

## **TILTING AT WINDMILLS: MORAL RIGHTS & BENTHAMISM**

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## **Introduction**

I have, until now, concluded that Anglosphere resistance to imprescriptible moral rights for artists/authors/creators (the norm in Civil Code countries) was, as demonstrated below, the result of precedent and path dependency of the Common Law, *i.e.*, the inherent conservatism of the Law. I now know better.

My recent research on the relationship between education and copyright reveals that the ideology of Jeremy Bentham played and continues to play a major role in this resistance. By ideology I mean a systematized explanation of the way the world works without god. Thus Common Law and Benthamism together inhibit implementation of moral rights in the Anglosphere with significant implications for income distribution in the emerging global knowledge-based economy.

## **Common Law Precedent & Path Dependency**

Until the 1710 *Statute of Queen Anne* the author had no claim on a work other than a one-time honorarium paid at the discretion of the printer/bookseller/publisher or as then known ‘Stationer’. Often in fact the author had to pay for the printing. Thus what today is copyright began as a printer’s right. This right or ‘privilege’ to print a work, *a.k.a.*, copy, was perpetual - granted and maintained at the pleasure of the Crown. Enforcement of printer’s or Stationers’ copyright rested, however, on the *Licensing Act* which required pre-publication censorship. This practice beginning by statute in 1401 (2 *Henry IV c.15* or *De Heretico Comburendo*) predates Caxton’s printing press in 1476.

With the 1710 Statute the author was identified for the first time as the original copyright owner. Copyright to a work, however, was fully assignable to a ‘proprietor’, *i.e.*, a printer/bookseller/publisher. Rights were exclusively economic – the right to print or re-print.

The Act in fact was intended to regulate the book trade in a new United Kingdom of Great Britain (1707). In addition to recognizing the author, the Act broke the copyright monopoly of the Stationers’ Company of London and ended Scottish book piracy. Such piracy began when the English *Licensing Act* lapsed in 1695. This marked birth of a ‘free press’ in the Anglosphere, *i.e.*, one not subject to pre-publication censorship by the State. In turn, this followed the Glorious Revolution of 1689 and birth of constitutional monarchy.

In 1710, by statute, a book became at one and the same time: (i) a commodity; (ii) an income-earning but intangible property like ‘goodwill’; and, (iii) the first intellectual property right – the right to copy – recognized under Common Law. Until 1710 copyright cases were heard before the royal Court of the Star Chamber. Patents – the right to invention - had to wait until 1852 for

Common Law courts to gain jurisdiction in the U.K. By contrast in 1790 the U.S. Congress enacted a Patent Act subject to Common Law.

After 1710 all books were to be bought and sold in the United Kingdom of Great Britain – England, Wales, Scotland & Ireland - under the same law. Thus:

... the Author of any Book or Books already printed who hath not transferred to any other the Copy or Copies of such Book or Books Share or Shares thereof or the Bookseller or Booksellers Printer or Printers or other Person or Persons who hath or have purchased or acquired the Copy or Copies of any Book or Books in order to print or reprint the same shall have the sole Right and Liberty of printing such Book and Books...

*Statute of Queen Anne, 8 Anne c.21*  
Royal Assent 1709; in force April 10, 1710.

Statutory copyright, however, unlike Stationer's copyright, was time limited - initially 14 years for a new work. The Act was intended "for the Encouragement of learned Men to compose and write useful Books". Furthermore the title "An Act for the encouragement of learning" established the statutory basis for all subsequent legislation in the Anglosphere. It was also the opening title of the first U.S. Copyright Act in 1790. Other than assigning first ownership to the author, no moral or prescriptive rights of authors as distinct from proprietors were recognized. It should be noted that the first reported use of the word 'copyright' occurs in 1735 during debate in the House of Lords.

With the *Statute of Queen Anne* the Battle of the Booksellers began. Court cases were launched by proprietors to re-establish perpetual copyright. This time it was not a royal 'privilege' but rather a natural right fully assignable by starving authors to proprietors. The starving artist was and indeed remains a central character in a campaign of strategic litigation waged by copyright proprietors. It was and is based on a false confabulation of the interests of author and proprietor – additional rights granted authors are assignable to proprietors. Whether additional income or other benefits flow to the artist/author/creator due to enhanced legislative rights, on average, depends on private contract, on average, between a starving artist and a corporate proprietor.

Sir William Blackstone contributed to the plaintiffs' cause. He published his influential *Commentaries on the Laws of England* in 1767. In it he interpreted copyright for the first time as a legal concept making only the second recorded use of the word 'copyright'. Applying John Locke's theory of natural law, Blackstone described copyright as a kind of personal property because any published work is based on the author's brainwork. This is 'the sweat of the brow' theory of copyright. Locke, however, in his *Memorandum of 1694* argued for freedom of the press and an end to the *Licensing Act* but against both Stationers' copyright and

perpetual copyright for the author *contra* Blackstone. In his defence Blackstone may not have been aware of the memo.

The initial strategic campaign of litigation in the lower courts came to a penultimate decision with the 1769 case of *Millar v. Taylor*. Chief Justice Mansfield held for the majority that a natural right to perpetual copyright existed. In response to this and other decisions by Mansfield, Thomas Jefferson in 1788 exclaimed:

I hold it essential in America to forbid that any English decision which has happened since the accession of Lord Mansfield to the bench, should ever be cited in a court; because, though there have come many good ones from him, yet there is so much sly poison instilled into a great part of them, that it is better to proscribe the whole.” (Commons 1924, 276)

Justice Yates, for the minority in *Millar v. Taylor*, argued that copyright as a natural right exists only until published. Yates used the analogy of ideas as wild animals which so long as penned up in one’s head belong to you in perpetuity but once let loose belong to everyone and no one at the same time, *i.e.*, a public good or bad. Thus with publication – dedication to the public – any natural right for perpetual copyright lapses and time limited statutory copyright begins. In *Millar v. Taylor*, again, no recognition was given to moral rights of the author distinct from economic rights assignable to a proprietor. It should be noted that there simply was no Common Law copyright before the *Statute of Queen Anne* because the Court of the Star Chamber ruled, *i.e.*, the royal prerogative not Common Law governed copyright.

The ultimate judicial decision in the initial campaign of strategic litigation was reached in 1774 with *Donaldson v. Beckett* decided by the Law Lords – the House of Lords as the highest court of appeal. Quite simply Justice Yates’ minority opinion in *Millar v. Taylor* won the day. With publication – dedication to the public – the natural right to perpetual copyright lapses and time limited statutory copyright begins. Again, no recognition was given to moral rights of the author; all rights remained assignable to a proprietor. Nor was there any recognition of ‘the public domain’ or any natural rights associated with it. A similar decision was reached by the U.S. Supreme Court in 1834 in the case of *Wheaton v. Peters* (33 U.S. 591).

In fact it was not until 1886 through translation of the Berne Convention that moral rights and the public domain entered the English legal lexicon. The *Convention for the Protection of Literary and Artistic Works*, however, reflects the French rather than Anglosphere experience of copyright or rather author’s rights. Elsewhere I have described the French experience which follows Immanuel Kant seeing a work as a projection of human personality and subject to imprescriptible

human rights as Natural Law including a distinction between economic and moral rights to a work.

In conclusion, there is no Anglosphere precedent for imprescriptible moral rights of the artist/author/creator under Common Law. In fact, the opposite is true. The precedent is that all natural rights are extinguished on publication.

Three other developments in Anglosphere legal evolution further prejudice the case for imprescriptible moral rights. First, in 1873 Common Law and Equity were consolidated in the U.K. by the *Judicature Act* (at different dates elsewhere in the Anglosphere). Courts of Equity predate Common Law courts as I have described elsewhere. Equity does not deal with guilt or innocence, right or wrong. Rather it deals with fairness. And Equity brought with it a tool previously denied Common Law courts – the injunction.

Common Law assumes one is innocent until proven guilty. In effect penalty is *ex poste* imposed after the facts are proved. Equity, on the other hand, requires fairness and if cause is shown - but not necessarily proven - a temporary injunction may be granted by a court to stop actions of a party likely to harm another. In this sense an injunction is *ex ante*, *i.e.*, before the facts are proved. Since 1873 the temporary injunction has become a favoured legal tool of copyright proprietors. More importantly without a dedicated Court of Equity the fairness of imprescriptible moral rights fails to rise above the din of Common Law precedent, practice and mindscape.

Second, a legal fiction also developed under Common Law granting legal persons or bodies corporate the same rights as natural persons. This is not the case in Civil Code countries. Thus in the infamous 1886 U.S. case of the Santa Clara railroad (118 U.S. 394), corporations were deemed entitled to the same “equal protection” as natural persons against discrimination under the Fourteenth Amendment of the Constitution intended to protect black voters after the Civil War. Equal protection of natural and legal persons makes assignment of copyright – moral and economic rights - to a proprietor *or* employer appear natural, normal and fair. It also renders negotiations between the starving artist and corporate proprietor, on average, profoundly unbalanced. Again it is neither natural nor normal in Civil Code countries. There even employees retain moral rights to their work. Contract negotiations are also better balanced but more complicated and costly to proprietors.

Third, the Battle of the Booksellers beginning with the 1710 *Statute of Queen Anne* was but the opening volley of a three hundred year campaign of strategic litigation by copyright proprietors in the Anglosphere. Skirmishes generally begin in the lower courts. A precedent is sought that will, in turn, be

used to influence higher courts. Then, having established precedent, legislation is lobbied to aid proprietors usually in the name of the starving artist.

The campaign so far has succeeded in extending copyright from an initial 14 to more than 100 years – life of the artist plus 70 years in the U.S. It may not be perpetual copyright but is the next best thing. This in an age of instant communication and rapid technological change! In the process the public domain has been starved of content. In the case of patents the initial 14 years grew to but 20 arguably because inventors do not enjoy a single industrial focus as with authors: the publishing industry and its self-interested trans-global descendants.

In the Anglosphere at least this result was achieved through the combined combat operations of artists/authors/creators acting as agents of proprietors who by contract then usurp the equity of their agents. In addition it has been achieved because there is no tradition of the public domain or of its effective representation in the Anglosphere. As for ‘learning’ - the stated objective of the 1710 *Statute of Queen Anne* and the 1790 U.S. Copyright Act - it has become an industry in and of itself and a major client/supplier to copyright proprietors, *i.e.*, printers/booksellers/publishers, *a.k.a.*, trans-global media conglomerates.

Copyright has not only returned to near perpetuity in the 300 years since the *Statute of Queen Anne* but the *Licensing Act* has arguably been resurrected. As described elsewhere, the *Digital Millennium Copyright Act* in the U.S. and the proposed *Copyright Modernization Act* in Canada substitutes post-modern economic censorship for the religious and political censorship of the *Licensing Act* of 1662. In this legal environment proprietors have a vested interest in not recognizing imprescriptible moral rights of creators. This is a far cry from the eloquent but confabulated words of Zechariah Chafee

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

### **Benthamism**

In introduction I defined ideology as a systematized explanation of the way the world works without god. The philosophy of Jeremy Bentham (1748-1832) fits the bill. The human world works by each person maximizing pleasure and minimizing pain – the two sovereign rulers of the State. Applying ‘felicitous calculus’ - the calculus of human happiness -Bentham believed it possible to calculate the greatest good for the greatest number for any public policy question. This was to be done by counting units of pleasure/pain called ‘utiles’, hence Utilitarianism. His was, according to Joseph Schumpeter, the last ‘great’ and most

dismal philosophy of the European Enlightenment. Life was nothing but calculatory rationalism by our very selfish selves.

Radical egalitarianism is the ‘moral’ of Benthamism. Each person and their happiness and pain is as important as that of any other. No classes, no hierarchies, all equal. Born *tabula rasa* – a blank slate – differences in education and upbringing create differences in society. Standardize education and upbringing and all will become equal again. Put another way, if the Industrial Revolution meant mass production of standardized goods and services then Benthamism meant mass production of standardized people – their customs, tastes and traditions.

The impact of Benthamism in the Anglosphere cannot be underestimated. It reformed the Elizabethan Poor Laws into an industrial system of public welfare characterized by the workhouse and poor house chillingly described by Charles Dickens. It shaped criminal law and even penitentiaries, *i.e.*, Bentham’s Panopticon design of a central tower from which guards on each floor could view all cell doors arrayed in diagonal wings around the tower. Compulsory mass education introduced in 1870 is also a by-product of Benthamism.

Also in the 1870s Bentham’s felicitous calculus was married to Newton’s calculus of motion in the ‘Marginalist Revolution’ of Economics. This spawned, in turn, consumer theory, then theory of the firm and finally the perfect competition model of market economics. The revolution shifted the focus from distribution of national income among classes – labour, landowners, capitalists, *etc.* – to the efficiency of the individual or atomized consumer and producer. This revolution rests on the assumption that the price a consumer is willing to pay is the measure of its utility, *i.e.*, the number of utiles received. It involves reification (making concrete something that is abstract) of happiness into dollars and cents. Thus modern market economics is rooted in Benthamism.

For our purposes, however, Bentham’s concept of and impact on Anglosphere Law is at issue. In his anonymous 1776 *Fragments on Government* Bentham criticized Blackstone’s concept of Law rejecting Natural Law as ‘an abuse of language’. This was, of course, the same year that Adam Smith published the *Wealth of Nations* and the American Revolution began. Then in 1791 in his *Anarchical Fallacies*, a commentary on the French Revolution’s *Declaration of the Rights of Man*, he noted “Natural rights is simple nonsense; natural and imprescriptible rights, nonsense upon stilts...” And in the *Constitutional Code* of 1830 he rejected the Bills of Rights as useful only as a check on non-democratic governments. He rejected it as limiting “legislative omnicompetence... in contradiction to the greatest happiness principle.”

Benthamism had a somewhat different impact in the U.K. and the U.S. In both, however, it was extremely influential in juristic studies downgrading Natural Law. And in both Bentham's demand for an efficient and highly centralized public administration laid the foundation for the modern service state.

In the U.K., however, Benthamism also provided a distinct English road to democracy. Given the Napoleonic Wars no doctrine tainted with Jacobinism could win public acceptance. The path to reform could not include discussion of a social contract, natural rights, rights of man or liberty, fraternity, and equality. Benthamism satisfied this requirement.

In the U.S., by contrast, the *Declaration of Independence* and the subsequent *Constitution* were both rooted in Natural Law – life, liberty and the pursuit of happiness. Perversely, at the constitutional level Benthamism was used in America to justify slavery, the fate of which was, of course, determined by the Civil War.

In both, however, Bentham's rejection of Natural Law and Natural Rights tainted and continues to taint Anglosphere Common Law. This makes recognition and implementation of imprescriptible moral rights for artists/authors/creators a much rougher road to hoe.

### **Conclusion**

Thus Common Law with its precedent and path dependency together with Bentham's rejection of Natural Law and Natural Rights inhibit implementation of imprescriptible moral rights for artists/authors/creators in the Anglosphere. This has significant implications for income distribution in the emerging global knowledge-based economy. Such an economy is based on production of intellectual property including copyright. It is also characterized by increasing contract and self-employment. In selling product the knowledge worker through a blanket or 'all rights' license currently assigns, gives up and/or waives all future claims to a work including the moral right to claim paternity. Employees, of course, have no economic or moral rights at all, unlike in Civil Code countries. Copyright proprietors, on the other hand, take onto themselves, through a confabulation of interests, all additional rights granted by the State to the 'starving artist'. Put another way, the emerging income distribution in the knowledge based economy will be determined by the contract bargaining power of the average knowledge worker, *a.k.a.*, the starving artist, who has none.

I must conclude therefore that my effort to rehabilitate and implement imprescriptible moral rights for artists/authors/creators in the Anglosphere amounts to tilting at windmills. Nonetheless, continuing to joust with such giants is necessary and important.

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### **Précis: Policy Research Notes #1, 2 & 3**

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

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

The first note also pointed out that Canada together with France and Sweden, among others, succeeded in establishing the right of Nation-States to subsidize and otherwise support their domestic cultural industries – free of free trade restrictions. This was achieved through the 2005 UNESCO *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* that came into force in 2008. At the conference, one hundred and forty-eight countries approved; the United States and Israel voted against; and, four abstained.

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

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

The [third policy research note](#) published August 31, 2010 concerned Government justification for the Canadian *Copyright Modernization Act* (CMA) being that "in the current digital era copyright protection is enhanced when countries adopt coordinated approaches based on internationally recognized norms". The Act focuses on commercial norms specifically efforts to prevent "circumvention of effective technological measures" intended to protect copyrighted works. This norm, however, is deeply rooted in American mercantilist legal precedent specifically the *Digital Millennium Copyright Act* which in turn bears an uncanny resemblance to the English *Licensing Act of 1662* with its search and seizure provisions concerning illegal printing presses and their manufacture.

Not only are there no 'effective technological measures' (all have been hacked) but the Act fails to address three cultural norms of copyright inherent in the *Berne Convention*. These include: moral rights of the artist/author/creator as inalienable human rights; national treatment requiring a Member State to treat foreign creators the same as nationals but allowing for different rights in different countries;

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and, grow the public domain into which all copyrighted works eventually fall and that is the root of national patrimony. In summary, the CMA would increase revenues for copyright proprietors, invade the digital privacy of all citizens, significantly reduce the public domain and not materially reward the 'average' creator, *a.k.a.*, the starving artist.