

**SUPREME COURT OF CANADA**

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| **Citation:** Entertainment Software Association *v.* Society of Composers, Authors and Music Publishers of Canada,  2012 SCC 34, [2012] 2 S.C.R. 231 | **Date:** 20120712  **Docket:** 33921 |

**Between:**

**Entertainment Software Association and Entertainment Software Association of Canada**

Appellants

and

**Society of Composers, Authors and Music Publishers of Canada**

Respondent

- and -

**CMRRA-SODRAC Inc., Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic and Cineplex Entertainment LP**

Interveners

**Coram:** McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

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| **Joint Reasons for Judgment:**  (paras. 1 to 44)  **Dissenting Reasons:**  (paras. 45 to 128) | Abella and Moldaver JJ. (McLachlin C.J. and Deschamps and Karakatsanis JJ. concurring)  Rothstein J. (LeBel, Fish and Cromwell JJ. concurring) |

Entertainment Software Association *v.* Society of Composers, Authors and Music Publishers of Canada, 2012 SCC 34, [2012] 2 S.C.R. 231

Entertainment Software Association and

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v.

Society of Composers, Authors and Music Publishers of Canada *Respondent*

and

CMRRA‑SODRAC Inc., Samuelson‑Glushko Canadian

Internet Policy and Public Interest Clinic and Cineplex

Entertainment LP *Interveners*

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

2012 SCC 34

File No.: 33921.

2011: December 6; 2012: July 12.

Present: McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

on appeal from the federal court of appeal

*Intellectual property — Copyright — Right to communicate a work to the public by telecommunication — Copyright Board certifying tariff for communication rights in copyrighted music contained in video games sold for download on Internet — Whether transmission of musical works contained in a video game through an Internet download is a communication to the public — Copyright Act, R.S.C. 1985, c. C-42, s. 3(1)(f).*

The appellants ESA represent a coalition of video game publishers and distributors who enable customers to download copies of video games from the Internet. These copies are identical to copies purchased in stores or shipped to customers by mail. The video games contain copyrighted musical works. The royalties for the reproduction of those musical works are negotiated before the games are sold to the public. The respondent SOCAN, which administers the right to “communicate” musical works on behalf of copyright owners, applied to the Copyright Board for a tariff covering downloads of musical works over the Internet. The Copyright Board concluded that the download of a file containing a musical work is a communication to the public by telecommunication within the meaning of s. 3(1)(*f*) of the *Copyright Act*, entitling SOCAN’s members to compensation in accordance with an approved tariff. On judicial review, the Federal Court of Appeal upheld the Copyright Board’s decision.

*Held* (LeBel, Fish, Rothstein and Cromwell JJ. dissenting): The appeal should be allowed.

*Per* McLachlin C.J. and Deschamps, Abella,Moldaver and Karakatsanis JJ.: The Copyright Board’s conclusion that the Internet delivery of a permanent copy of a video game containing musical works amounted to a “communication” under s. 3(1)(*f*) of the *Copyright Act* should be set aside.

The Board’s conclusion that a separate, “communication” tariff applies to downloads of musical works violates the principle of technological neutrality. This principle requires that the *Act* apply equally between traditional and more technologically advanced media forms. There is no practical difference between buying a durable copy of the work in a store, receiving a copy in the mail, or downloading an identical copy using the Internet. ESA has already paid reproduction royalties to the copyright owners for the video games. Absent evidence of Parliamentary intent to the contrary, we interpret the *Act* in a way that avoids imposing an additional layer of protections and fees based solely on the method of delivery of the work to the end user. To do otherwise would effectively impose a gratuitous cost for the use of more efficient, Internet-based technologies. The Internet should be seen as a technological taxi that delivers a durable copy of the same work to the end user. The traditional balance in copyright between promoting the public interest in the encouragement and dissemination of works and obtaining a just reward for the creators of those works should be preserved in the digital environment.

The term “communicate” in s. 3(1)(*f*) is not defined in the *Act*, but the legislative history of the *Act* demonstrates that the right to “communicate” is historically connected to the right to perform a work and not the right to reproduce permanent copies of the work. The 1988 amendment in the *Act* from “communicate . . . by radio communication” to “communicate . . . by telecommunication” does not demonstrate Parliament’s intent to remove all reference in s. 3(1)(*f*) to conventional performance or broadcasting activities, or to expand the communication right to technologies such as downloading that involve transmitting data in a way that gives end users a permanent copy of the work. Instead, the replacement of the words “radio communication” with “telecommunication” should be understood as merely expanding the *means* of communicating a work — that is, from radio waves to cable and other future technologies. By substituting the word “telecommunication” in 1988, Parliament did not intend to change the fundamental nature of the communication right, which has been concerned with performance-based activities for over 50 years.

Applying the dictionary definition of the word “communicate” has the effect of ignoring a solid line of legislative history connecting the term “communicate” to performance-based activities. The term “communicate” in s. 3(1)(*f*) should not be transformed by the use of the word “telecommunication” in a way that would capture activities that resemble reproduction. Such transformation would result in abandoning the traditional distinction in the *Act* between performance‑based rights and rights of reproduction.

*Per* LeBel, Fish, Rothstein and Cromwell JJ. (dissenting): The creators of works downloaded from the Internet are entitled to both communication and reproduction rights. Copyright is a creature of statute comprised of a bundle of independent statutory rights. Although a technologically neutral copyright law is desirable, the *Act* cannot be interpreted in a manner that divests these rights of their independent content. The right of reproduction continues to apply to copies made through downloads notwithstanding that they are digital copies and the communication right continues to apply to digital communications notwithstanding that they may differ from traditional broadcasting technologies.

The general rules of statutory interpretation require that the words of the *Act* are to 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. The word “communicate” is not defined in the *Act*. Parliament is presumed to use words in their ordinary meaning and d**ictionary definitions give** “communicate” and “transmit” overlapping meanings. Nothing in the context in which the words are used in the *Act* indicates that “communicate” is distinct in meaning from “transmit” or is limited to transmissions of information in a humanly perceptible form for immediate perceiving and listening.

The communication right set out in s. 3(1)(*f*) of the *Act* is a self‑standing right that is independent of the performance right set out in the introductory portion of s. 3(1). The rights listed in paragraphs 3(1)(*a*) to 3(1)(*i*) are in addition to the rights to produce or reproduce, perform or publish. Nor does the legislative history of s. 3(1)(*f*) confine the communication right to being only a variation of the performance right. Although there is an historic relationship between the right of public performance and the right to communicate to the public, the legislation has evolved. By adopting the word “telecommunication”, Parliament removed the historic reference to conventional broadcasting and encompassed evolving technologies. The current language of the *Act* does not support a conclusion that s. 3(1)(*f*) only applies to traditional broadcasting technologies.

The application of the communication right does not depend on the purpose of the communication. The fact that the Internet transmission delivers a copy of a video game, which contains a musical work, does not change the fact that there is an Internet communication requiring authorization of the copyright holder.

No policy concern arises because the reproduction right and the communication right are distinct and separate rights. The fact that there are two protected rights does not restrict the protection afforded by each right. To characterize an Internet transmission as a mere “method of delivery” of a work and limit the copyright to reproduction rights would pre-empt the application of the communication right. Inferring limits into the communication right for policy reasons is beyond the function of the courts.

**Cases Cited**

By Abella and Moldaver JJ.

**Referred to:** *Robertson v. Thomson Corp.*, 2006 SCC 43, [2006] 2 S.C.R. 363; *Théberge v. Galerie d’Art du Petit Champlain inc*., 2002 SCC 34, [2002] 2 S.C.R. 336; *Bishop v. Stevens*, [1990] 2 S.C.R. 467; *Composers, Authors and Publishers Assoc. of Canada Ltd. v. CTV Television Network Ltd.*, [1968] S.C.R. 676; *Canadian Wireless Telecommunications Assn. v. Society of Composers, Authors and Music Publishers of Canada*, 2008 FCA 6, [2008] 3 F.C.R. 539; *Canadian Admiral Corp. v. Rediffusion, Inc.*, [1954] Ex. C.R. 382; *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45, [2004] 2 S.C.R. 427; *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031; *Ash v. Hutchinson & Co. (Publishers), Ltd.*, [1936] 2 All E.R. 1496; *Apple Computer Inc. v. Mackintosh Computers Ltd.*, [1987] 1 F.C. 173.

By Rothstein J. (dissenting)

*Théberge v. Galerie d’Art du Petit Champlain inc*., 2002 SCC 34, [2002] 2 S.C.R. 336; *Compo Co. v. Blue Crest Music Inc.*, [1980] 1 S.C.R. 357; *Bishop v. Stevens*, [1990] 2 S.C.R. 467; *SOCAN Statement of Royalties, Public Performance of Musical Works 1996, 1997, 1998 (Tariff 22, Internet) (Re)* (1999), 1 C.P.R. (4th) 417; *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45, [2004] 2 S.C.R. 427; *SOCAN Statement of Royalties, Internet ― Other Uses of Music 1996‑2006 (Tariffs 22.B‑22.G)* (2008), 70 C.P.R. (4th) 81; *Bell Canada v. Society of Composers, Authors and Music Publishers of Canada*, 2010 FCA 220, 409 N.R. 102; *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 S.C.R. 283; *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339; *Canadian Wireless Telecommunications Assn. v. Society of Composers, Authors and Music Publishers of Canada*, 2008 FCA 6, [2008] 3 F.C.R. 539, leave to appeal refused, [2008] 2 S.C.R. vi; *Composers, Authors and Publishers Assoc. of Canada Ltd. v. CTV Television Network Ltd.*, [1968] S.C.R. 676; *Canadian Admiral Corp. v. Rediffusion, Inc.*, [1954] Ex. C.R. 382; *United States v. American Society of Composers, Authors and Publishers*, 627 F.3d 64 (2010), cert. denied (U.S.S.C., October 3, 2011, No. 10-1337); *Robertson v. Thomson Corp.*, 2006 SCC 43, [2006] 2 S.C.R. 363.

**Statutes and Regulations Cited**

17 U.S.C. §§ 101, 106(4) (2000).

*Act to amend the Copyright Act*, S.C. 1993, c. 23, s. 3.

*Act to amend the Copyright Act*, S.C. 1997, c. 24, ss. 18, 45.

*Canada‑United States Free Trade Agreement Implementation Act*, S.C. 1988, c. 65, ss. 61 to 65.

*Copyright Act*, R.S.C. 1985, c. C‑42, ss. 2 “telecommunication”, 2.2(1) “publication”, 2.4(1)(*c*), 3(1)(*f*), 15(1), 27(2), 29.4(2), 30.8(1), 67 to 68.2.

*Copyright Act, 1921*, S.C. 1921, c. 24, ss. 2(*q*) “performance”, 3(1).

*Copyright Amendment Act, 1931*, S.C. 1931, c. 8, ss. 2(3) “performance”, 3.

*Statement of Proposed Royalties to Be Collected by SOCAN for the Public Performance or the Communication to the Public by Telecommunication, in Canada, of Musical or Dramatico‑Musical Works*, (2005) 139 Can. Gaz. I (Supp.).

**Treaties and Other International Instruments**

*Berne Convention for the Protection of Literary and Artistic Works*, 828 U.N.T.S. 221, September 9, 1886; rev. in Berlin November 13, 1908, art. 11, 13, 14; rev. in Rome June 2, 1928, art. 11*bis*.

*Canada‑U.S. Free Trade Agreement*, 1987, arts. 2005, 2006.

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APPEAL from a judgment of the Federal Court of Appeal (Létourneau, Nadon and Pelletier JJ.A.), 2010 FCA 221, 406 N.R. 288, 323 D.L.R. (4th) 62, 86 C.P.R. (4th) 258, 14 Admin. L.R. (5th) 151, [2010] F.C.J. No. 1088 (QL), 2010 CarswellNat 3113, affirming a decision of the Copyright Board, www.cb-cda.gc.ca/decisions/2007/20071018-m-e.pdf, (2007), 61 C.P.R. (4th) 353, [2007] C.B.D. No. 7 (QL), 2007 CarswellNat 3466. Appeal allowed, LeBel, Fish, Rothstein and Cromwell JJ. dissenting.

*Barry B. Sookman* and *Daniel G. C. Glover*, for the appellants.

*Gilles Daigle*, *D. Lynne Watt*, *Paul Spurgeon* and *Henry Brown*, *Q.C.*, for the respondent.

Written submissions only by *Casey M. Chisick*, *Timothy Pinos* and *Jason Beitchman*, for the intervener CMRRA‑SODRAC Inc.

Written submissions only by *Jeremy de Beer* and *David Fewer*, for the intervener the Samuelson‑Glushko Canadian Internet Policy and Public Interest Clinic.

Written submissions only by *Tim Gilbert*, *Sana Halwani* and *Sundeep Chauhan*, for the intervener Cineplex Entertainment LP.

The judgment of McLachlin C.J. and Deschamps, Abella, Moldaver and Karakatsanis JJ. was delivered by

1. Abella and Moldaver JJ. — In the video game publishing industry, the royalties for the reproduction of any musical works which are incorporated into the games are currently negotiated before the games are packaged for public sale. Once these rights have been negotiated, the owner of the copyright in the musical work has no further rights when the game is sold. The question in this appeal is whether the rights are nonetheless revived when the work is sold over the Internet instead of in a store. In our view, it makes little sense to distinguish between the two methods of selling the same work.
2. The Copyright Board concluded that video games containing a musical work, the royalties to which have already been negotiated with the copyright owner, were nonetheless subject to a new fee when sold over the Internet ((2007), 61 C.P.R. (4th) 353). Its decision was upheld by the Federal Court of Appeal (2010 FCA 221, 406 N.R. 288). In our respectful view, the Board’s decision misconstrues the provisions at issue in the *Copyright Act*, R.S.C. 1985, c. C-42, ignoring decades of legislative history, and violates the principle of technological neutrality, which requires that the *Act* apply equally notwithstanding the technological diversity of different forms of media.

**Analysis**

1. The provision at issue in this appeal is s. 3(1)(*f*) of the *Copyright Act*, which states that copyright owners have the sole right

in the case of any literary, dramatic, musical or artistic work, to *communicate* the work *to the public by telecommunication* . . . .

1. The focus of this appeal is on the meaning of the word “communicate” in s. 3(1)(*f*), a term which is not defined in the *Act*. The Society of Composers, Authors and Music Publishers of Canada (SOCAN), which administers the right to “communicate” musical works on behalf of copyright owners, applied to the Board for a tariff under this provision to cover downloads of musical works over the Internet. The Entertainment Software Association and the Entertainment Software Association of Canada (collectively, ESA), which represent a broad coalition of video game publishers and distributors, objected to the tariff, arguing that “downloading” a video game containing musical works did not amount to “communicating” that game to the public by telecommunication under s. 3(1)(*f*). Instead, a “download” is merely an additional, more efficient way to deliver copies of the games to customers. The downloaded copy is identical to copies purchased in stores or shipped to customers by mail, and the game publishers already pay copyright owners reproduction royalties for *all* of these copying activities.
2. We agree with ESA. In our view, the Board’s conclusion that a separate, “communication” tariff applied to downloads of musical works violates the principle of technological neutrality, which requires that the *Copyright Act* apply equally between traditional and more technologically advanced forms of the same media: *Robertson v. Thomson Corp.*, [2006] 2 S.C.R. 363, at para. 49. The principle of technological neutrality is reflected in s. 3(1) of the *Act*, which describes a right to produce or reproduce a work “in any material form whatever”. In our view, there is no practical difference between buying a durable copy of the work in a store, receiving a copy in the mail, or downloading an identical copy using the Internet. The Internet is simply a technological taxi that delivers a durable copy of the same work to the end user.
3. This argument is echoed by David Vaver in his book, *Intellectual Property Law: Copyright, Patents, Trade-marks* (2nd ed. 2011), where he appears to criticize the Board’s decision in this particular case:

In principle, *substitute delivery systems* should compete on their merits: either both or neither should pay. Copyright law should strive for technological neutrality.

. . .

In the past, whether a customer bought a sound recording or video game physically at a store or ordered it by mail made no difference to the copyright holder: it got nothing extra for the clerk’s or courier’s handover of the record to the customer. Now, because of the telecommunication right, *copyright holders can and do charge extra for electronic delivery of identical content acquired off websites*. [Emphasis added; pp. 172-73.]

1. ESA’s argument is also consistent with this Court’s caution in *Théberge v. Galerie d’Art du Petit Champlain inc.*, [2002] 2 S.C.R. 336, that the balance in copyright between promoting the public interest in the encouragement and dissemination of works and obtaining a just reward for the creator requires recognizing the “limited nature” of creators’ rights:

The proper balance among these and other public policy objectives lies not only in recognizing the creator’s rights but in giving due weight to their limited nature. In crassly economic terms *it would be as inefficient to overcompensate artists and authors for the right of reproduction as it would be self-defeating to undercompensate them*. Once an authorized copy of a work is sold to a member of the public, it is generally for the purchaser, not the author, to determine what happens to it. [Emphasis added; para. 31.]

1. The traditional balance between authors and users should be preserved in the digital environment: Carys Craig, “Locking Out Lawful Users: Fair Dealing and Anti-Circumvention in Bill C-32”, in Michael Geist, ed., *From “Radical Extremism” to “Balanced Copyright”: Canadian Copyright and the Digital Agenda* (2010), 177, at p. 192.
2. SOCAN has never been able to charge royalties for copies of video games stored on cartridges or discs, and bought in a store or shipped by mail. Yet it argues that identical copies of the games sold and delivered over the Internet are subject to *both* a fee for reproducing the work *and* a fee for communicating the work. The principle of technological neutrality requires that, absent evidence of Parliamentary intent to the contrary, we interpret the *Copyright Act* in a way that avoids imposing an additional layer of protections and fees based solely on the *method of delivery* of the work to the end user. To do otherwise would effectively impose a gratuitous cost for the use of more efficient, Internet-based technologies.
3. The Board’s misstep is clear from its definition of “download” as “a file containing data . . . the user is meant to keep as his own” (para. 13). The Board recognized that downloading is a *copying* exercise that creates an exact, durable copy of the digital file on the user’s computer, identical to copies purchased in stores or through the mail. Nevertheless, it concluded that delivering a copy through the Internet was subject to two fees — one for reproduction and one for communication — while delivering a copy through stores or mail was subject only to reproduction fees. In coming to this conclusion, the Board ignored the principle of technological neutrality.
4. Justice Rothstein argues (at para. 126) that the Board can avoid such “double-dipping” by copyright owners by adjusting the two fees in a way that “divides the pie” between the collective societies administering reproduction rights, on the one hand, and communication rights, on the other. However, this seems to us to undermine Parliament’s purpose in creating the collective societies in the first place, namely to efficiently manage and administer different copyrights under the *Act*. This inefficiency harms both end users and copyright owners:

When a single economic activity implicates more than one type of right and each type is administered by a separate collective, the multiplicity of licences required can lead to inefficiency. . . . The result is that the total price the user has to pay for all complements is too high . . . .

. . .

. . . the fragmentation of licences required for single activities among several monopolist-collectives generates inefficiencies, from which copyright owners as a whole also suffer . . . .

(Ariel Katz, “Commentary: Is Collective Administration of Copyrights Justified by the Economic Literature?”, in Marcel Boyer, Michael Trebilcock and David Vaver, eds., *Competition Policy and Intellectual Property* (2009), 449, at pp. 461-63)

1. In our view, the Board improperly concluded that the Internet delivery of copies of video games containing musical works amounts to “communicating” the works to the public. This view is evidenced by the legislative history of the *Copyright Act*, which demonstrates that the right to “communicate” is historically connected to the right to perform a work and not the right to reproduce permanent copies of the work.
2. As this Court held in *Bishop v. Stevens*, [1990] 2 S.C.R. 467, at pp. 473-74, the 1921 Canadian *Copyright Act* was based on, and designed to implement, the following provisions of the 1886 *Berne Convention for the Protection of Literary and Artistic Works*, as revised in the 1908 Berlin Revision:

Article 11

The stipulations of the present Convention shall apply to the *public representation* of dramatic or dramatico-musical works and to the *public performance* of musical works, whether such works be published or not.

. . .

Article 13

The authors of musical works shall have the exclusive right of authorizing (1) the adaptation of those works to instruments which can *reproduce* them mechanically; (2) the *public performance* of the said works by means of these instruments.

. . .

Article 14

Authors of literary, scientific or artistic works shall have *the exclusive right of authorizing the reproduction* and public representation of their works by cinematography.

1. These articles were reflected in the introductory paragraph to s. 3(1) of the *Copyright* *Act, 1921*, S.C. 1921, c. 24, which granted

the sole right to *produce or reproduce* the work or any substantial part thereof in any material form whatsoever, *to perform*, or in the case of a lecture to deliver, the work or any substantial part thereof in public; if the work is unpublished, to publish the work or any substantial part thereof; . . .

1. In the 1921 *Act*, “performance” was defined in s. 2(*q*) as

any acoustic representation of a work and any visual representation of any dramatic action in a work, including such a representation made by means of any mechanical instrument;

1. The right to perform historically presupposed a live audience that would be present at the site where the performance took place. With the advent of radio broadcasting, however, a debate emerged about how this new technology should be treated under copyright law, reminiscent of the current debate over Internet technologies. The international consensus was that radio broadcasting should be treated as an extension of the existing performance right, in order to cover distant audiences: Paul Goldstein and P. Bernt Hugenholtz, *International Copyright: Principles, Law, and Practice* (2nd ed. 2010), at §9.1.4.3; Pierre-Emmanuel Moyse, *Le droit de distribution: analyse historique et comparative en droit d’auteur* (2007), at pp. 309-10. The Rome Revision (1928) of the *Berne Convention* therefore extended the Article 11 performance right. The new Article 11*bis* conferred on authors the “exclusive right of authorizing the *communication* of their works to the public *by radiocommunication*”.
2. Canada acceded to the amended *Berne Convention* in 1928, and enacted s. 3(1)(*f*) of the *Copyright Act* in 1931 to incorporate the new Article 11*bis*:

(*f*) In case of any literary, dramatic, musical or artistic work, to *communicate* such work by *radio communication*.

(*Copyright Amendment Act, 1931*, S.C. 1931, c. 8, s. 3)

1. At the same time, the 1931 *Copyright Amendment Act* amended the definition of “performance” to accommodate this new concept of performances at a distance:

“performance” means any acoustic representation of a work . . . including a representation made by means of any mechanical instrument *or by radio communication*. [s. 2(3)]

1. Like a performance, communicating a work by radio communication (i.e., a radio broadcast) under s. 3(1)(*f*) involved an “acoustic representation” of a work. Also like a performance, communication under s. 3(1)(*f*) did *not* contemplate the delivery of permanent copies of the work, since such a delivery was not possible through the means of Hertzian radio waves.
2. This interpretation of the original s. 3(1)(*f*) is supported by the legislative debates. In explaining the purpose of this provision to Parliament, the Minister responsible for the amendments, C. H. Cahan, stated that s. 3(1)(*f*) was intended to bring the *Copyright Act* into conformity with the Rome Revision of the *Berne Convention* (*House of Commons Debates*, vol. 1, 2nd Sess., 17th Parl., April 23, 1931, at pp. 899-900), and that “radio communication” was a form of performance:

In England, *the courts have decided that radio communication comes within the meaning of the word performance*;but in order to make it clear that the author’s rights include not only the right of performance by acoustic representation and so forth, but also by radio communication, we have added those words “or by radio communication” to the present definition of performances as contained in the act. . . . I am simply adding the words “or by radio communication” to make it clear that *in respect of radio communication the author has exactly the same rights as he has in relation to other performances of his work*. [Emphasis added.]

(vol. 3, June 8, 1931, at p. 2399)

1. This was also the interpretation of the original s. 3(1)(*f*) by this Court in *Composers, Authors and Publishers Assoc. of Canada Ltd. v. CTV Television Network Ltd.*, [1968] S.C.R. 676. The Court held that signals transmitted from CTV to its affiliates did not communicate “musical works” — at the time defined as “reduced to writing” — but instead communicated a “performance” of the works. In *obiter*, the Court went on to hold that Article 11*bis* of the *Rome Convention*, on which s. 3(1)(*f*) was based, was intended to cover public performances by radio broadcasting (pp. 680-82). Moreover, it held that “communication” is “apt to include performances in its meaning” (p. 681). As a result, the Court concluded that s. 3(1)(*f*) must include the exclusive right of public performance by radio broadcasting.
2. After 1931, there were no changes to s. 3(1)(*f*) until 1988. In 1988, s. 3(1)(*f*) was amended to read as follows:

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

(*Canada-United States Free Trade Agreement Implementation Act*, S.C. 1988, c. 65, s. 62)

1. SOCAN argues that the 1988 amendment from “radio communication” to “telecommunication” demonstrates Parliament’s intent to remove *all* reference in s. 3(1)(*f*) to conventional performance or broadcasting activities, and to expand the communication right to technologies that involve transmitting data in a way that gives end users a permanent copy of the work.
2. With respect, we disagree. The 1988 amendments to the *Copyright Act* found at ss. 61 to 65 of the *Canada-United States Free Trade Agreement Implementation Act*, were enacted in order to give effect to Articles 2005 and 2006 of the 1987 *Canada-U.S. Free Trade Agreement* (*CUFTA*): see *Canadian Wireless Telecommunications Assn. v. Society of Composers, Authors and Music Publishers of Canada*, 2008 FCA 6, [2008] 3 F.C.R. 539 (*CWTA v. SOCAN*), at para. 27. Before *CUFTA*, Canadian courts had held that “radio communication” under the former s. 3(1)(*f*) was limited to Hertzian radio waves and did *not* extend to communication by co-axial cables: *Canadian Admiral Corp. v. Rediffusion, Inc.*,[1954] Ex. C.R. 382, at p. 410. *CUFTA*, however, required Canada to compensate copyright owners for the retransmission of television signals that were sent over cable lines. The amendments were therefore designed to ensure that cable companies, and not just radio broadcasters, would also be captured under s. 3(1)(*f*): John S. McKeown, *Fox on Canadian Law of Copyright and Industrial Designs* (4th ed. (loose-leaf)), at pp. 21-86, 21-87 and 29-1.
3. In this context, the replacement of the words “radio communication” with “telecommunication” should be understood as merely expanding the *means* *of communicating* a work — that is, from radio waves (“by radio communication”) to cable and other future technologies (“to the public by telecommunication”). In our view, by substituting the word “telecommunication” in 1988, Parliament did not intend to change the fundamental nature of the communication right, which had for over 50 years been concerned with performance-based activities. Instead, Parliament only changed the *means of transmitting* a communication. The word “communicate” itself was never altered.
4. Parliament’s addition of the phrase “to the public” to s. 3(1)(*f*) also supports this interpretation of the 1988 amendments. Before 1988, there was no doubt that all communications were “to the public”, as the nature of a broadcast through radio waves was necessarily public. The term “telecommunication”, however, risked introducing ambiguity into the *Act*, as telecommunication could also include private communications. By adding the phrase “to the public” with the term “telecommunication” in 1988, Parliament clarified its intent to maintain the communication right as a category of performance right.
5. Therefore, we agree with Rothstein J. (at para. 98) that there is a “historic relationship” between the performance right and the communication right in the *Copyright Act*, but we disagree with his conclusion that Parliament intended to sever this relationship based on the 1988 amendments. In our view, this historical connection between communication and performance still exists today. With respect, the Board ignored this connection when it concluded that transmitting a download of a musical work over the Internet could amount to a “communication”.
6. The Board’s conclusion was based in part on its erroneous view that a “download” is indistinguishable from a “stream”. Although a download and a stream are both “transmissions” in technical terms (they both use “data packet technology”), they are not both “communications” for purposes of the *Copyright Act*. This is clear from the Board’s definition of a stream as “a transmission of data that allows the user to listen or view the content at the time of transmissionand that isnot meant to be reproduced” (para. 15). Unlike a download, the experience of a stream is much more akin to a broadcast or performance.
7. The Board also appears to have relied on Binnie J.’s observation in *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, [2004] 2 S.C.R. 427 (*SOCAN v. CAIP*), that a work has necessarily been “communicated” when, “[a]t the end of the transmission, the end user has a musical work in his or her possession that was not there before” (at para. 45), and on *CWTA v. SOCAN*, where Sharlow J.A. evoked *SOCAN v. CAIP* to hold that “[t]he word ‘communication’ connotes the passing of information from one person to another” (paras. 19-20).
8. As noted by Justice Rothstein, however, the comments in *SOCAN v. CAIP* were *obiter*, as the meaning of “communicate” in s. 3(1)(*f*) was not directly in issue in that case. Neither *SOCAN v. CAIP* nor *CWTA v. SOCAN* examined the legislative history behind the term “communicate” or the connection between communication and performance.
9. For the same reason, we cannot agree with Justice Rothstein’s dependence on the dictionary definition of the word “communicate” to mean *any* transmission of data, including a download which provides the user with a durable copy of the work. Dictionaries, while often offering a useful range of definitional options, are of little assistance in identifying what a word means when it is orphaned from its context: Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at p. 27; see also *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031, at para. 67 (*per* Gonthier J.). In our view, using dictionary definitions in this case has the effect of ignoring a solid line of legislative history connecting the term “communicate” to performance-based activities.
10. The Board’s interpretation of s. 3(1)(*f*) also ignores the historic distinction between performance-based rights and reproduction-based rights, improperly extending the term “communicate” to capture the Internet delivery of permanent copies of a work. In our view, this interpretation goes far beyond what the term “communicate” was ever intended to capture.
11. In enacting s. 3(1), Parliament distinguished between rights of reproduction and performance:

**3.** (1) For the purposes of this Act, “copyright” means the sole right to *produce or reproduce* the work or any substantial part thereof in any material form whatsoever, *to perform*, or in the case of a lecture to deliver, the work or any substantial part thereof *in public* . . . .

(*Copyright Act, 1921*)

1. This distinction between reproduction and performance in s. 3(1) has been maintained all the way through to the current version of the *Act*.
2. Performing a work is fundamentally different than reproducing it. As this Court concluded in *Bishop v. Stevens*, a performance is impermanent in nature, and does not leave the viewer or listener with a durable copy of the work:

The right to perform (including radio broadcast), and the right to make a recording, are separately enumerated in s. 3(1). They are distinct rights in theory and in practice . . . . [T]he rights to perform and to record a work are considered sufficiently distinct that they are generally assigned separately, and administered by different entities.

. . .

. . . A *performance is by its very nature fleeting, transient, impermanent*.When it is over, only the memory remains. . . . Furthermore, *no imitation of a performance can be a precise copy*. *A recording, on the other hand, is permanent*. *It may be copied easily, privately, and precisely*. *Once a work has been recorded, the recording takes on a life of its own*. . . . Once the composer has made or authorized a recording of his work, he has irrevocably given up much of his control over its presentation to the public. *These are the reasons why the rights to perform and to record are recognized as distinct in the Act, and why in practice a composer may wish to authorize performances but not recordings of his work*. [Emphasis added; pp. 477-79.]

1. In *Bishop*, the alleged infringer argued that the “right to broadcast” a musical work under s. 3(1)(*f*) included the incidental right to make an ephemeral copy for the sole purpose of facilitating the broadcast. This Court ultimately concluded that the right to perform — including the right to communicate — could not be understood to include the right to reproduce, since performing and communicating are different in nature from making a recording.
2. Even though *Bishop* interpreted the pre-1988 version of the *Copyright Act* (before the “telecommunication” amendment), the distinction between performance-based and reproduction-based rights established in s. 3(1) is evidenced in the provisions of the current *Act*. For example, in s. 2.2(1), the term “publication” *includes* “making copies”, but expressly *excludes* “the performance in public, or the communication to the public by telecommunication” of a work. Similarly, the educational institutions exception in s. 29.4(2) refers to the right to “reproduce” and the right to “communicate by telecommunication to the public” as distinct rights. The same is true of s. 15(1), which categorizes neighbouring rights under the *Act* into two categories: the right to “communicate” and “perform” a performance, and the right to “reproduce” a fixation of the performance.
3. The distinction between performance and communication rights on the one hand and reproduction rights on the other is also evident in the collective administration of copyright tariffs under the *Copyright Act*. In 1993, SOCAN — a performing rights society — was put in charge of administering the communication right in s. 3(1)(*f*) in relation to musical works: S.C. 1993, c. 23, s. 3: see McKeown, at pp. 3-12, 27-2 and 27-3. These provisions are contained in a section of the *Act* entitled “Collective Administration of *Performing Rights and of Communication Rights*”: ss. 67 to 68.2 (S.C. 1997, c. 24, s. 45): see McKeown, at p. 26-3. Even the Copyright Board itself categorizes its decisions relating to musical works into two categories: “Public Performance of Music” and “Reproduction of Musical Works”: http://www.cb-cda.gc.ca/decisions/index-e.html.
4. Therefore, the term “communicate” in s. 3(1)(*f*), which has historically been linked to the right to perform, should not be transformed by the use of the word “telecommunication” in a way that would capture activities akin to reproduction. Such transformation would result in abandoning the traditional distinction in the *Act* between performance-based rights and rights of reproduction. There is no evidence either in 1988 or in subsequent amendments to the *Act* that Parliament intended such abandonment.
5. SOCAN submits that the distinction between reproduction and performance rights in *Bishop* actually supports its view that downloading a musical work over the Internet can attract two tariffs. Since reproduction and performance-based rights are two separate, independent rights, copyright owners should be entitled to a separate fee under each right. This is based on the Court’s reliance in *Bishop*, at p. 477, on a quote from *Ash v. Hutchinson & Co. (Publishers), Ltd.*, [1936] 2 All E.R. 1496 (C.A.), at p. 1507, *per* Greene L.J.:

Under the Copyright Act, 1911 [on which the Canadian *Act* was based], . . . the rights of the owner of copyright are set out. A number of acts are specified, the sole right to do which is conferred on the owner of the copyright. The right to do each of these acts is, in my judgment, a separate statutory right, *and anyone who without the consent of the owner of the copyright does any of these acts commits a tort; if he does two of them, he commits two torts, and so on*. [Emphasis added.]

1. In our view, the Court in *Bishop* merely used this quote to emphasize that the rights enumerated in s. 3(1) are distinct. *Bishop* does *not* stand for the proposition that a *single* activity (i.e., a download) can violate two separate rights at the same time. This is clear from the quote in *Ash v. Hutchinson*, which refers to “two acts”. In *Bishop*, for example, there were two activities: 1) the making of an ephemeral copy of the musical work in order to effect a broadcast, and 2) the actual broadcast of the work itself. In this case, however, there is only one activity at issue: downloading a copy of a video game containing musical works.
2. Nor is the communication right in s. 3(1)(*f*) a *sui generis* rightin addition to the general rights described in s. 3(1). The introductory paragraph defines what constitutes “copyright”. It states that copyright “means” the sole right to produce or reproduce a work in any material form, to perform a work in public, or to publish an unpublished work. This definition of “copyright” is exhaustive, as the term “means” confines its scope. The paragraph concludes by stating that copyright “includes” several other rights, set out in subsections (*a*) through (*i*). As a result, the rights in the introductory paragraph provide the basic structure of copyright. The enumerated rights listed in the subsequent subparagraphs are simply illustrative: Sunny Handa, *Copyright Law in Canada* (2002), at p. 195; see also *Apple Computer Inc. v. Mackintosh Computers Ltd.*, [1987] 1 F.C. 173 (T.D.), at p. 197. The rental rights in s. 3(1)(*i*) referred to by Justice Rothstein, for example, can fit comfortably into the general category of reproduction rights.
3. In our view, therefore, the Board’s conclusion that the Internet delivery of a permanent copy of a video game containing musical works amounted to a “communication” under s. 3(1)(*f*) should be set aside.
4. We would therefore allow the appeal with costs.

The reasons of LeBel, Fish, Rothstein and Cromwell JJ. were delivered by

1. Rothstein J. (dissenting) — Under the *Copyright Act*, R.S.C. 1985, c. C-42 (the “Act”), s. 3(1)(*f*), a copyright holder has the sole right to “communicate [his or her] work to the public by telecommunication” and to authorize any such communication. The question in this case is whether a musical work is “communicate[d] . . . by telecommunication” when a file containing the musical work is downloaded from the Internet.
2. When files containing copyright protected works are downloaded, copyright holders are entitled to compensation for the reproduction of their works. This appeal concerns musical works contained in video games which may be downloaded from the Internet. The appellants, the Entertainment Software Association and the Entertainment Software Association of Canada (collectively, the “ESA”), argue that works transmitted over the Internet by downloading should not give rise to further compensation under s. 3(1)(*f*). The respondent, Society of Composers, Authors and Music Publishers of Canada (“SOCAN”), says that reproduction and communication are different and independent rights under the Act and that copyright holders are entitled to remuneration for the communication of their works through Internet downloading.
3. My colleagues Abella and Moldaver JJ. part company with me on some fundamental principles of copyright law. In my view, precedents of this Court have established the principles that must govern the analysis in this appeal. Copyright is a creature of statute (*Théberge v. Galerie d’Art du Petit Champlain inc*., 2002 SCC 34, [2002] 2 S.C.R. 336, at para. 5; *Compo Co. v. Blue Crest Music Inc*., [1980] 1 S.C.R. 357, at p. 373; *Bishop v. Stevens*, [1990] 2 S.C.R. 467, at p. 477). Copyright is comprised of a bundle of independent statutory rights (*Bishop v. Stevens*, at p. 477; *Compo Co. v. Blue Crest Music Inc.*, at p. 373). Courts must give effect to these independent rights as provided by Parliament. While courts must bear in mind that the *Copyright Act* “is . . . a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator”, which balance requires “not only . . . recognizing the creator’s rights but in giving due weight to their limited nature” (*Théberge*, at paras. 30-31), courts must still respect the language chosen by Parliament — not override it.
4. In my respectful opinion, my colleagues’ approach sweeps away these well-established principles. They start from the proposition that once the reproduction rights in the musical work contained in a video game are negotiated, “the owner of the copyright in the musical work has no further rights when the game is sold” (Abella and Moldaver JJ., at para. 1). They support their argument by reference to the principle of technological neutrality: because the production and sale of a *hard copy* of the video game would only engage the right to reproduce the musical works it contains, the sale of a *digital copy* of the game, by transmission over the Internet, must also not trigger protected rights other than the right to reproduce. For my colleagues, the “Internet is simply a technological taxi that delivers a durable copy of the same work to the end user” (para. 5). They say that the question in this appeal is “whether the rights are nonetheless revived when the work is sold over the Internet instead of in a store” (para. 1).
5. Generally, a technologically neutral copyright law is desirable. However, technological neutrality is not a statutory requirement capable of overriding the language of the Act and barring the application of the different protected rights provided by Parliament. My colleagues’ basic propositions pre-empt the application of other rights of the copyright holder to this set of facts and divest these rights of their independent content. There is no need to revive rights that have never been exhausted.
6. In many respects, the Internet may well be described as a technological taxi; but taxis need not give free rides.
7. Facts and Procedural History
8. On judicial review, the Federal Court of Appeal (“FCA”) upheld the determination by the Copyright Board that the download of a file containing a musical work is a “communicat[ion] . . . to the public by telecommunication” within the meaning of s. 3(1)(*f*) of the Act, entitling SOCAN members to compensation in accordance with an approved tariff. The ESA appeals to this Court from the decision of the FCA.
9. The ESA is a coalition of video game publishers and distributors. Video games are entertainment software consisting of millions of lines of software code. When installed and run on a computer, the software generates audiovisual effects in response to commands by the user. The audio component may include musical works as part of the game’s soundtrack.
10. Video games can be sold over the Internet. Customers navigate to the website of an online game provider where the video game program is offered for sale, pay the purchase price and download the program. The site transmits a permanent copy of the software to the customer’s hard drive. This mode of delivery of the purchased program competes with the traditional model, where the video game is stored on a CD or in a cartridge, requiring the customer to buy it at a store.
11. The customer must then install the program, either downloaded from the Internet or contained on the CD, on his or her computer. Only after the installation is complete may the customer run the game, at which point, the audio and the visual effects of the software become perceptible. The game and its audio and visual effects are not perceptible during the transmission of the file from the vendor to the video game user, a fact that is said to be of crucial significance in this case.
12. It is standard practice within the video game publishing industry to negotiate clearance of copyright for the *reproduction* of the musical works incorporated in the games prior to their publication. There is no dispute that once reproduction rights are cleared, the owner of copyright in the musical work would have no further rights when the video game is sold to a customer at a bricks-and-mortar store or if a CD containing the game is shipped through regular mail.
13. SOCAN is a collective society of composers, authors and publishers of music. It administers the right to perform in public and the right to communicate to the public by telecommunication the works covered by its members’ copyrights. It files proposed tariffs with the Board and collects royalties, as set by the Board, on behalf of its members.
14. These proceedings involve proposed tariffs first filed by SOCAN in 1995 for various uses of musical works constituting, in SOCAN’s view, copyright protected communication of musical works to the public over the Internet. There were objections to the filed proposals. In 1996, the Board decided to deal with legal issues separately from the determination of the actual tariffs. The first step was to “determine which activities on the Internet, if any, constitute a protected use [of SOCAN’s repertoire of music] targeted in the tariff” (*SOCAN Statement of Royalties, Public Performance of Musical Works 1996, 1997, 1998 (Tariff 22, Internet) (Re)* (1999), 1 C.P.R. (4th) 417 (“Tariff 22 decision”), at p. 424).
15. On October 27, 1999 (the Tariff 22 decision), the Board issued what it termed its Phase I decision, dealing with legal and jurisdictional issues. The Tariff 22 decision was ultimately appealed to this Court, but not on the issue of communication to the public by telecommunication now before this Court. However, in *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45, [2004] 2 S.C.R. 427 (“*SOCAN v. CAIP*”), at para. 30, Binnie J. noted the Board’s conclusion that “an Internet communication occurs at the time the work is transmitted from the host server to the computer of the end user, regardless of whether it is played or viewed at that time, or later, or never” (see Tariff 22 decision, at p. 450). He found that this particular issue was “no longer contested”.
16. In 2005, SOCAN modified its proposed Tariff to divide it into seven categories, each dealing with a different Internet-based activity. The sixth category applies to “Game Sites” and covers “communications of musical works as part of games, including gambling, from Sites or Services that consist predominantly of games . . .” (*Statement of Proposed Royalties to Be Collected by SOCAN for the Public Performance or the Communication to the Public by Telecommunication, in Canada, of Musical or Dramatico-Musical Works* (2005), 139 Can. Gaz. I (Supp.), at p. 18). When the Board proceeded to Phase II of the process to establish a tariff for the communication of musical works over the Internet for the years 1996 to 2006, the ESA argued that since the users can neither see, nor hear game software while it is being downloaded, “[t]he transmission solely involves a distribution of a copy of a work that is identical to copies available on discs in stores. The transmission [is] thus not a ‘communication to the public’” (A.F., at para. 20 (emphasis in original)).
17. The Board’s Phase II determination was rendered in two decisions. In the first, issued on October 18, 2007 (61 C.P.R. (4th) 353) (the “Tariff 22.A decision”), the Board rejected the ESA’s argument and confirmed its prior conclusion that a download is a “communication”. While the Tariff 22.A decision dealt with the details of the tariffs applicable to uses of music by online music services that offer catalogues of songs for downloading upon payment of the purchase price, the Board held that the legal principles established in that decision would also apply to other uses of music on the Internet. The Board’s second Phase II decision, issued on October 24, 2008, *SOCAN Statement of Royalties, Internet ― Other Uses of Music, 1996-2006 (Tariffs 22.B-22.G)* (2008), 70 C.P.R. (4th) 81 (the “Tariff 22.B-G decision”), established the details of the tariffs applicable to other uses of music on the Internet, including use by game sites at issue in this appeal (Tariff 22.G).
18. A number of objectors applied to the FCA for judicial review on different issues, which the FCA dealt with in separate decisions. *Bell Canada v. Society of Composers, Authors and Music Publishers of Canada*, 2010 FCA 220, 409 N.R. 102 (“*Bell Canada*”), was an appeal by online music services contesting the Board’s determination in the Tariff 22.A decision that a download of a music file from the online music service’s website by the end consumer is a “communication to the public”. The FCA held that the Board’s determination was a reasonable interpretation of s. 3(1)(*f*) of the Act. The FCA considered that *SOCAN v. CAIP* had fully answered the question of what constitutes a “communication” and accordingly confirmed that a download is a communication (para. 5).
19. As stated above, the ESA’s application for judicial review of the Tariff 22.B-G decision was dismissed by the FCA.On the issue of whether downloads of video games are communications to the public of the musical works they contain, the FCA referred to its reasons in *Bell Canada*, that is, that a download of a file containing a musical work is a communication to the public by telecommunication(2010 FCA 221, 406 N.R. 288, at para. 13).
20. Issue
21. The issue in this appeal is whether the transmission of a video game through an Internet download is a “communication” to the public within the meaning of s. 3(1)(*f*) of the Act. If it is, SOCAN is entitled to royalties for the communication of the included musical works.
22. Analysis

A. *Overview*

1. The ESA submits that on reading s. 3(1)(*f*) in its entirety, considering it in the context of the entire Act and in light of its legislative history, the provision “creates an exclusive right of public performance (or representation for works that are not publicly performed) delivered by means of telecommunication”. They say that to “communicate” must mean “to cause information in humanly perceivable form to be imparted to another person for immediate listening or viewing” (A.F., at para. 33 (emphasis added)). The communication right was never meant to cover situations where durable copies of the copyrighted works are made available, which are already covered by the *reproduction right* and for which copyright holders are already compensated. Since the users can *neither see nor hear* game software while it is being downloaded, the transmission from the online game provider to the user does not constitute a communication to the public. The ESA further argues that the Act uses both the terms “communicate” and “transmit” and that the two cannot have the same meaning. In their submission, the act of a game being downloaded by a user constitutes a transmission and not a communication. The ESA also relies on American jurisprudence and raises some “unintended consequences” of the decisions below.
2. In this appeal, the ESA does not advance arguments on whether, should the transmissions be found to be “communications” within the meaning of s. 3(1)(*f*), such transmissions would be communications “*to the public*”; this issue is dealt with in the companion case *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 S.C.R. 283.
3. SOCAN says that the decisions of the Board and of the FCA were correctly decided. In SOCAN’s view, to communicate means simply “to transmit, impart, make known or convey information” (R.F., at para. 32 (emphasis deleted)) and the ESA’s submissions would artificially restrict the ordinary meaning of the word. Further, SOCAN says that the ESA’s argument ignores the basic principle of copyright law that the copyrights granted in s. 3(1) for reproduction, performance and communication of a work are separate and distinct rights (R.F., at para. 9).

B. *Standard of Review*

1. For the reasons explained in *Rogers*, at paras. 10-16, the applicable standard of review is correctness.

C. *Whether Transmitting Musical Works Through Downloads Over the Internet Is “Communicating”*

(1) Section 3(1)(*f*) and Section 2

1. This appeal requires defining the right to “communicate . . . by telecommunication” in the *Copyright Act*. The ESA urges a definition of “communicate . . . by telecommunication” as “to cause information in humanly perceivable form to be imparted to another person for immediate listening or viewing” (A.F., at para. 33 (emphasis added)).
2. The exclusive right of the copyright holder to “communicate . . . to the public by telecommunication” is provided in s. 3(1)(*f*) of the Act:

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

. . .

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

. . .

and to authorize any such acts.

1. Section 2 of the Act defines “telecommunication”:

“telecommunication” means any transmission of signs, signals, writing, images or sounds or intelligence of any nature by wire, radio, visual, optical or other electromagnetic system;

It is not disputed that transmissions in the digital environment are “telecommunications”.

(2) The Approach to Statutory Interpretation

1. The *Copyright Act* must be interpreted in accordance with the general rules of statutory interpretation: “the words of an Act are to 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” (*CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339, at para. 9, citing E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87).

(3) The Precedents

1. The word “communicate” is not defined in the Act. I therefore start with the dictionary meaning of the word. The *Oxford English Dictionary* (online) defines the verb “communicate” as “[t]o impart (information, knowledge, or the like) . . .; to impart the knowledge or idea of (something), to inform a person of; to convey, express; to give an impression of, put across”. The *Shorter Oxford English Dictionary on Historical Principles* (6th ed. 2007), vol. 1, at p. 466, includes the following definition: to “[i]mpart, transmit”. The *Merriam-Webster’s Collegiate Dictionary* entry is defined as “to convey knowledge of or information about**:** make known” ((11th ed. 2003), at p. 251). There is no suggestion in these definitions that “to communicate” cannot mean “to transmit”, and indeed, the *Shorter Oxford English Dictionary* expressly includes in the definition of “communicate”, “transmit”.
2. Although the question was not directly in issue in that case (see para. 30), Binnie J. in *SOCAN v. CAIP* endorsed the ordinary definition of “communicate” as the appropriate interpretation of the word in s. 3(1)(*f*) of the *Copyright Act*:

The Board ruled that a telecommunication occurs when the music is transmitted from the host server to the end user. I agree with this.

. . .

The word “communicate” is an ordinary English word that means to “impart” or “transmit” (*Shorter Oxford English Dictionary on Historical Principles* (5th ed. 2002), vol. 1, at p. 463). [paras. 42 and 46]

1. Since *SOCAN v. CAIP*, the FCA has had the occasion to deal directly with the meaning of the right to “communicate” under s. 3(1)(*f*) in *Canadian Wireless Telecommunications Assn. v. Society of Composers, Authors and Music Publishers of Canada*, 2008 FCA 6, [2008] 3 F.C.R. 539, leave to appeal refused, [2008] 2 S.C.R. vi (“*CWTA*”). The question in that case, answered in the affirmative, was whether a person communicates to the public the musical works contained in ringtones when members of the public download the ringtones for their mobile phones. Sharlow J.A. rejected the argument that a transmission is not the same thing as a communication because “‘communication’ must be understood to include only a transmission that is intended to be heard or perceived by the recipient simultaneously with or immediately upon the transmission” (para. 18). She wrote:

In my view, the applicants are proposing a meaning of the word “communication” that is too narrow. The word “communication” connotes the passing of information from one person to another. A musical ringtone is information in the form of a digital audio file that is capable of being communicated. The normal mode of communicating a digital audio file is to transmit it. The wireless transmission of a musical ringtone to a cellphone is a communication, whether the owner of the cellphone accesses it immediately in order to hear the music, or at some later time. The fact that the technology used for the transmission does not permit the cellphone owner to listen to the music during the transmission does not mean that there is no communication. In my view, in the context of a wireless transmission, it is the receipt of the transmission that completes the communication.

This conclusion accords with the [*SOCAN v. CAIP*] case (cited above). In that case Justice Binnie, writing for the majority, said that the transmission of information over the Internet is a communication once the information is received (see paragraph 45). . . . [I]t is undoubtedly a true statement. [Emphasis added; paras. 19-20.]

(4) The ESA’s Arguments for Not Following *SOCAN v. CAIP* and *CWTA*

1. The ESA argues that *SOCAN v. CAIP* (to the extent that it addressed the issue) and *CWTA* should not be followed.

(a) *“Communicate” and “Transmit”*

1. The ESA first argues that there must be some difference between the words “communicate” and “transmit”. The two words are not used interchangeably in the Act and if Parliament used both words, it intended them to have different meanings. On this basis, the ESA submits that to “communicate to the public” means “more than the [mere] transmission of a file from one point to another point without that file being seen or heard” (A.F., at para. 73). Therefore, a download is not a communication within the meaning of s. 3(1)(*f*), but a mere transmission.
2. I do not find this argument compelling. Parliament is presumed to use words in their ordinary meaning: R. Sullivan, *Statutory Interpretation* (2nd ed. 2007), at p. 49. As noted above, to “communicate” means to “impart” or “transmit”. The *Oxford English Dictionary* (online) defines “transmit” as: “[t]o cause (a thing) to pass, go, or be conveyed to another person, place, or thing; to send across an intervening space; to convey, transfer; . . . [t]o convey or communicate (usually something immaterial) *to* another or others” (emphasis added); and, in a more technical sense: “[t]o send out electric signals or electromagnetic waves corresponding to (an image, a programme, etc.).” The definitions of “transmit” in the *Merriam-Webster’s Collegiate Dictionary* are:

to send or convey from one person or place to another . . .

to send out (a signal) either by radio waves or over a wire.

I see no reason why, having regard to context, the meaning of both words cannot overlap.

1. As set out above, s. 2 of the Act defines “telecommunication” as “any transmission of signs, signals, writing, images or sounds or intelligence of any nature by wire, radio, visual, optical or other electromagnetic system”. This definition equates the term “telecommunication” with the transmission of certain subject matter by electromagnetic system. The prefix “tele” simply means “to a distance”. So, “telecommunication” means communicating to a distance by the means specified in the Act. It would seem odd that “telecommunication” and transmission by electromagnetic system are interchangeable in the Act but that “to communicate” and “to transmit” would not be. The more obvious interpretation would be that for the purposes of s. 3(1)(*f*) of the Act, the exclusive right of the copyright holder to communicate works to the public by telecommunication is simply to transmit those works to the public by electromagnetic system, including the Internet.
2. The above definitions of “communicate” and “transmit” and the context in which the words are used in the Act do not support the ESA’s conclusion that to “communicate” in s. 3(1)(*f*) must necessarily mean to transmit information in a humanly perceptible form for *immediate* perceiving and listening. Even accepting that to communicate means to impart an idea, there is no requirement that the idea be perceived and heard *immediately*.
3. The ESA supports its argument that the words “transmit” and “communicate” must have different meanings primarily by reference to s. 2.4(1)(*c*). Section 2.4(1)(*c*) provides:

2.4 (1) For the purposes of communication to the public by telecommunication,

. . .

(c) where a person, as part of

(i) a network, within the meaning of the Broadcasting Act, whose operations result in the communication of works or other subject-matter to the public, or

(ii) any programming undertaking whose operations result in the communication of works or other subject-matter to the public,

transmits by telecommunication a work or other subject-matter that is communicated to the public by another person who is not a retransmitter of a signal within the meaning of subsection 31(1), the transmission and communication of that work or other subject-matter by those persons constitute a single communication to the public for which those persons are jointly and severally liable.

1. The ESA argues that the words “transmit” and “transmission” appear twice and the word “communicate” five times, and that this means that they must have different meanings. It says that transmitting is merely delivery or receipt of information or data being conveyed; that the term “communicate” pertains to what happens after transmission; and that this implies that the difference is that a transmission is not the conveyance of information in a humanly perceivable form. As a result, a transmission does not implicate s. 3(1)(*f*), because s. 3(1)(*f*) uses the term communicate which, by contrast, does imply conveyance in humanly perceivable form. Therefore, since the communication only occurs after the transmission, a download does not give rise to any entitlement under s. 3(1)(*f*).
2. This argument ignores the context and purpose of s. 2.4(1)(*c*). This section was introduced in 1988 in order to reverse the holding in *Composers, Authors and Publishers Assoc. of Canada Ltd. v. CTV Television Network Ltd.*, [1968] S.C.R. 676 (“*CAPAC*”), that CTV’s transmissions of programs to its affiliated stations, for further broadcasting to the public by the affiliated stations, did not engage the right to communicate to the public in s. 3(1)(*f*), because such transmissions remained within the private realm (see J. S. McKeown, *Fox on Canadian Law of Copyright and Industrial Designs* (4th ed. (loose-leaf)), at p. 21-90). In the context of s. 2.4(1)(*c*), a “transmission” describes conveying works within a network or programming undertaking before the work is conveyed to the public, while a “communication” is the conveyance of the work “to the public” by another actor within the network or programming undertaking. Without s. 2.4(1)(*c*), only the latter act — the communication to the public — would engage s. 3(1)(*f*); but a private transmission between affiliates would remain outside of copyright protection. The effect of s. 2.4(1)(*c*), where it applies, is to make the transmission and the communication a single act of communication to the public, so that both the person who transmits the work and the person who communicates the work to the public are jointly and severally liable for the act of communication to the public.
3. All that can be teased out of s. 2.4(1)(*c*) is that “communication to the public” is the phrase used to designate instances where copyright protection is engaged, and not that “communication” means a conveyance of information in a humanly perceivable form.  On the other hand, “transmit” or “transmission” are terms designating situations that do not engage copyright protection under s. 3(1)(*f*).  I agree with the ESA that s. 2.4(1)(*c*) suggests that under the Act, the words “communicate” and “transmit” are not used interchangeably. But the provision does not suggest that the words refer to different types of conveyances. Rather, the distinction is that the words are used in conjunction with different types of recipient and different legal significance. Unless the transmission is combined with a communication to the public, s. 3(1)(*f*) would not attach to the transmission. When the transmission is ultimately a communication to the public, s. 2.4(1)(*c*) provides that the transmission and the communication to the public are a single communication to the public which does attract copyright under s. 3(1)(*f*). Indeed, the word “communicate” is consistently used in conjunction with the words “to the public” throughout the Act. The ESA’s separating the word “communicate” from the words “to the public” to give it an independent meaning different from that of “transmit” is not supported by Parliament’s intention in enacting s. 2.4(1)(*c*).  The words of s. 2.4(1)(*c*), when read in context, do not support the distinction argued by the ESA.

(b) *The CAPAC Decision*

1. The ESA relies on this Court’s decision in *CAPAC* for the proposition that to communicate means disseminating performances to the public for immediate listening and not merely sending signals that may be perceived later. However, this jurisprudence is of little avail to the ESA.
2. As noted above, in *CAPAC*, this Court was asked to determine whether the transmission of television programs containing musical works by CTV to its affiliated stations, for broadcasting to the public by the affiliates, constituted “communicating the same by radio communication” (at p. 679), an act protected under s. 3(1)(*f*) as it read at that time.
3. It should first be noted that *CAPAC* interpreted provisions of the Act that have since been amended in a way relevant to the scope of s. 3(1)(*f*), as will be discussed later. In any event, in *CAPAC*, the *ratio* of the Court’s decision was that CTV’s transmissions of recorded TV programs containing music to its affiliates were not communications of musical *works* by radio-communication. Rather, as CTV was transmitting *performances* of musical works (e.g., in an ordinary TV program) and not the musical works themselves (e.g., the sheet of music), s. 3(1)(*f*), which did not apply to performances of musical works, was not engaged. It is important to note that this distinction arose from the definition of “musical work” in the Act as it read at the time and is no longer applicable.
4. Nonetheless, the ESA relies on some comments of Pigeon J., at pp. 681-82 of *CAPAC*, involving an analysis of Article 11*bis* of the *Berne Convention for the Protection of Literacy and Artistic Works*, 828 U.N.T.S. 221, on which s. 3(1)(*f*) was based. The ESA says that this analysis demonstrates that a communication is more than sending signals, which is all that occurs when works are downloaded as in the case now before the Court. Rather, the ESA says that Article 11*bis* contemplates public performances by broadcasting, in other words, communications in humanly perceptible form. Therefore, a “communicat[ion]” within the meaning of s. 3(1)(*f*) must also be a conveyance of information in humanly perceptible form.
5. However, the passages of Pigeon J.’s judgment note that “‘communication’ does not usually mean ‘a performance’ [but that] it is apt to include performances” (p. 681 (emphasis added)). The necessary implication of these words is that “communication” is a broader term than “performance”. Therefore, Pigeon J.’s analysis does not support the ESA’s contention that a communication is *necessarily* a performance or *necessarily* more than sending signals.

(5) Whether “Communicating” is “Performing” a Work at a Distance

1. The ESA further argues, based on the legislative history of s. 3(1)(*f*), that the communication right is only a variation of the performance right, being the right to perform a work to a *distant* audience. Because a performance, in the ESA’s submission, is, by nature, a transient event that cannot result in the transmission of a durable copy of the work to the audience, downloads cannot be performances and, therefore, cannot be communications.
2. I digress briefly to point out that the structure of s. 3(1) implies that the communication right in paragraph (*f*) is a self-standing right independent of the performance right in the introduction of the section. The first lines of the English version of s. 3(1) provide that

“copyright” . . . means the sole right to produce or reproduce the work . . ., to perform the work . . . in public or . . . to publish the work . . . and includes the sole right . . .

There then follow specific rights listed as paragraphs (*a*) to (*i*). Paragraph (*f*) provides for the sole right to “communicate the work to the public by telecommunication”.

1. While the use of the word “includes” could indicate that the rights listed in paragraphs (*a*) to (*i*) are instances of one of the rights in the opening words of s. 3(1), the context indicates otherwise. Several of the listed rights are clearly outside of the right to produce or reproduce, perform or publish. For example, paragraph (*i*) provides for the right to rent out a sound recording embodying a musical work. It is difficult to see how this right fits within the right to produce or reproduce, perform or publish the work. Indeed, it would be contrary to *Théberge*, in particular at paras. 42 and 45, where the majority of this Court held that a “reproduction” within the meaning of the Act requires a *multiplication* of copies. All the prerogatives of the copyright holder in s. 3(1) are better considered as separate and distinct rights (*Bishop v. Stevens*, at p. 477, *per* McLachlin J.; *Compo Co. v. Blue Crest Music Inc.*, at p. 373, *per* Estey J.).
2. This interpretation of the English version of s. 3(1) is consistent with the French version of the text, which states that “*[l]e droit d’auteur sur l’œuvre comporte le droit exclusif de produire ou reproduire . . . l’œuvre, [de la représenter ou de la publier]; ce droit comporte, en outre, [les droits énumérés aux al. a) à i)]*.” The use of the phrase “*en outre*” — in addition — indicates paras. (*a*) to (*i*) are in addition to those in the opening words.
3. Nonetheless, the ESA relies on legislative history in order to confine the scope of the right to communicate to the public to performing a work to a public in a distant place, in a humanly perceptible form, as distinct from a download.
4. The Canadian Act was based on the *Berne Convention* of 1886, as revised in Berlin in 1908 (see *Bishop v. Stevens*, at p. 473). The revised *Berne Convention* comprised certain public performance rights in certain types of works. However, the advent of the radio warranted another revision of the Convention. In 1928, Article 11*bis* was added to the text, which guaranteed that:

Article 11*bis*

(1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing the communication of their works to the public by radiocommunication.

1. In 1931, Canada implemented the revision through the then s. 3(1)(*f*), which provided for a right, “[i]n case of any literary, dramatic, musical or artistic work, to communicate such work by radio communication” (*Copyright Amendment* *Act,* *1931*, S.C. 1931, c. 8) (see *CAPAC*, at pp. 680-81).
2. Section 3(1)(*f*) was again amended in 1988. According to *Canadian Admiral Corp. v. Rediffusion, Inc.*, [1954] Ex. C.R. 382, the radiocommunication right extended to radio and traditional over-the-air television broadcasting, leaving transmissions by *cable* outside of copyright protection. This technology-specific communication right was amended to the technologically *neutral* right to “communicate . . . to the public by telecommunication” to reflect the obligations entered into by Canada under the *North American Free Trade Agreement*, Can. T.S. 1994 No. 2 (*Canada-United States Free Trade Agreement Implementation Act*, S.C. 1988, c. 65, ss. 61 and 62). The change from radiocommunication to telecommunication and further amendments in 1993 meant that Canadian cable companies which previously avoided any payment of royalties under the “radiocommunication” right, and other users, were now caught by the Act: S. Handa, *Copyright Law in Canada* (2002), at p. 320; D. Vaver, *Intellectual Property Law: Copyright, Patents, Trade-marks* (2nd ed. 2011), at p. 90.
3. The ESA argues that from the outset, s. 3(1)(*f*), as well as its Berne progenitor Article 11*bis*, were meant to provide *broadcasting* rights the nature of which is “to deliver content [i.e. performances of works] to a public audience for immediate listening or viewing” (A.F., at para. 40). In the ESA’s submission, the 1988 amendment from “radiocommunication” to “telecommunication” did not change the fundamental nature of the communication right, that is, that it was concerned with *broadcasting*. The word “communicate” in the English version was not amended, although the means by which the communication may be made were expanded (A.F., at para. 52). The verb “*transmettre*”, used in the French version of s. 3(1)(*f*) prior to the 1988 amendments, was replaced by “*communiquer*”.
4. There is little doubt that a historic relationship between the right of public performance and the right to communicate to the public did exist:

. . . as performance before a live audience was one of the first forms of exploitation to be covered by copyright, it made sense to create a right to provide protection when the performance took place at a distance through the use of Hertzian (radio) waves and the other types of communication technologies invented since then (television, cable, satellite and the internet).

(E. F. Judge and D. J. Gervais, *Intellectual Property: The Law in Canada* (2nd. ed. 2011), at pp. 166-67)

1. The legislation has evolved to recognize the evolution of technologies. In 1988, the relevance of including transmissions by cable within the communication right had become obvious due to the prevalence of that mode of telecommunication.
2. Even though the advent of cable may have been the catalyzing force for the 1988 amendment, the amendment did not only cover cable communications, in addition to radiocommunications, but adopted neutral language to encompass evolving but then unknown technological advances. In adopting the neutral language of “telecommunication”, Parliament removed all reference to conventional broadcasting. The fact that in 1988 Parliament did not foresee, or could not have foreseen, the way in which modern technologies would evolve should not serve to limit the scope of the communication right when it is applied to one such new technology.
3. On this basis, the historic relationship of s. 3(1)(*f*) with broadcasting-type industries does not support reading into the Act restrictions which are not apparent from and are even inconsistent with the current language of the Act. In particular, the historic relationship does not support adopting the ESA’s proposition to read into the language of the Act the significant restriction that the transmission must be in a “humanly perceivable form for immediate viewing or listening” (A.F., at para. 74). While the rationale for the 1988 change from radio to “telecommunication” was concerned with the technical *means* by which the communication to the public was made, nothing supports concluding that s. 3(1)(*f*) could not also apply to new technologies which operate in a manner different from traditional broadcasting. This includes a communication occurring in a manner which also provides durable copies of the works that the users may view at a later time. When transmitted over the Internet, whether works are perceptible immediately or at a later moment or whether or not the technology used involves producing temporary copies, as in the case of streams, or permanent copies of the work is irrelevant to whether a communication has occurred and the work will, or has the potential to be, viewed or listened to by the receiver. As stated at para. 45 of *SOCAN v. CAIP*:

At the end of the transmission, the end user has a musical work in his or her possession that was not there before. The work has necessarily been communicated . . . . To hold otherwise would . . . fly in the face of the ordinary use of language . . . .

(6) American Jurisprudence

1. The ESA relies on the decision of the United States Court of Appeals for the Second Circuit in *United States v. American Society of Composers, Authors and Publishers*, 627 F.3d 64 (2010) (“*U.S. v. ASCAP*”), *certiorari* denied (U.S.S.C., Octobre 3, 2011, No. 10-1337), where the Court of Appeals for the Second Circuit decided that the download of a copy of a work did not come within the scope of the right to perform in public, as defined in the U.S. *Copyright Act*, 17 U.S.C. §§ 101 and 106(4).
2. This decision is of no avail to the ESA. The United States copyright law does not include an exclusive right in the copyright holder to communicate to the public. Rather, it recognizes a right of public performance (17 U.S.C. § 106(4)), which has been understood to include situations such as radio or television broadcasting where performances are made available to a distant public. This is a fundamental difference with the right to communicate a work by telecommunication in s. 3(1)(*f*) of the Canadian Act, as explained above. The two cannot be equated.
3. This Court has recognized in the past important differences both in wording and in policy between Canadian and American copyright legislation. It has cautioned that “United States court decisions, even where the factual situations are similar, must be scrutinized very carefully” (see *Compo Co. v. Blue Crest Music Inc.*, at p. 367). The difference in statutory wording between the provisions of the American legislation and of the Canadian *Copyright Act* is sufficient to render the U.S. decisions of no assistance in the interpretive exercise engaged here. Indeed, following the American jurisprudence in interpreting Canada’s copyright legislation would, in this case, amount to rewriting the Canadian Act.

(7) The Application of Section 3(1)(*f*) Does not Depend on the Purpose of the Communication

1. The ESA’s argument that the sole purpose of the transmissions in the case of downloads is just to *deliver* *copies* to the customers is not an answer to the fact that a transmission by telecommunication to the public, and therefore, a communication within the meaning of s. 3(1)(*f*), effectively occurs.
2. A similar argument was made in *Bishop v. Stevens*. That case dealt with whether a TV station that had paid the appropriate royalties for the right to broadcast a performance of a musical work had also acquired the right to make an “ephemeral” recording of the performance *for the sole purpose of facilitating the broadcast*. It was held that the right to perform did not include the right to make a recording, albeit an “ephemeral” one made only for technical reasons. McLachlin J. held that “s. 3(1)(*d*) contains no mention of purpose” (p. 479):

Interpretation of a statute must always begin with the ordinary meaning of the words used, and nothing in this section restricts its application to recordings made for the purpose of reproduction and sale. A recording may be made for any purpose, even one not prejudicial to the copyright holder, but if it is not authorized by the copyright holder then it is an infringement of his rights. [p. 480]

1. Similarly, the fact that the work is transmitted over the Internet, and therefore, “communicate[d] . . . by telecommunication” within the ordinary meaning of the words, for the purpose of delivering a copy of the video game containing the musical work to the user, does not change the fact that there *is* an Internet communication requiring authorization of the copyright holder.

(8) Unintended Consequences

1. The ESA raises a number of “unintended consequences” that would flow from accepting that downloads are communications within s. 3(1)(*f*) of the Act.
2. The ESA first refers to s. 2.2(1) of the Act, which defines the concept of “publication” for the purposes of the Act. Section 2.2(1) provides:

2.2 (1) For the purposes of this Act, “publication” means

(a)  in relation to works,

(i) making copies of a work available to the public,

. . .

but does not include

(c) the performance in public, or the communication to the public by telecommunication, of a literary, dramatic, musical or artistic work or a sound recording, or . . .

1. The ESA argues that adopting the “broad interpretation of ‘communicate to the public’ to include distribution of durable copies over networks” would mean that where copies of works are “distributed” over the Internet, these works would not be considered as “published”, because publication, as defined by s. 2.2(1) of the Act, excludes works communicated to the public by telecommunication (A.F., at paras. 102-10).
2. In my opinion, no conclusion concerning the scope of the right to communicate to the public by telecommunication in s. 3(1)(*f*) can be drawn on the basis of s. 2.2(1). Section 2.2(1) is only relevant in understanding the scope of *publication*, in those sections where it appears in the Act. Where that word is used, the definition in s. 2.2(1) provides that it means “making copies of a work available to the public”, but does not include the communication of a work to the public by telecommunication. On the other hand, s. 2.2(1) does *not* provide a comprehensive definition for all purposes of the Act whereby “making copies of a work available to the public” can never occur in connection with communication to the public by telecommunication. It cannot be inferred that the independent right of communication to the public by telecommunication in s. 3(1)(*f*) cannot be engaged where, at the same time, copies of a work are made available.
3. As for the ESA’s argument that this may render publication technologically non-neutral, as works distributed *only* by making them available for download on the Internet would not be considered as published, whether this is the inescapable conclusion about the meaning of s. 2.2(1) remains to be seen in a case where the issue arises. Indeed, there is some authority suggesting that “[w]ork available online or sitting in a public database may therefore be considered ‘published’”, and this notwithstanding the fact that a work conveyed over the Internet constitutes a communication to the public by telecommunication (Vaver, at pp. 157 and 172-73).
4. ESA also argues that extending the s. 3(1)(*f*) right to include “digital delivery of copies of a work” would make the secondary infringement provisions in s. 27(2) “largely redundant” in the electronic environment (A.F., at para. 117). It says there would be little need for the secondary infringement provisions related to the electronic distribution of copies of works. I would note that this argument assumes that communication is equivalent to distribution under the Act without any supporting justification on the point. While it appears that such a redundancy point is a policy argument that should be addressed by Parliament if there is a view that any alleged overlap in the provisions is considered undesirable, I will deal with it briefly.
5. The basic difference between primary and secondary infringement is that primary infringement under s. 3(1) may occur without the infringer knowing that infringement is occurring while secondary infringement only applies where the person has actual or constructive knowledge that what is being distributed constitutes an infringing copy of a work. Section 27(2) provides in relevant part for purposes of this case:

It is an infringement of copyright for any person to

. . .

(*b*) distribute to such an extent as to affect prejudicially the owner of the copyright,

. . .

a copy of a work . . . that the person knows or should have known infringes copyright . . . .

1. A secondary infringer may be the same person as the primary infringer, but need not be. The purpose of s. 27(2) is to widen the net for copyright infringement beyond those who engage in primary infringement to those who, with knowledge or constructive knowledge, distribute to such an extent as to prejudicially affect the owner of the copyright, a copy of a work that already infringes copyright. A distributor who knows or should know that he is distributing an infringing copy of a work, for example because it was reproduced without authority of the copyright holder, may be liable for infringement even though he did not engage in the primary infringement. However, a distributor who distributes an authorized copy of the work will not be found liable under s. 27(2)(*b*).
2. According to the evidence in this case, it is standard practice in the video game publishing industry to negotiate clearance of copyright for the reproduction of the musical works incorporated in the games prior to their publication. In the possession of the video game vendor and before the vendor takes any action with respect to communicating the game, there is no infringement of copyright because reproduction rights have been cleared. Unless authorized by the holder of the rights under s. 3(1)(*f*), however, the communication of the game will violate s. 3(1)(*f*) of the Act. But s. 27(2) will not be engaged.
3. ESA has structured its examples in support of its redundancy argument carefully. However, they do not cover the facts of this case. Here the communication or distribution is of prior authorized copies, not infringing copies. Only s. 3(1)(*f*) is engaged, not s. 27(2).

(9) Policy Considerations

1. The policy concern raised by the ESA is that a copyright holder should not be entitled to both a reproduction and a communication right in the context of Internet downloads.
2. The answer to this concern is straightforward: the rights of copyright holders under s. 3(1) are distinct and separate rights. *Bishop v. Stevens* re-affirmed (at p. 477) the holding in *Compo Co. v. Blue Crest Music Inc*., at p. 373, *per* Estey J., that the rights listed in s. 3(1) are distinct and separate rights:

It is clear from an examination of s. 3(1) that it lists a number of distinct rights belonging to the copyright holder.  As stated in *Ash v. Hutchinson & Co. (Publishers), Ltd.*, [1936] 2 All E.R. 1496 (C.A.), at p. 1507, *per* Greene L.J.:

Under the Copyright Act, 1911 [on which the Canadian Act was based], s. 1(2), the rights of the owner of copyright are set out. A number of acts are specified, the sole right to do which is conferred on the owner of the copyright. The right to do each of these acts is, in my judgment, a separate statutory right, and anyone who without the consent of the owner of the copyright does any of these acts commits a tort; if he does two of them, he commits two torts, and so on. [Emphasis added.]

1. The occurrence of one infringement therefore does not preclude the finding of another. As “[i]nfringement is the single act of doing something which ‘only the owner of the copyright has the right to do’” (*Compo Co. v. Blue Crest Music Inc*., at p. 375), if two protected acts occur without authorization of the copyright holder, there are two infringements. The fact that there are two protected rights does not restrict the protection afforded by each right.
2. I cannot agree with my colleagues that the “principle of technological neutrality requires that … we interpret the *Copyright Act* in a way that avoids imposing an additional layer of protections and fees based solely on the *method of delivery* of the work to the end user” (para. 9 (emphasis in original)). Characterizing the Internet transmission as a mere “method of delivery” of the work pre-empts the application of the right to communicate by telecommunication in s. 3(1)(*f*). Further, the proposition is inconsistent with the approach to media neutrality as described by the majority of this Court in *Robertson v. Thomson Corp*., 2006 SCC 43, [2006] 2 S.C.R. 363, at para. 49, *per* LeBel and Fish JJ.:

Media neutrality means that the *Copyright Act* should continue to apply in different media, including more technologically advanced ones. But it does not mean that once a work is converted into electronic data anything can then be done with it. . . . Media neutrality is not a licence to override the rights of authors — it exists to protect the rights of authors and others as technology evolves.

1. A media neutral application of the Act to the facts of this case would mean that the right of reproduction continues to apply to copies made through downloads, notwithstanding the fact that they are *digital* copies. It would also support the proposition that the communication right must continue to apply to digital communications, notwithstanding that they may differ from traditional broadcasting technologies. A media neutral application of the Act, however, does *not* imply that a court can depart from the ordinary meaning of the words of the Act in order to achieve the level of protection for copyright holders that the court considers is adequate.
2. Any concerns arising from the independent protected rights in the digital context are concerns of policy, which are properly within the domain of Parliament in defining the scope of copyright. “The *Copyright Act* is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator” (*Théberge*, at para. 30). While the “courts should strive to maintain an appropriate balance between these two goals” (*CCH Canadian Ltd.*, at para. 10), inferring limits into the communication right in the present case would be beyond the function of the courts. “In Canada, copyright [remains] a creature of statute . . .” (*SOCAN v. CAIP*, at para. 82). See also *CCH*, at para. 9; *Théberge*, at para. 5; *Bishop v. Stevens*, at p. 477; *Compo Co. v. Blue Crest Music Inc.*, at p. 373.
3. Indeed, it would be hazardous for the courts to delimit the scope of broadly defined rights in the digital environment without the benefit of a global picture of the implications for all the parties involved. Binnie J. wrote in *SOCAN v. CAIP*, at para. 40:

The capacity of the Internet to disseminate “works of the arts and intellect” is one of the great innovations of the information age. Its use should be facilitated rather than discouraged, but this should not be done unfairly at the expense of those who created the works of arts and intellect in the first place.

1. In light of these considerations, providing exceptions to the right to communicate by telecommunication is properly left to Parliament. History has shown that Parliament will indeed legislate when it considers copyright protection to be improperly balanced (for example, it introduced the ephemeral recordings exception in s. 30.8(1), following the ruling in *Bishop* (S.C. 1997, c. 24, s. 18); McKeown, at pp. 21-82 to 21-83).
2. In addition, it should be borne in mind that SOCAN merely proposes tariffs, which must then be authorized by the Board. In doing so, it is within the power of the Board to adjust proposed royalty rates in a manner that it considers appropriate for a particular use. Specifically, when the same activity engages two protected rights, the Board is in a position to consider each of these rights in light of the type of use that causes users to engage in the activity. This is consistent with the core of the Board’s mandate as an economic regulatory agency, which consists of “working out . . . the details of an appropriate royalty tariff” (*SOCAN v. CAIP*, at para. 49) based on the economic value of the different ways in which copyrighted works may be used. The Board’s authority to determine royalty rates in factual circumstances addresses concerns about the relative value of services as between online game providers and bricks and mortar stores, and the overlapping of rights and alleged “double-dipping” by copyright holders.

IV. Conclusion — Meaning of “Communicate” in Section 3(1)(*f*)

1. Communicating works to the public by telecommunication is an independent and distinct right from other rights in s. 3(1) that are included within copyright. It is complete when the communication is received, in this case, when the file is downloaded to the user’s computer, even though it can be perceived only after the transmission, or whether or not it is ever perceived. As put by Professor Vaver, “[s]ending works by radio, television, cable, fax, modem, satellite, or microwave involves telecommunication”; if, in addition, the communication is “to the public”, it will attract liability (p. 172).
2. I would dismiss the appeal with costs.

*Appeal allowed with costs,* LeBel*,* Fish*,* Rothstein *and* Cromwell JJ. *dissenting.*

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