

## Impose Noncommercial Use Levy to Allow Free P2P File-Swapping and Remixing

Neil Weinstock Netanel\*

Commentators and courts have universally hailed the Internet as a vibrant new forum for self-expression and debate. But this acclamation masks sharp disagreement over whether certain Internet activities rightly fall within that favored category of constitutive speech. A prime example is the unlicensed use of copyright-protected material. The explosion of sharing and remixing popular songs and movies over Internet-based peer-to-peer networks like Napster and Morpheus has evoked sharply discordant reactions. Some commentators embrace that collection, exchange, and transformation of existing works as part and parcel of the individual autonomy, self-expression, and creative collaboration for which we celebrate the Internet. Others denounce those activities as the massive piracy of intellectual property. They fear that P2P file swapping poses a mortal threat to the copyright system that has spawned much of our cultural heritage.

The P2P controversy has degenerated into a steadily intensifying war of words and legal action. The copyright industries have successfully shut down a number of peer-to-peer networks – most famously, Napster -- and continue to bring lawsuits against others. They have also sought to compel telecommunications and consumer electronics companies to disable unlicensed P2P sharing of copyright-protected works.<sup>1</sup> The industries are now poised to target individuals who trade large numbers of files as well.<sup>2</sup> Yet, despite this three-pronged attack, unlicensed P2P file swapping continues apace. An estimated 5.16 billion audio files and well over 100 million video files were exchanged in 2001.<sup>3</sup>

As is often the case with such conflicts, both sides of the P2P debate make some credible arguments. On one hand, we should rigorously applaud the online collecting, swapping, reworking, and remixing of music, films, TV programs, art, and stories. By engaging in such activities, people who might previously have been passive consumers

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\* Arnold, White & Durkee Centennial Professor of Law, University of Texas School of Law.

<sup>1</sup> See *infra* notes 20 - 31.

<sup>2</sup> The industry has both pressed for criminal prosecution of and is preparing for filing civil actions against P2P file swappers. See Declan McCullagh, *Music body Presses Anti-piracy Case*, CNET News.com, August 20, 2002, <http://news.com.com/2100-1023-954658.html> (reporting that the Recording Industry Association of America has asked a federal judge for an order compelling Verizon Communications to reveal the name of a Verizon customer whom the RIAA accuses of illegally trading hundreds of songs); Declan McCullagh, *DOJ to Swappers: Law's Not on Your Side*, CNET News.com, August 20, 2002, <http://news.com.com/2100-1023-954591.html> (reporting statement by Department of Justice attorney that the Department is prepared to begin prosecuting individuals who engage in P2P file swapping, following Congressional and industry lobbying for such prosecutions); John Borland, *Record Labels Mull Suits Against File-Traders*, CNET News.com, July 3, 2002, <http://news.com.com/2100-1023-941547.html?tag=rn> (reporting industry deliberations regarding launching of civil suits against prolific file-swappers).

<sup>3</sup> Larry Dignan, *Study: Kazaa, Morpheus Rave On*, CNET News.com, August 14, 2002, <http://news.com.com/2100-1023-949724.html> (reporting results of Yankee Group study regarding audio files); *MPAA Snooping for Spies*, Wired News, July 22, 2002, <http://www.wired.com/news/politics/0,1283,54024,00.html> (reporting estimate of between 400,000 to 600,000 video files every day).

now assert a more active, self-defining role in the enjoyment, use, and creation of cultural expression, and share their interest, creativity, and active enjoyment with others. As Larry Lessig crisply puts it: “This is the art through which free culture is built.”<sup>4</sup> But at the same time, Internet users’ widespread downloading of unlicensed audio, video, graphic, and text files could well supplant markets for copyright-protected expression. Digital technology makes it easy for Internet users’ to distribute multiple perfect copies of a work throughout the world without compensating authors or other copyright holders. Such untrammled P2P file swapping could eviscerate the economic incentive for creating many types of valuable works.

Commentators and policymakers have put forth a variety of proposals to address the P2P file swapping controversy. In this paper I build upon an idea that I think holds the most promise: allowing untrammled noncommercial P2P file swapping in return for imposing a levy on certain P2P-related services and products. The levy, which I will term the “Noncommercial Use Levy,” or “NUL,” would be imposed on Internet Service Providers, computer hardware manufacturers, manufacturers of consumer electronic devices, such as CD burners, MP3 players, and DVD recorders, used to copy, store or perform downloaded files, manufacturers of storage media, commercial suppliers of P2P software and services, and commercial providers of other products or Internet access services the value of which, the Copyright Office determines, P2P file swapping substantially enhances. In return for imposition of the NUL, the law would provide for copyright immunity for individuals’ noncommercial copying and distribution of over digital networks of certain types of copyright-protected content.<sup>5</sup> Individuals’ noncommercial adaptations and modifications of such content would also be noninfringing as long as the derivative creator identifies the underlying work and indicates that it has been modified. The law would preclude digital content providers from employing technological Digital Rights Management (DRM) controls designed to block such noninfringing uses, but my proposal contemplates the application of DRM for other purposes.

The amount of the NUL would be determined (and periodically redetermined) by negotiations between ISPs and manufacturers of levied products, on one side, and associations representing holders of rights in different categories of works, on the other. The negotiations would be subject to mandatory arbitration before the Copyright Arbitration Royalty Panel in the absence of agreement. Levy proceeds would be distributed to copyright holders in proportion to the number of downloads and subsequent uses of their respective works and of users’ adaptations of their works, as measured by digital sampling technologies.

The NUL stands alongside two well-established mechanisms for allowing unhindered uses of copyright-protected material while still compensating copyright holders. These are: (1) levies on equipment and media used to make personal copies and (2) compulsory licenses for distributors of copyright-protected material, such as those available to record companies for producing cover recordings and cable and satellite TV operators for transmitting off-air broadcasts. Like the equipment and media levies, the

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<sup>4</sup> LAWRENCE LESSIG, *THE FUTURE OF IDEAS; THE FATE OF THE COMMONS IN A CONNECTED WORLD* 9 (2001).

<sup>5</sup> I set forth what I mean by “noncommercial” and “certain types of copyright-protected content” in the text accompanying notes 73- 75 *infra*.

NUL would serve to allow noncommercial personal uses. But the NUL would allow noncommercial distribution and modification as well as personal copying. It would also be imposed on ISPs, the supplier of an ongoing service that enables users to receive and distribute content, not solely on the sale of products used for consumer copying. Like the compulsory licenses, the NUL allows unhindered content distribution. But the NUL enables distribution by individual P2P participants rather than the entities upon which the compulsory fee is imposed.

I will argue that the NUL has significant advantages over leading alternatives to resolving the P2P file-swapping conundrum. These alternatives include (1) an absence of any legal requirement that copyright holders receive compensation for noncommercial uses, (2) content providers' proprietary control over content (through law and DRM), (3) current levies on equipment and media used to make personal copies, and (4) government subsidies to authors from general tax revenues. By highlighting NUL advantages, I do not mean to say that the alternative regimes should have no place in our legal regime. I argue only that the NUL should occupy a central role in accommodating the interests of noncommercial creators with those who create in exchange for monetary reward. To that end, the NUL would supplement or accommodate, rather than replace, the enumerated alternatives in some respects.

## I. BACKGROUND

The copyright industries have long insisted that they must be able to control the use of their works if they are to make their content inventories available over digital networks. Traditional copyright law is of uncertain efficacy to that end. Most commentators view personal, non-commercial copying as noninfringing, and there is some judicial support for that position as well.<sup>6</sup> In contrast, courts have held that the P2P distribution and modification of copyright-protected material does infringe even if undertaken without monetary compensation.<sup>7</sup> Indeed, under the No Electronic Theft Act, enacted in 1997, large-scale file trading can even constitute a crime.<sup>8</sup> But copyright holders have, at least until recently, regarded enforcement actions against individual Internet file-swappers as both impractical and impolitic.

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<sup>6</sup> See, e.g., *American Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 916 (2d Cir. 1994) (distinguishing systematic copying by company scientists from “copying by an individual, for personal use in research or otherwise (not for resale),” which, “under the fair use doctrine or the *de minimis* doctrine . . . might well not constitute an infringement”); *Williams & Wilkins Co. v. United States*, 487 F.2d 1345, 1350 (Ct. Cl. 1973) (“[I]t is almost unanimously accepted that a scholar can make a handwritten copy of an entire copyrighted article for his own use.”). See also *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) (holding that home videotaping of television programs for purposes of “time-shifting,” or watching a program after it has been broadcast, was a noninfringing fair use); Audio Home Recording Act, 17 U.S.C. § 1008 (immunizing from copyright infringement consumers' noncommercial digital and audio music recordings).

<sup>7</sup> *A&M Records v. Napster, Inc.*, 239 F.3d 1004, 1015 (9<sup>th</sup> Cir. 2001) (stating that personal uses are “commercial,” and thus disfavored for fair use, whenever users “get for free something they would ordinarily have to buy”).

<sup>8</sup> The No Electronic Theft Act, Pub. L. No. 105-147, 111 Stat. 2678 (1997), changed the definition of “financial gain,” a prerequisite for criminal penalties for willful copyright infringement, from “for profit” to include the “receipt, or expectation of receipt, of anything of value, including the receipt of other copyrighted works.”

The copyright industries look to two sources to fill copyright's P2P gap: technology designed to detect and impede unauthorized consumer file swapping and legal rules that require third parties -- new media enterprises, telecoms, and consumer equipment manufacturers -- to assist in putting technological controls in place and preventing such unauthorized file swapping that escapes technology's grasp. Copyright industries have begun to deploy Digital Rights Management technology to detect and block unauthorized uses. Digital watermarks and Internet spiders can detect individual file swappers, and encryption can prevent unauthorized access and copying.<sup>9</sup> But skilled programmers can design software to circumvent most such measures. Accordingly, the industries contend, if technological controls are to be effective, the law must prohibit the dissemination of software and other devices capable of skirting DRM technology.

The copyright industries have thus far met a receptive ear in Congress. In 1998 Congress enacted the Digital Millennium Copyright Act, which, among other provisions, protects technological copying and access controls against circumvention.<sup>10</sup> The DMCA lays the groundwork for far-reaching copyright holder control over digital content. Armed with DRM technology and the right to prevent circumvention, content providers could require payment each time a user reads, views, or listens to a work online, and could often do so even with respect to works that are no longer protected by copyright.<sup>11</sup> Only consumer resistance might cabin this "universal pay-per-use and de facto perpetual protection."<sup>12</sup>

Film studios and record labels have invoked both the DMCA and traditional copyright law to hold new media enterprises liable for personal uses and peer-to-peer dissemination of content. They have sued providers of P2P network services, like Napster, and P2P file-trading software, like Morpheus, for vicarious and contributory liability for users' allegedly infringing copying and distribution of copyright-protected

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<sup>9</sup> Proposed legislation would give the industry broad new powers to use technological self-help to stifle P2P file-sharing. The bill, proposed by Representatives Howard Berman and lauded by copyright industry representatives, would immunize a copyright holder from all civil and criminal liability under state and federal law for "disabling, interfering with, blocking, diverting, or otherwise impairing the unauthorized distribution, display, performance, or reproduction of his or her copyrighted work on a publicly accessible peer-to-peer file-trading network," so long as no file or data residing on a file trader's computer is impaired. The bill can be viewed at <http://www.politechbot.com/docs/berman.coble.p2p.final.072502.pdf>. See also Declan McCullagh, *Hollywood Hacking Bill Hits House*, CNET News.com, July 25, 2002, <http://www.news.com.com.2100-1023-946316.html?tag=rm>.

<sup>10</sup> 17 U.S.C. § 1201. Technically, copyright holders can prevent the circumvention only of access controls, not copying controls. But they can prevent the provision of any technology, product, service, device, or component that is primarily designed to enable the circumvention of either type of control. As a result, most users will be unable to obtain the tools they need to circumvent even if the law does not forbid the circumvention itself.

<sup>11</sup> See David Nimmer, *A Riff on Fair Use in the Digital Millennium Copyright Act*, 148 U. Pa. L. Rev. 673, 727-32 (2000) (presenting case studies showing how otherwise noninfringing activity would be subject to content provider control under the Act).

<sup>12</sup> *Id.* at 741. Alternatively, whether by preference or in response to consumer resistance, content providers might bundle expression, through the sale of subscriptions and on-site licenses, rather than imposing micro-charges for each use. See Yannis Bakos & Eric Brynjolfsson, *Aggregation and Disaggregation of Information Goods: Implications for Bundling, Site Licensing, and Micropayment Systems*, in INTERNET PUBLISHING AND BEYOND: THE ECONOMICS OF DIGITAL INFORMATION AND INTELLECTUAL PROPERTY 114 (Brian Kahin & Hal R. Varian, eds., 2000) [hereinafter INTERNET PUBLISHING]; Peter C. Fishburn et al., *Fixed-Fee Versus Unit Pricing for Information Goods: Competition, Equilibria, and Price Wars*, in INTERNET PUBLISHING, *supra*, at 167, 168-73.

works.<sup>13</sup> They sued MP3.com for enabling subscribers to access songs on subscriber-owned CDs via the Internet.<sup>14</sup> They have sued ReplayTV for selling a digital video recorder that enables users to skip commercials and share copies of TV programs with others.<sup>15</sup> They sued distributors of software that enable users to circumvent the copy and access protection on music streaming and DVDs.<sup>16</sup>

Copyright industry insistence on control has brought it into conflict with telecommunications and consumer electronics companies as well as with Internet users and new media entrepreneurs facilitating personal uses. The copyright and telecommunications industries negotiated a partial solution to their conflict. Their agreement effectively deputizes Internet Service Providers to enforce copyright infringement claims. The ISP safe harbor provisions of the DMCA,<sup>17</sup> which were drafted by copyright and telecommunications industry representatives, immunize an Internet Service Provider from liability for infringing material that an ISP subscriber places on an ISP server so long as the ISP removes that material upon receiving proper notice from the copyright holder.<sup>18</sup> A parallel provision immunizes Internet search engines from liability for linking to infringing material if the search engine removes the link upon receiving the copyright holder notice.<sup>19</sup>

As might be expected, the safe harbor provisions have led to the removal from the Internet of considerable material, both infringing and non-infringing. Copyright holders have not been shy about sending out DMCA “take down” notices.<sup>20</sup> And in numerous instances, risk-adverse ISPs and Internet search engines have removed subscriber content in the face of dubious copyright infringement claims.<sup>21</sup> As Google lamely explained after

<sup>13</sup> A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001); Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., U.S. Dist. Ct., C.D. Ca., Case No. CV 01-08541 SVW (PJWx).

<sup>14</sup> UMG Recordings, Inc. v. MP3.com, Inc., 92 F. Supp. 2d 349 (S.D. N.Y. 2000).

<sup>15</sup> Paramount Pictures Corp. v. ReplayTV, Inc., U.S. Dist. Ct., C.D. Ca., Case No. CV 01-9358 FMC (EX).

<sup>16</sup> RealNetworks, Inc. v. Streambox, Inc., No. C99-2070P, 2000 U.S. Dist. LEXIS 1889 (W.D. Wash. 2000) (music streaming); Universal City Studios, Inc. v. Corley, 273 F.3d 429 (2<sup>nd</sup> Cir. 2001) (DVDs).

<sup>17</sup> 17 U.S.C. § 512.

<sup>18</sup> 17 U.S.C. § 512(c).

<sup>19</sup> 17 U.S.C. § 512(d).

<sup>20</sup> For example, the Motion Picture Association of America states that it has sent out over 100,000 such notices since 2001. *MPAA Snooping for Spies*, Wired News, July 22, 2002, <http://www.wired.com/news/politics/0,1283,54024,00.html>. See also Motion for Leave to File and Brief *Amicus Curiae* of United States Internet Service Provider Association in Support of Respondent, Recording Industry Ass’n of America v. Verizon Internet Services, Inc., Case No. 1:02MS00323, U.S. Dist. Ct., D.C., filed Sept. 11, 2002, at 2 (noting: “Every day, members of US ISPA collectively receive dozens, if not hundreds, of notifications under § 512(c) alleging online copyright infringement.”).

<sup>21</sup> See, e.g., *MPAA Snooping for Spies*, Wired News, July 22, 2002, <http://www.wired.com/news/politics/0,1283,54024,00.html> (describing the lawsuit that the proprietor of Internetmovies.com website filed against the MPAA after the MPAA notified his ISP, apparently incorrectly, that he engaged in illegal file-swapping and the IPS disconnected his Internet service); Declan McCullagh, *Google Yanks Anti-Church Sites*, Wired News, March 21, 2002, <http://www.wired.com/news/politics/0,1283,51233,00.html> (describing Google’s removal of URLs linking to sites of a Church of Scientology critics in response to a DMCA take down notice from the Church). A 1999 report on the first year of experience under the DMCA notice take down provisions, co-authored by counsel for Adobe Systems and Yahoo! and presented to the World Intellectual Property Organization, found that (1) ISPs generally comply with take down notices within 24 hours, (2) most of the web sites that are subject to the notices are noncommercial, and (3) some five percent of take notices are sham claims used to silence or harrass critics. Batur Oktay & Greg Wrenn, *A Look Back at the Notice-Takedown*

cutting links to sites of a Church of Scientology critic in the face of a DMCA take down notice from the Church: "Had we not removed these URLs, we would be subject to a claim for copyright infringement, regardless of its merits."<sup>22</sup>

Yet even that generally acquiescent ISP (and search engine) response has failed to satisfy the copyright industry. A principal reason is that the DMCA safe harbor provisions are largely inapplicable to current P2P technology. Current technology does not require file swappers to upload content to web sites that reside on ISP servers and to which others are directed by search engine links. Rather, P2P software like Gnutella, Morpheus, and, for that matter, Napster enable Internet users to find and exchange files located on other users' hard drives. Users do transmit files *through* ISP networks. But the DMCA provides ISPs with complete immunity from liability for monetary damages and sharply limits the availability of injunctive relief where the ISP acts merely as a conduit for user transmissions.<sup>23</sup>

The copyright industries have begun aggressively to pursue a number of strategies that sidestep those limitations. In so doing, they have unhinged the delicate working compromise that has characterized copyright and telecommunications industry relations since enactment of the DMCA.<sup>24</sup> A group of record labels recently sued the four companies that control the Internet network backbone, seeking an order enjoining the companies from allowing their routing systems to be used to access a China-based web site for downloading unlicensed music recordings.<sup>25</sup> The recording industry has also sought to compel Verizon Communications to reveal the name of a Verizon subscriber the industry accuses of trading hundreds of music files.<sup>26</sup> Presumably the industry would then seek an injunction to require Verizon to terminate the subscriber's account, as well as bring an infringement action or seek criminal prosecution directly against the subscriber. Finally, the motion picture and recording industries have backed legislation that would immunize copyright holders from liability to ISPs or their subscribers for using technological self-help to hack into and disrupt P2P networks.<sup>27</sup>

Copyright industries have also pressed consumer electronics manufacturers to make their products compliant with Digital Rights Management technology, which would make it impossible for consumers to copy protected content even for noncommercial

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Provisions of the U.S. Digital Millennium Copyright Act One Year After Enactment, WIPO Doc. OSP/LIA/2, at 12, 17 (Dec. 1, 1999), [www.wipo.org/eng/meetings/1999/osp/pdf/osp\\_lia2.pdf](http://www.wipo.org/eng/meetings/1999/osp/pdf/osp_lia2.pdf).

<sup>22</sup> Quoted from Google letter to the Church critic in McCullagh, *id.*

<sup>23</sup> 17 U.S.C. § 512(a). The copyright holder's sole recourse against the ISP in such a case is to seek an injunction requiring the ISP to terminate the current account of the infringing subscriber or, where the infringing material resides on an online location outside the United States, to block access to that site. 17 U.S.C. § 512(j)(1)(B).

<sup>24</sup> See John Borland, *ISPs Gird for Copyright Fights*, CNET News.com, Sept. 9, 2002, <http://news.com.com/2100-1023-957023.html>.

<sup>25</sup> *Arista Records, Inc., et. al., v. AT & T Broadband Corp., et. al.*, Civil Action No. 02 CV 6554 (KMW), S.D. N.Y., filed August 16, 2002. The record companies withdrew their complaint after the offending web site mysteriously went offline. Anick Jesdanun, *Record Companies Drop Lawsuit*, Washingtonpost.com, August 21, 2002, <http://www.washingtonpost.com/wp-dyn/articles/A46326-2002Aug21.html>.

<sup>26</sup> See Declan McCullagh, *Music Body Presses Anti-piracy Case*, CNET News.com, August 21, 2002, <http://news.com.com/2100-1023-954658.html> (describing RIAA request and Verizon opposition).

<sup>27</sup> See *supra* note 9.

personal uses.<sup>28</sup> Consumer electronics manufacturers have resisted copyright industry efforts to obtain uniform DRM technical standards. Although they espouse a commitment to protecting intellectual property, the manufacturers oppose the functional degrading of device capability and drag on innovation that technology mandates would entail.<sup>29</sup> The copyright and consumer electronics industries remain at loggerheads. Legislation pending before Congress would require consumer electronics equipment, including personal computers and television sets, to meet DRM control standards.<sup>30</sup> But at this point, given the manufacturers' staunch opposition, Congress appears unlikely to enact it.<sup>31</sup>

In short, the copyright industry's antidote for peer-to-peer copying and distribution is to assert hermetic control over every access and use of digital content, backed by DRM technology, ISP policing, and compliant consumer electronics. Until such time as that regime can be put into place, copyright industries continue to attempt to withhold much of their content from online distribution, and the little they have released has only been in grudging, rearguard response to the peer-to-peer networks that they are making every effort to quash.<sup>32</sup> The copyright industry's war on unauthorized P2P file sharing and refusal to unleash its content for online distribution threaten to still the bubbling fount of "bottom-up" self-expression flowing from peer-to-peer network communication. They have also helped to impede deployment of broadband platforms for the high-speed dissemination of video, audio, and large text files.<sup>33</sup> As such, the industry approach threatens to quell P2P's promise of serving as a highly significant new platform for creativity and speech.

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<sup>28</sup> See Drew Clark & Bara Vaida, *Copyright Issues: Digital Divide*, National Journal, Sept. 6, 2002, <http://nationaljournal.com/about/njweekly/stories/2002/0906nj1.htm#> (detailing ongoing struggle between Hollywood and Silicon Valley).

<sup>29</sup> See *id.*

<sup>30</sup> The so-called Consumer Broadband and Digital Television Act would mandate technical standards for DRM controls absent agreement between content providers and consumer electronics companies. John Borland, *Anti-piracy Bill Finally Sees Senate*, CNET News.com, Mar. 21, 2002, <http://news.com.com/2100-1023-866337.html>. The FCC has also issued a proposed rule-making on adopting a DRM control standard, the so-called "broadcast flag," for digital television. FCC, In the Matter of Digital Broadcast Copy Protection, MB Docket No. 02-230, Notice of Proposed Rulemaking, August 8, 2002, [http://www.fcc.gov/Daily\\_Releases/Daily\\_Business/2002/db0821/FCC-02-231A1.pdf](http://www.fcc.gov/Daily_Releases/Daily_Business/2002/db0821/FCC-02-231A1.pdf).

<sup>31</sup> But see Declan McCullagh, *Why Telecoms Back the Pirate Cause*, CNET News.com, August 27, 2002, <http://news.com.com/2008-1082-955417.html> (quoting Verizon official's expression of concern that the bill might be broken up into pieces that will be reintroduced in new legislation).

<sup>32</sup> Amy Harmon, *Grudgingly, Music Labels Sell Their Songs Online*, N.Y. Times on the Web, July 1, 2002, <http://www.nytimes.com/2002/07/01/technology/01TUNE.html>. See also Simon Avery, *Company to Put Music Library Online*, July 9, 2002, <http://www.siliconvalley.com/mld/siliconvalley/news/3625461.htm> (reporting record label plan to release for digital distribution, through its subscription service, only its older, less popular content that doesn't sell quickly in stores and that amounts to less than one tenth of its catalogue).

<sup>33</sup> See Lawrence Lessig, *Who's Holding Back Broadband?*, Washington Post, Jan. 8, 2002, at A17 (quoting FCC Chairman Michael Powell as indicating that copyright holder reluctance to release content for broadband distribution has impeded broadband development and suggesting that a compulsory license to use copyright-protect content might be necessary to further broadband). Copyright industry concerns over P2P file swapping have also contributed to substantial delays in the Congressionally-mandated transition to digital television. See Mike Musgrove, *Digital TV Founders on Fears of Internet Piracy*, Washington Post, June 1, 2002, at E1 (reporting on inconclusive discussions between motion picture studios and consumer electronics companies regarding the adoption of technical standards for DVD movies' copy-prevention).

## II. BETWEEN THE SHOALS

My proposal for a NUL levy navigates between the twin shoals of what I term “digital abandon” – the massive unauthorized personal copying and dissemination of copyrighted works -- and “digital lock-up” – copyright industries’ hermetic control over every use of and access to those works in digital format. My proposal would give individuals the unhindered right to engage in the noncommercial copying, exchange, and modification of much copyright-protected expression. But to the extent ISPs and consumer electronics manufacturers pass on levy costs to their customers, it would effectively require that individuals pay for that right. My proposal would deny copyright holders proprietary control over such noncommercial uses. But it would entitle them to compensation for those uses.<sup>34</sup> Before further delineating my proposal, it is worth briefly assessing the digital abandon and digital lock-up alternatives.

Some commentators contend that digital abandon would greatly benefit all but entrenched copyright industries.<sup>35</sup> They emphasize that our use of existing expression is a social good, whether seen in market terms as the satisfaction of consumer wants or liberal democratic terms as an instance of personal liberty, self-definition, and self-expression. And they argue that the extension of copyright -- and content providers’ technological control – into personal free use zones has no justification. Copyright, they posit, operates primarily to protect traditional content distributors – record labels, book publishers, and movie studios – far more than creators. That protection might have been warranted in the brick-and-mortar world, when content distribution required massive investments in money and labor. But peer-to-peer networks, they maintain, render middlemen-content distributors, and thus copyright, obsolete. In the digital universe, in fact, copyright serves as a vehicle for media conglomerates to entrench their market position and expressive power. The copyright industries have employed copyright infringement litigation to stifle peer-to-peer networks and dry up financing for new media enterprises that threaten industry dominance.<sup>36</sup> Copyright also distorts our expressive universe by rewarding marketing muscle rather than spurring creation. Digital abandon, the commentators maintain, would beneficially undermine copyright industry entrenchment and distortion without unduly reducing incentives for authors. Under a regime of digital abandon, they contend, much expression would be created and

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<sup>34</sup> To paraphrase Richard Stallman’s apt distinction, they allow free use, in the sense of free (unbounded) speech, but not in the sense of free (gratis) beer.

<sup>35</sup> In describing the position favoring digital abandon, I synthesize arguments variously (and cogently) expressed by several commentators, including Ramond Ku, Jessica Litman, Glynn Lunney, and Mark Nadel. See Raymond Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 U. Chi. L. Rev. 263 (2002); Jessica Litman, *Digital Copyright* 151-86 (2001); Glynn S. Lunney Jr., *The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act*, 87 Virg. L. Rev. 813 (2001).

<sup>36</sup> For a discussion of this phenomenon from the viewpoint of a scholar who does not advocate digital abandon, see Randal C. Picker, *Copyright as Entry Policy: The Case of Digital Distribution*, Chicago John M. Olin Law & Economics Working Paper No. 147 (2d Series), <http://www.law.uchicago.edu/Lawecon/index.html>. Jane Ginsburg discusses previous instances in which copyright owners have sought to eliminate a new kind of dissemination, but denies that this is the case with P2P dissemination. Jane C. Ginsburg, *Copyright and Control Over New Technologies of Dissemination*, 101 Colum. L. Rev. 1613 (2001).

disseminated for free. In their view, in fact, such a regime could also provide authors with economic incentives from audience tipping and other sources that do not require copyright protection.

Digital lock-up seems to stand at the opposite end of the spectrum. Yet some commentators maintain that copyright holders' hermetic control would actually enable copyright industries to distribute their vast content inventories without burdening speech.<sup>37</sup> In this view, copyright holders armed with digital control would have every incentive to make their works widely available to all audiences and potential speakers. Copyright holders could do so through differential pricing, charging each user just what she is willing to pay for her desired use, whether it be downloading, a one-time listen or read, or incorporating the work into new expression. What's more, market pricing would signal consumer demand, and thus induce content producers to tailor content and content delivery mechanisms to the full spectrum of consumer tastes. Accordingly, these commentators contend, copyright holder control would both bolster and refine copyright incentives, without relying upon untested alternative compensation schemes and while allowing for widespread public access to existing expression.

Both sides make cogent arguments. But as I have discussed elsewhere, each overstates its case.<sup>38</sup> Like much of today's Internet, a copyright-free realm of digital abandon would undoubtedly be populated with a plethora of volunteer expression. But many expressive works – full-length motion pictures, novels, investigative journalism, and others -- require a sufficiently material commitment of time and money such that far fewer would be created without some mechanism for compensating authors.<sup>39</sup> Of equal, related importance is copyright's structural role in our system of free expression.<sup>40</sup> Copyright helps to underwrite a sector of professional, market-supported authors and publishing enterprises that serves as the cornerstone for a robust, independent press, with the wherewithal needed to stand up to government officials, corporations, political parties, and other centers of state and private power. Historically, copyright served to liberate authors from heavy-handed aristocratic patronage by providing them with a potential livelihood from paying audiences. In a liberal democratic society that rightly places a premium on free speech and free press, there remain substantial benefits to funding the creation and dissemination of many expressive works, and to funding them from sources other than state subsidy, corporate munificence, and party patronage.<sup>41</sup>

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<sup>37</sup> Here I synthesize various, leading arguments in support of this copyright maximalist (or "optimist") position in PAUL GOLDSTEIN, *COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX* (1994); 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 (1998); Stan Liebowitz, *Policing Pirates in the Networked Age*; Cato Policy Analysis No. 438, May 15, 2002, at 16-19, <http://www.cato.org/pubs/pas/pa438.pdf>.

<sup>38</sup> See NEIL WEINSTOCK NETANEL, *COPYRIGHT'S PARADOX: PROPERTY IN EXPRESSION/FREEDOM OF EXPRESSION* (Oxford U. Press forthcoming 2003).

<sup>39</sup> Jane Ginsburg has aptly called such works "sustained works of authorship." Jane C. Ginsburg, *Putting Cars on the "Information Superhighway": Authors, Exploiters, and Copyright in Cyberspace*, 95 COLUM. L. REV. 1466, 1499 (1995).

<sup>40</sup> See Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 Yale L. J. 283, 352-63 (1996).

<sup>41</sup> Neil Weinstock Netanel, *The Commercial Mass Media's Continuing Fourth Estate Role, in THE COMMODIFICATION OF INFORMATION* (Niva Elkin-Koren & Neil Netanel eds. forthcoming 2002).

Advocates of unhindered peer-to-peer file sharing do consider some intriguing alternative mechanisms for compensating creators. These range from voluntary audience tipping, to giving away expression to spur demand for related goods, to product placement advertising. I cannot elaborate upon or fully assess these various alternatives here. It does seem that the proffered alternatives would not be fully effective, complete, or desirable. Online tipping and other forms of voluntary payment, initially much touted, have yet to yield meaningful remuneration.<sup>42</sup> Giving away expression to promote sales of related goods is suited only to a narrow class of creations, like complementary software products or, perhaps, distributing free music to spur demand for live performances. Heavy reliance on product placement advertising is likely to entail what many would see as undesirable, advertiser-driven distortions in creative expression.<sup>43</sup> Accordingly, compensating creators through the NUL would seem to provide significant benefits over relying entirely on alternative payment mechanisms and authors' non-compensatory incentives to create.

At the same time, the notion that, under a regime of digital lock-up, copyright holders would engage in near-perfect price discrimination such that all would have access is little more than a pipe dream. For one, copyright industries' have repeatedly exhibited a path dependent resistance to licensing or engaging in new technological methods of exploitation that might endanger their traditional profit centers.<sup>44</sup> Indeed, they have a long history of seeking to reap monopoly rents through anticompetitive collusion, blocking new entrants, and paying off gatekeepers for consumer attention.<sup>45</sup> In the multimedia and Internet contexts, copyright industries have also engaged in protacted cross-sectoral turf battles, leaving would-be licencees with the costly task of seeking overlapping permissions.<sup>46</sup> That institutional conservatism and balkanization does not

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<sup>42</sup> See Chris Kelsey, *Bandwidth: Passing the Virtual Hat*, Onstage, Dec 1, 2001, [http://onstagemag.com/ar/performance\\_bandwidth\\_passing\\_virtual](http://onstagemag.com/ar/performance_bandwidth_passing_virtual) (discussing limitations of current online tipping services); Janet Kornblum, *Ain't Too Proud to Beg on the Net*, USA Today, Jan. 8, 2002, <http://www.usatoday.com/life/cyber/tech/2002/01/08/usat-tipjar.htm> (offering a somewhat more optimistic view of the potential for online tipping, but still reporting that online tips for authors have been extremely modest thus far).

<sup>43</sup> A seminal work on the untoward influence of advertising on our system of free expression is C. EDWIN BAKER, *ADVERTISING AND A DEMOCRATIC PRESS* (1994). For discussion and criticism of product placement, see Mark Crispin Miller, *Hollywood: The Ad*, *Atlantic Monthly*, Apr. 1990, at 41, 42, 49; Steven L. Snyder, Note, *Movies and Product Placement: Is Hollywood Turning Films into Commercial Speech?*, 1992 U. Ill. L. Rev. 301 (discussing product placement in novels, records, and television, in addition to movies).

<sup>44</sup> Lessig, *supra* note 4, at 89-93 (discussing firms' path dependence).

<sup>45</sup> The industry's anticompetitive behavior continues. As Judge Patel said in granting Napster's request for discovery on issues of record label antitrust violations and copyright misuse by attempting to control digital distribution of music exclusively through their joint ventures: "Even on the undeveloped record before the court, these joint ventures look bad, sound bad, and smell bad." In re Napster, Inc. Copyright Litigation, Memorandum and Order of February 21, 2001, p. 23. See also Jon Healey, *Net Services Want Better License Deals From Labels*, L.A. Times, August 5, 2002, at Part 3, Page 5 (detailing independent online music service claims that labels systematically favor their own online services and reporting Justice Department antitrust investigation of those practices); Anna Wilde Mathews, *U.S. Probes Movie-Industry Ventures for Possible Antitrust Problems on Web*, *The Wall Street Journal*, Dec. 2, 2001. For an historical overview, see Lauren J. Katunich, Comment, *Time to Quit Paying the Payola Piper: Why Music Industry Abuse Demands a Complete System Overhaul*, 22 Loy. L.A. Ent. L. Rev. 643 (2002); Simon H. Rifkind, *Music Copyright and Antitrust: A Turbulent Courtship*, 4 Cardozo Arts & Ent. L. J. 1 (1985).

<sup>46</sup> Mark A. Lemley, *Dealing with Overlapping Copyrights on the Internet*, 22 Dayton L. Rev. 547 (1997); R. Anthony Reese, *Copyright and Internet Music Transmissions: Existing Law, Major Controversies*,

inspire confidence that, if only given control, the industries would make their full store of cultural expression readily available at reasonable prices.

In addition, advocates of digital lock-up hold a Panglossian view of digital technology's capacity to support access-enhancing price discrimination. The advocates' vision of individualized price discrimination is predicated on the assumption that digital technology can accurately predict consumer valuations by compiling and analyzing user profiles based on individuals' past uses and purchases. But such "Consumer Relationship Management" systems are intrinsically limited; they cannot determine the reasons for past purchases or tease out quirks and changes in a consumer's preferences.<sup>47</sup> Nor is individualized analysis likely to be commercially or politically tenable. Internet user surveys and, recently, voter referenda show considerable public opposition to suppliers' collection of data about individuals' reading, listening, and viewing habits.<sup>48</sup>

Finally, price discrimination faces material cost and institutional obstacles. Determining user valuations, setting differential pricing, designing product and distribution systems to enable differential pricing, and creating and enforcing prohibitions against consumer arbitrage require considerable information, labor, and financial and organizational resources.<sup>49</sup> Not surprisingly, therefore, copyright industries resist providing no-cost or reduced-price licenses for non-profit, non-commercial, and educational uses.<sup>50</sup> Mid-level decision makers in copyright industry firms often apparently prefer to deny a low-price license outright – or simply to ignore such licensing requests -- than to devote the time required for individualized treatment or to risk a supervisor's wrath for having granted a discount from standard pricing.

To some extent, digital technology might lower the costs and institutional barriers to price discrimination, at least with respect to end users of expressive works. But where the consumer is a speaker who wishes to build upon, reformulate, or otherwise incorporate existing expression in new speech, copyright holders will often need to engage in a costly, individualized, non-automated assessment of what price to charge. Moreover, copyright holders are often unwilling to license controversial and critical expression at any reasonable price.<sup>51</sup> Thus, even if individualized price discrimination

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*Possible Solutions*, 55 U. Miami L. Rev. 237 (2001). See also Jim Hu, *Listen.com Inks Another Broadband Deal*, CNET News.com, Sept. 4, 2002, <http://news.com.com/2100-1023-956498.html> (citing complexity of clearing multiple rights as barrier to licensed digital distribution of music).

<sup>47</sup> For a discussion of the limitations of digital technology-based systems in determining individual preferences, see Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. Rev. 429, 472 (2002); Dan Hunter, *Philippic.com*, 90 Calif. L. Rev. 611, 627-36 (2002).

<sup>48</sup> For a discussion of public apprehension regarding perceived invasions of privacy through data collection regarding individuals' Internet use, see Jerry Kang, *Information Privacy in Cyberspace Transactions*, 50 Stan. L. Rev. 1193, 1196-97 (describing survey results). See also *Bank Privacy Measure Fails*, GrandForks.com, June 12, 2002, <http://www.grandforks.com/mld/grandforks/3450535.htm> (reporting North Dakota voters' repeal of finance industry-backed legislation that had allowed financial institutions to sell customer data to outside companies without getting the customer's written permission).

<sup>49</sup> See Yochai Benkler, *An Unhurried View of Private Ordering in Information Transactions*, 53 Vand. L. Rev. 2063 (2000) (contending that information and implementation costs will always leave price discrimination imperfect); Michael J. Meurer, *Copyright Law and Price Discrimination*, 23 Cardozo L. Rev. 55, 101-02 (2001) (discussing costs of implementing price discrimination).

<sup>50</sup> There is a wealth of anecdotal evidence, backed by this author's own experience, to support this point. See also John Borland, *Webcasters, Labels Appeal Net Radio Fees*, CNET News.com, Aug. 7, 2002, <http://news.com.com/2100-1023-948834.html> (reporting that record labels have shown no licensing flexibility towards hobbyist and independent webcasters who will be forced to go offline if required to pay the \$.07 per song statutory license rate set by the Librarian of Congress).

<sup>51</sup> The Margaret Mitchell Estate's recent lawsuit against a parodic sequel of *Gone With the Wind* from slaves' viewpoint is a poignant recent example. See *Suntrust Bank v. Houghton Mifflin Co.*, 252 F.3d 1165

through digital technology is technically and politically feasible, it is unlikely to condescend copyright holders to license remixing, fan edits and sequels, or other speech that recasts existing expression in a light that conflicts with the copyright holder's views or business plan.

In sum, digital lock-up would seem to fortify copyright industries against competing distributors and speakers far more than to reconstitute the expressive benefits of peer-to-peer exchange. A regime of digital lock-up might give copyright industries sufficient confidence to make their works available online. But this regime would largely replicate the structure of the pre-Internet mass media. It would be bereft of much of the user choice and bottom-up reassembly, reconfiguration, and redefinition of popular culture that so profoundly enriches peer-to-peer network communication today.

### III. COPYING EQUIPMENT AND MEDIA LEVIES

Given the disadvantages of digital abandon and digital lock-up, the best solution to the P2P file-swapping conflict is to carve out a middle ground between gratis personal copying and copyright holders' proprietary control. Regimes that impose levies on private copying equipment and media have long occupied a middle ground, but for reasons I will present discuss, would not apply to P2P file swapping.

Many countries, including Canada and most of Europe, allow individuals freely to make private copies, in return for which levies are imposed on the equipment and media used for that purpose.<sup>52</sup> Germany's provisions are among the most comprehensive.<sup>53</sup> They make personal copying noninfringing, but impose a levy on the sale of audio and video recording equipment, as well recording media such as blank tapes and cassettes.<sup>54</sup> Likewise, they impose a levy on copying equipment (including photocopiers, scanners and, recently, CD burners), and on certain operators of such equipment (principally photocopiers), including universities, libraries, and copy shops.<sup>55</sup> German (and French) officials have also proposed imposing a levy on general purpose home computers, but this has proven highly controversial.<sup>56</sup>

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(11th Cir. 2001) (overturning a preliminary injunction against publication of the sequel on grounds of fair use); David D. Kirkpatrick, *A Writer's Tough Lesson in Birthin' a Parody*, N.Y. Times, Apr. 26, 2001, at E1 (reporting history of Mitchell Estate efforts to prevent unflattering or controversial treatments of the classic Civil War saga). See also *Worldwide Church of God v. Phila. Church of God, Inc.*, 227 F.3d 1110 (9th Cir. 2000) (church suppressing use of racist tract written by its founder but since repudiated by the church); *Houghton Mifflin Co. v. Noram Pub. Co., Inc.*, 28 F. Supp. 676 (S.D. N.Y. 1939) (authorized publisher of English translation of *Mein Kampf* suppressing unauthorized, critical translation).

<sup>52</sup> For a list of private copying levy provisions of European Union countries, see Lunney, *supra* note 35, at 853 n. 137. For a brief description of Canada's provisions, see Ysolde Gendreau & David Vaver, *Canada*, in 1 Paul Geller & Melville Nimmer, *International Copyright Law and Practice* (2002) [hereinafter Geller & Nimmer], § 8[2][f][ii].

<sup>53</sup> Reinhold Kreile, *Collection and Distribution of the Statutory Remuneration for Private Copying with Respect to Recorders and Blank Cassettes in Germany*, 23 Int'l Rev. Indus. Prop. & Copyright L. 449, 449 (1992).

<sup>54</sup> Act Dealing with Copyright and Neighboring Rights (Copyright Act of September 9, 1965), Section 54. See also Adolf Dietz, *Germany*, in 2 Geller & Nimmer, *supra* note 52, § 8[2][a][ii].

<sup>55</sup> Act Dealing with Copyright and Neighboring Rights (Copyright Act of September 9, 1965), Section 54a.

<sup>56</sup> Dietz, *supra* note 54, § 8[2][a][ii], citing Zweiter Bericht der Bundesregierung über die Entwicklung der urheberrechtlichen Vergütung gemäß §§ 54 ff. Urheberrechtsgesetz (Second Remuneration Report), Bundestags-Drucksache 14/3972, July 11, 2000, also published in 2000 UFITA (III), 691, summarized in 2000 GRUR 860 (German Federal Government proposal).

Private copying levy proceeds are typically paid to a central office and then divided among rights holders' collecting societies pursuant to legislated or negotiated schedules. In turn, the collecting societies disburse the proceeds following a sampling procedure designed to determine the likely level of private copying for each work.

A private copying levy is found in U.S. law as well, but it is far less extensive than that of other countries. In its 1984 decision, *Sony Corp. of America v. Universal City Studios*,<sup>57</sup> the U.S. Supreme Court ruled that home video recording of television programs is noninfringing fair use. In *Sony's* wake, Congress considered, but rejected legislation that would have imposed a levy on the sale of videocassette recorders.<sup>58</sup> At the same time, *Sony* left open whether home recording of music would also constitute fair use. Unlike home recording of TV programs, which, *Sony* emphasized, typically involves making a temporary copy to view at a more convenient time, music recording usually entails "librarying," making a permanent copy for the user's collection. The music industry was willing to abide by the uncertainty about whether that distinction makes a difference so long as home recording equipment enabled consumers only to make imperfect copies of commercial recordings. But with the advent of digital audio recorders, with their capability of making perfect copies that might supplant CD sales, the record labels lobbied Congress to take action, initially by banning the manufacture and import of digital recorders.<sup>59</sup>

Ultimately, the record labels and consumer equipment manufacturers hammered out a compromise, which was codified in the Audio Home Recording Act of 1992.<sup>60</sup> The AHRA imposes a levy on digital audio recording devices and blank storage media. In return for the levy (and for requiring manufacturers of digital audio tape recorders to incorporate technology preventing serial digital copying), the Act prohibits suits against consumers for noncommercial copying of music using digital or analog equipment designed for that purpose.<sup>61</sup>

The AHRA might serve as useful precedent, but its levy provisions have largely remained a dead letter because the market for digital audio recording devices never developed. Nor would the Act immunize all who engage in P2P file swapping. For one, the Act applies only to music, not video and text files. In addition, as courts have suggested, the AHRA would not immunize home audio taping via general purpose computers and other devices not designed primarily to record music.<sup>62</sup> Finally, the Act's immunization for private copying would not extend to making files available for download to others on a P2P network.

Likewise with respect to the European Union. In its May 22, 2001 Directive on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information

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<sup>57</sup> 464 U.S. 417 (1984).

<sup>58</sup> H.R. 1030, 98<sup>th</sup> Cong. (1983).

<sup>59</sup> See H.R. Rep. No. 102-873(II), 102d Cong., 2d Sess. 2 (1992) (noting music industry concerns that digital audio tapes could enable perfect copies that would greatly decrease consumer demand for commercial prerecorded music). See also Ginsburg, *supra* note 36, at 1628 (describing background to enactment of the AHRA).

<sup>60</sup> Pub. L. No. 102-563, 106 Stat 4237, codified at 17 U.S.C. §§ 1001-1010.

<sup>61</sup> 17 U.S.C. §§ 1003-1007.

<sup>62</sup> Napster; Diamond Rio.

Society,<sup>63</sup> the E.U. endorsed the extension of the private copying levies in the digital sphere. The Directive authorizes EU member states to allow private, non-commercial copying in “any medium” so long as “rightholders receive fair compensation.”<sup>64</sup> So far, so good. But the Directive also countenances copyright holders’ employment of DRM technology and online “click-wrap” contract to control access to and uses of works, including using those tools to prevent unlicensed private copying.<sup>65</sup> In addition, the Directive’s provision allowing private, non-commercial copying does not appear to encompass making works available to the public by way of on-demand transmissions. The Directive requires that copyright owners have the exclusive right to authorize or prohibit any communication to the public of their works, including the making available to the public in such a way that members of the public may access the works from a place and at a time individually chosen by them.<sup>66</sup>

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<sup>63</sup> Directive 2001/29/EC of the European Parliament and of the Council Directive on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society, 2001 O.J. (L167) 10 [hereinafter EU Copyright Directive].

<sup>64</sup> EU Copyright Directive, Art. 5.b(2) provides. “Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 in the following cases:

(b) in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject-matter concerned.”

<sup>65</sup> As European commentators have bitterly lamented, the Directive is far from a paradigm of clarity. See, e.g., Bernt Hugenholtz, *Why the Copyright Directive is Unimportant, and Possibly Invalid*, 11 EIPR 501 (2000). In particular, it inartfully attempts to balance the European tradition of allowing private copying with rightholders’ interest in using technology and contract to prevent unlicensed digital copying. Article 5.2(b) provides that when a country does impose a private copying levy, “fair compensation” must “[take] account of the application or non-application of technological measures” to control access. Whether this means that the levy should be greater to account for an additional rightholder prerogative (that of controlling access in addition to copying) or less to reflect the inability of my users to make private copies is unclear. In addition, the Directive generally requires EU member states to take appropriate measures to ensure that copyright holders tailor DRM controls to enable users to benefit from limitations and exceptions to copyright holder rights. But the Directive provides only that EU member states *may* take such measures with respect to private copying on media other than paper and provides that member states shall not abrogate DRM controls for works or subject matter made available to the public on agreed contractual terms via an Internet site. EU Copyright Directive, Art. 4. For further discussion on the tension between private copying and DRM in the EU Directive, see Alvis Maria Casellati, *The Evolution of Article 6.4 of the European Information Society Copyright Directive*, 24 Colum.-VLA J.L. & Arts 369 (2001).

<sup>66</sup> EU Copyright Directive, Art. 3(1). Canada seems to come the closest to a system of levies that would allow for compensating P2P file swapping, at least of music. Canada’s Federal Court of Appeal recently upheld a decision of the Canadian Copyright Board that persons who post music on web sites (but not ISPs) must pay a royalty in an amount to be determined by the Board. *Society of Composers, Authors and Music Publishers of Canada v. Canadian Ass’n of Internet Providers*, 2001 FCA 166 (May 2, 2002). In addition, the Canadian collecting society that administers reproduction rights in musical works has proposed to the Copyright Board a tariff for a levy on operators of electronic networks (which appear to include ISPs) on which copyrighted music is distributed. The proposed levy would be a monthly royalty “the highest of 0.65% of its gross revenues or 10¢ per month per customer.” Statement of Proposed Royalties to Be Collected by SODRAN for the Reproduction, in Canada, of Musical Works in the Exploitation of an Electronic Network for the Years 2001 and 2002, Supp. C. Gaz. Pt. I, at 4 (May 13, 2000). For further discussion of levies and rights in music transmission in several jurisdictions, see Daniel J. Gervais, *Transmissions of Music on the Internet: An Analysis of the Copyright Laws of Canada, France, Germany, Japan, the United Kingdom, and the United States*, 34 Vand. J. Transnat’l L. 1363 (2001).

An NUL, as I will presently delineate, would be far more comprehensive than current private copying levies. It would allow private digital and nondigital copying of all types of communicative expression. It would also permit individuals' noncommercial remixing and dissemination of existing works through P2P networks. In return, it would impose a levy on a far broader range of goods and services than under current private copy levy regimes. Following my description of the NUL and how it would operate, I will consider some common criticisms that scholars have put forth regarding levies.

#### IV. A NONCOMMERCIAL USE LEVY

The increasingly bitter standoff between the copyright industry, on the one hand, and the telecommunications and consumer electronics industries and new media enterprises, on the other, has spawned a number of suggestions for allowing unhindered P2P file swapping while compensating copyright holders with proceeds of a compulsory license or levy. Proponents have included such disparate voices as FCC Chairman Michael Powell,<sup>67</sup> telecommunications giant, Verizon Communications,<sup>68</sup> and various representatives of the P2P and technology communities.<sup>69</sup> Similarly, the NUL would establish a free flowing, but paying P2P regime. It would promote the benefits of P2P self-expression while still remunerating authors (and their assigns).

Under the NUL regime, individuals would enjoy a privilege to engage in the noncommercial copying and distribution of over digital networks of certain types of copyright-protected content. The privilege would also extend to individuals' noncommercial remixes, adaptations, and modifications of such content as long as the derivative creator identifies the underlying work and indicates that it has been modified.<sup>70</sup> That inclusion of modified versions of existing works goes far beyond existing levy regimes. But it embraces speech that is among the most creative and vital of P2P communication. It would encompass expression ranging from fan fiction (such as stories that build upon television series episodes and characters) to remixes of popular songs. The requirement that the creator of a modified work clearly identifies it as such would prevent confusion regarding what is the "authentic," copyright-holder-authorized version.

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<sup>67</sup> See Lessig, *supra* note 33, at A17 (quoting FCC Chairman Michael Powell as suggesting that a compulsory license to use copyright-protect content might be necessary to further broadband).

<sup>68</sup> In the words of Verizon vice president and associate general counsel, Sarah Deutsch: "Companies like Verizon would want increased access to content. We've proposed a compulsory license (for) both video and music as a way to compensate the content owner and legitimize the file-sharing and other activities that are occurring today that are very difficult to stop." McCullagh, *supra* note 31. See also Jefferson Graham, *Kazaa, Verizon Propose to Pay Artists Directly*, USA Today, May 13, 2002, <http://www.usatoday.com/life/cyber/tech/2002/05/14/music-kazaa.htm> (reporting that an "unlikely alliance" of Verizon and P2P file-swapping service Kazaa are jointly proposing that an Internet use fee be imposed on computer manufacturers, blank CD makers, ISPs, and P2P software developers).

<sup>69</sup> See, e.g., Steven M. Cherry, *Getting Copyright Right*, IEEE Spectrum Online, July 1, 2002, <http://www.spectrum.ieee.org/WEBONLY/publicfeature/feb02/copyr.html>; Philip S. Corwin, Letter to Sen. Joseph R. Biden, Jr. on behalf of Sharman Networks, Feb. 26, 2002, at 14-16, <http://www.ipuf.org/ipuf/BidenReportLetterBA.htm> (arguing in favor of legislation that would establish an "Intellectual Property Use Fee"); Serguei Osokine, A Quick Case for Intellectual Property Use Fee (IPUF), Mar. 2, 2002, <http://www.ipuf.org/ipuf/ipuf.htm> (Gnutella software developer).

<sup>70</sup> The derivative creator would be required to do so both as part of the work's digital "copyright management information," within the meaning of Section 1202 of the Copyright Act and in a manner that is perceptible to a reader, listener, or viewer.

The limitation to noncommercial modifications would prevent market actors from putting out unlicensed competing versions (unless otherwise privileged to do so under traditional copyright law).

The user privilege would be absolute. It could not be waived by a shrinkwrap or other mass market license.<sup>71</sup> Nor would digital content providers be entitled to employ technological DRM controls to block the privileged uses.<sup>72</sup>

As noted above, the user privilege would apply only to “certain types of copyright-protected content.” By that term I mean communicative expression, including movies, music, text, and graphics, as opposed to computer programs. Although computer programs constitute a “literary work” under copyright law and have been held by some courts in some contexts to constitute “speech” for First Amendment purposes, their primary purpose is to serve as a tool.<sup>73</sup> Accordingly, their unlicensed P2P distribution does not have the same import for self-expression as the trading and remixing of works of popular culture. In addition, because computer programs are tools, and tools that work in complementary relation with other tools, the economics of creating, marketing, and using them is fundamentally different – and more varied -- than that pertaining to most cultural works.<sup>74</sup> For those reasons, it would be exceedingly difficult to use a statistical sample of computer software downloads or uses to gauge the proper amount of levy proceeds to allocate to a software producer.

The user privilege would also be limited to expression that the copyright holder has previously released to the public, whether online or offline. Copyright doctrine rightly extends special solicitude for unpublished works. Authors’ interest in privacy and creative control (at least in determining when a work is to be released to the public) should trump the interest of P2P file swappers unless the publication and distribution of the work meets the requirements for fair use.

In order to enjoy the privilege, the use would have to be “noncommercial.” Commercial exploiters of copyright-protected works should either obtain a license or qualify for fair use or some other exception to copyright holders’ exclusive rights. By “noncommercial” I mean that the individual is not selling copies of, access to, or advertising in connection with the copyright-protected work or any modification of the

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<sup>71</sup> This would likely require an explicit provision of the Copyright Act preempting state contract law on this point. See *Bowers v. Baystate Technologies, Inc.*, 2002 WL 1917337 (Fed. Cir. 2002) (holding that shrink-wrap license forbidding reverse engineering of computer program was not preempted by federal copyright law); *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996) (holding that a shrink-wrap license protecting nonoriginal, and thus noncopyrightable expression, was not preempted by federal copyright law).

<sup>72</sup> Cf. Dan L. Burk & Julie E. Cohen, *Fair Use Infrastructure for Rights Management Systems*, 15 Harv. J. L. & Tech. 41 (2001) (comparing technological and institutional arrangements for integrating fair use into DRM).

<sup>73</sup> See Pamela Samuelson et al., *A Manifesto Concerning the Legal Protection of Computer Programs*, 94 COLUM. L. REV. 2308, 2359–61 (1994) (indicating that although computer programs are ostensibly protected as literary works, but courts have effectively accorded them a quasi-sui generis protection that better comports with their functional nature).

<sup>74</sup> In addition to their complementary relation with hardware and other software, computer programs, as tools, are far more susceptible to consumer lock-in and network effects than is communicative expression. See CARL SHAPIRO & HAL R. VARIAN, *INFORMATION RULES* 103-225 (1999) (discussing lock-in, network effects, and complementary goods).

work. Contrary to some current law,<sup>75</sup> an individual's receipt of other works in digital format over P2P file swapping networks would not render a use "commercial."

Significantly, enterprises that supply goods or services used in P2P file swapping would also benefit from the privilege. Courts have held some such suppliers, including Napster, contributorily or vicariously liable for P2P participants' copyright infringements. But that rule would no longer obtain under the NUL regime. Because noncommercial P2P file swapping would not infringe the copyrights of swapped works, suppliers would not be contributorily or vicariously liable for such uses.

At the same time, the NUL would be imposed on commercial suppliers of P2P software and services. It would also be imposed on Internet Service Providers, computer hardware manufacturers, manufacturers of consumer electronic devices (including CD burners, MP3 players, and DVD recorders) used to copy, store or perform downloaded files, and manufacturers of storage media. Finally, to account for changes in technology, the NUL would also be levied upon commercial providers of other products or Internet access services the value of which, the Copyright Office determines, P2P file swapping substantially enhances. For example, if, as some commentators predict, wireless communications "commons" based on spread spectrum or Wi-Fi technology supplant proprietary ISP-operated networks, the NUL might be imposed on consumers' wireless communications equipment.<sup>76</sup>

The amount of the NUL would be determined (and periodically readjusted) through negotiations between associations representing the industries upon which the levy is imposed and associations representing holders of rights in different categories of works. In absence of agreement, the amount would be set in mandatory arbitration before the Copyright Arbitration Royalty Panel, the body entrusted with arbitrating disputes regarding levies and compulsory licenses under existing copyright law. The NUL would effectively consist of various sub-levies due from different levy payers to different rights holders. However, the NUL obligors would be entitled to require that all possible claimants participate in a single negotiation to determine both the size of the overall levy burden and the share of the proceeds to be paid to each right holder category. In that manner, the right holders will have to be cognizant of the overall ceiling for NUL payments and will need to negotiate with other right holders to determine their relative portions of the pie. By the same token, the industries upon whom the levy is imposed will negotiate with one another to determine their relative payment burdens.

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<sup>75</sup> See, e.g., *A&M Records v. Napster, Inc.*, 239 F.3d 1004, 1015 (9<sup>th</sup> Cir. 2001) (stating that personal uses are "commercial," and thus disfavored for fair use, whenever users "get for free something they would ordinarily have to buy"). See also No Electronic Theft Act, Pub. L. No. 105-147, 111 Stat. 2678 (1997), changing the definition of "financial gain," a prerequisite for criminal penalties for willful copyright infringement, from "for profit" to include the "receipt, or expectation of receipt, of anything of value, including the receipt of other copyrighted works."

<sup>76</sup> See Nicholas Negroponte, *Being Wireless*, *Wired*, Oct. 2002, at 116 (predicting that micro-operators of Wi-Fi networks will soon replace large wired and wireless telephone companies). See also Yochai Benkler, *Overcoming Agoraphobia: Building the Commons of the Digitally Networked Environment*, 11 *Harv. J. L. & Tech.* 287 (1998) (discussing possibilities for a telecommunications commons employing spread spectrum technology); NATIONAL ACADEMY OF SCIENCES, *BROADBAND: BRINGING HOME THE BITS* 143-44 (2002) (describing WLAN and other broadband mobile technologies that take advantage of unlicensed spectrum as presenting an "interesting possibility" for bottom-up, small operator high-speed communications networks).

In the event of mandatory arbitration before the Copyright Arbitration Royalty Panel, the Panel would set the levy and sub-levies at rates and terms calculated to maximize the availability of creative works to the public. The NUL should thus afford authors a fair return for their creative work and levy payers a fair income under prevailing economic conditions. It should also reflect the relative roles of the copyright holders and levy payers in making the copyrighted works available to the public, taking into account their respective creative contribution, technological contribution, capital investment, cost, and risk.

That formula draws upon Copyright Act provisions regarding compulsory licenses for cable and satellite retransmissions and certain satellite digital audio radio services.<sup>77</sup> But it decidedly differs from current Copyright Act provisions regarding a compulsory license for the transmission of sound recordings via Internet radio or “webcasting.” The webcasting provisions require the Panel to set a rate and terms that “would have been negotiated in the marketplace between a willing seller and a willing buyer.”<sup>78</sup> In contrast the NUL should be set, like other compulsory licenses, at a rate designed to maximize public access to existing works while ensuring reasonable remuneration to copyright holders and authors.

My proposal would posit, in other words, that copyright holders only have a right to remuneration for noncommercial P2P file swapping; they do not have a proprietary right to refuse to grant permission for such activity. The rationale for this is simple. The NUL would not serve merely to overcome transaction cost barriers to voluntary licensing of noncommercial P2P file swapping, although that is one of its advantages. Rather the levy is meant to occupy a middle ground between digital abandon and digital lock-up. It is a compromise between the position that noncommercial, personal uses should be the prerogative of the individual and the position that the law should guarantee that both copyright holders’ exclusive rights and practical ability to enforce those rights extend to P2P noncommercial uses.

Nor should the NUL be designed to replace copyright industry revenues from sales of hard copies, like CDs and DVDs. Rather the levy rate should reflect the lower costs of online distribution and the lesser need for industry investment in infrastructure for physical distribution. Affording authors and their assigns a fair return for creative work does not mean providing copyright industries with a hedge against technological change and new market conditions.

In sum, the NUL regime as I envision it would approximate a market bargain between the consumer public and the copyright industries. But instead of relying on separate bargains for each discrete use of each copyright-protected work, it would entail bargaining at the wholesale level between levy payers, effectively acting as representatives and proxies for the consumer public, and copyright holder associations.

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<sup>77</sup> 17 U.S.C. § 801(b)(1).

<sup>78</sup> 17 U.S.C. § 114(f)(2)(B). For application of that standard, *see* Copyright Office Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings, 37 C.F.R. Part 261, 67 Fed. Reg. 45240 (2002). The proposed “Internet Radio Fairness Act,” H.R. 5284, would eliminate the willing buyer/willing seller standard and replace it with the objective-based standard generally applicable to compulsory licenses under the Copyright Act, as set forth in Section 801(b)(1) of the Act.

In addition, the NUL regime would provide that the parties bargain under the shadow of a liability rule rather than property rule. NUL mandatory arbitration would set the levy in terms of social value and cost-plus pricing rather than the degree of market power and supracompetitive rents endemic to a proprietary copyright regime.

It is difficult to predict the amount of proceeds the NUL would garner. The size and character of markets for Internet access services and consumer copying equipment and media are highly fluid. To the extent it is a relevant factor, the potential market value of digital distributions of copyright-protected material also defies easy approximation. Copyright industry sites for online downloading would provide a useful benchmark. But they are very much in their infancy and, at this stage, reflect little more than an experimental incursion into the market. There is also a “chicken or the egg” problem; consumer demand for digital copying devices, like CD burners, and digital distribution platforms, like high-speed broadband Internet access, depends on the availability of desirable content,<sup>79</sup> but the widespread availability of such goods and services also greatly increases the demand for and value of digital distribution of copyright holder content.

As a rough estimation of possible NUL proceeds, Table I sets forth recent gross sales estimates for residential commercial ISP Internet access service, home computers, free-standing CD burners, MP3 players, and blank CDs. The sales of each of those items can fairly be attributed to a significant, albeit varying, degree to P2P file swapping. If the NUL were set at ten percent of the total gross sales for all of those items, it would yield some \$3.75 billion. If we add a yearly \$20 per student charge for university-sponsored Internet access (and college students are the heaviest users of P2P file sharing networks),<sup>80</sup> our total would be approximately \$4 billion.<sup>81</sup> That amount is considerably

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<sup>79</sup> Seth Schiesel, *A New Model for AOL May Influence Cable's Future*, N.Y. Times, Aug. 26, 2002, at C1 (noting that cable operators are highly dependent on popular content providers and reporting on AOL business plan to apply that lesson to its dealings with broadband operators).

<sup>80</sup> As reported in a recent survey, “[c]ollege Internet users are twice as likely to have ever downloaded music files when compared to all Internet users (60% of college Internet users have done so, compared to 28% overall). And, college Internet users are three times as likely to download music on any given day (14%, compared to 4% of the overall population of Internet users).” Steve Jones, et. al., *The Internet Goes to College: How Students are Living in the Future with Today's Technology 6* (Pew Internet and American Life Project 2002), [http://www.pewinternet.org/reports/pdfs/PIP\\_College\\_Report.pdf](http://www.pewinternet.org/reports/pdfs/PIP_College_Report.pdf). According to the survey: “College students also lead other Internet users in *file sharing* of all kinds. Forty-four percent of college Internet users report sharing files from their own computers while 26% of the overall population of Internet users has shared files. The sharing of files other than music is also greater among college Internet users – 52% of them have downloaded files other than music while 41% of the overall population of Internet users reported doing so.” *Id.* at 7.

<sup>81</sup> As of 1999, there were 14.5 million students enrolled in degree-granted institutions of higher education in the United States. See National Center for Educational Statistics, *Digest of Educational Statistics, 2000*, <http://nces.ed.gov/pubs2001/digest/ch3.html#1>. Eighty-five percent of those students use the Internet. U.S. DEPARTMENT OF COMMERCE, ECONOMICS AND STATISTICS ADMINISTRATION, NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION, *A NATION ONLINE: HOW AMERICANS ARE EXPANDING THEIR USE OF THE INTERNET 43* (Feb. 2002) [hereinafter *A NATION ONLINE*]. I assume that almost all of those student Internet users have Internet access through their college or university. See Hiawatha Bray, *Internet Visionary Hopes His Plan Has the E-Touch*, Boston Globe, July 23, 2001, at A1 (noting that “nearly every American college provides a free link to the Internet”); see also Barnaby J. Feder, *I.B.M. to Run a Venture to Rent Films Over the Web*, N.Y. Times, Sept. 9, 2002, at C6 (reporting

less than annual U.S. record sales (\$13 billion) and video rentals (\$8 billion), to give two examples of copyright industry sales that might be substantially supplanted by P2P file swapping.<sup>82</sup> But those figures include both retail mark-ups and the considerable costs of manufacture and physical distribution of copies to retail stores. In contrast, all of the distribution costs of P2P file swapping would be borne by Internet users and ISPs.

*Table I : Annual Gross Sales of P2P-Related Service and Equipment*

Service or Product	Annual Sales Estimate (2001) (in Billion Dollars)
Home Computers	\$20 <sup>83</sup>
Free-Standing CD Burners	\$0.7 <sup>84</sup>
MP3 Players	\$0.44 <sup>85</sup>
Blank CDs	\$0.3 <sup>86</sup>
Broadband Internet Residential Service	\$5.7 <sup>87</sup>
Dial-up Internet Residential Service	\$10.35 <sup>88</sup>
<b>Total</b>	<b>\$37.5</b>

that MovieLink and I.B.M. see a multi-billion market for online distribution of films, based on estimates that 13 million households and 10 million college dorm rooms have a broadband connection).

<sup>82</sup> See Benjamin M. Compaine & Douglas Gomery, WHO OWNS THE MEDIA?; COMPETITION AND CONCENTRATION IN THE MASS MEDIA INDUSTRY 324 (records), 420 (video) (3<sup>rd</sup> ed. 2000).

<sup>83</sup> According to Computer Industry Almanac, as of 2001, yearly sales of personal computers in the U.S. total over 40 million units and some 50.4% of personal computers in the U.S. are used in homes. Computer Industry Almanac Inc., Press Release: PCs-In-Use Surpassed 600 M. Over 45% of Worldwide PCs Are in Homes, <http://www.c-i-a.com/pr0302.htm>. I have roughly estimated an average sales price of \$1,000 per home computer.

<sup>84</sup> Devin Leonard, *This is War*, Fortune, May 27, 2002, [http://www.fortune.com/indexw.jhtml?channel=artcol.jhtml&doc\\_id=207975](http://www.fortune.com/indexw.jhtml?channel=artcol.jhtml&doc_id=207975).

<sup>85</sup> Worldwide sales for MP3 players in 2001 totaled 2.9 million. Jonathan Cassell, *Mixed Messages in the Consumer Supply Chain*, Electronic News, June 10, 2002, at 36. I estimate that 75% of these sales took place in the U.S. See Cahners In-stat Group, Demand for MP3 Players Rises as Digital Music's Beat Gets Louder, InstatWIRE, Sept, 27, 2000, [http://www.instat.com/instatwire/content/marketalerts/sept2000/mm0012da\\_0927.htm](http://www.instat.com/instatwire/content/marketalerts/sept2000/mm0012da_0927.htm) (noting that as of 1999, 90% of portable MP3 players were sold in the U.S. and Canada). The average sales price of an MP3 player in 2001 was \$204. Consumer Electronics, Volume 41; Issue 7, Feb. 12, 2001.

<sup>86</sup> Phil Kloer, *Burn CD Burn*, Atlanta-Journal Constitution, Jan. 11, 2002, at 1E (reporting that, according to the International Recording Media Association, 1.2 billion blank CDs were sold in North America in 2001 and that the average price per blank CD was \$0.25).

<sup>87</sup> According to a government survey, 53.9 million households had Internet access as of September 2001. A NATION ONLINE, *supra* note 81, at 3. Of these, approximately 20% (or 10.78 million) have high-speed (broadband) Internet connections and the remainder have dial-up. Federal Communications Commission, Third Report; In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable And Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, CC Docket 98-146, at 28 (Feb. 6, 2002) [hereinafter FCC Third Report]. Accordingly to an industry analyst, as of December 2001, the average monthly subscription price for broadband service was \$44.22 and for dial-up price was approximately \$20. See Mark Kersey, *AOL Time Warner is at a Crossroads*, ISP-Planet, [http://www.isp-planet.com/research/2002/ars\\_020130.html](http://www.isp-planet.com/research/2002/ars_020130.html).

<sup>88</sup> See note 87 *supra*.

Peer networks could also drastically reduce copyright holder marketing costs, or at least undermine the justification for paying for marketing out of copyright holders' monopoly rents.<sup>89</sup> Audiences generally want to know what others whose opinions they value think of new music, books, and movies. Peer recommendations and, as I will presently discuss, metering technology can provide that information without the enormous sums that copyright industries now spend on marketing, promotion, and payola.<sup>90</sup>

In sum, while the NUL might not substitute for the gross sales earned by today's copyright industries, it wouldn't and shouldn't have to. Rather, with levy paying industries negotiating opposite copyright holders as proxies for Internet users, the NUL would reflect the value of copyright holder inventories and future works in the P2P network environment. Together with commercial licensing and offline sources of copyright holder revenue, it would supply ample funding for the creation of "sustained works of authorship." At the same time, it would greatly broaden public access to existing expression, eliminating much of the deadweight loss associated with proprietary copyright.

Levy distribution is no less important than determining the levy's amount. In some countries, equipment and media levies are used in part to subsidize authors who might not otherwise garner market support.<sup>91</sup> Some commentators have advocated that such an approach be adopted in the U.S.,<sup>92</sup> and in fact ASCAP and BMI use a portion of their collective licensing proceeds for such purposes. Others have proposed that some portion of levy proceeds be distributed directly to authors and performers. These proposals would sidestep copyright industry intermediaries, including record labels and music publishers, who often hold the copyright in a work and pay authors what many deem to be meager royalties. For example, the proposed Music Online Competition Act would distribute half of statutory license payments directly to performing artists rather than funneling that payment through record companies, as is effectively the case with respect to copyright and performers' royalties under current law.<sup>93</sup>

Such proposals are well-meaning, but should ultimately be rejected. Levy proceeds would best be distributed in the manner that most closely reflects audience demand. They should also be paid to current copyright holders. While subsidizing certain forms of noncommercial authorship can be a salutary endeavor, using levy proceeds for that

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<sup>89</sup> Ku, *supra* note 35, at text accompanying notes 342-354; Nadel, *supra* note 35.

<sup>90</sup> On peer recommendations, see Yochai Benkler, *Coase's Penguin, or, Linux and The Nature of the Firm*, 112 YALE L. J. (forthcoming Winter 2002-03), <http://www.benkler.org/CoasesPenguin.PDF>.

<sup>91</sup> See Lunney, *supra* note 35, at 915 (noting that a number of European countries require that a certain portion of the levy funds be set aside for specified social and cultural purposes, including funding young or avant-garde artists).

<sup>92</sup> See, e.g., Lunney, *supra* note 35, at 912 (characterizing the directing of incentives towards the "marginal, rather than non-marginal work" as a clear advantage of a levy-based approach).

<sup>93</sup> The Music Online Competition Act of 2001, 107<sup>th</sup> Cong., 1<sup>st</sup> Sess., Introduced Aug. 3, 2001. Similarly, the Audio Home Recording Act provides for direct distributions to performers, nonfeatured vocalists, and writers. 17 U.S.C. § 1006(b).

purpose would greatly complicate and raise the cost of administering levy distributions. It would also open the door to interest group rent seeking at the legislative level.<sup>94</sup>

Distributing proceeds directly to authors also makes some sense in principle. Much of the record label or book publisher investment and contribution to value is directed to offline, brick-and-mortar distribution rather than online P2P dissemination. P2P networks open opportunities for authors to distribute their works directly to audiences, and much of the cost of P2P distribution is born by network participants. As a result, P2P dissemination calls into question the continuing dominance, if not relevance, of traditional copyright industries. But if authors in fact have less need for intermediaries in the P2P environment, then once P2P distribution reaches its full potential, authors will be in a far better bargaining position vis-à-vis record labels, book publishers, and other intermediaries than they are today. Authors may well be able to retain copyright ownership over their works or least bargain for greater royalties. Ultimately, it would seem, strengthening paying P2P file sharing through the NUL regime would engender a market solution to what some perceive to be the industry's unfair exploitation of authors under current conditions.

I propose, therefore, that levy proceeds would be distributed to copyright holders in proportion to the number of downloads of their respective works and of Internet users' adaptations of their works, as measured by digital sampling technologies. But significantly, the allocation of proceeds should also reflect subsequent uses of those works to the extent technically feasible.<sup>95</sup> Metering subsequent uses in addition to downloads would more accurately reflect each work's value. Certain types of works tend to be subject to more repeated viewing, reading, or listening than others, and such ongoing use is an important, additional component of a work's value.<sup>96</sup> One advantage of digital lock-up is that to the extent consumers make a micropayment for each use, creators' remuneration would more precisely reflect a work's ongoing value. A levy scheme that measures subsequent use would share that advantage while avoiding the drawbacks of copyright holders' hermetic control.<sup>97</sup>

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<sup>94</sup> Copyright legislation is notorious for interest group rent seeking and allocation. See JESSICA LITMAN, *DIGITAL COPYRIGHT* 35-63 (2001).

<sup>95</sup> Metering of such subsequent uses as well as downloads appears to be technologically feasible. See Cherry, *supra* note 69 (describing "RightsMarket" music-playing tracking software); Chris Oakes, *Word Docs with Ears*, *Wired News*, Aug 31, 2000, <http://www.wired.com/news/techology/1,1282,38516,00.html> (noting that code in a word processed document or email message can track subsequent uses of the file and report those uses over the Internet to another location); Brad King, *Songbird: Big Huff, Small Puff*, *Wired News*, May 10, 2001, <http://www.wired.com/news/mp3/0,1285,43687,00.html> (discussing file-swapping tracking systems of varying effectiveness).

<sup>96</sup> As a rough measure of this, see Eric W. Rothenbuhler & John M. Streck, *The Economics of the Music Industry*, in *Media Economics: Theory and Practice* 199, 200, 202 (Alison Alexander, et. al., eds., 2<sup>nd</sup> ed. 1998) (showing that consumers spend widely varied amounts of time per dollar on different types of media.)

<sup>97</sup> Of course, counting downloads, or even repeated uses, does not necessarily measure a work's value to the consumer. Neither expressive works nor uses of those works are necessarily fungible. It may be that devotees of Harry Potter value each read more than readers of a local newspaper or listeners to a popular song value their repeated uses, even though each might access the work the same number of times. A copyright holder's perfect price discrimination would measure that value, but as I have discussed above, such price discrimination can exist only in theory. All in all, metering downloads and uses would seem to be a good enough proxy for private valuation.

Measuring both downloads and subsequent uses over pure P2P networks would require DRM technology that watermarks files embodying copyright-protected works, tracks uses on personal computers, and transfers metering information to the location where use information is aggregated. Subsequent uses on devices, like MP3 players, that are not connected to the Internet would likely elide tracking, but metering downloads from personal computers to such devices could serve as a rough proxy for subsequent use. Of course, metering downloads and uses raises privacy and free speech concerns. But these concerns can be substantially ameliorated; metering could be subjected to strict technological and legal guarantees against any tabulation or use of the information other than as an aggregate measure of all user downloads and uses of each work. If the only ramification of metering use is that the user's favorite authors and recording artists receive more money, users would likely welcome such metering.

## V. CRITICISMS OF PRIVATE COPYING LEVIES

Commentators raise a number of concerns about private copying equipment and media levies. Indeed, among the relatively favorable assessments, Terry Fisher's concludes that although "a tax-and-royalty regime would likely be better than what we currently have, [it] would also have serious flaws."<sup>98</sup> In this Section, I briefly review these concerns and consider their applicability to the NUL. The concerns fall into three broad categories: insufficient funds, inequitable cross-subsidization, and distribution complexities.

### A. *Insufficient Funds*

Commentators express doubt that private copying levies can generate sufficient funds to satisfy copyright holders without imposing price increases on consumer electronics equipment that consumers deem unacceptable. As Glynn Lunney notes, even Germany's relatively extensive system of levies yields less than three percent of the total licensing revenue collected by GEMA, Germany's principal collective rights organization for music performances and reproductions.<sup>99</sup> And as Jane Ginsburg emphasizes, that pricing quandary may be even more intractable if levies are applied to all kinds of works subject to P2P file sharing, not just music.<sup>100</sup>

It is difficult to assess the insufficient funds concern in any definitive sense because no one knows how much money would be sufficient to spur the creation and dissemination of sustained works of authorship at an optimal level. To be certain, as I've discussed above, the NUL would not be designed to guarantee the copyright industries' current revenues and market position. Nor should it be designed to do so, especially in the face of network dissemination technology that appears significantly to diminish the value of the industries' contribution. At the same time, the NUL need not compensate

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<sup>98</sup> Fisher, *supra* note 101.

<sup>99</sup> Lunney, *supra* note 35, at 855. *But see* Ku, *supra* note 35, at [text at notes 333-335] (asserting that a two percent levy on consumer electronics sales would yield a significant amount, "equal to projected revenues for the entire digital downloading market under copyright in 2002").

<sup>100</sup> Ginsburg, *supra* note 36, at 1643.

copyright holders for all uses of their work. Rather the levy would aim only to compensate copyright holders only for the noncommercial uses permitted under the NUL regime. As such, the some \$4 billion in annual proceeds that, according to my rough conjecture, the NUL might yield is not an insignificant sum.

Likewise, the NUL proceeds would not represent copyright holders' sole source of revenue. Noncommercial P2P file swapping would likely significantly supplant sales of digital hard copies, such as sounds recordings embodied on CDs and movies on DVDs, as well as copyright industry sites for digital distribution of the content. But it might not do so entirely. Industries might offer sufficient brand recognition and value-added service and products so that many consumers prefer to buy content from them. Copyright holders can also profit from commercial licensing and offline sales and performances.

### *B. Inequitable Cross-subsidization*

Commentators contend that levies require low-volume users and nonusers of copyrighted material to subsidize high-volume users. I may use my computer hard drive, CD burner, and blank CDs entirely to store my own work. It is unfair to require that I pay a levy on that equipment and media so that others can reproduce copyright-protected material.<sup>101</sup> Such a levy, commentators argue, is also inefficient.<sup>102</sup> It increases the price for products in a manner that may be incommensurate with the use of those products to copy copyright-protected material. As such, it may impose an innovation-impeding tax on certain digital technologies.

There are a number of responses to these concerns. First, the nonuser subsidy problem is somewhat overstated. Imposing the levy will encourage some nonusers to become users. If paying an extra \$100 for a personal computer enables me legally to use it to trade music and video files, I will be more likely to use the computer for that purpose and I might find that I enjoy doing so.

Second, the NUL could be imposed selectively in ways that mitigate the nonuser cross-subsidy. For example, the NUL could take cognizance of the fact that, for their own reasons, businesses are likely to forbid employees from devoting work time to engage in P2P file swapping. To that end, as I've posited, the NUL would be imposed only on residential Internet access and home computers.<sup>103</sup> In addition, the type of equipment or service may sometimes serve as a rough proxy for an individual's ability to engage in, and thus valuation for, file trading. At least under current technology, the speed and character of Internet connection provides a good example. Although file compression technology has greatly reduced the time needed to download files, high-speed access is still a significant advantage for downloading music files and a virtual necessity for downloading movie files. Not surprisingly, therefore, according to a recent survey, half of all broadband subscribers, but only a quarter of dial-up subscribers, have

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<sup>101</sup> William Fisher, *Digital Music: Problems and Possibilities* (last revised October 10, 2000) [http://www.law.harvard.edu/Academic\\_Affairs/coursepages/tfisher/Music.html#IV2](http://www.law.harvard.edu/Academic_Affairs/coursepages/tfisher/Music.html#IV2); Ginsburg *supra* note 3659, at 1644; Lunney, *supra* note 35, at 856.

<sup>102</sup> Fisher, *supra* note 101; Lunney, *supra* note 35, at 856-67.

<sup>103</sup> Under current ISP-based Internet access, the limitation to residential Internet access could be easily effected at the level of the ISP. The limitation to home computers might be effected by providing businesses with a rebate.

downloaded music files, and some 12% of broadband subscribers, but essentially no dial-up subscribers, have downloaded movie files.<sup>104</sup> Broadband Internet also typically allows the subscriber to be online all the time without taking up a phone line. This characteristic is highly conducive to subscribers who wish their collections of music or movie files to be continually accessible to others on their P2P network.<sup>105</sup>

Thus ISPs could significantly ameliorate the nonuser cross-subsidy problem by simply passing on levy costs to broadband, but not dial-up, subscribers. In fact, the law setting out the ISP levy scheme might impose the levy only on the provision of high-speed Internet service to residential subscribers. That arrangement would roughly parallel the compromise embodied in the Audio Home Recording Act. Under the AHRA, a levy was imposed only on digital recording equipment and media, which provided the most ready vehicle for consumers to make copies that could supplant purchases of record labels' prerecorded music. But home copying was allowed on analog as well as digital systems.<sup>106</sup>

In fact, ISPs might also differentiate between broadband subscribers who wish to engage in sharing copyright-protected files and those who do not. They could establish a low price tier for those who promise to refrain from such file-sharing.<sup>107</sup> An ISP could detect its subscriber's cheating by tracing the uploading or downloading of watermarked files (which would be an exception to the general rule that tracing technology be used only to meter aggregate uses). Likewise, ISPs might charge willing subscribers only for actual uploads, downloads, and subsequent uses of watermarked, copyright-protected files. Given healthy competition between ISPs, a consumer could have a choice of an array of possible configurations and could move from tier to tier or from ISP to ISP if his demand for P2P file swapping changes.

### C. Distribution

<sup>104</sup> John B. Horrigan & Lee Rainie, *The Broadband Difference; How Online Americans' Behavior Changes With High-Speed Internet Connections at Home* 29 (Pew Internet and American Life Project 2002), [http://www.pewinternet.org/reports/pdfs/PIP\\_Broadband\\_Report.pdf](http://www.pewinternet.org/reports/pdfs/PIP_Broadband_Report.pdf).

<sup>105</sup> Jane Black, *Will Cable Unplug the File Swappers?*, Business Week Online, June 12, 2002, [http://www.businessweek.com/print/technology/content/jun2002/tc20020612\\_1108.htm?mainwindow](http://www.businessweek.com/print/technology/content/jun2002/tc20020612_1108.htm?mainwindow) (discussing tiering plans based on speed and bandwidth usage and noting that the new pricing models could raise costs for P2P file sharing).

<sup>106</sup> The AHRA remained much of a dead letter because digital music recording systems never took off in the market. But all indications are that American consumers have a strong pent-up demand for high-speed Internet service. See *Broadband 2001, A Comprehensive Analysis of Demand, Supply, Economics, and Industry Dynamics in the U.S. Broadband Market*, J.P. Morgan Chase & Co. and McKinsey & Company, Inc., Apr. 2, 2001, at 1, cited in FCC Third Report, *supra* note 87, at 28 n. 143 (predicting that residential high-speed service subscribership will increase from 1.9 million at the beginning of 2000 to 40 million at the end of 2005). Indeed, consumers' demand for broadband has been dampened in large part because of the dearth of quality content. An ISP levy that opened broadband to untrammelled P2P file sharing would help spur demand for the service.

<sup>107</sup> ISPs could quite readily offer subscribers different tiers of Internet service at different prices depending on whether the subscriber wishes the right to engage in P2P trading of copyright-protected files. Indeed, ISPs already offer different tiers of service at differential pricing. They typically price high-speed Internet access, or "broadband," at \$44 per month and dial-up access, or "narrowband," at \$20 per month. See Kersey, *supra* note 87. ISPs are also poised to break high-speed access into various tiers, charging the most for the highest speed. *Id.*; Black, *supra* note 105.

Finally, commentators note the problem of distributing levy proceeds to authors and copyright owners.<sup>108</sup> The AHRA only involves the home copying of music, yet even that law reflects a delicate compromise for dividing levy proceeds among various rights holders. Like the problem of pricing as a whole, that task would be rendered far more formidable if the levy is to encompass all kinds of works.

Certainly the negotiations and arbitration proceedings to establish the NUL amount and allocation would be far from simple. Nevertheless, as I've proposed, technological systems that track downloads and uses of copyright-protected materials could greatly simplify NUL fund distribution.

## VI. GOVERNMENT REWARDS

If we are to institute a comprehensive levy to fund noncommercial uses, why not simply pay for copyright holder compensation out of general tax revenues? An array of government rewards and subsidies have long provided significant support for both inventive and artistic activity. Proposals to replace intellectual property with a system of government rewards have been the subject of scholarly and policymaker attention since the mid-nineteenth century. Recent economic analysis has brought renewed interest to this possibility.<sup>109</sup> While the focus has been on patent, scholars have also considered the possibility that government rewards might provide an adequate incentive for the creation and dissemination of expression while avoiding the "deadweight loss" attendant to proprietary copyright.

Scholars have not presented a detailed proposal for government rewards to authors in lieu of copyright. But we can imagine that it could take much the same form as the NUL, except that authors would receive payments from an entity funded by general tax revenues rather than levies imposed on selected services and devices. As under the NUL regime, payment distributions could reflect each work's aggregate private value, based on a calculation derived from the number of downloads and uses of copyright-protected works reported by tracking and metering technology. Likewise, a government reward regime could permit free copying, distribution, and, with some possible limitations, modifications of expressive works.

A government rewards regime would have some advantages over the NUL. First, it would obviate the need to determine which P2P file-swapping related services and devices should be subject to the levy and what should be the amount of the levy imposed on each service and device. Second, it would avoid imposing an innovation inhibiting tax on new technologies for delivering and improving P2P communication and private copying. Third, a government rewards regime would be funded by a progressive income tax rather than regressive "sales tax" on goods and services.

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<sup>108</sup> Ginsburg *supra* note 36, at 1644.

<sup>109</sup> See, e.g., Steve P. Calandrillo, *An Economic Analysis Of Intellectual Property Rights: Justifications and Problems Of Exclusive Rights, Incentives To Generate Information, and the Alternative of a Government-Run Reward System*, 9 Fordham Intell. Prop. Media & Ent. L.J. 301 (1998); Nancy Gallini & Suzanne Scotchmer, *Intellectual Property: When is it the Best Incentive System?*, in 2 INNOVATION POLICY AND THE ECONOMY (Adam Jaffe, Joshua Lerner & Scott Stern eds., forthcoming MIT Press 2002); Steven Shavell & Tanguy Van Ypersele, *Rewards Versus Intellectual Property Rights*, 44 J. L. & Econ. 525 (2001).

On the other hand, as scholars have noted, a system of government rewards would have a number of potential drawbacks. First, commentators question whether the public would support sufficient funding for government rewards from general tax revenues. Funding government rewards from general tax revenues might well be a bargain. If properly tailored, it would dramatically lower the price for access to and secondary uses of expression and inventions, while still providing enough to give authors and inventors an incentive to create them. Nevertheless, even if economically rational, raising taxes is rarely a winning campaign plank. Moreover, the benefits of funding popular culture from the public fisc are far less apparent than those of government funding for technological innovation. To be certain, consumers wouldn't welcome paying more for P2P file-swapping related devices and services either. But consumers can at least see a more direct nexus between the use of such devices and services and swapping copyright-protected material.

Which leads to the second point: funding author payments from general tax revenues raises the issue of cross-subsidization, possibly to an even greater degree than private copying levies. Taxpayer funded government rewards schemes spread the cost of author payments among a far greater population. Thus while each person's share of that cost will be less under a government rewards scheme, it is likely that many more people who do not never engage in file sharing and never copy copyright-protected works will have to pay.

Of course, an argument for government rewards is that all of society benefits from both the creation of original expression and the greater creativity, knowledge, diversity of expression, and cultural involvement that P2P file sharing engenders. After all, both the creation of original expression and cheap public access to that expression means more dissemination of information, ideas, and opinion, and greater possibilities for further creative expression that builds upon existing works. As a member of a liberal democratic polity, I benefit from those goods, regardless of whether I directly consume copyright-protected material. For that reason, perhaps, both the initial creation of sustained works of authorship and subsequent P2P file sharing *should* be cross-subsidized, and cross-subsidized by the entire citizenry.

There is much to that argument. Yet nevertheless, even if P2P file sharing has social value, it also has private value specific to those who participate in it. And while a strong argument can be made that we shouldn't distinguish between types of expression in assessing expression's social value, it *is* hard to justify taxpayer-funded government subsidies for television sitcoms and popular songs that would find sufficient financial support in the market even without such subsidies. At bottom, therefore, government funds would be better spent subsidizing noncommercial expression and high-speed Internet access. The latter would indirectly support P2P file sharing, but would also underwrite many other communicative activities as well.

Finally, government rewards for authorship raises the specter of untoward government influence on authors' speech. In theory, a rewards system could be established with safeguards to prevent such influence. The law could require that rewards be disbursed strictly in accordance with neutral and objective criteria, such as data on user access and downloads. In addition, the disbursing body could be an independent and free-standing agency, insulated from political meddling. In practice, however, past experience demonstrates that even in democratic states and even under

conditions designed to insure expressive independence, public funding brings a degree of government interference.<sup>110</sup>

A reward for authorship program funded by the citizenry as a whole, rather than by those who are likely to copy, distribute, and modify copyright-protected works, would suffer from like vulnerability. It would inevitably be open – perhaps rightly so – to public scrutiny and debate, with the attendant possibility of government officials’ involvement in selecting which types of speech will and will not be funded. In contrast, since the NUL would be funded by users, not the public fisc, it would be an important step removed from political oversight and interference. The distribution of NUL levies would be seen more in market terms than as an expression of political values and priorities. As such, elected officials would likely feel less temptation and less need to meddle in its particulars.

At bottom, therefore, despite the advantages of a government rewards system, I suspect that the NUL would be both politically more tenable and more desirable.

## V. CONCLUSION

P2P file sharing is yet another instance in which copyright’s exclusive right paradigm should give way to a compensation paradigm. A Non-commercial Use Levy would be an important mechanism for ensuring that copyright holders receive adequate remuneration, while users enjoy the unhindered entitlement to engage in noncommercial copying, distributing, and modifying existing works.

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<sup>110</sup> See Netanel, *supra* note 41.