

# Coming to Terms with Copyright

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## A. INTRODUCTION

Canadian copyright governance is being pulled in different directions. The international trend, indeed the dominant trend, especially as evidenced by WIPO initiatives such as the WIPO *Copyright Treaty*<sup>1</sup> and WIPO *Phonographs and Phonograms Treaty*,<sup>2</sup> by US initiatives such as the *Digital Millennium Copyright Act*<sup>3</sup> and *Sonny Bono Copyright Term Extension Act*,<sup>4</sup> as well as recent bilateral treaties between the US and various small states, appears to be one in which intellectual property is conceived solely in terms of

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- 1 WIPO *Copyright Treaty*, World Intellectual Property Organization, 1996, <[www.wipo.int/treaties/en/ip/WCT/trtdocs\\_woo33.html#preamble](http://www.wipo.int/treaties/en/ip/WCT/trtdocs_woo33.html#preamble)> [WCT].
- 2 WIPO *Performances and Phonograms Treaty*, World Intellectual Property Organization, 1996, <[www.wipo.int/treaties/en/ip/wppt/trtdocs\\_woo34.html](http://www.wipo.int/treaties/en/ip/wppt/trtdocs_woo34.html)>.
- 3 U.S., Bill H.R. 2281, *Digital Millennium Copyright Act*, 105th Cong., 2d sess., 1998, <[www.eff.org/IP/DMCA/hr2281\\_dmca\\_law\\_19981020\\_pl105-304.html](http://www.eff.org/IP/DMCA/hr2281_dmca_law_19981020_pl105-304.html)> [DMCA].
- 4 *Sonny Bono Copyright Term Extension Act*, 505 U.S.C (1998), <[www.copyright.gov/legislation/s505.pdf](http://www.copyright.gov/legislation/s505.pdf)> [Copyright Term Extension Act].

rights and in a fashion in which such rights are treated ever more absolutely. This is amplified by technological advances that allow IP rights to be protected with increasing diligence and efficacy.

Almost as if in reaction to this dominant trend there is heightened interest in protecting the public domain of ideas, in recognizing the limited nature of copyright and its larger social purposes, and in rights-limiting doctrines such as fair dealing or fair use. Indeed, the recent decision of the Supreme Court of Canada in *CCH*,<sup>5</sup> recognizing the fundamental point that fair dealing is a part of copyright and not merely an exception to it, stands as the high water mark of common sense in a world tending far too strongly in favour of an absolutist view of intellectual property as composed uniquely of rights. Thus movements for generally available, publicly-licensed software, or permissive use licensing schemes for more traditional works such as Creative Commons, are gaining increased currency. Technology is also having an impact for those favouring a more limited view of copyright, or indeed those who wish to deny copyright protection altogether, allowing for copyrighted materials to be more freely available and shared.

The recent reforms to the law of copyright proposed by the Government of Canada, in marked contrast to the 9–0 view of the Supreme Court in *CCH*, appear for the most part<sup>6</sup> to be tending towards the absolutist view, weakening the availability of materials in the public domain, and much to the detriment in the long run of those individuals in the business of creating and producing ideas. (While asserting individual private property rights over the public domain might be helpful in the short term, enfeebling the public domain can only have negative consequences on everyone, including creators, in the long run.)

One area that reflects the absolutist position is in the treatment of the term of protection for copyright. In this area, the Canadian government is proposing to increase the length of the term of copyright with respect to photographs from fifty years from the taking of the photo<sup>7</sup> to the life of the photographer plus fifty years. This is a change that will affect corporate owners only; non-corporate owners of copyright in photos have al-

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5 *CCH Canadian v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339, <[www.canlii.org/ca/cas/scc/2004/2004scc13.html](http://www.canlii.org/ca/cas/scc/2004/2004scc13.html)>, 2004 SCC 13, [*CCH*].

6 An exception is some expanding of the educational exemption, although one might argue that the proposed expansion is insufficient.

7 *Copyright Act*, R.S.C., 1985, c. C-42 (as amended) s. 10, <<http://laws.justice.gc.ca/en/C-42/39253.html>>.

ready a term of “life plus 50” years. The rationale given for this proposed change is to harmonize the treatment of photographs with other copyrighted works, where the term in Canada is “life plus 50.”<sup>8</sup> In addition, the change was proposed in order to bring Canada in line with terms in the WCT. This proposal, in and of itself rather innocuous, evidences a number of significant errors in thinking about copyright: (1) that there needs to be harmony of terms as among different kinds of works protected by copyright; and (2) that we need to “harmonize upwards” by increasing the length of copyright terms. Indeed, if the *Copyright Term Extension Act* and copyright terms included in bilateral agreements between the US and Jordan, Singapore and Chile respectively are any indication, there will be increasing pressure to up the length of the standard copyright term from “life plus 50” to “life plus 70” years.<sup>9</sup>

In my view, it is time to begin re-thinking systematically the larger issue of copyright terms (preferably in the context of a larger systematic re-thinking of copyright). With some exceptions,<sup>10</sup> the extent to which the copyright term is taken as sacrosanct is surprising. In my view, we need to not only shorten the term of copyright generally, but also to vary the terms of copyright as between different kinds of works according to the context of the right and the resource protected by copyright. Finally, we might consider strengthening these proposals with a registration requirement, especially for longer terms, putting some of the onus on creators themselves of identifying and protecting works of ongoing value.

What this article provides is a conceptual and philosophical structure, albeit skeletal, for copyright reform generally and for the reform of copyright terms in particular. The argument herein is not grounded in the particular context of term extension debates in the US, nor based on free speech considerations, which while important can lose their persuasive force in the face of property rights talk.<sup>11</sup> It is also not grounded on technologically-driven imperatives. Rather, the argument is grounded on the general concepts of property and of copyright, and in the theoretical jus-

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8 *Ibid.*, at s. 6.

9 S.E. Trosow, “Fast-Track Trade Authority and the Free Trade Agreements: Implications for Copyright Law” (2003) 2 CJLT 135.

10 Lawrence Lessig, *The Future of Ideas: The Fate of the Commons in a Connected World* (New York: Vintage Books, 2001) at 250.

11 When a right is framed as a *property* right, it often trumps other kinds of rights. A sophisticated analysis of when rights-talk meets property talk can be found in L. Underkuffler, *The Idea of Property: Its Meaning and Power* (Oxford: Oxford University Press, 2003).

tifications for and history of copyright. I am of the mind that we need to tie the specific reforms back to a more general understanding of copyright. In this sense we must look back critically in order to re-assess how to move forward. Such a re-calibration would bring copyright protection back into line with its core justifications and history, balancing the rights of creators with the interests of maintaining a robust public domain. Perhaps ironically, addressing the term of copyright protection would also go a long way to solving some of the problems being created by new technologies respecting access for users and balancing the rights of creators and users (for example, technological protection measures, digital rights management). Such measures are weakening, if not completely obliterating the interests of users. That is, shorter terms of copyright *rights* might be seen as a counterbalance to technological advances that have served to make rights more absolute than they have been historically: the trade-off is a much shorter term for a stronger right vis-à-vis users.<sup>12</sup>

Of course, one has to be realistic in the sense that given the structure of international copyright, and US and EU preponderance in IP policy matters, that this situation will not change overnight and certainly not in this round of Canadian reform. However, there are dissident voices around the world and especially in the US, and this is a time to begin thinking in Canada about copyright terms in a more coherent manner. It is my hope that Canada will become a leader in this necessary and, I think, inevitable discussion. What follows is an attempt to help frame that discussion, and provide some of the theoretical underpinnings from which that discussion can proceed.

## B. THE PRESENT TERMS OF COPYRIGHT PROTECTION

The trend in the law of copyright is for ever-increasing terms of automatic protection. From its first inception in the Statute of Anne<sup>13</sup>, in which the duration of copyright protection was fourteen years (with one renewable fourteen year extension), the term of copyright protection has been continually increasing, to the point where copyright protection now extends

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12 This is not to say one should abandon efforts to keep fair dealing in the forefront when discussing new technologies. Moreover, attention must be paid to the fact that shorter copyright terms for certain kinds of works might effectively be circumvented by technological advances and contractual strategies that attempt to create a stronger right than is intended by copyright: further elaboration of this point is well beyond the scope of this paper.

13 *Statute of Anne*, 1710 (U.K.) 8 Anne c.19

well beyond the life of the creator. At a certain point, one must ask, “why so long?”

Canada still employs what can still fairly be described as the standard term for copyright protection: the life of the creator plus fifty years.<sup>14</sup> This has been the case since the adoption in Canada of the same standard found in the Berne Convention in 1924. Prior to this, Canada had employed the earlier US standard term of twenty-eight years protection followed by an optional fourteen-year renewal (the US had a registration requirement prior to 1976.).

The current term, as with previous terms before it, is coming under growing pressure for further increases. These come from both American and European circles, and recent bilateral agreements, where the term of protection is the life of the author plus seventy years. The US has rather colourfully (many argue to protect Mickey Mouse from the horrors of the public domain) enacted the *Copyright Term Extension Act*<sup>15</sup> extending the term of copyright protection to life plus seventy years. This statute was upheld by the United States Supreme Court in the case of *Eldred*,<sup>16</sup> in which the challenge to the term extension was brought on free speech grounds, and has been incorporated as the standard for protection in the recent bilateral trade agreements between the US and a number of smaller nations. The EU Directive does the same for works of European nationals.<sup>17</sup> True to the historical trend of copyright (and perhaps all other rights), the momentum is clearly pointing to longer terms of protection for all kinds of works.

Furthermore, corporate interests are increasingly the holders of copyright, especially for newer forms of copyrighted material, such as software. This has the effect of “de-personalizing” copyright by obscuring the relation between the creator and the work. One no longer identifies a Disney kid’s film with the person of Walt Disney (or even Michael Eisner for that matter), but rather with a team of anonymous, expert writers, animators and marketing professionals.

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14 Above note 7, at s. 6. For exceptions, see D. Vaver, *Copyright Law* (Toronto: Irwin Law, 2000) at 99–110.

15 Above note 4.

16 *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01-618), no.10.<[www.supremecourtus.gov/opinions/02pdf/01-618.pdf](http://www.supremecourtus.gov/opinions/02pdf/01-618.pdf)>.

17 Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights, <[http://europa.eu.int/smartapi/cgi/sga\\_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=31993Lo098&model=guichett](http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=31993Lo098&model=guichett)>.

The current reform in Canada thankfully does not succumb to the trend of increasing the term of protection to “life plus seventy.” Rather, it proposes to merely *harmonize* the treatment of photographs with other kinds of protected works. This appears to be rather minor tinkering in the grand scheme of things. However, while the decision to not increase the base term of copyright is welcome news in the climate of term *growth*, the underlying idea of harmonization as among different kinds of copyrighted works needs to be considered. Moreover, given the long length of copyright in the context of escalating calls for a robust public domain and increased users’ costs — especially for libraries and educational institutions — emanating from enhanced digital rights management and protection, etc., the length of copyright protection itself needs re-examination.

Why is uniformity seen to be a good thing? And why is the right so long in the first place? These two questions require constant consideration (and indeed constant re-consideration), especially given the inevitable march to ever-increasing terms of protection. Indeed, it seems to me that little thought has been given to constructing coherent copyright terms: here I mean coherence with the rights, principles and policy goals underlying the according of copyright protection. This paper, then, is a call for the reform of copyright terms generally. It is not about the minor reforms to the term of photographs contained in the current reform: while photographs are interesting in their own right, my concern in this essay is elsewhere.

In my view, consideration of the concept of copyright, the concept of property, the philosophical rationales for copyright protection and their history, all point to a right which ought to be shorter, and not automatic. From these perspectives, furthermore, it is evident that protection should involve some onus on the right-holder to signal the on-going validity of the right. Starting at these theoretical bases, furthermore, has led me to the conclusion that the term of protection be varied for certain kinds of copyrightable works.

### C. UNDERSTANDING THE CONCEPT OF COPYRIGHT, ITS PHILOSOPHY AND ITS HISTORY

In assessing the terms of copyright, there are a number of premises that the concept, the theory and the history of copyright all bring to the table. In addition, one must also consider what one might call lessons from the concept of private property, the point from which I shall begin.

## 1) Lessons From the Concept of Property

Those advancing a more absolutist view of copyright often import terms from property discourse, particularly the term and concept of “ownership” or “*propriété*.” In and of itself, this importing is not problematic: copyright (and indeed other sorts of intellectual resources) have a great number of affinities with more traditional forms of property resources. However, what is usually lacking from this application of property terms and concepts is the full nuance of property discourse. Rather, what is applied in IP discourse is some idea of ownership in its most absolute and abstract form.<sup>18</sup>

A critical error in property discourse, which unfortunately has found its way into intellectual property discourse, is to discuss the rights in absence of the resource. I have written elsewhere that re-defining private property as a relationship *through* a resource forces us to understand the particularities that any given resource brings to the property relation.<sup>19</sup> Thus objects of property *necessarily* mediate property relations, and frame the parameters of particular property relations. This perspective, I believe, is an equally necessary starting point from which to begin thinking about intellectual property. In concrete terms, then, we need to look at each kind of resource protected by copyright (or indeed IP), and assess the parameters of the kind of property relation that is appropriate for that resource. Thus it stands to reason that a different set of parameters will apply to traditional works than to computer software than to neighbouring rights, according to the context in which each work was created, and the purpose for which it was created. The intuitive initial conclusion from this analysis is that the need to harmonize all aspects of copyright’s rights is misguided.

A related error, equally critical, that occurs when people equate property terms and concepts to intellectual property and copyright discourse, is the presumption that the concept of property is only about rights, and hence copyright is likewise. That is, what gets imported from the concept of property is an absolute form of ownership that does not appear to have any limits, or does not appear to be subservient to any form of larger teleology. This understanding is as defective in property theory as it is in

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18 D. Lametti, “The Concept and Conceptions of Intellectual Property as seen through the Lens of Property,” in G. Comandé & G. Ponzanelli, eds, *Scienza e Diritto nel Prisma del Diritto Comparato* (Torino: Giappichelli, 2004) at 269.

19 See D. Lametti, “The Concept of Property: Relations *Through* Objects of Social Wealth” (2003) 53 U.T.L.J. 325.

IP theory: both property and IP are more than simply absolute bundles of rights. While they are indeed about bundles which include rights, such bundles are variable and include limits and duties, depending on the nature of the resource and the nature of the right.<sup>20</sup>

A quick glance at the law of property confirms in practice this conceptual observation. In the law of private property, not all property rights are the same. Furthermore, no rights — even the most powerful ownership rights — are unlimited and owners have some obligations to validate and maintain important property rights in valuable resources. Both the Common and the Civil law in Canada and elsewhere have a variety of private property institutions that allow for different kinds of property interests in a variety of resources. These range from the most powerful interests to the weakest. Whether one considers Common law concepts of property (for example, the doctrine of estates in real property or the ownership of personal property, and doctrines of possession), or the Civil law property structure (real rights of ownership and dismemberments), one encounters a range of different property institutions with differing powers, limits and responsibilities. So a fee simple differs from a life estate or *profit-à-prendre*, ownership from a usufruct or from a real servitude. Some of these have more powers and rights, others less; some are infinite in terms of time, others not. Moreover, the rights change according to the resource: private property (and many other) rules vary according to whether an object of social wealth is immovable (real property) or movable (personal property), tangible or intangible, fungible or non-fungible. Private legal systems deal with these questions as if they were second nature. While complex, it is fair to conclude that there is a multiplicity of property institutions that vary according to context. It is equally important to underscore that not all property rights have the same sets of powers, and indeed the same term.

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20 D. Lametti, above, note 19. In property theory generally, see J.W. Singer, *Entitlement: The Paradox of Property* (New Haven: Yale University Press, 2000); Gregory Alexander, *Commodity & Propriety: Competing Visions of Property in American Legal Thought 1776–1970* (Chicago: University Chicago Press, 1997); W.N.R. Lucy & C. Mitchell, “Replacing Private Property: The Case for Stewardship” (1996) 55 Cambridge L.J. 566; K. Gray, “Equitable Property” (1994) 47 Curr. Legal Probs. 157, at 161; and E.J. McCaffery, “Must We Have the Right to Waste?” in S.R. Munzer, ed., *New Essays in the Legal and Political Theory of Property* (New York: Cambridge University Press, 2001) at 76. See also, Eric Freyfogle, for example, “Ownership and Ecology” (1993) 43 Case W. Res. L. Rev. 1269 and “The Construction of Ownership” (1996) U. Ill. L. Rev 173.



Finally, even the most powerful interests of ownership are not at all absolute. Various kinds of norms limit what one can do with one's owned property, of whatever sort: legal doctrines, local usages, by-laws, production quota schemes, criminal, administrative and public statutes or codes, and cultural property norms. All limit the rights of the owner. And even the most formal enunciations of the property rights in legal terms — those enshrined in civil codes and doctrines of ownership — never posit ownership as absolute, but rather as ranging from close to absolute for ownership rights to much more limited for less powerful property rights.

It is also important to underscore that owners must — especially as resources become more economically valuable — take some proactive measures to maintain their rights. Thus registration systems for interests in land and buildings have been the norm for over a century, and registration has been a necessary requirement in order to give effect to a right against third parties. Registration systems for other kinds of wealth — Quebec now has a register of movable property (a concept akin to personalty in the Common law) and personal rights — are also becoming more popular as traditional forms of wealth give way in terms of relative importance to new kinds of resources. Moreover, some forms of wealth require some kind of minimal use or maintenance: doctrines in both the private legal systems in Canada allow in certain cases for property rights to be lost (through neglect or mistake) where someone else has possession of the object: acquisitive prescription through possession in the Civil law and adverse possession at Common law. One's object of property is a valuable resource, accorded to an individual to the exclusion of others: use it or lose it.<sup>21</sup>

The point here is that even for the most absolute forms of property rights there are still many limits and obligations — ranging from the perfunctory to the onerous — for validating, exercising and maintaining the right on the part of owners. Property is a complex set of rights and obligations and private property systems reflect this with varying property institutions: why then the impulse to treat all forms of copyrightable works as more-or-less monolithic?

Seen in this light, copyright "ownership" should not be treated as absolute, simply as a result of the use of the word ownership. If traditional ownership is far from absolute, why should we treat copyright as such? Like

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21 One might also think of patent (where failure to put the patent to use might result in a compulsory license being granted, or even with the patent being expropriated) and trademark and passing off (where non-use can lead to the loss of the right).

traditional property resources, we need to look at the intellectual resource at issue in the law of copyright, examine the source of its value and decide, accordingly, on the robustness of the right (in terms of scope and length) and on the steps needed to formalize the right. Only in this manner can we fully understand the basis of the legal relation we call copyright.

## 2) Lessons From the Concept of Copyright

The discussion of the concept of private property leads us to a brief review of the concept of copyright. In the Canadian context, the *Copyright Act* protects the widest notion of author's rights, comprising both the economic rights associated with a work — traditional Anglo-American copyright — and the moral rights of attribution, integrity, and first publication of the work associated with Continental *droit d'auteur*. The economic rights are limited to those enunciated in the Act: in a nutshell, they prevent others from copying the work. The same is true for moral rights, which are also articulated in a rather limited fashion in the Act. Indeed, the integrity right must be infringed in a relatively objective fashion to have legal consequence.<sup>22</sup>

The rights protected by copyright are varied. They include rights to prevent copying, control reproduction, translation, performing in public, and others. Neighbouring rights include rights over communications and the production of sound recordings. The rights of the copyright holder are expanding, in light of current technology, to controlling the circumstances in which copying is done; thus under the WIPO *WCT Treaty*, the power of the author is extended to “making available” the work, a spin-off of the initial right to control publications, but one which will likely apply to uploading on the internet in the context of file-sharing.

The *Copyright Act* also purports to cover a variety of different objects under the titles of “work” and neighbouring rights as caught by sections 3, 15, 18 and 21. They range from traditional literary, artistic, musical and dramatic works, to computer software, performances, sound recordings and communications signals. There are thus a number of works of vastly different natures covered by copyright. Some require a great deal of creative inspiration — a painting, a sculpture, a novel — while others re-

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22 *Snow v. Eaton Centre* (1982), 70 C.P.R. (2d) 105 (Ont H.C.J.); *Prise de Parole Inc. v. Guérin. Éditeur Ltée*, [1995] A.C.F. no 1583, (1995) 66 C.P.R. (3d) 257 (T.D.). The exception is for paintings, sculptures or engravings, where an even more objective standard is used. See D. Vaver, above note 14 at 161–63.

quire perhaps less-inspired but more methodical work — the creation of a database, for example. Some works — computer software and telecommunications — fall somewhere in between. Moreover, works are created by a variety of different means: by the solitary author at her laptop or painter at his easel, by a team of programmers working for a university computer science professor or for Microsoft, or by a cable television station. Some are produced using varying artistic methods, others with the most advanced digital and computer technologies.

While the nature of the work differs, so too does the way in which we value or appreciate the work. Traditional works have economic value on the market, but this value is in part based on an aesthetic appreciation that results in publication for a wider audience: the substance of such works must be read, shared, viewed, or otherwise appreciated in common by more than one person. The economic value is thus based on the attractiveness of its substance. The goal of copyright protection for works falling into this category is meant to prevent others from living off these works by copying the work and profiting economically. Copyright protection is not meant to bar legitimate, non-copying access to the work for non-economic purposes: reading the book, listening to the song, viewing the painting.

On the other hand, the market value of, for example, the software protected by copyright is appreciated in how well it functions: no sane person reads binary code as poetry (at least not yet!). Its economic value comes from how it functions, and copyright protection is meant to protect this method of functioning. While there might be some scope for the aesthetic “look” of the software to be protected by copyright, this has a lesser input in the valuation of the resource. Unlike traditional works, though, the lines of binary code in copyright-protected software are not shared — indeed quite the opposite — and thus any illicit copying done is in the attempt to mimic this functional character.<sup>23</sup> Thus, it is equally true that the goal served by the work varies with its nature.

The points to be made here are two. First, there are a wide variety of works to be covered by copyright. Indeed, one might argue that some cate-

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23 And thus the tests for copying have a great deal of look and feel about them, comparing how competing programmes function: *Delrina Corp. v. Triolet Systems Inc.* (2002), 165 O.A.C. 160, <[www.ontariocourts.on.ca/decisions/2002/march/delrinaC30375.htm](http://www.ontariocourts.on.ca/decisions/2002/march/delrinaC30375.htm)>, 22 C.P.R. (4th) 332 (C.A.) [*Delrina* cited to C.P.R.], following in substance the US test in *Computer Associates International Inc. v. Altai Inc.*, 23 U.S.P.Q. 2d 1241 (2d Cir. 1992), <[www.bitlaw.com/source/cases/copyright/altai.html](http://www.bitlaw.com/source/cases/copyright/altai.html)>.

gories of works are here by accident (such as computer software).<sup>24</sup> There is no reason why the same term of protection need necessarily apply. As the nature and teleology of the work differs (along with the creative process) so does the parameter of the right protecting it. This argument obviously applies to more than just the term of protection. We might for example argue for differing originality standards as the threshold of copyright protection.<sup>25</sup> Second, it is worth sub-dividing the kinds of works protected by copyright, and assessing the length of protection accordingly.

It is true that copyright serves a larger purpose or teleology, which comprises both individual and collective goals. It is meant to foster creative self-expression, and the advancement of a variety of artistic and educational discourses, thereby contributing to the overall benefit of society. This balanced approach to the goals of copyright — ensuring that incentives to create and the rights of users remain in harmony — has been often stated in the Anglo-American tradition, and was recently re-iterated in Canada in the *CCH* decision. Similarly, to the extent that one claims that the tradition of *droit d'auteur* also animates the Canadian discourse, it is equally clear that this tradition does not supplement the balanced approach of copyright discourse, especially as it pertains to economic rights.

A part of the balancing in Canadian copyright discourse is the view to protecting the public domain. The public domain, as enunciated in *CCH*, is a critical part of Canadian copyright discourse. Facts, information and ideas, in their abstract form, and the specific expressions of facts, information and ideas that have lost their copyright protection and moved into the public domain are critical to the ongoing development of new works. The process of creation, as understood by Jessica Litman, James Boyle and others defending the public domain, is seen as incremental, building on previous knowledge and expression. Copyright terms that are too long

24 Computer software was brought under the realm of copyright in Canada in *Schlumberger Canada Ltd. v. Commissioner of Patents* (1981), 56 C.P.R. (2d) 204 (F.C.A.), following the trend in the US. Decisions such as *Apple Computer, Inc. v. Mackintosh Computers Ltd.*, [1990] 2 S.C.R. 209, <[www.canlii.org/ca/cas/scc/1990/1990scc64.html](http://www.canlii.org/ca/cas/scc/1990/1990scc64.html)>, [1990] S.C.J. No. 61, have reinforced that classification, taking a static view towards code, analogizing code to a literary work and rejecting the view that copyright's value lies in its dynamic functioning. International treaties have also enshrined this position, and the *Copyright Act* was amended to follow suit. In my view, we are probably better off with a patent-like statute regulating software patents. Be this as it may, we should do our best to fairly protect — but not over-protect — software via copyright.

25 Obviously this analysis is beyond the scope of this paper.

will detract from the public domain and thus the vibrancy of works protected by copyright.

Thus the concept of copyright is a balanced concept, which must cover a wide range of works. Like property it is not absolute, and more explicitly than traditional property, it serves a greater good by according limited rights to individuals over certain types of resources.

### 3) Lessons From the Theoretical Justifications for Copyright

A number of theories have been advanced justifying copyright protection. While this forum is too brief to allow a full discussion, it is still necessary to understand in general terms the justifications for the institution of copyright in order to assess the parameters of the rights and duties — in this case the duration of the right and its robustness — that form a part of it. I shall assume that private property justification can be applied *mutatis mutandis* to copyright.<sup>26</sup>

For applied analytic purposes, one can divide arguments justifying the presence and parameters of (intellectual) property rights generally or copyright specifically into two categories. The first category consists of arguments emanating naturally from the *individual* and her relationship to objects of property or arising automatically as a result of specific actions she takes with respect to the creation of some object of property, in this case a work. The second category of arguments bases copyright protection on the *promotion of desired goals or outcomes*, according to various criteria such as well-being, utility or efficiency.<sup>27</sup> Even a cursory look at simplified versions of these arguments justifying the institution of copyright tells us

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26 What follows is an abridged restatement of the larger argument and methodology contained D. Lametti, "Publish and Profit: Justifying the Ownership of Copyright in the Academic Setting" (2001) 26 Queen's L.J. 497 at 520–60. For other applications of property theory to IP, see W.J. Gordon & K.L. Port, eds, *Symposium on Intellectual Property* (1993) 68 Chicago-Kent L. Rev. 585–1003; A.D. Moore, ed. *Intellectual Property: Moral, Legal, and International Dilemmas* (Lanham: Rowman and Littlefield, 1997).

27 These two categories accord roughly in ethical discourse to what are called "deontological theories" and "teleological" or "consequentialist" theories. I have argued elsewhere that what is ultimately needed — in both property theorizing and general ethical debates — is a theoretical approach which takes both into account, as well as other justifications which do not fall into this traditional ethical dichotomy. See D. Lametti, "The (Virtue) Ethics of Private Property: A Framework and Implications" in A. Hudson, ed., *New Perspectives on Property*

that neither of these sets of arguments is all-encompassing or all-persuasive in their justification. Rather, the arguments are persuasive to varying degrees and depend in large measure on the nature of the work created and the context in which it was created. Copyright terms need to reflect this reality: a single length term simply does not.

### a) Rights-based Arguments for Copyright Protection

Those arguments grounding private property rights on the natural rights accorded to the individual have been dominant in Western discourse.<sup>28</sup> These natural rights arguments, individualistic by nature, in turn divide into two categories. First, there are those justifications focusing on human action — specifically the creative process — and that assign rights naturally or logically to creators as a result of these actions. Human beings have justifiable property rights because they have created or improved upon some resource through their own action: labour arguments. Other versions stress the meritorious nature of the development or use of a resource, and the rewarding of such action with an ownership right: desert arguments. Given the rhetorical popularity of these types of “labour-desert”<sup>29</sup> arguments, some variant of them might therefore be pressed into the service of justifying intellectual as well as traditional property.<sup>30</sup>

Second, there are those arguments focusing on the natural or even necessary link that people have with their possessions, identifying the role that social resources play in human development and in the flourishing of human personality or personhood. Human action is not the focal point, but an incidental part of a natural process of human development or flourishing. The most popular arguments are attributed to Hegel and, more recently, Margaret Jane Radin.<sup>31</sup>

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*Law, Obligations and Restitution* (London: Cavendish, 2004) at 39; D. Lametti, “Property and (Perhaps) Justice” (1998) 43 McGill L. J. 665, at notes 14 & 15.

28 The most famous and perhaps most influential text has been John Locke’s *Second Treatise*, and in that Book V. See *Second Treatise*, in *Two Treatises of Government: a critical edition with an introduction and apparatus criticus*, P. Laslett, ed., 2d. ed. (London: Cambridge University Press, 1967) [*Second Treatise*].

29 The combination is Stephen Munzer’s: see *A Theory of Property* (Cambridge: Cambridge University Press, 1990), Part III, ch. 8.

30 A number of writers use some form of Lockean analysis. For more critical assessments see J. Hughes, above note 11, and L.C. Becker, “Deserving to Own Intellectual Property” (1993) 68 Chicago Kent L. Rev. 609.

31 G.W.F. Hegel, *Elements of the Philosophy of Right*, trans. by H.B. Nisbet, A. W. Wood, ed., (Cambridge: Cambridge University Press, 1991); M.J. Radin, “Property and Personhood” in *Reinterpreting Property* (Chicago: University of Chicago Press, 1993).

Of these two classes, labour-desert arguments are the most familiar and famous. The crux of the John Locke's famous argument is that we acquire ownership rights simply because we mix our bodies and our labour, both of which we unquestionably own, with resources in the natural world to produce some new object of social wealth. Thus appropriation and improvement of the natural world requires a physical effort which gives a justifiable private property right, either immediately or later in time.<sup>32</sup> This argument encounters serious difficulties at a variety of levels.<sup>33</sup> Thus, a more nuanced, persuasive approach, also attributable to Locke, puts the emphasis on rewarding meritorious behaviour — production and creativity — with respect to the use of social resources. These are the so-called desert arguments: we allow appropriation and award private property rights because they are deserved given the beneficial actions undertaken to harness, develop and exploit a resource.<sup>34</sup>

Labour-desert arguments have some value in understanding copyright. They do explain at least some aspects of human behaviour in the realm of copyright and some of the rules that have been put in place. We almost instinctively feel creators or those who labour should be rewarded in some way. Hence we often find copyright infringement rules protecting one's labour — the “sweat of one's brow” — as well as more creative forms of mental labour through the protection of the originality of a work.<sup>35</sup> We

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32 Exactly when is the subject of much debate, with important implications for the origins of and the limits on private property. See the debate between James Tully and Jeremy Waldron: J. Tully, *A Discourse on Property: John Locke and his adversaries* (Cambridge: Cambridge University Press, 1980) and J. Waldron, *The Right to Private Property* (Oxford: Clarendon, 1990).

33 First, there is the dubious initial assumption of self-ownership as the basis for our ability to appropriate resources to ourselves. Claiming that we own our bodies leads to variety of exaggerations: we aren't allowed to see body parts, for example. Second, the Lockean idea that human beings “mix” their labour with the natural environment, thus justifying an ownership claim, is highly problematic: it is impossible to quantify and qualify the mixing and draw consequences there from. In a famous example, if one throws a can of tomato juice into the ocean, does one own the ocean?

34 Again there are problematic assumptions, especially, the idea that resources get most of their value from the human element — Locke said 99/100 — and that all resources must be put to productive use. Most clearly this ignores the point that value is context-driven: productive use is understood in a specific context in which that kind of production is valued and appreciated. In other contexts, the labour may be valueless, or even seen as being negative.

35 I am using originality in its usual lay meaning and not in the copyright sense of “originating from.”



certainly view the creative process as beneficial to society in terms of the end products.

In the end, however, we should take care not to give such arguments too much weight, either with respect to property, or with respect to copyright. First, from a property perspective such arguments may not be strong enough to justify property rights in the face of equality claims. That is, either allowing people to appropriate from the common, or then allowing them property rights excluding others, runs against a basic intuition of equality. Locke acknowledged this in his famous provisos of “enough and as good” and “spoliation”: two well-known limitations on acquiring property rights and accumulating wealth that go towards balancing equality claims.<sup>36</sup> John Stuart Mill’s response to this challenge of justifying inequality affirmed a right to private property, but only if the creation and appropriation took place without wronging anyone else.<sup>37</sup> Second, labouring or engaging in virtuous behaviour does not necessarily justify a *property* right. There are other types of rewards and rights one might be given in return for meritorious use of resources. A financial reward such as a regular salary might very well do. That our society rewards a property right is only reflective of what our society has chosen to do.

Regarding copyright, there might be a lesser concern with the unfair appropriation and consumption of raw materials. Such might be the case because it is not as readily apparent that giving the “ownership” of copyright to one person necessarily disenfranchises another: the stock of ideas is after all unlimited, and in any event ideas alone cannot be the subject-matter of copyright. But this view takes a rather romantic view of creation, and downplays the contribution of the public domain to the creative process. We simply cannot create out of nothing: it is trite to say that all creation is contextual. If Jessica Litman is correct,<sup>38</sup> as I believe she is, the process of creation is more analogous to *adaptation* and thus requires a strong public domain. The Lockean arguments, as Carys Craig has pointed out, only go so far, and even Locke saw their limitations.<sup>39</sup> Even in Kantian terms, a strong argument for the protection of the public domain can be

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36 *Second Treatise*, above note 27 at 290–91 [Bk V, ss 33 and 31].

37 J.S. Mill, *Principles of Political Economy*, Sir W. Ashley, ed., (Fairfield, NJ: Augustus M. Kelley, 1987 [1848]) at 233 [Bk II, ch II, s. 5].

38 See *inter alia*, J. Litman, “The Public Domain” (1990) 39 *Emory L.J.* 965 at 969.

39 C. J. Craig, “Locke, Labour and Limiting the Author’s Right: A Warning against a Lockean Approach to Copyright Law” (2002) 28 *Queen’s L.J.* 1.



mounted.<sup>40</sup> Moreover, one should also note that at a general, institutional level, creation-without-wrong arguments of Mill's type cannot alone justify IP rules such as copyright protection, since an IP rule creates artificial scarcity after the fact by giving exclusive economic rights; we still have to justify the exclusive right granted to one person at the expense of others to something like information which otherwise would be shared.<sup>41</sup>

In the final analysis, labour-desert arguments provide some help in justifying copyright, since our society does wish to reward this kind of process and does often do so with a property right. Indeed, it is our particular society's entrenched social convention to reward such productive behaviour with an ownership or other sort of property right; thus one can argue forcefully the awarding of private property rights has reached a level of settled expectation. This expectation is becoming more entrenched as our world becomes increasingly market-driven (as worrisome as this trend might be, I acknowledge). They do help explain copyright generally as a method of rewarding creative activity, and the quantity of labour or creativity thus might assist us in determining the institutional design (i.e., length) of copyright terms. That is, the harder one has worked, or the more appreciated the kind of creation, the longer the right might be. However, these arguments are not sufficient on their own to justify either a property or copyright right, let alone an absolute one, given the drawbacks and limitations outlined above. Any rights justified here will be limited in nature.

A second set of well-known justificatory arguments stem from the idea, made famous by G.W.F. Hegel, that private property is necessary to our development as individuals. Private ownership allows us to actualize or concretize — literally to make *real* — our abstract rights, transforming them into direct rights in objects of social wealth.<sup>42</sup> Given their starting point in human freedom, these arguments can be safely categorized as emanating from the individual. They are natural to all human beings, regardless of any sort of specific behaviour with respect to a specific resource. A modern form of the argument, discarding the troubling and difficult idiosyncratic trappings of Hegelian analysis, has been advanced by Margaret Radin.<sup>43</sup> The persuasive force of this argument is that there is an

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40 A. Drassinower, "Sweat of the Brow, Creativity, and Authorship: On Originality in Canadian Copyright Law" (2003–2004) 1 UOLTJ 105; "A Rights-Based View of the Idea/Expression Dichotomy in Copyright Law" (2003) 16 Can. J.L. & Juris. 3.

41 See J.W. Harris, *Property and Justice* (Oxford: Oxford University Press, 1996) at 43.

42 Radin, above note 31.

43 *Ibid.*

intrinsic link between our belongings and our personhood, and that some private property rules as well as their specific contours are justified on these grounds. For instance, according to Radin, certain forms of common law personal property merit more rigorous protection than others because they are so closely linked to a person's identity.<sup>44</sup> Indeed, the Civil law notion of patrimony and the famous explanatory theory of Aubry and Rau would seem to fit quite well with such an argument.<sup>45</sup>

Once again, notwithstanding problems,<sup>46</sup> there remains a large degree of intuitive plausibility to such arguments, at least with respect to some resources. This Hegelian justification is particularly appropriate to the moral rights of the creator. Civil writers generally classify moral rights as non-pecuniary, extra-patrimonial rights, thereby linking them quite explicitly to the Continental romanticism of which Hegel was a part. In the economic realm of copyright, too, this is particularly true with regard to affording property rights over creative products that are closely identified to the mind or imagination of the creator. Creators and authors feel a strong affinity to their work, and it is commonplace for them to see their work as an extension of their being. Such a connection is also quite strong where the link between the author and the work is quite visible: the work shares part of the author's identity or is constitutive of it. A great deal of what we think of an author is based on what she writes, a painter what he paints, songwriters by their songs, and so on. So personhood theories appear to be especially strong when it comes to justifying the protection of creative work with intellectual property rights. Indeed, copyright rules

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44 *Ibid.* at 53–55

45 C. Aubry & C. Rau, *Cours de droit civil français d'après la méthode Zachariae*, 5th ed. by E. Bartin (Paris: Marchal & Billard, 1917) no. 573.

46 As with labour-desert arguments, personality theory also encounters serious difficulties: in this type of analysis are human beings overly objectified? "You are what you own or make" is a simple phrase illustrating (I hope) the problem of too strongly identifying or valuing people according to the objects they own. Moreover, do we reify property relations into more than they really are? Resources are part of our necessary interaction with the physical world: but are they necessary for all of our interaction with the social world as well? While obviously important, property relations are by no means all-encompassing as an extreme interpretation of personality theory might imply. One might interpret Hegel's theory in this way. Finally, personhood theory has difficulty dealing with fetishism, and specifically in distinguishing why certain fetishistic property relations are less important than other, more serious types of property relations that address more basic or pressing human needs. In copyright terms, the fetishistic argument is less relevant: the majority of works created has to be valued by others in some way to result in aesthetic or economic value.

and rights allow — more precisely, force — us to concretize our ideas in order for them to attract protection: the idea/expression dichotomy.

Admitting the skeletal nature of the foregoing recapitulation of arguments, what light is shed by either of these two sets of justifications on copyright terms? The most persuasive arguments come from personhood arguments, where the creator is most closely linked to the work: authors of traditional copyright works and performances. Labour-desert arguments also have some force in this same category as society can recognize and reward the creative process, although this must be put into context: are there other types of remuneration, for example, for the act of creation, such as, for example, a salary.

Applied to copyright terms we are left with the intuitive conclusion that the parameters of protection, and hence longer terms of protection, are more justified for works where the author's identity is closely tied to the object. Labour arguments are valuable but more problematic, as they are much more contextual and limited, and thus carry much less weight than personhood arguments in designing copyright terms.

### **b) Consequentialist Arguments for Copyright Protection**

A markedly different approach to the question of justifying copyright terms would be not to assess the various justificatory arguments from the perspective of what rights accrue naturally to creators, but rather, from a more global or institutional perspective, determine what rights ought to be accorded, in service of set goals, to the major stakeholders in the context of copyright: creators, right-holders and users. The approach in such a methodology is explicitly utilitarian or consequentialist. That is, once the goals of copyright protection are determined — fostering the creative process, protecting the sweat-of-the-brow, fostering a robust public domain, etcetera — the inquiry will then turn to the question of determining the most optimal length term in service of copyright's goals. It might be said that this sort of calculus is in fact what the common law of copyright already does in practice, giving statutory protection — even in the absence of any sort of natural rights to copyright<sup>47</sup> — to worthy recipients for a variety of principled or policy-based reasons. It is also explicitly the approach in the US, where the Constitution enshrines the purpose of copyright as promoting the arts and science.

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47 In *Estey J.'s well-known terms*: Copyright is a “creature of statute.” See *Compo v. Blue Crest Music*, [1980] 1 S.C.R. 357 at 373.

In general, utilitarian and efficiency arguments are much less rights-based than deontologically-oriented ones, as utilitarians usually see any given right as a creation of the polity: one need only recall Jeremy Bentham's famous quip "Natural rights is simple nonsense: natural and imprescriptible rights, rhetorical nonsense — nonsense upon stilts."<sup>48</sup> Rights are understood in the context of the state, and the role the state has in promoting certain goals, fostering certain virtues, and prohibiting other types of behaviour. A utilitarian or consequentialist approach allows for a multiplicity of factors or criteria to be taken into account and weighed before rights are accorded.

There are a number of methods or criteria used to assess copyright rules. One currently popular and useful method is to go about answering these questions using "utility and efficiency" arguments. These related concepts serve to establish the criteria for the overall goals envisioned by a copyright scheme; hence they serve to help frame not only the distribution of copyright ownership rights but also their parameters. There is also a voluminous discussion and debate over the appropriate measure of these standards, and in particular, how each criterion more effectively addresses the compelling critiques of the utilitarian approach in general.

By way of brief introduction, utility arguments are those which seek to maximize some form of individual or societal utility: in the oft-repeated phrase, "securing the greatest good of the greatest number."<sup>49</sup> For Bentham, action was in conformity with utility when it had the effect of increasing the happiness of the community.<sup>50</sup> There are, of course, a number of other proxies in addition to pleasure for a concept as nebulous as "the greatest good": either hedonistic or eudaemonistic happiness, aggregate wealth, well-being, the satisfaction of preferences and so on.<sup>51</sup>

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48 J. Bentham, *Anarchical Fallacies*, in J. Waldron, ed., *Nonsense upon Stilts: Bentham, Burke and Marx on the Rights of Man* (London: Methuen, 1987) at 53.

49 Often attributed to John Stuart Mill. See O. Piest, ed., *Utilitarianism* (Indianapolis: The Bobbs-Merrill Co., 1957) c. 1, for a general discussion of the concept.

50 J. Bentham, *An Introduction to the Principles of Morals and Legislation*, J.H. Burns & H.L.A. Hart, eds. (London: Athlone Press, 1970) at 13.

51 For an introduction to this literature, see B. Williams, *Ethics and the Limits of Philosophy: An Introduction to Ethics* (Cambridge, Mass: Harvard University Press, 1985) at 15–18, and generally R.G. Frey, ed., *Utility and Rights* (Minneapolis: University of Minnesota Press, 1984). Specifically, utilitarian arguments (as well as any purported standard of measuring of the greatest good) must address the problem of measuring and comparing different and often incommensurable subjective conceptions of desirable ends. For an introductory investigation, see J. Griffin, *Well-being: Its Meaning, Measurement, and Moral Importance* (Oxford:

Efficiency, on the other hand, might simply be thought of as achieving a desired goal at the lowest possible cost. A process is productively efficient either if the given result is attained with the fewest possible resources or if a given set of resources yields the best possible result.<sup>52</sup> In copyright this

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Clarendon Press, 1986) at 75–92. This potential incommensurability is allegedly most acute when confronting the dilemma of when (if ever) the overriding of an individual's desires can be justified, particularly in cases where individual desires conflict with the desires of the majority. Extreme forms of utilitarianism which tend to downplay or even ignore the individual as a rights-bearing entity — one might even say Bentham's variant — are particularly susceptible to this last form of critique, for instance from strong rights-based arguments. See, e.g. Kant's critique of utilitarianism in the *Foundations of the Metaphysics of Morals*, trans. by L.W. Beck (Indianapolis: Bobbs-Merrill, 1969), especially the First Section at 11–25. See also S. Scheffler, *The Rejection of Consequentialism* (Oxford: Clarendon Press, 1982). A more recent example of utilitarian thinking, using well-being as its criterion for comparison, is more successful at balancing the consequentialist analysis with at least some deontological imperatives, including the moral worth of the individual. J. Griffin, *Well-being*, *ibid.* Stephen Munzer's pluralistic approach to property theory does so at least implicitly: see Munzer, above note 29, Part III. I have argued elsewhere for an analogous middle ground and approach to ethics as regards private property theory: see "Virtue Ethics," above note 27, at notes 16–24 and accompanying text. See also Williams, *ibid.* Thus some notion of utility is a central tenet of this strand of consequentialist thought, and the augmenting of utility is a goal to be pursued at either the individual or societal levels, or both. On an individual level, the enhancement of utility might involve the promotion or discouragement of certain types of behaviour or reinforcement of certain types of expectations. This individual action will in turn have positive effects at a societal level, increasing aggregate good.

At a wider level, other related ideas are also brought into play. Indeed, modern law and economics analysis, which can safely be considered a variant of traditional utilitarian analysis, has incorporated under the rubric of welfare economics notions like efficiency and fairness as criteria for assessing property laws and norms. In particular, efficiency as a criterion addresses directly the goal of maximizing total societal welfare. According to Stephen Munzer, efficiency moderates utility by helping to meet the objection that interpersonal comparisons of utility cannot be made; efficiency helps move the analysis forward not by allowing such comparisons, but rather, by giving another alternative standard for ranking, thus making both concepts useful for private property analysis. See Munzer, above note 29 at 202–5.

- 52 On this point see R. Cooter and T. Ulen, *Law and Economics* (Glenview, Ill.: Scott, Foresman, 1988) at 16–18. A process or industry is allocatively efficient if, given a certain amount of resources, the allocation of these resources will make society best off. In a specific market, this ideal allocation arises if any demand that exists for a product at a marginal cost is satisfied: i.e., where an industry produces amount of goods equal to demand. In classic diagram, this is the intersection point of supply and demand curves. Efficiency in these forms

decision will often come at the level of the initial allocation of the ownership right.<sup>53</sup> However, such arguments are also useful in designing the parameters of the copyright institution. For the purposes of this analysis, we need to ask what length of copyright term is efficient or effective in producing the optimal level of copyrightable works.

In the realm of copyright, therefore, a robust utilitarian analysis — i.e., one that tries to capture the productive goals of copyright — does seem to fit quite readily into the stated goals of finding the best configuration or distribution of property rights in intellectual resources generally and erecting effective specific copyright rules to further those aims. In the law of copyright, society wishes to promote and protect the creation of a variety of creative and useful works. The utilitarian approach recognizes the explicit goal in question, and asks how best to tailor the institution towards achieving these specific, accepted policy goals.<sup>54</sup> In each of these cases, what was previously a non-appropriable “public good,” such as an idea or a fact is fixed in a material form and subsequently allocated to an individual because of a benefit to society.<sup>55</sup> The appropriateness of such an analysis is increased in the domain of copyright — as well as in the other areas of intellectual property, patent and trade-mark — in part on the increasing marketability of copyright resources, especially software and telecommunications rights, and the growing tendency of right-holders to act economically to maximize these protections.

The idea of efficiency — both productive and allocative — helps us to understand copyright terms. Indeed, one might argue that copyright pro-

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fosters a wider level of societal welfare. There are a number of contenders for the proper understanding of efficiency and overall societal welfare; each deals with different methods of analyzing trade-offs as between individuals and the attempts to provide an overall assessment of how aggregate utility has improved or deteriorated. Briefly, the three standards are Pareto-superiority (any change in positions as between individuals makes at least one person better off without making anyone else worse off), Pareto-optimality (a Pareto-superior position can no longer be achieved) and Kaldor-Hicks efficiency (Pareto-superior changes are allowed even where some might be made worse off where, in principle, those who are better off can compensate those who might be made worse off). For a discussion, see Cooter and Ulen, *ibid.* at 44–52 and Munzer, above note 29 at 198–202.

53 See my analysis in D. Lametti, above note 26.

54 See generally, Cooter & Ulen, above note 55 at 135–49.

55 A “public good,” in the pure sense, can be consumed without rivalry and which is non-exclusive and excludable. The classic example is national defence. Less-than-pure public goods are in part rivalrous and in part excludable: see generally Cooter & Ulen, above note 55 at 108–12.

tection fosters productive efficiency because it encourages the development of works by offering creators an economic incentive to create and by protecting those works with a species of property entitlement varying in time and intensity. Allocative efficiency, on the other hand, is placed to some extent in a dynamic tension with productive efficiency; once a work has been created the optimal *allocatively* efficient result is to have no intellectual property rules at all (since works can be transmitted at zero or low cost, especially given current technology). Therefore, any copyright rule actually distorts allocative efficiency. Put differently, it is productively efficient to encourage the creation of intellectual resources *ex ante*, but *ex post* allocatively inefficient to allow the entitlement-holder to charge a positive price for it. If this is true, much of the discussion around the justification of copyright rules will focus on fostering productive efficiency without too greatly diminishing allocative inefficiency. So for example the length of time protected by a copyright rule will balance incentives to create (productive efficiency) with a desire to make the exclusive use rights as short as possible (allocative efficiency).

Moreover, the idea that property rights are created and not natural — emblematic of the utilitarian approach — finds particular resonance in the realm of copyright and in the common law, statutory approach to copyright in particular. That is, it is the state that creates the property entitlement when it confers the patent monopoly, or protects and enforces the copyright or trademark regime. Utilitarian and efficiency analysis then assists in determining what types of rights should be protected, and how, and to what extent. It also helps assess what obligations or considerations ought to be given in return for this allocation of resources and rights. It is therefore not surprising that the pragmatism of utility and efficiency arguments seems to accord a great deal with what animates intellectual property norms trying to balance rights. Even in the history of copyright, the Statute of Anne initially accorded copyright to both publishers and authors in service of various goals: breaking an inefficient monopoly held by the Stationers Company, protecting authors (giving them incentive to create) but for the most part advancing the interests of booksellers, who were well-placed to distribute works to the greater public in an effective manner.<sup>56</sup> The

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56 See generally, D. Vaver, above note 14 at 2–3; M. Rose, “The Author as Proprietor: *Donaldson v. Becket* and the Genealogy of Modern Authorship” in B. Sherman and A. Strowel, eds., *Of Authors and Origins* (Oxford: Clarendon, 1994) at 23.



common law history is thus one of pragmatic, consequentialist constructions of copyright laws pertaining to economic rights.<sup>57</sup>

The advantage of the consequentialist approach is the balancing of interests that can be achieved when analysis is conducted carefully. One can take a variety of legitimate interests into account, measuring the persuasive weight of each right-holder's claim to some share of the resource. Obviously, creators are an important part of the analysis, and allocating a robust right to them creates some sort of incentive to create. But a public domain is also critical, as are other factors such as government support for research, educational, literary, artistic and musical contexts that encourage creation. Moreover, promoting overall efficiency also allows other factors to be considered, such as users rights (which spurs other forms of creation), the public benefit of the resource, and so on.

This approach, however, has its limitations. The standard criticism of utilitarian or law and economics arguments is that the assumptions about human nature upon which such theories are based are not necessarily persuasive in theory or self-evident in practice. This is no doubt true to the extent that actors do not always behave as self-interested, profit-maximizing individuals. Moreover, even though outside of their self-imposed parameters, utilitarian and efficiency arguments must nevertheless address situations where the optimal mix of consequentialist arguments does not adequately reflect what one might call justice or unjust enrichment arguments. In short, utilitarian arguments will not often be able to stand alone in a socially complex setting.

However, notwithstanding limitations, it remains true that a great deal of creative activity is spurred by economic, rent-seeking behaviour. The presumptive conclusions of a utilitarian analysis tell us that some protection is necessary to provide incentives to create, but too much protection is runs against allocative efficiency. It also tells us to look at the whole context — especially its economic aspects — in order to reach the most effective institutional design. For instance, are there other incentives present besides the copyright — a salary to a computer software designer, by way of example — that might compensate adequately without a copyright?

How do we fit rights-based and consequentialist analyses together? My sense is that the more the right in question is linked to the individual

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57 The Civil law, as stated at the outset, is grounded in the natural rights concept of *droit d'auteur* and is markedly different. But even the Civil law's understanding of either property rights or (the economic rights of) copyright should not be seen as absolute.



author, the more weight ought to be given to personhood justifications. This will be especially true for works of high originality. Where the work is more a product for the market, the less it is supported by such analysis. Rather, a labour theory will support rights for works created by sweat, though they will be more circumscribed by the context on which the work was created and the severe limitations of labour theories. Thus such works will gain less protection in terms of time. Shorter terms are generally supported by utilitarian analyses, and are quite strong in market contexts.

Both limits to labour theories and utilitarian analyses support strong rights to fair use or dealing, though for different reasons. Labour theories do so because of the presumptive or inherent equality of authors and their access to common resources. Utilitarian theories do so because of the necessity of a robust intellectual common to the creative process.

#### 4) Lessons From the History of Copyright

Space does not permit a full treatment of the history of copyright.<sup>58</sup> To the extent that some historical points have not been raised in previous sections, a few additional thoughts will have to suffice for the purposes of this essay.

The dominant history of copyright in Canada falls in line with the Anglo-American tradition. As alluded to above, this is a relatively utilitarian tradition, focused on balancing statutorily-based economic rights, but with a cautious pragmatic impulse to accord no more protection than is necessary. Within the context of this pragmatic impulse, there is care to protect, but not protect too much. Thus copyright's economic rights have always been limited, as set out in the statute. Even when a new process facilitates the reproduction of a work, courts will hesitate to call it copying unless it is clear that some form of copying actually has occurred.<sup>59</sup> Estey's dictum in *Compo* continues to ring true.<sup>60</sup> Copyright is first and foremost a balanced and pragmatic exercise that owes less to natural — and far from

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58 I shall leave this for another day and forum. For a good, balanced and brief summary from a Canadian point of view, see S. Handa, *Copyright Law in Canada* (Markham, ON: Butterworths, 2002) c. 3.

59 *Théberge v. Galerie d'Art du Petit Champlain inc.*, [2002] 2 S.C.R. 336, <[www.lexum.umontreal.ca/csc-scc/en/pub/2002/vol2/html/2002scr2\\_0336.html](http://www.lexum.umontreal.ca/csc-scc/en/pub/2002/vol2/html/2002scr2_0336.html)>, 210 D.L.R. (4th) 385, 17 C.P.R. (4th) 161, 285 N.R. 267, or *BMG Canada Inc. v. John Doe*, [2005] F.C.J. No. 858, 2005 FCA 193.

60 Above, note 50.

absolute — rights than it does cautious balancing of rights of authors, rights of users and other contextual factors.

And in this context, the copyright term is not sacrosanct. It started at fourteen years, and has increased since then. It was increased initially to buy more time for publishers, and later increasingly to protect creators. Under the influence of international treaties, it has further increased, but this is not to say that increases in length of copyright protection are always appropriate. Indeed, there even are some counter-examples: when, for instance, the resource was news information, the common law impulse accorded only a very brief right, either as a matter of case law<sup>61</sup> or by statute.<sup>62</sup> Similar arguments could be raised today, in the context of information on the internet.

*Droit d'auteur* is also present in the Canadian context in the sense of moral rights. As seen above, such arguments are closely linked to the individual and his personhood, and thus give some weight to an argument for natural rights of greater length. However, there are two points to be made here. First, the *droit d'auteur* tradition should not be understood as postulating absolute rights to authors.<sup>63</sup> Second, to the extent that the Continental tradition is more absolute, the history of *droit d'auteur* as it exists in *Canada* is one of grafting onto an existing common law structure. Thus the argument for rights of greater duration is of greater weight for non-economic, moral rights. By contrast, the treatment of economic rights as vividly seen relatively recently in *Théberge*, remains in the realm of a common law approach to copyright. While the *droit d'auteur* approach has tempered parts of copyright law in Canada, it certainly has not supplanted it. Thus the presence of enshrined moral rights in Canada has not resulted in a more absolute nature of copyright.

Thus these brief points from the history of copyright in Canada, which also ring true with the history of the practice of private property,<sup>64</sup> tell us

61 *International News Service v. Associated Press*, 248 US 215 (1918), <<http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=us&vol=248&invol=215>>.

62 Subscribing news services in Australia, which indeed funded the laying of a cable wire to that continent, were granted a twenty-four hour monopoly: see Lionel Bently, "Copyright and the Victorian Internet: Telegraphic Property Laws in Colonial Australia" (2004) 38 *Loy. L.A. L. Rev.* 71.

63 See P. Goldstein, *Copyright's Highway: From Gutenberg to the celestial jukebox*, (New York: Hill & Wang, 1996) at 171; J. Ginsburg, "A Tale of Two Copyrights: Literary Property in Revolutionary France and America" (1990) 64 *Tulane L. Rev.* 991 at 1005–6. See also S. Handa, above note 61 at 62–66.

64 The history of the practice of private property, in either the Common or the Civil law, cannot be understood in absolutist terms, despite rhetorical statements to

that rights over resources should not be mythologized as being absolute, prior to the state, and thus devoid of any limits or obligations.<sup>65</sup>

### 5) Learning From Copyright's Context

The conclusion to be drawn from this discussion is that the substantive range of what is covered by copyright is too wide to be covered in a one-size-fits-all format. As it stands, copyright law covers rights that go to a person's worth, but that have new economic value, it covers economic rights for traditional works assessed by mainly aesthetic standards, it covers works such as computer software whose value — like that of a patent — comes from the functional uses which it allows or to which it is put. There are simply too many kinds of resources to render a uniform treatment plausible, coherent or justifiable. While some categorization of the different types of works that fall under copyright's umbrella is present in the Copyright Act, more differentiation is needed, and indeed the different kinds of copyright protection should be better tailored to this reality. This is especially true with regard to term of protection.

All this accords with the theory of property, the justifications for copyright, and the history of copyright. There is nothing sacrosanct in the term of copyright. It was simply seen as the just balance for rewarding authors as against users. There is nothing inevitable in its length, or in its ever-increasing term. Nor is there anything that says a uniform term ought to be applied to all types of works.

From the concept of property, we have seen that rights can vary from full-blooded ownership to much less powerful rights, that rights vary especially with differing resources or works, that no rights are absolute, and that user's interests must be accounted for. From the justifications for property as applied to copyright, we see that both individual and utilitarian justifications come into play with varying force, depending on the resource. We also see from property rules (and indeed from other areas of IP), that property rights can be lost through inaction, and that registration of important property rights — historically land and buildings — is the norm and not the exception. From the concept of copyright, we see a pragmatic impulse, stressing balance over absoluteness.

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the contrary. Limits on private property, as well as obligations and duties have always existed: see D. Lametti, *The Deon-Telos of Private Property: Ethical Aspects of the Theory and Practice of Private Property* (D.Phil. Thesis, Oxford University, 1999) [forthcoming from McGill-Queens University Press] at c. 3.

65 D. Lametti, above note 19. See also J.W. Singer, above note 20.

A better approach to copyright generally and to copyright terms in particular would be to re-categorize the kinds of interests protected by copyright, according to their nature and justification, and then try to redefine the rights around these new sub-categories.<sup>66</sup> This will better effect the balance that the law of copyright is supposed to promote.

## D. COPYRIGHT TERMS: A RE-SKETCH

In light of the previous analysis, it is my view that it is necessary to subdivide the intellectual resources protected by copyright and set terms accordingly. I would propose the following categories as a model for re-classifying copyright terms for discussion purposes. Of course, these same considerations as to category and method would also apply to a larger discussion of reforming copyright generally. The goal here is to provoke discussion of both categories and terms of protection.

### 1) Moral Rights: Attribution for Life; Integrity with Copyright

Moral rights most resemble what civilians call extra-patrimonial rights: rights of a non-economic nature closely attached to the person. They are the most intimately linked to the person of the creator and are most persuasively justified by personhood arguments. We know a Picasso because of Picasso and his persona; we know a great writer like Margaret Atwood, Graham Swift, or Ian McEwan or a popular one like Dan Brown through their books; and we can recognize a building by Douglas Cardinal, Daniel Liebeskind, or Norman Foster. Thus these rights attach most closely and coherently to traditional works, as they are the most closely identified with the identity or the persona of the author. As such, traditional works have the strongest claim to the longest period of moral rights protection, though this protection is limited in the *Copyright Act* to protecting attribution and integrity. Conversely, such rights would not apply to works such as software, which do not have identifiable link to the identity of the creator.

Given the link to *personhood*, moral rights should apply only to natural persons creating traditional works, or neighbouring rights of performance. The term of protection will be the strongest, but what is the appro-

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66 One might also reconsider threshold concepts like “originality” under such an analysis.

appropriate length of term and as applied to which moral rights? With respect to attribution, moral rights should last at least the life of the author, given the close relation to the identity of the author. One would hope that in terms of fairness, one should always attribute to the source even afterwards. This is a form of intellectual or artistic honesty.

With respect to maintaining the integrity of the work, a similar argument could be made. A shorter period might be justified by the bringing into existence or reification of an object that can help inspire other works of art: we do not wish to preclude the possibility of postmodern works of art such as that created by Jeff Koons or Marcel Duchamp which are derivative or transformative. As it stands, the relatively objective test for mutilating a literary or musical work in Canada<sup>67</sup> is of such a high standard that few cases alleging damage to the integrity of the work will ever succeed. While the test for paintings and sculptures is more favourable to the creator, our history with moral rights in Canada thus far has not given cause for concern. Under these terms, the life of the author remains an appropriate time period for the duration of the right.<sup>68</sup>

Given their link to the creator's identity, such moral rights need not be registered: the author's *signature* should be sufficient to trigger a moral right and should be sufficient to put users on their guard to not infringe on a creator's moral rights. Obviously, a registration system would help put users on guard, and perhaps make their efforts to identify works much easier.

## **2) Economic Rights in Traditional Works: Life of the Creator(s) When Held by the Creator(s), If Assigned Fifteen or Twenty-Year Term & Registered**

Traditional works, for traditional reasons, comprise what we usually think of as the standard fare of copyright: literary, dramatic, musical and artistic works. They are also the most original in the lay sense of originality, and their creativity heightens identification with the author. As with moral rights, there is a close association between the author-creator and the cre-

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67 Above, note 22 and works cited therein.

68 If the test were to be weakened (i.e. lowered such that the test tends to the subjective view of the first creator), the fear resides in potentially not allowing works to be parodied or used in ways that are different than what the author had envisaged subjectively, but which others might find quite useful, interesting or otherwise artistically valuable. Here one could construct an argument for a shorter period for protection, such as one that tracks the term of copyright associated with the specific type work, as are outlined in the following sections.

ated work. As such, there is a very persuasive set of justifications provided by personhood arguments for robust protection of the economic rights afforded by copyright. There are also quite strong labour-desert arguments at play, although these are limited by the rights of others to create, and by the imperative of maintaining the public domain.

In terms of incentives, a long period of protection might be justifiable, although one could argue that many creators of this nature would not put economic gain at the forefront. In any event it is difficult to assess what length would be appropriate on purely utilitarian grounds. However, the personhood arguments are of sufficient force that, subject to the protection of fair users rights in service of the public domain, one could argue for protection that is extensive.

Hence the case is sound for long-term, relatively robust protection for traditional works. Certainly, one could make a strong case for the present term or perhaps more logically the life of the creator. (In my view, none of the natural rights justifying private property (labour-desert or personhood) are sufficient to justify inheritance, a point recognized by others,<sup>69</sup> as the heirs have neither laboured on nor otherwise deserved the resource, and they have no closer identity link to the work than family pride. As such, any justification for inheritance must be done on utilitarian grounds, and it is very difficult to see any strong incentive argument here.) Or, one could have an initial lengthy period of protection, initiated by registration of the copyright, with a right to re-register for a similar or shorter period. More will be said on this point below.

However, much of the value of traditional copyright is held by corporations, buying copyright rights from individual or joint creators, so some balance has to be struck. While we all might like the idea of the son of the composer of a Christmas ditty in Nick Hornby's *About a Boy* living off the royalties of dad's opus, the reality is more akin to Walt Disney buying up cartoon and children's story rights and holding them over long periods of time. In such circumstances, the economic value to the corporation becomes the focal point, and corporations do need rights of such length to turn a fair or decent profit in the marketplace. While more empirical studies could and should be done, a normal business life cycle<sup>70</sup> akin to patents would be the most logical term for copyright in my view.

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69 Most famously, see P.-J. Proudhon, *What is Property?*, trans. D.R. Kelley & B.G. Smith (Cambridge: Cambridge University Press, 1994) at 184–85.

70 What I mean here, in rather lay terms, is the period in which the average entrepreneur or investor would expect the resource to begin turning profits in order

Here then the argument is for a shorter term given this market reality. One could envisage a fifteen or twenty-year term, all of which is certainly sufficient on utilitarian or efficiency analysis to provide a strong incentive to create the work in the first place, and for the corporate copyright holder to exploit the ownership of the right on the market. In order to manage the right, a registration system would be required. Hence, one might also provide the right to extend the term once, through the registration mechanism.

My preferred solution mixes both of these. That is, the idea involves two different terms of protection for traditional works based on the holder: the creator has a lifetime right, and if she decides to alienate that right, the acquirer then obtains a twenty-year right. Once the term is complete, the work would return to the public domain. We could also consider a one-time right to renew the term; if adopted I would recommend terms — both initial and renewed — of fifteen years.

For the sake of the present round of Canadian copyright reform, with respect to photos, this solution would be intuitively plausible: the right is longer when held by the photographer, and shortened when alienated to a third party.

A registration system would simplify all of the above for the user wishing to know what is covered. As it now stands, many works that would otherwise be useful remain in the private sphere far too long. Lawrence Lessig has made sound arguments for a registration requirement generally,<sup>71</sup> and they are consistent with the argument thus far for any economic right. Regarding traditional works, however, I would be inclined to keep an automatic protection for the life of the author, giving greater weight to personhood concerns for these kinds of works than perhaps Lessig would. The registration system could then be required for cases where there is alienation to a third party. Admittedly this is a more complex solution than not requiring registration, or indeed forcing everyone to register, but given that the non-registered copyright holders will always be the actual creator, I do not believe that the idea of having some registered and some unregistered *traditional* works will be too difficult for users to manage. In any event, if pushed, I would be inclined to support registration for all traditional works. As Lessig has pointed out, and as has been shown with the Quebec initiative with a register for movable property and other

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to recoup and in initial investment. My understanding is that this period is relatively short — say, ten years — but I am suggesting terms that err in favour of the creator or copyright holder.

71 Above note 10 at 250–52.

rights, a registration system can be affected electronically, inexpensively and relatively efficiently.<sup>72</sup>

### 3) Economic Rights in Neighbouring Rights: Fifteen or Twenty Years and Registered

Neighbouring rights present a difficult sub-category. In some respects they are closely identified with the author (think of performance rights and sound recordings) thus attracting the support of personhood arguments and, to lesser extent, labour-desert arguments. However, telecommunications rights do not have the unique identification with the creator that do either traditional works or neighbouring rights of performance, and indeed, sound recordings lose some of the link to the identity of the artist when they are placed in the hands of a large corporation. (In any event, the traditional copyright in the song, its words and its music, still subsides in any event.)

Turning to efficiency-incentive arguments, we are in an area of uncertainty where more empirical data and analyses regarding optimal term length might be useful. Once again though, in intuitive terms, a shorter time period more akin to a business profit cycle would be more defensible.

Again I would argue for a twenty-year term and a registration requirement; if renewable, once, then I would shorten the initial and renewal periods to fifteen years.

### 4) Database/Facts and Information Products: Higher Threshold, Shorter Protection

Information products have been the subject of much litigation, and have put the focus on the battle between the so-called sweat-of-the-brow and creativity justifications for copyright as they regard the threshold question of the degree of originality required to attract copyright protection. The recent decision in *CCH* attempts to bring both positions into the fold. Hence, in principle, we know that the standard of originality is something more than sweat, something less than creative imagination;

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72 Above note 10 at 251; for the Quebec registry, see: <<http://si2.rdpdm.gouv.qc.ca/rdprmweb/html/registre.asp?sMenu=RDPRM>>



while the standard is higher than sweat, how much higher or in what cases higher is still unclear.<sup>73</sup>

We also know that such information products are often comprised of facts and data, not original in the lay sense, but certainly economically valuable and useful generally. The phone books, yellow pages and enhanced legal judgments that form the stock of the legal cases thus far rendered<sup>74</sup> are important and necessary repositories of data. We want to encourage their production. On the other hand, their importance as facts and data is necessary to ensuring a robust public domain. It is also important to understand that these works are now often scrupulously protected by technological means.

In these areas, personhood justifications are absent as there is little or no identification with a natural person. Labour arguments are more weighty — sweat and all — but as seen, they suffer from drawbacks and limitations. As outlined earlier, labouring to create a database might be financially compensated in other manners, such as the granting of the telephone monopoly that accompanies the printing of the white pages directory. Moreover, the labouring does not account for the nature of the information: its necessity to the general public, its usefulness in spurring other sorts of creative activity, and so on. Hence the rights-based justifications are less strong than one might otherwise think in an area perhaps most typified by labour. We then must rely on utilitarian considerations of balancing incentives and returns, such that products have sufficient protection, but no more than necessary.

Much has been written on database protection already, and the question of a different measure of protection for databases is becoming resolved in the affirmative position. Some attempts for database have been initiated, such as the European Database Directive,<sup>75</sup> providing for a shorter, though renewable, period of protection. The problem here is that by allowing renewal when the database is changed, the door is opened for perpetual protection (akin to the problem of evergreening in patent protection). While this might

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73 See the works in this volume on originality.

74 See e.g., *Feist Publications Inc. v. Rural Telephone Service Co.*, 449 U.S. 340 (1991), <[www.law.cornell.edu/copyright/cases/499\\_US\\_340.htm](http://www.law.cornell.edu/copyright/cases/499_US_340.htm)>, 111 S. Ct. 1282; 113 L. Ed. 2d 358 (1991), *Tele-Direct (Publications) Inc. v. American Business Information, Inc.*, [1998] 2 F.C. 22, <<http://reports.fja.gc.ca/fc/1998/pub/v2/1998fc21425.html>>, [1997] F.C.J. No. 1430 (C.A.), and *CCH*, above note 5.

75 Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, <<http://europa.eu.int/ISPO/infosoc/legreg/docs/969ec.html>>.

be justified in the sense that the database is being upgraded and maintained — a good thing to be encouraged — perpetual protection of facts can harm the public domain and stifle competition in the marketplace.

Given the nature of the resource, facts and data, and the fact that such data can be so well protected during the span of copyright protection period, I would therefore argue for a relatively short period of protection, say five to ten years, with one renewal period of five years. Five to fifteen years should provide for a sufficient economic incentive and return for compilers. Indeed in this information age, with technological protection measures to protect databases, it should be more than sufficient. Indeed merely the pace of technological change makes a period of five years probably sufficient in terms of planning one's rate of return on investment.

## 5) Software and Multimedia Works

There has now been a relatively long trend to protect software under copyright rules<sup>76</sup>. While this is erroneous in my view — it attempts to value software for its static quality instead of its dynamic value,<sup>77</sup> equating codal language to a language of expression in the artistic sense — it is a trend that we will have to live with: copyright protection for software is ensconced in the TRIPS agreement and domestic copyright law worldwide is complying.<sup>78</sup>

The practical effect of copyright protection for software is to protect software code for a period much longer than its effective period of use (and period of market recompense for owners): copies of WordPerfect 3 and Windows 3.1 are still covered by copyright. However, in copyright infringement cases, jurisprudence has responded to this overprotection by protecting only what is original in a piece of given software.<sup>79</sup> Indeed, once a feature — pull-down menus for example — becomes the industry stan-

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<sup>76</sup> See above note 24 and accompanying text.

<sup>77</sup> It should be noted that attempts to expand copyright protection to the functional aspects of code were initially accepted in the US, but were later overruled because to do so would amount to granting patent-like protection. Thus, there is an accepted divide — copyright protects the creative, nonfunctional aspects of software while patents are sought to protect the function. On this subject, see generally: K. L. Durell, "Intellectual Property Protection for Computer Software: How Much and What Form is Effective?" (2000) 8 Int. J. of L. and Information Technology 231.

<sup>78</sup> Above note 7 at s 3.1(h).

<sup>79</sup> See above note 23 and accompanying text.

dard, it is difficult to see how anything more than literally copying the actual lines of code in the original can be protected by copyright rules.

The problem with software is that unlike the either traditional copyright or the patent bargain which puts the new technology into a fuller view before protecting it for twenty years, with software, the underlying base code is protected from copying. Technological protection further isolates the software from access. Obviously code can be reverse-engineered, but this takes more of an effort, and most of us are incapable of doing this. As Lessig has pointed out, there is not access to the work in the same way in as there is in traditional copyright — we still get to read the *Virginia Woolf* covered by copyright<sup>80</sup> — or indeed patent, where the teaching is registered. And, as mentioned, copyright comes with a very long period of protection, extending many times beyond the useful life of the software. The counter-balancing needs of the public domain seem to me to be of paramount import here, since software serves as a platform for other kinds of software development, as are patents for other patents. One should be able to work with code freely for the purposes of creating new software products, as copyright protection has already worked protection for the original programme against copying.

To the extent that we will have to live with copyright protection of software, at least in part and for a long while, it is worth asking the same sorts of questions that we asked above: what justifications apply in context? While there is much labour expended in software development there is little association with an individual. We think of Bill Gates and Steve Jobs more as corporate magnates than as creators, as much as they would have us think otherwise. Indeed, most software is developed in a team setting, and copyright held by corporations. Thus while labour is expended, it is undertaken in a context where most of the actual developers are already being remunerated, and the corporate holder-employer has no strong link to the identity of the creators. In terms of incentive, the high-tech market is such that software becomes outdated rather quickly. Even with this obsolescence, software is produced and developed, with profit expectations in the months or a few years at most. Here we can clearly look to the market for guidance.

At the very least, we should have a different term of protection for computer software that makes code accessible after a much shorter period. The term would have to be sufficient to give software developers time to make their profit: perhaps a three-year period, with renewal once. Here

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80 Above note 10 at 252–53.

registration would also be necessary to provide clarity for the user. Lessig has generously suggested five years, renewable once.<sup>81</sup> This is fairly long term of protection for software in my view, but it is definitely preferable to the present state of affairs.

Multimedia works are complex of a variety of reasons.<sup>82</sup> Here too, a short period is preferable, given the pace of change of the technology market: three years, renewable once, seems intuitively right, but empirical studies would also be useful here. Where a multimedia work allows for user interaction, some allowance has to be made for the user's contribution to the software. User's rights have to be clearly identified and their scope defined, no doubt via a licensing scheme, and here the copyright holder should have the burden of clearly defining the scope in which users can modify the software.<sup>83</sup>

## 6) Fit with Other Copyright Reforms

Of course, no changes in length of copyright terms can be undertaken in a vacuum. These reforms must fit with other copyright reforms focusing on technology, fair use and dealing, originality, damages for infringement, and so on. Terms can be increased or decreased depending on overall policy goals and interaction with other reforms. For example, robust fair dealing provisions would allow for longer copyright terms, given that the public domain and users' rights are better protected in the fair dealing context.

As it stands, given the Canadian trend for relatively weak fair dealing provisions and technological protection — notwithstanding *CCH* — a shorter term represents one way to help users and the buttress the public domain.

Moreover, the considerations and lessons identified in this paper from the concepts of property and of copyright, from the discourse of justifications, ought to be applied in other areas of copyright reform: differentiating works, and tailoring tests and rights accordingly. The standard of

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81 *Ibid.* at 253.

82 See generally I. Stamatoudi, *Copyright in Multimedia Works: A Comparative Analysis* (Cambridge: Cambridge University Press, 2002).

83 Once again, one needs to keep in mind the issue of technology and licensing agreements effectively giving rights beyond the terms granted by copyrights. Care needs to be taken to fashion rules and terms that also prevent license agreements from according copyright-like rights that are more robust than the statutory rights accorded by copyright.

originality, for example, need not be the same for traditional works as for software or information products for example. And the rights protected by copyright in each case might very well differ.

## E. CONCLUSION: THE TERMS OF COPYRIGHT

Copyright law has now evolved in such a way that it covers many types of disparate works, each with a different history, justification for protection, importance in the world of art, ideas or software development, and impact on others. The law of property, under any legal system, treats different objects of property differently in terms of the rights and obligations bound up with each resource. Lawyers and laypersons have no problem working with such categories. Thus, there is no logical reason in the world except perhaps convenience to “harmonize” copyright terms across the board of all “works.”

Rather the opposite is true. We should classify the objects of copyright protection and decide the length or protection necessary to balance fairly all the competing interests found in the particular context of that particular object of copyright. Moreover, we could impose registration requirements, something that property systems do for important resources, such that they are secure, their owners can be identified, and can be used as collateral for secured lending.

It is clear that such a reform would add another layer of complexity to copyright law. However, it would not be overly complex, in my view, and certainly would not be impossible to administer in the face of modern technology. It would accord better to justifications for copyright, and it would be in line with private property law’s treatment of resources. As copyright law gets ever more valuable, such changes will surely come. We should start thinking of them sooner in Canada, rather than later, as leaders rather than as followers.