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Copyright in Canada: The New Millennium

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Prediction in any sphere of human affairs is foolhardy, and the law of copyright is no exception. When Judge Ilsley's Royal Commission recommended copyright reform in 1957, some predicted that action would be just around the corner. Some corner! A new generation came to adulthood and produced its own offspring before Phase I of copyright reform bore fruit in 1988. Since then copyright law has been amended a number of times, partly to implement obligations assumed by NAFTA and the World Trade Organization Agreement, and most recently in 1997 as a prelude to Canada's accession to the most recent version of the Berne Convention (1971) and the Rome Convention on the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (1961). The result is that Canadian and foreign authors, copyright owners, performers, record companies, broadcasters and exclusive book distributors have more rights than ever before; longstanding copying practices in places such as educational institutions, libraries, archives, museums are now regularized, but often only by paying tribute to a collecting society; and deaf and blind folk get some breaks to allow them access to material on a more equal footing with people without these impairments.

Prediction in the field of copyright law yields results that are either at best half right or half wrong, depending on one's perspective and disposition. Some things may be foreseeable, some may not, and how events will unfold is in the lap of the gods or their earthly proxies, the satraps of the communication and entertainment industries.

*118 The following predictions are therefore made on the basis that the only certainty in such a matter is their uncertainty:

- Copyright will be around in Canada for the foreseeable future. The rights will become stronger, more integrated, and more intrusive. Their holders will get more exclusivity over more activities. Users will get fewer freedoms, “user pays” will become the dominant ideology, the public domain will correspondingly shrink and, with it, the range of available tropes such as parody and quotation.

- Ever higher levels of protection will become entrenched internationally. The trend commenced by NAFTA, the World Trade Organization Agreement and a current crop of treaties sponsored by the World Intellectual Property Organization in Geneva will continue apace. Canada's ability to create and maintain policies that further its perceived national interests will diminish to the point of inconsequentiality. Politicians will continue to talk simultaneously about level playing fields and protecting local cultures, without seeing the fundamental inconsistency.

- The businesses that distribute copyright material will become bigger and more concentrated, and the rights in creative material will be held in fewer hands. The trend is already noticeable in the entertainment media and computer software industries, which are investing heavily in the Internet and other forms of electronic distribution. These industries have
a powerful vested interest in strong intellectual property protection and will continue using the information media they control to propagate their protectionist viewpoints.

- Authors, performers and academics will continue talking about the importance of moral rights — their right to be credited and to control the integrity of their work — but these rights will have more symbolic than practical value. Distributors will continue obtaining waivers of moral rights or will devise ways to assert these rights for their own benefit as it suits them.

These movements will not be frictionless. They form part of the continuing intense worldwide struggle for control over culture and the means of communication. On the one side are ranged the media owners and distributors, often vertically integrated multi-national corporations, which argue for increased protection and tribute for their products. Often aligned with them are the authors and performers, desperately hoping that increased protection will bring them increased revenue. *119 The fact that, historically, most authors and performers benefit little from such increases, either absolutely or when compared to the benefits received by distributors, will be conveniently ignored. (Perhaps all that authors and performers ultimately seek from additional protection is more social respect. If so, society would be better off awarding them more medals than more copyright.)

On the other side are ranged the users and institutions that benefit from broad rights of access. They argue for a broad public domain and for access to cultural products at a rate that ensures continued production but which will not yield excessive or windfall profit. Those who are simultaneously both owners and users gravitate from one side to another, trying to resolve their schizophrenia in a way that assures them maximum overall benefits. Between the two sides stand government officials, trying to broker deals in a way that seems best to advance national interests in culture and competitiveness.

Some of the trends noted above are now elaborated.

1. COPYRIGHT WILL STILL EXIST

As digitization and electronic delivery become even more prevalent as means of exploiting copyright-protected material, the question becomes whether copyright can survive in this environment. For, as a child of the Gutenberg era, copyright has come to depend on the creation of a tangible work, which is then exploited through mass marketing of copies, public performance or broadcast. Unauthorized dealings are usually easily handled by the civil or criminal law. With digitization and electronics, copyright has greater difficulty in coping with undesired manipulations and worldwide instantaneous movements of data. Detection and enforcement become more difficult, sometimes impossible; rights that appear on the statute books may be ignored in practice.

Will copyright die or, indeed, is it already dead, as some claim? Either funeral announcement seems premature. Copyright is neither dead nor dying, mainly because nobody apart from the occasional unbeliever can accept the possibility of such an occurrence. Copyrights keep being enforced in the courts; governments keep giving copyright holders more powers; billions of dollars keep changing hands annually as copyrights are bought, sold and licensed; and the traditional audiovisual and print media keep flourishing with new content and with recycled and repackaged old content. In short, Elvis is not cannot be dead.

*120 Most copyright holders view the new media as providing new opportunities rather than new enemies. Every new technology has brought with it a fresh range of activities over which copyright holders would prefer absolute control. In the real world, however, they are willing to settle for much less. So long as new technologies produce new profits that exceed any losses that may be incurred from the displacement of old technologies, copyright holders are ahead of the game. They simply adapt their business strategies to (1) embrace and exploit the new technology, (2) persuade those in power legislators, administrators, courts, and opinion-makers to provide them with effective mechanisms to achieve these ends, and (3) try to convince the world of the righteousness of their behaviour and the despicability of those who would challenge it.
It is on this last point that copyright law is the most vulnerable. For its survival ultimately depends on attracting and maintaining public support and confidence. Copyright cannot be something that is forced on an unwilling public, like a dose of bad-tasting medicine administered to cure a phantom malady. The way in which copyright law functions today often makes little sense to the informed viewer, let alone the general public. The law urgently needs to acquire a coherent moral centre that ordinary people can appreciate and accept. Those who wish copyright to survive would do well to concentrate on that goal, rather than reflexively advancing extravagant claims for protection that deny the public fair access to its common culture.

2. THE LAW WILL BECOME MORE STANDARDIZED AND INTERNATIONALIZED

One feature of Canadian copyright law in the new millennium may be that there will be no Canadian copyright law. I do not refer to the debate over Québec's future, nor do I mean that the law will simply disappear. Rather, Canadian copyright law may come to look even more like the laws of other countries.

A push for international harmonization already exists, for one meta-law for all countries. This has already been partly achieved by the almost universal acceptance of the Berne Convention and the World Trade Organization Agreement, as well as by the movements to adopt new treaties sponsored by the World Intellectual Property Organization. But these treaties still permit wide local differences in substance and procedure. The future should see greater attempts at uniformity, somewhat like those imposed on Europe by directives from Brussels. Whether the impetus will come through NAFTA or elsewhere is not important. What matters is that the impetus will come.

The reasons are clear enough. Multi-national corporations, today's main beneficiaries of copyright, find copyright differences between countries to be both irritating and costly. Documents of title and waivers that are valid in one country may turn out not to be so in other countries; an international law rule that allows one state to refuse to protect a work coming from another state longer than for the period granted by the latter state ("the rule of the shorter term") may eliminate protection altogether in one state, while retaining it in other states; some exceptions from national treatment are still permitted under international law. Paying lots of lawyers in lots of states to weave their way through local thickets imposes deadweight administrative costs that owners would like to avoid.

The pressure to create harmonized rules of title, contract, term, and as many other features as possible perhaps even harmonized language will likely become overwhelming. In succumbing, Canada will end up having less room to manoeuvre to maintain its distinctive cultures through copyright law. Considerable ingenuity will have to be exercised to find new ways of encouraging local cultural goals if, indeed, such policies can survive at all in the face of the ever more restrictive treaties on trade and investment that Canada persists in entering.

3. RIGHTS WILL INCREASE AND LAST LONGER

The new millennium will likely see copyright take on more rights and beneficiaries. Users will be able to do less without seeking permission from copyright holders. The public domain will shrink. Copyright will intrude even more into people's daily lives.

The copyright amendments of 1997 are harbingers of this trend. Performers, record companies and broadcasters are granted new and more extensive rights. Exceptions written into the law do little more than state the obvious, regularize existing user practices, or compel users to pay for the privilege of doing things they previously did for free.

These trends will likely continue. The distinction between copyright and neighbouring rights granted to performers, record companies *122 and broadcasters will blur even more: how a performer today differs from an author is already often unclear, for example, in improvisational work. Performers, record companies and broadcasters, who now get protection for only 50 years and a lesser range of rights than authors, will no doubt demand parity with authors and copyright owners. There will be pressure to raise Canada's present copyright term of 50 years past the author's death to seventy years, as the countries of Europe have done. Exclusive distributors may demand the right to halt parallel
imports and unauthorized distribution of copyright products, just as exclusive distributors of books were given this right in the 1997 legislation. Non-exclusive distributors may also demand rights of action, pointing to precedents in other intellectual property laws. Owners of electronic databases will demand protection for access to their compilations. Foreign authors will encourage their Canadian counterparts to demand a droit de suite (the right to get a cut of the resale price of artwork) and will themselves press for the public lending right to be transformed from an administrative scheme benefiting only Canadian authors to an author's right with national treatment for foreigners. More countries will adhere to the international conventions and so acquire Canadian benefits for their owners of copyright and neighbouring rights. Those that will not adhere, for their own reasons, will nevertheless demand protection in Canada for their nationals and, wherever possible, threaten trade retaliation if Canada does not quickly comply.

Canada will find these demands almost irresistible because many will come not only from abroad but also from Canada's own authors and copyright owners. Even now, these latter groups unashamedly argue for longer, even perpetual, duration of copyright and for a law that admits to no user exceptions at all. For them, the only public domain is a domaine publique payante, and the only fair dealer a dealer who begs first and pays later. Even those who today reproduce material to review, criticize, research or even privately study are condemned as plagiarists and free-riders by owner/author groups. The idea that this absolutist strategy may backfire in the long run, that it may benefit copyright owners more than authors, that it may increase private censorship of works that authors or owners would like suppressed or, even more radically, that copyright law may have a social purpose other than merely dropping coins in copyright owners' and authors' pockets, seems somehow to have escaped the new Me Generation of authors and owners.

*123 It is almost inconceivable that a movement like this could initially succeed almost anywhere, except Canada. But, of course, if it succeeds here, it will provide fuel for similar movements elsewhere. For in the law of intellectual property, there is no idea so silly that it does not find receptive soil somewhere.

4. MORE RIGHTS WILL BE COLLECTIVELY ADMINISTERED

Until 1988, collective administration of copyright in Canada was the exception. Music publishers, composers and lyricists used it to get royalties for public performances and broadcasts, but the laws regulating anti-competitive practices discouraged more general usage. All changed in 1988. The amendments of that year encouraged copyright collectives to form, and this trend was reinforced by the amendments of 1997. Collective administration is now seen as the way to implement the general principle of “user pays” and to narrow the range of permissible exceptions.

The trend towards collective administration will continue. Few individuals today can afford to litigate copyright claims and, even when they can, the damages may not cover their costs. Legal aid is rarely available. Class actions are a solution and may have a passing vogue: witness the present litigation brought by freelance writers against newspaper publishers in respect of the electronic distribution of articles. The very commencement of such actions may signal members of the class that they do indeed have a common interest, which may be worth institutionalizing in a collective. Test litigation will no doubt be brought before the Copyright Board or the courts to delineate the permissible reach of the collective's powers.

Collectives often prefer to deal with major users rather than individuals. Not only are economies of scale achieved, but the financial burden is more widely diffused and may even escape the notice of the average end user. Hidden taxes feel like no taxes and so create little opposition. The growth of collectives may therefore see a move toward more upstream imposition of royalties on larger institutions schools rather than students, law societies rather than individual lawyers or law firms and may even cause individual users themselves to associate into user groups to deal more effectively with owner collectives.

*124 5. CONCLUSION

The picture painted so far may depress those who believe that there is already too much copyright around. There is, of course, a plausible counter-scenario. Attempts to create more protection and eliminate the public domain will likely be strongly challenged, and the outcome of the ensuing struggle is far from certain. One version is being played out on the
Internet. Attempts to restrict content and use there have run into fierce resistance from advocates of free speech, free trade, and free association. Some courts and policymakers have responded by starting to develop a view of copyright that is consistent with and complementary to such values. Part of this strategy involves the carving out of a lively public domain, an intellectual commons symbolized by a liberal fair use regime, as an inherent attribute of any vital system of copyright.

In Canada, this debate has yet to take hold. The federal government provided a minor contribution in early 1997 in granting the public free use of federal legislation and judicial decisions; but provincial governments have so far not responded in kind in respect of their own laws and decisions. Courts have also contributed little to the debate, being content with fairly routine and mechanistic applications of the statute. Clashes between copyright and free speech and free association have tended to be resolved in favour of copyright, and legitimate parody and criticism have been suppressed. So, for example, a union that used a parody of the Michelin tire logo on its organizing material had to pay damages for copyright infringement, and Canada's much-vaunted Charter of Rights and Freedoms was found to be of no help to the hapless parodist. But these are still early days, and such decisions are unlikely to be the last word. For, at bottom, they reflect an old-fashioned notion that equates copyright with property and then proceeds to treat any incursion as an automatically unjustified encroachment on others' inalienable rights to private property. The equation of copyright with property of course conveniently begs the question of what the contours of this "property" should be; for to compare the rights a person has in respect of an automobile or land with those he or she has in respect of copyright is an exercise in contrast more than anything else.  


*125 More fundamentally, an approach like this is essentially antisocial. It separates the law from the people it affects. On this view, members of the public are merely passive viewers, not participants in the process by which a law is made and administered.

This approach is epitomized by a British dictum that has been followed by Canadian judges. The case in which it originally appeared involved a breathalyzer manufacturer, which tried to stop a newspaper from publishing an internal memo from one of the manufacturer's staff suggesting the products were giving inaccurate readings. The British court said this was one of those rare cases where the public interest in the due administration of justice trumped intellectual property, because innocent people might be convicted on the basis of a faulty instrument. But the court made it clear it was not providing a charter of rights for whistleblowers: "There is a world of difference between what is in the public interest and what is of interest to the public", said one of the judges.  


Intellectual property as a whole, including copyright, needs a better rallying cry than this. There may be some difference between what the public is interested in and what it should be allowed to know or influence, but in a modern democracy that gulf should be small. Otherwise copyright law will turn into something it already is in danger of becoming: a law with apparently little moral content, one that ignores the ordinary habits of citizens who otherwise pride themselves as law-abiding; a law that consequently cannot expect to gain the respect of the citizenry. 

Footnotes

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