of operating the service. This accords with the description of how Article 8 of the WCT was to operate offered by Appellants’ expert witness Mihály Ficsor (“**Ficsor**”) in his text on copyright and the Internet. Ficsor concluded that, while a communication to the public occurs when a work is made available for on-demand access, no new act occurs for copyright purposes when a made available work is selected and transmitted: “[I]t does not mean that two acts are carried out.... The entire act thus carried out will be regarded as a communication to the public.”⁵⁷

⁵⁷ Ficsor, Mihály, *The Law of Copyright and the Internet*, Oxford University Press (2002, at C8.23 [MC BOA, Tab 14]

The concept of ‘making transmittable’ [under Japanese law] seems to be somewhat narrower than the concept of ‘making available’ under Article 8 of the WCT.... This seems to be the case since **under the said provisions of the WCT...**, the concept of ‘making available’ includes both the element of making on-demand transmission *possible* and the *actual* on-demand transmissions carried out on the basis of this possibility, while the Japanese Copyright Law differentiates between these two aspects. [*emphasis* in original; **emphasis** added]

It seems, however, that, as far as the substantive effects of these provisions are concerned, **there is no real difference between them.** In fact, also **under Article 8 of the WCT...**, the act of ‘communication to the public’ in the form of ‘making available’ is completed by merely making the work available for on-demand transmission. **If then the work is actually transmitted in that way it does not mean that two acts are carried out: ‘making available’ and ‘communication to the public’.** **The entire act thus carried out will be regarded as communication to the public.** [**emphasis** added]

61. Music Canada attempts to deflect attention from Ficsor’s conclusions on this point through a patently incorrect summary of the context for his comments that both misstates his text and misdirects the analysis. In particular, Music Canada claims that an unnamed opponent “confected” a “merger theory” based on Ficsor’s statement, that his “statement [was] discussing Japanese law” and that his “discussion deals solely with the Japanese right of ‘making transmittable’.” Other than citing generally to the section of Ficsor’s treatise from which the quote above is taken, Music Canada offered no support for its statements.⁵⁸

62. In fact, as can be seen from even a cursory review of Ficsor’s text, none of Music Canada’s complaints is accurate. Ficsor *was* discussing the Japanese right of making transmittable at the *beginning* of the passage, but then expressly *switched* to describing the operation of Article 8 of the WCT by way of comparison. His conclusion that only one act is carried out, even if a work is subsequently streamed, was unambiguously a conclusion as to the effect of Article 8. Music Canada’s claim that Ficsor only discussed Japanese law, and dealt

⁵⁸ MC Factum, ¶101

“solely” with the Japanese right of making transmittable”, is flatly wrong, and amounts to a bald misdirection.

63. Accordingly, Ficsor’s statements that that no new act occurs for copyright purposes when a made available work is selected and transmitted, and that “The entire act thus carried out will be regarded as a communication to the public”, are both useful and available to be relied on.⁵⁹

v. Balance, Layering of Rights and Technological Neutrality

64. The conclusion that the MAP augments the act of communicating, without creating anything “independent” or “separate”, is consistent not only with a review of the text and context of the MAP and the WCT, but also with this Court’s jurisprudence on how to understand and interpret the Act.

65. First, the notion of “balance” in the context of copyright argues against the idea of separate (as opposed to “earlier”) protection. This Court has stated that “[t]he proper balance ... lies not only in recognizing the creator’s rights but in giving due weight to their limited nature”,⁶⁰ and most recently described that balance in *Access Copyright*:⁶¹

Accordingly, to understand and apply fair dealing doctrine requires first understanding the copyright balance. **Copyright law has public interest goals.** The relationship between members of the public and copyrighted works is not merely the “consequence of the author-work relationship” (Carys J. Craig, “Locke, Labour and Limiting the Author’s Right: A Warning against a Lockean Approach to Copyright Law” (2002), 28 *Queen’s L.J.* 1, at p. 6). Put differently,

⁵⁹ It is worth noting that these statements arise in Ficsor’s general writing, rather than in the opinion he was retained to prepare for these proceedings by Music Canada and its allies

⁶⁰ *Théberge* at 31, quoted in *SODRAC* at 47

⁶¹ *Access Copyright* at 91-94. See also *Théberge* at 30-32, *ESA* at 7-8, and *SODRAC* at 47 and 66 *et seq.*

the public benefits of our system of copyright are much more than “a fortunate by-product of private entitlement” (pp. 14-15, cited in *SOCAN*, at para. 9).

Instead, increasing public access to and dissemination of artistic and intellectual works, which enrich society and often provide users with the tools and inspiration to generate works of their own, is a primary goal of copyright. **“Excessive control by holders of copyrights and other forms of intellectual property may unduly limit the ability of the public domain to incorporate and embellish creative innovation in the long-term interests of society as a whole”** (*Théberge v. Galerie d’Art du Petit Champlain inc.*, 2002 SCC 34 (CanLII), [2002] 2 S.C.R. 336, at para. 32, per Binnie J.).

But it is also true that just rewards for copyright creators provide necessary incentives, ensuring that there is a steady flow of creative works injected into the public sphere. As Binnie J. put it, **“[i]n crassly economic terms it would be as inefficient to overcompensate artists and authors for the right of reproduction as it would be self-defeating to undercompensate them”** (para. 31). **A proper balance ensures that creators’ rights are recognized, but authorial control is not privileged over the public interest.**

Ultimately, **owners’ rights and the public interest should not conflict with one another.** As Professor Tawfik explains, copyright law has long been **an “integrated system that encouraged creators to generate knowledge, industry to disseminate it and users to acquire it and, hopefully, reshape it into new knowledge”** (“History in the Balance: Copyright and Access to Knowledge”, in Geist, *From “Radical Extremism” to “Balanced Copyright”*, 69, at p. 70). Creators’ rights and users’ rights are mutually supportive of copyright’s ends. [emphasis added]

66. This approach to copyright balance supports the conclusion that the MAP merely extends the communication right without creating a new right. Increased protection, in the context of on-demand streaming services, is achieved by moving the triggering event for the engagement of the communication right to be the act of making available instead of the act of streaming. That protection does not require an “independent” right, nor does it require making available to be an independent act subject to royalty double dipping. Instead, all that is required is to redefine the initial act that gives rise to protection to be a preparatory act in the process of on-demand streaming instead of a later step.

67. Indeed, to treat making available as somehow “independent” or “separate” would be to upset the required balance by doing far more than is necessary to achieve the MAP’s objective. This is particularly true where the solution arrived at was to fold an act not imbued with the hallmarks of copyright into an existing right. An appropriately balanced interpretation of that solution is to conclude that it expands a pre-existing right without creating a new or independent right.

68. The concept of technological neutrality also requires an interpretation of the MAP that sees it as a widening of the protected act of communicating to the public rather than a separate or independent protection (much less a separate “right”). This Court warned against the undue layering of protections in this context in *ESA*:

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. To do otherwise would effectively impose a gratuitous cost for the use of more efficient, Internet-based technologies.⁶² [emphasis in original]

69. The Court elaborated more broadly on technological neutrality in *SODRAC*:

The principle of technological neutrality is recognition that, absent parliamentary intent to the contrary, the *Copyright Act* should not be interpreted or applied to favour or discriminate against any particular form of technology. It is derived from the balancing of user and right-holder interests discussed by this Court in *Théberge* — a “balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator”: para. 30. Because this long-standing principle informs the *Copyright Act* as a whole, it must be maintained across all technological contexts: “The traditional balance between authors and users should be preserved in the digital environment . . .” (*ESA*, at para. 8).⁶³

⁶² [ESA](#) at 9

⁶³ [SODRAC](#) at 66

70. From this perspective, treating the MAP as creating separate protection runs afoul of the jurisprudence in at least two ways.

71. First, unlike in *Bishop*, the MAP expressly “includes” making available inside the act of communicating. Thus, as discussed at length above, it simply engages the communication right already engaged by on-demand streaming services.

72. Second, unlike in both *Bishop* and *SODRAC*, making available is an integral, and integrated, step in operating an on-demand service. It is the act of making works available “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” that defines a service as “on-demand”, and that separates it from less interactive services. Making a song or movie available is part and parcel of operating an on-demand service because, without that public facing act, there is nothing for the public to access. This contrasts with the prior reproductions and subsequent broadcasts (public performances) said to be distinct in *Bishop*, and even more strongly with the situation in *SODRAC*, where the impugned activity (pre-broadcast copying) clearly engaged an express separate right at a distinct stage of the business of broadcasting.

vi. Efficiency

73. Finally, as pointed out by the majority in *ESA*, the undue identification or layering of rights and protections cannot be cured at the valuation stage by relying on the Board to mitigate royalty double dipping by simply reallocating royalties among the potential claims and claimants.

Justice Rothstein argues ... that the Board can avoid such “double-dipping” by copyright owners by adjusting the two fees in a way that “divides the pie” between the collective societies administering reproduction rights, on the one hand, and communication rights, on the other. However, this seems to us to undermine Parliament’s purpose in creating the collective societies in the first place, namely to efficiently manage and administer different copyrights under the *Act*. This inefficiency harms both end users and copyright owners:

When a single economic activity implicates more than one type of right and each type is administered by a separate collective, the multiplicity of licences required can lead to inefficiency. . . . The result is that the total price the user has to pay for all complements is too high

. . .

. . . the fragmentation of licences required for single activities among several monopolist-collectives generates inefficiencies, from which copyright owners as a whole also suffer⁶⁴

vii. Conclusion

74. The MAP creates neither a “right”, nor “independent” or “separate” protection for the act of making available. What it actually does is cause the communication right to engage one step earlier in the process of operating an on-demand service. The communication right is engaged when a work is made available, regardless of whether the work is actually accessed by the public, but simply continues, rather than being reengaged, if the work is selected and streamed to the public.

⁶⁴ [ESA](#) at 11

D. The MAP Does Not Imply Additional Royalties

i. Introduction

75. As noted earlier, SOCAN's insistence on treating the MAP as a "right" conferring "separate" and independent" protection on the preparatory act of making available reflects a revenue goal: SOCAN is focussed on establishing separate and additional royalties to be paid by those who operate on-demand online services, including streaming services like Pandora. For example, SOCAN lauds the Board MAP Decision which, it says, found that making available and subsequent transmissions "are distinct activities that may give rise to separate licence fees".⁶⁵ Later, it asserts that "separate protection for the act of making available for on-demand access is consistent with the fact that the activity creates greater value" such that "a copyright holder is entitled to a greater royalty".⁶⁶

76. SOCAN's position is untenable. As discussed below, this proposed application of the MAP is inconsistent with the key principles of balance and technological neutrality, unsupported by the purpose of the CMA and represents a simplistic approach to copyright valuation that this Court rejected in *SODRAC*.

ii. The MAP was Not Introduced to Increase SOCAN's Royalties

77. Music Canada and SOCAN each have lengthy discussions in their factums as to the purpose and objectives of Article 8 of the WCT, and of the MAP that is said to have implemented that provision. The public statements cited focussed on protection – especially

⁶⁵ SOCAN Factum, ¶9

⁶⁶ SOCAN Factum, ¶163

against piracy in a digital age. But those statements did not go on to promote either Article 8 or the MAP as royalty enhancing provisions. Put differently, there is no indication that any infringement protection objectives behind the MAP were coupled with, or required, increased royalties to be paid by fee-paying on-demand services.

iii. Balance, Layering of Fees and Technological Neutrality

78. It is important to recall the factual context in which SOCAN's call for increased royalties arises. For on-demand services, the MAP expanded the communication right to include additional pre-existing activities. This was not a situation where copyright users started to perform new or additional acts, with the debate being whether those acts engaged different or additional rights. Instead, on-demand services continue to do what they have always done for their audiences: prepare curated collections of works from which the public can choose, and then transmit the chosen works to the public. Having the communication right engage at the making available stage changes nothing relating to the value of the service to the public and, as a result, adds nothing to the value of the works to the service.

79. Balance requires a recognition that there must be an economic balance between the creators and users of copyright. Any piracy prevention objectives of the CMA would become unbalanced if they were the Trojan horse for increased royalty payments by legitimate online services. This Court alluded to this in *ESA*:

[T]he balance in copyright between promoting the public interest in the encouragement and dissemination of works and obtaining a just reward for the creator requires recognizing the "limited nature" of creators' rights:

The proper balance among these and other public policy objectives lies not only in recognizing the creator's rights but in giving due weight to their limited nature. In crassly economic terms *it would be as inefficient to overcompensate artists and authors for the right of reproduction as it would be self-defeating to undercompensate them*. Once an authorized copy of a work is sold to a member of the public, it is generally for the purchaser, not the author, to determine what happens to it. [emphasis in original]⁶⁷

80. Moreover, the application of the principle of technological neutrality militates against additional fees or royalties flowing from the MAP. As noted above, this Court warned against the undue layering of fees in this context in *ESA*:

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. To do otherwise would effectively impose a gratuitous cost for the use of more efficient, Internet-based technologies.⁶⁸ [emphasis in original]

81. This Court confirmed in *SODRAC* that technological neutrality applies as much to valuing rights as to identifying their scope, expressly rejecting the proposition that “once it has been established that a copying activity engages the reproduction right, the principle of technological neutrality is spent”.⁶⁹

The principle of technological neutrality is recognition that, absent parliamentary intent to the contrary, the *Copyright Act* should not be interpreted or applied to favour or discriminate against any particular form of technology. It is derived from the balancing of user and right-holder interests discussed by this Court in *Théberge* — a “balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator”: para. 30. Because this long-standing principle informs the *Copyright Act* as a whole, it must be maintained across all

⁶⁷ [ESA](#) at 7, quoting from [Théberge](#) at 31

⁶⁸ [ESA](#) at 9

⁶⁹ [SODRAC](#) at 65

technological contexts: “The traditional balance between authors and users should be preserved in the digital environment . . .” (*ESA*, at para. 8).

In the regulatory context, the principle of technological neutrality applies to valuation of a reproduction licence, just as it does in determining whether an activity implicates copyright at all. The Board operates pursuant to the *Copyright Act*, and in its regulatory role of fixing royalties under s. 70.2, it may not simply set aside the principles that guide its interpretation of the Act once it has begun its valuation analysis. While the Board’s valuation analysis will vary according to the facts of each case, it is unreasonable for the Board to ignore the principle of technological neutrality in that analysis in cases where it is implicated.

Indeed, it would be inconsistent to require a technologically neutral interpretation of the *Copyright Act* but not require a technologically neutral application of the Act. As Professor Vaver has written, “Copyright law should strive for technological neutrality”: p. 172. Interpretation and application of the Act are both important in seeking this objective.⁷⁰ [emphasis added]

82. The Court went on in *SODRAC* to explain how to apply technological neutrality to copyright valuation:⁷¹

Because rights holders have the exclusive right to reproduce their works under s. 3(1)(d), they are entitled to be justly compensated for the use of that right. One element of just compensation is an appropriate share of the benefit that the user obtains by using reproductions of their copyright-protected work in the operation of the user’s technology. That just compensation must be valued, however, in accordance with the principle of technological neutrality. While highly unlikely, **where users are deriving the same value from the use of reproductions of copyright-protected works using different technologies, technological neutrality implies that it would be improper to impose higher copyright-licensing costs on the user of one technology than would be imposed on the user of a different technology. To do so would privilege the interests of the rights holder to a greater degree in one technology over the other where there is no difference between the two in terms of the value each user derives from the reproductions.**

The converse is also true. Where the user of one technology derives greater value from the use of reproductions of copyright-protected work than another user using reproductions of the copyright-protected work in a different technology, technological neutrality will imply that the copyright holder should be entitled to a larger royalty from the user who obtains such greater value.

⁷⁰ [SODRAC](#) at 66-68

⁷¹ [SODRAC](#) at 70-71

Simply put, it would not be technologically neutral to treat these two technologies as if they were deriving the same value from the reproductions. [emphasis added]

83. The Board's, and SOCAN's, proposition that the MAP gives rise to new or incremental royalties runs afoul of these principles.

84. First, unlike in *Bishop* or *SODRAC*, there is no discrete right or step being engaged by making available. In *Bishop*, the distinction between the reproduction and the broadcast (performance) were key to the Court's determination that "ephemeral" pre-broadcast recordings were separately protected and not implicitly permitted by the broadcast licence.⁷² In *SODRAC*, the Court distinguished between the "fundamentally distinct" activities of television production and broadcasting in finding that "broadcast-incidental" reproductions by the CBC were not implicitly authorized by the expressly limited synchronization licences granted earlier to program producers.⁷³ Here, however, where making available is simply a "preparatory step" in the process of operating an on-demand service, no such distinctions can be made.

85. Second, the demand for more and separate royalties flies in the face of this Court's admonition that different technologies deriving the same value from using copyright works should not be subject to different royalties. The MAP raises an analogous situation. Instead of considering a *new* technology, like digital movie downloads, and comparing it to the prior technology, such as DVD deliveries, the MAP requires a comparison of the *same* technology before and after the introduction of the MAP. In other words, the proper approach is to consider

⁷² *Bishop*

⁷³ *SODRAC* at 63

whether the introduction of the MAP has changed the value of the use of copyright works by on-demand services, given that there was no change in their conduct or the service they provide.

86. It should be clear that the MAP is incapable of changing the value of on-demand services to consumers, or the value of copyright works to online services. On-demand services always, by definition, made works available, and consumers always, by definition, accessed some or all of them to fulfill their on-demand preferences. Extending the ambit of the act of “communicating to the public” to include the initial step of making works available may offer piracy protection at a different or earlier stage than previously, but it adds nothing to the value of the works in on-demand services. That value already arose from the interactive nature of such services, whether the driver for interactivity – the fact that works were “made available” – was formally protected by copyright or not.

87. Indeed, SOCAN’s approach reflects the discredited approach of the Board and the collectives in *SODRAC*: “[s]imply put, more copies mean more value and thus, more royalties”.⁷⁴ This Court held that such a “simple” approach was “out of step with the principles of technological neutrality and balance.”⁷⁵ SOCAN attempts to re-run the same argument here, substituting “more rights” for “more copies”. However, as demonstrated above, neither more nor extended rights applied to the same activity give rise to more value or the right to more royalties. A “more means more” approach to considering the MAP is simplistic, rather than simple, and at odds with balance and technological neutrality.

⁷⁴ *SODRAC* at 83

⁷⁵ *Ibid*

88. Finally, the Board has already set SOCAN royalties for on-demand music services⁷⁶ and audiovisual services⁷⁷ and, as to online music, expressly dealt with how to address the additional interactivity in on-demand versus less interactive types of operations. The Board's conclusion was that the percentage of revenue royalty rate for on-demand services should be the *same* as for semi- or non-interactive alternatives – if the increased interactivity was more valuable to *listeners*, that would translate into greater revenue for the *services* and, in turn, higher royalties for SOCAN. Absent any increased value to listeners, however, no increased royalties would be paid. There was no independent or intrinsic value in being able to use music in an on-demand service over and above the value placed on interactivity by listeners.⁷⁸

E. Conclusion

89. The MAP expands the communication right in a way that makes it apply earlier in the on-demand process, and potentially to works that were not previously “communicated”. However, it is not a separate right, does not offer independent protection and does not trigger separate or additional royalties.

⁷⁶ [Board OMS Decision](#)

⁷⁷ Board Decision dated 2014-07-18 - SOCAN Tariff 22.D.1 and 22.D.2 for Internet uses, 2007-2013, as amended by Board Decision Number CB-CDA 2017-008 - SOCAN Tariff 22.D.1 (Internet - Online Audiovisual Services), 2007-2013 [Redetermination] (2017-01-27)

⁷⁸ [Board OMS Decision](#) at 233-38, 261, 265

PART IV - COSTS

90. Pandora requests its costs in this Court and before the FCA.

PART V - ORDER SOUGHT

91. Pandora respectfully asks that these appeals be dismissed.

92. Alternatively, Pandora asks that the appeals be dismissed as to the FCA’s conclusions that:

- (a) “Subsection 2.4(1.1) does not create a new exclusive right”;⁷⁹
- (b) “It would be contrary to the policy of the Act to establish a tariff on a preparatory step”;⁸⁰ and
- (c) “[T]here 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.”⁸¹

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 13th day of September, 2021.



David W. Kent
Jonathan O’Hara
Counsel for the Respondent Pandora

⁷⁹ [FCA Decision](#) at 96

⁸⁰ [FCA Decision](#) at 96

⁸¹ FCA Decision [2020 FCA 100](#) at 97

PART VI - TABLE OF AUTHORITIES

Cases	At para(s):
<i>Bishop v. Stevens</i> , [1990] 2 SCR 467 , 1990 CanLII 75 (SCC)	1, 8, 71, 72, 84
<i>Canada (Minister of Citizenship and Immigration) v. Vavilov</i> , 2019 SCC 65 (CanLII)	28, 32
<i>Canadian Broadcasting Corp. v. SODRAC 2003 Inc.</i> , [2015] 3 SCR 615 , 2015 SCC 57 (CanLII)	1, 8, 65, 69, 72, 81, 82, 84, 87
<i>CMRRA-SODRAC Inc. v. Apple Canada Inc.</i> , 2020 FCA 101 (CanLII)	24
<i>Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada</i> , [2012] 2 SCR 231 , 2012 SCC 34 (CanLII)	1, 4, 8, 34, 65, 68, 73, 79, 81
<i>Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada</i> , 2020 FCA 100 (CanLII)	25, 92
<i>Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada</i> , [2012] 2 SCR 283 , 2012 SCC 35 (CanLII)	1, 9, 12, 13, 14, 28
<i>Théberge v. Galerie d'Art du Petit Champlain inc.</i> , [2002] 2 S.C.R. 336 , 2002 SCC 34 (CanLII)	1, 65, 79
<i>York University v. Canadian Copyright Licensing Agency (Access Copyright)</i> , 2021 SCC 32 (CanLII)	1, 38, 65

Legislation and Regulations	At para(s):
<i>Copyright Act</i> , RSC 1985, c C-42	2, 34, 36, 37, 47, 58, 50, 65
Copyright Board Decision re Communication to the Public by Telecommunication - Scope of Section 2.4(1.1) of the Copyright Act – Making Available, dated August 25, 2017 [CB-CDA 2017-085]	7, 18, 19, 20, 30, 39, 46, 47, 49, 50, 75
Copyright Board Decision re Online Music Services (CSI: 2011-2013; SOCAN: 2011-2013; SODRAC: 2010-2013) dated August 25, 2017, [CB-CDA 2017-086]	5, 17, 18, 20, 22, 23, 24, 88
<i>Copyright Modernization Act</i> , SC 2012, c 20	2, 8, 18, 30, 31, 35, 36, 37, 39, 41, 50, 76, 79
Other Texts	At para(s):
Berne Convention for the Protection of Literary and Artistic Works (as amended on September 28, 1979)	54, 55, 56, 57
<i>WIPO Copyright Treaty</i> 2186 UNTS 121 ; https://wipolex.wipo.int/en/text/295157	2, 8, 15, 17, 31, 34, 35, 36, 39, 41, 45, 53, 54, 56, 57, 58, 59, 60, 62, 64, 77
<i>WIPO Performances and Phonograms Treaty</i> https://wipolex.wipo.int/en/treaties/textdetails/12743	16, 35, 36, 37