

## REJUVENATING COPYRIGHT

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*The law of copyright has, especially when combined with other legal mechanisms, become a potent and wide-ranging instrument — some say too much so for protecting and establishing markets in a wide range of products. This paper argues for a fundamental reassessment of domestic and international law. The protectionists' rallying cry of "to each cow its calf" has produced an incoherent system many ordinary people find unacceptable. Questions such as what specific activities deserve encouragement, what stimulus should be offered, and who should benefit and in what proportions need to be asked and answered. A recontoured copyright system may then regain the moral centre it needs if it is to attract public respect and compliance.*

*Le droit sur le droit d'auteur, spécialement lorsqu'il se combine avec d'autres techniques, est devenu un instrument puissant et de grande envergure — trop, diront certains, pour la protection et l'établissement de marchés dans une vaste gamme de produits. Cet article plaide en faveur d'une réévaluation fondamentale du droit national et international dans ce domaine. Les slogans des protectionnistes, comme «rendez à César ce qui appartient à César», ont engendré un système incohérent que les gens ordinaires trouvent inacceptable. Il faut répondre à des questions telles que : quelles sont précisément les activités qui méritent d'être encouragées? Quels stimulus devraient être offerts? Qui devrait recevoir les bénéfices et dans quelle proportion? Une fois redéfini, le système de droit d'auteur pourra retrouver le fondement moral dont il a besoin pour se mériter la considération et le respect de la loi.*

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*Too wonderful for words*

The copyright system has come in lately for a good deal of criticism. Purveyors of electronics denounce it as a print-age dinosaur, unable to adapt to the imperatives of technological revolution. Believers in an open society denounce it as a tool of oppression, enabling its owners to manipulate or sell artistic and information products to those who can afford them, without giving the rest of the world a chance to get a look in. Postmodernists denounce it as a system built on egocentrism and elitism because of its focus on an independent associetal author, an imaginative figment whose sponge-like activities belie its aspirations of quasi-divinity. About the only people not denouncing it are those whose businesses and livelihoods depend on the system; and of course, they denounce all denouncers.

Copyright deniers and their critics (mainly copyright beneficiaries) have this in common: they recognize the pervasiveness and power of copyright; they acknowledge, at least implicitly, that those qualifying for copyright protection are on to a Very Good Thing. Of course, copyright beneficiaries<sup>1</sup> are always after more protection and state involvement against those who practise copyright denial as a way of life. Their tactics are not to praise copyright — and certainly not to bury it — but rather to divert attention away from the benefits they get from copyright. It is, after all, easy to point to copyright's seamy side: how it allows X to lose \$Y from Z's piracy, where X = society/the economy/distributors/creators, Y = any figure followed by m/b/trillion, and Z = anything from local kids taping off-air to far-off factories turning out knock-offs and knock-off technology. Copyright diverters include authors and their unions, who cry poor through claims that copyright reneges, other than to a few superstars, on its promise to offer financial independence in return for the publication of their creativity.

Copyright diversion does not, however, signal the failure of the object denied: Microsoft may wail at software piracy, but Bill Gates still sits atop the Fortune 500 plutocrats' list through good products, good marketing — and copyright. What copyright diversion shows is how hard it is, in complex and growing societies, to monitor any type of public or private activity effectively, and equally how hard it is for the independent creator/entrepreneur to survive in economies where corporations, not individuals, dominate business activity.

The reality of copyright is that it is indeed a Very Good Thing. Its products are protected from copying or other forms of exploitation — public performance, broadcasting, translation, and other spin-offs — for the lifetime of the producer

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<sup>1</sup> The copyright sector is an ill-defined set of industries centred around print publishing, film making, advertising, and producing records, video games, computer programs, and associated material. Like the technology behind their products, these industries have marked tendencies towards greater integration: consider Sony or Time-Warner. There are also industries centred on performance and exhibition: live theatre, concerts, art displays, etc.

plus another 50 years.<sup>2</sup> In some places protection lasts for ever: in Canada, if the product has not been marketed or presented to the public,<sup>3</sup> in the United Kingdom, if the work is James Barrie's *Peter Pan* and its owner is a sick children's hospital that the government wants to subsidize with someone else's cash.<sup>4</sup> For a copyright to be obtained, no money need be spent; nobody needs to be notified that the right is claimed; protection is worldwide; distributors can carve up the world market into territories, often preventing parallel imports and maintaining varying price levels in different countries. One can start, stop and finish exploiting the product as one wishes, charge whatever prices the market will bear for the rights or products produced under it, refuse licences whenever one wants, and band together with others to exploit rights collectively, with relative immunity from competition or antitrust action so long as one behaves with a modicum of diplomacy. In most places, copyright owners can count on sympathetic lawmakers, bureaucrats and judges to enforce and expand their rights.<sup>5</sup> This is evidenced by the latest worldwide push to harness fine-tuned versions of copyright to protect business investment in ever-expanding computerized information webs.

### *Copyright's pale (but friendly) rivals*

It is easy to see why entrepreneurs like copyright so much, more than other forms of protection that wrestle for their attention: copyright's siblings are pale contenders in the protectionist stakes. *Patents* for new inventions last no more than 20 years, are not granted automatically, have to be applied for country by country, can cost thousands of dollars to get, and much more if they have to be enforced through litigation. *Design* protection is often shorter: in Canada, a lowly 10 years. Sectoral protection, e.g., for new types of *semiconductor chips* or *plant varieties*, mimics design or patent protection: a government bureaucrat must vet applications before any protection kicks in, and then protection is short: in Canada, 10 years for new semiconductor designs or 18 years for new plant varieties.

<sup>2</sup> There are aberrations both ways. At one end of the spectrum are shorter-protection products: e.g., in Canada, photographs, sound recordings and home videos, with a flat 50-year protection. At the other end of the spectrum, is the new EEC model inspired by Germany, where protection is for the author's-life-plus-seventy-years period. In between, is the US, where employee works ("works made for hire") have a term of the shorter of 100 years from creation or 75 years from publication.

<sup>3</sup> *Copyright Act*, R.S.C. 1985, c. C-42, s. 7.

<sup>4</sup> *Copyright, Designs and Patents Act 1988* (U.K.), s. 301 and schedule 6.

<sup>5</sup> The exceptions are typically countries where (a) the problem is less an antipathy to intellectual property than the presence of general obstacles to investment and marketing: xenophobia, corruption, or undeveloped business and legal infrastructures, or (b) where there is a deep-seated belief that full and free access to at least some kinds of knowledge is a public right. The concept of "free" access has here a literal meaning, none the attenuated one preferred by copyright owners, viz., freely available — at a price.

Copyright's only real rivals are trade-marks, trade secrets and contracts:

- *Trade-marks* can last forever, but protection is less effective than copyright: a trade-mark owner still has to register its claim with a national filing office, deal with officials or other businesses who may dispute its right, and pay periodic fees to keep the right alive. Trade-mark rights are also more fragile than copyrights: if not used, the mark can vanish into thin air or be snatched up by a rival. It must also be policed to stop it falling into the language, e.g. thermos in the United States (but not Canada).<sup>6</sup> Marks can be sold or licensed, but owners or licensees must use the mark with care or it may legally deteriorate to the point of disappearance.

- *Trade secrets* can last forever too, and without official registration or filing fees; any item of potential economic value can be protected under trade secret law. Their downside is that protection may be lost despite the owner's best efforts: someone may learn of the secret independently or may reverse-engineer it or the product that contains it; buyers from an industrial spy may even be allowed to profit from their purchase and may end up destroying its value altogether by publicizing it, so long as they didn't know they were dealing with a crook.

- *Contracts* too can last forever. Of course, you cannot have a contract without two or more people or entities agreeing to a set of terms, but there is constant pressure to have a person's silence, when confronted with a menu of preset standardized terms, be the new norm of consent that creates a binding obligation.<sup>7</sup> But contracts share the same disadvantage as trade secrets: it is hard to enforce them against people who did not "agree" to the terms.

Although copyright's rivals are not as good as copyright, they can still be employed to prop up production, marketing, distribution and spin-off activities in copyright industries. The law of contracts ensures production and exploitation agreements are kept and that deal-breaking is costly and painful. Laws promoting "fair" competition insulate firms from behaviour that threatens planning for profit: torts with ominous names like wrongful interference with business relations, injurious falsehood, breach of confidence, misappropriation of personality, passing off, and conspiracy are designed to scare off anyone with intentions of profiting from a copyright industry without paying whatever toll the industry wants to exact. Finally, criminal laws against fraud and copyright infringement, with threats of jail and massive fines, are there — and used — to halt practices that detract from the orderly authorized marketing of copyright properties.

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<sup>6</sup> Cf. *Aladdin Industries Inc. v. Cdn Thermos Products Ltd.* (1969), 57 C.P.R. 231 (Ex.), with *King-Seeley Thermos Co. v. Aladdin Industries Inc.*, 321 F.2d 577 (1963).

<sup>7</sup> Consumers have become used to signing forms without reading them, or to being told by a goods or service provider *ex post facto* of the rules of the game. This is sometimes successfully challenged in litigation, where judges find some reason not to enforce a standard form contract; but these are blips in the pattern of "normal" marketplace behaviour.

If copyright managers cannot make money off a market so fully organized and bolstered by domestic and international law as this, either they or their products do not deserve to be in the market at all. It is hard to imagine how a more effective market to attract investors, producers and distributors could be devised. The occasional leakage (through unauthorized exploitation) will not make the copyright ship sink: there are always plenty of passengers to spot the leak and bale, and there are even more who think they've paid for (or deserve) the cruise and so will salvage it.

*Too many passengers, too low fares*

It is the very attractiveness of copyright that threatens it as an institution. Everyone wants to be a passenger on this ship, whether they belong there or not. This is the phenomenon of "rent-seeking": offer a prize within everyone's reach, and everyone will drop whatever they're doing to go for it. Never mind that what they give up for the hunt would have benefited society (and perhaps themselves) more in the long run than the prize itself or the efforts made to attain it.

That is the central dilemma of copyright: it attracts more resources to it than would exist without its presence, and everyone wants their activity protected under copyright because it is by far the best game in town. Legislatures and courts in Canada and other Commonwealth states have easily been persuaded to take nearly all comers on board. Simply to "free-ride" on another's business efforts or investment is not wrong either under Canadian federal law or at common law<sup>8</sup> (although a different view may prevail in Quebec);<sup>9</sup> yet judges everywhere seem willing to use copyright law to prevent free-riding if some "work" in tangible form has been copied.

What makes copyright a legitimate instrument of social policy is the idea that the individual deserves the opportunity of developing personally and gaining economically from the product of his or her intellectual labour, and what is good for the individual is equally good for society. By the end of the 20th century, this notion has become totally degraded. The group Victor Hugo drew around him in the 19th century to fight for international copyright was certainly not campaigning to protect lottery tickets, money boxes, belt buckles, routine business correspondence, forms and office memoranda, or mechanical parts — items that have since been protected at one time or another under United States or Commonwealth laws. The degree of degradation appears when one looks at

<sup>8</sup> *MacDonald v. Vapor Can. Ltd.*, [1977] 2 S.C.R. 138 (federal law); *Westfair Foods Ltd. v. Jim Pattison Industries Ltd.* (1989), 59 D.L.R. (4th) 46 at 65 (B.C.S.C.), aff'd (1990) 68 D.L.R. (4th) 48 (C.A.); *Institut National des Appellations d'Origine des Vins et Eaux de Vie v. Andres Wines Ltd.* (1987), 40 D.L.R. (4th) 239, aff'd (1990), 30 C.P.R. (3d) 279 (Ont. C.A.).

<sup>9</sup> *Vidéotron Ltée v. Industrie Microlec Produits Électroniques Inc.*, [1988] R.J.Q. 546.

a symptomatic set of cases, those where work involving trivial artistic skill has qualified for protection.

The rallying cry came from England in the 1970s when a judge claimed that anything beyond a "single straight line drawn with the aid of a ruler" is protectible by copyright as an original artistic work.<sup>10</sup> This is no mere *bon mot* but in fact represents Commonwealth law. In Canada, copyright as an artistic work was extended to a common four-letter word, the VISA service mark in plain sloping capitals, for credit cards; in Australia, the same happened with single stylized letters (R, B).<sup>11</sup> This trend appears elsewhere. Commonwealth courts regularly protect commonplace correspondence, internal office memoranda and file notes; the most striking case is perhaps one where a business letter, comprising all of three perfectly ordinary sentences that would have made any literary stylist blench, was routinely protected.<sup>12</sup> Similarly, a 4-note musical theme used to identify a television channel has apparently been accepted as an original musical work in Britain.<sup>13</sup>

What do cases like this tell us about copyright law as practised in Commonwealth countries at the end of the 20th century?<sup>14</sup> The following:

- *Almost everything drawn, written down, crafted, composed, or recorded in some form can be protected by copyright.*

<sup>10</sup> *British Northrop Ltd. v. Texteam Blackburn Ltd.*, [1974] R.P.C. 57, 68 (Ch.D.).

<sup>11</sup> *Visa Int'l Service Assn v. Auto Visa Inc* (1991) 41 C.P.R. (3d) 77, 87 (Qué.); *Roland Corp. v. Lorenzo & Sons Pty Ltd.* (1991), 22 I.P.R. 245 at 248, accepted on appeal (1992), 23 I.P.R. 376 (Aust.).

<sup>12</sup> *Tett Bros. Ltd. v. Drake & Gorham Ltd.* (1934) Macg. C.C. 492 (Ch.D.). The letter read in full (omitting "Dear Sir" and "Yours etc.):

Further to the writer's conversation with you of to-day's date, we shall be obliged if you will let us have full particulars and characteristics of "Crystallite" or "Barex." Also we shall be obliged if you will let us have your lower prices for 1, 2, 3, 4 and 5 ton lots and your annual contract rates.

We have been using a certain type of mineral for some time past and have not found it completely satisfactory, and as we shall be placing an order in the very near future we shall be obliged if you will let us have this information at your earliest convenience.

It is an interesting question whether, by reproducing the above letter and omitting the author's name, the present writer has infringed both Tett Bros.' copyright and its writer's moral rights. Perhaps a judge may find this dealing "fairly" done for purposes of "research, review or criticism", but can a publisher shelter behind my defence when it reproduces this document? After all, publishing an unpublished work in full is everywhere the least likely of all activities to pass fair dealing muster; but perhaps *de minimis non curat lex auctoris* saves all.

<sup>13</sup> *Lawson v. Dundas*, (12 June 1985) (Ch.D., Falconer J.) (unreported).

<sup>14</sup> Some might claim this is now all overturned by the "landmark" U.S. decision of *Feist Pubs. Inc. v. Rural Telephone Service Co.* 111 S. Ct. 1282 (1991), requiring some spark of creativity as a precondition of copyright protection. But most Commonwealth courts are unlikely to reverse their jurisprudence because of a US decision on how its copyright law should be interpreted. What line Canadian judges will follow remains to be seen. The four years since *Feist* have produced no discernible change in the direction of Canadian jurisprudence. See Siebrasse, *Copyright in Facts an Information: Feist is not and should not be, the law in Canada* (1996) 11 C.I.P.R. 191.

The main exceptions are (1) direct tracings or exact copies of existing work, or (2) a single word, if protection is claimed as a *literary* work (the literary composition involved is thought too trivial); but a single word may qualify as an *artistic* work if neatly produced in something other than a plain Pica font.<sup>15</sup>

- *Overlapping protection is permitted, causing copyright policies to preempt other policies deliberately established by adjacent intellectual property regimes.*

The VISA and R and B “works” all qualified as trademarks and were used and fully protected as such. Yet copyright protection goes beyond what trademark law offers: it prevents uses by non-competing businesses, stops parallel imports of brand-name products, and protects brands that have gone into the public domain through non-use. Material may also be doubly protected under design and patent laws, as well as copyright.

- *All artistic endeavour is treated the same, whether destined for commercial or artistic purposes.*

We may applaud the practical implementation of the aesthetic theory that “all art is one”: it certainly saves making judges apply aesthetic criteria, a field where they have proved their ineptitude beyond all reasonable doubt. But the consequence has been to undermine the base — hence legitimacy — on which copyright has been built. Consider the following:

- A term of protection, life plus 50 years, initially justified as providing an author’s family with a patrimony, has been subverted to give long term — virtually perpetual protection — to commercial work. Since most commercial work is produced by employees, the copyright belongs to the employer, and no benefit ever goes to the author’s family; the employee’s stimulus to produce is salary, not *post-* or even *pre-mortem* copyright protection.

- The protection is not geared to the incentive needed to stimulate production. Business — or personal — correspondence never needed copyright to stimulate its appearance: witness the decline of personal letters ever since the telephone appeared, even as copyright protection remained constant or even improved. And to imagine that computer software needs protection for a century or more (depending on the longevity of the youngest programmer on the job)<sup>16</sup> before anyone is stimulated to produce is simply ludicrous. No rational business works on the prospect of amortizing returns over a period of a century.

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<sup>15</sup> On a whim, I decided this week to copyright *COPYRIGHT* in plain sloping capitals — remember, you first saw it here. Anyone henceforth writing *COPYRIGHT* may apply to me for a licence. The excuse that you forgot you saw it here first doesn’t work. Subconscious copying is still copyright infringement, as George Harrison learned to his cost: *Abkco Music Inc. v. Harrison’s Ltd.*, 722 F.2d 988, 998-9 (2d Circ., 1983).

<sup>16</sup> Most major computer programs are written by a number of people, and the internationally required term of copyright protection for joint authors is tied to the life of the last-to-die plus 50 years.

- Claims of protection for material the production of which copyright did not encourage appear opportunistic. *Some* protection may be warranted for, e.g., unwanted or premature disclosure of business correspondence, but privacy or confidentiality, rather than copyright protection, is more apt.
- Because litigation involving commercial work crowds out that involving fine art, courts are exposed and sympathetic to the protection of commercial work more than fine artwork<sup>17</sup> — paradoxically, since it was literature and fine art that created the very system from which commercial work now profits. The problem is pervasive: in recent years, judges have shown themselves quite unsympathetic to concepts of kinetic art,<sup>18</sup> postmodernist appropriation in the visual arts,<sup>19</sup> minimalist abstraction and body painting,<sup>20</sup> improvised dance,<sup>21</sup> improvised drama,<sup>22</sup> traditional and oral culture,<sup>23</sup> and the record sampling practices of rap musicians<sup>24</sup> — except, apparently, if the musicians are parodists with the commercial sense and good luck to work in the United States<sup>25</sup> and manage not to affect the potential licensing market of the work they take off.<sup>26</sup>

### *Scrutinizing the passenger list: rejuvenating copyright*

Criticisms like these have, not surprisingly, been swirling around for decades. It would be remarkable, even coincidental, if a system of protection introduced for books nearly three centuries ago is adequate for the task of

<sup>17</sup> The rot may have been set in as far back as Holmes J.'s decision, at the beginning of the century, to find circus posters could have copyright, emphasizing their "real" use, i.e., "to increase trade and to help to make money": *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903). The implicit contrast with fine art, which presumably has no "real" use other than mental diversion, is striking.

<sup>18</sup> *Komesaroff v. Mickle*, [1988] R.P.C. 204, 210 (Aust.).

<sup>19</sup> *Rogers v. Koons*, 22 U.S.P.Q. 2d 1492 (2d Circ., 1992).

<sup>20</sup> "Two straight lines drawn with grease-paint with another line in between them drawn with some other colouring matter, in my judgment, by itself could not possibly attract copyright": *Merchandising Corp of America Inc. v. Harpbond Ltd.*, [1983] F.S.R. 32, 46-7 (C.A.), denying protection to a pop star's facial makeup.

<sup>21</sup> *FWS Joint Sports Claimants v. Copyright Board* (1991), 36 C.P.R. (3d) 483 at 489-90 (Fed. C.A.).

<sup>22</sup> *Green v. Broadcasting Corp of New Zealand*, [1989] R.P.C. 700 at 702 (P.C.), aff'g [1989] R.P.C. 469 (N.Z.C.A.).

<sup>23</sup> *Robertson v. Lewis*, [1976] R.P.C. 169 (Ch.D.).

<sup>24</sup> *Grand Upright Music Ltd. v. Warner Bros Records Inc.*, 22 U.S.P.Q. 2d 1556 (D.C.N.Y., 1991).

<sup>25</sup> In Canada and England, parody has been treated less indulgently, at least since the 1980s: *Source Perrier SA v. Fira-Less Marketing Co. Ltd.*, [1983] 2 F.C. 18 (T.D.); *Schweppes Ltd. v. Wellingtons Ltd.*, [1984] F.S.R. 210 (Ch.D.). The parodist now must have a light touch or pay a toll before publicly mocking someone else's work too heavily — that is, if the source work copyright owner does not ban the parody altogether, as s/he has a right to do.

<sup>26</sup> *Campbell v. Acuff-Rose Music Inc.*, 114 S. Ct. 1164 (1994).



stimulating desirable levels of production in the cultural sector today. Yet the only effect criticism seems to have had on the system is to spur transnational corporate power, today's major beneficiary of the system, effectively to entrench high levels of domestic and international copyright protectionism in multilateral trade agreements like *NAFTA* and the *GATT*. The dogs of copyright may bark, but the protectionist caravan has moved on.

A major difficulty is that the critics, while agreeing that something is rotten in the state of copyright, have offered a bewildering array of ways to deputeify the system. Some propose scrapping it altogether;<sup>27</sup> others expanding coverage to all "cultural information", incorporating everything from astronomy to gastronomy (incidentally making starcharters, Paul Bocuse and Ronald McDonald's owner all colleagues in copyright);<sup>28</sup> yet others propose trimming copyright back to its traditional *belles lettres* and *beaux arts* vocation, while establishing a parallel *quasi*-copyright system designed to protect investment in useful innovation.<sup>29</sup>

Few would deny that *some* stimulus and protection has to be offered in *some* sectors to encourage production of goods that are easily appropriable, where copying avoids the producer's initial investment and deprives the producer of the opportunity of recoupment and making a fair profit. The question is *what* stimulus and *what* protection should be offered. The policy instruments for deciding these questions are readily at hand.

Whenever governments want fundamentally to review what services they provide or ought to provide, they introduce a system of zero budgeting. Under it, every department of government is allocated a budget of \$0. To get more, the department has to show why it needs it and how much it really needs to achieve its goals. There is no presumption that a department has an entitlement simply because it has always had one or had one the previous year. Each project and the level of support to be devoted to it have to be separately justified. The map created by the total number of successfully justified projects is then surveyed, checked off against policy criteria, and finally adjusted for anomalies. The product is not timeless; there are periodic short term reviews, based on the presumption of the prior budget's accuracy; there are periodic comprehensive audits to ensure policy objectives are being achieved; there are periodic longer term reviews, where a return to zero budgeting and no presumptions are the order of the day.

Copyright seems ripe for a zero budget review, domestically and internationally. The questions to be asked would be:

- What activities do we as societies desire to encourage?

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<sup>27</sup> Cf. T.G. Palmer, "Intellectual Property: A Non-Posnerian Law and Economics Approach" (1989) 12 *Hamline L. Rev.* 261.

<sup>28</sup> Cf. F.W. Grosheide, "Paradigms in Copyright Law" in B. Sherman & A. Strowel, *Of Authors and Origins* (1994).

<sup>29</sup> Cf. J.H. Reichman, "Legal Hybrids Between the Patent and Copyright Paradigms" (1994) 94 *Columbia L. Rev.* 2432.

- What degree of stimulus needs to be offered for the activities to occur?
- Who should benefit from the stimulus? The initial producer(s)? Later distributors? In what proportions and to what degree?

*Flushing out the bilges: a case study*

To be effective, a zero budget inquiry should be conducted at very specific micro-levels. For example, it does not follow that encyclopedias need the same level of protection as novels, or that business correspondence needs the same level of protection as computer software, or that the same groups responsible for their production, distribution and reception have interests in common — yet all this material is crudely lumped together by present copyright laws and treated identically as “literary work”.

The type and level of inquiry may be suggested by a minor study I recently conducted on copyright in legal documents — one small sub-class of “literary work”. After examining the law, practice and policy surrounding the grant and enforcement of copyright in this field, I concluded that protection could be justified where, without it, producers would decline to produce documents at all, would produce lower quality or fewer documents than was socially desirable, or would take costly steps to prevent copying. Protection as long as the author’s life-plus-50 years seemed completely unnecessary, but a policy more tailored to this particular activity than copyright law currently offers seemed warranted, *viz.*<sup>30</sup>

- Lawyers or their clients should not prevent others using documents drafted within the lawyer/client relationship. Copyright law does not here encourage more or higher quality production: professional pride, codes of ethics, and legal standards of care, confidentiality and fiduciary obligations — not to mention often hefty professional fees — achieve this.
- Lawyers should be able to control the *commercial publication* of their forms, since they should alone decide whether a document is fit for publication. They should then be able to reap the reward of their decision.
- Designing legal forms and compilations specially for publication are legitimate businesses that need protection from appropriation by competing publishers. The law can fairly require each publisher to make its own investment in production.
- The correction of faulty documents should be encouraged, even to the extent of allowing competitors to publish the full corrected document as a type of market discipline.
- Forms that embody products or services — *e.g.*, financial instruments — should be free for all to use because copyright provides no additional

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<sup>30</sup> D. Vaver, “Copyright in Legal Documents” (1993) 31 Osgoode Hall L.J. 661 at 683-84.

stimulus to innovation, protection may end up protecting the concept underlying the instrument, and the proliferation of different language seeking to accomplish the same object is an additional confusion financial markets do not need.

These were working assumptions only. They need testing after further field investigation (which I have not undertaken) to examine existing practices before final decisions can be made about how much protection, if any, is necessary. This approach and the reasons for it are summarized in the following paragraphs from the paper.<sup>31</sup>

Before the Anglo-American and Canadian copyright reforms of the early 20th century and onwards, copyright law tended to deal with isolated instances. In Britain, books, fine art, music, drama, even lectures had their own copyright statutes, tailoring protection closely to the exigencies of the subject-matter. The search for rationality, tidiness and consistency typical of the mid-Victorian era created a late 19th century movement towards generalization and reductionism: all creative work should be treated identically. "To each cow its calf" was the catchcry, and the many claimants clamouring for protection avoided examining too closely whether the animal was really bovine or an entirely different beast.

In truth, the incrementalism of the 18th and early 19th century statutes, which extended copyright step by step to particular subject-matters as a case was made, contained within it much wisdom. The process recognized that there might be as many laws of copyright as there were subject-matters deserving protection. Uniformity was necessary only when proponents could establish that a particular subject-matter shared another's creative process, and also that protection would achieve similar desirable social and economic ends. The idea that some creative work needed no protection because it would occur anyway was not then as heretical as copyright campaigners would make it seem today. It is now easier to claim that anything that might be of some use to anybody is potentially valuable and should be turned into a commodity; and if commodified, it almost goes without saying that it should be protected.

Perhaps it is time to return to an earlier mindset when dealing with the question of how far copyright law should protect legal documents [or any other material]. One could start by presuming that the work should have no protection. A solid factual case would then be needed before protection were extended to the work. One should keep an open mind on the type and duration of protection, and what otherwise infringing activities should be permitted. If this approach were thought too radical, one might start with the opposite presumption: the work should be protected like any other work, and a solid factual case would need to be made for diminishing or modifying protection where desirable. But this second approach should not be simply a way of returning to the *status quo ante*. Once situations justifying copying are identified, an exemption should be enacted and its operation monitored to see whether it should be broadened or widened.

Entrenched interests will naturally find this sort of inquiry anathema. But, after over a century of increased copyright protectionism nationally and internationally, it is surely time for the public affected by copyright law to regain control of the process, to influence developments from the bottom up rather than passively accepting them from the top down.

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<sup>31</sup> *Ibid.* at 682.

*Conclusion: regaining the moral centre*

Whatever crisis copyright is in has nothing to do with its effectiveness as a means for encouraging the making and marketing of products. Rather, the very range of activities it protects and inhibits leave it with little moral centre. Copyright proponents talk constantly about the need to educate the public about copyright but the very nature of technology undermines them. If they put their hands on their heart, can they swear or affirm the following?:

- Neither we nor our family uses, or has ever used, a video- or audio-tape recorder to tape a favourite programme off air. Nor, if we have “time-shifted”, have we ever failed to erase or tape over the program to prevent later re-view or re-hearing.<sup>32</sup>
- We have never photocopied or faxed an interesting item we saw in a newspaper, magazine or periodical to a friend, or (as at least one of the Canadian copyright experts at the conference at which this paper was presented did) put the items on transparencies to project before a public audience.
- We have never used computer shareware without paying the posted fee to the shareware owner. Nor have we ever made a spare copy for a friend.
- None of our children (let alone us) plays audio tapes so loudly that neighbours for streets around can hear (an unauthorized public performance); nor do we or our children dub and swap audio tapes.
- We have never called a copyright infringer, however heinous the offence, a “thief”<sup>33</sup> or a “pirate”, unless in the latter case the offender infringed at sea and flew the skull and crossbones.

For unless copyright proponents or educators can honestly swear or affirm the above, they lack the moral authority to condemn those whose only sin is to have different tastes in copyright infringement from them.

For copyright to be worth heeding, it needs a coherent moral centre the ordinary person can appreciate and accept. I doubt that centre exists today. The challenge is to re-create the system with that object in view. Whoever does that will surely deserve the appellation, Author of an Original Work.

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<sup>32</sup> All technically copyright infringements in Canada, which has no equivalent to *Sony Corp of America v. Universal City Studios Inc.*, 464 U.S. 417 (1984), holding VCR taping of home movies for “time-shift” viewing to be a non-infringing fair use. Perhaps long acquiescence by copyright owners of the practice in Canada now prevents any successful suit against individual “time-shifters”. A suggestion of a British Columbia judge that *Sony* may be accepted *tout entier* in Canada (*Tom Hopkins Int’l v. Redekop Realty Ltd.*, [1984] 5 W.W.R. 555 (aff’d without reference to this point, (1985), 20 D.L.R. (4th) 407 (B.C.C.A.)) is not borne out by anything in the *Copyright Act*.

<sup>33</sup> *R. v. Stewart* [1988] 1 S.C.R. 963 holds deliberate copyright infringement cannot be theft under the *Criminal Code*, although it may sometimes amount to fraud. Nevertheless, an organization, comprising computer software developers, continues to crusade against software infringers, brazenly calling itself the Canadian Alliance Against Software Theft.