The 2010 *Copyright Modernization Act* & the *Licensing Act* of 1662

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Cultural Economist & Publisher
Compiler Press, August 31, 2010

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Preface: PRN #1 & #2

This is the third in a series of Canadian copyright reform policy research notes (PRN) published by Compiler Press. They are intended to inform the process of reform. This intent extends beyond changes and amendments to the Act to include the more general question of copyright in the emerging global knowledge-based economy.

The first note published July 31, 2009 dealt with the Global Context of the reform process. It highlighted the initial global split in the multilateral copyright regime between the European-backed author-based *Berne Convention* of 1886 and what became the mercantilist-based *Pan American Copyright Convention* of 1947 backed by the United States. Then, at the height of its post-Cold War power, the United States acted as midwife to the World Trade Organization (WTO 1995) and its TRIPS or *Trade-Related Intellectual Property & Services Agreement.* It was then instrumental in promoting the World Intellectual Property Organization or WIPO's *World Copyright Treaty* (WCT) and *World Performance & Phonogram Treaty* (WPPT) - both signed by Canada in 1996. The Canadian reform process of 2010 in fact centres on Canada's ratification – or not - of these two treaties.

The first note also pointed out that Canada together with France and Sweden, among others, succeeded in establishing the right of Nation-States to subsidize and otherwise support their domestic cultural industries – free of free trade restrictions. This was achieved through 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.

The second note in the series published March 31, 2010 dealt with a Unified Theory of Canadian Copyright. Drawing on the work of the late L. Ray Patterson (Patterson & Birch 2009) it highlighted differences and similarities between U.S. and Canadian copyright traditions. Following Patterson it also proposed a unified or easement theory of copyright, *i.e.*, copyright is neither a plenary property right nor a statutory one but rather a balancing of rights and obligations between creators (generally Natural Persons), proprietors (generally Legal Persons), users (Natural and Legal Persons including libraries) and the State responsible for fostering the public domain, *a.k.a.*, learning.

A never ending campaign of strategic litigation in lower courts across the Anglosphere (most recently in the U.S.) has, according to Patterson, returned to copyright proprietors powers last enjoyed by the Stationer's Company of London prior to the *Statute of Queen Anne* in 1710 – the first modern copyright act to recognize any author's rights. This has allowed proprietors to usurp equity from creators, use private law to control access and thereby create an existential threat to freedom of speech, or rather 'freedom to hear', *a.k.a.*, access, by, among other things, privatizing much of the public domain, *e.g.*, Google's booking scanning scheme.

"current digital era copyright protection"

The more things change,
the more they stay the same.
Old French saying

In this third policy research note I raise the question: What's new but old about Bill C-32 – the 2010 *Copyright Modernization Act* (CMA)? I do so again by taking my lead from and hopefully extending the work of L. Ray Patterson, specifically his 2003 article: "The DMCA: A Modern Version of the Licensing Act of 1662".

On June 8, 2010 the Government of Canada introduced Bill C-32 – *The Copyright Modernization Act* - into the House of Commons for first reading. This follows Bill C-61 introduced June 12, 2008 and Bill C-60 introduced June 20, 2005, both of which died on the order paper first of a Liberal and then of a Conservative government. All three have the same objective – ratification of the World Intellectual Property Organization or WIPO's *World Copyright Treaty* (WCT) and *World Performance & Phonogram Treaty* (WPPT) both signed by Canada in 1996.

In the preamble to both C-61 and C-32 the Government of the day presents these treaties as representing internationally recognized norms with respect to current digital era copyright protection. I address the question of Norms below. For purposes of introduction, however, I restrict myself to defining the current digital era of copyright protection.

This era is arguably rooted in five major legislative developments in the United States over the last 35 years. The U.S. is, of course, the richest media market in the world and, as in many other fields, the global trend setter. The five are the:

(i) 1976 Amendment of the *U.S. Copyright Act;*

(ii) 1980 *Computer Software Copyright Act*;

(iii) 1988 *Berne Convention Implementation Act;*

(iv) 1998 *Copyright Term Extension Act;* and,

(v) 1998 *Digital Millennium Copyright Act* - DMCA

Before doing so, however, one must ask: Why does the American experience matters so much?

Law as Precedent & Path Dependency

Law, in all Nation-States, is made at four levels: international, statutory, regulatory and case. International law is made by Nation-States and International Organizations through the treaty-making process. For our purposes what is important is that to ratify a multilateral instrument often requires changing domestic law.

Statutory law is made by domestic legislators in parliaments, legislatures, congresses, *etc.* Regulatory is made by bureaucrats – domestic and international - interpreting and implementing a statute or treaty. Case law is made by judges – domestic and international - interpreting and enforcing international, statutory and/or regulatory law.

Complicating matters, however, is that when judges make Law it is by setting precedent. In the Anglosphere this body of precedent is called the Common Law. If a similar case was resolved in the past, a current court is bound to follow the reasoning of that prior decision under the principle of *stare decisis*. The process is called *casuistry* or case-based reasoning.

If, however, a current case is different then a judge may set a precedent binding future courts in similar cases. Often such precedents compel legislators and bureaucrats to change statutory and regulatory law. This is especially true with respect to intellectual property rights like copyright.

Rapidly changing technology, among other things, increasingly brings novel cases before the lower courts forcing legislators and bureaucrats to keep up or allow casuistry to run its course. The problem is that a court decision in a specific case can, for better or worse, establish 'path-dependency' for emerging techno-economic regimes (David 1990), *e.g.*, in biotechnology, software, *etc*. This reflects the more general psychological *Law of Primacy*: That which comes first affects all that comes after. In Law it is called precedent; in Economics it is called path dependency.

Furthermore, precedent established in one jurisdiction may spill-over into others. This is especially true of IPR precedents set by courts in the United States. These have great influence in other Common Law countries including Canada. The sheer scale of the American economy insures that case law is greater in volume if not better thought out than in smaller jurisdictions.

In this regard Patterson argues copyright proprietors have engaged in a continuing campaign of 'strategic litigation' following passage of the *Statute of Queen Anne* in 1710 – the first copyright act to recognize author's rights even if these were fully assignable to a 'proprietor'. Initially this was known as 'the battle of the booksellers'. Copyright proprietors ever since have initiated court cases to establish precedents in favour of their rights (Patterson & Birch 2009). Such precedents in turn can influence legislation. Today the campaign is waged by global communication conglomerates particularly in the United States.

One legal development emerging from the contemporary campaign is 'copyright misuse'. This is a relatively new legal

concept that emerged in the United States with the case of *Lasercomb America v. Reynolds* in 1990. The concept is based on the more developed doctrine of patent misuse. Copyright misuse occurs when a copyright owner, through a license, for example, stops someone from making or using something that competes with the copyrighted work but does not involve use of the original itself. The leading case is *Video Pipeline, Inc. v. Buena Vista Home Entertainment* (2003). While not successful due to legal technicalities:

> The defense of copyright misuse was raised … because Disney licensed its movie trailers subject to license terms that prohibit the licensees from using the movie trailers in a way that is derogatory to or critical of the entertainment industry or of Disney. That is, Disney uses the exclusive rights conferred upon it by the Copyright Act, not only to obtain a return for its creative efforts (which is consistent with the purposes of copyright protection), but also to suppress criticism (which is contrary to the purposes of copyright protection). (*Tech Law Journal Daily E-Mail Alert*, 2003)

IPR case law, especially in the United States, often leads to legislative initiatives sometimes sponsored by and sometimes drafted by industry itself:

> The most compelling advantage of encouraging copyright industries to work out the details of the copyright law among themselves, before passing the finished product on to a compliant Congress for enactment, has been that it produced copyright laws that the relevant players could live with, because they wrote them. If we intend the law to apply to individual end users' everyday interaction with copyrighted material, however, we will need to take a different approach... There are, [however], few signs that the entities proposing statutory revision have taken the public's interests very seriously. Instead, they seem determined to see their proposals enacted before they can be the subject of serious public debate (Litman 1996).

In the U.S. this tendency found expression in the so-called Mickey Mouse Copyright Act, or formally the 1998 *Copyright Term Extension Act*. It is so-called because the Disney Corp. lobbied to keep the early Mickey Mouse out of the public domain where any and all could play with him. More recently in 2005 the relationship surfaced in California where:

> … California's attorney general, Bill Lockyer, floated a letter calling peer-to-peer file-sharing software - long the bane of the entertainment industry's interests - a dangerous product. But a peek at the document's [digital] properties revealed that someone dubbed *stevensonv* had a hand in its creation.
>
> Vans Stevenson, a senior vice president with the Motion Picture Association of America, said later that he had offered input on the document but had not written it. (Zeller 2005)

To appreciate the scale of legislative initiatives following U.S. signature of the 1996 WCT/WPPT, many resulting from industrial lobbying, consider Appendix A. This lists 40 copyright related bills proposed and 7 public laws passed by the 105th and 106th Congress between 1997 and 1999.

In Canada a similar relationship between industry and the legislature has been suggested and reflected in Bill 32 (2010) and its predecessors – Bill 61 (2008) and Bill 60 (2005). In contrast to the U.S., however, between 1997 and 1999 in Canada only eight copyright related bills were proposed of which three were enacted. Four were private members bills and one government bill in First Reading; none received Royal Assent. Three statutes, however, did receive Royal Assent including two housekeeping amendments and S.C 1997, c. 24 *An Act to Amend the Copyright Act*, the first major restructuring of the Act in 76 years. Transmission rights were arguably the focus. None of the eight proposed and enacted statutes dealt with ratification of WIPO's 1996 WCT/WPPT.

The American Era

Development of statutory and case law in the United States arguably defines the current digital era of copyright protection. These have served as legal precedent in other jurisdictions and established techno-economic path dependency in many industries. I will now review the five major legislative developments in the United States over the last 35 years that define it as the American digital era of copyright protection.

(i) 1976 Amendment of the U.S. Copyright Act

Amendment in 1976 ended the traditional requirement that a work must be published before copyright is granted. This was complimented by introduction of a new electronic or digital transmission right adding to traditional print copyright and performance rights for musical and dramatic works introduced in the late 19th century.

As with the printing press conversion of old works to new media - old wine into new bottles – is initially the most profitable avenue for proprietors. A major reason it took until 1710 (the moveable type printing press was invented in 1440) to recognize the rights of contemporary authors was the backlog of public domain works from the ancient and medieval worlds being profitably converted into print from hand written sources. Works by contemporary authors, then as now, represented a small part of the national knowledge-base.

A prescient entrepreneurial example was Ted Turner's 1986 purchase of the MGM film library for transmission on his TV network. Conglomerate cross-media ownership allowing the conversion of copyrighted and increasingly public domain works from analog to digital formats and *vice versa* has in fact become the norm – content is king. This raises the question of media ownership concentration which is not, however, further considered in this policy research note.

(ii) 1980 Computer Software Copyright Act

In 1980 Congress added computer program as a work subject to protection under the *Copyright Act* (17 U.S.C. § 101). Extension to computer software means that software is now treated as if an artistic or literary work for purposes of the *Berne Convention*. Thereby distinction between human-readable and machine readable code and between utilitarian and non-utilitarian purpose was extinguished. Copyright in effect became industrial property.

Together with the 1976 amendment granting copyright protection to unpublished works this development has significant implications for the competitive ability of software proprietors to keep critical code from competitors and complimentary or application creators.

Furthermore in the 1981 U.S. case of *Diamond v. Diehr* the Supreme Court ordered the Patent & Trademark Office to grant a patent on an invention even though computer software was used. This precedent established that software can, under certain circumstances, also qualify for patent protection. Thus software is the only type of work subject to copyright, patent and trade secret

protection. In this sense, as I have argued elsewhere (Chartrand April 23, 2008), software is *sui generis* and deserving of its own unique form of intellectual property right protection as do integrated circuit topologies today.

In Canada, software gained copyright protection in 1988 (S.C. 1988, c. 15). Inclusion as an artistic or literary work was accompanied by extension of protection to unpublished works. Previously the price of copyright was publication; afterwards protection became available without publication.

With respect to patenting software in Canada, since the 1981 case of *Schlumberger Canada Ltd. v. Commissioner of Patents* such protection has effectively been available, again under certain circumstances. The question of 'soft' patents, however, remains a matter of commercial and legal controversy, *e.g.*, the Amazon dotcom 'one click' purchase program.

(iii) 1988 Berne Convention Implementation Act

In 1989, following Congressional passage of the *Berne Convention Implementation Act* in 1988, the United States acceded to the *Berne Convention*. This ended a century long schism in the multilateral copyright regime between the European-backed author-based *Berne Convention* of 1886 and what finally became the mercantilist-based *Pan American Copyright Convention* of 1947 backed by the United States (Chartrand March 2007).

It should be recalled that until the *Chace Act* of 1891 no American royalties were paid to foreign authors whose works were cheaply re-printed in the U.S. Copies were then sold legally in the U.S. and illegally, at very low prices, elsewhere in the English-speaking world including Canada. Similarly 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'. Multilaterally the U.S. treated the Americas, under the Monroe Doctrine, as their sphere of influence and actively resisted the imperial aspirations of European states with the *Berne Convention*. The UNESCO sponsored *Universal Copyright Convention* of 1952 failed to heal the rift.

Congress, after accession, also took steps to satisfy requirements of the *Berne Convention* including recognizing, for the first time under federal law, moral rights of creators. Initiatives included the *Visual Artists Protection Act* of 1990 which eventually became Section 106A of the *U.S. Copyright Act*. However, rights of paternity and integrity (two of many moral rights available in Civil Code countries) became available only to American 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.

Patterson & Birch write that this change was:

> … prompted by the adherence of the United States to the Berne Convention. The moral right is not a right of the copyright owner, but of the creator of the work - a personal right that enables the author to protect the integrity of the work and his or her reputation in conjunction with it. A feature of copyright in European countries, moral rights have been given only limited recognition in the United States, presumably because such rights are inalienable personal rights of the author to which the property right of the copyright holder may be subject. Moral rights, for example, might give the author of a novel the right to reject a movie producer's film treatment of the novel, although the producer had purchased the right to make the novel into a film. This fact probably explains why the statute limits the moral right to works of visual art, reflecting the disagreement as to the desirability of the doctrine between authors as creators and copyright holders as entrepreneurs. (Patterson & Birch 2009, 270)

It is an open question, however, whether the United States has fulfilled its obligations regarding moral rights of creators under the *Berne Convention*. To this point in time, to my knowledge, no member state of the Convention has challenged the U.S. on this question

(iv) 1998 Copyright Term Extension Act

Accession to the *Berne Convention* led to, among other things, increased industry lobbying, especially by the Disney Corporation, to extend the term of copyright. Thus in 1998 what has been called by critics the Copyright Theft Act or Mickey Mouse Copyright Act became Public Law 105-298 - the Sonny Bono *Copyright Term Extension Act*.

This Act extended the copyright term by twenty years for pre-existing works and extended it from life of the author plus 50 to 70 years for new works as permitted under the *Berne Convention*. As Paterson & Birch note:

> …This term of protection is the equivalent of three generations, or perhaps now four. While a copyright for multiple successive generations is not perpetual, it feels very much like a way-station on the road to infinity and thus presents a problem in view of the constitutional requirement that copyright be granted only for limited Times. (Patterson & Birch 2009, 273)

(v) 1998 Digital Millennium Copyright Act

In 1998 Congress passed and President Clinton signed the *Digital Millennium Copyright Act* or the DMCA. In fact the DMCA consist of five distinct acts:

Title I: *WIPO Copyright and Performances and Phonograms Treaties Implementation Act of 1998*;

Title II: *Online Copyright Infringement Liability Limitation Act*;

Title III*: Computer Maintenance Competition Assurance Act*;

Title IV: Miscellaneous Provisions; and,

Title V: *Vessel Hull Design Protection Act*.

For purposes of this third policy research note I consider only the first: the *WIPO Copyright and Performances and Phonograms Treaties Implementation Act of 1998*. This contains the most controversial aspect of the DMCA – provisions concerning circumventing technological measures to control access to protected works and digital rights management systems. I consider only the first – technological measures - in this note.

This Act arguably began the current digital era of copyright protection, an era of what I call 'private law' including rights of search and seizure not seen since the high days of the Stationer's Company of London in the 17th century. It was provisions of the DMCA that allowed the Recording Industry Association of America (RIAA) and Motion Picture Association of America (MPAA) and now independent film studios to initiate legal action against not just those financially benefiting from copyright infringement but also against individual users including students and grandmothers as well as internet service providers.

The DMCA has become the primary internationally recognized norm defining current digital era copyright protection and, as we shall see, authorizing private law prosecution of those engaged in the circumvention of effective technological measures of protection.

"internationally recognized norms"

For our purposes, a norm may be: "a model or a pattern; a type, [or] a standard" or "a standard or pattern of social behaviour that is accepted in or expected of a group" (OED, I 1a & b), in this case the international community of nations. A norm, however, may also be a legal precedent establishing path dependency. Thus with respect to intellectual property rights:

> the complex body of law, judicial interpretation, and administrative practice that one has to grapple … has not been created by any rational, consistent, social welfare-maximizing public agency. (David 1992)

The result, according to economist Paul David, is 'a Panda's thumb', *i.e.*, a striking example of evolutionary improvisation yielding an appendage that is inelegant yet serviceable (David 1992).

There are two classes of internationally recognized norms governing copyright: commercial and cultural. I will review Commercial Norms first and then Cultural Norms. It is important at the outset, however, to note that:

(a) intellectual property is traditionally divided into industrial property (patents, trademarks and registered industrial designs or design patents) treated under the 1883 *Paris Convention on Industrial Property* and copyright treated separately as 'protection of literary and artistic works' under the 1886 *Berne Convention*; and,

(b) copyright involves easement of inherent tensions between the rights of author/creators (generally Natural Persons), proprietors of the economic rights associated with copyright (generally Legal Persons), users (both Natural and Legal Persons) and the Nation-State as custodian, facilitator, patron, architect and/or engineer of the national culture, patrimony, public domain and national knowledge-base..

Commercial Norms

(i) 1662 English Licensing Act

Before considering the English *Licensing Act* of 1662 it is necessary to briefly review the evolution of the Common Law of business. During Tudor and Stuart monarchies the House of Commons increasingly refused to approve new taxes. Monarchs, however, realized they could raise money (and political favours) by granting charters and letters patent of monopoly to new groups or 'companies'. The number of such monopolies soared particularly during the early reign of Elizabeth I. Near the end of

her reign, however, such Crown grants of monopoly were increasingly:

> adjudged against the common right and public good, and against the common law, because, being a monopoly, it was against the liberty of the subject, and against the commonwealth. (Commons 1924, 226)

The process came to a head under James I with 1624 passage of the *Statute of Monopolies* which abolished the power of the guilds and other domestic Crown monopolies. This began an evolutionary process whereby Common Law courts progressively stripped the guilds, with one notable exception, of their monopoly powers and assumed responsibility for their regulation.

> The next hundred years, until the Act of Settlement in 1700, was substantially the struggle of farmers and business men to become members of the Commonwealth, whereby they might have courts of law willing and able to convert their customary bargains into a common law of property and liberty. The court which abolished the power of the gilds began to take over the work of the gilds. Their private jurisdiction became a public jurisdiction. And the very customs which the gilds endeavored to enforce within their ranks became the customs which the courts enforced for the nation. The monopoly, the closed shop, and the private jurisdiction were gone, but the economics and ethics remained. Much later, in the modern commonwealth, other functions of the gilds, such as protection of the quality of the product and the qualifications of practitioners, have also been taken over by courts or legislatures. (Commons 1924, 230)

The notable exception to the *Statute of Monopolies* of 1624 was the copyright monopoly granted to the Stationers' Company of London by Queen Mary I in 1557. This monopoly formally ended, however, only with the *Statute of Queen Anne* in 1710. It was at that time that the customs and practices of the Stationers Company became the foundation for Common Law copyright. The true source of the Stationers` monopoly power, however, was not their charter but rather delegation by the Crown of authority to enforce the *Licensing Act*.

Licensing acts predate the printing press introduced into England in 1476. The first act was passed by Parliament in 1401. Entitled *De Heretico Comburendo* (2 Henry IV c.15) it authorized ecclesiastic licensing for copying religious works, *i.e.,* pre-publication censorship. Initially it was directed at works by Wyclif & his Lollards (Harvey 2005, 162). Then in 1407 the *Oxford Constitutions* were issued by which: (i) censors were appointed by the Universities (Oxford & Cambridge); (ii) approved and licensed works were to be hand copied only by the Stationers' Company of London; and, (iii) manuscripts (originals) were to be deposited in the Oxford 'Chest' (Harvey 2005, 162-3). In 1414 another act of Parliament (2 Henry V, 1, c.7) established joint Church/State control over writing, possessing and disseminating copies of questionable religious doctrine (Harvey 2005, 166).

Acts continued to be issued after introduction of the printing press in 1476. Then in 1538, Henry VIII by the *Proclamation of November 16* transferred control of pre-publication censorship from the Church to the Crown, *i.e.,* the Court of the Star Chamber (Harvey 2005, 183). With Queen Mary's grant of a national charter to the Stationers` Company in 1557 enforcement of the *Licensing Act* was increasingly delegated to the Company and its officers. Even Cromwell issued a *Licensing Act* which was also enforced by the Stationers` Company.

With Restoration of the monarchy in 1660, the new King Charles II passed through Parliament in 1662 *An act for preventing the frequent Abuses in printing seditious treasonable and unlicensed Bookes and Pamphlets and for regulating of Printing and Printing Presses.* This was the *Licensing Act* of 1662. And it was regularly renewed by Charles II, James II, and in the early years of William & Mary`s reign. It lapsed in 1695 giving birth to a 'free press', free of pre-publication censorship. It also effectively ended the Stationers' Company copyright monopoly.

As will be demonstrated, it is with respect to "regulating of Printing and Printing Presses" that the *Licensing Act* of 1662 set the precedent for WIPO's 1996 WCT/WPPT but especially for the U.S. 1998 *Digital Millennium Copyright Act* and Canada's Bill C-32 – the 2010 *Copyright Modernization Act*. Thus the *Licensing Act* of 1662 states:

> … no joyner, carpenter, or other person shall make any printing press, no smith shall forge any iron-work for a printing press, no founder shall craft any letters which may be used for printing for any person or persons whatsoever; [nor import or buy materials] belonging unto

> printing, unless he or they respectively shall first acquaint the… master and wardens of the… company of stationers... for whom the same presses, iron work or letters are to be made, forged, cast, brought or imported… [15]
>
> *Licensing Act* 13 & 14 Car. II, c. 33, 1662.

To demonstrate this precedent in action today I will simply quote relevant sections of each treaty and statute with but two caveats. First, sections of WIPO's 1996 WCT/WPPT are enabling while sections of the U.S. DMCA and Canadian Bill C-32 enact a specific interpretation of "adequate legal protection and effective legal remedies". Second, other countries including the European Union (especially the U.K. and France) have introduced similar provisions regarding "circumvention of technological measures".

(ii) 1996 WIPO's World Copyright Treaty (WCT) and World Performances & Phonogram Treaty (WPPT)

> Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.
>
> Article 11: Obligations concerning Technological Measures, *WIPO World Copyright Treaty*, 1996

> Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by performers or producers of phonograms in connection with the exercise of their rights under this Treaty and that restrict acts, in respect of their performances or phonograms, which are not authorized by the performers or the producers of phonograms concerned or permitted by law.
>
> Article 18: Obligations concerning Technological Measures, *WIPO World Performance & Phonograph Treaty*, 1996

(iii) 2000 U.S. D.M.C.A.

> No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component

> or part thereof, that is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under this title.
>
> *U.S. Digital Millennium Copyright Act*
> 17 U.S.C. § 1201(a)(2)(A), 2000.

(iv) 2010 Canadian Copyright Modernization Act

> No person shall…
>
> (a) circumvent a technological protection measure…
>
> (b) offer services to the public or provide services if
>
> (i) the services are offered or provided primarily for the purposes of circumventing a technological protection measure…
>
> (c) manufacture, import, distribute, offer for sale or rental or provide - including by selling or renting - any technology, device or component if
>
> (i) the technology, device or component is designed or produced primarily for the purposes of circumventing a technological protection measure…
>
> Section 47, Bill C-32,
> *Copyright Modernization Act*,
> 3rd Session, 40th Parliament,
> 59 Elizabeth II, 2010
> proposed Section 41.1 (1) of
> *Copyright Act*, R.S. 1985, c. C-42.

(v) Analysis

Two questions arise. First, why should 'effective technological measures' require legal remedy? The answer, of course, is that they are not effective. Whether it is DVDs, CDs, Iphones, *et al*, digital locks have proven relatively easy to break by those financially and/or ideologically motivated to do so. And once broken the necessary information is spread by the worldwide web or internet. Arguably like the *Licensing Act* (Harvey, 2005) such legal measures will also fail. There will always be some "joyner, carpenter, or other person" willing to pick the lock. Thus, arguably, the level of so-called piracy has not significantly declined in the U.S. or elsewhere since introduction of such legal measures. It has become yet another law not respected by the public.

The second question is: What collateral damage is inflicted on society by implementing "adequate legal protection and effective legal remedies against the circumvention of effective

technological measures"? There are two forms of collateral damage: one concerns free speech, the other the public domain.

With respect to free speech, Patterson in his comparison of the DMCA and the *Licensing Act* finds:

> The statutes are similar because they represent the same goals: the control of access to ideas. The similarities make a difference because a legal construct to control public access to ideas undermines - and will eventually destroy - the right of free speech, the foundation of a free society. The Licensing Act and the DMCA are such constructs with one major difference. Under the Licensing Act, the persons given the power to determine what materials could be made accessible to the populace were public officials acting for the government; under the DMCA, they are private copyright holders acting for themselves as the beneficiaries of the copyright monopoly. (Patterson 2003, 33)
>
> One difference between the two statutes is that the Licensing Act precluded any access to forbidden materials because without publication, the material was not accessible. Under the DMCA, digitized material presumably is available for a fee, which ostensibly makes it less threatening than the Licensing Act. Persons with this view, however, overlook two points. The first is that not all people will have the coins to make the turnstiles turn. The second is that the real issue here is power, and Lord Acton's dictum remains valid: [p]ower tends to corrupt, and absolute power corrupts absolutely. (Patterson 2003, 41)

For Patterson religious and political censorship of the 17th century has been replaced by 21st century economic censorship. To him this reflects transformation of copyright from protection of the right's of an author to a stand alone work such as a book to controlling (censoring) access to the transmission of corporately owned for-profit digitized databases, *a.k.a.*, a service. And such services are increasingly in the hands of fewer and fewer firms raising again the question of media ownership that is not addressed in this policy research note.

And what is the collateral damage of such measures on the public domain? Court records, articles, books and photographs in the public domain are being increasingly digitized and loaded onto corporate databases – old wine in new bottles. Once re-corked such public domain content will then only be accessed for a fee.

In the case of the United States and the DMCA, Patterson concludes:

> If the U.S. Constitution is to be implemented with integrity in accordance with the principle that the Copyright Clause is a limitation on, as well as a grant of, congressional power, the unconstitutionality of the DMCA is beyond doubt. The statute is a complete repudiation of the constitutional policies that copyright promote learning, protect the public domain, and provide public access. The DMCA thus returns to the anti-learning, anti-public domain, anti-access policies of the Licensing Act. (Patterson 2003, 58)

Arguably the same can be said of Canadian Bill C-32 – *The Copyright Modernization Act* rooted, like the U.S. Copyright Clause, in the *Statute of Queen Anne* which is formally entitled: *An Act for the Encouragement of Learning…*

Perhaps it is time to see the public domain as a national resource like the radio spectrum. It may be auctioned off to the private sector but with conditions analogous to broadcasting regulation. To paraphrase Rosenberg on science, the body of knowledge called the public domain consists of an immense pool to which small annual increments are made at the frontier. The true significance of the public domain is diminished, rather than enhanced, by extreme emphasis on the importance of the most recent increment to that pool (Rosenberg 1994, 143).

Cultural Norms

While precedent for Commercial Norms of "current digital era copyright protection" is to be found in Common Law history, *i.e.*, the 1662 *Licensing Act*, the precedent for Cultural Norms is found in the French Revolution of 1789 and the European Civil Code. In this section I will first outline the nature of international law. Second, I will demonstrate copyright as cultural property. Third, I will sketch out the principal international instruments defining Cultural Norms. Finally I will analyze their implications for the contemporary multilateral copyright regime.

Law as jus cogens

Within a Nation-State Law relies on the monopoly of coercive power exercised by the State. This is the primary criterion of sovereignty. Between Nation-States, however, Law relies on *jus cogens* or the presumptive norms of international law.

Contemporary international law evolved out of ancient Roman and then Church law during the Middle Ages of Western Europe. Accordingly there are lots of Latin terms and phrases. International law, however, was further shaped by the increasingly secularization of Western Europe after the Peace of Westphalia of 1648. This Peace defined international relations as being between geographic-based Nation-States with fixed borders not royal families and their inter-marriage.

The elemental norm of international law is *pacta sunt servanda* meaning 'agreements must be kept'. Such "higher law" may not be violated because it serves the interests of the entire international community not just the needs of individual States. There is, however, no definitive statement by any authoritative body of what constitutes *jus cogens*. Rather such norms arise out of case law as well as changing socio-economic and political attitudes. Such norms can be affirmative as with *pacta sunt servanda* or prohibitive as with aggressive war, crimes against humanity, war crimes, maritime piracy, genocide, slavery and torture.

According to *pacta sunt servanda* all treaties once ratified by a Party are binding and it must perform terms of the agreement in good faith. They cannot invoke domestic law in the case of a State or the internal rules of an International Organization to justify failure to perform. The only exception is if *pacta sunt servanda* conflicts with another presumptive norm, *e.g*., prohibition against slavery. In such cases, according to Article 53 of the 1969 *Vienna Convention on the Law of Treaties*, an instrument is null and void.

If a Party fails to perform there may or may not be legal recourse for other Parties to an agreement, *e.g*., a WTO dispute panel or the International Court of Justice. Only at the extreme will the Security Council of the United Nations authorize coercive force against a treaty-breaker.

Like international law the European Civil Code also draws heavily on ancient Roman law especially the *Institutes of Justinian.* It should not therefore be surprising that Civil Code practice and tradition sometimes clashes with Common Law. This is especially true of copyright. It also means that international law tends to be more reflective of Civil Code than Common Law practice and tradition. For example, the wording of WIPO's WCT/WPPT 'technological measures' clauses quoted above stress the 'author'

while the corresponding American DMCA and Canadian Bill C-32 clauses make no reference to an author only to protected works.

Copyright as Cultural Property

Our modern concepts of copyright and cultural property emerged out of the French Revolution of 1789 as did the European Civil Code (Chartrand February 2009). I will review their beginnings and then draw conclusions about their relationship.

In England the 1710 *Statute of Queen Anne* recognized, for the first time, that an artist/author/creator had any rights in a work. The Act, however, made all rights assignable to a proprietor- a printer, publisher or bookseller. Across the Channel in the France of 1710 creativity was assumed a gift of God and the monarch as God's representative on earth held all rights to a work justifying such things as licensing acts. Any benefit to an author was a privilege granted by the monarch.

In 1777, however, things changed. Louis XVII granted authors (and their descendents) perpetual copyright in their work as a right of genius. This realized, in its way, the Enlightenment ideal of the individual as the foundation stone of creation – not god, king or pope. Proprietors in France, on the other hand, became thereby unhappy agents of the author. The political objective of Louis' beneficence, however, as in the case of the *Statute of Queen Anne vis-a-vis* the Stationer's Company of London, was to break the monopoly enjoyed by the Community of Sellers and Printers of Paris (Hesse 1990).

This sentiment was felt in the Anglosphere especially in the United States which in 1790 passed its first copyright act entitled: *An Act for the Encouragement of Learning.* While the sentiment was felt, the American Act followed the *Statute of Queen Anne* (including its title) making all rights of the author assignable to a proprietor. Nonetheless, the myth of the creator was implanted in the American heart and eloquently expressed in Zechariah Chaffe's words repeated in the prestigious *Great American Law Reviews* (Berring 1984):

> … intellectual property is, after all, the only absolute possession in the world... The man who brings out of nothingness some child of his thought has rights therein which cannot belong to any other sort of property. (Chaffee 1945)

During the French Revolution, however, the perpetual copyright of the author was, in turn, sacrificed in favour of the public domain or the public good. This partially reflected Isaac Netwon's famous aphorism (used by Google Scholar) that we all

stand on the shoulders of giants, *i.e.*, a contemporary creator draws on the work of past creators. Copyright was limited to the life of the author plus ten years because the revolutionaries wanted to convert the author, a perceived creature of royal privilege, into a public servant, the model citizen (Hesse 1990, 130).

At the same time revolutionary France considered the appropriate reward for living authors it also considered appropriate protection for works of the past artist/author/creator. Thus Abbe Grégoire was commissioned by the National Convention to investigate. He produced three reports in 1794. The first was entitled: *Report on the Destruction Brought About by Vandalism, and on the Means to Quell It*. (Grégoire coined the term 'vandalism'.) In effect he asked:

> Why should caring for paintings, books, and buildings be a concern of the nation? Why, especially in a republic that was beginning radically anew, should monuments redolent of the values of the old regime be respected? (Sax 1990a, 1144)

He answered that what was important was not the patron but the artist/author/creator. He concluded that:

> … the essential quality of the Republic reposed in the genius of individual citizens as revealed in the achievements of science, literature, and the arts. The body of artefacts that embodied the best of the people was the quintessence of France, its true heritage and patrimony. Those who were willing to see these artefacts destroyed, or sold abroad as if the nation cared nothing for them he said, were imperilling the most important symbols of the national identity, those things that spoke for what France should aspire to be. (Sax 1990a, 1156)

Given the instability of the revolution, the rise of Napoleon and restoration of the monarchy, Grégoire's Republican views held no immediate sway and effective legislation was not forthcoming. However, the banner was picked up by Victor Hugo in his 1825 essay *On the Destruction of Monuments in France*. Finally, in 1887 the *Monument Act* was passed during the Third Republic (Sax 1990b, 1560). Since that time legislation has been strengthened and sister legislation added.

Meanwhile in England Victor Hugo's call to arms found a receptive listener, John Ruskin. And it was Ruskin's long time

friend Sir John Lubbock, Member of Parliament for Maidstone who in 1872 introduced into the House of Commons *A Bill to Provide for the Preservation of Ancient National Monuments*.

> By conceiving of architecture as the embodiment of the life work of its creators, Ruskin shifted the focus of discussion from space to time. To think of Stonehenge in space is to see it as simply a physical thing, subject to the dominion of the proprietor within whose space it is located. But to think of Stonehenge in time is to see it as something from a distant century that has traversed the years - a part of the past that exists in the present. What has come to us is not merely the physical thing - for its physical capacity is often quite exhausted - but the human achievement that went into its creation. Its message of genius and commitment remains even in a withered and vestigial shell. (Sax 1990b, 1563)

The Bill proposed that a current owner of cultural property was a tenant, trustee or custodian of the Nation (as a temporal entity) and as such without freehold title. In other words, the State could limit the rights even of unwilling private proprietors. The Bill was not passed, however, until 1882 and in a weakened form. Since that time, however, there have been many amendments and sister legislation strengthening and extending its intent.

Under such cultural property legislation a current owner enjoys what under the Civil Code is called *usufruct* title, *i.e.*, use of the fruit but not ownership of the tree. The term is, however, also pertinent to copyright. Thus under the original American *Copyright Act* of 1790 - *An Act for the Encouragement of Learning*, the duration of copyright was 14 years with the possibility of renewal for another 14 years if the author was still alive. This was the term of two apprenticeships at the time – from gopher to journeyman. Thomas Jefferson, however, proposed a somewhat longer duration based on the principle that "the earth belongs in usufruct to the living" calculating the term of 19 years based on mortality tables (Jefferson, *Letter to James Madison*, September 6, 1789)

With respect to cultural property, on the other hand, encouraged by President Theodore Roosevelt Congress passed: *An Act for the Preservation of American Antiquities* (16 USC 431-433) in 1906. This criminalized unauthorized appropriation,

excavation, injury, or destruction of "any historic or prehistoric ruin or monument, or any object of antiquity" on federal land.

The American experience is, however, unlike the British and French in four ways. First, it embraces not just human-made artefacts but also natural sites of aesthetic value as part of our 'natural heritage'. Second, it is limited to federal lands and does not extend to unwilling private sector owners. Third, there is no sister legislation concerning moveable cultural property and hence no restriction on its export unless sourced from federal land. Fourth, it does not recognize the right of the Nation, as a temporal entity, to qualify private ownership of cultural property in the Present because of perpetual public ownership through Time.

From the common origins of copyright and cultural property I deduce the following. First, their common source is the genius of the individual creator. Second, they are related by Time. Cultural property generally begins as private intellectual property all of which eventually falls into the public domain. The artefact or physical matrix fixing the expression of the creator may or may not subsequently be nationalized. Of course, some cultural property such a national library is initially produced and remains the plenary property of the State.

Third, the appropriate reward for the living artist/author/creator is a time limited copyright inclusive of moral rights; for works of the past creator it is perpetual cultural property protection in the name of the Nation. The first becomes the second when copyright expires. A given work then enters the public domain and may be selected as cultural property to become part of the national patrimony and subject to public regulation. The mechanism is identification of works inclusive of moveable cultural property to be included on a schedule. The standard is "national importance" usually determined by a committee of experts. Once scheduled any action by the present owner or others resulting in its demolition, destruction or damage is an offense. In the case of moveable cultural property, sister legislation makes it subject to government restrictions on export.

This is arguably the internationally recognized norm by which works falling out of copyright becoming cultural property usually 100 years after their creation – a term approximating copyright protection – life of the artist plus 50 years in Canada but plus 70 years in the United States and many other *Berne Convention* countries. This includes architectural, artistic and literary works and derivatives including motion pictures, television programs and internet content. Both Canada and the U.K. follow this internationally recognized norm even though moral rights of living authors remain subject to waiver. The critical exception is

the United States which does not effectively recognize the moral rights of contemporary creators nor accept national responsibility for protection of cultural property inherited from past creators. In this sense the United States is truly 'exceptional'.

The Multilateral Regime

If, as noted by economist Paul David, the domestic IPR regime "has not been created by any rational, consistent, social welfare maximizing public agency" (David 1992) then the multilateral regime has been shaped by the conflicting self-interest of Nation-States responding to external or foreign and internal or domestic pressure.

(i) 1886 Berne Convention

Thus it was pressure by European authors and artists - led by Victor Hugo - that initiated the *Berne Convention* of 1886 (see PRN#1: Global Context, July 2009). It was also Victor Hugo who, as noted above, inspired the 1887 *Monument Act* in France which embodies our modern concepts of cultural property and national patrimony. In this regard it is important to note that the *Monument Act* defines a monument not only as architectural works but also moveable cultural property including books and paintings.

Both legislative actions were inspired by the same Kantian ideal that a literary or artistic work is an extension of its creator's personality. As such the artist/author/creator has a moral right that is imprescriptable, *i.e.*, it cannot be signed away or waived. It is a human right that trumps the economic rights of a copyright holder/owner/proprietor – natural or legal. A legal person cannot enjoy such rights because it does not have a personality. Similarly, in Civil Code countries an employee retains a moral right in his or her work while in Common Law countries all rights belong to the employer. Thus under the Civil Code, as with cultural property, the rights of a current copyright holder/owner/proprietor – natural or legal – are limited by the moral rights of the creator – living or dead.

This is the international norm excepting Anglosphere Common Law countries. Since the 1710 *Statute of Queen Anne* all rights of the author have been fully assignable to a proprietor. Moral rights were not recognized by the United Kingdom and what became the Commonwealth until the *Berne Convention* of 1886 and even then they were and remain subject to waiver, *i.e.*, they can be signed away. And while in 1989 the U.S. acceded to the *Berne Convention* it recognizes a moral right only for visual artists of 'recognized stature'. Similarly the United States insisted that the World Trade Organization's *Trade-Related Intellectual Properties and Services Agreement* (TRIPS) include Article 9 (1)

which explicitly excludes application of Article 6bis: Moral Rights of the *Berne Convention*.

(ii) 1910/1924 Obscene Publication Conventions (1949/1947 UN Protocols)

While copyright is intended to protect the rights of authors one form of content suffers under formal censorship at the multilateral level – obscene publications. The international process began with the 1910 *Arrangement between the United States and Other Powers Relative to the Repression of the Circulation of Obscene Publications.* According to its Preamble the purpose of the treaty is "the mutual interchange of information with a view to tracing and repressing offences connected with obscene publications". The Government of the French Republic was invested with secretariat responsibilities for the treaty until 1949 when a U.N. Protocol transferred responsibility to that body. The Protocol has been ratified by some 35 countries including Canada, China, France, the Russian Federation, the United Kingdom and the United States.

In 1924 the League of Nations sponsored the *International Convention for the Suppression of the Circulation of and Traffic in Obscene Publications*. Article 1 defines Punishable Offenses regarding "obscene writings, drawings, prints, paintings, printed matter, pictures, posters, emblems, photographs, cinematography films or any other obscene objects". All are copyrightable works.

Offenses include to: (1) make, produce or possess; (2) import, convey or export; (3) carry on or take part in a business [or] (4) advertise; obscene publications or other objects. Article 5 then authorizes the search, seizure, detention and destruction of such works. The League was invested with secretariat responsibilities for the treaty until 1947 when a U.N. Protocol transferred responsibility to that body. The Protocol has been ratified by some 56 countries including Canada, China, the Russian Federation and the United Kingdom but not France or the United States.

Neither treaty defines 'obscene' which derives from the Latin meaning 'behind the scene'. What ought to be kept behind the scene, however, varies significantly between countries and cultures. The most obvious example is Islamic societies which hold fundamentally different values from the West about the image of women. 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.

Today trade in copyrighted works can thus be prohibited by a Nation State if a work is judged 'obscene' according to its own national definition. Such works are effectively void of copyright protection before the courts. And, as noted above, search and seizure of obscene objects and publications is required of Nation-States under the 1924 Convention. This includes Canada.

Similarly under the American DMCA and similar legislation in other countries "current digital era copyright protection" grants copyright proprietors digital rights of search and seizure. A coincidence of interest between the State and copyright proprietors may develop in some Nation-States. For example, digital search of internet records by agents of copyright holders could uncover obscene publications and objects fitting a national definition of such works. If this information is disclosed to the authorities then copyright holders would be acting as a policing agent of the State just like the Stationer's Company from 1557 until the *Licensing Act* lapsed in 1695 when a free press was born.

(iii)1947 GATT & Contemporary Cultural Property

In the mid-20th century the definition of cultural property as a national asset was arguably extended to include motion pictures, television & radio programs or what I call contemporary cultural property as well as traditional moveable and immoveable cultural property which generally is at least 100 years old. Contemporary cultural property is, of course, made up of copyrightable works. As noted in greater detail in the first policy research note in this series (PRN#1: Global Context, July 2009), the 1947 *General Agreement on Tariffs and Trade* (GATT) contains four provisions drawing a distinction between trade in cultural and other goods and services. First, quotas are granted in Article III (10) with respect to cinema exhibition. Second, Article IV is entirely devoted to special arrangements for fixing quotas in the film industry which in practice have been extended television and radio programming as well as other cultural industries. Third, under Article XX (a), restrictions on free trade are permitted to protect public morals. This is consistent with the 1910/1924 treaties on obscene publication but is arguably broader in scope. Fourth, under Article XX (f) of GATT exceptions to free trade allow protection of traditional cultural property including artistic, historic and archaeological treasures.

(iv) 1954 Hague Convention

The concept of cultural property or national patrimony introduced by Abbe Gregoire during the French Revolution

matured in the European mind to embrace the patrimony or cultural inheritance of all nations and all humanity. It began in July 1874 at Brussels when delegates from 15 European States met to examine a draft international agreement about the laws and customs of war. This was the *Brussels Declaration*. It was submitted by Czar Alexander II who had previously emancipated the serfs in 1861. In effect, delegates recognized cultural property belongs to all humanity not just combatants in a conflict. While adopted by the conference the Declaration was not ratified.

Nonetheless, the *Brussels Declaration* (and the 1880 *Oxford Manual*) became the basis for the *Hague Conventions* on land warfare in 1899 and on land and sea warfare in 1907. Both include provisions extending protection to cultural property in times of armed conflict. In 1923, these provisions were extended to war in the air. Finally in 1954 a dedicated *Hague Convention for the Protection of Cultural Property in Times of Armed Conflict* was signed and subsequently came into force (Chartrand February 2009).

As evidenced below, Hague's definition of cultural property embraces works all of which are, were or would have been subject to copyright protection, *i.e.*, literary, artistic and architectural works:

> Article 1: Definition of Cultural Property
>
> For the purposes of the present Convention, the term "cultural property" shall cover, irrespective of origin or ownership:
>
> (a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above;

(v) 2003 UNESCO Convention on Intangible Cultural Property

Traditional and contemporary cultural property invokes State protection for the preservation and/or production of works that codify or tool knowledge into an extra-somatic matrix called a 'work'. This may be a book, building, machine, motion picture, painting, scientific instrument, sound recording, tapestry, *et al.* Intangible cultural property, on the other hand, invokes State

protection for the preservation and transmission of tacit personal knowledge, *i.e.*, knowledge fixed in a Natural Person that cannot easily be coded or tooled into matter/energy (Chartrand July 2006). Intangible cultural property has significant meaning for three groups: (i) preliterate and tribal peoples of the Third and Fourth Worlds; (ii) contemporary artists, artisans and technicians facing de-skilling through industrialization; and, (iii) so-called 'Living Treasures' (Chartrand February 2009).

With 1976 amendment of the U.S. Copyright Act and subsequent changes in legislation elsewhere copyright protection is now available without publication, *i.e.*, dedication to the public. Nonetheless, a work must still be fixed in an extra-somatic matrix to claim protection. Arguably the 2003 *UNESCO Convention on Intangible Cultural Property* goes a step further extending similar protection without fixation in material form. Thus:

> Article 2 – Definitions
>
> For the purposes of this Convention,
>
> 1. The "intangible cultural heritage" means the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage…

Some 69 Nation-States are parties to the convention. Most are Third World countries plus China and Japan while other major powers such as Britain, Canada, France, Germany, Italy, Russia and the United States are not party to the convention (Chartrand March 2007).

(vi) 2005 UNESCO Convention on Cultural Diversity

Arguably the WTO's 1994 TRIPS agreement and WIPO's 1996 WCT/WPPT embody the Commercial Norms of the multilateral copyright regime shaped by American mercantilist interests. This pressure has been constant since the first American *Copyright Act* in 1790. It is their national strategy. It is their 'soft-power'. I will have more to say about the American role in development of the multilateral copyright regime in the Analysis below.

If, however, Commercial Norms are dominated by American influence then the 2005 *UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions* embodies its Cultural Norms. In effect the Convention legitimizes the right of Nation States to subsidize and otherwise support their domestic cultural industries – free of free trade restrictions. The output of such industries is, of course, copyrightable works –

books, plays, paintings, motion pictures, *et al*. At the conference, one hundred and forty-eight countries approved; the United States and Israel voted against; and, four abstained.

The Preamble to the Convention highlights the exceptionalism of the American position:

> *Being convinced* that cultural activities, goods and services have both an economic and a cultural nature, because they convey identities, values and meanings, and must therefore not be treated as solely having commercial value,

(vii) Analysis

Three questions arise. First, what are the internationally recognized Cultural Norms? Second, what are their economic effects? And third, what are their geopolitical implications?

(i) What are the internationally recognized norms?

There are three internationally recognized Cultural Norms: moral rights, the public domain and national treatment. First, virtually all Nation-States except in the United States recognize the moral rights of creators and the Nation-State as a temporal entity. The 2003 *UNESCO Convention on Intangible Cultural Property* also recognizes the moral rights of cultural communities especially in the Third and Fourth Worlds. These rights are not available to legal persons, *i.e.,* bodies corporate or corporations, even in Common Law countries except the U.S.

Second, the public domain is universally recognized as the *raison d'etre* of copyright. This limited copyright monopoly is granted by the State to creators to ensure the eventual entry of their work into the public domain. In Civil Code countries this is explicit while in Common Law countries it is expressed as 'the encouragement of learning'.

The duration of the copyright monopoly has, however, been progressively extended in all countries. Today it approaches four generations and is *de facto* perpetual (Patterson & Birch 2009). The major reason for this extension is the coincidence of interests between creators and copyright proprietors. Both profit from a longer duration. Thus patents and copyrights initially enjoyed the same duration. Inventors, however, who span the spectrum of the natural & engineering sciences do not share an institutionally powerful lobby as do authors with their publishers. A patent now lasts for twenty years; a copyright up to life of the author plus seventy years.

Third, the concept of national treatment is also universally recognized. The foundation of copyright is the Nation-State. Each

has a different and distinct legal history with respect to, among other things, copyright. By the *Berne Convention* [Article 5 (3)], Parties are required to treat foreign creators and their works the same as nationals. This does not mean, however, that treatment is the same in all countries. Each country structures its copyright law to foster learning in its own way and to its own benefit. The exceptionalism of the United States with respect to copyright is the sterling example.

Contemporary cultural property law, however, qualifies the effect of national treatment of copyright. Thus quotas on film, television and radio programming limit opportunities for foreign creators and copyright proprietors. Similarly, the 1910/1924 *Conventions on Obscene Publications* as well as the 1947 GATT moral clause restrict works of foreign creators and copyright proprietors deemed obscene or a threat to public morals. And the definition of obscene and public morals is determined by each Nation-State.

(ii) What are their economic effects?

The direct economic effects of Cultural Norms are two-fold. First, in the buying and selling of copyright they complicate contract negotiations, introduce the additional risk of a creator exercising his or her rights in future and thereby inhibit commercial exploitation of copyrighted works. Arguably this is one reason why Hollywood over took Paris as the centre of the motion picture industry in the early 20th century. Extension of such rights to traditional peoples similarly complicates appropriation of their cultural property. In the artistic communities of the West this is a controversial issue. On the one hand most recognize ownership by traditional peoples; on the other, they believe free access to the inheritance of all humankind is necessary for inspiration.

The second economic effect of internationally recognized Cultural Norms is to enhance the bargaining power of individual creators and thereby shift income distribution in their favour. In the emerging knowledge-based economy this will become, in my opinion, a central public policy question. Under the British and Canadian systems, however, such rights are recognized but subject to waiver. In effect, as with the limited moral rights granted visual artists in the United States, a creator of 'recognized stature' will be able to exploit moral rights to his or her profit but other creators will not have the bargaining power to resist a blanket or "all rights" license of economic rights to a copyright proprietor plus a waiver of all moral rights.

(iii) What are their geopolitical implications?

The United States has pursued an explicitly mercantilist copyright policy since its first *Copyright Act* in 1790. Until the *Chace Act* of 1891 no royalties were paid to foreign authors – copyright piracy was a way of life for American publishers. Until 1984 when the Manufacturing Clause was dropped no work written by an American author could be sold in the U.S. unless it was printed there. And from shortly after the 1886 *Berne Convention* the United States orchestrated the *Pan American Copyright Convention* in opposition. In 1989 when finally the U.S. finally adhered to the *Berne Convention,* its implementation ran culturally counter to the spirit of the Convention.

Then in 1995 with its post-Cold War victory assured the U.S. finalized the Breton Woods agreements of 1947 by sponsoring the World Trade Organization and was instrumental in drafting the WTO's TRIPS Agreement. This removed moral rights as a trade-related intellectual property right and declared software a literary work (Articles 9 and 10, respectively). This effectively converted copyright into industrial property like patents, trademarks and registered industrial design or design patents. Victor Hugo must be rolling over in his marble lined Pantheon crypt!

Finally in 1996 the U.S. sponsored WIPO's WCT/WPPT and quickly set the international precedent for "current digital era copyright protection" with its 1998 *Digital Millennium Copyright Act.* This effectively re-introduced the *Licensing Act* of 1662 granting powers of search and seizure to copyright proprietors not enjoyed since 1695 when that censorial Act lapsed and a free press was born.

In response to ongoing U.S. mercantilist pressures the community of nations led by Canada, France and Sweden, among others, spearheaded the 2005 *UNESCO Convention on Cultural Diversity.* Building on film quotas introduced in France before the Second World War and exemptions granted under the 1947 GATT, the 2005 Convention excludes cultural goods and services, *i.e.*, copyrightable works, for purposes of free trade under the WTO.

This was not, however, just a cultural response. After a century of copyright piracy and another century of protectionism the United States enjoyed a significant comparative advantage when it adhered to the *Berne Convention* in 1989. It had become the third largest country in the world by population with a single national language and the highest GDP of any Nation-State. It could set world class production standards in most cultural industries because it could break even in its home market and cream off profits from export sales. Its closest rival is India whose

Bollywood enjoys a market large enough to break even domestically but export sales remain relatively small. China, on the other hand, has a sufficient domestic population but Leninist censorship inhibits cultural industrial development.

In the case of motion picture and television programming a peculiar industrial pricing model also makes U.S. export sales relatively cheap. Sales are based on price per viewer in the export market rather than cost of production. In any other industry this would be called 'dumping'. Foreign buyers, however, obtain world class product – in terms of production standards - often at a price less than domestic programming. This has an inevitably depressing effect on domestic cultural industries.

In response, Canada, France and Sweden, together with others, have created a web of international film and television co-production agreements and tax incentives intended to generate the high production standards demanded by audiences at home, abroad and especially in the American marketplace itself. In effect, these countries are trying to engineer a financially viable arts industry through control of the electromagnetic spectrum and other communications media as well as the 2005 UNESCO Convention. In these efforts, the Canadian attempt to build 'Hollywood North' has led the way. With innovation of the WWW, however, new questions of cultural sovereignty are arising, *e.g.*, Google`s book scanning of public domain works.

Summary Conclusions

As a Canadian, when my Government proposes copyright reform based on the premise that "in the current digital era copyright protection is enhanced when countries adopt coordinated approaches based on internationally recognized norms" I must ask:

What are those norms?

What defines the current digital era?

Is enhanced copyright protection worth the price – cultural, economic, geopolitical?

The Government puts forward the World Intellectual Property Organization's 1996 *World Copyright Treaty* and *World Performances and Producers Treaty* (WIPO WCT/WPPT) as embodying such norms. Specifically a Member State shall:

> provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty [or the Berne Convention]…

It should be noted that reference to the *Berne Convention* occurs only in the WCT, otherwise the above wording is identical in both treaties. This is important because the *Berne Convention* embodies the internationally recognized cultural norms of copyright including the moral rights of the artist/author/creator as a natural person even as an employee, national treatment and growth of the public domain into which all copyrighted works eventually fall encouraging learning and contributing to national patrimony. In this sense copyright is or rather becomes cultural property of a Nation-State.

WIPO WCT/WPPT, however, is simply enabling leaving 'adequate' and 'effective' undefined. Definition was in fact established by legal precedents set in the United States. It is these developments that define 'the current digital era' as American and established path dependency for industry over the last quarter century. In 1976 the U.S. introduced an electronic transmission right and removed the requirement that a work must be published before copyright is available. In 1980 it recognized computer software as a copyrightable work. These legislative initiatives, in turn, were based on a century of outright American copyright piracy (1790-1891) and another century of copyright protectionism until finally the U.S., arguably not in good faith, adhered to the *Berne Convention* in 1989. Then in 1998 it introduced the *Digital Millennium Copyright Act* (DMCA).

DMCA's definition of 'adequate' and 'effective' is in turn based on legal precedent – the English *Licensing Act* of 1662. Wording in the two is strikingly similar as is that of Canadian Bill C-32 – the 2010 *Copyright Modernization Act* (CMA). For purposes of the DMCA and CMA "adequate" and "effective" includes search and seizure of an individual's digital records and premises (ISP) for signs of infringement. This power was last enjoyed by the Stationer's Company of London under the English *Licensing Act* of 1662. Instead of one's door being knocked down, however, now one receives a letter in the mail from a prestigious law firm threatening legal action for infringement based allegedly on one's digital trail. One either pays a 'fine' of a few thousand dollars, ceases and desists or incurs the legal expense required to defend oneself in civil court. Other than digital invasion of privacy, however, what are the other costs of the enhanced copyright protection offered by Bill C-32?

(i) No 'effective technological measures'

First, there are arguably no 'effective technological measures'. To date virtually all have been circumvented, *a.k.a.*, hacked. Just as the *Licensing Act* failed to prevent construction and maintenance of illegal printing presses and hence unlicensed

publications it is questionable whether the DMCA or CMA can prevent such hacking and the publishing of resulting 'how-to' and content on the world-wide web. It becomes another law the public does not respect.

(ii) Not Recognize Moral Rights as Human Rights

Second, an ideological rather than financial reason for such circumvention is that while the CMA proposes to extend the moral rights of the artist/author/creator it fails to identify such rights as imprescriptable human rights. They remain, as in the United Kingdom, subject to waiver. And, as in the U.S. where only visual artists of 'recognized stature' enjoy *any* moral rights, it is only established artists/authors/creators of recognized stature that can resist an all rights or blanket license and waiver of all moral rights in favour of a copyright proprietor.

And, of course, work by an employee, such as members of many rock bands relative to their recording studios, belongs entirely to the employer. The employee has no moral rights at all. Thus in the popular mind it is the corporate copyright proprietor rather than the flesh-and-blood creator that gets the gravy so why not hack? The problem arguably lays in the Common Law fiction that natural and legal persons enjoy the same rights.

The international norm embodied in the *Berne Convention*, and based on Civil Code rather than Common Law tradition, is that there are moral rights, even of an employee, that no body corporate or legal person can enjoy because they lack a personality. The CMA would increase revenues for copyright proprietors, invade the digital privacy of all citizens but not materially reward the 'average' creator.

This average creator has been characterized in the campaign of strategic litigation waged by copyright proprietors since the 1710 *Statute of Queen Anne* as 'the starving artist'. Given that all additional or enhanced rights granted to a creator can be assigned or waived in favour of a proprietor under Common Law this reduces to the question of contract negotiating power and a starving artist has none. The implications for income distribution in a knowledge-based economy are significant.

(iii) Privatization of the public domain

Third, increasingly huge swathes of the public domain are being privatized. Once this old wine is re-bottled or digitized it is locked away in new bottles - a corporate database - access to which requires the public to pay a toll for what is supposed to be free for all. The public domain is a national resource like the radio spectrum. As such it may arguably be auctioned off to the private sector but with conditions analogous to broadcast regulation including public access. Copyright is historically justified to

"promote learning, protect the public domain, and provide public access" (Patterson 2003, 58). The DMCA, CMA and their foreign equivalents arguably have the opposite effect.

(iv) Transmission, software, database and copyright

Fourth, as technology changed new types of works were granted copyright or copyright-like protection. The three most contentious and which define the current digital era are transmission, software and database.

Transmission, because it is ephemeral, did not initially qualify for copyright protection until recording technology caught up. This right effectively extends copyright from protection of a work (as a product) against infringement by commercial competitors to protection of transmissions (as a service) against traditional fair use by the citizen consumer.

It remains questionable, however, whether it is the transmission or the program being transmitted that qualifies for protection. If it is the program as a work for purposes of the *Berne Convention* then a transmission right is redundant. It must be noted, however, that transmission as a work is not recognized in the *Berne Convention*.

Software, or rather computer programming, similarly did not initially qualify for copyright protection because it was considered algorithmic and utilitarian as at root it is machine-readable instructions. Literary and artistic works for purposes of the *Berne Convention* (which makes no reference to software) are human-readable and non-utilitarian. This includes the human-readable interface of a computer program but not the underlying machine-readable code. These are characteristics that serve to distinguish copyright treated under the *Berne Convention* of 1886 from industrial property especially patents treated under the *Paris Convention* of 1883. In other words, traditionally it was the painting not the paint brush that received copyright protection.

The problematic nature of software is also evident in the fact that it is the only type of work that qualifies for copyright, patent and trade secret protection. It is, in my opinion, *sui generis* or one-of-a-kind and deserving of its own special intellectual property right such as integrated circuit typologies currently enjoy.

Database remains the most contentious new type of work in the current digital era. The WIPO WCT/WPPT of 1996 was accompanied by WIPO's 1996 *Draft Treaty on Intellectual Property in respect of Databases.* Due mainly to American opposition it went no further. However, the European Union issued its own 1996 Directive regarding *Legal Protection of Databases*. The EU and the United States continue to disagree.

The EU Directive, which does not apply to computer programs, creates:

> a new form of copyright in databases, one that extends to contents previously in the public domain and otherwise not copyrightable. It narrowly restricted the application of the principle of allowing exclusions for "fair use" in research, and it permitted virtually indefinite renewal of copyright protection for databases without requiring the substantial addition of new and original content." (David 2000, 6)

The CMA, in the absence of restrictive database legislation, will effectively grant corporate proprietors free access to the public domain enclosing much of it into tollbooth databases. It will, in effect, create a new form of copyright as described above and represents a new enclosure movement – a revolution of the rich against the poor and an overturning of old customs and practices (Boyle 2003). The private sector gold rush to put old wine in new bottles can also have scholarly and social consequences such as the metadata problems associated with Google Books (Numberg August 2009).

(v) National patrimony

Fifth, our modern concepts of copyright and cultural property emerged out of the French Revolution of 1789. Both are rooted in the Kantian ideal that a literary or artistic work is an extension of the personality of its creator. Both are therefore founded on the moral rights of the artist/author/creator – living and dead. When copyright ends a work falls into the public domain from which some works are selected as cultural property to be preserved by a Nation-State as part of its national patrimony. This is the international norm except for the United States which does not recognize the moral rights of living creators nor State responsibility to preserve the works of past genius.

In the current digital era the question arises: What happens when cultural property law kicks in? Canadian works that fall into the public domain are daily being re-bottled into corporate databases and electronically privatized. If selected as part of our national patrimony will Government pay for the re-scanning of public domain works or build into the *Copyright Act* provisions to ensure that such works are available to Canadians without further charge? For example, should Government regulate, like a utility, access to Google's public domain materials to ensure they remain in the public domain? The public domain is the source of most of

our national patrimony. It is a national asset whose value has too long been neglected.

(vi) Free speech

Sixth, this leads to the question of whether there is a 'right to hear' or 'right to access' corresponding to freedom of speech or expression and is this freedom endangered by the DMCA, CMA and related foreign legislation? To the degree legal and other public records are being re-bottled in private tollbooth databases the answer is yes!

To emphasis 'the right to hear' Patterson & Birch (2009) quote President George Washington in a speech delivered just before enactment of the first U.S. copyright act in 1790. In it the President stressed that access to knowledge ensures accountability to the people "by teaching the people themselves to know and to value their own rights; to discern and provide against invasions of them." Such invasions included not just those by government but also by the private sector where profit is king. He knew full well how copyright was used in England for nearly three centuries under Anglican, Catholic and Cromwell's rule to control political and religious debate, *a.k.a.*, the public domain. The President knew full well of the highly profitable and perpetual copyright monopoly enjoyed by the Stationer's Company of London under all these regimes meaning there was no public domain, *i.e.*, no free speech, no freedom to hear, no access.

(vii) A world still divided

Seventh, for over a hundred years between 1886 when the *Berne Convention* was launched until 1989 when the United States finally adhered the world was divided into two competing copyright unions – the Berne and Pan American. The English speaking world was further divided between British and American publishers reminiscent of patent pooling between Germany and the United States in world chemical and pharmacological markets after Germany's adherence to the *Paris Convention* in 1901.

American adherence to Berne was in a sense a Trojan horse. Inside the union it could do more damage to its principles than outside. So it was that the WTO's 1994 TRIPS agreement under American pressure explicitly exempted moral rights (Section 6bis of Berne) from international trade. With American pressure WIPO's 1996 WCT/WPPT enabled the draconian measures of the U.S.'s 1998 *Digital Millennium Copyright Act*, the reincarnation of the English *Licensing Act* of 1662. All these actions were driven by the American mercantilist belief that literary and artistic works are just commodities with but economic value.

In response the community of nations drafted and passed the 2005 *UNESCO Convention on Cultural Diversity*. On the one

hand the Convention counters the American position by claiming literary & artistic works have both economic and cultural value. Member states take upon themselves the right and responsibility to foster and support cultural industrial development in their own countries. This includes grants and tax breaks for local production and quotas as well as bans on American cultural products considered offensive to national sensibilities. In effect, excluding the moral rights of the individual creator in TRIPS was balanced by increasing the moral rights of the Nation-State.

On the other hand, members of the UNESCO Convention have embraced DMCA-like legislation usually as a result of pressure from domestic cultural industries which hope to profit. In effect, the mercantilist attitude of the United States has been internalized by member states of the UNESCO Convention with respect to their own domestic cultural industries. It is a world still divided.

Arguably just as the UNESCO inspired 1952 *Universal Copyright Convention* attempted to heal the breach between the Berne and Pan American Conventions, current negotiation of the *Anti-Counterfeiting and Trade Agreement* (ACTA) may serve to bridge the gap between the United States and members of the 2005 UNESCO Convention. Only time will tell, however, because President Obama (and other national leaders) has placed ACTA negotiations under the cloak of national security. No freedom to hear, no access for the public: just Nation-States and Industry talking behind closed doors.

If Canada does not ratify WIPO's 1996 WCT/WPPT then a range of alternative domestic policies must be developed. These, however, must remain the subject of a future policy research note.

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Appendix A

U.S. Congressional Copyright Initiatives 1997-1999
Bills Introduced and Public Laws Passed by the 105th & 106th Congress

(a) 105th Congress
(23 bills introduced/ 4 Public Laws passed)

#	Title	Introduced
H.R. 72	Computer Maintenance Competition Assurance Act	1/7/97
H.R. 401	Intellectual Property Antitrust Protection Act	1/9/97
S. 28	Fairness in Musical Licensing Act	1/21/97
H.R. 604	Copyright Term Extension Act	2/5/97
P.L.105-801	Copyright Technical Amendments	2/11/97
H.R. 789	Fairness in Musical Licensing Act	2/13/97

P.L.105-298	Copyright Term Extension Act	3/20/97
S. 506	Copyright Clarifications Act	3/20/97
H.R. 1621	Copyright Term Extension Act	5/15/97
P.L. 105-80	To amend title 17, United States Code, to provide that the distribution before January 1, 1978, of a phonorecord shall not for any purpose constitute a publication of the musical work embodied therein	6/19/97
H.R. 2180	On-Line Copyright Liability Limitation Act	7/17/97
S. 1044	Criminal Copyright Improvement Act	7/21/97
P.L.105-304	Digital Millennium Copyright Act Formerly named WIPO Copyright Treaties Implementation Act	7/29/97
S. 1121	WIPO Copyright and Performances and Phonograms Treaty Implementation Act	7/31/97
S. 1146	Digital Copyright Clarification and Technology Education Act	9/3/97
H.R. 2589	Copyright Term Extension Act	10/1/97
H.R. 2652	Collections of Information Antipiracy Act	10/9/97
H.R. 2696	Vessel Hull Design Protection Act	10/22/97
H.R. 3048	Digital Era Copyright Enhancement Act	11/13/97
H.R. 3209	On-Line Copyright Infringement Liability Limitation Act	2/12/98
H.R. 3210	Copyright Compulsory License Improvement Act	2/12/98
S. 1720	Copyright Compulsory License Improvement Act	3/5/98
S. 2037	Digital Millennium Copyright Act	5/8/98

(b) 106th Congress
(17 bills introduced/ 3 Public Laws passed)

H.R. 89	Satellite Access to Local Stations Act	1/6/99
H.R. 354	Collections of Information Antipiracy Act	1/19/99
S. 95	Trading Information Act	1/19/99
S. 247	Satellite Home Viewers Improvements Act	1/19/99
S. 303	Satellite Television Act	1/25/99
H.R. 768	Copyright Compulsory License Improvement Act	2/23/99
H.R. 851	Save Our Satellites Act of 1999	2/25/99
H.R. 1027	Satellite Television Improvement Act	3/8/99
H.R. 1189	Technical Corrections	3/18/99
H.R. 1554	Satellite Copyright, Competition, and Consumer Protection Act of 1999	4/26/99
H.R. 1761	Copyright Damages Improvement Act	5/11/99
H.R. 1858	Consumer and Investor Access to Information Act	5/19/99
S. 1257	Digital Theft Deterrence and Copyright Damages Improvement Act	6/22/99
P.L. 106-44	Technical Corrections in Title 17	6/22/99
S. 1835	Intellectual Property Protection Restoration Act	10/29/99
P.L. 106-113	Intellectual Property and Communications Omnibus Reform Act of 1999	11/17/99
P.L. 106-160	Digital Theft Deterrence and Copyright Damages Improvement Act of 1999	11/18/99

Source: US Copyright Office

Appendix B

WIPO WCT &WPPT Digital Rights Management Clauses 1996

WIPO World Copyright Treaty

Article 12: Obligations concerning Rights Management Information

(1) Remedies

Contracting Parties shall provide adequate and effective legal remedies against any person knowingly performing any of the following acts knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate or conceal an infringement of any right covered by this Treaty or the Berne Convention:

(i) to remove or alter any electronic rights management information without authority;

(ii) to distribute, import for distribution, broadcast or communicate to the public, without authority, works or copies of works knowing that electronic rights management information has been removed or altered without authority.

WIPO World Performance and Phonogram Treaty

Article 19: Obligations concerning Rights Management Information

(1) Remedies

Contracting Parties shall provide adequate and effective legal remedies against any person knowingly performing any of the following acts knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate or conceal an infringement of any right covered by this Treaty:

(i) to remove or alter any electronic rights management information without authority;

(ii) to distribute, import for distribution, broadcast, communicate or make available to the public, without authority, performances, copies of fixed performances or phonograms knowing that electronic rights management information has been removed or altered without authority.

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August 31, 2010
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