The Copyright Pentalogy

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Published by University of Ottawa Press


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In many respects, the Internet may well be described as a technological taxi; but taxis need not give free rides. (Rothstein J in Entertainment Software Association v SOCAN)  

Introduction  

Just after the adoption of Bill C-11, the Supreme Court of Canada handed down five decisions, which are now referred to as the “pentalogy”, to follow the heretofore famous trilogy. The pentalogy, like its three-legged predecessor, marked a significant shift in Canadian copyright policy. The five cases dealt in one form or another with collective management of copyright in that they originated from appeals of decisions made by the Copyright Board of Canada.  

Of the five cases, two do not seem particularly controversial. In the first case, Re:Sound v Motion Picture Theatre Association of Canada, which involved the 1961 Rome Convention, a unanimous Court agreed with the Copyright Board that sound recordings embedded in movie soundtracks were not (or were no longer) to be treated as sound recordings under the Copyright Act, thus rejecting
the application in Canada of an Australian precedent based on a similar fact pattern but on very different statutory language. Given the wording of section 2 of the Act, the outcome seems reasonable. While the Rome Convention might have led the Court to take a longer look at the appellants’ arguments that a \textit{pre-existing} sound recording reproduced in a soundtrack is still a sound recording and/or that a new sound recording is created by ripping the soundtrack—based on the principle that statutes should be interpreted in accordance with treaties ratified or adhered to by Canada\footnote{7}—the statute seems rather unambiguous in defining a soundtrack as something other than a phonogram because it is not exclusively “aural”\footnote{8}. The idea that an existing sound recording ceases to exist under Canadian copyright law when (while) it is embedded in a soundtrack and re-emerges when ripped would deserve a longer comment, but the point is not one I wish to belabour here.

In the second case, \textit{Rogers v SOCAN},\footnote{9} the Court decided (unanimously on this point\footnote{10}) that a series of point-to-point on-demand transmissions of works constituted a form of communication to the public (covered by an exclusive right) even if each individual transmission was not, at least colloquially, public. The Court referred to the WIPO Copyright Treaty\footnote{11} and the making available right in that context. That case was, I believe, rightly decided if the normative basis for the definition of “public” that has applied to signals sent to groups of private homes, hotel rooms, etc. (which, together, constitute a “public”) is to be followed.

Two of the three other cases in the pentalogy were 5-4 splits. Not surprisingly, they are controversial. I return to those two cases below. I will also mention the fifth (and last case) of the pentalogy, namely \textit{SOCAN v Bell}, later on. It is not particularly controversial but it needs to be contextualized. However, before embarking on our review of the cases, I wish to take the reader for a quick a tour of ancient China and Greece.

\section*{A Binary Worldview}

In a binary worldview, as in the three great monotheistic religions, there is good, and the opposite of good, to which many names have been given (the devil, Satan, etc.). Had the Supreme Court of Canada’s
five-part intervention in copyright policy been a movie, the role of Rosemary’s baby (in the majority opinions and perhaps also in some of the other chapters in this book) would have been played by Collective Management Organizations (CMOs) such as Access Copyright and SOCAN.

Binary—in the dominant culture—is simple to understand: good v bad, Alouettes v Argonauts (for those in Eastern Canada), Lions v Rough Riders (for those in the West), or, in the copyright world, exclusive rights v exceptions. One must win and one must lose; one must be the slave to copyright owners’ control, or one can be “free”, both as in free beer and free expression (that is, without payment and without any use limitation or restriction). However, thinking in binary terms of this sort is but one way to see the world. Indeed, a significant part of the rest of the world has tended to see things somewhat differently. I will use China as a flag-bearer, but most of Asia would do. This was just as true in the cradle of now apparently binary-happy Western culture (that is, ancient Greece).

Yin and Yang are notions that will be familiar to most readers. Those notions are a “couple”, yet they work together. Winter may be the opposite of summer, but it is just as necessary. In other words, spring is not good to autumn’s bad. In Chinese philosophy, pairs are seen exactly as that, pairs: night/day; male/female; earth/sky; not one good and one bad. Elements of a pair do not annihilate one another; they complement each other. Some Chinese philosophers saw this as a reflection of nature because the world comes in pairs, as do we.

Many of the ancient Greeks were, surprisingly, in agreement with Chinese thinking on this point. Heraclitus wrote, somewhat enigmatically (that is, until one reads those statements along yin/yang lines): “The way up and the way down are one and the same”. He also wrote that “[i]n the circumference of the circle the beginning and the end are common”.

We are very far from our Supreme Court pentalogy. Or are we?

The Greeks, Plato first among them, perhaps, stressed a way (technè) to attain the Truth: dialectic (from dia-logos, the art of dialogue). I always thought that law was also a way to get to the “Truth”. Conversely, the way not to get there is to adopt an ideological filter instead of adjudicating on the facts. As Plato noted, “the virtue
of each thing, whether body or soul, instrument or creature, when given to them in the best way comes to them not by chance but as the result of the order and truth and art which are imparted to them.\textsuperscript{16} He also noted that, in dealing with the intersubjectivity issues of dialogue and language (logos), a dialectic approach implies that an organized dialogue was the best, and perhaps the only, true way forward.\textsuperscript{17} It is worth noting that it can also be entertaining. Indeed, one of the dominant art forms in ancient Greek was “dialectic” theatre; Sophocles and Euripides come to mind.

Plato was not alone. Aristotle’s \textit{Metaphysics} are similarly based in part on the notion of using opposites (\textit{antikeiména}) to arrive at a better understanding.\textsuperscript{18} He also spent a considerable amount of time explaining the distinction between contradiction (\textit{antiphasis}) and opposites (\textit{ta énantia}).\textsuperscript{19} Opposites are what allow one to define proper boundaries such as black and white, \textit{neither of which is right or better, but rather both necessary to understand an issue}.

I could go on, but I think I made my point. As we can explain our world and see Truth by looking at pairs of opposites \textit{but reality as a continuum} (think of all shades between black and white) explained using such pairs, so we may be better able to enter into a respectful and necessary dialogue as opposed to a war of ideas where one must win—and one does—not by analysis but by ideological assertion.

Must copyright be either a full exclusive right or nothing at all? I argue that it can be both and neither of those. And in the copyright system, it also means that more than one right may apply to a single act. From that perspective, the two most controversial opinions of the pentalogy strike me as informed by a very, and unnecessarily, binary worldview.

\textbf{A Binary Pentalogy}

The reasons of the Court’s majority opinions in the two most controversial cases of the pentalogy can be seen as a frontal assault on collective management of copyright. Indeed, both opinions were praised precisely for that reason—including in other chapters contained in this book. In that narrative, CMOs are depicted as mere tax collectors, \textit{des empêcheurs de tourner en rond}, as the French
expression has it. Absent CMOs, “right holders” may license their works directly to users (whether they be individuals, or CTV, or Google) or make their material available for free just like academics do.\textsuperscript{20} The Court’s majority was thus in line with \textit{l’air du temps}. Indeed, it seems trendy these days to battle CMOs, or even to challenge the very concept of collective management. For example, documents are being circulated showing abuses and mismanagement by certain CMOs.\textsuperscript{21} The intellectual heft of this broad anti-CMO rhetoric strikes me as questionable. Would a report on a brokerage house responsible for the 2008 worldwide financial meltdown justify the elimination of capitalism or of Wall Street? Most observers would agree, I suspect, that what is needed is proper regulation and swift legal action against criminal acts, including appropriate sanctions and ways to ensure it does not happen again—which brings us back to regulation.\textsuperscript{22} Unfortunately, when it comes to CMOs, it seems that rotten apples (real or not) are used as evidence that all apples are bad and even lead to proposals to get rid of all apple trees. Put less metaphorically, the \textit{very model}—in which authors pool their rights to generate income and make licensing as painless as possible (other than paying, which, as I argue below, is the whole point of this)—is presented as unacceptable because major users (CBC, CTV, Google, etc.) cannot (or should not) be expected to pay for copyright works.

In the binary worldview that leads to the conclusion that everything \textit{must} be free, as in free beer (the good) because otherwise the only other option is full right holder control of every use (the bad), it is necessary, rhetorically, to paint licensing as suboptimal, or worse. Indeed, a majority of the Supreme Court came close to describing collective management as abusive \textit{per se}.\textsuperscript{23} Unfortunately, what is often forgotten in that narrative is that CMOs are also the main source of revenue for several categories of professional creators whose works are used consumptively. In Churchillian terms, it may be the worst solution to make copyright work, except for other forms. It is patently false to say that collective management is the opposite of fair dealing. This is a clear error in logic. The opposite of fair dealing is infringement. In the presence of a CMO licensing scheme, this does not happen. A CMO would not refuse a licence to one who wishes to pay. Hence, as I demonstrate in greater detail
below, the issue is not about what material someone can use (or not). That is mere rhetorical artifice. The real issue is about which users should pay, and how much.

Let us now turn to three cases of the pentalogy not reviewed above in greater detail, including the two controversial ones just mentioned.24

ESA v SOCAN

In the first and probably most controversial case, Entertainment Software Association v SOCAN [ESA], the majority held that music downloads did not implicate the right of communication to the public by telecommunication. Abella J wrote:

Although a download and a stream are both “transmissions” in technical terms (they both use “data packet technology”), they are not both “communications” for purposes of the Copyright Act. This is clear from the Board’s definition of a stream as “a transmission of data that allows the user to listen or view the content at the time of transmission and that is not meant to be reproduced” (para. 15).25

Unlike a download, the experience of a stream is much more akin to a broadcast or performance.26

According to the opinion, simultaneity in the auditory or audiovisual experience (or at least contemporaneousness) seems to be required for a transmission to be a communication. If the perception is not contemporaneous with the transmission, then a more or less durable27 copy is made and then, because of the binary view of the majority,28 that reproduction cannot be also a communication.

The Court more or less correctly joined the communication by telecommunication right and the right of public performance at the hip, arguing that the latter began its existence with the (unavoidable) simultaneity of a live performance, and evolved to the near-simultaneous perception of live radio or television broadcast. It is also true that a similar path was followed by US courts, but on a very different statutory basis.29

The linkage between performance and communication is one thing.
The separation of communication and reproduction is quite another. As a result of ESA, the Copyright Board must now eliminate the portion of their payments to songwriters and composers that was paid (via SOCAN) for the right of communication to the public on downloads. What is less clear is what happens after that. If the Supreme Court’s decision is seen as a legal/technical one (that is, dealing strictly with the right(s) involved, but not the value of the use, which is an economic issue), the Board could say that the same total amount as before should be paid for the use of music, but all as mechanicals. While this sounds better for songwriters than a forced reduction in payments to them, it would still not be a benign change because it would substantially alter current financial flows. While some of the funds would end up in the hands of songwriters and composers, unlike with the SOCAN arrangement, the funds would go through music publishers (many of whom now belong to the major record labels). Then the payments to the labels (via publishing houses they now own) might be subject to so-called 360 contracts that allow the music labels to keep part of the payments owed songwriters and composers. By contrast, SOCAN pays songwriters directly and transparently.

A “total amount” approach (keeping the sum paid for music the same, but apportioning differently among CMOs) would be consistent with the Board’s practice in recent years to hear certain tariffs that involved both reproduction and communications together to establish a “total value” of music that was then apportioned among the collectives. From this perspective, the Board could change the allocation but not the value/payment equation. Indeed, nowhere does the Court actually say that songwriters and composers in Canada are overpaid (though it may be seen as implying that they are).

Major commercial users and those who support their cause will no doubt argue that what the Court did was normative in nature and must imply that music was overvalued—and songwriters overpaid. They will argue before the Board that, by eliminating one right (communication), the Court specifically intended to reduce payments to songwriters and composers. In support of that view,
the five-member majority seemed moved by the (in my respectful submission, unsupported) assertion that having to pay two collectives was inefficient and led to too high a payment.33

Indeed, we already can see34 that the first signs of the shift in financial flows were ordered by the Supreme Court in a decision published by the Copyright Board of Canada on 6 October 2012 concerning Tariff 22.A (online music).35 Following ESA, the Board eliminated payments to SOCAN (that is, songwriters and publishers) for permanent and limited music downloads (the latter being described as a form of rental).36 It increased the undiscounted “mechanical rate” from 8.8 percent to 9.9 percent for permanent downloads and from 5.9 percent to 9.9 percent for limited downloads, which will likely result in a diminution of overall payments to songwriters or, in economic terms, a mandated transfer of wealth from songwriters to major corporate users.37 For streaming, the Board let the existing SOCAN rate stand but increased mechanicals by 12.5 percent.38 In a rather interesting passage foreshadowing future developments, the Board noted the following:

Absent any relevant evidence, it is not possible to determine whether the non-existence of the communication right for downloads may influence the price of the communication right for streams. For example, what if the ability to transmit downloads and streams were ‘joint products’ in the economic sense of the term, i.e. that costs are shared in developing the ability to communicate? Economic theory suggests that if the market for one of the joint products is eliminated (arguably, declaring that a product does not exist eliminates the market for the product), the price of all other joint products should rise, all other things being equal. We leave this and other valuation issues to later proceedings.39
Questioning ESA’s Findings

The issue in the case was, as far as I can see, simply one of deciding whether/when a transmission is a “communication”. The Court may have done that, but it did a whole lot more. As I see it, the majority’s approach is open to criticism on several fronts.

First, I believe that it misapplied the notion of technological neutrality. To demonstrate this, let me begin by quoting from the majority opinion: “The question in this appeal is whether the rights are nonetheless revived when the work is sold over the Internet instead of in a store. In our view, it makes little sense to distinguish between the two methods of selling the same work.” Yet the difference between physical copies sold as goods and digital copies as “transmissions” is plain in the statute: notions of communication and transmission are applicable to intangible acts, not to sales of physical copies. The majority position is even harder to understand when considering that they found that the sale of physical copies and downloads must be treated equally as a matter of technological neutrality but, in the same breath, that downloads and streams must be considered as separate acts.

The majority view strikes me as incorrect also because the lines between streams and downloads are increasingly hard to draw. In a number of new and emerging business models, people use devices to stream content. However, while they may begin with a stream, they might store the file and view the rest later. Put differently, the timing of the consumption made of the protected “content” on a suite of devices that the user may have access to is the heart of the majority opinion, but it does not strike me as convincing because technology need not distinguish between copies stored on the device or streamed (but then likely stored on the device temporarily in any event). The majority opinion forces these to be considered as separate acts—and thus separate licensing transactions—rather than one set of pooled rights, depending on whether the act is a stream or download, and then ignoring the fact that “access” may imply both rights. As Rothstein J noted, in pronouncing this divorce of the rights of communication and reproduction, Abella and Moldaver JJ’s approach “sweeps away these well-established principles.”
A second major critique I would level at the majority opinion is that it will force the Copyright Board to reorient financial flows without clearly spelling out why it did so. The Board had unified tariffs and hearings so that it could determine the overall value of music to the user and the apportionment of that value among collectives all at the same time. As the Board explained in its Tariff 22.A 2012 decision:

[A] bundled approach is easier to justify when the Board is able to deal with all the relevant rights at the same time, as is always the case with retransmission. This allows the Board to determine not only what a fair price for the user is, but also what a fair allocation among copyright owners is.

The majority referred to the existence of a “multiplicity of collectives” as a kind of malum in se, but the issue that the Court’s majority was trying to remedy strikes me as theoretical or indeed non-existent. Unlike with patents, where multiple patents on a single product can lead to stacking, it has been part of copyright law and policy that the bundle can be split, and that some uses can require more than one right fragment. I have not seen evidence that multiplicity of CMOs is actually an issue for major users, other, of course, than the money they have to pay for music. I am not implying that this is an illegitimate argument on their part. Any business wants to reduce its costs. However, it must just be seen for what it is. For users, the existence of two rights and the obligation to clear both was and is essentially a financial issue because the Board unified tariff hearings and aimed to determine the total value of music.

A third critique I would offer is that the majority interpretation is singularly difficult to reconcile with the French version of the Copyright Act. Rothstein J noted (correctly, in my view) that the French version could serve as a guide to understand whether Parliament intended for different rights in the copyright bundle to be separate. As he wrote, his interpretation of the English version of s 3(1) “is consistent with the French version of the text, which states that “[l]e droit d’auteur sur l’œuvre comporte le droit exclusif de produire ou reproduire, [représenter ou publier] l’œuvre; ce droit comporte, en outre, [les droits énumérés aux alinéas (a) à (i)].” The
use of the phrase “en outre”—in addition—indicates paras. (a) to (i) are in addition to those in the opening words.\textsuperscript{45} One could say even more. Section 3(1) uses the word “comporte” (comprises) twice to refer to the reproduction right on the bundle and then says that “in addition” copyright includes other rights listed in section 3, including communication to the public.

A fourth flaw is the interface with Bill C-11. Of course, the Court cannot be blamed for this because the amended Copyright Act was not in force. However, the Board cannot escape addressing it in the near future. The new section 2.4(1.1) is part of the measures designed to make Canada’s legislation compliant with the WIPO Copyright Treaty. The Treaty requires that countries party to the treaty provide “authors of literary and artistic works…the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.”\textsuperscript{46} A lack of simultaneity (or the necessary evanescence of a transmission sans download) implies a download (otherwise, how will the user access it later than the transmission?). According to ESA, it cannot be a communication, but article 2.4(1.1) reads as follows:

\begin{quote}
[C]ommunication of a work or other subject-matter to the public by tele-communication includes making it available to the public by telecommunication in a way that allows a member of the public to have access to it from a place and at a time individually chosen by that member of the public.\textsuperscript{47}
\end{quote}

If one overlays the simultaneity/temporariness requirement imposed in the Court’s majority opinion on this new section, then the access to the public must logically be contemporaneous with the act that makes it available; otherwise, it isn’t a “communication”. This seems rather difficult to reconcile with the text of the amended statute for two reasons.\textsuperscript{48} First, “having access” does not necessarily imply simultaneous perception. Second, the section specifically mentions that the user may choose the time of access.

From this perspective, one way to read ESA might be to say that the case affects the past (including past tariffs) but not post Bill C-11
“making available” uses. Another way to read it is to say that the owner of the making available right would be owed a payment under an applicable tariff, independent of whether a reproduction also takes place. Bill C-11 would thus get us back in line with (for the future) long-standing principles and a well-known licensing *modus operandi*, because frequently more than one right in the bundle of copyright rights has applied to a single activity. For example, one can listen to a stream and make a copy. Broadcasters copy music on computers and then broadcast it; they still have to pay for both. As the Board noted in the most recent Commercial Radio tariff: “A Canadian radio station that broadcasts recorded music off a server reproduces and communicates musical works, performers’ performances and sound recordings. Four copyrights and two remuneration rights must be accounted for.”

Most other countries that have working collective management systems do something similar. As long as the tariffs are set in recognition of this—by taking account of the economic value of the music to the user—then the user should not much care how the funds are apportioned, provided the total amount paid is fair. This is precisely what the Board did, noting in the same decision: “[T]he Board has been asked to set tariffs for all those rights at the same time.”

Naturally, as a matter of principle no one is opposed to a simplification of copyright. Indeed, the bundle of rights may be ripe for such a simplification and I previously argued precisely that it should be simplified. However, I tend to agree with Rothstein J, who noted that this should be done by Parliament, not courts, with proper transitional measures, for at least two reasons. First, copyright contracts are made to reflect the bundle of copyright rights, and that bundle is fragmented just as much through the choices of copyright users as through those of copyright owners in their licensing decisions (by territory, language rights, versions, type of media, etc.). Second, most digital uses require a reproduction followed by a transmission, and ESA does not come into play when protected uses occur in that sequence: the transmission that precedes a permanent copy is not a communication, but the copy that precedes a communication remains a reproduction. Whether this somewhat uneven outcome is optimal is probably a matter on which reasonable people might apparently disagree.

Let us now turn briefly to *SOCAN v Bell*, a case related to ESA in a number of ways.
SOCAN v Bell

In SOCAN v Bell [Bell], a unanimous court agreed with the Copyright Board of Canada that listening to previews of a song in deciding whether to make a purchase was fair dealing for research. The decision is interesting, in my view, not so much on substance (because I agree with the outcome) but in that it proceeds formulaically, in a way that may seem familiar to US readers. It does so along the lines drawn in CCH Canadian [CCH], in determining whether a use argued to be fair falls under one of the purposes of fair dealing and then, as a factual matter, whether this use is fair based on the CCH factors. Interestingly, the Court also noted that US cases on fair use were not particularly helpful in a Canadian context. The Court’s statement about US law may have more to do with substantive law than methodology.

Then, while the outcome strikes me as fair, I am also not sure how the opinion sits with the elimination of the communication right from the download equation. Even though SOCAN eventually pays the authors and publisher, the two rights (communication and mechanical reproduction) typically belong to different entities (SOCAN v music publishers). As a technical matter at least, one could ask whether it is really “fair” to use the communication right owned by A to increase the sales of the mechanical right owned by B.

This leaves the second of the two most controversial cases in the pentalogy, a case dealing with reprographic licensing.

Alberta (Education) v Access Copyright

In Alberta (Education) v Canadian Copyright Licensing (Access Copyright) [Alberta (Education)], a split (5-4) court interpreted the Copyright Act in a way that (including in other chapters of this book) is seen as basically saying that any copying by teachers in a K-12 setting is for private study or research—ignoring what I read in even Abella J’s note of caution about the need to show the fair nature of the copying. Some of the key parts of the majority opinion read as follows:

Teachers have no ulterior motive when providing copies to students. Nor can teachers be characterized as having the completely separate purpose of “instruction”; they
are there to facilitate the students’ research and private study. It seems to me to be axiomatic that most students lack the expertise to find or request the materials required for their own research and private study, and rely on the guidance of their teachers. They study what they are told to study, and the teacher’s purpose in providing copies is to enable the students to have the material they need for the purpose of studying. The teacher/copier therefore shares a symbiotic purpose with the student/user who is engaging in research or private study. Instruction and research/private study are, in the school context, tautological.  

And later:

[P]hotocopies made by a teacher and provided to primary and secondary school students are an essential element in the research and private study undertaken by those students. The fact that some copies were provided on request and others were not, did not change the significance of those copies for students engaged in research and private study.

Beyond the nature of the limits that the majority may or may not have imposed on fair dealing, a number of the points made by the majority strike me as questionable. First, it is, as I understand it, the practice of students, schools and school boards to purchase textbooks and other materials (including digital materials) from private publishers. Now, school boards and schools will be allowed to copy existing books for free because their purpose is not profit, but instruction. One can easily understand the appeal of this view, for it would indeed be good if all educational material were available for free worldwide. Perhaps one day that will be the case, as foundations and other institutions decide that they will make all of this happen without the help of commercial textbook publishers. That said, whether the decision to eliminate or severely restrict commercial publishing in the educational sector is desirable is another matter on which I believe that reasonable people might disagree. I will come back to the empirics of the situation below.
Another interesting finding in the majority opinion reads as follows: “[T]he word ‘private’ in ‘private study’ should not be understood as requiring users to view copyrighted works in splendid isolation. Studying and learning are essentially personal endeavours, whether they are engaged in with others or in solitude.”61 As the dissent rightly asks, if copies made for a classroom are not public, then what is? To quote Rothstein J, “‘private study’ cannot have been intended to cover situations where tens, hundreds or thousands of copies are made in a school, school district or across a province as part of an organized program of instruction.”62 The majority simply read the word “private” out of the statute, at least as far as education is concerned. I would not be surprised if attempts were made to convince lower courts or the Board that widespread copying within corporations or governments is also private by the same logic.

As was shown in a US case (dealing with higher education, not K–12), authors and publishers make a lot of revenue by licensing some incidental but systematic types of uses.63 This revenue stream will be greatly affected by the Supreme Court’s decision. While there would be much more to say, I will leave the detailed analysis of fair dealing per se to Professor d’Agostino in her chapter in this book. However, a few additional comments are in order before moving on.

First, here, as with the previous case, it is unclear how the decision will interface with Bill C-11. The amended Copyright Act contains a new section (30.02), which provides a specific exception for copying by educational institutions, and it seems to require a licence. The new section reads in part as follows:

[I]t is not an infringement of copyright for an educational institution that has a reprographic reproduction licence under which the institution is authorized to make reprographic reproductions of works in a collective society’s repertoire for an educational or training purpose (a) to make a digital reproduction—of the same general nature and extent as the reprographic reproduction authorized under the licence—of a paper form of any of those works.64
If all copying in schools is fair dealing, then no educational establishment should need or have a “licence under which the institution is authorized to make reprographic reproductions.” Read in this fashion, s 30.02 would be rendered utterly inapplicable. Perhaps s 30.02 is simply no longer required because all or most educational uses are fair dealing? If that is the case, that begs the question whether, if indeed that was the law in Canada and that law was merely explicated by the Supreme Court (that is, fair dealing for private study was in the statute while Bill C-11 was being debated), shouldn’t Parliament have known that and taken that into account? Clearly, it will not be easy to reconcile Alberta (Education) with the outcome of the democratic debate in Parliament embodied in part in new section 30.02. The key, if there is one, may be in the note of caution sounded by Abella J on the fairness of the copying rather than a sole and myopic focus on its purpose. Perhaps the Copyright Board will be able to, on application from the CMOs concerned, set a limit on educational copying not by limiting the uses that are “private” but those that are fair under the CCH test.65

Alternatively, provincial governments, or some of them, that no longer need to pay Access Copyright (and the Quebec copyright collective, COPIBEC), or pay them lesser amounts, may decide to shift those funds to subsidize their private publishers more.66 Yet another option is that the price paid for books to commercial publishers (by provinces for public schools) will go up to compensate for the lack of reprographic income. That may work for major textbooks, but for secondary materials primarily used in education and regularly used in the curriculum, this option will not be available.

Provincial governments can also choose to pay to have textbooks prepared and made available online for free to everyone. If this is done without DRM, the textbooks will indeed be free for all (even outside the province) to use. However, governments could have done so anytime in the past. No one is prevented by copyright law from donating a work she owns to the public domain, as academic authors (who are otherwise remunerated for their work) often like to do.
Whichever path is chosen, there are three interesting empirical questions that deserve further examination. First, will students and educators massively use their “right” to copy everything and anything for educational purposes, or will they still prefer to rely on textbooks (whether paper or digital)? Second, will copying for free actually save money as compared to using commercial publishing and paying CMOs, or will it simply result in a shift to higher publishing subsidies? Third and, in my view, more importantly, will educators and students think it works better overall? This, only time will tell.

**Beyond Binary Copyright Policy**

As mentioned above, the traditional policy view of the exercise of copyright is binary (good/bad; control/free). This was extended by the Supreme Court to a perceived need to artificially separate rights in the copyright bundle. Everything must thus now be seen from “either/or” glasses: full right to exclude or full exception. Reality, I suggest, is more like a kaleidoscope. True, it might be a bit more messy and unstructured. As alluded to above, however, one could learn a thing or two from China and ancient Greece in that regard as we attempt to move forward. In other words, the binary worldview is convenient and beguilingly simple as an explanatory tool, but it should not be confused with reality. The binary nature of copyright seems facially reflected in many national laws and in European directives, because they contain rights and exceptions. However, in reality, laws put in place systems of rights and exceptions. Application of laws by courts should thus be more typically informed by the search for a systemic equilibrium.

As the Chinese and the ancient Greeks told us millennia ago, the world does not work in a binary way. In other words, there is a very important and substantial middle ground in copyright, an area comprising compulsory licences and collective management, in which right holders have, *de jure* or *de facto*, lost the ability to say no (that is, control uses), but not the right to be paid for some uses of their works. The picture looks like this (Figure 1):
This middle ground is much more than an aberration, an oversight or some species of *de minimis* case that one can proceed to ignore or relegate to a policy footnote. *That middle ground is an integral part of what makes copyright work.* We should not ignore it, as the majority of the Supreme Court arguably did in the pentalogy. Instead, we should increase the scope and reach of this middle ground if we want copyright to work for online uses while ensuring healthy financial flows to professional Canadian (and other) creators.\(^7\) Users who pay the required fee or tariff in this middle zone can use the licensed works usually with little or no constraints, because it is contained in the repertory of a voluntary licence administered by a CMO and/or covered by a statutory or compulsory licensing scheme (Figure 2).\(^2\)

*Figure 2. The traditional view (completed): use with remuneration*
My underlying premise is simple. Those who believe that YouTube can or should replace Denys Arcand and Neil Young and that self-published books should replace Marie-Claire Blais or Margaret Atwood have not discharged their burden of proof. Nor am I seeing credible evidence that Arcand, Young, Blais or Atwood would have created what they did had they not been able to live from their work or, alternatively, that they could have replaced their income by selling mugs and t-shirts. Let me be clear: I am not making a case against user-generated content or somehow arguing that creators are somehow “owed” a living. I am simply suggesting that professional creativity increases general welfare and that we will be better off if we find a way to retain financial flows to professional authors whose works people want to watch, read or listen to, rather than merely focusing on access restrictions and enforcement, on the one hand, and free content, on the other.

I simply do not accept the view that the real concern in eliminating CMOs is somehow about authors’ welfare. That highly cynical view ignores the fact that licensing via CMOs actually empowers forms of disintermediation (or, more accurately perhaps, reintermediation) where more of the funds paid get to creators and less to industrial intermediaries, so that, even if overall user payments may indeed diminish, professional authors can still make a decent living.

A proper licensing structure can ensure proper financial flows and may set some acceptable limits on copying and use. It can easily allow for the type of spontaneous copying that is usually mentioned as an example of what should be fair dealing in education or as previews on downloads sites. Indeed, I would suggest that a world in which spontaneous or similar copying is allowed, but systematic copying is licensed and materials thus freely available to educators and students, is preferable to one where educators are forced to deal with heavier DRMs to avoid the overreach (from the publishers’ perspective) of fair dealing.

I am not arguing that existing CMOs are a panacea. Indeed, necessary efforts are afoot to establish rules to ensure more uniform, transparent, fair and efficient collective management. There may be a case for some CMOs to merge or work more closely together, and there is undoubtedly a need in some quarters to achieve greater
efficiency. This is (in part) precisely due to the increased frequency in the use of more than one right in the copyright bundle, and it has already led some CMOS down that path. Beyond these immediate concerns, it may very well be that new entities and indeed new forms of collective management will emerge. I also see a greater role in the future for multilateral cooperation, possibly on the regulatory front (or as guidelines), but specifically in the area of rights documentation.

Making the normative case for “it should all be free” a little harder, free “content” in all forms and shapes is used as an input in major for-profit business models. The fact that content is free (as in free beer) increases bottom lines and shareholder value for online intermediaries, but not necessarily general welfare. By the same token, however, I see most efforts to control the Internet and restrict access as misguided because they irritate users and have not been shown to increase financial flows. In practical terms, I thus prefer models in which content is free (as in free expression) but in which professional authors can pool their rights to deal with professional users, whether through existing CMOs or otherwise. Such pools should be fair to them (which usually presupposed that they have a say and some form of control over the organization representing their interests). Pools should also be fair and provide benefits to users, principally in the form of full legal access to, and use of, a vast repertory of works (which could be virtually everything if extended repertoire licensing is added to the mix), with some form of payment for non-exempt uses adjudicated by a neutral third party (in this case, the Copyright Board).

What Happened to “Precedents”?  
Another matter that deserves mention is that the pentalogy rewrote a number of lines of Canadian copyright policy beyond collective management, not the least of which was to change the status of precedents that scholars and practitioners can rely on.

First, the concurrence by the Chief Justice in the two controversial majority opinions lends credence to the definitive burial of Bishop v Stevens. Not much of a surprise. "Precedents"?  

Second, one can reasonably wonder whether another Canadian classic, Boudreau v Lin, is still good law. The Copyright Board relied
on the case, but the Supreme Court’s majority opinion does not even mention it, and seems incompatible with the findings they had based on the case.\textsuperscript{83}

Even the very recent \textit{SOCAN v CAIP}\textsuperscript{84} now looks lame, a significant change of direction within a relatively short time frame, and perhaps a reflection of recent changes in the high court’s composition. I, for one, would certainly hesitate to say that \textit{SOCAN v CAIP} is still good law in Canada.

Above all, however, I was struck by the fate of the venerable \textit{University of London Press, Ltd. vs. University Tutorial Press, Ltd. [ULP]}\textsuperscript{85} This case was cited in at least 55 Canadian copyright cases.\textsuperscript{86} Of course, in a common law world one expects cases—even old classics—to be replaced (or updated) from time to time. That is part of our dynamic and flexible legal system, and I certainly do not dispute that process in any way here. However, one might expect a sentence or two to explain such major departures from precedent.\textsuperscript{87}

In \textit{ULP}, a publisher had issued a publication reproducing old exams and sold it to students who were preparing for their own exams. The publisher argued that the publication amounted to fair dealing “for the purposes of private study” by university students preparing for exams. The \textit{ULP} court had held that the company could not bring itself within the fair dealing exception, rejecting the argument that the purpose of the publication was “private” study.\textsuperscript{88} The case, was, therefore, relevant. It is now ostensibly in the dustbin of copyright precedents, but unfortunately without a clear explanation.

\textbf{Conclusion: Going Forward}

The controversial cases in the pentalogy will significantly affect financial flows to creators. In fact, the cases were \textit{not} primarily about what copyright material one is allowed to use because, in a collective management context, permission is granted to users who pay the applicable tariff.\textsuperscript{89} The false dichotomy between fair dealing and collective management must be seen for what it is, and it is \textit{not} about access, and least by major commercial users. Most people would agree that as much material as possible—from in-print and out-of-print books to TV shows from the 60s, 70s and 80s (and up to today’s show I just
missed) to music from every corner of the globe—should be available online, for then we all benefit. But why should it all be at the expense of creators and for the benefit of major for-profit business models?

The pentalogy was about *money* that (some) users don’t want to pay, because its main impact, at least in the short term, will be about whether users, including professional ones, should pay for uses of copyright material (“content”). In some cases, such as the case concerning previews, there were very good arguments to say that users should not have to pay. In the case of embedded sound recordings, the statutory text supported the Court’s conclusion. In the two 5-4 cases, however, reasonable people may well disagree with the outcome.

One could argue that, normatively, there are other issues (like obligations to keep track and report some uses) that separate collective management from fair dealing. I don’t necessarily disagree, but those were not the issue in the cases in the pentalogy. The issue was and is payment, or the absence thereof. Moreover, reporting of online uses by major commercial intermediaries can often be done automatically and in an aggregate form that protects end users’ privacy.

The pentalogy creates more uncertainty, not less, in copyright tariffs. The Copyright Board had navigated a middle way between a bundle of exclusive rights and users who want maximum access at a fair price. Perhaps everyone was unhappy with the Board’s decisions: rights holders because they weren’t getting enough; users because they had to pay. Yet, as a rule of thumb, isn’t generalized and equal discontent precisely a sign that the Board got it right?

There are a host of additional concerns that Canadian copyright policy makers and courts must now address: in particular, the difficult interface with Bill C-11 and the WIPO Copyright Treaty, both of which now look somewhat shambolic, just months after years of debate on the matter ended in Parliament.

As I close, let me suggest a simple view of the aims of copyright: authors want their books to be read (and songwriters their music to be heard, etc.), and users want to access and read/listen to them. Hence, in the grand copyright policy equation, only authors and users are, in fact, *necessary*. Beyond this, only CMOs, as agents of the authors, also may have some claim to being necessary: without
them, many users would find it impossible to conduct their business. By contrast, commercial intermediaries, whether they be publishers, record companies or online service providers of various kinds, are all contingent, because no individual intermediary or business model is essential. Yet, commercial intermediaries of all stripes seem to dominate the policy and scholarly discourse. My hunch is that this is so precisely because commercial intermediaries know they are replaceable. They have an incentive to use judicial, regulatory and other processes to artificially heighten their importance and to protect or increase their position and market shares.

Then one must also recognize that there is, and should be, room for both authors who “just want to be read” (e.g., authors of op-ed letters and academic writers who are otherwise remunerated) and dedicate their work to others for free (though they often insist on attribution, another feature of copyright, lest we forget). This was true before the pentalogy and remains true now. However, I am not sure on what authority one can argue that, because the model is good for bloggers and university professors, it should therefore be imposed on all other creators. As previously explained, I firmly believe that general welfare is maximized when our best songwriters, novelists and filmmakers can hope to make a living from their craft, which presupposes reasonably healthy financial flows. In more ways than one, this debate reminds me of fair trade for coffee.

It may seem too basic to state the point this way, but at bottom it is about money and not control, because, from a creator’s perspective, a viable solution often does not require limiting or controlling the quality or quantity of uses, but it does require finding ways to compensate professional authors whose works are successful in the marketplace. Open and unlimited access, with author compensation in appropriate cases, is not only possible; in many cases it is desirable. In other words, the best guidepost in mapping a way forward in the online environment may not be “free” as in free beer; but rather “free” as in free expression. This is what well-regulated, transparent and efficient collective management can help provide.

Collective management, whether in its present form or in some future new and improved incarnation—that regulators may help prod into existence—has thus far been the best way for creators to get
paid for the ongoing uses of work, whether they self-publish or work with or through major commercial disseminators. To quote Francis Gurry, Director-General of WIPO: “Collective management is the best option that we know for returning value to creators.” Yes, there is undoubtedly room for greater transparency and efficiency in the operation of some CMOs, and greater international coordination of rights information, but that is not a reason to reject the entire model, nor a reason to impose an unwarranted separation of rights in the copyright bundle. This is throwing the baby—indeed, the entire nursery—out with the bathwater.

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The term “phonogram” is defined in the Rome Convention to mean “any exclusively aural fixation of sounds of a performance or of other sounds” [emphasis added], Rome Convention, supra note 5, art 3(b).


The court was unanimous on the copyright aspects of the case, though not on the administrative law—the standard of review—aspects. This would need to be studied in a separate paper, but somehow I am not entirely certain how one should reconcile ESA and Alberta (Education) (infra note 58) on this point.


In the Yi King, or “YìJīng”, also known as the Book of Changes, Yin and yang are best described as two poles to explain “interactive energies”. See Wen Ran Zhang, Yin Yang: A Unifying Theory of Nature, Agents, and Causality, with Applications in Quantum Computing, Cognitive Informatics and Life Sciences (Information Science Reference, 2011) at 6.

Two lungs, brain hemispheres, arms, eyes, ears, etc.


Ibid at §109. Worth noting, Pythagoras made a list of ten “couples” (reproduced by Aristotle in his Metaphysics), including limited (péras)/unlimited (apeiron); odd (périton)/even (artion); left (aristeron)/right (dexion). Of course, not all Greek philosophers saw it this way.


For example in Sophist, when the Stranger says: “Are not thought and speech the same, with this exception, that what is called thought is the unuttered conversation of the soul with herself”. Translation at <http://philosophy.eserver.org/plato/sophist.txt>.


See ibid.

Academics may not be a perfect proxy for professional creators. Their salary is rarely dependent on how many copies of their books or articles are sold.


On that note, let me add that I will be first in line when it comes to asking for sanctions against CMOs that have abused the trust of those whose rights they administer. I also support regulation to ensure transparency and efficiency.

ESA, supra note 1 at para 11.
Before doing so, let me note that the first two sound strangely American in the way the majority and the dissent argue with each other.

Unfortunately, the Supreme Court truncated the quote from the Board's decision, which continues as follows: “even though a ‘temporary’ copy sometimes is stored on the user’s hard drive” (Re Tariff No. 22.A (Internet – Online Music Services) 1996-2006 (18 October 2007), Copyright Board of Canada at para 84 [https://www.cb-cda.gc.ca/decisions/2007/20071018-m-e.pdf] [Tariff 22.A 2007]).

ESA, supra note 1 at para 28.

Ibid at para 31.

Here, binary not because of the full exclusive right vs exception opposition, but because somehow rights in the bundle must be separate and distinct.


See infra note 36.


ESA, supra note 1 at para 11.

As of this writing (December 2012).

Re Statements of royalties to be collected by SOCAN and CMRRA/SODRAC inc. for the communication to the public by telecommunication or the reproduction, in Canada, of musical works (5 October 2012), Copyright Board of Canada [http://www.cb-cda.gc.ca/decisions/2012/socan-csi-reasons.pdf > [Tariff 22.A 2012].

Ibid at paras 89, 92.

The mechanical rate tariff is paid to CMOs that administer the reproduction right. The name stems from the fact that music is made available on recordings from which it can be perceived using “mechanical devices”. The difference between mechanical and communication to the public tariffs was easier to see when users could listen to the music either by turning on the radio or by playing a record (or CD), though uses that combine both rights have been around for a long time (e.g., a musical work embedded in a motion picture). On the Internet, most uses require the making of a copy (at least on the emission server) and many (all streaming services for example, as we now know from the pentalogy) involve a communication to the public. The Court artificially and without valid reason (that I can see) insisted on separating the two rights.


Ibid at para 105 [emphasis added].

ESA, supra note 1 at para 1.

Ibid at para 48.
In fact, an entire paper could be written on the application of statutory interpretation principles by the majority. See also s 16 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

ESA, supra note 1 at para 92.

WCT, supra note 11, art 8, entitled “Right of Communication to the Public”.

As Rothstein J noted in ESA, supra note 1 at para 47, “[C]ourts must still respect the language chosen by Parliament—not override it.”

Perhaps some forms of making available could also be seen as authorizations of a reproduction and this still covered under the statute.

Re Statement of Royalties To Be Collected by SOCAN, Re:Sound, CSI, Avla/Soproq and Artisti In Respect of Commercial Radio Stations (9 July 2010), Copyright Board of Canada <http://cb-cda.gc.ca/decisions/2010/20100709.pdf> [Statement of Royalties].

Ibid at para 2.


Statement of Royalties, supra note 50 at para 2.

See Daniel Gervais & Alana Maurushat, supra note 32.

ESA, supra note 1 at para 123.


This is discussed in Giuseppina d’Agostino’s chapter in this book.


Ibid at para 23.

Ibid at para 25.

Ibid at para 27.

Ibid at para 49.


Copyright Act, supra note 6, s 30.02; Bill C-11, supra note 2, cl 27 [emphasis added].

I am well aware of criticism concerning the way in which Access Copyright managed and argued the case, and that it may not have pursued a negotiated outcome with enough determination. That may well have had an impact on the outcome. Still, the outcome is what one must now deal with.

The latter option seems more likely. Because of their desire to “control” the curriculum,
I see it as unlikely that provincial education ministries would freely accept publicly available material to replace locally produced material entirely.

62 In that case, whether authors (not publishers) will also get increased subsidies will be an interesting subsidiary question. The CMOs actually pay a share to authors directly. Now this is also gone per the Court’s decision, or at least reduced to the same extent as the reduction in the CMOs’ licensing ability.


64 I will use the term “works” generically as including objects of neighbouring rights.

65 I should note that the picture refers to economic (patrimonial) rights. Moral rights still apply to most uses—even where an exception might prevent the reach of any exclusive right or even right to be paid. Typically, the moral right of attribution is not absolute. It applies, as under art 3 of the Swedish Copyright Act, “to the extent and in the manner required by proper usage”.

66 I also note that this approach seems compatible with the proposed European Copyright Code prepared by the Wittem Group.


68 As should be obvious by now, I do not espouse the “postmodernist” view of payment for intellectual creativity as outdated.

69 No author is forced to join a collective and an author who prefers to deal directly with major users or wants to dedicate content to the public domain or to major commercial sites like YouTube is mostly free to do so (Canada has fewer compulsory licensing schemes than the United States).

70 I understand that a teacher may need to make spontaneous copies and some other classroom uses. The Guidelines agreed to in the United States after the passage of the 1976 Copyright Act allowed educators some degree of flexibility in this matter, though they do not cover digital uses. However, the Supreme Court does seem to go at least a few steps beyond what the Guidelines allow.

In Canada, closer ties between SOCAN, CMRRA and SODRAC are an example. Consolidation is visible in other jurisdictions. In Australia, CAL and VISCOPY have entered into a service agreement to merge some of their activities, for the benefit of members and users. See <http://www.ifrro.org/sites/default/files/cal_viscopy-final.pdf>.

And perhaps the definition of “collective management” itself will expand. New services that allow authors directly to be paid for certain online uses of their works come to mind. See e.g. <http://www.tunecore.com>.

I am thinking in particular of WIPO's International Music Registry and the Global Repertoire database project (see <http://www.globalrepertoiredatabase.com/>).

Bishop v Stevens [1990], 2 SCR 467, 72 DLR (4th) 97 <http://canlii.ca/t/1fsv7>.


SOCAN v CAIP, supra note 3.

[1916] 2 Ch 601 [ULP].

This is based on a Westlaw search performed by the author in October 2012, counting (obviously) a case only once even if appealed etc.

The rather modest explanation is that, despite a significant overlap of the fact patterns, ULP was seen as not “particularly helpful”. Alberta (Education), supra note 58 at para 19.

ULP, supra note 85 at 613: “The defendants on these facts contend that their publication… is a fair dealing with them for the purposes of private study within s. 2, sub-s. 1, of the Act of 1911, and is therefore not an infringement of copyright. It could not be contended that the mere republication of a copyright work was a ‘fair dealing’ because it was intended for purposes of private study; nor if an author produced a book of questions for the use of students, could another person with impunity republish the book with the answers to the questions. Neither case would, in my judgment, come within the description of ‘fair dealing.’ In the present case the paper on more advanced mathematics has been taken without any attempt at providing solutions for the questions, and the only way in which the defendants have dealt with this paper is by appropriating it.”

This is a key point: CMOs do not refuse licences to users willing to pay the applicable tariff. Indeed, why would they?

If the past is prologue, then librarians do have a separate and stronger claim to permanency than commercial intermediaries.

See the Music Creators’ Alliance website (27 February 2013) <http://musiccreatorsalliance.com/The_Music_Creators_Alliance/the_music_creators_alliance.html>.
