

Who Killed the Radio Star? A Historical Analysis of How Music Blanket Licenses Distort the Production of Creative Content

Ariel Katz and Eden Sarid, University of Toronto

The late 1950s witnessed dramatic changes in cultural production in radio broadcast. Popular talk formats were abandoned in favour of pre-recorded music, talk formats that did survive changed in form and substance, and live broadcasting was almost completely discarded. While common accounts attribute these transformations to technological, social, and cultural changes (such as the advent of television, the growth of the suburbs, and the popularity of rock and roll), this paper explores the overlooked, and apparently central, role that copyright law and the licensing practices of performing rights in musical works have played. We argue that the practice of issuing all-or-nothing blanket licenses for the broadcast of musical compositions has altered the content of radio broadcasts because under these licenses, the marginal cost of playing pre-recorded music becomes virtually zero. This creates a strong incentive to prefer content available under the blanket license to other content (such as in-house produced talk radio or even creative-commons licensed music). The paper demonstrates this claim by tracing the history of radio broadcast, and shows why this explanation might better explain the transformations in radio broadcast. We comparatively analyze public and commercial radio and demonstrate that publicly funded radio typically offers a larger variety of cultural products. We then explain why the impact of blanket licensing was not felt in earnest until the 1950s. The paper makes three main contributions: first, it adds an unexplored IP dimension to the literature on radio history; second, it demonstrates that collective administration of copyrights results both in harms associated with higher prices, and in distortions in the kind and substance of content produced and broadcast; third, it reveals that while collective administration might benefit one class of copyright owners, it does so not only at the expense of users, but also harms creators of other types of content.

Ariel Katz

Ariel Katz is an Associate Professor at the Faculty of Law, University of Toronto, where he holds the Innovation Chair in Electronic Commerce. Professor Katz received his LL.B. and LL.M from the Hebrew University of Jerusalem and his SJD from the University of Toronto. His general area of research involves economic analysis of competition law and intellectual property law, with allied interests in electronic commerce, pharmaceutical regulation, the regulation of international trade, and particularly the intersection of these fields. Between 2009 and 2012 Professor Katz was the Director of the Centre for Innovation Law and Policy. Prior to joining the University of

Toronto Professor Katz was a staff attorney at the Israeli Antitrust Authority. While there, he litigated several merger appeals and restrictive arrangements cases before the Antitrust Tribunal and negotiated regulatory settlements. Professor Katz currently teaches courses on intellectual property, cyberlaw, and the intersection of competition law and intellectual property, and shares some of his current thoughts on these issues on his blog.

Eden Sarid

Eden Sarid is a Doctoral candidate at the University of Toronto, Faculty of Law. He is a Vanier Canada Graduate Scholar. His research interests include intellectual property, law and technology, cyber law, and cultural heritage. Eden's Doctoral research focuses on social and economic ordering in informal creative communities in intellectual property. Eden received his LLM from the London School of Economics and Political Science (with distinction) and was awarded the Chevening Scholarship by the UK's Foreign and Commonwealth Office. Eden received his LLB from the Hebrew University Faculty of Law (together with the University's Honours Program in Humanities). While in law school, Eden received several awards and prizes. Eden also served as a teaching assistant in Tort Law, Labour Law, and Jewish Law, and was an editor in the Law Faculty's Law Journal on Legislation. Following law school, Eden served as a law clerk, and later as a senior law clerk, to the Hon. Justice Elyakim Rubinstein and Hon. Justice Zvi Zylbertal of the Israeli Supreme Court. Eden later practiced as an associate in the IP department of S. Horowitz, one of Israel's largest law firms, and was a member of Israel Bar Association's Intellectual Property Board. Eden also served as a pro-bono legal consultant to the Jerusalem Open House LGBTQ Organisation.

Ariel Katz Associate Professor, Innovation Chair in Electronic Commerce Faculty of Law, University of Toronto ariel.katz@utoronto.ca ; www.law.utoronto.ca/faculty/katz ; www.arielkatz.org

EDUCATION

SJD University of Toronto

2005

Dissertation topic: Issues at the Interface of Antitrust and Intellectual Property Laws. 2005 Hartle Award for outstanding graduate scholarship, The Institute for Policy Analysis, University of Toronto LLM (magna cum laude) Hebrew University, Jerusalem

2001

LLB Hebrew University, Jerusalem

1997

ACADEMIC AND PROFESSIONAL EXPERIENCE

Global Engelberg Research Fellow New York University Law School Associate Professor, Innovation Chair in Electronic Commerce Director, Centre for Innovation Law and Policy Faculty of Law, University of Toronto

Fall 2012

July 2009 – present July 2009 – Dec. 2012

Visiting Professor Faculty of Law, Tel Aviv University

Spring 2009

Assistant Professor, Innovation Chair in Electronic Commerce Faculty of Law, University of Toronto

July 2004 – June 2009

SELECT RECENT GRANTS AND AWARDS

SSHRC Insight Grant, The Return of the Stationers: Monopoly and Competition in the Digital Economy

2014-2019

University of Toronto Faculty of Law and Faculty of Arts and Sciences Conference Grant (for the TPP Conference, \$15,000)

Small Collaborative Grant from Osgoode Research Intensification Fund and from Osgoode's Dean's Conference Fund (for the UNPACK SODRAC conference, \$4000)

Centre for Innovation Law and Policy Research Grant

2016

2004-2014

University of Toronto, Faculty of Law, Summer Research Assistantship Grant

2005-2006, 2014

SELECT RECENT PUBLICATIONS

The Interaction of Exhaustion and the General Law: A Reply to Duffy and Hynes (with Aaron Perzanowski and Guy Rub), 102 Virginia Law Review Online 8 (2016)

Intellectual Property and the Rule of Law, 17 Theoretical Inquiries in Law 633 (2016)

The Economic Rationale of Exhaustion: Distribution and Post-Sale Restraints, in Research Handbook on IP Exhaustion and Parallel Imports 23 (Irene Calboli & Edward Lee, eds.) (2016)

Digital Exhaustion: North American Observations, in Research Handbook on Electronic Commerce 137 (John A. Rotchild, ed.) (2016)

Spectre: Canadian Copyright and the Mandatory Tariff - Part I, 27 IPJ 151; Part II, 28 IPJ 39 (2015)

The First Sale Doctrine and the Economics of Post Sale Restraints, 2014 BYU L. Rev. 55 (2014)

SELECT RECENT CONFERENCE & WORKSHOP PRESENTATIONS

The Future of Libraries in the Digital Age: Copyright and the Role of Libraries in Preserving Knowledge, The Future of Libraries in the Digital Age, A Symposium Sponsored by I/S: A Journal of Law and Policy for the Information Society, the Moritz College of Law, and The Center for Interdisciplinary Law and Policy Studies, Ohio State University, March 25, 2016

TPP: A Big Deal, Technology and Intellectual Property Group Panel, University of Toronto, March 8, 2016

Why Tariffs Aren't Mandatory, UNPACK SODRAC: Technological Change and Copyright Tariffs after CBC v SODRAC, Osgoode Hall Law School, Feb 25, 2016 (conference co-organizer)

Permissionless Innovation, Emerging Competition Issues Workshop: Keeping Pace in a Changing World, Ottawa, Ontario January 19, 2016.

The TPP and the Expatriation of our Constitution, The Trans Pacific Partnership: Options for Canada and the World, University of Toronto, January 15, 2016 (conference co-organizer).

Keynote speech: From Copyright Children to Copyright Adults, Copyright in Canada Conference 2015, University of Toronto, Oct 2, 2015

Water and diamonds, music and talk. Response to Marcel Boyer, Annual Congress of the Society for Economic Research on Copyright Issues, University of Glasgow, Sept. 4, 2015.

Intellectual Property and the Rule of Law:

- The Toronto Intellectual Property Group, Toronto, April 14, 2016
- The Constitution of Information Conference, University of Toronto, Faculty of Law, May 29, 2015 (conference co-organizer)

Panel - Intellectual Property: International Exhaustion, The 2015 Henry T. King Jr. Annual Conference on Canada-United States Relations, The Digital Border, March 19 & 20, 2015, Canada-US Law Institute, Case Western Reserve Law School, Cleveland, OH

Right Under the Competition Bureau's Nose, Law Society of Upper Canada, 19th Annual Intellectual Property Law: The Year in Review, Toronto, Jan 22, 2015

Practicing Fair Dealing, The Ontario Library Association Super Conference, Toronto, Jan. 30, 2014

The IP Constitution, IP Scholars Conference, Boalt Hall Law School, UC Berkeley, Aug. 7, 2014

On the Partial (In)Alienability of Users' Rights

- 15th International Conference on Consumer Law, June 30, 2015, Amsterdam, the Netherlands
- Toronto-Siena-Tel Aviv Law and Economics Workshop, Naples, June 30-July 1, 2014
- Society for Economic Research on Copyright Issues Annual Congress, Barcelona, July 10-11, 2014
- Fourth Annual Research Roundtable on the Law and Economics of Digital Markets, Searle Center, Northwestern Law School, Oct 9-10, 2014

SELECT RECENT ORGANIZATION OF ACADEMIC EVENTS

UNPACK SODRAC: Technological Change and Copyright Tariffs after CBC v SODRAC (co-organized with Prof. Carys Craig), Osgoode Hall Law School, Feb 25, 2016

The TPP and the Expatriation of our Constitution, The Trans Pacific Partnership: Options for Canada and the World (co-organized with Prof. Dan Breznitz), University of Toronto, January 15, 2016

The Constitution of Information (co-organized with Prof. Lisa Austin), University of Toronto, Faculty of Law, May 28-29, 2015

EDEN SARID

30 Charles St. W., unit 1604, Toronto, ON, Canada • +1-416-829-8495 • eden.sarid@mail.utoronto.ca

EDUCATION Since 2014 University of Toronto, Canada

Candidate - Doctor of Juridical Science, Vanier CGS Scholar. GPA: A+ Awards:

– Vanier Canada Graduate Scholarship, 2016-2019. – University of Toronto Faculty of Law Doctoral Scholarship, 2014-2017. – Centre for International Governance Innovation, International Law Research

Program (Waterloo) Doctoral Scholarship, 2014-2015; 2016-2017. – School of Graduate Studies Travel Award, 2016. – Student Mobility Fund – Oxford University (Awarded by the Faculty of Arts and

Science, University of Toronto), 2016. University of Toronto Faculty of Law Fellowship,

2014. 2011-2012 London School of Economics and Political Science, United Kingdom
Master of Laws (LL.M.) with distinction.

– Recipient of the UK's Foreign and Commonwealth Office Chevening Scholarship

for emerging global leaders. 2006-2010 Hebrew University, Israel

Combined degree in Law (LL.B.) and in the Hebrew University's Honours Program for
Outstanding Students "Amirim" in Humanities. Honours and awards:

– The Israeli Society for Law and Medicine Award – First Prize, for an outstanding
paper on law and medicine, 2011. – Israeli Bar Award for outstanding students
engaged in volunteer and social

activity, 2010. – The Minerva Centre for Human Rights fellowship, 2009. – Faculty of
Law Award for outstanding students engaged in volunteer and social

activity, 2009. – Hebrew University Scholarship for outstanding students in the
"Amirim" program

in Humanities, 2006-2009. Journal: Hukim Law Journal on Legislation – Member of
the editorial board.

PUBLICATIONS

**2017 The International Governance of Underwater Cultural Heritage, 57 BERKELEY
JOURNAL OF INTERNATIONAL LAW**

**(forthcoming, 2017). 2015 Don't Be a Drag Just Be a Queen – On the Way Drag
Queens Protect Their Intellectual Property Without Legal Regulation, 10 FLORIDA
INTERNATIONAL UNIVERSITY LAW REVIEW**

**(2014) (invited symposium). 2009 Commentary - The Youth Law (Trial,
Punishment and Modes of Treatment) (Amendment No. 14) 2008, HEBREW
UNIVERSITY**

**JOURNAL ON LEGISLATION (ONLINE) (February 2009) [in Hebrew]. 2009 Commentary - Bill
to Amend the Evidence Ordinance (Demand of Supporting Evidence for
Conviction in cases of Admission of Guilt) 2009, HEBREW UNIVERSITY JOURNAL ON
LEGISLATION (ONLINE) (July 2009) [in Hebrew].**

WORK IN PROGRESS

**Legal Scholarship as 'Spectacular Failure' (with Omri Ben-Zvi). Music and Radio,
Water and Diamonds – Calculating Fair Royalties in the Canadian Radio
Broadcasting Industry (with Professor Ariel Katz).**

**Who killed the Radio Star? How Copyrights Affect Cultural Production in the
Radio Broadcast Industry (with Professor Ariel Katz). Fostering Innovation**

without IP – What Enables Informal Creativity?

SELECTED PRESENTATIONS 2016 Oxford University – European Policy for Intellectual Property – Presenter

Presented a study on the sociological and economic mechanisms that enable creative production and information sharing in non-IP creative communities. 2016 University of Kent, Critical Legal Scholars Conference – Presenter

Presented a study on the governance and preservation of maritime cultural property. 2016 Stanford University, IP Scholars Conference – Co-Presenter

Presented a study on the way the copyright licensing regime affects cultural production in the radio broadcast industry. 2016 University of Toronto, Faculty of Sociology – Commentator

Invited by Professor Vanina Lechziner to comment on her new book “At the Chef’s Table” exploring innovation in the culinary world. 2016 University of Toronto, Faculty of Law, Faculty Workshop – Presenter

Chosen by the Faculty to present my study on the way drag performers protect their intellectual property and the possible implications for innovation policy. 2015 Society for Economic Research on Copyright Issues – Co-presenter

Presented a paper on calculating fair compensation to copyright owners for the broadcasting of their creations over Canadian radio. 2014 Florida International University – “Layers of Law and Social Order” – Presenter

I was invited to present a follow-up on my study on the way drag performers protect their intellectual property and the possible implications for innovation policy. 2014 Stanford University – Conference for Junior Researchers – Presenter

Presented an empirical study of how drag performers protect their intellectual property via social norms, and the possible implications for innovation and IP law. P

PROFESSIONAL AND ACADEMIC

EXPERIENCE 2016-2017 University of Toronto, Faculty of law - SJD Advisor

Advisor to Masters’ students in devolving, refining and writing their thesis. 2013-2014 S. Horowitz & Co. Advocates and Patent Attorneys - Associate

An associate in the Intellectual Property department. I mainly focused on copyright litigation and international trademarks cases. 2012-2013 Supreme Court of Israel, the Hon. Justice Zvi Zilbertal - Legal Assistant 2010-2011 Supreme Court of Israel, the Hon. Justice Elyakim Rubinstein - Law Clerk

Advised Justice Zilbertal on different legal matters, assisted in drafting opinions and orders on a variety of legal issues, and assisted in tutoring law clerks. 2009-2013

Hebrew University – Faculty of Law - Teaching Assistant in Labour Law (2010,
**2013); Tort Law (2011); Jewish (Hebrew) Law (2009). 2011 Hebrew
University – Faculty of Law - Research Assistant**

Research assistant to Prof. Israel Gilad on limits of liability in tort law.
2007-2010 Prime Minister's office, Israel State Archives - Research Advisor

Performed historical and legal research; instructed researchers from Israel and abroad
in performing research in archival material.