Excerpt from:

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Promises to Keep: Technology, Law, and the Future of Entertainment

(Stanford University Press, 2004)

To sum up, the most plausible way of estimating the relative values to consumers of downloaded registered recordings would be to use a large-scale sampling system that automatically detects and records what persons willing to participate in such a regime are actually watching and listening to, and that aggregates such reports to prevent government officials from learning the consumption choices made by specific participants. The difficulties associated with this issue should not be underestimated. In particular, worries concerning the temptations to "game" the system justifiably loom large in the criticisms that have been made of all compulsory licensing systems. But the sampling approach seems sufficient to avoid the most serious of the known sources of distortion. Two other factors provide additional sources of solace. First, the large majority of consumers would try to make the system work, not to break it. After all, by disguising their true consumption patterns, they would not change the amount they paid in taxes; they would only prevent their favorite artists from getting their fair shares. Second, this task will get easier over time--as people increasingly consume recorded entertainment not by replaying permanent copies of recordings but through interactive streaming, which prevents far fewer logistical challenges.

Systems of the sorts described above would go far toward providing us information concerning the relative value to consumers of entertainment products. However, even a perfect count of consumption patterns would neglect two important factors--which, if possible, we should strive to take into account. The first is differences in the duration of works. Generally speaking, longer recordings provide more value to consumers than shorter recordings. The former keep people entertained longer than the latter. Viewed from another angle, the former demand from consumers more of their scarce time than the latter; the fact that consumers are willing to pay that price is indicative of the greater value they derive from the former. Various aspects of the laws and business models that currently govern the entertainment industry reflect sensitivity to this variable. A CD containing three twenty-minute recordings costs the same as a CD containing fifteen four-minute recordings. In effect, the copyright owner of the former earns more per song than the copyright owner of the latter. The mechanical royalties paid to the composers of songs (discussed in detail in Chapter 2) also vary with the duration of the resultant recordings. The current rate is 8 cents for recordings up to five minutes in length, and 1.55 cents per minute (or fraction thereof) for longer recordings. Thus, the composer of a song captured in a twenty-minute recording receives from the record company 31 cents for each copy made and distributed, while the composer of a song captured in a four-minute recording receives approximately one quarter of that amount. Pricing practices with respect to video recordings are not so consistent, but duration does matter to some extent. For example, a DVD or tape containing a short children's film or documentary typically costs less to rent or buy than a DVD or tape containing a feature-length film.

An alternative compensation system could and should incorporate this variable even more precisely. If we wished to give it a great deal of weight, we would multiply the number of times each registered work was listened to or watched by its duration when determining the share of the tax revenues to which each registrant was entitled. (Remember that we collected on the registration form the data necessary to make such adjustments.) But that may be going too far. Is a fifteen-minute version of "Stairway to Heaven" really worth three times as much to listeners as a five-minute Beatles song? Polls and studies of consumer behavior, conducted by the Copyright Office, might suggest a more modest multiplier. The main point is that some adjustment for duration would seem warranted.

Would the result be to induce all musicians to make long songs and all producers to create long films? No. The same forces that constrain the length of recordings today--cost pressure and awareness of consumers' tastes and attention spans--would offset the lure of larger per-consumption fees.

The second factor we risk neglecting is variation in the intensity of the pleasure consumers get from different works. For all three of the reasons outlined at the start of this section, we would want, if possible, to pay more to the creators of recordings that give consumers intense satisfaction than to the creators of recordings that please them less.

With respect to music, this variable is likely to be captured reasonably well in our consumption counts. If I like song number 1 a good deal, I am likely to listen to it often. If I like song number 2 less well, I am likely to listen to it less often. A determination of how frequently a given song is heard will thus be a reasonably good guide to the intensity of the pleasure consumers get from it. Even in the context of music, however, this correlation will be imperfect. Suppose, for example, I play recordings by Roy Hargrove and Branford Marsalis equally often, but the former I use as background music, while the latter engage my full attention. The greater value to me of Marsalis's music will not be captured in a consumption count.

With respect to movies, consumption data will be an even poorer indicator of consumers' experiences. To be sure, if I love a film, I may watch it more than once. But, of the large majority of films that I watch only once, some will give me a great deal of enjoyment, others relatively little. Refining our estimates of the relative value of different films to consumers would require us somehow to take such variations into account. To be sure, the present system does not. I cannot demand a rebate if, upon emerging from a theatre, I feel that the film I just watched was mediocre. Nor do I ordinarily tip the studio after watching what I consider a great film. But that the present system is crude in this respect does not mean that we should accept similar imperfection in the proposed regime.

So, would it be possible to take intensity of enjoyment into account? The most obvious of the possible mechanisms for doing so would be to ask consumers. In other words, a system based on consumption rates could be supplemented (or, conceivably, replaced) by a voting system. Several scholars exploring the possibility of an alternative compensation system for digital entertainment have considered schemes of this general sort. For example, in the spring of 2003, a small group of lawyers, academics, and musicians met at the Banff Centre for the Arts to continue a conversation begun the previous fall at the Blur Workshop on Power at Play in Digital Art and Culture concerning possible ways of compensating artists whose works are downloaded through peer-to-peer technologies. One of the participants, Jamie Love, subsequently reported the fruits of their discussions in a document known as the "Blur/Banff Proposal."[45] Among its principal features is the following suggestion:

> 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.
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> 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.
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> 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:
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> 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.[46]

A system of this sort would indeed enable us to track more precisely the values that people place upon digital works. Under such a system, for example, Marsalis would get more of my money than Hargrove.

Voting would not merely enable consumers to identify and reward music they really like, it would also enable them to express preferences of other sorts. As some of the examples set forth in the Blur/Banff proposal suggest, consumers might decide to divert flows of money from artists that they like to hear or watch to artists that they deem "deserving"--for example, because they were pioneers in a particular field or because they are especially needy. Among other things, this power might help to offset what the Blur/Banff discussants refer to as "the Britney effect"--the unfortunate tendency, discussed in Chapter 2, for "most of the money [to go] to a handful of famous artists, making them fabulously wealthy while other artists barely eke out an existence."

Another potential advantage of such a system is identified by Peter Eckersley. A voting mechanism would likely require simple pieces of hardware and software, which in turn could be configured so as to frustrate ballot-stuffing, a phenomenon that, as we have seen, threatens a usage-based system.[47]

These benefits are considerable, but they are offset by some serious worries. The simplest is that it is notoriously difficult to induce people to vote. Many Webcasters, for example, currently ask their listeners to "rate" the songs that are streamed to them; few listeners take the trouble to do so.

A different sort of worry involves the criteria that consumers might employ when casting their votes. "Giv[ing] all the money to performances of a specific genre of music, such as African music" seems unobjectionable, even commendable. But what if consumers used their power to reward musicians they found physically attractive or personable? One of the features of the current entertainment industry that many artists find noxious is the need they feel to present an attractive persona--through music videos, magazine photos and interviews, and so on--in order to sell records or films. A voting system might increase rather than reduce that problem--and thus exacerbate, rather than alleviate, "the Britney effect." Yet another possibility, identified by Eugene Volokh, is that consumers would vote, not for the musicians whose music they most liked, but for political causes. I might decide to devote all of my share of the tax revenues to the National Rifle Association, owner of the copyright in "The Second Amendment Blues," or the Sierra Club, owner of the copyright in "Tree-Sitting Chants."[48]

Such an outcome would be unfortunate for two separate reasons. First, it would divert money from the entertainment industry to politicians or lobbying organizations--one of the things that opponents of alternative compensation systems most fear. Second, it would introduce static into the signals that we are trying to provide musicians and filmmakers--indications of the kinds of recordings that consumers like to hear and watch. On balance, therefore, it seems that the hazards of voting systems exceed their potential benefits.

Is there any other way in which we could measure more sensitively the intensity of consumers' likes (and dislikes)? One possibility, suggested by Steve Shavell, would be to observe the ways in which consumers behave when confronted with the same or similar products in other contexts. For example, from the fact that tickets to the opera commonly cost more than tickets to rock concerts, we might infer that opera provides its devotees more intense satisfaction. Similarly, from the fact that Universal Music recently lowered the suggested retail price of all of its CDs--except those in its classical collection--from $18 to $12, one might infer that classical music is more valuable to its listeners than music of other genres. And so forth. These inferences would then be used to adjust the payments made to the registrants of recordings that fell into each category--for example, to give registrants of opera more per consumption than the registrants of rock.

At one, very high level, use of this technique seems to make good sense. When deciding how much of the pot to distribute to the registrants of movies and how much to distribute to the registrants of sound recordings, it's probably wise to look for guidance, at least for the immediate future, to the ways in which consumers in the aggregate have behaved in the recent past. Specifically, we can and should assume that the relative amounts that consumers spent during the past few years on movies and music fairly reflect the difference in the value they derived, in the aggregate, from those very different forms of entertainment. This guideline, in conjunction with the "make-whole" principle on which the system is founded, argues for maintenance of the shares each sector enjoyed before the new technologies began to undercut their markets. Thus, if our rough estimates of the magnitude of the injuries sustained by each group of copyright owners proved accurate, the Copyright Office in 2004 would divide up the pie as follows: $527 million

($479 million, adjusted for inflation) to the owners of copyrights in films; $168 million ($153 million, adjusted for inflation) to the owners of copyrights in musical compositions; and $1.149 billion ($1.045 billion, adjusted for inflation) to the owners of copyrights in sound recordings.

Past this point, however, the technique seems highly problematic for three reasons. First, as the foregoing examples suggest, it would be possible to employ this method only to differentiate types of recordings (opera versus rock music; action movies versus comedies; and so on), not to differentiate individual songs and films. Determining the relevant categories--and then deciding how to classify individual recordings--would be hard, costly, and controversial. (Are Jackie Chan films best described as action movies, comedies, or something else entirely?) Second, the difficulty of making choices of these sorts would create opportunities for government officials to indulge their biases concerning the relative merits of various types of entertainment--one of the primary hazards of an alternative compensation system. Finally, adoption of this approach would forfeit one of the great advantages of an alternative compensation system as compared to a market system. In the former, unlike the latter, the menu of entertainment products made available to the public would reflect fairly the preferences of all consumers of digital entertainment and would not be tilted toward the tastes of the rich, who are able and willing to pay more for their songs and films.

Once again, therefore, it seems that a technique for tracking more carefully the intensity of consumers' desires, though intriguing, has more costs than benefits. We would be better off relying on the imperfect approach outlined above: a simple consumption count, adjusted to take into account differences in the duration of songs and films.