FILE NO: 35918

SUPREME COURT OF CANADA

(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

BETWEEN :

CANADIAN BROADCASTING CORPORATION/SOCIÉTÉ RADIO-CANADA

APPELLANT
(Applicant)

AND :

SODRAC 2003 INC.
and
SOCIÉTÉ DU DROIT DE REPRODUCTION DES AUTEURS, COMPOSITEURS ET ÉDITEURS AU CANADA (SODRAC) INC.

(hereafter "SODRAC")

RESPONDENTS
(Respondents)

AND :

CENTRE FOR INTELLECTUAL PROPERTY POLICY AND ARIEL KATZ
and
SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY AND PUBLIC INTEREST CLINIC
and
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

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(PUBLIC VERSION)

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INTERVENERS

RESPONDENTS' FACTUM

PART I – OVERVIEW OF POSITION AND STATEMENT OF FACTS

A. OVERVIEW

1. Since the 1990 decision of this Court in *Bishop v. Stevens*,[1] broadcast-incidental copies have been recognized in Canada as compensable reproductions. Like other broadcasters, CBC has derived value from such reproductions for decades. In 1992, CBC agreed that it needed a licence from SODRAC for the right to make such copies of works, distinctly from its licence for the right to communicate such works. CBC has held these licences, and paid the required royalties, ever since.

2. In 1997, Parliament confirmed copyright protection for all broadcast-incidental copies, analog or digital, while introducing limited balanced exceptions that render certain copies non-infringing. It reaffirmed that approach in 2012.

3. When SODRAC and CBC were unable to agree on the renewal of their agreement, they sought arbitration before the Copyright Board, which led to the fixing of royalties for 2008 to 2012 and to the decisions now under appeal. The Board did not impose any new licensing obligations, or "layers" of royalties, on CBC resulting from its adoption of digital technology. The increase in CBC *total* royalty payments was a function of its increased use of the SODRAC repertoire and the increased value of broadcast-incidental copies to its business, which were clear from the evidence.

4. CBC seeks in this appeal to reverse decades of settled law, arguing that the interpretive principle of technological neutrality means that, where the communication right is engaged, the reproduction right disappears. Ignoring the existing statutory exceptions entirely, CBC submits that *all* broadcast-incidental copies should be exempted from liability as a result of its adoption of digital copying technology. In the alternative, it asks this Court to override the statutory right of copyright owners to issue limited licences by finding that the right to make broadcast-incidental copies is "implied" in synchronization licences that expressly *exclude* it. Should that argument fail, it suggests that this Court replace the Copyright Board's expert assessment by reducing the annual royalty from $1.2 million to $100.

5. This appeal amounts to an attempt by CBC to persuade this Court, through a misuse of the principle of technological neutrality, to upset the existing statutory balance in relation to

[1] *Bishop v. Stevens,* [1990] 2 S.C.R. 467 [*Bishop*] (Respondents' Book of authorities (hereafter R.B.A.) Vol. I, Tab 4).

broadcast-incidental copies and to substitute its own policy preferences for those of Parliament, enabling CBC to escape liability for copies it is making and deriving benefits from, and that it has been making and paying for, for decades.

6. CBC's position should be rejected. The *Act* clearly establishes SODRAC's entitlement both to collect royalties for broadcast-incidental copies and to license the right to make those copies separately from the right to synchronize music. The suggestion that CBC's shift from analog to digital copying should eliminate its longstanding licence obligations is the *opposite* of technologically neutral.

7. Therefore, the Board's decision to fix rates for broadcast-incidental copies was correct. Its decision to value these copies separately from synchronization copies was reasonable, as were its valuation methodology, the resulting rates, and the consequent interim royalties. The Federal Court of Appeal did not err by upholding the Board's decisions in these respects. Accordingly, CBC's appeal should be dismissed.

B. STATEMENT OF FACTS

8. While CBC has summarized a number of the facts that are relevant to this appeal, it has done so in a manner that misstates and misrepresents some of the most salient evidence. It is therefore necessary to correct the record in a number of important respects.

(a) The copying and licensing practices at issue predate CBC's adoption of digital technology

9. Broadcast-incidental copying is not new.[2] Before the Board, CBC indicated that the making of copies solely to facilitate broadcasting has been common in Canada since the 1950s.[3] Although digital television broadcast technology became viable only in the mid- to late 1990s,[4] CBC has been making broadcast-incidental copies of all its television programming, on magnetic tape, since at least the 1970s.[5] In other words, the making of broadcast-incidental copies is not a function of the adoption of digital content management technology. In CBC's case, broadcast-incidental copying predated the introduction of that technology by more than 20 years.

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[2] Reasons FCA, at para. 18, A.R. Vol. I, pp. 142-143; *Bishop*, *supra* note 1 at p. 483, 2nd para.
[3] DEF-1 at para. 18, Appellant's Record (hereafter A.R.) Vol. II, p. 165.
[4] SODRAC-82 (Murphy Report) at paras. 9, 21, 23, Respondents' Record (hereafter R.R.) Vol. VII, pp. 7, 13, 14, 15.
[5] SODRAC-156B, R.R. Vol. VII, p. 119.

10. The requirement to obtain and pay for the right to make broadcast-incidental copies also predates the adoption of digital technology. In 1992, following the decision of this Court in *Bishop*,[6] SODRAC began to issue reproduction licences to broadcasters in Quebec.[7] CBC was the first to agree to a licence (the "1992 Licence").[8] It expressly authorized CBC to make broadcast-incidental copies for radio and television, and to synchronize music both in television programs produced by CBC ("in-house programs") and in those commissioned[9] by CBC from producers ("commissioned programs").[10] CBC continued voluntarily to be bound by the 1992 Licence until March 31, 2009, when it was replaced by an interim order of the Board.[11]

11. At no time did CBC challenge its obligation to pay for broadcast-incidental copies, nor did it suggest that the right to make those copies was "implied" by the separate right to synchronize music in programs. There was likewise no suggestion that the later adoption of digital technology abrogated CBC's obligations in any way; indeed, the 1992 Licence was "technologically neutral" in that it expressly authorized copying by any means, whether then existing or later discovered, by any type of recording and on any type of audio-visual medium.[12]

(b) There is no new layer of licence or royalties for CBC following its adoption of digital technology

12. The 1992 Licence, like all licences granted by SODRAC to broadcasters, has always coexisted with licences from SOCAN, which require broadcasters to pay royalties for the *communication* of works as opposed to their reproduction.[13] That practice was simply the logical outcome of the recognition in *Bishop* that broadcasters engage in separate activities – reproduction and communication – that engage separate rights and therefore require separate payments. It long predated the adoption of digital technology and was not the result of that technological change.

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[6] *Bishop, supra* note 1; acknowledged by CBC: FCA at para.10, A.R. Vol. I, p. 139; CBC's response, at para. 2, A.R. Vol. II, p. 9; Fortier Testimony, transcripts Vol. 5, 7 June 2010 at pp. 798-800 R.R. Vol. III, pp. 14-16.
[7] Board's decision at para. 72, A.R. Vol. I, p. 28.
[8] Covering the period of 17 August 1990 - 31 August 1995: SODRAC-16, A.R. Vol. IV, pp. 4-5 (Art. 5.01)
[9] SODRAC-107B, R.R. Vol. IX, p. 1; SODRAC-107C, R.R. Vol. IX, p. 42. CBC also acquires outside programming ("acquired programs"): SODRAC 107A, R.R. Vol. VIII, p. 163; SODRAC-107D, R.R. Vol. IX, p. 93.
[10] SODRAC-16, A.R. Vol. IV, p. 2 (3rd para.), p. 3 (s. 1.02), p. 4 (s. 4) and p. 5 (s. 6.01); DEF-8, A.R. Vol. IV, p. 107; acknowledged by CBC: CBC Amended Notice of Application at para. 8, A.R. Vol. III, p. 23; CBC Supreme Court Application for leave to appeal, A.R. Vol. III, p. 74 at para. 9; A.F. at para. 30.
[11] Copyright Board Interim Order 31 March 2009, A.R. Vol. II, pp. 19-28.
[12] SODRAC-16 at. s. 1.02, A.R. Vol. IV, p. 3.
[13] CBC-8, p. 3 R.R. Vol. VI, p. 161: payments for radio and television from CBC to SOCAN, since 1987 for television.

13. The diagram provided by CBC in its Factum[14] is therefore misleading. Contrary to CBC's claim, SODRAC does not "seek to insert" an additional layer of royalties into the broadcasting process. Indeed, all three royalties depicted in the diagram have been part of that process since as early as 1992. The substantive changes proposed by SODRAC and adopted by the Board were: (a) the *removal* of the requirement that CBC pay synchronization fees related to commissioned programs and (b) the valuation of broadcast-incidental copies made by CBC separately from its synchronization copies. CBC's diagram is thus more accurately depicted as follows:

	Synchronization of Musical Work	**Creation of Broadcast-Incidental Copies**	**Television Broadcast of Musical Works**
Right Engaged	Reproduction	Reproduction	Communication
Royalty Payment (1992-2008)	Broadcaster to SODRAC[15]	Broadcaster to SODRAC	Broadcaster to SOCAN
Royalty Payment (2008-2012)	Producer to SODRAC[16]	Broadcaster to SODRAC	Broadcaster to SOCAN

14. Although CBC now claims that the change in SODRAC synchronization licensing practice resulted in difficulties,[17] CBC *agreed* to the shifting of responsibility for synchronization payments to outside producers so that its new licence would address synchronization for in-house programs only,[18] and no evidence supports CBC's claim that other broadcasters objected.[19] However, CBC also requested a *further* change: that its broadcast-incidental copies now be paid for by outside producers.[20] The Board rejected that proposal.

15. The change in SODRAC's practice was unrelated to CBC's adoption of digital technology. Whether CBC or a producer holds a synchronization licence, implying or not the right to make broadcast-incidental copies, is a media-neutral issue.

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[14] A.F. at para. 84.
[15] For in-house programs and commissioned programs. For acquired programs, the synchronization royalty was always paid by the third-party producer: Lavallée Testimony, transcripts Vol. 5, 7 June, 2010, at pp. 927-929, R.R. Vol. III, pp. 143-145; Fortier Testimony, transcripts, Vol. 5, 7 June 2010, at. pp 834-835, R.R. Vol. III, pp. 50-51; DEF-8, A.R. Vol. IV, p. 107.
[16] For in-house productions, the producer is the broadcaster.
[17] Appellant's Factum (hereafter A.F.) at paras. 33-45.
[18] DEF-1 at para. 172, A.R. Vol. II, pp. 209-210; FCA Interim at para. 22, A.R. Vol. 3, p. 55; Board's Decision, at paras. 31, 115, 226, 227, A.R. Vol. I, pp. 15, 42, 71-72.
[19] A.F. at para 45.
[20] DEF-1 at paras. 14, 179, A.R. Vol. II, pp. 162, 212.

(c) There was a significant increase in CBC's broadcast-incidental copying of SODRAC's repertoire regardless of its adoption of digital technology

16. Between 1992 and 2009, CBC's broadcast-incidental copying of works in the SODRAC repertoire increased significantly due to a combination of the expansion and increased use of SODRAC's repertoire, new uses of programs, and the introduction of new technology.

17. When the 1992 Licence was signed, CBC operated one specialty channel, CBC News World. By 2009, it had launched three new specialty channels (Bold, Documentary Channel, and RDI) and was also making its programs available on CBC websites and mobile devices.[21] Meanwhile, SODRAC's repertoire had increased by around 350%,[22] while CBC's use of that repertoire on conventional television alone had increased by 250%.[23]

18. CBC had also substantially increased the number of broadcast-incidental copies made of each program. In 1992, broadcast-incidental copies were made on tape[24] and by 2009 copies were made both on tape and digitally as follows:

[21] Board's Interim Decision 31 March 2009 at paras. 17-19, A.R. Vol. II, p. 24; Fortier Testimony, transcripts Vol. 5, 7 June, 2010, at. p. 821, R.R. Vol. III, p. 37; SODRAC-82, at para. 86, R.R. Vol. VII, p. 53.
[22] In 2009 (vs 1992) SODRAC represented 4494 authors (vs 1199), 1586 publishers (vs 555), 63 foreign societies (vs 23): SODRAC-24, R.R. Vol. V, p. 2 (vs SODRAC-25, R.R. Vol. V, p. 68); SODRAC-27 R.R. Vol. V, p. 69 (vs SODRAC-16, A.R. Vol. IV, p. 2).
[23] SODRAC-1 (Statement of case), at paras. 158, 159, A.R. Vol. II, p. 78, referring to SODRAC-112, R.R. Vol. VI, p. 80.
[24] SODRAC-156B at para. 12, R.R. Vol. VI, p. 119.
[25] SODRAC-82 at para. 64, 67, 71, R.R. Vol. VII, pp. 39-40, 41, 43; SODRAC-181, diagrams in pp. 35-36, R.R. Vol. IX, pp. 135-136; Murphy Testimony, Confidential transcripts Vol. I, June 1, 2010, pp. 33-34, R.R. Vol. II, pp. 63-64; SODRAC-94 (CBC Responses to Interrogatory 71, 84, 97), at pp. 23-24, 52-53 and 80-82, R.R. Vol. VII, pp. 103-104, 132-133, 160-162.
[26] A.F. at para. 26; SODRAC-82, at para. 65, R.R. Vol. VII, p. 40.
[27] SODRAC-82 at para. 64, R.R. Vol. VII, pp. 39-40; SODRAC-181, p. 32, R.R. Vol. IX, p. 132; Murphy Testimony, Confidential transcripts, June 1, 2010, pp. 33-34, R.R. Vol. II, pp. 63-64.
[28] SODRAC-82 at paras. 82, 83, 86, R.R. Vol. VII, pp. 50, 51, 53; SODRAC-181 pp. 46-50 R.R. Vol. IX, pp. 146-150.
[29] SODRAC-82 at para. 83, R.R. Vol. VII, p. 51.

There is no technical requirement to keep or erase radio and television broadcast-incidental copies on CBC servers, decisions are related to licencing requirements if any.[30]

19. Further, contrary to CBC's claim,[31] broadcast-incidental copies are not created "automatically".[32] CBC chooses to make them for business reasons. Digital copying, in particular, has led to greater productivity, effectiveness and efficiency.[33] Among other things, it has enabled CBC to repurpose content from existing conventional radio and television operations and transfer it seamlessly to new and emerging digital conduits, creating new opportunities to reach audiences and monetize content delivery.[34]

C. THE DECISIONS BELOW

(a) The Copyright Board focused on the evidence and arguments presented

20. The issue before the Board was essentially the determination of appropriate royalties for the broadcasters', Astral and CBC, various uses of the reproduction right.

21. At no time did CBC argue, as it now does before this Court, that the reproduction right is not engaged in the making of broadcast-incidental copies, nor did it claim the benefit of any statutory exception. On the contrary, CBC *expressly acknowledged* that broadcast-incidental copies were reproductions under the *Act*[35] and that it needed a licence to make broadcast-incidental copies of its in-house programs.[36] As for outside programs,[37] CBC asked that the Board compel SODRAC to issue "through-to-the-viewer" licences to producers so that they, and not CBC, would be obliged to pay for CBC's broadcast-incidental copies.[38]

22. In the end, the Board – having found that SODRAC had never issued "through-to-the-viewer licences" and that its licensees therefore had no right to authorize broadcast-incidental copies – determined that CBC should pay for broadcast-incidental copies.[39] Rather than using the

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[30] SODRAC-181, p. 31, R.R. Vol. IX, p. 131; Murphy Testimony, Confidential transcripts Vol. 1, June 1, 2010, p. 31, R.R. Vol. II, p. 61; SODRAC notes that no additional royalties are paid for the conservation of CBC's radio-television heritage: Board's Licence, ss. 2.01*h*), 5.08, A.R. Vol. I, pp. 94 and 98.
[31] A.F. at para. 89
[32] SODRAC-82 at para. 67, R.R. Vol. VII, p. 41; Murphy Testimony, Confidential transcripts, June 1, 2010, p. 34, R.R. Vol. II, p. 64: [redacted]
[33] SODRAC-181, pp. 8-10 R.R. Vol. IX, pp. 108-110; Murphy Testimony, Confidential transcripts Vol. 1, June 1, 2010, pp. 33-37, R.R. Vol. II, pp. 63-67.
[34] SODRAC-82 at para. 89, R.R. Vol. VII, p. 58.
[35] DEF-1 at paras. 16-25, A.R. Vol. II, pp. 164-167.
[36] DEF-1 at paras. 14, 179, A.R. Vol. II, pp. 162, 212.
[37] Commissioned or acquired programs.
[38] Board's Decision at para. 27, A.R. Vol. I, p. 14; DEF-1 at para. 69, A.R. Vol. II, p. 182.
[39] Board's Decision at paras. 62-63, 82-83, A.R. Vol. I, pp. 24-25, 31-32.

royalty in the 1992 Licence as the starting point,[40] the Board conducted a thorough valuation of CBC's reproduction activity based on expert scientific and economic evidence adduced by both parties. The Board concluded that broadcast-incidental copies had real and independent value, the royalty for which was properly set at 31.25%[41] of the amount paid by CBC to SOCAN for the communication of musical works, the same ratio agreed to by CBC with another collective and fixed in existing tariffs for radio stations.[42] The Board did not purport to increase an existing rate for broadcast-incidental copies to reflect increased copying by CBC or set a rate per copy; rather, it determined that a fixed percentage rate was more appropriate in the circumstances.[43]

(b) In its unanimous judgment, the Federal Court of Appeal focused on *Bishop* which addressed the type of copies at issue

23. On judicial review, CBC argued for the first time that *Bishop* had been overturned by *Entertainment Software Association v. SOCAN* and that technological neutrality dictated that since it paid royalties to SOCAN for the communication right, it was no longer required to pay royalties to SODRAC for broadcast-incidental copying.[44]

24. The FCA found that *Bishop* directly addressed the point at issue.[45] *Bishop* had determined that the right to make ephemeral recordings solely for the purpose of facilitating the broadcast of a work was caught by paragraph section 3(1)(*d*) of the *Act* and was not implied in the right to broadcast. Unless *Bishop* had been overturned, it determined the outcome of CBC's Application.[46] The FCA concluded that nothing in *ESA* authorized the Board to create a category of reproductions which because of their use in broadcasting ceased to be protected by the *Act.* It found as well that *ESA* had not overruled *Bishop*, which continued to be good law.[47]

25. The FCA reviewed the Board's calculation of a discount intended to ensure that, if the right to make broadcast-incidental copies has been granted and paid for in a synchronization licence, such payment is deducted from the royalty paid by CBC in order to avoid double

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[40] Board's Decision at paras. 96, 98, 118, A.R. Vol. I, pp. 36, 37, 43.
[41] Before repertoire adjustment.
[42] Board's Decision at paras. 99, 109, A.R. Vol. I, pp. 37, 40.
[43] Percentages of payments to SOCAN for conventional television, of revenues for specialized channels, of other reproduction royalties for Internet uses: Board's Decision at para. 110, A.R. Vol. I, pp. 40-41, Board's Appendix, A.R. Vol. I, p. 85.
[44] FCA at paras. 26, 33, A.R. Vol. I, p. 145, 148; *Entertainment Software Association v. SOCAN* [2012] 3 S.C.R. 231 [*ESA*], R.B.A. Vol. I, Tab 10.
[45] FCA at para. 45, A.R. Vol. I, p. 152.
[46] FCA at paras. 32, 33, A.R. Vol. I, p. 148.
[47] FCA at paras. 4, 48, A.R. Vol. I, pp. 138, 153-154

payment.[48] Applying the standard of reasonableness to rate issues, which it found to be economic matters on which deference was warranted, the FCA found that there was ample evidentiary foundation for the Board's decision.[49]

PART II – POSITION WITH RESPECT TO ISSUES IDENTIFIED BY CBC

26. CBC frames the first issue as: *Under a technologically neutral interpretation, do broadcast-incidental copies require a separate licence?* SODRAC submits that the answer is Yes.

27. CBC frames the second issue as: *If a licence is required, what is a technologically-neutral rate for broadcast-incidental copies?* SODRAC submits that the issue is more accurately stated as follows: *Was the Board's determination of the broadcast-incidental rates reasonable?* SODRAC submits that the answer is Yes.

28. The third issue, which addresses the Board's Interim Decision, is framed by CBC as follows: *Did the FCA err in law?* SODRAC would state this issue as follows: *Is the Board's Interim Decision reasonable?* SODRAC submits that the answer is Yes.

29. SODRAC would also add the following Issue: *What is the applicable standard of review?* It submits that the answers to this question are as follows: (a) as to whether the reproduction right is engaged, correctness; (b) as to whether a licence for broadcast-incidental copies is implied in a synchronization licence, reasonableness; (c) as to the rates for broadcast-incidental copies, reasonableness; and (d) as to the Board's Interim Licence Decision, Reasonableness.

PART III – STATEMENT OF ARGUMENT

A. BROADCAST-INCIDENTAL COPIES REQUIRE A SEPARATE LICENCE

(a) Broadcast-incidental copies engage the reproduction right

30. There is no substance to CBC's argument that technological neutrality requires this Court to ignore the clear exercise of the reproduction right when broadcast-incidental copies are made. In fact, both the language of the *Act*, as amended carefully in 1997 and 2012, and the decisions

[48] FCA at paras. 71, 79, 95, A.R. Vol. I, pp. 161, 164, 168; Board's Decision at para. 112, A.R. Vol. I, pp. 41-42.
[49] FCA at paras. 29, 52, A.R. Vol. I, pp. 146, 155.

of this Court make clear that the opposite is true. It would *not* be "technologically neutral" simply to extinguish the reproduction right at CBC's behest.

(i) Broadcast-incidental copies are reproductions under section 3(1)(d) of the Act

31. Paragraph 3(1)(*d*) of the *Act* recognizes that "to make any sound recording, cinematograph film or other contrivance by means of which [a] work may be mechanically reproduced or performed" is an exclusive right of the copyright owner. CBC makes broadcast-incidental copies on contrivances (tapes and servers) by means of which a work is further reproduced and later broadcast. These copies fall squarely within the scope of paragraph 3(1)(*d*).

32. In its submissions to the Board, CBC acknowledged that broadcast-incidental copies including "working copies for programming, copies for closed captioning or logging purposes, copies on server library, on broadcast servers, etc" were reproductions under subsection 3(1).[50] Although CBC now argues that the Board unduly extended the reproduction right or defined it too widely,[51] the Board's definition was in fact no broader than what CBC itself proposed.

(ii) This Court has confirmed that broadcast-incidental copies engage the reproduction right

33. In the decision below, the Board defined a "broadcast-incidental copy" as including a copy made to facilitate the broadcast of an audiovisual work,[52] making no distinction as to the media on which such copies are made. This type of copying is also commonly known, including in sections 30.8 and 30.9 of the *Act*, as an "ephemeral recording".[53]

34. *Bishop* ruled that making ephemeral recordings on tape prior to, and for the sole purpose of facilitating, a television broadcast engaged the reproduction right. The recordings were made for technical reasons, not for further reproduction or sale, and were found to be a virtually essential part

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[50] DEF-1 at paras. 16-25, A.R. Vol. II, p. 164-167.
[51] A.F. at paras. 81, 82.
[52] Board's Decision at paras. 11, 12, A.R. Vol. I, pp. 7-8.
[53] McKEOWN, *Fox on Canadian Law of Copyright and Industrial Designs*, Fourth Edition, 2014, Carswell, p. 15-9 [*McKeown*], R.B.A. Vol. II, Tab 38; The FCA equated its use of the term "ephemeral copies" to the Board's use of the term "broadcast-incidental copies", as follows: "*These copies, described earlier in these reasons as ephemeral copies, are known as incidental copies, and were described as follows by the Board*: '[...] A broadcast-incidental copy *is made to facilitate the broadcast of an audiovisual work or to preserve the work in the broadcaster's archives* [...]'" FCA at para. 17, A.R. Vol. I, p. 142.

of a process that facilitated reaching the same audience as a live broadcast.[54] The Court held that nothing in section 3 limited its application based on the purpose of a recording.[55]

(iii) Parliament has recognized that broadcast-incidental copies engage the reproduction right

35. In 1997, after the ruling in *Bishop*, Parliament introduced sections 30.8 and 30.9 (the "1997 Amendments") which created finely-calibrated exemptions for certain ephemeral recordings made by broadcasters.[56] In doing so, Parliament confirmed that broadcast-incidental copies were protected under the *Act*– otherwise, no exemption would have been necessary – while striking a balance between the interests of copyright owners and broadcasters in relation to those copies. The legislative history of the 1997 Amendments shows that, in enacting them, Parliament made deliberate choices in respect of copyright and broadcasting policy.[57]

(1) Canadian broadcasters sought the 1997 Amendments

36. The 1997 Amendments were widely understood as a legislative response to *Bishop*.[58] While the issue of ephemeral recording had "long been on the legislative agenda",[59] Canadian broadcasters now sought a legislative change to reflect then-current industry practices in Canada, and to make Canadian law comparable to legislation in the U.S, the U.K. and Australia that authorized limited ephemeral recordings.[60]

37. Arguing that broadcast-incidental copies were absolutely required for their operations,[61] the broadcasters requested a "transfer of format" exemption to allow them to copy works *onto digital broadcasting servers*, a technology that by then had been adopted by many broadcasters and was expected eventually to be adopted by all.[62] They argued that this exemption was "critical so that broadcasters could modernize their plants and keep their operations competitive without

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[54] *Bishop, supra* note 1, p. 470 b, c; p. 471 3rd para.; p. 479 h, i, j; p. 480 e, f; p. 475 g, h, R.B.A. Vol. I, Tab 4.
[55] *Bishop, supra* note 1, at p. 480b, R.B.A. Vol. I, Tab 4.
[56] *An Act to amend the Copyright* Act, S.C. 1997, c. 24, s. 18(1) (Respondents' Factum (hereafter R.F.) p. 65): The sections came into force on October 1st 1999 and they applied for part of the duration of the 1992 Licence and the entire duration of the 2008-2012 Licence; The Board Licence terminated on 31 March 2012: The Licence terminated on 31 March 2012: A.R. Vol. I, p. 91.
[57] *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168, 2012 SCC 68*, [2012] 3 S.C.R. 489, at para. 71, R.B.A. Vol. I, Tab 20.
[58] ROBIC, *Canadian Copyright Act Annotated*, 2012, Carswell, pp. 30.8-8 – 30.8-10 R.B.A. Vol. II, Tab 39.
[59] *Bishop, supra* note 1, at p. 484e, R.B.A. Vol. I, Tab 4.
[60] *McKeown, supra* note 53 at p. 15-9, R.B.A. Vol. II, Tab 38.
[61] SODRAC-159A pp. 1, 2, R.R. Vol. VI, pp. 122-123; SODRAC-150, p.13-14, R.R. Vol. VI, pp. 109-110.
[62] SODRAC-150 p. 5, R.R. Vol. VI, p. 101.

incurring additional copyright fees for technical, non-commercial reproductions of music that occur in the course of day to day broadcasting".[63]

(2) Parliament adopted limited technologically neutral exemptions for broadcast-incidental copying

38. In response to the broadcasters' lobbying, Parliament introduced sections 30.8 and 30.9[64] which provide that it is not an infringement of copyright for broadcasters to make ephemeral recordings provided that a series of specific conditions are met, including among other things that the copy be made by the broadcaster itself, for its own broadcasts; that it cannot be synchronized with any other work or subject-matter; and that a record be kept of the making and destruction of the copy and made available to the copyright owner on 24 hours' notice.[65]

39. Importantly, sections 30.8 and 30.9 also provide that an ephemeral copy must be destroyed by no later than 30 days after it is made, failing which the authorization of the copyright owner must be obtained and "any applicable royalty" paid.[66] Both sections provided as well that the exemption did not apply at all where a licence to make ephemeral copies was available from a collective society.[67] The very scheme of the exceptions shows that Parliament contemplated not only that broadcast-incidental copies are protected by paragraph 3(1)(*d*) but also that, unless specifically exempted, they require licences and warrant payments of royalties.

40. Sections 30.8 and 30.9 are, by their very nature, technologically neutral. They contain no restriction as to the medium on which ephemeral copies can be made or the type of broadcasting for which they may be used. As long as the statutory conditions are met, the exceptions apply equally to analog and digital copies made to facilitate conventional or other broadcast.[68]

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[63] SODRAC-150 p. 5, R.R. Vol. VI, p. 101; see also SODRAC-159B at para. 11, p. 2, at para. 7, p. 4 R.R. Vol. VI, pp. 128-130: changes in technological mediums should be exempted.
[64] The transfer of format exemption.
[65] *Supra* note 56, s.18 *introducing* s.30.8(1)(*b*), (*c*), 30.8(2), (3), (4) and s.30.9(1)(*c*), (*d*), (2), (3), (4), R.F. pp. 66-69.
[66] *Ibid.*, 30.8(5), 30.9(5), R.F. pp. 67 and 69.
[67] *Ibid.*, 30.8(8), 30.9(6), R.F. pp. 67 and 69; Although section 30.9(6) was repealed in 2012, it remained in force for most of the term of the 1992 Licence and for the entire term of the Board Licence
[68] *Broadcasting Act*, art. 2 (1) definition of broadcasting, A.B.A. Vol. I, p. 1; *Reference re Broadcasting Act*, [2012] 1 S.C.R. 142 at paras. 4, 6 (*a contrario*), R.B.A. Vol. I, Tab 19.

(3) Parliament balanced the rights and interests applicable to broadcast-incidental copies

41. By confirming that copying a work to facilitate broadcasting is *prima facie* an infringement of copyright,[69] but enacting limited exemptions to permit such copying under certain circumstances, Parliament balanced the interests of rights owners and broadcasters according to its own policy preferences. Parliament granted neither an unfettered reproduction right to rights owners, nor an unlimited exception to broadcasters. Because the exceptions are not limited in terms of medium or form of broadcasting, neither stakeholder has any greater or lesser interest in broadcast-incidental copies made using analog or digital media, or for conventional or Internet-based broadcasts. Further, Parliament recognized that, where broadcaster could readily access a repertoire of works through a collective society, no exemption was necessary.

42. Sections 30.8 and 30.9 were amended in November 2012,[70] such that among other things, broadcasters may now avail themselves of section 30.9,[71] even if a licence is available from a collective society. This expansion of the exemption meant a partial rebalancing by Parliament in favour of broadcasters. However, the limited exemptions remained in place, confirming once again that, in Parliament's view, broadcast- incidental copies do engage the reproduction right.

(4) CBC ignores the relevant legislation in Canada and elsewhere

43. In asserting before this Court (contrary to its submissions to the Board) that Parliament never intended for broadcast-incidental copies to be subject to the reproduction right, CBC ignores sections 30.8 and 30.9. It prefers to cite statements of Parliament concerning a new exception that was not in force at the relevant time, claiming that it is a declaratory and retroactive rule.[72] This claim is untenable: unlike other sections of the *Act*,[73] there is no indication that the new exception was adopted for greater certainty having always been the law.

44. CBC also asserts that broadcast-incidental copies are so "legally and economically unimportant" that a leading U.S. authority does not mention them.[74] CBC does not mention however, that legislation around the world, including the U.S., provide for limited exemptions

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[69] *McKeown* at p. 15-9, *supra* note 53, R.B.A. Vol. II, Tab 38.
[70] After the term of the Board's Licence; see *Copyright Act*, R.S.C. 1985, c. C-42, R.F. p. 45; *McKeown*, supra note 53, pp. 15-11, 15-12, 23-65, 23-66, R.B.A. Vol. II, Tab 38.
[71] But not section 30.8.
[72] A.F. at paras. 96, 97; The statements quoted are made in relation to section 30.71 of the Act, which was only enacted in November 2012
[73] For example s.13(6) and (7) of the *Copyright Act,* R.F. p. 49.
[74] A.F. at para. 3, footnote 2.

for ephemeral recordings made by broadcasters.[75] In other words, many foreign jurisdictions recognize, as does Canada, that broadcast-incidental copies engage the reproduction right.

(iv) Conclusion

45. There is ample support, both in the legislation and in the jurisprudence of this Court's precedent in *Bishop* that the reproduction right is engaged with respect to broadcast-incidental copies. As the FCA correctly noted, to accept CBC's position would mean that broadcast-incidental copies "cease to be protected by copyright".[76] In SODRAC's respectful submission, CBC has failed to demonstrate any legal basis for the protection to be eliminated.

(b) The interpretative principle of technological neutrality should not upset Parliament's careful balance

46. CBC invokes the interpretative principle of technological neutrality as justification to narrow the existing scope of the reproduction right by, in effect, introducing a new and unlimited exemption for broadcast-incidental copies. CBC's position is untenable because:

> (a) The interpretative principle of technological neutrality may not be used to add exemptions for broadcast-incidental copying over those carefully crafted by Parliament, thus disrupting Parliament's comprehensive scheme and upsetting its own balancing of interests;
>
> (b) The interpretative principle of technological neutrality may not be used to override the proviso in the *Act* that where a licence is available from a collective society for broadcast-incidental copying the exemptions do not apply;
>
> (c) The interpretative principle of technological neutrality cannot override the need that any exemption for broadcast-incidental copies absolutely requires limitations;
>
> (d) In any event, a proper application principle of technological neutrality would mean that broadcast-incidental copies continue to engage the reproduction right, not the reverse, since only the medium on which they are made has changed.

47. In SODRACS's respectful submission, CBC's position is founded on a misuse of technological neutrality, which it would apply not to interpret the *Act* but to oust statutory provisions that specifically address both broadcast-incidental copies and the adoption of digital technology.

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[75] *Berne Convention for the Protection of Literary and Artistic Works*, 828 U.N.T.S. 221, September 9, 1886; rev. Brussels June 26, 1948, art. 11(bis), R.F. p. 72; *European Union Directive No. 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society*, art. 5(2)(d); *U.S. Copyright Act*, 17 U.S.C. §112 and 114.
[76] FCA at para. 48, A.R. Vol. I, pp. 153-154.

(i) This Court should decline to create a new exception in the name of technological neutrality

48. There is a boundary between interpreting legislation and enacting it. It is SODRAC's respectful submission that CBC is asking the Court to cross over that boundary.

49. Copyright is a creature of statute. Even the modern purposive approach to interpretation does not give judges licence to substitute their policy preferences for those of Parliament.[77] Parliament has focused repeatedly on broadcast-incidental copying, including as recently as 2012,[78] and has set clear boundaries for such copying in all media. This Court should decline to expand the territory that Parliament has both established and occupied.

(1) This Court consistently declined to create judge-made exceptions

50. In *Bishop,* even before sections 30.8 and 30.9 had been adopted, this Court refused either to recognize an implied exemption from paragraph 3(1)(*d*) or to create a new one in light of the detailed and explicit exceptions existing elsewhere in the *Act*.[79] Observing that any new exception would need to be explicit "in order to strike the appropriate balance between the technical needs of the broadcasters and the need for security of the copyright holders," and that "the policy issues associated with such a rule would be beyond the proper purview of the courts",[80] the Court concluded that, "if a change is to be made to the *Act* it should be made by the legislature, not by a forced interpretation.".[81]

51. In *Euro-Excellence* a majority of the Court[82] recognized the limit of its authority to create exemptions through interpretation. One of the issues was the concurrent application of copyright and trademark protections for the same object, a logo on a chocolate bar. Rothstein J concluded that paragraph 64(3)(*b*) of the *Act* specifically addressed that issue.[83] Consequently, it was assumed that Parliament enacted these provisions after having turned its mind to the possibility of concurrent application.[84] In these circumstances, there was no scope for judicial intervention.

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[77] *Euro-Excellence Inc. v. Kraft Canada Inc.* [2007] 3 S.C.R. 20 at para. 3 [*Euro-Excellence*], R.B.A. Vol. I, Tab 11.
[78] *Copyright Modernization Act*, S.C. 2012, c. 20, ss. 33 and 34, modifying ss. 30.8 and 30.9 of the *Act*, R.F. p. 60.
[79] *Bishop*, *supra* note 1, pp. 480 j 481a, R.B.A. Vol. I, Tab 4.
[80] *Bishop*, *supra* note 1, p. 483.
[81] *Bishop*, *supra* note 1, p. 485 b.
[82] *Euro-Excellence*, *supra* note 77, R.B.A. Vol. I, Tab 11; The Court issued the following sets of reasons: (1) The principal reasons were written by Rothstein J (Binnie J. and Deschamps J concurring); (2) a brief concurring judgment by Fish J; (3) Bastarache J. (also for Charron J. and Lebel J.) concurred in the result but for different reasons; and (4) Abella J. also for McLaughlin) issued dissenting reasons on the exclusive licensee issue.
[83] Abella concurs on this issue: *Euro-Excellence*, *supra* note 77, at para. 110.
[84] *Euro-Excellence*, *supra* note 77 at para. 10, R.B.A. Vol. I, Tab 11.

The Court declined to read down the legislation through interpretation, substituting a different policy preference from that expressed by Parliament.[85] Abella J. agreed with Rothstein J on this issue, adopting the same reasoning for the application of subsection 27(4) of the *Act*: once the prerequisites of this provision apply, there is no scope for judicial intervention.[86]

52. In this case, sections 30.8 and 30.9 address the very issue raised by CBC - the concurrent application of the communication right and the reproduction right with respect to broadcasting- as well as the very technological change at issue.[87] These provisions represent Parliament's preferred approach to these specific issues: they exclude certain broadcast-incidental copies from protection where certain strict conditions are met, while affirming that the protection subsists where a licence is available from a collective society. These provisions cannot be read down using the interpretative principle of technological neutrality. By doing so, the Court would be introducing a new exemption, substituting a different policy preference from that of Parliament.

53. Indeed, while *Euro-Excellence* makes clear that this Court will not read *down* legislation through its interpretation. CBC proposes to take an even more drastic step: to read *out* sections of the *Act* as a matter of interpretation. CBC's position is akin to the approach to statutory interpretation rejected in *Canada v. Craig*[88] in which this Court decided to overrule its precedent in *Moldovan v. The Queen.*[89] There were two separate exceptions in the *Income Tax Act* and the interpretation in *Moldovan* resulted in the collapse of the second exception into the first one. In *Craig*, the Court ruled that a judge-made rule that reads one of the exceptions *out* of the provision is not consistent with the parliamentary intent.[90] CBC has proposed precisely such a "judge-made rule", effectively reading sections 3(1)(*d*), 30.8 and 30.9 out of the *Act* in seeking to be allowed to make broadcast-incidental copies without obtaining the available licence from a collective society or complying with any of the applicable exceptions.

54. A further judge-made exception would be directly at odds with the legislative scheme and the balance struck by Parliament. It would exempt *all* broadcast-incidental copies whether or not they satisfy the conditions of the statutory exceptions. To allow CBC to bypass these

[85] *Euro-Excellence*, *supra* note 77 at para. 9-13 (Rothstein J.), R.B.A. Vol. I, Tab 11.
[86] *Euro-Excellence*, *supra* note 77 at para 110 and 112 (Abella J.), R.B.A. Vol. I, Tab 11.
[87] Section 30.9 addressing the transfer of format copying to digital.
[88] *Canada v. Craig*, [2012] 2 S.C.R. 489 [*Craig*] R.B.A. Vol. I, Tab 6.
[89] *Moldovan v. The Queen*, [1978] 1 SCR 480 R.B.A. Vol. I, Tab 15.
[90] *Craig*, *supra* note 88 at paras. 28-30, R.B.A. Vol. I, Tab 6.

requirements through the use of an interpretative principle would fly in the face of Parliamentary intent.

(2) A novel exemption would upset the balance of interests struck by Parliament

55. CBC repeatedly reproaches both the Board and the FCA for failing to balance the respective interests of copyright owners and users. Without reference to any provision of the *Act*, CBC claims that they were obliged to conduct a balancing of these interests in the name of technological neutrality and that, by failing to do so, they unduly extended the scope of the reproduction right.

56. This misguided criticism fails to acknowledge that neither the Board nor the Courts can "balance" away a right that is provided by statute. When a copy is made, the infringement of copyright does not disappear merely because of a perceived imbalance. Clearly, technological neutrality is a factor to be considered when interpreting the *Act*,[91] and the traditional balance should be preserved in the digital environment.[92] However, the balance and technological neutrality remain interpretative rules *not* statutory provisions or rules akin to Charter provisions that can override legislation. They cannot render irrelevant the fact that a copy is made.

57. In *CCH v. Law Society of Upper Canada*,[93] the Court noted that the *Act* sets out the rights and obligations of *both* copyright owners and users, including the exceptions to copyright infringement in sections 29 and 30, in order to achieve an appropriate balance.[94] By enacting carefully-drawn exceptions in sections 30.8 and 30.9 that limit the right granted in subsection 3(1), Parliament has expressed its preferred balance through a comprehensive legislative scheme governing broadcast-incidental copies.[95] This Court has confirmed as much on several occasions. In *ESA*, Rothstein J. observed that, "Parliament will indeed legislate when it considers copyright protection to be improperly balanced (for example, it introduced the ephemeral recordings exception in s. 30.8(1), following the ruling in *Bishop*)".[96] In *Théberge*, the majority, discussing

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[91] *Rogers Communications v. SOCAN*, [2012] 2 R.CS. 283, at para. 40 [*Rogers*], R.B.A. Vol. I, Tab 22.
[92] *ESA*, *supra* note 44 at para. 8, R.B.A. Vol. I, Tab 10.
[93] [2004] 1 S.C.R. 339 at paras. 11, 12 [*CCH*], R.B.A., Vol. I, Tab 8.
[94] *Société canadienne des auteurs, compositeurs et éditeurs de musique c. Association canadienne des fournisseurs Internet*, [2004] 2 RCS 427, at paras. 131, 132, 114, [*CAIP*] R.B.A. Vol. I, Tab 25.
[95] See *Yugraneft Corp. v. Rexx Management Corp.*, [2010] 1 S.C.R. 649, R.B.A. Vol. I, Tab 29: Court's reasons delivered by Rothstein J., at paras. 38-41 on the comprehensive scheme resulting from the maxim *expressio unius est exclusio alterius.*
[96] Though speaking for the minority in *ESA*, *supra* note 44 at para. 125 (emphasis added) R.B.A., Vol. I, Tab 10.

the role of copyright exceptions in the balancing of interests, made specific reference to the ephemeral reproduction exceptions as "new protections to reflect new technology". [97]

58. The following statement by Rothstein J. in *Reference re Broadcasting Regulatory Policy* applies to this appeal as well:

> In my view, s. 21(1) represents the expression by Parliament of the appropriate balance to be struck between broadcasters' rights in their communication signals and the rights of the users, including BDUs, to those signals. It would be incoherent for Parliament to set up a carefully tailored signals retransmission right in the *Copyright Act*, specifically excluding BDUs from the scope of the broadcasters' exclusive rights over the simultaneous retransmission of their signals, only to enable a subordinate legislative body to enact a functionally equivalent right through a related regime. The value for signal regime would upset the aim of the *Copyright Act* to effect an appropriate "balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator."[98]

59. In this case, Parliament has struck the appropriate balance between the need of broadcasters and the interests of right owners. It would be equally incoherent for Parliament to set up a carefully-tailored scheme for broadcast-incidental copying only for that delicate balance to be disturbed by a judge-made exception in the name of technological neutrality.

60. If the Court introduced an exemption *without any limitations*, as CBC seems to propose, the result would upset the balance struck by Parliament. It would also be an anomaly: in other jurisdictions where broadcast-incidental copying is allowed without payments the applicable exemption is subject to specific limitations.[99]

61. In *Bishop,* the broadcaster claimed that the *Act* must be interpreted in light of technological progress and the practical exigencies of broadcasting.[100] The Court, however, refused to place its thumb on the scale of the interests of users and copyright owners finding that (a) it would be inappropriate to interfere given Parliament's repeated consideration of ephemeral copying and

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[97] *Théberge v. Galerie D'Art du Petit Champlain*, [2002] 2 S.C.R. 336 at para. 32., R.B.A., Vol. I, Tab 28.
[98] *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, [2012] 3 S.C.R. 489 at para. 67.
[99] See examples of time limitations given in [*Bishop*], *supra* note 1, p. 482, 3rd para. R.B.A. Vol. I, Tab 4; U.S.: *U.S. Copyright Act*, 17 U.S.C. §112, R.F. pp. 95-100; United Kingdom: *Copyright, Designs and Patents Act 1988*, U.K. 1988, c. 48, s. 68, R.F. p. 73; Germany: *Copyright Act of 9 September 1965* (Federal Law Gazette Part I, p. 1273), as last amended by Article 8 of the Act of 1 October 2013 (Federal Law Gazette Part I, p. 3714), s. 55, R.F. p. 76; Australia: *Copyright Act 1968*, No. 63, 1968, as amended, ss. 47, 70 and 107, R.F. p. 78; New Zealand, *Copyright Act 1994*, 1994 No. 143, s. 85, R.F. p. 89.
[100] *Bishop*, *supra* note 1, p. 475 d, e, f, R.B.A. Vol. I, Tab 4.

the policy factors involved;[101] and (b) any potential exemption would need to be qualified appropriately in order to strike "the appropriate balance between the technical needs of the broadcasters and the need for security of the copyright holders," so that the latter were protected by more than merely the broadcasters' good faith.[102] The Court found that setting limits on a right to make ephemeral recordings raised policy issues that were beyond the purview of the Court.[103]

62. There is no reason to believe that: (a) the making of broadcast-incidental copies no longer raises policy issues that require careful balancing; (b) the Court is in a better position today than it was in 1990 to determine those issues; or (c) it is now either necessary or appropriate for the Court to revisit a balance that has since been struck explicitly, and in great detail, by Parliament. Technological neutrality provides no principled or objective guide for the Court to develop exemptions, much less the qualifications necessary to achieve a proper balance.

63. In any event, there is no reason for this Court to intervene in the name of technological neutrality. First, as discussed above, the existing legislative scheme is *already* technologically neutral; it would require no rebalancing in this respect even if such adjustment were within the purview of the courts. Second, the evidence clearly shows that the introduction of digital technology has not resulted in any change to the balance; there is no new "layer" of rights or royalties, nor does CBC require any new licences.[104] The rights, licences, and entitlements to royalties with respect to broadcast-incidental copies have not changed. They are exactly the same as in the analog environment: a licence for reproduction and a licence for communication.

(ii) CBCs' position offends the principle of technological neutrality

64. In fact, for this Court to accept CBC's position that broadcast-incidental copies no longer engage the reproduction right would be anything but technologically neutral. The result would be that, strictly because of a change from analog to digital technology, CBC would no longer require a licence to make copies for which it has held a licence and paid royalties for decades. In SODRAC's submission, broadcast-incidental copies made on digital media require a licence just as the equivalent analog copies always have.

65. In *ESA*, Abella and Moldaver JJ., citing the earlier decision of this Court in *Robertson*, described technological neutrality as requiring that the *Act* "apply equally between traditional

[101] *Bishop*, *supra* note 1, p. 484 h, R.B.A. Vol. I, Tab 4.
[102] *Bishop*, *supra* note 1, p. 483c, R.B.A. Vol. I, Tab 4.
[103] *Bishop*, *supra* note 1, pp. 482-484, R.B.A. Vol. I, Tab 4.
[104] See above at paras. 12-13.

and more technologically advanced forms of the same media."[105] In *Robertson*, LeBel and Fish JJ., for the majority, also stressed that technological neutrality "is not a licence to override the rights of authors – it exists to protect the rights of authors and others as technology evolves."[106] Abella J., concurring on this point, added:

> The words 'any material form' whatever in s. 3(1) should be taken to mean what they say: the author's exclusive right to reproduce a 'substantial part' of a copyrighted work is not limited by changes in form or output made possible by a new medium. A media neutral *Copyright Act* ensures that such transformations in form do not erode the content of the copyright protection: [citation omitted].[107]

66. The 1992 Licence provided that the right to reproduce applied to any copy made by any means and on any medium, whether then known or subsequently discovered.[108] It was clear at all times that this included broadcast-incidental copies. The same provision appears in the Board Licence.[109] These provisions therefore *maintain* technological neutrality. As Abella J. made clear in *Robertson*, "there should be no loss of copyright by virtue of reproduction in a digital storage format."[110]

67. An interpretative principle is applied to the facts of a particular case; it cannot change them. CBC claims that broadcast-incidental copies are incidents of technology, obfuscating the fact that it has made those copies for years and held a licence to do so.[111] The introduction of digital broadcasting technology has changed only the medium on which such copies are made,[112] not the fact that CBC makes copies that require a licence. To paraphrase Rothstein J. in *Rogers*, "the balance between users and rights owners would not be appropriately struck where the existence of copyright protection depends merely on the business model the user chooses to adopt" – here, the method of copying – "rather than the underlying [reproduction] activity.[113]

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[105] *ESA, supra* note 44 at para. 5, R.B.A. Vol. I, Tab 10.
[106] *Robertson v. Thomson Corp.*, [2006] 2 S.C.R. 363 [*Robertson*] at para. 49, R.B.A. Vol. I, Tab 21.
[107] *Ibid.* at para. 76 (emphasis added).
[108] The 1992 Licence, art. 1.02, A.R. Vol. IV, p. 3
[109] Board's Licence, art. 2.01 A.R. Vol. I, p. 93.
[110] *Robertson, supra* note 106 at para. 97, R.B.A. Vol. I, Tab 10.
[111] See above at para 10.
[112] See above para 18.
[113] *Rogers, supra* note 91 at para. 40, R.B.A. Vol. I, Tab 22.

(iii) Bishop is still good law

68. Reducing *Bishop* to an "absolutist author-centric approach" that is "simply no longer the law in Canada,"[114] CBC proceeds to ignore the issues the Court ruled on in that case and its reasons for doing so. However, SODRAC submits that *Bishop* has not been undermined by the decisions on which CBC relies. Both the decision and its reasoning are still good law that applies squarely to this case and determines conclusively that the reproduction right is engaged.

(1) Bishop is not exclusively "author-centric"

69. The characterization of *Bishop* as reflecting an "earlier, author-centric view" of copyright appears to emanate from the suggestion in that case that the *Act* "was passed with a single object, namely, the benefit of authors of all kinds [...]".[115] While it is true that the decisions of this Court since *Théberge*[116] have, quite properly, presented the *Act* as reflecting a necessary balance between the rights of owners and the interests of users, that approach was present in *Bishop* as well. The Court referred repeatedly to the need to achieve balance between "the technical needs of broadcasters and the security of copyright holders".[117]

70. *Bishop* must be considered in its entirety, not dismissed summarily on the basis of a single passing characterization of presumed legislative policy. In fact, that is precisely what this Court did in *ESA*, in which the essential logic of *Bishop* was confirmed, not rejected.[118]

(2) There is no inconsistency between Bishop *and* ESA

71. CBC cites the principle of technological neutrality to urge this Court to reach the same result in this appeal as in *ESA*, where the transmission of a digital download was found to comprise a single activity that engaged a single right and thus to require a single licence. However, the circumstances of this appeal are in fact identical to those in *Bishop*, in which copying and broadcasting were found to be two separate activities that engaged two separate rights and therefore required two separate licences. In SODRAC's respectful submission, *ESA* did not repudiate *Bishop* but affirmed it. The two decisions are entirely consistent.

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[114] A.F. at para. 68.
[115] *SOCAN v. Bell,* [2012] 2 S.C.R. 326 at para. 9 R.B.A. Vol. I, Tab 24 referring to *Bishop*, pp. 478-479, quoting *Performing Rights Society, Ltd. v. Hammond's Bradford Brewery Co.*, [1934] 1 Ch. 121, at p. 127
[116] *Théberge, supra* note 97.
[117] *Bishop*, supra note 1, pp. 482, 483, R.B.A. Vol. I, Tab 4.
[118] *ESA, supra* note 44 at paras. 35-39, R.B.A. Vol. I, Tab 10.

72. The focus in *ESA* was on the meaning of the word "communicate".[119] The Court found that the right to communicate was historically connected to the right to perform, not to make permanent copies, and that, since no "performance" occurs when a videogame is purchased either in a store or through the Internet, there is no "communication" of the work.[120] But *ESA* did not hold that, had there been *both* a reproduction *and* a communication – i.e., two separate activities – the principle of technological neutrality would have eliminated the need for a licence for one or the other. As such, *ESA* does not support the proposition that technological neutrality should eliminate the reproduction right where a reproduction does occur.

73. In fact, the Court in *ESA* expressly *distinguished* the facts before it from those at issue in *Bishop*, in which two acts were effected and two licences were therefore necessary:

> [41] (...) Bishop does *not* stand for the proposition that a *single* activity (i.e. a download) can violate two separate rights at the same time. This is clear from the quote in *Ash v Hutchison*, which refers to "two acts". In *Bishop*, for example, there were two activities: 1) the making of an ephemeral copy of the musical work in order to effect a broadcast, and 2) the actual broadcast of the work itself. In this case, however, there is only one activity at issue: downloading a copy of a video game containing musical works.[121]

74. It is clear from this passage that nothing in *ESA* diminishes the essential logic of *Bishop*. CBC simply misses the mark by insisting that its underlying *economic* activity, broadcasting, remains the same despite the adoption of digital technology. For copyright purposes, what is relevant is that, by its own admission, CBC first copies musical works, then communicates them.[122] Its business purpose for doing so is irrelevant.

75. In this case, as in *Bishop*, CBC engages in two activities:[123] (1) the systematic and deliberate making and retention of broadcast-incidental copies on various media; and (2) the broadcast of the works on conventional channels, specialty channels, websites and mobiles. Unlike in *ESA*, the two activities do not happen at the same time. In an online sale of a video game, the Internet transmission is initiated at precisely the same time as the reproduction and concludes at the moment the reproduction is complete. A broadcast-incidental copy, by contrast,

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[119] *Ibid.* at para. 4, R.B.A. Vol. I, Tab 10.
[120] *Ibid.* at paras. 12-31, R.B.A. Vol. I, Tab 10.
[121] Our emphasis, *ESA*, *supra* note 44 at para. 41, R.B.A. Vol. I, Tab 10.
[122] DEF-1 at paras 16-25, A.R., Vol. II, pp. 164-167.
[123] Apart from synchronization.

is made before the broadcaster's initial communication of the work that is copied and is kept after that initial communication is complete, used and reused for future broadcasts.[124]

76. Further, the Court in *ESA* noted that its application of technological neutrality might have been different had the *Act* required otherwise:

> The principle of technological neutrality requires that, *absent evidence of Parliamentary intent to the contrary*, we interpret the *Copyright Act* in a way that avoids imposing an additional layer of protections and fees based solely on the method of delivery of the work to the end user. To do otherwise would effectively impose *a gratuitous cost* for the use of more efficient, Internet-based technologies.[125]

77. In this case, Parliament has clearly contemplated – indeed, it has *mandated* – that, unless specific statutory conditions are met, a reproduction licence must be obtained, and a royalty paid, when a broadcast-incidental copy is made. Those requirements exist separately and apart from any obligations in relation to the communication right. The reproduction royalty is *not* a "gratuitous cost" for the mere use of technology, as CBC claims, but a legitimate cost to obtain the distinct and valuable right to copy.

(3) The other authorities cited by CBC do not support its position

78. CBC purports to rely on the decision of this Court in *CAIP*,[126] which it mistakenly describes as having considered "whether 'caching' violated copyright".[127] In fact, *CAIP* did not consider whether cached copies engage the reproduction right. The issue was whether Internet service providers who engaged in caching were doing more than merely providing the means of telecommunication necessary for others to communicate works, such as to disqualify them from the "safe harbour" in paragraph 2.4(1)(*b*) of the *Act*.

79. In any event, CBC's attempt to equate cache copies with broadcast-incidental copies is inapposite. Unlike cache copies,[128] broadcast-incidental copies are neither "serendipitous" nor content-neutral. They are made *deliberately* by broadcasters[129] – prior to, not during, a

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[124] See para. 18 above in Statement of facts.
[125] Our emphasis *ESA*, *supra* note 44 at para. 9, R.B.A. Vol. I, Tab 10; Hagen, "Technological Neutrality in Canadian Copyright Law" in Michael Geist, ed, *The Copyright Pentalogy: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (University of Ottawa Press, 2013) 307, A.B.A. Vol. III, Tab 32, p. 311: This policy is consistent with the Canadian Supreme Court's *proviso* that a technologically neutral interpretation is only available absent Parliamentary intent, p. 311 2nd para. *in fine*.
[126] *CAIP*, *supra* note 94.
[127] A.F. at paras 92-95.
[128] *CAIP*, *supra* note 94 at para. 115, R.B.A. Vol. I, Tab 25.
[129] Above para 18.

transmission – in order to achieve real and specific efficiencies in relation to programs that the broadcasters themselves select.

80. CBC's reliance on *Théberge* is similarly misplaced. In *Théberge*, the Court found on the facts that, since the process at issue resulted in no multiplication of copies, the copyright owner's work had not been reproduced.[130] That is not the situation in this appeal, where each broadcast-incidental copy is additional to the original work.

81. CBC also cites *Théberge* in support of its argument that the reproduction right should not be engaged because compensation for broadcast-incidental copies is not a "legitimate interest".[131] However, in *Euro-Excellence*, a majority of this Court, in separate reasons authored by Rothstein J. and by Abella J. confirmed that *Théberge* does *not* support the proposition that statutory rights can be narrowed based on a theory of legitimate economic interests.[132]

82. In any event, SODRAC's objections to the use of technological neutrality to override copyright protection apply equally to CBC's theory of "legitimate economic interests". Since a broadcast-incidental copy falls within paragraph 3(1)(*d*) of the *Act* and is not exempted under sections 30.8 and 30.9, there is no scope for a judicially-created limit to protection based on what might -or might not- be "legitimate economic interests".[133] In this case, it is the role of the Copyright Board to assess the economic aspects of the right, including its value to the user, and to determine fair and reasonable royalties accordingly.

(c) Broadcast-incidental copies are not covered by synchronization licences

83. In the alternative, CBC submits that, if broadcast-incidental copies engage the reproduction right, technological neutrality nevertheless requires this Court to rewrite the Board Licence[134] and the synchronization licences granted by SODRAC to producers, such that the additional right to make broadcast-incidental copies is "implied" in these licences. Any other result, it claims, would permit SODRAC to engage in "non-neutral and royalty stacking".

84. This submission overreaches dramatically. It misrepresents the relationship between synchronization licences and broadcast-incidental copies, overlooks differences between in-house and outside programs, ignores the clear language of the applicable licences, and

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[130] *Théberge*, *supra* note 97 at para. 50, R.B.A. Vol. I, Tab 28.
[131] A.F. at paras. 81-82.
[132] *Euro-Excellence*, *supra* note 77 at para. 8 (Rothstein J.), at para.112 (Abella J.), R.B.A. Vol. I, Tab 11.
[133] *Ibid.* at para 112 (Abella J.).
[134] The Licence established by the Board, A.R. Vol. I, pp. 91-108.

misapplies technological neutrality, including by suggesting that it should override both SODRAC's statutory rights and its basic freedom of contract.

85. In fact, the licensing structure proposed by SODRAC and adopted by the Board is entirely rational and appropriate. It involves no "royalty stacking" or "double dipping"; it simply ensures that producers and broadcasters, respectively, obtain and pay for the rights to make the copies they actually make – no more and no less. It applies equally to traditional and more advanced forms of broadcasting and is neither inefficient nor contrary to the public interest.

(i) Standard of review: reasonableness

86. Contrary to CBC's submission, the standard of review for this alternative argument is reasonableness, not correctness. Because the questions fundamentally involve the interpretation of rights granted by contract, they are either pure questions of facts or questions of mixed fact and law from which pure questions of law should not be artificially extracted to allow CBC to continue its private litigation in front of this Court.[135] This Court has ruled recently that deference should be given to first-instance decisions on points of contractual interpretation.[136]

(ii) Synchronization and broadcast-incidental copies are distinct reproductions

87. Synchronization copies and broadcast-incidental copies are distinct reproductions. They are made at different times, for different purposes, by different entities (producers and broadcasters, respectively) or, in the case of in-house programs, by broadcasters acting also in the capacity of producer. Producers do *not* make broadcast-incidental copies.

88. It is common ground that a licence is required to make synchronization copies. Further, since CBC's alternative argument proceeds from the assumption that broadcast-incidental copies engage the reproduction right, it follows, for the purpose of this argument, that a licence is required to make those copies. Indeed, CBC has held and paid for a licence to do so since 1992.

89. The purpose of a synchronization licence is to enable a producer to incorporate music into the soundtrack of an audiovisual program that can then be licensed for exploitation, including by a broadcaster. It is pure hyperbole to suggest, as CBC does, that the licence is rendered "useless", or its purpose "frustrated", if it does not include the additional right to make broadcast-incidental copies. As long as the broadcaster who actually makes those copies obtains the right to do so,

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[135] *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 [*Sattva*] at paras. 50-55, R.B.A. Vol. I, Tab 23.
[136] *Ibid.* at para. 52, R.B.A. Vol. I, Tab 23.

which is readily available through SODRAC, there is no obstacle to the use of the program. In fact, the Board found that because of limited budgets Quebec producers would often likely opt for synchronization licences that do not include the separate right to authorize broadcasters to make broadcast-incidental copies.[137]

(iii) The Board Licence did not introduce a new layer of licences or royalties

90. The 1992 Licence allowed CBC to make broadcast-incidental copies of all programs,[138] as well as to synchronize music in its in-house programs and to authorize producers to synchronize music in commissioned programs.[139] Where a program was acquired rather than commissioned, the producer was required to obtain and pay for its own synchronization rights.

91. In its proposal to the Board, SODRAC sought to allocate responsibility for synchronization and broadcast-incidental copies to the entities who actually make them: producers and broadcasters, respectively. That meant that, as of 2008, CBC would be responsible for synchronization rights in relation to in-house programs, with producers responsible for synchronization rights in relation to all outside programs. As before, CBC would be responsible for all broadcast-incidental copies.

92. In other words, the change proposed by SODRAC was to shift responsibility for synchronization licences for *commissioned programs* from CBC to producers. CBC expressly agreed to that change,[140] and the Board adopted it. However, CBC proposed a further change, to which SODRAC objected: it sought to shift liability from CBC to producers for broadcast-incidental copies made of their programs by CBC.[141] The Board rejected that proposal, opting instead to maintain CBC's liability for all broadcast-incidental copies and fix royalties for those copies separately from synchronization copies made by CBC.[142]

93. As such, CBC's claim that the Board Licence has burdened it with a new layer of licences or royalties is simply false: both synchronization copies and broadcast-incidental copies have

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[137] Board Decision at paras. 82-83, A.R. Vol. I, p. 31; the royalty for synchronization will vary significantly depending on the grants: SODRAC's "bare" licences for existing works is 265$/30sec. (Board at para. 125, A.R., Vol. I, p. 45) as opposed to very higher prices prices listed in for different grants: see Table in Al Kohn & Bob Kohn, *Kohn on Music Licensing*, 4th ed (Wolters Kluwer, 2009) at p. 1130, A.B.A. Vol. IV, tab 40, p. 1130.
[138] Around 50% of CBC's programming is in-house programs (Para. 225-227 Board decision, A.R. Vol. I, p. 70-71) the other 50% is commissioned or acquired.
[139] SODRAC-16, p. 2, 3rd para, art. 1.02, 4, 6.01, A.R. Vol. IV, pp. 2-5; DEF-8, A.R. Vol. IV, p. 107.
[140] DEF-1 at para. 172, A.R. Vol. II, pp. 209-210; FCA Interim at para. 22, A.R. Vol. III p. 55; Board Decision at paras. 31, 115, 226-227, A.R. Vol. I, pp. 15, 42, 71-72.
[141] Board at para. 27, A.R. Vol. I, p. 14; DEF-1 at para. 69, A.R. Vol. II, p. 182.
[142] Sections 5.02, 5.03 Board's Licence, A.R. Vol. I, pp. 95-96

been licensed and paid for since 1992. At bottom, then, CBC's "alternative" suggestion that the right to make the latter be "implied" in licences to make the former is nothing more than a further attempt to avoid responsibility for reproductions for which it has *acknowledged* responsibility for decades and paid royalties accordingly.

(iv) Existing synchronization licences are not amenable to an implied right to make broadcast-incidental copies

94. When SODRAC issues a synchronization licence to a producer, it expressly *excludes* the right to make broadcast-incidental copies.[143] Contrary to CBC's submissions, the Board found that SODRAC's synchronization licences have always been consistent in this respect: SODRAC has never issued so-called "through –to-the viewer" synchronization licences.[144]

95. Similarly, the 1992 Licence expressly included the right to make all reproductions.[145] The right to make broadcast-incidental copies was not "implied" in the right to synchronize. Far from "derogating from its own grant" as CBC alleges,[146] SODRAC proposed that this state of affairs be preserved in the Board Licence: The Board agreed, structuring the licence to provide for two express authorizations: one to synchronize music in CBC's in-house programs[147], the other to make broadcast-incidental copies of all the programs the CBC broadcasts.[148]

96. Accordingly, *Netupsky v. Dominion Bridge*[149] is of no assistance to CBC. In that case, this Court concluded that a contract to provide plans contained an implicit authorization to reproduce them.[150] The contract was *silent* as to the right to make copies.[151] In this case, there is no silence: the right to make broadcast-incidental copies is expressly granted to CBC and expressly withheld from the producer. It would be either redundant or contrary to the contractual

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[143] Board's decision at para. 73, A.R. Vol. I, pp. 28-29; for description of types of licences: Board Decision at paras. 14-16, A.R. Vol. I, pp. 8-9.
[144] Board Decision at paras. 71-78, A.R. Vol. I, pp. 27-30; SODRAC-99, R.R. Vol. VIII, p. 1; SODRAC-99B, R.R., Vol. VIII, p. 102; Leclerc Testimony, Transcripts Vol. 8, June 10, 2010, pp. 1539, 1542-1543, 1553-1559, R.R., Vol. IV, pp. 138, 141-142, 152-153; SODRAC-194, R.R. Vol. VI, p. 145; SODRAC-195, Vol. VI, p. 149; Lavallée Testimony, Transcripts, vol. 5, June 7, 2010, p. 930, R.R. Vol. III, p. 146, Fortier Testimony, Transcripts, vol. 5, June 7, 2010, p. 908 and 848-857, R.R. Vol. III, pp. 124, 64, 73: no buy out for SODRAC or foreign societies; always "clauses de réserve": pp. 848-857
[145] SODRAC-16, p. 2, 3rd para, art. 1.02, 4, 6.01, A.R., Vol. IV, pp. 2-5.
[146] A.F. at para 103.
[147] Board's Licence, s. 2.01a), (A.R. Vol. I, p. 93) and the payment is provided in s. 5.02 (A.R. Vol. I, p. 95).
[148] S. 2.01e) (A.R. Vol. I, p. 94) and the payment is provided in s. 5.03(1) (A.R. Vol. I, pp. 95-96).
[149] *Netupsky et al. v. Dominion Bridge Co. Ltd.*, [1972] SCR 368, R.B.A., Vol. I, Tab 16.
[150] *Ibid.*, p. 377
[151] *Ibid.*, pp. 371-372.

intent of the parties to find that this right is instead "implied" in another right granted separately for a different purpose.

(v) There is no double-dipping

97. There is no basis to CBC's misleading suggestion that SODRAC "double dips" by collecting royalties at "different stages of the same economic activity.[152]

98 There are two distinct economic activities: television production, which involves synchronization by the producer, and broadcasting, which involves broadcast-incidental copying by the broadcaster. When CBC acts as producer and broadcaster, it engages in two separate activities and therefore pays royalties for both type of copies. Where it acts only as broadcaster, it pays only for broadcast-incidental copies, synchronization copies having been made and paid for by producers.

99. Further and importantly, the discount in the Board Licence *ensures* that there is *no* double payment.[153] If the right to make broadcast-incidental copies of a given musical work has been cleared in the producer's synchronization licence, CBC's royalties may be discounted accordingly.[154]

100. Ultimately, it appears that CBC's true objection is not to the need for two authorizations, but to the Board's decision to fix royalties separately for each type of copy rather than "implying" one in the other and fixing royalties in a single lump sum. Since the rate for synchronization copies is not under judicial review, this amounts to a challenge to the Board's valuation of broadcast-incidental copies, which is addressed in section B below.

(vi) Technological neutrality has no place in this analysis

101. CBC's reference to a "technologically-neutral approach to a synchronization licence" is meaningless. The decisions of this Court make clear that technological neutrality is a principle of statutory interpretation used to analyze the *Act*.[155] It has never been recognized, and should not be used, as a principle to interpret a licence.

102. In any event, technological neutrality would provide no basis to "imply" the right to make broadcast-incidental copies into a synchronization licence. All of the relevant reproduction

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[152] A.F. at para. 83.
[153] Board's Licence, s. 5.03(2), A.R. Vol. I, p. 96
[154] FCA at paras.70-71, 79-80, A.R. Vol. I, pp. 161, 164; Board Decision at paras. 112-114, A.R. Vol. I, pp. 41-42.
[155] *ESA*, *supra* note 44 at. paras 9, 49.

licences apply regardless of the media on which synchronization or broadcast-incidental copies are made and regardless of the means used to broadcast them. The shift to digital technology has not changed the fact that broadcast-incidental copies are made by broadcasters, not by producers, and that a licence to make them is not necessary to allow production and delivery of programs to a broadcaster. In other words, both existing synchronization licences and the Board's Licence "apply equally between traditional and more technologically advanced forms of the same media".[156] To determine that the right to make broadcast-incidental copies is now implied by the grant of a synchronization licence would in fact *offend* the principle of technological neutrality by forcing SODRAC to adopt a different approach to licensing solely because of a technological change.

(vii) SODRAC cannot be compelled to overlook CBC's liability for making broadcast-incidental copies

103. The Board's decision to include a separate authorization and royalty for broadcast-incidental copies in the Board Licence was reasonable. Under section 70.2 of the *Act*, the Board does not certify a tariff applicable to all users within a given group; it settles a private dispute between a collective society and a user who are unable to reach an agreement. In this case, CBC acknowledged that the arbitration by the Board was necessary.[157] Since the Board finds itself substituted for the will of the parties, it can impose on them whatever they could have agreed to themselves.[158] However, the Board cannot and will not eliminate the liability of a user who makes a copy.[159] The 1992 Licence required CBC to pay for all the broadcast-incidental copies it made. The Board simply continued that obligation. The only material difference is that the Board chose to value broadcast-incidental copies separately from synchronization, rather than setting a single lump-sum royalty for both. Doing so was in no way unreasonable.

104. By requiring CBC to obtain a licence and pay a royalty for the broadcast-incidental copies *that it alone makes*, rather than compelling SODRAC to require third-party producers to

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[156] *Robertson*, *supra* note 106 at para. 49; *Rogers*, *supra* note 91 at para. 39; *ESA*, *supra* note 44 at para. 5; *SOCAN v. Bell,* [2012] 2 S.C.R. 326 at para. 43.
[157] A.R. Vol. II, p. 9.
[158] *Copyright Board Decision in MusiquePlus*, November 16, 2000, p. 1 3rd para., p. 17 3rd para., p. 18 2nd para. [*MusiquePlus*], R.B.A., Vol. I, Tab 30; Roger Hughes & Susan Peacock, *Halsbury's Laws of Canada: Copyright* (LexisNexis, 2011) at para HCY-51, A.R. Vol. IV, Tab 36, p. 209; Stéphane Gilker, "Statut des ententes négociées hors du processus de la Commission" in Ysolde Gendreau, ed, *Institutions administratives du droit d'auteur* (Yvon Blais, 2002) 101, A.R. Vol. III, Tab 29, p. 125, 1st para.
[159] Board Decision at para. 62, A.R. Vol. I, pp. 24; The Board applied the same principle in *CSI Online March 2007*, at para. 119, R.B.A. Vol. I, Tab 31.

obtain and pay for those licences on CBC's behalf, the Board Licence is also entirely consistent with the principle of divisibility of copyright and the decisions of this Court.

105. As this Court has affirmed repeatedly, copyright is an exclusively statutory creation.[160] The clear language of the *Act* is determinative.[161] In this case, the relevant language is found in ss.13(4) and (6) which, as Abella J.[162] wrote in *Euro-Excellence*, entitles a right owner to divest itself of any interest in copyright, in whole or in part, either by assignment or by licence.[163] It is well understood that the words "either wholly or partially", along with the right to "grant *any* interest in the right by licence", give the owner the right to divide his copyright as to the mode of reproduction of a work.[164] The copyright owner may license each right, or any part of each right, separately. He may also impose a broad range of limitations on use which allows for considerable flexibility in the commercial exploitation of his rights.[165]

106. As Abella J observed in Euro-Excellence, these entitlements are "perfectly consistent with the statutory scheme" of which vertical and horizontal divisibility of copyright is a hallmark.[166] Quoting with approval from *Théberge*, she emphasized that the economic objectives of copyright are furthered by the transferability of full or partial copyright interests.[167] In any event, it must be assumed that Parliament enacted ss. 13(4) and (6) having turned its mind to the public interest and the possibility that grants of partial rights to licensees would give rise to separate royalties.[168] Unless and until Parliament provides otherwise, the courts must respect this policy choice which allows right owners to issue multiple licences for the exploitation of a work.[169]

(viii) The Board Licence is not contrary to the public interest

107. SODRAC's authority to limit its licences to the copies that a licensee actually makes is a statutory right. It is not, as CBC suggests, an aberration that the Board and the FCA were

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[160] *Euro-Excellence*, *supra* note 77 at para. 113, R.B.A. Vol. I, Tab 11.
[161] *Ibid.* at para. 114.
[162] Dissenting but not on this point.
[163] *Euro-Excellence, supra* note 77 at para. 116, R.B.A. Vol. I, Tab 11.
[164] *Bouchet v Kyriacopoulos*, 45 C.P.R. 265, R.B.A. Vol. I, Tab 5, cited in *Euro-Excellence*, *supra* note 77 at para. 117.
[165] *McKeown*, *supra* note 53, pp. 19-8, 19-9, 19-10 R.B.A. Vol. II, Tab 38.
[166] *Euro-Excellence, supra* note 77 at para. 117 R.B.A. Vol. I, Tab 11.
[167] *Ibid.*, referring to *Théberge*, *supra* note 97 at para. 12, R.B.A. Vol. I, Tab 28.
[168] *Euro-Excellence*, *supra* note 77 at para. 10.
[169] *Ibid.* at para 13.

"co-opted" to approve contrary to the public interest.[170] In fact, the only interest affected was CBC's pecuniary interest in paying for the copies it makes, rather than having others pay on its behalf.

108. There is no prospect that the Board Licence will allow SODRAC to impose undue control over the use of works by CBC or others. The *Act* does not require CBC to agree to a rate set independently by SODRAC. It provides for agreements or arbitrated licences determined by the Board through a fair process. The Board regulates the balance of market power between copyright holders and users [171] and, in this case, heard extensive evidence from both sides before fixing the terms of a licence where the user and the collective society could not agree.

109. The suggestion that the Board Licence leads to "inefficiencies" is similarly without merit. It makes no difference for a producer to pay somewhat less, and for CBC to pay somewhat more, because the right to make broadcast-incidental copies is licensed to the latter rather than the former. That would be true even if CBC did not produce its own programs and therefore had to write one extra cheque to SODRAC to cover its broadcast-incidental copying.

110. Finally, CBC is wrong to suggest that the Board Licence risks creating an "anticommons" that could impair users' ability to effectively exploit SODRAC's repertoire. An "anticommons" arises when multiple owners each have a right to exclude others from a scarce resource and no one has an effective privilege of use.[172] In this case: (i) there is one owner of the reproduction right, SODRAC, who has effective control and can license the use at issue; (ii) a licence is readily available from SODRAC upon payment of the appropriate royalty agreed with the user or determined by the Board through a fair process; and (iii) SODRAC does not exercise any undue control over the downstream use of the work: CBC, and any other licensed user, can make, store, and use any number of copies, in any format, so long as it pays the appropriate royalty.

B. THE BOARD'S DETERMINATION OF RATES FOR BROADCAST-INCIDENTAL COPIES WAS REASONABLE

111. The CBC submits that, if it requires a licence for broadcast-incidental copies, this Court should either impose a nominal royalty of $100 in lieu of the rates fixed by the Board or return the matter to the Board for determination in accordance with the principle of technological

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[170] A.F. at para. 107.
[171] A.B.A. Vol. III, Tab 28, p. 211, 2nd para.
[172] Michael Heller, "The Tragedy of the Anticommons: Property in Transition from Marx to Markets" (1998) 111 Harvard L. Rev. 621, A.B.A. Vol III, Tab 33, at p. 624.

neutrality.[173] SODRAC submits that both these requests should be dismissed. The Board's determinations as to rates for broadcast-incidental copies are well supported by evidence. The Board did not rely on a conjecture of value based solely on the number of copies made, as CBC suggests. It based its decision on a detailed and reasonable appraisal of the economic value of CBC's actual reproduction activity. It is a gross distortion of the principle of technological neutrality to suggest that it should pre-empt, or even colour, the sort of holistic economic analysis undertaken by the Board.

(a) Standard of Review: Reasonableness

112. The FCA correctly held that the Board's decisions on economic questions are reviewable on the standard of reasonableness because they inevitably involve questions of fact: the weight to be given to the evidence heard by the Board and the conclusions to be drawn from that evidence. The task for the reviewing court is to determine whether the royalties "fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law".[174]

113. Setting royalties for protected uses is at the heart of the Board's specialized jurisdiction. As this Court has previously determined, "the working out of the details of an appropriate royalty tariff [...] lies within the core of the Board's mandate".[175] Assessing the economic value of copyrights engages a field of knowledge and expertise that the courts do not share.[176] Rate decisions are questions of "fact, discretion or policy," which attract deference automatically, or, at minimum, engage questions "where the legal and factual issues are intertwined and cannot be readily separated," again attracting deference.[177]

114. CBC asserts that the Board's alleged failure to apply the principle of technological neutrality in setting the royalties converts this issue into a pure question of law. That submission is without merit. While the *legal* principle of technological neutrality is relevant to the interpretation of the *Act*, there is no support for the proposition that, once it is established that a right is engaged, the Board is bound to apply a corresponding *economic* principle of

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[173] A.F. at para. 114.
[174] FCA at para. 52 A.R. Vol. I, pp. 155; *Dunsmuir v. New Brunswick,* [2008] 1 S.C.R. 190 [*Dunsmuir*], at para. 47 R.B.A. Vol. I, Tab 9.
[175] *CAIP*, *supra* note 94 at para. 49, R.B.A. Vol. I, Tab 25.
[176] *Rogers*, *supra* note 91 at paras. 15-20 (majority, Rothstein J.), at para. 66 (minority Abella J.), R.B.A. Vol. I, Tab 22.
[177] *Dunsmuir supra* note 174 at para. 53, R.B.A. Vol. I, Tab 9; *Bell Canada v. Bell Aliant Regional Communications*, [2009] 2 S.C.R. 764 at paras. 36, 38, 40, R.B.A. Vol. I, Tab 2; *FWS Joint Sports Claimants Inc vs Border Broadcasters*, 2001 FCA 336 at para. 12, R.B.A. Vol. I, Tab 12.

technological neutrality in determining rates. The determinations of the value of a copy or the quantum of a royalty are not legal matters to which technological neutrality can be usefully applied.

115. While "technological neutrality requires that, absent evidence of Parliamentary intent to the contrary, [the courts] interpret the *Act* in a way that avoids imposing an additional layer of royalties based solely on the *method of delivery* of the work to the end user,"[178] it has no bearing on the *quantum* of royalties that should be paid once it has been determined that the right is engaged. It falls to the Board to determine an appropriate royalty rate based on its assessment of the evidence before it. Contrary to CBC's submissions, technological neutrality does not supersede or eliminate factors found by the Board, relying on economic expertise, to be relevant to that determination. It is for the Board to weigh each economic factor. Forcing the Board to apply an ill-defined economic principle of technological neutrality (of which there was no evidence before it) would improperly fetter its discretion.[179]

116. The authorities cited by CBC do not support its position. While the majority in *ESA* cautioned against imposing a *gratuitous* cost for the use of more efficient, Internet-based technologies,[180] it did so in the context of determining that the communication right was not engaged by a digital download. *ESA* did not address what the value of that right would have been had it in fact been exercised, nor did it hold that a cost arising from increased reliance on a protected right would be "gratuitous".

117. Similarly, when the Court in *Rogers* found that, "[if] the nature of the activity in both cases is the same, albeit accomplished through different technical means, there is no justification for distinguishing between the two for copyright purposes,"[181] it did so in the context of ensuring that a user could not avoid liability by effecting multiple individual transmissions rather than a single simultaneous transmission to multiple recipients. It did not hold that technological neutrality requires the Board to ignore evidence indicating that the use of copy-dependent technology makes the exercise of a given right more *valuable* to the same user.

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[178] *ESA*, *supra* note 44 at para. 9, R.B.A. Vol. I, Tab 10.
[179] *R. v. Nasogaluak,* [2010] 1 S.C.R. 206 at para. 46 R.B.A. Vol. I, Tab 18; *R. v. Beaudry,* [2007] S.C.R. 190 at para. 45, R.B.A. Vol. I, Tab 17; *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, at para. 37, R.B.A. Vol. I, Tab 26; *Maple Lodge Farms Maple Lodge Farms v. Government of Canada*, [1982] 2 S.C.R. 2, pp. 6-7, R.B.A. Vol. I, Tab 14.
[180] *ESA*, *supra* note 44 at para. 9, R.B.A. Vol. I, Tab 10.
[181] *Rogers*, *supra* note 91 at para. 29.

118. In any event, it is demonstrably wrong for CBC to suggest that the decisions below are founded solely on the proposition that "the mere adoption of digital technology justified a massive increase in copyright royalties."[182] In fact, the increase to CBC's *total* royalties was based on a detailed and reasonable appraisal, as discussed below, of the economic value of CBC's reproduction activity which had increased as a result of a combination of factors, including the growth of SODRAC's repertoire since 1992, the exploitation of that repertoire through additional channels and methods of distribution.[183] The *total* royalty payments to SODRAC still remain a minimal amount in view of the 1.8 billion annual revenue of CBC.[184]

(b) The Board set rates based on a solid evidentiary foundation

119. By attempting to reduce the Board's valuation approach to a single aphorism – "more copies means more value and thus, more royalties" – CBC fundamentally mischaracterizes both decisions below. It is also untrue to suggest, as CBC does, that "the Board's tariff relies on a conjecture of value based solely on the number of copies made."[185]

120. In fact, the Board based its decision on extensive evidence that demonstrated both the extent to which CBC reproduced works in the SODRAC repertoire and the economic benefits that it derived from those reproductions. After hearing evidence from 22 witnesses – including five experts, four of whom testified about the economic value of copies and the Board's use of ratios[186] and one of whom, an expert on broadcast technology, testified on the nature, importance and extent of copying[187] – the Board found that the use of copy-dependent technologies created significant value for broadcasters, and consequently that some of the benefits associated with such technologies should be reflected in reproduction royalties.[188]

121. Those findings are grounded firmly in the evidence and ought not to be disturbed. Merely because the Board adopted some conclusions of SODRAC's witnesses does not lead to an

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[182] A.F. at para. 67.
[183] See paras. 16-18 above.
[184] FCA Interim Order at para. 22, A.R. Vol. III, p. 55
[185] A.F. at para. 117
[186] Marcel Boyer, Paul Audley, Gerry Wall and Bernie Lefebvre, see Board Decision at paras. 36, 39 and 46.
[187] Dr. Murphy: SODRAC-82, R.R. Vol. VII, p. 1; SODRAC-82A, R.R. Vol. VIII, p. 78; SODRAC-181, R.R. Vol. IX, p. 101; Murphy Testimony, transcripts, June 1, 2010 Vol. 1 (public) and vol. 1 confidential, R.R. Vol. II, pp. 2 and 28.
[188] Board Decision at para. 81, A.R. Vol. I, p. 31.

unreasonable result justifying the Court's intervention in this highly specialized area. The FCA correctly held that the Board's decision fell within the range of possible, acceptable outcomes[189].

(i) The Board based its determination on the economic benefits derived from the right to make broadcast-incidental copies

122. CBC's insistence that its "underlying communication activity" has not changed since the adoption of digital technology[190] overlooks the fact that its underlying *reproduction* activity has changed dramatically and not only as a result of technological advancements. By looking at the benefits CBC actually derives from the right to make broadcast-incidental copies, and valuing the right accordingly, the Board quite properly focused on the economic "what" rather than ignoring it, as CBC proposes.[191]

123. The Board found that broadcast-incidental copies have real and independent value. They result in clear benefits and efficiencies for the broadcaster even when they do not generate direct profits. These findings were grounded firmly in the evidence, including that:

- Digital reproductions increase flexibility, transmission quality, and efficiency, creating new opportunities to reach audiences and monetize content delivery;[192]
- Broadcasters make investments in new technology and equipment to stay current with the competition, to maintain market share or even to minimize losses, to stay relevant[193] and protect their core business;[194] and
- From an economic perspective, there is always a direct, identifiable and measurable relationship between an input and its benefits. If broadcast-incidental copies did not add value, broadcasters would not make them.[195]

124. Indeed, broadcasters have long acknowledged that broadcast-incidental copies have value and are virtually essential to their operations.[196] When they lobbied for exemptions for broadcast-incidental copies, they did so on the basis that these copies were indispensable to their operations

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[189] FCA at para. 29, A.R. Vol. I, p. 146
[190] A.F. at paras 117-119, referring to *Rogers*, *supra* note 91 at para. 40.
[191] A.F.at para. 119.
[192] SODRAC-82 at para. 89, R.R. Vol. VII, p. 58; SODRAC-181 pp. 8-10, R.R. Vol. IX, pp. 108-110; Murphy Testimony, Transcripts Vol. 1, June 1, 2010, pp. 33-37, R.R. Vol. II, pp. 19-23.
[193] Wall transcript p. 2410, A.R. Vol. III p. 206; see also Meloul Transcripts vol. 10 at pp. 1990:20-1991:4 to which the Board refers to specifically in para. 81 R.R. Vol. IV, pp. 169-170.
[194] Board at paras. 50-56, 81, A.R. Vol. I, p. 21-23, 31
[195] SODRAC-57A at paras. 4, 12, 17, R.R. Vol. V, pp. 124, 128, 130, Boyer Testimony, Transcripts Vol. 1, June 1, 2010, pp. 163-164, 167, R.R. Vol. II, pp. 127-128, 131.
[196] *Bishop*, *supra* note 1 p. 480 e f, R.B.A Vol. I, Tab 4; *MusiquePlus*, *supra* note 158, p. 8 (R.B.A. Vol. I, Tab 30) referring to *Télé-Métropole* v. *Bishop*, FCA, 18 C.P.R. (3d) 257, p. 260 Justice Pratte, R.B.A Vol. I, Tab 27.

and were needed to stay competitive.[197] CBC itself readily admits that its operations would be "paralyzed" without the right to make broadcast-incidental copies.[198] The evidence is simply incompatible with CBC's claim that these copies have no positive economic value.

125. Having noted the "clear benefits arising from the copy-dependent technologies," and the fact that "these technologies involve the use of additional copies," the Board reasonably concluded, consistent with its prior rulings[199] and the evidence in this case, that rights holders are entitled to a fair share of the economic benefits generated by copy-dependent technology.[200] Contrary to CBC's submissions, the Board's conclusions were not based on "crudely quantitative" reasoning; at no point in its reasons did the Board indicate that the *number* of copies made by CBC determined in any way the *value* of those copies. Rather, its assessment of value was based on its appraisal of the overall economic benefit conferred by the right to copy. While CBC may disagree with that appraisal, it was not unreasonable.

126. The policy underlying the Board's decision is equally sound. The CBC's expert, Dr. Wall, testified that, whenever a business adopts new technology, it does so with a view to improving its financial position, but that it is often difficult to link that change to a measurable increase in profitability.[201] It does not follow, however, that the technology should be available to the business for free. Further, Professor Boyer, testifying for SODRAC, explained that the proposition that compensating rights holders would hinder the implementation of new technology is fundamentally wrong. While the same objection could be raised in relation to any participant involved in implementing the technology, it would be surprising if a computer manufacturer or programmer (or, for that matter, a landlord or public utility) were expected to forgo compensation for goods or services supplied for fear of reducing the incentive to invest in the technology.[202] When the owner of copyright in digital broadcasting software requests a royalty from a broadcaster in exchange for the right to use the product, it is not considered to be a "hold up", a disincentive, or an inefficiency requiring the royalty to be reduced or forgone.

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[197] SODRAC-159A pp. 1,-2, R.R. Vol. VI, pp. 122-123; SODRAC-150 pp. 13-14, R.R. Vol. VI, pp. 109-110; SODRAC-150 p. 5 R.R. Vol. VI, p. 101.
[198] A.F. at paras.89, 123.
[199] The Board refers in para. 51 to its *Decision in Commercial Radio 2010*, July 9, 2010, R.B.A. Vol. II, Tab 33, See also Board's *Decision in Commercial Radio* 2003, March 28 2003, pp. 4 and 11 R.B.A. Vol. II, Tab 32, *MusiquePlus*, *supra* note 158 pp. 8-9 R.B.A. Vol. I, Tab 30.
[200] Board Decision at paras. 51-56, 81 A.R. Vol. I, p. 22-23, 31
[201] Wall transcript p. 2411, A.R. Vol. III p. 207.
[202] Boyer Testimony, Transcript vol 1, June 1, 2010, pp. 173-175, R.R. Vol. II, pp. 137-139; SODRAC-57A paras. 15, 13 R.R. Vol. II, pp. 129, 128.

Similarly, owners of copyright in musical works should not be expected to license their rights for free simply because new technologies are involved.[203]

(ii) The Board's use of a ratio to determine the quantum of the royalty was not unreasonable

127. The Board determined the rates for broadcast-incidental copies based on its longstanding practice of using ratios between the communication right and the reproduction right.[204] The FCA found that the Board's decision to do so was based on the evidence before it and within its "expertise in the setting of appropriate royalties as a result of its long experience in doing so".[205] The FCA determined that the Board had not come to an unreasonable conclusion and, as such, deferred to its expertise. In SODRAC's respectful submission, this Court should do the same.

128. Contrary to CBC's submissions, there is nothing "arbitrary" about the Board's use of ratios. The Board heard evidence that the ratio methodology is grounded in sound economic theory, allowing the Board to analyze the effective use of each of the two rights and compare their value to the user. [206] The particular ratio chosen by the Board is anything but "arbitrary". Although the ratio has its roots in radio tariffs, the Board noted that it was also used as the basis of an agreement on broadcast-incidental copies between CBC and another collective, which served as confirmation of market acceptance[207]. The Board provided detailed reasons for rejecting CBC's claim that the radio ratio was not appropriate for use in television.[208] Similarly, the use of the broadcaster's revenues as the rate base was supported by the evidence[209] and also resulted from the Board's finding that it was appropriate to use the same base rate as SOCAN.[210]

129. Finally, it is worth noting a telling inconsistency in the CBC's position: even as it warns of the dangers of the "more copies, more value" approach that it mistakenly attributes to the

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[203] *Ibid.*
[204] *Commercial Radio 2003*, *supra* note 199; *Tariff 24 2006*, August 18, 2006, R.B.A., Vol. II, Tab 37, *Online Music services 2007*, October 18, 2007, R.B.A Vol. II, Tab 34; *Tariff 16 2009,* June 19, 2009, R.B.A. Vol. II, Tab 36; SODRAC-57 at paras. 11-6, R.R. Vol. V, pp. 76-81.
[205] FCA, at paras. 53, 59, A.R. Vol. I, pp. 22, 146
[206] SODRAC-57 at paras. 9, references to the Board's decisions in paras. 10-15, 16, 48-50, R.R. Vol. V, pp. 76-81, 88; Boyer Testimony, Transcript Vol, 1, June 1, 2010, pp. 142-161, R.R. Vol. II, pp. 106-125.
[207] Board Decision at paras. 98, 99, A.R. Vol. I, p. 37.
[208] Board at paras. 107-108, A.R. Vol. I, pp. 39-40; SODRAC-57 at para. 16C), R.R. Vol. V, pp. 80-81; Board at para. 50, A.R. Vol. I, p. 21; SODRAC-82A at para. 2; SODRAC-181, p. 31; Murphy Testimony, Confidential transcripts Vol. 1, June 1, 2010, p. 31, R.R. Vol. II, p. 61.
[209] Boyer Testimony, vol. 1, June 1, 2010, pp. 164-167, R.R. Vol. II, pp. 128-131; SODRAC-57A at para. 4, 2nd para., R.R. Vol. V, p. 124.
[210] Board at para. 108, A.R. Vol. I, p. 40

Board,[211] including the perceived risk that more copying in the future might lead to greater royalties, it criticizes the Board for using ratios to set a reproduction royalty that does *not* depend on the number of copies made.[212] This simply demonstrates CBC's fundamental misunderstanding of the Board's approach, which is in fact based on a reasonable and well-founded appraisal of the overall value of the right to make broadcast-incidental copies.

C. THE COURT SHOULD NOT INTERFERE WITH THE BOARD INTERIM LICENCE DECISION

130. CBC claims that, if the Board Licence is upheld by this Court, it should not be continued on an interim basis. First, it argues that the Board applied the wrong test in granting the Interim Licence[213] and second, that the blanket synchronization component part of the Interim Licence was determined without jurisdiction. Both of these claims are without merit.

(a) Standard of review: reasonableness

131. The Board has a discretionary power to issue interim orders.[214] In the context of an arbitration by the Board, this discretion is not, unlike the interpretation of the *Act*, shared with the courts.[215] Therefore, the standard of review is reasonableness. Furthermore, in matters of interim orders, even on questions of jurisdiction, the reviewing court will *not* interfere if the ongoing process allows the issues to be raised and an effective remedy to be granted.[216]

132. In any event, CBC's attempt at transforming the issue of an interim blanket licence into a matter of jurisdiction is ill-founded. True questions of jurisdiction are limited to questions of the authority of a tribunal to decide a matter.[217] The Board's determination of interim terms and conditions of a licence including its form (a transactional or a blanket license) is not a true question of jurisdiction: this is merely an exercise of the Board's authority not a decision with respect to its authority.

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[211] A.F. at paras. 116-123.
[212] A.F. at paras. 127-129
[213] Board Interim Decision, January 13, 2013, A.R. Vol. I, p. 122.
[214] S. 66.51 of the *Act*
[215] *Rogers*, *supra* note 91 at para. 15, R.B.A. Vol. I, Tab 22.
[216] *Canada (Border Services Agency) v. C.B. Powell Limited,* 2010 FCA 61 at para. 33, R.B.A. Vol. I, Tab 7; *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, [2012] 1 S.C.R. 364 at paras. 36, 52 R.B.A. Vol. I, Tab 13.
[217] *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, [2011] 3 S.C.R. 654 at para. 33, R.B.A. Vol. I, Tab 1; *Dunsmuir*, supra note 174 at para. 59, R.B.A. Vol. I, Tab 9.

133. Contrary to CBC's claims the Board had authority to issue an interim blanket synchronization licence. The jurisdiction of the Board to issue a licence does not depend on the consent of one party but on the reproduction right being engaged and a request from one interested party.[218] Although CBC may stop synchronizing works thereby avoiding the need for a licence, it will continue to require a licence unless and until it stops doing so, and the Board has the authority to issue a licence. As the FCA correctly found, to make the Board's remedial jurisdiction under section 70.2 dependent upon the consent of a user, regardless of the fact that the user makes copies, would be at odds with its mandate to resolve disputes.[219]

134. It is worth nothing that the order sought by CBC is to replace the Interim Licence with an order that the 1992 Licence continues in force[220]. However, the 1992 Licence is *also* a blanket licence: it authorizes all reproductions by CBC including synchronization of any work in the repertoire.[221] This request is incompatible with the argument that an interim blanket synchronization licence is "imposed" on CBC.

(b) The Board applied the right test

135. The Board issued an interim licence to avoid a legal vacuum and maintain the status quo, subject to its consideration of whether a change to the status quo was warranted on a balance of inconvenience.[222] These are reasonable principles to apply in making an interim order: in fact, they are based closely in the principles enunciated by this Court in *Bell Canada v. Canada (CRTC)*.[223]

136. The Board's application of these principles was similarly reasonable. If CBC's appeal is dismissed, it cannot continue to maintain that the status quo is anything other than the Board Licence. Even if the appeal is allowed, the Board Licence remains in effect other than the sections dealing with broadcast-incidental copies at issue in the appeal.[224] As such, it is unreasonable to treat the 1992 Licence as the status quo, as CBC proposes.

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[218] S.70.2 of the *Act*, R.F. p. 59.
[219] FCA at para 67, A.R. Vol. I, pp. 159-160.
[220] A.F. at para. 160.
[221] SODRAC-16, art. 2, A.R. Vol. IV, p. 3
[222] Board Interim Decision at paras. 18-19 A.R. Vol. I, pp. 126-127.
[223] *Bell Canada v. Canada (CRTC)* [1989] 1 S.C.R. 1722, p. 1754 [*CRTC*], R.B.A. Vol. I, Tab 3.
[224] Sections 2.01e), 5.03, A.R. Vol. I, p. 94-95.

(c) The Interim Licence causes no prejudice to CBC

137. Neither the Board nor the FCA refused to consider the CBC's arguments with respect to the 2012 Amendments or to its objections to the blanket synchronisation component of the Interim Licence. The Board simply determined the preferable process for hearing those arguments – reasoning that the issues ought to be considered at a full hearing, not on a preliminary basis.[225] This decision is reasonable since the Interim decision can be modified in its entirety in the final decision, as recognised by the FCA.[226]

138. The Board undertook a very careful examination of the issue of the blanket synchronization component of the licence. The Board specifically ensured to issue an Interim order that would *not pre-empt* either form of licence proposed by the parties to be adopted in the final licence.[227] The Board's reasons with respect to why it came to accept, on an interim basis, one form of licence over another are clear, and the decision falls within a range of reasonable outcomes.

139. The Board will hear CBC's arguments on the merits including the significance of changes to the *Act* and its objections to the blanket synchronization component in the full arbitration now pending in relation to the proposed licence for 2012-2016. The Interim Licence therefore causes no prejudice to CBC and allows its arguments to be heard in a timely and meaningful fashion.

PART IV – COSTS

140. SODRAC requests its costs both in this Court and in the Federal Court Appeal.

PART V – ORDERS SOUGHT

141. SODRAC respectfully submits that the appeal from the judgments of the Federal Court of Appeal in files A-516-12 and A-63-13 should be dismissed.

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[225] Board Interim Decision, at para. 20, A.R. Vol. I, p. 127: Board referring to reasons in a similar case: Commercial *Radio decision December 2012*, at paras. 11-14, R.B.A. Vol. II, Tab 35.
[226] *CRTC, supra* note 223, pp. 1755, 1761, R.B.A. Vol. I, Tab 20.
[227] Board Interim Decision at paras. 23-30, A.R. Vol. I, pp. 128-130.

143. In the alternative, if the appeal in file A-516-12 is allowed, SODRAC respectfully submits that the order of this Court should be restricted to setting aside only paragraph 2.01e) to the extent that it deals with television and section 5.03 of the Board Licence.

Dated at Montreal, Quebec this 20th day of February, 2015

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PART VI – TABLE OF AUTHORITIES

Case Law

Academic and Secondary Sources

PART VII - LEGISLATION	**REFERRED TO AT PARAS**
Canada	
Copyright Act, R.S.C., 1985, c. C-42, ss. 3, 13, 30.8, 30.9, 70.2	38, 39, 40, 42, 43, 50, 52, 53, 57, 82, 103, 105, 106, 133
Copyright Modernization Act, S.C. 2012, c. 20, ss. 33, 34	49
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Copyright Act 1968, No. 63, 1968, ss. 47, 70, 107 (Australia)	60
Copyright Act 1994, 1994 No. 143, s. 85 (New Zealand)	60
European Union Directive No 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, s. 5(2)d)	44
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