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November 3, 2021

By Email : Registry-greffe@scc-csc.ca

Deputy Registry
Supreme Court of Canada
301 Wellington Street
Ottawa, Ontario

Dear Deputy Registrar:

Re: SCC File No. 39418 *SOCAN v. Entertainment Software Association et al.*
Reply of the Respondents, Entertainment Software Association, Entertainment Software Association of Canada, Bell Canada, Quebecor Media Inc., Rogers Communications Inc. and Shaw Communications

1. Further to the order of J. Karakatsanis of October 14, 2021, these are the reply submissions of ESA and the Networks to the memoranda of fact and law filed by the interveners in this matter.

2. ESA and the Networks have no specific reply comments on the arguments filed by the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic, Professor Ariel Katz, and the Canadian Association of Libraries and Library Futures Institute.

3. ESA and the Networks will only comment on the arguments filed by Music Publishers Canada, which argues that interpretating the act of "making available" as including the activities covered by the communication right is not consistent with the divisibility of copyright.

4. ESA and the Networks submit that such an interpretation does not undermine the divisibility of copyright. The concept of divisibility is simply not applicable in this analysis. ESA and the Networks agree that copyright is a "bundle of rights", each of which can be licensed and compensated separately. They simply submit that the "making available" provision does not create an additional right in addition to those rights enumerated in section 3 of the *Copyright Act*.

5. It is inherent to the *Copyright Act* that the various rights that make up copyright are divisible. The public performance right is separate from the reproduction right and each right can be and is licensed or assigned separately.

6. As ESA and the Networks explained in their memorandum of fact and law, these independent rights are set out in subsection 3(1) of the *Copyright Act*. These rights are the right to reproduce, perform, and publish the work or any substantial part thereof. The "making available" provision, however, is not contained in this rights-granting section but rather in section 2.4(1.1). Even structurally, it is clear that the "making available" provision is intended to simply clarify the scope of activities covered by the communication right, not to create a new right that exists independently from the communication right.

7. The Music Publishers point to *Bishop v. Stevens* in support of their position that separate rights require separate licences.[1] ESA and the Networks do not dispute this guidance from this Court and simply note that two separate rights – communication and reproduction - were at issue in that case rather than the single right – communication - at issue here.

8. The Music Publishers claim that the Federal Court of Appeal's decision "runs afoul" of this Court's jurisprudence on the divisibility of copyright. This is not the case as the decision below clearly recognizes that the Court is interpreting one right, communication to the public by telecommunication, and determining the chain of events that is included in that one right. The Federal Court of Appeal's decision is consistent with this Court's understanding of the division of copyright.

9. Indeed to allow for the same right to be compensated twice would upset the balance of copyright. As this Court explained in *Théberge v. Galerie d'Art du Petit Champlain*, it is just as inefficient to over-compensate copyright owners as it is to under-compensate copyright owners. A single activity cannot trigger two rights.[2]

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[1] *Bishop . Stevens*, [1990] 2 SCR 467, 72 DLR (4th) 97.

[2] *Théberge v. Galerie d'Art du Petit Champlain*, 2002 SCC 34 at para. 31.

10. This is reinforced in the *ESA v. SOCAN* case that features prominently in this matter. In that case, this Court cautioned against the layering of rights:

> 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. To do otherwise would effectively impose gratuitous cost for the use of more efficient, Internet-based technologies.[3]

11. Ultimately, Music Publishers Canada is creating an issue where one does not exist. The spectre that this Court's decision in this matter might erase the inherent divisibility of copyright is unfounded.

12. ESA and the Networks have had an opportunity review the reply submissions of Pandora Media Inc. and support and adopt these submissions as well.

Yours truly,

FASKEN MARTINEAU DuMOULIN LLP

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JKW/ss

cc *Service list*

[3] *ESA v. SOCAN*, 2012 SCC 34 at para. 9.