

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM FEDERAL COURT OF APPEAL)**

BETWEEN:

AND BETWEEN:

**ENTERTAINMENT SOFTWARE
ASSOCIATION and ENTERTAINMENT
SOFTWARE ASSOCIATION OF CANADA**
APPELLANTS
(APPLICANTS)

**ROGERS COMMUNICATIONS INC,
ROGERS WIRELESS PARTNERSHIP AND
SHAW CABLESYSTEMS G.P, BELL
CANADA and TELUS COMMUNICATIONS
COMPANY**

APPELLANTS
(APPLICANTS)

- and -

**SOCIETY OF COMPOSERS, AUTHORS
AND MUSIC PUBLISHERS OF CANADA**
RESPONDENT
(RESPONDENT)

- and -

**SOCIETY OF COMPOSERS, AUTHORS
AND MUSIC PUBLISHERS OF CANADA**
RESPONDENT
(RESPONDENT)

- and -

**CMRRA/SODRAC INC, SAMUELSON-
GLUSHKO CANADIAN INTERNET
POLICY AND PUBLIC INTEREST CLINIC
and CINEPLEX ENTERTAINMENT LP**
INTERVENERS

- and -

**CMRRA/SODRAC INC, CINEPLEX
ENTERTAINMENT LP, SAMUELSON-
GLUSHKO CANADIAN INTERNET
POLICY AND PUBLIC INTEREST CLINIC
and APPLE CANADA INC. AND APPLE INC**
INTERVENERS

**FACTUM OF THE INTERVENER, SAMUELSON-GLUSHKO CANADIAN INTERNET
POLICY AND PUBLIC INTEREST CLINIC AND SAMUELSON-GLUSHKO CANADIAN
INTERNET POLICY AND PUBLIC INTEREST CLINIC**

Pursuant to Rules 37 and 42 of the Rules of the Supreme Court of Canada

Jeremy de Beer
David Fewer

Samuelson-Glushko Canadian Internet Policy
and Public Interest Clinic (CIPPIC)
57 Louis Pasteur St.
Ottawa, Ontario
K1N 6N5

Telephone: (613) 562-5800 Ext: 2558
FAX: (613) 562-5417
Email: dfewer@uottawa.ca

**Counsel for the Intervener (33921 & 33922),
Samuelson-Glushko Canadian Internet Policy
and Public Interest Clinic and Samuelson-
Glushko Canadian Internet Policy and Public
Interest Clinic**

TO: **THE REGISTRAR**

COPY TO: Barry B. Sookman
Steven G. Mason
Daniel Glover

McCarthy Tétrault LLP
P.O. Box 48, Suite 4700, T-D Bank
Tower
Toronto-Dominion Centre
Toronto, Ontario
M5K 1E6
Telephone: (416) 601-7949
FAX: (416) 868-0673

**Counsel for the Appellants (33921),
Entertainment Software Association
and Entertainment Software
Association of Canada**

Colin S. Baxter

Cavanagh Williams Conway Baxter LLP
1111 Prince of Wales Drive
Suite 401
Ottawa, Ontario
K2C 3T2
Telephone: (613) 569-8558
FAX: (613) 569-8668
E-mail: cbaxter@cwcb-law.com

**Agent for the Appellants (33921),
Entertainment Software Association and
Entertainment Software Association of
Canada**

AND TO: Gilles Daigle
D. Lynne Watt

Gowling Lafleur Henderson LLP
2600 - 160 Elgin Street
Ottawa, Ontario
K1P 1C3
Telephone: (613) 233-1781
FAX: (613) 563-9869
E-mail: gilles.daigle@gowlings.com

**Counsel for the Respondent (33921 &
33922), Society of Composers, Authors
and Music Publishers of Canada and
Society of Composers, Authors and
Music Publishers of Canada**

AND TO: Casey M. Chisick
Timothy Pinos
Jason Beitchman

Cassels Brock & Blackwell LLP
Scotia Plaza
2100 - 40 King Street West
Toronto, Ontario
M5H 3C2
Telephone: (416) 869-5403
FAX: (416) 644-9326

Eugene Meehan, Q.C.

McMillan LLP
50 O'Connor Street, Suite 300
Ottawa, Ontario
K1P 6L2
Telephone: (613) 232-7171
FAX: (613) 231-3191
E-mail: eugene.meehan@mcmillan.ca

Agent for the Intervener (33921 &

E-mail: cchisick@casselsbrock.com

**33922), CMRRA/SODRAC Inc and
CMRRA/SODRAC Inc**

**Counsel for the Intervener (33921 &
33922), CMRRA/SODRAC Inc and
CMRRA/SODRAC Inc**

AND TO: Tim Gilbert

Colin S. Baxter

Gilbert's LLP
77 King Street West
Suite 2010, P.O. Box 301
Toronto, Ontario
M5K 1K2
Telephone: (416) 703-1100
FAX: (416) 703-7422
E-mail: tim@gilbertslaw.ca

Cavanagh Williams Conway Baxter LLP
1111 Prince of Wales Drive
Suite 401
Ottawa, Ontario
K2C 3T2
Telephone: (613) 569-8558
FAX: (613) 569-8668
E-mail: cbaxter@cwcb-law.com

**Counsel for the Intervener (33921 &
33922), Cineplex Entertainment LP
and Cineplex Entertainment LP**

**Agent for the Intervener (33921 &
33922), Cineplex Entertainment LP and
Cineplex Entertainment LP**

AND TO: Gerald L. (Jay) Kerr-Wilson
Ariel A. Thomas
Julia Kennedy

Fasken Martineau DuMoulin LLP
1300 - 55 Metcalfe St.
Ottawa, Ontario
K1P 6L5
Telephone: (613) 236-3882
FAX: (613) 230-6423
E-mail: jkerrwilson@fasken.com

**Counsel for the Appellants (33922),
Rogers Communications Inc, Rogers
Wireless Partnership and Shaw
Cablesystems G.P, Bell Canada and
Telus Communications Company**

AND TO: Michael Koch

Dougald E. Brown

Goodmans LLP
333 Bay Street, Suite 3400
Toronto, Ontario
M5H 2S7
Telephone: (416) 597-5156
FAX: (416) 979-1234
E-mail: mkoch@goodmans.ca

Nelligan O'Brien Payne LLP
1500 - 50 O'Connor St.
Ottawa, Ontario
K1P 6L2
Telephone: (613) 231-8210
FAX: (613) 788-3661
E-mail: dougald.brown@nelligan.ca

**Counsel for the Intervener (33922),
Apple Canada Inc. and Apple Inc**

**Agent for the Intervener (33922), Apple
Canada Inc. and Apple Inc**

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PART I – OVERVIEW

1. This appeal should be allowed. Put simply, the Copyright Board incorrectly interpreted paragraph 3(1)(f) of the *Copyright Act*. Parliament did not intend the communication right administered by SOCAN to apply to a transmission that is, in its essential character, a sale of a digital copy of a work equivalent to a conventional retail transaction. Rather, paragraph 3(1)(f) was designed by Parliament to apply to an online transmission that is, in its essential character, analogous to any other performance, broadcast or similar communication. Although a copyright owner's rights are separate and distinct, the provisions of the *Act* should not be interpreted redundantly so as to make multiple layers of rights cover the same single transmission. This coordinated and technologically neutral interpretation is consistent with the *Copyright Act's* key object, which is to efficiently obtain just rewards for creators without creating practical obstacles to the proper utilization of protected works. Sound internet policy and a balancing of public interests also reinforce an interpretation of the statute that reduces transaction costs, discourages inefficient duplication, and limits royalty stacking, while still providing copyright owners full and fair compensation for online uses of works.

PART II – QUESTIONS IN ISSUE

2. CIPPIC's submissions address two issues:
- A. Standard of review: Whether the standard of review of correctness or reasonableness applies to the Board's interpretation and application of section 3 of the *Copyright Act*.
 - B. Statutory interpretation: Whether the online distribution of a digital copy of a musical work or video game including a musical work is a communication to the public by telecommunication within the scope of paragraph 3(1)(f).

PART III – ARGUMENT

A. STANDARD OF REVIEW

3. The standard of review applicable to the Board's decision is correctness.
4. In *Dunsmuir*, this Court summarized the simple two-step process for identifying the applicable standard

of review. First, if the standard applicable to a particular kind of question addressed by an administrative tribunal has already been satisfactorily determined, then reference to precedent resolves this issue for the reviewing court. Only where the standard of review has not already been satisfactorily determined is an analysis of various relevant factors required. The Court of Appeal followed neither step of this process.

Dunsmuir v. New Brunswick, 2008 SCC 9 at para. 62.

5. The Court of Appeal ignored well-settled jurisprudence applying the standard of correctness to the Copyright Board's interpretation and application of generally applicable provisions of the *Copyright Act*. The question in this case is the same category of question—the legal interpretation of a generally applicable provision of the *Copyright Act*—reviewed in *SOCAN v. CAIP* by the Court of Appeal and this Court on the standard of correctness. It is also virtually the same question that all parties, including SOCAN, and the Court of Appeal agreed in *CWTA v. SOCAN* should be reviewed for correctness.

Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers, 2004 SCC 45 at paras. 48-50, affirming in part 2002 FCA 166 at paras. 104-7; *Canadian Wireless Telecommunications Association v. Society of Composers, Authors and Music Publishers of Canada*, 2008 FCA 6 at para. 5.

6. The question of interpretation of a generally applicable provision of the *Copyright Act* in this case is also essentially the same as other legal questions that were held to be reviewable for correctness by the Court of Appeal, both pre- and post-*Dunsmuir*. For example, the Court of Appeal recently required the Board to correctly resolve questions relating to rights-holders' entitlement to collect royalties from satellite radio service providers. It is also well settled that the Board must correctly interpret the generally applicable definitions in Part VIII of the *Copyright Act*.

Sirius Canada Inc. v. CMRRA/SODRAC Inc., 2010 FCA 348 at para. 8; *Apple Canada Inc. v. Canadian Private Copying Collective*, 2008 FCA 9 at para. 2; *Canadian Private Copying Collective v. Canadian Storage Media Alliance*, 2004 FCA 424 at para. 145-7.

7. Alternatively, if the Court of Appeal implied by ignoring the settled jurisprudence that the standard of review had not already been satisfactorily determined, it misinterpreted the factors relevant to making that determination. Justice Evans conducted the most thorough judicial analysis of these factors pertaining to the Copyright Board in the Court of Appeal's decision in *SOCAN v. CAIP*, which was subsequently endorsed by this Court. After a meticulous review of the governing legal principles, he concluded that the decisive

factor settling correctness as the applicable standard was the fact that the provisions at issue—particularly section 3 of the *Copyright Act*—were not within the Board’s “exclusive domain” or “home territory”, but rather were in “shared space” with the courts.

SOCAN v. CAIP (FCA), at paras. 36-107, especially paras. 87, 104; *SOCAN v. CAIP* (SCC) at para. 48.

8. In error, the Court of Appeal in this judicial review focused on only one paragraph of the *Dunsmuir* decision, number 54, regarding the relevance of tribunals interpreting their “own” statute. Moreover, in focusing on this factor, the Court of Appeal contradicted the analysis by Justice Evans that has become the touchstone test of the standard applicable to Copyright Board decisions. Although the Board often deals with the *Copyright Act* and not other statutes, the *Copyright Act* is more often dealt with by courts and not the Board.

9. It is admittedly arguable that deference to the Board may be appropriate on questions involving the application of clearly settled copyright law to particular facts proved by evidence. In the Court of Appeal’s decision in *SOCAN v. CAIP*, Justice Evans acknowledged that the standard of reasonableness might apply in so far as a question “essentially involves the application, rather than the interpretation of the statute.” But the questions at issue in this judicial review are clearly questions of legal interpretation, not factual application. As this Court held in *SOCAN v. CAIP*, the standard of review is correctness because it is not the application of the facts themselves, but “the legal significance” of the facts that is in issue.

SOCAN v. CAIP (FCA) at para. 107; *SOCAN v. CAIP* (SCC) at para. 50.

10. The problems that would result if the questions in this case were reviewable for reasonableness, and not for correctness, should be obvious from the Court of Appeal’s conclusion at paragraph 65 of its judgment: the principle “that a download of a musical file from an online music service to a single user is a communication of the musical work to the public by telecommunication...is one which falls within the range of possible, acceptable outcomes.” With respect, the legal uncertainty resulting from this vague proposition would be problematic for copyright owners, users, and the general public. What other legal conclusions about downloading musical works might be reasonable, within a range of possible, acceptable outcomes? On precedent-setting interpretations of generally applicable provisions of the *Copyright Act*, reviewing courts must promote consistency and predictability by ensuring that the Board reaches the correct result, not merely a reasonable result.

B. STATUTORY INTERPRETATION

11. The words of paragraph 3(1)(f) should be interpreted “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.”

Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27 at para. 22, citing Elmer Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) at 87.

12. In its evolving historical context, paragraph 3(1)(f) was meant to cover a transmission analogous to a public performance or conventional broadcast. This provision was amended to encompass the transmission of works by cable, Internet and future modes of telecommunication, in addition to transmission by conventional broadcasts. It was not amended to cover the distribution of copies of works by various modes of telecommunication, in addition to distribution by physical media.

13. Bill C-11, *An Act to Amend the Copyright Act*, would further change the communication right to “include making [a work] available to the public by telecommunication in a way that allows a member of the public to have access to it from a place and at a time individually chosen by that member of the public.” This proposed amendment indicates that the communication right does not already encompass such activity. The decisions of the Copyright Board and Federal Court of Appeal, however, state that the communication right does currently apply where there is intent to communicate a work to a member of the public (*i.e.* making it available) and where, in fact, the work is received by at least one member of the public. Given Parliament’s proven intention to distinguish between a “communication to the public” of a work under the existing *Copyright Act* and the intention of “making it available to ... a member of the public” under the proposed reforms, this interpretation does not make sense.

Bill C-11, *An Act to amend the Copyright Act*, 1st Sess., 41st Parl., 2011, cl. 4 (amending s. 3(1) of the *Copyright Act*).

14. Grammatically, in the phrase “communication to the public by telecommunication” in the existing *Act*, the words “communication” and “telecommunication” must mean different things, as they would otherwise be redundant. Parliament could have said, simply, “telecommunication to the public,” but it chose not to. So, not every “telecommunication” is a “communication” protected under paragraph 3(1)(f) of the *Copyright Act*. As defined by section 2, not every “transmission of signs, signals, writing, images or sounds or intelligence of any nature by wire, radio, visual, optical or other electromagnetic system” falls within a

copyright owner's exclusive communication right.

15. Since the legal right of “communication” is an undefined term, analysis of the entire context of section 3, section 27, and other provisions of the *Copyright Act* is necessary to interpret its meaning. In context, the right to communicate a work is different than the right to reproduce a work, and different than the right to sell or distribute a copy of a work. Communication is addressed in paragraph 3(1)(f). Reproduction is addressed in the opening words of section 3. Sale and distribution are addressed in subsection 27(2). These are separate and distinct rights. The separate and distinct rights of a copyright owner, however, must not be interpreted and applied in isolation from each other. The harmonious scheme of the entire *Act* is only preserved if the various rights of a copyright owner are interpreted coherently and in coordination, not in a legal vacuum.

Bishop v. Stevens, [1990] 2 S.C.R. 467 at p. 13-14.

16. The Copyright Board's decision conflates the meaning and effect of a copyright owner's distinct rights. In practice, it causes the redundant application of each distinct right to the same act of telecommunication. An online transmission of digital information (a telecommunication) might, depending on its essential character, be a communication to the public, or a sale or distribution of a copy. However, a single distinct act will not usually be both a communication, and a sale and distribution. While it might make sense to divide copyright into distinct components covering essentially distinct acts, there is no sensible reason for Parliament to fragment copyright into multiple duplicative rights that apply redundantly to the same act.

17. In *Bishop v. Stevens*, this Court held that the activity of reproducing and subsequently broadcasting a work—two clearly separate and distinct acts as a matter of fact—implicated both the reproduction and communication rights, even if the sole purpose of the reproduction was to prepare for the broadcast. So, in circumstances where there are truly two distinct activities of a different essential character, two rights might possibly be infringed.

Bishop v. Stevens, [1990] 2 S.C.R. 467 at 20

18. But that scenario is distinguishable from most circumstances related to this case, where there is only one single activity—a telecommunication. Is the essential character of the telecommunication a sale and distribution of a copy of a work (addressed by subsection 27(2)) or a communication of a work (addressed by paragraph 3(1)(f))? On the correct legal interpretation of the *Copyright Act*, whether a single

telecommunication is essentially characterized as a distribution or a communication should depend on the fundamental nature of the transaction in light of all the circumstances, guided by core principles of copyright law and sound public policy.

19. One of the most significant principles influencing the characterization of the telecommunication of music at issue is the principle of technological neutrality. The principle of technological neutrality does not mean that technologically similar activities must always be characterized identically. For example, the Copyright Board's finding of fact that a "download" and a "stream" are technologically similar transmissions, except for their relative permanence, does not mean that they have the same essential character and, therefore, legal implications. Although there may, in fact, be little technological difference between selling downloads and streaming signals, there is, in law, a very meaningful difference between these transmissions.

Respondent's Factum, *ESA v. SOCAN*, Court File No. 33921 at para. 70.

20. The principle of technological neutrality means that essentially similar activities involving different technologies should be treated equally. The Copyright Board's decision contradicts this principle, and creates obvious technological bias. Both kinds of transmissions, downloads and streams, happen to be telecommunications as defined by section 2 of the *Copyright Act*, but each has different essential characteristics that determine its relationship to a copyright owner's distinct legal rights. The sale and transmission of a work from an online retailer is, essentially, like the sale and conveyance of physical media from a conventional retailer. The transmission of a stream from a webcaster is, essentially, like the transmission of a signal from a conventional broadcaster. The distinct essential characteristics of each kind of telecommunication makes it clear that only the first implicates reproduction, sale and distribution rights under section 3 and subsection 27(2), and only the second implicates SOCAN's communication rights under paragraph 3(1)(f).

21. In his leading text on this subject, Professor Vaver explains:

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 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.

David Vaver, *Intellectual Property Law*, 2nd ed. (Toronto: Irwin Law, 2011) at 172-3.

The state of affairs that Professor Vaver criticizes exists only because of decisions of the Copyright Board and Court of Appeal, which are now directly or indirectly in dispute before this Court. Parliament did not intend through the communication right to enable fundamentally similar transactions with the same essential characteristics (*i.e.* the physical and online sale of a copy of a work) to be treated differently. That is the opposite of technological neutrality.

22. SOCAN distinguishes the distribution of works by bricks-and-mortar retailers or by postal service from the telecommunications at issue in this case by arguing that “the musical work is delivered by telecommunication, which attracts liability pursuant to a proper interpretation of section 3(1)(f) [emphasis added].” But whether the delivery of works by telecommunication attracts liability under paragraph 3(1)(f), in addition to subsection 27(2) and other provisions, is the question in this case, not the answer. CIPPIC submits that paragraph 3(1)(f) does not apply to a delivery, nor a distribution, nor a transmission; it applies only to a communication.

Respondent’s Factum, *ESA v. SOCAN*, Court File No. 33921 at para. 72.

23. Likewise, SOCAN’s argument that “all forms of distribution of literary, dramatic, musical or artistic works by telecommunication should be similarly protected [emphasis in original]” ignores the obvious scheme of the *Copyright Act*, which protects different telecommunications differently. Some forms of telecommunication might be protected by the provisions of section 3 and subsection 27(2), and other forms—specifically communications—might be protected by paragraph 3(1)(f). So it is untrue that if a musical work were downloaded by or streamed to 100,000 people on demand “there would be no copyright protection.” These acts would probably infringe copyright under various provisions of the *Copyright Act*; they just may or may not infringe the particular communication rights that SOCAN happens to administer.

Respondent’s Factum, *Rogers et. al. v. SOCAN*, Court File No. 33922 at paras. 122-3.

24. And while CIPPIC agrees with the respondent SOCAN that “the *Act* must not punish creators for the technological advances in the exploitation of their works,” it is equally true that, as this Court held in

Robertson v. Thomson Corp., the principle of technological or media neutrality “precludes a finding of copyright infringement merely because it is possible to search [i.e. transact] with more efficient tools than in the past.”

Respondent’s Factum, *Rogers et. al. v. SOCAN*, Court File No. 33922 at para. 124; *Robertson v. Thomson Corp.*, 2006 SCC 43 at para. 48.

25. The object of the *Copyright Act* is also key to interpreting the scope of paragraph 3(1)(f). This Court has affirmed that the *Act* is usually “presented as a balance” of various rights and interests:

“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. ... Excessive control by holders of copyrights and other forms of intellectual property may ... create practical obstacles to proper utilization.”

Théberge v. Galeries d’Art du Petit Champlain inc., 2002 SCC 34 at paras. 31-2.

26. In this case, conflating all kinds of transmissions to the public within the communication right would create an inefficient, duplicative scheme of overcompensation, because the same single act would give rise to multiple liabilities under redundant sets of rights. While it is fair to recognize a creator’s distinct rights as they apply to different activities of essentially distinct character, stacking multiple rights over a single activity would be inconsistent with the objects of the *Copyright Act*. Such layering of liabilities, combined with the fragmentation of copyright administration among proliferating copyright licensing and collecting bodies, would create practical obstacles to the utilization of protected works, dramatically increase transaction costs and act as a drag on digital innovation in Canada. This problem is compounded by the potential additional layering of multiple neighbouring rights belonging to performers, sound recording makers and broadcasters.

27. Professor Heller calls the scenario caused by copyright fragmentation and duplication the “tragedy of the anticommons” leading to a “gridlock economy.” Professors Gervais and Maurushat identify this problem in Canadian copyright law specifically, with fragmentation stemming from “the lack of cohesion, standardization and, to a certain extent, effective organization of both copyright law and collective

management.”

Michael Heller, “The Tragedy of the Anticommons: Property in the Transition from Marx to Markets,” (1998) 111 *Harvard Law Review* 621-688; Michael Heller, *The Gridlock Economy: How Too Much Ownership Wrecks Markets, Stops Innovation and Costs Lives* (New York: Basic Books, 2008) at p. 1-2; Daniel Gervais and Alana Maurushat, “Fragmented Copyright, Fragmented Management: Proposals to Defrag Copyright Management,” (2003) 2:1 *Canadian Journal of Law and Technology* 15-33 at 1.

28. The present case is an ideal opportunity for this Court to address such problems by interpreting paragraph 3(1)(f) in the most grammatically plausible manner, harmoniously with the scheme of entire *Copyright Act* and consistently with its balanced objectives, thus reinforcing Parliament’s sound internet policy and the public interest.

PART IV – COSTS

29. CIPPIC does not seek costs and asks that no costs be awarded against it.

PART V – ORDER SOUGHT

30. CIPPIC respectfully requests that it be permitted to present oral arguments at the hearing.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 17th
day of November, 2011

Jeremy de Beer
David Fewer

Counsel for the Intervener, the Samuelson-Glushko Canadian
Internet Policy & Public Interest Clinic

PART VI – TABLE OF AUTHORITIES

Authority	Reference in Argument
<u>Cases</u>	
1 <i>Apple Canada Inc. v. Canadian Private Copying Collective</i> , 2008 FCA 9	6
2 <i>Bishop v. Stevens</i> , [1990] 2 S.C.R. 467	15,17
3 <i>Canadian Private Copying Collective v. Canadian Storage Media Alliance</i> , 2004 FCA 424	6
4 <i>Canadian Wireless Telecommunications Association v. Society of Composers, Authors and Music Publishers of Canada</i> , 2008 FCA 6	5
5 <i>Dunsmuir v. New Brunswick</i> , 2008 SCC 9	4
6 <i>Rizzo & Rizzo Shoes Ltd. (Re)</i> , [1998] 1 S.C.R. 27	11
7 <i>Robertson v. Thomson Corp.</i> , 2006 SCC 43	24
8 <i>Sirius Canada Inc. v. CMRRA/SODRAC Inc.</i> , 2010 FCA 348	6
9 <i>Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers</i> , 2002 FCA 166	5,7,9
10 <i>Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers</i> , 2004 SCC 45	5,7,9
11 <i>Théberge v. Galerie d'Art du Petit Champlain inc.</i> , 2002 SCC 34	25
<u>Secondary Sources</u>	
12 Bill C-11, <i>An Act to amend the Copyright Act</i> , 1st Sess., 41st Parl., 2011	13
13 Daniel Gervais and Alana Maurushat, "Fragmented Copyright, Fragmented Management: Proposals to Defrag Copyright Management," (2003) 2:1 <i>Canadian Journal of Law and Technology</i> 15-33	27
14 David Vaver, <i>Intellectual Property Law</i> , 2nd ed. (Toronto: Irwin Law, 2011) at 172-3	21
15 Michael Heller, "The Tragedy of the Anticommons: Property in the Transition from Marx to Markets," (1998) 111 <i>Harvard Law Review</i> 621-688	27
16 Michael Heller, <i>The Gridlock Economy: How Too Much Ownership Wrecks Markets, Stops Innovation and Costs Lives</i> (New York: Basic Books, 2008)	27