

Interpreting Copyright Law and Internet Facts

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INTRODUCTION

This paper probes interpretation issues elicited by the impact of digital technologies and the Internet on copyright law. The purpose of the paper is to instill a coherent framework for analyzing copyright law when it encounters Internet or digital facts. In part one, I propose a methodology of statutory interpretation that helps suitably adapt statutory language to technological developments. In essence it is this: courts should examine the language of the operative provision in its statutory context and in light of its purpose. A contextual interpretation of a broadly conceived rule can reveal a legislative intention that certain kinds of activities or things are to be included, even with respect to unforeseen technologies. More importantly with respect to new technologies, courts must always be ready to recalibrate the purpose behind a rule, i.e., to rebalance the interests inherent (and in some cases external) to the rule in way that seems most reasonable all things considered.

In part two, I introduce the reader to the challenges posed by Internet technology in connection with the interpretation of copyright law. While courts tend to treat the Internet as functionally the same as other technologies in most instances and proceed to analogize the facts before them with precedent cases, this approach on its own is not particularly effective. Rather, courts must always be attuned to the purpose behind a rule to help ensure the most appropriate application. Moreover, courts need to be cognizant that the nature of the Internet presents both external and internal perspectives of the facts. When courts relate the purpose of a rule to Internet or digital facts, they need to take into account both perspectives to ensure an interpretation that appropriately balances inherent and, where applicable, affected interests.

In part three, I apply the analysis and above methodology to three cases to help illustrate my thesis. The Supreme Court of Canada's analysis of the section 2.4 safe harbour is an excellent illustration of how courts accommodate interests inherent and external to the rule in question. The MP3 case, on the other hand, presents as an example of how the Federal Court of Appeal failed to apply a purposive analysis and thus came to an unconvincing interpretive result. Perhaps most intriguingly, the Robertson case is discussed as an example of how the legal issue in dispute dictates the perspective of the facts that is adopted.

I. STATUTORY INTERPRETATION

In this part, a methodology of statutory interpretation for adapting broadly conceived language to new technological developments is presented and then illus-

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trated with reference to the *Théberge* case and section 3 rights under the *Copyright Act*.

(a) A Methodology

Canadian courts typically apply a purposive approach to interpretation, meaning that the language of the rule is to be understood in its ordinary sense principally in light of its context and purpose.¹ The starting point for statutory analysis is to attempt a tentative understanding of the language in question.² In many cases, and particularly when broad language is used, this language will give rise to either different possible meanings or at least uncertainty at the fringes as to whether an activity or thing falls under the rule.³ A purposive approach to statutory interpretation, i.e., analyzing the ordinary language of the rule in light of its context and purpose, can instill a measure of precision using techniques which may help uncover a meaning consistent with the legislative intent and purpose of the rule. What this means, in a general sense, is that reasonable inferences are being made from a reading of the statute as a whole.

Context is a reference to other language in the statute which helps to inform and shape the meaning of language in question.⁴ This language may be in the im-

¹ This approach is best captured in the Driedger principle which is often referenced by Canadian courts: “. . .the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.” See Ruth Sullivan and Elmer A. Driedger, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Vancouver: Butte-worths, 2002) [Sullivan] at 1. All of these elements are present in the methodology I propose. I include scheme and intention under what I propose for “context of the statute”. The Supreme Court has seemingly also decided to simplify the analysis along similar lines: see *Canada Trustco Mortgage Co. v. R.*, 2005 SCC 54, [2005] 2 S.C.R. 601 (S.C.C.) at para. 10, where a textual, contextual and purposive analysis is adopted.

² All approaches to statutory interpretation unite on this point. Where they diverge is in what other considerations, if any, help shape or modify initial understandings of the language.

³ With respect to the latter, H.L.A. Hart referred to this phenomenon as penumbral meaning. According to him, there are standard instances which fall within the core meaning of the rule; conversely, there are cases which are at the fringes, in which case interpreters need to determine whether that activity is sufficiently similar in material respects with the core rules to be included: see H.L.A. Hart, *The Concept of Law*, 2d ed. (Oxford: Oxford University Press, 1994) [Hart] at 126-7. Lon L. Fuller conceptualized the interpretation of statutory rules differently. He rejected the idea of standard instances but understood meaning in an abstract sense, i.e., as identifying some significance in human affairs to be regulated by the rule. The concrete manifestations of that rule are to be determined at the point of application by considering the purpose of the rule and whether a particular interpretation is consistent with practices and attitudes in society. See Lon L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 1964) at 84; Lon L. Fuller, “Positivism and Fidelity to Law — A Reply to Professor Hart” (1958) 71 Harv. L. Rev. 630 [Fuller, “Fidelity”] at 664; Lon L. Fuller, *Anatomy of the Law* (New York: Frederick A. Praeger Publishers, 1968) [Fuller, *Anatomy*] at 59.

⁴ Context, according to Driedger, is multifaceted in that it includes the literary context (the immediate context and the Act as a whole including its scheme), legal context

mediate context of the provision in question or, indeed, other sections of the statute. The ordinary meaning of the rule “no vehicles in the park” may be unclear at the fringes (does it include bicycles?) until we look at another provision in the act (the context) which states that “bicycles in the park shall stay on designated trails”. Bicycles being thus regulated, they are allowed in the park and are not intended to be included as a vehicle under the prohibition. Closely related to this is legislative intent as inferred by the Legislature’s choice of language.⁵ We may glean a general intent behind a careful examination of statutory wording. If “no guns, fireworks or similar items are allowed in the park” is the rule we may infer a legislative intent that potentially dangerous items are prohibited in the park.⁶ As well, we may infer that the Legislature has delegated to the courts the manner in which “similar items” is to be interpreted.

Purpose refers to the reason behind a rule.⁷ So, while the legislative intent of the above rule is to prevent dangerous items from entering the park, the purpose may be to protect human health and safety. Purpose is perhaps the most malleable of factors that is employed in a purposive analysis. In one sense, this is because it operates a high level of abstraction, i.e., does the purpose of protecting human

(substantive law) and external context (how the legislation works in the real world). More precisely, the immediate context consists of the provision in which the words appear, closely related provisions, as well as the entire statute as amended. The legal context refers to extant substantive law that may shed light on legislative intent, comprised of the statute book as a whole including related legislation, relevant case law, the common law and international law. External context is concerned with the “setting in which [the enacted law] currently operates.” The assumption is that legislation “is a response to circumstances in the real world and it necessarily operates within an evolving set of institutions, relationships and cultural assumptions.” See Sullivan, *supra* note 1, at 260–2. For the purposes of my proposed analysis, I would equate external context with a consideration of the purpose of (or interest balancing behind) the rule.

⁵ Legislative intent may be conceived in a specific sense, i.e., what was the specific intention of this provision or statute as revealed by the lawmakers themselves, or in a purposive sense, i.e., what mischief in general terms was the Legislature concerned with remedying? See William N. Eskridge, Philip P. Frickey and Elizabeth Garrett, *Legislation and Statutory Interpretation*, 2d ed. (New York: Foundation Press, 2006) at 221. In Canada, courts have generally eschewed specific intent, preferring to glean legislative intent objectively from the language, scheme and/or purpose of the Act. Specific intent is particularly unhelpful for new technologies which are not envisaged at the time of the creation of the rule. This will be illustrated when we look at the MP3 case below.

⁶ This is an application of the maxim *ejusdem generis*: that general wording is to be informed by the more specific wording that precedes it. Statutory maxims can be particularly effective at fleshing out legislative intent. Since the source of determining objective legislative intent is the language of the statute, I choose to combine legislative intent and context under the heading “context.”

⁷ The “object of the Act” refers to its purpose, i.e., legislation is presumed to have a discoverable purpose, which should be furthered, or at least not defeated, by a given interpretation. Purpose goes to both the Act as a whole and the specific provision. See Sullivan, *supra* note 1, at 195–8. The purpose of an Act may be stated in the preamble though, more typically, it is divined through judicial interpretation.

health and safety mean that a carving knife is a “similar item” that cannot be brought into the park? The purpose is too abstract to resolve the issue in any definite sense. In resolving this kind of case, and in the absence of a context revealing an intended meaning, courts should resolve this interpretive ambiguity by balancing the interests involved the best that it can, i.e., the interest in allowing people to use carving knives for a picnic and the safety hazard of the knife causing an accident or being used for an improper purpose.⁸ A sensible interpretation would probably calibrate the balance at allowing people to bring the knife into the park given the legitimacy of its intended use. A gun or fireworks being more dangerous than a carving knife, and carving knife having a legitimate function within the park, the purpose of health and safety would not be undermined by allowing the knife into the park. However, notice that a judgment is being made as to how an initial purpose is balanced and modified against competing considerations, i.e., the community’s enjoyment of the park; in other words, the purpose of the statute is constantly being recalibrated every time novel fact situations present themselves to courts.

The methodology I prescribe is as follows: first, courts should employ a full purposive analysis of a rule in the first instance, i.e., considering the language at issue in its context and light of its purpose. In some cases, a close reading of the statutory language will reveal inferences as to whether a kind of activity was intended to be covered by a rule or not. In many cases, this will not resolve the interpretive difficulty. Courts then must attempt to calibrate the inherent and affected interests of a rule according to a balance that seems most reasonable to them.

(b) Copyright Law

Copyright gives the author of an original expressive work, e.g., expression in a book or in a painting, the exclusive right to produce the work in another derivative form, e.g., produce the book into movie, and to make copies in both its original and derivative form(s). These rights are outlined in section 3 of the *Copyright Act*:

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

- (a) to produce, reproduce, perform or publish any translation of the work,
- (b) in the case of a dramatic work, to convert it into a novel or other non-dramatic work,
- (c) in the case of a novel or other non-dramatic work, or of an artistic work, to convert it into a dramatic work, by way of performance in public or otherwise,
- (d) in the case of a literary, dramatic or musical work, to make

⁸ Hart argued that the apparent purpose behind a rule may be modified by new interests that need to be accommodated by the rule: see Hart, *supra* note 3, at 129. Fuller advanced that the purpose of a statute is not static but through interpretation, courts engage in a process of redefining and clarifying the ends themselves: see Fuller, “Fidelity”, *supra* note 3, at 668.

any sound recording, cinematograph film or other contrivance by means of which the work may be mechanically reproduced or performed,

(e) in the case of any literary, dramatic, musical or artistic work, to reproduce, adapt and publicly present the work as a cinematographic work,

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

(g) to present at a public exhibition, for a purpose other than sale or hire, an artistic work created after June 7, 1988, other than a map, chart or plan,

(h) in the case of a computer program that can be reproduced in the ordinary course of its use, other than by a reproduction during its execution in conjunction with a machine, device or computer, to rent out the computer program, and

(i) in the case of a musical work, to rent out a sound recording in which the work is embodied,

and to authorize any such acts. [Emphasis added.]

When courts employ broad language such as “produce” or “reproduce”, as emphasized above, we may presume an intention by the Legislature for courts to develop the meaning of the provision at the point of application.⁹ This institutional delegation reflects the impossibility of prescribing in advance all specific acts or things that are intended to be captured by a rule.¹⁰ However, the discretion of the court in exercising the delegated discretion is not unfettered. Courts must look to the statute as a whole to uncover clues about legislative intention and purpose. Thus, courts can develop principled meaning from open-ended language when, as in section 3, context reveals an intention to include certain *kinds* of activities under the rule but not others. Thus when a more specific subset of production and reproduction rights are enumerated, we look to the nature of those rights to determine commonalities in an effort to uncover the intention behind the words “produce” and “reproduce.” We then compare those commonalities with the activity or thing in question to see if, in material respects, it is the same or different. As we will see later on, the context of section 3 is an indispensable guide to extracting a more

⁹ Randal N. Graham, *Statutory Interpretation: Theory and Practice* (Toronto: Emond Montgomery, 2001) at 126. See also Cameron Hutchison “Which Kraft of Statutory Interpretation: A Supreme Court of Canada Trilogy on Intellectual Property Law” (2008) 46 *Alta. L. Rev.* at 2:

Superficially, statutes are threadbare vessels of communication. They attempt to regulate complex areas of human activity with relative linguistic brevity. Rules may be vaguely worded so as to encompass, in an abstract sense, a broad range of subject matter . . . Presumptions are often employed by courts to flesh out and maximize statutory meaning . . . We may further enhance statutory meaning when we recognize that linguistic devices such as vague language represent a delegation of interpretive function from the Legislature to the judiciary.

¹⁰ Hart, *supra* note 3, at 128; Fuller “Anatomy”, *supra* note 3, at 106.

precise meaning of the right to “produce” and “reproduce.”

It is often the case that a statute will use vague language but without contextual guidance as to a more exact meaning of the provision. Thus, for example, the right to “authorize any such acts” at the end of section 3 is not more exactly informed by either the immediate context or the statute as a whole. When that happens, courts will generally be more reliant on precedent and statutory purpose. But these are inexact guides which will leave more discretion to courts as to whether the activity is included or excluded.

The purpose of the *Copyright Act* is as follows:

“The *Copyright Act* is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator (or, more accurately, to prevent someone other than the creator from appropriating whatever benefits may be generated).”¹¹

This purpose reveals a balance between incentive (or just rewards) to create and access to those creations. Courts can only interpret vague language in light of such a purpose by trying to calibrate an appropriate balance between competing interests in view of facts of the case. On occasion, interests outside the rule will also have to be considered and possibly accommodated.

I will now illustrate these elements of a purposive interpretation by considering the case of *Théberge v. Galerie d’Art*.¹² Claude Théberge, a renowned Quebec artist, brought this action for copyright infringement against subsequent assignees of a contract authorizing poster copies of his paintings. The issue in this case was whether the transfer of the poster painting from a paper to canvas substrate (something not specifically addressed in the contract) by the subsequent assignees infringed Théberge’s section 3 right to produce or reproduce the work. Significantly, the process did not involve the creation of new copies, only the transfer of ink from one substrate (paper) to another (canvas).

The majority judgment, authored by Mr. Justice Binnie, held that there was no infringement on these facts. Denying any independent right of production under the Act,¹³ the focus of the decision was on whether or not the right to reproduce was infringed. Here, the majority reasoned that the transfer to a new substrate did not constitute infringement because there was no reproduction, i.e., no new copies were made. Put simply, copyright infringement requires the act of unauthorized copying.¹⁴ Even the act of making a derivative work — say taking the artistic drawing of cartoon character and making a doll out of it — involves a reproduction or “new copies or manifestations of the work,” according to this analysis.¹⁵ The purpose of the *Copyright Act*, reproduced above, helped direct the result. Emphasizing this

¹¹ *Galerie d’art du Petit Champlain inc. c. Théberge*, 2002 SCC 34, [2002] 2 S.C.R. 336 (S.C.C.), [*Théberge*] at para. 30.

¹² *Ibid.*

¹³ *Ibid.* at para. 48.

¹⁴ *Ibid.* at para. 42.

¹⁵ *Ibid.* at para. 49. In *obiter*, Binnie comments at para. 41 that “a change in substrate could, as part of a more extensive set of changes, amount to a reproduction in a new form (perhaps, for example, if the respondent’s work were incorporated by the ink

need for balance between creator rights and user rights, the majority interpreted the right of the copyright holder narrowly. Binnie asks “[b]ut in what way has the legitimate economic interests of the copyright holder been infringed? The process began with a single poster and ended up with a single poster.”¹⁶

The interpretive dilemma confronting the court in *Théberge* is whether the act of changing the substrate of authorized poster reproductions constituted infringement of the owner’s right to *produce* or *reproduce* the work. There is no indication in these general terms whether changing the background of authorized reproductions of a work engages either right. The case challenges the court to determine the fringes of meaning associated with this bare expression of broadly conceived rights. To resolve this interpretive dilemma, Binnie interprets the language with reference to the statute’s purpose, as he conceives it. The need to balance creator rights with user rights (here, purchaser rights), in his opinion, justifies reading down the rights of a copyright holder. Specifically, the “legitimate economic interests” of the copyright holder are not impacted by the subsequent assignee’s changing of the substrate.

In my opinion, the issue in *Théberge* was whether the right to produce was engaged, i.e., a derivative work of the original was made, since no new copies were made and thus there was no reproduction of the work. In other words, did this change in substrate amount to a new production of the work? If we look at specific manifestations of that right in subparagraphs (a) to (i) of section 3, we might conclude that the right to produce is more transformative in form, or qualitatively different in the method of communication, than merely changing the substrate. For example, the production right is engaged by making translations of a work, or by converting a dramatic work into a novel or vice versa.¹⁷ In terms of mode of communication, the right involves communicating by telecommunication.¹⁸ By analogizing the facts in *Théberge* with existing rights of production which we *know* were intended to comprise a copyright holder’s bundle of rights, we extrapolate the kinds of rights that should be accorded a copyright holder according to the intent of the Legislature. The interpretive issue in *Théberge* should have been resolved through a purposive analysis, specifically with reference to the immediate context of section 3. Rather unusually in this case, the vagueness of the right in question was supplemented with specific manifestations in the statute. These examples serve as standard instance cases through which the court could have analogized whether changing the substrate of a work engaged the right to produce.

transfer method into some other artist’s original work) but the present case does not rise to that level.”

¹⁶ *Ibid.* at para. 38.

¹⁷ *Copyright Act*, R.S.C. 1985, c. C-42, ss. 3(1)(b) and (c).

¹⁸ *Ibid.* s. 3(1)(f).

II. INTERNET FACTS

At the most general level, the “Internet is a worldwide network of interconnected computers.”¹⁹ Computers are able to communicate with each other (or in the technical sense, send and receive packets of data) instantaneously by means of a common protocol in which each computer has a unique Internet address. Individuals are able to create, store, and access vast amounts of information through user-friendly software. Digitization, which has accompanied the Internet, permits the conversion and storage of mass amounts of data with relative ease. This digitized information may be easily communicated and accessed through high bandwidth distribution.²⁰ This very basic explanation of the workings of the Internet and digitization offers a small flavour of the revolutionary nature of these technologies. Through user-friendly software applications, people around the world are able to communicate and transmit information with each other for all kinds of purposes immediately and on a massive scale.

Canadian courts have responded to Internet technology by treating it as functionally the same as other “real space” technologies like TV, radio, the telephone, or a host of others.²¹ In cases where there is precedent interpreting a rule, courts tend to assume a kind of functional equivalence between the Internet and other relevant technologies and have proceeded to analogize Internet facts with real space precedent. My point in this part of the paper is to suggest that analogical reasoning on its own is an inappropriate way to correlate Internet facts with precedent interpretation of a rule. Rather, courts must be attuned to the purpose behind the rule prior to assessing whether the Internet facts are, in the relevant material respects, sufficiently similar. Moreover, new technologies, like the Internet, may affect interests that were not in play when a prior interpretation was laid down. Courts, in those circumstances, may need to interpret the rule differently so as to accommodate newly affected interests. To complicate matters more, the Internet presents interpreters with two perspectives of the facts, an internal and external perspective, and the outcome of a case often depends on which perspective is chosen or emphasized.

¹⁹ *Society of Composers, Authors & Music Publishers of Canada v. Canadian Assn. of Internet Providers* (1999), 1 C.P.R. (4th) 417 at 425 (Copyright Bd.); reversed 2002 CarswellNat 964, 2002 CarswellNat 965 (Fed. C.A.); leave to appeal allowed 2003 CarswellNat 738, 2003 CarswellNat 739 (S.C.C.); reversed 2004 CarswellNat 1919, 2004 CarswellNat 1920 (S.C.C.).

²⁰ *Ibid.*

²¹ The author is currently conducting an empirical analysis of judicial interpretation of law and the internet in the legal areas of copyright, defamation and privacy. After reviewing all internet cases in each of these areas, my general impression (which I am confident will later be substantiated when the data is analyzed) is that courts and tribunals typically do not explicitly acknowledge that the internet is different but merely treat it as any other medium. For example, see *British Columbia Automobile Assn. v. O.P.E.I.U., Local 378*, 2001 BCSC 156, [2001] 4 W.W.R. 95 (B.C. S.C.), in which the court applies copyright’s substantial takings doctrine by comparing the look of the two websites in question. As this example shows, functional equivalence is often times appropriate.

(a) Analogy

Courts often analogize precedent case law with the facts of a dispute to determine whether an activity is within or outside of a rule, but without considering the rule's purpose. This is inappropriate for any interpretive exercise. Let's return to the "no guns, fireworks, or similar items are allowed in the park" rule as applied to the carving knife. As an interpreter, I must have some conception of the purpose of the rule before I can appropriately apply it to the facts. Otherwise, I might identify certain features or attributes of guns and fireworks, such as both use gunpowder (which is flammable) and find that a carving knife is allowed but butane lighter is not. However, if I look at the purpose of the rule, and identify it to be the safety of persons in the park, then butane lighters would be permitted and carving knives would be suspect (though as I reasoned above, probably allowable).²² The purpose, in other words, alerts the interpreter to which features of the facts are relevant to the rule in question.

We must be particularly sensitive to the purpose behind the rule, together with new interests brought into play, when we confront new technologies like the Internet.²³ Internet technology, in some of its features, has no precedent. There are real differences of kind or degree which demand that courts at the very least adapt established rules.²⁴ Consider, for example, the massive scale of dissemination of

²² See Fuller "Fidelity" *supra* note 3 at 664.

²³ When courts analogize with precedent cases without considering the rule's purpose they may nonetheless reach a result consistent a purposive analysis. In *Canadian Wireless Telecommunications Assn. v. Society of Composers, Authors & Music Publishers of Canada*, 2008 FCA 6, [2008] 3 F.C.R. 539 (F.C.A.); leave to appeal refused 2008 CarswellNat 3234, 2008 CarswellNat 3235 (S.C.C.), the court compared internet transmissions to facsimile technology (as per authoritative precedent in *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339 (S.C.C.) [*CCH*], to assist in determining whether the downloading of ringtones was a communication "to the public" under s. 3(1)(f). The court noted that both technologies can be used to send information to multiple recipients, and thus ringtone downloading on the internet fits within the rule. There was no consideration of the purpose of the rule though it seems clear that to heed the argument, as presented in that case, that downloading on the internet occurs individually and in private settings and thus the posting of ringtones is not to the *public* would eviscerate the substance of the right in a way that could not be justified in view of the fact that many telecommunication technologies operate in the same way, e.g., television. In other words, there was no purposive rationale (whether it be the balancing competing interests within the rule or consideration of external interests) to suggest that the internet should be treated differently than other telecommunication technologies.

²⁴ Some of these differences include: internet communications consist of data in multiple places at once, and not in one "real space" place; bandwidth is effectively infinite compared with the physical limitations of real space; lack of proximity in cyberspace between cause and effects compared with real space; information is non exhaustible and non rivalrous as compared with physical property and places; instantaneous transmission of perfect reproductions at zero marginal cost; the ease and massive scale of transmission of information; Information can cross international borders without detection. See Cameron Hutchison, "Interpretation and the Internet" C.I.P.R. 28:2] *John Marshall Journal of Computer and Information Law* (forthcoming).

information, including copyrighted works, through the Internet as compared with antecedent technologies. This feature of Internet communication may be the basis for departing from previous interpretations on the basis of advancing the rule's purpose. One issue in the SOCAN case was whether ISPs that provide host servers to music copyright infringers may be held liable for "authorizing" copyright infringement. Precedent established that *control* over the infringer was determinative of authorization liability (which an ISP has over its customer's host server).²⁵ However, in the Internet context, the court in obiter suggested that *knowledge* of the infringing activity by the ISP may be a more appropriate trigger. A different application of the rule was applied to the Internet as a means of accommodating a material difference (the difficulty of monitoring massive amounts of information by ISPs) which implicated an external interest (low cost Internet services). Both manifestations of this authorization rule are nonetheless consistent with the purpose: to establish liability of third parties who are indifferent to infringement when it is reasonably within their means to do something about it.

Courts which are not sensitive to the purpose of a rule and the differences of kind and degree inherent to the Internet run the risk of misapplying the rule to the Internet activity in question by either straying from the original purpose of the rule or not considering newly affected interests implicated by the technology.

(b) Perspective

Given the number of "layers" to Internet technology, it is possible that Internet activity may be conceptualized in a myriad of ways resulting in different perspectives on the facts. In an important work, Orin Kerr described the legal significance of this phenomenon.²⁶ According to Kerr, we can only apply the law once we are apprised of the Internet facts, and these facts really depend on whether an external or internal perspective is taken. The external perspective looks at the Internet in a technical sense, i.e., as a physical network and "we apply law to the Internet by applying the law to the electronic transactions underlying the network's operation."²⁷ The internal perspective, on the other hand, views the Internet as "window to a virtual world that is roughly analogous to the physical world of real space."²⁸ Thus, we try to "map the physical world of real space onto the virtual world of

²⁵ The Supreme Court analyzed this right in two 2004 cases — *CCH*, *supra* note 23, and *SOCAN v. Canadian Association of Internet Providers*, *infra* note 34. In both cases, authorize was defined as "sanction, approve and countenance." Also, both cases emphasized that this right will not be infringed by merely offering the use of technology, without more, that will facilitate infringement. There is a presumption, in other words, that "a person who authorizes an activity does so only so far as it is in accordance with the law" (*CCH* at para. 38). But the similarity between the holdings in the two cases ends there. In *CCH*, the trigger for authorization was whether there was control between the infringer and putative authorizer, e.g., an employment relationship. In *SOCAN*, authorization turned on whether an ISP has knowledge of the infringing activity but chooses to do nothing about it.

²⁶ Orin S. Kerr, "The Problem of Perspective in Internet Law" (2003) 91 *Geo. L.J.* 357.

²⁷ *Ibid.* at 361.

²⁸ *Ibid.* at 359-60.

cyberspace.”²⁹ Kerr provides the vivid example of the MP3.com case.³⁰ In this case, the external perspective instructs that the copying of music files onto servers and to computers as a space shift for consumers who had already purchased the CD, would be viewed as copyright infringement, i.e., technically a new copy of the copyrighted work is made. However, the fact that the music had already been purchased may, through an internal perspective, be more suggestive of a legitimate, non-infringing activity.³¹ Kerr further suggests that legal doctrine may (though not always) indicate which perspective interpreters should be attuned to.

However, Brett Frischmann argues that courts should resist adopting a *choice* of perspective; rather, each perspective of the Internet facts should be considered, otherwise courts may only appreciate “a partial view of the underlying facts.”³² When that happens, misleading analogies with real space may emerge which mask other legal issues that would be revealed under a fuller and robust appreciation of the facts. Frischmann thus prescribes the following methodology:

First, we should recognize both perspectives provide valid and accurate renditions of the underlying facts; second, we must carefully examine the set of interests at stake in a given dispute; and third, we must engage in a principled application of relevant legal doctrines designed to address such interests.³³

Frischmann’s argument has intuitive appeal. Why adopt either perspective exclusively and risk ignoring interests that emerge from a holistic appreciation of the facts? Such interests may need to be accommodated under the interpretation of a rule.

The *Copyright Act* typically describes rights in broad language which does not suggest a particular perspective. However, a purposive analysis favours an appreciation of all interests affected by a rule and thus Frischmann is probably right that we should not limit ourselves to one perspective or the other. As we will see in the next section, the best interpretations consider both perspectives. When a legal question forces a court to adopt a particular perspective, however, it usually has a deter-

²⁹ *Ibid.* at 361.

³⁰ As Kerr notes at 378-79:

In 2000, MP3.com began offering Internet users a service that allowed them to access their compact disc (CD) collections from anywhere in the world via the Internet. To enjoy the service, users needed to register and establish that they owned a particular collection of CDs . . . Registered users could then log on to mymp3.com and request specific songs . . . The owners of MP3.com provided this service by buying tens of thousands of copyrighted compact discs, and then copying them onto MP3.com’s servers. Whenever a registered user would request a particular song, MP3.com’s servers would run off a copy of the song from their servers and distribute it directly to the user over the Internet.

³¹ *Supra*, note 26, at 379.

³² Brett M. Frischmann, “The Prospect of Reconciling Internet and Cyberspace” (2003) 35 *Loy. U. Chicago L.J.* 20 at 207.

³³ *Ibid.* at 208.

minative impact on the outcome of a dispute.

III. APPLICATION

In this final section, I apply the analysis and methodology presented above to three prominent copyright law cases. The SOCAN case is exemplary of the methodology of interpretation of both law and Internet facts argued above. By contrast, the Federal Court of Canada's interpretive approach in the MP3 case runs contrary to a purposive analysis. Finally, the Robertson case is presented as an example of how the legal issue in dispute directs the court to adopt one perspective of the Internet facts of the Internet facts or the other, and how this perspective determines the outcome of the case.

(a) SOCAN

In *Society of Composers, Authors & Music Publishers of Canada v. Canadian Assn. of Internet Providers*,³⁴ the performing rights collective society proposed a tariff on Internet service providers (ISP) in connection with infringing music downloads on the Internet. One of the issues was whether ISPs are entitled to the safe harbour of s. 2.4(1)(b) when they engage in caching, i.e., copying downloaded files onto ISP servers as a means of lowering cost and enhancing the speed of the Internet.³⁵ Section 2.4(1)(b) protects a person against s. 3(1)(f) infringement when their "only act" is to provide "the means of telecommunication necessary for another person to communicate the work [to the public] . . ." The argument by SOCAN was the practice of creating cache copies undertaken by ISPs was not absolutely "necessary" to facilitate Internet communication and thus took this ISP function outside of the safe harbour.

The Supreme Court of Canada held that the safe harbour is not a narrow exception but should be read, like other limitations on rights under the *Copyright Act*, as "an important element of the balance struck by the statutory copyright scheme."³⁶ Accordingly, "necessary" in this provision is defined broadly as a means of telecommunication "reasonably useful and proper to achieve the benefits of enhanced economy and efficiency."³⁷ Were a more stringent definition of necessary applied, according to the court, advances in telecommunication would be inhibited as the argument could always be made that old technology could have been used to achieve the same ends.³⁸ The practice of caching is thus held to be "necessary", falling within the safe harbour at least where the ISP is acting as a content

³⁴ 2004 SCC 45, [2004] 2 S.C.R. 427 (S.C.C.).

³⁵ *Ibid.* at para. 23.

³⁶ *Ibid.* at para. 89. The Supreme Court begins its interpretive analysis with a statement of the purpose of the *Copyright Act* as per *Théberge*. At para. 40, the court finds that the Internet promotes these purposes, in that the "capacity of the Internet to disseminate 'works of the arts and intellect' is one of the great innovations of the information age. Its use should be facilitated rather than discouraged, but should not be done unfairly at the expense of those who created the works of art and intellect in the first place."

³⁷ *Ibid.* at para. 91.

³⁸ *Ibid.* at para. 113.

neutral “conduit”:³⁹

In the Board’s view, the means “necessary” under s. 2.4(1)(b) were means that were content neutral and were necessary to maximize the economy and cost-effectiveness of the Internet “conduit”. That interpretation, it seems to me, best promotes “the public interest in the encouragement and dissemination of works of the arts and intellect” . . . without depriving copyright owners of their legitimate entitlement. The creation of a “cache” copy, after all, is a serendipitous consequence of improvements in Internet technology, is content neutral, and in light of s. 2.4(1)(b) of the Act ought not to have any *legal bearing* on the communication between the content provider and the end user.⁴⁰

There are a number of revealing observations that must be made about this interpretation. First, the rule in question invites an external perspective of the facts, i.e., what are the “means . . . necessary?” The court however is not concerned only with a technical appreciation of the Internet but as Frischmann argues should be the case, takes stock of the Internet facts holistically. Indeed, one of those facts is a consideration of the functional nature of the transaction suggestive of an internal perspective, i.e., why should caching have any *legal bearing* on the *communication between content provider and end user*? More pressing is whether the interest of Internet economy and efficiency can and should be accommodated through the language of the rule and the purpose that rule serves. In the court’s judgment, this is a compelling interest extrinsic to purposes of copyright protection that needs to be accommodated under the rule’s interpretation, if possible.

Second, the language of the provision is broad enough to accommodate this interest since, as the Federal Court of Appeal acknowledged, there are two interpretations of the word “necessary” in this context: indispensable on the one hand, and reasonably useful on the other.⁴¹ There is nothing in the context of the Act to point to either interpretation and thus the court can exercise its judgment to accommodate the important interest of low cost, efficient Internet services provided it is not too disruptive to the balance of interests underlying copyright. Thus, and thirdly, the question becomes whether the interests behind the rule can accommodate the Internet interest in way that strikes an appropriate balance. The court finds that it can,

³⁹ That is, the ISP lacks actual knowledge of the infringing contents and can not, in the normal course of affairs, be expected to know given the technical and financial infeasibility of monitoring the prodigious amount of material moving on the internet: *ibid.* at para. 101.

⁴⁰ *Ibid.* at para. 115.

⁴¹ See *Society of Composers, Authors & Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2002 FCA 166, [2002] 4 F.C. 3, ¶128 (Fed. C.A.); leave to appeal allowed 2003 CarswellNat 738, 2003 CarswellNat 739 (S.C.C.); reversed 2004 CarswellNat 1919, 2004 CarswellNat 1920 (S.C.C.): The interpretive ambiguity in this case concerns the word “necessary.” The Federal Court of Appeal rightly noted that the word “necessary” may mean either (a) that which is “indispensable” or “essential” or (b) “reasonably useful” or “of greater or lesser benefit or consequence.” Mr. Justice Evans ruled that there was nothing in the context of the provision, including policy considerations, which suggested a meaning consistent with the second and less familiar definition: see para. 132.

and calibrates the rule by not imposing liability under the safe harbour on these facts (thus heeding the interests of promoting dissemination of copyrighted works, and Internet economy and efficiency) but with the important caveat that the activity must be content neutral (a limitation favouring copyright holders). In effect, then, the court interprets this case in a manner consistent with the methodology advanced in this paper: a purposive analysis of the law together with a holistic appreciation of the Internet facts.

(b) The MP3 Case

In *Canadian Private Copying Collective v. Canadian Storage Media Alliance*⁴², the Federal Court of Appeal was faced with determining the legality of imposing a collective administration levy on MP3 players. Section 79 of the *Copyright Act* was the operative provision:

“audio recording medium” means a recording medium, regardless of the material form, onto which a sound recording may be reproduced and that is of a kind ordinarily used by individual consumers for that purpose, excluding any prescribed kind of recording medium

A levy is imposed on a “blank audio recording medium” under this part of the Act as a means of compensating copyright holders for private copies of audio recordings made by consumers.⁴³ The apparent purpose of this regime is to provide a means of compensating rights holders given the widespread social practice of private copying of recorded music.

The interpretive difficulty in this case was the identification of what constituted the “medium” of an MP3 player: was it the embedded memory onto which the music was recorded or was it the MP3 player as a whole (i.e., what the court calls the “device”)? The distinction is important because the former is not “ordinarily used” for recording music since embedded memory on a MP3 player is indistinguishable from memory on a computer’s hard drive; the latter, on the other hand, is ordinarily used for recording music. The Copyright Board approved a levy for MP3 players.⁴⁴ The reasoning of the Board was that, notwithstanding that embedded memory in an MP3 player may be indistinguishable from memory on a computer’s hard drive, the intrinsic character of the device constituted an “audio recording medium” that is ordinarily used for private copying⁴⁵ Further, the language of s. 79, i.e., “regardless of material form”, was of overriding importance such that the

⁴² 2004 FCA 424, 247 D.L.R. (4th) 193 (F.C.A.); leave to appeal refused 2005 CarswellNat 2075, 2005 CarswellNat 2076 (S.C.C.); leave to appeal refused 2005 CarswellNat 2077, 2005 CarswellNat 2078 (S.C.C.).

⁴³ The act of reproducing an audio recording onto an “audio recording medium for private use” does not constitute infringement: see s. 80. The levy on blank audio recording medium is distributed to certain copyright holders: see s. 81.

⁴⁴ However, it rejected a levy on recordable or rewritable DVDs, removable memory cards and removable micro hard drives since these were not “ordinarily used” to copy music.

⁴⁵ *Private Copying 2003-2004, Tariff of Levies to be Collected by CPCC, Re* (2003), 28 C.P.R. (4th) 417, ¶155 (Copyright Bd.).

levy should apply to the medium regardless of its incorporation into a device.⁴⁶

At the Federal Court of Appeal, s. 79 was analyzed in two separate parts: whether the device was (1) ordinarily used and (2) the relevance of the medium's physical attributes, i.e., whether incorporation of computer hard drive within a device affects its status as an audio recording medium. The focus was on the second component. The argument of the Appellant was that the embedded memory into the device loses its "separate identity" as an audio recording medium. The Federal Court of Appeal held that it was incorrect to treat the context of the audio recording medium as the defining characteristic of whether it fits within the s. 79 definition. "The Board cannot establish a levy and determine its applicable rates by reference to the device and yet assert that the levy is being applied to something else."⁴⁷ The levy, according to the Federal Court of Appeal, is to be applied to the "audio recording medium" which the memory does not become until it is incorporated into the device. At the point of being embedded into the device, it no longer remains a medium.⁴⁸ Moreover, the court looked to the legislative history of the provision and determined that Parliament's intention was to apply the levy to media and not the hardware that plays the media.⁴⁹

The holding of the Federal Court of Appeal is not convincing from a purposive statutory analysis perspective. First, the language chosen by Parliament is exceedingly broad. In the context in which the word "medium" appears, its connotation seems to be "material or technical means of artistic expression" or "something . . . onto which information may be stored."⁵⁰ In addition, "regardless of its material form" expands the ambit of potential subject matter even further. In the same way that courts have interpreted similar language in section 3 to mean the *Copyright Act* is media neutral, this choice of language indicates an intention that the word "medium" is to evolve in meaning.⁵¹ Thus, we must presume an intention that Parliament wished to extend the levy to new media, as it develops, which is ordinarily used for making private copies of audio recordings. The purpose of compensating right holders for the widespread social practice of private copying confirms a meaning which captures both known and unforeseen targets (i.e., new tech-

⁴⁶ *Ibid.* at para. 130-1: "A medium that is incorporated into a device remains a medium."

⁴⁷ *Ibid.* at para. 152.

⁴⁸ *Ibid.* at para. 155.

⁴⁹ The Federal Court of Appeal looks at the legislative history and finds that the section was aimed at blank audio tapes and not at the hardware that played the music (tape recorders). In other words, Parliament specifically intended to limit the levy to the blank medium, not the hardware: *ibid.* at para. 158. As such, the MP3 player is not a medium to which s. 79 applied. If MP3 players are to be caught by the levy, this was for Parliament to decide, according to the Court: para. 164.

⁵⁰ *Merriam Websters Online Dictionary*, s.v. "medium", online: <<http://www.merriam-webster.com/dictionary/medium>>. See also *Oxford English Dictionary Online*, s.v. "medium", online: <http://www.askoxford.com:80/concise_oed/medium>: 1 a means by which something is expressed, communicated, or achieved. 2 a substance through which a force or other influence is transmitted. 3 a form of storage for computer software, such as magnetic tape or disks.

⁵¹ See e.g., *Robertson* (SCC), *infra* note 53, at para. 49.

nologies) under the levy. Moreover, there is no reason to treat MP3 players differently, i.e., there is no compelling interest to accommodate through a different interpretation in connection with the new technology. The levy would function the same way, in many respects, as it did for compact disks and cassettes.

Finally, a word must be said about looking to the legislative history of this provision. The Federal Court of Appeal seems convinced by the fact that, since the levy was not targeted to hardware, then it cannot apply to the MP3 “device.” The specific intent of the Legislature to capture certain known technologies at the time of the rule’s drafting is not communicated through the dynamic language of s. 79, and should therefore be of little relevance to the interpretation of a provision which seems to contemplate unforeseen technologies. The question courts need to ask themselves in such situations is whether the new technology fits within the conceptual content and purpose of the provision; and in respect of the latter, whether newly affected interests need to be accommodated in the interpretation. The inclusion of the MP3 player under the private copying levy, which is functionally equivalent to compact disks and cassettes, is consistent with the language and purpose of the private copy levy regime.

(c) **Robertson v. Thomson Corp.**

In this case, a freelance journalist sold articles to the *Globe and Mail* without license or assignment in respect of the electronic rights.⁵² The *Globe* subsequently published the articles in its print and online daily editions of the newspaper. The legal controversy arose when the *Globe* also included the article in other digital formats such as CD-ROMs and online Internet databases for which it charged fee for service. The legal issue became whether conversion and reproduction of the article (together with other news of the day) into these digital and electronic formats involved the copyright of the freelance author, on the one hand, or the newspaper as a collective work, on the other.⁵³ The former characterization would expose the *Globe* to copyright infringement while the latter would merely be an exercise of its legal rights in the collective work. At all three levels of judicial decision, the outcome boiled down to the choice of perspective taken by the court.

One perspective is to view the digital uploading of each day’s paper edition into the electronic archive as the act of reproducing the collective work. According to this “input” perspective, the article itself is the same as the one that appears in the newsprint version and identifies the *Globe* as its source, including the date of

⁵² One article was an excerpt from a book she had written for which her publisher authorized “one time usage” in exchange for a fee. The other article was purchased by oral contract. Electronic rights were not addressed in either contract: see *Robertson v. Thomson Corp.* (2001), 15 C.P.R. (4th) 147 (Ont. S.C.J.) [*Robertson*] at paras. 17-18, affirmed 2004 CarswellOnt 4015 (Ont. C.A.); leave to appeal allowed 2005 CarswellOnt 1501, 2005 CarswellOnt 1502 (S.C.C.); reversed 2006 SCC 43, 2006 CarswellOnt 6182, 2006 CarswellOnt 6183 (S.C.C.).

⁵³ A copyright subsists in a newspaper as a collective work when there is originality (skill and judgment) exercised in the selection or arrangement of the work: see s. 2 of the *Robertson v. Thomson Corp.*, 2006 SCC 43, 274 D.L.R. (4th) 138 (S.C.C.) [*Robertson*] at para. 37.

publication, the page number and the headline. More significantly, the article is “mechanically derived from a digitalized version of the deconstructed given edition of the newspaper.”⁵⁴ The skill and judgment of the collective work is maintained in the digitized form of the newspaper as it is inputted in to the electronic archive. The article is retrieved from this digitized version and appears as a stand-alone piece, though this is really a convenience of the technology (i.e., the search function) that does not go to the nature of the work. The underlying work remains a collective work. In other words, the argument is that a substantial part of the daily newspaper, as a collective work, is inputted into the databases; moreover, information identifying it as such is entered for display to the user. The ability to view individual articles is a mere incident of technology, and should not serve to distinguish that which is an individual work from that which is a collective work since to do so, would violate the principle of media neutrality in section 3.

The competing “output” perspective is that determining which work is reproduced — the individual article or the collective work as a whole — turns on which is actually displayed to the reader through the digitalized technology. Where enough of the context of the newspaper can be displayed to the user, according to the Court of Appeal and Supreme Court of Canada majority judgments, then it is the collective work that is qualitatively being reproduced.⁵⁵ However, when most of the context of individual article is removed, e.g., only the name of the paper, the date and page number are displayed with the article, then the collective work is not maintained. The majority Supreme Court judgment held that “[w]e cannot avoid comparing the original collective work with the finished collective work when determining whether there has been a reproduction.”⁵⁶ Specifically, enough of the context of the collective work must be displayed as an output to the viewer to maintain the collective work nature of the newspaper. A CD-ROM that presents daily newspapers that can be viewed separately and, when viewing a particular article, displays other articles from that day’s edition in a column to the side, preserves enough of the collective work context.⁵⁷

This case illustrates very well the competing perspective of facts that can emerge when Internet and digital technologies are applied to copyright law. What is missing is a discussion about the context of section 3 rights under the Act, other than the red herring of media neutrality as raised by the dissenting appellate justices.⁵⁸ On first impression, one might correlate the “input” perspective with production rights under section 3 as creating a new format or medium of a work in the

⁵⁴ *Robertson* (Ont. S.C.J.), *supra* note 52, at para. 113.

⁵⁵ See e.g., *Robertson v. Thomson Corp.* (2004), 34 C.P.R. (4th) 161, 72 O.R. (3d) 481, ¶67 (Ont. C.A.); leave to appeal allowed 2005 CarswellOnt 1501, 2005 CarswellOnt 1502 (S.C.C.); reversed 2006 CarswellOnt 6182, 2006 CarswellOnt 6183 (S.C.C.)

⁵⁶ *Robertson* (SCC), *supra* note 53, at para. 46.

⁵⁷ *Ibid.* at para. 52.

⁵⁸ The majority Supreme Court judgment is quite right: “Media neutrality means that the *Copyright Act* should continue to apply to different media, including more technologically advanced ones.” See *ibid.*, at para. 49. In other words, no one disputes that digitalized productions and reproductions give rise to rights under the *Act*. The question is who owns those rights. Media neutrality does not help us answer this question.

first instance.⁵⁹ Consider, for example section 3(1)(b) which specifies a right to “convert” a dramatic work into a novel or other non-dramatic work.⁶⁰ However, the right to convert as a right to produce, which might suggest the very act of digitizing information, is ultimately ambiguous in its meaning since the right presumes an end product. In other words, the right to convert a play to a novel is a useless right unless a play is ultimately produced and performed to an audience; analogically, the produced play is like the display of the digitized newspaper to the database user — the output perspective very much matters. The context of section 3 is ultimately unhelpful as to which perspective of the facts or combination of facts resolves the interpretive ambiguity.

The interpretive exercise must then turn to striking the appropriate balance of interests. While the dispute is between copyright holders, the outcome arguably has an impact on access to and dissemination of copyrighted works. Abella, for example, was explicit in identifying the public interest in access to archives as furthering dissemination of works of copyright in support of her dissenting judgment.⁶¹ Equally, however, one could argue that the financial plight of freelance journalists augurs for an interpretation favouring their interests so that they are afforded greater opportunities for a viable living thus furthering the incentive to create. As with many judgments which turn on a consideration of the rule’s purpose, it is possible to come to opposite though equally compelling interpretive results.

One probably should not presume that courts will always take an output-based perspective of the facts in similar cases. If a rogue database company were to copy *Globe* online editions (for argument’s sake, let’s say the *Globe* has purchased the electronic rights of all freelance authors) without permission and sell digitized versions of it, would a court seriously find that the *Globe* is without remedy since only decontextualized versions of the articles are presented to readers? In those circumstances, we can be relatively certain that a court would find this to be copyright infringement though the “losing” input perspective in *Robertson* would have to be adopted to achieve this result.

CONCLUSION

This paper has presented an appropriate methodology for adapting the conceptual content of broadly conceived statutory rules to the advent of new technologies. It is incumbent on interpreters of such rules to evolve meaning to embrace new developments provided it is consistent with the conceptual content of the language, a discernible legislative intent (as objectively determined from the context of the statute), and the apparent purpose behind the law. But it is not just about interpreting the law. New technologies present unique features, and even perspectives, that must be identified and correlated to the meaning of rules as determined by this methodology. Interpreters must be mindful of questions such as, what is the purpose of this rule and are there features of the new technology that justify a deviation from precedent interpretations? Does this new technology involve compelling

⁵⁹ Following *Théberge*, it seems there is no separate meaning for production rights and thus each court analyzes the case in connection with reproduction rights are involved.

⁶⁰ Similarly, see s. 3(1)(c).

⁶¹ *Robertson* (SCC), *supra* note 53, at para. 69 ff.

new interests that must be accommodated into the meaning of the rule? Notwithstanding the dynamic nature of the methodology proposed in this paper, there are of course limits to evolving meaning. So, for example, while a purpose of a rule can be modified to accommodate new interests, it should not be fundamentally changed nor should there be a disruptive unbalancing of the inherent interests to the rule. Also, broad language has conceptual content that can only be stretched so far. It is possible that a purpose or intent may support extending the application of a rule to a new technology though the language of the provision cannot support the interpretation. In such cases, interpreters should not exceed the conceptual content of the language used.