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Locks & Levies

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ABSTRACT

This paper explores two ways that law can influence the creation and distribution of digital content. Specifically, it looks at the relationship between (1) prohibitions against circumventing technological protection measures (TPMs) and (2) levies on products or services used to reproduce or transmit digital materials. The relationship between digital locks and levies is analyzed through a comparative study of developments in Canada and the United States.

Canada has created a broad levy (compared to the United States) to address the issue of private copying. Canada has not, so far, enacted specific anti-circumvention legislation like the Digital Millennium Copyright Act (DMCA). The United States, on the other hand, has enacted, in the DMCA, relatively strong prohibitions against circumventing TPMs. At the same time, a very narrow levy exists in the United States under the Audio Home Recording Act (AHRA). In short, the legal situation in Canada is basically the inverse of that in the United States. However, there have been proposals in the United States to expand the role of levies. There have also been proposals to introduce anti-circumvention provisions in Canada.

In this paper, alternative approaches are examined from the perspective of various stakeholders—creators, technology firms and consumers. Different types of copyright-holders generally prefer different approaches. Individual authors and performers and their representative societies have favorable attitudes towards levies, while major producers and distributors tend to prefer the control digital locks provide. Technology firms and communications intermediaries might be affected by both locks and levies, but are typically against expansive levy schemes. When considering the costs and benefits of locks or levies to consumers, it is important to distinguish between consumers of entertainment and consumers of electronics, who are impacted differently.

Because these stakeholders hold different preferences, compromises are likely to be made in Canada and the United States. If locks and levies are used simultaneously in the market, consumers risk being caught in

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the middle of a regime that prohibits the circumvention of digital rights management (DRM) systems in order to access or copy digital content, but at the same time mandates levy payments to compensate for copying that either cannot occur, is already licensed, or is or should be fair dealing/use. Without careful study, lawmakers in either country could accidentally create a scheme including conceptually and practically incompatible legal regulations. An overview of various stakeholders' experiences in Canada, the United States and Europe provides valuable insights for North American law and policy makers.

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As consumers continue to embrace new technologies for listening to and sharing music, movies and other forms of entertainment, content creators and distributors must adapt to the rapidly evolving business environment. There is no need to rehash modern technological, economic and cultural challenges in great detail. By now, everyone reading this paper is aware that tens of millions of people use peer-to-peer distribution networks to share music, movies and other digital content. Entertainment industry incumbents are threatened by this activity. There are several possible responses.

One is to use digital locks to control access to or use of digital content. Where legal protections are perceived to be inadequate, firms use technological protection measures (TPMs) to control what consumers are and are not able to do with entertainment products. TPMs are a key component of many digital rights management (DRM) strategies. Because digital locks can be picked, content owners have successfully lobbied international and some domestic lawmakers for specific legal prohibitions against circumventing TPMs.

Another response is to employ levies that generate revenues to incentivize content creation. Creators sacrifice a degree of control over

their works in exchange for remuneration intended to compensate for private or non-commercial copying. This approach is similar to compulsory licensing, except that licence fees are paid not by users of copyrighted materials, but by manufacturers or providers of certain goods or services.

There is an abundance of scholarship exploring TPMs and anti-circumvention provisions. There is also a growing body of literature discussing theoretical alternative compensation models. My goal is to juxtapose these issues by looking at recent real-world developments in Canada and the United States, and to some extent, Europe. I want to explore a worldwide trend toward the simultaneous presence of both locks and levies in digital entertainment markets.

Canada and the United States have much in common. In addition to sharing a border nearly 9000 kilometres long, there are remarkable economic, cultural and technological similarities between the two countries. Cultural industries are an important part of the economy in both Canada[1] and the United States.[2] Perhaps more importantly, consumers in both jurisdictions share similar tastes for entertainment products. Although Americans import less Canadian music than *visa versa*, a substantial number of Canadian artists are popular south of the border, demonstrating consumers' shared preferences. Canadians and Americans have access to much of the same technology for listening to and sharing music, movies, video games and other entertainment products. Both countries have above-average levels of broadband internet access.[3] Since the formation of the North American Free Trade Agreement, Canadians and Americans find themselves in an increasingly similar technological, cultural and economic environment.

Despite these similarities, North America is not yet as tightly integrated as, for instance, the European Union. There are important differences between Canada and the United States, from distinct regulatory regimes to particular political preferences. There are also rather different legal climates affecting the creation and distribution of digital entertainment products. In particular, these two countries have created distinct

1. In Canada, copyright-based industries account for 9.3% of the 2005 GDP. Copyright-based industries include the following three sectors as measured by Statistics Canada: information and cultural; professional, scientific, and technical; and arts, entertainment, and recreation. *See* Statistics Canada, http://www.statcan.ca/l01/cst01/econ41.htm?sdi=gross%20domestic%20product%20all%20industries.

2. In the United States, the figure was a comparable 12.4% for 2005. Copyright-based industries include the following three sectors as measured by the Bureau of Economic Analysis: information; professional, scientific and technical services; and arts, entertainment and recreation. *See* Thomas F. Howells III and Kevin B. Barefoot, *Annual Industry Accounts: Advance Estimates for 2005* at 18, (May 2006), http://www.bea.gov/bea/ARTICLES/2006/05May/0506_IndyAccts.pdf.

3. Although broadband penetration in 2004 was slightly higher in Canada (17%) than it was in the U.S. (13%), both countries are above the 10% average for OECD countries. *See* Dr. Sacha Wunsch-Vincent and Dr. Graham Vickery, *Working Party on the Information Economy – Digital Broadband Content: Music* at 85 (Dec. 13, 2005), http://www.oecd.org/dataoecd/13/2/34995041.pdf.

legal rules for creators and online entrepreneurs by, so far, adopting different policies on the issues of locks and levies.

In Part One of this paper, I explain that in Canada there is a relatively broad levy to compensate for private copying. There are not yet specific Canadian anti-circumvention provisions, although TPMs are apparently utilized nonetheless extensively. In Part Two, I look at the American situation, which is nearly the exact inverse. In the United States, there is a relatively narrow levy to deal with audio home recording, while there are fairly broad anti-circumvention provisions. However, there has been pressure to enact anti-circumvention provisions in Canada, and there have been numerous proposals to adopt a broader levy scheme in the United States.

Part Three of this paper explores some of the consequences of locks, levies and proposals for change, from the perspective of creators and distributors, technology firms and intermediaries and consumers of electronics and digital content. Locks and levies affect each of these stakeholders differently. In Part Four, I conclude that the diversity of perspectives between and within interested stakeholder groups is likely to lead to compromise solutions, combining aspects of multiple approaches. It is possible, therefore, that policymakers in Canada and/or the United States will create a system involving both locks and levies.

This is problematic. Consumers risk being caught in the middle of a regime that prohibits the circumvention of DRM systems in order to access or copy digital content, but at the same time mandates levy payments to compensate for copying that either cannot occur, is already licensed or constitutes fair use/dealing. This has already happened in Europe, nearly happened in Canada and could easily occur in the United States. Policymakers should be aware of these concerns in order to minimize incompatibilities within a system that simultaneously incorporates both locks and levies.

I. CANADA

Canadian copyright law includes an exemption/levy scheme to address the private copying of music. The law also allows for the use of TPMs, which many content creators and distributors successfully utilize in Canada. At present, however, the Copyright Act does not directly prohibit the circumvention of TPMs. The following section describes these various aspects of Canadian copyright law in more detail.

A. The Private Copying Levy

In Canada, after more than a decade of lobbying, the music industry convinced Parliament that private copying onto blank tapes was causing

significant losses.[4] So, in 1998, Part VIII was added to the Copyright Act to legalize private copying onto some types of blank media, and as a corollary to allow certain authors, performers and sound recording makers to propose to the Copyright Board a levy payable by manufacturers and importers of those media.[5] In short, the regime substitutes exclusive copyrights with a unique right to collect remuneration from third parties.

The object of Canada's private copying levy was to provide compensation to certain music creators, whose exclusive copyrights were believed to be practically unenforceable at the time the regime was enacted. According to Linden J.A., in *AVS Technologies*: "The purpose of Part VIII of the Act is mainly an economic one - that is, to fairly compensate artists and the other creative people for their work by establishing fair and equitable levies."[6] Although the rationale that private copying cannot be mostly addressed by legal or technological means is no longer applicable,[7] a levy does still alleviate problems with allowing copyright owners to monitor and control people's private activities.[8] There are misunderstandings and disagreements, however, about exactly what sort of private copying the Canadian levy scheme covers.

According to transcripts of meetings preceding the enactment of the levy, the matter to be addressed was actually quite specific—the use of

4. According to then Minister of Canadian Heritage, Sheila Copps, a majority of the 44 million blank tapes sold in Canada in 1994 were used to copy music. *See* A Study of Bill C-32, An Act to Amend the Copyright Act Before the Standing Committee on Canadian Heritage, 35th Parliament (Oct. 3, 1996) (statement of Shelia Copps, Deputy Prime Minister and Prime Minster of Canadian Heritage), *available at* http://www.parl.gc.ca/35/Archives/committees352/heri/evidence/21_96-10-03/heri-21-cover-e.html. *See also* Task Force on the Future of the Canadian Music Industry, http://www.canadianheritage.gc.ca/progs/ac-ca/progs/pades-srdp/pubs/f-sum-e.htm; Government of Canada, Parliamentary Sub-committee on the Revision of Copyright, *Charter of Rights for Creators* (1985) [hereinafter *Charter*].

5. *See* Copyright Act, R.S.C. 1985, ch. C-42, §§ 80, 82; Jeremy F. deBeer, *The Role of Levies in Canada's Digital Music Market*, 4:3 CAN. J. L. TECH. 153 (2005); Jeremy F. deBeer, *Copyrights, Federalism and the Constitutionality of Canada's Private Copying Levy*, 51 MCGILL L.J. (forthcoming 2006); Copyright Board of Canada, Private Copying 1999-2000, at 32-39 (Dec. 17, 1999), *available at* http://www.cb-cda.gc.ca/decisions/c17121999-b.pdf [hereinafter Copyright Bd. of Can., *Private Copying 1999-2000*]; Copyright Board of Canada, Private Copying 2001-2002, at 3-4 (Dec. 15, 2000), *available at* http://www.cb-cda.gc.ca/decisions/c22012001reasons-b.pdf [hereinafter Copyright Bd. of Can., *Private Copying 2001-2002*]; Copyright Board of Canada, Private Copying 2003-2004, at 2 (Dec. 12, 2003), *available at* http://www.cb-cda.gc.ca/decisions/c12122003-b.pdf [hereinafter Copyright Bd. of Can., *Private Copying 2003-2004*]; Canadian Private Copying Collective v. Canadian Storage Media Alliance, [2004] F.C.A. 424, ¶ 3 [hereinafter *CPCC v. CSMA*].

6. AVS Technologies Inc. v. Canadian Mechanical Reproduction Rights Agency, 7 C.P.R. (4th) 68, ¶ 5 (2000) [hereinafter *AVS Technologies*].

7. *See* P. Bernt Hugenholtz et al., *The Future of Levies in a Digital Environment*, at 42, (March 2003), http://www.ivir.nl/publications/other/DRM&levies-report.pdf.

8. *See* Katerina Gaita & Andrew F. Christie, *Principle or Compromise?: Understanding the Original Thinking Behind Statutory Licence and Levy Schemes for Private Copying*, at 6-10 (May 2004), http://www.law.unimelb.edu.au/ipria/publications/workingpapers/2004/IPRIA%20WP%2004.04.pdf.

blank tapes to copy music for private use.[9] Although blank CDs and other digital technologies were envisioned at the time, they were not in 1997 the matter of immediate concern. The "jukebox or record store in the sky" was foreseen, but recording industry lobbyists stressed that a levy could not replace the revenues that might be generated by a market for digital downloads.[10]

On the other hand, the Copyright Act defines media subject to the levy in a way that could hardly be more broadly drafted. The breadth of Canada's levy turns on the definition of an "audio recording medium" in section 79.[11] It is legal to copy privately using "a recording medium, regardless of its material form, onto which a sound recording may be reproduced and that is of a kind ordinarily used by individual consumers for that purpose."[12] Certain rights-holders may propose a levy payable by manufacturers and/or importers of the same.[13]

After its first hearings on the matter, the Copyright Board adopted a flexible and relaxed interpretation of "ordinarily used" in order to ensure that blank CDs, a relatively new technology at the time, would be captured.[14] It held the standard to mean that media are leviable so long as their use for copying music is "non-negligible."[15] In effect, according to the Board, ordinarily means not extraordinarily. The Federal Court of Appeal affirmed that this view was "not patently unreasonable" but stopped short of holding that the Board's interpretation was correct.[16] Such a low threshold makes Canada's levy much broader than the American scheme to deal with home audio recording, which captures only products that have a "primary purpose" of recording digital audio.[17]

Another key phrase in section 79 is "regardless of its material form." A strong argument can be made that this clause shows an intention to make the levy as technology-neutral as possible. Some government reports predating the levy support such an interpretation.[18] Following its third hearings on private copying, the Copyright Board interpreted

9. A Study of Bill C-32, An Act to Amend the Copyright Act Before the Standing Committee on Canadian Heritage, 35th Parliament (Oct. 3, 1996), *available at* http://www.parl.gc.ca/35/Archives/committees352/heri/evidence/21_96-10-03/heri-21-cover-e.html.

10. *See* A Study of Bill C-32, An Act to Amend the Copyright Act Before the Standing Committee on Canadian Heritage, 35th Parliament (Oct. 22, 1996), *available at* http://www.parl.gc.ca/35/Archives/committees352/heri/evidence/26_96-10-22/heri-26-cover-e.html; A Study of Bill C-32, An Act to Amend the Copyright Act Before the Standing Committee on Canadian Heritage, 35th Parliament (Nov. 7, 1996), *available at* http://www.parl.gc.ca/35/Archives/committees352/heri/evidence/37_96-11-07/heri-37-cover-e.html.

11. Copyright Act, R.S.C. 1985, ch. C-42, § 79.

12. *Id.*

13. *Id.* at § 81.

14. Copyright Bd. of Can., *Private Copying 1999-2000*, *supra* note 5, at 28-32.

15. *Id.* at 32.

16. *AVS Technologies*, 7 C.P.R. (4th) 68, ¶¶ 9-13; *see also* BLAIS ET AL., STANDARDS OF REVIEW OF FEDERAL ADMINISTRATIVE TRIBUNALS 141-42 (2d ed. 2005).

17. *See infra* Part II.B. (discussing the Audio Home Recording Act).

18. *Charter*, *supra* note 4.

the definition broadly to include digital audio recorders, such as the Apple iPod.[19] The Federal Court of Appeal, however, reversed the Board's decision on this point. The Court of Appeal held that memory is not a leviable medium if it is embedded into a device.[20] The Court felt the decision to extend the levy to iPods was for the legislator, not the Board or the courts, to make.[21] Because Canada's levy excludes devices, it is not as broad as some European schemes.[22] In theory, it is also unlike the American Audio Home Recording Act (AHRA) in this respect, although in practice that is a minor point of distinction.[23]

One interpretation of the Court's decision leaves open the possibility that *removable* digital memory, or a computer hard drive that has not yet been incorporated into a device, could be subject to a levy in the future. It may, however, be splitting hairs to call an iPod a device and removable or raw digital memory a medium. More importantly such a medium may not be in a form "ordinarily used" by individuals to copy music. In fact, the Copyright Board expressly held that products such as IBM MicroDrive hard drives or CompactFlash digital memory cards are overwhelmingly used for digital photography or other applications, not copying music.[24]

As a corollary to the liabilities imposed on manufacturers and importers of blank audio recording media, consumers are exempted under section 80 of the Copyright Act from liability for private copying using such media.[25] The private copying exemption only applies to a narrow genre of truly private copying onto certain types of media. The copy must be made "for the private use of the person making the copy"[26]—making a copy for a friend or family member is *not* permitted within the scope of this exception.[27]

However, Canadian courts and administrative decision-makers have downplayed the nexus between an approved tariff, actual levy payments and the legality of private copying. The Copyright Board of Canada has stated that "simply because the Board has not been asked to certify a tariff on hard disks in personal computers, it does not follow that private copies made onto such media infringe copyright."[28] Thus, some private copying activities might be legal under Part VIII of Canada's Copyright

19. Copyright Bd. of Can., *Private Copying 2003-2004*, *supra* note 5, at 10, 38.
20. *CPCC v. CSMA*, F.C.A. 424, ¶¶ 153-164 (2004).
21. *Id.*
22. *See* Hugenholtz, *supra* note 7, at 13.
23. *See infra* Part II.B. (discussing the Audio Home Recording Act).
24. Copyright Bd. of Can., *Private Copying 2003-2004*, *supra* note 5, at 44, 46-47.
25. Copyright Act, R.S.C. 1985, ch. C-42, § 80.
26. *Id.*
27. Copyright Bd. of Can., *Private Copying* 2003-2004, *supra* note 5, at 20.
28. *Id.* at 21.

Act,[29] despite the fact that the relevant media/devices are not actually the subject of a proposed or effective tariff.

This has led some to believe that Canada's private copying regime legalizes downloading from peer-to-peer (p2p) networks onto hard drives in personal computers.[30] A careful analysis reveals that is not likely true. The Copyright Board did lay down series of propositions that, if correct, could have led to the conclusion that downloading is legal in Canada: a) electronic and hard disk memory is leviable just as 'traditional' media like CDs and cassettes;[31] b) hard disk memory in personal computers is technically identical to other hard disk memory;[32] c) the "legitimacy" of an activity such as private copying depends not on the presence of a tariff on a particular kind or unit of a medium, but on whether the kind of medium is ordinarily used by individual consumers to copy music;[33] and d) personal computers are being widely used by individual consumers to copy music.[34] Because the Copyright Board had held that "digital audio recorders" (e.g. iPods) were a kind of "audio recording medium" subject to a levy, and iPods are technically indistinguishable from hard drives in personal computers,[35] an inference could have been drawn that it is legal to make private copies using personal computers.

Justice Von Finckenstein embraced this reasoning in his decision in *BMG Canada v. Doe*[36] to dismiss an interim motion brought as part of the Canadian recording industry's lawsuits against individual peer-to-peer network users, alleged to be copyright infringers.[37] However, in its judicial review of the Copyright Board's decision, the Federal Court of Appeal subsequently overruled the first of the Board's key propositions that could have rendered downloading legal.[38] As mentioned, the Court of Appeal overruled the iPod levy because it held that memory embedded in a device is not an audio recording medium.[39] The corollary is that private copying using iPods is *not* permitted (at least not under section 80), and inferentially, private copying using hard drives in personal computers is *not* permitted. Therefore, in the words of the Court of Appeal, "copyright infringement *could* result from the use of such devices to private copy."[40] Meanwhile, all of Justice Von Finckenstein's findings re-

29. Copyright Act, R.S.C. 1985, ch. C-42, §§ 79-88.
30. *E.g.*, BMG Can. Inc. v. Doe, [2004] F.C.J. No. 525, ¶ 25, *vacated*, [2005] F.C.A. 193.
31. *See* Copyright Bd. of Can., *Private Copying 2003-2004*, *supra* note 5, at 2.
32. *Id.* at 44.
33. *Id.* at 46.
34. *Id.*
35. *Id.* at 38-39.
36. [2004] F.C.J. No. 525, *vacated*, [2005] F.C.A. 193.
37. *BMG Can. Inc.*, [2004] F.C.J. No. 525, ¶ 25.
38. *CPCC v. CSMA*, [2004] F.C.A. 424, ¶¶ 153-164.
39. *Id.*
40. *Id.* at ¶ 147 (emphasis added).

garding the state of Canadian copyright law were vacated by the Federal Court of Appeal in *BMG Canada v. Doe*.[41]

In short, the legality of downloading in Canada depends on whether hard drives in personal computers are an "audio recording medium" according to the statutory definition. The Federal Court of Appeal's ruling in respect of digital audio recorders such as iPods implies that they are *not*.

The revenues generated by the levy are nevertheless substantial. The Canadian levy currently generates roughly $30-35 million per year for rights-holders.[42] Total Canadian levy revenues collected since 2000 have reached over $162 million (Canadian).[43] That may not seem like much, but extrapolated on a per capita basis and accounting for currency exchange rates, this would be roughly the equivalent of $1 billion (U.S.), or $250 million (U.S.) per annum.[44] Remember, the figures account *only* for the value of private copying onto blank CDs, audiotapes and minidiscs, and do *not* include compensation for p2p file sharing. In that light, Canada's levy generates a lot of money.

The Government has identified Canada's private copying regime as a timely issue, and has committed to engage in study and public consultations on the matter.[45] Among the most pressing questions will be whether, and if so how, the scheme should apply in the digital age. One possibility is to expand Canada's private copying levy to encompass iPods and similar digital music devices, solid-state removable digital memory products like CompactFlash cards, hard disc drives in desktop and laptop computers, and/or mobile phones, personal digital assistants and other convergence devices onto which music may be copied. Another possibility is to narrow or eliminate the levy altogether, instead promoting a combination of locks, licenses and litigation to control Ca-

41. *BMG Can. Inc.*, [2005] F.C.A. 193, ¶¶ 47-52.

42. Canadian Private Copying Collective, Financial Highlights, http://cpcc.ca/english/fin Highlights.htm.

43. *Id.* (on average, the Canadian levy has generated approximately $27 million (Canadian) a year in revenue, with royalty collections increasing dramatically over recent years).

44. The population of Canada was 32,270,500 in 2005. Statistics Canada, http://www40.statcan.ca/l01/cst01/demo02.htm. In 2005, the U.S. population was 297,599,080. U.S. Census Bureau, Monthly National Population Estimates, http://www.census.gov/popest/national/NA-EST2004-01.html. In order to arrive at $1 billion (U.S.), I applied the ratio of Canada to U.S. population to the $162 million (Canadian) in levy revenues. Then, I adjusted the product for an average exchange rate of 0.70436771 between January 2000 and December 2005 as calculated by the Bank of Canada. Bank of Canada, http://www.bankofcanada.ca/en/rates/exchange-avg.html.

45. Government of Canada, *Supporting Culture and Innovation: Report on the Provisions and Operation of the Copyright Act* 2 (2002), *available at* http://strategis.ic.gc.ca/epic/internet/incrp-prda.nsf/en/rp00863e.html; Government of Canada, *Government Statement on Proposals for Copyright Reform*, *available at* http://www.pch.gc.ca/progs/ac-ca/progs/pda-cpb/reform/statement_e.cfm.

nadians' music copying practices. At the present time, however, both the scope of the levy and the levy rate appear to have stabilized.[46]

B. Digital Rights Management Systems

Canada has not yet included prohibitions against circumventing digital rights management (DRM) systems in its copyright legislation. Regardless, DRM systems are used widely in Canada for distributing music and other digital content. The following section examines more closely the sorts of copy-controls that are presently used in Canada.

In 2002, Professor Kerr and a team of co-authors prepared a two-part report for the Department of Canadian Heritage on the subject of technological protection measures (TPMs).[47] In Part I, among other things, they describe various types of DRM systems, including TPMs.

TPMs include access-control measures, such as cryptography, where access to content is restricted in one way or another.[48] One of the most widely known TPMs they discuss is the Content Scramble System (CSS), which controls playback and recording of DVDs.[49] Simply put, most DVDs are region-coded to, among other things, limit unlicensed geographic redistribution of films.[50] For example, consumers who lawfully purchase a DVD in Europe may be frustrated to discover it will not play on their North American DVD player.

Other TPMs control not access to, but use of digital content.[51] Kerr and his co-authors describe Macrovision, the Secure Digital Music Initiative (SDMI) and other "copy-control" TPMs that allow a rights-holder to control copying, transmission and other uses of a work.[52] Another example of a widely used DRM tool is Adobe Systems PDF file format. Real Networks, Microsoft and Apple all use DRM systems, including TPMs, in one form or another to manage the distribution and playback of audio and/or multimedia files.

The Serial Copy Management System (SCMS) is a particularly interesting TPM given its connection with the Audio Home Recording

46. The Board has approved substantially the same private copying tariff for the past several years. *See* Copyright Bd. of Can., http://www.cb-cda.gc.ca/tariffs/certified/copying-e.html.

47. Ian Kerr, Alana Maurushat & Christian S. Tacit, *Technical Protection Measures: Part I - Trends in Technical Protection Measures and Circumvention Technologies* (2002), http://www.pch.gc.ca/progs/ac-ca/progs/pda-cpb/pubs/protection/protection_e.pdf [hereinafter Kerr et al., *TPMs: Part I*]; Ian Kerr, Alana Maurushat & Christian S. Tacit, *Technical Protection Measures: Part II – The Legal Protection of TPMs* (2002), http://www.pch.gc.ca/progs/ac-ca/progs/pda-cpb/pubs/protectionII/protection_e.pdf [hereinafter Kerr et al., *TPMs: Part II*].

48. Kerr et al., *TPMs: Part I*, *supra* note 47, at 2.

49. *Id.* at 9.

50. *Id.*

51. *Id.* at 19.

52. *Id.* at 9, 15.

Act[53] in the United States, discussed below.[54] This technology, with the aid of a digitally encoded watermark, allows unlimited copying from original recordings but not from second-generation copies. It prevents serial copying.[55]

TPMs recently made headlines in Canada (and the United States) in connection with their use by Sony BMG Music on CDs.[56] Tens of millions of discs included software that was designed to control consumers' uses of music, but which in fact installed on their computers a "rootkit" or another program that interfered with normal system operations, caused serious security vulnerabilities, was practically impossible to uninstall and surreptitiously reported information about users' computers and listening activities.[57] Numerous lawsuits were commenced in response to Sony BMG's actions. In the United States, the private actions were consolidated and settled, although there are still individual and government-led complaints or investigations pending.[58] Parallel class actions in Canada are also ongoing.[59]

For law and policy makers, and for consumers, these lawsuits are a clear reminder that TPMs are prevalent in the Canadian digital marketplace. In fact, all or most of the aforementioned DRM systems are apparently used as extensively and effectively in Canada as they are in other jurisdictions, despite the lack of circumvention prohibitions in the Canadian Copyright Act.

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53. Audio Home Recording Act of 1992, Pub. L. No. 102-563, 106 Stat. 4237 (codified as 17 U.S.C.A. §§ 1001-1010 (West 2006)).

54. *See infra* Part II.B.

55. Kerr et al., *TPMs: Part I*, *supra* note 47, at 13; *see also* Joel L. McKuin, *Home Audio Taping of Copyrighted Works and the Audio Home Recording Act of 1992: A Critical Analysis*, 16 HASTINGS COMM. & ENT. L.J. 311, 325 (1994).

56. *See* Jeremy F. deBeer, *How Restrictive Terms and Technologies Backfired on Sony BMG Music* (Part 1), 6 INTERNET & E-COM. L. IN CAN. 93 (2006); Jeremy F. deBeer, *How Restrictive Terms and Technologies Backfired on Sony BMG Music* (Part 2), 7 INTERNET & E-COM. L. IN CAN. 1 (2006); Alex Halderman & Edward W. Felten, *Lessons from the Sony CD DRM Episode*, http://itpolicy.cs.princeton.edu/pub/sonydrm.pdf.

57. Furthermore, consumers who had purchased one of these CDs could not use it on a computer without clicking to agree with misleading, not to mention ridiculous, terms and conditions. *See* Halderman & Felten, *supra* note 56.

58. *See In re* Sony BMG CD Techs. Litigation, Case No 1:05-cv-09575, (S.D.N.Y. 2005); Complaint, Mark Lyon v. Sony BMG Music Entm't, County Court of Hinds County, Mississippi, First Judicial District (Jan. 5, 2006) (consolidated into *In re* Sony BMG CD Techs. Litigation); *see also* Texas v. Sony BMG Music Entm't, Dist. Ct., Travis Co, Texas; Office of the Attorney General of Florida, Case No. L05-3-1157; Arik Hesseldahl, *Spitzer Gets on Sony BMG's Case*, BUSINESSWEEK, Nov. 29, 2005, *available at* http://www.businessweek.com/technology/content/nov2005/tc20051128_573560.htm.

59. Jacques v. Sony, 06-044 S.C.B.C. (2006); Cheneyl v. Sony, 06-CV-033329 Ont. Sup. Ct. Jus. (2006); Palmer. v. Sony BMG Music Entm't, 06-CV-304178CP Ont. Sup. Ct. Jus. (2006).

C. Paracopyright Proposals

Because prohibitions on the circumvention of DRM systems offer legal protection beyond that provided by traditional copyright law, they are sometimes referred to as "paracopyright" laws.[60]

Provisions addressing the circumvention of TPMs and tampering with rights management information (RMI) had their genesis in the World Intellectual Property Organization (WIPO) Copyright Treaty (WCT)[61] and the WIPO Performances and Phonograms Treaty (WPPT).[62] These are collectively known as the WIPO Internet Treaties. Article 11 of the WCT requires that:

> Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.[63]

Because "adequate legal protection" can be provided through diverse areas of law,[64] it would be inaccurate to suggest that Canadian law does not contain *any* anti-circumvention laws. But the government's own studies have concluded that "[a]t the moment, it is far from certain that new legislation designed to protect the legitimate use of TPMs is necessary to meet the TPM-related requirements of the WCT and WPPT."[65] Although Canadian law does not include specific prohibitions against circumventing TPMs, like the DMCA does, Canada's Copyright

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60. *See, e.g.*, Jeremy F. deBeer, *Constitutional Jurisdiction Over Paracopyright Laws*, *in* IN THE PUBLIC INTEREST: THE FUTURE OF CANADIAN COPYRIGHT LAW, 89, 89-90 (Michael Geist ed., 2005) (citing David Nimmer, *Puzzles of the Digital Millennium Copyright Act*, 46 J. COPYRIGHT SOC'Y U.S.A. 401, 405 (1998-1999)); Michael J. Remington, *The Ever-Whirling Cycle of Change: Copyright and Cyberspace*, 3 N.C. J. L. & TECH. 213, 238-41 (2002); Dan L. Burk, *Anti-Circumvention Misuse*, 50 UCLA L. REV. 1095, 1096 (2003); Kimberlee Weatherall, *Before the High Court: On Technology Locks and the Proper Scope of Digital Copyright Laws — Sony in the High Court*, 26 SYDNEY L. REV. 613, 615 (2004). Peter Jaszi has also used the terms "pseudocopyright" and "metacopyright" to describe similarly new rights. *See* Peter Jaszi, Professor, Is This the End of Copyright As We Know It?, Address at Nordinfo Conference in Stockholm, Sweden (Oct. 9-10, 1997), at 58-67.

61. World Intellectual Property Organization Copyright Treaty art. 11-12, Dec. 20, 1996, 36 I.L.M. 65 [hereinafter WCT], *available at* http://www.wipo.int/treaties/en/ip/wct/pdf/trtdocs_wo033.pdf.

62. World Intellectual Property Organization Performances and Phonograph Treaty art. 18-19, Dec. 20, 1996, 36 I.L.M. 76 [hereinafter WPPT], *available at* http://www.wipo.int/treaties/en/ip/wppt/pdf/trtdocs_wo034.pdf.

63. WCT, *supra* note 61, at 71; WPPT art. 18, *supra* note 62, at 86 (using similar language in respect of the rights of performers and record producers).

64. deBeer, *supra* note 60, at 94–95.

65. Kerr et al., *TPMs: Part II*, *supra* note 47, § 8.0; *see also* Ian R. Kerr, Alana Maurushat & Christian S. Tacit, *Technical Protection Measures: Tilting at Copyright's Windmill*, 34 OTTAWA L. REV. 7, 76–77 (2002-2003).

Act provides some protection.[66] Specifically, TPMs involving computer programs may be protected as literary works. Canada's Criminal Code also protects TPMs in various ways.[67]

Nevertheless, there has been pressure on Canada to strengthen its laws in this respect. Canada was even on the Special 301 Watch List maintained by the Office of the United States Trade Representative.[68]

In May 2004, the Standing Committee on Canadian Heritage recommended immediate ratification of the WCT and WPPT.[69] To accomplish this, the Government of Canada introduced Bill C-60 in the summer of 2005.[70] Bill C-60 would have prohibited the act of circumvention, or the provision of services to circumvent, but *only* if it were "for the purpose of an act that is an infringement of the copyright."[71] This legislation never made it past its first reading in the House of Commons. The minority government that introduced the Bill was defeated on a vote of non-confidence (over issues unrelated to copyright reform) before Bill C-60 made it to committee review.

As a result, Canadian law and policy makers went back to the drawing board. Just when it seemed the new government was picking up where the old one left off,[72] important stakeholders publicly expressed disapproval of the expected reforms.[73] Canada, it seems, is back to square one on the issue of prohibitions against the circumvention of DRM systems.

II. UNITED STATES

The United States' Digital Millennium Copyright Act (DMCA)[74] includes strong prohibitions against circumventing TPMs and/or devices that facilitate circumvention. There is a relatively narrow levy on very

66. *See* Christian S. Tacit & Nelligan O'Brien Payne, *The Current Status of Legal Protection for Technology Protection Measures in Canada* § 3.2 (2003), *available at* http://www.pch.gc.ca/progs/ac-ca/progs/pda-cpb/pubs/juridique/index_e.cfm.

67. *Id.* at §§ 3.3, 3.4.

68. Special 301 Watch List (2003), http://www.ustr.gov/Document_Library/Reports_Publications/2003/2003_Special_301_Report/Special_301_Watch_List.html?ht=.

69. Parliament of Canada, *Interim Report on Copyright Reform: Report of the Standing Committee on Canadian Heritage*, (Ottawa: Communication Canada, May 2004). http://www.parl.gc.ca/InfocomDoc/Documents/37/3/parlbus/commbus/house/reports/herirp01-e.htm [hereinafter *Interim Report*].

70. Bill C-60, Parliament of Canada (2005) (First Reading), http://www.parl.gc.ca/38/1/parlbus/chambus/house/debates/119_2005-06-20/toc119-E.htm (scroll down the schedule index to the "1510" time and click on the "Copyright Act" hyperlink).

71. *Id.* at § 34.02(1), *available at* http://www.parl.gc.ca/PDF/38/1/parlbus/chambus/house/bills/government/C-60_1.PDF.

72. *See Conservative Government to Introduce Copyright Bill: Bev Oda*, THE HILL TIMES (Ottawa, ON), Apr. 10, 2006, Politics Page, *available at* http://www.thehilltimes.ca/html/index.php?display=story&full_path=/2006/april/10/politics/&c=1.

73. *See, e.g.*, Canadian Music Creators Coalition, http://www.musiccreators.ca; Intellectual Privacy, http://www.intellectualprivacy.ca; Appropriation Art, http://www.appropriationart.ca.

74. 17 U.S.C.A. §§1201-1205, 1301-1332 (West 2006).

limited types of products established under the AHRA. Several commentators have, however, suggested expanding the role of levies in the United States. The following section explores these topics in more detail.

A. The Digital Millennium Copyright Act

American lawmakers were early adopters of the WIPO Internet Treaties' anti-circumvention provisions. In 1998, the DMCA[75] was adopted into law, marking perhaps the most significant amendment to the Copyright Act of 1976 to date.[76]

The DMCA prohibits acts of circumvention.[77] Recall that the Canadian proposal would have prohibited circumvention *only* if done for the purpose of facilitating copyright infringement. The DMCA instead enumerates several specific exceptions. The United States Copyright Office conducts triennial reviews of these exceptions, and has certain rulemaking powers in this respect.[78] These reviews have allowed for certain exceptions,[79] but they are rather narrow and obscure. American courts have not been willing to expand or broadly interpret the list of enumerated exceptions.[80] For instance, circumvention for fair use has not been permitted.

In addition to prohibiting circumvention of TPMs, the DMCA also prevents trafficking in technologies designed to circumvent encryption measures.[81] It is largely for this reason that the DMCA has led to heavy

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75. 17 U.S.C.A. § 1201(a)(1).

76. *See* JESSICA LITMAN, DIGITAL COPYRIGHT 37 (2001).

77. 17 U.S.C.A. § 1201.

78. Exemptions are granted for a period of three years with the possibility of extensions after the following triennial review. *See generally* Bill D. Herman & Oscar H. Gandy, Jr., *Catch 1201: A Legislative History and Content Analysis of the DMCA Exemption Proceedings* (2006), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=844544. To date, two triennial reviews have been completed by the U.S. Copyright Office: one in 2000 and the second in 2003. For information on the classes of exemptions requested by the public during the third triennial review currently under way, please see Comments on Anticircumvention Exemptions (2006) http://www.copyright.gov/1201/2006/comments/index.html.

79. Recommendation of the Register of Copyrights (2003), http://www.copyright.gov/1201/2003/index.html.

80. *See, e.g.*, 321 Studios v. MGM Studios, Inc., 307 F. Supp. 2d 1085, 1104 (N.D. Cal. 2004); Universal City Studios v. Corley, 273 F.3d 429, 443 (2d Cir. 2001); United States v. Elcomsoft, 203 F. Supp. 2d 1111, 1120 (N.D. Cal. 2002).

81. 17 U.S.C.A. § 1201(a)(2), (b)(1).

criticism from many commentators.[82] Several United States cases illustrate the breadth of the DMCA's possible effects.[83]

In some contexts, the threat of liability under the DMCA has lead to self-censorship by technology researchers.[84] Professor Felten of Princeton University, his research team, employer and organizers of an academic conference were formally threatened with legal consequences if findings regarding vulnerabilities with the Secure Digital Music Initiative (SMDI) copy protection scheme would have been presented.[85] The following year, Dmitry Sklyarov, a Russian programmer, was actually arrested and prosecuted (although not convicted) in the United States for working on a program that may have been used to circumvent technological restrictions in Adobe e-books.[86]

In other contexts, the DMCA has had anti-competitive effects. In *Lexmark International, Inc. v. Static Control Components, Inc.*,[87] the plaintiff used the DMCA to prevent the production of aftermarket toner cartridges.[88] Similarly, in *Chamberlain Group v. Skylink Technologies*,[89] the plaintiff attempted to use the DMCA to impede the production of universal garage door openers by one of its competitors.[90] Even though the defendants in both cases were ultimately successful,[91] their legal victories were not without costly litigation.

The DMCA has, of course, stifled technologies used to circumvent copyright-related TPMs. In 2000, major movie studios stopped a magazine from posting the code to circumvent access and copy controls on DVDs, and from knowingly linking to websites where the code was available.[92] Also in 2000, RealNetworks employed the DMCA to obtain an injunction against Streambox, designers of a digital VCR that allowed

82. *See, e.g.*, Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to Be Revised*, 14 BERKELEY TECH. L.J. 520, 527 (1999); Burk, *supra* note 60; Simon Fitzpatrick, *Copyright Imbalances: U.S. and Australian Responses to the WIPO Digital Copyright Treaty*, 5 E.I.P.R. 214, 223 (2000); Kamiel J. Koelman, Address at the ALAI Congress: The Protection of Technological Measures vs. the Copyright Limitations (June 2001), http://www.alai-usa.org/2001_conference/1_program_en.htm (scroll down to "Subpart 2"and click on the "text" link next to author's name to download document).

83. For more DMCA casualties, see Electronic Frontier Foundation, *Unintended Consequences: Seven Years Under the DMCA* (Apr. 2006), http://www.eff.org/IP/DMCA/unintended_consequences.php [hereinafter EFF, *Unintended Consequences*].

84. *Id.*

85. *Id.*

86. *Id.*

87. 387 F.3d 522 (6th Cir. 2004); *see also Recent Development: Control of the Aftermarket through Copyright*, 17 HARV. J. L. & TECH. 307 (2003) (criticizing Lexmark Int'l, Inc. v. Static Control Components, Inc., 253 F. Supp. 2d 943 (E.D. Ky. 2003)).

88. *Lexmark Int'l*, 387 F.3d at 529.

89. 381 F.3d 1178 (Fed. Cir. 2004).

90. *Id.* at 1183.

91. *Lexmark Int'l*, 387 F.3d at 553; *Chamberlain*, 381 F.3d at 1204.

92. Universal City Studios v. Reimerdes, 111 F. Supp. 2d 294, 303 (S.D.N.Y. 2000).

media streamed on-line to be time-shifted.[93] In 2004, commercial manufacturers of DVD back-up software were barred from distributing their software to consumers.[94]

In practice, the DMCA's anti-circumvention provisions transcend the physical boundaries of the United States' borders. Although a Norwegian teenager created the code at issue in *Reimerdes*, the DMCA applied when the code was distributed in the United States.[95] Similarly, Skylarov, the Russian programmer, was arrested as soon as he travelled to the United States.[96] In another copyright-related example, an American judge forced icraveTV, a Canadian company retransmitting television via the web, to shut down by ordering it to block its signal from reaching the United States.[97] In fact, the Supreme Court of Canada has noted several instances where American courts have held that United States copyright laws can apply extra-territorially.[98] Popular circumvention tools will be caught by the DMCA when either the technology or its creator enters the United States, demonstrating how broad the effects of this legislation can be.

B. The Audio Home Recording Act

In theory, the AHRA sets up a scheme not dramatically different from Canada's private copying levy. Rights-holders are entitled to collect royalties from manufacturers of certain digital audio recording devices, who must incorporate specific technological measures to prevent serial copying. As a corollary, the AHRA prohibits infringement suits in respect of certain private copying activities.[99] In practice, however, the levy scheme under the AHRA is much narrower than Canada's private copying levy. There are important technological, historical, legal and economic distinctions between these two schemes.

The AHRA arose out of uncertainty surrounding the introduction of the digital audio tape (DAT), which some music industry stakeholders saw as a highly disruptive technology.[100] Prior to the enactment of the

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93. RealNetworks, Inc. v. Streambox, Inc., No. 2:99CV02070, 2000 WL 127311, at *1 (W.D. Wash. Jan. 18, 2000).

94. *321 Studios*, 307 F. Supp. 2d at 1105.

95. *Reimerdes*, 111 F. Supp. at 311, 316.

96. EFF, *Unintended Consequences*, *supra* note 83.

97. Nat'l Football League v. TVRadioNow Corp., 53 U.S.P.Q.2d (BNA) 1831, 1833 (W.D. Pa. 2000).

98. *See* Soc'y of Composers, Authors & Music Publishers of Can. v. Canadian Ass'n of Internet Providers, [2004] 2 S.C.R. 427, 459-60.

99. *See* Alex Allemann, Note, *Manifestation of an AHRA Malfunction: The Uncertain Status of MP3 under* Recording Industry Association of America v. Diamond Multimedia Systems, Inc., 79 TEX. L. REV. 189, 195-96 (2000); Christine C. Carlisle, *The Audio Home Recording Act of 1992*, 1 J. INTELL. PROP. L. 335, 336, 338 (1994); Gary S. Lutzker, *Dat's All Folks:* Cahn v. Sony *and the Audio Home Recording Act of 1991 - Merrie Melodies or Looney Tunes?*, 11 CARDOZO ARTS & ENT. L.J. 145, 174-75 (1992); McKuin, *supra* note 55, at 325-28.

100. Saba Elkman & Andrew F. Christie, *Regulating Private Copying of Musical Works: Lessons from the U.S. Audio Home Recording Act of 1992* 4 (The Intellectual Prop. Research Inst. of

AHRA, there was debate about whether private copying constituted an infringement of copyright or an allowable "fair use," and whether DAT device manufacturers could consequently be held liable for contributory infringement.[101] In the famous *Sony Betamax* case,[102] the United States Supreme Court held that recording television programs for later viewing ("time shifting") was a fair use of copyright-protected works, and therefore manufacturers of videocassette recorders could not be held liable for contributing to the infringement of copyright.[103] Although it is arguable that the same reasoning applies to the transfer of music from one device or medium to another ("format shifting"), there are differences between analogue video recording and digital audio recording, including the ease with which multiple perfect copies can be made and distributed.[104]

Manufacturers of audio recording devices were reluctant to engage in prolonged and expensive litigation to find out whether they would be protected by the *Betamax* doctrine. Moreover, DAT manufacturers needed the recording industry to support the new technology by distributing music in this format.[105] Therefore, building on a series of negotiated agreements,[106] both sides lobbied Congress to codify their private compromise solution.

The resulting AHRA reflected agreements between device manufacturers and the recording industry concerning royalty payments and technological safeguards against serial copying. It also conferred a right upon consumers to make non-commercial audio home recordings, and prevented manufacturers, distributors, and importers of digital audio recording devices from being sued for facilitating the production of these private copies.[107]

In the AHRA, "digital audio recording device" is defined as:

> [A]ny machine or device of a type commonly distributed to individuals for use by individuals, whether or not included with or as part of

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Austl., Working Paper No. 12/04, 2004), *available at* http://www.ipria.org/publications/workingpapers/2004/IPRIA WP 12.04.pdf.

101. 17 U.S.C.A. § 107 (West 2006).

102. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984) [hereinafter *Sony Betamax*].

103. *Sony Betamax*, 464 U.S. at 421.

104. *See* Elkman & Christie, *supra* note 100, at 4 (citing Allemann, *supra* note 99, at 194).

105. *Id.* at 5.

106. The "Athens agreement," so-named for the city in which the meetings took place, ensured that DAT manufacturers would equip all DAT recorders with Serial Copy Management System (SCMS) thereby allowing unlimited copying from original sources and preventing serial copying, but failed to provide music creators with any compensation for home copying. *Id.* at 10; McKuin, *supra* note 55, at 322. The "Cahn agreement", named for the litigation that produced the settlement, provided for a royalty scheme to address this shortcoming. *See* Elkman & Christie, *supra* note 100, at 5-6. Notably absent from the parties' negotiated agreements was a consumer right to produce audio home recordings in the first place. Without such a right, manufacturers, distributors, and importers of digital audio recorders could not clearly escape legal liability.

107. Elkman & Christie, *supra* note 100, at 8, 13-14.

> some other machine or device, the digital recording function of which is designed or marketed for the primary purpose of, and that is capable of, making a digital audio copied recording for private use . . .[108]

To be caught by the AHRA, the device must be capable of producing a "digital audio copied recording."[109] That is defined in the AHRA as "a reproduction . . . of a digital musical recording, whether that reproduction is made directly from another digital musical recording or indirectly from a transmission."[110] A "digital musical recording" is a material object in which are fixed only sounds and things incidental to those sounds.[111] Importantly, this latter definition *excludes* objects "in which one or more computer programs are fixed."[112]

The AHRA enabled the introduction of new technologies, such as the DAT and the MiniDisc, into the marketplace, although perhaps after too long a delay. Consumers have never adopted DAT *en masse*. Also, the narrow definition of "digital audio recording device" ensured that courts limited the scheme's application to new technologies.[113]

So, the AHRA has certainly not been a panacea on the issue of audio home recording in the United States. The American recording industry has not always been successful obtaining injunctive relief against manufacturers of devices that are *sometimes* used to record digital audio.[114] At the same time, manufacturers lack the certainty they would like to introduce new technologies. Consumers are often caught in the middle of these battles. Several recent and ongoing cases demonstrate the point.

In *Diamond Multimedia Systems*,[115] the Court of Appeals for the Ninth Circuit held that a computer is not a "digital audio recording device" as outlined in the AHRA, because its "primary purpose" is not to produce digital audio copied recordings.[116] Further, computer hard drives are excluded from the ambit of the AHRA since hard drives contain computer programs that are "not incidental to any sound files that may be stored on the hard drive."[117] In other words, computers fail the "primary purpose" test and satisfy the "material object exception."[118]

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108. 17 U.S.C.A. § 1001(3).
109. *See* A&M Records Inc. v. Napster Inc., 239 F.3d 1004, 1024 (9th Cir. 2001); Elkman & Christie, *supra* note 100, at 11.
110. 17 U.S.C.A. § 1001(1).
111. 17 U.S.C.A. § 1001(5)(A)(i).
112. 17 U.S.C.A. § 1001(5)(B)(ii).
113. Elkman & Christie, *supra* note 100, at 13.
114. *See, e.g.*, Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc., 180 F.3d 1072, 1081 (9th Cir. 1999).
115. *Diamond Multimedia*, 180 F.3d at 1072.
116. *Id.* at 1078.
117. *Id.* at 1076.
118. Elkman & Christie, *supra* note 100, at 12.

Because portable MP3 players copy music from computers, they also do not fall within AHRA.

Based on this reasoning most other multi-purpose convergence devices, such as mobile phones, handheld PDAs, flash cards and other removable digital memory, might also fall outside the scope of the AHRA. The flexibility of the AHRA to deal with new technologies may, however, be tested in court again soon. The recording industry has recently filed suit against manufacturers of devices capable of recording and replaying music transmitted by satellite. In *Atlantic Recording Corp. v. XM Satellite Radio*[119] it has been alleged that the defendants are liable for direct, contributory and vicarious infringement of copyright.[120] Although the complaint makes no mention whatsoever of the AHRA, the defendants have argued that the allegedly infringing device conforms to the AHRA's definition of a 'digital audio recording device' thereby granting XM and their subscribers "absolute immunity" from the plaintiffs.[121] On the one hand, the devices at issue in the *XM Satellite* litigation are distinguishable from the Diamond Rio portable MP3 player, the iPod, and other devices because the former record "indirectly from a transmission" not "directly from another digital musical recording."[122] Therefore, unlike the issues in *Diamond Multimedia*, issues related to the fixation of other sounds on computers are irrelevant. On the other hand, the AHRA only provides a defense against actions based on the manufacture, importation or distribution of devices, or on the non-commercial use of such devices by consumers.[123] Some of the claims in the *XM Satellite* are based upon *other* allegedly infringing activities, such as delivering digital phonorecords.[124] Although the service of delivering content is closely tied to the product being distributed, it remains to be seen how the relationship will be interpreted under the AHRA.

In Canada, the Copyright Board has tried to expand the levy in a technology-neutral manner by including new media and devices ordinarily used for copying music.[125] However, given the Canadian Federal Court of Appeal's ruling overturning the Copyright Board's levy on iPods and similar devices and the decision of the United States Court of Appeals for the Ninth Circuit in *Diamond Multimedia* dismissing a claim with respect to the Diamond Rio portable MP3 player, the Canadian and

119. Complaint, Atl. Recording Corp. v. XM Satellite Radio Inc., No. 06-CV-3733 (S.D.N.Y. May 16, 2006), *available at* http://eff.org/IP/digitalradio/XM_complaint.pdf.

120. *Id.* at 15, 25, 27.

121. *See* Memorandum of Law in Support of Defendant's Motion to Dismiss at 1-2, Atl. Recording Corp. v. XM Satellite Radio, Inc., No. 06-CV-3733, 2006 WL 2429415 (S.D.N.Y. July 17, 2006).

122. *See* 17 U.S.C.A. § 1001(1).

123. *See* 17 U.S.C.A. § 1008.

124. *See* 17 U.S.C.A. §§ 115(a)(1), (b)(1)-(2), 501(a) (West 2006).

125. *See* Copyright Bd. of Can., *Private Copying 1999-2000*, *supra* note 5, at 29-32.

American positions are similar in some respects.[126] Unlike some European nations, neither Canada nor the United States levies many digital devices.[127] There are, however, still some major differences between the Canadian and American levy schemes.

The main difference is that the Canadian levy applies to media that are "ordinarily used" for private copying while the American scheme adopts a "primary purpose" test with an exception for objects used to copy computer programs.[128] This means CD burners incorporated into personal computers and, consequently, blank CDs are not levied in the United States. Canada, on the other hand, imposes a levy on blank CDs despite the fact that only one third of these media are used to copy music.[129]

That is the reason that Canada's levy generated roughly $35 million (Canadian) in 2005, and total revenues collected since 2000 equal about $162 million (Canadian).[130] As explained above, a levy of equivalent scope in the United States would have generated about $1 billion (U.S.), factoring in currency conversions and extrapolating for population differences.[131] By comparison, between 1992 and 2001, the net revenues from the levies collected under the relevant provisions of the United States Copyright Act total a little over $17.9 million (U.S.) (an average of under $2 million (U.S.) per annum).[132]

C. Exemption/Levy Proposals

Although the AHRA imposes only a very narrow levy, some American commentators have considered whether to expand the role of levies to compensate creators of digital content.[133] The appropriate scope of

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126. *Compare* Canadian Private Copying Collective v. Canadian Storage Media Alliance, [2004] 247 D.L.R. 193 at 234 (F.C.A.), leave to appeal to S.C.C. refused, [2005] 3 F.C.R. i, *with Diamond Multimedia* 180 F.3d at 1081 (indicating that both courts viewed MP3 players, such as the Apple iPod and the Diamond Rio portable MP3 player, as devices that should not be subject to restrictions).

127. *See* Hugenholtz et al., *supra* note 7, at 13.

128. *See* Copyright Bd. of Can., *Private Copying 1999-2000*, *supra* note 5, at 11; *Diamond Multimedia*, 180 F.3d at 1078.

129. *See infra* note 210 and accompanying text.

130. Canadian Private Copying Collective, *supra* notes 42-43.

131. Statistics Canada, *supra* note 44; U.S. Census Bureau, *supra* note 44 and accompanying text.

132. *See* Exhibit Retailers-16, filed as evidence *in* Copyright Bd. of Can., *Private Copying 2003-2004*, *supra* note 5; WILLIAM W. FISHER III, PROMISES TO KEEP: TECHNOLOGY, LAW AND THE FUTURE OF ENTERTAINMENT at 282 n.10 (2004).

133. *See generally* Peter K. Yu, *P2P and the Future of Private Copying*, 76 U. COLO. L. REV. 653, 763-64 (2005); FISHER, *supra* note 132, at 7-8; Raymond Shih Ray Ku, *The Creative Destruction of Copyright:* Napster *and the New Economics of Digital Technology*, 69 U. CHI. L. REV. 263, 269 (2002); S. J. Liebowitz, *Alternative Copyright Systems: The Problems with a Compulsory Licence*, at 11 (2003), http://www.serci.org/2003/liebowitz2.pdf; Jessica Litman, *Sharing & Stealing*, 27 HASTINGS COMM. & ENT. L.J. 1, 32 (2004); Glynn S. Lunney, Jr., *The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act*, 87 VA. L. REV. 813, 855-58 (2001); Robert P. Merges, *Compulsory Licensing vs. the Three "Golden Oldies" Property Rights, Contracts, and Markets*, CATO INSTITUTE, POLICY ANALYSIS NO. 508, at 12 (2004),

levies in the digital era is a hot topic for Canadian,[134] Australian[135] and European[136] experts as well. The following section describes the gist of some of the recent proposals.

Professor Netanel, for example, delineated a comprehensive model that would permit private copying, remixes, adaptations, modifications, and dissemination of all kinds of communicative expressions in both digital and non-digital forms.[137] To provide sufficient compensation to creators, a levy would be imposed on a broad range of goods and services, the value of which is substantially enhanced by peer-to-peer file sharing.[138] Professor Ku also advocated for levies on the sale of internet services and electronic equipment, but his model would apply to digital cultural products only.[139] Professor Fisher proposed to allow various uses of audio and video recordings in exchange for a system likely funded through taxation of digital recording and storage devices.[140] Eckersley has similarly discussed the concept of a virtual market—a decentralized, software-mediated, publicly funded mechanism to reward digital authorship without restricting flows of information.[141]

Although different in details, all of the aforementioned models are based on the same underlying idea: broad dissemination of music, movies and/or other forms of entertainment should be encouraged and the present copyright system is a hindrance. Therefore, a new system is needed to generate financial incentives for creators. The solution is a variant of compulsory licensing. However—and this is the key point—the license fees are to be paid not by actual users of copyrighted content but by third-party proxies, such as manufacturers of electronic hardware and software or network providers and other intermediaries.

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http://www.catoinstitute.org/pubs/pas/pa508.pdf; Neil Netanel, *Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing*, 17 HARV. J.L. & TECH. 1, 4 (2003).

134. *See, e.g.*, Daniel J. Gervais, *The Price of Social Norms: Towards a Liability Regime for File-Sharing*, 12 J. INTELL. PROP. L. 39, 72-73 (2004); John Davidson, *Rethinking Private Copying in the Digital Age: An Analysis of the Canadian Approach to Music* (2001) (unpublished L.L.M. thesis, University of Toronto Faculty of Law); Cathy Allison, *The Challenges and Opportunities of Online Music: Technology Measures, Business Models, Stakeholder Impact and Emerging Trends*, DEPARTMENT OF CANADIAN HERITAGE (2004), http://www.canadianheritage.gc.ca/progs/ac-ca/progs/pda-cpb/pubs/online_music/online_music_e.pdf.

135. *See, e.g.*, Peter Eckersley, *Virtual Markets for Virtual Goods: The Mirror Image of Digital Copyright?*, 18 HARV. J.L. & TECH. 85, 106-11 (2004); Andrew F. Christie, *Private Copying Licence and Levy Schemes: Resolving the Paradox of Civilian and Common Law Approaches*, INTELLECTUAL PROPERTY RESEARCH INSTITUTE OF AUSTRALIA 1 (2004), http://www.law.unimelb.edu.au/ipria/publications/workingpapers/Occasional%20paper%202.04.pdf; Gaita & Christie, *supra* note 8, at 1-3; Kimberlee Weatherall, *A Comment on the Copyright Exceptions Review and Private Copying* 1, 20-21 (Intellectual Property Research Institute of Australia, Working Paper No. 14/05, 2005), *available at* http://www.ipria.org/publications/workingpapers/WP14.05.pdf.

136. *See* Hugenholtz et al., *supra* note 7, at ii.

137. Netanel, *supra* note 133, at 35.

138. *Id.*

139. *See* Ku, *supra* note 133, at 313, 321-22.

140. FISHER, *supra* note 132, at 202-03, 216-17.

141. Eckersley, *supra* note 135, at 92-93.

It is important to distinguish these proposals from ostensibly similar ideas discussed, for example, by Professor Gervais,[142] the Electronic Frontier Foundation (EFF),[143] and from emerging licensed p2p services. Professor Litman noted that there are two models for collecting fees to be distributed among creators: (1) a direct blanket licensing fee or (2) a tax on the sale of goods or services.[144] Professor Gervais's model essentially proposed p2p user-fees, which are simply brokered by intermediaries and backed-up by enforceable exclusivity.[145] This type of scheme would be voluntary rather than compulsory.[146] Voluntary licensing proposals, unlike exemption/levy schemes, are still built on a framework of exclusive proprietary copyrights.[147] Professor Gervais advocated for a system whereby copyright is used to normatively coerce consumers into payment of licensing fees[148] but is in practice rarely or never actually litigated.[149] Generally, Professor Gervais, like the EFF, proposed to build new business models upon slight modifications to the existing paradigm.[150] These types of proposals are calls for more *business* reforms rather than *legal* reforms.

Other scholars also believe that market responses to p2p and private copying will eventually be found, so an expanded levy scheme is not the way of the future.[151] Professor Merges, for instance, has urged us to stick with the three "golden oldies"—property rights, contracts, and markets.[152] Likewise, Professor Leibowitz has emphasized that we should not "throw out the baby with the bathwater" but should instead investigate more carefully arguments surrounding a shift away from an unfettered market.[153]

Had the United States Supreme Court decided the *Grokster* case[154] differently, it is conceivable that Congress would be considering a com-

142. *See generally* Gervais, *supra* note 134, at 73 (discussing the idea of enforcing a voluntary compulsory licensing scheme).

143. *See generally* Electronic Frontier Foundation, *A Better Way Forward: Voluntary Collective Licensing of Music File Sharing* 1 (2004), http://www.eff.org/share/collective_lic_wp.pdf [hereinafter EFF, *A Better Way Forward*] (discussing the idea of enforcing a voluntary compulsory licensing scheme).

144. Litman, *supra* note 133, at 44.

145. Gervais, *supra* note 134, at 73.

146. *See* FISHER, *supra* note 132, at 46-52. Professor Fisher prefers a compulsory regime, but would be willing to accept a voluntary scheme, outside of governmental control. *Id.*

147. *See* EFF, *A Better Way Forward*, *supra* note 143 (discussing the benefits of voluntary licensing proposals to copyright owners and how these copyright owners are able to maintain proprietary rights to their works under this model).

148. *See* Gervais, *supra* note 134, at 56-58.

149. *See id.* at 59.

150. *Compare* Gervais, *supra* note 134, at 73, *with* EFF, *A Better Way Forward*, *supra* note 142, at 1-2 (suggesting alterations to the already existing p2p networks).

151. *See* Merges, *supra* note 133, at 10.

152. *See id.* at 5 ("Maintaining the traditional legal pairing of property rights and contracts, which usually leads to market formation, seems like a safer course than mandates or new market intervention to correct for past market intervention.").

153. Liebowitz, *supra* note 133, at 20.

154. MGM Studios Inc. v. Grokster, Ltd., 125 S. Ct. 2764 (2005).

pulsory licensing scheme right now. In fact, that is precisely what happened when the Supreme Court held that manufacturers of player piano rolls were not liable to pay royalties to music composers.[155] As things stand, dramatic changes of the sort proposed under Professor Netanel's "Non-Commercial Use Levy," (NUL) or Professor Fisher's "Alternative Compensation Scheme" (ACS) are unlikely.[156] That does not mean, however, that more moderate changes are out of the question. Although there may be problems implementing the types of reforms advocated by proponents of broader levy schemes, it would be unwise to dismiss outright the calls for change. Because of the strength of some of the arguments in favor of proposals for change, law and policy makers might be persuaded to adopt some of these suggestions.

III. STAKEHOLDERS

North American law and policy makers seem right now to be standing at a crossroads with levies to the left and locks to the right. Canadians and Americans are approaching this crossroads from opposite directions. Canada already has a relatively broad levy (compared to the United States), and is now considering introducing legal protections for TPMs.[157] The United States already has anti-circumvention provisions, and there are now suggestions to adopt a broad levy system.[158]

This section looks at the impact of locks and levies from the perspective of three main groups of stakeholders: creators, technology firms, and consumers. Analysis reveals conflicting views about the appropriate policy measures *between* and *within* these groups. The diversity of perspectives may lead to compromise solutions where aspects of multiple proposals are implemented.

A. Creators

Different creators and distributors benefit differently from locks and levies. Generally speaking, multinational movie studios, record labels, and other large-scale producers would prefer to rely upon locks to control the distribution of digital content. Authors, performers and small-scale producers are not usually adverse to the idea of sacrificing some control in exchange for the steady revenue streams provided by levies. Conflicts within the music industry itself significantly complicate policy debates surrounding these issues.

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155. *See* White-Smith Publ'g Co. v. Apollo Co., 209 U.S. 1, 18 (1908).

156. *See Grokster*, 125 S. Ct. at 2770.

157. House of Commons of Canada, Bill C-60, An Act to amend the Copyright Act ch. 27, (June 20, 2005), http://www.parl.gc.ca/38/1/parlbus/chambus/house/bills/government/C-60/C-60_1/C-60_cover-E.html. (proposing penalties for the circumvention of TPMs).

158. *See* Digital Millennium Copyright Act, 17 U.S.C.A. § 1201 (West 2006) (establishing anti-circumvention provisions); FISHER, *supra* note 132, at 202 (proposing a tax-based reward system); Eckersley, *supra* note 135, at 92-93 (proposing a publicly-funded remuneration system); Netanel, *supra* note 133, at 83 (proposing levies for non-commercial use).

Major corporate rights-holders seem to prefer TPMs to levies.[159] TPMs offer greater control over consumers' use of digital content, and therefore they facilitate new business models.[160] TPMs also help to facilitate price discrimination, which means charging different prices for different products, or even better, different prices for the same product, based upon a consumer's willingness to pay. This is an important profit-maximizing strategy.

Levies, on the other hand are perceived by this group as problematic for several reasons. For one, they complicate international copyright enforcement and licensing practices.[161] Also, although existing levy schemes are intended to cover only truly private copying and not peer-to-peer (p2p) file sharing, many consumers might get the impression that levies legitimize and compensate for unlimited copying and sharing. As mentioned, some judges have adopted this view, which proved to be highly problematic when Canadian copyright-holders attempted to sue users of p2p networks in Canada.[162] The major record labels are struggling to keep the issues of file sharing and private copying distinct from each other. In fact, concerns of these sorts have led the Canadian Recording Industry Association president, Graham Henderson, to argue that Canada's private copying levy should be abolished.[163]

However, many creators like levies. Individual authors, performers and collecting societies, for example, often argue in favor of the continued use of levies to remunerate for consumers' non-commercial or private copying activities.[164] Levies can help offset some of the power imbalances that exist between artists and music companies because statutes, regulations or administrative decisions may require equitable distribution patterns.

Some creators feel that TPMs primarily benefit major corporate producers by enhancing their already concentrated control over the distribution of digital content.[165] Moreover, these groups reject digital locks as "risky and counterproductive."[166] Incidents like the one described

159. Jörg Reinbothe, Private Copying, Levies and DRMs against the Background of the EU Copyright Framework, Address at the DRM Levies Conference in Brussels (2003), http://ec.europa.eu/internal_market/copyright/documents/2003-speech-reinbothe_en.htm.

160. *Id.*

161. *See* Reinbothe, *supra* note 159.

162. BMG Can. Inc. v. John Doe, [2004] F.C.J. No. 525, 18-19.

163. Larry Leblanc, *CRIA Calls for End of Blank-Media Levy*, BILLBOARD 18, Apr. 8, 2006, http://www.ccfda.ca/Downloads_resources/CRIA_CCFDA_Billboard.doc.

164. Reinbothe, *supra* note 159. *See, e.g., AEPO-ARTIS, FIA and FIM Express Their Deep Concern and Clear Opposition to any Restrictions of the Remuneration System for Private Copying*, MUSIC BUSINESS, May 31, 2006, http://www.labellife.com/2006/05/31/aepo-artis-fia-and-fim-express-their-deep-concern-and-clear-opposition-to-any-restrictions-of-the-remuneration-system-for-private-copying.

165. Press Release, Canadian Music Creators Coalition, Launch of a New Voice: The Canadian Music Creators Coalition (Apr. 26, 2006), *available at* http://www.musiccreators.ca/docs/Press_Release-April_26.pdf.

166. *Id.*

above involving Sony-BMG generate hostility toward the music industry in general, not just those who employ TPMs. Some creators are therefore skeptical of anti-circumvention provisions. For example, a group of high-profile Canadian artists including the Barenaked Ladies, Avril Lavigne, Sarah McLachlan and others have agreed that both artists and consumers need protection *from* TPMs.[167]

Studies suggest that legal protection for digital locks seems to influence what sort of content is created and by whom, but not the amount of content created. For example, a recent economic analysis of Canadian copyright-based industries concluded that the Canadian music scene is thriving.[168] On the one hand, there was consolidation among the major multinational record labels, and their record sales fell.[169] At the same time, however, a number of mid-sized Canadian-based firms leveraged their success in production and music publishing to establish a secure footing in the Canadian marketplace.[170] Despite the lack of specific anti-circumvention provisions in Canadian law, the Canadian sound recording industry *experienced steady growth* between 1999 and 2004.[171] The GDP contribution consistently outperformed overall Canadian GDP while growing from $243 million to $387 million (Canadian).[172]

To summarize, major producers and distributors tend to favor locks over levies while many artists and their representatives in collective societies would prefer levies to deal with issues like private copying, and perhaps even p2p file sharing.

B. Technology Firms

This group of stakeholders is also diverse. It includes manufacturers of media and devices related, in varying degrees, to the use of copyright-protected content. Such firms may produce blank analogue or digital audiotapes, CDs and digital memory, portable music and video devices, computer hardware and software, as well as other consumer electronic equipment. The group also includes retailers and other distributors of these media and devices, who are often overlooked as stakeholders. Internet service providers and other communications intermediaries may fall within this group too, as they could be the targets of levies in the future.

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167. *Id.*

168. CONNECTUS CONSULTING INC., THE ECONOMIC IMPACT OF CANADIAN COPYRIGHT INDUSTRIES—SECTORAL ANALYSIS 13 (2006), *available at* http://www.pch.gc.ca/progs/ac-ca/progs/pda-cpb/pubs/copyright/EconomicImpactofCanadian_e.pdf. The final report was submitted to the Copyright Policy Branch, Department of Canadian Heritage. *Id.* at 1.

169. *Id.* at 75.

170. *Id.*

171. *Id.* at 76.

172. *Id.* at 76-77.

Generally speaking, these firms argue against the imposition of levies on their products and services.[173] They claim that levy schemes put the onus on innovative technology and communications enterprises to subsidize the music industry.[174] One might argue this is justified on three possible grounds: causation, enrichment or convenience. Manufacturers and intermediaries would respond that profiting directly or indirectly from private copying is not a sufficient reason to impose a levy on their goods or services. Nor is simple convenience. It is much too simplistic to suggest that suppliers of blank media or Internet connectivity, for example, cause private copying.

In fact, many firms that would be targeted by levies can make a convincing argument that their obligation to provide remuneration to music creators and distributors runs contrary to fundamental principles established in cases like *Grokster*[175] and *Sony Betamax*[176] in the United States, and *CCH v. LSUC*[177] and *SOCAN v. CAIP*[178] in Canada.

Here, it is important to distinguish the legal situations in Canada and the United States. It is often unclear whether, in the United States, an electronics manufacturer can be held contributorily liable for consumers' copying activities. For example, although VCR manufacturers were absolved of responsibility in the *Sony Betamax* case, the Court in *Grokster* was divided as to whether or not p2p networks had substantial non-infringing uses.[179] As explained above, the uncertainty in American law was one of the key factors leading to the negotiated compromise embodied in the AHRA. In this respect, levies do offer a palpable benefit to entities that might otherwise face legal liability, or at least uncertainty.

By contrast, in Canada, it is clearer that most targets of a levy would not otherwise be held liable for consumers' copying. The Canadian equivalent of the American doctrine of contributory liability is found within the rules governing authorization of infringing activities. In the United States, simply providing the means to facilitate or benefit from copyright infringement is unobjectionable. To be held liable the alleged authorizer must have a degree of knowledge of and control over the actions of actual copyright infringers.[180] But, in Canada, there exists a rule

173. Reinbothe, *supra* note 159.

174. *See* Press Release, Canadian Coalition for Fair Digital Access, Hidden Levy on Recordable Storage Media is "Obsolete" and Should be Repealed (Nov. 4, 2003), http://www.ccfda.ca/Downloads_resources/ccfda_release_Nov4_eng.doc.pdf.

175. MGM Studios Inc. v. Grokster, Ltd., 125 S. Ct. 2764 (2005).

176. SonyCorp of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984) [hereinafter *Sony Betamax*].

177. *See* CCH Can. Ltd. v. Law Society of Upper Can., [2004] 1 S.C.R. 339, 68 [hereinafter *CCH v. LSUC*].

178. *See* Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers [2004] 2 S.C.R. 427, 467 [hereinafter *SOCAN v. CAIP*].

179. *Compare Grokster*, 125 S. Ct. at 2783-84 (Ginsburg, J., concurring) *with Grokster*, 125 S. Ct. at 2791 (Breyer, J., concurring).

180. *See id.* at 2782.

that even if one could be said to authorize the copying or communication of music, courts must presume that the authorization is only to act in accordance with the law.[181] The general rule is that liability for authorization only exists where an entity explicitly or implicitly "sanctions, countenances or approves" copyright infringement.[182] Unlike in the United States, therefore, a levy in Canada offers little or no benefit in terms of copyright immunity for firms that manufacture or distribute electronics media or devices.

Communications intermediaries in both Canada and the United States have little to gain in return for a levy. In both countries, there are already "safe harbour" provisions that protect these entities from liability. In the United States, these rules are found in 17 U.S.C. § 512.[183] In Canada, a simpler but nonetheless effective provision is found in § 2.4(1)(b) of the Copyright Act.[184]

It might be suggested that third party targets of levies actually benefit from the existence of exemption/levy schemes. The argument that legalizing private copying increases sales of copying hardware and software is difficult to refute or verify.[185] It assumes first that legalizing an activity will make it more prevalent. Peer-to-peer activities, however, may be influenced more by social than legal norms.[186] Second, it assumes that music copying and blank media are complementary, so that if the cost of copying music (in terms of legal risk and/or social stigma) declines, demand for blank media will rise. Third, it assumes that the increased demand resulting from legalization will be sufficient to off-set the decreased demand resulting from higher prices caused by a levy. Notice the contradictory assumptions regarding elasticity of demand that would be required to support this argument.

And furthermore, even if there were some financial benefit to these third parties, levies entail a substantial administrative burden.[187] Technology and communications firms are simply not in the business of collecting, accounting for and remitting levies.[188]

Levies can also result in significant market distortions by encouraging grey or black markets for levied products. This is a serious concern

181. *CCH v. LSUC*, [2004] 1 S.C.R. at 39.
182. *See CCH v. LSUC*, [2004] 1 S.C.R. at 38; *SOCAN v. CAIP*, [2004] 2 S.C.R. 427 at 84-85.
183. *See* 17 U.S.C.A. § 512 (West 2006).
184. *See* Copyright Act, R.S.C. 1985, ch. C-42 (1985); *SOCAN v. CAIP*, [2004] 2 S.C.R. at 446.
185. *See, e.g.*, Can. Private Copying Collective v. Can. Storage Media Alliance, [2004] F.C.A. 424, 685-687; Copyright Bd. of Can., *Private Copying 1999-2000*, *supra* note 5, at 38; *see also* FISHER, *supra* note 132, at 4.
186. Gervais, *supra* note 134, at 73.
187. Copyright Bd. of Can., *Private Copying 2003-2004*, *supra* note 5, at 25, 56.
188. *See id.*

for all parties affected by Canada's existing private copying levy.[189] The net effect of levies on providers of levied goods and services is unlikely to be positive.

Of course, TPMs can also affect technology firms and intermediaries in various ways. For example, the AHRA includes obligations relating to both locks and levies in the context of digital audio recording devices and media.[190] Not only are digital audio recording devices and media manufacturers required to pay royalties, they must design their products to include Serial Copy Management System (SCMS) copy-controls.[191] Another example of the effect of TPMs on consumer electronics manufacturers was the proposed "broadcast flag." Under this proposal, device manufacturers would have been obligated to make their products compliant with a standard digital rights management (DRM) system designed to control consumers' copying behaviour.[192] Initiatives such as these are usually unpopular. Like levies, they impose additional administrative, design, manufacturing and other unnecessary costs on equipment manufacturers.

Nevertheless, manufacturers and providers of consumer goods and services generally object to the idea of levies. These firms would typically prefer that content creators and distributors utilize TPMs.

C. Consumers

Just as different sorts of creators and copyright owners, as well as electronics firms and communications intermediaries, may have different preferences regarding locks and levies, consumers' reactions to these issues are likely to be mixed. To understand the attitudes of the general population toward locks and levies, it is necessary to differentiate between consumers of *entertainment* and consumers of *electronics*.

Many entertainment consumers, especially consumers of popular music and films, are also electronics consumers who buy products such as iPods and blank CDs. The inverse is also true for some electronics consumers. For example, iPod consumers are also music consumers. However, other types of electronics consumers may not be entertainment

189. Copyright Bd. of Can., *Private Copying 1999-2000*, *supra* note 5, at 58; Copyright Bd. of Can., *Private Copying 2003-2004*, *supra* note 5, at 24-25.

190. *See* McKuin, *supra* note 55, at 325-26.

191. *Id.* at 325.

192. *See* Electronic Frontier Foundation (EFF), http://www.eff.org/IP/broadcastflag/ (last visited Sept. 15, 2006). A broadcast flag is a digital lock placed on digital media that prevents its unauthorized reproduction by consumers using recording devices like VCRs, TiVo, DVD recorders, mp3, satellite radio, and the like. Essentially, the broadcast flag places control over copyrighted works and devices used to record those works in the hands of Hollywood. Unless Hollywood approves the device, consumers will be unable to make legitimate copies of flagged materials. EFF offers a brief video highlighting the dangers posed by the broadcast flag. *See id.* at http://www.eff.org/corrupt/ (follow Corruptibles video link) (last visited Sept. 15, 2006).

consumers. Many consumers purchase blank media for data storage or digital photography. Many consumers use computers and the Internet for research, finance, communication or a long list of things other than entertainment. Furthermore, many purchasers of blank media, computers and Internet access are not consumers at all but businesses, governments and other institutions. Again, diversity within consumers as a group makes it difficult to implement universal policies on locks and levies.

Proponents of digital locks might argue that TPMs and anti-circumvention provisions can offer entertainment consumers more choices for enjoying existing products and, eventually, more products to choose from.[193] The reasoning is that creators and distributors can earn greater profits if they are able to more precisely control the market for their products. Greater profitability increases the motivation to create and willingness to disseminate entertainment products. Not only is this good for creators and distributors, whose profits increase, but, it might be argued, this is also good for consumers, who can choose to enjoy the products created. Also, with TPMs, the market could determine prices that enable more consumers to purchase entertainment products, and could do so more efficiently than was traditionally possible.[194]

Digital locks do have a downside for entertainment and electronics consumers. For one, consumers must tolerate some inconveniences, such as interoperability issues. Sometimes, digital locks present security or privacy issues. The Sony BMG "rootkit" incident was a vivid reminder of the dangers associated with TPMs.[195] Interoperability, security and privacy concerns are clearly matters to be taken seriously, but they are also ones that presumably can and should be addressed with adequate consumer protection laws.[196]

Some critics of digital locks would argue that they do not increase but rather decrease the breadth of content from which consumers may choose.[197] This is because they help to concentrate control over the production of cultural goods and services among a small group of large enterprises. Competition laws may be not be effective to address this issue.

The more problematic aspect of digital locks, however, is the effect they can have on semiotic democracy[198] and a participatory, free cul-

193. *See, e.g.*, Barry B. Sookman, *"TPMs": A Perfect Storm for Consumers: Replies to Professor Geist*, 4 CAN. J. L. & TECH. 23, 29-31 (2005); Michael A. Einhorn, Commentary, *Canadian Quandary: Digital Rights Management, Access Protection, and Free Markets, Progress on Point 13*, THE PROGRESS AND FREEDOM FOUNDATION (2006) at 5, *available at* http://www.pff.org/issues-pubs/pops/pop13.12can_quan.pdf.

194. *See* FISHER, *supra* note 132, at 163–69.

195. *See* deBeer, *supra* note 60, at 95-99.

196. *See id.* at 5-6, 95-97.

197. *See* Sookman, *supra* note 193, at 31.

198. *See* FISHER, *supra* note 132, at 270 (tracing the origin of this phrase to John Fiske).

ture.[199] As Professor Fisher describes it, this is "the ability of 'consumers' to re-shape cultural artifacts and . . . to participate more actively in the creation of the cloud of cultural meanings through which they move."[200] Therefore, for many consumers who are proponents of levy/exemption schemes, the attractiveness lies mainly in the exemption aspect of the *quid pro quo*.

The value of such an exemption, however, depends greatly on its scope. To American consumers, a levy that covers only truly private copying—something just like Canada's private copying levy—would offer few if any benefits. Time or format shifting, archiving backups and personalizing compilations are all likely examples of "fair use" in the United States.[201] Even for Canadians, the value of an exemption for private copying is questionable. A decade ago, when Canada's private copying levy was being considered, the weight of opinion at that time was that distinctions between the American concept of "fair use" and the Canadian law of "fair dealing" meant private copying was clearly illegal in Canada.[202] Recently, however, the Supreme Court of Canada issued a series of landmark decisions about balance in copyright law.[203] A credible argument can now be made that some private non-commercial uses of music are "fair dealing" for the purposes of research or private study.[204] This would render the private copying exemption in section 80 of the Copyright Act redundant in some cases,[205] and call into question the value of a broader exemption/levy scheme for consumers.

On the other hand, a broader levy that covers not just private copying, but also p2p file sharing, would offer some palpable benefits to entertainment consumers. The trouble is that such an exemption would be nearly impossible to obtain in practice. For an exemption/levy scheme to succeed, fundamental and wholesale changes in the existing copyright system would be necessary.

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199. *See generally* LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY (2004).

200. *See* FISHER, *supra* note 132, at 28-31, 184.

201. *See* 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05 (Matthew Bender 1997) (1963); *Sony Betamax*, 464 U.S. at 432-33; *Diamond Multimedia*, 180 F.3d at 1079.

202. Copyright Bd. of Can., *Private Copying 1999-2001*, *supra* note 5, at 59.

203. *SOCAN v. CAIP*, [2004] 2 S.C.R. at 448-49; *CCH*, [2004] 1 S.C.R. at 23-24; Théberge v. Galerie d'Art du Petit Champlain Inc., [2002] 2 S.C.R. 336, 355-56.

204. In *CCH*, the Supreme Court of Canada unanimously agreed that systematic for-profit legal research carried out by tens of thousands of Ontario lawyers is fair dealing. *CCH v. LSUC*, [2004] 1 S.C.R. at 88-90. An individual's downloading activities for the purpose of consumer research, to evaluate a potential music purchase for example, would seem far less objectionable than that. *Id.*

205. The Supreme Court held that reference to specific exemptions is unnecessary if an activity falls within the more general fair dealing provisions. *See CCH v. LSUC*, [2004] 1 S.C.R. at 48-49. The Copyright Board, in contrast, held that the section 80 exemption for private copying relegates the general fair dealing exemption to a second-order enquiry. *See* Copyright Bd. of Can., *Private Copying 2003-2004*, *supra* note 5, at 20-21. At worst, therefore, if the section 80 exemption does not apply (because, for example, the medium is not an "audio recording medium"), the fair dealing provisions may be engaged.

Even then, not *all* consumers would be pleased with a levy/exemption scheme. Although there would be significant benefits to entertainment consumers, we must be careful to distinguish consumers of electronics and communications services. In Canada, the Federal Court of Appeal has acknowledged: "Such a scheme cannot be perfect; it is a rough estimate, involving possible overcharging of some and undercharging of others."[206] Although some users of the product or service in question—blank media, electronics devices, personal computers or Internet access—will engage in the copying or communication activities at the root of the scheme, a great number of others will not.

Some suggest that concerns about cross-subsidization are overblown.[207] But take the following concrete example: All blank CDs manufactured in or imported to Canada are subject to a levy to compensate for the fact that some blank CDs are used for copying music.[208] The Copyright Board found that "80 [to] 90 percent of individual consumers who buy blank CDs do so in some measure for the specific purpose of copying pre-recorded music. Moreover, it appears that over 40 percent of individuals use recordable CDs for no other purpose."[209] However, the highest estimates suggest that of *all* blank CDs bought in Canada, the proportion of blank CDs used by consumers to copy music (as compared to those used by businesses, or for copying data or photographs, for example) is roughly one third.[210] The levy rate is discounted to reflect this fact, but the point remains that purchasers of two thirds of all blank CDs subsidize the few consumers who use these media heavily for copying music. Simply put, the levy has a *much* larger effect on persons who do not engage in private copying than on persons who do.

The over-breadth of Canada's private copying levy is more than just an unfortunate side effect for consumer technophiles. It is a very serious issue for thousands of Canadian manufacturers, retailers and commercial purchasers of goods and services that are or would be levied. Imagine the effect that a levy on Internet access would have on e-commerce or educational uses of the Web. It would be inconsistent with a policy of reducing internet access costs to increase broadband penetration.

If a levy were imposed on digital memory generally, without amending the meaning of "ordinarily" as interpreted by the Copyright Board, the same problem could easily arise with respect to memory

206. Canada's private copying regime was described as such by the Federal Court of Appeal. AVS Technologies Inc. v. Canadian Mechanical Reproduction Rights Agency, 7 C.P.R. (4th) 68, ¶ 7 (2000) [hereinafter *AVS Technologies*].

207. Netanel, *supra* note 133, at 67–74.

208. Copyright Bd. of Can., *Private Copying 2003-2004*, *supra* note 5, at 15, 22.

209. *Id.* at 14.

210. *Id.* The data is insanely confusing, because there are different proportions to consider (including "consumer vs. business purchasers" and within that "music vs. non-music uses") and different statistics for different formats, not to mention conflicting evidence on the accuracy of different figures submitted by different parties.

cards, personal computers, mobile telephones, personal digital assistants or a range of other digital devices. Remember, even the iPod is also a personal agenda, portable data storage device, digital photo album, video player and, perhaps soon, a mobile phone. There is no way to distinguish customers who fill these devices with music from those who do other things. As technological advances lead to increasing product convergence, this problem will only be exacerbated.

The perceived unfairness might be alleviated through carefully tailored exceptions, which can, in theory, turn levies from blunt instruments into precise tools. However, separating the wheat from the chaff is not easy. If Canada's current private copying regime is any indication, things do not bode well for broader levy. The Federal Court of Appeal, affirming the Copyright Board of Canada on this point, recently noted that Part VIII of the Copyright Act contains no legitimate exemptions for the vast numbers of consumers and businesses who purchase blank media for purposes other than private copying.[211] The Court agreed with the Board's insights that there are fundamental problems with the *ad hoc* waiver program that has developed, which is administered unilaterally by the beneficiaries of the levy.[212]

When Canada's levy was first introduced, business and institutional purchasers of blank media, including churches, educators and broadcasters, were upset at the prospect of having to pay substantial levies.[213] To defray possible legal challenges to the scheme from these groups, the Canadian Private Copying Collective (CPCC) created an *ad hoc* scheme where it would consider applications from some purchasers to be "zero-rated."[214] In other words, if a purchaser agrees to certain restrictions, as well as auditing provisions, the CPCC might be willing to waive its right to collect levies from that purchaser. The program is only open to businesses or institutions, not individual consumers.[215] Even for the former, media must be purchased only from authorized distributors, not through ordinary retailers, which has created significant distortions in the chain of distribution for blank media.[216] So far, the private program has not been subjected to any supervision by the courts or the Copyright Board to ensure it is administered fairly and equitably.

In sum, it might be true that some consumers of entertainment products would benefit from DRM systems, if the result is more content and greater choice. Many however, are rightly more concerned about matters such as security, privacy, interoperability, convenience and the concentration of control over production. For these consumers, levies

211. *Id.* at 33-36.
212. Copyright Bd. of Can., *Private Copying 2003-2004*, *supra* note 5, at 24-27.
213. Copyright Bd. of Can., *Private Copying 1999-2000*, *supra* note 5, at 3.
214. *Id.* at 57.
215. Copyright Bd. of Can., *Private Copying 2000-2001*, *supra* note 5, at 16.
216. Copyright Bd. of Can., *Private Copying 2003-2004*, *supra* note 5, at 25.

represent a preferable alternative. However, many purchasers of multi-functional electronics devices or communications services would prefer not to pay levies on account of entertainment products which they never or seldom consume.

IV. COMPROMISES

It is evident that various stakeholders have diverging views on locks and levies. There is even considerable disagreement *within* stereotypical "groups" of stakeholders, such as "creators" or "consumers." Because of the diversity of perspectives no stakeholder is likely to see his/her ideal solution implemented. The polycentric nature of these issues requires trade-offs and compromises.

In fact, Professor Netanel characterizes his Non-Commercial Use Levy (NUL) as a middle ground between "digital lock-up" and "digital abandon."[217] Similarly, Eckersley proposes a virtual market between "information feudalism" and "information anarchism."[218] Professor Fisher suggests his Alternative Compensation Scheme (ACS) as a fair alternative to full propertization or other forms of regulation.[219] Proposals by Ku, Lunney, Litman and others could also be described as compromise solutions.

I would predict, however, that if lawmakers were to give serious consideration to these alternatives, the middle ground would not be these proposals themselves, but a point between these proposals and a scenario even more favorable to major content producers than the status quo. Professor Litman is, in my opinion, absolutely correct in stating:

> As consensus builds around the idea of paid peer-to-peer, it seems increasingly plausible that some legislation will emerge with enough support from the music, recording, computer, and consumer electronic industries to have a fair chance of enactment. I expect that that legislation will include both consumer downloads of music and collective licenses to pay for them. Such a bill is less likely to resemble the proposals advanced by Netanel, Fisher, Lunney, Ku, Gervais, or Lessig, however, than it is to be designed to maintain the current recording and music industry distributors in their market dominant position.[220]

Historical trends support this impression.[221] Often, the pressures of multiparty negotiations yielded rights for one group at the expense of another.[222] However, many times congressional pressure has prompted a

217. Netanel, *supra* note 133, at 83.
218. Eckersley, *supra* note 135, at 92-93.
219. FISHER, *supra* note 132, at 8-10.
220. Litman, *supra* note 133, at 39.
221. LITMAN, *supra* note 76, at 151.
222. *Id.* at 46.

flurry of compromises between the parties at the bargaining table, generating a law with something for everyone.[223]

Professor Netanel suggests that TPMs are incompatible with his NUL.[224] He states that digital content providers would not be permitted to use DRM systems or otherwise sabotage peer-to-peer (p2p) file sharing networks.[225] At least, he argues, consumers would have to be permitted to circumvent TPMs and circulate the tools needed to do so.[226] Eckersley's "virtual market" and Ku's "Digital Recording Act" alternatives are seemingly envisioned as a complete replacement for DRM systems, not a complementary option.[227]

But because of the tremendous difficulties of getting industry incumbents to embrace proposals for radical change, some proponents of broader levy schemes in the United States recognize the possible need to allow individual rights-holders to choose either locks or a levy. Under Professor Fisher's proposal, rights-holders would be free to opt-out of an alternative compensation scheme, and instead continue to distribute copyright-protected content and enforce their exclusive copyrights.[228] Those particular copyrights-holders would, of course, be ineligible to receive revenues generated under the alternative scheme. Presumably, aggregate levy rates may be reduced accordingly, and consumers' rights might depend on whether the work was included within the scheme or not. Professor Lessig likewise contemplates an alternative scheme complementing the existing system.[229] He specifically mentions how Professor Fisher's plan need not interfere with innovative businesses like Apple's iTunes Music Store.[230] As long as there are few limitations on what one is allowed to do with the content, he suggests that these alternatives can co-exist.[231] Similarly, Professor Lunney suggests that private copying could be addressed through a combination of weak encryption technologies, an honors system *and* a limited tax on copying devices and storage media.[232] Professor Litman also contemplates the simultaneous use of locks and levies. She would allow rights-holders to use TPMs to restrict access and copying, but would require that such files be uniformly identified, for example by a ".drm" extension.[233]

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223. *Id.* at 46-47.
224. Netanel, *supra* note 133, at 40-41.
225. *Id.* at 34-35, 40.
226. *Id.* at 40.
227. Eckersley, *supra* note 135 at 92-93; Ku, *supra* note 133, at 312-13.
228. FISHER, *supra* note 132, at 247-48.
229. LESSIG, *supra* note 199, at 301.
230. *Id.* at 302.
231. *Id.* He does not mention, however, the fact that Apple's business model relies heavily on TPMs restricting copying, remixing and, most importantly for Apple, interoperability. *Id.*
232. Lunney, *supra* note 133, at 910. If he had to choose, however, he would choose levies over locks. *Id.* at 911-12.
233. Litman, *supra* note 133, at 47.

Professor Yu notes that because different models have both benefits and limitations, "[t]he best system for policymakers to adopt may therefore involve a combination of these proposals."[234] He also notes that "the industry must be prepared to migrate from one regime to another, or even to adjust to living with many different regimes at the same time."[235]

No doubt it is correct that the best solution might be a hybrid of various possibilities. After all, copyright law already contains a mix of different rules providing for exclusive rights, protections for TPMs, compulsory and voluntary collective licensing regimes and levy schemes. The applicable framework may depend on the type of work at issue, for example a literary work or a sound recording, or the particular use being regulated such as a public performance or private copying.

However, the number of different copyright rules is one thing that makes the present copyright system so problematic. Canada already has too many copyright collectives.[236] In the United States (and elsewhere) it is extraordinarily difficult to understand, let alone navigate, the rights-clearance process for making music available online.[237] This overwhelming complexity stifles innovation. It is economically inefficient. Indeed, it is one of the reasons scholars have called for a new model.

While some in the United States have called for the phasing *in* of levies as an alternative to locks, valuable lessons can be learned from European and Canadian attempts to phase them *out*. There is a real danger that *alternative* compensation schemes will in practice become *additional* compensation schemes. This leads to a troubling problem of double-billing consumers.

Consumers can easily find themselves caught in the middle of a copyright regime that prohibits the circumvention of DRM systems in order to access or copy digital content, but at the same time mandates levy payments to compensate for copying that either cannot occur or is already licensed. Consumers can pay for the same activity two or even three times over. For example, someone who purchases a song from Apple's iTunes Music Store contractually acquires the right to make certain private copies of the track. They are expressly entitled to "burn" and "export" tracks "for personal, non-commercial use."[238] Even aside from these contractual terms, this activity may be fair use or fair dealing. Yet this consumer would pay for the same activity through a TPM-enforced

234. Yu, *supra* note 133, at 739.

235. *Id.* at 740.

236. *See* Daniel Gervais & Alana Maurushat, *Fragmented Copyright, Fragmented Management: Proposals to Defrag Copyright Management*, 2 CANADIAN J.L. & TECH. 15, 18 (2003), *available at* http://cjlt.dal.ca/vol2_no1/index.html.

237. Lydia Pallas Loren, *Reflections on Tasini and Beyond: Untangling the Web of Music Copyrights*, 53 CASE W. RES. L. REV. 673, 700-01 (2003).

238. *See* iTunes Terms of Sale (Oct. 10, 2005), http://www.apple.com/legal/itunes/ca/sales.html.

license and through a private copying levy. Furthermore, there is a danger this consumer could still infringe copyright laws by engaging in certain ancillary activities. We've seen from the Canadian experience that this can be a problem even if the levy is ostensibly technology-neutral.

Double-dipping in this manner is likely to cause resentment amongst consumers. This may ultimately jeopardize the viability of the levy scheme. Consumer hostility toward industry tactics could also undermine the implementation of creative new business models. In other words, locks and levies undermine each other.

The European Community's Copyright Directive tries to have it both ways—simultaneously encouraging the adoption of DRM systems and levy schemes to deal with private copying. The Copyright Directive expressly references the need for levies to take "account of the application or non-application of technological measures."[239] The Copyright Directive, however, contains few clues as to how exactly member states are to implement this instruction.

A team of experts led by Professor Bernt Hugenholtz has studied this aspect of the Copyright Directive closely.[240] They concluded that it would be most appropriate to phase out levies as TPMs become available, as opposed to actually applied.[241] The availability of TPMs would be based upon an assessment of whether they can be both realistically and legally applied in the marketplace.

However, despite the fact that TPMs *are* prevalent in the marketplace—take most online music stores for example—no member state has yet taken account of this. Although music sold through Apple's iTunes Store is protected with the FairPlay DRM system, many European countries nevertheless impose a levy on iPods.[242] Likewise, the levies on blank media such as CDs have been calculated without regard to the extent to which TPMs either license private copying or make it impossible.

A similar situation nearly materialized in Canada, without study or any public consultation on the issue. As explained above, in 2005 the Government of Canada tabled Bill C-60, which would have put specific anti-circumvention provisions into Canadian copyright law.[243] Recall that Bill C-60 would have prohibited circumvention *only* for the purposes

239. COPYRIGHT DIRECTORATE, THE PATENT OFFICE, DEPARTMENT OF TRADE AND INDUSTRY, EC DIRECTIVE 2001/29/EC ON THE HARMONISATION OF CERTAIN ASPECTS OF COPYRIGHT AND RELATED RIGHTS IN THE INFORMATION SOCIETY 48 (2002).

240. Hugenholtz et al., *supra* note 7, at 46.

241. *Id.*

242. Josiane Morel, Gov't Affairs Manager, Address at Government Affairs: DRM and Copyright Levies (Apr. 6, 2005).

243. Canadian Heritage, Copyright Reform Process, (July 10, 2006), http://www.pch.gc.ca/progs/ac-ca/progs/pda-cpb/reform/index_e.cfm.

of infringing copyright.[244] Recall also that, under Canadian law, private copying of sound recordings is not an infringement.[245] One might think, therefore, that circumventing TPMs for the purpose of private copying would have been permitted.

But Bill C-60 would have allowed circumvention for all non-infringing purposes *except* private copying under section 80.[246] This reservation—that one cannot circumvent to copy for private use—was somewhat mysterious. It would have prohibited consumers from making private copies even though they paid for the right to do so through the levy. In effect, this would have allowed the music industry to be remunerated for copies that individuals cannot make or have already paid for.

The only possible explanation is that the government was depending on the Copyright Board to factor this into consideration when setting the levy rate. Unfortunately, given the lack of consultation or explanation, we can only speculate as to the Canadian Government's intention. Although Europe's Copyright Directive has its problems, at least it contains *some* direction on this issue.[247]

Prior to Bill C-60, the Copyright Board of Canada had, in fact, demonstrated its own intention to phase out Canada's existing private copying levy.[248] The formula adopted by the Board for setting the levy rate contains a calculation recognizing that technological measures allow some consumers to pay directly for private copying rights.[249] As the practice of using TPMs becomes more widespread, the Board may be willing to reduce levy rates accordingly, perhaps eventually approaching zero. To be clear, however, there is no guarantee that this will happen.

Furthermore, unlike the Copyright Directive, the Board's calculation only takes account of the extent to which TPMs are actually *used*, not merely available. Hugenholtz and his team predicted that this undertaking "will prove to be a fruitless and frustrating exercise, in view of the non-linear relationship between content, technical protection measure, media, equipment and levy, and absent any baseline to measure the 'degree of use' against it."[250] According to them, it would have been better

244. Parliament of Canada, Bill C-60, An Act to Amend the Copyright Act § 27, (June 20, 2005), http://www.parl.gc.ca/38/1/parlbus/chambus/house/bills/government/C-60/C-60_1/C-60_cover-E.html.

245. Copyright Act, R.S.C. 1985, ch. C-42, § 80.

246. Can. H. Commons Bill C-60 at § 27. It would have been permissible to circumvent TPMs to exercise private copying rights granted by other sections of the Act, such as the fair dealing provisions in section 29.

247. Hugenholtz et al., *supra* note 7, at ii.

248. House of Commons of Canada, Bill C-60 An Act to amend the Copyright Act § 27, (June 20, 2005), http://www.parl.gc.ca/38/1/parlbus/chambus/house/bills/government/C-60/C-60_1/C-60_cover-E.html.

249. Copyright Bd. of Can., *Private Copying 2003-2004*, *supra* note 5, at 62.

250. Hugenholtz et al., *supra* note 8, at iv.

to adopt "a more sensible and workable interpretation, which is inspired by economical and practical considerations."[251]

In general it seems as if the Government, through Bill C-60, and the Copyright Board, in its recent decisions, have created a hierarchy whereby protection for technological measures is more important than the conceptual or practical integrity of the private copying scheme. In doing so, Canadian policy makers have apparently expressed a preference for technological measures over private copying levies as a solution to some of the problems of the digital music market.

The compromises concerning locks and levies struck under the European Copyright Directive are unfortunately typical in an era of copyright compromises. The failure of the Canadian Government to engage in a coordinated study of the relationship between locks and levies is also symptomatic of attempts to broker deals on particular issues. There is a risk that American lawmakers attempting to implement law reform proposals to deal with private copying and p2p will fall into a similar trap. Simultaneously using locks and levies to address these issues most seriously affects consumers, who can easily find themselves paying levies to compensate for copying that either cannot occur, is already licensed or is or ought to be fair use/dealing. Policymakers should be aware of this concern in order to minimize inconsistencies and incompatibilities when responding to the challenges of private copying and p2p.

251. *Id.*