The Economics of Collective Copyright

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This paper is a review of published and unpublished sources, to address a range of questions, criticisms and alternatives which have been presented to the existing model of collective copyright licensing. It follows an emerging modern narrative that eschews traditional debates about the source and status of this form of IP, and instead focuses on the economic function of copyright: ensuring creators are paid. This in turn leads to a discussion about the broader elements of effective payment, with an emphasis on the minimisation of transaction costs for creators, publishers and users of copyright materials.

The fallacy that digital reproduction removes the right of creators to expect revenue from their efforts is addressed, as is the parallel argument that ease of access should translate to free use.

From there, we look at a range of models for collective management of copyrights, focusing on their comparative efficiency in removing transaction costs.

The question of voluntary v. collective licensing is considered, as is the option of a single statutory rights holder v. multiple collecting societies selling the same rights.

A number of conclusions are drawn, illustrating that for small scale markets such as Australia, a single collecting society for a given form of copyright is most efficient, and delivers a range of critical certainties and indemnities to cover both users and creators of copyrights.

Some of the limits and competition effects of collecting societies are explored, including for performance rights and sub-licensing, but these do not undermine the fundamental economic efficiency delivered by the model.

Two Views of Copyright and Compensation

Forty years ago last month, at the height of concern around the threat of cheap copying to copyright revenues, Barbara A Ringer, the 8th US Register of Copyrights, and architect of the 1976 Copyright Act, gave a landmark address about the history and future of copyright.

Titled "The Demonology of Copyright", Ringer's speech summarised the history of Western copyright law, and noted the persistence of incommensurable views of the right, as either a true property, or an artificial monopoly.[1]

She went on to note that questions about the fitness of copyright to address new technology environments was not a new phenomenon, appreciatively quoting Harvard Professor Zechariah Chaffee's 1945 comments on cinema and radio:

> "Copyright is the Cinderella of the law. Her rich older sisters, Franchises and Patents, long crowded her into the chimney-corner. Suddenly, the Fairy Godmother, Invention, endowed her with mechanical and electrical devices as magical as the pumpkin coach and the mice footmen. Now she whirls through the mad mazes of a glamorous ball".[2]

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1 Barbara A Ringer, *The Demonology of Copyright*, RR Bowker Memorial Lecture, New Series, October 24, 1974.

2 Zechariah Chafee, "Reflections on the Law of Copyright", *Columbia Law Review*, 1945, quoted above n 1, p 16.

Plus ça change. Ringer discussed the impact of both existing and future technological challenges:

> "Reprography seems to me the most serious immediate problem in copyright law, but I have come to feel that satellites represent the most important development in human history since the printing press".[3]

From there, noting that since 1945 there had been an exponential growth in technological reproduction, but that the law had not kept pace:

> "These services cannot be cut off, but somehow the copyright law must find a way to insure that the interests of authors and copyright owners are protected at the same time. Increasingly, the answer being suggested to this problem nationally and internationally involves systems of compulsory licensing: free access with payment of reasonable compensation on some sort of blanket or bulk basis".[4]

And finally concluded:

> "If the copyright law is to continue to function on the side of light against darkness, good against evil, truth against newspeak, it must broaden its base and its goals ... Economic advantage and the shibboleth of 'convenience' distort the copyright law into a weapon against authors".[5]

In the current debate, where the "convenience" of new technology is unleashed to prove copyright outmoded (the pause it requires is inconsistent with the modern pace) this argument is both prescient, and pertinent.

The Western concept of copyright as it evolved in the 20th Century remains grounded in a principle of property, which is the expectation of the author to set the terms of use for her property. This contrasted with the contending conception of the Marxist East that new technologies had democratised access, therefore made art common property – a product of "polytechnic", rather than specialised training.[6] This may be the forerunner ethos of the blogosphere.

In the West, the idea that more democratic access to both creation and appreciation of art removes its commercial value has never been seriously entertained outside academia. Our economic institutions are built upon the bedrock belief that competition and innovation grow markets for both creation and appreciation, not destroy them.

Nonetheless, the idea that Ringer describes - of a nascent compulsory licence regime - reflects the economic problem of transaction costs, which is the real challenge in the nexus between technology and intellectual property law. The pause to reward the creator remains inviolable, but we want it to be as brief and uncomplicated as possible, without misappropriation.

This balance remains at the heart of most credible contemporary thinking on copyright law. This balance remains at the heart of most credible contemporary thinking on copyright law. Jane Ginsburg notes that even in the "Fair Use" context of US copyright statutes, there is a need to focus on creators' rights, distinguishing "transformative" uses from authentically novel works:

> "Mass digitisation does, at least at first blush, appear to present intractable transactions cost problems. The number of works at issue, and the difficulty of locating their right holders, and even if located, obtaining the necessary rights, may

3 Above n 1, p 17.
4 Above n 1, p 17.
5 Above n 1, p 19.
6 "Literary licence is now founded on polytechnic, rather than specialised training, and thus becomes common property", in Walter Benjamin, "The Artwork in the Age of Mechanical Reproduction", in *Illuminations: Essays and Reflections*, Harcourt Brace Jovanovich, 1968, p 232.

> make fair use seem a desirable solution ... but vast, immodest copying entitles the copyist to persist, without permission and without paying .. difficulties in rightowner location may justify a flexible solution .. [but] ... if the use is to be permitted, in many instances it should also be paid".[7]

Even where copyright emerges from a different tradition of author remuneration, there is strong argument that originators have greater rights than reprographers.William Patry is a former copyright counsel to the US House of Representatives, policy planner to the Register of Copyrights, and author of the seven-volume guide to American law: *Patry on Copyright*.

More recently he has served as Senior Copyright Counsel at Google, which through its book service, is an emergent form of collecting society.

In his 2011 book, *How to Fix Copyright*, Patry proposed a range of ambitious reforms, including global copyright laws, the removal of parallel importation regimes, and restriction on the remuneration of collecting society executives.

However, these prescriptions are all clustered around a central kernel for a new conception of copyright: abandoning the traditional notion of copyright as an exclusive dealing right, and instead focusing strictly on compensation.[8]

Considering the various pathways to compensation, Patry matches solutions to market demands:

> "One-to-one negotiations will always be necessary for situations where we want copyright owners to control the individual use of their work, such as licensing the use of a novel or musical composition in a movie for 'grand rights' (theatre), or for use in advertisements. Statutory licensing is appropriate where we do not want users to bargain over the licensee fee (usually because the transaction costs are high relative to the license fee) but we do want them to pay. Collective administration is appropriate where, due to large transaction costs and the potential inequality of bargaining leverage by individual copyright owners, we want users to have to negotiate fees."[9]

Two features stand out in this analysis. First, there is a separation between: the idea of control, which may remain necessary to restrict the performance of a work before an audience for profit; and the focus on simple compensation, which demands an efficient structure to minimise transaction costs. Australia has traditionally separated the markets between "grand rights" and broader performing rights managed by collecting societies.

And second, collective administration, whether based on a statutory licence or mandate from copyright owners, is focused on the compensation of creators, with a distinction between: resolving transaction costs for end-users, to permit a manageable fee to authors, via statutory licences; and, resolving transaction costs for creators, to permit negotiation with more sophisticated and disparate users.

Whether negotiation is direct, or via an intermediary collecting society, the principle persists that creators of copyright material have a right to compensation – which is a fundamental element of a property right. The remaining component of exclusive dealing - including the right to prohibit use or grant an exclusive licence - would apparently be restricted to the most valuable uses of a work.

While this interpretation sides with the view that copyright is a conferred rather than a natural right, it illustrates a key point about the execution of copyright for income purposes: approaches

7 Jane C. Ginsburg, *"Fair Use for Free, or Permitted-but-Paid?"*, Center for Law and Economic Studies, Columbia University School of Law, Working Paper No. 481, June 2, 2014, pp 22-3.

8 William Patry, *How to Fix Copyright*, Oxford University Press, 2011, Kindle Edition, Ch 7.

9 Above n 8.

to compensation are indifferent to both ideological or legal arguments about the nature and source of copyright. They are instead focused on efficient access to copyright material, without uncompensated appropriation.

From the perspective of a licence regime, the philosophical basis of a copyright is a fascinating, but ultimately irrelevant question: that the right is stapled to the act of creation one way or another, and consequently that the value of the right is not diminished by the form of a text's (or score's or image's) dissemination remains, and is a matter on which Ringer and Patry agree.

The intersection of the author, technology and payment is the territory of the modern collecting society, whether a compulsory licence holder, competiing rights society or corporate such as Google. This intersection and its economic underpinnings are the focus of this paper.

What is Efficient Copyright?

In economics, private property and efficiency are not always perfectly reconcilable goals. Unique property, such as real property or a film script, are only partially subject to competition, and have some internal monopoly characteristics. The purpose of their vendors is to maximise revenue for the specific property.

Conversely, economic efficiency presumes a level of competition which focuses on categories and sets of items without unique qualities, in order to maximise social welfare by limiting rents.

The arguments by technologists for efficient recasting of copyright generally claim that it is unsustainable for creators to expect continuing incomes given the speed at which media are now consumed. This is generally conflated with a vague inference that copyright has historically existed to fund the costs of reproduction, rather than creation.

Self-serving as such arguments are, they illustrate the changes in the demand profile for copyrighted materials, whether e-books, MP3s, high-definition downloads or public broadcast. These are markets hostile to the idea of monopoly retailers maximising profits by pricing access.

One of the problems here is the (often pejorative) claim of a copyright monopoly. This is a simple term in commodity economics, but becomes more complex in copyright, because we consider two interlocked markets, viz.:

1. the market for creative works (titles) which is often a publishers' market; and,

2. the market for reproductions, which is the consumer-facing market.

As an aside here, there is a reasonable question as to whether we can characterise either of these as a true monopoly. Some titles (e.g. maths books) are more substitutable than others (e.g. novels) but rate of substitution will change according to differential pricing: uniqueness is subject to price elasticity.

More formally, Martin notes:

> "Classic economic theories of intellectual property markets identify them with large fixed costs and low variable costs, which often characterize natural monopolies in other contexts.
>
> The problem with this rationale is that the existence of an intellectual property right is neither a necessary nor a sufficient condition for the existence of a natural monopoly …some copyrights cover subject matter with declining average costs of production, but most do not."[10]

10 Michael F. Martin, "Natural Monopolies in Antitrust, Patent, and Copyright Law: The Essential Facilities, Reverse Doctrine of Equivalents and Originality Docrtines as Triggers for a Compulsory Licensing Remedy", January 27, 2006, p 33.

More importantly, transaction costs are not artefacts of the copyright itself, but of its administration. Returning to the distinction between primary and secondary markets – and considering the former - there is strong evidence to support the view that creative works increase in supply when payments increase.[11]

Leaving aside crowdfunding and self-publishing, it follows that those payments will only increase if creators' copyrights are monetised by publishers, music producers and similar: those willing to bear the costs of advertising and other market development. Taking this into account, Leibowitz (University of Texas) describes copyright as follows:

> "The paradigmatic analysis of copyright proposes a tradeoff between allowing greater returns to producers of copies – by granting a copyright monopoly and having some or all of those returns pass on to the creators, leading to a greater number of creations – and the price consumers pay".[12]

The toll-collector here – traditionally but not necessarily a third-party publisher – professionally resolves the market for reproductions in order to reward the author or composer. There are potentially losses in surplus maximisation for social welfare, as well as costs to the creator and the consumer, but an equilibrium of sorts, within an imperfectly competitive market, is reached.

For this to become efficient in strict economic terms, we would need to limit the duration of copyright to the period required to deliver the author his expected reward.[13] For a range of reasons, this would be a palpable nonsense.

First, it would require us to assess the value of an author's time. And second, it ignores the fact that successful authors have typically written for some years until they have a breakthrough title which returns any income at all.

In this context, we would need to attach something resembling a type of Brown Tax model[14] to the copyright regime, to cover losses where work is done without profit, if we were to restrict income from success. This is not a proposal any technology group or government has seen fit to suggest.

The conclusion to be drawn is that efficiency will flow from tolerable limits – including fixed terms for intellectual properties such as copyright – rather than economic theory, because of imperfect information and asymmetric costs of creation. Nonetheless, economics has a key role to play.

This was the thesis of Associate Justice Hon. Stephen G Breyer, when as a young Harvard Professor seeking tenure, he penned his seminal article: "The Uneasy Case for Copyright".[15] This was an attempt to bring together legal and economic tools to resolve the pros and cons in the copyright debate during another period of technology change.

In his article, Breyer argued that copyright should be a balance between simultaneously maximising production and distribution of works.

This has been a highly influential article, and a departure point for a great deal of recent commentary in copyright economics. In 2011, now a member of the US Supreme Court, Breyer himself reflected on the article that:

11 Stan J Leibowitz, "Is Efficient Copyright a Reasonable Goal?", *George Washington Law Review*, Vol. 79, 2011, p 101.
12 Above n 11, p 105.
13 Above n 11, p 107.
14 Named for the late MIT Professor E Cary Brown. The government effectively becomes a partner in an enterprise, with a share equal to the taxation rate, so participates in both upside capture and downside compensation.
15 Stephen Breyer, "The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs", *Harvard Law Review*, 281 (1970).

> "The Coase theorem, which at that time was new, stated that if there were no costs of distributing property rights, and no costs of engaging in transactions with regard to those property rights, then the initial distribution of rights would not matter, because no matter what that was, people would exchange rights to get what they wanted. I wanted to take that idea and examine what application it had to the field of copyright ..."[16, 17]

The point here about transaction costs is highly pertinent. If dissemination of texts and other titles presented no cost to the creator or the consumer, then copyright would operate through a perfect negotiation between the two: in this case artificial copyright would simply create rents and costs. This is of course entirely theoretical, as there are substantial transaction costs, despite cheap technology.

The issue of transaction costs is assisted by the economic theory of rent dissipation. This is the argument that if no licence is set for what would otherwise be a public good, overuse will take place and thus "dissipate" the rights-holder's profits. Overfishing of unregulated waters is the typical industrial example.

Abramowicz (GWU Professor of Law) describes the impact of rent dissipation theory to copyright in a number of ways, including:

> "If a work is valuable ... concentrating rights to exploit the work in the creator avoids redundancy and wasteful competition."[18]

This gainsays the assumption embedded in many arguments for copyright erosion that copyrights are restrictions on public goods subject to non-rivalrous consumption.[19]

Abramowicz goes on to note that rent dissipation theory also supports exemptions for copyright, such as the "first sale doctrine", relating to resale of books, records, DVDs and similar:

> "There are ... no fixed costs associated with producing copies that already exist, so rent dissipation theory accurately predicts that copyright law should be less concerned with this form of unauthorised competition than with others."[20]

In this circumstance, the creator has already capitalised the value of the work in the reproduced article, and bears no transaction costs. Tests of exemptions like this are useful in considering the efficiency of the law as constructed.

It is informative here to note the distinction between a second-hand copy, and a new reproduction sold by a wholesaler into an international market: this is the fulcrum difference upon which reasonable parallel importation restrictions rest.

Much of the contemporary concern about the "costs" of copyright focuses on price differences between territories, where it is asserted that national border regimes and publishing oligopolies are preserving revenues which are no longer justified in a digital world.

The efficiencies of digital delivery in removing transaction (production) costs are consistently overstated. There are still costs associated with editing, rights negotiation, regional compliance

16 Hon. Stephen G Breyer, "The Uneasy Case for Copyright: A Look Back Across Four Decades", in *The George Washington Law Review*, Vol.79, No.6, 2011, pp 1636-7.

17 For a broader exposition of the Theorem, see Ronald H Coase, "The Problem of Social Cost", 1960, in Chennat Gopalakrishnan Ed., *Classic Papers in Natural Resource Economics*, MacMillan, 2000, pp 87-137.

18 Michael Abramowicz, "A New Uneasy Case for Copyright", in *The George Washington Law Review*, Vol.79, No.6, p 1654.

19 For the contrary view, see for example Amy Kapczynski, "The Cost of Price: Why and How to Get Beyond Intellectual Property Internalism", Yale Law School Faculty Scholarship Series, 2012, p 981.

20 Above n 19, p 1662.

and interaction with sites such as HDTracks and Amazon. Given the new competition for eyeballs on the internet, and the proliferation of mobile devices, the investments in typesetting and presentation and platform developmentare likely more expensive than for books and magazines.

There are, however, some predictable transaction cost efficiencies to be had, including in the compliance regime. As Litman (UMich) notes on disintermediation:

> "Simplifying the law to the point that one doesn't need a lawyer to be able to play, and giving more rights to creators and more freedom to readers, listeners and viewers will necessarily reduce the profusion of incentives currently enjoyed by many distributor intermediaries".[21]

This assessment is perhaps overly concerned with an equivalence of creators' and users' rights, but the point is well-taken: intermediation should reduce transaction costs, rather than inflate them. Individual users rarely have the wherewithal to check, interpret and comply with the legal expectations of copyright: the function of intermediators should be to relieve this responsibility, and in an efficient market, competition should ensure that the cost of this is not excessive.

It should be noted that "efficient" is not code for "free". While some of the costs of traditional music, film, book and journal publishing may have been ameliorated by online dissemination, the new environment delivers its own challenges. Online access sites, from YouTube to Google exist to earn profits, and have substantial sunk costs and recurrent expenses.

There do of course remain some areas where efficient copyright is difficult to determine, most notably performance, which challenges the historical requirement for a copyrighted article to be a tangible artefact, or to have a distinct author:

> "Who is sufficiently responsible for a work of performance to be deemed its author, and thus its default owner? In a world where works require dozens and even hundreds of people to complete them, this question will often be difficult to answer while both respecting creativity and recognising economic imperatives".[22]

We might suspect that any attempt to find a remunerative copyright structure for performance will follow a similar path to the payment for a text or score to be performed: as a one-to-many negotiation, it is likely to be most efficiently dealt with by contract rather than statute.

The legal environment of the web for creators is another emerging issue, where traditional copyright laws may be as equally puzzling for creators as for users. But there may be hope here. Reviewing the difficulties of collecting intellectual property revenues in the cloud era, Wang & Deng (Xiangtan) claim that the shift from the traditional ISP mode to cloud storage should in fact enhance the collection model:

> "Though the Internet intermediaries possessed the technical ability to enforce copyright, they did not directly communicate works, and most of them did not directly benefit from the communication of works as well. Actively enforcing copyrights will not contribute to their profits, but will affect the interests of their clients, thereby indirectly harm their own interests
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> … In cloud computing environment, computing resources including works will concentrate to the cloud, while the cloud service users essentially do not hold or only hold a little computing resources. This means that the cloud service providers in cloud are extremely similar to the intermediaries before the advent of the Internet

21 Jessica Litman, "Real Copyright Reform", in *Iowa Law Review*, 96(1), 2010, p 39.

22 Rebecca Tushnet, "Performance Anxiety: Copyright Embodied and Disembodied", Georgetown Public Law and Legal Theory research Paper No.13-040, in *Journal, Copyright Society of the USA*, 13(06), 7 May 2013, p 1002.

> rather than the Internet Intermediaries. The cloud computing providers can earn money directly from the communication of works and have incentives to enforce copyright ..."[23]

This is a powerful insight, from which we may draw two conclusions:

1. much of the call for copyright law reform has been grounded in the economics of new technology modes (bits over books) and the difficulty of copyright enforcement. This belies that argument, as the evolution of technology from distributed access to distributed storage underscores that the "difficulties" were transitory and driven by competing incentives, not embedded; and,
2. seeking change to a law on the basis of emergent technology is a short-term approach.

While there are complexities to copyright in the cloud which may suggest some refinement of the law, the role of a collecting intermediary which is central to the operation of modern copyright laws is reaffirmed.

There is an illustration here of the risk of abandoning traditional rights structures to convenience, masked as efficiency. There are lessons for the reform of Australia's digital laws under ss 116AA –116AJ of the *Copyright Act 1968*: online enforcement is feasible; it is simply a matter of aligned economic incentives.

A recent attempt at defining efficiency by the *World Economic Forum Global Agenda Council on the Intellectual Property System* proposed the following among its seven principles:

> "Copyright systems should enable rights to be meaningfully, practically, cost-efficiently and proportionally enforced", and,
>
> "Licensing should be streamlined in a content-appropriate manner and simplified to be as easy and efficient as possible, including for different types of content and across national boundaries".[24]

On the surface, these are fairly uncontroversial proposals. But they are on the gentle side of reform demands. A contrasting paper from the LSE for reform of the UK Digital Economy Act recommended a review that:

> "… strikes a healthy balance among the interests of a range of stakeholders including those in the creative industries, Internet Service Providers and internet users. Fitting the digital sharing culture and new forms of cultural production into a copyright enforcement model that is out of touch with today's online culture will only suppress innovation and dampen growth".[25]

"Today's online culture" is both subjective, and temporary, and no argument for a reduction of economic rights. It does not prohibit authors releasing their works for free, but the idea that low-cost distribution demands an end to creative compensation is another example of substituting convenience for efficiency.

A final thought on the nature of efficiency in copyright comes from a different form of intellectual property. In the patent regime, there is a concept of "inventing around", whereby inventors explicitly seek to design products to skirt the exclusivity of an existing patent.

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23 Taiping Wang & An Deng, "The Copyright System in the Cloud: Challenges, Opportunities and Prospecting for the Future", SSRN, June 22, 2014.

24 http://www3.weforum.org/docs/WEF_GAC_CopyrightPrinciples.pdf, Items 4 & 6, 2013.

25 Bart Cammaerts et al, "Copyright & Creation: A Case for Promoting Inclusive Online Sharing", London School of Economics and Political Science, Media Policy Brief 9, September 2013.

This is a source of innovation, in that it requires an alternative solution to a common problem. It is both a consequence and a goal of the narrow granting of patents.

When extended to the role of copyright, the principle of "inventing around" takes a reverse pathway, where the law has traditionally responded to innovation:

> "Unlike the patent statute, the copyright statute entails several features that foster statutory inventing around. First, copyright has evolved to place exclusive rights at the level of activities such as reproduction and distribution of copies, which are largely technological activities. Whereas patent law is meant to *promote* technological discovery and progress, copyright was classically intended as a response to technological discoveries or progress that made it easier for third parties to copy and benefit from the creative works of others. As new technology, such as the printing press, lowered the cost and speed of copying, prices fell, availability of content rose, and natural copy control by means of physical impediments deteriorated. Legal exclusivity replaced some of the control that was lost due to more effective copying technology. As increasingly effective copying technology was developed and disseminated – such as offset lithography, xerography, and digitization – legal exclusivity was called upon to fill a greater and greater gap between the initial cost of creation and the cost of subsequent dissemination".[26]

This is an underexplored element of economic efficiency. It posits that the evolutionary growth of various Copyright Acts has been to preserve rights and revenues in the face of emerging technologies, not to make them contingent upon innovation.

It is notable here that most of the claims of copyright hindering innovation are focused on "innovations" which seek to exploit copyright without traditional remunderation.

Exclusivity remains the soul of copyright, not access. However, the issue of minimising transaction costs remains, and exclusivity is of limited financial value without efficient distribution and use. This presents the question as to what structures may most efficiently intermediate between creators and their audiences, without diminishing rights (and with everyone being paid). This is the focus of the next section of this paper.

The Economics of Collective Rights Management

A recent lecture on copyright reform by the 12th and current US Register of Copyrights, Maria Pallante, noted in part:

> "Music reform is a particularly important licensing topic. The mechanical license for musical works – over a century old and currently embodied in section 115 of the Act – was established by Congress out of a concern that a single entity might monopolize the piano roll market by buying up exclusive rights".[27]

The idea of a compulsory licence for different applications of copyright is far from new. And it remains a powerful tool in ensuring creators are paid. Noting this, the US Digital Media Association, which is an advocate of more open access, has reaffirmed the principles of the s115 licence, but called for efficiencies to reduce the transaction costs:

> "The music marketplace would benefit greatly from replacing the current process of licensing music on a song-by-song basis with a blanket license system (without the

26 Dan L Burk, "Inventing Around Copyright", in *Northwestern University Law Review*, Vol. 109, 2014, p 69.
27 Maria A Pallante, "The Next Great Copyright Act", 26th Horace S Manges Lecture, Columbia University, March 4, 2013, p 20.

> ability of rights owners to "opt-out". Under this system, one license application would be served under a collective administration mechanism covering all musical works. For such a system to be effective, copyright users must nonetheless continue to have payment options designed to ensure that they only pay for the rights they need (and the actual level of use and consumption …".[28]

There is something of a Procrustean bed for music publishers here: publishers should not be able to charge per song, but consumers should be able to match their costs to their use.

This is an imbalanced approach to shared risk. It follows the belief that pricing should match consumer practice, rather than reflect costs of production, which is economically obtuse. As noted earlier, titles are not perfectly substitutable, and the cost of production includes misses as well as hits, so this proposal tilts us past the equilibrium point.

Licensing regulation is not simply a matter of cost minimisation, but also has competition goals. In the Australian context, Berger (Monash) notes:

> "In terms of competition, however, collecting societies represent parties who would otherwise normally compete with each other in the distribution of copyright material … There are, left unchecked, two unwanted consequences that may occur: first, collecting societies are able to extract higher licence fees than may otherwise be paid in a competitive market; and second, there may be 'less pressure on a monopoly supplier to operate efficiently and to offer the types of products and level of service that consumers want'".[29]

Similar concerns have been raised in other markets, where it has been argued that the measure of efficient distribution and remuneration is that the cost of individual sourcing (minus transaction costs) should be equal to a competing blanket licence fee.[30] This is an important argument for blanket licences and associated collecting societies, though it presumes a level of competition in order to realise the full theoretical benefits.

Such competition may be neither practical nor desirable, particularly in small markets such as Australia, where multiple collecting societies and competing licences are likely to magnify the role of transaction costs in the price of copyright materials: potentially pricing composers and authors out of the market.

Nor are collecting societies standalone bodies with a sole responsibility for competition or efficiency in the dissemination of texts and other titles. As Pallante notes:

> "All members of the online ecosystem should have a role, including payment processors, advertising networks, search engines, Internet service providers and copyright owners. These strategies can be a mix of legislative solutions and complementary voluntary initiatives, but where gaps in the law exist, Congress should not be absent".[31]

One of the risks stemming from current pushes for copyright reform is that they seek to invest all responsibility for a competitive market in the design, or operator of a licence. If the distribution of copyright materials is a cooperative task, then ensuring the compliance and quality are equally shared.

28 Digital Media Association, "Comments in Response to the Copyright Office's Notice of Inquiry on *'Music Licensing'*", May 2013, p 24.

29 Tyrone Berger, "Copyright, collecting societies and the ACCC: call for (new) guidelines", in *Australian Intellectual Property Law Bulletin*, April 2011, p 37 (embedded quote is from Alan Fels, 2002).

30 Michael A Einhorn, "Intellectual Property and Antitrust: Music Performance Rights in Broadcasting", in *Columbia Journal for Law and The Arts*, 2002, Author's copy, p 15.

31 Pallante, Above n 27, p 13.

However, for the remainder of this section, we will focus on the economics of collecting societies, as the historical and new intermediaries for creative income. This has four core elements:

1. the design of a licence, including:
   a. its content and scope;
   b. whether it is compulsory or voluntary (input);
   c. if the licence is exclusive or competitive (output);
2. the economic purpose of the intermediary: essentially whether or not it is interested in profit for itself, or purely for its clientele;
3. financial efficiency: success in reducing deadweight losses, certainty and transaction costs; and,
4. governance arrangements, to provide market confidence.

It is generally agreed that licensing and collective administration of rights are permitted in order to reduce the costs of trading copyrighted materials, and to simplify the process. A complementary characterisation is that collecting societies operate as a form of trade union for rights holders.[32]

Their role – other than providing the pathway for access and creative remuneration – is to:

> "… exploit economies of scale in administering and trading copyrights. This economic analysis helps to explain the scope of collective administration. Collectives offer efficiency gains where they help to reduce the number of transactions or the average costs of transactions compared to individual administration".[33]

In short, transaction costs in a high-technology environments are minimised within a monopoly (and monopsony) blanket licence model. This does still permit some price discrimination in the market, though predominantly related to volume of use: a variety of licences will be available distinguishing between frequent and sparse users, and large and small organisations.[34]

Statutory or compulsory licence versions of collecting societies have shown striking adaptability to a variety of issues associated with the migration of copyrights into new technology systems. For example, it was widely anticipated with the growth of online communication that the sheer number and distribution of users would make it nigh impossible for collecting societies to communicate with individual users, as opposed to ISPs and others.

One solution of "click-wrap" licensing has delivered a simple and brief pause point allowing for maximum collection of copyright revenues.[35] This is the installation of a gateway which triggers a licence payment requirement at a particular point in accessing a copyright-protected title. Examples of the pause point include: first access to the site; full text access; download; or printing.

This is a use-specific volumetric price options which stands in for blanket licences or subscriptions. All three options are available through sub-collecting society services such as JSTOR.

While this type of discrete licensing provides protection for individual uses of copyrights, true blanket licensing provides another low-cost user benefit: of certainty and legal protection. The importance of this is best observed in the contrary case.

In the United States, as a consequence of anti-trust settings, collecting societies can only operate non-exclusive licences, in order to ensure that there is adequate competition to limit the risk of

32 Christian Handke, "The Economics of Collective Copyright Management", in Richard Watt (Ed.), *Handbook of The Economics of Copyright*, Author's preliminary version, SSRN, April 24, 2013, p 2.
33 Above n.32, p 6.
34 Above n 32, p 8.
35 Gretchen McCord Hoffmann, "Arguments for the need for statutory solutions to the copyright problem presented by RAM copies made during web browsing", in *Texas Intellectual Property Law Journal*, Fall 2000, p 124.

excessive rents. Associated with this, and as an adjunct to competition, creator participation in one or more collecting societies is voluntary.

As a consequence of these arrangements, payers to a single society cannot be certain that their "blanket licence" covers the full range of copyrights they may need:

> "… due to the co-existence of similar CMOs [Collective Management Organisations] and the voluntary licensing basis, there is a possibility that no real blanket licences are available to users, making it difficult for users who use a mass of copyrighted materials to seek indemnity under the protection umbrella of a blanket licence".[36]

In contrast to the US, Canada offers a hybrid scheme of a single "CMO" with voluntary participation, which does little for competition, while retaining user liability.[37] The absence of indemnity undermines a key benefit of a single licence in removing transaction costs for users: the obviation of any further labour in searching and complying with copyrights. As the Chair of the US House Judiciary Committee Robert Goodlatte recently noted in hearings to review the Copyright Act 1976 (US):

> "While there is no doubt that flexibility in the copyright system is beneficial, certainty with regard to our legal provisions is just as beneficial, both for copyright owners and copyright users".[38]

The point about certainty is critical, and encapsulates the economic goal of removing transaction costs: both creators and users require a model which addresses all legal liabilities, while minimising pass-through costs. This is broader than copyright: given the number of businesses and institutions who rely on IP-protected materials, it is a pillar of market confidence.

Liu (Zhejiang Shuren University) offers a taxonomy of indemnity solutions by four licence models,[39] as follows:

1. implied licensing, where indemnity is provided by limiting the recourse of a rights holder who has not chosen to participate in the collective scheme;
2. the German model of "legal presumption", under which the collecting society is presumed to have rights, unless users can prove otherwise (presumably in order to avoid making a payment). Given the cost of litigation to avoid subscription to a licence, this is practically, if not formally, a compulsory licence;
3. mandatory licensing, where collective rights agencies base their business model on authorisation by rights holders; and,
4. extended collective licensing, where collecting societies negotiate licence fees on behalf of non-members as well as members.

Pioneered in the Nordic countries, the last of these is most apposite to the Australian market, as the benefits of an "all-inclusive" blanket licence naturally increase as scale diminishes. While the US market may have room to absorb the cost of multiple collecting societies, this would make little sense in Australia.

The model is endorsed by Pallante:

> "The United States has long had opt-in licensing schemes that permit authors to license their exclusive rights by voluntarily opting into a collective management

36 Wenqi Liu, "Models for Collective Management of Copyright from an International Perspective: Potential Changes for Enhancing Performance", in *Journal of Intellectual Property Rights*, Vol. 17, January 2012, p 47.
37 Above n 36, p 48.
38 Quoted on Bloomberg, www.bna.com, August 20, 2014.
39 Above n 38, pp 48-49.

> organisation … By contrast, opt-out systems reverse the general principle of copyright law that copyrighted works should be reproduced or disseminated only with the prior approval of the copyright owner … Extended collective licensing allows representatives of copyright owners and users to mutually agree to negotiate on a collective basis and then to negotiate terms that are binding on all members of the group … It has the potential to provide certainty to users and remuneration for copyright owners (for example in mass digitization activities) but would provide some control to copyright owners wanting to opt out of the arrangement".[40]

There is a shift here, both legally and economically, from a "property" model of exclusive dealing (including withholding access) to a "liability rules" arrangement, where access only requires compensation, not authorisation. This is a focus on the practical over the philosophical for certain types of use.

While this may be ideologically unpalatable to some defenders of copyright, in practice it is: "… an unavoidable consequence of copyright collectivisation".[41] The choice here is grounded in a judgement that costs are minimised if we focus on payment, rather than permission: favouring the collective, rather than the fragment. This is a sound economic, if questionable, jurisprudential assessment.

A distinction should be made here between an extended collective licence and a compulsory licence:

> "Compulsory licences are characterised by a limitation on the right holder's autonomy to enter into contracts. This limitation does not prevent the right holder from entering into voluntary licensing contracts, but the compulsory licensing scheme has a significant impact on the bargaining position of the right holder, because the right holder cannot prevent the protected work from being exploited and the expected fee under a compulsory licence imposes a ceiling on the royalties the right holder can demand in a bargaining situation … Unlike under compulsory licences, the price under an ECL-based regime thus depends on negotiations between users and the management organisation. The level of the price is thus not necessarily linked to (or limited by) the market price. The ECL model in this way allows for pricing up to the reservation price."[42]

The more we move towards a compulsory (or quasi-compulsory) licence rather than a voluntary arrangement, the more troubling this may become to some. However, the partial solution of voluntary licences v. comprehensive statutory licensing means some transaction costs are removed, but only a small fraction: any residual requirement to search and comply profoundly dilutes the benefits of a collective licence.[43]

This is emphasised in the case of "licence it or lose it" provisions, wherein works are made available for free reproduction unless there is an agreed price (essentially compulsory licensing requirements.)

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40 Pallante, above n 27, pp 23-24.

41 Ann-Catherine Lorrain, "Governing Collective Rights Management of Copyrighted Protected Resources, Or How Building Upon Copyright Collectivisation", paper to the *First Thematic Conference on the Knowledge Commons* of the IASC, University Catholique de Louvain, 12-14 September 2012, p 9.

42 Thomas Riis & Jens Schovsbo, "Extended collective licenses in action", in *International review of Intellectual Property and Competition Law*, 43(8), 2012, p 937.

43 For a complete breakdown of the elements of transaction costs in a voluntary regime, see Copyright Agency, "Response to Australian Law Reform Commission Discussion Paper: Copyright and the Digital Economy", July 2013, Appendix A, pp 42-3.

It is observed that a common agent reduces bargaining power disparity as well as transaction costs, which is exemplified in the case of Australian collecting societies and the Copyright Tribunal.[44]

There is a trade-off here: between vanilla compulsory licence fees providing market price caps and ECL models which may capture more accurately total market value but which require greater negotiation and therefore imply higher transaction costs.

It is typical that the "cartel" exemptions of collecting societies are governed by publicly approved rates and conditions. These can be highly contested. A recent example is the application in 2012 by Access Copyright to the Copyright Board of Canada to move from a series of periodic licences to a general tariff per Full-Time-Enrolment (FTE) of $45 for universities and $35 for other institutions, with an audit process for compliance and extensive reporting requirements.

This was contested on the basis (amongst others) that the royalty rate was fixed, to be varied only at the discretion of Access Copyright, compared to a previous licence regime where audits had delivered a level of use as a basis for payment:

> "… under the previous licence some portion of the amount due was based on the copying of ascertainable works at a per page price. In that situation, some level of reporting *was* directly tied to the amount of the royalty due. But in the new Proposed Tariff, it was the decision of Access Copyright and Access Copyright alone to forego royalties based on ascertainable copies of particular works".[45]

The tension here is between the acknowledged role of the collecting society in providing indemnified access at a reasonable cost, and the distaste of users for even centralised compliance reporting. The implied trade-off is that as we move to a fixed tariff, the argument for usage information is eroded.

There is a problem with this claim, insofar as the value of the tariff for both creators and users will be difficult to measure *post hoc*, and therefore both Access Copyright and Canadian universities will be data-poor when it comes to a future round of negotiation with the Copyright Board.

However, collective rights management arrangements also provide forms of competition which an open market might not foster, by providing a single portal for participants with unequal market power:

> "… it is important to note that one of the traditional functions of collecting societies lies in the defence of the weaker bargaining party, the author or the performer, against commercial users … This is also the purpose of rules that make collective management mandatory for certain rights".[46]

This is something of a turnaround, given the popular narrative that new technology is hampered by the market power copyright producers wield over users. Low barriers to market entry for small suppliers is a crucial feature of full competition. The alternative is for a handful of large publishers to control the market.

44 See Jane C. Ginsburg, above n 7, pp 59-60, 36.

45 Samuel Troscow et al, "Objections to the Proposed Access Copyright Post-Secondary Tariff and its Progeny Licenses: A Working Paper", University of Western Ontario, August 14, 2012.

46 Josef Drexl et al, "Comments of the Max Planck Institute for Intellectual Property and Competition Law on the Proposal for a Directive of the European Parliament and of the Council on Collective Management of Copyright and Related Rights and Multi-Territorial Licensing of Rights in Musical Works for Online Uses in the Internal Market (2012)372", Max Planck Institute Research Paper No.13-04, 2013, p 14.

Allowing parallel and equivalent rights for small members of collecting societies compared to large publishers is an equally important balance provided by collective rights management. Without this, collecting societies will only be agents of larger groups, which will lead to vertical inefficiencies and restrict social welfare.

A prominent Australian example of a small publisher utilising a collecting society revenue stream to innovate and grow is Pascal Press, developer of the internationally renowned learning game, *Mathletics*. Launched in 2005 through 3P Learning, today *Matheletics* reaches 10000 schools (5500 in Australia) and three million students in over 130 countries.

Group General Manager of Pascal Press, Jose Palmero advises:

> "*Mathletics* was one of the first products in the world to effectively demonstrate the concept of 'gamification': that is, producing high education outcomes through the use of an environment that incorporates game dynamics. As an independent publisher, without revenue via the statutory licence, it would have been impossible to develop *Mathletics*, or *Reading Eggs*, which required substantial investment and which employ a large number of authors, developers and designers."[47]

The alternative case is commonly offered, that such products can be developed through paygates, but this is more practical for large, established companies, and often more of a barrier to SMEs. Much of current commentary around "alternatives" for new product development is geared to multinationals.

The market power of global new technology companies is often underestimated, as their "communities" are used as ciphers for corporate interests. A subtle example here is the behaviour of Google's YouTube, in its negotiations with the German collecting society for musical works (GEMA):

> "Currently, without an agreement on the amount of royalties, Google uses its high visibility of YouTube to build pressure on GEMA towards an agreement by blocking potentially infringing videos in German and instead displaying a message stating 'this video is not available in Germany, because it possibly contains music for which the necessary rights have not been granted by GEMA'".[48]

This is at best disingenuous. YouTube has a vast market share, with almost a quarter of all social media visits, second only to FaceBook.[49] To claim a collecting society is refusing to "grant" rights implies an ulterior motive, rather the more likely case of a disputed and stalled price negotiation.

That collecting societies may withhold rights (subject to arbitration) rather than become price-takers in the face of such media power should be viewed as a positive assertion of rights-holders' interests.

This is not simply a phenomenon of the internet. Concerns that blanket licence providers may have excessive pricing power is also met by arguments of countervailing market power by large broadcasters, with evidence of price discrimination in licence fees.[50]

It has been also argued from time to time that collecting societies have passed their use-by date, to be replaced by technological solutions for payment.

47 In interview.

48 Sebastian Haunss, "The changing role of collecting societies in the internet", in *Internet Policy Review*, 30 September 2013, p 3.

49 Priit Kallas, "Top 10 Social Networking Site by Number of Visits (June 2013), www.dreamgrow.com, shares are 24.8% and 57.1% respectively, with all others under 2% (1% is approximately 35.1 million visits).

50 Ruth Towse, "Economics of Copyright Collecting Societies and Digital Rights: Is There a Case for a Centralised Digital Copyright Exchange?", in *Review of Economic Research on Copyright Issues*, 9(2), 2012, p 15.

Towse considers the alternative proposal for a simple one-to-many *Digital Copyright Exchange* (DCE): an online register which would directly link rights-holders and users, and remove the need for the administrative paraphernalia and costs of a traditional collecting society. She notes that such a service would presume perfect and costless data, and would need to resolve technology platform differences and provide revenue transfers that embedded digital rights management (DRM) have so far failed to deliver:

> "For that the databases of the collecting societies are needed … duplication of these would be inefficient. It is not clear how the DCE could assist with these matters without becoming a full scale collecting society".[51]

It is equally unclear how this would be a significant complementary contribution to the collecting society model, particularly for smaller participants. Studies of DRM, including those which identify some benefits in alleviating transaction costs, continue to conclude that direct solutions still require collective rights management for the foreseeable future:

> "When discussing the consequences of DRM-systems for the practice of collective rights management by collecting societies, the insight was gained that in the case of the individual exploitation of contents, transaction costs would rather be reduced in favour of authors and right-holders respectively than in favour of users. Users are stuck in part with prohibitively high search and information costs …
>
> In order to facilitate access to licenses and contents (i.e. for the reduction of information- and search costs), collective management seems to be equally necessary from an economic point of view for the time being."[52]

As with the example given earlier around cloud computing, the weight of evidence is that copyright regulatory solutions are best when they respect, but are otherwise indifferent to, current technology: focusing on minimal transaction costs, rather than maximum speed.

The other popular contender against collective rights management is the Creative Commons movement,[53] which follows the ethos of open source computing: to provide a series of *pro forma* licences via which creators can "share" their work with some users; rather than following the traditional path of reserving all rights. This is sometimes referred to as "copyleft".

The purpose of Creative Commons licensing is broadly to permit educational use, while restricting for-profit exploitation of materials. However, the difficulty here is that these licences are founded on only the access goal of copyright, rather than access plus remuneration.

They may in some cases be effective licences for an author to release works while segmenting the market according to her preferences. However, they only remove transaction costs where the work is free, requiring individual compliance where it is not:

> "Although there are positive features of the Creative Commons licensing system, including ease of access and the ability to facilitate the educational use of creative works, there are also, unfortunately, several flaws. These include, mainly, an over-simplification of copyright concepts such as the public domain, moral rights, fair use and fair dealing, and the lack of precision in definitions of terms such as 'commercial' and 'non-commercial'".[54]

51 Above n 50, p 23.

52 Gerd Hansen & Albrecht Schmidt-Bischoffshausen, "Economic functions of collecting societies – Collective rights management in the light of transaction cost- and information economics", SSRN, 18 October 2013, p 13.

53 See www.creativecommons.org.

54 Susan Corbett, "Creative Commons Licences, the Copyright Regime and the Online Community: Is there a Fatal Disconnect?", in The Modern Law Review, 74(4), July 2011, pp 530-1.

Failure to achieve precision in the definition and application of critical terms is only compounded when US-originated licences are translated into the international digital world. This is a case where a well-intentioned attempt to increase access has the potential to substantially increase costs of access, rather than remove them.

Another form of copyright revenue generation is via technology levies: these are statutory indirect taxes, based on sales of devices and/or blank media, including digital music players, tablets and printers. The intention is to provide a nominal revenue stream based on private copying (e.g. copying of a CD to one's own MP3 player).

This is something of a blunt instrument, though evidence of pass-through to consumers as an adjunct to the price of new technology is strong.[55] This is a measure of the efficiency of the mechanism, as it is the consumer's role as a private copier which is compensated through the levy. That said, levy income as a component of overall earnings for copyright authors is relatively trivial, typically under 0.5% of total composers' rights revenue.[56]

Small revenue contributors such as these are arguments for collective distribution of copyright income: without a statutory or other collecting society, these levies would require a separate bureaucracy, which would likely nullify their benefit.

Criticism is sometimes aimed at taxes such as copyright levies that they create markets which would not otherwise exist. This is true to the extent that an efficient collecting society permits greater average revenue capture than does an unregulated market. However, the reverse criticism is available that these are valid revenues, which would not be required but for new reproductive technologies.

There remains the inescapable conclusion that collective rights management is the most effective in addressing the modern view of copyright covered in the introduction to this paper: that it is about remuneration, not exclusivity for the majority of uses and users:

> "In a nutshell, collective management of copyright facilitates the fundamental shift in copyright from a half-functioning system based on proprietary rules to an efficient system based on liability rules, or in other words from an excluding system to a "business of yes".[57]

While the business rules for this system may benefit from occasional fine-tuning, the collective model is the only efficient choice for mass copyright management to date. From a pure economic perspective, the dilution of individual property rights may be a "second-best" solution,[58] but the "first- best" option only exists in the academy.

We note that there are exceptions to the primacy of collective licensing, typically where large organisations and governments directly license intellectual property. Equally, sub-licensing arrangements between broadcasters where a package of programming is carried by a regional station may be more efficient than universal adherence to statutory licences.[59]

However, in these cases, it may be argued that by building the rights for sub-licensing into the initial negotiation, the primary broadcasters are acting in the role of collecting societies by

55 Martin Kretschmer, "Private Copying and Fair Compensation: An empirical study of copyright levies in Europe", report to The Intellectual Property Office (UK), 2011, p 57.

56 Above n 55, p 33.

57 Reto M Hilty & Sylvie Nérisson, "Collective Copyright Management and Digitization: The European Experience", Max Planck Institute for Intellectual Property and Competition Law Research Paper No.13-09, 2013, p 7.

58 See Lorrain, above n 41, pp 6-7, 23.

59 US Copyright Office, "Copyright Office Satellite Television Extension and Localism Act Section 302 Report: a report of the Register of Copyrights", August 2011, p 69.

proxy: the capital fees for programmatic content reflect sub-licensing revenues. By removing the duplicate negotiation with primary rights-holders, they are reducing the transaction costs of secondary market players.

Give the "imperfect" nature of copyright collectivisation, there has recently been a great deal of focus on governance and pricing, to ensure minimum externalities and deadweight losses (administrative costs).

One of the challenges of this is that there is no real economic consensus on the overall value of copyright: because the very existence of IP law makes it impossible to compare earnings in the current regime to those foregone in its absence; and not all earnings from creation are strictly attributable to copyright (performance is an example where there is a direct ticket market, but this may depend indirectly on copyright industries for promotion).

Some attempts have been made, particularly in the context of digital piracy:

> "It has been argued that the advent of digitization provides a natural experiment for researching the economic importance of copyright and that measuring the value of lost sales and other revenues due to unauthorized use of copyright works is evidence of the value of copyright. Experience with empirical testing of 'piracy' has shown difficulties of this research, and although there is a consensus now that it has had a significant impact, particularly on sound recording ... it has taken almost a decade for that consensus to emerge, and during this time, not only has the technology changed, especially of distribution, but the players in the industry have too. This suggests how much more difficult it would be to measure a value for copyright in the whole economy."[60]

In the absence of an agreed value of copyright itself, valuing the contribution of collecting societies is challenging. However, the standard approach is to consider their role in minimising transaction costs, in line with the analysis above.

Much of the solution to this lies with transparency and reporting, an area in which Australia is a standards leader. The recent EU proposal for a directive on collective rights management imagines reporting of revenues and costs not only to rights-holders (members), but also to users and other collecting societies.[61]

These are described as horizontal obligations,[62] which not only permit transparency, but have a role in developing competition within single markets served by competing collecting societies. The presumption is that market competition here should provide downward pressure on prices and costs.

Competing evidence argues that multi-territorial competition can actually drive up transaction costs. From a music example:

> "TC are higher for services available in several countries than for those available in only one country ... Services in the sample which were available in several countries use twice the manpower for licensing rights than services available in only one country (3.1 and 1.7 FTE respectively). Expressed in financial terms, total costs are

60 Ruth Towse, "What we know, what we don't know and what policy-makers would like us to know about the economics of copyright", in Review of Economic Research on Copyright Issues, 8(2), 2011, pp 112-3.

61 European Commission, "Proposal for a Directive of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licenses of rights in musical works for online uses in the internal market", 2012, pp 9-10.

62 Jo o Pedro Quintais, "Proposal for a Directive on Collective Rights Management and (some) Multi-territorial Licensing", in *European Intellectual Property Review*, 2013-2, p 70.

> four times higher for services available in several countries (€118,000) than in one country (€29,000) ...
>
> In particular, negotiations are more costly for services available in several countries."[63]

This may initially appear counter-intuitive, going against expectations of returns to scale. However, it is consistent with economic theory: operation in multiple markets is not the same as growth of share in a single market. Multi-territorial licensing requires compliance with multiple subsidiary and sub-regional legal regimes. Moreover, it is a more complex negotiation, given the interests creators have in regional market segmentation, which they must concede in a multi-territory model.

Multi-territorial licensing also risks larger grey markets, given the substantial variation in statutory licence fees between adjacent jurisdictions.[64]

Structural criticisms are also levied:

> "If copyright owners are indeed numerous and dispersed, then we may assume that Canadian collectives will exhibit the classic problems associated with the separation of ownership and control ... while such problems associated with dispersed ownership are pervasive in the corporate world ... (the) collectives situation is quite unique ... because not only do they not face market discipline, they also do not have to respond to other disciplinary threats: the threat of exit by their members, or the threat of takeovers".[65]

While this is intended as a criticism of collective licence administration, it is more properly a criticism of incentives. Some of these are solved by proposals for greater transparency and accountability, and some by negotiation.

However, the genesis of collective administration remains the series of licences and exemptions which permit the operation of exclusive collecting societies. These are typically accompanied by governance and pricing oversight, which limit exploitation. As noted earlier in a Canadian example, it is likely that the user-group rent-seekers who call on governments to reduce prices and limit the application of copyright influence these limits.

As a final response to the suggestion of multiple collecting societies, we look to the views of the European Parliament:

> "The European Parliament emphasised in its seminal Echerer Report that 'it is precisely because of their exclusive position that [CMOs] provide a safeguard to prevent any further concentration of intellectual property'. The Parliament warned that a "misguided insistence on competition would also lead to further fragmentation of the markets, chaos in the clarification of rights and dumping tariffs".[66]

Collecting societies are an economically sensible choice. They deliver the primary benefits of copyright which are mass access and author reward, while minimising transaction costs. As discussed above, they will never be a perfect model, but they are the best practical solution we have yet imagined.

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63 Heritiana Ranaivoson et al, "The costs of licensing for online music services: an exploratory analysis for European services", in *Michigan State International Law Review*, 21(3), 2013, p 683.

64 See for discussion Severine Dusollier in "Symposium: Collective Management of Copyright: Solution or Sacrifice – Panel: Blanket Licensing and Beyond", in *Columbia Journal of Law & The Arts*, 34(4), 2011, p 854.

65 Ariel Katz, "Commentary: Is Collective Administration of Copyrights Justified by the Economic Literature?", in Boyer et al (Eds), Competition Policy and Intellectual Property, Federation Press, 2009, pp 463-4.

66 Christoph B. Graber, "Collective Rights Management, Competition Policy and Cultural Diversity: EU Lawmaking at a Crossroads", Inernational Communications & Art Law Lucerne research centre, University of Lucerne, Working Paper, 2012, p 13.