

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

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 INC., SHAW COMMUNICATIONS AND PANDORA  
MEDIA INC.**

Respondents  
(Applicants)

*[Style of cause continued on next page]*

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**FACTUM OF THE RESPONDENTS**

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

*(Pursuant to Rule 36 of the Rules of the Supreme Court of Canada)*

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*[Style of cause continued from previous page]*

SCC Court of File No.: 39418

**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  
(Respondents)

AND:

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

Respondents  
(Applicants)

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## TABLE OF CONTENTS

<b>I. OVERVIEW AND STATEMENT OF FACTS .....</b>	<b>1</b>
A. Overview .....	1
B. Statement of Facts .....	2
C. The Copyright Act and the Structure of the Copyright Bundle .....	3
D. The Copyright Board and its Digital Music Tariffs .....	6
E. Procedural History of this Appeal .....	8
<b>II. ISSUES.....</b>	<b>11</b>
<b>III. ARGUMENT.....</b>	<b>11</b>
<b>A. Standard of Review .....</b>	<b>12</b>
<b>B. Section 2.4(1.1) Clarifies the Scope of the Communication Right .....</b>	<b>16</b>
i. Text.....	17
ii. Context.....	18
iii. Purpose .....	21
iv. Conclusion .....	26
<b>C. A Freestanding “Making Available Right” Would Violate the User-Owner Balance.....</b>	<b>26</b>
<b>D. A Freestanding “Making Available Right” Would Violate Technological Neutrality ....</b>	<b>29</b>
<b>E. SOCAN’s Ancillary Arguments Are Unfounded .....</b>	<b>32</b>
i. Section 2.4(1.1) is Not a Deeming Provision.....	32
ii. There is No “Tariff Gap” in the <i>Copyright Act</i> .....	33
iii. There is No “Piracy Gap” in the <i>Copyright Act</i> .....	34
iv. There is No “Treaty Gap” in the <i>Copyright Act</i> .....	36
<b>IV. COSTS .....</b>	<b>39</b>
<b>V. ORDER SOUGHT.....</b>	<b>39</b>
<b>VI. TABLE OF AUTHORITIES .....</b>	<b>41</b>

## I. OVERVIEW AND STATEMENT OF FACTS

### A. Overview

1. This case is about double-dipping on copyright royalties, and whether double-dipping should be allowed in areas where this Court had previously said that it was forbidden. SOCAN<sup>1</sup> seeks to double-dip here in two distinct ways. First, SOCAN wants to double the number of performance royalty payments applicable to the online streaming of music. Whereas in the past only a single performance royalty was due, SOCAN now asks that two royalties be paid for the same activity. Second, with respect to downloads, SOCAN seeks to add a performance royalty to the reproduction royalty which is already paid on all downloaded music. This latter position was specifically rejected by this Court in 2012.

2. SOCAN's broad argument in favour of double-dipping is a direct challenge to a long line of this Court's cases, from *Théberge*<sup>2</sup> to *ESA*<sup>3</sup> and *Rogers*<sup>4</sup> to the recent *York University*<sup>5</sup> decision. These cases establish that technological neutrality and the user-creator balance prohibit the layering of royalties for the same activity. That prohibition is especially clear when the layering is based on discrimination between different types of technology.

3. In effect, SOCAN asks this Court to overturn its past precedents and depart from the requirements of technological neutrality and user-creator balance. Its request is based on a strained reading of s. 2.4(1.1) of the *Copyright Act*.<sup>6</sup> SOCAN claims that s. 2.4(1.1) creates a new form of copyright, entitling it to a second round of royalties. Section 2.4(1.1) does nothing of the sort.

4. SOCAN's proposed reading is unsupported by any of the customary tools of statutory interpretation. Instead, the text, context, and purpose of s. 2.4(1.1) all mark it as a definition whose purpose is to clarify the scope of the communication right. Nothing about s. 2.4(1.1) would indicate that it was intended to create a new freestanding copyright. Indeed, the very definition of "copyright" under the *Copyright Act* precludes such an interpretation.

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<sup>1</sup> The appellants are collectively referred to as "SOCAN" unless it is necessary to distinguish between them.

<sup>2</sup> *Théberge v Galerie d'Art du Petit Champlain*, 2002 SCC 34 [*Théberge*].

<sup>3</sup> *ESA v SOCAN*, 2012 SCC 34 [*ESA*].

<sup>4</sup> *Rogers Communications v SOCAN*, 2012 SCC 35 [*Rogers*].

<sup>5</sup> *York University v Access Copyright*, 2021 SCC 32 [*York*].

<sup>6</sup> *Copyright Act*, RSC 1985, c C-42.

5. Moreover, if s. 2.4(1.1) had such an effect, it would do far more than create a novel form of copyright. SOCAN's interpretation of s. 2.4(1.1) would "break" many users' rights contained in the *Act*, and would render the definition of "publication" impossible to apply in a digital environment. These are not consequences that Parliament ever intended s. 2.4(1.1) to provoke. Instead, they are a compelling signal that SOCAN's proposed interpretation is not one that s. 2.4(1.1) was ever intended to bear.

6. SOCAN's ancillary arguments are also unfounded. Section 2.4(1.1) is not a deeming provision, let alone one which was intended to override the principle of technological neutrality, the user-owner balance, and this Court's past interpretation of the meaning of the communication right. Similarly, there is no air of reality to the *in terrorem* allegations of a "piracy-gap" or a "tariff gap" or a "treaty gap" in the *Copyright Act*. SOCAN's arguments are directed at double-dipping on royalties from licensees, not combatting piracy. Nor is the Board unable to impose tariffs on any current or future business models. The decision below was able to set royalties for all activities before the Board even without reliance on a freestanding making available "right." Finally, there is no conflict with any of Canada's international obligations. There is no separate "making available right" in the United States, so it would be remarkable if Canada could not adopt similar copyright legislation.

7. In the final analysis, the text, context, and purpose of s. 2.4(1.1) converge towards a shared conclusion: this provision is a definition and is intended to merely clarify the scope of the communication right. Parliament included s. 2.4(1.1) in the *Act* in order to clarify that the communication right covers not just traditional "push" broadcast techniques, but also point-to-point or "pull" communications. This was the same conclusion which this Court arrived at in *Rogers*. Section 2.4(1.1) did not overrule *ESA*, instead it codified *Rogers*. The Board's decision to the contrary was both incorrect and unreasonable. This appeal should be dismissed.

## **B. Statement of Facts**

8. This appeal arises from a pair of linked decisions, only one of which has been appealed to this Court. Virtually all of the relevant factual record is contained in the un-appealed decision, which is now *res judicata*. Accordingly, this section sets out the legislative context of the *Copyright*

*Act* (**section C, below**). It then explains the administrative context, namely the Copyright Board and its digital music tariffs (**section D**). It concludes with a brief review of the procedural history for this appeal, including the factual findings which became *res judicata* when SOCAN failed to appeal the fact-based decision (**section E**).

9. The respondents who file this factum are the Entertainment Software Association and the Entertainment Software Association of Canada, two industry groups representing developers and publishers of videogame software, both in Canada and the United States, as well as leading telecommunication companies referred to as “the networks” in this factum, namely Bell Canada, Quebecor Media Inc., Rogers Communications, and Shaw Communications. All of the respondents are both users of copyrighted works and owners of their own copyrights. The outcome of this appeal will affect them in both capacities, and they draw on their experiences as users and owners.

### **C. The Copyright Act and the Structure of the Copyright Bundle**

10. Copyright is a “creature of statute” and exists only to the extent set out in the *Copyright Act*.<sup>7</sup> The *Copyright Act* itself is an exercise in balance between the rights of copyright owners and the rights of copyright users, which has been described by this Court:

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.<sup>8</sup>

11. Justice Binnie’s presentation of the user-creator balance, and his emphasis on the “limited nature” of copyright, has been cited many times by this Court.<sup>9</sup> Indeed, *Théberge* represented a departure from this Court’s prior approach to the *Copyright Act*, under which “any benefit the public might derive from the copyright system was only a fortunate by-product of private

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<sup>7</sup> *CCH Canadian v Law Society of Upper Canada*, 2004 SCC 13 ¶9 and cases cited therein; *Vigneux v Canadian Performing Right Society*, [1943] SCR 348 at 352-353; *Copyright Act*, RSC 1985, c C-42, s 89.

<sup>8</sup> *Théberge*, *supra* note 2 ¶31 [emphasis added].

<sup>9</sup> See e.g. *York University*, *supra* note 5 ¶93; *ESA*, *supra* note 3 ¶7; *CBC v SODRAC*, 2015 SCC 57 ¶47, 74 (majority), 170 (Abella J dissenting); *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, 2012 SCC 68 ¶66; *Keatley Surveying v Teranet*, 2019 SCC 43 ¶43-44.

entitlement.”<sup>10</sup> Since *Théberge*, it is now clear that the public interest must be directly served by the *Copyright Act*. This in turn requires that the *Act* always be interpreted with an eye towards preserving the balance between *owners* of copyright and *users* of copyright.

12. A second fundamental principle of the *Copyright Act* is the need to preserve technological neutrality. Like the user-creator balance, this principle has also been consistently applied by this Court in its copyright decisions.<sup>11</sup> Technological neutrality requires that the *Copyright Act* apply in a functionally-equivalent manner as between different technologies, and the business models dependent on those technologies.<sup>12</sup> As a result, copyright should not impose a layer of additional royalties based solely on the technology used to deliver a copy of a work, or provide access to a work.<sup>13</sup> Nor should exceptions and users rights operate differently in a digital environment.<sup>14</sup> Express parliamentary language is required to derogate from the principle of technological neutrality.<sup>15</sup>

13. Two remaining points are important to understand the scheme of the *Copyright Act*. The first is the distinction between “works” and “other subject matter” which is frequently made in the *Act*. A “work” is a literary, artistic, musical, or dramatic work, like a novel, a photograph, a song, or a movie.<sup>16</sup> These are the traditional subject-matter of copyright. In recent decades, the *Copyright Act* was extended to protect “other subject matter” like sound recordings, performer’s performances, and broadcast signals.<sup>17</sup> In general, the rights given to owners of copyright in a “work” are broader than those given to owners of copyright in “other subject matter.” However,

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<sup>10</sup> *Bell v SOCAN*, 2012 SCC 36 ¶9 [internal quotation marks omitted].

<sup>11</sup> *ESA*, *supra* note 3 ¶5-10; *Rogers*, *supra* note 4 ¶36-40, 52-57; *Bell*, *ibid* ¶43-46; *CBC*, *supra* note 9 ¶65-73; *Robertson v Thomson Corp*, 2006 SCC 43 ¶49; *Apple Computer v Mackintosh Computers*, [1990] 2 SCR 209, adopting trial reasons of Reed J given at [1987] 1 FC 173 (TD).

<sup>12</sup> *ESA*, *supra* note 3 ¶5; *Rogers*, *ibid* ¶29, 39-40; *Bell*, *supra* note 10 ¶43; *Apple Computer*, *ibid*.

<sup>13</sup> *ESA*, *ibid* ¶9, 11; *Entertainment Software Assoc. v. SOCAN*, 2020 FCA 100 ¶67, 96 (**Appellants’ Joint Record, Tab 2**) [“FCA Decision”].

<sup>14</sup> *Bell*, *supra* note 10 ¶43.

<sup>15</sup> *CBC*, *supra* note 9 ¶66. Such language is rare, since only a few provisions of the *Act* refer to specific types of technology. See e.g., ss. 30.2(2) (referring to “reprographic reproduction” more commonly known as photocopying) and 72.1 (referring to radio receiving sets). The relevant provisions for this appeal are all written in functional language, rather than technology-specific language.

<sup>16</sup> *Copyright Act*, RSC 1985, c C-42, s 2 s.v. “artistic work”, “cinematographic work”, “dramatic work”, “literary work” and “musical work”, and “every original literary, dramatic, musical and artistic work.”

<sup>17</sup> See e.g. *Copyright Act*, RSC 1985, s 15, 18, 21.

these “other subject matter” are not at issue in this appeal, which concerns only “works” and musical works in particular. All references to “copyright owners” in this factum refer to owners of copyright in “works” and not owners of copyright in “other subject-matter.”

14. The rights granted to copyright owners are set out in s. 3 of the *Copyright Act*. This definition is both internally and externally exhaustive. Externally, s. 2 of the *Act* confirms that “copyright” in a work is defined solely by the rights of s. 3.<sup>18</sup> Internally, s. 3 provides an exhaustive definition, since it incorporates a unique mix of “means” and “includes” language:

3 (1) For the purposes of this Act, copyright, in relation to a work, **means** the sole right to [...] **reproduce** the work or any substantial part thereof in any material form whatever, to **perform** the work or any substantial part thereof in public or, if the work is unpublished, to **publish** the work or any substantial part thereof, and **includes** the sole right:

(a) to produce, reproduce, perform or publish any translation of the work,

[...]

(f) in the case of any literary, dramatic, musical or artistic work, to communicate the work to the public by telecommunication,

[...]

and to authorize any such acts.

15. Faced with this unique structure, this Court’s *ESA* decision held that the “copyright bundle” consists of the three rights introduced using the word “means”, which are the rights to reproduce, perform, and publish a work.<sup>19</sup> The remaining rights listed at paragraphs (a) to (j) are merely illustrations or clarifications of these three rights.<sup>20</sup>

16. Because they are not separate copyrights, the illustrations at 3(1)(a)-(j) each inherit certain characteristics from the reproduction, performance, or publication right, respectively. For example, the “communication right” at 3(1)(f) is a performance-based right.<sup>21</sup> Thus, it is not triggered by the

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<sup>18</sup> *Copyright Act*, RSC 1985, c C-42, s 2 s.v. “copyright”.

<sup>19</sup> *ESA*, *supra* note 3 ¶42 (see also ¶33-35).

<sup>20</sup> *ESA*, *ibid* ¶42; *Apple Computer* (trial) at ¶44 (“the general wording is said to ‘include’ the specifics”), adopted on appeal by this court *supra* note 11.

<sup>21</sup> *ESA*, *ibid* ¶25-26, 31-32, 35-37, 39, 42; *Rogers*, *supra* note 4 ¶36-38.

creation of *permanent copies* of a work; rather, creation of new copies triggers the reproduction right.<sup>22</sup> The communication right is instead concerned with the telecommunication of a *performance* of the work to the public.<sup>23</sup> A single activity cannot trigger two rights.<sup>24</sup>

17. Concretely, this means that when music is downloaded, it triggers the reproduction right (*ESA*), and when music is streamed it triggers the performance right via the communication right (*Rogers*). The *ESA-Rogers* framework has been applied by lower courts and the Copyright Board for almost a decade without any difficulty and without any intervention from Parliament.

#### **D. The Copyright Board and its Digital Music Tariffs**

18. The Copyright Board is a uniquely Canadian institution, and the first of its kind in the world.<sup>25</sup> The Board was created in 1931 to regulate the monopolistic power of collective societies. These societies served an important purpose,<sup>26</sup> but their monopoly over copyright in popular music meant that they threatened to become “instruments of oppression and extortion” against copyright users.<sup>27</sup> The Board was therefore created to counterbalance the economic and legal monopolies held by collectives:

Societies, associations and companies had become active in the business of acquiring such rights. [...] The legislature evidently became aware of the necessity of regulating the exercise of the power acquired by such societies. [...] [T]his business in which the dealers [i.e. collective societies] were engaged is a business affected with a public interest; and it was felt to be unfair and unjust that these dealers should possess the power so to control such performing rights as to enable them to exact [...] such tolls as it might please them to exact.<sup>28</sup>

19. The Board initially only had jurisdiction over the performance right, but its jurisdiction has

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<sup>22</sup> *ESA*, *ibid* ¶12, 19, 32, 35-37, 42; *Rogers*, *ibid* ¶2; *Theberge*, *supra* note 2 ¶42

<sup>23</sup> See sources cited *supra* note 21.

<sup>24</sup> *ESA*, *supra* note 3 ¶9, 11, 40-41.

<sup>25</sup> Daniel Gervais, “A Uniquely Canadian Institution: The Copyright Board of Canada” 197 at 207-209, 218, in Ysolde Gendreau, ed, *An Emerging Intellectual Property Paradigm: Perspectives from Canada* (Edward Elgar, 2008).

<sup>26</sup> *ESA*, *supra* note 3 ¶11; *York*, *supra* note 5 ¶49, 56, 60-61.

<sup>27</sup> *Vigneux v Canadian Performing Right Society*, [1943] SCR 348 at 354, per Duff J, in the minority in this Court, but ultimately confirmed on this point by [1945] AC 108 (PC), and quoted with approval in *CBC*, *supra* note 9 ¶112.

<sup>28</sup> *Vigneux*, *ibid* at 352-353 [emphasis added]. See also *York*, *supra* note 5 ¶50-54

steadily expanded over the years, and now includes all rights in the copyright bundle.<sup>29</sup> However, regardless of the rights which the Board is adjudicating, its core function remains “regulating the actions of collective organizations”<sup>30</sup> in order to “protect users from the potential exertion of unfair market power by collective societies.”<sup>31</sup>

20. The Board shares jurisdiction over certain copyright issues with first-instance courts,<sup>32</sup> and exercises its jurisdiction to set “tariffs” for the use of copyrighted works.<sup>33</sup> A tariff is essentially a statutory licence which sets out the royalties and other conditions that a user may accept in exchange for a licence to use the works controlled by a given collective society.<sup>34</sup>

21. To be clear, the Board does not set the prices of books, films, or music. Rather, it sets royalty rates that may be paid by users whose activities implicate the relevant copyrights.<sup>35</sup>

22. The Board’s 2010-2013 Online Music Services Tariff is an example of this kind of royalty-setting exercise.<sup>36</sup> The Board did not tell users how much to charge for downloadable MP3 files, or how much a monthly subscription to a music streaming service should cost. Instead, the Board told users that if they wanted a licence to use the music owned by certain collective societies in the context of their online music services, then they would need to agree to pay those societies a defined percentage of their revenues (and comply with reporting obligations, etc.). These percentages ranged from 8.91% of revenues for permanent downloads of musical tracks, to 2.99% of revenues for interactive or semi-interactive webcasting of music videos.<sup>37</sup> Of course, before assigning a royalty to a given activity, the Board must first verify whether that activity constitutes an

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<sup>29</sup> *York, ibid* ¶¶55-58.

<sup>30</sup> *CBC, supra* note 9 ¶112.

<sup>31</sup> *York, supra* note 5 ¶67 (quoted), 58, 71 (similar language), 64, 71 (Act does not exist to benefit collectives).

<sup>32</sup> *Rogers, supra* note 4 ¶15, 17.

<sup>33</sup> *Copyright Act*, RSC 1985 c C-42, ss 67-76.1. The Board’s other functions at ss 77-88 are not relevant here.

<sup>34</sup> *York, supra* note 5 ¶20-25, 48-70. Tariffs cover the activities of entire industries, but the Board can also issue arbitral decisions binding only one user (s 71).

<sup>35</sup> References to “price setting” in the recent *York University* decision should be understood in this sense.

<sup>36</sup> Copyright Board of Canada, *Online Music Services (2010-2013)* (25 August 2017), CB-CDA 2017-086 at pages 138-139.

<sup>37</sup> *Ibid.* By way of comparison, most radio stations pay SOCAN 3.2% royalties on the first \$1.25 of gross revenue, and 4.4% on the rest of their revenues (*SOCAN, Re: Sound, CMRRA-SODRAC Inc., AVLA-SOPROQ, Artisti - Tariff for Commercial Radio*, 2008-2012, Canada Gazette Part I (Supp), 10 July 2010, at s 6(a)). This tariff remains in force because no subsequent tariff has replaced it: *Copyright Act*, RSC 1985 c C-42, s 73.2.

infringement of the copyright owner's rights.<sup>38</sup>

23. Where the public performance right in musical works is engaged, these payments are made to SOCAN, which holds a virtual monopoly over performance rights in popular music. Where the reproduction right in musical works is engaged, payments are typically made to either CMRRA, SODRAC, or CSI (a joint venture between CMRRA and SODRAC), since these three societies control the bulk of the reproduction rights in popular music. While the rights are managed by different collectives, the underlying copyright owners are normally the same people (authors, composers, and publishers) just represented by different collectives.

24. Once a tariff is in place, a user can decide to become a licensee under the tariff, negotiate a licence directly with the collective, or decline a licence and either refrain from using the works or take its chances in a copyright lawsuit.<sup>39</sup> Either way, enforcement always takes place before trial courts. The Board does not enforce its own tariffs, and so failure to pay royalties or otherwise comply with tariff conditions is addressed via enforcement proceedings in trial courts.<sup>40</sup> Infringement proceedings likewise always go before a trial court.<sup>41</sup>

### **E. Procedural History of this Appeal**

25. This appeal arises from two Copyright Board decisions that determined the royalties payable for the public performance of musical works by online music services. Those two Copyright Board decisions were then subject to a pair of related Federal Court of Appeal decisions, which dismissed judicial review in one case and granted it in the other. At every level, a pair of companion decisions was issued. At every level, the two decisions were inter-related. At every level, it is difficult to understand one decision without consulting the other. Yet only one of those decisions has been appealed to this Court. This section explains that unique procedural history and its relevance for this appeal.

26. At the Copyright Board level, these proceedings began with SOCAN Tariff 22.A for the

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<sup>38</sup> *ESA*, *supra* note 3 ¶¶9-10; *Bell*, *supra* note 10 ¶¶49; *Alberta (Education) v Access Copyright*, 2012 SCC 37 ¶¶12-13. Board Rate Decision, *infra* note 42 ¶¶160-179.

<sup>39</sup> *York*, *supra* note 5 ¶¶30, 34-40, 53; *CBC*, *supra* note 9 ¶¶107-110.

<sup>40</sup> *Copyright Act*, RSC 1985, c C-42, ss 73, 73.1, 77(3), 88(1), 88(3).

<sup>41</sup> *Copyright Act*, RSC 1985, c C-42, s 41.24.

year 2011.<sup>42</sup> This was a tariff which would set royalties payable to SOCAN by online music services operating in Canada.<sup>43</sup> SOCAN Tariff 22.A was then consolidated with similar tariffs proposed by other collective societies, namely SODRAC and CSI.<sup>44</sup> The end result was a joint “online music services” tariff proceeding for the years 2011-2013.

27. Due to certain legal positions taken by SOCAN in the Board Rate Decision, the Board decided to hold a separate hearing on the effect of the “making available” language which was added to the *Copyright Act* in late 2012.<sup>45</sup>

28. The Board Making Available Decision would determine whether the making available language entitled SOCAN to an additional layer of royalties beyond those it was already collecting for the public performance of musical works by online music service.<sup>46</sup> If the answer to that question was “yes”, then the Board Rate Decision would go on to determine the quantum of these additional royalties.

29. It is uncontested that under this Court’s celebrated 2012 “copyright Pentalogy”, holders of public performance rights (like SOCAN) are entitled to collect public performance royalties for streams of music, while holders of reproduction rights (like CSI/SODRAC) are entitled to collect reproduction royalties for downloads.<sup>47</sup> As a result, regardless of how the Board Making Available Decision was decided, the Board Rate Decision would also fix the public performance royalties that SOCAN is entitled to collect for streaming music, and the reproduction royalties that CSI and SODRAC would collect for copies of downloaded music.

30. The only live issue in the Board Making Available Decision was whether SOCAN could double-dip on downloads by collecting its own set of royalties on top of those already collected by CSI and SODRAC for the same activity, and on streams by collecting two royalties instead of one.

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<sup>42</sup> Copyright Board of Canada, *Online Music Services (CSI: 2011-2013; SOCAN (2011-2013); SODRAC (2010-2013))*, (25 August 2017) CB-CDA 2017-086 ¶2 [**Board Rate Decision**].

<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid* ¶3-7. A fourth collective objected to consolidation and its tariff was dealt with separately (see *ibid* ¶5-6).

<sup>45</sup> *Online Music Services (CSI: 2011-2013; SOCAN (2011-2013); SODRAC (2010-2013) – Making Available Right*, CB-CDA 2017-085 ¶1-8 [**Board Making Available Decision**].

<sup>46</sup> Board Rate Decision, *supra* note 42 ¶15-18, 141-144; Board Making Available Decision, *ibid* ¶1-7.

<sup>47</sup> Board Making Available Decision, *ibid* ¶87.

31. The Board Making Available Decision relied almost exclusively on international law arguments to conclude that the addition of “making available” language to the *Copyright Act* allowed SOCAN to charge an additional layer of royalties for downloads and streams.<sup>48</sup> This international law approach was based on expert testimony on the legal interpretation of various treaties. This evidence was led prior to this Court’s guidance in *Comeau* on such matters.<sup>49</sup>

32. The Board Rate Decision was released on the same day as the Board Making Available Decision. It applied the Board’s rulings from the Making Available Decision to the facts of the online music services industry. In contrast to the international law issues raised in the Board Making Available Decision, the Board Rate Decision was highly factual. It spent dozens of pages reviewing expert and fact evidence, and made numerous findings of fact, policy, and economics.<sup>50</sup>

33. Ultimately, the Board concluded that despite the voluminous evidence presented by both sides, it simply was not possible to quantify the value of the so-called “making available right” that it had identified in the Board Making Available Decision.<sup>51</sup> The result was that no royalties were payable to SOCAN for downloads. Of course, CSI and SODRAC continued to collect reproduction royalties for downloads. And SOCAN continued to collect royalties for streaming music.

34. Judicial review applications were filed against both the Board Making Available Decision and the Board Rate Decision. The Federal Court of Appeal found that the Board Rate Decision was reasonable, and deferred to the Board’s analysis of the “complex factual matrix” that had been placed before it by the parties.<sup>52</sup> By contrast, the FCA found that the Board Making Available Decision was unreasonable, and quashed that decision. However, the Federal Court of Appeal declined to issue an academic conclusion on the scope of the making available provision. Any such conclusion was academic because the FCA Rate Decision had decided that there was insufficient evidence to value any “making available” activities.<sup>53</sup> So regardless of how the court ruled, no money would change hands and no practical result would be achieved.

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<sup>48</sup> Board Making Available Decision, *ibid* ¶110-112, 129, 137-184, 188-203.

<sup>49</sup> *R v Comeau*, 2018 SCC 15 ¶40-41.

<sup>50</sup> Board Rate Decision, *supra* note 42 at pages 54-98.

<sup>51</sup> Board Rate Decision, *supra* note 42 ¶144-155.

<sup>52</sup> *CMRRA-SODRAC Inc v Apple Canada*, 2020 FCA 101, ¶3-5, 22, 24, 26-29 [**FCA Rate Decision**].

<sup>53</sup> *ESA v SOCAN*, 2020 FCA 100 ¶103-107 [**FCA Making Available Decision**]; FCA Rate Decision, *ibid*.

35. Since the FCA Rate Decision was not appealed, certain facts found in the Board Rate Decision are now *res judicata*. They should be considered here to avoid deciding issues in a factual vacuum.<sup>54</sup> The most important of these factual findings is that the Board could not “price the act of making available distinct from other acts of communication by telecommunication” even after voluminous factual and expert evidence led before a specialized tribunal over weeks of hearings. This is an important clue that perhaps there is no such thing as a distinct “making available right” in the first place. Indeed, the impossibility of putting a distinct “price” on an alleged “right” suggests that there was no distinct right to begin with. This in turn tends to confirm the interpretation advanced by ESA and the Networks, namely that there is no freestanding “making available right” in the *Copyright Act*.

36. Finally, it is important to note that the Board Rate Decision is neither the first nor the last time that the Copyright Board has or will consider the copyright royalties payable by online music services. The Board had previously set royalties for the online music service industry in an earlier 2012 ruling.<sup>55</sup> There is also a pending online music service tariff proceeding before the Board that considers the same issues and substantially the same parties as the Board Rate Proceeding.<sup>56</sup> As the market for digital music has evolved, the Board has regularly issued updated tariffs.

## II. ISSUES

37. There is only one issue in this appeal: did the Federal Court of Appeal err in rejecting the idea that section 2.4(1.1) creates a freestanding “making available right”? For the reasons given below, ESA and Networks submit that the answer to this question is “no.”

## III. ARGUMENT

38. The Board’s statutory interpretation of the *Copyright Act* should be reviewed on a correctness standard (**see section A, below**). However, the choice between standards of review

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<sup>54</sup> *R v Audet*, [1996] 2 SCR 171 at 195.

<sup>55</sup> *SOCAN Tariff 22.A (Internet—Online Music Services) 2007-2010 and CSI Online Music Services Tariff, 2008-2010*, Canada Gazette Part I (Supp), 6 October 2012.

<sup>56</sup> Copyright Board of Canada, Ruling of the Board on Objections to Interrogatories in Online Music Services [SOCAN: 2007-2018; Re:Sound: 2013-2018; CSI: 2014-2018], (21 August 2019), CB-CDA 2019-061. Judicial notice may also be taken of the case status available online via official Copyright Board docket records: <https://cb-cda.gc.ca/en/cases-tariffs/ongoing-cases/under-consideration/online-music-services>.

does not ultimately affect the outcome of the appeal, since the Board’s decision was neither correct nor reasonable. The Board’s decision was reviewable because it failed to engage with mandatory elements of statutory interpretation, namely the text, context, and purpose of s. 2.4(1.1) (**section B**). When those elements of statutory interpretation are considered, it becomes clear that s. 2.4(1.1) was never intended to create a new, freestanding “making available right.” Indeed, interpreting s. 2.4(1.1) in that way would violate technological neutrality and upset the user-creator balance, which are key principles underlying the *Copyright Act* (**sections C-D**). The true purpose of s. 2.4(1.1) is to clarify the scope of the communication right, and not to revolutionize Canadian copyright law; SOCAN’s *in terrorem* arguments to the contrary are unfounded (**section E**).

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

39. The Federal Court of Appeal did not rule on the standard of review, since it found that the Board’s decision was reviewable even under the more deferential reasonableness standard.<sup>57</sup> That conclusion continues to apply here since, as explained in sections B-D, the Board’s statutory interpretation was both incorrect and unreasonable.

40. If a standard of review analysis becomes relevant, ESA and the Networks agree with Music Canada that the Board’s interpretation of the *Copyright Act* is reviewable on a correctness standard.<sup>58</sup> The presumption of reasonableness under the *Vavilov* framework is rebutted here for two reasons: Parliamentary intent, and the rule of law requirement that no party be subject to competing decisions by different adjudicators with competing jurisdiction. However, the “treaty exception” proposed by Music Canada is unworkable and should be rejected.

41. In *Vavilov*, this Court emphasized that Parliamentary intent was the “pole star” of judicial review, and that reasonableness review is fundamentally “intended to give effect to the legislature’s choice to leave certain matters with administrative decision makers rather than the courts.”<sup>59</sup> Where a given matter has *not* been withdrawn from the jurisdiction of trial courts, the “pole star” of Parliamentary intent supports the opposite conclusion – namely, that reasonableness review was

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<sup>57</sup> *ESA v SOCAN*, *supra* note 3 ¶¶20-21, 46-47.

<sup>58</sup> Music Canada Factum, section H.

<sup>59</sup> *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 ¶33.

not intended to apply.

42. Here, the interpretation of the *Copyright Act* is not a task exclusively conferred upon the Copyright Board “rather than the courts.” Instead, trial courts routinely interpret and apply the *Act*, engaging in the same statutory interpretation exercises as the Board. Copyright cases thus reach this Court via judicial review of Board decisions<sup>60</sup> and via appeals from trial judgments.<sup>61</sup> Indeed, this Court has interpreted the same provisions of the *Act* via appeals arising from both sources.<sup>62</sup> And sometimes a trial court is called upon to properly interpret the Copyright Board’s own enabling provisions, as occurred in the recent *York University* case.<sup>63</sup> And other times copyright issues arise under other administrative law regimes, without the Copyright Board ever being involved.<sup>64</sup>

43. This is a “strong and compelling” signal that Parliament never intended a reasonableness review to apply to the Board’s statutory interpretation of the *Act*, since Parliament never withdrew these matters from the jurisdiction of trial courts in the first place.<sup>65</sup>

44. This Court reached precisely that conclusion in its pre-*Vavilov* cases.<sup>66</sup> In *Rogers*, this Court held that shared jurisdiction was a reliable signal of Parliament’s intent. This Court noted that the Board’s statutory scheme was “unusual” and thus “it must be inferred that the legislative intent was not to recognize the superior expertise of the Board relative to the court with respect to such legal questions.”<sup>67</sup> This unique situation was “quite unlike the scheme under which the vast majority of judicial reviews arise” and this uniqueness justified a correctness standard.<sup>68</sup> Concurrent first-instance jurisdiction thus rebutted the presumption that Parliament intended reasonableness review to apply to the Board’s statutory interpretation of the *Copyright Act*.

45. Parliament’s intent is confirmed by its longstanding acceptance of the *Rogers* decision.

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<sup>60</sup> See e.g. *ESA*, *supra* note 3; *Rogers*, *supra* note 4; *CBC*, *supra* note 9.

<sup>61</sup> See e.g. *York*, *supra* note 5; *CCH Canadian*, *supra* note 7; *Théberge*, *supra* note 2.

<sup>62</sup> For example, landmark fair dealing cases have arisen under both regimes: *York* and *CCH Canadian* (courts) and *Bell, Alberta (Education)* (Copyright Board tariffs).

<sup>63</sup> *York*, *supra* note 5.

<sup>64</sup> *Reference re Broadcasting Regulatory Policy CRTC 2010-167*, *supra* note 9.

<sup>65</sup> *Vavilov*, *supra* note 59 ¶70.

<sup>66</sup> *Rogers*, *supra* note 4 ¶¶14-20; SODRAC ¶35.

<sup>67</sup> *Rogers*, *ibid* ¶15 [emphasis added].

<sup>68</sup> *Ibid* ¶19.

Despite multiple statutory reviews of the *Copyright Act* in the decade since *Rogers* was decided, and multiple amendments to the Copyright Board provisions of the *Act*, there has been no move to overturn the *Rogers* decision or its progeny. Parliamentary intent thus favours a correctness approach to the Board's statutory interpretation of the *Act*.<sup>69</sup>

46. Reasonableness review is also rebutted on rule of law grounds, namely the need to prevent competing inconsistent decisions by the Board and a court on the same point affecting the same user. Consistent decision-making is a requirement of rule of law.<sup>70</sup> Accepting reasonableness review of the Board's interpretations would lead to the possibility of a "wrong but reasonable" interpretation being affirmed on judicial review, only for the same question to be decided differently on appellate review.<sup>71</sup> A tariff might impose a royalty on a given activity, only for a court to later conclude that the activity was exempt from royalties, since it was non-infringing.

47. This is not a hypothetical danger: while the Board establishes tariffs and statutory licences, it is trial courts who enforce those licences,<sup>72</sup> and infringement cases are brought in trial courts if a user refuses to take a licence under a tariff.<sup>73</sup> It makes little sense to defer to the Board's interpretation of the *Act* when setting a tariff if the same issue would be reviewed on a correctness standard once that tariff comes due for enforcement.

48. As this Court held in *Vavilov*, "the rule of law cannot tolerate conflicting orders and proceedings" which risk "pulling a party in two different and incompatible directions."<sup>74</sup> That statement was made about two competing administrative tribunals, but the same rule of law concerns arise from competing administrative and judicial decisions. Rule of law requires that the same copyright question receive the same answer, whether that question was first asked before the Board or before a trial court. A user or copyright owner should not face conflicting decisions which "pull them in different directions" on the same issue merely because one of the decisions emanates

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<sup>69</sup> Of course, reasonableness continues to apply for tariff-setting and factual components of Board decisions: *Rogers*, *ibid* ¶12, 20; *CBC*, *supra* note 9 ¶37, 40; *SOCAN v CAIP*, 2004 SCC 45 ¶49.

<sup>70</sup> *Vavilov*, *supra* note 59 ¶53, 70-72.

<sup>71</sup> This problem was first identified in *Rogers*, *supra* note 4 ¶14.

<sup>72</sup> *Copyright Act*, RSC 1985, c C-42, s 73, 73.1, 77(3), 88(1), 88(3) (delegating enforcement of tariffs to courts).

<sup>73</sup> *Copyright Act*, RSC 1985, c C-42, 41.24 (concurrent jurisdiction of federal and provincial trial courts to hear and determine all proceedings for civil remedies under the *Act*).

<sup>74</sup> *Vavilov*, *supra* note 59 ¶64

from an administrative tribunal. Indeed, the competing jurisdiction exception in *Vavilov* exists to prevent precisely that situation. It should be applied here by analogy, because the same rule of law concerns are equally compelling.

49. Reasonableness review would also render this Court's copyright jurisprudence less clear and less helpful for lower courts. If this Court affirmed the Copyright Board's interpretation under the reasonableness standard, parties and lower courts would remain uncertain about whether the Board's interpretation was correct, or merely wrong but reasonable. Certainty would be achieved only after the same issue was appealed to this Court for a second time, but starting from a court rather than the Board. This is an inefficient use of judicial resources and undermines access to justice.

50. Finally, the fact that Music Canada invokes an international treaty should not lead to correctness review, and this Court should decline to recognize a "treaties" exception to the *Vavilov* framework. There are three reasons for this. First, such an argument begs the question by assuming that the statute was intended to perfectly implement the plaintiff's chosen treaty. This may be a questionable assumption in many cases, including this one (see section E.iv, below).<sup>75</sup>

51. Second, Music Canada's argument cannot fit into the category of "general questions of law of central importance to the legal system as a whole." In *Vavilov*, this Court held that such questions must be of "fundamental importance and broad applicability," and gave as examples the scope of solicitor-client privilege or the applicability of *res judicata*.<sup>76</sup> Manifestly, the interpretation of s. 2.4(1.1) or the WIPO Copyright Treaty is *not* of similar importance to the Canadian legal system *as a whole*, since it lacks broad applicability outside of copyright law. This appeal is deeply important to copyright law, but importance alone does not transform an issue into one of "central importance to the legal system as a whole."<sup>77</sup> Breadth of application is needed. It is lacking here.

52. Music Canada tries to get around this problem by appealing to the effects of treaties in general, rather than to the specific treaty that is actually before this Court. This more general "treaty

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<sup>75</sup> FCA Making Available Decision, *supra* note 53 ¶¶79-93, especially ¶¶91, 93 (see also ¶¶59-64, 69-74).

<sup>76</sup> *Vavilov*, *supra* note 59 ¶59 (quoting *Toronto (City) v CUPE Local 79*, 2003 SCC 63), 60 (giving examples).

<sup>77</sup> *Vavilov*, *ibid* ¶61.

exception” runs into the third and final hurdle: it is inconsistent with *Vavilov*’s handling of international legal obligations. In *Vavilov*, this Court stated that treaties could serve as a contextual factor in the reasonableness analysis, rather than triggering correctness review: “international treaties and conventions [...] can help to inform whether a decision was a reasonable exercise of administrative power.”<sup>78</sup> And in considering Mr. Vavilov’s case, this Court applied a reasonableness review, even though international law played a key role in the statutory interpretation exercise.<sup>79</sup> Music Canada’s proposed “treaty exception” simply cannot be reconciled with how this Court addressed the same issue in *Vavilov*, where it was merely one factor among many in the reasonableness review, and not a shortcut to correctness review.

### **B. Section 2.4(1.1) Clarifies the Scope of the Communication Right**

53. The meaning and effect of s. 2.4(1.1) are questions of statutory interpretation. Regardless of whether such questions are answered by a court or a tribunal, they are answered in the same way: by considering the text, context, and purpose of the provision in question.<sup>80</sup> Where the text of a provision is clear, text plays a dominant role; as the text becomes more ambiguous, context and purpose play correspondingly greater roles.<sup>81</sup> External factors must also be considered, including notably past decisions by this Court, which place constraints on available interpretations.<sup>82</sup>

54. Here, the text, context, and purpose of s. 2.4(1.1) converge towards a shared conclusion: this provision is a definition, and that definition is intended to clarify the scope of the communication right. Parliament included s. 2.4(1.1) in the *Act* in order to clarify that the communication right covers not just traditional “push” broadcast techniques, but also point-to-point or “pull” communications of the Internet age.<sup>83</sup> Text, context, and purpose are unanimous in confirming that Parliament did not intend to create a new copyright. This Court’s judgments in *ESA* and *Rogers* reinforce that conclusion.

55. The Copyright Board failed to properly engage with the above factors, and instead

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<sup>78</sup> *Vavilov*, *ibid* ¶114.

<sup>79</sup> *Vavilov*, *ibid* ¶169 (reasonableness), 172, 177, 180, 182, 192, 194-195 (international law).

<sup>80</sup> *Vavilov*, *supra* note 59 ¶118 (principle), 181-183 (illustration); *York*, *supra* note 5 ¶75, 31, 33, 47; *Alexion Pharmaceuticals v Canada (AG)*, 2021 FCA 157 ¶36.

<sup>81</sup> *Vavilov*, *ibid* ¶120; *Canada Post v Canadian Union of Postal Workers*, 2019 SCC 67 ¶49.

<sup>82</sup> *Vavilov*, *ibid* ¶112; *Alexion Pharmaceuticals*, *supra* note 80 ¶7, 26-27, 48-49, 51.

<sup>83</sup> See e.g. *Rogers*, *supra* note 4 ¶2, 32-40, 46-49.

embarked on a results-based approach to statutory interpretation.<sup>84</sup> As a result, regardless of the standard of review that is applied, the Board’s interpretation cannot stand.

### i. Text

56. The text of s. 2.4(1.1) is straightforward. In both English and French, it provides an extended definition of the communication right, one that clarifies the nature of the telecommunications to which it applies (all emphasis added):

<b>Communication au public par télécommunication</b>	<b>Communication to the public by telecommunication</b>
<p>(1.1) Pour l’application de la présente loi, <u>constitue notamment une communication au public par télécommunication</u> 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</p>	<p>(1.1) For the purposes of this Act, <u>communication of a work or other subject-matter to the public by telecommunication</u> <i>includes</i> 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</p>

57. This kind of provision is well-known to legislators and lawyers alike: it is a statutory definition. Its form and wording are similar to many other statutory definitions which have been considered by this Court over the years.<sup>85</sup> As this Court noted in *Canadian Transit Co*, such provisions have an important but limited role to play in statutory interpretation: “A definition simply provides the meaning for a term used in the legislation.”<sup>86</sup>

58. Here, the use of “includes” or “notamment” signals that the definition serves to extend or clarify the scope of the base term which is being defined.<sup>87</sup> Or as the Nova Scotia Court of Appeal put it: “[...] subsections using the word ‘includes’ have no such restrictive meaning but enlarge the meaning of the word to cover something which would not otherwise be included in the term, or the

<sup>84</sup> *Vavilov*, *supra* note 59 ¶102, 120-121, 133-134; *Alexion Pharmaceuticals*, *supra* note 80 ¶37, 43-44.

<sup>85</sup> See e.g. *Copthorne Holdings v The Queen*, 2011 SCC 63 ¶74, 75, 108; *Re:Sound v Motion Picture Theatre Associations of Canada*, 2012 SCC 38 ¶33-36.

<sup>86</sup> *Windsor (City) v Canadian Transit Co*, 2016 SCC 54 ¶51.

<sup>87</sup> *Laidlaw v Toronto (Municipality)*, [1978] 2 SCR 736 at 744-745; *Nova v Amoco Canada Petroleum Co Ltd*, [1981] 2 SCR 437 at 460-461. The same approach prevails in Britain: *Dilworth v Commissioner of Stamps*, [1899] AC 99 at 105-106 (UKHL); *Inland Revenue Commissioners v Joiner*, [1975] 3 All ER 1050 at 1060-1061 (UKHL) per Lord Diplock.

inclusion of which would be doubtful.”<sup>88</sup> This precise function has been recognized with respect to the definitions contained in the *Copyright Act*: “Definitions are used for convenience and to bring more precision to a legislative text.”<sup>89</sup>

59. As a result, this Court has noted that litigants are generally ill-advised to rely on definitions as a source of novel rules of substantive law.<sup>90</sup> This is particularly true for the *Copyright Act*, since when Parliament desires to create new monetary obligations under the *Act*, “it does so with ‘clear and distinct legal authority showing that this was Parliament’s intent’.”<sup>91</sup> This observation applies equally to the creation of new exclusive rights which impose monetary obligations on users.

60. Indeed, the text of s. 2.4(1.1) is utterly unlike the text of the true rights-creating provisions elsewhere in the *Act*, all of which use “clear and distinct” language to establish new copyrights. For example, the text of section 3(1) opens with express rights-creation language: “For the purposes of this Act, copyright, in relation to a work, means the sole right to [...]” The communication right described in 3(1)(f) is similarly introduced with express rights-creating language: “copyright [...] includes the sole right [...] in the case of any literary, dramatic, musical or artistic work, to communicate the work to the public by telecommunication.” Equally explicit language is used to create copyrights for performances, sound recordings, and broadcasts.<sup>92</sup> By contrast, there is no rights-creation language whatsoever in s. 2.4(1.1).

61. In conclusion, the text of s. 2.4(1.1) is straightforward and unambiguous: this subsection supplies a definition which clarifies the scope of the communication right. Nothing about the text of this definition suggests that it was intended to create a new copyright. This textual interpretation is reinforced by the statutory context in which s. 2.4(1.1) appears.

## ii. Context

62. The context of a statutory provision includes the other relevant provisions of the Act,

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<sup>88</sup> *R v Jollimore*, [1950] NSJ 5 ¶11 (CA; five judge panel) [emphasis added], approved by a majority of this Court in *R v Gaysek*, [1971] SCR 888 at 893.

<sup>89</sup> *Canadian Cable Television Assoc v Canada (Copyright Board)*, [1993] FCJ 3 ¶13 (CA) [emphasis added]. See also *Re:Sound*, *supra* note 85 ¶29 (“This definition has a bearing on the limits of the right”), 34-35.

<sup>90</sup> *Canadian Transit Co*, *supra* note 86 ¶51.

<sup>91</sup> *York*, *supra* note 5 ¶32 (quoting *CBC* ¶107).

<sup>92</sup> *Copyright Act*, RSC 1985, c C-42, s 15(1), 15(1.1), 18(1), 18(1.1), 21(1), 26(1) (all including “sole right” language). See also ss 19(1)-19(1.2) (recognizing “entitle[ment] [...] to be paid equitable remuneration.”)

permissible extrinsic aids, and the principles underlying the Act.<sup>93</sup> Here, at least five contextual factors confirm that s. 2.4(1.1) was never intended to create a new copyright.

63. The first and most obvious contextual factor is that section 2.4(1.1) lies outside section 3 of the *Copyright Act*. That statement may seem obvious from a mathematical standpoint, but its legal relevance may be less obvious. Legal relevance flows from the very definition of “copyright” itself. Copyright is exhaustively defined in section 2 of the *Act* as follows: “**Copyright** means the rights described in [...] section 3, in the case of a work.”

64. This definition is exhaustive, as shown by the use of the word “means.” This word has long been accepted as a signal that Parliament intends to create an exhaustive definition,<sup>94</sup> including in the specific context of the *Copyright Act*.<sup>95</sup>

65. Parliament’s intention of achieving exhaustivity is confirmed by section 89 of the *Act*, which limits copyright to just those rights recognized by the *Act*.<sup>96</sup> Sections 3 and 89 thus work together to ensure that the only copyrights recognized in Canada are those which Parliament has chosen to list in section 3, since courts must apply statutory definitions when interpreting the *Act*.<sup>97</sup> It is the combined effects of sections 3 and 89 which ensure that copyright remains “a creature of statute.”<sup>98</sup> As a result, because s. 2.4(1.1) does not appear in section 3, this means that it cannot – by the very terms of the *Copyright Act* – create a new copyright.

66. Indeed, when Parliament wishes to expand the list of existing copyrights, it does so by adding new rights to section 3. This can be seen in the *Copyright Modernization Act* itself, which

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<sup>93</sup> *Copthorne Holdings*, *supra* note 85 ¶91 (general definition of contextual factors), 97, 112 (underlying principles of the Act); *Canada Post*, *supra* note 81 ¶50-53.

<sup>94</sup> See generally *Copthorne Holdings*, *supra* note 85 ¶108; *Laidlaw*, *supra* note 87 at 744.

<sup>95</sup> *ESA*, *supra* note 3 ¶42. Louis Carrière, *ROBIC Annotated Copyright Act*, s. 2 s.v. “copyright” (“As the definition of “copyright” in the *Copyright Act* uses the term “means”, this definition should be understood as exhaustive. [...] “Copyright” is therefore strictly defined and the concept should not be extended beyond the terms indicated in the definition.” at §5.1).

<sup>96</sup> While section 89 allows for the possibility of copyright being granted by “any other Act of Parliament”, no such act exists which could be relevant here. Only the Copyright Act need be considered.

<sup>97</sup> *Venne v Quebec (Commission de la protection du territoire agricole)*, [1989] 1 SCR 880 (“[...] Winzen argued that the word ‘agriculture’ in s. 101 should be given its ordinary meaning, not that assigned to it by the Act. This is an untenable proposition which goes against every principle” at 912-913); *Canadian Cable Association v Canada (Copyright Board)*, [1993 FCJ 3 ¶13 (CA).

<sup>98</sup> *CCH Canadian*, *supra* note 7 ¶9.

added the so-called “distribution right” to section 3 as 3(1)(j).<sup>99</sup> Parliament’s conscious choice to add the distribution right to section 3, while simultaneously declining to add a “making available right” in the same section, is a compelling contextual clue about how to interpret s. 2.4(1.1). If Parliament had intended to create a freestanding “making available right,” it would have simply added that right to section 3, just like it did for the distribution right. By declining to do so, Parliament signalled its intent to clarify the scope of an existing right, rather than create a new one.

67. A second contextual factor is the location of s. 2.4(1.1) within the *Copyright Act*. Section 2.4(1.1) is placed within a Part of the Act titled “Interpretation,” which immediately suggests that it serves a definitional function.<sup>100</sup> This suggestion is reinforced by s. 2.4(1.1)’s placement within that Part, since it is placed in the middle of a series of provisions that all share a similar function, namely to supplement or clarify definitions or concepts found elsewhere in the *Act*.<sup>101</sup> The Act treats s. 2.4(1.1) like any of the other provisions in this series, reinforcing its definitional function.

68. The third contextual factor is the inconsistencies which would be introduced into the *Act* by adopting SOCAN’s interpretation. Many such contradictions could be cited, but one is particularly flagrant. At s. 2.1, Parliament has carefully defined the publication right so that it **includes** “making copies of a work available to the public” while simultaneously **excluding** “the communication [of a work] to the public by telecommunication.”<sup>102</sup> Yet SOCAN’s position is that offering downloads (i.e. making digital copies of a work available to the public) is an example of communicating a work to the public via telecommunication. That approach cannot be reconciled with the definition of “publication.” Downloads would be included under section 2.2(1)(a) because copies are made available to the public, but then excluded under section 2.2.(1)(d) because they are also telecommunications. The fundamental definition of “publication” becomes contradictory under SOCAN’s theory; this reinforces the conclusion that Parliament could not have intended to introduce such contradictions and uncertainty into the Act.

69. The fourth and fifth contextual factors are the twin principles which underlie the *Copyright*

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<sup>99</sup> *Copyright Modernization Act*, SC 2012, c 20, s 4, adding s 3(1)(j) to the Act.

<sup>100</sup> The interpretative “Part” is not numbered, in contrast to Parts I-IX which follow.

<sup>101</sup> *Copyright Act*, RSC 1985, c C-42, ss 2.1-2.5, 2.7 (section 2.6 being a regulation-making power related to certain other definitions).

<sup>102</sup> *Copyright Act*, RSC 1985, c C-42, s 2.2(1)(a) (making copies available), 2.2(1)(c) (excluding telecommunication).

*Act*, namely technological neutrality and the balance between copyright users and copyright owners. Given their importance, these principles are addressed separately in sections C-D, below.

### iii. Purpose

70. The final consideration when interpreting a statutory provision is the purpose that the provision in question was intended to serve. “Purpose” refers to the purpose of the specific provision or group of provisions being interpreted, since the Act as a whole may serve a variety of purposes, some of which may be in tension with others.<sup>103</sup> This observation is particularly true for the *Copyright Act*, which must balance the rights of owners and users of copyright. With respect to s. 2.4(1.1), that purpose can be understood through two sources: this Court’s jurisprudence, and the legislative history.

71. This Court’s rulings in *ESA* and *Rogers* both provide insight into the purpose served by s. 2.4(1.1). Although these decisions were rendered before it became law, they address the purpose and legislative history of the communication right in general, which is the same right whose scope is at issue here. Indeed, *Rogers* even uses “making available” language and interprets the very copyright treaty on which SOCAN bases so much of its argument before this Court.

72. In *ESA*, this Court reviewed the legislative history of the communication right and issued its authoritative statement about how the communication right fits into the rest of the copyright bundle. This Court noted that there are three distinct rights within the copyright bundle, which are introduced with the word “means” at the outset of section 3; these rights are reproduction, performance, and publication.<sup>104</sup> The other rights listed at sections 3(1)(a)-(j) are not separate or additional rights, but rather illustrations of reproduction, performance, or publication rights.<sup>105</sup> In particular, the communication right is merely an aspect of the performance right.<sup>106</sup>

73. Due to technological changes, Parliament has amended the communication right many times in order to capture different ways in which a performance of a work can reach the public.<sup>107</sup>

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<sup>103</sup> *Cophorne Holdings*, *supra* note 85 ¶113; *Vavilov*, *supra* note 59 ¶118; *York*, *supra* note 5 ¶47.

<sup>104</sup> *ESA*, *supra* note 3 ¶42

<sup>105</sup> *Ibid* ¶42.

<sup>106</sup> *Ibid* ¶25-26, 42.

<sup>107</sup> *Ibid* ¶12, 16-25. See also *Rogers*, *supra* note 4 ¶37-38.

But the underlying nature of the right was never amended, and it remained a right concerned with performances of a work and not making copies (i.e. reproductions) of a work:

[25] In this context, the replacement of the words “radio communication” with “telecommunication” should be understood as merely expanding the means of communicating a work – that is, from radio waves (“by radio communication”) to cable and other future technologies (“to the public by telecommunication”). In our view, by substituting the word “telecommunication” in 1988, Parliament did not intend to change the fundamental nature of the communication right, which had for over 50 years been concerned with performance-based activities. Instead, Parliament only changed the means of transmitting a communication. The word “communicate” itself was never altered.

[39] Therefore, the term “communicate” in s. 3(1)(f), which has historically been linked to the right to perform, should not be transformed by the use of the word “telecommunication” in a way that would capture activities akin to reproduction. Such transformation would result in abandoning the traditional distinction in the Act between performance-based rights and rights of reproduction. There is no evidence either in 1988 or in subsequent amendments to the Act that Parliament intended such abandonment.<sup>108</sup>

74. With s. 2.4(1.1), Parliament has once again modified the scope of the communication right in order to clarify the “means of communication” to which it applies. And once again, Parliament has chosen to leave untouched the performance-based nature of the communication right: neither “performance” nor “communicate” have been amended by the *Copyright Modernization Act*. Indeed, Parliament reiterated the performance-based nature of the right by including “communication” in the text of s. 2.4(1.1), and by speaking of “access” (“accès à”) to the work, rather than any right to obtain a permanent copy (reproduction) of the work.

75. The result is that s. 2.4(1.1) does not change the performance-based nature of the

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<sup>108</sup> *Ibid* ¶25, 39 [underlining added; italic emphasis in the original].

communication right and *ESA*'s guidance on this point remains relevant. Just like in 2012, there is no evidence in 2021 that Parliament intended to abandon the performance/reproduction distinction that is so fundamental to the *Copyright Act*. Indeed, *SOCAN*'s argument amounts to saying that Parliament intended to turn the communication right into a right that doesn't require communication. There is no evidence in the record that Parliament intended anything of the sort.

76. Turning to *Rogers*, this Court squarely addressed how the *Act* should be applied to “on-demand” technologies that allow users to access works at times and places of their own choosing. In doing so, this Court identified the ambiguity in the existing law which s. 2.4(1.1) was intended to resolve. That ambiguity is the following: does the communication right cover only traditional “broadcast” technologies, or does it also cover “point-to-point or “on-demand” technologies:

The advent of on-demand technologies, and the Internet in particular, led to questions as to whether such new telecommunication technologies were encompassed in the communication right existing under the Berne regime. While it was possible to interpret the relevant articles as extending to on-demand transmissions over the Internet, there was ambiguity [...].<sup>109</sup>

77. This court expressly characterized the ambiguity as involving whether the communication right was triggered when a work is “made available” to the public via on-demand technologies.<sup>110</sup>

78. The *Rogers* court resolved this ambiguity by ruling that Canada's existing communication right captured the making available of works via on-demand technologies.<sup>111</sup>

79. In so doing, *Rogers* expressly considered the “making available” language of the WIPO Copyright Treaty (WCT), and its relationship with the prior Berne treaty.<sup>112</sup> This Court noted that the “making available” language of the WCT was intended to address the very same ambiguity that was being debated in *Rogers*.<sup>113</sup> The *Rogers* court ultimately endorsed the following view of the

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<sup>109</sup> *Rogers*, *supra* note 4 at ¶43 [emphasis added].

<sup>110</sup> *Ibid* ¶40, 56. See also ¶3 (device and place); 8, 34 (time); 43-48, 52 (making available on demand).

<sup>111</sup> *Ibid* ¶40, 52-57.

<sup>112</sup> *Ibid* ¶41-49.

<sup>113</sup> *Ibid*.

WCT's making available language:

In the end, “[t]he core concept of ‘making available’ . . . can fairly be called neither a reaffirmation nor a novelty, for it resolves an ambiguity as to whether the old communication to the public rights accommodated or excluded ‘pull technologies’.”<sup>114</sup>

80. *Rogers* confirms that the primary purpose of the making available language found in the WCT and carried over to the *Copyright Act* is to address the ambiguity about the scope of the communication right, and in particular, whether it applies when works are made available via on-demand technology.

81. *Rogers*' interpretation of the WCT “making available” language provides an important signal of the purpose which led to the inclusion of that same language into Canada's *Copyright Act*. Specifically, *Rogers* confirms that this language was added in order to clarify the scope of an existing right relative to new technologies, rather than to create a new copyright.

82. Second, this interpretation is supported by the legislative history across the three bills that were introduced before the passage of Bill C-11, which would become the *Copyright Modernization Act*, in 2012. Parliament has consistently presented s. 2.4(1.1)'s purpose as being the clarification of an existing right, and not the creation of a *sui generis* right.

83. In the Legislative Summary published with Bill C-60, a predecessor to Bill C-11, the making available provision is characterized as one that “changes the definition of communication to the public found in section 2.4(1)(a) of the Act to include making the work available in a way that allows members of the public to access it on demand.”<sup>115</sup> Consistent with the government's statement, s. 2.4(1.1) was introduced to the Act as an inclusive definition. A similar explanation is given in the Legislative Summary that accompanied Bill C-32, another predecessor to Bill C-11:

Clause 3 of the bill adds a new subsection to section 2.4 of the Act, clarifying that the definition “communication of a work or other subject-matter to the public by

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<sup>114</sup> *Ibid* ¶48, citing JC Ginsburg, “The (new?) right of making available to the public”, in D Vaver & L Bently, eds, *Intellectual Property in the New Millennium: Essays in Honour of William R. Cornish* (2004) 234 at 246.

<sup>115</sup> Legislative Summary, Bill C-60, 1st session, 38<sup>th</sup> Parliament [emphasis added].

telecommunication” includes making a work available by telecommunication [...].<sup>116</sup>

84. Similarly, at the second reading of Bill C-11, parliamentarians explained that this addition to the *Act* would “allow copyright owners to control how their works are made available online.”<sup>117</sup> Once again, the focus is on clarifying that the communication right applies to modern Internet-based telecommunications.

85. As important as what the legislative history says is what it does *not* say. There is a remarkable silence on the issues which SOCAN presents as the core of s. 2.4(1.1). At no point do Parliamentarians remark that they are creating a new freestanding copyright. Nor do Parliamentarians ever state that this new right’s purpose is to allow SOCAN to double dip on royalties. Still less do they declare an intention to convert the communication right from a performance-based right to a reproduction right. If any of these things were intended by Parliament, surely they would have been debated, and debated vigorously at that? This is an example where Parliament’s silence speaks as clearly as its words: none of these purposes were intended when s. 2.4.(1.1) was enacted.

86. Finally, the post-enactment legislative history is also relevant. *Rogers* and *ESA* precedents are now almost a decade old, and Parliament has had many opportunities to consider whether they should be overruled by legislation. It has repeatedly chosen not to do so. Parliament’s silence over such a long period “strongly suggests” its intent to maintain the balance previously struck.<sup>118</sup>

87. These opportunities included – most recently and most importantly – the five-year statutory review of the *Copyright Act*. That review concluded in 2019, some seven years after *ESA* and *Rogers* were handed down. The statutory review involved submissions from roughly 250 representatives of the copyright community, including SOCAN and Music Canada.<sup>119</sup> Parliament issued a report of 182 pages, containing 22 separate recommendations. The report specifically

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<sup>116</sup> Legislative Summary, Bill C-32, 3<sup>rd</sup> session, 40<sup>th</sup> Parliament [emphasis added].

<sup>117</sup> Bill C-11, 1<sup>st</sup> sitting, 41<sup>st</sup> parliament, February 10, 2012 (Cornelius Chisu).

<sup>118</sup> *Reference re Broadcasting Regulatory Policy CRTC 2010-167*, *supra* note 9 ¶73.

<sup>119</sup> *Report of the Standing Committee on Industry, Science and Technology*, Dan Ruimy, Chair, Statutory Review of the Copyright Act (Industry Canada, 2019) at Appendix A. For the participation of SOCAN and Music Canada, see pages 132-133, 147-148.

noted this Court’s Pentalogy rulings, including *ESA*.<sup>120</sup> None of these recommendations dealt with overruling *ESA* or *Rogers*, nor with redefining the scope of the “making available provision.” Nor is there any suggestion that Canada’s copyright law is out of step with international norms.<sup>121</sup>

88. If Parliament thought that *ESA* and *Rogers* were incompatible with Canada’s treaty obligations or its own legislative intent, it would have recommended changes to the *Copyright Act*. No changes have been recommended, let alone made, notwithstanding SOCAN and Music Canada’s participation in the 2019 statutory review.

89. Considered both individually and collectively, *ESA*, *Rogers*, and the legislative history confirm that the purpose of 2.4(1.1) was one of clarification, not revolution.

#### **iv. Conclusion**

90. The plain text of 2.4(1.1) marks it out as a statutory definition, and not as an attempt to create a new copyright. This interpretation is confirmed by the statutory context: many other provisions of the *Act* signal that s. 2.4(1.1) was not intended to create a new copyright, notably the exhaustive definition of “copyright” contained in section 2 of the *Act*. Finally, the text and context of s. 2.4(1.1) are aligned with the evidence of its purpose provided by this Court’s decisions in *ESA* and *Rogers*, and by the legislative intent. *Rogers* in particular shows that “making available” language was adopted in order to resolve ambiguities about how existing rights apply to on-demand technologies, and not to work a revolution in copyright law as SOCAN proposes.

91. This conclusion is reinforced by consideration of the twin principles which underly the *Copyright Act* as a whole: the balance between users and owners of copyright, and technological neutrality. These two principles are addressed in the sections C-D, below.

### **C. A Freestanding “Making Available Right” Would Violate the User-Owner Balance**

92. This Court has held time and again that the “extent of copyright” should always be determined in light of the need to balance the limited rights of copyright owners against the rights

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<sup>120</sup> *Ibid* at page 13.

<sup>121</sup> The only international copyright treaty referenced in the report is the Marrakesh Treaty regarding copyright exceptions to benefit persons with perceptual disabilities (*ibid*, at pages 13, 87).

of users, the whole in the public interest.<sup>122</sup> An integral part of this balance is the users' rights and exceptions contained in the *Act*.<sup>123</sup> That balance would be upset by recognizing a freestanding "making available right." Doing so would "break" many of the users' rights contained in the *Act*, as well as the *Reproduction of Federal Law Order* which otherwise guarantees free access to the law online. Such an interpretation must be rejected, since copyright "should not be read so broadly" that it risks "making inoperative" the limits that Parliament has built into the *Act*.<sup>124</sup>

93. On the first point, most of the users' rights (exceptions) in the *Copyright Act* are written to address either the performance right or the reproduction right, but not both. This drafting makes sense given the longstanding distinction between these two rights.<sup>125</sup> However, if the communication right is held to be infringed any time a work is merely "made available" for download online, then key users' rights cease to function in a digital environment. This is because these rights would need to protect against liability for both the reproduction and the "making available" (communication) that would occur when works are put up for download. Because many users' rights protect only against liability under the reproduction right, accepting SOCAN's theory would mean that no downloads can be offered under *any* of these users rights.<sup>126</sup>

94. Take the example of s. 32.2(1)(b), which is the users' right which protects Canadians' ability to do mundane things like take photographs of buildings or create landscape paintings without infringing copyright. This exception is drafted solely in terms of the reproduction right: "It is not an infringement of copyright [...] for any person to reproduce, in a painting, drawing, engraving, photograph or cinematographic work [...] [certain architectural works and public art]." <sup>127</sup> There is no mention of protection from infringement of the communication right in s. 32.2(1)(b), whether by "making available" or otherwise.

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<sup>122</sup> *Rogers*, *supra* note 4 ¶40 (quoted). See also *Théberge*, *supra* note 2 ¶30; *York*, *supra* note 5 ¶90, 103;.

<sup>123</sup> *CCH Canadian*, *supra* note 7 ¶38-39.

<sup>124</sup> *Théberge*, *supra* note 2 ¶22 (refusing to extend the reach of economic rights under s 3 so far that they would override limits placed on moral rights; the case for refusal is even stronger when collectives ask that economic rights be extended so far that they override limitations placed directly on economic rights themselves).

<sup>125</sup> See sources cited *supra* notes 20-22.

<sup>126</sup> Although photocopies and other analog reproductions would be unaffected, as well as, possibly, copies generated by certain fax transmissions.

<sup>127</sup> *Copyright Act*, RSC 1985 c C-42, s 32.2(1)

95. This means that if SOCAN's interpretation of s. 2.4(1.1) is accepted, Canadians can continue taking photographs of buildings, but they can no longer upload their photographs online. The instant they tried to make their photos available for download, they would have violated the so-called "making available" right and incurred copyright liability. This occurs because s. 32.2(1)(b) does not exempt infringement of the public performance right. As a result, s. 32.2(1)(b) would be confined largely to offline activities, whereas today it protects both online and offline activities. In other words, 32.2(1)(b) would break.

96. This breakage is a direct and unavoidable outcome of SOCAN's "making available" theory, since exceptions and users' rights were never intended to operate in a *Copyright Act* which contained a freestanding "making available right." The fact that exceptions fail to function as intended is a strong signal that SOCAN's argument is bad law: Parliament would never have introduced a "making available right" which destroyed the balance inherent in the carefully-crafted network of exceptions at ss. 29.21-32.2 of the *Copyright Act*.

97. Second, a freestanding "making available right" would be equally destructive to Canadians' free access to the law. Currently, access to the law at the federal level is guaranteed by the *Reproduction of Federal Law Order*, which provides a royalty-free copyright licence covering only reproduction-based activities:

And whereas the Government of Canada wishes to facilitate access to its law by licensing the reproduction of federal law without charge or permission;

[...]

Anyone may, without charge or request for permission, reproduce enactments and consolidations of enactments of the Government of Canada, and decisions and reasons for decisions of federally-constituted courts and administrative tribunals, provided due diligence is exercised in ensuring the accuracy of the materials reproduced and the reproduction is not represented as an official version.<sup>128</sup>

98. This is another example of a users' right framed entirely in terms of reproduction. If

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<sup>128</sup> *Reproduction of Federal Law Order*, SI/97-5, French version amended by SI/98-118.

SOCAN was correct that there is now a “making available right” triggered whenever a work is “made available” for download, then allowing people to download copies of federal statutes and judicial decisions from the internet would be offside the *Reproduction of Federal Law Order*. As a result, those same activities would presumptively violate Crown copyright.<sup>129</sup>

99. Once again, this cannot be the law. This document is the cornerstone for access to the law, and would not be lightly set aside. If Parliament had intended to create a right that would render the *Reproduction of Federal Law Order* inoperative in a digital environment, then surely it would have taken steps to amend that order. The fact that Parliament did not see any need to do so is a further indication that no such “making available right” was created by s. 2.4(1.1).

100. As the examples above illustrate, recognizing SOCAN’s “making available right” would disrupt the user-owner balance in ways whose effects are far-reaching and difficult to predict. Such consequences counsel against the interpretation which SOCAN proposes.

#### **D. A Freestanding “Making Available Right” Would Violate Technological Neutrality**

101. Absent Parliamentary intent to the contrary, the *Copyright Act* must be interpreted in a technologically-neutral manner.<sup>130</sup> Despite SOCAN’s arguments, its proposed interpretation of the *Copyright Act* would violate technological neutrality in two rather obvious ways. One of those two ways relates to the downloading of music, the second to the streaming of music.

102. With respect to downloads, SOCAN’s interpretation would re-introduce the same double-dipping problem identified and resolved in *ESA*. In *ESA*, this Court was faced with fundamental questions about how the rights of reproduction and public performance should be applied in an internet context. Specifically, this Court was asked to decide whether a download was a reproduction, a public performance, or both. There, this Court held that a transmission of a musical work over the Internet cannot be both an act of reproduction and an act of public performance. Online streaming and downloads were, respectively, public performances and reproductions.<sup>131</sup> Because streams and downloads each involved only one right in the copyright bundle, each activity

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<sup>129</sup> *Copyright Act*, RSC 1985, c C-42, s 12; *Keatley*, *supra* note 9 ¶31, 50-52 (majority); 129, 142 (minority).

<sup>130</sup> *CBC*, *supra* note 9 ¶66; *ESA*, *supra* note 3 ¶9.

<sup>131</sup> *ESA*, *ibid* ¶4-5.

attracted only one payment of royalties.<sup>132</sup> In particular, because downloads were not public performances, SOCAN could not collect royalties for downloads.<sup>133</sup>

103. *ESA* specifically rejected SOCAN’s argument that copyright owners should be allowed to charge two royalties for downloads.<sup>134</sup> This Court warned against any interpretation that, like SOCAN’s position, would result in “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.”<sup>135</sup> *ESA* made clear that both technological neutrality and the user-creator balance would be harmed by charging multiple royalties for a single activity.<sup>136</sup>

104. Here, SOCAN argues that s. 2.4(1.1) allows owners to collect two royalties for every download: one performance royalty when the work is “made available,” and one reproduction royalty when the work is actually downloaded. When the same musical work is sold to a consumer on a physical medium like a CD, it is common ground that only the reproduction royalty is payable. Yet as this Court recognized in *ESA*, these are functionally-equivalent activities: “In our view, there is no practical difference between buying a durable copy of the work in a store, receiving a copy in the mail, or downloading an identical copy using the Internet.”<sup>137</sup>

105. As a result, *ESA* held that SOCAN could not attempt to charge two royalties for this transaction:

SOCAN has never been able to charge royalties for copies of video games stored on cartridges or discs, and bought in a store or shipped by mail. Yet it argues that identical copies of the games sold and delivered over the Internet are subject to both a fee for reproducing the work and a fee for communicating the work. The principle of technological neutrality requires that, absent evidence of Parliamentary intent to

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<sup>132</sup> *ESA*, *ibid* ¶12, 32-41, especially ¶41.

<sup>133</sup> Although of course SOCAN remained free to collect royalties for streaming of music.

<sup>134</sup> *ESA*, *supra* note 3 ¶12, 32-41.

<sup>135</sup> *ESA*, *ibid* ¶9 [italics in the original].

<sup>136</sup> *ESA*, *ibid* ¶9-11. See also Ariel Katz, “Commentary: Is Collective Administration of Copyrights Justified by the Economic Literature?”, in Marcel Boyer, Michael Trebilcock and David Vaver, eds., *Competition Policy and Intellectual Property* (2009), 449.

<sup>137</sup> *ESA*, *ibid* ¶5.

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.<sup>138</sup>

The very argument that SOCAN advances here has previously been considered and rejected by this Court on the basis of technological neutrality.

106. SOCAN has not pointed to any evidence that Parliament intended to depart from the principle of technological neutrality when it enacted s. 2.4(1.1). Instead, both SOCAN and Music Canada accept that the principle of technological neutrality applies to this appeal.<sup>139</sup> That principle weighs strongly against interpreting s. 2.4(1.1) as creating a “making available” right that would allow layering of royalties online, but not otherwise. Indeed, one of the primary purposes of technological neutrality is to prevent the imposition of additional royalties based solely on the use of more efficient digital technologies.<sup>140</sup> That is precisely what SOCAN attempts to do here. SOCAN’s arguments in favour of such a result are not compatible with a technologically-neutral application of the *Act* and should be rejected on that basis.

107. With respect to streaming music, SOCAN’s argument would re-introduce the arbitrary distinctions between business models that were rejected by this Court in *Rogers*. In *Rogers*, this Court held that the *Copyright Act* must be applied similarly to traditional broadcast technologies and to more recent on-demand technologies: “Whether a business chooses to convey copyright protected content in a traditional, ‘broadcasting’ type fashion, or opts for newer approaches based on consumer choice and convenience, the end result is the same. The copyrighted work has been made available to an aggregation of individuals of the general public.”<sup>141</sup> This Court specifically refused to treat “streaming of files from the Internet” any differently from traditional broadcasting techniques.<sup>142</sup>

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<sup>138</sup> *ESA*, *ibid* ¶9 [italics in the original; underlining added].

<sup>139</sup> See e.g. SOCAN Factum ¶20, 38(d), 89; Music Canada Factum ¶2-3, 6, 28.

<sup>140</sup> *ESA*, *supra* note 3 ¶4-5, 9.

<sup>141</sup> *Rogers*, *supra* note 4 ¶40 [emphasis added]. See also ¶39, quoting *SOCAN v CAIP*.

<sup>142</sup> *Rogers*, *ibid* ¶5 (see also ¶54).

108. SOCAN’s proposed interpretation of s. 2.4(1.1) violates the core holding of *Rogers*. It is common ground that a traditional broadcaster pays only one royalty to SOCAN when it broadcasts a song. Yet SOCAN argues that an internet broadcaster should pay two royalties when it broadcasts the same song via on-demand streaming: one royalty when the song is “made available” for streaming, and a second royalty when the stream is accessed and the communication occurs. So even if the two radio stations reach the same audience, and generate the same revenues, SOCAN’s approach requires the internet radio station to pay two royalties, while the traditional broadcaster pays only once. The direct (and intended) consequence is that SOCAN’s making available theory would entrench a permanent difference between “push” and “pull” technologies. That was the very result which *Rogers* sought to avoid.<sup>143</sup> Once again, there is an impermissible violation of technological neutrality which should be rejected by this Court.

109. To sum up: for both downloads and streams, SOCAN’s approach creates differential treatment and a second layer of royalties in situations where this Court has previously found that technological neutrality requires equal treatment and the payment of a single royalty. This Court, in its *ESA* and *Rogers* decisions, was deeply concerned about the layering of rights for a single transaction, as well as the inefficiency and unfairness which result from sets of ‘stacked’ copyright fees. By contrast, the Board was entirely unconcerned with layering or double dipping in reaching its Making Available Decision. Such a result is contrary to technological neutrality, and should be rejected.<sup>144</sup>

### **E. SOCAN’s Ancillary Arguments Are Unfounded**

110. SOCAN advances a variety of *in terrorem* arguments, none of which are supported by the record below, nor by the applicable law. In particular, none of these arguments displaces the statutory interpretation arrived at after considering the text, context, and purpose of s. 2.4(1.1).

#### **i. Section 2.4(1.1) is Not a Deeming Provision**

111. SOCAN argues that s. 2.4(1.1) is some sort of implied deeming provision. This appeal to

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<sup>143</sup> Indeed, it is directly contrary to a ruling by this Court from the 1960s which rejected the idea that “the extent of the copyright with respect to the communication or transmission of performances of musical works, would depend on the means employed for such communication or transmission”: *Composers, Authors and Publishers Assoc of Canada v CTV Television Network*, [1968] SCR 676 at 682-683.

<sup>144</sup> *ESA*, *supra* note 3 ¶11; *Rogers*, *supra* note 4 ¶2.

implication is necessary because the text of s. 2.4(1.1) does not include the word “deem.” However, that omission is surely intentional, since when Parliament wishes to create a legal fiction via deeming in the *Copyright Act*, it does so expressly. This can be seen from the immediate context of s. 2.4(1.1) itself, and from the legislative history of the *Copyright Modernization Act*.

112. The consistent pattern of the *Copyright Act* is to use express deeming language when creating deeming provisions. Express language is used in ss. 2.1(1), 2.2(2), 2.2(3), 2.2(4), and 2.3, including provisions dealing with the scope of the communication right like s. 2.3. Elsewhere in the *Act*, deeming provisions are expressly identified as such by their titles.<sup>145</sup> This same deeming language is then entirely omitted from s. 2.4(1.1). It would be implausible for Parliament to follow a consistent pattern of usage elsewhere in the *Act*, only to abandon it in the case of s. 2.4(1.1).

113. Moreover, the *Copyright Modernization Act* (the statute which created s. 2.4(1.1) in the first place), uses the word “deem” or “deeming” no less than 18 times. Clearly, Parliament does not hesitate to use the word “deem” as a term of art when it is creating legal fictions in the *Act*. And yet once again, this same statute omitted any deeming language from the text and from the title of s. 2.4(1.1). Once again, this would be an implausible oversight for Parliament. It is most unlikely that the word “deem” was used intentionally 18 times and unintentionally omitted the 19<sup>th</sup> time Parliament wished to create a deeming provision. Nor does the legislative history of the *Copyright Modernization Act* contain statements by Parliamentarians calling s. 2.4(1.1) a deeming provision. The omission is telling.

114. This Court’s jurisprudence teaches that one should not conflate a definition and a deeming provision, since the two serve different statutory purposes and have different legal effects.<sup>146</sup> As explained above in section B, the text, context, and purpose of s. 2.4(1.1) confirm that it is a definition provision. There is no textual, contextual or purposive evidence that it was intended to be a deeming provision.

## ii. There is No “Tariff Gap” in the *Copyright Act*

115. SOCAN argues that unless its interpretation of s. 2.4(1.1) is adopted, there will be “gaps”

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<sup>145</sup> See titles to e.g. *Copyright Act*, RSC 1985, c C-42, ss 19.1, 19.2, 28.2(2), 30.02(6), 30.2(5.01), 38.1(1.11), 66(7).

<sup>146</sup> *R v Verrette*, [1978] 2 SCR 838 at 844.

in the *Copyright Act*, such that some business models will not be subject to any tariff at all. This submission is unsupported by any evidence of a single business model that is operating beyond the tariff system. Moreover, it is contradicted by the outcome of the Board Rate Decision below.

116. The Board Rate Decision considered a variety of ways in which music is used online, ranging from limited downloads to permanent downloads, to three different types of streaming (interactive, semi-interactive, and non-interactive), to hybrid webcasting models, to music videos.<sup>147</sup>

117. Every copyright-protected use of music considered by the Board Rate Decision was subject to a tariff and royalty.<sup>148</sup> No use escaped the Board’s tariff-setting function unless that use was exempted from royalties by a user’s right or was already subject to royalties because it was covered by another tariff.<sup>149</sup> The Board was able to accomplish this objective even though none of its royalties were based on the making available provision, since the Board had found that there was no reliable way to value that activity.<sup>150</sup>

118. The Board Rate Decision demonstrates that there is no “gap” in the tariff system. The Board was able to assign royalties to all relevant activities even though it did not rely on the making available provision at all.

119. This Court’s *ESA-Rogers* framework established clear and workable distinctions between the different rights that make up the copyright bundle. Those distinctions have translated into clear and workable Copyright Board tariffs, without legal uncertainty and without any gaps in in activities subject to tariffs. This system has functioned well and to the advantage of both users and copyright owners. SOCAN’s speculative arguments to the contrary should be rejected.

### **iii. There is No “Piracy Gap” in the *Copyright Act***

120. SOCAN is wrong to present the making available provision as if it were the main or only tool used to combat internet piracy in Canada. That is simply not how s. 2.4(1.1) functions within the scheme of the *Act*’s anti-piracy provisions. Nor is it a relevant submission in the context of a

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<sup>147</sup> Board Rate Decision, *supra* note 42 at pages 54-88.

<sup>148</sup> Board Rate Decision, *supra* note 42 ¶¶141-159, 180-187.

<sup>149</sup> *Ibid* ¶¶160-179 (cloud-based “digital storage locker” services were covered by the users’ right created by s. 31.1(4) of the *Act*), 185-186 (certain webcasts covered by other SOCAN tariffs).

<sup>150</sup> Board Rate Decision, *supra* note 42 ¶¶144-155.

judicial review of the Copyright Board, since the Board does not and cannot address piracy.

121. SOCAN’s “piracy gap” argument is based on looking only at the rights contained in section 3 of the *Act*. Yet the *Copyright Act* contains a wide range of anti-piracy tools outside of s. 3, complemented by non-statutory tools. Statutory anti-piracy tools include: infringement via provision of a service adapted for infringement;<sup>151</sup> secondary infringement via prejudicial sale, distribution, or exposition of a work;<sup>152</sup> infringement via circumvention of a technological protection measure;<sup>153</sup> the “notice-and-notice” regime;<sup>154</sup> criminal liability for knowing infringement,<sup>155</sup> etc. Powerful non-statutory tools are available via *Norwich* orders;<sup>156</sup> search engine de-indexing orders;<sup>157</sup> site-blocking orders;<sup>158</sup> “john doe” reverse class actions;<sup>159</sup> etc. None of these tools depend on the making available right; many predate the right by years or even decades. These potent anti-piracy tools all go unmentioned in SOCAN’s factum.

122. In any event, the Copyright Board is not a forum that awards remedies against pirates. The Board is charged with setting licence terms, and this Court has stated on multiple occasions that a licensee cannot be an infringer (or vice versa).<sup>160</sup> As a result, the Board never considers piracy issues, nor does it ever award remedies against pirates. Only willing licensees can appear before the Board, which means pirates never appear there. Any discussion of piracy is irrelevant to the Board’s mandate and to this judicial review of a Board decision. References to piracy appeared for the first time in SOCAN’s leave materials, and were not debated before the Board.

123. In conclusion, s. 2.4(1.1) is simply not the lynchpin of the anti-piracy system – copyright owners have been combating piracy since long before 2012. When copyright owners proceed against pirates, it is not before the Copyright Board. There is no “piracy gap” here.<sup>161</sup>

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<sup>151</sup> *Copyright Act*, RSC 1985, c C-42, s 27(3)-(4).

<sup>152</sup> *Copyright Act*, RSC 1985, c C-42, s 27(2)(b)-(d).

<sup>153</sup> *Copyright Act*, RSC 1985, c C-42, s 41.1.

<sup>154</sup> *Copyright Act*, RSC 1985, c C-42, s 41.25-41.27; *Rogers Communications v Voltage Pictures*, 2018 SCC 38.

<sup>155</sup> *Copyright Act*, RSC 1985, c C-42, s 42(1).

<sup>156</sup> *Voltage Pictures*, *supra* note 154 ¶18-19.

<sup>157</sup> *Google v Equustek Solutions*, 2017 SCC 34.

<sup>158</sup> *Teksavvy Solutions v Bell Media*, 2021 FCA 100.

<sup>159</sup> *Voltage Pictures*, *supra* note 154 ¶5.

<sup>160</sup> *York*, *supra* note 5 ¶33-38 (especially ¶34); *CBC*, *supra* note 9 ¶108, 111.

<sup>161</sup> It bears mentioning that all of the respondents are copyright owners in their own right, and they are confident that

**iv. There is No “Treaty Gap” in the *Copyright Act***

124. The WIPO Copyright Treaty does not require a freestanding “Making Available Right”, let alone mandatory double-dipping on royalties. SOCAN argues that Canada, as a signatory of the WCT, was required to create a freestanding making available right and therefore section 2.4(1.1) must create a freestanding making available right. This argument is both circular and unsupported by the expert evidence on the record.

125. First, even where Canada is a signatory to an international agreement, the structure of our constitution requires that domestic law always prevail. Thus, even if the WCT required Canada to create a freestanding making available right – and as explained below, it does not – it is the words of s. 2.4(1.1) that are paramount.<sup>162</sup> Regardless of Canada’s status as a signatory of the WCT, the question before this Court is what Parliament intended in enacting the statutory language that it did.<sup>163</sup> Appeals to international agreements are appropriate only if the ordinary tools of statutory interpretation leave this Court in doubt over what Parliament really meant. And as explained in sections B-D, Parliament intended to clarify the scope of the communication right, not revolutionize Canadian copyright law. Indeed, the *Copyright Modernization Act* is quite unlike other treaty-implementation statutes which the federal Parliament has used to adopt international conventions wholesale.<sup>164</sup>

126. Second, the parties before the Board, including ESA and the Networks, filed expert reports which explained why s. 2.4(1.1) was compliant with Canada’s international obligations. This expert evidence confirms that the WCT does not require a free-standing making available right, let alone a right which requires double-dipping on royalties by SOCAN.

127. The WCT does not prescribe specific statutory wording or a specific manner in which authors’ rights to authorize the communication of their works to the public must be protected. Each member country is free to enact legislation as it sees fit. As long as a WCT signatory’s copyright

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regardless of how this case is decided, they will have ample tools to combat piracy.

<sup>162</sup> *National Corn Growers v. Canada (Import Tribunal)*, [1990] 2 SCR 1324 at 1371-1372; *Capital Cities Communications v CRTC*, [1978] 2 SCR 141 at 173; Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6<sup>th</sup> ed (Markham, Ontario: LexisNexis, 2014) at 581. See also *Re: Sound*, *supra* note 85 ¶41, 44, 47-51

<sup>163</sup> Sullivan, *ibid* at 582.

<sup>164</sup> See e.g. *International Sale of Goods Contracts Convention Act*, SC 1991, c 13, s 4; *Carriage by Air Act*, RSC 1985, c C-26, s 2(1); *Marine Liability Act*, SC 2001, c 6, ss 26, 43.

owners have the ability to authorize the making available to the public of their works, then the signatory will have complied with Article 8. Indeed, this was the view of Dr. Mihály Ficscor, an expert who filed a report on behalf of SOCAN.<sup>165</sup>

128. The Objectors' experts, Professors Sam Ricketson and Jeremy de Beer, produced separate reports supporting the view that a freestanding making available right is not required to comply with the WCT.<sup>166</sup> They found that the *Act* does satisfy Canada's obligations under Article 8.<sup>167</sup> This is because the range of rights granted in the *Act*, including the reproduction right and the authorization right, as well as the prohibition on enabling copyright infringement, provide owners with the required protection.<sup>168</sup> These protections are then supplemented by an array of statutory and non-statutory enforcement measures.<sup>169</sup>

129. Professor Ricketson provided the following summary of his conclusions:

I conclude that an interpretation of the Canadian communication right in s 3(1)(f) so as to apply to the interactive making available of works that are streamed only is consistent with the requirements of article 8 of the WCT, so long as there are other exclusive rights, such as the reproduction right, that can apply to the making of transmissions that result or may result in downloads of the works made available. In other words, the Supreme Court interpretation can be applied consistently with the requirements of article 8.<sup>170</sup>

130. This interpretation of s. 2.4(1.1) as a clarifying provision that is designed to cover both making a work available and its access is also supported by the relevant academic literature, including literature cited by this Court in *Rogers*. In an influential paper, Jorg Reinboth and Silke von Lewinski interpret the making available provision as encompassing both the offering of works

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<sup>165</sup> Mihály Ficscor, *Expert opinion on the international norms in the right of making available to the public* (2013) (Appellants' Joint Record at Vol. 3, Tab 38).

<sup>166</sup> Professor Sam Ricketson, "Opinion on Article 8 of the WIPO Copyright Treaty", June 14, 2013 (Appellants' Joint Record at Vol. 4, Tab 39.B); Professor Jeremy de Beer, "Expert Opinion on Canada's Compliance with the WIPO Copyright Treaty", June 14, 2013 (Appellants' Joint Record at Vol. 4, Tab 38 C).

<sup>167</sup> Sam Ricketson, *ibid* at paras. 8, 36.

<sup>168</sup> *Ibid* at paras. 47-50.

<sup>169</sup> See notes 151-159 and surrounding text.

<sup>170</sup> Ricketson, *supra* note 166 at para. 8.

and the transmission to the user as one right:

First of all, the act of “making available” to the public for access covers the offering of works for access and extends to the entire transmission to the user, if such transmission takes place. Accordingly, the mere establishment of a server which may be accessed individually by members of the public and at their choice regarding time and place constitutes the act of making available under Art. 8 of the WCT. If a work is actually accessed, the whole act of communication is covered by the exclusive right, including the offering of the work in a server and its entire transmission up to the terminal from which the member of the public gets access to the work.<sup>171</sup>

131. Finally, it is worth noting that there has been no attempt to rework the *Act* despite the various reviews of the *Copyright Act* that have occurred since 2012. If Parliament believed that the making available right had been fundamentally misunderstood in light of *Rogers*, surely Parliament would have acted.<sup>172</sup>

132. Similarly, the international community has accepted the Canadian approach to copyright law which SOCAN finds so offensive. There have been no protests from our treaty partners that the making available right is not being respected, even from sources that are notoriously vigilant about perceived legislative lapses by Parliament.<sup>173</sup>

133. Of particular note, there is no mention of the making available provision in either the *Comprehensive Economic and Trade Agreement* with the EU or the *Canada-United States-Mexico Agreement*. Both of these treaties required amendments to Canada’s *Copyright Act*, but neither one required any change the scope of the making available provision, let alone any amendment to reverse *ESA* or *Rogers*.<sup>174</sup> Surely Canada’s closest trading partners would have raised the making available right during these negotiations if they thought Canada was in default of its obligations

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<sup>171</sup> Jorg Reinboth & Silke von Lewinski, *The WIPO Treaties 1996: Commentary and Legal Analysis* ( Butterworths, 2002) at 108. See also Claude Bunet, “Le Droit de Mise à disposition” (2013) 25 CPI 903.

<sup>172</sup> See notes 119-121 *supra*, and surrounding text.

<sup>173</sup> Judicial notice may be taken that there have been no USTR complaints against Canada based on the making available right: Office of the United States Trade Representative, Special 301 Report, Intellectual Property.

<sup>174</sup> See e.g. *Canada–United States–Mexico Agreement Implementation Act*, SC 2020, c 1, ss 23-34.

under the WCT or other agreements. The fact that they did not see fit to do so speaks volumes.

134. It is in fact unsurprising that there have been no objections from the United States, since that country does not have a separate “making available right”,<sup>175</sup> let alone a “making available right” which triggers double royalty payments. This position has been confirmed by Marybeth Peters, former Register of Copyrights of the United States who, in a letter to Congress, explained that “the activities involved in making a work available are covered under the exclusive rights of reproduction, distribution, public display and/or public performance set out in Section 106.”<sup>176</sup>

135. The American example shows that the WCT does not compel the results which SOCAN attributes to it. That is why domestic statutory interpretation cannot be subordinated to SOCAN’s treaty arguments – the WCT simply does not require Parliament to act as SOCAN alleges. Different countries have implemented different legislative solutions, and Canada is no different. An open-textured international treaty does not and cannot trump clear domestic legislation.<sup>177</sup>

#### **IV. COSTS**

136. ESA and the Networks request their costs in this Court and before the Federal Court of Appeal.

#### **V. ORDER SOUGHT**

137. ESA and the Networks requests that the appeal be dismissed with costs.

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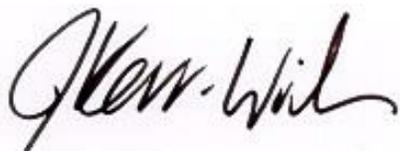
<sup>175</sup> Marybeth Peters, Register of Copyrights, *Hearing on Piracy of Intellectual Property on Peer-to-Peer Networks*, September 25, 2002.

<sup>176</sup> *Ibid.* See also Copyright Office, Library of Congress, *Study on the Right of Making Available’ Comments and Public Roundtable* (February 25 2014); Eric J. Schwartz and Jonathan Zavin, “Brief of Amicus Curiae Motion Picture Association of America, Inc. – Elektra Entertainment Group, Inc. v. Baker: 30(1) *Symposium: Making It Available at Your Own Risk: A Look into Copyright Infringement by Digital Distribution* (2009) at p. 12-13.

<sup>177</sup> See sources cited *supra* note 162.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 14<sup>th</sup> day of September, 2021.

SIGNED BY:



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## VI. TABLE OF AUTHORITIES

AUTHORITY	PARAGRAPH
Case Law	
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2. <i>Alexion Pharmaceuticals v Canada (AG)</i> , <a href="#">2021 FCA 157</a>	53, 55
3. <i>Apple Computer v Mackintosh Computers</i> , <a href="#">[1990] 2 SCR 209</a>	12
4. <i>Apple Computer v Mackintosh Computers</i> , <a href="#">[1987] 1 FC 173 (TD)</a>	12, 15
5. <i>Canada (Citizenship and Immigration) v Vavilov</i> , <a href="#">2019 SCC 65</a>	41, 43, 46, 48, 51,- 53, 55, 70
6. <i>Canada Post v Canadian Union of Postal Workers</i> , <a href="#">2019 SCC 67</a>	53
7. <i>Canadian Cable Association v Canada (Copyright Board)</i> , <a href="#">[1993] FCJ 3 ¶13 (CA)</a>	65
8. <i>Capital Cities Communications v CRTC</i> , <a href="#">[1978] 2 SCR 141</a>	125
9. <i>Copthorne Holdings v The Queen</i> , <a href="#">2011 SCC 63</a>	57, 64, 70
10. <i>Canadian Broadcasting Corp. v SODRAC</i> , <a href="#">2015 SCC 57</a>	11-12, 18-19, 24. 42, 45, 101, 122
11. <i>CCH Canadian v Law Society of Upper Canada</i> , <a href="#">2004 SCC 13</a>	10, 42, 65, 92
12. <i>CMRRA-SODRAC Inc v Apple Canada</i> , <a href="#">2020 FCA 101</a>	34
13. <i>Composers, Authors and Publishers Assoc of Canada v CTV Television Network</i> , <a href="#">[1968] SCR 676</a>	108
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17. <i>Entertainment Software Association v SOCAN</i> , <a href="#">2012 SCC 34</a>	2, 11-12, 15-16,

	18, 22, 39, 42, 64, 72-73, 101- 106, 109
18. <i>Google v Equustek Solutions</i> , <a href="#">2017 SCC 34</a>	121
19. <i>Inland Revenue Commissioners v Joiner</i> , [1975] 3 All ER 1050 at 1060-1061 (UKHL)	58
20. <i>Keatley Surveying v Teranet</i> , <a href="#">2019 SCC 43</a>	11, 98
21. <i>Laidlaw v Toronto (Municipality)</i> , <a href="#">[1978] 2 SCR 736</a>	58, 64
22. <i>National Corn Growers v. Canada (Import Tribunal)</i> , <a href="#">[1990] 2 SCR 1324</a>	125
23. <i>Nova v. Amoco Canada Petroleum Co Ltd</i> , <a href="#">[1981] 2 SCR 437</a>	58
24. <i>R v Audet</i> , <a href="#">[1996] 2 SCR 171</a>	49
25. <i>R v Comeau</i> , <a href="#">2018 SCC 15</a>	31
26. <i>R v Gaysek</i> , <a href="#">[1971] SCR 888</a>	58
27. <i>R v Jollimore</i> , <a href="#">[1950] NSJ 5 ¶11 (CA)</a>	58
28. <i>R v Verrette</i> , <a href="#">[1978] 2 SCR 838</a>	114
29. <i>Re:Sound v Motion Picture Theatre Associations of Canada</i> , <a href="#">2012 SCC 38</a>	57, 125
30. <i>Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168</i> , <a href="#">2012 SCC 68</a>	11, 42, 86
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32. <i>Rogers Communications v Voltage Pictures</i> , <a href="#">2018 SCC 38</a>	121
33. <i>Rogers Communications v SOCAN</i> , <a href="#">2012 SCC 35</a>	2, 12, 16, 20, 42, 44, 45-46, 54, 73, 76-79, 92, 107, 109
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37. <i>SOCAN v CAIP</i> , <a href="#">2004 SCC 45</a>	45, 107
38. <i>Théberge v Galerie d'Art du Petit Champlain</i> , <a href="#">2002 SCC 34</a>	2, 10, 11, 16, 42, 92
39. <i>Teksavvy Solutions v Bell Media</i> , <a href="#">2021 FCA 100</a>	121
40. <i>Toronto (City) v CUPE Local 79</i> , <a href="#">2003 SCC 63</a>	51
41. <i>Venne v Quebec (Commission de la protection du territoire agricole)</i> , <a href="#">[1989] 1 SCR 880</a>	65
42. <i>Vigneux v Canadian Performing Right Society</i> , <a href="#">[1943] SCR 348</a>	10, 18
43. <i>Windsor (City) v Canadian Transit Co.</i> , <a href="#">2016 SCC 54</a>	57
44. <i>York University v Access Copyright</i> , <a href="#">2021 SCC 32</a>	2, 11, 18-20, 24, 42, 53, 70, 92, 122
Legislation and Federal Orders	
1. <i>Canada–United States–Mexico Agreement Implementation Act</i> , <a href="#">SC 2020, c 1</a>	133
2. <i>Carriage by Air Act</i> , <a href="#">RSC 1985, c C-26</a>	125
3. <i>Copyright Act</i> , <a href="#">RSC 1985, c C-42</a>	3, 10, 13, 20, 22, 24, 67, 68, 94, 98, 112, 120-121
4. <i>Copyright Modernization Act</i> , <a href="#">SC 2012, c 20</a>	66
5. <i>International Sale of Goods Contracts Convention Act</i> , <a href="#">SC 1991, c 13</a>	125
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7. <i>Reproduction of Federal Law Order</i> , <a href="#">SI/97-5</a> , French version amended by SI/98-118	97
Legislative History	
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11. Sullivan, Ruth, <i>Sullivan on the Construction of Statutes</i> , 6 <sup>th</sup> ed (Markham, Ontario: LexisNexis, 2014), p. 581	125