EIGHTEEN

Use of Copyright Content on the Internet:

Considerations on Excludability and Collective Licensing

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A. INTRODUCTION

The Internet has been a catalyst for problems latent within the copyright system. Among the questions that can no longer be swept under the policy carpet, one could mention whether copyright should protect certain kind of works; what the proper originality standard should be (and whether it would be better to have a uniform international standard); whether it makes sense to grant copyright protection in the form of right "fragments" delineated by the technical or physical nature of the use made of a protected work (a copy, a performance, a communication by wire or "Hertzian waves," a transmission, an adaptation, etc.);[1] the related question of which uses of protected works should constitute an infringement of copyright; and last but not least, which uses should be licensed and by whom. This last question has taken a very high profile in recent years in the face of the rightsholders' recalcitrance to license many mass uses on the Internet.

1 Because digital technology usually requires a reproduction in order to communicate, perform or transmit, and possibly an adaptation or creation of a derivative work, this "nature-of-the-use" approach which means that a single use may in fact require an authorization under several rights fragments or headings. I recently suggested refocusing the copyright rights away from the technical nature of the use made and towards the effect of the use on the copyright holder's market. See Daniel Gervais. "The Reverse Three-Step Test: Towards a New Core International Copyright Norm" (2004) 9 Marquette Intel. Prop. L. R. 1, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=499924> [Gervais, "The Reverse Three-Step Test"].

At a more basic level, the question is essentially to determine for whom and in what circumstances should copyright prevent the use of material available on the Internet. To put the question differently, under what circumstances should a copyright holder have a right to exclude others from using her copyright work on the global network? This is the question I wish to examine in this chapter. The underlying hypothesis will be that policy analysis concerning copyright and other intellectual property rights is shifting because those rights are now facing a number of opponents, in most cases for the first time on that scale. Those opponents are other *rights,* including privacy. Clearly, copyright is not or no longer a closed system with exceptions looping back to a set of exclusive rights in which an appropriate equilibrium in the regulation of knowledge creation and dissemination was supposed to be reached. Inescapably, broader societal issues now form part of the equation.

I will begin the analysis in section B with a brief look at the history and purpose of copyright. In section C, I consider more specifically the intersection of copyright with the private sphere of users. In section D, I consider possible solutions, bearing in mind that the stated purpose of this book is to provide tools and thoughts on the ongoing copyright reform process.

B. A BRIEF LOOK BACK

The first copyright statute in the United Kingdom,[2] which was used as

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2 Prior to the *Statute of Anne*, 1710, 8 Ann., c. 19 (Eng.), there had been no copyright proper. Artists in classical Greece and the Roman Empire did not seek personal attribution, and it was common to identify someone else (a teacher, a famous person) as the "author." During the early and middle Middle Ages (approximately from the 8th to the 12th century), almost all artistic works were created in Europe under the patronage of the Roman Catholic Church, which became de facto the owner of all "works." Michelangelo was one of the first artists under Church patronage to insist on personal attribution. The insistence of the personal role of the author and the recognition of the link between authors and works is mostly a child of the Enlightenment, with, e.g., Kant's (and later Hegel's) view that the author infused his or her will into the work. See Harold C. Streibich, "The Moral Right of Ownership to Intellectual Property: Part I - From the Beginning to the Age of Printing" (1975) 6 Mem. St. U. L. Rev. 1; Dan Rosen, "Artists' Moral Rights: A European Evolution, An American Revolution" (1983) 2 Cardozo Arts & Ent. L.J. 155; Cheryl Swack, "Safeguarding Artistic Creation and the Cultural Heritage: A Comparison of Droit Moral Between France and the United States" (1998) *22* Colum.-VLA J.L. & Arts 361.

a basis for the 1921 Canadian *Copyright Act*,[3] many parts of which have survived to this day, was essentially a privilege granted by the Crown to authors and publishers to prevent reuse by other publishers.[4] It seems to have been derived from a previous act designed to limit publications to authorized publishers.[5] From its inception, copyright was thus a "professional right": a right used by professionals against other professionals. In fact, until the 1990s, copyright law and policy was aimed at professional entities, either legitimate ones such as broadcasters, cable companies or distributors; or illegitimate ones such as makers and distributors of pirate cassette and later CDs. In most cases, these professionals were intermediaries with no interest in the content itself (i.e., they could have sold shoes instead of music or books).

Copyright remained a right to prevent professional copying for a significant amount of time. A right to "perform in public" was added when authors of theatrical plays and music realized that selling sheet music or copies of their plays represented only a small fraction of the commercially relevant use of their works. Incidentally, this is also the time when copyright collectives were formed.[6]

The pre-Internet history of copyright and authors' rights during the twentieth century was essentially that of the adaptation to new forms of creation (e.g., cinema) and, more importantly, of new ways to disseminate copyrighted works (radio, then television broadcasting, cable, satellite). Canada's Act piggybacked on foreign and international developments un-

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3 *Copyright Act, 1921*, S.C. 11-12 Geo. V. c. 24; modified by *Copyright Act Amendment*, 13 & 14 Geo. V, c. 10, (1923) (Entered into force 1 January 1924); 27 Gaz. C. 26, 2157. The Canadian Act is clearly a common law-based statute (see *Théberge v. Galerie d'Art du Petit Champlain inc.*, 2002 SCC 34, <www.lexum.umontreal.ca/csc-scc/en/pub/2002/vol2/html/2002scr2_0336.html>, [2002] 2 S.C.R. 336 [*Théberge* cited to S.C.R.] at paras. 62–69).

4 Certain commercial entities waited to see which books were selling well and then started to copy them. This created a free-rider system, which was rather inefficient from a commercial standpoint: publishers had little incentive to invest in the publication of new books and authors were suffering from the narrow bandwidth for the dissemination of their books. This "free" and rather raw capitalism thus led to a market failure in the book trade that had to be regulated.

5 This is the argument made in L. Ray Patterson and Craig Joyce, "Copyright in 1791: An Essay Concerning the Founders' View of the Copyright Power Granted to Congress in Article I, Section 8, Clause 8 of the U.S. Constitution" (2003) 52 Emory L.J. 909, <http://ssrn.com/abstract=559145> at 916.

6 See Alana Maurushat and Daniel Gervais, "Fragmented Copyright, Fragmented Management: Proposals to Defrag Copyright Management (2003) 2 Can. J. of L. & Tech. 15, <http://cjlt.dal.ca/vol2_no1/pdfarticles/gervais.pdf>.

til fairly recently. From 1924 on[7] we lived with the 1911 British Act.[8] For a significant part of the current Canadian Act, we still do. Britain itself was an early member of the *Berne Convention*,[9] and thus influenced by the development of international norms.[10]

At the international level, new categories of works were added to the main copyright treaty, namely the *Berne Convention*,[11] when they fit two criteria: (a) belonging to the vast category of literary and artistic creation; and (b) being original. Originality, though formally defined neither in the *Berne Convention* nor in the 1994 WTO *TRIPS Agreement*,[12] is understood in the context of those two instruments to refer to intellectual creations. In other words, works that involve creative choices, that is, choices made by the author(s) that are not dictated by the function of the work, the method used to create the work, or applicable standards.[13]

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7 S.C. 1921, c. 24. The 1921 Act entered into force on 1 January 1924 See the *Copyright Amendment Act*, S.C. 1923, c. 10, s. 5. Prior to 1924 various British Acts were in force in Canada. See *Smiles v. Belford* (1877), 1 O.A.R. 436, [1877] O.J. No. 20 (C.A.).

8 *Copyright Act 1911* (UK), 1 & 2 Geo. 5, c. 46 (Eng.).

9 The UK was one of the first members of the "Berne Union," i.e., countries party to the *Berne Convention* (see next note), which it joined on 5 December 1887.

10 Britain was generally alone as a common law jurisdiction during the early evolution of the Convention, which tended to reflect the natural law-based "authors' rights" tradition (see above note 2). For example, the list of countries that originally joined in 1887, apart from the United Kingdom is as follows: Belgium, France, Germany, Italy, Spain, Switzerland and Tunisia. See WIPO, *Centenary Of The Berne Convention 1886–1986* (Geneva: WIPO, 1986).

11 *Berne Convention for the Protection of Literary and Artistic Works*, 9 September 1886, as last revised 24 July 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221, <www.wipo.org/treaties/ip/berne/index.html> [*Berne Convention*].

12 Agreement on Trade Related Aspects of Intellectual Property Rights *Agreement Establishing the World Trade Organization, Annex 1C: Agreement on Trade-Related Aspects of Intellectual Property Rights*, 15 April 1994, 33 I.L.M. 81 (1994), <www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm> [*TRIPS Agreement*].

13 See Daniel Gervais, "The Compatibility of the 'Skill and Labour' Originality Standard with the *Berne Convention* and the *TRIPS Agreement*" (2004) 26 Eur. Int. Prop. Rev. 2, [Gervais, "Skill and Labour"] at 75-80. A simple rule of thumb is to ask whether two authors put in the same situation would create the same work. Photography acted as a developer of this issue (see Margaret Ann Wilkinson & Charles A. Painter, "Shifting the Balance of Copyright Control for Photographic Works in Canada" (1999) 13 I.P.J. 353). Are photographs original? After all, the photographer merely captures what is in front of her, doesn't she? In some cases, that is true. Many amateur snapshots may not involve creative choices. The same may be said of technical photography (e.g., pictures of cells for a biology journal; pictures of a painting for a museum catalog (see *Bridgeman Art Library, Ltd. v. Corel Corp.*, 25 F. Supp. 2d 421 (S.D.N.Y. 1998); and 36 F. Supp.

The works "sphere" also grew by analogy. Ensconced in the belief that copyright should not depend on the aesthetic value of the work or on a determination of the literary merit,[14] which would have opened the door to indirect censorship, copyright policy makers eventually had to agree that computer programs should be analogized with literary works, and then databases to "collections" of works.[15]

The rights sphere grew along similar lines. Playwrights and authors of music obtained rights in respect of the live performance of their works by arguing that this was their main economic use (as opposed to reproduction of copies of their works on paper). When radio was invented, those same live performances (mostly of opera and music) were then broadcast directly to the homes of listeners. These people did not attend the live performance and the existing copyright rights did not apply. But broadcasters were making commercial use of the material (comparable to the use made in theatres or concert halls). It was quite logical then, to extend the right of public performance to the "communication" by Hertzian (radio) waves. It was only a small step after that to add television, and later communication by cable and satellite. The result of this historical process is the bundle composed of "copyright rights" we find in section 3 of the Act and most other national copyright laws.

2d 191 (S.D.N.Y. 1999)). But professional photographers do make several creative choices: the angle, the lighting, the filters, the speed, etc. (see, e.g., *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 60 (1884)). They may also have arranged the scene (see *Ateliers Tango Argentin Inc.* v. *Festival d'Espagne & d'Amérique Latine Inc.* (1997), 84 C.P.R. (3d) 56 (Que.Sup.Ct.); [1998] J.Q. 4870.

14 See Daniel Gervais, *La notion d'œuvre dans la convention de Berne et en droit comparé* (Geneva: Librairie Droz, 1998).

15 This expansion is visible in international norms. The *Berne Convention* (Art. 2(5)) only refers to collections of literary and artistic works. Art. 10 of the *TRIPS Agreement*, which also confirmed that computer programs were to be treated as literary works, states that "(2) Compilations of data or other material, whether in machine readable or other form, which by reason of the selection or arrangement of their contents constitute intellectual creations shall be protected as such."

There is a double expansion there: first collection is replaced with the arguably broader concept of compilation (which does not seem to require a similar level of connection among the elements in the "compilation" as one might expect to find in a "collection"); second, while *Berne* only applies to collections of works, here compilations of data are said to be protected. The Berne originality test is used quite clearly however. Compilations must be original in the sense of being intellectual creations that require creative choices in the selection or arrangement of their contents. See Gervais, "Skill and Labour," above note 13 and accompanying text.

Clearly, the rights contained in section 3 of the Canadian Act are not very useful in mapping out many aspects of use on the Internet.[16] Copyright fragments have lost their meaning to users and rightsholders alike. Contracts and licensing arrangements for copyright works do not usually base themselves on the specific rights fragments;[17] instead, they define the "use" that should be allowed. In other words, the use of a work on the Internet operates in some respects as a fiction *vis-à-vis* the Act.[18]

The net result of this evolution is that the Internet is regulated by analogy with an analogy. Communication on the Internet is considered to be analogous to a communication to the public, itself analogous to a public performance. That analogy, however, overlooks a fundamental difference. In the case of broadcasts, the *intermediary* (i.e., the broadcaster) is responsible both for the technical operation of getting content to end-users and

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16 See Michael A. Einhorn & Lewis Kurlantzick, "Traffic Jam on the Music Highway: Is it a Reproduction or a Production" (2003) 2 Review of Network Economics 10, <www.rnejournal.com/articles/Einhorn_mar03.pdf> at 11 ("Since these rights are controlled by different parties and agents, the complexity of the system leads to a gridlock of control that may hinder development.").

17 A contract to allow webcasting normally refers to the function of broadcasting, independently of whether a communication to the public, one or more reproductions, or adaptations may take place. The problem is that rights ownership is still by and large (especially in the area of collective management), owned by different entities based on the rights, not the functions. While a single economic transaction should take place, several legal transactions are involved. See A. & B. Kohn, *Kohn on Music Licensing: 2000 Supplement*, 2d ed. (New York: Aspen Law & Business, 2000) at 398–99.

18 A "multi-media work" is subdivided into the various components such as sound, image, photograph, or software program where rights clearance is required for each consequent subcomponent. Uses are broken down into specific "rights" as defined within the legislation. To do so, uses must be analogized to other categories within the Act. See Michael A. Einhorn & Lewis Kurlantzick, above note 16 at 10 ("At least four distinct rights are implicated in the use of any piece of recorded music in digital audio") and Mark Lemley, "Dealing with overlapping Copyrights on the Internet" (1997) 22 Dayton L. Rev. 548 at 565–66. ("Consider the case of an individual who provides an "Internet radio" service to subscribers, selecting and sending digital versions of recorded songs via the Internet in real time. If this individual transmits a copyrighted song, what copyright violations have occurred? He has made a copy of the song in his computer by loading the song in the first place, violating the reproduction rights of both the owner of the musical composition copyright and the owner of the sound recording copyright. He has also caused additional copies of the song to be made in the computers of each of the recipients, constituting more violations of each right. If fixation in RAM is sufficient for copyright infringement, he has made or caused to be made a minimum of seven copies, and more likely a few dozen, for each recipient of the service. Again, each of these copies potentially violates the rights of two different copyright owners.").

for selecting the content. Even cable companies select the channels they carry and often add channels of their own. On the Internet, the function is split, and this is, I suggest, the cause of a deepening malaise. In the vast majority of cases, ISPs do not select content. Instead, they merely provide the means to get content from one point to another. The point of origin may be a professional content provider, but it may also be another "user." When broadcasters were analogized with theatre and concert hall operators, the analogy held because both were making a professional use of copyright content. On the Internet, individual end-users have become "content providers" but they are not professionals. Still, rightsholders who analogize themselves to professional content providers have no hesitation to apply copyright, a hitherto purely professional right, to individual users. And that is when and why the tension emerged.

Indeed, that analogy may have induced a truly fundamental shift. While historically it is clear beyond cavil that copyright was a tool designed to support contractual relations between professionals (authors, publishers, producers, broadcasters, etc.) or to fight professional pirates, it is now used as a legal tool that rightsholders have turned against *end-users,* including consumers.[19]

Rightsholders want to use the copyright tools at their disposal for a dual purpose: (a) ensuring that end-users pay the fee for the material they use (which they see as including forcing users to get access only through authorized sources); and (b) preventing the transmission of the material by those "end"-users to other users (in other words, preventing them from becoming intermediaries). On the other side, individual users want to harness the enormous capabilities of the Internet to access, use and disseminate information and content. Thus, the demand created is huge and ever increasing.[20]

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19 See Press Release, Recording Industry Association of America, "Recording Industry Begins Suing P2P File Sharers Who Illegally Offer Copyrighted Music Online" RIAA (8 September 2003), <www.riaa.com/news/newsletter/090803.asp>. See also John Borland, "RIAA sues 261 file swappers" CNET News.com (8 September 2003), <http://news.com.com/2100-1023_3-5072564.html>; and John Borland, "RIAA files 80 new file-swapping suits" CNET News.com (30 October 2003), <http://news.com.com/RIAA+files+80+new+file-swapping+suits/2100-1027_3-5099738.html>.

20 Richard Stallman wrote a perceptive piece in 1996:

> The Internet is relevant because it facilitates copying and sharing of writings by ordinary readers. The easier it is to copy and share, the more useful it becomes, and the more copyright as it stands now becomes a bad deal.
>
> This analysis also explains why it makes sense for the Grateful Dead to insist on copyright for CD manufacturing but not for individual copying. CD production works like the printing press; it is not feasible today for ordinary

Internet technology has responded to this huge pull not only by providing the initial adequate technological means but also by responding to legal barriers. It has thus far effectively provided means to circumvent legal challenges: close Napster and peer-to-peer (P2P) emerges. Try to shut P2P down, as was done in the recent wave of subpoenas and lawsuits against individual file "sharers" in the United States,[21] and quite predictably another technology surfaces: anonymous file exchange systems, thus defeating any subpoena served on the ISP.[22] Because ISPs will not know the identity of users who are exchanging music files, subpoenas will be ineffective. In a similar vein, if a way is found to block music files, software that disguises the music content will be invented.[23] The lesson I suggest we draw from this series of events is a simple one: copyright was not meant

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> people, even computer owners, to copy a CD into another CD. Thus copyright for publishing CDs of music remains painless for music listeners, just as all copyright was painless in the age of the printing press. To restrict copying the same music onto a digital audio tape does hurt the listeners, however, and they are entitled to reject this restriction.
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> We can also see why the abstractness of intellectual property is not the crucial factor. Other forms of abstract property represent shares of something. Copying any kind of share is intrinsically a zero-sum activity; the person who copies benefits only by taking wealth away from everyone else. Copying a dollar bill in a color copier is effectively equivalent to shaving a small fraction off of every other dollar and adding these fractions together to make one dollar. Naturally, we consider this wrong. By contrast, copying useful, enlightening or entertaining information for a friend makes the world happier and better off; it benefits the friend and inherently hurts no one. It is a constructive activity that strengthens social bonds.

Richard Stallman. "Reevaluating Copyright: The Public Must Prevail" (1996) 75 Or. L. Rev. 291, <www.gnu.org/philosophy/reevaluating-copyright.html>.

21 *Ibid.* For a discussion of similar lawsuits in Canada see below note 41 and accompanying text.

22 See *Recording Industry Association of America v. Verizon Internet Services* (2003), 351 F.3d 1229 (D.C. Cir.) <www.dcd.uscourts.gov/03-ms-0040.pdf>, cert. Denied 125 S.Ct. 347 (US Sup. Ct. 2004) [*RIAA*]. CNet reported the increasing use of proxies to ensure the anonymity of file-sharers. See John Borland, "Covering tracks: New Privacy Hope for P2P" *CNET News* (24 February 2004), <http://news.com.com/2100-1027_3-5164413.html>. Another example is programmer Wyatt Wasicek, who has created a program called AnonX that masks the Internet address of people who use file-sharing programs such as KaZaa. Wasicek promises not to divulge his 7,000 users' Internet addresses, and believes he cannot be forced to do so. See Associated Press, "Angry with RIAA tactics, programmer creates mask for file-sharers" *SilliconValley.com* (11 February 2004).

23 Regularly, new technologies that promise to stop P2P sharing of copyrighted material (such as Audible Magic) emerge, usually with some concerns about pri-

to exclude use by individual end-users, and trying to make it fit that job description is unlikely to work, and, from a historical point of view, denatures the underlying policy.

The growth of the sphere of copyright norms was economically justified and understood by professionals because of the need to organize the market for copyright works and the related financial flows among all the professionals involved. Whether those professionals internalized these "business" norms was not crucial. Business entities comply with the law often as a simple risk assessment calculus. However, in bringing copyright into the millions of private spheres of individual Canadians, the need to align the legal norm with an underlying moral imperative, one that would make the rule fair and justified, has surfaced with a vengeance.

Many Internet users apparently do not agree that their file-sharing behaviour is morally wrong. They do not consider that they are "stealing," infringing the Decalogue's direction "Thou shalt not steal."[24] In fact, their cyberspace behaviour has shaped a new social norm of creating multiple links, by email, in chat groups, blogs or other Internet tools, with people with whom they share certain interests.[25] This is reinforced by the structure of hyperlinks, which allows users to "intuitively" follow their train of thought. If that technology and mode of interaction is to be developed, it requires more access, not more roadblocks. In a world where millions of Internet users are paying for high-speed to avoid having to wait to access material, a refusal to grant access because of a prohibition to use based on copyright is unlikely to be well received and accepted.

Not only is using copyright as a tool to prohibit use on the Internet risky behaviour from the fairly straightforward historical perspective of the purpose of copyright, namely the regulation of the interaction between professional actors responsible for the creation, publication, production and dissemination of works of the mind, but it also does not seem rooted in a moral imperative. Quite the opposite: it clashes with strong social norms that have developed specifically because of the informal, intuitive and global nature of the Internet.

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vacy. See John Borland, "File-swap 'killer' grabs attention," *CNet News* (3 March 2004) <http://news.com.com/2100-1025_3-5168505.html>.

24 See below note 69.

25 See Howard Rheingold, *Smart Mobs: The Next Social Revolution* (Cambridge: Perseus Books Group, 2002) at 51–61; see also Cass Sunstein, *Republic.Com* (Princeton, NJ: Princeton University Press, 2002) at 103.

C. EXCLUDABILITY AND THE PRIVATE SPHERE

1) Copyright's Foray in the Private Sphere

Maximizing rightsholder revenue (if that is what copyright actually does — one can query the results in cases such as music licensing for Internet use[26]) is not a right *per se*. The instrumental nature of intellectual property, a pillar of recent Supreme Court decisions,[27] focuses on social welfare impacts and revenue generation must thus be confronted with other equally important objectives and rights, especially when access to knowledge, information and culture is at stake.

As I have attempted to demonstrate, the commercial and public relations cost of trying to apply copyright against individual end-users illustrates a simple fact: it is not what copyright was meant to do. The history and underlying policy objectives of copyright indicate that it is a right to be exercised by and against *professionals*. Copyright was used to *regulate and organize* markets when a new form of dissemination was invented. The Internet is, from this perspective, probably the biggest jump in technological terms and yet copyright was used not to organize the music market but rather to deny it. Will it work? Historically, copyright was never a dam; it was used to dig rivers;[28] in other words, it was not designed to stop the flow of works, but to channel it and optimize the exploitation of works.

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26 See See Daniel Gervais, "The Price of Social Norms: Towards a Liability Regime for File-Sharing" (2004) 12 J. of Intell. Prop. 39, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=525083> [Gervais, "The Price of Social Norms"].

27 In the field of copyright: *Théberge,* above note 3; *CCH Canadian Ltd. v. Law Society of Upper Canada,* 2 SCC 44, <www.lexum.umontreal.ca/csc-scc/en/pub/2004/vol2/html/2004scr2_0427.html>, [2004] 1 S.C.R. 339 [*CCH* cited to S.C.R.]; and *Society of Composers, Authors & Music Publishers of Canada v. Canadian Assn. of Internet ProvIbiders,* 2004 SCC 45, <www.lexum.umontreal.ca/csc-scc/en/pub/2004/vol2/html/2004scr2_0427.html>, [2004] 2 S.C.R. 427 [*SOCAN* cited to S.C.R.]. A recent decision concerning pharmaceutical patents is also interesting from that perspective: *Bristol-Myers Squibb Co. v. Canada (Attorney General),* 2005 SCC 26, <www.lexum.umontreal.ca/csc-scc/en/rec/html/2005scc026.wpd.html> [*Bristol-Myers* cited to LexUM].

28 The successes of publishers of scientific and medical journals show that using copyright norms in the Internet environment is possible. By making journals available online and leveraging the technology to provide, e.g., raw lab data or files containing three-dimensional images, those publishers, who still sell plenty of paper copies, have increased total revenues. The key is to *trust* users, and let them use the material. Trust was always implicit in pre-Internet days, with legal devices such as the first-sale doctrine, private copying exceptions, fair use, etc.

The fact that copyright was not meant to be routinely used in the private sphere is further evidenced by the fact that exceptions and limitations to copyright were also written in the days of the *professional intermediary* as the user. This explains why in several national laws, the main exceptions can be grouped into two categories: private use, which governments previously regarded as "unregulatable"[29] (i.e., where copyright law abdicated its authority by nature); and use by specific professional intermediaries: libraries (and archives) and certain public institutions, including schools, courts and sometimes the government itself. Still today, there are several very broad exceptions for "private use" (e.g., Italy, Japan) that were adopted in the days when the end-user was just that, the end of the distribution chain.[30] End-users have always enjoyed both "room to move" because of exceptions such as fair use and rights stemming from their ownership of a physical copy. There was thus an intrinsic balance that recognized that end-users who did not significantly affect the commercial exploitation of works by their individual use should not be on the copyright radar. The Supreme Court wrote an interesting comment on this point in *Théberge*:

> 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 … such as fair dealing …. This case demonstrates the *basic economic conflict* between the holder of

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29 Professor Alain Strowel considers the defence of the private sphere as one of the three main justifications for exceptions to copyright, the other two being circulation of information, and cultural and scientific development. See Alain Strowel, "Droit d'auteur et accès à l'information: de quelques malentendus et vrais problèmes a travers l'historie et les développements récents" (1999) 12 Cahiers de propriété intellectuelle 185, <www.robic.ca/cpi/Cahiers/12-1/12-1%2009StrowelAlain.htm> at 198.

30 The result of those exceptions expressed, in a US context, as a combination of fair use and the first-sale doctrine See R. Anthony Reese, "The First Sale Doctrine in the Era of Digital Networks" (2003) 44 B.C. L. Rev. 577, <www.bc.edu/schools/law/lawreviews/meta-elements/journals/bclawr/44_2/09_FMS.htm>.

> For at least ninety-five years, the first sale doctrine in U.S. copyright law has allowed those who buy copies of a copyrighted work to resell, rent, or lend those copies. Copyright law is often viewed as a balance of providing authors with sufficient incentives to create their works and maximizing public access to those works. And the first sale doctrine has been a major bulwark in providing public access by facilitating the existence of used book and record stores, video rental stores, and, perhaps most significantly, public libraries.

> the intellectual property in a work and the owner of the tangible property that embodies the copyrighted expressions. [Emphasis added.][31]

More importantly perhaps, entering the private sphere meant that copyright had to fight a new, formidable opponent: the right to privacy, which is anchored, *inter alia,* in section Article 8 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*[32] and in Articles. 17 and 19 of *International Covenant on Civil and Political Rights*.[33] Beyond the intrinsic balance, which has proved difficult to maintain given that rights are expressed in terms of the technical nature of the use, the complexity of the policy equation is increased by the perceived to need to reach an extrinsic equilibrium, one in which copyright is balanced against several other societal priorities including privacy.

The right of "private use" is also considered fundamental in several European copyright statutes[34] and may have a strong constitutional basis in the United States.[35] It is also an important right in Canadian

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31 See *Théberge,* above note 3 **at para 32. The Aboveme Court wrote an interesting** comment on this point:

> 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 … such as fair dealing …. This case demonstrates the *basic economic conflict* between the holder of the intellectual property in a work and the owner of the tangible property that embodies the copyrighted expressions.

[Emphasis added.]

32 **Council of Europe, Committee of Ministers,** *Convention for the Protection of Human Rights and Fundamental Freedoms*, CETS No. 005 (1950), <http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm>.

33 *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations Treaty Series, 187, <www.unhchr.ch/html/menu3/b/a_ccpr.htm>.

34 **See Lucie M.C.R. Guibault, "Contracts and Copyright Exemptions" in** Berndt Hugenholtz ed., *Copyright and Electronic Commerce, Legal Aspects of Electronic Copyright Management* (The Hague: Kluwer Law, 2000) at 232.

35 **See Julie E. Cohen, "A Right to Read Anonymously: A Closer Look at 'Copyright** Management' in Cyberspace" (1996) 28 Conn. L. Rev. 981; and, Julie E. Cohen, "DRM & Privacy"(2003) 18 Berkeley L. & Tech J. 575, <http://www.law.berkeley.edu/journals/btlj/articles/vol18/Cohen.stripped.pdf> at 576–77. Professor Cohen continues by stating: "Properly understood, an individual's interest in intellectual privacy has both spatial and informational aspects. At its core, this interest concerns the extent of breathing space, both metaphorical and physical, available for intellectual activity. DRM technologies may threaten breathing space by collecting information about intellectual consumption (and therefore exploration) or by imposing direct constrains on these activities." She argues

law.[36] To summarize a complex set of arguments, it has been argued that copyright owners should not be able to control the uses of the works that are made by individual users in their private sphere, because this would amount to a violation of their privacy.

To quote Swiss copyright scholar Jacques de Werra:

> The conflicting interaction between copyright law and the right to privacy has become even more acute in the digital context, even if the issue of privacy in the internet age goes beyond the field of copyright law. From a copyright law perspective, the need for a protection of privacy has been specifically invoked with respect to the adoption of electronic rights management information, as these systems might "process personal data about the consumption patterns of protected subject-matter by individuals and allow for tracing of on-line behavior."[37] As a result, these electronic rights management information systems are required to incorporate privacy safeguards, as defined in the Directive[38] on the protection of individuals with regard to the processing of personal data and the free movement of such data.[39]

The clash is also important because when copyright confronts other rights, those rights normally have "rightsholders," that is, interest groups willing to defend those rights, which has not always been the case for individual copyright users.[40]

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that there may be harm in allowing individual to waive or sell usage data (via a DRM system) if it amounts to waiving their intellectual privacy. *Ibid.* at 609.

36 There would much to say on this point, but the comments of the Federal Court of Appeal in the *BMS v. Biolyse (*below note 41) are relevant, at least to the extent that they illustrate the direct confrontation between privacy and copyright. See also Professor Ian Kerr, chapter 6, above.

37 Recital 57 of the Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, <http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/l_167/l_16720010622en00100019.pdf>, [2001] O.J.L 167/10.

38 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and the free movement of such data, 1995 O.J.L. 281/31.

39 Jacques De Werra, "Moving Beyond The Conflict Between Freedom Of Contract and Copyright Policies: In Search Of A New Global Policy For On-Line Information Licensing Transactions: A Comparative Analysis Between U.S. Law and European Law" (2003) 25 Colum. J.L. & Arts 239 at 333.

40 See William M. Landes and Richard A. Posner, *The Political Economy of Intellectual Property Law* (Washington: AEI-Brookings Joint Center for Regulatory Studies, 2004).

The importance and potential impact of this clash should not be underestimated.[41] To illustrate this, let us go back to the 1980s. American pharmaceutical, software and entertainment companies were able to convince the United States Congress and the Executive Branch (in particular the United States Trade Representative) that intellectual property protection should be linked to trade, and that intellectual property was deserving of protection *qua* property.[42] Logically, terms such as "theft" or "piracy" could be used independently of documented market effects or actual lost sales, which do happen in many cases of professional piracy course but not in every case where a "pirated" copy is made or used. This powerful combination of trade and intellectual property led to the conclusion of the *TRIPS Agreement*.[43] Demands followed the conclusion of TRIPS for TRIPS-plus protection,[44] some examples of which may be found in the intellectual property chapter of NAFTA.[45] The tendency to continue increasing intellectual property protection in scope and duration turned at the international level, however, when the normative claims based on property

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41 It is interesting in that context to read the Federal Court of Appeal's comments in *BMG Canada Inc. v. Doe*, 2005 FCA 193, <www.fca-caf.gc.ca/bulletins/whatsnew/A-203-04.pdf> [*BMG*] at para 4:

> Citizens legitimately worry about encroachment upon their privacy rights. The potential for unwarranted intrusion into individual personal lives is now unparalleled. In an era where people perform many tasks over the Internet, it is possible to learn where one works, resides or shops, his or her financial information, the publications one reads and subscribes to and even specific newspaper articles he or she has browsed. This intrusion not only puts individuals at great personal risk but also subjects their views and beliefs to untenable scrutiny. Privacy advocates maintain that if privacy is to be sacrificed, there must be a strong *prima facie* case against the individuals whose names are going to be released. Whether this is the correct test will be addressed in this decision.

> Ultimately the issue is whether the identity of persons who are alleged to infringe musical copyright can be revealed despite the fact that their right to privacy may be violated. Each side presents compelling arguments and the difficulty lies in reaching a balance between the competing interests.

42 See Susan K. Sell, *Private Power, Public Law: The Globalization of Intellectual Property Rights* (Cambridge, U.K.: Cambridge University Press, 2003).

43 *TRIPS Agreement*, above note 12.

44 See Peter Drahos and John Brathwaite, *Information Feudalism* (New York: The New Press, 2003).

45 Chapter 17 of *Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States*, 17 December 1992, Can. T.S. 1994 No. 2, 32 I.L.M. 289 (entered into force 1 January 1994), <www.sice.oas.org/trade/nafta/naftatce.asp> [*NAFTA*].

and free trade were countered with similarly (politically) powerful claims based on public health and the right to life.[46] It may be that the power and breadth of copyright-based claims will face an equally formidable opponent in privacy.

One could respond of course that privacy is already included as part of the closed system of copyright regulation, and that the fact that private use is not expressly mentioned as an exception in a number of national laws or the *Berne Convention* is not surprising: it was of little interest to copyright holders until the invention of the VCR and double-deck cassette players, which only became popular in the 1970s. A number of countries introduced regulation *not* to stop the practice (and there were famous court cases where this was tried, including the *Sony* case in the US[47]), but rather to *compensate* rightsholders by introducing levies on blank tapes and, in certain cases, on recording equipment as well.[48] Yet, while levies and similar schemes may recognize that privacy plays a key role, it seems to be overstating the role of private use exceptions to consider that they define the complete scope of privacy rights of users of copyright material.

In sum, the invasion of the private sphere is at odds with the history of copyright, where it never forayed except, as just mentioned, in the case of levies. There was an implicit recognition that copyright did not apply to end uses, even though formally users were making copies and, in rarer cases, performing or communication works.

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46 **Susan K. Sell, above** note 42 at 56–57.

47 *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984), 774 S. Ct. 774.

48 **P.Bernt Hugenholtz, Lucie Guibault & Sjoerd van Geffen,** *Final Report on The Future of Levies in a Digital Environment* (Amsterdam: Institute for Information Law, 2003), <www.ivir.nl/publications/other/DRM&levies-report.pdf>. "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. With the advent of digital rights management (DRM) this assumption must be re-examined. … Where such individual rights management is available there would appear to remain no need, and no justification, for mandatory levy systems." The inapplicability of analog exceptions to the Internet is illustrated by the debate concerning § 110(2) of the US *Copyright Act*. It contains limitations on the nature and content of the transmission, and the identity and location of the recipients. As was noted by the United States Register of Copyrights in her May 1999 *Report on Copyright and Digital Distance Education*. Marybeth Peters, "Report on Copyright and Digital Distance Education" (U.S. Copyright Office, May 1999), <www.copyright.gov/reports/de_rprt.pdf>.

2) Excludability Revisited

The fact that copyright is an exclusive right, a right to exclude use by others is, in part at least, a fallacy. Leaving aside interesting debates as to whether copyright is "property" in a classical sense (which, one could argue, it is not because use and enjoyment by a third party does not prevent use by the owner), the fact is that copyright's power to exclude is only relevant as between competing professional users, whose business is to reproduce, distribute or otherwise disseminate copyright content. Author A can exclusively license or assign her copyright to Publisher B so as to exclude other Publishers from printing her book, thereby allowing a certain degree of market organization and scarcity (for the physical copies). But copyright's power to exclude did not, historically, extend its reach to individual end-users. While this was never formulated with a high degree of precision in copyright statutes, it is supported by the number of private use exceptions recognized by national courts and various statutes. It is also a fundamental concept of many national copyright systems, including Belgium[49] and Germany. One of the leading European intellectual property scholars considered that one should not focus on the technical nature of the use, but its impact and intent.[50] To quote another such scholar:

> … [C]opyright protects against acts of unauthorized communication, not consumptive usage … [T]he mere reception or consumption of information by end-users has traditionally remained outside the scope of the copyright monopoly. Arguably, the right of privacy and the freedom of reception guaranteed in Articles 8 and 10 of the European Convention on Human Rights would be unduly restricted if the economic right encompassed mere acts of information reception or end use.[51]

If copyright's excludability does not reach end-users, neither does it reach users who have no direct (one-on-one) transactional contact with

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49 Alain Strowel, above note 29.

50 Joseph Kohler, *Das Autorrecht: eine zivilistische Abhandlung; Zugleich ein Beitrag zur Lehre vom Eigenthum, vom Miteigenthum, vom Rechtsgeschäft und vom IndivIbidualrecht* (Jena: G. Fischer, 1880), <http://dlib-pr.mpier.mpg.de/m/kleioc/0010/exec/books/%22160676%22> at 230.

51 P. Bernt Hugenholtz. "Caching and Copyright: The Right of Temporary Copying" (2000) 22 Eur. Int. Prop. Rev. 482 at 485–86. See also Jaap Spoor, *Scripta manent. De reproduktie in het auteursrecht* (Groningen: H.D. Tjeenk Willink, 1976) at 137–38.

the rightsholders. I have previously argued[52] that whenever a right is managed collectively, excludability is illusory. Essentially, users pay a tariff to use works in the collective's repertoire. Collectives operating in whole or in part under agreements instead of tariffs must negotiate licenses in good faith or there is a risk of running afoul of competition law.[53]

Therefore, copyright's power to exclude is limited to cases where an exclusive distributorship (or other form of dissemination) is negotiated by the first owner of copyright or someone else who acquired rights from that first owner, and in cases of commercial piracy. It was not an obvious step for copyright on the Internet to try to reach end-users who do not consider themselves as pirates nor act with intent of commercial gain. That conceptual jump is, I would argue, precisely the point of origin of the problems we see today.

What does it mean for copyright? We should recognize that copyright is not intended to be used to stop (exclude) end-users. Copyright is an exclusion tool, as stated above, for dealings between (competing) professional entities or true pirates. Even in the case of pirates, the reach of copyright in the case of non-physical, Internet-based distribution is restricted by the technology itself. Copyright works best as an exclusion tool when its rules are internalized by its players (professional publishers, producers or broadcasters presumably want to be seen as obeying the rules of the road — they are also easy to sue) or when physical objects are involved (the typical example would be pirated CDs or DVDs).

Abandoning futile judicial attempts to prohibit end-users from using the Internet's power (unless a technological "silver bullet" is found), copyright can and probably should remain as the basis for an entitlement to remuneration when use reaches the level of interference with "normal commercial exploitation." This dynamic notion[54] of normalcy of commercial exploitation allows authors and rightsholders to claim payment/compensation for massive Internet uses — at least those that are not covered by an exception such as fair dealing or educational uses. Industry players must realize the difficulty in enforcing such payments, and the advantages of a higher degree of internalization of adequate copyright principles. Unfortunately, by treating millions of file-sharers as "pirates," they

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52 See Daniel Gervais and Alana Maurushat, above note 6.

53 A risk duly noted in the *Copyright Act,* which limited competition remedies when an agreement is notified to the Board. See s. 70.5.

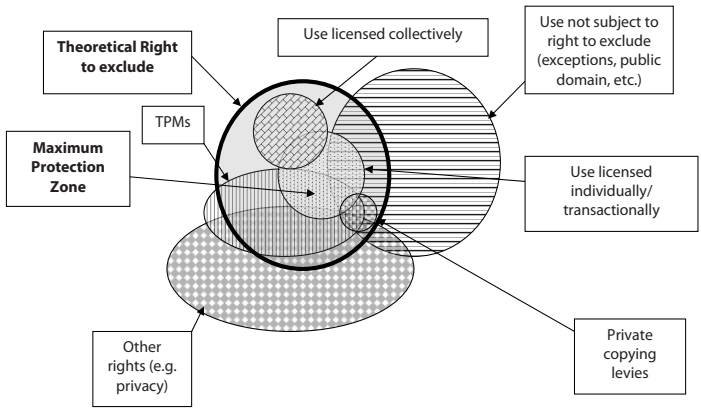
54 See below note 60 and accompanying text.

pushed the majority of Internet users into the "deviant" camp, and may have damaged respect for the rule of law.[55]

A solution — at this point, the only solution — is to *license* massive Internet uses beyond use permitted by exceptions in a way that respects all those involved in the creation, performance, publication, production and use of copyright content. Naturally, this includes respect for existing exceptions. And while soft enforcement measures may be used to help convince users to accept the scheme, it cannot be repeated often enough that the best way to ensure adoption of the principles is to treat users with a measure of respect and offer them terms they will perceive as fair.

3) A Diagrammatic View

The shrinking right to exclude and the counterweight of Technological Protection Measures (TPMs) and contracts can be represented as follows:



We see that the right to exclude is shrunk by legal exceptions but also confrontations with other rights. It is reinforced by TPMs and contracts that do not necessarily impose limit only on acts that would otherwise require the copyright holder's authorization under the Act and may in addition attempt to limit the availability of exceptions.[56] Another layer,

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55 See Daniel Gervais, "The Price of Social Norms," above note 26 at 48–50

56 Whether exceptions can be validly be derogated to by contract has not been conclusively determined under Canadian law. For a detailed comparative study, see Lucie M.C.R. Guibault, *Copyright Limitations and Contracts: An Analysis of the Contractual OverrIbidability of Limitations on Copyright* (Hague: Kluwer Law International, 2002).

namely the prohibition of TPM circumvention would have to be added if introduced into Canadian law as a result of WCT implementation.

We also see that individual use licenses overlap in significant part with collective licensing in some areas. Collectives often hold non exclusive right to license and the use may thus also be licensed by the rightsholder directly. However, collective licensing avoids licensing and payment for use that is otherwise exempted especially in a tariff context where it is excluded by definition in the Board's determination. If, for instance, a tariff was sought for reprographic use and Internet access in schools and universities[57], the Board would have to exclude from the license (and the payment) any use covered by an exemption (e.g. fair dealing for research or educational exceptions). No such guarantee can be offered in voluntary licensing situations.

Finally, private copying levies compensate a slice of the right to exclude removed by an exception. They may at times conflict with other rights, clash with the terms of a license or compensate for a use partly blocked by a TPM.

D. THE WAY FORWARD

1) The Role of Licensing

It seems fairly obvious that copyright is not meant to stop massive Internet uses. In terms of policy choices, there are thus three main options: (a) one could decide not to apply copyright to end-users; (b) one could treat end-users as professional content providers and apply copyright as it always has to professional entities; or (c) one could consider using copyright not to exclude massive individual uses, but rather to compensate rightsholders.[58]

The fact that copyright is a "professional right" is not directly codified in most national laws or international treaties. In fact, because copyright regulation focuses on the technical nature of the use (reproduction, communication etc.), not its effect or intent,[59] reproductions and communications to the public/public performances effected by individual users *a priori* fall under section 3 of the Act (and subsection 15 and 18 where applicable, as they would be amended by Bill C-60). The first option outlined above involves

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57 See ss. 30.01 and 30.02 of Bill C-60.

58 See generally, Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (New York: Penguin Books, 2004), <www.free-culture.cc/freeculture.pdf>.

59 Daniel Gervais, "The Reverse Three-Step Test," above note 1 at 13–21.

recognizing an exception to those exclusive rights. Any such exception is constrained by the international three-step test.[60] In a nutshell, the test is used to filter out unacceptable exceptions to exclusive copyright rights.[61] Exceptions are possible when they do not conflict with a "normal" exploitation of protected works or unreasonably limit the rightsholders' rights.

As to the second option, it is unrealistic for several reasons (including transaction costs and powerful social norms at play[62]) to prevent massive use on the Internet except for single streaming or DRM-restricted downloads of single songs from a small number of authorized sources. There is a market for this type of controlled access, of course, as the relative success of iTunes[63] demonstrates, but to think of the Internet as being entirely based on the television or cable model, where all content consisting of copyright material is provided by a small number of professionals conflicts with the scope and depth of current Internet practice.[64] True, there may also be cases where individuals put such large amounts of content available that they can be analogized with professional providers.[65] Copyright's ability to exclude may then be applied to them, although the moving target proper-

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60 See *Ibid.* and Paris, 22 April 2005, 4ième, B, *Stéphane P., UFC Que Choisir / Universal Pictures VIbidéo France et autres*, <www.juriscom.net/documents/caparis20050422.pdf>.

61 See Ruth Okediji, "Toward an International Fair Use Doctrine" (2000) 39 Colum. J. Transnat'l L. 75.

62 See Daniel Gervais, "The Price of Social Norms," above note 26.

63 See iPods & iTunes, <www.itunes.com>. iTunes is a song download service operated by Apple.

64 See Alison P. Howard, "A Fistful of Lawsuits: The Press, The First Amendment, and Section 43(A) of the *Lanham Act*" (2000) 88 Cal. L. Rev. 127 at 159.

> Copyright law also has been used to move information out of the public domain and into the private sphere, where it creates wealth for the property owner instead of enriching public discussion. This places dollars over discourse. As New York University law professor Diane Leenheer Zimmerman wrote, "What Justice Holmes later referred to as a marketplace of ideas presumably was conceived of as a place of free exchange, not of economic or contractual transactions." (Diane Leenheer Zimmerman, "Information as Speech, Information as Goods: Some Thoughts on Marketplaces and the Bill of Rights" (1992) 33 Wm. & Mary L. Rev. 665, 679)

65 See Peter Eckersley, "Virtual Markets for Virtual Goods: the Mirror Image of Digital Copyright?" (2004) 18 Harv. J.L. & Tech. 85, <http://jolt.law.harvard.edu/articles/pdf/v18/18HarvJLTech085.pdf> at 94–95:

> Exclusive rights also lie at the heart of the digital copyright crisis, because the Internet, with its combination of decentralization, reproductive symmetry, and near-universal coverage has made the task of enforcing such privileges nearly impossible. When enforcement is possible, it requires costly infrastruc-

ties of the Net may render those efforts inefficacious. Launching attacks against individuals on a wide scale with a view to getting them to remove content have not been particularly successful. In short, there is room for both exceptions and professionally distributed content, but that leaves a vast area of Internet content in search of another solution. In most cases, experience shows that that solution cannot be to exclude. Uses must be allowed.

The US Supreme Court recognized, at least indirectly, that licensing was a better use of copyright than exclusion (prohibition) in *Tasini v. New York Times*. [66] The facts of the case resembled those of the *Robertson* case[67] now before the Canadian Supreme Court. The main issue was whether freelance journalists whose articles had been published in various newspapers and periodicals could prevent the publishers from making available an electronic copy of the material. Having determined that the journalists (authors) had copyright in their articles, the US Court said the following in weighing whether to issue an injunction:

> … it hardly follows from today's decision that an injunction against the inclusion of these [freelance] Articles in the [publisher] Databases (much less all freelance articles in any databases) must issue. … The Parties (Authors and Publishers) may enter into an agreement allowing continued electronic reproduction of the Authors' works; they, and if necessary the courts and Congress, may draw on numerous *models* for distributing copyrighted works and remunerating authors for their distribution.[68] [Emphasis added.]

The Court thus considered the broader public interest at stake and whether preventing use by publishers was desirable. It clearly signaled that it preferred a negotiated solution, i.e., a license. One could assume that the authors would also prefer that their works be made available and to get paid for it, rather than exercise their right to exclude to prevent access.

Against the historical background painted above in section B, the *Tasini* and *Robertson* cases are within the proper purview of the right to exclude

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ture and direct enforcement of copyright law against the public at large, as opposed to enforcement against commercial "pirates."

66 **121 S.Ct. 2381 (2001), <http://laws.findlaw.com/us/000/00-201.html>** [*Tasini*].

67 *Robertson v. Thomson Corp.* (2001), 15 C.P.R. (4th) 147 (Ont. S.C.J.), aff'd (2004), 72 O.R. 481, 34 C.P.R. (4th) 161 (C.A.), <www.ontariocourts.on.ca/decisions/2004/october/C38148.htm> [*Robertson* cited to C.A.] leave to appeal to S.C.C. granted 21 April 2005.

68 *Tasini*, above note 66 at 2384.

because they affect economic relations between professionals. Yet, here again the fundamental point made is important: by preventing *all* publishers from making the material available, no one wins. Copyright may be used to organize access, not deny it. Excludability must be revisited, and licensing seems a far better option for all those concerned, including the public.

Which brings us to what is, at bottom, the real question: which uses should be paid for, and how? To quote Professor Jane Ginsburg, the dominant view among large rightsholders, is that technology can allow them to continue to maintain excludability:

> Having learned a lesson from *Betamax*, copyright owners cooperated with hardware manufacturers in proposing to Congress that the distribution of digital audio recording devices be permitted, subject to a statutory royalty on the equipment and blank recording media, and so long as the devices allowed the recording only of a first-generation copy. In other words, copyright owners conceded a de facto license to make private digital copies from the original recorded source, in return for a royalty that would help compensate for the copying.
>
> On the other hand, copyright owners secured control over second-generation copying, because the statute curtailed copyright owners' exclusive rights only for the first generation, and more importantly, because the statute mandated the inclusion of the Serial Copy Management System in every covered digital audio recording device. SCMS recognizes when a copy has been made, and prevents further copying from that copy. In addition, the AHRA made it unlawful to offer services or to distribute devices primarily designed to circumvent SCMS. For the first time, Congress reinforced exclusive legal rights by providing for technological measures to protect those rights, and then by granting additional legal protection to those technological measures. … Congress recognized that preservation of exclusive rights in a digital environment may require not only technological adjuncts, but a legal cease fire in the form of a prohibition on circumvention.
>
> …
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> Legal protection of access may encourage copyright owners to offer more kinds of distributions, from pay-per-view to unlimited copying, but this presumes that the technological measures that back up these offerings can in fact be enforced. As a practical matter, this means that users can be persuaded to refrain from rampant copying through file sharing and dissemination of circumvention hacks. In

> the post-Napster world, it would be a foolish copyright owner indeed who assumed that users' consciences are quickened by the direction in the decalogue, "Thou shalt not steal." Copyright owners will therefore have to be able to compete with "free."[69]

There is indeed an enormous amount of material available legally for free on the Internet, usually because the creator or provider (e.g., individuals, government[70]) decided not to use copyright to obtain remuneration. There is also a lot of material belonging to copyright owners made available without their authorization, a phenomenon epitomized by the peer-to-peer file-sharing of music and film content.[71] Many rightsholders are still looking for the silver bullet that will stop uncontrolled distribution of copyright material.[72] If the recent past is prologue, they will not find it. For the purposes of this paper, the only assumption we need to make is that there is a serious *possibility* that technology will not be able to stop file-sharing, independently of whether that is in fact desirable socially or economically. Indeed, the technological risk that we all run is that by forcing ISPs to reveal the identity of file-sharers, we force millions of Internet users deep into anonymity, which may have implications well beyond copyright. Already, proxy-based file-sharing has emerged.[73]

What, then, is the way forward? When individuals create content that they wish to provide for free, they can waive their copyright or provide royalty-free licenses. Creative Commons[74] comes to mind in that context, but one cannot force all content owners to accept free use of their material. Since they probably cannot exclude, and do not simply want to give it away, they must license. But how?

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69 Jane C. Ginsburg, "'The Exclusive Right To Their Writings': Copyright and Control in the Digital Age" (2002) 54 Maine L. Rev. 195 at 211–13.

70 US government material is not protected by copyright. See 17 U.S.C. § 105 <www4.law.cornell.edu/uscode/html/uscode17/usc_sec_17_00000105----000-.html>.

71 See Daniel Gervais, "The Price of Social Norms," above note 26.

72 *Ibid*., at 55.

73 See Daniel Gervais, "The Price of Social Norms," above note 26.

74 "Creative Commons is … us[ing] private rights to create public goods: creative works set free for certain uses. Like the free software and open-source movements, our ends are cooperative and community-minded, but our means are voluntary and libertarian. We work to offer creators a best-of-both-worlds way to protect their works while encouraging certain uses of them — to declare "some rights reserved." See Creative Commons, <www.creativecommons.org>; Creative Commons Canada, <www.creativecommons.ca>.

The objective is clear: to compensate rightsholders who do not wish to make their material available for free when the use of their material conflicts with a normal commercial exploitation. That delineates the cases in which a license fee should be required. This also means that any use covered by a valid exception, including fair dealing or specific educational exceptions does not enter this realm. Nor would any material made available under a royalty-free license.

There is another group of theories according to which anything available on the Internet without technological protection measures (TPMs) should be free. Period. That theory is shaky, to say the least. First, there are several categories of material to distinguish. There is material made available explicitly for free, with or without restrictions, such as material available under a Creative Commons license. Second, there is material with no specific indication of licensing terms. Third, there is material available under a restrictive license (e.g., no use beyond viewing or streaming), but not technologically locked. Finally, there is material made available with a TPM that prevents reuse, usually accompanied by restrictive contractual terms. Such TPMs vary in scope from a simple password to technological locks that prevent sending, cutting and pasting, etc.

In the latter case (TPM protected material), few people are seriously arguing that we should consider the material freely available. But can we, in the second and third categories above, either imply open contractual terms or override express restrictions? If so, on what legal basis? One has to consider applicable contract law and determine on which basis the contract law of the recipient country can be applied (assuming it allows an implied license or override). Because the effect of assuming a worldwide implied license (or override) is akin to an exception (or perhaps a royalty-free compulsory license), one risks a head-on confrontation with the three-step test and other treaty obligations.[75] Then, how can one verify that the material was made available with the rightsholder's consent in the first place? Finally, an unintended consequence of defending the no-restriction *cum* override view may be that more material will be locked up.

A much simpler solution is to facilitate the creation of a license for available material on conditions that specifically exclude paying for uses covered by exceptions to copyright. Such a license could cover all rights-

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75 **Incompatibility with the three-step test may lead to a finding of incompatibility** with Canada's obligations under the *TRIPS Agreement* and, unless the Act is then amended accordingly, to trade-based sanctions. See above notes 60 and 61 and accompanying text.

holders, except those who specifically do not want their material licensed. Those rightsholders can opt, at their peril in most cases, for a separate licensing system or continue to live with the mythology of control.

If one were to adopt this approach, one could then distinguish three possible universes of copyright uses. First, there would be uses paid to the rightsholder (in most cases, on a transactional basis). A subscription to an online publication or the download of a song or pay-per-view movie are good examples. A second universe would encompass free uses, such as those permitted by exceptions or stemming from ownership rights in a copy. One could argue that private uses and genuine transformative uses should fall into this category.[76] But that leaves a universe of uses not covered by exceptions and which cannot be realistically licenses transactionally. An annual or similar license then remains the only possible option to compensate rightsholders (within the scheme of the Act). Such licenses can only be efficiently offered by copyright collectives. Naturally, collectives will need to show that they can deliver the licenses that are required; that they can be trusted by both rightsholders and users; that they can be fair, transparent and efficient.

2) Extended Repertoire

To effectuate the above, a simple solution is the Extended Repertoire System (ERS). What is it? Starting from a definition of "repertoire" as the catalogue of rights that a collective management organization (CMO) can offer to users seeking to obtain a license from the CMO in question, the ERS concept may be summarized this way: as soon as the CMO can show to a proper authority that it represents a substantial number of authors or other relevant rightsholders, i.e. those of which the rights are likely to be managed by the CMO concerned and for the type of use concerned, it

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76 I am borrowing US terminology, with some adaptations. Transformative uses are a subset of derivative uses. (Genuine) transformative uses are those where the transformation is the product of original work that generates substantial social welfare benefits and is not a minor transformation primarily designed to free-ride on someone else's work or investment. Should copyright prohibit those uses? Parody is an example. In principle, authors benefit from a right to prohibit translations, as well as "adaptations, arrangements and other alterations of their works." (*Berne Convention*, Arts. 8 and 12; *TRIPS Agreement*, Art.9(1)). Translations are generally not considered genuinely transformative. Answering the question which other transformations are covered by the exclusive right of adaptation is much harder. Professor Lawrence Lessig has suggested a (copyright-) free culture to allow remix. See Lawrence Lessig, above note 59.

is entitled to apply to that authority (in Canada, the Copyright Board) for an extension of its repertoire. The Board can then decide, if it deems it is in the public interest, to grant to that collective the capacity to represent all rightsholders concerned, except those who expressly wish not to be represented. In other words, implementing ERS simply allows a collective to change its rights acquisition (that is, the acquisition of the authority to license on behalf of rightsholders) from an opt-in to an opt-out formula. The ERS does not change anything to who may require a license, nor does it affect the scope of exceptions. It merely makes it much easier for a CMO to acquire the authority to license in cases where a license is required.

The problem of many CMOs in Canada resides in acquiring a critical mass of rights in a way that enables them to respond to the requests of users, and gain the credibility and relevance necessary for them to thrive. The ERS would be particularly useful for smaller and newer CMOs, including those created to manage new rights or rights which used to be managed on an individual basis. Since the major advantage stemming from the availability of the ERS is the fact that it accelerates the acquisition of rights, smaller and newer CMOs would likely benefit most from it. These CMOs currently find themselves in a catch-22: not being important in size, they do not have the means to recruit members adequately. Without recruitment, there is no credibility, and most importantly, very few royalties are collected. They therefore find themselves lacking means and tools. Furthermore, without a well-established repertoire, a lack of interest on the part of the users is sure to follow — making "recruitment" of rightsholders even more challenging.

In short, the ERS offers many benefits. To users, because they can use works without worries after signing a contract giving them unrestricted access to a CMO's repertoire (apart from specifically excluded righsholders[77]). They know that they will not face legal action from non-represented (but non-excluded) rightsholders coming out of the woodwork after the licensing agreement is signed. Rightsholders have the advantage of a better protection of their rights, as well as increasing their clout in negotiations with users. Finally, the rights of the non-represented holders are also protected and they can benefit from the remuneration they deserve.

Implementing ERS in Canada only means giving the Copyright Board to grant an extension of repertoire to a CMO who requests it, if and only if the Board deems it in the public interest after hearing all interested

77 In countries where ERS has been in place for decades, such as all the Nordic countries, the list of exclusions tends to be very short.

parties. To grant the extension, the Board must be convinced that it will increase the efficiency of collective management for the benefit of both rightsholders and users. The Board may also impose conditions, such as the maintenance of an online list of rightsholders who decided to opt out, or transparency obligations.

The ERS is not a major policy shift. Arguably the Board already has the power to extend a repertoire under section. 70.15 of the Act when certifying a tariff. Viewed as a limit imposed on copyright owners to claim compensation beyond a tariff, section. 70.17 is also fully consonant with the ERS concept. In Bill C-60, a proposed limitation of liability in section 30.02(3) to the applicable tariff is also an "indirect implementation" of the ERS. A clean implementation of the ERS would allow the Board to take broader public interest considerations into account and to impose conditions to further protect the rights of non member rightsholders. It would also make the process more transparent for all those involved.

Unfortunately, the *Bulte Report*[78] conflated the ERS with the issue of licensing educational users. Yet, the scope of the educational exceptions is entirely independent of the existence of ERS. Whether or not the ERS is used, the Board has the same task: determining the scope of exceptions and whether a license is required and then assessing the proper tariff. In the case of educational institutions, by combining existing exceptions (and decoupling them where appropriate from the existing "in the classroom" requirement) and the broad definition of fair dealing adopted by the Supreme Court in *CCH*,[79] there are fewer uses that require licensing. But would it be fair to exempt, for example, chapters of textbooks that a student decides to scan and make available for free? In a small market such as Canada, this will likely lead to the disappearance of many Canadian textbooks, a boon for US textbook publishers no doubt but a choice which may not be optimal for Canadian educators and students.

The ERS is also fully compatible with the three-step test. It is neither an exception nor a compulsory license because rightsholders can opt out. Another baseless argument raised against the ERS is its incompatibility with Article 5(2) of *Berne*, which prohibits formalities concerning the existence and exercise of the rights granted by virtue of the Convention. It is a fundamental principle of the Convention and it must be interpreted broadly.

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78 See Canada. Standing Committee on Canadian Heritage, *Interim Report on Copyright Reform* (Ottawa: May 2004), <www.parl.gc.ca/InfocomDoc/Documents/37/3/parlbus/commbus/house/reports/herirp01/herirp01-e.pdf>.

79 *CCH*, above note 27.

However, those "conditions and formalities" are not, for example, the need to sign contracts, file statements of claim in courts, or deal with copyright agencies etc. That is not the intent or meaning of Article 5(2). Those are all normal acts that authors and other copyright holders must perform routinely to exploit their copyright works and not (as was made abundantly clear during the adoption and revision of the Convention) "formalities" prohibited under Article 5(2). If it were, a number of measures used throughout the world would be illegal, including mandatory collective management, limitation of remedies in case where collective management is in place, etc.

The formalities that are prohibited under Article 5(2) are essentially registration with a governmental authority, deposit of a copy of the work or similar formalities when they are linked to the existence of copyright or its exercise, especially in enforcement proceedings.[80]

3) An Example: Licensing of File-Sharing

File-sharing can be said to stand on both sides of the private use border. Downloading music to listen to is private. Copyright's attempt to stop that seems ill-advised both commercially and legally. But when music is made available to a "public" of other P2P users, the line of free use is crossed. Yet, because it cannot all be licensed transactionally (song-by-song), a blanket or repertory license is required. It may be offered by a CMO of course, but also possibly by new commercial entities.

Music file-sharing started as a centralized system known as Napster. The demise of Napster was made possible in large part precisely by its easily locatable (identifiable) and "controllable" nature. There were only a few servers to shut down and their owner/operator were easy to find. Exchanges of music files continued after Napster, and events since 2001 seem to beg the question whether the music industry underestimated the strength of the demand for, and the societal role of, file-sharing. Could it be that what they wrongly perceived as simple intellectual property theft (which should be fought in the same way as, say, shoplifting) could also and simultaneously be portrayed as a new form of interest-based social interaction?

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80 See WIPO, *Berne Convention Centenary: 1886–1986* (Geneva: WIPO, 1986) at 94 and subsequent; and Mihály Ficsor, "Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms" (Geneva: WIPO, 2004) at 41–42.

If the above analysis of the interplay between technology, law and what can broadly be referred to as the "market" is correct, then what will happen over the next year or two is also easy to predict. While the legal battles concerning the validity of subpoenas are not over at the time of this writing,[81] it is clear that if the music industry is (and it seems to be at least partly) successful with its battle against individual Internet file-sharers, technology will again rise to the challenge.

Was the music industry right in shutting down Napster? In its (brief) heyday, Napster had, according to some estimates, 60 million registered users,[82] a vast majority of whom were located in the United States. In those days (roughly 1999-2000), there were probably 80 to 90 million people in the US who could connect to the Internet. In other words, Napster reached approximately two thirds of its total potential market, numbers most marketing experts can only dream of. The music industry argued that it was losing sales of compact discs,[83] even though empirical data concerning the causality of the decline remained unclear and somewhat vague.

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81 In Canada, the Federal Court of Appeal dismissed the music industry's initial lawsuit without prejudice to their right to file new claims based on better evidence (see note 41 above). In the United States, despite an interesting decision by the DC Court of Appeals basically stating that the DMCA was "intended" to apply to a centralized model, not to P2P (see *RIAA*. above note 22 at 1238), new claims are regularly filed.

82 See Robert X. Cringely, "Son of Napster: One Possible Future for a Music Business That Must Inevitably Change" PBS News (24 July 2003), <www.pbs.org/cringely/pulpit/pulpit20030724.html>.

83 It may be relevant to recall that text publishers tried to ban photocopying in the 1970s. All or almost all publishers now license photocopying generated $107.3-million of revenues in the US in 2003, and $250-million worldwide in so-called reprography fees and levies. That may not sound like a lot, but when one considers it is basically all bottom-line cash, it is the rough equivalent of (assuming profits of 10 percent of gross revenues) $2.5-billion in gross sales. See International Federation of Reproduction Rights Organization, <www.ifrro.org/members/index.html> and "Copyright Clearance Center, Inc. 2003 Report to Rightsholders" Copyright Clearance Centre, <www.copyright.com> (on file with author). A more "poignant" example is the movie industry's attempt to have time-shifting of movies (and other television content) declared "unfair use" under 17 U.S.C. § 106 <www4.law.cornell.edu/uscode/html/uscode17/usc_sec_17_00000106----000-.html> and §107 <www4.law.cornell.edu/uscode/html/uscode17/usc_sec_17_00000107----000-.html>. Their attempts failed (see *Sony*, above note 47). Movie rentals are now a major source of income for the industry. Had time-shifting been banned, it is reasonable to assume that the installed base of VCRs would have been minimal, thereby preventing the growth of this segment.

Others argued that lower sales were due (at least in part) to a variety of other factors, including lower quality of new releases, the end of the vinyl to CD replacement market, etc. It is nonetheless fair to assume that, while the industry's data about the cause(s) of the decline are soft, a significant number of CD sales were lost to music downloads.[84]

The following hypothesis is offered to argue that it was not the optimal course of action. What if Napster users had been offered the possibility of continuing to share music for a modest licensing fee $5/month? What if this option was offered to music file-sharers? This $5 level is not chosen at random. There is clearly an optimal price point, i.e., one that accelerates adoption (or reduces the transition period) and generates maximum income.[85] Based on standard microeconomic analysis, at a higher price, there would normally be fewer users willing to pay, but total revenues might still be higher than at a lower fee paid by more users. While it is thus dif-

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84 According to the International Federation of the Phonographic Industry (IFPI) and other sources, worldwide sales of recorded music fell by 10.9 percent in value and by 10.7 percent in units in the first half of 2003. See International Federation of the Phonographic Industry , "Global sales of recorded music down 10.9 percent in the first half of 2003" International Federation of the Phonographic Industry (October 2003), <www.ifpi.org/site-content/press/20031001.html>. However, the trend has now stopped and may in fact have been reversed. According to the Canadian Recording Industry Association (CRIA), "global sales of recorded music were flat in 2004, with a slight reduction in physical audio sales offset by growing sales of DVD music videos and a sharp increase in sales of digital music. Regionally, 2004 saw strong markets in the US and UK and a slowing rate of decline in other major markets. Sales of physical formats declined by 1.3 percent in value (and by 0.4 percent in units) to US$33.6 billion. (The growth calculation is net of exchange fluctuations, comparing with US$34.1 billion in 2004). But with sales of music downloads via the internet and mobile phones making their first mark on the global market in 2004, total global sales are estimated to be flat in comparison to the previous year. Even excluding digital sales, 2004 was the best year-on-year trend in global music sales for five years. Sales of top-selling albums reversed several years of decline. Top 10 albums sales globally rose by 14 percent, while the top 50 albums were up 8 percent in value. Eight albums sold more than five million in 2004, up from five in 2003. Digital sales rose exponentially, with the total number of tracks downloaded in 2004 (including album tracks) up more than tenfold on 2003, to over 200 million in the four major digital music markets (US, UK, France, Germany). The trend has continued in 2005, with digital sales in the US in the first two months more than double that of the same period in 2004." Canadian Recording Industry Association, "Global Music Retail Sales, Including Digital, Flat In 2004" (March 22, 2005), <www.cria.ca/news/220305_n.php>.

85 Available data about music price points seem to corroborate the validity of the $5 level. See Daniel Gervais, "The Price of Social Norms," above note 26.

ficult to precisely ascertain appropriate price differentials, reasonable estimates can be made.

There are approximately 20,500,000 Internet users in Canada.[86] Two thirds of them engage in either occasional or heavy file-sharing. The potential market for a license is thus approximately 13,670,000 users. Assuming a $5/month license to file-share, and assuming that between 50 percent and 70 percent of those who file-share would eventually accept to pay the fee, the licensing market is then of between $500 and $700 million dollars per year. Given the size of the Canadian music industry, and given that there is no cost of sales (except possibly "sharing" with whoever collects the $5/month), the bulk of those revenues would be paid to artists, composers and record companies. While it is true that a significant portion of revenue for English-language music would be paid to foreign rightsholders, there is an issue of fairness to foreign rightsholders and one of compliance with our treaty obligations to consider. It would also be possible to keep part of the revenue to promote Canadian music, as part of a special fund.

How would one implement such a system? As mentioned above, the Board could, in theory, use its powers under section 70.15 to authorize a collective to license all rightsholders of a certain category for a defined use, by limiting the recourses of non-members to the amount set by tariff, at least until those rightsholders expressly choose to opt out. It could similarly request that collectives post a list of rightsholders who have opted out. This is, in fact, the purpose of the Extended Repertoire System. It would be cleaner for Parliament to provide more specific conditions under which such an extension should be granted. This is what I attempted to demonstrate in a report prepared for Heritage Canada in 2003.[87]

Users could be encouraged to sign up in various ways. The most efficient is to offer terms that are fair and balanced, and that fully respect the privacy of users as well as existing exceptions. This could be achieved efficiently in setting the conditions of a tariff by the Board.[88] Many users understand that authors and artists need income, but do not agree

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86 See "North American Usage and Population" Internet World Stats: Usage and Population Statistics, <www.internetworldstats.com/stats2.htm#north> (Updated 12 June 2005).

87 See Daniel Gervais, "Application of an Extended Collective Licensing Regime in Canada: Principles and Issues Related to Implementation" (June 2003), <www.pch.gc.ca/progs/ac-ca/progs/pda-cpb/pubs/regime/index_e.cfm>.

88 The price would be a dominant factor in ensuring acceptance. That would obviously be a dominant consideration in Board hearings.

with wide-ranging attempts to reduce their enjoyment of music and other works. They would be more inclined to accept a tariff if the use of the funds collected was transparent. Acceptance levels may be higher if part of the funds were retained to create a Music Fund for Canadian creators, artists and producers (and possibly for other types of works as well).

Technology could make acceptance more compelling. Users who pay the fee could, for example, access a file-sharing community supported by the industry which would be clean (i.e., no corrupted files or spoofs) and that may include rewards (free downloads, etc.). Payment by users would not only give them a "clean conscience" motivated by the desire to ensure that authors and artists are fairly compensated, but also offer them valuable services. It can be done.

E. CONCLUSION

Historically, copyright was a tool used to create the necessary level of scarcity among professional users. Authors dealt with a single publisher (in a given territory), allowing the market to be properly organized and that publisher to make a return on his investment, allowing him in turn to pay the author. Copyright was also useful in fighting piracy in the form of (often professionally produced) pirated goods. The private sphere of users was left alone, either through the application of privacy principles, chattel rights of "owners of copies" or specific exceptions such as private use/copying.

On the Internet, the fight against "piracy" has revealed, first, that it is much harder to target professional pirates who distribute virtual pirated copies. However, more importantly, copyright has tried to enter deep into the private sphere of end-users, thus breaking with two centuries of tradition and practice. The justification is that end-users are no longer at the end of a consumption chain, but a part of a vast redistribution network, the best example of which is probably peer-to-peer file-sharing. Yet, in confronting users and their privacy right, copyright may have taken on more than it can chew. Copyright's power to exclude was never used against end-users. In this Chapter, I argued that it should not, for legal, technical and commercial reasons. First, legally, using copyright to exclude use by end-users is not working. Those lawsuits may reduce the level of acceptance of the underlying copyright principles by the general public and of the rule of law itself. Second, technologically, users always seems to be a step ahead of "the law." If ISPs have to reveal the identity of their subscribers who file-share in court proceedings, those users will turn to

anonymizing technologies. This may have security implications well beyond copyright. Third, commercially, use on the Internet is not a marginal use to be fought but a main use to be reckoned with fully.

The only way of the three-prong quandary is to license Internet uses fairly, thereby ensuring revenue for creators, publishers and producers, while respecting users' privacy and uses covered by exceptions to copyright. The best way to implement such a license would be for the Copyright Board to grant appropriate collectives the power to represent all rightsholders concerned. The Board may already have the statutory ability to do so, but a clean implementation of the Extended Repertoire System (ES) would afford stronger guarantees of transparency and fairness for all those involved.