

**SUPREME COURT OF CANADA**

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| **Citation:** Canadian Broadcasting Corp. *v.* SODRAC 2003 Inc., 2015 SCC 57, [2015] 3 S.C.R. 615 | **Date:** 20151126**Docket:** 35918 |

Between:

Canadian Broadcasting Corporation

Appellant

and

SODRAC 2003 Inc. and Society for Reproduction Rights of Authors,

Composers and Publishers in Canada (SODRAC) Inc.

Respondents

- and -

Centre for Intellectual Property Policy, Ariel Katz,

Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic,

Canadian Musical Reproduction Rights Agency Ltd., Canadian Music Publishers Association, International Confederation of Music Publishers, Music Canada,

International Federation of the Phonographic Industry, Canadian Council of

Music Industry Associations, Canadian Independent Music Association and

Association québécoise de l’industrie du disque, du spectacle et de la vidéo

Interveners

**Coram:** McLachlin C.J. and Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon and Côté JJ.

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| **Reasons for Judgment:**(paras. 1 to 116)**Dissenting Reasons:**(paras. 117 to 192)**Dissenting Reasons:**(paras. 193 to 195) | Rothstein J. (McLachlin C.J. and Cromwell, Moldaver, Wagner, Gascon and Côté JJ. concurring)Abella J.Karakatsanis J. |

Canadian Broadcasting Corp. *v.* SODRAC 2003 Inc., 2015 SCC 57, [2015] 3 S.C.R. 615

Canadian Broadcasting Corporation Appellant

v.

SODRAC 2003 Inc. and

Society for Reproduction Rights of Authors,

Composers and Publishers in Canada (SODRAC) Inc. Respondents

and

Centre for Intellectual Property Policy, Ariel Katz,

Samuelson‑Glushko Canadian Internet Policy and Public Interest Clinic,

Canadian Musical Reproduction Rights Agency Ltd.,

Canadian Music Publishers Association,

International Confederation of Music Publishers,

Music Canada, International Federation of the Phonographic Industry,

Canadian Council of Music Industry Associations,

Canadian Independent Music Association and

Association québécoise de l’industrie du disque,

du spectacle et de la vidéo Interveners

**Indexed as: Canadian Broadcasting Corp. *v.*** SODRAC 2003 Inc.

2015 SCC 57

File No.: 35918.

2015: March 16; 2015: November 26.

Present: McLachlin C.J. and Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon and Côté JJ.

on appeal from the federal court of appeal

 *Intellectual property — Copyright — Licences — Collective societies — SODRAC administering reproduction rights as collective society — Application by SODRAC to set terms and conditions of licence for reproduction by CBC of musical works in SODRAC’s repertoire from 2008 to 2012 — CBC making ephemeral synchronization copies, including musical works, as producer and ephemeral broadcast‑incidental copies, including musical works, as broadcaster — Synchronization copies made during production subject to licence — Whether broadcast‑incidental copies engage reproduction right — If so, whether licence for broadcast‑incidental copies should be implied in synchronization licences — If reproduction licence required for broadcast‑incidental copies, whether Board erred in valuation of licence — Whether Board applied principles of technological neutrality and balance properly — Copyright Act, R.S.C. 1985, c. C‑42, s. 3(1)(d).*

 *Intellectual property — Copyright — Interim licences — Collective societies — Board decision setting terms and conditions of licence released after expiry of licence period — Board setting interim licence based on status quo — 2008‑2012 licence selected as status quo — Whether Board erred in setting terms of interim licence — Copyright Act, R.S.C. 1985, c. C‑42, s. 66.51.*

 *Administrative law — Judicial review — Standard of review — Copyright Board — Appropriate standard of review — Whether specific standard of review should be ascribed to each issue arising in decision under review.*

 CBC is both a producer and a broadcaster of television programs: it broadcasts its own original programs as well as those that it has licensed or bought from third parties, and it shows these programs on television and the Internet. SODRAC is a collective society organized to manage the reproduction rights of its members. When broadcasters, including CBC, produce a program, they make several kinds of copies. “Synchronization copies” incorporate musical works into an audiovisual program. A “master copy” is the final copy created when synchronization is complete. CBC loads the master copy into its digital content management system and makes several copies of the completed program, and thus of the music incorporated into the program, for internal use. Where these copies are made to facilitate broadcasting, they are called “broadcast‑incidental copies”.

 Following *Bishop v. Stevens*, [1990] 2 S.C.R. 467, in which it was held that “ephemeral” copies engaged the reproduction right in s. 3(1)(*d*) of the *Copyright Act* and that the right to make those copies is not implied by law in a broadcast licence, SODRAC began to differentiate between synchronization copies and copies made for other purposes. Initially, it granted free synchronization licences to licence holders, but it began asking producers to pay for those licences in or about 2006. In 2008, when SODRAC and CBC were unable to come to an agreement for the renewal of CBC’s licence, SODRAC asked the Board to set the terms of a licence for November 14, 2008, to March 31, 2012. CBC argues that broadcast‑incidental copies do not engage the reproduction right, or, in the alternative, that if a licence covering broadcast‑incidental copies is required, it should be implied from its synchronization licences or the synchronization licences of third party producers.

 In 2012, the Copyright Board held that CBC’s broadcast‑incidental copying activity engaged the reproduction right, that a licence for such copies could not be implied from synchronization licences covering the production process, and that CBC required a separate reproduction licence to legitimize its broadcast‑incidental copying. The Board valued this licence based on a ratio used in the commercial radio context and found to be equally applicable to the television context. The Board later issued an interim licence to take effect after the expiry of the 2008‑2012 licence that extended the terms of that licence on an interim basis, subject to minor modifications. The Federal Court of Appeal upheld both the 2008‑2012 licence and the interim licence that followed, subject to minor amendments.

 *Held* (Abella and Karakatsanis JJ. dissenting): The appeal should be allowed; the 2008‑2012 licence and the interim licence should both be set aside and the decisions of the Copyright Board should be remitted to the Board for reconsideration.

 *Per* McLachlin C.J. and Rothstein, Cromwell, Moldaver, Wagner, Gascon and Côté JJ.: Because of the unusual statutory scheme under which the Board and the court may each have to consider the same legal question at first instance, the standard of correctness applies to whether broadcast‑incidental copies engage the reproduction right, and thus whether the *Copyright Act* allows SODRAC to seek a licence for CBC’s broadcast‑incidental copying. A standard of reasonableness applies to each of the remaining issues.

 The Board was correct in finding that broadcast‑incidental copying engages the reproduction right, consistent with this Court’s decision in *Bishop* and the context of the statutory scheme set out in the *Copyright Act*. Though this Court’s subsequent decisions in *Théberge v. Galerie d’Art du Petit Champlain inc.*, 2002 SCC 34, [2002] 2 S.C.R. 336, and *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34, [2012] S.C.R. 231, have refined the understanding of the purposes of copyright law, the central holding in *Bishop*, that ephemeral copies engage the reproduction right, remains sound. Ephemeral copies are not exempted by ss. 30.8 and 30.9, and nothing in the text, context or legislative history of ss. 3(1), 30.8 or 30.9 supports the view that broadcast‑incidental copies are not reproductions under the Act. While balance between user and right‑holder interests and technological neutrality are central to Canadian copyright law, they cannot change the express terms of the Act.

 The Board was also correct in finding that a licence to make broadcast‑incidental copies should not be implied from synchronization licences issued by SODRAC. The synchronization licences do not give any indication that they included the right to make broadcast‑incidental copies. The separation of synchronization and broadcast‑incidental licences does not offend technological neutrality. Recognizing production and broadcasting as distinct activities validly subject to disaggregated licences does not impose new layers of protections and fees based solely on technological change. Economic considerations also justified the practice of dividing synchronization and broadcast‑incidental copy licences.

 However, the Board erred in failing to consider the principles of technological neutrality and balance in setting the valuation of this licence. The principle of technological neutrality recognizes that, absent parliamentary intent to the contrary, the Act should not be interpreted or applied to favour or discriminate against any particular form of technology. In the regulatory context, the principle of technological neutrality applies to valuation of a reproduction licence, so the Board should compare the value derived from the use of reproduction in the old and new technologies in its valuation analysis.

 To maintain a balance between user and right‑holder interests, the Board must also assess the respective contributions of the user and the copyright‑protected works to the value enjoyed by the user. It must have regard for factors it considers relevant in striking a balance between user and right‑holder rights when fixing licence fees. Relevant factors will include the risks taken by the user, the extent of the investment made by the user in the new technology, and the nature of the copyright-protected work’s use in the new technology.

 The 2008-2012 licence is set aside as it relates to the valuation of CBC’s television and Internet broadcast-incidental copies and the decision of the Board in that regard is remitted to the Board for reconsideration of that valuation in accordance with the principles of technological neutrality and balance. The Board’s valuation methodology did not give any indication that the principles of technological neutrality and balance were considered in the way it fixed the SODRAC reproduction royalties payable by CBC. The Board did not compare the value contributed by the copyright-protected reproductions in the old and new technology. It also failed to take into account the relative contributions made by the use of copyright-protected works and the risk and investment by the user in its new technology, as required by the balance principle.

 It was reasonable to use the interim licence to maintain the status quo and to use the 2008‑2012 statutory licence as the status quo in this case. However, because the interim licence was based on the terms of the 2008‑2012 licence, it is set aside and the Board’s decision in that regard is also remitted for reconsideration consistent with the principles guiding the redetermination of the 2008‑2012 licence.

 Finally, the Board has the statutory authority to fix the terms of licences pursuant to s. 70.2, but the user retains the ability to accept or decline those terms.

 *Per* Abella J. (dissenting): The Board’s decision to impose royalty fees for broadcast‑incidental copies was unreasonable.

 The *Copyright* *Act* strikes a careful balance between promoting the public interest in the encouragement and dissemination of creative works, and obtaining a just reward for creators. Maintaining the balance that best supports the public interest in creative works is the central purpose of the *Copyright Act*. The question is how to preserve this balance in the face of new technologies that are transforming the mechanisms through which creative works are produced, reproduced and distributed. The answer lies in applying a robust vision of technological neutrality as a core principle of statutory interpretation under the *Copyright Act*.

 A reasonable interpretation of the scope of the reproduction right must consider the wording of ss. 3(1) and 3(1)(*d*) in the context of the overarching purpose of the *Copyright Act* and the central principle of technological neutrality. Adopting a literal interpretation of the right in s. 3(1)(*d*) would leave no room for the principle of technological neutrality, which is rooted in the words “to produce or reproduce the work or any substantial part thereof in any material form whatever”. Technological neutrality ensures that copyright attaches to a particular activity based on the essential character of the activity or output, rather than to the process by which it occurs. Technological neutrality consists of media neutrality and functional equivalence. Media neutrality seeks to ensure that copyright doctrine evolves to embrace new technologies, preserving copyright not only in the medium in which the work is created but all existing and future media in which the work might be expressed. As long as the creative expression survives the transfer to a new medium, copyright in the work will survive.

 Functional equivalence, on the other hand, focuses on what the technology at issue is doing, rather than on the technical modalities of *how* it is doing it. This leads to interpretations of the *Act* that give functionally equivalent technologies similar treatment. It also avoids imposing copyright liability on technologies and activities that only incidentally implicate copyright. This case involves an application of functional equivalence.

 Broadcast‑incidental copies are those created to achieve a broadcast by providing the necessary technical modalities. In the context of copyright law, their creation cannot be seen as distinct from the core activity of broadcasting. A broadcast‑incidental copy is not transformed into a separate reproduction of the work simply because the technical imperatives of effecting a broadcast require the presence of multiple copies.Broadcast‑incidental copies do not, as a result, attract separate royalties. To conclude otherwise is to doom both technological neutrality and the ability of copyright law to preserve the delicate balance between the rights of copyright holders and the public’s interest in the dissemination of creative works.

 SODRAC holds only the reproduction rights in the works in its repertoire. It is not entitled to royalties associated with the broadcasting of those works, which are paid to the Society of Composers, Authors and Music Publishers of Canada (SOCAN). SODRAC is attempting to claim royalties in this case for the *method* of broadcasting the musical works to the public, despite never before receiving royalties for broadcasting activities.

 Sections 30.8 and 30.9 of the *Copyright Act* were a legislative response to this Court’s holding in *Bishop*, which was based on a literal interpretation of s. 3(1)(*d*). It held that the licensing of a performance right did not implicitly authorize ephemeral recordings of the performance for the purposes of effecting the broadcast. These discrete legislative responses to a specific judicial interpretation of the *Copyright Act* are far from representing the kind of express statutory language needed to displace such fundamental objectives and principles underpinning the *Copyright Act* as technological neutrality and balance. They were meant to provide greater certainty that certain classes of ephemeral recording are not to attract copyright liability and to maintain technological neutrality, not to be a defining statement on the content of the reproduction right, or which kinds of copies will trigger it.

 The Federal Court of Appeal’s suggestion that “more copies mean more value and thus, more royalties” violates technological neutrality by imposing additional copyright liability on the use of more efficient copy‑dependent broadcasting technologies, by erroneously tying the compensation owed to creators of copyrighted works to how efficiently the user exercises the right that was bargained for, and by artificially raising the cost of broadcasting. It also fails to take account of the fact that broadcasters are required to make certain broadcast‑incidental copies in order to comply with CRTC regulations and that the CBC already pays royalty fees for broadcasting rights to SOCAN.

 The principle of technological neutrality requires that the interpretation and application of the *Copyright Act* focus on the essential character of the activity and not on the technical modalities by which it is achieved. Modern digital technologies that are dependent on the creation of incidental copies do not change the essence of the broadcasting activity, and imposing additional fees for such copies raises the cost of broadcasting, an expense the consumer will be made to bear. Attaching copyright liability to incidental copies created as a result of improvements in broadcasting technologies therefore penalizes broadcasters and the public for utilizing new and improved technologies and artificially creates entitlements to compensation for creators that were never intended to be given under the *Act*.

 The majority’s articulation and application of the principle of technological neutrality on the issue of valuation is wholly inconsistent with the established case law in that it ties copyright-holder compensation to actions of the user that are unrelated and irrelevant to the rights held in the protected works, and focuses the inquiry on the value that the technology is creating for the user. The majority proposes two novel factors for the Board to consider when striking a balance between user and copyright-holder interests: (1) the nature of the copyright-protected work’s use in the new technology; and (2) the risks taken and the extent of the investment made by the user in the new technology. While the first factor is consistent with the balance articulated in *Théberge*, the second is not. If this new second factor is followed to its logical conclusion, users who make a sufficiently large investment or take sufficiently high risks may, by doing so, deprive the copyright holder of *any* entitlement to compensation for the use of the protected works.

 As this Court confirmed in *Entertainment Software Association*, technological neutrality operates to prevent imposing additional, gratuitous fees on the user simply for the use of more efficient technologies. Focusing the inquiry on the value that the technology is creating for the user, as opposed to the functional result created by the technology, misconstrues technological neutrality. A technological innovation may well create value for the user by increasing efficiencies, driving down costs, or allowing the user to remain competitive. But SODRAC, the copyright holder, is not entitled to be compensated for how efficiently the CBC uses technology to achieve its broadcast.

 The question of whether the Copyright Board ought to have imposed royalty fees on the CBC for the creation of incidental copies that arise as a technical part of the digital broadcasting process, is at the heart of the Copyright Board’s specialized mandate and therefore reviewable on a reasonableness standard. Extricating the various components of the Board’s decision and subjecting each to its own standard of review analysis represents a significant and inexplicable change in this Court’s standard of review jurisprudence. It risks creating an unworkable framework for the judicial review of administrative decision‑making and may well be seen as a way to give reviewing courts wider discretion to intervene in administrative decisions, as had been done in the pre‑*Dunsmuir* era through the use of the “preliminary question doctrine”.

 *Per* Karakatsanis J. (dissenting): There is agreement with Abella J.’s decision on the merits and in the result, but not with her position on the standard of review. Instead, there is agreement with the majority’s conclusion that the correctness standard applies to whether broadcast‑incidental copies engage the reproduction right and that the reasonableness standard applies to the balance of the decisions of the Copyright Board. However, the general approach taken by the majority to their analysis of the standard of review is not endorsed. In this respect, although this Court’s jurisprudence permits the isolation of a particular question of law on an exceptional basis, it does not require a separate standard of review analysis for each issue. An issue‑by‑issue approach, within each decision, unnecessarily complicates an already overwrought area of the law.

**Cases Cited**

By Rothstein J.

 **Applied:** *Théberge v. Galerie d’Art du Petit Champlain inc.*, 2002 SCC 34, [2002] 2 S.C.R. 336; *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34, [2012] 2 S.C.R. 231; *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3; **referred to:** *Bishop v. Stevens*, [1990] 2 S.C.R. 467; *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 S.C.R. 283; *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633; *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3, [2015] 1 S.C.R. 161; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers’ Association*, 2011 SCC 61, [2011] 3 S.C.R. 654; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Performing Right Society, Ltd. v. Hammond’s Bradford Brewery Co.*, [1934] 1 Ch. 121; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Statement of Royalties to be Collected by CMRRA/SODRAC Inc. for the Reproduction of Musical Works, in Canada, by Commercial Radio Stations in 2001, 2002, 2003 and 2004*, decision of the Board, file No. 2001‑2004, March 28, 2003 (online: http://www.cb‑cda.gc.ca/decisions/2003/20030328‑rm‑b.pdf); *Statement of Royalties to be Collected by SOCAN, Re:Sound, CSI, AVLA/SOPROQ and Artisti in Respect of Commercial Radio Stations*, decision of the Board, July 9, 2010 (online: http://www.cb‑cda.gc.ca/decisions/2010/20100709.pdf); *Gosling v. Veley* (1850), 12 Q.B. 328, 116 E.R. 891; *Ontario English Catholic Teachers’ Assn. v. Ontario (Attorney General)*, 2001 SCC 15, [2001] 1 S.C.R. 470; *Attorney‑General v. Wilts United Dairies, Ltd.* (1921), 37 T.L.R. 884; *Vigneux v. Canadian Performing Right Society, Ltd.*, [1943] S.C.R. 348; *Hanfstaengl v. Empire Palace*, [1894] 3 Ch. 109.

By Abella J. (dissenting)

 *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34, [2012] 2 S.C.R. 231; *Bishop v. Stevens*, [1990] 2 S.C.R. 467; *Théberge v. Galerie d’Art du Petit Champlain inc.*, 2002 SCC 34, [2002] 2 S.C.R. 336; *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45, [2004] 2 S.C.R. 427; *Robertson v. Thomson Corp.*, 2006 SCC 43, [2006] 2 S.C.R. 363; *Euro‑Excellence Inc. v. Kraft Canada Inc.*, 2007 SCC 37, [2007] 3 S.C.R. 20; *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36, [2012] 2 S.C.R. 326; *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37, [2012] 2 S.C.R. 345; *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 S.C.R. 283; *Cinar Corporation v. Robinson*, 2013 SCC 73, [2013] 3 S.C.R. 1168; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227.

By Karakatsanis J. (dissenting)

 *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 S.C.R. 283.

**Statutes and Regulations Cited**

*Copyright Act*, R.S.C. 1985, c. C‑42, ss. 2.4, 3(1), 30.7 [ad. 1997, c. 24, s. 18(1)], 30.8 [*idem*], 30.9 [*idem*], 66.51, 66.6(1), 70.2, 70.4.

*Copyright Modernization Act*, S.C. 2012, c. 20, summary.

*Television Broadcasting Regulations, 1987*, SOR/87‑49, s. 10(5).

**Authors Cited**

*Convention concernant la télévision et la radio entre la Société du droit de reproduction des auteurs, compositeurs et éditeurs au Canada (SODRAC) et la Société Radio‑Canada*, 19 mars 1992, art. 2.

Craig, Carys J. “Technological Neutrality: (Pre)Serving the Purposes of Copyright Law”, in Michael Geist, ed., *The Copyright Pentalogy: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law*. Ottawa: University of Ottawa Press, 2013, 271.

Driedger, Elmer A. *Construction of Statutes*, 2nd ed. Toronto: Butterworths, 1983.

Gurry, Francis. “The Future of Copyright”, speech delivered at the Blue Sky Conference, Queensland University of Technology, Sydney, February 25, 2011 (online: http://www.wipo.int/about‑wipo/en/dgo/speeches/dg\_blueskyconf\_11.html).

Hagen, Gregory R. “Technological Neutrality in Canadian Copyright Law”, in Michael Geist, ed., *The Copyright Pentalogy: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law*. Ottawa: University of Ottawa Press, 2013, 307.

Hutchison, Cameron J. “Case Comment: The 2012 Supreme Court Copyright Decisions & Technological Neutrality” (2013), 46 *U.B.C. L. Rev.* 589.

Hutchison, Cameron J. “Technological Neutrality Explained & Applied to *CBC v. SODRAC*” (2015), 13 *C.J.L.T.* 101.

Katz, Ariel. “Commentary: Is Collective Administration of Copyrights Justified by the Economic Literature?”, in Marcel Boyer, Michael Trebilcock and David Vaver, eds., *Competition Policy and Intellectual Property*. Toronto: Irwin Law, 2009, 449.

*Licence authorizing the Canadian Broadcasting Corporation to reproduce works in the repertoire of SODRAC for the period from November 14, 2008 to March 31, 2012*, file No. 70.2‑2008‑01, November 2, 2012, revised March 31, 2014, ss. 2.01, 5.03(2) (online: http://www.cb‑cda.gc.ca/decisions/2012/licence‑src‑

modifiee.pdf).

McKeown, John S. *Fox on Canadian Law of Copyright and Industrial Designs*, 4th ed. Toronto: Carswell, 2012 (loose‑leaf updated 2015, release 4).

Pallante, Maria A. “The Next Great Copyright Act” (2013), 36 *Colum. J.L. & Arts* 315.

Richard, Hugues G., and Laurent Carrière et al., eds. *Canadian Copyright Act Annotated*, vol. 3. Toronto: Carswell, 1993 (loose‑leaf updated 2015, release 8).

Syrtash, Veronica. “Supra‑National Limitations on Copyright Exceptions: Canada’s Ephemeral Exception and the ‘Three‑Step Test’” (2005‑2006), 19 *I.P.J.* 521.

Tussey, Deborah. “Technology Matters: The Courts, Media Neutrality, and New Technologies” (2005), 12 *J. Intell. Prop. L.* 427.

Vaver, David. *Intellectual Property Law: Copyright, Patents, Trade‑marks*, 2nd ed. Toronto: Irwin Law, 2011.

 APPEAL from a judgment of the Federal Court of Appeal (Noël, Pelletier and Trudel JJ.A.), 2014 FCA 84, [2015] 1 F.C.R. 509, 457 N.R. 156, 118 C.P.R. (4th) 79, [2014] F.C.J. No. 321 (QL), 2014 CarswellNat 808 (WL Can.), setting aside in part a decision of the Copyright Board of Canada, file Nos. 70.2‑2008‑01, 70.2‑2008‑02, November 2, 2012 (online: http://www.cb‑cda.gc.ca/decisions/2012/DecisionSODRAC5andArbitration02‑11‑2012.pdf), [2012] C.B.D. No. 11 (QL), and affirming a decision of the Copyright Board of Canada, file No. 70.2-2012-01, January 16, 2013 (online: http://www.cb-cda.gc.ca/decisions/2013/sodrac-16012013.pdf). Appeal allowed, Abella and Karakatsanis JJ. dissenting.

 Marek Nitoslawski and Joanie Lapalme, for the appellant.

 Colette Matteau and Lisane Bertrand, for the respondents.

 Howard P. Knopf, David Lametti and *Ariel Katz*, for the interveners the Centre for Intellectual Property Policy and Ariel Katz.

 David Fewer and Jeremy de Beer, for the intervener the Samuelson‑Glushko Canadian Internet Policy and Public Interest Clinic.

 Casey M. Chisick, Peter J. Henein and Eric Mayzel, for the interveners the Canadian Musical Reproduction Rights Agency Ltd., the Canadian Music Publishers Association and the International Confederation of Music Publishers.

 Barry B. Sookman and Daniel G. C. Glover, for the interveners Music Canada, the International Federation of the Phonographic Industry, the Canadian Council of Music Industry Associations, the Canadian Independent Music Association and Association québécoise de l’industrie du disque, du spectacle et de la vidéo.

 The judgment of McLachlin C.J. and Cromwell, Moldaver, Wagner, Gascon and Côté JJ. was delivered by

1. Rothstein J. — Broadcasting a program that uses copyright-protected music engages the right to communicate the work to the public by telecommunication — a right that rests exclusively with the copyright holder for that musical work. Thus, broadcasters must secure a licence to communicate the work. Broadcasting activities are complex, however, and broadcasters often engage not only in the telecommunication of musical works as part of the airing of a program, but also in making copies of programs, and thus of the music incorporated therein, for internal use. Where these copies are made to facilitate broadcasting, they may be described as broadcast-incidental copies.
2. Making copies of a copyright-protected work implicates the reproduction right, which also rests exclusively with the copyright holder. This case concerns the relationship between broadcast-incidental copies and the reproduction right established by s. 3(1)(*d*) of the *Copyright Act*, R.S.C. 1985, c. C-42.
3. In 2012, the Copyright Board, in setting the terms of a licence between Canadian Broadcasting Corporation (“CBC”) and SODRAC 2003 Inc. and the Society for Reproduction Rights of Authors, Composers and Publishers in Canada (SODRAC) Inc. (collectively, “SODRAC”) for the 2008-2012 period, held that CBC’s broadcast-incidental copying activity engaged the reproduction right, that a licence for such copies could not be implied from synchronization licences covering the production process, and that CBC required a separate reproduction licence to legitimize its broadcast-incidental copying. The Board further found that the appropriate valuation for this licence was more than nominal, and issued a licence authorizing CBC to reproduce works in the SODRAC repertoire in conjunction with a list of activities, including the production of CBC’s in-house programs and the broadcasting of programs on CBC’s television services and on the Internet: *Licence authorizing the Canadian Broadcasting Corporation to reproduce works in the repertoire of SODRAC for the period from November 14, 2008 to March 31, 2012* (online) (“2008-2012 statutory licence” or “2008-2012 licence”), s. 2.01.
4. It later issued an interim licence to take effect after the expiry of the 2008-2012 licence that extended the terms of that licence on an interim basis, subject to minor modifications. The Federal Court of Appeal upheld both the 2008-2012 licence and the interim licence that followed, subject to minor amendments.
5. The Board was correct in finding that broadcast-incidental copying engages the reproduction right, consistent with this Court’s decision in *Bishop v. Stevens*, [1990] 2 S.C.R. 467, and the context of the statutory scheme set out in the *Copyright Act*. Though this Court’s subsequent decisions in *Théberge v. Galerie d’Art du Petit Champlain inc.*, 2002 SCC 34, [2002] 2 S.C.R. 336, and *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34, [2012] 2 S.C.R. 231 (“*ESA*”), have refined our understanding of the purposes of copyright law, the central holding in *Bishop*, that ephemeral copies engage the reproduction right, remains sound. I further agree with the Board and the Federal Court of Appeal that a licence to make broadcast-incidental copies should not be implied from synchronization licences issued by SODRAC.
6. However, in my respectful opinion, the Board erred in failing to consider the principles of technological neutrality and balance in setting the valuation of this licence. I would remit this matter to the Board for reconsideration of the valuation of the 2008-2012 licence for CBC’s television and Internet broadcast-incidental copies applying the principles of technological neutrality and balance. Because the interim licence that followed was based on the terms of the 2008-2012 licence, I would also set it aside and remit it for redetermination.
7. Facts
8. The appellant CBC is both a producer and a broadcaster of television programs: it broadcasts its own original programs as well as those that it has licensed or bought from third parties, and it shows these programs on television and the Internet. Where a program contains copyright-protected musical works, CBC must ensure that it has secured all necessary licences for that work in order to reproduce and broadcast the work as part of a television program. Production and broadcasting may implicate both reproduction and the telecommunication rights in a work. This appeal is concerned primarily with the reproduction right established by s. 3(1)(*d*) of the *Copyright Act*.
9. The respondent the Society for Reproduction Rights of Authors, Composers and Publishers in Canada (SODRAC) Inc. is a collective society organized to manage the reproduction rights of its members. Its focus is on French-language music reproduction rights. Its members assign their reproduction rights to the collective society, which then stands in place of individual right holders in negotiations with parties who seek permission to reproduce works in its repertoire. This repertoire comprises the majority of French-language works written by Canadians.
	1. Synchronization Copies and Broadcast-Incidental Copies
10. A producer who wishes to use a musical work in an audiovisual program must incorporate that work into the production copy of the program, a process known in the industry as “synchronization”. The parties do not dispute that the synchronization process is an exercise of the reproduction right, and thus requires a licence if the musical work being incorporated is under copyright. Once the synchronization process is complete, the final product is referred to as a “master” copy. Where the producer is not also a broadcaster, this copy is then passed on once the program has been sold or licensed to a broadcaster.
11. Once CBC is in possession of the master copy of a program, whether it has been produced in-house or by an independent producer, the master copy is loaded into CBC’s digital content management system, a practice that has become widespread among broadcasters in recent years. Digital systems generally involve the storage of copies as electronic files on hard drives, while older analog systems stored copies on physical tapes. CBC makes use of its digital content management system to perform a number of functions that help prepare a program for broadcast.
12. These processes result in the creation of several copies, which are at the heart of this appeal. The parties refer to these copies as “broadcast-incidental copies”. Broadcast-incidental copies may be made for several purposes. For example, a copy may be made to reformat the master copy to suit CBC’s technical requirements, or to edit the copy for timing, language or closed captioning purposes. One or more additional copies may also be made to allow for screening of the program by various teams within CBC before broadcast.
	1. Licensing Practices
13. Broadly speaking, reproduction licences may take two forms: transactional or blanket. In a transactional licence, a prospective user seeks out the holder of the reproduction right in a particular work that the producer wishes to include in a program and negotiates an individual licence agreement. Blanket licences are negotiated between a producer and a collective society, and grant the producer the right to reproduce all works within the collective’s repertoire, subject to the negotiated terms of the licence.
14. Parties negotiating a reproduction licence may also choose to structure it as a “through-to-the-viewer” licence, in which the right holder grants the authority to make all reproductions necessary to take a program from production through to its ultimate broadcast to viewers. Alternately, they may choose to structure it as a “bare” synchronization licence, which grants the authority to make synchronization copies but does not cover additional copies made to facilitate broadcasting: decision of the Copyright Board, file Nos. 70.2-2008-01, 70.2-2008-02, November 2, 2012 (online) (“Statutory Licence Decision”), at paras. 15-16. As will be discussed below, however, CBC disputes whether bare synchronization licences are possible, or whether they must include an implied licence to make broadcast-incidental copies.
15. Where CBC acts as a producer, its practice has been to seek transactional synchronization licences from individual right holders where possible. When synchronizing French-language music, SODRAC exercises collective authority over the substantial majority of such works, and CBC has used blanket licences. Where CBC acts as a broadcaster of third party programs, it does not seek synchronization licences, as those licences will have been obtained by the producer before the final master copy of the program is handed over to CBC.
16. The issues in dispute on appeal arise in part from the history of dealings between CBC and SODRAC with regard to reproduction licences. It is helpful to review this history in understanding the arguments presented by both parties.
17. In 1990, this Court, per McLachlin J. (as she then was), issued its decision in *Bishop*, holding that “the right to broadcast a performance under s. 3(1) of the Act does not include the right to make ephemeral recordings for the purpose of facilitating the broadcast”: p. 485. Thus, reproductions made to facilitate broadcasting need to be authorized separate from the authorization to broadcast a performance to the public.
18. Following *Bishop*, in 1992, CBC and SODRAC first entered into a negotiated licence agreement permitting CBC to make synchronization copies and other reproductions of works within the SODRAC repertoire: *Convention concernant la télévision et la radio entre la Société du droit de reproduction des auteurs, compositeurs et éditeurs au Canada (SODRAC) et la Société Radio-Canada*, March 19, 1992 (“1992 Licence”), A.R., vol. IV, at p. 1. This agreement did not disaggregate synchronization copies and broadcast-incidental copies, but rather granted to CBC the authority to make any copies of works in SODRAC’s repertoire in connection with its broadcasting activities: 1992 Licence, art. 2. The 1992 Licence was thus a blanket, through-to-the-viewer licence. This licence also extended upstream authorization to third party producers to make synchronization copies in works commissioned for broadcast by CBC: Statutory Licence Decision, at para. 72.
19. In 1998, SODRAC began to differentiate between synchronization copies made by producers and copies for other purposes made by broadcasters. It did so by announcing its intent to require producers to obtain synchronization licences, though it granted such licences for free where programs were commissioned by broadcasters who held licences to SODRAC’s repertoire, on the understanding that the broadcaster had paid for the licence necessary to cover the producer’s copying: Statutory Licence Decision, at para. 72.
20. In or about 2006, SODRAC began asking producers to pay for their synchronization licences. These licences were structured to permit producers to make synchronization copies, but virtually all of them expressly barred producers from authorizing further downstream copying by broadcasters: Statutory Licence Decision, at para. 73.
21. In November 2008, after SODRAC and CBC were unable to come to an agreement for the renewal of CBC’s existing licence, SODRAC asked the Board, pursuant to s. 70.2 of the *Copyright Act*, to set the terms of a licence between the parties covering the reproduction by CBC of works in SODRAC’s repertoire for the period from November 14, 2008 to March 31, 2012: Statutory Licence Decision, at para. 3.
22. Proceedings Below
	1. Statutory Licence Decision
23. The Board issued its decision regarding the terms of the 2008-2012 statutory licence between CBC and SODRAC on November 2, 2012. This decision also set the terms of a licence between Les Chaînes Télé Astral and Teletoon (“Astral”) and SODRAC, and of a tariff covering certain reproduction activities related to the distribution of cinematographic works. Neither the Astral licence nor the tariff is at issue before this Court.
24. The Board conducted its analysis from the understanding that broadcast-incidental copies are reproductions within the meaning of the *Copyright Act*, and that they are not subject to an exception for ephemeral copies under the Act: see Statutory Licence Decision, at paras. 12 and 72.
25. CBC and Astral argued in part that SODRAC’s layered licence strategy — under which both producers and broadcasters would each be expected to pay a licence fee for their respective reproduction activities — went against prevailing industry practice, and was inconsistent with a through-to-the-viewer licensing approach: Statutory Licence Decision, at paras. 41-42 and 65. The Board remarked that the focus in this proceeding “must be to a large extent on SODRAC’s practices”: Statutory Licence Decision, at para. 64. Broader licensing practices were relevant, but not dispositive.
26. The Board found that “outright [through-to-the-viewer] buyouts are not the dominant model in Canada”, and that SODRAC “has issued few, if any, through-to-the-viewer [licences]”: Statutory Licence Decision, at para. 71. Thus, the Board did not find that the weight of industry practice or of SODRAC’s past practices established through-to-the-viewer licensing as a binding norm that would invalidate a layered approach to licensing.
27. The Board turned to the question of how royalty payments under the licence should be valued. Regarding the relationship between technological innovation and licence valuation, the Board observed that

[t]he adoption of copy-dependent technologies allows broadcasters to remain competitive and to protect their core business even when it does not generate direct profits. These technologies are necessary for Astral and CBC to remain relevant so that services continue to be seen by the public. These are clear benefits arising from the copy-dependant technologies. Since these technologies involve the use of additional copies, some of the benefits associated with the technologies must be reflected in the remuneration that flows from these incidental, additional copies. [Endnote omitted; para. 81.]

1. The Board set out its analysis of the appropriate valuation of the royalties covering CBC’s television-related copying activity. Regarding the broadcast-incidental copies at issue before this Court, the Board employed a ratio methodology and found that the appropriate royalty payable to SODRAC for these reproductions was to be determined as a percentage of the royalties CBC paid to secure communication rights for music that it broadcast on radio and television: Statutory Licence Decision, at paras. 108-9. The Board applied its reasoning regarding television broadcast-incidental copies to copies related to Internet delivery as well: Statutory Licence Decision, at para. 148.
	1. Interim Licence Decision
2. Following the release of its final decision regarding the 2008-2012 licence, the Board issued an interim decision in January 2013 extending the terms of the 2008-2012 licence on an interim basis pending the Board’s final determination of appropriate licence terms for the period from April 1, 2012 to March 31, 2016: Copyright Board file No. 70.2-2012-01, January 16, 2013 (online) (“Interim Licence Decision”).
3. In the Interim Licence Decision, the Board observed that “the best way to achieve the objectives of an interim decision is to maintain the status quo while avoiding a legal vacuum”, though circumstances may sometimes warrant a departure from the status quo: Interim LicenceDecision, at para. 18. The Board then found that the 2008-2012 licence was a more appropriate representation of the status quo than the 1992 agreement that preceded it: Interim Licence Decision, at para. 19.
4. Accordingly, the terms of the 2008-2012 licence were used to frame the interim licence. This structure included, among other things, a blanket synchronization fee, despite CBC’s expressed desire to move to a transactional model: Interim Licence Decision, at para. 8.
	1. Federal Court of Appeal, 2014 FCA 84, [2015] 1 F.C.R. 509 (“FCA Decision”)
5. The principal argument before the Federal Court of Appeal concerned whether the Board’s Statutory Licence Decision was inconsistent with the principle of technological neutrality as discussed by this Court in *ESA*: FCA Decision, at para. 26.
6. In analyzing the Board’s approach to valuing broadcast-incidental copies, the Federal Court of Appeal cited as a fundamental proposition the notion that,

if technological advances require the making of more copies of a musical work in order to get an audiovisual work that incorporates it to market, those additional copies add value to the enterprise. As a result, they attract additional royalties, not necessarily on a per-copy basis but on the basis of the additional value generated by those copies. Simply put, more copies mean more value and thus, more royalties. [para. 28]

It discussed the statements in *ESA* concerning the nature of technological neutrality, but did not find sufficient guidance to warrant its application to the facts of this case: paras. 40 and 44.

1. The Federal Court of Appeal affirmed the Board’s Statutory Licence Decision, subject to one technical amendment to the discount formula intended to capture CBC’s use of songs already subject to through-to-the-viewer licences: paras. 78-82. The court also affirmed the Board’s Interim Licence Decision: paras. 93-94.
2. Issues
3. This appeal raises the following issues:
	* + 1. What is the appropriate standard of review?
			2. Do broadcast-incidental copies engage the reproduction right, and if so, should a licence for such copies be implied in synchronization licences?
			3. If a licence for broadcast-incidental copies was required, did the Board err in setting the value of that licence in view of the principles of technological neutrality and balance?
			4. Did the Board err in setting the terms of the interim licence?
4. Statutory Provisions
5. The relevant statutory provisions are set out in the Appendix. The provisions most directly at issue in this appeal are ss. 3(1)(*d*), 30.7, 30.8, 30.9 and 70.2 of the *Copyright Act*.
6. Analysis
	1. Standard of Review
7. Whether broadcast-incidental copies engage the reproduction right, and thus whether the *Copyright Act* allows SODRAC to seek a licence for CBC’s broadcast-incidental copying, is a question of law. This Court has established that there is a presumption that the decisions of administrative bodies should receive deference when interpreting or applying their home statute. However, because of the “unusual statutory scheme under which the Board and the court may each have to consider the same legal question [under the *Copyright Act*] at first instance”, the presumption is rebutted here: *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 S.C.R. 283, at para. 15. Thus, a standard of correctness applies to this issue.
8. Whether a licence for CBC’s broadcast-incidental copying is implied in the associated synchronization licences involves both the scope of the reproduction right and the interpretation of SODRAC’s synchronization licences. As this Court has recently observed, “[c]ontractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix”: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, at para. 50. The licences here fall under that principle. Accordingly, a standard of reasonableness applies when reviewing the Board’s determination regarding what may be implied from the relevant synchronization licences.
9. The Board’s decision establishing the monetary value of a broadcast-incidental copying licence involves the examination of how the user intends to make use of the licensed works in light of the legal principles relevant to the reproduction right, and thus involves questions of mixed fact and law. Accordingly, a standard of reasonableness applies: *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3, [2015] 1 S.C.R. 161, at para. 40; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160, at para. 26.
10. CBC challenges the Board’s interim order on two points. First, CBC argues that the 2008-2012 licence was not an appropriate statusquo baseline for the interim licence. The selection of the baseline involves the exercise of the Board’s discretion to issue an interim licence under s. 66.51 of the *Copyright Act*. This exercise of discretion is not shared with the courts, and thus will be reviewed on a reasonableness standard.
11. The second basis on which CBC challenges the interim order concerns whether the Board may impose a blanket synchronization licence on a user against that user’s wishes. CBC characterizes this as a question of the Board’s jurisdiction to issue certain types of licences, and argues that it should be reviewed for correctness. While it is possible to frame any interpretation of a tribunal’s home statute as a question of whether the tribunal has the jurisdiction to take a particular action, this Court has rejected this definition of jurisdiction in the context of standard of review and emphasized that the category of “true questions of jurisdiction”, if it exists at all, is narrow: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers’ Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at para. 34. As in *Alberta Teachers’ Association*, the parties have not presented argument on the question of whether the category of true questions of jurisdiction should continue to be recognized. Assuming such questions exist, this issue is not one of the “exceptional” instances of a true question of jurisdiction.
12. The question of whether the Board is generally able to impose blanket synchronization licences under the *Copyright Act* against the wishes of a licensee is nonetheless a question of law, but it is not an interpretive question the Board shares with the courts at first instance: the courts can be seized of the question of whether the Board acted properly in structuring a licence only once there is a Board-imposed licence to review. Accordingly, this issue attracts a standard of reasonableness.
13. Justice Abella objects to the segmentation of issues for the purpose of standard of review analysis and to the confusion she says this causes. This is the same objection she raised in *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3, a decision issued by this Court in April 2015. *Saguenay* is the controlling authority and, on the issue of standard of review, these reasons apply *Saguenay*.
14. Justice Karakatsanis disagrees that a specific standard of review should be ascribed to each issue arising in the appeal. However, she herself extricates the question of whether broadcast-incidental copies engage the reproduction right. Then she says that a reasonableness standard applies to the balance of the decisions under review. She does not explain how she could come to that conclusion without considering the issues in the balance of the decisions under review. With respect, every standard of review analysis requires identification of the issues under review: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at paras. 51-64. She has simply done implicitly what these reasons do explicitly.
	1. SODRAC May Choose to Require a Licence for CBC’s Broadcast-Incidental Copies in Addition to Related Synchronization Licences
		1. Broadcast-Incidental Copies Engage the Reproduction Right
15. Section 3(1)(*d*) of the *Copyright Act* provides the copyright holder with the sole right “to make any sound recording, cinematograph film or other contrivance by means of which [a] work may be mechanically reproduced or performed”.
16. SODRAC’s efforts to seek licence payments for CBC’s broadcast-incidental copying have their origins in this Court’s decision in *Bishop.* This Court held that the making of “ephemeral” copies — in that case, recordings of a musical performance made to facilitate a later broadcast — does engage the reproduction right under the language of s. 3(1)(*d*) of the *Copyright Act*, and that the right to make such copies is not implied by law in a broadcast licence: pp. 484-85.
17. CBC’s principal argument on appeal is that broadcast-incidental copies do not engage the reproduction right, and thus do not support SODRAC’s efforts to seek licence fees for such copies. In so arguing, CBC places considerable weight on two general principles of Canadian copyright law: the balancing of user and right-holder interests as discussed by this Court in *Théberge* per Binnie J., and the principle of technological neutrality discussed most prominently by this Court in *ESA*. In CBC’s estimation, the development of these principles has resulted in a significant evolution of copyright law since *Bishop*.
18. CBC asserts that “[t]he scope of the reproduction right is determined by a balancing exercise between the legitimate interests of copyright holders and copyright users, such as the one this Court conducted in *Théberge*” (A.F., at para. 81), and that a proper balancing of user and right-holder interests favours finding that broadcast-incidental copies do not engage the reproduction right. It also asserts that the principle of technological neutrality is a means of protecting the proper balance between users and right holders in a digital environment: A.F., at para. 66.
19. To be sure, *Théberge* demonstrates how this Court’s understanding of the purpose of the *Copyright Act* has evolved since the pronouncement in *Bishop* that the “single object” of the Act was to benefit authors: *Bishop*, at pp. 478-79, quoting *Performing Right Society, Ltd.* *v. Hammond’s Bradford Brewery Co.*, [1934] 1 Ch. 121, at p. 127. *Théberge* observed that, when weighing competing policy interests under copyright, “[t]he proper balance . . . lies not only in recognizing the creator’s rights but in giving due weight to their limited nature”: para. 31. Similarly, in *ESA*,this Court observed that the principle of technological neutrality guards against “impos[ing] a gratuitous cost for the use of more efficient, Internet-based technologies”: para. 9, per Abella and Moldaver JJ. But in neither case did the Court go so far as to allow these principles to override express statutory terms. The scope of a right under the *Copyright Act* is determined, first and foremost, by the Act itself. The principles at work in *Théberge* and *ESA* can inform the interpretation and application of the terms of the Act, but they cannot supplant them.
20. The modern approach to statutory interpretation requires that we examine the “words of an Act . . . in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament”: E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87, approved and adopted in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21.
21. The ordinary meaning of the text of the *Copyright Act* indicates that broadcast-incidental copying activities do engage the reproduction right. As this Court held in *Bishop*, the text of s. 3(1)(*d*) covers such activity by its terms. Making broadcast-incidental copies is the making of a “sound recording, cinematograph film or other contrivance by means of which the work may be mechanically reproduced or performed”: s. 3(1)(*d*). Though this Court’s understanding of the purpose of copyright has evolved since the observation in *Bishop* that its “sole purpose” is protecting author interests, no recourse to this observation is required to read s. 3(1)(*d*) as being engaged by broadcast-incidental copying activities: p. 470. The plain language of the statute itself establishes this much.
22. The broader statutory context of the Act further provides strong indications that the legislature intended for broadcast-incidental copies to engage the reproduction right. Most significantly, ss. 30.8 and 30.9 (set out in full in the Appendix), enacted as part of a series of amendments to the Act in 1997, establish specific circumstances in which “[i]t is *not* an infringement of copyright” to make copies to facilitate broadcasting: S.C. 1997, c. 24, s. 18(1). In order to gain the benefit of ss. 30.8 or 30.9, broadcasters must meet a list of stringent conditions concerning, among other things, the timing, record keeping, and destruction of the copies. As counsel for CBC acknowledged during the hearing before this Court, CBC’s broadcast-incidental copying activities do not fit within the language of ss. 30.8 or 30.9: transcript, at p. 26.
23. If it were true, as CBC urges, that the *Copyright Act* should properly be read such that broadcast-incidental copying does not engage the reproduction right, there would have been no need for the legislature to enact ss. 30.8 and 30.9. Their existence is strong evidence that Parliament intended, as a baseline, that broadcast-incidental copies engage the reproduction right. As noted above, though the principles of balancing user and right-holder interests and of technological neutrality are central to Canadian copyright law, they cannot change the express terms of the *Copyright Act*.
24. Abella J. is of the opinion that, in reaching this conclusion, these reasons employ a “literal approach to the interpretation of s. 3(1)(*d*), reading the words of the provision without the benefit of the purpose and context of the *Act* to ascertain its true meaning”: para. 170. It is rather my colleague who uses the principle of technological neutrality to displace the words Parliament has used. With respect, through her use of the principle of technological neutrality, she does not give sufficient attention to the text and context and the legislative history that explain the carve out from the reproduction right provided by ss. 30.8 and 30.9 and the residual broad scope of s. 3(1)(*d*).
25. Subsequent to *Bishop*, in 1997, Parliament enacted ss. 30.8 and 30.9. Abella J. writes that these exceptions are not to be understood as a “comprehensive statement on the content of the reproduction right, or which kinds of copies will trigger it”: para. 175. But before ss. 30.8 and 30.9 received royal assent, broadcasters asked Parliament to expand their scope. In their view, ss. 30.8 and 30.9 unduly favoured the rights of copyright holders. The pleas of the broadcasters, however, went unanswered: see V. Syrtash, “Supra-National Limitations on Copyright Exceptions: Canada’s Ephemeral Exception and the ‘Three-Step Test’” (2005-2006), 19 *I.P.J.* 521, at pp. 530-32; J. S. McKeown, *Fox on Canadian Law of Copyright and Industrial Designs* (4th ed. (loose-leaf)), at pp. 23-62 and 23-63. Thus, the scope of ss. 30.8 and 30.9 was specific and deliberate. Parliament could have adopted broader provisions. It chose not to. It is not for the Court to do by “interpretation” what Parliament chose not to do by enactment.
26. The necessary implication of s. 30.7, also enacted in 1997, is that it absolves incidental, non-deliberate, inclusion of a work from infringement — a sterile provision and of no practical effect had Parliament considered incidental inclusion to be outside s. 3(1)(*d*) in the first place. There is no doubt that this provision applies to broadcasting, among other activities, and that the use of broadcast-incidental copies is deliberate and thus not exempted. See D. Vaver, *Intellectual Property Law: Copyright, Patents, Trade-marks* (2nd ed. 2011), at p. 223.
27. Although made in the process of broadcasting, these broadcast-incidental copies nevertheless trigger the reproduction right. They are not exempted by ss. 30.8 and 30.9. There is nothing in the text, context or legislative history of these provisions (or s. 3(1)) that supports the view that the broadcasting process obviates the fact that broadcast-incidental copies are reproductions under the *Copyright Act*. Arguments based on purpose in the form of technological neutrality and balance are advanced to come to the opposite conclusion, but purposive construction is a tool of statutory interpretation to assist in understanding the meaning of the text. It is not a stand-alone basis for the Court to develop its own theory of what it considers appropriate policy. Accordingly, the Board was correct in proceeding on the basis that broadcast incidental copies engage the reproduction right under s. 3(1)(*d*) of the *Copyright Act*.
	* 1. The Synchronization Licence Between CBC and SODRAC Does Not Imply a Licence to Make Broadcast-Incidental Copies
28. CBC argues in the alternative that if a licence covering CBC’s broadcast-incidental copies is required, it should be implied from CBC’s synchronization licences or the synchronization licences of third party producers. To hold otherwise, CBC asserts, would be to render synchronization licences “economically sterile” and would allow SODRAC to engage in “non-neutral royalty stacking”: A.F., at paras. 99-100.
29. CBC’s economic argument is based on the proposition that “a single master copy [made under a synchronization licence] is useless without a corresponding implied licence to make the necessary broadcast-incidental copies”: A.F., at para. 100. Instead, it argues that a “technologically-neutral approach to a synchronization licence is one that implies the necessary incidental rights in order to achieve the licence’s agreed-upon purpose”: A.F., at para. 100.
30. I cannot agree. To the extent CBC’s implied-licence argument turns on the language of SODRAC’s actual synchronization licences, these licences do not give any indication that they ought to be read to include the right to make broadcast-incidental copies. To the contrary, the Board found that “[v]irtually all SODRAC licences issued to producers that were filed in these proceedings clearly specify, in one form or another, that the producer cannot authorize copies made by broadcasters, distributors and other exhibitors”: Statutory Licence Decision, at para. 73.
31. Nor am I persuaded that licences to make broadcast-incidental copies should be implied under synchronization licences more generally, lest the synchronization licences be rendered sterile. Synchronization licences are intended to facilitate the production of audiovisual works. That these works may ultimately be destined for broadcast does not make the production of the single master copy itself “useless”. A stand-alone synchronization right is far from useless when held by an independent producer who synchronizes a song into a master copy and then sells or licences the finished product to a broadcaster. In that case, the primary purpose of the master copy, from the perspective of the producer, was not for it to be broadcast, but for it to be sold or licensed to a broadcaster. The synchronization licence is sufficient to meet the needs of such a producer.
32. Further, the Board identified certain economic considerations that it found justified the practice of dividing synchronization and broadcast-incidental copy licences into separate payments. Separate licensing of synchronization and broadcast-incidental copies allows producers to “remain free to decide whether they wish to offer a turnkey service for the audiovisual works they licence, or whether they wish to pay only for the rights they use” (Statutory Licence Decision, at para. 83), a choice that may be particularly valuable for smaller producers with modest licensing budgets.
33. In this case, the Board’s decision does not raise the spectre of “double dipping”. The terms of the licence set by the Board expressly protected against this possibility here. The 2008-2012 statutory licence includes a discount provision by which CBC’s licence payments for broadcast-incidental copying may be reduced to the extent that it broadcasts programs for which the producer has already cleared reproduction rights on a through-to-the-viewer basis: s. 5.03(2). Though, as the Federal Court of Appeal noted, the Board’s original discount formula was flawed (paras. 74-82), the formula, as amended by the Federal Court of Appeal, adequately guards against concerns that SODRAC may engage in double dipping by charging multiple parties for the same authorization.
34. CBC’s attempts to cast the implied-licence issue in terms of the principle of technological neutrality are unavailing. CBC has failed to highlight exactly how SODRAC’s desired practice of disaggregating synchronization and broadcast-incidental licensing would offend the principle as it has been understood by this Court. Separation of licences into synchronization and broadcast-incidental arrangements does not, on its own, impose a “gratuitous cost” based on formal technological distinctions, as was the concern in *ESA*.
35. Nor does technological neutrality stand for the proposition, as CBC urges, that the *Copyright Act* prohibits the creation of “additional layers of royalties at the behest of collective societies” such that disaggregating synchronization and broadcast-incidental copying is legally impermissible: A.F., at para. 105. This argument reads *ESA* too broadly. The difference between synchronization copies and broadcast-incidental copies is tied to the fundamentally distinct activities of production and broadcasting. They are different functions. This difference is not based on particular technological details; it would exist regardless of the technologies used either to produce or to broadcast. Thus, a decision recognizing production and broadcasting as distinct activities, and thus as the valid subject of disaggregated licences, does not offend the principle that “an additional layer of protections and fees” not be imposed based solely on technological change: *ESA*, at para. 9.
36. Accordingly, it was reasonable for the Board to decline to identify an implied licence to engage in broadcast-incidental copying within the synchronization licences underlying the programs that CBC broadcasts.
	1. In Not Taking Into Account the Principles of Technological Neutrality and Balance in Its Valuation Analysis, the Board’s Decision Was Unreasonable
		1. The Principle of Technological Neutrality is Relevant to Questions of Valuation
37. CBC asserts that the Board erred in failing to conduct its valuation analysis in accordance with the principle of technological neutrality. SODRAC argues that, once it has been established that a copying activity engages the reproduction right, the principle of technological neutrality is spent and has no bearing on valuation.
38. The principle of technological neutrality is recognition that, absent parliamentary intent to the contrary, the *Copyright Act* should not be interpreted or applied to favour or discriminate against any particular form of technology. It is derived from the balancing of user and right-holder interests discussed by this Court in *Théberge* — a “balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator”: para. 30. Because this long-standing principle informs the *Copyright Act* as a whole, it must be maintained across all technological contexts: “The traditional balance between authors and users should be preserved in the digital environment . . .” (*ESA*, at para. 8).
39. In the regulatory context, the principle of technological neutrality applies to valuation of a reproduction licence, just as it does in determining whether an activity implicates copyright at all. The Board operates pursuant to the *Copyright Act*, and in its regulatory role of fixing royalties under s. 70.2, it may not simply set aside the principles that guide its interpretation of the Act once it has begun its valuation analysis. While the Board’s valuation analysis will vary according to the facts of each case, it is unreasonable for the Board to ignore the principle of technological neutrality in that analysis in cases where it is implicated.[[1]](#footnote-1)
40. Indeed, it would be inconsistent to require a technologically neutral interpretation of the *Copyright* *Act* but not require a technologically neutral application of the Act. As Professor Vaver has written, “Copyright law should strive for technological neutrality”: p. 172. Interpretation and application of the Act are both important in seeking this objective.
41. In reviewing the Board’s decision, the Court of Appeal remarked upon the principle of technological neutrality, but declined to apply it, as that court felt that it had insufficient guidance from this Court on how it should be applied. These reasons aim to provide such guidance.
	* 1. Technological Neutrality in Valuation
42. Because rights holders have the exclusive right to reproduce their works under s. 3(1)(*d*), they are entitled to be justly compensated for the use of that right. One element of just compensation is an appropriate share of the benefit that the user obtains by using reproductions of their copyright-protected work in the operation of the user’s technology. That just compensation must be valued, however, in accordance with the principle of technological neutrality. While highly unlikely, where users are deriving the same value from the use of reproductions of copyright-protected works using different technologies, technological neutrality implies that it would be improper to impose higher copyright-licensing costs on the user of one technology than would be imposed on the user of a different technology. To do so would privilege the interests of the rights holder to a greater degree in one technology over the other where there is no difference between the two in terms of the value each user derives from the reproductions.
43. The converse is also true. Where the user of one technology derives greater value from the use of reproductions of copyright-protected work than another user using reproductions of the copyright-protected work in a different technology, technological neutrality will imply that the copyright holder should be entitled to a larger royalty from the user who obtains such greater value. Simply put, it would not be technologically neutral to treat these two technologies as if they were deriving the same value from the reproductions.
44. In determining whether a separate communication right was engaged in *ESA*, this Court held that technological neutrality required the consideration of the difference between the old and new forms of delivery of works. In the absence of any difference between them, no separate right was engaged: “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”: *ESA*, at para. 5. Similarly, in the valuation of a right, technological neutrality requires that different technologies using reproductions of copyright-protected work that produce the same value to the users should be treated the same way. Conversely, different technologies using reproductions that produce different values should not be treated the same way.
45. In this case, if CBC derives greater value from the use of broadcast‑incidental copies in its digital technology than it did under its prior analog technology, this is a factor in favour of the copyright holder being entitled to greater royalties for use of its copyright-protected work in CBC’s digital technology. Technological neutrality requires that the Board compare the value derived from the use of reproduction in the two technologies in its valuation analysis. As will be explained, it did not do so in this case, nor did it take into account the principle of balance, to which I now turn.
	* 1. Balance in Valuation
46. It is well established that copyright law maintains “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” of those works: *Théberge*, at para. 30. This balance “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”: *Théberge*, at para. 31.
47. When it is tasked with fixing licence fees, the Board must have regard to factors it considers relevant in striking a balance between the rights of users and right holders. Relevant factors will include, but are not limited to, the risks taken by the user, the extent of the investment the user made in the new technology, and the nature of the copyright-protected work’s use in the new technology. The Board must assess the respective contributions of, on the one hand, the risks taken by the user and the investment made by the user, and on the other hand, the reproductions of the copyright-protected works, to the value enjoyed by the user. In this case, where the financial risks of investing in and implementing new technology were undertaken by the user and the use of reproductions of copyright-protected works was incidental, the balance principle would imply relatively low licence fees to the copyright holder. As will be explained, the Board’s valuation methodology did not give any indication that the principles of technological neutrality and balance were considered in the way it fixed the SODRAC reproduction royalties payable by CBC on the basis of the SODRAC/SOCAN ratio.
48. Justice Abella argues that the extent of the investment made by the user in its technology and the risks undertaken in relation to that technology are “unrelated and irrelevant to the rights held in the protected works”: para 180. I cannot agree. In an unregulated market, a commercial user will always consider whether it makes economic sense to pay the licence fee demanded by the copyright holder. A licence fee that precludes the user from recovering what it considers an adequate return on its investment in its technology will result in there being no licence and no royalty. In the regulated context, it is the Board that must take account of such considerations. They are far from irrelevant.
49. Contrary to what Justice Abella asserts, it will never be the case that, because a user makes a significant investment in technology or assumes substantial risk, royalties for the rights holder will amount to zero. From the moment the right is engaged, licence fees will necessarily follow. The amount of the fee will depend upon the Board’s consideration of the evidence in each case, always having regard to the principles of technological neutrality and balance and any other factors it considers relevant.
50. Justice Abella also says that these reasons represent “a significant departure from the principle [of technological neutrality] as it was articulated in *Entertainment Software Association*”: para. 181. The issue in *ESA* (and *Rogers*) was whether the telecommunication right was engaged; whether one technology achieved a result more efficiently than another was irrelevant to whether the right was engaged.
51. Here, where the right is engaged, the issue becomes one of valuation of that right, and the principles of technological neutrality and balance must be adapted to the valuation context. When it is tasked with determining the value of a right, an important consideration for the Board is the value of that right to the user. The value of the use of reproductions in one technology may stem from functional differences from use in another technology. Value differences may also stem from internal efficiencies between technologies. Ignoring internal efficiencies would result in rights holders being denied additional royalties when the use of their copyrighted work in the more efficient technology confers greater value to the user of that technology. This would hardly constitute “gratuitous fees”, as asserted by Justice Abella: para. 182.
	* 1. The Board Did Not Consider the Principle of Technological Neutrality or Balance in Setting the Value of CBC’s Broadcast-Incidental Copying Licence With SODRAC
			1. The Board’s Statutory Licence Decision
52. The Board received a detailed picture of the structure of both CBC and Astral’s broadcast systems, the copies that were made in those systems, and what purposes they served, largely through the testimony and report of Dr. Michael Murphy and CBC’s responses to interrogatories. Further, CBC and Astral’s statement of the case before the Board expressly identified technological neutrality as a relevant consideration:

The Board must apply the principle of technological neutrality. One should not artificially introduce technology issues that are unrelated to the nature of the work being valued. To the knowledge of Astral and SRC/CBC, there is not a single television producer in North America who has ever been required by a composer, screenwriter or other rights holder to pay a greater license fee for music because of alleged technological efficiencies. These are simply irrelevant considerations in the marketplace in view of the nature of the work being licensed. There is no reason for broadcasters to be treated any differently because the issue is brought before the Board. [A.R., vol. II, at pp. 190-91]

1. Neither the record nor the Board’s Statutory Licence Decision, in which it used a ratio based on the royalties CBC pays to the Society of Composers, Authors and Music Publishers of Canada (‟SOCANˮ) to license performance rights to determine SODRAC royalties, gives any indication that the Board considered balance and technological neutrality in arriving at a valuation of the copyright-protected work. There is no indication that the relative value derived from the use of copyright-protected works in CBC’s digital technology as compared to its prior analog technology, or the relative contributions of the CBC and SODRAC to the analog and digital technologies were considered.
2. The Board concluded in this case that, “[s]ince these [digital content-management] technologies involve the use of additional copies, some of the benefits associated with the technologies must be reflected in the remuneration that flows from these incidental, additional copies”: Statutory Licence Decision, at para. 81. The value the Board ascribed to the uses of broadcast-incidental copies by CBC seems to have been based, at least to some extent, on the fact that more copies were being made under CBC’s digital content-management system, although the valuation formula the Board prescribed does not appear to be related to the use of additional copies.
	* + 1. The Federal Court of Appeal Decision
3. The Federal Court of Appeal summarized the Board’s approach as finding that, “[s]imply put, more copies mean more value and thus, more royalties”: para. 28. The court ultimately upheld the Board’s approach: para. 49. The notion that “more copies mean more value and thus, more royalties” is appealing in its simplicity. However, it is out of step with the principles of technological neutrality and balance.
4. The making of broadcast incidental copies cannot be equated with, for example, the copying of books. With a book, the author expects a return for the original expression that the *Copyright Act* has encouraged him to expend in producing the work. If copyright is infringed by the making and sale of unlicensed copies, an arithmetic approach (aggregating each lost royalty on each lost sale) would be one way of measuring the resulting loss.
5. However, where additional copies are made and used internally in an improved or more efficient broadcasting process, they are only made to render the process feasible. This process might only allow the user to keep up with the competition by reducing costs or by saving time, for example. It might even only allow the user of the copies to limit its losses. This is far from benefits that are proportional to the number of copies made. The Federal Court of Appeal set out a fair reading of *ESA* when it described it as establishing that “[t]echnological neutrality is determined by functional equivalence”: para. 39. I would add that, to the extent the Federal Court of Appeal suggested that the principle is concerned only with delivery of works, it read the principle too narrowly. The *Copyright Act* as a whole is to be read having regard to the principles of technological neutrality and balance, unless its text indicates otherwise. *ESA*’s focus on delivery of works was a specific application of the general principle, based on the questions presented in that case; the principle is not confined to that context.
6. The context here is the fixing of royalties by the Board under s. 70.2 of the Act. In that context, adherence to the principles of technological neutrality and balance require that account be taken of the value that the reproductions of the copyright-protected work contribute in the digital as compared to the analog technology, and of the relative contributions of the reproductions and the user’s investment and risk in providing the new technology.
	* + 1. The History of the Board’s 1:3.2 Ratio
7. A review of the history of the Board’s valuation methodology does not give any indication that the principles of technological neutrality and balance were considered, either explicitly or implicitly. The Board calculated the broadcast-incidental copy fee by setting it at 31.25 percent of the fee CBC pays to SOCAN to license performance rights, for a ratio between broadcast-incidental copying fees and performance fees of 1:3.2, which, expressed as a percentage, is 31.25 percent, subject to repertoire adjustment. The Board selected this 1:3.2 ratio based on its earlier use in a series of cases setting the relative values of broadcast-incidental copying and performance royalties in the commercial radio context. The Board in this case found the ratio to be equally applicable to the television context: para. 109.
8. The 1:3.2 ratio has its origins in the Board’s 2003 decision regarding commercial radio licence fee: *Statement of Royalties to be Collected by CMRRA/SODRAC Inc. for the Reproduction of Musical Works, in Canada, by Commercial Radio Stations in 2001, 2002, 2003 and 2004*,decision of the Board, March 28, 2003 (online) (“*Commercial Radio 2003*”). In that matter, the Board was tasked with setting tariffs for broadcast-incidental copying in the commercial radio context.
9. The Board considered three factors that it found relevant in supporting the tariff rate it ultimately selected. First, it found that the existence of the reproduction right “tends to plead in favour of a royalty that is more than nominal, even though its use in the course of broadcasting operations is secondary to broadcasting”: *Commercial Radio 2003*, at p. 13. Second, it found that “the use of new broadcasting techniques lowers costs for radio stations. Copying music to a hard drive optimizes the use of these new techniques, thus entitling rights holders to a fair share of the efficiencies arising from this reproduction”: *ibid.*, at p. 13. Third, the Board found the “optional” nature of the tariff (insofar as radio stations could avoid the tariff by declining to make broadcast-incidental copies) allayed concerns that a high tariff might discourage innovation in broadcasting techniques: *ibid.*, at p. 13.
10. The Board then weighed these factors and concluded that a base rate of 1 percent of the user’s gross revenues was appropriate, subject to adjustment based on repertoire size: *Commercial Radio 2003*, at p. 14. At the time, SOCAN was entitled to a performance tariff of 3.2 percent of gross revenues, thus establishing a ratio of broadcast-incidental copying and performance tariffs at 1:3.2.
11. In 2010, the Board was again tasked with setting reproduction and performance royalties to be paid to collective rights organizations for commercial radio activities: *Statement of Royalties to be Collected by SOCAN, Re:Sound, CSI, AVLA/SOPROQ and Artisti in Respect of Commercial Radio Stations*,decision of the Board, July 9, 2010 (online) (“*Commercial Radio 2010*”). In that matter, the Board reaffirmed the 1:3.2 ratio, underscored the fact that this ratio was supported in part based on the efficiency gains realized through digital technology, and applied it to set tariffs for broadcast-incidental copying: para. 223.
	* + 1. The Application of Technological Neutrality and Balance to the Valuation Analysis
12. It is evident both from the Board’s reasons in this case and the reasoning underlying the historical use of the 1:3.2 ratio that the valuation of the licence fee covering CBC’s broadcast-incidental copying did not apply a valuation method consistent with the principle of technological neutrality because there was no comparison of the value contributed by the copyright-protected reproductions as between CBC’s prior technology and its new digital technology. It also failed to take into account the relative contributions made by the use of copyright-protected works and the risk and investment by the user in its digital technology, as required by the balance principle.
13. One may argue that the complexities of technological systems and business models mean there is no objective way to determine how much of the value generated by a technologically dependent system should be allocated to right holders and how much should be allocated to the user, in view of technological neutrality and balance. It is the Board’s duty to apply the principles of technological neutrality and balance in a reasonable and coherent manner. Whenever the Board engages in the valuation of a licence or tariff, it arrives at a determination by applying its experience and expertise to weigh evidence that may not be reducible to an objective economic valuation. This difficulty, however, should not mean that the Board cannot carefully consider expert evidence, the availability of any suitable proxies, and other relevant considerations in arriving at a reasonable valuation. Overall, the Board’s valuation analysis must comport with the *Copyright Act*’s fundamental requirement to recognize technological neutrality and balance between user and right-holder interests. In licence proceedings where technological neutrality and balance are relevant, it will be for the Board to establish how evidence bearing on these principles will be presented. Since a party is generally required to provide evidence of what is necessary to support its claim, the Board may well consider placing the onus on the right holder to assert how the use of a copyright-protected work should justify its desired licence fee, with the onus then on the user to demonstrate why a lower fee is justified.
14. I do not, however, attempt to dictate the procedures the Board must follow in its licence proceedings, as it enjoys the discretion to set its own procedures and practices in each case, subject to its regulations as approved by the Governor in Council: *Copyright Act*, s. 66.6(1).
15. There will no doubt be a degree of informed judgment in the valuation analysis, as there is some amount of informed judgment in all licence proceedings in which the Board is called upon to assign monetary figures to uses of copyright-protected works whose value is not easily quantified. Nevertheless, the Board must ground its decisions in the *Copyright Act*, the principles of technological neutrality and balance, its expertise, and the evidence before it.
16. I conclude that the Board’s decision was unreasonable in that it did not consider how the principles of technological neutrality and balance ought to have been reflected in the licence fees imposed on CBC with regard to its television and Internet broadcast-incidental copying activity. I would remit the matter to the Board for reconsideration of those portions of the Statutory Licence Decision that address these fees with instructions to conduct its analysis in a manner that is consistent with technological neutrality and balance, as discussed above.
	1. The Board’s Interim Decision
		1. The Board’s “Status Quo” Approach Was Reasonable
17. The Board is empowered by s. 66.51 of the *Copyright Act* to issue interim orders. The language of s. 66.51 is discretionary: “The Board *may*, on application, make an interim decision.” The statute provides no further indication of how the Board is to exercise its discretion in issuing or choosing not to issue interim decisions.
18. In issuing its Interim Licence Decision, the Board observed that “[a]n interim decision serves chiefly to avoid the negative consequences caused by the length of the proceedings and may serve to avoid the legal vacuums created when protected works are used without authorization”: para. 17. In its opinion, “the best way to achieve the objectives of an interim decision is to maintain the status quo while avoiding a legal vacuum”, unless a balance of convenience indicates that a change to the status quo is appropriate: para. 18.
19. I am unpersuaded by CBC’s argument that the Board’s approach to identifying the status quo and using it as the basis for an interim licence has impermissibly “fettered its discretion by adopting an overly restrictive definition of the status quo”: A.F., at para. 139. The Board’s approach allows it to avoid the uncertainty and legal vacuums that would occur in the absence of an interim decision, and the use of the licence terms in effect immediately prior to the entering into effect of the interim decision provides for continuity between the previous arrangement and the interim licence. Further, the Board’s acknowledgment that factors may sometimes justify departing from the status quo where indicated by the balance of convenience provides that the Board has not completely fettered its discretion.
20. I find nothing unreasonable in the Board’s approach to identifying and using the 2008-2012 statutory licence as the status quo in this case. However, in view of the fact that I would remit the matter for reconsideration of the 2008-2012 licence as set out above, it will be necessary for the Board to reconsider the terms of the interim statutory licence to ensure that it is consistent with the Board’s redetermination of the 2008-2012 licence fee.
	* 1. The Board May Not Compel a User to Agree to the Terms of a Licence Against the Will of the User
21. CBC argues that, while the Board may fix the royalties to be paid under the statutory licensing procedure created by s. 70.2 of the *Copyright Act*, the Board may not set the other terms or structure of that licence. Specifically, CBC takes issue with the Board’s decision to impose an interim licence on a blanket basis, such that CBC pays for access to the entire SODRAC repertoire, rather than on CBC’s preferred transactional basis, whereby CBC would pay only whenever it actually used a work from the SODRAC repertoire. A blanket licence grants access to SODRAC’s entire repertoire for its duration, and thus reduces CBC’s ability to control its licensing costs. Under a transactional licence, by contrast, CBC may choose in any given situation whether it wishes to license a particular work or forego making use of SODRAC music. CBC argues that if the collective organization and the user disagree over the model a licence is to take — blanket or transactional — the Board lacks the power to compel the execution of a licence.
22. SODRAC counters that the Board has the power to issue licences in either blanket or transactional form, and should have this power in all proceedings under s. 70.2. To hold otherwise, it argues, would be “to make the Board’s remedial jurisdiction under section 70.2 dependent upon the consent of a user, [and] would be at odds with its mandate to resolve disputes”: R.F., at para. 133.
23. Though CBC first raised this issue in the context of the Board’s Interim Licence Decision, the dispute relates generally to the Board’s power to structure licences, whether interim or not: Does the Board’s power to set the terms of a licence include the power to bind the parties to those terms?
24. I do not read the *Copyright Act* to necessitate that decisions made pursuant to the Board’s licence-setting proceedings under s. 70.2 have a binding effect against users. Section 70.2(1) itself provides that where a collective organization and a user cannot agree on the terms of a licence, either party may apply to the Board to “fix the royalties and their related terms and conditions”. This grant of power speaks of the Board’s authority to set down in writing a set of terms that, in its opinion, represent a fair deal to license the use of the works at issue. It says nothing, however, about whether these terms are to be binding against the user.
25. The statutory context supports the conclusion that licences crafted pursuant to s. 70.2 proceedings are not automatically binding on users. Section 70.4 of the Act provides:

**70.4** Where any royalties are fixed for a period pursuant to subsection 70.2(2), the person concerned may, during the period, subject to the related terms and conditions fixed by the Board and to the terms and conditions set out in the scheme and on paying or offering to pay the royalties, do the act with respect to which the royalties and their related terms and conditions are fixed and the collective society may, without prejudice to any other remedies available to it, collect the royalties or, in default of their payment, recover them in a court of competent jurisdiction.

1. This provision makes it clear that a user whose copying activities were the subject of a s. 70.2 proceeding *may* avail itself of the terms and conditions established by the Board as a way to gain authorization to engage in the activity contemplated in the Board proceeding. The language of s. 70.4 does not, of its own force, bind the user to the terms and conditions of the licence.
2. The conclusion that Board licences established pursuant to s. 70.2 are not binding on users comports with the more general legal principle that “no pecuniary burden can be imposed upon the subjects of this country, by whatever name it may be called, whether tax, due, rate or toll, except upon clear and distinct legal authority”: *Gosling v. Veley* (1850), 12 Q.B. 328, 116 E.R. 891, at p. 407, as approved and adopted in *Ontario English Catholic Teachers’ Assn. v. Ontario (Attorney General)*, 2001 SCC 15, [2001] 1 S.C.R. 470, at para. 77, and *Attorney-General v. Wilts United Dairies, Ltd.* (1921), 37 T.L.R. 884 (C.A.), at p. 885. To bind a user to a licence would be to make it liable according to its terms and conditions should it engage in the covered activity. In the absence of clear and distinct legal authority showing that this was Parliament’s intent, the burdens of a licence should not be imposed on a user who does not consent to be bound by its terms.
3. SODRAC’s framing of the issue is not entirely wrong: the Board does have the power under s. 70.2 to “fix the royalties and their related terms and conditions”. That is, the Board may decide upon a fair royalty to be paid should the user decide to engage in the activity at issue under the terms of a licence. However, this power does not contain within it the power to force these terms on a user who, having reviewed the terms, decided that engaging in licensed copying is not the way to proceed. Of course, should the user then engage in unauthorized copying regardless, it will remain liable for infringement. But it will not be liable as a licensee unless it affirmatively assumes the benefits and burdens of the licence.
4. The matter is complicated considerably by the fact that the Board’s statutory licence decisions have, in recent years, taken on an increasingly retroactive character. CBC’s statutory licence in this case provides an example: the licence covers the period from November 2008 to March 2012, but the Board’s final decision was issued on November 2, 2012, after the term of the licence had expired. In situations like these, the Board may issue interim licences that seek to fill the legal vacuum before the final decision is ready, but this leaves a user to operate based on assumptions about how their ultimate liability for actions taken during the interim period will be evaluated.
5. Should a user engage in copying activity under an interim licence, and then find itself presented with a final licence whose terms it would not voluntarily assume, the user is left in a difficult position: accept the terms of an undesirable licence, or decline the licence and retroactively delegitimize the covered activity engaged in during the interim period, risking an infringement suit. This dilemma may mean that a user who operates under an interim licence has no *realistic* choice but to assume the terms of the final licence.
6. While I find this possibility troubling, I do not find that this result would detract from the more general proposition that there is no legal basis on which to hold users to the terms of a licence without their assent. The licence is not *de jure* binding against users, even if the particulars of a specific proceeding, and a user’s decision to engage in covered activity during an interim period, may mean that the user does not *de facto* have a realistic choice to decline the licence.[[2]](#footnote-2)
7. I conclude that the statutory licensing scheme does not contemplate that licences fixed by the Board pursuant to s. 70.2 should have a mandatory binding effect against users. However, this case does not require this Court to decide whether the same is true of collective organizations. It may be that the statutory scheme’s focus on regulating the actions of collective organizations, and the case law’s focus on ensuring that such organizations do not devolve into “instruments of oppression and extortion” (*Vigneux v. Canadian Performing Right Society, Ltd.*, [1943] S.C.R. 348, at p. 354, per Duff J., quoting *Hanfstaengl v. Empire Palace*, [1894] 3 Ch. 109, at p. 128) would justify finding that the Board does have the power to bind collective organizations to a licence based on the user’s preferred model — transactional or blanket — on terms that the Board finds fair in view of that model. However, this issue was not argued in this case.
8. I find that licences fixed by the Board do not have mandatory binding force over a user; the Board has the statutory authority to fix the terms of licences pursuant to s. 70.2, but a user retains the ability to decide whether to become a licensee and operate pursuant to that licence, or to decline.
9. Conclusion
10. The Board did not take account of the principles of technological neutrality and balance in valuing the licence fees for CBC’s television and Internet broadcast-incidental copies. I would allow the appeal, set aside the 2008-2012 statutory licence as it relates to the valuation of CBC’s television and Internet broadcast-incidental copies and remit the Statutory Licence Decision to the Board for reconsideration of that valuation in accordance with the principles of technological neutrality and balance.
11. To the extent that the interim licence fees were based on the valuation of the broadcast-incidental copies in the 2008-2012 statutory licence, I would set aside the interim licence and remit the Interim Licence Decision for reconsideration consistent with the principles guiding the redetermination of the 2008-2012 licence.
12. CBC is entitled to its costs here and in the Federal Court of Appeal.

 The following are the reasons delivered by

1. Abella J. (dissenting) — This appeal is based on a decision by the Copyright Board to impose royalty fees on the Canadian Broadcasting Corporation (CBC) for incidental copies required to be made in the process of turning a television program into a broadcast. The imposition of such fees not only violates the principle of technological neutrality endorsed by this Court three years ago in *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, [2012] 2 S.C.R. 231, it distorts the accepted balance between the rights of copyright holders and the public. The CBC already pays royalty fees for broadcasting rights. These additional fees artificially raise the cost of broadcasting television programs, resulting in an increased cost to consumers for the same product. Attaching copyright liability to incidental copies created as a result of improvements in broadcasting technologies penalizes broadcasters and the public for utilizing new and improved technologies and artificially creates entitlements to compensation for creators that were never intended to be given under the *Copyright* *Act*, R.S.C. 1985, c. C-42. The decision is, as a result, unreasonable.

Background

1. The CBC, Canada’s public broadcaster, both produces and broadcasts television programs. It broadcasts its own original programs as well as programs that have been produced by third party producers.
2. The Society for Reproduction Rights of Authors, Composers and Publishers in Canada (SODRAC) Inc. (SODRAC) is a collective society operating under the *Copyright Act*. It administers the reproduction rights held by its members in their musical works, namely, “the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever”: s. 3(1). Notably, it does not administer performance rights, which include broadcasting rights. SODRAC operates by taking an assignment of its members’ reproduction rights, and representing them in negotiations with parties who seek to reproduce works in SODRAC’s repertoire.
3. A producer of television programming incorporates musical works into an audiovisual program. The CBC pays royalties to SODRAC for the right to incorporate musical works in SODRAC’s repertoire into its television programs. The process of incorporation is called synchronization. It is a multi-step process which currently requires the creation of between 12 and 20 incidental copies of the work in order to produce the final synchronized “master” copy of the television program. Once the synchronization process is complete, there will be a single master copy of the synchronized program that the producer provides to the broadcaster, usually on a digital medium such as a CD or digital tape.
4. In order to lawfully reproduce the musical works during synchronization, a producer must obtain a synchronization licence from the holder of the reproduction right in the musical works.In Canada, SODRAC has a virtual monopoly over reproduction rights of French-language music. SODRAC issues synchronization licences to producers, allowing them to make any reproductions necessary to create a synchronized audiovisual work. If the CBC synchronizes a television program using music from SODRAC’s repertoire, it is required to have a synchronization licence from SODRAC. If it receives television programming from a third party producer, it is the third party producer who is required to have the synchronization licence.
5. SODRAC holds only the reproduction rights to the works in its repertoire, it is not entitled to royalties associated with the broadcasting of those works. Royalties for the right to broadcast the works are paid instead to the Society of Composers, Authors and Music Publishers of Canada (SOCAN), the collective society that administers the right to communicate the musical works to the public by telecommunication. In order to broadcast the synchronized television program, the CBC must obtain a broadcasting licence from SOCAN.
6. Until its application to the Copyright Board in this case, SODRAC had no entitlement to royalty fees for any aspect of broadcasting the musical works.
7. Like the synchronization process, the process of broadcasting the television program involves multiple steps, requiring the creation of incidental copies of the work. These are known as broadcast-incidental copies. The CBC makes broadcast-incidental copies of all television programs it broadcasts, regardless of whether they are produced in-house or by a third party.
8. The activity of broadcasting begins when the digital content of the master copy is transferred to the broadcaster’s digital content management system, which is the system that the broadcaster uses to manage the storage, editing, and airing of the program.
9. Modern digital broadcasting systems consist of a number of component parts, including a broadcast server hard drive (or series of hard drives) for temporary storage of a copy of the program until it is aired, a digital tape library for longer-term storage of the program (until expiry of the broadcasting rights), computers and software packages used for screening and editing the program in preparation to be aired, a video logger used to capture a real-time copy of the aired program for compliance with the Canadian Radio-Television and Telecommunications Commission (CRTC) requirements, and an automated content manager that gives instructions to the system for moving the files to and from the various components.
10. The use of modern digital broadcasting systems leads to the creation of broadcast-incidental copies of the programs, including the incorporated musical works, because, in order for the digital program file to exist on multiple components of the system at the same time, and to allow for the simultaneous functioning of the various components of the broadcasting system, multiple incidental copies of the program are necessarily created. The initial transfer of the master copy onto the digital content management system, for example, gives rise to a broadcast-incidental copy. More copies may be created as part of the process of ensuring file format compatibility with the broadcast server hard drives. Further copies will arise in the days immediately before broadcast, as the synchronized television program is temporarily copied from the digital tape library to the broadcast server hard drive: decision of the Copyright Board, file Nos. 70.2-2008-01, 70.2-2008-02, November 2, 2012 (online) (Statutory Licence Decision), at para. 54. While it is still technically possible to deliver television broadcasts without the use of servers and digital technologies, these technologies have become the norm not the exception as a result of the efficiencies and added functionality that they offer to broadcasters: Statutory Licence Decision, at para. 53.
11. More traditional broadcasting systems are analog systems. Analog systems use analog media, not digital techniques, for storage, reproduction, or transmission of the audiovisual program. An example of analog media is the VHS tape, which is a magnetic tape. Analog broadcasting systems formerly employed by television broadcasters also typically involved the creation of broadcast-incidental copies resulting from the need to screen and edit the programs before airing, as well as to create back-up copies. Analog systems, however, resulted in fewer broadcast-incidental copies than are created by modern digital broadcasting systems.
12. Modern digital broadcasting systems are much more efficient than analog systems because in the digital domain, broadcasters are able to compress and store much larger quantities of digital video programming on server hard drives and digital tapes than could be reasonably stored in a VHS tape library. Screening and editing the programs for closed captioning and different languages are also more efficiently accomplished using modern computer and software systems as opposed to analog systems.
13. Starting in 1998, SODRAC began requiring third partyproducers to acquire a separate synchronization licence. Because broadcasters who also produced audiovisual programs in-house, like the CBC, were already required to hold a synchronization licence for the same work, SODRAC initially did not charge third party producers any royalties for this additional licence. In 2006, however, SODRAC abandoned this policy and began charging producers full price for a synchronization licence, which now covered only a right of “first integration”: Statutory Licence Decision, at para. 73. Under this licence, producers paid royalties for the right to synchronize music into a single master copyof the television program, but had no right to make any downstreamincidental copies such as broadcast-incidental copies. These downstreamcopies, typically made by the broadcaster as they readied the synchronized copy for broadcast, became subject to additional royalties paid by the broadcasters. SODRAC’s new policy of monetizing broadcasting activities through the imposition of royalties for broadcast-incidental copies is what prompted this litigation.
14. In 1992, the CBC and SODRAC had a licenceagreement which authorizedthe CBC to reproduce works in SODRAC’s repertoire. This licence allowed the CBC to synchronize musical works into audiovisual programs, as well as to make any other incidental copies of the works including production-incidental copies and broadcast-incidental copies. In 2008, however, the CBC and SODRAC were unable to agree on the terms of a new licence because SODRAC sought to monetize broadcast-incidental copies in addition tothe synchronization rights. SODRAC asked the Copyright Board to fix the terms and conditions of a licence for the reproduction of musical works in its repertoire pursuant to s. 70.2 of the *Copyright Act.*
15. The Board concluded that broadcast-incidental copies implicated the reproduction right, and were therefore subject to royalties. Because the new broadcastingtechnologies which required additionalbroadcast-incidental copies generated benefits for the CBC by keeping the broadcaster relevant and competitive, the Board concluded that this benefit should be reflected in the compensation granted to the copyright holders. The Board accordingly certified SODRAC’s proposed tariff and imposed alicence on the CBC for 2008-2012that included royalty fees for the broadcast-incidental copies. The Board valued the broadcast-incidental copies by tying them to the value of the royalties paid by the CBC to SOCAN for the communication rights in the works. Under its 1992 licence, the CBC paid annual royalties to SODRACof $520,000; under the new Board-imposed agreement, it would pay $1.2 million per year.
16. After the release of this decision, SODRAC obtained an interim licence from the Board on the same terms for the 2012-2016 period.
17. The Federal Court of Appeal dismissed the CBC’s application for judicial review of the Board’s decisions. Applying *Bishop v. Stevens*, [1990] 2 S.C.R. 467,the Federal Court of Appeal concluded that “ephemeral recordings of [the] performance of a work, made solely for the purposes of facilitating that broadcast of the performance, were, if unauthorized, an infringement of the copyright holder’s rights”. It refused to apply the principle of technological neutrality articulated in thisCourt’s decision in *Entertainment Software Association*.

Analysis

1. The issue in this appeal is whether SODRAC is entitled to monetize broadcast-incidental copies despite the fact that SODRAC has no entitlement to royalty fees for any aspect of broadcasting. To answer the question requires knowing what a broadcast-incidental copy is.
2. In its decision, the Board defined incidental copies as follows:

 An *incidental copy* is necessary or helpful to achieve an intended outcome but is not part of the outcome itself. A *production-incidental copy* is made in the process of producing and distributing an audiovisual work, either before or after the master copy is made: it is a form of synchronization copy. A *broadcast-incidental copy* is made to facilitate the broadcast of an audiovisual work or to preserve the work in the broadcaster’s archives, while a *distribution-incidental copy* is made for purposes of readying or preserving the motion picture for distribution to the public: both are forms of post-synchronization copies. [Underlining added; para. 12.]

1. A broadcast-incidental copy is created when the content of the master copy of the synchronized television program is fed into the broadcaster’s digital content management system. This creates a high-resolution copy of the work. Once in the digital content management system, a low-resolution working copy that is not of sufficient quality to be broadcast will be used to facilitate editing the television program for such things as on-air text translations or closed captioning. A further low-resolution copy will be created for screening purposes by the programming, marketing, and communications teams. When all technical treatments of the program have been completed, another copy results from the digital file being reformatted to create a broadcast file that is compatible with the CBC’s broadcast server hard drives. Additional copies of the broadcast file are made when the file is copied as needed from the digital tape library to the broadcast server hard drives. While the program is being aired, a further copy is made as the aired program is recorded in real time in order to comply with CRTC regulatory requirements: see *Television Broadcasting Regulations,* *1987*, SOR/87-49, s. 10(5). The initial high-resolution copy of the program, as well as the low-resolution working copies, and the reformatted broadcast file, are all broadcast-incidental copies made for the sole purpose of facilitating the broadcasting of the audiovisual program.
2. The broadcast-incidental copies described above are strictly technical in nature in that they are created solely for purposes integral to the process of broadcasting television programs, and are not sold or made available to the public, or used for any independent revenue-generating purpose.
3. Broadcast-incidental copies are created in order to achieve the central activity of broadcasting by providing the technical modalities to achieve the broadcast and to comply with regulatory requirements. In the context of copyright law, their creation cannot be seen as distinct from the central activity of broadcasting without violating the principle of technological neutrality.
4. This appeal concerns the scope of the reproduction right set out in ss. 3(1) and 3(1)(*d*) of the *Copyright Act*,which state:

 **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, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof, and includes the sole right

. . .

(*d*) in the case of a literary, dramatic or musical work, to make any sound recording, cinematograph film or other contrivance by means of which the work may be mechanically reproduced or performed,

1. The introductory paragraph of s. 3(1) articulates three distinct rights held in protected works: the right to produce or reproduce (the reproduction right); the right to perform, which includes broadcasting rights; and the right to publish. The enumerated rights listed in s. 3(1)(*a*)-(*j*) are illustrative of these three fundamental rights: *Entertainment Software Association*, at para. 42.
2. As this Court observed in *Entertainment Software Association*, Parliament has distinguished between the rights of reproduction and those of performance/broadcasting. This distinction is drawn because a performance is, by its nature, fleeting and impermanent, whereas a reproduction creates a durable copy which takes on a life of its own: *Entertainment Software Association*, at para. 35. The acts of performing/broadcasting and those of reproducing a work engage two distinct interests for copyright holders. That is why distinct collective societies administer these rights: *Entertainment Software Association*, at para. 38.
3. It is not disputed that the broadcasting activities carried out by the CBC fall within the broadcasting/performance right. The question in this appeal is whether the technical means employed by the CBC to achieve the broadcasting activity also fall within the scope of the reproduction right.
4. A reasonable interpretation of the scope of the reproduction right must therefore consider the wording of ss. 3(1) and 3(1)(*d*) in the context of the overarching purpose of the *Copyright Act* and the central principle of technological neutrality.
5. The *Copyright* *Act* strikes a careful balance between promoting the public interest in the encouragement and dissemination of creative works and obtaining a just reward for creators: *Théberge v. Galerie d’Art du Petit Champlain inc.*, [2002] 2 S.C.R. 336, at para. 30. To tilt the balance too far towards protection of creators’ rightswould undermine the right of users to access and work with creative materials. To tilt it too far towards access, on the other hand, would fail to provide a just reward to creators, leading authors and their supporters to under-invest in producing and distributing their works. At both ends of the spectrum, the public loses some of the benefit of creative works: David Vaver, *Intellectual Property Law: Copyright, Patents, Trade-marks* (2nd ed. 2011), at p. 60; *Théberge*,at para. 31.
6. As this Court has consistently recognized, maintaining the balance that best supports the public interest in creative works is the central purpose of the *Copyright Act*: *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*,[2004] 2 S.C.R. 427 (*SOCAN* *v.* *CAIP*), at paras. 40-41; *Robertson v. Thomson Corp.*, [2006] 2 S.C.R. 363,at paras. 69-70; *Euro-Excellence Inc. v. Kraft Canada Inc.*,[2007] 3 S.C.R. 20, at paras. 76-84; *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, [2012] 2 S.C.R. 326 (*SOCAN v. Bell*), at paras. 8-11; *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, [2012] 2 S.C.R. 345,at para. 19; *Entertainment Software Association*,at paras. 7-8, per Abella and Moldaver JJ., for the majority, and paras. 47 and 123-25, per Rothstein J., dissenting; *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*,[2012] 2 S.C.R. 283 (*Rogers v. SOCAN*),at para. 40; *Cinar Corporation v. Robinson*,[2013] 3 S.C.R. 1168, at paras. 23 and 28.
7. The question in this case, once again, is how to preserve this balance in the face of new technologies that are transforming the mechanisms through which creative works are produced, reproduced and distributed. Francis Gurry, the Director General of the World Intellectual Property Organization, explained the challenge to copyright policy posed by new technologies as follows:

Underlying this process of change is a fundamental question for society. It is the central question of copyright policy. How can society make cultural works available to the widest possible public at affordable prices while, at the same time, assuring a dignified economic existence to creators and performers and the business associates that help them to navigate the economic system? It is a question that implies a series of balances: between availability, on the one hand, and control of the distribution of works as a means of extracting value, on the other hand; between consumers and producers; between the interests of society and those of the individual creator; and between the short-term gratification of immediate consumption and the long-term process of providing economic incentives that reward creativity and foster a dynamic culture.

(“The Future of Copyright”, speech delivered at the Blue Sky Conference: Future Directions in Copyright Law, February 25, 2011 (online).)

1. The answer to this challenge, in my view, lies in applying a robust vision of technological neutrality as a core principle of statutory interpretation under the *Copyright Act*, drawing particularly on this Court’s decision in *Entertainment Software Association*.
2. Such an approach finds its statutory origin in s. 3(1) of the *Copyright Act*, which provides that copyright includes the “sole right to produce or reproduce” a work or a substantial part of a work “*in any material form whatever*”: see *Entertainment Software Association*,at para. 5. Parliament has further signalled its support in the summary of the *Copyright Modernization Act*, S.C. 2012, c. 20, which states that the amendments to the *Act* were intended to “ensure that it *remains* technologically neutral”. These words signal Parliament’s intention that the *Act* must adapt and apply to new technologies in a manner that maintains the careful balance between creators and users that underpins the *Act* as a whole.
3. As an interpretive principle, technological neutrality prizes substance over form by applying the *Copyright Act* so that it “operates consistently, regardless of the form of the media involved, or its technological sophistication”: *SOCAN v. Bell*, atpara. 43. It arises in two different forms.
4. The first is the principle of media neutrality, which aims to ensure that copyright doctrine evolves to embrace new technologies. The basic premise of this principle is that “copyright subsists not only in the medium in which the work is created but all existing and future media in which the work might be expressed”: Cameron J. Hutchison, “Technological Neutrality Explained & Applied to *CBC v. SODRAC*” (2015), 13 *C.J.L.T.* 101, at p. 110. As long as the creative expression survives the transfer to a new medium, copyright in the work will survive. Media neutrality is not, however, restricted to protecting creators’ rights across new media; it can operate to protect the rights of users of copyrighted material across new media as well. As this Court observed in *Robertson*:

Media neutrality is reflected in s. 3(1) of the *Copyright Act* which describes a right to produce or reproduce a work “in any material form whatever”. Media neutrality means that the *Copyright Act* should continue to apply in different media, including more technologically advanced ones. . . . Media neutrality is not a licence to override the rights of authors — it exists to protect the rights of authors and others as technology evolves. [Emphasis added;para. 49.]

1. The second is the principle of functional equivalence, which asks courts to focus on *what* the technology at issue is doing, rather than on the technical modalities of *how* it is doing it when interpreting the rights and exceptions set out in the *Copyright Act*: Cameron J. Hutchison, “Case Comment: The 2012 Supreme Court Copyright Decisions & Technological Neutrality” (2013), 46 *U.B.C. L. Rev.* 589, at p. 590. This principle guides courts to interpretations of the *Act* that afford functionally equivalent technologies similar treatment, without getting caught up in the modalities through which the work is delivered: Carys J. Craig, “Technological Neutrality: (Pre)Serving the Purposes of Copyright Law”, in Michael Geist, ed., *The Copyright Pentalogy: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (2013), 271, at p. 275. It also implies that, “where there is no clear and pre-existing functional equivalent, courts should avoid emphasizing the details of particular technological systems and instead interpret copyright’s core concepts in a manner applicable across technologies”: Craig, at p. 275; see also Deborah Tussey, “Technology Matters: The Courts, Media Neutrality, and New Technologies” (2005), 12 *J. Intell. Prop. L.* 427; Gregory R. Hagen, “Technological Neutrality in Canadian Copyright Law”, in *The Copyright Pentalogy*, 307,at p. 317.
2. A functional approach totechnological neutrality “seeks to avoid imposing copyright liability on technologies and activities that, while theoretically capable of being included under the *Act*, only incidentally implicate copyright”: Hutchison (2015), at p. 113; see also Craig. “[S]ubstance”, in other words, “trumps form”: Hutchison (2015), at p. 111; see also *SOCAN v. CAIP*. Or, as Maria A. Pallante, the Director of the U.S. Copyright Office has observed, “new technologies have made it increasingly apparent that not all reproductions are equal in the digital age. Some copies are merely incidental to an intended primary use of a work, including where primary uses are licensed, and these incidental copies should not necessarily be treated as infringing”: “The Next Great Copyright Act” (2013), 36 *Colum. J.L. & Arts* 315, at p. 325.
3. This aspect of technological neutrality finds expression in a number of this Court’s recent rulings.In *SOCAN v. CAIP*, for example, the Court considered whether the practice of caching copies prevented Internet service providers from finding the protection of s. 2.4 of the *Copyright Act*, which insulates from liability those who provide *only* the means of telecommunication “necessary for another person to so communicate the work”. The Court concluded that Internet service providers were shielded by s. 2.4, even though their transmissions resulted in the creation of cache copies. As Professor Hutchison summarizes in his 2015 article,

. . . the practice of caching was an innovation that helped promote the dissemination of works (one of the goals of copyright law) without interfering with the legitimate entitlements of copyright owners. Incidental copies, in other words, were determined to lie outside the reproduction right as the interests of technological economy and efficiency trumped the making of mere technical copies that were imperceptible to an end user. [Footnote omitted; p. 114.]

1. Similarly, in *Entertainment Software Association*,this Court addressed the meaning of the communication right set out in s. 3(1)(*f*) of the *Copyright Act* and concluded that a separate communication tariff should not apply to downloaded copies ofmusical works. Because it gives rise to a durable digital copy, the downloading process is, at its core, an exercise of the reproduction right. Simply because the copy arrived by way of Internet-based delivery did not mean it was a communication under the *Act.* The central activity was the focus of the legal analysis, not the incidental technological process by which it took place.
2. Finally, in *Rogers v. SOCAN*,the Court addressed whether music streamed via the Internet to individual users constituted a communication “to the public” under s. 3(1)(*f*) of the *Copyright Act*. In concluding that it did, Rothstein J. observed that the “true character of the communication activity” and not its technicalities were crucial to properly interpreting the meaning of “to the public”: para. 30.Copyright protection should not depend“merely on the business model that the alleged infringer chooses to adopt rather than the underlying communication activity . . . [where] the end result is the same”: para. 40.
3. Together, these principles — media neutrality and functional equivalence — work to protect the fine balance between users and creators, between access and reward, enshrined in the *Copyright Act*. As Professor Tussey observes, “To the extent that the copyright balance of incentives and access has been appropriately set for a pre-existing technology, similar treatment of functional equivalents should maintain that balance”: p. 479. The analysis of whether copyright attaches to a particular activity should therefore focus on the essential nature of the activity or output, rather than the process by which it occurs.
4. That is precisely why the cached copies at issue in *SOCAN v. CAIP*, copies that were created as a result of the activities of the Internet service providers, did not bring the providers beyond the exception from liability for persons who provide *only* the means of telecommunication necessary for another person to communicate a work. The central activity of the providers was providing a conduit for communication, and the cached copies were created solely for the purpose of delivering faster and more economic service to internet users.
5. And it is why in *Rogers v. SOCAN*,although a temporary copy of the music file is transmitted to the user’s hard drive as part of the process of streaming music online, the Court treated the process of streaming as an exercise of the telecommunications right, not as a separate exercise of the reproduction right. Those temporary copies were considered to form a technical part of the streaming process, and did not transform the central activity of communicating the work by telecommunication.
6. And finally, it is why in *Entertainment Software Association*, where SOCAN wanted to charge royalties for copies of video games sold and delivered over the Internet despite being unable to charge royalties for copies of video games sold in a store or shipped by mail, this Court held that traditional and more technologically advanced forms of the same activity should be treated equally under the *Copyright Act*:

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. [Emphasis in original; para. 9.]

1. Similarly, in this case, SODRAC is attempting to claim royalties for the *method* of broadcasting the musical works to the public, despite never before receiving royalties for broadcasting activities.
2. Technological neutrality — and specifically, the principle of functional equivalence — is a crucial part of any reasonable interpretation of the application of the reproduction right to broadcast-incidental copies.
3. The CBC argued that SODRAC’s attempt to monetize broadcast-incidental copies “represents a subversion of the purpose of the *Copyright Act* in an attempt to generate economic rents through a layered licensing scheme”.
4. I agree. The principle of technological neutrality requires that the interpretation and application of the *Copyright* *Act* focus on the essential character of the activity and not the technical modalities by which it is achieved. The essential character of the *broadcasting* activity does not change with the adoption of modern digital technologies that are dependent on the creation of incidental copies in order to accomplish the activity. Each broadcast-incidental copy is not a separate reproduction of the work under the *Act*simply because the technical imperatives of effecting a broadcast require the presence of multiple copies.They do not, as a result, attract separate royalties. To conclude otherwise is to doom both technological neutrality and the ability of copyright law to preserve the delicate balance between the rights of copyright holders and the public’s interest in the dissemination of creative works.
5. Traditionally, broadcasting was subject only to communication fees. The Board’s decision to impose royalties on the CBC for the creation of copies made incidental to the activity of broadcasting amounts to finding that broadcasting in the digital era, as opposed to the pre-digital era, should be subject to two fees for the same activity. As this Court observed in *Entertainment Software Association*, this result harms both end users of the works and copyright owners:

When a single economic activity implicates more than one type of right and each type is administered by a separate collective, the multiplicity of licences required can lead to inefficiency. . . . The result is that the total price the user has to pay for all complements is too high . . . .

. . .

. . . the fragmentation of licences required for single activities among several monopolist-collectives generates inefficiencies, from which copyright owners as a whole also suffer . . . .

(Para. 11, quoting Ariel Katz, “Commentary: Is Collective Administration of Copyrights Justified by the Economic Literature?”, in Marcel Boyer, Michael Trebilcock and David Vaver, eds., *Competition Policy and Intellectual Property* (2009), 449, at pp. 461-63.)

1. Most pertinently, the Federal Court of Appeal was wrong to suggest that “more copies mean more value and thus, more royalties”. This, with respect, violates technological neutrality not only by imposing additional copyright liability on the use of more efficient copy-dependent broadcasting technologies which are functionally equivalent to traditional broadcasting systems, but also by erroneously tying the compensation owed to creators of copyrighted works to how efficiently the user of those works exercises the right that was bargained for.
2. Moreover, broadcasters are required to make certain broadcast-incidental copies in order to comply with CRTC regulations, such as to keep a record of exactly what was broadcast in the event of a public complaint or inquiry. Giving creators of broadcasted works additional copyright compensation because the CBC, in order to have the right to broadcast, is required to create incidental copies of the works for regulatory compliance purposes, gives creators compensation for something they are not entitled to under the *Act*.
3. It is, in fact, difficult to see how the creation of broadcast-incidental copies implicates the legitimate reproduction interests of the creators of the works in any way. These copies are, to borrow the language of *Entertainment Software Association*, merely technological taxis required for the delivery of the digital broadcast process. They are not recordings which fix a particular embodiment of the protected works, they are not delivered as durable copies to the viewer or listener, and they do not alter the degree of control that the composer once had over how the work will be presented to the public.
4. Excluding broadcast-incidental copies from the scope of the reproduction right under s. 3(1)(*d*) of the *Copyright* *Act* does nothing to prejudice the legitimate interests of copyright holders. Virtually all of the composers represented by SODRAC for the administration of reproduction rights in their works are also represented by SOCAN for the administration of communication rights. It is hard to see how the purposes of the *Copyright Act* are advanced by permitting the creators of musical works to bargain at one table for royalties in exchange for the right to broadcast their works, and then at another table for additional royalties for the technical modalities by which that same right is exercised.
5. That is why I have difficulty accepting Rothstein J.’s analysis. The result of his approach is to penalize broadcasters for implementing advancements in broadcasting technologies by creating artificial entitlements to compensation under the *Copyright Act* for incidental activities that were never intended to be covered by the *Act.*He begins his discussion of the scope of the reproduction right under s. 3(1)(*d*) with an acknowledgment that this Court’s understanding of the purpose of the *Copyright Act* has evolved from the author-centric view articulated in *Bishop* to that of maintaining the proper balance between the rights of creators and the public interest in the encouragement and dissemination of works of the arts and intellect. This balance involves not only “recognizing the creator’s rights but in giving due weight to their limited nature”: *Théberge*, at para. 31. He also acknowledges the role that the principle of technological neutrality, as set out most recently by this Court in *Entertainment Software Association*, plays in maintaining that balance. To this extent, I agree with his reasons. What I cannot agree with, however, is his finding that these fundamental principles of copyright law have been ousted in this case by the language of the *Copyright Act*. In so finding, he employs a literal approach to the interpretation of s. 3(1)(*d*), reading the words of the provision without the benefit of the purpose and context of the *Act* to ascertain its true meaning.
6. He points to ss. 30.8 and 30.9 of the *Copyright Act*,which create finely calibrated and limited exceptions for certain kinds of ephemeral recordings, as evidence of Parliament’s intention that broadcast-incidental copies engage the reproduction right. His argument is that, by virtue of creating these limited exceptions to the reproduction right, Parliament was confirming that all *other* ephemeral and incidental copies were protected under s. 3(1)(*d*) of the *Act*. Since the broadcast-incidental copies at issue in this case are not among the specific enumerated exceptions, Rothstein J. accepts SODRAC’s argument that they necessarily engage the reproduction right set out in s. 3(1)(*d*).
7. There is a much more plausible explanation for these narrow exceptions that better accords with the overarching purposes of the *Copyright* *Act*. As SODRAC acknowledges, these amendments were a legislative response to the Court’s 1990 decision in *Bishop*. In *Bishop*, the Court was asked to determine whether the licensing of a performance right — the right to broadcast a musical work — implicitly authorized ephemeral recordings of a performance of the work for the purposes of effecting the broadcast. The composer claimed that the pre-recorded tape of the performance implicated the reproduction right. The defendant did not deny that such a copy was made, but argued that it was “ephemeral” and, as such, should not attract copyright liability. Applying a literal interpretation of s. 3(1)(*d*) to conclude that the ephemeral recording engaged the composer’s reproduction rights, this Court held that a separate reproduction licence was required.
8. Broadcasters sought corrective legislative intervention. The results of their efforts were ss. 30.8 and 30.9. Section 30.8 makes provision for broadcasters who have a right to broadcast a live performance, but no right to make recordings of that performance. Subject to specific conditions, it allows them to make temporary recordings of the performance for the purpose of the broadcast without obtaining a second permission from the copyright holder: Hugues G. Richard and Laurent Carrière, eds., *Canadian Copyright Act Annotated* (loose-leaf), at pp. 30.8-9 and 30.8-10. Section 30.9 offers an exception for broadcasters who have a right to broadcast a sound recording but no right to make copies of it. It allows the broadcaster to convert apre-recorded performance from one medium to another if it is necessary for the purposes of broadcasting: Richard and Carrière, at p. 30.9-7. These exceptions are subject to specific conditions, including that the copy be made by the broadcaster itself for its own broadcast; and that it cannot be synchronized with any other work or subject matter. The parties agree that neither provision applies to the broadcast-incidental copies at issue in this case.
9. These discrete legislative responses to a specific judicial interpretation of the *Copyright* *Act* should not, it seems to me, be mistaken for a Rosetta stone on the scope and meaning of the reproduction right. And they are far from the express statutory language required to displace such fundamental objectives and principles underpinning the *Copyright Act* as technological neutrality and balance. The effect of such an approach is to set a new precedent for statutory interpretation, one that is contrary to the long-accepted approach which requires that we examine the words of a statute “in their entire context”.
10. It is more credible, it seems to me, to interpret ss. 30.8 and 30.9as an effort to provide greater certainty that certain classes of ephemeral recording are not to attract copyright liability. They were a response to a decision of this Court in order to *maintain* technological neutrality, *not* a comprehensive statement on the content of the reproduction right, or which kinds of copies will trigger it. While ss. 30.8 and 30.9 are illustrative of the distinction between broadcasting and reproduction rights and specifically identify certain classes of copies that do not engage the reproduction right, they are, as exceptions, of limited value in interpreting the scope of the reproduction right found in s. 3(1), a provision enacted many years earlier. To find otherwise would trap Parliament in an interminable and losing game of catch-up with swift and unknown technological currents.
11. This brings me to the effect of *Bishop* on this case. The Federal Court of Appeal concluded that the legal character of the broadcast-incidental copies at issue in this case was settled by that 1990 decision. *Bishop*, however, rests on jurisprudential foundations that have been revised by this Court’s subsequent jurisprudence. For a start, *Bishop* explicitly adopts a literal approach to the interpretation of s. 3(1)(*d*) and the introductory paragraph to s. 3(1) of the *Copyright Act*: pp. 484-85.
12. In the years since *Bishop* was decided, this Court has clarified that statutory interpretation cannot be founded on the wording of the statute alone: *Rizzo & Rizzo Shoes Ltd. (Re)*,[1998] 1 S.C.R. 27,at para. 21. The purposes of the *Copyright Act* — including the pre-eminent principle of technological neutrality, and the goal of maintaining the balance between users and copyright holders — have therefore taken on enhanced prominence in the interpretive exercise. These purposes lead us away from approaching the “reproduction right” as capturing every technical or incidental reproduction, and towards an approach that examines whether it is the kind of “reproduction” the *Act* was intended to protect. And that, in turn, requires examining the purpose and effect of the reproduction — in other words, its technological context.
13. If, on the other hand, we adopt a literal interpretation of the right enumerated in s. 3(1)(*d*) of the *Act*, there will be no room for the principle of technological neutrality in the interpretation of rights enumerated in s. 3(1) of the *Act*.Finding that the plain meaning of s. 3(1)(*d*) and the result in *Bishop* dictate the scope of the reproduction right in lieu of a purposive and technologically neutral interpretation will, as a result, roll back nearly two decades of this Court’s statutory interpretation and copyright jurisprudence.
14. Since, in my view, the creation of broadcast-incidental copies is not a compensable exercise of the reproduction right, it is not necessary to consider how the Board should value such copies. That said, I have concerns about how the majority articulates and applies the principle of technological neutrality to the issue of valuation. The thirteen years of copyright jurisprudence since *Théberge* have built up the principles of balance and technological neutrality floor by floor. With respect, the majority’s approach builds an entirely new structure which is not only wholly inconsistent with the established case law, it tears down the existing foundations. It has a significant and detrimental impact on how the balance is struck between copyright holders and the users of protected works, deviates from the principle of technological neutrality articulated in *Entertainment Software Association*, and creates uncertainty as to how the principle of technological neutrality operates.
15. First, this Court, in *Théberge*, concluded that the *Copyright Act* is a balance between obtaining a “just reward” for the creator of protected works, and “promoting the public interest in the encouragement and dissemination” of such works: para. 30. This balance considers whether the legitimate interests of copyright holders are implicated by the proposed use of their protected works. The majority’s application of the principle of technological neutrality disrupts how this balance is struck. The majority proposes two novel factors for the Board to consider when striking a balance between user and copyright holder interests: (1) the nature of the copyright-protected work’s use in the new technology; and (2) the risks taken and the extent of the investment made by the user in the new technology. While the first factor is consistent with the balance articulated in *Théberge*, the second is not. Its effect is to tie copyright holder compensation to actions of the user that are unrelated and irrelevant to the rights held in the protected works. If we follow the majority’s new factor to its logical conclusion, we could well find that users who make a sufficiently large investment or take sufficiently high risks may, by doing so, deprive the copyright holder of *any* entitlement to compensation for the use of the protected works.
16. Second, the majority’s articulation of the principle of technological neutrality in this case represents a significant departure from the principle as it was articulated in *Entertainment Software Association*. As the majority acknowledges, the principle of technological neutrality articulated in *Entertainment Software Association* seeks to preserve the accepted balance between creators and users in the digital environment. In a case like this, where the use of new technology intersects with the *Copyright Act*, the principle of technological neutrality calls for an inquiry into whether there is functional equivalence between the old and new technology in a way that maintains that balance. The focus is on *what function* the technology is performing, not *how* it is performing it: *Entertainment Software Association*, at paras. 5 and 9-10. In other words, as Rothstein J. himself noted in *Rogers v. SOCAN*, “[i]f the nature of the activity in both cases is the same, albeit accomplished through different technical means, there is no justification for distinguishing between the two for copyright purposes”: para. 29.
17. As this Court confirmed in *Entertainment Software Association*, technological neutrality operates to prevent imposing additional, gratuitous fees on the user simply for the use of more efficient technologies: para. 9. By focusing the inquiry on the value that the technology is creating for the user, as the majority does, as opposed to the functional result created by the technology, it misconstrues technological neutrality. A technological innovation may create value for the user by increasing efficiencies, driving down costs, or allowing the user to remain competitive. But as this Court observed in *Entertainment Software Association*, a copyright holder like SODRAC is not entitled to be compensated for how efficiently a user like the CBC uses technology to achieve its broadcast. Those gains have nothing to do with the copyright holder’s legitimate interests, or with the balance struck between the copyright holder and the user.
18. The result of the majority’s conclusionsis uncertainty as to the purpose and application of the principle of technological neutrality in the interpretation and application of the *Copyright Act*, uncertainty as to how users of copyrighted material are to exercise their authorized rights and activities without incurring additional copyright liability, and uncertainty as to the “value” of incidental activities. It also represents the acceptance of layered licensing schemes whereby, rather than licensing the central activity of broadcasting, licences are granted for the central activity as well as for its component partsbased solely on the method chosen to effect the central authorized activity. This results in the imposition of gratuitous costs on broadcasters merely for the use of more efficient technologies that do not engage with the legitimate interests of copyright holders. These are the very consequences that this Court’s decision in *Entertainment Software Association* said were proscribed by the principle of technological neutrality.
19. In conclusion, applying the standard of reasonableness and looking at the Board’s reasons as a whole, in my view its decision to impose royalty fees for broadcast-incidental copies was unreasonable. It is, as a result, unnecessary to consider the valuation issue.
20. Why apply reasonableness? Here we come yet again to this Court’s prodigal child, the standard of review. Too much obfuscation has already cluttered the journey, but while I hesitate to add words to an already overcrowded space, I have concerns that the majority has created yet another confusing fork in the road.
21. The central issue in this appeal is whether the Copyright Board ought to have imposed royalty fees on the CBC for the creation of incidental copies that arise as a technical part of the digital broadcasting process. This question is at the heart of the Copyright Board’s specialized mandate and therefore reviewable on a reasonableness standard.
22. In this case, rather than review the Copyright Board’s decision as a whole, Rothstein J. identifies no less than five separate issues, each of which he says attracts its own discrete standard of review analysis. One of these issues, “whether the *Copyright Act* allows SODRAC to seek a licence for CBC’s broadcast-incidental copying”, is said to warrant correctness review, while the other four are to be reviewed on the reasonableness standard. Applying these competing standards to the different components of the Copyright Board’s decision, he ultimately concludes that the Copyright Board was correct in proceeding on the basis that broadcast-incidental copies engage the reproduction right under the *Copyright Act*, but that some of its conclusions with respect to the other issues were reasonable while others were not. With respect, this takes judicial review Through the Looking Glass.
23. It is true that, in *Rogers v. SOCAN*, the majority held that the appropriate standard of review is correctness for questions of law for which the Copyright Board and courts share concurrent jurisdiction: para. 15. But in that case, the “sole issue” was “the meaning of the phrase ‘to the public’ in s. 3(1)(*f*) of the [*Copyright* *Act*]”: para. 2. After deciding the legal issue, the majority applied that conclusion to the facts:paras. 53-56.No further standard of review was discussed, considered or applied.In this case, the Board’s decision was to impose royalty fees for the creation of broadcast**-**incidental copies. Rothstein J. not only extricates as a discrete legal question whether the *Copyright Act* allows SODRAC to seek a licence for the CBC’s broadcast-incidental copying,he subdivides the rest of the decision into separate compartments entitled to their own standard of review. This is both new and regressive. It is also an approach that was proscribed by this Court in *Council of Canadians with Disabilities v. VIA Rail Canada Inc*., [2007] 1 S.C.R. 650, at para. 100.
24. Extricating the various components of the decision and subjecting each to its own standard of review analysis represents, with respect, a significant and inexplicable change in this Court’s standard of review jurisprudence, further erodes the careful framework this Court endorsed in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, and risks creating an unworkable template for the judicial review of administrative decision-making.
25. This latest movement in Rothstein J.’s shifting tectonic reviewing plates — extricating the various aspects of a tribunal’s decision for their own individual standard of review analysis — creates even more confusion in an area of jurisprudence already unduly burdened by too many exceptions in the brief years since this Court decided *Dunsmuir*. There are always many parts of a tribunal’s decision. Requiring courts to separately assess the standard of review for each of these parts and then to decide how many of those parts must be found to be unreasonable or incorrect in order to outweigh those parts which are found to be reasonable or correct may lead, with respect, to absurd results. Reviewing courts will be left to wonder just how many unreasonable or incorrect components of a decision it takes to warrant judicial intervention.
26. Breaking down a decision into each of its component parts also increases the risk that a reviewing court will find an error to justify interfering in the tribunal’s decision, and may well be seen as a thinly veiled attempt to allow reviewing courts wider discretion to intervene in administrative decisions. This, at its core, is the re-introduction of the long since abandoned “preliminary question doctrine”, whereby courts adopted such a broad and probing understanding of “jurisdictional error” that they could effectively substitute their own opinion for that of a tribunal on virtually any aspect of a tribunal’s decision. The preliminary question doctrine was a judicial tactic to permit courts to intervene and substitute their own views. It was a tactic *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227, sought to end and *Dunsmuir* sought to bury. Its spiritual heirs should be given the same treatment.
27. I would therefore allow the appeal with costs throughout.

 The following are the reasons delivered by

1. Karakatsanis J. (dissenting) — I agree with my colleague Justice Abella on the merits and in the result. I write, however, because I cannot accept her position on the standard of review. This expert tribunal is presumptively reviewable on the basis of reasonableness. However, I agree with Justice Rothstein that the legal issue of whether broadcast-incidental copies engage the reproduction right must be reviewed on the basis of correctness, in accordance with our decision in *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 S.C.R. 283, at paras. 10-20. As the presumption has not otherwise been displaced, the standard of review of reasonableness applies to the balance of the statutory licence decision and the interim licence decision: Copyright Board file Nos. 70.2-2008-01, 70.2-2008-02, November 2, 2012 (online), and file No. 70.2-2012-01, January 16, 2013 (online), respectively*.*
2. However, I do not endorse the general approach my colleague Justice Rothstein has taken to his analysis of the standard of review. I am concerned with a methodology that examines and ascribes a specific standard of review to each individual issue challenged within a tribunal decision. Our jurisprudence permits the isolation of a particular question of law on an exceptional basis; it does not *require* a separate standard of review analysis for each issue. I worry that an issue-by-issue approach, within each decision, will add to the submissions and analysis required to establish the standard of review in each case. It unnecessarily complicates an already overwrought area of the law.
3. I would allow the appeal.

**APPENDIX**

*Copyright Act*, R.S.C. 1985, c. C-42 (version in effect at the relevant time)

 **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, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof, and includes the sole right

. . .

(*d*) in the case of a literary, dramatic or musical work, to make any sound recording, cinematograph film or other contrivance by means of which the work may be mechanically reproduced or performed,

. . .

(*f*) in the case of any literary, dramatic, musical or artistic work, to communicate the work to the public by telecommunication,

. . .

and to authorize any such acts.

 **30.8** (1) It is not an infringement of copyright for a programming undertaking to fix or reproduce in accordance with this section a performer’s performance or work, other than a cinematographic work, that is performed live or a sound recording that is performed at the same time as the performer’s performance or work, if the undertaking

(*a*) is authorized to communicate the performer’s performance, work or sound recording to the public by telecommunication;

(*b*) makes the fixation or the reproduction itself, for its own broadcasts;

(*c*) does not synchronize the fixation or reproduction with all or part of another recording, performer’s performance or work; and

(*d*) does not cause the fixation or reproduction to be used in an advertisement intended to sell or promote, as the case may be, a product, service, cause or institution.

 (2) The programming undertaking must record the dates of the making and destruction of all fixations and reproductions and any other prescribed information about the fixation or reproduction, and keep the record current.

 (3) The programming undertaking must make the record referred to in subsection (2) available to owners of copyright in the works, sound recordings or performer’s performances, or their representatives, within twenty-four hours after receiving a request.

 (4) The programming undertaking must destroy the fixation or reproduction within thirty days after making it, unless

(*a*) the copyright owner authorizes its retention; or

(*b*) it is deposited in an archive, in accordance with subsection (6).

 (5) Where the copyright owner authorizes the fixation or reproduction to be retained after the thirty days, the programming undertaking must pay any applicable royalty.

 (6) Where the programming undertaking considers a fixation or reproduction to be of an exceptional documentary character, the undertaking may, with the consent of an official archive, deposit it in the official archive and must notify the copyright owner, within thirty days, of the deposit of the fixation or reproduction.

 (7) In subsection (6), “official archive” means the Library and Archives of Canada or any archive established under the law of a province for the preservation of the official archives of the province.

 (8) This section does not apply where a licence is available from a collective society to make the fixation or reproduction of the performer’s performance, work or sound recording.

 (9) A broadcasting undertaking, as defined in the *Broadcasting Act*, may make a single reproduction of a fixation or reproduction made by a programming undertaking and communicate it to the public by telecommunication, within the period referred to in subsection (4), if the broadcasting undertaking meets the conditions set out in subsection (1) and is part of a prescribed network that includes the programming undertaking.

 (10) The reproduction and communication to the public by telecommunication must be made

(*a*) in accordance with subsections (2) to (6); and

(*b*) within thirty days after the day on which the programming undertaking made the fixation or reproduction.

 (11) In this section, “programming undertaking” means

(*a*) a programming undertaking as defined in subsection 2(1) of the *Broadcasting Act*;

(*b*) a programming undertaking described in paragraph (*a*) that originates programs within a network, as defined in subsection 2(1) of the *Broadcasting Act*; or

(*c*) a distribution undertaking as defined in subsection 2(1) of the *Broadcasting Act*, in respect of the programs that it originates.

The undertaking must hold a broadcasting licence issued by the Canadian Radio-television and Telecommunications Commission under the *Broadcasting Act*.

 **30.9** (1) It is not an infringement of copyright for a broadcasting undertaking to reproduce in accordance with this section a sound recording, or a performer’s performance or work that is embodied in a sound recording, solely for the purpose of transferring it to a format appropriate for broadcasting, if the undertaking

(*a*) owns the copy of the sound recording, performer’s performance or work and that copy is authorized by the owner of the copyright;

(*b*) is authorized to communicate the sound recording, performer’s performance or work to the public by telecommunication;

(*c*) makes the reproduction itself, for its own broadcasts;

(*d*) does not synchronize the reproduction with all or part of another recording, performer’s performance or work; and

(*e*) does not cause the reproduction to be used in an advertisement intended to sell or promote, as the case may be, a product, service, cause or institution.

 (2) The broadcasting undertaking must record the dates of the making and destruction of all reproductions and any other prescribed information about the reproduction, and keep the record current.

 (3) The broadcasting undertaking must make the record referred to in subsection (2) available to owners of copyright in the sound recordings, performer’s performances or works, or their representatives, within twenty-four hours after receiving a request.

 (4) The broadcasting undertaking must destroy the reproduction when it no longer possesses the sound recording or performer’s performance or work embodied in the sound recording, or at the latest within thirty days after making the reproduction, unless the copyright owner authorizes the reproduction to be retained.

 (5) If the copyright owner authorizes the reproduction to be retained, the broadcasting undertaking must pay any applicable royalty.

 (6) This section does not apply if a licence is available from a collective society to reproduce the sound recording, performer’s performance or work.

 (7) In this section, “broadcasting undertaking” means a broadcasting undertaking as defined in subsection 2(1) of the *Broadcasting Act* that holds a broadcasting licence issued by the Canadian Radio-television and Telecommunications Commission under that Act.

 **66.51** The Board may, on application, make an interim decision.

 **66.6** (1) The Board may, with the approval of the Governor in Council, make regulations governing

(*a*) the practice and procedure in respect of the Board’s hearings, including the number of members of the Board that constitutes a quorum;

 **70.2** (1) Where a collective society and any person not otherwise authorized to do an act mentioned in section 3, 15, 18 or 21, as the case may be, in respect of the works, sound recordings or communication signals included in the collective society’s repertoire are unable to agree on the royalties to be paid for the right to do the act or on their related terms and conditions, either of them or a representative of either may, after giving notice to the other, apply to the Board to fix the royalties and their related terms and conditions.

 (2) The Board may fix the royalties and their related terms and conditions in respect of a licence during such period of not less than one year as the Board may specify and, as soon as practicable after rendering its decision, the Board shall send a copy thereof, together with the reasons therefor, to the collective society and the person concerned or that person’s representative.

 *Appeal allowed with costs,* Abella *and* Karakatsanis JJ. *dissenting.*

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1. This case pertains to the Board’s power to fix royalties under s. 70.2 of the *Copyright Act*. The considerations a court might take into account in assessing monetary remedies for infringement is left to be decided if and when such a case arises. [↑](#footnote-ref-1)
2. During the hearing before this Court, counsel for the interveners the Centre for Intellectual Property Policy and Ariel Katz briefly raised concerns regarding the Board’s power to issue retroactively binding decisions in general. That issue was not squarely before this Court in this case, and I do not purport to decide broader questions concerning the legitimacy of or limits on the Board’s power to issue retroactive decisions here. [↑](#footnote-ref-2)