COPYRIGHT LAW, DIGITAL TECHNOLOGY AND THE FUTURE OF ENTERTAINMENT

By

Angelene J. Galway

A thesis submitted in conformity with the requirement for the degree of Master of Laws

Graduate Department of the Faculty of Law

University of Toronto

Your file Votre référence
ISBN: 0-494-02509-3
Our file Notre référence
ISBN: 0-494-02509-3

COPYRIGHT LAW, DIGITAL TECHNOLOGY AND THE FUTURE OF ENTERTAINMENT

By

Angelene J. Galway

Admitted to Practice Law in Ontario, Canada

Master of Laws (LL.M.)
Faculty of Law, University of Toronto
2005

ABSTRACT

Evolutions in file sharing technologies and the Internet are transforming the way that entertainment content is delivered and used by consumers. The traditional control that the entertainment industry was able to exert over content is being usurped as music and movies become increasingly digitized and freely and instantaneously accessible around the globe. Once content is made available in this way, it can be reproduced with perfect fidelity, thereby undermining the exclusive rights to which creators and owners of such content are entitled pursuant to copyright laws. This thesis will critically examine the legality of downloading unauthorized entertainment content over the Internet. This thesis concludes by recommending a compulsory licensing scheme with a "sunset" provision that not only compensates rights holders, but also encourages the use and further development of various technologies, including Digital Rights Management and Peer-to-Peer file sharing systems.

ACKNOWLEDGMENTS

First, I would like to thank my mother, Joan Galway, for her immeasurable love and continued support of me. I am forever indebted to my sister, Laurie Galway, and I thank her for being an excellent role model, a brilliant lawyer, and for her generous spirit.

I would like to thank Rajen Akalu, Director of the Bell University Laboratories, and the Centre for Innovation Law and Policy for granting me a Fellowship to pursue the Master of Laws degree at the University of Toronto. I thank Professor Richard Owens, Director of the Centre for Innovation Law and Policy, for his cogent comments and invaluable supervision of this thesis. I would also like to acknowledge Kaye Joachim, David Dyzenhaus and Julia Hall for their tireless efforts and contributions to the LL.M. program.

As for my experience as an LL.M. student, I wish to thank each and every student in the graduate class for adding a new and treasured piece to the kaleidoscope that is my life. In particular, I would like to thank Kirk Haywood, Barbara Bressolles and Cindy Belanger for their invaluable friendship and collegiality.

Finally, I wish to thank all of my friends and family for their support throughout my various endeavors, academic and otherwise.

TABLE OF CONTENTS

I. Introduction

> *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 this should not be done unfairly at the expense of the creator of the works.*[1]
>
> ~Binnie, J.

Copyright law has been instrumental to the "development, growth and exploitation of the artistic and entertainment products which enrich our lives."[2] The digital copyright dilemma, as articulated above by Justice Binnie in June 2004, reflects both the challenges and new opportunities for copyright law brought about by the Internet. The copyright dilemma refers to the balancing of the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator.[3]

While there is a considerable amount of hyperbole surrounding the role and relevance of copyright law in the digital era, the copyright dilemma to which Justice Binnie refers is not new to the digital era. His formulation of the dilemma echoes the sentiments expressed by Lord Mansfield in 1785:

> [W]e must take care to guard against two extremes equally prejudicial; the one, that men of ability, who have employed their time for the service of the community, may not be deprived of their just merits, and the reward of their ingenuity and labour; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded.[4]

---

[1] *Society of Composers, Authors and Music Publishers of Canada* v. *Canadian Association of Internet Providers*, [2004] SCC 45.

[2] Industry Canada, *Copyright Infringement on the Internet*, Introduction at Section 1, online: http://strategis.ic.gc.ca/epic/internet/insmt-gst.nsf/en/sf03315e.html (last modified: December 22, 2004).

[3] *CCH Canadian Ltd.* v. *Law Society of Upper Canada*, [2004] SCC 12 at para. 23.

[4] *Sayre* v. *Moore* (1785), 1 East. 361n, 102 E.R. 139.

Currently, amid rampant unauthorized uploading and downloading of copyrighted content made possible by technology, the ongoing clash between the public and intellectual property rights holders, notably the music industry and film industries, over the future of intellectual property in the digital era is intensifying. Traditional business models are being challenged and content owners are now grappling with how best to respond to the challenges posed by technologies that usurp the entertainment industry's ability to control the distribution of content.

Copyright law has had a long-standing relationship with technology, from its statutory creation in response to the invention of the printing press, to the present legal wrangling over peer-to-peer (P2P) file sharing.[5] Online distribution of entertainment content is now a significant part of the digital landscape, and this thesis will argue that the technology that enables file sharing, and the platforms for the delivery of copyrighted works over the Internet, ought not to be discouraged. Rather, this thesis argues that creative schemes to fairly compensate copyright holders ought to be developed that will ensure the survival of the entertainment industries alongside the evolution of technology.

The film and music industries are important both culturally and economically, and they subsist on the basis of copyright protections afforded to artistic works. Issues relating to unauthorized copying of entertainment content are pressing given the economic value of

[5] P. Goldstein, *Copyright's Highway: From Gutenberg to the Celestial Jukebox* (Stanford, California: Stanford University Press, 2003) at 28.

copyright. Indeed, the economic contribution of the copyright-based industries[6] is becoming increasingly important, and the value of these copyright-based industries is significant to Canada's gross domestic product (GDP).[7] Copyright-based industries had a 6.5% growth rate in 2002 while agriculture had a –3.4% growth rate.[8] As to the value of the Canadian music industry in particular, Prime Minister Martin recently acknowledged that "...the Canadian music industry is the second most important music industry in the world...It's an important part of our sovereignty and an important part of our economy."[9]

Starting from the principle that artists and rights holders ought to be fairly compensated for their works, it will be necessary to either apportion liability for unauthorized downloading of music and film over the Internet, or otherwise compensate rights holders for their product.[10] This thesis will address Canadian copyright law as it applies to liability for infringement as a result of content transmission on the Internet. The protection of copyrighted works from

---

[6] Canadian Heritage, *The Economic Contribution of Copyright Industries to the Canadian Economy*, online: http://www.pch.gc.ca/progs/ac-ca/progs/pda-cpb/pubs/economic_contribution/tdm_e.cfm (last modified: December 22, 2004). Copyright-based industries, according to the World Intellectual Property Organization (WIPO), are industries that are engaged in the creation, production and manufacturing, performance, broadcast, communication and exhibition, or distribution and sales of works and other protected subject matter. WIPO also recognizes that economic impact can be related to both "core" copyright-based industries (i.e., those that produce goods that are copyright protected) and "non-core" copyright-based industries (i.e., those that support or are inter-related to core copyright-based industries). See: http://www.pch.gc.ca/progs/ac-ca/progs/pda-cpb/pubs/economic_contribution/tdm_e.cfm (last modified: December 22, 2004).

[7] *Ibid.*

[8] *Ibid.* Core copyright-based industries grew from a valueof $19,598 million dollars in 1991 to $39,561 million in 2002. When non-core industries are added, the totals become $26,987 million in 1991 and $53,408 million in 2002. Please see *Supra*, note 6.

[9] *Canadian PM Backs Music Industry*, online: P2Pnet.Net News http://p2pnet.net/story/1140 (last modified: September 9, 2004).

[10] While an examination of all of the issues implicated by Internet downloading is beyond the scope of this thesis, it is important to point out that the areas of law and policy implicated by unauthorized digital copying are broad. As highlighted by United States Senate Judiciary Chairman Orrin Hatch, downloading music from the Internet is more than an issue of protecting a recording company's catalogue of songs. Also at stake are fair compensation for artists, privacy rights of users of intellectual property, competition and security for copyrighted materials. Please see: M. Mosquera, *Post Napster: Technology Will Tell the Tale*, Internet Week, April 3, 2001, online: http://www.internetweek.com/story/INW2001403S0009 (last modified: December 14, 2004).

unauthorized copying is not a new issue, and Canada has laws prohibiting and penalizing infringement of copyright, as well as a legislative scheme to compensate rights holders for copying, at least for musical works. However, thus far in Canada, the law is unsettled in respect of the legality of downloading copyrighted works over the Internet.

Content owners need to know the extent to which their works will be protected on the Internet, either by legal mechanisms to combat infringement, fair remuneration for the use of their works on the Internet, or by effective technical protection measures and digital rights management systems. Protection is by way of copyright infringement liability, which liability can potentially fall on many players, the most important of which include: (i) downloaders and uploaders of copyrighted content without authorization from the content owners; (ii) Peer-to-Peer (P2P) file sharing network operators and software providers; and/or (iii) the Internet Service Providers (ISPs) that provide access to the Internet. This thesis will analyze the legality of downloading unauthorized works over the Internet and discuss which of the above groups, if any, is best situated to bear the legal and financial burden for unauthorized copyrighted content disseminated over the Internet.

In Part II of this thesis, the background to the digital era and emerging technologies will be discussed, along with the parallels that can be drawn from experience with prior technologies. A brief overview of the music and film industries will be provided in Part III in order to establish the context of the legal issues. Part IV will examine the framework for copyright protection and the rights held by copyright owners, with a particular emphasis on rights that are relevant in the context of the transmission over the Internet of copyrighted

music and film. Part V will critically examine the private copying regime, which was designed to deal with analog reproduction technology, and its relevance and applicability to digital downloading. In view of the conclusion reached in this thesis that the private copying regime is ill-equipped to compensate rights owners for unauthorized downloading of their copyrighted works, Part VI will address the potential liability of individual downloaders and P2P file sharing networks, while Part VII will examine the potential liability of ISPs.

Part VIII of this thesis will examine the ways in which the music and film industries have sought to protect their works from unauthorized copying through the use of technological measures to protect their works from unauthorized copying. Potential solutions for the entertainment industry, including legalizing downloading through voluntary and compulsory licensing schemes will be examined in Part IX. This thesis concludes in Part X by recommending a compulsory licensing scheme with a "sunset" provision that not only compensates rights holders for their works, but also encourages the use and further development of various technologies, including digital rights management (DRM) and P2P file sharing systems.

II. The Digital Era and the Challenge of Content Protection

> *Indeed, to content owners the Internet may sometimes appear as a 'global copying machine' with millions of irresponsible and anonymous pirates pushing the buttons, making the problems of copyright enforcement mind-boggling.*[11]

A. Piracy and the Internet

Piracy is generally defined as the unauthorized reproduction of near identical copies of copyrighted works for financial gain. When piracy occurs, the copyright owner is deprived of the benefits accruing from the property that they have created.[12] Specifically, piracy results in a direct loss in revenue to the artist and/or the right holder,[13] and indirectly deprives countries of economic gain.[14] A similar result may occur if unauthorized copies are not made for financial gain.

Prior to the advent of the Internet as a platform for delivery of content, a number of solutions were devised to combat piracy and unauthorized copying, including civil and criminal penalties. However, given the advancement in Internet file sharing technologies and the global nature of copying, it has become difficult if not impossible to hold copiers legally accountable. Indeed, the Internet as we know it has come a long way since the development of its predecessor, the ARPAnet, which started out in 1969 as a decentralized

---

[11] P. Bernt Hugenholtz, ed., *Copyright and Electronic Commerce: Legal Aspects of Electronic Copyright Management* (London: Kluwer Law International, 2000) at 1.
[12] George S. Takach, *Computer Law* (Toronto: Irwin Law, 1998) at 139.
[13] T. B. Cohen, *Anti-Circumvention: Has Technology's Child Turned Against Its Mother?*, (2003) 36 Vand. J. Transnat'l L. 961 at 965.
[14] *Ibid.* at 966.

network of only four computers.[15] In 2005, the Internet will have an estimated 1 billion users around the globe.[16] The relatively small size of MP3s, which use a compression system that decreases the size of a song to a manageable common format, and the ease and speed with which people can copy digital music with perfect fidelity copy after copy is a major problem for the entertainment industry. At present, it takes approximately fourteen seconds to download an average MP3 song file from the Internet using a high-bandwidth connection, as compared to ten minutes or longer on a 56k modem connection for the same file.[17] Broadband Internet access and the development and evolution of increasingly popular P2P sharing networks have posed challenges for those seeking to protect copyrighted content.

In 1995, only one in ten Canadians had Internet access at home. Two years later the number of such users increased to one in four, or seven to eight million Canadians.[19] As of September 2004, more than twenty million Canadians had Internet access, which represents an Internet penetration of 64.2%.[20] Moreover, Canada has one of the world's largest percentage of high-speed Internet users, second only to Korea.[21] In 1999, 14% of Canadians

---

[15] The ARPAnet, which was created by the US Department of Defense's Advanced Research Project Administration, was created as an information-sharing network capable of withstanding a Soviet nuclear attack. Please see : A. Staiman, *Shielding Internet Users From Undesirable Content: The Advantages of PICS Based Rating System*", 20 Fordham Int'l L.J. 866.

[16] R. Hurst, *How Many People Use the Internet? What Do They Use it For?,* online: http://www.bcentral.co.uk/issues/marketing/ebusiness/howmany.mspx (last modified: December 21, 2004).

[17] L. Thomason, *Music May Drown Out Your Message*, March 2004, online: NetMechanic http://www.netmechanic.com/news/vol7/design_no5.htm (last modified: May 3, 2004).

[18] L. Thomason, *Music May Drown Out Your Message*, March 2004, online: NetMechanic http://www.netmechanic.com/news/vol7/design_no5.htm (last modified: May 3, 2004).

[19] Industry Canada, *Retailing on the Internet: A* Guide, online: Retail Interactive http://retailinteractive.ca/SSI/ri/Sctn31_e.pdf. (last modified: August 13, 2004).

[20] According to the survey, 20,450,000 Canadians had Internet access as of September 1, 2004. The Internet penetration is based on an estimated Canadian population of 31,846,900 for the year 2004. Please see: *Internet World Stats: Usage and Populations Statistics*, online: http://www.internetworldstats.com/top20.htm (last modified: December 14, 2004).

[21] K. Belson, *America's Broadband Dream is Alive in Korea* (New York: The New York Times, May 5, 2003).

had high-speed Internet access at home, as compared to 52% at the end of 2003, which has been forecasted to increase to 59% by the end of 2004.[22]

Given the ubiquitous nature of the Internet, rights owners are losing control over their content in a way that was not possible in the world that confined unauthorized copying to hard copy reproductions. "Digital technology is detaching information from the physical plane", cautioned artist John Perry Barlow, "where property law of all sorts has always found definition."[23] This conundrum presents a number of unanswered questions, as posed by Barlow:

> If our property can be infinitely reproduced and instantaneously distributed all over the planet without cost, without our knowledge, without its even leaving our possession, how can we protect it? How are we going to get paid for the work we do with our minds? And, if we can't get paid, what will assure the continued creation and distribution of such work?

At present, the most popular type of files being shared on P2P networks is music.[24] On a global basis, CacheLogic, a UK firm that monitors traffic over networks, recently estimated that approximately three billion songs and five million movies are shared over the Internet on a daily basis.[25] Between July 2001 and June 2002, Canadians downloaded approximately

---

[22] CyberTRENDS Report, Winter 2004, online: http://www.comquest.ca/CyberTRENDS_Winter_2004.pdf at 31 (last modified: September 14, 2004).

[23] J. Barlow, *The Economy of Ideas: A framework for patents and copyrights in the Digital Age. (Everything you know about intellectual property is wrong.).* Wired Magazine, Issue 2.03 (March 1994), online: http://www.wired.com/wired/archive/2.03/economy.ideas.html (last modified: December 21, 2004).

[24] L. Rich, *Hollywood Prepares to Fight File-Swappers, The Industry Standard* (January 9, 2001).

[25] Reuters, *Study Finds Downloading From the Internet Doubled*, July 13, 2004; Reuters, *Video, File-sharing Thrives as Net Users Find New Outlets.* Abstracted by MusicBusinessCanada, *Global File Sharing Increasing But Video Downloads More Popular Than Music*, July 13, 2004, online: http://www.cirpa.ca/mbccore.cfm?Page=News&NewsID=531&mark=Newsid&value=531 (last modified: August 13, 2004).

1.1 billion tracks of recorded music, of which only 3% were authorized.[26] A recent study conducted by POLLARA Inc. and commissioned by CRIA found that nearly 180 million tracks are downloaded by Canadians per month from file-sharing networks.[27] The Motion Picture Association of American (MPAA) estimates that 350,000-400,000 films are illegally swapped on the Internet each day.[28]

Such downloading arguably affects the ability of record and film companies to recoup on their investments, which in turn, affects the livelihoods of the original artists and their investment of time, labour and skills.[29] While CRIA reports that the music industry in Canada has suffered to the tune of $465 million in retail sales losses since 1999, statistics on the effect that downloading from file sharing networks has on the music industry vary widely.[30]

Notwithstanding the wide discrepancies in losses attributable to the music industry, rights holders ought to be compensated for the use of their works, as provided in the federal *Copyright Act.*[31] Moreover, it appears that the Internet has created at least an attitudinal change towards copyright given the large numbers of unauthorized copyrighted music files

---

[26] *Submission of the Canadian Private Copying Collective with respect to Supporting Culture and Innovation: Report on the Provisions and Operation of the Copyright Act,* filed with the House of Commons Standing Committee on Canadian Heritage, September 15, 2003 at 1.

[27] Canadian Recording Industry Association, *New Industry Study Shows Downloading and Burning Discourages Music Sales*, July 6, 2004, online: http://cria.ca/news/cria_06jul04.htm (last modified: September 10, 2004).

[28] M. Graser, *Coming DVD Recorders will Speed Copying. Variety* (December 8-14, 2003) at 21.

[29] T. Black, *Intellectual Property in the Digital Era.* (London: Sweet & Maxwell, 2002) at 60.

[30] CRIA, *supra* note 27While it is beyond the scope of this thesis to analyze and compare the economic data, one recent study in the United States recently concluded that the effect of music downloads on record sales was statistically indistinguishable from zero. Please see: F. Oberholzer-Gee and K. Strump, *The Effect of File Sharing on Record Sales An Empirical Analysis* (March 2004), online: http://www.p2pnet.net/zero/FileSharing_March2004.pdf (last modified: September 30, 2004).

[31] R.S.C. 1985, s. C-42 ("Copyright Act").

being downloaded from the Internet, which one commentator referred to as the "hacker mentality and entitlement philosophy".[32]

B. Technological Inventions and Copyright

> *Since the birth of copyright, every age has seen the emergence of a new medium of expression or technology that has led people to express the fear or concern that it defined the boundaries of existing doctrines or that a new candidate for protection was so strikingly different that it required separate legal treatment. These apprehensions were voiced about photography, motion pictures, sound recordings, radio, television, photocopying and various modes of telecommunication. In each instance, the copyright system has managed over time to incorporate the new medium of expression into the existing framework.*[33]

There are advantages to online distribution, including the ability to deal directly with an individual consumer, lower distribution costs, and the opportunity for some artists to gain increased exposure to audiences. However, there are also great threats to the owners of the copyright in such works and to the authors whose moral rights to the integrity of their works and of authorship may be ignored.[34] In the context of other inventions mentioned above, the apprehension of the entertainment industry towards the Internet is not surprising. Indeed, such anxiety was suffered by literary publishers as far back as 1455, when they were outraged at the prospect of people being able to use the Gutenberg press to copy books and manuscripts without an author's permission.

---

[32] M. Garlick, *Pricing Recorded Music in an Online World.* Gilbert & Tobin July 11, 2000, online: thestandard.com http://www.thestandard.com/article/display/0,1151,21262,00.html (last modified: January 5, 2004).
[33] Miller, *Copyright Protection for Computer Programs, Databases and Computer-Generated Works*, 106 Harv. L. Rev. 977 (1993), at p. 982.
[34] Infringement of moral rights is addressed in ss.28.1 and 28.2 of the *Copyright Act.*

As noted by Elizabeth Atwood Gailey, "new technologies breathe new value into old content".[35] As discovered in the analog era, rights holders and software developers in the digital age are beginning to realize that content can be put to new and sometimes profitable uses. One need not look further than the recent history of the media to support this notion. The popularity of television in the 1950's and 1960's breathed new life into existing cinematographic works.

Perhaps the most striking example is that of the film industry, which at first vehemently resisted the production of video recorder (VCR) machines in the 1980s and only later realized the potential for the sale of films in video format.[36] Indeed, the VCR created an additional medium of exploitation for copyright works and therefore profit for the film and television industry. Similarly, the Internet has the capacity to breathe new life into copyright works that can be downloaded for a fee or other remuneration to the rights holders. However, as cautioned by Ruth Towse, in a report entitled *Assessing the Economic Impacts of Copyright Reform on Performers and Producers of Sound Recordings in Canada*, "[i]t is a well-attested fact in the economics of innovation that the adoption of new inventions is frequently not achieved by incumbents in the industry and it is newcomers who demonstrate wider uses."[37]

---

[35] E. Atwood Gailey, *Who Own Digital Rights? Communications and the Law*, March 1996, Vol. 18, no. 1, p. 13. Cited in P. Bernt Hugenholtz & Annemique M.E. de Kroon, online: http://www.ivir.nl/publications/hugenholtz/e-rights.html#note1 (last modified: December 17, 2004).

36 In respect of a 1982 study on the economic impact on copyright owners of home recording of their works, Dr. Fenton Hay noted that "[r]ecent advances in technology in a number of areas...and home recording equipment have raised questions regarding the ability of copyright protection to adequately protect the interests of copyright owners." See J. Keon, *Audio and Video Home Taping: Impact of Copyright Payments.* Policy Research, Analysis and Liaison Directorate, Policy Coordination Bureau, Consumer and Corporate Affairs Canada, 1982. Forward written by Dr. Fenton Hay, Director, Policy Research, Analysis and Liaison Directorate.

[37] R. Towse, *Assessing the Economic Impacts of Copyright Reform on Performers and Producers of Sound Recordings in Canada* (this report was commissioned by Industry Canada in 2003), online: Industry Canada http://strategis.ic.gc.ca/epic/internet/inippd-dppi.nsf/en/ip01112e.html (last modified: September 9, 2004).

III. The Film and Music Industries

A. The Music Industry

Thinking of music in terms of a product may at first seem unsettling, if not culturally crass. And there are those who believe that people should make music solely for the love of making music and not for profits. That sounds great in the abstract, but we must turn to the process of making music and the costs and players involved in the industry. In addition to the cost of equipment and the time and talent expended by musicians and songwriters, recording engineers, producers, agents, lawyers and a multitude of others are involved in the process of creating music and making it available for an audience. Music has spawned a meaningful industry that matters not only to music lovers, but also to the thousands of Canadians who depend on the industry for their livelihood.

The Internet has transformed the music industry from a commodity market based most recently on the physical compact disk, or 'CD', as the platform of delivery, to a service market based on the intangible download. The current popular modes of digital musical distribution include promotional websites, webcasting, authorized and unauthorized electronic musical sites, and of course the popular unauthorized P2P file sharing sites such as KaZaA. MP3.com is an example of the so-called "music service provider" (MSP) business model. At first MP3.com relied on website advertising, then it expanded its reach to

subscription services, retail music revenues, syndicated radio advertising revenues, music licensing, and music-related merchandise.[38]

In Canada, the downloading of unauthorized music appears to be rampant. The Canadian band the Tragically Hip recently learned what impact unauthorized downloading can have on the bottom line for artists. During a five week period from March 30 to May 7, 2004, Universal Music reported that there were 2.8 million attempts to illegally download that group's recordings, 500,000 of which were aimed at their new single, "Vaccination Scar". However, during that same period, it is reported that fewer than 1,000 copies were purchased online.[39]

To date, the Canadian music industry's efforts have included a public relations campaign aiming to raise the awareness of the value of music, and a battle in the courts. The first prong has taken aim at the younger generation and has included instant messages directed at unauthorized downloaders. While the public awareness campaign continues, the recording industry has, following the lead of its American counterpart, the Recording Industry Association of America (RIAA), also taken its fight to the courts. Additional measures have involved distribution of music through authorized music sites, such as "puretracks.com", "archambaultzik.ca", and "napster.ca".

---

[38] E. de Fontenay, *The Digital Economy: How Digital Goods are Reshaping the Rules of Commerce* (2000), online: MusicDish Industry e-Journal. Online: http://www.musicdish.com/mag/index.php3?id=2259 (last modified: December 2, 2003).

[39] Canadian Recording Industry Association, *More than Half a Million Illegal Download Attempts on New Tragically Hip Single*, May 12, 2004, online: http://cria.ca/news/cria_12may04b.htm (last modified: August 13, 2004). It should be noted that this data is not exhaustive and did not reflect how many CDs were purchased during that same time, or in the period following the online downloads.

B. The Film Industry

Major studios have established a life cycle for feature films that allows them to exploit their rights in a film at staged intervals utilizing different distribution channels and territories. The business model employed by the major studios makes them particularly vulnerable to piracy and unauthorized copying of their films given the current method of staging the release of films to maximize profits. In Canada and the United States, feature films are typically exploited by distributors in some or all of the following media, with the Internet currently in last position:

1. Domestic theatrical exhibition (in the United States and Canada);
2. foreign theatrical distribution (throughout the rest of the world);
3. video cassette, DVD and other video devices, such as laser disks, throughout the world;
4. exhibition on television in the United States and Canada, including, generally in the following order, pay (or "non-standard") television, network ("standard") television, and the television syndication market;
5. exhibition on pay television, network television, and individual television stations throughout the rest of the world; and
6. other non-theatrical exhibition such as airlines, CD-ROM, Internet, novelization and comic books. [40]

In 2003, major studios MGM, Paramount, Sony, Warner Brothers and Universal established an online movie rental service offering customers with broadband connections the opportunity to download movies for a fee per movie. Microsoft and Real Media provide the encoding for those films as well as digital rights management systems to protect the

[40] Excerpted with modifications from D. Zitzerman and A. Reinstein, *General Introduction to Film and Television*, Chapter 2 in Jacqueline J.L. King (ed.), *Entertainment Law in Canada* (Markham, Ontario, 2003).

content.[41] Although there are a limited number of Internet film sites, the Internet is a new medium of non-theatrical exhibition and appears to be the least significant at this time.

In terms of the timing of films being released using the Internet as a medium of distribution, this is expected to change given the increasing penetration of broadband access and the expected evolution of compression technologies. It is predicted that the increasing bandwidth and improvements in file compression technologies will provide a new stream of revenue for the movie industry. The challenge of course is not to lose control of the content in the process. Technology must be deployed that will satisfy customers' desires to find, acquire, playback and share movies online, while at the same time satisfying the film industry's need for secure content and, business models that work.[42]

---

[41] N. Fitzpatrick and S. Levene, *The Little Picture Show: Online Movie Distribution* (2003), online: http://www.google.ca/search?q=cache:C3j8kO23130J:www.dentonwildesapte.com/assets/1/11797.pdf+Fitzpatrick+Levene+The+Little+Picture+Show:+Online+Movie+Distribution+&hl=en (last modified: September 12, 2004).

[42] D. Steinberg, *The Near Future of Digital Rights Management* (October, 2003), online: http://www.macdevcenter.com/pub/a/mac/2002/10/03/drm.html (last modified: September 9, 2004).

IV. Copyright Law and the Internet in Canada

Striking the correct balance between access and incentives is the central problem in copyright law.[43]

A. Purpose of Copyright Law

According to the government report *Supporting Culture and Innovation: Report on the Provisions and Operation of the Copyright Act*, the *Copyright Act* is viewed as the foundation for creative endeavour as it allows traditional cultural industries, such as music and film to grow and thrive. The stated cultural policy objective of the *Copyright Act* is to ensure adequate protection for creators of cultural content and appropriate access for all Canadians to works that enhance the cultural experience. [44] One of the main challenges of the *Copyright Act* is ensuring that the appropriate balance is achieved with respect to promoting the public interest and rewarding the creators of intellectual works. In modernizing the *Copyright Act*, policy makers have therefore sought to meet both cultural and economic policy objectives.[45]

B. What is Copyright?

In Canada, copyright is protected solely by the *Copyright Act*, which was enacted in 1921.[46] The *Copyright Act* vests a bundle of rights in the owners and authors of original creative "works". The *Copyright Act* defines four types of copyright works: literary, dramatic, musical and artistic. [47] Every type of "work" is included within one or more of those categories,

---

[43] W. Landes and R. Posner, *An Economic Analysis of Copyright Law* (1989) 18 J. Legal Stu. 325, at 326.
[44] *Submission of the Canadian Private Copying Collective with respect to Supporting Culture and Innovation: Report on the Provisions and Operation of the Copyright Act,* filed with the House of Commons Standing Committee on Canadian Heritage, September 15, 2003 at Preface, online: http://strategis.ic.gc.ca/epic/internet/incrp-prda.nsf/en/rp00864e.html (last modified: December 22, 2004).
[45] *Ibid.*
[46] D. Vaver, *Intellectual Property Law* (Toronto: Irwin Law, 1997) at 21.
[47] See also: *Canadian Admiral Corporation Ltd.* v. *Rediffusion, Inc.* (1954), 20 C.P.R. 75 (Ex. Ct.).

although certain subcategories such as architectural works and cinematographs also exist. A holder of copyright, which can be the creator or anyone to whom the creator has transferred this right, can exploit and profit from the work as set out in the *Copyright Act*, or stop others from doing so without its consent or licence.[48]

C. Exclusive Rights

In the context of the Internet, the most relevant exclusive rights provided in Section 3 of the *Copyright Act* are the sole right to: (i) produce or reproduce the work; (ii) perform it in public; (iii) publish it; (iv) communicate it to the public by telecommunication; and (v) authorize any of these acts.[49] In Canada, pursuant to Subsection 14.1 of the *Copyright Act*, the author of a work is also entitled to certain moral rights, including the right to the integrity of the work and the right to be associated with the work as its author under his/her true name or a pseudonym, or alternatively the right to remain anonymous.

(i) Authorizing

Copyright owners have both the sole right to do the acts enumerated in Subsection 3(1) and the sole right to authorize the doing of these acts by others.[50] This matters in the context of the Internet because copyright infringements may be committed using physical equipment owned by others. The case law in Canada holds invariably that where equipment is used by a third party to infringe copyright, the owner of the equipment does not infringe so long as such an owner has no control over the manner in which the primary infringer uses the

[48] D. Vaver, *Canada's Intellectual Property Framework: A Comparative Overview*, (2004) 17 IPJ125 at 147.
[49] Other rights are provided in Section 3(1) of the *Copyright Act*, including the exclusive rights of adaptation, translation, conversion and rental.
[50] *Copyright Act*, s.3(1).

equipment. Indeed, the Supreme Court of Canada has held that merely providing the means of infringement is not the same as authorizing it, any more than someone selling a gun thereby authorizes a buyer to hunt without a licence or commit a crime.[51]

Although the *Copyright Act* does not define what it means to authorize, the Supreme Court of Canada has recently held that in order to 'authorize', a person must sanction, approve or countenance something more than the mere use of equipment that might possibly be used to infringe copyright.[52] This 'something more than mere use' need not go so far as to grant or purport to grant a right, but it may be sufficient to establish that a person has sanctioned, approved or countenanced an infringing activity if it is shown that certain relationships existed between the alleged authorizer and the actual infringer.[53]

The Canadian concept of authorization is different from the American concept of contributory infringement, which is broader in scope. The narrowness of the concept of authorization is of great importance in the Internet environment since much of the infringement which occurs on the Internet will occur as a result of users giving commands which result in reproductions or communication of copyright works to the public through the use of equipment provided by others. Since it is clear that such equipment can be used, and is in fact used, for non-infringing purposes, in many cases the owner of such equipment may not be liable for the infringement. This is important because P2P file sharing services

---

[51] *Muzak Corp.* v. *C.A.P.A.C.*, [1953] 2 S.C.R. 182 at 189.
[52] CCH *supra* note 3 at para. 30.
[53] *Ibid.*

that predominantly facilitate the file exchange of copyrighted music and film for free may avoid liability for copyright infringement.

(ii) Communication to the Public

The sole right to communicate a work to the public by telecommunication, as provided in Subsection 3(1)(f) of the *Copyright Act*, is not infringed when the person whose sole act in respect of that communication is providing the means of telecommunication necessary for another person to so communicate that work. As defined in Section 2 of the *Copyright Act*, telecommunication covers transmission by "wire, radio, visual, optical or other electromagnetic system". This exception is important in the digital environment given that Internet Service Providers provide at a minimum the means of transmission for copyrighted music and film content.

(iii) Collective Administration of Exclusive Rights

Collective administration of copyright is now extensive in Canada, particularly for music performance rights, reprography rights and mechanical reproduction rights.[54] There are several music collectives, including the Society of Composers Authors and Music Publishers of Canada (SOCAN), the Society for Reproduction Rights of Authors, Composers and Publishers in Canada (SODRAC), and the Neighbouring Rights Collective of Canada (NRCC).

---

[54] Copyright Board Canada, *Copyright Collective Societies*, online: http://www.cb-cda.gc.ca/societies/index-e.html (last modified: September 13, 2004).

SOCAN administers the performing and communication rights of its members, including performing rights in musical works on behalf of Canadian composers, authors and publishers as well as affiliated societies representing foreign composers, authors and publishers.[55] Pursuant to Section 2 of the *Copyright Act*, SOCAN is recognized as a collective society and it administers in Canada the world repertoire of copyright protected music. SODRAC is a reproduction rights society, and as such it grants authorizations for the recording and reproduction on any format of its members' works.[56]

The communication and performing rights of performers and makers of sound recordings are administered by the Neighbouring Rights Collective of Canada (NRCC). Most musicians assign their rights in their communication and performing rights to collective societies given the complexity and impracticality of monitoring and licensing their music domestically and in foreign jurisdictions.

(iv) User Rights

In practice, the notion of user rights becomes relevant only once the copyright holder has established a *prima facie* case of infringement, such as the copying or public performance of the whole or substantial part of the copyright holder's work.[57] In Canada, user rights are framed as exceptions to a copyright holder's exclusive rights. Unlike the United States, however, the list of exemptions is not open-ended. Some exceptions to copyright are in the

---

[55] Society of Composers Authors and Music Publishers of Canada, *About SOCAN: Who We Serve*, online: http://www.socan.ca/jsp/en/about/who_we_serve.jsp (last modified: August 3, 2004).
[56] Society for Reproduction Rights of Authors, Composers and Publishers in Canada, *Copyright: What You Need to Know*, online: http://www.sodrac.com/anglais/droit_auteur.html (last modified: September 9, 2004).
[57] D. Vaver, *Canada's Intellectual Property Framework: A Comparative Overview*, (2004) 17 IPJ125 at 149.

form of equitable remuneration resulting from the awareness that certain kinds of copying cannot be stopped, as will be discussed in respect of the private copying regime in Canada in Part V of this thesis.

D. Copyright Infringement

(i) Direct Infringement

Pursuant to Subsection 27(1) of the *Copyright Act*, the infringement of the above-noted exclusive rights gives rise to direct infringement. Liability for direct infringement does not require knowledge of the fact that an infringement is occurring.[58] The *Copyright Act* provides that direct infringement may arise either by a person doing any of the acts which fall within the exclusive rights of the copyright owner, or by a person authorizing someone else to do one of these things. It should be noted that an infringing act could involve the infringement of more than one of the exclusive rights of the copyright owner.[59]

Historically, infringement of copyright for making copies of a work was an infringement of the copyright holder's exclusive reproduction right. However, the transmission of copyright works over the Internet implicates additional rights.

---

[58] Innocent intention affords no defence and ignorance of the existence of copyright is no excuse for infringement. Copyright being a proprietary right, it does not avail the defendant to plead motive or intent.

[59] However, the *Copyright Act* does specify certain exclusions, which prevent some of these potential multiple infringement scenarios. For example, the *Copyright Act* specifies that the communication of a work to the public by telecommunication is neither a performance in public, nor the authorization of a performance in public of the work.

(ii) Indirect Infringement

In addition to direct infringement, the *Copyright Act* also contains provisions addressing the indirect infringement of copyright. Indirect infringement cannot be authorized by a third party since the acts which constitute indirect infringement are not within the list of those acts to which the copyright owner has an exclusive right.

The legal test for indirect infringement requires knowledge on the part of the infringer that the work infringes copyright, or would infringe copyright if copies had been made within Canada. Prohibited activities include the distribution of copyright material for the purpose of trade or to such an extent as to affect prejudicially the owner of the copyright, and the exhibition of a work in public by way of trade.[60]

E. Copyright Protection for Music and Film

> *The reproduction right is the rock on which the copyright system is built, enabling as it does right [sic] owners to authorize or prohibit the making of copies of their works.*[61]

After literary publishing, music was one of the first of the cultural industries to be afforded protection through copyright law. According to Ken Thompson, former Vice President and General Counsel of CRIA, the exclusive rights of reproduction and publication in sound recordings constitute the fundamental economic rights that underlie the continuing growth of the recording industry in Canada.[62]

---

[60] *Copyright Act*, ss. 27.2(b) and 27.2(c), respectively.
61 G. Davies, *Private Copying of Sound and Audio-Visual Recordings.* (Oxford: ESC Publishing Limited, 1984) at 21.
[62] G. Ken Thompson, *Phase 2 to Phase 3.* (Toronto: Insight Conference, June 24-25, 1997) at 2.

(i) Rights Provided By Statute

Copyright subsists in musical works and sound recordings, and also protects "any cinematograph", which includes "any work expressed by any process analogous to cinematography".[63] In the *Copyright Act*, Section 2 provides that "musical work" means any work of music or musical composition, with or without words, and includes any compilation thereof. A "sound recording" means a recording, fixed in any material form, consisting of sounds, whether or not a performance of a work, but excludes any sound track of a cinematographic work where it accompanies the cinematographic work.

In general, the author, which refers to the originator or creator of a work, is the first owner of the copyright. However, it is common practice for an author to assign or transfer some or all of his or her rights in a work to a record label or film company in exchange for a record or film deal.[64] The copyright holder of a sound recording has the sole right to publish it for the first time, reproduce it in any material form, and rent it out. A single song may be protected by various sections of the *Copyright Act* and may have many rights holders. Thus, the unauthorized copying of a song recording can potentially infringe several copyrights and cause damages in terms of revenue to various parties. For example, the lyrics of a song are protected by Subsection 3(1) of the *Copyright Act* as a "literary" work, which vests in the owner the right to "produce, reproduce, perform or publish any translation of the work",[65]

---

[63] *Copyright Act*, s.2.
[64] Typically, artists assign all of their rights in their music to the recording label, which then exploits the work and pays the artist a royalty based on units sold.
[65] *Copyright Act*, s.3(1)(a).

and the right "to communicate the work to the public by telecommunication".[66] The sound recording itself is protected separately under the *Copyright Act*.[67]

F. Globalization of Copyright Law and Canada's Process of Copyright Reform

The global nature of copyright and the recognition that the protections afforded thereby could be infringed in more than one country are evidenced by adoption of the first international treaty addressing copyright in 1886, the *Berne Convention for the Protection of Literary and Artistic Works*.[68] Over 100 years later, in order to address the challenges that have emerged as a result of the new digital technologies, the Diplomatic Conference on Certain Copyright and Neighbouring Rights Questions adopted the World Intellectual Property Organization (WIPO) *Copyright Treaty* (WCT) and the WIPO *Performances and Phonograms Treaty* (WPPT)[69] on December 20, 1996. These treaties represented the first international efforts to address the challenges in the digital era, by setting out, among other things, to create a new exclusive right in favour of copyright owners, including sound recording producers and performers, to make their works available online to the public, and to prevent the circumvention of copyright protections.[70]

---

[66] *Copyright Act*, 3(1)(f).

[67] *Copyright Act*, s.3(1)(d).

[68] The *Berne Convention for the Protection of Literary and Artistic Works* defined the minimum standards of protection with respect to copyright, and is premised on the following three principles: (1) works that originate in one of the contracting states must be provided the same protection in other contracting states as the former grants to the works of its own citizens; (2) this protection must not be conditional upon compliance with any formality; and (3) this protection is separate from the existence of protection in the country of origin of the work. Please see: *Berne Convention for the Protection of Literary and Artistic Works*, online: WIPO (http://www.wipo.int/treaties/ip/berne/index.html).

[69] *WIPO Performances and Phonograms Treaty*, 20 December 1996, online: WIPO (http://www.wipo.int/clea/docs/en/wo/wo034en.htm). WIPO *Copyright Treaty*, online: http://www.wipo.int/documents/en/diplconf/distrib/94dc.htm (last modified: August 14, 2004).

[70] Industry Canada & Department of Canadian Heritage, *A Framework for Copyright Reform* (Ottawa: Industry Canada, Department of Canadian Heritage, 2001) at 5.

Article 6(1) of the WCT provides for the exclusive right to make works available to the public:

> Authors of literary and artistic works shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their works through sale or other transfer of ownership.[71]

In Article 8 of the WCT, the exclusive right to permit any communication to the public through wire or wireless means, is provided as follows:

> Without prejudice to the provisions of Articles 11(1)(ii), 11*bis*(1)(i) and (ii), 11*ter*(1)(ii), 14(1)(ii) and 14*bis*(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.[72]

Perhaps the most controversial of the rights afforded by the WCT is provided at Article 11, which provides authors with effective legal remedies against the circumvention of technological measures used to protect their works from unauthorized and illegal use. Article 11 provides:

> Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.[73]

---

[71] WIPO *Copyright Treaty, supra* note 69.
[72] *Ibid.*
[73] *Ibid.*

While Canada became a signatory to both the WCT and WPPT in December 1997, it has yet to implement the treaties' provisions into domestic copyright law.[74] Indeed, Canada is required to bring the *Copyright Act* into compliance before the treaties can be ratified. Ratification is necessary to ensure that Canadian rights holders will benefit from protection in all treaty countries, and also to provide adequate protection for the dissemination of works that are made available on the Internet.

The current effort to modernize Canada's copyright laws began in the mid-1980's when the federal government sought to keep pace with international trends and emerging technologies. This first initiative culminated in 1984 with the release of a White Paper on Copyright entitled *From Gutenberg to Telidon.*[75] The subsequent reformation of the copyright system was implemented in two main phases, with Phase I ending in 1988 and Phase II ending in 1997.[76] Canada also brought the *Copyright Act* in line with commitments made under various international agreements, including the *Canada-United States Free Trade Agreement* (FTA) in 1989, the *North American Free Trade Agreement* (NAFTA) in 1995, and the World Trade Organization's (WTO) *Trade-Related Aspects of Intellectual Property Rights* (TRIPs) Agreement in 1996. The most recent amendments to the *Copyright Act* were contained in Bill C-32, *An Act to Amend the Copyright Act*, [77] and were passed by Parliament in April 1997.

---

[74] However, these treaties formed the basis of the controversial *Digital Millennium Copyright Act* (DMCA) in the United States.

[75] Consumer and Corporate Affairs Canada, *From Gutenberg to Telidon: A White Paper on Copyright* (Ottawa: Supply and Services Canada, 1984).). The goal was threefold: (i) to recognize and secure creators' rights in a communications era; (ii) to provide new opportunities for growth in the Canadian entertainment and information industries; and (iii) to strike an appropriate balance between creators' rights and users' needs, especially where market forces had not responded adequately to such rights and needs.

[76] Industry Canada and Canadian Heritage, *A Framework for Copyright Reform* (Ottawa: Industry Canada and Canadian Heritage, 2001), online: Strategis http:/strategis.ic.gc.ca/SSG/rp01101e.html (last modified: February 14, 2004).

[77] S.C. 1997, c.24.

These amendments were touted as the largest change in Canadian copyright law in over 70 years.

In respect of the Internet, the federal government first announced its intention to investigate the opportunities and challenges presented by the Internet in December 1994.[78] However, it was not until June 2001 that the Intellectual Property Policy Directorate of Industry Canada, in conjunction with the Copyright Policy Branch of the Department of Canadian Heritage, released a consultation paper on digital copyright issues to discuss the reform of Canada's *Copyright Act*.[79]

At that time, the Consultation Paper established its intention to build a strong copyright framework through regular cycles of legislative reform, while seeking to meet the following four key objectives: (i) create opportunities for Canadians in the new economy; (ii) stimulate the production of cultural content and diversity of choices for Canadians; (iii) encourage a strong Canadian presence on the Internet; and (iv) enrich learning opportunities for Canadians.[80] As highlighted in the Consultation Paper on Digital Copyright Issues, "[o]ne of the most important conclusions was the recognition that the *Copyright Act* applies in the digital environment:

> Some hold the view that all works created and stored in a digital medium should enjoy *sui generis* protection. The purpose of [recommendation 6.2] is to give assurance that such action is neither required nor appropriate...The digitization of

[78] Industry Canada, *Consultation Paper On Digital Copyright Issues*, (June 2001), online: Strategic Canada http://strategis.ic.gc.ca/epic/internet/incrp-prda.nsf/en/h_rp01102e.html (last modified: February 14, 2004).
[79] *Ibid.*
[80] *Ibid.*

> works, in itself, generally does not result in the creation of new works but constitutes the expression of copyright subject matter in a different format.[81]

The implementation of the WCT and WPPT was not considered until 2001. In June 2001, the Canadian Intellectual Property Directorate initiated consultation with stakeholders on several issues, including whether or not: (i) legislative measures are needed to deter the circumvention of technological measures that are used by rights holders to protect their rights; (ii) legislative measures are needed to deter tampering with rights management information; and (iii) legislative measures are needed to address the liability of network intermediaries in relation to copyright protected materials over digital networks.[82]

More than 600 submissions were received from interested parties during the fall of 2001, and round-table meetings were held in the spring of 2002.[83] As will be discussed in Part VII, the issue that received the most attention and received the widest range of responses was whether, and under what circumstances, the *Copyright Act* should be amended to provide sanctions against persons who use circumvention technologies to infringe copyright by defeating protective technologies, such as encryption.[84] As mandated by Section 92 of the *Copyright Act*, on June 18, 2003, the House of Commons Standing Committee on Canadian Heritage initiated its statutory review of the *Copyright Act.*

The Standing Committee on Canadian Heritage released its *Interim Report On Copyright Reform* in May of 2004, in which all of the members advocated a modernization of Canadian

[81] *Ibid.*
[82] *Ibid.*
[83] *Ibid.*
[84] *Ibid.*

copyright law and the ratification of the international agreements addressing intellectual property in the digital era that were signed by Canada in 1997.[85] While the Standing Committee's number one recommendation was that the federal government ratify the WCT and the WPPT treaties immediately, no action has been taken.[86]

In fact, Canada's approach has been slow and consultative, which has given lawmakers an opportunity to examine the problems encountered in the United States and other jurisdictions that have ratified those treaties. Some issues still need to be resolved, including whether a wholesale adoption of the protections afforded to technical protection measures is necessary and advisable in Canada given the balancing of interests that must take place. Another possible complication is with respect to the private copying regime and the increased costs associated with the adoption of those treaties, as will be discussed in Part V of this thesis.

---

[85] *Interim Report on Copyright Reform (2004)* at 12, online: http://www.parl.gc.ca/InfocomDoc/Documents/37/3/parlbus/commbus/house/reports/herirp01/herirp01-e.pdf (last modified: September 15, 2004).

[86] Ibid. The lack of direction provided by the Copyright Act on digital issues has recently been commented upon by the Supreme Court of Canada in the case of *Society of Composers, Authors and Music Publishers of Canada* v. *Canadian Association of Internet Providers*, *supra* note 1. Justice Binnie stated:"Parliament's response to the World Intellectual Property Organization's (WIPO) Copyright Treaty, 1996, (WCT) and the Performances and Phonograms Treaty, 1996, remains to be seen. In the meantime, the courts must struggle to transpose a *Copyright Act* designed to implement the Berne Convention for the Protection of Literary and Artistic Works of 1886, as revised in Berlin in 1908, and subsequent piecemeal amendments, to the information age, and to technologies undreamt of by those early legislators."

V. Private Copying Regime

Historically, copyright levy systems have been premised on the assumption that certain uses, especially private copying, of protected works cannot be controlled and exploited individually.[87]

A. Background

Some have argued, and one Federal Court judge has found, in the case of *BMG Canada Inc.* v. *Jane Doe* ("BMG"),[88] that the private copying regime extends to downloads. Prior to analyzing the merits of that case in Part VI of this thesis, the private copying regime will be critically examined.

The genesis of the international system of copyright levies dates back to the 1950's with the advent of mass market sound recording systems, and it is meant to compensate rights holders for the private copying of their audio, and sometimes visual, recordings. Many countries around the world, including most European Union member countries, have introduced such collective remuneration legislative schemes to compensate rights holders for the private copying of sound recordings, typically through the imposition of a levy on blank audio recording media or equipment.[89]

---

[87] P. Bernt Hugenholtz, L. Guibault and S. van Geffen, *The Future of Levies in a Digital Environment* (Final Report) (Amsterdam: Institute for Information Law, March 2003), online: http://www.ivir.nl/publications/other/DRM&levies-report.pdf (last modified: December 20, 2004).
[88] 2004 FC 488 ("BMG").
[89] Canadian Heritage, *Copyright Policy FAQ Sheet*, online: http://www.pch.gc.ca/progs/ac-ca/progs/pda-cpb/faq-info/faq_e.cfm#private (last modified: February 8, 2004).

Private copying levies are rooted in the practical impossibility of preventing private copying. In England, in the case of *C.B.C. Songs v. Amstrad*[90], Lord Templeman also commented on the societal undesirability of having a law that is treated with such contempt. Lord Templeman stated:

> From the point of view of society the present position is lamentable. Millions of breaches of the law must be committed by home copiers every year. Some home copiers may break the law in ignorance, despite extensive publicity and warning notices on records, tapes and films. Some home copiers may break the law because they estimate that the chances of detection are non-existent...Whatever the reason for home copying, the beat of Sergeant Pepper and the soaring sounds of the Miserere from unlawful copies are more powerful than law-abiding instincts or twinges of conscience. A law which is treated with such contempt should be amended or repealed.[91]

Canada was slow to adopt a private copying regime. In 1982, a paper examining the economic impact of the "burgeoning practice of home audio and video taping on the copyright payments to those whose works are being home recorded in Canada"[92] concluded that "it would be premature to introduce a copyright compensation scheme to reimburse copyright owners for the home taping of their works."[93]

In Canada, the private copying regime was not introduced until 1997 by virtue of Bill C-32, which provided an exception that permits the making of a copy of a musical sound recording for the private use of the person making the copy. A government background document to Bill C-32 cites a report of the Task Force on the Future of the Music Industry,

---

[90] [1988] A.C. 1013.
[91] *Ibid*, at 1060.
[92] J. Keon, *Audio and Video Home Taping: Impact of Copyright Payments.* Policy Research, Analysis and Liaison Directorate, Policy Coordination Bureau, Consumer and Corporate Affairs Canada (1982) at Summary.
93 *Ibid*, at Summary.

which found that nearly 44 million blank tapes were sold in Canada in 1995, of which it was estimated that 39 million were used by consumers to copy sound recordings.[94]

(i) Statutory Provisions

On March 19, 1998, Part VIII of the *Copyright Act* dealing with private copying came into force. In essence, that amendment to the *Copyright Act* legalized copying of sound recordings of musical works onto audio recording media for the private use of the person who makes the copy. Until that time, copying any sound recording for almost any purpose without authorization infringed copyright.[95] Subsection 80(1) of the *Copyright Act* provides as follows:

> 80.(1) Subject to subsection (2), the act of reproducing all or any substantial part of
> (*a*) a musical work embodied in a sound recording,
> (*b*) a performer's performance of a musical work embodied in a sound recording, or
> (*c*) a sound recording in which a musical work, or a performer's performance of a musical work, is embodied
> onto an audio recording medium for the private use of the person who makes the copy does not constitute an infringement of the copyright in the musical work, the performer's performance or the sound recording.

Subsection 80(2) of the *Copyright Act* provides limits on private copying, as follows:

> Subsection (1) does not apply if the act described in that subsection is done for the purpose of doing any of the following in relation to any of the things referred to in paragraphs (1)(*a*) to (*c*):
> (*a*) selling or renting out, or by way of trade exposing or offering for sale or rental;
> (*b*) distributing, whether or not for the purpose of trade;
> (*c*) communicating to the public by telecommunication; or

---

[94] *Legislative Highlights*, online: http://www.pch.gc.ca/main/c32/back.htm - http://www.pch.gc.ca/progs/ac-ca/progs/fcmus-cmusf/pubs/distribution/mdc.pdf (last modified: February 16, 2004).

[95] However, in practice such infringement was largely unenforceable given that private copying is generally done in the confines of ones personal space and is not easy to detect.

(*d*) performing, or causing to be performed, in public.

Finally, the amendment made provision for the imposition of a corresponding levy on blank audio recording media to compensate authors, performs and makers who own copyright in eligible sound recordings being copied for private use.[96]

(ii) Administration of the Levies

Tariffs on blank audio recording media are set by the Copyright Board and are payable by manufacturers and importers to the Canadian Private Copying Collective ("CPCC"),[97] which is a consortium of collective societies representing eligible songwriters, recording artists, music publishers and record companies, the groups on whose behalf private copying royalties are collected.[98] As provided in Subsection 86(1) of the *Copyright Act*, only those manufacturers or importers who sell or otherwise dispose of blank audio recording media to a society, association, or a corporation that represents persons with a perceptual disability are exempt from the payment of the levy.

The CPCC is charged with distributing the money to the representative collectives for the benefit of their members. It has devised a process that will permit these funds to be

---

[96] The purpose of the levies is to pay musicians and songwriters and other rights holders for the revenues lost from personal copying. Accordingly, the right of remuneration is provided at Subsection 81(1) of the *Copyright Act*, as follows:
Subject to and in accordance with this Part, eligible authors, eligible performers and eligible makers have a right to receive remuneration from manufacturers and importers of blank audio recording media in respect of the reproduction for private use of
(*a*) a musical work embodied in a sound recording;
(*b*) a performer's performance of a musical work embodied in a sound recording; or
(*c*) a sound recording in which a musical work, or a performer's performance of a musical work, is embodied.

[97] In a letter to the Copyright Board of Canada released Monday, January 18, 1999, the five collectives that filed tariffs for a proposed levy on blank audio recording media announced the creation of the CPCC.

[98] While songwriters and music publishers are eligible regardless of nationality, only Canadian recording artists and record companies may receive payments under current law.

distributed fairly amongst tens of thousands of copyright holders. From 2000-2002 private copying levies generated $59.3 million, of which $54.4 million was available for distribution to authors, performers and makers of sound recordings. In January 2003, the CPCC carried out the first of a series of payments being made from the over $28 million in private copying royalties available for distribution from 2000 and 2001.[99]

B. Analysis

There are numerous arguments militating against the continued existence of the presently configured private copying regime, the most salient of which will be outlined below.[100]

(i) The Music Industry is Privileged

The private copying exceptions only allow for copies to be made of musical works, which could include the work itself, the recording that incorporates it, or the performer's performance. Unlike other countries, Canada's private copying regime does not extend to other cultural content industries, such as the film industry.[101] The reproduction of any other non-musical works, such as audio books or books-on-tape, remains an infringement of the rights attached to those works. Given the speed with which new DVD recorders can copy, file compression systems for Internet downloading, and the likelihood that the private

[99] The CPCC anticipated that it would have the majority of the $28 million that it collected in 2000 and 2001 distributed to rights holders by the end of 2003 and that it will have started distributing the $26 million available for distribution from the levy in 2002. However, as of September 10, 2004, no new information was available as to the distribution of royalties on the CPCC web site. CPCC Press Release, *Canadians and Rights Holders and Creators Respond to New Blank Media Rates for 2003 and 2004* (December 12, 2003), online: http://cpcc.ca/english/pdf/CPCCnr12Dec2003.pdf (last modified: January 5, 2004).

[100] Others include the collection and distribution of the levies and the claim that the regime acts as a disincentive to progress.

[101] In most private copying schemes in other jurisdictions, blank audiovisual media are leviable. Please see: Appendix 3, G. Davies and M. Hung, *Music and Private Copying: An International Survey of the Problem and the Law*, Sweet & Maxwell, 1993; *Remuneration for Private Copying in Australia: A Discussion Paper*, Prepared by Australian Copyright Council, September 2001 at 9.

copying of films will proliferate alongside music, the federal government ought to undertake to review expanding the ambit of the regime to include the film industry.

(ii) Cross-Subsidization

While the levies are exclusively aimed at the recording industry, there are myriad reasons why consumers and businesses use storage media, other than for the purposes of recording copyright musical works, including backing up files and storing software. Thus, the levies are payable even on media that are ultimately sold to users who do not use them to copy music. The causal link or proximity between the loss suffered by the right holder and the act of copying is clearly missing. Stakeholders in the high technology sector who, for example, use CD-Rs for storing data, computer programs or other digital products, have pointed out that the levies applicable to digital recording media amount to cross-subsidization and add substantially to their costs, which in turn affects their competitiveness.

(iii) Double-Dipping

With the advent of paid online musical services such as "puretracks.com" in Canada, consumers pay to download music, which price includes compensation to the artists in the form of royalties and to the recording companies in terms of profits, yet these consumers are forced to pay a levy to the music industry when they buy blank CDs or other storage media. Moreover, it is assumed that consumers are paying for the number of private copies that they make given that most of the paid online music services utilize software that limits the number of copies that a purchaser can make of the songs.

(iv) Public Perception of the Levy as an Unlimited Licence to Copy

It is perhaps missing from much of the current debate, but people have to believe in the value of intellectual property if copyrights are to realize their full economic potential in Canada. When the user is forced to pay levies, there is likely a concomitant perception held by that user, however misguided, that he or she has already paid for an unlimited license to copy copyrighted materials. In this way, the private copying regime is appropriately criticized as a blunt instrument that legitimises a free copying mentality that could spill over to other cultural works.

(v) Blank Recording Media and Hybrid Media

Any recording medium that allows a work to be fixed could potentially be the subject of levies. While the lobby group representing wireless carriers, the Canadian Wireless Telecommunications Association (CWTA), discontinued its participation in the recent Copyright Board hearing involving the establishment of tariffs for 2003-2004 because it was assured that the CPCC would not propose a levy on cellular phones, it is conceivable that the levy could apply to cellular phones and many other devices capable of copying music.[102] However, extension of the levy to media that are not dedicated to copying works poses additional legitimacy problems.

[102] The CWTA's position, as documented in the recent Copyright Board decision is that "any extension of the definition of blank audio recording medium must be tightly constrained, and should not encompass cellular phones." Please see *2003 Tariff Decision* at 5.

(vi) Grey or Black Market

Since the United States excludes from the definition of "digital audio recording medium" any medium that is primarily used to record "audiovisual works or non-musical literary works", such as computer programs or databases, there is an incentive for a grey or black market in audio recording media to develop. In addition, the levy applies to blank recording media that are imported or manufactured for sale in Canada, but does not apply to importers who import the blank media for their own use. Some stakeholders argue that this creates another incentive for a grey market for blank media, affecting the Canadian suppliers' market and the rights holders' remuneration.

(vii) Copying from Unauthorized Sources

The private copying exception as provided in the *Copyright Act* does not provide that the source of the copy must be authorized. The legislature has failed to address this issue. In the 2003 Copyright Board decision, however, discussed below, the Copyright Board decided to resolve the issue of whether or not the source of the copied material need be authorized. For the sake of clarity, the federal government must narrow the exception, and specify that the private copying right applies only to copies made from authorized sources.

(viii) WCT and WPPT

If the WIPO Internet treaties are ratified by Canada, one potential change in respect of private copying could be the recognition of a universal repertoire in performers'

performances and makers' sound recordings. This could make the system much more difficult and expensive to enforce and administer.[103]

C. Copyright Board Tariff Hearings

While the Copyright Board cannot change the law, its purpose is to determine the levy value and the media to which it will apply. Procedurally, the CPCC submits its proposed levies and the Copyright Board holds hearings to hear any objections to the proposed levy amounts. The levy can be set for a one or two-year period. To date, with the exception of the Interim Tariff, all of the periods set and requested have been two years. The first decision, which established Canada's initial private copy levies for 1999 and 2000 was issued in 1999, and the second such decision was issued in 2000 and established revised levies for the years 2001 and 2002. On December 12, 2003, the Copyright Board issued its third and most recent decision on private copying levies for 2003-2004 ("2003 Tariff Decision").[104]

(i) Private Copying Tariffs for 2003-2004

Given the significant increases proposed by the CPCC and the wide scope of new media to which the CPCC proposed the levy ought to apply, there was understandable fear and media attention in respect of the anticipated ruling of the Copyright Board in respect of its tariff ruling. Indeed, the Copyright Board received over 1500 comments, and initially there were

---

[103] Please see : *M. Rushton, Economic Impact of WIPO Ratification on Private Copying Regime.* Prepared for Canadian Heritage. Final version: June 2002 at 3.

[104] Prior to the third decision, interim levies had been imposed by the Board for the year 2003, which were identical to the tariffs established for the prior two years. *Private Copying 2003-2004. Tariff of Levies to Be Collected by CPCC in 2003 and 2004 on the Sale, in Canada, of Blank Audio Recording Media (Re)*, (2003) 4 C.P.R. (4th). ("2003 Tariff Decision"). The case was heard by a panel of four adjudicators, including the Honourable Mr. Justice Gomery, Chairman, Callary, Vice-Chairman and CEO and Members Charron and Doucet, with Callary dissenting.

over 100 objectors to the proposed tariff. In essence, the CPCC sought to levy items previously not leviable, including DVDs, various formats of removable memory and non-removable memory, significant increases in the rates applicable to media that were subject to the levies, and to extend the zero-rating program, which program was devised by the CPCC without Parliamentary approval, that exempted audio recoding media destined for particular users.

While it was anticipated that the amount of the levies could increase significantly, the tariff remains unchanged. The most significant aspects of the decision were the Copyright Board's pronouncement that downloading recorded music in Canada was legal,[105] and the abolishment of the zero-rating program, which permitted certain parties defined by the CPCC to purchase otherwise leviable media royalty-free.

In respect of new media, the Copyright Board held that recordable or rewritable DVDs and removable electronic memory cards were not to be subject to private copying levies. However, it held that the memories embedded in digital audio recorders, a term used by the Copyright Board to identify MP3 players and similar devices, were to be subject to the levies. The Copyright Board therefore expanded the levy to apply to non-removable memory in digital audio recorders. The new added tariff on embedded memory on MP3 devices was set at $25 for hard drives of ten gigabytes or more, $2 for up to one gigabyte of hard drive space, and $15 for hard drives over one gigabyte and less than ten gigabytes.

[105] The decision received instant media attention and CNN had a crawler onscreen indicating that downloading music from the Internet was legal in Canada.

Audio Recording Media

According to Claude Majeau, Secretary General of the Copyright Board, "[a]s far as computer hard drives are concerned,...for the time being, it is still legal".[106] Of significance is the rather convoluted argument regarding the legality of a private copy if made onto an audio recording medium about which the Copyright Board has yet to given an opinion, and the illegality of a private copy if the audio recording medium used to record such music is deemed by the Copyright Board not to be of a kind ordinarily used by individuals for recording music.

In respect of the legality of copying onto audio recording media to which the Board has not yet expressed an opinion, the Board held:

> It would indeed seem illogical that the scope of the exemption could depend on the rights-holders' unilateral choice to propose or not a tariff. For instance, simply because the Board has not been asked to certify a tariff on hard disks in personal computers, it does not follow that private copies made onto such media infringe copyright. Moreover, to argue that a private copy of a particular medium is legal only if a levy was paid on that particular unit would be to add a condition that is not currently included in section 80.[107]

However, in respect of an audio recording medium to which no tariff applies because the Board has decided that such a medium is not of a kind ordinarily used by individuals for recording music, the Board held that this "is removed from the ambit of the exemption".[108] The implication of this conclusion is that recording a private copy onto an audiocassette of less than 40 minutes duration is illegal because the Copyright Board, in its first decision,

---

[106] *Supra* note 104.
[107] *Ibid.*
[108] *Ibid.*

decided that "audiocassettes of less than 40 minutes do not attract a levy".[109] Therefore, merely on account of the fact that the Copyright Board has opined on the audiocassette, it is illegal to make a private copy of a song onto such a device, yet it was, until the rendering of that Copyright Board decision, legal to make copies onto an iPod.

Zero-Rating System Abolished

In 1999, the CPCC established a program to permit media otherwise subject to private copying royalties to be purchased as zero-rated or royalty free. The program was implemented in response to concerns raised after the first Copyright Board hearing that it was unfair for those who do not copy music to pay the levy.[110] Accordingly, the program was available to a range of groups, including educational institutions, broadcasters, law enforcement agencies, advertising agencies, the music, film and video industries, courts, tribunals and court reporters, religious organizations, telemarketing firms, software companies, duplication facilities, medical institutions, technology companies, conference and training companies, governments, and other firms duplicating audio and data for business use. Purchasers were required to be certified in advance by the CPCC and buy from a CPCC-authorized seller.[111]

However, pursuant to the *Copyright Act*, only societies representing the perceptually disabled are eligible for an exemption. The Copyright Board held that the zero-rating system is not legal. Moreover, it concluded that:

---

[109] *Ibid.*
[110] *Ibid* at 17.
[111] CPCC, online: http://cpcc.ca/english/zeroRating.htm (last modified: February 16, 2004).

> The Board believes that if Parliament intended to insulate non copiers from the effects of the regime, it could have and would have established mechanisms within the Act. Yet Part VIII includes only one exception, to accommodate perceptually disabled persons.[112]

In his dissenting opinion, Vice-Chairman Callary, in holding that the zero-rating program should be maintained, stated that:

> ...the Board should proceed from the proposition that Parliament enacted a regime that is meant to be workable and fair and that achieves its underlying goals. The zero-rating program has become an intrinsic part of the regime, and as a result, a levy rate that does not account for it will be unfair to rights-holders.[113]

The abolishment of the zero-rating program will have the effect of lessening the public's confidence in the system. Further to the Copyright Board's decision, groups such as court reporters and religious organizationswill now be subsidizing the music industry.

Federal Court of Appeal 2004 Decision

Manufacturers of MP3 players and some retailers appealed the 2003 Tariff Decision. Three applications for judicial review were sought in resepct of the decision and joined by the court.[114] The CPCC, supported by the Canadian Broadcasting Corproation as intervenor, challenged the Copyright Board's finding that the zero-rating program is illegal. A coalition of retailers of blank media challenged the constitutional validity of the private copying regime, arguing that the entire scheme was not copyright law, or a tax, and therefore illegal. Finally, the Canadian Storage Media Alliance (CSMA), representing major manufacturers and

---

[112] *Ibid* at 23.
[113] *Ibid* at 81.
[114] *Retail Council of Canada* v. *Canadian Private Copying Collective*, Docket A-11-04; *Apple Canada Inc.* v. *Canadian Private Copying Collective*, Docket A-10-04; *Canadian Private Copying Collective* v. *Canadian Storage Media Alliance*, Docket A-09-04, online: http://www.mgblog.com/resc/FCAPrivateCopydecision.pdf (last modified: December 22, 2004).

importers of blank media, challenged the Copyright Board's decision that the memory embedded in MP3 players is leviable and the imposition of a levy that was higher than what was proposed by the CPCC.

While the Federal Court of Appeal upheld the Copyright Board's decisions in respect of the legality of the private copying regime and the illegality of the zero-rating scheme, it struck down the imposition of the levy on embedded memory in digital audio recorders. The court held that the levy was improperly applied to a device, rather than a medium as prescribed in Section 79 the *Copyright Act*.[115] Given that the levy has been struck by the Federal Court of Appeal, it may follow that it is no longer legal to copy music from CDs and then copy it to MP3 players, as this no longer meets the criteria set out in the *Copyright Act* for legitimate private copying. This issue must be resolved, and it may not have had its last day in court. The CPCC is currently considering an appeal to the Supreme Court of Canada on this issue.[116]

Conclusion on the Private Copying Regime

In its present state, the private copying regime is no longer a legitimate, nor satisfactory, method of compensating the music industry for its losses due to private copying. In light of the above problems inherent in the private copying regime, the private copying regime is presently at a crossroads. In a solidly reasoned decision, the lack of statutory underpinning of the zero-rating scheme was recently affirmed by the Federal Court of Appeal. In order to

[115] *Ibid*, at 47.
[116] Canadian Private Copying Collective, *Appeal Court Upholds Constitutionality of Private Copying Levy and Legality of CPCC's Zero-Rating Program*, December 17, 2004, online: http://cpcc.ca/english/pdf/CPCC17dec2004.pdf (last modified: December 18, 2004).

create a more fair and legitimate regime, the federal government must amend the *Copyright Act* to specifically exempt certain other classes of users, including those exempted under CPCC's zero-rating scheme. In order to gain legitimacy, Parliament ought to amend the legislation such that a scheme similar to the zero-rating system is statutorily prescribed. In addition, the class of exempted entities ought to be expanded to include commercial entities using blank recording media.

While it is clear that the private copying regime was adopted in Canada to compensate the music industry in light of the futility of enforcing prohibitions against private copying, there is no reason why the movie industry ought to be excluded from the ambit of the regime. Moreover, when the private copying regime was adopted, Parliament was concerned with the abuse of copyright owners' exclusive reproduction right and the private copying of copyrighted works for personal use.

In the digital era, however, other rights such as the right to communicate to the public and the authorization right[117] are potentially at stake, and the private copying regime does not adequately address the new reality of downloading and uploading copyrighted music from the Internet. Significantly, many devices capable of digital copying do not fall within the scope of the private copying regime. For example, the private copying regime does not cover audio recording media such as MP3 players, which strengthens the argument that the private copying regime as presently structured is ill equipped to deal with digital copying.

[117] As well as the making available right found in the WIPO *Copyright Treaty*.

Although any such system of levies is necessarily a form of rough justice, if the glaring legitimacy problems inherent in the private copying regime can be successfully remedied, the private copying regime could have a future alongside the alternatives that must be created for protecting digital content.

VI. P2P Networks: Unauthorized File Sharing of Copyrighted Music and Film

In response to the problem of unauthorized downloading, Ed Robertson of the Canadian band The Barenaked Ladies, expressed his disdain as follows:

> *I'm totally fine with people downloading music, as long as they steal everything that they want. If you want pants, go steal them. If you need gas in your car, you should steal it, because you can. As long as people are consistent I don't have a problem. As long as they see themselves as thieves in general then I don't mind if they steal everything that they like. But it irks me that it's only okay to steal music.*[118]

Unauthorized downloading of music has its share of enemies and proponents.[119] Musicians themselves are not a unified group against file sharing and some even upload their music themselves for their fans to enjoy. For musicians, file sharing of their songs could have a promotional effect on their songs and image and this could lead to larger turnouts for concerts. In general, the artist retains his or her rights for touring and merchandising. Therefore, it is not surprising that there is a divide in opinion between some artists and the recording industry.

A. What is Peer-to-Peer Technology?

Professor Hugenholtz briefly summarized P2P technology as follows:

> P2P software enables its users to interconnect with other users running similar software, and 'share' files that are available on their hard disks in so-called 'shared folders'. P2P technology allows users to act as 'peers' (i.e. equals) – clients and servers alike, no longer requiring the serves of an intermediary (host). In the modern P2P networks, even the search and retrieval functions, which in the Napster system

---

[118] CRIA, *More than Half a Million Download Attempts on New Tragically Hip Single* (May 12, 2004), online: http://cria.ca/news/cria_12may04b.htm (last modified: September 11, 2004).

[119] S. Fulghum, *Will Canada Tighten File Sharing Laws?* (April 7, 2004), online: SoulShine http://www.soulshine.ca/news/newsarticle.php?nid=431 (last modified: August 3, 2004). Fulghum offered the following advice for the industry: "Instead of attacking the people who support them and wasting money on law suits, music industry officials need to face the music and look in the mirror to solve their problems."

were centrally provided, are now exercised by 'peers' themselves, or by 'super-peers' with elevated status.[120]

There are four main types of P2P networks. The first is the Napster-style 'mediated' system, in which search and retrieval functions are provided, and users are pointed to other users and support is offered by the system. The second type, referred to as the 'pure' P2P system, comprises a system where all users in the network are on equal footing and the functions are decentralized, such as in the Gnutella system. Next, there is the so-called 'hybrid' system, in which there is no central mediator, but some peers act as 'mini-Napsters, or 'super-nodes' within a local branch of the P2P network.[121] The last type of file sharing system gathers bits of files and it is known as the BitTorrent program.

B. Napster and the Next Generation P2P Networks

In 1999, Shawn Fanning, an 18-year old college student at Northeastern University wanted to share music with his friend from Virginia. To solve this logistical issue, he developed the source code that created Napster and ultimately turned the music industry's business model on its head. Fanning was not an accomplished software genius – in fact, had never created a major software program, nor run a business before. And yet he managed to devise a software program that allowed computer users to directly access and exchange files stored on other users' computers, which avoids so-called server bottlenecks. [122]

---

[120] P. B. Hugenholtz, *P2P and Copyright: Are Levies a Solution?* Paper presented at the conference *Intellectual Property Beyond Rights*, IPR University Centre, Espoo, October 25-26, 2004.
[121] *Ibid.*
[122] M. Liedtke, *Napster's Technology Appears Destined to Revolutionize E-Commerce*, (July 27, 2000), online: http://sfgate.com/cgi-bin/article.cgi?file=/news/archive/2000/07/27/financial1804EDT0197.DTL (last modified: December 12, 2004).

In essence, the Napster system was comprised of an index and directory, which resided on a central server maintained by Napster, and the files were directly transferred utilizing various Windows protocols directly from user to user. Fanning had hoped to avoid any legal issues in respect of copyright infringement as the copyrighted files were never in Napster's possession, but the court found otherwise, as will be discussed *infra*.[123]

Fanning not only transformed the music business and music delivery platform, "he also helped launch a new programming movement – and a whole wave of start-ups dedicated to what has become known as P2P, or peer-to-peer, client-based Internet software."[124] Napster's success, and ultimately its downfall, is attributable to its software's combination of indexing, searching and file sharing. Arguably in response to the findings against Napster, new technology now being used by file sharing networks obviates the need for a central server. Programs such as KaZaA and Morpheus allow users to link their PCs to computer networks and then query a search engine for the file or title they're seeking. The software then churns out a list of other computers sharing the file.

In 2001, Bram Cohen created the BitTorrent system and his story is somewhat similar to Napster's Shawn Fanning. Cohen developed the BitTorrent program as a hobby after the

---

[123] K. Greenfeld, *Meet the Napster: Shawn Fanning was 18 when he wrote the code that changed the world. His fate, and ours, is now in the court's hands.* Time Magazine. September 25, 2000, online: http://www.cnn.com/ALLPOLITICS/time/2000/10/02/napster.html (last modified: December 14, 2004).

[124] K. Greenfeld, *Meet the Napster: Shawn Fanning was 18 when he wrote the code that changed the world. His fate, and ours, is now in the court's hands*, Time Magazine. September 25, 2000, online: http://www.cnn.com/ALLPOLITICS/time/2000/10/02/napster.html (last modified: December 14, 2004).

dot-com crash left him unemployed. His aim was to enable computer users to more easily distribute content online - not specifically copyrighted content.[125]

The BitTorrent system is unique in that users do not find and retrieve whole files. Rather, the program seeks out torrent files, also known as seed files, which are hosted by a number of Web sites. The files on the Web sites are not songs or movies, but serve as markers that point the way to other users sharing a given file. BitTorrent then assembles complete files from multiple chunks of data obtained from everyone who is sharing the file. Attempts to upload bogus files to corrupt the process fail because the BitTorrent program follows a blueprint of the original file when piecing it together.[126] While it has been stated that Cohen "didn't set out to upset Hollywood movie studios", it is becoming clear that "...his innovative online file-sharing software...has grown into a piracy problem the film industry is struggling to handle."[127]

During a recent interview with Cohen about the use of his software for the purposes of copyright infringement, he said: "It seems pretty clear that a lot of people are actively interested in engaging in wanton piracy".[128] However, Cohen indicated that he did not think that he was liable for any sort of infringement: "As far as I'm concerned, they're just

---

[125] A. Veiga, *BitTorrent Gives Hollywood a Headache*, (December 10, 2004), online: http://www.mymotherlode.com/News/article/id/D86T0EI01 (last modified: December 22, 2004).
[126] *Ibid.*
[127] *Ibid.*
[128] *Ibid.*

pushing around bits, and what bits it is they're pushing around is not really a concern of mine. There's not much I can do about it."[129]

In fact, the system is different and even more decentralized than the P2P systems based on the Gnutella protocol, which is a decentralized model where every client is a server and vice versa,[130] and certainly bears no resemblance to the control that could have been exerted by Napster to sort copyright from non-copyright material. The BitTorrent software enables users to share "large chunks of data", and unlike other popular file-sharing programs, the more people swap data on BitTorrent, the quicker it flows - and that includes such large files as feature films and computer games.

Because of its speed and effectiveness, the program now accounts for as much as half of all online file-sharing activity, says Andrew Parker, chief technology officer of Britain-based CacheLogic, which monitors such traffic.[131] According to John Malcolm, senior vice president of anti-piracy operations for the MPAA, BitTorrent is more of a threat because it is probably the latest and best technological tool for transferring large files like movies.[132]

---

[129] *Ibid.*

[130] Clip2 Distributed Search Services, *The Gnutella Protocol Specification*, online: http://www.stanford.edu/class/cs244b/gnutella_protocol_0.4.pdf (last modified: December 22, 2004).

[131] Veiga, *supra* note 125.

[132] *Ibid.* Malcom added: He added: "it is unusual, perhaps unique, in that the moment you start downloading you are also uploading...It's what makes it so efficient."

C. Peer-to-Peer File Sharing and Copyright Law

For the purpose of copyright law, every file is copied on a hard drive, a CD or in computer memory known as random access memory (RAM), and therefore likely falls under the rubric of copyright protection. The transmission of a file from one individual to another may result in a reproduction, a distribution, and possibly a public performance of the work.

Liability of End-Users

This thesis will now turn to the potential liability of users of P2P software for copyright infringement. In general, downloading copyrighted files, such as sound recordings and films, entails a reproduction of the work, and necessarily implicates the right of reproduction, which is an exclusive right held by the rights owners. However, given that some countries permit private copying and certain fair use and fair dealing exemptions, downloading arguably qualifies for an exemption in some countries. Indeed, in most jurisdictions the legal status of the files from which "private" copies are made is irrelevant. A notable exception is Germany, where the law does not exempt private copying from "obviously illegal sources".[133]

As will be discussed, there is no such exception in the United States, where the Court of Appeal for the Ninth Circuit recently decided[134] that P2P downloading is not entitled to the fair use exception for materials for which the user would otherwise have had to pay. Another exception can be found in Norway, where a lower court recently held that P2P

[133] Hugenholtz, *supra* note 120 at 3. This provision was introduced in the German *Copyright Act* in 2003 as part of the European Union Copyright Directive implementation package, and is now under review.
[134] *A&M Records v. Napster, Inc.*, 239 F.3d 1004, 1015 (9th Cir. 2001).

downloading is not exempted private copying provided that the files are intended for subsequent uploading.[135]

In most countries, uploading copyrighted files to other users of P2P networks is a separate and restricted act.[136] Indeed, making available copyrighted files for individual downloading generally falls within the scope of existing rights of communication to the public, public performance or similar rights. However, as will be discussed *infra*, this is not the case in Canada. In a recent Federal Court case, it was held that until such time as the WIPO Copyright Treaty (WCT) is ratified, which expressly provides for a right of 'making available', uploading files over a P2P network is not an illegal act.[137] Therefore, with the notable exception of Canada, users of P2P software who are sharing copyrighted files are directly liable for copyright infringement.[138]

In Canada, given that there is currently no liability for end users, there is necessarily no liability for P2P networks or software providers. Given that the underlying act is not considered an infringement of copyright, it would be impossible to find that the P2P networks infringed copyright, even on an indirect basis. However, the law in the United States is quite different, and it will be outlined following the critical examination of the Canadian approach.

---

[135] *Phonofile AS v. ABC Startsiden*, Oslo City Court 2003, reported by A. Lund, ALAI Study Days, Oaxaca 2004, as cited in Hugenholtz, *supra* note 120.
[136] *Ibid.*
[137] *BMG Canada* v. *John Doe*, 2004 FC 288.
[138] *Hugenholtz*, *supra* note 120.

D. The Canadian Approach to P2P

Until very recently, the Canadian recording industry seemed to have been taking a wait-and-see-what-happens-in-the-United States approach to the issue of file sharing. However, the Copyright Board of Canada decided on its own initiative in a hearing concerning private copying tariffs for the 2003-2004 period, to declare that downloading music is legal in Canada. That judgment in respect of music downloading is legally unsound and lacks an understanding of the private copying provisions of the *Copyright Act*.

After clearly stating that the proceedings were not about the legality of downloading, uploading or P2P networks, the Copyright Board held that the private copying regime allows the copying of unauthorized and copyright protected musical content, as follows:

> The regime does not address the source of the material copied. There is no requirement in Part VIII that the source copy be a non-infringing copy. Hence, it is not relevant whether the source of the track is a pre-owned recording, a borrowed CD, or a track downloaded from the Internet.
>
> Although the source of the copy does not matter, the destination does. The Board believes that section 80 creates an exemption that applies as long as two conditions are met: the copy must be for the private use of the person making it, and it must be made onto an audio recording medium, as defined in section 79.[139]

On a plain reading of the statutory provisions, the two conditions mentioned by the Copyright Board are not the only conditions that must be met before the private copying exception applies. To be sure, the exception to the prohibition against private copying does not apply if the copying is done for the purpose of distributing, whether or not for the purpose of trade, and communicating to the public by telecommunication.

---

[139] *2003Tariff Decision, supra* note 104 at 20.

In response to the Copyright Board's declaration that downloading was legal, the Canadian music industry pursued the protection of its members' intellectual property rights in the recent federal case of *BMG Canada Inc. et. al.* v. *Jane Doe et. al.*[140] Specifically, CRIA attempted to sue the users of twenty-nine Internet locations for copyright infringement. However, given that the users' identities were not known to CRIA, it sought third party discovery of their Internet Service Providers (ISPs) in the form of the users' identities and addresses for service pursuant to *Federal Court Rules* 233 and 238.

On March 31, 2004, Justice Konrad von Finckenstein dismissed a motion that would have allowed the music industry to commence actions against individuals who share copyright music files on the Internet. Justice Finckenstein ruled against the industry by stating that file sharing was not violating federal copyright laws. More specifically, Justice Finckenstein concluded that CRIA did not prove copyright infringement by the twenty-nine music uploaders named in the suit. As noted above, the WIPO Copyright Treaty (WCT) provides that authorization and distribution need not be proven in cases of copyright infringement. However, given that these treaties have not as yet been ratified by Canada, Justice Finckenstein looked to the relevant Canadian jurisprudence for guidance in making his decision.

Justice Finckenstein's decision represents the first application of the notion of authorization as established in the recent Supreme Court of Canada case of *CCH Canadian Ltd.* v. *Law*

[140] *BMG*, *supra* note 88.

Society of Upper Canada ("CCH").[141] In that case, involving the provision of a photocopier at the Law Society of Upper Canada's library, the Supreme Court held that setting up the facilities that allow copying does not amount to authorized infringement. In respect of authorization, Justice Finckenstein applied the test established in *CCH*, as follows:

> ...the case of CCH...established that setting up the facilities that allow copying does not amount to authorizing infringement. I cannot see a real difference between a library that places a photocopy machine in a room full of copyrighted material and a computer user that places a personal copy on a shared directory linked to a P2P service. In either case the preconditions to copying and infringement are set up but the element of authorization is missing.[142]

Accordingly, in respect of P2P software, the preconditions for copyright infringement are in place, but authorization is absent. With respect, there is a difference between providing the means of potential copyright infringement, such as the software, which may have other substantial non-infringing uses, and an individual user placing a file in her shared directory for the purpose of sharing that work with others. As noted by Daniel Gervais, the file sharers "have to take at least one additional step to identify the file as available to other P2P users," which Gervais argues is prima facie infringement.[143]

Not only did Justice Finckenstein find that there was a lack of authorization on the part of the individual file sharers, he found that downloading was legal on the basis that Section 80 of the *Copyright Act*, which established the legality of and framework for private copying, applies to downloads. While Section 80 does not require, nor mention, whether the source

---

[141] [2004] 1 S.C.R ("CCH").
[142] *Ibid*, at para. 27.
[143] D. Gervais, *Canadian Copyright Law Post-CCH*, (2004) IPJ 131 at 150. In his footnote to that comment, Gervais adds: At least with knowledge and if the making available corresponds to a choice made by the user, even a default choice but one that was explained and agreed to by the user.

of the material copied be legal, it does not simply follow that Section 80 applies to downloads and that they are therefore legal 'private copies'. Indeed, Justice Finckenstein failed to apply the test established in Section 80 for determining whether the private copying regime applies. Two determinations must be made in this regard, namely: (i) whether the copy is made on an "audio recording medium"; and (ii) whether the copy is made for the "private use of the person making the copy".[144]

Section 79 of the *Copyright Act* defines audio recording medium as a "recording medium, regardless of its material form, onto which a sound recording may be reproduced that is of a kind ordinarily used by individual consumers for that purpose, excluding any prescribed kind of recording medium". What is ordinary within the meaning of that section "is a dynamic one and ironically may be influenced by the fast growth of the P2P phenomenon".[145] However, no evidence was adduced, nor considered, by Justice Finckenstein in order to answer the first part of the test for determining whether a copy falls under the rubric of the private copying regime.

More importantly, however, is the requirement that the copy be for the private use of the person making the copy. Making a file available for P2P users to download may constitute a communication to the public and/or the authorization of such a communication. First, one would have to prove that the community of P2P users constitutes a public pursuant to

[144] *Copyright Act*, s.80(1).
[145] Gervais, *supra* note 143.

Section 80(2) of the *Copyright Act*. While the *Copyright Act* does not contain a definition of the term public, and the law in Canada is not settled in this respect.[146]

If the community of P2P users does constitute a public, then the argument can be made that a communication to that public takes place when the file is transmitted, and consequently that an authorization of that communication takes place when the file is identified by that person as available for other P2P users. Moreover, the *Copyright Act* does not contain a requirement that the communication be simultaneous. However, the fact that music cannot be heard because a file is transmitted poses a serious challenge to this contention. Indeed, determining whether a communication to the public is indeed a communication within the meaning of the *Copyright Act* is far from clear.

A file downloaded for someone to listen to later may be more similar to a distribution than a communication. Unlike the American copyright legislation, there is no right to distribute provided in Section 3 of the *Copyright Act*. It has been noted that it was "arguably unnecessary to have an additional right of distribution" pre-Internet, because "in the physical

---

[146] The Copyright Board in its initial hearing in the *Tariff 22* case held that an infringing communication to the public occurs whenever a content provider uploads material onto a server with the intention that the public or segment of the public will have access to it. This is so even though the members of the public neither request nor receive the material simultaneously, and may receive it individually in private. Article 1721 of NAFTA provides meaning to that term and may be useful in this context. Accordingly, article 1721 states:
public includes, with respect to rights of communication and performance of works provided for under Articles 11, 11bis(1) and 14(1)(ii) of the Berne Convention, with respect to dramatic, dramatico-musical, musical and cinematographic works, at least, any aggregation of individuals intended to be the object of, and capable of perceiving, communications or performances of works, regardless whether they can do so at the same or different times or in the same or different places, provided that such an aggregation is larger than a family and immediate circle of acquaintances or is not a group comprising a limited number of individuals having similarly close ties that has not been formed for the principal purpose of receiving such performances and communications of works.

world distribution required the making of copies".[147] However, distribution does defeat the private copying exception in Section 80 of the *Copyright Act*.

Michael Geist maintains that in order for file sharing to constitute distribution, there must be a positive act by the owner of the shared directory, such as sending out copies or advertising that the files are available for copying. In support of this contention, Geist refers to the fact that while the exclusive right to make available is included in the WIPO WPPT of 1996, because Canada has yet to implement that treaty, it is not part of Canadian copyright law. There is no other case law on this point and no statutory guidance. However, the illegality of uploading files onto the Internet, or making parts of one's computer hard drive accessible to P2P users, will of course be made crystal clear should the WIPO Copyright Treaty (WCT) be ratified by Canada given that the WCT provides a "making available" right

On April 13, 2004, CRIA appealed Justice Finckenstein's decision to the Federal Court of Appeal, arguing that the motions judge erred in both law and fact.[148] CRIA framed Justice Finckenstein's dismissal of its motion in binary terms as the death of copyright, as follows:

> The decision below now stymies the Appellants' efforts to bring proceedings to enforce their statutory rights. Unless this interlocutory appeal is allowed, the Defendants will evade the court's process, never needing to answer for their infringements. The grant of this appeal is therefore necessary to preserve the Appellants' access to justice, and to prevent the Appellants' rights under the Copyright Act from being rendered nugatory.[149]

---

[147] Gervais, *supra* note 143 at 152.

[148] Appellants asserted that the motions judge failed to apply the correct legal tests to the matter before him. Furthermore, they claimed that the motions judge used the occasion of the Appellants' interlocutory motions to make a number of sweeping but erroneous conclusions regarding the *Copyright Act*. These errors of law, together with the various misapprehensions of the evidentiary record, led the motions judge into error. See *CRIA Memorandum*, at para. 4.

[149] *Ibid,* at para. 5

While there has been no legislative response to the Federal Court ruling, Canadian Heritage Minister Helene Scherrer reacted to the surprising ruling by promising to make changes to Canada's copyright law as quickly as possible.[150] However, changes have yet to be tabled.

E. The American Approach to P2P

Given that the United States has been in the forefront of the battle against unauthorized downloading of copyrighted works, a brief overview and analysis of the major developments in the United States will be provided.

After the rise in popularity of Napster in 1999, which at its peak in popularity in February of 2001 had over fifty million users trading files[151], the music industry in the United States, as represented by the RIAA, shifted gears from its public relations battle to combat what it perceived to be illegal file-sharing and initiated the court battle against P2P networks, software makers, and individual uploaders and downloaders of unauthorized music.[152] In December 1999, RIAA filed a complaint on behalf of eighteen of its members against Napster, Inc. for contributory and vicarious copyright infringement.[153]

---

[150] D. Beazley, *Facing the Music* (April 3, 2004), online: http://www.canoe.ca/NewsStand/EdmontonSun/News/2004/04/03/407037.html (last modified: April 8, 2004).

[151] *Big Music's Digital Nightmare* (August 9, 2001), online: economist.com www.economist.com/agenda.printerfriendly.cfm?story_ID=729127 (last modified: August 10, 2004).

[152] In respect of unauthorized file sharing of music, the early seminal cases in the United States are *UMG Recordings et. Al. v. MP3.com, Inc.*, 92 F.Supp 2d 349 [2000]), *Napster (A&M Recordings Inc., et. al. v. Napster, Inc.*, 239 F.3d 1004 [2001]), and *Rodgers & Hammerstein Organization, et. al. v. UMG Recordings, Inc. and the Farm Club Online, Inc.* (60 U.S. P.Q. 2D [BNA] 1354 [2001]).

[153] *A&M Records Inc. v. Napster, Inc.*, 239 F.3d 1004, 57 U.S.P.Q.2d (BNA) 1729 (9th Cir. 2001), remanded to 2001 WL 227083 (N.D. Cal. 2001), aff'd, 284 F.3d 1091 (9th Cir. 2002). While an in-depth discussion of Napster and the technology deployed is beyond the scope of this paper, numerous commentaries have

Both the District Court and the Ninth Circuit ruled against Napster, largely because of its use of centralized servers and its ability to patrol and control its network.[154] In April 2003, the United States District Court for the Central District of California took a decidedly different direction from the developing jurisprudence against P2P networks and infrastructure providers and found that distributors of software that allows people to search and swap music and video files are not liable for copyright infringement. In that case, *Metro-Goldwyn-Meyer v. Grokster*,[155] known as *Grokster II*, the court affirmed the test for contributory or vicarious infringement of copyright, and found that the requisite level of knowledge could not be imputed to the defendants where their equipment could be used for substantially non-infringing uses. This new direction can be explained by reference to the technological distinctions between Napster and Grokster. Unlike Napster's operating system, Grokster does not maintain a centralized database of files available for users to download. Rather, its users connect and upload their file lists to "SuperNodes", or users operating computers with fast connections on the network. On account of the decentralized nature of the defendants' operating system, the court held that the services could continue even if the Grokster companies were no longer in existence. Following this conclusion, the court found that the

---

addressed the early cases and the reasons why Napster was held liable contributorily and vicariously liable for the copyright infringements committed by is users.

[154] Please see J. Askanazi, *The Fate of Napster: Digital Downloading Faces and Uphill Battle*, 13 Duke L. Tech. Rev. 13, 30 (2001). Napster operated a centralized, indexed database of all of the files available for download on its system, and the court found that Napster had control over the content and knowledge of infringing activity, yet it failed to purge infringing files.

[155] 259 F. Supp. 2d 1029, 1045-46, 66 U.S.P.Q.2d (BNA) 1579 (C.D. Cal. 2003) at 1582. In that case, twenty-eight music and entertainment companies sued Grokster, StreamCast Networks, and Sharman Networks for operating the P2P file-sharing services Grokster, Morpheus, and KaZaA.

defendants lacked the requisite control over users necessary to a finding of vicarious liability for its users' copyright infringement.[156]

However, on appeal to the federal United States Court of Appeals for the Ninth Circuit, the appellate court affirmed the lower court ruling and ruled against the music industry. Of particular importance, the appellate court did not say file-trading itself is legal, and lower courts in the United States have decided that individual computer users are breaking the law when they trade copyrighted files without permission. In refusing to find that the defendants were liable, the appellate court expressed its inability to accept their argument, as follows:

> The (record labels and movie studios) urge a re-examination of the law in the light of what they believe to be proper public policy. Doubtless, taking that step would satisfy the copyright owners' immediate economic aims. However, it would also alter general copyright law in profound ways with unknown ultimate consequences outside the present context.[157]

On December 10, 2004, the United States Supreme Court granted certiorari in that case. Oral arguments will be heard in March of 2005.[158] It therefore remains to be seen whether or not the United States will maintain the *status quo* in respect of the *Betamax* case.[159]

In respect of suing individual infringers for copyright violations, the RIAA took advantage of a section in the *Digital Millennium Copyright Act* ("DMCA"),[160] which provided a method

---

[156] 259 F.Supp.2d1029 (C.D. Cal. 2003), aff'd 380 F.3d 1154 (9th Cir. 2004).
[157] *Ibid.*
[158] Electronic Frontier Foundation, *Supreme Court to Hear MGM v. Grokster* , online: http://www.eff.org (last modified: December 13, 2004).
[159] *Sony Corporation of America Inc. et al. v. Universal City Studios, Inc. et al. v.*, 464 US 417.

for identifying individual users by subpoenaing their ISPs for their identities. Specifically, the suits filed by the RIAA have focused on Section 512(h), the subpoena provision of the *DMCA*, that allows any copyright owner or representative to "request the clerk of any U.S. district court to issue a subpoena" to force an ISP to identify "an alleged infringer." From September to mid-December 2003, the RIAA issued more than 3,000 such *DMCA* subpoenas to obtain names for copyright infringement lawsuits. These subpoenas were issued by clerks and viewed by many as an unwarranted invasion into the privacy of Internet users. Indeed, the subpoenas were filed prior to any charges of infringement and were not subject to review by a judge and required no notice to, or opportunity to be heard by, the alleged infringer.[161]

On December 19, 2003, the automatic subpoenas came to end when a federal appeals court judge ordered that the information subpoena process provided by the *DMCA* could not be used in infringement cases involving the P2P networks. In that case, the United States Court of Appeals for the District of Columbia Circuit ruled in favour of Verizon in the case of *RIAA v. Verizon.*[162] The judge reasoned that since file sharing was not in issue when the *DMCA* was enacted, it could not apply to this new situation.[163] The RIAA was not slowed down, however, by that decision, and from January 2004 to mid-March 2004, the RIAA filed

---

[160] Pub. L. No. 105-304, 112 Stat. 2860 (1988) ("DMCA"). The DMCA implements the WIPO Copyright Treaty.

[161] R. Mark, *RIAA Keeps Pressure on P2P Users* (March 23, 2004), online: http://www.internetnews.com/xSP/article.php/3330071 (last modified: August 3, 2004).

[162] 2003 U.S. App. LEXIS 25735 (2003), online: http://pacer.cadc.uscourts.gov/docs/common/opinions/200312/03-7015a.pdf (last modified: December 13, 2004).

[163] *Ibid.*

almost 1,600 lawsuits against alleged P2P users in which "John Doe" subpoenas were issued to track down the identities of alleged infringers.[164]

The new strategy of suing individual downloaders is not the most popular way of protecting copyright online, and it could turn into a heavy burden on the court system and will represent a huge expense to the RIAA in cases where defendants are not willing to settle. Sensational stories in the media about the RIAA suing grandmothers and minors have not met with public approval. However, we can expect the lawsuits to continue as the RIAA obviously finds, or at least hopes, that they will have an eventual deterrence effect. As noted by Cary Sherman, President of RIAA, "[l]awsuits are an important part of the larger strategy to educate file sharers about the law, protect the rights of copyright owners and encourage music fans to turn to legitimate music services."[165] As of December 2004, the RIAA had initiated 5,400 lawsuits against individual file sharers.[166] And in terms of their success, the RIAA has settled many lawsuits to date, even unpopular settlements such as one against a 12-year-old girl from New York for $2,000 in 2003.[167]

The United States, unlike Canada, has been very active in its legislative attempts to curb unauthorized downloading from the Internet. In September 2002, the United States House of Representatives Subcommittee on Courts, the Internet, and Intellectual Property held oversight hearings addressing the problems of piracy of intellectual works using P2P

---

[164] *Ibid.*

[165] *Ibid.*

[166] T. Goetz, *Sampling the Future*, (December 2004), online: Wired Magazine http://www.wired.com/wired/archive/12. 1/sample.html (last modified: December 13, 2004).

[167] J. Borlan, *RIAA Settles with 12-year-old Girl* (September 9, 2003), online: CNET News.com http://news.com.com/2100-1027-5073717.html (last modified: August 17, 2004).

networks.[168] The opening remarks of the Committee Chairman included a recognition of the value of intellectual property in the following statement:

> The wisdom of our Country's founders still rings true today. The authors of the Constitution understood that the incentive to create would greatly benefit the public. And more than two centuries after the fact, our lives have been enriched as a result—with inventions and products to make our lives easier, and music and movies to lift our spirits.[169]

During his opening remarks at that hearing, Congressman Howard Berman, the Ranking Member of the House Judiciary Subcommittee on Courts, the Internet, and Intellectual Property, addressed the need for legislation to combat piracy and urged the introduction of his draft bill known as the "Peer to Peer Piracy Prevention Act". [170] In respect of the problem of P2P piracy, Berman stated:

> There is no doubt that the vast majority of these P2P uploads and downloads constitutes copyright infringement. Music, movie, and television programs constitute an estimated 89 per cent of the files on P2P networks. As the 9th Circuit clearly held in the Napster case, the unauthorized distribution and reproduction of copyrighted

---

[168] *Piracy of Intellectual Prop. On Peer-to-Peer Networks, Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Prop. Of the House Comm. on the Judiciary, 107th Cong.* (2002), online: http://comdocs.house.gov/committees/judiciary/hju81896.000/hju81896_of.htm (last modified: August 12, 2004). A separate hearing on the issue specific issue of the use of P2P networks on university campuses was examined by the United States House of Representatives Subcommittee on Courts, the Internet, and Intellectual Property in February 2003: *Peer-to-Peer On University Campuses, Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Prop. Of the House Comm. on the Judiciary, 108th Cong.* (2003), online: http://comdocs.house.gov/committees/judiciary/hju85286_of.htm (last modified: August 12, 2004).

[169] Lamar Smith, Chairman, House of Representatives, Subcommittee on Courts, the Internet, and Intellectual Property, Committee on the Judiciary, Washington, DC., online: http://commdocs.house.gov/committees/judiciary/hju85286.000/hju85286_0f.htm (last modified: September 9, 2004).

[170] In summary, this bill aims to amends Federal copyright law "to protect a copyright owner from liability in any criminal or civil action for impairing, with appropriate technology, the unauthorized distribution, display, performance, or reproduction of his or her copyrighted work on a publicly accessible peer-to-peer file trading network, if such impairment does not, without authorization, alter, delete, or otherwise impair the integrity of any computer file or data residing on the computer of a file trader." Please see Bill Summary, online: http://thomas.loc.gov/cgi-bin/bdquery/z?d107:HR05211:@@@L&summ2=m& (last modified: September 9, 2004). There has been no further action on this bill since 2002.

> works by total strangers through a public P2P network is copyright infringement, pure and simple.[171]

The most recent legislation aimed at unauthorized file sharing of copyrighted works in the United States is the very controversial *Inducing Infringements of Copyrights Act of 2004*, which has come to be known as the "*Induce Act*".[172] Introduced by Senators Orrin Hatch and Patrick Leahy, this legislation aims to make technology companies liable for creating products that encourage consumers to violate copyright laws. This proposed legislation is likely in response to the new line of cases that have found that operators of the newly architected P2P networks themselves, nor the makers of the file sharing software, are liable for any copyright infringement. The Act seeks to undercut the law as established in the *Betamax case,*[173] which determined that a technology that is capable of substantial non-infringing uses is legal. Gigi Sohn, president of the technology policy group Public Knowledge foresees a bitter feud between the recording and computer technology industries, and predicts that "[s]upporters of the *Induce Act* will likely have a hard time convincing a majority of the Senate to go along" with the passage of the bill.[174]

Conclusion on P2P Liability

As technology that enables file sharing advances and becomes more decentralized, it is becoming less likely that P2P networks, or software providers, will be liable for the actions

---

171 *Supra* note 164, online: http://commdocs.house.gov/committees/judiciary/hju85286.000/hju85286_0f.htm (last modified: September 12, 2004).

172 *Senate Bill 2560*, online: http://thomas.loc.gov/cgi-bin/query/z?c108:S.2560 (last modified: September 12, 2004).

173 *Supra* note 159.

174 J. Glasner, *File-Trading Bill Stokes Fury*, (June 24, 2004), online: http://www.wired.com/news/business/0,1367,63969,00.html (last modified: August 11, 2004).

of their users. Individuals ought to be liable for copyright infringement as they are in the United States. However, perhaps the most pressing issue is the unenforceability of such legislation, even in the United States, if the Americans are able to pass new law laws that are tougher on peer-to-peer file sharers and networks. As Jessica Litman cautions, "[i]f forty million people refuse to obey a law, then what the law says doesn't matter."[175]

The decentralized nature of the Internet and the geographic disparity of its users creates an insurmountable problem in terms of enforcing economic rights attached to copyright. In the next section, therefore, the potential liability of ISPs will be examined.

[175] J. Litman, *Digital Copyright* (New York: Prometheus Books, 2001), at 169.

VII. ISP Liability

A. What is an ISP?

An ISP is defined as "an entity that provides its customers with access to the Internet."[176] The term is sometimes also used in reference to an entity that provides space on its servers to maintain a customer's website and make it accessible to the Internet (also known as a "hosting service", "hosting provider", or "online service provider"), and to online services like America Online that offer both access to the Internet and additional proprietary services like databases, forums, and access to online merchants.

B. Liability of ISPs

As stated above, the federal government has recognized the importance of the issue of ISP liability. Two approaches to the regulation of ISPs, in the forms of amendments to the *Copyright Act*, are being considered in this regard, namely: (i) to exempt ISPs from any liability when they act as intermediaries, with the possibility of imposing civil sanctions if certain requirements to curb the circulation of infringing material are implemented, such as a "notice and take down" procedure; and (ii) to subject ISPs to liability for copyright material on their facilities, with the possibility of a safe harbour from liability if certain actions, such as forwarding notices to infringers or collecting royalties for rights holders, are effected.

---

[176] M. Radin, J., et. al., *Intellectual Property and the Internet.* (New York: Foundation Press, 2004) at 373.

Pursuant to Chapter 3 of *Supporting Culture and Innovation: Report on the Provisions and Operations of the Copyright Act* (the "Section 92 Report"), the *Status Report on Copyright Reform* was released on March 24, 2004.[177] The liability of ISPs for the transmission and storage of copyright material over their facilities, when they are acting as intermediaries, is among the issues considered by the Status Report. As noted by the Committee, the *Copyright Act* contains an exemption from copyright liability for the "communication" of copyright material for persons that merely provide the necessary means of telecommunication. More specifically, Subsection 2.4(1)(b) of the *Copyright Act* provides that, for the purpose of communication to the public by telecommunication, "a person whose only act in respect of the communication of a work...to the public consists of providing the means of telecommunication necessary for another person to so communicate the work...does not communicate the work...to the public."

The Status Report failed to seize the opportunity to advocate, or at a minimum articulate, a strong policy direction, and instead merely summarized the two approaches taken by the European Union and the United States. Instead of providing a clear or reasoned analysis of which option may be the most suitable or viable for Canada, the authors of the Status Report seemed to seek judicial direction. As noted in the Status Report, "[t]he cases before the courts may need to be taken into account to specify these conditions and to specify the optimum scope of ISP liability."[178]

---

[177] Industry Canada, *Supporting Culture and Innovation: Report on the Provisions and Operation of the Copyright Act* (Ottawa: Industry Canada, 2002).
[178] *Ibid*, at p.III.

In the international arena, the liability of ISPs was the subject of a 1999 WIPO workshop, at which time the national and regional frameworks were examined, as were notice and takedown systems and the options for international harmonization.[179] The issue of ISP liability in the United States was delineated in the DMCA, which provides a safe harbour for ISPs when they are acting as mere conduits and not purveyors of copyright content over their networks.[180]

C. SOCAN's Proposed Internet Levy

> *In an era when it is as easy to access a website hosted by a server in Bangalore as it is to access a website in Mississauga, where is the protection for the financial rights of the people who created the music in the first place? Who, if anyone, is to pay the piper?*[181]

In a marked departure from the approach taken in the United States, where the recording industry has sued individual users and P2P file sharing services, SOCAN sought to make the ISPs liable for music downloaded by their customers. The Canadian Association of Internet Providers representing the ISPs argued that SOCAN should seek royalties for downloaded music from the websites that provide access to those works.

Pursuant to Section 67.1 of the *Copyright Act*, SOCAN and NRCC are required to file with the Copyright Board any proposed tariffs that it seeks to collect from users of copyright works in its repertoire. As a *quid pro quo*, once a tariff is certified and a user has paid, or has offered to pay the royalties in issue, an action may not be brought by either the authors of

---

[179] The World Intellectual Property Organization (WIPO), *Intellectual Property on the Internet: A Survey of Issues December 2002*, online: http://ecommerce.wipo.int at 44 (last modified: December 2, 2003).
180 *DMCA*, *supra* note 160, at Subsection 512(h).
[181] *Supra* note 1 at para. 7.

such works for infringement of their performing or communications rights in musical works, or for the recovery of royalties by performers and makers.

In 1995, in an early effort to protect its members' rights in the digital environment, SOCAN proposed and filed with the Copyright Board *Tariff 22*, which consists of a regime to remunerate rights holders for the exploitation of their musical works over the Internet. While *Tariff 22* seeks to license the royalties for the public performance of musical works by means of any telecommunication service whose transmission can be independently accessed, the primary targets of this tariff were the ISPs.

In essence, *Tariff 22* proposed a flat royalty rate payable by ISPs to SOCAN to compensate for unauthorized copying of musical works. The underlying justification for such a royalty is similar to the blank media levy – it is to apply to all ISPs without first ascertaining which ISPs are participating in the unauthorized exploitation of musical works in SOCAN's repertoire. More specifically, *Tariff 22* would require a licence and royalty fee

> ...to communicate to the public by telecommunication, in Canada, musical works forming part of SOCAN's repertoire, by a telecommunications service to subscribers by means of one of more computer(s) or other device that is connected to a telecommunications network where the transmission of those works can be accessed by each subscriber independently of any other person having access to the service.[182]

SOCAN proposed that ISPs pay royalties on a monthly basis, calculated as follows: (i) in the case of those telecommunications services that do not earn revenue from advertisements on the service, $0.25 per subscriber; and (ii) in the case of those telecommunications services

182 *Supra* note 1 at para. 12.

that earn revenues from advertisements on the service, 3.2 per cent of gross revenues, with a minimum of $0.25 per subscriber. [183]

The Copyright Board determined that it would address the proposal in two phases, the first of which involved the determination of "which activities on the Internet, if any, constitute a protected use targeted in the tariff". [184] Phase II, for which a hearing date has yet to be set, will address the second phase tariff structure and who specifically will be liable within the communication chain for the payment of fees and the amount of those fees under the tariff.

The hearing before the Copyright Board in respect of Phase I concluded in the fall of 1999. On October 27, 1999, the Copyright Board refused to hold ISPs liable for the tariff proposed. That decision was subsequently the basis of judicial review before the Federal Court of Appeal in the case of *Society of Composers, Authors and Music Publishers of Canada* v. *Canadian Association of Internet Providers* ("Tariff 22").[185] The Federal Court of Appeal decided that musical works transmitted over the Internet are communications to the public, but that intermediaries such as ISPs do not infringe copyright by transmitting these works because ISPs only provide the means of telecommunication necessary for others to communicate the works, which is exempted under the *Copyright Act*.[186]

---

183 Intellectual Property Policy Directorate Industry Canada, Copyright Policy Branch Canadian Heritage, *Consultation Paper on Digital Copyright Issues*, online: http://strategis.ic.gc.ca/epic/internet/incrpprda.nsf/vwapj/digital.pdf/$FILE/digital.pdf (last modified: February 13, 2004).

184 *Supra* note 1 at para. 13.

185 *Societyy of Composers, Authors and Music Publishers of Can*ada v. *Canadian Association of Internet Providers*, [2002] 215 D.L.R. (4th) 118 (Fed. Ct.).

186 The Federal Court also decided that the transmission of material from a cache is not exempted as this is not necessary, which finding was subsequently overturned by the Supreme Court of Canada.

On June 30, 2004 the Supreme Court of Canada released its highly anticipated and long awaited decision in the *Tariff 22* case, which addressed the issue of who should compensate the copyright holders for music that is downloaded in Canada from a foreign country over the Internet, allowing in part the appeal from the Federal Court of Appeal. The Supreme Court of Canada held that Subsection 2.4(1)(b) of the *Copyright Act* makes it clear that intermediaries are deemed not to be communicators of copyright content. Accordingly, the Supreme Court of Canada clarified that "[s]o long as an Internet intermediary does not itself engage in acts that relate to the *content* of the communication, but confines itself to providing 'a conduit' for information communicated by others, then it will fall within s. 2.4(1)(b)."[187] The Supreme Court of Canada also affirmed the Copyright Board's ruling that a telecommunication occurs when the music is transmitted from the host server to the end user.[188]

(i) Authorizing

Authorization requires that the ISP give approval to, sanction, permit, favour, or encourage the infringing conduct. McLachlin C.J., speaking for the court, stated that "...a person does not authorize infringement by authorizing the mere use of equipment that could be used to infringe copyright."[189] The Supreme Court of Canada affirmed the Copyright Board's finding that an Internet intermediary, including a host server, is a mere conduit when acting as an "innocent disseminator".[190] In support of this conclusion, the Supreme Court of Canada found that a similar approach with respect to technology infrastructure was taken in

[187] *Supra* note 1 at para 3.
[188] *Ibid.*, at para. 42.
[189] *Ibid* at para. 38.
[190] *Supra* note 1 at para. 95.

several cases in the past, including a case involving a contract dispute between two telephone companies in 1891. In that case, the Supreme Court held that "[t]he owners of the telephone wires, who are utterly ignorant of the nature of the message intended to be sent, cannot be said within the meaning of the covenant to transmit a message of the purport of which they are ignorant."[191]

In further support of this reasoning, the Supreme Court of Canada applied the reasoning in the 1945 case of *Vigneux* v. *Canadian Performing Right Society Ltd.*[192] to support its decision that the supply "of equipment or facilities by an intermediary that may be used to infringe copyright constitutes an infringement." In *Vigneux*, the issue involved the use of gramophones in public places. Vigneux installed and provided service for a coin operated gramophone that was leased by a restaurant owner, the co-defendant in that case, for the entertainment of his clients. The action was instituted by the Canadian Performing Right Society against both the owner and user of the gramophone on the basis that the defendants performed musical works without the authors' consent. In ruling for the defendants, the court held that "they had no control over the use of the machine; they had no voice as to whether at any particular time it was available to the restaurant customers or not." Following *Vigneux*, the Supreme Court of Canada, in the case of *Muzak Corp.* v. *Composers, Authors and Publishers Association of Canada Ltd.*,[193] drew an analogy by reference to the sale of a gun, reasoning that selling someone a gun does not thereby authorize that purchaser to hunt without a license or commit a crime.

---

[191] *Electric Dispatch Co. of Toronto* v. *Bell Telephone Co. of Canada* (1891), 20 S.C.R. 83, in *Supra* note 1 at para. 96.
[192] [1945] A.C. 108 (P.C.) ("Vigneux").
[193] [1953] 2 S.C.R. 182.

Absent legislation on this particular point of potential ISP liability, however, the Supreme Court theorized that, depending on the facts, "notice of infringing content, and a failure to respond by 'taking it down' may in some circumstances lead to a finding of 'authorization'."[194]

(ii) Notice and Take Down Scheme

The Supreme Court of Canada agreed with the Federal Court of Appeal regarding the potential of a finding of authorization where there is notice of infringing content and a failure to respond by "taking it down". Noting the difficulty faced by ISPs of deciding between "contesting a copyright action or potentially breaching its contract with the content provider", [195] the Supreme Court of Canada opined that remedial action by Parliament in the form of a notice and takedown procedure as has been legislated in the European Community and the United States would be more effective.

(iii) Jurisdiction: Location of an Internet Communication

Jurisdiction is germane to the *Tariff 22* decision, as well as to the certainty of commerce on the Internet and the apportionment of liability for copyright infringement or any approved Internet tariff. Given the impossibility of tracking down potential foreign infringers[196] and the challenge of applying national copyright law to activities that could take place in Canada

---

[194] *Supra*note 1 at para. 3.
[195] *Ibid* at para 127.
[196] As widely publicized, file sharing sites like KaZaA have located in offshore copyright havens such as Vanuatu in the South Pacific.

and one or more other countries, SOCAN sought to impose liability for royalties on ISPs located in Canada regardless of where the transmission originates.

The Copyright Board held that jurisdiction was to be decided by the location of the host server,[197] while the Federal Court of Appeal opted for the imposition of the less definite, but potentially more expansive "real and substantial connection" test. The majority of the Supreme Court of Canada, preferring the reasoning of the Federal Court of Appeal, held that a "real and substantial connection" to Canada was the appropriate test for determining the *situs* of an Internet communication, holding that that test "...is sufficient to support the application of our Copyright Act with international comity and be consistent with the objectives of order and fairness."[198]

The Supreme Court, finding that Parliament's jurisdiction was not limited, analyzed the real and substantial connection test adopted by the Federal Court of Appeal. In its decision, the Supreme Court of Canada appropriately noted that "[i]t is a different issue, however, whether Canada intended to exercise its copyright jurisdiction to impose copyright liability on every participant in an Internet communication with a 'real and substantial connection' to Canada". The determination of what Parliament intended is an example of statutory interpretation gone awry and Parliament ought to provide some clarity to the issue of jurisdiction.

---

[197] The Copyright Board analyzed the controversy surrounding direct broadcasting by satellite (DBS), and found that liability in Canada for the communication and authorization rights arises only when a work is posted to or downloaded from a Canadian server. Consequently, the location of the uploader and downloader are both irrelevant, even though one or both may be in Canada.

[198] *Supra* note 1 at para. 61.

In respect of the specifics of Internet jurisdiction, the Supreme Court of Canada provided a list of the relevant connecting factors, which include what appear to be the kitchen sink of possibilities, namely: the *situs* of the content provider, the host server, the intermediaries and the end user.[199] Without determining which factor may be more persuasive in determining the jurisdictional issue fundamental to the notion of liability, the Supreme Court held that "[t]he weight to be given to any particular factor will vary with the circumstances and the nature of the dispute."[200]

Therefore, Canada could exercise jurisdiction over both transmissions originating in Canada and those originating abroad. As the copyright liability of foreign content providers was not in issue in the case, the Supreme Court merely noted that "[w]hether or not a real and substantial connection exists will turn on the facts of a particular transmission."[201] The Supreme Court also referred to the possibility of copyright liability attaching where a foreign transmission is aimed at Canada, as "intimated" by the Copyright Board. However, the Supreme Court did not opine on this matter and it is assumed that it properly left this avenue open for Parliament to legislate.

Now we are left in the unenviable position of having no certainty in the area of liability and much time and money could be spent in courts fleshing out the meaning of the real and substantial connection test in this new context. It is clear that in the area of royalties,

---

[199] *Ibid.*
[200] *Ibid.*
[201] *Ibid*, at para. 77.

agreement at the international level will be required. This was also recognized by the Supreme Court. Accordingly, Mr. Justice Binnie made the following acknowledgment:

> This conclusion also raises the spectre of imposition of copyright duties on a single telecommunication in both the State of transmission and the State of reception, but as with other fields of overlapping liability (taxation for example), the answer lies in the making of international or bilateral agreements, not in national courts straining to find some jurisdictional infirmity in either state.[202]

While the Supreme Court should be commended for not opting for the simple, but easily avoidable, location of the server as determinative of jurisdiction, the federal government ought to establish on an international scale what it proposes in respect of jurisdiction.

(iv) Privacy Law

Mr. Justice LeBel, who agreed with the majority on the main issues, but for jurisdiction, provided some guidance as to how the highest court may interpret privacy law in the future. Mr. Justice LeBel cautioned as follows:

> The Court should adopt an interpretation of s.3(1)(f) that respects end users' privacy interests, and should eschew an interpretation that would encourage the monitoring or collection of personal data gleaned from Internet-related activity within the home...the real and substantial connection test, insofar as it looks at the retrieval practice of end users, encourages the monitoring of an individual's surfing and downloading activities. Privacy interests of individuals will be directly implicated where owners of copyrighted works or their collective societies attempt to retrieve data from Internet Service Providers about an end user's downloading of copyrighted works.[203]

In light of the privacy concerns necessarily implicated by the retrieval of information concerning end users' downloading practices, LeBel, J. cautioned that "[w]e should therefore

---

[202] *Ibid*, at para. 78.
[203] *Ibid*, at para. 153.

be chary of adopting a test that may encourage such monitoring".[204] This may represent a signal from the highest court that Canada will not tolerate the sort of self-help initiatives advocated in the latest round of American legislation.

Conclusion on ISP Liability

ISPs have been found to be not liable for copyright infringement when they act as mere conduits, and this is legally sound in light of the current exception in the *Copyright Act* for telecommunications providers. However, the tariff proposed by SOCAN to levy ISPs could provide a temporary solution to the problem of copyright infringement on the Internet, and this should be considered as an amendment to the *Copyright Act.*

Post Phase I, SOCAN is in now in the process of devising a fee structure and a scheme for imposing tariffs on content providers, but given the global nature of copyright, this will be difficult at best without international agreement such as there is for royalties. In an effort to achieve what copyright law has failed to protect and the complexities of enforcement, copyright holders have begun to use technology to protect their works, which topic will now be considered.

---

[204] *Ibid.*

VIII. Is The Answer to the Machine in the Machine? Digital Rights Management and the Future

In response to the problem of copyright protection in a digital world, Charles Clark maintains that "the answer to the machine is in the machine".[205]

A. What is Digital Rights Management?

DRM refers to a system for protecting the copyrights of data circulated via the Internet or other digital media by enabling secure distribution and/or disabling illegal distribution of the data. A more negative definition of DRM is "Digital Restrictions Management", which refers to the fact that DRM systems can be used to enforce restrictions on rights that users of intellectual property ought to have, namely fair dealing in Canada or fair use in the United States. Typically, a DRM system protects intellectual property by either encrypting the data so that it can be accessed by authorized users or marking the content with a digital watermark or similar method so that the content can not be freely distributed.[206]

The attempt to utilize technology to stifle the proliferation of unauthorized file sharing has involved two primary methods, the first of which was the invention of the CD that could not be copied. The other invention was the failed SDMI initiative, which involved secure compressed music file formats that it could not be played on multiple machines. As for the

[205] C. Clark, "The Answer to the Machine is in the Machine" in P.B. Hugenholz, ed., *The Future of Copyright in a Digital Environment.*

[206] In its classic manifestation, a DRM system is one in which content is obtained in a protected (usually encrypted) form, with a license that specifies the uses to which the content may be put. For example, licensing terms may dictate that the content can only be "played once", "copied three times", and/or accessed using certain hardware or platforms.

movie industry, an example of a successful and widely used early DRM system is the content scrambling system (CSS) used in DVDs, which system has been the subject of media attention.

To date, however, the technological efficacy of such measures is debatable. For example, Massive Attack's CD entitled 100th Window, released by EMI came with copy control software that angered people who purchased the CD. The CD was fraught with problems, including that it would only run on a PC that runs Windows.[207] And of course there is the problem of circumventing copyright protection systems. Jon Johansen, the infamous Norweigan teenager, created the DeCSS code that successfully unlocked the CSS code. The CSS serves as an example of the BOBE problem, or "break once break everywhere phenomenon", which DRM systems strive to avoid.[208]

B. The Need For Standardization

The music industry and technologists have an unenviable task ahead of them, namely to devise a standard that meets a lot of divergent needs. By the end of 2004, Thomson and Fraunhofer, the companies that license and own the patents behind the MP3 digital music technology, are expected to roll out MP3s with add-on DRM features. At present,

---

[207] Unfortunately for the entertainment industry, copy-protected CDs have not been popular and they have encountered myriad difficulties with them, and for a variety of reasons, the industry was unable to settle on a secure digital format.

[208] In the American *Betamax* case, Judge Ferguson noted that if he ordered Sony to put a low-cost jamming device in its video recording machines, "as sure as you or I are sitting in this courtroom today, some bright entrepreneur, unconnected with Sony, is going to come up with a device to unjam the jam. And then we have a device to jam the unjamming of the jam and we all end up like jelly." Of course, Judge Ferguson could not have anticipated the *DMCA*, which essentially results in the manufacture of the jelly to which he alluded. Canada has no such anti-circumvention measures in effect.

technology companies such as Apple, Microsoft and RealNetworks are using a variety of DRM technologies in the content that they are selling on their respective authorized downloading sites. Rocky Caldwell, Thomson's director of technology and marketing maintains that "[e]ventually, digital distribution will be a significant mass market". Further, Caldwell "...think[s] it will be served well by (digital rights management) that is based on standards. No one else seems to be proposing that."[209]

The need for standardization is clear. So is the need for systems that are accepted by customers. Online authorized music sites have utilized varying DRM systems. One such system is InterTrust, a DRM system that is used in partnership with AOL. However, as noted by Ken Hertz, entertainment lawyer, "InterTrust is a security toll which seems to completely ignore what consumers want to do...What record companies are trying to do is create systems that replicate their business model in a virtual world; the problem is that kids don't behave the way they do in the real world in the virtual world...In my opinion encryption seems to completely ignore the reality of where the technology goes.[210]

In Canada, we do not need the WCT to use TPMs or DRM systems. The problem that can arise, however, is with respect to ensuring that these measures are not circumvented and therefore rendered ineffective. The *Copyright Act* does not currently provide for the legal protection of technological measures, nor the prohibition of anti-circumvention measures.

---

[209] J. Borland, *MP3 Getting Antipiracy Makeover* (March 1, 2004), online: CNET NEWS http://news.com.com/MP3+getting+antipiracy+makeover/2100-1027_3-5167841.html (last modified: September 11, 2004).

210 John Alderman, *Sonic Boom: Napster, MP3, and the New Pioneers of Music* (Cambridge, MA: Perseus, 2001) at 146.

As highlighted in Part IV, above, the issue that received the most attention prior to the hearing addressing digital issues and the implementation of the WCT in June 2001 was whether, and under what circumstances, the *Copyright Act* should be amended to provide sanctions against persons who use circumvention technologies to infringe copyright by defeating protective technologies. Such protection may assist with the development of standards and an evolution in the technology used to manage rights.

C. International Protection

The enforcement of intellectual property rights is of international importance and concern, especially given the ease with which copyright protected material is sent instantaneously around the globe via the Internet. The legal framework for the protection of technical protection measures ("TPM"s) and DRMs is found in both the World Intellectual Property Organization (WIPO) Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (TPPT),[211] which treaties have been implemented by only a limited number of signatories, including the United States with the *DMCA* and the European Union with the *European Copyright Directive* (EUCD).

As noted in Part IV, Article 11 states that parties to the WCT shall provide sufficient and effective legal remedies against the circumvention of technological measures used by authors

[211] In its submission to the Standing Committee on Canadian Heritage on September 15, 2003, the Balanced Copyright Coalition urged the government not to follow the example of the *DMCA* in the United States, as follows: The rights and protections granted by the *DMCA* go far beyond the requirements of the WCT and the WPPT. This excessive approach severely limits public access to creative works; grants copyright protection to non-copyrighted material; erodes principles of fair use and exceptions to copyright; and places unnecessary and onerous burdens on service providers and other intermediaries. The Coalition also cautioned against legal protection for overly restrictive TPMs that could restrict what is now completely legal activity.

and copyright holders to protect their works from unauthorized and illegal use.[212] As noted in a federal report on digital copyright issues, the protection of technological measures refers to the legal methods that support the use of technologies, by copyright owners, for the purpose of retaining control over material accessible online, to overcome infringement.[213]

While Article 11 provides that contracting parties must provide protection against circumvention of technological measures, it does not specify the means for achieving this goal.[214] Indeed, there is no provision in the WCT preventing a nation from implementing a higher level of protection than that called for in the treaty.[215] This is evidenced by the implementation of varying levels of protection for anti-circumvention measures.[216]

In brief, while the DMCA and the EUCD were originally intended to implement United States and European treaty obligations in respect of TPMs, both measures went well beyond what international copyright treaties require. The language in the *DMCA*, for example, is so broad in what it prohibits that all facilitating and enabling activities intended to circumvent

---

[212] For ease of reference, the provision will be repeated below:
Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.

[213] Industry Canada & Department of Canadian Heritage, *Focus Paper: Consultation Meetings on Digital Copyright Issues, March-April, 2002* (Ottawa: Industry Canada & Department of Canadian Heritage, 2002), at 4.

[214] S. Kim, "The Reinforcement of International Copyright for the Digital Age" (2002-03) 16 Int. Prop. J 93 at 99.

[215] D. A. Basskin, "Tools and Rules: Implementing the Anti-Circumvention Provisions of the WIPO Copyright Treaty of 1996", (1999) 16 C.I.P.R. 227 at 239.

[216] For example, the European Union, the United States and Australia have implemented varying legislation addressing this issue.

technological restrictions are outlawed regardless of the lawfulness or necessity of the underlying use.[217]

D. Balancing Intellectual Property with Public Rights

> *Engineers often seek to simplify problems, but when the problem involves implementing legal statues (such as copyright) with executable code, simplifications might actually do damage, especially if the solution gives either party more power to assert control than the law entitles.*[218]

While some argue that DRM systems will result in more digital products being available to more people at lower costs than ever before, others maintain that DRM systems fail to adhere to the limitations placed on copyright holders' exclusive rights and thereby impede access. Examples include statutory exemptions such as fair dealing in Canada and fair use in the United States. Also important is the potential that certain materials that are not even protected by copyright, such as recorded music that has outlived its copyright protection and is in the public domain, or ideas and not expressions thereof, are made inaccessible.

In its submission to the Standing Committee on Canadian Heritage on September 15, 2003, the Balanced Copyright Coalition urged the government not to follow the example of the *DMCA* in the United States, as follows:

> The rights and protections granted by the *DMCA* go far beyond the requirements of the WCT and the WPPT. This excessive approach severely limits public access to creative works; grants copyright protection to non-copyrighted material; erodes

217 Section 1201(a)(1) of the *DMCA*. Specifically, section 1201 provides that "No person shall circumvent a technological measure that effectively controls access to a work protected under this title." This prohibition on circumvention became effective on October 28, 2000.
218 J. Erickson, *Fair Use, DRM, and Trusted Computing*, (April, 2003), *Communications of the ACM*, Vol. 46, No. 4, at 35.

> principles of fair use and exceptions to copyright; and places unnecessary and onerous burdens on service providers and other intermediaries.[219]

The Coalition also cautioned against legal protection for overly restrictive TPMs that could restrict what is now completely legal activity. In respect of the favouring of such protection of technological protection measures through anti-circumvention laws, Lawrence Lessig professed that this has led to a situation where "Code is Law", meaning that software, and not the law, regulates copyright.[220]

E. DRM and the Private Copying Regime

The advent of DRM systems highlights a major problem inherent in the private copying regime, namely the legitimacy of the private copying levies in light of DRM systems capable of controlling and even prohibiting private copying. The advent and the expected eventual widespread use of TPMs and DRMs have significant consequences for the control of content. Sound recordings and movies may now be protected by anti-copying technologies that may prevent the making of private copies. In light of such advances in technology, there is a need to assess whether recordings protected by such technologies ought to be excluded from the private copying regime.

Further to the WIPO Copyright Treaty of 1998, both the EUCD and the DMCA legitimize technological protection measures at the expense of private copying. Under the EUCD, for example, this means that circumventing technology to make a private copy at home could be

---

[219] *Submission by the Balanced Copyright Coalition to the Standing Committee on Canadian Heritage*, (September 1 2003), online: http://www.ccta.com/CMFiles/DetailsDocuments/09-15c58RPN-972004-812.pdf (last modified: August 14, 2004).

[220] L. Lessig, *Code and Other Laws of Cyberspace.* (New York : Basic Books, 1999).

considered illegal despite the private copying regimes in place. In 2003, the Institute of Information Law at the University of Amsterdam issued its Final Report on *The Future of Levies in a Digital Environment*, which concluded that "[w]here such individual rights management is available there would appear to remain no need, and no justification, for mandatory levy systems."[221] In Europe, the EC Copyright Directive, which was adopted in May 2001, provides that in calculating the amount of 'fair compensation' for acts of private copying, the "application or non-application of technological measures" be taken into account.[222] This provision has been interpreted as suggesting that a gradual phase-out of the levy system is envisioned in Europe as rights owners become more able to control private copying.[223] However, there is no such provision in the Canadian *Copyright Act.*

In Canada, in light of their stake in the private copying regime, CPCC's comments at the Canadian Heritage Copyright Hearing on November 4, 2003 were somewhat surprising.[224] At that hearing, the CPCC concluded the private copying regime is a stop gap measure until TPMs are pervasive and rights holders are fully able to control delivery of their goods and that the regime is devised to self-destruct as TPMs are implemented.[225] However, a formal agenda has yet to be tabled by the federal government.

---

[221] P. Hugenholtz, L. Guibault, S. van Geffen, *Final Report: The Future of Levies in a Digital Environment* (Amsterdam: Institute for Information Law, March 2003) at 2.
[222] Article 5.2(b) of the EC Copyright Directive May 2001
[223] *Supra* note 155 at 2.
[224] Standing Committee On Canadian Heritage, *Meeting No. 56 Re: Statutory Review of the Copyright Act, Section 92* (November 4, 2003).
[225] *Ibid.*

Conclusion on DRM

Given that the law can be a blunt instrument in the quest to curtail piracy and unauthorized copying, copyright holders ought to be permitted to use anti-circumvention devices to protect their works. However, while the WCT was designed to protect copyright law in the digital era, Canada must be careful to strike the right balance between facilitating the public interest in the encouragement and dissemination of works of the arts and intellect, obtaining a just reward for the creator, respecting the privacy of Canadians, and encouraging technological innovation and avoiding anti-competitive behaviour.

One of the major policy challenges involves the delicate balance between the rights of copyright holders and the limits places on those rights to benefit users. Canada recognizes that it is in the public interest to permit the use of copyrighted works for certain purposes, without the need to obtain permission from, or provide remuneration to, the copyright owner.[226] Fair dealing permits content users to reproduce a portion of a work without the permission of the copyright owner, provided the author is acknowledged, for the purpose of criticism, review, news reporting, research and private study.[227]

---

[226] Please see: *Théberge v. Galerie d'Art du Petit Champlain Inc.*, [2002] S.C.J. No. 32. In that case, the Supreme Court of Canada cautioned against favouring copyright holders at the expense of the public, as follows: ...the excessive control by holders of copyrights and other forms of intellectual property may unduly limit the ability of the public domain to incorporate and embellish creative innovation in the long-term interests of society as a whole, or create practical obstacles to proper utilization. This is reflected in the exceptions to copyright infringement enumerated in ss.29 to 32.2.

[227] *Copyright Act*, ss.29-29.2. Canadian law also provides similar exceptions for educational institutions, libraries, archives and museums.

Therefore, Canada must ensure that it does not adopt an over-broad approach to the protection of anti-circumvention measures. And this can be accomplished through exceptions to the anti-circumvention provisions, just as there are exceptions for fair dealing in the *Copyright Act*. As Terry Cohen maintains, exceptions to anti-circumvention provisions "would not only allow the use of certain materials for worthwhile causes but also would provide a means for rightful users of the material to access it – even if the copyright owner has digitally protected the work."[228]

Another important area of concern is the effect of DRM systems on users' privacy given that DRM systems often collect personally identifiable information. [229] Therefore, in addition to protecting DRM systems through the implementation of anti-circumvention measures, Canada must ensure that any such systems protect users' privacy. A further potential problem area concerns the potential impact of DRM systems on innovation and competition. In brief, standards can be created to "lock out" digital media devices and software creators.[230] For example, only iTunes and Quicktime software can play FairPlay files, and the iPod is the only compatible portable media player. In the United States, the possible anti-competitive effects are reinforced by the controls on reverse engineering in the DMCA.[231] In adopting anti-circumvention laws, therefore, Canada must strive to develop

---

[228] T. Cohen, *Anti-Circumvention: Has Technology's Child Turned Against Its Mother?*, (2003) 36 Vand. J. Transnat'l L. 961, online: http://law.vanderbilt.edu/journal/36-03/Cohen.pdf (last modified: December 20, 2004).
[229] R. Owens and R. Akalu, *Legal Policy and Digital Rights Management*, online: http://www.innovationlaw.org/Bell_Labs/pages/Owens-Akalu.pdf (last modified: December 20, 2004).
[230] Gartner G2 and The Berkman Center for Internet & Society at Harvard Law School, *Copyright and Digital Media in a Post-Napster World*, at 48, online: http://cyber.law.harvard.edu/media/files/wp2005.pdf (last modified: January 20, 2005).
[231] *Ibid.*

laws that protect DRM systems, while at the same time ensuring that competition and innovation are not stifled.

DRM systems have the potential of transforming the way that entertainment content is protected through the use of direct licensing. At this stage, however, the efficacy of such systems is suspect, and many believe that every DRM system is susceptible to being cracked. Given the ubiquity of the Internet and the BOBE phenomenon, once encrypted content is cracked, it is virtually impossible to control content. Moreover, there is nothing to prevent unencrypted content from finding its way onto P2P networks. While the efficacy of DRM systems has not yet been established, it is expected that flexible, accepted DRM systems will be developed and deployed in the coming years.

IX. Options for the Entertainment Industry

A. The Unenviable Problem

> *Since we don't have a solution to what is a profoundly new kind of challenge, and are apparently unable to delay the galloping digitization of everything not obstinately physical, we are sailing into the future on a sinking ship.*[232]

When the possibility of the introduction of the private copying regime was being debated in Canada, several possibilities were circulated in respect of how best to compensate the music industry for its perceived losses. One such possibility was a voucher system, whereby those who purchased blank tapes were given vouchers, which could be subsequently redeemed toward the purchase of records.

The entertainment industry is now in that same unenviable position. This time, however, the industry is attempting to control its works protected by copyright in the intangible world of the Internet. The effect on copyright could not be more dramatic as the rights holders potentially lose more than the potential to recoup the value of the reproduction of their works. They can lose control of the content itself as it can be made available to millions of Internet users around the globe without much effort. And while the source of the problem may be simple, the solution is complex and difficult to achieve.

The industry is being forced to come up with new and better business models to respond to the evolution of file sharing networks, while governments and collective societies are

[232] Barlow, *supra* note 23.

scrambling to come up with ways to make copyright fit this new digital era, and devise remuneration solutions, respectively.

It is hoped that the music industry will come to its senses and expend its efforts and resources on securing such business models, instead of suing and alienating its customers and potential customers. Wharton Professor Richard Shell compares the lawsuits against Ford's customers 100 years ago to the record labels suing its customers today. He posits that the record labels' strategy will suffer a similar fate and be unsuccessful: "As Henry Ford once summed it up, lawsuits against new technologies provide 'opportunities for little minds...to usurp the gains of genuine inventors...and under the smug protest of righteousness, work a hold-up game in the most approved fashion.'"[233]

And while the law is not settled in respect of the future liability of file sharing networks in the United States, and, at least in Canada, the liability of end users of unauthorized downloaded copies of copyrighted works, the following facts are not controversial. Artists and copyright holders ought to be compensated for their copyrighted works further to the economic rights provided to them in the *Copyright Act*. File sharing networks do not appear to be going away given the implementation of more decentralized networks and the use of open source software. And while Apple's itunes boasts of its catalogue of 500,000 songs, fans are said to be doing a better job as reflected by the millions of songs made available by

---

[233] G. Shell, *Suing Your Customers: A Winning Business Strategy?*, online: http://www.wharton.upenn.edu/faculty/shellric.html (last modified December 13, 2004).

fans for download on KaZaA.[234] What is less clear, however, is how to solve the problem of copyright infringement online.

B. Potential Solutions

The creation of a statutory license is the most popular and perhaps realistic of options. As highlighted by Professor Gervais, "[t]here is little doubt that collective administration is the way of the future, since it will be impossible for individual rights holders, except perhaps large entities, to monitor licenses and collect royalties around the world." [236] Given the high cost of negotiating licenses for every copyrighted work being used on the Internet via direct licensing, several scholars and other interested parties have advanced proposals to legalize file sharing and downloading and uploading of copyrighted content on the Internet.[237]

The appeal of a levy lies in its instantaneous effect as rights holders not presently being paid for the use of their works will receive some compensation. And echoing the sentiments expressed by Lord Templeman in respect of private copying, there is a positive social effect to legalizing what millions of people are doing everyday if downloading is illegal. And the same benefits that accrue to the collective administration of copyright royalties, such as the

---

[234] Electronic Frontier Foundation, *Voluntary Collective Licensing of Music File Sharing: A Better Way Forward* (Let The Music Play White Paper), online: http://www.eff.org/share/?f=collective_lic_wp.html (last modified: December 12, 2004).

[235] And in Canada, where file sharing has thus far been deemed legal, no statistics appear to indicate that the number of downloads is on the rise.

236 D. Gervais, *Digital Technology and the 'Copyright Industries'* (1996) 62 Copyright World 22 at 26.

[237] See also N. Netanel, *Impose a Non-commercial Use Levy to Allow Free P2P File-Swapping and Remixing*, online: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=3522560; and W. Fisher, *Promises to Keep: Technology, Law, and the Future of Entertainment*, Stanford Press, 2004.

savings in costs associated with attempting to enforce rights and transaction costs, will be available.

(i) Voluntary Licensing

The Electronic Frontier Foundations's *Let the Music Play White Paper* proposes a voluntary collective licensing scheme which is worthy of consideration. The precedent for its proposed model is found in broadcast radio, which was also resisted at first by songwriters. "After trying to sue radio out of existence, the songwriters ultimately got together to form ASCAP (and later BMI and SESAC)."[238] In return for paying a fee, radio stations were permitted to play whatever music they liked, using whatever equipment worked best.[239] What makes the Internet so complex, however, is that unlike a typical radio station, it is not used exclusively to transmit music to the masses. The radio stations provide readily accessible and identifiable payors for such a fee, but there is no such point person in the online world. If Shawn Fanning or Bram Cohen were delivering music via the Internet analogous to a pirate radio station, this would be different. This is why the issue of who should be liable for the online dissemination of copyright works is so complex.

Even if voluntary licensing were possible, problems include copyright holders not willing to assign their rights at any cost for fear of losing control over them, and users not paying the voluntary licensing fee or freeloading.

---

[238] *Supra* note 226.
[239] *Ibid.*

(ii) Compulsory Licensing

Compulsory licensing is an option to get around the problems associated with a voluntary scheme. Compulsory licenses are not new in Canada or the United States. Historically, the government has stepped into the fray and compelled copyright holders to license their work for a fee, which is why it is called a "compulsory license".

In the United States, the first compulsory license was granted in 1909 for the player piano. Since the player piano, the situation arose in respect of cable TV, satellite TV, digital recording media, and Internet radio. According to the Electronic Frontier Foundation, sheet music publishers claimed that the creation of piano-readable sheets was against the law and that they should have the right to monopolize the booming piano roll industry. Congress disagreed and instead crafted a compulsory license that paid recording artists while protecting the new technology. Today, this license allows bands to record (or "cover") another band's song (so long as they've paid the $.08 per copy of the recorded track). In 2001, the major record labels refused Napster's request to buy licenses and sell their artists' songs online with their authorization.[240]

Canada is well positioned to enact a statutory scheme of licensing as the Copyright Board could set the tariff rates, while SOCAN could distribute the income to rights holders. The revenue generated could be divided among copyright holders based on the number of downloads of each master. While this may seem like an unmanageable task, digital rights

[240] At that time, the music labels seemed to have been holding out for a free market solution.

management technology is already being used by performing rights societies to count the number of performances of songs on broadcast radio and TV.

While a compulsory licence always requires copyright holders to make their works available for fair compensation, the particular method of compensation is totally open. In the world of Internet radio, for instance, a webcaster pays for the songs that she plays. Her fees and playlists go to a central distribution point, and the artists on the playlists are compensated. On the other hand, cable TV companies pay broadcast networks directly when they play network programming like "The Simpsons".[241]

SOCAN has proposed a compulsory tariff scheme of Internet royalties known as Tariff 22, the details of which will not be known until Phase II is underway. However, given that ISPs have been freed of any liability for such royalties, it will be interesting to learn how SOCAN calculates and administers the royalty.

The major drawback is that any levy system is a form of rough justice with all of the problems outlined above in respect of private copying. Moreover, legitimate online service providers will find it more difficult to sell that which is paid for by a levy. In addition, copyright holders could become dependent on levies, which, in the long term, could dilute the exclusive economic rights afforded to them by the *Copyright Act*. It is advisable, however, that any such licensing scheme be implemented as a stop-gap measure like the private copying regime in light of the expected evolution in DRM systems. Therefore, any levy

[241] *Supra* note 226.

system applied ought to be instituted for an interim or sunset period in order for the content industries to get their houses in order.

X. Conclusions and Recommendations

The music industry is an incredible part of our sovereignty ... we're not going to let that be jeopardized[242].

~Paul Martin

While Canadian Prime Minister Paul Martin has claimed that he is "not going to let an industry that is so important to this country, so important to our ability to tell our stories and sing our songs to the rest of the world, be jeopardized",[243] the federal government has been slow in its attempt to combat the problem of unauthorized uploading and downloading of copyrighted content over the Internet.

Although the federal government's approach to copyright reform is laudable in that it has proceeded in such a consultative fashion involving a wide variety of stake holders, certain areas of the law need to be clarified and developed in a comprehensive and decisive fashion by the federal government without further delay. The process of copyright reform in these areas has simply taken too long and this may have severe and long-term implications for the entertainment industry in Canada. As prophetically cautioned by G. Davies in 1994:

> *Experience has demonstrated the need for copyright legislation to be adapted swiftly to new technology, and new uses of works. If government fails in this task, users and consumers come to believe that they have a right to free use of works. Subsequently, the entrenched interests they represent make the task of the law-maker in redressing the balance between the interest of the copyright owners and the public at large much more difficult.*[244]

---

[242] *Canadian PM Backs Music Industry*, online: P2Pnet.Net News http://p2pnet.net/story/1140 (last modified: September 9, 2004).
[243] *Ibid.*
[244] G. Davies, *Copyright and the Public Interest* (New York: VCH Publishers Inc., 1994) at 176-177.

While the private copying regime may have been an appropriate compromise for the home taping of music onto audiocassettes, the regime is no longer legitimately linked to its original purpose. The relevant jurisprudential bodies have interpreted those portions of the *Copyright Act* establishing the private copying regime as allowing downloading of music content from the Internet, which could not have been the intention of Parliament.

Perhaps the most insurmountable obstacle at this stage of the copyright battle is the attitude, that copyrighted works are free for the taking, that has grown up alongside the proliferation of P2P networks, which may have been reinforced by the recent and highly publicized pronouncements that downloading and uploading copyrighted works in Canada is legal. At the very least, the federal government must amend the *Copyright Act* to make it crystal clear that the private copying regime applies to private copying of authorized source material. For greater clarity, the *Copyright Act* should also state that unauthorized downloading and uploading of copyrighted works does not fall under the private copying regime, and that these activities constitute copyright infringement.

In addition, the federal government should amend the *Copyright Act* to make it illegal for Internet posters to make copyright material available for copying. Such legislative amendments will not interfere with any proposed statutory scheme of levies as the right to copy will be, like the private copying regime, an exception to the rights held by the copyright holders.

In order for commerce to thrive on the Internet, there must also be greater clarity with respect to the liability of ISPs and the timeline for such legislation is not satisfactory. If liability is to be attributed to ISPs in certain circumstances, often the only entities in a position to identify potential infringers of intellectual property rights, the federal government ought to make this plain. Furthermore, a notice and takedown system should be implemented such that ISPs could be liable for infringing content if they do not take the appropriate steps to take down such material.

In an analog world, it was much easier to control content and maintain exclusivity. In Canada, the current debate over DRM systems and the potential implementation of *DMCA*-styled legislation can be viewed as a catalyst for discussion between intellectual property rights owners and the public. At this stage of the dialogue, however, copyright owners and users, or those who profit from such uses, are currently in a shouting match over the legitimacy and efficacy of DRMs.

While it may be trite that a machine or code will not likely ever be able to decipher non-copyrightable material from that which is properly the domain of copyright, such as expression from ideas, or statutory exemptions such as fair use and fair dealing, a solution must be fashioned for the cultural content industries that is consistent with the purpose of the *Copyright Act*. The entertainment industry must embrace and harness technology and use it to its advantage to exploit the value of its copyrights. However, Canada must strive to achieve the appropriate balance between protecting intellectual property rights holders and users and their fundamental right to privacy. Any protection of DRM systems must be done

only as allowed by the *Copyright Act*, lest we devolve into a society that sanctions para-copyright.

While the current and ever-evolving P2P software and the popularity of broadband Internet access serves to magnify the problems of unauthorized use of copyright protected works, the entertainment industry would be well-advised to shift gears away from litigating and alienating its former and potential customer base to embracing the technology and focusing attention on developing better business models. In this regard, the music industry will have an easier time as music is necessarily more easily transformed to other platforms, such as ring tones on cellular phones. However, it is expected that the movie industry can learn from the mistakes made by the music industry before bandwidth and file compression technologies make it less time consuming, and thus more attractive for consumers, to download higher numbers of movie files.

What stakeholders need to do is step back and look at first principles. Copyright holders ought to be able to exploit their copyrights for commercial value. Those who wish to benefit from such works ought to pay the rights holders. As highlighted by Lionel Sobel, "better business models are the Holy Grail of the digital age."[245] And in the end, the solution to the problem of digital copying lies in improving business models and technological controls of content, while at the same time respecting users rights, or the limits that are placed on the exclusive rights of copyright holders. However, at this stage, the most

[245] L. Sobel, *DRM as an Enabler of Business Models: ISPs as Digital Retailers* (2003), online: https://www.law.berkeley.edu/institutes/bclt/drm/papers/sobel-drm-btlj2003.pdf (last modified: August 10, 2004).

viable solution is to require users to pay a tariff. Until such time as the entertainment industries are able to utilize effective and accepted DRM systems, an Internet tariff could be implemented with a sunset provision to remunerate copyright holders, while at the same time forcing copyright holders to devise better solutions for the entertainment industry.

Selected Bibliography

Legislation

Berne Convention for the Protection of Literary and Artistic Works, 9 September 1886 CTS 1948/22, online: WIPO (http://www.wipo.int/treaties/berne/index.html).

Copyright Act, R.S.C. 1985, c.C-42.

Copyright Amendment (Digital Agenda) Act 2000 (Australia).

Digital Millennium Copyright Act, Pub. L. No. 105-304, §103 112 Stat. 2860 (codified as amended at 17 U.S.C. §1201 (1988).

EC, *Council Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society*, online: The European Commission (http://www.europa.eu.int).

WIPO Copyright Treaty and the agreed statements of the Diplomatic Conference that adopted the Treaty and the provisions of the Berne Convention (1971), 20 December 1996, online: WIPO (http://www.wipo.int/treaties/wct/index.html).

WIPO Performances and Phonograms Treaty adopted by the Diplomatic Conference, 20 December 1996, online: WIPO (http://www.wipo.int/treaties/wppt/index.html).

Cases

A&M Records v. Napster, Inc., 239 F.3d 1004, 1015 (9th Cir. 2001).

BMG Canada v. *John Doe* , 2004 FC 488.

CCH Canadian Ltd. v. *Law Society of Upper Canada*, [2004] SCC 12.

Muzak Corp. v. *C.A.P.A.C.*, [1953] 2 S.C.R. 182 at 189.

Sayre v. *Moore* (1785), 1 East. 361n, 102 E.R. 139.

Society of Composers, Authors and Music Publishers of Canada v. *Canadian Association of Internet Providers*, [2002] 215 D.L.R. (4th) 118 (Fed. Ct.).

Society of Composers, Authors and Music Publishers of Canada v. *Canadian Association of Internet Providers*, [2004] SCC 45.

Tariff of Levies to Be Collected by CPCC in 2003 and 2004 on the Sale, in Canada, of Blank Audio Recording Media (Re), (2003) 4 C.P.R. (4th).

Théberge v. Galerie d'Art du Petit Champlain Inc., [2002] S.C.J. No. 32.

Books

T. Black, *Intellectual Property in the Digital Era.* (London: Sweet & Maxwell, 2002)

G. Davies, *Copyright and the Public Interest* (New York: VCH Publishers Inc., 1994).

G. Davies, *Private Copying of Sound and Audio-Visual Recordings.* (Oxford: ESC Publishing Limited, 1984).

P. Goldstein, *Copyright's Highway: From Gutenberg to the Celestial Jukebox* (Stanford, California: Stanford University Press, 2003).

P. Hugenholtz, ed., *Copyright and Electronic Commerce: Legal Aspects of Electronic Copyright Management* (London: Kluwer Law International, 2000).

L. Lessig, *Code and Other Laws of Cyberspace.* (New York : Basic Books, 1999).

J. Litman, *Digital Copyright* (New York: Prometheus Books, 2001).

M. Radin, J., et. al., *Intellectual Property and the Internet.* (New York: Foundation Press, 2004).

G. Takach, *Computer Law* (Toronto: Irwin Law, 1998).

D. Vaver, Intellectual Property Law (Toronto: Irwin Law, 1997).

Articles

J. Alderman, *Sonic Boom: Napster, MP3, and the New Pioneers of Music* (Cambridge, MA: Perseus, 2001).

J. Askanazi, *The Fate of Napster: Digital Downloading Faces and Uphill Batttle*, 13 Duke L. Tech. Rev. 13, 30 (2001).

J. P. Barlow, *The Economy of Ideas: A framework for patents and copyrights in the Digital Age. (Everything you know about intellectual property is wrong.).* Wired Magazine, Issue 2.03 (March 1994), online: http://www.wired.com/wired/archive/2.03/economy.ideas.html.

D. Basskin, *Tools and Rules: Implementing the Anti-Circumvention Provisions of the WIPO Copyright Treaty of 1996*, (1999) 16 C.I.P.R. 227.

D. Beazley, *Facing the Music* (April 3, 2004), online: http://www.canoe.ca/NewsStand/EdmontonSun/News/2004/04/03/407037.html.

K. Belson, *America's Broadband Dream is Alive in Korea* (New York: The New York Times, May 5, 2003).

Big Music's Digital Nightmare (August 9, 2001), online: economist.com www.economist.com/agenda.printerfriendly.cfm?story_ID=729127.

J. Borland, *MP3 Getting Antipiracy Makeover* (March 1, 2004), online: CNET NEWS http://news.com.com/MP3+getting+antipiracy+makeover/2100-1027_3-5167841.html.

J. Borlan, *RIAA Settles with 12-year-old Girl* (September 9, 2003), online: CNET News.com http://news.com.com/2100-1027-5073717.html.

Canadian Private Copying Collective, *Appeal Court Upholds Constitutionality of Private Copying Levy and Legality of CPCC's Zero-Rating Program*, December 17, 2004, online: http://cpcc.ca/english/pdf/CPCC17dec2004.pdf.

Canadian Recording Industry Association, *More than Half a Million Download Attempts on New Tragically Hip Single* (May 12, 2004), online: http://cria.ca/news/cria_12may04b.htm.

Canadian Recording Industry Association, *New Industry Study Shows Downloading and Burning Discourages Music Sales*, July 6, 2004, online: http://cria.ca/news/cria_06jul04.html.

Canadian PM Backs Music Industry, online: P2Pnet.Net News http://p2pnet.net/story/1140.

C. Clark, "The Answer to the Machine is in the Machine" in P. Hugenholz, ed., *The Future of Copyright in a Digital Environment.*

Clip2 Distributed Search Services, *The Gnutella Protocol Specification*, online: http://www.stanford.edu/class/cs244b/gnutella_protocol_0.4.pdf.

T. Cohen, *Anti-Circumvention: Has Technology's Child Turned Against Its Mother?,* (2003) 36 Vand. J. Transnat'l L. 961, online: http://law.vanderbilt.edu/journal/36-03/Cohen.pdf.

G. Davies and M. Hung, *Music and Private Copying: An International Survey of the Problem and the Law*, Sweet & Maxwell, 1993; *Remuneration for Private Copying in Australia: A Discussion Paper*, Prepared by Australian Copyright Council, September 2001.

Electronic Frontier Foundation, *Supreme Court to Hear MGM v. Grokster*, online: http://www.eff.org.

Electronic Frontier Foundation, *Voluntary Collective Licensing of Music File Sharing: A Better Way Forward* (Let The Music Play White Paper), online: http://www.eff.org/share/?f=collective_lic_wp.html.

J. Erickson, *Fair Use, DRM, and Trusted Computing*, (April, 2003), *Communications of the ACM*, Vol. 46, No. 4.

N. Fitzpatrick and S. Levene, *The Little Picture Show: Online Movie Distribution* (2003), online: http://www.google.ca/search?q=cache:C3j8kO23130J:www.dentonwildesapte.com/assets/1/11797.pdf+Fitzpatrick+Levene+The+Little+Picture+Show:+Online+Movie+Distribution+&hl=en.

E. de Fontenay, *The Digital Economy: How Digital Goods are Reshaping the Rules of Commerce* (2000), online: MusicDish Industry e-Journal http://www.musicdish.com/mag/index.php3?id=2259.

S. Fulghum, *Will Canada Tighten File Sharing Laws?* (April 7, 2004), online: SoulShine http://www.soulshine.ca/news/newsarticle.php?nid=431.

E. Atwood Gailey, *Who Own Digital Rights? Communications and the Law*, March 1996, Vol. 18, no. 1, p. 13. Cited in P. Bernt Hugenholtz & Annemique M.E. de Kroon, online: http://www.ivir.nl/publications/hugenholtz/e-rights.html#note1.

M. Garlick, *Pricing Recorded Music in an Online World.* Gilbert & Tobin July 11, 2000, online: thestandard.com http://www.thestandard.com/article/display/0,1151,21262,00.html.

Gartner G2 and The Berkman Center for Internet & Society at Harvard Law School, *Copyright and Digital Media in a Post-Napster World*, at 48, online: http://cyber.law.harvard.edu/media/files/wp2005.pdf.

D. Gervais, *Canadian Copyright Law Post-CCH*, (2004) IPJ 131.

D. Gervais, *Digital Technology and the 'Copyright Industries'* (1996) 62 Copyright World 22.

J. Glasner, *File-Trading Bill Stokes Fury*, (June 24, 2004), online: http://www.wired.com/news/business/0,1367,63969,00.html.

T. Goetz, *Sampling the Future*, (December 2004), online: Wired Magazine http://www.wired.com/wired/archive/12. 1/sample.html.

M. Graser, *Coming DVD Recorders will Speed Copying. Variety* (December 8-14, 2003).

K. Greenfeld, *Meet the Napster: Shawn Fanning was 18 when he wrote the code that changed the world. His fate, and ours, is now in the court's hands.* Time Magazine. September 25, 2000, online: http://www.cnn.com/ALLPOLITICS/time/2000/10/02/napster.html.

P. B. Hugenholtz, *P2P and Copyright: Are Levies a Solution?* Paper presented at the conference *Intellectual Property Beyond Rights*, IPR University Centre, Espoo, October 25-26, 2004.

P. Hugenholtz, L. Guibault and S. van Geffen, *The Future of Levies in a Digital Environment* (Final Report) (Amsterdam: Institute for Information Law, March 2003), online: http://www.ivir.nl/publications/other/DRM&levies-report.pdf.

R. Hurst, *How Many People Use the Internet? What Do They Use it For?,* online: http://www.bcentral.co.uk/issues/marketing/ebusiness/howmany.mspx.

Industry Canada & Department of Canadian Heritage, *A Framework for Copyright Reform* (Ottawa: Industry Canada, Department of Canadian Heritage, 2001).

Industry Canada, *Consultation Paper On Digital Copyright Issues*, (June 2001), online: Strategic Canada http://strategis.ic.gc.ca/epic/internet/incrp-prda.nsf/en/h_rp01102e.html.

Industry Canada, *Copyright Infringement on the Internet*, online: http://strategis.ic.gc.ca/epic/internet/insmt-gst.nsf/en/sf03315e.html.

Industry Canada & Department of Canadian Heritage, *Focus Paper: Consultation Meetings on Digital Copyright Issues, March-April, 2002* (Ottawa: Industry Canada & Department of Canadian Heritage, 2002).

Industry Canada, *Retailing on the Internet: A* Guide, online: Retail Interactive http://retailinteractive.ca/SSI/ri/Sctn31_e.pdf.

Industry Canada, *Supporting Culture and Innovation: Report on the Provisions and Operation of the Copyright Act* (Ottawa: Industry Canada, 2002).

J. Keon, *Audio and Video Home Taping: Impact of Copyright Payments.* Policy Research, Analysis and Liaison Directorate, Policy Coordination Bureau, Consumer and Corporate Affairs Canada (1982).

S. Kim, *The Reinforcement of International Copyright for the Digital Age*, (2002-03) 16 Int. Prop. J 93.

W. Landes and R. Posner, *An Economic Analysis of Copyright Law* (1989) 18 J. Legal Stu. 325.

M. Liedtke, *Napster's Technology Appears Destined to Revolutionize E-Commerce*, (July 27, 2000), online: http://sfgate.com/cgi-bin/article.cgi?file=/news/archive/2000/07/27/financial1804EDT0197.DTL.

R. Mark, *RIAA Keeps Pressure on P2P Users* (March 23, 2004), online: http://www.internetnews.com/xSP/article.php/3330.

Miller, *Copyright Protection for Computer Programs, Databases and Computer-Generated Works*, 106 Harv. L. Rev. 977 (1993).

M. Mosquera, *Post Napster: Technology Will Tell the Tale*, Internet Week, April 3, 2001, online: http://www.internetweek.com/story/INW2001403S0009.

N. Netanel, *Impose a Non-commercial Use Levy to Allow Free P2P File-Swapping and Remixing*, online: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=3522560.

F. Oberholzer-Gee and K. Strump, *The Effect of File Sharing on Record Sales An Empirical Analysis* (March 2004), online: http://www.p2pnet.net/zero/FileSharing_March2004.pdf.

R. Owens and R. Akalu, *Legal Policy and Digital Rights Management*, online: http://www.innovationlaw.org/Bell_Labs/pages/Owens-Akalu.pdf.

Reuters, *Study Finds Downloading From the Internet Doubled*, July 13, 2004; Reuters, *Video, File-sharing Thrives as Net Users Find New Outlets.* Abstracted by MusicBusinessCanada, *Global File Sharing Increasing But Video Downloads More Popular Than Music*, July 13, 2004, online: http://www.cirpa.ca/mbccore.cfm?Page=News&NewsID=531&mark=Newsid&value=531

M. Rushton, Economic Impact of WIPO Ratification on Private Copying Regime. Prepared for Canadian Heritage. Final version: June 2002.

G. Shell, *Suing Your Customers: A Winning Business Strategy*?, online: http://www.wharton.upenn.edu/faculty/shellric.html.

L. Sobel, *DRM as an Enabler of Business Models: ISPs as Digital Retailers* (2003), online: https://www.law.berkeley.edu/institutes/bclt/drm/papers/sobel-drm-btlj2003.pdf.

A. Staiman, *Shielding Internet Users From Undesirable Content: The Advantages of PICS Based Rating System*", 20 Fordham Int'l L.J. 866.

D. Steinberg, *The Near Future of Digital Rights Management* (October, 2003), online: http://www.macdevcenter.com/pub/a/mac/2002/10/03/drm.html.

Submission of the Canadian Private Copying Collective with respect to Supporting Culture and Innovation: Report on the Provisions and Operation of the Copyright Act, filed with the House of Commons Standing Committee on Canadian Heritage, September 15, 2003 at Preface, online: http://strategis.ic.gc.ca/epic/internet/incrp-prda.nsf/en/rp00864e.html.

L. Thomason, *Music May Drown Out Your Message*, March 2004, online: NetMechanic http://www.netmechanic.com/news/vol7/design_no5.htm.
D. Vaver, *Canada's Intellectual Property Framework: A Comparative Overview*, (2004) 17 IPJ125.

R. Towse, *Assessing the Economic Impacts of Copyright Reform on Performers and Producers of Sound Recordings in Canada* (this report was commissioned by Industry Canada in 2003), online: Industry Canada http://strategis.ic.gc.ca/epic/internet/inippd-dppi.nsf/en/ip01112e.html.

A. Veiga, *BitTorrent Gives Hollywood a Headache*, (December 10, 2004), online: http://www.mymotherlode.com/News/article/id/D86T0EI01.
D. Zitzerman and A. Reinstein, *General Introduction to Film and Television*, Chapter 2 in Jacqueline J.L. King (ed.), *Entertainment Law in Canada* (Markham, Ontario, 2003).