

Canadian Copyright Reform Policy Research Note #2
A Unified Theory of Canadian Copyright

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March 31, 2010

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Summary

Lyman Ray Patterson died in 2003. His intellectual last will and testament, however, entitled *A Unified Theory of Copyright* was only recently published. Patterson is one of the Masters of American Copyright. He sees copyright as juxtaposing free enterprise (economics) and free speech or ‘the right to hear’ (politics) and the purpose of copyright being to foster learning through access to knowledge.

Patterson argues two theories compete in the copyright debate, *i.e.*, as proprietary monopoly or statutory grant even though the proprietary theory was rejected by the U.S. Supreme Court in *Wheaton v. Peters* (1834). Tension between the two theories remained relatively harmless until 1976 amendment of the U.S. Copyright Act. The new digital transmission right extended copyright from protection of a work (as a product) against infringement by commercial competitors to protection of transmissions (as a service) against traditional fair use by the citizen consumer. In the process Patterson fears perpetual economic censorship (even of public domain materials) through ongoing fees for access. The result is an existential threat to democracy and free speech.

Patterson believes that ongoing legal tension between copyright as a proprietary monopoly and statutory grant has seriously compromised the encouragement of learning. To escape this tension Patterson proposes an alternative theory: copyright as easement of conflicting property rights.

As a practical matter, easement is a legal concept with which all courts and almost all citizens are familiar. It is real property law. It is urban zoning; it is access to the cottage and the lake. Its introduction should shift the lens through which lower courts view copyright litigation. “The essence of the easement theory, then, is this: it requires that rights in copyright law be defined for the purpose of regulation in terms of the public interest rather than in the private interest of the author, the publisher, or the user. “

The theory was developed in an American context. Can it work in Canada? The experience of both is rooted in the 1710 *Statute of Queen Anne* and rejection of the proprietary theory. Both share two legal fictions with pernicious copyright effects: (i) natural and legal persons enjoy the same rights; and (ii) the work-for-hire doctrine that copyright in a work produced by an employee belongs to the employer.

Canada, however, is different particularly due to the French Fact. It is bi-juridic with respect to property law: Common Law and European Civil Code in Quebec. Inside the Canadian Act are moral rights, Crown copyright, exhibition rights and levies on blank audio recording media not in the American Act. There is a clear Canadian separation of economic and non-economic rights of authors (*droit d’auteur*). Outside the Act are Public Lending Rights, Status of the Artist and cultural property legislation none of which exist in the U.S.

Nonetheless the unified or easement theory of copyright is applicable in Canada and necessary if income distribution in the emerging knowledge-based economy is to support the creative life and foster learning among the public.

Introduction

Lyman Ray Patterson (Pope Brock Professor, University of Georgia School of Law) died in 2003. His intellectual last will and testament, however, entitled *A Unified Theory of Copyright* was just recently published (Patterson & Birch 2009, 214-400).

Patterson was one of the Masters of American copyright along with Benjamin Kaplan, Mel Nimmer, Alan Latman and a few others. Unlike other Masters, however, Patterson takes an explicitly political economic posture. He sees copyright as juxtaposing free enterprise (economics) and free speech (politics) defined as access to knowledge or ‘the right to hear’ (Patterson & Birch 2009, 301). He stresses that the purpose of copyright is to foster learning through access to knowledge. This is so specified in the title of the first modern copyright act, the 1710 *Statute of Queen Anne*, and the title of the first U.S. copyright act of 1790.

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

Like the *Statute of Queen Anne* the original American copyright act was intended to foster learning by growing the public domain and prevent its monopolization, not maximize private profit. Between 1710 and 1976 Patterson argues copyright roughly attained its purpose. With the 1976 amendment of the American Copyright Act, however, things changed. Patterson fears that perpetual copyright is returning threatening freedom of speech yet again.

First, I will outline Patterson’s theory. Second, I will adapt it to the Canadian context which contains concepts either not considered or given short shrift in the American. Third, and finally, I will conclude with implications of the theory for Canadian copyright reform which appears in hiatus awaiting the outcome of multilateral negotiation of the *Anti-Counterfeiting Trade Agreement* (ACTA).

Patterson's Unified Theory of American Copyright Proprietary Monopoly or Statutory Grant?

Patterson argues two theories compete in the copyright debate, *i.e.*, as proprietary monopoly or statutory grant. In legal practice the second dominates in the Supreme Court of the United States while the first dominates in its lower courts. This remains the case even though the proprietary theory was rejected by the House of Lords in *Donaldson v. Beckett* (1774) and by the U.S. Supreme Court in *Wheaton v. Peters* (1834). Copyright is thus constitutionally a statutory grant not a natural or plenary property right.

Nonetheless publishers or rather copyright proprietors have kept the proprietary monopoly theory alive up until today through a continuing campaign of strategic litigation in the lower courts. This campaign began with passage of the 1710 *Statute of Queen Anne* which ended perpetual Stationer's Copyright and created the public domain. This first attempt is called by Patterson: "the Battle of the Booksellers" (Patterson & Birch 2009, 253). Ever since they have used the *in terrorem* argument of 'the starving artist' married to their role as assignee of any and all rights granted to the author. At root the proprietary theory rests on John Locke's 'sweat of the brow' theory of private property. What Patterson does not mention is that Locke himself, in his *Memorandum* of 1694 (Hughes 2006), argued against perpetual copyright whether it be Stationer's Copyright or one based on his own 'sweat of the brow' theory.

Tension between the two theories remained relatively harmless until 1976 amendment of the U.S. Copyright Act. Amendment ended the requirement that a work be published before copyright was granted. In part this reflected introduction of new electronic or digital transmission rights complimenting traditional publication rights and performance rights for musical and dramatic works introduced in the 19th century.

According to Patterson this extended copyright from protection of a work (as a product) against infringement by commercial competitors to protection of transmissions (as a service) against traditional fair use by the citizen consumer. Once a book as a product is sold the consumer can resell or otherwise make fair use of the knowledge contained therein. With electronic transmission any copying or subsequent distribution is potentially an infringement.

This change was accompanied by: (i) the progressive extension of copyright duration to three or four generations effectively reintroducing perpetual copyright; and, (ii) ever increasing use of exaggerated private law warnings against infringement by final citizen consumers such as FBI warnings on DVDs and limiting the liability of proprietors by means such as the

EULA or ‘shrink wrapped’, ‘one click’ end users agreements for computer software.

In effect Patterson argues that political and religious censorship of knowledge under the Stationer’s Company perpetual copyright is being reborn as perpetual economic censorship (even of public domain materials) through charging ongoing fees for access to knowledge. The result to his mind is an existential threat to democracy and free speech.

The Unified or ‘Easement Theory

Patterson believes that ongoing legal tension between copyright as a proprietary monopoly and as a statutory grant has seriously compromised attainment of the purpose of copyright – the encouragement of learning. To escape the resulting confusion Patterson proposes an alternative theory: copyright as easement of conflicting property rights. In eight succinct paragraphs Patterson lays out his alternative unified or ‘easement’ theory of American copyright:

A legal theory provides a framework for analysis. To be useful, it must be consistent, coherent, and congruent: consistent in its parts, coherent as a whole, and congruent with the public interest. We need not revisit the point that, by these measures, copyright theory is lamentably lacking by reason of its dual nature, which prevents it from doing what copyright theory should: enable a decisionmaker to allocate rights and duties among creators, entrepreneurs, and users in a manner that serves the public interest in the creation, transmission, and use of knowledge.

The unusual aspect of this dictum is the inclusion of duties in the copyright equation. The reason that duties are important in this context is that copyright law is based on a tripartite relationship of author, publisher, and user. While a two-sided relationship may involve only rights of one party and duties of the other, a three-sided relationship changes the equation so that all the parties have duties to each other: the author and the publisher have reciprocal duties; both have duties to respect the rights of the user; and the user has a duty to respect the rights of the author and the publisher.

This is not the usual analysis, both because the issue typically arises in litigation, which is bilateral in nature, and because publishers are assignees of authors. The assignor-assignee relationship gives the impression that copyright law entails only a bilateral relationship between author and user, which enables the publisher to reap the benefit of the equity due to the author.

The tripartite relationship, however, makes apparent this usurpation of equity, and that in turn makes apparent the defects of treating copyright as either the statutory grant of a monopoly or a natural law property of the creator. As to the statutory grant theory, courts have difficulty maintaining the limits of the grant, as the long-lived (and unconstitutional) sweat-of-the-brow doctrine proves. As to natural law property, courts have difficulty in recognizing the rights of users, both because users seldom have advocates and because the most fundamental characteristic of property - the right to exclude - is enhanced when the property is "natural," that is, acquired by creation rather than transfer.

While copyright is a form of property, it is in no sense natural; indeed, it is more of a quasi-property right than a plenary one. The question, then, is whether there is a property concept that is more appropriate for copyright as a limited property right than are fee simple rules developed for real property. Such a concept would be a quasi-property right because copyright entails limited rights recognized for a limited time among creators, entrepreneurs, and users - complex relationships that require a concept of adaptability.

The proprietary concept that has this characteristic is the easement, a concept of inclusion, not exclusion - and it is this variation on the property scheme that leads to the conclusion that copyright is best treated as quasi-property in the form of an easement. There is, in fact, a good case to be made that the easement concept is not only consistent with,

but may even be required by, the Copyright Clause of the Constitution.

One advantage of the easement theory is that it makes irrelevant the origin of copyright as the source of theory - creation by an author or grant by a legislature - which too often produces a tail-wagging-the-dog situation. This is because the legislative grant can be said to be based on the equity that is the basis of natural law, which serves as a rationale for enhancing copyright. The error is in assuming that the use of natural law as the motivation justifies treating the final product (despite its statutory limitations) as a natural law concept.

The advantage of easement theory is that it combines the natural law and statutory grant theories so that neither is dominant. Thus, copyright as an easement can be used to protect the author's rights, but also to limit those rights in order to protect the rights of others. The essence of the easement theory, then, is this: it requires that rights in copyright law be defined for the purpose of regulation in terms of the public interest rather than in the private interest of the author, the publisher, or the user. (Patterson & Birch 2009, 383-385)

A Unified Theory of Canadian Copyright

Patterson's unified or easement theory of copyright was developed in an American context. The question is will it work in a Canadian one? In Cultural Economics, Law is not a technical subject but rather a cultural artifact arising from the unique historical experience of a specific nation with its distinctive pattern of custom, habit and life ways (Schlicht 1998). More to the point, each system of Law has its own definition of what can be bought and sold, *i.e.*, what is property? When one moves to the international level one must accordingly accept that: "Law has become nation-specific; lawyers no longer form an international community" (Merryman 1981, 359).

Can/Am Similarities

Both the American and Canadian experience is rooted in the 1710 *Statute of Queen Anne* and rejection of the proprietary theory by the House of Lords in *Donaldson v. Beckett* (1774) and by the U.S. Supreme Court in *Wheaton v. Peters* (1834). In both copyright is technically a statutory not a natural monopoly yet,

particularly in the U.S.A., this legal fact is continually eroded by case law in the lower courts.

Legal Fictions

Canada and the U.S. also share two legal fictions with significant and arguably pernicious copyright effects.

Natural and Legal Persons

First, and fundamentally, is the fiction that natural and legal persons, *i.e.*, a flesh-and-blood human being and a body corporate – public or private, enjoy the same rights. U.S. law even extends 14th Amendment rights protecting against racial discrimination of former slaves to business corporations as a class (Nace 2005). On this point the American philosopher John Dewey concluded that in Law a person is anyone the Law says it is (Dewey 1928).

Patterson does not raise this issue directly but stresses “the usurpation of equity” of a creator by an assignee without highlighting that assignees in America are generally legal persons, *a.k.a.*, corporations. His comment does, however, highlight that copyright involves not just statutory and case law but also equity, *a.k.a.*, fairness, a distinct strand of Anglosphere law (Chartrand February 2008). This may partially explain Patterson’s repeated references to Judge Joseph Story’s characterization of copyright as the “metaphysics of the law” (Patterson & Birch 2009, 284, 327 & 395).

Another reason is Law must look outside itself for guidance and understanding of copyright. John Dewey argued, however, that when Law looks outside itself for insight, (in his case about corporate legal personality) the results can be unfortunate because “the human mind tends toward fusion rather than discrimination, and the result is confusion” (Dewey 1926, 670). Thus Law looks out with three-faces onto copyright: one sees trade regulation of a State sponsored monopoly; the second sees the natural or ‘human’ rights of the artist/author/creator (and of his or her assignee); and, the third sees an ever growing public domain and the learning it engenders.

Work-for-Hire

Second, there is the ‘work for hire’ doctrine. In both Canada and the United States and the Anglosphere generally copyright in a work produced by an employee belongs to the employer. Thus copyright for a broadcast, motion picture or photograph belongs to the owner of the negative or whoever commissioned the work, *a.k.a.*, the producer/proprietor/publisher. By contrast under European Civil Code author’s rights belong to the artist/author/creator/director, *e.g.*, the auteur theory of filmmaking. Hence no ‘colorization controversy’ is possible. In the Civil Code tradition the author as employee also enjoys moral rights not assignable to an employer.

Can/Am Differences

The French Fact

Canada is different particularly due to the ‘French Fact’. It is not just a bilingual and bicultural country, (English and French) it is also, with respect to property law, bi-juridic (Anglosphere Common Law and French Civil Code). 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.

With respect to copyright, the French Fact has been with us since before the first 1921 made-in-Canadian Copyright Act (Chartrand [September 2006](#)) with *Copyright* heading one page and “*Droit d’auteur*’ (rights of the author) opposite.

Part of the French Fact of Canadian copyright is the history of the Berne *Convention for the Protection of Literary & Artistic Works* of 1883. Led by Victor Hugo, European artists and writers in 1878 organized the International Artistic & Literary Association (*Association Littéraire et Artistique Internationale*). First in Paris it then met annually in different European capitals. In 1882, at Rome it agreed to organize an international conference of States about copyright, or rather author’s rights. At the Berne conference of September 1883, a draft convention was prepared and brought to the attention of the community of nations by the Swiss Federal Council (Kampelman [1947](#), 410-411). The Berne Convention of 1886 was the result. The rationale of the Convention was authorial rights not profits for the producer/proprietor/publisher. Many such rights are non-assignable or rather imprescriptible, *i.e.*, they cannot be signed away.

Copyright/Rights of the Author

Copyright (the word itself did not enter the English language until 1735) crystallized as printer’s or rather proprietor’s rights “when, in 1557, the Catholic Queen Mary (and King Philip) granted the guild of stationers a charter creating the Stationers’ Company and effectively made the booksellers the Crown’s policemen of the press”(Patterson & Birch 2009, 245).

Copyright remained a printer’s right until the author was recognized in the 1710 *Statute of Queen Anne*. Nonetheless as Patterson points out an author’s equity was thereafter and continues to be usurped by an assignee, *a.k.a.*, producer/proprietor/publisher or employer, generally a legal person.

In France, developments took a similar yet different turn. The *Code de la librairie* (the Publisher’s Code) established regulations for Parisian publishing in 1723 and was extended to the

entire nation in 1744. It contained no legal recognition of authors. Rather it expressed the belief that ideas were a gift from God revealed through the writer. They could not be owned or sold by the author. The power to determine what was truly God's knowledge belonged not to the author but to God's representative on earth, the king who had the exclusive divine right to determine what could be published, by whom and for how long it would be protected (Hesse 1990, 111)

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

During the French Revolution, however, the perpetual copyright of the author was, in turn, sacrificed in favour of the public domain. Copyright was limited to the life of the author plus ten years because the revolutionaries wanted to convert the author, a creature of royal privilege, into a public servant, the model citizen. The focus was on growing the public domain (Hesse 1990, 130).

Nonetheless, and unlike Common Law copyright based on precedent, the French revolutionaries drew on natural rights to recognize the absolute moral rights of the author. Such rights were separate and distinct from any economic rights associated with a work. In this they drew heavily on the contemporary thinking of Immanuel Kant who considered an author's work not an object but an extension of personality and subject to protection as such. It is a human right that no legal person can enjoy.

The American Republican Revolution of 1776 made the individual, the natural person, the cornerstone of the political and social order. The American Declaration of Independence of 1776 announces: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness".

The French Republican Revolution went farther. Article 2 of the French *Declaration of the Rights of Man and the Citizen* of 1789 declares: "The aim of all political association is the

preservation of the natural and imprescriptible rights of man. These rights are liberty, property, security, and resistance to oppression”.

Author’s rights in fact formed part of a grander scheme of public education for the French Revolutionaries. Thus the 1793 Lakanal Report, made on behalf of the Committee of Public Instruction, dubbed the proposed copyright law the “Declaration of the Rights of Genius,” stressing copyright’s kinship to other great Rights of Man (Ginsberg 1990, 1009) and as I have pointed out elsewhere to the Western ‘cult of the genius’ (Chartrand [February 2009](#)).

The two first Republican Revolutions took different routes arguably, however, to the same destination. Adopting British Common Law and its precedents, the American Revolution recognized copyright as consisting of only one set of rights initially vested in the author but fully transferable by contract or assigned to another person – natural or legal. In other words all rights were alienable rather than “unalienable”.

The French Revolution, on the other hand, recognized author’s rights as consisting of two distinct sets or bundles of rights – economic and moral. The first was alienable but limited in duration; the second, however, was inalienable or rather “imprescriptible”.

The common destination for both American and French Revolutionaries, however, was the same, even if expressed in different words. For the Americans it was ‘learning’. For the French, it was the public domain. Fostering learning by growing the public domain was the intent of statutory and natural laws of copyright in both Revolutions.

Moral & Other Distinctive Canadian Rights

Canadian copyright exhibits a number of distinctive rights relative to the American experience. Within the Act these include moral rights, Crown copyright, exhibition rights and a levy on blank audio recording media for home use. Outside the Act they include the Public Lending Rights program, the *Status of the Artist Act* and the *Cultural Property Export and Import Act* and its sponsor, the federal government department called Canadian Heritage/*Patrimoine canadien* www.pch.gc.ca.

Inside the Act

Moral Rights

Moral rights are separate and distinct from the economic rights associated with a work. The three most important are: (1) the paternity right - the right to be identified as the creator of a work and protected from plagiarism; (2) the integrity right - the right to protection against alteration or deformation of one’s work, and the right to make changes in it; and, (3) the publication right –

including the right not to publish at all (Hurt & Schuchman 1966, 424). In the European Civil Code tradition the most succinct expression of their nature is that they are “inalienable, unattachable, imprescriptible and unrenounceable” (*Andean Community Decision 351: Common Provisions on Copyright and Neighboring Rights*, Article 11, December 17, 1993).

In Canada the difference between copyright and *droit d’auteur* in the Act was essentially linguistic rather than substantive until 1931. The British government while signing the Berne Convention in 1883 and acknowledging moral rights applied the national treatment clause so that all such rights remained subject to contract in Britain and across the empire under the *Imperial Copyright Act*. This remained true until 1921 when the first made-in-Canada Copyright Act was passed by Parliament. There was, however, no mention of moral rights in the new Act. All rights remained subject to assignment.

The new made-in-Canada Act also reflected the fact that the U.S. from its beginning 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 in the U.S. primarily as an incentive for creators in the natural rights tradition. Thus with independence 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 was born in 1921.

In 1931 the Act was amended (S.C. 1931, c. 8, s.5) introducing the first moral rights clause entitled: *12 (7) Author’s right to restrain acts prejudicial to his honour or reputation*. The amendment was introduced to satisfy Canada’s requirements under the 1928 Rome revision of the Berne Convention. Such rights were accorded not just to writers but also to architects and visual artists. The rights remained, however, subject to national treatment, *i.e.*, to assignment.

When not assigned however, moral rights have been upheld by Canadian lower courts, for example, in *Snow v. The Eaton Centre Ltd. et al.* (1982), 70 C.P.R. (2d) 105 (Ont. H.C.J.). Michael Snow, creator of a “flight stop” sculpture of 60 Canadian

geese, sued when ribbons were added around the neck of each goose as a Christmas display. The artist argued the work was a naturalistic composition infringed by the “ridiculous” ribbons. The court granted an injunction.

In 1988 the French Fact asserted itself once more. The Act was amended (S.C. 1988, c. 15 and R.S. 1985 (1988), c. 10 (4th Supp.)) granting Moral Rights a major heading including Sections 14.1 (1-7) and 14.2 (1 – 2). Such rights continue after assignment of economic rights. They are available only to a natural person. They can be bequeathed but cannot be assigned yet may be waived. This arguably creates a new and unique French Canadian legal fiction: a human right that cannot be sold but may be waived!

The Act was amended again with S.C. 1997, c.24. This was the first major structural change to the Act in 75 years. It is arguably the Canadian parallel to the 1976 major restructuring amendment of the U.S. Copyright Act. In Canada, however, the most dramatic change was the titling of *Part I: Copyright and Moral Rights in Works* thereby clearly distinguishing economic from non-economic rights.

Of course the distinction between moral and economic rights is problematic. Moral rights on their own have significant economic implications. First, a proprietor exploiting a work remains forever subject to the initial creator. If exploitation infringes moral rights then production, distribution or exhibition of a work may be legally stopped. In Canada, however, the right is not imprescriptible. Rather a contractual waiver removes it as an impediment to exploitation by a producer/proprietor/publisher. If the initial creator subsequently objects he or she has no legal recourse.

In general the bargaining power of the creator and equity due him or her is enhanced in the French tradition and reduced in the English. This is arguably one reason why Hollywood rather than Paris became the film capital of the world. In the second case the result is the ‘fine art film’; in the first, the Hollywood blockbuster.

Second, moral rights in many countries now extend direct financial benefits to initial creators, *i.e.*, money in their pockets. Such extensions include exhibition rights for visual artists, public lending rights to compensate authors for sales lost through library use and *droit de suite* or rights of following sales of works in the visual arts. In the first instance, galleries pay; in the second, the State; and, in the third it is subsequent purchasers of a work of art. In all three cases such rights and related income streams flow only to the creator as a natural person not to an agent or proprietor. They are not available to legal persons.

This Canadian experience contrasts sharply with the United States response to accession to the Berne Convention: the *Berne Convention Implementation Act* of 1988. Required to take steps towards recognizing moral rights Congress passed 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 are available only to artists of 'recognized' reputation. Recognized by whom? By the courts!

Patterson does not report these limitations but does write:

The moral right is not a right of the copyright owner, but of the creator of the work - a personal right that enables the author to protect the integrity of the work and his or her reputation in conjunction with it. A feature of copyright in European countries, moral rights have been given only limited recognition in the United States, presumably because such rights are inalienable personal rights of the author to which the property right of the copyright holder may be subject. Moral rights, for example, might give the author of a novel the right to reject a movie producer's film treatment of the novel, although the producer had purchased the right to make the novel into a film. This fact probably explains why the statute limits the moral right to works of visual art, reflecting the disagreement as to the desirability of the doctrine between authors as creators and copyright holders as entrepreneurs. (Patterson & Birch 1990, 270)

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 the United States has in fact fulfilled its obligations under the Berne Convention.

Crown Copyright

Unlike the work-for-hire doctrine Crown copyright is no legal fiction. Section 12 of the Act titled: *Where copyright belongs to Her Majesty* grants copyright in any work prepared or published under the direction or control of the Crown to the Crown. In other words, government information paid for by taxpayers is not in the public domain. In the United States government information is in the public domain excepting for reasons of national security, commercial confidentiality or privacy.

Crown copyright can be used to justify user fees for government information. Elsewhere I have shown that in the case of government information such fees fail the test of welfare economics (Chartrand 1997). They also fail the test of fostering ‘learning’, the statutory objective of copyright.

Crown copyright was also the chosen instrument in an attempt to create a ‘Son of Sam’ law in Canada. In 1997 a private member’s bill was passed by the House of Commons to add Section 12.1 *Works by convicted persons relating to the crime*. It would have assigned copyright to the Crown for any work relating to that crime prepared and/or published by its perpetrator. The bill was not followed up by the Senate of Canada on the recommendation of the government of the day.

Freedom from Crown or State copyright in the U.S. is, however, according to Patterson, under attack. He notes that in *West Publ'g Co. v. Mead Data Cent., Inc.*, 799 F.2d 1219 (8th Cir. 1986) the court recognized copyright through the simple act of numbering pages of judicial decisions. Patterson argues that no “copyright holder be empowered to use page numbers to capture public domain material as a reward for publishing” (Patterson & Birch 1990, 282).

Exhibition Right

An exhibition right for works by visual artists in public galleries was introduced into the Canadian Act as Section 3(1)g by S.C. 1988 c. 15, s. 2. According to various studies the new right has been problematic at best with many galleries refusing to pay or requiring a waiver from artists. No such right exists in the American Act.

Levee on Blank Audio Recording Media

A levee (tax) on blank audio recording material intended for private or home use was introduced into the Canadian Copyright Act by S.C. 1997, c.24, s. 50 becoming Sections 82-86 of the Act. The Canadian Private Copying Collective (CPCC) is responsible for distributing the levee to artists and their representatives. Its distribution and fairness, however, have been questioned. No such right exists in the American Act.

Outside the Act

Outside the Canadian Copyright Act are Public Lending Rights, the *Status of the Artist Act* and the *Cultural Property Export and Import Act*. All three have significant copyright implications.

Public Lending Rights

Public lending rights are intended to compensate authors for sales lost through library use. The Canadian PLR program was

established by a Cabinet decision in March 1986, with an initial budget of \$3 million. Canada became the 13th country in the world to introduce a PLR program. No similar program exists in the United States.

Status of the Artist

The issue of artists' access to social and economic benefits has a long history in Canada and in continental Europe. In response the government of Canada passed the *Status of the Artist Act*: (S.C. 1992, c. 33). No similar legislation exists in the United States.

Section 3 of the Act defines government policy as follows:

(3) Canada's policy on the professional status of the artist, as implemented by the Minister of Canadian Heritage, is based on the following rights:

- (a) the right of artists and producers to freedom of association and expression;
- (b) the right of associations representing artists to be recognized in law and to promote the professional and socio-economic interests of their members; and
- (c) the right of artists to have access to advisory forums in which they may express their views on their status and on any other questions concerning them.

S.C. 1992, c. 33, s. 3

S.C.1999, c. 31, s. 192.

Cultural Property

Elsewhere I have described how our modern concept of cultural property and national patrimony like author's rights arose out of the French Revolution. In the case of cultural property it was under the guidance of Henri 'Abbe' Grégoire (1750-1831) – the man who coined the term 'vandalism' (Chartrand [February 2009](#)). As will be seen the argument for author's rights and cultural property rest on the same foundation – the genius of the individual citizen.

The relationship between intellectual and cultural property is Time. In this view, cultural property is private intellectual property including patented equipment and devices that has, over time, fallen into the public domain and then, in effect, been 'nationalized'. Traditionally (Merryman 2005) the term has been restricted to a limited range of things distinguishable from the ordinary by their special cultural significance and/or rarity. Such

cultural property constitutes a Nation-State's patrimony. As will be seen, however, this traditional definition is insufficient.

In the case of the French Revolution the Revolutionaries were overwhelmed by the wealth confiscated from the aristocracy and the Church. The National Convention in 1794 commissioned Grégoire to study the question. He produced three reports, the first of which was entitled: *Report on the Destruction Brought About by Vandalism, and on the Means to Quell It*.

He framed his answer, in Republican terms, asking: What does the spirit of liberty require? He answered:

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

For Grégoire, what was important was not the patron but rather the individual genius:

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

Given the instability of the revolution, the rise of Napoleon and restoration of the monarchy, Grégoire's Republican views held limited sway and effective legislation was not forthcoming. However, the banner was picked up by Victor Hugo in 1825. In his essay *Sur la destruction des monuments en France* (On the Destruction of Monuments in France), Hugo elaborated the idea of cultural property.

Thus in addition to his role in establishing the Berne Convention on contemporary creation, Hugo was also instrumental in developing our contemporary concepts of cultural property and national patrimony. He is a personal French link between copyright as author's rights and cultural property as the rights of past creators in the tradition of the Western cult of the genius. In

this tradition author's rights are justified - for a limited time – to encourage new work that will then flow into the public domain of knowledge growing a nation's patrimony.

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

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

Meanwhile, in England, Victor Hugo's call to arms found a receptive listener, John Ruskin. And it was Ruskin's long time friend Sir John Lubbock, Member of Parliament for Maidstone who, in 1872, introduced into the House of Commons *A Bill to Provide for the Preservation of Ancient National Monuments*. Like Hugo, Ruskin was the most eloquent preservation advocate of his country and Ruskin was the only author Lubbock quoted in support of the bill (Sax 1990b).

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

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

The American is unlike British, Canadian and French experience in four ways. First, the Act embraces not just human-made moveable and immoveable cultural property but also natural sites of aesthetic value as part of ‘natural heritage’. Second, it remains limited to federal lands and does not extend to unwilling private sector proprietors, *i.e.*, it is not ‘national’ not ‘compulsory’ in scope. Third, there is no sister legislation concerning moveable cultural property and no restriction on its export unless sourced from federal land. Fourth, American law remains focused on private property. It does not recognize the right of the Nation, as a temporal entity, to qualify private ownership of cultural property in the Present due to perpetual State ownership through Time.

Ironically, in the Anglosphere it is constitutional monarchies like Canada and the U.K. that recognize moveable and immovable cultural property as part of their national patrimony. Statutory limitations exist on their alteration, destruction and export. Again, this is unlike the American experience where only works found on federal lands qualify for protection. The rights of private American cultural property owners are not encumbered by the ‘national’ interest, *e.g.*, by export restrictions.

In Canada, the *Cultural Property Export and Import Act* (Act) came into force on September 6, 1977 (S.C. 1974-75-76, c. 50; R.S., 1985, c. C-51). It is intended to ensure the preservation in Canada of significant examples of cultural, historic and scientific heritage. It regulates the import and export of cultural property and provides tax incentives to encourage Canadians to donate or sell important objects to public institutions in Canada.

The traditional definition of cultural property is, however, changing. The right of Nation States to subsidize and otherwise support their domestic cultural industries – free of free trade restrictions - was recognized by the 2005 UNESCO *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*. At the conference, one hundred and forty-eight countries approved; the United States and Israel voted against; and, four abstained. This highlights again the ‘exceptionalism’ of the United States with respect to both intellectual and cultural property rights. Canada is a signatory. (Chartrand [July 2009](#))

Similarly intangible cultural property especially that of Third and Fourth World peoples is now recognized as ‘cultural property’ with ownership rights resting with those peoples themselves including traditional ecological knowledge or TEK. The 2003 UNESCO *Convention on Intangible Cultural Property* represents the most fully articulated multilateral expression of global opinion. Unlike the *Convention on Cultural Diversity*, however, both Canada and the United States do not recognize the *Convention on Intangible Cultural Property*.

Easement Theory in a Canadian Context?

Given the similarities and differences in the Canadian and American copyright experience the question arises: Will Patterson's unified or easement theory of American copyright work in Canada? In short, the answer is Yes!

First, both countries share ongoing legal tension between copyright as a proprietary monopoly and as a statutory grant. Resolution of this tension in both countries is possible using the easement theory.

Second, both Canada and the U.S. share the same pernicious legal fictions:

- (i) the fiction that natural and legal persons enjoy the same rights, and,
- (ii) the work-for-hire fiction, *i.e.*, all rights of an author as employee belong to the employer.

Third, in both Canada and the U.S. the result of these legal fictions has been threefold and the easement theory would serve to mitigate all three:

- (i) a general "usurpation of equity" due to the author by an assignee, generally a legal person. In Canada, economic are distinguished from moral and other rights available only to natural persons but such rights may be waived, *i.e.*, unlike the French experience they are not imprescriptible;
- (ii) the pervasive use of blanket or all rights licences (and of waivers in the case of Canadian moral rights) extinguishes all future claims of the artist/author/creator/director; and,
- (iii) the increasing appropriation of the public domain by private copyright proprietors discouraging learning, the statutory objective of copyright.

Fourth, and most importantly as a practical matter, easement is a legal concept with which all courts and almost all citizens are familiar in both the United States and Canada. It is real property law. It is urban zoning; it is access to the cottage and the lake. Introduction of the easement theory of copyright should shift the lens through which lower courts view copyright litigation. This requires, however,

that rights in copyright law be defined for the purpose of regulation in terms of the public interest rather than in the private interest of the author, the publisher, or the user (Patterson & Birch 2009, 385).

Conclusion

I conclude with implications of the unified or easement theory for Canadian copyright reform which appears in hiatus awaiting the outcome of multilateral negotiation of the *Anti-Counterfeiting Trade Agreement* (ACTA).

First, delay allows time to consider the American experience and the optics provided by this alternative legal theory to access any proposed amendments of the Canadian Act. It also provides time to contemplate what ACTA will be, given historical American industrialization of culture and its use of copyright as a tool of mercantilist competition (Chartrand [July 2009](#)).

Second, its application in Canada would further mitigate the effects of the latest Battle of the Booksellers, blunting their ongoing strategic litigation campaign to define copyright as plenary property enjoying a perpetual proprietary monopoly. The easement theory should assist government in accessing and responding to projects like Google Books with respect to copyright's purpose: to foster learning. For example, should government regulate, like a utility, access to Google's public domain materials to ensure they remain in the public domain? Is there a 'right to hear' corresponding to freedom of expression?

Third, application of the theory will further mitigate "usurpation of equity" due the author from assignees, generally a legal person. The significant difference in bargaining power of natural and legal persons has been barely affected by introduction of formal moral rights in Canada. Subject to waiver, moral rights like economic rights, remain subject to blanket or all rights licencing exhausting all future claims of the typical artist/author/creator. And, how much do they earn from copyright?

Fourth, and finally, a rebalancing of equity between artist/author/creator as a natural person and assignee/producer/proprietor/publisher as legal persons is critical in the emerging knowledge-based economy. While the traditional manufacturing economy boasted life-long employment, the knowledge-based economy is characterized by contract work and self-employment.

If the current regime continues, 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.*, Pavorotti. This could be the future of the knowledge-based economy - no middle class.

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