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*]

MUSIC CANADA'S FACTUM IN REPLY TO THE INTERVENERS

(Pursuant to the October 14, 2021 Order of Justice Karakatsanis)

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INTERVENERS

AND BETWEEN:

MUSIC CANADA

APPELLANT
(Respondent)

-and-

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TABLE OF CONTENTS

PART I – ARGUMENT IN REPLY

A. No "Unnecessary" or "Improper" Interpretation

1. Prof. Katz criticizes the Board for "embark[ing] on [an] unnecessary exercise" of statutory interpretation that "was neither necessary nor inexorably linked to the determination of the proposed tariffs."[1] This is a new issue raised improperly by an intervener. The argument is flawed.

2. First, Prof. Katz misconstrues the Board's functions and powers. The Board is not a mere rate-setter. As described in *Rogers*, while the Board's mandate includes "the working out of the details of an appropriate royalty tariff," "in order to carry out this mandate, the Board is *routinely* called upon *to ascertain rights underlying any proposed tariff*."[2] Parliament chose to vest the Board with authority to decide legal issues. That choice must be respected, not thwarted.[3]

3. Second, it was both necessary and appropriate for the Board to interpret s. 2.4(1.1). As the Board correctly explained: "It is not possible to set SOCAN Tariff 22.A (Online Music Services) without deciding the extent, if any, to which the enactment of subsection 2.4(1.1) of the Copyright Act and other companion amendments may 'revive' SOCAN's ability to collect royalties for the transmission of permanent copies of musical works."[4] Just as it was necessary for the Board to interpret s. 2.4(1)(b) of the 1988 Act in *SOCAN v. CAIP*, so too was it necessary for the Board to interpret 2.4(1.1) of the 2012 Act in this case.

4. Third, the Board's procedural decision to convene a separate proceeding to resolve this issue is owed deference.[5] The Board properly recognized the issue's broader significance, including for other tariffs and rights holders, and determined it should be resolved through a separate proceeding with participation from stakeholders across the copyright spectrum.[6] This procedure was consistent with the procedure in *Tariff 22*.[7] Flexibility, efficiency, and fairness are

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[1] Ariel Katz's Factum, ¶2, 6, 10.

[2] *Rogers v. SOCAN*, 2012 SCC 35 [***Rogers***], ¶12 [emphasis added]. See also *Rogers*, ¶65, *per* Abella J. (concurring); *NRCC v. SOCAN*, 2003 FCA 302, ¶42-60.

[3] *Canada v. Vavilov*, 2019 SCC 65, ¶12, 24, 30, 32.

[4] Board Notice (Dec. 7, 2012) (AR, V. I, Tab 1).

[5] *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, ¶231.

[6] Board Notice (Dec. 7, 2012) (AR, V. I, Tab 1).

[7] *SOCAN v. CAIP*, 2004 SCC 45, ¶13.

virtues in administrative decision making, and specialized tribunals should not be hamstrung in responding to emerging legal issues dynamically.[8]

B. No "Royalty Stacking," "Double-Dipping," or "Overcompensation"

5. Prof. Katz, CIPPIC, and the Libraries wrongly assert that giving full effect to the MAR in Canada would engender "royalty stacking," "double-dipping," and "overcompensation."[9]

6. First, each of these arguments puts the cart before the horse. The first question is whether Parliament intended to implement a new *right*. It did.[10] The second question is whether Parliament intended that right to trigger new *compensation*. It did. The Government expressly stated that the *CMA*'s "new rights and protections" would "help [artists and creators] protect their work and *ensure they are fairly compensated* for their efforts."[11] In breach of this Court's order prohibiting interveners from "adduc[ing] further evidence or otherwise … supplement[ing] the record," CIPPIC introduces *Hansard* excerpts from three Opposition MPs to suggest otherwise.[12] Their isolated comments shed no light on Parliament's intent.

7. Second, any concern about potential overcompensation is properly dealt with at the valuation stage, not while construing the scope of a right. As this Court explained in *SODRAC*, if "rights holders have [an] exclusive right … they are entitled to be justly compensated for the use of that right."[13] Concerns about valuation do not justify denying the existence of a right in the first place. The Board's valuation process considers, among other things, "the value of th[e] right to the user."[14] This rigorous, value-focused process protects against any overcompensation.

8. Third, properly interpreted, the MAR generates none of these outcomes. The MAR is part of the communication right and it covers both *providing access to* content and *transmitting* it. The Board can parse and assign different rates to different *components* of the communication right. For example, the Board can set a rate for the act of *providing access to* content and a different rate for

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[8] *Knight v. Indian Head Sch. Div. No. 19*, [1990] 1 S.C.R. 653, at 685.

[9] Ariel Katz's Factum, ¶15-16.

[10] Music Canada's Factum, ¶19-29.

[11] Govt. of Can., "What the *Copyright Modernization Act* Means for Owners, Artists and Creators."

[12] Côté J.'s September 15, 2021 Order; CIPPIC's Factum, ¶11.

[13] *SODRAC*, ¶70. See also *SODRAC*, ¶65-79.

[14] *SODRAC*, ¶79.

the act of *transmitting* that content via stream, download, or other means. Those separate acts can be separately valued, and rights holders can be separately compensated, without "double-dipping."

9. Fourth, this Court in *SODRAC* developed a mechanism for avoiding gratuitous "royalty stacking" based on the principle of technological neutrality: while "distinct activities" trigger distinct entitlements, rights holders cannot claim "gratuitous" compensation "based on formal technological distinctions."[15] Prof. Katz proposes an "implied licence" as a potential solution to the "problem of royalty stacking;" that "solution" was expressly rejected in *SODRAC*.[16]

10. Fifth, the evidence before the Board was clear that the MAR has functioned effectively in other jurisdictions for years.[17] There was no evidence of any crisis of "royalty stacking" or "overcompensation." The assertions of Prof. Katz, CIPPIC, and the Libraries to the contrary—citing ***themselves*** as authorities[18]—are impermissible attempts to supplement the record.

11. Sixth, ensuring fair compensation is only one aspect of the MAR. A principal purpose of the MAR is to "control the release of copyrighted material on the Internet," which prevents "unauthorized sharing of copyrighted material over peer-to-peer networks."[19] Valuation concerns do not justify denying rights holders these essential protections against mass infringement.

12. Seventh, Prof. Katz asks this Court to apply "the principle of exhaustion," which he concedes "is typically associated with the distribution of copies."[20] This principle does not apply to the MAR, is beyond the scope of this appeal, and is improperly raised as a new issue on appeal.

C. No "One Economic Activity, One Tariff" Rule

13. Prof. Katz proposes that "a single economic activity" should be entitled to a single tariff, "even if that activity involves more than one right."[21] His "submissions" are improper, and his

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[15] *CBC v. SODRAC*, 2015 SCC 57, ¶61-63.

[16] *SODRAC*, ¶56.

[17] Music Canada's Factum, ¶46-50, 54-63.

[18] Prof. Katz relies on three of his own articles and one of Jeremy de Beer, then-counsel for CIPPIC. CIPPIC relies on two articles by Prof. de Beer. The Libraries rely on two articles by Prof. de Beer and one by David Fewer, CIPPIC's counsel. None of these authors has the independence or qualifications to give expert economic evidence. *White v. Abbott*, 2015 SCC 23, ¶11, 32-34.

[19] Govt. of Can., "What the *Copyright Modernization Act* Means for Owners, Artists and Creators."

[20] Ariel Katz's Factum, ¶21.

[21] Ariel Katz's Factum, ¶5(b).

proposal is contrary to this Court's jurisprudence, the scheme of the Act, the copyright treaties Canada is bound by, and sound economics.

14. First, Prof. Katz's factum improperly introduces opinion evidence in the guise of argument. Essentially, he opines, based on his "expertise in copyright law, competition law, and the collective administration of copyrights" (***not economics***),[22] that it is bad economics to recognize different rights that cover the same or a similar "economic activity" (which he fails to define), repeatedly citing his own writings.[23] Although he participated in the Board hearing, he chose not to raise any such evidence or opinions before the Board.[24] He cannot do so now.

15. Second, Prof. Katz's "single economic activity" theory is an attempt to relitigate *SODRAC*. In *SODRAC*, this Court stated, "From the moment [a] *right* is engaged, licence fees will necessarily follow."[25] Thus, *rights*, not "economic activities," trigger compensation. As a corollary, if a "single economic activity"—whatever that means—triggers multiple rights, the rights holder(s) are entitled to compensation for *each* of those rights.

16. Third, the Act and the international treaties respecting copyrights to which Canada is bound establish copy*rights* covering a range of acts and not "economic activities." If a single act triggers multiple rights, the rights holder(s) must have the right to license, protect, and enforce *all* those rights. They are not forced to choose one and forgo all others, forfeiting essential protections and compensation.

17. Fourth, Prof. Katz's economic theory is unsound. The MAR enables rights holders to reduce piracy (free riding), thus lowering transaction costs in the creative industries. At a relatively minimal cost compared to alternatives, the ability to enforce promotes investment, market entry, competition, and total creative output.[26] Further, Prof. Katz's underlying assumption that copyright

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[22] Leave to Intervene Affidavit of A. Katz, ¶3.

[23] See, e.g., Ariel Katz's Factum, fn. 27-28, 39, 41.

[24] Dec. 21, 2012 Response of Ariel Katz (AR, Vol. II, at 154-55).

[25] *SODRAC*, ¶70, 77, 79 [emphasis added].

[26] G. Barker, "The Law and Economics of Copyright Law" (2019), at 12-14; G. Barker, "Agreed Use and Fair Use" (2013), at 14; H. Demsetz, "Creativity and the Economics of the Copyright Controversy" (2009), 6 *R.E.R.C.I.* 5, at 11.

holders "exercise monopolistic power" is both unsupported and contrary to the economic scholarship and this Court's jurisprudence.[27]

D. No "Discrimination Against Any Particular Form of Technology"

18. CIPPIC and the Libraries wrongly assert that Music Canada's approach to s. 2.4(1.1) offends the principle of technological neutrality.[28] Properly interpreted, the MAR does not "discriminate against any particular form of technology;" it covers *all* acts of making available. As this Court cautioned in *Rogers*: "[The] balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator…is not appropriately struck where the existence of copyright protection depends merely on the business model that the alleged infringer chooses to adopt."[29]

E. No "Failure to Adequately Reflect International Human Rights Treaties"

19. CIPPIC wrongly asserts that Music Canada's approach to s. 2.4(1.1) fails to reflect the values and principles of international human rights treaties. There is no human right to engage in piracy. This Court recognized in *Equustek* that injunctions prohibiting online infringement do not interfere with fundamental values or rights such as freedom of expression.[30] To the contrary, copyright protections *promote* those values and rights by promoting free expression, facilitating functioning markets, and enriching cultural life.[31] Indeed, copyright is *itself* recognized as a human right under the *ICESCR*, the *UDHR*, and s. 6 of the *Quebec Charter*.[32] Curtailing the MAR would bring about the very harm to human rights CIPPIC seeks to avoid.

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

B. SOOKMAN/D. GLOVER

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[27] S. Liebowitz & R. Watt, "How to Best Ensure Remuneration for Creators" (2006), 20 *J.E.S.* 513, at 517; A. Lerner *et al.*, "The Economics of Copyright 'Fair Use' in a Networked World" (2002), 92 *A.E.R.*; Barker, "Law and Economics," at 11-12; *York v. Access Copyright*, 2021 SCC 32, ¶48-54 (the Board prevents collectives from "exercis[ing] monopolistic power").

[28] CIPPIC's Factum, ¶16-20; Libraries' Factum, ¶4, 7-8.

[29] *Rogers*, ¶40. Also see Music Canada's Factum, ¶26-28, 42, 44, 80-82.

[30] *Google v. Equustek*, 2017 SCC 34, ¶48. See also *UPC Telekabel v. Constantin*, ECJ Case No. C-314/12 (Mar. 27, 2014); *Canada v. James Lorimer* (1983), [1984] 1 F.C. 1065 (C.A.), ¶29 (Supp. BOA, Tab 1); *Michelin v. CAW* (1996), [1997] 2 F.C. 306 (T.D.), ¶85; *Teksavvy v. Bell*, 2021 FCA 100, ¶46-59.

[31] See, e.g., *BMG Canada Inc. v. Doe*, 2005 FCA 193, ¶40; *Voltage Pictures, LLC v. John Doe*, 2017 FCA 97, ¶26, rev'd in part 2018 SCC 38.

[32] *ICESCR*, 993 U.N.T.S. 3 (1976), art. 15(1)(c); *UDHR*, U.N. Doc. A/810 (1948), art. 27(2); *Cinar Corporation v. Robinson*, 2013 SCC 73, ¶114. See also Commonwealth of Australia, *Explanatory Memorandum on Copyright Amendment (Online Infringement) Bill 2015*, ¶17-21, 27-30.

PART II - TABLE OF AUTHORITIES

Authority	Paragraphs of Memorandum
Case Law	
BMG Canada Inc. v. Doe, 2005 FCA 193	19
Canada v. James Lorimer & Co. (1983), [1984] 1 F.C. 1065 (C.A.)	19
Canada v. Vavilov, 2019 SCC 65	2
CBC v. SODRAC, 2015 SCC 57	9
Cinar Corporation v. Robinson, 2013 SCC 73	19
Council of Canadians with Disabilities v. VIA Rail, 2007 SCC 15	4
Google v. Equustek, 2017 SCC 34	19
Knight v. Indian Head Sch. Div. No. 19, [1990] 1 S.C.R. 653	4
Michelin v. CAW (1996), [1997] 2 F.C. 306 (T.D.)	19
NRCC v. SOCAN, 2003 FCA 302	2
Rogers v. SOCAN, 2012 SCC 35	2, 18
SOCAN v. CAIP, 2004 SCC 45	3, 4
Teksavvy v. Bell, 2021 FCA 100	19
UPC Telekabel v. Constantin, ECJ Case No. C-314/12 (Mar. 27, 2014)	19
Voltage Pictures, LLC v. John Doe, 2017 FCA 97, rev'd in part 2018 SCC 38	19
White v. Abbott, 2015 SCC 23	10
York v. Access Copyright, 2021 SCC 32	17
International Treaties	
Commonwealth of Australia, *Explanatory Memorandum on Copyright Amendment (Online Infringement) Bill 2015*	19
ICESCR, 993 U.N.T.S. 3 (1976), art. 15(1)(c)	19
UDHR, U.N. Doc. A/810 (1948), art. 27(2)	19
Other Authorities	
A. Lerner *et al.*, "The Economics of Copyright 'Fair Use' in a Networked World" (2002), 92 A.E.R.	17
Côté J.'s September 15, 2021 Order	6
G. Barker, "The Law and Economics of Copyright Law" (2019)	17

Authority	**Paragraphs of Memorandum**
G. Barker, "Agreed Use and Fair Use" (2013)	17
Govt. of Can., "What the *Copyright Modernization Act* Means for Owners, Artists and Creators"	7, 12
H. Demsetz, "Creativity and the Economics of the Copyright Controversy" (2009), 6 *R.E.R.C.I.* 5	17
S. Liebowitz & R. Watt, "How to Best Ensure Remuneration for Creators" (2006), 20 *J.E.S.* 513	17