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Licensed to Thrive? Podcasting and Copyright Law in Canada

Keith Sutherland[†]

I. Introduction

As a method of online content distribution, podcasting is a phenomenon rivalled only by the initial wave of peer to peer (P2P) file sharing and the mainly text-based “blogging” community. It allows individuals to regularly have media content downloaded automatically to their computers, to be enjoyed at the user’s convenience. Like many technologies involving digital media, podcasting gives rise to many issues about the role and purpose of copyright: how can we give copyright holders their due without impeding access to culturally significant works of creativity and intellect, and further, without stifling the continued development of useful technology?

Besides the challenges podcasting shares with other digital technologies, it has some relatively unique characteristics that merit special attention in the Canadian copyright system: specifically, its accessibility — just about anyone can create a podcast — and its subscription-based content delivery. These aspects of podcasting not only make it a widely used and growing form of content distribution, but also one that has grown out of individual efforts and which is still closely connected to amateur and non-commercial individuals in online communities.

This article examines podcasting and its specific characteristics to see, first, where it fits within Canada’s copyright law, and second, how the licensing regime for musical works in Canada applies to podcasting. The discussion next turns to whether or not the current licensing regime for podcasting is desirable in light of the purpose of copyright in Canada, and with a view to the various interests at stake: those of artists, in being paid, and those of society, in enabling podcasters to access material in order to produce their work. An examination of the current and proposed licensing regime and its implications leads to the conclusion that it is not very feasible for amateur or non-commercial podcasters to operate legally in Canada if they use musical content, and that at the very least, podcasting should be covered

by different tariffs than commercial Internet broadcasters or download services. The paper then goes on to explore suggestions that have been made to better serve the interests of rights holders, while also allowing more inexpensive access to users — the people who consume (listen to or watch) podcasts — in the online environment.

II. What Is Podcasting?

A podcast can most closely be analogized to a radio program that is distributed online and downloaded onto a computer to be synched with an MP3 player for listening. The name is an amalgam of the words “iPod” and “broadcasting” — the former being the ubiquitous portable device manufactured by Apple that is mainly marketed and used to play MP3 or other compressed audio files. Despite its etymology, the term “podcasting” is a misnomer in two senses: first, podcasts can be played on any portable media player (not just an iPod) or even one’s personal computer; and second, podcasting is not broadcasting in the traditional sense.

Creation and Distribution of Podcasts

In order to create the content of a podcast, a producer must use audio or video compression and editing software. This aspect of podcasting is notable because technological advances have made it possible for virtually anyone to access software to enable him or her to create content of this nature. In essence, anybody can be a radio station. This is relevant to a legal analysis of podcasting issues, because unlike radio or television broadcasting, the production and distribution of podcasts is extremely diffuse, ranging from teenage basement bloggers to major public and corporate entities.

Podcasting involves a “publish and subscribe” model. Creators can distribute audio or video files over the Internet automatically via syndication, which refers to making a part of a Web site available to other Web

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sites to use. Usually the part of a Web site that is syndicated is a Web feed, which is a page containing content items — for example headlines of weblog posts or major news outlets, or links to MP3 audio content.¹ The most popular format for Web feeds is RSS, which stands for “Really Simple Syndication”. Syndication enables podcast creators to disseminate their podcasts with relative ease to a wide audience: the podcast is posted at one online source, but is made available to consumers through every Web site that has a Web feed for that particular podcast.

Podcast Access and Consumption

The end users, those who will ultimately listen to or watch a podcast, can download content directly from a Web feed, for example, by clicking on a link on the feed page. However, a unique aspect of podcasting is its that users can subscribe to a Web feed by using an aggregator, which is a type of software that automatically retrieves syndicated content (e.g., podcasts) from Web feeds and downloads it onto the user’s computer. This downloaded content can in turn be transferred to an MP3 or media player, such as an iPod, for consumption at the user’s leisure — hence the “iPod” in podcast.

The appeal of subscribing to podcasts through an aggregator is that it vastly reduces the time and effort needed for a user to keep track of new developments on Web sites of interest.² One simply has to subscribe to a Web feed and the aggregator regularly checks it for updates, downloads the updates, and displays them all on a single page for the user to see when next opening the aggregator application. Because the downloading occurs automatically, podcasts have the further advantages of getting rid of download wait times entirely, and ensuring that high quality content (i.e., large files) can be accessed instantaneously: your latest CBC podcast can be downloaded onto your computer while you sleep, along with daily news headlines and some video clips, for instantaneous access in the morning.³ Podcasting thus provides the maximum amount of flexibility for people to consume content how, when, and where they want.

Podcasts Compared to Other Online Content

Podcasting, as a publish and subscribe consumption model, is distinct from other methods of content delivery. Its closest substitute is streaming (also known as webcasting), which involves on-demand delivery of linear audio-video content over the Internet.⁴ For example, many radio stations webcast their programs online simultaneously to their broadcast, or make shows available for listening at other times.

The first and most important difference between podcasting and streaming is its “time-shifting” characteristic. Streamed content can only be listened to at the time of delivery, whereas podcasts can be downloaded automatically and listened to many times.⁵ From a user’s

perspective this has two major advantages. First, the content can be listened to at will: there is no need for a user to tune in to a favourite radio program at a specific time. Second, once a podcast has been downloaded, it can be rewound, paused, and listened to as many times as the user wants without the risk that a stream will be broken and need to be re-buffered to continue listening.

Podcasting also holds some significant advantages for producers. First, time-shifting democratizes content delivery by enabling individuals to easily put out content that is automatically syndicated and delivered. Streaming, as it is used by conventional broadcasters, is only available to organizations with relatively significant amounts of time and money to maintain continuous content delivery to attract listeners. Further, webcasting that is delivered “on-demand” (for example, corporate Annual General Meetings are often available for online listening at any time) is easier to produce than a radio station’s “simulcast”, yet must be sought out for consumption, whereas podcasting makes it much easier for a creator to build an audience because consumers can have the most recent content downloaded automatically. Finally, because streaming generally uses synchronous transmission and therefore requires embedded time-code information, it uses more bandwidth than asynchronous transmission, which means that the content does not need to be delivered in the order in which it will be listened to.⁶ Podcasts are delivered asynchronously, and the lower bandwidth required results in lower cost to the producer, making podcasting a relatively economical way to broadcast to a large audience.⁷

There is also a legal difference between podcasting and streaming in that podcasting involves the reproduction of works, since a new copy of the podcast is created every time it is downloaded. Streaming, on the other hand, does not involve reproduction.⁸

Podcasting’s History and Future

A brief history of podcasting further provides context to the current legal aporia in which it sits, and can help glimpse its future growth and development that will need to be understood by creators, consumers and regulators.

Podcasting developed out of “blogging”, an Internet phenomenon that originated in the 1990s, whereby individuals or groups regularly post content on a Web site. Originally perceived as a sort of online diary, blogs today usually focus on a particular subject and combine text, images, and links to other online content. In a short period of time, blogging has developed into a highly pervasive cultural phenomenon that can have a large impact on public opinion as well as the mass media.

Podcasting is now achieving a similar (if not faster) growth trajectory. It became possible when Dave Winer released version 2.0 of the RSS syndication format, which allowed for syndication with attachments, such as the

popular MP3 audio format.⁹ Podcasting began in earnest around August 2004 when Adam Curry, a former MTV VJ, cobbled together a program that could automatically download new MP3 files from RSS Web feeds into a computer's iTunes application, and have these automatically transferred to an iPod connected to the computer.¹⁰

Podcasting is growing at a phenomenal rate. In September 2004, prominent IT blogger Doc Searls discussed podcasting and noted that at the time, googling "podcasts" returned only 24 hits, but predicted that "[a] year from now, it will pull up hundreds of thousands, or perhaps even millions".¹¹ At the time of writing this article, googling "podcasts" resulted in 281 million hits. While google hits by themselves could simply connote a user fad or a just a lot of talk, one study predicts that the audience of active podcast users will be 15 million by 2010 in the U.S.A. alone.¹² This exponential growth can be attributed partly to Apple Computer, which boosted the success of podcasts immensely by including an aggregator in its popular iTunes application, so that users of iTunes can subscribe to podcasts from the same application they use to manage their music libraries.

It is not just the astronomical numerical growth of podcasting that is notable. Equally important is the way its use has expanded to include more than tech-cowboys who view podcasting as a democratizing force or a sort of pirate radio that allows individuals to broadcast free from regulation and censorship. Podcasting is now mainstream enough to be used by major public radio stations (the BBC in Britain, NPR in the USA, and CBC in Canada)¹³ as well as by businesses,¹⁴ law firms,¹⁵ educational institutions,¹⁶ and religious organizations (giving rise to the term "godcasting").¹⁷ In Canada, the cellular phone service provider Rogers Communications Inc. introduced North America's first mobile phone podcast subscriptions.¹⁸

Due to its growing popularity as a vehicle for delivering media content, it appears that podcasting has the potential to become a viable business model. Early 2006 saw the first paid podcast subscriptions, and there will surely be more attempts to go that route.¹⁹ While podcasts are still untested as a money-making endeavour, a clear advantage is that production costs are minimal; one newspaper that sells podcast subscriptions of readings of its stories reports a 40% margin.²⁰ If there is an analogy to the development of other pay-for-access online content, such as that of newspapers or magazines, we can expect podcasts made by commercial entities to be made available for free until a critical mass of consumers makes it viable to deliver them on a paid subscription basis.

In sum, podcasting is catching on as a method of content delivery that resonates with a generation of users who favour the advantages of being able to have their preferred content delivered to them automatically for enjoyment on their own time. Its distinct characteristics make it easy and relatively inexpensive for everyday individuals to produce culturally pervasive programs and

reach a broader audience than would otherwise be possible. It also has the potential to become a viable business model. All of these qualities are taken into account in the following discussion of the legal environment in which podcasting exists.

III. Copyright and Podcasting

Rights Engaged by Podcasting

Music included in a podcast is governed by the *Copyright Act*, which protects both economic and moral rights in original artistic works.²¹ This article focuses on the economic rights involved in podcasting. A typical podcast that contains music will involve the economic rights of the author of a work, as well as so-called neighbouring rights of public performance and mechanical reproduction.²² For example, if you were to play a song by the Detroit Cobras, a popular underground cover band, in your podcast, you would need permission from the author who wrote the song, as well as from the band members, who each get a right in their unique performance, and lastly, from their record label who owns the rights in the sound recording itself. The following is a brief description of these rights:

i. Author's Rights

Subsection 3(1) of the *Copyright Act* covers what are commonly referred to as "author's" or "composer's" rights. The section gives the holder of a copyright in a work the sole right to produce, reproduce, perform, or publish the work or any substantial part of the work. This includes the sole right to make a sound recording of a work and to communicate it to the public by way of telecommunication.²³ A podcaster using a musical work could clearly infringe copyright by reproducing a work that somebody else created, and communicating it by telecommunication to a subscriber.

ii. Performance Rights

Performers are granted rights in their unique interpretation of the authors' compositions. Copyright exists in the performer's work, including the sole right to communicate the performance to the public by telecommunication and the right over reproductions of the fixation of the performance other than those authorized by the performer.²⁴ A podcast that plays a performance engages the right of the performer to control the communication of the performance.²⁵

iii. Sound Recording Rights

A sound recording is a recording fixed in any material form that consists of sounds, whether or not they are the performance of a work.²⁶ This right is usually held by the producer of a work, for example, a record company. The maker of a sound recording has the sole right to reproduce the recording in any material form.²⁷ Thus the creator of a podcast, by reproducing a music

recording in a podcast, also engages the rights of the entity who made the sound recording that the podcaster uses.

The *Copyright Act* states that holders of performance rights and sound recording rights have the right to collect royalties when their work is played, and specifies the division of such royalties.²⁸ It is also important to note that neighbouring rights are independent of the existence of underlying copyright in the music. For example, you can have mechanical rights in a recording of a public domain work (i.e., a work in which the original author no longer has copyright because the term for copyright has expired).²⁹

In sum, a typical podcast would engage a minimum of three rights: the rights of the author of a song; the rights of the performer of the song; and the rights of the maker of the sound recording. There might be more rights holders involved, if, for example, there is more than one writer of the song, a different lyricist, or multiple members of a band holding separate parts of the performance rights. Thus, the seemingly simple activity of reproducing a single copy of a song in a podcast actually requires the permission of numerous entities. While this task is made easier by the existence of collective rights management agencies, this minefield of intellectual property would likely be difficult for the average podcaster to navigate, to say the least. The next section discusses the current regime of licensing music in Canada as it applies to podcasting.

IV. Licensing Music for Use in a Podcast

Because copyright is divided up based on the nature of the use involved, a podcaster wishing to include a musical work in a podcast would have to get authorization from a number of sources. In most cases, the rights to the music in question can be licensed from collective rights management (CRM) bodies. CRM bodies exist because it is usually not feasible for copyright holders to license rights on an individual basis; thus, it is necessary to split the administration costs of collecting royalties among many copyright holders.

Performance Rights

In Canada, the Society of Composers, Authors and Music Publishers of Canada (SOCAN) is the most prominent body dealing with public performance and telecommunication rights. Composers and authors of works can choose to assign their rights to public performance and telecommunication to SOCAN, which licenses the works to various entities for myriad uses ranging from the obvious (commercial radio) to the more obscure (telephone “on-hold” music).³⁰ In return, it collects royalties from licensees, which it passes on to the composers, lyricists, and publishers after taking a fee for the administration of the rights.³¹

The Copyright Board statutorily fixes the fees that SOCAN charges for the license of its music repertoire.³² Currently, there is no approved tariff that covers podcasting, which naturally creates a problem for podcasters who wish to legally use SOCAN-controlled musical content. SOCAN is working to solve this problem, and has a proposal before the Copyright Board that would cover podcasting. Tariff 22, “Communications of Musical Works via The Internet or Similar Transmission Facilities”,³³ targets Web sites offering music content, granting “a licence to communicate to the public by telecommunication musical works forming part of SOCAN’s repertoire ... by means of Internet transmissions or similar transmission facilities”.³⁴

The fee for the license varies depending on the use. Podcasting could fall under category 1, “Music Sites”, which applies to “communications from Sites or Services that permit a User to select and listen to, reproduce for later listening, or both listen to and reproduce for later listening, a musical work or part of a musical work”.³⁵ One could debate whether podcasting meets this definition, for example, on the grounds that the license requires a user to “select” music and therefore may only apply to “point-and-click” listening or downloading, and not podcasts, which are delivered automatically by subscription. If this is the case, podcasting would likely be caught by the general wording of category 7, which applies to communications of musical works from a site or service other than one mentioned in the other categories.³⁶

Such a debate is perhaps pointless as far as the non-commercial podcaster is concerned, because for each category there is a minimum monthly fee of \$200 that applies regardless of whether or not the person using copyrighted material makes any revenue from the use of the works.³⁷ Under the proposed license, a podcaster would pay a minimum of \$2,400 per year if podcasting fell under category 1 or 7. Should this change, however, different minimum fees for different categories could pose further challenges for podcasters, since a podcast can be either streamed from its source, downloaded on demand (for example, if one were to download back episodes of a podcast to which one has recently subscribed), or downloaded automatically via a subscription. If a different fee were applied to any of those uses, SOCAN and other collective rights management agencies would need to specify into which category podcasting falls. As it stands now, however, any podcaster would be expected to pay \$2,400 in order to use any piece of music by an artist represented by SOCAN, regardless of whether a podcaster uses whole songs or merely a snippet as an introduction to a talk-based podcast.

While SOCAN used to offer voluntary licenses for \$600 that podcasters could use until a tariff is approved, these licenses are no longer available.³⁸ The public hearings for the proposed Tariff 22 are scheduled for April

2007, leaving podcasters in a legal umbra for the time being.³⁹

Reproduction Rights

An author's or publisher's rights to reproduce a musical work are managed in Canada mainly by the Canadian Musical Reproduction Rights Agency (CMRRA). This organization operates similarly to SOCAN and issues licenses to anyone who wishes to reproduce a work on a CD or audiocassette (mechanical rights), or as part of a soundtrack to an audiovisual production (synchronization rights).⁴⁰

Currently, the CMRRA does not have a statutory license for podcasters, but licenses songs for podcast distribution based on a tariff that it has proposed to the Copyright Board.⁴¹ This proposed tariff would apply to "online music services", which are services that allow users to receive streams or download sound recordings embodying musical works. This tariff does not distinguish between types of online content delivery, so it would apply equally to webcasters, downloading services, and podcasters. CMRRA would grant a license to reproduce music in CMRRA's repertoire for royalties amounting to the greater of 15% of gross revenue of their service or 10 cents per permanent download of a single musical work embodied in a sound recording.⁴² As an example, a podcaster who uses five songs in a podcast would owe the CMRRA 50 cents in royalties per download of that podcast. If this podcaster had 100 subscribers and produced 50 podcasts per year (i.e., approximately weekly), the fees collectible would be \$2,500. Given that many podcasts garner subscriptions exponentially greater than that,⁴³ a non-commercial podcaster could incur some very significant costs in this area of licensing.

Sound Recording Rights

Rights to use a sound recording are usually held by the record companies that produced the recording. A podcaster would need to get permission to use the sound recording from the relevant record company for each song used in a podcast.⁴⁴ In some cases, it may be possible to negotiate a master use license rather than to negotiate licenses on a per-song basis, but record companies are not obligated to do so⁴⁵ because they are not subject to a statutory licensing scheme such as those applying to author's rights and performance rights. Further, it appears that record companies have little or no interest in licensing their recordings for use in podcasts at the present time.⁴⁶ When record companies do license music for online purposes, they have required that it be subject to "digital rights management" (DRM) measures.⁴⁷ This DRM requirement could increasingly apply in the future: the United States, which already has a statutory licensing scheme for the digital performance of sound recordings, makes the use of DRM a condition of eligibility for the license.⁴⁸

Administrative Obligations

Not only will it be necessary for podcasters to pay tariffs to the appropriate licensing bodies, but there are also administrative requirements. For example, SOCAN's proposed license requires that licensees submit, "where applicable", a report detailing the number of users, the gross revenues, and gross operating expenses for the month. Licensees must also provide SOCAN quarterly reports with:

detailed information from licensee's site or service usage logs concerning the transmission of all musical works from the site ... [identifying] each musical work by title, composer/writer, author, artist, record label, and unique identifier (e.g. ISWD, ISAN etc.) length, type of use (i.e., theme, background or feature performance) and the manner of performance (i.e., instrumental or vocal), and specify the number of times each musical work was transmitted and whether the work was streamed or otherwise downloaded.⁴⁹

SOCAN also reserves the right to audit the licensee's books upon "reasonable notice" in order to verify the reported use information and the fees rendered.⁵⁰ It is understandable that licensing bodies have a strong desire to closely monitor the use and distribution of material in their repertoires online; however, it is also clear that the above reporting requirements are onerous for individuals.

Other Considerations

Since 1997, the United Nations World Intellectual Property Organization (WIPO) has been overseeing work on a proposed Treaty for the Protection of Broadcasts and Broadcasting Organizations.⁵¹ The main effect of this treaty would be to give broadcasters property rights in the recording, retransmission, and reproduction of their broadcast signals, even if the broadcast is of a non-original work (i.e., a work that would not normally be susceptible to copyright). Various drafts of the Treaty would also have it apply to webcasting (including podcasting). At this point it appears that provisions relating to webcasting will be taken out and put into a draft proposal for a separate instrument to cover webcasting and simulcasting rights.⁵² Regardless of whether the rights are packaged with traditional broadcasting or whether they are covered in a webcasting-specific treaty, it appears that copyright in webcasting is a definite possibility.

The proposed new rights in the Treaty have been seen by many as a threat to podcasting, on the basis that, among other things, such rights are not necessary for Internet-based broadcasting to flourish; rather, they will inhibit its growth by limiting even fair use of material, or applying copyright to Creative Commons works that were not intended to carry such restrictions on their use.⁵³ Further, the intent of the Treaty is to combat signal piracy, but that risk is very different in the contexts of broadcasting and podcasting.⁵⁴ At least one commentator also believes that the Treaty would be unconstitu-

tional if implemented in the United States on the grounds that it would create new copyright-like rights over unoriginal material.⁵⁵ Canada does not have a similar copyright clause in its constitution, but the fact remains that international treaty rights covering copyright in podcasts could chill the growth of the medium by making legal distribution more difficult, and also putting up one more hurdle that podcast creators must consider when drawing on works to put in their podcasts.

V. Challenges to the Licensing System

It is evident that the current licensing regime is likely unpalatable to many podcasters who desire to use music in their shows. While public broadcasting institutions or private commercial entities would have the capacity to investigate and understand the legal implications of podcasting as well as the capacity to pay for music licenses, many podcasts are produced by individuals without such capacities.

These non-commercial⁵⁶ podcasters face a number of barriers. First, the fragmentation of copyright can be confusing to anyone not versed in copyright or involved in the music industry. Many podcasters may not realize that there are multiple rights-holders involved in the playing of even part of one song. Second, the various rights may be held by any one of a potentially bewildering array of collective rights management organizations.⁵⁷ The discussion of podcast licensing above is merely illustrative and covers only the most prominent CRM bodies; there are many others who could be involved.⁵⁸

Third, once a podcaster navigates the issue of who holds what rights, and the myriad licensing organizations, another issue is that there is currently no statutory license that covers podcasting. This is understandable; as with many new technologies, the law in this area is lagging behind the current state of usage. However, given the rapid growth of podcasting, it is doubtless that the various collective rights management organizations will come up with solutions to this problem, as illustrated by the proposals put forward by SOCAN and CMRRA. A fourth and more important challenge is that, assuming the Copyright Board approves SOCAN's and CMRRA's proposed licenses, the costs under the various proposed tariffs would likely be prohibitive to a podcaster who creates and distributes podcasts on a non-commercial basis. Further, if such costs do not present too great a barrier to a non-commercial podcaster, the administrative requirements of dealing with various licensing agencies may be too time-consuming or give rise to privacy concerns. Lastly, if those hurdles can be overcome, there is no guarantee that the record companies holding sound recording rights will grant permission to use songs in podcasts.

The Need for a Different Model

Any licensing scheme in Canada should take into account the purpose of copyright law in Canada, which is to balance the dual objectives of ensuring a just reward for the creators of works and promoting the public interest in being able to access copyrighted works.⁵⁹ Further, in general, unless CRM bodies find ways to effectively license material for online use, they may see their scope of operations and influence diminish over time.⁶⁰ Given these considerations, the problems faced by podcasters point to the need for a different model for licensing music for use in podcasts. While there have been numerous suggestions of alternatives to the current copyright regime online (some of which are briefly discussed below), podcasting embodies a particularly apposite set of characteristics that militate in favour of exploring ways to not only protect rights holders' interests, but also to expand the use of music to foster the growth of podcasting's potential role in cultural production and the economy.

The reasons why a licensing regime should be especially sensitive to podcasters relate back to podcasting's unique characteristics as a method of online content delivery, such as time-shifting and subscription-based delivery.⁶¹ These and other characteristics, when taken together, show that podcasting has a cultural and utilitarian value which exceeds that of webcasting and P2P file sharing: it is distinct in ways that make it less of a threat to copyright and more valuable to society. The licensing regime must take these characteristics into account if it is to continue to effectively meet the balancing goals of copyright law in Canada. In short, the unique nature of podcasting supports the proposition that licenses for podcasting should not be granted on the same terms as for online commercial radio stations or music download sites.

One of the distinguishing characteristics of podcasting is its accessibility. As opposed to conventional Web-radio, which requires institutional resources and around-the-clock content, podcasting can be created by individuals on their own time. Even though webcasting can be easily created and delivered on-demand, it differs from podcasting in that it lacks the counterpart to accessibility: reach. Because of podcasting's subscription element, it can reach more people through syndication and flexible consumption.

Podcasting's accessibility and reach is easily visible: as an outgrowth of blogging, podcasting has a strong community element and exhibits a very high level of cultural relevance as measured by the extent of its popularity, whereas webcasting does not have a similar grassroots cultural relevance. Ultimately, podcasting's democratization of content creation and distribution has the benefit of decentralizing cultural production. The current model of copyright as a way to create markets for intellectual property has led to a concentration of cultural production in the hands of a few media corpora-

tions, as well as significant portions of royalties going to these intermediaries.⁶² Podcasting helps contribute to a vibrant cultural industry, which furthers important non-economic values.⁶³

Of course, accessibility and reach alone do not make podcasting particularly special: P2P downloading is both accessible and pervasive. The value that podcasting presents beyond P2P file sharing lies in its public and promotional nature. P2P users try to remain anonymous and use file sharing services as a sort of swap market, offering some content in return for other content. Many podcasters, on the other hand, see their role as beneficial to the artists and cultural community that they cover in their shows.⁶⁴ This relates back to podcasting's growth out of the blogging community: podcasters undertake their work to promote and discuss interests about which they are passionate. The promotional capacity of podcasts is helped by the fact that podcasters have the role of authorities or leaders in the subjects that they cover — similar to how magazines or radio shows can influence the public. Podcast subscribers, for their part, listen to podcasts not to get music to burn onto CDs or to mix into playlists, but to hear the latest bands or news.

The obvious counterargument to this view is that enthusiasm has never been a defence to copyright infringement, and we should not create such a defence. However, from a utilitarian perspective it can be said that podcasting has the potential to provide greater overall utility if non-commercial podcasters are not prevented from accessing copyright works by the economic and administrative demands of the licensing regime. Podcasting can undeniably serve a promotional purpose that increases public awareness of artists in a way that is more targeted than conventional online radio (because of the podcasting's subscription nature), and more effective than P2P downloading: because P2P file-sharing is usually anonymous, it is difficult to believe that those users engage in that practice in order to promote the artists whose works they upload; but the opposite is so of podcasting.

Thus, given the specific cultural role that podcasting plays (and has the potential to play) within society, it can be argued that podcasters are creating an important cultural product and performing a service that increases Canada's cultural resources. Whether or not this argument can be expected to hold any weight with copyright policymakers and legislators is questionable: in the educational context, even though there is a significant cultural value involved in giving students and teachers access to works, there are very few exceptions to use of copyrighted work in the educational sphere. However, it is important to note that the context in which podcasting sits differs in two significant ways from the educational context. First, this paper is not arguing that exceptions to copyright should be created for podcasting, but rather that due to the cultural value and business

potential of podcasting, it should be covered by a licensing regime that ensures its continued growth at the non-commercial level. Second, while in the educational context the benefit can be seen as resting primarily with the end user, in the online environment a podcaster is not only a user of copyrighted works but is also a distributor, so the promotional element of podcasting is much greater.

A further difference from P2P downloading is that works distributed through podcasting are less likely to result in further rampant file-sharing of the Napster or Limewire varieties. Music on podcasts appears as part of a "show", and may even come in the form of an incomplete song, be used as background music, or be otherwise lacking in integrity. Despite the fears of rights holders, even whole, high-quality songs on a podcast are not susceptible to being transferred out of the podcast onto other playlists or media such as an iPod or burned onto a CD, simply because the effort involved in editing a song out of a podcast is not worth it when the same song can be found legally for 99 cents on iTunes or illegally for free on a file-sharing service.⁶⁵

Because of the above characteristics of podcasting, the balancing that goes on in copyright law shows a significant value in ensuring that the licensing system gives non-commercial podcasters affordable and straightforward access to works. The next section discusses why such a suggestion is also beneficial to rights holders.

Is the Current Model of Copyright Good for Rights Holders?

The above argument that podcasting serves a valuable cultural function may be skeptically received by rights holders who worry that online distribution of their works via podcast could eat into royalty revenues from other sources. However, a licensing regime that effectively forecloses legal participation by the community of Internet user-producers who can be credited with podcasting's creation and initial growth is also less than optimal from a business perspective. Collective rights management agencies seek to secure the fullest amount of royalties due to the artists in their repertoires, yet risk losing a potential source of license fees.

Under the licensing regime as it appears right now, a podcaster has one of three options: pay the licensing fees to SOCAN, CMRRA and any other relevant bodies; not use works that are controlled by collective rights management agencies (by getting permission directly from the artists or using "podsafes" music); or use copyrighted content illegally. Given the difficulty and expense of going through the licensing process, it seems probable that many, if not most, non-commercial podcasters will not choose to get licenses for the content they use. Rather, it seems common for podcasters to choose to use works that are not subject to CRM licenses. For example, CBC Radio 3 produces a weekly

hour-long podcast that is perpetually near the top of iTunes' rankings of its most subscribed-to podcasts. However, it does not license its music through any collective rights management agency. It gets its content from bands that join the New Music Canada Web site, a CBC affiliated organization that promotes Canadian independent music. When they join, artists can give permission for their music to be used in Radio 3 podcasts. The podcasts of another popular podcaster, Marie-Chantalle Turgeon of Montreal, have been listed by *Spin Magazine*⁶⁶ as one of the five best podcasts to download, yet she does not license her music either. She simply gets permission to play music from the artists that she uses in her podcasts.⁶⁷

A related option available to podcasters is to use so-called "podsafes" music, a term that has arisen to broadly describe any work whose licensing requirements allow it to be used for free in a podcast, often while reserving the rights to impose more traditional constraints on other users.⁶⁸ The term also covers obvious cases of music that can be used legally, such as public domain works (apart from public performance or sound recording rights) and Creative Commons works.⁶⁹

The third option that podcasters have is to use copyrighted content illegally, that is, without paying licensing organizations or getting permission from the rights holders and record companies themselves. Although in the early days of podcasting this practice was more common, it will increasingly diminish. The growth of podcasting, not only in use but also in the public eye and on the radar of industry and CRMs, has led to a much greater awareness of the legal issues involved and the risk of infringing copyright.⁷⁰ In particular, there is a growing litigation risk that will affect the willingness and ability of podcasters to use any music they want.⁷¹ Podcasters usually create their shows in order to distribute them to the public, which is a more overt and traceable action than distributing copyrighted music through P2P channels. Thus the greater threat of legal action, which is compounded by the fear of unintended infringement simply due to the difficulty of understanding the licensing system, leads to the conclusion that this sort of use is not an ideal option for non-commercial and amateur podcasters.

Examination of these options points to podsafes music or non-CRM licenses as the preferable option for podcasters who wish to use music in their episodes. This poses a challenge to Canada's prevailing licensing system because rights holders who wish to have their works widely used and promoted (thereby earning more royalties) will miss out on a large and growing body of user-producers who are enthusiastic about music and who could be contributing to artists' incomes. Thus, from a utilitarian perspective of copyright there is a significant amount of economic gain to be had through increased

royalties if a way can be found to encourage the legal use of copyrighted material in podcasts.

Further, if podcasting becomes a viable business model, the current licensing regime risks missing out on a sizeable portion of the market for musical works, and therefore, sizeable royalties for creators of works used in podcasts. The nature of production and distribution of podcasts is such that almost anyone can become a producer and distributor without too much expense. This means that there is a wealth of creative potential to harness, some of which could end up being profitable. An example is the Ricky Gervais show, which began as a free show but which went commercial due to its incredible popularity.⁷² The nature of Internet distribution is such that word of mouth and non-traditional forms of promotion can unexpectedly turn a non-commercial podcast into a product with global subscribership. If podcasters are restricted to using podsafes music, then in the event that a podcast does turn into a commercial endeavour the artists belonging to various licensing bodies stand to lose out on potential revenue that could be gained from licensing music to such podcasts. More generally, if the legal environment surrounding podcasting is too onerous it may stifle podcasting at the grassroots level, leaving a smaller pool from which profitable podcasts can develop.

Finally, the SOCAN and CMRRA licenses, as they have been proposed to the Copyright Board, may not be as effective as desired. Since the proposed tariffs are directed towards the Web sites that offer music,⁷³ and not particular legal personalities, it seems possible to circumvent the spirit of the licensing requirements. SOCAN's Tariff 22 proposal, for example, grants licenses to "sites" or "services", which are defined as "a site or service accessible via the Internet or a similar transmission facility from which content is transmitted to Users". There is no specification that the site or service in question must be operated by a single individual or legal personality such as a corporation. On this basis, it would appear to be legal if a group of people formed a co-operative to run a Web site, pooling their money to be able to pay the \$2,400 minimum license fee and then offering podcasts or individual songs for download online. One could foresee this being particularly feasible and appealing to students in a university residence, for example.

In sum, there are a number of weaknesses in the licensing system that could be undesirable from the perspective of rights holders, because the barriers to use of copyrighted music by non-commercial podcasters have the potential to result in lost royalties that could be received from this area of use. Thus, from a utilitarian perspective the copyright licensing regime partially defeats the interests it sets out to protect.

VI. Alternatives to the Current Model

The above discussion illustrates how the current licensing regime, while working to adapt to the new technology of podcasting, still is not meeting its potential to maximize rights holder interests and the interests of podcasters and the listening public. Beyond the challenges to the licenses that are or will be available, there is the further issue of licensing sound recording rights from the record companies — an even bigger barrier because licenses must be negotiated on an individual basis.⁷⁴ With these challenges in mind, this section briefly discusses various proposals for alternatives to the current copyright system.

A Podcast-Specific Tariff

An obvious solution directly tailored for podcasters would be to simply change the current licenses offered by CRM bodies to give podcasting its own tariffs that take into account its unique technology and advantages. Podcasting is different enough from other methods of delivering content online that there are ample reasons to not lump it in with webcasting or downloading services for licensing purposes.

A tariff directed at podcasting could offer different types of licenses directed at different users of copyrighted material. One type could be along the lines of the proposals currently before the copyright board. Another type could involve lower fees and be available only to non-commercial podcasters. To appease fears that individuals paying reduced fees would then be unfairly favoured relative to institutional or commercial entities that produce podcasts, a non-commercial license could involve more limited rights to the material — perhaps by restricting the catalogue of works available to be used, or restricting the number of songs that can be used in a given time period. A non-commercial license might also be terminable such that if its subscribership passes a certain threshold, the podcaster must pay for the standard license.

The disadvantage of this idea is that, apart from whether or not SOCAN or CMRRA would be amenable to such a suggestion, it would lead to further fragmentation of copyright. Breaking down the licensing of copyrighted works based on the use to which they are put (for example, differentiating streaming from podcasting) adds inefficiency and increased expense to the work of CRM bodies in administering the rights.⁷⁵ Further, collective licensing is only workable to the extent that users of copyright works are able to use the works in the way that they want.⁷⁶ Because technology blurs the lines between different uses, it is less than ideal from the perspective of podcasters or CRM bodies to attempt to pigeonhole podcasting as a use. Two examples can illustrate this: first, as mentioned above, an end user can access the content of a podcast through streaming,

clicking to download, or automatic download through subscription. Second, consider such technology as the iFill, a product that records streamed Internet radio directly onto an iPod.⁷⁷ This device obviously poses problems for differentiated licenses that are based on the way music is distributed — a webcaster paying for a public performance right could suddenly find itself in breach of a copyright holder's reproduction rights if its content is being reproduced on iPods using the iFill.

Another problem, one that is not limited to this particular licensing option, is that it would not get around the problem podcasters face in licensing sound recordings from record companies. The current system predominantly involves collective rights management bodies that license music, and those bodies exist because of market failure at the individual level: it is not worth the time and expense for an individual artist to collect royalties for the artist's work, and not worth users' time and expense to track down individual copyright holders to clear the rights involved in use.⁷⁸ This logic does not apply to the record companies that hold rights in sound recordings, because there is a concentration of ownership that means each company has significant clout on its own to enforce its rights, and further clout in the form of the Canadian Recording Industry Association (CRIA) which represents the interests of record companies through lobbying, public awareness, and litigation.⁷⁹

Extended Licensing

Another option is extended licensing, which involves legislatively granting an extended effect to the agreements that CRM bodies have with the artists they represent. This extension is the authority to administer the rights even of rights-owners who are not members of the CRM body in question.⁸⁰ This allows users of copyrighted works to be comfortable with the assurance that every work they use relating to a certain field and right (for example, the performance right in music) is subject to the same terms as set out by the CRM body administering the right.⁸¹ Extended licensing is already used in Nordic countries, and is usually provided for in the *Copyright Act* of the country.⁸²

A Canadian version of extended licensing is the Extended Repertoire System (ERS), proposed by Daniel Gervais.⁸³ This system is very similar to the current collective rights management system that predominates in Canada today, but with the extended reach described above: instead of artists opting in to a collective rights management body and granting the body permission to administer rights on that basis, the ERS involves a statutorily mandated opt-out system: a collective rights management organization would automatically have the authority to grant licenses and administer the rights for all artists unless an artist specifically chose not to be represented by the collective.⁸⁴ Collectives would get this authority from the Copyright Board, who could certify a

collective if it could show that it currently represented a significant portion of artists for a given use (e.g., performance rights, reproduction rights), and if the Board determined that it would be in the public interest to grant the collective the capacity to represent all rights holders concerned.⁸⁵

The advantages of Gervais' Extended Repertoire System are that it is not a great departure from the current system and might therefore be seen as a realistic option to policy makers and legislators considering copyright reform. It does not change who would require a license to use works, nor does it change the existing exceptions to copyright (such as the fair dealing exception).⁸⁶ It simply extends the authority of collectives to represent more artists so that they can have the mass to effectively perform their licensing functions. The ERS also would meet the needs of users of copyright music because a user would be more likely to pay a small fee if he or she knew that such fee covered virtually all artists whose work would be used.

The major disadvantage of the ERS is that it remains to be seen whether it would reduce costs to users in Canada — something that this paper argues is necessary if music-based podcasts are to thrive. The extended licensing regimes used in Nordic countries are effective, and it certainly appears that by extending the authority of collectives to represent all rights holders concerned, it may be possible to get a significant portion of the population to pay for licenses, and such a demand might enable a lower optimal price point at which royalty revenues would be maximized. However, this would need to be explored more in a Canadian-specific context.

Tax or Levy Schemes

A more extreme suggestion to solve the digital copyright dilemma is to impose a tax or levy on users. An example is the system proposed by William Fisher III, who finds that in the digital age, our current method of protecting music and film, through government protection of private suppliers against competition from copiers, is no longer the optimal way to encourage production of such goods.⁸⁷ Instead, he proposes a system whereby a creator who wished to collect revenue for his or her work would register it with the Copyright Office.⁸⁸ The Copyright Office would then give the work a unique filename, which it would use to track transmissions of the work. The government would raise taxes sufficient to compensate creators for the use of their work, and distribute shares of this tax revenue to creators based on the popularity of their work as determined by the tracking system in place.⁸⁹

While Fisher asserts that the most economically sound approach is to use income tax to achieve the goals of the system, other scholars have suggested different methods of collecting revenue. For example, Professor Netanel proposes placing a levy on goods and services whose value is increased by digital file-sharing.⁹⁰ Pro-

fessor Yu proposes a somewhat similar scheme that would place levies on ISPs and certain electronic equipment.⁹¹

The advantages of such a system are that consumers would pay less for more entertainment,⁹² and artists would be fairly compensated because there would be less illegal use of their material and the taxation or levy system would ensure that they received the royalties they were due.⁹³ Further, musicians would benefit by being less dependent on record companies for their income, and less money would be retained by those intermediaries.⁹⁴ There would also be a benefit to both creators and consumers in the form of decreased litigation and other transaction costs.⁹⁵

There are also disadvantages of a tax or levy-based system of compensating artists in order to allow expanded uses such as allowing music to be distributed through podcasts. First, SOCAN has already unsuccessfully attempted to impose a sort of levy with its first Tariff 22 proposal, which it intended to apply to Internet service providers.⁹⁶ It appears that any move in that direction would require significant legislative impetus to succeed. Second, Jeremy deBeer points out that a tax or levy-based regime in the Canadian context might run into constitutional problems, and questions whether the federal government has the power to legislate such a scheme.⁹⁷ deBeer's other objections include philosophical⁹⁸ international treaty,⁹⁹ and cross-subsidization¹⁰⁰ grounds. These and other objections¹⁰¹ are on top of the logistical challenges that setting up such a system would present.

The Way Forward

The above discussion presents three options that attempt to tackle the problem of protecting copyright in the online context. All of them would present advantages for podcasting by allowing podcasters to use music with fewer burdens than those proposed by the current licensing regime. However, all also present disadvantages that society may not be ready to accept.

With this in mind, two steps should be taken to create a licensing scheme that is amenable to podcasting. First, because podcasting is currently in legal limbo when it comes to music licensing, a relatively quick solution is needed: the CRM bodies should create a license that reduces the fees payable by non-commercial podcasters to use music in their programs. This should, however, only be a temporary solution. As discussed above, it is not desirable to license music according to how it is used, and technologies will continually present new uses that further fragment copyright or that blur the lines between uses. In the long term, Canada should work towards an extended licensing scheme of the variety proposed by Gervais. Such a scheme is not very far conceptually from the current licensing regime for musical works, and has the potential to reduce licensing fees for podcasters while also ensuring that copyright holders are

duly compensated. A tax or levy scheme, on the other hand, faces more obstacles from a political, legislative and administrative perspective.

VII. Conclusion

Podcasting is an emerging technology that is unique in its method of distributing audio-visual content and in its speedy growth and popularity. However, like other forms of online content, it brings the possibility of copyright infringement and the need to ensure that creators of works and other rights holders are sufficiently protected. There is a concomitant need to make works sufficiently available to society in order to meet the balancing purpose of copyright. While Canada is in the process of expanding its current licensing regime to include podcasting, the proposed licenses from leading collectives such as SOCAN and CMRRA will create an inhospitable environment for the growth of music-based podcasting, especially those podcasters who do not earn any revenues from their podcasts.

Notes:

¹ Todd Cochrane, *Podcasting: The Do It Yourself Guide* (Indianapolis: Wiley Publishing, 2005).

² *Ibid.*

³ Dave Winer, "Payloads for RSS" (11 January 2001), online: TheTwoWayWeb.com <<http://www.thetwowayweb.com/payloadsforrss>>.

⁴ David J. Moser, *Music Copyright for the New Millennium* (Vallejo: ProMusic Press, 2002) at 157.

⁵ Edward L. Carter & Scott Lunt, "Podcasting and Copyright: The Impact of Regulation on New Communication Technologies" (2006) 22 Santa Clara Computer & High Tech. L.J. 187 at 196.

⁶ *Ibid.* at 199.

⁷ *Ibid.* at 200. But the costs can still be quite high: Mugglecast, an extremely popular podcast about the Harry Potter series of books, began to incur bandwidth costs of \$60,000 per year, an expensive surprise for its teenage creators. See *infra*, note 19.

⁸ Al Kohn & Bob Kohn, *Kohn on Music Licensing*, 2d ed. (New York: Aspen Law & Business Press, 2002) at 1258. See the further discussion about rights engaged by podcasting in section III. Further note that a podcast can also be listened to or watched as streamed content, which blurs this legal distinction.

⁹ *Supra*, note 5.

¹⁰ *Supra*, note 1. See also Doug Mohney, "iPodder Good Fodder for MP3 Heads", *The Inquirer* (30 August 2004) online: <<http://www.theinquirer.net/?article=18152>> (accessed 20 March 2006); see also Adam Curry, "iPodder — a Brief History" online: Indiepodder.org <<http://www.ipodder.org/history>> (accessed 20 March 2006).

¹¹ Doc Searls, "DIY Radio with Podcasting" (28 September 2004), online: Doc Searls' IT Garage <<http://garage.docsearls.com/node/462>>.

¹² Mark Chapman, "Podcasting: Who's Tuning In" (10 March 2006) online: iMedia Connection <<http://www.imediaconnection.com/content/8600.asp>>.

¹³ See e.g., CBC Radio, "Quirks and Quarks" podcast, online: Canadian Broadcasting Corporation <[feed://www.cbc.ca/quirks/quirks.xml](http://www.cbc.ca/quirks/quirks.xml)>.

¹⁴ Anjali Athavaley, "Mainstream Media is Tuning in to 'Podcasting'; Corporate America Overtakes a Popular Grass-Roots Digital Format", *The Washington Post* (18 July, 2005), online: The Washington Post <<http://www.washingtonpost.com/wp-dyn/content/article/2005/07/17/AR20050717011292.html>>. See, e.g., IBM podcasts, online: <[feed://www.ibm.com/investor/ibm_ir_podcast.xml](http://www.ibm.com/investor/ibm_ir_podcast.xml)>.

Taking into account podcasting's unique technological, economic, and cultural characteristics, it is evident that there is a need for a change to the licensing regime if podcasting is going to fulfill its potential as a business model and cultural resource. This change should first come in the form of tariffs specific to podcasting that would make works more affordable, and move towards an extended licensing system that gives CRM bodies the authority to license more works, with an eye towards reducing license fees payable by users of copyrighted works. If change does not come, music-based podcasting will be the domain of commercial entities and public institutions. Non-commercial podcasters using musical content will be outside of the mainstream, and talk-based podcasts will form the vast majority of non-profit podcast content. One thing though, seems certain — the future will bring more innovative methods of content delivery and the copyright regime will need to adapt in one way or another.

¹⁵ For example, Osler, Hoskin & Harcourt podcasts, online: Osler, Hoskin & Harcourt <http://www.osler.com/resources_landing.aspx?id=103666>.

¹⁶ For example, Harvard University podcasts some class lectures: online: Harvard University <[feed://www.fas.harvard.edu/%7Eecscie1/podcast/](http://www.fas.harvard.edu/%7Eecscie1/podcast/)>; In Canada, Dalhousie University Law School is in the process of creating a series of law-related podcasts.

¹⁷ For example, <<http://www.godcast.org>> includes a series of bible lessons in Klingon.

¹⁸ "Rogers Wireless and Melodeo Intro North America's First Mobile Podcast Service" (6 February 2006), online: Podcasting News <http://www.podcastingnews.com/archives/2006/02/rogers_wireless.html>.

¹⁹ Maija Palmer, "Is Ricky Gervais Having a Laugh?" *Financial Times* (28 February 2006), online: Financial Times <<http://news.ft.com/cms/s/c435a5fa-a7ff-11da-85bc-00779e2340.html>>. Ricky Gervais, a British comedian, was not the first paid subscription podcast, but was the first widely listened-to podcast to go that route.

²⁰ *Ibid.*

²¹ *Copyright Act*, R.S.C. 1985, c. C-42.

²² Sound recordings and performances are not traditionally part of copyright because they do not qualify as works and do not have an "author" in the traditional sense. While some other countries deal with these rights by granting neighbouring rights that are not technically part of copyright, in Canada neighbouring rights are actually part of copyright. See David Vaver, *Copyright Law* (Toronto: Irwin Law, 2000) at 53.

²³ *Supra*, note 21, s. 3.

²⁴ *Supra*, note 21, s. 15.

²⁵ Even though the performance right was originally conceived as a public performance right, it has expanded to include performances that are neither live nor to the public. Thus, the fact that podcasting is technically a one-to-one method of distribution does not exempt it from the application of this right. See Daniel Gervais, "Use of Copyright Content on the Internet: Considerations on Excludability and Collective Licensing" in Michael Geist, ed., *In The Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005).

²⁶ *Supra*, note 21, s. 2.

²⁷ *Supra*, note 21, s. 18(1)(b).

²⁸ *Supra*, note 21, ss. 19-20.

- ²⁹ Daniel Gervais & Elizabeth F. Judge, *Intellectual Property: The Law in Canada*, (Toronto: Thomson Carswell, 2005).
- ³⁰ Society of Composers, Authors and Music Publishers of Canada, online: SOCAN <<http://www.socan.ca>>.
- ³¹ Vaver, *supra*, note 22.
- ³² *Ibid.* For current tariffs see SOCAN's Web site: online: SOCAN <<http://www.socan.ca/jsp/en/resources/tariffs.jsp>> (last accessed 10 October 2006).
- ³³ SOCAN, *Statement of Proposed Royalties to be Collected by SOCAN for the Public Performance or the Communication to the Public by Telecommunication, in Canada, of Musical or Dramatico-Musical Works*, C. Gaz. I. Supplement (14 May 2005), online: Copyright Board of Canada <<http://www.cb-cda.gc.ca/tariffs/proposed/m14052004-b.pdf>>.
- ³⁴ *Ibid.*
- ³⁵ *Ibid.*, Tariff 22(1).
- ³⁶ *Ibid.*, Tariff 22(7).
- ³⁷ *Ibid.*
- ³⁸ Author's correspondence with SOCAN, November 7, 2006. These voluntary licenses were withdrawn in April 2006 because of the proximity of the Copyright Board hearings, since the licenses were intended to be one-year contracts. It is proposed that once Tariff 22 is approved it will be retroactive.
- ³⁹ Copyright Board of Canada, online: <<http://www.cb-cda.gc.ca/new-e.html>>.
- ⁴⁰ Canadian Musical Reproduction Rights Agency, *What is CMRRA?*, online: CMRRA <http://www.cmrra.ca/What_is_CMRRA_3/what_is_cmrra_3.html>.
- ⁴¹ CMRRA, "Statement of Proposed Royalties to Be Collected by CMRRA/SODRAC Inc. for the Reproduction of Musical Works, in Canada, for the Years 2005 to 2007" (1 May 2004) C. Gaz. I. Supplement, 10; online: Copyright Board of Canada <<http://www.cb-cda.gc.ca/tariffs/proposed/mp01052004-b.pdf>>.
- ⁴² *Ibid.*
- ⁴³ "Podcasting on the Rise" (6 June 2005), online: Burning Questions; The Official Feedburner Weblog <<http://www.burningdoor.com/feedburner/archives/001238.html>>.
- ⁴⁴ Matthew J. Astle, "Will Congress Kill the Podcasting Star?" (2005) Har. J.L. & Tech. 164.
- ⁴⁵ *Ibid.*
- ⁴⁶ Tod Maffin, online: <<http://todmaffin.com/blogs/radio/?p=878>> (last accessed 7 November 2006).
- ⁴⁷ Michael Einhorn, *Media, Technology and Copyright* (Northampton: Edward Elgar Publishing, 2004) at 51. DRM refers to measures taken to limit the uses that can be made of a given digital audio file, usually in an attempt to prevent unauthorized copying. For example, songs downloaded from iTunes have DRM technology embedded in them which limits the number of computers on which a given song can be played: see Apple Computer Inc., "Authorizing Your Computer" online: iTunes <<http://www.apple.com/support/itunes/musicstore/authorization/>>.
- ⁴⁸ *Supra*, note 44 at 198. Note that while the United States grants statutory licenses for sound recordings, these are for the "public performance" of a sound recording online, a right created by statute. See *Digital Performance Right in Sound Recordings Act of 1995*, Pub. L. No. 104-39; *Digital Millennium Copyright Act*, Pub. L. No. 105- 304, 112 Stat. 2860 (1998). In Canada there is no separate digital public performance right attached to a sound recording.
- ⁴⁹ *Supra*, note 33.
- ⁵⁰ *Supra*, note 33.
- ⁵¹ Mihaly Ficsor, *The Law of Copyright and the Internet: The 1996 WIPO Treaties, Their Interpretation and Implementation* (Oxford: Oxford UP, 2002). The text of the treaty is available at: <http://www.wipo.int/edocs/mdocs/sccr/en/sccr_15/sccr_15_2.pdf>. Currently, the treaty is on the backburner because the WIPO General Assemblies did not approve the recommendation to convene a diplomatic conference for the purpose of finalizing the treaty. Meetings are to be held in 2007 for parties to work on the draft further.
- ⁵² WIPO, *Revised Draft Basic Proposal for the WIPO Treaty on the Protection of Broadcasting Organizations*, SCCR/15/2, 15th Sess., online: WIPO <http://www.wipo.int/edocs/mdocs/sccr/en/sccr_15/sccr_15_2.pdf>.
- ⁵³ Electronic Frontier Foundation, "Joint Statement of Podcasting Organizations and Podcasters on the Proposed WIPO Treaty for the Protection of Broadcasts and Broadcasting Organizations Presented to 15th Session of Wipo Standing Committee on Copyright and Related Rights" (11-12 September 2006), online: Electronic Frontier Foundation <http://www.eff.org/IP/WIPO/broadcasting_treaty/podcasting.php>.
- ⁵⁴ James Boyle, "More Rights Are Wrong for Webcasters" *Financial Times* (26 September 2005).
- ⁵⁵ James Boyle, "Constitutional Circumvention" *Financial Times* (13 June 2006).
- ⁵⁶ I use the term "non-commercial" to mean podcasts that are not produced by business entities and also podcasts that are not produced by institutions such as universities or public broadcasters.
- ⁵⁷ James Kendrick, "A Short History of Collective Licensing: Musical Compositions — The American Experience" in James Kendrick, ed., *Collective Licensing: Past, Present and Future* (Netherlands: Maklu Publishers, 2002). Canada has the largest number of collective management organizations relative to population in the world: Daniel Gervais, *Collective Management of Copyright and Neighbouring Rights in Canada: An International Perspective* (A report prepared for the Department of Canadian Heritage, August 2001).
- ⁵⁸ Alana Maurushat & Daniel Gervais, "Fragmented Copyright, Fragmented Management: Proposals to Defrag Copyright Management" (Mar. 2003) 2:1 C.J.L.T. 15, online: C.J.L.T. <http://cjlt.dal.ca/vol2_no1/pdfarticles/gervais.pdf>.
- ⁵⁹ *Théberge v. Galerie d'Art du Petit Champlain*, [2002] 2 S.C.R. 336.
- ⁶⁰ Peter Jaszi, "The Future of Collective Licensing" in James Kendrick, ed., *Collective Licensing: Past, Present and Future* (Proceedings of the meeting of the International Association of Entertainment Lawyers, 2002) (Netherlands/Belgium: Maklu Publishers, 2002).
- ⁶¹ See *Podcasting Compared to Other Online Content*, above, at Section II.
- ⁶² Jeremy F. deBeer, "The Role of Levies in Canada's Digital Music Marketplace" (Nov. 2005) 4:3 C.J.L.T. 153.
- ⁶³ *Ibid.*
- ⁶⁴ Correspondence with podcaster Marie-Chantalle Turgeon, March 2006; also see <<http://todmaffin.com/blogs/radio/2005/06/18/one-podcasters-letter-to-the-copyright-board/>> (last accessed 7 November 2006). Claiming that their activities promote artists is not a new argument — Napster made similar claims — but such an assertion is much more legitimate when applied to podcasting for the reasons outlined in this paragraph.
- ⁶⁵ From a purely economic perspective, if it takes x minutes to cut a song out of a podcast, and an individual's time is worth \$y/hr, as soon as the price of a download is lower than (x/60)*y, it is economically optimal to purchase the download rather than cut from a podcast. The point at which it becomes economically preferable to simply purchase downloads occurs at relatively low values for x and y: for example, if it takes just six minutes to cut a song from a podcast and one's time is worth \$10/hr, then it is economically preferable to pay 99 cents to download the same song from a download server.
- ⁶⁶ Peter Gaston, "Radio Free Everywhere" online: Meidia <<http://www.meidia.ca/gx/spin.jpg>>.
- ⁶⁷ Correspondence with Marie-Chantalle Turgeon, March 2006.
- ⁶⁸ *Supra*, note 5. See also Tony Fox *et al.*, "Creative Commons, An Alternative, Web Based Copyright System" (2005) 16:5 Entertainment L.Rev. 111.
- ⁶⁹ Creative Commons is a non-profit organization that offers an alternative to traditional copyright. It allows authors to upload works and specify what uses the work is licensed for: a "some rights reserved" rather than an "all rights reserved" approach to copyright. Online: Creative Commons <<http://www.creativecommons.org>>.
- ⁷⁰ Matt May, "Podcasting, Music and the Law" (15 February 2005), online: best kung fu weblog <<http://www.bestkungfu.com/archive/date/2005/02/podcasting-music-and-the-law>>. See also Tod Maffin's blog about his quest to create legal podcasts: <<http://www.todgetslegal.com>> (last accessed 28 March 2006); also the Keener13 podcast, which proudly notes that it is one of the first podcasts in the U.S.A. to be completely legal *vis-à-vis* collective rights management organizations: online: WKNR <<http://www.keener13.com>>.
- ⁷¹ May, *ibid.*

- ⁷² Palmer, *supra*, note 19. While Gervais' podcast is talk-based and only uses music for its introduction and conclusion, in most cases such music would need to be licensed by the podcaster.
- ⁷³ SOCAN, *supra*, note 33; CMRRA, *supra*, note 41. The CMRRA tariff applies to "online music services".
- ⁷⁴ Record company approaches to sound recording licensing are not discussed in depth in this paper because there is little opportunity to engage in a critical evaluation of their licensing practices (given that they are at the sole discretion of the record companies) other than to say that a podcaster clearly faces an uphill battle to get such licenses.
- ⁷⁵ Jaszi, *supra*, note 60.
- ⁷⁶ Jaszi, *supra*, note 60.
- ⁷⁷ iFill, online: Griffin Technology <<http://www.griffintechology.com/products/ifill/>>.
- ⁷⁸ Teresa Scassa, "Interests in the Balance" in Michael Geist, ed., *In the Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005).
- ⁷⁹ Canadian Recording Industry Association, online: CRIA <<http://www.cria.ca/>>.
- ⁸⁰ Gustav Kamell, "Extended Collective License Clauses and Agreements in Nordic Copyright Law" (1985) 10 Colum.-V.L.A. J.L. & Arts 73.
- ⁸¹ Henry Olsson, "The Extended Collective License as Applied in the Nordic Countries" (Paper presented to the Kopinor 25th Anniversary Symposium, (20 May 2005), online: University of Turin <http://www.kopinor.org/hva_er_kopinor/kopinor_25_ar/kopinor_25th_anniversary_international_symposium/the_extended_collective_license_as_applied_in_the_nordic_countries>.
- ⁸² Daniel Gervais, "Collective Management of Copyright and Neighbouring Rights in Canada: An International Perspective" (Report prepared for the Department of Canadian Heritage, August 2001) at 39-40.
- ⁸³ Daniel Gervais, "Use of Copyright Content on the Internet: Considerations on Excludability and Collective Licensing" in Michael Geist, ed., *In the Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005) at 539.
- ⁸⁴ *Ibid.* at 542.
- ⁸⁵ *Supra*, note 83 at 542.
- ⁸⁶ *Supra*, note 83 at 542.
- ⁸⁷ William W. Fisher III, *Promises to Keep: Technology, Law, and the Future of Entertainment*, (Stanford: Stanford Law and Politics, 2004) at 202.
- ⁸⁸ This is an American institution, since the author writes in the American context. However, his proposal could be adapted to the Canadian copyright system.
- ⁸⁹ *Supra*, note 87 at 202.
- ⁹⁰ Neil Netanel, "Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing" (2003) 17 Harv. J. L. & Tech. 1.
- ⁹¹ Peter Yu, "P2P and the Future of Private Copying" (2005) 76 U. Colo. L. Rev. 653.
- ⁹² Even though many consumers get music and video for "free" through illegal means, overall a significant amount of money is spent every year by the average household, which would decrease under a tax/levy scheme. See Fisher, *supra*, note 87 at 236.
- ⁹³ *Supra*, note 87 at 203.
- ⁹⁴ *Supra*, note 87 at 203.
- ⁹⁵ *Supra*, note 87 at 203.
- ⁹⁶ See *Society of Composers, Authors, and Music Publishers of Canada v. Canadian Association of Internet Providers*, [2004] 2 S.C.R. 427.
- ⁹⁷ deBeer, *supra* note 62 at 158. While Parliament can enact laws relating to copyright and taxation, the provinces have jurisdiction over property and civil rights. It is not clear that a tax on Internet access or portable music players would be *intra vires* the federal government.
- ⁹⁸ In essence, a tax or levy scheme would contradict artist's natural property rights because the government would expropriate them by introducing a mandatory licensing scheme: see deBeer, *ibid.* at 157.
- ⁹⁹ Exceptions to copyright must pass a three-part test under the Berne Convention and the WTO TRIPs treaties, and arguably a broad exemption accompanying a levy would not meet this test: *Berne Convention on the Protection of Literary and Artistic Works 1886*, 828 U.N.T.S. 221 at Art. 9(2); *Agreement on Trade-Related Aspects of Intellectual Property Rights*, 1869 U.N.T.S. 299 at Art. 13. See deBeer, *ibid.* at 158.
- ¹⁰⁰ Cross-subsidization problems arise because in any tax/levy system it will be difficult to accurately determine which rights holders are entitled to remuneration, and on what basis remuneration is deserved. There is a further cross-subsidization problem in that imposing a levy on, for example, ISPs or other products forces technology suppliers to subsidize music production on questionable grounds. See deBeer, *ibid.* note 97 at 159.
- ¹⁰¹ See Fisher, *supra*, note 87 at 242-251.