SCC 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

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

AND BETWEEN:

MUSIC CANADA

APPELLANT

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

and

SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY AND PUBLIC INTEREST CLINIC, CANADIAN MUSIC PUBLISHERS ASSOCIATION CARRYING ON BUSINESS AS "MUSIC PUBLISHERS CANADA" AND PROFESSIONAL MUSIC PUBLISHERS ASSOCIATION, CANADIAN ASSOCIATION OF LAW LIBRARIES, LIBRARY FUTURES INSTITUTE AND ARIEL KATZ

INTERVENERS

FACTUM OF THE INTERVENERS, CANADIAN ASSOCIATION OF LAW LIBRARIES/ L'ASSOCIATION CANADIENNE DES BIBLIOTHÈQUES DE DROIT, and LIBRARY FUTURES INSTITUTE

(Pursuant to Rule 42 of the Rules of the Supreme Court of Canada)

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PART I - OVERVIEW OF POSITION AND STATEMENT OF FACTS

The Interest of the Interveners in this Litigation

1. Canadian Association of Law Libraries/ L'association canadienne des bibliothèques de droit ("CALL/ACBD") is a non-profit society whose objects include promoting access to legal information for all Canadians and to develop and increase the usefulness of Canadian law libraries.[1]

2. Library Futures Institute is a non-profit organization that champions the right to equitable access to knowledge. Its mission is to empower libraries to take control of their digital futures. It comprises library workers, educators, lawyers, activists, technologists, and researchers who believe in the imperative for libraries to lend, preserve, and acquire knowledge in the service of the public good.[2]

3. This case requires construing the terms "communication of a work or other subject-matter to the public by telecommunication" and "making it available to the public by telecommunication" and "a member of the public" in s. 2.4(1.1) of the *Copyright Act*[3]. The choice is between interpreting this new subsection as either clarifying the scope of s. 2.4(1) together with s. 3(1)(f)—which confirm a right to communicate a work to the public and are themselves the subject of considerable analysis; or creating a new and distinct right to broaden what constitutes a communication and triggers additional obligations or payments.

4. The weight of authority, a plain and reasoned reading of the subsection, and this Court's own jurisprudence, favour the narrower interpretation—that s. 2.4(1.1) creates no new right. The principle of technological neutrality, emphasized in prior rulings of this Court, further informs this choice. That is, when faced with a legitimate choice between an interpretation that produces different outcomes depending on which technology or format is being used and one that does not, the Court should prefer the one that does not.[4] For a library to exercise the reproduction-based rights Parliament granted to it, enabling lending the same resource in digital

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[1] Affidavit of Kim Nayyer, affirmed August 26th, 2021, at para 4.
[2] Affidavit of Kyle Courtney, affirmed August 27, 2021, at para 4.
[3] *Copyright Act*, RSC 1985, c C-42, s 2.4(1.1).
[4] *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34, [2012] 2 SCCR 231 [***ESA***] at paras 5-6.

format as it can lend in print, should not trigger an additional obligation by being caught up in a sweeping interpretation of "communication."[5]

5. Further, this Court has previously cautioned against constructions that would create new rights that can be difficult to later confine. When Parliament added these words to the Act[6] it did so to implement the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty (collectively known as the "WIPO Internet Treaties").[7] These treaties and subsequent domestic implantation were largely meant for online file sharing and to enable a mechanism for appropriate compensation for streaming. However, their construction carries implications for a much broader range of actors.[8] There is no indication in Parliament's choice of words, or in the Parliamentary record, to suggest an intention to create a new right merely by use of a digital medium.

6. This approach is also consistent with the larger public interest. Law and other libraries have long served to further the public interest. Indeed, they have been characterized as "legitimate proxies for the public interest."[9] Public interest is served when libraries are able to effectively and appropriately apply fair dealing provisions and other statutory rights and specifically enacted to enable platform-neutral lending of copyright-protected materials held in law and other libraries.

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[5] Trosow, Samuel E., "The Changing Landscape of Academic Libraries and Copyright Policy: Interlibrary Loans, Electronic Reserves, and Distance Education" in Michael Geist, ed, *"In the Public Interest: The Future of Canadian Copyright Law"* (Toronto: Irwin Law, 2005) 375 [**The Changing Landscape**] at 271.

[6] *Copyright Modernization Act*, SC 2012, c 20.

[7] Jeremy De Beer, "Copyright Royalty Stacking" in Michael Geist, ed, *The Copyright Pentalogy: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (University of Ottawa Press, 2013) 2013 CanLIIDocs 2, 335 [**Copyright Royalty Stacking**] at 361.

[8] De Beer, Jeremy and Burri, Mira, *Transatlantic Copyright Comparisons: Making Available via Hyperlinks in the European Union and Canada* (January 17, 2014). European Intellectual Property Review, Issue 2, at 95-105, 2014, NCCR Trade Regulation Working Paper No. 2013/22, online at SSRN online at SSRN: https://ssrn.com/abstract=2327005 [**Transatlantic Copyright Comparisons**] at 3-4, citing Ruth L Okediji, "The Regulation of Creativity Under the WIPO Internet Treaties" (2009) 77:5 Fordham Law Review 2379.

[9] Michelle M. Wu, "History of Libraries: Service to the Public Interest" in "*Rebalancing Copyright: Considering Technology's Impact on Libraries and the Public Interest*" (New York: William S. Hein & Co., Inc. 2021) 29 [**History of Libraries**] at 40. [Book of Authorities, Tab 2]

7. There is a public interest in enabling libraries to share knowledge with the public, especially persons seeking to access or understand the operations of our legal system. The development of digital lending mechanisms, along with the enactment of specific rights or exceptions, furthers this function. Technological neutrality in library services means that, rather than limiting services to those who can access the physical space of the library, libraries can make their resources available to a wider public. Technological neutrality enhances equitable public access to knowledge by reducing barriers imposed by distance or physical ability. A broad interpretation of s. 2.4(1.1) that considers existing and legislatively supported library lending activities as somehow triggering a new publisher right or user obligation would impose costs that would undermine this greater equity. By contrast, avoiding an overly expansive or broad understanding of "making available" and "communication to the public by telecommunication" will strike an appropriate balance between the public interest in having libraries and other institutions share information with the public and the interests of creators and those deriving rights from them in limiting dissemination of knowledge and information.

PART II - STATEMENT OF ISSUES AND POSITION

The Court should refrain from broadly construing the Terms “Making Available” and “Communication to the Public by Telecommunication” and from finding a new right

8. The central issue is whether s. 2.4(1.1) creates a new right by adopting an expansive meaning of “communication” or clarifies an existing one already carefully delineated by this Court. The practical outcome of this choice is whether s. 2.4(1.1) imposes obligations both when a work is made online and when it is shared or reproduced. In resolving this question the Court should reiterate its support of the principle of technological neutrality, particularly where this would further the public interest, and so adopt the narrow understanding that s. 2.4(1.1) creates no new, separate obligation that could curtail longstanding library service practice or inhibit technological innovations designed to further lawful, equitable access.

9. Copyright is a creature of statute, and the Court should refrain from finding the creation of a new statutory right in the absence of a clear legislative expression. The Court should be reluctant to contribute to what has been characterized as a one-way ratchet by recognizing new fragments of copyright.[10]

[10] Copyright Royalty Stacking at 358-59.

PART III - STATEMENT OF ARGUMENT

Meaning of the Terms "Communication to the Public by Telecommunication" and "Making Available"

10. Section 2.4 (1.1) states that 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. This Court considered the meaning of the term "communication to the public by telecommunication" at length in *ESA*[11] and concluded that the term "communication" was historically linked to the right to perform, and the mere addition of the term "telecommunication" should not transform its meaning to include activities related to reproduction.

11. Scholars interpret the term "making available" as making a work available by uploading it for interactive access irrespective of whether it is streamed or downloaded.[12] Streaming and downloading, even if part of a single activity of "making available", are two distinct uses. This Court in *ESA* also clarified that a single act such as downloading is not both a communication and reproduction at the same time and thus, cannot infringe both rights.[13] If a work is made available for downloading, the person making it available might be liable for reproducing while if the work is made available for streaming, the person might be liable for communication.[14]

12. Following the reasoning in *ESA*, making a work available in a way that allows access to a permanent download would implicate the reproduction right but not the communication right.

Purpose and Objectives of a Library

13. Libraries are among few institutions whose core operating principles do not involve some element of self-interest; they exist to make information accessible to the public.[15] Libraries stand for the principle that information should not be, and cannot be limited only to those who can afford it.[16] A core principle of library lending is that materials should be available for borrowing by library patrons irrespective of their format, so long as the library

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[11] *ESA*.
[12] Transatlantic Copyright Comparisons at 12.
[13] *ESA* at para 41.
[14] Transatlantic Copyright Comparisons at 12.
[15] History of Libraries at 40.
[16] History of Libraries at 40.

holds a copy that is legally available for lending. An overly broad interpretation of the terms "communication to the public by telecommunication" and "making available", will diminish libraries' abilities to serve their original purpose of knowledge dissemination to patrons and will stymie innovations that further this mission in the digital era.

14. Law libraries particularly are living repositories for collections of materials that have a unique place in Canadian society—that is, they hold vast amounts of primary sources of law as well as academic commentary on the law that is needed to understand, discuss and ultimately participate in Canada's legal system. Built on precedent and authority, our legal system demands that parties follow previous cases and contextualize them within relevant academic and professional comment. The courts demand that these sources be addressed not in broad, abstract terms but with specific reference to the entirety of the document and the specific language at issue. For legal professionals, academics, and the public to fully understand and use legal knowledge it is crucial they be able to access, copy, and share substantial portions of primary sources of law, reported cases and legal academic and professional commentary.[17] The very reason that many compilations of such documents are brought into existence and disseminated widely is to enable the public and legal community to know the law and to use these materials to participate in legal processes.

15. Libraries regularly innovate, using modern technology to ensure access to information. Materials can be loaned in person, in print, or they can be loaned online; the Internet serving as simply "a technological taxi" delivering those same materials.[18] This reflects the principle of technological neutrality: essentially similar activities involving different technologies should be treated equally.[19] If the outcome of this case is that the principle of technological neutrality no longer applies to digital activities of libraries, longstanding and innovative initiatives of libraries to facilitate access to information will be curtailed, and access to information will be diminished.

16. Interlibrary loan ("ILL") is an integral part of modern library services. Parliament has specifically provided for this function in the extensive provisions for libraries, archives and

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[17] *CCH Canadian Ltd. v Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 SCR 339 [***CCH***] at paras 61 and 64.
[18] *ESA* at para 5.
[19] Copyright Royalty Stacking at 350.

museums in the *Copyright Act*, including its platform or technological neutrality.[20] ILL is a process that allows libraries to share materials with each other. If a library user requires material, for example a case or book chapter from another jurisdiction, that is not available locally, the library may arrange to borrow the material from a faraway library.[21] The lending library may choose to send the physical item to the local library. However, many library materials do not circulate outside the physical space, so the lending library may copy a portion of the original and supply the copy to the local library. This is known as document delivery, and is the practice that in *CCH Canadian Ltd. v Law Society of Upper Canada* this Court both endorsed as a user right and confirmed is not a "communication to the public" within the meaning of s 3(1)(f).[22] Libraries may effect these loans by uploading a copy and providing a link through which the user can download the borrowed material at a time and place they choose. This common service of libraries engages a reproduction as authorized by s 30.2 of the Act, as a reproduction. An interpretation of s 2.4(1.1) that would result in characterizing this activity as a "communication" would not only be inconsistent with the library exceptions and with this Court's jurisprudence; it would either halt a daily and important function of libraries or trigger unsustainable cost to the library or its users.

17. Similarly, technological advancements in academic libraries allow educators to deliver course materials directly to students efficiently and in a controlled manner, as electronic reserves. Print materials are digitized and uploaded to a course reserves platform, whereby students can click a link to download and use them electronically, rather than by taking turns to borrow the print edition. The fair dealing provisions of the Act contemplate such use. [23]

18. Yet other innovations premised on the principle of technological neutrality are emerging. Controlled digital lending ("CDL") is an emerging practice that enables a library to circulate a digitized title in place of a physical one, using a link by which the user can access the digital reproduction for a limited time. CDL permits lending of only the number of copies that the library owned before digitization.[24] For example, a library that owns three print copies of a title may digitize one copy and use CDL to lend that digital copy and only two of the three

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[20] Sections 30.1-30.4, and specifically ss 30.2(5), 30.2(5.02).
[21] The Changing Landscape at 397.
[22] *CCH* at para 64.
[23] The Changing Landscape at 397-99; *Copyright Act*, ss. 29, 30.02.
[24] Hansen, David R. and Courtney, Kyle K., *"A White Paper on Controlled Digital Lending of Library Books"* (2018) [**Controlled Digital Lending of Library Books**] online: http://nrs.harvard.edu/urn-3:HUL.InstRepos:42664235.

print copies. Alternatively, it may lend three digital copies, or two digital copies and one print. When the library lends a digital copy, it prohibits lending the physical one. CDL is an emerging innovation that enables the library to lend digital editions to users in remote locations who are unable to borrow the print, facilitates access to library resources for readers with disabilities or physical access limitations, thus advancing the library's public interest mission.[25]

19. Many library users often look to digital access first. For some, the inability to physically travel to a library because of a remote physical location, cost-effectiveness, or personal physical ability means that physical lending is not practical. For others, physical access is a matter of great inefficiency or constraints of the holdings of the jurisdiction in which they are located. There is a public interest in preventing barriers to the technologically neutral delivery of library services

Potential Implications of an Overly Broad Interpretation of the Terms "Communication to the Public by Telecommunication" and "Making Available on Demand"

20. Implications of the interpretation of the terms "communication to the public by telecommunication" and "making available on demand" reach far beyond the music and entertainment industries. A broad interpretation of s 2.4(1.1) or an interpretation that it creates some new right is likely to adversely affect many other sectors whose activities include online delivery of information. A broad interpretation of the section, when applied to the activities of libraries risks unique societal harm. Libraries use technology to facilitate access to materials to its patrons. Should these activities be considered "communications" or "making available" and trigger some new right or obligation, libraries risk being subject to an obligation to pay for resources a second time—first in acquiring them, and then in lending them.

21. An overly broad interpretation risks the creation of two separate rights for a single activity. Such a ruling from this Court further risks encouraging other copyright holders such as publishers to expect and claim effective double or triple compensation: one from the library that purchased the work; a second from the library for posting a link to enable its online lending, along with opening the door to a claim for compensation from the person downloading the

[25] Controlled Digital Lending of Library Books.

work.[26] Such an outcome would render lawful innovative library services unsustainable and halt their exploration, development, and implementation.

22. In *Théberge v Galerie d'Art du Petit Champlain Inc.,* this Court observed that "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".[27] In this way, technological neutrality is presented as a means by which law strives to maintain a balance between copyright owners and end users in the digital environment. It implies that attributing insufficient weight to technological neutrality can result in more a beneficial situation for the copyright owners, to the detriment of the public interest.

Library and Education Exceptions Provided in The Copyright Act Would Be Rendered Redundant

23. A broad interpretation of s 2.4(1.1) risks producing a legal outcome that would capture the legitimate online activities of libraries as "communication of a work or other subject-matter to the public by telecommunication" or "making [a work] available to the public by telecommunication" with a library's user characterized as "a member of the public." But insofar as they implicate copyright, technologically neutral library lending activities are more aptly considered akin to reproductions. The language used in the user rights and library exceptions in the *Copyright Act* bears this out, using language such as "make… a copy of a work or other subject-matter" (s 30.1(1)); "make an intermediate copy" (s 30.1(23); "making copies" (s 30.1(4); "make, by reprographic reproduction…a copy of a work" (s 30.2(2)); "may provide the person for whom the copy is made" (s 30.2(4)); "making of a copy of a work other than by reprographic reproduction" (s 30.2(5.01)); and "provide a copy in digital form" (s 30.2(5.02). The principle of technological neutrality in copyright must be applied to digital activities, specifically those of the libraries. Otherwise, innovative and efficient initiatives of libraries to facilitate access to information would be jeopardized.

24. Interpreting s 2.4(1.1) the way the appellants advocate could even lead to an assertion that use of a mere hyperlink is "making available on demand" and triggers some new right or obligation, irrespective of whether any reproduction or infringing download occurs. Libraries

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[26] Fewer, David, "Making Available: Existential Inquiries" in Michael Geist, ed, *In the Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005) 267 at 277-78.
[27] *Théberge v Galerie d'Art du Petit Champlain Inc.* 2002 SCC 34, [2002] 2 SCR 336 at para 31.

often provide hyperlinks to direct users to resources—to recommended resources, to licensed reading materials, to digitized or archived materials, as well as to resources provided through ILL, e-reserves, or CDL services described. This Court tackled the question of hyperlinks a decade ago in a case of alleged defamation, in *Crookes v Newton*,[28] concluding that hyperlinks are more in the nature of a reference than a publication. Abella J, writing for the majority, observed that "[C]ommunicating something is very different from merely communicating that something exists or where it exists." The two separate concurring cautioned against a catch-all approach, noting the need for nuance and that one must examine what the hyperlink does or enables.[29]

25. This court has not considered the legal meaning of a hyperlink in a copyright case. However, a year after *Crookes*, the Federal Court of Canada issued a ruling wherein it wrote that "the communication of [a work] occurred by creating a hyperlink…"[30] Further, numerous European decisions have reached various conclusions on the legal implications of hyperlinks.[31]

PARTS IV and V – SUBMISSION ON COSTS

26. CALL/ACBD and Library Futures Institute do not seek costs and ask that no costs be awarded against them.

DATED in Vancouver, BC this 26th of October, 2021

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[28] *Crookes v Newton*, 2011 SCC 47, [2011] 3 SCR 269 [***Crookes***] at para 20.
[29] *Crookes* at paras 51, 59.
[30] *Warman v Fournier*, 2012 FC 803, appeal discontinued Feb. 14 and 18, 2014 (Court File No A-395-12).
[31] Transatlantic Copyright Comparisons; Kariyawasam, Kanchana. "To Link Or Not to Link: The use of Hyperlinks and Copyright Infringement." *Intellectual Property Journal* 31, No 2 (May 2019), 157-185. [Book of Authorities, Tab 1].

Part VI - List of Authorities

Description	Para No
Case Law	
CCH Canadian Ltd. v Law Society of Upper Canada, 2004 SCC 13, [2004] 1 SCR 339.	14, 16
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