

**IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF THE  
NORTH AMERICAN FREE TRADE AGREEMENT AND THE  
UNCITRAL ARBITRATION RULES, 1976**

**-BETWEEN-**

**THEODORE DAVID EINARSSON, HAROLD PAUL EINARSSON, RUSSELL JOHN  
EINARSSON, GEOPHYSICAL SERVICE INCORPORATED**

**(the “Claimants”)**

**-AND-**

**GOVERNMENT OF CANADA**

**(the “Respondent”)**

**(ICSID Case No. UNCT/20/6)**

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**EXPERT REPORT OF CAMERON HUTCHISON**

**CER-04**

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STIKEMAN ELLIOTT LLP  
Barristers & Solicitors  
4200 Bankers Hall West  
888 - 3rd Street S.W.  
Calgary, AB T2P 5C5 Canada  
P: (403) 266 9064  
E: mlemmens@stikeman.com

Matti Lemmens  
*Counsel for Theodore David Einarsson,  
Harold Paul Einarsson, Russell John  
Einarsson and Geophysical Service  
Incorporated*

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**A. Preliminary Matters**

1. My name is Cameron J. Hutchison and I currently reside at 10724 75 Avenue, Edmonton, Alberta T6E 1J9. I have no past or present relationship with – and am independent of - the parties to the arbitration, their legal counsel, or members of the Arbitral Tribunal.
2. I am Professor of Law at the Faculty of Law, University of Alberta, where I have been an active teacher and researcher since 2004. I hold the following degrees: B.A. (Hons.), LL.B. (Osgoode Hall), LL.M (University of Nottingham), and SJD (University of Toronto). I have taught intellectual property law at my faculty for eighteen years and am author of *Digital Copyright Law* (Irwin: Toronto, 2016) as well as co-author of all three editions of *Canadian Intellectual Property Law: Cases and Materials* (Emond Montgomery: Toronto). I have written several law review articles on copyright law, and two articles specifically on the principle of technological neutrality in Canadian law (both cited by Abella J. in *CBC v. SODRAC*). I have taught statutory interpretation at my faculty since 2008. In addition to writing several law review articles on the topic as it relates to intellectual property law, I am author of *The Modern Principle of Statutory Interpretation* 2<sup>nd</sup> ed. (LexisNexis: Toronto, 2022).
3. My legal opinion reflects my understanding of the law in Canada as it pertains to the issues I address, with a particular emphasis on Supreme Court of Canada jurisprudence. I have read some of the pleadings in this arbitration, the Alberta trial and appeal judgements in this matter (*Geophysical Service Incorporated v. Encana Corporation* 2016 ABQB 230; *Geophysical Service Incorporated v. Encana Corporation* 2017 ABCA 125), as well as the legal opinions of Mr. Nigel Bankes and Mr. Barry Sookman. I have genuine belief in the opinions and conclusions expressed in this report.

**B. Legal Opinion**

4. In this report, I provide my opinion, as solicited by the claimants' counsel, on the following three legal issues:
  - 1) **Whether there is a singular approach, under Canadian principles of statutory interpretation, to the resolution of overlapping statutory provisions?**

- 2) **What is the connection, if any, between statutory exceptions to copyright holder rights, and the various forms of copyright licensing?**
- 3) **What does the principle of technological neutrality mean in Canadian law?**
- 1) **Whether there is a singular approach, under Canadian principles of statutory interpretation, to the resolution of overlapping statutory provisions?**
5. The modern principle is the official approach to statutory interpretation in Canada and, accordingly, is used by courts to resolve problems of overlapping statutes. The modern principle calls for courts to fully construe legislation, using various inputs, to help uncover legislative intent. In situations of overlapping statutory provisions, the principle resolves apparent “conflict” that arises from a textual reading those provisions. In the result, the legislative intent reveals that one or both statutory provisions apply harmoniously to the case before the court. However, courts continue to reference priority rules, e.g. the special statute over the general statute, that are a holdover from a time when “conflict” was identified based on a textual reading of the statute. While courts do not now typically apply or resolve problems of overlapping statutes using priority rules, mention of these rules in the case law nonetheless creates confusion.

#### **a) The Modern Principle**

6. All matters of statutory interpretation in Canada, including the reconciliation of overlapping statutes, are resolved using the modern principle. The articulation of the modern principle most frequently cited by the Supreme Court of Canada is as follows:
- ... the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.<sup>1</sup>
7. The modern principle recognizes that a range of legitimate inputs helps ensure an interpretation that aligns with legislative intent. The first input is the “ordinary” meaning of the language at issue, defined as “the natural meaning which appears when the provision

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<sup>1</sup> **C-318** Ruth Sullivan & Elmer A. Driedger, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham, ON: Butterworths, 2002) at 1. The Supreme Court case most commonly cited as authority for the modern principle is **C-319** *Re Rizzo & Rizzo Shoes Ltd.*, [1998] S.C.J. No. 2, [1998] 1 S.C.R. 27 (S.C.C.).

is simply read through.”<sup>2</sup> This implies that words read in the immediate context of a statutory provision have a connotation of meaning that arises in the reader’s mind. This textual understanding is tentative and must be checked against other modern principle inputs.<sup>3</sup>

8. The “entire context” is a multifaceted consideration that includes statutory context, legal context, and external context. The statutory context consists of the language used in the immediate context of the provision in which the words appear, closely related provisions, the entire statute as a whole, and related statutes.<sup>4</sup> The legal context refers to relevant legal norms outside of the statute book, including applicable case law and judicial doctrines, relevant law of other jurisdictions, scholarly opinion, the common law, constitutional law and international law.<sup>5</sup> External context is concerned with both the “setting in which the provision was enacted or ... in which it currently operates.”<sup>6</sup> The assumption is that legislation “is a response to circumstances in the real world and it necessarily operates within an evolving set of institutions, relationships and cultural assumptions.”<sup>7</sup> External context is explicitly pragmatic in nature and invites consideration of the consequences of a particular interpretation.
9. The “scheme” of the Act refers to meaning to be gleaned from “how the provisions or parts of the Act work together to give effect to a plausible and coherent plan.”<sup>8</sup> We may infer meaning of a provision considering this overall plan. We should not expect that the legislature has promulgated rules that conflict, or do not fit, with one another. More broadly, according to the principle of coherence, various statutes form “parts of a functioning whole.”<sup>9</sup>

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<sup>2</sup> C-319 *Ibid.* at 21.

<sup>3</sup> C-319 *Ibid.* at 20.

<sup>4</sup> C-319 *Ibid.* at 261.

<sup>5</sup> C-319 *Ibid.* at 260-61.

<sup>6</sup> C-319 *Ibid.* at 260-62.

<sup>7</sup> C-319 *Ibid.* at 260-61.

<sup>8</sup> C-319 *Ibid.* at 284.

<sup>9</sup> C-319 *Ibid.* at 168-69.

10. The “object of the Act” means the purpose *i.e.*, legislation or a particular statutory provision has a discoverable purpose, which should align with the chosen interpretation.<sup>10</sup> The “intention of Parliament” invites courts to consider legislative history, which commonly includes comparing the current enactment with prior versions of a statute to identify meaningful changes in language. Legislative intention also refers to authoritative sources of meaning as derived from, for example, a sponsoring Minister’s explanation to the legislature about the meaning of a proposed statute, or a law reform report upon which the legislation is based.
11. All modern principle inputs are assessed holistically by courts to arrive at, what in their judgement, is the most persuasive account of legislative intent. Of course, judges may apply the modern principle and still arrive at different interpretations of legislative intent. In practice, judges may not always consider all components of the modern principle due to oversight or because inputs are not available or probative of legislative intent. For example, legislative history may be non-existent or, if available, fail to shed light on the matter.

#### **b) The Resolution of Overlapping Statutes Using the Modern Principle**

12. The problem of overlap is when two statutory provisions appear on a textual reading to conflict in their application to the facts before a court.<sup>11</sup> The Supreme Court has consistently maintained that the problem of overlapping statutory provisions is to be resolved through a modern principle construction.<sup>12</sup> Typically, this means the courts interpret the statutes considering their statutory context, purpose and legislative history.

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<sup>10</sup> C-319 *Ibid.* at 195.

<sup>11</sup> To be clear, the parameters here are (1) we are dealing with statutes of the same level of government whether the provisions are in the same statute or (more typically) in different statutes, and (2) there is no explicit reference to the relationship between the two provisions stated in either statute.

<sup>12</sup> C-320 *Nemeth v. Canada (Justice)* 2010 SCC 56 at para. 26 [hereinafter “Nemeth”]. C-321 *Reference Re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168* 2012 SCC 68 [hereinafter “Broadcasting Reference”] at paras. 11 – 13. Sometimes the modern principle is not stated per se though key elements, notably the statutory context, legislative history and purpose are used to construe the legislation: C-322 *Levis (City) v. Fraternalite des Policiers de Levis Inc.* 2007 SCC 14 [hereinafter “City of Levis”]; C-323 *Century Services Inc. v. Canada (Attorney General)* 2010 SCC 60 [hereinafter “Century Services”]. See also C-324 *Lorencz v. Talukdar* 2020 SKCA 28 [hereinafter “Lorencz”] for a recent example where statutory context, purpose and legislative history were examined.

13. In *Century Services Inc. v. Canada (Attorney General)*,<sup>13</sup> the Supreme Court confronted an apparent conflict between two insolvency law provisions found in the *Companies' Creditor Arrangement Act* (CCAA), and the *Excise Tax Act* (ETA). The latter statute created a deemed trust in favor of the Crown for unremitted GST of a debtor company; the CCAA, on the other hand, did not allow for statutory deemed trusts in favor of the Crown. After reviewing the statutory context, legislative history and purpose of the statutes, the Court concluded that the legislative intent was to, where possible, facilitate corporate reorganization of debtor companies; as such, the court held that the deemed trust in favor of the Crown under the ETA did not take effect unless the company was forced to liquidate assets. Notably, the CCAA, which took priority in this case, was both the earlier, and more general, statute.
14. Legislative history may not always be available or helpful. Still, a court may attempt to reconcile two apparently conflicting provisions by reading each statute purposively. In *Apotex v. Eli Lilly*,<sup>14</sup> the issue was the relationship between s. 50 of the *Patent Act*, which permits the sale of a patent, and s. 45 of the *Competition Act* which penalized agreements (including potentially a patent sale) that hindered competition. In that case the patent sale (allowed under s. 50) had the effect of creating a monopoly in the pharmaceutical process (penalized under s. 45).
15. Based on a contextual<sup>15</sup> and purposive reading of both statutes, the court held that both provisions operated harmoniously. As to the purposive aspect, the court reasoned:
- [30] the right to exclude others is an essential part of the [patent] bargain: the monopoly granted to the patentee is the recompense for ingenuity and the public disclosure of the invention. Moreover, as a unilateral act, the issue of a patent cannot be a conspiracy or agreement for the purpose of section 45.
- [31] The right to assign a patent is also valuable, and Parliament has authorized patent holders to assign their patents. No doubt, a patent holder may expect to obtain a higher price from a purchaser who already owns patents that would give the assignee a monopoly in a relevant market. However, to deter a patentee from obtaining the full potential value of the patent in these circumstances in order to maintain competition in a market is not incompatible with the essential bargain between the patentee and the state.

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<sup>13</sup>C-323 *Century Services supra* note 12.

<sup>14</sup>C-325 *Apotex Inc. v. Eli Lilly and Co.* 2005 FCA 361 [hereinafter "Apotex"].

<sup>15</sup> For e.g., s. 79 of the *Competition Act* explicitly mentions that intellectual property rights are excluded from the application of that provision; the rule of implied exclusion, according to the court, suggests that the absence of this language in s. 45 reveals an intention that intellectual property rights are not excluded for the purpose of this section.

[32] Second, an interpretation of section 50 of the *Patent Act* that does not immunize the assignment of patents from section 45 when it lessens competition is consistent with the purpose of the *Competition Act*, which is stated in section 1.1 [as enacted by R.S.C., 1985 (2nd Supp.), c. 19, s. 19] to be “to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy.” The importance of the Act and, within it, of section 45, was emphasized in *R. v. Nova Scotia Pharmaceutical Society*, 1992 CanLII 72 (SCC), [1992] 2 S.C.R. 606, at page 648, where Gonthier J. described the Act as being “central to Canadian public policy in the economic sector” and said that “s. 32 [now section 45] is itself one of the pillars of the Act.” It would be inconsistent with this view of the *Competition Act*, and of the place of section 45 within it, to reduce the scope of section 45 by reading in words that exclude an assignment of patents that lessens competition in the relevant market.

16. Courts may explicitly construe the relationship between the two statutes as part of a modern principle interpretation.<sup>16</sup> For example, in the *Broadcast Reference*<sup>17</sup> case, the court was asked to resolve an apparent conflict between a CRTC regulation created under the *Broadcasting Act*, and the scheme of broadcasting rights provided under the *Copyright Act*. The court first construed the *Broadcasting Act* to find the CRTC regulation *ultra vires*, then turned to the text, purpose and history of the *Copyright Act* provisions to find that Act prescribed a comprehensive scheme of broadcast rights pertaining to the issue at hand.<sup>18</sup>
17. There are, broadly speaking, two outcomes of a modern principle construction of overlapping statutes in relation to a dispute before a court. First, a court may construe a legislative intent that both statutes are to operate harmoniously. There are various permutations of this outcome. In *Apotex*, for example, both s. 50 of the *Patent Act* and s. 45 of the *Competition Act* applied though a transfer of patent rights could lead to a violation of the latter provision. In *Century Services*, both insolvency statutes applied though the CCAA had priority until such time as company assets had to be liquidated.
18. A second possible outcome is a legislative intent that one statute is found to eclipse the other. Thus, in the *Broadcast Reference*, the *Copyright Act* was found to comprehensively

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<sup>16</sup> C-324 *Lorenz* at para. 54: “Because two statutes are involved, part of the ‘entire context’ is the fit between the two statutes.”

<sup>17</sup> C-321 *Broadcast Reference supra* note 12.

<sup>18</sup> C-321 *Ibid.* at para. 78.



regulate the area of broadcasting rights to the exclusion of a CRTC regulation under the *Broadcasting Act*. Similar outcomes occurred in *Nemeth*<sup>19</sup> and *City of Levis*<sup>20</sup> cases.

### c) Jurisprudential Confusion

19. Notwithstanding the above, confusion arises from the persistence in the case law of older interpretive principles adopted at a time when courts construed legislation textually. Courts, and textbooks<sup>21</sup> on the subject, still characterize overlapping statutes as problems of statutory conflict. In effect, what they are referring to is an apparent conflict based on two textual readings of a provision; but under the modern principle, there is no statutory “conflict” between two provisions since a proper construction reveals that either one or both provisions is/are intended to apply to the facts before the court.<sup>22</sup>
20. Courts often mix elements of a modern principle construction of two statutory provisions, together with certain priority rules used to resolve textual ambiguity. In the *Nemeth*, *City of Levis*, *Lorencz* cases, for example, a modern principle construction ultimately resolved the apparent conflict, though the court in each case made passing reference to priority rules (namely *lex specialis*) used to resolve statutory “conflict”.
21. There are two priority rules commonly referenced in the case law. One rule is that the more recent statute has priority over the earlier statute (known in Latin as *leges posteriores priores contrarias abrogant*).<sup>23</sup> The rationale here is that legislators are notionally aware of the entire statute book at the time of enactment; as such, the legislature is deemed to have intended the newer law to take precedence.<sup>24</sup> A second rule is that the more specific statutory provision takes precedence over the more general one (known as *specialis*

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<sup>19</sup> C-320 *Nemeth supra* note 12. In this case, an apparent conflict between the *Immigration and Refugee Protection Act* (IRPA) and the *Extradition Act* was resolved such that the IRPA provision was found not to apply to extradition.

<sup>20</sup> C-322 *City of Levis supra* note 12. In this case, the court found that only one of two statutes that could apply to disciplinary action against a police officer was intended by the legislature to apply.

<sup>21</sup> C-326 Pierre-Andre Cote *The Interpretation of Legislation in Canada* 4<sup>th</sup> ed. (Thomson Reuters: Toronto, 2011) at 374 [hereinafter “Cote”]. C-327 Ruth Sullivan *Statutory Interpretation* 3<sup>rd</sup> ed. (Irwin: Toronto, 2016) at 317 *ff.*

<sup>22</sup> See e.g. C-323 *Century Services supra* note 12 at paras. 10-11: “It is difficult to imagine two statutory provisions more apparently in conflict. However, as is often the case, the apparent conflict can be resolved through interpretation. In order to properly interpret the provisions, it is necessary to examine the history of the CCAA, (sic) its function amidst the body of insolvency legislation enacted by Parliament.”

<sup>23</sup> C-326 *Cote supra* note 21 at 387.

<sup>24</sup> C-326 *Ibid.* at 385.

*generalibus non derogant*, or more commonly “*lex specialis*”).<sup>25</sup> The rationale here is that legislature has directed its mind specifically to a particular matter and thus, it is this intention that should take priority.<sup>26</sup>

22. Even according to their own terms, priority rules can be problematic. It is not always clear which statutory provision is the more specific such that *lex specialis* is applicable. For example, in analyzing which limitation period in two separate statutes applied to an accident claim, the Saskatchewan Court of Appeal in *Lorencz* questioned the lower court’s use of *lex specialis* as neither statute could be said to be “more precisely relevant.”<sup>27</sup> There may also be a problem determining which statute is later in time, e.g., does a statutory provision unaffected by an amendment to a different part of the same statute assume the date of amendment? Also, what happens when the priority rules themselves conflict, i.e., the special statute is earlier in time?
23. More fundamentally, the application of *lex specialis*, or other priority rules, to resolve overlapping statutory provisions is legally incorrect, and may lead to wrong results. Had the Supreme Court in *Century Services* relied on *lex specialis* to resolve the case, it would have arrived at the opposite result than it did using the modern principle. The inconsistent choice and application of method by courts means that it is virtually impossible for a party to know prior to a judicial ruling how the law resolves overlapping statutory directives. Even when the modern principle is applied (as it should be), judges may differ on the relationship between overlapping statutory provisions.

#### **d) Conclusion**

24. The modern principle is the official methodology for interpreting statutes in Canada and is used to resolve problems of overlapping statutes. At minimum, this means courts must

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<sup>25</sup>C-326 *Ibid.* at 386.

<sup>26</sup>C-326 *Ibid.*

<sup>27</sup>C-324 *Lorencz supra* note 12 at para 90-91. See also C-328 *Dunn v. Dunn* (1992) 9 OR (3d) 95, where the deceased had a minor child from a prior relationship in need of financial support and his only asset was a life insurance policy that named his current spouse as beneficiary. Proceeds from a life insurance policy were, under the *Insurance Act*, to flow to the named beneficiary while, under the *Succession Law Reform Act* (SLRA), were to form part of the deceased’s estate subject to the child support obligations. The court did not look behind the text but rather applied *lex specialis* to resolve the controversy, though it is not clear why the SLRA was considered the more special statute as both addressed life insurance specifically.

construe the statutory provisions considering text, statutory context, purpose and, where possible, legislative history. When that happens, courts find a legislative intent that both provisions operate together harmoniously and are not in conflict. The use of priority rules, while referenced in the case law, does not fit with a modern principle construction of a statute. Inconsistency of approach and application by courts to the problem of overlapping statutes makes legal certainty prior to a judicial ruling virtually impossible.

**2) What is the connection, if any, between statutory exceptions to copyright holder rights, and the various forms of copyright licensing?**

25. Copyright provides a bundle of exclusive rights to authors. In turn, licensing facilitates the dealing of exclusive rights in a work by an author for compensation. Exceptions to copyright diminish an exclusive right (or rights) for certain uses or activities during the term of the monopoly but without generally extinguishing exclusive rights. There is no connection between statutory exceptions to copyright holder rights, on the one hand, and various forms of licensing, on the other. In broad terms, exceptions to the exclusive rights of copyright holders arise by operation of law, in particular by legislative prescription. No prior agreement (implicit or explicit) of, or compensation to, the copyright holder is required to use the work. Various forms of licensing, on the other hand, are transactional in that copyright holders consent to, or have imposed on them by an administrative body, certain uses of a specific work according to individualized terms for a limited duration.

**a) Overview**

26. The purpose of the copyright system in Canada is to promote the “encouragement and dissemination of works of the arts and intellect [and to obtain] a just reward for the creator.”<sup>28</sup> The vehicle for encouraging the creation of works, and providing creators with their just reward, is the exclusive rights provided to an owner<sup>29</sup> of a work under s. 3 of the *Act*:

3 (1) For the purposes of this Act, copyright, in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof in any material form

<sup>28</sup> See C-345 *Theberge infra* note 52, and accompanying text.

<sup>29</sup> An author is the first owner of a work. However, she may sell the work or part of it such that she no longer owns the work, or ownership may vest in an employer by operation of law: see C-329 *Copyright Act*, RSC 1985, c. 42, s. 13.

whatever, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof, and includes the sole right

- (a) to produce, reproduce, perform or publish any translation of the work,
- (b) in the case of a dramatic work, to convert it into a novel or other non-dramatic work,
- (c) in the case of a novel or other non-dramatic work, or of an artistic work, to convert it into a dramatic work, by way of performance in public or otherwise,
- (d) in the case of a literary, dramatic or musical work, to make any sound recording, cinematograph film or other contrivance by means of which the work may be mechanically reproduced or performed,
- (e) in the case of any literary, dramatic, musical or artistic work, to reproduce, adapt and publicly present the work as a cinematographic work,
- (f) in the case of any literary, dramatic, musical or artistic work, to communicate the work to the public by telecommunication,
- (g) to present at a public exhibition, for a purpose other than sale or hire, an artistic work created after June 7, 1988, other than a map, chart or plan,
- (h) in the case of a computer program that can be reproduced in the ordinary course of its use, other than by a reproduction during its execution in conjunction with a machine, device or computer, to rent out the computer program,
- (i) in the case of a musical work, to rent out a sound recording in which the work is embodied, and
- (j) in the case of a work that is in the form of a tangible object, to sell or otherwise transfer ownership of the tangible object, as long as that ownership has never previously been transferred in or outside Canada with the authorization of the copyright owner,

and to authorize any such acts.

27. This bundle of exclusive rights includes the sole right of the copyright holder to produce or reproduce the work in any material form whatever, to perform or exhibit the work, to communicate the work by way of telecommunication (including by “making it available”),<sup>30</sup> to publish the work including any translation, and to offer first sale of tangible objects of a work in Canada. The term of these exclusive rights is the life of the author plus 70 years.<sup>31</sup>

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<sup>30</sup> **C-329 Copyright Act**, RSC 1985, c. 42, s. 2.4(1.1): “For the purposes of this Act, communication of a work or other subject-matter to the public by telecommunication includes making it available to the public by telecommunication in a way that allows a member of the public to have access to it from a place and at a time individually chosen by that member of the public.”

<sup>31</sup> **C-329 Copyright Act**, RSC 1985, c. 42, s. 6. In addition, an author has certain moral rights in a work, including the right to be associated with the work where reasonable in the circumstances. For moral rights, see ss. 14.1, 14.2, 28.1 and 28.2. The term is the same.

28. Exclusive rights form the basis for the sale and licensing of works to third parties for compensation. The licensing of exclusive rights is therefore integral to the compensation regime for authors as envisioned under the Act. The copyright system also balances exclusive rights with so-called user rights, such as fair dealing and other exceptions in the Act that permit specific uses during the term of the copyright. A notable feature of exceptions to copyright is that while a certain right (or rights) may be diminished for a particular use or activity, the exclusive rights of the copyright holder otherwise remain intact.

**b) Statutory Exceptions to Copyright**

29. There are numerous exceptions to copyright holder rights under ss. 29 to 32.2 of the *Copyright Act*. The most expansive of these are the fair dealing exceptions found in ss. 29 to 29.2. Section 29, for example, states: “[f]air dealing for the purpose of research, private study, education, parody or satire does not infringe copyright.” The language “does not infringe copyright” in s. 29 is typical of copyright exceptions. It simply means that the copyright holder does not hold full exclusive rights over the activity in question; their consent for that use is therefore not required. In other words, provided a use fits with the exception, anyone can use the copyright work during the term of the monopoly and without the consent, knowledge of, and without compensation to, the copyright holder.
30. The exceptions that follow the fair dealing provisions are more detailed in their requirements. One such provision foresees the interaction between copyright holder rights and mandated uses under other federal legislation. Section 32.2 provides:

It is not an infringement of copyright for any person

(a) to disclose, pursuant to the *Access to Information Act*, a record within the meaning of that Act, or to disclose, pursuant to any like Act of the legislature of a province, like material;

(b) to disclose, pursuant to the *Privacy Act*, personal information within the meaning of that Act, or to disclose, pursuant to any like Act of the legislature of a province, like information;

(c) to make a copy of an object referred to in section 14 of the *Cultural Property Export and Import Act*, for deposit in an institution pursuant to a direction under that section; and

(d) to make a fixation or copy of a work or other subject-matter in order to comply with the *Broadcasting Act* or any rule, regulation or other instrument made under it.

31. Again, the language “it is not an infringement of copyright for any person” places the identified use of the work beyond the purview of copyright holder rights.

32. I found only one other federal statute that references the limiting of copyright holder rights under the *Copyright Act*. Section 26(1) of the *Online News Act* states:

26(1) If news content is made available by a digital news intermediary and its operator is a party to a covered agreement in relation to the making available of the news content by the intermediary, the operator is not liable under the *Copyright Act* for an infringement of copyright in relation to activities that are subjects of that agreement.<sup>32</sup>

33. While the language here is different in that s. 26 appears to shield operators from claims of infringement (as opposed to declaring it *not* to be an act of infringement), the effect is the same. The activity in question is immune to copyright liability by statutory prescription, without any involvement of the copyright holder.

### **c) Licensing Under the *Copyright Act***

34. There are two forms of licensing under the *Copyright Act*: exclusive licensing and non-exclusive licensing. An exclusive licence is defined in s. 2.7:

2.7 For the purposes of this Act, an exclusive licence is an authorization to do any act that is subject to copyright to the exclusion of all others including the copyright owner, whether the authorization is granted by the owner or an exclusive licensee claiming under the owner.

35. Furthermore ss. 13(4) and (7) of the *Act* provide:

13(4) The owner of the copyright in any work may assign the right, either wholly or partially, and either generally or subject to limitations relating to territory, medium or sector of the market or other limitations relating to the scope of the assignment, and either for the whole term of the copyright or for any other part thereof, and may grant any interest in the right by licence, but no assignment or grant is valid unless it is in writing signed by the owner of the right in respect of which the assignment or grant is made, or by the owner’s duly authorized agent.

....

(7) For greater certainty, it is deemed always to have been the law that a grant of an exclusive licence in a copyright constitutes the grant of an interest in the copyright by licence.

36. Read together, these provisions allow a copyright owner to license exclusive rights to a third party by way of contract without relinquishing their ownership of the copyright. The

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<sup>32</sup> C-330 *Online News Act*, SC 2023, c. 23.

implication is that the rights licensed will, at some point, revert to the owner. The exclusive licence must be “in writing signed by the owner of the right,” and is governed according to the law of contracts. A right of action in respect of any act of infringement during the term of the exclusive license is transferred to the licensee.<sup>33</sup>

37. A non-exclusive license arises when a copyright holder, expressly or implicitly, consents to a certain use of a work on a non-exclusive basis. The Supreme Court affirmed that a “grant of an interest” in s. 13(4) does not include a non-exclusive license and thus, there is no requirement that it be in writing.<sup>34</sup> The court also cited, with approval, the following dicta:

The ‘grant of an interest’ referred to in s. 13(4) is a transfer of a property right as opposed to a permission to do a certain thing. The former gives the licensee the capacity to sue in his own name for infringement, the latter provides only a defence to claims of infringement.<sup>35</sup>

38. One kind of non-exclusive licence is an implied license, meaning that the copyright owner has signaled by her conduct a permission that a work may be used in a certain way.<sup>36</sup> For example, the owner of a blog entry posted on a webpage displaying a print icon implicitly gives permission to readers to print off a copy of the article for personal use. Implied uses are limited in nature as suggested by the context. There is nothing in the above example that would suggest the copyright holder is authorizing the republication of the blog entry in a newspaper. In *Labrecque v. Trudel*,<sup>37</sup> for example, infringement was found when the defendant used the plaintiff’s photograph, obtained via a Google image search, on its website. The posting of an image on the Internet by the owner was not construed by the court as implicitly authorizing someone to re-publish that image on a website. Implied licences are limited in scope and may be terminated unilaterally by an express or implied act of the copyright holder.

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<sup>33</sup> See s. 13(6): “For greater certainty, it is deemed always to have been the law that a right of action for infringement of copyright may be assigned in association with the assignment of the copyright or the grant of an interest in the copyright by licence.” See also *Robertson infra* note 34 at 385 where the court cited, with approval, dicta that the right to sue arises automatically under an exclusive license.

<sup>34</sup> C-331 *Robertson v. Thomson Corp.* 2006 SCC 43 at 384 [hereinafter “*Robertson*”].

<sup>35</sup> C-331 *Ibid.* at 385 citing C-332 *Ritchie v. Sawmill Creek Golf & Country Club Ltd.* (2004) 35 CPR (4<sup>th</sup>) 163 at para. 20

<sup>36</sup> C-333 *Tremblay v Orio Canada Inc.* 2013 FC 109 at para. 53.

<sup>37</sup> C-334 *Labrecque v. Trudel* 2014 QCCQ 2595.

39. Non-exclusive licences may also be express, whether by way of oral or written agreement. An express non-exclusive license may be a verbal permission of the copyright holder to use the work in a certain way, usually without compensation.<sup>38</sup> Alternatively, a permission may be in writing. The terms of service of many user-generated content websites provide for a rather expansive set of non-exclusive uses. Facebook, for example, has the following:

...when you share, post, or upload content that is covered by intellectual property rights on or in connection with our Products, you grant us a non-exclusive, transferable, sub-licensable, royalty-free, and worldwide license to host, use, distribute, modify, run, copy, publicly perform or display, translate, and create derivative works of your content....This license will end when your content is deleted from our systems.<sup>39</sup>

40. More formally, non-exclusive licenses include written contracts allowing certain uses of a work by one party in exchange for valuable consideration to the copyright holder. Publishing companies, for example, may contract with several libraries to license content, for consideration, on a non-exclusive basis. The scope of a written non-exclusive license has the potential to be much broader in scope than could be possible by way of an implied license. Whether by terms of agreement or by conduct of the copyright holder, the scope and duration of non-exclusive licenses is limited.
41. There is no compulsory licensing scheme under the *Copyright Act*. However, both the *Patent Act* and the *Plant Breeders Rights Act* have compulsory licensing schemes.<sup>40</sup> These regimes permit a party to petition an administrative body to impose a license on the intellectual property owner. The intellectual property owner is notified and may oppose the license. If the moving party convinces the administrative body that certain public interest conditions are met, non-exclusive licensing terms may be imposed on the intellectual property owner in favor of that party. The administrative body must also set the terms of compensation for the intellectual property owner.
42. The simplest example of this scheme is found in s. 32 of the *Plant Breeders' Rights Act*:

32 (1) Subject to subsections (2) to (6) and the regulations and if the Commissioner considers that it is appropriate to do so, the Commissioner may, on application by any

<sup>38</sup> C-332 *Ritchie supra* note 35 at paras. 21 – 23.

<sup>39</sup> C-335 Facebook, Terms of Service, available at [Facebook](#).

<sup>40</sup> C-336 *Plant Breeders' Right Act*, RSC 1990, c. 20, s. 32; C-337 *Patent Act*, RSC 1985, c P-4 s. 19 (use of patents by government), s. 21.01 ff. (compulsory licensing for essential medicines in developing countries); ss. 65 and 66 (compulsory licensing in cases of patent abuse).



person, authorize the doing of any act described in any of paragraphs 5(1)(a) to (g) [the exclusive rights of the owner] by granting the person a compulsory licence.

(2) In disposing of an application for, and settling the terms of, a compulsory licence pursuant to this section in relation to any plant variety, the Commissioner shall endeavor to secure that

(a) the plant variety is made available to the public at reasonable prices, is widely distributed and is maintained in quality; and

(b) there is reasonable remuneration, which may include royalty, for the holder of the plant breeder's rights respecting the plant variety.

(3) A compulsory licence under this section may include terms requiring the holder of the plant breeder's rights affected by the licence to make propagating material available to the holder of the compulsory licence.

(4) The Commissioner may at any time, on representations made by any interested person, extend, limit, vary or revoke a compulsory licence granted pursuant to this section.

(5) The Commissioner shall not dispose of any application for, or settle the terms of, a compulsory licence pursuant to this section or exercise jurisdiction pursuant to subsection (4) without giving interested persons who will be adversely affected by the Commissioner's decision a reasonable opportunity to make representations with respect thereto pursuant to such notice as the Commissioner deems it appropriate to give.

(6) No compulsory licence that is an exclusive licence shall be granted pursuant to this section.

43. Under this regime, the administrative body may impose a non-exclusive remunerative license on the intellectual property holder in favor of a third party, according to prescribed terms, to achieve certain public interest goals (here to facilitate lower costs and wider distribution of certain plant varieties).

44. Article 31 of the World Trade Organization TRIPS agreement accords with this understanding of compulsory licensing:

“31 Where the law of a Member allows for other use of the subject matter of a patent without the authorization of the right holder, including use by the government or third parties authorized by the government, the following provisions shall be respected...”<sup>41</sup>

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<sup>41</sup> C-338 Article 31 *Agreement on Trade-Related Aspects of Intellectual Property Rights as Amended by the 2005 Protocol Amending the TRIPS Agreement* [hereinafter TRIPS] available at [WTO | legal texts - Agreement on Trade-Related Aspects of Intellectual Property Rights as Amended by the 2005 Protocol Amending the TRIPS Agreement](#). C-339 Article 20.40 of the *United States-Mexico-Canada Agreement* available at [20-Intellectual-Property-Rights.pdf \(ustr.gov\)](#), affirms Article 31.

45. The provisions thereafter state, *inter alia*, that the scope and duration of the license shall be limited and non-exclusive, and that the rights holder is to be compensated.

**d) Licensing and Regulatory Requirements**

46. In *Geophysical Service Incorporated v Encana Corporation*,<sup>42</sup> Justice Eidsvik considered whether GSI's submission of seismic data as required under the *Canadian Petroleum Resources Act* (CPRA)<sup>43</sup> constituted an "implied license" or a "compulsory license." The justice states:

As noted above, the Defendants argue that by participating in the Regulatory Regime, GSI impliedly licensed its data for public use pursuant to the "rules of the regime". This is another way of viewing the allegedly competing legislation, that is, to take the view that s 101 of the CPRA creates a mandatory or compulsory licensing system for seismic data, once the confidentiality period has expired. The music and broadcast business also has compulsory licensing requirements and, in a way, the situation here is similar.<sup>44</sup>

47. This passage presents a novel understanding of copyright terminology that sometimes happens when a generalist judge encounters an unfamiliar, and complex, legal area.<sup>45</sup> Implied licenses and compulsory licenses are not, as canvassed above, the same thing. Moreover, compulsory licensing, which does not exist under the *Copyright Act*, is distinct from the collective administration of copyright.<sup>46</sup>
48. Nor does either form of licensing correspond to information submitted by a party to an administrative body to satisfy regulatory requirements. Section 101 of the CPRA has none of the hallmarks of a compulsory licensing scheme such as compensation to the copyright holder for imposing a license in favor of a third party. Nonetheless, Justice Eidsvik

<sup>42</sup>C-340 *Geophysical Service Incorporated v Encana Corporation*, 2016 ABQB 230 [hereinafter "*GSI v. Encana*"]

<sup>43</sup> C-341 *Canadian Petroleum Resources Act*, RSC 1985, c. 26 (2<sup>nd</sup> Supp.)

<sup>44</sup> C-340 *GSI v. Encana supra* note 42 at para. 308 – 310 (citations omitted).

<sup>45</sup> The vast majority of intellectual property dispute in Canada are resolved through the Federal Court of Canada. A CANLII.org search of the legislative title "Copyright Act" for the Alberta Court of Kings Bench (database from 1971 – present) displayed 23 cases. Five of these involved Geophysical Services Incorporated. Most cases appeared to involve either pre-trial matters, or substantive areas of law only incidentally connected to copyright.

<sup>46</sup> The collective administration of copyright refers to the creation of a collective society of rightsholders (usually allied with a specific right, e.g., public performance, and/or a particular subject matter of copyright, e.g. musical compositions) which may apply to the Copyright Board of Canada for approval of tariffs chargeable against certain third-party uses of the repertoire of works held by the rightsholders. Participating rightsholders voluntarily license their works to the collective society to participate in this regime. For example, SOCAN is a collective society that represents most music publishers and composers in Canada in respect of the public performance of musical compositions; SOCAN applies for tariffs on certain uses (e.g. radio play) of its rightsholders repertoire to the Copyright Board; if approved, SOCAN collects these tariffs and distributes these monies to rightsholders.

concludes that disclosure under s. 101 CPRA constitutes a compulsory license. Moreover, this characterization is indistinguishable from her interpretation of s. 101 as extinguishing copyright in the seismic data after the five-year confidentiality period.

49. Justice Eidsvik rejected an implied license characterization on the facts of this case, given that GSI did not acquiesce to administrative practices with respect to the copying of seismic data.<sup>47</sup> Still, the implied license characterization presents a new understanding of that term when applied to information submitted under a regulatory regime. The premise of implied licensing is that of a copyright holder freely choosing to permit certain uses of the work as suggested by her conduct or circumstance. The choice and control of the copyright holder that inheres in an implied license is absent in the context of participation in a regulatory regime, where consent is premised on legal compliance, business viability, knowledge of administrative practices and a belief that one can challenge those practices.
50. Furthermore, it must be legally wrong that a regulatory regime can, in its unfettered discretion, create the conditions for an implied license. An administrative body derives its powers from an enabling statute. It must construe the enabling legislation – here the word “disclosure” as used in s. 101 of the *CPRA* – using the modern principle and be guided by it when exercising its discretion in formulating policies or practices.<sup>48</sup> To the extent that an administrative body sets the terms of a licensing regime solely through the exercise of its own discretion, it is acting *ultra vires*.
51. Moreover, the interpretation of exceptions to copyright protection that guides this discretion must be informed by the principle of balance as expressed in the *Copyright Act* and Supreme Court copyright jurisprudence. Most exceptions in the *Copyright Act* have detailed requirements to minimize the impact of the exception on copyright holder rights. For example, the broadcast incidental copying that occurred in *CBC v. SODRAC*<sup>49</sup> failed to meet the detailed requirements of s. 30.09, which strictly safeguard copyright holder

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<sup>47</sup> C-340 *GSI v. Encana supra* note 42 at para. 317.

<sup>48</sup> Conversely, when construing legislation using the modern principle, Canadian courts may be guided by administrative policy and practice as non-binding context: C-342 *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para. 85.

<sup>49</sup> C-343 *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.* 2015 SCC 57 [hereinafter *SODRAC*].

rights against uses not specifically contemplated for that exception.<sup>50</sup> While the main exception to copyright – fair dealing – is necessarily broadly worded to capture an array of possible uses in varying contexts, here too the Supreme Court has elaborated a detailed analysis to assess the fairness of the dealing (to protect copyright holder rights) to maintain a balance of rights in the *Act*.<sup>51</sup> For example, the fairness of a particular dealing measures, among other things, the amount of a work taken, the extent of its dissemination, and the effect of the dealing on the work against the purpose of the dealing. The exceptions to copyright protection therefore convey a juridical intent that permitted uses do not result in an undue diminishment of monopoly rights.

52. Beyond fair dealing, the principle of balance pervades Supreme Court copyright jurisprudence. For example, the following passage is commonly cited as authority for the purpose of the *Copyright Act*:

The *Copyright Act* is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a

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<sup>50</sup> 30.9 (1) It is not an infringement of copyright for a broadcasting undertaking to reproduce in accordance with this section a sound recording, or a performer's performance or work that is embodied in a sound recording, solely for the purpose of their broadcasting, if the undertaking

- (a) owns the copy of the sound recording, performer's performance or work and that copy is authorized by the owner of the copyright, or has a licence to use the copy;
- (b) is authorized to communicate the sound recording, performer's performance or work to the public by telecommunication;
- (c) makes the reproduction itself, for its own broadcasts;
- (d) does not synchronize the reproduction with all or part of another recording, performer's performance or work; and
- (e) does not cause the reproduction to be used in an advertisement intended to sell or promote, as the case may be, a product, service, cause or institution.

(2) The broadcasting undertaking must record the dates of the making and destruction of all reproductions and any other prescribed information about the reproduction, and keep the record current.

(3) The broadcasting undertaking must make the record referred to in subsection (2) available to owners of copyright in the sound recordings, performer's performances or works, or their representatives, within twenty-four hours after receiving a request.

(4) The broadcasting undertaking must destroy the reproduction when it no longer possesses the sound recording, or performer's performance or work embodied in the sound recording, or its licence to use the sound recording, performer's performance or work expires, or at the latest within 30 days after making the reproduction, unless the copyright owner authorizes the reproduction to be retained.

(5) If the copyright owner authorizes the reproduction to be retained, the broadcasting undertaking must pay any applicable royalty.

<sup>51</sup> C-344 *CCH Canadian Ltd v. Law Society of Upper Canada* 2004 SCC 13 [hereinafter "*CCH*"]. If a use fits with an enumerated purpose of fair dealing, the fairness of the dealing (to protect the copyright owner's interests) considers: (1) the purpose of the dealing (2) the character of the dealing (3) the amount of the dealing (4) the nature of the work (5) alternatives to the dealing and (6) effect of the dealing on the work.

just reward for the creator (or, more accurately, to prevent someone other than the creator from appropriating whatever benefits may be generated).<sup>52</sup>

53. The principle of balance recognizes the value of user rights, which include the exceptions to copyright protection, but also the importance of incentivizing and rewarding creators of works by preserving their legitimate interests. Virtually every Supreme Court copyright decision of the twenty-first century articulates some version of the principle of balance.

#### **e) Conclusion**

54. Canada's copyright regime encourages authors to create works by offering them a bundle of exclusive rights for a lengthy term. Licensing allows authors to deal their exclusive rights in a work for compensation. User rights create balance in the copyright regime by permitting certain uses of work that diminish copyright holder rights during the term of the monopoly, without extinguishing exclusive rights.
55. The concept of licensing, in whatever form, is legally distinct from statutory exceptions in copyright law. Statutory exceptions arise by operation of law and except certain uses of a work from exclusive rights provided to intellectual property holders. They are available for all to use and do not involve, in any sense, the knowledge, participation or consent of the intellectual property right holder. As statutory prescriptions, they are limited only by the language used, and remain in effect until repealed by statute.
56. Licensing, on the other hand, permits the use of individual works according to unique terms and for a limited duration, whether by consent of the copyright holder or administrative process. After a license expires or is revoked, licensed uses are no longer permitted without the consent of the copyright holder. Most licensing is contractual in nature. Copyright holders enter contracts prescribing certain exclusive or non-exclusive uses of their work in exchange for compensation (or not). Implied licensing arises when a copyright holder, by her conduct, permits certain uses. Compulsory licensing is when an administrative body imposes a remunerative license on the intellectual property holder in favor of a third party on set terms and for a limited time.

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<sup>52</sup> C-345 *Theberge v. Galerie d'Art du Petit Champlain Inc.*, 2002 SCC 34 at para 30.

57. In *GSI v. Encana*, Justice Eidsvik characterized the disclosure regime in the *CPRA*, in tandem with administrative practices relating thereto, as either a “compulsory license” or an “implied license.” However, the disclosure regime bears none of the attributes of a compulsory licensing scheme. Implying a license from the mere fact of participating in a regulatory regime under conditions set by an administrative body upsets the conventional understanding of an implied license. Moreover, to the extent that the conditions set by an administrative body are unanchored in a modern principle construction of the enabling legislation (including the well-entrenched principle of balance as it pertains to copyright law), that discretion is *ultra vires*. By extension, it can not legitimately form the basis for setting the conditions of an “implied licence.”

### 3) What does the principle of technological neutrality mean in Canadian law?

58. Technological neutrality is an interpretive principle developed by the Supreme Court of Canada over the past twenty years to help rationalize the application of the *Copyright Act* to new digital technologies. Both the proliferation of copying occasioned by digital innovation and the widespread dissemination of copyrighted works via the internet challenged what had been clear regime of rights in the *Copyright Act*.<sup>53</sup> The principle of technological neutrality “neutralizes” the disruptive features of digitalization to accord with the essential nature of the rights provided under the Act.

#### a) Ownership of Copyright

59. The principle of technological neutrality first appears in *Robertson v. Thomson Corp.*<sup>54</sup> to resolve a problem of copyright ownership. In that case, a freelance journalist sold her article for publication in a newsprint version of the *Globe and Mail* newspaper. She later complained when her article was copied, without her permission, into digitized databases and CD-ROMs. Prior to digitization when entire daily newspapers were transferred onto microfiche, it was uncontroversial that it was the newspaper’s collective work copyright that was reproduced, and not that of individual journalists. With copies being digitized

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<sup>53</sup> On the disruptive attributes of digital innovation, see C-346 Cameron Hutchison *Digital Copyright Law* (Irwin Law: Toronto, 2016) at 15-16 [hereinafter “Hutchison”].

<sup>54</sup> C-331 *Robertson supra* note 34. The actual term used in that case is “media neutrality” but it is clear from subsequent case law that these terms are coterminous.

into, and retrievable from, databases, the question was *who* owned the reproduction rights – the individual journalist or the newspaper?

60. The Supreme Court, for the first time, articulated the principle of media neutrality as follows:

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. But it does not mean that once a work is converted into electronic data anything can then be done with it. The resulting work must still conform to the exigencies of the *Copyright Act*. Media neutrality is not a licence to override the rights of authors — it exists to protect the rights of authors and others as technology evolves.”<sup>55</sup>

61. The majority ultimately adopted an end-user perspective to resolve the dispute. Where, as in some database presentations, the article appeared individually, without any context of the newspaper provided, the journalist’s copyright prevailed. In databases where enough (but not necessarily all) context of the newspaper framed the article, the newspaper’s copyright was in play. The issue of whose rights were implicated when the newspaper was digitized into the database was not addressed by majority.<sup>56</sup> Importantly, then, it is the end user experience of the content (i.e. the context in which it is presented) that tells us whose copyright is, and is not, in play.

#### **b) The Reproduction and Telecommunication Rights**

62. With respect to exclusive rights, the principle of technological neutrality rationalizes the relationship between the reproduction right and the “right to communicate a work to the public by telecommunication” (hereinafter “telecommunication right”). These rights are found in s. 3(1) of the *Act*:

3 (1) For the purposes of this Act, copyright, in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof, and includes the sole right

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<sup>55</sup> C-331 *Ibid.* at para. 49.

<sup>56</sup> Interesting, Abella J, in dissent, also invoked media neutrality to hold that once the collective work newspaper came into being, the copyright of the author – insofar as how the collective work is ultimately transformed into other media – ceases.

(f) in the case of any literary, dramatic, musical or artistic work, to communicate the work to the public by telecommunication,...

63. Prior to digitalization and the internet, the two rights rarely overlapped. Musicians, for example, collected royalty streams from discrete activities – the sale of vinyl records (the right to copy) and radio and TV broadcasts (the telecommunication right).
64. This radically changed with the ease of copying and widespread dissemination of works facilitated by digitization. For example, consider an individual who downloads a music file over the internet. The transmission of the work via the internet involves the making of several copies including the downloaded copy, a temporary RAM copy on the receiving computer, and a cache copy on the server (the latter two being non-perceptible, technical copies). Do each of these copies implicate the reproduction right? The same activity is also, quite literally, a communication of the work by telecommunication. Is this right also in play?
65. In *Entertainment Software Association*,<sup>57</sup> the Supreme Court addressed the issue of which (or both) of the right to copy and the telecommunication right are implicated when (a) a work is downloaded via the internet and (b) a work is streamed over the internet. The specific issue raised in that case was whether a musical work synchronized into a video game elicited to two royalties (copying and telecommunication) when a game is downloaded over the internet, but only one (copying) when that same game is purchased in a store. Rather than give effect to the plain meaning of the wording of each right in s. 3, the court employed the principle of technological neutrality in a functional sense:

The principle of technological neutrality is reflected in s. 3(1) of the *Act*, which describes a right to produce or reproduce a work “in any material form whatever”. In our view, there is no practical difference between buying a durable copy of the work in a store, receiving a copy in the mail, or downloading an identical copy using the Internet. The Internet is simply a technological taxi that delivers a durable copy of the same work to the end user.

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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

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<sup>57</sup> C-347 *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada* 2012 SCC 34.



to the end user. To do otherwise would effectively impose a gratuitous cost for the use of more efficient, Internet-based technologies.<sup>58</sup>

66. In terms of demarcating the rights in play as between downloading, on the one hand, and streaming, on the other:

The Board’s conclusion was based in part on its erroneous view that a “download” is indistinguishable from a “stream”. Although a download and a stream are both “transmissions” in technical terms (they both use “data packet technology”), they are not both “communications” for purposes of the *Copyright Act*. This is clear from the Board’s definition of a stream as “a transmission of data that allows the user to listen or view the content at the time of transmission and that is not meant to be reproduced” (para. 15). Unlike a download, the experience of a stream is much more akin to a broadcast or performance.<sup>59</sup>

67. In other words, the modalities of delivery are ignored in favor of identifying the essential nature of the activity. Put simply, the court looks to *what* is happening, not *how* it is happening. When a work is downloaded over the internet such that the end user has a permanent and perceptible copy, this results in a single copy and elicits the reproduction right only. When a work is streamed over the internet (and the end user retains no permanent copy), this involves the telecommunication right, as a species of performance right. In this way, common activities on the internet were functionally categorized to rationalize rights and keep copyright costs associated with internet use and digital innovation to a minimum.<sup>60</sup>

68. The extent of this functional approach to demarcating these two rights was challenged three years later in *CBC v. SODRAC*.<sup>61</sup> At issue in that case was the treatment of so-called “broadcast-incidental copies”. After a musical work is incorporated into a video (called synchronization for which a reproduction fee is paid), modern production companies upload the master copy onto a digital content management system (DCMS) which, in this case, was used to prepare a CBC broadcast. DCMS’s make several “broadcast-incidental” copies for various purposes, e.g. “a copy may be made to reformat the master copy to suit CBC’s technical requirements, or to edit the copy for timing, language or closed captioning

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<sup>58</sup> C-347 *Ibid.* at paras. 5 and 9.

<sup>59</sup> C-347 *Ibid.* at paras. 27 and 28.

<sup>60</sup> Like C-331 *Robertson supra* note 34, the Court did not specifically address the status of the non-perceptible copies that arise in the transmission of the work. However, the implication is that such copies are not compensable.

<sup>61</sup> C-343 *SODRAC supra* note 49.

purposes. One or more additional copies may also be made to allow for screening of the program by various teams within CBC before broadcast.”<sup>62</sup>

69. Broadcast incidental copies are not generally consumed for their content but are nonetheless accessible and perceptible copies to technicians during the preparation stages of production. Are these to be treated as incidental copies to the true nature of the activity, being a performance of the work, as *Entertainment Software Association* would suggest? The majority opinion ruled that the plain language of the Act meant that broadcast-incidental copies implicated the reproduction right for which, on these facts, no exception applied. The court was not prepared to apply the principle of technological neutrality to override the plain language of the Act. As such, broadcast incidentals implicated the reproduction right.

### c) Fair Dealing

70. Finally, In *Bell*,<sup>63</sup> the principle of technological neutrality was used in the Supreme Court’s fair dealing factor analysis. Fair dealing allows the use of a work, during the term of the monopoly, for certain identified purposes under the *Act*.<sup>64</sup> If the use fits under one of the purposes, then fairness of the dealing is assessed under a factor analysis, including the amount of the work taken for the use.<sup>65</sup> Prior to this case, the amount of the work taken was assessed on an individual per-dealing basis. The rights holder SOCAN in this case argued that allowing the public to sample 30-second sound clips of musical works over the internet resulted in an excessive amount of works being sampled *in the aggregate*. Put another way, the internet allows individuals to sample music on a massive scale as compared to music sampling in other ways (e.g. going to a music store), and the court was urged to find this difference as militating against fair dealing. The court held:

Further, 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

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<sup>62</sup> C-343 *Ibid.* at para. 11.

<sup>63</sup> C-348 *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada* 2012 SCC 36 [hereinafter “*Bell*”].

<sup>64</sup> C-329 *Copyright Act supra* note **Error! Bookmark not defined.**, ss. 29 – 29.2.

<sup>65</sup> C-344 *CCH supra* note 51.

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 SCC 43 (CanLII), [2006] 2 S.C.R. 363, at para. 49.<sup>66</sup>

71. In the result, widespread sampling of works facilitated by the internet was not relevant to the fairness of the dealing; rather, the amount taken per individual dealing remained the only relevant consideration under this factor.

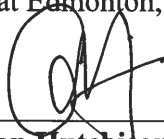
**d) Conclusion**

72. In sum, the Supreme Court developed the principle of technological neutrality to rationalize rights under the *Copyright Act* for the digital age. In its application, the Court has adopted a functional end-user approach to resolve problems of duplication of ownership and overcompensation to right holders. As such, digital innovation has not been shackled by what might otherwise be prohibitive costs associated with copyright liability. The principle has resulted in technical, non-perceptible copies such as cache copies, RAM copies, database copies – sometimes referred to as “non-consumptive” copies – to be non-compensable to copyright holders. However, technological neutrality maintains that copying a work that is accessible and perceptible to end user for its content – so called “consumptive copies” – implicates the reproduction right. For fair dealing, technological neutrality means factoring out one problematic feature of the internet – widespread dissemination of works - as militating against the fairness of the dealing.

**C. Conclusion**

73. I make this witness statement and expert report in support of the Claimants’ claim in this proceeding and for no other purposes.
74. I swear this expert report in English.

Signed at Edmonton, Alberta on January 18, 2024



\_\_\_\_\_  
Cameron Hutchison

<sup>66</sup> C-348 *Bell supra* note 63 at para. 43.