

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

BETWEEN:

**RE:SOUND**

APPELLANT  
(APPLICANT)

- and -

**MOTION PICTURE THEATRE ASSOCIATIONS OF CANADA, ROGERS  
COMMUNICATIONS INC, SHAW COMMUNICATIONS INC., BELL EXPRESSVU LLP,  
COGECO CABLE INC., EASTLINK, QUEBECOR MEDIA, TELUS COMMUNICATIONS  
COMPANY, TURNER BROADCASTING SYSTEMS INC, CANADIAN ASSOCIATION OF  
BROADCASTERS and CANADIAN BROADCASTING CORPORATION**

RESPONDENTS  
(RESPONDENTS)

- and -

**SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY AND PUBLIC INTEREST  
CLINIC**

INTERVENERS

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

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

David Fewer

Samuelson-Glushko Canadian Internet Policy and  
Public Interest Clinic (CIPPIC)  
57 Louis Pasteur St.  
Ottawa, ON K1N 6N5  
Telephone: (613) 562-5800 Ext: 2558  
FAX: (613) 562-5417  
Email: dfewer@uottawa.ca

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

TO: **THE REGISTRAR**

COPY TO: Mahmud Jamal  
Glen Bloom  
Jason MacLean  
Marcus Klee

Osler, Hoskin & Harcourt LLP  
Box 50, 1 First Canadian Place  
Toronto, Ontario  
M5X 1B8  
Telephone: (416) 862-6764  
FAX: (416) 862-6666  
E-mail: mjamal@osler.com

Patricia J. Wilson

Osler, Hoskin & Harcourt LLP  
340 Albert Street  
Suite 1900  
Ottawa, Ontario  
K1R 7Y6  
Telephone: (613) 787-1009  
FAX: (613) 235-2867  
E-mail: pwilson@osler.com

**Agent for the Appellant, Re:Sound**

**Counsel for the Appellant, Re:Sound**

AND TO: David W. Kent

McMillan LLP  
Brookfield Place, Suite 4400  
181 Bay Street  
Toronto, Ontario  
M5J 2T3  
Telephone: (416) 865-7143  
FAX: (416) 865-7048  
E-mail: david.kent@mcmillan.ca

Marie-France Major

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

**Counsel for the Respondent, Motion  
Picture Theatre Associations of  
Canada**

**Agent for the Respondent, Motion  
Picture Theatre Associations of Canada**

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

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 Respondents, Rogers  
Communications Inc and Shaw  
Communications Inc., Bell Expressvu  
LLP, Cogeco Cable Inc., Eastlink,  
Quebecor Media, Telus**

**Communications Company, Turner  
Broadcasting Systems Inc**

AND TO:

Mark Hayes

Hayes Elaw LLP  
2300 Yonge Street  
Box 2397, Suite 2102  
Toronto, Ontario  
M4P 1E4  
Telephone: (416) 966-3529  
FAX: (416) 966-3529

**Counsel for the Respondent, Canadian  
Association of Broadcasters**

AND TO:

Marek Nitoslawski

Fasken Martineau DuMoulin LLP  
Tour de la Bourse, bureau 3400  
800 Place Victoria  
Montréal, Quebec  
H4Z 1E9  
Telephone: (514) 397-4335  
FAX: (514) 397-7600  
E-mail: mnitoslawski@mtl.fasken.com

**Counsel for the Respondent, Canadian  
Broadcasting Corporation**

Gerald L. (Jay) Kerr-Wilson

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

**Agent for the Respondent, Canadian  
Association of Broadcasters**

Gerald L. (Jay) Kerr-Wilson

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

**Agent for the Respondent, Canadian  
Broadcasting Corporation**

**TABLE OF CONTENTS**

<b>DESCRIPTION</b>	<b>PAGE</b>
PART I – OVERVIEW	1
PART II – ISSUES	1
PART III – ARGUMENT	2
A.    STANDARD OF REVIEW	2
B.    STATUTORY INTERPRETATION	3
PART IV – COSTS	8
PART V – ORDER SOUGHT	8
PART VI – TABLE OF AUTHORITIES	10
PART VII – STATUTES RELIED UPON	11

## **PART I – OVERVIEW**

1. This appeal should be dismissed. The Copyright Board correctly interpreted the definition of “sound recording” in section 2 of the *Copyright Act*, R.S.C. 1985, c. C-42, and the relationship between section 2 and section 19. The *Act* does not protect a soundtrack, including any of its individual components, accompanying a cinematographic work as a sound recording or recordings separate and distinct from the cinematographic work. Rather, in circumstances where all or part of a soundtrack accompanies a cinematographic work, all audio-visual components are protected together as a single dramatic work. In addition to the compelling reasons given by the Copyright Board and the Federal Court of Appeal, this interpretation is clearly consistent with the object of the *Copyright Act*, 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 uses of their works.

## **PART II – ISSUES**

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 of the definition of “sound recording” in section 2 of the *Copyright Act*.

B. Statutory interpretation: Is a soundtrack or individual component of a soundtrack accompanying a cinematographic work protected as both a separate and distinct sound recording and as a part of the cinematographic work?

## PART III – ARGUMENT

### A. STANDARD OF REVIEW

3. The Federal Court of Appeal found that the Copyright Board’s decision was correct, and so did not need to make a determination of the proper standard of review. CIPPIC agrees that the Copyright Board’s decision was correct, and so survives challenge on any standard of review. However, because the parties disagree on the standard of review applicable to the Copyright Board’s interpretation of section 2 of the *Copyright Act*, CIPPIC’s submissions briefly address this issue.

4. Paragraphs 3-10 of CIPPIC’s factum in *Entertainment Software Association et al. v. SOCAN*, SCC File No. 33921, (*ESA*) and *Rogers Communications Inc. et al. v. SOCAN*, SCC File No. 33922, (*Rogers*) explain how the Federal Court of Appeal erred in those cases by failing to follow either step of *Dunsmuir*’s two-step process for determining the standard of review. Had the Federal Court of Appeal in those cases referred to the well-settled jurisprudence addressing the Copyright Board’s interpretation of generally applicable provisions of the *Copyright Act*, or analyzed the various factors relevant to determining the standard of review, it would have concluded that correctness is the standard applicable in those cases.

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

5. Likewise, in this case, well-settled jurisprudence or, alternatively, analysis of relevant factors indicates that the applicable standard of review is correctness. The same jurisprudence confirming that the Board’s interpretation of a generally applicable provision of the *Copyright Act* is reviewable for correctness also indicates—explicitly or by analogy—that the Board’s interpretation of section 2 of the *Act* is reviewable for correctness. The correctness standard has been regularly applied to the Board’s interpretation of the rights in section 3, the definitions in section 2.4, the definitions in section 79 and

other generally applicable provisions of the *Act*. There is no reason to review the Copyright Board's interpretation of the definition of "sound recording" in section 2 on a different standard.

*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; *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.

6. Indeed, the Federal Court of Appeal's straightforward application of the standard of review of correctness in this case supports the argument in *ESA* and in *Rogers* that the Court erred by applying the standard of reasonableness to a similarly generally applicable provision of the *Act*.

## **B. STATUTORY INTERPRETATION**

7. This appeal raises the issue of the proper interpretation of the definition of a "sound recording" pursuant to s. 2 of the *Copyright Act* and in light of the right under section 19 to equitable remuneration for the communication to the public by telecommunication and the public performance of a sound recording.

8. The words of section 2 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*, 2<sup>nd</sup> ed. (Toronto: Butterworths, 1983) at 87.

9. The Federal Court of Appeal correctly upheld the Copyright Board's decision that a soundtrack, including its individual components, falls outside of the definition of a "sound recording" under the *Copyright Act* when it accompanies a cinematographic work. For the many reasons thoroughly explained by the Copyright Board and endorsed by the Federal Court of Appeal, this interpretation is

the only one that that makes sense given the grammatical meaning of the words and logical context of the entire statutory scheme.

10. In addition to making grammatical and contextual sense, this purposive interpretation is also consistent with the fundamental object of the *Copyright Act*, which is to efficiently obtain just rewards for creators without creating practical obstacles to the proper utilization of protected works.

“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 ... 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.

11. 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 uses of their works.

12. Parliament introduced the definition of a “sound recording” to the *Act* in its 1997 amendments establishing a set of “neighbouring rights” for performers, record producers and broadcasters. The exclusion of a “soundtrack of a cinematographic work” from the definition of a “sound recording” serves to temper potential inefficiencies produced by this new layer of rights by removing some redundancy from the already-fragmented domain of audiovisual content. The exclusion thus helps retain the important balance between the interests of copyright owners and copyright users.

13. Without the exclusion of soundtracks or parts of soundtracks accompanying cinematographic

works from the definition of “sound recording,” prospective users would be subject to multiple layers of overlapping copyrights and neighbouring rights in the same single object. The sound recording would be protected separately and distinctly under sections 18, 19 and other provisions of the *Act*, and it would likely be protected as a substantial part of a cinematographic (dramatic) work under section 3. The double compensation of record producers, fragmentation of copyright, and stacking of royalties under the Appellant’s interpretation would only serve to introduce transaction costs and inefficiencies into Canada’s copyright system. It would stifle innovation and entrepreneurship in Canada, reduce consumer welfare, and hurt creators by unduly complicating the administration of copyright.

14. The Board recognized the “practical obstacles to proper utilization” (to use the words of this Court from *Théberge*) that might result from such a thicket of intellectual property rights at paragraph 29 of its decision, discussing the “veto” power over movie rentals that the Appellant’s interpretation would give each author, performer and record producer, as just one example. This problem of copyright fragmentation is also known as the “tragedy of the anticommons” or, more simply, “gridlock.”

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.

15. The Copyright Board’s interpretation does not mean that rights holders would be deprived of fair remuneration for the use of their works. Rights holders currently receive payments for the inclusion of their performances and recordings in cinematographic works via negotiated up-front agreements. Section 17 of the *Act* specifically requires a performer to agree to the embodiment of his or her performance in a cinematographic work, and section 18 facilitates the transactional licensing of sound recordings for reproduction by inclusion in cinematographic works.

16. The Copyright Board's interpretation of the definition of "sound recording" in section 2 is also technologically neutral. Although the Appellant argues that the principle of technological neutrality prohibits discrimination between radio broadcasts and audiovisual content such as movies, television, and the Internet, its argument actually confuses the protection of different types of works with the protection of works across different formats.

17. Canadian copyright law intentionally and justifiably treats different types of works differently, including distinguishing in various circumstances between the protection afforded to literary, artistic, musical and dramatic (including cinematographic) works, as well as between these works and the performers performances, sound recordings and broadcast signals owned by neighbouring rights holders. This scheme can be perfectly consistent with the principle of technological neutrality, which requires merely that the *Copyright Act* not be interpreted to discriminate between different types of technological formats or distribution platforms.

18. That is why the principle of technological neutrality prohibits the differential treatment of copies of musical works distributed on physical media through conventional retail outlets and copies of musical works distributed digitally through online music services, as explained at paragraphs 19-24 of CIPPIC's factum in *ESA/Rogers*. Similarly, a cinematographic work ought to retain its characterization irrespective of whether it is on a film reel, a DVD, or a file downloaded over the Internet. But it does not violate the principle of technological neutrality to treat a musical work, performance and sound recording differently from each other, or to treat a sound recording accompanying a cinematographic work differently from a sound recording not accompanying a cinematographic work, especially where that is the clearly expressed intention of Parliament.

19. In *Robertson v. Thomson Corp.*, Justice Abella explains the principle of technological

neutrality, concurring in part with the majority on the equivalence of newspaper articles on CD-ROMs versus in paper format:

The *Copyright Act* was designed to keep pace with technological developments to foster intellectual, artistic and cultural creativity. In applying the *Copyright Act* to a realm that includes the Internet and the databases at issue in this case, courts face unique challenges, but in confronting them, the public benefits of this digital universe should be kept prominently in view. As Professor Michael Geist observes:

The Internet and new technologies have unleashed a remarkable array of new creativity, empowering millions of individuals to do more than just consume our culture, instead enabling them to actively and meaningfully participate in it.

*Robertson v. Thomson Corp.*, 2006 SCC 43 at para. 76 [citations omitted].

20. As more individuals participate in creation of new media content, including cinematographic works such as mash-ups derived from other works, thus becoming both users and creators at users at the same time, it is more important than ever to not burden these new authors and related creators with complex and overlapping rights schemes. The most inefficient scenario, which would result from the Appellant's interpretation of section 2, would be that a prospective creator must negotiate with and pay the owner of the dramatic work, which includes payment for constituent parts like a soundtrack, and then also negotiate with and pay the owner of the sound recording, and pay further remuneration for the public performance or communication of that sound recording. This kind of royalty stacking and potential holdout problem is a real issue in copyright generally, and the "process can be even more complex where audiovisual works such as films or television programs are involved." The Copyright Board's correct interpretation of Parliament's intention to limit this problem where cinematographic works are concerned is at least a partial solution.

Jeremy de Beer, "Legal Strategies to Profit from Peer Production," (2008) 46 *Canadian Business Law Journal* 269 at 286.

21. This Court is facing distinct but similar problems of potential transaction costs, inefficient duplication and royalty stacking in the companion cases to this appeal, *ESA* and *Rogers*. The cases are, in many respects, distinguishable. *ESA* and *Rogers* both involve the assessment of whether a single act—the sale and online distribution of a copy of a work—involves multiple layers of redundant rights, including reproduction, communication, sale and distribution. CIPPIC submits in those cases that a technology neutral view of the essential character of that single act should determine which one of an owner’s various rights apply. In this appeal, by contrast, the issue is not the application of would-be overlapping layers of rights to a single act, such as a transmission, but the application of would-be overlapping layers of rights to a single work, like a film or television program.

22. While *ESA* and *Rogers* require the coordinated interpretation of sections 3 and 27 of the *Act*, and this appeal requires the coordinated interpretation of sections 2, 3 and 19, the guiding principle is the same. This Court should embrace an interpretation that efficiently obtains just rewards for creators without creating practical obstacles to the proper utilization of protected works. Because the Copyright Board’s decision in this case does precisely that, this appeal should be dismissed.

#### **PART IV – COSTS**

23. CIPPIC does not seek costs and asks that not costs be awarded against it.

#### **PART V – ORDER SOUGHT**

24. CIPPIC respectfully requests that it be permitted to make oral submissions at the hearing.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 22nd day of November, 2011.

---

David Fewer

Jeremy de Beer

Samuelson-Glushko Canadian Internet Policy and  
Public Interest Clinic (CIPPIC)

57 Louis Pasteur St.

Ottawa, ON K1N 6N5

Telephone: (613) 562-5800 Ext: 2558

FAX: (613) 562-5417

Email: [dfewer@uottawa.ca](mailto:dfewer@uottawa.ca)

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

**PART VI – TABLE OF AUTHORITIES**

<b>Authority</b>		<b>Reference in Augument</b>
	<u>Cases</u>	
1	Apple Canada Inc. v. Canadian Private Copying Collective, 2008 FCA 9	6
2	Canadian Private Copying Collective v. Canadian Storage Media Alliance, 2004 FCA 424	5
3	Canadian Wireless Telecommunications Association v. Society of Composers, Authors and Music Publishers of Canada, 2008 FCA 6	5
4	Dunsmuir v. New Brunswick, 2008 SCC 9	2
5	Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27	8
6	Robertson v. Thomson Corp., 2006 SCC 43	19
7	Sirius Canada Inc. v. CMRRA/SODRAC Inc., 2010 FCA 348	5
8	Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers, 2002 FCA 166	5
9	Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers, 2004 SCC 45	5
10	Théberge v. Galeries d'Art du Petit Champlain inc., 2002 SCC 34	10
	<u>Secondary Sources</u>	
11	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	14
12	Jeremy de Beer, "Legal Strategies to Profit from Peer Production," (2008) 46 Canadian Business Law Journal 269	20
13	Michael Heller, The Gridlock Economy: How Too Much Ownership Wrecks Markets, Stops Innovation and Costs Lives (New York: Basic Books, 2008)	14
14	Michael Heller, "The Tragedy of the Anticommons: Property in the Transition from Marx to Markets," (1998) 111 Harvard Law Review 621-688	14

**PART VII – STATUTES RELIED ON**

*Copyright Act*  
R.S.C., 1985, c. C-42

2. In this Act, [...]

“sound recording” means a recording, fixed in any material form, consisting of sounds, whether or not of a performance of a work, but excludes any soundtrack of a cinematographic work where it accompanies the cinematographic work;

[...]

3. (1) For the purposes of this Act, “copyright”, in relation to a work, ... 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,

[...]

19. (1) Where a sound recording has been published, the performer and maker are entitled, subject to section 20, to be paid equitable remuneration for its performance in public or its communication to the public by telecommunication, except for any retransmission.

\* \* \*

*Loi sur le droit d’auteur*  
L.R.C. (1985), ch. C-42

2. Les définitions qui suivent s’appliquent à la présente loi. [...]

« enregistrement sonore » Enregistrement constitué de sons provenant ou non de l’exécution d’une oeuvre et fixés sur un support matériel quelconque; est exclue de la présente définition la bande sonore d’une oeuvre cinématographique lorsqu’elle accompagne celle-ci.

[...]

3. (1) Le droit d’auteur sur l’oeuvre comporte ... le droit exclusif : [...]

f) de communiquer au public, par télécommunication, une oeuvre littéraire, dramatique, musicale ou artistique;

[...]

19. (1) Sous réserve de l’article 20, l’artiste-interprète et le producteur ont chacun droit à une rémunération équitable pour l’exécution en public ou la communication au public par télécommunication — à l’exclusion de toute retransmission — de l’enregistrement sonore publié.