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Technological Neutrality in Canadian Copyright Law

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I: Introduction: The Supreme Court of Canada Adopts Technological Neutrality

Recently, in Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada [ESA], Rogers Communications Inc. v Society of Composers, Authors and Music Publishers of Canada [Rogers] and Society of Composers, Authors and Music Publishers of Canada v Bell Canada [Bell], the Supreme Court of Canada dealt with the issue of how copyright law should treat competing disseminators of copyrighted subject matter. As the Court recognized, copyright law can impose costs on those who provide new forms of dissemination technology that don’t apply to incumbent disseminators, even where the new forms are more efficient. In order to deal with this problem, it applied a principle of technological neutrality, which requires, in one formulation, that, “the Copyright Act apply equally between traditional and more technologically advanced forms of the same media…” Applying that principle in ESA, the Court held that technological neutrality requires avoiding the imposition of additional copyright royalties
“based solely on the method of delivery of the work to the end user.” While this principle advances the law about how copyright applies to competing disseminators, the judgment raises an issue about whether new amendments to the Copyright Act that prohibit the circumvention of technological measures that protect copyright (technological protection measures, or TPMs) are consistent with the principle of technological neutrality, as they allow copyright owners to favour their own dissemination technology over that of competing disseminators.

The earlier case of Society of Composers, Authors and Music Publishers of Canada v Canadian Assn. of Internet Providers also concerned the dissemination function of copyright and the relationship between rival disseminators, members of SOCAN and Internet service providers (ISPs). Yet, in SOCAN v CAIP, the Court did not mention or apply the principle of technological neutrality to competing disseminators because of Parliament’s explicit treatment of those who merely provide the means of telecommunication under s 2.4(1)(b) of the Copyright Act. The result would have likely been the same had the principle of technological neutrality been applied, since the Court ruled, applying s 2.4(1)(b), that content-neutral ISPs do not communicate those works that are disseminated by others through their networks. Indeed, the Court lauded the Internet as a remarkable innovation, the use of which “should be facilitated rather than discouraged.” At the same time, it stated that such facilitation “should not be done unfairly at the expense of those who created the works of arts and intellect in the first place.” It thereby linked the issue of the treatment of rival disseminators to the rights of authors, implicitly raising the fundamental issue of how much authors (and other copyright owners) should benefit from new forms of dissemination. Later, in ESA, the Court grounded the principle of technological neutrality in the notion that the traditional balance between authors and users, as described in Théberge, should be preserved in the digital environment.

Théberge concerned the rights that an artist had in the poster that he created in relation to a gallery that chemically lifted the ink image from it and put it on a canvas backing. The Supreme Court made the fundamental point that authors deserve a just reward, but that their
copyrights are limited by the public interest in encouraging authors to create and to disseminate subject matter. In *CCH Canadian Ltd. v Law Society of Upper Canada [CCH]*, a case that concerned the scope of the copyrights of legal publishers in edited judicial reasons, the Supreme Court emphasized that the fair dealing exception that users enjoy, as well as other exceptions and limitations to copyright, are users’ rights. Later, *ESA* and *Rogers* made it clear that technological neutrality is an interpretive principle that is aimed, ultimately, at ensuring that the public interest in dissemination is efficiently promoted.

Of course, the application of the principle of technological neutrality is limited to situations where there is no legislative intent to the contrary, but this gives rise to the issue of whether the principle can be of any use given the existence of provisions that prohibit the circumvention of protected TPMs. These provisions present a difficult problem, because they potentially limit the ability of courts to give a technologically neutral interpretation of the *Copyright Act* whenever TPMs are used by copyright owners to favour themselves over rival disseminators and it is prohibited to circumvent the TPMs in the circumstances.

For many, this might appear justifiable on the basis that Parliament should be in charge of allocating the benefits of new technology. Be that as it may, the problem is that whatever balance of benefits may be set by legislation, private actors may undermine that balance through their use of technology. This chapter suggests that the principle of technological neutrality can be used to create new exceptions to the prohibition on circumventing protected TPMs and to strike down some prohibitions (which make user rights subject to not circumventing a TPM) on the basis of a conflict with the rule of law.

Section II will suggest that the principle of technological neutrality, as enunciated by the Supreme Court, is largely an accurate description of copyright’s current policy of dealing with disseminators. Section III describes the principle of technological neutrality in the recent Supreme Court judgments as one that requires treating competing disseminators of works and other subject matter equally under copyright law. Section IV argues that, according to the Supreme Court, the principle of technological neutrality is used to ensure
that copyright law does not overcompensate owners of copyrights at the expense of users of copyrighted works. Section V points out, in agreement with William Patry, however, that legislated TPM provisions enable incumbents to favour themselves over their rival disseminators, leading to the question of whether the principle of technological neutrality can be used by courts at all. Finally, Section VI argues that a broad prohibition against circumventing TPMs is contrary to the rule of law because TPMs can involuntarily force persons to abide by “digital rights” fashioned by copyright owners even though no corresponding copyrights exist. It suggests that an effective rule of law would empower courts to create new rights to circumvent TPMs (and, in some cases, strike down TPM provisions) in order to ensure technological neutrality.

II: Calls for Technological Neutrality in Copyright Law

Calls for technological neutrality have been made in numerous areas of the law, including electronic commerce and telecommunications law, and are currently being made with a great sense of urgency in copyright law. William Patry demands, for instance, that “[o]ur copyright law must be technology neutral…. ” David Vaver exhorts: “Copyright law should strive for technological neutrality.” Howard Knopf argues that, in copyright law, we need to ensure “technological neutrality and clear, general language.” Francis Gurry, the Director General of the World Intellectual Property Organization (WIPO), claims that “neutrality to technology and to the business models developed in response to technology” is a key principle that is needed to respond to digital technologies and the Internet. Canada’s recent Copyright Amendment Act was said to be drafted to “ensure that [the Copyright Act] remains technologically neutral.” What reasons could be advanced to support technological neutrality?

One possible rationale is that legislatures, rather than courts, should decide whether to extend the benefits of new dissemination technology to copyright owners. As Wu has shown, the communications policy of US copyright law, which developed in parallel with the growth of the recording industry, radio and television, and the cable industry, has, generally, been one where courts treat rival disseminators equally,
refusing to extend copyright to new methods of dissemination, at least where copyright owners sought to block the new technology rather than participate in the new form of dissemination. On his account, the classic legislative response to novel disseminators in the US (1900–1976) centred on access fees and compulsory licences. The modern regime (post-1976) has created a (judge-run) immunity scheme concerning electronics manufacturers, a safe harbour for ISPs, as well as new provisions (such as concerning TPMs) that affect users.

Arguably, a similar policy has existed in Canada. For example, in response to new dissemination technology, Parliament created the (now abandoned) compulsory licence for the reproduction of musical works, the private copying regime for sound recordings, the right to equitable remuneration for the public performance of works or their communication to the public by telecommunication, and extended the communication right to cover cable transmissions while creating the right to retransmit television signals. More recently, Parliament created a new form of secondary liability for enabling infringement, enhanced the immunity of ISPs and added anti-circumvention provisions regarding TPMs. This policy is consistent with the Canadian Supreme Court’s proviso that a technologically neutral interpretation is only available absent Parliamentary intent to the contrary.

A second possible reason is that copyright law should not be used, by either courts or legislators, as a means to control dissemination technology so as to favour incumbent disseminators over rival novel disseminators, such as by either blocking rivals by applying existing copyrights or treating them unequally by applying multiple copyrights (e.g., reproduction and communication rights) to them. Indeed, as will be discussed, the recent Supreme Court cases characterize the principle of technological neutrality as grounded in preserving the traditional balance between authors and users. According to this view, technological neutrality in copyright law is a means of stopping “[t]he proxy battle for control of technologies and markets through copyright law.” Through “proxy battles”, copyright owners have historically tried to extend copyright’s reach to cover new means of dissemination, regardless of whether copyright owners created or funded them, in order to undermine competing disseminators and expand their own market for their copyrights. As Francis Gurry says, technological neutrality
is needed to fend off copyright owners who wish to “preserve business models established under obsolete or moribund technologies.”

This second view is supported by the idea that copyright law should regulate competition between rival disseminators of copyrighted subject matter in order to promote innovation. For instance, the Canadian government has said that copyright law must be technologically neutral in order to ensure fair competition and foster innovation. It maintained that its self-described technologically neutral approach to drafting the Copyright Modernization Act was intended to “spur competition and foster innovation by ensuring that businesses have the flexibility to develop and offer innovative products and services to consumers, provided they fall within the permitted scope of the law.”

As evidence for its view, the Canadian government cited the US Sony litigation, through which the motion picture industry unsuccessfully attempted to block the distribution of video cassette recorders, saying that copyright can be a barrier to innovation when it is used by copyright owners to attempt to prevent the development of innovative consumer products.

As mentioned above, however, the Copyright Modernization Act created a new form of secondary infringement liability, and infringement for the circumvention of TPMs. These two new forms of infringement enhance the ability of copyright owners to control dissemination technology for their own benefit. So, while technological neutrality may be viewed as desirable, to some extent, by Parliament, it is subject to Parliament’s power to legislatively favour incumbent disseminators against new rivals.

Finally, but arguably most importantly, another view is that technology should not be used as a direct means of regulating our use of copyrighted subject matter. That is, the rule of law requires that “the relationship between the state and the individual be regulated by law.” While the rationale for the use of TPMs by copyright owners is clearly to regain some form of excludability with respect to their works that was lost through the information technology revolution, the result of their use will be the practical displacement of copyright law by TPM-powered digital rights management (DRM) systems that enable copyright owners to define the “right to control the manner
in which the public apprehend the work.” These systems subjugate user rights to create a “permissions-based culture,” to access subject matter (whether copyrighted or not) controlled by DRM. Further, with the aid of DRM, the digital ecosystem threatens to evolve into incompatible information fiefdoms controlled by Apple, Sony, Microsoft and Google through their digital appliances, all at the expense of the public interest.

III: The Supreme Court of Canada on Technological Neutrality and Media Neutrality

The three main cases under consideration concerned whether the dissemination of musical works by the Internet were an exercise of owners’ right to communicate to the public by telecommunication for the purpose of setting a tariff for copyright royalties. The underlying policy issue was how to split fairly the benefits of new forms of dissemination between incumbent disseminators (who are often copyright owners) as a (proxy) reward for authorship and novel disseminators, who want to be rewarded for creating new markets and more efficient forms of dissemination. In reaching its decision in these cases, the Supreme Court applied the principle of technological neutrality, which requires that, in the absence of evidence of contrary intent by Parliament, “the Copyright Act apply equally between traditional and more technologically advanced forms of the same media…” Failing to apply the principle of technological neutrality, it argued, could result in the imposition of additional costs on users of novel Internet-based methods of delivery relative to incumbent methods of dissemination, overcompensating authors at the expense of the public.

A. Robertson

Prior to the use of “technological neutrality”, in Robertson v Thomson Corp., the Supreme Court of Canada used the phrase “media neutrality”. Later, in ESA and, especially, Rogers, it used the two phrases somewhat interchangeably. That is understandable, as both media neutrality and technological neutrality are interpretive principles that are designed to ensure that the benefits of new media
and technology are allocated in a way that is consistent with the purpose of the *Copyright Act*. However, I argue that they are different conceptions of neutrality.

i. Media Neutrality of the Reproduction Right

In *Robertson*, the Supreme Court of Canada pointed to section 3(1) of the *Copyright Act*, which uses the phrase “in any material form whatever” as a reflection of media neutrality. 59

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

The majority of the Supreme Court said in *Rogers*, citing *Apple Computer Inc. v Mackintosh Computers Ltd.*, 60 that it had “long recognized in the context of the reproduction right that, where possible, the *Copyright Act* should be interpreted to extend to technologies that were not or could not have been contemplated at the time of its drafting....” 61 In *Apple*, for instance, a competitor of Apple etched a computer program into a silicon chip and reproduced that chip. 62 The chips were found to be reproductions of the computer program notwithstanding that they were silicon chips. 63

ii. Media Neutrality of the Copyright Act

In *Robertson*, the Supreme Court defined “media neutrality”: “Media neutrality means that the *Copyright Act* should continue to apply in different media, including more technologically advanced ones.” 64 Later, in *Rogers*, the Supreme Court noted that “in any material form whatever” in s 3(1) extends to the communication right in s 3(1)(f). 65 In *Robertson*, the Court made it clear that such rights were limited by the “exigencies of the *Copyright Act*.” 66 So, in *Robertson*, the Court found that *The Globe and Mail* did not reproduce the originality of its newspaper in all of the distinct databases that contained its newspaper articles. 67 Similarly, in *Théberge*, lifting the ink layer from a poster and placing it on canvas was not considered to be a reproduction in light of the goals of the *Copyright Act*. 68

In *ESA*, however, Rothstein J, in dissent, maintained that the
principle of media neutrality implies that the Internet delivery of a musical work is a communication just as, he claimed, the work would be communicated by traditional broadcast technologies. This conclusion does not follow, I believe, as it assumes that delivering a musical work is necessarily a communication rather than possibly merely the delivery or dissemination of a work. It is true that, if a delivery of a work is a communication, then, from the media neutrality principle, it is a communication regardless of the form of media. But the delivery of a work may not be a communication, like shipping a compact disc via the mail. The message of ESA is that one cannot conclude that a new medium of dissemination, such as Internet delivery, is a form of communication unless that characterization treats incumbent forms of delivery (such as mail) equally under copyright law.

B. Entertainment Software [ESA]

The most important case on the principle of technological neutrality is ESA. In that case, the appellant, Entertainment Software Association (the Association), represented a group of video game publishers and distributors. The video games contained musical works and the reproduction of the musical works in the video games had been licensed by the video game publishers. By downloading the gaming software from member sites, customers reproduced it. The downloaded copy is identical to a copy that could be purchased from the store or purchased online and then shipped to the buyer. The issue was whether the members of the Association communicate the software (and the musical work it contains) to the public by telecommunication. SOCAN argued that they did, the Copyright Board agreed and this was upheld by the Federal Court of Appeal.

The Copyright Board relied upon Binnie J’s observation in SOCAN v CAIP, that a work has necessarily been communicated when, “[a]t the end of the transmission, the end user has a musical work in his or her possession that was not there before.” It also relied on the more recent ruling in Canadian Wireless Telecommunications Assn. v Society of Composers, Authors and Music Publishers of Canada, concerning the downloading of ringtones, that “[t]he word ‘communication’ connotes the passing of information from one person to another.”
In ESA, the Supreme Court noted that Binnie J’s comments in *SOCAN v CAIP* were *obiter dicta* and that the meaning of communication was never at issue. It gave an extensive legislative history of the communication right, characterizing it as a kind of performance right that “did not contemplate the delivery of permanent copies of the work, since such a delivery was not possible through the means of Hertzian radio waves.” The Supreme Court agreed with the Association and also held that the Board’s conclusion violated the principle of technological neutrality.

In our view, the Board’s conclusion that a separate, “communication” tariff applied to downloads of musical works violates the principle of technological neutrality, which requires that the *Copyright Act* apply equally between traditional and more technologically advanced forms of the same media: *Robertson v. Thomson Corp.*, 2006 SCC 43, [2006] 2 S.C.R. 363, at para. 49. The principle of technological neutrality is reflected in s. 3(1) of the Act, which describes a right to produce or reproduce a work “in any material form whatever”. In our view, there is no practical difference between buying a durable copy of the work in a store, receiving a copy in the mail, or downloading an identical copy using the Internet. The Internet is simply a technological taxi that delivers a durable copy of the same work to the end user.

The Supreme Court says that the principle of technological neutrality is reflected in s 3(1) of the *Copyright Act*, but there is a subtle shift in meaning from media neutrality to technological neutrality because, while media neutrality may extend an existing communication right to new media, technological neutrality may require that the dissemination is no communication at all. The possibility that the dissemination of a work is not a communication at all is provided in the reasoning of David Vaver, which the Court cites as an echo of its own reasoning:

> In principle, substitute delivery systems should compete on their merits: either both or neither should pay. Copyright law should strive for technological neutrality.
In the past, whether a customer bought a sound recording or video game physically at a store or ordered it by mail made no difference to the copyright holder: it got nothing extra for the clerk’s or courier’s handover of the record to the customer. Now, because of the telecommunication right, copyright holders can and do charge extra for electronic delivery of identical content acquired off websites.81

The Supreme Court, thus, characterizes both the function of the download and of shipping through the mail as delivery. Although the Court does not use the language of “functional equivalence”, downloading and mail are, on its view, functionally equivalent as modes of delivery, despite their technological differences. In its words, “[t]he Internet is simply a technological taxi that delivers a durable copy of the same work to the end user.”82 The principle of technological neutrality requires that technologically distinct (e.g., downloading and shipping by mail), but functionally equivalent, methods of dissemination should be treated identically by copyright law.83 As a result, it ruled, like sending a compact disc via mail, Internet downloading is not a communication.84

C. Rogers

In Rogers, the issue was whether the dissemination of musical works by Rogers Communications and other companies were communications to the public by telecommunication under s 3(1)(f) of the Copyright Act.85 The Copyright Board had earlier agreed that a claim for royalties was well founded and the Federal Court of Appeal agreed.86 As discussed, the Supreme Court had determined in ESA that downloads of musical works were not communications, whether to the public or not. As for streaming music, Rogers and other music services claimed that communications over the Internet that are triggered (or “pulled”) by individual users are not to the public.87 The argument of Rogers was that if a single person initiates a single stream of music to himself or herself, it is not a stream to the public, but to that single person.88 Rogers claimed support from CCH, that single, point-to-point transmission of faxes of literary works were not to the public.89
The majority judgment in Rogers, written by Rothstein J, seemed to equate media neutrality and technological neutrality in section 6: “Section 3(1)(f) Is Not Limited to Traditional ‘Push’ Technologies; It Is Technology-Neutral”. It stated that media neutrality applies not only to the reproduction right, but also to the communication right.

Although the words “in any material form whatever” qualify the right to “produce or reproduce the work” in s. 3(1), the same 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).

The reference to media neutrality suggests that the Supreme Court considered push (broadcasting) and pull (streaming) technologies to be different material forms of communication and applied the principle of media neutrality to conclude that streaming music is a communication to the public, regardless of whether the technology is one of push broadcasting technology or the newer pull technology. But that conclusion cannot be inferred merely from the principle of media neutrality since the question is not whether the communication right extends to streaming, which was settled in the affirmative in ESA, but whether that communication is to the public. The issue that needs to be resolved is one of technological neutrality: how to treat broadcasting and streaming equally as forms of dissemination.

The answer given by the Court is that both music broadcasting and music streaming are characterized abstractly as making music available indiscriminately to anyone with access. The majority once again cites David Vaver on this matter: “If the content is intentionally made available to anyone who wants to access it, it is treated as communicated ‘to the public’ even if users access the work at different times and places”. Thus, “[a]lthough they occur between the online music provider and the individual consumer in a point-to-point fashion, the transmissions of musical works in this case, where they constitute ‘communications’, can be nothing other than communications ‘to the public’.”
D. Bell

In *Bell*, the issue was whether previewing short (30- to 90-second) excerpts of musical works by streaming them prior to purchase was fair dealing.\(^9^5\) The Supreme Court applied the test of fair dealing from *CCH*.\(^9^6\) For the first part of the test, the Court determined that the dealing was for an allowable purpose of research, since “research” should be interpreted generously in light of the fact that one of the purposes of the *Copyright Act* is to further the dissemination of works.\(^9^7\) In determining whether previewing was fair, it applied the standard factors for fairness.\(^9^8\) In terms of the amount of the dealing, SOCAN argued that the *aggregate* amount of dealing should be considered.\(^9^9\) The Court held, however, that, because fair dealing is an *individual* user’s right, the amount of dealing related to individual previews, not the aggregate number of previews.\(^1^0^0\)

The Supreme Court further commented that SOCAN’s interpretation of the “amount of the dealing” as the aggregate amount was not technologically neutral.\(^1^0^1\)

Further, given the ease and magnitude with which digital works are disseminated over the Internet, focusing on the “aggregate” amount of the dealing in cases involving digital works could well lead to disproportionate findings of unfairness when compared with non-digital works. If, as SOCAN urges, large-scale organized dealings are inherently unfair, most of what online service providers do with musical works would be treated as copyright infringement. This, it seems to me, potentially undermines the goal of technological neutrality, which seeks to have the *Copyright Act* applied in a way that operates consistently, regardless of the form of media involved, or its technological sophistication: *Robertson v. Thomson Corp.*, 2006 SCC 43, [2006] 2 SCR 363, at para 49.

In *Bell*, the Court considers the incumbent rivals to Bell to be those who *don’t* communicate works over the Internet, such as disseminators of non-digital works, where dealings would not be found to be unfair.
IV: The Supreme Court of Canada’s Rationale for Technological Neutrality

The Supreme Court grounds the principle of technological neutrality in the principle of prescriptive parallelism: “The traditional balance between authors and users should be preserved in the digital environment....” This is, apparently, the majority’s response to Rothstein J’s claim, in dissent, that “technological neutrality is not a statutory requirement capable of overriding the language of the Copyright Act and barring the application of the different protected rights provided by Parliament.” For the majority, technological neutrality furthers the purpose of the Copyright Act and, therefore, for them, is justified as a principle.

In the context of the dissemination function of copyright, the question is: To what extent should copyright owners (who are often the incumbent disseminators) benefit from the development of new forms of dissemination—and the resultant potential new market and new consumers—by third parties? In Rogers, the Court said:

Ultimately, in determining the extent of copyright, regard must be had for the fact that “[t]he Copyright Act is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator” (Théberge v. Galérie d’Art du Petit Champlain inc., 2002 SCC 34 (CanLII), 2002 SCC 34, [2002] 2 SCR 336, at para 30).

In Théberge, the Supreme Court defined a “just reward” to be one that would “prevent someone other than the creator from appropriating whatever benefits may be generated.” This might lead to the inference that all benefits deriving from new dissemination should accrue to the owners, hinted at in Rothstein J’s quip that, “[i]n many respects, the Internet may well be described as a technological taxi; but taxis need not give free rides.” Given such an understanding of a just reward, the principle of media neutrality could be interpreted extremely broadly to mean that copyrights should apply to all new forms of dissemination in such a way as to extract maximal benefits for copyright owners (which is assumed to be passed on to authors).
But the Supreme Court has moved away from the idea that copyright rewards authors for authoring toward the idea that it is merely an economic incentive to encourage them to create so as to benefit the public. On this reasoning, technological taxis must provide free rides if they efficiently benefit the public. In *Bell*, the Court said: 108

*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: see e.g. *Bishop v. Stevens*, 1990 75 (SCC), [1990] 2 SCR 467, at 478-79. Under this former framework, any benefit the public might derive from the copyright system was only “a fortunate by-product of private entitlement”: Carys J Craig, “Locke, Labour and Limiting the Author’s Right: A Warning against a Lockeian Approach to Copyright Law” (2002), 28 Queen’s LJ 1 at 14-15.

*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. As noted by Professor David Vaver, both protection and access must be sensitively balanced in order to achieve this goal: *Intellectual Property Law: Copyright, Patents, Trade-marks* (2d ed, 2011), at p 60.

As the Supreme Court said in *Théberge*, the traditional balance requires recognizing the limited nature of creators’ rights. 109 It identifies the “proper” balance with efficient compensation for the public benefit, which requires that authors not be overcompensated. 110

The proper balance among these and other public policy objectives lies not only in recognizing the creator’s rights but in giving due weight to their limited nature. In crassly economic terms it would be as inefficient to overcompensate artists and authors for the right of reproduction as it would be self-defeating to undercompensate them.
Overcompensation can occur in a number of ways. First, collective societies were created to efficiently manage copyrights; the Court cites Ariel Katz for the observation that a situation where multiple rights are managed by distinct collective societies that apply to single activities “can lead to inefficiency…. The result is that the total price the user has to pay for all complements is too high.”

Second, the provider of more efficient Internet delivery could bear additional costs (by paying the royalty for communicating the musical work) compared to offline delivery:

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.

Equal treatment also implies that novel disseminators won’t be accorded favourable treatment in comparison to incumbents by copyright law. Thus, in Rogers, the Supreme Court concluded that the communication right would apply to both traditional broadcasters and on-demand streaming services.

This balance is not appropriately struck where the existence of copyright protection depends merely on the business model that the alleged infringer chooses to adopt rather than the underlying communication activity. Whether a business chooses to convey copyright protected content in a traditional, “broadcasting” type fashion, or opts for newer approaches based on consumer choice and convenience, the end result is the same. The copyrighted work has been made available to an aggregation of individuals of the general public.

By grounding the principle of technological neutrality in the goal of efficient compensation of authors for the benefit of the public, however, it leaves itself open to the criticism that efficient
compensation is not the same as a just reward, as described in Théberge, and that abandoning a “Lockean” justification of copyright does not require the abandonment of a deontological theory of justice in favour of economic efficiency.

V: Technological Protection Measures

A. TPMs Can Control Dissemination

One might argue that, faced with copyright owners who employ TPMs to control access to, and dissemination of, works, the principle of technological neutrality is, practically speaking, irrelevant. Whatever balance is set legislatively by Parliament, that balance can be undone through the use of TPMs by copyright owners. Their effectiveness is legally guaranteed, subject to exceptions, by the prohibition against circumventing TPMs that control access to a work, as well as against their manufacturing, distribution, offering for sale or rental, or providing circumvention services.¹¹⁴ So, whereas copyright law used to control dissemination activity through the application of copyrights, as interpreted by courts, now it can substantially control TPMs independently of copyrights in the Copyright Act. As William Patry complains: “Previously, the copyright laws were technology neutral: They did not regulate technologies, but rather they regulated uses of copyrighted material, regardless of the technology employed.”¹¹⁵

B. TPMs Can Undermine Competition Amongst Disseminators

TPMs can create an uncompetitive dissemination environment in a number of ways. TPMs can be used by copyright owners to limit, prevent or control the emergence of new devices (e.g., tablets, smart phones, personal video recorders, game consoles, smart television) by ensuring that works can be disseminated and displayed only on devices that are authorized to be used by the owner of the work. For instance, the owner of a copyright in a TPM-protected work can require a device manufacturer to license the digital key—which would allow a media player to unlock the digital lock (i.e. TPM) protecting the work—from the copyright owner for a fee.¹¹⁶ Similarly, a gamer might download a game, as in ESA, but the game could be protected by a TPM that could require, in effect, the payment of a fee to the
copyright owner that is equivalent to or greater than the royalty that was denied by the Supreme Court. 117

C. TPMs Are Contrary to the Rule of Law
Numerous observers have criticized the prohibition on circumventing TPMs because it “undermines the balance between copyright owners and other parties that [copyright law] purports to achieve.” 118 Others have criticized TPMs as eliminating autonomous choice to such an extent that their use undermines moral decision making. 119 It might be countered, however, that, even if these moral critiques are sound, they do not undermine the legal validity of anti-circumvention measures that are explicitly enacted by Parliament. Law is one thing; its merits or demerits are another. So, if Parliament enacts copyright laws that give copyright owners a competitive advantage against competing disseminators, then courts appear to have no legal power to interpret copyright law in a technologically neutral manner. Does this entail that the principle of technological neutrality is effectively useless as an interpretive principle that can help to ensure that the public benefits from copyright law when TPMs are involved?

Arguably not, because the use of TPMs has deeper legal problems than are often acknowledged, as their use can come at a great cost to the rule of law, a fundamental norm of our legal system. 120 One aspect of the rule of law is that “the relationship between the state and the individual be regulated by law.” 121 As H. L. A. Hart showed, law is not the command of the sovereign backed by force, but is a form of epistemic guidance. 122 To be guided by a legal rule is to understand it and conform to the rule on the basis of its meaning, not merely by force. 123 Following a rule requires the possibility of understanding it, which is not necessary (or often possible) when technology compels behaviour. Unlike technology, legal norms are designed to be followed because their semantic content can be understood and internalized by persons as authoritative reasons for action, 124 perhaps even as a justification of both the decisions of courts 125 and the application of coercive force by government. 126 The law may coerce if necessary, of course, but coercion is not the reason for conformity; rather, it is a response to non-conformity and is itself governed by law. Likewise,
the rule of law does not itself prohibit TPMs but, to satisfy the rule of law, digital rights (in a DRM system) must mirror the underlying substantive values and rules of copyright law (that we can understand) rather than conflict with them. The absence of a right to circumvent TPMs that control access to a work in order to exercise a user right (or for another lawful purpose) is inconsistent with the rule of law. The rule of law requires that user rights in law are mirrored by digital user rights in DRM systems.

VI: How to Neutralize TPMs

The Copyright Act provides that additional exceptions to the prohibition of circumvention may be made through regulation by the Governor in Council. It envisages making regulations where the prohibition would unduly restrict competition in the aftermarket sector but also under additional circumstances. Several factors are given, such as whether the prohibition could adversely affect criticism, review, news reporting, and similar dealings with subject matter; but any relevant factor may be considered. Given that there is a power to make such regulations under the Copyright Act, can Canadian courts do anything to ensure that TPMs don’t undermine copyright’s balance?

Although there is a lot of talk about the value of the rule of law, courts may be wary of enforcing it in the face of anti-circumvention provisions. Yet, in cases such as fair dealing, given the requirement for a purposive interpretation under the Interpretation Act and case law, an effective rule of law would empower courts to make new exceptions to the prohibition, at least given the failure of the regulatory regime to do so. The absence of a right to circumvent a TPM in order to exercise a user right creates a gap between the goals of copyright law and the legislation. It has often been objected, of course, that courts cannot fill gaps, unless such gaps are the result of a mistake, but this is a very strict idea of purposive interpretation that does not accord with judicial practice. In practice, courts sometimes refer to a principle, which best fits and explains the existing law, as a kind of law. A (technological) disconnection is a gap that exists between the legislation and its purpose resulting
from a change in technology (or a misunderstanding of its implications during enactment) that undermines the ability of the provisions of an act to attain its objective. In ESA, the principle of technological neutrality was applied so as to “reconnect” the Copyright Act to its purpose.

The more difficult case is where a particular user right is explicitly subject to the user not circumventing a TPM to exercise it, such as the case with the right to reproduce for private purposes. In such a case, while there is no right to make a reproduction for a private purpose per se (and so no inconsistency with a digital prohibition in a DRM system), there is a conflict between the aim of the Copyright Act and the aim of the circumvention prohibition (which is to enable private actors to create private digital rules embodied in technology for their own benefit). An effective rule of law would empower courts to further the purpose of the Copyright Act when the effect of the circumvention prohibition is to undermine the purpose of the Copyright Act. Some might still object that courts have no business making law, but the answer is that courts would merely be engaged in interpreting and applying the rule of law. The rule of law is a legal principle that is contained in the Charter, an act of Parliament. Of course, judicial review might force Parliament’s hand to explicitly change the purpose of the Copyright Act to accord with the goals of the TPM provisions, but as long as it does not, an effective rule of law would require judicial action.

VII: Conclusion

This chapter argued that the new principle of technological neutrality is an interpretive rule that regulates competition between incumbent and new disseminators and, thereby, aims to further the goals of the Copyright Act. The principle of technological neutrality requires that copyrights are to be interpreted so that incumbent and new disseminators are treated equally, unless otherwise provided by Parliament. This principle of legislative interpretation is grounded by the Supreme Court in the principle that the author’s incentive must efficiently further the public’s interest in dissemination. The problem that this chapter identified is that while, absent Parliamentary intent
to the contrary, disseminators must be treated equally by copyright, Parliament has intervened to create a prohibition against circumventing TPMs, which can be used to treat disseminators unequally. These provisions permit copyright owners to define digital access rights as they please, privileging themselves as disseminators over rival disseminators. The lack of digital user rights as well as a general permission to circumvent TPMs for lawful purposes creates a conflict between copyright’s purpose and the purpose of the prohibition. It was suggested that an effective rule of law would empower courts to create a remedy where the effect of the circumvention prohibition is to undermine the purpose of the Copyright Act.

1 My sincere thanks to Maria Lavelle and Michael Geist for comments on an earlier version of this chapter and to the student editors who improved it.
5 The interpretation of these cases in this paper has been highly influenced by Timothy Wu, “Copyright’s Communications Policy” (2004) 103 Mich L Rev 278.
6 ESA, supra note 2. Compare Wu, supra note 5 at 284.
7 ESA, supra note 2 at para 9.
8 Ibid at para 5.
9 Ibid at para 9. The case, will, therefore have an impact on tariff-setting by the Copyright Board as well as provide a basis for actions for unjust enrichment for ringtone royalties that have already been paid to collective societies. See Howard Knopf, “Rogers, Bell, Telus & Quebecor to SOCAN: We Want Our Ringtones Money Back”, Excess Copyright blog (14 November 2012) <http://excesscopyright.blogspot.ca/2012/11/rogers-bell-telus-quebecor-to-socan-we.html> and Howard Knopf, “Rogers et al to Copyright Board Too re Ringtones: We Want Our Money Back”, Excess Copyright Blog (15 November 2012) <http://excesscopyright.blogspot.ca/2012/11/rogers-et-al-to-copyright-board-too-re.html>.
10 Copyright Act, RSC 1985, c C-42 <http://laws.justice.gc.ca/en/C-42/> [Copyright Act].
12 Ibid.
13 Ibid at para 40.
14 Ibid.
16 ESA, supra note 2 at para 8.
17 Théberge, supra note 15.
18 Ibid at para 30.
20 See Section III.
22 It is beyond the scope of the chapter to engage with the general literature on technological neutrality, such as Vincent Gautrais, Neutralité Technologique (Montreal: Les Éditions Thémis, 2012).
23 Ibid.
24 Patry, supra note 21 at 47.
29 Wu, supra note 5 at 297-324.
31 Wu, supra note 5 at 324-25.
32 Ibid at 341-66.
34 Copyright Act, supra note 10, Part VIII.
36 See ESA, supra note 2 at para 24.
Copyright Act, supra note 10, ss 27(2.3)-(2.4).

Ibid, s 31.1(1).

Ibid, ss 41-41.21.


Patry, supra note 21 at 47.

Ibid at 46-47.

Gurry, supra note 27.


Ibid.


Industry Canada, supra note 44.

Copyright Act, supra note 10, s 27(2.3).


For economic implications of excludability, see Michele Boldrin and David K Levine, Against Intellectual Monopoly (New York: Cambridge University Press, 2008).


ESA, supra note 2 at para 5.

Ibid at para 9.


See e.g. ESA, supra note 2 at para 5 and the dissent at paras 121-22, where Robertson is cited in the context of discussions of technological neutrality.

Robertson, supra note 57 at para 49.

60 Rogers, supra note 3 at para 39. At para 77 of Apple Computer Inc. v Mackintosh Computers Ltd., [1987] 1 FC 173, 28 DLR (4th) 178, 3 FTR 118, 10 CPR (3d) 1, 8 CIPR 153, Reed J agrees that the opening words of s 3 of the Copyright Act “were purposely drafted broadly enough to encompass new technologies which had not been thought of when the Act was drafted”.

61 Apple, supra note 60.

62 Ibid.

63 Ibid.

64 Robertson, supra note 57 at para 49.

65 Rogers, supra note 3 at para 39.

66 Robertson, supra note 57 at para 49.

67 Ibid at para 41.

68 Théberge, supra note 15 at para 38.

69 ESA, supra note 2 at para 122.

70 Ibid.

71 Ibid at para 4.

72 Ibid at para 1.

73 Ibid at para 4.

74 Ibid.

75 Ibid.

76 ESA, supra note 2 at para 30.


78 SOCAN v CAIP, supra note 11 at paras 19-20.

79 ESA, supra note 2 at para 19.

80 Ibid at para 5.

81 Vaver, supra note 25 at 172-73, cited in ESA, supra note 2 at para 6 [emphasis added].

82 ESA, supra note 2 at para 5.

83 A functional analysis is also given by Cameron J Hutchison, “The 2012 Supreme Court Copyright Decisions & Technological Neutrality”, SSRN (October 5, 2012) <http://ssrn.com/abstract=2157646> or <http://dx.doi.org/10.2139/ssrn.2157646>.

84 ESA, supra note 2 at para 43. Presumably a different conclusion would have been reached if the legislative history had revealed an intention that the communication right were to be distinct from the performance right.

85 Rogers, supra note 3.

86 Ibid at para 8.

87 Ibid at para 27.

88 Ibid.

89 CCH, supra note 19 at paras 78-79, quoted in Rogers, supra note 3 at para 27.
90 Rogers, supra note 3, heading after para 35.
91 Ibid at para 39.
92 Ibid at paras 53-56.
93 Vaver, supra note 25 at 173, cited in Rogers, supra note 3 at para 54.
94 Rogers, supra note 3 at para 53.
95 Bell, supra note 4 at para 1.
96 CCH, supra note 19.
97 Bell, supra note 4 at paras 15-30.
98 Ibid at paras 31-49.
99 Ibid at para 40.
100 Ibid at para 41.
101 Ibid at para 43.
103 ESA, supra note 2 at para 49.
104 Rogers, supra note 3 at para 40.
105 Théberge, supra note 15 at para 30.
106 ESA, supra note 2 at para 50.
107 This idea has been ably criticized by Mark Lemley in “Property, Intellectual Property, and Free Riding” (2005) 83 Tex L Rev 1031.
108 Bell, supra note 4 at paras 9-10.
110 Ibid, quoted in ESA, supra note 2 at para 7.
112 ESA, supra note 2 at para 9.
113 Rogers, supra note 3 at para 40.
114 Copyright Act, supra note 10, s 41.1.
115 Patry, supra note 21 at 43.
116 For a short description of the CSS system, see Mark Berry, “Cryptography in Home Entertainment” (June 2004) <http://www.math.ucsd.edu/~crypto/Projects/MarkBarry/index.htm>.
117 While s 41.12 of the Copyright Act, supra note 10, provides an exemption that permits circumvention of TPMs that protect a computer program for the sole purpose of making other programs interoperable with it, there is no general
exemption to circumvent to make copyrighted subject matter like cinematographic or musical works interoperable.

118 Graham Reynolds, quoted in Craig, “Locking Out Lawful Users”, supra note 102 at 196. For instance, a person may wish to make a reproduction of a work for private purposes, but that right is subject to the copier not circumventing a TPM protecting the work.


121 Ibid at para 20.


125 Nigel Simmonds, Law as a Moral Idea (Oxford: Oxford University Press, 2007) at 123.


127 This is despite the fact that an exception for circumventing for a lawful purpose would not violate the requirement of the WIPO Internet Treaties that the measures be adequate and effective. See Michael Geist, “The Case for Flexibility in Implementing the WIPO Internet Treaties: An Examination of the Anti-Circumvention Provisions” in Geist, supra note 102 at 204.

128 Copyright Act, supra note 10, s 41.21.

129 Ibid, s 41.21(2)(a).

130 Ibid.

131 Interpretation Act, RSC 1985, c I-21, s 12, states: “Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects”.


133 Dworkin, supra note 126.

134 Brownsword, supra note 119 at 161-68.
135 This kind of reasoning also occurred in Regina v Secretary of State for Health (Respondent) ex parte Quintavalle (on behalf of Pro-Life Alliance), [2003] UKHL 13 <http://www.publications.parliament.uk/pa/ld200203/ldjudgmt/jd030313quinta-1.htm>, where the House of Lords effectively rewrote the definition of “embryo” on the grounds that the previous definition was based upon the state of scientific knowledge at the time of the enactment.

136 Copyright Act, supra note 10, s 29.22.
