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Copyright decisions will grow the market

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Counterpoint: Copyright decisions will grow the market

Streamlining the rules is no free ride for users

The Supreme Court of Canada's copyright quintet — five landmark decisions released together last week — has been criticized as giving a free ride to tech companies and users of copyrighted materials. The reality is that the decisions will help grow the market for online content by streamlining copyright clearance, simplifying royalty structures, reducing legal fees and transaction costs, boosting digital sales and making the Canadian marketplace for digital content more competitive.

The education case that *Financial Post* editor Terence Corcoran calls an assault on copyright will drive innovation in classrooms across the country by providing necessary breathing room for teachers and students to deal fairly with copyright-protected materials. Schools will probably continue a trend that predates this decision by shifting away from collective blanket licences. But, where copying goes beyond validated fair dealings, institutions will instead choose market-oriented solutions like custom database subscriptions and direct licences on various terms from authors or publishers.

In fact, the court found no evidence that teachers' photocopying in schools is responsible for an alleged decline in textbook sales. And there is simply no reason to believe that the court's decision will make fewer books available in Canada; this system has worked reasonably well in the United States for decades.

The Supreme Court's ruling, in a separate case, that previews of songs offered for sale by online music services are also fair dealings is consistent with its decision about education. By also setting a low threshold to reach the important question of whether a dealing is really "fair" or not, the court has moved considerably closer to the flexible U.S. doctrine of "fair use" credited for much technological innovation and commercial success south of the border. Until now, Canadian businesses faced legal barriers to innovation that do not exist in the U.S.

Another of the basic issues was whether a distributor of digital content — in this particular case video games including music — should pay any more or less than someone who sells copies in bricks and mortar shops or delivers copies by courier. The Copyright Board and Federal Court of Appeal had held that online distribution requires two payments: one to make the copy, and one to transmit it. The Supreme Court has wisely set matters straight with a technologically neutral treatment of sales online and off, reducing duplication and inefficiencies.

Music creators, like textbook publishers, aren't entirely stranded by the Supreme Court rulings. In the case concerning online music services, the court distinguished downloading from streaming. Downloads — the

digital equivalent of record store sales — will still be paid for, but under a tariff scheme covering the reproduction of musical works. Online streams are more like conventional radio or television broadcasts, so conventional performance royalties will still flow for such activities.

Similar market efficiencies result from the case about music in movies: Copyright payments will be made, but up front, when the soundtrack is produced, not every time the movie is shown in theatres, on television or elsewhere. So residual royalties will continue to be negotiated by contracts, not collectives.

By streamlining the copyright environment, the decisions should help legitimate music sellers compete with illegal file-sharing platforms. Existing foreign services might finally be enticed to do business in Canada, and new commercial services might even emerge.

These decisions may be a short-term blow to the collective intermediaries representing authors and publishers of books and music, whose revenue will be significantly reduced. But the central thrust of the court's copyright quintet is not free access to books or music.

Rather, the Supreme Court has wisely recognized two essential points. First, that copyright cannot function without the flexibility to deal fairly with protected works in a wide variety of circumstances, especially but not only where no market harms are proven. And second, that a streamlined and consistent licensing framework is best to create a competitive digital market for music, movies, video games and other protected content.

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Jeremy de Beer, associate professor at the University of Ottawa, acted as co-counsel in all five cases for the intervenor, the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic (CIPPIC).