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THE IPOD TAX: WHY THE DIGITAL COPYRIGHT SYSTEM OF AMERICAN LAW PROFESSORS' DREAMS FAILED IN JAPAN

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A number of prominent American law professors have endorsed the notion of a tax on digital recording and music file-sharing—call it an "iPod tax"—with the proceeds to be paid into a general fund. A clearinghouse representing rights-holders would monitor which works were downloaded and how often and then divvy up the iPod tax revenues to the individual rights-holders. Japan has run a very similar system since the early days of digital recording in 1993. This Article focuses on how Japanese experts decided that regulatory failures merited killing an extension of their existing system, including a proposed iPod tax. In particular, the Article draws on the Japanese debate to propose a "friendly amendment" that would structure an American clearinghouse as a user-owned cooperative and thus reduce the chances of repeating Japan's mistakes.

INTRODUCTION

It's an iPod world, and we just live in it.[1] Or so goes the hype. But we should not let the "iPod" obscure the fact that

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1. *See* Alex Beam, *Wherever iTurn, It's an iPod World*, BOSTON GLOBE, Nov. 22, 2006, *available at* http://www.boston.com/news/globe/living/articles/2006/11/22/wherever_iturn_its_an_ipod_world/; *see generally* Posting of Mark Liberman & Benjamin Zimmer to Language Log, http://itre.cis.upenn.edu/~myl/languagelog/archives/002947.html (Mar. 21, 2006, 20:07 EST) (tracing the origins of the "snowclone" formula-based cliché "It's X's World, We Just Live In It," with specific references to the proliferation of iPod-related and Steven Jobs-related examples of the cliché).

there is a "world" out there. Like the United States, the rest of the world must confront how copyright law can make peace with digital copying and file-sharing technology. Other nations' experiences can shed light on our own untested policy proposals.

In particular, policymakers, judges, and professors in the United States and elsewhere all face the conflict between copyright industries and copyright users. The fight continues as the battleground shifts from Napster[2] to Grokster[3] or to YouTube.[4] Observers deem the problem to be one of piracy or free expression, depending on their viewpoint.[5] In addressing the conflict, a number of prominent American law professors have endorsed the notion of a tax on digital copying and transmission, with the proceeds to be paid into a general fund.[6] Some

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2. *See* A&M Records, Inc. v. Napster, 239 F.3d 1004, 1020–22 (9th Cir. 2001) (holding Napster contributorily liable to copyright holders for its users' infringement based on Napster's actual knowledge that specific infringing material was available on its system).

3. *See* Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 936–41 (2005) (reversing the Ninth Circuit to find that Grokster and several other defendants who distributed file-sharing software could be liable to copyright holders for their users' infringement, even though software and services provided were capable of legitimate uses).

4. The Viacom suit versus YouTube for copyright infringement appears to be the latest chapter in what is becoming an ongoing saga of rights-holders versus services employed by allegedly infringing users. *See* Miguel Helft, *Google Calls Viacom Suit on YouTube Unfounded,* N.Y. TIMES, May 1, 2007, *available at* http://www.nytimes.com/2007/05/01/technology/01google.html?ex=1188014400&en=fc9c06a89566ce0f&ei=5070 (describing content-owner Viacom's $1 billion infringement suit against YouTube, owned by Google); *see also* Posting of Farhad Manjoo to Machinist Tech Blog, http://machinist.salon.com/blog/2007/08/14/colbert_youtube/index.html (Aug. 14, 2007, 13:06 EST) (describing the case as a "fight between corporate giants over provisions of copyright law").

5. *See, e.g.*, Sonia Katyal, *Privacy vs. Piracy,* 7 YALE J. L. & TECH. 222, 225–26 (2004–05) (noting tension between Recording Industry Association of America's view of privacy and "civil liberties in cyberspace"); Peter K. Yu, *The Copyright Divide,* 25 CARDOZO L. REV. 331, 444 (2003) (noting divide between rights-holders and users in the copyright system, with contrasting viewpoints regarding piracy versus rights of expression).

6. *See* WILLIAM W. FISHER III, PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT 199–258 (2004) (recommending that the government administer a reward system using tax revenues collected from consumers to pay creators of works registered with the Copyright Office); LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY 296–306 (2004) (advocating free access to music that is not copyrighted or is used only in a noncommercial context, and proposing a charge or tax on other peer-to-peer file-sharing activities, such as copying to avoid the purchase of CDs and accessing copyrighted music that is either no longer sold or not easily accessible outside of the internet); Raymond Shih

call it an "iPod tax."[7] The term is not 100% accurate, since these proposals envision revenue from a broader range of sources than iPods, including peer-to-peer file-sharing and internet service providers. The common feature of these proposals is the creation of a clearinghouse[8] to serve as an intermediary between consumers and copyright holders, collecting the tax revenue from users in exchange for a "blanket license."[9] Consequently, it may be more accurate to describe these as

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Ray Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 U. CHI. L. REV. 263, 312–15 (2002) (calling for Congress to enact a Digital Recording Act that would provide musicians, songwriters and publishers with a source of revenue based on the popularity of their work and derived from statutory levies on subscriptions to internet services and the sales of computer, audio, and video equipment); Jessica Litman, *Sharing and Stealing*, 27 HASTINGS COMM. & ENT. L.J. 1, 41–49 (2004); Neil Weinstock Netanel, *Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing*, 17 HARV. J.L. & TECH. 1, 35–60 (2003) (delineating a noncommercial use levy for peer-to-peer file-sharing and streaming of copyright-protected material); *see also* Tom W. Bell, *Fair Use vs. Fared Use: The Impact of Automated Rights Management on Copyright's Fair Use Doctrine*, 76 N.C. L. REV. 557, 618–19 (1998) (positing that greater access to copyright-protected materials will result if copyright owners and consumers use automated rights-management technologies to create an efficient fared-use system).

7. *See generally* Sean Patrick Sullivan, *Music Industry Fee Could Pump Up Price of iPods*, CANADIAN PRESS, Aug. 1, 2007 (on file with author) (quoting Professor Michael Geist as describing the "so-called 'iPod Tax'" as "unfair"); John Borland, *No iPod Tax for Canada*, CNET NEWS.COM, July 28, 2005, http://news.com.com/No+iPod+tax+for+Canada/2100-1041_3-5809117.html (discussing the decision by Canada's Supreme Court not to hear a case about imposing a fee on iPods and other hard-drive players that are capable of copying files). German courts have ruled that the country's existing copyright levy, which resembles Japan's, should be extended to computers. *See German Court Sets Copyright Levy on New PCs*, ITWORLD.COM, Dec. 24, 2004, http://www.itworld.com/Man/2681/041224germanlevy/ (last visited July 12, 2007).

8. *See* Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 5 (1979) (describing the function of the American Society of Composers, Authors and Publishers (ASCAP) as a "clearing-house" for the negotiation and licensing of music performance); *see generally* MERRIAM-WEBSTER'S DICTIONARY, http://www.m-w.com/dictionary/clearinghouse (last visited July 2, 2007) (defining a clearinghouse broadly as an informal channel for collecting, classifying, and distributing materials, especially information).

9. See Section 115 Reform Act (SIRA) of 2006: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary, 109th Cong. (2006) (statement of the U.S. Copyright Office), *available at* http://www.copyright.gov/docs/regstat051606.html (describing the proposed blanket license as a statutory and compulsory license to be used by all music creators, distributors and users); *cf.* ASCAP Common Music Licensing Terms, http://www.ascap.com/licensing/termsdefined.html (last visited June 28, 2007) (defining a "blanket license" as a license that allows music users to perform any or all copyright protected music in ASCAP's repertory).

proposals for a "digital clearinghouse" system.[10] The digital clearinghouse proposals would apply collective licensing to the copying and file-sharing of digital content. Then, the digital clearinghouse would divvy up the revenues to the individual rights-holders.

The digital clearinghouse proposals are, paradoxically, both familiar and revolutionary. They are familiar in that proposed clearinghouses resemble clearinghouses such as ASCAP and BMI, which are already well known in the field of copyright.[11] But the proposals also represent a stark departure from the property rule remedies such as injunctions that typify intellectual property law,[12] in favor of liability rules that more closely resemble tort law.[13]

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10. The term "clearinghouse" denotes an organization that administers creators' rights collectively, as organizations such as ASCAP have done in the U.S. for nearly a century. *See infra* Part I.C.2 (explaining the role of the clearinghouses in these proposals). These organizations are often referred to as "collective rights organizations." *See* Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 CAL. L. REV. 1293, 1295, 1329 (1996) [hereinafter Merges, *Contracting into Liability Rules*] (referring to collective copyright licensing organizations such as ASCAP, formed in 1914, and Broadcast Music, Inc. (BMI) as collective rights organizations); *see also* About ASCAP, http://www.ascap.com/about/ (last visited July 2, 2007) (describing ASCAP as a performing rights organization, composed of U.S. composers, songwriters, lyricists, and music publishers, that licenses and distributes royalties for non-dramatic public performances of its members' copyrighted works); BMI.com, About, http://www.bmi.com/about/?link=navbar (last visited July 2, 2007) (explaining that BMI is a performing rights organization that issues licenses to various users of music, and collects and distributes licensing revenues to the songwriters, composers and music publishers it represents); Copyright Management Center, http://www.copyright.iupui.edu/permorg.htm (last visited July 2, 2007) (providing a list of collective rights organizations that either put users in contact with copyright owners or grant permission on behalf of copyright owners). However, the term "collective rights organization" suggests a union of private rights-holders—as opposed to a possible public or quasi-public body, such as the proposed digital clearinghouse.

11. BMI and ASCAP aggregate the composers' rights into a blanket license that they then sell on to broadcasters, who thereby acquire the ability to publicly disseminate any work within BMI's and ASCAP's repertoire of rights. *See infra* Part I.C.2 and accompanying text.

12. For instance, "I can stop you from using my stuff unless you pay me." *See* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092 (1972) (discussing the difference between protection under a property rule versus a liability rule); *see also infra* Part I.C.1 and accompanying text.

13. For instance, "Using my stuff means you must pay me a governmentally set payment." *See* Calabresi & Melamed, *supra* note 12, at 1092; *see also infra* Part I.C.1 and accompanying text.

The vehicle of a digital clearinghouse is not just a concept car. The United States would not be the first nation to implement such a system; Japan actually has run a very similar system since the early days of digital recording in 1993.[14] Like the United States, Japan is a large, highly developed nation with important copyright holders, major electronics and computer manufacturers, and a thriving consumer culture. In 2005, the question that confronted Japanese policymakers was whether to expand their existing system into the kind of broad iPod, MP3,[15] and P2P[16] levy proposed by American scholars.

This Article collects and presents industry data and reviews publicly available Japanese government reports and transcripts to understand why Japanese experts (mainly law professors) deputized by their government rejected a proposal to turn their existing system into an iPod tax system like the one proposed in America. In particular, this Article explains how regulatory failures led to disenchantment with the Japanese system, and accordingly proposes a "friendly amendment" to the American proposal. Specifically, the digital clearinghouse at the heart of these proposals should be structured as a user-owned cooperative, helping the United States to avoid repeating Japan's mistakes.

Section I explains the American proposals and categorizes their similarities and differences; it also examines the merits of adopting such liability rules rather than property rules in the digital copyright context. Section II describes the Japanese system of compensation to rights-holders for digital audio home recording by users, and Section III explains Japan's decision

14. Other nations, such as Germany and Canada, also run copyright levy systems. *See supra* note 7. Japan appears to be unique in having delegated the examination whether to extend the system to iPods and other hard-disk based players to a committee stacked with professors.

15. MP3 Motion Picture Experts Group Audio Layer 3, also known as MPEG-1 Audio Layer-3, or popularly as "MP3," is a standard for compressing digital music data so that it requires less memory while retaining high sound quality during playback. *See* Frequently Asked Questions about MPEG Audio Layer-3, http://www.iis.fraunhofer.de/EN/bf/amm/projects/mp3/index.jsp (last visited Nov. 2, 2007).

16. P2P refers in this context to "peer-to-peer file-sharing." More broadly, P2P refers to systems designed to allow multiple points on a network to communicate with each other, such as computers linked by the internet—this communication can occur through a centralized, client-server model, or a more diffuse model not based on a central server. *See* Understanding Peer-to-Peer Networking and File-Sharing, http://www.limewire.com/about/p2p.php (last visited Nov. 2, 2007).

not to extend this system to the iPod and like devices. Section IV sets forth this Article's own proposal—aimed chiefly at avoiding the regulatory capture that spoiled Japan's system.

I. THE DIGITAL CLEARINGHOUSE MODEL

A. The American Proposals

In recent years, several American law professors nearly simultaneously came to similar conclusions about how to solve the challenge to the rights of copyright holders posed by file-sharing and digital copying over the internet. Professor William Fisher of Harvard has proposed an "Alternative Compensation System" for copyright to deal with file-sharing,[17] Professor Neil Netanel of UCLA has put forth his "Noncommercial Use Levy" to achieve similar goals,[18] and Professor Jessica Litman of Michigan has advocated a "voluntary blanket license" to do the same.[19] Others have endorsed similar systems in other contexts.[20]

These American proposals share several features. First, they create defined rights on each side. On the copyright holder's side, the proposals recognize that private home recording of audio, video, and perhaps other material should yield compensation to the copyright holder.[21] On the con-

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17. *See* FISHER, *supra* note 6.

18. *See* Netanel, *supra* note 6.

19. *See* Litman, *supra* note 6.

20. *See* Glynn S. Lunney, Jr., *The Death of Copyright: Digital Technology, Private Copying, and the Digital Millenium Copyright Act*, 87 VA. L. REV. 813, 852–54 (2001) (discussing the European Union's authorization of levies imposed by its member states on equipment used for private copying); Randal C. Picker, *From Edison to the Broadcast Flag: Mechanisms of Consent and Refusal and the Propertization of Copyright*, 70 U. CHI. L. REV. 281, 290 (2003) (discussing the Audio Home Recording Act of 1992's copyright tax on digital recording devices).

21. *See* FISHER, *supra* note 6, at 199–258; LESSIG, *supra* note 6, at 296–306; Daniel J. Gervais, *The Price of Social Norms: Towards a Liability Regime for File-Sharing*, 12 J. INTELL. PROP. L. 39, 55–70 (2004) (suggesting that the proper response to peer-to-peer file-sharing may include licensing through internet service providers, copyright collectives, or technology companies); Ku, *supra* note 6, at 312–15; Litman, *supra* note 6, at 41–49 (proposing a blanket license that features terms and conditions prescribed by copyright law, and allows for voluntary participation by individual copyright owners); Lunney, *supra* note 20, at 844–68; Richard M. Stallman, *Copywrong*, WIRED, July/Aug. 1993, *available at* http://www.wired.com/wired/archive/1.03/1.3_stallman.copyright_pr.html (stating proposal for alternative compensation system for music copyright holders); *see*

sumer's side, users would have a clearly defined right to make private copies of copyrighted work. Second, a tax and a digital clearinghouse would try to track the bargains that individual rights-holders and consumers might make absent the daunting transaction costs. Specifically, consumers who made private copies would pay an appropriate tax to the digital clearinghouse. Third, the digital clearinghouse would then divvy up this levy to individual rights-holders, based on the frequency with which each rights-holder's works were copied.

Despite their overall similarities, the American proposals should be examined for their specifics in order to understand the activities to which the proposals apply and how the proposals relate to existing copyright law. Although the proposals resemble each other more than they differ, they vary based on whether they would supplement or replace existing copyright law. Additionally, they differ on whether they would cover only noncommercial activity or broader use. While there are numerous similar proposals,[22] this Article sets forth three that demonstrate differing degrees of ambition and scope.

1. Broader Ambition and Scope: William Fisher's "Alternative Compensation System"

In his book, *Promises to Keep: Technology, Law, and the Future of Entertainment,* Professor William Fisher presents perhaps the most detailed proposal (see Figure 1). He casts his proposal as an "alternative" to two existing models of encouraging creativity: traditional copyright and "private access control systems." [23] The first, traditional copyright law, is perhaps the most familiar. Under this paradigm, the government grants a

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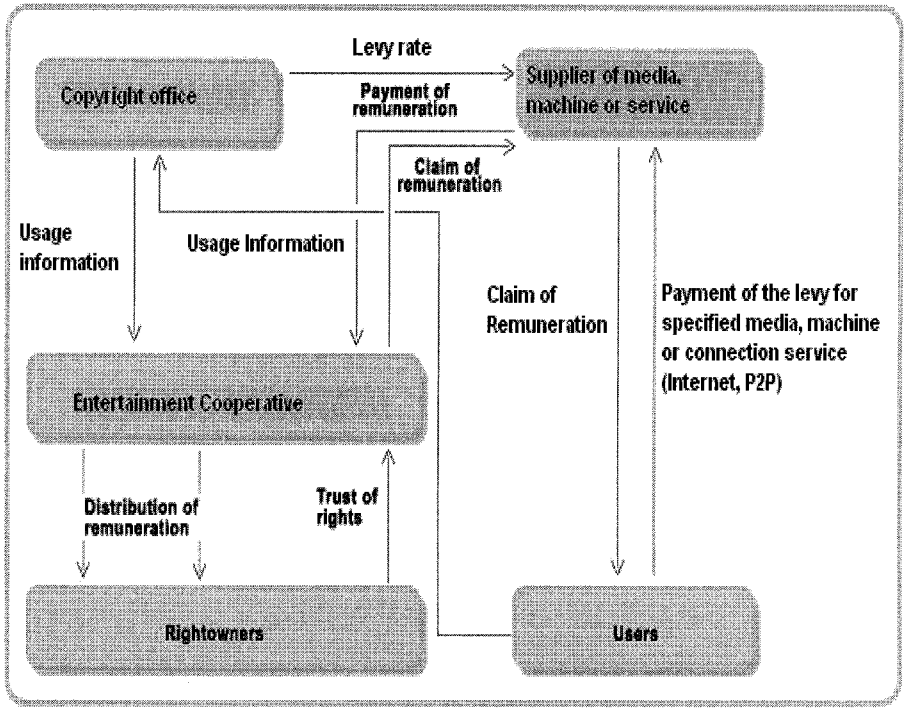
generally Electronic Frontier Foundation, A Better Way Forward: Voluntary Collective Licensing of Music File Sharing (Feb. 2004), http://www.eff.org/share/collective_lic_wp.pdf (last visited Aug. 20, 2007) (urging the music industry to offer the right to share files in exchange for a small monthly fee).

22. *See* FISHER, *supra* note 6, at 199–258; LESSIG, *supra* note 6, at 296–306; Gervais, *supra* note 21; Ku, *supra* note 6, at 312–15; Litman, *supra* note 6, at 41–49; Lunney, *supra* note 20, at 844–68; Stallman, *supra* note 21.

23. *See* FISHER, *supra* note 6, at 199–203 (citing U.S. state governments' common nineteenth-century practice of (1) authorizing the building of roads, bridges, and canals by private companies; (2) allowing these companies to charge tolls; and (3) guaranteeing that no competitive transportation system(s) would be built for a certain period of time).

creator protection against competition—typically by giving the creator exclusive rights to sell its product to the public.[24]

Figure 1: ***The Digital Clearinghouse Model—William Fisher's Alternative Compensation System***[25]



However, Fisher argues that technological innovation has "destabilized" traditional copyright law.[26] Digital recording technology coupled with internet communication greatly amplified the possibility of unauthorized copying, undercutting copyright holders' ability to receive compensation for their efforts. Further technological innovation then made possible advanced systems of "private access-control systems"—that is, digital rights management (DRM) techniques—that try to thwart unauthorized copying, with varying degrees of success.[27] To

24. *Id.*
25. Figure created by the author as an interpretation of FISHER, *supra* note 6, at 203–16.
26. *Id.*
27. *Id.*

augment the power of such DRM technology, copyright holders have obtained legal protection against its circumvention.

Fisher points out that this situation may impose significant costs for the legal system and also chill important rights to free expression and "fair use."[28] As a result, he proposes an "Alternative Compensation System" under which the government would tax both copying devices and recording media.[29] Copying devices would include such items as CD burners and digital video recorders ("DVRs," such as TiVos). Recording media would include blank CDs and DVDs and hard disk–based copying devices such as MP3 players and iPods.[30] Under Fisher's proposal internet access would also be taxed.[31]

Under the Alternative Compensation System, the Copyright Office would engage in methods such as surveys, statistical sampling, and analysis of consumption data to discern which works are more likely to have been copied by users. In particular, Fisher envisions a system of consumer household data collection akin to the Nielsen TV rating system—only with a much larger base of consumers and administered by the Copyright Office.[32] Those works copied more frequently would earn their creators a larger slice of the collected tax revenue. That data would be used by an "Entertainment Cooperative" to distribute the tax revenue to copyright holders in an equitable manner.

A key feature of Fisher's proposal is that once the system were in place, copyright law would be modified "to eliminate most of the current prohibitions on unauthorized reproduction, distribution, adaptation, and performance of audio and video recordings," so that "[m]usic and films would thus be readily available, legally, for free."[33] Thus, Fisher's proposal, while perhaps envisioned as a response to uncontrollable private, un-

28. *Id.*
29. *Id.*
30. *Id.* at 218 (treating iPods as MP3 players, despite the fact that iPods play a different, proprietary Apple format that limits the portability of the encoded sound or music, although this is perhaps not an important distinction for Fisher's taxation purposes).
31. *Id.* at 219–23 (suggesting that the taxation of internet access services is appropriate because American consumers will not be able to avoid such a tax, and it will capture revenue that would otherwise be lost as a result of peer-to-peer file-sharing).
32. *Id.* at 224–34.
33. *Id.* at 202.

authorized copying, in fact reaches well beyond today's non-commercial use.

Fisher's model is aimed at supplementing existing copyright law at first. However, he clearly envisions it replacing existing copyright law. The initial challenge that drives the proposal is P2P and private digital copying, but the Alternative Compensation System is designed to effectively supplant the entire copyright system, not merely create a private copying regime.

2. Broader Ambition, Narrower Scope: Neil Netanel's "Noncommercial Use Levy"

Professor Neil Netanel also has proposed a taxation-based system for compensating copyright holders. Netanel's system is arguably more restrained in its scope than Fisher's. Specifically, Netanel proposes a "Noncommercial Use Levy" to "give noncommercial users and creators freedom to explore, share, and modify" the "works that populate our culture."[34] His goal appears to be relatively modest, viewing copyright law as broad enough to encompass both the Noncommercial Use Levy and copyright holders' proprietary control.[35] Thus, Netanel does not appear to envision the wholesale replacement of copyright law, in contrast to Fisher.

Other than its limitation to noncommercial uses, Netanel's proposal greatly resembles Fisher's. The Noncommercial Use Levy would be imposed upon "commercial providers of all consumer products and services whose value is substantially enhanced . . . by P2P file sharing."[36] The exact determination of the levy's targets would be made by the Copyright Office, but would likely include internet service providers, computer hardware manufacturers, consumer electronics manufacturers (including manufacturers of MP3 players and DVRs), and manufacturers of storage media (blank CDs, DVDs, etc.).[37]

As in Fisher's Alternative Compensation System, the proceeds of Netanel's Noncommercial Use Levy would be divvied up among rights-holders, gauging the relative usage of individ-

34. Netanel, *supra* note 6, at 6.
35. *See id.*
36. *Id.* at 43.
37. *Id.*

ual works to fairly apportion revenues.[38] The extent to which particular individual works should be compensated would be based on estimates of their use by consumers; such estimates would be created with the use of technological tracking of downloads together with statistical sampling techniques.[39] Both proposals also envision a significant role for the Copyright Office, particularly in setting the appropriate tax rate.[40] Netanel's discussion of rate setting, however, is somewhat more detailed than Fisher's. In the short term, Netanel envisions a tax rate gauged to replace the revenue that copyright holders currently lose to unauthorized use such as peer-to-peer file-sharing.[41] In the longer term, he advocates a transition to a tax rate based on broader social concerns about widespread user access as well as fair compensation.[42] Such a measure would not necessarily track expected market bilateral bargains between users and rights-holders. Instead, in an effort to foster the perceived social benefit of wider dissemination of works, it would more closely resemble the relatively lower royalty rates currently paid by satellite radio broadcasters to copyright holders under the existing compulsory license system.[43]

3. Narrower Ambition and Scope: Jessica Litman's "Voluntary Blanket License"[44]

Professor Jessica Litman has advocated a system explicitly modeled on the proposed systems of Fisher and Netanel. However, she modifies the digital clearinghouse model based on her reading of political realities.[45] Her proposal would apply only

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38. *See id.* at 50–57.

39. In particular, Netanel observes that "technologies [that] rely on DRM encryption and smart software agents to identify files embodying copyright-protected works" already exist and could be repurposed for the task of divvying up the noncommercial use levy proceeds. *Id.* at 54.

40. *Compare* FISHER, *supra* note 6, at 202 (envisioning registration of copyrighted works and tracking of their downloads by the Copyright Office), *with* Netanel, *supra* note 6, at 44–45 (giving Copyright Office the role of administering noncommercial use levy).

41. Netanel, *supra* note 6, at 46–47.

42. *Id.* at 46–52. Netanel states that after "the initial five-year period . . . the NUL would likely be increasingly based on a fair return for online distribution, rather than supplanted hard copy revenues." *Id.* at 52.

43. *Id.* at 44–46.

44. Litman, *supra* note 6, at 41–49 (proposing the use of a voluntary blanket license that features terms and conditions prescribed by copyright law).

45. *Id.* at 39–49.

to the private use of copyrighted music, containing an explicit opt-out for those copyright holders who wish to eschew "sharing" music in favor of "hoarding" it under their direct control.[46]

Litman's proposal appears less ambitious, and of smaller scope. But in truth, she stoops to conquer. To avoid a direct confrontation with powerful music lobbies, Litman hopes to preserve a space for the sixty million consumers engaged in P2P networks in the United States.[47] Indeed, she actually seeks to channel P2P users into a lobby with a seat at the legislative bargaining table.[48]

The crux of Litman's proposal is to cast her own copyright model reform as a "blanket license" rather than a "levy"—while voluntary, the terms of the blanket license would be set by statute rather than subject to bargaining.[49] Embedded in her proposal is the belief that drawing the efficiency of P2P into a blanket license for private user copying will prove very successful for both users and those copyright holders who do not opt out. Indeed, Litman is optimistic that the "voluntary, blanket license" could draw in hold-outs based on its own success as a competitor to the traditional model of copyright industries. Additionally, she proposes that the works subject to the opt-out be so designated in manner clear to consumers, thus creating a kind of "common space" out of the remaining works.[50]

4. The Digital Clearinghouse Proposals Contrasted

Besides Fisher, Netanel and Litman, others have made similar proposals for modifying American copyright law. Proposals by Daniel Gervais, Raymond Ku, Lawrence Lessig, and Glenn Lunney all share the common features of addressing P2P and digital copying by users and advocating some kind of digital clearinghouse or collective license.[51]

As shown in Figure 2, the proposals contain a couple of important differences. The first is whether they aim merely to become private, noncommercial copying regimes, or whether

46. *Id.*
47. *Id.* at 40.
48. *Id.*
49. *Id.* at 41.
50. *Id.* at 47–50.
51. *See* LESSIG, *supra* note 6; Gervais, *supra* note 21; Ku, *supra* note 6; Lunney, *supra* note 20.

their scope broadens to include some commercial copying. The second key difference is whether they seek to mandate a replacement for or merely supplement existing copyright law. This distinction depends on whether they provide an opt-out for copyright holders who prefer existing copyright law, rather than the alternative regime, to apply to their works.

Figure 2: *The Digital Clearinghouse Proposals*

	Replace Existing Copyright Law?	Supplement Existing Copyright Law?
All use?	Fisher[52]	Fisher[53]
Noncommercial use?	Lunney[54] Netanel[55] *Japan's Existing System*[56]	Gervais[57] Ku[58] Lessig[59] Litman[60]

52. FISHER, *supra* note 6, at 9–10, 241, 252. Fisher's main proposal has an opt-out for artists willing to forego compensation under the new government-administered system. *Id.* at 241. He also suggests that his proposal can work as a private system. *Id.* at 252.

53. *Id.*

54. Lunney, *supra* note 20, at 911–16. Lunney proposes a levy on copying technology and storage devices used in private copying, together with some legitimization of private copying as an activity. *Id.* at 912. His proposal is perhaps the closest to Japan's existing private home recording levy system. *See infra* Part II.

55. Netanel, *supra* note 6, at 35–39 (delineating a noncommercial use levy that would allow for private digital and nondigital copying of most expressions, and remixing and dissemination of existing works through peer-to-peer networks).

56. *See infra* Part II.

57. Gervais, *supra* note 21, at 58–73. Gervais proposes a system of collective licensing of P2P file-sharing, with proceeds of the licenses to be distributed to copyright holders. His proposal would make the collective license system voluntary via either an opt-in or an opt-out. *Id.* at 72.

58. Ku, *supra* note 6, at 311–24. Ku places emphasis on the way in which digital distribution changes the effects of current copyright law. Ku would bifur-

These categories are not hermetically sealed, however. A supplemental regime can evolve to replace its predecessor; that appears to be Fisher's aim. Additionally, an efficient private copying regime may tend to lead creators to provide material for it, rather than for established commercial distribution channels. Thus, the division of these proposals to some extent reflects their initial impact, and not necessarily their hypothetical final outcomes.

B. Alternatives to the Digital Clearinghouse Model

While the appearance of many similar proposals suggests consensus, several writers in fact dissent.[61] Their reasons vary, but largely fall into two categories: practical doubts and substantive objections. Practical doubts include concerns about the government's role in administering a digital copyright tax system. Substantive objections encompass beliefs that greater individual control by copyright holders—as opposed to the broad collective licenses in the digital clearinghouse models—will lead to superior outcomes.

Practical doubts also include familiar public choice worries about the real effectiveness of regulation.[62] In an article that

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cate existing law, so that current law would remain for "offline" distribution, but "online" distribution would be handled through the noncommercial use levy. *Id.* at 321–22.

59. LESSIG, *supra* note 6, at 300–03. Lessig explicitly describes his proposal as a modification of Fisher's. *Id.* at 301. "Fisher imagines his proposal replacing the existing copyright system" but Lessig "imagine[s] it complementing the existing system" where necessary. *Id.* Among other applications, Lessig's proposal would include works that are copyrighted but not currently commercially available—those other than the copyright holder would be authorized to distribute such works digitally so as to increase dissemination of information. *Id.* at 299.

60. Litman, *supra* note 6, at 41. Litman proposes a statutory blanket license for voluntary rather than compulsory "sharing" of music over digital networks. *Id.* That is, copyright holders could decide to "opt out" of the new system. *Id.* at 45.

61. *See, e.g.*, Jane C. Ginsburg, *Copyright and Control over New Technologies of Dissemination*, 101 COLUM L. REV. 1613, 1642–45 (2001) (describing problems with existing compulsory licenses); Merges, *Contracting into Liability Rules*, *supra* note 10, at 1308–16 (criticizing compulsory licensing regimes).

62. *See, e.g.*, DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 12–37 (1991) (discussing the possible effects of special interest groups' activities, such as an increase in judicial activism with the advent of more economic regulations, and the elimination of other public goals as a result of the government devoting its resources to the pursuit of economic efficiency); Richard A. Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. &

significantly predated—and yet anticipated—some of the digital clearinghouse proposals, Robert Merges opposed the idea of a congressionally mandated compulsory license for digital content.[63] Admittedly, the proposal Merges critiqued did not deal with P2P users; Merges addressed a proposed compulsory license to simplify the work of multimedia industry producers.[64] Nonetheless, his doubts about compulsory licensing remain germane to the more recent proposals. Echoing Richard Epstein's general argument for the preferability of property rules over liability rules,[65] Merges questioned whether government-administered compulsory licensure would accurately set and manage the price for the license in the face of interested parties' rent-seeking behavior. [66]

Other criticisms of the digital clearinghouse models stem from differing views about the copyright holder's role and the best end result. Some of these criticisms appear to stem from naked ideological fear that these proposals will bind creativity in "a socialist gulag."[67] Others find more nuanced reasons to dissent. The argument that fair use is exclusively a response to market failure[68] had led some to a different conclusion about how to deal with private copying. Specifically, these commen-

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MGMT. SCI. 335, 336–41 (1974) (discussing the high cost of effective economic regulation, the distortion of the efficient functioning of the regulated markets, and the perceived absence of a link between the public interest and legislative action).

63. Merges, *Contracting into Liability Rules*, *supra* note 10, at 1299 (arguing a compulsory license imposed by Congress would involve lobbying by copyright holders to set high royalty rates, wasting of resources to educate Congress, and the maintenance of high royalty rates despite changing conditions in the market).

64. *Id.* at 1308–17 (discussing the shortcomings of 1909 Act, which required manufacturers of recordings or mechanical reproductions to obtain a license from the copyright owner and pay a statutory royalty).

65. *See* Richard Epstein, *A Clear View of* The Cathedral*: The Dominance of Property Rules*, 106 YALE L.J. 2091, 2093 (1997) (claiming that liability rules create the "cheap option" of lobbying regulators rather than bargaining with property owners).

66. See Merges, *Contracting into Liability Rules*, *supra* note 10, at 1308–16.

67. *See, e.g.*, Posting of James DeLong to IPcentral Weblog, http://weblog.ipcentral.info/archives/2005/07/writer_jay_curr.html (July 6, 2005, 8:42 EST) (advocating instead "a combination of improved DRM, evolving systems of micropayments, and self-help measures designed to frustrate the pirates—reinforced by a clear legal doctrine that interfering with creators' efforts to defend themselves is *ipso facto* evidence of evil intent").

68. *See* Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the* Betamax *Case and Its Predecessors*, 82 COLUM. L. REV. 1600, 1602, 1614 (1982) (discussing the courts' application of the fair use doctrine to cases in which the protection of a copyright owner's interests conflicts with the public's interest in dissemination).

tators advance the claim that if an exception for unlicensed private copying derives from the fact that, historically, the transaction costs of licensing such copying outweighed the benefits, then as transaction costs decline, the justification for allowing such unauthorized use should fall in tandem.[69]

As a result, some commentators have endorsed a kind of technological optimism that would obviate the need for a digital clearinghouse. In particular, they claim that digital rights management technology (DRM)[70] can facilitate licenses where they were previously precluded by transaction costs.[71] Under this view, technological fixes will enable contractual bargains between users and rights-holders where such bargains were previously thought impossible. Thus, runs the argument, technology can augment the power of existing property rules in copyright.

It is not clear whether the digital clearinghouse proponents or the DRM proponents have it right; ultimately, who is right depends on the answer to a very difficult empirical question. Each group of adherents has a different view on optimal bargains between rights-holders and users and on maximizing social welfare. Making the question more difficult, both groups make predictions about *future* expected results depending on their proposals: a liability rule augmented with a digital clearinghouse, or a property rule enhanced with DRM.

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69. *See* Bell, *supra* note 6, at 587–88, 596–97 (arguing that DRM increases value of copyrighted works, encourages greater production and distribution, and gives consumers better access to copyrighted works); Robert P. Merges, *The End of Friction? Property Rights and Contract in the "Newtonian" World of On-Line Commerce*, 12 BERKELEY TECH. L.J. 115, 132 (1997) (endorsing the argument, with some exceptions, that lowering transaction costs can shrink fair use's range); Maureen A. O'Rourke, *Copyright Preemption After the* ProCD *Case: A Market-Based Approach*, 12 BERKELEY TECH. L.J. 53, 79, 81–91 (1997) (describing "freedom of contract" approach to copyright preemption issues and endorsing a largely market-based solution to copyright preemption problem, including DRM).

70. This article strives to use the term "DRM" throughout while avoiding a value-laden terminology choice as to whether DRM is appropriately characterized as legitimate "rights enforcement" for copyright holders ("digital rights management") or an unfairly imposed restriction on consumers ("digital restriction management" per John Perry Barlow). *See* Stefan Krempl, *Wrapped Up in Crypto Bottles: A Talk with Cyber-Rights Pioneer John Perry Barlow About Digital Restrictions Management and the Future of Human Knowledge*, HEISE ONLINE, TELEPOLIS, Sept. 3, 2003, http://www.heise.de/tp/r4/artikel/14/14337/1.html (last visited August 20, 2007) (talking with Barlow about his fear that "Digital Rights Management today is Political Rights Management tomorrow").

71. *See supra* note 69.

There are several reasons to doubt that DRM or similar technology can cleanly replace the existing system of private copying allowed under fair use. First, as Professor Julie Cohen has pointed out, taking fair use totally private through DRM could diminish public goods under the existing system, since private bargains will not account for social welfare.[72] Second, the empirical case that DRM can actually achieve the claimed gains is doubtful. Engineers have recognized that, so long as content must be displayed or reproduced for users, there will exist an "analog hole" that creates vulnerability for any DRM system.[73] Third, DRM systems can also be more directly hacked by users, potentially leading to an arms-race dynamic between rights-holders and infringers that leaves both sides worse off than when they started.[74] Fourth, and finally, there are the non-economic goals that existing fair use seeks to achieve. William Fisher explicitly designs his digital clearinghouse proposal both to achieve compensation for creators and to enhance "semiotic democracy"—that is, to enable more of the population to engage with and create cultural products.[75] It is unclear that DRM as it exists or is likely to exist can achieve this goal, given the currently relatively weak and diffuse users relative to powerful and concentrated rights-holders.

C. Three Perspectives on the Virtues of the Digital Clearinghouse Proposals

The digital clearinghouse proposals do not emerge from thin air. They effectively mirror Coasean bargains.[76] Their

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72. Julie Cohen, *Lochner in Cyberspace: The New Economic Orthodoxy of "Rights Management,"* 97 MICH. L. REV. 462, 558–60 (1998).

73. *See, e.g.*, Douglas Sicker, Paul Ohm, & Shannon Gunaji, *The Analog Hole and the Price of Music: An Empirical Study*, 5 J. ON TELECOMM. & HIGH TECH. L. 573, 577 (2007) (describing how slightly poorer quality analog copies can be made from, for instance, music during playback through speakers).

74. *See* Salil K. Mehra, *Review of* "The Economic Structure of Intellectual Property Law" *by William Landes and Richard A. Posner (Harvard: 2003)*, 77 TEMP. L. REV. 957, 961 (2004).

75. FISHER, *supra* note 6, at 247.

76. In the absence of transaction costs, under either a clear property rule or a clear liability rule, the Coase Theorem suggests that parties will bargain to an efficient result. *See* Ian Ayres & Eric Talley, *Distinguishing Between Consensual and Nonconsensual Advantages of Liability Rules*, 105 YALE L.J. 235, 245 (1995) (observing that "when contracting is costless, of course both liability rules and property rules will engender efficient contracting and maximal efficiency" and that this "is a direct consequence of the Coase Theorem"). The clearinghouse pro-

structure reflects the experience copyright already has with the composers' rights organizations, most notably BMI/ASCAP.[77] Finally, the digital clearinghouse model potentially preserves important aspects of "net neutrality" in the market for online music and video content.

1. A Coasean Reverse of Copyright

The Coase Theorem's central claim is that, in a world of zero transaction costs, allowing the free exchange of clear property rights generates an efficient outcome independent of the initial allocation of ownership. In Coase's famous example, ranchers' livestock eat farmers' crops.[78] Coase demonstrated that, absent transaction costs, achieving an optimal result did not depend on whether farmers "owned" the right not to have their crops eaten or whether ranchers "owned" grazing rights; through voluntary transactions, resources would move to their highest use in either case.[79]

Despite the Coase Theorem's prominence, commentators have rarely focused on the implication that, in a transaction-cost-free world, requiring copyright holders to pay users not to infringe could be efficient.[80] In other words, users and copyright holders can be analogized to Coase's ranchers and farmers.[81] After all, if a user's use yields greater utility than a rights-holder's price to exclude that use, the important thing from a social perspective is not the initial allocation of rights or the distribution of gains, but instead that the creation is created and that the use occurs. The digital clearinghouse proposals represent a partial "flipping" of rights, as they would legitimize current private copying and peer-to-peer file-sharing

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posals manage to set forth clear rules and to lower transaction costs, so as to mirror Coasean bargaining in the real world of real transaction costs. *See infra* notes 85–88 and accompanying text.

77. *See infra* Part I.C.2.

78. *See* R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 2 (1960).

79. *Id.* at 8 (arguing that regardless of which party is liable for damages, the end result is the same use of the resources).

80. Paul Heald has written on the implications of this hypothetical upside-down Coasean world for patent reform. *See* Paul Heald, *Transaction Costs and Patent Reform*, 23 SANTA CLARA COMPUTER & HIGH TECH. L.J. 447, 451–52, 457–58 (2007).

81. *See* Robert P. Merges, *Of Property Rules, Coase, and Intellectual Property*, 94 COLUM. L. REV. 2655, 2662 (1994) [hereinafter Merges, *Of Property Rules*].

that is arguably "infringement" under current law.[82] In other words, they would grant users a right to engage in what is now infringement.

When commentators have addressed this Coasean reverse of existing intellectual property law, they have tended to view Coase's insights as generally ill-matched to intellectual property.[83] Robert Merges has alluded to several problems with the Coase Theorem's applicability to intellectual property. In particular, he points to the difficulty of clearly defining intellectual property rights and their transgression, the likelihood of strategic bargaining, and the built-in bias in intellectual property law that favors distributing rights to creators rather than infringers.[84]

Merges's misgivings track traditional critiques of the Coase Theorem.[85] The digital clearinghouse proposals themselves meet these qualms. Despite the fact that the proposals by and large do not explicitly reference the Coase Theorem,[86] they reflect its logic. First, they are designed to track agreements that could occur were it not for inhibitive transaction

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82. *Compare* Mark A. Lemley & Philip J. Weiser, *Should Property or Liability Rules Govern Information?*, 85 TEX. L. REV. 783, 792 (2007) (arguing that there are certain circumstances where the copyright owner's control over use should be limited), *with* Litman, *supra* note 6, at 29–31 (presenting potential favorable outcomes in support of fairly unlimited and uncontrolled peer-to-peer file-sharing).

83. *See* Merges, *Of Property Rules*, *supra* note 81 (arguing that the presence of high transaction costs does not necessarily halt exchanges); *see also* Gordon, *supra* note 68, at 1613 (discussion of the copyright market).

84. *See* Merges, *Of Property Rules*, *supra* note 81, at 2657–63 (discussing how intellectual property differs from the examples used by Coase).

85. *Id.* at 2657–59 nn.11 & 13–14 (citing previous work by economists such as Kenneth Arrow, Douglass North, and Robert Cooter concerning the difficultly of allocating clear property rights in the manner the Coase Theorem assumes, and the problem of strategic bargaining that can complicate the negotiations under the Theorem).

86. They generally do seem to apply Coasean concepts implicitly, however. *See, e.g.*, LESSIG, *supra* note 6, at 172–73; Gervais, *supra* note 21, at 46–50, 54–70; Ku, *supra* note 6, at 266–68, 306–12 (arguing that copyright is irrelevant in the context of internet peer-to-peer file-sharing because digital technology has trivialized, if not eliminated, the transaction costs of creating and distributing music); Litman, *supra* note 6, at 29–32, 42 (suggesting reduction of "unnecessary barriers" to file-sharing by allowing consumers to compensate creators directly in some instances, and letting contract law govern the mutual obligations of intermediaries and creators in other instances); Lunney, *supra* note 20, at 821, 869–912; Netanel, *supra* note 6, at 5–6, 24–25, 35–36 (arguing that a noncommercial use levy would track consumer demand, distribute payments to copyright owners, support production and dissemination of creative works, and value different types of expressions more efficiently than proprietary copyright).

costs. Second, while strategic bargaining over intellectual property may exacerbate transaction costs, several versions of the digital clearinghouse foreclose this problem by replacing existing copyright law with compulsory licenses, thus rendering bargaining unnecessary.[87] Finally, the built-in bias towards distributing rights to creators would not necessarily change. The digital clearinghouse proposals merely envision copyright holders owning a right to revenue rather than a right to exclude.[88] In short, they picture a liability rule rather than a property rule.

By embracing compulsory licensing,[89] the digital clearinghouse proposals also stir up debate over the appropriateness of liability rules or property rules, as categorized by Calabresi and Melamed.[90] This debate is all the more heated due to intellectual property law's general endorsement of injunctions—a rule that effectively confers a judicially enforced property right.[91]

Liability rules, as in tort law, involve government-set prices or damages for transgressions; property rules give owners the absolute right to prohibit transgression subject to negotiation. Drawing on the landmark work of Calabresi and Melamed,[92] commentators have argued about whether property rules (injunctions) or liability rules (damages or compulsory licenses with a socially set fee) are more appropriate for intellectual property.[93] The digital clearinghouse proposals, which largely include compulsory licensing, replace the property rules that dominate intellectual property with tort-like liability rules.[94] Administrative or judicial price-setting on users' activities would replace private negotiation between users

87. *See supra* Figure 2 and accompanying text.

88. *See supra* Part I.A.1–3.

89. *See supra* Part I.A.1–3. As discussed, only Professor Litman's proposal contemplates an opt-out by rights-holders. *See supra* Part I.A.3.

90. *See* Calabresi & Melamed, *supra* note 12, at 1092 (discussing the difference between protection by a property rule versus a liability rule).

91. *See* Lemley & Weiser, *supra* note 84, at 784 (observing "pervasive use of property rules and limited uses of 'liability rules'" in IP); Merges, *Of Property Rules*, *supra* note 83, at 2667 ("All familiar with the IP[] field recognize the strong presumption in favor of injunctions.").

92. *See* Calabresi & Melamed, *supra* note 13.

93. *Compare* Merges, *Of Property Rules*, *supra* note 83 (arguing for property rules), *with* Lemley & Weiser, *supra* note 84 (arguing for liability rules).

94. *See supra* notes 90–92.

and rights-holders subject to the latter group's ability to enjoin use.[95]

Professor Merges has argued that, under the Calabresi-Melamed framework, property rules prove superior to liability rules, citing the simple bilateral nature of a rights-holder user license, the relatively low transaction costs involved, and the difficulty a court would have accurately setting the price involved in a liability regime.[96] He also cites Professor Paul Goldstein's thesis that the kind of compulsory licensing involved in a liability rule can inhibit the evolution of technologies and institutions that could more efficiently handle such licensing.[97] Given the "cheap option" of a potentially favorable administrative remedy, users might eschew direct negotiation and relationship-building with rights-holders in favor of lobbying the administrators.[98]

In contrast, Professors Mark Lemley and Philip Weiser argue that liability rules may better suit intellectual property. They key on the idea that intellectual property rights are harder to define and enforce than real property rights.[99] They theorize that the property rule of injunctive relief may yield broader rights than are actually merited, encouraging a "holdup strategy" for the rights-holder.[100] In short, their fear is that a property rule may encourage strategic behavior by rights-holders that promotes a suboptimal result. However, Professor Henry Smith believes that this view may understate the virtue of a property rule in creating a simple modular signal to potential infringers.[101]

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95. *See* Lemley & Weiser, *supra* note 82 (supporting the use of regulatory and administrative bodies); Merges, *Of Property Rules*, *supra* note 81 (arguing that the parties should be left alone to make their own deals regarding value of the property).

96. *See* Merges, *Of Property Rules*, *supra* note 81, at 2664–65 (discussing the difficulty for a court to properly value a copyright holder's loss in an infringement case).

97. *See id.* at 2669 nn. 53–55 (citing Paul Goldstein's treatise on copyright law, in particular Goldstein's discussion of compulsory licenses).

98. *See* Epstein, *supra* note 65, at 2093; *see also* GOLDSTEIN ON COPYRIGHT § 13.2.1, at 13:41 (2005) (noting possible substitution of activity by "courts and Congress" through "injunctive relief [that] will often be the catalyst . . . to spur the formation of licensing institutions"); Merges, *Of Property Rules*, *supra* note 81, at 2662.

99. Lemley & Weiser, *supra* note 82, at 784.

100. *Id.* at 818–20 (applying this insight to copyright jurisprudence).

101. Henry Smith, *Intellectual Property as Property*, 116 YALE L.J. 1742, 1781 (2007). Professor Smith does accept that copyright may be more susceptible than

The digital clearinghouse proposals address the problems of both liability and property rules. Under the digital clearinghouse regime, rights-holders have a claim to compensation, but not injunction, and so they can avoid the Lemley-Weiser holdup concern. The proposals also are designed to deal with a phenomenon that differs from the traditional bilateral IP license Merges confronts. The digital clearinghouse proposals target multilateral behavior like peer-to-peer and private use where transaction costs can outweigh the value of the transaction. Several of the proposals explicitly propose a price-setting and revenue-splitting regime designed to reduce the opportunities for economic rent-seeking.[102] As a result, the design of these proposals makes sense under the frameworks set forth by commentators who have directly addressed Coasean bargaining, property/liability rules and IP.

2. Experience with BMI/ASCAP

The digital clearinghouse proposals draw not only on theory, but also on experience. Proponents and opponents of the compulsory licensing involved in the digital clearinghouse proposals both refer to longstanding experience with "collective rights organizations," most notably Broadcast Music, Inc. (BMI) and the American Society of Composers, Authors and Publishers (ASCAP).[103] The primary business of BMI and ASCAP is to serve as intermediaries between music composers and publishers on one side, and radio and television broadcasters on the other. In particular, BMI and ASCAP aggregate the

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patent to liability rules like compulsory licenses because of the relative ease of assessing costs in copyright. *Id.* at 1812.

102. Proponents of these models recognize that it is inefficient to pay creators more than the minimum it would require for them to produce their creation—just as other economic rents represent welfare losses. *See* FISHER, *supra* note 6, at 207–08 (suggesting the "full social value" of their creations or "what [creators] deserve" may generate overcompensation); LESSIG, *supra* note 6, at 232, 287–306 (suggesting that copyright should expire when it ceases to provide authors with incentives to create works, and that file-sharing should be taxed when it is used as a substitute for buying CDs).

103. *Compare* FISHER, *supra* note 6, at 50–52 (pointing out the "danger of oligopolistic behavior and pricing" on the part of performing rights organizations such as ASCAP and BMI), *with* Merges, *Contracting into Liability Rules*, *supra* note 10, at 1295 (arguing ASCAP and BMI have demonstrated the distinctive advantages offered by privately established collective rights organizations: "expert tailoring and reduced political economy problems").

composers' rights into a blanket license which they then sell on to broadcasters, who thereby acquire the ability to publicly disseminate any work within BMI's and ASCAP's repertoire of rights.[104]

The Supreme Court noted the efficacy of the BMI/ASCAP approach in a landmark antitrust decision just before the dawn of digital music, *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*[105] There, a broadcaster challenged the collective licensing system of BMI and ASCAP as per se illegal price fixing.[106] The Supreme Court refused to apply the per se rule based on the ancillary efficiencies of the BMI/ASCAP system.[107] The efficiencies that the Court pointed to are relevant to the attractiveness of the digital clearinghouse proposals today. In particular, the collective license reduced the transaction costs involved in performing copyrighted music in several ways that benefited both rights-holders and users. First, for both rights-holders and users, the single blanket license substituted for thousands of individual transactions that otherwise would have been required if broadcasters had needed to negotiate separate licenses for each piece of music they played on the air.[108] Second, because a popular song may have a short "shelf life," the blanket license allowed for longer-term licenses with fewer negotiations per time period; a system of licensing by individual song would require many short-term licenses.[109] Additionally, BMI and ASCAP could collectively monitor for infringement by nonlicensees—a task that might prove impossible for individual rights-holders.[110] Finally, the blanket license conferred relative *ex ante* certainty on broadcasters

104. *See* Merges, *Contracting into Liability Rules*, *supra* note 10, at 1329 (explaining ASCAP's function as a central depository allowing members control over their works while issuing "blanket licenses" to potential users).

105. 441 U.S. 1, 20–24 (1979). *Broadcast Music* was decided coincidentally in the same year that Sony and Philips initiated a design team that led to the successful marketing of the Compact Disc (CD) three year later. The development of the CD has been called the "'[b]ig bang' of the digital audio revolution." *See, e.g.*, *The CD Story*, 46 J. AUDIO ENG'G SOC'Y 458–65 (1998), http://www.exp-math.uni-essen.de/~immink/pdf/cdstory.pdf (relaying the development of the Compact Disc as told by Kees A. Schouhamer Immink); EDinformatics, Compact Disc, http://www.edinformatics.com/inventions_inventors/compact_disc.htm (last visited July 6, 2007).

106. *See Broad. Music*, 441 U.S. at 4.

107. *Id.* at 23–25.

108. *Id.* at 20–21.

109. *Id.* at 21–23.

110. *Id.* at 20–21.

that they could play music without the fear of costly copyright infringement litigation.[111] This final benefit extends beyond rights-holders and users to the society at large, since judicial resources are publicly funded.

The BMI/ASCAP system thus reduces transaction costs with an important result: It mirrors—roughly—individual licenses that otherwise might not occur because the benefit of the license may be swamped by the transaction costs involved in negotiating. As both proponents and critics of digital licensing systems have observed, BMI and ASCAP successfully apportion and distribute the bulk of the license fees to the copyright holders.[112] To do this, they employ sophisticated surveying and sampling methods to estimate the popularity of individual copyright holders' works so as to accurately allocate the license fees.[113]

The BMI/ASCAP system inspires the digital clearinghouse proposals in that it strikes a collective licensing bargain where individual licensing might otherwise be very difficult. Nonetheless, critics of a compulsory digital license observe that the BMI/ASCAP system is privately negotiated.[114] Additionally, it is not an exclusive license; copyright holders and users retain the ability to negotiate individually, though this is rarely done.[115] Nonetheless, it is difficult to cast the BMI/ASCAP model as a triumph of pure private ordering, because the organizations have been operating under various consent decrees actively monitored by the Justice Department's Antitrust Divi-

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111. *Id.* at 20.

112. *See* FISHER, *supra* note 6, at 51 (recognizing ASCAP's and BMI's successful distribution of approximately 80% to 85% of their gross revenues to member writers and publishers); Merges, *Contracting into Liability Rules*, *supra* note 10, at 1335–40 (acknowledging ASCAP's success with the determination of royalty rates and fair distribution of royalty income among members).

113. Both BMI and ASCAP use a combination of licensee self-reporting and statistical sampling techniques to estimate the relative use of the individual works subject to the blanket licenses they sell to copyright users. The more a work is found to be used, the greater a portion of the aggregated license fees that its composer receives. FISHER, *supra* note 6, at 51; Merges, *Contracting into Liability Rules*, *supra* note 10, at 1335–38 (discussing ASCAP's use of self-reporting by licensees and sophisticated sampling techniques for determining royalty rates and distribution of royalty income).

114. Merges, *Contracting into Liability Rules*, supra note 10, at 1295–97.

115. *See Broad. Music*, 441 U.S. at 29 (Stevens, J., dissenting) (ASCAP does not have exclusive control over the copyrights, and members are free to negotiate directly with composers and publishers).

sion since 1941.[116] Regardless of whether BMI/ASCAP provides a type of compulsory licensing, it does demonstrate the value in collective licensing that reduces transaction costs.

3. Content/Net Neutrality

Finally, the digital clearinghouse proposals envision a licensing scheme that is ultimately content-neutral. Professor Tim Wu describes the "net neutrality" principle as stemming from the idea that a public information network should treat all content equally to promote competition on merits.[117] A common feature—and a key merit—of the digital clearinghouse proposals is to treat different rights-holders' creations the same, save for their popularity of use. The compensation creators receive would depend solely on measures of utility to users; the system itself would not promote some rights-holders over others.

As a result, the digital clearinghouse approach obliquely addresses the issue of digital rights management ("DRM").[118] DRM technologies simultaneously hold promise and generate fear. For copyright holders victimized by rampant infringement, DRM may supply an antidote to lost revenue and diminished assets. For those who use copyrighted material, DRM may allow for a clearer resolution of the question of what is an appropriate use than the vagaries of the "fair use" doctrine provide.[119] However, DRM also creates fears based on concerns of liberty and efficiency. Commentators decry the possibility that DRM—combined with anticircumvention law—may impoverish free expression by sucking the oxygen out of the common cultural atmosphere.[120]

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116. Original cases brought almost seventy years ago against BMI and ASCAP were both settled with consent decrees that have since been incorporated into and consolidated with later consent decrees. United States v. American Soc'y of Composers, Authors & Publishers, 1940–43 Trade Cas. (CCH) ¶ 56,104 (S.D.N.Y. 1941); United States v. Broad. Music, Inc., 1940–43 Trade Cas. (CCH) ¶ 56,096 (E.D. Wisc. 1941).

117. Tim Wu, *Network Neutrality, Broadband Discrimination,* 2 J. TELECOMM. & HIGH TECH. L. 141, 147–48 (2003).

118. For my use of the term "DRM," see *supra* note 70.

119. *See* Bell, *supra* note 6, at 587.

120. *See, e.g.*, FISHER, *supra* note 6, at 6 (describing "threats . . . [to] our cultural environment"); LESSIG, *supra* note 6, at 30 ("Ours was a free culture. It is becoming much less so.").

Several of the digital clearinghouse proposals function much as a mandatory, universal license, so that what is currently unauthorized use becomes legitimate, compensated use.[121] Accordingly, the digital clearinghouse approach can head off the need to impose DRM on consumers to reduce what is now deemed infringement. Similarly, the popularity-driven compensation system common to the digital clearinghouse proposals reduces the incentive to segment off content distribution into competing proprietary networks that may hurt consumer and social welfare—the system is neutral as to particular networks or "synergies" between bundled works.[122] The incentives established by the digital clearinghouse proposals are designed to focus creators on producing the best work for their users, rather than leading them to cater to particular publishers or distribution networks that might skew incentives. With a clearinghouse system in place to compensate rights-holders, there may be decreased demand for expensive and intrusive DRM.[123]

Thus, the digital clearinghouse proposals address numerous concerns stemming from experience with collective rights organizations, theory on Coasean bargaining and rules, and insight about content and network neutrality. Small wonder, then, that so many American law professors seem to have reached a consensus on these proposals.[124] The question that remains, however, is why, presented with a similar proposal, Japanese law professors rejected it.

II. THE JAPANESE DIGITAL CLEARINGHOUSE

For years, Japan has used a system resembling the digital clearinghouse proposal to compensate copyright holders for digital copying of their works. Under the Japanese system, consumers pay a digital recording levy when they purchase de-

121. *See supra* Part I.A & Figure 2.

122. *See* Dan Hunter, *Walled Gardens*, 62 WASH. & LEE L. REV. 607, 611 (2005) (arguing against restricted access to academic scholarship).

123. However, it should be noted that the supposition that rights-holders would voluntarily forego DRM if compensated may not come to pass—and has not been correct in Japan. *See infra* Part III. However, the forbearance from DRM could be made compulsory under a clearinghouse system.

124. *See* Litman, *supra* note 6, at 33–34 (discussing different American law professors' proposals for adopting peer-to-peer file-sharing).

vices or media usable for private recording. Proceeds from digital recording levies are distributed to the copyright holders.

The Japanese system did not emerge spontaneously. Rather, it was a legislative bargain in response to copyright holders' concerns about proliferating CD rental shops and their customers—analogous, in some respects, to the current U.S. constituency of millions of P2P users.[125] This Japanese response took the form of a copying levy—that is, a liability rule—combined with a digital clearinghouse.[126] Notably, the system evolved as a reaction to technological advances that enabled high-quality copying of works.[127]

A. Pssst . . . Would You Like to Rent a CD?

Japan's CD rental stores predate peer-to-peer file-sharing and iPods. In fact, they predate MP3s, consumer CD recorders and even Digital Audio Tape.[128] With zany names like *You and I* (a homonym for the Japanese words for "Friendship" and "Love"),[129] these stores proliferated in the 1980s, renting out CDs and selling blank analog cassette tapes for use in "high-speed dubbing" machines that allowed the copying of a CD in minutes.[130]

These stores benefited from quirks of statutory drafting—which in turn became accidental loopholes because of technological change. The current version of Japan's Copyright Law became effective in 1971, though it has since been amended. Article 30 of the Copyright Law, both before 1971 and since, has included a general right for citizens to reproduce copy-

125. *See infra* notes 136–38, 148 and accompanying text.

126. *See infra* section II.B. and accompanying text.

127. *See infra* notes 144–48 and accompanying text.

128. *See* Guy de Launey, *Not-So-Big in Japan: Western Pop Music in the Japanese Market*, 14 POPULAR MUSIC 203, 215 (1995) (observing that CD "[r]ental shops eventually became [a] political football between the USA and Japan, the American side claiming that 'rental shops are closely allied to the political lobby of Japanese consumer-electronics and blank-tape manufacturers'" and adversaries to the music industry and performers, including American artists and record companies (citation omitted)); *A CD Business*, ECONOMIST, Dec. 21, 1991, at 80 (predicting, incorrectly, that "the widespread transfer to cassettes of compact discs (CDs) that people rent in Japan—looks like[ly to] be[] outlawed").

129. *A Very CD Business*, ECONOMIST, Sept. 15, 1990, at 87.

130. T.R. Reid, *End of the One-Night Disc? Japan CD Rentals Run Afoul of New Law*, WASH. POST, Jan. 3, 1992, at C1.

righted material for private use.[131] Prior to 1971, Article 30 included the qualification that such private reproduction should not be "by means of mechanical or chemical techniques."[132] However, the 1971 version of section 30 dropped that qualification as too restrictive.[133]

The omission of the provision excluding mechanical reproduction was not a major issue at first, since at that time, reel-to-reel tape recorders the size of small suitcases were the only reproduction machines available for use in private homes.[134] Unlike Walkmans—let alone iPods—reel-to-reel players did not greatly increase consumers' space-shifting ability when enjoying recorded music. However, the emergence of smaller cassette tapes and devices for playing and recording them created concern for music copyright owners.[135] The development of the audio CD in the early 1980s was the final ingredient for large-scale private copying. Taking advantage of the statutory hole, CD rental shops thrived, selling blank cassette tapes and providing in-store recording equipment.

In response, copyright holders in Japan lobbied and won a 1984 amendment explicitly excluding reproductions by use of publicly available machines, such as high-speed cassette dubbing machines in music rental stores.[136] But the amendment also recognized a "rental right" for copyrighted music, thereby legitimizing the CD rental industry.[137] Given the newly available and superior CD and the formal legitimatization of their activities, CD rental shops mushroomed from 34 nationwide in 1980 to 6,184 by 1989.[138]

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131. The current article 30 states in relevant part that, subject to certain exceptions: "(1) A work of authorship which is the subject matter of copyright (referred to as a 'work of authorship') may be reproduced by the user for using it personally or at his home or within a similarly limited circle . . . ." Copyright Act, Law No. 48 of 1970 art. 30 (Teruo Doi trans.), *in* TERUO DOI, JAPANESE COPYRIGHT LAW IN THE 21st CENTURY 217 (2001).

132. MASAAKIRA KATSUMOTO, THE NEW JAPANESE COPYRIGHT LAW 137 (1975); *see also* Copyright Act, Law No. 39 of 1899, art. 30, *in* DOI, *supra* note 131, at 278 ("[It] shall not be regarded as an infringement [to]: (i) Reproduc[e] without the intention of publishing and not by mechanical or chemical means. . . .").

133. KATSUMOTO, *supra* note 132, at 137; *see also* DOI, *supra* note 131, at 103 (noting 1970 version of law).

134. DOI, *supra* note 131, at 103.

135. *Id.*

136. Peter Ganea & Christopher Heath, *Economic Rights and Limitations*, *in* JAPANESE COPYRIGHT LAW 51, 58–59 (Peter Ganea et al. eds., 2005).

137. *Id.* at 59.

138. *A Very CD Business*, *supra* note 129; *see also infra* Figure 3.

The existence of the Japanese rental CD industry did not escape overseas notice: awareness of the Japanese experience helped spark the prohibition of similar businesses in America. Japanese CD rental shops became both a trade irritant and a cautionary tale for the American recording industry. The significant share of foreign music available for rent, combined with perceived differential treatment of foreigners under Japanese copyright law, led American trade negotiators to press the issue of Japanese CD rental stores both bilaterally with the Japanese government and during the TRIPS negotiations of the late 1980s and early 1990s.[139] In particular, the United States took the position that only authors can authorize or prohibit the rental of their audiorecordings; the Japanese (and European Union) position was that authors should only be able to prohibit rental for an initial period and thereafter are entitled only to fair remuneration for rental of their audiorecordings.[140] Additionally, when Congress passed legislation greatly reducing the possibility of CD rental shops in the United States,[141] statements were presented specifically warning of the degree to which such shops in Japan had accelerated the rate of private copying.[142] During the United States debate over what would ultimately become the Audio Home Recording

139. *A Very CD Business*, *supra* note 129 (stating that foreign music made up from 25% to 50% of Japan's music market in the preceding decades and noting complaints of differential treatment of foreign music companies concerning rental royalties); *see also* Bill Holland, *RIAA Adds to the Pressure, Politely*, BILLBOARD, Dec. 7, 1991, at 11 (reporting U.S. Trade Representative and Recording Industry Association of America's direct talks with Japanese government officials); Kyoko Sato, *Compact Disc Renters Fret Over Right to Rock*, NIHON KEIZAI SHIMBUN, Nov. 30, 1991 (reporting U.S. demand for "tighter copyright laws on rental CDs" in the context of the Uruguay Round, which involved TRIPS).

140. *See* Mitsuo Matsushita, *A Japanese Perspective on Intellectual Property Rights and the GATT*, 1992 COLUM. BUS. L. REV. 81, 94 (1992) (describing tensions in negotiation of draft of what came to be TRIPS).

141. The Record Rental Amendment of 1984 excluded CD rentals from the first sale doctrine. *See* Record Rental Amendment of 1984, Pub.L. No. 98-450, 98 Stat. 1727 (codified as 17 U.S.C. § 109(b)(1)(a) (2000)). Under this amendment, the owner of a copy of a phonorecord containing copyrighted material must obtain the permission of the copyright owner in order to rent out the phonorecord for direct or indirect commercial advantage. *Id.*

142. *Audio and Video First Sale Doctrine: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the H. Comm. on the Judiciary on H.R. 1027, H.R. 1029, and S. 32*, 98th Cong. 33 (1985) [hereinafter House Audio and Video Hearings] (joint statement of AGAC/The Songwriters Guild, the National Association of Recording Merchandisers, the National Music Publishers' Association, and the Recording Industry Association of America).

Act—the response to the near-perfect copying ability of the then newly-invented digital audio tape—evidence was introduced of the effects of Japanese CD rental shops.[143]

As in the United States,[144] the Japanese music industry learned from its experience with CD rental shops and grew particularly alarmed in the late 1980s at the potential new threat of digital copying made possible by the development of digital audio tape (DAT). In response, the Japanese government took two fundamental steps. First, while the law continued to allow CD rental without consent of the copyright holder, new amendments created a "waiting period" before a newly released CD could be made available in a CD rental shop.[145] Interestingly, although the waiting period was legislated at one year, Japanese record companies and the rental shops—the latter allied to domestic consumer electronics and recording-media manufacturers and their customers[146]—agreed to shorten the waiting period to mere weeks in exchange for royalty payments.[147] More relevantly, the Japanese government

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143. *See* 132 CONG. REC. S13107-04 (1986) (including text of the proposed Digital Audio Tape Tarriff Act, along with *Billboard* article referencing Japanese CD rental industry).

144. *See* Randal C. Picker, *Mistrust-Based Digital Rights Management*, 5 J. TELECOMM. & HIGH TECH. L. 47, 55–56 (2006) (discussing copyright holders' and music producers' fears).

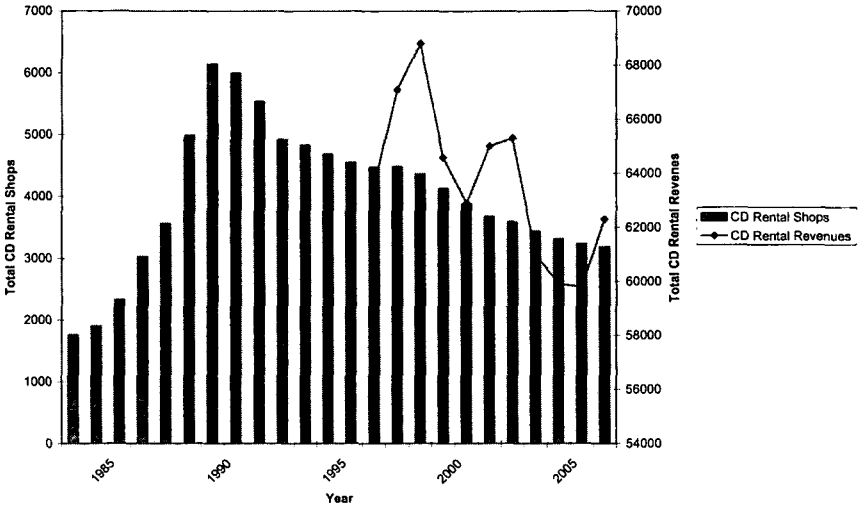
145. *See* Copyright Act, Law No. 48 of 1970, art. 95 *ter.*, *translated in* DOI, *supra* note 131, at 244 (establishing that waiting period can range from one month to twelve months depending on administrative order); Copyright Act Enforcement Order, Cabinet Order No. 335 of 1970, art. 57 *bis.* (administrative order specifying that the period will be twelve months), *translated in* DOI, *supra* note 131, at 314.

146. *See* Holland, *supra* note 139 ("[R]ental shops [were] closely allied to the political lobby of Japanese consumer-electronics and blank-tape manufacturers . . . ."); *A CD Business*, *supra* note 128 (observing the Japanese government's "reluctance to upset potential supporters," including "over 6200" rental shops and "tens of millions" of customers); *cf.* Litman, *supra* note 6, at 32–33 (arguing for peer-to-peer file-sharing based in part on the interest of millions of P2P users).

147. In general, since 1994, there has been a three-week embargo after the initial CD sale release date on CD rentals, lengthened from two weeks in 1992 and one week in 1991, when the waiting period was introduced. *See* Nihon konpakuto deisuku bideo rentaru shougyou kumiai [JAPAN CD AND VIDEO RENTAL TRADE ASSOCIATION], CD Rentaru ni kansuru shiryou [DATA ON CD RENTALS] 6 (2007), *available at* http://www.mext.go.jp/b_menu/shingi/bunka/gijiroku/020/07051108/001.pdf (report to the Ministry of Cultural Affairs) [hereinafter DATA ON CD RENTALS]. However, there is a longer waiting period for CD releases by new artists or low-sales volume niche artists. *Id.*; *see also* Steve McClure, *Japan's Record-Rental Biz Tries to Avert One-Year Lag*, BILLBOARD, Apr. 4, 1992, at 4 (reporting the rental shops were paying "Japanese record companies a one-time fee of 400 yen ($2.98) in exchange for the right to rent [CDs] starting one week after release"); Steve

established a digital clearinghouse system to transfer the proceeds of a new noncommercial use levy to copyright holders.[148]

Figure 3: *Japan's CD Rental Industry*



(Source: CD Rental Shops and Revenues from the Japan CD and Video Rental Trade Association 149 – revenues not available prior to 1995)

Under this bargain, CD rental shops continue in Japan to the present day as shown in Figure 3, though they have also

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McClure, *Trouble for Japan's Rental Outlets*, BILLBOARD, Jun. 1, 1991, at 5 (stating that "Japan's record companies and rental stores . . . reached a gentleman's agreement designed to placate both sides" and make a window-based system enforceable).

148. *See* Copyright Act, Law No. 48 of 1970 art. 30, *translated in* DOI, *supra* note 131, at 217, stating:

> (2) A person who makes a sound or visual recording for private use by an equipment having the function of sound or visual recording in digital form specified by a Cabinet order (other than one having a special function for broadcasting business or any other special function which is not usually designed for private use, or one having a sound or visual recording function auxiliary to the primary function, such as a telephone apparatus having a sound recording function) on a recording medium designed for sound or visual recording in digital form by such equipment specified by a Cabinet order shall be liable to pay a reasonable amount of compensation to the copyright owner.

This provision was created by a 1992 amendment to the Copyright Act that became effective on June 1, 1993. *Id.* at 105.

149. DATA ON CD RENTALS, *supra* note 147, at 7.

diversified into CD sales, DVD rentals and sales.[150] The shops' absolute numbers have consistently dwindled since their peak; CD rental revenues have also declined, though in a less steady fashion than the number of shops (see Figure 3).

B. SARAH Is Born

The Japanese digital clearinghouse established in 1993 was the product of several forces. Several contending lobbies pushed their cases, including widespread CD rental shops backed by powerful domestic electronics manufacturers, Japanese copyright holders irritated at increasing private copying, and American copyright holders aggravated by both private copying and perceived discriminatory treatment.[151] The development of CDs with high-quality audio playback and the advent of Digital Audio Tape (DAT) brought matters to a head.

The result was a real-world Japanese version of a digital clearinghouse system. In particular, 1993 amendments to the Japanese Copyright Law provide a liability rule for private digital copying.[152] Japanese consumers continue to possess the right to make private digital copies—they need no permission from copyright holders. However, users who copy must pay a governmentally set fee on the digital devices and media they use.[153] The Agency for Cultural Affairs,[154] an administrative body within the Japanese government, was granted the power

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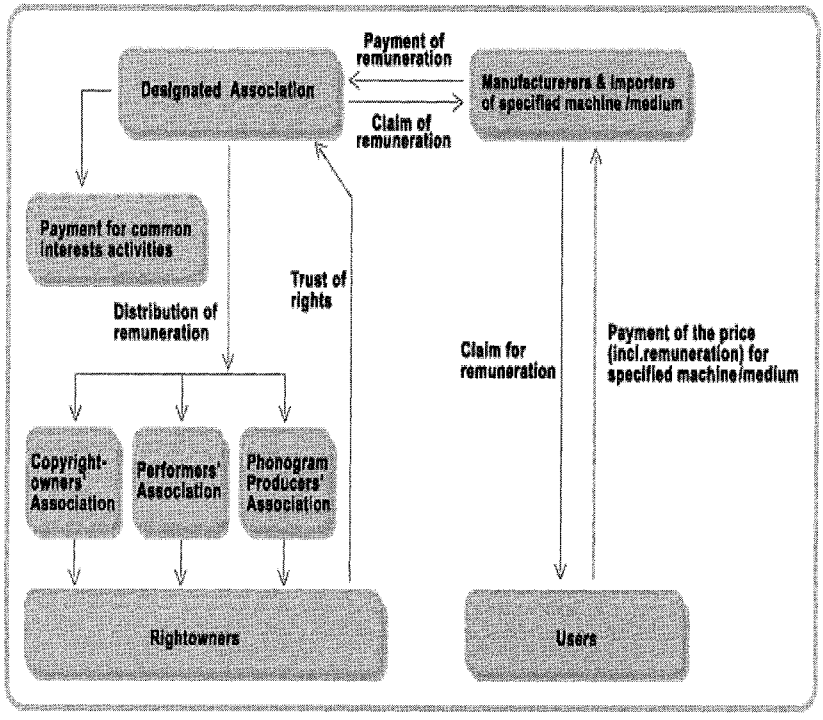
150. *See* Steve McClure, *Japanese CD-Rental Chain CCC Strikes Cost-Cutting Deal,* BILLBOARD, Nov. 9, 2002, at 54. In recent years, Japan's largest CD rental chain, Culture Convenience Club (Tsutaya), has also become its largest rental video chain. *See* Yuji Utsunomiya, *Tsutaya Rental Chain Charts Diversification Course,* JAPAN TIMES, Aug. 5, 2003, at 10. The shift in the industry due to technology is captured in the name changes of its trade association, which before August 1994 was the "Japan Record Rental Trade Association," then changed its name to the "Japan Compact Disc Rental Trade Association," and since June 1998 has become the "Japan Compact Disc and Video Rental Trade Association." *See CDV-Japan ni tsuite* [About CDV-Japan], http://cdvnet.jp/modules/xoopscdv/ (last visited June 20, 2007) (describing name changes of trade association currently representing 3628 stores).

151. *See supra* notes 126–43 and accompanying text; *see also* Dan Rosen & Chikako Usui, *The Social Structure of Japanese Intellectual Property Law,* 13 UCLA PAC. BASIN L.J. 32, 62 (1994).

152. *See* Copyright Act, Law No. 48 of 1970 art. 30, *translated in* DOI, *supra* note 131, at 217 ("(2) A person who makes [a digital] sound or visual recording . . . shall be liable to pay a reasonable amount of compensation to the copyright owner.").

153. There is an exemption for devices that the purchaser can demonstrate will not be used for private copying, but that exemption is rarely used since the cost of

Figure 4: ***Japan's Society for Administration of Remuneration for Audio Home Recording (SARAH)***[155]



to receive and approve royalty rate proposals from copyright holders' trade associations and to authorize these associations

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taking advantage of it is substantial in light of the refund. *See Minutes of the Meeting of the Legislative Issues Study Group of the Copyright Section of the Ministry of Cultural Affairs Advisory Council* (comment of member Maeda) (2005), (*translated by* Joe Jones & Salil Mehra), *available at* http://www.mext.go.jp/b_menu/shingi/bunka/gijiroku/013/05070401.htm [hereinafter *Minutes*] ("[T]he current lump sum collection [levy], that is from people who buy devices and recordable media, is first, collected in a lump sum at the time of purchase, and the current system provides that a person who can prove they are not conducting private audiovisual recording can get a refund, but that refund system is . . . one in which 80 yen is necessary to get 8 yen back, and so it has been pointed out that it does not really function").

154. The Agency for Cultural Affairs is responsible for, among other things, the maintenance and dissemination of copyright systems in Japan. *See* MEXT: Ministry of Education, Culture, Sports, Science and Technology, Cultural Affairs, http://www.mext.go.jp/english/bunka/index.htm (last visited August 22, 2007).

155. *Id.* (follow "Remuneration system" hyperlink) (last visited June 1, 2007).

to gather and distribute revenues to their membership.[156] The Society for Administration of Remuneration for Audio Home Recording (SARAH) was granted such authority in 1993;[157] a counterpart plays a similar role for digital video recordings.[158] SARAH distributes the revenue it collects to organizations representing composers, performers and publishers, who then distribute this money to their members.[159] As a result, a flow of revenue runs from users to rights-holders, mediated by government oversight and private trade association participation (see Figure 4). The picture is similar to William Fisher's proposal (see Figure 1), save for the fact that SARAH does not yet capture hard-disk based devices and internet file-sharing.

Japan's system also authorizes the Ministry of Cultural Affairs to designate digital devices and media as objects for a noncommercial use levy.[160] Over time, these media have come to include not just digital audio tape but also several types of recordable CDs, and the devices have expanded from digital audio tape recorders to include mini-disc (MD) and CD recorders.[161]

Under the current royalty schedule submitted by SARAH and approved by the Ministry, devices are levied at 2% of their scheduled base price, up to 1,000 yen (about $8),[162] and media at 3% of their base price.[163] Under this system, SARAH had collected a high of 4 billion yen (about $33 million) at its peak in 2001 (Figure 4).[164] While this may seem low in comparison

156. Chosakukenhou shikou kisoku [Copyright Law Enforcement Order], Ministerial Ordinance no. 265, Chapter 5, Articles 22-3, 22-4 (Dec. 23, 1970).

157. DOI, *supra* note 131, at 114–15.

158. *See* SARVH to wa? [What is SARVH?], http://www.sarvh.or.jp/dis/c_navi.html (last visited June 20, 2007) (describing SARVH as "a nonprofit corporation that receives royalty revenues from [video] device makers that consumers have paid, and then distributes that revenue to copyright holders").

159. *See* Society for Administration of Remuneration of Audio Home Recording (SARAH), The Practices of SARAH, http://sarah.or.jp/index_e.html (follow "About sarah" hyperlink; then follow "The practices of sarah" hyperlink) (last visited June 20, 2007) [hereinafter The Practices of SARAH] (describing payments to the Japanese Society for Rights of Authors, Composers and Publishers (JASRAC), the Japan Council of Performers' Organizations (GEIDANKYO), and the Recording Industry Association of Japan (RIAJ)).

160. *Id.*

161. *See* DOI, *supra* note 131, at 105–10 (setting forth the chronology of expansion of designated devices).

162. Amounts are calculated at 120 yen = $1.

163. *Id.*

164. *Id.*

with CD sales of 490 billion yen (about $4.4 billion) in the same year,[165] it should be remembered that user royalty fees are separate from rental royalty fees paid on a per CD basis by rental shops,[166] and that many CDs are sold to private individuals rather than rental shops.

Despite its digital copyright system, Japan has not escaped the issues that the U.S. confronts: increased digital copying, P2P file-sharing and MP3 players and iPods. Revenues collected under the system fell roughly in half from 2001 to 2005 (Figure 5),[167] thought to reflect the effects of P2P file-sharing as well as increased use of hard-disk based digital music players like the iPod, which unlike CDs, MiniDiscs ("MDs") and digital audio tape, were not subject to the levy.[168] Indeed, although recording industry sales fell somewhat after 1998, digital audio recording levy revenues fell more sharply (Figure 5). As a result, government action against internet file-sharing alone, which included some high-profile prosecutions,[169] would not have addressed the consumer shift towards the use of products not already subject to Japan's levy. Under the Japanese system, the Ministry of Cultural Affairs first needed to address the question of whether digital music players such as MP3 players and iPods should be included in Japan's digital clearinghouse system. To aid in this determination, the Ministry asked experts to do a study. As a result, those experts—mostly academics, especially law professors—were forced to consider the possibility of an iPod tax.

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165. *See* Japan External Trade Organization (JETRO), Japan's Music Industry 5 (Fig. 5), *available at* http://www.jetro.go.jp/en/market/report/pdf/2004_28_r.pdf.

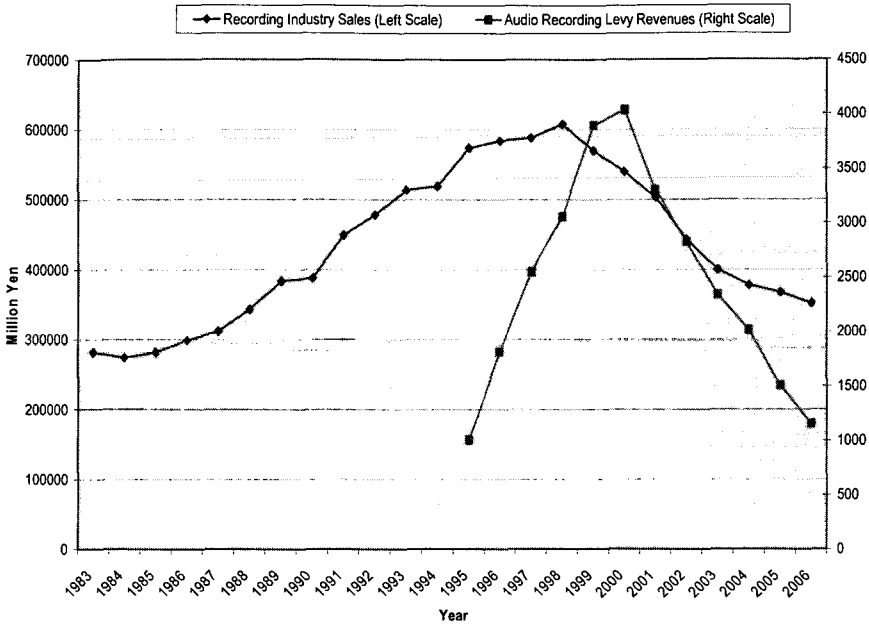
166. *See supra* note 147 and accompanying text.

167. *See id.* (showing 1.5 billion yen collected in 2005).

168. *See* Chester Dawson, *Japan's Music Industry Is Losing Its Groove*, BUSINESSWEEK, June 10, 2002, *available at* http://www.businessweek.com/magazine/content/02_23/b3786130.htm?chan=search (crediting an "epidemic of illegal copying" via the internet for lost sales); Steve McClure, *We've Got High Expectations*, JAPAN TIMES, Feb. 6, 2002, at 14 (noting growing popularity of file-sharing as well as the check on their popularity provided by rental CD shops). *But see* Tatsuo Tanaka, *Does File Sharing Reduce Music CD Sales?: A Case of Japan*, http://www.iir.hit-u.ac.jp/file/WP05-08tanaka.pdf (last visited Nov. 15, 2007) (concluding that answer to title question is no).

169. *See, e.g.*, Salil Mehra, *Software as Crime: Japan, the United States, and Contributory Copyright Infringement*, 79 TUL. L. REV. 265, 270–273 (2004) (describing prosecution of author of peer-to-peer software).

Figure 5: *Japan's Recording Industry and Digital Audio Recording Levy Revenues*



(Source: Recording Industry Association of Japan,[170] Society of Administration for the Remuneration of Audio Home Recording (SARAH)[171]— digital levy not applicable until late in 1994, thus no full-year data prior to that year)

III. THE IPOD TAX AND ITS REJECTION

The Japanese iPod tax proposal and the examination surrounding it represent a real-world attempt to create a digital clearinghouse and noncommercial use levy system. The information and arguments involved show that an American digital clearinghouse system would face serious practical management problems. Additionally, the Japanese experience suggests concern that an American system based on a compulsory license could morph into a deal between mobilized producer groups quietly extracting rents from more diffuse and disorganized

170. *See* DATA ON CD RENTALS, *supra* note 147.

171. *See* The Practices of SARAH, *supra* note 159 (outlining revenues from private recording levy).

consumer groups—a classic result predicted by public choice theory.

These arguments came to light as a result of Japan's wide-ranging use of advisory councils (*shingikai*) to channel the observations and opinions of outside experts into the legislative process. How much power the *shingikai* have to influence decision making is difficult to say. In the past, some critics have alleged that they are "puppet shows" controlled by bureaucrats.[172] According to these critics, the bureaucrats frame the agenda of the *shingikai* and fill them with members who can be manipulated.[173] However, competing accounts observe that the *shingikai* provide real access for interest groups to influence policy.[174] Thus, there is a debate over whether the *shingikai* promote interest group "capture" of government, or government "co-optation" of interest groups.[175] Essentially, the debate is about who sits in the driver's seat, interest groups or bureaucrats. This is relevant given some government voices outside the Ministry of Cultural Affairs who questioned the existing digital clearinghouse system during the council's study.[176]

The debate over the *shingikai* largely predates the 2001 enactment of Japan's Information Disclosure Law. While the law possesses some notable exceptions to disclosure, it has

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172. *See* CHALMERS JOHNSON, MITI AND THE JAPANESE MIRACLE 47–48 (1982); Frank Schwartz, *Of Fairy Cloaks and Familiar Talks: The Politics of Consultation*, *in* POLITICAL DYNAMICS IN CONTEMPORARY JAPAN, 217, 230 (Gary D. Allinson & Yasunori Sone eds., 1993); FRANK K. UPHAM, LAW AND SOCIAL CHANGE IN POSTWAR JAPAN 168–69 (1987); Mark A. Levin, *Smoke Around the Rising Sun: An American Look at Tobacco Regulation in Japan*, 8 STAN. L. & POL'Y REV. 99, 110 n.38 (1997).

173. *See* David Boling, *Access to Government-Held Information in Japan: Citizens' "Right to Know" Bows to the Bureaucracy*, 34 STAN. J. INT'L L. 1, 20 (1998); Tom Ginsburg, *Dismantling the "Developmental State"? Administrative Procedure Reform in Japan and Korea*, 49 AM. J. COMP. L. 585, 592–93 (2001).

174. *See* ULRIKE SCHAEDE, COOPERATIVE CAPITALISM: SELF-REGULATION, TRADE ASSOCIATIONS, AND THE ANTIMONOPOLY LAW IN JAPAN 17, 37–40 (2000); Levin, *supra* note 172, at 110 n.38.

175. Ginsburg, *supra* note 173, at 592.

176. *See, e.g.*, Yutaka Fujiwara, *Hotondo no shouhisha ga shirazu ni haratte iru shiteki rokuon rokga hosyoukin* [*The Private Audio/Video Recording Levy that Most Consumers Pay Unknowingly*] (part one), NIKKEI BUSINESS PLUS, Apr. 25, 2005 (Japan), *available at* http://chizai.nikkeibp.co.jp/chizai/gov/meti20050425.html (translation on file with author) (essay by member of policy planning office of Ministry of Economy, Trade, and Industry (METI), claiming that few consumers know about existing private recording levy, and that management of only one in ten consumer organizations seemed to know about it).

nonetheless created greater transparency on Japan's bureaucracy, and by extension the *shingikai*.[177] One result of this is that significant portions of the discussion, meeting minutes and reports of the debate over the iPod tax have become public—and thus a window into what a real-world debate over a proposed digital clearinghouse looks like.

In Japan's debate, the iPod tax proposal lost. The irony of this result is that the legislative council of the *shingikai* whose inquiry justified this defeat was dominated not by copyright industry representatives but by academics.[178] Indeed, the chairman, Professor Nobuhiro Nakayama of Tokyo University Law School, now heads the Japanese branch of Creative Commons,[179] a nonprofit organization aimed at reforming the existing system of copyright law.[180]

The iPod tax was first proposed in January 2005, and the study group spent most of the year considering the question.[181]

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177. *See* Jeff Kingston, Temple University Japan, Presentation at the Biennial Conference of the Japanese Studies Association of Australia (JSAA): *Information Disclosure in Japan* (July 3–6, 2005), at 12–14, *available at* http://law.anu.edu.au/anjel/documents/ResearchPublications/Kingston2005_InformationDisclosureInJapan.pdf.

178. *See* Shiteki rokuon rokuga hoshyoukin no minaoshi ni tai suru housei mondai shyouiinkai kakuiin teishutsu iken [Submitted Opinions of Each Member of the Legislative Issues Study Group for Revision of the Private Audio/Video Recording Compensation System], June 30, 2005 (Japan), *available at* http://www.mext.go.jp/b_menu/shingi/bunka/gijiroku/013/05070401/003_2.htm (last visited Nov. 15, 2007) (translation on file with author) (including roster showing 21 members, 14 of whom were listed as professors – 10 of whom teach law).

179. *See* Yutaka Fujiwara, *Hotondo no shouhisha ga shirazu ni haratte iru shiteki rokuon rokuga hoshoukin* [*The Private Audio/Video Recording Levy that Most Consumers Pay Unknowingly*] (part two), NIKKEI BUSINESS PLUS, Apr. 27, 2005 (Japan), *available at* http://chizai.nikkeibp.co.jp/chizai/gov/meti20050427.html (last visited Nov. 15, 2007) (translation on file with author) [hereinafter Fujiwara part two] (describing Nakayama as heading the study); *Minutes*, *supra* note 153, at 3 (identifying Nakayama as leader in transcript); Creative Commons Japan, http://www.creativecommons.jp/about/people/post/ (last visited Nov. 15, 2007) (translation on file with author) (describing Nakayama as chairman of board).

180. Creative Commons seeks "to build a layer of reasonable, flexible copyright in the face of increasingly restrictive default rules." Lydia Pallas Loren, *Building a Reliable Semicommons of Creative Works: Enforcement of Creative Commons Licenses and Limited Abandonment of Copyright*, 14 GEO. MASON L. REV. 271, 287 (2007) (quoting Creative Commons, http://wiki.creativecommons.org/History, and describing Creative Commons as "an international phenomenon").

181. In January 2005, the legislative study group was tasked with the question of how the existing system ought to handle hard-disk-based players. *See* Fujiwara part two, *supra* note 179. The report of the study group was issued in early De-

In doing so, they were forced to confront not only iPods and other hard-disk based devices but also the delivery of music via cellphones and internet connections. Thus, the press description as the study of an iPod tax was something of a misnomer, since the debate was actually wider.[182]

The reasons behind the defeat of the iPod tax are like two sides of the same coin. First, the panelists expressed dissatisfaction with the existing digital clearinghouse system, and doubts about extending it. Additionally, they hoped for something better, echoing in part the optimism of some American commentators on DRM technology. Members generally voiced concerns about lack of public awareness of what they were being levied for and how much—one committee member opined that she thought there were "many misunderstandings overall" that undermined the case for expanding the existing system.[183] In short, they thought that the existing system had a kind of democratic deficit. In particular, echoing the *Grokster* case in the United States,[184] members expressed doubts about the ability to decide whether all hard-disk based devices should be deemed as aimed at copyrighted music or video, or whether this risked over-inclusion of devices that can be used for other purposes.[185] As one committee member pointed out, "the things [iPods and MP3 players] themselves are hard disks which can be used for any purpose" not just copying or storing copyrighted music.[186]

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cember. *Bunka shingikai chosakuken bunkakai housei mondai shyouiinkai houkokusho* [*Report of the Legal Issues Sub-Committee of the Culture Council Copyright Sub-Panel*] (Japan), Dec. 2005 (Saari Endo, trans.) (translation on file with author).

182. *See, e.g.*, Martin Fackler, *Japan's Music Industry Wants Fee on Sales of Latest Digital Players*, N.Y. TIMES, Oct. 10, 2005, at C4; Yuri Kageyama, *Japan Mulling "iPod Tax," but Divided Opinions Make Imposition Unlikely*, SEATTLE TIMES, Oct. 12, 2005, *available at* http://archives.seattletimes.nwsource.com/cgi-bin/texis.cgi/web/vortex/display?slug=webipodtax12&date=20051012.

183. *See Minutes*, *supra* note 153, at 43 (statement of member manga artist Machiko Satonaka) ("I think there are many misunderstandings overall, so if we are to expand the scope of the system from here on, I think it is necessary to more and more intensively publicize how much of this is being used to protect copyrights.").

184. *See* Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 936–41 (2005).

185. *See Minutes*, *supra* note 153, at 31 (statement of member attorney Takashi Yamamoto) ("[D]oesn't the issue arise in this situation of whether it is fair to place something [capable of noninfringing use] within or outside the scope of remuneration . . . ?").

186. *Id.*

The spectre of DRM also loomed large over the proceedings. Like American commentators, some *shingikai* panelists believed that DRM, which could supply the technological ability to solve the market failures that at least partially justify fair use, could also make the existing Japanese digital clearinghouse system unnecessary.[187] As one committee member pointed out, "when DRM and other rights management systems operate to protect the rights of the rights holders" the grounds for the system "disappear."[188] From the consumer's vantage point, others pointed out that it seemed unfair to continue to impose the levy for private copying if DRM would reduce the ability of consumers to make such copies. In effect, they feared that consumers would be deprived of the benefit of their bargain by "technological preservation measures" imposed by rights-holders.[189]

In written summaries, the council did put forth several arguments in favor of extending the current levy into an iPod tax. First, their fact-finding showed that purchases of iPods, MP3 players and other similar devices were used primarily to make digital copies of music; indeed, it seemed inequitable to treat hard-disk based devices differently from recordable CDs and mini-disks which were already covered by the levy.[190] Additionally, the council found that, while there may be cases to which the levy cannot be extended, it is inevitable that technological change would require its application to some new

187. *See id.* at 30 (statement of Takashi Yamamoto) ("[I]sn't it the case that the grounds for this remuneration system to apply disappear when DRM and other rights management systems operate to protect the rights of the rights holders?").

188. *Id.*

189. *Id.* at 37 (statement of member Professor Hiroshi Morita) ("I think the private audiovisual recording remuneration system is premised on the meaning that if you pay the remuneration, you can freely conduct private audiovisual recording if you want, but in contrast to that, copy controls like DRM are expanding, and if private audiovisual recording can no longer be freely conducted, it may be time to do away with the remuneration system for private audiovisual recording."); *id.* at 50, 51 (statement of member Professor Toi) (observing that "technological preservation measures are being developed" and concluding that "we should consider . . . a structure" in which works containing such controls are excluded from the remuneration system).

190. Ministry of Cultural Affairs, Copyright Shingikai, Legislative Subcommittee, *Chief Opinions Concerning the Designation of Hard-Disk Based Devices*, Jul. 29, 2005 (Japan), *available at* http://www.mext.go.jp/b_menu/shingi/bunka/gijiroku/013/05072901/001.htm (last visited Nov. 15, 2007) (Joe Jones, trans.) (translation on file with author).

cases.[191] Finally, the council observed that if the iPod tax were imposed, it would be necessary to address the contracts and burdens that stronger DRM would impose on consumers and the impact this would have on Japan's existing system of "fair use"-like permissible private copying.[192]

The *shingikai* minutes also contain several arguments against adopting the iPod tax. Some members believed that the existing digital clearinghouse system's problems made it a poor candidate for expansion.[193] First, there was the problem that users who bought music downloads from online services to put on their hard-disk players would essentially be double-charged for the same digital copy, once in the fee to the online service and a second time via the noncommercial use levy.[194] Second, some panelists were concerned about fairness and transparency; because the levy is incorporated in the price of the device and/or media, consumers pay without understanding why or how much.[195] Third, the hard-disk players differ from previously levied devices because the media and the device were physically integrated into machines that could have more general use than duplicating copyrighted works.[196] Essentially, this problem partly resembles the U.S. issue of how to deal with devices capable of a substantial noninfringing use—the chief problem in *Sony* and *Grokster*.[197] Finally, there was some doubt about the ability to properly craft a rule that would attach the levy only to the "right" hard-disk based devices.[198]

Ultimately, inability to gather a consensus doomed the Japanese iPod tax.[199] As a result, as private copying shifts

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191. *Id.*
192. *Id.*
193. *Id.*
194. *Id.*
195. *Id.*
196. *Id.*
197. *See* Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 936–41 (2005); Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 442 (1984) (stating that "[t]he question is thus whether the Betamax is capable of commercially significant noninfringing uses").
198. *Compare Grokster*, 545 U.S. at 932–33 (recognizing need for a rule to deal with the "equivocal conduct of selling an item with substantial lawful as well as unlawful uses"), *with Sony*, 464 U.S. at 441–42 (recognizing need to craft distinction allowing sale of items that "though adapted to an infringing use" are "capable of substantial noninfringing use").
199. *See* Martin Fackler, *Japanese Panel Rejects 'iPod Tax,'* INT'L HERALD TRIB., Dec. 1, 2005, *available at* http://www.iht.com/articles/2005/12/01/business/

away from devices such as recordable CDs and towards hard-disk and flash-memory based devices, and as the delivery system moves from CD rental shops to cell phones and the internet, Japan's digital clearinghouse system may sunset through inaction in the face of technological change. The debate over Japan's iPod tax suggests that this result derives at least in part from Japan's ambivalence towards its digital clearinghouse system.

IV. A FRIENDLY AMENDMENT TO THE AMERICAN PROPOSALS

The failure of Japan's iPod tax demonstrates several problems that the adoption of an American clearinghouse model must address. Although Japan's system of policy-making differs from ours, there are some similarities. Like Japan, America has a political system that many characterize as relatively favorable to producer lobbies over consumer groups, particularly in the IP area.[200] Despite that producer bias, just as Japan had an incumbent industry of CD renters and rental shops, America has an existing base of music filesharers and iPod users. Perhaps most importantly, like Japan, it is difficult to imagine producers, consumers, academics and government officials reaching consensus. And certainly, America also has its own history of capture of well-intentioned regulatory bodies.[201]

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ipod.php (citing Ministry of Cultural Affairs official statement that "without a consensus" proposal could not proceed); Kageyama, *supra* note 182 (observing that "divided" study group was "highly unlikely" to come up with an agreement, thereby dooming proposal). In general, Japanese policymakers operate under a system of deliberation and consensus. *See* Carl F. Goodman, *The Somewhat Less Reluctant Litigant: Japan's Changing View Towards Civil Litigation*, 32 LAW & POL'Y INT'L BUS. 769, 782 (2001) (stating that in Japan "legislation is drawn up over an extended number of years through a consensus-making process"); Yoshiharu Matsuura, *Law and Bureaucracy in Modern Japan*, 41 STAN. L. REV. 1627, 1634 (1989) (stating "[t]he primary duty of the bureaucrats [in Japan] is to help the 'consensus' (whatever it may be) emerge, and to lead the whole process to the culmination of a new law"); UPHAM, *supra* note 172, at 203–04 (noting "consultative consensual character" of Japanese "administrative process" traditionally).

200. *See, e.g.*, Timothy B. Lee, *Entangling the Web*, N.Y. TIMES, Aug. 3, 2006, at A21 (likening dangers that net neutrality legislation would be captured by regulated industry to history of Interstate Commerce Commission's capture by railroad industry).

201. *Id.*; *see also* Jean-Jacques Laffont & Jean Tirole, *The Politics of Government Decision-Making: A Theory of Regulatory Capture*, 106 Q. J. ECON. 1089 (1991); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971).

The proposal here seeks to modify the existing clearinghouse proposals to make interest-group capture of regulation more difficult. Regulatory capture is often looked at as a pathology; to the extent it is one, there is no widely-agreed-upon panacea. Nevertheless, some commentators have suggested several preventive measures to prevent such capture. Cass Sunstein has advocated cost-benefit analysis to move beyond the question of which interest group pays more to regulation based on wider concerns.[202] Ian Ayres and John Braithwaite have suggested that rules that keep a single maverick private player in an industry "honest" can be preferable to the kind of industry-wide regulation that leads to capture.[203] Others have suggested that transparency of policymaking to the public particularly aids the effort to avoid regulatory capture.[204]

In view of these critiques and the Japanese experience, this Article makes the following proposal. The digital clearinghouse model with the features common to the proposals discussed should be adopted. However, it should have four features not previously proposed:

1. The clearinghouse should be structured as a cooperative owned by those users who purchase copyrighted works.

2. Ownership should be pro rata divided by users based on their annual level of purchasing copyrighted works.

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202. *See* Cass R. Sunstein, *Cognition and Cost-Benefit Analysis*, 29 J. LEGAL STUD. 1059, 1064–73 (2000); *see also* Steve P. Calandrillo, *Responsible Regulation: A Sensible Cost-Benefit, Risk Versus Risk Approach To Federal Health and Safety Regulation*, 81 B.U. L. REV. 957, 975 (2001) (stating that "the implementation of cost-benefit and risk-risk analysis should help avoid such misallocation of resources based on inappropriate private pressure").

203. Ian Ayres & John Braithwaite, *Partial-Industry Regulation: A Monopsony Standard for Consumer Protection*, 80 CAL. L. REV. 13, 52–53 (1992) (proposing regulation of a single player or part of market to delegate part of regulatory role to the competitive process; partial-industry regulatory regimes seek to "restrain the private exploitation of monopoly power without substituting the public exploitation of capture"); *see also* Jonathan B. Baker, *Mavericks, Mergers, and Exclusion: Proving Coordinated Competitive Effects Under the Antitrust Laws*, 77 N.Y.U. L. REV. 135, 174–76 (2002) (explaining how a single "maverick" firm in an industry can prevent others from colluding and achieving anti-consumer results).

204. *See* Cary Coglianese, Richard Zeckhauser & Edward Parson, *Seeking Truth for Power: Informational Strategy and Regulatory Policymaking*, 89 MINN. L. REV. 277, 334 (2004); David B. Spence & Lekha Gopalakrishnan, *Bargaining Theory and Regulatory Reform: The Political Logic of Inefficient Regulation*, 53 VAND. L. REV. 597, 623 (2000) (noting belief that "[o]nly rigorous transparent standards . . . can prevent regulatory capture" in the environmental regulatory context).

3. The prices for copyrighted works should be set by the clearinghouse itself.

4. A portion of the clearinghouse's revenues should be rebated back to users annually.

This structure would achieve several goals in line with preventing regulatory capture. First, a user-owned cooperative would be independent of other distribution channels. While agency problems will always exist, keeping ownership based on current-year use prevents the acquisition of the clearinghouse. Governance should be modeled based on existing cooperative models, through the election of coop shareholder representatives to direct the organization. Thus, it is more likely to remain an independent player in the industry. Even if other competing, proprietary channels emerge, the clearinghouse's maverick status may hinder the industry-wide collusion necessary for the capture of copyright regulation.

Second, by turning users into owners, this structure would give users more of a stake in the optimization of prices by the cooperative's directors.[205] By rewarding users with a share of the profits from the distribution, the cooperative would have strong incentives to make their own accurate "cost-benefit analysis." Get the prices too low, and too few works would be created and sent through the clearinghouse;[206] too high, and users would buy fewer works. Additionally, an individual work that, all things being equal, was encumbered with burdensome DRM would be "overpriced" and thus fail in competition with less "locked-up" works. The copyright holder would have to decide whether to drop the DRM or face a drop in price.

Third, and perhaps most relevant to the Japanese debate, a user-owned clearinghouse is most likely to be transparent. For its own operation, it will likely have to make significant disclosures to users. Their financial interest in the clearinghouse's workings suggest that they will have an incentive to push for such information. And this financial stake also gives

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205. Jessica Litman's proposal, *see supra* note 6, did seem to reflect her view, expressed more fully in her later work, Jessica Litman, *Lawful Personal Use*, 85 TEX. L. REV. 1871, 1878 (2007), that users should be recognized as possessing some kind of cognizable right.

206. Some might fear that users would be tempted to set prices quite low, since the lost rebate to them would be outweighed by reduced expenditures on copyrighted works. However, that temptation would be partially offset by (a) increased sales volume at the lower price and (b) lowered incentive to create works for the system due to overly low prices.

diffuse users a tangible reason to organize, so as to counteract the inherent advantage that producers have in this regard.

Finally, this structure is particularly suited to some sort of private right of action. The legal infrastructure for the adjudication of such claims already exists in the United States.[207] Additionally, embracing the American tradition of private litigation on behalf of consumers can help keep in check industry capture of an American digital clearinghouse.

CONCLUSION

Japan's rejection of the kind of digital clearinghouse that some American law professors seek does not involve a repudiation of the proposal on the merits. Rather, the debate shows the difficulty of implementing such a system in the real world given the very real possibility of regulatory failure. This is true even when implementation is primarily just an extension of an existing system. Thus, any such system must be designed to be resilient against attempts at capturing it.

207. *See* Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action,* 103 COLUM. L. REV. 149, 151 (2003) (describing American "class actions today [as] serv[ing] as the procedural vehicle not ultimately for adversarial litigation but for dealmaking on a mass basis . . . in which class members' rights to sue are 'bought and sold'"). Class actions in civil litigation may come to be less particular to America. *See* Hannah L. Buxbaum, *Transnational Regulatory Litigation,* 46 VA. J. INT'L L. 251, 296 (2006) (describing growing adoption of group claims in European consumer protection law).