

**INTELLECTUAL & CULTURAL PROPERTY**

**Cult of the Genius**

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*Preface*

**Introduction**

It will surprise some that a compilation of agreements, charters, covenants, conventions and treaties documenting the multilateral cultural property rights (CPRs) regime is prefaced by a comparison with intellectual property rights (IPRs) specifically with copyright - as author's rights - but also with industrial property including patents, registered industrial designs and trademarks.<sup>1</sup> Nonetheless, IPRs and CPRs are twins birthed in the intellectual firestorm of the Republican Revolution of the 18th century.

**The Unfinished Revolution**

The first Republican revolution was the American of 1776. It overthrew an ancient regime of subordination by birth but nonetheless adopted many of the Common Law legal traditions and precedents of their ancient masters especially business law. Business law for one hundred years after the *Statute of Monopolies* of 1624 evolved through a process of Common Law courts converting customary bargains and business practices of guilds and corporations into a common law of property and liberty. However, while “the monopoly, the closed shop, and the private jurisdiction were gone ... the economics and ethics remained” (Commons 1924, 230).

Furthermore, intellectual property was exempt. Copyright remained vested by the Crown (and by Cromwell) in the Stationer's Company of London until 1710.<sup>ii</sup> Patents of invention remained subject to the Royal Prerogative until 1852.<sup>iii</sup> After 1624 (1710 and 1852 respectively for copyright and patents), Law became increasingly focused on private property. In contrast, there was an apparent lack of interest in common or public property for the last three hundred years of Anglosphere legal history (C. Rose 2003) with the notable exception of cultural property.

The second Republican revolution, the French of 1789, threw out not just feudal overlords but also common law and religion. They rethought Law from a Republican, secularist perspective. Like the Americans, they made the Individual, the Natural Person, the cornerstone of the political and social order. Thus the American *Declaration of Independence* announces: “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness”. The French *Declaration of the Rights of Man and the Citizen* of 1789 (Article 2) arguably goes further declaring: “The aim of all political association is the preservation of the *natural* and *imprescriptible* rights of man. These rights are liberty, property, security, and resistance to oppression.” [*emphasis added*]

The term *natural* indicates that Nature, not some divinity, is the scientific source of these rights in an ideological sense. The word ‘ideology’ has many meanings today (Gerring 1997) but was coined simply enough by Condillac in 1797 to mean ‘the science of ideas’ (OED, *ideology*, 1b). Separation of Church and State was critical to both American and French revolutionaries but the French were atheists while the Americans were theists. A secular science of ideas to counter the

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awe and mystery of religious and metaphysical thought and ritual was part of the French revolutionary agenda to complete the overthrow of the ancient regime.

The term *imprescriptible* indicates that no contract infringing such rights, even willingly signed, is enforceable by the courts, *i.e.*, they *cannot* be signed away. They cannot be assigned, transferred or waived in favour of a Proprietor – Natural or Legal. And, as will be seen, the moral rights of a Creator, a Natural Person, are *imprescriptible*; they are ‘human rights’ in this tradition. They apply to both contemporary Creators under IPRs and past Creators under CPRs.

**Cult of the Genius**

The Republican ideal of the Individual was the political culmination of a process beginning with the Renaissance ‘cult of the genius’ (Woodmansee 1984; Zilsel 1918). Three generations earlier the Black Death (1347-1351) shattered the High Middle Ages dramatically shrinking the labour pool. Competition for scarce talent led to the Renaissance genius of the 15th century who, at one and the same time, was artist/architect/engineer/humanist/scientist. Unlike their predecessors they signed their work.

Genius, no matter social origin, demonstrates god-like powers of creating *ex nihilo* or ‘out of nothing’ (Nahm 1947). Such new knowledge changes the way people see, hear and understand the world and themselves. Fed by Christian belief in the equality of souls and theological rejection of slavery, this, along with the birth of incipient Capitalism, marked the first eruption of the Individual out of feudal subordination by birth. These geomancers of perspective, among other things, gave us the concept of objectivity or what Martin Heidegger (1938) called “The Age of the World Picture”. They were followed in the 16th century by Reformation prophets like Luther who asserted a direct link between the Individual and God without mediation of Church, Pope, priest or philosopher.

In the 17th century the experimental philosopher revealed God’s other book, the Book of Nature (Jacob & Jacob 1980) and joined the hall of heroes followed by the author in the 18th (Woodmansee 1984). The ever increasing flow of new knowledge initiated the “*Querelle des Anciens et des Modernes*”, *i.e.*, the battle of the Ancients and the Moderns, marking the dawn of the European Enlightenment (Kristeller 1952, 19). Who are superior, the Ancients or the Moderns? The answer: the Moderns!

As we have seen, by the end of the 18th century Republican Revolutions shattered feudal subordination declaring all ‘men’ equal. In the 19th, the inventive genius of Watt was followed by Bell, Edison, Marconi, Morris and others who transformed the life ways of humanity. At the same time as the first telephone call in 1876, the troubled and tortured artist starving in his garret became the spear point of an *avant garde* transforming the way we see, feel and hear our inner and outer worlds (Bell 1976). In the 20th century, natural & engineering scientists donned the cape of genius as the atomic bomb and nuclear energy, followed by computers, genomics and space travel, caught the popular imagination with a fuzzy haired Einstein as its poster boy. The most

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recent addition to the pantheon of genius is arguably the business entrepreneur/innovator such as Bill Gates, Steve Jobs, Sam Walton, *et al.* Out of this traditional cult of the genius emerged a ‘legal fiction’ I call the Myth of the Creator (Chartrand Fall 2000) eloquently expressed by Zechariah Chafee:

... 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)

**The American Experience**

A sense of this myth flows through Article 1, Section 8 of the U.S. Constitution of 1787 (the copyright or intellectual property clause):

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

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

Inclusion of a ‘monopoly-granting’ power in the Constitution, however, involved great debate and deliberation. The framers were suspicious of all monopolies especially given experience with the East India Company which led to the Boston Tea Party.<sup>iv</sup> They also knew how copyright had been used as a tool of censorship in Britain (Loren 1999).

The principal antagonists were Thomas Jefferson who initially opposed and James Madison who proposed its inclusion leading three years later to the Copyright and Patent Acts of 1790. In this debate Madison played both sides of the fence supporting, on the one hand, the natural rights of Creators while on the other promoting the interests of the printing and other fledgling industries of the new Republic. In the process he confabulated, in the popular mind, the natural rights of a Creator and their total assignment to a Proprietor. Arguably this confusion still reigns. In fact, the ‘starving artist’ has been the battle cry of Proprietors since the Battle of the Booksellers following 1710 passage of the *Statute of Queen Anne*, the first modern copyright act recognizing author’s rights yet making them assignable, in whole or in part, to a Proprietor.<sup>v</sup>

Accordingly U.S. statutory law followed British precedent and tradition and Congress passed the first *U.S. Copyright Act* of 1790 entitled: *An Act for the Encouragement of Learning, by securing the Copies of Maps, Charts and Books, to the Authors and Proprietors of such Copies, during the Times therein mentioned.* The key change from Section 8 of the Constitution is the term “Proprietors” also used in the

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*Statute of Queen Anne.* In fact the title is almost identical to the British statute of eighty years earlier. Thus were ‘exclusive’ rights qualified.

Since the *Statute of Queen Anne* all rights of the author in the Anglosphere have been assignable by contract to a Proprietor – Natural or Legal. Under this tradition all copyright on works produced by an employee belong to the employer.<sup>vi</sup> The author cannot even claim authorship. Furthermore there was, and arguably still is, no recognition of ‘moral rights’ in the American *Copyright Act* while in the contemporary British and Canadian acts all such rights can be waived by contract.

The U.S. from the beginning looked upon copyright as an instrument of industrial warfare first with Britain and then the world. It was not and arguably still is not seen primarily as an incentive for Creators or growth of the public domain. Thus no royalties were initially paid to foreign authors (generally British) whose works were pirated and cheaply re-printed. Copies were then sold legally in the U.S. and illegally, at very low prices, elsewhere in the English-speaking world especially Canada. American printer/publishers had a field day while Canadian competitors languished under royalties imposed by the *Imperial Copyright Act*. While this piratical U.S. regime ended with the *Chace Act* of 1891, the fact remains that until 1984 no book written by an American author could be sold in the United States unless printed there. This was known as the ‘Manufacturing Clause’.<sup>vii</sup>

**The French Experience**

In France developments took a different turn. The *Code de la librairie* (the Publisher’s Code) established royal regulation of Parisian publishing in 1723. It was then extended to the entire nation in 1744. Like England until 1710, it contained no legal recognition of authors. Rather it expressed the belief that ideas were a gift from God revealed through the writer. They could not be owned or sold by the author. The power to determine what was truly God’s knowledge belonged not to the author but to God’s representative on earth - the King - who had the exclusive right to determine what could be published, by whom and for how long protected (Hesse 1990, 111).

In 1777 things changed. A set of royal degrees was issued that broke up the publishing monopoly (the primary intention of the *Statute of Queen Anne vis-a-vis* the Stationer’s Company of London). In effect, the author was, as in England, used as a foil at the expense of the Paris Publishers’ and Printers’ Guild. In recognizing the author for the first time the decree granted *privilèges d’auteur* or author’s privilege in perpetuity. Publishers’ privileges (*privilèges en librairie*), by contrast, were limited to the lifetime of the author and nonrenewable (Hesse 1990, 113). In effect, the publisher became nothing more than an agent of the author.

During the French Revolution, however, the perpetual copyright of the author was, in turn, sacrificed in favour of the public domain. Copyright was limited to the life of the author plus ten years because the revolutionaries wanted to convert the author, a creature of royal privilege, into a public servant, the model citizen. Their focus was the public domain (Hesse 1990, 130).<sup>viii</sup> In this Ginsburg finds a shared

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objective between the French revolutionaries and their American cousins (Ginsberg 1990). The specific public good, however, remained implicit as ‘learning’ in the Anglosphere but explicit in the French – the public domain - a term that only entered “Anglo-American discourse through the French of the Berne Convention” in 1886 (M. Rose 2003, 84). The public domain is where private intellectual property goes after monopoly protection runs out and where it becomes a true ‘public good’: Free for all! In the Anglosphere tradition it might be called the ‘intellectual commons’.

Unlike the United States, the French revolutionaries drew on natural rights recognizing the absolute moral rights of the author/creator/inventor. In this they relied heavily on the contemporary thinking of Immanuel Kant who considered an author’s work not an object but rather an extension of personality and subject to protection as such, *i.e.*, a human right.<sup>ix</sup> So accepted was this view that for over 100 years in France there was no statutory law defining moral rights.<sup>x</sup>

Moral rights are separate and distinct from economic rights.<sup>xi</sup> The three most important among many are: (1) the paternity right - the right to be identified as the creator of a work and protected from plagiarism; (2) the integrity right - the right to protection against alteration or deformation of one’s work, and the right to make changes in it; and, (3) the publication right (Hurt 1966, 424) – including the right not to publish at all or to withdraw it from publication. The most succinct expression of their nature is “inalienable, unattachable, imprescriptible and unrenounceable” (Andean Community, *Common Provisions on Copyright and Neighboring Rights*, Article 11, 1993). These rights apply to employees as well as freelancers.

In summary, with respect to contemporary creation the Anglosphere ranks, in decreasing precedence, the rights of the Proprietor, the Creator and the Public (as public domain and User). By contrast, in the French or Civil Code tradition the rank ordering is the Public, the Creator and the Proprietor.

**Cultural Property****The French Experience**

Revolutionary France, however, faced an additional problem presented by history, or rather lack thereof. In England, 250 years before, Henry VIII appropriated the treasures and property of the Roman Catholic Church and re-distributed them to supporters of the Church of England. In 1640 the Great Rebellion established a Commonwealth re-distributing property of the feudal lords. Then the monarchy was restored in 1660 with restitution of some but not all feudal rights. And, in short order, traditional monarchy was replaced by a ‘constitutional’ one with the Glorious Revolution of 1689. The resulting Bill of Rights of the same year granted freedom of speech in Parliament which was then, without statute, extended to freedom of the press when the last Licensing Act lapsed in 1697.<sup>xii</sup> In France, the Church and feudal lords, however, retained full feudal possession until the revolution of 1789. The immensity of moveable and immoveable cultural property overwhelmed the revolutionary government after its confiscation.

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When a dynasty falls the traditional practice is to destroy its signs, symbols and monuments. Thus the early Christians suffered persecution and martyrdom for 300 years at the hands of pagans. Confiscated Christian property was, however, returned in 313 C.E. by the Edict of Milan (Langer 1952, 119). Soon after Christianity was declared the official religion of the Roman Empire and the same Christians who had called for respect, tolerance and understanding pillaged and burnt pagan temples and libraries. Similarly, the First Emperor of China - Ch'in Shih Huang Ti who built the Great Wall - conducted a great book burning in 213 B.C.E. Essentially he said: Before Me, No History! One of the few books to survive, from a continuous literature of almost 3,000 years, was the *I Ching - The Book of Changes* (Wilhelm 1950, xlvii). Such iconoclasm, together with 20th century updates by Hitler, Stalin, Mao, Pol Pot and Idi Admin demonstrate that more than rain forests can be lost forever.

The question is: What is lost? To the victors it is simply the signs, symbols and monuments of a failed regime. To the Nation (as a temporal entity existing in Time as well as Space) and arguably to the rest of humanity, however, it is loss of knowledge <sup>xiii</sup> as well as a betrayal of past creators and of liberty itself. This was the view of Henri 'Abbe' Grégoire (1750 –1831) who gave birth to our modern concept of cultural property at the height of the French Revolution. His success can be judged relative to the fact that:

Public responsibility for the conservation of artifacts of historic or aesthetic value is now acknowledged everywhere. One way or another the state will ensure preservation of a Stonehenge or a Grand Canyon as well as a great many lesser cultural icons. (Sax 1990a, 1142)

Commissioned by the National Convention in 1794, Grégoire, produced three reports, the first of which was entitled: *Report on the Destruction Brought About by Vandalism, and on the Means to Quell It.* <sup>xiv</sup> 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 framed his answer, in Republican terms, by asking in turn: What does the spirit of liberty require? He offered three answers:

First, that liberty is only realized where the talent and creative energies of the individual flourish. Second, that only where tolerance for difference and respect for creativity exist can that flourishing occur. And third, that the pursuit of knowledge and repudiation of ignorance are essential to a process where talent and creativity will blossom. (Sax 1990a, 1155)

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For Grégoire, what was important was not the Patron but rather the work of individual genius:

... 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 artifacts that embodied the best of the people was the quintessence of France, its true heritage and patrimony. Those who were willing to see these artifacts destroyed, or sold abroad as if the nation cared nothing for them he said, were imperiling 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 1825. In his essay *Sur la destruction des monuments en France* (On the Destruction of Monuments in France), Hugo elaborated the idea of cultural property. He declared that:

... It is necessary to halt the hammer that mutilates the face of the country. A single law would suffice; it is only necessary that it be made. Whatever the rights of property may be, the destruction of a historic and monumental edifice cannot be permitted to these ignoble speculators whose interest blinds their honor; miserable creatures, and such fools that they don't even realize they are barbarians. There are two elements in an edifice, its utility and its beauty. Its utility belongs to its owner, its beauty to everyone. Thus to destroy it is to exceed the right of ownership. (quoted in Sax 1990b, 1560)

In 1830, under the restored monarchy of Louis-Phillipe, the post of Inspector of Historical Monuments was proposed and a budget for the protection of monuments appropriated. Finally, in 1887 the *Monument Act* was passed during the Third Republic (Sax 1990b, 1560). Since that time the legislation has been strengthened and sister legislation added. Under sister legislation, moveable cultural property is also subject to government restrictions including export.

Not coincidentally, led by Victor Hugo European artists and writers in 1878 organized the International Literary & Artistic Association (*Association Littéraire et Artistique Internationale*). First in Paris it then met annually in different European capitals. In 1882, at Rome it agreed to organize an international conference of States about copyright, or rather author's rights. At the Berne conference of September 1883, a draft convention was prepared and brought to the attention of the community of nations by the Swiss Federal Council (Kampelman 1947, 410-411). The *Berne Convention for the Protection*



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*of Literary and Artistic Works* of 1886 was the result. Thus Hugo provides a personal link between copyright as author's rights and cultural property as protection of the rights of past Creators.

**The British Experience**

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*. Like Hugo, Ruskin was the most eloquent preservation advocate of his country and Ruskin was the only author Lubbock quoted in support of the bill:

[I]t is again no question of expediency or feeling whether we shall preserve the buildings of past times or not. We have no right whatever to touch them. They are not ours. They belong partly to those who built them, and partly to all the generations of mankind who are to follow us. The dead have still their right in them: that which they labored for... we have no right to obliterate. What we have ourselves built, we are at liberty to throw down; but what other men gave their strength and wealth and life to accomplish, their right over does not pass away with their death: still less is the right to the use of what they have left vested in us only. It belongs to all their successors. (from Ruskin's *The Seven Lamps of Architecture* quoted in Sax 1990b, 1561).

The Bill elicited heated debate. It struck at the core of Anglosphere law – private property. Title to private real property traditionally meant a private owner could do whatever he, she or it wished as long as it did not infringe a neighbour's rights. The Bill, however, introduced the concept of title in Time rather than in Space. This is similar to intellectual property rights, *i.e.*, they endure only in Time then the knowledge they fix enters the public domain. In the case of cultural property, private ownership in the Present is qualified by perpetual State ownership through Time.

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

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in a withered and vestigial shell. (Sax 1990b, 1563)

While not discussed during parliamentary debate, under the Civil Code the legal right to use and derive benefit from property owned by another person (so long as it is not damaged) is called *usufruct* from the Latin meaning ‘use of the fruit’, not ownership of the tree. In Common Law, one might call it ‘tenant title’. What the Bill proposed was that a current owner of cultural property was a tenant, trustee or custodian of the Nation as a temporal entity and as such was without full or freehold title. In other words, the State would limit rights even of unwilling private proprietors.

Lubbock’s Bill left untouched, however, all ordinary uses and rights of ownership. It permitted public intervention only if an owner set out to destroy what virtually everyone agreed should be preserved. And even then it compensated for whatever economic benefit the destruction and subsequent development would have produced (Sax 1990b, 1549).

Nonetheless,

Ruskin’s message to Lubbock, and Lubbock’s message in turn to his countrymen, was that only where there are mere stones can there be mere property. Only where there is a collectivity with nothing to say about itself as a community of aspiration can there be no public claim upon the masterworks of the past. (Sax 1990b, 1564)

Unfortunately the Bill was not passed until 1882 and in a significantly weakened form. Since that time, however, there have been many amendments and sister legislation strengthening and extending its intent. The basic mechanism is identification of monuments (or of moveable cultural property in the case of sister legislation) to be included on a schedule. The standard is “national importance” determined by a committee of experts. Once scheduled, any work resulting in its demolition, destruction or damage is an offense. In the case of moveable cultural property, sister legislation also makes it subject to government restrictions including export.

### **The American Experience**

In 1906, during the administration of President Theodore Roosevelt, Congress passed: *An Act for the Preservation of American Antiquities* (16 USC 431-433). It criminalized unauthorized appropriation, excavation, injury, or destruction of “any historic or prehistoric ruin or monument, or any object of antiquity” on federal land and required the issuance of permits to qualified applicants for the excavation and study of ruins and archeological sites.

The American is unlike the British and French experience in four ways. First, the Act embraced not just human artifacts such as moveable and immoveable cultural property but also natural sites of aesthetic value

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forming part of our ‘natural heritage’. Second, it remains limited to federal lands and does not extend to unwilling private sector proprietors, *i.e.*, it is not ‘national’ in scope. Third, there is no sister legislation concerning moveable cultural property and hence no restriction on its export unless sourced from federal land. Fourth, American law remains focused on private property. It does not recognize the right of the Nation, as a temporal entity, to qualify private ownership of cultural property in the Present due to perpetual State ownership through Time.

In summary, the U.S. IPR regime favours the Proprietor in the tradition of their ancient masters and refuses to recognize the moral rights of the Creator - author and inventor - in the tradition of the American ‘Republican’ Revolution. With respect to CPRs, unlike even England, U.S. law favours unwilling private Proprietors in possession of ‘national’ cultural property and refuses to accept any State responsibility for national culture (except that on federal lands) but rather lets the private market do it. Relative to the rest of the world this makes the United States of America ‘exceptional’. It should be noted that the U.S. has ratified the 1970 UNESCO *Convention on the Illicit Import, Export and Transfer of Cultural Property*, but like its 1989 accession to the *Berne Convention* it did so very much more for ‘market’ than cultural reasons.

At the extreme one might say: In the U.S.A., the marketplace is culture (except on federal lands) and Creators –contemporary and past - enjoy no moral rights and all economic ones are subject to contract and effective ownership by a Proprietor – Natural or Legal. Not only is this contrary to Section 8 of the Constitution, it perpetuates feudal practices inherited from England. In other words, the American remains an unfinished revolution at least with respect to IPRs and CPRs.

**Evolving Definition**

To this point I have examined the ideological and historical roots of intellectual & cultural property in the Republican Revolution. Over time, however, the definition of what constitutes cultural property has evolved. Thus in the 21st century there are three distinct classes of cultural property. First, there is ‘traditional’ cultural property discussed above, *i.e.*, moveable and immovable material artifacts of the Past. Second, there is cultural property of the Present produced by national ‘cultural industries’. Third, there is ‘intangible’ cultural property including the oral traditions of aboriginal and traditional peoples of the Third and Fourth Worlds, traditional artistic techniques and methods displaced by modernization as well as so-called ‘Living Treasures’. While the first invokes near universal support, contemporary and intangible cultural property remain controversial especially in the Anglosphere.

Beyond State ownership in Time what these three forms of cultural property share is Abbe Grégoire’s insight that they contain or fix knowledge. In this view, the relationship between intellectual and cultural property is Time. Thus traditional cultural property generally begins as private intellectual property that has, over time, fallen into the public domain and the artifact (a physical matrix fixing or containing that

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knowledge) is then partially or fully ‘nationalized’. Of course, some is initially produced as and remains publicly-owned by the State.

Form, according to Francis Bacon, is “the real or objective conditions on which a sensible quality or body depends for its existence” (OED, *form*, n, 4 c). Knowledge takes three forms— codified, tooled and personal. Codified knowledge is fixed in an extra-somatic (Sagan 1977), *i.e.*, out-of-body, matrix as *meaning*. Sender and receiver must share the code if the message is to convey meaning from one human mind to another.<sup>xv</sup> Furthermore, the communications media into which codified knowledge is fixed to receive copyright protection generally has no function other than to communicate meaning, *i.e.*, the matrix is non-utilitarian. For example, a book may be a good read but makes a poor door jam, or similarly, a CD may yield beautiful music but serves as a second-rate coaster for a coffee cup.

With respect to IPRs, codified knowledge is protected by copyright, registered industrial design and trademark. With respect to CPRs, codified knowledge is protected as literary and artistic works including monuments and antiquities forming part of national patrimony along with the natural heritage of the Nation.

Tooled knowledge, on the other hand, is also fixed in an extra-somatic matrix but as *function*. It is protected under IPRs by patent and under CPRs as scientific instruments, machines, tools and other physical artifacts like Faraday’s first electric motor of 1821. Unlike a work of art that is appreciated for what it is, a patented device or process is valued for what it can do, *i.e.*, the matrix into which knowledge is fixed has utilitarian function.

Tooled knowledge takes two forms – hard and soft. Hard tooled is the physical instrument or process that manipulates matter/energy. As a scientific instrument tooled knowledge extends the human reach and grasp far beyond the meso-scope level of daily life to the micro- and macro-scopes of electrons, quarks, galaxies, the genomic blueprint of life, *et al.* To see and manipulate matter/energy in such unseen, unreachable spaces and places our tools must go where no human can. They generally report back in numbers (digital) converted into graphics (analogue) to be read by the human eye. Modern scientific observation thus involves a cyborg-like relationship between a Natural Person and an instrument. This constitutes ‘Instrumental Realism’ (Idhe 1991). It provides what Galileo called ‘artificial revelation’ (Price 1984).

Soft tooled knowledge, on the other hand, refers to the standards, *e.g.*, 110 vs. 220 volt, embedded in a device as well as its programming such as software, operating instructions and techniques to optimize performance. In effect, tooled knowledge is the physical technology, *cum* Heidegger, by which humanity enframes and enables Nature to serve its purpose.

Both codified and tooled, in turn, contrast with personal knowledge<sup>xvi</sup> fixed in a Natural Person as neuronal bundles of memory and reflexes of nerve and muscle, *e.g.*, of an athlete, brain surgeon, dancer, sculptor or technician, as *know-how*. In this case, the matrix is a Natural Person. Some personal knowledge can be codified; some tooled; but some inevitably remains ‘tacit’, *i.e.* inexpressible as codified knowledge but visible in performance (Polanyi Oct 1962). With respect

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to IPRs, personal knowledge is protected as the *know-how* of a Natural or, by legal fiction, a Legal Person under Common Law.<sup>xvii</sup> With respect to CPRs, personal knowledge is recognized in, among other ways, through the ‘Living Treasures’ of a Nation or a people.

Traditional and intangible cultural property constitutes a Nation’s ‘patrimony’ to which some contemporary work will be added through the test of Time. These three forms of cultural property, together with private intellectual property and the public domain, constitutes the national knowledge-base.

*Traditional*

At the extreme, cultural property includes all the artifacts of daily national life. Traditionally, however, it is restricted to a limited range of things or rather artifacts distinguishable from the ordinary by their aesthetic value, cultural significance, rarity and/or age. Designated or listed works—artworks, books, buildings, monuments, *et al*—usually can be bought and sold domestically (within limits imposed by the State) but not necessarily internationally. Traditional cultural property is thus subject to differing national policies limiting both domestic and international trade.

The traditional cultural property economy is populated by artists, collectors, dealers and auction houses, museums, art historians, archaeologists, ethnographers and, of course, national cultural officials (Merryman 2005). A significant problem is theft and subsequent illicit import and export of traditional cultural property between countries. Thomas Hoving, former curator of the Metropolitan Museum of Art, and subsequently president of Hoving Associates, estimated that, ounce for ounce, art and antiquities are more valuable than heroin; they yield a higher rate of return at less risk and face significantly less punitive criminal punishments (Chartrand 1992). In fact, since the time of Abbe Grégoire, protection of traditional cultural property has been extended beyond Nations to all of humanity. Arguably this gained clearest expression with the 2003 UNESCO *Declaration on the Intentional Destruction of Cultural Property* made in response to Taliban destruction of the colossal Bamiyan Buddhas in 2001.

*Contemporary*

In the 20th century the concept of cultural property was extended to State protection or rather support of contemporary creation. Thus in the 1947 *General Agreement on Tariffs and Trade* (GATT), there are four provisions making a distinction between cultural and other goods and services in international trade. First, quotas are protectionist measures that run counter to the free circulation of goods under Article XI. However, an exemption is 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. This provision represented a compromise between the USA film industry and the Europeans keen to maintain quotas first established between 1919 and 1939. They have since been extended to television and other so-called ‘cultural industries’.

Third, under Article XX (a), restrictions on free trade are permitted to protect public morals. To the degree public morals are part

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of national culture then foreign cultural goods threatening public morals may be restricted. The most obvious example is Islamic societies which hold fundamentally different values from the West 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. Multilateral instruments dealing with trade in obscene materials and artifacts in fact form part of the contemporary multilateral intellectual & cultural property rights regime

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

With the fall of the Berlin Wall, a new era began. Some argue that global conflict based on ideology was replaced by the clash of cultures. (Huntington 1993) It will be where the "tectonic plates" of different cultures meet that conflicts will erupt. The 1990s tragedy in the Balkans between Catholic Croats, Orthodox Serbs and Moslem Bosnians who share a common language (Serbo-Croatian) and a common ethnic background (Southern Slavs) demonstrates that it takes only one significant cultural difference (in this case, religion) to lead to genocide, ethnic cleansing and cultural vandalism.

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

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

On the economic front Canada, France and Sweden, among others, continue to press the World Trade Organization to maintain its

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exemption of cultural goods and services from free trade. These countries, together with others, have created a web of international film and television co-production agreements intended to generate the high production standards demanded by audiences at home, abroad and especially in the American marketplace itself. In effect, these countries are manipulating the regulatory environment to engineer a financially viable arts industry through control of the electromagnetic spectrum and other communications media. In these efforts, the Canadian attempt to build 'Hollywood North' has led the way. With innovation of the Internet, similar questions of cultural sovereignty are arising, *e.g.*, the success of Google search and book scanning led France and the European Union to respond with counter-measures to compete.

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

*Intangible*

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 an 'artifact'. 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 encoded.

That tacit personal knowledge finds expression in performance (or demonstration) was one of the insights of philosopher of science Michael Polanyi ([1958], 1962). For Polanyi, we 'indwell' in our codes (languages) and our tools as extensions of ourselves. They become subsidiary to our focal consciousness. We feel where the hammer hits the nail not the hand holding it. The tacit ability to manipulate code and tool matter/energy to serve human purpose constitutes *technology* in its original sense of 'reasoned art' – from the ancient Greek *techne* meaning art and *logos* meaning reason.<sup>xviii</sup> Tacit knowledge, in turn, has become a bone of contention in discussion about the emerging knowledge-based economy (Cowan, David & Foray, 2000).

Intangible cultural property has specific meaning for three groups of people: (i) preliterate and tribal peoples of the Third and Fourth Worlds; contemporary artists, artisans and technicians facing de-skilling; and, so-called 'Living Treasures'.

*(i) Preliterate & Tribal Peoples*

In preliterate societies knowledge is transmitted orally, usually through the mnemonics of chant, ritual and storytelling, enforced through religious practice and taboo. The association of rhythmic or repetitively patterned utterances with supernatural knowledge endured well into historical times. Among the ancient Arabs, for example, the word for

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poet was *sha'ir*, “the knower”, a person endowed by the spirits with knowledge (Jaynes 1978).

Oral tradition remains the dominant form of inter-generational and intra-generational transfer of knowledge among peoples of the Fourth World – aboriginal or indigenous peoples. It can only be transmitted and the fabric of the culture maintained through person-to-person communication. It is not codified extra-somatically. To many tribal peoples, a song, story or icon does not belong to an individual but to the collective. Rights are often exercised by only one individual in each generation, often through matrilineal descent.

The intellectual property rights regime, however, is based on three principles: (a) fixation of knowledge in material matrix; (b) limited duration of rights before knowledge enters the public domain; and, (c) rights are granted only to a Person – Natural or Legal. This means that: (a) ephemeral works such as the spoken word are not protected; (b) tribal traditions granting rights in perpetuity – as long as the rivers flow and the sun shines – have no legal standing because the knowledge is in the public domain; and, (c) family lines, clans or tribes are not Persons in a legal sense and hence can have no standing in court unless they incorporate and adopt alien ways of governance.

The question of “appropriation” has arisen in the artistic community regarding the telling of tales and creation of works of art based on Fourth World cultures. At the extreme, the term is ‘cultural vampirism’. On the one hand, some in the First World community recognize ownership by Fourth World peoples of their own cultural property. On the other hand, there are those who believe if artists restrict themselves to their own culture all humanity will be deprived of cultural richness.

An apocryphal example of appropriation is the alleged mid-1980s case of the thunderbird motif used by the Kwakiutl people of west coast Canada. Kwakiutl women knitted woolen sweaters using this design. A pair of Japanese businessmen saw the sweaters on a tour and promptly mass produced them for sale in Asia. Apparently over \$100 million in sales were made. Not a penny was returned to the Kwakiutl people. And because such images are considered to be in the public domain the Kwakiutl had no standing in court to seek damages and compensation for the appropriation of their cultural property for the profit of others.

Another aspect of Third (the developing countries of the South) and Fourth World knowledge is traditional environmental knowledge, or TEK, defined as a body of knowledge built up by a people through generations of living in close contact with a specific natural environment. The exploitation of TEK by biotech firms has led to charges of ‘biopiracy’ (Duffield 2002), *i.e.*, stealing the work of others for one’s own profit. Among the leading and most articulate critics is India-born Vandana Shiva (1999). As she has noted, for many Indian farmers “IPR” stands for “intellectual piracy rights”. A case in point is the neem tree, which has been cultivated and nurtured by Indian peasant farmers for millennia as a biopesticide and medicine. American and Japanese corporations “patented” the medicinal and pesticide properties of the tree with no royalties accruing to Indian farmers.



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In response Third World countries have increasingly sought to protect their biological as well as cultural resources. India, for example, is compiling a 30-million-page electronic encyclopedia of its traditional medical knowledge (as well as yoga positions). Ancient texts in Arabic, Bengalis and Sanskrit are being translated into five global languages - English, French, German, Japanese and Spanish - in an effort to establish 'prior art' and prevent others from claiming intellectual property rights (Biswas 2005).

There are thus similarities between Third and Fourth World peoples. However, the Third World is made up of sovereign Nation States. They can pass laws and sign international agreements requiring "national treatment". Peoples of the Fourth World, on the other hand, are unable to do so. Rather, they must depend on national and international institutions if their cultural property is to be legally recognized. In this regard the 2005 UNESCO *Convention on Intangible Cultural Property* represents the most fully articulated international expression of global concern.

*(ii) Contemporary Artists, Artisans & Technicians*

Since the dawn of the Industrial Age, the work of artists, artisans and technicians has been progressively displaced by machines including computers and motion picture projectors. In many cases tacit skills and techniques developed over generations and transmitted through person-to-person communication including performance and demonstration have been lost.

In Science and Technology this is justifiably called progress. It is well documented that what usually begins as a manual protocol of a researcher is passed on eventually becoming embodied in generations of an instrument that are progressively more opaque until finally it becomes a 'black box' (Baird 2004; Rosenberg 1994; Cambrosio & Keating 1988). At this point the protocol becomes subsidiary to the researcher allowing focal attention to shift to the next question. Effectively there is no need for a human operator at all. Push button A then B and then get results! New knowledge displaces the old because it is generally superior – the point of the Enlightenment.

In the Arts and Humanities, however, it is not progress in any aesthetic or cognitive sense but rather economics that is at play. New knowledge does not necessarily displace old in these knowledge domains. Rather superior aesthetic and cognitive knowledge is too often displaced or 'dumbed down' due to market forces. Thus new knowledge is not necessarily superior but rather cheaper than the old.

Craft or hand methods generally produce superior aesthetic and sometimes technical results but are not subject to mass production and therefore do not enjoy economies of scale. With a limited market for expensive hand-made things there can be but few with the skills necessary to produce them. The knowledge acquired and passed on over generations can thus be lost, forever, in but one. How to maintain such intangible cultural property or craft knowledge yielding superior aesthetic results is the point of a movement called 'Living Traditions' (White & Hart 1990).

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In the 'live' performing arts it has similarly been recognized (Baumol & Bowen 1966) that an income gap exists between what it costs to perform a live Mozart concerto and what ticket buyers in a middle class democracy can reasonably afford relative to alternative entertainment opportunities including recordings. It takes the same number of players and time to practice and perform the concerto today as it did in the time of Mozart himself. There are, however, no labour savings devices available. But costs have gone up so much faster than ticket prices that there simply should be, for strict financial reasons, no live Mozart concerto performed evermore.

Yet the 'live' performance is qualitatively different and arguably aesthetically superior to the machine-recorded one (Baumol & Oates 1972, 1974, 1976, Tullock 1974, 1976). Should knowledge of how to play Mozart with violin, flute, piano *et al* with excellence in front of a live audience be allowed to fade away for market reasons? To economist John Maynard Keynes, father of the Arts Council of Great Britain, the answer was no. Rather public subsidy was appropriate to ensure a reasonable supply of a 'merit good' that the market itself cannot profitably afford to produce. Put simply: the social and cultural benefits outweigh the costs. In this example traditional, contemporary and intangible cultural property find a common need for State sponsorship through Time.

Alas some important intangible cultural property has been lost to the live performing arts. As I understand it, between 1929 (with birth of the movie palace followed by the Second World War) and the early 1960s no major performing arts venue was erected anywhere in the world. The architects of La Scala, of Carnegie Hall and Massey Hall who knew site lines and acoustics as experiential art forms did not pass on the knowledge to future generations. Their knowledge was not needed nor applied. No apprentices learned the ways of the masters. The knowledge was lost.

When in the 1960s an enormous cultural building boom occurred across the West this knowledge was lacking, or rather, we were ignorant of how to duplicate let alone exceed past master builders. Initially the result was concrete 'barns' with bad site lines for the audience and terrible acoustics. Since that time experience has accumulated but generally through Science and Technology enframing and enabling physical nature rather than application of the intangible cultural property of master builders. Again, the 2005 UNESCO *Convention on Intangible Cultural Property* arguably represents the most fully articulated multilateral expression of global concern.

*(iii) Living Treasures*

A Living Treasure is a Natural Person who embodies or fixes in their person the cultural knowledge (or some significant part thereof) of an entire People – tribal, communal, regional, national or global. Such Treasures possess a high degree of the knowledge and skills required to perform and/or re-create specific aspects of a community's intangible cultural heritage. The institution - formal and informal - is well established in many Asian nations.

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As with contemporary artists, artisans and technicians, however, Living Treasures are often the last link to skills and techniques of the ancestors. Unlike the West, however, in the Third and Fourth Worlds it is too often not just a technique but an entire culture and its knowledge that is lost with their passing. To ‘link back’ is the meaning of the Latin word *re-ligio*. In this sense Living Treasures are numinous personalities commanding respect if not reverence linking the Past and Present with the promise that old knowledge will continue to the Future. Again, new knowledge is not necessarily superior to old in the Arts & Humanities. And again, the 2005 UNESCO *Convention on Intangible Cultural Property* represents the most fully articulated multilateral expression of global concern.

**Multilateral Regime**

Law is enforced by the State. Sovereignty, at root, is the State’s monopoly of coercive force. As suggested by John R. Commons (1934), the probability of the State (or its officials) exercising this power to enforce contracts (rule of law) is a primary concern for all business enterprise everywhere.

***Jus cogens***

Between Nation-States, however, Law relies on *jus cogens* or the presumptive norms of international law, arguably the most elemental of which 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 they tend to arise out of case law as well as changing social and political attitudes. Such norms can be both affirmative as with *pacta sunt servanda* or prohibitive as with prohibitions against aggressive war, crimes against humanity, war crimes, maritime piracy, genocide, slavery and torture.

According to *pacta sunt servanda*, all instruments in force are binding on Parties to them who, in turn, must perform them in good faith. Thus Parties cannot invoke domestic law in the case of a State, or internal rules in the case of an International Organization, as justification for failure to perform. The only legal exception is when this norm conflicts with another, *e.g.*, the prohibition against slavery, in which case according to Article 53 of the 1969 *Vienna Convention on the Law of Treaties* such instruments are void.

If a State fails to perform there may or may not be legal recourse for other parties to an agreement, *e.g.*, WTO dispute panels or appeal to the International Court of Justice. Only at the extreme will the Security Council of the United Nations ‘legitimize’ coercive force against a treaty-breaker. <sup>xix</sup>

Accordingly the complex web of global and regional agreements, conventions and treaties that constitutes the multilateral intellectual & cultural property rights regime rests on the ‘good faith’ of Nation-States. Each comes to the table with its distinct legal tradition as well as wants, needs and desires. To ratify an instrument, however, usually requires a State to adjust domestic laws that conflict with treaty

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obligations.

With respect to *jus cogens*, presumptive norms or heuristics of the multilateral ICPR regime, one is ‘national treatment’ and another is *lex fori*. *Lex causae* is Latin for ‘law of the cause’. It refers to which law has precedence when there is a conflict of laws in an action, e.g., infringement of a patent granted in one State but infringed in another. There are two possibilities – *lex fori* and *lex loci*.

With respect to procedure, the applicable law will always be the law of the court (*lex fori*) hearing the case. With respect to substantive law, however, it may be that of the State granting the right, or *lex loci*. Thus the 1889 Montevideo *Treaty on Literary and Artistic Property* (unlike the Bern Convention) adhered to *lex loci* meaning that the rights of an author were determined by the laws of the country of origin where the work was first published not where the infringement took place.

It is important to note that the multilateral ICPR regime pre-dates the current world-order of Nation-States (a term that only entered American English in 1919). The first efforts began at the height of the once great global economy of European colonial empires on which the sun never set. With respect to the cultural property rights regime, it began in 1874 with Article 8 of the *Declaration of Brussels*. The Paris *Convention for the Protection of Industrial Property* was signed in 1883 and the Berne *Convention for the Protection of Literary and Artistic Works* in 1886.

### **Intellectual Property**

Traditionally, intellectual property breaks out into two classes: industrial property and literary & artistic works. Industrial property includes patents, registered industrial designs and trademarks (inclusive of marks of origin). In general, industrial property involves utilitarian goods and services (knowledge tooled as function) while:

[t]hough copyright is expressed in terms of property, it is not directly analogous to industrial property (patents, trademarks and industrial designs), where the major concern is with the circulation of goods that have economic value apart from their intellectual content. As it deals with purely intellectual matter, copyright can never interfere with a person’s physical well-being. (Keyes & Brunet 1977, 3)

#### *Industrial Property*

Industrial property was the subject of the first multilateral IPR agreement: the Paris *Convention for the Protection of Industrial Property* of 1883. Patents were the centerpiece of the Paris Convention. In fact it represented the triumph of the patent movement led by the United States against the anti-patent movement led by Germany. The first U.S. Patent Act: “An act to promote the Progress of Useful Arts”, was passed in 1790 more than 60 years before Great Britain passed its first act. The U.S. had developed over that period a system for treating applications, assessing claims and granting patents. This experience informed and shaped the Paris Convention. Success led one American observer to call the Convention “the most perfect example of a multilateral convention affecting economic matters” (Kronstein & Till 1947, 765). Ironically, after Germany acceded to the Paris Convention in 1901 (the last major

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industrial power to do so) it engaged in ‘patent pooling’ with the United States in key industries especially chemicals and pharmaceuticals effectively dividing up world markets between them. The success of American leadership in the patent movement resulted in a relatively unified global system under the Paris Convention and its subsequent amendments. This is a dramatically different outcome from copyright.

*Literary & Artistic Property*

Literary & artistic works were the subject of the second multilateral IPR agreement: the *Berne Convention for the Protection of Literary & Artistic Works* of 1883. Protection of literary & artistic works under Common Law is called *copyright*; under the Civil Code, *author’s rights*. They are not the same.

As we have seen, European artists and writers led by Victor Hugo organized the International Literary & Artistic Association (*Association Littéraire et Artistique Internationale*) in 1878. At their Berne conference of September 1883, a draft convention was prepared and brought to the attention of the community of nations by the Swiss Federal Council (Kampelman 1947, 410-411). The *Berne Convention for the Protection of Literary and Artistic Works* of 1886 was the result. Again, Hugo provides a personal link between copyright as author’s rights and cultural property as protection of the rights of past Creators.

Three years after the Berne Convention the same authorial rationale gave birth, in 1889 to the second major multilateral copyright agreement: the *Treaty on Literary and Artistic Property* done at Montevideo, Uruguay during the South American Congress on Private International Law. This was the first step in development of the Pan-American copyright system. Unlike subsequent agreements, however, it was open to non-American states. It was ratified by Argentina (1891), Bolivia (1903), Paraguay (1889), Peru (1889), and Uruguay (1892) and agreed to by France, Spain, Belgium, Italy, Germany, and Austria. It was, as noted above, also *lex loci* in nature.

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

Whether due to the Monroe Doctrine by which the United States asserted an obligation to protect the Americas from foreign influences or for economic reasons, a distinct Pan-American copyright regime emerged to challenge the Berne Convention and complicate multilateral copyright relations. The first formal Pan-American copyright convention was signed at the Second International Conference of American States at Mexico City in 1902. The *Inter-American Literary and Artistic Property Convention* was ratified by Guatemala, Salvador, Costa Rica, Honduras, Nicaragua and the United States. It was followed by the *Buenos Aires Convention on Literary and Artistic Copyright* of 1910 and its revision in 1928. The system was finalized with the Pan American Copyright Convention of 1946, or formally the *Inter-American Convention on the Rights of the Author in Literary, Scientific and Literary Works*.

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

Before and after the First and Second World Wars various attempts were made to reconcile these two regimes. It was not, however, until the UNESCO inspired *Universal Copyright Convention* of 1952 that an overarching instrument, however flawed, was erected to span the gulf between the two regimes. Arguably, it did not succeed.

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

**Cultural Property**

Globally, there have been three periods in the evolution of the multilateral cultural property rights regime: to World War II, Cold War and Post-Cold War periods. I will outline each.

*To World War II (1874-1945)*

To World War II (1874-1945) attention focused on protecting traditional cultural property in times of war. It began in Brussels during July 1874 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 subsequently ratified.

Later in 1874 the Institute of International Law appointed a committee to study the Declaration. This led in 1880 to the Institute’s adoption of the *Manual of the Laws and Customs of War* at Oxford. In turn, the *Brussels Declaration* and the *Oxford Manual* became the basis for the Hague Conventions on land warfare in 1899 and on land and sea

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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.

Following the 1935 Pan American *Roerich Pact* for the protection of artistic, scientific and historic institutions and monuments attempts were made for a more global convention. In 1939 a draft convention prepared by the International Museums Office of the League of Nations was submitted by the Netherlands but due to the outbreak of World War II no further action was taken.

*Cold War (1945-1990)*

In the Cold War period (1945-1990) attention focused on finalizing the Hague Convention and regulating the flow of cultural property between countries. Accordingly in 1954 a dedicated Hague *Convention for the Protection of Cultural Property in Times of Armed Conflict* was signed and subsequently ratified.

In 1945, however, the United Nations Educational, Scientific and Cultural Organization (UNESCO) was created as branch of the United Nations. Article 1 of its Constitution calls for protection and preservation but also for the free flow or exchange of cultural property between nations. Nonetheless, in 1947 the General Agreement on Tariffs and Trade (GATT) was signed and subsequently ratified. It not only exempted traditional cultural property from free trade requirements but extended the exemption to contemporary cultural property initially motion pictures but subsequently other cultural industries, *e.g.*, broadcasting and publishing.

UNESCO then established a regulatory framework for the international exchange of contemporary cultural property through its 1948 *Beirut Agreement* on visual and auditory materials and its 1950 *Florence Agreement* on educational, scientific and cultural materials. In 1970 UNESCO's *Convention on the Illicit Import, Export and Transfer of Cultural Property* attempted to stem the growing illegal flood of traditional cultural property between nations. The only other binding instrument created during this period was UNESCO's 1972 *Convention on the Protection of World Cultural & Natural Heritage*. This was the first multilateral instrument to reflect the American tradition of linking human-made and natural heritage.

*Post-Cold War (1990-2008)*

In the Post-Cold War period (1990-2008) the international flow, preservation and production of cultural property became the focus of attention. As will be demonstrated in more detail below the WTO's 1995 *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS) radically altered the multilateral intellectual property rights regime by, among other things, effectively converting copyright into industrial property. This has had significant implications for multilateral cultural property rights and the international flow of contemporary cultural property. Also in 1995 the UNIDROIT *Convention on Stolen or Illegally Exported Cultural Objects* was signed coming into force in 1998 thereby reinforcing the 1970 UNESCO Convention to stem the theft and illegal export of traditional moveable cultural property.

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Preservation and protection was also the intention of UNESCO's 2001 *Convention on the Underwater Cultural Heritage* arguably reflecting technological change that eased access to another source of traditional cultural property. It was also arguably the intention of UNESCO's 2001 *Convention for the Safeguarding of Intangible Cultural Property*. In this case, however, it was arguably a response to TRIPS implicit exemption of such rights rather than technological change.

Similarly UNESCO's 2005 *Convention on the Protection and Promotion of Cultural Diversity* was a response to TRIPS but this time to promote production of contemporary cultural property by domestic cultural industries rather than to protect and preserve traditional property. It was an assertion of cultural sovereignty on the part of 148 nations with only 2 opposed – the United States and Israel - with 4 abstaining.

**TRIPS (1995)**

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

For the first time virtually all Nation-States agreed to abide by common rules of trade recognizing the WTO as final arbitrator of disputes and authorizing it to sanction countervailing measures against offenders of its rules. Given the historical role of trade disputes fueling international conflict, the WTO compliments the UN as a bulwark of international peace, law and order.

As a multilateral instrument, the WTO is a 'single undertaking', *i.e.*, it is a set of instruments constituting a single package permitting only a single signature without reservation. One of these instruments is the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS) that constitutes, in effect, a global treaty on trade in knowledge, or more precisely, in intellectual property rights (IPRs) such as copyrights, patents, registered industrial designs and trademarks. TRIPS, however, is only one part of a complex WTO package that includes the General Agreement on Tariffs and Trade (GATT) and twenty-six other agreements.

With respect to the multilateral ICPR regime TRIPS is, however, only the tip of the iceberg. Below is a web of global and regional agreements, conventions and treaties including those administered by the World Intellectual Property Organization (WIPO) as well as other international organizations especially UNESCO. WIPO, like UNESCO, is a special subject agency of the United Nations.

TRIPS requires accession to some but not all WIPO instruments. It also explicitly excludes 'non-trade-related' intellectual & cultural property rights, *e.g.*, aboriginal heritage rights including traditional ecological knowledge or (TEK), collective or community-based intellectual property in general (Shiva 1999) as well as the moral rights of the Natural Person.



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Furthermore WIPO (an International Organization) has a formal agreement with the WTO (an International Organization) to administer TRIPS as it does the Paris, Berne and many other multilateral instruments. Such agreements are the subject of the 1986 *Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations*. Thus it is no longer just the laws of nations but also the internal rules of international organizations that shape the multilateral regime, *i.e.*, treaties between international bureaucracies.

The effects of TRIPS on the multilateral ICPR regime are four-fold: First, by excluding moral rights of the Natural Person TRIPS effectively converted copyright or ‘protection of literary and artistic works’ into industrial property. As demonstrated above these are historically two separate classes of intellectual property. In this regard, Victor Hugo must have turned over in his hallowed Parisian Pantheon crypt when computer software was accepted as ‘a work’ subject to his 1886 *Berne Convention on the Protection of Artistic and Literary Works*. Until then copyright protected only artistic and literary works of words, images, shapes and/or sounds, *i.e.*, human-readable code.<sup>xx</sup>

Second, TRIPS energized countries like Canada, France and Sweden to use UNESCO as a vehicle to counter its perceived economic bias and to assert cultural sovereignty (Chartrand 2002). Thus the 2003 *UNESCO Convention on Intangible Cultural Heritage* responded to implicit exclusion from protection under TRIPS. Similarly, the 2005 *UNESCO Convention on Cultural Diversity* affirmed the rights of a Nation-State to, among other things, promote creation of ‘commercial’ works through their domestic cultural industries.

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

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

Third, given TRIPS is administered by WIPO (a UN special subject agency) and conventions on intangible cultural property and cultural diversity are administered by UNESCO (also a UN special subject agency) then the split between Culture and Commerce, between Common Law and Civil Code traditions, has, in effect, been institutionalized opening up a new division in the multilateral regime similar to that created by the Berne and Pan American Copyright Conventions.

Fourth, the intellectual property rights regime is a critical policy instrument for the competitiveness of nations in a global knowledge-

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based economy. Preferential public support for production of traditional goods & services such as cars is subject to harmonization under the rules of the WTO. Intellectual property rights under TRIPS, however, remain subject to national treatment. This allows a Nation-State to design an ICPR regime best suited to its own purposes – commercial and/or cultural.

**Conclusion: The Unfinished Revolution**

For over 200 years the American Revolution has symbolized the overthrow of an ancient regime of subordination by birth by a new society founded upon the freedom and equality of the Individual. The success of this Republican Revolution represented the political culmination of a long historical process beginning with the Renaissance cult of the genius of the 15th century. The god-like power to create out of nothing demonstrated that it was not bloodline but rather the randomly distributed creative genius of the Individual that directs the evolution of human society. From Da Vinci and Michelangelo to Edison and Marconi to Bill Gates and Sam Walton it has been the Individual who has led humanity from being victim of the vicissitudes of Nature – flood, famine, fire, plague, *et al* - to becoming master of Planet Earth.

This was the certainly the view of the Founding Fathers when they wrote Article 1, Section 8 of the U.S. Constitution in 1787 (the copyright or intellectual property clause):

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

This view is evident in the eloquent words of Zechariah Chafee, one of the leading legal scholars of his time, which sums up this Myth of the Creator:

... 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. (Chafee 1945)

It took, however, almost two hundred years for the American Revolution to realize the universalism of its values extending them to all Individuals – black and white, male and female, rich and poor, gifted and disabled, gay and straight.

Alas in subsequent statutes, up to the Present, the American Congress has chosen to limit and narrow the exclusive rights of the Creator in favour of the Proprietor. It thus refuses to recognize the moral rights of the Creator, *i.e.*, “rights therein which cannot belong to any other sort of property”. Nonetheless, in the name of the ‘starving artist’ Congress has extended the duration of copyright to near perpetuity, which both Thomas Jefferson and the French Revolutionaries feared, and through the use of blanket or all rights licenses encouraged the transfer of all remaining rights to the Proprietor – usually a Legal Person, *i.e.*, a corporation. In fact, under American Common Law, a Natural and Legal Person enjoy the same rights – an outcome that would have shocked

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participants of the Boston Tea Party held against the monopoly privileges of the East India Company.

Similarly, while initially granting exclusive rights in Time to the Creator to enhance ‘learning’, Congress has narrowed ‘fair use’ and hence limited the public domain in favour of corporate Proprietors. It also fails to recognize the rights of the Nation as a temporal entity or community to protect and preserve the product of its past genius. Replacing the word ‘France’ with *America* in Sax’s interpretation of Abbe Grégoire’s words:

... 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 artifacts that embodied the best of the people was the quintessence of *America*, its true heritage and patrimony. Those who were willing to see these artifacts destroyed, or sold abroad as if the nation cared nothing for them he said, were imperiling the most important symbols of the national identity, those things that spoke for what *America* should aspire to be. (Sax 1990a, 1156)

While the rest of the world has, in the main, endorsed the Republican Revolution with its creed of “We, the People” and recognized the “exclusive rights of Authors and Inventors” the United States remains stuck in a pre-revolutionary mercantilist intellectual and cultural property rights regime. It has taken this vestigial view out into the world splitting the community of nations first between the Berne Convention and the Pan American Copyright Convention and now between TRIPS (to which all nations must adhere to join the WTO) and UNESCO’s *Convention on Cultural Diversity* to which, effectively, only the United States refuses to adhere.

As we enter the so-called knowledge-base economy questions about national patrimony (including natural heritage and biodiversity) and exclusive rights of the Creator will take on ever increasing importance. The traditional manufacturing economy boasted life-long employment; the knowledge-based economy contract work and self-employment. In the Anglosphere, copyright and moral rights belong to the employer not the employee. This is doubly so under Crown copyright. Even contract work and self-employment are subject to blanket or all rights licences which extinguish all future claims of the Creator and, in Canada, waive all moral rights, *i.e.*, they are prescriptable. By contrast, under Civil Code, an employee retains moral rights over his or her work and may even enjoy ‘neighbouring rights’. <sup>xxi</sup>

If Anglosphere practice continues, it can be expected that the income distribution of contract and self-employed knowledge workers will become like that of self-employed artists and entertainers - second only to pensioners as the lowest income class recognized by Revenue Canada (Chartrand 1990). Furthermore, their income distribution is not a pyramid with a broad base, wide middle and a peak. Rather it is an obelisk with a huge base of poor ‘starving artists’, a thin column of middle class survivors and a tiny peak earning enormous sums – Nature is aristocratic. This could be the future of the knowledge-based

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economy— no middle class. For the sake of America and the rest of the world it is critical that the United States complete its revolution and recognize the moral rights or rather the “exclusive rights of Author or Inventor” – Present & Past. This requires but one Supreme Court answer to one question: Under the Constitution, Article 1, Section 8: Do Natural and Legal Persons enjoy the same intellectual property rights? If not, how so?

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**Endnotes**

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<sup>i</sup> Traditionally intellectual property breaks out into copyright or protection of literary and artistic works under the Berne Convention of 1886 and industrial property including patents, registered industrial designs and trademarks under the Paris Convention of 1883.

<sup>ii</sup> The political utility of Stationers’ Company copyright to Anglican, Catholic and Republican rulers explains its exemption. This monopoly was supported by pre-publication Licensing Laws the last of which expired in 1695. A ‘free press’ was born subject to libel but not pre-publication censorship enforced by the Stationers Company. Without the protection of a Licensing Act the Stationer’s Copyright was subject to Scottish pirates who took a successful work, re-typeset it and then sold it at a lower price with no payments to the author, editor or for promotion. The Statute of Queen Anne of 1710 was intended to do three things. First, primarily it was intended to prevent any future monopoly of the book trade. Second, it was intended to draw Scotland under a common copyright law to resolve the ‘piracy’ controversy. Third, it was intended to encourage production and distribution of new works. The vehicle chosen to achieve all three objectives was the author even though nor moral rights were recognized and all economic rights were subject to contract to a Proprietor.

<sup>iii</sup> For more than 200 years the patent system in Britain developed through case law without statute. It was not until the Patent Law Amendment Act of 1852 that a formal patent act came into existence (UK Patent Office, July 13, 2004). The first U.S. patent act was “An act to promote the Progress of Useful Arts” passed in 1790. Its legal status was based, however, on Article 1, Section 8, Clause 8 of the Constitution.

<sup>iv</sup> The treatment of Legal Persons under American law is historically problematic. As Nace points out from Independence in 1776 until the late 1860s corporations were very tightly controlled and limited in their activities. This reflected the bitter experience of the colonists, for example, with the practices of the East India Company that led to the Boston Tea Party (Nace 2005) and to the censorial practices of the Stationer’s Company of London.

<sup>v</sup> The London booksellers told tragic tales of piracy ruining honest businessmen, their wives and children. Literary works were the inheritances of innocents and pirates were, in effect, stealing from the mouths of babies. These tales of woe were adopted by those advocating authors’ rights and used to illustrate the problems of lax copyright protection for authors

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A number of cases were brought to court by printers/booksellers/publishers during the 1750's and 1760s to gain recognition of a common law copyright independent of the statutory rights established by the Statute of Queen Anne. Publishers argued that an author is entitled to enjoy the fruit of his labor, just like all other forms of property - in perpetuity. A publisher, being merely an assignee of the rights of the author, should therefore also enjoy such rights in perpetuity independent of statute. It was not, however, until 1769 that a definitive legal decision was rendered on the issue in *Millar v. Taylor*.

<sup>vi</sup> The only notable exception is the university professor due to contract and traditional academic freedom. Nonetheless, they too have become enthralled to the Proprietor as commercial academic publisher to whom they generally assign all economic rights in the hope of publishing or perishing. See my “Third Age of the University: From Interpretation to Generation to Commercialization of Knowledge”, 2008.

<sup>vii</sup> It should be noted that Austria-Hungary was also a pirate State ([Woodmansee 1984, 439](#)).

<sup>viii</sup> The intellectual gymnastics of Condorcet to justify copyright is a dominant theme of Hesse's 1990 article “Enlightenment Epistemology and the Laws of Authorship in Revolutionary France, 1777-1793”. Initially rejecting all copyright – author's and printer's rights - in favour of the public domain, the course of the Revolution forced Condorcet to rationalize copyright as a necessary evil. No serious books were being published because of rampant piracy but anonymous counter-revolutionary and partisan pamphlets and tracts proliferated. Copyright, or rather author's rights, would flush the author out into the public domain where Madame Guillotine could greet him.. It would also stop piracy and encourage printers to be good citizens and publish good books. In some ways the anonymity of WWW or web production is creating a similar contemporary political condition, e.g., the ‘Hillary 1984’ ad by an ‘anonymous’ political operative (Coomarasamy April 6, 2007).

<sup>ix</sup> Kant plays a critical role in the theoretical justification and content of current French, German, and Swiss copyright systems and, by extension, all countries adopting the European Civil Code. There are, however, differences between the rights recognized by different Civil Code countries as there are between Anglosphere Common Law countries.

<sup>x</sup> As such rights are ‘natural’, the French revolutionaries did not deem a statute necessary. In fact it took case law during the 19th and early 20th centuries to legally define such rights. It was, in fact, only in 1957 that French statutory law formally recognized the moral rights of the author (Sarruaute 1968).

<sup>xi</sup> Nonetheless they have significant economic or rather implications: They obviously enhance bargaining power of a Creator in any contractual negotiations. They can also stop any subsequent use of the work, e.g., the ‘colourization’ controversy (of black & white motion pictures) in the United States could not happen in France because the



director of the motion picture is the rights holder not the owner of the negative as in the Anglosphere.

<sup>xii</sup> There were two parts to pre-Statute of Queen Anne copyright. First, a work was subject to pre-publication censorship under the Licensing Act. Second, the work was then assigned to a member of the Stationer's Company of London for printing.

The Company received 'guild' status under Queen Mary, elder Catholic sister of Elizabeth I. Each subsequent ruler, including Cromwell, maintained their monopoly until Queen Anne. Each could thereby control the public domain or intellectual commons. The printer enjoyed perpetual copyright. The author might, or might not, receive a one-time honoraria from the printer but all subsequent revenues and rights went exclusively to the printer Proprietor.

Once the Licensing Act lapsed in 1695 Scottish pirate printers terrorized the London and English book market until the Statute of Queen Anne in 1710 which also terminated perpetual copyright and thereby the Stationer's Company monopoly.

<sup>xiii</sup> Ignorance is defined as the absence of knowledge and it was against ignorance that Grégoire fought.

<sup>xiv</sup> Grégoire coined the term 'vandalism'. (Saxe 1990a)

<sup>xv</sup> - Robert Reich notes that workers in a knowledge-based economy are symbol makers and manipulators of numbers, words, images, sounds, etc. (Reich 1992).

<sup>xvi</sup> Mainstream discussion of the knowledge-based economy is effectively limited to codified and 'tacit' knowledge (Cowan, David, Foray 2000) with some treatment of 'local knowledge'. The later, a form of collective, sociological or 'team' knowledge, remains, nonetheless, tacit.

The concept of tacit used in this discussion derives from philosopher of science Michael Polanyi whose master work is: *Personal Knowledge: Towards a Post-Critical Philosophy* (Polanyi [1958] 1962). Polanyi believed all knowledge is ultimately personal and tacit in that it results from our tacit integration of subsidiary (background) and focal (foreground) awareness into a gestalt whole called 'knowing' (Polanyi Oct. 1962)

Contemporary discussion, however, dissociates tacit from personal transforming it into a 'corporate asset'. Such disassociation arguably reflects the bias of capitalist economics towards capital and away from labour. In fact one can speak of a labour theory of knowledge and its corollary, the knowledge theory of capital (Chartrand 2007).

Furthermore, in the contemporary public policy debate there is no discussion of tooled knowledge. For Polanyi this too would be unimaginable. To him we live or rather 'indwell' in our tools, toys and instruments. We 'feel' the hammer hit the nail at the point of impact, not in our hand. For Polanyi scientific instrumentation extends the human senses and grasp. The newer, better, more sophisticated the tool the farther our senses and grasp reach. The knowledge to do so is tooled or fixed into matter/energy as a device or process and can be extracted, if at all, through 'reverse engineering'.

<sup>xvii</sup> 'Know-how' is generally protected under confidentiality clauses in contracts of employment. It is, however, recognized as a distinct class of

intellectual property under NAFTA, WTO treaties and other multilateral treaties.

<sup>xviii</sup> It is also why in the ancient and the medieval worlds what today we call the 'fine arts' (excepting music) was a sub-class of the Mechanical Arts practiced by the common people but not by the nobility. Fuller notes that in ancient Greece even writing was considered a Mechanical Art suitable only for slaves and scribes (Fuller 2000). The spoken word was the domain of the Liberal Arts fit only for those of gentle birth.

<sup>xix</sup> This assumes international law based on the Western European tradition since the Peace of Westphalia of 1648 which defines such relations as between Nations. By contrast, attempts to extend Islamic Sha'ria law to the international level are based on religion. Implications for intellectual & cultural property is demonstrated by the continuing *fatwa* or religious judgement against Salman Rushdie for his 1988 book *The Satanic Verses* issued by Ayatollah Khomeini. The impact of such international extension of religious law on freedom of speech and other core Western cultural values is becoming increasingly apparent.

<sup>xx</sup> At the experimental level, both touch and smell are in the process of being codified to then be played back to a human reader.

<sup>xxi</sup> For example, *droit de suite*, *i.e.*, rights of following sales, by which an artist receives a percentage of each subsequent sale of a work. It is found in the statutes of both France and California.