

2.0 Breadth: Copyright – Comparative Analysis

2.1 Objective

Once new expressions ... appear, how are they best bestowed upon the public? With what rewards and protections should their creators be induced to share their creations? ... And how should these inducements for creative individuals be balanced with concerns such as free speech and expression, intellectual freedom, and future innovation? (Saint-Amour, 2003, p.1)

For my breadth comprehensive examination I wish to explore the uses of copyright (or lack thereof) across differing historical periods and geographic regions. Continuing with the same theme as Examination 1.0, how media affects cultural relations, I have identified the following issues as relevant to this discussion:

- i) the increasing importance of copyright towards the economic power of cultural industries
- ii) the reliance on circulation of creative expression as critical to a nation's character
- iii) the application of the Western European model of copyright to differing regions and cultural norms
- iv) the potential repercussions of increasingly stringent requirements for international copyright protection as it affects creativity

Inherent to copyright law are two competing objectives: the encouragement of creative endeavor for societal benefit, and, the allocation of property rights for the benefit of individuals. The former could be described as the fundamental tenet of copyright law⁴, rooted in non-economic benefit; while the latter focuses on the realization of future economic value. From its inception, the Western European model of copyright has placed greater emphasis upon the

⁴ The first codified copyright law, the English Statute of Anne, appeared under the title of "An Act for the Encouragement of Learning;" and the United States enshrined copyright as a constitutional means of promoting "Progress of Science and Useful Arts."

objective of cultural commodification, resulting in an increasingly instrumentalist implementation of copyright (Macmillan, 2005, p.41-42). Yet copyright's market-mechanism persona is often conveniently obscured by its guise as a measure of artistic patronage—patronage considered essential to the wellbeing of a nation (Murray, 2004).

The idea of national culture has permeated the evolution of copyright law in its various incarnations. The utilitarian Anglo-American tradition of copyright and the European tradition of creator's rights were both harnessed in aid of the nation (McGill, 2003; Wirténs, 2004).

Outside Western notions of liberal democracy, copyright was seen as an integral part of nation building by both the Tsarist and Communist regimes of Russia (Sundarajan, 2005). However,

the author-centric and commercial foundations of copyright law are by no means prevalent throughout the globe. In many cultures, creativity is prized for its noncommercial and non-

individual construction—*i.e.*, in India, anonymity represented the pinnacle of creative identity

(Sneh Pandit quoted in Sundarajan, 2001, p.142); in China and Japan, virtue was seen in the

separation of commerce and creativity (Alford, 1995, p.29; Smiers, 2002, p.127), and, First

Nations people prized the collaborative nature of creativity (Coombes, 1998, p.229). However,

the strictures of international copyright laws can subvert and constrain these alternative cultural paradigms. While copyright has the potential to promote culture in a variety of settings

(Sundarajan, 2001, p.139), the legal homogeneity demanded by Trade-Related Aspects of

Intellectual Property (TRIPs) within the World Trade Organization (WTO) may:

...ultimately entail the imposition of a monolithic vision of culture on member states. By defining copyright in terms which are both comprehensive and stringent, TRIPs effectively determines which forms of cultural expression will be eligible for copyright protection ... (Sundarajan, 2001, p.141).

Until recently, copyright represented an imperfect commodification of a cultural exchange—it was neither possible nor considered desirable to extract monetary payment for every conceivable use of a creative expression. Today, the technological feasibility of locking down published materials (Geist, 2006), coupled with a heightened prominence of personal property rights (Boyle, 2002), have the potential to nullify the safeguards built into copyright law—*i.e.*, term limitation and user rights of fair dealing/use—that are intended to support the fundamental tenet of the law.

2.2 Methodology

Harold Innis' work in communication can apply to discussions of copyright. Copyright law is a means of structuring media; it organizes communication and dictates certain social relations. Catherine Frost identifies key subject areas utilized by Innis in his explorations of media, "... he was concerned with a medium's potential to influence content and to foster new social and economic monopolies down the line (2003, p.11)." Copyright arises within this element; it is a means by which abundance can be reduced to scarcity thus inviting market monopoly and exploitation. Innis posed that new media originated in the margins of society, potentially able to offset the monopolies established by the dominant medium (Babe, 2000, p.84). Extending this hypothesis then, user rights are capable of diluting monopolies of knowledge and can be construed as an innovation from the margins. With this perspective, user rights act as an agent of social cohesion. As creative endeavor is implicitly and explicitly collaborative, facilitating public access to copyrighted work will foster a climate of mutual cooperation instead of heightened expectations of economic benefit. Expectations which do not always translate to tangible economic reward (Murray 2004, Rushton, 2002).

2.3 Literature

In devising the reading list, my intention was to identify differing approaches to questions of circulation and authorship within creativity. Delineating copyright by mode of creativity is, I feel, as important as identifying copyright regimes by nation state. To that end, I have endeavored to collect a wide base of literature, illustrating various creative paradigms, copyright implementations in both developing and developed nations, and, theoretical articles discussing aspects of the commodification or circulation of creative endeavor. In addition, I have included two examples of Canadian case law which illustrate the circumscribing of creativity to support a national identity, and, promoting the aspect of private property over creative expression; together with two examples of efforts to offset the centralizing tendency of private property through usage of the public right of fair dealings.

Readings: Copyright (Breadth)

Cases

1. Ludlow Music Inc. v. Canint Music Corp 114 [1967] 2 Ex. C.R. 109, 51 C.P.R. 278, 62 D.L.R. (2d) 200
2. Allen v. Toronto Star Newspapers 36 O.R. (3d) 201 [1997] O.J. No. 4363
3. Michelin v. CAW 124 F.T.R. 192 [1997] 2 F.C. 306
4. Law Society of Upper Canada v. CCH Canadian 2004 SCC 13

Books/Journals

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6. Alford William P. "Chapter Two: Don't Stop Thinking About ... Yesterday: Why There Was No Indigenous Counterpart to Intellectual Property Law in Imperial China," and, "Chapter Three: Learning the Law at Gunpoint: The Turn-of-the-Century Introduction of Western Notions of Intellectual Property," in *To steal a book is an elegant offense*. Stanford: Stanford University Press. 1995. p. 9-55.
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16. Geist, Michael. *Our Own Creative Land—Cultural Monopoly and the Trouble with Copyright*. Toronto: The Hart House Lecture Committee, University of Toronto. 2006.
17. Ginsburg, Jane. "A Tale of Two Copyrights: Literary Property in Revolutionary France and America," in *Authors and Origins*, eds. Brad Sherman and Alain Strowel, Clarendon Press: Oxford. 1994. p.131-158.
18. Gordon, Wendy J. "Chapter Four: Copyright Norms and the Problem of Private Censorship" in "Commodification and Cultural Ownership" in *Copyright and Free Speech—Comparative International Analyses*. Edited by Jonathan Griffiths and Uma Suthersanen. Oxford: Oxford University Press. 2005. p.67-96.
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20. Hyde, Lewis. "Chapter Four: The Bond," and, "Chapter Five: The Gift Community," in, *The Gift: Imagination and the Erotic Life of Property*. New York: Random House, 1983. p.54-92.
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