The iPod Tax: Why Japanese Law Professors Rejected the Digital Copyright System of American Law Professors' Dreams

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It's an iPod world, and we just live in it. Or so goes the not-necessarily-unjustified hype. But with the benefits of technology come the cost of legal conflict. In particular, a sizeable literature has sprung up focused on the risks that the Internet and digital copying pose for the copyright holders of the recording and film industries.

A number of prominent American law professors have endorsed the notion of a tax on digital recording and music filesharing – call it an "iPod tax" – with the proceeds to be paid into a general fund. A clearinghouse representing rights holders would monitor which works were downloaded, how often, and, perhaps, with how much use. The clearinghouse would then use a formula to translate this data into a gauge of the relative popularity of musical works. Finally, the clearinghouse would divvy up the iPod tax revenues to the individual rightsholders The clearinghouse approach addresses important concerns. On the one hand, it directly addresses the so-called "piracy" concerns of the recording and film industries. On the other hand, it creates clear legitimacy for users' noncommercial recording. In doing so, the clearinghouse proposals alleviate the need for thorny digital rights management systems, and allow users to freely choose among competing content.

This would not be the first time the U.S. has tried to implement a levy and clearinghouse system for audio home recording – an abortive attempt came in the Audio Home Recording Act of 1992's levy on digital audio tape players – and if successful, the U.S. would not be the first nation to run an effective, wide-ranging copyright levy and clearinghouse system. In fact, Japan has actually run a very similar system since the early days of digital recording in 1993. The Japanese system imposes a tax on recording media such as blank CDs and DVDs that consumers can use to engage in private home recording. That revenue is then split among copyright holders in the recording and film industries based on measures of the popularity of their works.

This Article addresses this neglected Japanese experience. In particular, after a dozen years of experience, faced with the iPod and similar computer memory-based devices, the Japanese decided not to extend their system beyond blank CDs and DVDs. On the advice of a committee dominated by law professors, the Japanese government stopped their digital recording media tax from morphing into an iPod tax.

This Article looks at the nature of the proposed American clearinghouse model, and compares it with that of the existing system in Japan. It focuses on how and why Japanese experts decided that killing an iPod tax was in fact worth a departure from their previous system. In particular, the Article draws on the Japanese debate to propose a framework to distinguish "format shifts" in recording technology from "industry shifts." The desire to prevent a copyright tax from turning into a veto on new industry development animated Japanese discussions. This approach can shed new light on

current American thinking about digital rights management and the non-infringing use test in the post-MGM v. Grokster world.