RETHINKING PRIVATE COPYING IN THE DIGITAL AGE:
AN ANALYSIS OF THE CANADIAN APPROACH TO MUSIC

By

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A thesis submitted in conformity with the requirements for the degree of Master of Laws
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ABSTRACT

Digital technology and the Internet in particular have fundamentally altered the dynamics of private copying. Private copying can no longer be thought of simply as the domestic non-commercial exercise of the reproduction right. Private copying is now an international problem implicating both the communication to the public and reproduction rights. This expansion of private copying has already undermined, and threatens to further undermine, the remuneration received by creators for users’ enjoyment of their intellectual property.

In the context of the Canadian approach to music, possible solutions to the digital private copying dilemma are explored. The author advocates a policy response that builds upon the existing statutory licence for private copying and extends the model to the communication right via a levy targeting ISPs in Canada. International implications of the proposed solution are considered, in respect of both Canada’s international treaty obligations and ensuring remuneration for creators on a global level.
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### TABLE OF CONTENTS

1. **Introduction**  
   2. **Technology and Private Copying**  
      A. Re-defining Private Copying for the Digital Age  
      B. Transformation of the Copyright/Technology Relationship  
      C. Emergence of Technological Protection Measures  
      D. Legislative Protection of Technological Measures  
         (a) WIPO Internet Treaties  
         (b) Domestic Approaches to the Implementation of the WIPO Internet Treaties’ Anti-circumvention Provisions  
            (i) Australia: the *Digital Agenda Act* Reforms  
            (ii) U.S.: the *Digital Millennium Copyright Act* Reforms  
            (iii) Europe: the E.U. Copyright Directive  
            (iv) Canada  
   E. Implications for Private Copying  
      (a) Technological Measures May Nullify Private Copying Exceptions  
      (b) Limitations of a Purely Technological Response to Private Copying  
         (i) Socially Sub-optimal Outcomes  
         (ii) Ability to Private Copy Adds Value to the “Original” Work  
         (iii) Technological Measures Are Susceptible to Defeat  
         (iv) Technological Measures Fail to Protect the Existing Repertoire of Music  
         (v) An Emerging Challenge: Peer-to-Peer File Trading Networks  
   3. **Canadian Regulation of Private Copying**  
      3.1 Reproduction Right  
         A. Introduction to Part VIII of the Canadian *Copyright Act*  
         B. Reproduction Licence
(a) Scope of the Licence
   (i) Application of the Licence – meaning of “audio recording medium” 26
   (ii) Copying onto Hard Disks – “Ripping” CDs and Downloads 27
(b) Limitations on the Licence 29

C. Reproduction Levy
   (a) Application of the Levy
      (i) Current Focus of the Levy – meaning of “audio recording medium” 31
      (ii) Future Focus of the Levy – Hard Disks and MP3 Players 31
(b) Levy Should Apply to Media and Equipment 32
(c) Alleviating the Impact of Levying Hard Disks 33
   (i) Statutory Exemptions to the Levy 34
   (ii) Copyright Board Discretion 37

D. Relationship Between the Licence and Levy 38

E. Beneficiaries of Remuneration 39

F. Practical Considerations
   (a) Defining the Target of the Levy – “blank audio recording medium” 41
   (b) Levy Evasion and Avoidance 42

3.2 Communication to the Public Right

A. Introduction to the Communication to the Public Right 44

B. Tariff 22
   (a) Overview of Collective Licensing of Music in Canada 46
   (b) SOCAN’s Internet Tariff 47

3.3 Interaction of Part VIII with Tariff 22

A. The Board’s Interpretation of the Communication Right 49

B. Inadequate Protection in Canada for the Online Transmission of Performers’ and Makers’ Intellectual Property 50
4. Digital Private Copying and International Obligations

A. Overview of Canada’s Treaty Obligations Effecting Private Copying

B. Application to a Digital Private Copying Scheme

(a) Internet Levy

(b) Private Copying Exception to the Reproduction Right
5. Conclusion
1. Introduction

Private copying has traditionally been thought of as the non-commercial copying of sound or audio-visual recordings for domestic use.\(^1\) Despite the non-commercial nature of the copying, private copying nonetheless prima facie infringes the reproduction right of owners of copyright in the work being copied. As technology has developed over the last few decades, private copying has become increasingly pervasive and virtually impossible to prevent. Although considerable disagreement exists over the magnitude of the impact of private copying on copyright owners, there is little doubt that private copying costs the entertainment industry considerable revenue due to lost sales.\(^2\)

As a result, a number of countries, including Canada, have introduced private copying regimes dealing with the reproduction right.\(^3\) These schemes provide a licence permitting certain private copying in return for a levy on either recording media, hardware or both. The rationale for these regimes is that it is practically impossible for copyright owners to prevent or license private copying. Furthermore, as Lord Templeman noted in

\(^1\) The non-commercial nature of private copying is what distinguishes it from piracy which is unauthorized copying for commercial gain.

\(^2\) In justifying the need for a private copying regime, the Canadian Government cited the 1995 Report of the Task Force on the Future of the Canadian Music Industry which found that nearly 44 million blank tapes were sold in Canada in 1995 and, of those, approximately 39 million were likely used by consumers to copy sound recordings. (Canada, House of Commons of Canada, Standing Committee on Canadian Heritage, “A study of Bill C-32, An Act to amend the Copyright Act” (3 October 1996), Evidence of Hon. Sheila Copps ([then] Deputy Prime Minister and Minister of Canadian Heritage), online: Parliament of Canada <http://www.parl.gc.ca/committees352/heri/evidence/21_96-10-03/heri-21-blk101.html> (date accessed: 21 March 2001).

\(^3\) The author has become aware that more than 40 countries have enacted private copying regimes. For a list of countries which, as of 1993, had enacted private copying schemes, see Appendix 3, G. Davies & M.E. Hung, *Music and Video Private Copying*, (London: Sweet & Maxwell, 1993).
C.B.S. Songs v. Amstrad, it is socially undesirable for the law to be treated with contempt and for individuals to be held liable for conduct that few citizens consider wrong.

The conventional focus of private copying has been domestic and limited to the reproduction right. Digital technology has, however, fundamentally changed the dynamics of private copying. Unlike analog technology, digitization now permits endless serial copying with no degradation in quality. More importantly, the Internet provides a forum for the widespread dissemination of copyright works. The dissemination of copyright works has been aided by compression technologies, such as the MP3 format, which allow digital copies to be reduced to computer files of manageable size without any noticeable loss in sound quality. Due to their smaller size, MP3 files may be easily transferred over the Internet.

The popularity of MP3 format, together with increasing Internet bandwidth, led in 1999 to the appearance online of so-called peer-to-peer (P2P) file trading networks, the most notorious of which is Napster. P2P networks, such as Napster and those based on the Gnutella protocol, effectively turn users' hard drives into servers, permitting users to share data on their hard drives. The most popular data being shared on P2P networks is, of

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5 In Amstrad, Lord Templeman stated, “From the point of view of society the present position is lamentable. Millions of breaches of the law must be committed by home copiers every year. Some home copiers may break the law in ignorance, despite extensive publicity and warning notices on records, tapes and films. Some home copiers may break the law because they estimate that the chances of detection are non-existent. [...] Whatever the reason for home copying, the beat of Sergeant Pepper and the soaring sounds of the Miserere from unlawful copies are more powerful than law-abiding instincts or twinges of conscience. A law which is treated with such contempt should be amended or repealed.” (Ibid at 1060) Despite this powerful judicial pronouncement, the United Kingdom has yet to introduce a private copying scheme.
6 Digitization has also allowed owners to adopt technological means of protecting their property. The interaction of technological protection measures and related laws will be explored in Section 3 below.
course, music although, as compression technologies improve, movies will increasingly be traded. \(^8\)

Aside from these technical aspects of the Internet which impact upon private copying, note should also be made of the pervasive attitudinal change brought about by the Internet. This change has been aptly referred to as a "hacker mentality and entitlement philosophy." \(^9\) Many Internet users believe that content on the information highway should be freely accessible and free of charge. This view is apparent from and attributable to the popularity of Napster which, at its peak in February 2001, had over 50 million users trading music files. \(^10\)

These developments have rendered the original focus of private copying on the reproduction right outdated. Private copying has become an international problem implicating both the reproduction and communication rights. Although digitization has transformed private copying, in this paper, I argue that the rationale for a private copying scheme applies equally, if not more cogently, in the digital age. In the digital age, however, private copying schemes must encompass both the communication and reproduction rights.

This paper represents the first study of how copyright law can and should deal with the digital private copying dilemma through statutory licences. In the context of recent developments in Canadian copyright law, the paper attempts to build upon the work that has preceded it, which has dealt solely with the reproduction right and primarily in the

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\(^10\) "Big music’s digital nightmare" *The Economist* (9 August 2001), online: Economist.com <http://www.economist.com/agenda/PrinterFriendly.cfm?Story_ID=729127> (date accessed 17 August 2001). However, the peak in simultaneous users was 1.6 million in February 2001 (A. Sullivan, “In Napster’s
context of analog technology. In advancing the view that statutory licences represent the solution to the digital private copying dilemma, the approach taken, although in parts descriptive, synthesizes recent developments in the Canadian approach to private copying and analyzes their impact upon how the current scheme may adapt to and provide a workable solution to the digital private copying dilemma.

Private copying is potentially a very wide topic. This paper will focus on just one aspect of private copying: copying of pre-recorded music. Music has been chosen, not only because it is at present the most pressing problem, but also because the Canadian legislation that impacts upon private copying applies only to music. Much of the discussion will, however, also be relevant to audio-visual works which, as noted, will likely soon become more commonly available on the Internet. Within the music framework, this paper will focus further and will not address streaming, a format which roughly provides the Internet equivalent of traditional broadcasting, except that the technology does not allow a permanent copy to be made by the end user. Streaming is, however, an important element in ensuring access to digital music because its secure format has significant appeal for the record industry. Therefore, it should be considered in broader analyses of means to enable access to digital music.


11 In Germany, for example, the private copying exception encompasses copying of literary, artistic, audio and audio-visual works (Article 53 German Copyright Law (Urheberrechtsgesetz, UrhG)). The breadth of the German scheme is, however, unusual. Most other countries instead focus on copying of music, movies or both.

12 Supra note 8 and accompanying text.


14 Much of the debate surrounding streaming has occurred in the United States. See Reese, supra note 13. See also the proposed Music Owners’ Listening Rights Act of 2000 (Bill No. H.R. 5275, introduced on 25 September 2000, online: U.S. Copyright Office <http://thomas.loc.gov/cgi-bin/query/z?c106:h5275:> (date
This paper is structured as follows. In Section 2, I examine the relationship between technology and copyright and how this impacts upon private copying. Section 3 contains the bulk of the substantive discussion in this paper. This part separately considers the Canadian approach to regulating the reproduction and communication to the public rights, analyzes the interaction of these rights, and then proceeds to identify how a scheme may be structured in order to provide a comprehensive solution to private copying in the digital age. In Section 4, a brief overview is provided of Canada’s international obligations and how these impact upon solutions to the digital private copying dilemma. Finally, concluding remarks are made in Section 5.

2. Technology and Private Copying

A. Re-defining Private Copying for the Digital Age

Traditionally, private copying has referred to copying undertaken for non-commercial purposes in a domestic setting. In the author’s view, digital technology has rendered this understanding out of date. A brief comment regarding terminology is therefore in order. Although the terms “private copying” and “home copying” will be used as shorthand throughout this paper, it should be recognized that these terms are no longer accurate. With the advent of the Internet, and P2P file-trading platforms, the activity is no longer limited to an exercise of the reproduction right. The communication right is directly implicated when users transmit copyright works via the Internet.

Furthermore, the “private” label has also become outdated. The private/public distinction, so often used in copyright law as a means of delineating the boundary between owner and user rights in relation to a work, has become blurred in the digital age because...

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accessed: 22 February 2001) which would legalize the creation of digital music lockers such as those at issue in UMG Recordings et. al. v. MP3.com, Inc. 92 F.Supp. 2d 349 (S.D.N.Y. 2000) [hereinafter MP3.com].
most exploitations of a work are in a sense private as individuals increasingly access and exploit copyright works from personal computers in their homes. In the author's view, therefore, these uses by individual consumers are more accurately described as "non-commercial exploitations" of a work. In the following sub-section, the discussion will turn to the impact of technology on private copying.

B. Transformation of the Copyright/Technology Relationship

The interaction between copyright and technology has been one of the most prominent features in the development of copyright law over the last century. Historically, copyright owners have approached new technologies with considerable trepidation because of the ability of new advances to undermine owners' exploitation of their intellectual property. In several cases over the last two decades in various countries, rightsholders unsuccessfully targeted manufacturers of equipment for the copying activities of hardware users, which they alleged infringed their reproduction right. In both Sony and Amstrad, the two most notable cases, the courts were clearly aware of the impact of their decisions on the public interest both in reasonable private use of works and in consumer access to the latest technologies.

This hostile relationship between the technology and copyright industries is, however, changing in the digital age. The entertainment industry is now almost universally embracing technology, often in conjunction with contractual means, as the answer to the

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15 Davies & Hung, supra note 3 at 1.
18 Although the interaction between copyright and contract, and the extent to which "shrink-wrap" and "click-wrap" contracts can over-ride copyright exceptions, is a topic of great importance, it is beyond the scope of
threat posed by digital technology to the exploitation of their intellectual property. As will be explored more fully in sub-section E. below, these measures, however, have the potential to suppress the public’s desire to fully utilize technology and make reasonable private use of works.

C. Emergence of Technological Protection Measures

Manifestations of the changing relationship between the copyright and technology industries are evident from the exponential growth of an electronic intellectual property rights management industry. A wide range of technological measures are currently under development. These measures generally fall into two categories. Watermark technology allows copyright owners to track unauthorized copies of works, but does not prevent user access to works or unauthorized copying. The second more far-reaching technology is the digital envelope which prevents user access to works, thereby curtailing users’ ability to use and copy works and consequently reducing policing costs for content providers.

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19 Consider, for example, the Secure Digital Music Initiative (SDMI) which is a recording industry-sponsored project directed at determining secure methods of distribution of music over the Internet. See <www.sdmi.org>. Ironically, the SDMI is currently led by Dr Leonardo Chiariglioni, the primary developer of MP3 technology. (L. Jones, “An Artist’s Entry into Cyberspace: Intellectual Property on the Internet” (2000) 22(2) E.I.P.R. 79 at 90).

20 In February 2001, Webnoize estimated that the number of digital rights management companies had quadrupled in the past sixteen months, due largely to the copyright troubles affecting the music industry. (T. Kontzer, “After Napster, A Deluge of Digital-Rights Software” Techweb (19 February 2001), online: Techweb <http://www.techweb.com/wire/story/TWB20010219S0005> (date accessed: 28 February 2001)).


22 *Ibid* at 2451.
Among the most notable recent technological protection developments which will effect the delivery of music in the future are the following proposals: first, encrypted compact discs that can not be "ripped" into digital files and made available online; and, second, a technology called CPRM (Content Protection for Recordable Media) that prevents certain types of files from being transported to portable devices, such as the flash memory cards used in MP3 players. While the widespread market implementation of these measures may still be some time off, they each raise fundamental questions regarding consumer freedom and the ability of copyright users to exercise copyright exceptions. Implications of these and other technological measures on private copying will be discussed more fully below.

D. Legislative Protection of Technological Measures

(a) WIPO Internet Treaties

The importance of technological protection measures in the digital age was recognized in the December 1996 adoption of two new treaties, the World Intellectual Property Organization Copyright Treaty (WCT) and the World Intellectual Property Organization Performances and Phonograms Treaty (WPPT). The WCT deals with the traditional subject matter of copyright – literary, dramatic, artistic and musical works – and

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25 See below Section 2 E. “Implications for Private Copying”.
the WPPT deals with the neighbouring rights of performers and producers of phonograms. The treaties attempt to bring copyright law into the digital age by addressing the impact of the Internet on the copying and distribution of copyright subject matter. In doing so, the treaties encourage authors to make their works available online. Among the provisions adopted in the treaties is Article 11 of the WCT which obliges signatories to:

Provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used in connection with the exercise of their rights [...] and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.

A parallel provision is found in the WPPT. Both treaties also provide for the protection of Electronic Rights Management information (ERM) by requiring that signatories prohibit the removal or alteration of ERM or the distribution of works with knowledge that ERM has been removed or altered. The treaties will come into force three months after ratification or accession by thirty countries.

The adoption of the WIPO Internet Treaties has been widely accepted by commentators as striking an appropriate balance between user and owner interests. The provisions are broadly drafted and leave considerable discretion to signatories as to the specifics of implementation. The flexibility of the provisions of the treaties has, however, caused considerable tension at the domestic level, particularly in relation to the appropriate

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WCT, supra note 26 at Article 11.
WPPT, supra note 27 at Article 18.
WCT, supra note 26 at Article 12 and WPPT, supra note 27 at Article 19.
WCT, supra note 26 at Article 20 and WPPT, supra note 27 at Article 29. As of 15 July, 2001 there had been 26 and 24 ratifications and accessions to the WCT and WPPT, respectively. See <http://www.wipo.int/treaties/docs/english/u-page31.doc>.
level of legal protection for technological measures. The central concern regarding the implementation of anti-circumvention laws is that such measures will override copyright law and render meaningless copyright exceptions, such as for private copying, that are designed to balance user and owner interests. This concern arises because technological measures can potentially prevent not only infringing copying of works, but also non-infringing copying and access to works, a result that would appear to be antithetical to copyright policy. A further practical difficulty in regulating circumvention devices is that the same devices can facilitate both lawful and unlawful acts. Policy makers have consequently grappled with whether rightsholders who use technological measures should be legally obliged to provide access to and allow non-infringing copying of their works by persons whose use falls within a copyright exception.34

(b) Domestic Approaches to the Implementation of the WIPO Internet Treaties' Anti-circumvention Provisions

As Canada has yet to introduce anti-circumvention measures to its Act, in this subsection, I briefly survey other international approaches that will likely guide Canadian policy makers. At a domestic level, two main approaches have emerged: the Australian approach and the U.S./European approach.

(i) Australia: the Digital Agenda Act Reforms

Australia, in the Copyright Amendment (Digital Agenda) Act 2000 (Cth),35 opted to closely follow the minimum requirements of the WIPO Internet Treaties, resulting in legislation that is more favourable to the interests of copyright users than the approach in

35 [hereinafter Digital Agenda Act]. The amendments introduced to the Australian Copyright Act 1968 (Cth) by the Digital Agenda Act came into effect on 4 March 2001.
the United States and Europe. The Australian act targets only acts preparatory to circumvention of a "technological protection measure", such as the manufacture and making available online of devices. The act of circumvention itself is not proscribed because the government considered that acts preparatory to circumvention represent the greatest threat to copyright owners' rights rather than the individual acts of circumvention. The Digital Agenda Act allows a limited range of exceptions to the anticircumvention provision. Exceptions are provided for "permitted purposes" including, amongst other things, certain copying of computer programs, educational copying and copying for persons with disabilities. Notably, fair dealing is not an exception to the anticircumvention provision.

(ii) U.S.: the Digital Millennium Copyright Act Reforms

In contrast to Australia, the U.S., in the Digital Millennium Copyright Act (DMCA), opted for a more aggressive implementation of the WIPO Internet Treaties, an approach that is hardly surprising given the country's position as the world's dominant exporter of copyright material. The DMCA, currently the subject of Constitutional challenge in *Universal City Studios v. Reimerdes*, goes beyond the requirements of the

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36 Fitzpatrick, *supra* note 33 at 222.
37 Defined in Section 10 of the *Copyright Act 1968* (Cth) to encompass both access and copy control mechanisms.
38 Section 116A, *Copyright Act 1968* (Cth).
39 Report of House of Representatives Standing Committee on Legal and Constitutional Affairs, *Advisory Report on the Copyright Amendment (Digital Agenda) Bill 1999*, December 1999, paras. 4.36-4.43. The government was also concerned that a ban on acts of circumvention could prevent users from engaging in lawful activities, such as fair dealing (J. Lahore, "Fair Dealing and the Digital Agenda: Will the Copyright Balance Survive?" (2000) 18(1) *Copyright Reporter* 23 at 29).
40 Sections 116A(2) and (3), *Copyright Act 1968* (Cth).
41 Section 116A(3), *Copyright Act 1968* (Cth).
42 Sections 47D (interoperability), 47E (error correction) and 47F (security testing), *Copyright Act 1968* (Cth).
43 Part VB, *Copyright Act 1968* (Cth).
45 111 F. Supp. 2d 294 (S.D.N.Y. 2000) [hereinafter *Reimerdes*]. This case concerns the legality of DeCSS, an algorithm used to decrypt a copy control mechanism protecting digital versatile disks (DVDs), a new digital
treaties and has been widely criticized for favouring copyright owner interests at the expense of users' rights. The DMCA differs markedly from the Digital Agenda Act in the manner in which the anti-circumvention provisions have been implemented and the penalties that attach to their breach.

In terms of its practical operation, the DMCA divides technological measures into two categories: measures that prevent access to a work, and measures that prevent copying of the work. In the case of measures that prevent access to a work, both the provision of circumvention devices or services and the act of circumvention itself are proscribed. However, for measures that prevent copying of a work, only the provision of circumvention devices is regulated. Section 1201 therefore does not prevent circumvention of a technological measure that prevents copying of a work. The reason for this distinction was to continue to allow the public to make fair use of copyright works. As the fair use doctrine is not a defense to gaining unauthorized access to a work, the act of circumventing a technological measure in order to gain access to a work is prohibited.

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47 The Australian Act provides as its maximum penalty a fine of up to 550 penalty units (A$60, 500) and five years imprisonment for individuals and five times that for corporations (section 132(6A), Copyright Act 1968 (Cth)). In contrast, the U.S. Copyright Act provides for a penalty of up to USS$500,000 and five years imprisonment for first offences and double that for subsequent offences (s. 1204(a)(1) and (2)). On 18 July 2001, the first arrest was made in the U.S. under the anti-circumvention provisions. Dmitry Sklyarov, a Russian national, was arrested at a conference in Las Vegas for allegedly trafficking in software designed to defeat technological measures used in certain electronic books (D.P. Hamilton, “U.S. Agents Arrest Russian Programmer Over Allegations of Copyright Violation” Wall Street Journal Online (18 July 2001), online: WSJ.com <http://interactive.wsj.com/articles/SB995419559592324309.htm> (date accessed: 18 July 2001).
52 U.S. Copyright Office Summary, supra note 48 at 4.
54 U.S. Copyright Office Summary, supra note 48 at 4.
subject to narrow statutory exceptions including reverse engineering and encryption research.

Practically, however, the anti-circumvention provisions' distinction between access and copying makes little sense especially when applied to music. The Recording Industry Association of America (RIAA) controls over 90% of music sold in the U.S. and chooses the format in which it makes its artists' music available. Given the greater breadth of protection offered by digital envelopes and their associated reduction in copyright infringement policing costs, it is likely that RIAA will favour their use over other ERM technologies such as digital watermarks. As under the Australian Act, because the provision of circumvention devices is prohibited, in theory it will be difficult for consumers to access circumvention devices needed to exercise their fair use rights.

(iii) Europe: the E.U. Copyright Directive

The approach in Europe has recently been formalized in the European Directive on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information

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56 17 U.S.C. §1201(g). On 27 October 2000, the Library of Congress issued its ruling on additional classes of works to which an exemption from the prohibition on circumvention of access control technologies will apply. On the recommendation of the Register of Copyrights, the Librarian of Congress created only two further narrow exceptions: “1. Compilations consisting of lists of websites blocked by filtering software applications; and 2. Literary works, including computer programs and databases, protected by access control mechanisms that fail to permit access because of malfunction, damage or obsoleteness.” (Recommendation of the Register of Copyrights and Determination of the Librarian of Congress, 65 FR 64555, October 27, 2000, online: U.S. Copyright Office <http://www.loc.gov/copyright/fedreg/65fr64555.pdf> (date accessed: 21 February 2001).
57 Pollack, supra note 21 at 2464.
59 Pollack, supra note 21 at 2481.
60 In practice, however, circumvention devices will likely become readily accessible online. This point is discussed in greater detail below in Section 2. E. (b) (iii) “Technological Measures Are Susceptible to Defeat”.
Society (EU Copyright Directive), adopted by the European Union’s Council of Ministers in April 2001. The Directive, required to be implemented by member states by 22 December 2002, closely follows the approach of the U.S. in relation to the protection of technological measures. The Directive requires member states to “provide adequate legal protection” of “technological measures” against both acts of circumvention and distribution of circumvention devices. The interaction of Article 6 with Article 5 – “Exceptions and limitations” – is critical to interpreting the impact of the Directive on private copying. Article 5(2)(b) permits member states to provide exceptions in relation to private copying. In relation to this exception, however, Article 6(4) simply permits, but does not require, member states to take measures to provide for the exercise of private copying. Therefore, the Directive allows technological measures to over-ride the private copying exception.

(iv) Canada

Although Canada has yet to make the legislative changes necessary to ratify the WIPO Internet Treaties, it recently released a discussion paper that suggests that it will adopt an approach closer to Australia’s than the United States’ and Europe’s. In considering the difficulties with determining the appropriate legislative protection of technological measures, the report emphasizes the capacity of such legislative protection to undermine copyright exceptions and limitations that are central to the Canadian copyright balance. The authors of the report state:

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62 Article 6(3) defines “technological measures” to include both access control and copy control mechanisms.
63 EU Copyright Directive, Article 6(1).
64 Ibid at Article 6(2).
65 Canadian Government Digital Copyright Discussion Paper, supra note 34 at 25.
The departments question whether it is possible to establish a legal framework which, on the one hand covers virtually all activities that undermine the use of technological measures, but at the same time continues to reflect the policy balance currently set out in the Act. Such a change in the Copyright Act could potentially result in a new right of access, the scope of which goes well beyond any existing right, and would represent a fundamental shift in Canadian copyright policy. It could serve to transform a measure designed for protection into a means of impeding legitimate uses.66

The report specifically notes the potential for legislative protection of technological measures to render meaningless certain exceptions in the Act, such as the private copying exception contained in Part VIII of the Canadian Copyright Act.67

E. Implications for Private Copying

Against this backdrop, it is now appropriate to consider how technological measures and associated laws impact upon private copying.68 As Canada has yet to implement anti-circumvention provisions, it is positioned well to gain from the experiences of other jurisdictions in how anti-circumvention provisions and associated laws impact upon private copying. In this sub-section, I consider the potential of technological measures to override the private copying exception contained in Part VIII of the Canadian Copyright Act and then proceed to argue that a purely technological response to private copying will likely prove inadequate.

66 Ibid at 24.
67 Ibid at 25. See section 3.1 "Reproduction Right" below for discussion of the Canadian private copying regime.
68 There is a vast body of literature considering the impact of technological measures on copyright exceptions generally. Many commentators fear that technological measures and contract will supplant copyright as the means of regulating access to and use of creative works. The analysis in this paper will however focus on the more specific issue of how such measures affect private copying. For literature dealing more generally with
(a) Technological Measures May Nullify Private Copying Exceptions

While the differences between the two primary approaches to the implementation of legislative protection of technological measures was noted in the preceding sub-section, each nation’s implementation of the WIPO Internet Treaties share a common feature: technological measures are permitted to prevent private copying. In Australia, this is a natural consequence of the absence of a private copying exception. However, in the United States and Europe, jurisdictions which have traditionally permitted certain private copying, whether under a statutory licence or the broad fair use doctrine, this result is more surprising.

The outcome in Europe and the U.S. is largely attributable to practical difficulties with regulating circumvention devices, as well as the growing popularity of the view that private copying should not be permitted in the digital age and is best controlled by technological measures. In this paper, an alternative view is put forward for the management of private copying in Canada. I argue against a purely technological response and assert that efforts must focus on developing the existing private copying regime because it represents the most appropriate compromise between owner and user interests.

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the impact of technology and contract on copyright, see T.C. Vinje, “Copyright Imperilled” (1999) 21(4) E.I.P.R. 192; Vinje, supra note 13; P. Samuelson, supra note 46.

69 In Australia section 111 of the Copyright Act 1968 (Cth) provides a very limited private copying exception. It deems time-shifting to not be an infringement of copyright in the television or radio broadcast. However, the provision does not consider the underlying copyrights in other works contained in the signal. As a result, this exception provides Australian time-shifters with little practical protection from an infringement action. A more comprehensive private copying regime was introduced in Part VC of the Copyright Amendment Act 1989 (Cth). However, the High Court of Australia found the scheme to be unconstitutional and it has since been repealed. (Australian Tape Manufacturers Association Ltd v. Commonwealth of Australia (1993), 176 C.L.R. 480.)
(b) Limitations of a Purely Technological Response to Private Copying

(i) Socially Sub-optimal Outcomes

A technological response presents two basic outcomes for private digital copying in Canada, neither of which is socially desirable. If technological measures prove unsuccessful, whether because of susceptibility to defeat by hackers or because of lack of acceptance from consumer’s in the marketplace, there will likely be unrestrained private copying. Citizens would be liable for copyright infringement and creators would receive no compensation because the laws would be difficult or uneconomical to enforce against individual infringers. In the alternative, if effective technological measures are widely deployed and accepted by consumers, there may be no private copying at all. This outcome is also unattractive because consumers’ access to works may be limited as will consumer freedom to, for example, enjoy works at different times or in different formats. In the balance of this sub-section, I draw on recent experiences in other countries, particularly the United States, to argue that a comprehensive private copying regime is necessary to solve the dilemma of private digital copying of music.

(ii) Ability to Private Copy Adds Value to the "Original" Work

Consumers have long valued their ability to make copies of copyright works. Since the widespread introduction of the video cassette recorder, consumers have benefited from the ability to time-shift, that is record a program and watch it at a later more convenient time. In a number of jurisdictions, including the United States, the United Kingdom, New Zealand and many European countries, time-shifting has for many years

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70 Sony, supra note 17.
71 Section 70 of the 1988 UK Copyright, Designs and Patents Act permits the recording of a broadcast or cable programme for private time-shifting purposes without any infringement of the copyright in the broadcast/cable programme or of any of the works included in it.
been recognized as lawful. In Canada, however, time-shifting infringes the copyrights in works contained in the broadcast signal as well as the communication signal. Format shifting, the copying of a musical work from one form of storage to another, is, however, permitted in Canada under Part VIII of the Copyright Act. Similarily, many consumers engage in mixing, that is preparing their own compilations of works, especially musical works. Mixing is also permitted in Canada.

The ability to engage in these practices, whether lawful or not, depending on the particular jurisdiction, makes the work of more value to the consumer than one which may be only accessed under controlled conditions and which may not be copied. After taking account of the additional value to a consumer that the ability to copy provides, a number of economists have found empirically that private copying results in a net gain to society. Shapiro and Varian caution copyright owners to consider the consumer value in flexibility of use when deciding whether to apply technological measures to protect their works. They argue that consumers are accustomed to making a wide range of uses of copyright works and may reject works for which access and use is tightly controlled.

It is difficult to predict whether consumers will reject tightly-controlled “originals.” Competition among information providers will factor largely in consumer reaction. If the market is competitive and one content provider supplies works on a less restrictive basis than another, price being equal, one would expect consumers to purchase

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72 Section 84 of the 1994 New Zealand Copyright Act contains an identical exception to the one found in the UK Act.
73 See below Section 3.1 “Reproduction Right”.
74 Ibid.
77 Ibid.
the more flexible format. Samuelson cites the experience of the software industry in support of this proposition. Companies which distributed their software without copy-protection measures were able to attract enough customers from the leading software firms that the leaders eventually opted to abandon technological protection measures. This outcome seems improbable in the music industry, at least in the short term, given the market power of the big labels and, more significantly, their collective participation in determining uniform technological protection measures as part of the SDMI. However, in the longer term, consumers may become more powerful as the Internet will likely fundamentally change the music distribution industry, all but eliminating the monopoly of the big labels in making music available to the public. Consequently, consumers would have the market power to demand music in a flexible format.

(iii) *Technological Measures Are Susceptible to Defeat*

The efficacy of a solely technological response to private copying is further limited by the susceptibility of any technological control to defeat and the capacity of the Internet to make circumvention devices widely accessible. It has been argued that it does not matter that that no technological access or copy control mechanism is completely fool-proof because such measures are directed at ensuring compliance by the majority of the population, which does not have the ability or the propensity to defeat such measures. This argument has been subsumed by developments in circumvention technology with many circumvention devices such as DeCSS, the program in dispute in *Reimerdes*, that is used to decrypt the technological measure protecting DVDs from copying, taking the form

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78 Samuelson, *supra* note 46 at 566.
of software that may be easily downloaded from the Internet. The simplicity of accessing and downloading such software makes circumvention feasible for the everyday citizen. Consumers will also likely have a greater incentive to do so if, as expected, technological measures prevent consumers from engaging in uses such as time-shifting and format-shifting to which they are accustomed.

Anti-circumvention laws protecting technological measures represent only a partial solution to private copying of music. The Internet has transformed private copying into a cross-border problem, requiring an international response in order to effectively manage it. As the Motion Pictures Association of America (MPAA) has discovered, despite its aggressive use of the DMCA to prevent the making available of DeCSS in the United States, the “hack” remains widely available online, primarily on servers outside the U.S. over which the MPAA has no jurisdiction. Although widespread implementation of the WIPO Internet Treaties, and perhaps even the Hague Convention, will provide some assistance, there will always be countries that are parties to neither international convention. Servers in these jurisdictions have the potential to become host to the latest “hacks”. The jurisdictional limitations of copyright law make these countries equally attractive as “copyright havens” for copyright content such as unlawful copies of MP3 music files. Furthermore, in the case of copy-control mechanisms such as DeCSS, the anti-

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81 The Advanced eBook Processor (AEBPR) which is used to unlock the technological measures used to protect ebooks is also available via download from the Internet. (United States of America v. Dmitry Sklyarov Criminal Complaint, dated 7 July 2001, online: Electronic Frontier Foundation <http://www.eff.org/IP/DMCA/US_v_Sklyarov/20010707_complaint.html> (date accessed: 14 July 2001)).

82 CSS (Content Scramble System) was hacked by a 15 year-old Norwegian, Jon Johansen. He made the hack available from a local server in Norway and, as Norway has not yet enacted the anti-circumvention provisions contained in the WIPO Internet Treaties, the MPAA has no recourse against him or means of preventing Americans from downloading DeCSS.

circumvention laws in Australia and the United States do not proscribe its circumvention by consumers.\(^4\) The copyright owner is therefore left only with the possibility of proceeding against individual users for copyright infringement.\(^5\) In the event that the copyright owner is able to detect these infringements, it is unlikely to prove economical or commercially desirable to proceed against individual infringers because of the risk of alienating both potential customers and the government, the support of both of which is required for the continuation of appropriate copyright protection in the future.\(^6\)

(iv) Technological Measures Fail to Protect the Existing Repertoire of Music

The effectiveness of a purely technological response to private copying of music is also limited by the fact that technological measures may only be applied prospectively, leaving the existing repertoire of works open to copying. This is a serious problem because most of the existing repertoire of music has been digitized due to the success of the CD format. In CD format, a musical work is easily converted to MP3 format. Although copy-protected CDs may be slowly entering the market,\(^7\) a significant proportion of the world’s repertoire of music has already been made available online in MP3 format. In 1999, the International Federation of Phonographic Industries (IFPI) estimated that there were more

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\(^4\) Australian law does not proscribe any acts of circumvention. The DMCA prohibits circumvention to defeat access control measures, but not circumvention to defeat copy control measures. There is some dispute as to whether CSS represent the merger of a copy control and access control measure in which case its circumvention would appear to be unlawful. U.S. authorities, however, seem to view CSS as a copy control measure (Recommendation of the Register of Copyrights and Determination of the Librarian of Congress, 65 FR 64555, October 27, 2000, online: U.S. Copyright Office <http://www.loc.gov/copyright/fedreg/65fr64555.pdf> (date accessed: 21 February 2001).

\(^5\) Depending on the purpose of the copying that results from the use of the circumvention device a U.S. user may have a fair use defence. In Canada the copying may, under some circumstances, be permitted under the private copying exemption contained in Part VIII of the Act. (See below Section 3.1 “Reproduction Right”). The copyright owner may also be able to pursue individual infringers for breach of contract, if there is a contract accompanying the work that prevents copying or circumvention of a technological measure protecting the work.

\(^6\) M. Racicot et. al., supra note 80 at 291.

than one million illegal music files online.\textsuperscript{88} Due to the recent popularity of services such as Napster, this figure no doubt represents but a fraction of the illegal music files available online in 2001.

\textit{(v) An Emerging Challenge: Peer-to-Peer File Trading Networks}

The record industry has, to date, been very successful in combating illegal copies of music online. The IFPI reports that during 2000 alone, it shut down 15,000 web sites and had as many as 300,000 illegal music files removed.\textsuperscript{89} In the U.S., the record industry has also been successful in a number of high-profile test cases including \textit{MP3.com} and \textit{A & M Recordings, Inc. v. Napster}.\textsuperscript{90} The biggest challenge faced by the music industry, however, awaits it in the form of user-friendly peer-to-peer file trading networks that are completely decentralized and used for a multiplicity of purposes. File trading platforms such as those based on the Gnutella protocol have a number of features which make them less susceptible to legal challenge by copyright owners under U.S. copyright law. First, unlike Napster, these services do not have a central server and as such they do not have the same ability to police their networks. Second, the platforms are used for trading not just music or movies, but other digital files such as pictures, thereby likely bringing the services under \textit{Sony}'s "substantial non-infringing uses" test.\textsuperscript{91} Third, although this has yet to be tested in the courts, there is also a possibility that privacy laws will prevent monitoring of files traded

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\textsuperscript{90} 239 F.3d 1004 (9th Cir. February 12, 2001) [hereinafter \textit{Napster}].
\textsuperscript{91} \textit{Sony}; \textit{supra} note 17 at 442.
over the networks. Finally, it appears that these services are increasingly being based in off-shore jurisdictions beyond the reach of U.S. copyright law. Broadly similar reasoning would also apply under the laws of Canada.

In the likely event that the music industry is unable to shut down these platforms, it appears that the uncompensated trading of copyright works will continue, leaving the industry again with the prospect of pursuing individual infringers. The inadequacies of this alternative have already been noted. There is therefore a pressing need in the digital world for a private copying model which offers a compromise between the interests of copyright owners and users. In the context of the Canadian approach to regulating private copying, I will now turn to an analysis of how a private copying regime may be structured in the digital age.

3. Canadian Regulation of Private Copying

3.1 Reproduction Right

A. Introduction to Part VIII of the Canadian Copyright Act

In the introduction and Section 2, it was noted that the traditional focus in the regulation of private copying was on the reproduction right. In Canada, the reproduction right at issue in private copying is dealt with in Part VIII of the Copyright Act, which was

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92 This is, however, by no means certain. Contractual terms in an ISP agreement stating that the ISP may monitor its networks could result in a finding that the user had no reasonable expectation of privacy.

93 Sullivan, supra note 10.

94 The existence of control is a pre-requisite to the imposition of liability under the concept of authorization found in Canadian law (Vigneux v. Canadian Performing Rights Society, [1945] A.C. 108 (P.C.)). Therefore, given the apparent absence of control over their networks, it is unlikely that an action for authorization against these services would succeed under the law of authorization. In Canada, privacy laws governing the private sector are far less developed than in the United States and may, in the present circumstances, not provide a remedy. However, other laws may be of relevance, such as section 182 of the Criminal Code R.S.C. 1985, c. C-46 which proscribes the interception of communications. Sections 342.1(1) [unauthorized use of a computer] and 430(1.1) [mischief in relation to data] may also apply.

95 See supra notes 85-86 and accompanying text.

96 R.S.C. 1985, c. C-42 [hereinafter Canadian Copyright Act].
introduced to the Act in 1997 as part of the reforms contained in Bill C-32. Prior to the introduction of Part VIII to the Canadian Copyright Act, private copying infringed copyright.

The key features of Part VIII are a licence, which legalizes certain private copying, and a levy which provides the basis for the remuneration of creators. The licence contained in section 80 of the Act permits the reproduction of a musical work (and the other copyright subject matter) embodied in a sound recording onto an "audio recording medium" for the private use of the person who makes the copy. Section 81 provides for a right of remuneration for eligible authors, performers and makers of sound recordings in respect of the private copying. Section 82 provides remuneration to creators by levying all "blank audio recording medium" manufactured or imported into Canada for the purpose of trade. Manufacturers and importers of blank audio recording media are liable to pay the levy upon selling or otherwise disposing of the blank media in Canada. Only blank media sold to associations representing persons with perceptual disabilities are exempt

97 Now an Act to Amend the Copyright Act, S.C. 1997, c. 24. The Constitutionality of Part VIII was unsuccessfully challenged in Evangelical Fellowship of Canada v. Canadian Musical Reproduction Rights Agency (C.A.) [2000] 1 F.C. 586. The applicants sought a prohibition or stay of the Copyright Board proceedings on the grounds that Part VIII is legislation in respect of taxation and is not copyright legislation under subsection 91(23) of the Constitution Act, 1867.
98 Although the fair dealing defence in section 29 of the Canadian Copyright Act encompasses "private study", private copying never constituted fair dealing under the Act. (Private Copying 1999-2000, Tariff of Levies to be Collected by CPCC (Re) (1999), 4 C.P.R. (4th) 15 at 21[hereinafter Private Copying 1999-2000]).
99 Strictly speaking, Part VIII does not provide a licence to private copy because the term "licence" implies a permission to do something that would otherwise be illegal; section 80 instead deems certain private copying to not be an infringement of copyright. In this paper, the term licence will be adopted as shorthand for the permissive effect of section 80.
100 Namely, the performer's performance and the sound recording. In this paper reference to copying music is adopted as shorthand for reproduction of the musical work, performer's performance and sound recording.
101 Section 2 of the Canadian Copyright Act defines "maker" as, inter alia, "in relation to a sound recording, the person by whom the arrangements necessary for the first fixation of sounds are undertaken." In this paper, the term "maker" will be used to signify the owner of the copyright in the sound recording.
102 Section 82(1)(a), Canadian Copyright Act.
from the levy.\textsuperscript{103} The following definitions, central to the regime’s operation, are found in section 79:

“audio recording medium” means a recording medium, regardless of its material form, onto which a sound recording may be reproduced and that is of a kind ordinarily used by individual consumers for that purpose, excluding any prescribed kind of recording medium;

“blank audio recording medium” means
(a) an audio recording medium onto which no sounds have ever been fixed, and
(b) any other prescribed audio recording medium.

Copyright collective societies are required to file with the Copyright Board\textsuperscript{104} a proposed tariff.\textsuperscript{105} After considering the proposed tariff and any objections to it, the Copyright Board must determine the amount and application of the levies, ensuring that the levies are “fair and equitable”.\textsuperscript{106} In its most recent decision, the Board set levies at 29 cents for audio cassettes, 21 cents for recordable CDs (CD-Rs) and recordable-rewritable CDs (CD-RWs), and 77 cents for CD-R Audio, CD-RW Audio and MiniDiscs.\textsuperscript{107} The collective societies are then required to distribute the proceeds of the levies to “eligible” creators as soon as practicable.\textsuperscript{108} All Canadian composers, lyricists, performers and makers of sound recordings qualify for the scheme, as do all foreign authors who are from a Berne Convention or WTO member state.\textsuperscript{109} However, only those foreign performers and makers from states that grant Canadian citizens or corporations similar benefits for home copying are eligible.\textsuperscript{110} Section 85 allows the Minister of Industry to designate qualifying states and

\textsuperscript{103} Section 86, Canadian Copyright Act.
\textsuperscript{104} [hereinafter “Board”].
\textsuperscript{105} Section 83(1), Canadian Copyright Act.
\textsuperscript{106} Section 83(9), Canadian Copyright Act.
\textsuperscript{108} Section 84, Canadian Copyright Act.
\textsuperscript{109} Definition of “eligible author” in section 79, Canadian Copyright Act.
\textsuperscript{110} See definitions of “eligible maker” and “eligible performer” in section 79, Canadian Copyright Act.
to tailor the benefits for foreign nationals to match that afforded to Canadians by the foreign private copying scheme.

Analysis of Part VIII will be used as a basis for a more general analysis of reforms that are required in order for a private copying model to respond to the challenges of private digital copying. Discussion will focus primarily around theoretical issues regarding the scope of the licence, limitations on the licence, the subject of the levy and the relationship between the licence and levy. Brief comment will also be made regarding a number of practical issues surrounding the scheme.

B. Reproduction Licence

(a) Scope of the Licence

(i) Application of the Licence – meaning of “audio recording medium”

A central feature of any private copying scheme is the scope of the licence. Internationally, there is considerable divergence between jurisdictions as to the activities permitted under the private copying licence. The Canadian statutory licence is amongst the more narrow private copying exceptions; it is limited to the copying of musical works. This is because such copying was considered to be the most pervasive private copying activity and also the one that causes the greatest harm to rightsholders.\(^{111}\) The licence only permits the copying of a musical work from one sound recording to another “audio recording medium”, which is defined in section 79 and extracted above.\(^{112}\)

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\(^{112}\) See above page 25.
The definition of “audio recording medium” (and consequently the scope of the licence and levy) is limited to media “of a kind ordinarily used by individual consumers” for private copying. In Private Copying 1999-2000, the first decision of the Copyright Board regarding the private copying scheme, the Board defined “ordinarily used” according to the consistency of use rather than regularity of use by consumers. The Board also determined that “audio recording medium” should be interpreted to include all non-negligible uses of a recording medium. Consequently, for example, CD-Rs and CD-RWs were levied in Private Copying 1999-2000 although the proportion of those media used for private copying was estimated to be only between 5 and 15 per cent. The Board also noted that the analysis must focus on use by the individual consumer, rather than consumers generally. Therefore, all non-negligible uses of an audio recording medium by individual consumers, irrespective of whether other consumers use such media, are exempted from infringement under the licence.

(ii) Copying onto Hard Disks — “Ripping” CDs and Downloads

Extrapolating from these determinations by the Board, the licence clearly permits, amongst other things, copying from a tape to a tape or from a CD to a tape. Although they have not been levied, the Board has also indicated that the memory cards in portable MP3 players will in time come within the scope of the levy, suggesting that copying to MP3 players is presently licensed. Importantly, the licence probably also permits copying

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113 Definition of “audio recording medium” in section 79, Canadian Copyright Act. (emphasis added).
114 Private Copying 1999-2000, supra note 98 at 41-42. The Board’s interpretation of “ordinarily used” was challenged and affirmed by the Federal Court of Appeal in AVS Technologies Inc. v. Canadian Mechanical Reproduction Rights Agency (CMRRA) [2000] F.C.J. No. 960.
115 Private Copying 1999-2000, supra note 98 at 43.
116 Ibid at 42.
117 For example, the Board states that “the fact that only 5 per cent of a given type of medium is sold to individual consumers does not mean that it does not qualify. In fact, all those media, including the 95 per cent sold to “non-consumers”, will be subject to the levy as long as a non-marginal number of consumers use them for private copying in a fashion that is non-marginal.” (Ibid at 42).
118 Private Copying 1999-2000, supra note 98 at 44.
from a CD to a digital file capable of storage on a computer hard drive and the reproduction involved when music is downloaded from the Internet. The Board has, however, yet to address this issue and no levy currently applies to hard disks.

However, in Private Copying 2001-2002, the Board indicated that it expects digital downloads to occupy a large share of the next hearing to determine the tariff. In order for copying onto hard disks to be licensed, hard drives must fall within the definition of “audio recording medium”. At the next private copying hearing, the Board will likely receive submissions from parties advocating one of two views regarding whether hard disks constitute “audio recording medium”. According to one view, once a hard drive is incorporated into a computer, the analysis should focus upon the computer as whole, and not the hard drive. If this is the case, the question then becomes whether a computer is “ordinarily used by individual consumers” as a recording medium onto which sound recordings are copied. As computers are used for a wide range of purposes, such as producing, displaying and disseminating data, it is arguable that the use of computers for storing sound recordings is so negligible so as to not bring computers within the definition of “audio recording medium”. If this view is accepted by the Board, ripping CDs onto a computer hard drive or the act of downloading music from the Internet will infringe copyright.

Although this argument has merit, the better view, in the author’s opinion, is that hard drives should be considered as a separate component and analyzed as such. This view has some support from the Board’s decision in Private Copying 1999-2000 which looks at memory sticks, smart cards and flash memory, the storage component of portable audio

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equipment, in isolation from the actual hardware as a whole. Given the Board's definition of “audio recording medium” as including all non-negligible uses of a medium, it appears that hard drives do indeed constitute “audio recording medi[a]” because their use by consumers for storing music is commonplace, especially with the rapid increase in hard drive capacities in recent years. Assuming that a hard drive is an “audio recording medium”, and as hard drives have not been excluded from the definition of “audio recording medium” by regulation, the Canadian licence therefore covers the act of downloading music from the Internet. This conclusion is subject to the proviso that, once downloaded, the work is not then distributed or disseminated to others in any way. As noted, format shifting from a computer hard drive to an MP3 player is also licensed. As such, Part VIII appears reasonably well-equipped to deal with digital private copying of music.

(b) Limitations on the Licence

As alluded to in the previous paragraph, the licence is limited to copies made for the private use of the person who makes the copy. Section 80(2) clarifies this limitation by expressly stating that the licence does not apply if, inter alia, the copying is done for the purposes of distributing the work or communicating it to the public. In this sub-section, the implications of these limitations for physical distribution will be discussed. The implications for electronic distribution via the Internet will be deferred and discussed below.

120 I thank Mario Bouchard, General Counsel of the Copyright Board, for alerting to me this view held by some parties. (Email from Mario Bouchard, General Counsel of the Copyright Board, to the present author (3 August 2001)).
121 See Private Copying 1999-2000, supra note 98 at 44.
122 Section 80(2), Canadian Copyright Act.
123 See below Section 3.3 E. (c) (ii) “Proposed Amendment to the Existing Private Copying Licence".
In practice, an anomaly results from these limitations. As the Board noted in
Private Copying 2000-2001, the licence permits the copying of a borrowed or stolen CD
but does not permit an individual to copy a CD for a third party.\footnote{Private Copying 2001-2002, supra note 107 at 292. The related issue of third party copying in the context of the fair dealing exception was considered by the Australian Copyright Law Review Committee in its report entitled “Simplification of the Copyright Act 1968 – Part 1 Exceptions to the Exclusive Rights of Copyright Owners” (1998), online: CLRC <http://clrc.gov.au/clrc/gen_info/clrc/clrc%20report/ReportHeadings1.html> (date accessed: 21 April 2001). The Committee concluded that copying on behalf of another for whom the copying would be considered a fair dealing is unlikely to be permitted under the Australian fair dealing exception unless the purpose of the copier’s dealing was also fair (at paras. 6.94-6.97). The Committee recommended that, in principle, copying by a person on behalf of another should not be excluded from being “fair” under the Committee’s proposed open-ended “fair use”-style exception (at para. 6.103).} This distinction makes little sense in the context of the rationale of the private copying scheme of providing compensation to creators for copying that they can neither prevent nor licence because in both cases the result is the same - a copy is made in circumstances that the copyright owner can not control and that also represent a potential lost sale to the copyright owner - yet only the first activity is captured by the licence and levy. A related rationale of the private copying scheme is to provide clarity for home copiers and avoid their being liable for non-commercial copying. It is difficult to see any difference in moral guilt between an individual making a copy for a third party and the individual lending the pre-recorded CD to the third party to make the copy themselves.

In the author’s view, rather than restricting the licence according to the use to which the copy is put, the better approach would be to limit the licence to copying that is neither directly nor indirectly commercial. If this limitation were adopted, creators would be compensated for more of the activities that infringe their rights which they are unable to control, without any greater risk that the private copying scheme would legalize or encourage piracy.
C. **Reproduction Levy**

(a) Application of the Levy

(i) **Current Focus of the Levy – meaning of “audio recording medium”**

The subject of the Canadian private copying levy has been and is likely to become even more controversial. The levy for private copies applies to “blank audio recording medium” which is defined in section 79 and extracted above.\(^\text{125}\) This definition incorporates the definition of “audio recording medium” but limits its scope to only those media “onto which no sounds have ever been fixed”\(^\text{126}\) and any other media prescribed by regulation. No media have as yet been excluded from the levy via regulation. In its two decisions to date, the Board has levied analog cassette tapes as well as MiniDiscs and various forms of recordable CDs.\(^\text{127}\)

(ii) **Future Focus of the Levy - Hard Disks and MP3 Players**

As discussed in sub-section B. above, the Board has yet to consider the issue of levying hard disks but has indicated that the memory components of MP3 players are leviable (although they have not yet been levied).\(^\text{128}\) As noted, in the author’s view, hard drives fall within the definition of “audio recording medium” and are therefore leviable.\(^\text{129}\) Several compelling reasons demand that the Board extend the levy to both hard disks and MP3 players at its next hearing. As the popularity of Napster demonstrates, downloading of music to hard drives and subsequently MP3 players has become commonplace and is now a significant element of the private copying market. Furthermore, hard drives and MP3 players reduce the need for recordable CDs, suggesting that the extension of levies to these

\(^{125}\) See above page 25.  
\(^{126}\) Section 79, definition of “blank audio recording medium”.  
\(^{128}\) See especially *supra* note 118 and accompanying text.  
\(^{129}\) *Supra* notes 121-122 and accompanying text.
items will be critical in counterbalancing the decline in revenue generated by the levy on recordable CDs.

(b) Levy Should Apply to Media and Equipment

The Canadian approach, in focussing on recording media, may be contrasted with other jurisdictions which instead levy recording equipment, or both equipment and recording media. The reason for levying media alone appears to be that purchases of media are generally representative of actual copying, whereas a one-off royalty on a piece of equipment is not representative because utilisation of hardware for copying varies considerably from user to user. A further practical problem of levying hardware alone is that consumers purchase hardware infrequently and the revenue generated for creators under such a private copying scheme would be sporadic, as the market for new hardware matures and then declines.

In the digital age, levying both media and equipment will likely prove necessary because improving technologies have significantly increased the prevalence of private copying. In order to ensure that creators are adequately remunerated for the private use of their works, in the author's view, there is a need to broaden the private copying scheme's revenue base by levying both media and equipment. The levy is justified on certain hardware because of the regularity with which certain machines, such as CD burners, are used to make private copies. While the explosion in popularity of CD burners may be attributed partly to users wishing to back-up data, the majority of new purchasers appear to

130 In the United Kingdom, the Whitford Committee recommended the introduction of a levy on recording equipment and rejected levying blank tapes. The Committee's recommendations were never enacted. (N. Khan, "The White Paper Proposals on the Private Copying of Sound Recordings" (1986) 136 (6260) New Law Journal 602).

131 For example, Germany levies both media and equipment (Article 53, German Copyright Law (Urheberrechtsgesetz, UrhG)).

132 Davies & Hung, supra note 3 at 226.
purchase CD burners in order to copy music. It would therefore seem justified for a levy to apply to CD burners. In fact, under German copyright law, a collective has already established a levy on CD burners.\(^{133}\)

(c) Alleviating the Impact of Levying Hard Disks

Although it may not have been the intention that the levy would extend to hard drives at the time Part VIII was introduced,\(^ {134}\) in the author’s view, computer hard disks fall within the scope of the levy and will likely become subject to a levy following the next tariff hearing. The application of a levy to hard drives is, however, particularly problematic, especially in light of a number of the deficiencies in the Canadian scheme. The most obvious objection to the imposition of a levy on hard drives is that most individual consumers and businesses use hard disks either exclusively or primarily for purposes other than storing music. Although this is undoubtedly a valid criticism, the consequences for creators of not levying hard drives will likely be severe as works become more and more frequently available in digital format and hard drives become more widely used for storing music. The impact of a levy on hard drives on individuals or businesses who use hard drives for non-infringing purposes could be minimized significantly by two measures: first, by extending exemptions to the levy; and second, by the Board determining levies according to the storage capacity of the hard drive. Each of these measures will be considered in turn.


(i) Statutory Exemptions to the Levy

Current Exemption Scheme is Inadequate

A considerable weakness in the Canadian private copying scheme is the narrowness of the statutory exemptions to the levy. The scheme exempts associations that represent persons with a perceptual disability, presumably because such organizations use recording media for producing non-infringing products such as talking books for blind people. Media produced for export from Canada are also exempted since the media will not be used for copying in Canada. Because of the confines of these exemptions, industries which are high volume users of blank recording media and purchase media from Canadian manufacturers or importers must pay the levy even though they use the media for non-infringing purposes. Such industries include the computer software industry and the pre-recorded music industry which use blank media to develop or distribute their own intellectual property. The non-exemption of these industries from the levies was challenged in Private Copying 1999-2000 and, in response, the Board determined that, “it cannot create further exceptions” because the Act is clear in exempting only associations representing persons with perceptual disabilities.

Fortunately, the unfairness of this situation has been alleviated somewhat by a “zero-rating scheme” which was introduced voluntarily by the Canadian Private Copying Collective (CPCC), the collective administering the scheme. Upon application to the CPCC, the zero-rating scheme permits certain categories of users such as broadcasters, religious organizations and law enforcement agencies to purchase levy-free media from

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135 Section 86, Canadian Copyright Act.
136 Section 82(2), Canadian Copyright Act.
137 This assumes that manufacturers and imports (and other parties in the distribution chain) do not absorb the levy as part of their costs. As the recording media is a high volume-low margin industry it is highly probable that the cost of the levy will be borne by the final purchaser of the media.
participating manufacturers, importers and distributors.\textsuperscript{139} The scheme does not apply to CD-Rs or CD-RWs and is generally limited to high volume purchasers.\textsuperscript{140} Consequently, the scheme is only a partial solution, especially for low-volume non-infringing users and non-infringing users of CD-Rs and CD-RWs.

The absence of reasonable exemptions to the levy not only undermines the integrity of the private copying scheme, but provides an incentive for users, particularly high volume users, to import media directly, thereby costing business to local sellers.\textsuperscript{141} As the size of the levies increase due to the growth in private digital copying, and their application likely widens to encompass hard drives and MP3 players, the need for reasonable exemptions becomes more pressing. Rather than a half-measure which relies on the goodwill of the administering collective, it is more appropriate to provide for exemptions to the private copying scheme in the statute. Exemptions offer greater certainty for users of recording media and would align the Canadian private copying scheme more closely with the ideal of “user pays.” As presently drafted, the Canadian scheme is not a user pay regime because of the significant number of non-infringing users of media who are nonetheless required to pay the levy.\textsuperscript{142}

\begin{footnotesize}
\textsuperscript{139} Other users eligible for the scheme are court or tribunal reporters, the music and advertising industry and certain professional users such as conference/training companies.
\textsuperscript{140} The zero-rating scheme initially required applicants to purchase at least one thousand units per year, significantly limiting its usefulness. It has since been expanded and now allows a supplier to consolidate purchases from a number of clients.
\textsuperscript{141} Provided that the media is not blank when disposed of, media imported directly are not leviable. (Section 82(1)(a), Canadian Copyright Act).
\textsuperscript{142} Mario Bouchard also points out that the scheme cannot be considered user pays when it is the manufacturer and not the user that is required to pay the levy. (Email from Mario Bouchard, supra note 120) Strictly speaking, this is correct. However, because of the nature of the recording media industry, the levy will invariably be passed on to the final purchaser (See supra note 137).
\end{footnotesize}
An Exemption Model for the Digital Age – the Australian Model

A possible model for statutory exemptions is contained in the repealed Australian private copying scheme. The Australian scheme provided for three categories of exemptions:

- "prescribed organisations". The intention of the legislature was to enact regulations to exempt from the scheme organizations such as educational institutions, broadcasters and pre-recorded cassette manufacturers.

- "exempt bodies". This category operated in a similar fashion to the Canadian zero-rating scheme and was intended to encompass blank tape users such as law firms and non-profit associations.

- The third category included individuals or bodies other than "prescribed organisations" and "exempt bodies". These blank tape purchasers were entitled to reimbursement of the levy if they provided the collecting society with a receipt and a statutory declaration that they would not use the tape (or make it available to others) for infringing purposes.

In determining exemptions to the levy, it is necessary to balance the cost of the exemption process (and its consequent effect on the proceeds available for distribution to eligible creators) against principles of fairness and "user pays," which are critical to a private copying scheme's successful operation and acceptance by the public. The Australian exemptions model represents in part a sensible and workable model, although it may be more administratively costly than the Canadian exemption scheme. Particularly in

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143 See supra note 69.
144 Section 135ZZS(1), Copyright Amendment Act 1989 (Cth) (repealed). "[P]rescribed organisations" were required to give the collecting society particulars of the tape and a receipt for purchase in order to qualify for reimbursement.
146 Ibid at 73. Presumably, other uses such as conference and training organisers would have been eligible as "exempt bodies." "[E]xempt bodies" were required to apply to the collecting society for an exemption number (Section 135ZZT(1), Copyright Amendment Act 1989 (Cth) (repealed)). If the society was satisfied that these bodies did not use tapes or make tapes available to others for infringing purposes, an exemption number would be issued and these bodies would then be entitled to be reimbursed (Section 135ZZS(1), Copyright Amendment Act 1989 (Cth) (repealed)).
147 Section 135ZZS(3), Copyright Amendment Act 1989 (Cth) (repealed).
relation to its provision of exemptions for individual users, the exemptions scheme potentially removes the incongruity in the Canadian scheme of persons who use recording media for non-infringing purposes having to pay the levy. In the short run, while the size of the levies is fairly nominal, there is a risk that the transaction costs involved in administering exemptions for low-volume purchasers of media will prove prohibitive. However, this risk is slim because there is little incentive for individual users to bother applying for an exemption when their reimbursement will be nominal.148

(ii) Copyright Board Discretion

The second mechanism which will limit the impact of a levy on hard drives and other media widely used for non-infringing purposes is the Copyright Board’s discretion in setting levies. In its two decisions to date, the Board has proved itself adept to considering differences in consumer usage of media and has adjusted levies accordingly. For example, the Board has recognized that media such as the mini-cassettes commonly used in dictating machines are capable of being used for private copying but their use for these purposes is so marginal to not warrant the imposition of a levy.149 The Board has further recognized the array of non-infringing uses for media (for example, use for backing up data or storing photographs)150 and has reduced the size of levies to take this into account.

148 A further practical issue that would have to be taken into account with an exemptions model is supervision of exempt users by the collecting society. In order to deter users from abusing the exemption process, it may be necessary to provide the collecting society with powers to randomly audit exempt users to ensure compliance with the criteria for exemption. A precedent for this already exists in the Canadian private copying scheme which allows the collecting body to audit the records of manufacturers and importers of recording media (Tariff of Levies to be Collected by CPCC in 1999 and 2000 for the Sale of Blank Audio Recording Media, in Canada, in Respect of the Reproduction for Private Use of Musical Works Embodied in Sound Recordings, of Performer’s Performances of Such Works and of Sound Recordings in which Such Works and Performances are Embodied, Supplement to the Canada Gazette, Part I December 18, 1999, sections 8 and 9).

149 Private Copying 1999-2000, supra note 98 at 43.

150 Ibid at 59.
In relation to hard drives, it is likely that the Board will recognize that hard drives with small capacity should not be levied, while those with larger capacity, which one would expect to be more commonly used for copying music, should be levied. Similarly, one would expect the Board to significantly discount the levies applied to hard disks because of their substantial non-infringing uses. As a result, even without the ability to exempt non-infringing uses, the levies for hard disks would likely not be too onerous. Inequities could, however, be removed by the addition of an exemption process as discussed above.\textsuperscript{151}

\textbf{D. Relationship Between the Licence and Levy}

The licence and the levy in the Canadian private copying scheme appear to be largely co-terminous, meaning that only private copying onto media which are leviable is licensed.\textsuperscript{152} This flows from the fact that the levy applies to “blank audio recording medium” which incorporates the definition of “audio recording medium” to which the licence applies. Although co-terminous in the sense that only copying onto media which are leviable (as distinct from levied) is licensed, the licence and levy are, however, not identical in scope.

In practice, an anomaly results from the structure of the regime: emerging uses of new recording media are automatically licensed even though there will invariably be a lag before the Board levies those media. For example, the downloading of music from the Internet appears to be currently licensed because hard drives are ordinarily used by individual consumers for recording. Yet, as noted, the levy has not yet been applied to hard disks. As the use of a new recording medium for private copying is presumptively licensed,

\textsuperscript{151} It appears that section 87 of the Canadian Act provides some scope to alter the exemptions available under Part VIII.
copyright owners also do not have the option of choosing not to seek a levy on the medium and thereby making it illegal to copy onto that media.\footnote{See supra notes 108-110 and accompanying text.}

Although the present structure does create a temporary anomaly, the lag problem may be overcome by the Board’s power, on application, to review its decisions if there is a material change in circumstances.\footnote{If the regime was re-structured so that the levy and licence were identical in scope, the definition of “audio recording medium” would also have to be modified to no longer be anchored to the present copying practices of consumers.} If, alternatively, the licence and levy were instead identical in scope, only copying onto media which had already been levied would be licensed. This would, however, appear illogical because consumers would have to refrain from using a new recording medium for private copying until the Board caught up with the technology and levied the media.\footnote{Definition of “eligible author” in section 79, Canadian Copyright Act.}

\textbf{E. Beneficiaries of Remuneration}

The beneficiaries of the revenue generated by the levies under Part VIII are carefully targeted. As noted earlier,\footnote{See supra notes 108-110 and accompanying text.} all Canadian creators of music qualify for the scheme, as do all foreign authors who are from a Berne Convention or World Trade Organization member state.\footnote{Berne Convention for the Protection of Literary and Artistic Works, first signed on 9 September 1886 and revised subsequently on 24 July 1971 and 28 September 1979 [hereinafter Berne Convention].} The distribution of the proceeds of the levies to both local and foreign authors ensures the Canadian scheme’s compliance with the principle of national treatment for authors espoused in Article 5(1) of the Berne Convention.\footnote{Section 66.52, Canadian Copyright Act (Discussed in Ibid).} This principle requires member states to grant to nationals of other member states the rights provided by the Convention as well as any other rights enjoyed by their nationals.
In relation to foreign performers and makers, however, only those from states that grant Canadian citizens or corporations similar benefits for home copying are eligible. The Canadian Minister of Industry has yet to designate any states whose performers and makers are entitled to share in the benefits of the Canadian private copying scheme. The anomaly that results is that it is lawful in Canada to reproduce foreign performers’ performances and foreign record companies’ sound recordings for private use even though these foreign rightsholders receive no remuneration under the Canadian private copying scheme. This outcome jeopardizes the user pays goal of the regime because Canadians are permitted to privately copy the intellectual property of foreign performers and makers without paying for the privilege.

The inequity of the reciprocity requirement for the remuneration of foreign performers and makers is readily apparent considering that, of the musical sound recordings privately copied in Canada, 72% involve foreign non-eligible performers and 67% involve foreign non-eligible makers of the sound recordings. It is also unclear why no Ministerial declarations have been made when countries such as Germany, for example, already remit remuneration to Canadian performers and makers based upon the national treatment principle. While the exclusion of foreign performers and makers from the Canadian scheme is undoubtedly beneficial for the Canadian copyright trade imbalance, and helps

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159 See definitions of “eligible maker” and “eligible performer” in section 79, Canadian Copyright Act.
160 See section 85, Canadian Copyright Act.
161 Private Copying 1999-2000, supra note 98 at 40.
162 Davies & Hung, supra note 3 at 217.
163 Considerations of the effect of copyright royalties on a nation’s trade balance are, of course, critical to policy making. Australia, for example, has an annual net trade deficit in copyright royalty transactions of over $1 billion. (Office of Regulation Review, An Economic Analysis of Copyright Reform. A Submission to the Copyright Law Review Committee’s Review of the Copyright Act (Cth) 1968 (1995), cited in A. Mason, “The Users’ Perspective on Issues Arising in Proposals for the Reform of the Law of Copyright” (1997) 19 Syd. L. R. 65 at 71).
to reduce the size of the levies,\textsuperscript{164} it is unfair to foreign performers and makers and compromises the quid pro quo nature of the regime.

\textbf{F. Practical Considerations}

(a) Defining the Target of the Levy – “blank audio recording medium”

The Canadian reproduction levy applies only to “blank audio recording medium” which are defined as media “onto which no sounds have ever been fixed” and any other media prescribed by regulation.\textsuperscript{165} The problem that arises from this definition is that in limiting the levy to media onto which no sounds have ever been fixed, a significant loophole is created. Manufacturers or importers could simply place trivial sounds on the media before selling them with the intention that the sounds would be erased (or ignored) by users. If this occurs, liability will not attach to the media because they would not be considered blank when first sold. At present, there is no evidence of this avoidance occurring. However, the incentive for avoidance by manufacturers or importers will increase significantly as levies increase.

The levy may also be avoided unintentionally by some manufacturers and importers simply because of the way certain media are sold. For example, many hard drives are sold by the manufacturer or importer pre-loaded with certain software, such as the operating system. This software invariably contains sounds such as the sounds that a computer makes when a file is closed or an email is received. It appears that these hard drives and other media sold with sounds on them are not captured by the levy, unless regulations are passed specifically including them within the definition of “blank audio

\textsuperscript{164} By the author’s calculations based upon the Board’s determination of the levies in \textit{Private Copying 1999-2000}, the levies would approximately double in size if foreign performers and makers were remunerated under the scheme.

\textsuperscript{165} Section 79, definition of “blank audio recording medium”.
recording medium”. Yet, as these hard drives likely fall within the definition of “audio recording medium” their use for private copying of music is permitted.

As the above examples demonstrate, the requirement that no sounds be affixed to a medium in order for it to be levied is particularly problematic. The requirement compromises the congruity of the licence and levy by creating a situation where certain media are not leviable although recording onto those media would be licensed. Although this loophole may be closed by way of regulation,\textsuperscript{166} passing regulations is time-consuming and inefficient. Logically, there is no reason why “blank audio recording medium” needs to be defined according to the absence of sounds; the critical consideration is whether or not the medium is used for copying music. Again, the repealed Australian private copying scheme provides a model with a more workable provision.\textsuperscript{167} The Australian private copying scheme would have levied media “of a kind ordinarily purchased or hired for use for making copies of sound recordings, \textit{whether or not any sounds are embodied in the tape}”\textsuperscript{168} This definition is superior because it avoids intentional and unintentional avoidance of levies through the sale of media embodying sounds.\textsuperscript{169}

\textbf{(b) Levy Evasion and Avoidance}

A concern raised when the Canadian levy was introduced was that it would lead to a surge in grey market sales, that is sales in Canada of non-levied blank audio recording media.\textsuperscript{170} The fear of the recording media’s industry body, the Canadian Storage Media

\begin{footnotesize}
\begin{enumerate}
\item Email from Mario Bouchard, \textit{supra} note 120.
\item Another model which preceded the drafting of the Australian legislation was the Austrian Copyright law which avoids defining the leviable media according to whether sounds have already been fixed to it. The Austrian law refers to “sound or visual recording media intended for the purpose [of copying] (recording material)”. (Austrian Copyright Amendment Law 1980, Article 42, cited in Davies & Hung. \textit{supra} note 3 at 226).
\item Section 135ZZJ, \textit{Copyright Amendment Act 1989} (Cth) (repealed) (emphasis added).
\item Explanatory Memorandum, \textit{supra} note 145 at 64.
\item Private Copying 1999-2000, \textit{supra} note 98 at 49.
\end{enumerate}
\end{footnotesize}
Alliance (CSMA), was that unscrupulous importers or manufacturers would dispose of media in Canada without paying the levy and gain a price advantage over legitimate operators who had paid the levy.\textsuperscript{171} Although the sale of non-levied "blank audio recording medi[a]" is illegal, there was some concern that these activities would in practice be difficult to detect.\textsuperscript{172} The ability of the CPCC to recover the levies in court and, upon court approval, require levy defaulters pay up to five times the amount of the levy as a penalty was considered an insufficient deterrent.\textsuperscript{173}

The Copyright Board has not yet found any significant evidence of grey market activities,\textsuperscript{174} but one would expect grey market activities to surge as levies increase. Consequently, it may be necessary to provide greater control over the retail sale of media and equipment since retailers provide the primary distribution channel for these products. Under the Canadian private copying model, there is nothing to prevent unscrupulous retailers from purchasing media on the grey market. As the levy is only applied at the manufacture and import stage, no liability would arise for this type of conduct. It may therefore be wise to introduce an offence structured similarly to secondary copyright infringement. Under such an offence, it would be unlawful for a person, for the purposes of trade, to sell or otherwise dispose of media subject to the levy that the person knew or should have known was media on which the levy had not been paid.\textsuperscript{175}

\textsuperscript{172} \textit{Ibid.}
\textsuperscript{173} The right of recovery of unpaid levies is set out in section 88 of the Canadian \textit{Copyright} Act. The query regarding the adequacy of the penalties was raised in \textit{Ibid.}
\textsuperscript{174} The Board attributed this primarily to the small size of the levies and the weakness of the Canadian currency relative to the U.S. dollar (\textit{Private Copying 1999-2000}, supra note 98 at 48-50 and \textit{Private Copying 2001-2002}, supra note 107 at 305-306). Another compelling factor that has limited grey market activity has been the lack of legitimate distribution channels for grey market recording media.
\textsuperscript{175} Davies & Hung have also suggested that greater co-operation is required between collecting societies and Customs officials in order to control these grey market activities (\textit{supra} note 3 at 232).
A related concern regarding the application of the levy in Canada is its restriction to imports for "the purposes of trade".176 If hard disks are levied and the levy is substantial, individual consumers will have the incentive to avoid the levy by importing computers directly from the United States. No levy will apply because the importation is not "for purposes of trade". PC manufacturers and retailers have already raised this concern in Germany where the collectives have proposed to attach a fee of 30 euros (US$26.85) to each computer sold in Germany.177 The German PC industry group has challenged the levy because it is concerned that consumers will order PCs directly from neighbouring countries without such fees, costing business to local manufacturers and vendors.178 Following protests from local manufacturers, the French government abandoned its plans to levy hard drives.179 These concerns of levy avoidance by consumers could be abated by removing the "trade purposes" limitation on the application of the levy.

3.2 Communication to the Public Right

A. Introduction to the Communication to the Public Right

As noted in the introduction and Section 2 above, until recently, private copying has been essentially a domestic problem with national responses focussing solely upon the reproduction right. The Internet’s capacity for the rapid and widespread dissemination of music has, however, changed the fundamentals of private copying. Private copying is now an international problem directly implicating the communication right. In the author’s view,

176 Section 82(1), Canadian Copyright Act.
178 Ibid.
a comprehensive policy response to the digital private copying dilemma must encompass both the reproduction and communication rights.

The Canadian Copyright Act deals separately with the communication of works to the public and the communication of the neighbouring rights in sound recordings and performances. Section 3(1)(f) of the Canadian Copyright Act grants authors of musical and other works the exclusive right both to communicate their work to the public by telecommunication and to authorize the communication of their work. Section 2 defines "telecommunication" broadly to encompass transmission by wired or wireless means. Performers and makers of sound recordings, however, do not have an exclusive right of communication, but instead have a right of remuneration for the communication to the public and public performance of their intellectual property. Performers and makers consequently do not have the right to refuse to authorize the communication of their copyright subject matter because they do not have an exclusive right to which an authorization right could attach.

The application of the communication and reproduction rights to the distribution of music on the Internet is particularly complex. Many of the uncertainties of how these rights are to be applied have, however, now been made clear following the Copyright Board’s decision in SOCAN Statement ofRoyalties, Public Performance of Musical Works 1996, 1997, 1998 (Tariff 22, Internet) (Re). The Board’s findings in Tariff 22 and broader implications of the decision will be discussed in the following sub-section and section 3.3.

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180 Section 2 defines “telecommunication” to mean “any transmission of signs, signals, writing, images or sounds or intelligence of any nature by wire, radio, visual, optical or other electromagnetic system”.

181 Section 19, Canadian Copyright Act.

B. Tariff 22

(a) Overview of Collective Licensing of Music in Canada

While it is not compulsory in Canada for creators to assign the management of their communication and performing rights to copyright collectives, in practice the overwhelming majority of owners do.183 Licensing of the communication and performing rights for musical works in Canada is administered by SOCAN (Society of Composers, Authors and Music Publishers of Canada) which represents Canadian composers, authors and publishers as well as affiliated societies representing foreign composers, authors and publishers. The communication and performing rights of performers and makers of sound recordings are administered by the Neighbouring Rights Collective of Canada (NRCC).

Section 67.1 of the Act requires collectives, such as SOCAN and NRCC, to file with the Copyright Board proposed tariffs of royalties to be collected from users of the copyright material in their repertoire. Unless Ministerial consent is granted, collectives are prohibited from suing parties for infringement of the communication and performing rights of the intellectual property in their repertoires until a tariff is certified.184 Under section 68.2 of the Act, once a tariff is certified and a person has paid or has offered to pay the specified royalties, an action may not be brought by authors for infringement of their performing or communication rights in musical works or for the recovery of royalties by performers and makers.185

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183 Email from Mario Bouchard, General Counsel of the Copyright Board, to the present author (10 August 2001).
184 Section 67.1(4), Canadian Copyright Act. No such restriction applies to copyright owners who have not assigned their rights to collectives. Ministerial consent has, to date, never been sought and appears unlikely to be granted under any foreseeable circumstances (H.P. Knopf, “Copyright and the Internet in Canada and Beyond: Convergence, Vision and Division” (2000) 22(6) E.I.P.R. 262 at 264).
185 Interestingly, section 68.2(2)(a) does not refer to proceedings being barred in relation to the authorization right for authors of musical works. However, one would assume that basic principles of good faith in contract
(b) SOCAN’s Internet Tariff

With the surge in popularity of the Internet, SOCAN recognized that musical works would, in time, be exploited online. As a result, in 1995, SOCAN filed a proposed tariff, Tariff 22, with the Copyright Board in respect of the communication to the public by telecommunication of musical works over networks, including the Internet. SOCAN claimed that it was entitled to collect royalties from parties responsible for posting or otherwise making available musical works online and the parties who provide and operate the facilities used for Internet communications. Practically, however, SOCAN sought to collect royalties only from telecommunications service providers, primarily Internet Service Providers (ISPs). The proposed tariff required telecommunications service providers to pay monthly fees to be calculated as follows:

(a) in the case of those telecommunications services that do not earn revenue from advertisements on the service, $0.25 per subscriber; and
(b) in the case of those telecommunications services that earn revenue from advertisements on the service, 3.2 per cent of gross revenues, with a minimum of $0.25 per subscriber.\(^{186}\)

Due to the complexity of the issues raised by the tariff, the Copyright Board elected to conduct hearings in two phases. Phase I was confined to legal and jurisdictional issues, and Phase II, which has yet to commence, will determine who should pay the tariff and the tariff structure.\(^{187}\) The Board issued its decision on 27 October, 1999 as to Phase I and, in doing so, clearly rejected SOCAN’s premise that ISPs were liable for communications. The Board’s primary conclusions may be summarized as follows:

\(^{186}\) Transmission of Musical Works to Subscribers via a Telecommunication Service not Covered Under Tariff Nos. 16 or 17, cited in Knopf, supra note 183 at 263.

\(^{187}\) As noted earlier at note 184 and accompanying text, collectives are prohibited from suing until a tariff is certified. Therefore, until Phase II is concluded, SOCAN is presently in a state of limbo with respect to the
The Internet is a telecommunications network.\textsuperscript{188}

A communication does not need to be instantaneous or simultaneous to be a "communication to the public".\textsuperscript{189}

A musical work is not communicated when it is made available on a server for subsequent download (ie. "uploaded");\textsuperscript{190} it is communicated by the "uploader" at the time that the server responds to a request from a user (ie. the "downloader") to download the work from the server.\textsuperscript{191}

However, a person who uploads a work authorizes the communication of the work to the public; the uploader is liable for the authorization the moment the work becomes available and even before the occurrence of any communication.\textsuperscript{192}

A person that creates an embedded (ie. a self-executing) hyperlink to a work authorizes its communication. A person that merely supplies a hyperlink which must be activated by the user does not.\textsuperscript{193}

Whether or not a communication is "to the public" is to be determined according to established principles from existing case law.\textsuperscript{194}

Passive intermediaries such as ISPs who do not act in concert with content providers do not communicate works.\textsuperscript{195} This follows from the "common carrier" exception found in section 2.4(1)(b) of the Copyright Act.\textsuperscript{196}

Communications occur in Canada, and therefore liability to SOCAN only arises, if the server is in Canada (subject to the proviso below).\textsuperscript{197} The locations of the website and the uploader and downloader are not relevant.

This jurisdictional limitation is, however, subject to the proviso that the issue of whether "an entity that provides content outside Canada with the intention to

\textsuperscript{188} Tariff 22, supra note 182 at 441.
\textsuperscript{189} Ibid at 445.
\textsuperscript{190} Ibid at 448.
\textsuperscript{191} Ibid at 450.
\textsuperscript{192} Ibid at 450ff.
\textsuperscript{193} Ibid at 458.
\textsuperscript{194} Ibid at 444.
\textsuperscript{195} Ibid at 450-454.
\textsuperscript{196} Section 2.4(1)(b) states that "a person whose only act in respect of the communication of a work or other subject-matter to the public consists of providing the means of telecommunication necessary for another person to so communicate the work or other subject-matter does not communicate the work or other subject-matter to the public".
\textsuperscript{197} Tariff 22, supra note 182 at 459.
communicate it specifically to a recipient in Canada is communicating it in Canada remains open".198

Immediately following the decision, SOCAN and Time Warner filed an application for judicial review of the Board’s findings by the Federal Court of Appeal. The review is expected to be heard towards the end of 2001. This application will likely prove unsuccessful as the applicants must establish that the Board’s conclusions were “patently unreasonable.” This is a very difficult threshold to meet and the Federal Court of Appeal has generally shown great deference to the Board’s decisions.199

3.3 Interaction of Part VIII with Tariff 22

A. The Board’s Interpretation of the Communication Right

A number of issues are highlighted by the application of Tariff 22 and Part VIII to typical user behaviour on the Internet. First, according to Tariff 22, the posting of a musical file on a server, such that the file is accessible on an on-demand basis, constitutes an authorization of the communication of that work.200 According to Tariff 22, the work is communicated when the file is actually downloaded.201 The exercise of the authorization right therefore precedes the communication and, indeed, is exercised whether or not a communication in fact occurs. This is an unusual result and, on the face of it, contrary to the general principle that there can be no authorization unless there has actually been an exercise of the primary right, in this case the communication right.202 The Board counters that the result is not as unusual as it appears because SOCAN, for example, authorizes the

198 Ibid at 460 [hereinafter referred to as the “Board’s proviso”].
200 See supra note 192 and accompanying text.
201 See supra notes 190-191 and accompanying text.
broadcast of music by a radio station when it licenses the station, and not when the broadcast in fact occurs.203

B. Inadequate Protection in Canada for the Online Transmission of Performers’ and Makers’ Intellectual Property

The Board’s conclusion that the making available of a work comes within the authorization right, coupled with the limited right in relation to communications that performers and makers enjoy under Canadian copyright law, is significant. Performers’ and makers’ rights in this context are limited to a right of remuneration for the communication of their intellectual property; they do not have a right to authorize the communication of their performances and recordings because they do not have an exclusive right to which an authorization right could attach. Two important practical consequences flow from this. First, because the Act provides performers and makers with only a limited right of remuneration and not an exclusive right, they can not invoke the communication right to prevent the posting of works embodying their subject matter on the Internet nor can they use the communication right to prevent the downloading of their subject matter (which the Board found to constitute the act of communication).204 Second, because the Board found that the making available of a work comes within the authorization right, and performers and makers do not have an authorization right, performers and makers are not entitled to remuneration when their subject matter is posted online. However, once the download commences the right of remuneration takes effect and performers and makers become entitled to remuneration for the communication of their subject matter.205

202 See Hanimek, supra note 17.
203 Tariff 22, supra note 182 at 457.
204 As a reproduction is made when a file is posted to a server, performers and makers would, however, be able to prevent the posting of their subject matter using their reproduction right.
205 Because of performers’ and makers’ limited rights, NRCC’s recent proposed tariff restricts its focus to licensing Internet radio operators and Internet simulcasters. (Statement of Proposed Royalties to be Collected
The Act's provision of a non-exclusive right for performers and makers, together with the Board's conclusion regarding the making available act, has the effect that performers and makers have no entitlement whatsoever for the transmission involved in the posting of their works online.\textsuperscript{206} In this respect, the Canadian Act is a long way short of compliance with Articles 10 and 14 of the WPPT which, respectively, provide performers and makers with the exclusive right of making their intellectual property available to the public on an on-demand basis. In a recent discussion paper, however, the Canadian government sought feedback on a proposal to amend the Act to specifically provide makers and performers with an exclusive making available right.\textsuperscript{207} This change is essential in order to adequately protect performers' and makers' rights on the Internet.

C. Jurisdiction

A further issue raised by the Board's analysis in \textit{Tariff 22} concerns jurisdiction. The challenge faced by the Board was how to apply national copyright law to activities that potentially take place in Canada and one or more other countries. This was not a novel task as a similar controversy has for many years existed in relation to direct broadcasting by satellite (DBS).\textsuperscript{208} In \textit{Tariff 22}, the Board considered the debate surrounding DBS and found that, subject to the proviso regarding content on foreign servers specifically targeting

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\textsuperscript{206} However, the reproduction right would apply. See \textit{supra} note 204.
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\textsuperscript{207} Canadian Government Digital Copyright Discussion Paper, \textit{supra} note 34 at 19-20. This and other changes to the Act, such as in relation to legislative protection of technological measures, will allow Canada to ratify the WIPO Internet Treaties.
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\textsuperscript{208} Under the "communication theory" proposed by Dr. Arpad Bogsch, former Director General of WIPO, the right owner in the country of reception as well as emission must be taken into account. The emission theory, on the other hand, only requires the permission of rightsholders in the originating state. The emission theory was adopted in Europe by the \textit{EC Directive on Satellite Broadcasting and Cable Retransmission} (93/83/EEC).
\end{flushleft}
Canadians,' liability in Canada for the communication and authorization rights arises only when a work is posted to or downloaded from a Canadian server. Consequently, the location of the uploader and downloader are both irrelevant, even though one or both may be in Canada.

The jurisdictional limitation provides certainty and is theoretically consistent with the territorial view of copyright law as a national regime woven together by international treaties and a system of collectives. In respect of Canadian law at least, the Board’s finding has the effect that a website operator will be required to pay royalties only in their “home” jurisdiction with the royalty payments distributed internationally by virtue of agreements between collectives. In practice, however, the limitation of jurisdiction to content on Canadian servers is problematic. The location of the server is an inflexible jurisdictional basis and is at odds with the more flexible, though less certain, approach to jurisdiction taken in other areas of Internet law. In criminal law, for example, a Canadian resident is liable to prosecution under the Criminal Code if he commits a crime on the Internet, irrespective of the server’s location. Similarly, in a civil law context, in relation 209

209 The proviso is that the issue of whether “an entity that provides content outside Canada with the intention to communicate it specifically to a recipient in Canada is communicating it in Canada remains open” (See supra note 198 and accompanying text).

210 Knopf, supra note 184 at 265.

211 This point is, however, subject to the important proviso that Canadian law of course does not effect the position in other jurisdictions regarding liability for the communication right. Other countries are open to find liability for the communication right (or their copyright law equivalent to the Canadian communication right) on the basis of receipt of the signal in the jurisdiction rather than the Board’s approach based upon the location of the server. This proviso is especially pertinent in relation to the United States which grounds liability for the public performance right (17 U.S.C. §§ 101, 106) based upon receipt of the signal in the United States irrespective of the location of the server. Consider, for example, the interesting case of Twentieth Century Fox Film Corp. v. iCraveTV, online: MPAA <http://www.mpaa.org/Press/> (date accessed: 21 March 2001). iCraveTV, a Toronto-based Internet start-up, began re-transmitting on the Internet television signals that originated in the United States. Although the server was located in Toronto, the plaintiff was nonetheless successful in obtaining a permanent injunction in the United States against iCraveTV for, inter alia, infringement of the U.S. public performance right because the Internet-based transmissions were accessed and received online by residents of the United States.


213 M. Geist, “Vital ruling misses boat on offshore servers” Globetechology.com (18 November 1999), online: Globetechology.com <http://news.globetechology.com/servlet/GAMArticleHTMLTemplate?
to jurisdiction over unlawful activities on e-commerce web pages, courts have little regard to the location of the web site’s server and instead focus on the nature of the web site and its effects in the jurisdiction.

**D. Enforcement**

Significant problems of enforcement arise from two of the Board’s key findings. The first finding, referred to in the preceding sub-section, is the jurisdictional limitation to content posted on Canadian servers. The second finding is that ISPs, provided that their role is as a passive intermediary, are not liable for the communication of works.

(a) Jurisdictional Difficulties

(i) No Remuneration for Music Accessed by Canadian Residents from Foreign Servers

The Board’s decision on jurisdiction provides the incentive for users to post content on servers outside Canada, potentially in jurisdictions with weak or non-existent copyright laws. The jurisdictional finding also ignores the practical reality that the

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214 The analysis seeks to determine whether the web site is passive or active. Jurisdiction will be asserted more readily over active sites. This test was established in *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.* 952 F. Supp. 1119 (W.D. Pa. 1997) and has been subsequently adopted in Canada in *Braintech, Inc. v. Kostiuk,* [1999] B.C.J. No. 622 (C.A.) and *Pro-C Ltd. v. Computer City, Inc.* (2000), 7 C.P.R. (4th) 193.


216 Supra notes 195-196 and accompanying text. See below sub-section E. “ISP Liability for Distribution of Music Online”.

217 So called “copyright havens”. See above pages 20-21 for discussion of copyright havens in the context of circumvention devices. The difficult issue of jurisdiction and enforcement over transborder communications has been reviewed by WIPO as part of its ongoing work on conflicts of law and intellectual property. In this context, Professor Ginsburg has proposed a more expansive test that designates a single national law to govern the infringing act and also attempts to overcome the avoidance problem posed by copyright havens (J.C. Ginsburg, “Private International Law Aspects of the Protection of Works and Objects of Related Rights Transmitted Through Digital Networks (2000 Update)” (2000) WIPO Doc. WIPO/PIL/01/2, online: WIPO <http://www.wipo.int/pilforum/en/documents/pdf/pil_01_2.pdf> (date accessed: 23 March 2001). Although a detailed examination of the test is beyond the scope of this paper, it is worth noting that the test allows for reasonable certainty and also ensures that content posted on servers in copyright havens is captured by the copyright laws of a country with internationally accepted copyright laws.
overwhelming majority of copyright content accessed by Canadians is located on servers outside Canada, most often in the United States.\textsuperscript{218} Very little of this copyright content is directed specifically at Canadians, nullifying the possibility that the Board could, in line with its proviso,\textsuperscript{219} exert jurisdiction over the communications from these non-Canadian servers. As, subject to the Board’s proviso, communications from servers outside Canada were found not to implicate the communication right in Canada, the majority of music accessed by Canadians will be done so free of liability in Canada. Consequently, creators in the majority of cases are denied compensation for the benefit of access to and use of their intellectual property by residents of Canada.

\textit{(ii) Enforcement Against Non-residents of Canada Posting Music on Canadian Servers}

A further problem presented by the Board’s finding on jurisdiction is that content on Canadian servers is posted by both resident and non-resident individuals and corporations. Therefore, SOCAN will in many cases be seeking royalties from users located outside Canada. If these users refuse to comply with SOCAN’s request for payment, SOCAN nevertheless could sue in a Canadian court for the amount of the unpaid royalties.\textsuperscript{220} SOCAN would likely have little trouble in securing judgment in Canada but would then be forced to take the additional steps of having the judgment certified and enforced in the non-resident defaulter’s jurisdiction. As Canada is a signatory to the \textit{Convention on the Recognition and Enforcement of Foreign Judgments in Civil and...}


\textsuperscript{219} See supra note 198 and accompanying text.

\textsuperscript{220} Section 68.2(1) of the Canadian Copyright Act permits the collective society to recover royalties in court where there has been a default of their payment.
Commercial Matters, 221 SOCAN would likely be able to have the judgment certified in the foreign jurisdiction and would then be able to enforce the judgment in the foreign jurisdiction. 222 However, although enforcement against foreign users is possible, it is time-consuming and costly and there remains the risk that the debtor may have no assets to satisfy the judgment. Therefore, enforcement against foreigners is unlikely to prove commercially feasible in the majority of cases.

If SOCAN is unable to collect royalties from foreign parties, it will presumably request the Canadian Internet provider which manages the server to remove the infringing material. As the Canadian Association of Internet Providers (CAIP), the Canadian Internet industry association, has a voluntary code 223 that sets out a “notice and take-down” procedure, the infringing materials would likely be removed from the server fairly promptly, avoiding significant damage to the rightsholder’s interests. 224 Although damage may largely be avoided, no compensation will flow to creators for the uses of their intellectual property that occur before the material is removed from the server.

(b) Individual Licensing Impractical Irrespective of Location of Licensee

Although the location of the putative licensee is problematic, perhaps the greater problem presented by the Board’s decision in Tariff 22 is that SOCAN is largely limited to

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222 This assumes, of course, that the foreign state is also a signatory to the Foreign Judgments Convention and recognizes the Canadian judgment.


224 This is, of course, assuming that the manager of the server is a member of CAIP and has agreed to comply with the Code. The Canadian government recently foreshadowed that it favours the implementation of a statutory complaints-driven notice and take-down procedure, which would operate similarly to the procedure introduced to the U.S. Copyright Act (17 U.S.C §512) by the DMCA (Canadian Government Digital Copyright Discussion Paper, supra note 34 at 35-38).
licensing individual users. The transaction costs involved in licensing individuals, together with the time and cost of detecting infringement, make the licensing process unworkable. Although technology is proving to be increasingly useful in monitoring and accounting for use of copyright works, the systems are presently inefficient and it remains to be seen whether future technology will make it possible to detect and consequently licence individual downloads.

The effect of the Board’s two findings, therefore, is that in many cases SOCAN will have no effective means of compensating authors for the communication of their works. In the author’s view, in order for creators to be remunerated for the exploitation of their copyright subject matter by residents of Canada, the focus must shift to more practical targets for licensing. In this regard, discussion will therefore turn to the issue of ISP liability.

E. ISP Liability for the Distribution of Music Online

(a) Liability for Infringement of the Communication Right

It was due to these two primary practical difficulties that SOCAN targeted ISPs in Tariff 22. It would have been administratively straightforward for SOCAN to license ISPs as they are readily identifiable and keep records of their subscribers and revenues. The liability of ISPs for the communication right in Canada revolved around the interpretation

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225 The legal reasons for this will be explored more fully in sub-section E. below, but for present purposes, the focus is on the practical difficulties presented by the Board’s decision in this respect.
226 For example, software called Songbird was created for and used by the recording industry to monitor the thousands of music files that were once available on the Napster network. (IFPI 2001 Music Piracy Report, supra note 89 at 8-9). Musicbot is another program which combs the Internet continuously searching for the use of audio files (C.P. Spurgeon, “Digital Networks and Copyright: Licensing and Accounting for Use – The Role of Copyright Collectives Evolution or Revolution?” (1998) 12 I.P.J. 225 at 254).
227 For example, Musicbot is only capable of identifying the presence of music files and not whether they contain copyright-protected music. Consequently, there is still the need for substantial human supervision and human involvement is also required in taking the legal steps to have infringing material removed from the Internet.
given to the “common carrier” exception in section 2.4(1)(b) which was introduced in the pre-Internet age and provides that:

A person whose only act in respect of the communication of a work [...] to the public consists of providing the means of telecommunication necessary for another person to so communicate the work [...] does not communicate the work [...] to the public.\(^{228}\)

Debate surrounding the interpretation of this provision centred on the meaning of the phrase “means of telecommunication”. SOCAN argued that the phrase referred to the means of transmission, such as the physical equipment, and not to a “service” such as that provided by ISPs.\(^{229}\) The “service” provided by ISPs includes not just physical facilities, but also other aspects such as software, content hosting and caching and, according to SOCAN, is therefore beyond the scope of the term “means”. In SOCAN’s view, the provision therefore exempts from liability the telephone company that supplies connectivity for an ISP, but not the ISP.\(^{230}\)

The broader interpretation, which was favoured by the Board, understood the phrase “means of telecommunication” to connote any Internet intermediaries, even those which provide “services that are ancillary to providing the means of communication”.\(^{231}\) The Board found that unless Internet intermediaries act “in concert” with content providers, they do not communicate works to the public simply because they provide infrastructure facilities.\(^{232}\) In the author’s view, legally, the Board’s interpretation is the correct one. Although the decision does not refer to other international approaches to ISP liability, the Board was likely mindful that international consensus favours the exclusion of ISPs from

\(^{228}\) Emphasis added.
\(^{229}\) *Tariff 22*, supra note 182 at 451.
\(^{230}\) *Ibid* at 451-452.
\(^{231}\) *Ibid* at 452.
\(^{232}\) *Ibid* at 453-454.
liability. Practically, however the exclusion of ISPs from liability creates great difficulties in terms of compensating creators for the online use of their intellectual property. These issues will be explored further in sub-section F. below.

(b) Liability for Infringement of the Reproduction Right

The uploading of a work to an "external" server in Canada creates a copy of the work on the server and may also involve a number of transitory reproductions in transporting the file from the uploader to the external server. Logically, irrespective of the location of the uploader, the reproduction is made in Canada if the server is physically located in Canada. Part VIII of the Canadian Act does not apply to these copies. Therefore, assuming the work is protected by copyright, the uploader would be liable in Canada for the reproduction on the server and possibly also for the transitory reproductions. Under present Canadian law, it is also possible that ISPs whose facilities in Canada are used in the course of making these reproductions may be liable for authorizing the reproduction(s) made by the uploader.

The liability of ISPs for authorizing reproductions made using their facilities in Canada is unclear because the common carrier exception applies only to the

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233 In the U.S., consider the seminal decision on the liability of ISPs in Religious Technologies Centre v. Netcom On-Line Communication Services Inc., 907 F. Supp. 1361 (N.D. Cal. 1995). The principles from Netcom have been widely accepted and have essentially been codified in the U.S. Copyright Act at section 512. Australia also generally exempts ISPs from liability following the introduction of sections 39B and 112E to the Copyright Act 1968 (Cth) by the Digital Agenda Act. These sections allow that a carrier which provides facilities which may be used for making a communication is not taken to have authorized any infringement of copyright merely because the facilities were used by persons to infringe copyright. In addition, sections 43A and 111A provide that temporary copies made as part of the technical process in making or receiving an authorized communication do not infringe copyright.

234 "[E]xternal" is used to indicate a server other than the user's own hard drive which in peer-to-peer file trading platforms is effectively transformed to a server once the user connects to the network (See above page 2).

235 The descriptions "ISPs in Canada" and "Canadian ISPs" are used to refer to ISPs who have their infrastructure facilities located in Canada. Logically, as the majority of users connect to a Canadian ISP by dialling into its modem pool, most, if not all, of an ISPs customers are residents of Canada as foreigners are unlikely to willingly incur long-distance calling charges to connect to the Internet via a Canadian ISP, especially if they have a local provider.
communication right; there is therefore no exception to the reproduction right. In Canada, the Copyright Act is a strict liability statute and it has been suggested that ISPs consequently are liable for reproductions on their networks irrespective of whether there was any intent to infringe.\(^\text{236}\) SODRAC,\(^\text{237}\) a reproduction rights collective, has capitalized on this uncertainty and has filed proposed tariffs for the “reproduction in Canada of Musical Works in the Exploitation of an Electronic Network”.\(^\text{238}\) The proposed tariffs will, if certified, license the “reproduction” of works in the SODRAC repertoire by ISPs in Canada and their customers. Reproductions are defined broadly to include, amongst other things, caching, hosting, storing, uploading, downloading, browsing.\(^\text{239}\) The proposed tariffs require Canadian ISPs to pay royalties of the greater of 0.65% of their gross revenues or 10 cents per month per subscriber.\(^\text{240}\)

In its recent Digital Copyright Discussion paper, the Canadian government raised a number of concerns regarding SODRAC’s proposed Internet Reproduction Tariffs.\(^\text{241}\) In particular, the Canadian government notes that the SODRAC approach\(^\text{242}\) would provide

\(^{236}\) Canadian Government Digital Copyright Discussion Paper, supra note 34 at 33.
\(^{237}\) SODRAC is an acronym for Société du droit de reproduction des auteurs, compositeurs et éditeurs au Canada. SODRAC administers the reproduction right for its members who are owners of the copyright in musical works.


\(^{239}\) Ibid.

\(^{240}\) Proposed SODRAC Internet Reproduction Tariffs, supra note 238. The tariff does not specify whether subscriber includes both resident and non-Canadian-resident subscribers. Presumably, it covers both as it directed at reproductions made on the ISPs facilities physically located in Canada. The location of the subscriber appears immaterial. As discussed at supra note 235, the majority of the ISPs subscribers will likely be residents of Canada.

\(^{241}\) Canadian Government Digital Copyright Discussion Paper, supra note 34 at 34.

\(^{242}\) Although referred to here as the “SODRAC approach”, the strategy is more accurately described as the SOCAN Tariff 22 approach since SOCAN had sought to levy ISPs as early as 1995 and was denied by the Board in Tariff 22.
ISPs and their subscribers with incomplete protection from potential copyright liability because the licence would be limited to SODRAC's repertoire, which represents only a portion of all copyright material circulating on the Internet. Consequently, the SODRAC tariff would have to co-exist with other rules covering liability for material not controlled by SODRAC. Aside from this practical difficulty, the SODRAC approach results in the imposition of an additional operating cost on Canadian ISPs. This outcome is problematic when one considers the importance of a strong Canadian ISP sector to the growth of the digital economy. Therefore, it appears likely that the Canadian government will amend the Copyright Act to exempt ISPs from liability for reproductions as well as communications.

F. Issues Arising from a Proposal for an Internet Levy

(a) Rationale for an Internet Levy

Legal principle and wider policy concerns about not impeding the growth of the digital economy support the Board’s exclusion of ISPs from liability in Canada for the communication right, as does international consensus on ISP liability. However, as noted earlier, considerable practical difficulties in terms of enforcement result from this policy choice. In the author’s view, the chief difficulty of enforcement concerns the practical impossibility of licensing millions of individual users. These same difficulties have applied for many years to traditional private copying and have led in many countries to the introduction of a “blank tape” levy. The differentiating element regarding non-commercial

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243 Canadian Government Digital Copyright Discussion Paper, supra note 34 at 34.
244 Ibid.
245 The Canadian Government has expressed that is conscious of the importance of the ISP sector to the digital economy. (Ibid at 31).
247 See above sub-section E. (a) “Liability for Infringement of the Communication Right”.
248 See above sub-section D. “Enforcement”.
online infringement is that there may be technological means of preventing online infringement. In the author’s view, however, a purely technological response will likely prove inadequate in preventing the widespread distribution of music online. Therefore, there is a need for a workable scheme which will provide compensation to creators for the communication of their protected material online.

The precedent for a scheme exists in the private copying regime considered in Section 3.1 above. Part VIII of the Act levies importers and manufacturers, not because in law they are liable for copyright infringement, but because they represent the only feasible point at which a levy can be imposed. Consistent with this rationale, certain Internet parties should be required to pay a levy, again not because in law they are liable for copyright infringement, but because, practically, they represent the only viable means of ensuring creators are compensated for the activities of individual Internet users.

In the author’s view, the inability of the law to provide a viable means of ensuring creators are compensated for the use of their copyright material in Canada justifies this pragmatic approach in advocating an Internet levy. For example, when a resident of Canada downloads music from a foreign server, he realizes an economic benefit in Canada. However, under Canadian copyright law, the creators’ communication rights have not been infringed in Canada. This economic benefit represents a potential lost sale for the copyright owner that is not remunerated under the communication right, nor is the reproduction involved in the download currently remunerated under the private copying scheme. If, as the author advocates, levies are extended to hard disks, the download will be partly remunerated due to the royalty from the exercise of the reproduction right. If remuneration for the reproduction right is eventually provided to creators, this outcome would

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249 See above Section 2. E. “Implications for Private Copying”.
nonetheless be inadequate because the economic benefit enjoyed by the user due to the transmission is not fully captured. There are therefore compelling policy justifications for an Internet Levy, possible features of which will be touched upon in the remainder of this sub-section.

(b) Target of the Internet Levy

Prima facie, the appropriate target of this levy would appear to be Internet platforms that facilitate the exchanging of files. Levying these parties is justified because their services are often used for infringing purposes and they derive economic advantage from the infringing activities of their users, in much the same way as blank tape manufacturers. The difficulty, however, with levying file-trading platforms is that file-trading is increasingly occurring on P2P networks which utilize the Gnutella protocol.\(^{250}\) Unlike Napster, Gnutella is an open source software standard that is characterized by the fact that no single organisation owns it or has control over it.\(^{251}\) Due to the decentralized nature of the Gnutella-based file-trading environment, it therefore seems impractical if not impossible to effectively levy these file trading platforms.

This outcome leaves ISPs as the only viable target for levies. In the author’s view, ISPs should, subject to a notice and take-down system for example, be exempted from liability for copyright infringement,\(^{252}\) but ought also be the target of a compulsory licensing scheme similar to the existing private copying regime. Exempting ISPs from liability for copyright infringement would remove a considerable operating expense for

\(^{250}\) See above Section 2 E.(b)(v) “An Emerging Challenge: Peer-to-Peer File Trading Networks”.


\(^{252}\) As noted, Tariff 22 already effectively exempts ISPs from liability for the communication right but liability for authorization of the reproduction right remains an unresolved issue in Canada.
ISPs and would lessen the impact of liability for tariffs on their operating costs. Based upon proposed tariffs already filed by SOCAN, NRCC and SODRAC, one would estimate that royalties may be upwards of 60 cents per month per subscriber. Just as manufacturers of blank recording media have done, ISPs could pass on the levies to their subscribers who would and should ultimately bear the impact. ISPs already have the ability to monitor the volume of data their users are downloading and could therefore shift the burden of paying the levies towards heavy downloaders because of the probability that these users trade music files.

It is not possible within the scope of this paper to exhaustively analyze the proposal for an Internet levy. However, in the balance of this sub-section, a number of the key issues that require close consideration will be highlighted.

(c) Proposed Operation of the Internet Levy

(i) Scope of the Licence

Unlike Part VIII which effectively compulsorily licenses music creators’ reproduction right in relation to private copying, it would be more appropriate for this proposed Internet levy to operate on an opt-in (or perhaps even an opt-out) basis for creators. The reason for this will be explored more fully in Section 4, but for present purposes it may be noted that a compulsory scheme would likely be inconsistent with

253 Although ISPs in Canada have not yet been found liable for copyright infringement, CAIP has expended considerable resources lobbying and intervening to avoid its members being held liable. The President of CAIP, Jay Thomson, estimated that CAIP’s intervention in Tariff 22 cost over $100,000 in legal fees alone, none of which is recoverable from SOCAN or other proponents of Tariff 22. (G.K. Thompson, Presentation at the Canadian Copyright in the Digital Age Public Forum, Hosted by The University of Ottawa Faculty of Law, 26 March 2001 [unpublished]).

254 This estimate is derived by adding the royalties set out in SOCAN’s Tariff 22 as filed in 1995, NRCC’s Internet Tariff and SODRAC’s Proposed Internet Reproduction Tariffs.

Canada's international treaty obligations. Creators would thus retain their rights to not participate, but would therefore not share in the revenues from the scheme. In practice, one would expect most creators to participate, given that almost all authors of musical works presently voluntarily assign their communication and performing rights to SOCAN. As noted earlier regarding SODRAC's Proposed Internet Reproduction Tariff, a deficiency in this opt-in (or opt-out) style licensing structure is that consumers might still be liable for infringing the copyright of subject matter not covered by the tariffs despite paying royalties. Although this is a significant incongruity of the proposed scheme, for the reasons enunciated earlier, the risk of individual users being sued is more academic than real.

The proposed scheme would apply to musical works and their embodied subject matter, that is performances and sound recordings. The scheme would licence both the communication of copyright material in SOCAN and NRCC repertoires together with network-based reproductions not covered by Part VIII of musical works in the SODRAC repertoire. Provision should be made also for collectives representing the reproduction rights of makers and performers to participate in the scheme. In practice, the proposed ISP-targeted licensing scheme could be structured to operate similarly to Part VIII, with a licence permitting the reproduction and communication by individual users of materials in the tariffs, and a levy required to be paid by ISPs in Canada. Collectives would be required to file proposed tariffs with the Copyright Board which would be responsible for fixing a fair and equitable levy, taking into account evidence of the online activities of users.

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256 See below Section 4. B. (a) "Internet Levy".
257 See supra note 183.
258 See supra notes 243-244 and accompanying text.
Although a detailed account of the appropriate jurisdictional basis for the communication right is beyond the scope of this paper, it should be noted that the application of the communication right would need to be interpreted differently in order for the scheme to achieve its objectives of compensating creators for the use of their copyright material in Canada. If the Board’s present interpretation is retained, the proposed scheme would be rendered meaningless and would generate little or no revenue because, as noted, the overwhelming majority of materials are accessed from servers outside Canada. Given this concern, and the fact that Canadian ISPs would be the collection point in the proposed regime, it would therefore seem logical for the scheme to focus on the transmission of music files by their subscribers, who invariably will be residents of Canada.261

(ii) Proposed Amendment to the Existing Private Copying Licence

In order for the proposed scheme to operate effectively along side the existing private copying regime, a significant amendment would likely be required to the licence as set out in section 80 of the Act. As noted earlier, the licence currently applies only to copies made for the private use of the copier.262 It was argued in the context of physical distribution of copies that there was a need to reform the limitations on the licence so that the exemption is restricted to non-commercial copying, and not on the basis of the use to which the copy is put.263 This need is more pressing in relation to electronic distribution because the licence presently does not apply to downloads if the file is subsequently made available to others. Therefore, in determining the amount of the levies at its next hearing, the Board is precluded from considering copies made if the downloaded copy is subsequently made available for others to access.

260 See supra notes 85-86 and accompanying text.
262 See supra note 235.
261 Ibid.
The limitations on the licence therefore will likely significantly curtail the amount of levies collected because file trading relies upon users making their material available to others. Although altering the limitations on the licence is a substantial change to the dynamics of the existing regime, the change is necessary both to ensure that digital downloads are fully captured by the levies and that the proposed licensing scheme operates logically and effectively. Were these limitations removed and the proposed Internet levy adopted, owners would still be able to prevent users uploading their works to external servers because the reproduction made as a result of uploading is not exempted under Part VIII and would not be covered by the proposed Internet levy.

(iii) Co-existence of Licence with Mainstream Music Distribution Models

Importantly, the proposed scheme could operate side-by-side with the mainstream market for the sale of music online in a similar way that the private copying market co-exists with the market for sales of pre-recorded CDs. Provided that the “official” online market for music allows downloads at reasonable prices and with the flexibility favoured by consumers, one would expect it to function in tandem with the proposed licensing scheme. Official music sites could offer consumers comparable benefits over unofficial copies that the mainstream market for the sale of tangible copies of music currently does. For example, official online music sites potentially offer consumers more convenient and reliable access to music together with the security of knowing that files provided by official sites are unlikely to be affected by computer viruses.²⁶⁴

²⁶² See above Section 3.1 B. (b) “Limitations on the Licence”.
²⁶³ Ibid.
²⁶⁴ At the time of writing, the music industry had yet to launch its official web sites. MusicNet and Pressplay are expected to launch towards the end of 2001, once licensing difficulties and concerns regarding protecting their files from piracy are overcome (J. Healey, “Record Labels Prepare Their Online Assault” Los Angeles Times (23 July 2001), online: LATimes.com <http://www.latimes.com/template ...ry.jsp?slug=la%2D0000060022jul23> (date accessed: 24 July 2001).
(iv) Limitations on Proposed Licence

An important limitation on this proposed scheme is that it would be limited to the distribution of music by means such as peer-to-peer file trading networks, instant messaging and email. The scheme would therefore not permit the uploading of a music file to an “external” server such that multiple users can access the file at a time they have individually chosen. Provided that music files are not posted on servers in countries with internationally inadequate copyright laws, reasonable means already exist for copyright owners to prevent the availability of music files on such servers. Permitting the uploading to external servers would also generate considerable international controversy because non-residents of Canada would have access to the files without paying for the privilege. A further limitation that should be imposed on the licence is a restriction to non-commercial file trading by “natural persons.”

(v) Exemptions

As with the private copying scheme in Part VIII of the Act, under the proposed Internet levy, there would again be a need for exemptions from the levies. The exemption scheme should recognize that a wide array of entities other than private sector commercial operators act as ISPs. In Canada, libraries, government departments, educational institutions, hospitals, and numerous companies provide Internet service to their patrons and staff. Consequently, an exemption process structured similarly to that proposed for the private copying regime should be adopted. ISPs other than those which provide access to users in their own homes should generally be exempt from paying royalties because the scheme would only apply to private non-commercial communications and reproductions.

The exemption scheme should also recognize that users connect to the Internet from a wide range of hardware. Users with slow modems and computers with small hard
drives should be exempt because their hardware is not conducive to exchanging music on any significant scale. Similarly, individuals who connect to the Internet from web-enabled cellular telephones or personal organizers should also be exempt on the same basis. There should also be the capacity to exempt regular users of official music sites to avoid the inequity of these users funding the non-official activities of other users. These exemptions are necessary to ensure that the proposed licensing scheme is accepted by the public as a reasonable compromise to the digital private copying dilemma.

(vi) Policy Implications

The policy implications of a licensing scheme of this nature must be carefully considered. A domestic concern is that the scheme could act as an impediment to the growth of the digital economy. In the author’s view, the impact of levying ISPs would not be as great as may be feared because the development of the digital economy is well-advanced. Furthermore, an exemption scheme would exempt a significant number of users, targeting only users who are most likely to engage in file trading of music. As noted earlier, ISPs already have the capacity to monitor the volume of data their users are downloading, and it would be logical for ISPs to shift the majority of the burden of the levies to heavy downloaders, meaning that newcomers to the Internet would not be significantly affected. 265

A more significant concern, however, is the international consequences of Canada adopting this proposed scheme. As no other country has implemented a scheme of this nature, there is likely to be criticism from other states whose nationals will have access to material that has been lawfully made available by Canadians. Furthermore, assuming that

265 Supra note 255 and accompanying text.
the national treatment principle is applied to the distribution of royalties from the scheme, there will be a significant worsening of the Canadian copyright trade imbalance.\textsuperscript{266}

There is no obvious solution to these international concerns. These issues, however, serve to emphasize that digital private copying has become an international problem requiring an international response. In the following section, I will consider the conformity of Canada’s existing private copying regime and proposed changes with international obligations.

4. Digital Private Copying and International Obligations

A. Overview of Canada’s Treaty Obligations Affecting Private Copying

There is no international treaty dealing directly with private copying. However, Canada is party to a number of international treaties which include obligations that impact upon how a private copying regime may be structured. The most significant treaties are the \textit{Berne Convention}\textsuperscript{267} which applies to works and the \textit{Rome Convention}\textsuperscript{268} which applies to the neighbouring rights of broadcasters, performers and makers of sound recordings.\textsuperscript{269} Article 15(1)(a) of the \textit{Rome Convention} permits contracting states to provide in their national legislation exceptions to the protection guaranteed by the convention for private use. The \textit{Berne Convention} does not mention private use, but Article 9(2), in what has become known as the “three-step test”, requires that exceptions to the reproduction right:

\begin{itemize}
  \item only apply in certain special cases;
  \item not conflict with a normal exploitation of a work; and
\end{itemize}

\begin{footnotes}
\item[266] See supra note 163 and accompanying text for further discussion of the consequences for royalty distribution on a nation’s copyright trade imbalance.
\item[267] Supra note 158.
\item[268] \textit{Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations}, first signed on 26 October 1961 [hereinafter \textit{Rome Convention}].
\item[269] Canada is also a party to the \textit{Universal Copyright Convention} which provides protection substantially similar to the \textit{Berne Convention}.
\end{footnotes}
not unreasonably prejudice the legitimate interests of the author.

With the exception of Article 6bis on moral rights and the rights derived therefrom, the provisions of the Berne Convention have been incorporated in the TRIPS Agreement\textsuperscript{270} by reference in Article 9. Consequently, WTO Member States must, with the exception of the moral rights provision, comply with the Berne Convention or risk a complaint to the WTO and possible trade sanctions for non-compliance. TRIPS also separately contains its own three-step test, set out in Article 13:

Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.

Article 13 of TRIPS, however, is broader than the Berne 3-step test as it applies to all the rights set out in the Berne Convention and TRIPS, and not just the reproduction right. The 3-step test has also been incorporated in the WCT and WPPT, agreements which Canada has signed but has yet to ratify.\textsuperscript{271}

There is some confusion regarding the scope of Article 13 of TRIPS. On a broad interpretation of Article 13, the 3-step test would apply to all the provisions in TRIPS. If this interpretation were correct, exceptions related to not just works, but also performances, phonograms and broadcasts would be subject to the 3-step test. Consequently, the Rome Convention's private use exception would effectively be subject to the 3-step test. The better view, however, appears to be that Article 13 applies only to works and not to performances and phonograms. If this view is correct, only exceptions in relation to works are subject to the three-step test. This view is supported by the fact that Article 13 refers only to the exploitation of a "work" and does not make any mention of phonograms or

\textsuperscript{270} Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994 33 I.L.M. 1 [hereinafter TRIPS].
performances. Furthermore, the position of Article 13 in the Agreement tends to point to an intention that Article 13 only apply to works, as the provisions in the copyright section that come before Article 13 relate only to works. In contrast, the provision which follows Article 13, which is the final provision in the copyright section of TRIPS, deals solely with the protection of performers, producers of phonograms and broadcasters. Given that Article 13 precedes Article 14, and uses the term “work” and not the terms “phonograms” and “performances” used in Article 14, it may be concluded that the 3-step test provided in Article 13 does not apply to sound recordings and performances.

B. Application to a Digital Private Copying Scheme

(a) Internet Levy

The application of the TRIPS Agreement’s 3-step test to the private copying scheme is complex and uncertain. The proposed incorporation of the communication to the public right and network-based reproductions in the private copying regime probably does not raise any compliance issues with Article 13 of TRIPS because the proposed additions to the private copying regime will operate on a voluntary basis for creators. In fact, it was for this reason that a voluntary rather than compulsory scheme was proposed because a compulsory scheme would likely have had too great an impact to be compliant with the 3-step test.

271 Article 10, WCT and Article 16, WPPT.
(b) Private Copying Exception to the Reproduction Right

(i) Digital Technology Demands a Re-Assessment of the Exception

There is considerable doubt regarding the compliance of the private copying exception to the reproduction right. In the author’s view, performance and sound recordings are not subject to Article 13 of TRIPS. Therefore, the private copying exception for performances and sound recordings appears to be compliant with Canada’s international obligations, given that Article 15(1)(a) of the Rome Convention expressly permits a private use exception for both performances and sound recordings. The position regarding the copyright in the musical work is more complicated because any exception to the reproduction right of works is subject to Articles 9(2) of Berne and Article 13 of TRIPS.

In relation to analog technology, it is likely that Article 9(2) of the Berne Convention does permit a private copying exception. This is because, at the time Article 9(2) was drafted, the provision was intended to accommodate all existing exceptions under national law, apart from those covered by other provisions of the Convention. As several countries already had private copying exceptions to the reproduction right, it must be assumed that these exceptions were not to be precluded by the new provision.

The position regarding digital private copying of musical works is more uncertain because the same reasoning can not apply as digital technology was not in use on the consumer market when Article 9(2) was added to the Berne Convention in 1967. As digital technology has fundamentally altered the way in which works are exploited, it can not be assumed that a digital private copying exception is compliant with the 3-step test simply

272 See J. Lahore, “The Blank Tape Royalty Scheme – some comments on Australia’s obligations under the Berne Convention” (1989) 7 Copyright Reporter 15.
273 Ibid at 16.
because analog private copying likely is. It is therefore necessary to re-assess whether a private copying exception to the reproduction right in the digital era is compatible with the 3-step test set out in Berne and TRIPS.

(ii) Guidance from the "Homestyle Case"

A recent WTO Dispute Settlement decision in United States – Section 110(5) of the Copyright Act, Report of the WTO Panel\(^{275}\) has provided long-overdue direction regarding the interpretation of the 3-step test. The case is noteworthy for two primary reasons. First, the Panel recognized that exceptions may cause more damage if applied to Internet-based activities than they would in the traditional analog environment.\(^{276}\) This underscores the importance of re-assessing existing exceptions for the digital environment. Second, the Panel meticulously considered each of the three steps and confirmed the commonly held view that the test is cumulative; the exception to copyright infringement must satisfy each condition of the test.

The first step, "certain special cases", was interpreted as requiring that the exception be clearly defined, narrow in scope and have a legitimate public policy objective.\(^{277}\) The second step, "no conflict with the normal exploitation of the work", was interpreted broadly to mean no direct or indirect disruption to existing or potential future activities by which rightsholders extract economic value from their rights.\(^{278}\) In interpreting the third step, "no unreasonable prejudice to the legitimate interest of the right holder", the

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\(^{275}\) WT/DS160/R, 15 June 2000 [hereinafter the Homestyle Case]. The decision followed a complaint by the EU regarding section 110(5) of the U.S. Copyright Act which provides for two exceptions. The first, the "homestyle exception" permitted retail establishments to play music by means of "home style equipment", such as a radio, provided that no charge is made and the transmission is not retransmitted. The second, "business exception", covered the playing of radio or TV broadcasts of non-dramatic musical works depending on the size of the establishment and the nature of the equipment used. The WTO panel found that the "homestyle exception" complied with the 3-step test, but the "business exception" did not.

\(^{276}\) ibid at paras. 6.103-6.112.

\(^{277}\) ibid at 6.149ff.

\(^{278}\) ibid at paras. 6.165-6.189.
Panel defined “legitimate interest” to cover any issue of importance to the right holder whether economic or not. Relevant factors may be the context in which the copyright content appears, the extent to which it is exposed to piracy threats and the intensity of its use as a consequence of the exception.

(iii) Application of the Homestyle Case to the Private Copying Exception to the Reproduction Right for Musical Works

In relation to musical works, the application of the Panel’s interpretations to the exception to the reproduction right for digital private copying raises a number of difficulties. In the context of this paper, a detailed analysis is not possible. However, a number of issues will be raised which warrant further consideration. As the fact situation considered in the Homestyle Case was an uncompensated use, it is difficult to determine how the analysis would differ for the private copying exception which is a remunerated use. In the author’s view, although it would be a relevant in the analysis, especially in steps two and three, the fact that the private copying would be remunerated would not by itself save the exception from possible non-compliance with the three-step test.

Some owners of the copyright in musical works would argue that a digital private copying exception does not comply with any of the three conditions. For example, although the private copying exception is clearly defined, one may question its scope and whether it constitutes a “special case”. As digital private copying has become so pervasive, it is arguable that it is no longer a “special” case, irrespective of the sound public policy justification for the exception. Furthermore, owners may argue that a private copying exception conflicts with the normal exploitation of a work by detracting from demand for sales of authorized copies of music. In relation to the third step, there is similarly a strong

case that a compulsory private copying exception prejudices the legitimate interest of the right holder by condoning or encouraging piracy activities.

(iv) A Possible Solution to Potential Non-compliance with TRIPS

A potential resolution to the possible non-compliance of the compulsory private copying exception for musical works with Article 13 of TRIPS would be to make participation in the licensing scheme voluntary, as has been suggested earlier regarding the scheme for the communication right and network-based reproductions. In the same way that most owners currently voluntarily assign their performing rights to SOCAN, one would expect the majority of owners to participate in the private copying regime, especially if the alternative is, as has been argued, the likelihood of rampant uncompensated private copying. This alternative would likely achieve the same result as compulsory licensing of private reproductions without the risk of a WTO complaint and possible trade sanctions. However, especially if there is modest participation by owners, the suggestion would have the same shortcoming of the proposed opt-in (or opt-out) Internet levy: that consumers might still be liable for copyright infringement despite having paid royalties on recording media and equipment. As noted earlier, in the author’s view, however, the risk of being sued is largely academic.  

5. Conclusion

Digital technology has fundamentally transformed the activity of private copying. The Internet in particular has converted private copying into an international problem implicating both the reproduction and communication to the public rights. This expansion of private copying has already undermined, and threatens to further undermine, the

remuneration received by creators for users’ enjoyment of their intellectual property. Digital private copying therefore demands a policy response or, in the face of dwindling remuneration for their intellectual efforts, creators will have little incentive to continue to create the entertainment products that enrich our lives.

Technological protection measures supported by legislation offer one possible response to the digital private copying dilemma. As Canada has yet to implement such measures, it is well-positioned to learn from the experiences in other jurisdictions, such as Australia and the United States, which have implemented measures in their copyright law. The experiences to date suggest that technological measures and related laws are problematic and, in the author’s view, are incapable of controlling digital private copying. Consumers will either reject tightly-controlled copies or have the incentive to download the latest “hacks” from the Internet to allow them to make private copies of works.

Due to these limitations, in this paper, a response based upon statutory licences has been advocated. I have argued for an integrated approach to digital private copying building upon the existing statutory licence and extending the model to the communication right via a levy targeting ISPs in Canada. I have asserted that the Board must extend the reproduction levy to hard disks and MP3 players in order to ensure digital private copying is appropriately remunerated. Legislative changes have also been recommended such as extending the levies to equipment and providing for a more comprehensive exemptions process. Although the exemption of ISPs from liability in Tariff 22 appears legally correct, pragmatically, ISPs must be levied for reasons similar to why manufacturers and importers of blank audio recording media are levied. Irrespective of whether a legal right is exercised

\[^{251}\text{Supra note 255 and accompanying text.}\]
in Canada, when residents of Canada access music online, they enjoy an economic benefit in Canada that represents a potential lost sale to the owners of copyright in the music.

Despite the suggestions for improvement to the existing model, such as a comprehensive exemption process, and similar suggestions regarding the proposed Internet levy, the solution proposed is nonetheless imperfect. Although workable exemptions to the levies would likely exempt many users who do not private copy, some users who utilize media and the Internet for reasons other than private copying purposes will nonetheless end up paying levies and subsidizing the private copying of others. The inadequacies of this outcome, however, must be balanced against the alternative of dwindling compensation to creators for the digital private copying of their property. The proposed integrated statutory licence approach, in the author’s view, represents the only viable means of compensating creators and continuing to provide them with the incentive to create.

The discussion in this paper has focussed on music, although it should be noted that the discussion has applications beyond music. For example, as movies become more commonly traded online over the coming few years, it will likely prove important to extend the model to cinematographic works. However, important differences between the music and movie industries must be first acknowledged. For example, in order to maximize revenue from the release of a movie, a movie’s release is staggered internationally. Unlike music, this business model may, for the time being, dictate that a model permitting Internet-based transmissions of a work is inappropriate.

Although the model has been discussed in the context of Canada, it must be recognized that proposed changes to Canada’s copyright law must be considered in light of Canada’s international obligations, particularly the TRIPS Agreement. Although the issue
is open, the author notes that a serious issue arises regarding the compliance of the reproduction right aspect of the model in view of Article 9(2) of the *Berne Convention*, which now forms part of TRIPS. The risk of non-compliance with TRIPS may require that participation in the regime covering the reproduction right become voluntary for creators.

Furthermore, due to the Internet, domestic copyright law now has international ramifications. Amongst the policy concerns highlighted regarding the possible creation of an Internet levy, was the fact that content legally made available by residents of Canada will be accessed online by non-residents of Canada, potentially undermining the efforts of other jurisdictions to control copyright content on the Internet. In the author’s view, efforts to control copyright content online will prove increasingly difficult and a better response would be for other jurisdictions to consider implementation of a model such as that proposed for Canada. In the author’s view, a uniform international response utilizing copyright collectives’ existing international channels for the distribution of royalties offers the most comprehensive and viable solution to the digital private copying dilemma. This response may be the only way of ensuring the continued creation of the entertainment that we all value.