A SUMMARY SURVEY OF INTELLECTUAL PROPERTY IN THE GLOBAL VILLAGE

Introduction

European colonization in the 16th through early 20th centuries left the world divided between two great legal traditions – the Common Law & Equity in the United Kingdom and its former colonies and the Civil Code in Continental Europe and its former colonies plus Korea, Japan, Thailand and Taiwan. The only other legal traditions remotely comparable in geographic coverage is Islamic *Shar'ia* that treats infringement of intellectual property as a moral rather than a criminal offense. Thus rather than amputating the right hand for theft, the offender, his family and tribe are shamed. Differences in the treatment of intellectual property under the two Western legal traditions has great significance for the knowledge-based economy including the Arts. These differences are summed up in Exhibit 1.

Common Law and Equity evolved in England beginning in the 12th century. Common Law essentially deals with questions of guilt or innocence, right or wrong based on precedent. Equity deals with questions of fairness based on concepts like horizontal and vertical equity, *i.e.,* unlike treatment of unlike *vs.* like treatment of like. The Civil Code, on the other hand, deals with both guilt and innocence as well as fairness based on principles summed up by Natural Rights.

Under Common Law & Equity, Legal Persons (bodies corporate) and Natural Persons (flesh and blood human beings) essentially enjoy the same rights. In the constitutional monarchies of the British Commonwealth this legal fiction flows from the concept of the Crown. The State is thus fictionally represented as the monarch, a human personality. In the USA similar treatment of Legal and Natural Persons began with the 1886 decision in *Santa Clara County vs. the Southern Pacific Railway*. Until then corporations were limited to the functions and States for which and in which they were chartered. In this case the railway successfully invoked the 14th Amendment of the USA Constitution intended to protect former slaves from discrimination. Subsequent court cases followed including *Citizens United* in which the Supreme Court in 2010 extended freedom of expression guaranteed by the 1st Amendment to corporations as 'persons'. This decision effectively squashed federal political fund raising limitations on corporations. In 2013, in *Hobby Lobby,* a privately owned corporation using the *Citizens United* decision successfully argued before the Court of Appeals that freedom of religious expression is similarly protected under the 1st Amendment. The intent was to block the *Affordable Care Act* from requiring the firm to pay insurance premiums for certain types of contraception. The case is scheduled to be taken up by the Supreme Court.

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Under the Civil Code, Legal and Natural Persons do not enjoy the same rights especially intellectual property rights. A created work is considered an extension of the human personality. As such it is subject to imprescriptible moral rights, not recognized by Common Law & Equity. In effect they are human rights in the Natural Rights tradition.

Under both systems intellectual property involves the fixation of new knowledge in a material matrix. Thus it is not an idea but its fixation, its expression in material form that receives protection from infringement by way of counterfeiting, piracy or plagiarism. Protection is legislated by the State, however, only for a limited time after which the knowledge enters the public domain (Civil Code) and becomes free for all to encourage learning (Common Law & Equity).

Knowledge itself takes three basic forms. Codified knowledge is fixed in a matter/energy matrix as meaning. Both sender and receiver must understand the code. As such it is protected by copyright or author's rights, registered industrial design or USA design patent and by trademark including marks of origin. Tooled knowledge is fixed in a matter/energy matrix as function. The operator must know which button to push or lever to pull. It is protected by patent. Personal knowledge is fixed in the neuronal memory and reflexes of a Natural Person as 'know-how'. It is protected through contract by confidentiality and non-disclosure clauses. Trade secrets may take the form of codified or tooled knowledge protected by secrecy enforced through contract by confidentiality and non-disclosure clauses.

In turn, intellectual property takes three forms – industrial, literary & artistic and cultural property. All three involve fixation of knowledge in a matter/energy matrix. In the case of Industrial Property it is utilitarian; in the case of literary & artistic property it is meaningfulness; and, with respect to cultural property it is the original matrix fixing the genius of our ancestors – as will be seen, both living and dead. I will summarize each form of intellectual property, interrelating them and highlighting contrasting treatment under the two great Western legal traditions.

Before commenting on the differences, however, it is important to note certain complications. Legally things are not black or white rather there are many shades of grey. First, the USA Declaration of Independence & Constitution are based on Natural Rights. Second, with respect to Canada, one must note Quebec's Civil Code's Natural Rights tradition and the Republic of South Africa that employs both Common Law & Equity as well as the Civil Code. And with respect to the UK, its membership in the EU brings with it the taint of the Natural Rights tradition. Furthermore, at the multilateral level the international norm –*jus cogens* – is national treatment, *i.e.,* a resident of one Nation State filing for protection in another State receives the same protection as a domestic resident. This does not mean, however, that protection is the same in the two Nation States.

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Industrial Property

The 1883 Paris *Convention on the Protection of Industrial Property* now includes all members of the World Trade Organization (WTO). Its founding father, so to speak, was the USA. Its experience, in operating a systematized patent system from the first USA Patent Act of 1790, formed the foundation of the agreement. In the UK, for example, patents of invention remained a royal prerogative until the *Patent Act* of 1852, with all the arbitrariness that prerogative implies. There are three major types, all utilitarian in nature. A functioning thing or process is protected by patent; its aesthetic design by registered industrial design; and, its quality by trademark (or mark or origin), assurance from a going concern, *i.e.,* customers come back again and again.

In both legal traditions a patent must be filed in the name of a Natural Person, the inventor or inventors. An employee usually assigns all economic rights or a portion to the employer but retains a moral right called *Paternity*. A registered design, however, is treated differently. Under Common Law & Equity all rights – economic and moral – belong to the employer. Under Civil Code the employee retains Paternity. In both Traditions, a Trademark is filed in the name of a Firm – Natural or Legal - or by a Location – Mark of Origin.

Literary & Artistic Property

The 1886 Berne *Convention for the Protection of Literary & Artistic Property* now also includes all members of the World Trade Organization (WTO). The founding father of the Berne Convention was Victor Hugo leading European artists and writers beginning in 1878 with the *International Literary & Artistic Association* (*Association Littéraire et Artistique Internationale*).

Such property receives very different protection. Under Common Law & Equity it is called copyright, a direct Common Law descendant of printer's rights. All economic and other rights of an artist/author/creator can be assigned in full. And even where moral rights are recognized, *e.g.,* Canada, they are subject to waiver in favour of a Legal or Natural Person. All rights to a work produced by an employee or on commission belong to the employer. Similarly all rights belong to the producer of collective works such as Motion Pictures, Sound Recordings, TV Programs &Theatrical Productions.

The Civil Code tradition is based on the premise of Immanuel Kant that a created work is an extension of a human personality and a body corporate has no personality. Under the Civil Code tradition there are two distinct sets of property rights – economic and moral. All economic rights are subject to assignment (all rights) or license (some rights). Moral rights, however, are imprescriptible so that a court will not enforce a contract to the contrary. The most important Moral Rights are of Paternity, Integrity and Publication. Employees retain Paternity to their

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works as do commissioned authors. The Director, rather than the Producer, of a collective work retains Moral Rights so there can never be a 'colourization controversy' in Paris as occurs in Hollywood – the *auteur theory* of filmmaking.

Unfortunately, admission of computer software – both human readable (base code) and machine readable (executable code) – as literary & artistic property under national and multilateral legislation reflects a blurring of the distinction between industrial and literary & artistic property. Among other things, this reflects the utilitarian, mercantilist perspective of all intellectual property by the USA, *i.e.,* all intellectual property is industrial property. Multilaterally, this influence is evident in both the WTO's TRIPS Agreement and the even more controversial ACTA. Software is the only intellectual property protected by copyright, patent, trademark and by trade secrets. It is *sui generis* – one of a kind - and deserving of unique protection as are integrated circuit typographies.

Global support for Moral Rights by Civil Code countries is also lacking because, whether it is Bertelsmann, Sony or Vivendi, companies founded in Civil Code countries find it more profitable to operate under the Common Law & Equity of the USA and the Anglosphere in general. Contract negotiations are simpler. And, I suspect, average wages including royalties for artists, artisans and craftspersons much lower. Certainly many French Canadian songwriters and musicians have left and continue to leave Montreal for Paris with its living wage royalties. Others have learned English and taken over Las Vegas.

Cultural Property

Like the modern concept of author's rights and the public domain, the concept of cultural property arose during the French Revolution. Until then the overthrow of a regime was followed by the wholesale destruction of its signs and symbols. Abbe Grégoire, however, successfully argued before the National Assembly that such works were not symbols of the old regime but rather the works of French artists, artisans and craftpersons and, using Kant's argument, they were extensions of human personality deserving of protection. Today there are three types of cultural property – traditional, contemporary and intangible.

Traditional cultural property includes historic/original scientific, literary & artistic works and monuments. It is important to note that it is the original matrix that constitutes traditional cultural property, *i.e.,* it is the container rather than the contained that receives protection. Protection of such property began in 1899 with the first Hague Convention leading up to the 1954 Hague *Convention for Protection of Cultural Property in Event of Armed Conflict*. The 1970 UNESCO *Convention on the Illicit Import, Export and Transfer of Cultural Property* is currently the final word in civilian protection of such property with the notable exception of the 2003 UNESCO *Declaration on the Intentional Destruction of*

Cultural Property made in response to Taliban destruction of the colossal Bamiyan Buddhas in 2001.

Contemporary cultural property involves modern works of the media arts such as broadcasting, sound and video recording. Thus the 1949 *General Agreement on Tariffs and Trade* (GATT), to which all WTO members belong, recognized the right of member state not only to protect traditional cultural property but also approved cultural quotas on contemporary works and outright ban on importing immoral works. Similarly the 2005 UNESCO *Convention on Cultural Diversity* approved subsidies of contemporary cultural industries by member states. The USA and Israel are the only Nation States not to sign or ratify the 2005 convention.

Intangible cultural property refers to the cultural patrimony of Fourth World tribal, aboriginal peoples or what in Canada are call the First Nations. Such patrimony tends to be oral, hence intangible, and is not subject to fixation. This includes their TEK – traditional ecological knowledge. Furthermore protection of such property varies dramatically between Fourth World Peoples. The 2003 UNESCO *Convention on Intangible Cultural Property* recognized that Fourth World Aboriginal Peoples own their Cultural Patrimony. It is important to note that Canada, Russia and the USA did not sign nor ratify the 2003 convention.

Conclusions

This is but a summary survey of intellectual property in the global village. There are many variations, many shades of grey, in protection of intellectual property between Nation States. As Merryman notes in his 1981 *Stanford Journal of International Law* article "On the Convergence (and Divergence) of the Civil Law and the Common Law" when one moves to the multilateral level one must accept that: "Law has become nation-specific; lawyers no longer form an international community" (Merryman 1981, 359).

The fact is intellectual property is too important to be left to the lawyers and Legal Persons. Income distribution in an increasingly knowledge-based economy hangs in the balance.

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EXHIBIT 1

LEGAL TRADITIONS

Common Law & Equity	Civil Code
Anglosphere	Continental Europe & former colonies plus Japan
Precedent (Legislative Omnicompetence)	Principle (Natural Rights)
Natural & Legal Persons enjoy same rights	Natural & Legal Persons enjoy different rights
The Crown as legal fiction	
USA Santa Clara vs. Southern Pacific (1886)	
USA Citizens United (2010)	
USA Hobby Lobby (2013)	

Complicating Factors

USA Declaration of Independence & Constitution based on Natural Rights
Quebec's Civil Code's Natural Rights tradition
U.K. membership in EU with its Natural Rights tradition

INDUSTRIAL PROPERTY

Filing required in each Member State of Paris Convention 1883

<u>Patents</u>

In both Traditions, filed only in the name of the Natural Person Inventor (s).
In both, Economic Rights to Employer; Paternity retained by Employee

<u>Registered Industrial Designs</u> or USA <u>Design Patents</u>

All rights to Employer	Paternity retained by Employee

<u>Trademarks</u> including <u>Marks of Origin</u>

In both Traditions, filed in name of Firm – Natural or Legal - or Location

LITERARY & ARTISTIC PROPERTY

Courtesy protection in each Member State of Berne Convention 1886

Copyright (Printer's Rights)	Author's Rights
Economic Rights	Economic & Moral Rights
All rights subject to assignment, license or waiver	Economic Rights subject to assignment or licensing
	Moral Rights of Natural Person imprescriptible, *e.g.,*
	Paternity Right
	Integrity Right
	Publication Right
Employees & Commissioned Works	Employees & Commissioned Works
All rights to Employer or by Waiver	Paternity retained by Employee
Collective Works – Producer	Collective Works – Director's Moral Rights

e.g., Motion Pictures, Sound Recordings, Television Programs &Theatrical Productions

Associated Rights – None	Associated Rights, *e.g.,*
	Exhibition Rights
	Rights of Following Sale (*droit de suite*)
	Public Lending Rights

CULTURAL PROPERTY

Traditional

1970 UNESCO Illicit Import, Export and Transfer of Cultural Property
Historic/Original scientific, literary & artistic works **and** monuments
(In USA only on federal lands including natural sites & Indian burial grounds)

Contemporary

1949 GATT approved cultural quotas & 2005 UNESCO approved subsidies of Cultural Industries
(USA & Israel not ratify 2005 Convention)

Intangible

2003 UNESCO Fourth World Aboriginal Peoples own their Cultural Patrimony
(Canada, Russia & USA not ratify)

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