

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

RESPONDENTS

AND BETWEEN:

MUSIC CANADA

APPELLANT

- 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

[Style of cause continued on next page]

**FACTUM IN REPLY TO THE FACTUMS OF THE INTERVENERS
PANDORA MEDIA INC.**

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

[*Style of cause continued*]

- 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 IN REPLY TO THE FACTUMS OF THE INTERVENERS
PANDORA MEDIA INC.**

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

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OVERVIEW

1. Pandora replies to the arguments of the Interveners, Canadian Music Publishers carrying on business as “Music Publishers Canada” and Association des professionnels de l’édition musicale (the “**Publishers**”).

2. The Publishers’ submissions are based on the false premise that the divisibility of copyright is threatened by the decision below and is under attack by the respondents on this appeal. The Publishers’ submissions miss the mark:

(a) the appeals do not raise issues relating to the acknowledged divisibility of copyright, but instead consider whether the making available provision (“**MAP**”) creates a new and independent right;

(b) the Publishers’ description of divisibility is limited, anachronistic and, ultimately, overbroad and incorrect;

(c) the Publishers misstate Pandora’s position as to the nature and status of the MAP, and those misstatements vitiate their subsequent submissions; and

(d) in any event, the Federal Court of Appeal’s (“**FCA**’s”) conclusion that the MAP does not give rise to an independent right entitling the Appellant SOCAN to incremental royalties is not inconsistent with the modern concept of copyright divisibility.

PART I - STATEMENT OF ARGUMENT

A. Divisibility is Not at Issue

3. Pandora does not take issue with the proposition that copyright, in Canada, is divisible and may, where appropriate, be licensed in discrete “slices”.

4. However, the Publishers’ extensive submissions extolling the virtues of divisibility miss the point, as Pandora does not challenge its existence or seek to eliminate it. Instead, as set out in its Respondent’s Factum, Pandora’s position in these appeals is that the MAP simply does not give rise to either an independent right or separate or additional royalties for on demand streaming services. The existence of divisibility does not determine these issues.

B. The Publishers' Concept of Divisibility is Obsolete

5. The Publishers advance a description of divisibility that may once have been accurate, but which has been overtaken by decades of jurisprudence from this Court post-*Bishop*.¹ For example, the Publishers assert that divisibility enables rights holders to splinter their rights for licensing purposes in order “to maximize revenue and secure fair compensation for the use of each right in various contexts.”² That assertion, however, must be read together with, and is constrained by, overarching characteristics of copyright identified by this Court.

(a) *Balance* between the interests of rights holders and rights consumers is paramount: “[t]he proper balance ... lies not only in recognizing the creator’s rights but in giving due weight to their limited nature”.³

(b) *Technological neutrality* dictates that rights holders cannot unduly “layer” their rights so as to impose gratuitous costs on users.⁴

6. Accordingly, the concept of divisibility as proposed by the Publishers is out of step with this Court’s jurisprudence and, to that extent, inapt as an analytical tool on these appeals.

C. The Publishers Mischaracterize Pandora’s Position

7. The Publishers cite to Pandora’s submissions in asserting that “this Court should not remove liability where it exists.” Elsewhere, the Publishers complain that the Respondents’ position would require courts to “dismiss or ignore...protected acts”.⁵

8. The Publishers misunderstand Pandora’s position. Works made available for on demand streaming (which is all that Pandora addresses) will not be “ignored” or have their copyright status

¹ *Bishop v. Stevens*, [1990] 2 SCR 467, 1990 CanLII 75 (SCC) (“*Bishop*”)

² Factum of the Interveners Canadian Music Publishers and Association des professionnels de l’édition musicale (“**Publishers’ Factum**”), para 26

³ *Théberge v. Galerie d’Art du Petit Champlain inc.*, [2002] 2 S.C.R. 336, 2002 SCC 34 (CanLII) at 30-32; *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, [2015] 3 SCR 615, 2015 SCC 57 (CanLII) (“*SODRAC*”) at 47 and 66 *et seq.*; *York University v. Canadian Copyright Licensing Agency (Access Copyright)*, 2021 SCC 32 (CanLII) at 91-94

⁴ *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, [2012] 2 SCR 231, 2012 SCC 34 (CanLII) (“*ESA*”) at 9

⁵ Publishers’ Factum, paras 23 and 35

“removed”. Indeed, such works will be protected by the communication right as soon as they are made available. Put differently, making works available for on demand streaming now falls within the act of communicating to the public by telecommunication, and such works are thus protected by the communication right once made available. The point is simply that this protection (i) is not a stand-alone right, separate from any subsequent streaming, (ii) continues (rather than starts afresh) if a work is selected and streamed and (iii) does not give rise to a separate and independent right to remuneration.

D. The FCA Decision is *Not* Inconsistent With Copyright Divisibility

9. The Publishers suggest that the owner of the communications right in a made-available work could *separately* license, and collect royalties for, the making available and subsequent streaming of that work. They say that this is because rights holders are “free[] to license (or not to license) distinct activities that occur within a single process”, that “making available [is] a separate and divisible aspect of the communication right” and that the separate licensing of making available and streaming can “ensur[e] that users are not forced to obtain licences for uses that they do not need.”⁶

10. The Publishers’ position is inconsistent with the law, and with both the structure of the MAP and the nature of on demand streaming.

11. First, as noted above, this Court has put limits on the extent to which rights holders may subdivide and layer rights. As noted in *ESA*, where transmissions of works for permanent copying (*i.e.* downloads) were at issue, technological neutrality precluded royalty stacking and gratuitous costs based on the method of delivery, and blocked SOCAN’s claim that downloads should implicate both the reproduction and the communication right.

12. Second, the Publishers rely on the outcomes in *Bishop* and *SODRAC*. However, as noted before, those outcomes are distinguishable as arising from truly distinct acts. In *Bishop*, broadcasting (*i.e.* performance/communication) was distinct from, and did not imply a licence for, recording the performance in question. In *SODRAC*, the “synchronization” licence granted to the program producer was separate from and did not imply a licence for a broadcaster to later make convenience

⁶ Publishers’ Factum, paras 6 and 30-31

copies. In each case, the two steps were separate, and not inextricably bound up together in a single event.

13. Making available is completely different, as even a cursory review of the language of the MAP and the nature of on demand streaming makes clear.

14. The MAP provides that communicating a work “includes making it available to the public by telecommunication *in a way that allows a member of the public to have access to it from a place and at a time individually chosen* by that member of the public” [*emphasis added*].⁷ In other words, the MAP *only* applies to works made available for on demand access. The corollary is that on demand services can *only* operate by making works available. Just as the defining characteristic of the MAP is that the availability be on demand, the defining characteristic of an on demand service is that its works are “made available”.

15. Accordingly, the two steps of making a work available and then, if it is selected, streaming it to an on demand subscriber, are completely intertwined. Indeed, while some works in an on demand streaming service may be made available, but never selected or streamed, *every* work made available must be *capable* of being selected and streamed. Otherwise, the service is not truly on demand.

16. This fact demonstrates that the Publishers’ claim - that making available and streaming should be seen as separate acts - is untenable. There can be no such thing as a mere making available licence. What right would it grant? Unless the right to stream each selected work is included, the works in the licensee’s catalogue would not be accessible by the public at the time and place of their choosing. Put differently, a work that can only be displayed in an online catalogue, but not streamed if selected, is not actually “available”, and thus the prerequisite for a “making available” licence would be missing. The Publishers’ position creates a tautology: a work is not “made available” unless it is accessible on demand; there is no “making available” in the abstract or separate from the ability to transmit.

17. Moreover, the “on demand” prerequisite in the MAP demonstrates the fallacy of the Publishers’ claim that treating making available as a separate and independently licensable right is beneficial to and “efficient” for “traditional broadcasters” which do not require that “right”.⁸

⁷ *Copyright Act*, [RSC 1985, c C-42](#), s. 2.4(1.1)

⁸ Publishers’ Factum, para 31

Traditional broadcasters “communicate to the public by telecommunication”, but since they do not do so on demand they make *nothing* available. Thus, by definition, the communication right that they license will simply not include the act of making available; put another way, there is nothing to exclude.

18. Finally, the Publishers say that the amounts payable for any licence “may vary”, and note that “the issue of valuation is not before the Court”,⁹ perhaps suggesting that the matter might be punted back to the Board to be resolved as a matter of royalty-setting at a rate hearing. However, where there have been untenable claims to multiple rights, leading to improper layering and “double dipping”, this Court has resolved them, and has resisted treating them as mere rate setting matters to be left to the Board.¹⁰

E. Conclusion

19. Accordingly, there is nothing about the concept of divisibility that is inconsistent with the decision below or Pandora’s position on these appeals. Indeed, the Publishers’ submissions illustrate the point that the making available of a work may trigger the communication right but does not create a new and separate right or give rise to new and incremental royalties.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 3rd day of November, 2021



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⁹ Publishers’ Factum, para 23

¹⁰ *ESA*, *supra*, [\[2012\] 2 SCR 231](#) at 11

PART IV – Table of Authorities

Cases	At para(s):
<i>Bishop v. Stevens</i> , [1990] 2 SCR 467 , 1990 CanLII 75 (SCC)	5
<i>Canadian Broadcasting Corp. v. SODRAC 2003 Inc.</i> , [2015] 3 SCR 615 , 2015 SCC 57 (CanLII)	5(a)
<i>Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada</i> , [2012] 2 SCR 231 , 2012 SCC 34 (CanLII)	5(b), 18
<i>Théberge v. Galerie d'Art du Petit Champlain inc.</i> , [2002] 2 S.C.R. 336 , 2002 SCC 34 (CanLII)	5(a)
<i>York University v. Canadian Copyright Licensing Agency (Access Copyright)</i> , 2021 SCC 32 (CanLII)	5(a)
Legislation	
<i>Copyright Act</i> , RSC 1985, c C-42 , s. 2.4(1.1)	14