

**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. AND APPLE CANADA INC., BELL CANADA,
QUEBECOR MEDIA INC., ROGERS COMMUNICATIONS, SHAW COMMUNICATIONS,
PANDORA MEDIA INC.

Respondents
(Applicants)

AND BETWEEN:

MUSIC CANADA

Applicant
(Respondents)

and

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

Respondents

**FACTUM OF THE RESPONDENTS,
APPLE INC. AND APPLE CANADA INC.**

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

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I. OVERVIEW OF THE RESPONDENTS' POSITION AND FACTS

A. Introduction

1. The sole issue before this Court is the proper interpretation of section 2.4(1.1) of the *Copyright Act*. That section states:

For the purposes of this Act, communication of a work or other subject-matter to the public by telecommunication includes making it available to the public by telecommunication in a way that allows a member of the public to have access to it from a place and at a time individually chosen by that member of the public.¹

2. Despite the fact that the provision simply clarifies the meaning of “communication to the public by telecommunication”, the appellants argue that section 2.4(1.1) grants a free-standing right that is implicated whenever a work is made available to the public, i.e., uploaded online, regardless of whether the work is made available for communication purposes (i.e, for streaming) or solely for reproduction purposes (i.e., for downloading).

3. The appellants ostensibly seek this interpretation in order to prevent Canada from becoming a haven for online piracy; however, they argue for a result that would impose an additional layer of royalty payments on legitimate online services providing both downloads and streams to Canadian consumers.

4. The interpretation urged by the appellants on the Court is unsupported.

(a) It contradicts the language of section 2.4(1.1), which is clearly limited to an elucidation of the scope of “communication to the public”, and which makes no mention of reproduction whatsoever.

(b) It contradicts the context and positioning of section 2.4(1.1), which is included in the Interpretation section of the *Copyright Act* and is grouped together with other provisions explaining or delineating the right to communicate a work to the public

¹ *Copyright Act*, RSC 1985, c C-42 (“*Copyright Act*”).

by telecommunication (i.e., the communication right). It does not form part of section 3(1) of the Copyright Act, which delineates what comprises copyright.

- (c) It ignores the expert evidence led in the proceeding – both by the respondents and by the appellants, which was that the signatories to the WIPO Treaties intended to create an umbrella solution that left it to individual signatories to ensure how to protect the rights of copyright owners to authorize the making available of their works online.
- (d) It is premised on the argument that Parliament must have intended to create a free-standing making available right in order to fill a “gap” in the *Copyright Act*, despite the fact that there is no such gap, as other provisions of the *Copyright Act* protect the rights of copyright owners to authorize the making available of their works online.
- (e) It is incompatible with this Court’s decision in *Entertainment Software Association v. Society of Composers, Authors and Music*², which held that the *Copyright Act* and the rights granted therein reflect the historical distinction between the public performance right (which the Court found does not apply to downloads) and the reproduction right (which the Court found does apply to downloads). The interpretation urged by the appellants would blur this fundamental distinction, notwithstanding that there is nothing to indicate that Parliament intended such a radical change to the structure of the *Act*.
- (f) It is inconsistent with the principle of technological neutrality, as it would impose a second layer of royalties on the delivery of copies of musical works over the Internet, as compared to physical delivery of those same copies. The appellants’ interpretation would have this effect, notwithstanding that there is no indication (let alone a clear indication) that Parliament intended such a result. This too is incompatible with this Court’s decision in *ESA*.

² *Entertainment Software Association v. Society of Composers, Authors and Music*, 2012 SCC 34 (“*ESA*”).

- (g) It fails to recognize that the uploading of works which are subsequently communicated, i.e., streamed, is merely a preparatory step, and part of one act of communication. It thereby imposes an additional layer of royalties due to the on-demand nature of such communications, as distinct from traditional broadcasts – again in a manner violating the principle of technological neutrality.

B. Facts

5. The respondents, Apple Inc. and Apple Canada Inc. (together, “Apple”), operate an online store that offers end-users the ability to download copies of musical works and other copyrighted material and a music service that offers end-users the ability to stream musical works and other copyrighted material.

6. This proceeding arose when the Copyright Board (the “Board”) was considering a tariff proposed by the appellant, Society of Authors, Composers and Music Publishers of Canada (“SOCAN”). The tariff in question was to apply to musical works that are communicated to the public by telecommunication through an online music service. In the course of that proceeding, SOCAN requested that the Board rule as to the legal effect of section 2.4(1.1), which had been added to the *Copyright Act* in late 2012. While all parties agreed that section 2.4(1.1) clarified the scope of “communication to the public by telecommunication”, they disagreed as to whether it expanded the scope of “communication to the public” such that it would encompass the uploading of works that were intended for downloading.

7. At the time of the proceeding, Apple did not require a license from SOCAN in respect of downloads offered by it to end-users, due to this Court’s decision in *ESA*, holding that downloads do not constitute communications to the public. However, Apple was licensed by, and made payments to, another collective society, CMMRA-SODRAC (“CSI”) as well as to other rights holders for any reproductions of works made by it and its end-users, including downloads.

8. In the proceeding before the Board, Apple and other respondents took the position that section 2.4(1.1) clarified the scope of “communication to the public by telecommunication” so as to make it clear that it applied to interactive, on-demand communications, and that it encompassed steps that were preparatory to a transmission, namely, the uploading of music online that would permit users to stream the music (as streaming had been held by this Court to constitute a “communication to the public by telecommunication”).

9. The appellants, however, took the position that section 2.4(1.1) went much further. They took the position that section 2.4(1.1) expanded the scope of “communication to the public by telecommunication” so that it encompassed not only steps that were preparatory to activities that had previously been held to constitute communications to the public, but also steps that were preparatory to activities that had been held not to constitute communications. The appellants took the position that, by virtue of section 2.4(1.1), all uploading of music online constituted a communication to the public by telecommunication regardless of whether the music, once uploaded, was going to be available for streaming (i.e., communication), or whether it was only going to be available for reproduction (i.e., downloading).

10. The appellants based their argument upon the premise that section 2.4(1.1) created a new “making available right”, despite the fact that:

- (a) the word “right” does not appear in the section;
- (b) the section appears in the “Interpretation” portion of the *Act*, rather than the section of the *Act* that enumerates the rights that comprise copyright, i.e., section 3(1); and
- (c) the section’s applicability was clearly limited to the phrase “communication to the public by telecommunication,” with no mention of reproduction whatsoever.

11. The practical effects of the appellants’ arguments were broad. The relevant SOCAN tariff relates to the communication of works to the public. Therefore, under its tariff, SOCAN can only collect royalties in respect of such communications. Other rights – most notably, the right to reproduce works – are administered by other collective societies, or by the copyright holders themselves. And those other societies and individuals collect royalties – including from Apple – in respect of the reproduction of copyrighted works.

12. The effect of the appellants’ arguments would be to:

- (a) expand the scope of the royalties that SOCAN collects for performances to the public so as to encompass activities that could not possibly result in a communication to the public, including activities that could only result in reproductions of works (the royalties for which are already collected by others),

thereby imposing a duplicate royalty for the sale of downloads based on their method of delivery – i.e., over the Internet; and

- (b) authorize SOCAN’s collection of two separate royalties in the case of streams – one for the uploading of content (including music that is never accessed by a user) and one for its streaming – even though these steps form part of the same interactive communication.

13. Notwithstanding the sweeping effects of the appellants’ interpretation, the Board held that section 2.4(1.1) granted to SOCAN the right to collect royalties for the mere uploading of works online, regardless of whether the works were made available for streams (i.e., for communication) or for downloads (i.e., for reproduction). In reaching its conclusion, the Board held that section 2.4(1.1) and the other amendments to the *Copyright Act* that were enacted as part of the same legislation were intended to ensure that the *Copyright Act* was consistent with the then-recent WIPO treaties.³ The Board further held that the WIPO treaties were intended to ensure that rights holders had a basis to hold liable those who make copyrighted works available to the public online, even where there is no evidence of reproduction or actual communication to the public.⁴

14. And then, without considering other provisions of the *Copyright Act* that would effectively fulfill that same purpose, the Board held that it was necessary to read section 2.4(1.1) as expanding the communication right to create an exclusive, free-standing right to control all acts of making works available to the public, i.e., the uploading online. According to the Board, such an interpretation was the only way to render Canada’s *Copyright Act* compliant with the WIPO treaties.⁵

15. Because it had held that each uploading of music online constituted a “communication to the public”, the Board considered, in its companion decision certifying SOCAN’s tariff, whether to certify a royalty payable to SOCAN in respect of the mere uploading of music online, which would be separate and distinct from the royalty applicable to any ensuing stream or download. Having considered the evidence, the Board declined to certify any such distinct royalty, holding

³ Copyright Board of Canada, *Scope of Section 2.4(1.1) of the Copyright Act – Making Available* (25 August 2017), CB-CDA 2017-085, at para. 14 (“Board Decision”) [Appellant’s Joint Record, Tab 1 (“AJR”)].

⁴ Board Decision, *supra* note 3, at para. 111 [AJR, Tab 1].

⁵ Board Decision, *supra* note 3, at para. 147 [AJR, Tab 1].

that “the evidence on the value of making available . . . is significantly deficient”.⁶ SOCAN’s application for judicial review from that decision was dismissed,⁷ and leave to appeal from that dismissal was not sought.

16. On judicial review, the Federal Court of Appeal decided that s. 2.4(1.1) of the *Copyright Act* does not expand the scope of the communication right so as to include steps that are preparatory to a reproduction, and that any “making available” of a work will merge with a subsequent communication of the work by streaming.

17. More specifically, the Court of Appeal applied the holding of this Court in *ESA* that a download does not constitute a “communication to the public”, but rather constitutes a “reproduction-based” activity.⁸ As made clear in *ESA*, that distinction precludes a copyright holder such as SOCAN from collecting communications-based royalties for reproduction-based activities.

18. The Court of Appeal also applied the interpretive principle of technological neutrality, as discussed in *ESA* and in *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*⁹, pursuant to which courts should strive for an interpretation of the *Copyright Act* that does not distinguish between different methods of exercising the same right, i.e., digitally vs. physically. Having applied that principle, the Court rejected the interpretation propounded by the Board, which would have imposed an additional tariff burden on online reproduction (downloading) activities that is not imposed on the same activities that use older, physical technologies (e.g. CDs).¹⁰

19. Finally, the Court of Appeal interpreted World Intellectual Property Organization Copyright Treaty (the “WCT”) Article 8 consistently with this Court’s decision in *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*¹¹, which explained that Article 8 does not create any novel right, but rather merely resolves an ambiguity

⁶ Copyright Board of Canada, *Online Music Services (CSI: 2011-2013; SOCAN: 2011-2013; SODRAC: 2010-2013)* (25 August 2017), CB-CDA 2017-086, at para. 147; and see para. 144 (“Rate Decision”).

⁷ *CMRRA-SODRAC Inc. v. Apple Canada Inc.*, 2020 FCA 101.

⁸ *Entertainment Software Assoc. v. Society Composers*, 2020 FCA 100, at para. 65-66 (“FCA Decision”) [AJR, Tab 2].

⁹ *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57 (“SODRAC”).

¹⁰ *FCA Decision*, *supra* note 8, at para. 67 [AJR, Tab 2].

¹¹ *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35 (“Rogers”).

regarding whether the right to “communicate to the public” is broad enough to encompass interactive point-to-point online communication technologies such as on-demand streams.

II. QUESTIONS IN ISSUE

20. The issues before this Court are:

- (a) Does section 2.4(1.1) expand the scope of “communication to the public by telecommunication” such that it encompasses steps that are preparatory to a reproduction (such as the posting of music on an Internet site so as to permit users to download the music)?
- (b) Does section 2.4(1.1) grant an exclusive, free-standing right to control all acts of making works available to the public, i.e., the uploading online, that is compensable apart from and in addition to, the streaming of that work?

III. ARGUMENT

- (a) **Does section 2.4(1.1) expand the scope of “communication to the public by telecommunication” such that it encompasses steps that are preparatory to a reproduction (such as the posting of music on an Internet site so as to permit users to download the music)?**

A. Standard of Review

21. The Federal Court of Appeal applied the deferential standard of review – that of reasonableness – to the statutory interpretation adopted by the Board. And, even with that deferential standard, the Board’s interpretation was rejected. The appellant Music Canada now appears to argue that a less deferential standard – that of correctness – should have been adopted.¹² Apple agrees with the reasons cited in the factum of the respondents Entertainment Software Association and Entertainment Software Association of Canada that the standard of review should be that of correctness.¹³

¹² Factum of Music Canada, paras. 117-120.

¹³ Factum of the respondents, Entertainment Software Association and Entertainment Software Association of Canada, at section IV.A.

B. Distinction between Performance Rights and Reproduction Rights

22. As explained by this Court in *ESA*, the *Copyright Act* provides an exhaustive definition of copyright in the opening words of section 3(1), which state that “copyright means” the sole right to do three things: to produce or reproduce a work; to perform a work; and to publish an unpublished work. Section 3(1) states:

For the purposes of this Act, copyright, in relation to a work, means the sole right to produce or 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 ...

23. Copyright is limited to these three exclusive rights:

The introductory paragraph defines what constitutes “copyright”. It states that copyright “means” the sole right to produce or reproduce a work in any material form, to perform a work in public, or to publish an unpublished work. This definition of “copyright” is exhaustive, as the term “means” confines its scope.¹⁴

24. As further explained in *ESA*, the list comprising subsections 3(1)(a) through 3(1)(i) does not set out additional, free-standing rights. Rather, those paragraphs are merely illustrations of the three rights that comprise copyright:

The paragraph concludes by stating that copyright “includes” several other rights, set out in subsections (a) through (i). As a result, the rights in the introductory paragraph provide the basic structure of copyright. The enumerated rights listed in the subsequent subparagraphs are simply illustrative.¹⁵

25. At issue in *ESA* was subsection 3(1)(f), which refers to the right to “communicate [a] work to the public by telecommunication”. The issue before the Court was whether “communicate” as used in subsection 3(1)(f) captured downloads of copyrighted works. The Court held that it did not and based its conclusion upon the distinction between the right to perform and the right to reproduce.

26. First, the Court traced the historic evolution of the *Copyright Act* and noted that, since 1931 (when communication by “radio communication” was first addressed by the *Copyright Act*), the

¹⁴ *ESA*, *supra* note 2, at para. 42.

¹⁵ *ESA*, *supra* note 2, at para. 42.

right to authorize the communication of works had formed part of the performance right. By contrast, the right to authorize the communication of works had never been considered to form part of the reproduction right:

[C]ommunication under s. 3(1)(f) did *not* contemplate the delivery of permanent copies of the work . . .¹⁶ [emphasis in original]

27. Second, the Court rejected the argument that Parliament had intended to fundamentally change the meaning of “communication” when it amended the *Act* so as to cover communication by “telecommunication” (which replaced communication by “radiocommunication”):

. . . [B]y 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.¹⁷

28. Third, the Court considered other aspects of the *Act* that reinforced both the linkage between “communications” and the performance right, and the distinction between “communications” and the reproduction right. These include:

- (a) the fact that subsection 3(1)(f) refers to “communication to the public”, which this Court held “clarified [Parliament’s] intent to maintain the communication right as a category of performance right”;¹⁸
- (b) the fact that section 2.2(1) provides that “publication” includes “making copies” but expressly excludes “the performance in public, or the communication to the public by telecommunication” of a work;¹⁹
- (c) the fact that section 29.4(2) refers to the right to “reproduce” and the right to “communicate by telecommunication to the public” as distinct rights;²⁰ and

¹⁶ *ESA*, *supra* note 2, at para. 19; and see para. 13-18.

¹⁷ *ESA*, *supra* note 2, at para. 25.

¹⁸ *ESA*, *supra* note 2, at para. 26.

¹⁹ *ESA*, *supra* note 2, at para. 37.

²⁰ *ESA*, *supra* note 2, at para. 37.

- (d) the fact that SOCAN, a performing rights society, was put in charge of administering the communication right in respect of musical works.²¹

29. In light of the foregoing, the Court held that “communication” should not be interpreted so as to encompass activities that are “akin to reproduction”:

[T]he 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.²²

30. The Court went on to explain that to hold otherwise would “result in abandoning the traditional distinction in the *Act* between performance-based rights and rights of reproduction”.²³

31. Guided by this traditional distinction, and by the fact that downloading is a “copying exercise”, the Court held that the downloading of a work does not amount to “communicating” that work by telecommunication.²⁴

C. The Appellants’ Argument Would Erase the Fundamental Distinction Between Performance and Reproduction

32. The argument advanced by the appellants would undo all that the Court did in *ESA* and would commingle what this Court held should be kept separate. The appellants would read “communication” so broadly as to encompass acts that are neither performative nor preparatory to a performance, and indeed that have nothing to do with performance. The appellants would read “communication” so as to encompass acts that are preparatory to reproduction.

33. The appellants argue that, because the *Copyright Modernization Act*²⁵ introducing section 2.4(1.1) was enacted a mere few weeks prior to this Court’s issuance of its decision in *ESA*, Parliament cannot be taken to have been aware of *ESA* and that, accordingly, section 2.4(1.1) should be interpreted without regard to the Court’s decision in *ESA*.²⁶ The appellants’ argument – and their reliance upon the relative timing of the enactment of section 2.4(1.1) – has no

²¹ *ESA*, *supra* note 2, at para. 38.

²² *ESA*, *supra* note 2, at para. 39.

²³ *ESA*, *supra* note 2, at para. 39.

²⁴ *ESA*, *supra* note 2, at para. 43.

²⁵ *Copyright Modernization Act*, S.C. 2012, c. 20 (“*Copyright Modernization Act*”).

²⁶ *Factum of Music Canada*, at para. 107 and *Factum of SOCAN* at para. 48.

foundation. The holding in *ESA* was based upon the distinction between performative acts and copying. And the Court traced the origins of that distinction to the *Berne Union Convention* of 1931. There is nothing in section 2.4(1.1) or in the *Copyright Modernization Act* more broadly to suggest that Parliament intended to erase the distinction between performance and reproduction that has formed part of the fundamental structure of Canada's copyright law since the 1930s.

34. Certainly, there is no indication that, in enacting section 2.4(1.1), Parliament intended the type of sweeping structural change that the appellants urge upon this Court. There is no indication that Parliament intended to erase the distinction between performance and reproduction, such that acts that relate solely to reproduction activities would fall within the scope of "communication" and therefore within the scope of performance.

35. On the contrary, Parliament left unchanged all of the provisions of the *Copyright Act* that were relied upon by this Court in *ESA* as evidencing Parliament's intent to exclude copying/reproduction activities from the scope of "communication". Specifically:

- (a) Parliament made no change to the opening words of section 3(1), which enumerates reproduction and performance as two of the three types of rights that inhere in copyright;
- (b) Parliament made no change to the illustrative list that follows after the opening words, other than to add a provision related to the sale of works that are tangible objects;²⁷
- (c) Parliament made no change to section 2.2(1), which defines "publication" so as to include "making copies", but to exclude public performance or communication to the public; and
- (d) Parliament made no change to section 29.4(2) of the *Act*, which refers to the right to "reproduce" and the right to "communicate by telecommunication to the public" as distinct rights. Indeed, the *Copyright Modernization Act* introduced more such

²⁷ The added provision is now section 3(1)(j) of the *Copyright Act*, R.S.C., 1985, c. C-42.

exceptions, further entrenching the difference between reproductions and performances.²⁸

36. While the addition of section 2.4(1.1) may have clarified the meaning of “communication to the public” so as to include acts that might otherwise be viewed as merely preparatory to communication, it did not expand it so far as to include actions that are preparatory not to communication or any other type of performance, but rather are preparatory only to reproduction, and that are actions having nothing whatsoever to do with communication, and nothing to do with performance.

D. Section 2.4(1.1) Did Not Create a New Right but Rather Merely Clarifies the Communication Right

37. The appellants’ argument is based on the premise that, in enacting section 2.4(1.1), Parliament intended to create a new right, to which the appellants refer as the “making available right” or “MAR”, for short.²⁹ However, the appellants’ premise is flawed.

38. Both the text of section 2.4(1.1) and its placement within the existing structure of the *Act* demonstrate that Parliament did not intend to create a new right.

39. Had Parliament intended to create a new “making available right”, it could have expanded upon the opening words of section 3(1). But Parliament did not do so.

40. In fact, Parliament did not include section 2.4(1.1) in either of the rights-granting parts of the *Act*. It did not include section 2.4(1.1) in Part I, “Copyright and Moral Rights in Works”, nor did it include section 2.4(1.1) in Part II, “Copyright in Performers’ Performances, Sound Recordings and Communication Signals and Moral Rights in Performers’ Performances”. Rather, it included section 2.4(1.1) in the “Interpretation” part of the *Act*.

41. And it drafted section 2.4(1.1) as an interpretive aid, whose scope was limited to elucidating the meaning of the term “communication of a work or other subject-matter to the public by telecommunication”.

42. The interpretation urged by the appellants – that section 2.4(1.1) creates an exclusive, free-

²⁸ See, e.g., subsections 30.02(1)(a) and (b); 30.04(2)(a) and (b); and 31.1(1).

²⁹ Factum of Music Canada, at para. 64; Factum of SOCAN at para. 57.

standing right – does not respect these textual indicia of meaning:

- (a) The appellants’ interpretation does not take into account the interpretive principle which holds that headings may be used as an interpretive aid and ought to be considered and relied on like any other contextual feature;³⁰
- (b) The appellants’ interpretation does not conform with the principle that Parliament is presumed to adopt a simple, straightforward and concise way of expressing itself³¹; and
- (c) The appellants’ interpretation is inconsistent with the presumption that related concepts and provisions are grouped together in a meaningful way, and the sequencing of clauses and sections reflect a rational plan.³²

43. Finally, although the appellants place a great deal of emphasis on extrinsic aids, such as a Legislative Summary and a Government of Canada publication,³³ those aids do not assist the appellants. As noted by Justice Rothstein, in *Professional Institute of the Public Service of Canada v. Canada (Attorney General)*, extrinsic evidence of legislative intent should only be resorted to where there is genuine ambiguity in the legislative provisions:

As this Court reiterated in *Bell ExpressVu Limited Partnership v. Rex*, “[i]t is only when genuine ambiguity arises between two or more plausible readings, each equally in accordance with the intentions of the statute, that the courts need to resort to external interpretive aids”.³⁴

44. In the present case, neither appellant argues – even in the alternative – that there is any ambiguity in section 2.4(1.1). Without a finding of such ambiguity, the extrinsic evidence upon which the appellants rely can be of no assistance.

³⁰ Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (LexisNexis Canada Inc., 2014), p. 461 (“*Sullivan*”) [Book of Authorities Tab 1]; *Skoke-Graham v. R.*, [1985] S.C.J. No. 6, paras. 41-42..

³¹ *Sullivan*, *supra* note 30, p. 208.

³² *Sullivan*, *supra* note 30, p. 210.

³³ Referred to, for example, at paras. 19, 88 and 110 of the factum of SOCAN. And see factum of Music Canada at paras. 5, 21, 23, 24, 26 and 28.

³⁴ *Professional Institute of the Public Service of Canada v. Canada (Attorney General)*, 2012 SCC 71 at para. 95.

E. Conformity with the WIPO Treaties does not Demand a Stand-alone Making Available Right

45. Instead of relying on the language and context of section 2.4(1.1) within the *Copyright Act*, the appellants base their interpretation on evidence regarding the legislative history of the provision – specifically that, in enacting section 2.4(1.1) along with the other provisions of the *Copyright Modernization Act*, Parliament was, at least in part, intending to ensure Canada’s domestic legislation was “in harmony” with the provisions of both the WIPO Treaties – the *Copyright Treaty* (often referred to as the “WCT”) and the *Performances and Phonograms Treaty* (referred to as the “WPPT”).³⁵ However, from that unobjectionable proposition, the appellants leap to the conclusion that Parliament intended to enact a free-standing “making available right”.

46. The appellants’ conclusion is based on a misconception regarding the need to interpret section 2.4(1.1) as a free-standing making available right in order to bring the *Copyright Act* into harmony with the WIPO Treaties.³⁶ A closer examination of the language of these treaties and evidence regarding their implementation, reveals this to be a fiction.

47. The *Copyright Treaty* was a special agreement among contracting parties to the *Berne Convention for the Protection of Literary and Artistic Works* (“Berne Convention”) which was intended to further develop the rights set out in that *Convention*. It uses language that is strikingly similar to the language used by Parliament. Article 8 of the *Copyright Treaty* states:

. . . [A]uthors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them. [emphasis added]

48. In effect, Article 8 of the *Copyright Treaty* is simply a combination of section 2.4(1.1) of the *Copyright Act* along with the language of section 3(1)(f) of the *Act*. As with the *Copyright Act*, the *Treaty* clarifies the scope of communication so as to include making available as a preparatory step that authorizes a communication. It does not (as the appellants would have it) create a free-standing exclusive right to “make works available”.

³⁵ See, e.g. the Factum of Music Canada at para. 20; Factum of SOCAN at para. 91.

³⁶ SOCAN argues “[A]n exclusive making available right is mandatory” [emphasis added] under the WIPO Treaties and other international agreements, at para. 102 of its factum.

49. The language used in the *Copyright Treaty* is particularly salient because of its roots in the *Berne Convention*, which was the source of the distinction between performance-based rights and reproduction-based rights, which distinction was embodied in Canada's *Copyright Act* and recognized by this Court in *ESA*.³⁷ The *Copyright Treaty* does not reflect a wholesale departure from that *Convention* as argued by SOCAN.³⁸

50. The language of the *Copyright Treaty* can be usefully contrasted to the language of the *Performances and Phonograms Treaty*, which takes a different approach by creating a free-standing right to authorize the making available (as distinct from communication) of fixed performances. Both performers and producers enjoy such a right. Article 10 which deals with performers states:

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

51. And Article 14 which deals with producers states:

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

Thus, in their language itself, the two treaties take two different approaches, further underlining the close connection between the *Copyright Treaty* and the communication right, specifically.

52. Moreover, the mode of implementation of the *Copyright Treaty* indicates that conformity with that *Treaty* does not demand that Canada legislate a free-standing making available right. As described by the appellants' own expert witness, Dr. Mihaly Ficsor, the signatories to the *Copyright Treaty* adopted an "umbrella solution", whereby each signatory was to be free to choose for itself the precise manner in which it would ensure that a creator would have recourse against persons who made the creator's works available to members of the public for either download or

³⁷ For the importance of the *Berne Convention* to Canada's *Copyright Act*, see *ESA*, *supra* note 2, at para. 13-15.

³⁸ Factum of SOCAN, at para. 53.

streaming.³⁹

53. As further explained by both Dr. Ricketson and Jeremy De Beer, the expert witnesses before the Board on behalf of the respondents, a freestanding making available right is not required to comply with the WCT:

. . . [T]he beauty of Dr. Ficsor’s umbrella solution was that, while countries must somehow protect all kinds of making available, the treaties leave open how precisely countries might do that.⁴⁰

54. Accordingly, contrary to what is argued by the appellants, Canada’s conformity to the two WIPO treaties does not turn on whether or not Canada has enacted a free-standing “making available right”. Rather, it turns on whether Canada’s legislation provides recourse against persons who make a creator’s works available on the Internet to members of the public, without the consent of the creator.

55. The expert evidence led by the respondents in this proceeding is that compliance with the WIPO treaties does not depend upon the precise legislative method chosen by a signatory for imposing liability on a person who makes a work available. So long as liability is imposed, the signatory will be compliant.⁴¹

56. As is discussed in the section below (and contrary to what is argued by the appellants), it is not necessary to read section 2.4(1.1) as creating a free-standing right in order for Canada to comply with its obligations under the WIPO treaties. Rather, the *Copyright Act* already protects a creator’s sole right to authorize either downloads or streams through the making available of works online.

F. Canada is Compliant with the WIPO Treaties

57. As is discussed in the section which follows, the *Copyright Act*:

³⁹ Mihály Ficsor, Expert opinion on the international norms in the right of making available to the public (2013), at page 6 [AJR, Tab 38B].

⁴⁰ Professor Sam Ricketson, “Opinion on Article 8 of the WIPO Copyright Treaty”, June 14, 2013, at para. 29-32 [AJR, Tab 39B]; Professor Jeremy de Beer, “Expert Opinion on Canada’s Compliance with the WIPO Copyright Treaty”, June 14, 2013, at para. 19 [AJR, Tab 39C].

⁴¹ De Beer, para. 33 [AJR, Tab 39C].

- (a) imposes liability on a person who makes a work available for streaming without the rights holder's permission, by virtue of section 3(1)(f) (along with the interpretive aid provided by section 2.4(1.1)); and
- (b) imposes liability on a person who authorizes the downloading of a work without the rights holder's permission, by virtue of section 3(1).

58. To explain, a stream constitutes “a communication to the public by telecommunication”. A person who makes a work available for streaming (by uploading that work to the Internet in such a manner that it can be streamed by a member of the public) may be liable for copyright infringement on two related grounds.

59. First, he may be liable on the basis that he has authorized a “communication to the public by telecommunication”, within the meaning of section 3(1)(f) and the closing words of section 3(1), which together provide that “copyright” means:

. . . the sole right to produce or 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

. . .

(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.

60. Second, as clarified by section 2.4(1.1), he may be liable on the basis that the act of uploading, being preparatory to the ultimate stream, is encompassed within the scope “communication to the public” itself.

61. Turning next to the case of downloads, a download constitutes a reproduction of a work. As this Court noted in *ESA*:

[D]ownloading is a *copying* exercise that creates an exact, durable copy of the digital file on the user's computer, identical to copies purchased in stores or through the mail.⁴²

62. A person who makes a work available for downloading (by uploading that work to the

⁴² *ESA*, *supra* note 2 at para. 10.

Internet in such a manner that it can be downloaded by a member of the public) may be liable for copyright infringement on the basis that he has authorized a “reproduction” of the work, within the meaning of the opening and closing words of section 3(1).

63. By protecting a creator’s exclusive right to authorize the reproduction or performance of his or her works through the making available of those works online, Canada’s legislation falls within the “umbrella solution” adopted by the signatories to the *Copyright Treaty*. Canada’s treaty obligations are met.

64. In order to raise the spectre that excluding the application of 2.4(1.1) to downloads may not meet Canada’s treaty obligations, however, the appellants argue that a person who uploads a work to the Internet in such a manner that it may be downloaded by others may not have authorized a reproduction of the work, within the meaning of section 3(1). However, the appellants’ arguments do not withstand scrutiny.

65. The appellant, SOCAN, devotes only a single paragraph to this issue. It states that the authorization “right” is “insufficient as it would leave gaps in protection”. The supposed “gaps” upon which SOCAN relies comprise the necessity to prove that the alleged “authorizer” has “sanctioned, approved or countenanced” the ultimate reproduction of the work.⁴³

66. However, while SOCAN asserts that proving such “sanction, approval or countenancing” would “impose factual and evidentiary requirements”, those requirements are more illusory than real. It stands to reason that any person who has uploaded a work to the Internet in such a way that others can reproduce it through downloading has sanctioned or approved that downloading.

67. The arguments on this point raised by the appellant, Music Canada, similarly do not withstand scrutiny. Like SOCAN, Music Canada points to the decision of this Court in *CCH v. Law Society of Upper Canada* as purportedly imposing a high burden on a plaintiff who seeks to establish that the defendant authorized infringement. Citing that case, Music Canada asserts that “authorization is a question of fact that depends on the particular circumstances and requires consideration of the specific relationship between the person who authorizes and the person who makes the copy”.⁴⁴

⁴³ Factum of SOCAN at para. 130.

⁴⁴ Factum of Music Canada, para. 96.

68. However, the facts before the Court in *CCH* bore no relation to a person who makes a music file available on the Internet for downloading. *CCH* required this Court to decide whether the Law Society had authorized infringement by having made photocopiers available in its library. There was no question that some acts of photocopying that might be carried out at the library could constitute copyright infringement, but many others would not (e.g., copies that were made for the purpose of research or private study). It was in that context that the Court noted that the mere fact of providing equipment that might or might not be used for infringing purposes was not sufficient to constitute “authorizing” infringement:

However, a person does not authorize infringement by authorizing the mere use of equipment that could be used to infringe copyright.⁴⁵

69. By contrast, one would be hard pressed to conceive of an instance where the indiscriminate downloading of songs would be non-infringing.

70. Other provisions of the *Copyright Act* – certain of which were themselves added through the enactment of the *Copyright Modernization Act* – confirm that indeed, online reproductions are protected. These are discussed further in the section that follows.

71. Accordingly, contrary to the arguments advanced by the appellants, reading section 2.4(1.1) so as to limit its applicability to performative acts (or acts that are preparatory to performance) would not render Canada non-compliant with its obligations under the WIPO treaties. There would be no “gap” with respect to recourse against persons who make works available online for download. Such persons would still be liable for authorizing reproduction.

G. Limiting the Applicability of Section 2.4(1.1) to Communications – and Acts Preparatory to Communications – Does Not Implicate Concerns About Online Piracy

72. The applicants argue that the decision below would somehow make Canada a haven for online piracy. There is no foundation to this argument.

73. There is a full host of protections and enforcement rights granted under the *Copyright Act* to copyright holders to ensure recourse against acts of infringement. As noted in the previous section, persons who upload works to the Internet such that they can be downloaded by others may

⁴⁵ *CCH v. Law Society of Upper Canada*, 2004 SCC 13 at para. 38

be liable as authorizing infringement of copyright.

74. Moreover, the *Copyright Act* includes numerous other provisions that can be deployed in the face of online piracy, including, for example, sections:

- (a) prohibiting secondary infringement via prejudicial distribution of a work (section 27(2)(b) and (d)) and imposing criminal liability for distribution of infringing copies of works (section 42(1)(c));
- (b) establishing the “notice and notice” regime under which copyright owners can require Internet service providers to provide notice to infringers (sections 41.25 and 41.26);
- (c) granting to copyright owners the procedural right to bring “John Doe” reverse class actions;⁴⁶ and
- (d) responding directly to a scenario where a person is uploading works online in order to authorize their downloading. Section 27(2.3) states in part:

It is an infringement of copyright for a person, by means of the Internet or another digital network, to provide a service primarily for the purpose of enabling acts of copyright infringement if an actual infringement of copyright occurs by means of the Internet or another digital network as a result of the use of that service.

75. Exceptions to these provisions establishing liability for infringing reproductions offered online further confirm that these protections extend to reproductions. Subsection 31.1(1), for instance, specifically refers to reproductions when clarifying the exception for the provision of network services:

A person who, in providing services related to the operation of the Internet or another digital network, provides any means for the telecommunication or reproduction of a work or other subject-matter through the Internet or that other network does not, solely by reason of providing those means, infringe copyright in that work or other subject-matter. [emphasis added]

76. It does not follow, therefore – even if the language and context of section 2.4(1.1) were capable for bearing such an interpretation – that in order for Canada to comply with the WIPO

⁴⁶ See, e.g. *Rogers Communications Inc. v. Voltage Pictures, LLC*, 2018 SCC 38.

Treaties – section 2.4(1.1) necessarily must be interpreted as introducing an exclusive stand-alone right for “making available”.

H. The Appellants’ Arguments Are Inconsistent with this Court’s Decision in *Rogers Communications v. SOCAN*

77. Prior to the enactment of section 2.4(1.1), certain parties continued to advance an argument before the Court that, because each transmission is initiated by a single consumer, acting in isolation, even a stream, i.e., a “communication” could not be characterized as being directed “to the public”.

78. In *Rogers*, this Court considered whether “pull” transmissions such as streams – which occur at a time and place of a user’s choosing – constitute communications “to the public” within the meaning of section 3(1)(f). In upholding the ruling of the Court of Appeal that such on-demand streams did constitute communications to the public, the Court referred specifically to Article 8 of the *Copyright Treaty* and held that the Article 8 was intended to clarify that the “public” need not be “together in time and space”. Rather, so long as the streaming link was available to the public, the communication that results when the link is engaged constitutes a communication “to the public”.⁴⁷

79. The Court quoted with approval from the following scholarly commentary:

[Article 8] targets on-demand transmissions (whether by wire or wireless means), for it makes clear that the members of the public may be separated both in space and time.⁴⁸

80. Moreover, the Court made it clear that the core concept of “making available” in Article 8, from the perspective of Canadian law, does not require the creation of any new right. Rather, it merely resolved an ambiguity regarding whether the communication right, as it then existed, was broad enough to encompass on-demand streams:

In the end, “the 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

⁴⁷ *Rogers*, *supra* note 11, at para. 52.

⁴⁸ *Rogers*, *supra* note 11, at para. 46.

excluded ‘pull technologies’...’⁴⁹

81. Thus, as is made clear in *Rogers*, in order to do justice to Article 8 (upon which the Applicants allege that section 2.4(1.1) is based) it is unnecessary to create a new right that is separately protected apart from, or in addition to, the actual transmission of a work. Rather, to give meaning to section 2.4(1.1) it is sufficient to recognize that the section clarifies an ambiguity as to the application of the communication to the public right to on-demand technologies.

I. The Principle of Technological Neutrality

82. There is a further reason why the appellants’ interpretation of section 2.4(1.1) should be rejected. If the appellants’ interpretation were accepted, making a work available for download would constitute a “communication to the public”, while the subsequent download would constitute a digital “reproduction”. In this manner, the single reproduction would give rise to two separate royalty obligations. By contrast, a physical reproduction made of the same work would only give rise to one royalty obligation.

83. Such a result would violate the interpretive principle of “technological neutrality” that was endorsed by this Court in *ESA*. Pursuant to that principle, the courts should strive for an interpretation of the *Copyright Act* that does not distinguish between different methods of exercising the same right. Thus, for example, the courts should strive for an interpretation of the *Act* that does not impose different royalty burdens upon different technological methods of reproduction. Rather, an act of reproduction should attract the same royalty burden, regardless of the technological means used. Absent a clear expression of Parliament’s intention to the contrary, the courts should presume that Parliament did not intend to impose an additional layer of protections and fees based solely on the fact that purchasers of copies of musical works from Apple’s online store have them delivered over the Internet, rather than by physical means. As this Court stated in *ESA*:

The principle of technological neutrality requires that, absent evidence of Parliamentary intent to the contrary, we interpret the *Copyright Act* in a way that avoids imposing an additional layer of protections and fees based solely on the method of delivery of the work to the end user.⁵⁰

⁴⁹ *Rogers*, *supra* note 11, at para. 48.

⁵⁰ *ESA*, *supra* note 2, at para. 9.

84. The Court explained that Parliament is presumed to intend the *Copyright Act* to apply equally as between traditional and more technologically advanced forms of the same activity. Thus, Parliament is presumed to have intended the *Copyright Act* and any tariffs imposed thereunder to apply equally to all reproduction of works, regardless of the particular technology used to effect the reproduction:

The principle of technological neutrality is reflected in s. 3(1) of the Act, which describes a right to produce or reproduce a work “in any material form whatever”. In our view, there is no practical difference between buying a durable copy of the work in a store, and receiving a copy in the mail, or downloading an identical copy using the Internet.⁵¹

85. The Court went on to explain that this principle weighed against an interpretation of the *Act* that would “effectively impose a gratuitous cost for the use of more efficient, Internet-based technologies.”⁵²

86. In *SODRAC*, the Court reiterated the importance of this interpretive principle of technological neutrality, quoting the same writing of Professor Vaver as in *ESA*:

As Professor Vaver has written, “Copyright law should strive for technological neutrality.” Interpretation and application of the Act are both important in seeking this objective.⁵³

87. In the present case, contrary to the foregoing jurisprudence, the interpretation of section 2.4(1.1) propounded by the appellants would treat reproductions effected by download over the Internet differently from reproductions effected by other, less technologically advanced means. The result would be that reproductions effected by download would be subject to an additional fee that would not be payable in respect of reproductions made, for example, by physically reproducing a work. Such a result would disrupt the economic balance between creators’ and users’ rights.

88. The appellants, for their part, wholly misconstrue the principle of technological neutrality. They urge this Court to apply the principle in such a manner as to erase any distinction between the uploading of works for the purpose of offering of downloads and the uploading of works for the purpose of offering streams. This ignores the fact that these two acts of uploading are

⁵¹ *ESA*, *supra* note 2, at para. 5.

⁵² *ESA*, *supra* note 2, at para. 9.

⁵³ *ESA*, *supra* note 2, at para. 6; see also *SODRAC*, *supra* note 9, at para. 68.

preparatory steps that engage two separate and distinct rights: one engages the reproduction right; the other engages the communication right. And the two acts of uploading result in the offering of very different products. Apple offers customers a choice. Through downloads, customers can purchase or rent a copy of music. Through streams, customers can access music as part of a subscription service. These are fundamentally different products that engage fundamentally different rights. They each reflect a separate model for consuming musical works – they are not merely the same product in a different “material form”. And they engage fundamentally different rights. Accordingly, the appellants cannot obtain support for their position by applying the principle of technological neutrality.

- (b) **Does section 2.4(1.1) grant an exclusive, free-standing right to control all acts of making works available to the public, i.e., the uploading online, that is compensable apart from and in addition to, the streaming of that work?**

89. The implication of the appellants’ position is that in the case of streams, there are two separate communications – one associated with the preparatory step of uploading a work and another associated with the subsequent streaming (i.e., transmission) of the work. Assuming SOCAN could prove that the uploading has value (something it has failed to do), a streaming service such as Apple’s would be liable for two distinct royalties – one for the uploading of works and another for their transmission.

90. The appellants’ contention would artificially split one on-demand communication into two separate rights, for the sole purpose of imposing two royalties for the same activity. Such an interpretation would:

- (a) fly in the face of the language of section 2.4(1.1) which, as explained above, does not establish a stand-alone right;
- (b) contradict the evidence before the Board of SOCAN’s own expert, Dr. Ficsor, who has made it clear there is only one communication associated with both the uploading and transmission of a work; and
- (c) violate the interpretive principle of technological neutrality by imposing an additional layer of royalties on interactive, on-demand streams than on traditional non-interactive “broadcast” streams.

91. If such a separate royalty for merely uploading a song were held to apply, this leads to the absurd scenario of royalties being payable on songs that are never subsequently streamed or downloaded. As a result, a stand-alone uploading tariff would apply only to those works that are, by definition, so unpopular that they are never streamed.

92. *SODRAC* cannot assist the appellants. The Court there recognized the importance of the interpretive principle of technological neutrality, but found that there were multiple activities taking place, namely the production of TV shows and their subsequent broadcasts. The Court held that each of these activities implicated a distinct right.⁵⁴ This is a very different situation from the present case, where section 2.4(1.1) does not establish a stand-alone right, but rather, clarifies that in the case of interactive or on-demand streams, the preparatory step of making available is included in the meaning of communication. It still constitutes a single activity, in contrast to the two very different activities considered in *SODRAC*.

93. As outlined above, there is no indication that Parliament intended to create two separate rights for a single activity. Such an interpretation is not reflected by the grammatical and ordinary sense of the words read harmoniously with the scheme of the *Act*, or the jurisprudence. It also is not supported by SOCAN's expert, Mihaly Ficsor, on whose analysis the Board otherwise relied. Professor Ficsor has stated that where a work is made available and there is a subsequent transmission, there is only one communication: "the entire act thus carried out will be regarded as a communication to the public."⁵⁵

94. This interpretation, that there is only one communication, is also supported by the interpretive principle of technological neutrality. As applied in *ESA*, this principle holds that there should not be an additional layer of royalties associated with delivery of works over the Internet. This applies not only to the delivery of copies but also streams. On-demand streams implicating section 2.4(1.1) include a preparatory step, that is, the uploading of works before a member of the public can "have access to it from a place and at a time individually chosen by that member of the public." The availability of on-demand streams reflects a technological development from the traditional broadcasting paradigm, which reflects a "push" technology that does not provide for any on-demand transmissions. On-demand streams nonetheless implicate the same right as

⁵⁴ *SODRAC*, *supra* note 9, at para. 63.

⁵⁵ Mihály Ficsor, *The Law of Copyright and the Internet* (Oxford University Press, 2002), p. 508, [Book of Authorities of Music Canada, Tab 14].

broadcasts – a “communication to the public by means of telecommunication”, i.e. the transmission of a work that is perceptible to the user. Requiring an additional layer of royalties for streams, due simply to the fact they are delivered on-demand over the Internet, would violate the principle of technological neutrality in the same way as the layering of royalties for Internet delivery of copies eschewed by the *ESA* Court.

95. In *Rogers*, this Court refused to treat on-demand streaming any differently from traditional broadcasting techniques: “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.”⁵⁶

96. SOCAN argues that the uploading step, i.e., the “making available” is consistent with the fact that the activity creates greater value for both online platforms and their users.⁵⁷ However, given that there is only one communication when a work is uploaded and then streamed, this would only leave the uploading of those works that are never streamed to be valued under a separate “making available” tariff. The absurdity of such a result, i.e., that the only works for which SOCAN would receive payment are those that are never streamed during the relevant tariff period, demonstrates the wrongheadedness of treating the preparatory step of uploading as a communication that attracts royalties in and of itself.

IV. COSTS

97. Apple requests its costs of the within appeal.

⁵⁶ *Rogers*, *supra* note 11, para. 40.

⁵⁷ SOCAN Factum, at para. 163.

V. ORDERS SOUGHT

98. Apple respectfully requests that the appeal be denied, with costs.

September 13, 2020

ALL OF WHICH IS RESPECTFULLY SUBMITTED

A handwritten signature in black ink, consisting of stylized, overlapping loops and a long horizontal tail extending to the right.

GOODMANS LLP
Counsel to Apple Inc. and Apple Canada Inc.

VI. TABLE OF AUTHORITIES

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