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Technological Neutrality Explained & Applied to *CBC v. SODRAC*

Cameron J. Hutchison*

The term “technological neutrality” surfaced in the Supreme Court’s 2012 copyright jurisprudence though no one, including the Federal Court of Appeal in *CBC v. SODRAC*,¹ quite knows exactly what it means. This article analyzes the principle of technological neutrality as comprising two dimensions: as *non-discrimination* in that new technologies endogenous to copyright are to be embraced under the *Act*² to the benefit of both copyright holders and users; and as *non-interference* insofar as sufficiently high thresholds of conduct or activity are required before copyright liability will attach to technologies endogenous to copyright. It may surprise some that both iterations of this principle (though not so named) are well established in Supreme Court copyright jurisprudence. Once these dimensions are understood, we must then struggle with the issue of its application as a “principle” of copyright law. I argue that principles of law assist interpretation by providing direction in the face of ambiguous or absurd statutory meaning in unusual cases. In other words, principles rationalize the law in a way that strict construction of statutory meaning cannot always accomplish. Principles do not compel specific results, but rather are a tool that might augur for a particular interpretation of statutory meaning in a given factual context in order to make the law coherent.

This article explores technological neutrality in the factual context of *CBC v. SODRAC*, heard before the Supreme Court of Canada in March of 2015 with decision pending at the time of publication. After outlining the history of the case in the first part, this article concludes with an application of the principle of technological neutrality, as *non-interference*, to the case. The only result coherent with the Supreme Court’s prior case law is to *not* treat non-usable or dormant incidental copies as reproductions under the *Act*. The status of permanent copies that serve a useful and identifiable purpose, e.g. archived copies, is less clear though it would not necessarily create incoherence in the law to recognize them as reproductions.

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¹ *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2014 FCA 84, 2014 CarswellNat 808, 2014 CarswellNat 809 (F.C.A.), leave to appeal allowed 2014 CarswellNat 3299, 2014 CarswellNat 3300 (S.C.C.) Per Pelletier J. at paras 39-40: “A careful reading of these passages [from the Supreme Court 2012 decisions] incorporate at least three views of technological neutrality. . . In light of these different views of technological neutrality, it is difficult to know how one is to approach technological neutrality post-ESA.”

² *Copyright Act*, RSC 1985, c-42 [hereinafter *Act*].

I. THE DISPUTE

This is the Supreme Court's sixth case in the past dozen years dealing with the copyright implications of internet and digitization technology. This time the purported copying at issue is situated within the context of splicing musical works into visual works, a process known as synchronization. While TV and radio have long required the making of copies to effect a broadcast, advances in digital technology now demand more copies than ever to achieve efficient delivery of broadcasted content.³ In the television context, or audiovisual medium, several copies of a musical work, perhaps as many as 12 and 20, are needed to produce, edit, and mix prior to delivery to the broadcaster.⁴ Once received by the broadcaster, several more copies of the digital file are made before, during, and after the program is broadcast to ensure compatibility with existing software, to undertake further editing for purposes of language or closed captioning, and/or to make back-up and delivery copies.⁵ The Copyright Board identified the types of copies made as follows:

11. . .*Synchronization* refers to the process of incorporating a musical work into an audiovisual work.⁷ Thus, a *synchronization copy* is any copy made in order to include the work into the final (*master*) copy of an audiovisual work. A *post-synchronization copy* of the music is made each time the audiovisual work itself is copied, for example to broadcast, deliver or distribute the audiovisual work.

12. An *incidental copy* is necessary or helpful to achieve an intended outcome but is not part of the outcome itself. A *production-incidental copy* is made in the process of producing and distributing an audiovisual work, either before or after the master copy is made: it is a form of synchronization copy. A *broadcast-incidental copy* is made to facilitate the broadcast of an audiovisual work or to preserve the work in the broadcaster's archives, while a *distribution-incidental copy* is made for purposes of readying or preserving the motion picture for

³ See *Commercial Radio Copyright Board of Canada* (9 July 2010) at paras 56—71: In the radio context, the Copyright Board has detailed the process of broadcasting new music. If a station is interested in obtaining a song that has been uploaded onto DMDS by a record label, it downloads a temporary encrypted copy of the music file onto its server; that temporary copy is then decrypted and decompressed into a usable copy; in most instances, this copy is then placed on a “download directory” of the broadcaster's hard drive; from here, an editor may download a copy to alter and manipulate the metadata (but not the music content) associated with the file, e.g. the genre of music; once the editing is complete, multiple copies may then be placed back onto the hard drive where it may be accessed by a number employees to facilitate evaluation and selection of the music. Furthermore, to safeguard against server or network failure, an additional local copy may be made. In *Copyright Act*, ss 70.2 and 70.15 Copyright Board of Canada (2 November 2012) [hereinafter CBD], the Board implies at para 51 that the technical aspects of music broadcasting serve as a good background to understanding the broadcasting of synchronized works.

⁴ CBD, *supra* note 3 at para 52.

⁵ *Ibid* at para 54.

distribution to the public: both are forms of post-synchronization copies.⁶

Importantly, the Board notes that “[w]hile it is still possible to deliver television broadcasts without the use of servers and digital reproduction technologies, the efficiencies and added functionality associated with these technologies are such that such use has become the norm, not the exception.”⁷

(a) The Copyright Board Decision

The Federal Court of Appeal decision, discussed below, arose from three applications for judicial review of Copyright Board decisions.⁸ The main parties to the Copyright Board, Federal Court, and Supreme Court of Canada appeal proceedings are the CBC and SODRAC. The Canadian Broadcasting Corporation (CBC) is Canada’s national public broadcaster and is engaged in both the production and broadcasting of radio and television programs. The Society for Reproduction Rights of Authors, Composers and Publishers in Canada Inc. and SODRAC 2003 Inc. (collectively SODRAC) are collective societies that administer the reproduction rights of musical compositions. As both a producer and broadcaster of audiovisual content, the CBC requires a synchronization license from SODRAC to mesh musical works from SODRAC’s catalogue into audiovisual content. The nature of the dispute between these two parties was whether a synchronization license exhausts the reproduction rights associated with the musical work; or put another way, whether incidental copies made in the production and broadcast of the synchronized work engage the reproduction right on top of the performance right already purchased.

SODRAC’s main argument was that its “bare” synchronization license permits a limited number of copies to be made and that “these licenses do not authorize downstream copies”, in particular broadcast-incidental copies.⁹ In other words, broadcasters must pay (and pay handsomely) for these incidental copies. The CBC responded that “through-to-the-viewer” licenses, in which all copies needed to effect a broadcast to the intended consumer market, not only facilitates a functioning market but should form the basis for interpreting the reproduction right in the synchronization context.¹⁰ Moreover, the CBC argued that the increased number of copies demanded by new technology should not be reflected to both the benefit of SODRAC and detriment of technology users. If

⁶ *Ibid* at paras 11-12.

⁷ *Ibid* at para 53.

⁸ *CBC v. SODRAC*, *supra* note 1 at para 5.

⁹ *CBD*, *supra* note 3 at para 22. See also para 73: “Virtually all of SODRAC licenses issued to producers that were filed in these proceedings clearly specify, in one form or another, that the producer cannot authorize copies made by broadcasters, distributors and other exhibitors.”

¹⁰ *Ibid* at para 27.

this is to be the case, then there will be a disincentive for broadcasters to adopt new technologies.¹¹

The Copyright Board of Canada held that broadcast incidental copies were reproductions under the *Act* subject to compensation. Moreover there were sound policy reasons in their view for doing so:

The adoption of copy-dependent technologies allows broadcasters to remain competitive and to protect their core business even when it does not generate direct profits. These technologies are necessary for Astral and CBC to remain relevant so that services continue to be seen by the public. These are clear benefits arising from copy-dependant technologies. Since these technologies involve the use of additional copies, some of the benefits associated with the technologies must be reflected in the remuneration that flows from these incidental additional copies.¹²

This view that copyright holders should be paid for the benefits accruing through the use of new technologies stands in stark contrast to the Supreme Court's dicta on the issue in similar cases.¹³

(b) The Federal Court of Appeal

On appeal to the Federal Court of Appeal, the CBC challenged both of these findings, namely that incidental copies made for broadcast implicate the reproduction right, and that such copies added any value to the broadcasting enterprise.¹⁴ On the legal issue of the reproduction right, the CBC argued that assessing royalties on necessary incidental copies for digital production discourages the use and development of new technologies.¹⁵ The CBC relied on the Supreme Court's copyright pentology, and in particular *Entertainment Software, Rogers*, and the *Bell* cases, in advancing its technological neutrality argument. However, the Federal Court had problems deciphering a precise meaning of technological neutrality;¹⁶ as such, it relied on a much clearer precedent in the pre-digital Supreme Court of Canada case, *Bishop v. Stevens*.

In *Bishop*, a sound recording copy was made of a song writer's composition as performed by another artist for the purpose of a broadcast. The song writer claimed that the pre-recorded tape of the performance implicated his

¹¹ *Ibid* at para 30.

¹² *Ibid* at para 81.

¹³ See, for example, *SOCAN v. CAIP*, *infra* note 57 and accompanying text, wherein cached copies, needed to facilitate an economical and efficient internet, were found not to attract copyright liability since it does not touch on the legitimate interests of the copyright holder.

¹⁴ *CBC v. SODRAC*, *supra* note 1 at paras 28 and 29. The FCA refused to reconsider the second finding as this was one of fact.

¹⁵ *Ibid* at para 30.

¹⁶ See the three possible meanings suggested at *ibid* at para 39.

reproduction right for which no license was given. The defendant broadcaster did not deny that such a copy was made but instead suggested that the copy was “ephemeral” and made solely for the purpose of the broadcast; as such it should not attract copyright liability.¹⁷ Interestingly, the Supreme Court observed “[t]he issue in this case arises because the introduction of new technology presented a situation not contemplated by the drafters of the original Canadian Copyright Act in the 1920’s.”¹⁸ But, much like the Copyright Board in the present decision, the court emphasized that copyright law is “purely statutory law” and adhered to the section 3 delineation between the right to make a sound recording of a work, in section 3(1)(d), as distinct from the right to perform the work in the chapeau of section 3.¹⁹ In other words, the “ephemeral copy” triggered the reproduction right of the copyright holder.

In the present case, *Bishop* was cited by the Federal Court of Appeal as binding precedent that was directly on point, in that “ephemeral recordings made solely for the purpose of facilitating a broadcast of a work were caught by paragraph 3(1)(d) of the *Act* and were not implied in the right to broadcast a work.”²⁰ The CBC appealed this decision to the Supreme Court of Canada, for which leave was granted.

¹⁷ *Ibid* at para 5. At para 14, the appellant argued that: “An ephemeral recording may be distinguished from a true recording by the purpose for which it is made. A record within the meaning of s. 3(1)(d), according to the appellant, is one made for the purpose of being reproduced, thereby reaching a wider audience than the original performance. An ephemeral recording, on the other hand, is but a means to facilitate reaching exactly the same audience as a live broadcast performance would. It is not intended to be reproduced, and it is often technically unsuitable for high quality reproduction.” Another argument of the appellant presaged technological neutrality as *non-interference* in that ephemeral copies were said to be practically necessary to facilitate modern broadcasting: *ibid* at para 23.

¹⁸ *Ibid* at para 9.

¹⁹ In a rather unexpected turn, the court then buttresses this holding by emphasizing the importance of preserving the sound recording right in this context: “A recording. . . is permanent. It may be copied easily, privately and precisely. Once a work has been recorded, the recording takes on a life of its own. That is why, from a composer’s point of view, the right to control the circumstances under which the first recording is made is crucial. Once the composer has made or authorized a recording of his work, he has given up much control over its presentation to the public. These are reasons why the rights to perform and to record are recognized as distinct in the *Act*, and why in practice a composer may wish to authorize performance but not recordings of his work.” *Ibid* at para 21.

²⁰ *Ibid* at para 52. It should be noted that the 3(1)(d) wording has changed but not in a material way. It now reads [used to read]: “in the case of a literary, dramatic or musical work, to make any sound recording [sound recording replaces “record, perforated roll”], cinematograph film or other contrivance by means of which the work may be mechanically reproduced or performed.”

II. THE PRINCIPLE OF TECHNOLOGICAL NEUTRALITY

It is understandable that the Federal Court of Appeal was confounded by the principle of technological neutrality. The phrase has been used in different ways by prior courts in cases involving internet or digital facts. The concept has also been applied in many of these same cases without being identified as such. In this section, I offer an analytical framework for understanding both technological neutrality, and the role of principles in legal interpretation. I undertake the latter task first.

(a) The Role of Principles in Legal Interpretation

Judicially created principles, arising as they might without statutory pedigree, should be understood not as activism but as a necessary tool for bringing coherence to the law. This is no less true for statutory law, where often general rules are set out in advance by a Legislature far removed from the point of application in specific cases. Indeed, statutes like the *Copyright Act* attempt to prospectively regulate complex areas of human activity with a view to paradigmatically conceived scenarios, i.e. typical *kinds* of foreseeable cases that might arise.²¹ These statutory provisions, including *all* of the ones discussed in this article, are typically broadly worded and non-specific to any particular result. It follows that statutory meaning will often be uncertain or incomplete in the face of novel cases, the kinds of cases not foreseen by the legislature and for which, consequently, there is no reasonably clear interpretation flowing from the statute. These problems place judges in the difficult role of developing the meaning of the law at the point of application in respect of novel disputes.

One way that courts can facilitate the coherent development of the law is through the application of principles to resolve uncertain or absurd statutory meaning in the face of novel facts. Ronald Dworkin explained the role of principles, as contrasted with rules. To him, rules dictate “in an all or nothing fashion. If the facts a rule stipulates are given, then either the rule is valid. . .or it is not. . .”²² Principles do not operate in an all or nothing fashion nor do they explicate the conditions of their application; rather, they offer a reason to argue in one direction but without necessitating a particular decision. Furthermore, in situations where the literal application of a rule may lead to an otherwise straightforward though unreasonable result, Dworkin insists on a mediating role for legal principle:

Instead, we make a case for a principle, and for its weight, by appealing to an amalgam of practice and other principles in which the implications of legislative and judicial history figure along with appeals

²¹ See HLA Hart, *The Concept of Law* 2nd ed. (Oxford: Clarendon Press, 1994) at 128. See also Cameron Hutchison, “Which Kraft of Statutory Interpretation: A Supreme Court of Canada Trilogy on Intellectual Property Law” (2008) 46 *Alberta L R* 1, at pp 21 ff.

²² Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977) at 24.

to community practices and understandings. There is no litmus paper for testing the soundness of such a case—it is a matter of judgment, and reasonable men may disagree.²³

As an example, Dworkin presents the case of *Riggs v. Palmer*, in which a court was faced with a grandson seeking to inherit from a validly enacted will made by the grandfather whom he murdered. Since this was a validly enacted will according to statute (and further there was no mention that a beneficiary could not inherit as a result of murdering a testator in that statute), a straightforward application of the rule should have permitted the grandson to inherit. Yet, the court found that it is a fundamental maxim of the common law, as found in contract and property law, that no one should profit from his own wrongdoing; as such the grandson was denied the inheritance.²⁴

In the context of the *CBC v. SODRAC* dispute, the rule that a copy is a copy and implicates the reproduction right (rule) may in some instances need to give way to technological neutrality (principle). This is not merely a theoretical proposition. The Supreme Court has used principles, in a Dworkinian sense, to resolve a number of copyright disputes in the face of unclear or absurd statutory meaning.

(b) Principles of Copyright Law

Other than technological neutrality, there are at least two other “tentative” principles (so named because they are disputed) of intellectual property law that have emerged in Supreme Court jurisprudence in recent years. They are the principle of legitimate economic interests which first appears in *Theberge*,²⁵ and the separation principle which debuts in *Kirkbi*.²⁶

In *Theberge*, the central issue was whether an ink transfer of a print from one substrate (paper) to another (canvas), without creating more copies in the process, engaged the copyright holder’s right to “produce or reproduce” the work under section 3 of the *Act*. This language is broad and non-specific to a particular result in this factual context. Binnie J., for the majority, reasoned that

²³ *Ibid* at 36.

²⁴ *Ibid* at 23. But how do we know when, as in *Riggs v. Palmer*, a rule should be changed by a principle? Dworkin’s answer in *Law’s Empire*, when he revisits this question, is: “[i]t is only because we think the case for excluding murderers from a general statute of wills is a strong one, sanctioned by principles elsewhere respected in the law, that we find the statute unclear on the issue.” Ronald Dworkin, *Law’s Empire* (Cambridge Mass: Harvard University Press, 1986) at 352.

²⁵ *Galerie d’art du Petit Champlain inc. c. Théberge*, 2002 SCC 34, 2002 CarswellQue 306, 2002 CarswellQue 307 (S.C.C.). My brief treatment of the cases in this section in particular reflects an assumption that most readers of this article are familiar with these judgments.

²⁶ *Kirkbi AG v. Ritvik Holdings Inc. / Gestions Ritvik Inc.*, 2005 SCC 65, 2005 CarswellNat 3631, 2005 CarswellNat 3632 (S.C.C.).

But in what way has the legitimate economic interest of the copyright holder been infringed? The process began with a single poster and ended with a single poster. The image “fixed” in ink is the subject-matter of the *intellectual* property and it was not reproduced. It was transferred from one display to another.²⁷

The tentative principle of legitimate economic interests offered a reason to limit the copyright holder’s reproduction right in favor of the purchaser’s interest to engage in this activity with validly purchased copies.

In *Kirkbi*, the makers of Lego blocks attempted to extend their monopoly after the patent expired by claiming the design of the blocks as unregistered trade-marks. The doctrine of functionality, which disallows such utilitarian features to be used as a trade-mark, prevented them from doing so. The only problem was that *Kirkbi* had a strong statutory interpretation argument that negated the doctrine of functionality in respect of unregistered marks.²⁸ That result, however, would have been absurd in that unregistered marks would be treated very differently in this respect than registered marks. Rather than struggle with the sloppy legislative drafting that led to such a result, the court instead began its analysis with what seemed to be an organizing principle of intellectual property regimes:

The economic value of intellectual property rights arouses the imagination and litigiousness of rights holders in their search for continuing protection of what they view as their rightful property. Such a search carries with it the risk of discarding *basic and necessary distinctions between different forms of intellectual property and their legal and economic functions*. The present appeal is a case in point. It involves the distinction between patents and trade-marks. In order to understand the role and relevance of the doctrine of functionality in the law of trade-marks, some comments on the nature and function of patents and trade-marks will be useful.²⁹ (emphasis added)

This separation principle in *Kirkbi* essentially overrides an otherwise straightforward albeit absurd application of the statute. The doctrine of functionality therefore applied to both registered and unregistered trade-marks.

In *Bastarache J.’s* judgement in *Euro Excellence*,³⁰ both “legitimate economic interests” and “separation” were applied as principles (though not called as such) in a way that avoided an unpalatable result suggested by the legislation. The facts and law in the case are complicated and, for present purposes, it is enough to know that the copyright in trade-marked logos was asserted as a means of preventing the otherwise legal importation of chocolate

²⁷ *Theberge*, *supra* note 25 at para 38.

²⁸ See Hutchison, *supra* note 21 at p 13 — 15.

²⁹ *Ibid* at para 37.

³⁰ *Kraft Canada Inc. v. Euro Excellence Inc.*, 2007 SCC 37, 2007 CarswellNat 2087, 2007 CarswellNat 2088 (S.C.C.).

bars. In holding that copyright should not be misused to frustrate legitimate trade, Bastarache J. reasoned that both the legitimate economic interests³¹ of the copyright holder, as referred to in *Theberge*, and the separation of intellectual property regimes,³² as articulated in *Kirkbi*, meant that “incidental” works of copyright, in this case logos on chocolate bars that functioned as trade-marks, are not actionable in this context. Importantly, the two other judgements in that case either rejected the application of these concepts as having any bearing on the dispute, or did not consider them. Nonetheless, Bastarache’s judgement very much applied these principles in a Dworkinian sense.

It is not unusual that the meaning of a principle—indeed its very existence—may be judicially debated. Reasonable men may, as Dworkin tells us, disagree about such things. Decision makers must look to the judicial and legislative history, together with community understandings and practices, to ascertain whether a concept has achieved enough traction within the legal corpus that it has persuasive value as a fundamental organizing principle of the law. Legitimate economic interests and separation appear not to have attained that level. However, the principle of technological neutrality, as the next section shows, has permeated the case law such that it may be used, where relevant, to make the law a coherent whole.

(c) Technological Neutrality Explained

The principle of technological neutrality has played a central role in the interpretation of key issues in copyright law jurisprudence over the past dozen years. Almost inadvertently, the case law has developed the principle more than has heretofore been recognized. It is now possible to define the contours of technological neutrality in a way that can be meaningfully applied to cases like *CBC v. SODRAC*.

The principle of technological neutrality embraces two different concepts: (1) a principle of non-discrimination in respect of technologies and activities endogenous to copyright; and (2) a principle of non-interference in connection with activities and technologies exogenous to the *Act*. The primary purpose and effect of *non-discrimination* is to ensure that copyright doctrine evolves in ways

³¹ *Ibid* at para 85. The *Act* protects only the legitimate economic interests of copyright holders. It protects the economic benefits of skill and judgment; it does not protect all economic benefits of all types of labour... In particular, if a work of skill and judgment (such as a logo) is attached to some other consumer good (such as a chocolate bar), the economic gains associated with the sale of the consumer good must not be mistakenly viewed as the legitimate economic interests of the copyright holder of the logo that are protected by the law of copyright.

³² *Ibid* at para 87: “. . . While it is certainly true that one work can be the subject of both copyright and trade-mark protection (see s. 64(3)(b) of the *Act*), it is equally certain that different forms of intellectual property protect different types of economic interests. To ignore this fact would be to ignore the “basic and necessary distinctions between different forms of intellectual property and their legal and economic functions”, as noted by LeBel J. at para 37 of *Kirkbi*.”

that embraces new technologies. This can operate to extend the rights of both owners and users of copyright. The main concern of *non-interference* is that copyright not unduly restrict the use of existing, or the innovation and development of new, technologies. A corollary of both *non-discrimination* and *non-interference* is the concept of *functional equivalency*, in that it furthers the goals of both iterations of technological neutrality to treat new technologies the same as functionally equivalent existing technologies.

(i) *Non-Discrimination*

Courts have long taken the view that a copyright subsists not only in the medium in which the work is created but all existing and future media in which the work might be expressed. In other words, we might say that copyright does not discriminate against any technology—even those yet to come into being—so long as enough of the expression survives its transfer into the new medium. The statutory basis often cited for this principle (formerly known as media neutrality) is the section 3 right of copyright holders “. . .to produce or reproduce the work or any substantial part thereof *in any material form whatever*. . .”

The italicized language was in issue in *Robertson v. Thomson Corp.*³³ In that case, the legal question was whether the newspaper’s collective work copyright, or a journalist’s individual article copyright, was *reproduced* by the process of digitizing archived newspapers that contained both. The court reasoned that if enough of the skill and judgment of the collective work format is perceptible to the viewer of an archived work, then the newspaper copyright prevails. By the same token, if the end user is allowed to retrieve articles individually and out of context of the collective work, then it is the journalist’s copyright that is reproduced. The court therefore provided a method of adapting the right to reproduce a work to digital technologies in this context. Also, the first indication that media neutrality might apply beyond section 3 of the *Act* is presaged in the following dicta:

Media neutrality is reflected in s. 3(1) of the *Copyright Act* which describes a right to produce or reproduce a work “in any material form whatever.” *Media neutrality means that the Copyright Act should continue to apply in different media, including more technologically advanced ones.*³⁴ (emphasis added)

This broader ambit of the technological neutrality principle as non-discrimination finds support in both the *Rogers*³⁵ and *Bell*³⁶ cases. In *Rogers*,

³³ *Robertson v. Thomson Corp.*, 2006 SCC 43, 2006 CarswellOnt 6182, 2006 CarswellOnt 6183 (S.C.C.).

³⁴ *Ibid* at para 49.

³⁵ *Public Performance of Musical Works, Re*, 2012 SCC 35, 2012 CarswellNat 2378, 2012 CarswellNat 2379 (S.C.C.) [Rogers].

³⁶ *Public Performance of Musical Works, Re*, 2012 SCC 36, 2012 CarswellNat 2380, 2012 CarswellNat 2381 (S.C.C.) [Bell].

the issue was whether streamed music³⁷ via the internet to individual users constituted a communication “to the public” under section 3(1)(f) of the *Act*. The appellant online music service providers cited *CCH*, in which the Court determined that a fax transmission of a single copy to a single person was not a communication to the public but that “a series of repeated fax transmissions of the same work to numerous different recipients” might be.³⁸ The appellants interpreted this *obiter* narrowly to mean that the right is only engaged when there are multiple transmissions originating *from the single act* of the sender. Thus any given stream is point-to-point and cannot be a serial transmission. The respondent, SOCAN, replied that *CCH* did not require that a series of transmissions must result from a single act of a sender to constitute communication to the public.³⁹

Rothstein J. determined that the appellants’ interpretation of 3(1)(f) would lead to arbitrary results in that separate emails of a work to 100 recipients would *not* constitute infringement but a single email to 100 addressees would.⁴⁰ The “true character of the communication activity” and not its technicalities must be considered to ensure that substance trumps form and copyright protection develops on a principled basis.⁴¹ The true character of streaming is that it is “targeted at an aggregation of individuals”⁴² and thus “to the public” according to Justice Rothstein. Moreover, to accede to the appellants’ interpretation would have the effect of excluding all on-demand, or “pull” technologies from the ambit of 3(1)(f). Here, Justice Rothstein notes that “the Act should be interpreted to extend to technologies that were not or could not have been contemplated at the time of its drafting.”⁴³ Moreover, he reiterates dicta from *Robertson*:

Media neutrality means that the *Copyright Act* should continue to apply in different media, including more technologically advanced ones . . . [I]t exists to protect the rights of authors and others as technology evolves.⁴⁴

In other words, Rothstein J. applied the technological neutrality principle to the broadly worded language of section 3(1)(f),⁴⁵ and as such declared immaterial

³⁷ Unlike downloads which result in permanent copies, a stream “is a transmission of data that allows the user to listen to or view the content transmitted at the time of transmission, resulting only in a temporary copy of the file on the user’s hard drive:” *Rogers, supra* note 35 at para 1.

³⁸ *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, 2004 CarswellNat 446, 2004 CarswellNat 447 (S.C.C.) at para 78.

³⁹ *Rogers, supra* note 35 at para 27.

⁴⁰ *Ibid* at para 29.

⁴¹ *Ibid* at para 30.

⁴² *Ibid* at para 33 (quoting the Copyright Board).

⁴³ *Ibid* at para 39.

⁴⁴ *Ibid* at para 39.

⁴⁵ *Ibid* at para 39.

the differences in the means and method of telecommunication employed so long as it effected the result of communicating the work “to the public,” i.e. the work was “targeted at an aggregation of individuals”. This, as we will see, was *non-discrimination* based on functional equivalency.

Furthermore in *Bell*, technological neutrality was cited in the court’s fair dealing analysis. The case concerned whether music preview streams of 30-90 seconds constitute research under fair dealing. In assessing the third factor for determining the fairness of the dealing—the “amount” taken—SOCAN argued that the *aggregate* number of previews by consumers should be the metric and given that on average there were 10 previews for each song purchased, the dealing was unfair.⁴⁶ The Court disagreed, holding that it is only *individual* use that is relevant.⁴⁷ Moreover, the court emphasized that focusing on aggregate use on the internet as relevant to fair dealing could undermine the principle of technological neutrality:⁴⁸

. . . given the ease and magnitude with which digital works are disseminated over the Internet, focusing on the “aggregate” amount of the dealing in cases involving digital works could well lead to disproportionate findings of unfairness when compared with non-digital works. If, as SOCAN urges, large-scale organized dealings are inherently unfair, most of what online service providers do with musical works would be treated as copyright infringement. This, it seems to me, potentially undermines the goal of technological neutrality, which seeks to have the *Copyright Act* applied in a way that operates consistently, regardless of the form of media involved, or its technological sophistication: *Robertson v. Thomson Corp.*, [2006] 2 S.C.R. 363 (S.C.C.), at para. 49.⁴⁹

This application of technological neutrality to fair dealing implies that the principle applies to the whole *Act* including user rights.

In the three cases above, technological neutrality as *non-discrimination* ensured that copyright holder, as well as user, rights were appropriately extended into, as the case may have been, new mediums or methods of reproduction, dissemination, or research use. As we will see below, comparing extant and new technologies through the lens of functional equivalency ensured a principled extension of copyright holder rights. But *non-discrimination* is not simply coterminous with functional equivalency, as sometimes the technology in question has no meaningful real space analogue. Streamed previews of musical works, as in *Bell*, presents such a case as one strains to think of a means of music sampling that is remotely similar. Sometimes then, courts use technological

⁴⁶ *Bell*, *supra* note 36 at para 40.

⁴⁷ *Ibid* at para 41.

⁴⁸ *Ibid* at para 43.

⁴⁹ *Ibid* at para 43.

neutrality in a discretionary manner to maintain a balance of rights and interests under the *Act*.

(ii) *Non-Interference*

As a principle of non-interference, technological neutrality seeks to avoid imposing copyright liability on technologies and activities that, while theoretically capable of being included under the *Act*, only incidentally implicate copyright. Here, courts balance the potential rights of copyright owners against the interests of technological use and innovation. Moreover, insofar as such technologies facilitate the dissemination of works, this further favors a non-infringement holding. There is established precedent in this regard in Supreme Court copyright jurisprudence, though the older case law does not explicitly identify technological neutrality by name.

In both the 2004 cases of *CCH* and *SOCAN*,⁵⁰ the court considered the meaning of “authorizing” copyright infringement.⁵¹ In *CCH*, the specific issue was whether self-service photocopier machines located in the Great Library constituted an implicit “authorization” on the part of the library for patrons to commit copyright infringement. The court held that

... a person does not authorize infringement by authorizing the mere use of equipment that could be used to infringe copyright. Courts should presume that a person who authorizes an activity does so only so far as it is in accordance with the law. The presumption may be rebutted if it shown that a certain relationship of control existed between the alleged authorizer and the persons who committed the copyright infringement.⁵²

In the context of internet intermediary liability for illegal downloading by their customers in the *SOCAN* case, the Court cited the *CCH* case in finding that internet service providers do not “authorize” infringement by merely providing connectivity:

...but it is true, as it was in *CCH* case, that when massive amounts of non-copyrighted material are accessible to the end user, it is not possible to impute to the Internet Service Provider, based solely on the provision of Internet facilities, an authority to download copyrighted material as opposed to non-copyrighted material.⁵³

In essence, the holdings in *CCH* and *SOCAN* mirror the staple article of commerce doctrine in U.S. copyright law, meaning that the mere sale or

⁵⁰ *Society of Composers, Authors & Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45, 2004 CarswellNat 1919, 2004 CarswellNat 1920 (S.C.C.).

⁵¹ Section 3 of the *Act* provides, as a distinct right at the end of s 3, “. . .and to authorize any such acts”, also known as the authorization right.

⁵² *CCH*, *supra* note 38 at para 38.

⁵³ *SOCAN*, *supra* note 50 at para 123.

provision of products or services that have substantial non-infringing uses will not, without more, invite copyright infringement.⁵⁴

Furthermore, the court in *SOCAN* considered whether the practice of caching copies on servers came within section 2.4 which insulates from liability those who merely provide the means of telecommunication “necessary for another person to so communicate the work. . .” In reading down the language of “necessary” to mean that which maximizes the cost-effectiveness and efficiency of the internet (as opposed to its more ordinary meaning as “indispensable”), the court was explicitly concerned about regulatory chill.⁵⁵ The court reasoned that the practice of caching was an innovation that helped promote the dissemination of works (one of the goals of copyright law) without interfering with the legitimate entitlements of copyright owners.⁵⁶ Incidental copies, in other words, were determined to lie outside the reproduction right as the interests of technological economy and efficiency trumped the making of mere technical copies that were imperceptible to an end user.

In *Public Performance of Musical Works, Re*,⁵⁷ the issue was whether an additional telecommunication right tariff should apply to internet download purchases of video games for which a reproduction right fee had already been paid. The majority opinion reversed prior interpretations of section 3(1)(f) by indicating that the provision’s pedigree was as a performance right and thus was not triggered by the downloading (or reproduction) of copies. The majority also affirmed that it would violate the principle of technological neutrality to treat a hard copy purchased in a store differently than a copy obtained via internet download:⁵⁸

The principle of technological neutrality requires that, absent evidence of Parliamentary intent to the contrary, we interpret the *Copyright Act* in a way that avoids imposing an additional layer of protections and fees based solely on the method of delivery of the work to the end user. To do otherwise would effectively impose a gratuitous cost for the use of more efficient, Internet-based technologies.⁵⁹

⁵⁴ *Sony Corp. of America v. Universal City Studios Inc.*, 464 U.S. 417 (U.S. Sup. Ct., 1984) considered whether the sale of video cassette recorders, which had infringing and noninfringing uses, constituted contributory infringement under U.S. copyright law. At 442: “The staple article of commerce doctrine must strike a balance between a copyright holder’s legitimate demand for effective—not merely symbolic—protection of the statutory monopoly, and the rights of others freely to engage in substantially unrelated areas of commerce. Accordingly, the sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes. Indeed, it need merely be capable of substantial noninfringing uses.”

⁵⁵ *SOCAN*, *supra* note 50 at para 114.

⁵⁶ *Ibid* at para 115.

⁵⁷ *Public Performance of Musical Works, Re*, 2012 SCC 34, 2012 CarswellNat 2376, 2012 CarswellNat 2377 (S.C.C.) [*Entertainment Software*].

⁵⁸ *Ibid* at para 5.

Again, an activity judged exogenous to copyright—the downloading of a work as a method of electronic commerce—was insulated from potential liability.

This string of cases, whether in name or in conceptual application, invoke a principle of technological neutrality as *non-interference* by: (1) ensuring appropriately high thresholds of active conduct (i.e. control and knowledge) are in place before the use of technology will be hampered by concerns for copyright infringement; (2) declaring that incidental non-usable copies made in the process of facilitating the efficient and economical transmission of internet communications will not trigger copyright infringement; and (3) overturning a previous interpretation of the section 3(1)(f) right so that e-commerce delivery of products do not attract copyright infringement. In each instance, it is fair to say that the court could just as easily (indeed perhaps more easily) have made the opposite interpretation, given previous court holdings and the statutory language in question. Instead, a principle of technological neutrality justified, and rationalized, the law in a way that balanced the legitimate rights of copyright holders against the legitimate uses and innovations of technological development. Functional equivalency provided a lens through which to understand the activity in question in *Entertainment Software*. But as *CCH* and *SOCAN* show, technological neutrality as *non-interference* is much more than analogizing different technologies in light of the law. Rather, its preoccupation is to ensure that copyright liability does not attach to new innovations, unless the activity in question truly impacts on the legitimate rights of copyright holders.

(iii) *The Corollary of Functional Equivalency*

In the present context, functional equivalency is the process of analogizing between two technologies relative to a specific legal question that identifies a function. Specifically, we look to the law to see what specific legal issue and function is identified as relevant (e.g. what is a “reproduction” or communication “to the public”?) and then analogize between a known technology (that falls within the rule) and a new one (that we are not sure about) to see if they perform the same function, notwithstanding their obvious differences. The function as identified in the law, and comparison between technological facts, is usually viewed through the lens of an end user of the technology.

In *Robertson*, for example, the legal question was whose originality was *reproduced* through digitized copies—that of the newspaper (collective work) or the journalist (individual article). Much like other case law dealing with internet and digital technologies, the court had to choose a perspective about what it means to *reproduce* a work. According to a technical perspective (argued as the “input” perspective), if the collective work is entered in a digitized form as such

⁵⁹ *Ibid* at para 9.

then it remains a collective work regardless of its screen display format to the end user. The “output” perspective, on the other hand, asks whether what is displayed on the screen reproduces the originality of the newsprint collective work, or the stand alone article. The court favored the latter perspective. Sometimes then, the legal issue itself needs to be defined more precisely—whether technical or display copies constitute reproduction—before a functional analysis between the technologies—newsprint paper versus CD ROM version of an archived daily—can be undertaken. Often, the perspective adopted is that of the end user of the technology.

Functional equivalency is a useful heuristic for developing the law in a principled way through analogical reasoning. However, it is not the only measure of when a principle of technological neutrality should apply. The *CCH* and *SOCAN* cases, in particular, are fine examples of how courts choose not to impede technological innovation through copyright liability in the absence of a functional equivalency argument.

III. CBC V. SODRAC AT THE SUPREME COURT

The Supreme Court’s digital and internet copyright jurisprudence reveals different manifestations of a principle of technological neutrality. The principle has two main facets, *non-discrimination* and *non-interference*, both of which now appear well established in the law. The methodology for determining when the principle applies is, like the application of all principles of law, a matter of judgment in specific cases. In some cases, a heuristic of functional equivalency has been adopted. As the name implies, this demands that a function first be identified; that function is framed by the specific legal issue usually as perceived from the perspective of an end user of the technology. An analogy is then drawn between the two technologies specific to that function to determine equivalency.

What does all of this mean for *CBC v. SODRAC*? It depends on the type of copies at issue. With respect to purely incidental copies, i.e. those rendered unusable or are dormant as sound recordings after production and broadcast, there is a persuasive argument from a standpoint of coherence that these should *not* be subject to separate charge as reproductions. From the digitized input argument in *Robertson*, to the cached copies in *SOCAN*, to the temporary file copies created to effect streaming in *Rogers*, the Supreme Court has consistently denied the possibility of incidental technical copies as implicating the reproduction right. The reason for this is that the court has viewed the ultimate functional purpose of the activity in question—be it providing a means of telecommunication, or reproducing or performing a work—to be material, not the technical means by which that function is accomplished. Implicit in this reasoning is the idea that such copies are temporary and not ultimately usable after serving their purpose. Moreover, this result accords with the rationale of technological neutrality as *non-interference*. In the balancing act between the interests of technological use and innovation on the one hand and the legitimate interests of copyright holders on the other hand, there appears little contest. These unusable or dormant copies

serve only to facilitate efficient and economical digital communications (as well as dissemination of works) while the claim to reproduction for copies that are not part of the end product is correspondingly weak.

The legal status of usable copies which survive the production and broadcast process and serve an identifiable purpose as reproductions seems less clear. Indeed, even the new amendments to the *Act* do not provide a clear answer.⁶⁰ This is where individual judgment about the weight of the principle of technological neutrality relative to the weight of the legitimate rights of a copyright owner may be balanced. The most sensible view is to treat these copies as reproductions but to accord them value relative to their purpose. In other words, archived copies would implicate the reproduction right but only in terms of its value as an archived copy. It would be wrong to assess these copies, as the Board did, at a premium rate on the basis that copyright owners should share the benefits of copy-dependent technology used by broadcasters. In fact, this reasoning tilts the balance too heavily in favor of copyright holders as the substantial increased cost would hamper the use and innovation of these new production methods, thus violating the principle of technological neutrality as *non-interference*.

IV. CONCLUSION

In their own unique ways, the Copyright Board and Federal Court of Appeal decisions profoundly misunderstood the principle of technological neutrality that has emerged over the past dozen years within the skein of Supreme Court of Canada copyright jurisprudence. The Copyright Board's perception that the benefits accruing from technology are an added value in which copyright holders are entitled to share (regardless of the kind of copying that takes place) is fundamentally at odds with Supreme Court holdings, in similar cases, that copyright should not place an undue cost to the development of new technologies. The principle of technological neutrality requires a more nuanced understanding of when reproduction rights are triggered within a performance rights context so as to balance the rights of copyright holders against the rights of technology users and innovators. The Federal Court of Appeal's folly is less transparent though equally flawed. Relying on the precedent of *Bishop v. Stephens*, the court believed it was on solid ground in finding that ephemeral copies trigger the reproduction right. However, a number of Supreme Court cases have since rendered this precedent incoherent. Incidental copying has long been ubiquitous in the digital and internet context, and the Supreme Court has routinely refuted any reproduction rights associated with them.

This article has offered a conception of technological neutrality, both as an analytical tool for understanding the copyright implications of new technologies,

⁶⁰ Section 30.71 and 30.8 both contemplate that incidental copies (which *are* permitted to effect technological processes or a broadcast) must in the normal course of events be destroyed after their purpose has been served.

and as a mediating principle of copyright law. The analytical framework suggests that technological neutrality as *non-discrimination* extends the rights of copyright owners and users in a way that ensures that these rights remain relevant to the emergence of practices associated with new technologies. Technological neutrality as *non-interference*, on the other hand, acts on a check against copyright liability attaching too readily to activities that either do not legitimately impact on the rights of copyright holders, or when they do, reach too far beyond copyright to be reasonable. In this way, technological uses and innovations are not unduly curtailed. Importantly, technological neutrality in either manifestation operates as a principle of law. It is a question of judgement if, and how, it applies. Still it can have decisive force in determining the outcome of a given case, either as a means of elucidating the content of vague statutory language or as offering a reason to avoid an otherwise absurd rendering of the law.