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Technological Neutrality: (Pre)Serving the Purposes of Copyright Law

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Abstract:
In the realm of law, neutrality is widely hailed as a fundamental principle of fairness, justice and equity; it is also, however, widely criticized as a myth that too often obscures the inevitable reality of perspective, interest or agenda. It should come as little surprise, then, that the principle of technological neutrality, recently employed by the Supreme Court of Canada when applying copyright law to online activities, seems similarly fundamental in the copyright realm—but also largely mythical and potentially obfuscatory. In what is now dubbed the Supreme Court's "copyright pentalogy"—five copyright judgments released concurrently by the Court in July 20121—the unprecedented importance accorded by the Court to the principle of technological neutrality is clear; what remains unclear is precisely what "technological neutrality" means, why it matters, and whether or how it can (or should) ever be attained.

This chapter aims to critically assess the significance of the principle and its potential to guide the future development of copyright law and policy in Canada. In Part 2, I set out the various shades of meaning that can be attached to technological neutrality, first as a principle of sound regulation, and then as a principle of statutory interpretation by the courts. I review, in Part 3, the reasons delivered by the Justices in three of the five cases to examine the various and divergent ways in which the principle of technological neutrality was defined and rationalized by members of the Court. I proceed to explore the application of the principle and its role in resolving the legal issues before the Court, drawing connections between conceptualizations of the principle and its interpretive impact, and focusing on its capacity to support the extension and/or circumscription of owners' and users' rights. In Part 4, I consider whether the role accorded to technological neutrality as a guiding principle is justifiable or appropriate in the context of Canadian copyright policy. Arguing that its justification is found in, and flows from, the concept of balance at the heart of the copyright system, I proceed to offer some thoughts on its potential significance in the future of Canadian copyright law and in light of the recent amendments to the *Copyright Act*.2 Part 5 concludes that the new emphasis placed by the Court on technological neutrality as a guiding principle is an important and positive development for Canada's copyright system. The caveat, however, is that the principle cannot perform this role effectively if conceived (or rhetorically invoked) as a limited principle of formal non-discrimination that merely justifies the extension of copyright's reach. Rather, I argue, it must be conceived in a functional sense, shaping copyright norms to produce a substantively equivalent effect across technologies, with a view to preserving the copyright balance in the digital realm.

Keywords:
Canadian copyright policy, copyright law, technological neutrality

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CARYS J. CRAIG

1. Introduction

In the realm of law, neutrality is widely hailed as a fundamental principle of fairness, justice and equity; it is also, however, widely criticized as a myth that too often obscures the inevitable reality of perspective, interest or agenda. It should come as little surprise, then, that the principle of *technological* neutrality, recently employed by the Supreme Court of Canada when applying copyright law to online activities, seems similarly fundamental in the copyright realm—but also largely mythical and potentially obfuscatory. In what is now dubbed the Supreme Court's "copyright pentalogy"—five copyright judgments released concurrently by the Court in July 2012[1]—the unprecedented importance accorded by the Court to the principle of technological neutrality is clear; what remains unclear is precisely what "technological neutrality" means, why it matters, and whether or how it can (or should) ever be attained.

This chapter aims to critically assess the significance of the principle and its potential to guide the future development of copyright law and policy in Canada. In Part 2, I set out the various shades of meaning that can be attached to technological neutrality, first as a

principle of sound regulation, and then as a principle of statutory interpretation by the courts. I review, in Part 3, the reasons delivered by the Justices in three of the five cases to examine the various and divergent ways in which the principle of technological neutrality was defined and rationalized by members of the Court. I proceed to explore the application of the principle and its role in resolving the legal issues before the Court, drawing connections between conceptualizations of the principle and its interpretive impact, and focusing on its capacity to support the extension and/or circumscription of owners' and users' rights. In Part 4, I consider whether the role accorded to technological neutrality as a guiding principle is justifiable or appropriate in the context of Canadian copyright policy. Arguing that its justification is found in, and flows from, the concept of balance at the heart of the copyright system, I proceed to offer some thoughts on its potential significance in the future of Canadian copyright law and in light of the recent amendments to the *Copyright Act*.[2] Part 5 concludes that the new emphasis placed by the Court on technological neutrality as a guiding principle is an important and positive development for Canada's copyright system. The caveat, however, is that the principle cannot perform this role effectively if conceived (or rhetorically invoked) as a limited principle of formal non-discrimination that merely justifies the extension of copyright's reach. Rather, I argue, it must be conceived in a functional sense, shaping copyright norms to produce a substantively equivalent effect across technologies, with a view to preserving the copyright balance in the digital realm.

2. Understanding Technological Neutrality and Its Shades of Meaning

2.1 Technological Neutrality as a Regulatory Starting Point

Technological neutrality is an inherently appealing concept for policy makers in the digital age. At its core, the concept implies that regulations can and should be developed in such a way that they are independent of any particular technology, neither favouring nor discriminating against specific technologies as they emerge and evolve. From a principled perspective, neutrality and non-discrimination in the law are almost always laudable goals; from a practical perspective,

technologically neutral regulation holds the promise of sustainable laws in a time of rapid technological change. No doubt owing to this intrinsic appeal, the principle of technological neutrality is regularly invoked as a regulatory starting point in policy documents from around the globe,[3] but typically with little explanation or justification. This led one commentator to align technological neutrality with "motherhood and apple pie"[4]—the general wisdom being that it is an unquestionably good thing. Professor Reed rightly cautions that "this consensus among legislators seems to have developed in an almost complete absence of any clear understanding [of] what the term 'technology neutrality' might actually mean."[5] In fact, technological neutrality has many shades of meaning, and, of course, different meanings can produce differing applications with more or less desirable results. Before we embark on understanding the significance of the principle as invoked by the Supreme Court, it is therefore worth exploring the various ways in which it might be employed.

Bert-Jaap Koops has expertly deconstructed the claim (or "policy one-liner") that ICT regulation should be technology neutral, helping us to discern the divergent meanings and potential uses of the term.[6] Koops explains that usages can be divided into three broad categories: those emphasizing (A) the purpose of regulation; (B) the consequences of regulation; and (C) legislative technique. Within each of these categories, Koops identifies two or more approaches, which are closely interrelated but stress different aspects of technology neutrality.

Focusing on the substantive purpose of regulation, one approach (A1) stresses the need to regulate *functions and effects* of actions (technology uses), but not the actions or means of the actions (the technologies) themselves. This functional approach produces regulation that is intended to be technology neutral in its effects (though it may be technology-specific where the effects of technologies differ).[7] A second and related purposive approach (A2) emphasizes that what holds offline should also hold online, with the goal of establishing functional equivalence between the online and offline worlds (and, again, different treatment of specific technologies may be necessary to realize equivalent results).[8]

A less substantive approach to technological neutrality focuses on avoiding potential negative consequences of regulation. One version (B1) stresses non-discrimination between certain technologies so that the rules do not favour some technologies over others. Related to this, a second version (B2) starts with the position that regulation should not hamper the development of technologies. This, too, can justify technology-specific regulation, where uniform rules might inhibit new technologies (for example, the decision not to extend traditional broadcasting content regulations to the Internet).

Finally, emphasizing legislative technique, another approach to technological neutrality derives from basic principles of law-making. First, it might be stressed (C1) that effective laws should be sustainable and not constantly in flux as technologies change. The extent to which consistency in function or effect can be achieved over time and in the face of rapid technological change is, of course, open to challenge. A related starting point (C2) is that formal laws should be sustainable while other forms of regulation can more appropriately be used to further technology-specific aims. An alternative starting point in the same vein (C3) might stress that the law should be transparent and readily understood by those who are subject to it. The more technologically specific the rules, the more detailed and the less accessible they become (as anyone who has taken even a cursory glance at Canada's new *Copyright Modernization Act* would likely attest!).

For the purposes of what follows, the approaches identified by Koops can be broadly classified into those concerned primarily with a functional approach to copyright law (producing equivalent effect across technologies); the potential discriminatory or adverse consequences of copyright on technological development; and the "future-proofing" of copyright law. Importantly, none of these approaches necessarily entails neutrality in the sense of a formal equality that would preclude differentiation between technologies by the law; rather, different treatment can be justified as *substantively* technology neutral where overlooking technical differences would produce unequal results.

2.2 Technological Neutrality as a Judicial Approach

If these various approaches describe the starting point for the development of technology-neutral regulation, what should technological neutrality mean for the judiciary and others charged with interpreting and applying the law? While Koops's concern is with regulatory practice, he acknowledges that one strategy for achieving technological neutrality is for laws to be *interpreted* in a functionalist or teleological way, according more importance to their purpose than their precise form.[9] Even where the laws as written are technologically specific, Koops suggests that technological neutrality can be advanced through their functional interpretation. The capacity for such teleological interpretation is enhanced, Koops notes, by the establishment of a legal framework that outlines the main substantive principles, rights and values that are at stake.[10] Such a framework is, by nature, technology neutral and supports a functional approach to the application of specific rules.

In a similar vein, but focusing specifically on the role of courts in maintaining the media neutrality of copyright law, Deborah Tussey articulates three "rules-of-thumb" to keep courts "on a media-neutral keel."[11] First, where statutory guidance is lacking or ambiguous, courts should generally afford functionally equivalent technologies similar treatment unless there is a compelling doctrinal or policy reason that dictates otherwise. Tussey explains, "To the extent that the copyright balance of incentives and access has been appropriately set for a pre-existing technology, similar treatment of functional equivalents should maintain that balance."[12] Second, where there is no clear and pre-existing functional equivalent, courts should avoid emphasizing the details of particular technological systems and instead interpret copyright's core concepts in a manner applicable across technologies. A good example of this approach is found in the judicial treatment of software infringement claims that invoke basic concepts of originality, idea-expression dichotomy, merger and *scènes à faire* to determine if substantial copying of code has occurred.[13] Finally, courts should give more weight to broader policy considerations such as fairness,

incentives and innovation, as well as related empirical evidence, in determining how the law should apply to new technologies: "the application of text to technology should be accompanied by full and fair review of policy concerns and consideration of likely market impacts."[14]

The concept of technological or media neutrality has in fact made quite frequent appearances in the copyright jurisprudence of several common law jurisdictions, but unfortunately without much elucidation of its meaning, or explanation as to why, or the extent to which, it matters. In the United States, media neutrality has been described as "a fundamental principle of the Copyright Act," and has been endorsed by the Supreme Court as a relevant consideration in determining the scope of copyright, particularly in the context of collective works.[15] The principle has remained closely tied to the idea (C1) that the 1976 US legislation was intentionally "future-proofed," with the result that the rights it protects are generally not technology specific.[16] The uncontroversial nature of this basic and rather benign proposition has allowed the principle to remain largely beyond critique.[17] In the United Kingdom, the legislative intention to achieve technological neutrality has been taken into account in determining the broad scope of the "communication to the public" right.[18] The concept has received more extensive consideration in the Australian courts, where a declared objective of the copyright law revision process was "to replace technology-specific rights with technology neutral rights so that amendments to the Act are not needed each time there is a development in technology."[19] As in the United Kingdom, the principle has been invoked to support the inclusion of point-to-multipoint transmissions within the right of "communication to the public."[20] In a recent case, the full Federal Court referred more generally to "the desirability of technological neutrality—of not limiting rights and defences to technologies known at the time when those rights and defences were enacted."[21] The Court also explicitly limited the significance of the principle, however, stating: "It is not for this Court to re-draft [a] provision to secure an assumed legislative desire for such [technological] neutrality."[22]

3. Technological Neutrality before the Supreme Court of Canada

3.1 Media Neutrality in Robertson v Thomson

While the term "media neutrality" had previously surfaced in Canada's courts,[23] it was in the 2006 case of *Robertson v Thomson* that the Supreme Court first explicitly addressed its significance in the copyright context.[24] The reasons offered by the split bench in *Robertson* merit attention as a harbinger of what subsequently unfolded in the 2012 decisions.

The majority in *Robertson* found that reproduction of the *Globe & Mail* newspaper in an electronic database caused the original compilation work to be "fragmented, submerged, overwhelmed and lost",[25] with the result that the database was found to reproduce the individual articles as opposed to the newspaper *per se*, thereby potentially infringing the copyright of freelance authors in their works. The dissenting Justices invoked the concept of media neutrality to stress the functional equivalence of the electronic database with an electronic archive, itself akin to a traditional library:

> If media neutrality is to have any meaning, it must permit the publishers to convert their daily print edition into electronic form…. [T]his electronic edition…is a reproduction of the print edition in electronic form. That is precisely what media neutrality protects. … The analysis is unchanged if a number of these hypothetical electronic editions are collected together. This is simply the electronic analogy to stacking print editions of a newspaper on a shelf.[26]

The majority was criticized for its concern with the form rather than the substance of the database on the grounds that this was "inconsistent with the media neutral approach mandated by s 3 of the *Copyright Act*."[27]

The principle of media neutrality was, however, explicitly acknowledged by all members of the Court. The majority judgment recognized that "[m]edia neutrality is reflected in s 3(1) of the *Copyright Act* which describes a right to produce or reproduce a work

'in any material form whatever,'"[28] and emphasized that the Justices were "mindful of the principle"[29] in arriving at their conclusion. The difference between the majority and minority application of media neutrality to the legal issue at hand can be at least partly explained, however, by the divergent characterizations of the principle and the significance attributed to it.

The majority defined media neutrality as meaning that "the *Copyright Act* should continue to apply in different media, including more technologically advanced ones."[30] This approach is focused on non-discrimination between different technologies (in the sense of Koops's meaning B2), and is thus limited where differences between media produce legally significant differences in effect. The majority found that the electronic database was not simply an equivalent, if more effective, technical alternative to the traditional or even electronic archiving of individual issues, such that "focusing exclusively on input in the name of media neutrality takes the principle too far and ultimately, turns it on its head."[31] Given that the principle "exists to protect the rights of authors and others as technology evolves," the majority insisted that media neutrality "is not a license to override the rights of authors."[32]

The minority accorded media neutrality a somewhat different significance. Similarly taking as a starting point the section 3(1) right to reproduce the work "in any material form," the minority stressed that "[t]he concept of media neutrality is how Parliament chose to come to grips with potential technological developments"[33] (consistent with meaning C1). The minority's emphasis on the functional equivalence of electronic and traditional archiving further invokes technical neutrality in the sense of regulating effects rather than means (A1) and achieving equivalency between offline and online activities (A2). But what comes through clearly in the dissenting reasons—and particularly in the passages that speak to the potential of new technologies—is the commitment to a principle of media neutrality attentive primarily to the *purpose* of the law (in the sense of meaning A, generally). Thus, the minority analysis begins by observing that section 3(1) of the *Copyright Act* has been substantially unchanged since 1921, just after "the first domestic radio sets, and many decades before the technological revolution

that produced, among other innovations, online databases."[34] The reasons proceed directly to a description of the overarching purposes of copyright, as articulated by the Court in the case of *Théberge v Galérie d'Art du Petit Champlain inc.*: "promoting the public interest in the encouragement and dissemination of artistic and intellectual works, and justly rewarding the creator of the work."[35] Tasked with maintaining an appropriate balance between these goals, the minority notes the significance of the public interest in the availability of archived newspapers.[36] The link between the public purposes of copyright and the public interest in new technologies is brought to the fore in the following passage, which hints at how a purposive construction of copyright law aligns with a functional conception of technological neutrality:

> The *Copyright Act* was designed to keep pace with technological developments to foster intellectual, artistic and cultural creativity. In applying the *Copyright Act* to a realm that includes the Internet and the databases at issue in this case, courts face unique challenges, but in confronting them, the public benefits of this digital universe should be kept prominently in view. As Professor Michael Geist observes:
>
> > The Internet and new technologies have unleashed a remarkable array of new creativity, empowering millions of individuals to do more than just consume our culture, instead enabling them to actively and meaningfully participate in it.[37]

The divergence between the minority and majority rulings in *Robertson* reveals the importance of the particular meaning or emphasis given to the principle of technological neutrality, and the bearing that this has on the results that the principle will produce. It also suggests, however, that even following the rules of thumb for media-neutral interpretations of the law could produce significantly different results depending on the assumptions that are brought to bear at any stage of the analysis.

Consider again Tussey's first rule of thumb, that "where statutory

guidance is lacking or ambiguous, courts should afford functionally equivalent technologies similar treatment."[38] In any case, particularly one involving new technologies, reasonable people may differ on the question of whether the law is actually clear or ambiguous, and on whether it is directly applicable as written or effectively silent given the technical specificities at issue. Opinions might also differ on whether an analogy to a pre-existing technology is apt or inappropriate, and whether technical functions are substantively equivalent or significantly different in nature or scope. Turning to Tussey's second rule, that judges should focus on core copyright concepts rather than technical particularities, the core concepts of copyright law are famously fluid, subjective and malleable, with the result that they are often more useful to rationalize a conclusion than they are helpful in producing one. The concept of "substantial reproduction" at issue in *Robertson*, for example, provides little guidance in determining how much copying is too much in any particular case (as do the attendant concepts of "recognizability" and "essential or vital part"), and caused apparent confusion when applied to determine the scope of the owner's right in a compilation.[39] Finally, taking Tussey's third suggestion that greater regard be had to policy considerations, given the controversy over copyright's policy and how they ought to be balanced, this interpretive approach will inevitably produce different results depending on the policy perspective brought to bear by the decision maker. It is evident, for example, that the majority's analysis in *Robertson* was guided by a concern with protecting the rights of authors in the digital realm, while the minority was somewhat more concerned with protecting the public interest in accessing the works at issue.

The point I mean to make is that even a common or overlapping understanding of technological neutrality, coupled with a shared commitment to advancing a technologically neutral interpretation of the law, can produce very different results when law is applied in particular contexts. Ultimately, what matters is how decision makers understand the law as written, the technology as used, the core copyright concepts at play, and, most importantly, the larger legal framework—the rights and values at stake in the copyright balance.

3.2 Conceptions of Technological Neutrality in the Copyright Pentalogy

The principle of technological neutrality made a decisive appearance in three of the five judgments released by the Court in summer 2012: *Rogers*, *ESA* and *Bell*. This section will provide an overview of these cases, assessing the role played by the principle in the reasoning of the Court. To begin, however, it is helpful to pull back and consider the various definitions of, and rationales for, technological neutrality that were offered in the rulings.

3.2.1 A Minimalist Approach

The narrowest formulation of the principle is found in the dissenting judgment of Rothstein J in *ESA*, which adopted the statement of LeBel and Fish JJ writing for the majority in *Robertson*: "Media neutrality means that the *Copyright Act* should continue to apply in different media, including more technologically advanced ones…. Media neutrality is not a license to override the rights of authors—it exists to protect the rights of authors and others as technology evolves."[40] As in *Robertson*, this statement reflects a restrictive vision of technological neutrality as concerned only with non-discrimination between technological means in a formalistic sense: the law remains applicable across different technologies. The emphasis is, again, not on the effect of the law as such, but on its capacity to apply in new and unanticipated contexts. To the extent that broader public policy concerns are considered, the concern appears to be with the continued recognition and protection of authors' or owners' rights.

This restrictive version of the neutrality principle coincides with a similarly constrained vision of its appropriate role in shaping the interpretation of the law. Continuing in the formalist vein, Rothstein J writes: "A media neutral application of the Act…does not imply that a court can depart from the ordinary meaning of the words of the Act in order to achieve the level of protection for copyright holders that the court considers is adequate."[41] The minority is prepared to acknowledge that "[g]enerally, a technologically neutral copyright law is desirable."[42] Neutrality is cast here as a typical baseline, an

appropriate default position that might be sound, but from which the law may readily depart: regarded in this way, it is far from a standard against which the law ought to be measured, nor even a goal to which the lawmakers—or those tasked with applying the law—should aspire. The minority's depiction of the principle of technological neutrality minimizes its potential to legitimately inform, and certainly to determine, how the law *should* be interpreted and applied.

What was essentially the position of the majority in *Robertson* became the minority approach to technological neutrality in *ESA*. By the same token, as we will see, the majority position in *ESA* echoes and builds upon the dissenting reasons in *Robertson*. Before we get there, however, it is useful to consider the approach taken by the Court to technological neutrality in its unanimous judgment in the *Bell* and *Rogers* cases, which represent, in my view, intermediate approaches to the principle, somewhere in between that of the minority and majority in *ESA*.

3.2.2 An Intermediate Approach

In *Bell*, Abella J references technological neutrality as a "goal," and explains that the principle "seeks to have the *Copyright Act* applied in a way that operates consistently, regardless of the form of media involved, or its technological sophistication."[43] Interestingly, the majority ruling in *Robertson* is cited in support of this statement. When we consider Koops's shades of meaning, however, we can see a subtle but potentially important difference between the definition offered here by Abella J, and that of Fish and LeBel JJ in *Robertson*. Whereas the *Robertson* majority wrote that "[m]edia neutrality means that the *Copyright Act* should *continue to apply* in different media,"[44] Abella J emphasizes that it should be applied "in a way that *operates consistently*." The emphasis is not on non-discrimination between technologies in a formal sense (B1), but rather on substantive equivalence of effect when the law is applied across different technologies. Put another way, the formulation offered by Abella J and accepted by the full bench in *Bell* hints at a more functional and effects-oriented vision of technological neutrality (A1).

In *Rogers*, in reasons written by Rothstein J, the discussion of technological neutrality is largely tied, as one might anticipate, to the idea of the law's "continued relevance in an evolving technological environment,"[45] and the *extension* of the Act, "where possible," to technologies that "were not or could not have been contemplated at the time of its drafting."[46] What is interesting here, however, is the link drawn between the concept of media neutrality and the idea of copyright as a balance between the public interest and authors' just rewards.[47] Rothstein J draws the connection when he notes that the copyright balance "is not appropriately struck where the existence of copyright protection depends merely on the business model" chosen; whether conveying content through traditional or new media, he notes, "the end result is the same."[48] Thus we have, in *Rogers*, a vision of technological neutrality articulated by Rothstein J and endorsed by seven members of the bench[49] that captures the more substantive concern with the equivalent effect of technology in light of the law's purpose. That said, the emphasis remains on the protection of copyright (and so of copyright owners) across technologies, where consistent with the clear wording of the Act.[50]

3.2.3 An Expansive Approach

We can envisage the principle of technological neutrality along a conceptual spectrum: at one end, it is a limited principle of formal non-discrimination between technologies; at the other end, it is a broad and substantive principle that informs a teleological interpretation of the law. With each articulation of the principle so far, we have inched further along the spectrum. It is with the majority's judgment in the *ESA* case, I suggest, that we reach the most expansive version of the principle.

Abella and Moldaver JJ begin with a simple but substantive expression of technological neutrality as requiring "that the Copyright Act *apply equally* between traditional and more technologically advanced forms of the same media."[51] Again, the emphasis is on functional equivalence and consistency in effect. The majority stresses that, when works are downloaded, the Internet is a delivery system—a "technological taxi"[52]—no different in function or effect from a store

clerk or a courier putting a copy of the work in the hands of the end user. A purposive approach to technological neutrality emphasizing function and effect (A1) therefore requires that equivalent delivery methods receive equal treatment by the law (consistent with the idea, in the sense of A2, that what holds offline should also hold online).

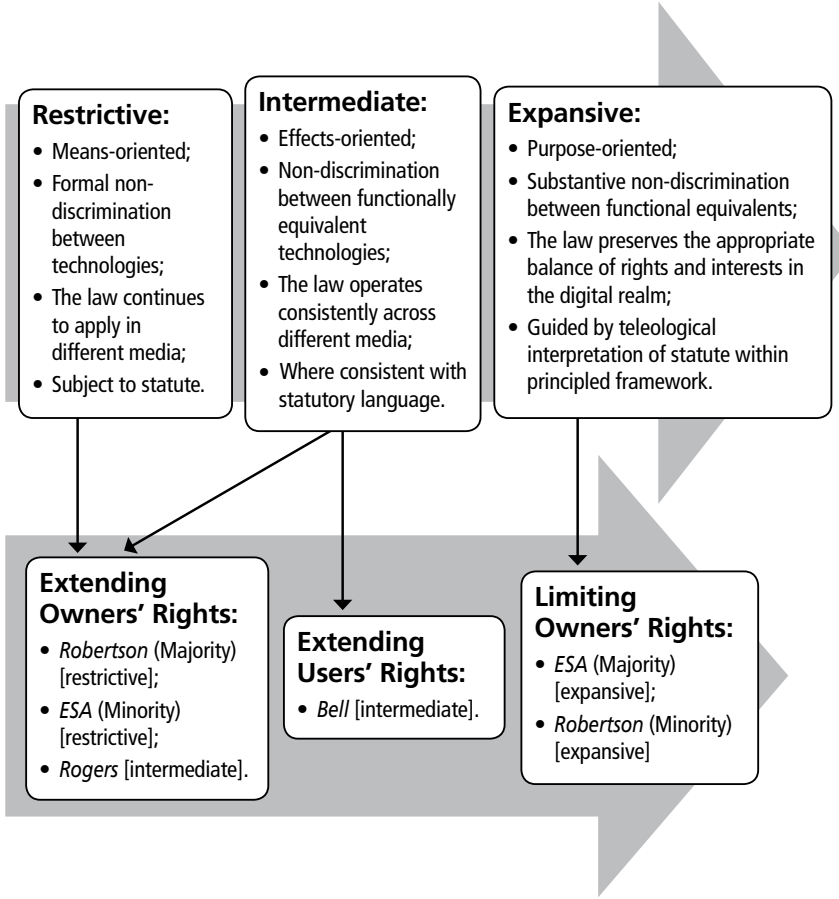
What sets the majority's ruling apart, however, is the explicit connection drawn between this functional approach and copyright's policy balance, with the statement that "[t]he traditional balance between authors and users should be preserved in the digital environment."[53] This resonates with Professor Tussey's assertion that where copyright has struck an appropriate balance in traditional media, "similar treatment of functional equivalents should maintain that balance."[54] It also embraces what has been called the principle of "prescriptive parallelism," which conveys the notion that "the traditional copyright balance of rights and exceptions should be preserved in the digital environment."[55] In particular, Abella and Moldaver JJ emphasize that their application of the technological neutrality principle is consistent with the recognition, in *Théberge*, of the "limited nature" of creators' rights and the inefficiency of "overcompensating creators." Commitment to technological neutrality *in effect* is thus presented as a principled means by which to maintain the appropriate balance between owners and users in the digital environment; it follows that attributing insufficient weight to technological neutrality can tip the balance too far in favour of owners' rights, to the detriment of the public interest. With this, the majority in *ESA* invokes an expansive version of technological neutrality as an overarching policy consideration that should inform the interpretation and application of copyright law in continuing pursuit of its broader public policy goals.

3.3 Putting Technological Neutrality to Work in the Copyright Pentalogy

My final aim in Part 3 is to demonstrate how the varying conceptions of technological neutrality and its role informed the interpretation and application of the legal provisions at issue. The principle was invoked to achieve three somewhat distinct ends: to extend the protection of

owners' rights into new technological contexts; to ensure the equal availability of users' rights in new technological contexts; and to restrict the extension of owners' rights into new technological contexts. As illustrated below, these results roughly map onto the somewhat distinct approaches to technological neutrality identified in Part 3.2 above: the minimal approach, stressing non-discrimination; the functional approach, stressing equivalent effect; and the teleological approach, stressing the broader copyright balance.

Figure 1. **Approaches to technological neutrality.**



3.3.1 Extending Owners' Rights

Both *Rogers* and *ESA* were concerned with the scope and application of the section 3(1)(*f*) right of the copyright owner to "communicate the work by telecommunication." In *Rogers*, the question was whether music streamed over the Internet to individual end users is a communication "to the public" within the meaning of section 3(1)(*f*). *ESA* was concerned with whether downloading video games that include musical works is a "communication" at all. In both cases, technological neutrality was raised as a basis for extending the protection of owners' rights into the online environment.

The communication right has been described as "one of the most clearly technology indifferent legal provisions" in the ICT field.[56] In Canada, as Rothstein J explains, the previous "technology-specific communication right" that attached to "radiocommunication" was amended in 1988 to the "neutral language [of 'telecommunication'] to encompass evolving but then unknown technological advances."[57] Yet, what we see in these cases is that, given the significant difference in the nature of offline and online communication methods, technology-indifferent laws do not necessarily render extraneous a technology-neutralizing interpretation.[58] As Shira Perlmutter has observed:

> [E]ven rights deliberately written to be technologically neutral are quickly called into question by the rapidity of today's technological developments. There enures a tremendous diversion of time and energy in debating the precise borders of each right. Which rights are implicated by a particular type of dissemination—for example, "making available" online? Reproduction? Distribution? Rental? Communication?[59]

Rothstein J and the minority in *ESA* were of the view that the communication right is implicated when works are downloaded over the Internet.[60] A means-oriented and formal non-discrimination approach to technological neutrality might suggest that discriminating between transmissions of electronic downloads and streamed transmissions is contrary to the basic principle. However, seen from a more substantive and effects-oriented perspective, the minority's

reasoning can be admonished for falling afoul of Tussey's second rule of thumb—focusing on the technical details of the technologies at issue. By directing the inquiry toward the system specifics (the technical *means* of transmission) rather than the *outcome* of that technical process (the acquisition of a copy), the minority could be accused of pinning its judgment on "technological details rather than lasting principles governing rights and liabilities."[61] More importantly, satisfied with the "ordinary" meaning of the neutral term "communication" and its application to downloads by virtue of their "transmission,"[62] the minority also falls afoul of Tussey's third rule: its focus is on the black letter law, largely unencumbered, it would seem, by a concern with the *effect* of capturing downloads within the communication right—the substantive inequality produced between traditional and online distribution systems, and the resultant impact on copyright's fragile balance. Attentive primarily to the need to secure protection for owners across new technologies, the minority's reasons relegate consideration of the broader role of technological neutrality in securing consistency in effect and preserving the appropriate policy balance.

In *Rogers*, communication "to the public" was held to include "a series of point-to-point communications of the same work to an aggregation of individuals" on the grounds that "it matters little for the purposes of copyright protection whether the members of the public receive the communication in the same or in different places, at the same or at different times or at their own or the sender's initiative."[63] The Court emphasized the technology-neutral language of the amended statutory provision[64] and found, in the expanded scope of section 3(1)(*f*), "evidence that the Act has evolved to ensure its continued relevance in an evolving technological environment." Thus, the Court determined that limiting the communication rights to "push-technologies" and so excluding "pull-technologies" would be "inconsistent with the neutral language of the Act itself."[65] The extension of neutral statutory language to afford protection in relation to online streaming is a good example of a non-discrimination approach at work, ensuring that the law does not discriminate between traditional broadcast and Internet communications, the effects of which are viewed as essentially equivalent. The approach is also in line with Tussey's second

recommendation: that courts avoid technology-centred judgments and interpret copyright's core concepts in terms applicable across technologies.[66] Taking this non-discrimination approach, technological neutrality was employed to extend owners' right to "communicate to the public" into a new technological context where communications occur at a place and time chosen individually by end users.

3.3.2 Extending Users' Rights

As Cameron Hutchinson has observed, the most significant aspect of the *Bell* case in regard to technological neutrality is the explicit extension, for the first time, of the principle beyond the rights of copyright owners to the rights of users.[67] The issue before the Court was whether the streaming of short extracts or "previews" of musical works could benefit from the fair dealing defence. SOCAN argued that the "amount" of the dealing was unfair in light of the aggregate quantity of music heard through previews by consumers. Invoking the principle of technological neutrality, the Court held that the relevant amount is rather the proportion of each extract to the whole work (thus supporting the finding of fair dealing for research purposes). The Court explained:

> [G]iven the ease and magnitude with which digital works are disseminated over the Internet, focusing on the "aggregate" amount of the dealing in cases involving digital works could well lead to disproportionate findings of unfairness when compared with non-digital works. If…large-scale organized dealings are inherently unfair, most of what online service providers do with musical works would be treated as copyright infringement. This…potentially undermines the goal of technological neutrality….[68]

The "intermediate version" of technological neutrality articulated in *Bell*, which was focused on consistent operation of the law across technologies, allowed the principle to expand from preserving owners' rights in new environments to preserving the rights of users to deal fairly. While online dealings may well be different in scale than their offline equivalents (and the "character" of such dealing

may weigh against finding fairness), the Court was alert to the risk that assuming (or even double-counting) unfairness based on the potential scale or aggregate volume of digital dealings could *effectively* render the fair dealing defence severely weakened or even eviscerated in the online environment. Such a result would be contrary to the more substantive vision of technological neutrality as concerned with achieving consistency in the effect of the law when applied in different technological contexts. As the Court recognized, the effects of copyright law depend not only on the continued protection of owners' rights, but also on the continued recognition of their appropriate limits.

3.3.3 Restricting the Reach of Owners' Rights

It should come as no surprise, however, that it is with the *ESA* case, where the majority offered the most expansive version of technological neutrality as a guiding principle, that we see its most prominent and potentially impactful use. Finding that digital downloads implicated only the reproduction right and not the communication right, which has historically been linked to public performance, Abella and Moldaver JJ focused on "*what* the internet technology was *functionally* doing as opposed to *how* it was technically doing it."[69] The majority thus explained: "Although a download and a stream are both 'transmissions' in technical terms (they both use 'data packet technology'), they are not both 'communications' for the purposes of the *Copyright Act*…. Unlike a download, the experience of a stream is much more akin to a broadcast or performance."[70]

The importance of differentiating downloading from streaming activities—while justified through an analysis of legislative history[71] and a (somewhat controversial) interpretation of section 3(1)[72]—was clearly motivated by an overarching concern with the practical consequences of finding otherwise. If, as SOCAN argued, the activity of downloading a copy of a video game can infringe on both the reproduction and the communication right, the effect is to permit "double-dipping" by copyright owners,[73] requiring the payment of two fees to two separate collective societies.[74] This result was dismissed as inefficient, and therefore harmful to "both end users and copyright

owners."[75] Moreover, it was explicitly criticized for "ignor[ing] the principle of technological neutrality."[76] The majority reasoned that permitting such double dipping in respect of copies delivered through the Internet would "effectively impose a gratuitous cost for the use of more efficient, Internet-based technologies," as compared with delivery through stores or by mail. Informed by its version of technological neutrality, then, the majority opted quite deliberately to interpret the 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."[77]

This use of the principle is interesting in two respects. First, as noted, the result is to discriminate between two kinds of online activities—streaming and downloading—and, in doing so, to overlook the technical means employed for both kinds of transmissions (data packet transmission that is not a "single activity" in any technical sense). This approach might be thought to undermine technological neutrality insofar as it distinguishes between technical processes and imposes legal consequences for using one form of transmission over another. Such a critique would have to rely, however, on a formal non-discrimination–based vision of the principle. Thus, Rothstein J and the minority warn against "limit[ing] the scope of the communication right when it is applied to one such new technology."[78] However, taking a substantive approach concerned with functional equivalence and discriminatory effect, I would suggest, the majority's conclusion is well supported and eminently defensible. Protecting an additional income stream for digital downloads that is not available for hard copy sales is essentially the opposite of technological neutrality, thus understood.[79]

Second, the majority's ruling and reasons signal a willingness to actively limit the potential reach of the ostensibly technology-neutral rights of copyright owners in new technological contexts in recognition of the broader policy balance implicated by owners' claims. In this vein, the minority takes a legally formalist stance and criticizes the majority for "reading into the Act restrictions which are not apparent from and are even inconsistent with the current language of the Act."[80] According to Rothstein J, by "inferring limits into the communication right," the majority ruling went "beyond the function

of the courts."[81] Indeed, the ruling has proved controversial precisely because the Court could easily have accorded "communication by telecommunication" its readily available and previously attributed meaning,[82] and thereby protected the rights of owners to demand public performance fees for every digital transmission of their works.

Instead, as Professor Hutchinson explains, the majority presented technological neutrality as a "principle of non-interference" when it sought to "avoid imposing copyright liability on technologies and activities that, while theoretically capable of being included under the Act, only incidentally implicate copyright."[83] In doing so, the Court took a more activist stance, unapologetically curtailing owners' rights in the digital environment in the name of technological neutrality, thereby insulating the users of new technologies from potential (and doctrinally justifiable) liability—an interpretive approach with potentially significant consequences for future demands for online copyright protection.[84] While the expansive version of the technological neutrality principle might equally support extending copyright or protecting user rights in particular contexts, it is only in this expansive form that the principle has thus far been employed to actively delimit owner rights.

4. The Promise of the Technological Neutrality Principle

Having charted the various definitions and rationales offered in respect of the principle of technological neutrality, and their bearing on the interpretation and application of the law, I want to offer, in the final section, some brief thoughts about the justification and potential implications of the principle as it emerged, fully formed, from the *ESA* case.

4.1 On Justifications

To the extent that technological neutrality can be derived directly from the face of the *Copyright Act*, it is generally found in the wording of section 3(1) and the owner's exclusive right to reproduce the work "in any material form whatsoever." This provision undoubtedly demonstrates an ambition toward a technologically neutral copyright but, in itself, it demands nothing more than extending the reach of

owners' rights to new media, thereby ensuring non-discrimination in the applicability of the law to different technologies, and, to a certain degree, "future-proofing" the law. What we see in *ESA* is a markedly broader, functional vision of technological neutrality as a guiding principle that actively distinguishes between technological means and restricts copyright's reach in new contexts with a view to achieving consistency in effect; so, if not in the language of the *Act*, where can the principle, in this form, find its origin and justification? The answer, I suggest, is simple and lies in the overarching policy goals of the copyright system as articulated by the Supreme Court in the *Théberge* case.

In *Théberge*, writing for the majority, Binnie J stated that copyright requires "a 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."[85] In *Bell*, Abella J explained the significance of the case:

> *Théberge* reflected a move away from an earlier, author-centric view which focused on the exclusive right of authors and copyright owners to control how their works were used in the marketplace…. *Théberge* focused attention instead on the importance copyright plays in promoting the public interest, and emphasized that the dissemination of artistic works is central to developing a robustly cultured and intellectual public domain. … [B]oth protection and access must be sensitively balanced in order to achieve this goal.[86]

This principled recognition of copyright as requiring a sensitive public policy balance, rather than simply the protection of a private property right, has had a marked impact on the landscape of Canadian copyright law. If copyright in general requires this balance, then it must surely follow that copyright in the digital era requires the *preservation* of this balance, which must mean that the law should have the same effect (produce a similar balance of rights and interests) whether applied offline or online. The broad principle of technological neutrality, as employed by the majority in *ESA*, therefore flows naturally from the Court's recognition of the *Théberge*

balance and its continued significance in the digital environment. Correspondingly, as one might expect, the most limited version of technological neutrality, as employed by the minority in *ESA*, aligns with a restrictive vision of balance and its role in guiding the interpretation of the law. Citing the same statement of balance from *Théberge*, Rothstein J continues: "While the 'courts should strive to maintain an appropriate balance between these two goals,'…[i]n Canada, copyright [remains] a creature of statute."[87] Neither balance nor technological neutrality, from this viewpoint, offers a basis for "delimit[ing] the scope of broadly defined rights in the digital environment"; rather, this task is properly left to Parliament, which will "legislate when it considers copyright protection to be improperly balanced."[88]

With respect, Rothstein J appears to permit the principle of balance to inform the extension of owners' rights into the online environment (protecting owners in *Rogers*), but not to limit owners' rights (in *Robertson* and *ESA*). My argument is that, if one begins with a commitment to the principle of balance as articulated in *Théberge*, then it should follow as a matter of course that the balance must be preserved as technologies evolve; this, in turn, demands a principle of technological neutrality that focuses on the *effects* on the law in new technological contexts, and that justifies (in Koops's terms) a functionalist or teleological interpretation of the law with a view to the substantive principles at stake.[89] In Tussey's terms, technological neutrality is necessarily furthered by consideration of copyright's broader policy goals, rather strict adherence to the black letter law.[90] The important point is that technological neutrality, as presented by the majority in *ESA*, is not a new and overarching policy parachuted into Canadian copyright law; rather, it is a principled interpretive tool mandated by the overarching policy of Canada's copyright law—the preservation or continuing pursuit of an appropriate balance between protecting authors and promoting the public interest. As Tomas Lipinski writes, "The overall goal of balance in the copyright law between rights of copyright owners and copyright users is paramount and the concept of technological neutrality in the application of the law assists in achieving that goal."[91]

4.2 On Implications

If there is anything on which everyone can agree, it would seem to be that the Court's invocation of technological neutrality in *ESA* is of potentially enormous significance when it comes to interpreting and applying the *Copyright Act* as amended by the *Copyright Modernization Act*. Exactly what significance the principle will have, however, and what outcomes it might produce, are less evident and more open to debate. As Michael Geist has argued, "the linkage between technological neutrality and the limited nature of creators' rights could prove very significant as the court is concerned that a non-neutral approach may result in overcompensating creators."[92] With this as a potential starting point, the general assumption seems to be that, for better or for worse, the principle may be employed to restrict the scope of the owner rights that have been created or expanded by the new *Act*.

The new *Act* contains a large volume of technologically specific provisions that would appear to be inherently at odds with the guiding principle of technological neutrality as a regulatory strategy. It should be recalled, however, that as a principle of regulation, technology specificity is the opposite of technology *independence*; technology-specific regulations may thus be said to be technologically *neutral* if it is claimed that they differentiate between technologies with legally relevant differences. In such instances, different treatment may be "necessary to realize an equivalent result."[93] Thus, the additional protection of digital rights management (DRM) systems, for example, is identified by Koops as "a technology-specific or technology-driven regulation, which aims to create the same copyright-law effect in the on-line era as it had in the off-line era."[94] Such protection may therefore be claimed to be functional (in the sense of Koops's A1), by attempting to reinstate the norms of the analog world in the digital environment through a combination of technology and law. Koops explains:

> [T]he advent of new technologies has threatened to shift the power balance between copyright owners and users to make users more powerful: they can cheaply and without limit make perfect copies, which formerly they

> could not do. Thus, the law reacts by shifting the power balance back towards copyright holders: it prohibits the circumvention of DRM systems.[95]

But as Koops rightly warns, "[w]hether it achieves that aim is another matter; the power balance is now arguably tipped deeper towards copyright holders than it has ever done before."[96] Indeed, even the premise that new technologies represent a net threat to copyright owners (never mind the appropriate legal response) is open to dispute. As Lipinski notes, "those who have control of a technologically dependent medium, the digital medium for example, in fact control both the ownership and the access to the work, without heed to users' rights." Rather than neutrality, then, Lipinski perceives in digital environments "the ascendancy of ownership rights."[97]

It might be claimed that the technology-specific provisions of the *Copyright Modernization Act* are aimed at ensuring the continuing application and enforcement of copyright in the digital environment, with the intention that "what holds offline should also hold online." Certainly, it seems fair to say that copyright's balance "can no longer be purely internal to the legal framework of rights and limitations but must factor in elements of practical reality, including the impact of the additional risks engendered, and the additional protection made possible by technology."[98] Even rationalized in these terms, however, many of the technology-specific provisions exemplify the distortive potential of such efforts, especially when guided by a primary concern to protect the rights of copyright owners against the increased risk associated with the digital environment. By focusing on the perceived threat to copyright owners presented by digital technologies, Canada's legislature has enacted technology-specific laws that overcompensate owners and tip the balance in their favour. In particular, the additional protections afforded to digital locks (the technological protection measures that prevent access or certain uses of digital content) seem largely incapable of justification when seen through the lens of technological neutrality.

On their face, of course, the provisions violate the basic starting point of technological neutrality insofar as they target the technology itself: section 41.1(1)(*c*), for example, makes it unlawful to

"manufacture, import, distribute, offer for sale or rental or provide… any technology, device or component" produced primarily for the purpose of circumventing a technological protection measure. Such device prohibitions regulate particular technologies (the means) rather than particular uses (the effects), discriminate between different technologies, and quite deliberately restrict the development of certain technologies. There is no sound basis on which to assert that the anti-circumvention provisions simply shift the balance *back*. The greatest difficulty with such an argument is that these added protections entirely neglect one half of the copyright balance by failing to safeguard in any meaningful way the rights of lawful users of protected works. The new *Act* contains no general fair dealing defence to circumvention liability, and no route by which to demand access to works for lawful purposes. By privileging digital locks and their protection over user rights and the public interest, the new rules disrupt the traditional copyright balance, "sacrificing user rights and privileges to the ultimate power of technical control."[99]

As such, Michael Geist is right to suggest that "the biggest long term impact [of the *ESA* decision] may be felt when courts begin to assess the effect of the new digital lock rules. Those rules are distinctly non-neutral and could face a rough ride if challenged before the courts."[100] Geist explains, "those rules 'impose an additional layer of protections' and create 'a gratuitous cost' for consumers who lose their user rights in the shift to Internet-based technologies"—precisely the kinds of effects that the Court found to be contrary to its substantive version of the technological neutrality principle.[101]

I argued above that technological neutrality is not a new principle suddenly imported by the Court into Canada's copyright law; rather, technological neutrality is about preserving copyright's fundamental balance between owners and the public as technologies evolve. By the same token, the digital lock protections in the *Copyright Modernization Act* do not violate the principle of technological neutrality simply because they are technology specific; rather, these additions to the rights of owners violate the principle because they fail to preserve the copyright balance in the digital environment.

With the enactment of the *Copyright Modernization Act*, the legislature has opted for an abundance of technology-specific provisions that establish additional protections for owners without corresponding protections for users. The new requirements lack transparency and comprehensibility for ordinary Canadians tasked with following the rules, and place extraordinary monitoring and compliance obligations on intermediaries and service providers (even including, for example, teachers offering distance-learning lessons). There is no doubt that, in doing so, the legislature has threatened the ability of the judiciary to keep copyright on the technologically neutral and balanced trajectory established by the Supreme Court in recent copyright jurisprudence. However, this does not minimize the significance of these path-breaking decisions—it suggests that the Court's powerful reasoning may have come just in time to save Canada's copyright balance.

Koops writes that "within a system of functional interpretation of laws, technology neutrality becomes a minor issue: practice can deal with laws that seem technology-specific by interpreting them in a functional way."[102] While not always possible or sufficient to achieve equivalence of result, "the possibility of functional interpretation may often be a good way of circumventing the problem of technology neutrality."[103] Moreover, as Koops suggests, the effects of technology-specific regulation can be minimized by the establishment of a clear framework of substantive principles such as that elucidated by the Supreme Court in the copyright arena over the past decade. By providing a clear sense of the "fundamental rights and values that are at stake and the rationale that underlies" Canada's copyright system, the Court has established a principled framework that will, in the future, facilitate "the practice of interpreting…technology-specific laws…in a functional, teleological way."[104]

It is hoped, then, that as Canadian courts grapple with the amended *Copyright Act*, and find themselves challenged with interpreting its dense, technology-specific provisions in new and likely unforeseen situations, this principled framework of rights and values will guide the judicial understanding and application of the law. As an interpretive tool, the principle of technological neutrality should

assist in achieving consistency in the application of copyright (and its limits) in furtherance of copyright's purposes. This should mean, for example, minimizing to the extent possible the scope and impact of the anti-circumvention right on non-infringing uses, thereby giving substance to the Court's repeated insistence that fair dealing is a "users' right" and "an essential part of furthering the public interest objectives of the *Copyright Act*."[105] Without abandoning due regard for the statutory language,[106] courts should strive to apply the text of the law in a way that advances the purposes of copyright by preserving the balance between authors' rights and the public interest in the encouragement and dissemination of works. It is unfortunate that elements of the newly written law do more to jeopardize than to assist in this task; but it is fortunate indeed that those tasked with applying the law can do so with the principle of technological neutrality to guide them as they carve out a path for copyright in this digital age.

5. Conclusion

The idea that technological neutrality should be a governing principle in the realm of copyright law has long been present in Canada, as elsewhere, but has gone largely unexamined until now. The Supreme Court's 2012 copyright decisions shone a light on the principle and its potential significance in shaping the copyright law of the digital era. Evident in these rulings were three distinguishable conceptualizations of technological neutrality: a minimalist version focused on formal non-discrimination and the extension of rights into new media; an intermediate version concerned with functional equivalence and consistency of effect in the application of copyright to new media; and an expansive version—extending beyond any previous judicial treatment of the principle in Canada or elsewhere—that demands a teleological interpretation of the law aimed at advancing the purposes of the copyright system as the technological landscape shifts. With these decisions, technological neutrality emerged as a fundamental and functional principle that can inform the application of copyright law in important and arguably unanticipated ways. Not only can it explain the extension of copyright protection into new technological contexts, but it can also be asserted as a safeguard of user rights and their availability in respect of novel technologically facilitated

consumer practices. Most importantly, however, the principle supports circumscribing the potential reach of existing owners' rights where their extension threatens to upset copyright's fragile balance in the digital domain.

The unprecedented power of technological neutrality to shape the contours of copyright protection therefore depends on an understanding of the principle that extends beyond simple non-discrimination in the application of copyright norms to new media. Rather, its power flows from a substantive commitment to the notion that copyright law should apply with equivalent *purpose and effect* across the technological landscape. Taking seriously the idea of copyright as a balance between authors and the public reveals the principle to be ultimately concerned with the *preservation* of this copyright balance in the digital environment. As such, the technological neutrality principle does not occupy a separate or parallel position alongside the guiding principle of balance—it is part and parcel of that balance. Its significance, then, will not be determined by the mere acceptance of technological neutrality as an ideal. As evidenced by the various iterations and applications of the principle by the Justices of the Supreme Court, the significance of technological neutrality will ultimately depend on the meaning and significance that we accord to the public policy objectives of our copyright system.

[1] *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34, [2012] 2 SCR 231 <http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/9994/index.do> [*ESA*]; *Rogers Communications Inc. v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 SCR 283 <http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/9995/index.do> [*Rogers*]; *Society of Composers, Authors and Music Publishers of Canada v Bell Canada*, 2012 SCC 36, [2012] 2 SCR 326 <http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/9996/index.do> [*Bell*]; *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37, [2012] 2 SCR 345 <http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/9997/index.do> [*Alberta (Education)*]; *Re:Sound v Motion Picture Theatre Associations of Canada*, 2012 SCC 38, [2012] 2 SCR 376 <http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/9999/index.do> [*Re:Sound*].

[2] *Copyright Act*, RSC 1985, c C-42 <http://laws.justice.gc.ca/en/C-42/>; *Copyright Modernization Act*, SC 2012, c 20 <http://laws-lois.justice.gc.ca/PDF/2012_20.pdf>.

[3] See Bert-Japp Koops, "Should ICT Regulation be Technology-Neutral?" SSRN <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=918746> in Bert-Jaap Koops, Miriam Lips, Corien Prins & Maurice Schellekens, eds, *Starting Points for ICT Regulation: Deconstructing Prevalent Policy One-liners* (The Hague: TMC Asser Press, 2006) 77 at 1-2 [cited to SSRN].

[4] Chris Reed, "Taking Sides on Technology Neutrality" (2007) 4:3 SCRIPTed 263 at 265 <http://www.law.ed.ac.uk/ahrc/script-ed/vol4-3/reed.asp>.

[5] *Ibid.*

[6] Koops, *supra* note 3.

[7] *Ibid* at 6. Koops offers as an example different rules for "spamming" in the context of telephone, facsimile and email communications, on the apparent grounds that the cost and intrusiveness of unsolicited communications varies with the medium used.

[8] See *ibid* at 6-7.

[9] *Ibid* at 24-25.

[10] *Ibid* at 25.

[11] Deborah S. Tussey, "Technology Matters: The Courts, Media Neutrality, and New Technologies" (2005) 12 J Intell Prop L 427 at 477.

[12] *Ibid* at 479.

[13] See e.g. *Computer Associates International, Inc. v Altai, Inc.* 982 F (2d) 693 (2d Cir 1992); *Delrina Corp. (Carolian Systems) v Triolet Systems, Inc.* (2002), 58 OR (3d) 339 (CA) <http://www.canlii.org/en/on/onca/doc/2002/2002canlii11389/2002canlii11389.html>.

[14] Tussey, *supra* note 11 at 481.

[15] See *New York Times Co., Inc., et al. v Tasini et al.*, 533 US 483 (2001) at 502 [*Tasini*]. The Supreme Court agreed with the Publishers that "the 'transfer of a work between media' does not 'alte[r] the character of' that work for copyright purposes." The Court held that, in this case, "media neutrality should protect the Authors' rights in the individual Articles to the extent those Articles are now presented individually, outside the collective work context, within the Databases' new media."

[16] See especially *Tasini v New York Times Co.*, 972 F Supp 804 at 818 (SD New York 1997) where the District Court agreed that "the 1976 [Copyright] Act was plainly crafted with the goal of media neutrality in mind"; noted that key terms of the Act such as "copies" and "literary works" are "defined to accommodate developing technologies"; and described as "telling" the fact that "none of the provisions of the Act limit copyright protection to existing technologies." Compare *Greenberg v National Geographic Society*, 533 F (3d) 1244 at 1257 (2008), adopting from *Tasini* the description of media neutrality as a "long-embraced doctrine" and a "staple of the Copyright Act", and referencing the legislative history and intention behind the 1976 legislation. The court states: "As technology progresses and different mediums are created through which copyrightable works are introduced to the public, copyright law must remain grounded in the premise that a difference in form is not the same as a difference in substance." In this case, the principle was held to permit the exact

conversion of a collective work from print to digital form as a privileged "revision" by the owner of copyright in the collective work.

[17] There are some exceptions: see Kevin Smith, "Technological Neutrality as Rhetorical Strategy", Duke University Scholarly Communications Blog (18 October 2009) <http://blogs.library.duke.edu/scholcomm/2009/10/18/technological-neutrality-as-a-rhetorical-strategy/> [Smith, "Rhetorical Strategy"]: "[T]hat copyright law should be technologically neutral seems benign enough, but the work that the music publishing industry tries to get that rhetoric to do is very troubling." See also Kevin Smith, "Coming Clean on Technological Neutrality", Duke University Scholarly Communications Blog (23 October 2012) <http://blogs.library.duke.edu/scholcomm/2012/10/23/coming-clean-on-technological-neutrality/>. Smith complains that technological neutrality is used by copyright owners as "a battle cry" or "a rhetorical smoke screen" only when it supports their claims.

[18] See *ITV Broadcasting Ltd. & Ors v TV Catchup Ltd.*, [2011] FSR 40, [2011] EWHC 1874 (Pat) at para 102 [*ITV*] (given "the obvious desire in the [InfoSoc] Directive to provide for a technologically neutral definition of communication to the public" it would be "an unfortunate result if a point-to-multipoint communication were to be actionable but a number of point to point transmissions were not"). References to technological neutrality also appear in respect of broadcasting and communications legislation, e.g. *British Telecommunications Plc, R (on the application of) v Secretary of State for Culture, Olympics, Media and Sport*, [2012] All ER (D) 52 (Mar), [2012] EWCA Civ 232; *Hutchison 3G UK Limited v Office of Communications* [2008] CAT 11.

[19] Explanatory Memorandum to the *Copyright Amendment (Digital Agenda) Bill 1999* (Cth), cited in *National Rugby League Investments Pty Ltd. v Singtel Optus Pty Ltd.* [2012] FCAFC 59 at para 95 [*National Rugby*].

[20] *Roadshow Films Pty Ltd. v iiNet Ltd.* [2011] FCAFC 23 at paras 164, 692 [*Roadshow*].

[21] *National Rugby*, *supra* note 19 at para 95. The idea that technological neutrality protects users as well as owners is also evident in *Gammasonics Institute for Medical Research Pty Ltd. v Comrad Medical Systems Pty Ltd.*, [2010] NSWSC 267 at para 38 (supporting an interpretation of digital downloads as "goods": "this approach has the advantage of being 'technology-neutral' since it affords the same protection to the consumer irrespective of the technical medium used for delivery."

[22] *National Rugby*, *supra* note 19 at para 96. Compare *Roadshow*, *supra* note 20 at para 169: "[T]he object of the Digital Agenda Act, to create a technology neutral right of communication, cannot override the plain words of the Copyright Act itself."

[23] See e.g. *Apple Computer Inc. v Mackintosh Computers Ltd.*, [1987] 1 FC 173 at paras 52, 80; *Re Public Performance of Musical Works 1990 to 1993*, [1993] 52 CPR (3d) 23 at para 59; *Canadian Assn. of Broadcasters v SOCAN*, [1994] 58 CPR (3d) 190 at para 23; *Re SOCAN Statement of Royalties 1994-1997*, [1996] 71 CPR (3d) 196 at para 126; *Re Private Copying 2003-2004, Tariff of Levies to be Collected by CPCC*, [2003] 28 CPR (4th) 417 at para 135.

[24] *Robertson v Thomson Corp*, 2006 SCC 43, [2006] 2 SCR 363 <http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/2317/index.do> [*Robertson*].

[25] *Ibid* at para 44, LeBel and Fish JJ, writing for Bastarache, LeBel, Deschamps, Fish and Rothstein JJ. This conclusion was similar in substance and effect to the ruling of the US Supreme Court in *Tasini*, *supra* note 15 (notwithstanding important differences between the US and Canadian law regarding copyright in collective works).

[26] *Robertson, supra* note 24 at paras 86-90, Abella J, writing for McLachlin CJC and Binnie, Abella and Charron JJ.

[27] *Ibid* at para 93, Abella J.

[28] *Ibid* at para 49.

[29] *Ibid* at para 48.

[30] *Ibid* at para 49.

[31] *Ibid* at para 48.

[32] *Ibid* at para 49.

[33] *Ibid* at para 75.

[34] *Ibid* at para 68.

[35] *Ibid* at para 69, citing *inter alia Théberge v Galerie d'Art du Petit Champlain inc.*, 2002 SCC 34 at para 30, [2002] 2 SCR 336 [*Théberge*]; *CCH Canadian Ltd. v Law Society of Upper Canada*, 2004 SCC 13 at para 23, [2004] 1 SCR 339; and *Society of Composers, Authors and Music Publishers of Canada v Canadian Assn. of Internet Providers*, 2004 SCC 45 at para 40, [2004] 2 SCR 427 [*SOCAN v CAIP*].

[36] *Robertson*, *supra* note 24 at para 70.

[37] *Ibid* at para 79, citing Michael Geist, *Our Own Creative Land: Cultural Monopoly and the Trouble with Copyright* (Toronto: Hart House Lecture Committee, University of Toronto, 2006) at 9.

[38] Tussey, *supra* note 11 at 477.

[39] For a sound critique of the Court's reasoning, see Gregory R Hagen, "Layered Rights: Robertson v Thomson" (2007) 6:1 Can JL & Tech 61 <http://cjlt.dal.ca/vol6_no1/index.html>. See also Navin Khanna and Julie Catzman, "SCC's premise on copyright for collective work is troubling", *Lawyers' Weekly* (24 November 2006) <http://www.lawyersweekly.ca/index.php?section=article&articleid=387>.

[40] Writing for LeBel, Fish, Rothstein and Cromwell JJ, citing *Robertson*, *supra* note 24 at para 49.

[41] *ESA, supra* note 1 at para 122.

[42] *Ibid* at para 49.

[43] *Bell, supra* note 1 at para 43.

[44] *Robertson*, *supra* note 24 at para 49.

[45] *Rogers*, *supra* note 1 at para 38.

[46] *Ibid* at para 39, once again citing *Robertson*, *supra* note 24 at para 49.

[47] *Rogers*, *supra* note 1 at para 40, citing *Théberge*, *supra* note 35 at para 30.

[48] *Rogers*, *supra* note 1 at para 40.

[49] Abella J's concurring reasons concerned the majority's approach to the standard of review.

[50] See *Rogers*, *supra* note 1 at para 39: "[T]he same [media neutrality] principle should guide the application of the neutral wording of the right to 'communicate… to the public by telecommunication.' The broad definition of 'telecommunication' was adopted precisely to provide for a communication right 'not dependent on the form of technology' (*SOCAN v CAIP*, at para 90)."

[51] *ESA*, *supra* note 1 at para 5 [emphasis added], citing *Robertson*, *supra* note 24 at para 49.

[52] *ESA, supra* note 5 at para 5.

[53] *Ibid* at paras 7-8, citing Carys Craig, "Locking Out Lawful Users: Fair Dealing and Anti-Circumvention in Bill C-32", in Michael Geist, ed, *From "Radical Extremism" to "Balanced Copyright": Canadian Copyright and the Digital Agenda* (Toronto: Irwin Law, 2010) 177 at 192 <http://www.irwinlaw.com/content/assets/content-commons/666/CCDA%2007%20Craig.pdf> [Craig, "Locking Out Lawful Users"].

[54] Tussey, *supra* note 11 at 479.

[55] Jerome H Reichman, Graeme B Dinwoodie, and Pamela Samuelson, "A Reverse Notice and Takedown Regime to Enable Public Interest Uses of Technically Protected Copyrighted Works" (2007) 22 Berkeley Tech. L J 981 at 1042 <http://scholarship.law.duke.edu/faculty_scholarship/1861/>. For further discussion of this principle, see Carys Craig, "Digital Locks and the Fate of Fair Dealing in Canada: In Pursuit of Prescriptive Parallelism" (2010) 13:4 J of World Intell Prop 503 <http://onlinelibrary.wiley.com/doi/10.1111/j.1747-1796.2009.00394.x/full>.

[56] Reed, *supra* note 4 at 269. Reed explains: "If the works of Shakespeare were still in copyright I could infringe his rights in *Hamlet* in numerous offline ways, for example via the use of technologies such as semaphore flag communication."

[57] *ESA*, *supra* note 1 at paras 96, 100, Rothstein J.

[58] Compare Reed, *supra* note 4 at 270.

[59] Shira Perlmutter, "Convergence and the Future of Copyright" (2000) 24 Colum-VLA JL & Arts 163 at 173.

[60] *ESA*, *supra* note 1 at para 105: when a work is downloaded, "a transmission by telecommunication to the public, and therefore, a communication within the meaning of s 3(1)(*f*), effectively occurs."

[61] Compare Tussey, *supra* note 11 at 479.

[62] See *ESA*, *supra* note 1 at para 107.

[63] *Rogers*, *supra* note 1 at para 52.

[64] *Ibid* at para 41, citing the *Canada-United States Free Trade Agreement Implementation Act*, SC 1988, c 65, ss 61, 62.

[65] *Rogers, supra* note 1 at para 38. This conclusion is consistent with rulings in the United Kingdom and Australia. Compare *ITV*, *supra* note 18; *Roadshow*, *supra* note 20.

[66] Tussey, *supra* note 11 at 477.

[67] Cameron J Hutchinson, "The 2012 Supreme Court Copyright Decisions & Technological Neutrality" SSRN at 16 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2157646>.

[68] Bell, *supra* note 1 at para 43.

[69] Hutchinson, *supra* note 67 at 1.

[70] *ESA*, *supra* note 1 at para 28.

[71] *Ibid* at paras 32-39.

[72] *Ibid* at para 42: "[T]he rights in the introductory paragraph provide the basic structure of copyright. The enumerated rights listed in the subsequent subparagraphs are simply illustrative." The statutory language (copyright "means…and includes…") supports this interpretation on its face, but as Rothstein J observed, it is difficult to reconcile this interpretation with the rental rights in s 3(1)(*i*) (despite the majority's statement to the contrary). In my opinion, the majority's approach is nonetheless to be preferred; the awkward fit of rental rights can be viewed as a testament to the problems that accompany piecemeal, interest-driven extensions of copyright in anticipation of future income streams arising from new technological capabilities.

[73] *Ibid* at para 11.

[74] For an in-depth analysis of this issue, see Jeremy de Beer's chapter in this volume: "Copyright Royalty Stacking".

[75] *ESA*, *supra* note 1 citing Ariel Katz, "Commentary: Is Collective Administration of Copyrights Justified by the Economic Literature?" in Marcel Boyer, Michael Trebilcock & David Vaver, eds, *Competition Policy and Intellectual Property* (Toronto: Irwin Law, 2009) 449 at 461-63.

[76] *ESA*, *supra* note 1 at para 10.

[77] *Ibid* at para 9.

[78] *Ibid* at para 100.

[79] Smith, "Rhetorical Strategy", *supra* note 17. Describing the argument of US music publishers who claimed the right to collect a fee for public performance for digital downloads, Smith writes: "To call this grasp at a wholly new income stream 'technological neutrality' shows amazing nerve; it is really the opposite of such neutrality." In *United States v American Society of Composers, Authors and Publishers*, 627 F (3d) 64 (2d Cir 2010), it was held that the download of a copy of a work did not come within the scope of the right to perform in public, as defined in the U.S. *Copyright Act*, 17 USC §§ 101 and 106(4). Citing differences between US and Canadian law, Rothstein J found this decision to be of no persuasive authority in *ESA* (at para 103). Despite differences in the statutory language, however, the issue of technological neutrality is similarly implicated by both claims.

[80] *Ibid* at para 101.

[81] *Ibid* at para 123.

[82] See e.g. *SOCAN v CAIP*, *supra* note 35 at para 10 (describing downloaded musical works as having been communicated by telecommunication); *Canadian Wireless Telecommunications Assn. v Society of Composers, Authors & Music Publishers of Canada*, 2008 FCA 6 at para 19 [*Canadian Wireless*] (holding that the wireless transmission of a musical ringtone, when received, is a completed communication).

[83] Hutchinson, *supra* note 67 at 17.

[84] At the time of this writing, Rogers, Bell, Telus and Quebecor are already seeking

reimbursement of some $15 million paid to SOCAN since 2006 on account of the certified Ringtones Tariff that was upheld by the Federal Court of Appeal in *Canadian Wireless*, *supra* note 82.

[85] *Théberge*, *supra* note 35 at para 30.

[86] *Bell*, *supra* note 1 at paras 9-10. Abella J cites as an example of this earlier, author-centric view, *Bishop v Stevens*, [1990] 2 SCR 467. Notably, this is the same case cited by Rothstein J in *ESA* as a basis for his interpretation of section 3 in favour of the plaintiff copyright owner. See *ESA*, *supra* note 1 at para 91.

[87] *ESA*, *supra* note 1 at para 123.

[88] *bid* at paras 124-25.

[89] Compare Koops, *supra* note 3 at 24-25.

[90] Tussey, *supra* note 11 at 480.

[91] Tomas A Lipinski, "The Myth of Technological Neutrality in Copyright and the Rights of Institutional users: Recent Legal Challenges to the Information Organization as Mediator and the Impact of the DMCA, WIPO and TEACH" (2003) 54:9 J of Am Soc for Info Sci & Tech 824 at 825 <http://onlinelibrary.wiley.com/doi/10.1002/asi.10269/pdf>.

[92] Michael Geist, "Beyond Users' Rights: The Supreme Court Entrenches Technological Neutrality as a New Copyright Principle", Michael Geist Blog (16 July 2012) <http://www.michaelgeist.ca/content/view/6592/125/> [Geist, "Beyond Users' Rights"].

[93] See Koops, *supra* note 3 at 7-8.

[94] *Ibid* at 8.

[95] *Ibid* at 18.

[96] *Ibid* at 8.

[97] Lipinski, *supra* note 91 at 825.

[98] Perlmutter, *supra* note 59 at 169.

[99] Craig, "Locking Out Lawful Users" *supra* note 53 at 198.

[100] Geist, "Beyond Users' Rights", *supra* note 92.

[101] *Ibid.*

[102] Koops, *supra* note 3 at 25.

[103] *Ibid.*

[104] *Ibid.*

[105] *Bell*, *supra* note 1 at para 11.

[106] Compare Tussey, *supra* note 11 at 481.