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David Vaver*

Need Intellectual Property be Everywhere?:
Against Ubiquity and Uniformity

Intellectual property is more prevalent in every corner of our working and leisure lives. International pressure, through both bilateral treaties and multilateral treaties is causing intellectual property law to standardize at high levels throughout the world. Legal standardization may be beneficial in general but is not so for intellectual property in either the developed or the developing world. The law in developed countries is currently incoherent and itself requires major reconsideration. The imposition of such a defective law on the developing world is helpful to neither side. The paper argues that current intensification and harmonization trends are therefore undesirable, and that retrenchment and diversity in intellectual property law are preferable strategies for both developed and developing countries.

Le domaine de la propriété intellectuelle est omniprésent dans nos vies, du travail aux loisirs. Par l'entremise des traités bilatéraux et multilatéraux, la communauté internationale demande la normalisation des lois reliées au droit de propriété intellectuelle à un niveau exigeant. La normalisation juridique en général peut s'avérer avantageuse dans le domaine de la propriété intellectuelle, mais ne l'est pas ni pour les pays industrialisés, ni pour les pays en voie de développement. La loi dans les pays industrialisés est présentement incohérente et nécessite une révision importante. L'imposition d'une telle loi aux pays en voie de développement n'avantage personne. L'auteur proposera que les tendances actuelles d'intervention et d'harmonisation ne sont pas souhaitables. Il accentuera également les stratégies préférables de retranchement et de diversité dans le domaine du droit de la propriété intellectuelle.

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Introduction

Some have called intellectual property law the most boring subject known to man but, boring or not, intellectual property (IP) is omnipresent and certainly much more talked about than once was the case. Twenty years ago, the press ran few IP-related stories. Today, no week or sometimes even day goes by without a paper or news magazine coming out with one.

For example, on the flight from Heathrow to Halifax to deliver this lecture, I picked up a copy of *Time* and *Business Week* magazines, and the next morning I glanced through *The Globe and Mail*. All had IP items in them, *The Globe* without knowing it. *Business Week* had an Op-Ed piece on “How To Achieve Digital Nirvana”—not an article about tossing out all computers but instead about the need for protagonists in the copyright wars on the Internet to reach a compromise solution.¹ *Time* had three pieces. One reported the European Commission’s decision that feta cheese from Greece alone could be labelled “feta”; producers outside Greece, who currently make most feta-style cheese, were considering legal action.² Another piece dealt with the current trend for orchestras to record their performances on their own-name labels, and talked about the royalty split for performers.³ Yet another dealt with the heats for the America’s Cup yacht race currently being run off New Zealand. The syndicate from Seattle had somehow got hold of the design secrets of three of the other boats and had been disciplined for this skullduggery.⁴

1. Stephen H. Wildstrom, “How to Achieve Digital Nirvana” *Business Week* [European Edition] (4 November 2002) 10.

2. Blaine Grateman, “Biz Watch” *Time* [Atlantic] 160:18 (28 October 2002) 22 at para. 13.

3. James Inverne, “The DIY Symphony; Orchestras are defying the slump in classical CD sales by launching their own record labels” *Time* [Atlantic] 160:18 (28 October 2002) 60.

4. Tom Dusevic, “Luxury Crews; Millions of dollars, sleek yachts and skullduggery come together in the race for the America’s Cup” *Time* [Atlantic] 160:18 (28 October 2002) 56.

The piece in *The Globe and Mail* by Drew Fagan was entitled “Sweet Continental Harmony.”⁵ It dealt with the possibility of Canada’s concluding a *NAFTA*-plus agreement with the United States. Fagan thought the time was ripe to create “one North American economic space.” He cited Canadian International Trade Minister Pierre Pettigrew, who spoke of the need to “better co-ordinat[e] Canadian and U.S. regulations in everything from civil aviation safety to pesticide registration.”⁶ IP, though not universally classed as a form of pesticide, is nevertheless sure to be on the list of any *NAFTA*-plus deal: the *TRIPS*-plus bilateral treaties the U.S. is currently concluding all include IP provisions. Fagan’s article is timely and I return to its implications later.

My talk has four interlinked themes:

- IP is now everywhere, in the sense both that it surrounds us in most of our working and leisure environment, and also that it now exists virtually throughout the world in pretty much this intensive form.⁷
- Despite these phenomena, difference and variation have always been features of IP.
- As currently configured in the developed world, IP is excessive. It needs trimming back.
- Ubiquity and uniformity are not always virtues in law, and, globalization notwithstanding, they are not virtues for IP law, which in many respects is incoherent and morally indefensible. If it were a product, it would be declared unmerchantable and unfit for its purpose. That is no testimonial for a law that the developed world continues to impose on the developing world. The tendency towards ubiquity and uniformity needs to be reversed. A nation should, within broad limits, be free to strike its own balance in its IP laws to suit its own circumstances: fewer and more varied IP laws should be considered virtues, not vices. (Note that I stress both “within broad limits” and “balance.”)

The Supreme Court of Canada recently recognized the notion that IP laws must be balanced and that different nations can, with perfect propriety, strike the balance differently.⁸ A painter tried to use the *Copyright Act* to stop his works from being transferred from posters and cards on to canvas and then being resold. Copyright law stops unauthorized “reproduc[ti]on”

5. Drew Fagan, “Sweet Continental Harmony” *The Globe and Mail* (29 October 2002) A19.

6. *Ibid.* at para. 11.

7. At least in theory. Enforcement of the law is variable, which in itself is telling.

8. *Théberge v. Galerie d’Art du Petit Champlain* (2002), 210 D.L.R. (4th) 385, 17 C.P.R. (4th) 161, 2002 SCC 34 [Théberge].

of the copyright holder's work,⁹ but a majority of the Court refused to read "reproduction" expansively to catch the impugned activity. In copyright, as in biology, reproduction usually means adding one more unit to the species beyond what existed before. In the case of the paintings, the image was chemically transferred from poster or card to canvas. The poster or card was now blank; the canvas was not. The net increase in paintings was zero: hence no reproduction. Binnie J. for the court majority paid nodding homage to "the globalization of the so-called 'cultural industries'" and to the desirability "within the limits permitted by our own legislation, to harmonize our interpretation of copyright protection with other like-minded jurisdictions."¹⁰ That said, like-minded jurisdictions differed: civil law jurisdictions gave authors more control over what buyers did with a work than occurred in common law jurisdictions. Such restrictions could be imposed by clear legislation but not by judges interpreting legislation expansively. The following important passages appear in the judgment:

The *Copyright Act* is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator (or, more accurately, to prevent someone other than the creator from appropriating whatever benefits may be generated) ... The proper balance among these and other public policy objectives lies not only in recognizing the creator's rights but in giving due weight to their limited nature. In crassly economic terms it would be as inefficient to overcompensate artists and authors for the right of reproduction as it would be self-defeating to undercompensate them... Excessive control by holders of copyrights and other forms of intellectual property may unduly limit the ability of the public domain to incorporate and embellish creative innovation in the long-term interests of society as a whole, or create practical obstacles to proper utilization.¹¹

What is over- or under-compensation or excessive control clearly involves a value judgment, a weighing of costs and benefits, striking a balance, and recognizing that the matter is one on which minds even within the same state—let alone among states—may reasonably differ.

At the same time, we should recognize that some standardization is beneficial. While nations should have the discretion "within broad limits" to chart their own IP course, some common core rules may reasonably be adopted. For example, one could argue for standardized property and liability rules on the Internet, *e.g.*, on questions such as entitlement to a

9. *Copyright Act*, R.S.C 1985, c. C-42, s. 3(1).

10. Th  berge, *supra* note 8 at para. 6.

11. *Ibid.* at paras. 30-32.

domain name or the liability of Internet Service Providers (ISPs) for carrying infringing material. In the former case, a domain name may be adopted in one country but may have immediate worldwide impacts on others. In the latter case, where and how an ISP chooses to operate can be fortuitous; liability should not turn on chance elements such as the location of the server or the ISP's notional place of business. More generally, the requirements of what should be protected worldwide could be relatively standardized at the core, but nations should have greater flexibility than they do now to exclude items from protection and to set conditions and levels of protection according to their notions of economic interest.

These suggestions may seem modest but are actually quite controversial. The current trend is toward "one world, one law" for IP, and that law is, for the most part, not arrived at democratically through the parliamentary process. It comes from meetings of bureaucrats and industry lobbyists in international fora far removed from their countries of origin: Geneva, Montevideo, Marrakesh, Doha. Parliaments then are presented with *faits accomplis*: they must enact implementing legislation or expose their country to international economic sanctions.¹²

This process is seen most graphically in the conclusion in 1994 of *TRIPs* (the Agreement on Trade-Related Aspects of IPRs, including Trade in Counterfeit Goods) as part of the *World Trade Organization Agreement*.¹³ Nations wishing to be part of a liberalized world trading system had to accept a far from liberalizing set of IP rules. Many of the national representatives at the meetings at which the rules were fixed clearly did not appreciate what they had signed on to—as is now becoming apparent. Their countries have found out since, and many are not at all happy. Claims by pharmaceutical companies that international IP rules prevented poor AIDS-ravaged countries from making patented anti-AIDS drugs available to patients at a lower return than patent holders wanted, proved to be a final straw. IP law started to look a luxury that only the rich could afford and that in poor countries cost lives. *TRIPs* is currently being reviewed but

12. See Peter Drahos (with John Braithwaite), *Information Feudalism: Who Owns the Knowledge Economy?* (London, England: Earthscan Publications, 2002).

13. *Agreement on trade-related aspects of intellectual property rights, Annex 1C of the Agreement Establishing the World Trade Organization*, 15 April 1994, B.T.S. 57 (1996), A.T.S. 1995/8 (entered into force 1 January 1995), online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/legal_e.htm> [*TRIPs*].

negotiations to change it are proving slow and difficult. Those with advantages are always loathe to give them up.¹⁴

I. *Part One*

What is meant by IP? The most familiar and oldest sets of IP rights are probably patents, copyrights and trade secrets, joined a little later by trademarks and industrial design rights. More recently, new rights have appeared over performances, integrated circuit topographies and plant varieties, the laws of torts and delict have expanded to cover various acts of unfair competition, and in other jurisdictions rights in databases and minor subpatentable inventions have also been created.

In Canada, IP issues have been handled by federal and provincial jurisdictions acting in tandem. At confederation, the federal parliament established IP rights (IPRs) under its exclusive power over patents, copyrights, and the regulation of interprovincial trade and commerce. The provinces had their own supplementary IPRs, created either by legislation or judge-made law. These rights run against various acts of unfair competition, *e.g.*, passing-off one's business, products or services as another's, or improperly taking another's trade secrets or confidential information.

Just as the federal parliament keeps adding to the IP menu, so too do the provinces. Thirty years ago, the Ontario courts decided to follow a U.S. trend to give celebrities the right to exploit the value attaching to their personal attributes: their name, likeness and voice. Other provinces had dealt with this perceived problem by passing cautious privacy legislation from the 1960s. Ontario had not, but this did not deter the Ontario courts. Judges were entitled to develop the common law to reflect commercial realities and expectations; it was just a little step, to create from a patchwork of indirect and indistinct rights, a clear stand-alone right in a celebrity to prevent the misappropriation of his or her personality.¹⁵

14. As to how Dr Horace Read would have reacted to these particular events, I have little doubt. On the more general question, on whether nations should have wide flexibility to tailor IP laws to their own circumstances, I suspect he too would have been sympathetic. From early days, a major interest of his (indeed the subject of his doctoral thesis) was the conflict of laws—or, in its less combative nomenclature, private international law—the means by which we decide which system of law should govern a particular dispute or issue where an activity or its impact crosses national, state or provincial boundaries. A premise of private international law is that different countries will have different laws; hence the need for a ubiquitous and uniform meta-law to resolve, in a given case, which system of substantive law should be preferred. Dean Read's Canadian roots and experience no doubt shaped his attitude. Difference is a historical feature of Canadian law and life, a value not merely to be tolerated but as often celebrated.

15. *Krouse v. Chrysler Canada Ltd.* (1973), 1 O.R. (2d) 225, 40 D.L.R. (3d) 15 (C.A.).

Somewhat oddly, other Canadian courts followed the Ontario line to create an overlapping common law right even where the province in question protected the celebrity's right through legislation.¹⁶ The contours of this common law right against misappropriation of personality still remain far from clear.¹⁷ How well-known need one be to qualify as a celebrity? How long does the right last? What acts does it apply to? Does it behave like copyright and outlast the celebrity for 50 years past his or her death? Might it run forever, at least as long as the memory of the celebrity lives on in people's hearts and minds?

On such questions, the law that Canadian courts have traditionally turned to, British law, has been of little help. It has steadfastly turned back attempts to create a new-fangled "quasi-copyright" in a person's name or image. The estate of the late Elvis Presley, buoyed by successes in its home country in gaining control over third-party uses of the singer's attributes, tried in vain to convince English courts to grant it a similar privilege. Saying that "[m]onopolies should not be so readily created,"¹⁸ the Court of Appeal held that the estate could not register 'Elvis', 'Elvis Presley' and Presley's signature as trademarks for toiletries. It granted superior rights to a local trader who had long been selling Presley memorabilia without complaint, and who had secured a U.K. trademark registration over 'Elvisly Yours' for similar goods. In more recently extending the old passing-off tort to prevent the commercial use of a celebrity's image to endorse products, the English court was again at pains to point out that the action would have failed, had the element of implicit endorsement and thus misrepresentation been absent.¹⁹

At this stage, one might legitimately ask: what has all this to do with IP? What is "intellectual" about the image that has developed around a celebrity person—probably more a fabrication of media relations consultants than anything the celebrity may him or herself have done? Labelling this "property" "intellectual" itself sounds a fabrication. A British IP judge makes that point graphically:

The general area of law now called "Intellectual Property" is in the main a law conferring private rights on one party to prevent competition from others. It is fundamentally about industry—an economic law—a law that controls or forms the base for industrial activities. To call it "intellectual" is misleading. It takes one's eye off the ball. "Intellectual" confers a

16. *Joseph v. Daniels* (1986), 4 B.C.L.R. (2d) 239, 11 C.P.R. (3d) 544 (S.C.).

17. See e.g. *Gould Estate v. Stoddart Publishing* (1996), 30 O.R. (3d) 520, 74 C.P.R. (3d) 206 (Gen. Div.), aff'd (1998), 39 O.R. (3d) 545, 161 D.L.R. (4th) 321 (C.A.).

18. *Elvis Presley Trade Marks*, [1999] R.P.C. 567 at 598 (C.A.), Simon Brown L.J.

19. *Irvine v. Talksport Ltd.*, [2002] 2 All ER 414, [2002] 1 W.L.R. 2355, [2002] E.W.H.C. 367 (Ch.D.), aff'd on liability and damages increased [2003] E.W.C.A. Civ. 423 (C.A.).

respectability on a monopoly which may well not be deserved. A squirrel is a rat with good P.R.²⁰

These points are well made. The IP label is a relatively recent concoction. The unifying phrase used to be “intellectual and industrial property”: the “intellectual” part covered copyright, which was devoted to the arts—the product of the intellect, and typically created for its own sake (think Wordsworth, Baudelaire). Industrial property covered patents, designs and trademarks (think ‘Coca-Cola’, ‘IBM’ or ‘Microsoft’). These might or might not engage the intellect. Inventing and designing typically did; concocting a trademark typically did not. The decision to call shredded wheat breakfast cereal ‘Shreddies’ may, in some quarters, be called intellectual or even creative. But the cerebration involved is trivial, except by the inflated standards of Madison Avenue and its counterparts. The common thread that does unite patents, designs and trademarks is the object with which the activity giving rise to these rights is done: for industrial ends, not for their own sake.

Of course, a moment’s hesitation reveals that the supposed opposition between “industrial” and “non-industrial” is itself false. Writers, artists and composers may live to create, but they also create to live—and have done so for centuries. Music records, books and posters that circulate in their thousands or millions are as much mass-produced industrial products as are computers and breakfast cereals.

Similarly, the supposed opposition between the “industrial” and the “creative” is equally false. Inventing usually involves “intellectual” work, often of a higher order than required to obtain a copyright, but even here the patient slogger can be as inventive, legally, as the Archimedean bather. Much copyright work, too, has little “intellectual” attached to it either. There is currently a debate in Commonwealth courts about whether just being “industrious” can give you a copyright; the more widespread view is that it can. Catalogues and even lists of things such as fox hunting days²¹ and sports fixtures²² have been treated in the U.K. as “original” compilations entitled to copyright, and an Australian court recently said the same of an ordinary white pages telephone directory.²³ That point is presently in

20. Robin Jacob, “The Stephen Stewart Memorial Lecture: Industrial Property—Industry’s Enemy” (1997) 1 I.P.Q. 3 at para. 2.

21. *University of London Press Ltd. v. University Tutorial Press Ltd.*, [1916] 2 Ch. 601 at 608, 115 L.T. 301.

22. *Ladbroke (Football) Ltd v. William Hill (Football) Ltd.*, [1964] 1 All E.R. 465, [1964] 1 W.L.R. 273 (H.L.).

23. *Desktop Marketing Systems Pty Ltd. v. Telstra Corporation Ltd.*, [2002] FCAFC 112, leave to appeal to High Court of Australia refused by the High Court.

controversy in Canada. The Federal Court of Appeal a few years ago thought that the typical yellow pages business directory—and certainly a white pages telephone directory—was not original enough to have copyright—not enough creativity.²⁴ Just this year, a different panel of judges of that Court thought that creativity was not needed for copyright.²⁵ Edison may have thought that “genius” was 1% inspiration and 99% perspiration. But for copyright, 0% inspiration and 100% perspiration seems enough, and the perspiration need amount to no more than the slightest of glows. Coolly writing an ordinary business letter,²⁶ *billet doux*, or even a “dear diary” entry,²⁷ is original enough for the writer to acquire a copyright in his or her expression—a “poor ill-favoured thing” maybe, but “mine own.”

People—including, contrary to normal expectations, even lawyers—tend to abbreviate lengthy phrases, and so it has become with the ponderous “industrial and intellectual property.” The choice whether to shorten the tag to “industrial property” or “intellectual property” was clear to those who worked to promote and establish the field: better the squirrel than the rat. For one thing, industrial property invokes commercially zoned buildings. For another, to protect matters “intellectual” sounded more easily justifiable than to protect matters merely “industrial,” and could appeal to homely rhetoric: what could more properly be termed a man or woman’s own than what came out of his or her mind? So “intellectual property” the field became, however contentious both the “intellectual” and the “property” parts were. (What is now “property” was once “privilege”: benefits conferred upon individuals by the state in its discretion, not as of right.)

So publicity rights for celebrities have come to fall under the IP umbrella. The relationship between Shania Twain and her persona can be treated, in one aspect, much like the relationship between the Kellogg Company and the “Kellogg Co.” trademark. If the latter is IP, then so is the former,²⁸ and

24. *Tele-Direct (Publications) v. American Business Information* (1997), [1998] 2 F.C. 22, 154 D.L.R. (4th) 328 (C.A.), leave to appeal to S.C.C. refused [1997] S.C.C.A. No. 660 [*Tele-Direct*].

25. *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2002] 4 F.C. 213, 212 D.L.R. (4th) 385, 2002 FCA 187, leave to appeal to S.C.C. granted [*CCH Canadian*].

26. *British Oxygen Co. Ltd v. Liquid Air Ltd.*, [1925] Ch. 383.

27. *A. v. B.*, [2000] E.M.L.R. 1007 (Ch.D.).

28. If more were needed, then one need only call in aid paragraphs 9(1)(k) and (l) of the *Trade-marks Act*, R.S.C. 1985, c. T-13, as am. by S.C. 1990, c. 14, s. 8; 1993, c. 15, s. 58; 1994, c. 47, s. 191; 1999, c. 31, s. 209 (F). There, the adoption in connection with a business of any mark that falsely suggests a connection with any living individual, or that consists of or closely resembles the portrait of any individual who is living or who has died in the last 30 years, is banned. The affected individual may, under those provisions, obtain an injunction against the adopter, without proof of injury or damage. So the well-known Rothschild family successfully relied both on their publicity rights and on s.9 of the *Trade-marks Act* to stop a Toronto cigar merchant calling himself “Rothschild at Yorkville.” (*Baron Philippe de Rothschild S.A. v. La Casa de Habana* (1987), 19 C.P.R.(3d) 114, 17 C.I.P.R. 185 (Ont. H.C.J.). See also *Carson v. Reynolds*, [1980] 2 F.C. 685, 49 C.P.R. (2d) 57 (T.D.)).

the legal incidents developed for IP law tend to spill over by analogy to personality rights.

So what exactly are patents, trademarks and copyrights, and what they are for?

To deal with the second question first: theories abound on what IP rights are for, but the most justifiable theory is economic. Creative work can cost time and effort to produce; it is cheap to replicate. Without protection few, or fewer, workers would be encouraged to toil in those fields, and their output would be inferior to what would be created under conditions of no free riding.

As for what IP rights look like: take, first, patents. Patents are granted to protect new, non-obvious and useful inventions. They last for twenty years from the date an application is filed with a patent office. A patent prevents everyone within the granting territory from exploiting the invention, even independent creators who know nothing of the earlier invention. In recent years, patents have come to be granted over not only mechanical products and processes, but also (somewhat controversially) over such technologies as computer programs, business methods and genetically engineered higher life forms. The last-mentioned form of technology recently came from the Supreme Court of Canada in the guise of the question whether or not a mouse implanted with a cancer gene could be patented in Canada. The mouse had been patented in the U.S. and Europe but the Supreme Court, dividing 5:4 and reversing a 2:1 decision of the Federal Court of Appeal, decided that higher life forms could not be patented under the current *Patent Act*. The technology was beyond what the *Act* ever envisaged, and it was for Parliament to decide whether and, if so, how to provide it.²⁹ The setback for biotechnology patenting is, however, likely to be only temporary. Where stakes are high, being odd man out in the IP world does not generally last for long.

The law of copyright traces back to the early eighteenth century—some say even earlier. It used to protect just books but judges soon expanded that to include any printed piece of paper: *e.g.*, a single page of sheet music. Now it is designed to stop the copying of an extraordinarily wide range of things—almost anything written, drawn, or expressed in any way—from e-mails to databases, from elaborate artwork to children's finger-paintings, from opera to broadcast call signals. Unlike a patent, copyright protects only against copying, not independent creation, but copying is broadly

29. *President & Fellows of Harvard College v. Canada (Commissioner of Patents)*, [2002] S.C.J. No. 77, 2002 SCC 76, rev'g [2000] 4 F.C. 528, 189 D.L.R. (4th) 385 (C.A.), rev'g [1998] 3 F.C. 510, 79 C.P.R. (3d) 98 (T.D.), aff'g Commissioner of Patents' decision of 4 August 1995.

construed, perhaps too broadly.³⁰ Acts such as translation, public performance, broadcast, and even some renting (in Canada, over sound recordings and computer programs) fall under the copyright holder's control. Copyright lasts a long time: now life of the author plus fifty years (life plus seventy years has recently become the European and U.S. norms).

The third pillar of IP is trademark law. Trademarks make the economy function smoothly. Businesses use brands to advertise their products and services; consumers rely on brands to buy what they want or feel they want, and shun what they do not. The law has long supported efforts to stop businesses from wrongly diverting consumers' buying decisions. The trader who first supplied consumers under a particular brand could stop other traders from using that brand, or a confusingly similar one, to capture custom that rightly belonged to the first trader. True, consumers had some recourse in such cases: they might get a refund on returning a product they had mistakenly bought. But this occurred infrequently: they might never discover their mistake; the product might do the job anyway; it might be consumed before the mistake was found out, or it might just not be worth the time and trouble needed to undo the error. Brand owners who were injured in this way certainly had a major incentive to clamp down on false marketing, and their efforts were supported by governments and courts alike. Governments set up trademark registries where brand owners could file their trademark claims, and also set up schemes to ease the resolution of disputes over ownership and use of competing marks. Even without such registries, courts developed the principles of common law and civil law to give traders recourse against those who would lure customers away by deceptive marking.

II. *Part Two*

That IP is now everywhere, in the sense that it surrounds us in most of our working and leisure environment, is a proposition easily proved. Those who sit in front of a computer all day browsing the Internet and proprietary databases—so-called “knowledge” workers: a term that encompasses professors, money traders, even lawyers and judges—need little proof of that. The content we see, hear or otherwise access is all covered by IP of one sort or another.

Quite apart from the Internet, IP is everywhere. We are surrounded by it. The packaged food we buy or eat, the clothes we wear, the products we

30. For example, subconscious copying can be infringement (*Abkco Music v. Harrisongs Music, Ltd.*, 722 F.2d 988 at 999 (2nd Cir. 1983), involving the late George Harrison).

use at home or at work, all carry trademarks. I need only mention ‘Coca-Cola’, ‘Levis’, ‘IBM’, ‘Microsoft’, ‘Nike’, or ‘Seiko’, and wherever I am in the world, and whatever other language people speak there, those words will be understood. McDonald’s has succeeded where Esperanto has failed, in creating a world language—no doubt, limited in imagination, communicative purpose and range, but, within those parameters, supremely effective.

The e-mails and letters we write, the notes we take and make, the computer programs we use, the websites we access, the files we download (with the copyright holder’s consent, of course), the television programmes we see, and the radio programmes we hear—all carry automatic copyright protection. The cars we drive, the buses we take, the products we use—all are either covered by patents, or contain critical parts or accessories that are patented. The food we eat may come from plants that may be patented or protected by plant breeder rights.

Even the house where we live or the building in which our apartment is located, unless it is ancient (Georgian—*i.e.*, George VI—or earlier?), is protected by copyright. Ornate or humble, attractive or an eyesore, the building is classified by copyright laws as an architectural work, a subset of artistic work, a category buildings share with paintings and sculpture. If the structure’s design is original to its author—be that person an architect, designer, builder or a simple layman—then nobody can copy all or a substantial part of the design, without the consent of the author or whomever he may have transferred the copyright to. Sometimes one may be even unable to make additions or changes to the building without getting the author’s consent. Authors—and architects and designers are classed as authors—may have “moral rights”: they (and, after death, their estate) can veto alterations or additions that might prejudice the author’s honour or reputation.

The phenomenon is worldwide. In 1992, Canada committed itself in *NAFTA* to high levels of IP protection. The U.S., followed by Europe, insisted on similar high levels of IP protection for everyone who wished to be part of the World Trade Organization, and so it came to pass with the annexing of *TRIPs* to the *WTO Agreement* in 1994. The *WIPO Internet Treaties of 1996* committed adherents to the imposition of strict copyright controls on material passing over the Internet.

III. Part Three

Yet difference and variation have always been features of IP law. This is obvious when one looks at the different schemes of protection within IP

law itself. There is no logical reason why books cannot be patented, and indeed for a period in British history they were: for long the King's Printer had patents over the printing of the authorized version of the Bible. Eventually, however, copyright became the property of choice for books, and patents were kept just for inventions. The terms of copyright and patents were initially very similar: fourteen years for patents, fourteen years with a further right of renewal of fourteen for copyrights. Eventually, however, copyright developed its own internal logic and grew ever further apart from the patent system, and trademarks too took their own separate course.

The present IP system is as different today from the systems of the 18th century as today's technology is from the technology of that century. States deliberately developed their policies to suit their own economies and states of development. In the 19th century, the U.S. did not extend its copyright law to foreigners; it wanted foreign—particularly British—books and ideas to spread quickly and cheaply in the U.S.; its publishers were happy to distribute foreign books at no cost, and Charles Dickens was ridiculed when he toured the U.S. urging them to recognize his copyrights. Canada's 19th century history too involved trying to import cheap unauthorized U.S. reprints rather than the dearer editions British publishers made available.

How times have changed. Today, countries that do not recognize U.S. copyrights are called thieves and pirates by U.S. media producers and are threatened by their proxy, the U.S. Trade Representative, with trade sanctions. Canada too has sometimes joined the U.S. chorus.

What is lost from this discourse is the obvious point that there is no single platinum standard IP law. Countries at different levels of cultural and economic development do not need or want an IP law that has been developed and refined for countries having a very different culture and economy. This point was glossed over in the globalization rush of the late 20th century, but will not go away.

IV. *Part Four*

So, one may say, what? Why should not high levels of protection be granted to creative and innovative work? Does not the very presence of so much IP-protected work prove that the system is working? If IP were not all around us, there would be fewer worthy works around, and that would be a bad thing.

The argument is good if the premise is valid: that without IP there would be in fact less innovation and fewer worthy works. This proposition may be empirically true for some works and activities, but it is demonstrably untrue

for others. The key is to identify those classes of work where production is less than desirable.

As for cases where work would be produced with or without IP protection: consider architecture. There was no copyright law covering architecture or anything else in ancient days; yet buildings that were extraordinary, judged by standards then and now, were designed and erected throughout the ancient world. Indigenous people needed no copyright laws to encourage them to design effective dwellings: harsh nature provided the incentive. In international copyright law, architecture was unprotected before 1908; unprotected in the U.K. before 1912, in Canada before 1924, and in the U.S. before 1990. If the incentive argument holds, then the absence of copyright law would have produced no buildings at all in these countries before those dates, or at least fewer buildings and inferior ones at that. Simple observation denies the validity of those arguments. The fee paid to the designer and the consequent enhancement to reputation attending the showing of his work were most often his or her incentive.

The incentive argument has little force in the production of vast classes of work, both in days gone past and now. In Canada, as in other Commonwealth states, legislation is said to have copyright. Do legislatures produce more or better legislation because copyright spurs parliamentarians on? (Libertarians would certainly argue for the withdrawal of copyright if legislators would be discouraged from legislating more.) What of judges' reasons for judgment, for which copyright has equally been claimed? Would any judge refuse to write if his reasons had no copyright? Has any judge written better because they had?³¹ Would Michelangelo have painted or sculpted better or more had there been copyright laws then in place (there were not)? Would more computer programs have been created during the 1970s with strong IP rights (protection then was, at best, uncertain)?

Equally consider the question of rights. U.S. and U.K. authors were unprotected in each other's country during most of the 19th century, and they knew it. In theory, fewer books should have therefore been written in the 19th century because authors or publishers would get no return on unauthorized foreign publications. There is no empirical support at all for that theory. Nineteenth century readers had plenty of art, music, literature and drama to choose from. Would—could—Dickens have written any more than he did, even though he knew he would be immediately copied in the U.S. without authority or recompense? Harriet Beecher Stowe kept writing for the rest of her life even as *Uncle Tom's Cabin* continued being widely

31. See David Vaver, "Copyright and the State in Canada and the United States" (1996) 10 I.P.J. 187 [Vaver, "Copyright and the State"].

published worldwide without her authority. She continued although she also knew that her work could be translated even in her own country into other languages: in 1853, she lost a U.S. court case against an unauthorized German translator of *Uncle Tom's Cabin*, even though she planned herself to bring out a German edition.³² Clearly, writers wrote and publishers published despite what, to their and our eyes, appear to be quite defective and primitive copyright laws.

To avoid misunderstanding, I am not arguing in favour of depriving copyright holders of the right to control translations. Irrespective of incentive arguments, such rights may be worth granting for fairness reasons. But that shifts the argument to more unstable and debatable grounds. Fairness arguments cannot avoid questions of costs and benefits. The cost of granting additional copyrights is clear: the more rights are held by an IPR holder—whether on what is protected or the degree to which it is protected—the less liberty of action other persons will have. Restricting the liberties of all, including the right to compete, create or innovate within another IP's field, may be more costly overall than granting more rights to some.

Moreover, the costs and benefits may vary depending on the time and place. That is why a single standardized IP law worldwide seems a poor object to strive for. Would good IP policy for the U.S. or Canada or the U.K. inevitably be so for Rwanda or Oman or Fiji? Would good policy for the U.S. necessarily be good policy for Canada?

Consider the following example. A few months ago, a musical group called The Planets issued a record album which included a track titled "One Minute Silence," attributed on the cover to John Cage and one of the group's members, Mike Batt. The title was quite accurate: the track comprised a minute's silence. When the record was released, the publishers of John Cage's "work" entitled 4'33" complained that Batt had infringed the copyright owned by Cage's estate. Cage's score reads thus on an otherwise blank page: "4'33" FOR ANY INSTRUMENT OR COMBINATION OF INSTRUMENTS."³³ The publisher, the alleged "right" holder, argued not only that Cage's work had copyright but also that Batt had infringed that copyright by his inclusion of a performance of a substantial part of the piece on the record.

32. *Stowe v. Thomas*, 23 Fed. Cas. 201 (ED Pa. 1853).

33. John Cage (1993). 4'33" (Original version), Edition Peters, No. 6777a. This version, which contains a 1960 copyright notice, adds 10 pages (or 12 pages, depending on whether one counts the back inside and outside cover), on some of which appear vertical ruled lines, arranging time and space according to the formula: "1 page = 7 inches = 56". This addition is of intellectual interest only and does not seem to modify any perceptible auditory feature of the work.

This all sounds quite amusing, except that the publisher seemed to be in earnest and the case in fact settled “without prejudice” on Batt’s paying Cage’s estate an undisclosed sum, widely reported as £100,000, although Batt says it was less. Unfortunately, U.K. and other Western laws, as currently structured, allow such jokes to be plausibly and seriously played. Modern copyright legislation deliberately leaves the definition of a musical work vague. Standards of infringement are similarly vague: a “substantial part” of the work cannot be reproduced, but “substantiality” is treated as a question of “fact and degree,” which gives lawyers and courts plenty of scope for fuzzy argument and reasoning.

A newspaper columnist, dealing with the Cage/Batt imbroglio, had this comment on the infringement issue:

My totally uninformed opinion is that one minute of silence is as different from 4 minutes and 33 seconds of silence as Florida is from Alaska. If a pianist sits at the keyboard for a minute and doesn’t play a note, you might not be sure if he is doing so intentionally or if he is simply daydreaming about Reese Witherspoon. When the pianist sits motionless for 4 minutes and 33 seconds, however, you can be pretty sure that he is making some sort of artistic statement. Either that or he’s dead.³⁴

That’s not bad for a “totally uninformed opinion.” An argument along these lines is certainly on track on the issue of substantiality.

To cap matters, Batt now says he has registered copyrights “on all “silent musical seconds” from one second up to 10 minutes”—except for 4’33”. “I’ve got him [Cage] hemmed in,” Batt is reported as saying, “[h]e can’t move an inch, and he will be breaching my copyright if his piece is performed and overruns by a second or two.”³⁵ Silence can indeed be golden.

Cage died in 1992. His estate can therefore continue to claim copyright in 4’33” throughout the world until the end of 2042 and in some countries even until the end of 2062. Perhaps the claim will be exploded before then as a mere bubble. Music presupposes sound, and Cage’s work is the antithesis of that. It may be merely an unprotected “idea” rather than the protected “expression” of an idea. So it may have no U.K. copyright.

34. David Grimes, “Sounds of silence prompt noisy feud” *Sarasota Herald-Tribune* (3 October 2002) E1 at paras. 10-11. Grimes added: “Also, I am of the opinion that the quality of silence has changed over time. Fifty years ago, it was not that big a deal to pass 4 minutes and 33 seconds of your life in complete silence. Today, it is unheard of, unless you live in a cave in Tibet, and even there I bet a phone solicitor would find a way to ring you up at dinnertime just as you’re lifting that first spoonful of yak soup to your lips.” (*ibid.* at para. 12).

35. “The Scurra” *The Mirror* (3 October 2002) 14. Where exactly Batt has “registered” his copyrights is unclear. The U.K. has no copyright registry. Maybe Batt has registered in the U.S., or perhaps he is just making a point.

Even if Cage's work is copyright, consider the question of infringement. Cage's claim would have been difficult had Batt not attributed the track on his album to Cage. Having "produced" "his" 4' 33", Cage has no monopoly over silences of this or any length, at best, only over those silences that reproduce his. Veterans observing a minute's silence on Remembrance Day can do so regardless of Cage. They "create" their own silences; they do not re-create Cage's. Silence pre-dates Cage.

Even were a particular period of silence attributed to Cage, one returns to the point that Cage's work is, if the expression of an idea, a simple expression. Judges say that the simpler an expression, the more exact must the copy be before it can be labelled as "substantial." Mike Batt's instincts in claiming copyrights in longer and shorter silences may have a legal basis: 4'30" silence might infringe Cage's copyright; 1 minute or 10 minutes probably would not.

One could argue that a law that pressures musicians to buy off claims such as Cage's is absurd and cannot morally be imposed on other states. A more modest argument against ubiquity and uniformity is also available. Just because one country is willing, for its own reasons, to protect a particular activity does not mean that another country need accept that decision. Even if Cage's work were protected by copyright in the U.K., Canada need not extend it a Canadian copyright, nor need any another country do so under its law. That is indeed the current position under international law for copyright³⁶ but not for patents. States must make patents available for any new, non-obvious and useful inventions "in all fields of technology."³⁷ They cannot discriminate by place of invention, field of technology, or by whether products are imported or locally produced. Exceptions from these standards exist but they are few and narrow.³⁸ Developed countries are even now pressing to eliminate these exceptions one by one, eventually to nothingness.

It is important to note the ideology at work here, for simplification trends in one field of IP have a habit, like seeds in the wind, of crossing to other fields. As goes patenting in *TRIPs*, so may go the law of copyright

36. *TRIPs*, *supra* note 13, Part II, s. 1, art. 9(1) compels the observance of *Berne* standards on subject-matter. *Berne* allows member states some discretion on the protection of disputable works such as "4'33". Subject-matter standards depend on the state where protection is claimed, whether the work's country of origin or any other country affords that work copyright (*Berne Convention for the Protection of Literary and Artistic Works*, of 9 September 1886, completed at Paris on 4 May 1896, revised at Berlin on 13 November 1908, completed at Berne on 20 March 1914, revised at Rome on 2 June 1928, at Brussels on 26 June 1948, at Stockholm on 14 July 1967, and at Paris on 24 July 1971, and amended on 28 September 1979, 1161 U.N.T.S. 3, 4(F), 31(E), U.S. Treaty Doc. 99-27 (entered into force 10 October 1974), art. 5(2) [*Berne*]).

37. *TRIPs*, *ibid.*, Part II, s. 5, art. 27(1).

38. *Ibid.*, Part II, s. 5, arts. 27(1)-(3).

and trademarks. The ideology in patents clearly derives from the current U.S. approach to patenting.³⁹ A U.S. patent can be obtained, in the rhetoric accepted by the U.S. Supreme Court, for “anything under the sun that is made by man.”⁴⁰ The premise is that any advance, good or bad, deserves the reward of a patent. The patent system is there to grant property rights. Property is thought to be good in itself and therefore deserving of encouragement: the more property there is, the greater the incentive to use and profit from it, and the better off society will be as a whole (ignoring distributive effects). Under this conception, the grant of property is sharply distinguished from its use. Just as a gun can be used for good or ill, so may a property right. Just as any quantity of guns can freely be made, so may any quantity of patents be created. Just as it is the job of other laws—tort or criminal law—to regulate the use of guns, so it is the job of such other laws—including competition law—to regulate the use of patent rights.

This ideology of the patent system is not the only one prevailing in the developed world. A different view holds in Europe. There patents are indeed property rights but their grant is not automatic. Technology may be good or bad; if bad, it should be discouraged early on. Certainly, there should be no incentive to develop anti-social technologies by offering the prospect of a patent, or indeed any other privilege or financial grant. So it was under the first English patent law, the *Statute of Monopolies* of 1624: no grant of patent for an invention would be made that was “mischievous to the state by raising prices of commodities at home, or hurt of trade, or generally inconvenient.”⁴¹ For such reasons, patents for new machinery had been denied in the 16th century where the machines would throw workers out of jobs and create social unrest.⁴² Similarly now, a European patent cannot be granted for an invention the exploitation of which would be “contrary to ‘*ordre public*’ or morality.” Patenting in Europe is not a morally neutral act: “The state, as granting authority, cannot disclaim responsibility for the inventions for which it grants protection.”⁴³ Inventors can claim no natural right to benefit from immoral or socially disruptive activity, however

39. This and the following paragraphs are based on David Vaver, “Invention in Patent Law: A Review and A Modest Proposal” (2003) 11 Int. Jo. Law & IT 286 at 296 ff.

40. *Diamond v. Chakrabarty*, 447 U.S. 303 at 308 (1980).

41. *Statute of Monopolies*, 1623-24 (U.K.), 21 Ja. 1, c. 3.

42. More recently, in states which retain the 1624 formula—*e.g.*, Australia and New Zealand—the question whether business methods, medical and surgical treatments are patentable or not has been decided partly by reference to whether the grant of a patent would be “generally inconvenient.”

43. William R. Cornish, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights*, 4th ed. (London, England: Sweet & Maxwell, 1999) at 228.

ingenious. As a concession to Europe, this approach is reflected in a *TRIPS* exception.⁴⁴

These may not be the only theories of IP protection that merit consideration. Neither seems so morally superior that it warrants imposition on unwilling third parties. I have elsewhere criticized the rhetoric that insulates IP rights from being balanced by rights of at least equal importance:

the right of people to imitate others, to work, compete, talk, and write freely, and to nurture common cultures. The way intellectual property should be reconciled with these values—or vice versa—has changed much over time and continues to vary among countries and among legal systems. The adjustments occur for social and economic reasons; they are not preordained by natural law. Where a particular line should be drawn can certainly not be answered by circularities like “intellectual property is property . . .”⁴⁵

V. Part Five

Let us return to the idea noted at the beginning of this discussion, that there should be “one North American economic space.” For IP, the practical expression of this idea would mean the creation of identical IP laws throughout the two countries. One might welcome that idea—if the laws were all or most those that one liked. I expect I might like some, but not most. The fear is not simply that U.S. law would largely supplant Canadian law, although this is what happened in significant sections of *NAFTA* and *TRIPs*. Rather, the stage would be set for a further increase in IP protectionism on both sides of the border simply for the sake of uniformity, not because of any forthcoming proof that additional protection was needed as an incentive to create or innovate. In Europe, the experience has been to harmonize up, not down: the highest, not lowest, common denominator of protection tends to win out. Here is the irony, writ large, of the presence of IP in a free trade agreement. IP is mostly about insulating large sectors of the economy from free trade. It is about restricting trade and competition both within the country and across borders. It is truly a rat in a squirrel’s coat.

Consider some random examples where the two laws now differ and what “ironing out the differences” may result in.

44. *Convention on the grant of European patents*, 5 October 1973, 1065 U.N.T.S. 199, 13 I.L.M. 268, Part II, c. 1, art. 53(a); reflected in *TRIPs*, *supra* note 13, Part II, s. 5, arts. 27(2)-(3).

45. David Vaver, *Intellectual Property Law: Copyright, Patents, Trade-marks* (Concord, Ont.: Irwin Law, 1997) at 5-6 [Vaver, *Intellectual Property*].

Trade-marks

- U.S. law protects well-known trademarks not only against confusing uses but against dilution. Had Dalhousie Law School advertised my lecture as ‘The Greatest Show on Earth’, under U.S. law not only may it have been liable for misleading and deceptive advertising, but also Ringling Bros. Circus could have sued under trademark law to stop this use. Nobody would have been misled by the Law School’s claim into believing that I was about to do a trapeze or elephant act; yet since ‘The Greatest Show on Earth’ is a registered mark and famous to boot, its owner can stop even non-confusing non-competitive uses in the U.S. that dilute the distinctive quality of the phrase.⁴⁶

Canada also has an anti-dilution provision in its *Trade-marks Act* but it is poorly drawn and—fortuitously, though, as some think, fortunately—it does its job equally poorly.⁴⁷ In Canada, the Michelin Tire Company could not use trade-mark or passing-off law to stop a trade union from using a caricature of its ‘Bibendum’ registered mark in leaflets designed to persuade workers in Michelin’s Nova Scotia plants to join the union.⁴⁸ In the U.S., Michelin would have had a better chance, unless the union could successfully have pleaded free speech rights (a defence that failed dismally in Canada).⁴⁹

Levelling U.S. and Canadian law would almost certainly require Canada to amend its anti-dilution provisions to grant greater protection to trade-mark owners. Under such a law, Ringling Bros. might have prevailed against Dalhousie Law School in my hypothetical above. Michelin might now win against the union unless Canadian courts are willing now to take a wider view of the union’s free speech rights than prevailed in the actual case.⁵⁰

46. *Ringling Bros. v. B.E. Windows*, 937 F. Supp. 204 (S.D.N.Y. 1996). The U.S. Supreme Court recently raised the barrier for these suits by requiring the claimant to prove actual loss of distinctiveness for its mark and actual damage: *V Secret Catalogue, Inc. v. Moseley* [2003] SCT-QL 44.

47. For example, the provision, s. 22 of the *Trade-marks Act*, R.S.C. 1985, c. T-10, prevents comparative advertising at point-of-sale but, oddly, not on radio or television, unless the advertisement is recorded and viewed near where the goods are sold. See *Clairol International v. Thomas Supply & Equipment Co.*, [1968] 2 Ex. C.R. 552, 55 C.P.R. 176, approved in *Syntex v. Apotex*, [1984] 2 F.C. 1012, 1 C.P.R. (3d) 145 (C.A.).

48. *Compagnie Générale des Établissements Michelin-Michelin & Cie v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW Canada)* (1996), [1997] 2 F.C. 306, 71 C.P.R. (3d) 348 (T.D.) [Michelin], rejecting the claim under s. 22 of the *Trade-marks Act*, *ibid.* See also Vaver, *Intellectual Property*, *supra* note 45 at 216-19.

49. See *Lanham Act*, 15 U.S.C. 1125(c)(4), as am. by the *Federal Trademark Dilution Act of 1995*.

50. *Michelin*, *supra* note 48, may no longer be good law on its view of Charter free speech rights. See *British Columbia Automobile Assn. v. Office and Professional Employees’ Int. Union* (2001), 10 C.P.R.(4th) 423, 85 B.C.L.R. (3d) 302 (S.C.); *R. v. Gignard*, [2002] 1 S.C.R. 472, 209 D.L.R. (4th) 549, 2002 SCC 14.

- Smells are probably not registrable in Canada because a mark must be clearly described and visually depicted. Such constraints did not inhibit a U.S. appeals panel in the Patent and Trademark Office from deciding in 1990 to accept a smell as a registrable trademark, in this case, plumeria scent added to sewing thread.⁵¹ Presumably the board members were keen gardeners and could, in a blindfold test, differentiate a plumeria from a petunia. Whether the general public was as discerning is debatable. To vary Dorothy Parker's *bon mot* about horticulture: you can take a board to culture but you cannot make it think.

Canada would nevertheless be expected to follow the U.S. route, either through legislation or court decision, for the sake of uniformity, even though other jurisdictions resist registration of such marks, for good reason. Take the isolated case where fresh cut grass has been registered in Europe for tennis balls.⁵² Smell may attract or repel buyers, even of tennis balls; one suspects that nobody has sought to register the smell of horse manure for them nor, for that matter, the smell of the interior of well-worn tennis shoes. But should the first trader who decides to make his product artificially smell better be granted a state monopoly for that feature against other like-minded traders? Generally, one should resist the temptation to grant monopolies over selling features of a product that may make it more attractive to buyers, but which at best are merely secondary identifiers of origin. The consumer has already usually identified the product through the word, symbol or design mark that has been placed on it. To allow that secondary characteristic to operate as a mark is to prevent rival traders from making their product similarly attractive. It is to grant a limited, but nevertheless quite significant, form of monopoly over a selling feature.

After a brief flirtation with smell marks, European trademark registries have gone off them.⁵³ Most require, as in Canada, that a

51. *Re Clarke*, 17 U.S.P.Q.2d 1238 (T.T.A.B. 1990).

52. *Vennootschap Onder Firma Senta Aromatic Marketing's Application*, [1999] E.T.M.R. 429 (Eur. Comm. Trade Marks Office, Second Board of Appeal) [*Senta Aromatic*]. See Debrett Lyons, "Sounds, Smells and Signs" [1994] E.I.P.R. 540. The odour of beer for dart flights, and of roses for tyres, were registered as trade-marks in the U.K. before the Patent Office took stock and decided to register no more smells.

53. A smell mark has been declared ineligible for registration as a European Community trade mark because such marks cannot be represented graphically (*Sieckmann v. Deutsches Patent und Markenamt*, Case C-273/00 (12 December 2002) (E.C.J.) aff'g the Advocate General's Opinion (6 November 2001), disapproving of the *Senta Aromatic* case, *supra* note 52).

mark be graphically depicted accurately in words or by a drawing, so that other users of the registry know precisely what is being claimed and what they must steer clear of. Colours and shapes may no doubt be accurately displayed, but what of sounds, smells or tastes? Can the smell of “freshly cut grass” be accurately described for these purposes? Does all grass smell the same? Is the smell admixed with the smell of fumes from the gas-driven mower? Does the grass smell the same from a distance as from close quarters? Does it help to know that the mark holder said it tested “14 grass fragrances—including clay court and hay—before opting for the freshly cut grass odour?”⁵⁴ Will a spectrogram produced by an electronic nose technologist suffice to delineate it? Or a reference to the chemical compound that produces the smell? A deposit of the smelly item?⁵⁵ Imagine what might now be registered: “Cricket balls that smell of jock-straps? Footballs that smell of feet? Golf balls that smell of money?”⁵⁶ More to the point, how will a rival trader who wants to apply a smell to his product know when he has produced something confusingly similar? Will the smell of “newly mown hay” or “freshly pruned trees” infringe?⁵⁷ Will an initially neutrally smelling ball that, with use, acquires the smell of grass become infringing?

- Celebrities’ rights of publicity currently arise in the U.S. under state legislation or common law decision. Not all states, however, recognize such rights. An attempt to enact a federal publicity rights law has so far stalled. In Canada, publicity rights are probably part of the law of all the provinces, either at common law or statute, although, as noted earlier, much about them is yet unclear. Will not harmonization compel North American-wide recognition of such rights at a high level—say, celebrity’s life plus 50 (70?) years, as in California—without debate on whether the fact or level of these rights is a good thing or not?

54. Steve Bird, “Game, Scent and Match for Grassy Tennis Balls” *The Times of London* (25 May 2000) Home News.

55. *John Lewis of Hungerford Ltd.’s Trade Mark Application* (2000), [2001] R.P.C. 28, [2001] E.T.M.R. 104 (Trade Marks Registry Appeal).

56. Graeme Leech, “Melba” *The Australian* (26 May 2000) Features 14 at para. 12.

57. No doubt the objections to registering smells as trademarks can be overcome. In patent law, when it proved difficult to describe a biotechnological invention adequately in words, the *Patent Act* was changed to permit the deposit of samples to help round out the disclosure. The *Trade-marks Act* could easily be amended to relax the requirement for drawings and visual depictions of the mark by, for example, allowing a sample of the smell to be deposited (and perhaps periodically refreshed as it degraded), and to suffice as a substitute for or complement to the writing requirements. The question is whether we should strive to overcome the requirement for visual depiction.

Copyright

- Copyright in Canada currently runs for the life of the author plus 50 years. In the U.S., it runs for life of the author plus 70 years; so too in Europe. Will the U.S. now peel back its term by 20 years, or will Canada have to raise its term to life-plus-70 too? Few can doubt the answer, and, since the U.S. applied its increase to both new works and existing works, then—assuming this feature survives its current constitutional challenge before the U.S. Supreme Court (it did)⁵⁸—Canada would do this too.
- In Canada, blank tapes and recordable CDs carry levies to compensate for private home copying of music. Will the U.S. enact a similar levy?
- Databases are probably protected in Canada, even those that compile existing material and involve no creativity. Only “original” work is protected but originality may include industrious collection. So white pages telephone directories are probably copyrightable in Canada.⁵⁹ Such directories cannot constitutionally be protected in the U.S. because the copyright clause in the U.S. Constitution has been interpreted to require some element of creativity—true “authorship” beyond sorting material alphabetically is required for work to be original there.⁶⁰ Would Canada adopt the U.S. standard of creativity and withdraw copyright from existing merely industrious databases? Or could the U.S. enact a “low-threshold-of-originality” database law mirroring Canada’s, under its powers to implement treaty obligations?⁶¹
- One area where the level of copyright barrier may not be lifted is for government works. In the U.S., works of the federal government have long had no copyright protection, nor have federal and state legislation and judicial opinions: the people have already paid once for the works through taxes, and democratic ideals require that the country’s laws be freely accessible to all.

Canada has inherited the British attitude towards such matters: the Crown claims, either under the *Copyright Act* or under the ancient

58. *Eldred v. Ashcroft*, 123 S. Ct. 769 (2003).

59. *CCH Canadian Ltd.*, *supra* note 25, disapproving *Tele-Direct*, *supra* note 24, on this point.

60. *Feist Publications v. Rural Telephone Service Co.*, 499 U.S. 340, 111 S.Ct. 1282 (1991).

61. See *supra* note 58.

royal prerogative, exclusive rights over legislation and possibly even court opinions (although the judges sometimes claim they own that copyright). Canada's stance is shared by some other Commonwealth countries and one or two in Europe, but the trend worldwide is for such material not to have copyright for public policy reasons.⁶²

Many would be pleased to see Canada and the provinces lose any possibility of monopoly claims over government works, laws and court opinions. This gain is however more than offset by the greater protection Canada would have to extend to private sector works.

Patents

- In the U.S., business methods, computer programs and methods of medical treatment are patentable. Patenting such material in Canada (and in Europe, although less so now for computer programs) is difficult. Undoubtedly Canada would have to change its law to make these activities clearly patentable. After all, provisions on business methods and computer programs already appear in *TRIPS*-plus treaties that the U.S. has negotiated with developing countries. Canada would also need to affirm that it would not make or continue any of the exceptions to patenting that *TRIPS* allows: anything under the sun that is made by man—the U.S. patenting standard—would become Canada's too.
- Would Canada have to scrap the Patented Medicine Prices Review Board, established a decade ago to oversee price rises for patented pharmaceuticals? Would Canada extend, as the U.S. does, the duration of patents for pharmaceuticals to compensate for the time lag in getting departmental clearance for marketing?
- In Canada, anyone may experiment with a patented invention to see how it works and to try to improve it. Such experiments are forbidden in the U.S. One may experiment with an invention out of curiosity but with no direct or indirect commercial motive. In October 2002, Duke University was told by a U.S. appeals court that the ordinary research work it conducted would be classed as commercial for the purposes of the patent law. A research university attracts better faculty, students and grants than a non-research one; it can therefore be considered as commercial an enterprise as any firm listed on the stock exchange.⁶³ Under this rule, much scientific research in

62. See generally Vaver, "Copyright and the State", *supra* note 31.

63. *Madey v. Duke University*, 307 F.3d 1351 (Fed. Cir. 2002), cert. den. June 27, 2003 (U.S.S.C.).

Canadian universities would have to cease or, at least, come under the control of patent holders and become subject to their scrutiny and direction. Here is an area of comparative advantage Canada might well wish to preserve. The U.S. attitude is the strictest in the world. Europe lets competitors, let alone universities, experiment in patented inventions. It thinks, rightly, that innovation will occur at a higher rate, the more people are entitled to do it.⁶⁴

VI. Part Six

To return to the question posed by this lecture: is more IP everywhere better?

On looking at the laws of the E.U., Canada and the U.S., one finds IP laws reach out everywhere. They need not. In many areas, people will be as creative without IP rights as they are with them: in fact IP rights may hamper their creativity, especially where existing work is experimented with, built on and improved. The law is unnecessary to encourage the activity; instead it acts as an inhibitor.

I mentioned the *Michelin* case earlier.⁶⁵ The Michelin trademark was registered under both Canadian trademark and copyright law. Ultimately, Michelin managed to stop the union, not because it was infringing the trademark (it was not) but because it was infringing copyright in the trademark. Copyright protection here is cumulative and entirely adventitious. Even without any copyright law, Michelin would have produced its Bibendum drawing and adopted it as a trademark. Michelin gets adequate protection for its logos under trademark law. It does not need the protection of copyright law. It certainly does not need the level of protection the court gave it, a right to prevent caricatures of the symbol to convey information effectively.

This level of protection is also found in other developed country jurisdictions. It is unnecessary there. It is certainly unnecessary in the developing world. *TRIPs* insists on same standards everywhere in the world, at least for nations which wish to be part of the world trading bloc. The model is very much a Western model, inspired by U.S. and European law. Canada supinely backed this model. In fact, in *NAFTA*, Canada was the experiment for the new world IP order.

64. See e.g. the German cases where clinical trials were permitted under the experiment exemption to the German Act, tracking that in the EPC: *Klinische Versuche (Clinical Trials) I* (1995), [1997] R.P.C. 623 (German Supreme Court); *Klinische Versuche (Clinical Trials) II*, [1998] R.P.C. 423 (German Supreme Court).

65. *Supra* note 48.

This insistence on high standards of IP protection in developing countries has had various unfortunate consequences. One is that developing countries themselves are now looking around to see how they can become part of this game. Traditional methods of employing herbal medicines used to be thought of as the common heritage of mankind. They were shared within communities and handed down. Developing countries now seek to enclose this knowledge: to claim IP rights in traditional knowledge. They too are becoming part of the Greek “feta” game: claiming exclusive rights in geographical indications such as Basmati and Jasmine rice and Darjeeling tea. They can hardly be blamed. Once the enclosure game has started, nothing is outside its logic.

Uniformity is sometimes useful.⁶⁶ Information assembly and product development today, more than at any other time in history, are boundless. Their place of production, distribution or reception is often a matter of chance. So, at first blush, IP rules concerning these activities should not differ according to such chance elements.

It is wrong, however, to overstate the benefits of uniformity. While attractive to theoreticians who like their law tidy, it may sometimes lack real-world relevance. Thus, e-surfing and e-commerce may function marginally better with common rules but, even without such rules, they may function well enough for most practical purposes. In principle, uniformity makes sense only if good rules are first chosen to be harmonized. Having one uniform, but bad, rule across a large territory seems a poor gain over having diverse, but less bad, rules.

The Globe and Mail features a ‘Thought du Jour’ entry on its front page and has run a competition for readers to come up with their own ‘Thoughts’. One entry in the issue published the following day after Drew Fagan’s NAFTA-plus article read:

A step backwards is a step in the right direction if you are facing the wrong way to begin with.⁶⁷

This ‘Thought’ fairly describes what has been happening with IP over the last decade or two. We should start stepping backwards in the right direction. We should ask ourselves whether extra IP protection is really needed and, where it is not, repeal it. We should certainly not ask others to keep marching forward in the wrong direction.

66. See David Vaver, “Copyright Developments in Europe: The Good, The Bad and the Harmonized” in Niva Elkin-Koren & Neil Weinstock Netanel, eds., *The Commodification of Information* (The Hague, Netherlands: Kluwer Law International, 2002) 223 at 236-37.

67. “Thought du Jour” *The Globe and Mail* (29 October 2002) A26. The entry was credited to Jaime Smith.