

Introduction

**THE COMPLEAT MULTILATERAL COPYRIGHT
& RELATED 1886-2007**

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Introduction

The Work

THIS is a reference work documenting 121 year's of multilateral copyright relations beginning with the Berne Convention of 1886. By 'multilateral' I mean relations between three or more Nation-States. Bilateral copyright has a longer and more troubled history. It was such troubles that led to the complex contemporary multilateral copyright regime of 62 agreements, conventions, covenants and treaties compiled herein (see [Exhibit 1](#), vii).¹

Excluding the *Executive Summary*, the work consists of four parts:

- 1. Introduction:** explaining the structure, organization and limitations of the work as well as providing an historical, cultural, economic, legal and geopolitical assessment of the significance of the multilateral copyright regime;
- 2. Index of Instruments:** naming and numbering each instrument followed by a Legal Lexicon of terms used in multilateral relations;
- 3. Instruments:** organized in three parts: Global, Regional (the Americas and Europe) & UN/UNESCO recommendations and resolutions. Each instrument is preceded by an Index by chapter, section, article and, in many cases, by sub-article; and,
- 4. Meta Index:** an index of instrument indices permitting the reader to scan the contents of all instruments at a glance.

On the one hand, this work is the record of multilateral attempts to accommodate new ways of fixing the expression of ideas or knowledge onto a material matrix thereby creating new works subject to copyright, *e.g.*, 'talking' pictures, radio and television, VCRs, DVDs, WWW, *et al.* In the process, streams of royalties are created and sometimes successfully exploited fostering the industrial organization of a knowledge-based economy. On the other hand, it is the record of multilateral attempts to recognize and reward creators – Natural and Legal – to foster learning and grow the public domain, in effect, to grow the national knowledge-base. It is thus a summary record of multilateral attempts to balance the conflicting interests of creators, users and proprietors of copyrighted works with the self-interest of Nation-States in the context of ever accelerating technological change.

Instruments have been compiled, 55 out of 62, from English-language online treaty series maintained by: the Council of Europe (CE), European Union (EU), Organization of American States (OAS), United Nations Education, Scientific & Cultural Organization (UNESCO), United Nations (UN) and the World Intellectual Property Organization

¹ Two exceptions must be noted. First, the *International Covenant on the Rights of Indigenous Nations* of 1994 is included (#5: 91-100). This was initialed by representatives of indigenous nations, not Nation-States. Second, copyright-related provisions of the *Canada-United States Free Trade Agreement* of 1988 are included (#34: 461-462).

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Exhibit 1

LIST OF INSTRUMENTS

GLOBAL

1. Berne Convention 1886
2. Circulation of Obscene Publications 1910
UN Protocol 1949
3. Film Registration 1989
4. Indigenous Nations 1994
5. Trafficking in Obscene Publications 1924
UN Protocol 1947
6. Type Face (Vienna Agreement) 1973
7. UN Commercial Samples & Advertising Materials 1952
8. UN Performers, Producers of Phonograms & Broadcasting
Organizations (Rome Convention) 1961
9. UNESCO Cultural Diversity 2005
10. UNESCO Educational, Scientific & Cultural Materials
(Florence Agreement) 1950
Protocol (Nairobi Agreement) 1976
11. UNESCO Exchange of Publications 1958
12. UNESCO Government Documents 1958
13. UNESCO Intangible Cultural Heritage 2003
14. UNESCO Visual and Auditory Materials
(Beirut Agreement) 1948
15. UNESCO/WIPO Double Taxation 1979
16. UNESCO/WIPO Folklore 1984
17. UNESCO/WIPO Producers of Phonograms 1971
18. UNESCO/WIPO Satellites 1974
19. UNESCO/WIPO Tunis Model Law 1976
20. Universal Copyright Convention 1952
21. WIPO Convention 1967
22. WIPO Copyright 1996
23. WIPO Databases 1996
24. WIPO Integrated Circuits (Washington Treaty) 1989
25. WIPO Performances & Phonograms 1996
26. WIPO-WTO Agreement 1995
27. WTO GATT Provision 1947
28. WTO TRIPS Agreement 1994

REGIONAL

The Americas

29. Inter-American Copyright Convention 1902
30. Buenos Aires Convention 1910
Revision 1928
31. Pan American Copyright Convention 1946

Latin America

32. Common Provisions on Copyright and Neighboring
Rights, Andean Community 1993
33. Montevideo Treaty 1939

North America

34. Canada-United States Free Trade Agreement 1988
35. North America Free Trade Agreement 1994

Europe

Council of Europe

36. CE Audiovisual Heritage 2001
Protocol 2001
37. CE Broadcasts from Outside National Territories 1965
38. CE Conditional Access 2001
39. CE Cybercrime 2001
40. CE Transfrontier Broadcasting by Satellite 1994
41. CE Transfrontier TV 1989
Protocol 1998
42. CE TV Broadcast Protection 1960
Protocols 1965, 1974, 1983, 1989
43. CE TV Film Exchange 1958

European Union

44. EU Computer Programs 1991
45. EU UNESCO Cultural Diversity 2006
46. EU Databases 1996
47. EU Electronic Commerce 2000
48. EU Harmonizing Certain Aspects of Copyright 2001
49. EU Harmonizing Term of Copyright Protection 1993
50. EU Global Networks 1999
Amendment 2003
51. EU Rental & Lending Rights 1992
52. EU Resale Rights 2001
53. EU Safer Use of the Internet 2005
54. EU Satellite Broadcasting & Retransmission 1993
55. EU Topographies of Semiconductors 1986
56. EU WIPO Copyright Treaty and Performances
& Phonograms Treaty 2000

UN/UNESCO

RESOLUTIONS & RECOMMENDATIONS

57. UN Direct Television Broadcasting 1982
58. UNESCO Access to Cyberspace 2003
59. UNESCO Moving Images 1980
60. UNESCO Status of the Artist 1980
61. UNESCO Traditional Culture & Folklore 1989
62. UNESCO Translators & Translations 1976

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(WIPO). Exceptions were compiled from other sources.²

None of the 62 instruments ([Exhibit 1](#), vii) has a complete index in the original. Furthermore most provide no titling of chapters, sections or articles. An *Editor's Note* at the beginning of each instrument indicates if titling has been added. Where possible, titling was derived from provisions of the Berne Convention. Comprehensive titling and indexing of instruments is a major value added of this work.

Limitations

This work has a number of limitations. First, and most important, its author is not a lawyer. Rather I am an economist who has researched and studied copyright for thirty years beginning with the now defunct Canadian Bureau of Intellectual Property during preparation of the 1977 Keyes/Brunet Report. I continued my research from 1978 to 1989 first as research officer and then Director of Research & Evaluation for the Canada Council. Since that time (1989-2007) I have published many articles and legal compilations concerning Canadian and international copyright and other intellectual property rights including a previous edition of this work. Nonetheless, this work is only a reference guide. For purposes of legal argument the reader is directed to the 'official' instrument and relevant amendments. I therefore disclaim responsibility for any damages resulting from error of fact or other faults contained in this work - *caveat emptor!*

Second, I practice Cultural Economics classified as category 'Z000' by the [American Economics Association](#). The 'Z000' engages the economics of the arts, religion, social norms and economic anthropology. I trace my specific intellectual roots, however, to the American Institutionalism of J.R. Commons (1924). My ideological

² #19: 262-277, *UNESCO/WIPO Tunis Model Law* of 1976 compiled from hardcopy provided by WIPO;

#29: 426-429, *Inter-American Literary and Artistic Property Convention* of 1902 compiled from HeinOnline;

#30: 430- 433, *Buenos Aires Convention* of 1910 and its 1928 revision (#30, 434-437) compiled from the JSTOR edition of the *American Journal of International Law*, respectively, Vol. 5 (1), Supplement: Official Documents. January 1911 and Vol. 22 (3), Supplement: Official Documents. July 1928;

#31: 438-442, *Pan-American Copyright Convention* of 1946 compiled from the *Codice del diritto d'autore* website, Studio Ubertazzi, Milan;

#33: 457-460, *Montevideo Treaty on Intellectual Property* of 1939 compiled from the JSTOR edition of the *American Journal of International Law*, Vol. 37 (3), Supplement: Official Documents. July 1943;

#34: 461-462, *Canada-United States Free Trade Agreement* of 1988 compiled from the Agriculture & Agri-Food Canada website; and,

#35: 463-487, *North American Free Trade Agreement* of 1994 compiled from the Foreign Affairs & International Trade Canada website.

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bottom line is that maximizing, *i.e.*, economic, behaviour, takes place within the context of culture and law. If you do not account for culture, you end up in the cannibal's cooking pot; if you do not account for law, you end up in jail. Neither is a maximizing outcome.

Third, only instruments available in English have been compiled. In some cases translations by third parties have been used. This limitation means that one foundational instrument is not included: the *Treaty on Literary and Artistic Property* done at Montevideo, Uruguay on January 11, 1889. Signed during the South American Congress on Private International Law, this is considered the first instrument in development of the Pan-American copyright system. Unlike later agreements, however, it was open to non-American states. No English language version could be found for purposes of this work.

Copyright as Intellectual Property

Before presenting an assessment of the significance of the multilateral copyright regime it is necessary to distinguish copyright from other intellectual property rights (IPRs). Major IPR classes include: patents & industrial design, copyright & trademarks and 'know-how' & 'trade secrets'. IPRs do not protect knowledge or ideas but rather their expression fixed in a material 'matrix'. A matrix is a "supporting or enclosing structure" (OED *matrix*, n I). Traditionally it is something that can be seen, touched or otherwise perceived by a human being and exhibiting some permanence. Finally, knowledge fixed in such a matrix must be original in order to receive protection.

With respect to copyright, Justice Yates, in his dissenting opinion in the 1769 case of *Millar v. Taylor*, laid out the legal reasoning why ideas or knowledge are not protected. He argued, drawing on the *Institutes of Justinian* (one of the sources of the European Civil Code), that ideas are not the object of property rights because they are like wild animals or *ferae naturae*. Once set free they belong to no one and everyone at the same time, *i.e.*, they are in the public domain. It is only their expression fixed in material form – commonly known as a work – that qualifies for protection (Sedgwick 1879). More will be said about this dissenting opinion below.

I will briefly outline the different forms of knowledge, the problematic nature and types of matrix in which it may be fixed to qualify for IPR protection([Chartrand July 2006](#)).

First, knowledge assumes three forms: personal & tacit, codified and tooled. The first is protected by 'know-how' and 'trade secrets'. The second is protected by copyright and trademarks. The third is protected by patents and industrial design. Ultimately, however, as noted by Michael Polanyi ([1958] 1962), all knowledge is personal & tacit. It is the Natural Person who must decode; it is the Natural Person who must push the buttons. Without the intermediation of a Natural Person codified and tooled knowledge remain an artifact without meaning or function.

Personal & tacit knowledge is fixed as neuronal bundles of *memories and reflexes* of nerve and muscle in a Natural Person and/or in

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the *routines* (Loasby 2000) of a Legal Person. As will be seen, the distinction between a Natural and Legal Person plays a critical role in the multilateral copyright regime (*Natural vs. Legal Person*, xxxviii). Codified knowledge is fixed or encoded on an extrasomatic (Sagan 1977) or ‘out of body’ matrix called a communications medium that conveys *semiotic meaning* from one human mind to another.³ Tooled knowledge is fixed as *function* in an extrasomatic matrix called an instrument, device or process.

Second, what constitutes a matrix is problematic. For example, until 1988 under Canadian copyright recorded extemporaneous music, *i.e.*, music improvised and simultaneously recorded, did not qualify for protection because it was not “reduced to writing or otherwise graphically produced or reproduced” (Keyes & Brunet 1977, 40). The recording itself did not qualify as a matrix. Similarly, computer programs did not qualify because they could not be ‘read’ by a human being. Furthermore, ephemeral displays on computer screens received no protection because they had no permanence (Keyes & Brunet 1977, 129).

The law, being inherently conservative, concluded that if the matrix was not perceptible by a human being then it was not possible to assess other requirements for protection, *e.g.*, originality, non-obviousness, usefulness, *etc.* An electron might be a part of the physical world but if one could not see, touch or otherwise perceive it then it had no legal status.

Things changed. In effect, the evidence of tooled knowledge, *i.e.*, machine instrumentation extending the human senses and grasp, has been admitted by the Courts. The implication is that there is no longer any microscopic (or macroscopic) legal limit to intellectual property being fixed in a material matrix, only technical ones.

Third, a matrix comes in three types: utilitarian, non-utilitarian and/or a Person – Natural or Legal. In the case of patents & industrial design tooled knowledge is fixed in a utilitarian matrix. For patents, a device or process has a function or purpose other than itself. Unlike a work of art appreciated for what it is, a patented work is appreciated for what it can do. Industrial design, on the other hand, is the non-functional characteristics of a device such as its shape, size and colour, *e.g.*, a coffee cup without a corporate logo or aesthetic design remains a coffee cup. The matrix carrying the design has a function independent of the design itself.⁴

In the case of copyright and trademarks, codified knowledge is fixed in a non-utilitarian matrix. It carries semiotic or symbolic meaning from one human mind to another. This, however, excludes computer software which conveys operating instructions to a machine or, in

³ This explicitly excludes software copyright and patents which constitute, as I argue below, a distinct *sui generis* class of work.

⁴ It should be noted that in the British legal tradition industrial design emerged out of copyright while in the American legal tradition it evolved out of patents.

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genomic programming, operating instructions to molecules. I will have more to say about ‘human-readable’ and ‘machine-readable’ copyright below. For now it is sufficient to say that the matrix for copyright and trademark is, in effect, a communications medium with no function other than to carry a message from one mind to another, *e.g.*, a book may make a good read but is a second-rate door jam. Put yet another way, a work of art, traditionally the exclusive subject of copyright, is valued in and of itself with no utilitarian purpose or function. Similarly, a trademark is protected no matter the matrix to which it is affixed – the side of a truck, a coffee cup or an integrated circuit. It symbolizes either a Person – Natural as in a silversmith’s mark or Legal as in a corporate logo – or a Place as in a mark of origin.

Finally, in the case of know-how and trade secrets, the matrix is a Person – Natural or Legal. Secrecy protects both because in most countries there is no formal statute. They are, however, implicitly recognized under the TRIPS Agreement (Section 7: Protection of Undisclosed Information, #28: 409). Trade secrets are also explicitly recognized under Article 1711 of NAFTA (#35: 476). Due diligence to protect ‘the knowledge’ is required by the Courts. When a Natural or Legal Person (including a government) discovers that know-how or a trade secret has been revealed by an agent or a third party without permission, legal recourse is available through the Courts for breach of contract, breaking and entering, trespass, *et al.* I now turn to the significance of the multilateral copyright regime.

Significance

The significance of the regime will be demonstrated by weaving together the differing and sometimes conflicting and often changing historical interests of:

- creators, proprietors and users of copyrighted works;
- the Nation-States they call home; and
- other countries especially their differing legal traditions.

To do so I will consider the historical, cultural, economic, legal and geopolitical significance of the regime. Along the way one must keep in mind that copyright literally means ‘the right to copy’ leaving a number of questions implicit. Copy what? Who exercises the right? What limits its exercise? What justifies it? Furthermore, copying is not creation or consumption but rather a distributive mechanism for knowledge. In a sense copyright is the law of communications (Patterson 2001, 731)

Copyright in the ‘Anglosphere’ (Bennett 2000) has, however, acquired additional meanings especially from the French *droits d’auteur*, *i.e.*, rights of the author, and *domaine publique*, *i.e.*, the public domain. To complicate matters further, multilateral copyright concerns treaties between Nation-States requiring them to respect, in their own territories, the rights of nationals of other subscribing nations (Kampelman 1947, 406).

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Historical Significance

The history of the multilateral copyright regime consists of five overlapping eras or epistemes (Foucault 1973). They are: (i) national; (ii) bilateral; (iii) multilateral; (iv) bipolar; and (v) monopolar copyright. They overlap forming the fabric of our contemporary world view. The Present is thus an overlapping temporal gestalten woven out of uneven and unequal strands stretching ontologically backwards into the Past (Emery & Trist 1972). The integrity of the weave and its pattern changes and evolves through time as new strands are added and different ones rise to and fall from prominence, *e.g.*, as national legislation is modified to adjust to new bilateral or multilateral treaty obligations. Such a view contradicts the concept of ‘modernity’ as the homogenous co-temporality of all sectors of society.

National Copyright

Copyright, as the right to copy, is the legal and political offspring of the printing press and traditional censorship by Church and State. Until innovation of the moveable type printing press in the 15th century each copy of a work was a handcrafted product enjoying no economies of scale. Output was small, expensive and distribution limited. In addition each copy was subject to human error, distortion and/or critical judgement. No ‘definitive’ text, other than the original manuscript, existed. Church and State could easily censor and remove a text judged irreligious, seditious or treasonous from the public domain. Authors were also subject to secular and religious penalty up to and including death.

With the printing press, however, secular and religious authority faced a changed situation. Copies could, once typeset, be produced at increasing returns to scale, *i.e.*, each subsequent copy cost less than the previous. Furthermore, each copy was identical and not subject to distortion in the copying process. The printing press was thus the first engine of mass production. It also acts like a scientific instrument that once calibrated provides measurement without further human mediation.

The response of religious and secular authorities to the printing press was a new layer of censorship – copyright – the right to copy. In England, under Common Law many rights initially derive from inscribing or copying one’s name and explaining one’s ‘title’ to property on a register. Thus in medieval England to obtain the right to farm a particular piece of land, one’s name had to be inscribed on a register of tenants. This was, and still is, called ‘copyhold’ to the land (Mead 1999).

Accordingly, the first copyright law of 1476, the year William Caxton introduced the printing press in England, was a licensing law requiring printers to inscribe their name, location and titles of works they wanted to print on a register. If approved for publication after review, *e.g.*, by the Court of the Star Chamber, the Crown granted a *copye* to the printer. The rights flowing from this *copye* constituted “copyright” and were held by the printer at the pleasure of the Crown in perpetuity.

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Three distinct classes of works initially received a *copye*. First, it could be granted to an individual or group of individuals to print a particular book of unknown or collective authorship. Second, it could be granted for an entire class of works on a specific subject or particular category such as the Statutes of the Realm. Third, it could be granted for works by a named author (Feather 1991-92, 446). With the exception of the last, and initially least significant class, a *copye* was granted to the printer, not to the author.

In 1557, Queen Mary I granted a charter to what became the Company of Stationers of London. Stationers' copyright was based on royal prerogative or letters patent covering the entire publishing industry as an estate. The monopoly was assigned to members as a freehold interest. No consideration was given to author's rights. Stationers' copyright was also perpetual at the pleasure of the Crown.

It is important to note that Stationers' copyright and patents of invention were the only Crown monopolies to escape dissolution under the *Statute of Monopolies* of 1624 during the reign of James I. The copyright monopoly survived due to its political usefulness in fostering the political and religious orthodoxy of the day, no matter who was in power – Anglican, Catholic or Protestant (Patterson 1993). It was intended to censor the public domain. Even after 1710, when copyright became vested in the author rather than the printer (*Cultural Significance*, xix), copyright remains subject to the Crown. Illustrative is the following early 20th century Canadian example:

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

Revised Statutes of Canada 1906, c.70, s. 7

In France, at the time of the British *Statute of Monopolies*, a manuscript was submitted to the chancellor's committee of examiners who decided upon its appropriateness for publication. If a work was approved, a 'privilege' was then granted to the printer. This privilege too was perpetual at the pleasure of the Crown. The Community of Sellers and Printers of Paris, founded in 1618, cooperated, like the Stationer's Company in London, with examiners and police in investigating foreign works. Furthermore, by assisting royal agents on raids, officers of the Paris community made certain that provincial sellers and printers complied with the regulations (Birn 1970-71, 133).

Copyright remained a printer's right until the author was recognized in the 1710 British *Statute of Queen Anne* and with French *privilèges d'auteur, i.e.*, author's privileges, first granted in 1777 (Hesse 1990, 113). National copyright in fact continues to evolve idiosyncratically within the framework of the multilateral regime.⁵

⁵ Limited by minimum conditions required by the 1995 WTO *Agreement on Trade-Related Aspects of Intellectual Property Rights* or the TRIPS Agreement (#28: 389-425).

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Under the regime ‘national treatment’ is the accepted test of compliance. This means, for example, that Canada must extend to foreign authors and proprietors the same rights as granted to Canadian nationals. These rights, however, need not and are generally not the same between countries.

Bilateral Copyright

Control over domestic copying was, however, continually challenged by works produced in other jurisdictions. There were two sides to the problem. First, works censored or banned in one jurisdiction could be mass produced in another and copies slipped across the border threatening secular and religious authorities.

Second, printing became the first industry of mass production enjoying economies of scale. The industry spawned a series of institutional and occupational spin offs including booksellers and publishers. Quite simply printing became big business. However, the copyright assigned to a printer in one jurisdiction had no legal standing in another. Thus if a work became popular in France it could be translated and/or simply re-published in its original language, for example, in Holland. No payment or honoraria was made to the author or original printer. Cheap editions could therefore be produced eventually finding their way into the domestic market threatening the financial viability of the original printer.

Such ‘piracy’ of foreign works also became national policy in some jurisdictions. In Austria-Hungary, for example, Johann Trattner of Vienna, became one of the most successful pirate publishers of the late eighteenth century terrorizing the German book trade for over three decades. His activities were officially sanctioned as late as 1781 by royal decree. Even strict Viennese censorship was relaxed for pirated editions of otherwise forbidden works if they were ‘local products’ that brought profits to the capital but were sold abroad (Woodmansee 1984, 439).

Such a mercantilist rationale also formally inspired the United States until the late 20th century and, arguably, informally thereafter. After gaining its political independence from England, the USA looked upon copyright as an instrument of industrial independence, specifically in the printing trades. Thus no royalties were paid to foreign authors or publishers (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’.

With each nation going its own way and intercourse between nations increasing, international piracy grew. The first country to reject national boundaries was France which in 1793 granted equal protection

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to residents and non-residents alike. Across Europe copyright protection was gradually extended to the nationals of countries which entered into reciprocal arrangements. Such bilateral agreements characterized international copyright until the Berne Convention of 1886 (Kampelman 1947, 410). It is important to note, however, that bilateral copyright continues, *e.g.*, bilateral agreements signed between the United States and Singapore in 1987 and Indonesia in 1989.

Multilateral Copyright

Bilateral agreement, however, proved unsatisfactory. Among other things, new agreements had to be considered not only with respect to the two negotiating countries but also other nations that had agreements with either of the contracting parties. Furthermore, such treaties often set complicated registration and timing conditions before protection could be extended.

It was failure of bilateral copyright agreements together with pressure from authors that led to the first multilateral copyright agreement – the *Berne Convention for the Protection of Literary and Artistic Works* of 1886 (#1:13-51). It is important to note that the countries establishing the Berne Union - Belgium, France, Germany, Great Britain, Haiti, Italy, Liberia, Spain, Switzerland, and Tunisia - justified the act not by reference to censorship or commerce but rather to the promotion and protection of the artist/author/creator.

In this regard the first multilateral intellectual property rights convention was the 1883 *Paris Convention for the Protection of Industrial Property* covering patents, trademarks and registered industrial design. That copyright was not ‘industrial property’ (Keyes & Brunet 1977, 3) was recognized with the 1886 Berne Convention which also introduced Civil Code concepts such as moral rights and the public domain into the Anglosphere legal lexicon.

Three years after the Berne Convention the same authorial rationale gave birth, in 1889, to the second major multilateral copyright agreement: the *Treaty on Literary and Artistic Property* done at Montevideo, Uruguay during the South American Congress on Private International Law. This was the first step in development of the Pan-American copyright system. Unlike subsequent agreements, however, it was open to non-American states. It was ratified by Argentina (1891), Bolivia (1903), Paraguay (1889), Peru (1889), and Uruguay (1892) and agreed to by France, Spain, Belgium, Italy, Germany, and Austria. No English language version, however, could be found for purposes of this work.

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

Whether due to the Monroe Doctrine by which the United States asserted its obligation to protect the Americas from foreign influence or

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for other reasons, a distinct Pan-American copyright regime emerged to challenge the Berne Convention and complicate multilateral copyright relations. The first formal Pan-American copyright convention was signed at the Second International Conference of American States at Mexico City in 1902. The *Inter-American Literary and Artistic Property Convention* (#29: 426-429) was ratified by Guatemala, Salvador, Costa Rica, Honduras, Nicaragua and the United States. It was followed by the *Buenos Aires Convention on Literary and Artistic Copyright* of 1910 (#30: 430-433) and its revision in 1928 (#30: 434-437). The system was finalized with the Pan American Copyright Convention of 1946, formally the *Inter-American Convention on the Rights of the Author in Literary, Scientific and Literary Works* (#31:438-442).

In effect this development split the world into two competing multilateral regimes. First, the Berne Convention is an open treaty, *i.e.*, open to all nations. The Pan American Convention, on the other hand, is a closed treaty open only to countries in the Americas. Second, Berne requires no special procedures such as registration to obtain protection in a participating State, *i.e.*, national treatment is automatic. On the other hand, the Pan American Convention allows for special procedures including use of the ‘©’ symbol on any work claiming protection in a participating State (#31: 440). Third, Berne extended ‘courtesy’ protection to works if simultaneously published in a Berne Convention country whether or not they originated in a participating State. Under the Pan American Convention, on the other hand, protection was restricted to works from participating nations. In a sense Berne focuses on the artist/author/creator no matter citizenship while the Pan American Convention protects only works by resident creators.

Before and after the First and Second World Wars various attempts were made to reconcile these two regimes. It was not, however, until the UNESCO inspired *Universal Copyright Convention* of 1952 (#20: 278-321) that an overarching instrument, however flawed, was erected to span the gulf between the two regimes.

It is important to note, however, that in 1947 the General Agreement on Tariffs and Trade (GATT) established a set of cultural exemptions among market economies from free trade including film quotas (later extended, *de facto*, to television programming) on foreign works and prohibition of works that threaten public morals (#27: 387-388). It is this clause, for example, that permits Islamic countries to ban works portraying women in an un-Islamic fashion.

Another critical step in the evolution of the multilateral copyright regime took place in 1967 when the World Intellectual Property Organization (WIPO) was spun off from UNESCO. It assumed responsibility for the United International Bureau for the Protection of Intellectual Property which had been set up in 1893 to administer both the Berne and Paris Conventions. Since its creation WIPO has initiated a number of ‘global’ copyright-related agreements including the 1996 *WIPO Copyright Treaty* (#22: 340-347).

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Bipolar Copyright

With the Russian Revolution of 1917, and especially its extension after World War II, a Second World governed by Marxist rather than market economics emerged. In this Second World of the Communist Revolution, *e.g.*, Russia, China, Cuba, *etc.*, all “means of production” were the property of the State. With respect to intellectual property, moral rights of the artist/author/creator were recognized, *i.e.*, paternity or authorship were recognized but economic rights were limited to a onetime cash award or honorarium with all subsequent income flowing to the State.

With respect to the Soviet Union there were two distinct phases to its cultural policy. First, between the Communist Revolution of 1917 and 1932 the “People’s Commissar of Enlightenment” viewed the arts as an integral part of human development. Artistic change, however, was seen as evolutionary, not revolutionary in nature. While the workers were the owners of the artistic means of production they were not yet ready to operate them. They needed to be educated.

Cultural education of the masses took two forms. First, ‘Agitprop’ was used to consolidate the revolution especially in the country-side.⁶ The illiterate masses were inundated by images – moving and still. Actors and musicians toured the country side providing the sound and fury of Revolution. Futurist art with its thrusting vision flourished. Second, the masses needed access to the best capitalist art of the past before true proletarian art could emerge. Censorship was relatively rare. In this phase the Soviet State acted like an Architect (Chartrand & McCaughy 1989) designing an environment in which creativity could flourish.

Second, in 1932 the second Five Year Plan⁷ was implemented by Joseph Stalin. For him, the high costs of industrialization and the need to develop a new socialist society combined to change the role of the State from Architect to Engineer of cultural life. This saw the rise Socialist Realism that:

downplays the notion that the ‘means of production’ in the arts belongs to the masses, substituting the idea that it is the final product, the artwork itself, that is the property of the proletariat. Under this scheme, the social responsibility of the artist lies in “satisfying” the “owners” that is producing works that can be immediately accepted by the masses. (Kay 1983)

⁶ One of the most effective works of Agitprop was ‘the hammer and sickle’ selected by Lenin and Commissar of Enlightenment Lunacharsky during a competition of artists. While the symbolic reference is to the industrial worker (the hammer) and the agriculture worker (the sickle) it also suggests the crescent moon of Islam, the Cross of Christianity and the five-pointed star of Solomon or Judaism – the three dominant religions of pre-revolutionary Russia, religions Communism intended to replace.

⁷ This was, of course, a year before Hitler turned all the means of artistic production to foster the Third Reich with all its pomp and circumstance.

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Henceforth all art in the Soviet Union had to be socialist realist; that is, realist in form and socialist in content. Artistic activity was organized into “creative unions” to monitor new works and ensure conformity with the aesthetic principles of the Communist Party. Artists who produced work that did not conform were expelled and no longer recognized as artists.⁸

It is ironic that, on the one hand, it was Soviet works in the Czarist tradition – ballet and symphonic music - that won critical acclaim in the West, not works of socialist realism. On the other hand, it was popular cultural products of the West that were sought after within the Soviet Union, not works of socialist realism. Stanislaus and his tractor simply did not sell East or West.

Neither the Soviet Union nor the People’s Republic of China (until 1992) joined the Berne Convention.⁹ Instead they treated protected works as capitalist fodder to feed the revolution. Works from capitalist countries were freely exploited subject to Communist censorship by both dominant communist powers and, with exceptions, by their satellite partners. Ideologically, compromise was not possible.

Monopolar Copyright

With the collapse of the Soviet Union in 1989 and submission by the People’s Republic of China to the discipline of the marketplace things changed. Only one ideology was left standing – market economics. Only one super-power remained able to project conventional military force anywhere in the world – the United States of America.¹⁰

The umbrella of free market institutions developed under American leadership after the Second World War (including the World Bank, International Monetary Fund and especially the General Agreement on Tariffs and Trade) rapidly expanded again under American leadership but this time to serve a monopolar world. Most importantly the World Trade Organization was established in 1995.

The WTO Agreement is a ‘single undertaking’ consisting of a set of some sixty agreements (*Legal Lexicon*, 12). Membership requires accepting all without reservation. One of these is TRIPS - the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (#28: 389-425). It is important to note that TRIPS explicitly excludes moral rights as trade-related IPRs (#28, 399).

WIPO also initiated a series of new copyright-related agreements beginning with the *Treaty on Intellectual Property in respect of Integrated Circuits*, the ‘Washington Treaty’ of 1989 (#24: 360-369).

⁸ In Communist China socialist realism was also promulgated but access to capitalist art was sacrificed during the Cultural Revolution. This mirrored actions of the first emperor who, in 213 B.C.E., burned twenty-five hundred years of written culture (Wilhelm, 1950: xlvii) so that ‘Before Me, No History!’

⁹ Both did, however, join the UCC (#20, 278-321)

¹⁰ The Russian Federation as well as China, Ukraine, Belarus, and Kazakhstan retain the ability to send nuclear missiles anywhere in the world but cannot project conventional forces globally unlike the former Soviet Union.

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This followed the American *Semiconductor Chip Protection Act* of 1984 and EU protection of semiconductor typographies in 1986 (#55: 732-739). While the Washington Treaty is not in force it may still come to pass. The treaty remains open. WIPO also initiated multilateral conventions covering copyright, databases and phonograms in 1996 (see #'s 22 to 25: 340-382).

In this new monopolar world, the USA, using official and unofficial channels, *e.g.*, the International Intellectual Property Alliance, is pressing other Nation-States to comply with its interpretation of copyright, *e.g.*, extinction of moral rights. To Michael Geist such efforts suggest the “US copyright lobby [is] out-of-touch” with reality (Geist 2007). The grounds for this argument will be laid out below.

Division and difference thus continue to plague the multilateral copyright regime. Arguably a new division has opened up between WIPO (commerce) and UNESCO (culture). Both the 2003 UNESCO convention on *Intangible Cultural Heritage* (#13: 215-227) and its 2005 convention on *Cultural Diversity* (#9: 158-172) explicitly state they do not conflict with other agreements, *e.g.*, the *WIPO Copyright Treaty*. Nonetheless, there appears to be an implicit tension between commerce vs. culture (*Geopolitical Significance*xxxix).

Cultural Significance

Copyright, from the 15th to the 18th century, was granted exclusively to printers allowing them to copy works approved by the State. In this sense copyright had only a political economic dimension – commerce and censorship. During this period the bulk of printed works, however, were ancient texts whose authors were long since dead or were sacred texts inspired by God and belonging to no one. These were the ‘popular’ and hence profitable works of the time. The few living authors sold their works out right to printers who then enjoyed exclusive rights to reproduction. Royalties were unheard of. Authorship or paternity and the right not to have a work altered to the prejudice of the author (so-called ‘moral rights’) were often recognized but not as law but rather as guild custom and tradition. Economic rights were limited to a onetime cash payment or honorarium - what today is called a blanket or ‘all rights’ licence. Over time, however, two cultural trends became intimately associated and entwined with the right to copy – author’s rights and the public domain.

Author’s Rights

In the ancient West and the Islamic world until recently (Habib 1998), knowledge was kept secret or, when made public, its paternity was protected by moral rather than legal rights ([Chartrand April 2000](#)). Ownership, in an economic sense, did not exist *per se*. Punishment for falsely claiming paternity, or what today we call copyright or patent infringement took the form of defamation of the infringer and casting shame on his or her family and tribe.

After the fall of Rome, knowledge in the West became the preserve of the Roman Catholic Church. In secluded, distantly separated

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monasteries surviving written works of the Ancient World were lovingly copied and preserved. They provided the gold standard for secular knowledge in the so-called ‘Dark Ages’ while the Bible shed all the light thought necessary on God’s purpose.

With respect to rare and ancient manuscripts, the Church had a practice of charging a fee for access. This has been called “institutional copyright” (Kampelman 1947, 407).¹¹ Authors of new works that drew upon knowledge from the well of ancient nature lore were branded witches and warlocks while those who experimented with nature were branded alchemists and magicians. Both were subjected to the same penalty: Burn the body, save the Soul! Old ‘approved’ knowledge was revered; new knowledge was generally suppressed making ownership literally a metaphysical question. Furthermore, approved works were inspired by God and should be made freely available to all.

With the ‘Renaissance Man’ of the 15th century – the artist/engineer/humanist/scientist – there began, however, a distinct Western ‘Cult of the Genius’ (Zilsel 1918; [Kristeller 1954](#), 510; [Woodmansee 1984](#)). Genius, no matter its social origin, demonstrates god-like powers of creating *ex nihilo*, i.e., out of nothing ([Nahm 1947](#)). Such new knowledge changed the way people saw, heard and understood the world and themselves. Fed by Christian belief in the equality of souls and theological rejection of slavery, this marked the first eruption of the Natural Person out of feudal subordination by birth. Ownership of ‘new’ knowledge began to evolve into marketable property. Ownership became not just a question of metaphysics and morality but also of money and wealth.

In the 17th century the experimental philosopher and in the 18th, the author joined this pantheon of Western genius ([Woodmansee 1984](#)). Increasing amounts of new knowledge flowing from all domains ignited the *Querelle des Anciens et des Modernes*, i.e., the battle of the Ancients and the Moderns marking the end of the Renaissance and the beginning of the 18th century European Enlightenment ([Kristeller 1952](#), 19). Who are superior, the Ancients or the Moderns? The answer: the Moderns.

By the end of the 18th century Republican Revolutions shattered feudal subordination declaring all men equal. In the 19th, the inventive genius of Watt was followed by Bell, Edison, Marconi, Morris and others who transformed the life ways of humanity and introduced the Industrial Revolution. And, about the same time as the first telephone call in 1876, the troubled and tortured artist starving in his garret became the spear point of an *avant garde* transforming the way humanity sees and hears its inner and outer worlds (Bell 1976). Finally, in the 20th century, natural

¹¹ The first reported case of copyright infringement in the Anglosphere occurred in 567 of the Common Era. An Irish monk (later to become ‘Saint’ Columba of Iona) visited a neighboring monastery. Therein he copied - without permission - the Abbott's Psalter. When the Abbot found out he demanded the offending copy be turned over to him; Columba refused. The Abbott appealed to the King who ordered the infringing copy to be delivered to its ‘proprietor’; Columba complied (Beck 1998).

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& engineering scientists donned the cape of genius as nuclear energy was followed by computers, genomics and space travel caught the popular imagination with a fuzzy haired Einstein as its poster boy.

Out of this traditional Cult of the Genius emerged what I call the Myth of the Creator ([Chartrand Fall 2000](#)):

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

To step back, during the 16th and 17th centuries new works began to displace the classics becoming popular and hence of commercial appeal to printers. Authors, however, did not enjoy copyright. Rather they received a one-time lump sum ending their involvement with a work. Author's rights, as part of the 'natural rights' movement in England, began, however, to find expression in the writings of John Milton and John Locke.

As previously noted Stationers' Copyright and patents of invention were the only monopolies to escape dissolution under the 1624 *Statute of Monopolies* during the reign of James I. In the case of copyright, the reason was its political usefulness in censoring the public domain. This statute, however, was only an opening salvo in what became a civil war between Parliament and the Crown under James' son, Charles I. It was, in effect, the first wave of the Republican Revolution.

The final constitutional battle between the Crown and Parliament was "The Glorious Revolution of 1689" when the last of the Stuart monarchs, the catholic James II, was deposed by an Act of Parliament and replaced by his 'protestant' daughter Mary and her consort William of Orange as 'constitutional monarchs'. The resulting 'Bill of Rights' of 1689 established free speech in Parliament and inspired a 'free press' in England.

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

There were many attempts by the Stationer's Company to restore the old licensing system in the late 1690s and early 1700s, but it was not until 1710 that a new copyright system came into force. In fact between 1695 and 1710, Scottish and domestic 'pirates' made it increasingly difficult for London booksellers. Any Scottish pirate could take a

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successful work, re-typeset it and then sell it at a much lower price with no payment to the author, original proprietor or for promotion.

The *Statute of Queen Anne* of 1710 had three objectives. First, it was intended to prevent future monopoly of the book trade, *i.e.*, it was intended to further freedom of the press. Second, it was intended to draw Scotland under a common copyright law and thereby resolve the piracy controversy. Third, it was intended to encourage production and distribution of new works. The vehicle chosen to achieve all three objectives was the author.¹²

The *Statute* is considered the turning point in the history of copyright because it was the first law to formally recognize an author's rights and, more importantly, it effectively terminated prior government censorship through pre-publication licensing.¹³ Recognition of the author was, however, principally a device to attain its primary objective, *i.e.*, abolition of Stationer's Copyright (Feather 1988, 31-36). In effect, it was a trade regulation bill (Shirata 2000) and did not recognize any inalienable, unattachable, imprescriptible or unrenounceable rights of the author.

In the end, the Statute extended the existing copyright monopoly of the Stationer's Company for 21 years and granted an exclusive right for new works for fourteen years with an option to renew for the same period if the author survived. Furthermore, the Statute recognized the author as the initial copyright holder to encourage "learned men to compose and write useful books". Nonetheless, it explicitly recognized the interests of "proprietors" to whom all author's rights were transferable by contract.

While the Statute eliminated Stationer's copyright booksellers nonetheless tried to forge a case to regain perpetual protection for their businesses. This included a series of legal actions and public relations campaigns called the "Battle of the Booksellers" (Shirata 2000). The London book merchants told tragic tales of piracy ruining honest businessmen, their wives and children. Literary works were the inheritances of innocents and pirates were, in effect, stealing from the mouths of babes. The author/artist/creator was, and continues to be, used as a means to an end – increased profits for copyright proprietors.¹⁴ Cynically one might say that copyright proprietors have a vested interest in maintaining the 'starving artist'. Poverty makes them pliant under contract and their 'suffering' makes sympathetic advertising copy for stricter enforcement of copyright and profits.

¹² It should be noted, however, that the legal instrument was only christened 'copy-right' in 1735 during debate in the British House of Lords (OED, *copyright*, n, 1).

¹³ It can be argued, however, that compulsory registration to obtain copyright can serve a similar function.

¹⁴ This practice continues to this day, *e.g.*, by the Motion Picture Association of America and the Recording Industry Association of America. Thus the RIAA is currently taking students to court for infringement in the name of musicians who, in the popular music industry, are usually under contract as 'employees' with copyright vested in the employer.

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Publishers argued that an author is entitled to enjoy the fruit of his labor, just like all other forms of property – in perpetuity. A publisher, being merely an assignee of the rights of the author, should therefore also enjoy such rights in perpetuity independent of statute. It was not, however, until 1769 that a most controversial legal decision was rendered in *Millar v. Taylor*.¹⁵ Perpetual copyright was recognized initially vested in the author but fully transferable by contract to a proprietor.

Sir William Blackstone contributed to the plaintiffs' cause. Blackstone had previously published *Commentaries on the Laws of England* in 1767 in which he interpreted copyright for the first time as a legal concept (Blackstone 1771). Using Lockean natural law theory (Locke 1690), he described copyright as a kind of personal property in common law on the ground that any kind of published work is based on the author's brainwork. This became known as 'the sweat of the brow' theory.¹⁶

The plot of the booksellers was, however, ultimately defeated in 1774 by the decision of the House of Lords in *Donaldson v. Beckett*. It was this decision that established the basic concept of Anglo-American copyright. When an author fixes his creation in a tangible medium, he obtains a common law right that is eternal in nature. However, he loses this common law right with publication or 'dedication to the public'. In effect, the House of Lords accepted the dissenting opinion of Justice Yates in *Millar v. Taylor* (Sedgwick 1879). A corresponding precedent was established in the USA with the 1834 Supreme Court decision in *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 8 L. Ed. 1055 which distinguished between rights in copyright at common law and under federal statutory law.

¹⁵ As John R. Commons noted:

The court of King's Bench, the highest court of the common law, divided on the question, the majority supporting Lord Mansfield, who went to the furthest possible extreme in his identification of the right of exclusive copying and selling the copies of one's manuscript with the right of exclusive holding and selling physical things and their products... [C]opyright... like the ownership of physical objects, [is] the perpetual property of the author, his heirs and assigns forever. This outcome Mansfield expressly contemplated, saying, "property of the copy thus narrowed (i.e. defined as a common-law right) may equally go down from generation to generation, and possibly continue forever." This conclusion was vigorously protested by Justice Yates, the only dissenting justice, saying, "This claim of a perpetual monopoly is by no means warranted by the general principles of property." (Commons 1924, 275)

¹⁶ It is important to note, however, that Locke in his *Memorandum* of 1694 argued for freedom of the press and against both Stationer's copyright and perpetual copyright for the author *contra* Blackstone (Hughes 2006). In his defense Blackstone may not have been aware of the memo.

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There are number of implications to these decisions, implications that continue to haunt copyright to this day. First, if Anglosphere legislation has one peculiarity, it is respect for the rights of private property. Yet with copyright, a right said to exist from time immemorial, was swept away. It is impossible to avoid the conclusion that artistic and literary property is regarded as differing in essential ways from any other sort of property (Sedgwick 1879).

Second, not only common law property rights were eliminated. Traditional ‘moral rights’ of the author previously recognized by guild custom and tradition were also effectively extinguished. Once sold, a work could be used or abused as a proprietor saw fit. The author, having received initial payment had no further rights over disposition of a work.

Third, even though *Millar vs. Taylor* was overturned, it established the Myth of the Creator in the public mind. The change, in fact, was less a boon to authors than to publishers, for it meant that copyright was to have another function. Rather than simply being the right of a publisher to be protected against piracy, copyright would henceforth be a concept embracing all the rights that an author might have in a work. This meant that the publisher, as the author’s assignee, would enjoy the same rights (Patterson 1968).

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 primary representative on earth, the king who had the exclusive right to determine what could be published, by whom and for how long it would be protected (Hesse 1990, 111).

In 1777 things changed. A set of royal degrees was issued that broke up the publishing monopoly. In effect, the author was, as in England, used as a foil at the expense of the Paris Publishers’ and Printers’ Guild. In recognizing the author for the first time the decree granted *privilèges d’auteur* or author’s privilege *in perpetuity*. Publishers’ privileges (*privilèges en librairie*), by contrast, were limited to the lifetime of the author and nonrenewable (Hesse 1990, 113). In effect, the publisher became nothing more than an agent 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 the public good (Hesse 1990, 130).¹⁷ In this Ginsburg finds a shared

¹⁷ The intellectual gymnastics of Condorcet to justify copyright is a dominant theme of Hesse’s 1990 article “Enlightenment Epistemology and the Laws of Authorship in Revolutionary France, 1777-1793”. Initially rejecting all

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objective between the French revolutionaries and their American cousins (Ginsberg 1990). The specific public good, however, remained implicit in the Anglosphere rather than explicit in the French – the public domain.

Nonetheless, and unlike England, the French revolutionaries drew on the theory of natural rights to recognize the absolute moral rights of the author, *i.e.*, no statutory law was necessary because such rights were inherent in the Natural Person. 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 rather an extension of personality and subject to protection as such.¹⁸

Moral rights are separate and distinct from the economic rights associated with a work. The three most important moral rights 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 - the right not to publish at all (Hurt 1966, 424). The most succinct expression of their nature is that they are "inalienable, unattachable, imprescriptible and unrenounceable" (#32: 448).¹⁹

The third wave of the Republican Revolution in 1789, like the second American wave of 1776, made the individual, the Natural Person, the cornerstone of the political and social order. Thus the American *Declaration of Independence* of 1776 announces that "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". Article 2 of the French *Declaration of the Rights of Man and the Citizen* of 1789 declares that: "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".

copyright – author's and printer's rights - in favour of the public domain, the course of the Revolution forced Condorcet to rationalize copyright as a necessary evil. No serious books were being published because of rampant piracy but anonymous counter-revolutionary and partisan pamphlets and tracts proliferated. Copyright, or rather author's rights, would flush the author out into the public domain where Madame Guillotine could greet him.. It would also stop piracy and encourage printers to be good citizens and publish good books. In some ways the anonymity of WWW or web production is creating a similar contemporary political condition, *e.g.*, the 'Hillary 1984' ad by an 'anonymous' political operative (Coomarasamy April 6, 2007).

¹⁸ Kant plays a critical role in the theoretical justification and content of current French, German, and Swiss copyright systems and, by extension, all countries adopting the European Civil Code. There are, however, differences between the rights recognized by different Civil Code countries as there are between Anglosphere Common Law countries.

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

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With respect to copyright, however, the two Revolutions took different routes 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 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” and perpetual. Due to the precedent of *Millar vs. Taylor*, however, American Revolutionaries confused legal practice (one bundle of fully alienable rights) with moral theory resulting in what Patterson calls “The Dual Theoretical Basis of Copyright” (Patterson 2001, 722).²⁰

The common destination of both American and French Revolutionaries, however, was the same, expressed however in different words. For the Americans it was ‘learning’. For the French, it was ‘enlightenment’. For both fostering growth of the public good or rather the public domain was the intent of all statutory and natural law governing copyright.

Before turning to the public domain it is important to note that the Berne Convention itself was instigated by the artistic or creative community, not commerce or government. Led by Victor Hugo, artists and writers organized themselves in 1878 into an International Artistic & Literary Association (*Association Littéraire et Artistique Internationale*). Meeting first in Paris, the association gathered annually in various European capitals. At its 1882 meeting in Rome, the Association agreed to convene a conference at Berne in the following year to develop an international conference of States concerning copyright. At the Berne conference of September 1883, a draft convention was prepared. To bring the draft to the attention of the community of nations the Swiss Federal Council was asked and agreed to serve as intermediary (Kampelman 1947, 410-411). The Berne Convention of 1886 was the result. Again the Convention was not inspired by commerce or censorship but rather by the need to protect the trans-national ‘natural rights’ of the artist/author/creator. The British government while signing the convention and thereby acknowledging moral rights applied national treatment so that all such rights remain subject to contract in Britain.

Public Domain

The term ‘public domain’ entered “Anglo-American copyright discourse through the French of the Berne Convention” in 1886 (M. Rose 2003, 84). The public domain is where knowledge is at home as a public good, *i.e.*, it is non-excludable and non-rivalrous in consumption. In the

²⁰ More specifically, Patterson contends that “The constitutional concept of American copyright as a regulatory monopoly for marketing works has been corrupted by the theory that copyright is a proprietary monopoly of the author.” (Patterson 2001, 722)

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public domain everyone has the right to know and my use does not reduce the knowledge available to you.

In effect, the public domain constitutes the endowment of the national and global knowledge-based economy. It is also where freedom of speech and freedom of the press find their home in a democracy. The ultimate objective of both Anglosphere copyright and European author's rights is to grow this public domain and make its riches accessible to all citizens.

Intellectual property rights, however, make new knowledge rivalrous and excludable by law, not by nature. Such knowledge is protected, however, only for a limited time after which it too enters the public domain. For that period, however, it is 'enclosed' (Boyle 2003). It is fixed in a work that is the exclusive possession of its creator who determines access and application. In the Anglosphere, however, this is usually a corporate proprietor, *i.e.*, a Legal rather than a Natural Person, using an 'all-rights' or 'blanket licence'. In other words, where intellectual property rights privatize knowledge limiting access through price and other mechanisms, in the public domain knowledge is free to all without cost or constraint. In this sense there are two distinct knowledge domains – the public and the private. To paraphrase Nathan Rosenberg about science (Rosenberg 1994, 143), the public domain is an immense pool to which small annual increments from the private domain are made at the frontier. The true significance of the public domain is diminished, rather than enhanced, by extreme emphasis on the importance of only the most recent increments to that pool.

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

There is, however, a premonition of an Anglosphere public domain implicit in the titles of the 1710 *Statute of Queen Anne*, formally, *An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned* and the title of the first U.S. Copyright Act of 1790, formally, *An Act for the Encouragement of Learning, by securing the Copies of Maps, Charts and Books, to the Authors and Proprietors of such Copies, during the Times therein mentioned*. The key word in both is 'learning'. Copyright is by statutory precedent thus to be judged by its contribution to learning.

Copyright is, however, also "essentially the law of communication and communication is the life blood of a free society" (Patterson 2001, 731). In law, copyright is supposed to be a regulatory monopoly balancing the interests of creators, proprietors, users and the

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public good. In practice, however, confusion between the moral rights of creators and the financial rights of proprietors has effectively turned it into a “proprietary monopoly” (Patterson 2001, 732). This threatens the public domain and traditional political freedoms.

Thus the First Amendment of the U.S. Constitution is directly related to copyright and hence to any American concept of the public domain (Alstyne 2003). The historical connection is the pre-Statute of Queen Anne Licensing Acts which were used to control the press, restrict religious and political debate and thereby the public domain. These, at one and the same time, were used to restrict the press and maintain the perpetual copyright of the Stationer’s Company. In this sense, the First Amendment can be seen as a sibling of modern copyright with both serving to define the public domain. David Lange takes this argument further arguing that the public domain itself should be recognized as having a status analogous to citizenship with affirmative rights. “I want the public domain, however it may be defined, to secure these elemental aspirations which I believe innate in human kind: to think and to imagine, to remember and appropriate, to play and to create (Lange 2003, 483).

Arguably, Adam Smith’s alarm about a ‘political economy’, *i.e.*, one in which economic profit translates into political power and political power translates into economic profit, is being recycled in modern times. The relationship between political power and economic profit is an increasingly central theme of the knowledge-based economy. In the crudest terms, a knowledge-based economy means the monetarization of knowledge. Political power writes the intellectual property statutes defining knowledge as economic property. Private proprietors strive to maximize profits by re-structuring the business environment through such statutes. According to Jessica Litman with respect to copyright this has got to the point that the “copyright industries... work out the details of the copyright law among themselves, before passing the finished product on to a compliant Congress for enactment” (Litman 1996). In other words, if the intellectual property regime of a nation is the economic constitution of the knowledge-based economy then it is simply too important to be left to proprietors. The regime itself is justified primarily as a reward for creative genius to the benefit of the public. The public domain, which arguably an IPR regime is intended to grow, is a national asset in and of itself, a pearl without price. It is an asset whose value should not be lost in pursuit of private profit. The public domain is a good and its growth the reason for intellectual property rights in the first place.

Copyright, author’s rights and the public domain, however, are all First and Second World legal concepts. In the Third World (or ‘the South’) there are historically varied traditions governing copyright. Early Islamic jurists, for example, recognized a creator’s rights and offered protection against piracy (Habib 1998). However, they treated infringement as a breach of ethics, not a criminal act of theft punishable by amputation of the right hand. Rather, punishment took the form of defamation of the infringer and casting shame on his tribe. Only in

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recent years have formal copyright statutes been adopted in many Islamic countries, *e.g.*, Saudi Arabia in 1989.

In much of the Third World, however, another tradition exists similar to that of the aboriginal peoples of the Fourth World. This recognizes 'collective', 'communal' or 'folkloric' IPRs. This contrasts with the Western individual-based concept. Folkloric IPRs recognizes rights to all kinds of knowledge, ideas and innovations produced in 'the intellectual commons', *e.g.*, in villages, among farmers, in forests among tribal peoples, *etc.* Some of this constitutes 'TEK', *i.e.*, traditional ecological knowledge. TEK has been infringed by Western and Japanese corporations in a number of countries including India (Shiva 1993). Such rights, however, are excluded under the TRIPS Agreement because they fall into what both Anglosphere Common Law and European Civil Code call the public domain and can therefore be freely exploited by any and all.

Unlike the Third World, however, aboriginal nations of the Fourth World do not constitute 'Nation-States'. They are therefore seldom represented on the international stage. In 1984, a draft non-binding UNESCO treaty on folkloric copyright was proposed (#16: 244-248) and UNESCO also passed a non-binding *Recommendation on Safeguarding Traditional Cultures and Folklore* in 1989 (#61: 772-776). A 'unofficial' instrument was also signed in 1994 by several indigenous peoples: *The International Covenant on the Rights of Indigenous Nations* (#5: 91-100). Arguably, however, two recent UNESCO Conventions, the first on *Intangible Cultural Heritage* in 2003 (#13: 215-227) and the second on *Cultural Diversity* in 2005 (#9: 158-172) give tacit multilateral recognition to aboriginal heritage rights.

Economic Significance

IPRs including copyright provide the legal foundation for the industrial organization of the knowledge-based economy. They constitute what Harold Innis calls the staple of such an economy. Innis is arguably the founder of the only indigenous school of Canadian economics based on his 'staple theory'. He studied Canada's development – from cod to fur to timber to wheat. Each staple, according to Innis, engenders a distinctive patterning to the economy. Near the end of his career he moved on to study 'communications' and its matrix concluding, in effect, that it is the ultimate staple commodity (Innis 1950, 1951). Accordingly, a knowledge-based economy is not like a traditional manufacturing economy in a number of ways.

Average Cost Curve

First, the average cost curve in a knowledge-based economy is not the classical 'U' shape of manufacturing caused by the diminishing marginal product of fixed capital with variable labour. Rather, it is 'L' shaped. Consider, hypothetically, that the first unit of Windows VISTA cost \$500 million to develop but the second and all subsequent units cost a \$1.99 (once you have a CD/DVD burner). This highlights the economic significance of copyright and IPRs. Without State-sponsored

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and enforced IPRs the enormous initial investment required for many innovations would be unprofitable. Arguably, however, the same holds for the individual artist/author/creator. At the extreme, there is Van Gogh, the epitome of the mad starving artist. He cut off his ear and sent it to his girl friend; spent much of his life in an insane asylum; and, in return, he gave us *Sunflowers* and *Starry Nights* available for only \$1.99 at your local dollar store.

Employment

Second, while the traditional manufacturing economy boasted life-long employment, the knowledge-based economy is characterized by contract work and self-employment. In the Anglosphere, copyright and moral rights belong to the employer, not the employee. This is doubly so under Crown copyright. In the case of contract work and self-employment blanket or all rights licences extinguish all future claims of the creator. By contrast, under the Civil Code, an employee retains moral rights over his or her work and may even enjoy some ‘neighbouring rights’.

If Anglosphere practice continues, it can be expected that the income distribution of contract and self-employed knowledge workers will become like that of self-employed artists and entertainers. They are second only to pensioners as the lowest income class recognized by Revenue Canada (Chartrand 1990). Furthermore, their income distribution is not a pyramid with a broad base, wide middle and a peak. Rather it is an obelisk with a huge base of poor ‘starving artists’, a thin column of middle class survivors and a tiny peak earning enormous sums, *e.g.*, Pavoratti. This could be the future of the knowledge-based economy—no middle class.

Government

Third, theoretically in a manufacturing economy a consumer acquires all benefits of a good at market price while producers recover all costs. In theory, there are no externalities, *e.g.*, there is no pollution. In such an economy there is, theoretically, no role for government. In a knowledge-based economy, however, IPRs must be created by the State *before* a market can exist, *i.e.*, no government, no knowledge-based economy.

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

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IPRs are traditionally granted *only*: (i) with full disclosure²¹ of the new knowledge; (ii) for a limited time, *i.e.*, either a specified number of years and/or the life of the creator plus a fixed number of years; and, (iii) for fixation of new, novel or original knowledge in a material matrix.

Eventually, however, all intellectual property (all knowledge) enters the public domain where it may be used by anyone without charge or limitation. Even while IPRs are in force, however, there are exceptions such as ‘free use’, ‘fair use’ or ‘fair dealing’ under copyright. Similarly, national statutes and international conventions permit certain types of research using patented products and processes. And, of course, governments retain sovereign authority to waive all IPRs in “situations of national emergency or other circumstances of extreme urgency” (#28: Article 31b, 406). For example, following the anthrax terrorist attacks in 2001 the U.S. government threatened to revoke Bayer’s pharmaceutical patent on the drug Cipro (BBC News October 24, 2001).

Network Effects

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

It is not, however, just the matrix or medium that generates network effects. The expression or message itself can generate such effects. These are called ‘spin-offs’. Consider a literary work, *e.g.*, a

²¹ Full disclosure for a patent requires an application in writing and graphics in sufficient detail that anyone ‘ordinarily skilled in the art’ can reproduce the invention. Copyright traditionally required publication, *i.e.*, dedication to the public. However, as noted by Patterson (2001), the 1976 U.S. Copyright Act granted copyright to unpublished works. In effect, such works become trade secrets. Arguably this is how software copyright is protected. In its anti-trust case against Microsoft, the European Union is effectively requiring publication of the full code to obtain copyright. (See below, *Legal Front*, xli.)

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short story, which becomes a play. In turn, the play becomes a film which, in turn, is spun off into posters, toys, T-shirts, a soundtrack and video games. The film and the soundtrack are broadcast on television and radio. Eventually a book is made about making the movie, and then a sequel is produced. All flow from the initial work; each represents a new way to fix creative expression in a new and different matrix.

Panda's Thumb

Fifth, copyright (and other Anglosphere IPRs) is rooted in Common Law precedent, not Civil Code principle. In a way, legal precedent in the Anglosphere acts like 'path dependency' in techno-economic regimes. Once a standard is set all subsequent developments must conform. Precedent, of course, is established through case law rather than statute (*Statutory & Case Law*, xxxvii).

Paul David ²² characterizes the resulting regime as 'a Panda's thumb', *i.e.*, "a striking example of evolutionary improvisation yielding an appendage that is inelegant yet serviceable" (David 1992). The costs of administering such an awkward and ungainly creature have, however, grown dramatically. In the case of copyright this is due to, among other things, introduction of digitalization as fixation and the internet as publication. Similarly, even due diligence by patent office officials is insufficient to cope with the flood of new genomic, nanotech and software patent claims. It is also problematic if the existing IPR regime continues to inspire new knowledge or inhibit its creation and entry into the public domain (*Predatory Practices*, xxxiv).

Paradigm X

Sixth, an alternative economic model, more consonant with a knowledge-based economy (what I will call 'Paradigm X') was proposed just before Adam Smith's *The Wealth of Nations* crowned manufacturing king of economics in 1776. The alternative was presented by the pre-revolutionary French Physiocrats who gave us the term 'economist'. Behind the Gallic façade of *laissez faire* and *laissez passer*, there was a deeper policy implication never realized because of the French Revolution (Samuels 1962, 159). The Physiocrats wanted to reach below the surface of the marketplace down to the legal foundations of capitalism (Commons 1924).

For the Physiocrats "the public interest is manifest in the continuing modification or reconstitution of the bundle of rights that comprise private property at any given time" (Samuels 1962, 161). By changing the nature of the bundle of rights that constitute copyright (or patents, trademarks and industrial design and by creating new ones) the State creates entrepreneurial opportunities in a *laissez faire, laissez passer* knowledge-based economy (OECD 1996). This legal strategy is a tacit compliment to what the OECD calls the 'National Innovation

²² "... the complex body of law, judicial interpretation, and administrative practice that one has to grapple with in the area of intellectual property rights has not been created by any rational, consistent, social welfare-maximizing public agency." (David 1992)

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System' (OECD 1997). Three examples will demonstrate – computer software, collectives and national treatment.

First, until 1988 in Canada (1980 in the U.S.) copyright was available only for human-readable 'works of art'. Since then Microsoft has become one of the largest and most profitable corporation in the world. Its foundation is, of course, copyright in the Windows operating program. Computer software, however, is the only type of work that crosses the copyright/patent barrier, *i.e.*, there are now both software copyrights and software patents. The difference in term between the two is striking – in Canada 20 years for a patent and 50 for a corporate copyright. In the U.S. it is 20 years versus 70. Furthermore as unpublished works enjoying copyright protection computer programs are also effectively treated as trade secrets, *i.e.*, not dedicated to the public. This suggests software is a *sui generis* type of work deserving its own distinct intellectual property classification rather than receiving a mix of copyright, patent and trade secret protection.

Such reconsideration is also appropriate for another reason. The distinction between 'machine readable' and 'human readable' codified knowledge fuelled the 1970s debate about software copyright. Recognition in 1988 of software copyright was a break with a long legal tradition restricting copyright to 'artistic and literary works', *i.e.*, works carrying semiotic meaning from one human mind to another. A computer program, while codified and fixed in a communications medium, is intended to be decoded by a machine not by a human mind. It is intended to manipulate the flow of electrons in a circuit. In turn, such circuits may activate other machines and/or machine parts, *e.g.*, industrial robots in steel mills, auto plants and fabricating industries. It fixes knowledge as *function*, not *meaning* into the matrix.

Similarly, genomic programming is also codified and fixed in a communications medium but intended to be decoded by machines and molecules, not by a human mind. It is intended to manipulate the chemical bonds of atoms and molecules to analyze or synthesize biological compounds and living organisms with intended or designed characteristics. Software – computer and genomic – constitutes, in my terms, a form of 'soft-tooled' knowledge fixing knowledge as function rather than 'codified' knowledge fixing meaning (Chartrand July 2006).

Second, introduction of new rights in Canada in 1988 and 1997 including exhibition rights and fees levied on blank recording materials was followed by formation of many new collective societies. Such collectives receive and distribute royalties to creators/copyright proprietors as well as to monitor infringement. The development of new copyright collectives was actively encouraged by the government. A web survey in 2003 showed that there were 6 such societies in the U.K., 10 in the U.S. and 35 in Canada (Chartrand 2003).

Third, public sector support, *e.g.*, subsidies, for the production of traditional goods & services such as cars is subject to harmonization under the rules of the World Trade Organization (WTO). Intellectual property rights, however, especially copyright, is subject only to

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‘national treatment’. This means, for example, that Canada must extend to foreign artist/author/creators and proprietors the same rights as granted to Canadian nationals. These rights, however, need not and are not generally the same between countries. For example, the term of copyright in Canada is life of the artist plus fifty years. In the U.S., it is life of the artist plus seventy years. This means that the work of an American artist will enter the Canadian public domain twenty years earlier than in the U.S. In turn this means, for example, that a web-based entrepreneur could post and sell such work in Canada *and* the U.S. without infringing copyright in Canada. In a way this would parallel what the U.S. did to Canada in the 19th century (Allingham 2001).

Predatory Practices

Seventh, another economic implication of the multilateral copyright regime and all State-sponsored IPRs is their predatory rather than defensive use. Beyond the Mercantilist tendencies of some Nation-States this includes ‘patent wars’ and ‘copyright misuse’.

In the case of patents, some corporations spend enormous sums of money on research projects that fail for one reason or another. Nonetheless, everything that can be patented is patented. These patents may be retained or sold to a patent holding company of one form or another. If a rival or competitor emerges who subsequently succeeds in making the technology work then that competitor may be charged with patent infringement. Whether the charge is valid or not, the rival faces enormous legal costs defending itself or settling out of court. Both ways, competition is restrained and innovation inhibited.

Copyright misuse is a relatively new legal concept that emerged in the United States with the case of *Lasercomb America v. Reynolds* in 1990. The concept is based on the more developed doctrine of patent misuse. Copyright misuse occurs when a copyright owner, through a license for example, stops someone from making or using something that competes with the copyrighted work but does not involve use of the original itself. The leading case in the U.S. is the 2003 *Video Pipeline, Inc. v. Buena Vista Home Entertainment*.²³

By repressing ‘free speech’ copyright abuse is an existential threat in a 21st century information democracy taking us back to the

²³ While not successful due to legal technicalities:

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

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origins of copyright as private law censoring the public domain. Patterson, among others, is concerned about its implications:

The application of copyright law to new communications technology has brought to fruition the latent conflict between political rights and property rights - that is, the political right of access guaranteed by the First Amendment and the property right of copyright. (Patterson 2001, 703)

Legal Significance

The multilateral copyright regime is, of course, a work in progress: governments change, technology changes and the regime evolves. One constant over more than 120 years, however, is the difference between Anglosphere Common Law copyright and European Civil Code author's rights. As human artifacts, of course, both Common Law and Civil Code have strengths and weaknesses and both are less than ideal in practice.

Beyond the use of precedent (Common Law) and principle (Civil Code), three additional differences include the clash of: (i) commerce vs. culture; (ii) statutory vs. case law; and, (iii) the Natural vs. the Legal Person.

Culture vs. Commerce

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

During the French Revolution the economic rights of the author and publisher were sacrificed in favour of the public domain. Nonetheless, the Revolutionaries and subsequent French regimes recognized and retained perpetual moral rights for the artist/author/creator.

During the American Revolution, copyright was initially recognized as a natural right of the author in the so-called 'Copyright Clause' of the U.S. Constitution (Section 8, Clause 8). With the first Copyright Act of 1790, however, copyright became a Mercantilist tool of industrial policy. No rights were granted to foreign authors and all rights of domestic authors – economic and moral – were and remain extinguishable by contract. There were and are no inalienable, unattachable, imprescriptible or unrenounceable rights of the author. In the words of David Vaver:

Anglo-American law takes a more pragmatic approach to copyright. Copyright is essentially a vehicle to propel works into the market: it is more an instrument of commerce than of culture. It is geared more to the media entrepreneur than the author. It is ready to grant

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copyrights not just to authors but to secondary users who add value to the work: record companies, broadcasters, movie studios, and even printers... Unfair competition rather than authors' rights seems to be the guiding force behind copyright. Whether rights should be extended to a work is more a question of political pragmatism depending on the strength of a particular interest group... In such a scheme, economic rights are emphasized: moral rights are unheard of, save insofar as particular complaints can be slotted into some common law theory or statute designed to prevent unfair competition. Unless an author has retained some moral rights by contract, the assignment or licensing of the work *pro tanto* terminates his or her involvement with it. (Vaver 1987: 82-83).

In the clash between culture and commerce, the U.S. is arguably at one extreme. Thus in order to accede to the Berne Convention, Congress in 1989 took steps towards recognizing moral rights, *e.g.*, the *Visual Artists Protection Act* of 1990 which eventually became Section 106A of the U.S. Copyright Act. However, the right of paternity and integrity of one's work is available only to artists of 'recognized' reputation. Recognized by whom? By the Courts! Similarly, the *Architectural Works Copyright Protection Act*, Pub. L. 101-650 was passed in 1990. Its moral rights provisions, however, are so weak that it has not been incorporated into the U.S. Copyright Act. It is an open question whether the United States has in fact fulfilled its obligations under the Berne Convention.

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

In France there are also many 'neighbouring rights' outside the principle statute. These are intended to reward the individual creator, not the corporate bottom-line. For example, there is a right of following sales or *droite de suite* in the visual arts. A percentage of the resale value of an artwork, painting, sculpture, *etc.*, is returned to the artist each time it is re-sold. It is an imprescriptible. It should be noted, however, that the State of California has instituted a right of following sales for resident artists.

In Canada a unique mix is being blended. Formal moral rights were introduced into the Canadian Act in 1988. Neighbouring rights such as exhibition rights for visual artists in public galleries and a levy on blank recording materials for distribution to musicians have also been added to a traditionally Anglosphere piece of legislation. Such moral

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and neighbouring rights, however, are subject to assignment or waiver in favour of copyright proprietors, *i.e.*, Legal Persons. Whether this Canadian panda's thumb can survive is problematic.

Statutory vs. Case Law

In the Anglosphere tradition copyright is both statutory law enacted by a legislature and case law applying precedents set by judges. Under the Civil Code author's rights are primarily statutory.²⁴ In general terms Common Law is rooted in precedent while the Civil Code is rooted in principle, *i.e.*, judges are guided by principle not precedent. In this regard, the most important precedent in the development of copyright (and all forms of intangible property including 'good will') was Justice Yates' dissenting opinion in the 1769 case of *Millar v. Taylor* (Commons 1924). As noted, he established why ideas are not protected comparing them to wild animals that once set free are in the public domain. Only their expression fixed in material form – a work – qualifies for protection (Sedgwick 1879).

Precedents set in different Anglosphere jurisdictions, *e.g.*, Australia, Canada, the U.K., the U.S., *etc.*, can and do spill over, from time to time, into the courts and legislatures of other jurisdictions. Thus genetic patents in the U.S. emerged from a 1980 Supreme Court decision in *Diamond v Chakrabarty* that reinterpreted existing law, *i.e.*, there was no change in the statute. Similarly, software patents in the U.S. emerged from a 1981 Supreme Court decision in *Diamond v. Diehr*. Arguably, these U.S. decisions set the stage for changes in legislation in other Nation-States. Similarly, the U.S. *Digital Millennium Copyright Act* served as a model and/or a warning for provisions proposed to amend the Canadian Copyright Act, Bill C-60, 2005 (Chartrand September 2006). Of course, the growing body of Australian, Canadian and UK IPR case law may eventually also set precedents for other jurisdictions, *e.g.*, the Supreme Court of Canada's rejection of a patent for the 'Harvard mouse'.

Case law, unlike statutory law, is made not after detailed legislative debate and discussion of its implications by all affected parties but literally on a case by case basis. Only the specifics of a case as argued by plaintiff and defendant are considered in light of judicial interpretation of existing law. The result can have unexpected, unintended and unsettling consequences. The most recent U.S. example is *MGM vs. Grokster* decided by the Supreme Court on June 23, 2005. In effect, the Court "expanded the Copyright Act ... to cover a form of liability it had never before recognized ... — the wrong of providing technology that induces copyright infringement" (Lessing March 18, 2007). The result, according to Lawrence Lessing, is to "Make Way for Copyright Chaos". For his part, Patterson similarly expresses concern about the use of the Courts by copyright proprietors to establish precedents in specific cases that are then used generally to restrict access to works under copyright and even those already in the public domain (Patterson 2001).

²⁴ See *supra* n. 18.

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Natural vs. Legal Person

Another characteristic of Anglosphere Common Law is use of ‘legal fictions’. This is especially true in the ramshackle edifice called copyright (Patterson 2001). One such fiction is ‘corporate legal personality’. A Natural Person is a living human being; a Legal Person is a body corporate. The vast bulk of productive assets are owned by fictitious Legal Persons such as corporations, companies, sociétés, Gesellschaften. Such persons are birthed under incorporation statutes that allow them to engage in a wide variety of profit making and charitable activities. In the Anglosphere tradition, however, Legal and Natural Persons increasingly enjoy the same rights (Nace 2005)²⁵ while under Civil Code they enjoy different rights.

Another critical legal fiction is ‘the author’ in whom copyright vests. An author, however, is not just a Natural Person but also a Legal Person acting as an employer, contractor or transmitter of other people’s work. The latter generates what Patterson (2001) calls ‘transmission copyright’. Operating under this legal fiction any and all moral rights of the Anglosphere artist/author/creator, recognized under the Civil Code as unrenounceable, are extinguishable under contract.

Civil Code creator’s rights are justified because the work of a Natural Person bears the “imprint of personality” that a body corporate cannot possess (Geller 1994). Such rights are intended to reward creative individuals for their contribution to our collective knowledge, to our culture. Argument about this imprint has fueled ongoing controversy between the United States and the European Union, especially France, over extending to American media corporations doing business in Europe rights restricted by the Civil Code to Natural Persons, *i.e.*, imprescriptible moral rights.

Following John Dewey’s reasoning (1926) that a ‘corporate legal personality’ is anything the law says it is, so too is copyright. He also reasons, however, that when the law looks outside itself for insight about questions such as corporate legal personality the result can be unfortunate because “the human mind tends toward fusion rather than discrimination, and the result is confusion” (Dewey 1926, 670). In copyright, the law looks Janus-like towards copyright as trade regulation of a State sponsored monopoly and towards the natural rights of the creator. The result is that a cultural icon ‘the author’ is used by proprietors to enclose the public domain (Boyle 2003) to increase profits. The changing and fictional nature of ‘author’ has led some observers to write of the ‘Death of the Author’ (Bently 1994) and call for the end of proprietary copyright based on authorship (Patterson 2001). To my mind, this is throwing out the baby with the bathwater.

²⁵ The treatment of Legal Persons under American law is historically problematic. As Nace points out from Independence in 1776 until the late 1860s corporations were very tightly controlled and limited in their activities. This reflected the bitter experience of the colonists with, for example, the practices of the East India Company that led to the Boston Tea Party (Nace 2005) and to the censorial practices of the Stationer’s Company of London.

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

Geopolitical Significance

The term ‘cultural sovereignty’ emerged from the French in the 1970s as Quebec independence dawned as the overarching existential Canadian political question of the day. Like many French public policy concepts it migrated to Ottawa and was absorbed into the English-Canadian public policy lexicon.

Cultural sovereignty today, however, involves the struggle to be heard at home and abroad above the booming voice of the American entertainment industry that penetrates the cultural marketplace of every nation on earth. The one remaining superpower is also a global cultural colossus spanning East, West, North and South. Fuelled in part by the peculiar pricing methods of the entertainment industry, *i.e.*, a rate per viewer rather than the production cost of the work itself, American entertainment programming essentially ‘breaks even’ in its domestic market and then earns profits from a global audience. Only India has a domestic market large enough to support a ‘world-class’ film industry. China, of course, is another question due to political Leninism continuing after Marxism was abandoned in favour of the Market. The relatively vibrant Hong Kong film industry, however, suggests what might happen if Leninism was abandoned on the mainland too. In this regard, it is important to remember that the three largest Nation-States by population are: China, India and the United States, in that order.

As dollars go to American programming, however, they flow out of the country leaving the domestic arts industry poorer financially and arguably culturally. Local production cannot, due to limited audience size, afford ‘world-class’ standards, at least in the media and performing arts, *i.e.*, the ‘collective’ arts of film, sound recording, live stage and television. In the literary and visual arts, *i.e.*, the ‘solitary’ arts, however, world class standards are set by individual creators such as Margaret Atwood and Robertson Davies and the economics of production are less inhibiting to local competition. In the solitary arts it is more a question of talent than of budget.

The battle for cultural sovereignty contests the quasi-Mercantilist success of the United States with TRIPS (#28: 389-425) and the *WIPO Copyright Treaty* (#22: 340-347). It is being fought on three fronts: diplomatic, economic and legal.

Diplomatic Front

First, there is the diplomatic front where Canada, France and Sweden, among others, are pressing the WTO to maintain and extend GATT exemptions of cultural goods and services from free trade

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restrictions (#27: 387-388). Arguably, success is at hand.²⁶ With the 2005 convention on *Cultural Diversity* (#9: 158-172) and the 2003 convention on *Intangible Cultural Heritage* (#13: 215-227), UNESCO has become the multilateral focus for forces striving to counter commercialization or ‘Americanization’ of copyright. Recognition of cultural sovereignty, author’s moral rights and the collective rights of indigenous peoples are inherent in these efforts.

WIPO, on the other hand, has arguably become the focus for commercial interests notwithstanding several serious attempts to address indigenous and folkloric rights (#16: 244-248). Given ‘national treatment’ is the test under TRIPS, a clash between the two appears probable. Will, for example and hypothetically, France invoke such UNESCO conventions as a defense before a WTO tribunal adjudicating a claim by the U.S. against its film and television quotas and subsidies to French producers?

Economic Front

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

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

Canada, of course, and some of its provinces, has been a pioneer in developing ‘Hollywood North’, *i.e.*, competing for U.S. film and TV production locations through special employment tax credits and other

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On 20 October 2005, the General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO) approved the Convention on the Protection and Promotion of the Diversity of Cultural Expressions [#9, 158-172]. The Convention, a product of years of intensive negotiation, was sponsored by both Canada and France. The Government of Quebec enthusiastically supported Canada’s efforts. The Convention received widespread support: 148 countries voted in favour. The United States and Israel voted against, and Australia, Honduras, Liberia and Nicaragua abstained. (Carnaghan 2006)

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subsidies (Acheson & Maule 1994). Australia & New Zealand have similarly been active in supporting their 'cultural industries'. Eire, or the Republic of Ireland, has arguably gone furthest by exempting all copyright income earned world-wide by a resident Natural Person from income tax.

Legal Front

The third front is legal, specifically the manipulation of national intellectual property rights regimes including copyright. Nation-States can shape their IPR regimes to enhance perceived competitiveness constrained only by 'national treatment' under TRIPS (#28: 389-425). Three Anglosphere – Canada, the U.K. and the U.S.A. - and two European Union (EU) examples demonstrate the mutagenic nature of national copyright regimes and the multilateral one.

In Canada, the Copyright Act is increasingly diverging from the traditional Anglosphere model of printer's copyright (Chartrand Sept. 2006). It is adopting more and more provisions from the European Civil Code tradition, *e.g.*, moral rights, exhibition rights and levies on blank recording media. This is in keeping with the 'French fact' of Canada. Canada is not just bilingual and bicultural but also bi-juridic operating with Anglosphere Common Law in English-speaking Canada and the European Civil Code in the French-speaking Province of Quebec. Just as language structures human thought, law structures attitudes and behaviour contributing to the ethos or distinctiveness of a culture. With the exception of the Republic of South Africa, Canada is the only major English-speaking country to operate with both legal traditions.

The United Kingdom, on the other hand, is also transforming its legal practice. It is adapting its Common Law tradition to membership in a Civil Code-dominated European Union. Directives (*Multilateral Legal Lexicon*, 10) are intended to align national practice within the Union including the U.K. (#'s 44-56: 614-741). While both Canada and the UK now recognize moral rights they remain, nonetheless, subject, to extinction by contract and/or waiver in favour of a copyright proprietor, *i.e.*, a Legal Person. There are still no inalienable, unattachable, imprescriptible or unrenounceable rights of the artist/author/creator. Nonetheless the shift from Common Law precedent to Civil Code principle is underway.

The U.S.A. too has been actively adjusting, adapting and evolving its copyright and IPR regime in general. Its strategy appears to be a set of *sui generis* or 'one-of-a-kind' solutions. Three examples demonstrate.

First, the U.S. acceded to the Berne Convention in 1989 but made only cosmetic changes to meet minimal moral rights requirements of the Convention, *e.g.*, the *Visual Artists Protection Act* and the *Architectural Works Copyright Protection Act*. It can be argued, however, that accession was motivated by monetary not cultural reasons, *i.e.*, a 20 year international extension of copyright on some of its most lucrative artistic and literary properties including Mickey Mouse.

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Author's rights and the public domain *per se* did not factor into the decision except as a means to a Mercantilist end.

Second, as demonstrated, U.S. case law plays an unpredictable role in defining new rights. It was a court decision that extended copyright protection to computer software and it was a court decision that granted patents on organisms. Statutory law then caught up. As new rights emerge the U.S. government strives to extend them extraterritorially through bilateral and multilateral relations. Each activist court decision in the United States thus reverberates throughout the multilateral copyright regime.

Third, the U.S., officially and unofficially, has adopted an aggressive multilateral copyright policy exhibiting its traditional Mercantilist tendencies. It thus criticizes other Nation-States for practices it practices in its own jurisdiction. Michael Geist calls this a "do what I say, not what I do" policy (Geist 2007). Compulsory licensing, fair use and time shifting are widely accepted practices in the U.S. that the International Intellectual Property Alliance does not want other Nation-States to practice. Put another way, the *Manufacturing Clause* may be gone but the Mercantilist motivation continues to drive US multilateral copyright policy.

Finally, the European Union has also been active in shaping its own multilateral copyright regime. The EU Database Directive of 1996 (#46: 622-633) and the Microsoft anti-trust case demonstrate.

The European Commission's *Directive on the Legal Protection of Databases* is an example of a *sui generis* right.²⁷ The competitive implications of this new right attracted American attention (David 2000, 19) much as the 1984 *Chip Protection Act* in the United States caused the EU to respond with its 1986 directive on topographies of semiconductor products (#55: 732-739). There has, however, been no successful American statutory response to date. In this context the 1996 WIPO *Draft Treaty on Intellectual Property in respect of Databases* (#23: 348-359) is the only overarching international instrument addressing a question that could potentially result in a new Berne/Pan American type split in the multilateral copyright regime.

If the EU database directive narrows the public domain then the ongoing EU anti-trust case against Microsoft expands it at the expense of the U.S.A. Formal EU recognition of software copyright occurred in 1991 (#44: 614-619), some ten years after the United States and three years after Canada. The EU extended Berne Convention treatment of literary works to computer programs including the distinction between the Natural and Legal Person.

²⁷ It creates: "a new form of copyright in databases, one that extends to contents previously in the public domain and otherwise not copyrightable. It narrowly restricted the application of the principle of allowing exclusions for "fair use" in research, and it permitted virtually indefinite renewal of copyright protection for databases without requiring the substantial addition of new and original content." (David 2000, 6)

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In one generation software copyright has become the legal foundation for a massive global industry with Microsoft arguably at its head. Using well documented ‘sharp practices’ and playing off the ineptitude of its competitors Microsoft now dominates the software market. It has, *de facto*, established its products as industrial standards. As the standard all other products must be compatible with its Windows and Office products if they are to succeed in the marketplace. Without doubt this standardization did and continues to foster the growth and spread of computer mediated knowledge as well as growth of the underlying techno-economic regime, *e.g.*, Wintel CPU’s, sound and video cards, WWW, *et al.*

The first Bush White House, in 2000, faced an anti-trust case against Microsoft for alleged abuse of its position brought under the Clinton Administration. It decided on regulatory and procedural penalties. The option of breaking up one of America’s largest, most profitable exporters was dropped.²⁸

In the European Union, however, more serious penalties were applied and more are threatened. In addition to massive fines, Microsoft has been required to open up its ‘kernel’ code to competitors to allow their products to work smoothly with Windows and thereby compete in the marketplace. Microsoft is also required to cease ‘bundling’ new programs into its Window operating systems, *e.g.*, Microsoft is forced to sell a version of Windows XP in the EU without Windows Media Player. In my reading, the EU now requires that for software copyright to exist, as opposed to a trade secret, the full work, the complete code, must be dedicated to the public, *i.e.*, published. If this reading is correct, then case law in the EU may result in a potentially massive shake up of the global software industry. The irony is that it was, among others, American corporate competitors of Microsoft who called on the EU to act. This may prove a decision that comes back to haunt them. Together with growing controversy about software patents, it may also lay the ground work for declaring computer and genomic software distinct *sui generis* works rather than literary or artistic ones *per* the Berne Convention.

Conclusions

With the end of the Market/Marx Wars the Communist Revolution collapsed. The previous Republican Revolution survives. A world divided and threatened with nuclear winter for almost half a century now rallies around the last ideology standing – market economics with its political and legal corollaries: popular democracy and private property.

²⁸ The ubiquitous nature of Microsoft products around the world including within foreign governments and corporations also provides the U.S. with a potentially powerful geopolitical weapon. Compliance with changing U.S. security requirements could allow Windows and Office programs to act as a Trojan horse in the growing information wars of the 21st century. At the extreme, ‘enemy’ computers could be remotely shut down using hidden ‘trap doors’ with devastating economic and military effect..

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Its root is the American Declaration of Independence of 1776 that shattered the ancient regime of subordination by birth. Henceforth the individual, not the family, clan or bloodline nor bodies corporate would be the lodestone of society. This marked the culmination of a process beginning with the artist/engineer/humanist/scientist of the 15th century European Renaissance. The individual through creativity and talent erupted out of anonymity into celebrity. It continued during the Protestant Reformation of the 16th century when the individual was linked directly to the godhead without intermediation by pope, priest or philosopher. It accelerated with the Scientific Revolution of the 17th century with the 'experimental philosopher' who William Whewell in 1833 renamed 'scientist' (Snyder 2000). It was, however, only in the 18th century that the right to copy an author's work became vested in the author rather than a Legal Person.

The Republican Revolution had five major waves: (i) the English Revolution or 'Great Rebellion' of 1640; (ii) the American Revolution of 1776; (iii) the French of 1789; (iv) the Latin American of the early 19th century; and, (v) the Chinese republican revolution of the early 20th century. In all cases they were initially betrayed. In the first, the monarchy was restored in 1660 and the 'Glorious Revolution' of 1689 was required to establish a 'constitutional' monarchy. In the second, the definition of 'Man', or Natural Person, was limited to white males (sometimes called the 'pale penis people'). In the third, terror was justified in the defense of liberty. In the fourth, a caste system - with descendents of European *conquistadores* at the top, mixed bloods in the middle and indigenous peoples at the bottom was erected. And the fifth was swept away by the Communist Chinese Revolution of 1949.

Progressively, however, the franchise has been extended to all Natural Persons as citizens, discrimination under the law has been eliminated and the concept of human rights is engrained into the polity. The Republican Revolution also has fostered the most rapid and extensive increase in population and wealth ever experienced in human history. It defeated its last rival in 1989 to become the last ideology standing other than various forms of religious fundamentalism.

It is ironic that the world and the multilateral copyright regime should remain divided by the refusal of descendents of the American Revolution to: (i) distinguish between the rights of Natural and Legal Persons; (ii) acknowledge the unalienable moral rights of the Natural Person as artist/author/creator; and, (iii) prevent perpetual copyright. This refusal threatens the existential foundations of the emerging global knowledge-based economy and information democracy in the 21st century. The public domain has progressively been enclosed to produce profits for proprietors (Boyle 2003) while the artist/author/creator has been enthralled to a new regime of corporate overlords. In effect, the American Revolution is unfinished..²⁹

²⁹ It was the troubling implications for democracy of perpetual copyright supported by Chief Justice Mansfield in the 1769 case of *Millar v. Taylor* that led Thomas Jefferson to exclaim: "I hold it essential in America to forbid that any English decision which has happened since the accession of Lord Mansfield

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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." (quoted in [Commons](#) 1924, 277)

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