



SUPREME COURT OF CANADA

CITATION: Society of
Composers, Authors and Music
Publishers of Canada v.
Entertainment Software
Association, 2022 SCC 30

APPEAL HEARD: January 18,
2022

JUDGMENT RENDERED: July
15, 2022

DOCKET: 39418

BETWEEN:

Society of Composers, Authors and Music Publishers of Canada
Appellant

and

**Entertainment Software Association, Entertainment Software Association of
Canada, Apple Inc., Apple Canada Inc., Bell Canada, Quebecor Media Inc.,
Rogers Communications Inc., Shaw Communications and Pandora Media Inc.**
Respondents

AND BETWEEN:

Music Canada
Appellant

and

**Entertainment Software Association, Entertainment Software Association of
Canada, Apple Inc., Apple Canada Inc., Bell Canada, Quebecor Media Inc.,
Rogers Communications Inc., Shaw Communications and Pandora Media Inc.**
Respondents

- and -

**Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic,
Canadian Music Publishers Association carrying on business as “Music
Publishers Canada”, Professional Music Publishers Association, Canadian
Association of Law Libraries, Library Futures Institute and Ariel Katz
Intervenors**

CORAM: Wagner C.J. and Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin,
Kasirer and Jamal JJ.

**REASONS FOR
JUDGMENT:** Rowe J. (Wagner C.J. and Moldaver, Côté, Brown, Kasirer
and Jamal JJ. concurring)
(paras. 1 to 114)

**CONCURRING
REASONS:** Karakatsanis J. (Martin J. concurring)
(paras. 115 to 161)

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Society of Composers, Authors and Music Publishers of Canada

Appellant

v.

**Entertainment Software Association,
Entertainment Software Association of Canada,
Apple Inc.,
Apple Canada Inc.,
Bell Canada,
Quebecor Media Inc.,
Rogers Communications Inc.,
Shaw Communications and
Pandora Media Inc.**

Respondents

- and -

Music Canada

Appellant

v.

**Entertainment Software Association,
Entertainment Software Association of Canada,
Apple Inc.,
Apple Canada Inc.,
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Library Futures Institute and
Ariel Katz**

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Indexed as: Society of Composers, Authors and Music Publishers of Canada v. Entertainment Software Association

2022 SCC 30

File No.: 39418.

2022: January 18; 2022: July 15.

Present: Wagner C.J. and Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin, Kasirer and Jamal JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Intellectual property — Copyright — Communication to public by telecommunication — Making available online — On-demand transmissions — Amendment to Copyright Act clarifying that communication of work to public by telecommunication includes making it available to public in way that allows members of public to have access to it from place and at time they have individually chosen — Copyright Board concluding that amendment requires users to pay one royalty when work made available to public online and another royalty when work downloaded or

streamed by member of public — Whether amendment creates new compensable making-available right — Copyright Act, R.S.C. 1985, c. C-42, ss. 2.4(1.1), 3(1)(f).

Administrative law — Judicial review — Standard of review — Standard of review applicable where administrative body and courts share concurrent first instance jurisdiction over questions of law.

In 1997, Canada signed the *WIPO Copyright Treaty*, one of two treaties negotiated for the purpose of adapting international copyright rules to new and emerging technologies. The Treaty sets out a number of protections that member countries are to provide to authors. Article 8 provides that authors of literary and artistic works shall enjoy the exclusive right to make their works 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. In 2012, Parliament added s. 2.4(1.1) to the *Copyright Act* by way of the *Copyright Modernization Act* (“*CMA*”) to implement the rights and protections of the Treaty. Section 2.4(1.1) amends s. 3(1)(f) of the *Copyright Act* by clarifying that “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”.

In the context of proceedings to set a tariff for online music services, the Copyright Board of Canada, which shares concurrent first instance jurisdiction over some aspects of the *Copyright Act* with the courts, concluded that s. 2.4(1.1) deems the

act of making works available to be a separately protected and compensable activity. This meant that two royalties would be payable when a work is distributed online: (1) when it is made available online and (2) when the work is actually streamed or downloaded. The Federal Court of Appeal overturned the Board's decision. It concluded that Parliament did not intend to create a new compensable making available right, and that, properly interpreted, s. 2.4(1.1) did not subject downloads and streams to two royalties.

Held: The appeal should be dismissed.

Per Wagner C.J. and Moldaver, Côté, Brown, **Rowe**, Kasirer and Jamal JJ.: The *Copyright Act* does not require that users pay two royalties to access works online. The reading of s. 2.4(1.1) of the *Copyright Act* that is most consistent with its text, structure, purpose, and context is that s. 2.4(1.1) clarifies that (1) s. 3(1)(f) applies to on-demand streams, and (2) a work is performed as soon as it is made available for on-demand streaming. This interpretation is technologically neutral and allows Canada to fulfill its obligations under art. 8 of the Treaty through a combination of the performance, reproduction, and authorization rights in s. 3(1). If a work is streamed or made available for on-demand streaming, the author's performance right is engaged. If a work is downloaded, the author's reproduction right is engaged. If a work is made available for downloading, the author's right to authorize reproductions is engaged. There are no gaps in protection. If a work is downloaded or made available for downloading, s. 3(1)(f) is not engaged. If a work is made available for streaming and

later streamed, s. 3(1)(f) is only engaged once.

The Board's decision should be reviewed under the standard of correctness. In *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, the Court recognized five categories for correctness review. None of these categories justifies applying a correctness standard of review to situations of concurrent administrative and court first instance jurisdiction. Nevertheless, in rare and exceptional circumstances, new correctness categories can be recognized when applying reasonableness would undermine legislative intent or the rule of law in a manner analogous to the five correctness categories discussed in *Vavilov*. When courts and administrative bodies have concurrent first instance jurisdiction over a legal issue in a statute is one of those rare and exceptional circumstances where it is appropriate to recognize a new category of correctness review. Applying correctness accords with legislative intent — by conferring concurrent first instance jurisdiction to courts and administrative bodies, it should be inferred that the legislature wanted to subject those decisions to appellate standards of review. Applying correctness also promotes the rule of law. First, when there is concurrent first instance jurisdiction, the legislature has expressly involved the courts in the interpretation of a statute, which necessarily carries with it the implication that, absent legislative direction to the contrary, courts will operate by their settled standards. Second, it avoids conflicting statutory interpretations, and it provides a way to manage differing decisions between courts and tribunals. Third, this correctness category can be defined with precision, as it will apply only when courts and administrative bodies

have concurrent first instance jurisdiction over a legal issue in a statute.

A treaty should be considered when interpreting statutes that purport to implement the treaty. The treaty is relevant at the context stage of the statutory interpretation exercise. There is no need to find textual ambiguity in a statute before considering the treaty. Where the text permits, legislation should be interpreted so as to comply with Canada's treaty obligations, in accordance with the presumption of conformity. However, a treaty cannot overwhelm clear legislative intent. The court's task is to interpret what the legislature has enacted and not subordinate this to what the federal executive has agreed to internationally.

Article 8 of the Treaty forms a relevant part of the context of s. 2.4(1.1) because Parliament intended to fulfill Canada's obligations under art. 8 through s. 2.4(1.1): the *CMA*'s preamble states that it was enacted in part to implement the "norms" of the Treaty, and the wording of art. 8 and s. 2.4(1.1) is similar. The Treaty was also ratified shortly after the *CMA* was passed, and an explanatory memorandum placed before the House of Commons stated that the *CMA* was developed with a view to implementing the rights and protections of the Treaty.

The Board's interpretation of s. 2.4(1.1) is inconsistent with its text and structure, it undermines the purpose of the *Copyright Act*, and it is not required by art. 8. To understand the text of s. 2.4(1.1), one must understand the basic scheme of the *Copyright Act*. The opening paragraph of s. 3(1) exhaustively sets out three copyright interests that authors have in their works: the right to (1) produce or reproduce a work

in any material form, (2) perform a work in public, or (3) publish an unpublished work. A single activity can only engage one of the three copyright interests. When a work is downloaded, giving a user a durable copy of a work, only the author's reproduction right is engaged. When a work is streamed, allowing a user to experience a work for a limited period of time, only the author's performance right is engaged. Authors are entitled to royalties for use of their works when an activity engages one of the copyright interests in s. 3(1). Nothing in the text of s. 2.4(1.1) indicates that Parliament intended to allow authors to charge two royalties for a single protected activity. The Board's interpretation is also entirely inconsistent with the Court's holdings in *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34, [2012] 2 S.C.R. 231, and *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 S.C.R. 283, which explained that downloads and streams are a single activity. Had Parliament intended to treat the act of making available as a new separately compensable activity, the way to do so would have been to add "making available" as a fourth copyright interest in the opening paragraph of s. 3(1), rather than as a modification to the scope of s. 3(1)(f).

The Board's interpretation also undermines the purpose of the *Copyright Act* because it violates the principle of technological neutrality by requiring that users pay additional royalties to access works online. Distributing functionally equivalent works through old or new technology should engage the same copyright interests. What matters is what the user receives, not how the user receives it. If that new technology

gives users durable copies of a work, the author's reproduction interest is engaged. If the new technology gives users impermanent access to the work, the author's performance right is engaged. Clear legislative intent would be needed to derogate from the principle of technological neutrality given its central importance to the scheme of the *Copyright Act*. Since there is no persuasive basis for concluding that Parliament intended to derogate from the principle of technological neutrality, s. 2.4(1.1) should be interpreted in a way that is technologically neutral.

Finally, while the Board correctly concluded that art. 8 of the Treaty requires that member countries give authors the right to control the act of making works available, in addition to any download or stream that might later occur, this obligation does not require the imposition of additional royalties on downloaded or streamed content. Each state can fulfill its art. 8 obligations through an explicit making available right or through a combination of pre-existing rights. Provided that the *Copyright Act* gives effect to art. 8's goals through any combination of rights, Canada will be in compliance with its obligations under art. 8.

Per Karakatsanis and Martin JJ.: The standard of review of the Board's decision should be reasonableness. Creating a new correctness category only three years after a majority of the Court in *Vavilov* set out a comprehensive judicial review framework undermines *Vavilov*'s promise of certainty and predictability. *Vavilov* explicitly established a presumption of reasonableness that could only be displaced in five situations. Concurrent jurisdiction at first instance was not among them. The

creation of a sixth category is simply contrary to the majority reasons in *Vavilov*.

Although the Court did not definitively foreclose the possibility that another category could be recognized, the establishment of new categories was explicitly reserved for possible circumstances which could not be realistically foreseen. The reasons in *Vavilov* were based on a thorough review of the relevant jurisprudence, including correctness cases of recent vintage, such as *Rogers*. It is therefore unrealistic to suggest that the Court's own precedent represents a possible set of circumstances that it could not have contemplated. And neither legislative intent nor the rule of law can make this case rare and exceptional — to conclude otherwise sweeps aside the Court's recently established framework governing the standard of review.

When applying the standard of reasonableness, context does not modify the standard or degree of scrutiny by the reviewing court, but it is obviously important in determining whether the decision itself is reasonable. And where the reasonableness standard applies to questions of statutory interpretation, the reviewing court must examine the administrative decision as a whole, including the reasons provided by the decision maker and the outcome that was reached. The court does so in reference to the modern principle of statutory interpretation, under which words, policy objectives and consequences all matter. It is not a purely textual exercise.

Even on a reasonableness standard, the failure of the Board to consider the Court's material and binding precedents or the animating themes of the *Copyright Act* was unreasonable. It was unreasonable for the Board to disregard the Court's decision

in *Entertainment Software Association* — the leading domestic authority on s. 3(1)(f). While the Board correctly pointed out that *Entertainment Software Association* was decided against a different legislative backdrop, three critical aspects remained the same: (i) the language of s. 3(1)(f); (ii) the *Copyright Act*'s fundamental distinction between performance and reproduction rights, and (iii) Parliament's commitment to preserve technological neutrality. Had the Board meaningfully engaged with *Entertainment Software Association*, it would not have rendered a decision that captured downloads — a reproductive activity — within an act of communication, nor would it have effectively created two separate rights for a single activity.

The Board's decision was also unreasonable in the context of the broader statutory scheme. First, the Board's reasons fail to meaningfully address the duplicate royalties that would arise when a work is subsequently downloaded or streamed. This was unreasonable in light of the Court's caution against this precise kind of layering of rights. Second, the interpretation advanced by the Board is not technologically neutral because it opens the door to duplicate royalties simply because the transaction takes place online. Without displacing Parliament's intent, the Board could not endorse an interpretation that applied differently to diverse forms of media.

As this is not a case where the omission is a minor aspect of the interpretive context, the Board's interpretation of s. 2.4(1.1) cannot be accepted. If correctness was the applicable standard, there would be agreement with the majority that s. 2.4(1.1) could not be read as creating a new independent right that is triggered when works are

made available for downloading or on-demand streaming, nor as creating a separate tariff. Nothing in the text, context, or purpose of s. 2.4(1.1) suggests otherwise, particularly when viewed in light of the legal landscape in which it operates.

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By Rowe J.

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du Petit Champlain inc., 2002 SCC 34, [2002] 2 S.C.R. 336; *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36, [2012] 2 S.C.R. 326; *York University v. Canadian Copyright Licensing Agency (Access Copyright)*, 2021 SCC 32; *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339; *Keatley Surveying Ltd. v. Teranet Inc.*, 2019 SCC 43, [2019] 3 S.C.R. 418; *Muzak Corp. v. Composers, Authors and Publishers Association of Canada, Ltd.*, [1953] 2 S.C.R. 182; *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2002 FCA 187, [2002] 4 F.C. 213; *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45, [2004] 2 S.C.R. 427; *Apple Computer, Inc. v. Mackintosh Computers Ltd.*, [1988] 1 F.C. 673, aff'd [1990] 2 S.C.R. 209; *SOCAN Statement of Royalties, Public Performance of Musical Works 1996, 1997, 1998 (Tariff 22, Internet) (Re)* (1999), 1 C.P.R. (4th) 417; *Warman v. Fournier*, 2012 FC 803, 104 C.P.R. (4th) 21.

By Karakatsanis J.

Applied: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653; **considered:** *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 S.C.R. 283; *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34, [2012] 2 S.C.R. 231; **referred to:** *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3

S.C.R. 654; *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45, [2004] 2 S.C.R. 427; *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57, [2015] 3 S.C.R. 615; *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559; *Uber Technologies Inc. v. Heller*, 2020 SCC 16; *TELUS Communications Inc. v. Wellman*, 2019 SCC 19, [2019] 2 S.C.R. 144; *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247; *Construction Labour Relations v. Driver Iron Inc.*, 2012 SCC 65, [2012] 3 S.C.R. 405; *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324; *Théberge v. Galerie d'Art du Petit Champlain inc.*, 2002 SCC 34, [2002] 2 S.C.R. 336.

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APPEAL from a judgment of the Federal Court of Appeal (Pelletier, Stratas and Near JJ.A.), 2020 FCA 100, [2021] 1 F.C.R. 374, [2020] F.C.J. No. 671 (QL), 2020 CarswellNat 1745 (WL), setting aside a decision of the Copyright Board of Canada, No. CB-CDA 2017-085, [2017] C.B.D. No. 11 (QL), 2017 CarswellNat 4235 (WL). Appeal dismissed.

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Jessica Zagar, for the interveners the Canadian Music Publishers Association carrying on business as “Music Publishers Canada” and the Professional Music Publishers Association.

Kim Paula Nayyer and Robert Janes, Q.C., for the interveners the Canadian Association of Law Libraries and the Library Futures Institute.

Sana Halwani and Andrew Moeser, for the intervener Ariel Katz.

The judgment of Wagner C.J. and Moldaver, Côté, Brown, Rowe, Kasirer and Jamal JJ. was delivered by

ROWE J. —

I. Overview

[1] Does the *Copyright Act*, R.S.C. 1985, c. C-42, require that users pay two royalties to access works online, even though accessing the same work offline requires paying only one royalty?

[2] The answer to this question depends on the correct interpretation of s. 2.4(1.1) of the *Copyright Act*. Section 2.4 (1.1) modifies the definition of s. 3(1)(f) by holding a work is *communicated* to the public as soon as it is 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”. The Copyright Board of Canada concluded that s. 2.4(1.1) deems the act of making works available to be a separately protected and compensable activity. In practical terms, this meant that users needed to pay two royalties to access works online — a royalty for “making works available” and an additional royalty when the work was actually downloaded or streamed. The Board reasoned that this was the only interpretation that would fulfill Canada’s obligations

under art. 8 of the 1996 *WIPO Copyright Treaty*, Can. T.S. 2014 No. 20, which requires that member countries give authors the exclusive right to control the act of making works available.

[3] The Federal Court of Appeal overturned the Board's decision. It concluded that the Board focused too much on art. 8's meaning, rather than s. 2.4(1.1)'s meaning. Had it properly interpreted s. 2.4(1.1), the Board would have seen that Parliament did not intend to subject downloads and streams to two royalties.

[4] The appellants, the Society of Composers, Authors and Music Publishers of Canada ("SOCAN") and Music Canada, ask that this Court overturn the Court of Appeal's decision and adopt the Board's interpretation of s. 2.4(1.1).

[5] I cannot agree with the Board's interpretation of s. 2.4(1.1). The *Copyright Act* does not exist solely for the benefit of authors. Its overarching purpose is to balance authors' and users' rights by securing just rewards for authors while facilitating public access to works. When this balance is achieved, society is enriched. Authors are encouraged to produce more works, and users gain access to works which they can use to inspire their own original artistic and intellectual creations.

[6] The principle of technological neutrality helps the *Copyright Act* balance the rights of authors and users. This principle holds that, absent parliamentary intent to the contrary, the *Copyright Act* should not be interpreted so as to favour or discriminate against any form of technology. It protects authors and users by ensuring that works

attract the same rights and give rise to the same royalties regardless of the technological means used to distribute the works.

[7] The Board's interpretation departs from the principle of technological neutrality. It requires that users pay additional royalties to access works online. Requiring that users pay additional royalties based on the mode of the work's distribution violates the principle of technological neutrality and shifts the balance between users' and authors' rights that has underpinned the *Copyright Act* for decades decisively in favour of authors.

[8] The Board's interpretation is not required by art. 8 of the *WIPO Copyright Treaty*. The Board's interpretation of s. 2.4(1.1) would fulfill Canada's obligations under art. 8. But other interpretations of s. 2.4(1.1) that are more consistent with its text, context, and purpose also conform to art. 8. In my view, s. 2.4(1.1) clarifies two things: (1) s. 3(1)(f) applies to on-demand technologies, and (2) a work is performed as soon as it is made available for online streaming. This interpretation of s. 2.4(1.1) is technologically neutral and allows Canada to fulfill its obligations under art. 8 through a combination of the performance, reproduction, and authorization rights in s. 3(1). If a work is streamed or made available for on-demand streaming, the author's performance right is engaged. If a work is downloaded, the author's reproduction right is engaged. If a work is made available for downloading, the author's right to authorize reproductions is engaged. There are no gaps in protection.

[9] As this interpretation of s. 2.4(1.1) is more consistent with its text, context, and purpose, I would adopt it over the Board's. If a work is downloaded or made available for downloading, s. 3(1)(f) is not engaged. If a work is made available for streaming and later streamed, s. 3(1)(f) is only engaged once. It follows that I would dismiss the appeal.

II. Facts

[10] In 1997, Canada signed the *WIPO Copyright Treaty*. The *WIPO Copyright Treaty* is one of two treaties negotiated in 1996 for the purpose of adapting international copyright rules to new and emerging technologies.

[11] The *WIPO Copyright Treaty* sets out a number of protections that member countries are to provide to authors. Of relevance to this appeal is art. 8, which provides that,

[w]ithout 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, authors of literary and artistic works shall 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.

[12] In 2012, the *Copyright Modernization Act*, S.C. 2012, c. 20 (“*CMA*”), amended the *Copyright Act*. Among other changes, the *CMA* introduced three “making available” provisions: ss. 2.4(1.1), 15(1.1)(d), and 18(1.1)(a). Sections 15(1.1)(d) and

18(1.1)(a) apply to performances and sound recordings and are not at issue in this appeal.¹ Section 2.4(1.1) applies to original works. It amends s. 3(1)(f) — which gives authors the right to “communicate the work to the public by telecommunication” — by clarifying that,

[f]or the purposes of [the *Copyright 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.

[13] Shortly after the *CMA* received royal assent, but before it came into force, this Court released two important decisions on the scope of s. 3(1)(f): *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34, [2012] 2 S.C.R. 231 (“*ESA*”), and *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 S.C.R. 283. *ESA* held that the transmission of a musical work over the Internet that results in a download is not a communication by telecommunication under s. 3(1)(f). *Rogers* concluded that on-demand streams were captured by s. 3(1)(f).

[14] After *ESA* and *Rogers* were released and after the *CMA* came into force, the Board received submissions on the meaning of s. 2.4(1.1). SOCAN, which

¹ Sound recorders and performers are not entitled to traditional copyright protection because they are not “authors”. They do not do anything “original” and they do not produce a “work”. Sound recorders record a work and performers interpret or execute works. Nevertheless, the *Copyright Act* protects these efforts in Part II: D. Vaver, *Intellectual Property Law: Copyright, Patents, Trade-marks* (2nd ed. 2011), at pp. 63, 97-98 and 109-10. The rights provided to sound recorders and performers differ in justification and practice from the rights provided to authors in s. 3(1) of the *Copyright Act*.

administers the s. 3(1)(f) right to “communicate” musical works on behalf of copyright owners, submitted that s. 2.4(1.1) requires that users pay tariffs² (i.e., royalties) when they post works on the Internet in a way that allows the public to access the work. These royalties would be payable irrespective of whether the works are subsequently transmitted to a member of the public by way of download, stream, or not at all.

III. Decisions Below

A. *Copyright Board of Canada, 2017 CanLII 152886*

[15] The Board accepted SOCAN’s position. It reasoned that s. 2.4(1.1) deems making a work available to be a “communication” to the public regardless of whether any subsequent transmission occurs and regardless of whether a subsequent transmission is a download or a stream. This meant that two royalties would be payable when a work is distributed online: (1) when it is made available online and (2) when the work is actually streamed or downloaded. The Board’s reasoning relied heavily on art. 8 of the *WIPO Copyright Treaty*, which it read as requiring that member countries provide a separate and compensable protection for the act of “making a work available”.

² A tariff is a rate set by the Board which determines the licence fees payable to collective societies like SOCAN for the use of works. Collective societies like SOCAN collect the tariffs and give the resulting royalties to rights holders: see Part VII.1 of the *Copyright Act*; *Re:Sound v. Canadian Association of Broadcasters*, 2017 FCA 138, 20 Admin. L.R. (6th) 179, at paras. 9-16.

B. *Federal Court of Appeal, 2020 FCA 100, [2021] 1 F.C.R. 374 (Pelletier, Stratas and Near JJ.A.)*

[16] The Federal Court of Appeal held that the Board's decision was unreasonable. Regarding the standard of review, the Court of Appeal noted that the jurisprudence prior to *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, required reviewing the Board's interpretation of s. 2.4(1.1) on a standard of correctness. However, after *Vavilov*, this jurisprudence was uncertain. While the Court of Appeal identified strong reasons for reviewing the Board's decision on a standard of correctness, it applied the standard of reasonableness because it had not received submissions on the issue.

[17] The Court of Appeal concluded that the Board placed too much weight on art. 8 when interpreting s. 2.4(1.1). Rather than focusing on what art. 8 means, the Board should have focused on what s. 2.4(1.1) means. Had it done so, the Board would have seen that Parliament did not intend to create a new compensable making available right.

[18] While the Court of Appeal rejected the Board's interpretation of s. 2.4(1.1), it did not explain what s. 2.4(1.1) means — it simply rejected the Board's interpretation of s. 2.4(1.1) and quashed the Board's decision.

IV. Parties' Positions

A. *Appellants*

[19] The appellants ask this Court to affirm the Board’s interpretation of s. 2.4(1.1). They argue that the Board correctly concluded that s. 2.4(1.1) deems the act of making works available to be a “communication” under s. 3(1)(f). A royalty is therefore payable whenever a work is made available for downloading or streaming. If the work is later downloaded, another reproduction royalty is payable. If the work is later streamed, another performance royalty is payable.

B. *Respondents*

[20] The respondents ask this Court to reject the Board’s interpretation of s. 2.4(1.1). They argue that s. 2.4(1.1) does not require that users pay two royalties to download or stream works. If a work is downloaded, only a single reproduction royalty is payable. If a work is streamed, only a single performance royalty is payable. Correctly interpreted, s. 2.4(1.1) simply clarifies that a work is “performed” as soon as it is “made available” for on-demand streaming. At that point, a royalty is payable. If the work is later streamed by a user, no additional royalty is payable because the stream is part of one continuous act of performance that began when the work was “made available” for streaming.

V. Issues

[21] This appeal raises three issues:

- (a) What is the appropriate standard of review?

- (b) What role does the *WIPO Copyright Treaty* play in interpreting s. 2.4(1.1)?

- (c) Does s. 2.4(1.1) entitle authors to an additional “making available” royalty?

VI. Analysis

A. *Issue 1: What Is the Appropriate Standard of Review?*

(1) Prior Jurisprudence Needs to Be Reconsidered in Light of *Vavilov*

[22] Prior to *Vavilov*, the Board’s decisions on the scope of rights in the *Copyright Act* were reviewed on the standard of correctness: see, for example, *Rogers*, at paras. 10-20; *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57, [2015] 3 S.C.R. 615 (“*CBC*”), at para. 35.

[23] These pre-*Vavilov* cases held that correctness was appropriate because the Board and courts have concurrent first instance jurisdiction over some aspects of the *Copyright Act*. In infringement actions, the scope of rights under the Act is routinely brought before courts for interpretation. Similarly, the Board may need to decide the scope of rights in the Act in order to set tariffs, as occurred in this case: *Rogers*, at

paras. 12-13. Given this shared jurisdiction, the pre-*Vavilov* cases concluded that correctness was appropriate because it minimized the risk of conflicting statutory interpretations and gave effect to legislative intent: *Rogers*, at paras. 12-15; *CBC*, at para. 35.

[24] In *Vavilov*, this Court reconsidered its standard of review jurisprudence. It simplified the law by holding that courts should review administrative decisions on a standard of reasonableness except when doing so would undermine legislative intent or the rule of law: paras. 17 and 69.

[25] *Vavilov* overtook the prior jurisprudence: para. 143. Cases from this Court applying a correctness standard to the Board's decisions therefore need to be reconsidered in light of *Vavilov*.

(2) Concurrent First Instance Jurisdiction Should Be Recognized as a Sixth Category of Correctness

[26] *Vavilov* recognized five categories for correctness review: legislated standards of review, statutory appeal mechanisms, constitutional questions, general questions of law of central importance to the legal system as a whole, and questions related to the jurisdictional boundaries between two or more administrative bodies (paras. 17 and 69). None of these categories justifies applying a correctness standard of review to situations of concurrent administrative and court first instance jurisdiction.

[27] Nevertheless, I would apply a correctness standard of review to the Board's decision. *Vavilov* did not "definitively foreclose the possibility that another category could be recognized as requiring a derogation from the presumption of reasonableness review": *Vavilov*, at para. 70. In rare and exceptional circumstances, new correctness categories can be recognized when applying reasonableness would undermine legislative intent or the rule of law in a manner analogous to the five correctness categories discussed in *Vavilov* at paras. 23 and 70.

[28] This is one of those rare and exceptional circumstances where it is appropriate to recognize a new category of correctness review: when courts and administrative bodies have concurrent first instance jurisdiction over a legal issue in a statute. Applying correctness to these issues accords with legislative intent and promotes the rule of law.

(a) *Legislative Intent*

[29] Reasonableness is the standard of review that, in most instances, gives best effect to legislative intent. When the legislature has granted exclusive jurisdiction to an administrative decision maker, courts presume that the legislature wanted that decision maker to operate without undue judicial interference: *Vavilov*, at para. 24.

[30] When the legislature expressly involves the court in the administrative scheme, this presumption no longer applies. That is why legislated standards of review and statutory appeal mechanisms give rise to a correctness standard of review. Such

statutory features indicate legislative intent for judicial involvement and a desire to subject those decisions to appellate standards of review: *Vavilov*, at para. 36.

[31] When the legislature enacts a statute that gives concurrent first instance jurisdiction to courts and administrative bodies, the legislature expressly involves the courts. Like legislated standards of review and statutory appeal mechanisms, concurrent first instance jurisdiction signals a legislative intent for judicial involvement. By conferring such jurisdiction, it should be inferred that the legislature wanted to subject those decisions to appellate standards of review.

[32] My colleague suggests that, because there is no statutory appeal mechanism or legislated standard of review, a sixth correctness category cannot be recognized on the basis of legislative intent. With respect, this argument misconceives the question at issue. If there were legislated standards of review or statutory appeal mechanisms, the Board's decision would already be reviewed for correctness under those established correctness categories. There would be no reason to consider a sixth category of correctness. When there is no statutory appeal mechanism or legislated standard of review (or other established correctness category), the question is whether correctness is nevertheless appropriate because applying reasonableness would undermine legislative intent in a manner *analogous* to the established correctness categories. Since that is the case here, a sixth category of correctness is justified on the basis of legislative intent.

(b) *Rule of Law*

[33] The presumption of reasonableness must give way to considerations aimed at maintaining the rule of law, which requires that certain questions be answered consistently and definitively: *Vavilov*, at para. 53. Legal inconsistency “is antithetical to the rule of law”: *Vavilov*, at para. 72.

[34] Applying reasonableness to the Board’s interpretation of the rights in the *Copyright Act* creates two legal inconsistencies. First, it subjects the same legal issue to different standards of review depending solely on whether the issue arises before the Board or the courts. As this Court explained in *Rogers*, at para. 14,

[i]t would be inconsistent for the court to review a legal question on judicial review of a decision of the Board on a deferential standard and decide exactly the same legal question *de novo* if it arose in an infringement action in the court at first instance. It would be equally inconsistent if on appeal from a judicial review, the appeal court were to approach a legal question decided by the Board on a deferential standard, but adopt a correctness standard on an appeal from a decision of a court at first instance on the same legal question.

[35] Second, differing standards of review could lead to conflicting statutory interpretations. For example, the Board could interpret s. 2.4(1.1) as requiring that users pay a performance royalty when works are downloaded, while a court could interpret the provision such that no such royalties are payable in those circumstances.

[36] This raises different concerns than the potential for inconsistent decisions within an administrative body. In *Vavilov*, at para. 72, this Court declined to recognize a correctness category for legal questions on which there is persistent discord within an

administrative body for three reasons: (1) ensuring that administrative bodies remain independent, as the legislature intended, requires tolerating some inconsistencies; (2) a robust reasonableness review can adequately manage the serious rule of law concerns that emerge when the law is indeterminate; and (3) the point at which internal discord becomes serious enough to warrant a correctness standard is impossible to define in the abstract. None of these rationales justifies maintaining a reasonableness standard of review when courts and administrative bodies have concurrent first instance jurisdiction.

[37] First, when there is concurrent first instance jurisdiction, the legislature has expressly involved the courts in the interpretation of a statute. While one may contemplate a degree of inconsistency within an administrative body regarding the interpretation of a statute, no such inconsistency can be tolerated when a court interprets a statute. When the legislature confers first instance concurrent jurisdiction, that necessarily carries with it the implication that, absent legislative direction to the contrary, courts will operate by their settled standards, as explained in *Vavilov*, at para. 37.

[38] Second, the more methodologically rigorous reasonableness review developed in *Vavilov* cannot adequately deal with an inconsistency in statutory interpretation between courts and administrative bodies. *Vavilov* offered guidance as to how to manage persistent discord *within* administrative bodies at paras. 129-32. But, other than telling administrative bodies to consider relevant judicial decisions, at

para. 112, it offers little guidance on managing differing decisions between courts and tribunals. In those circumstances, unless the statute allows for only one reasonable interpretation, discord could persist indefinitely: see para. 124.

[39] Third, this correctness category can be defined with precision. It will apply when courts and administrative bodies have concurrent first instance jurisdiction over a legal issue in a statute. Such situations are rare. “Concurrent jurisdiction at first instance seems to appear only under intellectual property statutes where Parliament has preserved dual jurisdiction between the tribunals and the courts”: *Rogers*, at para. 19. Administrative bodies will also continue to benefit from the presumption of reasonableness in other circumstances. The Board’s decision on tariff rates, for example, will continue to be reviewed on a standard of reasonableness as that is a matter that comes within the Board’s exclusive jurisdiction.

(3) Conclusion: Standard of Review

[40] Recognizing concurrent first instance jurisdiction between courts and administrative bodies as a sixth category of correctness review gives effect to legislative intent and promotes the rule of law. I will therefore review the Board’s decision under the standard of correctness.

[41] I wish to emphasize that these reasons do not purport to change when it is appropriate to recognize a new correctness category. *Vavilov* contemplated that new correctness categories could be recognized only in rare and exceptional circumstances.

Courts should only recognize new correctness categories when doing so is “consistent with the framework and the overarching principles set out in [*Vavilov*]”: para. 70. This is one of those circumstances.

[42] Nor do these reasons depart from *Vavilov*. Contrary to my colleague’s assertion, this Court never “chose *not* to make first instance concurrent jurisdiction an exception”: para. 125 (emphasis in original). When this Court wanted to reject the possibility of a certain correctness category, it did so expressly: see *Vavilov*, at paras. 71-72. Concurrent first instance jurisdiction was not discussed in *Vavilov*. Accordingly, I seek to give effect to *Vavilov* by considering whether treating concurrent first instance jurisdiction as a new correctness category furthers the framework and principles in *Vavilov*. With respect, I say that it is my colleague who departs from precedent by effectively reading the possibility of further correctness categories out of *Vavilov*.

B. *Issue 2: What Role Does the WIPO Copyright Treaty Play in the Interpretation of Section 2.4(1.1)?*

[43] The Court of Appeal criticized the Board for focusing on the meaning of art. 8 in the *WIPO Copyright Treaty*, rather than the meaning of s. 2.4(1.1) in the *Copyright Act*. The parties also disagree on how much focus should be placed on art. 8. This case therefore calls for a reiteration of the role international treaties play in statutory interpretation.

(1) A Treaty Is Relevant at the “Context” Stage of Statutory Interpretation

[44] A treaty should be considered when interpreting statutes that purport to implement the treaty, in whole or in part. The treaty is relevant at the context stage of the statutory interpretation exercise: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 70; *B010 v. Canada (Citizenship and Immigration)*, 2015 SCC 58, [2015] 3 S.C.R. 704, at para. 49; R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at §18.30.

[45] There is no need to find textual ambiguity in a statute before considering the treaty. The modern approach to statutory interpretation requires interpreting the statute’s text in its “entire context”. The statute’s context includes any relevant international legal obligations: *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324, at pp. 1371-72; *Crown Forest Industries Ltd. v. Canada*, [1995] 2 S.C.R. 802, at para. 50; Sullivan, at §18.26.

[46] If a statute implements a treaty without qualification, the interpretation of the statute needs to be wholly consistent with Canada’s obligations under the treaty: *Office of the Children’s Lawyer v. Balev*, 2018 SCC 16, [2018] 1 S.C.R. 398, at para. 31. If the statute is less explicit as to the extent to which it gives effect to a treaty, the weight given to obligations under the treaty will depend on the circumstances of the case, such as the treaty’s specificity and the statute’s text: *Rahaman v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 89, [2002] 3 F.C. 537, at para. 36. Where the text permits, legislation should be interpreted so as to comply with

Canada's treaty obligations, in accordance with the presumption of conformity: *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292, at para. 53; *Németh v. Canada (Justice)*, 2010 SCC 56, [2010] 3 S.C.R. 281, at para. 34; *B010*, at para. 48.

(2) Courts Must Always Give Effect to the Statute's Meaning

[47] The presumption of conformity is an aid to interpretation. The task remains to give effect to legislative intent. The separation of powers requires that courts give effect to a statute that demonstrates legislative intent not to comply with treaty obligations: *Hape*, at para. 53. Negotiation, signing, and ratification of treaties are acts of the executive. Once ratified, treaties do not automatically become part of domestic law; rather, they are given effect through domestic legislation: Sullivan, at §18.36.

[48] Accordingly, while a treaty can be highly relevant to statutory interpretation, it cannot overwhelm clear legislative intent. The court's task is to interpret what the legislature (federally and provincially) has enacted and not subordinate this to what the federal executive has agreed to internationally. It is always the domestic statute that governs because "[i]nternational law cannot be used to support an interpretation that is not permitted by the words of the statute": *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62, [2014] 3 S.C.R. 176, at para. 60.

(3) Application

[49] Article 8 forms a relevant part of the context of s. 2.4(1.1). The *CMA*'s preamble states that it was enacted in part to implement the "norms" of the *WIPO Copyright Treaty*. The wording of art. 8 and s. 2.4(1.1) is similar. As well, shortly after Parliament passed the *CMA*, Canada ratified the *WIPO Copyright Treaty*. An explanatory memorandum placed before the House of Commons regarding the treaty states that "Canada's recent [*CMA*] was developed with a view to implementing the rights and protections of the *WIPO Copyright Treaty*, thereby putting Canada in a position to ratify": condensed book (Music Canada), at p. 15. I am satisfied that these facts indicate that Parliament intended to fulfill Canada's obligations under art. 8 through s. 2.4(1.1). That provision should therefore be interpreted so as to fulfill Canada's obligations under art. 8, to the extent possible given the *Copyright Act*'s text.

C. *Issue 3: Does Section 2.4(1.1) Entitle Authors to an Additional "Making Available" Royalty?*

[50] The Board concluded that s. 2.4(1.1) deems making a work available to be a "communication" under s. 3(1)(f), regardless of whether any subsequent transmission occurs and regardless of whether a subsequent transmission is a download or a stream. Therefore, the Board reasoned, as soon as a work is made available online, s. 3(1)(f) is triggered and a royalty is payable. If the work is later downloaded or streamed, another royalty is payable. This interpretation means that distributing works online requires paying two royalties — one when the work is made available and another when the work is downloaded or streamed.

[51] I am not persuaded that this is the proper reading of s. 2.4(1.1). While this interpretation is one means to fulfill Canada's obligations under art. 8, it is inconsistent with the text, structure and purpose of the *Copyright Act*. Further, art. 8 does not require this interpretation. If s. 2.4(1.1) is read as clarifying two things — (1) that s. 3(1)(f) applies to on-demand streams and (2) a work is performed as soon as it is made available for streaming — then Canada would also fulfill its obligations under art. 8. Either interpretation would fulfill Canada's obligations under art. 8, but the latter interpretation is more consistent with the text, structure and purpose of the *Copyright Act*. For that reason, it is the latter interpretation, not the one adopted by the Board, that should be given effect.

[52] My analysis in this section will proceed in five parts. I will explain why the Board's interpretation (1) is inconsistent with s. 2.4(1.1)'s text and structure; (2) undermines the purpose of the *Copyright Act*; and (3) is not required by art. 8. I will then (4) offer my own interpretation of s. 2.4(1.1) and (5) explain why this interpretation allows Canada to fulfill its obligations under art. 8 through a combination of the performance, reproduction, and authorization rights in s. 3(1).

(1) Text and Structure

[53] To understand the text of s. 2.4(1.1), one must understand the basic scheme of the *Copyright Act*.

[54] The opening paragraph of s. 3(1) of the *Copyright Act* exhaustively sets out three copyright interests that authors have in their works: the right to (1) produce or reproduce a work in any material form; (2) perform a work in public; or (3) publish an unpublished work. Section 3(1)(a) to (j) is “illustrative” of these three broad copyrights: *ESA*, at para. 42. For example, s. 3(1)(f), which gives authors the right to “communicate the work to the public by telecommunication”, illustrates an activity that falls within the broader right to perform a work in public. It is not a standalone or *sui generis* copyright in addition to the general rights described in s. 3(1): *ESA*, at paras. 25-27 and 42.

[55] The rights enumerated in s. 3(1) are distinct. A single activity can only engage one of the three copyright interests. When a song is downloaded, for example, only the author’s reproduction right is engaged. Similarly, when a work is streamed, only the author’s performance right is engaged: *ESA*, at para. 41. Authors are entitled to royalties for use of their works when an activity engages one of the copyright interests in s. 3(1).

[56] To determine which copyright interest is engaged by an activity, one must examine what that activity does to the copyrighted work. A performance is impermanent — “[w]hen it is over, only the memory remains”: *Bishop v. Stevens*, [1990] 2 S.C.R. 467, at p. 479. Performances also allow authors to retain more control over their works than reproductions, as performed works can be withdrawn from the user after the performance is over. Accordingly, when an activity allows a user to

experience a work for a limited period of time, the author's performance right is engaged. A reproduction, by contrast, gives a user a durable copy of a work: *Théberge v. Galerie d'Art du Petit Champlain inc.*, 2002 SCC 34, [2002] 2 S.C.R. 336, at paras. 42 and 47; *ESA*, at para. 35. Authors lose significantly more control over their works when they are reproduced. Once reproduced, authors cannot limit when, how, or the number of times a user experiences the work. Accordingly, activities that give users a durable copy of a work engage the author's reproduction right.

[57] An activity that does not engage one of the three copyright interests in s. 3(1) or the author's moral rights³ is not a protected or compensable activity under the *Copyright Act*. In *Théberge*, for example, this Court held that authors could not prevent users from re-fixing their works on other canvasses because that activity did not engage the author's reproduction, performance, or first publication rights. Even though altering the work in this manner was undoubtedly an "activity" in a physical sense, it was not a protected or compensable activity because there is no right of "fixation" in s. 3(1) of the Act.

[58] The Board's interpretation of s. 2.4(1.1) is inconsistent with the text of s. 2.4(1.1) and the scheme of the *Copyright Act*. In *ESA* and *Rogers*, this Court explained that, since downloads and streams were single protected activities, authors could charge one royalty when users access works as downloads or streams — a reproduction royalty for downloads or a performance royalty for streams. The Board's

³ Moral rights are outlined in ss. 14.1 and 28.1 of the *Copyright Act*. They are not in issue here.

interpretation is entirely inconsistent with the holdings in *ESA* and *Rogers*. It would allow authors to charge two royalties for a single protected activity. If a work is downloaded, a user would pay (1) a performance royalty for making the work available and (2) a reproduction royalty for the download. If a work is streamed, a user would pay two performance royalties: (1) a performance royalty for making the work available and (2) another performance royalty for the stream.

[59] There is nothing in the text of s. 2.4(1.1) to indicate that this was Parliament's intent. Section 2.4(1.1) is located in the "Interpretation" Division of the Act. It modifies the scope of an author's performance right by modifying the definition of s. 3(1)(f). Since a download is a single protected activity that never engages s. 3(1)(f), I fail to see how modifying the definition of s. 3(1)(f) transforms downloads into two separately compensable activities. Similarly, I do not see how s. 2.4(1.1) transforms a single activity like streaming into two separately compensable performances. While I accept that the act of "making a work available" is a separate *physical* activity from the act of a user downloading or streaming a work, it does not follow that it is a *separately compensable* activity. Had Parliament intended to treat the act of making available as a new separately compensable activity, the way to do so would have been to add "making available" as a fourth copyright interest in the opening paragraph of s. 3(1), rather than as a modification to the scope of s. 3(1)(f).

[60] I do not accept SOCAN's argument that this case is similar to *CBC*. In *CBC*, this Court found that the CBC had to pay separate reproduction royalties each

time it made synchronization and broadcast incidental copies of a work. Two reproduction royalties were appropriate in that case because there were two protected activities in issue: (1) synchronization copying and (2) broadcast incidental copying. Since each activity created a separate durable copy of the work, each activity was protected and engaged the author's reproduction interest: *Théberge*. But in this case, like in *ESA* and *Rogers*, there is only one protected activity in issue: either a download or a stream.

[61] For these reasons, I find no textual support for the Board's interpretation of s. 2.4(1.1).

(2) Purpose of the *Copyright Act*

[62] The Board's interpretation of s. 2.4(1.1) also undermines the purpose of the *Copyright Act* because it violates the principle of technological neutrality.

[63] The principle of technological neutrality holds that, absent parliamentary intent to the contrary, the *Copyright Act* should not be interpreted in a way that either favours or discriminates against any form of technology: *CBC*, at para. 66. Distributing functionally equivalent works through old or new technology should engage the same copyright interests: *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36, [2012] 2 S.C.R. 326, at para. 43; *CBC*, at para. 72. For example, purchasing an album online should engage the same copyright interests, and attract the same quantum of royalties, as purchasing an album in a bricks-and-mortar

store since these methods of purchasing the copyrighted works are functionally equivalent. What matters is *what* the user receives, not *how* the user receives: *ESA*, at paras. 5-6 and 9; *Rogers*, at para. 29. In its summary to the *CMA*, which precedes the preamble, Parliament signalled its support for technological neutrality, by stating that the amendments were intended to “ensure that [the *Copyright Act*] remains technologically neutral”.

[64] The Board’s interpretation of s. 2.4(1.1) violates the principle of technological neutrality because it requires that users pay additional royalties to access works online. To illustrate, consider a retailer that allows customers to purchase a digital or physical copy of an album. Regardless of whether the work is sold digitally or physically, the author’s reproduction interest in s. 3(1) is engaged because the user receives a durable copy of the work: *ESA*, at para. 31. The author is therefore entitled to a reproduction royalty. But under the Board’s interpretation of s. 2.4(1.1), purchasing the album online would entitle the author to an additional royalty — a performance royalty for making the work available for online purchase. Similarly, streaming the album online would require paying a “making available performance” royalty and a “streaming performance” royalty. But playing that same album on the radio would only require paying one performance royalty. Requiring that users pay additional royalties based solely on the mode of the work’s distribution violates the principle of technological neutrality.

[65] The appellants concede that the Board’s interpretation of s. 2.4(1.1) is not technologically neutral. They submit, however, that Parliament intended to derogate from the principle by passing s. 2.4(1.1). Because works can only be “made available” online — since there is no bricks-and-mortar way for the public to access a work at a time and place of their choosing — the appellants submit that Parliament must have intended to impose additional royalties on works distributed online.

[66] This is entirely unpersuasive. Clear legislative intent would be needed to derogate from the principle of technological neutrality given its central importance to the scheme of the *Copyright Act*. To appreciate why, it is necessary to situate the principle within the Act.

[67] Copyright law does not exist solely for the benefit of authors: *York University v. Canadian Copyright Licensing Agency (Access Copyright)*, 2021 SCC 32, at paras. 90-91. Its overarching purpose is to balance users’ and authors’ rights. It does this by securing just rewards for authors while facilitating “public access to and dissemination of artistic and intellectual works, which enrich society and often provide users with the tools and inspiration to generate works of their own”: *Access Copyright*, at para. 92; see also *Théberge*, at paras. 30-31.

[68] The *Copyright Act* uses various tools to achieve this balance. Fair dealing, for example, promotes this balance by allowing “users to engage in some activities that might otherwise amount to copyright infringement”: *Bell*, at para. 11; see also *Access Copyright*, at para. 90. Similarly, the idea/expression dichotomy protects this balance

by extending copyright protection to only original artistic expressions, not original ideas. This ensures that the public can freely use new ideas to inspire their own original works: *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339, at para. 8; A. Drassinower, “Copyright Is Not About Copying” (2012), 125 *Harv. L. Rev. F.* 108, at p. 111.

[69] Like fair dealing and the idea/expression dichotomy, the principle of technological neutrality is a tool for balancing users’ and authors’ rights. It ensures that authors retain the same rights over their works regardless of the technological means used to distribute those works. If the *Copyright Act* entitles authors to receive a certain royalty when their work is reproduced or performed offline, technological neutrality preserves an author’s right to receive that same royalty when their work is reproduced or performed online. As a corollary, it also protects users by preventing authors from extracting more royalties merely because their work is reproduced or performed online. As Professor Carys J. Craig explains in “Technological Neutrality: (Pre)Serving the Purposes of Copyright Law”, in M. Geist, ed., *The Copyright Pentalogy: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (2013), 271,

[t]his principled recognition of copyright as requiring a sensitive public policy balance, rather than simply the protection of a private property right, has had a marked impact on the landscape of Canadian copyright law. If copyright in general requires this balance, then it must surely follow that copyright in the digital era requires the *preservation* of this balance, which must mean that the law should have the same effect (produce a similar balance of rights and interests) whether applied offline or online. [Emphasis in original; p. 292.]

[70] With this context in mind, I am not persuaded that, in adopting s. 2.4(1.1), Parliament intended to derogate from the principle of technological neutrality. The principle of technological neutrality is designed to operate precisely in situations like the present case, where a novel technology emerges that has no clear traditional equivalent. In those circumstances, courts must look at what that new technology does to the substance of the work by examining which, if any, of the copyright interests in s. 3(1) are engaged by this new method of distributing a work. If that new technology gives users durable copies of a work, the author's reproduction right is engaged. If the new technology gives users impermanent access to the work, the author's performance right is engaged. What matters is *what* the user receives, not *how* the user receives it.

[71] With that said, copyright is a creature of statute. Parliament can therefore always choose to derogate from the principle of technological neutrality: *Keatley Surveying Ltd. v. Teranet Inc.*, 2019 SCC 43, [2019] 3 S.C.R. 418, at para. 40. But derogating from this principle means significantly altering the balance between users' and authors' rights that has been foundational to the *Copyright Act* for decades: *Keatley*, at paras. 43-44. In this case, it would tilt the balance significantly in favour of authors. Users would face increased costs and be penalized for using certain new and improved technologies.

[72] Thus, courts should not conclude that Parliament intended to derogate from the principle of technological neutrality unless there is strong evidence that this was Parliament's intent: see, for example, *CBC*, at paras. 50-51. That is not the case here.

As discussed, the text of s. 2.4(1.1) and its placement in the *Copyright Act* does not support the view that Parliament wanted to make downloads and streams subject to two royalties. Further, as I will discuss next, giving effect to the *WIPO Copyright Treaty* does not demand this interpretation.

[73] Since there is no persuasive basis for concluding that Parliament intended to derogate from the principle of technological neutrality, s. 2.4(1.1) should be interpreted in a way that is technologically neutral: reproducing or performing a work online or offline should engage the same copyright interests and require the same royalties.

(3) Section 2.4(1.1)'s Statutory Context: Article 8

[74] The Board did not err when it concluded that art. 8 requires that member countries give authors the right to control the act of making works available, in addition to any download or stream that might later occur. Authors should have recourse against individuals who upload their works online in a way that makes them available for downloading or streaming, even if the work is never actually downloaded or streamed.

[75] But I part company with the Board in its conclusion that this obligation requires imposing additional royalties on downloaded or streamed content. The *WIPO Copyright Treaty* does not demand that member countries create a new compensable “making available right” to satisfy art. 8. Member countries simply need to ensure that authors can control the physical act of making their works available. This control can

be provided through any combination of rights. Accordingly, while I agree that the act of “making a work available” is a separate physical activity from a download or stream, I disagree with the view that the act of “making a work available” gives rise to distinct communications to the public (i.e., distinct performances). The making available of a stream and a stream are both protected as a single communication to the public, while the making available of a download is protected as an authorization to reproduce, and the download is protected as a reproduction.

[76] I expand on these points below, beginning with an examination of the goals of art. 8.

(a) *Article 8’s Goals*

[77] Article 8 has two goals: (1) clarify that on-demand transmissions are captured by the right to communicate works to the public; and (2) ensure that authors can control the act of making their works available online. To understand these goals, it is necessary to understand the problem that art. 8 was designed to address.

[78] There is no “international copyright” law. However, many states have signed international treaties that require that they provide authors with certain protections in domestic copyright legislation. The 1886 *Berne Convention for the Protection of Literary and Artistic Works*, 828 U.N.T.S. 221, for example, requires that member countries give authors an exclusive right to reproduce a work or perform a work in public. Canada’s *Copyright Act, 1921*, S.C. 1921, c. 24, was based on, and

designed to implement, the *Berne Convention*: C. Foong, *The Making Available Right: Realizing the Potential of Copyright's Dissemination Function in the Digital Age* (2019), at p. 54; L. Bently and B. Sherman, *Intellectual Property Law* (4th ed. 2014), at pp. 40-41; D. Vaver, *Intellectual Property Law: Copyright, Patents, Trade-marks* (2nd ed. 2011), at p. 55; *ESA*, at para. 13, citing *Bishop*, at pp. 473-74.

[79] The *Berne Convention* has been updated from time-to-time to respond to new technologies: L. E. Harris, *Canadian Copyright Law* (4th ed. 2014), at p. 59. In 1928, for example, the *Berne Convention* was updated to clarify that radio communications should be treated as an extension of the existing performance right: *ESA*, at para. 16.

[80] The *Berne Convention* needed to be updated again in response to on-demand technologies. By the 1990s, it was clear the *Berne Convention* protected authors when their works were distributed through traditional “push” technologies like radio and cable broadcasts. But it was not clear whether it also protected authors when their works were distributed through newer “pull” technologies like on-demand transmissions. While it was possible to read the *Berne Convention* as applying to on-demand technologies, uncertainty existed: S. Ricketson and J. C. Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (2nd ed. 2005 (reprinted 2010)), vol. I, at p. 742; Foong, at pp. 56-57; M. F. Makeen, “Video streaming and the communication to the public right in the United States and

European Union”, in T. Aplin, ed., *Research Handbook on Intellectual Property and Digital Technologies* (2020), 246, at p. 253; *Rogers*, at para. 43.

[81] Article 8 resolved this ambiguity: Foong, at p. 60. It clarified that the right of “communication to the public” (an existing *Berne Convention* right) applied to on-demand transmissions:

The WCT’s principal innovation is its specification that the right of communication to the public includes a right of “making available. . .”. This 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. . . . [I]t was possible to interpret the Berne Convention to cover at least wired on-demand transmissions of certain kinds of works, but it was not clear that the Berne Convention *required* member states to extend the communication to the public right to these transmissions. The WCT therefore supplies the missing mandate. . . . [Emphasis in original.]

(Ricketson and Ginsburg, at p. 746; see also explanatory notes on art. 8 (then art. 10) in Diplomatic Conference on Certain Copyright and Neighboring Rights Questions, *Basic Proposal for the Substantive Provisions of the Treaty on Certain Questions Concerning the Protection of Literary and Artistic Works to be Considered by the Diplomatic Conference*, Doc. CRNR/DC/4, August 30, 1996, at notes 10.11 and 10.13.)

[82] Article 8’s first goal was therefore to clarify that the right to communicate works to the public (a performative activity) applied to on-demand technology. This was “neither a reaffirmation nor a novelty, for it resolves an ambiguity as to whether the old communication to the public rights accommodated or excluded ‘pull technologies’”: J. C. Ginsburg, “The (New?) Right of Making Available to the Public”, in Columbia Law School Public Law & Legal Theory Working Paper Group, Working

Paper No. 04-78 (2004), at p. 12; see also J. Reinbothe and S. von Lewinski, *The WIPO Treaties 1996: The WIPO Copyright Treaty and The WIPO Performances and Phonograms Treaty — Commentary and Legal Analysis* (2002), at pp. 102 and 109; Makeen, at pp. 253-54; J. S. McKeown, *Fox on Canadian Law of Copyright and Industrial Designs* (4th ed. (loose-leaf)), at § 21:59.

[83] Article 8's second goal was to ensure that authors could control when their works were made available online. The appellants, respondents, and their experts generally agree that art. 8 requires that member countries give authors the right to control the act of *offering* their works for downloading or streaming. The academic literature overwhelmingly supports this view: Reinbothe and von Lewinski, at p. 108; Bently and Sherman, at p. 45; United States Copyright Office, *The Making Available Right in the United States: A Report of the Register of Copyrights* (February 2016), at pp. 13-14; B. B. Sookman, *Sookman: Computer, Internet and Electronic Commerce Law* (loose-leaf), at § 3:90. As Cheryl Foong explains,

[c]ertain characteristics of the making available right can be outlined. As the provision of mere accessibility is sufficient to infringe the right, it is not necessary to prove that an actual transmission has occurred. In this way, article 8 of the WCT lowered the communication right's threshold of protection and enlarged its scope. [p. 79]

[84] Similarly, as Ricketson and Ginsburg wrote, “[i]t is not necessary that the offer be accepted: ‘making available’ embraces incipient as well as effected communications” (p. 747).

[85] This persuasively establishes that art. 8 requires that member countries give authors the right to control when and how their work is made available for downloading or streaming. This conclusion is in full accordance with the wording of art. 8, which entitles authors to control the act of making a work available in a way that the public “may access” it. Actual transmission is not required. It is also supported by the explanatory notes accompanying art. 8 (then art. 10), which explain that the relevant act protected by art. 8 is the “initial act” of providing “access” to the work:

10.10 The second part of Article 10 explicitly states that communication to the public includes the making available to the public of works, by wire or wireless means, in such a way that members of the public may access these works from a place and at a time individually chosen by them. The relevant act is the making available of the work by providing access to it. What counts is the initial act of making the work available, not the mere provision of server space, communication connections, or facilities for the carriage and routing of signals. It is irrelevant whether copies are available for the user or whether the work is simply made perceptible to, and thus usable by, the user. [Emphasis added.]

[86] This conclusion is also consistent with the *WIPO Copyright Treaty*’s purpose: to fill potential gaps in the *Berne Convention* created by the emergence of new Internet technologies. There would be significant gaps in protection if copyright owners had no recourse against individuals who illicitly make works available online for downloading or streaming.

[87] But this conclusion does not require reading s. 2.4(1.1) as creating a new compensable “making available right”. Under the *WIPO Copyright Treaty*’s “umbrella

solution”, member countries can protect the act of making a work available through various means. This is the issue to which I turn next.

(b) *The Umbrella Solution*

[88] To recap, art. 8 obliges member countries to do two things: (1) protect on-demand transmissions and (2) give authors the right to control when and how their work is made available for downloading or streaming. It does not, however, tell member countries how to give effect to these obligations. To accommodate different legal traditions and different drafting techniques among member countries, the *WIPO Copyright Treaty* adopted an “umbrella solution”: each state could decide how to fulfill its art. 8 obligations. Member countries could provide for art. 8 protections through “an explicit making available right or provide effective coverage of the right through a combination of pre-existing rights”: Foong, at pp. 62-63; see also Makeen, at p. 254; R. Keller, “Moving Toward a Balanced ‘Making Available Right’ in Canada” (2014), 27 *I.P.J.* 213, at pp. 221-22. As the explanatory text accompanying art. 8 (then art. 10) emphasizes:

10.21 It is strongly emphasized that Article 10 does not attempt to define the nature or extent of liability on a national level. This proposed international agreement determines only the scope of the exclusive rights that shall be granted to authors in respect of their works. Who is liable for the violation of these rights and what the extent of liability shall be for such violations is a matter for national legislation and case law according to the legal traditions of each Contracting Party.

[89] In accordance with the umbrella solution, member countries have protected the act of making works available through a variety of means. Some have adopted wording similar to that in art. 8. Others have made no statutory changes, relying instead on existing rights to give effect to the obligations under art. 8. The United States, for example, has relied on its existing reproduction, performance, and distribution rights to give effect to its art. 8 obligations: United States Copyright Office, at pp. 74-77; Foong, at p. 84; Makeen, at pp. 256-57.

[90] In sum, the umbrella solution gave “relative freedom [to] national legislators in choosing the right of distribution, the right of communication to the public, the combination of these rights, or a new right, to fulfil obligations under Article 8”: M. Ficsor, *The Law of Copyright and the Internet: The 1996 WIPO Treaties, their Interpretation and Implementation* (2002), at p. 501. Accordingly, provided that the *Copyright Act* gives effect to art. 8’s goals through any combination of rights, Canada will be in compliance with its obligations under art. 8.

(4) What Is the Correct Interpretation of Section 2.4(1.1)?

[91] With the art. 8 context in mind, the reading that is most consistent with the text, structure, purpose, and context of s. 2.4(1.1) is as follows: s. 2.4(1.1) clarifies that (1) s. 3(1)(f) applies to on-demand streams, and (2) a work is performed as soon as it is made available for on-demand streaming. This interpretation gives effect to Canada’s obligations under art. 8 through a combination of the performance, reproduction, and authorization rights in s. 3(1). In so doing, it also respects the principle of technological

neutrality as it ensures that authors retain the same rights and royalties over their works regardless of whether the works are distributed online or offline.

[92] First, s. 2.4(1.1) clarifies that the communication right in s. 3(1)(f) applies to on-demand streams. When the *CMA* received royal assent, it was not clear whether s. 3(1)(f) applied to “pull” technologies like on-demand streams. In *Rogers*, for example, a group of music service providers argued that s. 3(1)(f) did not apply to newer “pull” technologies like on-demand streams. Section 2.4(1.1) ends this debate by clarifying that s. 3(1)(f) applies to on-demand technology, since on-demand technology “allows a member of the public to have access to [a work] from a place and at a time individually chosen by that member of the public”.

[93] The significance of s. 2.4(1.1) was blunted by *Rogers*, which interpreted s. 3(1)(f) as applying to on-demand streaming before s. 2.4(1.1) came into force. However, the *CMA* received royal assent before *Rogers* was released. Just as art. 8 did for the *Berne Convention*, s. 2.4(1.1) was intended to resolve an ambiguity and clarify that s. 3(1)(f) applies to on-demand streams. Had *Rogers* not been decided at the time or had it been decided differently, s. 2.4(1.1) would have significantly clarified the law: see J. de Beer, “Copyright Royalty Stacking”, in M. Geist, ed., *The Copyright Pentology: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (2013), 335, at p. 363.

[94] I also note that s. 2.4(1.1) provides slightly broader protection to authors than *Rogers* provides. Section 2.4(1.1)’s language makes clear that a single on-demand

stream to a member of the public is a “communication to the public” under s. 3(1)(f). By contrast, the *ratio* in *Rogers* held that on-demand streams could be communications to the public if there was a “series of point-to-point communications of the same work to an aggregation of individuals”: para. 52 (emphasis added). Under s. 2.4(1.1) there is no need to prove a “series” of point-to-point communications. A single point-to-point on-demand communication to a member of the public will engage s. 3(1)(f).

[95] Second, s. 2.4(1.1) clarifies that a work is performed as soon as it is made available for on-demand streaming. This interpretation is supported by the text of s. 2.4(1.1), its context, and the broader purpose of the *Copyright Act*.

[96] Textually, s. 2.4(1.1) says that a work is communicated when the work is made available in a way that “allows” a member of the public to access a work from a place and time of their choosing. It does not say that the work needs to be accessed for it to be communicated.

[97] Contextually, art. 8 supports this reading of s. 2.4(1.1). As discussed, art. 8 requires that member countries give authors the right to control the act of making works available, in addition to any resulting download or stream. One way to do so is to clarify that a work is performed as soon as it is made available for on-demand streaming.

[98] Finally, this interpretation is consistent with the purpose of the *Copyright Act* as it promotes technological neutrality. Historically, a work was performed as soon as the public was given the *opportunity* to experience the work for a limited period of

time. For example, when a work is transmitted over cable television, the work is performed, regardless of how many customers tune in to the channel. “[T]here need not be an audience listening to the performance, as long as the performance is meant for an audience”: Harris, at p. 141. As Ricketson and Ginsburg explain,

[i]f only one person initiates the on-demand transmission at a time (or ever) is there a “communication to the public” within the meaning of the Berne Convention? The number of recipients should not in fact matter; what should count is the availability of the communication to “the public”. For example, there is a “communication to the public by wire” of a cinematographic work (article 14^{bis}(1)) if a film is transmitted on cable television, even if no viewer in fact selects that channel to watch. What makes the communication “to the public” is the invitation to any member of the public to turn on the television and view the programme. Even when the cable transmission is restricted, for example, to paying subscribers, it still is “to the public” because any member of the public is invited to pay the fee. [Emphasis added; pp. 742-43.]

[99] Section 2.4(1.1) ensures that on-demand streams receive similar treatment. Section 2.4(1.1) makes it clear that a work is performed as soon as it is made available to the public for on-demand streaming because, at that point, users are given the opportunity to temporarily experience the work. Once a work is made available for on-demand streaming, all users have to do is tune in to the stream to experience the work. This is the digital equivalent of flipping to a 24/7 television channel that is continuously playing — that is performing — a particular work.

[100] This interpretation does not require treating the act of making the work available as a separate performance from the work’s subsequent transmission as a stream. The work is performed as soon as it is made available for on-demand streaming.

At this point, a royalty is payable. If a user later experiences this performance by streaming the work, they are experiencing an already ongoing performance, not starting a new one. No separate royalty is payable at that point. The “act of ‘communication to the public’ in the form of ‘making available’ is completed by merely making a work available for on-demand transmission. If then the work is actually transmitted in that way, it does not mean that two acts are carried out: ‘making available’ and ‘communication to the public’. The entire act thus carried out will be regarded as communication to the public”: Ficsor, at p. 508. In other words, the making available of a stream and a stream by a user are both protected as a single performance — a single communication to the public.

(5) Does the *Copyright Act* Accord With Article 8?

[101] With this interpretation in mind, I conclude that the *Copyright Act* gives effect to Canada’s obligations under art. 8 through a combination of the performance, reproduction, and authorization rights in s. 3(1).

[102] If works are streamed or made available for streaming, the author’s performance right as illustrated by s. 3(1)(f) is engaged. A user cannot stream a work or make a work available for on-demand streaming without engaging the author’s performance right in s. 3(1).

[103] However, since downloads do not engage s. 3(1)(f) or the author’s performance rights, the *Copyright Act* protects downloads through a different set of

rights: the reproduction and authorization rights. If a work is downloaded, the author's reproduction right is engaged; if the work is made available for downloading, the author's right to authorize reproductions is engaged. To understand this point, it is necessary to understand the right to authorize reproductions or performances of a work in s. 3(1).

[104] "It is an infringement of copyright for any person to do, without the consent of the copyright owner, anything that by this Act only the owner of the copyright has the right to do": s. 27(1). This includes the right to "authorize" a reproduction or performance: s. 3(1). To "authorize" means to sanction, approve and countenance: *CCH*, at para. 38, citing *Muzak Corp. v. Composers, Authors and Publishers Association of Canada, Ltd.*, [1953] 2 S.C.R. 182, at p.193. Whether a reproduction or performance has been authorized is a question of fact and can be "inferred from acts that are less than direct and positive, including a sufficient degree of indifference": *CCH*, at para. 38.

[105] Authorization is a distinct right granted to copyright owners. A user who unlawfully authorizes a reproduction or a performance of a work may be held liable for infringement of that right, regardless of whether the work is ultimately reproduced or performed: *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2002 FCA 187, [2002] 4 F.C. 213, at paras. 112-13; *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45, [2004] 2

S.C.R. 427, at para. 120; B. Sookman, S. Mason and C. Craig, *Copyright: Cases and Commentary on the Canadian and International Law* (2nd ed. 2013), at p. 1001.

[106] If an individual makes a work available for downloading, that person implicitly authorizes the work's reproduction: *Apple Computer, Inc. v. Mackintosh Computers Ltd.*, [1988] 1 F.C. 673 (C.A.), at p. 697, aff'd [1990] 2 S.C.R. 209. As the Copyright Board recognized in *SOCAN Statement of Royalties, Public Performance of Musical Works 1996, 1997, 1998 (Tariff 22, Internet) (Re)* (1999), 1 C.P.R. (4th) 417,

“[a]uthorization” constitutes a separate protected use under the *Act*. To authorize is to sanction, approve and countenance. The person who makes a musical work available on an Internet-accessible site authorizes its communication. The work is posted for the sole purpose of being communicated and with full knowledge and intention that such a communication would occur. The person who makes the work available does more than merely provide the means to communicate the work; he/she either controls or purports to control the right to communicate it.

...

Moreover, it is the act of posting that constitutes authorization. By doing so, a person invites anyone with Internet access to have the work communicated to them. [Footnotes omitted; pp. 455-57.]

See also *Warman v. Fournier*, 2012 FC 803, 104 C.P.R. (4th) 21, at para. 13.

[107] While the above passage refers to communications, the Board's comments are similarly applicable to reproductions. If a person makes a work available for downloading without authorization, that person infringes the copyright owner's right to authorize reproductions. That is so regardless of whether the works are ultimately downloaded.

[108] Together, the performance, reproduction, and authorization rights in s. 3(1) of the *Copyright Act* give effect to Canada's obligations under art. 8 and they do so in a technologically neutral manner. If a work is streamed or made available for on-demand streaming, the author's performance right is engaged. If a work is downloaded, the author's reproduction right is engaged. If a work is made available for downloading, the author's right to authorize reproductions is engaged. There are no gaps in protection.

[109] I would add that there is nothing novel about relying on a combination of rights to give effect to the obligations under art. 8. As noted above, the United States also relies on a combination of rights to satisfy art. 8's requirements. As the United States Copyright Office explained, when examining the United States' compliance with the *WIPO Copyright Treaty*,

[t]he Office maintains its longstanding view that the act of making a copyrighted work available in such a way that members of the public may access it at a time and place of their choosing will implicate one or more of the exclusive rights under Section 106 of the U.S. Copyright Act. In general, where a party offers members of the public access to a work in the form of a download, the offer implicates the right of distribution. Where access is offered in the form of a stream or the showing of an image, the relevant right is that of public performance or public display. In each case, the applicable statutory provision satisfies the essential elements of the treaty obligation, including specifically the requirements that the exclusive right cover (1) offers to communicate a work, not just completed transmissions, and (2) individualized communications that can be received in separate places and at different times. [p. 74]

D. *Summary*

[110] To recap, I do not agree with the Board's interpretation of s. 2.4(1.1). The reading most consistent with the text, structure, purpose and context of s. 2.4(1.1) is as follows: s. 2.4(1.1) clarifies that (1) s. 3(1)(f) applies to on-demand streams, and (2) a work is performed as soon as it is made available for on-demand streaming.

[111] This interpretation of s. 2.4(1.1) gives effect to Canada's obligations under art. 8. There is no way to download a work, stream a work, or make a work available for on-demand streaming or downloading that does not engage one of the author's exclusive rights in s. 3(1).

[112] This interpretation is also technologically neutral. Similar to offline distributions, downloading or streaming works will continue to engage only one copyright interest and require paying one royalty — a reproduction royalty for downloads or a performance royalty for streams. If a work is downloaded or made available for downloading, s. 3(1)(f) is not engaged. If a work is made available for streaming and later streamed, s. 3(1)(f) is only engaged once.

[113] Before concluding, I would note that the value of these rights is not in issue in this appeal. Setting the appropriate royalties to compensate authors when these rights are engaged is a matter for the Board to decide. Similarly, the considerations that a court might have regard to in assessing monetary remedies for infringement is a matter to be decided if and when such a case arises.

VII. Conclusion

[114] For the foregoing reasons, I would dismiss the appeal. Apple Inc. and Apple Canada Inc. are awarded their costs in this Court; the remaining respondents are awarded their costs in this Court and in the Federal Court of Appeal.

The reasons of Karakatsanis and Martin JJ. were delivered by

KARAKATSANIS J. —

[115] In *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, this Court sought to bring coherence and predictability to the law governing judicial review. The majority “set out a holistic revision of the framework” anchored in a strong presumption of reasonableness, which could only be rebutted in five situations (para. 143).

[116] This case does not fall within any of those categories. Nevertheless, my colleague concludes the standard of review is correctness. Even though the majority in *Vavilov* did not choose to recognize concurrent first instance jurisdiction between courts and administrative bodies as an exception to the presumption of reasonableness, my colleague does so, creating a sixth category of correctness review. I cannot agree.

[117] By creating a new correctness category only three years after a majority of the Court set out a comprehensive framework, my colleague’s conclusion undermines *Vavilov*’s promise of certainty and predictability. His approach shows no fidelity to the

majority's reasons in *Vavilov*, which were “the product of careful consideration undertaken following extensive submissions and based on a thorough review of the relevant jurisprudence” (para. 69). This thorough review obviously considered correctness cases of recent vintage, such as *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 S.C.R. 283. Indeed, the majority cited *Rogers* at para. 48.

[118] In my view, a faithful application of the *Vavilov* framework can only result in one conclusion — the standard of review in this case is reasonableness. Even so, the Copyright Board of Canada's decision cannot be upheld. The reasons are unreasonable in light of the statutory context and this Court's precedents.

[119] My reasons proceed in three parts. First, I address the applicable standard of review in light of *Vavilov*. Second, I discuss the appropriate approach to a reasonableness review. Finally, I turn to the Board's reasons in this case (2017 CanLII 152886).

I. The Standard of Review is Reasonableness

[120] In the decade following the Court's decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, the standard of review proved contentious. *Vavilov* promised to bring the parties' focus back to the substantive merits of their case rather than the governing test (para. 69, quoting *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3

S.C.R. 654, at para. 36, which quoted *Dunsmuir*, at para. 145, per Binnie J., concurring).

[121] In granting leave in *Vavilov*, the Court “viewed these appeals as an opportunity to consider the law applicable to the judicial review of administrative decisions as addressed in *Dunsmuir* and subsequent cases” (para. 6 (emphasis added)). The Court “appointed two *amici curiae*, invited the parties to devote a substantial portion of their submissions to the standard of review issue, and granted leave to 27 interveners, comprising 4 attorneys general and numerous organizations representing the breadth of the Canadian administrative law landscape” (*Vavilov*, at para. 6).

[122] In addition to hearing from a broad range of parties, the Court undertook an exhaustive review of its jurisprudence, including recent correctness cases: *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45, [2004] 2 S.C.R. 427, at paras. 48-50; *Rogers*, at paras. 10-20; *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57, [2015] 3 S.C.R. 615 (*CBC*), at para. 35. The majority’s decision was “the product of careful consideration undertaken following extensive submissions and based on a thorough review of the relevant jurisprudence” (*Vavilov*, at para. 69 (emphasis added)).

[123] With the assistance of submissions and our existing jurisprudence, the majority set out a new “holistic” framework. *Vavilov* was explicit about what it accomplished: a presumption of reasonableness in judicial review that could only be displaced in five situations. Those situations are: (i) where the legislature explicitly

prescribes the applicable standard of review; (ii) where the legislature has provided a statutory appeal mechanism; (iii) constitutional questions; (iv) general questions of law of central importance to the legal system as a whole; and (v) questions related to the jurisdictional boundaries between two or more administrative bodies (*Vavilov*, at paras. 17 and 69). The Court made clear “that these reasons address all of the situations in which a reviewing court should derogate from the presumption of reasonableness review” (*Vavilov*, at para. 69 (emphasis added)).

[124] Concurrent jurisdiction at first instance was not among these five exceptional categories. Although the Court did not “definitively foreclose the possibility that another category could be recognized”, noting that “it would be unrealistic to declare that we have contemplated every possible set of circumstances [that would] require a derogation from the presumption of reasonableness”, this was clearly not so with concurrent first instance jurisdiction between the Copyright Board and courts (para. 70). I repeat the obvious: The Court had its own recent precedent in *Rogers* before it — a decision that is cited in *Vavilov*. The establishment of new categories was explicitly reserved for possible circumstances the Court could not realistically foresee. It is “unrealistic” to suggest that the Court’s *own precedent* represents a “possible set of circumstances” that it could not “have contemplated”.

[125] Instead, the Court chose *not* to make first instance concurrent jurisdiction an exception. In so doing, it overturned *Rogers* on the standard of review issue. This was not an oversight. Nor was it inadvertent. The majority acknowledged that the

judgment “depart[ed] from the Court’s existing jurisprudence on standard of review in certain respects” (*Vavilov*, at para. 18).

[126] Finally, even if *Rogers* had *not* been within the contemplation of the Court, it would not qualify as an additional exceptional correctness category: “any new basis for correctness review would be exceptional and would need to be consistent with the framework and the overarching principles set out in these reasons” (*Vavilov*, at para. 70).

[127] I reject the suggestion that this is such a rare and exceptional circumstance. A new category of concurrent jurisdiction at first instance cannot be justified on the basis of the rule of law or legislative intent. These considerations did not justify the creation of this category in *Vavilov*. They do not justify creating this category now.

[128] First, I agree with the majority in *Vavilov* that “the more robust form of reasonableness review . . ., which accounts for the value of consistency and the threat of arbitrariness, is capable, in tandem with internal administrative processes to promote consistency and with legislative oversight . . ., of guarding against threats to the rule of law” (para. 72 (citation omitted)). With courts also acting as first instance decision makers, a robust form of reasonableness is even more equipped to safeguard the rule of law. Specifically, a binding and material precedent will place a limit on what is reasonable in the circumstances (*Vavilov*, at paras. 111-12, per the majority, and para. 293, per Abella and Karakatsanis JJ., dissenting, but not on this point).

[129] Administrative decision makers also play an important role in upholding and applying the rule of law. In any event, consistency in decision making and the rule of law cannot be absolute in nature regardless of the context (*Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756, at pp. 787-88).

[130] In my view, recognizing a sixth category on the basis of the rule of law flouts *stare decisis* principles and therefore runs directly *counter* to the rule of law. Ultimately, a faithful application of the majority's framework in *Vavilov* cannot credibly justify the creation of a sixth correctness category on this basis.

[131] Second, the *Copyright Act*, R.S.C. 1985, c. C-42, gives no clear signal of legislative intent regarding the applicable standard of review. *Vavilov* states that the legislature can provide this signal in two ways: it can explicitly prescribe the standard, or it can provide a statutory appeal mechanism (para. 33). Concurrent jurisdiction between a tribunal and a court was before the Court in *Vavilov* but was not identified as an analogous signal of legislative intent requiring correctness review. Here, there is no legislated standard of review, statutory appeal mechanism, nor any other analogous provisions. Legislative choice “pulls in two directions” — the absence of these “clear signals” is telling (*Vavilov*, at paras. 39 and 49). It follows that a sixth category cannot be established on the basis of Parliament's intent.

[132] Consequently, neither legislative intent nor the rule of law can bring this case into the realm of the “rare and exceptional” — to conclude otherwise sweeps aside

the Court’s recently established framework governing the standard of review. Rather, the creation of a sixth category is simply contrary to the majority reasons in *Vavilov*. This Court’s “guidance . . . should be treated as binding” when it “turns its full attention to an issue and deals with it definitively” (M. Rowe and L. Katz, “A Practical Guide to *Stare Decisis*” (2020), 41 *Windsor Rev. Legal Soc. Issues* 1, at p. 10).

[133] Although my colleague relies on para. 70 to steer off the clear pathway set by *Vavilov*, it must be read in the context of the preceding paragraph. Paragraph 69 speaks for itself:

In these reasons, we have identified five situations in which a derogation from the presumption of reasonableness review is warranted either on the basis of legislative intent (i.e., legislated standards of review and statutory appeal mechanisms) or because correctness review is required by the rule of law (i.e., constitutional questions, general questions of law of central importance to the legal system as a whole, and questions regarding jurisdictional boundaries between administrative bodies). This framework is the product of careful consideration undertaken following extensive submissions and based on a thorough review of the relevant jurisprudence. We are of the view, at this time, that these reasons address all of the situations in which a reviewing court should derogate from the presumption of reasonableness review. As previously indicated, courts should no longer engage in a contextual inquiry to determine the standard of review or to rebut the presumption of reasonableness review. Letting go of this contextual approach will, we hope, “get the parties away from arguing about the tests and back to arguing about the substantive merits of their case”: *Alberta Teachers*, at para. 36, quoting *Dunsmuir*, at para. 145, per Binnie J., concurring.

[134] For all these reasons, I conclude that the majority decision in *Vavilov* compels review of the Board’s decision under a reasonableness standard.

[135] Given the majority's departure from *Vavilov*, I would sound a note of caution. Questioning the continued authority of correctness cases that predate *Vavilov* undermines the Court's framework and its goal of promoting consistency, coherence, and certainty in the law of judicial review. Regrettably, my colleague's approach will not be without consequences. Not only will it open the door to endless litigation concerning possible exceptions to the reasonableness presumption, it will erode the presumption of reasonableness in all standard of review cases going forward. This result is precisely what *Vavilov* aimed to avoid.

II. Reasonableness Review

[136] Before turning to the Board's reasons in this case, I address the approach to reasonableness review. First, three clarifying comments.

[137] In *Vavilov*, the Court was clear: there is only one standard of reasonableness. The Court expressly rejected the idea that context could modify the standard or degree of scrutiny by the reviewing court. While context does not affect the standard of review, it is obviously important in determining whether the decision itself is reasonable (*Vavilov*, at para. 67; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 59). To the extent that the reasons of the Federal Court of Appeal imply otherwise, they are incorrect (2020 FCA 100, [2021] 1 F.C.R. 374).

[138] Second, I would also note that, in conducting a reasonableness review, it is not helpful to review the factors set out by the court below in paras. 26-36 of their reasons. *Vavilov* was designed to provide a clear, coherent and *comprehensive* framework, so additional considerations are unnecessary and undermine the Court's goal of bringing clarity to the standard of review.

[139] Finally, it is misleading to characterize the Court's recent jurisprudence as a return to textualism, as the Federal Court of Appeal did, at para. 42. As the Court confirmed in *Vavilov*, courts and administrative decision makers alike interpret a statutory provision "by applying the 'modern principle' of statutory interpretation, that is, that the words of a statute must be read 'in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament'" (*Vavilov*, at para. 117, citing *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21, and *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26, both quoting E. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87).

[140] Context and consequences remain essential (see, e.g., *Uber Technologies Inc. v. Heller*, 2020 SCC 16). A purely textual reading is inconsistent with a broad and remedial approach to statutory interpretation. And, as Abella J. and I have noted elsewhere, "words matter, policy objectives matter, and consequences matter" (*TELUS Communications Inc. v. Wellman*, 2019 SCC 19, [2019] 2 S.C.R. 144, at para. 108).

[141] With those clarifications in mind, the framework for reasonableness review can be plainly stated as follows.

[142] A reasonable decision is “one that is based on an internally coherent and rational chain of analysis” that operates within the bounds set by the context (*Vavilov*, at para. 85; see also paras. 293 and 296, per Abella and Karakatsanis JJ., dissenting, but not on this point). The reviewing court asks “whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility” (*Vavilov*, at para. 99). This approach requires the reviewing court to start with how the decision maker arrived at their interpretation and to determine whether that interpretation was defensible in light of the facts and the law (*Vavilov*, at para. 86, per the majority, and para. 205, per Abella and Karakatsanis JJ., both quoting *Dunsmuir*, at para. 47).

[143] Statutory interpretation questions may be evaluated on a reasonableness standard (*Vavilov*, at para. 115). Where this standard applies, “the reviewing court does not undertake a *de novo* analysis of the question or ‘ask itself what the correct decision would have been’” (*Vavilov*, at para. 116, quoting *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247, at para. 50). Rather, “the court must examine the administrative decision as a whole, including the reasons provided by the decision maker and the outcome that was reached” (*Vavilov*, at para. 116).

[144] The court does so, as explained above, in reference to the modern principle of statutory interpretation. Although administrative decision makers need not engage in a formalistic interpretation, their task is to interpret the contested provision in a

manner that is consistent with the text, context and purpose, applying their particular insight into the statutory scheme at issue (*Vavilov*, at paras. 120-21).

[145] At all times, a reasonableness review proceeds from a posture of deference. It finds its starting point in judicial restraint and respects the distinct role of administrative decision makers (*Vavilov*, at para. 75). It follows that a decision must be afforded a fair and generous construction.

[146] The party challenging the decision must satisfy the court “that any shortcomings or flaws relied on . . . are sufficiently central or significant to render the decision unreasonable” (*Vavilov*, at para. 100). In this case, that burden lies with the respondents.

III. Applying the Standard of Review in This Case

[147] I turn now to the application of the reasonableness standard in this case.

[148] As I will explain, the Board’s decision is unreasonable because it disregards two significant considerations: (i) a recent precedent from the Court, and (ii) the guiding principles of the statutory scheme. Although administrative decision makers need not “explicitly address all possible shades of meaning”, the Board did not consider key elements that supported a contrary interpretation of the relevant statutory provision (*Vavilov*, at para. 122, quoting *Construction Labour Relations v. Driver Iron Inc.*, 2012 SCC 65, [2012] 3 S.C.R. 405, at para. 3).

[149] First, the Board's decision is unreasonable because it interpreted s. 2.4(1.1) without meaningful consideration of the legal context, as required by *Vavilov*, at para. 112. Specifically, the Board determined, at para. 136, that *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34, [2012] 2 S.C.R. 231 (*ESA*) — a relevant and binding precedent from this Court — was distinguishable and therefore not binding. As a result, the Board considered it irrelevant to an interpretation of s. 2.4(1.1).

[150] In my view, it was unreasonable for the Board to disregard *ESA* — the leading domestic authority on s. 3(1)(f). It did so for three reasons. The Board first dismissed the applicability of *ESA* because it was decided without reference to the *WIPO Copyright Treaty*, Can. T.S. 2014 No. 20, or the *WIPO Performances and Phonograms Treaty*, Can. T.S. 2014 No. 21. Although I agree that the Treaties form part of the relevant legal context, this was not a cogent basis to disregard or distinguish *ESA*'s interpretation of the *Copyright Act*, especially because domestic law always prevails (*National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324, at pp. 1371-72).

[151] The Board next pointed out that *ESA* was decided against a different legislative backdrop. Yet, three critical aspects of the legislation remained the same with the enactment of the *Copyright Modernization Act*, S.C. 2012, c. 20 (*CMA*): (i) the language of s. 3(1)(f), (ii) the *Copyright Act*'s fundamental distinction between performance and reproduction rights, and (iii) Parliament's commitment to preserve

technological neutrality. All these aspects were critical to the Court’s reasoning in *ESA* and have implications for the reasonable interpretations available to the Board. It was unreasonable for the Board to disregard the similarities in context.

[152] Finally, the Board noted that the “previous interpretation of ‘communicate’ in *ESA* focussed only on the transmission element of that right and is distinguishable” (para. 117). While *ESA* considered the definition of “communication” in a more narrow sense because it only focussed on part of the activity in question (i.e., downloads), summarily dispensing with its guidance was inappropriate. The act of making available is inextricably bound with any subsequent transmission — someone cannot stream or download a work without it first being made available. A consideration of this whole transaction is necessary because otherwise the Board could not assess the entirety of rights engaged. The result, as is evident, is an interpretation that would create two rights for a single activity, which fails to strike a proper balance between user and creator rights.

[153] Had the Board meaningfully engaged with *ESA*, it would not have rendered a decision that captured downloads — a reproductive activity — within an act of communication, contrary to *ESA*, at para. 39, nor would it have effectively created two separate rights for a single activity, contrary to *ESA*, at para. 41. Without a cogent reason to distinguish *ESA*, the Board unreasonably neglected the Court’s interpretation of s. 3(1)(f) and reached a conclusion that is inconsistent with a material legal precedent of the Court.

[154] The Board’s decision was also unreasonable in the context of the broader statutory scheme.

[155] First, as the Court has recognized, the Act aims to strike a balance between the interests of user and creator, and the proper balance “lies not only in recognizing the creator’s rights but in giving due weight to their limited nature” (*Théberge v. Galerie d’Art du Petit Champlain inc.*, 2002 SCC 34, [2002] 2 S.C.R. 336, at para. 31). With the benefit of duplicate royalties, the equilibrium now swings heavily in the creator’s favour, contrary to this Court’s instructions to maintain balance in *CBC*, at para. 63, and *ESA*, at paras. 9 and 11. The Board’s reasons fail to meaningfully address the duplicate royalties that would arise when a work is subsequently downloaded or streamed. This was unreasonable in light of the Court’s caution against this precise kind of layering of rights, or “double-dipping” of tariffs (*ESA*, at para. 11). This aspect of the Board’s decision was not reasonable.

[156] Second, the Board’s reasons with respect to technological neutrality — a guiding interpretive principle for the Act — were unreasonable. At para. 128, the Board recognized that the *CMA* expressed Parliament’s goal to ensure the Act remains technologically neutral. It also acknowledged that the principle of technological neutrality applies unless there is evidence of Parliamentary intent to the contrary (para. 127). Yet, the interpretation advanced by the Board was not technologically neutral because, contrary to the importance placed on technological neutrality by this

Court in *ESA*, at para. 2, and *CBC*, at para. 66, it opened the door to duplicate royalties simply because the transaction takes place online.

[157] The Board's sole basis for concluding that the principle of technological neutrality does not limit or restrict the meaning of s. 2.4(1.1) was confined to one sentence highlighting "the legislative history, the rationale for the WIPO Internet Treaties, and the legislative objective to fully implement those treaties using a 'coordinated approach'" (para. 129). The Board did not explain how this can displace Parliament's express intention to enact the *CMA* in a technologically neutral way. Without displacing Parliament's intent, the Board could not endorse an interpretation that applied differently to diverse forms of media. The Board's decision in this respect was unreasonable.

[158] In summary, the failure of the Board to consider the Court's material and binding precedents or the animating themes of the *Copyright Act* was unreasonable. While a failure to consider "a pertinent aspect of [a provision's] text, context or purpose" will not always be fatal under a reasonableness review, this is not a case where the omission is a minor aspect of the interpretive context (*Vavilov*, at para. 122). As a result, I do not accept the Board's interpretation of s. 2.4(1.1).

[159] Unless there is only one reasonable outcome, as a general rule, a court applying the reasonableness standard refrains from deciding the issue (*Vavilov*, at paras. 83 and 110). Accordingly, a reviewing court "does not ask what decision it would have made in place of that of the administrative decision maker, attempt to

ascertain the ‘range’ of possible conclusions that would have been open to the decision maker, conduct a *de novo* analysis or seek to determine the ‘correct’ solution to the problem” (*Vavilov*, at para. 83).

[160] If correctness was the applicable standard, then I would agree with my colleague’s conclusion that s. 2.4(1.1) could not be read as creating a new independent right that is triggered when works are made available for downloading or on-demand streaming, nor as creating a separate tariff. Nothing in the text, context, or purpose of s. 2.4(1.1) suggests otherwise, particularly when viewed in light of the legal landscape in which it operates.

IV. Disposition

[161] I would dismiss the appeal. Remitting the matter for a new interpretation is unnecessary because it would not change the result on the merits: the Board already found that it did not have sufficient evidence to determine what tariff should apply to the making available activity.

Appeal dismissed.

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