

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

B E T W E E N:

CANADIAN BROADCASTING CORPORATION/SOCIÉTÉ RADIO-CANADA

Appellant

– and –

**SODRAC 2003 Inc. and SOCIETY FOR REPRODUCTION RIGHTS OF AUTHORS,
COMPOSERS AND PUBLISHERS IN CANADA (SODRAC) INC.**

Respondents

– and –

**CENTRE FOR INTELLECTUAL PROPERTY POLICY AND ARIEL KATZ,
SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY AND PUBLIC
INTEREST CLINIC, CANADIAN MUSICAL REPRODUCTION RIGHTS AGENCY
LTD., CANADIAN MUSIC PUBLISHERS ASSOCIATION, AND INTERNATIONAL
CONFEDERATION OF MUSIC PUBLISHERS, and MUSIC CANADA,
INTERNATIONAL FEDERATION OF THE PHONOGRAPHIC INDUSTRY,
CANADIAN COUNCIL OF MUSIC INDUSTRY ASSOCIATIONS, CANADIAN
INDEPENDENT MUSIC ASSOCIATION AND L'ASSOCIATION QUÉBÉCOISE DE
L'INDUSTRIE DU DISQUE, DU SPECTACLE ET DE LA VIDÉO**

Interveners

**FACTUM OF THE INTERVENER, SAMUELSON-GLUSHKO CANADIAN INTERNET
POLICY AND PUBLIC INTEREST CLINIC (CIPPIC)**

Jeremy de Beer
David Fewer

**Samuelson-Glushko Canadian Internet
Policy & Public Interest Clinic (CIPPIC)**

University of Ottawa, Faculty of Law

57 Louis Pasteur St.

Ottawa, Ontario K1N 6N5

Tel: 613 562-5800 (ext.2558)

Fax: 613 562-5417

cippic@uottawa.ca

Counsel and Agent for the Intervener

TO: THE REGISTRAR

**COPY TO: Me COLETTE MATTEAU
Matteau Poirier avocats inc.
353 Saint-Nicholas Street
Suite 210
Montréal, Québec H2Y 2P1**

Tel: 514 281-0033
Fax: 514 284-9328
cmatteau@matteaupoirier.com

Counsel for the Respondents

**Me FRÉDÉRIC LANGLOIS
Deveau, Gagné, Lefebvre, Tremblay
& associés, S.E.N.C.R.I.
867 Saint-René Blvd. West
Suite 8
Gatineau, Québec J8T 7X6**

Tel: 819 243-2616 Ext. 224
Fax: 819 243-2641
flanglois@deveau.qc.ca

Agent for the Respondents

**AND TO: Me MAREK NITOSLAWSKI
Me JOANIE LAPALME
Me MICHAEL SHORTT
Fasken Martineau DuMoulin, LLP
800 Square Victoria
Suite 3700
Montréal, Québec H4Z 1E9**

Tel: 514 397-4335
Fax: 514 397-7600
mnitoslawski@fasken.com
jlapalme@fasken.com

Counsel for the Appellant

**Me JAY KERR-WILSON
Me AIDAN O'NEILL
Fasken Martineau DuMoulin, LLP
55 Metcalfe Street
Suite 1300
Ottawa, Ontario K1P 6L5**

Tel: 613 696-6884
Fax: 613 230-6423
jkerrwilson@fasken.com

Agents for the Appellant

**AND TO: Me HOWARD P. KNOPF
Macera & Jarzyna LLP
427 Laurier Avenue West
Suite 1200
Ottawa, Ontario K1R 7Y2**

Tel: 613 238-8173
Fax: 613 235-2508
howard.knopf@macerajarzyna.com

**Counsel for the Interveners
Center for Intellectual Property Policy
and Ariel Katz**

**AND TO: Me CASEY M. CHISICK
Me PETER J. HENEIN
Me ERIC MAYZEL
Cassels Brock & Blackwell LLP
Scotia Plaza
40 King Street West
Suite 2100
Toronto, Ontario M5H 3C2**

**Tel: 416 869-5403
Fax: 416 644-9326
cchisick@casselsbrock.com**

**Counsel for the Interveners
Canadian Musical Reproduction Rights
Agency Ltdl., Canadian Music Publishers
Association, and International
Confederation of Music Publishers**

**AND TO: Me BARRY B. SOOKMAN
Me DANIEL G.C. GLOVER
Mc Carthy Tétrault LLP
TD Bank Tower
66 Wellington Street West
Suite 5300
Toronto, Ontario M5K 1E6**

**Tel: 416 601-7949
Fax: 416 868-0673
bsookman@mccarthy.ca**

**Counsel for the Interveners
Music Canada, International Federation
of the Phonographic Industry, Canadian
Council of Music Industry Associations,
Canadian Independent Music Association
and l'Association Québécoise de
l'Industrie du disque, du spectacle et de la
vidéo.**

**Me JEFFREY W. BEEDELL
Gowling Lafleur Henderson LLP
160 Elgin Street
Suite 2600, Stn. D
Ottawa, Ontario K1P 1C3**

**Tel: 613 786-0171
Fax: 613 788-3587
jeff.beedell@gowlings.com**

**Agent for the Interveners
Canadian Musical Reproduction
Rights Agency Ltdl., Canadian Music
Publishers Association, and
International Confederation of Music
Publishers**

**Me COLIN S. BAXTER
Conway Baxter Wilson LLP
1111, Prince of Wales Dr.
Suite 401
Ottawa, Ontario K2C 3T2**

**Tel: 613 780-2012
Fax: 613 688-0271
cbaxter@conway.pro**

**Agent for the Interveners
Music Canada, International
Federation of the Phonographic
Industry, Canadian Council of Music
Industry Associations, Canadian
Independent Music Association and
l'Association Québécoise de
l'Industrie du disque, du spectacle et
de la vidéo.**

TABLE OF CONTENTS

PART I. OVERVIEW.....	1
PART II. POSITION ON APPELLANT’S QUESTIONS	2
PART III. ARGUMENT	2
A. The decision in <i>Bishop v Stevens</i> does not determine the outcome of this appeal.	2
1. Principles of statutory interpretation have changed since <i>Bishop</i>	3
2. The purposes of copyright law have been clarified since <i>Bishop</i>	3
3. <i>Bishop</i> does not support an unlimited interpretation of the right to reproduce.	5
B. The Act’s purposive balance inherently limits the scope of the reproduction right.....	6
1. A purposive interpretation of the reproduction right is necessary, not inappropriate.	6
2. The principle guiding copyright law is balance, not bare value.....	8
3. Balance requires a functional not formalistic application of technological neutrality.....	8
C. The practical realities of digital technology limit the scope of the reproduction right.	9
PART IV. SUBMISSIONS ON COSTS	10
PART V. ORDER SOUGHT	10
PART VI. TABLE OF AUTHORITIES	11
PART VII. STATUTORY PROVISIONS	13

PART I. OVERVIEW

1. The Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic (CIPPIC) invites this Court to reaffirm two core values at the heart of Canadian copyright jurisprudence—purposive balance and pragmatic efficiency. These values shape the principle of technological neutrality, which helps guide the interpretation and application of the *Copyright Act*.¹
2. This appeal turns on the meaning of the word “reproduce” in section 3 of the *Act*. Should “reproduce” be interpreted literally? Or should “reproduce” be interpreted purposively and pragmatically? CIPPIC supports a purposive and pragmatic interpretation.
3. A purposive and pragmatic interpretation of the reproduction right suggests it does not encompass literally all copying. Affirming that principle is not judicial activism; it is a common sense and technologically neutral application of Parliamentary intent. Parliament did not strike a balance by enacting literally limitless rights only to claw them back with various technical exceptions elsewhere in the *Act*. Parliament’s balance is also embedded in the inherently limited scope of the rights granted.
4. Twenty-five years ago, in the case of *Bishop v Stevens*, this Court was “not convinced that there is any reason to depart from the literal readings of s. 3(1)(d) and the introductory paragraph to s. 3(1).”² Today, the purposive and pragmatic reasons to depart from a literal interpretation are much clearer.
5. Since the turn of the 21st century, this Court has consistently emphasized balance and efficiency in its interpretations of the *Act*.³ Interpreted purposively, section 3 cannot give copyright holders the right to control literally every digital copy of a work, however ephemeral or *de minimus*. Common sense and case law reinforce the inherent limitations in copyright’s scope. In a digital environment, where countless ephemeral copies are inevitably required even to access a work, a literal interpretation of the reproduction right would be unsustainable.
6. Parliament has occasionally caught up with new technology and enacted specific provisions that provide greater certainty about the limits of reproduction rights. Technological neutrality, however, helps courts future-proof the law by interpreting copyright’s scope based on fundamental principles, not the technical

¹ *Copyright Act*, RSC 1985, c C-42.

² *Bishop v Stevens*, [1990] 2 SCR 467 at 484 [*Bishop*], Respondents’ Book of Authorities (“RBA”) at Tab 4.

³ *Théberge v Galerie d’Art du Petit Champlain inc*, 2002 SCC 34, [2002] 2 SCR 336 at paras 30-31 [*Théberge*], Appellant’s Book of Authorities (“ABA”) at Tab 24; see also cases cited *infra* at paras 16, 36.

or political circumstances of the day. To protect the public interest, CIPPIC endorses Professor Craig’s persuasive analysis of technological neutrality: “its justification is found in, and flows from, the concept of balance at the heart of the copyright system,”⁴ she writes. Technological neutrality “must be conceived in a functional sense, shaping copyright norms to produce a substantively equivalent effect across technologies, with a view to preserving the copyright balance in the digital realm.”⁵

PART II. POSITION ON APPELLANT’S QUESTIONS

7. The intervener submits:
 - A. The decision in *Bishop v Stevens* does not determine the outcome of this appeal.
 - B. The *Act*’s purposive balance inherently limits the scope of the reproduction right.
 - C. The practical realities of digital technology limit the scope of the reproduction right.
8. CIPPIC invites this Court to consider its submissions in deciding the Appellant’s first question on appeal, which is whether a technologically neutral interpretation of the *Copyright Act* requires licenses for “broadcast-incidental copies.”⁶ While CIPPIC submits that not all copies of a work are necessarily reproductions under the *Act*, it takes no position on the parties’ specific rights or liabilities in this appeal.

PART III. ARGUMENT

A. The decision in *Bishop v Stevens* does not determine the outcome of this appeal.

9. The law evolves. Even the interpretation and application of purely statutory rights cannot remain static. “This Court, above all others in this country, cannot be simply mechanistic about previous decisions, whatever be the respect it would pay to such decisions.”⁷ Chief Justice Laskin’s celebrated remarks in *Harrison v Carswell*, a case about the scope of proprietary rights established by *The Petty Trespass Act*, are particularly apt in the circumstances of this appeal, which concerns the scope of proprietary rights under the *Copyright Act*. CIPPIC invites this Court to reconsider its ruling in *Bishop*.

⁴ Carys Craig, “Technological Neutrality: (Pre)Serving the Purposes of Copyright Law,” in Michael Geist, ed, *The Copyright Pentology: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (Ottawa: University of Ottawa Press, 2013) 271 at 272 [*Craig*], ABA at Tab 26.

⁵ *Craig*, *ibid* at 272.

⁶ Appellant’s factum at para 54.

⁷ *Harrison v Carswell*, [1976] 2 SCR 200 at 205, Intervener’s Book of Authorities (“IBA”) at Tab 6.

10. The outcome of this appeal is not determined by the decision in *Bishop* for three reasons. First, principles of statutory interpretation have changed significantly in the past twenty-five years. Second, this Court has since clarified the polycentric purposes of copyright law. Third, *Bishop* does not support a literally unlimited interpretation of the reproduction right, based on its facts or its outcome.

1. Principles of statutory interpretation have changed since *Bishop*.

11. *Bishop* was decided before this Court had pronounced on the proper approach to statutory interpretation. In *Rizzo & Rizzo Shoes Ltd (Re)*, Justice Iacobucci recognized that “statutory interpretation cannot be founded on the wording of the legislation alone.”⁸ Without the benefit in *Bishop* of this Court’s endorsement of the “modern approach”⁹ to statutory interpretation, a literalist view of the *Copyright Act* must be reevaluated. Simply looking beyond the words of a statute does not mean a judge is making policy or substituting its preferences for Parliament’s. Interpretation is inevitable.

12. An approach different than the one in *Bishop* has been applied across a wide range of interpretative settings.¹⁰ Taking into account not just literal meaning but also the statutory context, the scheme of the Act, the object of the legislation, and Parliament’s intent is now the proper way to interpret the *Copyright Act*. Chief Justice McLachlin settled this point with a unanimous judgment in *CCH*.¹¹ That copyright is purely statutory does not obviate, but rather reinforces, the need for a modern approach to interpretation.

2. The purposes of copyright law have been clarified since *Bishop*.

13. *Bishop* was decided in a very different era of copyright’s evolution. Then, some believed that copyright law had “... a single object, namely, the benefit of authors of all kinds,” a sentiment attributed to a Chancery court decision of 1934.¹² That peculiar view of copyright’s single purpose is inconsistent with over three hundred years of history. The opening words of *The Statute of Anne, 1710* called it “An act for the encouragement of learning ...”¹³ Copyright was intended not to protect authors *per se*, but to encourage them to write books and disseminate knowledge in the public’s interest.¹⁴

⁸ *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at para 21, ABA at Tab 15.

⁹ Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Toronto: LexisNexis Canada, 2014) at 20-21, IBA at Tab 12.

¹⁰ *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42, [2002] 2 SCR 559 at para 26, IBA at Tab 2.

¹¹ *CCH Canadian Ltd v Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 SCR 339 at para 9 [*CCH*], IBA at Tab 3.

¹² *Performing Right Society, Ltd. v Hammond's Bradford Brewery Co.*, [1934] 1 Ch. 121 at 127, IBA at Tab 7.

¹³ *Statute of Anne*, 8 Anne, c. 19 (1710).

¹⁴ Lyman Ray Patterson, *Copyright in Historical Perspective* (Nashville: Vanderbilt University Press, 1968) at 227, IBA at Tab 11.

14. At the turn of the 21st century, this Court decisively abandoned the one-dimensional view of copyright's purpose that had coloured some earlier cases. Justice Binnie's balanced approach in *Théberge* was instead faithful to the longstanding notion that copyright encourages people to create works that benefit the public, citing *dicta* from the 1769 case of *Millar v Taylor*.¹⁵
15. Passing reference in *Bishop* to the balance between "the technical needs of broadcasters and the security of copyright holders"¹⁶ does not adequately capture the complex and polycentric nature of copyright's balance as now understood. Justice Binnie explained three interwoven aspects of balance:
- a) The public interest in the encouragement and dissemination of creative works, and the ability of the public domain to incorporate and embellish creative innovation in the long-term interests of society.
 - b) The just reward for the creator, or as he puts it more accurately, preventing the misappropriation of benefits which might undermine the incentive to create.
 - c) The rights of other individual members of the public, such as the property rights of a purchaser owning tangible objects, which may outweigh copyright owners' rights.
16. The need for balance has been cited consistently in copyright cases since decided by this Court.¹⁷ No decision of this Court has since suggested that copyright has any singular purpose other than balance.
17. The notion that balance is the key purposive principle guiding statutory interpretation in copyright cases is now beyond question. Accepting balance as an interpretive principle does not, of course, automatically resolve the issue in this appeal. It does suggest that *Bishop*, which was decided on the basis of very different principles, failed to settle the meaning of the word "reproduce" in the *Act*.

¹⁵ *Théberge*, *supra* note 3 at para 30, citing *Millar v Taylor* (1769), 4 Burr 2303, 98 ER 201, *per* Willes J, at 218.

¹⁶ *Bishop*, *supra* note 2 at 482.

¹⁷ *CCH*, *supra* note 11 at para 10; *Society of Composers, Authors and Music Publishers of Canada v Canadian Assn of Internet Providers*, 2004 SCC 45, [2004] 2 SCR 427 at paras 40-41 [*SOCAN v CAIP*], ABA at Tab 22; *Robertson v Thomson Corp*, 2006 SCC 43, [2006] 2 SCR 363 at paras 69-70 [*Robertson*], ABA at Tab 18; *Euro-Excellence Inc v Kraft Canada Inc*, 2007 SCC 37, [2007] 3 SCR 20 at paras 76-84, IBA at Tab 5; *Society of Composers, Authors and Music Publishers of Canada v Bell Canada*, 2012 SCC 36, [2012] 2 SCR 326 at paras 8-11, [*SOCAN v Bell*], ABA at Tab 21; *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37, [2012] 2 SCR 345 at para 19, IBA at Tab 1; *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34, [2012] 2 SCR 231 at paras 7-8, 47, 123-125 [*ESA*], ABA at Tab 12; *Rogers Communications Inc v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 SCR 283 at para 40 [*Rogers v SOCAN*], ABA at Tab 19; *Cinar Corporation v Robinson*, 2013 SCC 73, [2013] 3 SCR 1168 at paras 23, 28 [*Cinar*], IBA at Tab 4.

3. *Bishop* does not support an unlimited interpretation of the right to reproduce.

18. “Performing a work is fundamentally different than reproducing it.”¹⁸ That is why the rights enumerated in section 3(1) are distinct. And that is the basic proposition *Bishop* stands for, this Court explained in the 2012 case of *ESA*.¹⁹ If this Court declines to expressly overrule the literal interpretation of the *Act* laid out in *Bishop*, the meaning of that case can be confined to the idea that copyright holders have “distinct and separate rights.”²⁰ The Respondents call this the “essential logic” of *Bishop*.²¹
19. CIPPIC shares this limited interpretation. Insofar as the Court read the *Act* literally, CIPPIC understands this in reference merely to the structure of subsection 3(1) and the relationship between the enumerated rights. Like the majority in *ESA*, CIPPIC believes that since the rights are distinct, *i.e.* different, an activity implicating one right does not implicate another.²² The proposition that the rights in subsection 3(1) are separate and distinct settles nothing in respect of the precise scope of any particular right. “[W]e can say a communication is not a reproduction, and a reproduction is not a communication, but beyond that, the distinction between the two rights offers little help in defining either of them.”²³
20. *Bishop* does not say literally every copy is a reproduction. Even if *Bishop* is not overturned because it predated accepted principles of statutory interpretation or misapprehended the purpose of copyright, the case did not settle the meaning of “reproduce” in the *Act*.
21. To the extent *Bishop* said anything about the reproduction right, this Court held that permanence is a condition necessary to call a copy a reproduction under the *Act*. The “fleeting, transient, impermanent” nature of performances was a key reason to distinguish performance from reproduction. “A recording, on the other hand, is permanent,” wrote Justice McLachlin.²⁴ The facts of *Bishop*—the physical tapes had not been destroyed even by the time of trial—limit its applicability to cases involving permanent copies.²⁵ This Court’s decision did not extend protection to copies that are not “permanent,” but only “fleeting, transient, impermanent.” It is a misnomer to call *Bishop* a case of “ephemeral” copying.

¹⁸ *ESA*, *ibid* note 17 at para 35.

¹⁹ *ESA*, *ibid* note 17 at para 41.

²⁰ *ESA*, *ibid* note 17 at para 119 (*per* Rothstein J, dissenting).

²¹ Respondent’s factum, para 74.

²² *ESA*, *supra* note 17 at para 81.

²³ Jeremy de Beer, “Copyright Royalty Stacking,” in M. Geist, ed., *The Copyright Pentology: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (Ottawa: University of Ottawa Press, 2013) 335 at 349, ABA at Tab 27.

²⁴ *Bishop*, *supra* note 2 at 479.

²⁵ *Bishop*, *ibid* note 2 at 487.

22. Justices Abella and Moldaver reiterated in *ESA* that performance and reproduction are distinct because “a performance is impermanent in nature, and does not leave the viewer or listener with a durable copy of the work.”²⁶ A reproduction therefore is permanent, and does leave a durable copy. The idea of durability was key to this Court’s decision. These cases suggest that durability is one of the conditions necessary to characterize a copy as a reproduction under the *Act*.
23. There is a good reason that the right to reproduce is associated with control over only durable copies of a work, explained in *Bishop*. With a permanent recording available, the author has “irrevocably given up much of his control over its presentation to the public.”²⁷ Fleeting, transient, impermanent copies made as the inevitable result of digital technology or for purely technical reasons have nothing to do with an author’s control over public perception of the work. Even with a performance, “[w]hen it is over, only the memory remains.”²⁸ After fleeting digital copies have disappeared, there remains nothing at all.

B. The *Act*’s purposive balance inherently limits the scope of the reproduction right.

1. A purposive interpretation of the reproduction right is necessary, not inappropriate.

24. The legal meaning of the word “reproduce” is not self-evident when one adopts a modern approach to statutory interpretation. Grammatical, contextual, and purposive indicia of the scope of the reproduction right may support several plausible conclusions, especially given Parliament’s objective of technological neutrality. Just as it was held in *ESA* that not all transmissions are communications, whatever the dictionary might say,²⁹ so too is it true in this appeal that not all copies are necessarily reproductions.
25. That Parliament has turned its mind to some kinds of ephemeral copying does not settle the scope of the reproduction right any more than the existence of fair dealing provisions settles the standard of originality. This appeal is analogous to *CCH* in that way. Writing for a unanimous Court, the Chief Justice explained that interpreting originality to impose a low standard of industriousness would tip the scale too far toward authors’ rights. A more balanced standard of skill and judgment safeguards against overcompensation and protects the public domain.³⁰ This Court did not say a balanced interpretation of originality was unnecessary because Parliament had enacted fair dealing anyways. Nor did the Court

²⁶ *ESA*, *supra* note 17 at para 35.

²⁷ *Bishop*, *supra* note 2 at 479.

²⁸ *Bishop*, *ibid* note 2 at 479.

²⁹ *ESA*, *supra* note 17 at para 31.

³⁰ *CCH*, *supra* note 11 at para 23.

dismiss the need for a purposively balanced interpretation of the threshold for protection and general fair dealing rights, despite the existence of more specific technical provisions that might have applied to libraries, archives and museums including the Great Library.

26. Parliament has also introduced technical limits on the scope of the communication right, via paragraph 2.4(1)(b) for example. Yet, that did not stop a majority of this Court in *ESA* from deciding that not all transmissions in fact are communications under the *Act*, regardless of the technical exception.³¹ Another example would be to mistakenly believe that a practical and efficient interpretation of Internet service providers' liability is unnecessary because Parliament has already struck a balance by limiting the term of copyright protection.³² Or to strangely suggest that almost anything is a "substantial part" of a work within the meaning of section 3 because concerns about overprotection can be dealt with through limitations and exceptions elsewhere in the *Act*.³³
27. Balance is embedded in every section of the *Act*. The interpretative significance of specific technical exceptions elsewhere is equivocal. Perhaps legislators felt greater certainty was only needed for some kinds of copying and not others. Or perhaps they simply sought to appease the most vocal lobby groups, without thinking of unforeseen others or the unpredictable future. This is an intractable debate, which CIPPIC encourages this Court to avoid.
28. Applying the principles of balance, efficiency, and technological neutrality to interpret the scope of the reproduction right does not require this Court to override the language of the *Act* or ignore the intention of Parliament. CIPPIC does not suggest that this Court should imply an exception into section 3 or elsewhere in the *Act*. Technological neutrality is among the statutorily expressed signals of Parliament's intent about the proper interpretation and application of copyright.³⁴ It is "how Parliament chose to come to grips with potential technological developments."³⁵ Parliament obviously intended the *Act* to be efficient and practically workable. Achieving balance is a goal shared by judges and legislators alike.

³¹ *ESA*, *supra* note 17 at para 28.

³² *SOCAN v CAIP*, *supra* note 17 at para 115.

³³ *Cinar*, *supra* note 17 at para 28.

³⁴ *Copyright Modernization Act*, SC 2012, c 20, at summary (g).

³⁵ *Robertson*, *supra* note 17 at para 75.

2. The principle guiding copyright law is balance, not bare value.

29. The Board’s decision rests on the idea that if there are efficiencies or other benefits gained by the use of new technologies then copyright holders always deserve a share. Because “technologies adopted by the producers and broadcasters add value to their business,” wrote the Board, and “... part of this value arises from the use of additional copies, some of the benefits flowing from those copies should be reflected in the remuneration paid for the additional copies.”³⁶ Justice Pelletier concisely characterized the Board’s view: “more copies means more value and thus, more royalties.”³⁷
30. Bare value is not the principle that should guide interpretation and application of the *Copyright Act*. This fallacy simply presumes that every copy is a compensable reproduction. It conflates the fact of copying with the legal scope of copyright. It substitutes legal analysis with the rough idea that “what is worth copying is *prima facie* worth protecting.”³⁸ Professor Vaver has sharply criticized this approach as being “too crude to be overtly accepted. Taken literally, it begs all questions of copyrightability, infringement, and substantiality.”³⁹ Professor Drassinower explains: “Copying per se is a merely physical act, devoid of juridical import. The wrong embedded in the act is not to be found in the bare act as such.”⁴⁰
31. The purpose of the *Act* is not to ensure that copyright holders always get a share of the value others realize through technological innovation. Whether copyright holders deserve a share of the benefits of others’ technological innovation is the question, not the answer. The Board got the principle backwards.

3. Balance requires a functional not formalistic application of technological neutrality.

32. The Respondents argue for a formalistic view of technological neutrality. Since the Appellant paid royalties when it made a copy on tape, submit the Respondents, it should pay for each digital copy too.⁴¹ Nobody disputes that the same synchronization royalties are payable for analogue and digital copies. The question for this Court is whether the adoption of digital technologies, which necessarily creates more digital copies in the process, requires more royalties than were payable in an analogue world.

³⁶ *SODRAC v CBC/Astral* (2012), Copyright Board Files 70.2-2008-01/02, at para 81, Appellant’s Record (“AR”) vol 1 at 1.

³⁷ *Canadian Broadcasting Corporation v SODRAC 2003 Inc*, 2014 FCA 84 at para 28, AR vol 1 at 132.

³⁸ *University of London Press Ltd v University Tutorial Press Ltd*, [1916] 2 Ch. 601 at 610, IBA at Tab 8.

³⁹ David Vaver, *Intellectual Property Law: Copyright, Patents and Trademarks*, 2nd ed (Toronto: Irwin Law, 2011) at 188-189, IBA at Tab 13.

⁴⁰ Abraham Drassinower, “Copyright Is Not About Copying,” (2012) 125 *Harv L Rev* 108 at 112, IBA at Tab 10.

⁴¹ Respondents’ factum, at para 64.

33. CIPPIC supports Professor Craig’s convincing conclusions about technological neutrality as a functional and substantive principle. Even if it was true that reproduction royalties are payable for every analogue copy, “different treatment can be justified as *substantively* technology neutral where overlooking technical differences would produce unequal results.”⁴²
34. Justice Abella, with whom the Chief Justice concurred, endorsed this functional approach to technological neutrality in *Robertson*: an electronic database of newspaper articles is “simply the electronic analogy to stacking print editions of a newspaper on a shelf.”⁴³ Writing for a unanimous bench in *SOCAN v Bell*, Justice Abella also emphasized functionality when she wrote that the principle aims to ensure the *Act* “operates consistently” across media.⁴⁴ Justice Rothstein hit upon the same idea in deciding that liability should not depend “merely on the business model” where “the end result is the same.”⁴⁵ This is also similar to what Justices Abella and Moldaver wrote in *ESA*. There is no practical difference between delivering a record by mail and downloading it online: “The Internet is simply a technological taxi that delivers a durable copy of the same work to the end user.”⁴⁶
35. In this appeal, CIPPIC is not insisting on a free ride for new technologies. CIPPIC is asking this Court to carefully consider who gets paid, and more importantly, why. Treating literally every digital copy as a compensable reproduction under the *Act* would produce unequal results and unworkable outcomes.

C. The practical realities of digital technology limit the scope of the reproduction right.

36. Pragmatism has informed this Court’s unanimous interpretation of the word “original,” copyright’s threshold for protection.⁴⁷ Cached copies of digital works were held not to trigger copyright liability, in order to maximize economy and cost-effectiveness.⁴⁸ Justices of this Court have explained there is nothing colourable about creating practical and easily accessible electronic databases.⁴⁹ Digital delivery of durable copies of works via the Internet is not communication, in part due to efficiency concerns.⁵⁰

⁴² *Craig*, *supra* note 4 at 274. See also Cameron J Hutchinson, “The 2012 Supreme Court Copyright Decisions & Technological Neutrality,” 46 UBC L Rev 589, ABA at Tab 38.

⁴³ *Robertson*, *supra* note 17 at para 90.

⁴⁴ *SOCAN v Bell*, *supra* note 17 at para 43.

⁴⁵ *Rogers v SOCAN*, *supra* note 17 at para 40.

⁴⁶ *ESA*, *supra* note 17 at para 5.

⁴⁷ *CCH*, *supra* note 11 at para 24.

⁴⁸ *SOCAN v CAIP*, *supra* note 17 at para 15.

⁴⁹ *Robertson*, *supra* note 17 at para 89.

⁵⁰ *ESA*, *supra* note 17 at paras 4-5, 9.

37. In a digital environment, treating literally every copy as a reproduction is simply not realistic. Take basic web browsing for example, which involves countless ephemeral reproductions not only by intermediaries but also by end users. Reading an e-book is impossible without ephemeral copying. Interpreting the reproduction right literally would, in practical terms, give copyright owners unprecedented control over other people's ability to even access digital content—in technological terms, accessing digital content cannot be done without prolific ephemeral copying.
38. There could indeed be general fair dealing rights or even specific technical provisions that perhaps exonerate all of us for the massive amount of infringement we would commit online every day. Yet it would be inadequate to hope or assume that particular exceptions would apply to counterbalance a court's overbroad reading of the reproduction right. As Professor Drassinower explains, "It would truly be a melancholy state of affairs for copyright jurisprudence if something as utterly fundamental to the very operation of the Internet required the force of a public interest exception to sustain its lawfulness."⁵²
39. It would be just as unworkable to expect everyone to wait years for a legislative reaction when the next unpredictable technology arises, as it inevitably will. The principle of technological neutrality suggests that Parliament already intended to future-proof copyright law by allowing courts to apply common sense when interpreting the *Act*. The existence or potential enactment of technical exceptions does not eliminate the need to interpret the inherently limited scope of section 3 in a purposively balanced and pragmatically efficient way.

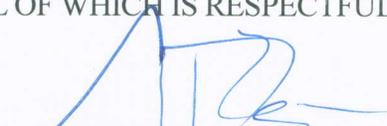
PART IV. SUBMISSIONS ON COSTS

40. CIPPIC does not seek costs, and submits that it should not be liable for any costs.

PART V. ORDER SOUGHT

41. CIPPIC seeks permission to present oral submissions in support of its position.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 2nd day of March 2015.



Jeremy de Beer

Counsel for the Intervener, CIPPIC



David Fewer

⁵² Abraham Drassinower, *What's Wrong with Copying?* (Cambridge, MA: Harvard University Press, 2015) at 104, IBA at Tab 9.

PART VI. TABLE OF AUTHORITIES

Authority		Reference in Argument
Cases		Para
1	<i>Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)</i> , 2012 SCC 37, [2012] 2 SCR 345.	16
2	<i>Bell ExpressVu Limited Partnership v Rex</i> , 2002 SCC 42, [2002] 2 SCR 559.	12
3	<i>Bishop v Stevens</i> , [1990] 2 SCR 467.	4, 15, 21, 23
4	<i>Canadian Broadcasting Corporation v SODRAC 2003 Inc</i> , 2014 FCA 84.	29
5	<i>CCH Canadian Ltd v Law Society of Upper Canada</i> , 2004 SCC 13, [2004] 1 SCR 339.	12, 16, 25, 36
6	<i>Cinar Corporation v Robinson</i> , 2013 SCC 73, [2013] 3 SCR 1168.	16, 26
7	<i>Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada</i> , 2012 SCC 34, [2012] 2 SCR 231.	16, 18, 19, 22, 24, 26, 34, 36
8	<i>Euro-Excellence Inc v Kraft Canada Inc</i> , 2007 SCC 37, [2007] 3 SCR 20.	16
9	<i>Harrison v. Carswell</i> , [1976] 2 SCR 200.	9
10	<i>Performing Right Society, Ltd v Hammond's Bradford Brewery Co.</i> , [1934] 1 Ch 121.	13
11	<i>Rizzo & Rizzo Shoes Ltd. (Re)</i> , [1998] 1 SCR 27.	11
12	<i>Robertson v Thomson Corp</i> , 2006 SCC 43, [2006] 2 SCR 363.	16, 28, 34, 36
13	<i>Rogers Communications Inc v Society of Composers, Authors and Music Publishers of Canada</i> , 2012 SCC 35, [2012] 2 SCR 283.	16, 34
14	<i>Society of Composers, Authors and Music Publishers of Canada v Bell Canada</i> , 2012 SCC 36, [2012] 2 SCR 326.	16, 34
15	<i>Society of Composers, Authors and Music Publishers of Canada v Canadian Assn of Internet Providers</i> , 2004 SCC 45, [2004] 2 SCR 427.	16, 26, 36
16	<i>SODRAC v CBC; SODRAC v Astral</i> (2012), Copyright Board Files 70.2-2008-01, 70.2-2008-02.	29
17	<i>Théberge v Galerie d'Art du Petit Champlain inc</i> , 2002 SCC 34, [2002] 2	5, 14,

	SCR 336.	
18	<i>University of London Press Ltd v University Tutorial Press Ltd</i> , [1916] 2 Ch. 601.	30
Secondary Sources		
19	Abraham Drassinower, “Copyright Is Not About Copying”, (2012) 125 Harv L Rev 108.	30
20	Abraham Drassinower, <i>What’s Wrong With Copying?</i> (Cambridge: Harvard University Press, 2015).	38
21	Carys Craig, “Technological Neutrality: (Pre)Serving the Purposes of Copyright Law,” in Michael Geist, ed, <i>The Copyright Pentology: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law</i> (Ottawa: University of Ottawa Press, 2013) 271.	6, 33
22	Cameron J Hutchinson, “The 2012 Supreme Court Copyright Decisions & Technological Neutrality,” 46 UBC L Rev 589.	33
23	David Vaver, <i>Intellectual Property Law: Copyright, Patents and Trademarks</i> , 2nd ed (Toronto: Irwin Law, 2011).	30
24	Jeremy de Beer, “Copyright Royalty Stacking,” in Michael Geist, ed, <i>The Copyright Pentology: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law</i> (Ottawa: University of Ottawa Press, 2013) 335.	19
25	Lyman Ray Patterson, <i>Copyright in Historical Perspective</i> (Nashville: Vanderbilt University Press, 1968).	13
26	Ruth Sullivan, <i>Sullivan on the Construction of Statutes</i> , 6th ed (Toronto: LexisNexis Canada, 2014).	11
Statutory Provisions		
27	<i>Copyright Act</i> , RSC 1985, c C-42, section 3.	1
28	<i>Copyright Modernization Act</i> , SC 2012, c 20, at summary (g).	28
29	<i>Statute of Anne</i> , 8 Anne, c. 19 (1710).	13

PART VII. STATUTORY PROVISIONS

Copyright Act, RSC 1985, c C-42

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

...

and to authorize any such acts.

3. (1) Le droit d’auteur sur l’oeuvre comporte le droit exclusif de produire ou reproduire la totalité ou une partie importante de l’oeuvre, sous une forme matérielle quelconque, d’en exécuter ou d’en représenter la totalité ou une partie importante en public et, si l’oeuvre n’est pas publiée, d’en publier la totalité ou une partie importante; ce droit comporte, en outre, le droit exclusif:

...

Est inclus dans la présente définition le droit exclusif d’autoriser ces actes.

*Copyright Modernization Act, SC 2012, c 20***Summary**

This enactment amends the Copyright Act to

(a) update the rights and protections of copyright owners to better address the challenges and opportunities of the Internet, so as to be in line with international standards;

(b) clarify Internet service providers' liability and make the enabling of online copyright infringement itself an infringement of copyright;

(c) permit businesses, educators and libraries to make greater use of copyright material in digital form;

(d) allow educators and students to make greater use of copyright material; (e) permit certain uses of copyright material by consumers;

(f) give photographers the same rights as other creators;

(g) ensure that it remains technologically neutral; and

(h) mandate its review by Parliament every five years.

Sommaire

Le texte modifie la Loi sur le droit d'auteur pour:

(a) mettre à jour les droits et les mesures de protection dont bénéficient les titulaires du droit d'auteur, en conformité avec les normes internationales, afin de mieux tenir compte des défis et des possibilités créés par Internet;

(b) clarifier la responsabilité des fournisseurs de services Internet et ériger en violation du droit d'auteur le fait de faciliter la commission de telles violations en ligne;

(c) permettre aux entreprises, aux enseignants et aux bibliothèques de faire un plus grand usage de matériel protégé par le droit d'auteur sous forme numérique;

(d) permettre aux enseignants et aux élèves de faire un plus grand usage de matériel protégé par le droit d'auteur;

(e) permettre aux consommateurs de faire certains usages de matériel protégé par le droit d'auteur;

(f) conférer aux photographes des droits égaux à ceux conférés aux autres créateurs;

(g) éliminer la spécificité technologique des dispositions de la loi;

(h) prévoir un examen quinquennal de la loi par les parlementaires.

The Statute of Anne; April 10, 1710

8 Anne, c. 19 (1710)

An act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies, during the times therein mentioned.

I. Whereas printers, booksellers, and other persons have of late frequently taken the liberty of printing, reprinting, and publishing, or causing to be printed, reprinted, and published, books and other writings, without the consent of the authors or proprietors of such books and writings, to their very great detriment, and too often to the ruin of them and their families: for preventing therefore such practices for the future, and for the encouragement of learned men to compose and write useful books; may it please your Majesty, that it may be enacted, and be it enacted by the Queen's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same;

II. That from and after the tenth day of April, one thousand seven hundred and ten, the author of any book or books already printed, who hath not transferred to any other the copy or copies of such book or books, share or shares thereof, or the bookseller or booksellers, printer or printers, or other person or persons, who hath or have purchased or acquired the copy or copies of any book or books, in order to print or reprint the same, shall have the sole right and liberty of printing such book and books for the term of one and twenty years, to commence from the said tenth day of April, and no longer; and That the author of any book or books already composed, and not printed and published, or that shall hereafter be composed, and his assignee or assigns, shall have the sole liberty of printing and reprinting such book and books for the term of fourteen years, to commence from the day of the first publishing the same, and no longer; and That if any other bookseller, printer or other person whatsoever, from and after the tenth day of April, one thousand seven hundred and ten, within the times granted and limited by this act, as aforesaid, shall print, reprint, or import, or cause to be printed, reprinted, or imported, any such book or books, without the consent of the proprietor or proprietors thereof first had and obtained in writing, signed in the presence of two or more credible witnesses; or knowing the same to be so printed or reprinted, without the consent of the proprietors, shall sell, publish, or expose to sale, or cause to be sold, published, or exposed to sale, any such book or books, without such consent first had and obtained, as aforesaid: then such offender or offenders shall forfeit such book or books, and all and every sheet or sheets, being part of such book or books, to the proprietor or proprietors of the copy thereof, who shall forthwith damask, and make waste paper of them; and further, That every such offender or offenders shall forfeit one penny for every sheet which shall be found in his, her, or their custody, either printed or printing, published, or exposed to sale, contrary to the true intent and meaning of this act; the one moiety thereof to the Queen's most excellent majesty, her heirs and successors, and the other moiety thereof to any person or persons that shall sue for the same, to be recovered in any of her Majesty's courts of record at Westminster, by action of debt, bill, plaint, or information, in which no wager of law, essoin, privilege, or protection, or more than one imparlance shall be allowed. II. And whereas many persons may through ignorance offend against this act, unless some provision be made,

whereby the property in every such book, as is intended by this act to be secured to the proprietor or proprietors thereof, may be ascertained, as likewise the consent of such proprietor or proprietors for the printing or reprinting of such book or books may from time to time be known; be it therefore further enacted by the authority aforesaid,

That nothing in this act contained shall be construed to extend to subject any bookseller, printer, or other person whatsoever, to the forfeitures or penalties therein mentioned, for or by reason of the printing or reprinting of any book or books without such consent, as aforesaid, unless the title to the copy of such book or books hereafter published shall, before such publication, be entered in the register book of the company of stationers, in such manner as hath been usual, which register book shall at all times be kept at the hall of the said company, and unless such consent of the proprietor or proprietors be in like manner entered as aforesaid, for every of which several entries, six pence shall be paid, and no more; which said register book may, at all seasonable and convenient time, be resorted to, and inspected by any bookseller, printer, or other person, for the purposes before-mentioned, without any fee or reward; and the clerk of the said company of stationers shall, when and as often as thereunto required, give a certificate under his hand of such entry or entries, and for every such certificate may take a fee not exceeding six pence.

III. Provided nevertheless, That if the clerk of the said company of stationers for the time being, shall refuse or neglect to register, or make such entry or entries, or to give such certificate, being thereunto required by the author or proprietor of such copy or copies, in the presence of two or more credible witnesses, That then such person and persons so refusing, notice being first duly given of such refusal, by an advertisement in the Gazette, shall have the like benefit, as if such entry or entries, certificate or certificates had been duly made and given; and that the clerks so refusing, shall, for any such offence, forfeit to the proprietor of such copy or copies the sum of twenty pounds, to be recovered in any of her Majesty's courts of record at Westminster, by action of debt, bill, plaint, or information, in which no wager of law, essoin, privilege or protection, or more than one imparlance shall be allowed.

IV. Provided nevertheless, and it is hereby further enacted by the authority aforesaid, That if any bookseller or booksellers, printer or printers, shall, after the said five and twentieth day of March, one thousand seven hundred and ten, set a price upon, or sell, or expose to sale, any book or books at such a price or rate as shall be conceived by any person or persons to be too high and unreasonable; it shall and may be lawful for any person or persons, to make complaint thereof to the lord archbishop of Canterbury for the time being, the lord chancellor, or lord keeper of the great seal of Great Britain for the time being, the lord bishop of London for the time being, the lord chief justice of the court of Queen's Bench, the lord chief justice of the court of Common Pleas, the lord chief baron of the court of Exchequer for the time being, the vice chancellors of the two universities for the time being, in that part of Great Britain called England; the lord president of the sessions for the time being, the lord chief justice general for the time being, the lord chief baron of the Exchequer for the time being, the rector of the college of Edinburgh for the time being, in that part of Great Britain called Scotland; who, or any one of them, shall and have hereby full power and authority, from time to time, to send for, summon, or call before him or them such bookseller or booksellers, printer or printers, and to examine and enquire of the reason of the dearness and inhauncement of the price or value of such book or books by him or them so sold or exposed to sale; and if upon such enquiry and examination it shall be found, that the price of such book or books is inhaunced, or any wise too high or unreasonable, then and in such case the said archbishop of Canterbury, lord chancellor or lord keeper, bishop of London, two chief justices, chief baron, vice chancellors of the universities, in that part of Great Britain called England, and the

said lord president of the sessions, lord justice general, lord chief baron, and the rector of the college of Edinburgh, in that part of Great Britain called Scotland, or any one or more of them, so enquiring and examining, have hereby full power and authority to reform and redress the same, and to limit and settle the price of every such printed book and books, from time to time, according to the best of their judgments, and as to them shall seem just and reasonable; and in case of alteration of the rate or price from what was set or demanded by such bookseller or booksellers, printer or printers, to award and order such bookseller and booksellers, printer and printers, to pay all the costs and charges that the person or persons so complaining shall be put unto, by reason of such complaint, and of the causing such rate or price to be so limited and settled; all which shall be done by the said archbishop of Canterbury, lord chancellor or lord keeper, bishop of London, two chief justices, chief baron, vice chancellors of the two universities, in that part of Great Britain called England, and the said lord president of the sessions, lord justice general, lord chief baron, and rector of the college of Edinburgh, in that part of Great Britain called Scotland, or any one of them, by writing under their hands and seals, and thereof publick notice shall be forthwith given by the said bookseller or booksellers, printer or printers, by an advertisement in the Gazette; and if any bookseller or booksellers, printer or printers, shall, after such settlement made of the said rate and price, sell, or expose to sale, any book or books, at a higher or greater price, than what shall have been so limited and settled, as aforesaid, then, and in every such case such bookseller and booksellers, printer and printers, shall forfeit the sum of five pounds for every such book so by him, her, or them sold or exposed to sale; one moiety thereof to the Queen's most excellent majesty, her heirs and successors, and the other moiety to any person or persons that shall sue for the same, to be recovered, with costs of suit, in any of her Majesty's courts of record at Westminster, by action of debt, bill, plaint or information, in which no wager of law, essoin, privilege, or protection, or more than one imparlance shall be allowed.

V. Provided always, and it is hereby enacted, That nine copies of each book or books, upon the best paper, that from and after the said tenth day of April, one thousand seven hundred and ten, shall be printed and published, as aforesaid, or reprinted and published with additions, shall, by the printer and printers thereof, be delivered to the warehouse keeper of the said company of stationers for the time being, at the hall of the said company, before such publication made, for the use of the royal library, the libraries of the universities of Oxford and Cambridge, the libraries of the four universities in Scotland, the library of Sion College in London, and the library commonly called the library belonging to the faculty of advocates at Edinburgh respectively; which said warehouse keeper is hereby required within ten days after demand by the keepers of the respective libraries, or any person or persons by them or any of them authorized to demand the said copy, to deliver the same, for the use of the aforesaid libraries; and if any proprietor, bookseller, or printer, or the said warehouse keeper of the said company of stationers, shall not observe the direction of this act therein, that then he and they so making default in not delivering the said printed copies, as aforesaid, shall forfeit, besides the value of the said printed copies, the sum of five pounds for every copy not so delivered, as also the value of the said printed copy not so delivered, the same to be recovered by the Queen's majesty, her heirs and successors, and by the chancellor, masters, and scholars of any of the said universities, and by the president and fellows of Sion College, and the said faculty of advocates at Edinburgh, with their full costs respectively.

VI. Provided always, and be it further enacted, That if any person or persons incur the penalties contained in this act, in that part of Great Britain called Scotland, they shall be recoverable by any action before the court of session there.

VII. Provided, That nothing in this act contained, do extend, or shall be construed to extend to prohibit

the importation, vending, or selling of any books in Greek, Latin, or any other foreign language printed beyond the seas; any thing in this act contained to the contrary notwithstanding.

VIII. And be it further enacted by the authority aforesaid, That if any action or suit shall be commenced or brought against any person or persons whatsoever, for doing or causing to be done any thing in pursuance of this act, the defendants in such action may plead the general issue, and give the special matter in evidence; and if upon such action a verdict be given for the defendant, or the plaintiff become nonsuited, or discontinue his action, then the defendant shall have and recover his full costs, for which he shall have the same remedy as a defendant in any case by law hath.

IX. Provided, That nothing in this act contained shall extend, or be construed to extend, either to prejudice or confirm any right that the said universities, or any of them, or any person or persons have, or claim to have, to the printing or reprinting any book or copy already printed, or hereafter to be printed.

X. Provided nevertheless, That all actions, suits, bills, indictments or informations for any offence that shall be committed against this act, shall be brought, sued, and commenced within three months next after such offence committed, or else the same shall be void and of none effect.

XI. Provided always, That after the expiration of the said term of fourteen years, the sole right of printing or disposing of copies shall return to the authors thereof, if they are then living, for another term of fourteen years.