CORPORATE EROSION OF FAIR USE: GLOBAL COPYRIGHT LAW REGARDING FILE SHARING

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INTRODUCTION

THE OWNERSHIP OF INTELLECTUAL PROPERTY, although perhaps not articulated as such, has likely existed for as long as there has been language. Disputes would understandably arise as the creators of art, literature or music sought exclusive rights of remuneration and recognition, and the ability to copy, distribute, and broadcast. However, due to the often ethereal nature of an idea or an artistic piece, copyright law has long been difficult to apply and enforce. Historically, the standard printing of literary works was regulated through licensing, which was possible largely due to the rarity of reading and writing abilities. It was with the invention of the printing press, which enabled people to reproduce multiple copies more easily, that we could begin to see the roots of today's copyright issues. As information becomes increasingly accessible, legislators have sought to address and protect the rights of artists by ensuring that they receive adequate return for the use of their works, while balancing among others; most commonly the public interest right of fair use for the purpose of education, criticism and research, so long as credit is given.[1] In this paper, I will discuss how the record and film industries in Canada, the U.S., and worldwide are pressuring local governments to become tougher on copyright infringement by taking some very controversial actions; such as suing private citizens or individual downloaders; in an effort to wage war on piracy against creators and patrons of file sharing networks (also known as "peer-to-peer" (P2P) networks). I will argue that these actions are not only damaging their businesses but are ineffectual and ought to be re-examined, as the traditional exclusive rights paradigm of copyright law — wherein the owner holds all rights to the work, must yield to a compensation paradigm — wherein the owner is adequately compensated whenever their work is accessed or used.[2] What is more, these actions

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[1] *Copyright Act*, 17 U.S.C. § 107 (1976).

[2] National Research Council, *The Digital Dilemma: Intellectual Property in the Information Age*, (Washington, D.C.: National Academy Press, 2000) at 76-87, online: The National Academies Press <http://fermat.nap.edu/books/0309064996/html/>.

are unjustified as they are eroding the public's pre-existing fair use rights and are also a potential threat to privacy rights.[3]

At one end of the debate on file sharing are monolithic organisations like the Recording Industry Association of America (RIAA), the Canadian Recording Industry Association (CRIA), and the Motion Picture Association of America (MPAA). These associations represent a large portion of North American recording artists and film studios and claim that P2P file sharing networks infringe upon copyright law because they deprive the artists and the studios of their royalties. On the opposite side of this debate, supporters of file sharing contend that these issues are nothing more than the growing pains of a new technology. Consider for example, the first player pianos and the cylinder phonograph which eliminated the need for live musical performances, to modern recordable media such as audiocassettes and VHS tapes, which brought the ability to record and "time shift" into people's homes for later listening or viewing. Supporters argue that there are many legitimate benefits of P2P, and the illegitimate purposes are exaggerated and are not the sole reason for the negative economic effects claimed.

Due to the vast disseminative nature of the Internet, the latest pop song may originate from anywhere in the world. Therefore, P2P networks have become an issue of international interest. This paper, however, will focus on the contrast between Canadian decisions and approaches taken in the U.S., as they represent good examples of the opposite sides of the spectrum.[4]

With each newly emerging technology, the issue of copyright infringement becomes more and more difficult to interpret and address, especially given the ease of use and access to recording machinery in consumers' homes. For example, in 1976, Sony released the Betamax video tape recorder (VTR), later referred to as the videocassette recorder (VCR). Universal City Studios and Walt Disney Productions promptly sued Sony, in *Sony Corp. v Universal City Studios, Inc.*,[5] contending that the use of video recording equipment at home amounted to copyright infringement. Universal and Walt Disney relied on a "contributory copyright infringement" argument, saying that Sony was responsible for making large-scale copying possible.[6] The courts, however, dismissed this vicarious liability argument, stating that even if some people used them in illegal ways, the VCR had a substantially legitimate use, and ruled that it was possible to record media at home, as long as it was for private and personal use. As a result, this case also let personal

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[3] *Supra* note 1.
[4] For a discussion of other countries, see *infra* note 34.
[5] *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).
[6] *Ibid.*

computers, which can digitize and record audio and video, develop without restrictions.

In general, most people understand copyright infringement to consist of creating copies of commercial works and distributing them in the pursuit of profit, and that the warnings on videocassettes threatening massive fines and prison time apply typically only to those people who were actively trying to make money. However, since the advent of the digital era, something new has entered the equation. With all other previous mediums, copies were imperfect analog copies that suffered some degradation and loss of information at each stage of reproduction. Furthermore, it simply wasn't that easy to do. Now, digital copies are identical, every bit as clear as the original source, and can be copied indefinitely. These facts, coupled with the widespread ability to transmit information all over the world, and the fact that most homes in G8 countries have a computer, have led the RIAA, CRIA, and MPAA to resurrect their copyright infringement claims with renewed fervour, as more and more people can now easily make and distribute commercial quality copies.

FILE SHARING

INITIALLY, IN THE LATE 80s AND EARLY 90s, information that people wanted to share online would be posted on their websites and could be downloaded directly from their computers. If they were not the owners of the copyright, once discovered, these people were easily stopped. Since the information existed on their computers, their identities were easy to determine, and it was clear that they were providing access, which is central to claims of copyright infringement.[7] These incidents typically resulted in a cease and desist and possibly a fine. Now, however, assisted by P2P software, users are able to download and share files contained on their computers' hard drives via the Internet by running a small program that makes a list of files they have chosen to share, typically (but not limited to) mp3 music files. Other people running the same sort of software can connect and get a copy of some or all of the files that are shared. The first high profile software program to make this possible was called Napster, which garnered worldwide

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[7] U.S. Department of Justice, News Release, "Defendant Sentenced for First Criminal Copyright Conviction Under the 'No Electronic Theft' (NET) Act for Unlawful Distribution of Software on the Internet" (23 November 1999), online: U.S. Department of Justice <http://www.usdoj.gov/criminal/cybercrime/levy2rls.htm> and Marc Lindsey, "World File Sharing War" (2004) 8:4 Copyright & New Media Law Newsletter (QL) [Lindsey].

attention in 1999.[8] This revolutionary program led to an outcry from artists and record companies claiming that this was copyright infringement, as users were obtaining their material without their express or implied permission as would be the case when a consumer purchases the music.[9] A collection of record labels took action against the creator of Napster, and following a successful motion for preliminary injunction, the plaintiffs were successful in establishing a *prima facie* case of direct copyright infringement stating that the users' activities did not amount to fair use of the copyrighted works.[10] Napster advanced newly added section 512 from the *Digital Millennium Copyright Act (DMCA)* relating to "safe harbour",[11] albeit unsuccessfully, as the courts found that this limited liability applied only where Napster:

1. receives reasonable knowledge of specific infringing files with copyrighted musical compositions and sound recordings;
2. knows or should know that such files are available on the Napster system; and
3. fails to act to prevent viral distribution of the works.[12]

Napster was brought down fairly easily because every user of the software had to connect to a central computer, which then did all the legwork of connecting those who had a song, to those who wanted that song. The courts imposed an injunction against running the central computer in participation of copyright infringement. It was uncertain if Napster would fight the injunction or would attempt to continue providing their service under another incarnation, but after a couple of years in limbo, Napster became a pay download site.

Napster was only the beginning of file sharing and shortly after its downfall, many other P2P sites, such as Grokster, Kazaa, and Gnutella, began emerging. Modern file sharing software has now removed the centralization; instead, each personal computer (PC) that has files available for sharing is part of a huge game of "telephone"; where a group of kids sit in a circle and a message is passed around the circumference of the circle, one ear at a time. This circle now includes lists of shared files from each member, and requests for particular files are passed along by each member of the circle, in both directions, over and over again. Anyone can step in or out at any time and the circle will expand or contract and keep passing messages. Eventually, a file sharer and a file

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[8] *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001).
[9] *Supra* note 1, §§ 106-122 & § 501.
[10] *Supra* note 8 at headnote.
[11] *Supra* note 1, § 512.
[12] *Supra* note 8 at para. 84.

searcher will be united when messages echoing around the circle overlap. Very often the searcher will find dozens of sharers all offering the exact same file. The searcher's software will then ask for a small piece of the file from each of the people offering it, meaning that no one person bears the high cost of heavy Internet traffic, and the person acquiring the file receives it at an aggregated rate that is far faster than if it was downloaded from a single source.[13] There is no central computer running the show in this new scheme, so anyone attempting to stop file sharing must now try to use the law to go after the creators of the software or individual users. File sharing used to be mostly about music. Now as bandwidth increases, people are also downloading TV shows, movies, video games, and business software using the same sort of peer-to-peer software.[14]

THE RECORDING INDUSTRY ASSOCIATION OF AMERICA (RIAA) & THE MOTION PICTURE ASSOCIATION OF AMERICA (MPAA)

AS ONE OF THE WORLD'S LARGEST EXPORTERS of culture through music and film, it is not surprising that U.S. entertainment associations are at the forefront of this campaign against file sharing. The RIAA and MPAA, among others, not satisfied with their success in shutting down P2P networks, are now filing aggressive lawsuits against individuals.[15] As of 2003, the RIAA had filed over 3000 lawsuits, most of which were against college and university students.[16] In filing these individual claims, the plaintiff has two options: to seek a court order to subpoena Internet Service Providers (ISPs) to provide information on suspected copyright infringers, or to file John Doe claims and file a motion for third party discovery of the otherwise anonymous defendant,[17] which are costly and often

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[13] Interview of Christian Monkman by Scott Monkman (20 February 2006), "P2P Telephone Analogy."

[14] Georgia Research Tech News, News Release, "Optical-Wireless Convergence: New Network Architecture Delivers Super-Broadband Wired and Wireless Service Simultaneously" (16 March 2006), online: Georgia Institute of Technology <http://gtresearchnews.gatech.edu/newsrelease/hybrid-network.htm>.

[15] *MGM Studios Inc. v. Grokster, Ltd.*, 125 S.Ct. 2764 (2005). The Supreme Court, however, failed to address the uncertainties in copyright law's traditional secondary liability doctrines — contributory infringement and vicarious liability — and found Grokster guilty of the new inducement of infringement and did not overturn the Betamax decision which many believed was based on the capability of substantial non-infringing uses and its minimal effect.

[16] Lindsey, *supra* note 7.

[17] *RIAA v. Charter Communications Inc.*, 393 F.3d 771 at 775 (8th Cir. 2005).

embarrassing.[18] However, to date the RIAA has not had successful claims against individuals for copyright infringement in downloading files but has merely arrived at settlements, which have been reached largely due to the cooperation of several American universities.[19] The RIAA contacts the university with the IP addresses of the alleged infringers, and since in these cases the university is the ISP, they may then discover and disclose the individual's identity to the RIAA or issue a notice to the student. Depending on the extent of the alleged infringement, the student may be required to attend an ethics class, face expulsion or be threatened with a lawsuit from the RIAA. These individuals do not usually opt to take the case to trial, as they assume that they cannot fight the RIAA and simply pay a fine commensurate with the number of files that were found in their possession, and the RIAA leaves them alone. With regard to commercial service providers, however, this is not so simple. In seeking a subpoena for disclosure of a person's IP address, the RIAA requires consent from the ISP, or they must prove a *prima facie* case and seek an order of disclosure to determine the person's identity. Without a *prima facie* case, the ISP is under no obligation to release that information, as it is contrary to s.551(c)(1) of the *Privacy Act*.[20] Concerning universities, I can only speculate that students have not met the definition within subchapter V-A of "subscribers," or that the argument was not advanced. Even pursuant to a court order, the subscriber is entitled to notice and the opportunity to answer, as well as protection of privacy concerning activities as outlined in s.551(c)(2) & (h).[21] Without the identity of these people, the cases are thrown out for lack of an identified defendant and/or insufficient evidence to support a claim.

THE DIGITAL MILLENNIUM COPYRIGHT ACT (DMCA)

THE *DMCA*, WHICH AMENDED THE *U.S. COPYRIGHT Act* in 1998, was generally thought to be a new and effective tool to be used in the war against piracy.[22] The most notable change that the *DMCA*

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[18] Nate Mook, "RIAA sues deceased grandmother" *BetaNews* (4 February 2005), online: BetaNews Inc. <http://www.betanews.com/article/RIAA_Sues_Deceased_Grandmother/1107532260>.

[19] Tony Roda, "Combatting Piracy" (2003) 7:2 Copyright & New Media Law Newsletter (QL).

[20] Title 47, U.S.C. § 551 (1934).

[21] *Ibid.*

[22] See generally *supra* note 1.

has had is to prevent anyone from distributing software or hardware that can "circumvent" copy protection mechanisms, [23] "and one federal appeals court has ruled that even links to circumvention software are illegal. The law, however, is generally understood to allow the theoretical discussion of circumvention techniques."[24]

More generally, the *DMCA* attempted to continue to strike a balance by providing a more detailed process to be followed in obtaining IP addresses while protecting ISPs from liability, in exchange for a level of cooperation from ISPs upon notice of alleged infringement.[25] In practice, however, it has not yielded the favourable results that the RIAA had anticipated.[26] The court in *RIAA v. Charter Comm.*[27] upheld the decision in *Verizon*,[28] where it was decided that according to the requirements of s.512(c)(3)(A)(iii), the ISP could not remove the infringing material as it resided on another user's computer and terminating the account was not an acceptable remedy. Further, as *Charter* was limited to acting as a conduit for the alleged infringement, they were not subject to subpoena under s.512(h).[29]

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[23] *Ibid.*, § 1201.

[24] Tom Krazit, "DMCA Axes sites discussing Mac OS for PCs" *CNET News* (17 February 2006), online: CNET Networks <http://news.zdnet.com/2100-9590_22-6040983.html>; *Universal v. Reimerdes*, 111 F.Supp.2d 294 (S.D.N.Y. 2000), 00 Civ. 00277 (LAK), online: The Berkman Center for Internet & Society at Harvard Law School <http://cyber.law.harvard.edu/openlaw/DVD/NY/trial/op.html>.

[25] *Supra* note 1, § 501(b); Subpoena power authorized under the *DMCA*, which required the identity of one who had engaged in unprotected conduct of sharing copyrighted material on the Internet, provided sufficient safeguards and judicial supervision to protect Internet users' First Amendment rights, including anonymity; *DMCA* required a copyright owner to submit a sworn declaration to the effect that the purpose for which the subpoena was sought was to obtain the identity of an alleged infringer and that such information would only be used for the purpose of protecting copyright rights, and also required a person seeking a subpoena to state, under penalty of perjury, that he was authorized to act on behalf of the copyright owner.

[26] *Supra* note 15 at 10.

[27] *Supra* note 17.

[28] *RIAA v. Verizon*, 351 F.3d (D.C. Cir. 2003) at 1229-236.

[29] *Supra* note 17 at 776.

THE CANADIAN RECORDING INDUSTRY ASSOCIATION (CRIA)

THE BASIS OF CANADIAN COPYRIGHT INFRINGEMENT CLAIMS are found in section 3 of the *Copyright Act*, which, similar to U.S. Title 17, sections 106-122, lists rights held by copyright holders.[30] Although similar, Canadian legislation provides deeper statutory protections for fair use, known in Canada as fair dealing.[31] Interestingly, however, prior to the amendment to the *Copyright Act* in 1998, any copying at all was considered copyright infringement. As part of the amendment, the Copyright Board of Canada implemented a 29¢ levy on audiocassettes of 40 minutes or longer, 21¢ on CD-Rs and CD-RWs, and 77¢ on CD-R Audio, CD-RW Audio and MiniDiscs, to be collected by the Canadian Private Copying Collective.[32] This was done to offset the decision to allow private and personal use copying without permission from the copyright holder, as defined in sections 79 and 80, which is typically understood to be for the purpose of back-up copies. What is more, the Copyright Board explicitly confirmed that they were most concerned with unauthorized profit and the uploading of copyrighted material, thus making the material available for copyright infringement, and not so much concerned with downloading for personal and private use:

> The regime does not address the source of the material copied. There is no requirement in Part VIII that the source copy be a non-infringing copy. Hence, it is not relevant whether the source of the track is a pre-owned recording, a borrowed CD, or a track downloaded from the Internet.[33]
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> This exception does not apply if the reproduction is for the purpose of selling, renting, offering for sale or rental, distributing — whether or not for the purpose of trade —

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[30] *Copyright Act*, R.S.C. 1985, c. C-42, s.3 [*Copyright Act*]; *supra* note 1, §§ 106-122 & § 501.

[31] *Copyright Act*, *ibid.* at s.29.

[32] Copyright Board of Canada, *Private Copying 2003-2004* at 1, online: Copyright Board of Canada <http://www.cb-cda.gc.ca/decisions/c12122003-b.pdf> [*Private Copying 2003-2004*]. The levies on personal media players have since been removed, but the levies remain in effect per *Private Copying 2006*, online: Copyright Board of Canada <http://www.cb-cda.gc.ca/decisions/c21122005-b.pdf>.

[33] *Private Copying 2003-2004*, *ibid.* at 20.

> communicating to the public by telecommunication, or publicly performing the musical work. It is this kind of private copying that is intended to be compensated by the levy recently decided by the Copyright Board, pursuant to section 82 of the Copyright Act.[34]

Therefore, as suspected by most people, so long as you were not actively distributing music or movies especially for a profit, you were within your fair dealing rights. Part VIII of the *Copyright Act* legalizes private copying by a class of users, while providing that rights-holders are compensated for the expropriation of their exclusive rights. The levy supports creators of artistic works and cultural industries by balancing the rights of creators with the rights of users for fair dealing and private use, by ensuring that rights holders obtain some financial reward for their creation in circumstances where they previously did not.[35] As such, the levy can be shown to affect the behaviour of individuals by continuing to create incentive for artists. These levies make up over 70 percent of the purchase price of blank media and the Canadian Private Copying Collective (CPCC) estimates that these levies generate over $30 million a year and growing.[36] Although initially there were some delays in distributing the royalties, from 2000 to 2003 approximately $90 million was paid out, and from 2003-2005 an additional $60 million has been paid to over 65,000 rights holders.[37] It is not entirely clear, however, how these levies are distributed among artists whose works are downloaded. For example, are all artists simply given a share, or is there a method of data collection that tracks which artists are being downloaded more heavily and pays out the levies accordingly? To date,

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[34] Daniel J. Gervais, "Transmissions of music on the internet: An analysis of the copyright laws of Canada, France, Germany, Japan, The United Kingdom, and the United States" (2001) 34 Vand. J. Transnat'l L. 1363 at 1368-369.

[35] For a discussion of the formula used to reach fair and equitable levies, and the disbursement of royalties, see *Private Copying 2003-2004*, *supra* note 32, Appendix I at 87-90.

[36] Canadian Private Copying Collective, News Release, "Thousands of Singers, Musicians, and Songwriters among those who received over $60 million in three years from private copying levy" (25 January 2006), online: Canadian Private Copying Collective <http://cpcc.ca/english/pdf/CPCCPressRelease-Distribution-25January2006.pdf>; "$33.2 million distributed to rights holders in recorded music" (7 January 2005), online: Canadian Private Copying Collective <http://cpcc.ca/english/pdf/CPCC07Jan05.pdf>; "Creators of recorded music have benefited to the tune of $26.4 million from Canadian blank media levy" (14 September 2004), online: Canadian Private Copying Collective <http://cpcc.ca/english/pdf/september14_04EN.pdf>.

[37] *Ibid.*

the levies paid amount to nearly $200 million,[38] and while the CRIA estimates their losses to be approximately $500 million since 1999 due to lost revenues,[39] their estimates have been highly inconsistent and cannot be confirmed. In addition, they are not taking into account many other possible factors for decreased sales.[40] There is some evidence that losses are greatly exaggerated, and that the levies are in fact adequately and possibly overcompensating Canadian artists.[41] What is more, these levies exist in approximately 25 countries including G8 and other European Union members. In fact, the U.S. has been collecting levies on digital audio recording devices ranging from $8 to $12 since 1994.[42]

Canadian jurisprudence has been similar to that of the U.S., save perhaps being somewhat more consistently favourable to fair dealing rights. The requirements for establishing a *prima facie* case against the person before an IP address may be released are quite high, while in the U.S. there are motions to have the orders fulfilled without the need of a judge, but merely by a clerk. In Canada, regarding the limited liabilities of ISPs, the courts have drawn analogies to telephone companies who provide the medium but do not control the message.[43] Both the Copyright Board of Canada and the Federal Court of Canada have ruled that private copying may include peer-to-peer music downloads.[44] "This interpretation is consistent with both the technologically neutral language found in the legislation as well as with many similar private copying systems in Europe."[45]

In response to pressure from the U.S. and to fall in line with the World Intellectual Property Organization (WIPO), in June 2005, the

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[38] *Ibid.*

[39] Michael Geist, "Exploding the Big Music myth" *P2P NET* (6 December 2004), online: People to People Net <http://p2pnet.net/story/3209>.

[40] Ken Fishter, "Survey says: music costs too much, and it sucks" *Ars Tecnica* (2 February 2006), online: Ars Tecnica LLC <http://arstechnica.com/news.ars/post/20060202-6103.html>; Jim Welte, "Report: It's the music, stupid" *CNET* (07 February 2006), online: CNET Networks <http://www.cnet.com.au/mp3players/musicsoftware/0,39029154,40060145,00.htm> [Welte].

[41] Michael Geist, "Time music industry focused on product" *Toronto Star* (6 December 2004), online: Toronto Star Newspapers Limited <http://www.michaelgeist.ca/resc/html_bkup/dec62004.html>.

[42] *Supra* note 1, § 1004.

[43] *Society of Composers, Authors & Music Publishers of Canada v. Canadian Assn. of Internet Providers*, [2004] 2 S.C.R. 427 at para. 4; See also *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339 for similar analogy regarding copy machines placed in libraries.

[44] *Private Copying 2003-2004*, *supra* note 32; *BMG Canada Inc. v. John Doe*, [2005] F.C.J. 858.

[45] *Supra* note 41.

Canadian Parliament proposed a comparable version of the *DMCA* known as Bill C-60.[46] While it was comparable, it seemed to make the notice regime more akin to warning a person to cease infringement through the ISPs' contacting the customer. Another important provision was to make circumvention of copy protection for the purpose of copyright infringement illegal. This differed from the stricter language of the *DMCA*, which did not consider that there were legitimate purposes to circumventing copy protection. The Bill, however, was ultimately rejected; it was quashed because levies were already being collected, and would, therefore, be in conflict with the allowed exception of the right to make private copies for private use. There was no indication that the levies would decrease, as there would always continue to be those who would pirate materials; therefore, people would essentially be charged for a right they were not allowed to exercise, or pre-emptively presumed guilty and fined in advance, as is the case in the U.S.[47]

DIGITAL RIGHTS MANAGEMENT (DRM)

DESPITE THE LEGISLATION AND JURISPRUDENCE THAT allow fair dealing copying, software, film and record companies have been increasingly including anti-copying software, most notably since the *DMCA* and its related amendments, with what is now commonly known as digital rights management (DRM). Today, very few retail CDs sold are not copy protected in some fashion. DRM is typically a layer of information embedded on the disc that tells the disc reader that the disc can only be read for the purpose of playback.[48] This software takes up precious space on the disc and as a result, this has led to the loss of the compact disc digital audio trademark, which sets a number of quality standards to ensure the compatibility and high audio quality of the disc.[49] Ironically, this means that the quality of commercial compact discs in the 80s & 90s are often superior in

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[46] Bill C-60, *An Act to amend the Copyright Act*, 1st Sess., 38th Parl., 2005, online: Parliament of Canada <http://www.parl.gc.ca/PDF/38/1/parlbus/chambus/house/bills/government/C-60_1.PDF>.

[47] Michael Geist, "Bill C-60 and Private Copying," online: Michael Geist <http://michaelgeist.ca/component/option,com_content/task,view/id,1157/Itemid,85/>; Philip Dorrell, "Copyright Levies: The Copyright Levy AKA Piracy Tax" *Philip Dorrell Home Page* (1 April 2005), online: Philip Dorrell Home Page <http://www.1729.com/ip/CopyrightLevies.html>.

[48] Reuters News, "Sony tests technology to limit CD burning" *CNET* (1 June 2005), online: CNET Networks <http://news.cnet.co.uk/digitalmusic/0,39029666,39189658,00.htm>.

[49] "Red Book (audio CD standard)," online: About, Inc. <http://experts.about.com/e/r/re/Red_Book_(audio_CD_standard).htm>.

compatibility and sound than CDs produced recently. Although the software has improved from its initial incarnation, in the past, whole shipments of discs were returned as faulty as they would not play in many standardized players or would cause people's computers to crash.[50] Furthermore, for all the clear negative effects of DRM, it may be argued that it has done little, if anything, to curb copying, as with each new copy protection scheme, there is a person who will figure out how to circumvent it or will write software to crack it, thus making it possible to copy the disc.[51]

A recent U.S. case illustrates the dangerous escalation of DRM software as record companies continued to try to develop effective copy protection. In 2004, Sony was caught including very controversial DRM software on certain discs.[52] The software resembled and acted like a virus, more commonly known as a "rootkit."[53] Upon inserting the disc into your computer drive, a program would install itself without the user's permission and embed itself so that it could not be removed. The software purported to install only a proprietary media player required to play the audio disc but in fact took control of some aspects of your computer from within.[54] This rootkit created a dangerous security compromise that hackers could and did in fact exploit using the work already done by Sony BMG.[55] Also, the program would run in the background, significantly slowing down your system and would "phone home" to Sony headquarters from time to time searching for updates of itself.[56] This created problems of privacy since during the broadcast,

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[50] Frank Thorsberg & Tom Spring, "New Shackles on Your CD, Video Copying" *PC World* (January 2002), online: PC World Magazine <http://www.pcworld.com/news/article/0,aid,68799,pg,1,00.asp>.

[51] John Borland, "Sony CD protection sparks security concerns" *CNET* (1 November 2005), online: CNET Networks <http://news.com.com/Sony+CD+protection+sparks+security+concerns/2100-7355_3-5926657.html?tag=nl>.

[52] For a list of affected albums see "CD's Containing XCP Content Protection Technology" *Sony BMG*, online: Sony BMG Music Entertainment <http://cp.sonybmg.com/xcp/english/titles.html>.

[53] *Supra* note 51.

[54] Mark Russinovich & Bryce Cogswell, "Sony, Rootkits and Digital Rights Management Gone Too Far" *Freeware Sysinternals* (31 October 2005), online: Freeware Sysinternals <http://www.sysinternals.com/blog/2005/10/sony-rootkits-and-digital-rights.html>.

[55] Alorie Gilbert, "Attack targets Sony 'rootkit' fix" *CNET* (16 November 2005), online: CNET Networks <http://news.com.com/Attack+targets+Sony+rootkit+fix/2100-7349_3-5956707.html?tag=nl>.

[56] Mark Russinovich & Bryce Cogswell, "More On Sony: Dangerous Decloaking Patch, EULAs And Phoning Home" *Freeware Sysinternals* (4 November 2005), online: Freeware Sysinternals

information about your network configuration could be seen at Sony's end, thus making it an easier system to compromise. Sony initially denied that the program did this, and then denied that they ever looked at the records. However, imagine an employee listening to this CD at work, as many companies might allow. Unbeknownst to the employee, this software has installed itself and is broadcasting the company's network configuration. Not only is the installation of any software on a work computer by employees likely prohibited, this also gives rise to issues of potential corporate espionage. Depending on the size of the company, the cost would be potentially crippling in terms of lost productivity and massive IT wages paid out in order to have the rootkit removed and the system restored to normal. Those who did discover the software and attempted to remove it found that their CD-Rom drive no longer functioned because the software had embedded itself so deeply, and unfortunately, in some cases, a system reinstall was required.[57] Sony's response, which was not very forthcoming, was to offer a kit to uninstall the software, requiring you to provide further information by registering yourself in order to receive the kit.[58] They also offered to exchange the CD for a credit to download the album and about $7,[59] and recalled all remaining copies from store shelves.[60] Despite the invasive nature of the software, instead of being fined or criminally charged, in 2005 Sony was simply forced to settle a class action lawsuit for an undisclosed amount.[61]

DRM and other issues continue to plague consumers in the legal downloading arena with Apple's iTunes being a prime example. With iTunes, you purchase an mp3 file online. These files also contain DRM, which limits what use the consumer may make of the music once they have paid and downloaded it. Typical restrictions include one-way

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<http://www.sysinternals.com/blog/2005/11/more-on-sony-dangerous-decloaking.html>.

[57] *Supra* note 54.

[58] Sony BMG Music Entertainment, "SONY BMG CD Technologies Settlement PROOF OF CLAIM FORM," online: Sony BMG CD Technologies Settlement <http://www.sonybmgcdtechsettlement.com/pdfs/ClaimForm.pdf>.

[59] "Instructions," online: Sony BMG Music Entertainment <https://secureweb.rustconsulting.com/sonybmgcdtechsettlement/Instructions.aspx>.

[60] John Borland, "Sony offers new CDs, MP3s for recalled discs" *CNET* (18 November 2005), online: CNET Networks <http://news.com.com/Sony+offers+new+CDs%2C+MP3s+for+recalled+discs/2100-1002_3-5960987.html?tag=nl>.

[61] Ingrid Marson, "Sony settles 'rootkit' class action lawsuit" *CNET* (29 December 2005), online: CNET Networks <http://news.com.com/Sony+settles+rootkit+class+action+lawsuit/2100-1002_3-6012173.html>.

transferability from the computer to the media player, or a limited number of CDs that may be made, if any at all. An example of this is, that without some more creative hacking, Apple iTunes files cannot be converted from their original format into the more widely compatible mp3, which at one point prompted French Parliament to consider anti-trust legislation against Apple forcing interoperability of files between music players.[62] There are other services besides iTunes, such as Rhapsody, Napster, and mp3.com, which do not have these restrictions, but the greatest appeal of a downloading site is the catalogue of downloadable material for which iTunes currently has the most comprehensive database of music. This is due to the popularity of the iPod and the simplicity of the interface, and most importantly that you can only use iTunes with an iPod. A recent development with iTunes is that even after you have purchased a song with the ability to make two or three copies, if the rights holder changes their permission to say that only one or two copies may be made, iTunes will then go onto your computer and further encrypt or replace the file to reflect the artists' wishes. DRM is becoming "less about protecting copyright and more about creating a system in which people rent rather than own the media they spend money on."[63] Furthermore, if you want to convert the files into a CD that can be played in other stereos, you have to spend time on your computer converting the files to a burnable format, before burning it onto a CD. Despite the comparable price, these are not pure copies. Downloaded music tracks from any service are not the full quality Wav files that you would obtain if you were to purchase a proper CD.[64] Wav files are roughly 10 times larger than compressed mp3 files, (or Apple's AAC) which, using algorithms, eliminate high and low end sounds that are outside of the range of human hearing. It was this compression and reduced size that made music downloading over the Internet and huge storage in small media players feasible in the first place. This compression, however, becomes noticeable with multi-layered music, such as classical, and will not sound nearly as good on a Hi-Fi Stereo as a commercial CD. The reason this is not a big issue is that people tend to listen to their music in small headphones inside the ear, and more and more, people simply do not burn CDs but just carry their media players around.

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[62] Elinor Mills, "Apple calls French law 'state-sponsored piracy'" *CNET* (22 March 2006), online: CNET Networks <http://news.com.com/Apple+calls+French+law+state-sponsored+piracy/2100-1025_3-6052754.html?tag=nl>.

[63] "MPs in digital downloads warning" *BBC NEWS* (4 June 2006), online: BBC NEWS <http://news.bbc.co.uk/2/hi/technology/5041684.stm>.

[64] Adam Pash, "WAV – What is a WAV," online: About, Inc. <http://mp3.about.com/od/glossary/g/wav.htm>.

Finally, despite the fact that you are no longer receiving a tangible physical copy, as you are receiving only a digital version, the purchase price of 99 cents per song is the same as the cost of a CD. However, once it has been copied to a digital format, there is no longer a distribution cost to the producer. There is no product, as it clearly does not include a disc, a case or a liner insert, which make up a significant cost of producing a CD. Therefore, beyond the original production cost of recording the album, the costs are greatly, if not nearly altogether, reduced. There are no longer any packaging or shipping costs, but only marketing costs and fees to maintain Internet bandwidth. The same CD that once cost the industry $2 to $4 apiece to produce, now costs next to nothing. In a market economy such as ours, consumers expect that as costs decrease, the savings should be passed on to them to some degree. Unfortunately however, as is the case with a monopoly, this is almost never the case, as the legal downloading industry is still demanding the same arbitrarily high retail price that they always have.

To sum up, the consumer is faced with an unacceptable choice between purchasing a CD of reduced quality and compatibility, which comes with the risk of intrusive and potentially damaging DRM at the same price or purchasing digital files of reduced quality which come with restrictions that amount to renting the music rather than owning it at the same price. The cost of legal downloading services remains too high, since, in addition to the clear decrease in quality, the cost to the consumer has remained the same and has become far more inconvenient.

OTHER FACTORS

THERE ARE TWO PARTS TO CHALLENGING the entertainment industry's argument that P2P networks are hurting their business. First, it can be argued that there are other reasons to explain the lower revenues, and second, that it hasn't actually hurt business.[65] With regards to both the record and film business, over the past few years, Wal-Mart has become one of the largest retailers in North America. They have managed this despite carrying only best sellers in the small section within their stores. As more dedicated music and movie stores go out of business, consumers can no longer find the older titles, which were a steady and considerable portion of record sales. Furthermore, as it does with all of its product lines, Wal-Mart uses its purchasing power to pressure suppliers to lower their prices, so that they in turn can

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[65] Beth Potier, "File sharing may boost CD sales" *Harvard News Office* (2002), online: Harvard University Gazette <http://www.news.harvard.edu/gazette/2004/04.15/09-filesharing.html>; Welte, *supra* note 40.

undercut the competition. This in itself will lower record companies' revenue. Finally, it may simply be that many people just don't care for the music being produced and simply aren't buying. In conjunction with the now limited selection offered, and the habit of over exploiting popular trends, the market is saturated with formulaic music that appeals to the lowest common denominator, forcing consumers to look elsewhere. It doesn't appear as though people began downloading music with the intention of depriving artists of their due compensation, as according to an Ipsos poll:

> Of those surveyed, 74 percent said that CDs are too expensive, and 58 percent said music in general is "getting worse." Nearly two-thirds blamed the decline in sales on either competition from other media, a decline in new-music quality, or too expensive CDs. One-third said the decline is due to illegal downloading or CD burning. A whopping 92 percent said they never download free music using a P2P service, and 80 percent said they think free music downloading is stealing.[66]

For those who are downloading, it can be argued that it was due to one or several of these factors. People tried P2P and were understandably hooked on the ability to discover wonderful music that they had never heard or had not been able to find for years, at the click of a mouse. Now, downloading has become a difficult habit to break, particularly given that there are no incentives to return to CD purchases, or pay downloads, and in fact many reasons to stay away. The aforementioned tactic of individual lawsuits meant to deter downloaders are only going to continue to foster the divide, as the risks of being prosecuted only fuel the resentment towards record companies and incite economic protest.

Despite the fact that most people now consider it somewhat unethical to download files, given the alternative, they continue to do it anyhow. People have become disgruntled with the cost of entertainment, which has not gone down in approximately 30 years, despite lower recording, production, manufacturing, shipping and marketing costs. The RIAA has argued that the aggressive copy protection and individual lawsuits are an effort to protect the royalties of artists. Yet, historically recording contracts have paid very little in terms of royalties; somewhere around 12 percent.[67] Since the public has long suspected that it is not in fact the artist losing the bulk of the money, which according to polling is the central ethical basis for the public's reluctance to use P2P,[68] people have

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[66] Welte, *ibid.*
[67] *Supra* note 39.
[68] Welte, *supra* note 40.

less incentive to continue to support the premium disc costs. While it is clear that the record producer bears the economic risk, the rewards are not proportional. Even with a generous estimate of $1 per CD to the artist and a modest price of $15 for the CD, with a sale of 1 million copies, the artist, as the creator of the work makes $1 million, while the record company will make 15 times that amount minus production costs. People don't want to deprive artists of their due royalties, but high prices, lack of availability, bad music, questionable DRM tactics and lawsuits against the customer base have caused a backlash.

Movie studios advanced this claim in the *Betamax* case[69] over 20 years ago, which ironically, Sony now finds itself having been on both sides of the debate. At the time, Universal's claim was that VCRs in homes would hurt the film industry. However, there is no indication that this ever occurred. Similar to the record industry, if the movie industry is suffering, then it is easily arguable that it is less about piracy as only a small percentage of people are downloading movies, and likely due more to external factors such as greater home theatre technology coupled with inflexibility on the part of theatre companies in the face of market shifting. Rather than being competitive and creating incentives for people to continue going to theatres, theatres still demand outrageous ticket prices for which their audiences are now subjected to 45 minutes of advertising. Rather than lowering prices to bring more people in, theatres and moviemakers are punishing those who attend movies by trying to offset their losses through the added advertising, thus making the experience even less pleasurable. This, coupled with the fact that movies can be rented and watched at home, where, due to the increasing quality and affordability of entertainment technology, rivals, if not exceeds, the experience of the theatre. Rather than sit in an unfamiliar chair that is being kicked periodically, you can recline in your favourite chair and watch your big screen television in digital surround sound with popcorn and snacks that don't break the bank. The same, if not more relaxing, home experience costs a tenth of what the theatre is demanding. These types of trends indicate that people want to be entertained in the comfort of their homes. In many cases, people may want to watch a first run movie but not enough to pay such a premium. To combat this, the MPAA could release first run movies to home audiences for a fee, similar to the way people can order movies through their satellite television providers. As with online music, once the movie file is uploaded, there is no cost to ship. Beyond the cost of the production all money received is profit. This creates options for consumers where there were none before and may capture an audience that would likely not have entered the theatre in the first place.

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[69] *Supra* note 5.

On a related note, similar tactics are now being taken with home entertainment, as DVDs contain "must watch" material such as copy warnings and players that can skip through "must watch" material are illegal. The problem, however, is that oftentimes movie studios now flag previews as "must watch" material.[70] This may sound unimportant, but it is an example of how studios, absent constraints or regulations, are allowed to slowly encroach and restrict the way we privately view goods that we have legitimately purchased.

The second part of the argument is that downloading has not hurt the industry, but thanks to the pioneering of Napster, the industry has been revitalized.[71] People have access to independent music from across the world that never would have been discovered if not for file sharing. Through simple word of mouth, artists are achieving success without massive record distribution. This is simply a new form of marketing. You can obtain the disc for free by downloading, and if you like the music, you can go out and buy the CD for the full recording studio quality. But then we run into the copyright problem on commercial CDs again. Consumers are faced with the dilemma of downloading a reduced quality disc for free, paying for that same reduced quality, or purchasing a commercial CD and hoping that it won't wreck their computers. This may soon be a moot point, however, as there are signs that the public prefers the ease of finding their music online and the days of physical media are numbered. The majority of people don't believe that the music should be free, so after discovering the artist, given the unappealing alternatives, they may instead choose to support the artist by paying to attend a concert where they can support the band directly.

RECOMMENDATIONS

P2P DOWNLOADING IS NOT THE PROBLEM; it is just a reaction to an exciting new technology. The real problem has been poor consumer treatment prior to and in reaction to this technology. Imagine a city where the traffic lights are notoriously poorly timed. Over time, motorists discover that a trip that ought to take 10 to 15 minutes, takes 25 to 35 minutes as they hit every red light regardless of traffic. Motorists soon discover that if they speed slightly or drive slowly between certain lights, they will hit fewer red lights. Upon discovering this behaviour, the city, rather than address the root of the problem by improving the light system, installs cameras throughout the city to catch

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[70] Lisa M. Bowman, "Newsmaker: Fighting for your copy rights" *CNET* (22 March 2002), online: CNET Networks <http://news.com.com/2008-1082-866516.html>.
[71] Jonathan Silverstein, "iTunes: 1 Billion Served" *ABC News* (23 February 2006), online: ABC News Internet Ventures <http://abcnews.go.com/Technology/story?id=1653881>.

those speeding. Despite fewer tickets being issued after the initial installation, speeding has not decreased, but has simply changed. Now, rather than speeding slightly between lights, motorists have adjusted their behaviour by memorizing the locations of the cameras, and now speed excessively between them, and hit the brakes immediately before the cameras. I draw this analogy to show how the industry could have addressed the problem by addressing the source of the behaviour and creating incentives, or removing justifications for such behaviour by creating a solution that would benefit both parties, rather than attacking its consumers. Founder of the consumer rights group DigitalConsumer.org, Joe Kraus, believes:

> . . . [T]hat we are entering a world where the personal-use rights that consumers have are being taken away by media companies under the guise of preventing illegal copying, but (in) reality (companies are) trying to establish new business models . . . Intellectual property holders (should have the right) to protect their intellectual property, but that protection cannot come at the loss of the rights that consumers have for personal and fair use . . . Imagine a world where I'm used to recording (the television show) "Everybody Loves Raymond," and a media company says I can't do it anymore. Oh, but you can do it if you pay another $2 per episode. What is really happening here is that media companies are trying to create a new business model that charges consumers to have their personal-use rights back, and I think that's wrong. [72]

Here, we have clear issues of invasion of privacy, criminal tampering, and unauthorised installations by the entertainment industry all in the name of protecting their bottom line. The stranglehold that the entertainment industry has long had over the choice, the delivery and the consumption of consumers' entertainment was a complete monopoly that did not allow for checks and balances. This has now resulted in a sort of pendulum effect. It is the uncompromising attitude of an industry that has unfairly treated its customers and artists that has led to a silent economic revolution. It is not simply about getting something for free, but losing faith in the value of the product. People have learned that $20 is too much for a CD and that little of that goes to the artist anyhow; therefore, the market will no longer sustain it. The RIAA *et al.* ought to stop suing people and come to some sort of standard and show

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[72] *Supra* note 70.

consumers that artists are actually being compensated fairly. The discussion with copyright boards to impose a levy on media players ought to be revisited as well as a constant re-examination of existing levies. On a purely business level, the industry ought to recognise that they can no longer justify generating a 500 percent profit over and above what the artist receives, and that in reducing the price of CDs they will remove much of the incentive to seek pirated copies. Fewer people will spend the time downloading an album, converting it and burning it to a disc when they can purchase a high quality CD with all the interesting information and lyrics on the inside liner for under $8. The retail price mp3s also ought to be reduced by at least half in recognition of the lower production costs and decreased quality and limitations on freedom of use. Finally, I would suggest the elimination of DRM as the public is being doubly taxed,[73] and they have thus far proven ineffective and expensive. These acts would unify the industry and bring incentive and credibility to legal downloading. People won't be faced with the dilemma of whether to pay what the studios are demanding and suffer the DRM consequences, or to seek alternative methods. Much of the world dances to the beat of the free market; therefore, where there is a demand, a supply will present itself. If there is no legitimate way to get it, there will be illegitimate suppliers instead. This is simply market correction.

The stricter interpretation of copyright law, as advocated by certain parties, is leading to an erosion of established rights. Any time there is a potential to lose established rights, the public ought to be concerned. We can presently see subtle signs of personal rights erosion from governments across several areas, from our privacy rights concerning questionable anti-terrorism tactics to a regression regarding the rights of freedom of choice.[74] As corporations grow larger, we begin to see a shift of power as they continue to exert more influence on government as their wealth increases, seeking indulgences that favour their business goals. If this trend continues unchecked, we may one day see the interest of the corporation supersede both the power of the state and the right of the individual. Those in favour of P2P networks advocate the benefits claiming that this is a tool that will help the growth and evolution of

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[73] Faultline, "Blank media levies: record once, pay thrice" *The Register* (4 May 2004), online: The Register, <http://www.theregister.co.uk/2004/05/04/blank_media_levies/page2.html>.

[74] Susan Page, "NSA secret database report triggers fierce debate in Washington" *USA TODAY* (11 May 2006), online: USA TODAY <http://www.usatoday.com/news/washington/2006-05-11-nsa-reax_x.htm>; Evelyn Nieves, "S.D. Abortion Bill Takes Aim at 'Roe'" *Washington Post* (23 February 2006) A01, online: The Washington Post Company, <http://www.washingtonpost.com/wp-dyn/content/article/2006/02/22/AR2006022202424.html>.

business and communication on the Internet, as these programs allow huge amounts of data to be transmitted between people for legitimate uses without the similarly huge connections. What makes the Internet such a powerful medium is the ability to disseminate information widely and easily. However, it seems that if the RIAA had its way, individuals would only be able to listen to their purchased music in a locked room under a blanket. An overly strict interpretation of copyright law would mean that a dentist playing music in his office or a person listening to music in the car with the windows down is in breach of copyright, as these would constitute public performances.

CONCLUSION

DESPITE SEEMINGLY STRICTER LEGISLATION AND aggressive civil lawsuits, in practice things are much the same. The courts, legislators, and the public are still clear that generating a profit through piracy remains an activity that ought to be denounced. Although the uploading of material seems to be an issue of concern with copyright advocates, the courts thus far have been reluctant to find infringement without clear intention to provide access to others or to realise monetary gain. This has been seen most notably in the case law in Canada,[75] the inconsistent decisions in the U.S.,[76] and the widely polarized debates between consumer rights groups and copyright boards globally.[77] Given the nature of the transmissions and the various industry issues as articulated in this paper, coupled with the lack of evidence to support the deleterious effects claimed, the courts are reluctant to give these claims merit, recognizing that to do so may raise a potentially slippery slope regarding the erosion of personal rights and threats to privacy. Furthermore, the courts may not want to generally criminalize an activity that would include a whole group of people who do not necessarily deserve to be labelled criminals. Courts may be moved by the previous argument regarding VCRs: that these are the growing pains of a new technology and that there is a legitimate potential to be harnessed. What is clear is that the courts are not satisfied with the current state of copyright law and may be awaiting a clearer definition from legislators of exactly when copyright infringement occurs and clear cases where it ought to be and ought not to be punishable. Alternatively, the courts may be indicating that the state of copyright law is unsatisfactory as a whole and requires revision. As an interim solution, it seems as though

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[75] *Private Copying 2003-2004*, *supra* note 32; *Society of Composers*, *supra* note 43.

[76] *A&M*, *supra* note 8; *MGM*, s*upra* note 15. *RIAA*, *supra* note 17; *Universal*, *supra* note 24; *RIAA*, *supra* note 28; *BMG*, *supra* note 44.

[77] See Slashdot.org and Groklaw.net for ongoing developments.

Canada is on the right track. The levies have thus far proven to be an effective legislative tool in compensating artists and maintaining creative incentive. Case law has also demonstrated that the courts are favouring the rights of the public and falling in line with the purpose of the levies, by wishing only to punish those who clearly sought to deprive the artists of remuneration. Hopefully, this will continue and will eventually send a message to legislators to better define copyright infringement and with any luck, put an end to many of the seemingly frivolous lawsuits coming from the entertainment industry.

At the end of the day, two things seem clear. First, the exchange of information over the Internet will not be stopped. Second, people began downloading music for free simply because they could. The entertainment industry has a right to protect its interests, but the potential for illegal activity is insufficient to quash this technology, as there is no conclusive proof that these industries are suffering as they claim, and there are already measures in place to compensate. Since the primary rationales behind copyright seem to be recognition and remuneration:

> It may make more sense to consider that the Internet is the best embodiment of the change of the traditional exclusive right paradigm to a compensation paradigm, in which rightsholders organize the market — to a certain extent — with a view to ensuring proper financial returns. In other words, if the only option of users is to infringe or not access music at all, many of them will find a way to access the content they want. If, on the other hand, content is accessible but in an organized, properly channelled way, the "need" to infringe greatly diminishes and copyright survives . . . [T]he focus is shifting from preventing unauthorized uses to getting paid for "authorized" — and unavoidable — uses.[78]

Now that there are some improved pay options, such as mp3.com, many people have switched over. It was simply a matter of the market filling that demand rather than resisting it. Had the entertainment industry simply adjusted much sooner, we could have been at this point earlier and there would be a bigger database of files and greater incentive to patronize pay sites.[79] Having recognized the success of pay download sites, it will take only a little more improvement before others make the

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[78] *Supra* note 34 at 1416, 1365.

[79] IFPI, "Legal music downloads triple in 2005; file-sharers take heed of lawsuits" (21 July 2005), online: International Federation of the Phonographic Industry <http://www.ifpi.org/site-content/press/20050721.html>.

switch. With home recording studios becoming more commonplace, the trend of moving away from tangible media and the accessibility of a powerful marketing tool such as the Internet, the entertainment industry must make adjustments if they are to compete. Individuals are becoming more capable than ever of producing CDs and films and finding distribution through downloading services, thereby taking all the profit for themselves and altogether eliminating the middle man.