

“MAKING AVAILABLE” = COPYRIGHT INFRINGEMENT

In 2012, the *Copyright Act* was amended to clarify that “making a work available” for on-demand transmission or streaming constitutes a telecommunication which requires the authorization of the copyright owner. With everyone on the Internet capable of making works available to the public, this amendment has a broad impact.

For collective societies engaged in the collection of royalties on behalf of copyright owners, this raised the question of whether a royalty should be payable when: (a) a work is made available for streaming or downloading; and (b) when the work is later streamed or downloaded. In other words, is the work communicated to the public twice?

The Copyright Board concluded that two royalties were indeed payable, but this decision was quashed by the Federal Court of Appeal.ⁱ In a decision released July 15, 2022, the Supreme Court of Canada sustained the court’s decision.ⁱⁱ

2012 Amendments

In 2012, the *Copyright Act* was amended in part to comply with Canada’s international treaty obligations. Article 8 of the *WIPO Copyright Treaty* stipulated that:

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

The 2012 amendments included three new “making available” provisions, namely ss 2.4(1.1), 15(1.1)(d) and 18(1.1)(a). The amendment to section 2.4 defined a telecommunication to the public to include “making available”. The amendments to section 15 and section 18 defined copyright in a performance and a sound recording, respectively, to include “making available”.ⁱⁱⁱ

This appeal was concerned only with the interpretation of the new section 2.4(1.1) in conjunction with the pre-existing section 3(1)(f).

“Rights” under the *Copyright Act*

Section 3(1) of the *Copyright Act* sets out the fundamental interests or “rights” of an author:

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thereof in any material form whatever, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof, and includes the sole right

(a) to produce, reproduce, perform or publish any translation of the work,

(b) in the case of a dramatic work, to convert it into a novel or other non-dramatic work,

(c) in the case of a novel or other non-dramatic work, or of an artistic work, to convert it into a dramatic work, by way of performance in public or otherwise,

(d) in the case of a literary, dramatic or musical work, to make any sound recording, cinematograph film or other contrivance by

means of which the work may be mechanically reproduced or performed,

(e) in the case of any literary, dramatic, musical or artistic work, to reproduce, adapt and publicly present the work as a cinematographic work,

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

(g) to present at a public exhibition, for a purpose other than sale or hire, an artistic work created after June 7, 1988, other than a map, chart or plan,

(h) in the case of a computer program that can be reproduced in the ordinary course of its use, other than by a reproduction during its execution in conjunction with a machine, device or computer, to rent out the computer program,

(i) in the case of a musical work, to rent out a sound recording in which the work is embodied, and

(j) in the case of a work that is in the form of a tangible object, to sell or otherwise transfer ownership of the tangible object, as long as that ownership has never previously been transferred in or outside Canada with the authorization of the copyright owner,

and to authorize any such acts.

While section 3 may appear to provide a long list of “rights”, the Supreme Court determined in previous decisions that the opening paragraph of section 3(1) exhaustively identifies only three interests: (1) to produce or reproduce; (2) to perform; and (3) to publish. Subsections (a) through (j) are merely “illustrative” of these broader rights.^{iv}

In this decision, the Supreme Court further determines that the three interests in section 3(1) are distinct and a single activity can only engage one of the three copyrights. Authors are entitled to royalties for use of their works when an activity engages one of the three copyright interests. An activity that does not engage one of the three copyright interests in section 3(1) or the author’s moral rights in section 14.1 or 28.1 is not a protected or compensable activity under the *Copyright Act*.^v

With respect to works made available via the Internet,

- a. the reproduction right is engaged when a work is downloaded or made available for download; and
- b. the performance right is engaged when a work is streamed or made available for streaming.

While the court accepted that the act of “making a work available” for download or streaming is separate physical activity from the act of a user later downloading or streaming the work, it did not accept that it was a separately compensable activity. The court concluded that if Parliament had intended to add “making available” as a new compensable activity, it should have amended the opening paragraph of section 3(1) to add it as a fourth copyright interest.

Technological Neutrality

The principle of technological neutrality holds that, absent parliamentary intent to the contrary, the *Copyright Act* should not be interpreted in a way that either favours or discriminates against any form of technology. In the words of the Supreme Court, “[w]hat matters is *what* the user receives, not *how* the user receives it”.^{vi}

For downloads, the court determined that there is no telecommunication and neither sections 2.4(1.1) or 3(1)(f) are engaged. Instead, the court found that downloads engage the reproduction right and making a work available for download engages the right to authorize such reproductions per the closing words of section 3(1). Anyone who unlawfully authorizes a reproduction may be liable for infringement regardless of whether the work is later downloaded and thereby reproduced.^{vii}

For streaming, the court draws an analogy to television where works are deemed to be performed upon transmission regardless of whether any viewers actually tune in to the transmission. In the words of the court, making a work available for on demand streaming is “the digital equivalent of flipping to a 24/7 television channel that is continuously playing – that is performing – a particular work”.

The new section 2.4(1.1) clarifies that a work is performed as soon as it is made available for on-demand streaming regardless of whether any viewers actually stream it. A royalty is payable when the work is made available. If a user later experiences the performance by streaming the work, they are experiencing an ongoing performance and no separate royalty is payable.^{viii} The act of making a work available for streaming and the act of streaming the work are a single performance and a single telecommunication.

Value of Rights Separate Issue

ⁱ 2017 CanLII 152886

ⁱⁱ 2022 SCC 30

The value of the royalties or damages payable when “making a work available” was not determined by this appeal. Setting an appropriate tariff for royalties payable to collective societies is a matter for the Copyright Board. The appropriate royalty to be paid in a private license agreements will continue to be the subject of negotiation and the factors to be considered by a court when awarding damages for infringement will continue to be subject to argument.

However, it is clear that liability for compensation will follow for “making a work available” via the Internet regardless of whether or not any member of the public later downloads or streams the work.

Conclusion

With everyone on the Internet capable of making works available to the public, it was critical to grant copyright owners the authority to remove such activity if unauthorized in order for them to maintain control over their property.

The Supreme Court determination that the act of “making a work available” and the later act of streaming or downloading the work are each a single continuous act is likely to increase the value of the royalty or damages payable when a work is made available via the Internet.

Disclaimer: The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

ⁱⁱⁱ Since sound recorders and performers are not “authors”, their rights under the *Copyright Act* are addressed separately.

^{iv} The right to “authorize” others to engage in any of the acts set out in section 3 is also identified a “distinct right” at para 105.

^v 2022 SCC 30 at paras 55 and 57.

^{vi} Ibid, paras 63 and 70.

^{vii} Ibid, para 105 and 107.

^{viii} Ibid, para 100.