Models for Alternative Compensation for Entertainment Content: A Critical Review

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1. Introduction

At the core of the digital revolution is a profound structural change in the way we create and distribute information. The PC and the Internet greatly reduced many, but importantly not all, of the costs associated with creating high-quality informational products and provided nearly everyone in the developed world with a highly efficient platform for accessing, manipulating, and distributing digital goods. Successive waves of technological innovations – from newsgroups, to the web, and p2p filesharing architectures – have turned this technical potential into a reality. Yet, such profound change also poses profound challenges. Among the most important one is this: if information can be distributed more efficiently freely as commercially, how do we ensure that the creators of informational goods are compensated for their labour and thus are able to continue to produce them?

The content industry and branches of the IT industry since the early 1990s have been promoting one solution to this problem: Digital Restrictions Management systems (DRM), a highly invasive, structurally privacy-endangering technology for controlling the use of digital goods on the devices of the users. It soon became clear that DRM by itself could in principle not be able to control content effectively, so the the lawmakers were called in to grant special legal protection to these "effective technological measures." The resulting lawmaking (down from WCT to DMCA, EUCD and national copyright reforms) effectively abolished copyright limitations in the online realm. On the Internet, not pubic law but private contracts and technology are to rule from now on.

It is becoming evident that DRM creates a range of new problems. Privacy, invulnarability of the private sphere, limitation rights, competition and the freedom of innovation, research and teaching, the sustainability of cultural goods – the list of values threatened by DRM ist long. The DRM scenario comes at high social costs and produces significant drawbacks for nearly everyone other than few large media conglomerates and their coveted ‚stars' (Lessig 2001). Revealingly, the people who are actually developing DRM technology recognize its inherent problems and call it "ineffective"[1] and "stupid".[2]

With the growing recognition that the DRM trajectory is a dead-end street the urgency rises to develope alternatives. The goal is to create a framework that combines the efficiency of open distribution with a mechanism to reward creativity, restoring for the digital environment the original aim of the copyright regime: the balance between the interest of the creatives to be compensated for their work and those of the public to have access to creative works.

In the following, we offer a critical review of the state of discussion on *alternative compensation schemes* (ACS), hoping to contribute to advancing the networked discourse in its convergence towards a rough consensus on the basic features of such a system.

All of the schemes reviewed here propose to put content under a statutory license for online use. The rights holders would lose their current control over the distribution of content. In return, they would be compensated indirectly with funds raised either by subscriptions to develivery channels , levies on goods and services associated with the delivery of online entertainment, or via general taxes .

None of the proposed systems is comprehensive, neither in terms of content nor delivery channels. Fisher, for example, deals only with music and film, giving little thought to other content such as text. Netanel deals only with p2p distribution.

1 Biddle et al. (2002)
2 Safford (2002)

Next to some form of statutory license, all proposed systems require components to a) register and identify the the works b) track their use c) raise money for compensation, d) allocate the funds to the benficiaries.

2. Who's in charge?

A fundamental question of the system architecture is who will administer/control the major components of the scheme. The proposed schemes can be grouped into three categories, depending on who they envision to run the various elements.

2.1. The State

The system easiest to think of is a centralized institution in charge of registration, tracking, collection and allocation, run by the state or a state-endowed monopoly. Fisher, for example, places a central agency at the heart of his system. „The best candidate for the job would likely be a new, quasi-independent arm of the Copyright Office, whose judgments would be subject to meaningful review by the Court of Appeals for the D.C. Circuit." Since the new system needs to be implemented on a global scale, Fisher even envisiones a *global* copyright office with which artists in all countries would register their works.[3]

2.2. The Creatives

Since their property rights are concerned, traditionally – in continental Europe, that is – authors and performing artists organized in collective rights managment organizations aka Collecting Societies (CS) in order to collect compensation for secondary uses of their works.[4] CSs were founded by authors who realized that they could not individually enforce their rights *vis-à-vis* every single cafe, dance hall or radio station. CSs started to organize the collection (often having to sue to get commercial users of works to conclude a contract with them) and the alloction of the revenues to their members. CSs also naturally developed a sense of solidarity, deciding to set aside part of the common pool of levies for social causes, for authors in need, for young authors, for work categories that need special support etc. If that sounds to good to be true, it is. In practice, the CS system has many problems. One, though not the only one, is related to the fact that publishers have joined the authors' CSs and increacingly reshaped them to serve their particular needs. Stangely enough, none of the proposals on the table have suggested an ACS modelled after existing CSs. We have attempted to do so below (section: Elements of a Future System).

2.3. The Users

Some proposals put the users in charge. Not for running the system as such, but for deciding who gets what share. The Blur/Banff group proposes that „listeners would not avoid the compulsory licensing fee, but they would decide who would receive the money."[5] The reason for this mechanism is to counteract the „Britney effect": By allocating funds according to measured use of works this proposal sees the danger of most of the money going to a handful of famous artists.[6] Therefore it was suggested that listeners would choose artists directly or intermediators that supported musicians. „There was [also] a proposal to create a role for musicians and songwriters to bargain with listeners over key features of the allocation system."[7] (For a critique of this approach see below, section: Why User Voting is a Bad Idea.)

3 Fisher (2003) ch 6 p 61
4 For history, structures across Europe, and current issues of Collecting Societies: Hugenholtz (2003)
5 Love (2002)
6 see also the Lorenz Curve of distribution of the CSs in Kretschmer 2003
7 Love (2002)

2.4. The Exploiters

None of the existing proposals suggests to put the exploiters in control, yet that they will make the claim seems obvious. Assuming that eventually all parties would agree that the ACS is in the best interest of all, wouldn't the exploiters demand that they should be in charge of running it? They might argue that since the ACS destroys much of their traditional structures they should be given the chance to survive by operating and charging for registration, marking, metering and sampling, collection and allocation. They might argue that they know the markets (for music, film, software etc.) best, so they could manage the new market most efficiently.

3. Statutory License for Digital Works

3.1. Free Distribution

To enable free circulation of creative works on the Internet everyone seems to agree that a statutory license is required. Such a license defines a) the rights of third parties to make available and to access works covered by the license, and b) the level of compensation for rights holders for the use of their works by third parties.

Statutory licences already exist to regulate relationships among business entities (e.g. the statutory license that allows cable providers to retransmit broadcast signals) and to regulate user acts in respect to published works (e.g. the copying licenses for educational and private use in droit d'auteur).[8]

Given these precedents, how could the statutory license for the ACS be constructed? WCT ff. created a new exclusive right of authors to make their work available online. The new digital copyright laws do not provide for any limitations in the online realm. Private copying limitations do allow to pass copies to family and personal friends. The recent German law argued that p2p regularily does not constitute personal relationships among participants, distributing copies via p2p is therefore illegal.

The new statutory license would create compensated secondary use rights for published works. It would also create the right to distribute copies to unknown third parties via the Internet, and to publicly perform works on the Internet (e.g. non-interactive web-casting). For this to become possible, not only national law would have to be changed (The change would be most severe in the copyright countries that would have to turn their fair use doctrine into a proper statutory license.) but also international treaties (the Berne Convention and TRIPS). Limitations are currently restricted by the Berne three-step test, here in the version of Article 13 of TRIPS: "Members shall confine limitations and exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rights holder." One could argue that through the structural shift caused by the digital revolution, the "normal exploitation" changes and therefore Berne might be interpreted to still hold under the ACS, but this would clearly be stretching it.

3.2. The Effect on DRM

The new statutory license would also have to adress the issue of DRM. Currently, the circumvention protection for DRM is absolute (e.g. Germany) or restricted only by very narrowly confined exceptions (e.g. the US). It is to be expected that in the short run much of primary sales off- and online will be done with DRM. Could DRM and ACS schemes co-exist? What would be the source for the copies freely circulating in the ACS if they cannot legally be extracted from their DRM

8 Limitations to copyright are designed as statutory licenses in the droit d'auteur countries, while fair use or fair dealing in the copyright countries is a "defense" for infringements. Fair use is not a statutory license and therefore not compensated.

wrappings?

Netanel suggests that the new license „would generally preclude digital content providers from employing technological Digital Rights Management (DRM) controls designed to block such noninfringing uses.“ Unfortunately, Netanel, who restricts the license to „non-commercial“ systems (i.e. those that do not charge for content), does not specify how commcerial distributors could protect their content from leaking into the non-commerical systems. Yet, this is likely to happen if DRM is curtailed. More consistent is Fisher‘s proposal in this regard. He sees the statutory license as the dominant way rights holders will be compensated for the online distribution of their content and consequently makes no distinction between commercial and non-commercial systems.

To get rid of DRM is, of course, one of the main purposes of the ACS. Reversing the decision to grant it special protection by law would mean the death of DRM and of the business models based on it. Maximum resistance is to be expected. Instead of head-on demanding a reversal of the law, we might also consider a softer 'real political' strategy suggested by Till Kreutzer[9] that would likely lead to the same result, only that the market would abolish DRM.

An issue currently under hot debate that arises from the co-existence of levies and DRM is how to avoid double payment: flat levies on copying devices and recordable media *and* charges for individually licensed copies of media not otherwise copyable. To solve this problem, Till Kreutzer suggested that works marketed via DRM that only allow individually licensed private copies would have to be registered with the CS. These works would be taken out of the system of allocation of levies. This model would satisfy the tariff differentiation demanded by the German copyright law and the law regulating the CSs. Rightsholder would have to make the choice which way to go. The assumption is that in the beginning indie publishers would simply not be able to afford the DRM way, which would increase the popularity of their works. But, given 'correctly' set traiffs also majors would release parts of their catalog in unprotect form to experiment with business models with a different revenue mix of primary and secondary market. Ideally, it will show that levies outweigh the price for the DRM way and the losses due to user unwillingness to buy into DRM.[10]

3.3. Freedom Make and Distribute Derivative Works?

The primary goal of the statutory license is to allow free online circulation of works. Yet, most of the proposals go much further.[11] They want to facilitate not just distribution of digital works, but also the freedom to modify works. Fisher‘s system, for example, would „eliminate the current prohibitions on the reproduction, distribution, public performance, adaptation, and encryption circumvention of published recorded music and films.“[12] His rationale is the following: „The malleability of digital recordings has increased dramatically the ability of artists to incorporate the work of their predecessors into their own creations. Many of the resultant composites are socially beneficial. We should strive to exploit the new technological opportunities – to foster both creative and critical retooling and recycling of creative material. To do so, we need a mechanism for dividing – efficiently and fairly – the revenue attributable to composite products.“[13] His proposal „would help us to reconcile two goals long considered to be in conflict – facilitating cumulative innovation, and ensuring that pioneers are adequately compensated. .. the creators of composite entertainment products (such as rap music, expurgated movies, and “mash-ups”) would, in their registration forms, identify the copyrighted works that they had incorporated into their own

9 Head of the copyright division of the Institute for Legal Questions of Free and Open Source Software (ifrOSS, http://www.ifross.de)

10 http://www.ifross.de/ifross_html/art38.pdf

11 Only Griffin does not take that step.

12 Fisher (2003) ch 6 p 61

13 Fisher (2003), ch 6 p 55

products and the total duration thereof. Using that data and some formulae, the revenue stream attributable to each composite product would be divided among the various contributors.“[14]

It seems questionable whether it's desireable to connect the issue of freedom of distribution with the one of freedom of modification. The two raise very different questions. The latter is likely to increase opposition from a group whose support will be necessary for any system to gain normative legitimacy: the creatives, particularly in Europe, where the moral rights (integrity of work, attestation, recall) are an integral part of the legal and cultural tradition. As Fisher points out, moral rights are affected: „Less notorious but equally worrisome are the threats they pose to the interests of artists in the ‚integrity‘ of their works and the interest of the general public in the stability of our cultural environment.“[15]

Adaptation of „functional works“ such as software is essential for improvement, the utility of this freedom is obvious. It's less obvious for „expressive works“, a distinction that even GPL advocates like Richard Stallman make. A novel, symphony, or painting might be quoted but it is not improved or adapted by modifying it. Many artists might not be interested in re-using parts of works from others, and might not be happy about others doing so with their works.

We should consider if it would not be more appropriate to leave this decision to the authors. They could indicate if they want to authorize derivative work when they register their work. The license templates provided by the CreativeCommons project appear to offer a working model to address this aspect.

4. Registration and Identification of Works

Since users are paying a lump sum levy, no identification of works would be needed for billing purposes. But since beneficiaries are to be comensated in proportion to the use made of their works, some form of identification is needed to measure this use. Therefore, rights holders have to register their works with some agency.

Works not registered would not receive compensation but nevertheless be subject to the statutory license. If the statutory license included the right to modify works, not registering a work would effectively mean putting it into the public domain. For works to which the owners have not completely abandoned all rights, registration would in effect be mandatory. They would still lose all rights to control the work but at least be compensated.

Registration could be a straightforward process of filling in a web form and receiving a work identifier in return. This function could be operated by existing registration agencies like the Copyright Office in the US or the CSs in Europe, by the new Online CS suggested below, by the organization managing the numbering system, or by an independent service provider. One should also consider linking the registration to the compulsory library copy system. Publishers are required by law to hand in a copy of a book or magazine to a specified public library. This system is already being extended to digital works.[16] Conditioning compensation on providing a copy for public access and long-term preservation would greatly strengthen the compulsory library copy, helping to build a reliable long-term archive of digital cultural goods.

14 Fisher (2003), ch 6 p 43 f. The idea of keeping track of parts of works by others reminds one of Ted Nelson‘s TransCopyright. (http://xanadu.com/tco/)

15 Fisher (2003), ch 6 p11

16 Publishers of online books or magazines bearing and ISBN or ISSN are required to hand in a copy to the Deutsche Bibliothek in Frankfurt/Main – which is struggling to build an infrastructure to sustainably store these works.

What that identifier will be is a more tricky question. Traditional numbering systems are the ISBN[17] and ISSN. Similar numbering schemes exist or are being developed[18] for other categories of works, like the *International Standard Recording Code* (ISRC) for sound recordings, the *International Standard Works Code* (ISWC) for compositions and the *International Standard Audiovisual Number* (ISAN) for films (both in ISO standardization). CISAC is also building the *Common Information System* (CIS) as one-stop clearing house for rights. In the digital realm the *Digital Object Identifier* (DOI) is being established.[19]

The identifier provided by the registrar has to be attached to the digital file. This can be done inside the file header, e.g. as XML tag. Fisher suggests that „the creator would insert that number into the filename of the copy of the recording that he or she made available to the world."[20] Netanel suggests the use of 'digital fingerprinting' technology to identify content.[21]

The assumption is that there would be little incentive to manipulate these IDs and that a reference copy provided to the registrar would make it easy to detect manipulation. Therefore the technical implementation would be optimized not to prevent gaming but for easy metering of downloads (and possibly of use).

Who would register? In case of film the producer, for music the performer (or asignee), naming the owner of the composition. Joint authors can all register. Misrepresentation would be a fellony and some kind of conflict resolution procedure would need to be established. If the work reuses components from other works, these samples have to be declared during registration.[22]

Where would one register? Most schemes envision a national agency, either as a function of the central state agency, or something similar to the ISBN model. Yet, there is no need to centralize this function. One could easily imagine multiple, competing registrars, who would adhere to certain standards about what information to collect on the registration form and how to share this information. The registrars would compete for customers based on price and particulars of their services. A working model for this is the registration of Internet domain names already operates like this.[23]

5. Measuring Use of Content

While levies are to be collected as flattly as possible, their redistribution to beneficiaries should be as accurately as possible aligned with actual use made of works. Ideally, without any distortion by money, a system could be devised that much more accurately than the market measures the acutal appreciation of works.

There are a number of points were usage could easily be metered.

17 ISBNs are assigned by ISBN group agencies worldwide coordinated by the International ISBN Agency in Berlin. In the United States R.R. Bowker is the independent agent for this system. The registration fees are nominal: $14.95 for 10 ISBNs; $39.95 for 100 ISBNs; $119.95 for 1000 ISBNs; $299.95 for 10,000 ISBNs.

18 Most active in this field is CISAC (*Confédération Internationale des Sociétés d'Auteurs et Compositeurs*), http://www.cisac.org/

19 http://www.doi.org/

20 Fisher (2003), ch 6 p. 7

21 Netanel (2003) p.40

22 Fisher (2003), ch. 6, p.10

23 One could imagine registrars specializing on certain types of works, languages or regions. Since there are likely to be registration fees, there might also be price competition ensuring that registration costs would be low and the need to cooperate across competing institutions would likely increase transparency.

- *Webcasting*.Online radio stations are already required to present playlists as well as estimated numer of listeners.

- *Downloading*. Logfiles of servers can be used easily to track the number of downloads and on-demand streams. P2p servents could be equipped with a counter reporting back to a central host. KaZaA has already volunteered to provide such figures. All of the other file-sharing services could be required to do so – as a condition of immunization from liability for copyright infringement. Yet simple download figures are not enough. For one, they are prone to „ballot stuffing“, ie. people downloading their own content repeatedly in order to increase their compensations. Furthermore, given the fact that people are free to explore new music, downloads are a very imprecise indicator for actual use.

- *User Surveys*. For Fisher monitoring actual use would be desirable because, "if consumers store on their hard drives just as many Doobie Brothers songs as Eric Clapton songs, but play the latter 10 times as often, we would want to pay Clapton 10 times as much."[24] Fisher and Netanel therefore suggest estimating the frequency with which each registered recording is consumed with the help of surveys, like the Nielsen ratings for TV. Fisher also imagines the central copyright agency responsible for this, but this data could also be provided my an indepenent agency, similar to Nielsen Media Research. Its task would be to randomly select a set of households who were willing to allow to be monitored[25] (with appropriate software on their various playback devices) what copyrighted content they actually listen to and watch.

  The use of standardized software plus the ease with which playback devices could report their counts through the Internet would make this system far cheaper to operate, per household, than the Nielsen ratings. Privacy, of course, must be guaranteed.

6. Financing the System

6.1. Determining the Total Amount to be Collected

The question of how much money has to be raised to compensate all parties is likely to be very contentious and, for now, all we have are 'back-of-the-envelope' figures. Fisher, for example, assuming the new distribution system would replace 20% of current music and smaller proportion of film sales, comes up with a figure of close to $ 2.5 billion.[26] This is a substantial amount, yet, given the size of the user base, not impossible to raise.

The most uncontroversial standard for determining the figures is the current size of the market. Fisher, for example, uses numbers from 2000. Yet, as Leibowitz (2003) points out, the more the new system replaces the old, the more difficult it will be to use the market as a bench mark. The production of entertainment content changes over time. The markets so far have been very dynamic, both in size as in internal composition. How would the total amount to be raised be determined in, say, 10 years, when the new system has replaces, say, 80% of the primary market? What relevance will figures from 2000 then have?

Fisher writes himself: "The question of how much money would be necessary to put copyright owners, collectively, in the same position they would have occupied in the old technological and legal universe would become, over time, ever harder to answer and would make less and less sense as a guideline."

24 Fisher (2003), ch 6 p 33
25 Privacy, of course, must be guaranteed
26 Fischer(2003), ch 6 p 23. This figure would include the costs of running the system.

His solution is to have the collecting agency, the Copyright Office, periodically recalibrate the amount to be collected. But how? Criterion eventually would be the public interest. „The Office would strive to determine the amount of money that, when distributed to creators, would sustain a flourishing entertainment culture...The Office would answer the question iteratively – through frequent, modest adjustments of the tax rates, followed by studies of the impact of each change. If, in a given year, the entertainment industry seemed starved, the Office would enrich the mixture a bit.“[27] This solution, however, is at best impractical,[28] at worst dictatorial. That state granted money could be the lever to steer culture sounds like communism at its worst!

A different approach could start from the financial requirements of authors and performers, then determine what non-creative services will still be needed in a free-distribution online environment (proof-reading, editing, mixing, promotion, financing ...) and what their costs are, add in the overhead of the levy system to get the amount that eventually will have to be raised through levies. Yet, determining what the financial requirements of authors and performers are is dangerously close to determining what a "fair wage" or "fair price" would be, a question that has been raised for hundreds of years and never been answered to anyone's satisfaction. The most practical answer so far – there is no fair price, the right price is whatever the market bears – would evidently not be applicable.

Here, clearly, more research in necessary. A useful tool would be an online simulation system for testing variations in base data and assumptions. Base data will be published figures from various industries (work classes: music, film, text, software; device and media makers; ISPs) and CSs. The data will be visible, so when the music industry complains about false figures the challenge will go back to them to provide „correct“ figures. The assumptions (e.g. 20% of music and 5% of film revenues are lost to free online circultation) can be freely manipulated, and the outcome will change accordingly.

6.2. Raising the Necessary Funds

A central question is, of course, how to raise the money needed to run such a system. Griffin is the only one who proposes users to pay subscriptions to the content delivery service. Yet, this is the approach some of the few existing systems are currently taking. For example, Play Louder MSP[29], MIT's LAMP (via student fees)[30]. The disadvantage of these systems is that content can only circulate within their "gated communities" hence they need DRM solutions with all the associated social costs.[31]

All other proposals are looking at a mandatory fee as a source of revenue. Fisher examines the use of the federal income tax to raise money. Advantage is that there are no significant additional administrative costs; it is progressive, therefore benefits and burdens of the increased tax burden would be roughly aligned. However, Fisher thinks that it‘s politically unacceptable because the alignment would be only rough. And as a general tax the money might be devoted to projects other than compensating artists. But he does see it as the solution for the „final mutation of the system.“

Most models propose levies on (1) equipment used to make copies of digital recordings; (2) media

27 Fisher (2003), ch 6 p 24
28 What are the criteria according to which one can determine if an entertainment culture is 'flourishing'?
29 http://www.playloudermsp.com
30 Though the LAMP project, broadcasting through MIT’s campus cable network, is closer to ‘interactive radio’ than file sharing. http://lamp.mit.edu/
31 Playlouder, for example, block p2p traffic from and to users of other ISPs. This does not affect free sharing of content among Playlouder customers.

used to store such copies; and (3) services used to gain access to the Internet.

Fisher proposes a levy on CD-burners, digital video recorders, broadband Internet access, blank CDs, MP3 players, HDD-based home-entertainment devices and other devices and services associated with the use of digital entertainment. The total spending on all these items in the US is projected for 2004 to be $15.222 billion. To raise the calculated amount of $2.418 billion a tariff of 15.88% on all these items would be required.

While the specifics of Fisher's calculation and the resuling rates are likely to be controversial, the overall figure indicates that a levy would need to be substantial enough to be noticeable (with all the potentially distorting effects), but not prohibitive, for example, forcing people to cancel their Internet access.

7. Allocating Levies

Calculating and negotiating a "fair" share for each beneficiary is a notoriously controversial issue with existing CSs and one that is likely to be even more controversial in the new system. It breaks down into two questions: which portions should go to the different categories of beneficiaries collectively, to authors and performing artists, and to each of the exploiters like publishers and record companies?[32] When each group received its fair share, the second question is how much each member of the respective groups should receive.

7.1. Who should be compensated?

So the first question is: who should receive levies? Authors and performers, that much is clear.[33] But what about the intermediaries? Under the current system, they argue that they provide a valuable service whithout which creative works would not reach users. This assumption is, of course, being challenged by the digital revolution. But even in the current system not every party instrumental to bring works to users gets paid based on IPRs. The printer doesn't get transferred any rights. As a

32 To give a few examples, in Belgium, reprography levies are distributed between authors and publishers 50:50, in Germany it is 70:30, in Spain it is 55:45. Levies for private copying of sound recordings are split between authors, performing artists and producers in Belgium 33:33:33, in France, Italy and Spain 50:25:25, in Germany and the Netherlands distribution schedules are not set by law but negotiated between CSs and their members: Germany: 58% to authors and 42% to performers and phonogram producers, in the Netherlands it is 40:30:30. (Hugenholtz et al. 2003 p. 20 ff.).

33 Maybe not to everyone. Netanel writes, without any reference to the fact that continental European CSs have been paying directly to authors from the beginning: "Others have proposed that some portion of levy proceeds be distributed directly to authors and performers, sidestepping copyright industry intermediaries, who often hold the copyright in a work and pay authors what many deem to be meager royalties. In that regard, the recently enacted Small Webcaster Settlement Act directly allocates 45 percent of the proceeds from its statutory license payments to sound recording artists and five percent to nonfeatured performers, rather than funneling that payment through record companies, as is generally the case with respect to copyright and performers' royalties under current law. Such proposals are well-meaning, but, on balance, should ultimately be rejected. Levy proceeds would best be distributed in the manner that most closely reflects audience demand. They should also be paid to current copyright holders." Netanel grants the 'strategic' option of considering this path: "It may well be that including direct payments to authors would be necessary to obtain the political support required to enact a levy regime." (Netanel 2003, p. 42)
Given the current practice of buy-out contracts in the copyright countries, funneling author's and performer's payments through "exploiters" is guaranteed to leave creatives with nothing. If we design the ACS so that "current copyright holders" remain the primary beneficiaries of the compensation we will reproduce the 'shortcomings', to put it diplomatically, of the current system. The double structure of a CS for creatives and one for intermediaries is intended to alleviate this problem (see above).

service provider to the publisher, he handles atoms not IPRs. So does the retailer, the party that actually brings works to users. This is different in the music industry where the publishers do transfer IPRs to record companies.

The argument is that publishers in print and record companies in music bear the main financial risk, therefore they should get a large share of the levies. But also the retailer bears the risk that certain works don't sell, that he is offering the wrong selection for his clientel. But he is not being compensated. In the online realm, what would be the intermediaries? ISPs, content and DRM service providers. Their contributions are clearly instrumental to bringing works to users. Should they receive a share of the levies? The argument against this could be that, just as printers, ISPs don't touch IPRs just bits. But the same is, in fact, true of much of the functions that a record company fulfills: management, marketing, handling of atoms, financing. An advertizing agency doesn't receive IPRs on the product they sell, neither does a bank financing a creative production. A re-evaluation of the role of the intermediaries and which of them should receive a share from copyright proceeds is needed.

Once it's clear who the beneficiaries are, the question is how to divide the sum total of the levies among them. In Fisher‘s system, rights holders would be compensated based on a key which is calculated taking into account the type of work, the degree to which other works are incorporated[34] and length of the work. His starting point for calculating the proportions that should go to the owners of copyrights in films, in musical compositions, and in sound recordings would be the status quo at the start of the ACS. The total amount of the levies and the allocation ratios would need to change over time to reflect changes in the production environment. Fisher remains mute on how such changes would be negotiated, presumably in a copyright tribunal representing all beneficiaries, but he simply states that the Copyright Office's goal would to be ensure a „rich entertainment culture.“

How would one centrally determine what a ‚rich entertainment culture’ really is? Fisher imagines a *social engineering* experiment of gigantic proportions when he writes: „Just as the proposed periodic adjustments of the tax rates are done incrementally, so the shares would be changed, not in a sudden lurch, but slowly. After each change, the Copyright Office would watch the affected industries to ascertain whether the shift were consistent with its overall responsibility to sustain a rich entertainment culture.“[35]

7.2. Should all works be includes in the ACS?

What kinds of works, if any, should be excluded from the ACS? There is little futurism in predicting that there will never be agreement over what constitutes a ‚rich entertainment culture‘, particularly since this would be a levy or even tax-payer financed entertainment culture. Would it include free porn for everyone (within the already existing confines of legality)?[36] That might be politically a very hard proposition to win a majority on. But if we start excluding certain types of content from the system, we create the problem of having to monitor content. This, however, would counter the entire premise of the system.

34 Works incorporating parts of others (sampling, mash-ups) would be shared according to rough levels, up to the point past which the administrative costs associated with tracking each contribution and distributing the resultant money made it senseless to do so

35 Fisher (2003)

36 Droit d'auteur does not protect sweat-of-the-brow creations but requires a certain level of creative inventiveness ('Schöpfungshöhe') for something to be a protected work. It seems that therefore much of pornographic production consisting of little more than the old in-and-out game is not protected by copyright to begin with.

Excluding certain types of content from registration and compensation would mean either to destroy the industries producing it – by allowing the free distribution of their products but not compensating for it – or having to ensure that

a) only registered content is freely distributed online, making it necessary to maintain a parallel (DRM) infrastructure for controlled distribution of works not covered by the statutory license and therefore / or not registered in the ACS. It would also require those not whishing to collect money to register their works, in order to get access to the free distribution channel. And it might require pulling a digital fence between registered and non-registered works. This distinction would need to be implemented in a machine-processable way, on the level of meta-data or even IP packet headers.

b) only appropriate content is registered. The latter would amount to the registrars becoming dangerously close to a censor board and we would enter a never-ending discussion over where to draw the line. What about gangster rap? Or Nazi rock? Books offending religious feelings? And even if one could determine a list of excluded categories, mapping content onto these categories will be simply impossible. Is *Satanic Verses* high art or blasphemy? The sorry state of the *National Endowment of the Arts*, wrecked by vicious and partisan discussions about whether tax-payers should finance art that the majority of them might find objectionable, should serve as a reminder of the problems and dangers that such discussions entail. Since we are talking about access to compulsory levies or even tax-payer money, we doubt that free speech rights would protect controversial content.

7.3. Why User Voting is a Bad Idea

Most proposals provide that each beneficiary gets compensated according to the use made of her work. Since this might entail the danger of the winner-takes-all effect that characterizes markets for cultural goods today, a voting mechanism by users has been suggested (Love, Eckersley) to replace or accompany allocation based on measured use. Yet, in our view, user voting has at least three very substantial drawbacks, apart from the practical difficulties of getting people to vote.

1.) There is simply no normative or legal basis why someone should be allowed to decide who deserves to be compensated and who not. There is no possible justification for disapropriating the creatives. (That was the structural deficit of the old system, that we should avoid in the new one.) As long as compensation rates for use of one's own work are set at the 'right' level one can speak of a just quid pro quo. What could justify that not measured use but user voting determines the income of creatives? Dedicating a portion of the total pool of levies to social and cultural causes, like supporting artists in need, is a valuable and necessary idea, but shouldn't the community of authors and performers decide these issues rather than the users?

2.) The proposed system will even exasserbate the winner-takes-all situation. Britney fans will also listen to other music that, if metered, gets a share, but will dedicate all their share of the levy to Britney. Less famous artists would be worse off than in the current system. And even the "indie" intermediaries will raise more issues than they solve.[37] Hence voting is not a convincing

37 Competing agencies could offer various policies: "For example, an intermediator might propose to:
1. Give all the money to performances of a specific genre of music, such as African music, American jazz, or performances of classical music.
2. Ensure that 15 percent of the revenue supported retired blues artists that are down on their luck.
3. Allocate all money on the basis of the volume of downloads.
4. Allow the listeners to directly allocate fees to specific artists." (Love, 2002)

Yet, this is entirely unworkable. The categories that these intermediaries would represent are extremely vague, at best. Where‘s the dividing line between, say, Blues and Rock‘n‘Roll? Does the term Gaelic folk music only cover artists from Wales? Even if these kinds of classificatory issues could be solved, again a

solution to the „Britney effect“.

3.) It's a solution to problem that might not even exist in an online environment under the ACS. For all we know, the appreciation of music and other categories of works will be much more diversified in an environment not restricted by IPRs. People will be able to explore the virtually complete pool of works and rather discover new artists than download works that have already been "broadcast to death." There is evidence that who's a star in the offline world is not necessarily as highly in demand in p2p networks. A recent presentation by Apple on download behaviour in iTunes Music Store suggests that user's interests are much more diverse than the current music industry makes us think. Apple laid out that most asked for are rare titles This also disproves the idea of economists that the market is the only meaningful way to measure he appreciation of information users (Liebowitz 2003).

8. Elements of a Future System

As we have seen, from a systems architecture point of view,[38] the most difficult aspects are likely to be a) determining the total amount to the raised and b) how to distribute the funds. To address the first issue, the current rough figures give an indication of the order of magnitude, but, clearly, more research is needed. As for the second issue, we have seen that providing users via voting with substantial discretion over how funds should be distributed is not an option. Similarly, basing the entire system in a central, state-run agency, having to devine what a 'rich enterainment culture' is, seems also highly problematic. If recent experience is any indication (ICANN), such central agencies are likely to represent their constituent interests very unequally, even if no money is directly involved.

The model remaining that could serve as a guideline for the new system are the (continental European) collective autors' societies. They represent the creatives directly and have proved to be capable of raising and distributing levies. Yet existing CSs suffer from three major flaws that would need to be avoided in a new system:

1. The founding generation of authors and performing artists were later joined by publishers and recording companies who also needed a mechanism to collect their remuneration rights to secondary uses, e.g. from libraries. It seemed like a good idea to pool interests and try to reap economy-of-scale effects in order to bring overhead costs down to a reasonable level. This turned out to be a structural mistake. Even if there is a nominal parity between authors and publishers in the decision making fora of CSs, industry is regularily in a stronger position than authors. Therefore, CSs policies often reflect publisher‘s interests rather than those of authors.

2. CSs are chronically intransparent in their decisions on tariffs and allocation ratios. In Germany, the GEMA which should be representing the interest of composers and musicians, is probably the best-hated organization among creatives.

3. Existing CSs have proven incapable of coping with the digital age. E.g., GEMA declares itself incapable of allowing its members to set individual policies for their works, e.g. exclude a work from collective management. Their capabilities allow only an all-or-nothing representation of the works of its members. This leads to the absurd situation where GEMA collects levies for downloads of a song that a member band puts up on their website for free promotional download. The musicians, of course, are also the beneficiaries of the payment which they get back after two years and after substraction of 15% administrative charges by GEMA.

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very big if, then how are users supposed to know that the agency claiming to represent retired blues musicians actually represents all of them, and not just a lucky few?

38 Politically, every single aspect, starting with the statutory license, will be very contentious.

For these reasons, we propose to set up a new Online Collecting Society, or rather a tripple structure: an Online CS representing authors and performers, another Online CS representing the rights of companies providing services to the creatives, and a collecting agency as the executive arm of both CSs. The structure, as today, would be under the legal oversight of a government agency like the Copyright Office. All other functions, such as registration and usage monitoring could be provided by independent agencies, working under the guideline of the new Online CS. Such a separation of functions would likely increase transparency, because large amounts of data would need to be shared among the constitutive actors, rather than everything being handled discretely 'in house'.

The collecting agency could be modelled after the ZPÜ (Zentralstelle für Private Überspielrechte), an agency established by all concerned German CSs for collecting levies on recorders and empty media. The ZPÜ does nothing but collect the determined amount from the makers and importers and distribute it to the CSs according to the ratios set by the CSs.

By separating collection and distribution of levies, several or ideally all CSs could share the collecting part of the infrastructure and reach efficiency through economy of scale. On the distribution side there wouldn't be any need to concentration. At least two groups, the creatives and the intermediaries, could both organize separately and set their own internal allocation policies.

Separating these two groups would have two main advantages:

1. The two CSs would encompass equals: individuals (authors and performers) in one and companies in the other. The missmatch of individuals and corporations being represented in the same organisation would be gone. Both could set their own priorities, devlop their own sense of solidarity, the one setting up a fund for needy artists, the other a fund for rescueing failing companies.

2. This is a historical chance for authors to organize as authors. This chance was missed when publishers joined the old CSs. Authors do not organize in unions, and there are few other authors' organizations (e.g. the PEN Club). In the case of the Online CS, there would be an existential, i.e. monetary incentive for all authors to join. This would create a powerful collective societal actor that could articulate its interests towards the exploiters and intermediaries. In societal debates like the one over the ongoing copyright reform, authors wouldn't any longer be spoken for by industry, as an appendix to the exploiters, with supposedly identical interests in profit maximization, but finally authors could speak for themselves.

Would it be feasable to seperate the CSs for creatives and intermediaries? The exploiters have set a precedent already. In Germany, the publishers withouth the authors have set up a CS for collecting levies on electronic clipping services.[39] The publishers were not satisfied with the speed and quality of the existing CS in charge (VG Wort), so they gave their mandate to PMG which costs them twice as much but they get their share faster, so they are happy.[40] Therefore, parallel CSs are, in fact, possible. If the exploiters can do it without the authors, authors can do it without them.

What would be the rights that the Online CS collectively represents, and why wouldn't the existing CSs be in charge? German copyright prohibits tranfer of rights to forms of use unknown at the time the contract is concluded. The newly introduced right of making available clearly refers to new forms of use. For digital re-use of works on CD-ROM or online the rights to which were originally

39 PMG, http://www.pressemonitor.de/
40 PMG and VG Wort have an exchange agreement.

transferred for analog use, this question has been settled by the courts: it does constitute a new form of use and therefore has to be compensated by the exploiters. Since it would be impractical to contact tens of thousands of journalists and photographers to negotiate contracts for putting a newspaper archive online, this compensation can only be collected by a CS.

The CSs themselves argue that even if the majority of their members has not transferred digital rights to them in their membership contracts, implicitly they did indeed grant them these rights as well. This seems a very weak argument. Certainly, if a new free online circulation limitation were introduced as an exception to the new right of making available, it could be easily argued that not the old analog CSs should be in charge of managing the compensation rights but a new digital-born Online CS. It would conclude exchange agreements with the old CSs and would set the boundaries of their respective jurisdictions[41] in what without any doubt will be hairy negotiations.

Existing CSs are organized by work category: music, text, image and fine arts, movies etc. The *Online* CS would be based on distribution medium not work category. It would therefore comprise authors and performers of all work categories that are digitally representable.[42] Do novelists, photographers, composers, software authors (if they were to be included), illustrators etc. have enought in common to meaningfully organize in one CS?

There would be (pairs of) Online CSs in each country, and they would have agreements to represent each other's rights in their respective territories and share the proceeds, just like the exchange agreements between CSs today.

9. Epilogue: New Business Models

When up- and downloading of music and other works will not be restricted any more a complete archive of everything ever recorded and still playable would emerge in no time. There are many possible sources contributing to such a distributed archive: rights holders providing access to their material, open contributory models like Project Gutenberg, publicly funded digitization of sound archives of science, public broadcast, cultural heritage preservation programs and others.

At this point, there is no telling what the technical infrastructure of such an distributed archive would be. The choice between p2p or mesh or central server architectures will be a pragmatic issue, based on technical and procedural considerations. The strong emphasis of many authors on p2p as the future Internet might be overstating the importance of this architecture. The Project Gutenberg still relies on a central server (mirrored across the world) as the repository. As Fisher points out, "it would be much more convenient and reliable to obtain a copy of the latest Eric Clapton release from a server at Clapton's website than to download it from Kazaa."

This will not be the end of the music business. First, a substantial part of the music business happens offline or live (concerts, merchandizing, special events). Second, it would not make online, pay-per use distribution of content impossible, but it would radically transfrom the structure of the market place. It would shift, "from one for products to one for delivery services."[43] Under the new framework, providers would have to compete on the basis of the quality of the delivery channel, for example, by guaranteeing fast download rates, by providing exlusive live streams, or, by creating

41 Where to draw the line: online vs. offline (technically distinguishable, work-wise meaningless. What share should the Online CS get for levies on recordable CDs onto which works are burned that were only published online?)? Digital vs. analog works (also largely meaningless)?

42 E.g. sculptors only insofar as digital representations (photos, 3d-datasets) are concerned.

43 Griffin (2001). See also commercial Linux distributions where not the IPRs are charged for but packaging, manual, installation support, in short: delivery.

„value-added“ services, such as access to fan clubs or special events for members of their channels.[44]

One can also imagine new services that would fill the ocean of content into bottles making it readily consumable by users. Recommendation services, sharing of favorite lists, radio stations that webcast programs based in each subscriber's preferences and many others could develop services that are based on the need to make the abundance of content accessible to users, who, by and large, don't know the richness of what is out there.

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44 An example for such a service is emusic.com that sells access to 275’000 standard mp3 files, provided by over 900 independent labels. Most of these files are also available on Kazaa, but emusic provides efficient, high-quality access to complete sets of songs. Its prices are much lower than, say, Apples iTunes. Emusic charges between $9.99 and $19.99 /month for 40 or 90 songs/month. iTunes charges $ 0.99 per song.

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