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2013

# Copyright Royalty Stacking

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11

# Copyright Royalty Stacking

JEREMY DE BEER[1]

## Introduction

Canadian copyright law evolved more in 2012 than in any other year in recent memory. Parliament substantially amended the *Copyright Act*, and the Supreme Court of Canada decided a quintet of landmark copyright cases.[2] This chapter addresses the issue of copyright royalty stacking, connecting recent developments with broader legal and economic principles.

By copyright royalty stacking, I mean the layering of multiple payments for permission—through a certified tariff, collective blanket licence or individual contract—to use copyright-protected subject matter. Stacking is related to, but different than, the fragmentation of copyright through legislative changes, court decisions or licensing transactions. Fragmentation may or may not lead to royalty stacking; royalty stacking depends more directly on market structures than legal rights, although one does influence the other. Moreover, royalty stacking may result not only from the fragmentation of copyrights, but also from the multiplication of rights holders, through new neighbouring rights or paracopyright protections for technological measures. While the term "royalty stacking" may have pejorative

connotations, I use it neutrally in this chapter to describe a phenomenon commonly encountered in copyright licensing transactions. Normative conclusions about royalty stacking are based on underlying legal and economic principles, not the phenomenon *per se*.

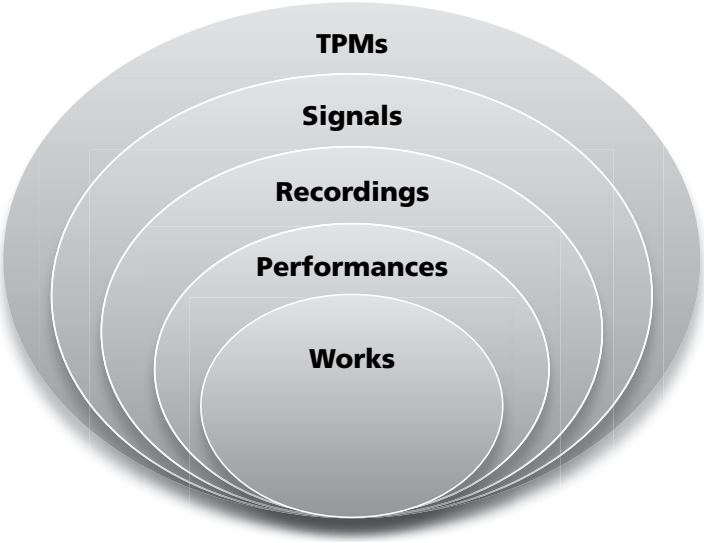
My legal analysis of key Supreme Court decisions and amendments to the *Copyright Act* interpreted in light of the copyright quintet indicates that Canadian jurisprudential developments will probably reduce copyright royalty stacking. The potential implications discussed in this chapter are substantial. Changes in Canadian copyright law could reduce royalties flowing to or through certain collective management organizations in the foreseeable future. However, according to established economic theory, a more streamlined system of copyright licensing would increase certainty and reduce transaction costs, thereby growing the market for copyright-protected content. In the long run, this would lead to more commercial opportunities for entrepreneurial upstarts seeking to establish new businesses offering innovative products and services in creative industries, more choices for consumers in the legal market for creative content and, ultimately, more money for creators individually and in the aggregate. While only time will tell if legal economic theory will prove true in practice, aspects of the copyright quintet and statutory reforms that reduce royalty stacking set up a conceptually sound structural framework for continued economic development of Canadian cultural industries.

I begin this chapter by defining the concept of copyright royalty stacking, setting out core features and practical examples of this phenomenon. Next, I analyze aspects of the Supreme Court's recent decisions that are directly or indirectly relevant to copyright royalty stacking, and synthesize implications in the historical context of Canadian copyright law and in light of very recent legislative reforms. Royalty stacking is related to several basic theoretical problems with property rights, including intellectual property rights, which become apparent in this chapter through the lens of law and economics. After explaining the theoretical implications of unstacking copyright royalties, I conclude the chapter by examining ongoing developments at the Copyright Board of Canada, the quasi-judicial tribunal addressing royalty stacking most immediately and directly.

## What Is Copyright Royalty Stacking?

To understand copyright royalty stacking, one must understand the complex structure of copyright protection: What subject matter is protected, and how? Authors' original works are the conceptual core of copyright-protected subject matter.[3] Rights also exist in subject matter related to original works, such as performances, recordings or broadcasts. Music offers a practical and prevalent example. What a layperson hears as a "song" on the radio is to a copyright lawyer a package of four separately protected elements: (1) a *musical work*, including the composition and often lyrics; (2) a *performance* of the *work* by a singer and/or a band; (3) a *recording* of the *performance* of the *work*, recorded usually in a studio but sometimes at an event; and (4) a *broadcast* of the *recording* of the *performance* of the *work*. Copyright and related rights, also called neighbouring rights, are layered around one another, as shown in Figure 1.

*Figure 1.* **Layers of protected subject matter**



The work, performance, recording and broadcast are each protected separately, and often licensed separately, despite the fact that the same person or legal entity could control the rights to each. For instance, a singer/songwriter could own both the author's copyrights in the musical work and the performer's related rights in the performance. Or, the singer/songwriter could assign copyright to a music publishing company affiliated with or controlled by the record company that owns the related rights in the recording of the work performed.

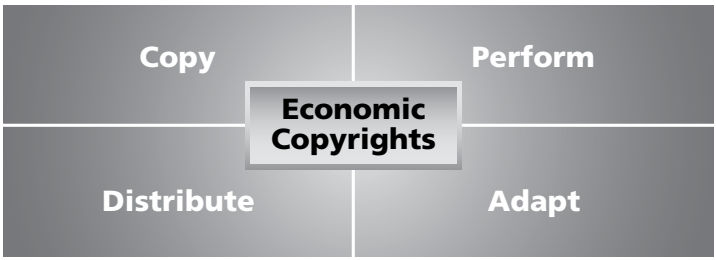
In a digital context, an additional layer of legal rights may also protect technological protection measures (TPMs) that control access to or copying of works and other subject matter, or information used to manage rights.[4] Notably, these rights typically belong not to the author or performer, but to the record producer, broadcaster, retailer or other distributor that applies the TPM to the work or related subject matter. Geo-fencing technologies that prevent music from being streamed or purchased outside of certain jurisdictions, applied by services such as Pandora or Spotify or retailers like Apple iTunes, are good examples.

Through a progressive series of international treaties, countries have agreed to create laws that protect works with copyright,[5] other subject matter with related rights,[6] and technologies applied to both works and related subject matter with prohibitions on circumvention and tampering. Consequently, Canada's *Copyright Act* establishes protection for works in section 3; related rights in sections 15 (performances), 18 (sound recordings) and 21 (communication signals); and technological measures and management information in newly amended sections 41.1 to 41.21.[7]

That explains what is protected, and by implication who is protected—the owners of works and related subject matter. How are they protected? Copyright is usually understood to consist of a bundle of rights. In conventional property discourse, the bundle of rights metaphor captures multiple and various incidents of ownership, including, among other things, use rights and transferability.[8] Other kinds of intellectual property rights focus protection especially on "use."[9] Copyright, by contrast, is not framed around the right to *use* a work or other subject matter. Rather, use rights are subdivided into

several categories. The precise contours of these categories vary from country to country, but basically follow four general themes: (1) the right to *copy*; (2) the right to *perform* live or transmit technologically; (3) the right to physically or electronically *distribute* copies; and (4) the right to *adapt*, derive or transform, as shown in Figure 2.

*Figure 2.* **Taxonomy of protected rights**




While not every enumerated right in every country aligns perfectly with this thematic classification scheme, and leaving aside the complex categorization of moral rights, these themes generally correspond to different methods of extracting economic value from a work or other protected subject matter. A musical work, for example, may be produced and sold as sheet music, which constitutes copying and distribution; made into a sound recording, which is usually understood as a copy, which is then distributed for sale, or rented out, which is also a form of distribution; performed live in concert or via broadcast, cable or Internet transmission, each of which are kinds of performances; translated into other languages or rearranged for different instruments or musical styles, which are examples of adaptation; or synchronized with other audiovisual content such as a television program, advertising commercial or motion picture. My examples here are not exhaustive or categorical, but rather are illustrative of the application of various aspects of copyright and related rights to particular activities. How precisely these rights and uses should and do align is one of the central issues with copyright royalty stacking.

Not every right holder is granted every one of these protections, but there is a pattern. An owner of copyright in a work (e.g., a

musical composition and lyrics) has the exclusive right to use that work in all of the ways listed above. An owner of related rights in a performance, recording or broadcast does not necessarily have all of the same rights. And the related rights the owner does have may not be exclusive rights to prevent others from using their subject matter, as a copyright owner could, but rather, rights to receive remuneration if and when their subject matter is used.[10]

So, in Canada, for example,[11] an owner of copyright in a work has under section 3 of the *Copyright Act* the sole right to copy (produce or reproduce) the work, to perform (or communicate or exhibit) the work, and to adapt (or translate or convert) the work. The owner of related rights in a performance or recording, by contrast, has, among other things, the sole right under sections 15 and 18 to copy the recorded performance,[12] but under section 19, the right only to receive equitable remuneration for a performance or communication. In effect, performers and record makers can prohibit others from copying recorded performances without an individual licence, but cannot prohibit others from broadcasting recorded performances; they can only claim equitable remuneration for broadcasting music through a Copyright Board–certified tariff. Whether a performer or record maker could prohibit or merely claim remuneration for the transmission of a recorded performance via the Internet would depend on whether Internet transmission involves copying, communicating or both—that is the kind of practical question that my analysis of copyright royalty stacking in this chapter helps answer.

The issue with copyright royalty stacking starts to become clear when one combines the many different elements of protected subject matter—a musical work, performance, recording and broadcast, for example—with the many different rights protected in some or all of those elements—copying, performance, distribution, adaptation and potentially more. To "use" a "song" could require a dozen licensing transactions, perhaps more if there are jurisdictional, temporal or technological complexities.

Matters are even more complicated by the various systems a prospective licensee might need to navigate in order to obtain permission. Some rights are administered collectively, while others are dealt with individually. Most collective societies represent a majority of rights holders in their respective domains (authors,

performers, record makers or broadcasters, for example), but none represent 100 percent of available repertoire. So a mixture of collective and individual licensing is almost always necessary. Some collectively administered rights require payment of a tariff certified by the Copyright Board of Canada, while others require payment or negotiation with a particular collective society. And furthermore, the collective societies that a prospective licensee must deal with are not always the same in Quebec and the rest of Canada. Table 1 presents a simplified example of the licensing requirements for most English-language music in Canada, excluding Quebec.

*Table 1:* **Simplified matrix of protected subject matter and rights**

| | Copy | Perform | Distribute | Adapt |
|---|---|---|---|---|
| **Musical work** | Board-certified CMRRA* tariff | Board-certified SOCAN** tariff | Individual transactions with owners | Individual transactions with owners |
| **Performer's performance** | Individual transactions with AVLA*** | Board-certified Re:Sound tariff | Individual transactions with owners | Individual transactions with owners |
| **Sound recording** | Individual transactions with AVLA | Board-certified Re:Sound tariff | Individual transactions with owners | Individual transactions with owners |
| **Broadcast signal** | Individual transactions with owners | Board-certified retransmission tariff | Individual transactions with owners | Individual transactions with owners |

* Canadian Musical Reproduction Rights Agency
** Society of Composers, Authors and Music Publishers of Canada
*** Audio-Video Licensing Agency

Which royalty payments are required would depend on the prospective licensee's precise activities. The more rights holders from whom permission is required or to whom compensation must be paid, and the more rights belonging to each rights holder that are implicated by a prospective licensee's activities, the more complex and costly the transactions and the activities become. And whether payment of a tariff or a licensing transaction with a collective society listed in the Table is sufficient for a licensee depends on that collective's repertoire, which is never exhaustive.

Not every user of music would require copyright clearance for every right or rights holder referenced in Table 1. But some would. Websites that host and transmit remixed user-generated content, for instance, could have especially complex licensing requirements. The key question for copyright policy makers and practitioners is not which services currently exist that require all of the above copyright clearances, but rather, which innovative new services do not exist now but might emerge if copyright systems were simpler.

Copyright royalty stacking is the layering of payments for permission—through a certified tariff, collective blanket licence or individual contract—to use copyright-protected subject matter. While the system that enables copyright royalty stacking may seem, on first impression, inherently problematic, the normative implications of this issue are complex.

Permission or payment requirements to different parties for different things are understandable. Even though a song on the radio may not be perceived as a separate work, performance, recording and broadcast, many people can appreciate the value of these distinct contributions. The practical challenges are coordinating and pricing the licensing transactions that are part of the value-added supply chain from creators to consumers.

Some royalty stacking is caused by the fragmentation of copyrights into sub-components that can be licensed separately, based on the territorial, commercial, technological or other demands of licensees. In many contexts, licensees first demanded such fragmentation.[13] For example, a licensee may not want to pay for worldwide rights when they do business only in one country, or pay to put sound recordings on the Internet when their business is selling only lyrics or musical scores, or pay to transmit content when their business is based on storage alone, and so on. Many of SOCAN's tariffs are structured to meet users' demands, while mechanical licences are issued separately because that is what licensees had required.[14] In this way, fragmentation facilitates the efficient market exploitation of protected content.[15]

Prospective licensees' practical problem is that the way markets were structured to respond to past licensing demands may no longer be suited to modern technological or commercial circumstances, which licensees say is inconvenient. Their principled objection to

copyright royalty stacking is that, in some cases, owners' rights now seem redundant—multiple payments are occasionally routed through different intermediaries to the same party for the same activity, which licensees say is unfair.

Copyright owners' basic justification for royalty stacking is that what might seem at first glance like redundant payments are actually not; ostensibly overlapping payments are required not for the same use of the protected subject matter, but for different uses. For instance, radio broadcasters argue that they simply use music, and should accordingly pay once for this single input. Rights holders claim, to the contrary, that radio broadcasters' standard practices constitute both reproduction and communication—not just use—of musical works, performances and sound recordings, and that multiple payments to multiple parties are therefore warranted.

Legislative reforms discussed below have a major impact on that specific issue, and similar conceptual arguments were at the heart of several of the cases in the Supreme Court quintet. These cases provide useful practical examples to further explore the theoretical and practical aspects of copyright royalty stacking.

## Interpreting the Copyright Quintet and Statutory Reforms

There are many ways to interpret and analyze the Supreme Court of Canada's 2012 copyright quintet. Some scholars have seized upon the principle of technological neutrality, which influenced the Court's decisions in at least two of the cases.[16] Some have emphasized the Court's unequivocal endorsement of users' rights, which were at the heart of another two of the five cases.[17] Some have assessed the impact of the Court's decisions on the collective administration of copyright.[18] And some have focused on issues of administrative law, specifically the standard of judicial review.[19]

## Selling and Streaming Music Online

### The Context of Tariff 22

Considerable historical context is required to fully appreciate the companion cases *ESA* and *Rogers*. While that history is probably worthy of its own book, this chapter introduces only the basics. These

cases are the latest episodes in the long and winding saga of SOCAN's Tariff 22, which seeks to establish royalties for the communication of music via the Internet. SOCAN is the collective society that administers the performing rights of composers, authors and music publishers in Canada, including their rights to communicate musical works to the public by telecommunication.

SOCAN first proposed Tariff 22 in 1996, applying to the Copyright Board of Canada for certification of a tariff targeting Internet service providers (ISPs), which SOCAN alleged were involved in communicating works to the public in Canada and/or authorizing their subscribers' communications. The Copyright Board divided its proceedings into two phases, dealing with purely legal issues first. Among other things, the Board decided that the passive transmission of digital content via the Internet would not trigger application of the proposed tariff because such action neither communicated nor authorized communication of SOCAN's repertoire.[20] The Federal Court of Appeal affirmed most but not all of the decision of the Board.[21] On the main issue of copyright liability, the Supreme Court of Canada agreed with the Board's original ruling that ISPs are not liable to pay a tariff when they act as neutral intermediaries.[22]

Following the Supreme Court's 2004 decision, SOCAN asked the Board to certify a revised Tariff 22. Like everything else on the Internet, online music transmissions had changed dramatically during the years since SOCAN's original proposal. Walled gardens of content like America Online became less popular; few Internet subscribers hosted music on their ISP's servers, preferring peer-to-peer file sharing; and the World Wide Web became a platform for new music sites such as MySpace. Many other personal and commercial websites began to include background music, traditional broadcasters began simulcasting, and new companies sold subscriptions to music streaming services. The most profound change came via Apple's iTunes music store, which has quickly become the digital substitute for traditional record retailers.

SOCAN's restructured tariff proposal tracked commercial and technological developments. Proceedings before the Copyright Board were bifurcated to deal separately with Tariff 22.A and 22.B-G, backdated to the period of 1996 to 2006. Tariff 22.A proposed to target

online music services that stream or sell copies of music;[23] Tariff 22.B-G proposed to target websites that use music in other ways, including Internet simulcasting and video gaming.[24]

The reason that the tariffs and corresponding Board decisions were divided this way is at least indirectly related to copyright royalty stacking. CMRRA and SODRAC are the collecting societies that administer reproduction rights in musical works in Canada and Québec. Through a joint venture, CMRRA/SODRAC Inc. (CSI), these collectives filed a tariff targeting many of the same online music services as SOCAN's Tariff 22.A—companies that stream or sell copies of digital music via the Internet. In 2007, the Board certified CSI's first "Online Music Services" tariff.[25] Perhaps because of interim agreements that had been negotiated between the collectives and services already operating in Canada, including Apple, there was no apparent disagreement among the parties before the Copyright Board about the legal requirement to pay royalties for reproducing musical works as part of streaming or sales transactions.[26]

When, in 2007, the Board also certified SOCAN's corresponding Tariff 22.A, it addressed several important legal questions. Among them was the issue of royalty stacking that would eventually reach the Supreme Court of Canada.[27] (Whether previews of music offered for sale online are fair dealing for the purpose of consumer research was also addressed at this point in the decision.[28]) Objectors argued that transmissions of music from online music services are not communications, and if they are communications, are not to the public, so fall outside the scope of the rights SOCAN administers. For reasons discussed later in this chapter, the Copyright Board rejected the objectors' arguments and certified Tariff 22.A.[29]

With that decision, it became clear that online music services selling subscription services or digital downloads were required to pay CSI for the right to reproduce musical works and SOCAN for the right to communicate those works to the public. This arrangement resulted in precisely the kind of copyright royalty stacking described in the first part of this chapter, since both SOCAN and CSI represent authors, composers or music publishers to whom copyright has been assigned. Table 1, above, shows the rights at issue in the two left columns of the first row.

In effect, based on these tariffs, licensees argued they would pay the same creator twice, through different collective societies, to use the same copyright-protected work. The ostensible justification for that arrangement was that the same licensee is "using" the same work differently, both copying and communicating it, for which the *Copyright Act* requires separate payments. The Board wrote:

> SOCAN members are not double dipping. The communication and reproduction rights are separate rights, often owned by separate persons, administered through separate channels and subject to separate regimes. The person who copies a work to effect a broadcast of that work "commits two torts" and should pay for both acts. The same should hold true when the sequence is inversed and someone communicates a work to a member of the public with a view to providing that person with a copy of the work.[30]

When the Board dealt a year later with SOCAN Tariff 22.B-G, it implicitly applied the same legal reasoning to certify a tariff for online simulcasting by radio and television broadcasters, and for audio content transmitted by other websites, including websites for downloading or playing video games.[31]

Applications for judicial review of the Board's decisions in both Tariff 22 cases were practically inevitable; it is standard for Copyright Board proceedings. Procedurally, the Copyright Board's certification of Tariff 22.A gave rise to the *Rogers* case in the Supreme Court, while its certification of Tariff 22.B-G triggered the *ESA* case. But because the Board's 2007 decision on Tariff 22.A laid the legal foundation for both certified tariffs, only its reasons in that case were formally reviewed. Also, even though the Board had reached its decisions over a year apart, the Federal Court of Appeal dealt with both applications simultaneously. In both *Bell Canada et al. v SOCAN* (which became the *Rogers* case in the Supreme Court)[32] and *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*,[33] the Court of Appeal upheld the Copyright Board's decision.

To appreciate why the Federal Court of Appeal agreed with the royalty stacking arrangements established at the Copyright Board,

it is necessary to mention another case that was decided around the same time as the Board's Tariff 22 cases: *Canadian Wireless Telecommunications Association v SOCAN*.[34] In that 2008 decision, the Federal Court of Appeal considered whether the Board correctly certified SOCAN's tariff for the communication of ringtones from mobile service providers to their subscribers. The Court rejected CWTA's legal argument that transmitting a ringtone does not "communicate" the work "to the public". In doing so, it also rejected the premise on which that attempted legal argument rests—that splitting reproduction and communication rights in the same work creates double compensation of the same copyright owners by the same licensees.[35]

While the Supreme Court of Canada refused to hear an appeal of the *CWTA* case in 2008,[36] it agreed to consider similar royalty stacking issues when it granted leave three years later in *ESA* and *Rogers*.

## Supreme Court Consideration of Royalty Stacking

The last time the Supreme Court of Canada dealt explicitly with copyright royalty stacking was in 1990, in *Bishop v Stevens*.[37] The Supreme Court held then that the right to broadcast (perform/communicate) a work did not include the incidental right to reproduce it in preparation for the broadcast. Performance and reproduction, the Court explained, "are distinct rights in theory and in practice".[38]

This remark was central to the Copyright Board's ruling in the Tariff 22.A decision, to the Federal Court of Appeal's decision in *CWTA*, and to both the majority and dissenting opinions in *ESA*. In *CWTA*, the court relied on *Bishop v Stevens* for the proposition that: "the right to reproduce a musical work and the right to communicate it to the public by telecommunication are separate statutory rights."[39] Four days before that case was heard—which is when the Board released its reasons for Tariff 22.A—the Board had made much the same point: "The communication and reproduction rights are separate rights, often owned by separate persons, administered through separate channels and subject to separate regimes."[40] This reasoning, which has dominated Canadian copyright licensing discourse for nearly twenty years, raises two problems.

First, referring to licensing and administration practices is not

particularly helpful, because licensing and administration practices evolve and adapt to legal interpretations of the underlying rights. Had the Court held in *Bishop v Stevens* that performance and reproduction rights are fundamentally similar, licensing practices would probably now reflect that understanding through combined collective administration of both rights. Since the Court decided the rights are distinct, they are now unsurprisingly administered separately.

Moreover, the basic reason that performance and reproduction rights have historically been administered separately is because each system catered to different kinds of licensees, requiring different licences based on the different activities in which licensees engaged. Performing rights societies typically licensed establishments where music is performed or entities using telecommunications technologies to communicate music at a distance. Reproduction rights agencies typically licensed companies to make sound recordings or synchronize musical works with other audiovisual content, such as films or television programs. Each kind of licensee had distinct licensing needs, which separate administrative regimes served well. However, the bare fact that separate licensing systems exist now is alone an insufficient reason to preserve this administrative arrangement if it is no longer efficient or otherwise justified.

Second, conceptually, saying that communication and reproduction rights are separate or distinct does not tell us much about the scope of either right, except perhaps vis-à-vis the other right. Indeed, the distinction highlighted in *Bishop v Stevens* was invoked to support directly contradictory opinions on the communication right in the 5-4 split decision in *ESA*.

Rothstein J, in dissent, reasoned that a copyright holder is entitled to both reproduction and communication royalties in respect of an online transmission because these are separate rights. "The fact that there are two protected rights," wrote Rothstein J, "does not restrict the protection afforded by each right."[41] He wrote that this answer to *ESA*'s royalty stacking argument was "straightforward", but the majority opinion suggests that the legal reasoning is not so simple.

Indeed, the majority drew the exact opposite interpretative inference from the same principle. Because of the recognized separation and distinction between reproduction and performance

rights, Abella and Moldaver JJ held that "[p]erforming a work is fundamentally different than reproducing it."[42] Interpreting the reproduction right to encompass activities traditionally linked to the performance right "would result in abandoning the traditional distinction in the *Act* between performance-based rights and rights of reproduction."[43] In other words, because these rights are distinct, they must cover different activities.

In my view, the majority's interpretation of the principles described in *Bishop v Stevens* is sensible. That reproduction and communication rights are separate and distinct *does* restrict the protection afforded by each right. Each right protects an activity that the other right does not.

However, even accepting that point will not entirely resolve most cases. That is, we can say a communication is *not* a reproduction, and a reproduction is *not* a communication, but beyond that, the distinction between the two rights offers little help in defining either of them. Defining what *is* a communication was the heart of the issue facing the Supreme Court.

On that point, basically, the dissenting judges preferred a literal interpretation, and the majority of the Court took an historical, contextual and purposive perspective. While the dictionary definition of communication could suggest that the right covers any transmission of information,[44] the majority held that such an interpretation would be inconsistent with the historical introduction and evolution of communication rights in Canada,[45] the statutory context of section 3 and other parts of the *Copyright Act*,[46] and the legislative purpose of protecting copyright in a balanced, efficient and technologically neutral way.[47]

The law in Canada is now clearer about what activity is and is not a communication. "Internet delivery of copies"[48] or "the Internet delivery of a permanent copy"[49] or a "durable copy"[50] is *not* a communication.[51] The *ESA* case ruled out collecting communication royalties in these circumstances. "[T]he streaming of files from the Internet," however, *is* a communication "by online music services who make the files available."[52] The *Rogers* decision states that in circumstances where "musical works are indiscriminately made available to anyone…requesting the streams…the transmission of any file…constitutes communicat[ing] the work to the public by telecommunication."[53] Ambiguity remains, however, around the

definition of "durable" copies.

Returning to royalty stacking, the principle of separate and distinct rights basically converts an issue of legal interpretation into a matter of factual application. None of the judges in *ESA* seemed to disagree that there may be circumstances where two licences for two separate rights are needed. Rothstein J was explicit that "if two protected acts occur without authorization of the copyright holder, there are two infringements."[54] The inference that explains the majority's views on royalty stacking is that if one protected act occurs, there is one infringement. According to Abella and Moldaver JJ's majority reasons, "*Bishop* does *not* stand for the proposition that a *single* activity (i.e., a download) can violate two separate rights at the same time."[55] Underlying the decision, therefore, is the clear impression that "Internet delivery of copies" constitutes a single act, which could implicate either but not both separate and distinct reproduction and communication rights.

Unfortunately, both the majority and the minority opinions on the relationship between the number of "protected act[s]" and the number of infringements are tautological. On either analysis, almost everything hinges on the characterization of the "act" in question. The central determination that courts or the Copyright Board must now make about future royalty stacking cases is whether the fundamental nature of a potential infringer or prospective licensee's activity implicates one or more rights.[56] The Court did not provide an analytical touchstone for characterizing any particular use (or uses) as a single activity or multiple distinct activities, but it did offer two guiding principles—technological neutrality and economic efficiency.

The principle of technological neutrality does not mean that technologically similar activities must always be legally characterized the same. Rather, the principle means that essentially similar activities involving different technologies should be treated equally. As David Vaver put it in a passage quoted by the Supreme Court, "substitute delivery systems should compete on their merits: either both or neither should pay."[57]

So the Board's statement that "[s]ending a music file over the Internet is protected by the *Act;* sending a music CD in the mail is not"[58] should have been the question in the case, not the answer.

According to the Supreme Court, "there is no practical difference between buying a durable copy of the work in a store, receiving a copy in the mail, or downloading an identical copy using the Internet. The Internet is simply a technological taxi that delivers a durable copy of the same work to the end user."[59] The Court therefore overruled the Copyright Board's decision that "Internet transmissions are not just another form of delivery."[60]

Even Rothstein J, writing for the majority in the *Rogers* case, held that what matters is not the business model but rather the underlying activity. "Whether a business chooses to convey copyright protected content in a traditional, 'broadcasting' type fashion, or opts for newer approaches based on consumer choice and convenience, *the end result is the same*."[61] He made this remark to equate on-demand streaming with conventional broadcasting activities, but his emphasis on practical results, rather than technical processes, is perfectly consistent with the majority's decision in *ESA*, despite his dissent in that case.

So the Copyright Board's finding of fact that a "download" and a "stream" are technologically similar transmissions, except for their relative permanence, does not mean that they have the same essential character and, therefore, legal implications. And the judgments in *ESA* and *Rogers* are easily reconcilable because, as it was put in arguments: "The sale and transmission of a work from an online retailer is, essentially, like the sale and conveyance of physical media from a conventional retailer. The transmission of a stream from a webcaster is, however, essentially like the transmission of a signal from a conventional broadcaster."[62] The Supreme Court accepted this argument, writing: "Although a download and a stream are both 'transmissions' in technical terms…they are not both 'communications' for purposes of the *Copyright Act*. … Unlike a download, the experience of a stream is much more akin to a broadcast or performance."[63]

The key to determining which activities implicate which rights is assessing the essential character of the impugned use. Is the essential character of the use akin to a traditional performance, or is it more like conventional copying? Answering that question will help to resolve the issue of which rights apply. Analytically, the exercise seems similar to the process of characterizing the pith and substance

of impugned legislation when assessing the validity of legislation within Canada's constitutional division of powers. Such reasoning is not entirely foreign to contemporary thinking about other intellectual property issues.[64]

The second principle relied on by the Supreme Court in characterizing the essence of ESA's activities—economic efficiency—received relatively less attention. Though undoubtedly important, it was touched upon only briefly in the Supreme Court's reasons in *ESA*, citing the work of Professor Katz: "When a single economic activity implicates more than one type of right and each type is administered by a separate collective, the multiplicity of licences required can lead to inefficiency."[65] In support of the Supreme Court's judgment, and to guide decision makers applying its principles in the future, later sections of this chapter elaborate on the economic theoretical implications of royalty stacking.

## Stacking Rights in Movie Soundtracks

Before examining conceptual issues around legal coherence and economic efficiency, it is worth highlighting one other case from the Supreme Court's quintet that implicated copyright royalty stacking: *Re:Sound v MPTAC*.[66] This case was ostensibly about statutory interpretation, like *ESA* and *Rogers*, but in a broader context, it raised a potential royalty stacking problem.

Re:Sound Music Licensing Company (Re:Sound) is a collective society administering the neighbouring rights of performers and record makers. It plays roughly the equivalent of SOCAN's role for authors of musical works, administering performing/communication rights but not reproduction rights. Unlike authors, however, performers and record makers do not have the exclusive right to communicate their protected subject matter to the public. The way that performers and record makers get paid for performance/communication rights in Canada is through a Copyright Board tariff certifying "equitable remuneration."[67]

A growing number of tariffs have been certified by the Copyright Board, establishing equitable remuneration for playing sound recordings on radio; during dances and fitness classes; at bars, festivals,

parks, parades and similar places; and more. The two tariffs at issue before the Supreme Court in 2012 claimed equitable remuneration for the performance/communication of the recorded music in movie soundtracks when movies are played in a theatre or on television.

Theatre operators and television broadcasters objected, on the grounds that movie soundtracks are specifically excluded from the *Copyright Act*'s definition of a "sound recording," which is what Re:Sound members own. While this legal technicality provided the basis for arguments and the bulk of the Supreme Court's judgment, another of the objectors' underlying concerns was that they already pay for the recorded music in movie soundtracks when they negotiate contracts to exhibit or broadcast the entire movie.

A common entertainment industry practice is for movie producers, music performers and record makers[68] to individually agree on the royalties to be paid for so-called synchronization rights, such as the right to put music in a movie soundtrack.[69] These may be "bare synchronization" agreements, or "through-to-the-viewer" licences, which, as the label suggests, clears rights for the production as well as downstream uses. Licences may provide for upfront buyouts, or contain clauses setting out the residual royalties that will be paid to various parties involved in making the movie, including sometimes the soundtrack, when the movie is later exhibited, broadcast or franchised into sequels, merchandise, amusement park rides and various other spin-offs. Objectors' alleged that enabling Re:Sound's members to negotiate payment terms and conditions up front, when movies are made, and then collect more remuneration later, when movies are exhibited or broadcast, would be double dipping.

That explanation is among the most plausible reasons why Parliament defined a "sound recording" to *exclude* "any soundtrack of a cinematographic work where it accompanies the cinematographic work."[70] Performers and record makers would get paid when soundtracks are played separately from the movie, but not when they are packaged together.

The Supreme Court did not discuss the contextual problem of royalty stacking, preferring to base its decision on the plain language of the statute. But the case nonetheless provides an excellent example of the structural features of copyright protection that make royalty

stacking a challenge. Unlike *ESA* and *Rogers*, which presented royalty stacking problems involving separate and distinct rights of authors of musical works—reproduction and communication—*Re:Sound* involved the potential stacking of collectively administered equitable remuneration rights on top of individually negotiated licensing contracts. Given that theatre operators and television broadcasters *do* pay royalties for the performance/communication rights of authors of musical works (despite similar pre-clearance procedures), the *Re:Sound* case also illustrates the potential complexities of layering additional protection for neighbouring rights holders.

## The Implications of Unstacking

Earlier in this chapter I explained how different categories of copyrights and related rights generally correspond to different methods of extracting economic value from a work or other protected subject matter. More accurately, these rights evolved as changing technological capabilities and consumer behaviours led to new business models exploiting content, and lawmakers responded with corresponding protection through new rights. Whether and how evolving copyrights and related rights align with the realities of new technologies, behaviours and business models is one of the central issues around copyright royalty stacking that this chapter addresses.

Royalty stacking is not always, on a balance, unjustified. Indeed, there are some good reasons why royalty stacking might be permitted. The arguments made to the Supreme Court in *ESA* and *Rogers* were, basically, that the plain language of the statute suggests that any transmission of information is a communication, and that this is appropriate because that is the way Canadian copyright administration and Copyright Board tariffs have been structured in practice. Those arguments are unconvincing.

A much better point, which was not clearly articulated to the Court, could have been that the creators of musical works should fairly share in the economic benefits of technological progress that enables prospective licensees to communicate protected content more cheaply; that the demand for content contributes directly to the economic success of telecommunications companies and supports their cost-saving delivery systems. This principle might explain

why the communication right would cover digital but not physical distribution. Such arguments would not automatically win the matter, but they would be a consideration against which to balance counterarguments about legal coherence and economic efficiency.

The main complaints about copyright royalty stacking are that it adds costs and complicates transactions. Adding costs is not a policy problem *per se*; if those costs are justified on a principled basis, imposing them simply transfers wealth from one party to another. Moreover, as Rothstein J correctly reasoned in dissent in *ESA*, the Copyright Board can mitigate the impact of royalty costs on licensees by setting reasonable total combined rates.[71]

Transactional inefficiencies, uncertainties and complications are more serious challenges, however. These can undermine functioning of the market for copyright-protected content, inhibit the introduction of innovative products and services, and cause economic losses to all parties involved. To understand how, we can consider the fundamental economic theories underlying all property rights, including intellectual property rights.

Judge Richard Posner, a godfather of law and economics scholarship, points out that property law is most efficient when rights are exclusive, universal and transferable.[72] The last of these features is most relevant to royalty stacking. In an enormously influential and widely cited article, economist Ronald Coase explained how, in a world without transaction costs, rights will be exchanged in markets that efficiently allocate entitlements to those who value them the most.[73] This concept is central to welfare economics, and a primary reason that people believe intellectual property protection is capable of driving economic growth.

Although rarely articulated as such, the Coase theorem underpins the utilitarian concept of intellectual property rights as incentives. Intellectual property provides incentives to invest time, effort and money into intellectual endeavours because rights can be exploited in the market to make profit. Take away market transactions and you are left with a purely psychological theory of incentives or deontological theory of intellectual property protection.

Since Coase's path-breaking article was published in 1960, scholars have sought to better understand the factors that interfere with efficient

bargaining. One such factor is the fragmentation and/or layering of rights—the conceptual issue at the heart of *ESA*, *Rogers* and *Re:Sound*. Michael Heller identified the problem of property fragmentation in a seminal article published in the *Harvard Law Review* in 1998.[74] He called this the "tragedy of the anticommons," mirroring Garrett Hardin's famous parable of the "tragedy of the commons" that had been published forty years earlier.[75] Hardin initially presented private property rights as a solution to the tragic overuse of resources that would occur in a world of open access. Heller did not dispute Hardin's claim, but countered that private property can also be a problem. Too much property is as inefficient as too little.

He and Rebecca Eisenberg applied this insight to intellectual property rights specifically: "In theory," they wrote, "in a world of costless transactions, people could always avoid commons or anticommons tragedies by trading their rights. In practice, however, avoiding tragedy requires overcoming transaction costs…. Once an anticommons emerges, collecting rights into useable private property is often brutal and slow."[76] This phenomenon has also been discussed as a "thicket, a dense web of overlapping intellectual property rights that a company must hack its way through in order to actually commercialize new technology."[77] Mark Lemley and Carl Shapiro have also studied the interconnected problems of patent holdups and royalty stacking when a patent covers one important component of a complex product.[78]

Thickets are not just a patent problem; such concerns apply to copyright as well. Daniel Gervais and Alana Maurushat have described, for example, the fragmentation of collectively administered copyright in Canada, explaining how "the rights contained in section 3 are no longer useful in mapping out the real world."[79] While their focus is on the practical rather than theoretical problems of fragmentation, they effectively highlight the complexities of copyright licensing transactions.

The Supreme Court has also acknowledged that too much copyright protection can cause adverse consequences, ruling in *Théberge*: "In crassly economic terms it would be as inefficient to overcompensate artists and authors for the right of reproduction as it would be self-defeating to undercompensate them."[80] While the Supreme Court did

not elaborate in *Théberge* on the reasons that overcompensation is inefficient, which may be related to transaction costs or other factors, in *ESA* it took an important step toward a legal interpretation of the *Copyright Act* that slightly reduces royalty stacking.

One argument to counter concerns over transaction costs is that the licensing needs in *ESA* and *Rogers* were actually not all that complicated. The only question was whether licensees had to pay one tariff or two. In fact, ESA's members might not have paid any tariff, if they pre-cleared the entire bundle of rights through pure buyouts, as is sometimes done in the film and television industries. One could also argue that combining tariff-setting procedures helped mitigate the burdens of participating in Copyright Board hearings. That reasoning, however, would overlook other aspects of the copyright anticommons problem.

Just paying two tariffs is not enough to legally operate an online music service in Canada. The two tariffs in question would have covered only authors/owners' rights in musical works; they would not have provided licences to reproduce or communicate neighbouring rights holders' performances or sound recordings. Those reproduction rights must mostly be negotiated directly with record companies, while remuneration for communicating sound recordings may be the subject of another tariff scheme. In such deals, the costs of legal advice and licensing transactions are not the only concerns. These are compounded by a potential holdout problem—even if an online music service provider pays the certified tariffs covering musical works, any particular copyright owner could withhold permission to use its performances and sound recordings.

Another counterargument that suggests royalty stacking is not inappropriate is the explicit statutory recognition in subsection 13(4) that rights holders may carve up copyrights in any manner they please: "The owner of the copyright in any work may assign the right, either wholly or partially, and either generally or subject to limitations relating to territory, medium or sector of the market or other limitations relating to the scope of the assignment, and either for the whole term of the copyright or for any other part thereof, and may grant any interest in the right by licence…". However, it is important to distinguish particular licensing practices from established legal

rights. Although contracts might contain a wide variety of unique clauses on payments or permissions, courts need not compound the legal complexity by reinforcing the fragmentation of copyrights.

In real property law, the notion that rights should not be fragmented beyond a stable set of fixed entitlements is known as the *numerus clausus* principle. Its origins lie in the civil law system, but the label has also been applied to similar common law concepts.[81] As applied in the well-known case of *Keppell v Bailey*, the principle holds that private parties cannot through property transactions or licensing practices create new incidents of ownership.[82] Parties may generally structure contractual relationships however they wish, but cannot by doing so transform the nature of the underlying property rights vis-à-vis third parties.

Merrill and Smith note that the *numerus clausus* principle applies not only to real property, but is also reflected in other areas of property law, including intellectual property.[83] They remark that the *numerus clausus* is "an extremely important qualification on the principle of freedom of contract—a principle widely regarded by law-and-economics scholars as promoting the efficient allocation of resources".[84] It is particularly useful for limiting adverse effects of excessive fragmentation, i.e. an anticommons.[85] While Merrill and Smith's work centres on the limited forms that intellectual property rights in general may take, other scholars have explained how the same principles should prevent fragmentation within intellectual property rights, such as copyrights.[86] The concept has been applied most specifically to digital copyright cases.

The *numerus clausus* serves several important functions required equally, if not more, for intellectual property than for real property. It facilitates transferability of rights, increases certainty of transactions, aids identification of owners, and more. Bruce Ziff points to another rationale for the *numerus clausus* principle: "[I]mpediments to the termination of property rights suggests the need for caution in their initial recognition, because doctrinal mistakes cannot easily be corrected."[87] In other words, once a new right is recognized, it is very difficult to reverse. The one-way ratchet of intellectual property measures that fragment existing rights or add new ones is a well-documented problem.[88] Courts should be reluctant to contribute to

this phenomenon by recognizing new fragments of copyright.

So, based on the *numerus clausus* principle, even if it is true that the *Copyright Act* permits owners to structure licensing and administration in creative ways, it does not follow that courts should recognize such arrangements as creating or reinforcing legal entitlements. This reasoning supports the Supreme Court decision in *ESA*, even though the Court did not discuss such theories. In sum, based on the well-established economic theories underpinning copyright and other property rights generally, the Supreme Court was right to be wary of an interpretation of authors' reproduction and performance rights that could compound the problem of copyright royalty stacking.

The final section of this chapter considers the early impact of the Supreme Court rulings in practice, and the potential significance of statutory reforms that have or soon will come into effect in Canada.

## Statutory "Modernization" and Early Impacts in Practice

The immediate aftermath of the Supreme Court's decisions in *ESA* and *Rogers* was a Copyright Board decision certifying SOCAN Tariff 22.A for the years 2007 to 2010, covering only online music services that stream music, not services that distribute copies.[89] SOCAN is not entitled to collect performance/communication royalties from companies that distribute copies.

It does not necessarily follow from the Supreme Court decisions that reproduction royalties cannot be collected from companies that stream songs. The factual question would be whether online music services that stream musical works are engaged in one activity or two. Copying digital files and storing them on computer services might seem like a separate and distinct activity from streaming, and hence trigger multiple royalty payment obligations. This scenario is almost exactly like that in *Bishop v Stevens*, where the Supreme Court ruled that both reproduction and performance royalties were payable. Nevertheless, reproduction tariffs purporting to cover online music streaming will almost certainly be challenged before the Copyright Board, likely leading to a judicial review of this issue by the Federal Court of Appeal in coming years.

The Board has also indicated that it is interested in hearing

arguments about the impact of the Supreme Court's decisions on applicable tariffs for satellite radio transmissions—presumably contemplating whether one or both of the performance and reproduction rights are implicated in that context.

Statutory reforms will complicate these analyses. In Bill C-11, the Government of Canada introduced a provision governing "temporary reproductions":

> 30.71 It is not an infringement of copyright to make a reproduction of a work or other subject-matter if:
>
> (*a*) the reproduction forms an essential part of a technological process;
>
> (*b*) the reproduction's only purpose is to facilitate a use that is not an infringement of copyright; and
>
> (*c*) the reproduction exists only for the duration of the technological process.

It is easy to imagine a convincing argument that reproducing musical works is an "essential part" of the technological process of streaming, which would not be infringing if appropriate performance royalties were paid. The challenge would be that most music providers streaming music require permanent, not temporary, reproductions that endure longer than the technological process requires. Reasonable counterarguments could be made in favour of a broad interpretation of the technological process of streaming. But time will tell whether such arguments are successful.

There are similar statutory reforms in Bill C-11 exempting broadcast undertakings from liability for ephemeral reproductions of sound recordings.[90] Such new provisions will save costs for radio and television broadcasters, but they are unlikely to apply to online music services. Online services are, so far, outside of the scope of this exemption because they are not regulated as broadcasters by the Canadian Radio-television and Telecommunications Commission (CTRC). How the links between the CRTC and Copyright Board proceedings might evolve in coming years is the subject of another paper.[91]

Another practical issue already raised before both the Copyright

Board and the Federal Court concerns the impact of the new "making available" provision in Canada. Implementing the WIPO Internet Treaties required providing authors, performers and record makers not only with the right to perform/communicate their protected subject matter, but also with the right to make the subject matter available to be communicated. Accordingly, section 2.4 of the *Copyright Act* has been amended to add the following clause:

> (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.

David Fewer has analyzed previous proposals to introduce this right in Canada, cautioning that the wrong approach could result in additional copyright royalty stacking.[92] The question is whether this new provision clarifies or supplements the common law interpretation of existing rights in the *Copyright Act*. One possibility is that this legislative amendment supplements Canadian law by creating a new, additional making available right.[93] Another possibility, however, is that Bill C-11 merely clarifies or codifies existing law.[94] The more legally, purposively and practically sound interpretation of the making available right in Canada is that it is not a separate right, but is subsumed within the communication right as interpreted by the Supreme Court.

First, Rothstein J's *dicta* in the *Rogers* case leaves little doubt that the Supreme Court believes making available is already protected as part of performance and communication rights in Canada. On-demand streaming constitutes a communication for which SOCAN is entitled to a tariff regardless of the fact that each stream is separately transmitted to a single recipient at the times and places of the recipients' choosing. The *Rogers* decision elaborates on the Federal Court of Appeal's ruling about facsimile transmissions in the case of *CCH v LSUC*, which had been subsequently confirmed by the Supreme Court of Canada: "Merely evincing a willingness to accept requests by patrons of the Great Library for copies of the Publishers' works is not an infringement

of the Publishers' right to communicate their works to the public."[95] In *Rogers*, Rothstein J (who had concurred in the *CCH Canadian Ltd. v Law Society of Upper Canada* judgment when he sat on the Federal Court of Appeal) distinguished the facts of *CCH* and explained: "Following the online music services' business model, musical works are indiscriminately made available to anyone with Internet access to the online music service's website." He ruled that interpreting the communication right to include making content available for on-demand streaming is "not out of step" with international treaties that Canada had not and has not ratified—but soon will ratify.

Second, the basic structure of subsection 2.4(1.1) precludes the possibility that making available is a "right" at all. At most, placed where it is among definitional provisions, subsection 2.4(1.1) delineates the scope of the communication right in paragraph 3(1)(*f*). Furthermore, in *ESA*, the majority of the Supreme Court was clear that the communication right enumerated in paragraph 3(1)(*f*) is itself not a "sui generis right in addition to the general rights described."[96] The three rights of reproduction, performance and publication "provide the basic structure of copyright", while communication is "simply illustrative" of a kind of activity that falls within performing rights generally. In arriving at this interpretation, the Supreme Court relied on the precise statutory language (in English, at least) of the subsection: copyright "means" the rights stated in the introductory paragraph, and "includes" the various rights subsequently enumerated.[97] Based on that principle, the language in subsection 2.4(1.1) that communication "includes" making available confirms that making available is not a new right.

The practical effect, if not the explicitly stated intent, of the Supreme Court's rulings is that making available was already a protected right under the umbrella of communication, irrespective of implementation of the WIPO Internet Treaties. Copyright means the rights of publication, reproduction and performance; performance includes communication; and communication includes making available.

Although making available is not a new right, but is rather subsumed within the communication right, do recent statutory reforms override the practical outcome of *ESA*? This question matters because licensees are trying to avoid copyright royalty stacking in the future.

Also, telecommunications firms in particular are trying to claim back from SOCAN about a decade's worth of ringtone royalty payments they say were paid improperly, because *ESA* implicitly overruled the *CWTA v SOCAN* decision that had upheld the ringtones tariff. These firms argue that if video game downloads are not communications, as per *ESA*, neither are (or were) ringtone downloads. They have sought to pursue this argument simultaneously before both the Copyright Board and the Federal Court.[98]

In recent submissions to the Copyright Board of Canada, SOCAN said statutory reforms override the Supreme Court's recent rulings:

> It is SOCAN's position that with the coming into force of Bill C-11, the introduction of the [making available right] re-establishes SOCAN's right to require licences – and the Board's jurisdiction to certify tariffs – in respect of the downloading of musical works made available to the public in such a way that members of the public may access the musical works from a place and at a time individually chosen by them. This would cover ringtones and ringbacks, as well videogames and full-length musical tracks.[99]

At the time of this chapter's publication, the Copyright Board had just decided that the court is the better arbiter of questions about retroactive ringtone royalties, so refused to vary or vacate a previously certified tariff.[100] But the Board will prospectively consider SOCAN's argument that statutory reforms proclaimed into force on 7 November 2012, roughly five months after the decision in *ESA*, re-establish its right to collect communication royalties when downloads are made available. That issue will be alive in proceedings over ringtones, and in the next sequel to the never-ending saga of Tariff 22.

In these circumstances, the usual devices of statutory interpretation are not particularly helpful. References to legislative history and debates to infer Parliamentary intent are pointless, because this particular problem only became apparent after the substance of Bill C-11 was well settled. The Bill had already received Royal Assent roughly two weeks before the Supreme Court's decisions were released.

One way to address the issue is, therefore, based on the plain

language of subsection 2.4(1.1). Offering for sale a permanent download seems, on its face, to constitute making a work 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." This interpretation would suggest that SOCAN's rights to collect communication royalties are indeed re-established. That, however, would also reintroduce all of the problems that a majority of the Supreme Court sought to avoid through its ruling in *ESA*.

A contextual interpretation of subsection 2.4(1.1) would suggest that the phrase "allows a member of the public to have access" must be read with specific reference to the communication right that the clause defines. Making a work available in a way that allows access to on-demand streaming would, relying on the Supreme Court's reasoning in *Rogers*, implicate the communication right. Making a work available in a way that allows access to a permanent download would, relying on the Supreme Court's reasoning in *ESA*, implicate the reproduction right but not the communication right.[101]

Reading subsection 2.4(1.1) contextually, to apply only to making available for communication, not reproduction (i.e. streaming, not downloads), would also be supported by a purposive interpretation that aims to avoid the inefficiencies of overcompensation, consistent with the Supreme Court's statements in *Théberge* about the purpose of copyright law. When purposively deciding these difficult questions, decision makers at the Board and eventually the courts might also bear in mind this chapter's cautionary analysis of copyright royalty stacking.

## Conclusion

The legal changes brought about in 2012 by several important Supreme Court decisions should help to alleviate aspects of the problem of copyright royalty stacking. The Court has confirmed that communication and reproduction rights are separate and distinct, and more importantly that this principle means a single activity will normally not infringe both rights. The key question going forward, therefore, is whether in any particular case, a potential infringer or prospective licensee in fact engages in a single activity or multiple separate activities. Before ruling that multiple rights are implicated,

adjudicators should be cautious about the implications on transaction costs that might undermine economic efficiencies in the market for copyright-protected content. Early indications in practice suggest that there will be less royalty stacking in Canada following the Supreme Court's recent decisions. Given the Court's decisions and the sound legal and economic principles supporting them, new statutory amendments to the *Copyright Act* should not be interpreted to undo the structural simplification of Canadian copyright law.



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[1] The author declares the following competing interests: The author was co-counsel for the intervener, the Canadian Internet Policy and Public Interest Clinic (CIPPIC), in *ESA*, *Rogers*, *Bell*, *Re:Sound*, and *Alberta (Education)*. The author thanks the Social Science and Humanities Research Council (SSHRC) for grant funding that supported this research; Jacqueline Rowniak for research and editorial assistance; Mario Bouchard, Michael Geist, Jacob Glick, Jay Kerr-Wilson, Bob Tarantino and two anonymous peer reviewers for comments and feedback on earlier drafts.

[2] *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34, [2012] 2 SCR 231 <http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/9994/index.do> [*ESA*]; *Rogers Communications Inc. v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 SCR 283 <http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/9995/index.do> [*Rogers*]; *Society of Composers, Authors and Music Publishers of Canada v Bell Canada*, 2012 SCC 36, [2012] 2 SCR 326 <http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/9996/index.do> [*Bell*]; *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37, [2012] 2 SCR 345 <http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/9997/index.do> [*Alberta (Education)*]; *Re:Sound v Motion Picture Theatre Associations of Canada*, 2012 SCC 38, [2012] 2 SCR 376 <http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/9999/index.do> [*Re:Sound*].

[3] See discussion of this issue in Jeremy de Beer, "Copyrights, Federalism, and the Constitutionality of Canada's Private Copying Levy" (2006) 51 McGill LJ 735 at 746 <http://lawjournal.mcgill.ca/documents/1224864774_de_Beer.pdf>.

[4] Ian R Kerr, Alana Maurushat & Christian S Tacit, "Technical Protection Measures: Tilting at Copyright's Windmill" (2002-03) 34 Ottawa L Rev 1 at 13 <http://www.rdo-olr.uottawa.ca/index2.php?option=com_sobi2&sobi2Task=dd_download&fid=784&Itemid=842>.

[5] Berne Convention for the Protection of Literary and Artistic Works, 9 September

1886, as revised at Paris on 24 July 1971 and amended in 1979, S Treaty Doc No 99-27 (1986) <http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html>; *WIPO Copyright Treaty*, 20 December 1996, 36 ILM 65 (entered into force 6 March 2002) <http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html>.

[6] *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations*, 26 October 1961, 496 UNTS 43 <http://www.wipo.int/treaties/en/ip/rome/trtdocs_wo024.html>; *WIPO Performances and Phonograms Treaty*, 20 December 1996, 36 ILM 76 <http://www.wipo.int/treaties/en/ip/wppt/trtdocs_wo034.html>.

[7] *Copyright Act*, RSC 1985, c C-42 <http://laws.justice.gc.ca/en/C-42/>.

[8] Tony Honoré, "Ownership" in AG Guest, ed, *Oxford Essays in Jurisprudence* (Oxford: Clarendon Press, 1961) 107; JE Penner, "The Bundle of Rights Picture of Property" (1995-96) 43 UCLA L Rev 711 at 741-746.

[9] Regarding patents, see e.g. *Monsanto Canada Inc. v Schmeiser*, 2004 SCC 34 at paras 28-58, 70-73, [2004] 1 SCR 902 <http://canlii.ca/t/1h3pt>. Regarding trademarks, see e.g. *Mattel, Inc. v 3894207 Canada Inc.*, 2006 SCC 22 at para 5, [2006] 1 SCR 772 <http://canlii.ca/t/1nfhl>.

[10] Non-exclusive rights permitting compensation but not full control would be protected by liability rules rather than property rules, as defined by Guido Calabresi & A Douglas Melamed, "Property Rules, Liability Rules, and Inalienability: One View of the Cathedral" (1972) 85:6 Harv L Rev 1089.

[11] The web of overlapping copyrights and related rights is not precisely the same in the United States, but the phenomenon of copyright royalty stacking is very similar. See generally Lydia Pallas Loren, "Untangling the Web of Music Copyrights", SSRN, (2003) 53 Case W Res L Rev 673 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=424701>; Mark A Lemley, "Dealing with Overlapping Copyrights on the Internet", SSRN, (1997) 22 U Dayton L Rev 547 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=41607>.

[12] Prior to the 2012 copyright reforms introduced by Bill C-11, performers did not have the same exclusive right as record makers to control copying of their recorded performances. *An Act to amend the Copyright Act*, SC 2012, c 20, s 9 <http://www.parl.gc.ca/content/hoc/Bills/411/Government/C-11/C-11_4/C-11_4.PDF>.

[13] Mario Bouchard, "An *Essai* on Monetizing Copyright over the Internet" (2010-11) 45 IECLC, abridged from Mario Bouchard, "An *Essai* on Monetizing Copyright over the Internet", *Entertainment, Advertising & Media Law Symposium* (Toronto: Law Society of Upper Canada, 2009).

[14] *Ibid*.

[15] Daniel Gervais, "Essai sur le fractionnement du droit d'auteur" (2002) 15 CPI 501.

[16] Cameron J Hutchison, "The 2012 Supreme Court Copyright Decisions & Technological Neutrality", SSRN (5 October 2012) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2157646>.

[17] Michael Geist, "Supreme Court of Canada Stands up for Fair Dealing in Stunning Sweep of Cases", Michael Geist Blog (12 July 2012) <http://www.michaelgeist.ca/content/view/6588/125/>; Michael Geist, "Supreme Court Shakes Foundations

of Copyright Law", Toronto Star (15 July 2012) <http://www.thestar.com/business/article/1226800--supreme-court-shakes-foundations-of-copyright-law>.

[18] Daniel Gervais, "A Shakeup in Canadian Copyright Policy?", The Trips Agreement (14 July 2012) <http://www.tripsagreement.net/?p=319>.

[19] Paul Daly, "Standard of Review in the Copyright Cases", SSRN, (19 September 2012) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2149254>. See also Jeremy de Beer et al, *Standards of Review of Federal Administrative Tribunals* (Butterworths of Canada, 2003), chapter 9.

[20] *Statement of Royalties to be Collected for the Performance or the Communication by Telecommunication, in Canada, of Musical or Dramatico-Musical Works (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 of Canada <http://www.cb-cda.gc.ca/decisions/1999/19991027-m-b.pdf>.

[21] *Society of Composers, Authors and Music Publishers of Canada v Canadian Association of Internet Providers*, 2002 FCA 166 at paras 185-192, [2002] 4 FC 3 <http://canlii.ca/t/1g0ls>.

[22] *Society of Composers, Authors and Music Publishers of Canada v Canadian Association of Internet Providers*, 2004 SCC 45 at paras 100-01, [2004] 2 SCR 427 <http://canlii.ca/t/1hddf> [*SOCAN v CAIP*]; Jeremy F de Beer & Christopher D Clemmer, "Global Trends in Online Copyright Enforcement: A Non-Neutral Role for Network Intermediaries?", SSRN, (2009) 49:4 Jurimetrics J 375 at 379-80 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1529722>.

[23] *Statement of Royalties to be Collected by SOCAN for the Communication to the Public by Telecommunication, in Canada, of Musical or Dramatico-Musical [Tariff No.22.A Internet—Online Music Services (1996-2006)]* (24 November 2007), Copyright Board of Canada, Supp C Gaz I, 3 <http://www.cb-cda.gc.ca/tariffs-tarifs/certified-homologues/2007/20071124-m-b.pdf> [*Tariff 22A 2007*].

[24] *Statement of Royalties to be Collected by SOCAN for the Communication to the Public by Telecommunication, in Canada, of Musical or Dramatico-Musical Works (Tariffs Nos. 22.B to 22.G Internet—Other Uses of Music (1996-2006))* (25 October 2008), Copyright Board of Canada, Supp C Gaz I, 3 <http://www.cb-cda.gc.ca/tariffs-tarifs/certified-homologues/2008/20081025-m-b.pdf> [*Tariffs 22B to 22G 2008*].

[25] *Statement of Royalties to be Collected by CMRRA/SODRAC Inc. for the Reproduction of Musical Works, in Canada, by Online Music Services in 2005, 2006, 2007* (31 March 2007), Copyright Board of Canada, Supp C Gaz I <http://www.cb-cda.gc.ca/tariffs-tarifs/certified-homologues/2007/20070321-rm-b.pdf>. Indeed, when the time came for the Board to consider online music tariff proposals from CSI for the years 2008-10 and from SOCAN for 2007-10, the Board decided to combine the proceedings and resolve relevant legal and economic issues together: *Re: CSI Online Music Services (2008-2010) and SOCAN Tariff 22.A (Internet Online Music Services) 2007-2010* (8 October 2009), Copyright Board of Canada <http://www.cb-cda.gc.ca/decisions/2009/20091008.pdf>.

[26] *Collective Administration in Relation to Rights Under Sections 3, 15, 18, and 21: Statement of Royalties to be Collected by CMRRA/SODRAC Inc. for the Reproduction*

*of Musical Works, in Canada, By Online Music Services in 2005, 2006 and 2007* (16 March 2007), Copyright Board of Canada <http://www.cb-cda.gc.ca/decisions/2007/20070316-rm-b.pdf>.

[27] *Collective Administration of Performing Rights and of Communication Rights: Copyright Act, subsection 68(3): Statement of Royalties to be Collected by SOCAN for the Communication to the Public by Telecommunication, in Canada, of Musical or Dramatico-Musical Works [Tariff No. 22.A (Internet—Online Music Services) 1996-2006]* (18 October 2007), Copyright Board of Canada, paras 86-100 <http://www.cb-cda.gc.ca/decisions/2007/20071018-m-e.pdf> [*Copyright Board 22A 2007*].

[28] *Ibid* at paras 101-16.

[29] *Tariff 22A 2007*, *supra* note 23.

[30] *Copyright Board 22A 2007*, *supra* note 27 at paras 99-100.

[31] Reasons at *Collective Administration of Performing Rights and of Communication Rights: Copyright Act, subsection 68(3): Statement of Royalties to Be Collected by SOCAN for the Communication to the Public by Telecommunication, in Canada, of Musical or Dramatico-Musical Works [Tariffs Nos. 22.B to 22.G (Internet—Other Uses of Music) 1996-2006]* (24 October 2008), Copyright Board of Canada <http://www.cb-cda.gc.ca/decisions/2008/20081024-m-b.pdf>. Tariff at *Tariffs 22B to 22G 2008*, *supra* note 24, later corrected as *Statement of Royalties to Be Collected by the SOCAN for the Communication to the Public by Telecommunication, in Canada, of Musical or Dramatico-Musical Works: Tariffs Nos. 22.B to 22.G—Internet—Other Uses of Music (1996-2006)* (15 November 2008), Copyright Board of Canada <http://www.cb-cda.gc.ca/tariffs-tarifs/certified-homologues/2008/20081115-m-b.pdf>.

[32] *Shaw Cablesystems G.P. v Society of Composers, Authors and Music Publishers of Canada*, 2010 FCA 220 at paras 65-66 <http://decisions.fca-caf.gc.ca/en/2010/2010fca220/2010fca220.pdf>. Confusingly, the Federal Court of Appeal decision combined applications for judicial review brought separately by Shaw (A-519-07) and by Bell, Rogers, Puretracks and Telus (A-520-07), but styled the case alphabetically not numerically, as *Bell Canada et al. v SOCAN*. For reasons I cannot determine, this case later became *Rogers Communications Inc. v Society of Composers, Authors and Music Publishers of Canada* (*Rogers*, *supra* note 2), in the Supreme Court of Canada; not to be confused with *Society of Composers, Authors and Music Publishers of Canada v Bell Canada* (*Bell*, *supra* note 2), which dealt with music previews and fair dealing.

[33] *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*, 2010 FCA 221 <http://decisions.fca-caf.gc.ca/en/2010/2010fca221/2010fca221.pdf>.

[34] *Canadian Wireless Telecommunications Assn. v Society of Composers, Authors and Music Publishers of Canada*, 2008 FCA 6, [2008] 3 FCR 539 <http://reports.fja.gc.ca/eng/2008/2008fca6.html> [*CWTA*].

[35] *Ibid* at paras 13-15.

[36] *Canadian Wireless Telecommunications Assn. v Society of Composers, Authors and Music Publishers of Canada*, [2008] SCCA 135, 2008 CanLII 46984 <http://canlii.ca/en/ca/scc-l/doc/2008/2008canlii46984/2008canlii46984.html>.

[37] *Bishop v Stevens*, [1990] 2 SCR 467, 1990 CanLII 75 <http://canlii.ca/t/1fsv7> [*Bishop*].

[38] *Ibid* at 13.

[39] *CWTA*, *supra* note 34 at para 15.

[40] *Copyright Board 22.A 2007*, *supra* note 27 at para 100.

[41] *ESA*, *supra* note 2 at para 120.

[42] *Ibid* at para 35.

[43] *Ibid* at para 39.

[44] *Ibid* at para 31.

[45] *Ibid* at paras 13-27.

[46] *Ibid* at paras 33-42.

[47] *Ibid* at paras 5-11.

[48] *Ibid* at para 12.

[49] *Ibid* at para 43.

[50] *Ibid* at paras 5, 10, 31, 35.

[51] The Copyright Board interpreted the communication right to include a "permanent download" and "limited download," and defined a download to include "a podcast". The Supreme Court judgment taken as a whole seems to rule out communication royalties for all of these forms of delivering a "copy". While the Copyright Board called such copies downloads, that terminology can cause confusion because the word "download" can be both a noun, i.e. the product being delivered (to deliver a download), and a verb, i.e. the method of delivery (to download a download).

[52] *Rogers*, *supra* note 2 at para 5.

[53] *Ibid* at para 56. And, although a close reading of the *Rogers* case reveals that the Court never explicitly stated so, it seems that the mere making available, without the transmission, might already be protected by the communication right in Canada, even before the coming into force of statutory reforms to implement the WIPO Internet treaties.

[54] *ESA*, *supra* note 2 at para 120.

[55] *Ibid* at para 41.

[56] The Supreme Court did not clearly state whether characterization of the licencee's activities is a legal or factual issue; most observers would suggest it is a mixed application of facts to law.

[57] *ESA*, *supra* note 2 at para 6, quoting David Vaver, *Intellectual Property Law: Copyright, Patents Trade-Marks*, 2d ed (Toronto: Irwin Law, 2011).

[58] *Copyright Board 22.A 2007*, *supra* note 27 at para 99.

[59] *ESA*, *supra* note 2 at para 5.

[60] *Copyright Board 22.A 2007*, *supra* note 27 at para 99.

[61] *Rogers*, *supra* note 2 at para 40 [emphasis added].

[62] *ESA*, *supra* note 2 (Factum of the Intervener, Samuelson-Glushko Canadian Interest Policy and Public Interest Clinic (CIPPIC) at para 20) <http://www.cippic.ca/sites/default/files/33921%2633922_CIPPIC_Factum.pdf>.

[63] *ESA*, *supra* note 2 at para 28.

[64] Jeremy F de Beer, "Constitutional Jurisdiction Over Paracopyright Law" <http://www.irwinlaw.com/content/assets/content-commons/120/Two_01_deBeer.pdf> in Michael Geist, ed, *In the Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005); Jeremy F de Beer, "Copyrights, Federalism, and the Constitutionality of Canada's Private Copying Levy" (2006) 51 McGill LJ 735 <http://lawjournal.mcgill.ca/documents/1224864774_de_Beer.pdf>.

[65] *ESA*, *supra* note 2 at para 11, quoting Ariel Katz, "Commentary: Is Collective Administration of Copyrights Justified by the Economic Literature?" in Marcel Boyer, Michael Trebilcock & David Vaver, eds, *Competition Policy and Intellectual Property* (Toronto: Irwin Law, 2009) 449 at 461-463.

[66] *Re:Sound*, *supra* note 2.

[67] *Copyright Act*, *supra* note 7, s 19(1). That is more than they would get in the United States, where uses like radio broadcasting are understood to boost record sales. Indeed, rather than paying royalties to performers and record producers, broadcasters got (or get) payola for album airplay and other promotion. See e.g. Ronald H. Coase, "Payola in Radio and Television Broadcasting" (1979) 22:2 JL & Econ 269.

[68] Leaving aside authors', composers' or publishers' rights in the underlying musical work, which were not at issue in the *Re:Sound* case.

[69] The Copyright Board of Canada explained similar practices related to the licensing of musical works (not sound recordings) for inclusion in and distribution with audiovidual productions in *Society for Reproduction Rights of Authors, Composers and Publishers in Canada v Canadian Broadcasting Corporation and Les Chaînes Télé Astral and Teletoon* (2 November 2012) <http://www.cb-cda.gc.ca/decisions/2012/DecisionSODRAC5andArbitration02-11-2012.pdf>). See also Donald S Passman, *All You Need to Know About the Music Business*, 7th ed (New York: Free Press, 2009), at 241-45; Paul Sanderson, "The Licensing and Administration of Copyright and the Regulation of Music in Media", in Paul Sanderson, *Musicians and the Law in Canada*, 3d ed (Toronto: Carswell, 2000) at 31-48.

[70] *Copyright Act*, *supra* note 7, s 2, "sound recording".

[71] *ESA*, *supra* note 2 at para 126.

[72] Richard A Posner, *Economic Analysis of Law*, 7th ed (New York: Aspen Law, 2007) at 33ff.

[73] Ronald Coase, "The Problem of Social Cost" (1960) 3 JL & Econ 1 <http://www.econ.washington.edu/user/yoramb/socialcost.pdf>.

[74] Michael A Heller, "The Tragedy of the Anticommons: Property in Transition from Marx to Markets", SSRN, (1998) 111:3 Harv L Rev 621 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=57627>.

[75] Garrett Hardin, "The Tragedy of the Commons" (1968) 162:3859 Science 1243 <http://www.cs.wright.edu/~swang/cs409/Hardin.pdf>.

[76] Michael A Heller & Rebecca S Eisenberg, "Can Patents Deter Innovation? The Anticommons in Biomedical Research" 280:5364 Science 698 <http://www.sciencemag.org/content/280/5364/698.full>. See also Michael A Heller, *The Gridlock*

*Economy: How Too Much Ownership Wrecks Markets, Stops Innovation, and Costs Lives* (New York: Basic Books, 2008).

[77] Carl Shapiro, "Navigating the Patent Thicket: Cross Licences, Patent Pools and Standard Setting" in *Innovation Policy and the Economy*, Adam B Jaffe, Josh Lerner & Scott Stern, eds (Cambridge: MIT Press, 2011) 120 <http://www.nber.org/chapters/c10778.pdf>.

[78] Mark A Lemley & Carl Shapiro, "Patent Holdup and Royalty Stacking" (2007) 85 Texas L Rev 1991.

[79] Daniel J Gervais & Alana Maurushat, "Fragmented Copyright, Fragmented Management: Proposals to Defrag Copyright Management" (2003) 2:1 Can JL & Tech 15 at 20.

[80] *Théberge v Galérie d'Art du Petit Champlain Inc*, 2002 SCC 34 at para 31, [2002] 2 SCR 336 <http://canlii.ca/t/51tn>.

[81] Bruce Ziff, "The Irreversibility of Commodification" (2005) 16 Stellenbosch LR 283.

[82] *Keppell v Bailey* (1834), 2 Myl & K 517.

[83] Thomas W Merrill & Henry E Smith, "Optimal Standardization in the Law of Property: The Numerus Clausus Principle" (2000) 110:1 Yale LJ 1 at 4 <http://www.yalelawjournal.org/pdf/110-1/NEW%20MERRILL.pdf>.

[84] *Ibid* at 5.

[85] *Ibid* at 6.

[86] Christina Mulligan, "A Numerus Clausus Principle for Intellectual Property", SSRN, Tenn L Rev [forthcoming] <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2017023>; Enrico Baffi, "The Anticommons and the Problem of the Numerus Clausus of Property Rights", SSRN (19 October 2007) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1023153>.

[87] Bruce Ziff, "Yet Another Function for the Numerus Clasus Principle of Property Rights, and a Useful One at That", SSRN (19 March 2012) at 1 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2026088>.

[88] For example, see Susan Sell, "The Global IP Upward Ratchet, Anti-Counterfeiting and Piracy Enforcement Efforts: The State of Play" (2010) PIJIP Research Paper no 15, American University Washington College of Law, Washington, DC <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1016&context=research>. See also Peter Drahos, "The Global Ratchet for Intellectual Property Rights: Why It Fails as Policy and What Should Be Done About It" (2003) <http://www.anu.edu.au/fellows/pdrahos/reports/pdfs/2003globalipratchet.pdf>.

[89] *Statement of Royalties to Be Collected by SOCAN for the Communication to the Public by Telecommunication, in Canada, of Musical or Dramatico-Musical Works: Tariff No.22.A Internet—Online Music Services (2007-2010)* (6 October 2012), Copyright Board of Canada, Supp C Gaz I <http://www.cb-cda.gc.ca/tariffs-tarifs/certified-homologues/2012/Tarif-SOCAN22A.pdf>.

[90] *Copyright Act*, *supra* note 7, ss 30.8(11), 30.9, as amended.

[91] de Beer & Clemmer, *supra* note 22.

[92] David Fewer, "Making Available: Existential Inquiries" <http://www.irwinlaw.com/pages/content-commons/making-available--existential-inquiries---david-fewer> in Michael Geist, ed, *In the Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005).

[93] Ruth Sullivan, *Statutory Interpretation*, 2d ed (Markham: Irwin Law, 2007) at 317.

[94] *Ibid* at 314.

[95] *CCH Canadian Ltd. v Law Society of Upper Canada*, 2004 FCA 278 at para 102, aff'd 2004 SCC 13, [2004] 1 SCR 339 at para 78.

[96] *ESA*, *supra* note 2 at para 42.

[97] *Ibid*.

[98] *Rogers Communications Partnership et. al. v SOCAN* (2012), Federal Court File No. T-2046-12 (Plaintiff's Statement of Claim) <http://www.scribd.com/doc/113244090/rogers-et-al-v-socan-claim-or-return-of-ringtone-payments>.

[99] Letter to the Copyright Board of Canada from Gowlings LLP Re: SOCAN Tariff 24 (2003-2005 and 2006-2013) Ringtones and Ringbacks Application to Vary filed by Bell Mobility et al. (September 10, 2012) <http://www.scribd.com/doc/113393656/T-24-SOCAN-Response-to-Appn-ToVary-September-10-2012-Ltr-to-Gilles-McDougall-OTT-LAW-3299187-V5#>.

[100] *Statement of Royalties to be Collected by SOCAN for the Public Performance or the Communication to the Public by Telecommunication, in Canada, of Musical or Dramatico-Musical Works (Tariff 24—Ringtones (2003-2005), Ringtones and Ringbacks (2006-2013))* (27 October 1999), Copyright Board of Canada <http://www.cb-cda.gc.ca/decisions/2013/SOCAN-Tariff-24-18-01-2013.pdf>.

[101] One difficulty with that approach is the lack of statutory or principled grounds to suggest that merely making a work available might constitute reproduction. An interpretation to that effect could set a very problematic precedent, so perhaps the issue of making available for reproduction is best left alone by adjudicators until the need for a firm resolution arises.