

POSTSCRIPT 2016
The Arm's Length Principle & the Arts:
An International Perspective – Past, Present & Future (1985)
Funding the Fine Arts:
An International Political Economic Assessment (2001)

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**The Arm's Length Principle & the Arts:
An International Perspective
(1985)**

In September 1985 my research officer, Claire McCaughey, and I, as Research Director, submitted a policy research study to the Canada Council (for the Arts) entitled: *The Arm's Length Principle & the Arts: An International Perspective – Past, Present & Future*. The report presented, among other things, three principle findings.

- i – The Arm's Length Principle
- ii – Four Alternative Roles; and,
- iii - Trends

i – Arm's Length Principle

The report established the historical and legal basis of the arm's length principle. The principle applies to the role of the State in funding selected activities, e.g., the Fine Arts, through an intermediary institution such as an arts council. The total financial amount of support is determined by the State but its distribution is based on apolitical criteria such as excellence as determined by, among other things, peer evaluation. By the Fine Arts I mean what in French is called *Les Beaux Arts* or more crudely in English, the arts-for-arts-sake arts. Thus the criterion of success is excellence, not profit or votes.

ii – Four Alternative Roles

The report presented a four-fold model of alternative roles for the State in support of the Fine Arts. In summary:

Exhibit 1

Four Alternative Roles for Public Support of the Fine Art 1985	
Facilitator	Tax exempt charitable donations with aesthetic priorities set by individual donors - USA
Patron	Arm's length council distributing funds by peer assessed excellence - UK
Architect	Ministry of Culture designing facilities, funding operations and recognizing the special status of the artist - France
Engineer	Ownership of the means of production distributing funds according to a State imposed aesthetic - USSR

iii - Trends

The Report identified three emerging trends:

- (a) Convergence;
- (b) Lotteries; and,
- (c) Commercial Realism.

(a) Convergence

By 1985 it was apparent that Nation States were beginning to diversify their roles. Thus in the USA, traditionally a Facilitator, the National Endowment for the Arts (an arts council Patron) was founded. In the UK and European Community,

(traditional Patron and Architect, respectively) began to encourage private donations through tax exemption, *i.e.*, a Facilitator. Canada, traditionally a Patron, established the federal department of Canadian Cultural Heritage, *i.e.*, an Architect.

(b) Lotteries

By 1985 lottery funding of the Fine Arts remained a matter of controversy within the arts community in Canada and the USA. Legalized in Canada in 1970, federal lottery funding was offered to the Canada Council in the early 1980s. It refused for two reasons. First, it was argued (incorrectly) that such funding would be unstable. Second, the question was asked: How can such a beautiful thing as Fine Art be supported by a vice like gambling? In Europe and Australia, on the other hand, the Fine Arts accepted lottery funding.

(c) Commercial Realism

By 1985 the vocabulary changed (unfortunately in my opinion) from the Arts or the Arts Industries to the Cultural Industries. UNESCO played a major role in this changed terminology. Given the overwhelming presence of the American entertainment industry on the screens, sound systems and bookshelves of the 'free' world (and behind the Iron and Bamboo Curtains too), many Nation States recognized the need to subsidize and support both for profit and non-profit components of the so-called Cultural Industries so that their national voice could be heard on the world stage. Potential trade disputes were mitigated by sections of the 1949 *General Agreement on Tariffs and Trade* (GATT) that grant Member States exemptions for the Arts: Articles: III, 10; IV; XX a, d & f. Subsequently, in 2005, the *UNESCO Convention on the Protection and Promotion of Diversity of Cultural Expression* established such exemptions as a settled matter of international law.

The report was subsequently presented at a conference in Chicago and published in *Who's to Pay? for the Arts: The International Search for Models of Support*, M.C. Cummings Jr & J. Mark Davidson Schuster (eds.), American Council for the Arts, NYC, 1989.

Funding the Fine Arts: An International Political Economic Assessment (2001)

In 2001 the Association of Nordic Theatre Scholars invited me to update the 1985 report. It was subsequently published as "Funding the Fine Arts: An International Political Economic Assessment", *Nordic Theatre Studies*, Vol. 14, 2002. It is important to note that the USSR had ceased to exist by this time and the Second World of command economies including the People's Republic of China (that gave up Marxist economics but retained Leninist politics), gradually melted into the global free trade economy of the World Trade Organization (WTO) in 1995.

The update, in addition to summarizing the four-fold model, presented, among other things, three principle findings:

- i --Fiscal Arguments;
- ii - Previous Trends; and,
- iii - Emerging Trends

i -Fiscal Arguments

The fiscal policy of a State involves the choice to tax and/or spend. Such choices are primarily political intended to gain electoral benefit. There are at least three economic perspectives that can be used to assess such choices: (a) Business Economics; (b) Political Economics; and, (c) Welfare Economics.

(a) Business Economics assesses the economic size and importance of an industrial sector with respect to employment and contribution to Gross Domestic Product (GDP). The greater the employment and contribution the more likely the State will support it.

In the case of the Fine Arts, measured as a standalone sector, employment and contribution to GDP is small. Furthermore, in the case of the live performing arts there is William Baumol's 'income gap' between what can be reasonably charged at the box office and the cost of production. In fact the live performing arts are an 'unproductive industry'. Other industries enjoy increasing productivity as new and improved capital increases output per worker. In the live performing arts increased productivity is not possible. It takes the same time to rehearse and perform a Vivaldi concerto today as when first performed. In other words, the live performing arts are a black hole in business terms. Subsidies and tax expenditures and/or private donations must increase over time if rising production costs are to be met.

(b) Political Economics considers the 'political' constituency for the Fine Arts. On the demand-side the audience tends to be 'elite' and 'effeminate', *i.e.*, highly educated, financially well off and slightly more female. On the supply-side, producers also tend to be highly educated but financially not as well off and slightly more male.

On the demand-side, a financially affluent, numerically small and predominantly female audience presents political problems. Is it welfare for the rich? Is it politically productive to subsidize upper-class rather than working-class women, particularly in predominantly 'jock' cultures?

Furthermore, the fact that the Fine Arts are led by an *avant-garde* ruthlessly critical of the 'Powers-that-Be' also presents political problems. Why should government fund its critics?

(c) Welfare Economics is concerned with the balance between equity and efficiency. In this view the Fine Arts are a 'merit good'. A merit good is one whose consumption or production generates benefits external to market price. It is the opposite of a demerit good, *e.g.* smoking or, at the extreme, criminal activity. As with 'public goods', the private market cannot profitably provide the quantity or quality that a society considers adequate. Today, for example, education is considered a merit good because it not only improves an individual's career prospects but also makes them a better citizen.

To individual donors and many within the private and public sectors the Fine Arts are a merit good. The merit audience is as old as the Fine Arts themselves. Globally aristocratic and ecclesiastic patrons of past centuries funded them. Today, public and private sector patrons support them. It is the tradition of "multiple funding sources", *i.e.*, box office revenue plus public and private donations that supports the independence of the Fine Arts.

ii - Previous Trends 1985

With respect to previously trends, convergence continued between 1985 and 2001. Australia, a traditional Patron, made the Sydney Opera a federal budgetary 'line item' like an Architect. In 1994 the federal government tried to enfold the Canada Council for the Arts with the Social Sciences & Humanities Research Council (SSHRC) and the International Cultural Relations Bureau of External Affairs & International Trade Canada. The effort failed by one vote in the Canadian Senate. The federal government did, however, succeed in compelling the Canada Council to adopt its wordmark acting like an Architect even though the Council is legally an agent of the legislative not the executive branch. In the USA the culture wars resulted in significant funding cuts to the NEA and, in effect, legislative censorship of federal funding of the *avant-garde* like an Engineer. In the UK, the Arts Council of Great Britain founded in 1945 was dismantled by the Thatcher government, support was regionalized and lottery funding became an increasingly important source of funding.

Lotteries became increasingly important not only in England. In Canada, however, much of the new funding went to regional, local or community-based arts activities, not the Fine Arts. At the state level in the USA revenues from the Massachusetts 'arts lottery' were so large that funds were capped and the excess diverted to support activities far removed— roads, sewers, *et al.* Remaining funds favoured community-based rather than the professional Fine Arts.

Commercial Realism continued to mature between 1986 and 2001. As a political constituency the entertainment arts industry is better organized and funded than the Fine Arts. It also tends to be less controversial because international rather than local standards are at play. It also promises to deliver profits and jobs. The result: public funding, especially tax breaks for the TV and movie industries, were increasingly made to support commercial realism rather than the Fine Arts, *e.g.*, Canada's efforts to make Toronto or Vancouver 'Hollywood North'.

iii - Emerging Trends 2001

Four emerging trends were identified in 2001:

- (a) Cultural Sovereignty & Supra-National Cultural Affairs
- (b) Equifinality, Egalitarianism & Re-Definition
- (c) Market Realism, WIPO, WTO & WWW
- (d) Subsidiarity, the Second Wave & the Little Sisters

(a) Cultural Sovereignty & Supra-National Cultural Affairs

By 2001 the battle for cultural sovereignty (a term deriving from Quebec's attempt to separate from Canada) was fought on two fronts. First was the economic front where Canada, France and Sweden, among others, pressed the World Trade Organization to maintain the exemption of artistic goods & services. Together with other Nation States, they wove a web of international film and television co-production agreements intended to generate the high production standards demanded by audiences especially in the American marketplace. The European Union adjusted its regulatory environment attempting to engineer a financially viable industry. The European Investment Bank assisted European media companies compete against Hollywood and Silicon Valley. Such measures generally followed earlier Canadian examples.

The second front was international institution building and related supra-national cultural affairs detailed in the original article. Principally focused on exemption from free trade restrictions, these multilateral efforts culminated with the 2005 UNESCO *Convention on the Protection and Promotion of Diversity of Cultural Expression*. It established such exemptions as a settled matter of international law. One hundred and forty-eight countries approved; the United States and Israel voted against; four abstained.

(b) Equifinality, Egalitarianism & Re-Definition

Among other things equifinality refers to different initial conditions leading to the same outcome. In this case by 2001 most Patron states had created *de facto* ministries of culture adopting the Architect role. Most adjusted their tax systems to encourage corporate and private giving to charitable causes including the Fine Arts adopting the Facilitator role. Most Architect states similarly adjusted their tax systems to play a Facilitator role and many created *de facto* arm's length arts councils thereby adopting the Patron role. With respect to the Entertainment Arts, Facilitator, Patron and Architect states adopted the Engineer role striving to create a financially viable industry often in collaboration with foreign allies through co-production agreements.

Egalitarianism has historically been contrasted with Elitism. Between 1985 and 2001 there was a notable trend away from traditional politics of 'elite accommodation' towards the politics of polls. The elite and contrarian nature of the Fine Arts led to a decline in its political influence and fiscal resources.

Without clear definition the Fine Arts were unable to effectively compete in the court of public opinion with sectors such as business, education, health, science and technology. The Fine Arts exists within the wider context of an Arts Industry including the Amateur, Applied, Entertainment, Fine and Heritage Arts. In summary:

Exhibit 2
The Arts Industry

ART	AMATEUR Self-actualization	APPLIED Marriage of aesthetic/ utilitarian	ENTERTAINMENT Amusement, diversion, enjoyment, recreation	FINE Enlightenment	HERITAGE Enrichment. social cohesion, continuity
Literary	Non-profit	For-profit	For-profit	Non-profit	Non-profit
Media	Non-profit	For-profit	For-profit	Non-profit	Non-profit
Performing	Non-profit	For-profit	For-profit	Non-profit	Non-profit
Visual	Non-profit	For-profit	For-profit	Non-profit	Non-profit

Using this definition the Arts Industry includes all profit and non-profit (including public) enterprise and institutions including incorporated and unincorporated businesses as well as self-employed artists that:

- i - use one or more of the Arts as a primary factor of production, *e.g.*, advertising, fashion, industrial and product design;
- ii - use one or more of the Arts as a tied-good in consumption, *e.g.*, home entertainment hardware, magazines and newspapers; and/or,

- iii -produce one or more of the Arts as final output, *i.e.*, create, produce, distribute and/or conserve goods and services in the literary, media, performing, visual and/or heritage arts.

While the Fine Arts represent a tiny part of the whole it plays three crucial roles. It is the research & development sector, standard setter and talent training ground for the entire industry.

(c) Market Realism, WIPO, WTO & WWW

With the end of the Market/Marx Wars economic globalization formally began with creation of the World Trade Organization (WTO) in 1995. The market triumphed. In diplomatic terms the WTO is a ‘single undertaking’, that is, a set of legal instruments constituting a single package permitting only a single signature without reservation. To join the WTO, a Nation State must accept all agreements in the package.

One of these agreements is the *General Agreement on Tariffs & Trade* (GATT). Articles: III, 10; IV; XX a, d & f exempt the Arts from free trade restrictions, *e.g.* the ‘morals clause’ and film quotas. The WTO also regulates trade in intellectual property or ‘IP’ through the *Trade Related Intellectual Property & Services Agreement* (TRIPS) administered by the World Intellectual Property Organization (WIPO). Over the period there were ongoing tension between the USA and other countries over exemptions and TRIPS. As previously noted while tensions remain, the 2005 UNESCO *Convention on the Protection and Promotion of Diversity of Cultural Expression* established exemptions as a settled matter of international law.

Behind the scenes, however, lurked an emerging nervous system encircling planet Earth – the World Wide Web, the WWW, ‘the Web’ or the Internet. It began to transform economics, education, entertainment, health care, information, news and the nature of work. It began to break down traditional business models in the motion picture, music and publishing industries, *a.k.a.*, the Entertainment Arts. Distribution costs on the Web are virtually zero. The ability of national and sub-national cultures to globally voice their aesthetic achievements was enhanced. However, as became apparent after 2001, excepting China and Russia, their voices sounded mainly through American cyber instruments such as the so-called FANGS – Facebook, Amazon, Netflix and Google.

(d) Subsidiarity, the Second Wave & the Little Sisters

The subsidiarity principle was adopted by the European Union to mean, at one and the same time, activities that can best be achieved:

- (i) by reason of scale or effect at the Union level; and/or,
- (ii) as closely as possible to the citizen.

Thus, on the one hand, it adjusts the Union-wide regulatory environment including the electromagnetic spectrum and communications media. On the other hand, the Union targets many cultural policies and programs at the regional or sub-national level, *e.g.*, Sicily and Calabria, not at the national level, Italy. Regional cultures, languages and Arts are fostered in a way traditional Nation States did not in their quest for national unity.

In the English-speaking world a similar phenomenon was the Second Wave of arts councils created in the 1980s. Funded by lottery monies a new set of ‘quasi-arm’s length’ councils emerged at the provincial and state level in Canada, the USA

and the UK. This Second Wave supported amateur, community, folk, grass roots and/or heritage art, with limited support going to the Fine Arts.

Related to growing support to aboriginal, heritage, provincial and/or regional cultures is the concept of ‘The Little Sisters’. Such regional cultures, or ‘little sisters’, contend with the homogenizing and standardizing influence of a global ‘Big Brother’ that in 2001 was American. Protection of regional and indigenous cultures may become as important in the 21st century as the environmental or ‘Green’ movement of the 20th. If it is important to maintain the rain forest is it not equally important to preserve the indigenous cultures that live within? This was formally recognized with the 2003 UNESCO *Convention for the Safeguarding of the Intangible Cultural Heritage*. Significantly, Canada, Russia and the United States did not subscribe to the Convention.

The 2001 update concluded that as the 21st century opened, the Fine Arts were between a rock and a hard place. On the one hand, market realism and the search for cultural sovereignty led Nation States to develop a financially viable Entertainment Arts industry. This left the Fine Arts competing with a better organized and politically acceptable sector of the industry. On the other hand, new public monies from lotteries in the Anglosphere and through subsidiarity in the EU flowed to the amateur, community, heritage, provincial and regional arts. Again, politically more acceptable sectors of the industry.

This unenviable position reflected, among other things, the shift from the politics of elite accommodation to the politics of polls isolating the ‘elite’ Fine Arts from an increasingly egalitarian political economic process. What were the Fine Arts to do? As noted above, I suggested one strategy: a well-grounded definition of the Arts Industry and the role of the Fine Arts within it.

Postscript 2016

In October 2015 the editor-in-chief of the academic journal *Córima. Revista de Investigación en Gestión Cultural* requested Spanish translation rights for both the 1985 report and 2001 update plus a 2016 update. This Postscript is my response to the latter request.

This Postscript provides three things:

- i - extension of the four- to a five-fold model and constellation of the Arts within the global knowledge-based economy;
- ii - updates previous trends; and,
- iii - identifies emerging trends 2016.

i - The Five-Fold Model

Between 2002 and 2006 I completed my doctorate and published my dissertation *The Competitiveness of Nations in a Global Knowledge-Based Economy*. It became apparent that even a well-grounded definition of the Arts Industry and the role of the Fine Arts within it was insufficient defense. Rather the Arts as a whole needed to be constellated within the emerging global knowledge-based economy.

In such an economy there are three principal knowledge domains distinguished by their differing objectives, methodologies and tolerance of difference through time:

Natural & Engineering Sciences (NES) – the hard experimental sciences leading to physical technology;

Humanities & Social Sciences (HSS) – the soft human sciences or sciences of the artificial leading to organizational technology; and,

The Arts – literary, media, performing & visual arts leading to design technology.

In summary:

**Exhibit 3
Knowledge Domains**

Natural & Engineering Sciences (NES)	Humanities & Social Sciences (HSS)	The Arts
<p>Knowledge is fact-based and subjected to objective, value-free testing in which replicability is the criterion. It is concerned with objective truth, understanding and manipulation of the physical world. It exhibits decreasing tolerance through time for difference and error as old knowledge is progressively and reductively displaced by the new, <i>i.e.</i>, NES knowledge progresses vertically up the ladder of time.</p>	<p>Knowledge is value-based and subjected to mixed value-free/normative testing in which historical context plays a critical role. It is synthetic in that it concerns reconciliation between objective and subjective truth. It exhibits shifting tolerances through time as old knowledge is often recycled in a pedagogic spiral to which new knowledge is added. New knowledge therefore does not necessarily displace old knowledge and revisionism is common, <i>i.e.</i>, seeing old things in new ways as well as seeing new things in old ways.</p>	<p>Knowledge is concerned with subjective truth; a search for <i>kosmos</i> or the right ordering of the multiple parts of the world. It is holistic in aesthetic contemplation or gestalt. Testing is personal and subjective: It tends towards increasing tolerance of differences, styles and tastes. It is value laden. New knowledge does not displace the old. Shakespeare still speaks, Bach still plays and Tutankhamen still sits on his throne. Modern creators compete not just against each other but against the best that has ever been!</p>

In such an economy it is necessary for the State not only to foster and support these domains as Facilitator, Patron, Architect and Engineer but also to act as Custodian maintaining the national knowledge-base similar to but different from what in the HSS is called national patrimony. The national knowledge-base includes tacit knowledge embodied in Natural Persons as skills, repertoire and technique. Such knowledge is, among others, embodied in Living Treasures recognized by the 2003 UNESCO *Convention for the Safeguarding of the Intangible Cultural Heritage*.

Accordingly, with respect to the Fine Arts there are five alternative but not mutually exclusive roles for the State:

In summary:

Exhibit 4
Five Alternative Roles, 2016

Five Alternative Roles for Public Support of the Fine Arts 2016	
Custodian	Care and maintenance of the national knowledge-base including skills, technique and repertoire
Facilitator	Tax exempt charitable donations with aesthetic priorities set by individual donors
Patron	Arm's length council distributing funding by peer assessed excellence
Architect	Ministry of Culture designing facilities, funding operations and recognizing the special legal status of the artist
Engineer	Use of State funds, licensing & regulatory authority and tax exemptions to foster and promote a commercially viable Arts Industry

ii - Previous Trends 1985, 2001

Assuming the Arts Industry consists of Amateur, Applied, Entertainment, Fine and Heritage Arts then trends established before the turn of the century continued. Convergence led States to adopt a similar mix of roles with accent on their historical starting point. Furthermore, egalitarian values increasingly dominated with Amateur and Heritage Art receiving increased funding from lotteries in the Anglosphere and subsidiarity in the European Union while the elite national Fine Arts received a lower priority.

Similarly the quest for cultural sovereignty became increasingly focused on Market Realism with States striving to engineer a commercially viable entertainment arts industry usually involving co-production agreements with other countries to achieve global production standards. Thus the Entertainment Arts and increasingly the Applied Arts as fashion and product design received increasing support while the non-profit Fine Arts receive a lower priority. In other words, the Fine Arts remained caught between a rock and a hard place that tightened further with post-2001 economic trends.

iii - Emerging Trends 2016

In 2016 at least three major trends are at play:

- (a) Conserver Society
- (b) Cultural Sovereignty & Globalization
- (c) Vocabulary

(a)-Conserver Society

The Great Recession of 2008 was followed by what some call the Long Recession or 'secular stagnation' of the global economy. Rather than fighting the slowdown in economic growth with bold fiscal stimulus governments around the world responded with austerity to reduce deficits and debt. Attempts by central banks to stimulate the economy through innovative monetary policies such as quantitative easing (QE) have, by 2016, failed to revive global growth.

This period of slow growth is reminiscent of the 1970s during which the Club of Rome published its 1972 study *The Limits of Growth* and in 1978 the Montreal-based futures studies institute GAMMA published its report on a slow growth economy entitled *The Conserver Society*.

In this scenario when the pie is growing everyone benefits: a rising tide floats all boats. When, however, the economic pie does not grow sectors begin fighting to maintain or increase their share at the expense of others. It is an economy in which everyone struggles simply to hang on to what they have. The resulting stress has arguably contributed to ‘the sharing economy’. In this economy individuals and households share capital assets such as cars and houses through *Uber, Airbnb, et al.*

Austerity has placed the Fine Arts under increasing pressure as public sector support has been slashed. Major institutions survive but are increasingly reliant on the ‘Rolex’ world of corporate sponsorship reminiscent of the department store Mitsukoshi Gekijō’s resurrection of kabuki theatre. In this world traditional Western art forms like opera, symphonic music and live theatre become increasingly dependent on corporate sponsorship as elite Legacy Art. Meanwhile declining public support has forced the *avant-garde* to rely entirely on its wits and erratic, volatile private patronage.

(b) Cultural Sovereignty & Globalization

When the Dot Com Bubble of 2001 burst a number of trends were set in motion. First, the myth, prevalent at that time, that the internet economy would end the business cycle was replaced by more realistic expectations. These included, however, realization that the digital was unlike all previous communication revolutions. The shift from manuscript to print, from painting to photography to motion pictures to television, from sheet music to sound recordings to radio, were one-to-one transformations or essentially upgrades of existing media. The digital revolution, however, involved converting all forms of communication – sight, sound and text - into one. In future, 6G internet protocols promise the conversion of physical objects themselves into the ‘internet of things’.

Second, the 2001 bankruptcy of a major American firm, Global Crossing, allowed, for the first time, non-American companies to take ownership of one of the hardware backbones of the World Wide Web specifically in South-East Asia. This facilitated, among other things, growth of India as a software powerhouse and development of its off-shore call centres serving much of the Anglosphere.

Third, while the American monopoly of internet hardware was broken it was American firms that most successfully innovated services on the Web especially the FANGs – Facebook (2005), Amazon (online 1995), Netflix (streaming 2007) and Google (1998). Relying on GATT exemptions noted above other Nation-States struggle to maintain cultural sovereignty that, at the extreme, include the Great Fire Wall of China, data compression technologies used by some Islamic States, various measures of the Russian Federation and EU protection of personal information.

Fourth, the film industry in a number of countries took off after 2001 including India’s Bollywood, China, South Korea and Nigeria’s Nollywood. Film, a media art, is arguably the new opera in that it combines all other art forms – literary, performing, visual and even heritage arts - into one product, a motion picture or television program. While reflective of their indigenous cultures with the exception of South Korea (and to a lesser extent India), none have succeeded in developing successful export markets. South Korea, through government engineering, has seen its music, film and television programming gain significant audiences in many East Asian economies.

Fifth, globalization of the American entertainment arts industry is fueled by Asian and European investment. The most recent example (2016) is acquisition of Legendary Pictures by a Chinese-based firm. Sony Columbia-Tri-Star Pictures is Japanese owned. MCA/Universal was at one point Japanese-owned (1990) then Canadian owned (1995) then French-owned (2000) before it returned to American ownership in 2009. In the publishing industry Hachette (French owned) is one of the five largest English language publishers in the world while Bertelsmann (German owned) plays a significant role in the Anglosphere publishing industry.

The United States is the third largest market by population after China and India but is also the richest market and sets global production standards. Entertainment can breakeven in the domestic American market then reap profits from global sales. It is said American entertainment is the second largest export of the United States after airplane manufacturing.

The sheer financial size of the American market also leads foreign firms, through international co-production agreements, to produce 'American cultural clones'. An interesting sci-fi example is the 2012 motion picture *Iron Sky* co-produced by Australian, Finnish and German investors. Telling the fictional tale of a Nazi colony on the Moon invading Earth, the action takes place in Washington and New York City, not Berlin, Canberra or Helsinki and was produced in English.

Sixth, the trend of most concern to me is *corporatization of author's rights*. Such rights are embodied in the original 1886 Berne *Convention for the Protection of Literary and Artistic Property*. The Convention was inspired by Victor Hugo and the International Literary & Artistic Association (*Association Littéraire et Artistique Internationale*). Such rights include imprescriptible moral rights such as paternity, *i.e.*, the right to claim authorship even by an employee. Such rights emerged out of the 18th century European Enlightenment and have been embedded in the European Civil Code and its many global variations.

Of its original signatories only the United Kingdom rejected moral rights by exercising the Convention's provision allowing national treatment, *e.g.*, authors of foreign works published in the UK receive the same protection as UK authors in the UK. Moral rights can be waived by contract.

The United States was not a signatory. It did not join the Berne Convention until 1989. It did so only after giving up on the so-called Pan American Copyright Convention (1946) and UNESCO's Universal Copyright Convention (1952). The USA, like the UK, practices Anglosphere Common Law and Equity. The former is the law of precedent. In the case of author's rights or *copyright* the legal precedent is printer's rights of the 16th century, not author's rights of the 18th century Enlightenment. From its beginning the USA used copyright as a weapon in industrial warfare against the printing industry of its parent country, the UK. In fact the USA and the Austro-Hungarian Empire were the great copyright pirate nations of the 19th century.

Complicating matters in the Anglosphere is that Legal Persons, *i.e.*, bodies corporate or corporations, increasingly enjoy the same rights as Natural Persons, *i.e.*, flesh and blood human beings, especially in the USA. In effect, this means all of an author's rights can be assigned in favour of a body corporate. Where moral rights are recognized, *e.g.*, Canada, they can be waived by contract. Furthermore, an employee enjoys no right of paternity, *e.g.*, the right to claim authorship while patents can only be filed in the name of a Natural Person (inventor), *i.e.*, an employee, not a corporation.

When the USA became bound by the Berne Convention in 1989 it was obligated to recognize moral rights in its Copyright Act even if, as in Canada, they were subject to waiver by contract. 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, 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, have not been incorporated into the U.S. Copyright Act. It is an open question whether the United States has fulfilled its obligations under the Berne Convention.

In 1995, under pressure from the USA, the TRIPS Agreement, part of the WTO undertaking, explicitly excluded moral rights as well as the intellectual property rights of Fourth World aboriginal and tribal peoples. It also successfully pressed for inclusion of computer software as ‘literary and artistic property’ for purposes of the Berne Convention. Beyond Victor Hugo rolling over in his Pantheon crypt, this means computer software is the only intellectual property protected three ways: by copyright, patent and trade secrets. Software is *sui generis*, one of a kind, and, in my opinion, deserving distinct protection like integrated circuit topographies, not as ‘literary and artistic property’.

The historical American drive to convert literary and artistic property into industrial property like patents and trademarks hit a slight speed bump with the 2016 Transpacific Partnership. Note 97 to Article 18.69: Rights Management Information (RMI) reads:

A Party may comply with its obligations under this sub-subparagraph by providing for civil judicial proceedings concerning the enforcement of moral rights under its copyright law.

Arguably American failure to fulfill its obligations under the Berne Convention has not been challenged because, among other things, Asian and EU entertainment companies have significant financial investments in the Anglosphere market where it is more profitable under Common Law & Equity. Specifically, it absolves them of all moral rights to creators. It makes contracting so much easier and cheaper than in their own home markets.

This trend threatens to undermine the economic and social wellbeing of artists in all sectors of the industry. In effect author’s rights are being converted into industrial property owned by corporate proprietors. Put another way, in pursuit of cultural sovereignty through a financially viable Entertainment Arts industry many countries may be selling their cultural souls, author’s rights, to corporate devils.

(c) Vocabulary

The initial 1985 policy research study was drafted in the context of the Arts with focus on the Fine Arts. The 2001 update was drafted in the context of the Cultural Industries in which the Fine Arts played a smaller role. The present 2016 Postscript is drafted in the context of the Creative Industries. What’s in a name?

As previously noted the term ‘Cultural Industries’ entered the lexicon in the mid-1980s under the influence of UNESCO. The term, to my mind, is too broad and amorphous. Thus, according to the Oxford English Dictionary (OED), Culture refers to: “The distinctive ideas, customs, social behaviour, products, or way of life

of a particular nation, society, people, or period. Hence: a society or group characterized by such customs, *etc.*” To then apply the term ‘industry’ confuses matters further: Thus according to the OED, current English usage of ‘industry’ derives from the French: “Productive work, trade, or manufacture. In later use *esp.*: manufacturing and production carried out on a commercial basis, typically organized on a large scale and requiring the investment of capital.”

The term “Creative Industries’ entered the lexicon in 1994 with the Australian Government’s cultural policy report: *The Creative Nation*. To my mind the term is both too narrow and too broad. Thus the OED narrowly defines ‘creative’ as: “The creative faculty; creative work; (Advertising) creative material produced for an advertising campaign, such as the copy, design, or artwork.” On the other hand, restricting Creative Industries to the Arts implies other industries are not creative including those flowing from the Natural & Engineering Sciences (NES) as well as the Humanities & Social Sciences (HSS).

The problem is epistemological, *i.e.*, it concerns the theory of knowledge. To answer we must parse a little Latin and Greek. Deriving from the Latin the OED broadly defines Art as: “Skill in doing anything as the result of knowledge and practice.” The question is: What knowledge and practice?

To the Greeks it was *Logos*, logic. To the Romans it derives from *Ratio*, reason. The difference: *Ratio* leads to calculatory rationalism as in contemporary economics; *Logos* leads, in Greek, to its opposite - *Techne* or Art. When combined this leads to physical technology, *i.e.*, logical or reasoned art emerging from the NES.

Similarly, the word ‘Science’ derives from the Latin *scire* “to know” which, in turn, derives from *scindere* “to split”, *a.k.a.*, reductionism. The opposite of Reductionism is Design. The word Design derives from the 16th century Renaissance Italian. Design is eternally linked to a form of causality utterly rejected by physics and the positivistic philosophy of science – *teleology*: “the doctrine or study of ends or final causes” (OED). In effect, Design involves putting things together (creation) rather than taking them apart (criticism).

Techne or Art is the technology of the human heart, the technology of emotion and, at least in the West, aesthetically restricted to the distant senses of sight and sound. It concerns not the objective world of matter/energy but the subjective world of emotion/feeling. Its power has long been feared. Thus Plato warned in *The Republic*:

... we must remain firm in our conviction that hymns to the gods and praise of famous men are the only poetry which ought to be admitted into our State. For if you go beyond this and allow the honeyed muse to enter, either in epic or lyric verse, not law and the reason of mankind, which by common consent have ever been deemed best, but pleasure and pain will be the rulers in our State (Book X).

Art employs skills and techniques to manipulate human emotion, whether a brush stroke, a colour, a curve, a pirouette, accent or tone of voice, wording or raised eyebrow. Such skills are learned experientially, by doing. Professional training at national theatre, film (media) and dance schools, music conservatories as well as visual arts and design academies generally achieve the highest standards. It is for such institutions that the State must, minimally, exercise a custodial role. There are at least two reasons.

First, like universities these *experiential* institutions of learning educate, train and polish national talent hopefully to global standards. Faculty are generally practitioners able to direct talent to appropriate producing companies and other employment and educational opportunities including master classes. They are the bones producing the life blood of the Arts Industry. In this regard I cannot resist stressing two things.

- (a) the institutional importance of repertoire theatre in the international success of Australian and British actors, directors and playwrights; and,
- (b) the absence of an organized recruitment system existing in the Sports Industry that actively seeks out, fosters and promotes talent from peewee to the major leagues.

Second, these institutions are critical because of the ‘churn factor’. It is sometime said of the Fine Arts that nothing fails like success. Usually it implies artistic excellence is not matched by financial gain. In this case success in cultivating world-class talent often leads such talent away from their home country towards the glitz, glamour, fame and financing of Hollywood and its ilk. Cream rises to the top. This is churning, continually training replacements for the last generation of successful talent to leave the nest. It is for this reason, among others, I have long advocated national and regional ‘creativity havens’. In brief, all copyright related income of a Natural Person (not legal ones) becomes tax exempt in a given jurisdiction. Such a haven is intended not only to retain local talent but also to encourage world-class talent to relocate stimulating the local arts scene. If successful it can, however, be anticipated that other jurisdiction will, as with movie tax credits, eventually compete.

End of Line 2016

Over some thirty years between the original 1985 policy research study, the 2001 update and this 2016 Postscript the Fine Arts have found themselves in an increasingly tight squeeze between a rock and hard place. On the one hand, political calculus shifted from elite accommodation to politics by polls. This has seen increasing support for egalitarian community or local-based arts activities especially in the Amateur and Heritage Arts. On the other hand, the drive to cultural sovereignty has seen increasing public support for both the Applied and Entertainment Arts. The result has been stagnating or declining public sector support for the Fine Arts as well as the commercialization of its internal culture and the corporatization of author’s rights, a foundation stone of *Les Beaux Arts*. The Long Recession of 2008 caused by continuing government austerity has tightened the squeeze even further threatening conversion of the living Fine Arts into the Legacy Arts of the West leaving its *avant-garde* to rely entirely on its wits and the kindness of strangers.

In my view two things need be done. First, the Fine Arts must be seen by the public as part of a larger whole – a national Arts Industry. Its distinct market segments – Amateur, Applied, Entertainment, Fine and Heritage – must be seen as working together, each playing its part in the health and growth of the industry. The Fine Arts, for its part, is to be cast as the research & development sector, training ground and standard setter for the industry. This requires definition according to the Standard Industrial Classification System, part of the National Accounts of every Member State of the United Nations. It requires an estimate of

its size and contribution to employment and GDP. This includes the balance of trade in artistic goods & services, broadly defined.

Second, the Fine Arts must be seen by the public as the burning heart of a distinct knowledge domain, a distinct way of knowing – the Arts – that together with the Natural & Engineering Sciences and the Humanities & Social Sciences fuel competitiveness in the emerging global knowledge-based economy.