Canadian Copyright Reform
Policy Research Note #1

THE GLOBAL CONTEXT

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Index

Abstract

The current round of copyright reform (Phase 3) reflects the present Government's desire to ratify two 1996 WIPO treaties on copyright and neighbouring rights. These two, however, are but patches on the larger fabric of the multilateral copyright regime. Six of some 60 multilateral instruments are examined with respect to author's rights including moral rights, the public domain, fair use and the Anglosphere's continuing confabulation of the exclusive rights of the author as a Natural Person and those of a proprietor as a Legal Person.

The Berne Convention of 1886 primarily concerned author's rights including moral rights. The Pan American Convention of 1946 represented American geo-economic success in protecting the Americas from foreign interests while furthering the interests of its own printing industry. The 1947 GATT was intended to establish free trade but exempted cultural goods & services including national cultural industries. The 1994 WTO TRIPS de-cultured copyright converting it into industrial property by exempting aboriginal heritage rights, collective or communal copyright and the moral rights of the author as a Natural Person. The two 1996 WIPO treaties continued de-culturing copyright by adding protection for digital rights management (DRM) technologies. The 2005 UNESCO convention on cultural diversity reasserted GATT cultural exemptions and asserted the right of Nation-States to subsidize and support their cultural industries effectively nationalizing production of copyrighted works.

In the process sight has been lost of the moral 'human' rights of the artist/author/creator as a Natural Person, fair use and the public domain in whose name the copyright monopoly is granted in the first place. Canadian copyright reform offers a unique opportunity to bring these issues back into focus and to public attention. An opportunity missed is no opportunity at all.

Introduction

With all the Twitter, Google, Bing, Bang, Boom about the WWW or Internet we can be blinded to the basics of copyright reform: changing the definition of property – of what can be bought and sold and what cannot and by whom. The current round (Phase 3) of reform is fueled by the present Government's desire to ratify two treaties that Canada initially signed in 1997. These are the World Intellectual Property Organization (WIPO)'s 1996 treaties on copyright and on performances & phonograms, *a.k.a.*, 'neighbouring rights'. Both were initiated at the peak of American 'soft-power' at the end of the Market-Marx Wars just after the birth of the WWW. Iconic Windows '95 ® was only a two year old when the final text was signed.

The bottom line: to ratify Canada must change its domestic law to conform to a multilateral definition of legal property, *i.e.*, copyright and neighbouring rights. If it fails to ratify then it is free from related obligations. This is true of all treaties in all fields of international law. Of course, there are consequences to either ratification or rejection.

These two instruments, however, are but patches in a far more complicated design making up the multilateral copyright regime. This regime consists of some 31 global copyright and related instruments including the two named above. They also include two conventions (1910 & 1924) and their UN protocols (1949 & 1947, respectively) concerning obscene publications and related material. In effect such works receive no multilateral copyright protection.

There is also the 1976 UNESCO/WIPO Tunis Model Law for developing nations highlighting differences between Anglosphere Common Law and European Civil Code traditions of copyright and author's rights, respectively.

In addition there are nearly 30 regional instruments concerning the Americas as well as the Council of Europe and European Union plus 1 UN resolution and 5 UNESCO recommendations. Thus more than 60 distinct international instruments define the multilateral copyright regime.

In this note I consider six global instruments. I summarize each and then weave their implications into the fabric of a preferred future for Canadian copyright, cultural sovereignty, competitiveness and especially its creators. 'Preferred', of course, refers to the objective function of the author – what I want to maximize subject to real world constraints.

Berne Convention 1886

The Berne Convention for the Protection of Literary & Artistic Works of 1886 was made, in effect, between the major western European nations and empires including the British with its *Imperial Copyright Act* forming part of the Canadian Copyright Act until 1921. Berne, like the 1883 Paris Convention on Industrial Property – patents, registered industrial designs and trademarks - pre-dates the contemporary global order of Nation-States starting with the Treaty of Versailles in 1919 and its League of Nations followed by the United Nations in 1945.

The Paris Convention of 1883 represented the triumph of the patent movement led by the United States against the anti-patent movement led by Germany. The first U.S. Patent Act: "An act to promote the Progress of Useful Arts", was passed in 1790 more than 60 years before Great Britain. The U.S. had developed over that period a system for treating applications, assessing claims, granting patents and establishing Common Law precedents for settling disputes. This experience informed and shaped the Paris Convention. Success led one American observer to call it "the most perfect example of a multilateral convention affecting economic matters". Ironically, after Germany acceded in 1901 (the last major industrial power to do so) it engaged in 'patent pooling' with the United States in key industries especially chemicals and pharmaceuticals effectively dividing up world markets between them – an example of the geo-economics of nations.

Berne, on the other hand, was informed by the European Civil Code experience specifically that of France. In fact Berne was inspired by Victor Hugo leading European artists and writers in 1878 into the International Literary & Artistic Association (*Association Littéraire et Artistique Internationale*). First in Paris it then met annually in different European capitals. In 1882, at Rome it agreed to organize an international conference of States about copyright, or rather author's rights. At the Berne conference of September 1883, a draft convention was prepared and brought to the attention of the community of nations by the Swiss Federal Council. The Berne Convention was the result.

Berne stresses the rights of the creator following the logic of the philosopher Immanuel Kant (1724-1804) writing at the end of the European Enlightenment and the beginning of the first Republican Revolutions - the United States in 1776 and France in 1789. To Kant a literary or artistic work is a projection of its creator's personality. As such it is subject to a creator's moral rights the most succinct expression of which is found in the *Andean Community Common Provisions on Copyright and*

Neighboring Rights, Article 11, 1993: "inalienable, unattachable, impresciptible and unrenounceable". In effect they are 'human rights' that cannot be bought or sold. They adhere only to a Natural Person including employees as well as freelancers. They do not adhere to a Legal Person – a body corporate - because such entities have no 'personality' to project. Moral rights are separate and distinct from economic ones and take legal precedence over economic rights, *i.e.*, moral rights trump economic ones including those of a proprietor, of whom more below.

Not coincidentally, Victor Hugo was also instrumental in developing our contemporary concepts of cultural property and national patrimony. Hugo is thus a personal link between copyright as author's rights and cultural property as the rights of past creators in the tradition of the Western cult of the genius. In this tradition author's rights are justified - for a limited time – to encourage new work that will then flow into the public domain of knowledge. Even while under protection Berne defines 'free use' of a work while in Commonwealth countries it is called 'fair dealing' and 'fair use' in the United States. They are not the same. Traditionally, the lending library was made possible because of such exceptions from infringement. Furthermore, under Civil Code the public domain trumps both creator and proprietor. It is the *raison d'etre* for the short-run monopoly granted to a creator of a literary or artistic work.

In a way the public domain is to intellectual property what national patrimony is to cultural property – moveable, immoveable and intangible. Cultural property – at least moveable and immoveable - is recognized by the laws of almost every nation on Earth including Canada and the United Kingdom *excepting* the United States.

In the case of cultural property, private ownership in the Present is qualified by perpetual public ownership through Time. In effect, 'We, the People' is the collective expression of a community concerned with its Past, Present and Future. Put another way, the enlightenment Republic is a consensual libertarian collective in Time. It is the only body corporate that enjoys 'moral rights' because it has 'personality'. This concept emerged out of the French Revolution.

Ironically, in the Anglosphere it is constitutional monarchies such as Canada and the United Kingdom that recognize moveable and immovable cultural property as part of their national patrimony. Statutory limitations exist on their alteration, destruction and export. Again, this is unlike the American experience where only works found on federal lands qualify for protection. The rights of private American cultural

property owners are not encumbered by the 'national' interest, *e.g.*, by export restrictions.

In the case of private intellectual property rights they endure only for a period of Time. Then the knowledge they enclose enters the public domain where it is free to encourage learning. The duration of private rights is an ongoing policy question reflecting the shifting historical power balance and changing alliances between creators, proprietors and users in the legislative process.

While the United Kingdom (and therefore Canada) ratified Berne it exercised Article 5 regarding national treatment. This requires, for example, that nationals of Berne Convention countries be treated in Britain as if they were British nationals. British rights, however, were not and today are not the same as on the Continent. The first English copyright act to recognize the author as originating source rather than God or his earthly representative, the King, was the 1710 Statute of Queen Anne: *An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned.* Its primary purpose, however, was to break the perpetual copyright enjoyed by the Stationer's Company of London.

Nonetheless, author's rights were subject to contract in favour of what the Act names within as 'proprietors'. No moral rights were recognized. Both Canada and the United Kingdom have since, however, gone some distance in recognizing moral rights. Nonetheless, they remain subject to contract or waiver.

Thus Canada prides itself on being a bilingual and bicultural (English/French) as well as a multicultural society. However, it is also bi-juridic operating with Anglosphere Common Law in English-speaking Canada and European Civil Code in the Province of Quebec. Just as language structures human thought, law structures attitudes and behaviour contributing to the ethos or distinctiveness of a culture. With the exception of the Republic of South Africa, Canada is the only English-speaking country to operate with both legal traditions. In this regard McGill University Law School in Montreal was the first and I believe remains the only law school in the world to offer a joint program in Common Law and Civil Code. The difference between the two can be summed up as precedent (Common Law) versus principle (Civil Code). As human artifacts, of course, both have strengths and weaknesses and both are less than ideal in practice. Arguably the Canadian Copyright Act headed on one page 'Copyright' and on the other '*Droit d'Auteur*' is truly a bi-juridic statute. On the one hand since 1988 it has recognized extensive and growing moral

rights in the Civil Code tradition; on the other, it makes all such rights subject to contract or waiver in the Common Law tradition.

One right has, however, been created outside the Act – the Public Lending Right (PLR). PLR compensates Canadian authors for library use of their works. It is available only to the author as a Natural Person.

In the case of the U.K., membership in the EU has exposed it to 'harmonization' of copyright with its continental partners. This has required explicit statutory statement of moral rights which, however, remain subject to national treatment and therefore to contract and/or waiver.

Finally in 1989 the U.S. acceded to the Berne Convention and Congress took steps towards recognizing moral rights, *e.g.*, the *Visual Artists Protection Act* of 1990 which eventually became Section 106A of the U.S. Copyright Act. However, rights of paternity and integrity (only two of the moral rights available in Civil Code countries) of one's work are available only to artists of 'recognized' reputation. Recognized by whom? By the Courts! Similarly, the *Architectural Works Copyright Protection Act*, Pub. L. 101-650 was passed in 1990. Its moral rights provisions, however, are so weak that it has not been incorporated into the U.S. Act. It is an open question whether the United States has in fact fulfilled its obligations under the Berne Convention.

It is with respect to the media arts, *e.g.*, audio-video recording (inclusive of photography) and broadcasting (inclusive of the WWW) that the difference between Civil Code and Common Law traditions is most apparent. The 1976 UNESCO/WIPO Tunis Model Law at Section 11- Ownership of Copyright, Subsection (3) Cinematographic works, thus offers two alternatives to assigning ownership:

> *Alternative A*: to the intellectual creator of the work, *a.k.a.*, the director or its 'auteur'; or,
>
> *Alternative B*: to the maker of the work, *a.k.a.*, the publisher, producer, proprietor or owner of the negative

Under Alternative A there can, for example, be no 'colorization controversy,' as there is in the United States motion picture industry, because the director holds moral rights to the work. Under Alternative B the director is an employee and all rights, including moral ones, belong to the employer unless otherwise specified by contract.

One thing is certain: Under Anglosphere Common Law moral rights of the author/artist/creator are not "inalienable, unattachable, impresciptible and unrenounceable". I call this the 'unfinished revolution' of the English-speaking world.

Pan American Convention 1946

The Pan American Copyright Convention of 1946, or legally the *Inter-American Convention on the Rights of the Author in Literary, Scientific and Literary Works*, represented the culmination of nearly 60 years of explicit geopolitical effort by the United States to keep the Americas free from 'foreign influences', *a.k.a.,* European colonial empires. The 1946 Convention was therefore informed by the American copyright experience.

Article I, Section 8 of the 1788 U.S. Constitution (known as the Intellectual Property or Copyright Clause) states, in Natural Rights terms:

> The Congress shall have Power ... To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

It is important to note the explicit parallelism between copyright as protection for authors and patents as protection for inventors. This parallelism was accepted, at the time, as natural. Both protect new knowledge as the fruit of genius; both are to be 'exclusive' to the author or inventor as a Natural Person. Both originally had the same duration – 14 years, the term of two apprenticeships.

Inclusion of a 'monopoly-granting' power in the Constitution, however, involved great debate and deliberation. The framers were suspicious of all monopolies especially given experience with the East India Company which led to the Boston Tea Party. They were also well aware of copyright used as a tool of censorship by the Crown and of the perpetual copyright enjoyed by the Stationer's Company of London until 1710.

The principal antagonists were Thomas Jefferson who initially opposed and James Madison who proposed its inclusion. In this debate Madison played both sides of the fence supporting, on the one hand, the natural rights of authors while on the other promoting the interests of the printing industry of the new Republic. In the process he confabulated, in the popular mind, the natural rights of a creator and their total assignment by contract to a proprietor. Arguably this confusion continues. Thus the 'starving artist' has been the continuing cry of proprietors since the Battle of the Booksellers following the Statute of Queen Anne.

Congress passed the first U.S. Copyright Act in 1790 entitled: *An Act for the Encouragement of Learning, by securing the Copies of Maps, Charts and Books, to the Authors and Proprietors of such Copies, during the Times therein mentioned*.

The key change is the term "Proprietors' used within the Statute of Queen Anne. Henceforth the exclusive rights of the author would be encumbered by those of the proprietor.

The U.S., from the beginning, looked upon copyright as an instrument of industrial warfare with Great Britain specifically in the printing trades. It was not and still is not seen primarily as an incentive for creators in the Natural Rights tradition. Thus no royalties were paid to foreign authors (generally British) whose works were cheaply re-printed. Copies were then sold legally in the U.S. and illegally, at very low prices, elsewhere in the English-speaking world including Canada. American printer/publishers had a field day while Canadian competitors languished under royalties imposed by the *Imperial Copyright Act*. While this piratical U.S. regime ended with the *Chace Act* of 1891, the fact remains that until 1984 no book written by an American author could be sold in the United States unless printed there. This was known as the 'Manufacturing Clause'. It should be noted that Austria-Hungary was another copyright 'pirate' nation of the 19th century.

American geo-economic efforts in the Americas, however, started off on the wrong foot. Three years after the Berne Convention the same authorial rationale gave birth in 1889 to the second major multilateral copyright agreement: the *Treaty on Literary and Artistic Property* done at Montevideo, Uruguay during the South American Congress on Private International Law. This was the first step in development of the Pan-American copyright system. Unlike subsequent agreements, however, it was open to non-American states. It was ratified by Argentina (1891), Bolivia (1903), Paraguay (1889), Peru (1889), and Uruguay (1892) and agreed to by France, Spain, Belgium, Italy, Germany, and Austria. It was also, unlike Berne, l*ex loci* in nature. This means that infringement in another member country is judged in that country according to the substantive law of the country in which copyright was initially granted.

It is important to note that most Latin American Nation-States had gained independence from Spain and Portugal by the late 1820s following the third wave of the Republican Revolution led by Simon Bolivar. All began and continue to operate under variations on the Civil Code. Accordingly they do not recognize copyright but rather author's rights.

Whether due to the Monroe Doctrine by which the United States asserted an obligation to protect the Americas from foreign influences or for geo-economic reasons, a distinct Pan-American copyright regime emerged to challenge the Berne Convention and complicate multilateral copyright relations. The first formal Pan-American copyright convention was signed at the Second

International Conference of American States at Mexico City in 1902. The *Inter-American Literary and Artistic Property Convention* was ratified by Guatemala, Salvador, Costa Rica, Honduras, Nicaragua and the United States. It was followed by the Buenos Aires *Convention on Literary and Artistic Copyright* of 1910 and its revision in 1928. The system was finalized with the Pan American Copyright Convention of 1946.

In effect this split the world into two competing multilateral regimes. First, the Berne Convention is an open treaty, *i.e.*, open to all nations. The Pan American Convention, on the other hand, is a closed treaty open only to countries in the Americas. Second, Berne requires no special procedures such as registration to obtain protection in a participating State, *i.e.*, national treatment is automatic. On the other hand, the Pan American Convention allows for special procedures including use of the '©' symbol on any work claiming protection in a participating State. Third, Berne extends 'courtesy' protection to works if simultaneously published in a Berne Convention country whether or not they originated in a participating State. Under the Pan American Convention, on the other hand, protection is restricted to works from participating nations. In a sense Berne focuses on the artist/author/creator no matter citizenship while the Pan American Convention protects only works by resident creators.

Before and after the First and Second World Wars various attempts were made to reconcile these two regimes. It was not, however, until the UNESCO inspired *Universal Copyright Convention* of 1952 that an overarching instrument, however flawed, was erected to span the gulf between the two. Arguably, it did not succeed. As we have seen the U.S. finally acceded to Berne in 1989 essentially making the Pan American Convention mute. Arguably, it did so, however, primarily for geo-economic not cultural reasons, *e.g.*, globally extending the duration of early entertainment industry copyrights. Put in other words, the United States acceded to Berne to stop Mickey Mouse from playing in the public domain.

GATT 1947

The 1947 *General Agreement on Tariffs and Trade* (GATT) was one pillar of the post-WW II global economy. Market-based economies of the First World learned an important international trade lesson from the Great Depression: Protectionism, *e.g.*, tariffs, quotas, *etc*, is a negative sum game – everyone loses. Originally intended as the foundation of an International Trade Organization that was still born, GATT was paralleled in 1949 by the Council for Mutual Economic Assistance

(COMECON) between Marxist command economies of the Second World. The developing Third World of the South including 'non-aligned nations' became the ideological and economic prize – cadre, markets and resources - in the autarkic Market/Marx Wars. GATT continues today as one of nearly 30 agreements constituting the World Trade Organization (WTO) of which more below.

GATT nonetheless recognizes that some things are not subject to 'free trade'. These include cultural goods and services, *e.g.,* literary & artistic works. There are thus four provisions making a distinction between cultural and other goods and services in international trade. First, quotas – limiting the number of units into one's market - are protectionist measures that run counter to the free circulation of goods under Article XI. However, an exemption is granted with respect to cinema exhibition. Article III (10) makes reference to the exemption. Second, Article IV is entirely devoted to special arrangements for fixing quotas in the film industry. This provision represented a compromise between the USA film industry and the Europeans keen to maintain quotas first established between 1919 and 1939. They have since been extended to television and other so-called 'cultural industries'.

Third, under Article XX (a), restrictions on free trade are permitted to protect public morals. To the degree public morals are part of national culture then foreign cultural goods threatening public morals may be restricted. The most obvious example is Islamic societies which hold fundamentally different values from the West and the East about the image of woman. Similarly, controversy about sex and violence in books, film, video and TV has also traditionally been used to justify restrictions on cultural goods imported from more 'liberal' countries. The classic example was 'kiddie porn' once exported from Scandinavian countries. Social science research in those countries, at the time, suggested no harm flowing from such products. Under international pressure, however, the trade has since ceased. As has been seen, multilateral instruments dealing with trade in obscene materials and artifacts in fact form part of the contemporary multilateral intellectual & cultural property rights regime.

Fourth, under Article XX (f) of GATT, exceptions to free trade allow protection of artistic, historic and archaeological treasures. Similarly, Article 36 of the Treaty of Rome, which created the European Union, exempts cultural treasures from the general prohibition on quantitative restrictions on trade.

In effect, a GATT member may legitimately intervene in the market for cultural goods & services – contemporary and/or historic.

TRIPS 1994

In 1995 the World Trade Organization (WTO) began operations and a new global economy was born. Today, virtually all member states of the United Nations (UN) belong to the WTO with the notable exception of the Russian Federation. Put another way, global regulation of political and military competition by the UN beginning in 1945 was extended to global regulation of economic competition by the WTO fifty years later. This was possible only because of the triumph of the Market over Marx.

For the first time virtually all Nation-States agreed to abide by common rules of trade recognizing the WTO as final arbitrator of disputes and authorizing it to sanction countervailing measures against offenders of its rules. This is unlike GATT which has no enforcement powers. It is, however, like the still born International Trade Organization of 1947. Given the historical role of trade disputes fueling international conflict, the WTO compliments the UN as a bulwark of international peace, law and order.

Arguably, the WTO represents the ultimate geo-economic achievement of American soft-power at its peak with the triumph of the market over Marx. Put another way, market economics together with popular (or republican) democracy is the last ideology standing – the last secular theology.

The WTO is a 'single diplomatic undertaking', *i.e.*, it is a set of nearly 30 instruments constituting a single package permitting only a single signature without reservation. One of these is the Trade-Related Intellectual Properties and Services Agreement (TRIPS) that constitutes, in effect, a global treaty on trade in knowledge, or more precisely, in intellectual property rights (IPRs) including copyrights, patents, registered industrial designs and trademarks.

TRIPS requires accession to some but not all WIPO instruments. It also explicitly excludes 'non-trade-related' intellectual & cultural property rights, *e.g.*, aboriginal heritage rights including traditional ecological knowledge or (TEK), collective or community-based intellectual property as well as the moral rights of the Natural Person. These have no legal standing for purposes of international trade. In effect, copyright is reduced to industrial property like patents, trademarks and registered industrial designs. No morality remains, only utility. Commerce trumps Culture.

As for 'free use', 'fair dealing' or 'fair use' as general principles, no mention is made. Rather limitations or exceptions are confined to "certain special cases which do not conflict with a

normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder."

As for the public domain, Section 70(3) states there "shall be no obligation to restore protection to subject matter which … has fallen into the public domain". Implicitly this permits members to claw back works from the public domain and/or extend the duration of current works. This is what the U.S. did when it acceded to the Berne Convention in 1989.

In addition, Article 10 extends copyright protection to computer programs as if they were literary works under the Berne Convention. Until TRIPS only works of words, images, shapes and/or sounds, *i.e.*, human-readable code were protected. Victor Hugo must have turned over in his hallowed Parisian Pantheon crypt when TRIPS recognized software as 'a work' subject to his 1886 Berne Convention for the Protection of Literary & Artistic Works.

Furthermore WIPO (an international organization) has a formal agreement with the WTO (an international organization) to administer TRIPS as it does the Paris, Berne and many other multilateral instruments. Such agreements are subject to the 1986 *Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations* (not in force at the time of this writing). Thus it is no longer just the laws of nations but also the internal rules of international organizations that shape the multilateral intellectual & cultural property rights regime, *i.e.,* treaties between international bureaucracies.

TRIPS marked the beginning of a new geo-economic order. Just as Second World command economies melted into a single global marketplace under the WTO, the First World shifted from a manufacturing to a knowledge-based economy. Thus in 1996 the Organization for Economic Cooperation & Development (OECD) – the First World club - published: *The Knowledge-Based Economy* (KBE) which rationalized the transition. Then in 1997, it published a survival guide: *National Innovation Systems* (NIS).

Creation of the WTO (especially TRIPS) and recognition of the knowledge-based economy by the OECD initiated an avalanche of change. Almost immediately, rapid institution building began. A new private sector specialty emerged called 'knowledge management'; governments created knowledge ministries, departments and agencies; 'knowledge audits' were conducted by firms and Nation-States. The mandate of the University was transformed from generation to commercialization of new knowledge as it was welded into the NIS.

WIPO Copyright/Performances & Phonograms Treaties 1996

The 1996 WIPO Copyright and Performances & Phonogram Treaties formalized the multilateral 'de-culturing' of copyright in favour of its commercialization. Thus in the Copyright Treaty there is no mention of the public domain nor of moral rights. No general principle of fair use is referenced. Rather 'certain special cases' allowing limitations of or exceptions to rights are permitted if they "do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author." Reference to 'the author' arguably continues the Anglosphere confabulation of author's rights being fully and completely transferable to a proprietor, usually a body corporate or Legal Person. Accordingly, moral rights cannot be invoked because they "conflict with a normal exploitation of the work". Or, to paraphrase one legal wit in private correspondence: Moral rights are all ideology and get in the way of making a good contract".

The Copyright Treaty also confirms computer software as a literary & artistic work for purposes of the Berne Convention. The inappropriateness of copyright protection for software which can also enjoy patent and trade secret protection will be the subject of another Policy Research Note in the near future. With respect to fair use and the public domain, the Treaty requires legal protection of digital rights management (DRM) technologies – effectively creating an untamperable lock on all digital content – CD, DVD, WWW, *et al*. Given corporate copyright under Berne endures for 70 years such technologies effectively could achieve for modern proprietors what the Stationer's Company of London enjoyed: perpetual copyright. This is a particular concern with respect to the recent Google book scanning agreement with authors and publishers in the U.S.

With respect to the Performers & Phonograms Treaty concerning 'neighbouring rights' the case is more nuanced. Reflecting its antecedent, the 1961 Rome *Convention on Performers, Producers of Phonograms & Broadcasting Organizations,* the WIPO Treaty explicitly recognizes moral rights of performers. It can be argued that performer's rights historically began as a moral question with the dawn of audio-video recording in the 19th century. Thus interpretative artists began to enjoy something only literary and visual artists had enjoyed in the past – a re-read and performance after death. There may never again be a Richard Burton, but his image, his voice, and his performances will now endure like the plays of Shakespeare in which he performed. The result was a set of new rights for the performer similar to, or 'neighbouring', copyright for an author and for

producers similar to the traditional printer/publisher. Nonetheless such rights remain subject to national treatment.

In the Treaty there is also no mention of the public domain. and no principle of fair use is stated. Rather, as with the Copyright Treaty, 'certain special cases' allowing limitations of or exceptions to rights are permitted. The Treaty also requires legal protection of DRM technologies

UNESCO Cultural Diversity Convention 2005

With the fall of the Berlin Wall, a new era began. Some argue that global conflict based on ideology was replaced by the so-called clash of civilizations. It is where the "tectonic plates" of different cultures meet that conflicts will erupt. The 1990s tragedy in the Balkans between Catholic Croats, Orthodox Serbs and Moslem Bosnians who share a common language (Serbo-Croatian) and a common ethnic background (Southern Slavs) demonstrates that it takes only one significant cultural difference (in this case, religion) to lead to genocide, ethnic cleansing and cultural vandalism.

Yet more subtle and simmering differences and disputes between allies, long suppressed in the bi-polar global struggle, have also re-surfaced. Some such differences find expression in the concept of 'cultural sovereignty'. The term has been current in Canada since introduced at the height of the struggle for Quebec independence during the 1970s. It speaks to a world (or a Nation-State) in which military and economic sovereignty has been compromised, if not totally surrendered, through alliances with others. In such a world sovereignty can openly be expressed only through the 'soft power' of culture. Since that time, the term has attained the global diplomatic stage.

Cultural sovereignty, in effect, involves the struggle to be heard at home and abroad above the booming voice of the American entertainment industry that has succeeded in penetrating the cultural marketplace of every nation on earth. The one remaining superpower is thus also a global cultural colossus spanning East, West, North and South. Fuelled in part by the peculiar pricing methods used in the entertainment industry, *i.e.* a rate per viewer rather than the production cost of the work itself, the high technical standards embodied in American entertainment arts programming have set the bar for audiences around the world. As domestic audience dollars flow to American programming, however, they flow out of a country leaving the local arts industry poorer financially and culturally in that local production is not encouraged.

Canada, France and Sweden, among others, continue to press the World Trade Organization to maintain its exemption of cultural goods and services from free trade under GATT. These countries, together with others, have created a web of international film and television co-production agreements intended to generate the high production standards demanded by audiences at home, abroad and especially in the American marketplace itself. The need for such cooperative effort is that excepting the U.S. and India, no national marketplace is large enough to break even while attaining world-class production standards. Breaking even in the domestic market makes export sales gravy for media conglomerates in the U.S. with works sold on a per viewer basis. In other industries this would constitute 'dumping', a breach of WTO rules. The Chinese market being subject to ongoing Leninist censorship cannot yet compete.

In effect, these countries are trying to engineer a financially viable arts industry through control of the electromagnetic spectrum and other communications media. In these efforts, the Canadian attempt to build 'Hollywood North' has led the way. With innovation of the WWW, new questions of cultural sovereignty are arising, *e.g.*, the success of Google search and book scanning led France and the European Union to respond with counter-measures.

The right of Nation States to subsidize and otherwise support their domestic cultural industries – free of free trade restrictions - was arguably recognized by the 2005 UNESCO *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* that came into force in 2008. At the conference, one hundred and forty-eight countries approved; the United States and Israel voted against; and, four abstained. This highlights again the *exceptionalism* of the United States with respect to intellectual & cultural property.

To the degree such works are 'cultural' there is little controversy. To the degree they are 'American cultural clones' primarily intended for sale in and to profit from the largest media market in the world, the U.S., controversy is likely to arise. The U.S. may, in the future, attempt to prohibit sale and distribution of such goods under provisions of the GATT and TRIPS or claim countervail before a WTO dispute panel. Any attempt to do so, however, will be answered by reference to the UNESCO convention.

While stressing the rights of the Nation-State, the Convention makes no reference to the public domain, moral rights of authors or fair use by users. It does, however, make several

references to the ‘”artist and other cultural professionals” and the need to foster their development.

In short, if 1994 TRIPS and the two 1996 WIPO treaties de-culture copyright turning it into industrial property then the 2005 UNESCO convention nationalizes production of copyrighted works. In effect, a global schism now exists similar to the Berne/Pan American Convention clash. On the one hand there is the commercialism of the WTO TRIPS agreement and the two 1996 WIPO treaties. All three are administered by WIPO. On the other hand is the nationalization of cultural production through the UNESCO convention resting on GATT cultural exemptions but subject to WTO tribunal interpretation of those exemptions. To complicate matters, both WIPO and UNESCO are special subject agencies of the United Nations.

The situation is, however, even more complex still. Thus on the one hand, the U.S. is pitted against erstwhile allies such as Canada and France who initiated the 2005 Convention on Cultural Diversity. On the other hand, together they collectively drafted an Anti-Counterfeiting Trade Agreement (ACTA) in 2007 that would accelerate conversion of copyright into industrial property.

Conclusion

The end of the Market/Marx Wars, birth of a single World Trade Organization and emergence of the global knowledge-based economy have led on the one hand to ever increasing proprietary control of copyrighted and even out-of-copyright works embodied in digital rights management (DRM) technologies. On the other hand, it has led to the assertion of cultural sovereignty by Nation-States claiming the right to foster and support their own cultural industries, *i.e*., in the production of copyrighted works.

In the process sight has arguably been lost of the moral ‘human’ rights of the artist/author/creator as a Natural Person, fair use and the public domain in whose name the copyright monopoly is granted in the first place. Canadian copyright reform offers a unique opportunity to bring these issues back into focus and to public attention. An opportunity missed is no opportunity at all.

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