

Canada's private copying levy – does it comply with Canada's international treaty obligations?

Andrew F. Christie,[†] John Davidson[‡] and Fiona Rotstein[#]

Intellectual Property Research Institute of Australia
The University of Melbourne

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Intellectual Property Research Institute of Australia
The University of Melbourne
Law School Building
Victoria 3010 Australia
Telephone: 61 (0) 3 8344 1127
Fax: 61 (0) 3 9348 2353
Email: info@ipria.org
www.ipria.org

[†] Andrew Christie is the Davies Collison Cave Professor of Intellectual Property in the Faculty of Law at the University of Melbourne, and is also the Director of the Intellectual Property Research Institute of Australia, University of Melbourne.

[‡] John Davidson is admitted to practice law in New South Wales, Australia and Ontario, Canada, and is currently a legal consultant with Rouse & Co International's Dubai office.

[#] Fiona Rotstein is a Research Fellow at the Intellectual Property Research Institute of Australia, University of Melbourne.

Abstract

The Canadian private copying scheme imposes a statutory levy on blank audio recording media, to compensate composers, performers and producers of sound recordings for the private copying of their subject matter that is permitted under the scheme. While both Canadian and foreign composers are entitled to receive payment under the levy, only Canadian performers and sound recording makers, and performers and makers from a country that provides reciprocal rights to Canadians, are entitled to receive remuneration from the levy. This article examines whether the operation of the private copying levy in relation to foreign performers and sound recording makers is consistent with the requirement of ‘national treatment’ pursuant to Canada’s international copyright obligations, current and future. The article concludes that a very strong argument can be made that the private copying levy regime is not in compliance with Canada’s national treatment obligations as they currently exist under the *Rome Convention* and the *TRIPS Agreement*, and as they will exist in the future once Canada ratifies the *WIPO Performances and Phonograms Treaty*.

1. INTRODUCTION*

The Canadian statutory scheme for the private copying of music is topical and controversial. As technology has developed over the last few decades, private copying of music has become an increasingly prevalent practice.¹ Although private copying of sound recordings represents an unauthorised exercise of the copyright owners' exclusive rights, it is practically impossible for the copyright owners to prevent or license such copying.² The Canadian scheme consists of a statutory

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¹ While audiocassettes have all but disappeared from view, Canadians are using a range of other media onto which music may be copied, including CDs, MiniDiscs, iPods, MP3 flash card technologies, hard disc drives in computers, and also the Internet for the purposes of peer-to-peer (P2P) file sharing.

² As stated by the Canadian Private Copying Collective: "At the present time, the industry cannot control the vast majority of the copying activity that is occurring." Canadian Private Copying Collective, 'Submission of the Canadian Private Copying Collective with Respect to *Supporting Culture and Innovation: Report on the Provisions and Operation of the Copyright Act*' filed with the House of Commons Standing Committee on Canadian Heritage (September 15, 2003) 11 <http://cpcc.ca/english/pdf/section92Brief150903.pdf>.

licence³ that makes legal a practice that is generally not considered abhorrent by society,⁴ and a statutory levy that is meant to compensate copyright owners for their losses. The scheme has been the subject of much discontent.⁵

The key features of the Canadian private copying scheme are contained in Part VIII of the *Copyright Act*.⁶ While both Canadian and

³ Strictly speaking, the Canadian copyright legislation does not provide a licence to privately copy because the term “licence” implies a permission to do something that is illegal; section 80 of the *Copyright Act* instead deems certain private copying to not be an infringement of copyright. In this article, the term licence will be adopted as shorthand for the permissive effect of section 80.

⁴ As Lord Templeman noted in *C.B.S Songs v Amstrad* [1988] A.C. 1013 at 1060: “Millions of breaches of the law must be committed by home copiers every year. [...]Whatever the reason for home copying, the beat of Sergeant Pepper and the soaring sounds of Miserere from unlawful copies are more powerful than law-abiding instincts or twinges of conscience. A law which is treated with such contempt should be amended or repealed.”

⁵ On the topic of the private copying levy, Geist writes “Consumers dislike paying what resembles a tax, retailers complain it drives business out of the country, and artists doubt its effectiveness in light of the inexcusably slow rate of royalty distributions”: M. Geist, ‘Copying levy hasn’t worked well for anyone’, *The Toronto Star* (August 8, 2005)

http://www.ccfda.ca/Downloads_resources/TorStar08_08_2005.pdf.

⁶ R.S.C. 1985, C-42 (hereinafter *Copyright Act*). Part VIII of the *Copyright Act* was introduced to the Act in 1997 as part of the reforms contained in Bill C-32

foreign composers of musical works are entitled to receive payment under the levy, only Canadian performers and sound recording makers, and performers and makers from a country that provides reciprocal rights to Canadians, are entitled to receive remuneration from the levy.

This article examines whether the operation of the private copying levy in relation to foreign performers and sound recording makers is consistent with the requirement of ‘national treatment’ pursuant to Canada’s international copyright obligations, current and future. Due to the recent demise of the much-publicised *Bill C-60: An Act to Amend the Copyright Act*,⁷ which was an attempt to implement the provisions of the two remaining international copyright treaties that are yet to be ratified into Canadian law,⁸ the topic is very much a

(now an *Act to Amend the Copyright Act*, R.S.C. 1997 C-24.) Prior to the introduction of Part VIII to the *Copyright Act*, private copying infringed copyright.

⁷ *Bill C-60: An Act to Amend the Copyright Act* [hereinafter *Bill C-60*], first reading June 20, 2005

http://www.parl.gc.ca/PDF/38/1/parlbus/chambus/house/bills/government/C-60_1.PDF.

⁸ The two international copyright treaties that are yet to be ratified by Canada are the World Intellectual Property Organization (WIPO) Internet Treaties – the *WIPO Copyright Treaty*, which applies to literary and artistic works, and the *WIPO Performances and Phonograms Treaty*, which applies to the ‘neighbouring rights’ subject matters of performances and sound recordings (phonograms).

‘live’ issue. The previous Canadian government had promised public consultations on the issue of national treatment of the private copying levy in the near future;⁹ however, the current Canadian government is yet to unveil its policy regarding the issue.

This article is structured as follows. By way of providing context, section 2 addresses the operation of the levy, and in particular the beneficiaries of the levy. Section 3 examines whether the levy’s provision for the remuneration of foreign performers and sound recording makers is consistent with the principle of national treatment contained in the international treaties to which Canada is currently a party, the *Rome Convention*¹⁰ and the *TRIPS Agreement*.¹¹ The extent to which national treatment applies to the levy under the international treaties to which Canada will, in due course, become a party – the

⁹ See Canadian Government, *Government Statement on Proposals for Copyright Reform* http://pch.gc.ca/progs/ac-ca/progs/pda-cpb/reform/statement_e.cfm.

¹⁰ *Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations*, first signed on 26 October 1961.

¹¹ *Agreement on Trade-Related Aspects of Intellectual Property Rights*, Annex 1C to the *Agreement Establishing the World Trade Organization* 1994. Canada is a member of the World Trade Organization (the WTO) and the TRIPS Agreement is an obligation for all WTO members.

*WIPO Copyright Treaty*¹² and the *WIPO Performances and Phonograms Treaty*¹³ – is also examined in Section 3. Finally, concluding remarks are made in Section 4.

2. THE PRIVATE COPYING LEVY

2.1. Operation of the Levy

(a) Legislative Structure

According to section 82 of the *Copyright Act*, every person who, for the purposes of trade, manufactures in Canada or imports into Canada a “blank audio recording medium” is liable to pay a levy to the collecting body on selling or otherwise disposing of that medium in Canada,¹⁴ unless the medium is sold for export and is in fact exported from Canada.¹⁵ Only a blank audio recording medium that is sold to

¹² *WIPO Copyright Treaty* 1996, first signed on 20 December 1996.

¹³ *WIPO Performances and Phonograms Treaty* 1996, first signed on 20 December 1996.

¹⁴ *Copyright Act*, section 82(1)(a).

¹⁵ *Copyright Act*, section 82(2).

an association representing persons with perceptual disabilities is exempted by the *Copyright Act* from the levy.¹⁶

Section 79 defines “blank audio recording medium” to mean an audio recording medium onto which no sounds have ever been fixed, and any other prescribed audio recording medium. The liability for paying the levy arises upon “selling or otherwise disposing of those blank audio recording media in Canada”.¹⁷ The levy must be paid to the “collecting body”, which is defined by section 79 to be the collective society designated as the collecting body by the Copyright Board under section 83(8). The Canadian Private Copying Collective is the collective society for the private copying levy,¹⁸ and it files with the

¹⁶ *Copyright Act*, section 86.

¹⁷ *Copyright Act*, section 82(1)(a).

¹⁸ The organisations that created the Canadian Private Copying Collective and have authorised it to act on their behalf are: the Canadian Mechanical Reproduction Rights Agency (CMRRA), the Neighbouring Rights Collective of Canada (NRCC), the Société de gestion des droits des artistes-musiciens (SOGEDAM), the Society for Reproduction Rights of Authors, Composers and Publishers in Canada (SODRAC), and the Society of Composers, Authors and Music Publishers of Canada (SOCAN).

Copyright Board a proposed tariff specifying the media to be levied and the proposed rates for each type of media.¹⁹

After considering the proposed tariff and any objections to it, the Copyright Board must determine the amount and application of levies, ensuring that the levies are “fair and equitable”.²⁰ In its most recent decision, the Copyright Board set levies at: 29 cents for each audio cassette of 40 minutes or more in length; 21 cents for each recordable CD (CD-R) or recordable-rewriteable CD (CD-RW); and 77 cents for each CD-R Audio, CD-RW Audio or MiniDisc.²¹ The collective societies are then required to distribute the proceeds of the levies to “eligible” creators as soon as practicable.²²

(b) Judicial Consideration of the Legislation

There have been various court cases considering the Canadian reproduction levy, in relation to its constitutional validity, its

¹⁹ Section 83(1), *Copyright Act*.

²⁰ Section 83(9), *Copyright Act*.

²¹ Copyright Board, ‘Statement of Proposed Levies to Be Collected by CPCC on the Sale, in Canada, of Blank Audio Recording Media for the Year 2007: Private Copying Tariff 2007’, *Supplement Canada Gazette*, Part I (February 25, 2006).

²² Section 84, *Copyright Act*.

application, and its collection. The levy regime was held to be constitutionally valid by the Federal Court of Appeal in *Canadian Private Copying Collective v. Canadian Storage Media Alliance*.²³

The constitutional validity of the scheme had been challenged on three grounds: (i) that the levy regime did not fall within the federal Parliament's exclusive legislative authority over "copyrights"; (ii) that the levy was a "tax" and as such was unconstitutional because it had not been introduced into the House of Commons by a ways and means motion; and (iii) that the levy regime was *ultra vires* the authority of Parliament because it was excessively broad and vague, and not sufficiently connected to copyright.

The Federal Court of Appeal held that, viewed from their "purpose and legal effects", all the provisions of Part VIII are "tightly linked to Parliament's goal to compensate rightsholders in respect of the reproduction of music for private use".²⁴ Given that the "essential element" of copyright law involves the "establishment of a legal framework allowing rightsholders to be rewarded for the reproduction

²³ [2005] 2 F.C.R. 654.

²⁴ [2005] 2 F.C.R. 654, 676.

of recorded music by third parties”,²⁵ Part VIII is “in pith and substance” copyright law.²⁶ The court found, in addition, that the levy regime was a “regulatory scheme” rather than a tax.²⁷ The court also found that the regime was neither overly vague nor insufficiently connected to copyright law.²⁸

The Federal Court of Appeal, in the same case, set aside the Copyright Board’s levies on the memory of digital audio recorders, on the ground that such a medium does not constitute an “audio recording medium” within the meaning of section 79 of the *Copyright Act*.²⁹ There have been, in addition, a number of recent cases concerning non-payment of the levy.³⁰

²⁵ [2005] 2 F.C.R. 654, 674.

²⁶ [2005] 2 F.C.R. 654, 676.

²⁷ [2005] 2 F.C.R. 654, 683-687.

²⁸ [2005] 2 F.C.R. 654, 688.

²⁹ *Canadian Private Copying Collective v. Canadian Storage Media Alliance* [2005] 2 F.C.R. 654, 707-712.

³⁰ See, for example, *Canadian Private Copying Collective v. First Choice Recording Media Inc.* [2005] FC 187; *Canadian Private Copying Collective v. 9087-0718 Québec Inc.* [2006] FC 283; and *Canadian Private Copying Collective v. Computer Warehouse Outlet Inc.* [2005] FC 770.

2.2. Beneficiaries of the Levy

The beneficiaries of the revenue generated by the levy are carefully targeted. Pursuant to section 81(1), the levy is payable to “eligible authors”, “eligible performers” and “eligible makers”.

(a) Authors

An “eligible author” is defined as an author of a musical work that is embodied in a sound recording and in which copyright subsists in Canada.³¹ Put simply, copyright will subsist in Canada in a musical work either if the author at the time of creation of the work is a national of, or if the first publication of the work occurs in, Canada or another country that is a signatory to the *Berne Convention*,³² the *Universal Copyright Convention*,³³ or the *Agreement Establishing the World Trade Organization* (hereafter ‘a treaty country’).³⁴ It follows

³¹ Section 79, *Copyright Act*.

³² *Berne Convention for the Protection of Literary and Artistic Works*, first signed on 9 September 1886 and revised subsequently on 24 July 1971 and 28 September 1979.

³³ *Universal Copyright Convention*, first signed at Geneva on 6 September 1952 and revised subsequently at Paris on 24 July 1971.

³⁴ *Copyright Act*, sections 5(1)(a) and (c) and section 2 (definition of “treaty country”).

that an author who is a national of a country other than Canada is entitled to receive remuneration under the levy so long as either the author is a national of a treaty country or first publication of the author's work occurred in Canada or in a treaty country.

The distribution of the proceeds of the levies to both local and foreign composers ensures the scheme's compliance with the principle of 'national treatment' for authors, as espoused in Article 5(1) of the *Berne Convention* and Article 3(1) of the World Trade Organization's *Agreement on Trade-Related Aspects of Intellectual Property Rights* ("*TRIPS Agreement*"). This principle, expressed in simple terms, requires member states to grant to nationals of other member states the rights provided by the *Berne Convention* or the *TRIPS Agreement*, as well as any other rights relating to copyright enjoyed by their nationals.

(b) Performers and Makers of Sound Recordings

In contrast, the definitions of "eligible performer" and "eligible maker" are such that, in addition to Canadian performers and makers of sound recordings, the only foreign performers and makers entitled to remuneration under the private copying scheme are those from

countries that grant Canadian citizens or corporations similar benefits under their national copyright legislation – i.e. from countries that provide reciprocal entitlement.³⁵ Although section 85 of the *Copyright Act* allows the Minister of Industry to designate qualifying states and to tailor the benefits for foreign nationals to match that afforded to Canadians by the foreign private copying scheme, a Canadian Minister of Industry is yet to designate any states whose performers and makers of sound recordings are entitled to share in the benefits of the Canadian private copying scheme.

The anomaly that results is that it is lawful in Canada to reproduce a foreign performer's performance and a foreign record company's sound recording for private use even though these foreign rightsholders receive no remuneration under the Canadian private copying scheme. This outcome jeopardises the *quid pro quo* justification of the private copying scheme (remuneration in return for copying), because Canadians are permitted to privately copy the copyright material of foreign performers and makers of sound recordings without paying for the privilege.

³⁵ *Copyright Act*, section 79.

The inequity of the reciprocity requirement for the remuneration of foreign performers and makers of sound recordings is readily apparent when it is noted that, of the musical sound recordings privately copied in Canada, approximately 73% involve foreign non-eligible performers and 78% involve foreign non-eligible makers of the sound recordings.³⁶ It is also unclear why no Ministerial declarations have been made when countries such as Germany, for example, already remit remuneration to Canadian performers and makers of sound recordings based upon the national treatment principle.³⁷ While the exclusion of foreign performers and makers of sound recordings from the Canadian scheme is undoubtedly beneficial for the Canadian copyright trade imbalance, it is unfair to foreign performers and makers of sound recordings (as well as inconsistent with the *quid pro quo* justification of the scheme). Finally, it is by no means clear that the reciprocity requirement for the remuneration of foreign performers

³⁶ See *Private Copying 1999-2000, Tariff of Levies to be Collected by the CPCC (Re)* (1999) 4 C.P.R. (4th) 15 at 30; *Private Copying 2001-2002, Tariff of Levies to be Collected by the CPCC (Re)* (2001) 10 C.P.R (4th) 289 at Appendix 1; *Private Copying 2003-2004, Tariff of Levies to be Collected by the CPCC (Re)* (2003) 28 C.P.R (4th) 417 at Appendix 1.

³⁷ G. Davies & M.E. Hung, *Music and Video Private Copying* (Sweet & Maxwell, London, 1993), 217.

and makers of sound recordings is consistent with Canada's current and future international treaty obligations, as discussed below.

3. NATIONAL TREATMENT AND THE PRIVATE COPYING LEVY

3.1. Relevant International Treaties

There is no international treaty dealing directly with private copying. However, Canada is party to a number of international treaties which include obligations that impact upon how a private copying regime may be structured. Currently, Canada is a party to the *Berne Convention* which applies to literary and artistic works, the *Rome Convention* which applies to the neighbouring rights of broadcasters, performers and makers of sound recordings, and the *TRIPS Agreement* which applies to all these subject matters.³⁸

Canada is also a signatory to the World Intellectual Property Organization (WIPO) Internet Treaties, that is the *WIPO Copyright Treaty* which applies to literary and artistic works, and the *WIPO Performances and Phonograms Treaty* which applies to 'neighbouring

³⁸ Canada is also a party to the *Universal Copyright Convention*, which provides protection substantially similar to the *Berne Convention*.

rights'. However, Canada is yet to ratify either the *WIPO Copyright Treaty* or the *WIPO Performances and Phonograms Treaty* by incorporating their principles into domestic law. Proposed by the former Minister of Canadian Heritage, *Bill C-60* was an attempt by the previous (Liberal) Canadian government to implement the *WIPO Copyright Treaty* and the *WIPO Performances and Phonograms Treaty* into national copyright law. The government intended to consider ratification of the treaties after the bill had passed.³⁹ However, the bill only made it to its first reading before being scrapped on 30 November 2005, when the Conservatives tabled a non-confidence motion that passed, effectively toppling the Liberal government. As of August 2006, the new Canadian (Conservative) government is yet to ratify these treaties.

3.2. The Principle of National Treatment

According to Ricketson, 'national treatment' pursuant to an international convention, "simply removes any differences between national and foreign authors, providing that both are to be treated in

³⁹ See Canadian Government, 'Frequently Asked Questions: Amendments to the *Copyright Act*', question 4 <http://strategis.ic.gc.ca/epic/internet/incrp-prda.nsf/en/rp01146e.html>.

the same way under national law”.⁴⁰ All Contracting States must apply the principle of national treatment, in a non-discriminatory manner. Put in simple terms, national treatment requires Canada to provide to the nationals of other Contracting States the same treatment regarding copyright and neighbouring rights that it extends to its own nationals. As Stephen Ladas writes, national treatment involves “the complete assimilation of foreigners to nationals, without condition of reciprocity”.⁴¹

The distribution of the proceeds of the private copying levy to both local and foreign composers ensures Canada’s compliance with the principle of national treatment for authors, as espoused in and required by Article 5(1) of the *Berne Convention*, Article 3(1) of the *TRIPS Agreement* and Article 3 of the *WIPO Copyright Treaty* (which expressly incorporates Article 5(1) of the *Berne Convention*). More controversial, in terms of Canada’s current and future international obligations, is the distribution of the proceeds of the levy to foreign performers and makers of sound recordings on the basis of reciprocity.

⁴⁰ S. Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986* (Centre for Commercial Law Studies, London, 1987), 194.

⁴¹ S.P. Ladas, *The International Protection of Literary and Artistic Property* (Macmillan, New York, 1983), 365.

This section of the article discusses whether the reciprocity requirement for the remuneration of foreign performers and makers of sound recordings is consistent with the principles of national treatment contained in the *Rome Convention*, the *TRIPS Agreement* and the *WIPO Performances and Phonograms Treaty*.

3.3. Compliance with the *Rome Convention*

Canada is a Contracting State to the *Rome Convention*. The Convention requires Contracting States to provide national treatment to performers, and to makers of sound recordings, if any of a number of specified conditions is met. For a performer whose performance is incorporated in a phonogram, national treatment must apply if the phonogram is protected under Article 5 of the Convention.⁴² Article 5 sets out the conditions for national treatment to apply in respect of a maker of a sound recording. The relevant condition in Article 5 is that the maker of a sound recording is a national of another Contracting State (the criterion of nationality).⁴³ It follows that the relevant

⁴² *Rome Convention*, Article 4(b). It would seem that national treatment must also apply if performance takes place in another Contracting State: Article 4(a).

⁴³ *Rome Convention*, Article 5(1)(a). It is to be noted that, pursuant to Article 5(3), Canada has exercised its entitlement to declare that it will *not* apply the other

condition, in respect of both a performer whose performance is incorporated in a sound recording and a maker of a sound recording, is the nationality of the maker of the sound recording. Where the maker of the sound recording is a national of a Contracting State, Canada must provide national treatment to both the performer and the maker of the sound recording.

Article 2 of the *Rome Convention* specifies what is required by the obligation to provide national treatment. According to Article 2(1):

For the purposes of this Convention, national treatment shall mean the treatment accorded by the domestic law of the Contracting State in which protection is claimed:

- (a) to performers who are its nationals, as regards performances taking place, broadcast, or first fixed, on its territory;
- (b) to producers of phonograms who are its nationals, as regards phonograms first fixed or first published on its territory;
- (c) to broadcasting organisations which have their headquarters on its territory, as regards broadcasts transmitted from transmitters situated on its territory.

conditions specified in Articles 5(1)(b) and (c) – namely, the criterion of fixation and the criterion of publication, respectively.

It follows that, in respect of a sound recording the maker of which is a national of a Contracting State, the treatment that Canada must provide to the performer whose performance is fixed in the sound recording is the treatment that Canada provides to a Canadian performer in respect of a performance taking place, broadcast or first fixed in Canada. Likewise, in respect of a sound recording the maker of which is a national of a Contracting State, the treatment that Canada must provide to the maker of the sound recording is the treatment that Canada provides to a Canadian maker of a sound recording in respect of a sound recording first fixed or first published in Canada.

It was observed earlier that a Canadian performer and a Canadian maker of a sound recording receive under the Canadian copyright legislation the entitlement to remuneration under the private copying levy.⁴⁴ It follows that, pursuant to the requirement to provide national treatment under the *Rome Convention*, Canada is required to provide the entitlement to remuneration under the private copying levy to performers and to makers of sound recordings of other Contracting

⁴⁴ See sections 79 and 81(1) of the *Copyright Act*.

States, whether or not those other Contracting States provide a reciprocal entitlement to Canadian performers and makers of sound recordings. If this interpretation is correct, then Canada is in breach of its obligations under the *Rome Convention* unless its derogation from national treatment in this respect is permitted by the Convention.

Pursuant to Article 2(2) of the *Rome Convention*, national treatment “shall be subject to the protection specifically guaranteed, and the limitations specifically provided for, in this Convention”. The meaning of the first part of Article 2(2) (“subject to the protection specifically guaranteed”) seems clear: even if a Contracting State does not grant the guaranteed protection to its own nationals, it nevertheless must grant the guaranteed protection to nationals of other Contracting States.⁴⁵ The meaning of the second part of Article 2(2) (“subject to ... the limitations specifically provided for”) likewise seems clear: a Contracting State may deny performers or producers of other

⁴⁵ See C. Masouyé, *Guide to the Rome Convention and to the Phonograms Convention* (WIPO, Geneva, 1981), 19; and S.M. Stewart, *International Copyright and Neighbouring Rights*, second edition (Butterworths, London, 1989), 227.

Contracting States an entitlement enjoyed by its own nationals, if the Convention so permits.⁴⁶

The *Rome Convention* permits Contracting States to limit the application of national treatment in the circumstances and in the manner specified by Article 16.⁴⁷ Article 16(1) sets out the circumstances in which a Contracting State may declare that it will not apply certain provisions of the Convention. Such a declaration can be made, under Article 16(1)(a), in relation to Article 12. Canada has elected to make such a declaration in relation to Article 12, in the form permitted by subparagraph (iv) of Article 16(1)(a). In particular, Canada has elected to declare that, as regards a foreign maker of a sound recording who is a national of a *Rome Convention* Contracting State, it will limit the protection provided by Article 12 to the extent to which, and to the term for which, the Contracting State grants protection to sound recordings first fixed by nationals of Canada. That is to say, Canada has elected, under Article 16(1)(a)(iv) to adopt a

⁴⁶ C. Masouyé, above n 45, 19; and S.M. Stewart, above n 45, 227.

⁴⁷ The provisions in relation to which an Article 16 declaration can be made are Articles 12 and 13.

principle of reciprocity in relation to protection of foreign makers of sound recordings.

At first glance, this may appear to provide the basis for Canada adopting a principle of reciprocity in relation to the entitlement of remuneration under Part VIII of the *Copyright Act*. On closer inspection, however, it will be seen that this is not the case. A declaration under Article 16(1)(a) may be made only as regards Article 12 of the *Rome Convention*. Article 12 deals with the entitlement of a performer whose performance is incorporated in a sound recording, and of a maker of a sound recording, to equitable remuneration for the use of a sound recording for “broadcasting or for any communication to the public”. Article 12 does not apply to reproduction. Thus, a declaration under Article 16 cannot be made in relation to remuneration for private copying.

Thus, Canada’s adoption of reciprocity as a condition of payment of remuneration under Part VIII of the *Copyright Act* cannot be justified by its declaration under Article 16(1)(a)(iv) of the *Rome Convention*. Hence, it seems clear that Canada is in breach of the *Rome Convention* by adopting the reciprocity approach in relation to performers and makers of sound recordings.

3.4. Compliance with the *TRIPS Agreement*

As a member of the World Trade Organization (WTO), Canada must comply with the provisions of the *TRIPS Agreement*. Article 3(1) of the Agreement is the main provision dealing with national treatment. This article provides that each Member shall accord to the nationals of other Members “treatment no less favourable than it accords to its own nationals with regard to the protection of intellectual property”.⁴⁸ This obligation is expressly stated to be subject to the exceptions already provided in, inter alia, the *Rome Convention*. Further, in respect of performers and makers of sound recordings, this obligation is expressly stated to apply only “in respect of the rights provided under” the *TRIPS Agreement*. As explored below, three issues arise in relation to Article 3(1) and its relevance to the private copying levy.

The first issue concerns the scope of the concept of “treatment ... with regard to the protection of intellectual property”. Does this include a

⁴⁸ According to Gervais, the reference in Article 3(1) to treatment “no less favourable”, rather than to “the same” treatment, could be interpreted as meaning that foreigners may enjoy better treatment than nationals: D. Gervais, *The TRIPS Agreement: Drafting History and Analysis* (2nd ed., Sweet & Maxwell, London, 2003), 98 especially footnote 40.

provision dealing with entitlement to remuneration under a statutory licence? Regarding the meaning of “protection” of intellectual property, the *TRIPS Agreement* itself makes express reference. Footnote 3 of *TRIPS* states that, for the purposes of Article 3 (national treatment) and Article 4 (most-favoured-nation treatment), “protection” shall include:

matters affecting the availability, acquisition, scope, maintenance and enforcement of intellectual property rights as well as those matters affecting the use of intellectual property rights specifically addressed in this Agreement.

There is no WTO dispute resolution jurisprudence directly interpreting this concept. Although Article 3(1) was in issue in the case of *United States – Section 211 Omnibus Appropriations Act of 1998*⁴⁹ (hereinafter *Havana Club Case*), both parties accepted that the relevant provision (which refused to recognise an assertion of ownership of trademark rights in particular circumstances) did concern the “protection” of intellectual property. This understanding was not disputed by either the Panel or the Appellate Body.

⁴⁹ WT/DS176/R, 6 August 2001 (Panel); WT/DS176/AB/R, 2 January 2002 (Appellate Body).

At the outset, it is to be noted that the footnote 3 definition of “protection” is inclusive, not exhaustive. It is to be expected, therefore, that the concept of “protection” of intellectual property would be interpreted broadly by a WTO dispute resolution Panel. This approach is consistent with the observation of the Appellate Body in the *Havana Club Case* that “the national treatment obligation [has] long been a cornerstone of the world trading system ... [and] ... is a fundamental principle underlying the *TRIPS Agreement*”.⁵⁰

An expansive interpretation of “protection” most likely would encompass an entitlement to remuneration under a statutory exception to the reproduction right. Thus, it seems reasonable to assume that the treatment in section 81 of the *Copyright Act* in relation to which right holders are entitled to receive the private copying levy is a treatment with regard to the protection of intellectual property, and hence is subject to the principle of national treatment laid down in Article 3(1) of the *TRIPS Agreement*.

⁵⁰ WT/DS176/AB/R, 2 January 2002, para 241, 242.

The second issue that arises concerns the interrelationship between Article 3 and the provisions of the *Rome Convention* dealing with exceptions. Does the *Rome Convention* permit an exception to national treatment in respect of a private copying provision? As was noted in the immediately preceding section of this article, the *Rome Convention* does permit Contracting States to declare non-application of certain provisions, including national treatment provisions, and Canada has chosen to do so in relation to some of those provisions. It was also noted, however, that the provisions in relation to which Canada has declared non-application of the national treatment principle do not (and, indeed, cannot) include entitlement to remuneration for private copying. Thus, Canada's adoption of a reciprocity approach to payment for remuneration of foreign performers and makers of sound recordings cannot be justified as an exception to the principle of national treatment permitted under the *Rome Convention*.

The third and final issue regarding Article 3 and its relevance to the reproduction levy relates to the "rights provided under" the *TRIPS Agreement* regarding performers and makers of sound recordings. Is an entitlement to remuneration under a statutory licence one of those rights? According to Article 14(1) of the *TRIPS Agreement*,

performers, in respect of a fixation of their performance on a phonogram (i.e. a sound recording), have the right to prevent, *inter alia*, the unauthorised reproduction of such a fixation. That is to say, the rights of performers under the *TRIPS Agreement* include the copying (whether private or otherwise) of a performance of a musical work embodied in a sound recording. Pursuant to Article 14(2), producers of phonograms (i.e. makers of sound recordings) have the right to prohibit the direct or indirect reproduction of their phonograms. That is to say, the rights of makers of sound recordings under the *TRIPS Agreement* include the copying (whether private or otherwise) of a sound recording embodying a musical work. Hence, it can be seen that obligation of national treatment imposed by Article 3 of the *TRIPS Agreement* extends to all the rights of reproduction that are the subject of the section 80 licence under the *Copyright Act* – that is, the rights of reproduction of the composer, the performer and the maker of the sound recording.

In light of the above analysis, it seems the better view is that the *TRIPS Agreement* imposes on Canada an obligation to provide national treatment in respect of the entitlement, under section 81 of the *Copyright Act*, to remuneration for private copying. However, Canada provides national treatment of entitlement to remuneration only in

relation to composers. Regarding performers and makers of sound recordings, entitlement to remuneration is based on reciprocity. In respect of these beneficiaries to the remuneration levy, there is a real likelihood that Canada is in breach of its obligations under Article 3(1) of the *TRIPS Agreement*. This conclusion appears to be consistent with the views of other commentators.⁵¹

3.5. Compliance with the WIPO Performances and Phonograms Treaty

Given the expressed intention of the Canadian government to ratify the WIPO Internet Treaties, it is necessary to consider whether the private copying levy is consistent with the requirement of national treatment under the *WIPO Performances and Phonograms Treaty*. *Bill C-60* was silent as to any proposed changes to Part VIII of the *Copyright Act*. Therefore, the effect of national treatment under the *WIPO Performances and Phonograms Treaty* on the entitlement to remuneration for private copying under section 81 of the *Copyright Act* was left unresolved. According to a 2002 study, the ratification of the WIPO Internet Treaties could generate “a substantial increase” in

⁵¹ See, for example, G. Davies and M.E. Hung, above n 37, 215-217; and D. Gervais, above n 48, 100.

payments from Canadian consumers to foreign performers and makers, and could also necessitate a change in the setting of the levy based on the existing method used by the Copyright Board.⁵² Whereas the Canadian government left the issue unanswered under *Bill C-60*, this section of the article examines whether the *WIPO Performances and Phonograms Treaty* obligation of national treatment extends to the entitlement to remuneration under the private copying levy.

The principle of national treatment is contained in Article 4(1) of the *WIPO Performances and Phonograms Treaty*. According to this provision:

Each Contracting Party shall accord to nationals of other Contracting Parties, as defined in Article 3(2), the treatment it accords to its own nationals with regard to the exclusive rights specifically granted in this Treaty, and to the right to equitable remuneration provided for in Article 15 of this Treaty.

Article 15(1) of the *WIPO Performances and Phonograms Treaty* grants to performers and producers of sound recordings the right to a single equitable remuneration for the use of phonograms for

⁵² M. Rushton, *Economic Impact of Canadian WIPO Ratification on Private Copying Regime* (Department of Canadian Heritage, Ottawa, 2002).

broadcasting or communication to the public. The national treatment obligation in respect of Article 15(1) is qualified by Article 4(2), which provides that it does not apply to the extent that the Contracting Party makes use of the reservations permitted by Article 15(3).

The exclusive rights granted by the *WIPO Performances and Phonograms Treaty* to performers, and to the makers of sound recordings, include the right of authorising the direct or indirect reproduction of their performances fixed in sound recordings, and of their sound recordings, respectively, in any manner of form.⁵³ The issue that arises is whether the entitlement for remuneration for private copying under section 81 of the *Copyright Act*, is one of the “exclusive rights specifically granted” by the *WIPO Performances and Phonograms Treaty*. There are two views on this question, with proponents for each of them.

(a) Narrow View

Under one view, the principle of national treatment does *not* apply, because the right to remuneration as provided under section 81 of the

⁵³ *WIPO Performances and Phonograms Treaty*, Articles 7 (for performers) and 11 (for makers of sound recordings).

Copyright Act is not one of the exclusive rights specifically guaranteed by the *WIPO Performances and Phonograms Treaty*. This view takes a narrow interpretation of what is an “exclusive right”. Reinbothe and von Lewinski are proponents of the narrow interpretation. In their view, the “exclusive rights” guaranteed by the *WIPO Performances and Phonograms Treaty* are simply those rights provided by Articles 5 through 12 – that is, performers’ moral rights, performers’ economic rights in their unfixed performances, and performers’ and sound recording makers’ rights of reproduction, distribution, rental and making available.⁵⁴ A right of remuneration in relation to one of these rights is not itself one of these rights. Thus, according to Reinbothe and von Lewinski, a right of remuneration for private copying is not an exclusive right guaranteed by the *WIPO Performances and Phonograms Treaty*, even though it is “derivative of the exclusive right of reproduction”.⁵⁵

This interpretation has been the subject of subsequent elaboration by von Lewinski. In a study commissioned by the Canadian Private

⁵⁴ J. Reinbothe and S. von Lewinski, *The WIPO Treaties 1996* (Butterworths, London, 2002), 287.

⁵⁵ J. Reinbothe and S. von Lewinski, above n 54, 288.

Copying Collective, von Lewinski considered the “literal interpretation” of Article 4(1).⁵⁶ In her view:

The literal interpretation of these words does not leave any doubt. The ordinary meaning of the term “exclusive right” is the following: the exclusive right is a right to authorize or prohibit the relevant uses and enables the right holder to exclude third parties from such uses. In the case of the right of remuneration for private reproduction, the right holder cannot exclude third parties from private reproduction. Consequently, it does not represent an exclusive right, whether or not specifically granted in the WPPT.⁵⁷

In von Lewinski’s opinion, this interpretation is supported by the “systematic interpretation” of Article 4(1). In relation to that, she states:

The specific wording “the exclusive rights specifically granted in this Treaty” and “the right to equitable remuneration provided for in Article 15 of this Treaty” has to be read in its context. Firstly, the context of Article

⁵⁶ S. von Lewinski, ‘National Treatment for Private Copying Levies Under the WPPT’, Appendix E to the *Submission of the Canadian Private Copying Collective with respect to Supporting Culture and Innovation: Report on the Provisions and Operation of the Copyright Act*, filed with the House of Commons Standing Committee on Canadian Heritage, September 15, 2003 <http://cpcc.ca/english/pdf/section92Brief150903.pdf>.

⁵⁷ S. von Lewinski, above n 56, 2

4(1) of the WPPT shows that this provision lays down the obligation of national treatment in a comprehensive way; any other rights which are not exclusive rights, or the specific remuneration right under Article 15 of the WPPT, are not covered. The comprehensive nature of Article 4(1) of the WPPT in combination with the specific reference only to the statutory remuneration right under Article 15 of the WPPT does not leave any room to argue that, in addition, any further statutory right of remuneration would also be covered by this provision.⁵⁸

(b) Broad View

The alternative view is that the principle of national treatment *does* apply, because the right to which the entitlement to remuneration for private copying relates is the right of reproduction, and this is a right guaranteed by the *WIPO Performances and Phonograms Treaty*. Under this interpretation, what matters is the general right to which the provision in the national legislation relates, not the specific right provided by the national legislation. Therefore, even though the specific right (of an entitlement to remuneration for private copying) in the *Copyright Act* is not guaranteed by the Treaty, the principle of national treatment nevertheless applies because this specific right

⁵⁸ S. von Lewinski, above n 56, 2.

relates to a general right (the right of reproduction) guaranteed by the Treaty.

Ficsor is a proponent of this interpretation. He considers that an exclusive right of reproduction that is limited to a right of remuneration “is still a right provided for in the Treaty, but limited just in the given case”.⁵⁹ Thus, in his view, a failure by a Contracting State to grant the right to remuneration to nationals of other Contracting States “is not likely to be allowed on the basis of Article 4 of the Treaty”.⁶⁰

In 2002, the Canadian government appeared to be of the same opinion.

In its 2002 *Section 92 Review Report*,⁶¹ the government stated:

⁵⁹ M. Ficsor, *The Law of Copyright and the Internet* (Oxford University Press, New York, 2002), 614.

⁶⁰ M. Ficsor, above n 59, 614.

⁶¹ Industry Canada, *Supporting Culture and Innovation: Report on the Provisions and Operation of the Copyright Act (2002)* (hereinafter *Section 92 Review Report*). The *Section 92 Review Report* was produced pursuant to section 92 of the Copyright Act, which requires the relevant Minister, before the 5th anniversary of the 1997 reforms to the Copyright Act, to report to parliament on the operation of the Act and any recommendations for reform. The *Section 92 Review Report*, tabled in October 2002, identified private copying as one of the “medium term” issues on the reform agenda, which were scheduled for review in a two to four

When Canada ratifies the WPPT, it may be necessary to amend the Act, either by narrowing the scope of the exception in section 80 or by paying royalties from the levy to sound recording makers from all WPPT countries on a national treatment basis.⁶²

The *Section 92 Review Report* was then referred to the Standing Committee on National Heritage, whose task was to report back to Parliament with recommendations for reform. In its May 2004 *Interim Report on Copyright Reform*, the Standing Committee on Canadian Heritage concluded that the private copying regime does not prevent Canada's ratification of the *WIPO Performances and Phonograms Treaty* and that the treaty should be ratified 'immediately'.⁶³ Further, in its March 2005 *Government Statement on Proposals for Copyright Reform*, the Ministers of Industry and Heritage Canada reaffirmed this recommendation and explained that consultation on the issue of

year time frame. Since then, the copyright revision process has focused on "short term" issues.

⁶² *Section 92 Review Report*, above n 61, 39.

⁶³ See The Standing Committee on Canadian Heritage, *Interim Report on Copyright Reform*

http://www.parl.gc.ca/InfocomDoc/Documents/37/3/parlbus/commbus/house/reports/herirp01/07-rap-e.htm#TOCLink_07_3.

national treatment regarding entitlement to the private copying levy would follow after the introduction of *Bill C-60*.⁶⁴

(c) Preferred View

We do not find persuasive the reasoning of Reinbothe and von Lewinski in support of the narrow interpretation of what is “an exclusive right specifically granted” by the *WIPO Performances and Phonograms Treaty*. In particular, we disagree with their reasoning on both the “literal interpretation” and the “systematic interpretation”, to adopt the wording of von Lewinski.

As elaborated by von Lewinski, the “literal interpretation” is founded on the view that an “exclusive right” is a right to authorize or prohibit the relevant uses and enables the right holder to exclude third parties from such uses. This view, to us, is too simplistic. While it is true that an exclusive right is a right to authorise or to prohibit (and thus to

⁶⁴ According to the *Government Statement on Proposals for Copyright Reform*, “Questions have been raised regarding Canada's ability to ratify the WPPT in the absence of changes to the private copying regime...the Government proposes to release a consultation paper on this issue as soon as possible after introducing the bill”: Canadian Government, *Government Statement on Proposals for Copyright Reform*, above n 9.

exclude third parties from) relevant uses, it is more than that. It includes various entitlements that go with the right – for example, the entitlement to bring a legal action to restrain third parties from undertaking the relevant uses, and/or the entitlement to obtain compensation (e.g. damages) from third parties undertaking the relevant uses without consent. These entitlements are part of the exclusive right, and so must be subject to national treatment in relation to it.

The entitlement to remuneration under the private copying levy is, likewise, a part of the relevant exclusive right – in this case, the right of reproduction. Under the Canadian private copying scheme, the copyright owner's exclusive right of reproduction has been limited – the entitlement to restrain an unauthorised reproduction has been removed, but the entitlement to be compensated for a reproduction is maintained in the form of a statutory licence. This entitlement is just as much a part of the exclusive right of reproduction as is the entitlement of the copyright owner (in the non-private copying case) to sue for damages. As with the entitlement to obtain damages, the entitlement to obtain compensation under the private copying levy must be subject to the principle of national treatment.

This understanding of the operation of the principle in fact seems to be accepted by Reinbothe and von Lewinski. When discussing the matters to which the principle of national treatment applies under the *WIPO Performances and Phonograms Treaty*, they state:

In addition to these substantive rights (the exclusive rights and right to remuneration under Article 15 WPPT), the national treatment obligation also extends to the treatment ‘with regard to’ such rights. This includes the term of protection and the provisions of remedies (in a broad sense) and on the enforcement of rights contained in the WPPT.⁶⁵

Surely the statutory right to remuneration for a private copying, which but for the statutory licence would be an infringement of the exclusive right of reproduction, is a matter ‘with regard to’ the exclusive right of reproduction?

Furthermore, we find Reinbothe and von Lewinski’s view of what is not an exclusive right to be inconsistent with their view on what is an exclusive right. Reinbothe and von Lewinski state that the exclusive rights specifically granted by the Treaty include the moral rights granted to performers by Article 5. Article 5 grants a performer the

⁶⁵ J. Reinbothe and S. von Lewinski, above n 54, 288.

right to claim to be identified as the performer of his or her performance, and the right to object to any distortion, mutilation other modification of his or her performance that would be prejudicial to his or her reputation.⁶⁶ However, these moral rights do not fit von Lewinski's definition of an exclusive right as "a right to authorize or prohibit the relevant uses and enables the right holder to exclude third parties from such uses".⁶⁷ Indeed, this point seems to be acknowledged by Reinbothe and von Lewinski themselves. When including moral rights in the list of exclusive rights specifically granted by the Treaty, they add the observation "even if moral rights are, arguably and strictly speaking, not exclusive rights".⁶⁸ In our view, a right to remuneration for private copying, deriving as it does from the exclusive right of reproduction granted by Articles 7 and 11, is no less an exclusive right specifically granted by the Treaty than is the moral rights of performers granted by Article 5.

According to von Lewinski's "systematic interpretation", it is clear that Article 4(1) does not require national treatment because "the

⁶⁶ *WIPO Performances and Phonograms Treaty*, Article 5(1).

⁶⁷ S. von Lewinski, above n 56, 2

⁶⁸ J. Reinbothe and S. von Lewinski, above n 54, 287.

specific reference only to the statutory remuneration right under Article 15 of the WPPT does not leave any room to argue that, in addition, any further statutory right of remuneration would also be covered by this provision”.⁶⁹ Put simply, von Lewinski’s view is that because only one statutory right of remuneration is mentioned in Article 4(1), no other statutory right of remuneration is covered by that article. There is, however, a fundamental flaw in this logic. The right of remuneration provided by Article 15 is for use of phonograms for broadcasting or communication to the public. Unlike the statutory right of remuneration for private copying provided in the Canadian copyright legislation, this is not a right of remuneration which derives from an exclusive right provided by the Treaty. That is to say, the *WIPO Performances and Phonograms Treaty* provides neither an exclusive right of broadcasting nor an exclusive right of communicating to the public to performers and makers of sound recordings. Thus, the right of remuneration for broadcasting and communication to the public could not be considered to be an “exclusive right specifically granted” by the Treaty, and therefore it had to be specifically identified in Article 4(1) for national treatment to apply. In contrast, the right to remuneration for private copying

⁶⁹ S. von Lewinski, above n 56, 2.

does derive from an exclusive right specifically granted in the Treaty (the right of reproduction), and so it was not necessary to specifically identify it in Article 4(1) for national treatment to apply. Put simply, the absence of express reference in Article 4(1) to the right of remuneration for private copying is not evidence that it was intended to be excluded from the article; rather, there was no need to expressly identify it because the wording of Article 4(1) was sufficient to cover it.

Finally, we are of the view that a “systematic interpretation” of the *WIPO Performances and Phonograms Treaty* provides strong support for the view that national treatment *does* apply to the right to remuneration for private copying. All Contracting States are obliged to provide the exclusive right of reproduction to performers and makers of sound recordings. However, Contracting States are entitled to provide limitations and exceptions to this right (and to the other rights specifically granted in the Treaty) so long as certain conditions are met.⁷⁰ The view of Reinbothe and von Lewinski is that the

⁷⁰ Those conditions are that the exceptions and limitations (1) are of the same kind as they provide in their national legislation in connection with the protection of copyright in literary and artistic works, and (2) are confined to certain special cases which do not conflict with a normal exploitation of the performance or

obligation of national treatment only applies to an exclusive right specifically granted by the Treaty where the exclusive right is not subject to any exception or limitation. Where the right is subject to an exception or limitation (such as the exception for private copying under a statutory licence and levy scheme), the right is no longer subject to the obligation of national treatment even though the exception or limitation is permitted by the Treaty.

In our opinion, this view is illogical. It means a Contracting State could render nugatory the obligation of national treatment in respect of any exclusive right specifically granted by the Treaty merely by adopting an exception or limitation in relation to it. Why should national treatment be obliged in respect of an unexcepted and unlimited exclusive right, but not in respect of an excepted or limited exclusive right? In our opinion, no sensible answer can be given to this question.

For the above reasons, we reject the narrow view adopted by Reinbothe and von Lewinski. We adopt, instead, the view that where a

sound recording and do not unreasonably prejudice the legitimate interests of the performer or of the maker of the sound recording: *WIPO Performances and Phonograms Treaty* Article 16.

statutory right to remuneration derives from an exclusive right specifically granted by the *WIPO Performances and Phonograms Treaty*, that statutory right is subject to the obligation to provide national treatment pursuant to Article 4(1) of the Treaty. Because the right to remuneration under the Canadian private copying levy derives from the right of reproduction, and because this right is an exclusive right specifically granted by the *WIPO Performances and Phonograms Treaty*, we are of the opinion that the right to remuneration for private copying is subject to the obligation to provide national treatment.

4. CONCLUSION

This article has examined whether the entitlement to remuneration for private copying of musical works and sound recordings under Canadian national law is covered by the obligation to grant national treatment under Canada's international obligations. While the scope and degree of national treatment may vary, the obligation is a very important part of any international agreement on the protection of intellectual property rights. With regard to Canada's current international obligations, Canada is a Contracting State to the *Rome Convention*, and as a member of the WTO, it must comply with the

TRIPS Agreement. In adopting a reciprocity approach in relation to performers and makers of sound recordings, a very strong argument can be made that Canada is not in compliance with the national treatment obligations pursuant to Article 2(2) of the *Rome Convention* and Article 3(1) of the *TRIPS Agreement*.

With regard to Canada's future international obligations, although Canada became a signatory to the *WIPO Performances and Phonograms Treaty* and *WIPO Copyright Treaty* in 1997, it is yet to ratify either treaty. Commentators are divided on whether or not the *WIPO Performances and Phonograms Treaty* obligation of national treatment extends to the entitlement to remuneration for private copying. Our view is that it does.

When Canada finally does ratify the WIPO Internet Treaties, it will be interesting to see how its private copying regime is affected under amendments made to the *Copyright Act* and what will become of the reproduction levy. While there has been speculation that the levy will be scrapped,⁷¹ Canada is awaiting the response of its newly appointed

⁷¹ See, for example, M. Geist, 'What could Tory copyright look like under Harper government?', *The Hill Times* (April 3, 2006)

government on this issue. If the operation of the levy and the failure to pay royalties to foreign performers and makers of sound recordings continue unchanged under a Canadian ratification of the WIPO Internet Treaties, we believe that Canada will remain in breach of its international treaty obligations.

http://www.thehilltimes.ca/html/index.php?display=story&full_path=/2006/april/3/geist/&c=1.

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