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INTRODUCTION

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The *Society for Economic Research on Copyright Issues* held its 2005 Congress in Montréal, Canada. Some of the papers presented at that congress are contained in this issue of *RERCI*. This introduction also includes a report on the round table session which was held on the pricing of copyright. For the sake of this introduction, the presentations could be informally regrouped under three headings: the proper compensation principles for copyrights; the phenomenon of copying and sharing, including the piracy activity; the development of the open/free source software movement.

In the first group of papers on the proper compensation principles for copyrights, appear the keynote contribution of Baumol and the paper by Oksanen and Valimaki.[1] In the second group on the phenomenon of copying and sharing, including the piracy activity, appear the papers by Keintz, Norbert, Rochelandet & Le Guel, and Farchy & Ranaivoson. In the third group on the open/free source movement, one finds the papers by Koski and Buainian & Mendes. The paper by Chow and Leo on the importance of the copyright industry in Singapore, can be considered independently.

In **Intellectual Property: How the Right to Keep it to Yourself Promotes Dissemination**, William J. Baumol presents the fundamental dilemma between the two somewhat contradictory objectives of Copyright law and policy, namely to ensure that the creators of the property can benefit from their efforts as a matter of equity and incentive for creative effort and to facilitate ease of access and dissemination to ensure maximal potential benefits to society as a whole. As Baumol asserts, the easier access to some IP is, the less its creator can hope to charge for it since if anyone can make use of it with no impediment, the price will be driven to zero. Moreover, a simplistic representation of static welfare theory is often used to justify a zero price for IP on the basis that once some intellectual property has been created, it becomes an economic public good: any restriction to its use is preventing the generation of positive benefits at zero social cost. But as stresses by Baumol, once intertemporal considerations are introduced, such an argument is simply wrong, if the zero price policy leads to a reduction in the future stock of IP.

In the paper **Copyright Levies as an Alternative Compensation Method for Recording Artists and Technological Development**, Ville Oksanen and Mikko Välimäki consider alternative compensation methods for recording artists. Alternatives such as collective (blanket) licenses or levies on recording devices or Internet connections are not only promoted by organizations such as the Electronic

[1] On this same topic, the round-table session also debated the issue of proper pricing of copyrights. A summary of this session is included below.

Frontier Foundation but also by academics. Oksanen and Valimaki begin by looking at copyright royalties and show that recording artist income is in practice not dependent on record sales as the music industry is much larger than the recording industry. They propose another levy-based compensation method, with the users having the power to vote how the levies should be distributed, and apply it to Finland. After describing the current Finnish copyright law and levy-system, Oksanen and Valimaki discuss governmental subsidies to the music industry, and show how to implement their method, why they would most likely go against both EU copyright directive and WIPO copyright treaties, what the impact would be on artists' income. They conclude with a discussion of the impact of extensive private copying not only on the copyright system but also on the alternative compensation proposals and the music industry in general.

In his paper **Digital File Sharing and the Music Industry: Was there a substitution effect?**, Norbert J. Michel adds to the several empirical studies exist that measure the impact of file-sharing services on music sales, which suggest that there was a negative impact on sales. Michel claims that most of these studies do not examine (at the household level) whether consumers substituted out of music and into movies. Using micro-level data from the Consumer Expenditure Survey (1998 through 2003) to test for this possible substitution effect, Michel shows that the data do not support the hypothesis that music consumers spent less on music because they spent more on either movie tickets or prerecorded movies (purchases or rentals).

In **DRMs: A New Strategic Stake For Content Industries. The Case of the Online Music Market**, Joëlle Farchy and Heritiana Ranaivoson observe that the recording industry has always been very dependent on the existing technologies and that the compact disc and the Internet have simply been the latest examples of this phenomenon. They analyse the development of Digital Rights Management systems (DRMs) as the way for the music industry to curb the expansion of online piracy. Farchy and Ranaivoson claim that the compact disc has been some kind of gold mine for the recording industry, at least for the major companies. The appearance of the blank CD allowed to copy music in a much better way than on blank tapes. As for the internet, major companies used to consider it as another way to distribute their music but the emergence of Napster made them realize that there might be something else behind this tool, hence the importance of developing Digital Rights Management systems. The authors observe that DRMs are often described as essential in the development of the legal online offer of content, notably of music. That is why they are becoming a crucial stake for the whole recovering music industry. Farchy and Ranaivoson make precise the strategic role of DRMs. Their aim is to study the technological competition between those firms that try to impose their standard on the growing market of DRMs. They find that the results of this competition may not be beneficial to the content industries.

In **P2P Music-Sharing Networks: Why The Legal Fight Against Copiers May Be Inefficient**, Fabrice Rochelandet & Fabrice Le Guel investigate empirically the behavior of copiers over P2P networks through an ordered Logit model of intensity using a unique dataset collected from more than 2,500 French households. In accordance with the prediction of the Beckerian framework, copying behavior is negatively correlated with the willingness to pay for an original when a copy is available. But individuals are influenced by their social neighboring and their

learning about copying as, while motivated by the search for diversified contents, they remain very concerned with artists' interests.

In **The Recording Industry's Digital Dilemma: Challenges and Opportunities in High-Piracy Markets**, Brett Keintz observes that the recording industry has experienced significant revenue decline and piracy growth over the last five years. He claims that in some countries like the United States, piracy is comprised mainly of the illegal sharing of digital recorded music files while in other countries like Spain, recorded music piracy is dominated by the production and distribution of CD-R by organized crime networks. Keintz claims that efforts such as legislative and law-enforcement changes have at best slowed the growth of piracy activity and that the recording industry must develop a strategy, aimed at restoring revenue growth and reducing piracy, based on offering consumers a "compelling digital music value proposition."

In **Free Software and Intellectual Property in Brazil: Threats, Opportunities and Motivations**, Antônio Márcio Buainain and Cássia Isabel Costa Mendes discuss the implications of the intellectual property system as applied to software, especially the use of patents, for innovation in developing countries. They also assess the possible consequences of free software and a new intellectual property system on innovation in Brazil; to do so, they analyse the new approach to intellectual property in the current debate on 'global patents' versus more flexible copyright system. They discuss the flexible copyright system to promote technological innovation, the meaning of the reduction of income of software companies in developed countries as an indicator of a possible exhaustion of the sales model of software, the threats and opportunities for the new business model based on free software and copyleft licence in Brazil, and finally the motivations for using and developing free software to promote the Brazilian software industry.

In **OSS Production and Licensing Strategies of Software Firms**, Heli Koski sheds light on the relatively recently emerged new business models employing open source activities in the software industry. He analyses data from 73 Finnish OSS companies' product type (proprietary versus OSS product) and license type (copyleft versus non copyleft licenses) choices and shows that firm ownership structure has a major influence for the software firms' business strategies. Family-owned firms tend to rely on the traditional proprietary software in their product selection, whereas widely-held companies are more likely to supply OSS products while service-oriented firms are likely to offer more complementary products and supply their products more often under the OS licenses. The servers are more likely to be licensed under the non copyleft license. Moreover, the more restrictive form of licenses, the copyleft license, is used more often in companies active in open source software development projects. This finding is consistent with the earlier studies that have found that more than 70% of the OSS development projects employ the GPL copyleft license.

In **Economic Contribution of Copyright-Based Industries in Singapore**, Kit Boey Chow and Leo Kah Mun perform the first study on Asia, based on the new comprehensive WIPO framework for measuring the economic magnitude of copyright-based industries. Started in November 2003, the study shows that Singapore's copyright-based industries generated in 2001 an output of S$30.5 billion and

value added of S$8.7 billion which was equivalent to 5.7% of GDP. The 29 copyright-based industries provided employment to 118,600 persons or 5.8% of Singapore's workforce in 2001.

A special and innovative activity took place at this 2005 Congress, namely a roundtable on **The Pricing of Music Copyrights** during which participants explored the main legal and economic forces to be considered in determining prices for music copyright. Roundtable participants included Besides Gilles McDougall, Director of Research and Analysis at the *Copyright Board of Canada*, the panel included Lilla Csorgo, Economist Lay Member of the *Canadian Competition Tribunal*, Paul Audley, President of *Paul Audley and Associates*, Fred Lazar from *York University* and Claude Brunet, national administrator of the intellectual property group of the law firm *Ogilvy Renault*. Marcel Boyer from the *Centre interuniversitaire de recherche en économie quantitative*, the *Centre interuniversitaire de recherche en analyse des organisations* and the the *Université de Montréal* chaired the discussion.

Music as a commodity has characteristics of public goods: its consumption is non-rivalrous and non-exclusive. It is non-rivalrous because consumption by one individual does not decrease consumption by another individual. It is non-exclusive in that it is not possible (or very costly) to prevent others from consuming it without authorization. In such cases, markets become less efficient at establishing optimal prices. A public body can intervene to take up the role of the market and establish prices that will be optimal from the society's point of view. In addition, because of the non-exclusive nature of music, music collectives were formed, with the objective to prevent the non-authorized consumption of music. However, by their very nature, the formation of these collectives have resulted in entities that reduce the amount of competition among copyrighted pieces of music. Public bodies help assure in cases where the formation of such collectives have resulted in market power that this market power is not abused.

In Canada, the *Copyright Act* establishes many different copyrights for music. For instance, authors and composers of a musical work have the exclusive right to perform it in public, to authorize it, to communicate it to the public by telecommunication and to reproduce it. Performers and makers have a right of remuneration for the performance in public or the communication to the public by telecommunication of published sound recordings and performers' performances.

Some of these rights can be administered individually. In these cases, rights owners are responsible for negotiating directly with the users, and the prices for the use of the rights are generally the result of economic forces coming into play. However, many of the copyrights are administered collectively. The primary owners of the rights transfer their rights to a collective society who is responsible for administering "collectively" the various rights it then owns. In such cases, institutions such as the *Copyright Board of Canada* can intervene to consider the characteristics of the market for a particular right, and set a price that would otherwise prevail in a competitive market.

Gilles McDougall began the session by describing the nature and the role of the *Copyright Board* in Canada. He explained that the mandate of the *Copyright Board* is to establish royalties to be paid for the use of copyrighted works when the

administration of such copyright is done by a collective society. As an administrative tribunal, its objective is to set royalties that are fair and equitable for both copyrights owners and users.

The Board has already intervened in many areas. For instance, a variety of tariffs for the benefit of either authors, composers, artists or producers have been certified for situation where musical works or sound recordings are being performed in public such as in concert hall, restaurant, hockey stadium or public places. Similarly, many tariffs exist for situation where musical works or sound recordings are being communicated to the public by telecommunication (e.g., radio and television). The *Copyright Board* has also recently certified tariffs for the reproduction of musical works by commercial and non-commercial radio stations, and for the reproduction of musical works embodied in cinematographic works that are distributed as videocopies.

Some of the other areas of jurisdiction of the Board include the fixation and reproduction of works and communication signals of the broadcasters, the private copies of sound recordings that individuals are allowed to make for their personal use and the retransmission by a cable or a satellite company to their subscribers of a distant signal broadcasted over-the-air by a television or a radio station.

Mr. McDougall went on to briefly describe the functioning of the Board, and the process leading to a Board's hearing for a specific tariff. To start the process, a collective society must file a tariff proposal with the Board. This tariff proposal will usually specify which right is involved, which specific uses are being targeted and what are the proposed rates. This tariff proposal is published by the *Copyright Board* in the *Canada Gazette* to allow the users targeted to file objections to the tariff if they wish to do so. It is when such objections are filed by users that the Board establishes a schedule of proceedings that eventually leads to a formal hearing.

As part of the schedule, a process of interrogatories is established, by which parties can ask questions to each other and exchange information. The information obtained from this interrogatory process is usually used by the parties to prepare the position and the arguments that they intend to present at the hearing: their statement of case.

In the case of a collective society, the statement of case usually includes studies on the use and the value of the repertoire and on the financial impact of the proposed tariff on the users. The capacity of the users to pay the proposed tariff is also usually examined. The studies can sometimes consist of very extended surveys or value studies embodying economic theory and concepts.

In the case of the objectors, the statement of case also usually includes some form of financial impact study and capacity to pay study. Objectors also sometimes include alternative tariff proposal.

At the hearings, each party is given the opportunity to present its case, including calling expert witnesses, and to cross-examine other party's witnesses. After the conclusion of the hearings, members of the Board will consider the evidence submitted by the parties, and render a decision based on this evidence by certifying the terms and conditions of the tariff, including a rate, and by issuing reasons to explain the decision.

The Board generally tries to establish tariffs that would tend to prevail if a private market working competitively existed for such use of copyrighted works. In

setting a tariff, the Board will usually try to find a proxy on which it can rely. A proxy consists of a price for a similar good, transacted in a similar market and used in similar circumstances. There are no specific rules, and proxies are determined on a case-by-case basis. For instance, a tariff for the public performance of musical works, for the benefit of authors and composers, can sometimes serve as a good proxy for the a tariff for the public performance of sound recordings and performers' performances, for the benefit of performers and record producers. Although not quite the same good, the former is usually in the same market and involves similar uses as the latter.

Private agreements sometimes exist for similar goods in similar markets and can be considered as possible proxies. The Board will examine these agreements and decide whether the surrounding circumstances are such that they can be considered as being the result of free negotiations between parties, and thus be useful as proxies.

Foreign markets are also often proposed by the parties as possible proxies. When asked to rely on international comparisons however, the Board is always concerned that the many different characteristics and circumstances that exist between countries may prevent tariffs from being easily and directly comparable.

When no proxy is available, the Board can use a "range" approach. This consists of identifying a "comfortable" upper and lower limit for the rate, and then identifying upward and downward factors, within the range, that will help determine a specific value for the rate.

In setting tariffs, the Board usually needs, at the minimum, to evaluate the following factors. Because the Board certifies tariffs for blanket licences, the Board needs to set an average price based on an average use of copyrighted works by users. Measuring that average use can take the form of an average number of minutes of music in total radio programming if the tariff concerns radio stations. In other cases, it could be the average number of reproductions of literary or musical works.

The Board will also need to make sure that the tariff does not have a strong detrimental effect on the members of (or stakeholders of) the industry, and that profit margins will not be dramatically affected by the tariff. For the Board, a "fair tariff" is also a tariff that can be paid by the users. A low capacity to pay has often been considered by the Board as one factor that can contribute to a reduction in the rates it intends to set.

The Board must also be conscious of the potential effect a tariff can have on the creation of grey or black markets. A recent example of this potential effect is in private copying. In its last decision, the Board concluded that it is possible that a further increase in the levy on blank CD could create sufficient incentives for buyers to evade the tariff by obtaining their CDs either legally from elsewhere than Canada (grey market), or illegally in Canada through an importer or manufacturer that avoids paying the levy (black market). Because neither of these possibilities is desirable from the point of view of the Board, this factor contributed to the decision of the Board to freeze the rate on blank media.

Finally, among the principles that the Board seek to follow when setting tariffs, Mr. McDougall discussed the following:

Coherence between tariffs. The Board tries to set tariffs that establish a similar value for similar uses. For instance, in the case of music, about 45 different tariffs exist for the benefit of authors and composers (commercial radio, non-commercial radio, bars, discotheques, karaoke, concerts, sports events, cinemas, skating rinks,

etc). There are also tariffs for the benefit of performers and record producers for similar uses. The tariffs set by the Board must remain coherent between the various rights that are being remunerated (i.e., performance, communication, authorization, reproduction, etc.), between the various rights owners (i.e. authors, composers, artists and producers), and between the various rights users.

Practicality of the tariff. The Board tries to certify tariffs that apply to and are consistent with the business practices of the industry.

Ease of administration. The tariff should not be too costly to administer. In trying to achieve fair and equitable tariffs, the Board tries to keep in mind that as the number of categories of payers or rates increase, so the administration costs associated with the tariff.

Non-discriminatory practices. The Board tries to establish similar prices for similar uses and users (except sometimes when a rate reduction needs to be given to a particular category of users, for instance small users, because of a low capacity to pay).

Stability. The Board always tries to consider the potential disruptive impact of changing an existing tariff on the market. In particular, because copyrighted goods are often used as input in the production process of many users, the impact of the tariff it certifies on the cost and the price structures of the final goods always need to be considered.

Lilla Csorgo[2] argued that the rate for the use of music copyright is frequently, if not almost exclusively, set on the basis of proxies rather than by directly estimating the value of music. For new copyright uses, the rate is often based on an existing rate for a similar use which itself might have originally been set on the bases of another rate, or, less often, on a market-based price observed for a non-music product.

Does this suggest that the pricing of music copyright does not amount to much more than an endless series of ultimately baseless proxies and, if so, is this a problem?

It tends to be agreed that the rate which users of music pay for the use of music should be correlated with the value that users derive from music. Generally, the higher the relative marginal product of an input, the higher the share of the output's value attributable to that input. If the value of one of the inputs in the creation of the final good or service should fall, then one would expect the amount accorded to this input also to be reduced. In the case of the tariffed price for copyrighted music, where the set rate tends to be a percentage of revenue, this is particularly clear. The revenue share accruing to the owners of all inputs have to sum to one. Conditional on this restriction, if the total value of the good or service is to be maximized, the revenue shares accruing to the different input owners should be more heavily weighted towards those factors or inputs that are used relatively more intensively in the final good or service as compared with their use in another final product. This elicits the efficient selection of inputs.

An exercise to price music from first principles should thus seek to estimate the value of the marginal product of music in the various end-uses in which it is used, for example, the share of television output value attributable to music, the share

[2]The views expressed herein are not purported to be those of the *Canadian Competition Tribunal* or any other person. Csorgo thanked Frank Mathewson of the University of Toronto and Jane Murdoch of CRA International Inc. for their helpful comments, and reminded the audience that all errors are hers.

of commercial radio output value attributable to music, the share of restaurants, pubs, night clubs output value attributable to music, etc. Such an exercise is at best not easy and at worst impossible for a variety of reasons stemming mainly from a lack of appropriate data. It is also always time-consuming and expensive, and will involve assumptions that will inevitably be debated and not necessarily be resolved in a satisfying manner.

So if valuation of the marginal product of music is not always or even often possible, are proxies satisfying substitutes? As a general proposition, proxy measures are useful when direct measures are either unavailable or are too costly to determine. A proxy is helpful when it bears a market similarity to the services at issue. A proxy is efficient if the cost of obtaining a more exact measure outweighs the benefit.

The proxies with the strongest potential are those where the users of the music input compete in the same downstream market, using the same or similar inputs, from the same or similar sources (this was recognized by the *Copyright Board of Canada* in its 1996 decision in regard to Tariff 17.A, the tariff for the use of *SOCAN*'s repertoire by specialty television services). The reason for this is that products that compete with each other exercise mutual competitive discipline on each other and thus on observed equilibrium prices – not just on output prices but also on input prices. Competing firms using similar inputs to production are unwilling to pay more than their rivals for inputs because a relatively more expensive input will reduce a firm's ability to compete successfully in the output market. A firm forced to pay a higher price for a similar input would be competitively disadvantaged. Thus, firms competing in the same output market tend to face similar input prices.

So, knowing that good proxies for music inputs are those where the resulting outputs compete with each other, how do we go about recognizing them? There is a well-established and widely accepted body of economic literature that defines the procedures for determining which products are in the same relevant product market. In Canada, this approach is outlined in the *Merger Enforcement Guidelines* of the *Commissioner of the Competition Bureau*. Relevant markets are defined by reference to actual and potential sources of competition that constrain the ability of a firm to increase the price of its product. If a price increase would likely cause a sufficient number of buyers to switch their purchases to other products so as to constrain the initial price increase, those products are considered substitutes and thus part of the relevant market. Thus, the key question to be answered in determining if another rate or price is a good proxy for the music input under consideration is whether the resulting output products have a price constraining effect on each other.

Absent an answer in the affirmative to this question, there is no reason why two non-competing companies should pay similar prices for their respective inputs. For example, the rate paid by commercial television broadcasters for musical works is more likely to be a good proxy for the rate to be paid by pay and specialty television services for musical works than the rate paid by commercial radio, because commercial radio is likely a more distant substitute for pay and specialty channels than commercial broadcast television. This is the case even though pay and specialty television services differ from commercial television services. Products can be differentiated but still be in the same market.

It is possible that two products that do not compete with each other because, for example, they are sold in different geographic markets, are similar and thus one may provide important information in regard to the other. Similarly, for example, men's and women's shoes may not be substitutes for each other but the pricing of one may be informative in regard to the pricing of the other. It is also possible that it may not. The pricing of men's and women's haircuts, for example – services that are provided in competitive markets – are notoriously different. Given potential differences in demand and supply conditions for non-competing, although similar, products, the use of such products as proxies should typically only be considered when the use of products that are in the same product market are not available.

Since in many instances the price or rate paid for music is already subject to regulatory oversight, the above proposition in regard to proxies suggests the use of existing regulated rates as proxies, or is at least consistent with such usage.

The use of proxies is beneficial in assuring that tariffs do not create a competitive imbalance across players. For example, if the tariff for one type of music user is higher than for another type of user on the basis that one user is in a better financial position, where both types of users compete in the same market, such a decision would penalize the more successful market participant. This could have perverse effects, reducing a firm's incentive to achieve high growth, high profitability and high usage since doing so would at the margin lead to higher costs in the form of higher tariffs.

Entry into a new business involving music may well have been based on a business model that includes a range of rates that are similar to those for existing, similar (and so possibly competitive) services. The setting of disproportionately different rates from existing ones can negatively impact investment decisions. Moreover, since rates are typically set after entry, it is important to avoid setting opportunistically high rates *ex post*. An expectation of such behaviour can also deter entry in future new uses.

All this does not mean, of course, that regulated rates should not differ from each other or should move in lock-step with each other.

The main reason to change a rate is information suggesting that the underlying value of the music input has changed. Changes in the underlying value of music can be ascertained from changes in the demand for the music input, changes in the nature of the output that relies on the music input (which can indirectly change the demand for music), and changes in the upstream production of musical works (which impacts the supply of music).

Greater availability of information or changes in information about the original proxy might also allow for the refinement of the use of that proxy. More information can allow for a better determination of whether two products are in fact in the same market. Changes in market circumstances such as changes in consumer demand might also result in a finding that two previously competing products no longer have a price constraining effect on each other.

An item that should not generally be considered sufficient for change in the price of music is change in the accompanying factors of production, namely technology: for example a switch from CDs to computer mainframes, or the use of broadband. Technology tends to be an independent input from music just as much as other factors of production such as technicians are. If there are no changes in demand

for the music input, no changes in the output, and no impact on the upstream production of musical works, there should not be a change in the price of music.

Paul Audley also addressed the issue of alternative approaches to establishing the value of music rights to help an institution such as the *Copyright Board of Canada* establish a tariff. His discussion was along the following lines.

For a tariff to be equitable, rights holders should be paid an amount that reflects the benefit the user derives from the specific music inputs used – i.e., the musical work, the performance and the sound recording, as well as its communication, public performance, reproduction or whatever specific right(s) is (are) involved (hereafter for simplicity the music input).

Establishing the benefit the user derives should begin with assembling as much information as possible about the business model, the inputs required and the cost structure of the industry. The goal should be to go as far as possible towards understanding how important music is to the user's business.

The analysis can then turn to whether there are comparisons, or "proxies" that can assist in establishing the appropriate level of payment. This proxy analysis should draw distinctions among the different types of proxies.

The best proxy is obviously a market-based one, reflecting the ultimate goal of determining the level of payment that would be made in a competitive market with willing sellers and willing buyers. The *Copyright Board* was able to use this approach in private copying and the retransmission tariff. (An alternative with the same purpose might be to assess, as was done earlier in the Digital Pay Audio Tariff, what would happen in a hypothetical or simulated auction.)

A second-best type of proxy would be to look at existing regulated rates as a basis for comparison. Such a proxy may prove satisfactory, but that assumes the *Copyright Board* had sound evidence and valuation arguments before it when the tariff was certified and that there have been no material changes in the industry since the rate was established.

Whatever the proxy, whether a market-based price or a regulated rate, the industry in question must then be compared to the "proxy" industry to see whether adjustments are needed, and if so, what they are. What are the differences in the business model and cost structure? Are the businesses for which a rate is to be set more or less dependent on music than the proxy industry? What adjustments are required to reflect these differences?

Tariffs are usually set as a percentage rate, rather than a fixed price. Tariffs such as private copying and the tariff which applies to establishments using background music are the exception. The existing tariffs for commercial radio and pay audio services provide an example of how different the resulting percentage rates may be where a substantially different mix of inputs are relied upon by two industries.

Careful analysis specific to the industry in question and any proposed proxy industry – along with supporting facts – is always the key to arriving at a level of payment that reflects the benefit users derive from their reliance upon music.

There will not always be a valid proxy available and the temptation to propose an inappropriate one should be resisted. In particular, where the basis for a regulated rate is lost in time and its validity can no longer be explained and examined, it is always time to begin again.

Fred Lazar addressed the issue along the following lines. The goal of the *Copyright Act* is to ensure that the required incentives will be available so that

the investments needed to create music and other intellectual property covered by the Act will be made. So the key issue facing the *Copyright Board of Canada* is determining the licensing fees required to satisfy the needs of the users of music in the broadcasting industry and to contribute towards providing the incentives needed to achieve the "optimal" rate of growth in the supply (repertoire) of music in Canada.

There are two problems that arise immediately. It is very difficult, if not altogether impossible, to establish what should be the "optimal" rate of growth in the supply of music per year. The problem becomes even more challenging when quality becomes another variable to consider. Secondly, there is currently a very large supply (stock/repertoire) of music available. The new music created each year (the annual flow), that gets added to the existing supply (repertoire), comprises a very small percentage of the total supply available each year.

License fees can be negotiated directly between those who want to use music and the copyright holders. On the other hand, licensee fees can be determined by a *Copyright Tribunal* that serves as the arbiter between the interests of users, in our case – broadcasters – and the interests of creators or other copyright holders of music. From an economist's point of view, a *Copyright Tribunal* is the preferred alternative for setting license fees if the transactions' costs savings outweigh the inefficiencies resulting from license fees that differ from market-determined levels. A *Copyright Tribunal* also can be used to enhance the bargaining position of either the users of music or the copyright holders. From an economist's perspective, income distribution should not have priority over efficiency.

Consequently, a key issue facing the *Copyright Board of Canada* is determining the license fees required to satisfy the demands of the users of music in the broadcasting industry and to provide the incentives needed to create new music and thus increase the outstanding supply of music in Canada. The Board must obtain information on the prices that would be negotiated in free markets. However, in the absence of open market negotiations and contracts, the Board must try to best approximate what these prices might be. It is most unlikely that a single license fee regime would be the outcome of open market negotiations. Therefore, the Board should look for various guideposts to help make its decisions.

In a competitive environment, the price of music would be extremely low because of a very high degree of substitutability that exists between the various types of music, and indeed between the songs themselves.

The Board also should consider what the costs might be of setting the tariff rates at the "wrong" level. The economic costs of setting the tariff rates at the wrong levels might be quite small. But there are costs nevertheless. And since Canadian broadcasters compete with US and other foreign broadcasters for programming and creative inputs, it is important to consider the competitive environment in determining the copyright licensing regime for broadcasters in Canada.

Finally, **Claude Brunet** addressed the issue from the point of view of a lawyer, arguing that prices cannot be the only measure of value in copyright. More specifically, he stated that in the history of law, there have been many different philosophies that justify the recognition of a creator's rights over his/her creation: From the Talmud's interpretation of Yahweh's pronouncement against "prophets who steal My words one from the other", to the recognition in communists regimes of the fact that a creation is an extension of the creator's personality, to the USA

concept of a social contract that initially granted rights in *copies* manufactured in the US insofar as copies were made available to the public, to the continental European systems – rooted in the French Revolution – that authors have property and personality rights over "works of their minds".

Reducing copyright to a mere economic incentive to creation is adopting an exceptionally narrow view that, moreover, ignores completely the driving forces that make an author create. Though he gave some away, Van Gogh never sold a single painting during his lifetime. The initial run for a poetry book in Canada is a few hundred copies. The young men and women in the neighborhood garage band are not reinventing music because they are being paid for it.

The law of copyright – throughout the world – is not concerned with protecting and stimulating the act of creation *per se*. Its concern is with the terms and conditions of use of the thing created. These terms and conditions cannot be reduced to a mere matter of "price", although "price" is admittedly a very important component of these terms and conditions.

Economists will not grasp fully the centuries old science of copyright if their only objective is to find the "price" that ensures an "optimal supply" of works of the mind. In good measure, at the heart of copyright is an issue of control over the work of one's mind. Creators will naturally seek to exercise this control over every possible use of their creation. A car manufacturer does not care whether the buyer of his car drives the car in the city or on a country road. Luc Plamondon or Andrew Lloyd Weber, on the other hand, would probably have an interminable list of conditions if Disney on Ice wanted to produce Notre Dame de Paris or The Phantom of the Opera.

The legal science of copyright has long distinguished between two very different categories of uses that command different degrees of control. Initially referred to as "grands droits" and "petits droits", these categories today would be better described as "primary" and "secondary" exploitations.

In the "secondary exploitations", the risk of the work being transformed, modified, adapted is less to non-existent. Secondary exploitations are exploitations of fixed copies of the work, rather than exploitations of the work itself. With respect to these secondary exploitations, the control sought by the creator does tend to become a simple matter of pricing. Because of this, secondary exploitations lend themselves easily to collective administration. Creators mostly seek fair and equitable remuneration for the use of copies of their creations.

However, absent fair and equitable remuneration, creators will withdraw from the market of secondary exploitations and will pull back to a zone where they can and do exercise control: primary exploitations. This year, the *Motion Picture Academy* has considered not issuing copies of the nominated films to its own voting members. The recording industry is actively engaged in putting every new sound recording under lock and key. In movie theaters, bouncers monitor the movie going public to ensure that no recording devices are being used.

Because economists have reduced copyright to a mere right to remuneration and because the remuneration – improperly seen as an incentive to create – is so unfair and so inequitable, creators are coming back to the primal roots of copyright: a right to access. It is in the zone of *access* that the true "discussion" takes place between the willing buyer and the willing seller. If *access* is to be made more

convenient and more universal, secondary exploitations must be priced at the level that granting access would have yielded.

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