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
(Respondent)

-and-

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

RESPONDENTS
(Applicants)

[Style of cause continued on next page]

FACTUM OF THE INTERVENERS CANADIAN MUSIC PUBLISHERS ASSOCIATION carrying on business as "MUSIC PUBLISHERS CANADA" and ASSOCIATION DES PROFESSIONNELS DE L'ÉDITION MUSICALE
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada)*

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[Style of cause continued from previous page]

AND BETWEEN:

MUSIC CANADA

APPELLANT
(Respondent)

-and-

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

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-and-

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TABLE OF CONTENTS

PART I – OVERVIEW AND STATEMENT OF FACTS 1

PART II – RESPONSE TO QUESTIONS IN ISSUE 2

PART III – ARGUMENT 2

A. The *Act* Expressly Provides for the Divisibility of Copyright 2

B. The Divisibility of Copyright is Well-Established in Canadian Copyright Law 3

C. Divisibility and Flexibility Furthers the Objectives of the *Act* 6

D. The Underlying FCA Decision Threatens the Inherent Divisibility of Copyright 8

PART IV – COSTS 10

PART VII – TABLE OF AUTHORITIES AND LEGISLATION 11

PART I – OVERVIEW AND STATEMENT OF FACTS

1. The *Copyright Act*[1] entitles copyright owners to divide and subdivide their exclusive rights, to license them separately, in whole or in part, and to secure fair compensation for the use of each right in various contexts. Copyright owners have done so for decades, long before the rise of digital technology.[2]

2. Indeed, the inherent divisibility of copyright is fundamental to Canada's copyright regime. Effective licensing practices and the ability of copyright owners to secure fair remuneration for uses of their work depend on the divisibility of copyright.

3. As this Court has affirmed repeatedly, divisibility dictates that, when a user undertakes a sequence of distinct activities that engage more than one right, or that engage the same right more than once, the user is required to obtain a licence, and pay any necessary compensation, for each protected act. Where multiple copyright events occur, "licence fees *will necessarily follow*" for each one.[3]

4. The decision under appeal threatens that divisibility. The Federal Court of Appeal (FCA) held that the act of making a work available on demand—that is, in a way that allows a member of the public to have access to the work from a place and at a time individually chosen by that person—is not a separate act of communication to the public by telecommunication. Instead, the FCA held that the act of making available merges with any stream that may follow, such that, for purposes of the *Act*, the two acts effectively become one.[4]

5. The notion that two distinct activities can "merge" to become a single protected act is antithetical to the principles underlying the divisibility of copyright. The effect of that

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[1] RSC 1985, c C-42.

[2] *Muzak Corp v Composers, Authors & Publishers Assn of Canada*, [1953] 2 SCR 182 at 188, 19 CPR 1 [*Muzak*].

[3] *Canadian Broadcasting Corp v SODRAC 2003 Inc*, 2015 SCC 57, [2015] 3 SCR 615 at para 77 [*CBC*] (emphasis added).

[4] *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*, 2020 FCA 100, [2020] FCJ No 671 at paras 96-97 [FCA Decision].

notion is to impermissibly "read down" rights afforded by the *Act* or "substitute [a court's] policy preferences for those of Parliament."[5]

6. It is imperative that the disposition of this appeal reflect the long-established principle that copyright comprises a bundle of rights that are inherently divisible and subdivisible and can be licensed separately from one another. That includes the freedom to license (or not to license) distinct activities that occur within a single process.

PART II – RESPONSE TO QUESTIONS IN ISSUE

7. The Music Publisher Associations interest in this proceeding lies in preserving the integrity of the underlying legal principles engaged by the issues on appeal and ensuring that this Court appreciates the consequences of undermining the principle of divisibility of copyright.

PART III – ARGUMENT

A. The *Act* Expressly Provides for the Divisibility of Copyright

8. The plain language of the *Act* confirms that the exclusive rights it affords are separate, distinct, and inherently divisible.

9. Subsection 3(1) of the *Act* defines "copyright" in a work as the sole right to produce or reproduce the work in any material form, to perform the work in public, or to publish the work if it is unpublished. That "includes," but is not limited to, the sole right to engage in the more specific acts listed in paras. 3(1)(a) through (i).

10. Each of the rights in that copyright bundle may be further subdivided. This is confirmed by s. 13(4) of the *Act*. Section 13(4) permits copyright in a work to be assigned, either "wholly or partially," and either generally or subject to a broad, non-exhaustive range of limitations, for the whole or any part of the term of copyright. It also permits the grant of

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[5] *Euro-Excellence Inc v Kraft Canada Inc*, 2007 SCC 37, [2007] 3 SCR 20 at paras 3, 8 [*Euro-Excellence*].

"*any* interest in the right"—that is, wholly or partially and subject to any applicable limitations—"by licence."[6]

11. It is widely accepted that the words "wholly or partially" in s. 13(4) permit a copyright owner to assign or license different rights, and different uses of the same right, separately.[7] As noted in *Fox on Copyright*, the divisibility of copyright allows "a considerable amount of flexibility to a copyright owner in the commercial exploitation of the rights in issue."[8]

12. In *Euro-Excellence*, Abella J., dissenting on other grounds, wrote that, pursuant to s. 13(4), "the owner of a copyright is free to divest itself of *any* interest in the copyright, in whole or in part, either by assignment *or* by licence."[9] She cited *Bouchet v. Kyriacopoulos*, citing *Fox on Copyright*, to hold specifically that the *Act* "obviously provide[s] for the right of a copyright owner to divide his copyright as to the ***mode of reproduction*** of the work."[10]

B. The Divisibility of Copyright is Well-Established in Canadian Copyright Law

13. This Court has consistently affirmed the divisibility of copyright. The jurisprudence is clear: distinct acts that engage more than one right, or distinct acts that engage the same right more than once, trigger distinct liability under the *Act*.

14. As early as 1953, in *Muzak*, this Court recognized that copyright in musical works is "distributed into a number of interests both 'vertical' and 'horizontal.'"[11] The Court rejected the argument that a party that makes and delivers sound recordings to another party authorizes the performance of the recorded music in public by that other party. If that were

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[6] *Copyright Act*, *supra* note 1, s 13(4); see also s. 25 (performers, sound recording makers, broadcasters).

[7] See, e.g., David Vaver, *Copyright Law* (Toronto: Irwin Law, 2000) at 228, 234-235; *CBC*, *supra* note 3 at paras 56-60.

[8] John S. McKeown, *Fox on Canadian Law of Copyright and Industrial Designs* (Toronto: Thompson Reuters Canada Limited, 2012) at 19-1(e).

[9] *Euro-Excellence*, *supra* note 5 at para 116 (emphasis in original).

[10] *Bouchet v Kyriacopoulos*, (1964) 45 CPR 265 at 276, 1964 CarswellNat 32 (emphasis added).

[11] *Muzak*, *supra* note 2 at 188.

so, the "very distinction between the right to make a record and the right to give a public performance by means of it which ... the *Act* provides for, is wiped out."[12]

15. In *Bishop*, this Court rejected a broadcaster's argument that, because it had obtained a licence to broadcast a musical work, it did not require a separate licence to make copies of that work to facilitate the broadcast. Among other things, the broadcaster argued that re-recording was virtually essential "to ensure the quality of broadcasts and to enable broadcasters to offer the same programming at convenient times across five different time zones."[13] Nevertheless, McLachlin J. (as she then was), writing for a unanimous Court, held that copying and broadcasting musical works were separate activities that engaged separate statutory rights and therefore required separate licences.[14] In other words, a licence to broadcast the musical work did not imply any right to reproduce it because the communication right and the reproduction right are distinct.

16. In *ESA*, this Court reaffirmed its reasoning in *Bishop* while distinguishing the two cases on their facts. In *Bishop*, the broadcaster engaged in two separate activities—the making of an ephemeral copy to facilitate the broadcast, and the actual broadcast—and therefore required two separate licences. Conversely, in *ESA*—which was decided before s. 2.4(1.1) was enacted to address the making available of works on demand—this Court found that there was only one activity, the transmission of a digital download of a musical work, which engaged only one right and therefore required only one licence.[15]

17. In *CBC*, some 25 years after *Bishop* was decided, this Court reaffirmed the underlying logic of that earlier decision, which the appellant had attempted to dismiss as irrelevant as a result of *ESA*. Unlike *Bishop*, in which the Court considered distinct activities that triggered

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[12] *Ibid.* at 189.

[13] *Bishop v Stevens*, [1990] 2 SCR 467 at 487, 72 DLR (4th) 97 [*Bishop*].

[14] *Ibid.* at 484-485. See also *Compo Co Ltd v Blue Crest Music et al*, [1980] 1 SCR 357 at 373, 105 DLR (3d) 249.

[15] *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34, [2012] 2 SCR 231 at para 41 [*ESA*].

different exclusive rights, the Court in *CBC* considered distinct activities that triggered *the same* right.

18. As the Court noted, when broadcasters produce a program, they make several kinds of copies, including synchronization copies, which are created to incorporate musical works into an audiovisual program; master copies, which are created when the synchronization is complete; and broadcast-incidental copies, which are created to facilitate broadcast. CBC argued that broadcast-incidental copies were mere preparatory copies, necessary only to prepare the program for broadcasting, and therefore did not engage the reproduction right.[16] CBC also argued, that even if a licence was required to make broadcast-incidental copies, it should be implied from the synchronization licence.[17]

19. This Court rejected those arguments. While the Court acknowledged that its understanding of the purpose of copyright had evolved since its decision in *Bishop*, the majority held once again that the plain language of para. 3(1)(d) of the *Act* makes clear that the reproduction right applied to copies made to facilitate broadcast. The Court also concluded that the Board was correct to find that a licence to make broadcast-incidental copies should not be implied from a synchronization licence.[18]

20. The Court acknowledged that a synchronization licence does not necessarily cover every conceivable use of the reproduction right in the production of an audiovisual work. Rather, separate licensing of synchronization copies and broadcast-incidental copies allows producers to "'remain free to decide whether they wish to offer a turnkey service for the audiovisual works they license, or whether they wish to pay only for the rights they use' … a choice that may be particularly valuable for smaller producers with modest licensing budgets."[19]

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[16] See, e.g., *Canadian Broadcasting Corporation v SODRAC 2003 Inc*, 2014 FCA 84, [2015] 1 FCR 509 at paras 18-19; *CBC*, *supra* note 3 at para 45.

[17] *CBC*, *supra* note 3 at para 56.

[18] *Ibid*. at para 49.

[19] *Ibid*. at paras 59-60.

21. The Court also held that recognizing synchronization copies and broadcasting copies as distinct activities, validly subject to disaggregated licences, did not offend the principle of technological neutrality. To the contrary, a process *can* include separate events that engage separate rights or separate exercises of the same right without amounting to an impermissible "layering of protections and fees."[20]

22. In consequence, the Court in *CBC* concluded that the making of synchronization copies and the making of broadcast-incidental copies by broadcasters in the course of their broadcasting activities are distinct activities, even when the broadcaster is also the program producer. While each activity triggers the reproduction right, each is a separate exercise of that right and requires a distinct licence.

23. The jurisprudence is clear that, when a user undertakes a sequence of distinct activities that engage more than one right, or that engage the same right more than once, the user is required to obtain a licence, and pay the necessary compensation, for each protected act. "From the moment the right is engaged, licence fees will necessarily follow."[21] While the amount of the licence fee may vary from case to case (and the issue of valuation is not before the Court in this appeal), a court will not simply dismiss or ignore the protected acts to minimize a user's liability. To do so would undermine the divisibility of copyright.

C. Divisibility and Flexibility Furthers the Objectives of the *Act*

24. The divisibility of copyright is a central tenet of Canada's copyright regime that ought to be preserved in a manner consistent with the jurisprudence. The divisibility of copyright promotes the policy objectives of the *Act*, which include ensuring a just reward for creators and promoting both the creation and the dissemination of works of the arts and intellect.[22]

25. In *Euro-Excellence,* Abella J. agreed that divisibility furthers the goals of the *Act*:

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[20] *Ibid*. at para 63.

[21] *Ibid*. at para 77.

[22] *Théberge v Galerie d'Art du Petit Champlain Inc*, 2002 SCC 34, [2002] 2 SCR 336 at para 30 [*Théberge*].

> A copyright holder's ability to alienate its interest either through licensing or assignment is perfectly consistent with the statutory scheme. ***Vertical and horizontal divisibility is, arguably, a hallmark of copyright***: see *Bouchet v. Kyriacopoulos* (1964), 45 C.P.R. 265 (Ex. Ct.). And, as Binnie J. noted in *Théberge*, at para. 12, ***the economic objectives of copyright law are furthered through the transferability of either full or partial copyright interests.***[23]

26. On one hand, the inherent divisibility of copyright is crucial to the ability of copyright owners, including the members of the Music Publisher Associations, to earn fair compensation for the use of their works. It is what enables them to divide and subdivide their exclusive rights, to license them separately, in whole or in part, and to secure fair compensation for the use of each right. Rights holders rely on their ability to license the rights they own or control for different purposes to maximize revenue and secure fair compensation for the use of each right in various contexts.

27. At the same time, the divisibility of copyright promotes reasonable access to works by permitting a prospective licensee to pay for only the territory that it requires, the sector of the market in which it operates, or the types of uses it makes.

28. As Professor Vaver has written, the "statutory IP regimes have been deliberately organized to facilitate a free national and international market in rights …. They may usually be split up horizontally and vertically—by territory, time, market, and so on—and dealt with accordingly. The maximum extraction of rents is thus assured."[24]

29. The flexibility afforded by the inherent divisibility of copyright ensures that prospective licensees are able to seek, obtain, and pay for, licences only for the uses they need. In many cases, flexibility in licensing was "first demanded by users" and continues as a way to meet their needs. A licensee may not, for example, want to pay for worldwide rights when it does business only in one country.[25]

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[23] *Euro-Excellence*, *supra* note 5 at para 117 (emphasis added).

[24] David Vaver, *Intellectual Property Law*, 2d ed (Toronto: Irwin Law, 2011) at 558; Sunny Handa, *Copyright Law in Canada* (Markham: Butterworths Canada, 2002) at 336.

[25] Jeremy De Beer, "Copyright Royalty Stacking" in Michael Geist, ed, *The Copyright Pentalogy – How the*

30. ESA suggests that acknowledging the act of making available as engaging the communication right would result in "Internet broadcasters" being required to pay two royalties to "broadcast" a song "via on-demand streaming," while a traditional broadcaster pays only one. It portrays that example as an impermissible violation of technological neutrality.[26] But ESA fails to appreciate that recognizing the act of making available as a separate and divisible aspect of the communication right actually *advances* the purposes of copyright by ensuring that users are not forced to obtain licences for uses that they do not need.

31. For example, recognizing that the communication right is engaged by the act of making available separately from any act of transmission that may follow means that a traditional broadcaster who does not offer on-demand functionality will not be required to license the right to make a work available on demand. To require traditional broadcasters to obtain broader communication rights than they need would create obvious inefficiencies, including additional licensing and transaction costs.

D. The Underlying FCA Decision Threatens the Inherent Divisibility of Copyright

32. The FCA Decision runs afoul of this Court's jurisprudence upholding the divisibility of copyright and jeopardizes the economic objectives of copyright law that are advanced by that principle.

33. The FCA used purposive construction to conclude that it would be contrary to the policy of the *Act* to establish a tariff on a "preparatory step" as that would "constitute disaggregating rights for the purpose of adding an additional layer of royalties." By dismissing the act of making available as a mere "preparatory act" that "merges" with whatever transmission that may follow,[27] the FCA Decision undermines the inherent

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Supreme Court of Canada Shook the Foundations of Canadian Copyright Law (Ottawa: University of Ottawa Press, 2013) 335 at 342.

[26] Factum of the Respondents, Entertainment Software Association, Entertainment Software Association of Canada, Bell Canada, Quebecor Media Inc, Rogers Communications Inc and Shaw Communications, at para 108.

[27] FCA Decision, *supra* note 4 at paras 96-97.

divisibility of copyright and jeopardizes the ability of copyright owners to divide and subdivide their exclusive rights and to license them separately.

34. As this Court held in *CBC*, principles of balance and technological neutrality cannot change the express terms of the *Act*. It is not for a court to do by "interpretation" what Parliament chose not to do by enactment. Arguments based on purpose in the form of balance and technological neutrality are not a "stand-alone basis for the Court to develop its own theory of what it considers appropriate policy."[28]

35. For that reason, this Court should not remove liability where it exists. Pandora, for example, argues that to recognize the act of making available separately from a subsequent act of transmission would turn "technological neutrality on its head".[29] It would do no such thing. The act of making a work available for subsequent transmission is a distinct activity that triggers s. 3(1)(f) of the *Act* separately from any transmission that might follow. The notions of balance and technological neutrality may factor into the valuation exercise where distinct acts trigger the same right more than once, but they do not empower the Court to convert a protected act into an unprotected one.

36. It would be no more logical (and would find no more support in the jurisprudence) to dismiss the act of making available as merely "preparatory" than to dismiss the reproductions at issue in *Bishop* and *CBC* for that reason. Neither proposition is tenable.

37. In *CBC*, different integral steps in the process of producing and broadcasting a program engaged the reproduction right more than once, just as they do in the process of operating an on-demand service. Similarly, different "integral"[30] steps in the process of operating an on-demand service may engage the communication right more than once. Each scenario merely acknowledges that an activity engages a right and that subsequent activities in the process may engage the same right, or different rights.

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[28] *CBC*, *supra* note 3 at paras 48-55.

[29] Factum of the Respondent, Pandora Media Inc, at paras 8, 65-66 [Pandora Factum].

[30] *Ibid*. at para 72.

38. To give proper effect to the character of the statutory rights afforded to copyright owners, the *Act* must be interpreted in a way that does not permit one exclusive right—or, indeed, one protected act—to encroach upon or affect the separate recognition of another. There is nothing in the *Act*, or in relevant jurisprudence, to support the proposition that a subsequent transmission of a work modifies or overrides the character of the act that preceded it.

39. The character of a subsequent or preceding act, whether it is a communication or a reproduction, has no bearing on whether or not an act of making available engages the right to communicate a work to the public by telecommunication. To find otherwise would threaten the ability of copyright owners to secure fair compensation for the exploitation of their works by ensuring they are compensated whenever an exclusive right is triggered, even as part of a process or sequence of acts that triggers other rights or triggers the same right more than once. It would also jeopardize the ability of users to negotiate and pay only for the licences they need.

PART IV – COSTS

40. The Music Publisher Associations do not seek costs and submit that the ordinary rule that costs are not awarded against an Intervener should apply.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 27th day of October, 2021.

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PART VII– TABLE OF AUTHORITIES & LEGISLATION

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