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## Intellectual Property

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# THE FAILURES AND PROMISES OF CANADA'S ALTERNATIVE COMPENSATION SYSTEM FOR PRIVATE REPRODUCTION OF COPYRIGHTED RECORDINGS

Evgenia Fkiaras<sup>1</sup>

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## Abstract

Canada's copyright system imposes a levy on manufacturers and importers of blank audio recording media. Revenue raised by this levy goes to the eligible owners of musical copyright—rightsholders. Thus, Canada squarely faces the reality of the modern age by acknowledging that users will duplicate copyrighted material at the same time that it attempts to guarantee compensation to certain rightsholders. Like its counterpart, the American Audio Home Recording Act of 1992, this system has certain fundamental flaws. What these flaws indicate about the future of copyright law is unclear.

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## INTRODUCTION

<1> At the threshold of the new millennium, John Perry Barlow of the Grateful Dead wrote of the public's common disregard of current copyright law: "We've won the revolution. It's all over but the litigation."<sup>2</sup> This forecast resonates today in the wake of a recent decision by the Canadian Federal Court of Appeal exempting manufacturers and importers of mp3 players from a levy imposed on recorders of blank media such as rewritable compact discs.<sup>3</sup> The revenue from this levy goes to eligible authors, performers, and makers who own rights in musical works embodied in sound

recordings—the rightsholders.<sup>4</sup> Since Canada anticipates that users will duplicate copyrighted recordings, it attempts to compensate rightsholders for such use through the distribution of the levy proceeds. Although this is a valiant effort to balance the needs of rightsholders with the reality of modern use, the Federal Court decision is one manifestation of the weaknesses of this levy system. Much like its counterpart in the United States, the American Audio Home Recording Act of 1992 (“AHRA”),<sup>5</sup> the Canadian levy system may prove ineffectual because of its misdirected technological focus. Contrary to Barlow’s assertion, a copyright reform revolution has hardly been won; it is still in the heat of battle, uncertain where it will go.

## LEVIES IN CANADIAN MUSIC COPYRIGHT LAW

<2> Canada’s Copyright Act (“Act”) protects the original expression of ideas, i.e., it protects certain categories of works and other subject matter.<sup>6</sup> It does so by giving the rightsholder a bundle of exclusive rights relating to the use of the protected work, including the right to reproduce it.<sup>7</sup> Pursuant to Part VIII, the Act allows duplication of copyrighted material for private use so long as rightsholders retain the right to be compensated for such reproduction.<sup>8</sup> To ensure this compensation, the Copyright Board of Canada (“Board”) is authorized to establish levies on manufacturers and importers of blank audio recording media that may potentially be used to store private reproduction.<sup>9</sup> One example is the audiocassette. This is a classic medium used to make the proverbial “mixed tape,” a colloquial reference to a collection of copies of what are usually copyrighted songs. The revenues from the levies on these media are then distributed to rightsholders.<sup>10</sup>

<3> The Board has implemented its statutory obligation through a series of levies on audiocassettes, MiniDiscs, recordable compact discs (“CD-Rs”), rewritable compact discs (“CD-RWs”), recordable audio compact discs (“Audio CD-Rs”), and rewritable audio compact discs (“Audio CD-RWs”).<sup>11</sup> Manufacturers and importers naturally pass on the cost of the levy to consumers, who thus pay more for their products.<sup>12</sup>

<4> The Board has an obligation to create levies that are “fair and equitable.”<sup>13</sup> The Canadian Private Copying Collective (“CPCC”)—the body that collects and distributes the levies<sup>14</sup>—implemented a system that had originally been approved by the Board called zero-rating. This system exempts from the levy purchasers who register that they do not partake in private replication of copyrighted musical works embodied in sound recordings (e.g., companies that duplicate media for businesses).<sup>15</sup> After the Federal Court of

Appeal declared zero-rating to have no statutory underpinning, the Board can no longer take this system into account in setting the levies.<sup>16</sup> The only parties whose exemption from the levy can be reflected in the rates set by the Board are those who have perceptual disabilities.<sup>17</sup> Other factors that the Board considers in setting the levies include a given medium's alternative uses.<sup>18</sup>

#### LEVIES AS COMPENSATION AND REGULATION: SIGNS OF WEAKNESS

<5> The weaknesses of the Act stem from the difficulty of identifying proper media and devices on which to impose the levy.<sup>19</sup> The narrow application of the Act's provisions reflects this difficulty: While it isolates certain kinds of media as subject to the levy, it does not authorize its imposition on other devices that actually duplicate copyrighted material. The same case that declared zero-rating unsupported by statutory law held that a permanently embedded memory incorporated into a digital audio recorder cannot be subject to the levy system.<sup>20</sup> This exempts the most ubiquitous of hard drive players used for music: the iPod and similar mp3 players.

<6> Essentially, the Act mandates levies on audio recording media, defined as "recording med[ia] regardless of material form, onto which a sound recording may be reproduced and that is of a kind ordinarily used by individual consumers for that purpose."<sup>21</sup> Interpreting this extremely broad provision, the Board had reached the conclusion that the levy was applicable in the case of digital audio recorders.<sup>22</sup> In so doing, it effectively took the position that it could look through the device being sold (e.g., the mp3 player) and reach the recording medium (i.e., the permanently embedded memory) found in that device.

<7> The Federal Court of Appeal disagreed with the Board. The court found, based on the Board's own reasoning and the private copying tariff that the Board certified, that "it is the device that is the defining element of the levy and not the memory incorporated therein."<sup>23</sup> The Court concluded that the Board could not "establish a levy and determine the applicable rates by reference to the device and yet assert that the levy is being applied on something else."<sup>24</sup> The ultimate subject matter of the levy was the device (i.e., the digital audio recorder) rather than a medium (i.e., memory) as defined in the Act. <sup>25</sup> Accordingly, the levy did not apply to digital audio recorders. <sup>26</sup> In so ruling, the Court acknowledged that the source of this exclusion was Parliament's difficulty in predicting the exact evolution of technology.<sup>27</sup>

<8> Parliament's understandable lack of foresight results in a revenue base that does not reflect reality. Broadening this base to

include a wider range of devices, however, creates other practical problems. Devices that are capable of reproducing, distributing, and retaining copyrighted material are so diverse in their functions and capabilities that it is difficult to subject even some of the most ubiquitous of them to levy systems without becoming overinclusive. Thus, the Board has not imposed the levy on digital versatile disks ("DVDs"), removable micro hard drives, and removable memory cards despite the CPCC's request that it do so. These devices may be used for the purpose of copying music, but the Act exempts them because that is not their ordinary use.<sup>28</sup>

<9> The current court battles surrounding some peer-to-peer file sharing systems—Kazaa, for example—also indicate how murky delineating such boundaries can be. While the issue in those cases is not the possible imposition of a levy but rather the legality of these systems, a similar issue is raised: whether the mere establishment of the infrastructure that allows the possibility of copying authorizes or encourages duplication of copyrighted works.<sup>29</sup> How to define the technology that is responsible for private reproduction of copyrighted audio recordings is as of yet a highly contentious issue.

<10> An analogous situation to the Canadian levy system is that of the AHRA in the United States. This statute established a royalty system on the sale of digital audio recording devices, such as audiocassettes, whose revenues are allocated among music rightsholders.<sup>30</sup> However, as with the Canadian Act, computer hard drives, video home recording devices, and mp3 players do not fall under the scope of the AHRA and are not subject to the levy.<sup>31</sup> Very little has changed since the AHRA was enacted in 1992, and many scholars are of the opinion that it has been ineffective both as a compensation mechanism and as a regulatory scheme for audio copyright.<sup>32</sup> At the very least, there is an undeniable tide of litigation over the private reproduction of copyrighted audio recordings despite the passage of the AHRA.<sup>33</sup> Given the parallels between the American and the Canadian levy systems, there is reason to think that the fate of the Canadian Act's levy could be very similar to that of the AHRA: statutory obsolescence.<sup>34</sup>

## THEORETICAL UNDERPINNINGS: THE CONUNDRUM OF NON-PHYSICAL PROPERTY

<11> The problems with the levies notwithstanding, at the heart of the Canadian system is a valiant attempt to address the problems of the unique character of intellectual property in the context of today's modern technology: Because intellectual property lacks physical form, the public often treats it as a public good. Like public goods, enjoyment of recorded music by one person does not preclude its enjoyment by others, i.e., it is nonrivalrous.<sup>35</sup> Most

significantly, modern technology recently has made recorded music nonexcludable—once music is released, it is nearly impossible to

contain and regulate its dispersal to others.<sup>36</sup> Physical property, on the other hand, is both rivalrous and excludable; it is no pipe dream to expect that those who purchase an item of physical property (e.g., a rake) will not duplicate and distribute exact replicas of this property.

<12> The ease of sharing copyrighted material, therefore, makes laws that limit the distribution and use of such material particularly difficult to enforce.<sup>37</sup> The United States' Digital Millennium Copyright Act ("DMCA")<sup>38</sup> perfectly illustrates this difficulty. The DMCA was enacted in 1998 to adapt copyright law to the digital age by making it a crime to override technological barriers limiting and controlling use of copyrighted material.<sup>39</sup> Despite the fact that the music lobby vigorously pursues these statutory rights in court,<sup>40</sup> 18 million consumers copied CDs and 27 million consumers made CDs from music files stored on their computers by the end of 2004.<sup>41</sup> The public often disregards—even if their actions are not based on conscious ideology—the private property rights of copyright owners because intellectual property currently lacks the rivalrous and excludable qualities of private physical property.

<13> Nevertheless, as is the case with public goods, it would be hard to create incentives for individuals to provide recorded music if none of the securities inherent in property rights were maintained. By retaining interests that include the rights of exclusion and remuneration for production, creators may theoretically recover the cost of producing music along with enough profit to make it worth their while to do so.<sup>42</sup> Thus, there were strong public policy reasons— "[t]o promote the Progress of Science and useful Arts" — behind the creation of copyright laws that granted creators exclusive rights to their works.<sup>43</sup> The Canadian system recognizes the dichotomy between the reality of a product's existence in the modern age and the need to create incentives for rightsholders to create the product.<sup>44</sup> The limitations of the Canadian levy system, however, demonstrate the inherent difficulty in translating an appreciation for the characteristics of intellectual property into a practicable regulatory and compensatory system.

## CONCLUSION

<14> Canadian copyright law represents a significant departure from models that presume enforceable exclusivity in intellectual property. It follows traditional models by guarding against unauthorized reproduction and distribution of protected material. At the same time, it recognizes the reality of a product—copyrighted sound recordings—that has ceased to be excludable. To balance the reality

of users who treat musical recordings as if they were a public good against the need to compensate creators for their products, the Act has imposed a levy on manufacture and importation of blank audio recording media. However, the exponential progress and divergence of technological systems pose serious questions about the practical impact of such a system; much like the AHRA, it is possible that it will prove unsuccessful in its current form as a compensatory and regulatory system for copyright.

<15> Despite the Canadian system's shortcomings, its theoretical underpinnings could prove invaluable as a springboard for copyright reform. At the end of the day, those involved with the music industry need to examine the lessons of Canada's levy system and grapple with the competing interests of rightsholders and users alike, whether through legal reform, technological innovation, or modification of current market models. Barlow was premature in declaring victory in his revolution against copyright as we know it; as the Canadian system of alternative compensation indicates, we are at a crossroads with regard to copyright law and our direction is not yet clear.

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#### Footnotes

1. Evgenia Fkiaras, University of Washington School of Law, Class of 2006. Thank you to Erin for her encouraging words and to Mr. Gilles M. Daigle for his meticulous editing.
2. John P. Barlow, *The Next Economy of Ideas*, Wired Magazine, Oct. 2000, at <http://www.wired.com/wired/archive/8.10/download.html>.
3. *Canada (Canadian Private Copying Collective) v. Canadian Storage Media Alliance*, [2004] F.C.A. 424, 2004 Fed.C.C. LEXIS 2023, at \*71.
4. *Id.* at \*2.
5. 17 U.S.C. §§ 1001-10 (2005).
6. See Copyright Act, R.S.C., ch. C-42 (1997) (Can.).
7. See, e.g., Alex Colangelo, *Copyright Infringement in the Internet Era: The Challenge of MP3s*, 39 Alberta L. Rev. 891, 902 (2002); Copyright Act, R.S.C., ch. C-42, § 3 (1997) (Can.).
8. See, e.g., Copyright Act, R.S.C., ch. C-42, §§ 81-82 (1997) (Can.); Colangelo, *supra* note 7, at 903.
9. *Canada (Canadian Private Copying Collective) v.*

10. Copyright Act, R.S.C., ch. C-42, §§ 81-84 (1997) (Can.).
11. *Canada (Canadian Private Copying Collective) v. Canadian Storage Media Alliance*, [2004] F.C.A. 424, 2004 Fed.C.C. LEXIS 2023, at \*4.
12. *Id.* at \*3. See also David Paterson, *Recordable Media Levy Handicaps High Tech Sector*, Globe and Mail (Toronto Can.), Jan. 4, 2000, at B12, at [http://www.cata.ca/Advocacy/Copyright\\_Board/levyarticle-Jan400.html](http://www.cata.ca/Advocacy/Copyright_Board/levyarticle-Jan400.html).
13. Copyright Act, R.S.C., ch. C-42, § 83 (1997) (Can.).
14. *Canada (Canadian Private Copying Collective) v. Canadian Storage Media Alliance*, [2004] F.C.A. 424, 2004 Fed.C.C. LEXIS 2023, at \*2-3.
15. *Id.* at \*4-5.
16. *Id.* at \*57.
17. See, e.g., *Id.* at \*36; Copyright Act, R.S.C., ch. C-42, § 86 (1997) (Can.).
18. *Canada (Canadian Private Copying Collective) v. Canadian Storage Media Alliance*, [2004] F.C.A. 424, 2004 Fed.C.C. LEXIS 2023, at \*60.
19. Parliamentary debates on the technology subject to the levy reflect an awareness of this difficulty. The debates included testimony that “the bill...you have before you is already obsolete, because there are already media on the market that go beyond what is provided in the bill, particularly in terms of sound recordings.” House of Commons, 35th Parliament, 2nd Session, Standing Comm. on Canadian Heritage, Meeting No. 24, Oct. 9 1996, at [http://www.parl.gc.ca/35/Archives/committees352/heri/evidence/24\\_96-10-09/heri24\\_blk101.html](http://www.parl.gc.ca/35/Archives/committees352/heri/evidence/24_96-10-09/heri24_blk101.html).
20. *Canada (Canadian Private Copying Collective) v. Canadian Storage Media Alliance*, [2004] F.C.A. 424, 2004 Fed.C.C. LEXIS 2023, at \*71.
21. Copyright Act, R.S.C., ch. C-42, § 79, 82 (2001) (Can.).
22. *Canada (Canadian Private Copying Collective) v. Canadian Storage Media Alliance*, [2004] F.C.A. 424, 2004 Fed.C.C. LEXIS 2023, at \*62-63.

24. *Id.* at \*67-68. *Journal of Law, Technology & Arts*, Vol. 2, Iss. 4 [2006], Art. 2
25. *Id.* at \*62. Thus, a blank audiocassette is subject to a levy, but a tape recorder is not. *See Id.* at \*71.
26. *Id.* at \*72.
27. *Id.* at \*69-70. *See also* House of Commons, 35th Parliament, 2nd Session, Standing Comm. on Canadian Heritage, Meeting No. 24, Oct. 9 1996, at [http://www.parl.gc.ca/35/Archives/committees352/heri/evidence/24\\_96-10-09/heri24\\_blk101.html](http://www.parl.gc.ca/35/Archives/committees352/heri/evidence/24_96-10-09/heri24_blk101.html).
28. *Canada (Canadian Private Copying Collective) v. Canadian Storage Media Alliance*, [2004] F.C.A. 424, 2004 Fed.C.C. LEXIS 2023, at \*60.
29. *See B.M.G. Canada Inc. v. Doe*, [2004] A.C.W.S.J. 4957 at ¶ 26. In the case of peer-to-peer file sharing systems, the specific issue is whether the placement of personal copies into a directory accessible to other users authorizes or encourages copyright infringement.
30. *Id.* §§ 1003-04, 1006.
31. *See, e.g., Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys.*, 180 F.3d 1072, 1077-79 (9th Cir. 1999); Urs Gasser et al., *Copyright and Digital Media in a Post-Napster World*, GartnerG2 and the Berkman Center for Internet & Society at Harvard Law School, at 6 (2002), at <http://cyber.law.harvard.edu/media/files/wp2005.pdf>.
32. *See Gasser, supra* note 31, at 6. *See also* Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 *Stan. L. Rev.* 1345, 1407 (2004) ("The AHRA hasn't seen much use...because the digital audio recording systems covered by the Act never caught on.").
33. *See* Press Release, Recording Indus. Ass'n of Am., *Copyright Infringement Lawsuits Brought Against 753 Additional Illegal File Sharers* (Feb. 28, 2005), at <http://www.riaa.com/news/newsletter/022805.asp>; Press Release, Recording Indus. Ass'n of America, *Prestigious Groups File Amicus Brief in Support of Recording Industry In Case Against Verizon* (June 20, 2003), at [http://www.riaa.com/news/newsletter/062003\\_2.asp](http://www.riaa.com/news/newsletter/062003_2.asp).
34. *See Gasser, supra* note 31, at 6.
35. William W. Fisher III, *Promises to Keep* 199-200 (Stanford University Press 2004).

36. *Id.* Karas: The Failures and Promises of Canada's Alternative Compensation Sy
37. John P. Barlow, *The Economy of Ideas*, Wired Magazine, Mar. 1994, at [http://www.wired.com/wired/archive/2.03/economy.ideas.html?topic=&topic\\_set](http://www.wired.com/wired/archive/2.03/economy.ideas.html?topic=&topic_set).
38. 17 U.S.C. §§ 512 et seq. (1998).
39. See Gasser, *supra* note 31, at 7; *The Digital Millennium Copyright Act*, The UCLA Online Inst. for Cyberspace Law and Policy (April 2004), at <http://www.gseis.ucla.edu/iclp/dmca1.htm>.
40. See Press Release, Recording Indus. Ass'n of Am., *Copyright Infringement Lawsuits Brought Against 753 Additional Illegal File Sharers* (Feb. 28, 2005), at <http://www.riaa.com/news/newsletter/022805.asp>; Press Release, Recording Indus. Ass'n of America, *Prestigious Groups File Amicus Brief in Support of Recording Industry In Case Against Verizon* (June 20, 2003), at [http://www.riaa.com/news/newsletter/062003\\_2.asp](http://www.riaa.com/news/newsletter/062003_2.asp).
41. See Gasser, *supra* note 31, at 13.
42. See Fisher, *supra* note 35, at 200.
43. U.S. Const. art. I, § 8, cl. 8.
44. See *C.C.H. Canadian Ltd. v. Law Soc'y of Upper Canada*, [2004] A.C.W.S.J. LEXIS 1057, at \*14; Michael Geist, *A Balanced Approach to Reforming Copyright Law*, University Affairs, Oct. 2004, at [http://www.universityaffairs.ca/issues/2004/october/copyright\\_law\\_01.htm](http://www.universityaffairs.ca/issues/2004/october/copyright_law_01.htm).  
 . Parliamentary debates on the efficacy of the system included testimony that "in the modern world control is often not possible. Often the only choice is either some kind of collective administration of copyright or just being robbed, and between those two choices collective administration is preferable." House of Commons, 35th Parliament, 2nd Session, Standing Comm. on Canadian Heritage, Meeting No. 24, Oct. 9 1996, at [http://www.parl.gc.ca/35/Archives/committees352/heri/evidence/24\\_96\\_10-09/heri24\\_blk101.html](http://www.parl.gc.ca/35/Archives/committees352/heri/evidence/24_96_10-09/heri24_blk101.html).

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