SCC No. 39418

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

B E T W E E N:

SOCIETY OF COMPOSERS, AUTHORS AND MUSIC PUBLISHERS OF CANADA

Appellant (Respondent)

- and -

ENTERTAINMENT SOFTWARE ASSOCIATION, ENTERTAINMENT SOFTWARE ASSOCIATION OF CANADA, APPLE INC., AND APPLE CANADA INC., PANDORA MEDIA INC.

Respondent (Appellant)

AND BETWEEN:

MUSIC CANADA

Appellant (Appellant)

- and -

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

Respondent (Respondent)

- and -

SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY AND PUBLIC INTEREST CLINIC, CANADIAN MUSIC PUBLISHERS ASSOCIATION CARRYING ON BUSINESS AS "MUSIC PUBLISHERS CANADA" AND ASSOCIATION DES PROFESSIONNELS DE L'ÉDITION MUSICALE, THE CANADIAN ASSOCIATION OF LAW LIBRARIES/L'ASSOCIATION CANADIENNE DES BIBLIOTHÈQUES DE DROIT AND LIBRARY FUTURES INSTITUTE, AND ARIEL KATZ

Interveners

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PART I - OVERVIEW AND STATEMENT OF FACTS

1. These appeals address the interpretation of s. 2.4(1.1) of the *Copyright Act*[1] (the Making Available Provision or "MAP") and whether it creates a right to a "making available" tariff. They arise from a proceeding before the Copyright Board of Canada (the "Board") to certify tariffs proposed by SOCAN relating to online music services. In those tariffs, SOCAN did not propose a royalty merely for making a work available. Yet, instead of limiting itself to questions required to fulfil its rate-setting function, the Board embarked on a separate special proceeding to attempt to provide a comprehensive interpretation of the scope of the MAP.[2] During that proceeding, the Board interpreted international treaties[3] to determine what Parliament would need to do to comply with them, which in turn, led the Board to declare the law with respect to a series of hypothetical questions, none of which were before it, and many of which would never come before it.

2. The *Making Available Decision* was based on the faulty premise that it was proper for the Board to convene such a proceeding to determine the meaning and scope of the MAP. The *Making Available Decision* was neither necessary nor inexorably linked to the determination of the proposed tariffs, which is the Board's mandate. In fact, the Board ultimately declined to set a tariff for the act of making a work available.[4]

3. In addition, the Board's conclusion that the MAP should, in principle, lead to a separate and additional royalty rate for the mere act of making a work available is based on a second faulty premise: that activities involving more than one of the exclusive rights under s. 3(1) of the *Act* should *ipso facto* attract a separate or additional payment. This faulty premise has no basis in

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[1] RSC 1985, c C-42 [the *Act*].

[2] *Re Scope of Section 2.4(1.1) of the Copyright Act – Making Available* (25 August 2017), CB-CDA 2017-085, online: Copyright Board of Canada <https://decisions.cb-cda.gc.ca/cb-cda/decisions/en/item/366772/index.do> [*Making Available Decision*].

[3] *WIPO Copyright Treaty*, 22 December 1997, (entered into force 13 August 2014, adopted in Geneva on December 20, 1996), online: *WIPO Lex* <www.wipo.int/treaties/en/ip/wct>; and *WIPO Performances and Phonograms Treaty*, 22 December 1997, (entered into force 13 August 2014, adopted in Geneva on December 20, 1996), online: *WIPO Lex* <www.wipo.int/treaties/en/ip/wppt> (collectively, the "*Treaties*").

[4] *Statement of royalties to be collected for the communication to the public by telecommunication to the public by telecommunication or the reproduction, in Canada, of musical works* (25 August 2017), CB-CDA 2017-086 at para 199, online (pdf): Copyright Board of Canada <https://decisions.cb-cda.gc.ca/cb-cda/decisions/en/366865/1/document.do> [*Tariff Decision*].

copyright law, and further, it undermines the purpose for which the Board was established: avoiding the exercise of monopolistic power. The assumption that remuneration should follow any act that engages one of the exclusive rights encourages copyright collectives and their members to artificially and inefficiently splinter their copyrights and propose additional tariffs or higher rates, thereby unfairly exerting greater market power.

4. These appeals present this Court with the opportunity to clarify both the proper mandate of the Board and the proper basis for the creation of new copyright tariffs.

PART II - STATEMENT OF INTERVENER'S POSITION

5. Professor Katz respectfully submits that this Court should reiterate and clarify that:

(a) The Board should focus on its core mandate of setting royalty-rates, not develop copyright jurisprudence; and

(b) Consistent with general principles for calculation of monetary awards and with the Board's regulatory purpose, there is no basis for setting additional tariffs or higher rates on a single economic activity even if that activity involves more than one right.

PART III - STATEMENT OF ARGUMENT

A. THE BOARD SHOULD NOT HAVE STRAYED FROM ITS RATE-SETTING FUNCTION

6. The function of the Board is clear, specific, and narrow – to fix the maximum rates which collective societies can charge users.[5] Occasionally, the Board may need to determine questions of law if, but only if, their determination is necessary and inexorably linked to its core rate-setting mandate. In the *Making Available Decision* the Board strayed from its rate-setting mandate, choosing instead to engage in a lengthy standalone proceeding to provide a comprehensive and

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[5] *Posen v Canada (Minister of Consumer & Corporate Affairs)* (1979), [1980] 2 FC 259 at para 6 (FCA), Book of Authorities "**BOA**", Tab 5; *FWS Joint Sports Claimants v Canada (Copyright Board)* (1991), [1992] 1 FC 487 at para 6 (FCA) [*FWS*]; *CTV Television Network Ltd. v Canada (Copyright Board)*, [1993] 2 FC 115 at paras 16-18 (FCA) [*CTV Television*]; *Society of Composers, Authors & Music Publishers of Canada v Canada (Copyright Board)*, [1993] FCJ No 137 at para 41 (FCTD), **BOA**, Tab 6; *Rogers Communications Inc v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35 at para 12; *Canadian Copyright Licensing Agency (Access Copyright) v. Canada*, 2018 FCA 58 at para 112 [*Access Copyright*].

definitive interpretation of the MAP that would be relied on in future cases, involving other collectives and other users. This inquiry was outside of its mandate because it attempted to answer a wide array of questions with applications beyond the scope of the proposed tariffs, the alleged answers to which ultimately had no effect on the tariff it certified. Although the parties do not focus on whether the Board should have determined the scope of the MAP, this type of question forms the backdrop of appellate litigation and is thus a proper question for this Court to consider.[6]

(i) The function of the Board is to set tariff rates

7. As this Court and other courts have consistently held, the Board's mandate is limited to setting the quantum of royalty rates. It is not a tribunal designed for determining substantive questions of copyright law, let alone novel ones. Those determinations are for the courts.[7]

8. That said, "in order to be functional, [the Board] must have the power to initially, though not conclusively, decide questions of law and jurisdiction" and thus "possesses the incidental powers which are necessary and inexorably linked to the exercise of its function which is of fixing the rates which the performing rights societies can charge."[8] Such determinations should be made on an ad-hoc basis and "may not bind everyone for all time."[9] The Federal Court of Appeal reaffirmed those holdings recently.[10]

(ii) The Board strayed from its function in the Making Available Decision

9. In deciding to convene a special proceeding to determine the scope of the MAP, and in issuing the decision that it did, the Board strayed from its function. The proceeding that gave rise to the *Making Available Decision* stemmed from three tariff proposals for online music services that SOCAN filed in 2010, 2011, and 2012 (for the years 2011, 2012, and 2013 respectively). In each of those proposed tariffs, SOCAN proposed the payment of licence fees by online music

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[6] *R v Mian*, 2014 SCC 54 at paras 34-5.
[7] *Society of Composers, Authors and Music Publishers of Canada v Canadian Assn of Internet Providers*, 2004 SCC 45 at paras 49-50.
[8] *CTV Television*, *supra* note 5 at paras 14 & 16.
[9] *FWS*, *supra* note 5 at para 6.
[10] *Access Copyright*, *supra* note 5.

services that deliver streams and downloads of musical works.[11] SOCAN did not propose a separate royalty in those tariffs for the act of "making available" those works.

10. The only legal question that was properly before the Board, as a necessary incident to the exercise of its core rate-setting competence, was whether the enactment of the MAP rendered this Court's holdings in *ESA*[12] moot, such that SOCAN could collect royalties for downloads. The Board concluded that: i) the MAP did not produce that effect and ii) in accordance with *ESA*, SOCAN could not collect royalties for downloads.[13] But instead of limiting itself to that question, the Board embarked on the unnecessary exercise of attempting to provide a comprehensive and authoritative interpretation of the scope of the MAP.[14] The Board purported to adjudicate the issue in the absence of a live dispute between the parties, a practice which this Court has found to be inappropriate.[15]

11. As a result of the Board's wide-ranging and needlessly broad analysis, the parties' submissions before this Court also cover issues that could never come before the Board.[16] As set out above, the Board's mandate is to set copyright royalty rates, not to stop copyright pirates or opine on Canada's compliance with the Treaties or identify perceived "gaps" in copyright protection. Indeed, what a copyright owner may consider a "gap" may merely reflect Parliament's choice of "giving due weight to [the] limited nature" of their rights.[17] This Court should treat those issues with great caution, if at all.

12. Moreover, assuming, *arguendo*, that the Board's treaty interpretation was correct, such determination would still be unnecessary for its rate setting function. The Treaties do not say whether a single economic activity could implicate two separate rights, nor do they purport to

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[11] *Statement of proposed royalties to be collected by SOCAN for the public performance or the communication to the public by telecommunication, in Canada, of musical or dramatico-musical works*, SI/10-31, (2010) C Gaz I, Supp; SI/11-22, (2011) C Gaz I, Supp; SI/12-22, (2012) C Gaz I, Supp.

[12] *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34 [*ESA*].

[13] *Making Available Decision*, *supra* note 2 at para 15; *Tariff Decision*, *supra* note 4 at para 199.

[14] *Making Available Decision*, *supra* note 2.

[15] *York University v Canadian Copyright Licensing Agency (Access Copyright)*, 2021 SCC 32 at paras 83-84 [*York*].

[16] See e.g. Factum of the Appellant, Music Canada at paras 51-63.

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

prescribe whether activities involving more than one right require additional or separate fees, and they say nothing about the collective administration of copyright and how regulatory bodies determine their rates. The Treaties leave such matters entirely to domestic law.

13. The broadening of the Board's mandate exemplified by the *Making Available Decision* was not caused by any change to statute or case law; rather, it stemmed from the Board's own initiative. If it were Parliament's intention to widen the Board's jurisdiction beyond its tariff setting mandate, it would have clearly stated such a change.[18] It has not done so.

14. Nor should this Court recognize such an expanded mandate. Preserving the Board's narrow mandate will promote administrative efficiency, thereby reducing the substantial delay in the tariff certification process, and the retroactive application and unknown liability that accompanies such delay.[19] In the rare case where there is a benefit from an authoritative determination of an important yet unsettled question of law, applicable to several similar cases, the courts are the appropriate forum to make such a determination and the existing reference mechanism offers a path to do so.[20]

B. ANY NEW TARIFFS SHOULD BE BASED IN NEW ECONOMIC ACTIVITIES

15. Even if this Court were to hold that the MAP created a standalone right, it does not follow that the mere act of making a work available would require a separate license or additional royalty.

(i) The Board's purpose includes preventing excessive market power

16. As this Court recently affirmed in *York*, in establishing the Board and empowering it to set the rates charged by collectives, Parliament's goal has been lowering transaction costs and increasing convenience through collective licensing while preventing collectives from exercising excessive market power.[21] It follows that how copyright owners would behave in a competitive market, where they compete rather than act in concert, provides a yardstick for measuring whether

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[18] *CTV Television Network Ltd. v Canada (Copyright Board)*, [1990] 3 FC 489 at para 13 (FCTD), **BOA**, Tab 4.
[19] *Canadian Broadcasting Corp v SODRAC 2003 Inc*, 2015 SCC 57 at para 109; Senate, Standing Senate Committee on Banking, Trade and Commerce, *Copyright Board: A Rationale for Urgent Review*, 42-1, No 7 (30 November 2016) (Chair: David Tkachuk); House of Commons, *Statutory Review of the Copyright Act*, 42-1, No 16 (June 2019) (Chair: Dan Ruimy) at 102.
[20] *Canada (Citizenship and Immigration) v Mason*, 2021 FCA 156 at paras 77-78; *Federal Courts Act*, RSC 1985, c. F-7, ss 18.3(1) and 28(2).
[21] *York*, *supra* note 15 at paras 48-50, 60-61, 67-68.

their collective licensing schemes are consistent with the goals of the legislative scheme. Licensing schemes that increase efficiency but not market power meet Parliament's goal; others do not.

17. This goal has become even clearer with the addition of Section 66.501 of the *Act*, which explicitly sets out the what the Board should consider in performing its rate-setting function. Chief among those are the rates and related terms and condition that "would have been agreed upon between a willing buyer and a willing seller acting in a competitive market with all relevant information, at arm's length and free of external constraints" and "the public interest".[22]

(ii) The divisibility of the copyright bundle and its misuse

18. It is trite law that a copyright owner can license or assign each right to different persons and may further subdivide those rights.[23] Although this malleability may allow owners to structure business models that maximize their private gain, it neither determines which activities fall within the scope of each right, nor does it compel the law to endorse any business model or licensing scheme (individual or collective) that an owner might choose.[24] This malleability is desirable when it permits better exploitation of works, provided it rewards the copyright owner fairly for the value derived from her work, relative to its alternatives, and not a reward inflated by anticompetitive behaviour.[25]

19. In *ESA*, this Court recognized the risk that copyright may be administered collectively in a way that undermines the efficiency rationale for collective administration.[26] One way in which collective administration may be misused arises in situations where users' economic activities map onto several rights. In a competitive market, copyright owners would find it advantageous to offer users "cleared parcels" that include all the necessary rights and allow the buyer to use the work without the need to negotiate additional licences. Works in such form would be more marketable

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[22] *Copyright Act*, RSC 1985, c C-42, s. 66.501(a) & (b).
[23] *Copyright Act*, RSC 1985, c C-42, s. 13(4).
[24] Jeremy de Beer, "Copyright Royalty Stacking" in Michael Geist, ed, *The Copyright Pentalogy* (2013) 335 at 358, online: CanLII <https://canlii.ca/t/nh>.
[25] Stephen M Maurer & Suzanne Scotchmer, "Profit Neutrality in Licensing: The Boundary Between Antitrust Law and Patent Law" (2006) 8:3 Am Law Econ Rev 476 at 480-2, **BOA**, Tab 8.
[26] *ESA*, *supra* note 12 at para 9.

and gain a competitive advantage over those that require the user to negotiate additional licences.[27] However, collective administration may encourage copyright owners to unbundle one or more of the rights that users need and, by administering that essential component collectively, earn monopoly profit akin to those they would earn if they had colluded outright.[28]

20. This case presents a good illustration. An online music provider who wishes to allow its subscribers to purchase a song (e.g., say, as a download), would presumably need to be able to upload a copy of the song to a server, make it available to users who wish to download it, authorize them to download it, and transmit it. In a competitive market, the price to which an online provider and copyright holder will willingly agree will not be a function of how many rights must be implicated in the sale of downloads, but of how much the online provider is willing to pay for the full bundle they need given the availability of substitutes. While a more popular song may command a higher price, the availability of other songs exerts a competitive pressure on that price. Bickering over how many rights are implicated would not allow the owner to charge more and may in fact be counter-productive and push the online provider to choose other songs.

21. Paradoxically, despite its supervisory role, the rate-setting function of the Board encourages collective societies to inefficiently subdivide the rights that they administer. Because collectives cannot simply charge the full monopoly price, they need to convince the Board that additional or higher rates are warranted. The methods they use include dividing amongst themselves the administration of distinct rights, and thus requiring users who need additional rights to pay royalties to additional collectives, and seeking to designate as many acts as possible as "compensable".

(iii) Additional causes of action don't necessarily result in additional awards

22. At common law, the mere fact that a plaintiff's harm may be traceable to more than one cause of action has never been grounds to increase the damages to which a plaintiff is entitled. Rather, in cases where one tortfeasor commits two independent torts that cause the same injury, or

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[27] Ariel Katz, "The Potential Demise of Another Natural Monopoly: Rethinking the Collective Administration of Performing Rights" (2005) 1:3 J Comp Law & Econ 541 at 561-2, online: Oxford Academic <https://perma.cc/3WJJ-ME9T>.

[28] Ariel Katz, "Copyright Collectives: Good Solution But for Which Problem?" in Harry First, Rochelle C Dreyfuss & Diane L Zimmerman, eds, *Working Within the Boundaries of Intellectual Property: Innovation Policy in the Knowledge Society* (Oxford: Oxford University Press, 2009) at 409–10, fn49 and accompanying text, **BOA**, Tab 7.

in situations of concurrent liability in tort and contract, the defendant is only liable to pay damages for the total harm resulting from that injury once.[29] A plaintiff is to be put in the position that it would have been in had the wrongs not occurred and courts are mindful to avoid multiple or overlapping recovery.[30] A plaintiff is not entitled to a "double dipping" windfall simply because its injury is traceable to multiple, independent tortious acts.[31] The same is true in copyright law.[32]

23. However, the Board's approach to tariffs ignores this legal principle. In *Public Performance 2007*, the Board dismissed the concerns raised by objectors about the potential for double-dipping or royalty stacking by taking the position that different rights – in that case, the reproduction and communication rights – were separate, and concluded that "[t]he person who copies a work to effect a broadcast of that work 'commits two torts' and should pay for both acts."[33]

24. The phrase "commits two torts" in *Public Performance 2007*, was a direct quote from *Ash v Hutchinson*,[34] which stands for the proposition that the rights enumerated in s. 3(1) of the *Act* are separate and distinct. Yet, notably, the rest of the Board's conclusion, "and should pay for both acts" was stated without any supporting authority.[35] If the Board assumed that that conclusion

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[29] See e.g. *Sorbam Investments Ltd. v Litwack*, 2021 ONSC 5226.
[30] *Pro-Sys Consultants Ltd v Microsoft Corporation*, 2013 SCC 57 paras 35-41; *BG Checo International Ltd. v British Columbia Hydro and Power Authority*, [1993] 1 SCR 12 at 26; *Multiple Access Ltd v McCutcheon*, [1982] 2 SCR 161 at 191.
[31] See e.g. *H (SG) v Gorsline*, 2001 ABQB 163; *Brooks v British Columbia*, 2000 BCSC 735, rev'd 2003 SCC 53 (but not on this issue).
[32] *E.g., Caxton Publishing Company Limited v Sutherland Publishing Company*, [1936] Ch 323 at 337, 340-2, aff'd [1939] AC 178, **BOA**, Tab 3; cited in *91439 Canada Ltée v Éditions JCL Inc* (1994), [1995] 1 FC 380 at para 10 (FCA); see also *Telewizja Polsat S.A. v Radiopol Inc*, 2006 FC 584 at para 53.
[33] *Statement of royalties to be collected by SOCAN for the communication to the public by telecommunication, in Canada, of musical or dramatico-musical works* (18 October 2007) at para 100, online (pdf): Copyright Board of Canada: <https://decisions.cb-cda.gc.ca/cb-cda/decisions/en/366622/1/document.do> [*Public Performance 2007*].
[34] *Ash v Hutchinson & Co. (Publishers), Ltd*, [1936] Ch 489 at 506 (CA), **BOA**, Tab 1, followed by this Court in *Compo Co v Blue Crest Music Inc*, [1980] 1 SCR 357; *Bishop v Stevens*, [1990] 2 SCR 467 and; *ESA*, *supra* note 12.
[35] *Public Performance 2007*, *supra* note 33 at para 100.

flows directly from the "two torts" proposition, then *Ash v Hutchinson* belies such conclusion.[36]

(iv) Solutions to the problem of royalty stacking

25. To prevent the mischief of royalty stacking,[37] copyright law employs various techniques, some statutory[38] and some judge-made, employing and developing several legal doctrines, as the following examples illustrate.

26. In *ESA*, this Court adopted a functional approach to characterizing the activity at issue, as opposed to a highly legalistic or technical one. The decision as to whether the delivery of permanent downloads implicated the reproduction right or the communication right focused on the experience online music providers offered to their customers: be it reproduction-based or performance-based. This approach pre-empted royalty-stacking by interpreting the *Act* in a way that avoids imposing an additional layer of protections and fees so that, as much as possible, a single economic activity corresponds with one type of right.

27. In other cases, where such a preemptive solution may not work, courts have used other approaches. For example, in *Netupsky v Dominion Bridge*, this Court adopted an expansive, "implied in law", concept of implied licence[39] and in *British Leyland*, Lord Templeman relied on

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[36] In *Ash v Hutchinson*, *supra* note 34, the author of a book first obtained judgment for copyright infringement against D, the alleged author of an infringing book. He then brought another action for damages from the publishers and printers of the same book. Slesser LJ, writing the main judgment rejected the argument that separate acts of authorization constituted separate torts, and concluded that those acts comprised a single infringing activity. Further, the Court noted that "The injuria which the plaintiffs suffered at [the printers'] hands is different from the injuria at the hands of the author and the publishers, though the damnum might have been the same" (at 497). Accordingly, the court ordered an inquiry to determine if any additional damages existed (at 499).

[37] de Beer, *supra* note 24.

[38] Such as s. 30.71 of the *Act*.

[39] *Netupsky et al. v Dominion Bridge Co. Ltd*, [1972] SCR 368 at 377-8; Ariel Katz, "Digital Exhaustion: North American Observations", in John A. Rothchild, ed, *Research Handbook on Electronic Commerce Law* (Edward Elgar Publishing, 2016) 137 at 151, online: CanLII <https://canlii.ca/t/tcw5>.

the common law doctrine of non-derogation from a grant.[40]

28. More generally, the principle of exhaustion of intellectual property rights serves to limit the power of copyright owners to control the use of their works after they allowed their initial exploitation. While exhaustion, as a copyright doctrine, is typically associated with the distribution of copies, this Court and other Canadian courts have applied the principles that underlie it to limit the power of copyright owners in a variety of other contexts.[41]

29. Apart from these doctrines, competition between copyright owners provides the most important prophylactic to royalty stacking and related inefficiencies, as noted above.

(v) An effective tariff scheme should be grounded in economic activity

30. Instead of accepting the tariff scheme advanced by the collective societies, and splintering copyright into smaller and smaller pieces, licensing should be grounded in economic activity. Consistent with how the courts approach the calculation of monetary awards in copyright law and in general, this position would also better address the mischief that copyright regulation was intended to remedy, and give effect to the intention of Parliament.

31. As discussed above, in *ESA*, this Court acknowledged the inefficiency arising out of situations when a single economic activity implicates more than one type of right and results in the stacking of royalties.[42] Further, as illustrated above, in a competitive market, copyright owners refrain from splintering rights into multiple licenses with separate payments. Enabling collective societies to use the regulatory scheme to accomplish what they could not do in a competitive market is contrary to both the intention of Parliament and s. 66.501(a) of the *Act*.

32. A single economic activity should not be burdened with superfluous royalty obligations.

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

Sana Halwani Andrew Moeser Alexis Vaughan

Lenczner Slaght LLP, Counsel for the Intervener, Ariel Katz

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[40] *British Leyland Motor Corp Ltd v Armstrong Patents Co Ltd*, [1986] AC 577 at 643 (HL), **BOA**, Tab 2.
[41] See generally Katz, *supra* note 39.
[42] *ESA*, *supra* note 12 at para 11. See generally de Beer, *supra* note 24.

PART VII - LIST OF AUTHORITIES

	Authority	Cited in Paras.	Paras. cited
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2.	*Ash v Hutchinson & Co. (Publishers), Ltd*, [1936] Ch 489 (CA)	24, fn36	497, 499, 506
3.	*BG Checo International Ltd. v. British Columbia Hydro and Power Authority*, [1993] 1 SCR 12	22	26
4.	*Bishop v Stevens*, [1990] 2 SCR 467	24	
5.	*British Leyland Motor Corp Ltd v Armstrong Patents Co Ltd*, [1986] AC 577 at 643 (HL)	27	643
6.	*Brooks v British Columbia*, 2000 BCSC 735, rev'd 2003 SCC 53	22	
7.	*Canada (Citizenship and Immigration) v Mason*, 2021 FCA 156	14	77-78
8.	*Canadian Broadcasting Corp v SODRAC 2003 Inc*, 2015 SCC 57	14	109
9.	*Canadian Copyright Licensing Agency (Access Copyright) v. Canada*, 2018 FCA 58	6, 8	112
10.	*Caxton Publishing Company Limited v Sutherland Publishing Company*, [1936] Ch 323, aff'd [1939] AC 178	22	337, 340-2
11.	*Compo Co v Blue Crest Music Inc*, [1980] 1 SCR 357	24	
12.	*CTV Television Network Ltd. v Canada (Copyright Board)*, [1993] 2 FC 115 (FCA)	6, 8	14, 16-18
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14.	*Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34	10, 19, 24, 31	9, 11
15.	*FWS Joint Sports Claimants v Canada (Copyright Board)*	6, 8	6

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	(1991), [1992] 1 FC 487 (FCA)		
16.	*H (SG) v Gorsline*, 2001 ABQB 163	22	
17.	*Multiple Access Ltd v McCutcheon*, [1982] 2 SCR 161	22	191
18.	*Netupsky et al. v Dominion Bridge Co. Ltd*, [1972] SCR 368	27	377-8
19.	*Posen v Canada (Minister of Consumer & Corporate Affairs)* (1979), [1980] 2 FC 259 (FCA)	6	6
20.	*Pro-Sys Consultants Ltd v Microsoft Corporation*, 2013 SCC 57	22	35-41
21.	*R v Mian*, 2014 SCC 54	6	34-5
22.	*Re Scope of Section 2.4(1.1) of the Copyright Act – Making Available* (25 August 2017), CB-CDA 2017-085, online: Copyright Board of Canada <https://decisions.cb-cda.gc.ca/cb-cda/decisions/en/item/366772/index.do>	1, 10	15
23.	*Rogers Communications Inc v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35	6	12
24.	*Society of Composers, Authors & Music Publishers of Canada v Canada (Copyright Board)*, [1993] FCJ No 137 (FCTD)	6	41
25.	*Society of Composers, Authors and Music Publishers of Canada v Canadian Assn of Internet Providers*, 2004 SCC 45	7	49-50
26.	*Sorbam Investments Ltd. v Litwack*, 2021 ONSC 5226	22	
27.	*Statement of royalties to be collected by SOCAN for the communication to the public by telecommunication, in Canada, of musical or dramatico-musical works* (18 October 2007), online (pdf): Copyright Board of Canada: <https://decisions.cb-cda.gc.ca/cb-cda/decisions/en/366622/1/document.do>	23, 24	100
28.	*Statement of royalties to be collected for the communication to the public by telecommunication to the public by telecommunication or the reproduction, in Canada, of musical works* (25 August 2017), CB-CDA 2017-086, online (pdf): Copyright Board of Canada <https://decisions.cb-cda.gc.ca/cb-cda/decisions/en/366865/1/document.do>	2, 10	199,

	Authority	Cited in Paras.	Paras. cited
29.	*Telewizja Polsat S.A. v Radiopol Inc*, 2006 FC 584	22	5
30.	*Théberge v Galerie d'Art du Petit Champlain inc*, 2002 SCC 34	11	31
31.	*York University v. Canadian Copyright Licensing Agency (Access Copyright)*, 2021 SCC 32	10, 16	48-50, 60-61, 67-68, 83-84

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1.	Ariel Katz, "Copyright Collectives: Good Solution But for Which Problem?" in Harry First, Rochelle C Dreyfuss & Diane L Zimmerman, eds, *Working Within the Boundaries of Intellectual Property: Innovation Policy in the Knowledge Society* (Oxford: Oxford University Press, 2009)	19	409–10, fn49
2.	Ariel Katz, "Digital Exhaustion: North American Observations", in John A. Rothchild, ed, *Research Handbook on Electronic Commerce Law* (Edward Elgar Publishing, 2016) 137, online: CanLII <https://canlii.ca/t/tcw5>	27, 28	151
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4.	House of Commons, *Statutory Review of the Copyright Act*, 42-1, No 16 (June 2019) (Chair: Dan Ruimy)	14	102
5.	Jeremy de Beer, "Copyright Royalty Stacking" in Michael Geist, ed, *The Copyright Pentalogy* (2013) 335, online: CanLII <https://canlii.ca/t/nh>	18, 25, 31	358
6.	Senate, Standing Senate Committee on Banking, Trade and Commerce, *Copyright Board: A Rationale for Urgent Review*, 42-1, No 7 (30 November 2016) (Chair: David Tkachuk)	14	
7.	*Statement of proposed royalties to be collected by SOCAN for the public performance or the communication to the public by telecommunication, in Canada, of musical or dramatico-musical works*, SI/10-31, (2010) C Gaz I, Supp; SI/11-22, (2011) C Gaz I, Supp; SI/12-22, (2012) C Gaz I, Supp	9	

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8.	Stephen M Maurer & Suzanne Scotchmer, "Profit Neutrality in Licensing: The Boundary Between Antitrust Law and Patent Law" (2006) 8:3 Am Law Econ Rev 476	18	480-2
9.	*WIPO Copyright Treaty*, 22 December 1997, (entered into force 13 August 2014, adopted in Geneva on December 20, 1996), online: *WIPO Lex* <www.wipo.int/treaties/en/ip/wct>	1	
10.	*WIPO Performances and Phonograms Treaty*, 22 December 1997, (entered into force 13 August 2014, adopted in Geneva on December 20, 1996), online: *WIPO Lex* <www.wipo.int/treaties/en/ip/wppt>	1	

STATUTORY PROVISIONS

	Statutes, Regulations, Rules, etc.	Cited in Paras.	Section, Rule, Etc.
1.	*Copyright Act*, RSC 1985, c C-42	1, 3, 17, 18, 25	2.4(1.1), 3(1), 30.71, 66.501(a) & (b), 13(4)
	Loi sur le droit d'auteur (L.R.C. (1985), ch. C-42)	1, 3, 17, 18, 25	2.4(1.1), 3(1), 30.71, 66.501(a) & (b), 13(4)
2.	*Federal Courts Act*, RSC 1985, c. F-7	14	18.3(1), 28(2)
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