

**BMG CANADA, INC. V. DOE & SOCIETY OF
COMPOSERS, AUTHORS & MUSIC PUBLISHERS OF
CANADA V. CANADIAN ASS'N OF INTERNET
PROVIDERS: WHY THE CANADIAN MUSIC
COMPENSATION SYSTEM MAY NOT WORK IN THE
UNITED STATES**

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Canada and the United States rely on similar copyright schemes. When it comes to crafting and enforcing copyright law for and on the Internet, however, the solutions and outcomes in the two countries significantly differ. Recent Canadian court decisions *BMG Canada, Inc. v. Doe* (“*Doe*”)¹ and *Society of Composers, Authors & Music Publishers of Canada v. Canadian Ass’n of Internet Providers* (“*SOCAN*”)² confirm that in Canada, copying or downloading music from the Internet for personal noncommercial use does not constitute infringement. Consequently, Internet service providers (ISPs) are not liable for contributory infringement or related royalty payments. In light of the marked departure these cases represent from U.S. law and norms, and larger problems with Canada’s levy-based copyright regime, *Doe* and *SOCAN* demonstrate that it may not be feasible or desirable to adopt recent suggestions that the United States implement a Canadian-style system.

This Note analyzes how Canada’s copyright laws operate in relation to the Internet and considers the concerns pertinent to adopting a similar system in the United States. Part I summarizes Canadian copyright law in general, and the levy/tariff system in particular, as they operate in the Internet environment. Part II briefly describes the *Doe* and *SOCAN* decisions and what they say about user, ISP, and P2P file-sharing liability in Canada. Part III reviews the current state of file-sharing copyright

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1. *BMG Can., Inc. v. Doe*, [2004] F.C. 488 (Can.).

2. *Soc’y of Composers, Authors & Music Publishers of Can. v. Can. Ass’n. of Internet Providers*, [2004] S.C.R. 427, 2004 Can. Sup. Ct. LEXIS 46.

jurisprudence on the Internet in the United States. Finally, Part IV analyzes how *Doe* and *SOCAN* heighten existing problems with the Canadian levy/tariff system, and concludes that these shortcomings would render it unwise to adopt a similar system in the United States.

I. THE CANADIAN COPYRIGHT SYSTEM

Canadian copyright law is a statutory scheme that protects rights similar to those protected in the United States.³ Unlike the United States, however, Canada utilizes a compensatory scheme consisting of tariffs and levies on goods and services related to consumption of copyrighted works.

A. THE CANADIAN COPYRIGHT ACT

The Canadian Copyright Act protects five general categories of creative works: literary, dramatic, artistic, and musical works, and sound recordings.⁴ A recorded musical work is typically protected by several different copyrights, including those in the musical composition, the lyrics, and the performance.⁵ The Act grants a copyright holder the exclusive rights to produce, publicly perform, publish in the original language or translation, make a sound recording or cinematographic film of, reproduce, communicate by telecommunication, and rent or authorize renting of the work.⁶ Direct infringement occurs when an individual exercises one of the copyright owners' rights without the consent of the copyright owner.⁷ The statute also defines secondary infringement, which

3. See generally Sheldon Burshtein, *Surfing the Internet: Copyright Issues in Canada*, 13 SANTA CLARA COMPUTER & HIGH TECH. L.J. 385, 395-408 (1997) (discussing Canadian copyright law in general and Internet issues in particular); Alex Colangelo, *Copyright Infringement in the Internet Era: The Challenge of MP3s*, 39 ALBERTA L. REV. 891, 902-03 (2002) (discussing challenges Canada faces in applying its copyright laws on the Internet); Daniel J. Gervais, *Transmissions of Music on the Internet: An Analysis of the Copyright Laws in Canada, France, Germany, Japan, the United Kingdom, and the United States*, 34 VAND. J. TRANSNAT'L L. 1363, 1367-72 (2001) (comparing Canadian copyright law to that of other countries).

4. See Copyright Act, R.S.C., ch. C-42, § 2 (1985) (Can.).

5. Musical works include any work of music or musical composition, with or without words, and compilations of musical works. *Id.* Song lyrics are classified as literary works. *Id.* The Canadian Copyright Act also protects performance of musical works. *Id.* § 15.

6. *Id.* § 3. The scope of the performance right depends on whether the work is fixed or not. If the performance is not fixed, the copyright owner can communicate the work by telecommunication, perform it publicly, and fix the performance. *Id.* § 15(a). If the performance is fixed the rights-holder can reproduce, authorize fixation, reproduce reproductions, and rent the performance. *Id.* § 15(b)-(c).

7. *Id.* § 27(1).

is constituted by the sale, lease, distribution for the purposes of trade, exhibition in public by the way of trade, or importation of infringing works when the actor “knows or should have known [that she] infringes the copyright or would infringe the copyright if [the action] had been made in Canada by the person who made it.”⁸

Certain types of activities that involve the reproduction or performance of copyright-protected works are exempted from copyright infringement in Canada. The most notable exception is for reproduction of a sound recording “for the private use of the person who makes the copy.”⁹ This private personal use exemption for music, which was introduced in 1998 as an amendment to the Canadian Copyright Act,¹⁰ is balanced by a levy that consumers pay on blank media in order to compensate rights holders for such copying.¹¹ This is one of the most significant differences between the copyright laws of Canada and the United States.¹² While prior to the advent of the Internet the meaning of “private personal use” was relatively clear, the *Doe* and *SOCAN* cases reveal that the Internet’s capabilities have rendered the scope of the exemption one of the most contentious and economically significant issues in Canadian copyright law.

B. THE CANADIAN LEVY SYSTEM

In deciding how to enforce the Canadian Copyright Act in the Internet age, the Canadian Parliament determined that “it was difficult to detect infringements, and adequate enforcement of the law was a somewhat distant hope that would, in effect, only serve to clog the [Canadian] judicial system.”¹³ Thus, the Parliament decided to compensate artists by

8. *Id.* § 27(2)-(5).

9. *Id.* § 27(2). In addition to the private personal use exemption discussed here, the “fair dealing” doctrine allows other exemptions such as copying for private research, and performance under certain circumstances. *Id.* The fair dealing doctrine belongs to Canadian common law and is not legislatively defined; hence, the court interprets the facts of each case. Canadian fair dealing differs from the United States’ “fair use” doctrine, as the latter is broader in scope. *See* Burshtein, *supra* note 3, at 405.

10. *See* Canadian Copyright Board, *Fact Sheet*, Dec. 12, 2003, at <http://www.cb-cda.gc.ca/news/c20032004fs-e.html>.

11. *See* R.S.C., ch. C-42, § 80.

12. Although the Audio Home Recording Act provides a similar exemption for copies made onto digital audio tape (DAT), likewise subsidized by a levy on blank recordable compact discs, limited consumer adoption of the DAT format has rendered the provision largely irrelevant. 17 U.S.C. § 1001 (2000).

13. Mark K.J. Rushton & Virginia H.L. Jones, *The Tortoise and the Hare: Canadian Legislative Copyright Reforms Race Against Copyright Infringement Over Kazaa and Other New Generation Peer-to-Peer Networks*, 32 *AIPLA Q.J.* 197, 245 (2004).

implementing a levy on blank media.¹⁴ Seeking additional compensation, SOCAN applied to the Canadian Copyright Board for an Internet tariff known as “Tariff 22.”¹⁵

1. *The Levy System*

While § 80 of the Canadian Copyright Act allows private personal copying of sound recordings, it also restricts such copying to a form of recording media that is subject to a consumer levy: domestically produced or imported blank media including analog audio cassette tapes, compact discs, MiniDiscs, and various forms of memory permanently embedded in a digital audio recorder (such as an MP3 player).¹⁶ As new copying media appear, the Canadian legislature modifies the levy system to include them.¹⁷ The Copyright Board then determines the levy amount in consultation with all interested parties.¹⁸ The levies aim to compensate artists for lost royalties due to consumers’ home copying.¹⁹ Whether the levy sufficiently compensates artists, however, is widely disputed.²⁰

Under the levy system,²¹ the Canadian Private Copying Collective (CPCC)²²—an umbrella organization consisting of five Canadian music collective societies, of which SOCAN²³ is one—collects the fee on blank

14. See R.S.C., ch. C-42, § 80.

15. Statute SOCAN, *Web Licensing*, available at http://www.socan.ca/jsp/en/music_users/web_licensing.jsp (last visited Feb. 28, 2005).

16. See R.S.C., ch. C-42, § 80; see also Canadian Copyright Board, *supra* note 10 (discussing what the media categories from which levies are collected include and exclude).

17. Rushton & Jones, *supra* note 13, at 248.

18. R.S.C., ch. C-42, § 83(1)-(9).

19. W. Victor Tuomi, *Music, Copyrights, and the Internet: The Copyright Board Chimes In*, 18 CAN. INTEL. PROP. REV. 69, 171 (2001).

20. See, e.g., Rushton & Jones, *supra* note 13, at 249 (“[A] blank media levy masked in the price of consumer goods is not sufficient to compensate for all varieties of copyright infringement.”); Tuomi, *supra* note 19, at 77-80 (criticizing the levy system as a form of tax).

21. See Kimberly Hancock, *Canadian Copyright Act Revision*, 13 BERKELEY TECH. L.J. 517, 525-26 (1998).

22. See generally Canadian Private Copying Collective, <http://cpcc.ca> (last visited Feb. 28, 2005).

23. See generally SOCAN, <http://www.socan.ca> (last visited Feb. 28, 2005). SOCAN is a not-for-profit corporation representing composers, songwriters, and lyricists. Membership is not compulsory. “SOCAN is part of a worldwide network of similar societies administering similar repertoires. . . . SOCAN has filed and continues to file numerous [requests for] tariffs.” JOHN S. MCKEOWN, CANADIAN LAW OF COPYRIGHT AND INDUSTRIAL DESIGNS 709-10 (3d ed. 2000). There are twelve such collective societies in Canada. *Id.*; see also Hancock, *supra* note 21, at 525-26 (discussing the levy system). Other member collectives are the Canadian Mechanical Reproduction Rights

media. The CPCC then distributes the collected fees to its constituent societies, which, in turn, distribute the fees to artists.²⁴ In general, a collective society licenses²⁵ the right to perform its members' copyrighted works publicly "by [members'] assignment, grant of license, appointment of it as their agent or otherwise, authoriz[ing] it to act on their behalf in relation to that collective administration."²⁶ The collective societies also pursue copyright enforcement actions on their members' behalf.²⁷

Agency (CMRRA), the Neighboring Rights Collective of Canada (NRCC), the Societe de gestion des droits des artistes-musiciens (SOGEDAM), and the Societe du droit de reproduction des auteurs, compositeurs, et editeurs au Canada (SODRAC). Canadian Copyright Board, *supra* note 10.

24. Artists can join any society for which they qualify for some nominal annual or one-time membership fee; any one artist can qualify for more than one society. See SOCAN, *How Membership Works*, available at http://www.socan.ca/jsp/en/music_creators/how_it_works.jsp (discussing one time membership fees and royalties distribution process and timetable in SOCAN) (last visited Feb. 28, 2005); SOCAN, *Membership Criteria*, available at http://www.socan.ca/jsp/en/music_creators/criteria.jsp (last visited Feb. 28, 2005) (discussing the membership criteria for music creators and music publishers).

25. "The cost of a SOCAN license depends on a range of factors, from where and how the musical work is being performed, to the seating capacity, and even the kind of event In fact, there are more than 20 different tariffs set by the Copyright Board to accommodate the different uses of music." SOCAN, *How Our Licensing Works*, available at http://www.socan.ca/jsp/en/music_users/how_it_works.jsp (last visited Feb. 28, 2005); see also SOCAN, *SOCAN Tariffs*, available at <http://www.socan.ca/jsp/en/resources/tariffs.jsp> (last visited Feb. 28, 2005) (listing various kinds of tariffs). SOCAN also assists Canadians to obtain a license on foreign music as it has "reciprocal agreements with organizations similar to SOCAN, from all over the world." SOCAN, *Do You Need A License?*, available at http://www.socan.ca/jsp/en/music_users/do_you_need_license.jsp (last visited Feb. 28, 2005).

26. MCKEOWN, *supra* note 23, at 710 (quoting R.S.C., ch. C-42, § 2 (1985) (Can.)). Sections 67-68.2 outline the law applicable to collective societies:

In order to come within the definition, the society must carry on the business of the collective administration of copyright and operate a licensing scheme applicable to a repertoire pursuant to which the society sets out classes of uses that it agrees to authorize under the Act and the royalties and terms and conditions relating to such use.

Id. Collective societies periodically file the lists of all musical works in current use with the Minister at the Copyright Office. *Id.* 709; see also MIHALY FICSOR, COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS (2000); Stanley M. Besen, et al., *An Economic Analysis of Copyright Collectives*, 78 VA. L. REV. 383 (1992) (arguing that collectives centralize administration of copyrights and lower costs allowing more transactions to occur).

27. MCKEOWN, *supra* note 23, at 708 ("The rules of the societies provid[e] for the pooling of the fees and damages recovered and division of the fund among the members after the deduction of expenses.").

Obtaining a tariff in Canada is a complex and often lengthy process. A collective society such as SOCAN first must file a proposed tariff with the Copyright Board, which is then published in the *Canada Gazette*. Prospective users may file written objections within sixty days after the publication of the tariff.²⁸ No collective society can commence an infringement or royalty recovery action unless a proposed tariff has been filed, absent special consent from the Minister of the Copyright Board.²⁹ The Copyright Board must set tariffs on a “reasonable and suitable” or “rational” basis, and then publish approved tariffs in the *Canada Gazette* as soon as practicable.³⁰ Once the Copyright Board certifies a tariff, the defendant in an enforcement action cannot dispute its validity,³¹ and the collective society cannot cancel the underlying license. Any party, however, can appeal the Copyright Board’s decision in the system of Canadian federal courts.

2. *Tariff 22*

In 1995, SOCAN proposed what became known as “Tariff 22” to the Copyright Board as another way to compensate artists for Internet distribution of their works.³² “Tariff 22 seeks to license the royalties for the public performance of musical works by means of any telecommunication service whose transmission can be independently accessed. The primary targets of this tariff are ISPs.”³³ Unlike the blank media levy, Tariff 22 focuses on indirect infringements “occurring because of the content providers’ authorization and communication” over the Internet.³⁴ While the validity of Tariff 22 has not been contested, the Canadian courts have been addressing the issue of who should be

28. R.S.C., ch. C-42, § 67 (1)-(5); *see also id.* § 68 (outlining Copyright Board decision and objections processes).

29. *Id.* § 67(4); *see also* C.A.P.A.C. v. Maple Leaf Broad. Co., [1953] Ex. C.R. 130, 150 (Can.).

30. *See* R.S.C., ch. C-42, §§ 66.91, 68(4); Can. Assn. of Broads. v. Soc’y of Composers, Authors & Music Publishers of Can., 58 C.P.R. 3d 190 (Fed. Ct. 1994) (Can.); *see also* Can. Broad. Co. v. Can., 47 C.P.R. 3d 426 (Fed. Ct. App. 1993) (Can.) (holding that the rates do not have to be set to negotiated price in a competitive market); Can. Copyright Broad. Co. v. Can., 30 C.P.R. 3d 269 (Fed. Ct. 1990) (Can.) (holding that the Copyright Board should not “pursue consistency at the expense of the merits of individual cases”); Performing Rights Org. of Can., Ltd. v. Can. Broad. Co., 7 C.P.R. 3d 433 (Fed. Ct. 1986) (Can.).

31. *Maple Leaf Broad.*, [1953] Ex. C.R. at 130.

32. SOCAN, *Web Licensing*, available at http://www.socan.ca/jsp/en/music_users/web_licensing.jsp (last visited Feb. 28, 2005) [hereinafter, SOCAN, *Web Licensing*].

33. *Id.*

34. Rushton & Jones, *supra* note 13, at 246.

responsible for payment of Internet tariffs since 1995.³⁵ *SOCAN* is the latest development in the allocation of Tariff 22.³⁶

II. *DOE AND SOCAN*

Two recent Canadian copyright decisions, *Doe* and *SOCAN*, liberally interpreted the Canadian Copyright Act to clarify the liability issues involved with Internet music file sharing. In *Doe*, the Federal Court held that end users are not liable for trading Internet-downloaded music files because § 80 of the Copyright Act allows private noncommercial copying by end-users.³⁷ In *SOCAN*, the Supreme Court of Canada held that ISPs are not required to collect Tariff 22 because they are mere intermediaries in the file transfer process.³⁸ Section 2.4(1)(b) of the Copyright Act states that persons who only supply “the means of telecommunication necessary for another person to so communicate” are not themselves to be considered parties to an infringing communication. Moreover, forcing ISPs to pay the tariff would hinder innovation.

A. *DOE: DOWNLOADING SONGS FOR PERSONAL USE DOES NOT CONSTITUTE COPYRIGHT INFRINGEMENT*

The plaintiffs in *Doe*, all members of Canada’s recording industry (collectively referred to as “CRIA”), demanded that five Canadian ISPs disclose the identities of twenty-nine customers, each alleged to have infringed the copyrights of more than one thousand songs by anonymously using software such as Geekboy and KaZaA to install Internet-downloaded music onto their home computers and to illegally trade it.³⁹ The Court of Appeals held that the ISPs did not have to disclose the

35. See *Soc’y of Composers, Authors and Music Publishers of Can. v. Can. Assoc. of Internet Providers*, [2002] F.C. 3 (Can.); *Soc’y of Composers, Authors and Music Publishers of Can. v. Can. Assoc. of Internet Providers*, C.P.R. 4th 417 (Copyright Bd. 1999) (Can.).

36. The Copyright Board decided to conduct hearings for Tariff 22 in two phases. Phase one, completed in the fall of 1999, dealt with the legal issues pertaining to the tariff such as who is liable and what actions are liable under the Copyright Act. Phase two will deal with the tariff structure and who specifically will be liable within the communication chain for the payment of fees and amount of those fees under the tariff. As yet, the date for the hearing of phase two has not been set.

SOCAN, *Web Licensing*, *supra* note 32.

37. *BMG Can. Inc. v. Doe*, [2004] F.C. 488, ¶ 25 (Can.).

38. *Soc’y of Composers, Authors & Music Publishers of Can. v. Can. Ass’n of Internet Providers*, [2004] S.C.R. 427 (Can.), 2004 Can. Sup. Ct. LEXIS 46, at *89.

39. *Doe*, [2004] F.C. 488, ¶¶ 1-2.

identity of individual customers because CRIA failed to meet three of the five necessary criteria to compel such disclosure.⁴⁰ Specifically, CRIA failed to make a prima facie case of copyright infringement, establish that the ISPs were the only practical source for the identity of the P2P users, and establish that the public interest for disclosure outweighed privacy concerns.⁴¹

The court began by construing § 80 of the Copyright Act, which states:

(1) Subject to subsection (2), the act of reproducing all or any substantial part of [a] musical work embodied in a sound recording, . . . onto an audio recording medium for the private use of the person who makes the copy does not constitute an infringement of the copyright in the musical work, the performer's performance or the sound recording.⁴²

The court held that "downloading a song for personal use does not amount to infringement."⁴³ The court also implied that uploading does not amount to infringement: "No evidence was presented that the alleged infringers either distributed or authorized the reproduction of sound recordings [when they] merely placed personal copies into their shared directories which were accessible by other computer users via a P2P service."⁴⁴ According to the court, distribution only occurs when a defendant commits a "positive act . . . such as sending out the copies or advertising that they are available for copying."⁴⁵ Thus, "[t]he mere fact of placing a copy on a shared directory in a computer where that copy can be accessed via P2P services does not amount to distribution."⁴⁶

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40. (a) [T]he applicant must establish a prima facie case against the unknown alleged wrongdoer; (b) the person from whom discovery is sought must be in some way involved in the matter under dispute, he must be more than an innocent bystander; (c) the person from whom discovery is sought must be the only practical source of information available to the applicant; (d) the person from whom discovery is sought must be reasonably compensated for his expenses arising out of compliance with the discovery order in addition to his legal costs; (e) the public interests in favor of disclosure must outweigh the legitimate privacy concerns.

Doe, [2004] F.C. 488, ¶¶ 13, 43 (citing *Norwich Pharmacal v. Customs & Excise Comm'rs*, [1974] A.C. 133 (Can.), and *Glaxco Welcome PLC v. Canada*, 81 C.P.R. 3d 372 (Fed. Ct. 1998)).

41. *Id.* ¶ 43.

42. R.S.C., ch. C-42, § 80 (1) (1985) (Can.).

43. *Doe*, [2004] F.C. 488, ¶ 25.

44. *Id.* ¶ 26.

45. *Id.* ¶ 28.

46. *Id.* ¶ 28.

Second, the court noted that individual privacy rights outweighed the public's interest in protecting copyrights since "the protection of privacy is of utmost importance to Canadian society"⁴⁷ and there existed a "serious possibility of an innocent account holder being identified."⁴⁸ The court observed that the Canadian Parliament had recognized the need to protect privacy on the Internet when it passed the Personal Information Protection and Electronic Document Act.⁴⁹ Accordingly, the court held that "[u]nder these circumstances, given the age of the data, its unreliability and the serious possibility of innocent account holders being identified . . . the privacy concerns outweigh the public interest concerns in favor of disclosure."⁵⁰

B. SOCAN: ISPS ARE NOT REQUIRED TO COLLECT TARIFF 22 FROM INTERNET USERS

After *Doe* established that individual end users do not directly infringe copyrights file sharing when they engage in private home copying of music files through Internet file sharing, *SOCAN* held that ISPs are not secondary infringers for facilitating such file sharing. As a result, ISPs need not collect or pay Tariff 22, since tariff liability only follows from one's infringement of the communication right.

In *SOCAN*, the plaintiff sought to collect royalties under Tariff 22 from the Canadian Association of Internet Providers, a coalition of Canadian ISPs who had challenged *SOCAN*'s contention that ISPs must pay royalties for copyrighted musical works transmitted over the Internet.⁵¹ *SOCAN* argued that ISPs infringed its exclusive right to communicate the works to the public by telecommunication and the right to authorize such communication,⁵² and thus must pay royalties under Tariff 22.⁵³ The ISPs countered that they were merely conduits, and

47. *Id.* ¶ 36.

48. *Id.* ¶¶ 42.

49. *Id.* ¶¶ 38-40 (citing Personal Information Protection and Electronic Documents Act, R.S.C., ch. C-5, §§ 3, 7(3)(c) (2000) (Can.)).

50. *Id.* ¶ 42.

51. *Soc'y of Composers, Authors & Music Publishers of Can. v. Can. Ass'n of Internet Providers*, [2004] S.C.R. 427 (Can), Can. Sup. Ct. LEXIS 46, *22-*25.

52. "For the purposes of this Act, [the copyright holder has] . . . the sole right . . . in case of any literary, dramatic, or artistic work, to communicate the work to the public by telecommunication . . ." R.S.C., ch. C-42, § 3(1)(f) (1985) (Can.).

53. *See SOCAN*, [2004] S.C.R. 427, Can. Sup. Ct. LEXIS at *20-*23; *see also* Rushton & Jones, *supra* note 13, at 256 (arguing that ISPs are well situated to collect tariffs from individual customers).

because they did not regulate or authorize the content of the Internet communications they transmitted, Tariff 22 did not apply.⁵⁴

Ultimately decided by the Supreme Court of Canada, the *SOCAN* case originated in the Canadian Copyright Board in 1995, when SOCAN applied for the approval of Tariff 22 to allocate royalties due as a result of Internet file sharing.⁵⁵ The Board concluded that, unlike content providers, ISPs do not execute “a communication” under § 24(1)(b) of the Act and hence are not liable for royalties.⁵⁶ The Board further held that even where an ISP does more than act as a conduit, it should not incur copyright liability unless the communication originates from a server located in Canada.⁵⁷

On review, the Canadian Federal Court reversed the Board’s decision. Though the court agreed with the Board that copyright liability does not accrue to ISPs that perform a purely intermediary function, it held that if a Canadian ISP creates a “cache” of Internet material, even for purely technical reasons, it no longer acts as a mere intermediary.⁵⁸ Instead, the ISP becomes a participant in the copyright infringement and is thereby subject to Tariff 22.⁵⁹ One judge dissented on this point, arguing that creating a cache for the purpose of enhancing Internet economy and efficiency should not constitute infringement.⁶⁰ The court also took a broader jurisdictional approach to the Internet than the Copyright Board, finding that liability for copyright infringement may be imposed upon any

54. *SOCAN*, [2004] S.C.R. 427, Can. Sup. Ct. LEXIS at *22-*23.

55. *Id.* at *24-*25.

56. Such is the case since § 2.4(1)(b) of the Canadian Copyright Act states that persons who only supply “the means of telecommunication necessary for another person to so communicate” are not themselves to be considered parties to an infringing communication. *Id.* at *33.

57. *Id.* at *35-*36. If the content provider has “the intention to communicate [. . .] specifically to recipients in Canada,” the exception may apply. *Id.*

58. *Id.* at *21-*22. The court defined “cache” to be:

[w]hen an end user visits a Web site, the packets of data needed to transmit the requested information will come initially from the host server where the files for this site are stored. As they pass through the hands of Internet Service Providers, a temporary copy may be made and stored on its server. This is a cache copy. If another user wants to visit this page shortly thereafter, using the same Internet Service Provider, the information may be transmitted to the subsequent user either directly from the Web site or from what is kept in the cache copy. The practice of creating “caches” of data speeds up the transmission and lowers the costs.

Id. at *29.

59. *Id.* at *36-*38.

60. *Id.* at *38-*39 (Sharlow, J.A., dissenting-in-part).

telecommunication entity that has “a real and substantial connection” with Canada, and that the scope of the Canadian Copyright Act is not restricted to Internet communications originating from host servers located in Canada.⁶¹

The Supreme Court of Canada reversed the Federal Court, upholding the Copyright Board’s decision and protecting the ability of ISPs to deploy innovative technologies, such as caching, that improves Internet efficiency without invoking royalty liability in the process.⁶² As the Court reasoned, the “capacity of the Internet to disseminate ‘works of the arts and intellect’ is one of the great innovations of the information age. Its use should be facilitated rather than discouraged”⁶³ The Court further noted:

Parliament has decided that there is a public interest in encouraging intermediaries who make telecommunications possible to expand and improve their operations without the threat of copyright infringement. To impose copyright liability on intermediaries would obviously chill that expansion and development, as the history of caching demonstrates.⁶⁴

Therefore, ISPs acting as intermediaries should not be held liable for infringing uses of digital content since “[i]t is clear that Parliament did not want copyright disputes between creators and users to be visited on the heads of the Internet intermediaries, whose continued expansion and development is considered vital to national economic growth.”⁶⁵

The Court declined to join the fray on the jurisdictional question, observing that regardless of where the communication originates, Parliament already decided in § 2.4(1)(b) of the Copyright Act that ISPs are mere intermediaries and therefore not liable when such communications infringe.⁶⁶ The Court noted that § 2.4(1)(b) “is not a

61. *Id.* at *36-*38.

62. *Id.* at *39.

63. *Id.*

64. *Id.* at *79.

65. *Id.* at *89.

66. *Id.* at *66.

Section 2.4(1)(b) shields from liability the activities associated with providing the means for another to communicate by telecommunication. “The means,” as the Board found, “. . . are not limited to routers and other hardware. They include all software connection equipment, connectivity services, hosting and other facilities and services without which such communications would not occur”. . . . So long as an Internet intermediary does not itself engage in acts that relate to the content of the communication, *i.e.* whose participation is content neutral, but confines itself to providing “a

loophole but is an important element of the balance [between artists and consumers] struck by the statutory copyright scheme.”⁶⁷ Thus, ISPs are no more liable than “the owners of the telephone wires, who are utterly ignorant of the nature of the message intended to be sent, (and) cannot be said within the meaning of the covenant to transmit a message of the purport of which they are ignorant.”⁶⁸

C. THE AFTERMATH OF *SOCAN* AND *DOE*

Taken together, *Doe* and *SOCAN* make it difficult for collective societies to compensate its member artists for Internet file-sharing activities, since they cannot collect royalties either from end users or from ISPs. The decision in *Doe* reaffirmed that end users are not liable for illegally trading Internet-downloaded music because users already pay a blank media levy. In *SOCAN*, the court reaffirmed that the Parliament made a policy decision to protect ISPs from liability when it enacted § 2.4(1)(b) of the Copyright Act.

The result of this impasse has been a raging debate between the collective societies on the one side and ISPs and users on the other. Collective societies argue that the blank media levy does not sufficiently compensate the copyright holders and that Tariff 22 has essentially been rendered moot. ISPs and end users conversely argue that the Canadian levy and tariff system works well, compensating artists while also protecting privacy and the personal noncommercial copying right codified in the Copyright Act.

III. UNITED STATES COPYRIGHT LIABILITY

The United States’ copyright scheme takes a markedly different approach to Internet file sharing than that established by the Canadian Copyright Act and the decisions in *SOCAN* and *DOE*. Instead of using a levy/tariff system of compulsory licensing to compensate artists,⁶⁹ the

conduit” for information communicated by others, then it will fall within § 2.4(1)(b). The appellants support this result on a general theory of “Don’t shoot the messenger!”.

Id. at *68-*69.

67. *Id.* at *66.

68. *Id.* at *70-*71.

69. U.S. copyright law does deploy a levy system for personal copies made DAT, where levies collected on blank DAT tapes and DAT devices are distributed to music copyright holders and consumers are exempt from lawsuits for personal copying. Audio Home Recording Act of 1992, 17 U.S.C. § 1001 (2000). However, due to limited popularity of the DAT format the system is not widely used.

United States relies primarily on private contractual arrangements between the copyright holders and users.⁷⁰

The United States Copyright Act does not permit noncommercial copying beyond that protected by the fair use doctrine.⁷¹ Consequently, individual users can be held directly liable for copyright infringement when they trade copyrighted music files on the Internet.⁷² The *Napster* court specifically found that file sharing over the Internet is not a fair use of copyright music, and hence end users who use P2P to copy files are direct infringers.⁷³ Indeed, the recording industry has filed a number of direct copyright infringement lawsuits against individual file sharers over the past two years.⁷⁴

The state of secondary liability for file sharing is less clear. The fact that end users commit direct infringement when downloading copyrighted files in the United States exposes ISPs and P2P providers to potential secondary liability for facilitating such infringing acts.⁷⁵ With the passage of the Digital Millennium Copyright Act, ISPs received a statutory exemption and/or safe harbor from secondary liability similar to § 2.4(1)(b) of the Canadian Copyright Act.⁷⁶ P2P software providers, however, enjoy no such statutory protection and have been held

70. For instance, user agreements in which the user promises not to use her ISP to infringe copyrights. See Niva Elkin-Koren, *Copyrights in Cyberspace—Rights Without Laws?*, 73 CHI.-KENT L. REV. 1155 (1998) (advocating “private ordering” on the Internet where ISPs and users engage in contractual agreements).

71. See 17 U.S.C. § 107.

72. See, e.g., Elliot M. Zimmerman, *Entertainment, Arts, and Sport Law: P2P File Sharing: Direct and Indirect Copyright Infringement*, 78 FLA. BAR J. 40, 40-42 (2004) (discussing direct liability in the United States).

73. *A & M Records v. Napster*, 239 F.3d 1004, 1014-15 (9th Cir. 2004) (holding that Napster users are not fair users).

74. See Alice Kao, Note, *RIAA v. Verizon: Applying the Subpoena Provision of the DMCA*, 19 BERKELEY TECH. L.J. 405 (2004) (discussing the use of the DMCA's subpoena provision to obtain the identities of two Verizon Internet subscribers). *But see* Tim Wu, *When Code Isn't Law*, 89 VA. L. REV. 679 (2003) (noting that because of cost and unpopularity copyright owners have declined to sue consumers of infringing copyrighted works). This view that copyright owners would not risk costs and unpopularity to assert their rights became obsolete in August, 2003, when the RIAA filed its first lawsuits against music file sharers.

75. While bulletin boards and ISPs can also be held directly liable for copyright infringement taking place on their services, the secondary liability theories prove to be more applicable. See *Playboy Enters., Inc. v. Frena*, 839 F. Supp. 1552 (M.D. Fla. 1993) (granting summary judgment for direct copyright infringement against a bulletin board service which allegedly did not have any prior knowledge that its users uploaded and downloaded files to its server).

76. See 17 U.S.C. § 512.

secondarily liable under common law.⁷⁷ The federal courts have been inconsistent in the way they have interpreted and applied common law secondary liability rules to file sharing—most notably, the so-called “*Sony Betamax*” rule. In *Sony*, the United States Supreme Court outlined the substantial noninfringing use test, which states that no contributory infringement accrues to the provider of a staple article of commerce when the product is widely used for legitimate noninfringing uses.⁷⁸ Applications of *Sony* to P2P providers have yielded incongruent results, causing pervasive legal uncertainty that may be clarified by the Supreme Court’s review of the *Grokster* case this year.⁷⁹

In sum, the decisions in *SOCAN* and *Doe* mark a drastic divergence between the United States and Canada pertaining to Internet copyright law. In essence, the two countries have two different default rules: in Canada file sharing is legal, while in the United States it is not. Both approaches are widely criticized, as each is attended by its own drawbacks. Canada’s problems are associated with government regulation, while many of the United States’ woes stem from legal ambiguity and market failure.

77. In the United States there are two theories of secondary liability for copyright infringement: contributory and vicarious. The elements of contributory liability are (1) knowledge of and (2) causation, inducement, or material involvement in a second party’s infringing conduct. To show vicarious liability one must establish (1) the right and ability to supervise the infringing conduct, and (2) a direct financial interest in (though not necessarily direct awareness of) that conduct. See Elizabeth Miles, *In re Aimster & MGM, Inc. v. Grokster, Ltd.: Peer-to-Peer and the Sony Doctrine*, 19 BERKELEY TECH. L.J. 21 (2004) (summarizing and analyzing United States secondary liability law as it applies in the P2P context).

78. *Sony Corp. of Am., Inc. v. Universal City Studios, Inc.*, 464 U.S. 417, 591 (1984).

79. See *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 380 F.3d 1154 (9th Cir.) (following precedent in *Napster* and holding that Grokster was not secondarily liable because it deployed a decentralized architecture that precluded the requisite knowledge and control and allowed for numerous noninfringing uses), *cert. granted*, 125 S. Ct. 686 (2004); *A&M Records v. Napster*, 239 F.3d 1004 (9th Cir. 2004) (holding Napster was secondarily infringing because it had actual knowledge of infringing activity, provided the “site and facilities” for the directly infringing conduct of its users, and benefited financially); *In re Aimster Copyright Litig.*, 334 F.3d 643 (7th Cir. 2003) (holding Aimster secondarily liable as it failed to introduce any evidence of noninfringing uses, and had constructive knowledge of infringing activities despite specially designed encrypted technology that prevented specific knowledge). See also generally Brandon Michael Francavillo, *Pretzel Logic: The Ninth Circuit Approach to Contributory Infringement Mandates That the Supreme Court Revisit Sony*, 53 CATH. U. L. REV. 855, 858 (2004) (arguing that the “ambiguity of *Sony* has caused an approach to contributory infringement in the Ninth Circuit that contradicts the purpose of copyright law and undermines its effectiveness in protecting the rights of copyright holders”).

IV. DISCUSSION: CANADIAN APPROACH MAY NOT WORK IN THE UNITED STATES

While their approaches to enforcing copyrights on the Internet significantly differ, both Canada and the United States suffer a similar uncertainty on the part of legislatures and courts about how to achieve the goals of copyright in the Internet context. Some argue that the Canadian levy/tariff system is superior to the American solution, as it has shifted “in the last couple of years . . . [to] a more balanced approach with a balance between creators and users”⁸⁰ than that in the United States.⁸¹ However, the Canadian copyright compensation system poses problems unknown in the United States. While the viability of a Canadian-like system in the United States merits deeper consideration than the scope of this Note permits, the following observations encapsulate current critiques to suggest that the time is not ripe to import Canadian concepts into U.S. copyright law.

A. CRITIQUES OF THE CANADIAN COPYRIGHT COMPENSATION SYSTEM

The Canadian approach is criticized as ineffective because it undercompensates copyright holders and is unfairly crude. Furthermore, the pre-digital levy/tariff system has been ineptly adapted to the Internet context. Consequently, a Canadian-style scheme is more likely to compound existing problems with file sharing in the United States than it is to solve them.

First, the Canadian music industry argues that the current levy/tariff system is ineffective. Record companies claim that P2P sharing of music files has cost the industry \$450 million since 1999.⁸² The economic blow

80. Robert Thompson, *Music Industry Can't Sue Net Freeloaders: Canadian Judge: 'Heard Around World'*, NAT'L POST, Apr. 1, 2004, at A1, available at 2004 WL 74108976.

81. The United States' approach has been criticized in number of respects. See Daniel J. Gervais, *The Price of Social Norms: Towards a Liability Regime for File Sharing* (2005), at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=525083 (asserting that the U.S. law works against Internet norms); Electronic Frontier Foundation, *A Better Way Forward: Voluntary Collective Licensing of Music File Sharing*, available at http://www.eff.org/share/collective_lic_wp.php (pointing out that the United States' approach is ineffective and potentially dangerous to privacy, innovation, and economic growth).

82. Mark Evans, *The Music Industry Conundrum: Copyright Board, CRIA at Odds Over Downloading*, FIN. POST, Dec. 18, 2004, at FP16, available at 2003 WL 70272859.

caused by file sharing is compounded by low compulsory license rates.⁸³ Moreover, the rates for compulsory licenses “easily become outdated and unreflective of supply and demand.”⁸⁴ This discrepancy between market and actual rates is probably due to the absence of actual bargaining between music producers and music consumers under the statutory scheme.⁸⁵ Moreover, the legislative “lock-in” characteristic of rates set by statute ties participants “to an outdated pricing structure.”⁸⁶

Second, critics contend that the Canadian levy system is a crude and unjust collection mechanism, as it collects revenues from every buyer of blank media even when the media can be used for purposes other than music downloading. For instance, compact disc manufacturers complain that customers must pay the levy for CDs they use for downloading digital pictures from their own cameras or backing up their computer files—that is, to make copies of their own work that do not infringe another’s copyright.⁸⁷ Blank media producers correctly see the levy as a form of tax that diminishes the sale of their goods without discriminating between the media’s possible uses.⁸⁸ Since the music industry periodically demands

83. See Graham Rockingham, *When the Music’s Over*, HAMILTON SPECTATOR, Apr. 4, 2003, at A12, available at 2003 WL 14603150 (asserting that many Canadian singers are “worried about the survival of the [music] industry” since CD sales have decreased dramatically and levies do not provide sufficient compensation). In addition, record companies have spent one million dollars in an unsuccessful effort to convince Canadians that downloading music for free is equivalent to stealing. See Evans, *supra* note 82. But see Michael Geist, *Law Bytes*, TORONTO STAR, Nov. 29, 2004, at D02, available at 2004 WL 98036495 (suggesting that music industry revenues declined due to non-file sharing reasons—for example, people spend more time playing video games and talking on cell phones).

84. Robert P. Merges, *Compulsory Licensing vs. the Three ‘Golden Oldies’ Property Rights, Contracts, and Markets*, POL’Y ANALYSIS 9, Jan. 15, 2004, available at <http://www.cato.org/pubs/pas/pa508.pdf> (explaining generally that the lack of increase in compulsory license rates may partially be due to legislative lock-in that replaces market negotiations).

85. *Id.* at 4, 7-9. The United States is no stranger to such problems. When Congress enacted the compulsory statute for player piano rolls, “the statutory royalty rate for covers was well below what many believed the market rate would have been. *Id.* at 4.

86. *Id.* at 4, 9-10 (speculating that legislative lock-in was the probable reason for the price stagnation for recorded compositions between the 1909 Copyright Act and the 1976 Copyright Act).

87. Evans, *supra* note 82.

88. Unless the demand curve for CDs is perfectly inelastic, which is highly unlikely, the CD producers have to share the tax burden with CD buyers. “The incidence [i.e., the tax burden to consumer and producer] of a tax in any market depends upon elasticities of supply and demand in . . . [a given] market. The more inelastic demand is relative to supply, the more the tax will impact upon consumers The more inelastic supply is

increases in the levy,⁸⁹ media manufacturers' dissatisfaction with the system can only increase with time.⁹⁰

Third, observers have suggested that the provision of Canadian copyright law that allows private personal copying in exchange for imposing the levy/tariff⁹¹ should be inapplicable in the Internet context.⁹² This portion of the statute was enacted before the Internet era, and aimed only to compensate artists for lost sales of music from copies made for back-up, personal compilations, or use in the car.⁹³ The law's drafters never foresaw the infinite perfect copies and widespread distribution the Internet would enable.⁹⁴ Thus, applying the law in the Internet context is as inappropriate as it is unfair, and belies the drafters' intent. These critics contend that the Canadian legislature must amend the copyright statute in light of file sharing and other methods of digital distribution.⁹⁵

Fourth, the Canadian system is arguably unfair to music consumers, as it often double or even triple taxes for downloading the same song more than once.⁹⁶ For example, an individual who makes two copies of the same song, one onto a CD and another one onto her iPod, has to pay a 21-cent

relative to demand, the more the tax incidence will be upon suppliers . . ." J. BRUCE LINDEMAN, *MICROECONOMICS* 140 (1992).

89. There does not appear to be an empirical study compares how the proposed levy increase relates to the rate of inflation in Canada.

90. See Evans, *supra* note 82; see also Jack Kapica, *CPCC Wins CD Levy Dispute*, *BREAKING NEWS FROM GLOBEANDMAIL.COM* (2004) (discussing a case in which an importer of blank CDs lost to the CPCC and had to pay immediately and on the highest scale provided in the tariffs).

91. R.S.C., ch. C-42, § 80 (1985) (Can.).

92. See Jeremy F. deBeer, *Canadian Copyright Law in Cyberspace: An Examination of the Copyright Act in the Context of Internet*, 63 *SASK. L. REV.* 503 (2000).

93. *Id.* at 536 ("[T]he [Canadian] Copyright Act is ill suited to address many complex issues [on the Internet] . . . [and] judicial interpretation has not adequately supplemented this legislation. There are very few Canadian cases that deal with the copyright on the Internet and what few exist are not comprehensive enough."); see also *We Deserve Fair Rates*, *TORONTO STAR*, Dec. 8, 2004, at A25, available at 2004 WL 101556047.

94. deBeer, *supra* note 92, at 536.

95. See Jane Bailey, *Of Mediums and Metaphors: How a Layered Methodology Might Contribute to Constitutional Analysis of Internet Content Regulation*, 30 *MAN. L.J.* 197 (2004) (offering an alternative approach to analyzing Internet problems); Craig McTaggart, *A Layered Approach to Internet Legal Analysis*, 48 *MCGILL L.J.* 571 (2003) (proposing a new approach to copyright law as it applies to the Internet).

96. See Tyler Hamilton, *What's Next: A Tax for Singing in the Shower*, *TORONTO STAR*, Jan. 19, 2004, at C01, available at 2004 WL 57233950.

tariff for the recordable CD and a 25-dollar tariff for the iPod.⁹⁷ This seems unfair, as § 80 of the Canadian Copyright Act presupposes that the user pays a levy in exchange for a general right to copy for personal private use. Paying more than once could be seen as contrary to the intent of the Act. A U.S. citizen may counter that 21 cents for a CD's worth of songs, even if paid 3 times, seems like a fine bargain compared to the dollar one pays to download a single song from iTunes.com.⁹⁸ Still, given the sophistication of current technology and tax collection systems, many Canadians believe that it is unfair to bear such an indiscriminate tax.⁹⁹ Furthermore, as the levy increases over time, many predict the emergence of a so-called "gray market" for blank media sold outside of Canada.¹⁰⁰ One cannot help but to see the irony of America's elderly going to Canada to buy cheaper drugs as Canadian youth cross the U.S. border to buy cheaper MP3 players, iPods, and blank CDs.¹⁰¹

B. PROPOSALS TO ADOPT A CANADIAN-LIKE SYSTEM IN THE UNITED STATES

Despite the shortcomings of the Canadian copyright compensation system, there have been numerous proposals urging the United States to adopt a compulsory licensing system similar to Canada's.¹⁰² For example, Daniel Gervais suggests that even relying on conservative estimates, the

97. *Certified Tariffs*, Copyright Bd. of Can., available at <http://www.cb-cda.gc.ca/tariffs/certified/copying-e.html> (last visited Mar. 19, 2005).

98. Similarly, iPods store thousands of songs and can be infinitely rerecorded, so a blank media levy of \$25 may not be excessive even when duplicating songs copied onto other levied media. The CPCC recently filed an appeal with the Supreme Court of Canada on a federal court decision that overturned a levy on devices such as MP3 players. See Jack Kapica, *Media-Levy Supporters to Appeal Ruling*, GLOBE AND MAIL UPDATE, Jan. 13, 2005, available at <http://www.globetechnology.com/servlet/story/RTGAM.20050113.gtcopy0113/BNStory>.

99. Barbara Caplan & Kevin Evans, *Fight Music Levies, Not Downloaders*, NAT'L POST, Nov. 29, 2004, at FP15, available at 2004 WL 99315878.

100. Evans, *supra* note 82.

101. The leakiness inherent to intellectual property regimes compels some to argue that cross-border copyright regimes must be harmonized to avoid such gray markets. *Id.*

102. See, e.g., WILLIAM W. FISHER, PROMISES TO KEEP, 173-259 (2004) (proposing a Canadian-like approach in the United States); LAWRENCE LESSIG, FREE CULTURE (2004); LAWRENCE LESSIG, THE FUTURE OF IDEAS (2001) (calling for a compulsory licensing system that allows media companies "compensation without control"); Neil Weinstock Netanel, *Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing*, 17 HARV. J.L. & TECH. 1 (2003) (proposing a levy to be imposed on the sale of any consumer product or service involved in P2P file sharing); Gervais, *supra* note 81; Electronic Frontier Foundation, *supra* note 81. *But see* Merges, *supra* note 84 (arguing generally against a compulsory licensing system).

U.S. music industry can easily replace its twelve billion dollars in annual CD sales through a modest worldwide compulsory license fee that varies based on the country's ability to pay (that is, five dollars a month per user in North America and fifty cents a month in North Africa).¹⁰³ Such a system would allow increasing investment into the music industry as investors gain confidence in the Internet distribution platform.¹⁰⁴ Advocates argue that "P2P is here to stay"¹⁰⁵ and "su[ing] millions American music fans into submission is destined to fail."¹⁰⁶ Gervais, however, acknowledges that the exact number of users willing to pay for even for a nominal license is hard to predict.¹⁰⁷

Another argument in favor of a compulsory licensing system rests on a social norm premise: "If people can be made to act properly because of social norms, rather than because of fear of legal sanction, then the desired behavior can be obtained at less cost."¹⁰⁸ The proponents of this theory argue that since sharing is the norm on the Internet,¹⁰⁹ copyright enforcement would be less costly and more successful if the solution to current file sharing problems in the United States were consistent with such norms.¹¹⁰ A levy system could leverage existing norms surrounding file sharing without forcing P2P coders to fight back "either by circumventing the legal norm or making its enforcement next to impossible."¹¹¹

On the other side, opponents of such proposals criticize the Canadian levy-based system for distorting the market for music. "Rather than allowing musicians, artists, and other copyright owners to negotiate licensing terms for use of their work, a compulsory license forces

103. Gervais, *supra* note 81, at 4-9 (assuming that "two thirds of its [Napster's] total potential market" would be willing to participate in the program); *see also* Electronic Frontier Foundation, *supra* note 81 (making similar five dollars a month proposal).

104. Electronic Frontier Foundation, *supra* note 81 (arguing that this will encourage a competitive market for file sharing applications and ancillary services, not merely a few authorized sources such as Apple's iTunes and Napster 2.0 as is currently the case).

105. Gervais, *supra* note 81, at 4.

106. Electronic Frontier Foundation, *supra* note 81, at 4 (suggesting that suing end users may inflict "collateral damage on privacy, innovation and music fans").

107. Gervais, *supra* note 81, at 7. It is also unclear how such a system would be implemented.

108. *Id.* at 9.

109. HOWARD RHEINGOLD, SMART MOBS: THE NEXT SOCIAL REVOLUTION (2002).

110. Gervais, *supra* note 81, at 11.

111. *Id.* at 13.

copyright owners to allow use of their works under legislatively set process and restrictions on use.”¹¹²

Others have argued that a Canadian-like system is simply incompatible with the American way: “It is a brave proposal in a political culture that is allergic to taxes and uncomfortable with complex solutions.”¹¹³ Furthermore, in Canada, a country with far lower population density, communication may well be more important than in the United States—and thus, sharing on the Internet may hold a higher social value.¹¹⁴ Indeed, Canadians may embrace their copyright scheme as a cultural icon that sets their country apart from the United States on many levels.¹¹⁵ To the extent that Canadian copyright law embodies uniquely Canadian concepts of culture and social relations, it likely makes a poor fit for the United States.

V. CONCLUSION

While the Canadian approach to copyright enforcement on the Internet has its virtues, analysis of the *Doe* and *SOCAN* cases in their larger context suggests that the Canadian system poses unique challenges to both copyright holders and consumers in Canada. Though the United States’ approach to enforcing copyright on the Internet is also imperfect and much

112. Merges, *supra* note 84, at 1-2 (suggesting generally that levies artificially fix the price of a downloadable song). Price fixing is usually economically wasteful as it is almost impossible for the government to fix the price at the market rate, much less to constantly adjust it in response to supply and demand. Consequently, the government is likely to end up with a price floor (price above the market price) or price ceiling (price below the market price). A price floor essentially taxes users for song downloading and discourages some from participating in the market who otherwise would have participated. A price ceiling subsidizes users who otherwise would not participate in the market for song downloading. In either case, the government distorts the market and does not achieve the socially optimal output.

113. Robert S. Boynton, *The Tyranny of Copyright?*, N.Y. TIMES, Jan. 25, 2004, 2004 WL 4788385. Numerous political differences exist between the United States and Canada that can explain the difference in political cultures. For example, the “United States has more elections, selecting more officials for public office, than any other country on Earth. . . . A Canadian votes at most three times . . . in a four-year period, except for an occasional referendum, such as Quebec’s 1995 vote for sovereignty.” MORRIS P. FIORINA ET AL., *AMERICA’S NEW DEMOCRACY* 10-11 (2004). These political culture differences may also reflect different copyright norms in the United States and Canada.

114. See Jonathan L. Faber, *Culture in the Balance: Why Canada’s Copyright Amendments Will Backfire on Canadian Culture by Paralyzing the Private Radio Industry*, 8 IND. INT’L & COMP. L. REV. 431, 431-59 (1998) (suggesting that Canada has struggled to develop a culture distinct from that of the United States and has historically used copyright laws to do so; thus, the Canadian-like compulsory licensing approach may not be as appropriate in the United States).

115. *Id.*

criticized, adopting Canadian copyright concepts and mechanisms in the United States may serve only to compound existing problems. Policy makers would be well served to be cautious in considering such imports from our neighbors to the north.

