SUPREME COURT OF CANADA

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Case in Brief: *Society of Composers, Authors and Music Publishers of Canada v. Entertainment Software Association*

Judgment of July 15, 2022 | On appeal from the Federal Court of Appeal
Neutral citation: 2022 SCC 30

The Supreme Court rules the Copyright Act only requires users to pay one royalty fee to stream works online.

Copyright law protects original works of writing, music or art. Under Canada's *Copyright Act*, the person who creates a work holds its "copyright" and is the only person with the right to reproduce or perform the work. If someone else wants to reproduce or perform the work, they must ask the copyright holder for permission, and they are usually asked to pay a fee called a royalty.

The copyright holder is also the only person with the right to communicate the work to the public by telecommunication, such as playing a song on the radio. In 2012, a new section was added to the *Copyright Act* to clarify that this right includes "making the work available" online by uploading it to the Internet. For example, downloading a song creates a new copy of the music, so a reproduction royalty must be paid. Likewise, streaming a video of the song is a new performance of the music, so a performance royalty must be paid.

The Copyright Board of Canada is a federal administrative body whose mandate includes approving the amount of royalties to be paid for some online services. It received submissions from different groups on how to interpret the new section of the *Copyright Act*, including the Society of Composers, Authors and Music Publishers of Canada ("SOCAN"). SOCAN is an organization that collects and distributes royalties for music creators, publishers and visual artists. SOCAN argued that "making works available" online attracts a royalty separate from the royalties for downloading or streaming the same works later on. This would mean that, for example, online music services would have to pay a royalty when they post a song on the Internet in a way that allows for online access by individual users. Another royalty would be paid when a song is downloaded or streamed. The Copyright Board agreed with SOCAN.

The Federal Court of Appeal overturned the decision of the Copyright Board. It said the new section of the *Copyright Act* does not create a new and separate royalty for uploading a work, in addition to the royalty that must be paid when users download or stream the content. SOCAN appealed the Court of Appeal's decision.

The Supreme Court has dismissed SOCAN's appeal.

The Copyright Board's decision was wrong.

Writing for the majority of Supreme Court judges, Justice Malcolm Rowe found that the Copyright Board's interpretation of the new section of the *Copyright Act* was inconsistent with the text and purpose of the law and how it operates, and ran contrary to previous decisions of the Supreme Court in other copyright cases. In rejecting the Board's and SOCAN's interpretation, Justice Rowe said "the *Copyright Act* does not exist solely for the benefit of authors".

The Copyright Board's interpretation would also force users to pay more fees if they access works on the Internet instead of using other means, such as listening to the radio. Justice Rowe said this violates the principle of technological neutrality: the law should treat online works the same way it treats offline works. "What matters is what the user receives, not how the user receives it," he wrote.

For streaming, the Supreme Court found that the new section of the *Copyright Act* simply clarifies that a work is "communicated" when it is made available or uploaded online. This already attracts a royalty. If and when individual users stream that same work, no additional royalties must be paid. Streaming is part of "one continuous act" that began when the work was made available online. Because of this, streaming something that was already uploaded online requires paying only one royalty, not two.

Downloading is different. It involves a separate right: the right to reproduce the work, not the right to communicate the work to the public by telecommunication.

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This interpretation of the new section of the *Copyright Act* ensures that Canada complies with its obligations under an international copyright treaty.

The test to determine how courts should review administrative decisions on legal issues, like the decision of the Copyright Board here, was set out in an earlier Supreme Court case: *Canada (Minister of Citizenship and Immigration) v. Vavilov*. *Vavilov* established categories of legal issues that should be reviewed under the standard of "correctness". "Correctness" means that the administrative decision on that issue has to be the only right answer in light of the law and the facts. But the legal issue raised by the Copyright Board's decision in this case did not fall into one of the existing "correctness" categories. However, *Vavilov* said that new categories could be created in rare circumstances. The Supreme Court created a new category of "correctness" review and found that the Copyright Board's decision was wrong in this case.

Breakdown of the decision: *Majority*: Justice Rowe dismissed the appeal (Chief Justice Wagner and Justices Moldaver, Côté, Brown, Kasirer and Jamal agreed) | ***Concurring:*** Justice Karakatsanis dismissed the appeal, but did not agree that the Copyright Board's decision should be reviewed under the "correctness" standard (Justice Martin agreed)

More information (case # 39418): Decision | Case information | Webcast of hearing

Lower court rulings: decision (Copyright Board of Canada) | appeal (Federal Court of Appeal)
