

# Competition Law as a lever for AI regulation

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## **Abstract**

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# 1 Introduction

Recent Supreme Court of Canada (SCC) copyright cases of particular relevance to libraries include *York University v Canadian Copyright Licensing Agency (Access Copyright)*<sup>1</sup> and *Society of Composers, Authors and Music Publishers of Canada v Entertainment Software Association*.<sup>2</sup> In *York*, the SCC rejected Access Copyright’s attempt to impose mandatory tariffs upon York University, but the SCC did not address York University’s claim of fair dealing. In *SOCAN*, the SCC supported technological neutrality in ruling that “[s]imilar to offline distribution, downloading or streaming works will continue to engage only one copyright interest and require paying one royalty.”<sup>3</sup>

Beyond copyright, *SOCAN* is also noteworthy for adding a category for correctness review to those recognised by the SCC in *Canada (Minister of Citizenship and Immigration) v Vavilov*<sup>4</sup> as reasons to “derogat[e] from the presumption of reasonableness review.”<sup>5</sup> As the SCC noted in *SOCAN*, *Vavilov* allowed that there might be additional “exceptional” circumstances beyond those recognised in *Vavilov* that require this derogation.<sup>6</sup> The additional category added in *SOCAN* is “when courts and administrative bodies have concurrent first instance jurisdiction over a legal issue in a statute.”<sup>7</sup>

# 2 Analysis

The *Copyright Act* has been interpreted broadly by Canadian courts.<sup>8</sup> In *CCH Canadian Ltd. v Law Society of Upper Canada*, the SCC adopted a large and liberal interpretation of “fair dealing”.<sup>9</sup> For commentary on that decision, see Scassa<sup>10</sup> and de Beer.<sup>11</sup>

The work of Ziff remains an important resource on property law.<sup>12</sup> The author discusses

<sup>1</sup> *York University v Canadian Copyright Licensing Agency (Access Copyright)*, 2021 SCC 32 [*York*].

<sup>2</sup> *Society of Composers, Authors and Music Publishers of Canada v Entertainment Software Association*, 2022 SCC 30 [*SOCAN*].

<sup>3</sup> *Ibid* at para 112.

<sup>4</sup> *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].

<sup>5</sup> *Ibid* at para 69.

<sup>6</sup> *SOCAN* at para 27.

<sup>7</sup> *Ibid* at para 28.

<sup>8</sup> *Copyright Act*, RSC 1985, c C-42.

<sup>9</sup> *CCH Canadian Ltd. v Law Society of Upper Canada*, 2004 SCC 13 at para 48 [*CCH*].

<sup>10</sup> T. Scassa, “Recalibrating Copyright Law?: A Comment on the Supreme Court of Canada’s Decision in *CCH Canadian Limited et al. v. Law Society of Upper Canada*” (2004) 3:2 *Canadian Journal of Law and Technology* 119 [Scassa].

<sup>11</sup> J. de Beer, “Canada’s Copyright Tariff-Setting Process: An Empirical Review” (2016) 63:3 *Journal of the Copyright Society of the U.S.A.* 399 [de Beer].

<sup>12</sup> B. Ziff, *Principles of Property Law*, 5th ed (Carswell, 2010) [Ziff].

the numerus clausus principle at length.<sup>13</sup>

For a detailed treatment see also Judge and Gervais.<sup>14</sup> Gervais has written a complementary structural account.<sup>15</sup>

The *CCH* decision remains authoritative on fair dealing.<sup>16</sup>

### 3 Conclusion

The cases surveyed above confirm that *Society of Composers, Authors and Music Publishers of Canada v Entertainment Software Association* and *Canada (Minister of Citizenship and Immigration) v Vavilov* together represent a significant development in administrative and copyright law.<sup>17</sup>

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<sup>13</sup> *Ibid* at pp 148-155.

<sup>14</sup> E.F. Judge & D.J. Gervais, *Intellectual Property: The Law in Canada*, 2nd ed (Carswell, 2011) at pp 5-7 [Judge & Gervais].

<sup>15</sup> D.J. Gervais, *(Re)structuring Copyright: A Comprehensive Path to International Copyright Reform* (Edward Elgar, 2019) [Gervais].

<sup>16</sup> *CCH* at para 48.

<sup>17</sup> *SOCAN* at paras 27-31.

# Bibliography

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