

Copyright Board
Canada



Commission du droit d'auteur
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Regime Collective Administration of Performing and of Communication Rights
Members The Honourable William J. Vancise
Mr. Claude Majeau
Mr. J. Nelson Landry
Proposed Tariffs Considered Online Music Services (CSI: 2011-2013; SOCAN: 2011-2013; SODRAC: 2010-2013)

Communication to the public by telecommunication

Scope of section 2.4(1.1) of the *copyright act*– making available

Reasons for decision

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I. INTRODUCTION

[1] The Society of Composers, Authors and Music Publishers of Canada (SOCAN) filed proposed tariffs for the communication to the public by telecommunication of works in SOCAN's repertoire in connection with the operation of an online music service for each of the years from 2011 through to 2013, inclusive, on March 31, 2010, March 31, 2011, and March 30, 2012, respectively. These proposed tariffs were merged into a single proposed tariff, Tariff 22.A (2011-2013).

[2] On July 12, 2012, the Supreme Court of Canada issued its decision in *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*.¹ As discussed more fully below, the Supreme Court concluded that the transmission over the Internet of a musical work that results in a download of that work is not a communication by telecommunication. The effect of this decision on SOCAN was that it could not collect royalties for such downloads.

[3] In the *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*² companion case issued on the same day, the Supreme Court explicitly stated that

[i]n *ESA*, a majority of this Court determined that musical works are not “communicated” by telecommunication when they are *downloaded* [...] The question of whether the online music services engage the exclusive right to “communicate . . . to the public by telecommunication” by offering *downloads* to members of the public has now become moot.³ [emphasis in original]

[4] On November 7, 2012, the *Copyright Act*⁴ (the “Act”) was amended by the coming into force of most provisions of the *Copyright Modernization Act* (the “CMA”),⁵ including subsection 2.4(1.1). It provides that

[f]or the purposes of this Act, communication of a work or other subject-matter to the public by telecommunication 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.

¹ *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34, [2012] 2 SCR 231. [ESA]

² *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 SCR 283. [Rogers]

³ *Ibid* at para 2.

⁴ *Copyright Act*, R.S.C. 1985, c. C-42.

⁵ *Copyright Modernization Act*, S.C. 2012, c. 20. [CMA]

[5] SOCAN contends that this provision renders moot the Supreme Court's decision in *ESA* and requires persons, such as online music services, to pay royalties to SOCAN when they post musical works on their Internet servers in a way that allows access to them by their end-user customers, irrespective of whether the musical works are subsequently transmitted to end-users by way of downloads, streams or not at all.

[6] On November 28, 2012, SOCAN informed the Board that it was of the view that the effect of subsection 2.4(1.1) on its proposed Tariff 22.A (Online Music Services) could, and should, be determined by the Board as a purely legal issue.⁶

[7] On December 7, 2012, the Board issued a Notice stating that the effect of subsection 2.4(1.1) was properly before it as a necessary incident to the exercise of its core competence and that it was not possible to certify the proposed Tariff 22.A without deciding what effect subsection 2.4(1.1) has on SOCAN's ability to receive royalties for such activities. The Board stated that, as the question is purely legal, it would be decided by a separate proceeding, and that all those who might be affected by the decision of the Board would be entitled to participate in such a proceeding. The December 7, 2012 Notice read as follows:

SOCAN intends to ask that the Board deal with the impact of the coming into force of the making available right on its proposed tariffs [...] Specifically, SOCAN wishes the Board to rule on the interface between the making available right and *ESA v. SOCAN* [2012 SCC 34] and companion cases.

In a nutshell, SOCAN is of the view that the making available right renders moot the conclusion that the communication right does not apply to downloads of musical works. Without doubt, some users will take issue with that view.

The issue is properly before the Board as a necessary incident to the exercise of its core competence. 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.

The issue certainly is not limited to a single SOCAN tariff, and probably not limited to SOCAN itself. Any decision the Board may render on the meaning of the making available right with respect to musical works will have some impact on the interpretation of the same right with respect to other works, performances and recordings, especially if the Board's decision is judicially reviewed.

The Board's preliminary views on the issue are as follows.

⁶ SOCAN, "Making Available Right" (e-mail to Copyright Board, 2012-11-28).

First, the interpretation of the making available right essentially raises purely legal issues that require little (or preferably, no) discovery or presentation of new evidence.

Second, the issue would be best approached through a separate proceeding during which all those who may be affected by a decision of the Board may have an opportunity to make their views known.

Third, the examination of the issue should not change anything to the timetable of other proceedings, other than to carve out the interpretation of the making available right as an issue to be examined in those proceedings.

Fourth, it should be possible to deal with the issue through written submissions. Collectives would be allowed four weeks to file their legal arguments. Objectors would respond within four weeks and collectives would be allowed two weeks to reply. Accordingly, all pleadings would be filed before the end of March 2013. The possibility of oral arguments should be entertained only after the collectives' replies have been filed.

Fifth, the following parties appear to be directly or indirectly concerned by the issue:

- any collective that may, now or later, act for those whose works, performances or recordings may be made available 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;
- any objector who may make available a work, performance or recording 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, including objectors to SOCAN tariffs 17 (Transmission of Pay, Specialty and other Television Services by Distribution Undertakings), 22.A (Online Music Services), G (User Generated Content), H (Game Sites) and I (Other Sites) as well as all other SOCAN 22 tariffs, to the extent that these are currently user-based, 23 (Hotel and Motel In-room Services), 24 (Ringtones and Ringbacks) and 25 (Satellite Radio Services).

Recipients of this notice are asked to inform the Board no later than Friday, December 21, 2012, of the following:

- a. whether they consider themselves to be affected by the issues to be determined and if so, how;
- b. whether they intend to participate in this proceedings;
- c. to the extent possible, their preliminary views on the issues to be determined; and
- d. any comments they may have on whether the issues to be determined should be addressed as proposed in this notice.

Responses to the comments of others should be received no later than Friday, January 11, 2013. [emphasis omitted]

[8] Subsequent to the Board's Notice, the following parties chose to participate and make submissions:

- Alliance of Canadian Cinema, Television and Radio Artists (ACTRA PRS)
- Apple Canada Inc. and Apple Inc. (Apple)
- Artisti
- Bell Canada (Bell)
- Canadian Association of Broadcasters (CAB)
- Canadian Broadcasting Corporation / *Société Radio-Canada* (CBC/SRC)
- Canadian Copyright Licensing Agency o/a Access Copyright
- Canadian Media Production Association (CMPA)
- Canadian Musical Reproduction Rights Agency Ltd. (CMRRA) and the Society for Reproduction Rights of Authors, Composers and Publishers (SODRAC) (jointly CSI)
- Canadian Retransmission Collective (CRC)
- Cineplex Entertainment LP (Cineplex)
- Entertainment Software Association (ESA)
- Google
- Microsoft Corporation (Microsoft)
- Music Canada (formerly CRIA)
- Musicians' Rights Organization Canada (MROC)
- National Campus and Community Radio Association / *L'Alliance des radios communautaires* (NCRA/ARC)
- Pandora Media Inc. (Pandora)
- Prof. Ariel Katz
- Province of British Columbia
- Quebec Collective Society for the Rights of Makers of Sound and Video Recordings (SOPROQ)
- Quebecor Media Inc. (Quebecor)
- Re:Sound Music Licensing Company (Re:Sound)
- Retail Council of Canada (RCC)
- Rogers Communications (Rogers)
- Shaw Communications (Shaw)
- Sirius XM Canada Inc. (Sirius)
- *Société des auteurs et compositeurs dramatiques* (SACD) and the *Société civile des auteurs multimédia* (SCAM) (jointly SACD-SCAM)
- *Société du droit de reproduction des auteurs, compositeurs et éditeurs au Canada* (SODRAC)
- *Société québécoise de gestion collective des droits de reproduction* (Copibec)
- Society of Composers, Authors and Music Publishers of Canada (SOCAN)
- Yahoo! Canada (Yahoo)

[9] Generally, those parties can be grouped into five broad categories:

1. Copyright Collective Societies:

Collective societies that administer rights that may be triggered or otherwise affected when works (e.g., SOCAN) or other subject-matter (e.g., Re:Sound) are made available. These entities administer various copyrights, either by directly entering into licence agreements with parties, or by the means of tariffs;

2. Rights Holder Groups:

Groups that represent the interests of copyright holders whose content may be made available (e.g., Music Canada). Many of the copyrights of the rights holders are administered by collective societies. Members of a rights holder group may also be members of one or more copyright collective societies and of one or more other rights holder groups. A rights holder group itself may be a member of another rights holder group;

3. Users:

Persons who perform activities that may involve the making available of works or other subject-matter (e.g., Apple). These parties, including the Objectors to Tariff 22.A, generally use copyrighted material in the course of their operations. Some may have agreements with rights holders, or may avail themselves of a tariff administered by a collective society. Many of the parties are also rights holders themselves, and exploit their copyright for commercial purposes;

4. User Groups:

Groups that represent the interests of such persons (e.g., ESA); and,

5. Individuals:

One individual, Prof. Ariel Katz, also made submissions in his personal capacity.

[10] The parties made submissions based on a wide variety of arguments, including arguments based on the textual reading of the legislative provisions, the intent of Parliament, and Canada's international obligations, primarily under the World Intellectual Property Office (WIPO) Copyright Treaty⁷ and, to a lesser extent, the WIPO Performances and Phonograms Treaty⁸ (together colloquially referred to as the "WIPO Internet Treaties").

[11] Given the positions of the parties described below, we deal with the following legal issues:

- A. Does subsection 2.4(1.1) of the *Act* result in an online music service communicating a work to the public by telecommunication when it places a copy of that work on a server

⁷ *World Intellectual Property Organization Copyright Treaty* (adopted in Geneva on December 20, 1996), online at: http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html. [WCT]

⁸ *World Intellectual Property Organization Performances and Phonograms Treaty* (adopted in Geneva on December 20, 1996), online at: http://www.wipo.int/treaties/en/ip/wppt/trtdocs_wo034.html. [WPPT]

from where it can be downloaded by the public?

- B. Is the Board's interpretation of subsection 2.4(1.1) of the *Act* consistent with Canada's obligations under Article 8 of the WCT and Articles 10 and 14 of the WPPT?
- C. Does the transmission of a work or other copyright subject-matter "merge" with the initial act of making available into a single protected act?
- D. When do the various "making available" provisions (subsection 2.4(1.1) and paragraphs 15(1.1)(d) and 18(1.1)(a) of the *Act*) come into effect?

II. SUMMARY OF THE DECISION

[12] As will be made clear from the reasons that follow, subsection 2.4(1.1) of the *Act* deems the act of placing a work or other subject-matter on a server of a telecommunication network in a way that a request from a member of the public triggers the transmission of that work or subject-matter, including in the form of a stream or download, whether or not such a request ever takes place, to be a communication to the public by telecommunication.

[13] A more limited interpretation of subsection 2.4(1.1) of the *Act*, which would make this provision applicable only when a work is made available for streaming, would not comply with Canada's international obligations. The fundamental reason for the enactment of subsection 2.4(1.1) by Parliament was for Canada to comply with Article 8 of the WCT.

[14] The interpretation of subsection 2.4(1.1) of the *Act* that it applies to the making available of both streams and downloads is consistent with Canada's obligations under Article 8 of the WCT and Articles 10 and 14 of the WPPT. It is also consistent with the technological neutrality interpretation principle.

[15] The introduction of subsection 2.4(1.1) of the *Act* did not have the effect of overturning *ESA*. The interpretation we adopt here is not in conflict with the meaning of paragraph 3(1)(f) of the *Act* as described in that decision.

[16] The act of making a work available to the public remains a communication to the public by telecommunication regardless of whether the subsequent transmission is a download or a stream. It remains distinct from any subsequent act of transmission; the two acts do not merge and become a single, larger act.

[17] Subsections 2.4(1.1), 15(1.1) and 18(1.1) of the *Act* came into force on November 7, 2012. The effects of these provisions are entirely prospective from those dates; they are neither retroactive nor retrospective.

III. RELEVANT STATUTORY PROVISIONS

[18] The *CMA* amended the *Copyright Act* to provide as follows:

2.4(1.1) For the purposes of this Act, communication of a work or other subject-matter to the public by telecommunication 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.

[...]

15(1.1) Subject to subsections (2.1) and (2.2), a performer's copyright in the performer's performance consists of the sole right to do the following acts in relation to the performer's performance or any substantial part of it and to authorize any of those acts:

[...]

(d) to make a sound recording of it available to the public by telecommunication in a way that allows a member of the public to have access to the sound recording from a place and at a time individually chosen by that member of the public and to communicate the sound recording to the public by telecommunication in that way.

[...]

18(1.1) Subject to subsections (2.1) and (2.2), a sound recording maker's copyright in the sound recording also includes the sole right to do the following acts in relation to the sound recording or any substantial part of it and to authorize any of those acts:

(a) to make 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 and to communicate it to the public by telecommunication in that way.

[19] The communication right is provided at paragraph 3(1)(f) of the *Act* and reads as follows:

3(1) For the purposes of this Act, "copyright", in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof, and includes the sole right

[...]

(f) in the case of any literary, dramatic, musical or artistic work, to communicate the work to the public by telecommunication,

IV. POSITIONS OF THE PARTIES

[20] Parties in the Copyright Collective Societies and the Rights Holder Groups categories generally argue that the act of making a work available in the manner described in subsection 2.4(1.1) of the *Act* triggers the right of communication to the public by telecommunication. This is so whether the resulting transmission can be a download or a stream. Furthermore, some of these parties argue, explicitly or implicitly, that a download that results from a making available

also triggers the right of communication to the public by telecommunication. Other parties disagree with this latter proposition.

[21] Most parties argue either that the WCT requires that their interpretation be adopted in order for Canada to be compliant with its obligations or that their interpretation is compliant with these obligations.

[22] Parties in the Users and User Groups categories generally agree that the act of making a work available in the manner described in subsection 2.4(1.1) of the *Act*, where the resulting transmission is a stream, triggers the right of communication to the public by telecommunication. However, most parties in these categories argue that where a work is made available for download—or, some parties submit, actually results in a download—this does not trigger the right of communication to the public by telecommunication. Some parties in the Users and User Groups categories argue that in order for subsection 2.4(1.1) to be triggered, an actual transmission must take place. Furthermore, most parties in these categories argue that the WCT provides for sufficient flexibility for their interpretation to be consistent with Canada's obligations.

[23] The positions taken by most of the parties to this proceeding are set out below. However, not all parties provided substantive arguments on the legal issues raised by the Board. The fact that we do not mention or cite a specific submission or argument of a party does not mean that we have not read or considered the submission or taken it into account when preparing these reasons. The number of parties involved, the number of positions, and variations of the arguments led us to address some arguments by subject-matter rather than by source.

[24] We further note that some parties state that they support the position adopted by another party, only to make submissions that deviate from—or are even at odds with—the purportedly supported position. As such, statements that a party supports the submissions of another party could not always be taken at face value.

A. COPYRIGHT COLLECTIVE SOCIETIES

i. Access Copyright and Copibec

[25] Access Copyright and Copibec describe themselves as “collective societies that represent the copyright interests of authors and publishers of literary works.”⁹

⁹ See Access Copyright and Copibec, “Submissions of Access Copyright & Copibec on the Making Available Amendment” (e-mail to Copyright Board, 2013-08-21) at 1.

[26] They argue that the timing of the Royal Assent of the Bill permits the Board to consider pre-*ESA* interpretations of paragraph 3(1)(f) of the *Act*. They submit that subsection 2.4(1.1) expands the scope of paragraph 3(1)(f)¹⁰ to create liability for the act of making a work available.

[27] According to Access Copyright and Copibec, the act of “making available” a work is, since the coming-into-force of subsection 2.4(1.1) of the *Act*, a discrete, tariffable act comprised within the right of communication to the public by telecommunication. The act is complete once access to a work is enabled by posting the work online, and remains an act of communication irrespective of whether the user perceives any resulting transmission simultaneously with the transmission or at a later time.

ii. Artisti

[28] Artisti¹¹ describes itself as

[TRANSLATION] a collective society that administers certain rights for the benefit of performers participating in sound recordings, in particular made available to the public 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.¹²

[29] Artisti submits that the proceeding was primarily about the making available of a work, and not sound recordings, and that the Board should limit its conclusions to those issues that SOCAN specifically raised.

[30] It further argues that “making available” does not require actual access to occur for it to be triggered, and that the possibility of having access is sufficient. The acts of making available and a subsequent transmission for download or streaming are distinct, and trigger distinct rights, even though these acts may occur in rapid sequence.

[31] Lastly, according to Artisti, subsection 2.4(1.1) of the *Act* is not intended to restrict the ambit of “communication” to simultaneous acts of transmission and perception, since the provision speaks of being able to choose the time of access.

¹⁰ *Copyright Act*, s. 3(1)(f) (“For the purposes of this Act, “copyright,” in relation to a work, [...] includes the sole right [...] in the case of any literary, dramatic, musical or artistic work, to communicate the work to the public by telecommunication.”)

¹¹ See ARTISTI, “*Position d’ARTISTI / Droit de mise à la disposition*” (e-mail to Copyright Board, 2013-08-21) [Artisti Submission]; ARTISTI, “*Réplique d’ARTISTI / Droit de mise à la disposition*” (e-mail to Copyright Board, 2013-10-18).

¹² Artisti, “Re: Making Available Right / Droit de mise à disposition” (e-mail to Copyright Board, 2012-12-21).

iii. CSI

[32] CSI¹³ describes itself as a joint venture of CMRRA and SODRAC. CSI licenses the reproduction rights in the joint repertoire of CMRRA and SODRAC to various music users, including radio stations, background music services and online music services.¹⁴

[33] It states that for the purposes of this proceeding, CSI and its parent collectives, CMRRA and SODRAC, represent only the reproduction right in musical works and collect royalties pursuant to the CSI Online Music Services Tariff for the reproduction of musical works in permanent downloads, limited downloads, and on-demand streams.

[34] CSI contends that, given the Board's Notice, only issues related to the making available of works should be addressed, and not the making available of performers' performances fixed in sound recordings, nor the making available of sound recordings.

[35] It submits that subsection 2.4(1.1) of the *Act* implements Article 8 of the WCT through the communication right alone. However, while subsection 2.4(1.1) may apply to downloads, so does the reproduction right. If the making available right applies to an online transmission of music, it applies to acts that are separate and distinct from those that trigger the reproduction right, which applies independently to other aspects of the process.

[36] CSI submits that *ESA* remains good precedent and argues that its position is consistent with that decision since the act of making a work available for download is an act separate from the transmission of a download. Moreover, *ESA* also reaffirmed the well-established proposition that, where a given activity or transaction involves multiple acts, it is entirely appropriate to recognize each act separately. In any case, CSI argues, the act of making available a work is distinct from any initial reproduction made on the service provider's servers before any transmission occurs.

[37] Finally, CSI submits that it would contravene the WIPO Internet Treaties if a right were not applicable in a particular context only because the other right applies to a (different) act in the same context.

[38] CSI filed the expert opinion of Dr. Silke von Lewinski,¹⁵ which was prepared jointly on behalf of CSI and Music Canada.

¹³ See CSI, "Submissions of CMRRA-SODRAC Inc. (CSI) on the Making Available Right" (e-mail to Copyright Board, 2013-08-21).

¹⁴ CMRRA-SODRAC, "About CSI", online: CSI Music Services <http://www.cmrrasodrac.ca/en/about-us/about-csi>.

¹⁵ Silke von Lewinski, "Expert Opinion on the rights of making available and of reproduction under the WCT and WPPT" (e-mail to Copyright Board, 2013-08-21). [von Lewinski Opinion]

iv. SACD-SCAM

[39] SACD-SCAM¹⁶ describe themselves as

[TRANSLATION] collective societies managing copyright in dramatic works. Both manage collectively the reproduction, the communication to the public by telecommunication and the making available rights of the authors they are representing.¹⁷

[40] They argue that subsection 2.4(1.1) does not create a new right, but amounts to a rule of interpretation, and that it must cover the “offering” of a work, even where this is not followed by an actual transmission of that work. It is triggered as soon as it is possible to access the work by telecommunication. If an actual transmission follows, it is only the “making available” that is triggered. This subordination of the subsequent transmission to the act of making available prevents the layering of rights for acts that are closely connected.

[41] However, they submit, the making available of a work is not always a communication of that work. While the making available of a work resulting in a communication may be a communication itself, the act of making available in other situations, such as where no transmission results, may fit elsewhere into the basic structure of copyright (i.e., the right to reproduce, produce, perform, or publish, enumerated in subsection 3(1)). Just because the right to communicate a work to the public by telecommunication includes the making available of that work does not prevent this making available “right” from being an example of the right to reproduce, the right to perform in public, or the right to publish the work.

v. SOCAN

[42] SOCAN¹⁸ submits that subsection 2.4(1.1) creates a new right, and renders moot and inapplicable the conclusion reached by the Supreme Court in *ESA*. It argues that the provision expands the scope of the right in paragraph 3(1)(f) so that posting a work on an Internet server in a way that allows access to it by a member of the public triggers the right to communicate to the public by communication, whether the work is subsequently transmitted by way of downloads, streams, or not at all.

[43] SOCAN further submits that after a work is made available, any subsequent acts of transmission may be communications or reproductions. The acts involved in a download are

¹⁶ See SACD-SCAM, “*Mémoire de la Société des Auteurs et Compositeurs Dramatiques et de la Société Civile des Auteurs Multimédia / Droit de mise à disposition*” (e-mail to Copyright Board, 2013-08-21). [SACD-SCAM Submission]

¹⁷ SACD-SCAM, “*SACD-SCAM – Avis du 7 décembre de la Commission – Droit de mise à disposition*” (e-mail to Copyright Board, 2012-12-18).

¹⁸ See SOCAN, “SOCAN’s Submissions on the Making Available Right” (e-mail to Copyright Board, 2013-03-08); SOCAN, “SOCAN’s Reply Submissions on the Making Available Right” (e-mail to Copyright Board, 2013-10-18).

limited to the end-user's request for a copy of the musical file and the resultant permanent reproduction. The making available of a work on the online music server is a separate and distinct act.

[44] SOCAN argues that its interpretation is supported by evidence showing the intention of Parliament and that the interpretation offered by some Users and User Groups would not meet Canada's obligations under the WCT.

[45] SOCAN filed the expert opinions of Dr. Mihály Ficsor¹⁹ and Dr. Jane Ginsburg,²⁰ which were prepared at SOCAN's request.

B. RIGHTS HOLDER GROUPS

i. Music Canada

[46] Music Canada²¹ is a non-profit trade organization that promotes the interests of its members: Sony Music Entertainment Canada Inc., Universal Music Canada Inc., and Warner Music Canada Co.²²

[47] Music Canada submits that subsection 2.4(1.1) is a deeming clause that artificially imports into the expression "communication by telecommunication" an additional meaning other than its normal meaning. It argues that paragraph 3(1)(f) must be interpreted to include the making available of streams and downloads, and that this is consistent with *ESA*. Having subsection 2.4(1.1) applicable only to the making available of streams, and not of downloads would expose identical acts of making available to different legal standards and would result in fragmented rights. It further argues that making available should cover all elements of the transmission to the end user, should a transmission occur.

[48] Lastly, Music Canada submits that its proposed outcome is the only one that permits Canada to fully comply with Canada's treaty obligations under the WCT.

[49] As noted, Music Canada filed the expert opinion of Dr. Silke von Lewinski,²³ jointly on behalf of itself and CSI.

¹⁹ Mihály Ficsor, "Expert opinion on the international norms on the right of making available to the public and on its application in countries where it has been implemented" (e-mail from SOCAN to Copyright Board, 2013-03-08). [Ficsor Opinion]

²⁰ Jane C. Ginsburg, "Opinion on Article 8 of the WIPO Copyright Treaty" (e-mail from SOCAN to Copyright Board, 2013-10-18). [Ginsburg Opinion]

²¹ See Music Canada, "Submissions of Music Canada on the Making Available Amendment" (e-mail to Copyright Board, 2013-08-21).

²² Music Canada, "About", online: <http://musiccanada.com/about>.

ii. CMPA

[50] The CMPA²⁴ states that it “represents the interests of screen-based media companies engaged in the production and distribution of English-language television programs, feature films, and new media content in all regions of Canada.”²⁵

[51] The CMPA expresses concerns that there may be legislative gaps if an actual reproduction of—as opposed to the provision of access to—a work was necessary for liability to arise under subsection 2.4(1.1). Furthermore, the CMPA submits that the WIPO Internet Treaties require that liability be based on the provision of access to a work, not necessarily its reproduction.

[52] The CMPA submits that enforcing the reproduction right against a multitude of end-users is not pragmatically possible, and that the purpose of the making available right is to provide effective recourse against the person making the content available to the public, not the end user. It therefore urges the Board to reject the position that the “making available” right is limited only to the making available of streams.

C. USERS

[53] The Users all take the position that the decision of the Supreme Court of Canada in *ESA* has not been overturned by subsection 2.4(1.1), and continues to govern whether a download is a communication to the public by telecommunication, and that SOCAN does not have the right to collect royalties for musical works that are downloaded via the Internet as a result of the making available of those works.

i. Apple

[54] Apple²⁶ argues that subsection 2.4(1.1) of the *Act* does not apply a new “making available right” to downloads, nor does it reflect Parliament’s intent to impose an additional layer of protection and fees based solely on the fact that downloads are transmitted over the Internet rather than delivered physically. In Apple’s submission, subsection 2.4(1.1) does not change the nature of a communication, as described in *ESA*, but merely clarifies that Internet communications apply to “pull” or interactive transmissions.

²³ von Lewinski Opinion, *supra* note 15.

²⁴ See CMPA, “SOCAN Tariff 22.A / The Making Available Amendment” (e-mail to Copyright Board, 2013-08-21).

²⁵ *Ibid* at para 2.

²⁶ See Apple, “Submissions on Making Available of Apple Inc. & Apple Canada Inc.” (e-mail to Copyright Board, 2013-06-14) [Apple Submission]; Apple, “Reply on Making Available of Apple Inc. & Apple Canada Inc.” (e-mail to Copyright Board, 2013-10-18).

[55] It also argues that Article 8 of the WCT was intended to fill any existing gaps in national copyright laws—not to add additional layers of fees for already compensated transactions. The protection of digital downloads (as opposed to streams) solely through the reproduction right is consistent with Canada’s international obligations.

ii. Cineplex

[56] Cineplex²⁷ states that it

operates Cineplex Store, an online service that offers customers digital copies of movies for either purchase or rental by download, as well as movies on DVD and Blu-ray for delivery by traditional physical means.²⁸

[57] Cineplex proposes an interpretation of subsection 2.4(1.1) that excludes distribution of copies via download. According to it, online services that make available copies of musical works for download, including works embedded in audio-visual content, do not engage the right of communication to the public administered by SOCAN.

[58] It argues that subsection 2.4(1.1) added a definitional clarification of the term “communication to the public” by including the act of “making available to the public” within its scope. Thus, the act of “making available” must be construed as an illustrative example of “communication,” which is in turn an illustrative example of “performance.” According to it, SOCAN’s interpretation violates the principle of technological neutrality.

[59] Lastly, Cineplex submits that its proposed interpretation is compliant with the WCT since Canada already protects the making available of works for download via rights of reproduction and authorization, and thus it has no obligation to extend its right of communication to cover that activity.

iii. Microsoft

[60] Microsoft²⁹ states that it

develops, manufactures, licenses, and supports a wide range of programs, devices, and online services, including Windows, Surface, Microsoft Office and Microsoft Office 365, SkyDrive, Xbox and Xbox Live, and Bing. Microsoft’s products and services are used by consumers

²⁷ See Cineplex, “Cineplex’s Submissions on the Making Available Amendment” (e-mail to Copyright Board, 2013-06-14) [Cineplex Submission]; Cineplex, “Cineplex’s Reply Submissions on the Making Available Amendment” (e-mail to Copyright Board, 2013-10-18).

²⁸ *Ibid.*

²⁹ See Microsoft, “Microsoft’s Submissions on the Making Available Amendment” (e-mail to Copyright Board, 2013-06-14). [Microsoft Submission]

worldwide to access, experience, and enjoy a wide range of media including music, games, movies, and television, whether such media is obtained via Microsoft online services such as Xbox Music or Xbox Live, via third party applications, or from third party online marketplaces.³⁰

[61] As part of its licensed entertainment services in Xbox Music and Xbox Live, Microsoft enables users to download media files containing music for which they have purchased a licence (including music tracks, film, television, and video game content). Additionally, users of various Microsoft online cloud services may also choose to store or backup, and download media files containing music for their personal use, whether obtained from Microsoft or from third party media providers.

[62] Microsoft submits that users of music on the Internet are not liable to pay communication right royalties to SOCAN when they post musical works on their Internet servers for download by their end-user customers.

[63] Microsoft argues that subsection 2.4(1.1) of the *Act* does not render *ESA* moot or inapplicable. According to it, the communication right engages and protects activities akin to performance, but not activities akin to reproduction. The inclusion of making available within the scope of communication means that subsection 2.4(1.1) must be read in accordance with the scope of the communication right as discussed in *ESA*, and therefore applies only when works are made available by streaming. This aligns with paragraphs 15(1.1)(d) and 18(1.1)(a), where the mode of access by telecommunication that supports the act of making available must be a mode of access that would constitute a communication to the public by telecommunication.

[64] Microsoft also submits that any act of making available takes its character from the mode of “availability.” Only availability that fits within the concept of communication as developed in *ESA* can constitute availability for these purposes. Requiring a separate payment for the making available of works for download would go contrary to the principle of technological neutrality, as would amount to “double dipping.”

[65] Lastly, Microsoft argues that this approach is consistent with international treaties, as there is nothing in the treaties that requires Canada to enshrine protection for making available for downloads within the domestic communication right.

³⁰ Microsoft, “Making Available – Microsoft Request to Participate” (e-mail to Copyright Board, 2013-02-28).

iv. Networks

[66] Bell Canada, Google, Rogers Communications, Shaw Communications, Quebecor Media, and Yahoo! filed together as the “Networks.”³¹ They argue that the amendment of the *Act* by the addition of subsection 2.4(1.1) did not amend the communication right, or create a new “making available” right, but merely included the act of “making available” within the scope of the existing right in paragraph 3(1)(f) of communication to the public by telecommunication. Since *ESA* continues to be good law, the right in paragraph 3(1)(f) is itself an example of an activity covered under the public performance right contained in subsection 3(1) of the *Act*. Subsection 2.4(1.1) does not have the effect of turning an act that is not a performance into a performance. Thus, they submit, subsection 2.4(1.1) applies only to the making available of works for the purpose of communication, not for download. Once a work is communicated to the public by telecommunication that transmission and the preparatory act of making the work available merge into a single act of public performance.

[67] Moreover, they argue, an interpretation that would result in downloads being subject to more than one right would be contrary to the Supreme Court’s statement in *ESA* that a single event cannot engage more than one right.

[68] Lastly, they submit that their interpretation of subsection 2.4(1.1) is consistent with the WCT, as the treaty permits flexibility in its implementation. In particular, the WCT does not require that the act of making available be covered by a free-standing right, nor does it require that downloads be protected as public performances.

[69] The Networks filed the expert opinions of Prof. Sam Ricketson³² and Prof. Jeremy de Beer,³³ which were prepared at the request of the Networks.

v. Province of British Columbia

[70] The Government of British Columbia³⁴ submits that subsection 2.4(1.1) does not create another exclusive right of “making available,” in addition to the exclusive rights set out in

³¹ See Networks, “Submissions of Bell Canada, Google, Rogers Communications, Shaw Communications, Quebecor Media, and Yahoo! (the “Networks”) on the Making Available Amendment” (e-mail to Copyright Board, 2013-06-14) [Networks Submission]; Networks, “Reply Submissions of Bell Canada, Google, Rogers Communications, Shaw Communications, Quebecor Media, and Yahoo! (the “Networks”) on the Making Available Amendment” (e-mail to Copyright Board, 2013-10-18).

³² Exhibit Objectors-1 (Sam Ricketson, “Submissions of Bell Canada, Google, Rogers Communications, Shaw Communications, Quebecor Media, and Yahoo! (the “Networks”) on the Making Available Amendment”). [Ricketson Opinion]

³³ Exhibit Objectors-2 (Jeremy de Beer, “Expert Opinion on Canada’s Compliance with the WIPO Copyright Treaty”). [de Beer Opinion]

³⁴ See Government of British Columbia, “Reply Of Her Majesty The Queen In Right Of The Province Of British

section 3 of the *Act*. Rather, making a work available for the purpose of communication is protected under the public performance right in section 3 and making available for the purpose of downloading is protected under the reproduction right in section 3. Where a work is merely made available but no download of the work has occurred, since no reproduction right has been engaged, no event compensable to the owner of the reproduction right has occurred.

D. USER GROUPS

i. CAB

[71] CAB³⁵ states that it supports the overall conclusions of Apple, Bell, Cineplex, Google, Microsoft, Rogers, Shaw, Quebecor, and Yahoo and relies on the analysis undertaken in the expert opinions of Professors Sam Ricketson and Jeremy de Beer.

[72] CAB submits that subsection 2.4(1.1) applies in the context of communications, but does not apply in the context of reproductions. According to it, subsection 2.4(1.1) does not create a new, separate right, but only clarifies the existing right of communication to the public by telecommunication, and does not give rise to a separately tariffable activity.

[73] It further submits that such an interpretation is consistent with Canada's international obligations.

ii. ESA

[74] ESA³⁶ submits that the Supreme Court's decision in *ESA* has not been rendered moot by the addition of subsection 2.4(1.1), and that SOCAN still cannot collect royalties for the transmission of downloads; nor can it collect for the mere posting of musical works online. According to ESA, there is nothing in the context of the 22.A tariff to distinguish it from the context in the *ESA* decision: it is the single activity of the downloading of a musical work.

[75] It argues that since stores can place musical works into their inventory without paying a charge, online music stores should not have to do so when they post musical works online—in line with the principle of technological neutrality. Moreover ESA submits that adopting an interpretation wherein the posting of a work online may trigger the reproduction right as well as

Columbia / Making Available Amendment" (e-mail to Copyright Board, 2013-10-18).

³⁵ See CAB, "Submissions of the Canadian Association of Broadcasters (CAB) on the Making Available Amendment" (e-mail to Copyright Board, 2013-06-14); CAB, "SOCAN Tariff 22.A – The Making Available Amendment" (e-mail to Copyright Board, 2013-10-18).

³⁶ See ESA, "Written Submission of Entertainment Software Association and Entertainment Software Association of Canada" (e-mail to Copyright Board, 2013-06-14) [ESA Submission]; ESA, "Reply Submission of Entertainment Software Association and Entertainment Software Association of Canada" (e-mail to Copyright Board, 2013-10-18).

the communication right would disregard the prohibition against the layering or rights and “double (or more)-dipping.”

[76] Lastly, it argues the introduction of subsection 2.4(1.1) does not demonstrate an intent of Parliament to overturn the principles enunciated in the *ESA* decision.

iii. RCC

[77] RCC³⁷ submits that subsection 2.4(1.1) acts as a definition, not as a new right with respect to works. The context and content of the WCT demonstrate that a separate right for the making available is not required. However, even if a new right had been created, it is not one that can be dealt with by collective administration. It argues SOCAN’s interpretation of subsection 2.4(1.1) would create the kind of layering of rights, or “double-dipping” of tariffs, of which the Supreme Court of Canada has expressed its wariness. In any case, according to RCC, what SOCAN seeks is the creation of copyright-like rights not found in the *Act*.

[78] Furthermore, RCC argues that collective societies such as SOCAN may not have the chain of title to administer the “making available right,” as framed by SOCAN, including in relation to foreign rights holders.

E. INDIVIDUALS

i. Prof. Katz

[79] Prof. Katz,³⁸ Associate Professor at the University of Toronto, states that he is a consumer who purchases digital content online, an objector in the *Access Copyright – Reproduction of Literary Works by Post-Secondary Educational Institutions* tariff matter, that he works in an educational institution that is currently a licensee of Access Copyright, and that he is an author and a copyright holder.

[80] Prof. Katz submits that if subsection 2.4(1.1) is a new right, then it cannot be presumed that SOCAN is entitled to collect royalties for it, since it seems highly unlikely that SOCAN could have obtained those rights since the *CMA* came into force.

[81] He further submits that it is not self-evident that judicial economy justifies holding a special proceeding involving numerous parties, instead of proceeding in the normal way of deciding legal questions as they pertain to specific circumstances in specific proceedings.

³⁷ See RCC, “SOCAN Proposed Tariff 22 and Making Available Right (“MAR”)” (e-mail to Copyright Board, 2012-12-21).

³⁸ See Ariel Katz, “Making Available Right / Droit de mise à disposition” (e-mail to Copyright Board, 2012-12-21).

V. LEGAL ISSUES

A. DOES SUBSECTION 2.4(1.1) OF THE ACT RESULT IN AN ONLINE MUSIC SERVICE COMMUNICATING A WORK TO THE PUBLIC BY TELECOMMUNICATION WHEN IT PLACES A COPY OF THAT WORK ON A SERVER FROM WHERE IT CAN BE DOWNLOADED BY THE PUBLIC?

i. Background

[82] SOCAN applied for a tariff for the use of musical works on the Internet in 1996. The application for a tariff was divided into two phases: the first dealt with the legal issues and the second established the royalties payable for the use of online music. In the first phase, the Board concluded that a musical work is communicated by telecommunication when packets of data are transmitted over the Internet so that, once reassembled, the work is performed, copied or otherwise conveyed to the recipient.³⁹ As such, these acts of transmission were captured by paragraph 3(1)(f) of the *Act*, which provides that “ ‘copyright,’ in relation to a work [...] includes the sole right [...] in the case of any literary, dramatic, musical or artistic work, to communicate the work to the public by telecommunication.”

[83] The Board also found that a communication intended to be received by members of the public in individual private settings is a communication “to the public,” but that the sole posting of a file, intended to be accessed by more than a single recipient, is not a communication to the public by telecommunication of a work contained in that file: “[a] musical work is not communicated when it is made available on a server.”⁴⁰

[84] In subsequent decisions, the Board and the Federal Court of Appeal held that the transmission of musical works in the form of electronic data packets to the public by telecommunication amounted to communication to the public by telecommunication pursuant to paragraph 3(1)(f) of the *Act*.⁴¹

[85] Until 2012, no court or tribunal found that a transmission of a musical work that results in a download over the Internet was not a communication to the public by telecommunication. As Justice Binnie of the Supreme Court of Canada stated in *SOCAN v. CAIP*, a work has necessarily

³⁹ *SOCAN Tariff 22 – Transmission of Musical Works to Subscribers Via a Telecommunications Service not covered under Tariff Nos. 16 or 17* (27 October 1999) Copyright Board Decision at 28. [*SOCAN Tariff 22*]

⁴⁰ *Ibid* at 26.

⁴¹ *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45, [2004] 2 SCR 427. [*SOCAN v. CAIP*] See also Decision of the Board dated October 18, 2007, certifying *SOCAN Tariff 22.A (Internet – Online Music Services) for the Years 1996 to 2006*; Decision of the Board dated August 18, 2006 certifying *SOCAN Tariff 24 (Ringtones), 2003-2005* at para 62; *Canadian Wireless Telecommunications Association v. SOCAN*, 2008 FCA 6, [2008] 3 FCR 539; *Entertainment Software Assn. v. Society of Composers, Authors and Music Publishers of Canada Inc.*, 2010 FCA 221; *Shaw Cablesystems G.P. v. Society of Composers, Authors and Music Publishers of Canada*, 2010 FCA 220, [2012] 2 FCR 154.

been “communicated” when, “[a]t the end of the transmission, the end user has a musical work in his or her possession that was not there before.”⁴² While *obiter*, Justice Binnie’s comments highlight the fact that at the time, it had been accepted that the transmission of a musical work that results in a download of that work is a communication to the public by telecommunication of such work.

[86] In its 2012 *ESA* decision, the Supreme Court of Canada rejected this position.⁴³ In that case, *ESA* argued that the operators of Internet game sites did not “communicate” musical works within the meaning of paragraph 3(1)(f) of the *Act* when they transmitted video games containing musical works to their customers.⁴⁴ The Supreme Court held that the transmission of musical works resulting in permanent copies via the Internet does not constitute communication of those works.⁴⁵

[87] As SOCAN administers only the right of communication to the public by telecommunication, but not the right of reproduction, the effect of *ESA* is that SOCAN could not collect royalties for the transmission via the Internet of musical works resulting in downloads. It continued to be able to collect royalties for the streaming via the Internet of musical works to the public. Collectives that administered the right of reproduction and the right to authorize reproduction, of musical works could seek and collect royalties for the reproductions of those works resulting from such downloads.

ii. Parties’ arguments

[88] SOCAN argues that, as a result of the new subsection 2.4(1.1) of the *Act*, Internet music services are liable to SOCAN when they post musical works on their Internet servers in a way that allows customers to have access to them from a place and at a time chosen by each customer, irrespective of whether the musical works are subsequently transmitted to end-users by way of downloads, streams, or not at all.

[89] SOCAN submits that the act of “making available” a musical work in this manner is captured by subsection 2.4(1.1) of the *Act*, which has the effect of rendering that act a communication to the public by telecommunication. Since it administers the right of communication to the public by telecommunication, it claims that it is eligible to receive royalties for such acts.

⁴² *SOCAN v. CAIP*, *Ibid* at para 45.

⁴³ *ESA*, *supra* note 1.

⁴⁴ *Ibid* at para 65.

⁴⁵ *Ibid* at para 127.

[90] Other parties contend that the act of making available for the purpose of streaming falls under paragraph 3(1)(f) of the *Act*, but making available for the purpose of downloading does not.⁴⁶ The argument in support of this position is that subsection 2.4(1.1) clarifies the scope of the communication right in paragraph 3(1)(f). The communication right was not amended and the act of making available was merely included within the scope of the existing concept of communication to the public by telecommunication, which is itself an example of an activity covered under the public performance right provided for in subsection 3(1).

[91] Some parties⁴⁷ submit that it is notable that Parliament did not amend the *Act* by making the protection relating to “making available” a separate right under the *Act*, but chose rather to clarify the definition of communication to the public by telecommunication by using a definitional subsection. They disagree with SOCAN that subsection 2.4(1.1) of the *Act* creates a new right to make works available. In their submission, it merely clarifies that the right to communicate a work to the public by telecommunication includes the making available of that work. They argue that the interpretation of subsection 2.4(1.1) proposed by SOCAN introduces a new communication right for the initial step of making copies available for subsequent download and has the effect of completely abandoning the traditional distinction between the reproduction and performance rights confirmed by the Supreme Court of Canada in *ESA*.

[92] This position is based primarily on the argument that, according to *ESA*, “copyright” “means the sole right [...] to perform [a] work or any substantial part thereof in public,” which, “in the case of any literary, dramatic, musical or artistic work,” includes the sole right “to communicate the work to the public by telecommunication” which—as a result of subsection 2.4(1.1)—“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.”

[93] In other words, subsection 2.4(1.1) of the *Act* clarifies that the act of “making available” is included in, and constrained by, the definition of “communicate” which, in turn, is included in, and constrained by, the scope of “perform.” Since *ESA* stands for the proposition that a communication to the public by telecommunication occurs when a musical work is transmitted by way of a stream, but not when it is transmitted by way of a download, this argument leads to the conclusion that placing a copy of a musical work on a server from which it is available to the public to be downloaded does not engage subsection 2.4(1.1) as no “communication to the public,” as described by the majority in *ESA*, occurs or will occur.

⁴⁶ See e.g., Apple Submission, *supra* note 26 at paras 28-30, 51; ESA Submission, *supra* note 36 at para 10; Microsoft Submission, *supra* note 29 at paras 4, 28-29; 32-33.

⁴⁷ See e.g., Networks Submission, *supra* note 31 at para 19.

iii. Analysis of the statutory language

[94] Does subsection 2.4(1.1) clarify the meaning of the expression “communication to the public by telecommunication” with the result that it is applicable only in performance-like situations, such as streams, or should it be interpreted as expanding the meaning of the expression to include acts of “making available” regardless of the nature of any subsequent transmission?

[95] Statutory enactments and amendments must be interpreted in accordance with the modern principles of interpretation set out by the Supreme Court of Canada in *Re Rizzo & Rizzo Shoes Ltd.*⁴⁸ That is, the words must be considered in their entire context and in a grammatical and ordinary sense, harmonious with the scheme of the *Act*, the object of the *Act*, and the intention of Parliament.⁴⁹

iv. History of subsection 2.4(1.1)

[96] Prior to the enactment of the *CMA* in 2012, the *Act* did not explicitly provide protection for works and other subject-matter in relation to the act of making these available to the public.

[97] Several previously introduced bills addressed this issue in various ways. In 2005, the first of these bills, Bill C-60,⁵⁰ explicitly provided protection for the making available of works and other subject-matter.⁵¹ That Bill died on the Order Paper. In 2008, the then government attempted to amend the *Act* and tabled Bill C-61,⁵² which did not repeat the explicit language of Bill C-60 with respect to the protection for making available of works. In June 2010, the Government tabled Bill C-32.⁵³ This Bill also died on the Order Paper but was reintroduced unchanged as Bill C-11 in September 2011.⁵⁴ Bill C-11, titled the *Copyright Modernization Act*, received Royal Assent on June 29, 2012. Unlike Bill C-61, the *CMA* explicitly amended the *Act* by the addition of subsection 2.4(1.1) which reads as follows:

For the purposes of this Act, communication of a work or other subject-matter to the public by telecommunication 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.

⁴⁸ *Re Rizzo & Rizzo Shoes Ltd.* [1998] 1 SCR 27. [*Rizzo*]

⁴⁹ *Ibid* at para 21. See also: *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 SCR 339; *R. v. Monney*, [1999] 1 SCR 652; *Atco Gas and Pipelines Ltd. v. Alberta*, 2006 SCC 4, [2006] 1 SCR 140.

⁵⁰ Bill C-60, *An Act to amend the Copyright Act*, 1st Sess, 38th Parl, 2005.

⁵¹ *Ibid* cls 2, 8(1), 10.

⁵² Bill C-61, *An Act to amend the Copyright Act*, 2nd Sess, 39th Parl, 2008.

⁵³ Bill C-32, *An Act to amend the Copyright Act*, 3rd Sess, 40th Parl, 2010.

⁵⁴ Bill C-11, *An Act to amend the Copyright Act*, 1st Sess, 41st Parl, 2011 (Royal Assent on 29 June 2012). [Bill C-11]

[98] The Preamble to the *CMA* makes it clear that Parliament intended to implement new copyright protections via “coordinated approaches, based on internationally recognized norms.” It stated:

Whereas the *Copyright Act* is an important marketplace framework law and cultural policy instrument that, through clear, predictable and fair rules, supports creativity and innovation and affects many sectors of the knowledge economy;

Whereas advancements in and convergence of the information and communications technologies that link communities around the world present opportunities and challenges that are global in scope for the creation and use of copyright works or other subject-matter;

Whereas in the current digital era copyright protection is enhanced when countries adopt coordinated approaches, based on internationally recognized norms;

Whereas those norms are reflected in the World Intellectual Property Organization Copyright Treaty and the World Intellectual Property Organization Performances and Phonograms Treaty, adopted in Geneva in 1996;

Whereas those norms are not wholly reflected in the *Copyright Act*.

[...]

[99] Thus, one of the main purposes of the *CMA* was to establish copyright protection that is based on internationally recognized norms, as reflected in the WCT and the WPPT.

v. Government statements

[100] In addition to evidence of Parliamentary intent that can be found from the *CMA* itself, there are the various statements made by the Government during the introduction and development of the Bill.

[101] When introducing the *CMA*, the Government stated its core objectives for the new legislation as follows:

The *Copyright Modernization Act* provides copyright industries with a clear framework in which to invest in creative content, reach new markets, engage in new business models and combat infringement in a digital environment. Copyright owners are often artists and creators. The *Copyright Modernization Act* promotes creativity, innovation and culture by introducing new rights and protections for artists and creators. It will help these people protect their work and ensure they are fairly compensated for their efforts.

[...]

The WIPO Copyright Treaty and the Performances and Phonograms Treaty, collectively known as the WIPO Internet treaties, establish new rights and protections for authors,

performers and producers. Canada signed the treaties in 1997. The proposed Bill will implement the associated rights and protections to pave the way for a future decision on ratification. All copyright owners will now have a “making available right,” which is an exclusive right to control the release of copyrighted material on the Internet. This will further clarify that the unauthorized sharing of copyrighted material over peer-to-peer networks constitutes an infringement of copyright.⁵⁵

[102] The Government explained the proposed addition of subsection 2.4(1.1) to the *Act* in a document entitled: Government of Canada, “Balanced Copyright—Glossary.” It stated that the “making available right” is an “exclusive right of copyright owners to authorize the communication of their work or other related subject-matter in a manner in which the time and place of receiving the communication can be individually chosen by members of the public (e.g., iTunes).”⁵⁶

[103] While we recognize that such statements play a limited role in the interpretation of legislation, and are mindful of the limited reliability and weight of such evidence,⁵⁷ in our opinion they are relevant to both the background and the object of the *CMA*.

vi. Context and grammatical and ordinary sense

[104] It should be noted that subsection 2.4(1.1) of the *Act* is not confined to the communication by telecommunication of a work but also applies to “other subject-matter.” The concept of “making available,” as a protected act, also appears in paragraphs 15(1.1)(d) and 18(1.1)(a) of the *Act*.

[105] This, or a similar expression, appears in some of the other provisions created by the *CMA*, such as subsections 29.21(1),⁵⁸ 30.04(1),⁵⁹ and 30.04(5).⁶⁰

⁵⁵ Government of Canada, “What the *Copyright Modernization Act* Means for Copyright Owners, Artists and Creators”, online: <https://web.archive.org/web/20130123093243/http://balancedcopyright.gc.ca/eic/site/crp-prda.nsf/eng/rp01189.html>.

⁵⁶ Government of Canada, “Glossary”, online: https://web.archive.org/web/20121101104212/http://balancedcopyright.gc.ca/eic/site/crp-prda.nsf/eng/h_rp01190.html.

⁵⁷ *Rizzo*, *supra* note 48 at para 35.

⁵⁸ *Copyright Act*, s. 29.21(1) (“It is not an infringement of copyright for an individual to use an existing work or other subject-matter or copy of one, which has been published or otherwise **made available** to the public, in the creation of a new work or other subject-matter in which copyright subsists and for the individual [...]” [emphasis added])

⁵⁹ *Copyright Act*, s. 30.04(1) (“[...] it is not an infringement of copyright for an educational institution, or a person acting under the authority of one, to do any of the following acts for educational or training purposes in respect of a work or other subject-matter that is **available** through the Internet.” [emphasis added])

⁶⁰ *Copyright Act*, s. 30.04(5) (“Subsection (1) does not apply if the educational institution or person acting under its authority knows or should have known that the work or other subject-matter was **made available** through the

[106] The expression “making [...] available” is not entirely new to the *Act*. For example, subparagraph 2.2(1)(a)(i), which existed before the coming into force of the *CMA*, defines “publication” using the expression “making [...] available” in relation to works and sound recordings.⁶¹ However, the definition expressly excludes the communication of a work by telecommunication.⁶² These provisions do not appear to shed light on the issue identified above.

[107] Arguments that subsection 2.4(1.1) applies only to the making available of performance-like transmissions rely heavily on the analysis of the majority in *ESA*, and in particular the majority’s interpretation of subsection 3(1) and the terms “means” and “includes.” Since the phrase “to communicate to the public by telecommunication” appears in paragraph 3(1)(f), subsection 2.4(1.1) becomes part of the ambiguous “means [...] and includes” structure that was at issue in *ESA*.

[108] In its interpretation of the communication right prior to the enactment of subsection 2.4(1.1), the Supreme Court in *ESA* held that subsection 3(1)

states that copyright “means” the sole right to produce or reproduce a work in any material form, to perform a work in public, or to publish an unpublished work. This definition of “copyright” is exhaustive, as the term “means” confines its scope. The paragraph concludes by stating that copyright “includes” several other rights, set out in subsections (a) through (i). As a result, the rights in the introductory paragraph provide the basic structure of copyright. The enumerated rights listed in the subsequent subparagraphs are simply illustrative [...] The rental rights in s. 3(1)(i) referred to by Justice Rothstein, for example, can fit comfortably into the general category of reproduction rights.⁶³

[109] In *ESA*, the Supreme Court stated that “communication by telecommunication” was fundamentally a performance right, and the term “communicate” did not extend to reproduction-based activities.⁶⁴ It based this conclusion on the legislative history of section 3, as well as the *Berne Convention for the Protection of Literary and Artistic Works*⁶⁵ and the *Canada-U.S. Free Trade Agreement*,⁶⁶ which connected the term “communicate” to performance-based activities.⁶⁷

[110] That interpretation was based on the performance-based activities covered by Articles 11 and 11bis of the *Berne Convention* which subsection 3(1) and paragraph 3(1)(f) of the *Act* were

Internet without the consent of the copyright owner.” [emphasis added]

⁶¹ *Copyright Act*, s. 2.2(1)(a)(i).

⁶² *Copyright Act*, s. 2.2(1)(c) (“[...] but does not include [...] the performance in public, or the communication to the public by telecommunication, of a literary, dramatic, musical or artistic work or a sound recording [...]”)

⁶³ *ESA*, *supra* note 1 at para 42.

⁶⁴ *ESA*, *supra* note 1 at para 39.

⁶⁵ *Berne Convention for the Protection of Literary and Artistic Works*, 828 U.N.T.S. 221, September 9, 1886; rev. in Berlin November 13, 1908; rev. in Rome June 2, 1928. [*Berne Convention*]

⁶⁶ *Canada-United States Free Trade Agreement*, 22 December 1987 (entered into force 1 January 1989).

⁶⁷ *ESA*, *supra* note 1 at paras 31-32.

intended to implement. The *Berne Convention* and the amendments made as a result of the 1988 *Canada-US Free Trade Agreement* did not explicitly require protection for the transmission of copies.⁶⁸ The Supreme Court in *ESA* did not consider the effects of the WCT, as Canada had not yet implemented the WIPO Internet Treaties.

[111] The WCT was a special agreement among *Berne Convention* contracting parties that was intended to expand the rights set out in that Convention. The new protection for the act of making a work available by telecommunication was intended to provide rights holders with a basis to hold liable those who make copyrighted works available to the public online even where no evidence of reproduction or actual communication to the public was present.

[112] The legislative history of subsection 2.4(1.1) clearly distinguishes the issue before the Board from the issue before the Supreme Court of Canada in *ESA*. There is a vast difference between the legislative backdrop to the 1988 amendments and the WIPO Internet Treaties. While in *ESA* the Supreme Court held that “communication by telecommunication” is an act that occurs when a work is streamed, but not when it is downloaded, the Court did not consider the scope of “making [a work] available by telecommunication.”

[113] The dictionary definition of the word “communicate,” which in its ordinary meaning includes the successful transmission or conveyance of information from one person to another does not appear to fit the expression “making [...] available to the public by telecommunication” of subsection 2.4(1.1) of the *Act*. This is distinct from the ordinary, or more general, meaning of “communicate [...] to the public by telecommunication” in paragraph 3(1)(f), which includes the transmission of information from one person to another.

[114] The Oxford Canadian Dictionary defines communicate and communication as follows:

communicate [...] 1 *tr.* a. transmit or pass on (information) by speaking, writing or other means. b. transmit (heat, motion, etc.). c. pass on (an infectious illness). d. impart (feelings etc.) non-verbally [...] 2 *intr.* succeed in conveying information, evoking understanding, etc. [...] 3 *intr* [...] share a feeling or understanding; relate socially [...]

communication [...] *n.* 1 a. the act of communicating, esp. imparting news. b. an instance of this. c. the information etc. communicated. 2 a means of connecting different places, such as a door, passage, road, or railway. 3 social contact; routine exchange of information. 4 (in *pl.*) a the science and practice of transmitting information esp. by electronic or mechanical means.⁶⁹

⁶⁸ *Ibid* at paras 21-24.

⁶⁹ The Canadian Oxford Dictionary, 2nd ed, *sub verbo* “communicate”, “communication”.

[115] Since the making available of a work does not require any actual transmission to take place, the ordinary meaning of the phrase “communicate [...] to the public by telecommunication” cannot bear the meaning ascribed to it by subsection 2.4(1.1) of the *Act*. The provision therefore has the effect of a deeming clause.

[116] The effect of a deeming clause was described in *R. v. Verrette*⁷⁰ where the Supreme Court explained that for the purposes of the statute, a deeming clause performs the purpose of expanding a word beyond its ordinary meaning to achieve a special purpose. This is a statutory fiction that imports into a word or expression an additional meaning that it would not otherwise have. As the Supreme Court stated in *Verrette*, a deeming clause enlarges the words so that it shall be taken as if it were that thing although it is not, or there is a doubt as to whether it is.⁷¹

[117] In our opinion, the effect of the deeming provision in subsection 2.4(1.1) of the *Act* is to expand the meaning of the right of communication to the public by telecommunication, by reason that no definition of “communication” includes the preparatory act—that is, the “making available” of content in and of itself. The word, in its grammatical and ordinary meaning, includes only the successful transmission or conveyance of information from one person to another. Therefore, subsection 2.4(1.1) creates the legal fiction that the act of “making available” a work in the manner described is an act of communication to the public by telecommunication of that work. The previous interpretation of “communicate” in *ESA* focussed only on the transmission element of that right and is distinguishable; it does not restrict the interpretation of subsection 2.4(1.1).

[118] As such, while many parties referred to the concept in subsection 2.4(1.1) of the *Act* as a “making available right” or MAR, it is probably more accurate to refer to it as a component of the right to communicate to the public by telecommunication.

[119] The attempt by some parties to limit or restrict the interpretation of subsection 2.4(1.1) of the *Act* to the on-demand provision of transmissions of streams adds restrictions to the clause which are not apparent from, and are inconsistent with, the language of that clause.⁷²

vii. Whether two rights can be triggered

[120] Some parties argue that concluding that the making available of a work for download amounts to a communication to the public by telecommunication would be contrary to the Supreme Court’s interpretation of *Bishop v. Stevens*⁷³ in *ESA*.

⁷⁰ *R. v. Verrette*, [1978] 2 SCR 838.

⁷¹ *Ibid* at pp 845-846.

⁷² A similar concern was raised by the Supreme Court of Canada in *Rogers*, *supra* note 2 at para 38.

[121] It is important, however, to note precisely what the Supreme Court decided in *Bishop*. There, the Court found that since the rights to perform a work and to record a work are distinct, the right to broadcast a performance under subsection 3(1) of the *Act* does not include the right to make ephemeral recordings for the purpose of facilitating the broadcast.

[122] In *ESA*, the Supreme Court found that *Bishop* does not stand for the proposition that a single activity (in that case, a download) can involve two separate rights at the same time.⁷⁴ The difference between *Bishop* and *ESA* is that *ESA* dealt with a single activity. The acts of reproduction are separate and distinct in theory and in practice from the act of making a work or other subject-matter available to the public. An act of reproduction may precede the act of making a work available or it may follow such an act, or there may be no reproduction by the person making the work available to the public.⁷⁵

viii. Technological neutrality

[123] Some parties rely on the principle of technological neutrality to argue that subsection 2.4(1.1) of the *Act* cannot be interpreted to include acts of making available that result in streams as well as those that result in downloads. According to this argument, since *ESA* construed the term “communicate” to exclude downloads by relying on the principle of technological neutrality before the *CMA* amendments, after the amendments, the term must therefore be construed in the same way.

[124] As Justice Rothstein, dissenting in *ESA*, pointed out, “technological neutrality is not a statutory requirement capable of overriding the language of the *Act*.”⁷⁶ It has been interpreted by the courts as meaning that the *Act* should be interpreted to apply or to extend to technologies that were not or could not have been contemplated at the time of the drafting.⁷⁷

[125] In *Rogers*, the principle of technological neutrality was applied by the Supreme Court in deciding that paragraph 3(1)(f) of the *Act* was broad enough to include on-demand communications. It stated:

Although the words “in any material form whatever” qualify the right to “produce or reproduce the work” in s. 3(1), the same principle should guide the application of the neutral wording of the right to “communicate ... to the public by telecommunication.” The broad

⁷³ *Bishop v. Stevens*, [1990] 2 SCR 467. [*Bishop*]

⁷⁴ *ESA*, *supra* note 1 at para 41.

⁷⁵ von Lewinski Opinion, *supra* note 15 at paras 81-89.

⁷⁶ *ESA*, *supra* note 1 at para 49.

⁷⁷ *Robertson v. Thomson Corp.* 2006 SCC 43, [2006] 2 SCR 363 at para 49. [*Robertson*]

definition of “telecommunication” was adopted precisely to provide for a communication right “not dependent on the form of technology (*SOCAN v. CAIP*, at para. 90).”⁷⁸

[126] In our opinion, the principle of technological neutrality would suggest that the deeming language in subsection 2.4(1.1) of the *Act* should be given a technologically neutral interpretation whereby it applies both to streams and downloads “in different media, including more technologically advanced ones.”⁷⁹

[127] In *ESA*, the Supreme Court held that the principle of technological neutrality was a principle of construction that applied “absent evidence of Parliamentary intent to the contrary.”⁸⁰ Here, it is clear that Parliament did not intend that the principle of technological neutrality limit the scope of subsection 2.4(1.1) of the *Act*. On the contrary, Parliament intended to create a technologically neutral protection that applies to the making available of protected works “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.”

[128] As previously noted, the preamble to the *CMA* expressed Parliament’s goals to “update the rights and protections of copyright owners to better address the challenges and opportunities of the Internet so as to be in line with international standards, [...] ensure that it remains technologically neutral”⁸¹ and to “establish rules that are technologically neutral, so they are flexible enough to evolve with changing technologies and the digital economy, while ensuring appropriate protection for both creators and users.”⁸²

[129] We agree with Music Canada that the *CMA* specifically intended to change the *Act* to address digital challenges. Given the legislative history, the rationale for the WIPO Internet Treaties, and the legislative objective to fully implement those treaties using a “coordinated approach,” the principle of technological neutrality does not limit or restrict the meaning of subsection 2.4(1.1) of the *Act*.

ix. What is the effect of the introduction of subsection 2.4(1.1) of the Act on the ESA decision?

[130] Prior to the coming into force of the relevant provisions of the *CMA*, and in particular subsection 2.4(1.1) of the *Act*, Canadian law, as described in the *ESA* decision, limited the

⁷⁸ *Rogers*, *supra* note 2 at para 39.

⁷⁹ *Robertson*, *supra* note 77 at para 49.

⁸⁰ *ESA*, *supra* note 1 at para 9.

⁸¹ *CMA*, *supra* note 5, preamble.

⁸² Government of Canada “Backgrounder”, online:

https://web.archive.org/web/20130414150846/http://balancedcopyright.gc.ca/eic/site/crp-prda.nsf/eng/h_rp01237.html.

communication right to completed transmissions of copyrighted content to the public to performance-based activities, such as streams. While the scope of the right was broad enough to include on-demand communications, there was still a requirement to establish that there had been an actual transmission. The mere availability of copyrighted content was not enough to trigger the right.⁸³

[131] Some parties submit that the *ESA* decision is either moot, or not binding, while other parties argue that it continues to be good precedent.

[132] For example, Microsoft contends that *ESA* governs the interpretation of the amendments to the *Act*. It argues that subsection 2.4(1.1) of the *Act* received Royal Assent after *ESA* was argued but before the decision was rendered. Accordingly, in its submission, Parliament cannot be said to have intended to change or otherwise influence the effect of *ESA* through the amendment. It points out that the amendment was only proclaimed in force on November 7, 2012, about four months after the release of the *ESA* decision and thus was not addressed by the Court. Nevertheless, *ESA* described the historic relationship among communication, performance and reproduction that were said to continue up to the date of the decision. As a result, in its submission, the Supreme Court of Canada necessarily described the concept of “communication” as it stood when Parliament passed the *CMA* which contained the amendment. It contends the communication right chosen by Parliament as the vehicle for protecting the making available of musical works had at that time all of the characteristics and limitations described in *ESA*, notwithstanding that the decision in *ESA* was decided after the *CMA* received Royal Assent and prior to its coming into force.

[133] In Microsoft’s submission, the amendment cannot be taken to have “overturned” *ESA* and cannot be interpreted so as to produce results inconsistent with either the conclusion of the copyright policies and principles set out in that decision. As a matter of statutory interpretation, it argues the inclusion of making available within the envelope of communication rather than its establishment as a free-standing right means the amendment must be read in accordance with *ESA*.

[134] As another example, Access Copyright and Copibec argue that the timing of the Royal Assent of the Bill permits the Board to consider the pre-*ESA* interpretations of paragraph 3(1)(f) of the *Act*.

[135] It is a basic principle of statutory interpretation that the meaning of words used in legislation is fixed at the time of enactment and not at some later time.⁸⁴ Since the *ESA* decision

⁸³ *SOCAN v. CAIP*, *supra* note 41 at paras 45-46; *CWTA v. SOCAN*, 2008 FCA 6, [2008] 3 FCR 539 at paras 19-20, leave to appeal refused, [2008] 2 SCR vi.

⁸⁴ *Perka v. The Queen*, [1984] 2 SCR 232 at 265-266; See also *Felipa v. Canada (Minister of Citizenship and*

was rendered after the enactment of the *CMA*, the former could not have changed Parliament's intent.

[136] In any event, by the passage of the *CMA*, Parliament deemed that the making available is also included in the communication right, without otherwise changing what the "transmission component" of communication to the public by telecommunication means. Only the latter part was in issue in the *ESA* decision. As such, we are unconvinced by the arguments discussed above for the simple reason that the issue in *ESA* and the one with which we are concerned here are different. Therefore, given that the issue before us is to determine the scope of subsection 2.4(1.1) of the *Act*, and not to revisit the "transmission component" of the right of communication to the public by telecommunication, it is not necessary to address the argument of Access Copyright and Copibec based on subsection 45(4) of the *Interpretation Act*⁸⁵ with respect to the effect of judicial decisions on statutory interpretation.

B. IS THE BOARD'S INTERPRETATION OF SUBSECTION 2.4(1.1) OF THE ACT CONSISTENT WITH CANADA'S OBLIGATIONS UNDER ARTICLE 8 OF THE WCT AND ARTICLES 10 AND 14 OF THE WPPT?

[137] The Preamble of the *CMA* and statements made by the Government during its introduction and development, demonstrate that one of the main purposes of the Bill was to implement the WCT and WPPT. The interpretation of subsection 2.4(1.1) of the *Act* must be in harmony with this intention. Although the discussion herein focusses mainly on subsection 2.4(1.1) of the *Act* and Article 8 of the WCT, the underlying principles of our analysis are applicable *mutadis mutandis* to paragraphs 15(1.1)(d) and 18(1.1)(a) of the *Act* and Articles 10 and 14 of the WPPT.

[138] As a starting point, it is useful to note that there does not appear to be any significant dispute that the WIPO Internet Treaties were intended to cover the making available of works and other subject-matter in a way that they may be downloaded or streamed. The parties who made submissions on the issue also agree that implementation methods under the "umbrella solution"⁸⁶ (described below at paragraphs 152 and following) for the fulfilling of Canada's treaty obligations are only acceptable if the WIPO Internet Treaties are fully complied with. This

Immigration), 2011 FCA 272 at paras 70-71 (explaining that subsequent case law could not change Parliament's intent at the time of enactment); Ruth Sullivan, *Sullivan on the Construction of Statutes* (5th Ed.) (LexisNexis Canada Inc.: Toronto, 2008) at 146-147; Pierre-André Côté, *Interpretation of Legislation in Canada* (3rd Ed.) (Carswell: Scarborough, 2000) at 267.

⁸⁵ *Interpretation Act*, R.S.C. 1985, c. I-21, s. 45(4) ("A re-enactment, revision, consolidation or amendment of an enactment shall not be deemed to be or to involve an adoption of the construction that has by judicial decision or otherwise been placed on the language used in the enactment or on similar language.")

⁸⁶ See e.g., Apple Submission, *supra* note 26 at para 52; Ricketson Opinion, *supra* note 32 at para 37; de Beer Opinion, *supra* note 33 at para 18; von Lewinski Opinion, *supra* note 15 at para 44; Ginsburg Opinion, *supra* note 20 at para 17.

means there must be no gaps in protection for the making available of both streams and downloads.

[139] SOCAN and some other parties submit that such activities are captured by subsection 2.4(1.1) of the *Act*; it is clear that there would be no gap if this provision were interpreted in this way. However, other parties argue that the making available of a work for download is not covered by subsection 2.4(1.1). Since such an approach would, *a priori*, leave a gap if no other right is applicable to this activity, we must determine whether this proposed interpretation of subsection 2.4(1.1) adequately or fully complies with Canada's WIPO Internet Treaty obligations.

i. The scope of WCT Article 8

[140] The expert opinion of Dr. Mihály Ficsor, former Assistant Director General of WIPO, the person responsible for the preparation of the WIPO Internet Treaties and the development of the “umbrella solution,” is particularly helpful in that respect. Dr. Ficsor points out that there were several issues that needed to be solved, for example:

The legal characterization of—the applicable exclusive right or rights for—the acts of including works and objects of related rights in the Internet for interactive use (for any kind of use by those who may get access to them) was one of these issues. In fact, it seemed to be the biggest issue as potential obstacle to agreement between such key negotiating parties as the United States and the European Community.

This thorny problem was solved through the so-called “umbrella solution” serving as a basis of the recognition of the right of (interactive) making available to the public which had been worked out by me and offered to the negotiating parties in the way described below.⁸⁷

[141] Dr. Ficsor sets out in great detail the problem that confronted the drafters of the WIPO Internet Treaties: how to apply the concepts of distribution and communication to the public when existing norms were not sufficient. The *Berne Convention*⁸⁸ does not provide for a right of distribution for all categories of works but only for cinematographic works; and although coverage of the right of communication to the public is broader, it still does not cover all categories of works. Thus it became clear that it would be difficult for the various countries to select only one of the two basic candidate rights—either distribution or communication to the public directly.

[142] Dr. Ficsor sums up the intention of the drafters of the “making available” provisions in the WCT and the WPPT as follows:

⁸⁷ Ficsor Opinion, *supra* note 19 at 2.

⁸⁸ *Berne Convention*, *supra* note 65 Arts. 11*bis*, 20.

The intention—which is duly reflected in the text of the relevant provisions of the two Treaties and which is also confirmed by their “preparatory work”—was to provide for an exclusive right in order to control the decisive act of uploading and making accessible for interactive use of protected works and objects of related rights on the Internet irrespective of the nature/purpose of the transmissions taking place in the course of such use. The relevant provisions of the WCT and the WPPT were adopted by the 1996 Diplomatic Conference on the basis of a unanimous understanding that the making available right is applicable both where the resulting interactive use takes the form of transmissions only allowing perception of and where they may result in downloading of the works (performances and/or phonograms) thus made available.⁸⁹

[143] Professor Ginsburg puts it this way:

The making available right targets on-demand transmissions (whether by wire or wireless means), for it makes clear that the members of the public may be separated both in space and in time. The technological means of “making available” are irrelevant; the right is expressed in technological neutral terms [...] Equally importantly, the right applies to the “work”; is not limited to “performances” of the work. Thus it covers making the work available both as a download and as a stream.⁹⁰ [footnotes omitted]

[144] Dr. von Lewinski also participated in the development of the provisions of the WCT and WPPT addressing the making available right and provides her opinion that:

The making available right under the WCT and WPPT applies as soon as a work, performance, or phonogram, which is stored on a server, is rendered accessible to the public through an [I]nternet or other network or connection that may be used by members of the public in such a way that they then may access these works, performances or phonograms at a time and from a place individually chosen.⁹¹ [footnotes omitted]

[145] Article 8 of the WCT requires signatories to provide to authors the exclusive right of authorizing the communication to the public of their works. Some parties appear to argue that this right to authorize a communication to the public includes the “making available” of a work.⁹² This approach would essentially apply the same argument as to the meaning of “including” of Article 8 of the WCT, as is being put forward by those parties in relation to the interpretation of subsection 2.4(1.1) of the *Act*; that is that the phrase in Article 8 “including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them” is a clarification of

⁸⁹ Ficsor Opinion, *supra* note 19 at 3.

⁹⁰ Jane C. Ginsburg, “Recent Developments in U.S. Copyright Law—Part II, Caselaw: Exclusive Rights on the Ebb?” (2008) Columbia Public Law & Legal Theory Working Papers, paper 08158 at 37.

⁹¹ von Lewinski’s Opinion, *supra* note 15 at para 11.

⁹² See e.g., Networks Submission, *supra* note 31 at paras 53ff.

the *in limine* phrase “any communication to the public of their works, by wire or wireless means.”

[146] We disagree. As all the expert opinions make clear, the act of making available can occur without any communication taking place. As such, the *in fine* phrase cannot be a clarification of the *in limine* phrase. More logically, just like subsection 2.4(1.1) of the *Act*, this portion of Article 8 is a deeming provision, which expands the meaning of the expression “any communication to the public.”

[147] Therefore, it is our opinion that to the extent that a country’s existing law grants an exclusive right of authorizing the communication to the public of a work, but does not cover the mere “making available” of that work, a gap exists, and such country is not compliant with Article 8 of the WCT.

ii. Compliance through existing rights and a “performance-based” subsection 2.4(1.1)

[148] Those parties that submit that subsection 2.4(1.1) of the *Act* does not apply for the making available that may result in downloads, and that such an interpretation is compliant with the WCT, argue that one or more combinations of the existing rights of reproduction, of authorizing reproductions, and of authorizing communications to the public by telecommunication, along with their proposed interpretation of the scope of subsection 2.4(1.1), are sufficient to meet the obligation contained in Article 8 of the WCT. Some argue that the WCT does not require a specific manner of implementation, and, furthermore, that the WCT does not require a freestanding “making available” right.

[149] SOCAN and some Copyright Collective Societies and Rights Holder Groups disagree. They argue that while Professors Ricketson and de Beer state that a country potentially could implement the WIPO Internet Treaties in the manner they propose, neither the professors, nor the parties relying on their expert opinions, provide any reasons or jurisprudence to support their contention that Canada intended to, and in fact did, implement the WIPO Internet Treaties in the manner they propose.

[150] Professor Ricketson states that

an interpretation of the Canadian communication right in s. 3(1)(f) so as to apply to the interactive making available of works that are streamed only is consistent with the requirements of article 8 of WCT, so long as there are other exclusive rights, such as the

reproduction right, that can apply to the making of transmissions that result or may result in downloads of the works made available.⁹³

[151] In Prof. Ricketson’s opinion, the right required by Article 8 of the WCT supplements the pre-existing exclusive rights to broadcast and communicate works that are required under the *Berne Convention*. He notes that, in addition to the rules of treaty interpretation allowing member states to implement standard rights in the manner of their choosing, the wording of Article 8 is open-ended enough to provide member states with flexibility of implementation. He concludes that the words of Article 8 do not place any qualification on the way works are made available, and finds confirmation for this principle in the Basic Proposal for the “umbrella solution.”⁹⁴

[152] The term “umbrella solution” refers to a compromise solution worked out during the WCT negotiations which contained the following elements: “(i) the act of interactive transmission should be described in a neutral way, free from specific legal characterization (for example, as making available a work to the public by wire or by wireless means, for access by members of the public); (ii) such a description should not be technology-specific and, at the same time, it should express the interactive nature of digital transmissions in the sense that it should go along with a clarification that a work or an object of related right is considered to be made available “to the public” also when the members of the public may access it at a time and at a place freely chosen by them; (iii) in respect of the legal characterization of the exclusive right—that is, in respect of the actual choice of the right or rights to be applied—sufficient freedom should be left to national legislation; and, (iv) the gaps in the Berne Convention in the coverage of the relevant rights—the right of communication to the public and the right of distribution— should be eliminated. This solution was referred to as the “umbrella solution,” and it was adopted by the Diplomatic Conference as a basis for the provisions concerning interactive transmissions.”⁹⁵

[153] Professor de Beer also concludes that when determining whether Canada’s copyright law is compliant with Canada’s international obligations, the key question is whether the substance of the law complies— not whether the specific manner of implementation matches that of other member states and that “perfect harmonization with all foreign approaches is impossible, as well as unnecessary, for Canada’s treaty compliance.”⁹⁶

[154] In their respective opinions, Professors Ricketson and de Beer both conclude that the *CMA* does not need to grant a freestanding “making available” right to comply with WCT obligations,

⁹³ Ricketson Opinion, *supra* note 32 at para 8.

⁹⁴ *Ibid* at paras 37-38.

⁹⁵ WIPO, “Guide to the Copyright and Related Rights Treaties Administered by WIPO” (2004) at 208-209, online at: http://www.wipo.int/edocs/pubdocs/en/copyright/891/wipo_pub_891.pdf

⁹⁶ de Beer Opinion, *supra* note 33 at para 8.

and further provide an opinion that the interpretation that subsection 2.4(1.1) does not cover the making available of downloads satisfies the WCT obligation under Article 8.

[155] Given all the evidence, Articles 31 and 32 of the *Vienna Convention on the Law of Treaties*,⁹⁷ as well as the history and effect of the “umbrella solution,” we find that there is no specific approach that needs to be adopted by WCT member states in order for them to be compliant. It can take any form: a reproduction right, a distribution right, a publication right, a communication right, or a stand-alone making available right, or any combination thereof.⁹⁸ However, that does not answer the fundamental question: does the interpretation urged on us by some parties—that subsection 2.4(1.1) of the *Act* does not cover the making available which may result in downloads—satisfy Canada’s treaty obligations under Article 8 of the WCT?

iii. What rights may be used to comply with Article 8 of the WCT?

[156] Some experts argue that only some rights should be considered in whether a WCT member’s domestic implementation of the protection of the “making available” of a work meets the obligations of that treaty, and that the reproduction right should not be one of these.

[157] For example, Dr. Ficsor and Dr. von Lewinski state that the reproduction right is not a viable mechanism for the implementation of the right of making available as applied to making copies available to the public for downloading. Dr. Ficsor provided a detailed explanation of the two candidate rights in reviewing the WIPO Treaties negotiations and explained why the reproduction right was considered insufficient. In short, the reproduction right is not the same as the right of providing access to or making available in interactive environments.⁹⁹

[158] Dr. von Lewinski states that the reproduction right was not a candidate right that could form part of the umbrella solution to satisfy the obligations under the WIPO Internet Treaties as it relates to making available:

Accordingly, among the candidate rights discussed for application to the act of making available were only rights that would cover the act of making available as a form of diffusion in the broadest sense, as opposed to the mere reproduction right. In fact the reproduction right was mentioned in the Basic Proposal as applying to any reproductions taking place in the course of such making available and as applying in addition to a right of making available. Likewise, discussion of the Committees of Experts and of the Diplomatic Conference confirmed that the reproduction right was always considered as a right applying

⁹⁷ *Vienna Convention on the Law of Treaties*, 23 May 1969, (entered into force 27 January 1980).

⁹⁸ See e.g., SACD-SCAM Submission, *supra* note 16 at paras 18-20.

⁹⁹ Mihály Ficsor, “Copyright in the Digital Environment: The WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)” (February 2005) WIPO/CR/KRT/05/7 at paras 44-45.

to acts of reproduction in the context of internet transmission, and that any other, additional right or rights would have to cover the (different) act of making available.

Therefore, I disagree with the expert opinions of J. de Beer and S. Ricketson, as far as they consider the reproduction right (including the right to authorize reproduction) to be a possible candidate right to implement the making available right as regards downloads.¹⁰⁰ [footnotes omitted]

[159] However, Professor Ginsburg states that

[w]hat matters is not the label any national law confers, but rather its actual coverage. In one way or another, or in combination, member states must ensure that authors enjoy the right to control the offering and provision of on-demand access by the public, whether that access takes the form of a stream or of a download.¹⁰¹

[160] She continues:

Canada may therefore, consistently with WCT art. 8, enact a “making available” right that comprehensively regulates offering on-demand streaming and downloading, but it may also cover on-demand offers for streaming and downloading through a combination of exclusive rights, for example, through a public performance or communication to the public right over offers to stream, and a reproduction/distribution right over offers of downloads. But it cannot, consistently with its international obligations, cover offers to stream on the one hand, but only actual deliveries of downloads on the other.¹⁰²

[161] This is supported by Dr. Jörg Reinbothe and Dr. von Lewinski in their text where they state that the United States

expressed its understanding that the right of making available as contained in Article 10 Basic Proposal I 1996 could be implemented into national law *by any exclusive right*, hence not necessarily by the right of communication to the public. This understanding was not opposed by other delegations.¹⁰³ [emphasis added]

[162] We agree. What name a right is given in domestic legislation does not make it any more or any less compliant. What is important is that all the acts contemplated by the treaties are covered through one or more exclusive rights.

¹⁰⁰ von Lewinski Opinion, *supra* note 15 at paras 101-102.

¹⁰¹ Ginsburg Opinion, *supra* note 20 at para 15.

¹⁰² *Ibid* at para 16.

¹⁰³ Jörg Reinbothe and Silke von Lewinski, *The WIPO Treaties 1996. The WIPO Copyright Treaty and The WIPO Performances and Phonograms Treaty, Commentary and Legal Analysis* (London, UK: Butterworths, 2002) at 102-103.

[163] We note that while some of the submissions and expert opinions used the term “offer” as a synonym or shorthand for “make available,” they are not the same. A work must actually be made available in the manner described in subsection 2.4(1.1) of the *Act* before the making available right is triggered—a mere offer to transmit a work, without the work being ready for on-demand transmission, is not sufficient. This necessary state of readiness has been described by the expert witnesses as “accessible for interactive use”¹⁰⁴ or as an “incipient” communication.¹⁰⁵

[164] We find that, in order for a country to be compliant with Article 8 of the WCT, it must provide a right, or combination of rights—however named, and whether existing or new—which grants an owner of copyright an exclusive right to authorize:

- i. the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them;
- ii. an act of communication to the public that results from such a making available, if any; and,
- iii. an act of reproduction that results from such a making available, if any.

[165] Provided that the acts above are captured in one way or another, a country’s obligation in respect of the *in fine* portion of Article 8 of the WCT is met.

[166] As we are of the opinion that the rights in the *Act* already covered the last two of the three acts above, we find most relevant the fact that compliance requires that an exclusive right, or rights, are triggered as soon as a work is made available in the manner described in Article 8 of the WCT— even without any subsequent download or stream taking place. Therefore, we now must consider the alternative rights proposed by some of the parties to determine whether any of them would cover such an act.

[167] For the reasons described below, we are not persuaded that the combination of alternative rights put forward is sufficient to cover all the acts enumerated above.

iv. Reproduction right

[168] The right to prohibit a reproduction may not be sufficiently broad as to prohibit a subsequent act of “making available” of a reproduction. While it is true that—in the current state

¹⁰⁴ Ficsor Opinion, *supra* note 19 at p 3 (“The intention [...] was to provide for an exclusive right in order to control the decisive act of uploading and making accessible for interactive use of protected works.”)

¹⁰⁵ Sam Ricketson & Jane Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (Oxford: Oxford University Press, 2006) Vol. I at para 12.58 (“simply offering the work on an indiscriminating basis, so that any member of the general public may access the work, should come within the scope of the right [...] It is not necessary that the offer be accepted: ‘making available’ embraces incipient as well as effected communications.”)

of technology—an act of reproduction almost always precedes an act of “making available,” it does not appear that the right to prohibit the former would always permit the prohibition of the latter.

[169] For example, the initial act of reproduction (e.g., the copying of a work onto a server) may be done by a person who is authorized to make such a reproduction, while the subsequent “making available” (e.g., configuring the server in such a fashion that a request to that server made by the public will result in access to that copy of that work) may be done by another person. The right of reproduction would not be triggered by that subsequent act of “making available.”

[170] Even if the owner of the right of reproduction were to require, by way of a term in a licence, that a licensee not permit any other person to make available any resulting copies, any breach thereof would only be actionable as against the licensee— and not against the person who actually made the work available. Such a potential contractual right does not arise to the level of an “exclusive right” as contemplated in the WCT.

v. Authorization of reproduction or authorization of communication to the public

[171] Some parties, such as Music Canada, argue that the “authorization” right in the *Act* is not sufficient as, *inter alia*, the obligations in the WCT require strict liability for the mere “making available.” We express no view on whether compliance with the WCT requires strict liability— or permits another standard, as there was insufficient evidence from the various experts on this point.

[172] More importantly, for an “authorization” to be an infringement under the *Act*, a subsequent infringing act must actually occur. In our opinion, this feature of the authorization right leaves an important gap in the protections required by the WCT.

[173] One of the effects of Article 8 of the WCT was to remove the evidentiary requirement of rights holders to prove that their works had actually been consumed in some manner (either by reproduction or communication to the public). While the right to control the “making available” of a work does not give control over any act used to actually consume that work (such as by hearing, viewing, or reading it), it provides a way for rights holders to prohibit an activity (the making available) that *could* lead to such a consumptive act.

[174] For example, in the case of a work posted on a public website, no evidence of an actual resulting download would be required for the “making available” to be triggered, thus relieving the copyright owner of the burden of proving that a download actually took place, and that the download was infringing.

[175] As discussed above, in our opinion, for a party to be compliant with the WCT, an exclusive right must be triggered by the making available to the public of a work in such a way that members of the public may access these works from a place and at a time individually chosen by them. By its very nature of requiring a subsequent act in order for liability to occur, the concept of authorization is deficient in this respect.

[176] In our opinion neither the right to reproduce a work, nor the right to authorize the reproduction or communication to the public of a work—alone or in combination—adequately cover these situations.

[177] The same reasoning would apply to an analysis of the existing right to authorize the reproduction of sound recordings and performances fixed in sound recordings, and therefore these rights would not be sufficient to meet the obligations in Articles 10 and 14 of the WPPT.

vi. Distribution right

[178] Some parties briefly mention the distribution right, contained in paragraph 3(1)(j) of the *Act*, as being a possible candidate for the set of rights used to comply with Article 8 of the WCT. The provision provides that “copyright” includes the sole right, “in the case of a work that is in the form of a tangible object, to sell or otherwise transfer ownership of the tangible object, as long as that ownership has never previously been transferred in or outside Canada with the authorization of the copyright owner.”

[179] Dr. Ficsor states that in order for a distribution right to be sufficient, it would have to cover “distribution through reproduction through transmission—that is making available copies by making such copies, through transmission of electronic signals, in the receiving computers.”¹⁰⁶ Dr. von Lewinski states that the concept of exhaustion does not apply to the making available right in Article 8 of the WCT.¹⁰⁷

[180] The Canadian distribution right does not have these characteristics. Thus, this argument can readily be dispensed with. The distribution right in paragraph 3(1)(j) of the *Act* applies only to works contained in tangible media—while the WCT has no such limitation. Furthermore, the right is only triggered when an actual distribution takes place—as opposed to being triggered as soon as the work has become available in a way that could result in a “distribution.” Lastly, the right in paragraph 3(1)(j) applies only so long as “ownership has never previously been transferred in or outside Canada with the authorization of the copyright owner.” Once ownership of the tangible object containing the work is transferred, the right is no longer applicable—or, in other words, the right is exhausted.

¹⁰⁶ Ficsor Opinion, *supra* note 19 at 6.

¹⁰⁷ von Lewinski Opinion, *supra* note 15 at paras 41, 118.

[181] All of these aspects of the distribution right, as encompassed in the *Act*, make it unsuitable for meeting the obligation in Article 8 of the WCT.

[182] Therefore, we find that the proposed interpretation whereby subsection 2.4(1.1) of the *Act* would not cover the making available of downloads would result in Canada not complying with Article 8 of the WCT, and would therefore not be an interpretation harmonious with the intention of Parliament: to implement the WCT.

vii. Does the Board’s interpretation of subsection 2.4(1.1) of the Act meet the requirements of Article 8 of the WCT?

[183] Having found that an implementation of Article 8 of the WCT can take whatever form, and be implemented by whatever exclusive right—or combination of exclusive rights—as long as it covers “the making available to the public in such a way that members of the public may access these works from a place and at a time individually chosen by them” regardless of whether or not it is followed by a stream or a download, or nothing at all, we are of the opinion that our interpretation meets all the requirements of Article 8 of the WCT. Subsection 2.4(1.1) of the *Act* describes how the “making available” of works is protected through the exclusive right of communication to the public by telecommunication while the subsequent resulting transmissions of works, if applicable, are already protected by exclusive rights under subsection 3(1) of the *Act*.

viii. Foreign legislative regimes

[184] Some expert witnesses described the legislative regimes of selected countries that implemented the WIPO Internet Treaties. Given that those treaties provide for broad flexibility in the manner of the implementation of the obligations stemming therefrom, we find little relevance in looking at a select number of countries’ manner of implementing protection for the act of “making available” in their respective legislation.

C. DOES A TRANSMISSION OF A WORK OR OTHER SUBJECT-MATTER “MERGE” WITH THE INITIAL ACT OF MAKING AVAILABLE INTO A SINGLE PROTECTED ACT?

[185] There remains one issue to address and that is the *merging theory* in the context of the making available of works, as described below. We characterize the issue as fundamental as several submissions integrate the theory, either implicitly or explicitly,¹⁰⁸ in their reasoning but come to very different conclusions as to what legal effect merging has in the context of the issues we must decide.

¹⁰⁸ See e.g., *ibid* at para 11.

[186] For example, Cineplex argues that “the making available of a work and its subsequent transmission constitute one protected transaction, giving rise to a performance royalty in the context of a stream, and a mechanical royalty in the context of a download.”¹⁰⁹ Similarly, SACD-SCAM submits that

[TRANSLATION] if the work, the performance, or the sound recording is actually transmitted subsequently to the offer, it is then the “making available” right, and only that right that will cover all of the online activities: there should not be a cumulative exercise of several rights.¹¹⁰

[187] In the context of the making available of works and other subject-matter, the *merging theory* essentially means that once a work or other subject-matter is made available to the public and is then subsequently transmitted, that subsequent transmission merges with the initial act of making available to become a single protected act, and, arguably, subject to a single right.

[188] Looking at the history and the language of the WCT and WPPT, and, more importantly, language in the *Act*, we conclude, for the reasons that follow, that the *merging theory* is not applicable to the protection of the making available of works and other subject-matter as implemented under the *Act*.

i. The domestic provisions

[189] There is no dispute among the parties that the sole act of making a work or other subject-matter available “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”¹¹¹ regardless of whether any subsequent transmission ever occurs, is enough to trigger the protection or liability afforded by subsection 2.4(1.1) of the *Act*. We agree with that position. The situation with respect to the rights afforded to performers’ performances fixed in sound recordings and sound recordings by paragraphs 15(1.1)(d) and 18(1.1)(a) of the *Act* respectively, conveys the same notion even more so since these provisions create a stand-alone exclusive right. It is desirable to have the same principles apply equally to the making available to the public of works on the one hand, and the making available to the public of sound recordings and performers’ performances on the other.

[190] The unambiguous language in subsection 2.4(1.1) of the *Act* deals solely with the act of posting of a work (or other subject-matter) online in a manner that makes it accessible by members of the public at a time and place of their choosing.

¹⁰⁹ Cineplex Submission, *supra* note 27 at para 66.

¹¹⁰ SACD-SCAM Submission, *supra* note 16 at para 51.

¹¹¹ *Copyright Act*, s. 2.4(1.1).

[191] Subsection 2.4(1.1) of the *Act* deems that the sole act of posting of a work (or other subject-matter) online in a manner that makes it accessible by members of the public is to be considered a communication to the public by telecommunication of that work or other subject-matter. There is no condition attached to the provision to suggest that access has to actually occur for the protection or liability to be triggered. It refers to “making it available to the public by telecommunication.”¹¹² Thus, the mere act of making available in a manner that permits the subsequent access by members of the public is sufficient to trigger the deeming clause, and does not require the subsequent act resulting from the access, whichever form it takes.

[192] The meaning of “communication to the public by telecommunication” as it pertains to transmissions of a protected work has not changed with the coming into force of the *CMA*. The legislator created a legal fiction effectively making an act that was arguably outside of the scope of the right of communication to the public by telecommunication now one clearly deemed to be within it.

[193] Furthermore, in practice, the act of making a work or other subject-matter available to the public and the subsequent resulting transmission, whichever form it takes, may be carried out by different individuals, at different times and different places. The *merging* of the act of making available with the subsequent transmission could create situations where the legal relationship (standing, protection, and liability) between two individuals could be altered retroactively by the sole action of a third party, at a different time and place of the latter’s choosing. This would occur, for example, where a transmission subsequent to a making available changes the legal nature of the making available from an act of communication to the public by telecommunication into one of reproduction. An interpretation that would make such situations possible is not justifiable or desirable.

ii. Article 8 of the WCT and Articles 10 and 14 of the WPPT

[194] Article 8 of the WCT reads as follows:

Without prejudice to the provisions of Articles 11(1)(ii), 11*bis*(1)(i) and (ii), 11*ter*(1)(ii), 14(1)(ii) and 14*bis*(1) of the Berne Convention,¹¹³ authors of literary and artistic works shall

¹¹² *Ibid.*

¹¹³ *Berne Convention*, *supra* note 65, Arts. 11(1) (“Authors of dramatic, dramatico-musical and musical works shall enjoy the exclusive right of authorizing: [...] (ii) any communication to the public of the performance of their works. [...]”), Art. 11*bis*(1) (“Authors of literary and artistic works shall enjoy the exclusive right of authorizing: (i) the broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images; (ii) any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organization other than the original one; [...]”), Art. 11*ter*(1) (“Authors of literary works shall enjoy the exclusive right of authorizing: [...] (ii) any communication to the public of the recitation of their works.”), Art. 14(1) (“Authors of literary or artistic works shall have the exclusive right of authorizing: [...] (ii) the public performance and communication to the public by wire of the works thus adapted or

enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.¹¹⁴

[195] The clear language in Article 8 of the WCT does not require subsequent transmissions resulting from the making available of a work to be protected under the same right.

[196] The first part of Article 8 of the WCT, namely “Without prejudice to the provisions of Articles 11(1)(ii), 11*bis*(1)(i) and (ii), 11*ter*(1)(ii), 14(1)(ii) and 14*bis*(1) of the *Berne Convention*” indicates that all previous rights covered by the specific provisions of the *Berne Convention* are not to be affected by the obligations created by that Article. As a corollary, the domestic legislation implementing the subject-matter found in Article 8 of the WCT should probably not disturb pre-existing rights covering the subject-matter of the enumerated provisions of the *Berne Convention*.

[197] Article 8 of the WCT does not speak of “making available to the public” as a stand-alone exclusive right, but rather as something that may be included in a pre-existing right of communication to the public, without prejudice to the latter. It explicitly states that the obligations under the *Berne Convention*, and by extension the rights implemented to meet such obligations, should not be affected by the implementation of the protection for the act of making available to the public. Adopting the *merging theory*, as described above, would disturb the legal meaning of rights addressed in the *Berne Convention*, namely the reproduction and the communication rights related to some protected works.

[198] Articles 10 and 14 of the WPPT read as follows:

Article 10—Right of Making Available of Fixed Performances

Performers shall enjoy the exclusive right of authorizing the making available to the public of their performances fixed in phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.¹¹⁵

Article 14—Right of Making Available of Phonograms

reproduced.”), 14*bis*(1)(“Without prejudice to the copyright in any work which may have been adapted or reproduced, a cinematographic work shall be protected as an original work. The owner of copyright in a cinematographic work shall enjoy the same rights as the author of an original work, including the rights referred to in the preceding Article.”)

¹¹⁴ WCT, *supra* note 7, Art. 8.

¹¹⁵ WPPT, *supra* note 8, Art. 10.

Producers of phonograms shall enjoy the exclusive right of authorizing the making available to the public of their phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.¹¹⁶

[199] It is noteworthy that those provisions are crafted differently than Article 8 of the WCT, since phonograms or “sound recordings” in the Canadian domestic context, do not necessarily benefit from full exclusive rights as do works. In Canada, prior to the coming into force of the *CMA*, sound recording makers and performers whose performances were fixed in a sound recording enjoyed a right to remuneration for the communication to the public by telecommunication and the public performance of sound recordings rather than an exclusive right. That situation is the main reason paragraphs 15(1.1)(d) and 18(1.1)(a) of the *Act* are worded differently than subsection 2.4(1.1) of the *Act*.

[200] The way protection for the act of making available of phonograms and performances fixed therein is addressed in the WPPT makes it clear that such act can be protected in its own right and does not have to be dependent on or amalgamated with another right.

[201] It is generally agreed by all parties that both the WCT and the WPPT provide broad latitude to member states for the implementation of the obligations contained therein within their domestic legislation.¹¹⁷ We are of the same opinion.

[202] The actual online transmissions of copyrighted content were not part of any “gap in protection” which the WIPO Internet Treaties, and in turn the *CMA*, were intended to resolve. Adequate protection for such transmissions is already provided under the *Act* through exclusive rights of reproduction and communication to the public by telecommunication.

[203] On the issue of merging, as defined herein, we find that that the “making available” to the public is legally distinct from the transmission that may result from such “making available,” and therefore subsequent resulting transmissions are to be evaluated on their own right.

D. WHEN DO THE VARIOUS “MAKING AVAILABLE” PROVISIONS (SUBSECTION 2.4(1.1) AND PARAGRAPHS 15(1.1)(D) AND 18(1.1)(A) OF THE ACT) COME INTO EFFECT?

[204] Pursuant to the Order Fixing Various Dates as the Dates on which Certain Provisions of the Act Come into Force,¹¹⁸ subsection 2.4(1.1) of the *Act* came into force on November 7, 2012. Paragraphs 15(1.1)(d) and 18(1.1)(a) of the *Act*, providing for a “making available” right for

¹¹⁶ WPPT, *supra* note 8, Art. 14.

¹¹⁷ See e.g., Ricketson Opinion, *supra* note 32 at para 17; de Beer Opinion, *supra* note 33 at paras 7, 8, 13, 15, 16; Ginsburg Opinion, *supra* note 20 at paras 5, 15, 16; Ficsor Opinion, *supra* note 19 at 6-9; von Lewinski Opinion, *supra* note 15 at paras 90-104.

¹¹⁸ *Order Fixing Various Dates as the Dates on which Certain Provisions of the Act Come into Force* (P.C. 2012-1392 October 25, 2012; SI/2012-85 November 7, 2012).

performances fixed in sound recordings and sound recordings respectively, also came into force on that date.

[205] However, these rights only applied to sound recordings, and performances fixed in such sound recordings, that have a point of attachment to Canada, as described in subsections 15(2.1) and 18(2.1) of the *Act*. The Order provided that the provisions extending these rights to WCT and WPPT member states, subsections 15(2.2) and 18(2.2), would come into force once Canada had ratified those Treaties.

[206] The Government of Canada filed instruments of ratification of the WPPT on May 13, 2014, and the Treaty came into force for Canada on August 13, 2014, triggering the coming into force of those provisions.

[207] Because of certain statements made by some of the parties in these proceedings, both during these proceedings, and during the development of the *CMA*, we believe it is important to note that the effect of these provisions is entirely prospective. They are neither retroactive, nor retrospective. Such a prospective effect is to be presumed unless it is possible to discern a clear legislative intent that it is to apply retrospectively.¹¹⁹ In this case, there is no such intent discernible. Furthermore, unlike subsections 13(6) and 13(7) of the *Act*, for example, there is no language in the provision to suggest that it acts as a “clarification” or that the provision is deemed to always have been the way it reads after the amendment.



Gilles McDougall
Secretary General

¹¹⁹ *R. v. Dineley*, 2012 SCC 58, [2012] 3 SCR 272.