

The Role of Copyright Collectives in Web 2.0 Music Markets

Daniel J. Gervais¹

I keep reading that the music and film industries are simply trying to protect their property, but that in spite of valiant efforts, the flow of P2P is not yet under control. Others argue that dollars coming in are what ultimately matters, and that music industry sales are going back up (from the post-Napster lows); they point to a Canadian study released recently that purported to show that P2P users were as likely to buy CDs as non P2P users.ⁱ

While opinions and studies--both the data they use and their analysis--are open to disagreement, the fact remains that the laws of physics that applied to the sale of physical copies of records, CDs and the like do not seem to apply to the Internet, which seems counterintuitive to market experts trying to apply traditional rules such as scarcity of supply. There is no scarcity of supply here. Nor are traditional laws of pricing of physical goods directly applicable because the market for authorized music is competing with "free."

What is needed, then, is a shift similar to the shift to "quantum physics." Let us call it "quantum market economics" for the music industry. The first law of this new environment, as I have argued in a number of past publications, is that value of an information object on the Internet is not derived from its scarcity but rather from the fact that those who value it most will find it.ⁱⁱ This explains the tremendous value of companies like Google, at least as far as its traditional role as "finder" of information objects is concerned. It is also the core of most Web 2.0 business models. The music industry has been very slow and late in its efforts to adapt to this new environment,

¹ Acting Dean, University Research Chair in Intellectual Property and Osler Professor of Law, Faculty of Law (Common Law), University of Ottawa. This paper is based on part of Chapter 1 of COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS (Kluwer Law/Aspen, 2006). See www.collectivemanagement.net.

and its efforts thus far have been insufficient, and not reflective of the qualitative and quantitative magnitude of the shift.

I want to explore three trends that may affect the future of collectives in this changing environment. Note, first, that I am talking here as an observer who believes in the future of copyright collectives. Second, my approach is not prescriptive. I am not advocating a particular future, I am just trying to identify trends I see happening.

First trend: the discourse about “property.” This discourse is rhetorically useful because when you say that someone is stealing your property, it has both cultural and political resonance. However, as far as P2P is concerned, it is falling mostly on deaf ears outside of the US Congress and a few other legislative bodies. This results in part from the shift to Web 2.0 economics. Yet it has other, normative roots, namely the progressive shift to, and alignment with, trade, which began in the United States in the 1980s through section 301 of the *Trade Act*ⁱⁱⁱ and culminated at the multilateral level in the WTO TRIPS Agreement. This alignment had two important consequences. First, trade law is pragmatic, something illustrated by fuzzy notions under WTO law as “nullification or impairment” of benefits or the doctrine of “reasonable expectations.” Second, international trade remedies are generally predicated on a showing of *actual* adverse impact on trade, and the protection of intellectual property by trade rules does not seem to mesh with its ideological defense as a “property” right. When someone is trespassing on your land, you don’t have to show that there is an adverse impact. In trade law, you do, and the piracy data, which basically multiplies unauthorized copies with full market value, is not particularly useful in this context. It fails to acknowledge the market and normative shifts identified above.

When in the house of trade, the buffet of law & economics awaits. There have been clear signs of this shift. For instance, economic theory took center stage in the Eldred case in the US Supreme Court.^{iv} It is also behind suggestions for new forms of protection that are more apt to fulfill the “function” of copyright. Economists seek to discourage appropriation while limiting protection to an optimal level – that is, not protect beyond what is necessary to attain the objective^v of avoiding both excessive rent-seeking and free-riding.^{vi} The focus of copyright theory has thus shifted at least in part from the traditional fight against piracy, whose aim is to minimize

unauthorized uses, to an economic focus which many believe should be to maximize authorized uses. In other words, the right question is how you get as many people to pay for music, not how you make sure no one listens without paying. How many dollars pour into the system, not how many copies are made. There is a world of difference here.

Second trend: Increasingly the legal norms do not mesh with the social norms at play. As survey after survey has shown, copyright, when decoupled from a physical object, is not treated the same way as personal property. To put it bluntly, stealing a CD from a store and seen much more widely as something reprehensible than downloading a song without paying. The massive enforcement efforts deployed by the music industry are another sign of a lack of internalization of the norms. Legalism breeding compliance over purpose.

Users are not naïve. Most know that the law forbids them to upload files to a server or make them available on a P2P network. But until and unless user-friendly legal solutions allow access on as good as basis as the illegal offerings, the problem will remain. The temptation of the Internet, with its enormous power to transform, or even transcend, a model of distribution deemed obsolete by many (pop) music consumers, is simply too strong.

Third and last trend I want to mention. This one puts the current debates in historical perspective. It shows that copyright was not originally designed to deal with consumers. Until the mid 1990s, users of copyrighted “content” were not part of the copyright equation. That is from 1710 (the first copyright statute in England until 10 years ago, copyright was not a significant preoccupation for consumers and other end-users. The proof is in the many exceptions in national laws related to private use, private copying^{vii} and the rule of exhaustion of the right after the sale of a copy.^{viii} Copyright was mainly used to make transactions between authors, publishers, producers, and distributors possible, and of course also to fight *professional* piracy. End users of copyrighted goods rarely if ever had to accept a contract before having access to a work. When a book or recording was purchased, there was certainly a sales contract (generally unwritten), but not a contract concerning use (equitable or not) of the book or recording.

With the Internet, users have become a full part of a copyright equation that *a priori* was not designed to include them. This raised two series of problems: first, copyright and the contracts ruling it were redirected towards end-users. Users who download a file must now routinely accept (by clicking the “I Accept” button) a contract that often forbids them from reusing the work in ways that would be otherwise permitted by law.^{ix} There may also be Technological Protection Measures (TPMs) and then laws such as the *Digital Millennium Copyright Act*^x or the Information Society Directive,^{xi} both based on the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, which protect against circumvention of the TPM.

This is a source of tension specific to the digital environment, and more particularly the Internet. Previously, users had a margin of freedom, recognized by law and forming an integral part of copyright’s internal equilibrium. This margin was reduced for the stated reason that users abused it or, at least, that certain private uses or reuses have had a negative impact on the market.^{xii} But *nonprofessional* users quickly became aware of constraints that they had rarely noticed up to then: all the “trust” that had been placed in them via rules and exceptions concerning private use were gone. They saw their role changed from that of consumer and user to that of budding pirate. Studies in the area of social norms show that this may change attitudes about being “good citizens” and may even induce marginal behavior.^{xiii}

An additional problem that copyright now faces as a result is that those end-users have *rights*, such as privacy and consumer protection. Copyright will have to fight normative battles against those rights after it removed itself from the protection as property to claim protection under trade law. This is just beginning, but it may be safe to say that saying no and enforcing it won’t become any easier.

So what should collectives do?

Since 1999, I have been advocating a system whereby users would pay to have access to software client that would give them access to a repertory--of music or videos or something else. The client would track usage and report anonymously to a central

server. The client would only work if a monthly fee was paid. This is technologically very easy to do. The network would also be free of spoofed files via this client.

I want to suggest one reasonably straightforward instantiation. A very significant portion of unauthorized access to music in North America happens on university and college campuses. Of course, one can sue, and sue, and sue. It may reduce the number of downloads somewhat, but does it increase revenue? The trends over the last six years speak for themselves.

Imagine that university students would pay a student copyright fee of, say, \$5/month, even on a purely voluntary basis. Do the math. This would generate more net revenue, with no distribution cost, than the industry is taking in now.

Currently, the industry's eggs are almost exclusively in the single download with TPM model. What we have is a "by-the-drink" model and a free illegal "open bar" model. Based on the trends identified above, I think this will be gradually replaced with TPM free or very loose TPMs, because of users' reluctance to embrace control-based models.^{xiv} Digital is currently about 16% of income and that is far better than zero of course, but I suggest that it could be 50 times higher. And then of course, majors must renegotiate with a dominant player, namely iTunes and their percentage of incoming financial streams may be affected.

Perhaps it is too late to move to a "controlled open bar" (by which I mean download but with the option to save and share within a network), but I think consumers would welcome it. It may very well still happen and there are start-ups trying to make something it happen. There are experiments going on, but on a picayune scale compared to what it should be, and should have been, and meanwhile probably billions are left on the table.

Of course, collectives can thrive. Any such system would require a central collective mechanism to process the usage data, provide guarantees about anonymity and privacy protection. And be able to aggregate and report data so that money could flow to the proper rights holders. Who better than a collective?

ⁱ “The Impact of Music Downloads and P2P File-Sharing on the Purchase of Music: A Study for Industry Canada” (2007), available at http://strategis.ic.gc.ca/epic/site/ippd-dppi.nsf/en/h_ip01456e.html.

ⁱⁱ See *e.g.*, “The Price of Social Norms: Towards a Liability Regime for File-Sharing,” 12 *J. Intell. Prop. L.* 39-74 (2004);

ⁱⁱⁱ Trade Act of 1974 § 301 (as amended 19 U.S.C. §§ 2411-2420 (1994)).

^{iv} *Eldred v. Ashcroft*, 537 U.S. 186 (2003)

^v See, for example, J. H. Reichman, “A Contractually Reconstructed Research Commons for Scientific Data in a Highly Protectionist Intellectual Property Environment,” 66 *Law & Contemp. Probs.* 315 (2003)

^{vi} E. Mackaay, “Legal Hybrids: Beyond Property And Monopoly?,” 94 *Columbia L. Rev.* 2630, 2631 (1994): “Competition involves, amongst other things, freedom to imitate successful formulas developed by others. Yet most nations have developed, as part of the ordinary law of the land, rules restricting the extent to which imitators may free ride on the efforts of others.”

^{vii} In Canada, articles 29 and 80 of the *Copyright Act*.

^{viii} Also called “first sale doctrine,” according to American practice.

^{ix} For example, articles 29 and 30. A Canadian government report also discusses this issue (p. 34):

The Act provides for specific exceptions for certain users in certain contexts. A number of stakeholders have been concerned that exceptions permitting certain uses of copyright material are effectively undermined by the terms of use found in standard-form contractual agreements, such as so-called “shrink-wrap” licenses that accompany software. With this type of license, the act of removing the wrap or cover signals the agreement of the user to the terms of use. This standard-form contract would thereby override the statutory exceptions in the Act. There is a corresponding concern that such standard-form contracts can also be used to extend the scope of protection beyond what is contemplated in the Act.

“Supporting Culture and Innovation: Report on the Provisions and Operation of the Copyright Act,” Oct. 2002. Available at <http://strategis.ic.gc.ca/pics/rp/section92eng.pdf>.

The U.K. has a provision in its Act that prevents an educational exception from being limited by contractual agreement.

See Lucie Guibault, Copyright Limitations and Contracts. An Analysis of the Contractual Overridability of Limitations on Copyright (London: Kluwer Law International, 2002).

^x Pub. L. No. 105-304, 112 Stat. 2860 (1998).

^{xi} *Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.*

^{xii} This bears some resemblance to the second part of the three-part test in article 9(2) of the Berne Convention and article 13 of the TRIPS Agreement. See Daniel Gervais, The TRIPS Agreement: Drafting History and Interpretation, 2nd ed. (London: Sweet & Maxwell, 2003). pp. 144–52.

^{xiii} Eric Posner has shown that the rate of tax evasion grows in proportion to efforts to control it. A citizen who is treated like a (potential) thief thus will have more of a tendency to behave as the government “expects” him or her to. See Eric A. Posner, “Law and Social Norms: The Case of Tax Compliance,” 86 *Virginia L. Rev.* 1781 (2000).

^{xiv} Use of Rights Management Information to tie a particular copy to a specific user may, however, increase, thereby potentially increasing the chances of a clash with privacy rights.