

THE UNFINISHED REVOLUTION
Arts Management in the 21st Century Global
Knowledge-Based
Digital Economy

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Global arts management operates under two conflicting legal traditions: pre-revolutionary Anglosphere copyright and post-revolutionary Eurosphere author's rights. Differences have significant implications for competitiveness, personal information including audience development and the future of the global knowledge-based digital economy itself. Why the differences? What are the implications? Can the Revolution be completed?

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The Revolutions

The American Revolution of 1776 overthrew an ancient regime of subordination by birth – born above stairs one ruled, born below one served. The Revolution technically ended with the 1783 Treaty of Paris establishing by Natural Rights that we are all created equal and enjoy certain unalienable rights.

When I say the American Revolution ‘technically’ ended I mean legal application of its central premise has been a gradual process stretching over more than two hundred years. During this time an expanding legal definition of a *Natural Person* emerged along with associated unalienable rights – end of slavery, extension of the vote to men without property then to women, the Civil Rights Act, recognition of the LGBTQ including the transgendered.

Six years later, however, the French Revolution of 1789 established through its legal heir, the Civil Code, imprescriptible rights of every Natural Person or citizen - male/female, black/white, yellow/red, rich/poor, *et al.* Such imprescriptible rights included moral rights of artists/authors/creators. Such rights reflect the Enlightenment precept of Georg Wilhelm Friedrich Hegel (1770-1831) and especially Immanuel Kant (1724-1804) that a created work is an extension of a human personality and as such subject to imprescriptible human rights including the right of paternity – the imprescriptible right to say *I made this!* To be clear, moral are not economic rights *per se*. Nonetheless they have significant economic implications.

The 1789 Revolution also recognized cultural property rights. Thus, Abbe Grégoire (1750 –1831) in his 1794 report to the National Assembly coined the term *vandalism* to describe the initial destruction of Church and Crown property. Such palaces, chateaux, churches *et al.*, he argued, were monuments not to the ancient regime but to the genius of French artists and artisans whose work should be protected and preserved. Again, Kant’s precept at work. That moral rights of artists/authors/creators are inherent in the Civil Code tradition is demonstrated by France codifying such rights only in 1957 in response to pressure from the American entertainment industry and State Department.

The Kantian precept informs statutory author’s rights in virtually all Nation-States outside the Anglosphere including Latin America, much of Africa and East Asia. Collectively this multilingual cluster of countries share the Civil Code and constitute what I call the ‘Eurosphere’. The precept continues, as will be seen, to inform development of Eurosphere law regarding personal information, copyright/author’s rights and digital taxation.

I call the American *the unfinished revolution* for reasons noted above and because, as will be demonstrated below, it does not yet fully recognize nor respect the moral rights of creators. Why should differences between Anglosphere and Eurosphere Natural Rights be a concern to arts management in a 21st century global knowledge-based digital economy (KBDE)? It is because they affect management, operating under conflicting legal traditions of literary & artistic property, creative and performing artists as well as administrative, archival, curatorial, stage and technical crafts. One must ask: What are the differences and implications?

The Differences

If the Civil Code and imprescriptible moral rights are products of the 18th century Enlightenment then Anglosphere copyright is the product of the religious wars of the 15th, 16th and 17th centuries and the influence of Jeremy Bentham in the 18th and 19th centuries. First, the wars.

In England, copyright emerged from a coincidence of interests between Church, Crown and the Stationers of London. The Church and Crown were concerned with content: heresy and sedition, respectively. The Stationers were concerned with their exclusive right to copy what was licensed by Church and Crown, *i.e.*, copyright. The formal relationship began in the Age of Manuscripts when Parliament, in 1401, passed *2 Hen. IV, c.15, or De Heretico Comburendo*. The Crown through Parliament thereby made it illegal to make, write or possess books contrary to the Catholic Faith. Then in 1407, by the *Oxford Constitutions*, censors were appointed by the Universities (Oxford & Cambridge). Approved works were to be copied *only* by the Stationers' Guild of London. The manuscript (original) was to be deposited in the Oxford 'Chest'.

With Print pre-publication licensing continued with prerogative courts of Church and Crown evolving into the Courts of High Commission for Matters Ecclesiastic and the Star Chamber. Such courts settled copyright disputes between Stationers as well as heretic and/or seditious publications. **Critically in 1534 by the parliamentary Act of Supremacy Henry VIII became head of a new Church of England, disestablishing the Church of Rome. By this Act heresy became sedition and sedition became heresy. Church and Crown censorship became one and the same. This was unlike on the continent where Church and Crown censorship remained separate in the Protestant North and Roman Catholic South.**

In 1557 Queen Mary I granted a Royal Charter to the Stationers' Company of London. Her successor Elizabeth I confirmed the Charter affirming perpetual copyright to members of the Company. In return, the Company assisted in enforcing censorship much like social media platforms today that censor hate, pedophilia and terrorism on behalf of the State. Authors sometimes received an honorarium but all rights and revenues from subsequent printings went to the printer, not the author, *i.e.*, the right to copy (copyright) was a printer's right, not an author's right. Copyrights became investment instruments bought and sold between Company members and passed on to heirs in perpetuity including the infamous English Stock.

In 1640, under pressure from Parliament, Charles I abolished the prerogative courts establishing the principle of *habeas corpus, i.e.*, a prisoner must be brought before a magistrate to determine if there are grounds for detention. Under Cromwell's Commonwealth licensing shifted to Parliament and enforcement to unprepared Common Law courts. Nonetheless, Cromwell maintained the Company's Charter, its member's copyright monopoly and its role in censorship.

After the 1660 Restoration, Charles II in 1662 gave royal assent to the last and most detailed Licensing Act (*14 Car. II, c.33*). L. R. Paterson (2002) has noted similarities between the 1662 Act and WIPO's 1996 *World Copyright Treaty* (WCT) and *World Performances & Phonogram Treaty* (WPPT) as well as the 1998 U.S. *Digital Millennium Copyright Act*. Similarities lay in their treatment of digital

rights management apps and device and 1662 treatment of printing press components. The 1662 Act, however, had a sunset clause that was allowed by Parliament to lapse creating profound problems for the Stationers including Scottish copyright piracy. Nonetheless Stationer's perpetual copyright endured.

Fourteen years before Kant's birth, in 1710, Parliament passed the *Statute of Queen Anne* (8 Ann. c. 21), the first 'modern' copyright act. Perpetual copyright was abolished replaced by a duration of fourteen years after the death of the author who was acknowledged *for the first time* as the original copyright owner. However, all author's rights were assignable to a proprietor or copyright owner.

Three questions arose. First, how would the now united Church/Crown/Parliament deal with heretic and seditious publications without licensing laws and prerogative courts? Second, how would Common Law courts deal with copyright post-Stationers' perpetual monopoly? Third, what were the legal rights of the author?

First, without pre-publication licensing laws and prerogative courts the Crown had to rely on *ex post* enforcement of laws against libel, heresy and sedition in public before Common Law courts.

Second, as was traditional in England since the 1624 *Statute of Monopolies* when a prerogative monopoly such as the Stationers' Company lapsed the Common Law courts took over adopting traditional practices as the basis for emerging business law. The 1710 *Statute of Queen Anne* explicitly recognizes the past practices of the Stationers. It should be noted that the Index to Blagden's *The Stationers' Company: A History, 1403-1959* has no entry for 'author'.

Another Anglosphere Common Law tradition complicates the matter. This is the legal fiction that a Legal Person (a body corporate) enjoys the same rights as a Natural Person (a flesh and blood human being). Under the Civil Code there are rights that only a Natural Person enjoys including moral rights.

Third, with respect to the legal rights of the author there was in 1710 no concept of moral as distinct from economic rights nor of the public domain. The legal question became does the author and by extension a proprietor enjoy perpetual copyright under Common Law or is it limited by statute? In 1769 in *Millar v. Taylor* the Court of King's Bench headed by Lord Mansfield declared in favour of perpetual copyright. In 1774, however, the House of Lords in *Donaldson v. Beckett* controversially overturned that decision and established the purely statutory nature of copyright. Confirming the English roots of American copyright, the first major American copyright case - *Wheaton v. Peters* in 1834 - confirmed the statutory nature of copyright.

While the American Revolution used Natural Rights to justify the overthrow of an ancient regime it nonetheless adopted the English Common Law of business. This is evident in the similar titling of the 1710 *Statute of Queen Anne* and the first 1790 American Copyright Act. It should be noted that Thomas Jefferson initially opposed the statute given the history of copyright abuse by the Stationers' Company.

Beyond the influence of religious wars on the evolution of copyright there is Jeremy Bentham (1747-1832). Bentham was father of the last philosophy to emerge from the Enlightenment: Utilitarianism. He was also architect of the so-

called Administrative State whose followers, the Philosophic Radicals, went on to become the Liberal Party of Great Britain. In 1791 in his *Anarchical Fallacies*, a commentary on the French Revolution's *Declaration of the Rights of Man*, Bentham noted "Natural rights is simple nonsense; natural and imprescriptible rights, nonsense upon stilts..." He came to this conclusion based on his theory of legislative omnicompetence meaning the legislature can overturn any right including imprescriptible Natural Rights such as those of the author.

Taken together the religious wars and Bentham's thinking shaped Anglosphere copyright into a law regulating trade in published works with no reference to Natural Rights and thereby excluding moral rights of authors including the paternity rights of employees enjoyed by Eurosphere citizens. What are the implications for arts management of this conflict of legal traditions?

Implications

The conflict between pre-revolutionary Anglosphere copyright and post-revolutionary Eurosphere author's rights breaks down into pre- and post-social media. Using the Google Search definition social media includes "websites and applications that enable users to create and share content or to participate in social networking". It is important to note that content is artistic works at the amateur and professional level in the literary, media, performing and visual arts. Arguably the social media era began with Facebook in 2005. Until then the so-called information superhighway or internet or world-wide web was essentially a one-way street from proprietor/publisher to consumer. Today it is multilane and bi-directional with user generated content occupying more and more of a consumer's time and attention. Such online activity generates Big Data harvested by platform enterprise using a for-profit business model that does not recognize the moral rights of creator users including their personal information.

Pre-Social Media

The following are three implications that preceded and continue in the social media era:

(i) Commerce vs Culture

Copyright concerns commerce (profit); author's rights concern culture (principle). Moral rights and the public domain are Civil Code constructs. In fact, the concept of the public domain only entered Anglosphere lexicon with the 1886 *Berne Convention for the Protection of Literary and Artistic Property* inspired by Victor Hugo and the International Literary & Artistic Association. Until then 'encouragement of learning' was the cultural justification of copyright reflected in the titles of the 1710 *Statute of Queen Anne* and the 1790 U.S. Copyright Act.

Nonetheless, the Natural Rights tradition survives in the American imagination in what I call the *Myth of the Creator* penned by Zechariah Chaffe:

... 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...

However, in the Anglosphere rights of artist, author, designer, director, inventor or scientist are fully (excepting paternity for U.S. patents) appropriable by

a corporate employer and from a self-employed or contract worker just like “any other sort of property”. Why? It is due to the legal fiction that Natural and Legal Persons enjoy the same rights combined with statutory grants of industrial privilege, *a.k.a.*, intellectual property rights, favouring Legal over Natural Persons.

(ii) U.S. Mercantilism

Given the commercial nature of copyright it is not surprising that after 1783 the U.S. adopted a merciless mercantilist policy towards the mother country. Until 1891 the work of any foreign writer could be reprinted in the U.S. without permission and without royalty then sold cheaply in world markets including Canada. In fact, the U.S. and the Austro-Hungarian Empire were the great copyright pirates of the 19th century. The so-called Manufacturing Clause of the U.S. Copyright Act continued in effect until 1984 requiring all works sold in the U.S. by American authors to be printed in the U.S.

The United States did not join the Berne Convention until 1989. It did so only after giving up on the Pan American Copyright Convention (1946) and UNESCO’s *Universal Copyright Convention* (1952). In 1989 the U.S. acceded to Berne. Congress then took steps, as required by treaty, to recognize moral rights, *e.g.*, the *Visual Artists Protection Act* of 1990 which eventually became Section 106A of the U.S. Copyright Act. However, rights of paternity and integrity (only two of the moral rights available in Eurosphere countries) of one’s work are available only to works 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 never been incorporated into the U.S. Copyright Act.

Under continuing pressure from the U.S., the *Trade Related Intellectual Property and Services Agreement* (TRIPS), part of the 1995 WTO Treaty, did two things. First, TRIPS de-cultured copyright converting it into industrial property by exempting aboriginal heritage rights, collective or communal copyright and the moral rights of the author as a Natural Person. Second, the U.S. successfully pressed for inclusion of computer software as ‘literary and artistic property’ for purposes of Berne. Victor Hugo must have rolled over in his Pantheon tomb! Software is, of course, the foundation of the KBDE. This made software the only ‘work’ of intellectual property protected three ways: by copyright, patent and trade secrets. In my opinion, software should be protected by a *sui generis* or one-of-a-kind set of rights as with integrated circuit topographies.

(iii) Uneven Playing Field

Recognition and enforcement of moral rights creates a significant administrative burden with financial and other costs not imposed on arts management in Anglosphere countries. This includes management of moral rights for literary & artistic property, creative and performing artists as well as administrative, archival, curatorial, stage and technical craftspersons. Differences between legal traditions on the supply and demand side of the global arts industry results in an uneven playing field, *a.k.a.*, unfair competition. Put simply Eurosphere artistic productions are systemically disadvantaged relative to Anglosphere productions.

The result has been that the second largest export of the U.S. – entertainment programming - is built on the backs of creators who do not benefit from moral rights. Arguably American failure to fulfill its obligations under the Berne Convention has not been challenged at the WTO by Eurosphere countries because, among other things, Asian and EU entertainment companies have significant investments in the U.S. market where it is more profitable. Specifically, it absolves them of moral rights to creators. It makes contracting much easier and much more profitable than in their home markets. This includes, of course, film co-productions between Common Law and Civil Code countries. An interesting sci-fi example is the 2012 motion picture *Iron Sky* co-produced by Australian, Finnish and German investors. Telling the fictional tale of a Nazi colony on the Moon invading Earth, the action takes place in Washington and New York City, not Berlin, Canberra or Helsinki and was produced in English. Such co-productions are known as ‘American cultural clones’ designed for the Anglosphere market.

Post-Social Media

In the decades since the WTO’s inception in 1995 the U.S. successfully innovated a global KBDE driven by mass consumption *and* production of organized, retrievable information, *a.k.a.*, knowledge. Respectively these constitute *Content* and *Big Data* including the so-called FANGS – Facebook (2005), Amazon (1995), Netflix (2007 streaming) and Google (1998). Psychographic profiles of consumers and voters are but two outputs of data mining social media where consumers *willingly* provide new knowledge to the FANGs and other private and public entities, online with a click. In the Anglosphere personal information given through an electronic End Users Licensing Agreement (EULA) is like any other piece of corporate property to be bought and sold according to corporate interest at any point in time subject only to national law.

The competitive disadvantage of Eurosphere arts management was exasperated by emergence of social media. The Anglosphere business model of social media does not recognize the moral rights of creator users including their personal information. Without the Kantian precept, still considered ‘nonsense upon stilts’, the Anglosphere is struggling with data mining as witnessed by the recent international parliamentary conference in Ottawa.

On the other hand, the European Union’s response to social media has been driven by the Kantian precept and its influence is likely to increase post-Brexit. To repeat, under Common Law personal information given through an electronic check-box contract to a corporation is like any other piece of corporate property. Under the Civil Code, however, personal information is an extension of a human personality subject to “inalienable, unattachable, imprescriptible and unrenounceable” moral rights. Four recent EU legal developments demonstrate:

(i) *EU Court of Justice’s “right to be forgotten,” Judgement, 2012*

The World-Wide Web is a giant reservoir collecting and preserving everything that is posted online together with an address or *url*. Sometimes the information contained is defamatory, simply wrong or otherwise detrimental to the welfare of an individual. For example, an individual may be falsely convicted of a crime and then pardoned. The original news of the conviction remains accessible on the web affecting the individual’s employment opportunities. The Court

determined that in such cases an individual has the right to have such information ‘forgotten’.

Forgotten by whom and how? The ‘who’ is a search engine like Google Search. The ‘how’ is to delete or ‘forget’ the *url* from any search result. This right applies only to a Natural not a Legal Person or body corporate. This decision set the precedent for the right of erasure provisions contained in the GDPR.

(ii) General Data Protection Regulation (GDPR), 2018

Like fishing and pollution quotas the EU’s GDPR establishes property rights in personal information. Put simply, the entry of personal information into the public domain and its use by any and all third parties is subject to the informed consent of its creator, the individual citizen. The GDPR came into force May 25, 2018.

In the global KBDE the primary source of personal information is that collected and compiled by social media platforms. In return for a ‘free’ service like Google Search & Maps as well as paid services the consumer provides access to personal information and online activity. Use of such personal information is now restricted in the EU.

Again, Eurosphere arts management faces an additional burden this time in audience development and marketing not imposed in the Anglosphere. There, despite heated public debate, personal information remains the property of corporate collectors who wholesale and retail that information for profit. The response of Facebook and other social media platforms to the GDPR has been: See you in court! Quite simply the GDPR threatens to undermine if not destroy the Anglosphere social media business model.

(iii) EU Copyright Directive, 2019

The term ‘copyright’ is a misnomer. It should read ‘Author’s Rights Directive’. It is cast in the Civil Code tradition recognizing the moral rights of creators. After Brexit, Malta will be the only remaining English-speaking EU state. It is likely that usage of the term ‘copyright’ and its associated concepts will decline in the EU. There may be an eventual exception, *i.e.*, the concept of ‘fair use’ in the American tradition or ‘fair dealing’ in the British tradition. Such exceptions from infringement allow for restricted non-profit, individual use of copyrighted works. Arguably such an exemption would be required to save ‘meme’ culture in the EU.

The Directive transforms social media platforms from flow through utilities like the traditional telephone company with no liability for content into publishers responsible for the content presented on their web pages. Like the GDPR, the Directive threatens to undermine the current Anglosphere social media business model built on no legal liability for content.

(iv) French Digital Tax, 2019

The French government plans to implement a ‘digital tax’ on social media platforms operating in France. The subject is currently under debate in the EU and under study by the OECD. The Minister of Finance argues that the profitability of social media platforms in France depends on content created by French citizen users. It is only appropriate, he concludes, that the French people should be paid for their work. Hence a digital tax.

What is clear is that the Eurosphere has been, is and will continue to be at a systemic disadvantage to the Anglosphere arts industry. This is the result of differing legal systems. In this regard, it is important to note that the dispute between the U.S. and the EU over transborder data flows is rooted in law, not commerce. If the EU were pursuing advantage it would junk historic legal principles including the Kantian precept and simply adopt Anglosphere commercial practices. Put another way, the conflict is between commerce and culture.

Conclusion

There are two possible outcomes of the legal conflict between pre-revolutionary Anglosphere copyright and post-revolutionary Eurosphere author's rights. First, the Anglosphere accepts the Kantian precept (or its equivalent) more nearly completing the Revolution. The playing field will be levelled. Second, the Anglosphere continues to reject the precept as 'nonsense upon stilts' and the world-wide web fractures into the Anglosphere, Eurosphere and Sinosphere.

1. The Revolution more nearly complete

Why should the Anglosphere especially the U.S. abandon copyright and accept the Kantian precept? I offer four reasons:

(i) Constitutional Consistency

The Kantian precept is consistent with the American Revolution's 'ideology', a term coined by Condillac during the French Revolution meaning 'the science of ideas'. The Natural Rights foundation of the United States is reflected in Article I, Section 8 of the Constitution known as the "Intellectual Property or Copyright Clause" that states:

The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

Notice it is 'Authors and Inventors' not proprietors or producers or corporations. With respect to the Natural Rights of creators, the American is truly an unfinished revolution. A 2011 example concerns the estate of Bob Marley. Inspired by revolutionary anti-capitalist ideals his song book was, after his death, used, figuratively speaking, to sell everything from toilet paper to peanuts. When his family objected an American court found in favour of Island Records because legally Marley was an employee with no copyright let alone moral rights to his work. Furthermore, the United States is required by the Berne Convention to recognize moral rights. It has failed to do so.

(ii) Competition Policy

The increasing concentration of commercial content (copyrights) in the hands of a shrinking number of American 'majors' in competition with digital giants Amazon and Netflix present a classic case in competition policy. For my purposes, as an economist, I offer the words of American legal scholar L. R. Patterson:

A body of law recognizing the author's creative interest in his work would require a limitation of the scope of copyright, for it would require recognition of rights in the author

independent of copyright. By limiting the scope of copyright, such a body of law would provide an effective weapon against the problem of monopoly, which has continually plagued copyright. Thus, a law recognizing the author's creative interest would be not only beneficial to the author; it would also be beneficial to society, for it would effectively limit the absolute control of a work which the copyright owner has today. (Patterson 1968, 18)

(iii) Personal Information

While social media platforms existed prior to Facebook, *e.g.*, Google Search (1997) and myspace (2003), Facebook launched in 2005 has become the public face of social media and associated problems. Currently with some 2 billion subscribers Facebook vacuums up personal information and online activities of its users including user generated content everywhere they go with a smart phone. Together with input from other platforms, personal information is now wholesaled and retailed in nanosecond auctions for advertising space on a specific user's display. This is very big business. The business model and its free services depend on the buying and selling of personal information that has limited protection in the Anglosphere.

Ongoing controversy and irresolution in the Anglosphere about 'Big Tech' could be easily resolved if property rights to personal information were first established. The Kantian precept or its legal equivalent under Anglosphere Equity offers a solution: As with the GDPR, entry of personal information into the public domain and its use by any and all third parties is subject to the informed consent of its creator, the individual citizen.

(iv) Income Inequality

The last time I checked Canadian self-employed artists & entertainers were the second lowest income category after pensioners. As Research Director of the Canada Council for the Arts during the 1980s I witnessed many Quebecois artists and entertainers flee to France where moral rights and higher royalties made the creative life viable. And as the KBDE has progressed in the Anglosphere so has income inequality as life-long employment fades displaced by life-long learning by an increasingly contract, part-time and self-employed or 'gig' labour force. The individual 'knowledge worker' is the subject of increasingly stringent confidentiality, non-disclosure and non-compete clauses in employment and other business agreements. Such restrictions on knowledge gained on the job in turn reduces employment opportunities with competitors and in related fields.

Recognition of the moral right of paternity under copyright for employees and contract workers, as in Civil Code countries, would help re-balance the employment bargain. It would create intellectual property rights in the job. It would reduce alienation from the fruit of one's labour and enhance alternative employment opportunities. Another side effect would be enhanced corporate accountability and transparency.

2. The Revolution unfinished

The second and more probable outcome is that the Anglosphere continues to reject the Kantian precept as 'nonsense upon stilts.' With minor legal

modifications the social media business model of the wholesale and retail of personal information will continue. Assuming the European Court finds the GDPR, Copyright Directive and eventual digital tax legal then the Anglosphere business model will have trouble surviving in the Eurosphere. In effect there will be a great legal firewall around the Eurosphere behind which social media evolution and the arts industry will go one way while the Anglosphere goes another. The world wide web will be partitioned into three distinct legal domains: the Anglosphere guided by copyright and Common Law; the Eurosphere guided by the Kantian precept and the Civil Code; and, the Sinosphere guided by Market Leninism and the thoughts of Chairman Xi.

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