THE UNFINISHED REVOLUTION

Arts Management in a 21st Century Global Knowledge-Based/Digital Economy

Introduction

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 Right, 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 LGBQ 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* - male/female, black/white, yellow/red, rich/poor, *et al*. Such imprescriptible rights include moral rights of artists/authors/creators. Such rights reflect the late Enlightenment argument of 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 argument at work. That moral rights of artists/authors/creators are inherent in the Civil Code tradition is demonstrated by France codifying such rights by statute only in 1957 in response to pressure from the American entertainment industry and State Department.

I call the American 'The Unfinished Revolution' for reasons noted above and because, as will be demonstrated below, it does not yet recognize or respect the moral rights of artists/authors/creators. Why should differences between American or rather Anglosphere and European Natural Rights be a concern to arts management in a 21st century global knowledge-based/digital economy (KB/DE)? It is, of course, because they involve management, under two conflicting legal traditions, of literary & artistic property, creative and performing artists as well as administrative, archival, curatorial, stage and technical crafts. One must ask: Why the difference and what are its implications?

Why the Difference?

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.

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In England, copyright emerged from a coincidence of interest between Church, Crown and the Stationers of London. The Church and Crown were concerned about 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 hand 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 or seditious publications. 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 Stationers 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 honoraria 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. 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 in front of a magistrate to determine if there are grounds for detention. Under Cromwell's Commonwealth jurisdiction for licensing shifted to Parliament and infringement enforcement shifted 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, in 1662, Charles II 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's treatment of printing press components 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's treatment of digital rights management devices. 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 technically endured.

It was fourteen years before Kant's birth, in 1710, that 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-Stationer's 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 statutory laws against heresy and sedition as well as libel laws in public before Common Law courts.

Second, as was traditional in England since the 1624 *Statute of Monopolies* when a prerogative monopoly like 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 practices of the Stationers. Another Common Law tradition complicates the matter further. 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 an author's moral rights.

Third, with respect to the legal rights of the author there was 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* contentiously overturned that decision and established the purely statutory nature of copyright.

While the American Revolution used Natural Rights to justify the overthrow of an ancient regime of subordination by birth 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 the 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 influence of 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 Civil Code citizens. What are the implications for arts management of this conflict of legal traditions?

Implications

I will treat but four of the many implications flowing from conflict between Common Law copyright and Civil Code author's rights.

First, 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 titles of both the 1710 *Statute of Queen Anne* and the first 1790 U.S. Copyright Act.

Nonetheless, the Natural Rights tradition still lives 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…

In fact, Anglosphere rights of the artist, author, designer, director, inventor or scientist are fully (excepting paternity for patents) appropriable by a corporate employer, or, assignable or waivable, in whole or in part, by 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.

Second, 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 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 and Congress took steps, as required by treaty, 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, rights of paternity and integrity (only two of the moral rights available in Civil Code 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 passed in 1990. Its moral rights provisions, however, are so weak that it has not 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, it 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, it 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 KB/DE. 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.

Third, differences between legal traditions on the supply and demand side of the global arts industry results in an uneven playing field and unfair competition. Put simply Civil Code artistic productions are economically disadvantaged relative to Common Law productions.

On the supply side, 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 yet to be challenged at the WTO by Civil Code 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 so much easier and much more profitable than in their home markets. This includes, of course, audio-video 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.

Furthermore, recognition and enforcement of moral rights in Civil Code countries creates a significant administrative burden with financial and other costs not imposed on arts management in Common Law 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.

On the demand side, audience data is critical to successful audience development and marketing. In the global KB/DE the primary source of audience information is personal information accumulated on and compiled by social media platforms. Under Common Law personal information given though an electronic check-box contract to a corporation is like any other piece of corporate property to be bought and sold according to corporate interest at any time subject only to national law. Under the Civil Code, however, personal information is an extension of a human personality, Kant again, and subject to "inalienable, unattachable, imprescriptible and unrenounceable" moral rights. This clash of legal systems has profound implications for the future KB/DE most evident in the European Union's General Data Protection Regulation (GDPR) 2016/679 that came into force May 25, 2018 and the response of Facebook and other social media platforms – see you in court. Quite simply the GDPR threatens to destroy the current Anglosphere social media business model. Again, Civil Code arts management faces another administrative burden suffering financial and other costs in audience development and marketing not imposed on arts management in Common Law countries.

Fourth, the last time I checked Canadian self-employed artists & entertainers were the second lowest income employment category after pensioners. As Research Director for 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 KB/DE has progressed in the Anglosphere so has general 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.

Conclusion

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 works. Until the Revolution is completed global arts management will continue to operate under two conflicting legal traditions with Civil Code arts production at a systemic competitive disadvantage.

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