ARTIST COMPENSATION & THE CANADIAN COPYRIGHT REGIME

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I. Introduction

[1] Canada's cultural industries are important, and need and deserve to be supported. Copyright law is one traditional method to provide such support. Within copyright law, moreover, there are several alternative mechanisms that can generate monetary and non-monetary rewards for cultural creators. This paper surveys and evaluates these mechanisms, as well as other legal and policy instruments that can be used to encourage the creation and dissemination of Canadian cultural products.

[2] The sky is not falling. Peer-to-peer networks, for example, do not inevitably spell doom and gloom for Canadian cultural industries. There is, therefore, no need to embark on an unnecessary and unwise overhaul of copyright law. We are, however, in the midst of dramatic technological, social and economic changes. Canada's cultural industries share legitimate concerns about sustainability in the face of such changes, and for that reason foresight is warranted. The challenge is to cut through the rhetoric to evaluate the problem and derive appropriate solutions.

[3] Money is obviously an important, if not the most important, aspect of any plan to promote Canadian culture. Hence, this paper focuses on ways to generate the revenue streams that keep our cultural industries afloat. Very broadly speaking, there are at least three means to financially support the development of Canadian cultural products.

[4] The first is to grant proprietary rights, namely exclusive copyrights, to artists and intermediaries. Revenues can then be generated through the sale of goods and services to consumers of cultural products protected by such rights. The second is to establish non-proprietary rights of remuneration. In certain situations, it is seen as impracticable to obtain such remuneration from actual consumers of cultural products. Therefore, revenues can instead be generated by imposing levies on third-party proxies—manufacturers and providers of related goods or services—who are presumed to be able to distribute, and to actually distribute, these costs to culture consumers. The third is to provide public funding to creators of cultural products. In this context, revenues essentially flow from the public at large, or ideally from consumers of cultural products, through direct or indirect taxation mechanisms.

[5] Canadian cultural industries are currently supported to some extent by all such schemes. This state of affairs is generally acceptable, with several caveats. Exclusive copyrights can sometimes be useful means to support culture, but there are issues of enforceability, and like all proprietary monopolies there are associated costs and benefits of copyright. Its most significant drawback is inhibited dissemination of and access to cultural products. Arguably, levies on proxy goods and services may be necessary in certain contexts. Such circumstances are rare, and not currently present in Canada. The

suggestion that there should be, for example, a levy on Internet access, modelled roughly upon what is known as "Tariff 22",[2] is therefore unnecessary. Internet service provider (ISP) liability generally may be a step in this direction, so lawmakers should tread carefully. Where the need for levies exists, there are substantial difficulties with implementation that must be addressed. The fundamental shortcoming of both copyright laws and proxy levies is that they primarily support foreign not Canadian cultural industries. Therefore, public funding is essential. Public funding programs are admittedly vulnerable to the political environment, and require safeguards protecting creators' independence. Yet their contingent nature is precisely the advantage; money can be directed toward those most in need of support.

[6] My goal is not to evaluate the nuances of any particular scheme but to consider the conceptual and pragmatic implications of these various alternatives, from a specifically Canadian policy perspective. The paper takes a birds' eye view of recent legal developments, policy initiatives and general proposals designed to support Canadian cultural industries. I conclude that we do not need drastic copyright reform or newfangled levy schemes. Copyright law does require tweaking, and there are serious concerns with Canada's current private copying levy. But the real key is reduced reliance upon copyright royalties and levy revenues as a primary means to compensate Canadian artists and induce Canadian cultural creativity.

II. The Products and Players

[7] The term "cultural industries" is used in this paper in a very broad sense. It includes both "popular" or "pop" culture, such as mass-marketed books, recorded music, movies, television programs and the like, and so-called "high" culture, like paintings, sculptures, photographs and the performing arts for example. There are few bright lines here. A live dramatic or musical performance can easily be seen as either popular or high culture, depending on one's personal views. Yet there is an indefinable difference at the core, so that popular culture is usually classified alongside sports and gambling in the entertainment or leisure industries, whereas high culture is associated with relatively elitist performing arts like the ballet or symphony.[3]

[8] Another distinction can be drawn between "physical" culture and "weightless" culture.[4] The former includes tangible products, like CDs; the latter includes intangible events, like radio broadcasts. Sometimes this mirrors the distinction between a good and a service. I use the term "cultural products" to include both.

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[2] See *infra* note 34 and accompanying text.
[3] Peter S. Grant & Chris Wood, *Blockbusters and Trade Wars: Popular Culture in a Globalized World* (Vancouver: Douglas & McIntyre Ltd., 2004) at 2-3.
[4] Rick Van der Ploeg, "In Art We Trust" *De Economist (Leiden)* 150:4 (October 2002) 333.

[9] It is important to appreciate the market structure of Canadian cultural industries, in order to understand whose interests are at stake in the debate. The creation of cultural goods and services, particularly pop culture, is said to be a "team sport".[5] Broadly speaking there are five interest groups to consider: authors, performers, producers, distributors and consumers. Authors and performers are both artists, and producers and distributors are both intermediaries. None of these labels are employed as technical definitions. Although they may coincide with familiar classes of rights-holders in copyright law, I use the terms more flexibly and intuitively. Crucially, a given actor may play one, some or all of the following roles in respect of a particular product, or in respect of different products at one time or another.

[10] Throughout this paper, I use examples to illustrate some of my key concerns and recommendations. The popularity and putative vulnerability of the music industry—or more accurately the recording sector of the music industry—make it a timely and appropriate candidate for discussion. Music has been called "intellectual property's canary in the digital coalmine."[6]

[11] Authors are the natural persons from whom cultural creativity originates.[7] In lay terms, an author is commonly thought of in relation to books or stories. Technically, in copyright law, a corporation may be an author.[8] My view of the term lies somewhere between these interpretations. Thus, literary writers, songwriters, screenwriters, play writers, dramatists, composers, drawers, painters, photographers, programmers or other front-line creators of cultural products are all authors. Corporate or other legal entities are not. Authors are the first and most important link in the chain of cultural creativity.

[12] There is a class of authors that includes persons who translate stories from one language to another, or who arrange piano scores for the guitar, or who turn novels into screenplays. These interpreters straddle the line between authors and performers. Performers, like authors, are natural persons. Singers immediately spring to mind. But the class of performers goes beyond music to include performers of dramatic works, for example. The actors in a movie, television show or play are all performers; so too is a director, in a way.

[13] The class of producers is perhaps the broadest in scope. Producers scout, fund, concretize and promote cultural products. They assume all or most of the enormous

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[5] Grant & Wood, *supra* note 3 at 27

[6] Committee on Intellectual Property Rights in the Emerging Information Infrastructure, National Research Council, *The Digital Dilemma: Intellectual Property in the Information Age* (National Academies Press, 2004) c. 2, online: <http://www.nap.edu/html/digital_dilemma/>.

[7] See generally Jane C. Ginsburg, "The Concept of Authorship in Comparative Copyright Law" (2003), Columbia Law School, Pub. Law Research Paper No. 03-51, online: <http://ssrn.com/abstract=368481>.

[8] Under s. 10(2) of the *Copyright Act*, for example, a corporation can be deemed to be an author of a photograph. *Copyright Act,* R.S.C. 1985, c. C-42.

financial risk involved in large-scale cultural productions, like movies for example.[9] Therefore, unlike authors and performers, producers can be and almost inevitably are legal entities, not living persons. Of course, a vast number living persons control and work for these companies,[10] but that is distinct from direct personal involvement in the *ab initio* creation or performance of cultural products. This distinction is highly relevant when it comes to evaluating mechanisms to support each of these parties, and will become more apparent in the next section.

[14] Music producers are officially called sound recording makers in copyright law.[11] Literary publishers are also producers, and of course, there are movie producers as well. Their function is essentially the same as sound recording makers—to turn works or performances of works into marketable commodities. Note that songwriters and composers typically have music publishers, adding another layer of complexity to the discussion. Most major recording companies are subsidiaries of larger entities that also control a music-publishing business (and often have interests in film and television production as well).

[15] Producers are, usually to some extent, distributors. Fundamentally, distributors disseminate cultural products to consumers. Distributors are also nearly always corporations, as opposed to living persons. Broadcasters are one type of distributor. Broadcasters transmit signals "over the air", but similar distribution undertakings may transmit content via cable, satellite or the Internet. Another class of distributors includes traditional retailers, such as the Canadian outlet Sam the Record Man, and the now ubiquitous Wal-mart. They distribute physical culture. These businesses are faced with competition from the new online music retail sector, which includes most famously Apple's iTunes Music Store, the Canadian enterprise Puretracks.com, and Québec's Archambault.ca. These online businesses distribute weightless culture without a physical package.

[16] Generally, the more ambitious the undertaking, the more important the role of intermediaries. Most action-adventure films, for example, could never be made without the backing of major studios to assume the financial risks of production and distribution. Record producing similarly requires a vast investment of capital. And physical culture is usually more costly to produce and distribute than weightless culture, perhaps with the exception of broadcasting.

[17] Consumers are the driving force behind all cultural industries. Without consumers, artists and intermediaries would have nobody to write, perform, produce or

[9] Grant & Wood, *supra* note 3 at chapter 4.
[10] Grant & Wood, *supra* note 3 at 27-29.
[11] See *Copyright Act, supra* note 8, s. 2 (definition of "maker").

distribute *to*. Consumers may be creators themselves, and can sometimes act as their own producers and distributors. Technologies, like peer-to-peer networks for instance, allow consumers to create, exchange, adapt, improve and re-exchange cultural products. The empowerment of consumers in this regard has the potential to result in the most significant market shake-up modern day cultural industries have ever seen. When this potential fully materializes, it will dramatically undercut traditional assumptions about, and models of, developing cultural products and supporting cultural players. At present, we are in a period of transition; now is the time for evolution, not revolution.

[18] This discussion of cultural players is directly relevant to the question of whom Canadian law and policy is catering to, and consequently, which of the available options are preferable. It also gives a taste of the diversity of interests at stake. The immediate lesson is that there is no silver bullet, no magic pill, no holy grail. Not all of the solutions discussed below are appropriate to support all genres of cultural goods and services, nor all of the people and companies involved in their creation. Generalizations are dangerous, and broad-brush solutions are difficult to find.

III. The Purposes

[19] Before discussing how law and policy can support Canadian cultural industries, it is worth discussing why it is necessary or desirable to do so. Material on this point is abundant, so I will only give a brief summary here.[12] Roughly, the justifications for supporting cultural industries fall into two categories. One view treats legal protection of creators' rights as a means to the end of greater creativity for the benefit of society generally. The other perceives protection of creative work as a natural right simply formalized by legal recognition.

[20] Treating creators' rights as a means to an end is rooted in utilitarianism, and is often discussed in economic terms. Economists see exclusive property rights as essentially achieving two related objectives in respect of a given resource: providing incentives to invest in it, and disincentives to exploit it. Without exclusive property rights, investors of time, effort, money, etc. would bear all of the costs and realize none

[12] See, J. Hughes "The Philosophy of Intellectual Property" (1988) 77 Georgetown L. J. 287; E.C. Hettinger "Justifying Intellectual Property" (1989) 18 Philosophy & Public Affairs 31; W.J. Gordon, "An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent and Encouragement Theory" (1989) 41 Stanford L. Rev. 1343; T.G. Palmer, "Are Patents and Copyrights Morally Justified? The Philosophy of Property Rights and Ideal Objects" (1990) 13 Harvard J. L. & Public Policy 817; W.J. Gordon, "On Owning Information: Intellectual Property and the Restitutionary Impulse" (1992) 78 Virginia L Rev 149; W.J. Gordon, "A Property Right in Self Expression: Equality and Individualism in the Natural Law of Intellectual Property" (1993) 102 Yale L .J. 1533; P. Drahos, *The Philosophy of Intellectual Property* (Aldershot: Dartmouth Publishing Company, 1996); and C. Craig "Locke, Labour and Limiting the Author's Right: A Warning against a Lockean Approach to Copyright Law" (2002) 28 Queen's L. J. 1. See also the articles contained in W.J. Gordon & K.L. Port, eds., "Symposium on Intellectual Property Law Theory" (1993) 68 Chi.-Kent L. Rev. 583.

of the benefits of their investment.[13] Similarly, without exclusive property rights, anyone with access to a resource would over-use it, leading to its premature or inefficient exhaustion.[14] Although these rationales may both apply to "classic property"[15]—widgets, oil reserves, farmland, and so on—they are not both applicable when it comes to cultural products. Cultural products, as opposed to the physical vessels embodying them, are non-rivalrous and non-excludable. They are what economists call "public goods", like national defence or street lighting. Cultural goods are "ideational resources"[16] that cannot be overused like tangible resources. So there is no rationale to artificially exclude others from using these cultural products, *except only* to the extent that eliminates irreplaceable incentives to invest (effort or money) in the creation of such products in the first place. I emphasize below that these incentives may be, but need not necessarily be, in the form of exclusive saleable property rights.

[21] The second broad view on this topic suggests that creators possess natural and innate rights over their creations. Again, there at least two (really, more) perspectives under this rubric. One posits that creators deserve to be rewarded for their works, or become owners by investing their labour in a project.[17] Another suggests that creators' works reflect the essence of themselves or their personhood, and recognition of control facilitates their freedom and autonomy.[18]

[22] There is a parallel between arguments that suggest property rights are simply incentives for creative investment and arguments that suggest property rights are necessary rewards for creative output. Of course, there are fundamental differences: each starts from a different premise. The incentive rationale uses social welfare as the starting point—creators have rights to the extent that benefits society, and have no choice but to cooperate or cease creating altogether. The reward rationale starts with the opposite proposition—creators can determine whether or not to share the benefits of their creativity with society. But closer to the surface there is a common thread: both utilitarian incentive and natural reward theories mandate some form of economic flow to creators, albeit the former from an *ex ante* perspective, and the latter *ex post*.

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[13] The costs and benefits are said to be "externalities", which private property "internalizes" to owners. See H. Demsetz "Toward a Theory of Property Rights" (1967) 57(2) The American Economic Review 347.
[14] This phenomenon is said to be a "tragedy of the commons", which private property prevents by allowing an owner to exclude all other would-be users. See G. Hardin, "The Tragedy of the Commons" (1968) 162 Science 1243.
[15] I use this term to connote tangible, physical, corporeal objects and/or rights in those objects. See J.F. deBeer, "Reconciling Property Rights in Plants" (2005) 8 Journal of World Intellectual Property [forthcoming in 2005].
[16] A term invented by James Harris in *Property and Justice* (Oxford: OUP, 1996).
[17] See, for example, J. Locke, *Second Treatise of Government*, ed. by G.W. Gough (Oxford: Basil Blackwell, 1976) at ch. V; and L.C. Becker, *Property Rights: Philosophic Foundations* (London: Routledge and Kegan Paul, 1977) at 45-6.

[23] Distinctions amongst Canada's cultural players are highly relevant here. Artists—authors and performers—are living, breathing persons who can at least purport to claim natural rights of ownership in their creative output. Whether or not the claim is convincing is debateable, but at least, *prima facie*, it is credible. The same is not true of corporate intermediaries—producers and distributors—that as unnatural legal entities cannot even begin to profess entitlement to natural property rights. If they are to lobby for additional legal rights, such as expanded proprietary control over the products they produce and distribute, the argument must rest on utilitarian grounds. More particularly, the argument must be that property rights are necessary to induce their investments in cultural products. The argument that these legal entities represent the work of vast numbers of people in their employ cannot hold water because the benefits of any rights claimed accrue not to employees but to corporate stockholders.

[24] The stark dichotomy between human artists and corporate intermediaries has implications for the types of legal and non-legal support mechanisms that Canadian policy-makers can choose to offer. To begin, this requires abandoning the tunnel vision that exclusive property rights, or other forms of *ex post* compensation for that matter, are the only effective, or even the most efficient, way to encourage cultural productivity.

IV. The Payoff

[25] Development of Canada's cultural industries can be encouraged through monetary or non-monetary means. The latter is an especially important measure for artists, as opposed to intermediaries. Non-monetary support may satisfy the incentive and reward rationales, as well as personality or autonomy based ideals. The first and most obvious non-monetary support measure is the legal recognition of moral rights under copyright law.[19] Other means consist of increased education and training in all of the sectors discussed in this paper. Furthermore, recognition through formal awards and prizes or informal respect and prestige can also serve a valuable role supporting cultural products.

[26] My purpose in this paper, however, is to concentrate on the monetary incentives and rewards that drive Canada's cultural industries as a whole. Monetary support mechanisms are relevant to both artists and intermediaries. Broadly speaking, there are at least three means through which to generate the revenue streams that sustain this sector: exclusive proprietary rights, third-party proxy liabilities and public funding programs.

A. Exclusive Proprietary Rights

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[18] See, for example, G.W.F. Hegel, *Elements of the Philosophy of Right*, ed. by A.W. Wood, trans. by H.B. Nisbet (Cambridge: CUP, 1991); and M.J. Radin, *Reinterpreting Property* (Chicago: University of Chicago Press, 1993).

[19] *Copyright Act*, *supra* note 8, ss. 14.1, 14.2, 28.1, 28.2.

[27] Cultural products, like all ideational resources, are not naturally scarce. All Canadians can simultaneously sing a given song without doing the song itself any true harm. A sound recording can be copied a million times a little or no cost or effort, and again with no true harm to the original recording. All Canadians cannot simultaneously wear my socks, and it would take a fair bit of money and effort to make a million pairs of socks. So the sock market functions like this: scarcity requires exclusive property rights (to avoid tragic overuse); exclusive property rights facilitate market transactions; and market exchanges generate profits (to encourage further investment). Copyright law works backward in respect of cultural products: to encourage investment, profits are available in a market driven by exclusive property rights that create artificial scarcity. In other words, Canadians who want access to cultural products must bargain for it in a market propped up by artificial scarcity. This allows creators and disseminators of these products to sell them for a price, thus generating a profitable return on investment and funding further product development.

[28] There are, however, impediments to the perfect operation of this market. Laws that create artificial scarcity are sometimes practically unenforceable. The phenomenon known as "private copying" is an example. It is common practice for consumers of music to transfer formats (for instance, recording a CD to an audiotape or iPod or personal computer); to make backups or duplicates (for instance, archiving a collection on a personal computer, or recording a CD for listening in the car); or to create compilations (mixing and burning a personalized CD). Leaving aside, for the moment, the question of whether these practices *should* be controlled, it is arguably difficult to do so. It is generally believed that there are pragmatic licensing problems. But more importantly, the requisite monitoring and enforcement mechanisms could be highly objectionable from a privacy perspective.

[29] Consequently, lawmakers and policymakers have legitimized the activity and imposed a corresponding levy on blank media. This exemption/levy scheme is the definitive exemplar of the type of support mechanism discussed in detail in the next section. Suffice it to say now that this response may be unnecessary for two reasons. The conventional wisdom that it is impracticable or ineffective to enforce legal rights against individual private copiers and the assumption that private copying cannot be controlled by technology are both questionable.

[30] The problem with the legal and technical mechanisms that support markets for cultural products is not that they are ineffective; to the contrary, they may be far *too* effective. Like all property laws, a copyright reinforced by technological protection creates a monopoly over a particular product. Monopolies can give rise to deadweight social costs, such as reduced access and inflated prices. In short, granting proprietary control over a cultural resource may inhibit efficient dissemination of that resource. Thus,

the challenge of this proprietary model is to find the optimal point where legal and technological protections provide just enough incentive to induce production without inhibiting dissemination more than absolutely necessary.

[31] Currently copyright laws attempt capture this ideal through the notion of "balance". As stated by Justice Binnie:

> 30 The Copyright Act is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator (or, more accurately, to prevent someone other than the creator from appropriating whatever benefits may be generated). …
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> 31 The proper balance among these and other public policy objectives lies not only in recognizing the creator's rights but in giving due weight to their limited nature. In crassly economic terms it would be as inefficient to overcompensate artists and authors for the right of reproduction as it would be self-defeating to undercompensate them.
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> 32 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.[20]

As longs as this balance is respected as the paramount value in copyright law, the monopoly costs of legal control over cultural products can be kept somewhat in check.

[32] Currently, however, there are no checks on the potential monopoly costs of technological protection measures (TPM) that can be used to "lock up" cultural products. Canada has signed but not yet ratified two treaties requiring introduction of laws to prevent circumvention of TPM.[21] However, commentators who have looked carefully at this issue have confirmed that Canadians need protection *from*, not protection *for*, TPM.[22] Without safeguards (protecting fair dealing activities and public domain materials, for instance) TPM may render the legal balance moot. So, as will become more apparent in the next section, the question is not *can* law and technology protect cultural products, the question is whether and how much they *ought* to do so.

[33] Creating a well-functioning market must focus not only on sellers of cultural products, but on buyers as well. Efficient markets depend upon frictionless transactions.[23] Friction, and therefore transaction costs, can be reduced if copyright laws are relatively clear, and if copyrights are packaged in a useable format. It has been suggested that fair dealing defences, for example, inhibit voluntary transactions because of the uncertainty

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[20] *Théberge v. Galerie d'Art du Petit Champlain Inc.*, [2002] 2 S.C.R. 336.
[21] The United States has enacted such a law through the *Digital Millenium Copyright Act of 1998*, Pub. L. No. 105-304, 112 Stat. 2860. The anti-circumvention provisions of the Act are contained in section 1201.
[22] Ian R. Kerr, Alana Maurushat & Christian S. Tacit, "Technological Protection Measures: Tilting at Copyright's Windmill", 34 Ottawa Law Review 7 (2002-2003). The DMCA has been widely condemned by academic commentators. For insight into why, see for example Dan. L. Burk, "Anticircumvention Misuse", 50 UCLA L. Rev. 1095.
[23] R. Coase, "The Problem of Social Cost" (1960) 3 J. of L. and Econ. 1; R.A. Posner, *Economic Analysis of Law*, 5th ed. (New York: Aspen Law & Business, 1998) at 8.

associated with their application.[24] This inefficiency, however, may be a necessary feature of the legal balance that is fundamental to copyright. In contrast, the fragmentation of copyright into various different rights held by different entities is an unjustifiable impediment to market exchange.

[34] Currently, copyright law is structured to make it difficult for users of cultural products to bargain for the rights they need and want—for example, the ability to use "music", rather than a separate work, performance, recording and broadcast, and the separate rights to reproduce and to communicate those things. From the perspective of buyers, bundling rights in the market is crucially important.[25]

[35] In some cases, there are collective societies or licensing agencies that simplify the process somewhat, by eliminating the need to negotiate with an individual party. However, there are an exceptionally large number of Canadian copyright collectives, and there is still inadequate co-operation amongst these representatives to facilitate the convenient acquisition of multiple rights from multiple entities.[26] The bottom line is that there are layers upon layers upon layers upon layers of necessary permissions, and little or no way to find out whether and from whom permission should be sought. The pragmatic impossibility of clearing these rights can lead to a stalemate where the product simply cannot be used.[27]

[36] In sum, a proprietary copyright model need not be fatally ineffective. Professor Merges suggests, therefore, that we should stick with the three "golden oldies"—property rights, contracts and markets—to encourage cultural creativity.[28] As he puts it: "Maintaining the traditional legal pairing of property rights and contracts, which usually leads to market formation, seems like a safer course than mandates or new market intervention to correct for past market intervention."[29] The criticism of this position is that a market-driven property rights model is too effective, and thus entails unwarranted monopoly costs. This drawback can, however, be mitigated through carefully balanced laws that package copyrights in a user-friendly format, and through safeguards against technological suppression of legal balance.

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[24] Norman Siebrasse, "A Property Rights Theory of the Limits of Copyright"(2001) 51 Univ. of Toronto L.J. 1.

[25] Not surprisingly, rights-holders tend to resist this idea, in order to protect control over numerous and independent revenue streams. See, for example, "The Digital Rights Bundle: Real Progress for Songwriters and Publishers?" (December 11, 2004) Billboard Magazine.

[26] See Daniel J. Gervais and Alana Maurushat, "Fragmented Copyright, Fragmented Management: Proposals to Defrag Copyright Management", (2003) 2(1) Canadian Journal of Law & Technology, at 18-20.

[27] Referred to as a "tragedy of the anticommons". See M. Heller "The Tragedy of the Anticommons: Property in Transition from Marx to Markets" (1997-1998) 111 Harv. L. Rev. 621.

[28] Robert P. Merges, "Compulsory Licensing vs. the Three "Golden Oldies" Property, Contract Rights and Markets" (2004) Policy Analysis No. 508, CATO Institute, online: <http://www.cato.org/pubs/pas/pa508.pdf>.

B. Third-Party Proxy Liabilities

[37] As mentioned, a perception exists that law and technology cannot always effectively create the artificial scarcity that drives markets for cultural products. For example, in the late 1990s, it was thought that there could be no functional market for the private copying of music in Canada. Part VIII of the *Copyright Act* was therefore enacted to address this phenomenon. Simply put, it sets out a regime that legalizes private copying onto certain blank media, and as a corollary, allows rights-holders to propose a levy to be paid by importers and manufacturers of such blank media.[30]

[38] This idea was not novel. Similar schemes are in place in many countries around the world. These schemes vary greatly in scope.[31] The rationale for private copying levies also varies between countries, basically along common law and civilian lines.[32] In civilian countries, the initial view was that creators did not have the *legal right* to control private copying. An exemption/levy scheme was introduced in response to this lack of legal control. In common law countries, the initial view was that creators did not have the *practical ability* to control private copying. An exemption/levy scheme was introduced in response to this lack of practical control. Of course, it is actually debatable whether Canadian creators ever did have, or ought to have had, the legal right to control private copying. Regardless, the point is currently moot; there is now only a right of remuneration.

[39] Numerous proposals have been put forward recently advocating a greatly expanded role for an exemption/levy model, in response to perceived market failures or more fundamental objections to proprietary controls over cultural products. The Supreme Court's consideration of *SOCAN v. CAIP*[33] is sometimes viewed in this light. The case, better known as "Tariff 22", stems from a proposal by the collective society that administers authors' performance and communication rights in Canada to collect royalties from anyone who communicates music to the public via the Internet. The central issue involved the copyright liability of ISPs in that regard.

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[29] *Ibid.*
[30] *Canadian Private Copying Collective v. Canadian Storage Media Alliance*, 2004 FCA 424; *Private Copying 1999-2000*, (Copyright Board of Canada) online: <http://www.cb-cda.gc.ca/decisions/c17121999-b.pdf>; *Private Copying 2001-2002*, (Copyright Board of Canada) online: <http://www.cb-cda.gc.ca/decisions/c22012001reasons-b.pdf>; *Private Copying 2003-2004*, (Copyright Board of Canada) online: <http://www.cb-cda.gc.ca/decisions/c12122003-b.pdf>.
[31] See P.B. Hugenholtz, L.M.C.R. Guibault & S.M. van Geffen, *The Future of Levies in a Digital Environment*, (2003) Institute for Information Law, online: <http://www.ivir.nl/publications/other/DRM&levies-report.pdf>.
[32] A.F. Christie, "Private Copying Licence and Levy Schemes: Resolving the Paradox of Civilian and Common Law Approaches" (2004) Occasional Paper No. 2/04, Intellectual Property Research Institute of Australia, at 3-7, online: <http://www.law.unimelb.edu.au/ipria/publications/workingpapers/Occasional%20paper%202.04.pdf>.
[33] *Society of Composers, Authors and Music Publishers of Canada v. Canadian Association of Internet Providers*, 2004 SCC 45.

[40] A popular understanding is that Tariff 22 is an effort to hold ISPs liable for their customers' copyright infringements. In other words, because of a perceived inability to enforce copyright vis-à-vis individuals who transmit music via the Internet, Tariff 22 would levy a charge at a convenient chokepoint. This impression is somewhat mistaken. In truth, Tariff 22 sets user fees. Rights-holders do not argue that ISPs are liable (secondarily, contributorily or vicariously) for the activities of their customers, or that ISPs should act as collecting agents. It was alleged that ISPs "authorize" their customers' communications, but the concept of authorization in Canada is still premised on the activities of the "authorizer" not the "authorizee".[34] Mainly, rights-holders argue that ISPs themselves communicate as part of a chain of communication and are therefore directly liable for copyright royalty payments. Tariff 22 as structured targets ISPs and uploaders, not necessarily ISPs in lieu of uploaders.

[41] Although it is arguable that there is little *practical* difference, there is an important *legal* difference. Recently, however, it has been suggested that this legal difference should be narrowed or eliminated. The Supreme Court ruled in *SOCAN v. CAIP* that ISPs are not typically liable for the communication, or authorizing the communication, of copyrighted content.[35] This confirmed the opinion of the Copyright Board.[36] But the Standing Committee on Canadian Heritage recommended that the default position be reversed: "ISPs should not generally be exempted from liability for infringing copyrighted materials on their facilities."[37] The heart of the debate is whether, upon receiving notice of allegedly infringing content in its system, an ISP should be obliged to remove such content or simply notify its client of the allegation. Although the latter of these obligations is less objectionable, the Committee recommended a "notice and takedown" regime.

[42] There is really a spectrum of options on the issue of ISP liability. One suggestion is to solicit co-operation from ISPs in the enforcement of copyright, by requiring disclosure of customers' identities for example.[38] ISPs would bear no direct copyright liability, but would merely assist with enforcement. A second option is to hold ISPs liable for their own active role in communicating copyrighted content via the Internet. Further, ISPs could be made directly responsible for authorizing or contributing to their customers' infringements. And finally, ISPs could be made liable to pay a levy intended to remunerate rights-holders for customers' online activities. This fourth option should be

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[34] *CCH Canadian Ltd. v. Law Society of Upper Canada* , [2004] 1 S.C.R. 339 at paras. 37-38; *SOCAN v. CAIP*, *ibid.* at paras. 120-29.
[35] *SOCAN v. CAIP*, *ibid*; Copyright Act, *supra* note 8, s. 2.4(1)(b).
[36] *Statement of royalties to be collected by SOCAN for the performance or communication by telecommunication, in Canada, of musical or dramatico-musical works - Tariff 22 [Phase I: Legal Issues]* (1999), 1 C.P.R. (4th) 417.
[37] Canada, Standing Committee on Canadian Heritage, *Status Report on Copyright Reform*, (2004) at 10, online: <http://www.pch.gc.ca/progs/ac-ca/progs/pda-cpb/reform/status_e.cfm>.

seen as part of a larger trend, in which rights-holders seek compensation not from actual consumers of cultural content, but from third-party proxies.

[43] Tariff 22 seems to be based on a hybrid of options two and three. Insofar as Tariff 22 reflects option two, it is clearly a direct user-fee. If ISP liability is premised on authorization, however, the line between options three and four becomes blurry. It is unclear precisely what the Standing Committee has recommended, and why it has done so. It is therefore difficult to critique its position. It did not discuss in its latest report any policy or principle that would support its recommendation; the conclusion was bluntly stated as the rationale.[39] Three possible grounds could be advanced—causation, enrichment or convenience. But these are not normally organizing principles in copyright law, and an explanation is warranted if things should be different in respect of ISP liability. Moreover, it is unclear whether the recommendation endorses ISP liability for *their own* activities, or for *their customers'* activities. Would the customer *and* the ISP both be liable for their respective role in a communication? If so, would safeguards ensure that rights-holders are not paid twice for the same activity? If, however, the recommendation is to hold ISPs liable *in lieu of* their customers, we would seem to be moving toward an expanded exemption/levy regime. In that case, how would the concerns that plague Canada's existing levy be addressed? These questions do not seem to have been thought through.

[44] At least one scholar has proposed specifically that Canadian ISPs should be made legally responsible for providing remuneration in respect of *other parties'* Internet activities involving copyrighted cultural products.[40] The gist of this idea is to enact a regime similar to Part VIII of the Copyright Act to apply to Internet activities. Legislative amendments would permit unlimited non-commercial communications and reproductions; a correlative levy would be imposed on ISPs, who would presumably pass the costs to subscribers who benefit from the new copyright immunity. The regime would apply to music, possibly also to movies and perhaps even to other cultural products.[41]

[45] The suggestion to adopt an exemption/levy model for Internet transmissions resembles grander schemes proposed lately by several American commentators. Professor Netanel, for example, delineates a comprehensive model that would permit private copying, remixes, adaptations, modifications, and dissemination of all kinds of communicative expressions in both digital and non-digital form.[42] To provide sufficient

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[38] See *BMG Canada Inc. v. John Doe*, [2004] F.C.J. 525 (QL).
[39] Standing Committee, *supra* note 37 at 10-11.
[40] John Davidson, "Rethinking Private Copying in the Digital Age: An Analysis of the Canadian Approach to Music" (LL.M. Thesis, University of Toronto Faculty of Law, 2001) [unpublished].
[41] *Ibid.*
[42] Neil Netanel, "Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing", (2003) 17 Harv. J. L. & Tech. 1.

compensation to creators, a levy would be imposed on broad range of goods and services the value of which is substantially enhanced by peer-to-peer file sharing. Professor Ku also advocates for levies on the sale of Internet services and electronic equipment, but his model would apply to digital cultural products only.[43] Professor Fisher proposes to allow various uses of audio and video recordings in exchange for a government reward system funded through taxation of digital recording and storage devices.[44] Professor Lessig's model is similar, but he considers it to be useful only for a transitional period, until convenient music streaming via the Internet makes file sharing obsolete.[45]

[46] Although different in details, all of the aforementioned models are based on the same underlying idea—dissemination of cultural products should be encouraged and the present copyright system is a hindrance. Therefore, a new system is needed to preserve financial incentives for creators. The solution is a variant of compulsory licensing. The licence fees, however, are provided not by consumers of cultural products but by third-party proxies.

[47] It is important to distinguish these proposals from ostensibly similar ideas discussed, for example, by Professor Gervais,[46] Professor Litman[47] and the Electronic Frontier Foundation.[48] For one, the latter are generally voluntary rather than compulsory.[49] This difference has been called "more formal than fundamental".[50] However, voluntary schemes are undoubtedly compliant with Canada's international treaty obligations, whereas overbroad exemption/levy schemes face uncertainty in this regard.[51]

[48] Moreover, the Constitution limits Parliaments' ability to enact any sort of cultural policy it wishes under the auspices of the *Copyright Act*. Parliament may enact laws in respect of "copyright", but the provinces control "property and civil rights." Of course,

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[43] Raymond Shih Ray Ku, "The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology" (2002). 69 U. Chi. L. Rev. 263.
[44] William W. Fisher III, *Promises to Keep: Technology, Law, and the Future of Entertainment* (San Francisco: Stanford University Press, August 2004), online: <http://cyber.law.harvard.edu/people/tfisher/PTKChapter6.pdf> c. 6.
[45] Lawrence Lessig, "Free Culture", (New York: The Penguin Press, 2004), online: < http://www.free-culture.cc/freeculture.pdf> at 296-304.
[46] Daniel J.Gervais " The Price of Social Norms: Towards a Liability Regime for File-Sharing" (2004) 12:1 J. of Intellectual Prop. L. 39.
[47] Jessica Litman, "Sharing & Stealing" (2004), 27 Hastings Comm/Ent LJ 1.
[48] Electronic Frontier Foundation, "A Better Way Forward: Voluntary Collective Licensing of Music File Sharing" (2004), online: <www.eff.org/share/collective_lic_wp.pdf>. David Kusek and Gerd Leonhard apparently propose a similar plan, although the details are vague. See David Kusek "Music Like Water" *Forbes* (31 January 2005) online: <http://www.forbes.com/columnists/free_forbes/2005/0131/042.html>.
[49] Professor Fisher prefers a compulsory regime, but would be willing to accept a voluntary scheme, outside of governmental control; see *supra* note 45 at 46-52.
[50] Litman, *supra* note 48 at 33.

by following proper procedures, Parliament can also impose taxes. But Parliament cannot just tax Internet access or personal computers and, by calling it "copyright", make it so. This problem may not be insurmountable in the United States, where the Supreme Court seems to have given Congress considerable leeway to promote science and useful arts.[52] But Australia's exemption/levy scheme was struck down for violating its Constitution.[53] In Canada, levies, unlike exclusive copyrights, are (for the moment)[54] vulnerable to attack on similar grounds.

[49] This is because exclusive proprietary copyrights are still at the heart of voluntary licensing proposals. Professor Gervais, for instance, advocates a system whereby copyright is used to normatively coerce consumers into payment of licensing fees, but is in practice rarely or never actually litigated. This is distinct from a system where creators have only entitlements to collect revenues from specified third parties. In one case exclusive enforcement remains an option, albeit an unadvisable one; in the other case, there is no choice but to collect remuneration.

[50] Another crucial difference is in terms of the payers of the proposed charge. Professor Litman notes that there are two models for collecting fees to be distributed among creators: a direct blanket licensing fee and levy or tax on the sale of goods or services.[55] Professors Gervais' model, for example, essentially proposes user-fees, which are simply brokered by intermediaries and backed-up by enforceable exclusivity. Professors Netanel's plan, for example, essentially call for charges on the goods and services of associated third-party proxies. In my view, the former is far less objectionable.

[51] Several concerns should be addressed before an even wider exemption/levy scheme is introduced in Canada. First, such a model is a non-starter for anyone who believes that creators have natural property rights in their work. Expropriating the rights of corporate intermediaries is certainly not an issue, but things are perhaps different for human artists. Defenders of artists' natural property rights are generally in the minority, but recent jurisprudence is ambiguous and the debate is not yet settled.[56] If nothing else,

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[51] *Berne Convention Protection of Literary and Artistic Works 1886*, 828 U.N.T.S. 221 at Art. 9(2); *Agreement on Trade-Related Aspects of Intellectual Property Rights 1994*, 1869 U.N.T.S. 299 at Art. 13. See also Gervais, *supra* note 46 at 71-73.
[52] See, for example, *Eldred v. Ashcroft*, 537 U.S. 186 (2003), 123 S.Ct. 769, considering Congress' power, under Article 1, Section 8 of the United States Constitution, to extend the term of copyright protection.
[53] *Australian Tape Manufacturers Assn. Ltd. v. Australia* (1993), 176 C.L.R. 480, 112 A.L.R. 53 (Aus. H.C.).
[54] The Canadian Private Copying Collective has announced its intention to ask the Supreme Court of Canada to review the Federal Court of Appeal's decision in *CPCC v. CSMA*, *supra note 30*, in which such constitutional issues were raised. See J.F. deBeer & G. Régimbald, "The Constitutional Implications of Private Copying and (Il)legal Downloading" (2005) [unpublished, on file with author].
[55] See Litman, "Sharing or Stealing" *supra* note 47 at 42.
[56] See C. Craig, *supra* note 12.

natural rights arguments seem to explain moral rights under Canadian copyright law. Exemption/levy schemes must, therefore, overcome this philosophical obstacle.

[52] Although intermediaries cannot raise the objection just discussed, an exemption/levy model is unpalatable nonetheless. Levies are perceived to be a compromise to pacify those foregoing proprietary control. But in all honesty, why would a rational rights-holder agree to sacrifice control over current revenue streams, only to venture into uncharted territory? A levy suits existing rights-holders if it represents a new revenue source, not a replacement for existing (or potential) revenue. The development of private copying regimes bears this out.

[53] That aside, the need for an exemption/levy scheme has yet to be conclusively demonstrated. On the technological front, one of the most thorough studies on this issue to date has concluded that levies should be phased out as tools become available to control private copying activities.[57] Simply put, TPM and DRM have eroded the fundamental assumption underlying levies in the first place—that certain activities cannot be adequately prevented or otherwise remunerated. It is true that no TPM or DRM are entirely unassailable, but that does not mean they are not generally effective.

[54] Recent lawsuits around the globe also suggest that exemption/levy schemes may be unnecessary from a legal perspective. Obviously, it is impossible to sue everyone, but that isn't the point of law generally. Laws exist not to be litigated. They are most effective when operating in the background, influencing social norms and facilitating the voluntary exchange of rights and obligations. For legal norms alone to be useful, it is not necessary that laws always be enforced—just that there be a credible threat of enforcement in order to coerce compliance. Existing copyright laws now do this, to the greatest possible extent without unduly compromising other values like privacy, freedom of expression and the dissemination of culture and information. As Professor Gervais points out, the recording industry's problem with peer-to-peer networks is not the impracticability of licensing the activity but the difficulty of influencing social norms surrounding this technology.[58] The recording industry might have earned $12 billion if it had licensed rather than sued Napster and its users.[59]

[55] Furthermore, exemption/levy schemes entail the drawback of cross-subsidization. This is a problem in two ways. First, there is internal cross-subsidization. The higher the number and more variable the type of former copyright holders who become entitled to

[57] P.B. Hugenholtz, *supra note 30*. See also N. Helberger "It' s not a right, silly! The private copying exception in practice" *INDICARE Monitor* (7 October 2004).
[58] Gervais, *supra* note 46.
[59] *Ibid*. Sony BMG and Grokster may be moving in this direction. Jon Healey, "Sony BMG, Grokster Join Forces" *Los Angeles Times* (29 October 2004) C1.

remuneration, the more difficult it is to distribute levy revenues on a just basis.[60] Revenue generated on account of certain works ends up subsidizing other works, because it is impossible to precisely correlate the collection and distribution of funds to deserving (on whatever basis) rights-holders. Most proposals espouse a tracking system of one sort or another to address this issue. Such systems may be feasible in the long term, but uniform implementation will require tremendous co-ordination and commitment.

[56] A second, more problematic, type of cross-subsidization is external; exemption/levy schemes typically put the onus on innovative technology and communications enterprises to subsidize cultural creators. The presumption, of course, is that the costs are eventually passed on to the actual consumers of cultural products. Nevertheless, the impact on these industries is real.

[57] It has been suggested that blank media importers actually benefit from legitimized private copying, for example through increased sales.[61] It is difficult to refute or verify this claim, which rests on a series of assumptions. The first is that that legalizing an activity (music copying, for example) will make it more prevalent. This is not certain; peer-to-peer networks, for example, are influenced more by social than legal norms.[62] Second, it is assumed that music copying and blank media, for instance, are complementary, so that if the cost of copying music (in terms of legal risk and/or social stigma) declines, demand for blank media will rise. This is probably true, but more information is needed to determine whether this increase will be sufficient to offset the decreased demand attributable to higher prices that include a new levy. A commonly advanced claim is that demand for blank media is price inelastic so that a levy would have little effect.[63] But one cannot generalize about the various products that might be levied—blank CDs, personal computers, Internet access, etc..

[58] Regardless, however, even if there was a net financial benefit to third-party businesses, that is no reason to impose a levy on them. For one, it is arguably unfair to saddle technology and communications firms with the administrative burden that levies entail. They are simply not in the business of collecting, accounting for and remitting levies.

[59] The "beneficiary" justification for targeting third parties resembles an argument properly resisted in the context of high-profile contributory liability cases.[64] It runs

[60] Determining what constitutes a just basis is itself problematic, but presumably, popularity is as good a measure as any.
[61] *CPCC v. CSMA*, *supra* note 30 at paras. 68-70; *Private Copying 1999-2000*, *supra* note 30 at 16. See also Fisher, *supra* note 44 at 4, 41.
[62] Gervais, supra note 46.
[63] See *Private Copying 1999-2000 supra* note 30 at 37-38; *Private Copying 2001-2002*, *supra* note 30 at 4-6; *Private Copying 2003-2004*, supra note 30 at 58-59.
[64] See, for example, *Metro-Godwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 380 F.3d 1154 (9th Cir. 2004).

counter to the fundamental principles of *Sony-Betamax*[65] in the United States, and *CCH v. LSUC*[66] in Canada: providing the means to facilitate, or benefiting from, copyright infringement is not itself objectionable. As Professors Lemley and Reese have recently put it: "Unrestricted liability for anyone who is in any way involved with such copyright infringement is a bad idea."[67] Levies on third-party proxies push this principle to the breaking point.

[60] Moreover, the higher up the "food chain" one goes, the less accurate the charge becomes. Fewer (indirect) payers of the levy are actual consumers of the cultural products at the root of the scheme. The further removed the charge is from the end consumer, the greater this problem becomes. Canada has experience with this phenomenon in the context of its private copying regime.

[61] All blank CDs manufactured in or imported to Canada are subject to a levy to compensate for the fact that some blank CDs are used for copying music. However, the highest estimates suggest that of all blank CDs in bought Canada, the proportion of blank CDs used by consumers to copy music (as compared to those used by businesses, or for copying data or photographs, for example) is roughly one third.[68] The levy rate is obviously discounted to reflect this fact. Nevertheless, the point remains that purchasers of two thirds of all blank CDs subsidize the consumers who use these media heavily for copying music.

[62] This is more than just an unfortunate side effect for select technophiles; it is a very serious issue for thousands of Canadian businesses—manufacturers, retailers and commercial purchasers of goods and services that are or would be levied. Although a levy on Internet access would certainly catch music downloaders, it could have dramatic adverse effects on electronic commerce or educational institutions, for example. This should not be simply tolerated as collateral damage in the war on putative piracy.

[63] Certain consumers also pay twice. For example someone who purchases a song from Apple's iTunes Music Store contractually bargains for the right to make certain private copies of the track[69] yet pays again for the same activity through the private

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[65] *Sony Corp. of America v. Universal Studios, Inc*., 464 U.S. 417 (1984).
[66] *Supra* note 34.
[67] Mark A. Lemley and R. Anthony Reese, "Reducing Copyright Infringement Without Restricting Innovation" (2004) 56 Stanford L. Rev. 1345 at 1349.
[68] The data is insanely confusing, because there are different proportions to consider (including "consumer vs. business purchasers" and within that "music vs. non-music uses") and different statistics for different formats, not to mention conflicting evidence on the accuracy of different figures submitted by different parties. *Private Copying 2003-2004, supra note 30*.
[69] Apple's Terms of Sale entitle the purchaser to "burn and export" tracks "for personal, non-commercial use." Because of the private copying levy, section 80 of the *Copyright Act*, *supra* note 8, allows "reproducing all or any substantial part of [a musical work, performance or recording] onto an audio recording medium for the private use of the person who makes the copy".

copying levy on blank CDs. Should she pay again through a levy on Internet access or iPods.[70]

[64] The unfairness might perhaps be alleviated through carefully tailored exceptions, which can in theory turn levies from blunt instruments into precise tools. However, separating the wheat from the chaff is not easy. If Canada's current private copying regime is any indication, things do not bode well for a potential levy on personal computers or Internet access. The Federal Court of Appeal, affirming the Copyright Board of Canada on this point, recently noted that Part VIII of the *Copyright Act* contains no legitimate exemptions for the vast numbers of consumers and, more importantly, businesses who purchase blank media for purposes other than private copying.[71] The Court seemed to agree with the Board's insights that there are fundamental problems with the *ad hoc* waiver program that has developed, which is administered unilaterally by the beneficiaries of the levy.[72]

[65] It has been said about Canada's private copying regime: "Such a scheme cannot be perfect; it is a rough estimate, involving possible overcharging of some and undercharging of others."[73] By analogy, everyone pays taxes to fund education whether or not they have school-aged children. This is true, but note that the burden of education is thereby spread throughout the whole population. Levies spread the burden of funding culture among only a select group—technology and communications firms and their customers—rather than the public at large. They are essentially a half-way-point between user fees and public finding, which is conceptually and pragmatically awkward.

[66] Insofar as a levy is necessary or desirable, a more precise alternative would impose the charge at the source, not the destination, of copies of cultural products. For example, in the context of music, one option is to levy pre-recorded CDs and paid downloads, from which all copies ultimately originate. The value of private copying, to creators and consumers, would thereby be built into the source itself. A levy on CDs and downloads could account for all 'spin-off' copies that might eventually be made from that original source. Some would argue that, in fact, private copying is already factored into the price of music. This is explicitly acknowledged with authorised downloads that include the right to make copies. A levy would put the matter beyond doubt.

[67] Funding the music industry through a tax on pre-recorded CDs or digital downloads, rather than a levy on blank CDs, is like funding highways through toll roads

[70] See *CPCC v. CSMA*, *supra note 30*.
[71] *Ibid.* at paras. 118-126.
[72] *Private Copying 2003-04*, *supra note 30*.
[73] Canada's private copying regime was described as such by the Federal Court of Appeal in *AVS Technologies Inc. v. Canadian Mechanical Reproduction Rights Agency* (2000), 7 C.P.R. (4th) 68 (F.C.A.) at para. 7.

and gasoline taxes. In principle, such a scheme might focus the burden of levies more precisely on the activities that justify their existence. First, the groups intended to benefit could directly collect the levies. Administrative, opportunity and other transaction costs that are currently imposed on manufacturers, importers, distributors and retailers of levied products could be reduced or eliminated. Second, it would insulate non-copiers from any effect of the levies. The burdens would fall instead on those who consume music. This suggestion is not without precedent—for example, the French film industry is supported in part by a levy on cinema tickets.

[68] In short, an exemption/levy scheme is a shotgun approach that splatters liability around with the hope that, in the process, some of the intended targets will be hit. There is no principled reason to impose the financial and administrative burden of a levy on the technology and communications industries and their customers. Neither causation nor enrichment nor convenience has traditionally been a foundational principle in copyright law. Liability, if appropriate at all, should continue to be based upon the voluntary use of a cultural product in exchange for a user-fee, insofar as possible paid by the consumer of the product directly to its author. Professor Merges claims: "[W]e will be judged wise for avoiding abrupt changes in our IP system that replace volunteerism and trade with forced sharing."[74] Although there are circumstances whether that might be necessary, it is not clear in Canada at this point that we cannot create a functional market in an online environment, let alone that the market has completely failed offline.

[69] Therefore, when the question of ISP liability is looked at as part of the bigger picture of third-party proxy charges to compensate artists on and offline, the option seems less attractive. This is not to say ISPs should not be liable for their own direct and voluntary use of cultural content. It is inappropriate, however, to hold them liable for their customers' activities. Similarly, a levy on personal computers is unwarranted at this time. Instead, the market can give consumers who wish to pay for access to cultural products the ability to do so on clear and reasonable terms. Music, for instance, can be sold online à la carte (from the iTunes Music Store, for example), through licensed peer-to-peer smorgasbords (foreshadowed by recent co-operation between Sony BMG and Grokster), and from traditional bricks-and-mortar retailers.[75]

[70] For many proponents of exemption/levy schemes, the attractiveness lies mainly in the exemption aspect of the *quid pro quo*. There are compelling objections to cultural markets, which are premised on artificial scarcity, and which replicate flaws in the current system in the new online environment. At the core of this hostility is the conviction that cultural players ought not be given proprietary control over cultural products. The protest may be moral, or it may be based on economic inefficiencies. Make

[74] R. Merges, *supra* note 28 at 2.

no mistake—there are serious problems with existing copyright law. Exemption/levy proposals, however, tend to divert attention from more moderate possibilities that are politically, economically and legislatively realistic.

[71] That said, to the extent that we are going to seriously re-evaluate the current system, we should abandon completely the idea of *ex post* compensation based on consumer demand—that is what markets do, and what markets do best. Starting from the ground up, the "compensation" label is misleading and unnecessary.

[72] It is misleading because any compensation forthcoming has less to do with the use of any particular work than with expropriation of rights-holders' ability to control its use. As mentioned, most proposals include some mechanism to correlate distribution of levy revenues with the popularity of particular works. But in general, the remuneration is compensatory only on a macro level.

[73] It is unnecessary because the purpose of the exercise is not to compensate but to induce. Of course, compensation is one method to induce creativity. But it is clearly not the only method. This is a key plank in the analysis, which requires us to reflect back on the purposes of copyright law. Recall that copyright protection, certainly for intermediaries if not also for artists, is warranted only to the extent it constitutes the most efficient and effective mechanism to induce investment in the creation and dissemination of cultural products. There is no principled reason that the economic incentives to create cultural products must come in the form of property rights to be exploited after the product has been created. We must instead ask ourselves what required to induce socially valuable cultural products.[76] The real problem is to generate "inducements", not "compensation". The concepts may coincide, but are not synonymous.

[74] Having established that our primary objective is to induce rather than compensate creativity, we should ask ourselves a related question: which parties in the creative process are best targeted? There are really three options. Efforts could be focussed on supporting artists (authors and performers), intermediaries (producers and distributors) or consumers. It is my position that all three groups require support, but that intermediaries are generally adequately protected, and further efforts should be focussed on the end nodes of the supply and demand chain—artists and consumers. The appropriate response, therefore, is neither copyright reform nor exemption/levy schemes, but rather is reduced dependence on copyright royalties or levy remuneration as a primary support mechanism for Canadian cultural industries.

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[75] See Healy *supra* note 59; and Gervais, supra note 46.

[76] Steven Shavell and Tanguy van Ypersele, for example, have provided a thorough analysis of how rewards other than intellectual property rights might be calculated . See "Rewards Versus Intellectual Property Rights" (October 2001) XLIV Journal of Law and Economics 525 at 529.

C. Public Funding Programs

[75] Neither exclusive copyrights nor third-party levies alone can adequately support Canadian cultural industries. One reason is that, in practice, a significant portion copyright and levy revenues flow to or through intermediaries. There are several explanations for this, including the fact that the custom and structure of cultural industries is such that artists often assign their rights to intermediaries, such as music or literary publishers.[77] In other words, corporate intermediaries perform a gate-keeping function, and an artists' copyright is often the price of admission to the market.

[76] In theory, greater revenue for intermediaries means greater investment in product development, and so the benefit to grassroots artists is indirect but nevertheless real. This is true, to an extent, but there are further problems to confront. It is questionable policy to entrust responsibility for the development of cultural products entirely to private entities. "What will happen is a more commercially oriented cultural sector offering fairly homogeneous fair for a mass audience and selected quality niches for a rich elite."[78] A vibrant cultural industry furthers important non-economic values[79] that may be neglected in a mass market controlled by global gatekeepers.

[77] Also, most revenues generated through copyrights and levies are destined for export from Canada. In a series of recent columns, Professor Geist has commented on Canada's "cultural deficit."[80] To be clear, the deficit Canada suffers is really in the exchange with the US. In the year 2002 Canada's deficit in culture services trade with the US stood at almost $1.2 billion, and in trade with the rest of the world amounted to a roughly $250 million surplus.[81] A quick look at the significance of copyright royalty payments to Canada's cultural deficit with the US shows a worrisome trend. It may also be a good indication of the effect of recent copyright reforms. Between 1996 and 2002

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[77] In the context of the music industry, see generally, David L.P. Garson *et al., Musicians and the law in Canada : A Guide to the Law, Contracts, and Practice in the Canadian Music Business* 3d ed. by Paul Sanderson (Scarborough: Carswell, 2000).

[78] van der Ploeg, *supra* note 4.

[79] van der Ploeg mentions "aesthetic, decorative, spiritual, social, identity, historical, symbolic and authenticity values, as distinct from economic values such as use, exchange, store, status, option and bequest values. *Ibid.*

[80] Michael Geist, "Why Canada should follow U.K., not U.S., on copyright", *Toronto Star*, Oct. 4, 2004; M. Geist, "Advancing Technology Threatens Cultural Policy", Toronto Star (Nov 8, 2004): "For every dollar earned by Canadian sound recording artists in foreign markets, Canadians send $5 out of the country to compensate foreign artists; Canadians import nearly three times the number of books as they export (as measured in dollars); and the Canadian broadcast industry generates only $33.8 million in foreign markets while Canadians spend more than $500 million on foreign broadcasting."

[81] The precise figures are $1,181,610,000 and $262,907,000. In 2002 total Canadian imports of cultural services exceeded exports by $ 918,703,000. In that amount, copyright royalties and related services accounted for 360,548,000. See Statistics Canada: Culture Trade Survey 1996-2002; Culture services trade: Data tables, September 2004, catalog no. 87-213-XWE, online: <http://www.statcan.ca/english/freepub/87-213-XIE/87-213-XIE.xls>.

Canada's deficit with the US in copyright royalty payments more than doubled.[82] And while in 1996 those payments accounted for only 19% of the deficit, their share increased to 31% in 2002. At the same time, our deficit in trade-mark royalty payments increased by about one quarter,[83] and their share of Canada's deficit with the US actually decreased from 45% to 41%. If Canada further amends its copyright legislation to conform to international agreements, changes to the private copying levy, for just one example, will generate "a substantial increase in payments from Canadian consumers to foreign performers and makers"—further net outflows could be in the tens of millions of dollars.[84]

[78] The state of the Canadian film industry is also revealing.[85] In countries with a strong national cinema industry, domestic market share at the box office rarely exceeds 10-20%, although French films are taking more than 30% of the French national market.[86] Canadian domestic films' share of the Canadian box office, however, is 4%.[87] Our proximity to Hollywood is obviously to blame. Positive proof is in the fact that English-Canadian films account for 1% of our box office, whereas French-Canadian films (for which there is virtually no competition from the United States) account for 20.8%.[88]

[79] More generally, Peter S. Grant and Chris Wood have noted an alarming trend in the market for cultural goods and services:

> Five huge record companies control more than 70 per cent of dollar volume in sound recordings. Hollywood dominates cinema film screens and floods local television with hard-to-resist drama. The concentration of media is growing apace around the world. It is harder and harder for "independent" producers to survive, whether in the United States or in any country where concentration is increasing. The distribution of cultural products is often in the hands of gatekeepers who reduce choice rather than expand it. In the book field, shorter shelf life and tightened supplier margins from big-box retail stores have increased the sales of bestsellers, led to publisher consolidation and hurt mid-list titles.[89]

This passage hints at who are most in need of support—real living and breathing Canadian artists, not foreign corporate intermediaries. Yet stronger copyright laws and third-party levies both contribute significantly to a net outflow of revenue from Canada to

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[82] From $160,563,000 to $365,471,000.
[83] From $372,986,000 to $490,418,000.
[84] M. Rushton, "*Economic Impact of Canadian WIPO Ratification on Private Copying Regime: An Update*" (2003) at 6.
[85] See, for example, George Melnyk, *One Hundred Years of Canadian Cinema* (Toronto: University of Toronto Press, 2004).
[86] Jean-Marie Le Breton "*The Film Industry in Britain and France –Strategies for Success*" (2000) Franco-British Council, online: <http://www.francobritishcouncil.org.uk/filmindustry.htm>; Others put the French number even higher, at 42% in 2001. See Grant & Wood, *supra* note 3 at 295.
[87] Denis Seguin, "Role Reversal" (2004) 77:18 *Canadian Business* 33.
[88] *Ibid.*
[89] Grant & Wood, *supra* note 3 at 1.

foreign producers and distributors of cultural products, primarily in Hollywood and New York City.

[80] Modern copyright law exhibits the Matthew effect: "For unto everyone that hath shall be given, and he shall have abundance: but from him that hath not shall be taken away even that which he hath."[90] If the influence of the music industry was at all in doubt, Saint Matthew's point has been re-dubbed "the Brittany effect".[91] I am not making a value judgment on the merits or demerits of the American pressures on Canadian cultural industries. I am, however, suggesting that neither exclusive copyrights nor exemption/levy schemes may be able to achieve the objective of supporting Canadian artists specifically.

[81] Of course, greater copyright royalties and levy revenues benefit not *just* corporate American interests; Canadian artists and intermediaries will benefit as well. But it is important to understand that all of the benefits—to Canada and Hollywood's creators alike—come at the expense of the Canadian public. Since Canadian consumers of cultural products, or worse Canadian technology and communications firms and their customers, are footing the bill, the goal should be to direct as much benefit as possible exclusively to Canadian creators.

[82] Grant and Wood describe a "toolkit" that governments can use to support popular cultural products, which includes support for public broadcasting, scheduling or expenditure requirements for private broadcasters, subsidies or tax incentives, foreign-ownership rules and competition policy measures.[92] Moral rights are another important tool. But since the focus of this paper is on economic support, I only want to briefly discuss subsidies or incentives through public funding programs.

[83] There are currently a variety of public funding programs designed to support Canadian cultural industries.[93] Tax incentive programs are widely utilized in Canada.[94] But there are also automatic or discretionary funds available. There is the Canada Music Fund, which assists the Canadian music industry through various initiatives supporting songwriting, composing, new musical works, specialized music, market development, sound recording entrepreneurship and the preservation of Canadian music collections. Arts Presentation Canada supports professional arts festivals, performances and other artistic experiences. The Book Publishing Industry Development Program seeks to ensure choice of and access to Canadian books that reflect Canada's cultural diversity and

[90] Matthew 25:29.
[91] See James Love, "Artists Want to be Paid: The Blur/Banff Proposal" online: <http://www.nsu.newschool.edu/blur/blur02/user_love.html>.
[92] Grant & Wood, *supra* note 3 at 5.
[93] *Ibid.* at c. 13.

linguistic duality. The Canadian Magazine Fund is part of the government's policy to support the Canadian magazine industry. There is also the Canadian Television Fund to assist with the creation and prime time broadcast of Canadian television programs in both official languages. These are just some examples of the many public support programs directed at Canada's cultural industries.

[84] Public funding programs need not focus exclusively on the creation of cultural products, but should actively support dissemination as well.[95] Or, from another perspective, emphasis should be placed on supply-side *and* demand-side cultural subsidies. Rick van der Ploeg discusses support for cultural industries in the Netherlands, a country that like Canada is vulnerable vis-à-vis potentially dominating neighbours:

> In the Netherlands a new fund has been set up, which will reward those venues which come with an adventurous, high quality programme of culture. The idea is that it takes time to cultivate an audience and also that it is worthwhile for success productions to have a longer run. … [T]hese demand incentives may provide a quality boost to programming which would otherwise be unprofitable. It may also help to add a 'bums on seats' premium to the lump-sum finance of many performing arts to give a bigger incentive for drawing bigger audiences and generating income from the market.[96]

There is empirical evidence to show that public funding in regional cultural industries pays off, by encouraging a thriving cultural community, and in terms of spin-off economic activities.[97]

[85] Data also suggests that public funding programs are inherently more efficient than a system of collectively administered copyright when it comes to generating and distributing revenue to cultural creators.[98] Of course, the Canada Music Fund receives all its income from the federal government, whereas copyright collectives rely on numerous sources of revenue. Therefore, I am not suggesting that a system of collectively administered copyrights could or should be replaced by the Canada Music Fund. Since there is no direct competition between those two systems of supporting Canadian creators, both can and should exist together.

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[94] Canadian Heritage Cultural Affairs. Financing of Cultural SMEs. http://www.pch.gc.ca/progs/ac-ca/pubs/profile/5_e.cfm.

[95] See Allan Gregg, "Art for Everyone: Stop funding elitist culture and support ventures that unite us"*Maclean's* 116:21 (26 May 2003) 40.

[96] van der Ploeg, *supra* note 4.

[97] "In 2001-2002, cultural spending by all three levels of government in Atlantic Canada totalled $446.2 million, 49 per cent of it from Ottawa. But study author Nicole Barrieau, a researcher with the Universite de Moncton, said the industry generated $2.1 billion in economic activity - 3.1 per cent of the region's GDP - and created more than 34,000 jobs." See Stephen Bomais, "Culture industry gives more than it gets, study finds" *Daily News Halifax* (20 November 2004) 21.

[98] The average expense/revenue ratio for the Canada Music Fund is about 11%. See Canada Music Fund Annual Report 2002-2003, online: <http://www.canadamusiccouncil.ca/en/about/pdf/Annual_Report_CMF.pdf>. SOCAN, for example, had an expense/revenue ratio at 20% in 2002. See Statement of Operations Chart, SOCAN, online:<https://www.socan.ca/jsp/en/word_music/FinRep03.jsp#s1>. CPCC, an umbrella organization

[86] Funding public support programs for cultural industries is sometimes difficult and controversial.[99] In this respect, tax incentives are less awkward than direct subsidies. Where monetary payments are involved, however, there is certainly good reason to adopt the "source levy" proposal discussed above. A highly successful illustration of such a scheme is found in the French film industry.[100] French films are supported not only by a copyright levy on blank video recording media and equipment, but also by a tax on cinema tickets. The latter mechanism concentrates the costs of the scheme on persons more likely to derive benefits from the supported cultural product. It is more accurate, and therefore, more fair.

[87] Another difficulty in delivering public cultural support is establishing selection criteria. Funding can be linked to potential or past performance, subjective merit or some other criteria. Also there is the risk that public funding programs can constrain freedom of expression and lead to state control over culture. This, however, is largely illusory:

> "The stilted "social realism" of the Soviet Union and the People's Republic of China or Wagneresque pretensions of Nazi Germany were true attempts at "command and control" culture. But since the middle of the last century, all the major democracies have also at one time or another subsidized both high and low culture. They have generally attached few or no overtly political or ideological strings to their aid."[101]

Thus, I am not advocating a centrally planned welfare scheme for artists and cultural entrepreneurs. The Department of Canadian Heritage should not become our cultural soup kitchen. Generally, funding programs can co-exist with a system of exclusive property rights.

[88] Public funding does, however, create a problem of double-dipping; in other words, using public funds to create cultural products that are then protected by statutory monopolies and sold back to the Canadian public for a price. In the United States, this prompted introduction of the *Public Access to Science Act*, which would exclude from copyright protection works resulting from scientific research substantially funded by the Federal Government.[102]

[89] A similar result could be achieved with cultural products funded by Canadian taxpayers, without legislative amendments. A government policy requiring the use of fair and reasonable licenses as a condition of public support can alleviate the dilemma. Administrators of public funding programs might contractually require funding recipients to adopt a licence that, for example, allows the public to copy, distribute, display, and

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representing multiple collectives, most recently reported a ratio of 15%. See Financial Highlights, Canadian Private Copying Collective, on line: <http://cpcc.ca/english/finHighlights.htm>.

[99] Grant & Wood, *supra* note 3 at 304-306.

[100] See generally Jean-Marie Le Breton, *supra* note 86; and Grant & Wood, *ibid.* at 298-99 at sources cited therein.

[101] Grant & Wood, *supra* note 3 at 293.

[102] See HR 2613, 108th CONGRESS, 1st Session, June 26, 2003.

perform the work, on the condition that users give the original author credit, do not use the work for commercial purposes, and do not alter, transform, or build upon the work. Such a licence need not apply worldwide. If Canadian tax or levy payers funded a cultural product, the Canadian public should be able to use the work; however, the creator could still exploit the work abroad. It would take very little effort for those responsible for administering Canada's cultural subsidy programs to implement a mandatory licensing policy as a condition of public funding.

[90] Doing so would offer the best of all worlds. Creators who wish to go it alone in the market could use copyright law to protect cultural products that can be made available to consumers in useable bundles on balanced and reasonable terms. Those who rely on subsidies to create cultural products would sacrifice some ability to exploit their works vis-à-vis the public who paid for the work up front.

VI. Conclusion

[91] Canadian copyright law does not need radical reform, although there are some unjustifiable barriers to efficient use of cultural products. There is no reason to impose liability on third-party proxies—Internet service providers or digital equipment manufacturers, for example—in order to deal with perceived market failures. What is necessary is to reduce our dependence on copyright royalties and levy revenues as primary means to support Canadian cultural players and products.