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Daniel J. Gervais

Alana Maurushat

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Fragmented Copyright, Fragmented Management: Proposals to Defrag Copyright Management

By Daniel Gervais[†] and Alana Maurushat[‡]

Abstract

The collective management of copyright in Canada was conceived as a solution to alleviate the problem of inefficiency of individual rights management. Creators could not license, collect and enforce copyright efficiently on an individual basis. Requiring users to obtain permission from individual copyright holders for the use of a work was equally inefficient. Collectives, therefore, emerged to facilitate the clearance of rights between creators and users. Even with the facilitation of collectives in the process, clearing rights remains an inherently difficult and convoluted process. This is especially so in the age of the Internet where clearing rights for multimedia products presents new unprecedented challenges. As a result of an infelicitous legal evolution and the multiplication of collectives, fragmentation of copyright, and the way in which it is used and enforced, has occurred. This paper addresses the problems associated with fragmentation and offers solutions to “defrag” the collective management of copyright in Canada.

La gestion collective du droit d’auteur au Canada était à l’origine une solution apportée à l’inefficacité de la gestion individuelle des droits. Les créateurs n’étaient pas en mesure d’octroyer des licences, de percevoir et de mettre en œuvre leur droit d’auteur de façon individuelle. Il était tout aussi inefficace d’exiger des utilisateurs d’œuvres qu’ils obtiennent des licences de chaque ayant droit individuel. Les sociétés de gestion qui ont été mises sur pied devaient faciliter la gestion des rapports entre ayants droit et utilisateurs. Mais malgré le rôle joué par ces sociétés de gestion, l’obtention de autorisation nécessaires à l’exploitation d’une œuvre protégée reste un processus long et alambiqué. Cela est particulièrement vrai depuis l’arrivée d’Internet, qui pose des défis

sans précédents dans ce domaine. Le résultat de l’évolution parfois mal orientée de la législation applicable et la création de multiples sociétés de gestion ont mené à un fractionnement du droit d’auteur et de sa gestion. Cet article se penche sur le problème du fractionnement et propose des solutions devant permettre de défragmenter la gestion collective du droit d’auteur.

The main problem with the collective management of copyright in Canada is fragmentation. Fragmentation is a term we use in this paper to refer to the lack of cohesion, standardization, and, to a certain extent, effective organization of both copyright law and collective management per se.¹ Fragmentation occurs on many different levels: rights stemming from the law² recognising several economic rights (reproduction, communication to the public, adaptation, rental, etc.);³ within the market structure; within licensing practices; within a repertory of works; within different markets (language, territory); and through the interoperability of rights clearance systems. Fragmentation impacts directly on all affected parties whether they are rightsholders, users of copyright works, or regulatory authorities that oversee the process.

The structure of the paper is as follows: first, it will explore the history of collective management societies (sometimes referred to simply as “collectives”); second, focus on the origin of collective management societies and copyright law in Canada; third, look at the development of technologies and their intersection with copyright law and its management; fourth, examine the origins of fragmentation and the various problems that ensue from the situation; and fifth, look to potential solutions to alleviate some of the concerns and challenges posed by fragmentation.

[†]Osler’s Professor of Technology Law, Faculty of Law (Common Law), University of Ottawa.

[‡]LL.M. (Ottawa); Assistant Lecturer, University of Hong Kong, Faculty of Law. The authors wish to thank Mr. Mario Bouchard, General Counsel of the Copyright Board of Canada, for his ideas and advice. The ideas are expressed, however, under the authors’ own responsibility.

International History of Collective Management Societies

Early history

The story of the rise of collective management societies has become a quaint and famous tale. It begins with the French playwright Pierre-Augustin Caron de Beaumarchais in the dark and dingy Parisian theatres in the 1700s. Theatrical companies at the time were enthusiastic in their encouragement of promoting plays and artists, but were less generous when it came time to share in the revenues. The term “starving artist” was more literal than figurative.⁴

Beaumarchais was the first to express the idea of collective rights management. In 1777, he created the General Statutes of Drama in Paris. What began as a meeting of 22 famous writers of the Comédie Française over some financial matters turned into a debate about collective protection of rights. “They appointed mandatories (agents), conducted the now famous *pen strike and laid a foundation for the French Society of Dramas’ Authors (Société des auteurs dramatiques)*”.⁵ In 1838, Honoré de Balzac and Victor Hugo established the Society of French Writers⁶ which was mandated with the collection of royalties from print publishers.

The net of authors’ societies, shaped by the cultural environment of each country, slowly spread throughout the world. The collective management of copyright was seen as a practical and efficient way of allowing creators to be compensated. In Italy the SIAE, under the direction of Barduzzi, was so efficient that the state also empowered them to collect theatre and cinema taxes.⁷

Problems were not limited to the domestic scene, however. As collective management societies flourished in their own national states, the need for cooperation and harmonization on the international level became apparent. In 1925, Romain Coolus organized the Committee for the Organization of Congresses of Foreign Authors’ Societies. This Committee was founded to tackle some insurmountable problems involving international issues.⁸

Around the same time, Firmin Gémier succeeded in creating the Universal Theatrical Society.⁹ Both of these initiatives led to the founding congress meeting in 1926 of the International Confederation of Societies of Authors (CISAC).¹⁰ The founding members identified the need to establish both uniform principles and methods in each country for the collection of royalties and the protection of works, and ensure that literary and artistic property¹¹ were recognized and protected throughout the world.¹²

The evolving role of copyright collectives

While the formation of national and international collective management societies may have once been

considered revolutionary, the pivotal role that they continue to play as facilitator in the copyright industry is more properly characterized as evolutionary. Collective management societies facilitate the establishment of unified methods for collecting and dispersing royalties as well as negotiating licensing arrangements for works. Yet, licensing and royalty payment, while still important, is not the only preoccupation of collective management societies. Over time the role of collectives has evolved to oversee copyright compliance, fight piracy and perform various social and cultural functions.¹³

Since the inception of collective management societies, countries have fostered the growth of such societies through legislative initiatives in the belief that collectives offer a viable solution to the problem of individually licensing, collecting and enforcing copyright. In theory, collective licensing enables creators to exercise rights in a fair, efficient and accessible manner. It ensures copyright protection when individual management of it becomes difficult and often unfeasible from an economic perspective.¹⁴ For example, tens of thousands of radio stations *worldwide cannot possibly individually clear the rights of authors, composers, performers and producers of each song played.*

While collective management societies were initially promoted as an efficient way to collect and disburse monies to compensate rightsholders for copyright works, increasingly the structure of collective management societies, both on a national and international level, has raised questions about their efficiency.¹⁵ In addition to those significant structural issues, the market conditions and business trends of copyright owners are changing, and collectives must adapt.¹⁶ Just as the role of collective management societies is evolutionary, so is their underlying stated efficiency.¹⁷ While the current milieu of collective management societies may have served both creators and users reasonably well in the past, the system must adapt to remain both efficient and relevant.¹⁸

In recent years, the advent of innovative technologies has forced collectives to grapple with new and pressing challenges. Reconciling digital technology with the collective management of copyright, however, has not yet posed a problem that cannot be accommodated within the current framework. Indeed, copyright and the collective management of copyright has often been a response to the introduction of new technologies whether it is the photocopy machine¹⁹ or the VCR or indeed the Internet.²⁰ Thus, copyright law and the management of copyright are, and will likely remain, in a state of constant evolution and flux. Like its European and American counterpart, the Canadian experience is a reflection of such evolution.

Collective Management Societies in Canada

Origins of collective management in Canada

The birth of copyright law in Canada was first expressed in a Statute of the Legislature of Lower Canada in 1832.²¹ Many intermediary provisions were culminated along the way to the official adoption of the *Copyright Act in 1921 but which did not enter into force until 1924*.²² In theory, the Act allowed for the existence of musical performing rights societies, however, *in practice, only one such musical performing rights society emerged. In 1925, the Canadian Performing Rights Society (CPRS) was formed as a subsidiary of the British Performing Rights Society (PRS)*.²³ CPRS later became known as the Composers, Authors & Publishers Association of Canada (CAPAC).²⁴ Since its adoption, the Act has been continually amended, most notably in 1931 to allow CPRS to file tariffs with the Minister, and in 1936 to permit the control of performing rights societies, or more accurately, the performing rights society CPRS.²⁵ Thus, the Copyright Appeal Board was established through the 1936 amendment.

In 1940, another musical performing rights society was set up under the name BMI Canada²⁶ which later became known as the Performing Rights Organization of Canada (PROCAN).²⁷ BMI Canada was formed to *alleviate concerns that existing societies operated on a restrictive membership basis making it difficult for other legitimate writers or music publishers to collect music royalties*.²⁸ Furthermore, it was felt that both ASCAP and CPRS had a limited repertory of music, thus failing to address new forms of music at the time such as jazz and country music.²⁹

These two organizations, CAPAC and PROCAN, enjoyed a monopoly on both the collective management music performance rights, but also, more broadly speaking, they enjoyed a unique and privileged position as the only existing types of collectives in English Canada. It was not until 1988, that Canada would see *new collectives enter the scene*.³⁰ And, in 1990, CAPAC and PROCAN, *with the encouragement of the Copyright Appeal Board to “harmonize and uniformize” their different tariff structures and in an effort to promote efficiency, merged to become SOCAN*.³¹

Calls for reform

In the 1970s there were calls for revision to the *Copyright Act. Much of the impetus of this call for change arose from the rapid advances in technology at the time, particularly in photocopying, audio-visual recordings and re-broadcasting of television broadcasts*.³² The use of these technologies stimulated widespread interest in extending the concept of performing rights societies to areas other than musical performances.

Prior to the 1988 amendments, the government commissioned several reports over a span of some 17 years to address what kind of reforms were required.³³ A consensus emerged from these that there was a need to extend rights societies to multiple areas of copyright. (In particular, the recommendations of the Economic Council,³⁴ Keyes and Brunet Report,³⁵ and the Smith Report.³⁶)

In response to new technologies such as the photocopier and cable television, revisions were made to *the law adding rights and introducing new means to promote an efficient and robust copyright regime in Canada*. Several amendments were made to the *Copyright Act that impacted on collective management societies and licensing regimes. The first involved the 1988 amendments of Bill C-60*³⁷ that modified and introduced provisions relating to collective management societies and their regulatory administration. Bill C-60 canvassed many issues such as the extension of moral rights, the imposition of stiffer penalties for piracy, and the establishment of copyright protection for computer programs. The 1988 amendments also resulted in the Copyright Appeal Board becoming the Copyright Board. The “new” Board was endowed with rate-setting authority but with little direct authority over the organization, membership or administration of collective management societies.³⁸ Bill C-60 called for the abolition of a compulsory licence in sound recordings and introduced a definition of “collective society” into the *Copyright Act. The definition, however, was limited to the “general licensing regime” as outlined in section 70.1 of the Act. Of particular relevance in these amendments was the possibility of establishing new types of copyright collective management societies other than music performing rights societies*.

The second legislative initiative involved the creation of a retransmission right in 1990 as the result of the Canada–U.S. Free Trade Agreement. The Free Trade Agreement recognized the need to regulate television and radio signals that spilled over from the United States to Canada, and vice versa. The *Free Trade Implementation Act created the right to remuneration for works retransmitted on a distant signal by cable and air retransmission system. Canada accordingly modified the Copyright Act allowing for the establishment of retransmission tariffs which would require approval by the Copyright Board*.³⁹

The third reform in 1997 came through Bill C-32.⁴⁰ *The definition of a “collective society” was extended in the Copyright Act to capture a broader range of collective management societies*.⁴¹ Bill C-32 further modified the mandate of the Copyright Board. The Copyright Board was given the additional responsibilities of establishing tariffs for “neighbouring rights”,⁴² as well as for the adoption of tariff related to private copying.⁴³

Current regimes of collective management

The aforementioned series of amendments resulted in a multi-tiered legal regime structure for the collective management of copyright:⁴⁴

- music performing collectives (and certain neighbouring rights);
- retransmission collecting bodies;
- general licensing bodies; and
- private copying.

The first three types of collectives are subject to varying forms of regulation under the *Copyright Act* although the statutory regime is different for each type.

Music performing collectives are regulated by sections 67–70 of the *Copyright Act*. The statutory framework for music performing collectives requires collectives to file a list of their musical works with the Copyright Board as well as a statement of proposed tariffs they wish to impose.⁴⁵ The Copyright Board is authorized to approve the royalties or to make alterations to the proposed rates.⁴⁶ In doing so, the Board considers any objections to the proposed tariffs, and is required to publish the tariffs once approved.

Retransmission collecting bodies are defined in section 71 of the *Copyright Act*. The statutory regime for retransmission collecting bodies is different from that of music performing collectives. The Copyright Board has the authority to approve the proposed statement of tariffs with or without alterations, to consider objections and to then publish the statements.⁴⁷ This regime differs, however, from the music performing collectives in that the Board has the specific power to prescribe, subject to Cabinet regulations, the manner of determining the amount of royalties. The Board has further discretionary power to determine the apportionment of the tariff.

General licensing bodies are regulated by sections 70.1–70.6 of the *Copyright Act*. The general regime operates in a sense by way of contractual default. Where a licensing body or prospective user are unable to agree on royalties or the terms and conditions for the use of a work, either party may apply to the Copyright Board to fix the royalties and related terms and conditions.

Private copying is regulated under sections 79–88 of the *Copyright Act*. This regime is concerned with a remuneration scheme designed to compensate rightsholders for the use of works that would otherwise be considered non-infringing under the *Copyright Act*, the private copying of sound recordings. The Copyright Board establishes the levies to be applied to the various items that fall within the purview of this regime such as blank tapes, blank CDs and CD burners.⁴⁸

The C-32 amendments have allowed for the emergence of several new collectives.⁴⁹ There are, at the time of this writing, some 36 collectives operating in Canada.⁵⁰ Canada has the largest number of collective management organizations, especially in relation to the

country's population, with the possible exception of Brazil.⁵¹ The number of collectives is probably too high and it seems unlikely that all can survive in a limited market.⁵² Furthermore, the sheer number of collective administering bodies in Canada has made it difficult (at least for less seasoned users) to navigate through the maze of organizations in order to use a work.

The number of collective management societies, however, is only one factor in the problem of rights clearance. Indeed, the question must be asked why this problem has not been raised in the past. The answer lies in part in the development and use of new digital technologies and the growth of multimedia products. As one author commented:

The advantage of [collective] systems is clear. Authors and other rightsowners could never individually control the mass use of their works, at least not in the analogue world. Collective management is so often the only means of making copyright function at all. In the digital environment, however, the co-existence of multiple societies for all different types of works could be an obstacle for an efficient clearing of rights for what is now called, in a mysterious word, "multimedia", what the Berne Convention simply calls "collections".⁵³

The clearance of rights for multimedia products exposes the existing fragmentation in the collective management of copyright. Not only must users ascertain which of the different rights are in operation, but they must then ascertain which of the 36 collectives they must address in order to clear rights to a work.

Development of the Market

Economic rationale for collective management

Collective management of copyright was promoted as an effective way for authors and rightsholders such as performers, publishers and producers to monitor and, in some cases, control certain uses of their works that would be otherwise unmanageable individually due to the large number of users worldwide or due to the development of new technologies. The use of music for broadcast by radio stations is perhaps the best example of such a use. As already mentioned, thousands of radio stations worldwide cannot possibly clear individually the rights for each song they play. Nor would those rightsholders want to receive, and have to respond to, those individual requests.

Collective management has also allowed authors to use the power of collective bargaining to obtain more for the use of their work and negotiate on a less unbalanced basis with large multinational user groups.⁵⁴ That being said, most collective schemes value all works in their repertory on the same economic footing, which may be unfair to those who create works that may have a higher value in the eyes of users. Additionally, collective man-

agement ensures that users will have easy access to rights needed to use material protected by copyright.

To a certain extent, collective management societies facilitate the market between creators/producers of copyright works, and the users of these works. In some respects, collective management societies can be seen as the axel or pivot point on a balanced teeter-totter — users on one side and creators on the other. Once an authorized copy of a work is sold to a member of the public, it is generally for the purchaser, not the author, to determine what happens to it.

Collective management societies may be seen as a balancing force between authors and users,⁵⁵ but it is important they constantly adapt to ensure they are best able to facilitate this process. Their continued justification, in some respects, relies on their ability to act as effective facilitators. Where collective management societies are unable to effectively play this role, and where they may actually impede or hamper the system by unreasonably preventing the use of works, a re-evaluation of both their role and value becomes necessary. Indeed, *Théberge*⁵⁶ demands that this issue be brought to the forefront.

Rationale for collectives in the digital environment

Collectives are now facing the challenges of the digital age. Claims that copyright does not work in the digital age are usually the result of the inability of users to use protected material lawfully.⁵⁷ Especially with the Internet, users of copyright material can (and want to) easily access millions of works and parts of works, including government documents, legal, scientific, medical and other professional journals, music, video excerpts, e-books, etc. While digital access is fairly easy once a work has been located (though it may require identifying oneself and/or paying for a subscription or other fee), obtaining the right to use the material beyond its primary use (which is usually only listening, viewing or reading) is more difficult unless already allowed under the terms of the licence or subscription agreement or as an exception to exclusive rights contained in a nation's copyright regime.⁵⁸

While in some cases, this is the result of the rightsholders' unwillingness to authorize the use — and generally a legitimate application of their exclusive rights — there are several other cases where it is simply the unavailability of simple, user-friendly licensing that makes authorized use impossible. Both rightsholders and users are losers in this scenario: rightsholders because they cannot provide authorized (controlled) access to their works and lose the benefits or orderly distribution of their works, and users because there is no easy authorized access to the right to reuse digital material. In other words, this inability to “control” their works means that these works are simply unavailable (legally) on the Internet.⁵⁹

The pervasive nature of the Internet and the increasing tendency to link various appliances and devices such as personal digital assistants (PDAs) and, soon, television sets and stereo receivers, to the global network means keeping any material that can be digitized off the Internet will become increasingly difficult — technically, commercially, or both. While a combination of technology and law might allow rightsholders to keep material off major servers in a number of countries (though not all countries have copyright laws) and/or request that Internet service and access providers (ISPs/IAPs) block access to (domestic and foreign) Web sites that make possible access to “pirated” material, user/consumer demand for digital access may ultimately prevail. Consequently, only rightsholders who are prepared to meet this demand will survive.⁶⁰

The fact remains that a large amount of copyright material is (and more will be) available through digital networks and that the “market” will need to be organized in some way. By “organized”, we mean that users will want access and the ability to reuse material lawfully; and rightsholders will be able to meet those needs in a reasonably efficient way.⁶¹ These uses include putting the material on a commercial or educational Web site or an Intranet, e-mailing it to a group of people, reusing all or part of it to create new copyright material, storing it and perhaps distributing on a CD-ROM. Authors and other rightsholders will want to ensure that they can put reasonable limits on those uses and reuses and get paid for commercially significant uses of their material (absent, of course, a specific exemption in the Act).

It has been argued⁶² that collective management offers the most workable solutions and best represents key principles of intellectual property amid rapid technological advances. Collective management societies may be instrumental in facilitating relations between copyright holders and users of content providing they remain efficient. Their expertise and knowledge of copyright law and management may be essential to make copyright work in the digital age. Under this theory, the individual exercise of rights in the digital environment is rendered impractical if not futile due to the possibility and ease of disseminating works. Collectives, therefore, may become critical intermediaries in this process providing they are able to adapt to both the needs and concerns of the creators they represent and to the market. Their expertise and knowledge of copyright law and management may be viewed as essential to make copyright work in the digital age.⁶³

On the other hand, it may be that, with the aid of technology, the individual exercise of rights will become not only feasible but a more efficient solution, at least in certain cases.⁶⁴ Thus, it may be the case that the advancement of new technologies will minimize the role of collective management societies. Whatever view is taken, the rationalization of the collective management of copy-

right remains an important task; it may be that collective management societies need to re-conceptualize their role as less aligned with “collective” administration and more aligned with the “central” administration of facilitating rights management.

If collective management societies are to play the role of intermediary fully and efficiently, these organizations must acquire the rights they need to license digital uses of protected material and build (or improve current) information systems to deal with ever more complex rights management and licensing tasks. Thus, the ability of collectives to meet the needs of both authors and users is dependent on the evolution of both their internal practices, and the framework in which collective management societies work to alleviate the many concerns of fragmentation within the current system.⁶⁵

The problem of rights clearance and the collective management of copyright in the digital era is not unique to Canada. All nations and collective management societies throughout the world are having to adapt their laws and infrastructure to meet the challenges of digital technology and multimedia products. This challenge arises irrespective of the philosophical underpinnings of a nation’s copyright system, whether it is rooted in economic rights, moral rights, utilitarian rights or any combination of these.⁶⁶

The advent of digital technologies is not to be mistaken for the one and only, or main problem, of the collective management of copyright. As we have already seen, the sheer number of collectives in Canada contributes greatly to problems of efficient rights clearing. Meanwhile, identification of the various rights involved coupled with finding the rightsholders associated with the underlying rights is perhaps aptly entitled “organized chaos”.⁶⁷ The examination of digital technology and the rights clearance of multimedia products merely highlights problems that already exist in the current system.⁶⁸ An examination of the use of multimedia products and their intersection with collectives allows us to take a closer look at some of the problems of the collective management of copyright. In this respect, it is like putting the cell of a diseased specimen under the lens of a microscope — while it does not illustrate the entire problem, it allows us to analyze some of the symptoms.

Fragmentation: The Problem Unveiled

The fragmentation of rights

Copyright, as such, does not exist. In effect, national laws on copyright do not, or no longer, create a “copy”-right. Rather, they outline a collection of rights in relation to literary and artistic works which reflect a series of acts requiring authorization from the rightsholder. Canadian copyright law is not an exception to this rule regardless of whether section 3 of the Act iter-

ates a notion of “copy”-right; it is merely illusory. This complicates decisions about how to adapt the copyright framework to merging technologies.

The history of copyright law is a progression along two axes; first, along a “work” axis, to bring under the copyright umbrella new forms of creation (photography, cinematography, computer programs); second, along a “rights” axis, to create rights in respect of new uses of copyright material (radio and television broadcasting, cable and satellite transmission, now the Internet).⁶⁹ Initially, each type of use fit rather nicely under one right (or fragment of the copyright “bundle”):⁷⁰ reproduction was the right for books,⁷¹ records and compact discs; communication to the public for broadcasters,⁷² adaptation for novels made into movies, etc. But the Internet changed all that: making a protected work available on an Internet server is a reproduction (on the server) and a communication to the public.⁷³ Holders of the reproduction fragment of the copyright bundle in respect of musical works are asking for a tariff to be paid because broadcasters are making copies that go beyond the ephemeral recording exception.⁷⁴ Exceptions to rights are being challenged.⁷⁵ Not only can the right be exploited differently, and different fragments grouped (“sub-bundles”), as in the broadcasting and Internet examples above, but each of these “rights” may be further subdivided based on the language and the market where the work will be used. The Act itself recognizes this subdivision as articulated in section 13(4):

The owner of the copyright in any work may assign the right, either wholly or partially, and either generally or subject to limitations relating to territory, medium or sector of the market or other limitations relating to the scope of the assignment, and either for the whole term of the copyright or for any other part thereof, ...

Clearly, the rights contained in section 3 are no longer useful in mapping out the real world.⁷⁶ Copyright fragments have lost their meaning to users and rightsholders alike. In actuality, contracts and licensing arrangements for copyright works do not usually refer to the specific rights enumerated in this section or if they do, it is an afterthought.⁷⁷ Contracts define the “use” that should be allowed, and not which fragments of rights are needed. This is not borne from any malicious intent but stems from how the rights within a particular market develop over time, factoring into the equation the evolution of technology. In the era of the Internet, the use of a work (often multimedia) operates in some respects as a fiction vis-à-vis the Act.⁷⁸ The multimedia work is subdivided into the various components such as a sound, an image, a photograph, or a software program where rights clearance is required for each consequent subcomponent. These works are broken down into specific rights as defined within the legislation and are often analogized to other categories within the Act. A multimedia work, for example, under Canadian law is a “compilation” while a software program is a “literary work”.

The fragmentation of clearance processes

The changes previously outlined pose significant problems for rights clearance because, as the division of tasks among the fragments is becoming progressively obsolete (at least for newer uses), collective administration is still organized around such fragments. SOCAN has the right of communication to the public, while SODRAC, CMRRA, CANCOPY and COPIBEC have the rights of reproduction (for musical and textual works, respectively). Hence, even when efficient systems are available, rights clearance may prove a difficult task.

The inherent difficulty in rights clearance is perhaps best illustrated by way of an example, showing that the process often involves multiple layers of rights, and clearing each of these rights can be a labyrinthine process (even if each such process is in itself efficient). This may be analogized to a maze whose point of entry and exit are challenging to find, and where the path to completion remains filled with obstacles and hurdles. Now imagine not one maze but three additional mazes stacked on top: the copyright works (or substantial parts of works) used the subdivision of rights within such work, the various rightsholders associated with each of those rights, and the particulars of each market/territory where the rights must be cleared. Because rights ownership and licensing arrangements change through time, our maze becomes more like a four-dimensional matrix.

Take for example the making of a film. The foundation dimension of the matrix would consist in identifying and clearing the rights for the various types of works within the film. We will call this the “big bundle” of rights. The works in question could include the screenplay, the book which the screenplay was based on, the musical works incorporated in the film, any art or photographs used in the setting, as well as the end product of the film itself. Each of the works in this “big bundle” may in turn involve several different rights, rightsholders, and systems of rights clearance which comprise the remaining three layers in our four-dimensional matrix.

Let us now turn our attention to making our film which we will call, “The Big Bundle”, based on the book titled, “Bundling”. To use this book, we will require authorization from both the author and the publisher. Once we have acquired the rights to the book “Bundling”, we turn our attention to making a screenplay based on the book. We hire an American screenwriter to create the script for “The Big Bundle”. Afterwards, we may have to comply with the rules and regulations of the Screenwriters’ Guild.⁷⁹

We must now consider the musical works that we will use in our film. Several musical works have been selected to accompany scenes throughout our movie. We must obtain authorization for each musical work. Some of the songs have been written and performed by the same composer while others have separate composers, lyricists and performers. Each musical work will inevi-

tably have a producer to contend with as well. One of these rightsholders has died and the rights to the musical work are now in the deceased’s estate — this particular rightsholder has four heirs. For our opening theme song, we have decided to commission an original musical work which will involve a composer, performers and a producer. The use of these musical works in our film will in turn lead to the soundtrack for “The Big Bundle”.

As we shoot our film, various set designs are built. We may wish to display artwork or photographs to set the ambiance for a scene in which case the artists and/or art owners will need to be contacted. One scene will be shot in a park with a statue. Permission to film the statue within the scene must be obtained. Or perhaps we will have a scene where our characters rent a movie, and we wish to show two minutes of footage from this film, leading to yet another rights clearance transaction.

While in search for the perfect location for specific scenes, we have decided to shoot “The Big Bundle” in Canada and France. Different issues and rights will need to be cleared according to the laws and contractual agreements negotiated in each of these nations. In addition to the number of varying rights and rightsholders in each of these nations, each nation will also have its own unique system of rights clearance which may or may not involve anywhere from one collective society and upwards to an almost unlimited amount.

As our film is being made, new rights and rightsholders emerge. For example, under French law, our director has an unwaivable and non-transferrable right to remuneration for several forms of exploitation of the film in France, including video rentals.⁸⁰ Meanwhile, we may have to contend with guilds when dealing with any potential rights that our actors and writers may acquire in our production, and, if we choose to involve actors from the countries that we are shooting in, perhaps different national guilds or collectives. Likewise we, the studio/producer, will acquire rights in our film, either as full copyright or, as in Europe, a neighbouring right as producers of the “first fixation” of the audiovisual work.⁸¹

Once our film is made, we will have to resolve issues of distribution. Different cinema companies will have to be negotiated with for the right to distribute and play “The Big Bundle”. Our film will eventually be released on video and possibly later broadcast over television, and perhaps cable and satellite. The situation is further complicated by the fact that separate distribution agreements will need to be negotiated on a per country basis. And, as indicated above, each element of this puzzle, including copyright transfers, may change through time.

The four-dimensional rights matrix is complex, posing several challenges in the production of our film. Each work we wish to use is exploited in a unique way, thus different types of works are often subject to a separate legal and administrative regime. In most circum-

stances, rights clearance will have to be negotiated with the applicable collective society; finding which collective society has acquired the right to administer and negotiate on behalf of the rightsholder is another matter altogether. One collective society may represent a creator for part of her repertoire, and another collective for the remainder.⁸² Likewise, each different type of work, whether it is rights to a sound recording or the rights to a screenplay, will inevitably involve multiple collective management societies, multiple rightsholders, and numerous rights stemming from the works of these rightsholders. Again, all of this varies over time as legislation, practices and the factual situations presented in this example constantly change. The fragmentation within the system is complex: different works are exploited in a variety of ways while each of these works involves multiple rights, rightsholders, systems of rights clearance, and markets. Fragmentation is all-pervasive. The hurdles in weaving our way through this rights clearance matrix are perplexing at best, insurmountable at worst.

How does one simplify the system? Is it possible to shrink the four-dimensional matrix into a single-layered maze? What tools may be developed to aid in hurdling obstacles along the way? Should a centralized “information booth” be set up at the entranceway to guide users through the maze? Will some form of standardization be sufficient or is a new approach to copyright altogether required?

Defragging the System

Various clearance systems are based on sometimes obsolete fragments, each with its own idiosyncrasies. This means that even if each such “sub-system” (for a clearance process requiring several clearance transactions performed through different intermediaries, including several collectives) is efficient, efficiency of the process as a whole is in jeopardy. When applied to the Internet, the very mechanisms in place for rights clearance become part of the equation when building an efficient business model. In other words, collective management is not a neutral service. Given the fragility of Internet-based business models for delivery of copyright content on the Internet,⁸³ it is worth asking whether such influence is positive, especially in light of the fact that it follows from the application of legacy systems and regulations that were never intended for a network technology such as the Internet. Economically efficient clearance “should ensure that copyright administration favours no one delivery method over another.”⁸⁴

Many collective management organizations may be critical intermediaries in the process of organizing new markets and in making improvements to the existing system. Their expertise and knowledge of copyright law and management may be essential to make copyright work in the digital age.⁸⁵ Regardless of whether digital technology is involved, the standardization of practices

amongst collective management societies would lead to greater efficiencies and alleviate some of the fragmentation under the current system. To play that role fully and efficiently, however, these organizations must acquire the rights they need to license digital uses of protected material and build (or improve current) information systems to deal with ever more complex rights management and licensing tasks. Additionally, collective management societies will need to organize and cooperate fully, both on a national and international scale to achieve their role as facilitators of rights clearance. The following suggestions are offered as potential means to achieve this goal.

Technology

Technology and, in particular, electronic rights management systems,⁸⁶ are a useful tool in copyright clearance, especially in the digital environment. To borrow from our four-dimensional matrix, such technologies would operate like a joystick to a videogame. The joystick is a mechanism of control — it facilitates rights clearance in that it aids the user in jumping over hurdles steering them towards proper identification of the rightsholders involved and the rights that will need to be cleared. While it does not guarantee the success of the player, the joystick greatly increases the likelihood of successfully navigating through the matrix.

Before we can understand electronic copyright management systems, we need to understand the concepts that underlie such systems from a more technical perspective, starting with “rights management” itself. Copyright management systems (CMS) are basically databases that contain information about content (works, discrete manifestations of works and related products) and, in most cases, the author and other rightsholders.⁸⁷ That information is needed to support the process of authorizing the use of those works by others. A CMS thus usually involves two basic modules, one for the identification of content and rightsholders, the other for licensing (or, rarely, for other rights transactions, such as a full assignment). In many cases, ancillary modules such as payment or accounts receivable are also considered part of the system, but the core of a CMS is content and rights identification coupled with a licensing tool.

A copyright management system can be used by individual rightsholders or by third parties who manage rights on behalf of others. A rightsholder might use the system to track a repertory of works or products embodying such works (or substantial parts thereof), or an organization representing a group of rightsholders might use a CMS to track each rightsholder’s rights and works. Such an organization might be a literary agent representing a number of writers, or, more commonly, a collective management society.

Applying the above concepts, it is easy to see that rights management functions are made much easier with computers, which can act both as huge rights databases and automated licensing engines. Computer-

ized systems allow rightsholders to automatically grant licences to users without human intervention, which has the benefit of keeping transaction costs low and making licensing an efficient, Internet-speed process: licences to use a specific work can be granted online, 24 hours a day, to individual users. Ideally, such licences will be tailored to a user's needs.⁸⁸ For example, a corporation may want to post a flattering newspaper article on its Web site or send it via email to its customer base; an individual author may decide to purchase the right to use an image, video clip, or song to use in her/his own creative process; a publishing house might purchase the right to reuse previously published material. Electronic Copyright Management Systems (ECMS) may also be used to deliver content in cases where the user does not have access to such content in the required format. Or, they may be used to create licensing sites or offer licensing options at the point where the content is made available. Finally, digital technology can also be used to track usage ("metering" and "monitoring"), look for unauthorized online uses (programs known as "spiders" or "bots" that scour the Web looking for unauthorized copies of material on Web sites) or to encrypt material in digital containers to limit further uses of the material.

For transactional (case-by-case) licences, an ECMS thus basically acts as a licensing engine. There are various implementations of such systems that range in technical sophistication from the very basic to the very complex (and expensive). Using an ECMS, the user can search available content and rights online, submit a licence request online and receive a response from the system. A variation on this theme is where the user first locates the content (using a search engine or portal) and is then offered licensing options at the point of content.⁸⁹

To protect content on the Internet, a number of "rights management systems" are now combined with technology that prevents reuse of online content (except *as authorized at the time the content was acquired*).⁹⁰ *This may take the form of a "container" in which digital content is delivered and/or a watermark to track content posted on (publicly-available) Web sites. The protection technology checks for authorization before providing access to the protected content or allowing the user to make or send a copy.*⁹¹ Whether these systems succeed as intermediaries will ultimately depend on users' reaction and acceptance level. The negative reaction to the industry's offering of such services in the post-Napster era shows that users will not easily accept stringent controls.⁹²

In order to be optimally efficient and deal with digital usage information, online member and work registration, user requests and online transactional licensing (where such licensing on reasonably standard terms is possible), collective management societies need a rights management system with both an efficient "back-end" system and a user-friendly online interface ("front-end"). However, building an all-encompassing

online multimedia licensing system operated jointly by all Canadian collectives does not currently seem justified either by current licensing practices or by prevailing market conditions. To go back to our matrix, ECMS are akin to both a tool to aid in hurdling obstacles and, at the same time, act as an information booth, identifying rights and then directing users to rightsholders.⁹³

The sheer number of collectives in Canada, which surpasses the number of similar organizations in almost any other country (even those with far higher population levels),⁹⁴ potentially poses a problem for establishing ECMS. It is not economically feasible to build an integrated rights management system for each of them. Clearly, some collectives have rights management needs that can be met with a very basic infrastructure. As a rule, however, to offer online services and deal with online users and usage, including rights management information, an efficient system is required. That does not mean that to perform other functions, the fractioning of the "CMO market" in Canada is necessarily counter-productive. In order to implement an efficient system, collectives should cooperate within appropriate groupings (i.e., CMO's having a sufficient degree of commonality) to limit the number of rights management systems to be developed and they should develop compatible systems to ensure that the exchange of data will be possible.⁹⁵

To be able to licence quickly and efficiently online, an ECMS is indispensable. But, under the current structure of collective rights management in Canada, an ECMS does not in and by itself solve the problem of fragmentation; it only assures that the fragment covered by the ECMS in question is managed efficiently.

Extended collective licensing

The extended collective licence is used in all Nordic countries. It is a voluntary assignment or transfer of rights from rightsholders to the collective with a *legal extension of the repertoire to encompass the non-member rightsholders, thus simplifying and making more effective the acquisition of rights. Some call it a "backup legal licence", but this expression may be confusing since the rightsholder can choose to opt out of the system. This, of course, is not possible under a compulsory (also known as legal) licence.*⁹⁶

Extended collective licensing may be an appropriate and effective method in facilitating rights clearance. Extended collective licensing could be considered in the next phase of reform of the *Copyright Act*, *but only for "general regime" collectives and only in respect to published works, thus excluding rights such as music performance, which have a special regime under the Act.*⁹⁷

The extended collective licence works as follows: as soon as a considerable (or substantial) number of rightsholders in a given category agree to join forces in a collective, the repertoire of the appropriate collective is automatically extended, not only to other domestic

rightsholders in the same category but also to all relevant foreign rightsholders. The licence also extends to deceased rightsholders, particularly in cases where estates have yet to be properly organized.

The extended collective licence is an interesting model for countries like Canada where, on the one hand, rightsholders are reasonably well organized and informed, and, on the other hand, a great part of the material that is the object of licences comes from foreign countries. It is often more difficult and time-consuming to obtain an authorization for the use of foreign material. The extended collective licence provides a legal solution to this situation, as the agreements struck between users and rightsholders will include all non-excluded domestic and foreign rightsholders.

Finally, by accelerating the acquisition of rights, the extended collective licence also increases the efficiency and promptness of royalties' collection. The monies redistributed to rightsholders are thereby increased.

An extended collective licence is, however, of limited application. Such licences alleviate the specific fragmentation problem of acquiring authorized access to works of non-members of a collective but they do not address the seemingly larger problems associated with fragmentation. Furthermore, such a collective licensing regime is limited to collectives operating under the "general regime". To draw upon our matrix image, an extended collective licence effectively removes some of the obstacles in rights clearance but it is a specific solution aimed at a specific problem.

Combined multiple licences assessed by component uses

A multiple blanket licence would present an alternative solution. The two most relevant uses of such licences are where there are inherent difficulties in advanced clearance of rights, and where consolidation is more practical from a user's (and sometimes creator's) perspective. From a functional point of view, collective management societies were seen as a practical substitute for a blanket licence due to the multitude of uses and the difficulty of advance clearance.⁹⁸ Forcing users to go through a collective society to obtain authorization for the use of a work as opposed to dealing with rightsholders on an individual level was seen as a necessary process. It may be the case, however, that with multimedia works, a blanket licence may be a more appropriate response.

While collective management societies lessen the difficulties of advanced clearance, the issue of advanced clearance for multiple rights or media forms requires additional solutions. Clearing countless rights for multimedia products is a cumbersome procedure. Some multimedia producers have stated that they would rather use works in the public domain or hire persons to

create new works rather than obtaining permission to use existing copyright works.⁹⁹ A new blanket licence could operate on the level of "uses". In other words, fees for the use of a work would be determined based on the actual use of a work, and not based on the negotiated term set by each collective society.

This solution has the advantage of being fairer to users and potentially achieves administrative efficiencies for both creators and users. Such a system would be fairer to users in that there would no longer be a discrepancy in fees to be paid for similar uses of a work.¹⁰⁰ Administrative efficiencies, on the other hand, result from each and every collective having to file tariffs to be approved by the Copyright Board.¹⁰¹ This would require changes to the current law but would allow for more efficient uses of the Board's resources, and would be a significant tool to users in clearing rights

In essence, a single tariff (and cheque) could be established for different types or uses of works. This would require a more proactive approach on the part of the Copyright Board, but it is not unprecedented.¹⁰² In this sense, the user would pay an admission fee at the entrance to the matrix and those at the ticket booth would identify rightsholders and disperse cheques to the varying collective management societies. This would not require the law to be changed but could require a centralized administrative regime to disperse the cheques. Though a centralized administrative agency may be the key to the success of such a system, it should be noted that it would not necessarily be required. The money could simply be put in one pot, and in order to draw money from the pot, collective management societies would have to cooperate in order to ascertain who would get what. The Copyright Board could simply elect not to approve tariffs filed by collective management societies, requiring them to modify the fees to a set standard.

This solution is somewhat coercive; it would force collective management societies to cooperate with one another in order to receive monies. But such "umbrella" collectives already exist to receive monies from users that are then redistributed to the member collectives, who in turn distribute to their members. The best examples are the Private Copying Collective of Canada (CPCC) and the Neighbouring Rights Collective of Canada (NRCC).¹⁰³

While this solution would appear to have many benefits, the downside is that not all collectives may be willing to cooperate voluntarily with one another. It may turn out that more inefficiencies and battles over money are created. Such an outcome would not address the difficulties for users to obtain advance clearing of rights nor would such a solution necessarily rid the system of discriminatory practice.¹⁰⁴

Exemptions of Acts and compulsory licensing

This solution allows us to draw a crucial distinction between two legislative tools at Parliament's disposal. First, the government may take away the rights of authors entirely, by exempting certain acts that would otherwise require an authorization from the author. Perhaps the best example is the inclusion of those acts into the fair dealing sphere although there are other types of exemptions in the Act.¹⁰⁵ In other cases, the government may decide that it would be impractical or unfair to require that an authorization be obtained and impose a compulsory licence: a work covered by a compulsory licence may be used without authorization, provided the tariff (if any) set by the Copyright Board is paid.

There is, however, a fundamental difference between these two tools. In one case, the author or other rightsholders might argue (assuming copyright is a property right) that they are expropriated without compensation (though ostensibly in the public interest). Users might argue that in such a case the copyright monopoly is simply not extended into areas where it does not belong; their claim is usually that they need to access and use a work lawfully and that in certain cases, obtaining a licence is either impossible or completely impracticable.¹⁰⁶ When a compulsory licence is in place, these "obstacles" are removed and the issue then boils down to whether the authors and other rightsholders should be financially compensated.

A serious obstacle to the establishment of a new compulsory licence or exemption is that it must be allowed under the Berne Convention for the Protection of Literary and Artistic Works,¹⁰⁷ to which Canada is party, and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS),¹⁰⁸ administered by the World Trade Organization (WTO) and subject to the WTO's binding dispute-settlement system.¹⁰⁹ There are very few cases where such compulsory licensing or exemption would be possible. There is no such limitation on, for example, using extended collective licensing, provided rightsholders can opt out of the scheme and continue to manage their rights individually.¹¹⁰

Centralized licensing agents

Centralized licensing must be distinguished from collective licensing. Collective licensing, as in the case of Canada, typically involves the establishment of a collective society for the administration of a specific right such as mechanical rights or reproduction rights, on behalf of rightsholders. The collective aspect is formed through the coming together of rightsholders within a particular domain whereby the collective society negotiates and administers the clearance and use of rights for a set fee.¹¹¹ Centralized licensing, on the other hand, is the aggregation of collective management societies into an umbrella society for the sole purpose of providing a central point

of information. It is sometimes referred to as a "one-stop-shop" service (or "guichet unique").

The centralized licensing agency acts as an information booth or a service counter. Users can then obtain all needed licences at the same time and place. The advantage of this system is that users are saved from the onerous task of identifying rightsholders and then clearing rights involved through multiple agents. Ideally, a centralized licensing agency would utilize an electronic rights management system to aid in this process but it is important to realize that the use of such a technology is not itself representative of a centralized scheme — more changes are needed.¹¹²

In Europe, problems of fragmentation and the challenge of licensing multimedia products are being addressed both at the different national and international governmental levels.¹¹³ New rights clearance centres have been established in many countries on the national level, but a central clearance centre for all of Europe has yet to emerge. A common characteristic of these clearance centres is that the multimedia producer can clear all rights for a project by stopping and shopping at one single centre. Several countries have implemented "one-stop-shop" centres.¹¹⁴

The European Commission also funded 10 pilot projects on multimedia rights clearance systems: INDECS,¹¹⁵ EFRIS,¹¹⁶ TV FILÈS,¹¹⁷ PRISAM,¹¹⁸ ORS,¹¹⁹ BONA FIDE,¹²⁰ b© (before copyright),¹²¹ COMPAS¹²² RCTRIDW¹²³ and VERDI.¹²⁴ The VERDI project attracted much attention. The aim of the VERDI project was to build an infrastructure to licence use of multimedia content for European users and rightsholders.

A "one-stop-shop" multimedia clearance centre has also been started in Japan. For example, the Japan Copyright Information Service Center (J-CIS) contains a database that provides users with information about copyrights in multiple fields, but it does not yet go as far as handling rights clearance.¹²⁵ Japan is also the home of the Copymart project launched several years ago by Professor Zentaro Kitagawa.¹²⁶ Copymart is a highly flexible system allowing rightsholders (or their representatives) and users to "meet" electronically. Users can then obtain a licence based on their needs.¹²⁷

Meanwhile, voluntary licensing of digital uses by collective management societies is already in place in the United States. ASCAP and BMI, the two U.S. performing rights collectives, have tariffs relating to the public performance of music on the Internet. Copyright Clearance Centre (CCC) licenses reproduction of printed material for inclusion in "digital coursepacks", reuse of material on Web sites, intranets, CD-ROMs and other digital media. CCC also offers a repertory-based licence for internal digital reuse of material by corporate users. Interestingly, in the latter program, users can only scan material not made available by the publisher himself in

digital form.¹²⁸ CCC's ability to license digital uses is entirely based on voluntary and non-exclusive rights transfers from rightsholders.

The "one-stop-shop" clearance centres greatly facilitate rights clearing with multimedia products and are seen as a solution originating with the market.¹²⁹ Central licensing has been heralded an efficient way of rights clearance for both collective society members and users.¹³⁰ Central licensing, however, is not a solution free of criticism. These central licensing agents are administered on a national basis; coordination on a European and an international basis remains largely unexplored.¹³¹ The extent of collaboration and standardization, therefore, is somewhat restricted to the domestic market. Furthermore, there are concerns that users will begin to "shop" deals — advantageous for users but potentially disadvantageous for creators. As one author notes:

A deeper tension lies between some of the European collecting societies themselves all intent on being the one to offer the one stop license and as this power struggle is played out, the situation has arose that it now becomes possible to shop around the various territories to get the best rates and widest territorial licenses. All of this in front of the backdrop of the failure to conclude a memorandum of understanding between collecting societies and rights owners for either international or European-wide on-line licensing and question ... of who licenses whom.¹³²

Finally, pre-clearance of rights on a transactional basis at a one-stop-shop is a fairly complex, long and expensive process even when done through an efficient ECMS and even with the added benefit of having a single point of departure in the rights maze. It may work for professional users seeking to create a CD-ROM, but in its current form and application, is much less viable for mass market uses.¹³³

This also begs the question of whether the acquisition and management of (multimedia) rights should be facilitated by legislative or contractual mechanisms. A market solution may not be the most efficient or feasible solution. On the other hand, an overriding central licensing system may require legislative backing.¹³⁴

The workability of a central licensing agency or one-stop-shop multimedia clearance centre in Canada remains an attractive solution. It must be noted, however, that licensing of digital uses has in fact begun. SOCAN filed a tariff for the public performance of music (known as "Tariff 22") and the Copyright Board rendered a "Phase I" decision on legal issues,¹³⁵ which was modified by the Federal Court of Appeal,¹³⁶ a decision now before the Supreme Court.¹³⁷ SODRAC and CMRRA have also filed tariffs concerning the reproduction of music in Internet transmissions and NRCC with respect to the neighbouring rights involved in the transmission.¹³⁸ While these initiatives are important, they fall shy of implementing a centralized licensing system that would truly constitute a "one-stop-shop" environment for users. An overarching system is required which would incorporate all collective management societies for rights identification and licensing terms.

It may be the case that in Canada, one or two collective management societies are best suited to provide centralized licensing services, and that an entirely new agent would not need to be created.¹³⁹ Again, the more important question is whether such an arrangement will evolve "naturally" or whether a legislative impetus will be necessary.

Standard form contracts and coalitions

Multilateral agreements between collective management societies represent another potential solution. Referring to our matrix example, collective management societies would set up agreements with one another to set standards and establish cooperative compensatory regimes, so that a user could approach any of these societies and obtain the information necessary to clear the right to use a work. They would not have to go from point to point in search of the relevant information. This is best characterized as a standardization effort.

A useful example of such a system is the administration of mechanical rights in Europe. Centralized licensing regimes on a European-wide (and to a certain extent worldwide) basis are prevalent within the field of mechanical rights. The Bureau International des Sociétés Gérant les Droits D'Enregistrement et de Reproduction Mécanique (BIEM) and the International Federation of the Phonographic Industry (IFPI) were formed as international organizations that group societies for the purpose of effective and efficiently administrating mechanical rights.¹⁴⁰

BIEM is a confederation or a "super society" of over 40 mechanical rights organizations from over 30 countries throughout the world.¹⁴¹ BIEM is responsible for negotiating the terms of a general licensing system for the reproduction of musical works on sound recordings with IFPI. The licensing arrangements are then administered by member organizations of BIEM in their respective territories. This arrangement is aligned with a centralized licensing arrangement. However, these arrangements were not as harmonized as one might expect. The licensing arrangements varied in terms of national and international repertoire covered, duration, and discounts on royalties to the record companies.¹⁴² This led to dissatisfaction of many music producers and record companies who began to challenge the authority of many collective management societies, and to the individual negotiation of contracts.¹⁴³

Furthermore, the success of BIEM is largely contingent on negotiations for the renewal of the BIEM/IFPI Standard Contract which the two organizations negotiate every four to five years. This Standard Contract forms the basis for reciprocal agreements between societies.¹⁴⁴ The last round of negotiations in 1997 at the MIDEM Conference between BIEM and IFPI generated disagreement in positions between the two groups. This, in turn, resulted in a stalemate in the process; based on economic and legal interests, the mechanical rights socie-

ties sought to maximize the compensation to music creators and publishers while the phonographic societies sought to reduce such costs.

After experiencing an impasse in negotiations for the better part of a year, and after more than a year of operating under the conditions of an expired contract, an agreement regarding the terms to constitute a new Standard Contract between BIEM and IFPI was signed. The contract was to be executed with effect from July 1, 1997 through June 30, 2000.¹⁴⁵ This contract, known as the “Cannes Agreement”, involved two essential elements: the mechanical rights societies agreed not only to reduce overall commission rates taken on phonomechanical royalty income but also to introduce an element of transparency to their procedure.¹⁴⁶

In the spirit of previously negotiated contracts between BIEM and IFPO, new coalitions and efforts are being made in the exploitation and administration of multimedia rights. For example, some major players of the music industry (BIEM, CISAC, IFPI, and RIAA) are working together on a project to develop a global identification scheme for digital music content.¹⁴⁷ A similar scheme has been developed to identify motion pictures.¹⁴⁸

While the promulgation of standard form contracts is an appealing solution, it is premised on voluntary association. It is a matter of conceptualization at one level, and practical reality at the other. Should collective management societies form such arrangements and take the initiative to establish centralized licensing regimes, then other solutions may not be required. The current reality, however, is that this is not occurring in Canada, therefore, perhaps legislative or governmental involvement is required.

International centralized licensing system

The point may be made that any reformation to the structure of collective management societies on a national level is an incomplete solution. Some would argue that an international collective society is required.¹⁴⁹ One argument in favour of this solution is that while rights may be owned on a national basis, they do not necessarily need to be managed on a national basis. In the digital era, the latter point is amplified. But the creation of an international centralized licensing system is, to a certain extent, somewhat beyond the scope of this paper and perhaps beyond the scope of a realistic solution.¹⁵⁰

Revamping copyright

The most radical solution and one requiring a rich and complex analysis, but one which is mostly outside of the scope of this paper, is to literally scrap “copy”-right law altogether. The argument is that in the advent of digital technology, it may be that to speak of copyright in terms of rights associated with “copying” a work is a misnomer.

According to one theory, what are important are distribution rights. This is perhaps mostly amply illustrated in the following passage:

... the fundamental right granted by copyright is the right of reproduction — of making copies. Indeed the very word “copyright” appears to signify that the right to control copying must be fundamental part of any system of copyright ... The advent of digital documents has illuminated this issue: In the digital realm, copying is not a good predictor of intent to infringe; moreover, copying of digital works is necessary for normal use of those works. We argue that the right to control copying should be eliminated as an organizing principle of copyright law. In its place, we propose as an organizing principle the right to control public distribution of the copyrighted work.¹⁵¹

Other proposals, applicable only to the Internet, are to create a “right of computer network transmission”¹⁵² or to replace copyright with a broad levy on blank media.¹⁵³ This could be helpful if such right combined and/or replaced all existing fragments, not if added as an additional one.¹⁵⁴

Others have focused on transforming copyright into a “use” right, which could be limited to commercially significant uses, especially unauthorized uses that lead to loss of revenue for rightsholders.¹⁵⁵ A reform of the list of fragments of the copyright bundle contained in section 3 of the Act would start from the premise that such rights do not correspond to actual uses, which are often mini-bundles of many of the listed rights.¹⁵⁶

While the soil is perhaps not yet ripe to completely revamp copyright law at this point, it is important to recognize the growing discourse in this area.

Conclusion

Collective management societies may be justified only so far as the level of quality of services is acceptable and efficient, thereby taking into account the administrative technologies available. Thus, in its inception, collective management societies developed out of necessity; it was not feasible for authors and publishers to maintain a direct relationship with users. In the advent of new technologies, however, authors and publishers may be able to initiate and maintain a direct relationship with users. While this does not necessarily abolish altogether the role of collective management societies, it highlights the need to reform the existing collective society structure in order to justify their continued existence on one level, and to alleviate the emerging problems of fragmentation. This is not to say that the role of collective management societies is diminishing. It is that their role is changing. There is a similar motif that runs through each of the outlined solutions: that some form of centralization and standardization is an absolute prerequisite to efficiency, particularly in the context of the digital era.

Notes:

- ¹ Fragment or fragmentation is derived from the Latin adjective “fractus”. According to Benoit Mandelbrot, “The corresponding Latin verb ‘frangere’ means ‘to break’: to create irregular fragments. It is therefore sensible — and . . . appropriate . . . that, in addition to ‘fragmented’, fractus should also mean ‘irregular,’ both meanings being preserved in fragment.” The notion of fragments is a component to chaos theory. For an explanation of chaos theory and for further examples of Benoit Mandelbrot’s work in the area see Manus J. Donahue III, “An Introduction to Mathematical Chaos Theory and Fractal Geometry,” online: Duke University Homepage: <http://www.duke.edu/~mjd/chaos/chaos.html> (date accessed: 14 January 2003).
- ² *Copyright Act, R.S.C. 1985, c. C-42 [hereinafter the “Act”]*.
- ³ The Act, *supra* note 2 at s. 3.
- ⁴ While this may be an exaggeration on the authors’ part, this cliché remains, nonetheless, a somewhat accurate portrait of financially struggling artists both then and now.
- ⁵ CPTech’s Page on Collective Management of Copyrights, online: Home Page of Consumer Project on Technology: <http://www.cptech.org/cm/copyrights.html> (date accessed: 14 January 2003).
- ⁶ La Société des Gens de Lettres Homepage: http://www.sgdl.org/fr_his.htm (date accessed: 14 January 2003).
- ⁷ For a complete historical account of the formation of collective management societies, see *International Confederation of Societies of Authors and Composers, As Long as There are Authors (Paris: General Secretariat of the International Confederation of Societies of Authors and Composers, 1996)*.
- ⁸ As one commentator noted:
The Portuguese Society of Authors offered to represent French authors, and the theater managers of Lisbon immediately threatened to boycott French plays. The Spanish society SGAÉ would not allow the SACD to deal with its members on an individual basis. (*Ibid.* at 10)
- ⁹ The biography of Firmin Gémier may be found (in French) Odeon Theatre de Europe, online: <http://www.theatre-odeon.fr/public/document/biograph/gemier.htm> (date accessed: 14 January, 2003).
- ¹⁰ The International Confederation of Societies of Authors online: <http://www.cisac.org> (date accessed: 14 January, 2003).
- ¹¹ The French law on authors’ rights (the civil law version of copyright) is actually known as the *Code of Literary and Artistic Property (Law No. 92-597 of July 1, 1992, as amended by Laws Nos. 94-361 of May 10, 1994, and 95-4 of January 3, 1995)*.
- ¹² By “world” we are only referring to the Western world. This is inclusive of the Anglo-Saxon and droit d’auteur traditions of copyright.
- ¹³ See M. Ficsor, *Collective Administration of Copyright and Neighboring Rights (Geneva: WIPO, 1990)* at 80–83.
- ¹⁴ This is stated quite clearly in Article 1 of the Statutes of the International Federation of Reproduction Rights Societies (IFRRO): “Collective or centralized management is preferable where the individual exercise of rights is impracticable”. See *International Federation of Reproduction Rights Societies, online: http://www.ifrro.org* (date accessed: 14 January, 2003).
- ¹⁵ For example, often rights are governed by multiple collective management societies within a particular nation. Coordination is therefore required not only between national collective management societies, but then on an international basis between collective management societies. There is a significant lack of standards among many collective management societies. Identification alone of an underlying right and rightsholder can be a convoluted process.
- ¹⁶ As one author notes, “efficiency will be what, in the end, members and music users most want and will most easily recognize, however it is measured”. See J. Hutchinson, “Collection and Distribution of Performing and Mechanical Royalties: A View from the UK” (July, 1998) 84 *Copyright World* 30 at 32.
- ¹⁷ As Peter Drucker notes, “efficiency is doing better what is already being done”. See P. Drucker, *Innovation & Entrepreneurship: Practices and Principles (London: Heineman, 1986)*, where Drucker discusses the nexus between technology, innovation and efficiency.
- ¹⁸ Licensing, collecting and enforcing copyright may now be done on an individual basis through the aid of technologies such as digital rights management systems. While the authors’ do not adopt the view that collectives will no longer have a role to play in the digital environment, the point is that new technologies alleviate some concerns of inefficiency related to individually licensing, collecting and enforcing copyright.
- ¹⁹ The notion of contributory/secondary infringement was introduced to copyright regimes as a deterrent to third parties such as copy centres and shops from unlawfully reproducing copyright works.
- ²⁰ As H. Cohen Jehoram notes:
Photocopying machines were only a new technique and copyright itself was the child of technology, of the most fundamental revolution in information technology, Gutenberg’s invention of movable type. Copyright could in the long run only profit from developing means of exploiting works, despite the other side of the coin, that some new infringing practices of users could not be stopped. But then copyright has never been a watertight system. If the lack thereof was to be called a crisis, then copyright has always been in crisis. Exactly the same could be said with respect to the dangers for copyright in the digital age.
See H. Cohen Jehoram, “The Future of Copyright Collective Societies” (2001) *E.I.P.R.* 134.
- ²¹ Keyes & Brunet, *Copyright in Canada: Proposals for a Revision of the Law (Consumer and Corporate Affairs, 1977)* at 5.
- ²² The Act, *supra* note 2.
- ²³ J. Matejcek, *History of BMI Canada Ltd. and PROCAN and their role in Canadian music in 1940–1990 (Toronto, 1995)* at 2.
- ²⁴ CPRS came to be called CAPAC in 1945.
- ²⁵ *Copyright Board Annual Report 1998–1999*, at 7.
- ²⁶ BMI Canada was a subsidiary of Broadcast Music, Inc, a U.S. collective created by users (broadcasters) to manage composers’ rights and compete with the American Society of Composers, Authors and Publishers (ASCAP). See online: BMI <http://www.bmi.com> (date accessed: 14 January 2003) and online: The American Society of Composers, Authors and Publishers <http://www.ascap.com> (date accessed: 14 January 2003).
- ²⁷ P. Grant, “Competition and the Collectives in Canada: New Developments in the Relationship between Copyright and Antitrust Law,” (1990–91) 1 *M.C.L.R.* 191 at 192.
- ²⁸ J. Matejcek, *supra* note 23 at 3.
- ²⁹ *Ibid.*
- ³⁰ The situation in Québec may be differentiated with the rest of Canada. Collectives outside of the realm of music performing were established. The validity of their legal status, however, was uncertain. They were in some ways akin to labour groups in their fight to establish rights. The legal status of collectives was not confirmed until the 1988 Amendments to the *Copyright Act*.
- ³¹ J. Matejcek, *supra* note 23 at 95–124.
- ³² D. Smith, *Collective Agencies for Administration of Copyright (Consumer and Corporate Affairs Canada, 1983)* at 1.
- ³³ See for example: M. Berthiaume & J. Keon, *The Mechanical Reproduction of Musical Works in Canada (Consumer and Corporate Affairs Canada, 1980)*; J. Keon, *A Performing Right for Sound Recordings: An Analysis (Consumer and Corporate Affairs Canada)*; Keyes & Brunet, *supra* note 21; L. Liebowitz, *Copyright Obligations for Cable Television: Pros and Cons (Consumer and Corporate Affairs)*; D. Magnusson and V. Nabhan, *Exemptions Under the Canadian Copyright Act (Consumer and Corporate Affairs)*; D. Smith, *ibid.*; and B. Torno, *Fair Dealing: The Need for Conceptual Clarity on the Road to Copyright Revision (Consumer and Corporate Affairs)*.
- ³⁴ Economic Council of Canada (1971) at 151; cited by D. Smith, *supra* note 32, at 3, recommended that:
... an adjustment of the Copyright Act to permit the wider use of the performing-rights-society approach, including its extension into the field of printed and other materials ... [and] that powers of the Copyright Appeal Board to regulate the fees and royalties of such “collectives” and the powers of the Minister to issue compulsory licenses must also be enlarged.
- ³⁵ Keyes & Brunet, *supra* note 23 at 212, likewise called for reforms:
... creators and owners of copyright should organize to protect their rights and to exploit them in a way that satisfies both their interests and the contemporary needs of society ... it should be possible to build upon the experience of the collective management societies

already existing and to devise new contractual arrangements adapted to the nature of those rights to be collectively exercised.

³⁶ D. Smith, *supra note 32* at 5, provides a succinct summary for the reorganization of collectives to account for new technologies, uses and changes in the market:

The rationale for the extension of the principles underlying the existing musical performing rights societies to other areas is described by Keyes and Brunet in the context of new and previously unanticipated uses of protected material. In the realm of photocopying, for example, Keyes and Brunet point out that existing concepts of fair dealing approved by authors and publishers predate widespread photocopying. Copying for private use has clearly been undertaken since the print media began, but until recently this copying was relatively infrequent, limited in length and generally unlikely to compete significantly with the copyright material.

³⁷ S.C. 1988, c. 65.

³⁸ J. Matejcek, *supra note 23* at 104.

³⁹ See *Copyright Board Annual Report 1989-1990*, at 10.

⁴⁰ R.S.C. 1997, c. 24.

⁴¹ Prior to 1997, the definition of “collective society” only applied to the general licensing regime under section 70.1 of the *Copyright Act*. In the 1997 amendments, the definition of a collective society was changed to read:

A “collective society” means a society, association or corporation that carries on the business of collective administration of copyright or of the remuneration right conferred by section 19 or 81 of the benefit of those who, by assignment, grant of licence, appointment of it as their agent or otherwise, authorize it to act on their behalf in relation to that collective administration, and (a) operates a licensing scheme, applicable in relation to a repertoire of works, performer’s performances, sound recordings or communication signals of more than one author, performer, sound recording maker or broadcaster, pursuant to which the society, association or corporation sets out classes of uses that it agrees to authorize under this Act, and the royalties and terms and conditions on which it agrees to authorize those classes of uses, or (b) carries on the business of collecting and distributing royalties or levies payable pursuant to this Act.

⁴² “Neighbouring rights” refer to the public performance and communication to the public by telecommunication of sound recordings of musical work, for the benefit of the performers of these works and the makers of the sound recording.

⁴³ The private copying of recorded musical works for the benefit of the rights owners in the works, the recorded performances and the sound recordings.

⁴⁴ Some commentators believe that a fifth category could be said to exist, consisting of “unregulated collectives”. As Grant commented, “A company that licensed the use of the works of multiple authors to users can avoid the application of the general licensing body regime by declining to operate a ‘licensing scheme.’” In particular, if that company does not deal with users on a “general tariff” basis but negotiates each use individually, then it may not necessarily qualify as a “licensing body” under section 70.1 of the Act. P. Grant, *supra note 27* at 199. This may be true, but does not impact one way or the other on our analysis.

⁴⁵ A comprehensive list is provided of the various tariffs on the Copyright Board’s Web site. Online: <http://www.cb-cda.gc.ca> (date accessed: 14 January 2003).

⁴⁶ Decisions regarding music performances may be found online: *Copyright Board Canada Web site*, <http://www.cb-cdagc.ca/decisions/music-e.html> (date accessed: 14 January, 2003).

⁴⁷ Refer to the Copyright Board’s Web site online: <http://www.cb-cdagc.ca/decisions/retransmission-e.html> (date accessed: 14 January 2003).

⁴⁸ See the decisions on private copying online: *Copyright Board Canada Web site*: <http://www.cb-cda.gc.ca/decisions/copying-e.html> (date accessed: 14 January, 2003).

⁴⁹ As some have suggested, perhaps far too many collectives. See Sunny Handa, *Copyright Law in Canada* (Markham: Butterworth, 2002) at 357: *The large number of collective management societies according to the author makes it, “difficult to navigate through the myriad of organizations in order to make a simple use of a work”.*

⁵⁰ A list of Canadian collective societies with Web links is available online: *Copyright Board Canada Web site* <http://www.cb-cdagc.ca/societies/index-e.html> (date accessed: 14 January, 2003).

⁵¹ D. Gervais, “Collective Management of Copyright and Neighbouring Rights in Canada: An International Perspective” (2002) 1 *Canadian Journal of Law & Technology*, 21, 39.

⁵² *Ibid.*, at 39-40.

⁵³ H. Cohen Jehoram, *supra note 20* at 135.

⁵⁴ For instance, imagine if corporations such as MTV or MuchMusic negotiated the use and fee for each song/video it broadcasted with individual artists. While artists such as U2 or Madonna would be in a position to negotiate on a balanced power basis, the same would not be said for new groups struggling to find any airtime.

⁵⁵ The recent Supreme Court of Canada decision of *Théberge* reiterated the need for a balanced approach and also emphasized the importance of the public domain to incorporate and embellish creative innovation:

31 The proper balance among these and other public policy objectives lies not only in recognizing the creator’s rights but in giving due weight to their limited nature. In crassly economic terms it would be as inefficient to overcompensate artists and authors for the right of reproduction as it would be self-defeating to undercompensate them.

32 Excessive control by holders of copyrights and other forms of intellectual property may unduly limit the ability of the public domain to incorporate and embellish creative innovation in the long-term interests of society as a whole, or create practical obstacles to proper utilization. This is reflected in the exceptions to copyright infringement enumerated in ss. 29 to 32.2, which seek to protect the public domain in traditional ways such as fair dealing for the purpose of criticism or review and to add new protections to reflect new technology, such as a limited computer program reproduction and “ephemeral recordings” in connection with live performances.

Théberge v. Galerie d’Art du Petit Champlain inc. (2002) SCC 34, at para. 31-32.

⁵⁶ *Ibid.*

⁵⁷ Some of this text is an updated version of an article by this author, D. Gervais, entitled, “Lock-It Up or License”, published as a chapter in H. Hanson (ed.) *International Intellectual Property Law & Policy* (6th ed.) (New York: Juris Publishing, 2000).

⁵⁸ Many national copyright regimes allow for exceptions such as fair dealing or fair use. Under such exemptions, users are allowed to perform acts which they would otherwise not be authorized to do. For example, users are often allowed to “tinker” with the source code of a computer program for the purpose of enhancing and adapting such programs. This is known as reverse engineering.

⁵⁹ This may be characterized as the “all or nothing” approach. If a creator makes available a work on the Internet, the ability to control the dissemination and use of the work is lost. The alternative is simply not to make available works over the Internet.

⁶⁰ It is important to note that the market remains immature. It is too early to conclusively determine that users will opt *en masse* to download free pirated versions of copyright works. A good example of this is the MP3 phenomenon. While Napster may have been shut down, other sites have since emerged to facilitate file-swapping of music. This, however, is not determinative of the state of the market. Companies offering on-line subscription services for downloading music have likewise seen a steady increase in sales. There is a common thread to both of these phenomena, accessing works in digital format is something that consumers want.

⁶¹ D. Gervais, *supra note 57*. In this study, the author examines in detail methods of adapting systems to facilitate access to works.

⁶² See for example: J. Hutchinson, *supra note 16*; H. Cohen Jehoram, *supra note 20*; and C. Jarvis, *infra note 63*.

⁶³ Others have advanced the view that collectives are preferred to individualized licensing based on the balanced footing argument. For example, C. Jarvis articulates:

And would it not be the case that setting up a “digital shop” offering works at set prices via the Internet will surely remove any user’s ability to negotiate according to individual circumstances. And, probably more importantly, how will the user know that the price is fair and reasonable? It is also not clear how any user will be able to work out who a particular copyright owner might be in such an environment (the collecting societies provide a unique “portal” in this respect) — so this could create another barrier to use that does not exist currently.

See C. Jarvis, "Broadcasts: Collective Licensing — The End or a New Beginning? Found in Collective Licensing: Past, Present and Future" (Netherlands: MAKLU Publishing, 2002) at 97.

⁶⁴ M. Kretschmer, "The Failure of Property Rules in Collective Administration: Rethinking Copyright Societies as Regulatory Instruments" (2002) E.I.P.R. 126 at 133. Under this theory, rightsholders will use digital rights management systems to control and disseminate the use of their works. *The author explains:*

In short, the transaction cost argument for collective administration from the cost of individual contracting may support not a universal rights administration system (to which all rightsholders have access on similar terms), but a system where the major rightsholders selectively decide, supported by sophisticated information technology, whether collecting licence fees is worthwhile.

⁶⁵ The proliferation of digital technology presents problems both to authors and copyright holders, as well as for users. As one author notes:

The advent of the digital age has allowed for new technologies to put the power of creation in the hands of the masses as never before. Similarly, digital technologies have allowed works of compilation (especially those that are in multimedia format) to develop at an unprecedented rate. For both creators of works, especially those that are not significant in size or value, and for those creating compilations or other works that require licensed rights from a large number of rights holders, the Copyright Act creates a formidable hurdle. Transaction costs in clearing rights (i.e., getting appropriate licences and authorizations) are often extremely high relative to the value of the work being created and certainly as compared to the value of the work being cleared. Rights clearance is undoubtedly one of the central copyright issues for the first half of the 21st century.

S. Handa, *supra* note 49 at 354.

⁶⁶ For an expansive overview of the different underpinnings of a copyright system see and compare: W.L. Hayhurst, "Intellectual Property Laws in Canada: The British Tradition, the American Influence and the French actor" (1996) 10 I.P.J. 265; M. Goudreau, "Le droit moral de l'auteur au Canada" (1994) 25 R.D.G. 403; Y. Gendreau, "Moral Rights" in G.F. Henderson, ed. *Copyright and Confidential Information Law in Canada* (Toronto: Carswell, 1994) 161; D. Vaver, *Copyright Law* (Toronto: Irwin Law, 2000) at 12; D. Vaver, *Intellectual Property Law: Copyrights, Patents, Trade-Marks* (Concord: Irwin Law, 1997); S. Handa, *supra* note 49; H.G. Fox, *The Canadian Law of Copyright* (Toronto: University of Toronto Press, 1944) at 12–32; Mikus, *Droit de l'édition et du commerce du livre* (Montreal: Éditions Thémis, 1996).

⁶⁷ Refer to note 1 where the idea of chaos theory was introduced and paralleled with fragmentation. Chaos theory looks at unstable periodic behavior. That is, there is no regular repetition of values making future prediction impossible. Oddly enough, however, one would expect such "chaos" to prevent any form of organization when, in fact, a coherent, albeit somewhat intangible, system emerges.

⁶⁸ In an Australian copyright study it was noted that, "identifying and finding copyright owners for the purpose of obtaining clearances was the issue most strongly identified by the producer respondents as their copyright concern in relation to multimedia". See J. Fitzgerald, "Licensing Content for Multimedia," (July, 1998) 84 Copyright World 23 at 23.

⁶⁹ See D. Gervais, *La notion d'œuvre dans la Convention de Berne et en droit comparé* (Genève : Droz, 1998). *The setting of applicable tariffs for Internet use of music was explored in the controversial "Tariff 22" Decision.* *Infra* note 73 and accompanying text.

⁷⁰ In the case of the use of music, users could obtain a licence from SOCAN to play/use music for karaoke, skating arenas, bars, and public performances. The demarcation lines with the Internet, however, did not neatly fit within existing uses and licences. For example, what if a band chose to perform an Alannis Morissette song streamed in realtime which would be shown live in a bar in Toronto. *The advent of the Internet poses new challenges to such traditional licences.*

⁷¹ Of course, each fragment can itself be split. The owner of the right for the hardcover edition may not be the same as for paperback.

⁷² Because they needed to make temporary copies of material to be broadcast and this involved another right, legislators in several countries, including Canada (*supra* note 2 at ss. 30.8 and 30.9 of the Act), opted for so-called "ephemeral recordings".

⁷³ The Copyright Board addressed the issue when a communication occurs to the public via the Internet in its Tariff 22 decision. In answering whether a communication on the Internet occurs, the Board held that:

"the communication must originate from a server in Canada"; "communications triggered by an embedded hyperlink occur at the site to which the link leads"; for a cache, "the communication occurs at the location of the host or mirror site from which the cache originally obtained the information". On appeal, the Federal Court of Appeal confirmed that a communication to the public is made, "when the transmission of material from the server occurs, and not when the content provider chooses the means through which to communicate". *Re SOCAN Statement of Royalties (Tariff 22, Internet), [2002] FCA 166 at para 133; [1999] 1 C.P.R. (4th) 417.*

⁷⁴ Refer to the CMRRA and SODRAC filings at the Copyright Board online: Copyright Board Canada Web site <http://www.cb-cda.gc.ca/tariffs/proposed/mn11052002-b.pdf> (date accessed: 14 January, 2003).

⁷⁵ By way of example, there has been much debate as to whether the retransmission regime applies to Internet broadcasting. Many interest groups have lobbied to amend the Act to exclude Internet retransmissions. For more information about the debate surrounding Internet retransmission see, "Consultation Paper on the Application of the Copyright Act's Compulsory Retransmission to the Internet", online: Canada's Business and Consumer site <http://www.strategis.ic.gc.ca/SSG/1/rp0008e.html> (date accessed: 14 January, 2003). Submissions and comments on retransmission are available online: Canada's Business and Consumer site <http://www.strategis.ic.gc.ca/SSG/rp01100e.html> (date accessed: 14 January, 2003). This debate led to Bill C-48 *An Act to Amend the Copyright Act, passed by the House of Commons on June 18, 2002.*

⁷⁶ See M. Einhorn and L. Kurlantzick, "Traffic Jam on the Music Highway" (2002) 8 J. of the Copyright Society of the USA 417. ("Since these rights are controlled by different parties and agents, the complexity of the system leads to a gridlock of control that may hinder development.")

⁷⁷ A contract to allow Web casting normally refers to the function of broadcasting, independently of whether a communication to the public, one or more reproductions, or adaptations may take place. The problem is that rights ownership is still by and large, especially in the area of collective management, owned by different entities based on the rights, not the functions. While a single economic transaction should take place, several legal transactions are involved. See A. & B. Kohn, *Kohn on Music Licensing* (2nd ed.): 2000 Supplement (New York: Aspen Law & Business, 2000), at 398-9.

⁷⁸ See M. Einhorn and L. Kurlantzick, *supra*, note 75, at 417. ("At least four distinct rights are implicated in the use of any piece of recorded music in digital audio.") M. Lemley, "Dealing with overlapping Copyrights on the Internet" (1997) 22 Dayton L. Rev. 548 at 565-6. ("Consider the case of an individual who provides an 'Internet radio' service to subscribers, selecting and sending digital versions of recorded songs via the Internet in real time. If this individual transmits a copyrighted song, what copyright violations have occurred? He has made a copy of the song in his computer by loading the song in the first place, violating the reproduction rights of both the owner of the musical composition copyright and the owner of the sound recording copyright. He has also caused additional copies of the song to be made in the computers of each of the recipients, constituting more violations of each right. If fixation in RAM is sufficient for copyright infringement, he has made or caused to be made a minimum of seven copies, and more likely a few dozen, for each recipient of the service. Again, each of these copies potentially violates the rights of two different copyright owners.")

⁷⁹ See online: Screenwriters Guild of America <http://screenwritersguild.org> (date accessed: 14 January, 2003). *Canadian organizations representing screenwriters include the Writers Guild of Canada, which created a new collective, the Canadian Screenwriter Collection Society (CSCS). See online: Canadian Screenwriter Collection Society <http://www.writersguildofcanada.com/cscs/index.html> (date accessed: 14 January, 2003).*

⁸⁰ A. and H.-J. Lucas, *Traité de la propriété littéraire et artistique* (2nd ed.) (Paris : Litec, 2001) at 222-3.

⁸¹ *Ibid.* at 172. See also Articles 2, 7 and 9 EU Council Directive 92/100/EEC of November 19, 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (OJ L 346, 27.11.1992, as amended by Council Directive 93/98/EEC of 29 October 1993 (OJ. L 290, 24.11.1993)).

⁸² Many composers changed their U.S. performing right affiliation from ASCAP to BMI, or vice versa, and may thus have rights that at a certain point in time were administered by one society and later by another.

⁸³ iCraveTV was not able to survive even the first round of litigation. Meanwhile, online music delivery services are struggling to survive in the

current market. Broadcasting online, whether it is television or radio, has yet to find a viable business model.

⁸⁴ M. Einhorn, *supra* note 76 at 420.

⁸⁵ Collectives have gained essential experience in developing successful licensing models, establishing a strong customer basis, and have experience working with the various artists and distributors of content.

⁸⁶ Electronic rights management systems (ERMS) are also referred to as digital rights management systems (DRMS) and copyright management systems (CMS).

⁸⁷ See J. Cunard, "Technological Protection of Copyrighted works and Copyrighted Management Systems: A Brief Survey of the Landscape," ALAI Congress 2001. See also D. Gervais, "Electronic Rights Management and Digital Identifier Systems" (1999), online: *The Journal of Electronic Publishing* <http://www.press.umich.edu/jep/04-03/gervais.html> (date accessed: 15 January 2003).

⁸⁸ Many licences to use a work are granted where the user obtains permission for several different uses of a work. It may be the case that the user only requires the work for a specific purpose. Why should the user pay to acquire rights to use a work in a manner for which he/she has no intention of using it for?

⁸⁹ *The Wall Street Journal Online* and *The New York Times* on the Web utilize a technology called "Rightslink". This technology allows a user to click on the "Rightslink" icon. The system will prompt the user to provide certain information, and agree to a set of terms. At this point the user may e-mail the article to a friend or colleague or reprint and republish the article. See online: Rightslink <http://rightslink.copyright.com> (date accessed: 15 January 2003).

⁹⁰ Examples include Content Scrambling System (CSS) and Secure Digital Music Initiative (SDMI). See online: Secure Digital Music Initiative Web site www.sdmi.org (date accessed: 15 January 2003).

⁹¹ One of the better known early examples of a DRM model is the European Imprimatur Project. This particular DRM can be broken down into four key components: a unique identification number, an intellectual property rights database, a monitoring service provider and a certification authority. See G. Greenleaf, "IP, Phone Home: The Uneasy Relationship Between Copyright and Privacy" (2002) 32 (1) HKLJ 35 at 47. See also L. Bygrave and K. Koelman, "Privacy, Data Protection and Copyright: Their Interaction in the Context of Electronic Copyright Management Systems" (1998), online: Imprimatur Services Limited http://www.imprimatur.net/IMP_FTP/privreportdef.pdf (date accessed: 16 January 2003).

⁹² The slow adoption of legal music sites is one such example. In fact, even sites backed by large record companies face copyright hurdles. See Amy Harmon, "Copyright Hurdles Confront Selling of Music on the Internet", *The New York Times*, Sept. 23, 2002, online: *New York Times Online* <http://www.nytimes.com/2002/09/23/technology/23MUSL.html> (date accessed: 15 January 2003). The amount of controversy of the "Berman Copyright Bill", which would allow copyright holders to find and interrupt downloads of material they think is unauthorized. See Declan McCullagh, "Hollywood hacking bill hits House", CNET News.com, July 25, 2002, online: CNET News.com <http://news.com.com/2100-1023-946316.html> (date accessed: 15 January 2003); and by the same author "P2P foes defend hacking bill", CNET News.com, Sept. 26, 2002, online: CNET News.com <http://news.com.com/2100-1023-959774.html> (date accessed: 15 January 2003). As we have argued elsewhere (see Daniel Gervais, "Copyright and eCommerce", in *Intellectual Property in the Global Marketplace* (2nd ed), 2002 Supplement (New York: Wiley & Sons, 2002), at 16A.5, the question is whether content providers should use all their resources to minimize unauthorized uses, or rather maximize authorized (paid) ones. Clearly, the assumption that every unauthorized copy is a lost sale is wrong. On this point see Reuters "KPMG study faults entertainment companies' focus on piracy", Sept. 24, 02, online: SiliconValley.com <http://www.siliconvalley.com/mld/siliconvalley/news/editorial/4144704.htm> (date accessed: 15 January 2003).

⁹³ These systems often perform several functions. The first, if so required, is to break down the rights in a work (more the case with multimedia works). The second function is to identify the rightsholder(s) of the work. The third function is then to clear these rights, followed by establishing licence terms, and payment of fees for the use of a work. Such technologies facilitate the expediency and efficiency of licensing content online. See T. Koskinen-Olsson, "Secure IPR-Content on the Internet" ALAI Congress 2001.

⁹⁴ Interestingly enough, this potential problem was addressed in the 1977 Keyes and Brunet report, "... a multiplicity of societies administering

identical rights should not be encouraged, rather, potentially monopolistic societies should be controlled and regulated". See Keyes & Brunet, *supra* note 21 at 215.

⁹⁵ These would seem to follow the best practices emerging from ongoing efforts in countries other than the U.S. This will be explored in greater detail when addressing centralized licensing regimes or one-stop-shop services.

⁹⁶ Internationally, very few countries have adopted compulsory licensing of digital uses. Such a system exists in the Danish legislation but has yet to be applied in practice. It would be an extension of the licence existing under ss. 13 and 14 of the *Danish Copyright Act, 14/06/1995, No. 395*.

⁹⁷ The report tabled by the Minister of Industry and the Minister of Canadian Heritage pursuant to s. 92 of the Act refers to this as a potential solution. See "Supporting Culture and Innovation: Report on the Provisions and Operation of the Copyright Act" (2002), online: Government of Canada Web site <http://www.strategis.ic.gc.ca/SSG/rp00863e.html> (date accessed: 15 January, 2003). The issue of extended licensing is discussed at section B.1.1. of the Report, "Collective management of copyright."

⁹⁸ See P. Grant, *supra* note 27 at 209. Grant espouses the idea that the advantage of collectives is that they reduce transmission costs and allow for greater efficiencies. He argues that the regulatory regime within the Copyright Act allows for a dominant collective to emerge and forces users to deal only with that particular collective. This greatly facilitates the advance clearance of rights. From the authors' point of view, such efficiencies were gained by virtue of the fact that works were not necessarily multi-purpose. One could purchase the licensing rights to a song for example, or to use a photograph. The situation is complicated by the proliferation of multimedia where rights are not as easily broken down.

⁹⁹ See T. Koskinen-Olsson, "Copyright, Repography & Digital Use", online: Kapiosto <http://www.kapiosto.fi/tiedotus/sida.htm> (date accessed: 15 January 2003). See also S. Simpson, "Review of Australian Collecting Societies" (1995), online: Department of Communications, Information Technology and the Arts Home Page <http://www.dcita.gov.au> (date accessed: 15 January, 2003).

¹⁰⁰ As it stands, collectives sometimes negotiate different licensing terms and fees with users regardless of whether the actual "use" of the work is similar in nature.

¹⁰¹ This might also provide the impetus for collaboration of establishing fair and competitive user fees.

¹⁰² The Board had "combined" the CPRS and CAPAC tariff prior to their merger.

¹⁰³ See *supra* note 55.

¹⁰⁴ By discriminatory, we are referring to different fees for different users, as well as different compensation schemes for different creators, many of whom are members of the same collective.

¹⁰⁵ It has been asked in the S.92 Report in section B.2.8, "Whether sections 29 and 29.1 of the Act should be amended to expand the scope of fair dealing to ensure that it does not exclude activities that are socially beneficial and cause little prejudice to rights holders' ability to exploit their works and other subject matter." *Supra* note 97. Such an expansion of fair dealings might include a right to browse materials available on the Internet or might refer to time transferring on the Internet.

¹⁰⁶ This is often why users choose to create new works or to use works in the public domain. If works subject to copyright were automatically covered under a compulsory licence, one would speculate increase in the actual use of such works.

¹⁰⁷ Of Sept. 9, 1886, as last revised at Paris, July 24, 1971, S. Treaty Doc. No. 99-27, 828 U.N.T.S. 221.

¹⁰⁸ Of April 15, 1994, Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization ("WTO Agreement"), (1994) 33 I.L.M. 1197.

¹⁰⁹ See D. Gervais, *The TRIPS Agreement: Drafting History and Analysis* (London: Sweet & Maxwell, 1998) at 88-91.

¹¹⁰ Although clearly not a violation of the text of TRIPS, one could argue that the extended licence has the effect of impairing, to a certain degree, the exercise of exclusive rights and that nullifies and impairs expected benefits under the TRIPS Agreement. Under GATT and WTO law, member States may win a panel decision even without a violation of the text of any WTO agreement, if they could show such nullification or impairment of benefits reasonably expected under the Agreement. See WTO Agreement, Article XXIII; and J. H. Jackson, *World Trade and the Law of GATT* (Charlottesville: The Michie Company, 1969), at 178-186. However, Article 64(3) of TRIPS suspended any such dispute in the area

of intellectual property until January 1, 2000, and such suspension was extended indefinitely at the Doha Ministerial Conference in paragraph 11.1 of the Decision Concerning Implementation-related issues and concerns of 20 November 2001, WTO document WT/MIN(01)/17, online: World Trade Organization http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_implementation_e.htm (date accessed: 15 January 2003). See also Daniel Gervais, *The TRIPS Agreement: Drafting History and Analysis*, *ibid.* at 249-50.

¹¹¹ M. Ficsor, *supra* note 13.

¹¹² As H. Cohen Jehoram notes in the European context:

The changes which must be realized in the present copyright societies are not to be underestimated. It is not just a question of technical automation. That would only be a relatively minor operation. It is to be feared, however, that a psychological and political watershed is also at issue here: that human minds will have to change, always a painful operation. Copyright societies have historically been created by professional artistic and literary associations, which represented not only the individual interests of their members, but also the interests of the profession as such. The old leveling system of fixed tariffs for everyone was not only dictated by efficiency, but it also the interests of the profession as such. The old leveling system of fixed tariffs for everyone was not only dictated by efficiency, but it also met certain social concerns of the associations for their less successful members. The present trend towards radical individualization in general is squarely contrary to these concerns. Copyright in the hands of the reorganized societies will be an unmitigated capitalistic tool, a mere instrument to have rights smoothly and precisely taken care of in electronic commerce. The present collective administration will have to give way to central administration of rights.

Supra note 20 at 137.

¹¹³ B. Hugenholtz identifies several licensing problems for multimedia products in Europe including: multiplicity of rights, multiplicity of rights owners, overlapping rights, legal insecurity, lack of established licensing practices and foot dragging. See B. Hugenholtz, "Copyright and Multimedia: Licensing in the Digital Era" (1996), speech for the Congresso Europeo Derecho Audiovisual online: Instituut voor Informatierecht <http://www.ivir.nl/publications/hugenholtz/PBH5.doc> (date accessed: 15 January 2003).

In July 1995, the European Commission issued the European Commission Green Paper of 27 July 1995 on Copyright and Related Rights in the Information Society ("Green Paper" online: SCADPlus <http://europa.eu.int/scadplus/leg/en/lvb/l24152.htm> (date accessed: 15 January 2003)). One of the key issues identified in the Green Paper was the complicated licensing problems involved in producing and publishing multimedia works. The Green Paper called for the need to create "clearing houses" which would act as a form of a centralized licensing agent or as they are now referred to as, "one-stop-shop" services. Thus, collectives would utilize the clearance centre to facilitate the acquisition and management of multimedia rights. The Green Paper, however, rejected the idea that these "one-stop-shop" centres should be non-voluntary opting instead, to leave it to the market.

¹¹⁴ France: In 1995, SESAM was the first clearing centre to be established in Europe. It incorporates five collective management societies: ADAGP, SACD, SACEM, SCAM, and SDRM (See SESAM online: <http://www.sesam.org> (date accessed: 15 January 2003)). Another excellent overview of SESAM use of digital rights management systems may be found in B. Salvas, "La gestion collective à l'heure d'Internet," (2000) 13 C.P.I. 139). Germany: In Germany, CMMV was formed in 1996 and is comprised of nine collecting societies: GEMA, GVL, VG WORT, GÜFA, GWFF, VG BILDKUNST, VFF, VGF, and AGICOA (See online: CMMV Home Page <http://www.cmmv.de> (date accessed: 15 January 2003)). Netherlands: CEDAR was formed in the Netherlands exclusively to address multimedia rights clearance. Its wide variety of members consist of: Beeldrecht, Burafo, Buma/Stema, Foto Aniem, Leenrecht, Lira, Musi@copy, Nieuwswaarde, Pro, Reprrecht, SCRIO, and de Thuiskopie. Many of these members are, in turn, comprised of a multiple of societies. (See online: CEDAR <http://www.cedar.nl> (date accessed 15 January 2003)). Others include Finland's KOPIOSTO, Italy's SIAE, Norway's CLARA, Spain's OM and Sweden's COPYSWEDE.

¹¹⁵ INDECS is the Interoperability of Data in E-Commerce Systems. See Schippan, "Purchase and Licensing of Digital Rights: The VERDI Project and the Clearing of Multimedia Rights in Europe" (2000) 22 E.I.P.R. 24 at 26.

"The subject of the INDECS project is the creation of a common format — a unique metadata code — to achieve a high level of interoperability between different identification systems."

¹¹⁶ EFRIS stands for the Extended Frankfurt Rights Information System. See Schippan, *ibid.*

"The aim of the EFRIS project is to intensify the transaction around the Frankfurt Book Fair by encouraging the adoption of Internet-based-standards and thus facilitating the trade with multimedia rights."

¹¹⁷ The TV FILES project refers to the Intellectual Property Rights for TV Programmes. Schippan, *supra* note 115.

"TV FILES seeks to establish a database with audiovisual works to create a contact network between European TV programme buyers, film producers and multimedia producers."

¹¹⁸ PRISAM refers to the Producers Rights Information System for Audiovisual and Multimedia. Schippan, *supra* note 115.

"PRISAM's aim is to create a 'one-stop information shop' to facilitate negotiations between European producers and editors of multimedia products on the one hand and rightsholders on the other... The one-stop information shop will contain all sorts of audiovisual works needed for the development of multimedia products, except for news and sports events."

¹¹⁹ ORS refers to Open Rights System. Schippan, *supra* note 115.

"The subject of ORS is to construct a prototype software which would enable producers of multimedia software to obtain from right owners the necessary authorization to use objects or works protected by intellectual property rights."

¹²⁰ BONA FIDE is the Broker-Based Network Architecture for Fail-Safe IPR Clearance of Digital Content. Schippan, *supra* note 115 at 27.

"BONA FIDE aims to develop a pilot broker system designed to register, store, distribute and monitor usage of multimedia material."

¹²¹ *Ibid.*

"The 'before copyright' project foresees the establishment of a network-connected agency whose main task is to co-ordinate the activities of multimedia producers in the audiovisual sector at a very early stage."

¹²² COMPAS is the Copyright Management and Multimedia Rights Clearance Best Practices for Educational Multimedia. Schippan, *supra* note 115.

"The aim of COMPAS is to identify the main difficulties involved in funding, producing, distributing and marketing multimedia products designed for training and educational purposes, review current procedures for managing multimedia rights and streamline them by developing common reference standards."

¹²³ RCTRIDW is the Rights Clearance for a Trans-Regional Integrated Digital Warehouse. *Supra* note 115.

"RCTRIDW sets out to study the feasibility of creating a multimedia rights clearance system for a digital multimedia warehouse operating across seven European minority-language regions and designed to allow transregional commercial exploitation of public sector film, TV and radio archive."

¹²⁴ VERDI is the acronym for "Very Extensive Rights Data Information." See Schippan, *supra* note 115.

¹²⁵ T. Ueno, "Taking a Step Forward Toward Achieving Harmonization and Cooperation Between Technology and Law" online: http://www.cric.or.jp/cric_e/cuj/cuj99/cuj99_3.html.

¹²⁶ See Zentaro Kitagawa, "Future of the Copyright Law System", lecture presented at the symposium "Copymart: The Product and its Prospects", held in Berlin on Sept. 5 and 6, 2002 (on file with authors — to be published). See also online: Copymart Home Page http://www.copymart.gr.jp/english/tophome_e.html (date accessed: 15 January 2003).

¹²⁷ *Ibid.*

¹²⁸ See online: Copyright Clearance Center <http://www.copyright.com> (date accessed: 15 January 2003).

¹²⁹ While such systems may be fostered and funded by governments, they are often voluntary. Likewise, market players have had a large influence in the establishment and terms of operation of such one-stop-shop systems.

- ¹³⁰ J. Hutchinson, *supra note 16 at 32*.
- ¹³¹ Although one important step in this direction is the so-called Santiago Agreement, which clarifies among performing rights collectives that the licensor of a content provider shall be the society of the country where the content provider has its actual and economic location and that the licence granted to the content provider is valid worldwide. See J. Becker, "Santiago Agreement and 'Fast Track'" (2001) 163 GEMA News. Online: GEMA News <http://www.gema.de/engl/communication/news/n163/santiago.shtml> (date accessed: 15 January 2003). If applied successfully, this may not deal with all applicable rights (including public performance/communication to the public and reproduction, and only covers a specific use). Still, it is a step in the right direction.
- ¹³² J. Channon, "Ring Tones," in *Collective Licensing: Past, Present and Future (Netherlands: MAKLU Publishers, 2002) at 85*.
- ¹³³ This is not to say that, as both technology and practices evolve, such a system would be unworkable at the mass market level, but that such a system for individual users is not yet feasible.
- ¹³⁴ Mandating non-voluntary central licensing centers, however, may raise issues of competition law.
- ¹³⁵ Re SOCAN Statement of Royalties (Tariff 22, Internet), [1999] 1 C.P.R. (4th) 417.
- ¹³⁶ [2002] FCA 166.
- ¹³⁷ Application for leave to appeal filed July 31, 2002. [2002] S.C.C.A. No. 289.
- ¹³⁸ The case of iCraveTV is also relevant in this context. It raises doubts about the extent to which Internet transmissions of broadcasts could qualify as "retransmissions" and consequently benefit from the non-licensing voluntary regime of section 31 of the *Copyright Act*. *COPIBEC and CANCOPY have already obtained the right to licence certain digital secondary uses of printed material from several member rightsholders*.
- ¹³⁹ The notion of "société de perception" could perhaps appropriately be expanded to provide centralized administration of rights clearance.
- ¹⁴⁰ For more information about this negotiation see <http://www.biem.org>.
- ¹⁴¹ *Ibid.*
- ¹⁴² *Ibid.*
- ¹⁴³ For example, the GEMA decisions held that rightsholders were free to assign their repertoires to the society offering the best terms. Another example is EMI who established its own independent collection agent, the *Music Rights Society Europe (MRSE)* as opposed to using a collective society. A final example involves the *Central Licensing Agreement* which had been entered into between *PolyGram Records* and *MCPS*. The novel feature arising from this Agreement related to *MCPS's* proposals in respect of accounting direct to publishers in the country of sale rather than to the societies, thereby speeding up payments to publishers and reducing commission costs.
- ¹⁴⁴ The standard contract between BIEM and IFPI may be found online: BEIM <http://www.biem.org/biem/bportail.nsf/55f702a4cb425d15c125692700379d1d/f1046b60cccd4844c12569a5004a269d?OpenDocument> (date accessed: 15 January 2003).
- ¹⁴⁵ For a detailed account of this agreement see <http://www.nmpa.org/nmpa/nv-sf97/cannes.html>.
- ¹⁴⁶ See (1998) 157 GEMA News. Available online: GEMA News <http://www.gema.de/engl/communication/news/n157/midem98.shtml> (date accessed: 15 January 2003).
- ¹⁴⁷ For a more detailed description of this project see <http://cisac.org/cisac/webcontent.nsf/midem2001>.
- ¹⁴⁸ The International Standard Audiovisual Number (ISAN). See "Terms Of Reference For ISO/TC 46/SC 9 Working Group 1 for the development of ISO Project 20925", ISO Document ISO/TC 46/SC 9/WG 1 N 189 of June 19, 2002. Available online: National Library of Canada Web site <http://www.nlc-bnc.ca/iso/tc46sc9/wg1/wg1n189.pdf> (date accessed: 15 January 2003).
- ¹⁴⁹ See D. Wood, "Collective Management and EU Competition Law," found in *Collective Licensing: Past, Present and Future (Netherlands: MAKLU Publishers, 2002)*.
- ¹⁵⁰ A. Kabat proposes that a worldwide Internet collecting society be established. See A. Kabat, "Proposal for a Worldwide Internet Collecting Society: Mark Twain and Samuel Johnson Licenses," (1998) 45(3) *J. Copyright Soc. USA* 337. B. Salvat makes an interesting comment on this solution:
 Alan R. Kabat utilize justement comme argument en faveur de la creation d'une telle société de gestion collective unique consacrée à Internet la difficulté d'en arriver à un dénominateur commun entre les différentes règles nationale régissant le droit d'auteur. Il soutient que la creation d'une tel société unique, qu'il nomme WICS (Worldwide Internet Collecting Society).
Supra note 114 at 182.
- ¹⁵¹ See E. Miller and J. Feigenbaum, "Taking the Copy Out of Copyright," (Information Society Project, Yale Law School, 2002), online: Computer Science at Yale University <http://www.cs.yale.edu/homes/jf/MF.pdf> (date accessed: 10 January 2003).
- ¹⁵² See M. Lemley, *supra note 78 at 583*.
- ¹⁵³ See Neil Netanel, "Impose a Noncommercial Use Levy to Allow Free P2P File-Swapping and Remixing", draft paper available online: University of Texas at Austin http://www.utexas.edu/law/faculty/nnetanel/Levies_chapter.pdf (date accessed: 15 January 2003).
- ¹⁵⁴ A digital transmission right was introduced in the Japanese *Copyright Act*. See D. Gervais, "Transmissions of Music on the Internet: An Analysis of the Copyright Laws of Canada, France, Germany, Japan, the United Kingdom and the United States" (2001) 34 *Vanderbilt J. of Transnat'l L.* 1363 at 1382.
- ¹⁵⁵ See A. Christie, "A Proposal for Simplifying United Kingdom Copyright Law", (2001) 23 *Eur. Intell. Prop. Rev.* 26; and Shira Perlmutter, "Convergence and the Future of Copyrights" (2001) 24 *Columbia-VLA J. L & the Arts* 163.
- ¹⁵⁶ See J. Ginsburg, "Can Copyright Become User-Friendly" (2002) 25 *Columbia-VLA J. L & the Arts* 71 at 83.