CHAPTER FIFTEEN

User-Generated Content and Music File-Sharing:

A Look at Some of the More Interesting Aspects of Bill C-32

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This chapter is not intended as an update, but rather as an addendum to my chapter in Professor Geist's previous book on Canadian copyright reform.[1] In that chapter,[2] I suggested that the upcoming reform should focus on excludability of Internet-based uses, that is the exercise of exclusive copyright to prevent online uses of copyright material. I also suggested that this excludability was technologically problematic. Users empowered by social norms and ever-changing technological tools going well beyond peer-to-peer software,[3] and even relying on the old

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1 See Michael Geist, ed., *In the Public Interest* (Toronto: Irwin Law, 2005), www.irwinlaw.com/store/product/120/in-the-public-interest — the-future-of-canadian-copyright-law.

2 Daniel Gervais, "Rethinking Excludability: Use of Internet-Based Content," in *ibid.* at 517, www.irwinlaw.com/pages/content-commons/use-of-copyright-content-on-the-internet--considerations-on-exludability-and-collective-licensing---daniel-gervais.

3 See Richard Abbott "The Reality Of Modern File Sharing" (2009) 13:5 J. Internet L. 3. This technology-focused analysis concludes as follows:

> Do not listen to anyone pitching a product, service, or legal strategy purporting to eliminate file sharing. The sharing of files via hosting services is far more complex than peer-to-peer networking, and both evolve constantly. The next steps are already being taken. Proxy schemes are working protect uploaders,

USENET,[4] circumvent technological protection measures (TPMs), and ultimately access millions of MP3s. Proxies and anonymous clients make the activity increasingly hard to detect and track.[5] Finding more intrusive ways to track Internet usage is not just a technological challenge; it also pits copyright against other rights, including users' privacy rights and interests. It made sense in the context of that chapter to suggest that more online uses should be permitted (and licensed), where appropriate using a collective model providing licensed access to a repertory of works or other protected subject matter.[6] In this chapter I return to the issue of music file-sharing to see how much progress we have made.

Another aspect of online use that deserves special attention is reuse, especially to create so-called user-generated content.[7] On this front, Bill C-32 would impose a transformative use exemption (already dubbed the "YouTube" exception). Whether an exemption or a license is a better solution depends on whether one thinks that sites such as YouTube (or its owner, Google, Inc.) should pay right holders for use, of their content, or whether it should be free. The current focus of right holders is on removal of the content pursuant to a notification to the host site. As a normative matter, it makes sense to allow this aspect of the Internet to flourish by using *ex post* control (such as the proposed notice and notice[8]) and providing safe harbours, rather than ban the activity completely. Canadians want their children to be fully computer and web-literate and participate in the "remix culture." They do not want them to be creative only by proxy.

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encryption protocols are masking files from inspection, and the dark market of anonymous payment schemes allow sharers to avoid leaving paper trails."

Ibid. at 8.

4 Sascha Segan, "R.I.P Usenet: 1980–2008" *PCMag* (31 June 2008), www.pcmag.com/article2/0,2817,2326849,00.asp.

5 See *ibid*. and mIRC, www.mirc.com; Mark H. Wittow & Daniel J. Buller, "Cloud Computing: Emerging Legal Issues for Access to Data, Anywhere, Anytime" (2010), 14:1 J. Internet L. 1. According a recent IFPI (International Federation of the Phonographic Industry) report, "Although P2P file-sharing remains the most damaging form of piracy due to the volume of files shared by users, the last two years have seen a sharp rise in non-P2P piracy . . . ." IFPI, *Digital Music Report 2010: Music how, when, where you want it*, http://www.ifpi.org/content/library/DMR2010.pdf at 19 [*IFPI Report*]. Unless indicated otherwise, all hyperlinks in this chapter were last accessed on 10 July 2010.

6 The *Copyright Act* protects musical, dramatic, artistic and literary works, but also protects two other "subject matters", namely musical performances and sound recordings. *Copyright Act*, R.S.C. 1985, c. C-42 [*Copyright Act*].

7 I suggest a definition at the beginning of Part B below.

8 Bill C-32, *Copyright Modernization Act*, 3d Sess., 40th Parl., 2010, cl. 47 (ss. 41.25, 41.26).

The proposed "transformative work" exemption should achieve this purpose.

In the following pages, I take an in-depth look at the flawed approach in the Bill to the file-sharing problem, and at possible issues with the UGC exception.

A. FILE-SHARING

1) The File-sharing Phenomenon

In terms of realistic technological options, it seems difficult to "stop the Internet," a network using packet switching technology and designed by the United States Department of Defense's Advanced Research Projects Agency (ARPA) to be virtually unstoppable. From a business standpoint, maximizing access also makes sense in terms of generating revenue for creators and copyright industries.[9] Indeed, despite harsh penalties available against file sharers in the United States since the entry into force of the *Digital Millennium Copyright Act* in 1998, implementing the 1996 *WIPO Copyright Treaty* (WCT) and the *WIPO Performances and Phonograms Treaty* (WPPT), music file-sharing has not stopped, far from it.[10] Even in markets where dramatic action made a significant dent in unauthorized file-sharing, numbers are creeping back up. Paid single downloads are not enough to make up for the drop in revenues.[11] Meanwhile, the size of the record-

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9 Presumably, money is made by maximizing authorized uses, not minimizing unauthorized uses.

10 There is still hope, however, that the lawsuits will eventually deter file-sharing. Professor Henslee notes for instance that "[w]hile the RIAA suits have not dramatically curtailed illegal downloading, more stories about the large damages accessed Jammie Thomas will begin to deter illegal downloading." William Henslee, "Money For Nothing And Music For Free? Why The RIAA Should Continue To Sue Illegal File-Sharers" (2009), 9 J. Marshall Rev. Intell. Prop. L. 1.

11 See Ethan Smith, "Sales of Music, Long in Decline, Plunge Sharply" *Wall Street Journal* (21 March 2007), http://online.wsj.com/article_email/SB117444575607043728-lMyQjAxMDE3NzIoMTQyNDE1Wj.html.This article notes that "[t]he sharp slide in sales of CDs, which still account for more than 85 percent of music sold, has far eclipsed the growth in sales of digital downloads, which were supposed to have been the industry's salvation."

The *IFPI Report* notes that for instance that "Research by GfK in June 2009 found that 60 per cent of infringing file-sharers had stopped or reduced their activity as a result of the introduction of the IPRED law. However, piracy levels in Sweden are believed to have risen again since then, underlining the need for sustained enforcement and ISP cooperation." *IFPI Report*, above note 5 at 27.

ing industry has been reduced by almost half.[12] In Canada, the industry reported an overall drop of 9 percent from 2007 to 2008, with a 14 percent decline in CD sales obviously not compensated by a 65 percent increase in paid downloads.[13]

The recording industry, used to a model predicated mostly on the sale of physical objects (CDs) or other "units"[14] with *supporting* income streams from live performances (concerts), broadcasting, merchandising revenue, and even private copying levies now finds itself with only those "supporting "income streams, as CD sales are dwindling. The new stream of individual digital downloads probably will never compensate for lost carrier sales.

Looking at this empirical picture, if the purpose of copyright law is to help organize markets to allow those who create and disseminate new music (subject to market forces) to make a living, then it has failed. Put differently, if even successful songwriters and performers (measured by the number of people who listen to their music) cannot live from their work, then I suggest that the system is broken. It also has profound implications for Canadian culture, as only creators successful in much larger markets (such as the United States) will survive, and it is their music that Canadians will be able to download.

As most readers know quite well, the transfer of music files, often in unprotected MP3 format, among Internet users began with the centralized system called Napster, the first generation of file-transfer software designed essentially for musical files. The collapse of Napster was facilitated, to a great extent, by its easily localizable and controllable character.[15]

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12 From $38.6 billion in 1999 to $27.5 billion in 2008, according to IFPI, as reported at http://en.wikipedia.org/wiki/Music_industry. A 2009 report shows global trade revenues (a subset of total revenues) down 7.2 percent to US$17 billion. Physical sales fell by 12.7 percent globally while digital music sales rose by 9.2 percent to US$4.3 billion. In the US, digital sales account for nearly half — 43 percent — of the recorded music market. Adjusted for inflation, the drop is dramatic. Will iTunes compensate? The 2009 number (US$4.3 billion, up 12 percent in 2009 over 2008, is only approximately 10 percent of global 1999 revenues. See *IFPI Report*, above note 5 at 10 and www.ifpi.org/content/section_news/20100428.html.

13 See "Statistics," The Canadian Recording Industry Association, www.cria.ca/stats.php.

14 The best evidence of this is perhaps the way in which the success of an album or song (gold, platinum etc.) was calculated, namely on the sale of individual copies. Still today the industry statistics report "unit" sales even for the digital market. See http://76.74.24.142/A200B8A7-6BBF-EF15-3038-582014919F78.pdf.

15 See Gregory Hagen & Nyall Engfield, "Canadian Copyright Reform: P2P Sharing, Making Available and the Three-Step Test" (2006) 3:2 U. Ottawa L. & Tech. J. 477 at 503, www.uoltj.ca/articles/vol3.2/2006.3.2.uoltj.Hagen.477-516.pdf [Hagen & Engfield].

After all, it consisted of just a few servers and it proved easy to target their owners and operators and make them cease their activities. However, sharing of music files continued, and the events that followed the injunctions levelled against Napster in 2001 raised the question of whether the music industry had underestimated the strength of demand for and role of file-sharing.[16] Now many are asking whether that is in fact desirable, including songwriters themselves:

> File sharing is both a revolution in music distribution and a very positive phenomenon. The volunteer efforts of millions of music fans creates a much greater choice of repertoire for consumers, allowing songs — both new and old, well known and obscure — to be heard. All that's needed to fulfill this revolution in distribution is a way for Creators and rights holders to be paid.[17]

Is it possible that what some perceived as simple theft,[18] which must be fought in the same way as, say, shoplifting, could also be described as a new form of social interaction? Empirically, it seems that there has never been a time in history when more people have listened to more music. Music is everywhere, on every device. People email, blog and text about their favourite artists, but business models lag behind. Indeed, in line with its vision of the traditional world based on ownership and the distribution of discrete carriers such as compact discs, a model in which it controls the manufacturing and use of each copy (as would happen for a car or a house), the recording industry thought that it could implement TPMs in order to limit, control or at least impede copying. But copying is how millions of users access music.

One commentator drew an interesting analogy with traffic regulation:

> The real problem has been poor consumer treatment prior to and in reaction to [P2P] technology. Imagine a city where the traffic lights are notoriously poorly timed. Over time, motorists discover that a trip that ought to take 10 to 15 minutes, takes 25 to 35 minutes as they hit every red light regardless of traffic. Motorists soon discover that if they speed slightly or drive slowly between certain lights, they will hit fewer red lights. Upon discovering this behaviour, the city, rather

16 See Genan Zilkh, "The RIAA's Troubling Solution To File-Sharing" (2010), 20 Fordham Intell. Prop. Media & Ent. L.J. 667, 669–75.

17 Songwriters Association of Canada, "Our Proposal: Detailed (Updated March 2009)" www.songwriters.ca/proposaldetailed.aspx.

18 *IFPI Report*, above note 5 at 3.

> than address the root of the problem by improving the light system, installs cameras throughout the city to catch those speeding. Despite fewer tickets being issued after the initial installation, speeding has not decreased, but has simply changed. Now, rather than speeding slightly between lights, motorists have adjusted their behaviour by memorizing the locations of the cameras, and now speed excessively between them, and hit the brakes immediately before the cameras . . . . Here, we have clear issues of invasion of privacy, criminal tampering, and unauthorised installations by the entertainment industry all in the name of protecting their bottom line.[19]

The industry added "click-wrap" contracts (which are accepted by a mouse click) in order to eliminate legal exceptions or limitations, including fair dealing in some cases, thus combining the legal protection of the contracts with the technical locking mechanisms. This made it illegal and almost impossible to bypass them. This supplementary anti-bypass protection exists in the United States, Europe, and many other countries, and it is now foreseeable in Bill C-32 that it will be applied in Canada. The problem is that, while it may work to bring recalcitrant users back in the mainstream, the measures have been used — in vain it seems — to fight the mainstream itself.[20]

As might be expected, technologists reacted by creating a new technological model that we now call "peer-to-peer," which enabled informal file-sharing networks without a central file servers to make music and other files from millions of personal computers available to the entire world. [21] Moreover, Internet users, who are told they are part of the "problem" that the industry is targeting, may feel the urge to resist.

The guilty parties are now individuals, whom the recording industry tried to identify by taking various Internet service providers (ISPs) to court It is now trying to make ISPs police the Internet via the Anti-counterfeiting Trade Agreement (ACTA).[22] In parallel, Internet users are turning to proxy-based and secure USENET connections, which ISPs can-

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19 Scott Monkman, "Corporate Erosion of Fair Use: Global Copyright Law Regarding File Sharing" 6 Asper Rev. Int'l Bus. & Trade L. 265, 282–83.

20 *Ibid*. at 285.

21 See Andrea Slane, "Democracy, Social Space, and the Internet", (2007) 57 U. Toronto L.J. 81 at 99–100, http://muse.jhu.edu/journals/university_of_toronto_law_journal/v057/57.1slane.pdf.

22 According to a communiqué endorsed by a number of academics and non-governmental organizations published in 23 June 2010, ACTA, a trade agreement to which Canada would become party, would:

not easily track, to access their music. There is no way for users who might want to, to pay to do what they want to do. The continuing message is that listening to music in the way that an entire generation is taking for granted is wrong and should be stopped, as opposed to being an activity that could be the largest revenue source for the industry in its history.[23]

The "war" against file-sharing is costing the industry billions of dollars (to acquire and use the technology aimed at countering the phenomenon, to pay lawyers and to absorb losses of sales). It has caused enormous frustration and cynicism among consumers, thus probably exacerbating the drop in sales. Trying to make up for lost revenue, the majors have been increasingly relying on contracts, such as "360" deals, which give them control over all sources of income generated by a performer, including merchandising sales.[24] They have also signed agreements, such as the much touted deal with Spotify, that have brought vast amounts in the coffers of record companies, but that have apparently not generated quite the same degree of enthusiasm on the part of creators and performers.[25]

- Encourage internet service providers to police the activities of internet users by holding internet providers responsible for the actions of subscribers, conditioning safe harbors on adopting policing policies, and by requiring parties to encourage cooperation between service providers and rights holders;
- Encourage this surveillance, and the potential for punitive disconnections by private actors, without adequate court oversight or due process.

See American University Washington College of Law, "International Experts Find that Pending Anti-Counterfeiting Trade Agreement Threatens Public Interests" (23 June 2010), www.wcl.american.edu/pijip/go/acta-communique.

This interpretation was denied by a number of participating governments.

23 Even numbers as low as $5/month per broadband user for a file-sharing license could generate total revenues similar to those the industry made in its heyday. See "Peter Jenner Admits That Stopping File Sharing Is Impossible" *TechDirt* (14 July 2010), http://www.techdirt.com/articles/20100714/16215410220.shtml; and Daniel Gervais, "The Price of Social Norms: Towards a Liability Regime for File-Sharing" (2004), 12 J. Intell. Prop. L. 39–74, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=525083.

24 See Susan Abramovitch & Shelagh Carnegie, "'360 deals' offer new options for artists in recording industry" *Lawyers' Weekly* 26:45 (6 April 2007) 12. Officially known as "multiple-rights agreements" they vary enormously in scope and "fairness" towards the artist. Madonna, U2, Shakira, Jay-Z can negotiate 360 contracts that they consider beneficial. New artists may not have the necessary clout, yet a "360" may be all that is on offer. See Edward Pierson, "Negotiating A 360 Deal: Considerations on the Promises and Perils of a New Music Business Model" (2010) 27:4 Entertainment and Sports Lawyer 1, http://new.abanet.org/Forums/entsports/PublicDocuments/winter10.pdf.

25 According to Sony BMG, "Spotify earns us more than iTunes." This is according to a Swedish article quoted in Barry Sookman, "Copyright Reform for Canada: What

This cynicism and even disrespect for the rule of law, and the cat-and-mouse technological game it has induced, may have repercussions in other areas. For example, highly encrypted anonymous peer-to-peer clients developed to thwart the music industry's efforts may be used to transfer child pornography.[26] When music users are encouraged to increase their anonymity, everyone loses.

2) The Impact of P2P

Not all published studies support the assumption that file-sharing is the leading cause for the drop in music sales. This is notably the case with the May 2007 report prepared for Industry Canada.[27] To be clear, it is not the drop in sales of CDs (an average drop of 26 percent in units sold, and of 37 percent in receipts between 1995 and 2005[28]) that is in question, but rather the cause-and-effect link. File-sharing is *a* cause for this drop, but how much? Although file-sharing whether on P2P networks, on torrents or using other, increasingly undetectable technologies,[29] is likely the cause

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Should We Do? A Submission to the Copyright Consultation" (2009) 22 I.P.J. 1 at n. 43. However, see Dan Martin, "Spotify slammed by songwriters: A songwriters' association has criticised the Spotify streaming service over 'tiny' payments to musicians" *The Guardian*, (13 April 2010), www.guardian.co.uk/music/2010/apr/13/spotify-songwriters (who notes that the British Songwriters Association believes that "there is no clear trail that can be established so that the songwriter can trace back what they ought to have got. These things are behind a blanket of secrecy, and that is extremely worrying." Unlike revenues funnelled through a copyright collective, there is no obvious way for songwriters to obtain data on use of their works.)

26 For example, USENET, which can accessed via a secure connection, is now essentially used for file-sharing and porn. See above note 4. The most extraordinary aspect of USENET is that millions of users pay on average $20 per month to get access (via an encrypted SSL connection to USENT), a multiple of the $5/month file-sharing licensing models discussed in a number of studies. For a pricing example, see http://www.usenet.net. On the monthly fee, see, e.g., Daniel Gervais, note 23 above.

27 Industry Canada, *The Impact of Music Downloads and P2P File-Sharing on the Purchase of Music: A Study for Industry Canada* by Birgitte Andersen & Marion Frenz (2007), www.ic.gc.ca/eic/site/ippd-dppi.nsf/vwapj/IndustryCanadaPaperMay4_2007_en.pdf/$FILE/IndustryCanadaPaperMay4_2007_en.pdf [*Industry Canada Study*].

28 According to the OECD report, the drop in sales of records (units) between 1998 and 2003 was 31.4 percent in Canada, versus 20.1 percent in the United States and a world average of 14 percent.

29 See above note 3 and Ernesto, "Filesharing Report Shows Explosive Growth for uTorrent" http://torrentfreak.com/p2p-statistics-080426, which notes that "[f]rom December 2006 to December 2007 LimeWire lost approximately 25 percent of its user base. By the end of 2007, 17 percent of all PCs in the United States had LimeWire installed, compared to 23.3 percent last year. . . . The uTorrent user base on the other

for a substantial proportion of the drop in sales of CDs, from an empirical point of view the industry's strategy of "counterattack" does not seem to be working very well.[30]

The Industry Canada Study shows that 77.2 percent of Canadians over fifteen years of age have purchased compact discs. However, 29 percent of Canadians have downloaded music through peer-to-peer networks, 20 percent have copied files from friends, and 41.7 percent have downloaded music from promotional, personal, or free sites. At the same time, only 13.6 percent of Canadians had paid to download music. [31] In 2003, 24.3 percent of all Canadian households (compared to 7.8 percent in 1999) obtained music on the Internet and saved it.[32] More important, the proportion of Canadians who have downloaded music from peer-to-peer sites had grown to 35.1 percent for those aged nineteen to twenty-four years, and to 40.7 percent for those aged twenty-five to thirty-four years, while paid downloads by these groups represent 15 percent and 19 percent, respectively.[33] In other words, the largest consumers in the sector download twice as much from peer-to-peer sites than from pay Web sites, and acquire three times as much music from free sites and friends as from pay download sites.

At the aggregate level, the report published by the OECD in 2005 shows that Canada accounted for 8 percent of peer-to-peer users in the OECD

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hand is rapidly growing. uTorrent installs more than doubled in nearly every part of the world in the last 12 months. The BitTorrent client is most popular in Europe (11.6 percent)." The data reported in this article shows an increase in uTorrent installs in Canada up from 4.1 percent of PCs to 9.3 percent from 2007 to 2008.

30 A already dated OECD report noted, that

> [T]he use of all monitored networks (fast-track plus all other networks) has been on the rise until the peak in April 2004 with almost 10 million users and month-on-month growth (seasonal effects seem to reduce P2P usage in the summer month [sic]). The rather flat trend of the fast-track networks since November 2003 and the parallel rise of simultaneous use of other networks may hint at a migration of P2P users to networks that attract less attention from the music industry and thus fewer lawsuits. This result is confirmed by more recent analysis. Some studies also contest the existence of an impact of the lawsuits on file-sharing; with P2P users recognising the low probability that they will be targeted by a lawsuit.

OECD Working Party on the Information Economy, *Digital Broadband Content: Music*, DSTI/ICCP/IE(2004)12/FINAL (13 December 2005), www.oecd.org/dataoecd/13/2/34995041.pdf at 101 [*OECD Report*].

31 Industry Canada Study, at 17.

32 *OECD Report*, above note 30 at 74.

33 *Industry Canada Study*, above note 31 at 47-28.

countries, while its population represents only 1.2 percent of the total population of these countries.[34] Canada represents about 2 percent of music sales in the world.[35] The conclusions of the Industry Canada Study, which are controversial, discussed the causal link between peer-to-peer and the drop in CD sales. The authors summarize their conclusions as follows:

> In the aggregate, we are unable to discover any direct relationship between P2P file-sharing and CD purchases in Canada. The analysis of the entire Canadian population does not uncover either a positive or negative relationship between the number of files downloaded from P2P networks and CDs purchased. . . .
>
> We also find that both the P2P file-sharing group and the entire population show a positive and statistically significant association between ripping CDs and CD purchases. For the entire population, there is also a positive and significant effect on CD purchasing from individuals downloading via private web sites. . . . However, people who also own an MP3 player appear to be less likely to purchase CD albums. . . .
>
> However, our analysis of the Canadian P2P file-sharing subpopulation suggests that there is a strong positive relationship between P2P file-sharing and CD purchasing.[36]

A well-known commentator, Stan Liebowitz, felt that these results were untenable for a number of reasons, notably the conclusion that the number of music files exchanged would lead to an increase in sales of CDs, which has not been the case.[37] To be fair, the study did *not* state that peer-to-peer has led to an increase in sales of CDs, but that there was a correlation between sales and the intensity of file transfers.[38] Correlation and causality are two different notions. Still, many of the lessons that intuitively apply

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34 *OECD Report*, at 106.

35 *Ibid*., at 21.

36 *Industry Canada Study*. Above note 31 at 26-27 and 33

37 See the substance of and the response to his critique at Birgitte Andersen, "The Impact of Music Downloads and P2P File-Sharing on the Purchase of Music" *Dynamics of Institutions & Markets in Europe* (16 November 2007), www.dime-eu.org/node/477.

38 See also Mark Hefflinger, "Report: Top Songs at Retail Also Most Popular on P2P" *Digital Media Wire* (14 May 2009), www.dmwmedia.com/news/2009/05/14/report percent3A-top-songs-retail-also-most-popular-p2p. Yet even here is the wave of file-sharing all lost sales, or would some of it function as unpaid advertising, as when a someone sends a song to a friend thinking she might like it. If the recipient discovers a new artists that way, sales may increase. Yet for new blockbusters, P2P undoubtedly replaces many a licensed download.

to piracy of carriers do not map well onto the online environment. I return to this in the next section.

Whether the Industry Canada Study properly reflects the behaviour of Canadian consumers or not, the results raise a certain number of complementary questions. For example, if users who have downloaded music from peer-to-peer sites are less likely to pay for their downloads, is it because TPMs make files from paid downloads less friendly than their free versions? Based on a significant experiment in France, TPM-free files sell better than those with a TPM on the same download sites.[39] Record companies must have access to comparable data since they are beginning to adopt formats without a digital rights management system (DRM).

Putting aside the eventuality of a system of remuneration for file transfers, would legal downloading compensate for the drop in sales of CDs? The OECD study observed:

> [T]he online music market was initiated somewhat later than in the United States, with agreement in October 2003 of the Canadian Musical Reproduction Agency and the Canadian Recording Industry Association to issue licenses to Internet music distributors (agreement on standard terms and conditions). Napster, MusicNet and Puretracks (a Canadian-owned service) were the first services to sign framework agreements with the associations. Apple announced an online music store ITunes coming to Canada in November 2004. According to PwC (2004), total digital spending is expected to grow from USD 3 million in 2004 (0.4 percent of total music sales) to USD 102 million in 2008 (14 percent of total music sales).[40]

Even if the growth in sales of single downloads were sustained, it seems highly improbable that the OECD objectives would be reached.[41]

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39 Denis Rouvre. "La FNAC vend des MP3 sans DRM" *PrésencePC* (17 January 2007). Solveig Emerard-Jammes, "Franck Leprou : Les DRM ont constitué des freins à l'achat de musique sur les sites de téléchargement légal," *Le Journal du Net* (25 October 2006). In general, the "majors" have given up "heavy" TPMs. "Napster moves to MP3-only music download format," *CNET News* (6 January 2008); "Sony BMG to drop copy protection for downloads," *CNET News* (7 January 2008).

40 *OECD Report*, above note 30 at 33.

41 See above notes 10 and 11.

3) Film v. Music

The film industry has fared much better in the Internet era than its music cousin.[42] Why? First of all, the consumption patterns are vastly different. Music is everywhere, and users typically want "their music" on all their devices. Films are generally "consumed" once or a few times at most. Second, file size is an issue, as users cannot easily store 50,000 films on a computer, which they can easily do with songs. This also means that downloading a movie takes much more time and bandwidth. Third, and more importantly, whether a song is downloaded from LimeWire for free or from iTunes, the quality is essentially the same, if one excepts the possibility of spoofs, spyware and viruses when using file-sharing networks. By contrast, a film is not "the same" if the file quality is low, and the experience of watching a movie on a computer does not equal watching it in a theatre. [43] Consequently, quantitatively, there is much less file-sharing of movies than music, and the product resulting from a download is qualitatively different. As such, it is an irritant, but not an existential threat to the industry. Fourth and finally, a common source of piracy for new films, before they are released on DVDs, is camcording in a theatre[44]. This form of piracy is much easier to prevent than file-sharing, because it is not digital. Fighting it means enforcing a ban on the use of a physical device (the camera) in theatres.[45]

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42 The most recent industry report available notes that "[w]orldwide box office for all films reached $29.9 billion in 2009, up 7.6 percent over 2008's total. International box office ($19.3 billion) made up 64 percent of the worldwide total, while U.S. and Canada ($10.6 billion) made up 36 percent, a proportion consistent with the last several years. U.S./Canada box office and international box office in U.S. dollars are both up significantly over five years ago" (figures in US dollars). See Motion Picture Association, Theatrical Market Statistics 2009, http://mpaa.org/Resources/091af5d6-faf7-4f58-9a8e-405466c1c5e5.pdf. The same may not be true of television. See Rory Cellan-Jones, "File-sharers' TV tastes revealed" *BBC News* (28 August 2009),. http://news.bbc.co.uk/2/hi/8224869.stm.

43 The loss of income is undoubtedly significant, but it does not equal the number of people who appropriate or watch a copy without paying, because not all of them would pay to see it in a theatre. As such "official" estimates of losses due to piracy must be considered with some caution.

44 There were, however, several reports a few years ago suggesting that studio personnel were a major source of bootlegs. See, e.g., John Schwartz "Hollywood Faces Online Piracy, but It Looks Like an Inside Job" *New York Times* (15 September 2003), www.nytimes.com/2003/09/15/technology/15MOVI.html.

45 Bill C-59, which received Royal Assent on 22 June 2007, amended the *Criminal Code* to prohibit the unauthorized recording of a movie in a movie theatre (camcording). See Bill C-59, *An Act to amend the Criminal Code (unauthorized recording of a*

The evidence for the above is there: the film industry has just had its best years ever in terms of global revenues. It loses some revenue to online file-sharing of course, but the issue is manageable. The film industry has also been able to use the Internet to generate additional sales, such as Netflix and advertising, thereby compensating for some and perhaps all of the revenues that may be lost to file-sharing.[46]

4) Bill C-32 and File-Sharing

Bill C-32 has taken on board many of the ideas suggested to the government and Parliament concerning online uses. Unfortunately, as far as the main form of online use is concerned, it only follows the WCT and WPPT.[47] Lest I misguide the reader, I am not opposed to TPMs, but when millions of Canadians are file-sharing — it is now the main mode of access to music, at a ratio approaching forty unauthorized downloads for each one that is paid[48]— the way in which this interdiction will allow Canadian songwriters and performers to make a decent living remains rather obscure.

In jurisdictions which have adopted this property-based view in which each copy must be controlled by the right holder (generally not the creator or performer, but the record company), the situation is not markedly different from the current Canadian picture.[49] Enforcing a ban on circumven-

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movie), 1st Sess., 39th Parl., 2007, www2.parl.gc.ca/HousePublications/Publication.aspx?Docid=3297657&file=4.

46 Readers in Canada and elsewhere outside the United States may not yet be familiar with NetFlix, a monthly subscription of approximately US$10 offering unlimited access to watch a large database of films online, and DVDs by mail. The service should soon be available to Canadians. See www.theglobeandmail.com/news/technology/netflix-will-cross-border-to-canada-this-year/article1644548/

47 See Carys Craig, "Locking out Lawful Users: Fair Dealing and Anti-Circumvention in Bill C-32" and Michael Geist, "The Case for WIPO Internet Treaty Flexibility" in this volume.

48 Some even put the number at 49:1. See www.songwriters.ca/proposaldetailed.aspx.

49 Somewhat illogically it seems, the industry is comfortable with streaming services and YouTube, now a main source of access to music and often licensed, yet without any direct control over use. Add the widely available technologies that transform YouTube videos into MP3 files, and the industry's virulent opposition to licensing at least some forms of file-sharing may become even harder to justify in the eyes of the average music user. Even YouTube videos promote this application. See, e.g., www.youtube.com/watch?v=tE9ITkjFpZg.

It is true of course that to make an MP3 from a YouTube video, one must watch or at least play the video. See Michael Driscoll, "Will YouTube Sail Into The DMCA's Safe Harbor Or Sink For Internet Piracy?" (2007) 6 J. Marshall Rev. Intell. Prop. L. 550, n. 133.

tion of TPMs may work on a small scale, that is, vis-à-vis a small number of deviant users (probably easier to identify if they stand out in a crowd of compliant users). By definition, a majority of Canadians cannot be deviant. I am also concerned that pushing younger Canadians into illegality (not allowing them to access the music the way they want legally) may actually drive them to become less law-abiding generally.[50] The Bill has thus far missed a golden opportunity to discuss how the online music market is broken, and how it could be fixed.

5) The International Legal Context

Any solution to the problem of online music transfers with neither payment nor control will have to be compatible with Canada's international obligations that result from the treaties to which it is a party. There are five such agreements, four of which are administered by the World Intellectual Property Organization (WIPO) and one by the World Trade Organization (WTO).[51] The WTO administers the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs).[52] Any infringement on Canada's obligations flowing from the TRIPs Agreement may lead to application of the WTO's dispute-settlement procedure. This is not a theoretical recourse. An American exception concerning the performance or public execution of music was successfully contested in 2000, and one year later Canada modified its Patent Act after a WTO special dispute-settlement group concluded that an exception provided in the Act infringed on the three-step test.[53]

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50 "Morality: Rose-coloured spectacles? Cheats may or may not prosper, but they despise themselves for cheating" *The Economist* (24 June 2010), www.economist.com/node/16422414/print. The article noted that, "The moral, then, is that people's sense of right and wrong influences the way they feel and behave. Even when it is someone else who has made them behave badly, it can affect their subsequent behaviour." This correlates with Eric Posner's finding on tax law compliance. See Eric A. Posner, "Law and Social Norms: The Case of Tax Compliance" (2000), 86 Va. L. Rev. 1781.

51 See World Intellectual Property Organization, www.wipo.int and World Trade Organization, www.wto.org, respectively.

52 *Agreement on Trade-Related Aspects of Intellectual Property Rights* (15 April 1994) in *Agreement Establishing the World Trade Organization, Annex 1C*, www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm, 1869 U.N.T.S. 299, (1993) 33 I.L.M. 81.

53 See *Patent Protection for Pharmaceutical Products in Canada — Chronology of Significant Events*, 6 October 2008, www2.parl.gc.ca/content/LOP/ResearchPublications/prb9946-e.htm; and Daniel Gervais, *The TRIPs Agreement: Drafting History and Analysis*, 3d ed. (London: Sweet & Maxwell, 2008), at 382–83.

The TRIPs Agreement was adopted in April 1994. It integrates most of the provisions in two previous treaties administered by WIPO: the 1971 Act (or version) of the *Berne Convention for the Protection of Literary and Artistic Works* (the *Berne Convention*) and the 1961 *Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations* (the *Rome Convention*).[54]

After the adoption of the TRIPs Agreement, WIPO concluded negotiations on two new treaties in 1996, the WCT and the WPPT. Today, Canada is bound by the TRIPs Agreement, the *Berne Convention*, and the *Rome Convention*. As a consequence, aside from the risk of a trade dispute in the case of a violation of the TRIPs Agreement, it is highly improbable that the Canadian government would support a solution that is not compatible with these instruments.

The TRIPs Agreement is part of the "chain" of trade measures negotiated during the Multilateral Trade Negotiations of the Uruguay Round (1986–94), at the end of which the WTO was established. The agreement does not reinvent the wheel with regard to copyright. It integrates all of the rights and other substantial provisions in the Berne Convention, except for moral rights (which were not considered "trade-related"[55]). This means that all rights (including the rights to reproduction and communication to the public) are covered in the TRIPs Agreement, as are the limitations and exceptions set out in the Berne Convention. However, there is one important difference: a three-step test is used in the TRIPs Agreement to authorize all limitations and exceptions applicable to all of the rights.

The test set out in Article 13 of the TRIPs Agreement authorizes limitations on and exceptions to the right of reproduction:

- In certain special cases
- That do not infringe on normal exploitation of the work
- That do not cause an unjustified prejudice to the legitimate interests of the creator

Very briefly,[56] all exceptions to copyright must satisfy each of these three conditions. The WTO has interpreted the first condition as meaning that an exception or limitation must have a limited field of application or an exceptional scope.[57] The second condition means that an exception will not

54 See Daniel Gervais, *ibid.*, at 213–14.

55 See *ibid.* at 214–15.

56 For a more detailed explanation, see *ibid.* at 237–48.

57 *Ibid.*

be allowed if it bears on a type of exploitation that has or would probably have considerable importance.[58] In other words, an exception that is used to limit a significant existing or reasonably predictable potential market and/or to enter into competition with the copyright holder is prohibited. Finally, under the third condition, a prejudice is caused to the interests of rights holders and rises to an unjustified level if an exception or limitation engenders an unjustified lost business opportunity for the copyright holder that is not compensated by, for example, a copyright levy.[59] In sum, it is all about money — which is exactly surprising for a trade agreement.[60]

6) The Way Forward

Clearly, file-sharing reveals a fundamental change in the way in which we consume music. *Music consumption has grown greatly in the last five years*. It is the *financial flows* that have not.

Empirical and theoretical analyses support a few assumptions about future business models. First, many consumers seem ready to pay, even if the question of the price remains an obvious matter for discussion. In fact, consumers do pay for some music and for ring tones for their cell phones. Second, consumers are not attracted to the subscription model; it remains to be determined whether there is a problem with the price or whether subscription simply does not respond to consumer demand. It requires a behaviour modification the outcome of which is less freedom than unpaid access, and with a payment to boot.

Given that consumers pay for other formats, it is conceivable that price is not the main issue. However, paid, authorized music should be as user-friendly as "free music." Business models will develop over licensed "file-sharing," for example by designing unobtrusive clients that can inform a user that an artist whose music she downloaded is coming to her area, etc. To make this possible, however, users must be *allowed* to pay to enjoy the music the way they want and for many of them, the only way, that they know.

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58 *Ibid*. This is reflected at least indirectly in the transformative use exception discussed in connection with UGC in Part B below.

59 *Ibid*.

60 Daniel J. Gervais, "Intellectual Property, Trade & Development: The State Of Play" (2005), 74 Fordham L. Re*v* 505, 505–6.

In spite of the music industry's far from brilliant and probably counter-productive efforts to stem the tide of file-sharing,[61] there may be a simple way to re-establish contact with the "moral fibre" of consumers, many of whom I would argue understand that creators and others in the industry must be paid for their work. After all, music consumption has grown and users recognize the value of the music that they love and listen to on their iPods and MP3 players all the time, all over the world. They don't want to be told that they do not have the right to do what they are doing or have the reasons for this ban explained to them. They want to be told *how* they can do it.

A compulsory licence instituting a system of remuneration for unlimited online music file-sharing would be prohibited by international law. The way to make such a system compatible is to make it voluntary, although it can be an opt-out regime, as proposed by the Songwriters Association of Canada (SAC), as opposed to the more traditional opt-in (sign up) model.[62] The simplest system would be based on the payment of a monthly fee by users via their ISP. Absent an agreement, and partly because there is no obvious advocate for all Internet users to make such an agreement, a tariff should be set by the Copyright Board, which could also, as with private copying and other tariffs, set the split among the various categories of right holders.

The idea that providing legal access may work better online than trying to stop use is not exactly new. In a 1998 paper prepared for the World Intellectual Property Organization (WIPO),[63] I had suggested that licensing was a better option. Robert Kasunic similarly observed in 2004 that:

> Copyright owners often want too much control. The public often wants too much for free — something for nothing. All too often, neither side seems capable of empathy. Yet finding a common ground or the proper balance between these conflicting interests is the essence of copyright. The controversy over P2P is an excellent case in point for

61 See Thomas Mennecke, "P2P Population Remains Steady" *Slyck* (20 October 2006), www.slyck.com/story1314_P2P_Population_Remains_Steady.

62 See above note 17. The proposal was amended in part to allay concerns expressed by record labels about the compatibility of the initial version with Canada's treaty obligations. See Barry Sookman, "The SAC Proposal for the Monetization of the File Sharing of Music in Canada: Does It Comply with Canada's International Treaty Obligations Related to Copyright?" (2008) 21 I.P.J. 159.

63 Electronic Rights Management and Digital Identifier Systems, 23 Nov. 1998, WIPO Document ACMC/1/1, www.wipo.int/edocs/mdocs/enforcement/en/acmc_1/acmc_1_1-main1.pdf.

> this seeming lack of empathy, both for copyright owners' attempts to control the technology and the public's willingness to abuse it.[64]

And in one of the best copyright essays ever written, Benjamin Kaplan famously wrote, back in 1967:

> [C]opyright or the larger part of its controls will appear unneeded, merely obstructive, as applied to certain sectors of production . . . here copyright law will lapse into disuse and may disappear. . . . [L]arge repertories of works will be made available . . . and charges and remittances figured on rough-and-ready bases, all with liberal application of some principle of "clearance at the source" to prevent undue bother down the line to the final consumer.[65]

The participation of ISPs in a future licensing model may presume that receipts would be shared with them to compensate for their role as fee collectors. Bill C-32 proposes a vast safe-harbour for them. Their agreement to collect a fee could be seen as a reasonable trade-off, given that many users pay for high-speed internet at least in part to access music files. Additionally, the system could allow them to store heavily traded files on their own server legally, thereby reducing their operating costs. It would also allow for better tracking of files that are traded via the type of technology used by BigChampagne,[66] and thus allow for quick and fair distribution by copyright collectives. Alternatively, the Canadian Radio-television and Tele-communications Commission (CRTC) could set as a condition to operate as an ISP a contribution to compensate for file-sharing,[67] but (a) it is imperative that the contribution be at a sufficient level to truly compensate creators and the industry, and (b) it is hard to

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64 Rob Kasunic, "Solving the P2P 'Problem' — An Innovative Marketplace Solution" March 2004, http://fairuse.stanford.edu/commentary_and_analysis/2004_03_kasunic.html.

65 Benjamin Kaplan, *An Unhurried View of Copyright*, (New York: Columbia University Press, 1967) at 121–23.

66 See BigChampagne Media Measurement, www.bigchampagne.com. Interestingly, their service is also used by large music labels. See Mark Hefflinger, "Universal Music Taps BigChampagne for Online Metrics" *Digital Media Wire* (18 August 2009) www.dmwmedia.com/news/2009/08/18/universal-music-taps-bigchampagne-online-metrics.

67 Although that is debatable under the current Telecommunications Act (1993, c. 38), and the *Broadcasting Act*, (S.C. 1991, c. 11) as interpreted in *In The Matter Of The Broadcasting Act, S.C. 1991, C. 11,* 2010 FCA 178, http://decisions.fca-caf.gc.ca/en/2010/2010fca178/2010fca178.html.

imagine, contrary to proposals made by certain Quebec commentators,[68] to see how an ISP should be asked to pay for file-sharing by their subscribers while maintaining that all file-sharing should remain fully illegal. *On a rien pour rien*.

B. USER-GENERATED CONTENT

1) An Exception for User-Generated Content?

First, let us define our area of enquiry. I propose to define user-generated content (UGC) as content that is created using tools specific to the online environment and/or disseminated using such tools. Bill C-32 contains a transformative use exception ostensibly designed for the online *re*use environment.[69] The proposed solution would remove the most visible irritants for millions of Canadians who neither understand nor accept restrictions they consider obsolete, unjustified, or both. It would ensure buy-in in what has become a participatory democratic environment. It reflects concerns expressed widely in popular deliberations ("listening to the City"), in what is referred to in policy analysis literature as communicative reauthorization.[70] Clearly, the shift from a one-to-many entertainment and information infrastructure to a many-to-many infrastructure has deep consequences on several levels. It has made possible mass fan fiction, mashups, music remixes, cloud computing, collages, etc. Blogs have transformed the access to, and arguably the nature of, information.[71]

The proposed exception is not a license to freely copy anything or to upload it to any social site.[72] It requires transformation. It is a *limited* right to reuse existing works to create new works, in cases where a licensing transaction is not reasonable and there is no demonstrable impact on the market for existing works.

The contours of the exception are unclear and will need to be defined by courts. Three important points in that connection are as follows:

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68 See "L'AGAMM rights holders demand their fair share" *CNW* (15 June 2010), www.newswire.ca/en/releases/archive/June2010/15/c5205.html.

69 Above note 8, cl. 22 (s. 29.21).

70 Archon Fung, "Democratizing the Policy Process," in Michael Moran, Martin Rein & Robert E. Goodin, eds., *The Oxford Handbook of Public Policy* (Oxford: Oxford University Press, 2006) 669 at 676–78.

71 See above note 21 at 81–83.

72 In any event, the three-step test would not allow this type of exception. It would seem to fail on all three steps. See the discussion in section A(6)).

- If the exception allows "the creation of a *new work or* other subject-matter in which copyright subsists," does this mean that if what is created is in the nature of a copyright work, as opposed to a sound recording or performance, then that work must itself meet the requirements for protection, and most notably originality,[73] to be covered by the exception?
- The "solely for non-commercial purposes"[74] condition must apply *to the user*. If applied to a site like YouTube or even most blog services providers, the exception would seem fleeting at best;
- Then of course the importation into the Act of a three-step test inspired criterion, namely that the "use of, or the authorization to disseminate, the new work or other subject-matter does not have a substantial adverse effect, financial or otherwise, on the exploitation or potential exploitation of the existing work or other subject-matter — or copy of it — or on an existing or potential market for it, including that the new work or other subject-matter is not a substitute for the existing one"[75] will allow Canadian courts to consider previous interpretations of the three-step test, including by the World Trade Organization, and perhaps inform future interpretations of the test. In doing so, courts should bear in mind of course that the exception, as proposed in Bill C-32, differs from the TRIPs test, but that Canada is also bound by TRIPs and that statutes should, wherever possible, be interpreted consistently with Canada's international obligations. My sense is that the impact of this condition will depend in large part on the burden of proof. If users are required to prove a negative (that is, the absence of a "substantial adverse effect") then the exception will shrink into obsolescence. However, with time, even if the primary burden is on the user, categories may develop that are presumptively non-adverse.

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73 See Elizabeth F. Judge & Daniel Gervais, "Of Silos and Constellations: Comparing Notions of Originality in Copyright Law" (2009), 27 Cardozo Arts & Ent. L.J. 375 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1545986. The authors note (at 376) that originality "is the sieve that determines which "productions of the human spirit" are protected by copyright and acquire the status of 'work'." The counterargument is that the Act protects "original works" then arguably, there is such a thing as an unprotected, "unoriginal work" that is still a work.

74 This term is used in several proposed amendments to the Act. It will no doubt be the subject of much litigation, to determine whether it has the same meaning throughout (compare this proposed exception to statutory damages), to what extent intentionality of the user governs vs. the right holder perspective, which might be that everything is potentially commercial.

75 Bill C-32, above note 8, cl. 22 (s. 29.21(1)(d)).

2) Amateur Reuse

To answer the questions above, it seems useful to contextualize UGC. This may illuminate the underpinnings of the proposed exception.

UGC discussions typically focus on *amateur* creation and reuse. Is this what the noncommercial condition aims to accomplish? Is the fact that UGC is amateur content a new normative vector to consider? [76] After all, reuse is not a major source of doctrinal tension. Most copyright theories support reuse. If I may be allowed a few analytical shortcuts, one could say that natural rights theory supports reuse. John Locke based his property right on transformative labor. Locke was talking about what one takes from "nature," of course, not other authors.[77] Still, the analogy between transforming nature and creating literary or artistic works holds — admittedly though only up to a point 1 because of the investment of skilled labor. Most authors do not "take from nature" (perhaps an artist does when painting a natural scene?); authors take *from each other* and all those who created before them and made their work available for others to enjoy. Humanity, as Blaise Pascal once said, is but one Person who continually grows.[78] Utilitarianism also supports reuse, at least once a proper return has been made possible by a limited exclusive right. Looking at UGC using an instrumentalist lens, shouldn't one seek the optimal point between protection that induces the creation and dissemination of new works and allowing the creativity of others to flourish?

Yet, in spite of apparent theoretical support and familiarity with reuse, copyright law is undeniably struggling to cope with UGC for many reasons. Some are qualitative (e.g., amateur vs. professional users), but one

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76 The proposed exemption for parody and satire provides an interesting contrast *Copyright Act*, above note 6, s. 28.2(1)(b). Cultural progress depends on ability to make reasonable use of pre-existing material. In cases where the user cannot reasonably be expected to obtain a license and where societal value will be derived from allowing the use, an exception should apply. But satire is fundamentally different. While parody and pastiche are used to make fun of a copyright work, and possibly its creator, satire uses someone else's copyright work to convey an unrelated political or other message. Moreover, while use of a work for parody is necessary (to identify the work that is parodied), such is not the case for satire. Satire also risks a moral right violation by associating a work with a cause that the author does not support. Yet, some forms of satire would fit in the user-generated content exception.

77 See Samuel E. Trosow, "The Illusive Search for Justificatory Theories: Copyright, Commodification and Capital" (2003), 16 Can. J.L. & Juris. 217 at 224.

78 Quoted in translation in Daniel Gervais, "The Tangled Web of UGC: Making Copyright Sense of User-Generated Content" (2009), 11 Vand. J. Ent. & Tech. L. 841 at 845, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1444513.

is simply quantitative. Hundreds of millions of Internet users are downloading, altering, mixing, uploading and/or making available audio, video and text content. They are new to the copyright world.

For approximately 290 of its 300 year history (since the 1710 Statute of Anne), the "copy-right" was traded among professionals, including authors, publishers, producers, broadcasters, etc. It was occasionally used against *professional* pirates. Only in the past ten years has it also been used routinely against individual consumers and end-users.[79] This is, I suggest, the source of much of the tension in the copyright system; it also greatly increased the level of attention paid to copyright law and policy. Put differently, while the law has not changed, its target and purpose has.[80] This was possible because formally the copy-right is formulated in terms of technical restricted acts, such as reproduction, public performance, etc. There is little if any focus in copyright legislation on the nature or category of users, except for a few targeted exceptions.[81]

The transition is not an easy one. Trading copyright between and among professionals or enforcing it against those same professionals (or professional pirates) assumed that the users were identifiable (that is, known quantities) and that normal licensing transactions were possible. In other words, the market functioned because copyright owners would contractually grant authorizations to (professional) users. In cases where a large number of users used a large repertory of works owned by a plurality of owners, collective systems were put in place to allow the licensing of hundreds, sometimes thousands of users.[82] Those systems are sometimes supported by compulsory licenses.[83]

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79 Although in January 2008 the US recording industry announced it would no longer be filing massive amounts of lawsuits against individual end-users. See Sarah McBride & Ethan Smith, "Music Industry to Abandon Mass Suits" *Wall Street Journal* (29 December 2008), http://online.wsj.com/article/SB122966038836021137.html.

80 This also explains the emergence of para-copyright norms such as anti-circumvention of TPMs.

81 For example ss. 30.1–30.5 of the *Copyright Act*, which provide various exceptions for libraries and other institutions. *Copyright Act*, R.S.C. 1985, c. C-42 [*Copyright Act*].

82 See Daniel Gervais, "Collective Management of Copyright: Theory and Practice in the Digital Age" in Daniel Gervais, ed., *Collective Management of Copyright and Related Rights,* 2d ed., (Alphen aan den Rijn: Kluwer Law International, 2010).

83 See, e.g., the compulsory license for cable retransmission in section 31(2) of the Act, above note 6, s. 31(2). Bill C-32 could patch a number of issues in this context. Why, one might ask, is s. 38.1(4) only applicable to certain collectives (i.e., it excludes the "general regime" collectives? Should we not decide who should administer the rights in ss. 17 and 19(2)(b)? Is s. 70.16, which was never used to my knowledge, still relevant? Among the proposals in the Bill, is it optimal to delete the collective man-

Typically, however, collective licenses are for *non-altering uses* and/or integral copying, such as reproduction of sound recordings or public performance. Collectives do not routinely license the right to prepare derivative works, at least not on the basis of pre-existing tariffs.[84] Nor have they licensed individual end-users, other than exceptionally.[85] But now individual Internet users have become "content providers," intermediaries of sorts, even though they are not professionals. Consequently, rights holders have analogized them to (professional) content providers and other intermediaries, and had no hesitation to apply copyright, a hitherto purely professional right, to those individual users.[86] Licensing mechanisms have thus far been unable to follow. In fact, some might say that one reason why end-users were traditionally left out of the equation was the fact the system could not license/integrate them. Digital technology may be changing this and could remove this obstacle.[87] There are other reasons, including privacy, to leave end-users out of the transactional licensing equation, however.

3) Privacy

The fact that copyright was not initially designed to be routinely used in the private sphere of users is evidenced by the fact that exceptions and

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agement exception to the exception in s. 30.9 while maintaining the obligation to destroy the copy after 30 days? Finally, was it the intention of the drafters of proposed s. 30.03(2)(b) to imply/confirm that tariffs set by the Board may be retroactive?

84 A tariff may be defined for these purposes as a set of licensing conditions, including a price which may be set on various bases (units produced, user revenue, etc.), that any qualified user (normally, any person to whom the tariff applies) may invoke and use a work contained in the repertory of works covered by the tariff according to the conditions contained therein. Competition (antitrust) law often prevents collectives from refusing to issue a license based on such a tariff to a qualified user. For example, if a tariff allows a broadcaster to broadcast a repertory of musical works for a given period of time in exchange for the payment of a percentage of the broadcaster's advertising revenues, then any broadcaster (who qualifies—this may be determined under other (e.g., broadcasting) statutes) would be entitled to the license. In the United States, this is "regulated" by consent decrees negotiated between ASCAP and BMI, on the one hand, and the Department of Justice, on the other.

85 Copyright Clearance Center, Inc. (CCC) grants individual users reproduction licenses. See Copyright Clearance Center, www.copyright.com. However, collectives have not been in the business of granting micro-licenses.

86 And now proposing to use criminal sanctions and ISPs to police their behaviour, having apparently come to the conclusion that individual licenses do not work as well. See above notes 22, 80.

87 One should not belittle the scope of the challenge ahead in that case: millions of users who do not fit existing user profiles, and a system not equipped to grant them licenses.

limitations to copyright were written with the professional user in mind. This explains why in several national laws, the main exceptions can be grouped into two categories: first, private use, which governments previously regarded as "unregulatable" as a practical and/or normative matter,[88] and where copyright law thus abdicated its authority; second, specific uses by professional intermediaries: libraries (and archives) and certain public institutions, including schools, courts and sometimes the government itself. Regarding the former, there are still today several very broad exceptions for "private use."[89] End-users always enjoyed both "room to move" because of exceptions such as fair use and rights stemming from their ownership of a physical copy.

Entering the private sphere also means that copyright must now fight a new, formidable opponent: the right to privacy, which is anchored, *inter alia*, in Article 8 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*;[90] and in Articles 17 and 19 of the *International Covenant on Civil and Political Rights*.[91] If privacy-invasive tools are used to distribute and/or monitor end-users, privacy will be(come) a major issue. If, however, systems that decouple usage data from individual identities early on (upstream) are used, then the issue may vanish from major policy radars.

Owing to this perceived inadequacy of copyright licensing and normative concerns about privacy and/or ownership of copies, social norms have emerged according to which some uses or reuses of digital content are acceptable. Those norms have not responded well to the traditional prohibitions against reproduction, the preparation of derivative works and communicating/publicly performing protected content. In fact, com-

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88 Daniel Gervais, "The Purpose of Copyright Law in Canada", (2005) 2:2 Univ. Ottawa L. & Tech. J. 315, n. 47, www.uoltj.ca/articles/vol2.2/2005.2.2.uoltj.Gervais.315-356.pdf. Professor Alain Strowel considers the defence of the private sphere as one of the three main justifications for exceptions to copyright, the other two being circulation of information, and cultural and scientific development. See Alain Strowel, "Droit d'auteur et accès à l'information: de quelques malentendus et vrais problèmes a travers l'histoire et les développements récents" (1999), 12 Cahiers de propriété intellectuelle 185 at 198.

89 The regime designed to protect privacy is expressed as a combination of chattel rights of the owner of the copy and exceptions to copyright, in particular fair dealing.

90 *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 221 (entered into force 3 September 1953, as amended by Protocols No. 11 and No. 14), http://conventions.coe.int/treaty/en/Treaties/Html/005.htm.

91 16 December 1966, 999 U.N.T.S. 171 (entered into force 23 March 1976).

bined with ineffective enforcement,[92] copyright has barely made a dent in the massive reuse of protected content.[93] Those social norms are arguably supported by a rather vague notion of fair or *de minimis* use, buttressed by perceived social value in letting users create freely and, at least for some, making content "more available." There is undeniably a meme, with a strong built-in feedback loop, that many forms of UGC are "acceptable," though within mostly undefined parameters.

4) Applying "Old" Copyright to UGC

Copyright's ineffectual response to the social norms that underpin UGC is multifactorial: Application of a regulatory system not designed for mass reuse (but rather for mass consumptive use); inability and/or unwillingness to license both because of the type of use (reproduction/creation of derivatives) and because of the type of user; normative battles with the rights of end-users, including privacy and consumer protection;[94] and a marked lack of understanding, at least until very recently, of network effects and the use of the Internet to create/join virtual groups of friends or people with similar interests and who, acting gregariously (and, thus, naturally) want to "share" the pictures, shows, books or music they like, but that in most cases they have not authored.[95]

This poses the question how far does the private sphere extend? Does it explode when a digital use inside the sphere is made available to others online? The social norms at play do not seem to reflect the traditional distinction between private (tolerated) and public (unauthorized) use. Those have been the norms for decades and they are reflected in the traditional views expressed by large rights holders. For example, the Recording Industry Association of America condones limited copying for private use, but does not approve of the making available of copyrighted content online.[96]

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92 At least if measured in terms of overall decrease in unauthorized use. See above note 10.

93 See Brett Lunceford, "Meh. The Irrelevance of Copyright in the Public Mind" (2008), 7 Nw. J. Tech. & Intell. Prop. 33, www.law.northwestern.edu/journals/njtip/v7/n1/3/.

94 See Jeremy Stanley, "Managing Digital Rights Management: Effectively Protecting Intellectual Property and Consumer Rights in the Wake Of The Sony CD Copy Protection Scandal" (2008) J. L. & Pol'y for Info. Soc'y 157.

95 *See* Daniel Gervais, "The Price of Social Norms," above note 23.

96 See "Piracy: Online and On the Street", Recording Industry Association of America, www.riaa.com/physicalpiracy.php?content_selector=piracy_online_the_law

> . . . burning a copy of CD onto a CD-R, or transferring a copy onto your computer hard drive or your portable music player, won't usually raise concerns so long as:

Technologically, however, it is often the same copy that is legal to make (for personal use) but whose use then becomes illegal, again according to the traditional view, if made available to others. On a technical level, making it available would then be an infringement under one of several possible theories, based on each national legal system. In Canada, it could be considered the authorization of a communication to the public.[97] The social norm/legal norm disconnect seems to lie in the blurring of that private/public distinction.

Traditionally there were thus two distinctions made, one between private and public use and another between professional and amateur uses. The technological environment until approximately 2000 meant that those two "Venn diagrams" were almost perfectly superposed. Amateur meant private (and vice versa) and non-commercial and professional meant public and commercial. The shift from one-to-many to many-to-many dissemination modes destabilized this system and amateur no longer meant private.

Normatively, the question is this: should amateur prevail over public when the two Venn diagrams are separated? Some have argued for an amateur "exemption" to allow remix.[98] If, however, the amateur becomes a "player" by leaving her private sphere,[99] then normatively the question is no longer a confrontation of privacy and copyright, but one of amateur intermediary/provider vs. professional. While historically the latter was the (only) focus of copyright law, if the absence of the amateur was not driven by normative considerations but rather practical ones, then those amateurs should probably learn to use exemptions such as fair use or safe harbors. Then again, a valid case can be made that at least "small" everyday usage need not be in copyright's sights, and should focus only on what Paul Ohm calls "superusers."[100] As a practical matter, this rings true if

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- The copy is made from an authorized original CD that you legitimately own
- The copy is just for your personal use.

97 See *Society of Composers, Authors & Music Publishers of Canada v. Canadian Assn. of Internet Providers,* [2004] 2 S.C.R. 427, http://csc.lexum.umontreal.ca/en/2004/2004scc45/2004scc45.html; Daniel Gervais, "The Purpose of Copyright Law in Canada" (2006), 2:2 Univ. Ottawa. J. L. & Tech. 315 at 323–25, www.uoltj.ca/articles/vol2.2/2005.2.2.uoltj.Gervais.315-356.pdf.

98 See Lawrence Lessig, *Remix: Making Art and Commerce Thrive in the Hybrid Economy* (New York: Penguin Press, 2008).

99 Deciding in which cases this happens would require a different paper, and the answer is likely to be different in each legal system.

100 See Paul Ohm, "The Myth of the Superuser: Fear, Risk, and Harm Online" (2008), 41 U.C. Davis L. Rev. 1327.

transactional licensing (for one-off uses) is envisaged — though blanket licenses for some uses may also be used.

5) Bill C-32's Test

By selecting commerciality as the filtering criterion, Bill C-32 navigates the shoals of amateur vs. professional with some difficulty. An amateur may upload content not with the direct purpose of making money, but in order to gain her 15 minutes of fame. Others might use YouTube, Facebook and other sites simply to disseminate content among friends and family. An expansive definition of commerciality might cover the former, and an exception reduced to the latter type of use would likely fail to achieve any significant adjustment of the current regime.

The three-step test again offers a possible solution, and courts will have to make a fundamental decision early on, namely whether to link up the analysis of commerciality in section 29.21(1)(1) with the condition set forth in section 29.21(1)(d).[101]

If the perceived commercial nature of the upload is looked at ontologically as it were, as a threshold condition *before* turning to impact on the market, it will be necessary to articulate clear standards for both. Parliament could of course amend the Bill to make the link (or absence thereof) clearer. My own sense is that commerciality enunciates the purpose and the adverse effect test enunciates the method by which the protection of right holders should be gauged. In other words, we should protect against unauthorized commercial reuse (except, for example, in parody cases) pre-

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101 Canadian courts may look at the test also when examining the compatibility of the educational exceptions with the three-step test. The approach taken in proposed section 30.04 is to remove non-TPM protected material and material that includes a "clearly visible notice," a term which may be defined at a later date by regulations. This seems to follow the logic of an implied license or a novel form of estoppel. In equitable terminology, failure to take steps to limit reuse (by using a TPM and/or notice) after making material available online amounts to a waiver of one's right to enforce copyright against educational establishments. This license and/or equity analysis may work for material made available with the authorization of the right holder. A harder case would involve material that is there without such authorization but which does not meet the actual or constructive knowledge test of illegality contained in proposed section 30.04(5).

On the application of international norms by Canadian courts, see Daniel Gervais, "The Role of International Treaties in the Interpretation of Canadian Intellectual Property Statutes" in O. Fitzgerald, ed., *The Globalized Rule of Law: Relationships between International and Domestic Law* (Toronto: Irwin Law, 2006) 549–72.

cisely because it negatively affects an existing or reasonably predictable market for the copyright work.

In spite of those significant areas in need of further clarification, the Bill drafters had the right idea when they decided to add specific exceptions instead of an open-ended "such as" or similar wording in the chapeau of existing section 29. While that option is intellectually appealing due to its apparent unlimited flexibility, the Bill's approach is superior for at least three reasons. First, adding "such as" would not *demonstrably* solve anything; it would merely postpone the issue in hopes of favourable court decisions. There is no guarantee that courts would "add" the purposes Canada needs, those that the policy review leading to the tabling of the Bill, has identified. It thus represents a policy gamble. Second, it would generate uncertainty and associated costs, until and unless we hear from appellate courts on a variety of new fair dealing purposes.[102] Third, in the wake of *CCH*,[103] Canada already has a fair degree of flexibility on the fairness *criteria*.

Adding open flexibility on *purpose* of the use would potentially reach well beyond US fair use, itself already at risk of a three-step test violation. Put differently, Canada limits fair dealing purposes, while the United States codified a historical rule of reason (four factors) that now looks like a rather rigid "formula" to determine fairness.[104] However, in both countries one of the two parts of the exception is constrained (purpose OR fairness), which at least the first step of the three-step test seems to require. Removing all constraints by adding "such as," while acknowledging the flexibility on fairness criteria enunciated in *CCH,* may thus clash with the three-step test.[105] It also transfers policy-making responsibility to courts, thus adding uncertainty to an already complex copyright regulatory scheme,[106] and not addressing the known problems with the current structure of exceptions in the Act.

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102 Bill C-32 should harmonize the "source identification" component of fair dealing, basing it on the moral right to claim authorship and requiring that the author and original work be identified unless impracticable. Compare, e.g., ss. 29.21(1)(a) and 30.04(2). Then, how will new fair dealing purposes interface with, specific exceptions? See, e.g., s. 30.2(4).

103 *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339, http://csc.lexum.umontreal.ca/en/2004/2004scc13/2004scc13.html [*CCH*].

104 17 U.S.C. § 107.

105 See above note 53.

106 See Mistrale Goudreau, "Réforme de droit d'auteur et interprétation judiciaire" in this volume.

C. CONCLUSION

Bill C-32 proposes the implementation of several interesting ideas to modernize the *Copyright Act*. Among the most interesting aspects are the proposed exceptions for user-generated content, parody and education. In this chapter, I considered the normative arguments in support of the UGC exception, and questions concerning the proposed wording. I am concerned that superimposing the commerciality and "adverse effect" criteria may create confusion and suggested an approach to reconcile what seem to be a statement of purpose and the applicable test.

However, the Bill has a major flaw. It does not provide a solution to the unpaid file-sharing of music, a solution that Canadian songwriters and performers desperately need The Bill would implement the 1996 WIPO treaties but sings the same tired song that more enforcement will somehow do in Canada what it has failed to do in the choir of countries that have tried it for over ten years. More enforcement may work to target marginal, recalcitrant users and it does seem useful for the film industry, which has been impacted by the Internet very differently from the music industry. While the music industry has shrunk by almost half and record companies are making survival deals that do not seem favourable for creators, Canadian songwriters and performers — other than a very small group of the very successful ones — are suffering. A world in which extremely talented Canadian music creators must abandon their craft for financial reasons at a time in history when people listen to more music than ever before but are simply unable to use it and pay for it the way they want would be a major tragedy, one that is entirely avoidable.