

SUPREME COURT OF CANADA HITS PAUSE BUTTON ON DOUBLE ROYALTIES PAYABLE BY ONLINE MUSIC SERVICE USERS

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Online music service (“**OMS**”) providers scored a win on July 15, 2022, with the Supreme Court of Canada (“**SCC**”) decision in *Society of Composers, Authors and Music Publishers of Canada (“SOCAN”) v Entertainment Software Association*. In the decision, the SCC ruled that the Copyright Act (“**Act**”) does not require OMS providers to pay two separate royalties to access works online. In making its decision, the SCC sided with OMS providers and found only a single royalty was payable to copyright owners when their works were uploaded or “made available” on the Internet.

This decision clarifies the obligations that OMS providers owe to copyright holders when distributing content online. The SCC rejected arguments from SOCAN (an organization that collects and distributes royalties for music creators, publishers and visual artists) which sought an additional royalty from OMS users when those same works were subsequently downloaded or streamed on the Internet. Online distribution of music and other similar works is increasingly becoming the dominant form of content distribution and access and this area is a complex and economically important industry in Canada.^[1] In this context, the decision is a helpful touchpoint to understand the rights of copyright owners and online distributors.

Case History of Royalties Payable for Online Music Service Providers

The question of double royalties originated from a decision of the Copyright Board of Canada (the “**Board**”) which concluded that copyright owners were entitled to royalties both (1) when a work was made available to the public and (2) when the work was downloaded or streamed.

Before the case reached the SCC, the Federal Court of Appeal (“**FCA**”) overturned the Board’s decision, concluding that the making available provision did not create a new and separate royalty for uploading a work in addition to the royalty payable when users download or stream the content.

The Making Available Provision Requires Payment of a Single Royalty

The SCC sided with the FCA for three reasons, as explained below.

(a) *International Treaty Obligations under the WIPO Copyright Treaty*

In 1997, Canada signed the *WIPO Copyright Treaty* (“**Treaty**”), thereby agreeing to adopt and play by international copyright rules for new and emerging technologies. Article 8 of the *Treaty* informed the SCC’s conclusion about whether the “making available provision” of the *Act* required users to pay double royalties. The SCC found that paying double royalties was one way to fulfill Canada’s obligations under the *Treaty*, but it was not a “required interpretation.”^[2] The alternative interpretation, accepted by the SCC, was that paying royalties only once also satisfied the *Treaty* obligations and was more consistent with “the text, structure and purpose” of the *Act*.^[3]

(b) The Text, Structure, and Purpose of the Copyright Act

The SCC’s decision also found that requiring double royalties was inconsistent with the text and structure of the *Act*, and would undermine its purpose. Importantly, the *Act* protects three distinct interests of copyright owners: the right to (1) produce and reproduce a work; (2) perform a work in public; and (3) publish a work. Since these three rights are distinct from one another, a single activity can only engage one right at a time, and therefore each activity is only compensable once. When dealing with copyright owners, OMS providers or other online digital content distributors must be mindful of these rights.

However, to the benefit of OMS providers, the SCC determined that the making available of a work online and the downloading or streaming of a work were a single act or “performance” and therefore engaged only one compensable right.

The SCC also interpreted the purpose of the *Act* in a manner beneficial to OMS providers. The purpose of the *Act* is not “solely” to benefit authors, but rather to “balance authors’ and users’ rights by securing just rewards for authors while facilitating public access to works.”^[4] Part of this balance is ensuring that authors cannot claim additional royalties for works produced online.

(c) The Principle of Technological Neutrality

Finally, the SCC applied the principle of technological neutrality that also helped to keep money in the pockets of OMS users. The SCC found that the principle of technological neutrality requires the *Act* to be interpreted in a manner that does not favour any single form of technology. For example, payable royalties should be the same regardless of whether a user is purchasing a music album online or purchasing an album at a brick and mortar store.^[5] The Court’s endorsement of this principle is potentially significant for OMS providers and other providers of digital media and online services as it signals that the courts will treat traditional and digital media in a similar fashion.

The Takeaway

The SCC has ruled that OMS users are only required to pay copyright owners once when works are made

available online. As a single action, or “performance,” the copyright owners are entitled to a single royalty. Although copyright owners have the right to control the act of making works available, and any subsequent downloads or streams, these obligations do not attract additionally compensable royalties for downloaded or streamed content. This decision clarifies both the rights of copyright owners, and the obligations of those who provide platforms for copyright owners to make their works available. In a fast evolving digital world, the law is often reactive and slow to adapt to new methods of artistic work and distribution. However, decisions like this one help provide more definitive guidance regarding the obligations of OMS providers.

For questions regarding this article, content royalties, or online content distribution, please contact the authors.

[1] Steven Globberman, “[The Entertainment Industries, Government Policies, and Canada’s National Identity](#)” (March 2014) at 4-5, online (pdf): Fraser Institute.

[2] *Society of Composers, Authors and Music Publishers of Canada v Entertainment Software Association*, 2022 SCC 30 at para 51 [*Society of Composers*].

[3] *Society of Composers* at 51.

[4] *Society of Composers* at 5.

[5] *Society of Composers* at 63.

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A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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