Its Significance

The *Canadian Copyright Act* has significance for many facets of Canadian life beyond music downloads and photocopying. I will examine five: the historical, cultural, economic, legal and political significance of the Act. My conclusion in brief: the Act, and intellectual property rights in general (henceforth 'IPRs'), is too important to be left to private industry and politicians. It defines who we are as a creative, democratic nation. Before treating the significance of the Act I must, however, distinguish copyright from other IPRs. Major branches include: patents & designs, copyrights & trademarks and 'know-how' & 'trade secrets'.

First, IPRs do not protect ideas but rather their expression fixed in a tangible material 'matrix'. A matrix is a "supporting or enclosing structure" (OED matrix, n I). A matrix is also something that traditionally can be seen, touched or otherwise perceived by a human being and, furthermore, has some permanence. Finally, expression fixed in a matrix must be original to receive protection by the State.

Second, what constitutes a matrix is problematic. For example, under Canadian copyright until 1988, recorded extemporaneous music, *i.e.*, music improvised and simultaneously recorded, did not qualify for protection because it was not "reduced to writing or otherwise graphically produced or reproduced" (Keyes & Brunet 1977, 40). The recording itself did not qualify as a matrix. Similarly, until 1988, computer programs did not qualify because they could not be 'read' by a human being. The law, being inherently conservative, concluded that if the matrix was not perceptible then it was not possible to assess other requirements for protection, *e.g.*, originality, non-obviousness, usefulness, *etc.* Thus ephemeral displays on computer screens, prior to 1988, also received no protection in Canada (Keyes & Brunet 1977, 129). An electron might be a part of the physical world but if one could not see, touch or otherwise perceive it then it had no legal status as a matrix.

Third, the matrix may take one of three forms: utilitarian, non-utilitarian or a Person – natural or legal. In the case of patents & industrial designs, the matrix is utilitarian. For patents, a device or a process has a function or purpose other than itself. It is unlike, for example, a work of art that is appreciated for what it is, not for what it can do. It is the way function is fixed or tooled into matter and energy that is protected. With industrial design it is the non-functional characteristics of a device or tool such as its shape, size and colour that is protected, *e.g.*, a coffee cup without a corporate

logo or aesthetic design remains a coffee cup, *i.e.*, the matrix carrying the design has a function independent of the design itself.

In the case of copyright and trademarks, the matrix is non-utilitarian. It is carries semiotic or symbolic meaning from one human mind to another. This definition, however, excludes computer software which conveys operating instructions to a machine or, in genomic programming, operating instructions to molecules. I will have more to say about 'human-readable' and 'machine-readable' copyright below. For now, it is sufficient to say that the matrix is essentially a communications medium that has no function other than to carry a message from one mind to another, *e.g.*, a book may make a good read but is a second-rate door jam. Put another way, a work of art, traditionally the exclusive subject of copyright, is valued in and of itself with no utilitarian purpose or function. Similarly, a trademark is protected no matter the nature of the matrix to which it is affixed. It symbolizes either a Person – natural as in a silversmith's mark or legal as in a corporate logo – or a Place, *i.e.*, as a mark of origin.

Finally, in the case of 'know-how' and 'trade secrets', the matrix is a Person – natural or legal. Secrecy protects both but in most countries including Canada there is no formal statute. Due diligence to protect 'the knowledge' is generally required by the courts. When a natural or legal person (including a government) discovers that know-how or a trade secret has been revealed by an agent or a third party without permission, legal recourse is available through breach of contract before the civil courts or in criminal court, *e.g.*, for breaking-and-entering and/or theft. I now turn to the significance of the Act.

(a) Historical Significance

The Canadian Copyright Act is an evolving work product of the Parliament of Canada striving to fulfill its constitutional responsibility for copyright. That responsibility, however, was not fully assumed until 1921, more than fifty years after Confederation in 1867. Until then it was divided between the *Imperial Copyright Act* and sections of other Imperial and Canadian statutes, *e.g.*, the *Criminal Code of Canada*. During this time, the Parliaments at Westminster and Ottawa were often at odds over whose provisions should prevail as the law of the land (Allingham 2001).

Assumption of full responsibility with a 'made-in-Canada' *An Act to amend and consolidate the Law relating to Copyright*, (S.C. 1921, c. 24) brought with it, however, British common law precedents stretching back long before the historic 1710 *Statute of Queen Anne*. This was the first modern copyright act because for

the first time in English history authors were granted statutory rights to their works. The word 'copyright' itself, however, did not enter the English language until 1735 (OED, copyright). These rights, nonetheless, were fully transferable, by contract, to 'proprietors', *i.e.*, printers, booksellers or publishers. The change, in fact, was less a boon to authors than to proprietors because it meant that copyright was to have another function. Rather than simply being the right of a publisher to be protected against piracy, copyright would henceforth be a concept embracing all the rights that an author might have in a published work.

It was such 'proprietors' who, prior to the *Statute of Queen Anne*, enjoyed 'Stationers' Copyright'. In 1557, Queen Mary I granted a charter to what became the Company of Stationers of London. Stationers' Copyright was based on royal prerogative or letters patent covering the entire publishing industry as an estate. The monopoly was assigned to members as a freehold interest. No consideration was given to author's rights. It was perpetual at the pleasure of the Crown. Stationers' Copyright and patents of invention were, significantly, the only Crown monopolies to escape dissolution under the *Statute of Monopolies* of 1624 during the reign of James I.

The reason for its survival was its political usefulness in fostering the political and religious orthodoxy of the day, no matter who was in power – Anglican, Catholic or Protestant (Patterson 1993). It was intended to limit or to censor the domain of public discourse. Nonetheless, all rights granted to the author and hence to proprietors after 1710 remain subject to the Crown. Illustrative is the following Canadian example*:*

> 7. Exception to immoral works
> No literary, scientific or artistic work which is immoral, licentious, irreligious, or treasonable or seditious, shall be the legitimate subject of such registration or copyright.
>
> R.S. 1906, c.70, s. 7

Copyright is, in fact, historically rooted in censorship, pre-publication licensing and grants of industrial privilege initiated by the Tudor monarchs in response to introduction of the printing press in 1476 (Chartrand 2000). Its root is not therefore the 'natural rights' of the creator associated with the other page of the Canadian statute book: *en français – drôit d'auteur, i.e.*, rights of the author. The British root is printer's copyright intended to propel works into the marketplace by granting rights to secondary creators like publishers, recording companies and motion picture studios (Vaver 1987). It is, in effect, trade regulation of a State-sponsored monopoly. Its root is not the natural rights of the

creator *cum* the European Civil Code which primarily intends to promote culture.

In this regard the first international intellectual property rights convention was the 1881 *Paris Convention for the Protection of Industrial Property* covering patents, trademarks and registered industrial designs. That copyright was not 'industrial property' (Keyes & Brunet 1977, 3) was formalized with the 1886 *Berne Convention for the Protection of Literary and Artistic Works* which introduced Civil Code concepts such as moral rights and the public domain into the English legal lexicon.

There is thus an inherent tension between two distinct legal traditions within the pages of the *Canadian Copyright Act* itself. This is evident in Bill C-60, 2005 regarding moral rights in performances, recordings and communications (p. 97). While it is proposed that such rights shall not be assignable as in the Civil Code, they may be waived by contract unlike the Civil Code. Arguably, the most succinct expression of moral rights is that they are "inalienable, unattachable, impresciptible and unrenounceable" (Andean Community 1993).

Full responsibility for copyright in 1921 also brought with it Canadian precedents, especially those concerning the predatory *U.S. Copyright Act*. Article I, Section 8 of the 1788 *U.S. Constitution* (known as the Intellectual Property or Copyright Clause) states, in very natural rights terms:

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

Two years later, however, 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 is the term "Proprietors'. The U.S. increasingly looked upon copyright as an instrument of industrial independence from Britain, specifically in the printing trades. It was not and arguably still is not seen primarily as an incentive for creators in the natural rights tradition. Thus no royalties were paid to foreign authors (generally British) whose works were cheaply re-printed. Copies were then sold legally in the U.S. and illegally, at very low prices, elsewhere in the English-speaking world including Canada. American printer/publishers had a field day while Canadian competitors languished under royalties imposed by the *Imperial Copyright Act*. While this piratical U.S. regime ended with the *Chace Act* of 1891, the fact

remains that until 1984 no book written by an American author could be sold in the United States unless printed there. This was known as the 'Manufacturing Clause'. It is against this historical backdrop of conflicting legal traditions and national self-interest that the *Canadian Copyright Act* of 1921 was born.

(b) Cultural Significance

Canada prides itself on being a bilingual and bicultural (English/French) as well as a multicultural society of which I will have more to say below. For now, however, it is important to note that Canada is also bi-juridic operating with Anglosphere Common Law in English-speaking Canada and European Civil Code in the Province of Quebec. Just as language structures human thought, law structures attitudes and behaviour contributing to the ethos or distinctiveness of a culture. With the exception of the Republic of South Africa, Canada is the only English-speaking country to operate with both legal traditions. In this regard McGill University Law School in Montreal was the first and I believe remains the only law school in the world to offer a joint program in Common Law and Civil Code. The difference between the two can be summed up as precedent (Common Law) versus principle (Civil Code) (Chartrand 2006). As human artifacts, of course, both have strengths and weaknesses and both are less than ideal in practice.

While the American Republican Revolution overturned the ancient regime of subordination by birth it nonetheless adopted English Common Law and precedent governing business including copyright (Commons 1924). The French Republican Revolution, on the other hand, overturned not just the regime but also the old French common law. It was replaced by the Napoleonic Code or what became the Civil Code. It is a legal code rooted in 'natural rights' as seen at the height of the 18th century Republican Revolution, *e.g.,* moral rights of creators.

Both legal traditions are mutagenicly at play in and out of the *Canadian Copyright Act*. In 1986 Canada, for example, introduced a 'neighbouring right' outside the Act: the Public Lending Right. This is intended to compensate Canadian authors when their books are lent to the public by libraries. With S.C. 1988, c. 15, the term 'moral rights' entered the Act for the first time. In turn, S.C 1997, c. 24 introduced levies on blank recording materials to compensate creators for private copying of their works. These rights do not exist in, or out of, the *U.S. Copyright Act.* Nonetheless, all moral rights in the Canadian Act are subject to contract, *i.e.,* they are not 'imprescriptibles'. By contrast, the Public Lending Right is imprescriptible and cannot be transferred to a publisher or agent, only to an author's heirs.

One critical Civil Code concept not in the present Act is 'the public domain'. The term public domain entered "Anglo-American copyright discourse through the French of the Berne Convention" in 1886 (M. Rose 2003, 84). The public domain is where knowledge is at home as a public good, *i.e.*, it is non-excludable and non-rivalrous in consumption. In the public domain everyone has the right to know and my use does not reduce the knowledge available to you. Intellectual property rights like copyright make new knowledge rivalrous and excludable by law, not by nature. It is protected, however, only for a limited time after which it too enters the public domain.

For that period, however, it is 'enclosed' (Boyle 2004). It is fixed in a work that is the exclusive possession of its creator who determines access and application. Generally, however, this is a corporate proprietor, *i.e.*, a legal rather than a natural person, using an 'all-rights' or 'blanket licence' granted by the creator and increasingly in Canada including a waiver of all moral rights. In other words, where intellectual property rights privatize or enclose knowledge limiting public access through price and other mechanisms, in the public domain knowledge is free to all without cost or constraint. In this sense we may speak of two knowledge domains – the public and the private. To paraphrase Nathan Rosenberg about science (Rosenberg 1994, 143), the public domain is an immense pool to which small annual increments from the private domain are made at the frontier. The true significance of the public domain is diminished, rather than enhanced, by extreme emphasis on the importance of only the most recent increments to that pool.

In this regard there has been an observable lack of interest in the Anglosphere legal tradition about common property such as the public domain over the last three hundred years. Carol Rose concludes it has been dominated by questions of private not public property (C. Rose 2004). In recent decades, however, ecology has exposed the tragedy of the public commons of the air, water, oceans and biosphere leading, in turn, to new law. The public domain too is a public commons but one unlike any other. The more it is used the bigger it grows; your taking does not decrease my share; or, paraphrasing Isaac Newton's famous aphorism: "We all stand on the shoulders of giants".

There may, however, be a premonition of an Anglosphere concept of the public domain implicit in the titles of the first *U.S. Copyright Act* of 1790 (noted above) and the 1710 *Statute of Queen Anne* or more formally, *An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned.*

The key word in both is 'learning'. Copyright is by statutory precedent to be judged by its contribution to learning. If so then Bill C-60 in 2005 continues an apparently counter-intuitive trend set in motion with S.C. 1988, c. 15 towards increased regulation (and paperwork) for educational institutions in their effort to encourage learning.

Canada is, however, not just bi-cultural (English/French) but also multicultural hosting millions of people from other cultural, linguistic and legal traditions – Arabic, Asian, African, Caribbean, European, Hindu, Latin American, *et al*. Furthermore, Canada has not two but three founding peoples – English, French and peoples of the First Nations, *i.e.*, its aboriginal peoples with their own varying linguistic and cultural traditions, as well as the Metis peoples of mixed aboriginal and European descent.

Anglosphere copyright and Civil Code author's rights are both based on the 'Person' – natural or legal; many other traditions are not. The Fourth World of 'aboriginal', "indigenous' or 'native' peoples has a concept of collective or communal intellectual property existing in perpetuity, *i.e.* not limited to the life of an individual creator plus some arbitrary number of years after death. To tribal peoples, a song, story or icon does not belong to an individual but to the collective. Rights are, however, often exercised by only one individual in each generation, sometimes through matrilineal descent.

Unlike the Third World, aboriginal nations do not constitute 'Nation-States'. They are therefore seldom represented on the international stage. Beyond the 1984 draft treaty on folkloric copyright (UNESCO/WIPO 1984), UNESCO passed a *Recommendation on Safeguarding Traditional Cultures and Folklore* in 1989. Another instrument was signed in 1994 by several indigenous peoples themselves: *The International Covenant on the Rights of Indigenous Nations.* This articulates a distinctive Fourth World view of intellectual property rights including copyright. At present, however, 'folkloric' and 'aboriginal heritage rights' have no standing in most courts of the world.

The United States, however, is an exception. It has recognized some Native American heritage rights. The U.S. Congress thus passed *Public Law 101-601: The Native American Graves Protection and Repatriation Act of 1990* converting native art and artifacts into "inalienable communal property". According to Clair Farrer (1994) this can logically be extended to include the written and spoken word embodied in stories and sacred tales. In Canada there is no corresponding legislation.

In the so-called Second World of the Communist Revolution, *e.g.,* Russia, China, Cuba, *etc.,* all "means of production" were the property of the State. With respect to intellectual property, moral rights of the creator were recognized, *i.e.,* paternity or authorship were recognized, but economic rights were limited to a onetime cash award or honorarium with all subsequent income reverting to the State.

In the Third World (or the South) there are historically varied traditions governing copyright. Early Islamic jurists, for example, recognized a creator's rights and offered protection against piracy (Habib 1998). However, traditional Islamic law treats infringement as a breach of ethics, not a criminal act of theft punishable by amputation of the right hand. Rather, punishment took the form of defamation of the infringer and casting shame on his tribe. Only in recent years have formal copyright statutes been adopted in many Islamic countries, *e.g.,* Saudi Arabia in 1989.

In much of the Third World, however, another tradition exists similar to that of the First Nations or aboriginal peoples of the Fourth World. This recognizes 'collective', 'communal' or 'folkloric' copyright. This contrasts with the Western individual-based concept. Folkloric copyright recognizes rights to all kinds of knowledge, ideas and innovations produced in what can be called 'the intellectual commons', *e.g.,* in villages among farmers, in forests among tribal peoples, *etc.*. This constitutes 'TEK', *i.e.,* traditional ecological knowledge. Such collective traditional rights have been infringed by Western-based corporations in a number of countries including India (Shiva 1993). As a multicultural Nation-State Canada hosts all these different cultural traditions. None, however, have been given legal standing except for Anglosphere copyright and, to a lesser extent, French author's rights.

(c) Economic Significance

IPRs including copyright provide the legal foundation for the industrial organization of the knowledge-based economy. They constitute what Harold Innis calls the staple of such an economy. Innis is arguably the founder of the only indigenous school of Canadian economics based on his 'staple theory'. He studied Canada's development - from cod to fur to timber to wheat. Each staple, according to Innis, engenders a distinctive patterning to the economy. Near the end of his career he moved on to study 'communications' and its matrix concluding, in effect, that it is the ultimate staple commodity (Innis 1950, 1951).

A knowledge-based economy is different in a number of ways from the traditional Standard Model of market economics in

which manufactured goods are the staple. First, ideally in a manufacturing economy a consumer acquires all benefits of a good at market price while producers recover all costs including the opportunity cost of entrepreneurship. In theory, there are no externalities, *e.g.*, there is no pollution. In such an economy there is, theoretically, no role for government. In a knowledge-based economy, however, creation of intellectual property rights by the State is necessary *before* a market can exist, *i.e.*, no government, no knowledge-based economy.

In the Standard Model, IPRs are justified by market failure, *i.e.*, when market price does not capture all benefits and all costs of production, *e.g.*, pollution costs. These are called external costs and benefits, *i.e.*, external to market price. IPRs, in this view, are created by the State as a protection of, and incentive to, the production of new knowledge which otherwise could be used freely by others (the so-called free-rider problem). In return, the State expects creators to make new knowledge available and that a market will be created in which such knowledge can be bought and sold. But while the State wishes to encourage creativity, it does not want to foster harmful market power. Accordingly, it builds in limitations to the rights granted to creators. Such limitations embrace both Time and Space. They are granted, assuming full disclosure of the new knowledge:

- only for a fixed period of time, *i.e.*, either a specified number of years and/or the life of the creator plus a fixed number of years; and,
- only for the fixation of new or original knowledge in material form, *i.e.*, it is not ideas but rather their fixation in material form that receives protection.

Eventually, however, all intellectual property (all knowledge) enters the public domain where it may be used by anyone without charge or limitation. Even while IPRs are in force, however, there are exceptions such as 'fair use' or 'fair dealing' under copyright. Similarly, national statutes and international conventions permit certain types of research using patented products and processes. And, governments retain authority to waive all IPRs in "situations of national emergency or other circumstances of extreme urgency" (WTO/TRIPS 1994, Article 31b), *e.g.*, following the anthrax terrorist attacks in 2001 the U.S. government threatened to revoke Bayer's pharmaceutical patent on the drug Cipro (BBC News October 24, 2001).

Second, the average cost curve in a knowledge-based economy is not the classical 'U' shape of manufacturing resulting from the diminishing marginal product of fixed capital and

increasing labour. Rather, it is 'L' shaped. Suppose, for illustration purposes, that the first unit of Windows VISTA cost $500 million to develop but the second, and all subsequent units, cost a $1.99 (once you have a floppy drive or a CD/DVD burner). This highlights the economic significance of copyright and IPRs. Without State-sponsored and enforced IPRs the enormous initial investment required for many innovations would be unprofitable, an act of charity growing the public domain. Arguably, however, the same holds for the individual artist/creator. At the extreme, there is Van Gogh, the epitome of the mad starving artist. He cut off his ear and sent it to his girl friend; spent much of his life in an insane asylum; and, in return, he gave the world sunflowers and starry nights available for only $1.99 at the local dollar store.

Third, fixing an expression in a new type of matrix, *e.g.*, DVDs, creates a new type of work in which copyright may subsist. It may also generate an entirely new 'techno-economic regime' involving a web of related installations and services (David 1990). In this regard, the printing press was the first engine of mass production. With Gutenberg's innovation of the 'moveable type' printing press in 1456 C.E., once a work was 'fixed' in type, copies became cheaper and cheaper as the costs of acquiring a work from an author and typesetting were spread over a larger and larger print run – the principle of mass production. It also gave rise, through progressive division and specialization of labour, to a network of new industrial activities and skills like publishing, copy editing, bookstores, newspapers, print advertising, *etc.* In this sense, a new matrix acts like what economist Paul David (1990) calls "a general purpose engine' or I call a general purpose tool (Chartrand 2006). These tend to generate "network externality effects of various kinds, and so make issues of compatibility standardization important for business strategy and public policy" (David 1990, 356). This is why so much is riding on the outcome of the current industrial battle about the format of high definition DVDs, *i.e.*, Sony's Blu-ray versus Toshiba's HD-DVD. Like the previous Betamax/VHS battle which matrix is adopted as the 'standard' will have a significant economic impact on consumers and especially on the competitors themselves.

It is not, however, just the matrix or medium that generates network effects. The expression or message itself can generate such effects or what are called 'spin-offs'. Consider a literary work, *e.g.*, a short story, which becomes a play through the licence of copyright. In turn, the play becomes a film which, in turn, is spun off into posters, toys, T-shirts, a soundtrack and video games. The film and the soundtrack are broadcast on television and radio. Eventually a book is made about making the movie, and then a

sequel is produced. All flow from the initial work; each represents a new way to fix creative expression in a new and different matrix.

Fourth, copyright (and other Anglosphere IPRs) is rooted in precedent, not principle and reason. The result is:

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

Paul David characterizes the existing Anglosphere IPR regime as 'a Panda's thumb', *i.e.*, "a striking example of evolutionary improvisation yielding an appendage that is inelegant yet serviceable" (David 1992).

Fifth, another economic implication of the Act concerns employment in a knowledge-based economy. Under the existing Act, copyright and moral rights belong to the employer, not the employee. This is doubly so for works made under Crown copyright (s.12, p. 81). Under the Civil Code, an employee retains moral rights over his or her work and may even enjoy some 'neighbouring rights'.

While the traditional manufacturing economy boasted life-long employment, the knowledge-based economy is increasingly characterized by contract work and self-employment. The pervasive use in the Anglosphere of blanket or all rights licences (in Canada including waiver of moral rights) extinguishes all future claims of the creator. If such trends continue, it can be expected that income distribution for contract and self-employed knowledge workers will increasing look like that of self-employed artists and entertainers who are second only to pensioners as an 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, *e.g.*, Pavoratti. This could be the future of the knowledge-based economy under the current Canadian copyright regime - no middle class.

Sixth, another economic implication of the Act and all State-sponsored IPRs is their predatory rather than defensive use. This includes 'patent wars' and 'copyright misuse'. In the case of patents, some corporations spend enormous sums of money on research projects that fail for one reason or another. Nonetheless, everything that can be patented is patented. These patents may be retained or sold to a patent holding company of one form or another. If a rival or competitor emerges who subsequently succeeds in making the technology work then that competitor may be charged with patent infringement. Whether the charge is valid

or not, the rival faces enormous legal costs defending itself or settling out of court. Both ways, competition is restrained and innovation inhibited.

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

> The defense of copyright misuse was raised … because Disney licensed its movie trailers subject to license terms that prohibit the licensees from using the movie trailers in a way that is "derogatory to or critical of the entertainment industry or of" Disney. That is, Disney uses the exclusive rights conferred upon it by the Copyright Act, not only to obtain a return for its creative efforts (which is consistent with the purposes of copyright protection), but also to suppress criticism (which is contrary to the purposes of copyright protection). (Tech Law Journal Daily E-Mail Alert, August 27, 2003)

As will be seen below, copyright misuse by repressing 'free speech' represents an existential threat to a 21st century information democracy taking copyright back to its origins as a means of censoring the public domain.

Seventh, finally and perhaps ironically, an alternative economic model more consonant with the contemporary knowledge-based economy was proposed just before Adam Smith's *The Wealth of Nations* made manufacturing king of economics in 1776. The alternative was proposed by the pre-revolutionary French Physiocrats who gave us the term 'economist'. Behind the Gallic façade of *laissez faire* and *laissez passer*, there was a deeper policy implication never realized because of the French Revolution (Samuels 1962, 159). The Physiocrats wanted to reach below the surface of the marketplace down to the legal foundations of capitalism (Commons 1924). For the Physiocrats, "the public interest is manifest in the continuing modification or reconstitution of the bundle of rights that comprise private property at any given time" (Samuels 1962, 161). By changing the nature of the bundle of rights that is copyright or patents, trademarks and industrial designs and by creating new

ones the State creates entrepreneurial opportunities in a *laissez faire, laissez passer* knowledge-based economy (OECD 1996). This legal strategy is a critical compliment to what the OECD calls the 'National Innovation System' (OECD 1997). Three examples will demonstrate – computer software, copyright collectives and national treatment.

First, until S.C. 1988, c. 15 (1980 in the U.S.) copyright was available only for human-readable 'works of art'. Since then Microsoft has become one of the largest and most profitable corporation in the world. Its foundation is, of course, copyright in the Windows operating program. Computer software, however, is the only type of work that crosses the copyright/patent barrier, *i.e.*, there are now both software copyrights and software patents. The difference in term between the two is striking – in Canada 20 years for a patent and 50 for a corporate copyright. In the U.S. it is 20 years versus 70. This suggests software is a *sui generis* type of work deserving its own distinct intellectual property classification rather than traditional copyright and patent protection.

Such reconsideration is also appropriate for another reason. The distinction between 'machine readable' and 'human readable' codified knowledge fuelled the 1970s debate about software copyright. Recognition in 1988 was a break with a long legal tradition restricting copyright to 'artistic works', *i.e.*, works carrying semiotic meaning from one human mind to another. A computer program, while codified and fixed in a communications medium, is intended to be decoded by a machine not by a human mind. It is intended to manipulate the flow of electrons in a circuit. In turn, such circuits may activate other machines and/or machine parts, *e.g.*, industrial robots in steel mills, auto plants and fabricating industries. Similarly, genomics programming is also codified and fixed in a communications medium but intended to be decoded by machines and molecules, not by a human mind. It is intended to manipulate the chemical bonds of atoms and molecules to analyze or synthesize biological compounds and living organisms with intended or designed characteristics. Software – computer and genomic - constitutes a form of 'soft-tooled' rather than 'codified' knowledge (Chartrand 2006).

Second, introduction of new rights in S.C. 1988, c. 15 and S.C. 1997 c. 24 was followed by formation of many new collective societies to receive and distribute royalties to creators/copyright proprietors as well as to monitor infringement. The result, as revealed in a 'WWW' or web survey, shows that there are 6 such societies in the U.K., 10 in the U.S. and 35 in Canada (Chartrand 2003).

Third, public sector support for the production of other goods & services such as cars is subject to harmonization under the rules of the World Trade Organization (WTO). Intellectual property rights, however, especially copyright, is subject only to 'national treatment'. This means Canada must extend to foreign authors and copyright owners the same rights as granted to Canadian nationals. These rights, however, need not and are not generally the same between countries. For example, the term of copyright in Canada is life of the artist plus fifty years. In the U.S., it is life of the artist plus seventy years. This means that the work of an American artist will enter the Canadian public domain twenty-five years earlier than in the U.S. In turn this means, for example, that a web-based entrepreneur could post and sell such work in Canada *and* the U.S. without infringing copyright in Canada. In a sense this would parallel what the U.S. did to Canada in the 19th century.

(d) Legal Significance

The *Canadian Copyright Act* is, of course, a work in progress: governments change, technology changes and the Act changes and evolves. Beginning with S.C. 1988, c. 15, however, the Government of Canada began a planned three phase process to modernize the Act. Phase II was completed with S.C. 1997 c. 24. Arguably Bill C-60 2005 was a step towards completing Phase III. With the defeat of the last government, however, the Bill died on the order paper. It is unclear when and if the new government will re-introduce the Bill or propose another or simply wait.

In the interim the existing Act will continue to be tested in the Courts. This exposes another critical facet of the Anglosphere copyright tradition. It is both statutory law enacted by a legislature and case law determined by judges. In this regard, the most important judicial precedent in the development of copyright (and intangible property like 'good will') was a dissenting opinion in the 1769 case of *Millar v. Taylor* (Commons 1924). In it Justice Yates explained why ideas are not protected. Drawing on the *Institutes of Justinian* (one of the sources of the Civil Code), he observed that ideas are not the object of property rights because they are like wild animals or *ferae naturae* that once set free belong to no one and everyone at the same time, *i.e.*, they are in the public domain. It is only their specific expression fixed in material form – commonly known as a work – that qualifies for protection (Sedgwick 1879).

Precedents set in different Anglosphere jurisdictions, *e.g.*, Australia, Canada, the U.K., the U.S., *etc*., can and do spill over, from time to time, into the courts and legislatures of other

jurisdictions. Thus genetic patents in the U.S. emerged from a 1980 Supreme Court decision in *Diamond v Chakrabarty* that reinterpreted existing law, *i.e.,* there was no change in the statute. Similarly, software patents in the U.S. emerged from a 1981 Supreme Court decision in *Diamond v. Diehr*. Arguably, these U.S. decisions set the stage for changes in Canadian legislation. Similarly, the U.S. *Digital Millennium Copyright Act* of 2000 may have served as a model and/or a warning for provisions proposed in Bill C-60, 2005. Of course, the growing body of Canadian copyright case law may also set precedents for other jurisdictions including the U.S., *e.g.,* the Supreme Court of Canada's rejection of a patent for the 'Harvard mouse'.

Another characteristic of Anglosphere Common Law is use of 'legal fictions'. Thus a root tension within the *Canadian Copyright Act* centres on the Common Law fiction of 'corporate legal personality'. A natural person is a living human being; a legal person is a body corporate. The vast bulk of productive assets are owned by fictitious legal persons such as corporations, companies, sociétés, Gesellschaften. Such persons are birthed under incorporation statutes that allow them to engage in a wide variety of profit making and charitable activities. In the Anglosphere tradition, however, legal and natural persons increasingly enjoy the same rights (Nace 2005) while under Civil Code they enjoy different rights.

It is with respect to knowledge that this difference is most apparent. Civil Code creator's rights are justified because the work of a natural person bears the "imprint of personality" that a body corporate cannot possess (Geller 1994). Such rights are intended to reward creative individuals for their contribution to our collective knowledge, to our culture. Argument about this imprint has fueled ongoing controversy between the United States and the European Union, especially France, over extending to American media corporations doing business in Europe rights restricted by Civil Code to natural person, *i.e.,* imprescriptible rights.

Following John Dewey's reasoning (1926) that a 'corporate legal personality' is anything the law says it is, so too is copyright. He also reasons, however, that when the law looks outside itself for insight, about questions such as corporate legal personality, the result can be unfortunate because "the human mind tends toward fusion rather than discrimination, and the result is confusion" (Dewey 1926, 670). In copyright, the law looks Janus-like two ways at once: towards copyright as trade regulation of a State sponsored monopoly and towards the natural rights of the creator. This is captured in the title of Part I of the Act: *Copyright and Moral Rights in Works* (p. 57).

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The tension between commerce and culture exists throughout the Anglosphere and to a lesser extent in Civil Code countries as well. In effect, there has been confusion between the natural rights of creators and trade regulation. It is, however, only a question of degree. Arguably, the U.S. is at one extreme. Thus in order to accede to the Berne Convention, Congress in 1989 took steps towards recognizing moral rights, *e.g.,* the *Visual Artists Protection Act* of 1990 which eventually became Section 106A of the U.S. Copyright Act. However, rights of paternity and integrity of one's work is available only to artists of 'recognized' reputation. Recognized by whom? By the courts! Similarly, the *Architectural Works Copyright Protection Act*, Pub. L. 101-650 was passed in 1990. Its moral rights provisions, however, are so weak that it has not been incorporated into the U.S. Act. It is, to my mind, an open question whether or not the United States has in fact fulfilled its obligations under the Berne Convention.

At the other extreme is France where arguably culture trumps commerce. This is perhaps most evident in the 'auteur' theory of filmmaking which arguably inhibited the commerce success of French filmmaking *vis-à-vis* Hollywood. In the Anglosphere, the initial owner of the 'print' (or negative in the case of a photograph) is the initial copyright owner. In France, the author of a motion picture is the director. Imperscriptible moral rights belong to the director. Accordingly, there can never be 'colourization' controversy in France as there is in the United States. The author/director has the final legal yes or no.

In France there are also many 'neighbouring rights' existing outside the principle Act. These are intended to reward the individual creator, not the corporate bottom-line. For example, there is a right of following sales or *droite de suite* in the visual arts. A percentage of the resale value of an artwork, painting, sculpture, *etc.,* is returned to the artist each time it is re-sold. This, like the Public Lending Right, is an imprescriptible. It should be noted, however, that the State of California has instituted a right of following sales for resident artists. Such 'neighbouring rights' offer, as will be seen, a potential compliment to copyright in development of a distinctive intellectual property rights regime at both the national and sub-national level.

So in the emerging knowledge-based economy, what shall it be? Commerce or culture? Profit or learning? The natural or the legal person? The private or public domain? What is the appropriate balance? Who decides and how are questions of growing political significance in a 21st century information democracy.

(e) Political Significance

The Act has significance for Canadian political life at four levels: international, national, provincial and constitutional. In brief, at the international level it plays a role in maintaining and extending Canadian cultural sovereignty. Nationally, it recognizes the distinctive contribution of French Canada to Confederation while failing to recognize Aboriginal or Native Heritage Rights and ignoring the growing power and concentration of copyright proprietors, *i.e.,* 'the media'. At the provincial level neighbouring rights, *i.e.,* those created outside the Act can be tailored to foster the 'creativity haven' of the 21st century. Constitutionally, the Act represents a clash between precedent and principle, specifically between the legal fiction of 'the Crown' and the Natural Person of the 18th century Republican Revolution. I will outline each in turn.

(i) International: Pursuit of 'Cultural Sovereignty'

The term 'cultural sovereignty' emerged from the French in the 1970s as Quebec independence dawned as the overwhelming existential Canadian political question of the day. Like many such French public policy concepts it migrated to Ottawa and was absorbed into the English-Canadian public policy lexicon. Cultural sovereignty today, however, involves the struggle to be heard at home and abroad above the booming voice of the American entertainment industry that penetrates the cultural marketplace of every nation on earth. The one remaining superpower is also a global cultural colossus spanning East, West, North and South. Fuelled in part by the peculiar pricing methods of the entertainment industry, *i.e*., a rate per viewer rather than the production cost of the work itself, American entertainment programming essentially 'breaks even' in its domestic market and then earns profits from a global audience. In fact, India is the only other Nation-State to have a domestic market large enough to support a fully developed 'world-class' film industry. China is, of course, another question due to political Leninism continuing after abandoning economic Marxism in favour of the Market. The relatively vibrant Hong Kong film industry, however, suggests what might happen if Leninism too was abandoned on the mainland. In this regard, it is important to remember that the three largest Nation-States by population are: China, India and the United States, in that order.

As dollars go to 'American' programming, however, they flow out of the country leaving the domestic arts industry poorer financially and arguably culturally. Local production cannot, due to limited audience size afford 'world-class' standards, at least in the media and performing arts, *i.e.,* the 'collective' arts of film,

sound recording, live stage and television. In the literary and visual arts, *i.e.*, the 'solitary' arts, however, world class standards are set by individual creators such as Margaret Atwood and Robertson Davies and the economics of production are less inhibiting to local competition. In the solitary arts it becomes more a question of talent than of budget.

The battle for cultural sovereignty is fought on several fronts. First, there is the diplomatic front where Canada, France and Sweden, among others, are pressing the World Trade Organization to maintain and extend GATT (General Agreement on Tariffs & Trade) exemptions of 'cultural goods and services' from free trade restrictions. Arguably, success is at hand:

> On 20 October 2005, the General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO) approved the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*. The Convention, a product of years of intensive negotiation, was sponsored by both Canada and France. The Government of Quebec enthusiastically supported Canada's efforts. The Convention received widespread support: 148 countries voted in favour. The United States and Israel voted against, and Australia, Honduras, Liberia and Nicaragua abstained. (Carnaghan 2006)

Second is the economic front where again Canada, France, Sweden and many other countries have created a web of international film and television co-production agreements to generate the high production standards demanded by audiences especially in the American marketplace. To the degree such works are 'cultural clones', *i.e.*, intended to *seem* 'American' then to that degree the objective is commercial, not cultural. The U.S. government has understandably complained that the distinction is not being respected by many of its competitors for the American entertainment dollar.

In Europe, individual member-states and the European Union are actively engaged in manipulating the regulatory environment to 'engineer' a financially viable entertainment arts industry through control of the electromagnetic spectrum and other communications media. The European Union itself is also offering subsidies and other support to explicitly help domestic media companies compete against Hollywood and Silicon Valley (Chartrand 2002).

Canada, of course, and some of its provinces, has been a pioneer in developing 'Hollywood North', *i.e.*, competing for U.S. film and TV production locations, through special employment tax credits and other subsidies (Acheson, K. & Maule, C. 1994). Australia & New Zealand have similarly been active in supporting their 'cultural industries'. Eire, or the Republic of Ireland, has arguably gone furthest by exempting all copyright income earned world-wide by a resident natural person from income tax.

The third front in the fight for cultural sovereignty is legal, specifically the manipulation of intellectual property rights including copyright. As previously noted, Nation-States can shape their IPR regimes to enhance competitiveness constrained only by 'national treatment' required under the WTO's TRIPS Agreement. In the case of Canada, the Act is diverging more and more from the traditional Anglosphere model, *e.g.*, in the U.S. It is adopting more and more provisions from the European Civil Code tradition, *e.g.*, moral rights and levies on blank recording media. The French fact is asserting itself through the Act. At the same time, however, the Act struggles to maintain its Anglosphere 'industrial' character requiring all rights to be subject to assignment or waiver by creators to copyright proprietors. There are no 'imprescriptibles' in the Act. This is a unique Canadian solution which may, or may not, stand the test of time and logic. Arguably, it is a Panda's Thumb at best. It may simply be, however, that it is the fruit of a poisonous tree that should be cut back and restricted to trade regulation while rewarding creators through 'neighbouring rights' tailored to Canadian conditions.

(ii) National: Quebec, the First Nations & Media Concentration

The *Canadian Copyright Act* has significance for national political life by: (i) recognizing the distinctive contribution of French Canada to Confederation; (ii) failing to recognize Aboriginal or Native Heritage Rights; and, (iii) failing to recognize the growing power and concentration of copyright proprietors or what is commonly called 'the media'. I will review each in turn.

First, the 'two solitudes' of English & French Canada is a central existential fact of being Canadian. Increasing expressed as 'the French fact' it is, among federal statutes, arguably most evident in the Act. Moral rights and other Civil Code provisions have thus been introduced based upon the French experience. Neighbouring rights such as Public Lending Rights and Status of the Artist legislation reflect the same source. This tradition places principle and culture ahead of precedent and commerce.

Introduction of such 'French' provisions into the Act and related neighbouring rights is also arguably a function of the global French language marketplace. While serving as Research Director for the Canada Council during the late 1970s until 1989 I heard accounts of many talented French-speaking artists and entertainers leaving Canada for France to enjoy the significantly better rights and remuneration available under the Civil Code. The exodus may, or may not, have taken some of the wind out of the sails of Quebec separatism after 1976. Those who stayed in Canada found it necessary, in many cases, to enter the Anglosphere marketplace where some such as Celine Dion and Circle de Soleil have enjoyed spectacular success. Nonetheless, today, the English-speaking creative community also lobbies for moral rights and the status of the artist, all pioneered in Quebec but based more generally on the 'French Canadian fact'.

Second, beyond the 'two solitudes' there is the growing existential question of land claims by the First Nations peoples. Past failure to honour treaty obligations or to make treaties with the native peoples, *e.g.,* in British Columbia, has rebounded on Canada, its provinces and citizens through court decision and the rule of law. Implicit is the issue of Native or Aboriginal Heritage Rights, *i.e.,* a claim not to land but to recognition and ownership of the products of their own varied cultures as 'nations'. Civil Code and Common Law 'copyright' differ with respect to temporary rights granted to a natural and/or legal person after which all work enters the public domain where it is free for all. Among the First Nations, however, the distinction is between temporary individual rights and collective perpetual rights flowing from an 'oral' not written tradition.

Among the First Nations oral communication remains the dominant means of inter-generational and intra-generational knowledge transfer as song and story and pattern and picture. Sometimes only one in each generation of a family, tribe or nation is allowed to 'pass on' the tradition – as long as the rivers flow and the sun shines – never entering the public domain. When it does enter the public domain the secret is revealed, the magic gone, the line ended, the tradition possibly becoming extinct. Sometimes, however, others may make money in the process.

The question of "appropriation" has arisen in the creative community regarding the telling of tales and creation of works based on Fourth World cultures generally. On the one hand, some recognize the ownership of Fourth World peoples of their own culture. On the other hand, others believe if artists restrict themselves to their own culture all of humanity will be deprived. An extreme example is the alleged case of the thunderbird motif of

the Kwakiutl people of west coast Canada. I say 'alleged' because I read about it in a 1980s *Globe & Mail* news article which I failed to reference at the time and have not since tracked down. True or not, it illustrates a problem called "cultural vampirism".

Kwakiutl women knitted woolen sweaters in their villages using the thunderbird design for decades if not generations. A pair of Japanese businessmen saw the sweaters on a tour in the mid-80s and promptly mass produced them in Asia. Apparently over $100 million in sales were made. Not a penny returned to the Kwakiutl people. Such images are in the "public domain" according to First World intellectual property rights – Civil Code or Common Law; the Kwakiutl have no standing in court to seek damages and compensation for the appropriation of their cultural property for the profit of others.

The question is 'legal standing' in the courts, *e.g.,* as created by American *Public Law 101-601: The Native American Graves Protection and Repatriation Act of 1990* (Farrer 1994) This statute and the resulting 'de-accessioning' of works made by First Nations peoples from museums around the world reflects the success of the Zuni people of the southwest United States in suing a museum. The museum sought to preserve sacred sculptures for their beauty but, for religious reasons, they could not be preserved but rather had to be allowed to dissolve into their elements. A U.S. court found for the Zuni. Whether or not Native Heritage Rights should be recognized in the *Canadian Copyright Act, e.g.,* by exemption, or in separate 'neighbouring rights' legislation is an open question. Nonetheless, recognition of Native Heritage Rights and 'legal standing' for the First Nations peoples should be, in my opinion, part of any final resolution of the existential land claims of the First Nations peoples of Canada.

Third, since the 1969 *Royal Commission on Newspapers* the question of press ownership has been publicly debated and studied in Canada. Globally some five major conglomerate firms dominate the arts, entertainment and news industries. Their legal foundation is copyright.

Arguably, Adam Smith's alarm about 'political economy', *i.e.,* with economic profit translating into political power and political power translating into profit, is being recycled in modern times. The relationship between politics and profit is a central theme of the knowledge-based economy. In the crudest terms, a knowledge-based economy means the monetarization of information. Political power writes the intellectual property statutes defining knowledge as property. Private proprietors strive

to maximize profit by re-structuring the business environment through such statutes.

According to Jessica Litman in the United States this has got to the point that the "copyright industries… work out the details of the copyright law among themselves, before passing the finished product on to a compliant Congress for enactment" (Litman 1996). The incestuous relationship between the legislative process and copyright proprietors recently surfaced in California where:

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

This creates a political economic dilemma for a 21st century information democracy. Politicians need the media especially favourable media coverage plus campaign donations to get elected. Media conglomerates, unlike all other donors, provide both. In turn, the conglomerates need politicians to pass legislation increasing profitability, limiting competition and generally favouring their interests. Hand meets glove. Traditionally, the answer has been to 'break up' such media conglomerates based on ownership restrictions, *e.g.*, can the owner of the only newspaper in a city also be the owner of the only local private television station? Arguably, a similar effect can be achieved by changing copyright. Media concentration is potentially an existential political problem especially when copyright misuse is factored into the equation of power.

(iii) Provincial: Neighbouring Rights

While copyright is constitutionally an explicitly federal responsibility, neighbouring rights are not. The ability of the Provinces to legislate rights for their creative residents is not inhibited. In the United States, for example, the State of California has legislated rights of following sales for its resident visual artists. The State of New York attempted but failed to introduce similar legislation. To the degree that such neighbouring rights are restricted to resident natural persons they are not 'subsidies' in terms of the WTO. They are, nonetheless, a potentially significant

instrument in enhancing the competitiveness of both Canada and/or its provinces in a global knowledge-based economy. Creative talent is the spark plug of such an economy. Such new rights would be intended to foster a 'creativity haven' where talent would want to live and work. In this regard, Eire (the Republic of Ireland) has effectively used exemption of copyright income earned by natural persons resident in the Republic for at least six months a year. This was part of successful national industrial strategy that has made 'the Celtic Tiger' of the EU.

There is a wide spectrum of potential 'neighbouring rights' that could be introduced at the provincial level. These include:

- Aboriginal Heritage Rights granting standing in provincial courts to aboriginal peoples with respect to alleged appropriation of their intellectual property;
- Public Exhibition Rights to compensate public galleries and museums for administration and payment to resident creators;
- Public Lending Rights for works of resident creators borrowed from public libraries including media works. Provincial rights could be coordinated with the national Public Lending Rights Commission housed in the Canada Council;
- Rights of Following Sale for works of resident creators in all disciplines including the media arts. A work sold early in a career for a low price would thus generate ongoing income to the creator on subsequent re-sale;
- Status of the Artist legislation strengthening collective and individual bargaining rights of creators *vis-à-vis* copyright proprietors; and,
- Tax exemption of copyright income earned by resident creators – basement inventors, poets, playwrights, *et al.*

Constitutional: The Natural Person and the Crown

The concept of the 'natural person' and 'natural rights' emerged out of the European Enlightenment and the 18th century Republican Revolution that overthrew an ancient regime of subordination by birth. These led to modern popular democracy and the principle of one person, one vote.

Constitutional expression of democracy in a republic, however, is radically different than in a constitutional monarchy such as Canada. In a republic, authority is rooted in the citizen or 'We, the People'; in a constitutional monarchy, it is rooted in the legal fiction of 'the Crown'. Thus a statute passed by the

Parliament of Canada becomes law only with 'Royal Assent' including the *Canadian Copyright Act*. In the Act itself the clash between these two constitutional principles – the Natural Person and the Crown - is growing. Through principle, the Act increasingly recognizes the natural rights of the author/creator. Through precedent, however, the Act links us back to Crown grants of industrial privilege (*e.g.*, increasing media concentration), censorship of the public domain (*e.g.*, 'Son of Sam' and neighbouring 'Anti-Hate' legislation) and subordination of the author/creator to bodies corporate, *i.e.*, to copyright proprietors. Before exploring historical and contemporary expressions of this clash, it is important to more clearly define the nature of 'the Crown'.

Unlike the United States with its constitutional separation of powers, a central principle of constitutional monarchy is 'the indivisibility of the Crown'. Power flows down in the name of Her Majesty, not up from the people. Similarly, the executive, legislative and judicial branches are all subject to, if not agents of, Her Majesty. So too are all natural and legal persons as well as their property. Everything and everyone is subject to the pleasure of Her Majesty. In federal constitutional monarchies such as Australia and Canada indivisibility also applies at the jurisdictional level, *e.g.*, the province of Saskatchewan in right of Her Majesty is indivisibly linked to the Dominion of Canada in right of Her Majesty. Of course, this is all a 'legal fiction'.

In political terms, however, this means that a 'Bill of Rights' such as the *Canadian Charter of Rights and Freedoms*, unlike the American First Amendment, is subject to a 'notwithstanding' clause that allows a parliamentary or legislative majority with the assent of Her Majesty's representative - the Governor General or Lieutenant Governor of a province - to abrogate any and all rights contained therein including freedom of the press. While more formal than the unwritten British constitution, these Canadian political rights are significantly less binding than those of the *U.S. Bill of Rights*, Amendments 1-10 to the *U.S. Constitution* All three, however, share a common historical nexus with copyright.

As previously noted Stationers' Copyright and patents of invention were the only monopolies to escape dissolution under the *Statute of Monopolies* during the reign of James I. In the case of copyright, the reason was its political usefulness in censoring the public domain. This Statute, however, was only an opening salvo in what became a civil war between Parliament and the Crown under James' son, Charles I.

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Arguably, the final constitutional battle between the Crown and Parliament was "The Glorious Revolution of 1689" when the last of the Stuart monarchs, the catholic James II, was deposed by an Act of Parliament and replaced by his 'protestant' daughter Mary and her consort William of Orange. The resulting 'Bill of Rights' of 1689 established free speech in Parliament which marked the beginning of a 'free press' in England or what subsequently became the United Kingdom and its colonies.

In 1695 the last of the *Licensing Acts* lapsed. Government control of the press was henceforth limited to post-publication libel law. Suspension further spurred development of a free press that could publish without prior consent of the authorities. Without the *Licensing Act*, however, the Stationer's perpetual copyright also lapsed and a rival appeared on the horizon – Scotland. While England and Scotland had been under the same monarch since 1603 they remained separate countries with separate legislatures and separate laws. This meant that Stationer's Copyright did not have force in Scotland. As long as the licensing laws were in place, however, London booksellers could limit competition. With their expiration, competition grew.

There were many attempts by the Stationer's Company to restore the old licensing system in the late 1690s and early 1700s, but it was not until 1710 that a new copyright system came into force. In fact between 1695 and 1710, Scottish and domestic 'pirates' made it increasingly difficult for London booksellers. Any Scottish pirate could take a successful work, re-typeset it and then sell it at a much lower price with no payments for the author, editor or promotion.

The *Statute of Queen Anne* of 1710 had three objectives. First, it was intended to prevent any future monopoly of the book trade, *i.e.,* freedom of the press. Second, it was intended to draw Scotland under a common copyright law and thereby 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.

Until the Statute, the author had no economic and limited moral rights to a work after it was sold. Generally, a work was bought outright by a printer/bookseller/publisher for a flat one-time fee much like an all-rights or blanket license today. No royalties flowed to the author from subsequent sales. They did enjoy certain 'moral rights' including the right not to have the text changed and the right of attribution. Such rights, however, were based on ethical practices of the printers' guild, not law.

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The *Statute of Queen Anne* is considered the turning point in the history of copyright because it was the first law to formally recognize an author's rights and, more importantly, it effectively terminated prior government censorship through pre-publication licensing. Recognition of an author's rights by the Statute was, however, principally a device to attain its primary objective, *i.e.*, abolition of the Stationer's monopoly (Feather 1988, 31-36). In effect, it was a trade regulation bill and did not recognize any inherent and inalienable rights of the author (Shirata 1999).

In the end, the *Statute of Queen Anne* extended the existing copyright monopoly of the Stationer's Company for 21 years and granted an exclusive right for new works for fourteen years with an option to renew for the same period. Furthermore, the Statute recognized the author as the initial copyright holder to encourage "learned men to compose and write useful books". Nonetheless, it also explicitly recognized the interests of "proprietors".

The change was, however, less a boon to authors than to publishers because it meant that copyright was to have another function. Rather than simply being the right of a publisher to be protected against piracy, copyright would henceforth be a concept embracing all the rights that an author might have in a published work. And since copyright was transferable by contract to the publisher, the change meant that the proprietor would enjoy any new rights granted the author (Patterson 1968).

Abuse of copyright under the Crown (and Cromwell's Commonwealth) led Thomas Jefferson to initially oppose any American copyright act. Such abuse also led to the First Amendment of the U.S. Constitution which arguably is directly related to copyright and hence to an Anglosphere concept of the public domain (Alstyne 2004):

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The historical connection is the pre-Statute *Licensing Acts* used to control the press, restrict religious and political debate and thereby censor the public domain. Pre-publication licensing also maintained perpetual copyright for the Stationer's Company. In this sense, the First Amendment is a sibling of copyright serving to define the public domain. David Lange takes this argument further arguing that the public domain itself should be recognized as having a status analogous to citizenship with affirmative rights. "I

want the public domain, however it may be defined, to secure these elemental aspirations which I believe innate in human kind: to think and to imagine, to remember and appropriate, to play and to create" (Lange 2004, 483).

Unless the public domain as legal principle is reconciled with the public domain as legal precedent, Lange's vision will, however, remain unrealized. In fact, the progressive extension of the term of copyright in the United States, now exceeding 100 years – life of the author plus 70 years – suggests that *de facto* perpetual copyright has returned. This sense is enhanced by the ubiquitous spread of all rights or blanket licenses that extinguish a creator's rights in favour of corporate proprietors who continue to argue for more rights and draconian enforcement of existing rights in order to preserve 'the starving artist'. Increasing media concentration and the appearance of copyright misuse adds a distinctly monopolistic flavour to a brew that may realize Thomas Jefferson's worst fears about copyright as a threat to democracy.

In Canada, as a constitutional monarchy, limitation by the Crown of copyright as a 'natural right' is reflected in one of the most peculiar chapters in the history of the *Canadian Copyright Act*, the so-called 'Son of Sam' or 'profit from authorship respecting a crime' legislation. In 1997 Liberal Member of Parliament for Scarborough-West, Mr. Tom Wappel, introduced two private member's bills both entitled *An Act to amend the Criminal Code and the Copyright Act* (Bill C-205, p. 8 and Bill C-220, p. 9). Both were passed by the House of Commons but not by the Senate. Mr. Wappel proposed to extend Crown copyright under section 12 of the Act (p. 81) to "a person who has been convicted of an offense under the Criminal Code" and any copyright in any work by that person based on that offense "shall belong to Her Majesty and shall subsist for the time that the copyright would subsist if it belonged to the convicted person".

While these two bills did not become law they highlight that under the existing Canadian Constitution, and therefore under the Act, there can never be, with one very important qualification, "inalienable, unattachable, impresciptible and unrenounceable" rights of the author/creator. The Crown trumps all. The qualification, however, concerns "copyright proprietors". Such rights could be granted to natural persons relative, not to the Crown, but to other legal persons. In essence, one legal fiction 'the Crown' could, with respect to the natural rights of the author/creator, trump another legal fiction, that of "legal corporate personality'. In the process, growing media concentration would be mitigated by increasing the rights of all knowledge workers. Historically, such a change in bargaining power would parallel that

in the 1880s when Anglosphere governments around the world abrogated conspiracy laws against trade unions in order to balance the growing power of the 'Robber Barons'. It would also realize the eloquent words of Zechariah Chafee when he wrote:

> … 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)

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Harry Hillman Chartrand, PhD
Cultural Economist & Publisher
Compiler Press
Lecturer, Economics, University of Saskatchewan
Lecturer, Contemporary Issues, University of the Arctic

215 Lake Crescent
Saskatoon, Saskachewan, Canada
S7H 3A1
Tele/Fax: (306) 244-6945

Compiler Press: http://members.shaw.ca/compilerpress/
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