



Supreme Court Update – Ephemeral Copies, Technological Neutrality and the *Copyright Act*

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The Supreme Court of Canada has released its much anticipated decision in *Canadian Broadcasting Corp v SODRAC 2003 Inc.*, addressing the principle of copyright technological neutrality. At issue was whether ephemeral or broadcast-incidental copies that current broadcasting technology renders necessary in the course of broadcasting a work to the public engage the reproduction right provided for in the *Copyright Act*, and if so, how compensation with respect to those copies should be valued for the purpose of royalty payments.

The appellant, Canadian Broadcasting Corporation, argued that the principle of “technological neutrality” espoused by the Supreme Court of Canada in the Court’s 2012 decision, *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada (“ESA”)*, would render ephemeral/incidental copies unprotected by copyright, since they should be viewed as part of, not separate from, the broadcasting process, and therefore not subject to a separate license and royalty scheme. The respondent, Society for Reproduction Rights of Authors, Composers and Publishers in Canada, argued that the earlier Supreme Court decision in *Bishop v Stevens* already settled the issue, finding ephemeral reproductions and broadcast reproductions to be two distinct acts, each requiring their own licenses and royalty payments.

In 2014, the Federal Court of Appeal rejected CBC’s arguments and concluded that *Bishop* had not been overruled by the Supreme Court of Canada in *ESA*. Furthermore, the Court found that nothing in *ESA* would authorize the Copyright Board to create a category of reproductions or copies which, by their association with broadcasting, would cease to be protected by the *Act*.

Justice Rothstein, now retired, penned the majority decision for the Supreme Court, writing what will be his last judicial contribution to Canadian intellectual property law. The majority affirmed that *Bishop* was still good law, relying on principles of purposive construction:

Although made in the process of broadcasting, these broadcast-incidental copies nevertheless trigger the reproduction right... There is nothing in the text, context or legislative history... that supports the view that the broadcasting process obviates the fact that broadcast-incidental copies are reproductions under the *Copyright Act*. Arguments based on purpose in the form of technological neutrality and balance are advanced to come to the opposite conclusion, but purposive construction is a tool of statutory interpretation to assist in understanding the meaning of the text. It is not a stand-alone basis for the Court to develop its own theory of what it considers appropriate policy. Accordingly, the Board was correct in proceeding on the basis that broadcast incidental copies engage the reproduction right under s. 3(1)(d) of the *Copyright Act*.

Although noting the importance of the principle of technological neutrality, the majority held that it did not override the statutory language of the *Copyright Act*:

The principle of technological neutrality is recognition that, absent parliamentary intent to the contrary, the *Copyright Act* should not be interpreted or applied to favour or discriminate against any particular form of technology. It is derived from the balancing of user and right-holder interests discussed by this Court in



Théberge — 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”: para. 30. Because this long-standing principle informs the *Copyright Act* as a whole, it must be maintained across all technological contexts: “The traditional balance between authors and users should be preserved in the digital environment”: *ESA*, at para. 8.

As such, the Copyright Board was correct in holding that the ephemeral/incidental copies were protected by copyright, and subject to a royalty payment separate from that covering the broadcast itself. Having said this, the majority saw the Board as having failed, however, to strike a balance between the rights of users and right-holders while applying the principle of technological neutrality to licence valuation:

Because rights holders have the exclusive right to reproduce their works under s. 3(1)(d), they are entitled to be justly compensated for the use of that right. One element of just compensation is an appropriate share of the benefit that the user obtains by using reproductions of their copyright protected work in the operation of the user’s technology. That just compensation must be valued, however, in accordance with the principle of technological neutrality...

In this case, where the financial risks of investing in and implementing new technology were undertaken by the user and the use of reproductions of copyright protected works was incidental, the balance principle would imply relatively low licence fees to the copyright holder... the Board’s valuation methodology did not give any indication that the principles of technological neutrality and balance were considered...

In her dissent, Justice Abella rejected the majority’s interpretation of the statutory language and instead analyzed the reproduction right afforded by the *Copyright Act* through the application of the principle of technological neutrality. Justice Karakatsanis also wrote a dissenting opinion, agreeing with Justice Abella on the merits and in the result, but disagreeing on her position on the standard of review.

The Supreme Court of Canada’s decision has implications for broadcasters and rights holders beyond the broadcast issues addressed, and will no doubt be considered where works are reproduced through non-traditional means, such as through Internet streams and channels. It will also be interesting to see how the Copyright Board will now apply the principle of technological neutrality, balance the competing rights of users and rights-holders and reach an implied “relatively low” license fee. Stay tuned for further analysis of this decision.

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