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Artists Want to Be Paid: The Blur/Banff Proposal

Popular music has defined each generation. And, as we began the next millennium, music is also shaping a new generation of technologies and laws that will have consequences far beyond this particular art form. This is a report of a conversation about music, and more particularly, how musicians should be paid for digital works. The conversation began at an April 2002 Blur workshop on "Power at Play in Digital Art and Culture," at The New School in New York City. I was asked to participate in a panel discussion on intellectual property, which asked:

> *Any exclusive claim to "all now-known or hereafter existing rights of every kind and nature throughout the universe" is outlandish enough to make the most ambitious conquistador cringe. Is intellectual property the economy of the future; or is it the strip-mining of history? Does it guarantee the viability of creativity; or is it a tidal wave of authoritarian exploitation? And worst of all, does the subject really have to be so droll and technocratic?*

The issues raised in this panel were revisited later in the workshop, first under "Truisms and Consequence," where a number of groups explored intellectual property issues. Our group choose the theme "artists want to be paid" as the topic for further work, with a particular focus on music distributed in digital formats.

The explosive popularity of Napster and successor peer-to-peer (P2P) file sharing programs were both a tool for expanding access to music and a threat to an existing economic system for supporting artists. For millions of people, it was simple and convenient to download digital copies of recorded music for free. The recording industry has launched a counter attack of legal and technological measures, designed to enhance their control over the redistribution of works. The legal and technological infrastructure being proposed by the music industry would be implemented across a wide range of information goods, from software to data, motion pictures and news, and text documents. The music industry wanted tight controls over the development of new information technologies, and the ability to track the movement of nearly any information, and to obtain the identities of everyone who shared information with anyone else.

The rise of Napster and its successors had been accompanied by a social movement of sorts, a generation who both refused to abide by copyright laws, and who offered cogent critiques of the inefficiencies, unfairness, and cartel-like features of the current music industry.

The participants in the Blur workshop came from diverse backgrounds, including those with backgrounds in music, performing arts, software and Internet technologies, criticism, law, and policy fields. Our group decided to propose a new model for compensation of artists whose works were downloaded through P2P technologies. There were a number of different views in our group, with radically different notions of the feasibility of music industry efforts to defeat various file sharing technologies, and philosophical and strategic differences as to desirability of making new compensation models voluntary or non-voluntary. After a presentation of our "model," which differed depending upon who presented it, there was sufficient interest for follow-up conversations. Sara Diamond invited Alan Toner, a lawyer who was working on open source software issues; Jamie King, a musician and music critic; Ted Byfield, a theorist and Nettime.org moderator; and myself, to participate in a week-long workshop in Canada, at the Banff Centre for the Arts. We discussed these issues further often with the substantial disagreements on the role of the state or the degree to which "solutions" to the P2P dilemma would be voluntary or non-voluntary. However, there was also a large degree of agreement on key features of the compensation scheme. What follows is my final presentation of the Blur/Banff proposal at the Banff workshop.

Economics and Economists

I was trained as an economist, and agree with Keynes who famously said, "practical men, who believe themselves to be quite exempt from any intellectual influences, are usually the slaves of some defunct economist." Other disciplines might frame this differently, but would agree that we often assume there are only a few feasible approaches to organizing the economy, without really considering important alternatives. In terms of our traditions and roots, economists influence us all. Adam Smith's fundamental distrust of the government and his admiration of the price system in guiding resource allocation is of course, at the heart of the modern political economy, and so too is the observation that businessmen are constantly seeking to create cartels and monopolies, and to otherwise engage in conspiracies against the public.

While Adam Smith was perhaps the most effective spokesman for capitalism, there were plenty of influential critics. Karl Marx could describe its flaws in ways often appreciated more outside of the economics profession, although certainly we all are Marxists in some ways. My own favourite early critic was Thorstein Veblen, whose essays and books would emphasize the role of marketing in shaping preferences, the idea of social status as something you buy and advertise, and thinking also about non-market factors, such as our instinct for workmanship. When John Maynard Keynes was not advertising the importance of the economics profession, he was persuading a generation that governments can fix problems, becoming a hero to interventionist economists.

Joseph Schumpeter's work was in many respects a reaction to Keynes. He was appalled by Stalin, saw the private sector as a protector of freedom, and emphasized the dynamic nature of markets, and promoted the idea of that monopolies were part of the process of "creative destruction," where the prospects of earning monopoly rents created investments in innovations that would replace older technologies and older monopolies. An economist whose work was perhaps more widely appreciated after the rise of the Internet was Ronald Coase, who would eventually win a Nobel Prize by drawing attention to the importance of transaction costs. Coase saw the modern corporation as a mechanism to avoid the high transaction costs that markets often require.

Among more modern economists, one could mention William Bowen and William Baumol, who examined the limits of productivity in performing arts. After all of these years, it still takes four persons to perform a string quartet, and given the higher levels of productivity in manufacturing and other areas, the relative price of a live performance has risen. Even before there was an explosive growth in the markets for information goods, there was a major increase in the work by economists on markets for information, including for example the work that recently won George Ackerloff, Michael Spence, and Joe Stiglitz the Nobel Prize. I was a student and research assistant to Joe Stiglitz, who was always drawn to examine those cases where markets do not work, or at least do not work best.

Marginal Cost Pricing, Public Goods

Information goods were among those that could be copied fairly cheaply, sometimes at zero or close to zero cost, but also often require high fixed costs, conditions that lead to increasing returns to scale, and present a number of policy dilemmas. There are questions about the most efficient methods of financing the fixed costs of information goods and debates about how best to control or regulate the types of monopolies that are associated with increasing returns. In addition, there are concerns that society under-invests in some information (basic medical research), and over-invests in others.

Many information goods are "non-rival in consumption," meaning the consumption by one does not preclude or diminish consumption by another. But unlike some goods, such as the signals broadcast by a lighthouse, or the security everyone enjoys from national defense expenditures, it's often possible to exclude some from enjoying or using an information good,[1] and indeed, copyright laws are legal instruments to prevent the free sharing of information goods. By restricting access to information goods, society would create private incentives to invest in new information, and create mechanisms to support writers, musicians and other artists, in some cases far beyond what would they would ever make performing to a live audience.

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Baumol and others would call this a "quasi public good."

The Social Benefits of Copying

The widespread adoption of computers and the Internet made people think about information economies and the complex reasons people create goods.

Before the Internet became widely available nearly everyone in the United States, Europe and other wealthy countries accepted the basic notions of copyright and that there would be enforceable restrictions on access to privately owned information. While there were many exceptions and also a strong role for the public sector to play in creating some works, the event that really challenged public thinking was the creation of the Internet.

The Internet was exactly the opposite of what was supposed to happen, if one had listened only to the public relations efforts of the copyright industry. The public sector played a huge role in the development of the technology. The protocols were open and in the public domain. The users owned the physical infra-structure. Everything about the early Internet was designed to make it easy to copy information. There were no mechanisms to set prices. In a competitive market, Internet Service Providers were forced to offer unlimited access for a flat monthly fee, and for users, bandwidth was free on the margin. The software was free. Programs like Apache and Bind were open source and could be freely copied. And when HTML and the Web was introduced, browsers were designed to provide users with access to the underlying code of documents, making it easy to reuse or modify. If information wanted to be free, it had a friend in the Internet.

Public Seeks Open Access Government Created Databases

In the early 1980's, President Reagan had insisted on sweeping privatisation of the dissemination of government databases, which were only available from a handful of high-priced vendors, sometimes under exclusive contracts to very limited audiences. By the early 1990's these policies were under attack by a social movement seeking to place these same databases on the Internet where they would be freely available. Among the more dramatic battles concerned West Publishing. West had a near monopoly on published judicial opinions in print formats, and a huge business selling access to a wide range of databases. West sought a number of national and global initiatives to give it property rights in the public documents. But the Internet had not only made it possible to imagine new methods of disseminating court opinions and other data, but it gave the public an opportunity to monitor policy makers, organize, and to protect the public domain, at least for the time being.

The Evil Empire and the Rise of the Free Software Movement

When personal computers were first becoming popular, Microsoft founder Bill

Gates seemed like a geeky and likeable Harvard dropout who had shaken up the old guard. But by the time the Web was taking off in the early 1990's, Bill Gates was increasingly seen as a terrifying, powerful and brutal monopolist, crushing rivals and stifling the development of new technologies. When Microsoft's efforts to destroy Netscape became the subject to a highly publicized antitrust trial, it was the end of innocence for a generation of software users.

Microsoft's anticompetitive acts were juxtaposed by Richard Stallman's evangelistic promotion of free software. Stallman's subversive "copyleft" licensing strategies found resonance among a global community of software programmers. Under Linus Torvald's leadership, the development of GNU/Linux appeared to do more to thwart Microsoft's evil intentions than the US and European antitrust authorities. The new free and open source software model eventually gained acceptance among Microsoft's corporate rivals.

The business model for free/open source software was almost a mystery. Millions of lines of code were being written and an industrial strength rival to Microsoft's server platform had emerged and was widely gaining market share and acceptance. The free software was copyable, and under the various licensing schemes, not really "owned" by anyone.

Battles Over Patents and Access to Medicine

Meanwhile, a more serious conflict over intellectual property was brewing. For decades the US government had led a global campaign for tough rules on patents. By 1995 the World Trade Organization had come into being and required virtually every country to adopt 20-year patents on medicines and other measures. The harsh consequences of applying US style patent rules in developing countries was most dramatically seen through the global AIDS crisis, where African countries were being asked to pay ten thousand dollars or more per year for treatments that were available for a few hundred dollars from generic suppliers. As AIDS activists' disrupted Al Gore's presidential bid, and a highly publicized trial over patent rules in South Africa was broadcast globally, the right to copy was also seen as the right to live.

Peer-to-Peer File Sharing

Against this topsy-turvy world of information wanting to be free, new "open source" business models, and deep concerns over the ethical consequences of strong intellectual property rules, Napster and other P2P technologies exploded onto the scene. More than 80 million persons registered to use Napster. Anyone with an Internet connection could freely download a vast sea of digital MP3 files, and songwriters, performers and the industry that owned and controlled these works were getting nothing.

The music and film industry had anticipated that digital technologies would be a problem, but they were stunned at the widespread success of Napster. The various legal strategies undertaken against Napster and other P2P clients led to counter legal strategies and searches for new technological fixes, and the prospects for a ongoing battle of wits between the owners of music and clever hackers.

For millions of listeners, and even for many musicians and songwriters, the P2P technologies represented something more interesting than a license to steal. The highly oligopolistic music industry was certainly charging hefty prices for music, but it was also not passing on much of the revenue to the songwriters and performers. The promotion of music was centered on a small number of acts, often packaged and managed by major labels like commodities. The industry frequently allowed beautiful performances to languish or disappear, as distribution efforts were highly selective. For listeners, if one did not hear music on an overly commercialised and concentrated radio market, or on a handful of cable television stations, it was difficult to experiment or learn about new artists or performances.

For millions of P2P users, the experience was far richer than simply stealing music. It was a chance to enjoy music in a different and better way, free from the massive marketing efforts the "music industry" featured. It was the nature of the searching technology that one typically found multiple performances of a song, often by artists one had never heard of. A search would lead listeners to try out a new artist, collaboration, or genre of music.

The music industry and listeners debated and wondered if the "copyright police" would outsmart the hackers who wrote new file sharing software programs. And if the P2P technologies were uncontrollable, would musicians be forced to rely upon a new "gift" economy, where listeners would volunteer to compensate artists for works.

Compulsory Licensing for P2P Distribution of Music

Against this debate, some looked at the P2P technologies as a candidate for a compulsory license. In the past, a wide range of "new" technologies for disseminating and listening to music had benefited from compulsory licenses, such as player pianos, juke boxes, radio, and for the use of songs in records, compact discs, and other recorded music.

Senator Orrin Hatch and other members of the Congress expressed support for some type of compulsory licensing on music that would permit Napster or other P2P services to have access to copyrighted works, in return for compensation to artists. In some countries, such as Canada or the Netherlands, there are levies on digital media, which is earmarked to support domestic artists.

In the Blur and Banff workshops, there was a debate over the feasibility of a compulsory licensing approach for P2P technologies. If, as some argued, the developers of file sharing technologies would completely defeat all legal and technological efforts to control copying, there would be uncertain incentives to pay fees. The users would have to voluntarily declare they were using a P2P service. But, if the best and easiest to use P2P clients relied upon centralized index services like Napster or if prices for the services were considered reasonable, one could imagine widespread willingness to pay for a P2P service. Alternatively, the compulsory license could be structured as a mandatory fee on bandwidth services, similar to the levies in some countries on digital media.[2]

There is an extensive trade framework to regulate the uses of compulsory licenses. The WTO TRIPS agreement on the trade related aspects of intellectual property says:

WTO TRIPS Article 13 (copyright) Limitations and Exceptions

Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.

The Berne Convention for the Protection of Literary and Artistic Works, which the US has signed, says national governments can issue compulsory licenses to use musical works, but only within national boundaries, and in return for equitable remuneration.

Article 11bis

(2) It shall be a matter for legislation in the countries of the Union to determine the conditions under which the rights mentioned in the preceding paragraph may be exercised, but these conditions shall apply only in the countries where they have been prescribed. They shall not in any circumstances be prejudicial to the moral rights of the author, nor to his right to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority.

Article 13

(1) Each country of the Union may impose for itself reservations and conditions on the exclusive right granted to the author of a musical work and to the author of any words, the recording of which together with the musical work has already been authorized by the latter, to authorize the sound recording of that musical work, together with such words, if any; but all such reservations and conditions shall apply only in the countries which have imposed them and shall not, in any circumstances, be prejudicial to the rights of these authors to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority.

The Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, which has been signed by 71 countries, but not

2
For an anti-levy view, see: http://www.eicta.org/copyrightlevies/index.html

the United States, also discusses the use of compulsory licenses.

> *Article 15*
>
> *{Permitted Exceptions: 1. Specific Limitations; 2. Equivalents with copyright}*
>
> *1. Any Contracting State may, in its domestic laws and regulations, provide for exceptions to the protection guaranteed by this Convention as regards:*
>
> *(a) private use;*
>
> *(b) use of short excerpts in connection with the reporting of current events;*
>
> *(c) ephemeral fixation by a broadcasting organisation by means of its own facilities and for its own broadcasts;*
>
> *(d) use solely for the purposes of teaching or scientific research.*
>
> *2. Irrespective of paragraph 1 of this Article, any Contracting State may, in its domestic laws and regulations, provide for the same kinds of limitations with regard to the protection of performers, producers of phonograms and broadcasting organisations, as it provides for, in its domestic laws and regulations, in connection with the protection of copyright in literary and artistic works. However, compulsory licences may be provided for only to the extent to which they are compatible with this Convention.*

How Would Compulsory Licensing Work in Practice?

The Blur/Banff discussions focused on the practical issues of how a compulsory license might work. We first examined how one might set or collect fees, focusing on such alternatives as levies on purchases of computer equipment or bandwidth. Alternatively we developed various systems for subscription services based either upon a flat rate or the amount of downloaded music. Some thought the fees should be paid directly from general tax revenue. There was no group consensus about these issues, but there was an appreciation that it would be good to structure the fee so that it was in some sense free on the margin. It would be a positive feature if listeners could freely experiment with unknown artists or music types, thus contributing to discovery, growth, and opportunities for new artists.

The group spent considerable time looking at how the money might be distributed to artists, starting with traditional approaches, and then looking at innovative suggestions that sought to replace market or government allocations with new social collaborations between listeners and artists.

Core Components of a Compensation System

A traditional compulsory license would base compensation to artists on the usage of works. The more popular songs and performers would get the most money. One could imagine very granular measurements of downloaded music, which

would raise privacy concerns. Or some thought that in a method similar to payments for elevator music, allocations could be determined by sampling of downloads.

But the allocation of funds based upon usage was considered flawed. These allocations would mimic the market, but the market was not ideal. There was much discussion of the "Britney" effect—most of the money now goes to a handful of famous artists, making them fabulously wealthy while other artists barely eke out an existence. Some artists in our workgroup wanted a portion of revenues allocated in a random, lottery-like fashion. Every artist would at least have some chance of leading the good life.

There was considerable interest in allocating some of the funds to projects that are not successful in the marketplace, such as experimental music, the recording of folk music, or even to the support of infrastructure, such as performance centers or public recording studios.

Next, there was a discussion of the role that artists themselves could play in allocating funds. For instance recognizing the contributions of those who had influenced their art in an important way, or ensuring that studio musicians and others that supported the more famous artists were compensated fairly. Another possibility would be to have some of the funds allocated by governments or elites, who would make sure that opera, avant-garde music, or other types of music were supported. There were obvious problems in relying on either government or elites to control allocations, as unpopular or controversial views would be vulnerable to repression or censorship.

Listeners Would Have to Pay, but Could Choose Who They Paid

To counter the dangers of government control over allocations, or the lack of legitimacy of elites to allocate funds, there was a proposal that listeners themselves could directly or indirectly decide who received funds. Listeners would not avoid the compulsory licensing fee, but they would decide who would receive the money. There were several variations on this theme including proposals that listeners would choose artists directly or intermediators that supported musicians.

The role of the intermediaries was discussed at length. There were after all, lots of areas where buyers or sellers now choose intermediators for various tasks. For example, companies who sell stocks choose exchanges to list shares, and the various exchanges compete against each other for the public's trust. The more the exchange is trusted, the more access to investor support.

It was proposed that intermediaries would compete against each other, offering listeners different alternatives for how the money would be distributed. In this model, each intermediator could propose very different systems, and listeners would decide (and continually re-evaluate) where to put their money, effectively choosing

the groups that did the best job in supporting artists. Anything would be possible. For example, an intermediator might propose to:

1. Give all the money to performances of a specific genre of music, such as African music, American jazz, or performances of classical music

2. Ensure that 15 percent of the revenue supported retired blues artists that are down on their luck

3. Allocate all money on the basis of the volume of downloads

4. Allow the listeners to directly allocate fees to specific artists

This is to mention only a few possibilities discussed in the workgroup.

Governments could regulate the intermediators on issues of transparency and accountability, similar to government oversight of securities exchanges. Governments could also have the money allocated in a mixed system with some fixed allocations and some user determined allocations. For example, governments might require that:

1. At least 30 percent of fees be allocated on the basis of traditional usage based distributions

2. At least 10 percent support non-commercial music productions

3. At least 5 percent be contributed to a retirement fund for burned-out musicians

4. There be a minimum contribution to session musicians

Experiment, Evaluate, and Learn

In the beginning it would be important to experiment with different approaches, evaluate them and consider changes. There was a proposal to create a role for musicians and songwriters to bargain with listeners over key features of the allocation system, including:

1. The price of the compulsory license

2. The minimum allocations to various systems

3. To suggest systems of compensation that are more fair than current market outcomes

The Blur/Banff discussions were seeking to find a way that the listeners and artists could build a new social contract that would compete with and possibly replace the current system of distributing and marketing music. It would seek to liberate the art from the consequences of marketing art as a commodity. If the P2P model was successful, the expenditures on marketing would fall, and the greater share of resources would be available to artists themselves.

Concluding Thoughts on the Blur/Banff Proposals

I was quite taken by the creative approaches proposed by the artists in the Blur and Banff workshops and found the exercise more productive than I had anticipated. Potentially, these approaches have broad consequences beyond the industry and culture of creating and performing music. Like the millions of enthusiastic Napster and other P2P users, the artists in the workshops saw P2P technologies as offering the freedom to create new relationships between creators and listeners. This would have been unthinkable before the rise of the Internet.

The P2P culture is now quite important in open source medical research, the development of free software, journalism (Slashdot, etc.), and social activism. We are thinking more about the enormous costs of distribution and marketing components of the economy and how the industries that control marketing can also shape the development of the products themselves. In medicines, a handful of "big pharma" companies dominate the costly and labour intensive systems for marketing medicines to doctors, consumers, and third party payers which in turn leads to considerable control over the inventions developed by Universities and small businesses. In software, Microsoft's marketing muscle and control over industry standards allows it to squeeze innovative companies and exploit consumers. In the film, music, and book industries, the firms that control "shelf space" control and shape what we read, listen to, and watch.

The P2P technologies provide an opportunity to develop a new model for supporting art and other creative efforts, assuming that there is a system that involves compensation to creators. The Blur/Banff proposals were about artists being paid within a system a decentralized decision-making and independence from state action, but without a commercial market model. There would be a role for centralized decision making to address the amount of compensation listeners would pay in order to allow the P2P service to override the exclusive rights of creators and performers. But the freedom of artists would be protected by decentralized decision making. Listeners, not the state, decide who gets what.

The Blur/Banff proposals was presented as a work in progress, but the process itself is part of the answer. The freedom to imagine alternative distributions of revenues is important. It forces us to justify particular outcomes, and to entertain alternatives. The notion of intermediators competing against each other to support artists turns the current system around. The agents of the system work for listeners. The listeners would have more power to shape the art and it would be interesting to see the difference between this and the system we have now.

In medical research or software one can imagine systems where consumers of medicines or users of software could control more of their investments in the development of new products. Public broadcasting models could be transformed by new systems based upon this model. There is much to consider. I'm sure that Marx, Veblen, Kenyes, and Stiglitz would find this interesting. I'm not sure about the rest of my profession.