ONLINE MUSIC 2007

15TH ANNUAL FORDHAM CONFERENCE ON INTERNATIONAL INTELLECTUAL PROPERTY LAW AND POLICY

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INTRODUCTION

This paper will outline the situation in Canada regarding "online" music in this author's view, along with some observations on the overall international scene. In the spirit of disclosure, I should point out that I have at various times acted for and against parts of the music industry. Lately, I have fought on behalf of various clients against private copying levies and against the attempts by the major record companies to sue alleged P2P downloaders and file sharers in Canada. I also wrote a an amicus brief for KaZaA in the Grokster litigation in the U.S. Supreme Court. However, the view presented in this paper or in my presentation are strictly my own.[1]

1. THE OVERALL CANADIAN SITUATION

a. The Collectives

The major traditional collectives representing composers, authors and publishers who have an interest in online music are:

i. SOCAN - for composers, authors and publishers. This is the counterpart of ASCAP + BMI + SESAC. There used to be two such collectives in Canada, but they were allowed to merge in 1990.
ii. CMRRA - The Canadian Musical Reproduction Rights Agency is the counterpart of Harry Fox in the USA
iii. SODRAC is roughly the French Canadian counterpart to CMRRA
iv. CMRRA/SODRAC have combined for certain purposes as CMRRA/SODRAC Inc. or CSI.

Canada now has neighbouring rights - therefore, performers and producers want to be paid for everything online. Enter the NRCC (Neighbouring Rights Collective of Canada).

b. The Private Copying Levies

Canada has a private copying levy - which has generated probably close to $200 million since 1999. The figures for 2006 have not yet been publicly reported. This is collected by the Canadian Private Copying Collectives[2], which is a collective of music industry collectives. I mention this levy scheme because it is the elephant in the room of Canadian copyright, in many respects and has a profound impact on copyright issues affecting the music industry in Canada.

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[1] Some of this material previously appeared in my blog at www.excesscopyright.blogspot.com

[2] www.cpcc.ca

The levy scheme has effectively legalized P2P downloading.[3] This is because Part VIII of the Canadian Copyright Act provides a quid pro quo. In exchange for the levy scheme, private copying is legal - and the Copyright Board has indicated that it doesn't matter where the copy comes from, or whether the CPCC has chosen to ask for a levy on the particular medium which is being used to make the copy. So - in other words - copies made onto CDs are clearly legal because there is a levy on CDs. Copies made onto PC hard drives are very likely legal because the CPCC could probably ask for and receive a levy on PC hard drives.[4] They have refrained from doing so for blatantly obvious practical and political reasons. The interesting gray area concerns things like iPods - which the Federal Court of Appeal has clearly ruled cannot be levied because they are devices and not "media" and are therefore outside of the scope of the levy legislation. However, the Court has gone further and suggested in *obiter dicta* that making copies on iPods may be infringing because an iPod does not fall within the definition of "blank audio recording medium." [5]

In any event, the levy scheme is very controversial even within the music industry. It, along with Canada's privacy legislation, has made it more difficult for CRIA to proceed in mass RIAA-type litigation. I say difficult, but not impossible. If CRIA were to put forward sufficient and reliable evidence that is not blatant hearsay (in contrast to the evidence that they used in the unsuccessful attempt), it might well succeed, at least against file sharers.[6] But CRIA has chosen not to press forward and has used its partly self inflicted loss in Canada as a means of attempting to convince law makers that it needs much tougher DMCA type legislation in Canada. Only time will tell is this strategy will succeed.

So - for the moment - there are no law suits against individuals underway in Canada for P2P activity - and no tactics such a deposition of a 10 year child a disabled mother living off medical

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3 See my discussion on the ***BMG v. Doe*** trial level and appeal decisions, wherein the Federal Court of Appeal stopped short of reversing in substance the much commented upon findings of the trial judge. http://www.macerajarzyna.com/pages/publications/BMG%20Case%20-%20E-Commerce.pdf

4 http://cb-cda.gc.ca/decisions/c12122003-b.pdf pp. 20 -21.

5 ***Canadian Private Copying Collective v. Canadian Storage Media Alliance et al,*** (2004) [2005] 2 F.C. 654, (2004) 36 C.P.R. (4th) 289 para. 147.

6 The ***BMG v. John Doe*** litigation in the Federal Court and Federal Court of Appeal is analyzed from various points of view in (2005-06) 6 I.E.C.L.C. which is availabe online at http://www.macerajarzyna.com/pages/publications/BMG%20Case%20-%20E-Commerce.pdf

benefits who was seven years old when the alleged infringement took place.[7] And no law suits against 12 year girls living in subsidized housing.[8]

The next major round in the levy controversy will be CPCC's recent attempt to impose a $75 levy or "tax" as it is commonly called on iPods, Zunes and other MP3 players. The Federal Court of Appeal clearly ruled in 2004 that this was not possible[9] and leave to appeal was denied by the Supreme Court of Canada in 2005. However, the CPCC is back attempting to do exactly the same thing in 2007. This would appear to be a clear instance of "res judicata." In anticipating this point, the CPCC announced at the time of publication of the proposed tariff to have an opinion to the contrary from its law firm - but has not seen fit to publish it.

The next levy round will also include an attempt by CPCC to impose a $10 levy on flash memory cards, which by its own figures are only used at most about 20-25% for the reproduction of music - and I suspect that the actual figure is only a fraction of this fraction. And much of that music has already been paid for at least once already, especially if the card is in a cell phone or an MP3 player.

Finally, the private copying levies are a major complicating factor in copyright reform in Canada. The potential that Canadian WIPO treaty ratification will result in a doubling of the cost of the levies and outflows of hundreds of millions of dollars due to the national treatment requirement of the WPPT is an acknowledged issue and a major complication in the revision process. Everything would be much simpler if the levies were repealed - which Canada's New Government pledged to do in its March 19, 2005 Policy Declaration[10] before the election in which it gained power - at least the power of a minority government. The Policy Declaration also promised to "*to continue to allow an individual to make copies of sound recordings of musical works for that person's personal and individual use*."

2. CURRENT AND PENDING ONLINE TARIFFS IN CANADA

a. SOCAN Tariff 22 - Phase I

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7 Atlantic v. Andersen (Oregon) http://recordingindustryvspeople.blogspot.com/search?q=kylee+andersen

8 http://news.com.com/RIAA+settles+with+12-year-old+girl/2100-1027_3-5073717.html

9 ***Canadian Private Copying Collective v. Canadian Storage Media Alliance et al,*** (2004) [2005] 2 F.C. 654, (2004) 36 C.P.R. (4th) 289 para. 164.

10 http://www.conservative.ca/media/20050319-POLICY%20DECLARATION.pdf

In 1995, SOCAN started out on what it calls Tariff 22 - which was an application to the Copyright Board to get paid for the use of music on the internet. The Board early on wisely bifurcated the hearing into legal and quantum issues. Some but by no means all of the legal issues were finally determined by the Supreme Court of Canada in 2004.[11] That decision held that ISPs as such are off the hook in their capacity of passive carriers of content and can rely on a particular exception in the legislation for the caching activity as a necessary aspect of providing the means of communication by telecommunication. In fairness to SOCAN, it appears that the issue of liability for caching arose from the bench in the Federal Court of Appeal - but, however if arose, it became the focus of a very complex appeal and resulting decision from the Supreme Court of Canada.

In what may prove to be the most complex legacy of the initial round of Copyright Board hearings, and the resulting litigation, the Supreme Court of Canada held that liability could arise to SOCAN in Canada for activity abroad, thereby injecting an element of extraterritoriality into Canadian copyright law:

> [60]...A real and substantial connection to Canada is sufficient to support the application of our *Copyright Act* to international Internet transmissions in a way that will accord with international comity and be consistent with the objectives of order and fairness.
>
> [61] In terms of the Internet, relevant connecting factors would include the *situs* of the content provider, the host server, the intermediaries and the end user. The weight to be given to any particular factor will vary with the circumstances and the nature of the dispute. [12]

However, even after all of this, we still do not know definitively what the problematic phrase "communication to the public by telecommunication" means in Canada in terms of various architectures and modes of "online" delivery.

b. Ringtones - Decision of August 18, 2006

The "communication by telecommunication" issue could and perhaps should have been addressed squarely but was not even substantively dealt with in the Copyright Board's decision last August 18, 2006 on Ring Tones.[13] The reason it was not addressed was that the objectors to the tariff inexplicably conceded that the delivery of ring tones to members of the public involved

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11 ***SOCAN v. CAIP,*** 2004 SCC 45.

12 ***SOCAN v. CAIP,*** 2004 SCC 45, paras. 60, 61.

13 http://cb-cda.gc.ca/decisions/m20060818-b.pdf

a "communication by telecommunication."[14] They did not concede that it was to the public. Now, on judicial review, the objectors have changed counsel and raised this argument for the first time. Again, in the spirit of disclosure, I had raised this argument at an earlier stage of the hearing, but my client, then known as MOVISO - the largest supplier of ring tones at the time - withdrew from the hearing, as have other large entities since then on other files at the Copyright Board. However, that is another story. It will be interesting to see how the Federal Court of Appeal deals with this new issue that is now being raised for the first time at the judicial review stage.

Further, re ringtones, back on August 22, 2006 I wrote on my blog:

> *1. It's not obvious that any or all of the various methods of delivering ringtones to customers involve a "communication to the public by telecommunication". The remaining objectors conceded that there was a "communication by telecommunication" of a musical work - but disputed whether it was "to the public", which is indeed an arguable point. The objectors' strategy was to argue that the communication was not "to the public" - and, alternatively, if there was liability, the "communication" aspect is purely incidental to the reproduction right and should thus be valued accordingly.*
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> *2. But, actually, it's not clear that the provision of ringtones to customers in the various ways that this is normally done even involves "communication" or "telecommunication" at all. There are many ways of moving music around on the internet - and it is arguably erroneous to lump them all together as "communication" or "telecommunication" or both. For example, the transmission of a digital file that must be stored and may later be performed as a musical composition is arguably not the same thing at all for copyright purposes as real time on demand streaming that cannot be stored for later retrieval and amounts, in effect, to on demand radio or webcasting.*
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> *3. The problem with this decision lies in the result that effectively conflates and perhaps even confuses the communication right with the reproduction right. This goes back to the Board's 1999 decision in SOCAN's Tariff 22. Whether or not this should have been challenged following the 1999 Tariff 22 decision, or whether it should have been raised in this instance is a matter upon which reasonable minds may disagree. But the result, unless reversed, will likely compound the imposition of multiple layers of payment to multiple claimants for multiple rights involving the same activity and transaction. The concept of "double payment" will likely become "triple" or more.*
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> *4. Thus, ringtone users will eventually be making payments potentially for the communication right, the performance right, and the reproduction right to potentially three categories of claimants who sometimes wear multiple hats - composers/authors and their publishers, record producers and performers. The same will hold true for online*

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[14] Ibid. p. 4.

music - i.e. iTunes.

5. In fact the Board itself even seems to hint in para. 12 of its decision that SOCAN could file a tariff for the "performance in public" of a ringtones, which would compound the multi layering problem to a new level, i.e.

> *SOCAN has not filed a tariff for the performance that may occur when a ringtone is played in a public setting. (Emphasis added)*

6. The Board does more than hint in paragraph 7. It virtually lays down the red carpet for the recording industry to come and claim their share of the pie in respect of master tones (i.e. recorded performances).

7. Is this what Parliament intended? One would hope not. This would be the antithesis of efficiency and even the music industry has mixed feelings about it - witness the opposition even of CRIA to SOCAN in this hearing and to the music publishers in the CSI hearing on online music starting on September 6, 2006.

8. Even the Copyright Board cannot make the internet cash pie expand forever, and the current and future internecine battles in the music industry are mostly about how large the pie can grow and how it will divided before the growth boom finally gets corrected.

9. Note that composers and authors have always been paid for ringtones obtained though Canadian wireless providers or any other "authorized" sources, and access is tightly controlled in Canada. The essence of the transaction involves a reproduction - which has already been taken into account in the "behind the scenes" licensing. The question is how many more times and to how many more parties is the Copyright Board going to allow payments to be made? SOCAN doesn't control reproduction rights here. But it represents the same composers, authors and publishers who do. If the Copyright Board is correctly interpreting the law, is Parliament going to stand by and let this multiple payment game continue?

10. This would not surprise me. The policy of Canadian Heritage is to support collectives in a variety of ways, including subsidies and legislation that creates new rights and the possibility of new tariffs and ever increasing revenues. Many of these officials probably see the prospect of multiple payments to multiple collectives for the same transaction as a good thing. Collectives do indeed serve an essential function - if not encouraged to excess. But the danger of the Canadian Heritage approach is that it appears to exemplify the old fallacy that that, if copyright is good, more of it must be even better. Lest we forget, we are dealing with the collective exercise of monopoly rights.

11. It was exactly this type of multiple payment problem arising from then new

technology ("talking pictures") that led Parliament back in the 1930's to put the brakes on SOCAN's predecessor by establishing the predecessor of the Copyright Board.

12. The result of this decision is another blow to the concept of technological neutrality, as some would define it. Why should the efficient transfer of a file over the internet trigger copyright liability for "communication" by "telecommunication" when the provision of the same file by much less efficient physical means (e.g. sending a CD by snail mail) does not? Quite apart from the spectre of multiple payments and layering, this amount to a tax on efficiency. It could also spread to other businesses, even beyond the music business. If the Board is right, then it would presumably follow that e-books involve the "communication" of literary works. But I shouldn't give Access Copyright ideas.

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15. On the communication point, it strikes me that the Board hung its hat mainly on one word - the word "might" - from an obiter dicta passage in the Supreme Court of Canada's decision in CCH v. LSUC. In that passage, Chief Justice McLachlin said that:

> *I agree with these conclusions. The fax transmission of a single copy to a single individual is not a communication to the public. This said, a series of repeated fax transmissions of the same work to numerous different recipients might constitute communication to the public in infringement of copyright. However, there was no evidence of this type of transmission having occurred in this case.*
>
> *(Emphasis added)*

16. The Supreme Court was not concerned in that case with the niceties of the various architectural permutations of how things happen on the internet, and the Copyright Board appears not to have delved too deeply even in this instance into how ringtones find their way from a composers' pen to the intrusive and usually distorted cacophony that we too often hear during quite meditative moments at the opera or in funeral parlours.

17. Moreover, a fax "transmission" - note that the Chief Justice does not necessarily equate the word "transmission" with the word "communication" - results immediately in something that is directly readable by the recipient. The transmission of a ringtone file does not immediately result in the conveying of any information - much less music - to any person. It must get properly loaded into the handset, paid for, selected, and is later activated only when the cell phone "rings".

18. Nor, with respect, should the Copyright Board put too much reliance on paragraph 42 of the SOCAN v. CAIP decision in which Justice Binnie agreed with the Board that "a

telecommunication occurs when the music is transmitted from the host server to the end user." There is a potentially big difference between "the music" being "transmitted" and a file being copied that only later can be heard as music when it is played on a device. This may sound picky and even akin to sophistry - but that's the nature of history of copyright law, which has always focussed on legal and technological niceties.

19. It appears that the objectors may have indirectly broached the "communication" point indirectly by arguing that the Board was really seeking to impose a "making available" right - which is required by the 1996 WIPO WCT treaty. But - as everyone knows - Canada has notably NOT YET ratified this treaty. And even if Canada does, the scope of the "making available" right is very uncertain and Canada would be wise to implement it in the most narrow and careful possible fashion. Ironically, the cursory 1998 analysis by Johanne Daniel and Lesley Ellen Harris, upon which the government relied for so long, concluded, without any stated reasoning, that Canada already complied with the WIPO WCT treaty in respect of the required "communication right" that included "a making available" right for composers and authors. The debate about whether Canada does or does not already have a "making available" right evidently is far from over. Some will see this decision as effectively confirming that we do, even if the Board says that we don't.

20. The rate calculation issue will be even harder to review - the Federal Court of Appeal is very reluctant to interfere with the fact finding/evidentiary aspect of any tribunal's work. Much of the evidence was treated as confidential - which may be just fine for the parties, including interests not present, although this leaves the public very much in the dark. Consider the expurgated final conclusion, which will cause considerable frustration to anyone trying to understand what the Board was trying to say here:

J. Ability to Pay[127] The Canadian ringtone market has grown very quickly in recent years. Mr. Sone estimated the revenues generated by ringtone retail sales in2004 to be over $15 million, and predicted that revenues might reach $30 million in 2006. In addition, the costs associated with the production and sale of ringtones seem to be quite low. Those figures, which were not challenged by the objectors, are indications of a financially sound industry. Moreover, the rate we have set is low enough not to lead to XXXXXXXXXXXXXXXXXX in the ringtone market. In other words, larger than the XXXXXXXXXXXXXXXXXXXX amount of the royalties that will actually be paid. There should therefore be no consequence on market prices.

(Footnote omitted)

XXX = expurgated by the Board

21. This is a highly unusual way to conclude a decision of this importance that will set

the stage for much to come in the future. Look at the actual decision - it at least indicates the amount of space of the expurgated portions.

22. Interestingly, the rate arrived at by the Board after 14 months of consideration ends up being effectively the average of the rate proposed by SOCAN (10%) and the rate proposed by the objectors (1.5%). The exact arithmetic average would have been 5.75%. The Board ends up with 6%, although they have an admittedly more complex way of getting to that conclusion.

23. It is difficult to guess whether there will be judicial review. We'll know by September 18, 2006. Depending on how one reads between the lines, so to speak, of the final paragraph, the 6% solution may not cause immediate serious pain to any of the remaining objectors. The Board seems confident that "There should therefore be no consequence on market prices." - for reasons that must remain confidential. We shall see. That's a lot for the Board to assume, especially when the impact of the inevitable future multiple layer ringtone tariffs becomes apparent.

24. The public interest factor in this case may not be as obvious as in some other Board decisions. If kids want to spend lots of money on ringtones and buy new ones every week in order to be "cool", that is their decision - and it may annoy their beleaguered parents who will foot the bill. Clearly, this is discretionary spending. The real public interest lies in the legal and rate making precedents that are being set here.

25. The absentee proxy for the public interest - who is mandated by law to watch out here - is the Commissioner of Competition - who has basically never become involved in Board matters, even though there are many situations where such involvement might may be warranted. Moreover, the Board itself could and arguably should look out more for the public interest and play a more pro-active inquisitorial role. Instead, it treats most proceedings as adversarial. In the result, the administrative law process is often more adversarial than actual litigation.

26. If there is no attempt at judicial review, it may be because there is no immediate and direct cost/benefit advantage to any of the objector parties. If so, this will not be the first time that the public interest has been left behind by a simple cost/benefit analysis by the objectors and the unwillingness of the Board or the Commissioner of Competition to fully pursue their roles in the guardianship of the public interest.

27. The real danger is that this ruling on communication to the public by telecommunication will serve as a springboard - both legally and in terms of a quantitative proxy - for the forthcoming attempts by SOCAN and the music publishers and eventually others to add large amounts to the cost of online music obtained from iTunes, and other internet music modes, etc. The current 6% solution is far from a "low" rate. Given the size of the ringtone industry, it will be a lot of money and an important

precedent and building block in other files to come.

28. It is not known why it took the Board 14 months to render this decision. Meanwhile, the CMRRA/SODRAC ("CSI") attempt to add 15% to the cost of online music is about to start hearings on September 6, 2006 and will hopefully confront some of the "double payment" issues that are now looming larger than ever. That hearing is based upon the reproduction right. The SOCAN attempt to ratchet up the price of paid downloads by 25%[15] based upon the allegedly applicable communication right is lurching along at full speed - albeit with several notable drop outs - including clients of mine once again. The SOCAN hearing in particular stands to be profoundly effected if there is successful judicial review of the current decision.

29. Finally, it's frankly disappointing that the full Board did not hear this case. We had the benefit of the Chairman's presence (he is a Court of Appeal judge from Saskatchewan). However, two of the most experienced Board members did not sit on this matter, which is potentially one of the most important that the Board has heard in a very long time.

Since I wrote the above[16], the judicial review process is well underway and the memoranda have been filed. The issue concerning "communication" has indeed been raised.

In fact, this is how I compared the Canadian ringtones decision to the American one,[17] which followed shortly thereafter, on my blog on October 18, 2007:[18]

Ringtones REDUX - US & Canada compared

Here's an update of my earlier posting and a brief take on yesterday's American decision.

The US Register of Copyrights has just rendered a very important decision on ringtones, which can be found here. The proceeding was commenced on August 1, 2006. After written submissions received on September 14, 2006 and a brief oral hearing on October 4, 2006, she yesterday issued a detailed 35 page single spaced decision with 137

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15 http://cb-cda.gc.ca/tariffs/proposed/ma20052006-b.pdf p. 14

16 http://excesscopyright.blogspot.com/2006/08/ringtones-observations-on-6-solution.html

17 http://www.copyright.gov/docs/ringtone-decision.pdf

18 http://excesscopyright.blogspot.com/2006/10/ringtones-redux-us-canada-compared.html

footnotes, one of which refers to the recent Canadian decision on a small point. Bill Patry has a good analysis of the decision on his blog.

Here's my quick take on a very complex and very important decision, from Canada's standpoint:

Canadians should note:

1. Providers of ringtones in the USA may avail themselves of the compulsory license regime found in s.115 of the US Copyright Act. Canada, probably unwisely, abolished the compulsory mechanical licensing regime for musical works in 1988. Not only has the USA retained its compulsory license for mechanical reproductions - but has created a new compulsory license regime in the form of the Digital Performance Right in Sound Recordings Act of 1995, which was held to apply in most cases to the provision of ringtones as songs or portions thereof as a "digital phonorecord delivery" or "DPD". The argument that the compulsory license applies only to a whole song and not a portion thereof was rejected. Generally speaking, it appears that there will be a one stop shop mechanism for ringtone providers to get a compulsory license for monophonic, polyphonic and mastertone ringtones, except in the presumably rare case that a ringtone comprises sufficient originality to be a "derivative work" under American law, or is an newly created composition and recording never before distributed to the public.

2. Although the actual rates are not yet determined, they will likely be MUCH lower than in Canada - where a initial 6% solution was imposed (essentially half way between SOCAN's number and the objectors' number). And Canada has not seen the end of ringtone tariff costs, because the 6% goes to SOCAN and the other "colleges" of rights holders will soon want their piece of the pie in addition.

Some points worthy of note:

• Not everything about US copyright law is bad. Au contraire. This decision illustrates an example of what is good about it - namely it is much more technologically neutral in the result than we see in Canada in this instance. It may turn out as well that that Congress saw more clearly into the digital future in 1995 in some respects than Canada has yet managed to do. Canada is still grappling with some of the less desirable last century aspects of US law, such as the DMCA - while ignoring what is sometimes better and more prescient about US copyright law.

• The Copyright Office has shown its ability to deliver a very learned decision very quickly. The process - which involved referral of a question of law by the Copyright Royalty Board to the Register of Copyrights - started on August 1, 2006 and resulted in the ruling of October 17, 2006 - less than three months. The lengthy delay of 14 months in the rendering of the Canadian ringtones decision - this following a two year lead up of

preliminary matters - will have a ripple effect on other Board hearings, especially since the Canadian decision is now the subject of judicial review and could be overturned. To be fair, the Canadian Copyright Board heard a lot of factual evidence that was apparently not dealt with in the American proceeding which was on certain legal issues only, and has determined a rate - which also has not yet happened in the USA.

• But it should be asked whether Canada's Copyright Board should bifurcate more often. Not every instance will turn out to be as much of a problem as Tariff 22. In fact, an early determination of some of the obvious legal questions in de novo tariffs - based upon a minimum evidentiary record if indeed needed - might save a lot of time and money overall. In some cases, tariffs have been so poorly conceived that the Board ought to find a way at the outset to say "try again next year" - and save everyone a lot of bother.

• The American case illustrates the ongoing complexities and ironies of internecine warfare in the music industry. However, Congress and the Copyright Office appear to have a good understanding of how this works. One can only smile that the RIAA also has been caught, yet again, sucking and blowing. It often deplores the concept of compulsory licenses when it is on the receiving end, but is apparently quite happy to take advantage of them when it suits its needs.

• The American decision is expected to result in falling prices to consumers in the "mobile industry" - whereas Canadian prices are clearly heading upwards due to high and layered tariffs.

• This decision illustrates by contrast that Canada has a much more costly and complex system. That seems to be the Canadian way. This renews the question about whether or not the Canadian Board can or should do something to stop this costly and complex layering of tariffs. Paying much higher tariffs overall to more parties in Canada - when most of the money will go the USA and Europe anyway - is not very obviously in Canada's national interest, to say the least.

• Do we need another judicial commission to sort out what the bureaucrats, Parliament and the Copyright Board are all unwilling or unable to confront?
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c. CSI ONLINE DECISION - MARCH 16, 2007

CSI (roughly the equivalent of the Harry Fox Agency) sought a tariff for online music based on permanent downloads, limited downloads and on-demand streams. The CSI decision has recently been rendered by the Copyright Board on March 16, 2007.[19] This matter was heard by

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[19] http://cb-cda.gc.ca/decisions/i16032007-b.pdf

the Board in September, 2006 and the decision was rendered approximately 6 months later in accordance with the new benchmark announced by the Board's Chairman in a speech last year. The 6 month benchmark is based upon a comparison the Judge made in a recent speech with the pendency of Supreme Court of Canada proceedings.[20] This is a significant improvement over the 14 months it took to render the Ringtones decision.

This is decision that will not likely provoke much controversy. Although the Board rejected much of the theory advocated by CSI for valuing its tariff rates[21], it gave CSI a goodly proportion of what it wanted in terms of actual numbers. For example, with respect to permanent downloads, which will surely prove to be the most important aspect of this tariff, CSI had asked for 15% of gross revenues with a minimum of 10 cents per download. The Objectors suggested 5.3% and 3.85 cents respectively. In the result, the Board awarded 8.8% of gross revenues with a minimum of 5.9 cents for this category - better than half of what CSI had asked for.

There appears to have been little discussion of legal issues, and in particular the question of double payments. The point of potential overlap with SOCAN's Tariff 22 appears to have been made by the Objectors but dismissed in short order by the Board.[22]

The Copyright Board apparently took a very hands on approach in devising wording for the tariff that it believes will be viable - which involved much communication after the hearing between the Parties and Board counsel. The final tariff wording is very different from what was published initially in the official Canada Gazette. One positive outcome is that the Board declined to incorporate any reference to TPMs or minimum security requirements, noting that Puretracks, a major Canadian provider, has begun to offer DRM-free music.[23]

d. SOCAN Tariff 22 - Phase II

In a few days, on April 17, 2007, the Board will resume hearings on SOCAN's Tariff 22. There will be many uncertainties about this hearing. Mostly, there will be uncertainty about the "communication" right - because that is still pending before the Federal Court of Appeal. There will also be uncertainty because some parties that should be there won't be there - including clients of mine and others.

Here is part of the blog entry I posted on March 2, 2006:

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[20] http://cb-cda.gc.ca/aboutus/speeches/20060823.pdf

[21] In particular, CSI's attempt to use the recently established Mastertone rate as a proxy.

[22] http://cb-cda.gc.ca/decisions/i16032007-b.pdf para. 84.

[23] http://cb-cda.gc.ca/decisions/i16032007-b.pdf at pars. 134, 158.

"Fallout" at the Copyright Board?

Two significant players in Canada's copyright scene have just conspicuously withdrawn in protest from two major Copyright Board hearings. They are Archambault (the Quebec music retailer) and Canoe (an internet portal), which are both part of the giant Quebecor empire. The hearings involved music on the internet. One is the decade old and still inchoate SOCAN Tariff 22 tariff. The other is the CMRRA/SODRAC (CSI) proposed webcasting tariff. Archambault had earlier withdrawn from the CSI proposed online music tariff. Efforts on the part of objectors to somehow consolidate or rationalize these three closely interrelated tariffs have proven fruitless.

In an 8 page letter from their counsel, Me Jean-Philippe Mikus, Archambault and Canoe stated that they had to take:

the least harmful path given the untenable constraints now being imposed on objectors wishing to express their point of view before the Board. Archambault and Canoe are compelled to withdraw because their participation in the Board's proceedings would imperil their key financial information invaluable trade secrets critical technological information strategic information concerning development and marketing plans and projects, and a host of other information in respect of which the utmost secrecy is essential for their survival.

They point out that "…the mere participation in the Board's hearings is in and of itself a very considerable burden on a number of levels. The mass of information that collectives systematically seek to obtain from objectors brings about exorbitant costs both in terms of collecting the information and then processing it."

They suggest:

When collective societies holding monopolies or quasi-monopolies are involved in infighting and then formulate grossly exaggerated claims and multiply instances before the Board, including unreasonable requests for disclosure of irrelevant or marginally relevant highly confidential information, some measure of control must be exercised. The Board should be the first line of defense to avoid that exclusive copyrights established by Parliament and concentrated in the hands of collective societies be an instrument of oppression (to paraphrase Lord Justice Lindley in Hanfstaengl v. Empire Palace (1894) 3 Ch. I09). The experience of Archambault and Canoe leave the bitter impression that the Board is failing at this task and that this failure is already causing extremely serious harm to businesses that have had the courage to jump into untested waters. Significant reform is both necessary and urgent to end the abuses that threaten the very foundation of Canadian businesses offering legal alternatives for the use of music on the Internet. At this stage, it appears that such reforms can only originate from the government or Parliament; it is unfortunate to say that our clients no longer hold out any hope that the

Board is able or wiling to address these concerns.

They conclude by reserving the right to seek judicial review "on the basis inter alia that they have not been given the right, reasonably exercised, to be heard in these proceedings."

While none of this is particularly new to those experienced with Board practice, the letter is a potentially very important development. It was copied to the very long list of objectors in both files and to both Ministers responsible for the copyright file. The current Ministers may prove to be more sympathetic to the concerns of objectors than their predecessors, given this Government's potentially different perspective on regulation and the costs thereof imposed upon business.

The fundamental dilemma is that virtually all objectors have many issues to worry about other than fighting copyright tariffs. And almost all of them balk at the incredibly high costs of pursuing objections, which routinely run into the six figures and can go beyond. Resulting direct financial savings are often hard to quantify since most collectives overreach to an often absurd extent in the initial proposed tariff. For these and many other reasons, the economics of objecting are not alluring to many entities, even though they may be directly affected. And trade associations aren't always the answer. In fact, the sad demise of the CCTA, after so many years of valiant and competent contributions to Copyright Board and appellate jurisprudence, shows the difficulties faced by even the most sophisticated and substantial of objectors.

The collectives, on the other hand, have usually only one purpose on their mind, which is increasing Copyright Board tariffs and lobbying for the statutory rights that make this possible. Their costs are paid for – not surprisingly - from the Copyright Board tariffs that are paid by objectors. The more the collectives spend, the more they make - and vice versa and so on. This is classic asymmetrical warfare, in which a relatively small single purpose and highly strategic entity can win major victories against a much larger opponent.

As the letter points out, it is very difficult for an objector to play a limited role in a hearing. It is basically all or nothing:

The approach adopted by the Board so far is very much akin to an "all or nothing approach. There is simply no way of participating in the Board' s work if a party wishes to both put forward its point of view usefully before the Board and be concerned about the confidentiality of its business information. Parties are expected to be subjected to a full inquiry by collective societies, in the presence of all their competitors. The issuance of confidentiality orders does not justify such inflexibility.

There have been other withdrawals in the past, including MOVISO (for whom I acted),

> *which was perhaps the largest supplier of ringtones in Canada and the world. It withdrew during the interrogatory phase from a major hearing on SOCAN's proposed ringtone tariff, where staggering amounts of money and important legal issues were at stake. The Board and the Canadian public lost the benefit of their participation. ADISQ recently withdrew from the CSI Online Music Services Tariff proceedings. ADISQ is a professional association which represents hundreds of independent Quebec undertakings working in various aspects of the record, entertainment and video industries, including record producers, distributors, publishing firms, performers' managers, entertainment producers, booking agencies, playhouses, video clip production firms, etc.*

There are still many problems with SOCAN's proposed Tariff 22. It is still inchoate and unfocussed. As framed, it can lead to absurd results. Anyone who posts a tiny amount of music is liable for a minimum of $200 a month to SOCAN. That is absurd. Meanwhile, it is going forward.

The Supreme Court of Canada has opened a potential Pandora's box of uncertainty in terms of extraterritorial application of the tariff, as noted above. It will be interesting to see if SOCAN attempts to enforce its potential extraterritorial reach against major foreign providers such as MSN, Yahoo, etc.

It is fairly safe to assume that SOCAN's Tariff 22 quest will continue long into the future before there is any resolution.

Meanwhile, we have no idea what webcasting will cost in Canada. Or how much SOCAN will add to the already existing costs of delivery of a song from iTunes, etc. Or how many more multiple payments we will see for the same transaction.

And SOCAN's Tariff 22 isn't the end of the matter. We have yet to hear from CMRRA/ SODRAC whose Webcasting tariff was withdrawn on March 22, 2006. I assure you that they have not gone away and that they will return.

3. PROS AND CONS WITH CANADIAN APPROACH

The Canadian copyright landscape is probably more akin to a labyrinth and one of the most complex in the world. In the recent CSI hearing, the Board heard from the interestingly named Eddy Cue, head of the iTunes project worldwide for Apple. The Board found that:

> *[58] Mr. Cue compared the way in which iTunes clears rights in Canada, the United States and Europe. In the United States, record labels generally provide all necessary rights for one fee, having secured the right to reproduce the musical*

> *work. In Europe, iTunes must purchase the rights for the sound recording and for the musical work separately, but is able to purchase the right to reproduce and communicate the work in a single transaction. In Canada, iTunes must licence separately the right to reproduce the musical work, the right to communicate the musical work and the right to reproduce the sound recording.*

And even this fails to point out the obvious - that Canada has neighbouring rights and a vast number of active collectives. The complexities in Canada have only started.

Canada has about ten times the number of organized collectives as the USA. And the Government is encouraging this proliferation.

This is not the fault of the Copyright Board. Canada's Parliament has handed the Board a mandate that consists of some generally sketched and inevitably overlapping rights deliberatively designed to catch just about every activity anyone can imagine. Canada's government has directly and indirectly subsidized many of the collectives - in ways ranging from direct subsidies of electronic activity to very favourable licensing deal that provided millions in start up cash flow in the case of Access Copyright.

That said, the Copyright Board, however, has not done everything it can to confront the issue of double, triple and more payments. It tends to "value" each usage on its own, often reaching back for proxies based upon previous Board decisions. This shows the tremendous importance of inaugural tariffs.

There has been little or no interest on the part of the Commissioner of Competition in the activity of the Copyright Board, despite a clear role for the Commissioner that is set out in the legislation. This is in complete contrast to the approach of the EU and the USA - where there is an innate antitrust based scepticism of collectives.

The Canadian approach is also highly inbred. In some cases, the same parties that form together to make one collective or coalition find themselves opposing each other in another hearing. This leads to interesting situations - such as the same law firm effectively acting both for and against the same client in different files before the Copyright Board. Odd coalitions of apparently sophisticated clients come and go - but I sometimes wonder if they all really understand just how small a world it has become in Canada. And it need not be this way. And from a public interest standpoint, it probably shouldn't be this way - because some important arguments may fall by the wayside in this process. Canada's Supreme Court may soon have something to say about this, in a pending and potentially landmark decision concerning alleged conflict of interest by a major

law firm.[24]

This is especially worrisome in view of the increasing convergence taking place between content owners and users, and the decreasing level of competition - as evident in the recent rapid approval by Canada's Competition Bureau of the merger of two major broadcasting entities, namely CTV and CHUM.

There are also a number of problems concerning the way the Board deals with interrogatories, hearsay evidence and evidence from witnesses who may indeed have some expertise but little or no independence. However, these are issues for another day.

4. SLOW ROLL-OUTS BUT MUCH SUCCESS IN CANADA

Canada has had a slower roll out of online services than the USA. There are many possible explanations for this and there has been a lot of finger pointing.

However, certain music industry statistics are very interesting.

According to Michael Geist:

> *The success of the Canadian music industry is also being replicated online. Nielsen SoundScan Canada reports that digital download sales in Canada grew by 122 percent last year, well above the growth rates in both the U.S. (65 percent) and Europe (80 percent). Moreover, the Canadian market now features twice as many online music sellers as the U.S. when measured on a per capita basis*.[25]

And according to Nielsen Soundscan Canada, there was a 9.8% growth in music industry sales overall in 2006 based on units sold, including the spectacular 120% or so increase in online sales.[26] Interestingly, CRIA's website that normally reports such statistics is now several months behind.[27]

The Canadian statistics are clearly rather awkward for the music industry - since there is obvious success of online music in particular and the industry overall in Canada despite its protestations that the sky is falling. The need for urgent and draconian copyright revision based upon a 10 year old American model DMCA approach seems even less compelling now - not that it ever was.

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[24] http://205.193.81.30/information/cms/case_summary_e.asp?30838

[25] http://www.michaelgeist.ca/content/view/1856/159/

[26] http://excesscopyright.blogspot.com/2007/01/sky-isnt-falling.html

[27] http://cria.ca/stats.php

5. THE DRM DEBATE IN CANADA

Speaking of DRM and DMCA, it is well known that the Canadian government is under much pressure from the international recording industry and the American government to ratify the 1996 WIPO treaties and implement tough DMCA style legislation to force the acceptance of DRMs and TPMs.

Much can be said about this - but Bruce Lehman has probably said it best and most eloquently at a recent conference at McGill.[28] This is what he said according to Michael Geist:

> *The most interesting - and surprising - presentation came from Bruce Lehman, who now heads the International Intellectual Property Institute. Lehman explained the U.S. perspective in the early 1990s that led to the DMCA (ie. greater control though TPMs), yet when reflecting on the success of the DMCA acknowledged that "our Clinton administration policies didn't work out very well" and "our attempts at copyright control have not been successful" (presentation starts around 11:00).*
>
> *Moreover, Lehman says that we are entering the "post-copyright" era for music, suggesting that a new form of patronage will emerge with support coming from industries that require music (webcasters, satellite radio) and government funding. While he says that teens have lost respect for copyright, he lays much of the blame at the feet of the recording industry for their failure to adapt to the online marketplace in the mid-1990s.*
>
> *In a later afternoon discussion, Lehman went further, urging Canada to think outside the box on future copyright reform. While emphasizing the need to adhere to international copyright law (ie. Berne), he suggested that Canada was well placed to experiment with new approaches. He was not impressed with Bill C-60, seemingly because he does not believe that it went far enough in reshaping digital copyright issues.* [29]

I shall have more to say about the Canadian legislative environment in another panel at this year's conference.

6. THE GLOBAL FUTURE

It is clear that online music industry revenues have not yet replaced the declines in traditional

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[28] http://mediasite.campus.mcgill.ca/mediasite2/viewer/Viewer.aspx?layoutPrefix=LayoutTopLeft&layoutOffset=Skins/Clean&width=800&height=631&peid=6e197c68-0b63-4474-ac3b-f770e220de0e&pid=2276b8bb-0299-4f9e-9be8-d83d3539f313&pvid=501&mode=Default&shouldResize=false&playerType=WM64Lite

[29] http://www.michaelgeist.ca/content/view/1826/125/

sources of revenues for record companies. Is this bad news? If so, what is the cause?

I would suggest that the music business is remarkably healthy - but the major record industry is wallowing in potentially suicidal self destruction.

People are still spending lots of money on music that frankly isn't' very good. And they are doing so in sprite of intense competition from DVDs , cable TV fees, video games and other sources of competition for household entertainment dollars. Gone are the days when disposable income was dissipated only at the movie theatre and the record store.

There is compelling econometric evidence and analysis from Oberholzer and Strumpf that P2P activity has at most a negligible effect on music industry revenues and may actually help the record companies.[30]

Perhaps the problem with the music industry - and particularly the major recording industry because the music industry is far from monolithic - is that it has come to assume that it is entitled to a constant rate of return and rate of growth. That is not so - unless it wishes to be treated as a government regulated monopolist - and there are few of those left.

In most competitive industries, it is clear that the road to success lies not in extracting the most possible monopoly rents but rather in acquiring inputs for the least possible price and selling outputs for the least possible margin that will suffice to undermine the competition and still yield a sufficient profit. A small margin on billions can be worth much more than a large margin on millions. That is the open secret of success of many of many clients in the retail sector today. It wasn't always this way. Perhaps the record companies will learn this lesson before it is too late. However, I doubt it.

7. ALTERNATIVES?

There is proverbial talk about "alternative compensation systems", models involving "trusted intermediaries", and other systems that depend on the notion that the public will be willing - or at least obliged - to pay a little each that will add up to a lot overall. Two current variations on this theme emanate from credible sources. Both are preferable to traditional levies because they come closer to the mark in terms of exacting payment from those who actually engage in copying. However, both depend essentially on content owners being economic rationalists and acting in their best interests, which experience shows is unlikely to happen.

a. The EFF Scheme

The EFF has a scheme that would involve voluntary low monthly payments that would give the

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[30] http://excesscopyright.blogspot.com/2007/02/statistically-indistinguishable-from.html

right to a sort of "all you can eat" license to download copyrighted material. This is what the EFF calls "A Better Way Forward: Voluntary Collective Licensing of Music File Sharing". [31] In the words of the EFF:

> *The concept is simple: the music industry forms a collecting society, which then offers file-sharing music fans the opportunity to "get legit" in exchange for a reasonable regular payment, say $5 per month. So long as they pay, the fans are free to keep doing what they are going to do anyway—share the music they love using whatever software they like on whatever computer platform they prefer—without fear of lawsuits. The money collected gets divided among rights-holders based on the popularity of their music.*
>
> *In exchange, file-sharing music fans will be free to download whatever they like, using whatever software works best for them. The more people share, the more money goes to rights-holders. The more competition in applications, the more rapid the innovation and improvement. The more freedom to fans to publish what they care about, the deeper the catalog.*

The problem with this is that, absent a more or less complete catalog, there is little incentive for either content owners or users to sign up. Users will not be immune from law suits for statutory damages if one of more of the litigious major record companies stay outside of the scheme. To the average user, it makes little difference if they are sued for one million or four million dollars. Either claim, if successful, will have the same result. So, why pay "insurance" to eliminate only part of this risk?

b. The NOANK Scheme

The NOANK scheme emanates from Harvard and is led by Paul Hoffert and Terry Fisher. It would entail the payment by commercial ISPs, universities, etc. to a trusted intermediary - i.e. NOANK - of small sums collected form each user - for the right to download *ad libitum.* 85% of this money would find its way to the appropriate content owners. However, once again, this will only be attractive to anyone if virtually all of the major content owners in a particular category - such as music - are onboard. NOANK claims to be making progress in China, with Canada next of the horizon. This effort seems to trace back in some ways to the mid 1990's. In Mr. Hoffert's own words:

> *In the 1990s, I was director of CulTech Research Centre at York University, where I led teams that investigated digital content distribution on broadband networks. We followed both the technology and cultural impacts of the information revolution. In 1996, in Ontario, we undertook one of the most extensive digital communities trials to date. In Newmarket, a suburb of Toronto, we took 100 homes and spent approximately $100*

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[31] http://www.eff.org/share/collective_lic_wp.pdf

> *million: so it actually cost us a million dollars per home to do the trial. We wanted to see what would happen, how these users would react to content. We gave them advanced digital devices throughout their homes and watched it become, on many levels, a highly integrated community — a community in the broadest sense.*[32]

The NOANK scheme would work as follows:

> *In brief, here's how the system works: In each country, copyright owners (record companies, music publishers, film studios, etc.) authorize Noank to distribute digital copies of their works. Noank, in turn, enters into contracts with major network service providers: broadband consumer ISPs; mobile phone providers; and universities. Noank provides the service providers' end-users with unlimited downloading, streaming, and copying licenses. In return, each access provider pays Noank a fee on behalf of each of its end-users (consumers, students, employees). 85% of the money collected from these content fees is distributed to content copyright owners. A small software program on the users' device counts the content use. That information (automatically aggregated to protect users' privacy) is used to determine the amount of money paid to each copyright owner.*
>
> *Implementation of the system is currently most advanced in China and Canada. Once it is up and running in those countries, we plan to launch in other countries.*[33]

NOANK has the Harvard halo over it. Harvard is the largest shareholder. It has no government funding. Thus far, it has also no major western content owners onside.

This may succeed to an extent in China because China is quite eager to show respect for intellectual property and at least some enforcement activity. However, I suspect that this will be a much tougher sell in North America and the rest of the world.

In addition to the Newmarket project, Mr. Hoffert led an earlier effort to simplify the licensing process for musical rights in Canada . It cost a lot of money; however, the music industry did not sign on. It exists now only as a demo website.[34] Content owners and collective were not really interested in simplifying transactions and are certainly not interested in loss of control.

c. If you build it, will they come?

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[32] Hoffert, P. (2002, January 1). Action. Canadian Journal of Communication [Online], 27(4). Available: http://www.cjc-online.ca/viewarticle.php?id=741

[33] http://www.noankmedia.com/index.html

[34] www.rightsclearinghouse.ca

The problem with these approaches lies in the notion that the content industries willing be willing to accept small payments from large numbers of people in exchange for massive loss of control and loss of exclusive rights. This has never been the case and it unlikely to happen in the absence of severe coercion by Government and major revision of international treaties. In other words, it likely won't happen. There will have to be major market failures before it happens.

These utopian visions are unlikely, in my view, to work out. This is because these concepts must inevitably involve either or both of the "C" word and the "D" word, as I call them. More on this below.

d. Other ideas that might work

In my view, the only future approaches that may work in the foreseeable future are either or both of the following.

i. "A Nickel a Schtickel"

The first and most obvious is that of the Sandy Pearlman approach, namely lowering the price of an authorized download to a nickel or some other irresistible price point. Some New Yorkers and others may understand what I mean when I call this a "nickel a schtickel" approach.

The idea is very simple. If one lowers the price, the demand will increase and the quantity sold could increase far more than the factor of price reduction. The price elasticity of demand of online music is very likely quite high. So, if Pearlman is right, the price can be lowered by a factor a twenty to a nickel and the quantity sold would increase by forty or more - a huge net gain. And the increase would be pure profit because the incremental costs for additional downloads are - or ought to be - or will be - close to zero.

This is really simple Economics 100. But it won't happen soon. In fact, it probably can't happen in Canada in the foreseeable future. Ths is because the Copyright Board has set minimum royalties that already exceed the retail price of the "nickel a schtickel" model. The Canadian Copyright Board has been nothing if not consistent in rejecting "ad valorem" royalty rates in the digital context - with the result that Canadian pay almost twice as much for blank CDs than Americans - the difference being the $0.21 Canadian levy which is almost half the retail cost of the product in Canada. These minimum rates are effectively fixed for years at a time.

In my view, the Copyright Board should not be setting minimum rates in an era where prices can free fall fast in a truly free market. For example, hard drive storage is now less than $0.50 per gigabyte at the retail consumer level. It wasn't long ago that PCs and laptops were sold with hard drives that measures in the few or few hundred megabytes and sold for much more than the price of today machines. Even in 2003, the CPCC was seriously proposing a levy of $21 a gigabyte on hard drive memory in MP3 players. If it had succeeded, today's 80 gigabyte iPod would presumably have a levy or "tax" on it of $1,680 when it now sells retail for less than $400.

And we can now buy external terabyte hard drives for under $500 - for example USD $350 here in NYC - now.[35] And even in Canada for less than $500.[36]

That is a lot of memory - it translates - in the words of one seller - to:

Up to 284,000 Digital Photos
Up to 250,000 Songs
Up to 76 hours of Digital Video

The message ought to be clear - a free market with low royalty rates could result in bountiful profits to everyone. Minimum royalty rates - either through regulation or industry price fixing to which antitrust authorities turn a blind eye - are a definite disincentive to efficiency in the digital age.

ii. Wait and See

Then, there is the "wait and see" alternative. It worked rather well in the movie industry - despite the efforts of Jack Valenti - who saw the VCR as analogous to the Boston Strangler. Governments resisted his efforts to get a rental right written into the copyright law. The U.S. Supreme Court resisted the effort to ban the time shifting technology of the VCR. Many economists said that if prices were lowered, good things would happen. Finally, the prices of Hollywood movies came down from $150 wholesale to about $20 retail. The rest is history.

And the Valenti/VCR melodrama once again shows that the entertainment industry can be capable of some very irrational economic behaviour that gets them acting against their own fiscal best interests. This has happened since the earliest days of technology. The industry almost always tries to lobby and litigate to preserve its then current business model. Fortunately for them, they rarely succeed in the end.

The entertainment industry is often motivated by an instinct to preserve control - and that is not always good economics. When consumers decided how they wanted to use commercially recorded videos and VCRs, the industry prospered. Why won't the industry let go of digital music and let the consumers decide best how to use it, along with the hardware and software that promises a bountiful feast of choice?

8. THE "C" WORDS

The main "C" word is "compulsory licensing". It is what we have in effect in Canada in many

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[35] http://www.jr.com/JRProductPage.process?Product=4112488

[36] http://www.costco.ca/en-CA/Browse/Product.aspx?Prodid=10299356&whse=BCCA&topnav=&browse=

respects, through various Copyright Board tariffs. It is what NOANK and the EFF will ultimately need for their ideas to work, It is as old as copyright law - but as fresh as tomorrow's guru vision. It's just that one can't use this term anymore. The big record companies loves to hate the idea of a compulsory mechanical license - but seem to be quite addictted to the concept as long as it is called something else. And this is notwithstanding the fact that they now own an enormous share of the music publishing business.

Compulsory licenses can work and are sometimes needed, as long as one dare not speak their name and as long as the rate is set by legislators or a truly independent authority that will look out for and be held accountable to the public interest.

Another "C" word is "control." The major content owners don't want to hear any discussion about schemes that would see them losing any "control" of their property.

Still another "C" word is that of "collective" - which can be stretched to have a socialist or even Communist sense. Indeed, in some minds, some of the utopian schemes based upon alternative licensing compensation schemes smack somewhat of payment "from each according to their ability and to each according to their need." Graham Henderson, the CEO of CRIA (CDN counterpart to RIAA) reportedly referred at a conference to Terry Fisher, a Harvard professor, author of a book that deals with alterative compensation schemes[37], and a founder of NOANK, as "Comrade Fisher".[38]

9. THE "D" WORDS

The "D" word these days may be either or both of DRM and DMCA.

At the EMI/Apple news conference on April 2, 2007, I don't know how many times I heard Jobs and EMI Group CEO Eric Nicoli refer to "DRM-Free" music. It seems that DRM is becoming the "D" word - even in the highest corporate musical circles.

Interestingly, Jobs himself kept repeating that DRMs can already be stripped form iTunes songs by making a CD copy - which lots of folks know. This is a "hassle" as he calls it - but not an insurmountable one. It will disappear now - but for a price.

Jobs also explicitly mentioned the SONY root kit episode as an example of how DRM doesn't work.

Nicoli conceded that file sharing might become easier now. The implication here is that any losses due to increased private copying due to file sharing will be more than capitalized into the

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[37] William W. Fisher III, ***Promises to Keep***, Stanford University Press, 2004.

[38] http://www.michaelgeist.ca/resc/html_bkup/feb212005.html

purchase price of the download. It will, of course, be difficult to separate out what relative premium consumers notionally allocate to the two improvements - i.e. "DRM free", and higher fidelity. It remains to be seen what the take up will be.

The DMCA is also a term that can evoke mixed reactions. As noted above, its father and architect - Bruce Lehman - is distancing himself form it. The DMCA can have some perverse results - especially with respect to DRM. At the time of the SONY Rootkit disaster, where SONY's DRM and TPM scheme negligently infected thousands of computers, it was observed by many that any attempt to rescue or repair one's computer would - strictly speaking - be illegal under the DMCA. True, the Librarian of Congress, on the recommendation of the Register of Copyrights, came to the rescue and provided an exemption under rulemaking power[39] to cover this type of situation. However, one should not need recourse to such a mechanism.

The concept of mandating the approval of limits on technology and actually penalizing persons or prohibiting devices that can reach beyond those limits is deeply troubling and is getting very far removed from any underlying notion of what copyright is or ought to be,

In any event, with very credible people running for cover and distancing themselves from DRMs and even the DMCA, there would seem to be no need for any country to rush into new legislation that embraces these concepts. Especially - as in the in the case of Canada - when sales are improving. Could it be that Canada's music and record industry - at least the independent part of it that is opposed to a DRM and DMCA approach - is so healthy because of the absence of DMCA type of legislation?

Last year, most of the important independent record companies split from CRIA and formed their own coaltion, called the Canadian Music Creators Coaltion. Some very well known artists, such as Steve Page of Bare Naked Ladies - have become outspoken and articulate advocates for a brand of copyright protection that the majors don't want. In their own words, the Coalition says:

> ***Suing Our Fans is Destructive and Hypocritical***
> *Artists do not want to sue music fans. The labels have been suing our fans against artists' will, and laws enabling these suits cannot be justified in artists' names.*
>
> ***Digital Locks are Risky and Counterproductive***
> *Artists do not support using digital locks to increase the labels' control over the distribution, use and enjoyment of music or laws that prohibit circumvention of such technological measures. Consumers should be able to transfer the music they buy to other formats under a right of fair use, without having to pay twice.*[40]

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39 http://www.copyright.gov/1201/

40 http://www.musiccreators.ca/wp/?page_id=8

One of the main forces behind this coaltion is Nettwerk records, whose artists include Sarah McLachlan and Avril Lavigne. In a move bound to raise eyebrows in multinational record industry circles, the Canadian government has just announced a direct funding of $650,000 for this innovative and brave company[41], which is also funding the defence of one of the victims of the American RIAA litigation campaign.

According to Nettwerk's press release on the RIAA litigation:

> *In August 2005, the Recording Industry Association of America (RIAA) filed a complaint against David Greubel for alleged file sharing. Greubel is accused of having 600 suspected music files on the family computer. The RIAA is targeting nine specific songs, including "Sk8er Boi" by Arista artist Avril Lavigne, a Nettwerk management client. The RIAA has demanded Greubel pay a $9,000 stipulated judgment as a penalty, though it will accept $4,500 should Greubel pay the amount within a specific period of time.*
>
> *"Suing music fans is not the solution, it's the problem," stated Terry McBride, C.E.O of Nettwerk Music Group.*
>
> *Nettwerk became involved in the battle against the RIAA after 15-year-old Elisa Greubel contacted MC Lars, also a Nettwerk management client, to say that she identified with "Download This Song," a track from the artist's latest release. In an e-mail to the artist's web-site, she wrote, "My family is one of many seemingly randomly chosen families to be sued by the RIAA. No fun. You can't fight them, trying could possibly cost us millions. The line 'they sue little kids downloading hit songs,' basically sums a lot of the whole thing up. I'm not saying it is right to download but the whole lawsuit business is a tad bit outrageous."* [42]

And that leads to the third "D" word - which is "dystopia". In 2005, I wrote about a "policy dystopia of levies + litigation + TPMs + statutory damages + overlapping potential tariffs at the Copyright Board."[43] The word was also part of the title of a recent conference on these issues

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[41] http://www.pch.gc.ca/newsroom/index_e.cfm?fuseaction=displayDocument&DocIDCd=CR061625

[42] http://www.marketwire.com/mw/release_html_b1?release_id=107623

[43] (2005-06) 6 I.E.C.L.C. avaialbe online at http://www.moffatco.com/pages/publications/BMG%20Case%20-%20E-Commerce.pdf

at McGill.[44]

The concept is simple - we could be in a best of all possible utopian digital world. The celestial juke box is a good idea - not an evil one. It just came to soon for some people and there are strong forces that want to prevent this from happening. At the highest levels, they are seeking curbs and limits on new technology and the resurrection and perpetuation of a business model that died a long time ago. At its worst, it involves law suits against children and their devastated parents.

These law suits carry clout because of the regrettable availability of statutory damages against individuals for commonly accepted, practised and even inadvertent behaviour. In fact, even Edgar Bronfman - who runs one of the four major record companies - has admitted that his own kids are guilty of the behaviour for which he is busy suing other kids and families. This is from a recent Reuters interview and report:

> *We asked Edgar Bronfman, the head of the world's fourth largest music company, at the Reuters Summit whether any of his seven kids stole music.*
>
> *"I'm fairly certain that they have, and I'm fairly certain that they've suffered the consequences."*
>
> *We couldn't begin to guess what that means. He explained to our Second Life reporter, Adam Pasick:*
>
> *"I explained to them what I believe is right, that the principle is that stealing music is stealing music. Frankly, right is right and wrong is wrong, particularly when a parent is talking to a child. A bright line around moral responsibility is very important. I can assure you they no longer do that."*[45]
>
> *Great, but what did he do to them?*
>
> *"I think I'll keep that within the family."*

I don't' recall any of the 20,000 or so lawsuits having a defendant by the name of Bronfman. The feature of American and Canadian law which permits such law suits must be reformed - because it has been violently and shamefully abused by the record industry. These law suits are a low point in corporate and legal behaviour. They will ultimately cause a great deal of damage and backlash - which could adversely affect the many creators and content owners who are

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[44] Musical Myopia, Digital Dystopia: New Media and Copyright Reform http://www.cipp.mcgill.ca/en/events/past/

[45] http://blogs.reuters.com/2006/12/01/the-most-dangerous-download-of-all/

responsible and who use their rights with more wisdom and maturity.

10. THE APPLE/EMI MOVE

On April 2, 2007 Apple and EMI announced that they would offer "DRM free" music - but at a higher price. Many pounced on the higher price, and noted that the move should be towards a lower one. I've already talked about that.

There were other interesting aspects to the news conference. Jobs himself admits that less than 5% of tunes on an iPod are paid for from iTunes. So where do the other 95-98% come from? Isn't this is a bit like asking where babies come from? Most of us know the answer. The other 95 to 98% of the songs come from P2P and from CDs already owned by music fans, who are being sued in massive quantities in the USA for enjoying their music in the way that the industry is encouraging them . Besides, does anyone seriously think that a device that can hold 20,000 or so songs is going to be filled up with 20,000 songs at $0.99 each - so that it can left on a subway or dropped from a bicycle? These are fragile and allegedly not very reliable machines - and I doubt that even Edgar Bronfman would spend $20,000 or more to legally fill one up with songs from the iTunes store.

Of course, one way of increasing the percentage of paid for music would be to drastically lower the price. But that would be too easy.

Moreover, iPods are used for lots of things other than music, e.g. podcasts, photos, videos, and even movies. That, however, is not stopping the CPCC from seeking a levy of up to $75 on these devices. I've already mentioned the very basic "res judicata" legal issue.

11. TECHNOLOGICAL NEUTRALITY

Everyone believes in technological neutrality - but rarely in their own back yard. At some point, there needs to cogent answers to questions such as:

- why does the music cost more when delivered over the internet than when sold as a CD - and sound worse - and include DRM?
- why can consumers import CDs but not iTune files over the internet?
- why does making a webcast cost so much more than broadcasting from a radio transmitter?
- why are levies and royalty rates on digital delivery modes seeming to be going up when hardware (particularly memory) and software technoloy and traditional CD and DVD prices are dropping?
- why is there an apparent digital penalty and not a digital dividend?

12. THE EU ANTITRUST AND FREE TRADE INITIATIVES

The day after the EMI/Apple announcement last week, the EU indicated it would press ahead with an investigation as to why songs on iTunes cost more in some countries than others. Many at this conference would roll their eyes and say that, of course, it's obvious that there are differences because copyright laws and licensing deals are still primarily territorial in nature. Except that we are dealing now with Europe and that principle has long been under attack with tangible goods - such as normal plastic CDs and books. If these physical objects can travel freely across borders in order ensure free trade inside the EU, why shouldn't' electronic files?

The EU is making progress on EU wide deals for collective licensing and even perhaps on an EU patent system. The music industry's series of country specific fortresses is under attack. And if it falls in Europe, it may well fall elsewhere.

And many observers have wondered aloud whether the Apple/EMI move that would give consumers a DRM-free option for a price isn't some sort of attempt to distract the EU and several concerned countries from ongoing concerns about interoperability.[46] Time will tell.

13. CONCLUSION

Revenue generating online music has a great future - perhaps the only future for big music as we know it. But this will only happen if and only if:

a. there are no artificial minimum royalty prices imposed
b. true competition is allowed and if necessary imposed at both a national and international level
c. technological neutrality is honoured in spirt and result and not simply in name
d. compulsory licenses are utilized when necessary - and are not repressed out of ideological principle
e. DRMs and TPMs are not given life support and mandatory deference by legislation and treaty law.

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[46] Ed Felten has a good blog on some of the possible strategies behind the Apple/EMI move. See http://www.freedom-to-tinker.com/?p=1141