

IP Osgoode Speaks

REFRAMING COPYRIGHT'S KEY EXCLUSIVE RIGHTS IN THE AGE OF ACCESS: LESSONS FROM SOCAN V ESA 2022

WITH DR. CHERYL FOONG

WEDNESDAY, SEPTEMBER 13, 2023 | 12:30 - 2:00 PM

In *SOCAN v ESA*, 2022 SCC 30, the Supreme Court held that making a copy of a work available to the public for downloading was not a communication of the work by 'making available' but an authorisation of the reproduction right. This presentation parses the decision and draws out lessons from several angles. The Court's willingness to proactively address overlapping rights and interest prompts a comparative critique of Australian courts' indifference to the issue of overlaps. The decision also highlights the flexibility available under the 'umbrella solution' to satisfy the WIPO Internet Treaties. Importantly, the decision raises substantive questions about the future of the making available right and the reproduction right. *SOCAN v ESA* could be seen as a judicially crafted patchwork solution to alleviate the overlap problem in the short term, but it may nevertheless inspire clearer and more sustainable limits on copyright's key exclusive rights going forward.

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