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Copyright Law and Postmodern Art:
Reconciling Property in Mass Media with Democracy

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A Thesis
in
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of
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ABSTRACT

Copyright Law and Postmodern Art: Reconciling Property in Mass Media with Democracy

Jonathan J. Sommer

This thesis is an analysis of the conflict between copyright law and postmodern appropriational artforms such as audio-visual collage. By looking at the philosophic foundations of copyright, authorship and property, and then surveying the current law of copyright and the reasoning of the judiciaries in both Canada and the United states, this thesis considers whether or not copyright is usurping the right of postmodern artists, in particular, and the citizens of Canada, in general, to freely express themselves in a critical dialogue with the mass media which has come to dominate their landscape.

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Introduction: The Issues

...the particular evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation: those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced in its collision with error.

-John Stuart Mill, On Liberty

What meaning does dialogue have when we are bombarded with messages to which we cannot respond, signs and images whose significations cannot be challenged, and connotations we cannot contest?

-Rosemary Coombe,

University of Toronto Faculty of Law

To the Canadian mass media, whether the medium be television, radio, newspaper, film or otherwise, there can be no more important or famous a law than Section 2(b) of the *Canadian Charter of Rights and Freedoms* which, since 1982, has been a part of our *Constitution*. That section guarantees to "everyone" the "fundamental freedom" of:

freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication

Similarly, the American Constitution, in the First Amendment, states that "Congress shall make no law... abridging the freedom of speech, or of the press".

It has become almost trite to speak of the importance of freedom of speech, and of the press, to the proper functioning of the democratic process in all of its various dimensions: political, social, academic, legal, and psychological. As with other essential principles which draw as much exaltation and reverence, however, the cliché status of freedom of expression has not been unknown to make it invisible to us in our daily thoughts and acts. Our legislatures and, as will be shown, our courts, bow with unquestioning awe at the obviousness of the section 2(b) axiom and yet, somehow, with eyes respectively cast towards the floor, see only the ground, and forget why they are bowing in the first place.

Professor Peter Hogg of Osgoode Hall Law School has discussed the three most important rationales for the constitutional protection of freedom of expression. For the first of these, Hogg refers us to the decision of the Supreme Court of Canada, written primarily by Rand J., in Switzman v. Elbling ([1957] S.C.R. 285) where Rand J. stated that parliamentary government was "ultimately governed by the free public opinion of an open society", requiring "the condition of virtually unobstructed access to and diffusion of ideas" (p. 358). The comments of Rand J. were expanded upon in the same case by Abbott J. who, in a separate portion of the judgment, noted that "the right of free expression of opinion and of criticism" were "essential to the working of a parliamentary democracy such as ours"(p. 369).

For the second rationale, Hogg directs us to John Stuart Mill's essay *On Liberty* (1859), wherein it is argued that the right to express one's opinions ought to be protected

as it is only by the "collision of adverse opinions" that truth can emerge. Hogg also notes that Oliver Wendell Holmes used this rationale in his dissenting opinion in Abrams v. United States ((1919) 250 U.S. 616), where he wrote that truth is brought out of a "free trade in ideas" by "the power of thought to get itself accepted in the competition of the market" (p.630). This particular rationale might also be supported as a legislative attempt to accelerate the teleological process making up Hegel's dialectical idealism, whereby history moves towards a greater and greater degree of socio-political perfection as ideas, constructs and systems, called "theses", are confronted with their opposites, or "antitheses", resulting in new and, necessarily more correct, theses.

The third rationale for the constitutional protection of freedom of expression is its role as an instrument of personal fulfilment. Hogg explains:

On this theory, which is to be found in some American judicial decisions, expression is protected not just to create a more perfect polity, and not just to discover the truth, but to "enlarge the prospects for individual self-fulfilment"¹, or to allow "personal growth and self-realization"². If expression is conceived in these broad terms, it covers much that is not speech at all: art, music and dance, for example." (p.784).

These three rationales for protecting freedom of expression are summarized in the official line of the Supreme Court of Canada as stated in Irwin Toy v. Quebec, [1989] 1 S.C.R. 927, by Dickson C.J., Lamer and Wilson JJ, in their joint majority judgment:

¹Nowak and Rotunda, *Constitutional Law* (4th ed., 1991) p. 940

²Tribe, *American Constitutional Law* (2nd Ed., 1986), at p. 787

(1) seeking and attaining the truth is an inherently good activity; (2) participation in social and political decision-making is to be fostered and encouraged; and (3) the diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated... (p. 976)

Although the Canadian constitutional provision, 2(b), which uses the term "expression" is, on its face, much broader than its American counterpart which covers only "speech", it does not seem to have been treated much more broadly, as will be shown later on in this paper.

And so, with the *Charter's* guarantee of freedom of expression as a backdrop, we now turn to the mass media and look to the area of law which is, with the possible exception of the regulatory legislation governing broadcasting, legally and often otherwise, the most important overriding concern, limit and *raison-d'être* for every single minute of airtime, every newspaper article and photograph, and every foot of film projected on a screen: copyright.

Copyright's power to determine what information we obtain, when and where we obtain it, and on what terms, cannot be underestimated. With very few exceptions, every morsel of media, be it as simple and inconsequential as a brief thank-you letter to a friend, or as complex and expensive as James Cameron's next "bigger is better" blockbuster action film, the law of copyright dictates who has what rights in regard to that media. In the example of the thank-you letter, copyright law automatically provides the author with the right to control the reproduction, sale, broadcast, translation, adaptation and modification of the letter. The author is also given the ability to profit, or not, from most of the letter's uses, and to sell the right to exercise those uses to others.

with possible restrictions on, among other things, the period, quantity, geographical area, media and language of reproduction. In the example of the blockbuster action film, it is most certain that the numerous copyrights attracted by this production, including copyright in the script, music, sets and images, have been divided up by hundreds (if not thousands) of pages of complex copyright licensing and sale agreements, most of which have been signed well in advance of the time at which the actual shooting begins.

There is a corollary effect caused by the extensive powers of ownership and control awarded by copyright - that creature of statute given substance in the Canadian *Copyright Act*, the single legislative instrument setting out all aspects of rights, exceptions, offences and remedies. The corollary effect is that with few exceptions, the public consumers of mass media are not permitted to engage in the retransmission or mirroring of the media which surrounds them and makes up much of their sensory, ideological, political, religious and social lives. Rosemary Coombe comments that:

Intellectual property laws... may serve to deprive us of the optimal *cultural* conditions for dialogic practice. By objectifying and reifying cultural forms – freezing the connotations of signs and symbols and fencing off fields of cultural meaning with “No Trespassing” signs – intellectual property laws may enable certain forms of political practice and constrain others (p. 69).

This results, arguably, in a non-interactive system of media control wherein the audience, unlike in oral cultures where the exact retelling of stories was encouraged, is actually prohibited, by both civil and criminal law, from commenting on or criticising the dominant voices of the mass media by using the same visual and sonic language as those

dominant voices in reply. Marvin Heiferman and Lisa Phillips. in Image World: Art and Media Culture. comment that:

In postwar America, media images have dominated our visual language and landscape, infiltrating our conscious thoughts and unconscious desires. In a century that has seen the intrusion of saturation advertising, glossy magazines, movie spectacles, and television, our collective sense of reality owes as much to the media as it does to the direct observation of events and natural phenomena.” (p. 13)

Television, for example, bombards its viewers with copyrighted media twenty-four hours a day, much of it in the form of advertising (which also includes trade marks), but remains relatively immune to the possibility that the broadcasted material will be absorbed by the audience, 're-told' and, possibly, edited for the purpose of creating something new, or in order to criticise the media from which it was spawned. Such forms of interaction are, in the current context of copyright law, nearly impossible, especially where those seeking to participate in such acts of appropriation are doing so without substantial funding or, to a greater extent, where the mode of appropriation is used to show the original material in a less than favourable light. Copyright, particularly in Canada, allows no defences or exceptions for these practices.

This aspect of the restrictive nature of Canadian (and global) copyright law becomes more and more problematic as we witness the expansion of the foothold which mass media has on our lives. While it can be presumed that the average nineteenth-century citizen of this country saw or heard little, if any, mass media as s/he walked down the street or went to work, such is no longer the case. It would be virtually impossible to

travel more than a couple of blocks in any Canadian city without being confronted with some copyrighted (or trademarked³) form of media. It might be said that we now live in a "media landscape", where the highways, streets, vehicles, people, toilets and even classrooms, are being replaced with media which is owned and which, if it is reproduced by its inhabitants, even in the form of a painting or sound composition, may result in a lawsuit, a fine, or even imprisonment.

It is impossible to say to what extent the practice of appropriational art, by visual, sonic or other means of collage, does exist or, more importantly, would exist, if it were not for the fact that it is, for all intents and purposes, an illegal artform. That appropriational art is somewhat elusive does not, however, furnish us with any sort of conclusive evidence as to its importance or potential. That is an aspect of this discussion which can only be explored by the practical task of actually creating more permissive copyright legislation, or by the courts in Canada and abroad employing more liberal and experimental interpretations of the legislation which already exists. For now, however, and for the purposes and scope of this paper, it is only possible to speculate as to what answers these queries might yield, and to argue, in a relative vacuum, that there are stalwart philosophical, constitutional and social reasons in support of the position that the grip of copyright ought to be relaxed, and the air and blood of democratic discourse be given a chance to flow. The arguments in support of this position will be advanced in the

³ During the writing of this paper, University of Toronto law professor Rosemary J. Coombe published her book, The Cultural Life of Intellectual Properties: Authorship, Appropriation, and the Law, which provides an often parallel, and excellently researched analysis of the problems confronted here, but with an emphasis on trademark law (which provides protection against copying and use of corporate symbols, names and logos).

three chapters of this paper: first, the crumbling philosophical foundation of copyright; second, current copyright law and postmodern artforms; and last, legislative and judicial solutions.

In the first chapter, we will undertake to examine and critique the logic underlying the basic principles and framework of both property law in general, and copyright in particular. In this way, an attempt will be made to show that there is little if any justification for upholding or expanding the scope of copyright or the degree of protection afforded authors and rights-holders. The chapter will provide a brief overview of the legislative and judicial pronouncements making up the current state of copyright in Canada, and then, by examining various philosophic perspectives on property, ownership and authorship, will seek to explore an alternative mode of looking at this most abstract and intangible form of property law.

The second chapter of this paper, Copyright and the Postmodern, provides an overview of the theory and practice of postmodern appropriational art, and then, by a detailed analysis of both American and Canadian constitutional, statutory and jurisprudential law, considers the reasons for what is, apparently, a failure of copyright to accept or allow the existence of this novel and innovative form of cultural discourse.

The third and final chapter of this paper has two purposes. First, it reviews the possible negative results of copyright's increasingly restrictive hold on the flow of expressive forms may have on the state of free, democratic discourse in and on mass media. Second, it uses these predictions as a jumping-off point for the structuring of

instead of copyright. This author owes her his gratitude for providing references, insights, supportive arguments, several of which are referred to herein.

various potential legislative and judicial reforms of copyright law intended to re-align copyright with justifiable principles of ownership, practical policy objectives and, most importantly, with a realistic consideration of the balance which must be struck between principles of property and of freedom of expression in a society which is, perhaps paradoxically, a democracy with a capitalist economic structure.

The sources from which this discussion draws its components are many. In the first chapter, the works of several philosophers are considered, as well as the statements and writings of influential authors of fiction, and artists. Also, there is some review of the development of copyright law as presented by several legal historians. The second chapter, which discusses copyright and the postmodern, draws from many sources in all forms of media: journals, from law, fine art and cultural studies; articles from newspapers, magazines, and internet websites; radio and magazine forums and interviews; even background discussions between the author of this paper with artists from various disciplines. And although every attempt has been made to understand and include the perspectives of all of the parties to the vast playing field which comprises those effected by copyright law, such a task is, inevitably, Herculean and, therefore, certain limitations are bound to exist.

It is of no small importance to note the possibly obvious, but nevertheless distinctive, difference between, on the one hand, the jurisprudential texts, or cases, discussed in the second chapter and, on the other hand, all of the other sources from which material is derived for this paper. The pronouncements of the judiciary are, for all intents and purposes, truly authoritative. This is not to say that they are not open to interpretation, deconstruction or criticism, but merely that these are texts which speak *the*

law, and which have profound effect on the way in which any discourse about mass-media appropriation is executed. The cases herein, one might say, are not merely texts, but they are *the* texts. They are the expression in language of the authority of the judges who do, in fact, make the decisions about the application of copyright. Therefore, be it agreeable or not, the structure of argument set out in this paper seeks not to subvert or to circumnavigate these judicial texts, but to speak in their own language, the limited and pragmatic lexicon of property ownership, of dictionary definitions, and of the strict construction of the *Copyright Act* and the *Canadian Charter of Rights and Freedoms*. And while other authors, such as Rosemary Coombe, may utilize a mode of discussion which is less legalistic and, perhaps, more inclusive of disparate and alternative viewpoints of the kind that, somehow, appear too esoteric and academic to argue in a courtroom, this author has chosen this route in order to create a blueprint for argument with the judiciary, and for dialogue with the voting laypersons, lawyers and politicians capable of initiating real change within the substantially closed system of language and interaction which defines the ultimate text of copyright law in Canada.

For further reasons of cross-disciplinary accessibility, the author has attempted to avoid the use of language that is based too heavily in either of the legal, media studies or cultural studies contexts. The language of each of these spheres can be too highly referential for accessibility by outsiders and, arguably, fails to transcend the multidisciplinary divisions that this paper, by bringing various perspectives together, is specifically attempting to avoid. If democracy, art, copyright and mass media are to be laced together with a minimum of discord, a certain amount of downward equalization may have to be imposed on the distinctive complexities of each. It is the author's hope

that the effect of this leveling, which occasionally may involve limited-depth explanations of law, art or cultural studies concepts, is not oversimplification, but rather, that it is a pragmatic and functional compromise which might be readily incorporated in all implicated disciplines. This paper, therefore, proposes to speak not with the exclusive terminology of any one field, but with a comprehensible and reasonable voice to all fields.

It ought to be stated at the outset of this somewhat speculative and, in some aspects, esoteric, inquiry, that the wind of change does not seem to favour the principles and the direction of critical analysis taken herein. Recently, the United States government has passed what are popularly known as the "Sonny Bono" copyright reforms. These reforms, if upheld by the courts, will greatly increase the control American copyright owners hold over their intellectual property. Specifically, the changes involve the extension of the term of copyright protection by approximately 20 years to works which already enjoyed a full 75 years of protection. Arizona State University law professor Dennis S. Karjala. However, points out that this extension is not unproblematic:

...heirs and assignees of creative composers from the 1920's have already enjoyed millions of dollars of extra royalty income as a result of [previous copyright] extension. The 1998 term extension provides these noncreative recipients with another 20 years of such royalties, all paid out of the pockets of the public. (p.3).

Although no such move towards longer copyright protection terms has been made as of yet in Canada, it is not inconceivable, especially given that Canadian copyright law is generally more protective of authors' rights than American law, that this sort of

extension might be enacted. This possibility will be discussed more fully in the third chapter of this paper.

As will be seen shortly, the direction in which copyright seems to be headed presents serious problems for the striking of a balance between corporate control of the media, on the one hand, and democratic expression by the citizenry on the other. Furthermore, it does not appear that this conflict will be resolved easily, especially in light of the seemingly ever-widening reach of corporate lobby influence into government decision-making. In the transition from industrial to information society, however, some compromise must be reached, or the tyranny of our government will be the least of our worries.

Chapter I: The Crumbling Philosophic Foundation of Copyright Law

The standard Canadian property law textbook by Da Costa, Balfour and Gillese begins with the following question and answer: "What is property? It is obvious that a book, or a car, or a piece of land can be property." (p.1:5). This is not a solid beginning, however, for as many cultures will tell us, there is little that might be called "obvious" about either this notion or about the very concept of property itself. Our textbook authors would only have had to look as far as the native Indians of North America and to their centuries of struggle over land and rights to see that this is so. It might, nevertheless, be supposed that property law can operate despite these other-culture confusions by simply ignoring them, much as it has for the better part of its history. After all, the textbook authors' statement is true for the majority of those to which it is meant to apply - or is it? Are there axioms and assumptions implicit in this traditional view of property which represent not the innate relation of person to thing for all people, but rather, a hegemonic imposition of a particular view? And, in more pragmatic terms, how, if such is the case, can the axioms and assumptions of that hegemonic imposition be identified?

If Hegel's idealist dialectic view of history is correct, in which each concept, each idea, and each system will eventually meet and be synthesized with its opposite, or antithesis, then the critical material needed to identify a hegemony of property law should be visible both in its clash with alternative systems of human-object relations, as well as in the conflicts encountered in the application of its most theoretical and distilled forms. For the purpose of this chapter, therefore, we will examine these clashes in the context of copyright law, which may be seen as one of the most intangible and conceptually pure

manifestations of the Western concept of property, in which the relation is not necessarily of person to possessed object, but of owner to infinite and often unpossessed copies of an object or a configuration of objects. It will here be argued that the paradigm in which justification for copyright law can be found seems clear and reasonable at first, but upon close examination is quick to reveal a myriad of flaws, some of which threaten its very foundation, thereby giving credence to the position of those who support some degree of allowable appropriation. In order to demonstrate this, we will examine four separate areas which, when taken together, create a highly problematic picture of copyright as well as of property law's assumptions about the "obvious" rights which somehow connect person to object. These four areas are: first, Western philosophical justifications for property ownership; second, the historical development of copyright law; third, the philosophical justifications for copyright; and fourth, some alternative philosophical views which may serve us to better understand the inadequacies and biases inherent in copyright especially, and in property law in general. The focus in the course of this examination will be on Canadian copyright law, though, in order to fully discuss the philosophical aspects of this form of law, both British and American copyright will be looked at in this chapter as well.

Western Philosophical Justifications for Property

The importance of the concept of property within our society is immense, but the acknowledgment of this fact does little to explain why it is so, or whether it must be so. For this reason, philosophers and economists have devoted a substantial amount of thought to finding ways in which such an importance may be explained or, at least, justified.

While attempts to answer questions as to whether there can be some sort of connection between person and object, a connection which might be anything other than a legal fiction created by social convention, seem to go nowhere, the questions which ask how or why property can or should exist have shown much greater, though ultimately inconclusive, yields.

Philosophy professor Alan Carter, in his book The Philosophical Foundations of Property Rights, defines the nine categories under which Western philosophical justifications for property may be categorized. These are: labour and desert (Locke and Mill), whereby ownership and the right to dispense with that ownership is created by having worked on or produced a thing⁴; liberty (Nozick), which can only be achieved within a framework of property laws which guarantee that the ownership of property is protected by the state; utility (Bentham), whereby property laws serve to further the greater good of a society; efficiency, wherein a certain system of property law may be the most efficient method of allocating resources (compare private to state ownership); first

⁴ This is what is commonly known as the Natural Rights Thesis, which is nicely summarized by Locke himself, in his Two Treatises of Government:

“Though the Earth, and all inferior Creatures be common to all Men, yet every Man has Property in his own Person. This no Body has any Right to but himself. The Labour of his Body, and the Work of his Hands, we may say, are properly his. Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his Labour with, and joyned to it something that is his own, and thereby makes it his property” (Locke, p.116).

It might be noted, however, that the application of this principle to copyright is problematic for three reasons. First, it ignores the contribution of other past authors which, if subtracted from the sum value of the work, would leave only the labour added or, not very much. Second, as David Fewer has pointed out: “compensation for work depends on what the market will bear. It does not follow that a property right in a work creates a desert for what the market will bear: markets are social constructs, dependent on variables far beyond the control or competence of the author” (p.12). Third, this thesis

occupancy (Kant), that the first to claim and/or possess a piece of property should, from their hardship or waiting, be given a right to that property; personality, which (in Hegel's view) has its reification in the relationship of person to objects, a relationship shaped and protected by property law; moral development (Green and Bosanquet), whereby the individual's evolution as a moral being in a society is furthered by a mutual recognition of property rights between the members of that society; and finally, human nature (Hume), which requires that property laws exist in order for people to live in peace and prosper.

Taken as exclusive theories of justification, professor Carter is unconvinced that any one of these is entirely satisfactory. Together, however, they do form a powerful set of tools, some of which will be used here, to be put to work in any analysis of property rights.

The Historical Development of Copyright

For most of human history, and for most of the time since writing first emerged, in the forms of pictographic and later syllabic lexical systems, the expressions of thoughts, stories and structures were not the subject of property laws. The principle means by which cultural information was handed from generation to generation, craftsman to apprentice, parent to child, was by oral means. Some, such as the troubadours or muses, excelled at the skills of oratory and traveled, telling their tales.

fails to take into account the idea/expression dichotomy so fundamental to copyright. This failure is discussed later on in the body of this paper.

And even when these oral cultures' myths finally made it to paper or papyrus scroll, as some say is the case with the works of Homer, the process of inscription was done by hand and took great effort and time.

The European adoption of the Chinese-invented xenographic printing press (c.1400, uses wooden or metal plates), followed by the moveable-type printing press (Gutenberg c.1450, utilizes re-usable single characters which are arranged on a plate) changed things forever (Compton's). No longer was a book something to be preserved and laboriously hand-reproduced by monks or trained copyists. A single manuscript could be the source of an infinite number of copies. The cost of books plummeted and literacy spread rapidly.

Most importantly to our discussion, however, is the spread, occasioned by the increase of literacy, of writings that were critical of either state or church, especially in England. While previously it had been impossible for anyone without vast labour resources to disseminate any kind of radical writings, now both the technology and the audience for such a venture were in place. At the time during which this situation was present in England, there was a highly-organized group of publishing houses - "stationers" as they were called - whose power had emerged from a long-established union of scribes and bookbinders and from a Crown-sympathetic use of its state given powers to "search out, seize and destroy offending works"(Goldstein, pg.41). By the Crown controlling who was licensed, it established a system in which "[t]he Stationers got the economic rewards of monopoly; in return, the Crown got from the Stationers a ruthlessly efficient enforcer of the censorship"(Goldstein, pg.42).

In 1694, however, the *Licensing Act*, which was the statutory backbone of this relationship, expired. For several years after this point, the Crown had to exercise censorship by criminal prosecutions for seditious libel, and the Stationers, having lost their search and destroy capabilities, had to resort to common law damages as a remedy for the copying of works to which they had established contractual, but not statutory, exclusivity (Goldstein, pg.42).

Displeased with this state of affairs, the Stationers lobbied the government for a statute protecting author's rights to property in their works. By doing this they did two things: first, they hoped to create a right of property which could be transferred to them, thereby allowing them to maintain monopoly control over the works they bought or commissioned (Patterson, pg.28); second, and most ironically, by using the argument that without copyright protection authors would cease to write, they gave copyright the foundation of justification that it continues to grow upon today. The *Statute of Anne*, therefore, which was enacted in 1710, established copyright law almost inadvertently, and only as a means to the attainment of the Stationers' ends did it establish the rights of the author. The *Statute of Anne* has since provided the model on which the numerous copyright acts enacted in the Commonwealth nations and in the United States, as well as the international copyright conventions in existence today, have been based.

The Current Framework of Copyright Law in Canada

The law of copyright in Canada is established by three separate sources: the *Constitution Act* of 1867, the *Copyright Act*, R.S., c. C-30, s.1, and the decisions of the judiciary that interpret these first two sources. It is from the composite interaction of these three that what we know as copyright emerges.

The *Constitution* dictates the division of powers between the federal and provincial governments. In the case of copyright, the power to legislate is given to the federal government, despite the fact that property rights are generally within the purview of provincial jurisdiction. For this reason, the *Copyright Act*, a piece of federal legislation, has uniform application across the country, and cases dealing with copyright issues may be heard by the Federal Court of Canada or by provincial trial courts. Appeals of copyright cases originating in the federal courts may be heard first by the Federal Court of Appeal, and then, if given leave, by the Supreme Court of Canada. For several reasons, the most important of which are speed of disposition, cross-Canada enforceability of judgments, as well as the intellectual property specialization of the court, the Federal Court is often the preferred forum for copyright infringement actions (Harris (1992), p 157). The copyright owner, however, is free to have such an action heard in whichever court they please, including the provincial small claims courts.

The vast bulk of the law of Copyright in Canada is contained in the *Copyright Act*, which sets out all of the parameters of copyright's application, the procedure by which copyright issues shall be adjudicated, as well as the remedies available to those whose copyrights are infringed.

Interpretation of the constitutional provision authorizing the federal government to enact copyright legislation, and of the legislation that is enacted thereby, is the domain of the judges of the various courts hearing copyright cases. It is the role of these justices to, wherever possible, apply the rules and principles set out in the *Copyright Act* and, where there is ambiguity or uncertainty, to resolve these problems by considering various factors such as the spirit of the *Act*, relevant jurisprudence, submissions of counsel in the

case before them, and the writings of legal scholars. It might be noted, however, that copyright has no fundamental basis in the common law, and that it is purely a creature of statute which, unlike many other laws of property, would not exist were it not for the acts of the Federal Legislature. For this reason, the judges of the courts interpreting copyright law ought to be somewhat limited in their ability to speak of fundamental principles or policy in the interpretation of copyright law. As will be seen further on in this paper, however, these judges recently seem to confuse the statutory animal of copyright with its common law cousin, real property law, thereby disregarding the limited scope with which the *Copyright Act*, arguably, ought to be applied.

Before we discuss the specifics of copyright protection in Canada, however, it may be useful to review the most basic, and commonly misunderstood, concept of copyright: the idea/expression dichotomy. This concept may be summed up by stating that copyright law provides protection not to ideas, but to the *expressions* of those ideas - to the concrete form in which those ideas are caused to manifest themselves by the author. It is not contrary to the laws of copyright, for example, to use the original ideas contained in this paper in another work, by the author or by someone else, so long as those ideas are not reproduced by copying the same words or by the use of a substantially similar form. In another example, the ideas explained by this paragraph have been said many times, but not by the same sequence of words or paragraphs⁵. Each new expression, therefore, deserves and attracts separate copyright protection.

⁵ Even if someone did, purely by coincidence, write an identical paragraph, never having heard or read this one, both authors would be entitled to independent copyright protection.

Under the *Copyright Act* there are certain categories of expressions, or works, which are covered. These are those which are any one or more of “original literary, dramatic, musical and artistic” works. These categories include: tables, computer programs, compilations of literary works, pieces for recitation, choreographic works, mime, and other scenic arrangements or acting, the forms of which are fixed in writing or otherwise, as well as:

every original production in the literary, scientific or artistic domain,
whatever may be the mode or form of its expression, such as compilations,
books, pamphlets and other writings, lectures, dramatic or dramatico-
musical works, musical works, translations, illustrations, sketches and
plastic works relative to geography, topography, architecture or science...

(s.2)

In addition to the above, copyright also extends to photographs, motion picture film, videotaped recordings, and to sound recordings.

The requirement that a work be “original” in order to attract the protection of the *Copyright Act* has been interpreted by the judiciary as being a very low threshold. Lesley Ellen Harris notes:

The first thought that comes to most people’s minds is that the criterion of originality means that a creation must be completely novel (as in patent law) and also possess some aesthetic, artistic or literary quality. This is not true. In fact, the standard of originality is very low, at least in relation to our expectations. (Harris (1992), p.18)

This assertion may be supported by reference to the decision of the English courts in University of London Press Limited v. University Tutorial Press Limited, [1916] 2 Ch. 601, wherein it was written that:

...the Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work – that it should originate from the author.

In addition to the requirement of originality, a work must be “fixed”. This means that it must exist in some material form, be it in writing, sketches, diagrams or otherwise. Harris has pointed out that this requirement reinforces the distinction between works which are ideas and those which are expressions, extending protection only to the expressions.

Finally, in order to attract copyright protection, a work’s author must be either: a Canadian citizen, a British subject (or citizen of a Commonwealth country), a citizen of a country which is a signatory to the *Berne Convention* (an international copyright convention), or a citizen of a country to which the *Copyright Act* may extend from time to time (Harris, p.23). This protection is, under Canadian law, automatic, thereby making unnecessary any form of registration or copyright notice (the © symbol is an example of this). Often, however, it may be desirable for an author to register her work and provide notice, as these acts may be of some assistance to a court as evidence of the date of creation as well as of the intentions of the author not to allow reproduction by others.

The owner of a copyright in a particular work is entitled to two categories of rights: first, copyright; second, moral rights. Included in the first category are (subject to

numerous exceptions): the right to control the reproduction, public performance, publication, adaptation, translation, telecommunication, importation (of competing copies of books), authorization (of others to exercise copyrights in the work), exhibition. Also included in the first category are the right to make visual or sonic reproductions of literary, dramatic or musical works (called the "mechanical right"), and a synchronization right (right to synchronize sonic works to pictures). All "mechanical contrivances", or information storage media, also carry various rights designed to allow their creator to control the reproduction and transcription of these media.

The second category of rights, moral rights, are of a somewhat different character. This right arises from section 14.1 of the *Copyright Act*:

14.1 (1) The author of a work has... the right to the integrity of the work and... the right, where reasonable in the circumstances, to be associated with the work as its author by name or under a pseudonym and the right to remain anonymous.

This right cannot be assigned. In other words, it cannot, unlike the first type of right conveyed by the *Act*, be transferred to anyone other than the original author. It may, however, be waived.

As with any law, there are exceptions to the general rights set out in the *Copyright Act*. These exceptions derive from section 29 of the *Act*, which outlines defences to an action for infringement of copyright. Although the section provides numerous exceptions, the portions of that section which are relevant to this discussion read as follows:

29. Fair dealing for the purpose of research or private study does not infringe copyright.

29.1 Fair dealing for the purpose of criticism or review does not infringe copyright if the following are mentioned:

- (a) the source; and
- (b) if given in the source, the name of the
 - (i) author, in the case of a work,
 - (ii) performer, in the case of a performer's performance,
 - (iii) maker, in the case of a sound recording, or
 - (iv) broadcaster, in the case of a communication signal

Also, there are special exceptions set out for educational institutions, libraries, archives, museums, the National Archives of Canada, and persons with perceptual disabilities. Further, there are certain limited exceptions pertaining to recognized publicly displayed works:

32.2 (1) It is not an infringement of copyright

- (c) for any person to reproduce, in a painting, drawing, engraving, photograph or cinematographic work
 - (i) an architectural work, provided the copy is not in the nature of an architectural drawing or plan, or
 - (ii) a sculpture or work of artistic craftsmanship or a cast or model of a sculpture or work of artistic craftsmanship, that is permanently situated in a public place or building

The *Copyright Act* also, as mentioned above, contains a section wherein the remedies of copyright holders are set out, including their entitlement, subject to the discretion of a court, of "injunction, damages, accounts and otherwise that are conferred

by law for the infringement of a right" (s.34). Also, section 42 of the *Act* makes it a criminal offence to "knowingly" take part in certain acts of copyright infringement, and provides for a fine of up to one million dollars and/or imprisonment for up to five years.

The above outline of Canadian copyright law is merely that - an outline - and is generally confined to the aspects of copyright which are directly or indirectly relevant to the issues to be considered in this paper. These aspects will be discussed in greater detail further on.

Western Philosophical Justifications for Copyright

As was noted above, Canadian intellectual property law bears a substantial similarity to the U.S. model, except for the fact that U.S. copyright is provided with constitutional protection, while ours is not. The Founding Fathers of the United States, themselves products of the Enlightenment's epistemological models, felt that the technological and social growth of their new nation would be much expedited if there were some way to increase the flow and diversity of information, scientific and otherwise (U.S. Office of Tech. Asses., p.37). If their nation were to avoid the damages of a stagnant intellectual conservatism which they felt plagued European culture, they would have to encourage alternative ideas and novel theories:

[Europeans, many of which were now coming to America, had] experienced an expansive sense of power over nature and themselves: the pitiless cycles of epidemics, famines, risky life and early death, devastating war and easy peace - the treadmill of human existence - seemed to be yielding at least to the application of critical intelligence. Fear of change, up to then nearly universal, was giving way to fear of

stagnation: the word innovation, traditionally an effective term of abuse, became a word of praise. (Gay, p.9).

The framework of modern intellectual property law, especially that of the United States, has been established with the goal of promoting innovative thoughts and inventions. This goal, as may be discerned from the historical survey of copyright's origins above, was not the central motivation for the lobbying which led to the creation of the 1710 *Statute of Anne*, but was able to emerge in subsequent legislation. The statutes of most recent copyright systems are designed to insure the financial compensations and incentives that would make the spread and practical application of innovative ideas economically-rewarding undertakings worthy of effort. This is demonstrated in the excerpted portion of the U.S. *Copyright Act* of 1909, which reiterates with greater detail and eloquence those principles set out in the original U.S. *Federal Copyright Act* of 1790:

The enactment of copyright legislation by Congress under the terms of the Constitution is not based on any natural right that the author has in his writings, for the Supreme Court has held that such rights as he has are purely statutory rights, but on the ground that the welfare of the public will be served and progress of science and useful arts will be promoted..."...the policy is believed to be for the benefit of the great body of people, in that it will stimulate writing and invention to give some bonus to authors and inventors.(U.S.*Copyright Act*.1909).

From this statement it may be clearly seen that the primary motivation behind the creation of American copyright legislation is to benefit the collective, and not the individual. It is for this reason that the United States *Copyright Act* contains a set of "fair

use” provisions designed to allow the public to use copyrighted works for education, critiques, parody and other applications without violating copyright. Ironically, the Canadian *Copyright Act* is far more restrictive on the freedom of the public to use copyrighted material. As lawyer Lesley Ellen Harris points out,

[t]he American provision allows many more free uses of copyright materials than [the Canadian equivalent.] fair dealing... The provision in the Canadian *Act* does not give permission in advance to use copyrighted material. Rather, it is a defense which may be raised in a copyright violation suit.(Harris, pg.110).

Despite this difference between the two systems of copyright, however, they are very similar in almost all other respects, and it seems safe to say that, despite slight weighting in the favour of the public in the American system, both have as their common goals both the advancement of learning and the creation of incentives for innovators and creators.

This justification for intellectual property law is not a new one, and may be compared to Professor Carter’s “utility” category of property law justification, as listed above. This category results from Bentham’s assertion that:

...utility is...that principle which approves or disapproves of every action whatsoever, according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question: or, what is the same thing in other words, to promote or oppose that happiness (pp.11-12).

As professor Carter points out, this principle is extended by Bentham inductively to precipitate a greater good because "as the community is composed of individual members, the object of law should be to maximize the happiness of the greatest number of those individuals"(Carter, pg.51). The "happiness" of the community is, in terms of copyright's aims, the progress of the technological and of the aesthetic. Furthermore, for copyright law to be "utilitarian" in principle, its presence must be an actual, rather than a merely incidental or unconnected, cause of this happiness. But is such the case? Can copyright really be justified by the utilitarian reasons which are so clearly proclaimed in the *Federal Copyright Act* above? And if not, can copyright's existence be justified by any of the other principles listed by Professor Carter? The next section will attempt to answer these questions and to provide some alternative viewpoints which may cast light on other possible justifications of copyright and the problematic nature of those justifications.

Alternative Philosophical Views

As was said earlier, the idea which is at the root of copyright is that unless there is some legal protection provided to innovators, inventors and artists, they will not produce the work which is of great benefit to their community. The soundness of this fundamental assumption, however, is questionable.

It might be useful to consider other factors especially important to the problem of encouraging those works that are protected by copyright: books, paintings, drawings, maps, music, etc. The reality, as evidenced by the unfortunately abundant number of "starving" artists, writers and musicians, is that much of the innovative, creative labour covered by copyright law is not primarily motivated by monetary profit obtained, but

rather, as most creative people will agree, comes from a compulsion to create. The average painter paints because she feels that she must, the writer because it is something she loves. And while it cannot be doubted that the possibility of profit can be an encouragement, it is difficult to imagine that, in these realms of creation, the presence or absence of copyright protection would make a difference of such consequence as to prevent these works from being made. Perhaps, however, these more purely "artistic" endeavours are not the realms in which copyright litigation dominates. Professor Christopher Lind, in a "Moral Critique" of copyright law in Canada, says that in situations such as this, "Capitalism [shows itself to be] a child of ...market society, and one of its features is the relentless extension of market assumptions into areas where the market has not ruled" (Lind, pg.70). Much in keeping with the historical analysis of the evolution of copyright discussed earlier, he argues that rather than being a boon to the furtherance of knowledge and to the encouragement of innovative labours, Canadian copyright law is an imposed system designed to further the interests not of the actual creators (although a few do benefit), but of the large commercial interests involved in publishing and broadcasting. Also, he argues that the imposition of such a system of law has the effect of transforming⁶ the exchange of ideas into thievery (Lind,pg.71). He considers:

⁶Some scholars, such as Kathy Bowrey, applying a structuralist hegemonic analysis, have examined the possible effects of copyright law as a statutory definition of what constitutes art. In her essay "Copyright, the Paternity of Artistic Works, and the Challenge posed by Postmodern Artists", she looks at the way in which copyright reinforces a male-centered, non-communal vision of authorship: "...despite contrary assertions, Anglo-based law is... steeped in a concern to protect the paternity of artistic works. Copyright serves a gatekeeping function that secures the legitimacy of artistic works by segregating these from basic commodity items and from work naturally

The case of the small computer programmer is used to justify and affirm the extension of copyright protection to computer programs without the protection of compulsory licensing that applied to drug patents. Who will gain from this extension? Will it be the small-time programmer, or will it be Bill Gates [?](Lind, pg.72)

Further, legal scholar David Fewer, in his article "Constitutionalizing Copyright: Freedom of Expression and the Limits of Copyright in Canada", has questioned the connection between copyright and innovation by noting that:

Newton and Einstein both contributed more original labour with more laudatory results in devising their theories of physical nature than the vast majority of authors protected under copyright law ever could, and yet copyright law firmly grounds the fruits of their labours in the public domain. (p.13).

Nevertheless, if despite the lip service given to the protection of the regular-Jane-artist, the *raison d'être* of copyright law is still the same as it was when the *Statute of Anne* was passed, then how is it that it is so easy to convince ourselves that this area of law is justifiable? For, regardless of who will profit (mostly large corporations like Microsoft or Sony), and who will be restricted⁷ in freedom of expression and

associated with women's reproductive labour. Copyright is essential to keep artistic works from intermingling with their social inferiors."(Bowrey, pg.296)

Another interesting essay in this area is "Common Properties of Pleasure: Texts in Nineteenth Century Women's Clubs", by Anne Ruggles Gere. This essay describes the "subversion" of copyrighted texts that were appropriated into the communities of women's clubs for the purposes of group reading and analysis.

⁷The Postmodern being's existence can be likened to a reversal of the schizophrenic disorder model: while the schizophrenic subject suffers from lapses into a heterogeneity

appropriation (the community), the average person seems to freely accept and even support copyright's power. Because of this seeming contradiction, it would therefore appear that this justification and support comes from a much deeper level of our collective consciousness than can be explained by the simple utilitarian arguments of Bentham and the legislators of copyright law.

The categories of property law justification described by professor Carter give us a hint at the makeup of the paradigm underlying copyright and the reason it is so readily accepted that there may be property ownership in infinite and unpossessed copies of a work. Apart from the concept of utility, Carter listed labour, desert and first occupancy. These three justifications for property law all share the requirement that the ownership of a thing be bestowed because the owner has affected so great an original transformation of that thing as to justify making that thing hers. The person deserving of ownership status is, in a sense, the creator - either by radical alteration or by laboured discovery, of the created object.

of persona, the postmodern individual exists as one of the heterogeneities of a schizophrenic cultural persona. Our relation to, and comprehension of, the other is virtually impossible, and we must be content to exist in our own perceptual universes or, it would seem, go mad.

As described in Chapter 2, it is this schizophrenic unity, this heterogeneous commonality, which is the focus of much of postmodern art. We cut and paste, appropriate and re-contextualize, uncovering new similarities and inconsistencies between formerly separate fields of knowledge and belief. Visual art becomes a collage compiling images from commercial, religious and artistic sources - sometimes adding other media to the mix: projected photographs, attached objects, fire and water. And in the sonic arts as well, music borrows from sound sources other than those traditionally employed: recorded or digitally sampled sounds of cars, machines, voices, animals and, most notably, silences.

When the postmodern artist wishes to represent her world by assembling its fragmented icons into a work of collage, it is inevitable that she will be in violation of

Western culture has long worshipped the power of the individual as creator. The dominant creation myth of Christianity envisions the process of history as a line which begins with a solo god's construction of the universe from nothing, continues through Eden and humanity's original sin, and finishes with the final apocalypse and judgment. And from within this system of belief emerges the idea of free will in man and womankind: the ability, without hindrance by deterministic forces, to spontaneously decide. And it is from this mythology that our belief and praise of the artist or inventor has its genesis.

When we take a close look at the idea of the artist as spontaneous originator from the perspectives of, first, our philosophic tradition in the West, and second, the Eastern view of creation and authorship, it becomes difficult to maintain such a view, despite its ongoing popularity. Let us briefly examine two of the philosophic objections that have accrued over time.

A first objection may be made in order to contradict the concept that ideas or expressions can originate from one individual author, implying a sort of spontaneous generation, or free will, and denying the collective nature of creation. Coombe points out that the intelligibility of copyright depends:

...upon the assertion of a unitary point of identity – a metaphysics of authorial presence – that denies the investment of others in the commodity/text, and the constitutive history of others in its development, circulation, and significance (p. 62).

copyright law. It is at this point that the law that claims to protect innovation finds itself as the principle barrier to that innovation.

If, however, one has no free will and is without a “unitary point of identity” then one is merely a link in a chain of determinism, and therefore not an originator. Without free will, therefore, authorship is reduced to nothing more than pre-destined and impersonal labor, and certainly deserves no special treatment in the law. And as time goes on, and science progresses, the possibility that free will exists is being shown to be less and less probable: even the hope that sub-atomic particles would demonstrate an underlying spontaneity to the universe is currently being dispelled by chaos theory.

A second objection may be found in the experiences of those who are credited with truly innovative and original work. For example, James Joyce, in his Portrait of the Artist as a Young Man writes:

The personality of the artist, at first a cry or a cadence or a mood and then a fluid and lambent narrative, finally refines itself out of existence, impersonalizes itself, so to speak": "The artist, like the God of the creation, remains within or behind or beyond or above his handiwork, invisible, refined out of existence, indifferent, paring his fingernails. (Joyce, pg.215)

Similarly, Arthur Miller, in a *New Yorker* interview wherein he discusses the circumstances under which his most celebrated play, Death of a Salesman, was written, states:

I started in the morning, went through the day, then had dinner, and then I went back there and worked till – I don't know – one or two o'clock in the morning... It sort of unveiled itself. I was the stenographer. I could hear them, literally. (p. 42).

The author, in other words, may be merely the channel through which the work becomes actualized⁸. It is as if she has very little to do with the work other than its physical production. As regards copyright, this view of authorship might be argued in order to justify some sort of finder's fee for the artist, but little else.

It appears that all of the above two philosophical perspectives share one thing in common: a de-emphasis on the value of the individual as the spontaneous and original creator of a work. In turn, this conception of artist as handmaid to some greater deterministic force clearly runs against any special treatment of the artist beyond rewarding him/her for direct labours associated with the production of material objects. While such a method of labour reward is not terribly difficult to reconcile with the current scheme by which many artists, such as painters and sculptors, are paid, problems arise with any artistic medium that involves reproduction as a part of its standard mode.

The arbitrariness of copyright's justification of the artist-as-creator concept is further revealed by examining Eastern thoughts on the subjects of both creation and authorship. If we consider China and the Byzantine Empire, for example, we find that the use of these concepts was either non-existent or developed much later than in the West (Chinese notions of authorship only become visible ten centuries⁹ after the Greeks, and the Byzantines never showed any acknowledgment of them at all (Britanica.14-126)). These de-emphases of the importance (and merit) of the author as transformer and

⁸This view is shared among many artists, famous and unknown, including both Pablo Picasso and John Cage, and has gained substantial theoretical backing in the postmodern era where, according to thinkers such as Derrida, Ashley and Walker, not only human expression, but the human herself, is created and defined by a symbology which is beyond her control.

originator become more understandable when we look at what is an exemplary Eastern view of creation:

When heaven and earth were joined in emptiness and all was unwrought simplicity, and without having been created, things came into being. This was the Great Oneness. All things issued from this oneness but all became different, being divided into the various species of fish, birds, and beasts...But he who can return to that from which he was born and become as though formless is called a "true man." The true man is he who has never become separated from the great oneness. (from Huai-nan Tzu's synthesis of Confucius' teachings, c.122 B.C.E.)(Boorstin, p.16)

The importance this passage gives to the "true man" is due not because he has ordered or transformed or innovated, but rather, because he has done the opposite, allowing himself to be dispersed and de-ordered. The Western concern with the inviolable distinctness of the soul is in stark contrast to this notion. The Buddha, also, as scholar Daniel Boorstin points out, is even less concerned with creation than Confucius:

Not only did the Buddha remain silent when asked about the first creation. He despised "speculations about the creation of the land or sea" as "low conversation"... He urged disciples to follow his example and not fritter away their energy on such trifles.(Boorstin, pg.20)

In much of the East, as these passages make clear, creation, and thereby individual authorship, is seen as merely a part of what is a cycle of Hindu, Buddhist or Confucian

⁹Furthermore, the Chinese did not then develop any sort of copyright legislation until the 1990's.

return, or reincarnation. The Western belief in the value of the author as originator becomes meaningless in the indivisible oneness that is the universe. It is not difficult to see, given this mythology as a philosophic background, how it is that copyright, a recognition and affirmation of individualistic accomplishment, has only very recently been a legislative issue in the East¹⁰.

Conclusion

A search for copyright's justification seems to reveal little of substance and brings us to ask whether this body of law establishes a property right which is essential to achieve any of the nine goals of property listed by professor Carter, or alternatively, whether it is no more than that which it was originally intended to be in 1710: a way for big businesses to protect their interests. The argument which regards property as inessential as a labour incentive is quite compelling, and is supported by the reality that having a low income is often par for the course in the lives of many people who devote their career energies to their creative works. And while it might be said that copyright certainly acts as an encouragement to these creators, it is questionable whether the degree of protection required for this encouragement is even approximately close to the substantial amount of actual protection provided by the *Copyright Act*, and by the extremely strict mode of interpretation exercised by the Canadian courts in that act's application, as will be seen in our later discussion of the *Michelin* case.

¹⁰Although research into the area of copyright law and its effect on North American Indian culture and artistic production is difficult to find, there is a mass of work on Native conflicts with Western property law. The writings of Leroy Little Bear on the Native understanding of what property means stress a similar view to these Eastern concepts of the place of the individual not as a separate and self-defined unit, but rather, as a part of a great community of living things, all of which are interconnected and, ultimately, one.

Also, as we have seen in philosophy and among artists themselves, there is a strong and well-reasoned opposition to the artist-as-creator merit argument. All this is not to say that copyright is completely unjustified, merely that the justification it does have is far more limited than seems apparent in any cursory examination. Furthermore, its justification is dependent upon the viewpoint of the person who is looking, and whether that person regards the law as primarily for the powerful, with some "trickle-down" to the less-powerful, or if they regard it as a way in which to further equality, democracy and progress. If the former, then copyright has much to excuse its power over the freedom of information exchange. If the latter, however, such a justification may be hard to find.

Chapter II: Copyright and the Postmodern

Jean Baudrillard once said of our era:

...we are 'post' - history has stopped. one is in a kind of 'post-history' which is without meaning... We can no longer be said to progress. So it is a 'moving' situation... I have the impression with post-modernism that there is an attempt to rediscover a certain pleasure in the irony of things, in the game of things. Right now one can tumble into total hopelessness - all the definitions, everything, it's all been done. What can one do? What can one become? It is more a survival among the remnants than anything else.

Whether or not his description is accurate, much of both the art and the commercial imagery of the postmodern era reflect the idea that it is impossible to invent further, and that the only type of creativity or innovation possible is that of the kind which devours and regurgitates all that which has already been. In this paradigm, the world of ideas and expressions must be content to move forward by reaching into its own past, and it must work with a redefined mode of invention in which newness cannot be found in any one element of an invention, but in the juxtaposition of many such elements with one another. In the postmodern era all change is merely the alteration, shuffling or re-making of a collage made up from the lexicon of iconographic history.

As will be explained, these concepts, when they are reified by artistic practice, do not sit well with the existing body of copyright law or with the policy underlying that law. Arguably, the notions of authorship and originality implicit in copyright law involve a particularly spontaneous view of invention that gives much credit to the author as the

source of the work. The art of the postmodern, as this chapter will show, by using strategies of appropriation and re-contextualization, comes into direct conflict with copyright's fundamental understanding of what constitutes a work. This conflict, however, can be resolved. By a critique of two recent American copyright decisions, Rogers v. Koons (960 F.2d 301 (2nd. Cir. 1992)), and Campbell v. Acuff-Rose Music Inc. (29 U.S.P.Q. (2d) 1961 (U.S. S. Ct. 1994)), and by a comparative analysis of the recent Canadian decision in Compagnie Générale des Établissements Michelin-Michelin & Cie (Plaintiff) v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW- Canada), (1996), 71 C.P.R. (3d) 348 (Federal Court, Trial Division), this chapter will attempt to reveal the current state of judicial copyright policy in Canada and in the United States. The question of what possible changes copyright might undergo in order to adapt to and protect, in particular, the practices of postmodern artists, and in general, the public's right to engage in meaningful discourse with and about the media landscape which surrounds it, will be the subject matter of the next chapter. As will be seen by our analysis of the decision in *Michelin*, however, the distance that Canadian copyright law would have to go in order to affect this transformation is substantially greater than that of our American counterparts. For this reason, some attention will be paid in the course of our analysis to both the underlying policy differences between U.S. and Canadian copyright, as well as to the more extensive moral rights regime in Canada.

The Connection Between Art and the Politics of Democracy

Before discussing postmodern artistic practice and its conflict with copyright law, it may be of some assistance to analyze the use and value of the fine arts in the context of

a democratic political structure. As will become clear later in this chapter, the *Copyright Act* and the methods of analysis used by the courts in dealing with copyright infringement lawsuits involve a balancing between the protection of the copyright owner's exclusive rights of use on the one hand and, on the other hand, the public's right to use, modify or critique by copying all or part of copyrighted works. On the public rights side of this weighing is the constitutional issue of freedom of expression, briefly mentioned in Chapter I, and explored later in this chapter. In order to have a clear conception of what is at stake in this constitutional dimension, however, we will now briefly look into the role of art as a part of democratic dialogue.

In the introduction to this thesis there were put forward several of the established rationales for protecting and encouraging freedom of expression in the democratic context. Generally, however, it might be said that these rationales do not speak to the distinction between different forms of expression, but merely to the principle that expression, plain and simple, is to be encouraged as it forms the basis for open, democratic dialogue. The role of painting, sculpture and other media in communicating their authors' perspectives is left unclear.

Legally speaking, the various media mentioned above are all accepted forms of expression. Furthermore, it is trite to say that the same are considered to be communicative media by those outside the legal community. As such, the visual arts are a recognized aspect under the umbrella of democratically important elements. But what, we are prompted to ask, is their role in this system?

The history of political struggle is rife with strong views on the role of art in the service of "the people", whomever or however defined that group may be. Take, for

example, this excerpt from a manifesto issued by the Syndicate of Technical Workers, Painters, and Sculptors, Mexico City, 1922:

...the art of the Mexican people – is the highest and greatest spiritual expression of the world-tradition which constitutes our most valued heritage. It is great because it surges from the people: it is collective, and our own aesthetic aim is to socialize artistic expression, to destroy bourgeois individualism... We repudiate the so-called easel art and all such art which springs from ultra-intellectual circles, for it is essentially aristocratic... We hail the monumental expression of art because such art is public property. (Schmeckebeier, p.31)

Art, it seems, in the service of political objectives, is rarely seen as an inert force. Hitler, for example, after “cleansing” the museums of Germany, opened the *Haus der deutschen Kunst* in 1937 and informed the nation that the propagandist art displayed would remain unchanged for the duration of what was to be his 1000-year empire (Selz, p.459). So great was the fear of the Fuehrer of the power of art to cause damage to his political stranglehold, that he threatened sterilization or punishment for those artists who would try to express themselves without conforming to the aesthetic directives of the Third Reich:

They would be the object of great interest to the Ministry of the Interior of the Reich which would then have to take up the question of whether further inheritance of such gruesome malfunctioning of the eyes cannot at least be checked. If, on the other hand, they themselves do not believe in the reality of such impressions by trying to harass the nation with this

humbug for other reasons, then such an attempt falls within the jurisdiction of the penal law. (Selz, p.459)

In the views of this author, the justification for Hitler's fear is real. Art seems to have a remarkable effect not just on people's knowledge, but on their beliefs as well. And this effect, while perhaps difficult to explain, is evidenced not just by the forceful uses of visual art to promote or attack, as seen above, but also in their role to explore. Visual art is, like the written word, a language, but it is a language with its own particular range of communicative possibilities, many of which lay outside the set of meanings transmissible by words. What are these possibilities and what are the limitations? These are questions without easy answers. Suffice it to say, however, that reason cannot deny that the horror of Picasso's *Guernica* cannot be completely expressed in words, or that the sublime intensity of Van Gogh's *Wheat Field with Crows* could never be rendered in an e-mail.

Even in the so called heartland of democracy, the United States, the force with which the visual arts communicate is clearly evidenced by the hostile reactions that are so often provoked by the work of artists whose messages fail to conform to the status quo. Take, for example, the McCarthy hearings and the resulting black-listing of various supposedly communist filmmakers. Or, more recently, consider the great public revulsion for the homoerotic photographs of Robert Mapplethorpe. There scarcely seems to be a time when some large portion of the citizens of that nation is not upset about some visual art work.

As a final point in this analysis of the value of the visual arts in a democratic society, we will make one last consideration. In addition to the particularly potent effect of visual art to stimulate and unify social structures and individuals, there is one further

possible consequence to the practice of art. This consequence, which is the social participation of the artist herself, is discussed by Holger Cahill, who was the director of the short-lived but impressive Federal Art Project, an American make-work program that, during the Roosevelt era, paid approximately 5.000 artists to make the art they wanted to make:

A new concept of social loyalty and responsibility, of the artist's union with his fellow men in origin and destiny, seems to be replacing the romantic concept of nature which for so many years gave to artists and to many others a unifying approach to art... This is what gives meaning to the social content of art in the deepest sense. An end seems to be in sight to the kind of detachment which removed the artist from common experience, and which at its worst gave rise to an art merely for the museum, or a rarified preciousness. (Cahill)

Postmodern Appropriational Art

What exactly is postmodern appropriational art? Some of the names which have been employed to characterize this artistic and conceptual zeitgeist, such as The Age of Plunder and The Orgy of Pastiche, relate only the superficial results of the postmodern artistic practice, but are insufficiently descriptive of the rationale behind appropriational collage. In justifying the techniques used, the artists of the postmodern utilize one of the underlying tenets of postmodern semiotic theory: the free floating signifier.

Much of postmodern theory involves a conceptualization of the world as an ever-changing, ever-shifting sea of symbols. Each symbol has a double aspect: it is both signifier and signified. The signifier is the symbol itself, its perceptible surface elements.

The signified is the meaning that the signifier conjures up. Of course, this 'conjuring up' can only occur in the mind and senses of the observer. This is where postmodern semiotic theory deviates from previous modernist conceptions of the process by which meaning is derived from a symbol. While the modernist school views all observers as generally alike in their perceptions of the symbols that make up the world around them, many postmodernists insist on the absolutely unique character of individual perception. The resulting hyper-subjectivity, when applied to semiotics, creates a world in which any given signifier has (and exhibits) a different and infinitely malleable signified for each and every possible observer. It is for this reason that these are called free-floating signifiers. Much like electrons, which have no position relative to a nucleus until they are observed (this is called the collapse of probabilities), a signifier has no signified until a subjective mind gives it one.

Latching on to this highly personalized mode of understanding human perception, postmodern artists often seek to mix and re-align the signifiers which dominate our cultures into new and strange juxtapositions or contexts. And the art of the postmodern often seeks to reveal the temporary and personal nature of the thread which ties signifier to signified by pointing out the problematic nature of authorship itself. After all, if an artistic work is made up of signifiers, and the artist, like other observers, sees the work in an entirely unique and incommunicable way, with her own set of signified's, how can that artist be credited with creating the work which others see? Are the others not the creators of the work, simply by the act of looking at or hearing it? Professor Brad Sherman of Cambridge University and the London School of Economics describes some of the ways in which this plays itself out:

Appropriation artists also often aim to caricature and mock traditional artistic criteria such as originality and authorship (Carlin, 1988: 108). That is, they question whether it is any longer possible to speak of 'original' works of art, and whether it is sensible to attribute a work of art to an isolated individual: the artist. By openly copying images, appropriation artists also aim to highlight the fact that the environment they represent is made up as much by advertising logos, trade marks and media images, as it is by landscapes, mountain ranges and forests (Sherman, p.33).

In addition to these critical practices, postmodern artists often draw source material from both camps of the traditional social divisions: high culture and mass, or low, culture (Sherman, p.32). Examples of this occur when Marcel Duchamp adds a mustache to the Mona Lisa, Andy Warhol paints a stack of Campbell's soup cans, or Canadian composer John Oswald distorts and re-mixes Stravinsky. If the viewer is the principle defining force in creating the meaning of a work, then everything - every symbol, word, picture, shape - has value only in relation to that viewer, and the notion of an aesthetic hierarchy existent outside of the individual subjective becomes groundless.

The implications of this type of thinking on copyright are substantial. Beyond purely economic reasoning, it becomes difficult to justify any natural law or equitable notion of an author's right to control the reproduction or borrowing from her works. Arguably, the relationship that copyright presupposes to exist between author and work, is one which is inescapably bound up in the fleetingly temporary nature of the author's subjective conception of the work at the time it was created. And when an artist like American Mike Bildo paints a life-size Cezanne, Matisse or Picasso and then signs his

own name in the corner he is making a statement of this type: he is saying that these works are authored by whomever it is who chooses to appropriate their images (though I very much doubt that he turns down the proceeds from sales of his paintings). Much of postmodern art is of this type: the artist appropriates, or selects from, the images that make up his world, thereby denying any reality save his own; and thereby defining those images as the lexicon of his perceptual universe. As law professor John Carlin says: "[t]he referent in postmodern art is no longer 'nature,' but the closed system of fabricated signs that make up our environment" (p.111), and, as professor Badin comments "[t]hese objects, or signs, replace the natural world mirrored in canvases and sculptures of the past" (Badin, p.1657).

If anything, copyright is the legal recognition that an individual can own property in symbols, or *expressions*, and that these expressions originate from that individual. As we have seen, by attacking the very notion of origination, postmodernity and postmodern appropriational artists ram head-on into the protective wall that copyright seeks to build around authors, painters and other creators of the works which fall into its various categories. But is not one of the primary tenets of copyright law the protection and encouragement of new and innovative works?

When the law prohibits the very thing it is designed to protect is it necessary to eliminate that law? The answer to this question might seem to be "yes", and many recent writers, most notably John Perry Barlow, former songwriter for The Grateful Dead, have sought either the radical re-writing of copyright or its demise.

Barlow denies copyright's clear separation between expression and idea, arguing that the two are inextricably linked and that to constrain one is to constrain the other as

well. He views such a constraint as detrimental to cultural and technological progress, as well as a futile and Herculean task:

The more universally resonant an idea or image or song, the more minds it will enter and remain within. Trying to stop the spread of a really robust piece of information is about as easy as keeping killer bees south of the border.(Barlow, p.90).

But in all of his "free information" preaching, Barlow never comes up with a way to strike the balance necessary for the creation of new works: the balance between the importance of spreading new and useful information to the many, on the one hand, and, on the other hand, the need for economic incentives to sustain and motivate the creators of these works.

And so to the central question of this paper: can the challenges presented by postmodern thinkers, artists and society to copyright law be met without the complete upheaval that so many have claimed is necessary?

We will now turn to the two recent cases referred to earlier, *Koons* and *Campbell*, wherein the American courts have attempted to deal with infringement actions against appropriational artists. The reasoning processes employed in the two cases are useful contexts in which to illustrate the shortcomings of current law in dealing with appropriation art. The further impediments to these practices resident in Canadian copyright law will be examined further on.

American Copyright and Postmodern Art

The case of Rogers v. Koons arose when Jeff Koons, a famous New York postmodern artist, commissioned an Italian design firm to make four life-size sculpture

copies (each to be called "String of Puppies") of the subject matter in Art Rogers' photo-postcard entitled "Puppies". Rogers was a fairly well known photographer, and this particular work had brought him substantial commercial success, both as a postcard and in other printed forms. Koons purchased the postcard and then sent it to the Italian firm with instructions to make the reproductions "as per photo". Koons never asked for, or in any other way obtained, the rights to use the image in "Puppies". Subsequently, Koons, who prior to becoming an artist had been a commodities broker, sold three of the four sculptures for a total of \$367,000 (U.S.) to collectors. These proceeds were not unusually high for Koons' works, which usually sold for prices in excess of \$100,000. Of course, when Rogers learned of the existence of the copies and of their sale prices, he brought a copyright infringement action against Koons, seeking damages in the form of infringed profits, as well as an injunction to prevent the sale of the fourth sculpture and force Koons to deliver it to Rogers. Koons tried to send this last sculpture out of the country in order to sell it, and was found in contempt of court. Instead of going to trial, both parties opted for summary judgement, as there was no substantial dispute as to the facts, only as to the legal fairness of Koons' use of the photo.

The fair use doctrine is a defence that is exclusive to American law, and should not be confused with the far more restrictive fair dealing provisions in Canadian copyright, discussed in the last chapter. In essence, fair use allows the use of limited (but nevertheless "substantial") portions of copyrighted works without the permission of the copyright holder so long as the use may be categorized as criticism, comment, parody, satire, or as one of a variety of other uses. The analysis of Charles S. Haight, Jr., of the United States District Court for the Southern District of New York, whose decision was

later affirmed by Cardamone J. of the United States Court of Appeals. Second Circuit. involved a four part test to determine whether or not Koons' use qualified under any of the permissible categories listed above. The questions to be asked in the test are: first, what is the purpose and character of the use; second, what is the nature of the copyrighted work; third, what amount and substantiality of the work has been used; fourth, what is the effect of the use on the market value of the original. We will examine the court's method of dealing with each of these determinations in turn.

As Cardamone J. writes, the purpose and character of the use is found by asking "whether the original was copied in good faith to benefit the public or primarily for the commercial interests of the infringer". Here the court noted that first, Koons' intentional removal of Rogers' copyright notice on the postcard before sending it to the design firm constituted exploitative conduct, and second, that the Supreme Court in Sony Corp. of America v. Universal City Studios Inc. (1984), had said that "copies made for commercial or profit-making purposes are presumptively unfair". The court then reasoned that, considering the substantial profits Koons was reaping from his use of "Puppies", his use was presumptively unfair. The court went on to consider whether there was validity to Koons' claim that his copies were satires or parodies. In the words of the court:

Koons argues that his sculpture is a satire or parody of society at large. He insists that "String of Puppies" is a fair social criticism and asserts to support that proposition that he belongs to the school of American artists who believe the mass production of commodities and media images has caused a deterioration in the quality of society, and this artistic tradition of which he is a member proposes through incorporating these images into

works of art to comment critically both on the incorporated object and the political and economic system that created it (p.309).

Apparently, Koons proposed to utilize Rogers' "Puppies" to make an observation about the aesthetic and ideological landscape that makes up his world. "Puppies", it seems, was to him an element of that landscape, much like a mountain or lake would be an element in a landscape of an earlier era. Whether or not Koons described how this image was useful in this way cannot be determined by the judgement. Presumably, though, the tone of kitschy Rockwellishness which permeates Rogers' original photo, coupled with the mass-copied aspect of the puppies themselves, make this image the perfect carrier for Koons' message as expressed in the above quote.

Unfortunately for Koons, and for numerous other artists who would support his methodological treatise, the court failed to recognize any way in which his appropriation of "Puppies" might fit into the existing doctrine of fair use parody or satire, which the court defined as follows:

...as we understand it, [this] is when one artist, for comic effect or social commentary, closely imitates the style of another artist and in so doing creates a new art work that makes ridiculous the style and expression of the original (p.309).

The court then went on to claim that Koons' use failed to satisfy this definition primarily because Rogers' photo was not "at least in part, an object of the parody". In other words, the court found that rather than pointing *to* "Puppies", Koons' sculpture *was* "Puppies".

What neither the court nor, presumably, Koons' lawyers, seemed disposed to articulate, was that Koons viewed "Puppies" in an entirely different light than the court. His understanding of that work, as evidenced by the description of his purpose given earlier by the court, is that because of what it depicts and what sentiments and vision it displays in that depiction, it becomes a type of aesthetic cliché: no longer merely an individual work but, without attempting to be so, a representation of the collective consciousness and thereby, less an expression and more a fact or idea, and fair game for commentary and criticism by anyone. Professor Sherman comments on the way in which this is at odds with copyright law:

...while copyright law ignores the meaning of the artistic work and focuses upon its surface appearance, appropriation art inverts this process by focusing upon the meaning of the work at the expense of its visual appearance. There is, in effect, a reversal of the idea-expression dichotomy: the expression is the same, it is the idea that is different(p.39).

Following this line of reasoning, we might further notice that neither the court nor, presumably, either of the parties, commented on the possibility that "String of Puppies" might constitute such a radical recontextualization of "Puppies" so as to render it a work that was not only distinct from that original, but one that was a new and different work altogether. This possibility is rendered all the more plausible if one takes into account the following factors: first, the life-size aspect of the work; second, the situating of the work in a fashionable and very expensive art gallery; third, and most notably, Koons' reputation as a postmodern appropriator and as a commentator on the commodification of art. No one, in other words, commented that factors traditionally seen

as extrinsic to the work, such as the appropriator's reputation, should be considered as an inseparable part of the "copy" and might, if substantial enough, make the appropriated portions of the "original" work insignificant by comparison. Art, after all, is not created or sold in a vacuum. The very fact that Koons was the producer of "String of Puppies" is what gave the work its aesthetic value and ideological identity.

Ironically, in assessing damages, the court did recognize the substantial contribution of Koons' reputation to the dollar value obtained for the sculptures. This might lead us to ask why this contextual argument works only when dealing with this type of assessment, but not in contemplating the non-pecuniary issues in the case? Although the court fights hard for Rogers' right to prevent others from usurping his control of potential markets for his work, we must ask whether the market which Koons penetrated was indeed within the scope of Rogers' "Puppies". This question may be answered by another: were the buyers of "String of Puppies" buying a larger, three-dimensional version of Rogers' original work, or were they simply purchasing "Koons"?

After finding that "String of Puppies" failed to satisfy the requirements of the fair use doctrine, the court went on to consider the nature of the copyrighted work. If the copied work is more factual than fictional, the court said, the scope of the fair use standard applied will be broader. The court found that "Puppies" is a "work of art" with "creative and imaginative" qualities. Because of this, the court found that the acceptable scope of fair use to be applied in this case should be narrow, and that this factor, therefore, "militates against a finding of fair use".

As was discussed above, postmodern semiotic theory plays havoc with what the court here considers to be a simple task of differentiating fact from fiction. The

commercial nature of the "Puppies" postcard would, in the view of many, have a tendency to transform it from being an individual and unique artistic work replete with "fictional" content, into a factual fragment making up the landscape of common experience and, within the paradigm of free-floating signifiers, of meaning and origin as well. This problem leads us to ask two questions which will be addressed later in this paper: first, when and how does a work cross the border between being the fictional work of an author and, on the other end of the spectrum, being a piece of the public experience with such a life of its own so as to be entirely distinct from the "original" work: Second, should the law somehow recognize this transformation, and if so, how?

Addressing the third question in the fair use test, the amount and substantiality of the work used, the court said that the relevant question is what portion of the expression, as opposed to the factual content of the work, has been copied. Furthermore, the court reasoned that "[i]t is not fair use when more of the original is copied than necessary"(p.311). Regarding these determinations, the court found that Koons had gone far beyond using a portion of "Puppies", and that his appropriation amounted to an act of "piracy". Clearly, as has already been pointed out, the court failed to consider the possibility that the huge contextual shift which "Puppies" underwent by being appropriated might be a factor to be considered in deciding how much of the original work was carried over into the "copy". Looked at in this way, it might just as reasonably be said that only the most superficial remnant of the original work remained in "String of Puppies". Taking on this perspective, however, would require not only forming a definition of the "copy" which includes the context of that work, but also defining the original in the same contextual manner. Apparently the court did not consider this on its

own, nor does it seem that such a method of analysis was suggested to it by either of the parties.

The fourth and final fair use determination, one which the United States Supreme Court in *Stewart*, 495 U.S. 207, called the "most important, and indeed, central fair use factor", is the effect of the use on the market value of the original. The court claims that here there is a balancing which must be made "between the benefit gained by the copyright owner when the copying is found an unfair use and the benefit gained by the public when the use is held to be fair". The court then goes on to explain how this evaluation is to be made:

The less adverse impact on the owner, the less public benefit need be shown to sustain non-commercial fair use. It is plain that where a use has no demonstrable impact on a copyright owner's potential market, the use need not be prohibited to protect the artist's incentive to pursue his inventive skills. (p.312).

The court then reasons that "String of Puppies" would harm Rogers' potential market for derivative works of "Puppies", such as sculptures and, in the case that Koons' decided to make postcards of "String of Puppies", for that market as well. While it is highly questionable whether there would be any market for sculpture versions of "Puppies" which were produced by Rogers, there is, admittedly, some merit to the argument concerning the postcard market. The danger which this concern seeks to prevent (i.e. the stealing of markets for derivative works), however, may not be as serious a threat as the court might have us believe. After all, even if the court were to accept that "String of Puppies" is a parody or, by considering context, an entirely new work,

copyright could still protect Rogers' postcard market. In either case, the elements that might make it a parody or a new work - the size and medium, the price, the gallery, Koons' reputation - would be substantially, if not completely, lost when the work was reduced to a photo on a postcard. In this form, "String of Puppies" could no longer be said to have enough distinguishing features from those of the original, and could thereby be seen as encroaching on that original, both in expression, perceivable meaning, and form. Rogers' postcard market could, in this way, retain complete protection without making impossible the creation and marketing of aesthetically similar derivatives, such as those which postmodern appropriation artists wish to make. In furtherance of this idea, the "potential market" test employed in cases such as this might go beyond the judicial speculation as to what markets it is "not implausible"(p.312) that the creator of the original work might exploit, and utilize a more realistic test of what markets this creator either intends or has the demonstrable capacity to exploit. Here, for example, there is no evidence that Rogers ever intended to sell sculpture derivatives of "Puppies" in the high-priced New York art market, nor does it seem even plausible that such an option existed or would ever exist. If copyright intends to protect creators' options to profit from their works, then provided the copies made are, and remain, for the most part distinguishable from the original, there is no equitable or practical reason why this protection should extend to markets or profits which those creators had no reasonable hope of reaching. It does not seem illogical to ask of copyright law: why protect a right that the protected party could never exercise? The answer to this might be that it is better to give that right to some other party who is in the position to use it, both for his own gain, as well as for the progress of the arts in general. Here, it seems reasonable to add that such a practice

might even profit the creator of the original work. Although there are no figures available, it seems a safe bet that Koons' appropriation only enhanced the marketability of the "Puppies" postcards, by simultaneously banishing them to the status of middle-America kitsch and, at the same time, lifting them up onto the shrine of American cultural and ideological icons, much like the eternal coolness that Andy Warhol gave to Campbell's soup cans.

All things considered, it seems doubtful that anyone could question the fairness of the court's final decision in Rogers v. Koons: the remaining sculpture was ordered delivered to Rogers; Koons was subject to a fine for contempt in willfully disobeying the original injunction; and he was ordered to pay to Rogers "a reasonable license fee for the use of 'Puppies'" which would be calculated as the amount which "best approximates the market injury sustained by Rogers as a result of Koons' misappropriation", subject to the consideration of "Koons' own notoriety and his related ability to command high prices for his work"(p.313). Perhaps what is objectionable about this decision to postmodern appropriational artists, however, is not obvious in these particular circumstances, where Koons, despite his wealth, deliberately avoided paying or even getting permission for his appropriation of "Puppies". The problem is the restrictive view propounded by the court as to what constitutes fair use, and its complete failure to acknowledge that while factors extrinsic to the work itself may be considered in the assessment of damages, similar "contextual" factors might also be considered in determining whether the "copy", as a parody or critique, may be defensible under the fair use doctrine. Apparently, the court's vision was restricted entirely to the most superficial review of the differences between "Puppies" and "String of Puppies". And while this narrow vision may be partly justified

by the "reasonable person" standard used in the copy test (this will be discussed later), it is, arguably, based on a view of art that is nothing short of ignorant. Art, for hundreds of years, and always increasingly so, is dominated by contextual factors. If this were not the case, the Mona Lisa would merely be a smirking woman, Picasso's *Guernica* a collection of random black and white images, and anything by Pollock a big, colourful mess.

The second case we are to examine is that of Campbell v. Acuff-Rose Music Inc., a U.S. Supreme Court decision which, according to one writer, "could very well go down in jurisprudential history as the case that shepherded copyright law's entry into the postmodern era" (Badin, p.1653). The action here came about when a rap group by the name of "2 Live Crew" (Campbell) used several short digital samples taken from Roy Orbison's song "Oh, Pretty Woman", the publisher of which is Acuff-Rose Music Inc. The 2 Live Crew song, titled "Pretty Woman", used substituted lyrics such as "Oh, hairy woman", and "bald-headed woman" for those in the original. Members of 2 Live Crew claimed that their work was a parody of the original and that it commented critically on the "white-centered popular music" from which that original came.

When the Supreme Court decided *Campbell* in favour of 2 Live Crew, they did indeed aid the progress of postmodern art practices, though perhaps not enough. Their decision was reached by reasoning that the traditional fair use presumption that a commercial parody is unfair should not be followed. Although this appears to eliminate one of the hurdles to be overcome by appropriation artists such as Jeff Koons, whose extreme commercialism might militate against their ability to invoke the fair use doctrine, it fails to expand the concept of parody to include the type of substantial

recontextualization now practiced by many artists. As Roxana Badin of the Brooklyn Law School points out:

The Supreme Court's salutary elimination of the commercial presumption, however, is limited to works that convey a parodic purpose. Consequently, while [*Campbell*] has rescued one form of valuable artistic expression from an outmoded view of creative value, it nonetheless implicitly excluded appropriation art from fair use protection"[...]the court ignored the transformative value of a creative work that criticizes without parodying its target and allowed a presumption to remain against the work's commercial character, thereby jeopardizing its immunity as fair use.(p.1653-1654).

Indeed, Justice Kennedy, who wrote the concurring decision for *Campbell*, quoted from, and thereby upheld, the principle in *Rogers* that "the copied work must be, at least in part, an object of the parody"(960 F.2d 301). In the narrow understanding of art shown by the court in *Rogers*, as discussed earlier, this is a requirement that the "copy" not be so similar in the most superficial way to the original that one might be mistaken for the other. The copy should, one might say, work as an immediately obvious parodic frame around the original. Without allowing the consideration of context (or "re-context") to enter into this evaluation, however, there does not seem to be any way that appropriation works of the type here discussed can qualify under the fair use parody exception. Badin comments:

If [*Campbell*] had held that a review of the secondary work's transformative value did not depend on the obviousness of its criticism or

its conventional resemblance to parody, appropriationists would have a forum [...] in which this particular kind of criticism could be judged fairly. (p.1688).

This is not what *Campbell* mandated, and so, all told, the prospect for an allowance of postmodern appropriational art techniques by the American courts is grim. The combination of the *Rogers* and *Campbell* decisions, as we have seen, create a virtual prohibition of appropriation where the parodic or critical elements of the "copy" are primarily contextual. Now, however, as we look to find the possibilities of practicing this type of art in Canada, we find the American prohibition to be lax and flexible by comparison. Canadian law, it will be shown, contains several further impediments to appropriation artists, the net result of which is that the only reasonable advice a lawyer might give her postmodern artist client would be "go South, young man, go South".

The Canadian Position

As will be seen below, the difference between American and Canadian copyright law is that while the American legislation and jurisprudence allow very little appropriation to take place where the appropriator has failed to get the permission of the copyright holder, the Canadian position allows even less. The following excerpt from lawyer Glenn A. Bloom in Art, the Art Community, and the law: a legal and business guide for artists, collectors, gallery owners, and curators serves as an excellent example of the practical difficulty of practicing in the appropriational arts:

A word of caution to artists creating collages: Unless you obtain the authorization of the owner of the copyright for individual images and text used in a collage, you may not be able to reproduce the collage without

infringing copyright in the individual elements... Collage artists should always consult with the copyright holders and obtain appropriate permissions.(Bloom. p.48).

In order to comprehend the reasons for the less permissive nature of the Canadian regime, we will consider the three primary differences between American and Canadian copyright and, in the course of that exposition, we will attempt to reveal the paradigm underlying the failure of copyright law in Canada to adequately address the appropriational art problem that is the subject of this paper. The three primary differences to be examined are: first, the constitutional sources of copyright; second, the distinction between American fair use and Canadian fair dealing; and third, the moral rights regime in Canada. For purposes of convenience, we will discuss the application of the *Charter*'s freedom of expression protections in the context of the second issue, wherein the recent and influential decision in *Michelin* will be analyzed.

i) Constitutional Sources of Copyright

The most essential difference between American and Canadian copyright law, as it applies to the issues before us, rests in each of these nations' underlying rationale for copyright itself.

American copyright law has its roots in the United States Constitution. Article I, section 8:

The Congress shall have the power... To promote the Progress of Science and the useful arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

The emphasis in this constitutional directive is on the promotion of scientific and "useful" artistic progress, and the means to that end are the rights given to authors. Generally, this has resulted in the U.S. courts interpreting copyright law so as to give only as much protection to authors as is necessary in order to provide the economic security and incentives which will keep them actively creating and inventing. In Canada, on the other hand, as was discussed earlier, although the federal government has been given the power to legislate in relation to copyright by section 91(23) of the *Constitution Act of 1867*, this section does not make any policy pronouncement like its American counterpart. Rightly or wrongly, Canadian copyright has evolved primarily as a statutory right of authors and of authors alone. There is little in Canadian law like the American struggle to balance the rights of copyright owners and users. This is evidenced by the notable lack of reference to the public interest in statements such as this one by Henderson:

Copyright law is fundamentally concerned with the protection of literary, artistic, dramatic and musical works against unauthorized copying....reproduction....and performance in public. It protects the original expression used by an author in creating these types of works, once they are in affixed and permanent form (Henderson, p.264)

It should be noted that in the last few years, however, there has been some increase in the consideration given to the public interest (Gow, p.3), most notably in the *Final Report* of the Information Highway Advisory Council's Copyright Subcommittee (Canada, 1995b), and in the actual report (Canada, 1995a). Both these documents refer to the "marketplace of ideas," and comment that "Canada's success on the Information

Highway depends on whether we can establish a competitive framework that unleashes creativity, innovation and growth"(1995a: ix). Presumably, the innovation and growth here spoken of is not only that of the individual creators, but of Canadian society as a whole, as is evidenced by the report's later statement that copyright acts as "the essential lever to encourage creativity and ensure adequate compensation for creators... [and is therefore] important to the realization of Canadian cultural sovereignty and national identity" (1995a: p.35)

ii) The Canadian Fair Dealing Exception & the *Charter*

A second difference between the copyright law of Canada and the United States, and one which is especially important to appropriation art, lies in the difference between the American fair use doctrine discussed at length above, and the Canadian defence of fair dealing. First, while the American fair use exception has been considered by the courts in conjunction with the legislative history and policy considerations discussed above, and is thereby "flexible and capable of the same evolutionary and 'living tree' approach sought by copyright owners when it comes to the enforcement of rights"(Henderson, p.258), the Canadian defence "is statutorily restrictive and not easily capable of a remedial, flexible, or evolutionary interpretation"(Henderson, p.259). As James Zegers comments in his 1994 article Parody and Fair Use in Canada After Campbell v. Acuff-Rose:

In contrast to s.107 of the United States *Copyright Act*, the Canadian "fair dealing" exception is a closed set. Only those uses listed in s.27(2)(a) are included.(p.209)

Second, there is no recognition in the Canadian fair dealing provision of the *Copyright Act* of parody. And, according to Henderson, two cases, ATV Music Publishing of Canada Ltd. v. Rogers Radio Broadcasting Ltd., (1982), 65 C.P.R. (2d) 109 (Ont. H.C.), and Ludlow Music Inc. v. Canint Music Corp., (1967), 51 C.P.R. 278 (Ex. Ct.), have demonstrated that Canadian courts do not, and probably will not, recognize any fair dealing parody defence, and that "[i]n the few other instances where parody has been considered in Canada the rather dry analysis of substantial taking is applied, to the inevitable favour of the plaintiff" (p.261). The fair dealing provision of the *Copyright Act*, as was discussed above, allows limited copying of protected works for the "purposes of private study or research", and for "criticism, review or newspaper summary". And as Zegers argues:

While the Canadian fair dealing provision in s.27(2)(a) is more restrictive than its American counterpart, it is nonetheless broad enough to contain parody. By including criticism as one of the uses that may be permitted under ss.27(2)(a), the Canadian Copyright Act by implication includes parody, since parody is, by definition, a form of criticism. (p.209).

Strangely enough, however, in no Canadian case has the term "criticism" been found to include parody or, for that matter, anything even remotely akin to the sort of re-contextualization discussed above.

Although Henderson found the permissive result in *Campbell* to be an insult to the copyright owners, due mostly to the distasteful character of the parody, he does favour the introduction of parody into the Canadian copyright regime. He criticizes the courts and parliament as being "somewhat lacking in a sense of humour where parody is

concerned". but notes that "given that the targets of a great amount of satire by way of parody are politicians themselves, one ought not to be overly optimistic"(p.262).

Historically, fair dealing has been interpreted by English and Canadian courts in a manner that is reasonably broad and flexible. Copyright scholar John McKeown points out that the "fair" aspect of the exception has been seen as being inclusive of the following considerations: first, the copier's purpose or motive for making the copy; second, the importance of the portion taken and its quantitative relationship to the original as a whole; third, whether or not the copy is in market competition with the original; lastly, whether or not the original has been published (McKeown, p.550). Lord Denning, M.R., who was, arguably, the United Kingdom's greatest, or at least most spirited, judge, stated the following about the concept of fair dealing¹¹:

It is impossible to define what is "fair dealing". It must be a question of degree. You must consider first the number and extent of the quotations and extracts. Are they altogether too many and too long to be fair? Then you must consider the use made of them. If they are used as a basis for comment, criticism or review, that may be a fair dealing. If they are used to convey the same information as the author, for a rival purpose, that may be unfair. Next, you must consider the proportions. To take long extracts and attach short comments may be unfair. But, short extracts and long comments may be fair. Other considerations may come to mind also. But, after all is said and done, it must be a matter of impression. (*Hubbard*, p.1027)

Additionally, Lord Denning's observations can be further broadened by the comments of Megaw, L.J., also of the English Court of Appeal, who uses an example to argue for the use of a flexible approach to the notion of "proportions", touched on by Denning:

Suppose that there is on a tombstone in a churchyard an epitaph consisting of a dozen or of 20 words. A parishioner of the church thinks that this sort of epitaph is out of place on a tombstone. He writes a letter to the parish magazine setting out the words of the epitaph. Could it be suggested that the citation is so substantial, consisting of 100 per cent of the "work" in question, that it must necessarily be outside the scope of the fair dealing provision? To my mind it could not validly be so suggested. (Hubbard, p. 1028)

Clearly, the previously considered four considerations, coupled with the above comments of Lord Denning and Justice Megaw, might lead us to believe that fair dealing has, both in Canada as well as in the United Kingdom, enjoyed a large, fact dependant, sensitively considered application. The examination of current case law below, however, reveals that any such liberal interpretation is being either curtailed or eliminated completely by the Canadian judiciary.

In order to reveal and analyze the more current reasoning employed by the Canadian courts in dealing with the appropriation of copyrighted material, especially in situations where parody is raised as a defence, as well as in order to introduce a discussion of the *Charter* into our argument, we will now examine the recent decision of

11 In Hubbard v. Vosper [1972] 1 All E.R. 1023 (Eng. C.A.).

the Federal Court of Canada in Compagnie Générale des Établissements Michelin-Michelin & Cie (Plaintiff) v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW- Canada), (1996), 71 C.P.R. (3d) 348 (Trial Division), a case which, as it was only decided after Henderson's article, did not fall into the scope of his study. Although the subject matter of this case does not involve an appropriation by any "artist", in the traditional sense of the title, the reasoning of the court in this case may add even greater persuasive power to the argument that current copyright law is unreasonable, as the appropriation in question was done not, as is the case with many an "artist", in order to receive monetary rewards, but rather, by a non-artist, labour organization as a statement intended to criticize a corporate entity's treatment of its workers¹². In this way, this case is of great value as an example of the limited and narrow scope of the mode with which the Canadian judiciary interprets the applicability of the statutory defences established by the *Copyright Act*, especially where

¹² A case involving similar circumstances but which was concerned with trademark law and not copyright, is Canada Safeway Ltd. V. Manitoba Food & Commercial Workers, Local 832 (1983), 73 C.P.R. (2d) 234 (Man.C.A.). In that case, the court granted an injunction to Safeway preventing the worker's union from passing out a leaflet which criticised Safeway, where, in the opinion of the court, "...the way in which the insignia is being used by the union does give the impression to a significant number that it is a [Safeway] company pamphlet" (p.236). Although Coombe seems to consider this decision a restriction on the union's ability to criticise Safeway, it is arguably more permissive in its general attitude towards intellectual property than *Michelin*, and appears only to be concerned with situations in which it is, on first impression, difficult or impossible to tell the difference between the appropriation and the original source –i.e. where there is a strong potential for confusion. It might be said, in fact, that this case is actually in conflict with *Michelin*, especially in regard to where the court states that "I am of the opinion that there would be no valid ground for objection if the insignia were used simply to show that the pamphlet in question was about the company. Such a use of the company insignia would be no more wrongful than use of the company name"(p.236). Nevertheless, had counsel for Safeway argued that the copyright of the company in the

the objective of the appropriator can so easily be characterized as democratic speech. For these same reasons, however, the case represents a troubling indicator of the degree to which simplistic common-law notions of absolute property ownership may be intruding upon the more recently recognized, though fundamental, right of freedom of expression set out in section 2(b) of the *Charter of Rights and Freedoms*. This case, in other words, is worth examining as it demonstrates in a pure and, more importantly, binding manner, a complete failure of the Federal Court, the supposed experts in copyright law, to address or even to seriously consider, the arguments and views set out in this paper, some of which were argued by counsel for the defendants, CAW.

The facts of *Michelin* are not particularly complex. The defendant, National Automobile, Aerospace, Transportation and General Workers Union of Canada (known as "CAW"), was involved in an attempt to unionize the workers at several tire plants in Nova Scotia which were owned and operated by the plaintiff, Michelin North America (Canada) ("Michelin"). In the course of the unionization campaign, CAW, without any authorization from Michelin, distributed leaflets that utilized the Michelin "Bibendum" (a.k.a. the "Michelin Man") as a symbol of the Michelin corporate entity. The representation was not a flattering one, wherein "a broadly smiling "Bibendum", arms crossed, with his foot raised, [stands] seemingly ready to crush underfoot an unsuspecting Michelin worker". Also in the same leaflet, "...another worker safely out of the reach of "Bibendum's" looming foot has raised a finger of warning and informs his blithe colleague, "Bob, you better move before he squashes you". Bob responds "Naw, I'm

insignia design had been violated, the court might not have made any such liberal pronouncement.

going to wait and see what happens". In bold letters at the bottom of the cartoon images, the following bold caption was written: "Don't wait until it's too late! Because the job you save may be your own. Sign today for a better tomorrow." (pp. 4-5). The leaflet was distributed to Michelin workers and a poster version of its featured cartoon was displayed for several months in an urban public location.

Michelin sued CAW for both trademark and copyright infringement for employing the word "Michelin" and the figure of the "Bibendum" in the union-promoting materials. In regards to the trademark issue, CAW successfully defended itself by arguing that it had not "used" Michelin's trademarked name or "Bibendum" in the sense required by the *Trademarks Act*. That is, these trademarked representations of the corporate identity had not been used by CAW "in the sale, distribution or advertisement of wares or services in association with a confusing trademark or in a manner that is likely to have the effect of depreciating the value of goodwill attached to the trademark" (p.372).

In defending itself against the copyright infringement action, however, CAW was unable to persuade the court of its two principal arguments: first, that, in this case, the use of the name "Michelin" and the "Bibendum" qualify as parody which, they claimed, is a form of "criticism", and is therefore a use which falls within the statutory defence set out in section 27(2)(a.1) (now s.29.1) of the fair use portion of the *Copyright Act*; second, that the relevant portions of the *Copyright Act* are constitutionally invalid, as they contravene the guarantee of freedom of expression at section 2(b) of the *Canadian Charter of Rights and Freedoms*.

Justice Teitelbaum, who presided over the case, considered whether or not the “Bibendum” depicted on the Defendants’ leaflet was a “substantial reproduction” of the Plaintiff’s “Bibendum”, and concluding that it was:

In effect, it is immaterial if the Defendants have employed some labour and some originality if there is nonetheless reproduction of a substantial part of the original. In any event, I can find no merit in the Defendants’ submission that the “Bibendum” on their posters and leaflets displayed sufficient mental labour and originality to constitute an entirely new result. (p.376).

As in *Rogers v. Koons*, the court failed to consider the possibility that the use of the “Bibendum” in the leaflet was markedly different from the original not because of its simple surface appearance, but rather, because of the radical recontextualization of the image. No longer was the “Bibendum” a signifier erected in order to sell tires to the public – it had been transformed into a symbol of an unfair employer, and was being directed at the workers of that employer. It was, therefore, a representation of Michelin the Employer, and not of Michelin the Tire Manufacturer. Further, the use did not appear to be one which would usurp the market share of Michelin by selling tires using the “Bibendum”, or by selling or giving away “Bibendum” images to those who would, were it not for the free leaflets, have purchased “Bibendum” emblazoned products directly from Michelin. Not only was this point not considered by the court in this case, but it does not seem to have ever been raised by the Defence.

Following the “substantial reproduction” assessment, Teitelbaum J. then went on to deal with Defendants’ parody argument, making it clear from the beginning of his reasons that this argument was going to get nowhere:

Under the Copyright Act, “criticism” is not synonymous with parody. Criticism requires analysis and judgment of a work that sheds light on the original. Parody is defined in the Collins dictionary (Second Edition) as “a musical, literary or other composition that mimics the style of another composer, author, etc. in a humorous or satirical way”. (p.378).

Following this statement, he then, without reasons, rejected the Defendants’ submission that there was no need to cite the source of the appropriated figure as “in a parody, the source is implicitly known to the onlooker” (p.379). He also rejected the American jurisprudence outright (including *Campbell v. Acuff-Rose*), by stating that while “most fascinating from both a cultural and legal perspective, I have not found it to be persuasive authority in the context of Canada’s particular copyright regime” (p.380). By accepting that “criticism” includes parody, he felt that he “would be creating a new exception to the [sic] copyright infringement, a step that only Parliament would have the jurisdiction to do” (p.381). End of discussion.

Perhaps the most interesting thing about this portion of *Michelin* is that the Defendants did not seem to attempt to argue that the use of the “Bibendum” was, in itself, a form of criticism, sufficient to satisfy the defences part of the *Copyright Act*. In this way they might have gotten around Justice Teitelbaum’s complaint that “[m]y role is not to create legislation, but to apply the existing rules crafted by Parliament” (p.384). The

Justice did, in obiter¹³, note that “Michelin is the “Bibendum” and the “Bibendum” is Michelin, so any criticism of the “Bibendum” is criticism of Michelin and vice versa” (p.382), and it might be said that if this is so, then it would be allowable for the Defendants to use the “Bibendum” as a criticism of the Michelin corporation. Instead of making this more direct form of argument, however, the Defendants attempted to arrive at “criticism” by way of “parody”, a word which does not appear anywhere in the Copyright Act. In this manner, it appears that their argument may have failed because they built a faulty bridge in order to get over a non-existent river. Considering the single-mindedness of the Justice’s reasons, however, it does not seem likely that any argument, no matter how logical, would have been persuasive.

Having disposed of the Defendants’ position as regards to the *Copyright Act*, Teitelbaum then considered the constitutional issue. The union argued that the published materials using the “Bibendum” were protected by s. 2(b) of the Charter, and that the relevant sections of the *Copyright Act* are not saved under s.1 of the *Charter* as being “reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”.

Teitelbaum began the inquiry by reference to two previous cases in which copyright infringement defendants had raised freedom of expression claims. He noted what legal scholar David Fewer has called the “short work” (p.34) with which such claims have been dismissed, and then stated:

¹³ From *obiter dicta*, meaning a portion of the decision which is merely discussion of a question or issue not to be decided, and on which the reasons given make no binding pronouncement.

I agree with the Defendants that the use of a copyright by a union to parody a company logo in the midst of an organizing campaign does raise certain constitutional issues. I do, however, part company with the Defendants on the resolution of the constitutional question. I hold that the Defendants' right to freedom of expression was not restricted.

And then came the most remarkable sentence - the court's justification for this conclusion:

The Charter does not confer the right to use private property – the Plaintiff's copyright – in the service of freedom of expression.

We will now look at the line of reasoning employed by the court to arrive at the above result. First, the court considered whether or not the union's leaflets constitute expression. It noted the statement of Justice Mahoney for the Federal Court of Appeal in The Queen v. James Lorimer and Co., [1984] 1 F.C. 1065, that the freedom of expression defence is not available to infringers when:

so little of [their] own thought, opinion and expression is contained in the [Defendants'] infringing work that it is properly to be regarded as entirely an appropriation of the thought, belief, opinion and expression of the author of the infringed work (p. 388).

Finding that the union's use of the "Bibendum" "conveys meaning, a meaning entirely different from the original..." (p. 389), Teitelbaum concluded that the use was a form of expression. This led to the next question, "is the use of the 'Bibendum' on the leaflets a prohibited form of expression?"

Although the labeling of a form of expression as prohibited has generally been used in cases where the expression is violent¹⁴ (such as in the “expressing” of some message through the act of murder), where it is advertising for the purposes of prostitution¹⁵, or where it is a prohibition on the publication of hate propaganda¹⁶. Teitelbaum reasoned that:

The Plaintiff argues that using another’s private property is a prohibited form of expression or else qualifies as a special circumstance warranting the removal of the expression from the protected sphere. I agree... that the Defendants are not permitted to appropriate the Plaintiff’s private property – the “Bibendum” copyright – as a vehicle for conveying their anti-Michelin message. Thus, the Defendants’ expression is a prohibited form or is subject to what Justice Linden... called a “special limitation” and is not protected under the umbrella of Section 2(b).

It is unclear what Teitelbaum means by saying that the use of the “Bibendum” by the union was “a prohibited form” or “a special limitation”. This statement seems tantamount to saying “I don’t know what to call it, or why, but it’s something bad”. This is not particularly convincing reasoning, but it is perhaps necessary in order to reach a result that is as unsupportable by the jurisprudence and by the law as is this one.

Teitelbaum then goes on to open his argument up to further criticism by attempting to draw an analogy between the union’s use of the “Bibendum”, on the one

¹⁴ See Irwin Toy v. Quebec [1989], 1 S.C.R. 927 and R. v. Keegstra [1990], 3 S.C.R. 697

¹⁵ See Re ss. 193 and 195.1 of Criminal Code (Prostitution Reference) [1990] 1 S.C.R. 1123

hand, and picketing of private corporate property on the other. He quotes the former Chief Justice Dickson of the Supreme Court of Canada, and several other courts, all in decisions about the constitutional right of picketers and demonstrators to use private or government land for the purpose of voicing their opinions. At no point does Teitelbaum ever refer to any case which involves intangible property, such as copyright, though he does acknowledge that there may be a distinction:

What then is the nature of copyright as private property? Copyright is an intangible property right... But just because the right is intangible, it should not be any less worthy of protection as a full property right. (p. 388)

At this point it may be of some assistance to ask whether or not the difference between land and the "Bibendum" is merely that one is tangible property, while the other is intangible. Much intangible property, such as stock in a company, or profit rights in a venture, may be distinguished from copyright in that they are not reproduceable forms of property. They do not, in other words, allow the possession of the property by both the owner and by someone else without depriving the owner of the use of the original object. And while it may be said that the simultaneous holding of the object of copyright by more than one party may reduce the potential market for the sale of further reproductions of that object, it does not effect the use and enjoyment of the original by the owner in the same way that, for physical reasons, a piece of land cannot be fully enjoyed by two persons simultaneously. In the case of tangible property, the source of value is in the exclusive possession of the original, while in copyright the value derives from a market

16 See Keegstra, *supra*.

wholly independent and unaffected by the possession of the original work. Teitelbaum seems to miss this difference when he states that:

The Defendants had no need to adopt a form of expression, the use of copyrighted material, that *deprived* the Plaintiff of its property and actually subverted the... value of promoting the diversity of ideas. In other words, if copyright is not respected and protected, the creative energies of authors and artists in furthering the diversity of ideas will not be adequately compensated or recognized. (p. 396)(emphasis mine)

This gives rise to several questions. First, of what was Michelin *deprived*? The union was using the “Bibendum” in a non-commercial way. It is entirely unclear what deprivation Teitelbaum is referring to here. Furthermore, how and what does this case have to do with protecting “the diversity of ideas”, unless we are speaking of the union’s ideas, or with the “creative energies of authors and artists”? Although Teitelbaum refers to Supreme Court Justice McLauchlin’s rule in Committee for the Commonwealth of Canada v. Canada (1991), 77 D.L.R. (4th) 385, that “the individual asserting a right to free expression on public property had to establish a link between the use of the public property and one of the purposes – truth, social participation and diversity of ideas – informing the protection of freedom of expression” (p. 395), he somehow finds that the situation in *Michelin* does not satisfy these qualifications.

Of particular note in Teitelbaum’s statement above, is his implicit objection to the use of copyrighted material as the chosen form of expression when, he appears to be implying, other less obtrusive forms of expression might have been used instead. To make the point even stronger: why should the union be allowed to use the Bibendum in

their criticism of Michelin when they might just as well do so without using the Bibendum at all?

A possible answer to this question comes in the form of another: why shouldn't they? The *Copyright Act* does not contain a clause requiring those relying on the exceptions to use the least intrusive means of communication of their fair dealings. It merely states that fair dealings are acceptable for certain uses, of which criticism and review are two. Thus, so long as the use fits within the exception, there is no mandated consideration of the choice of form.

Ironically, Teitelbaum's less/least intrusive concern is one which is firmly entrenched in the common law of the *Charter*. When a provision of a statutory law, such as the *Copyright Act*, is found to infringe one of the rights set out in the *Charter*, such as freedom of expression, the government must demonstrate that the infringement is justified by an important purpose and that such infringement is "as little as reasonably possible". It appears that, implicitly, Teitelbaum has reversed this test by demanding that the union, in expressing themselves, must infringe a statute-created law as little as is reasonably possible. This seems a strange and upside-down state of affairs wherein a statute is raised to quasi-constitutional status while the Constitution is dismissed as secondary. Unfortunately, this reversal of hierarchical positions is not clearly stated in the decision, and as such, would be either difficult or impossible to appeal.

Not all of Teitelbaum's unsupportable reasons, however, are left unsaid. Near the end of the *Michelin* decision, Teitelbaum makes his most telling statement. After noting that it would not be allowable for someone to draw a moustache on an original painting, he writes:

...what if the infringer asserted the right to copy or substantially reproduce the painting with a moustache? Our instincts might not be so certain about the scope of the infringer's freedom of expression because our perceptions are coloured by the intangible nature of the copyholder's right. We should guard against such instincts in this instance since they might lead us to undervalue the nature of the Plaintiff's copyright and overestimate the breadth of the Defendants' freedom of expression (p. 398).

It seems as if Teitelbaum is saying that although his decision appears to be counterintuitive and illogical to our "instincts" and "perceptions", we should accept it anyhow. But, one is prompted to ask, are not the "common" law and the legislative acts of representative government supposed to be consistent with our perception and instincts?

Teitelbaum's counterintuitive mode of unsupported reasoning in *Michelin* may, however, direct us to the implicit assumptions he makes in deciding copyright cases. First, his conclusions are consistent with an understanding of property that does not include reproducible forms of intangible property. Second, his reasoning is also consistent with the previous dismissive jurisprudence in which freedom of expression concerns have arisen in copyright infringement cases.

Although some might consider *Michelin* to be a major blow to the rights of copyright users, it may also be seen as a step forward in that, finally, a court has seen fit to actually write down in substantial detail the reasoning on which it bases a rejection of both an expanded reading of the term "criticism", as well as the applicability of freedom of expression claims to copyright litigation. Having now exposed these arguments to public consideration, they have also been exposed to rejection and criticism by courts.

scholars and the citizens who have an interest in allowing persons who have been subjected to the mass media deluge of corporate interest signifiers to speak back to those powerful forces, turning their languages and imageries back on them.

iii) Moral Rights

In addition to the constitutional and fair use/dealing differences between American and Canadian copyright law, a third substantial impediment which exists for appropriation artists in Canada is the existence of moral rights, discussed briefly above. While moral rights legislation has been enacted by several American state governments, and has been recently introduced into federal law in that country, those moral rights are generally limited to the visual arts only (*Visual Artists Rights Act of 1990*, Pub. L. No. 101-650, Title VI, 104 Stat. 5089 (1990)). The Canadian *Copyright Act*, on the other hand, in no way restricts the categories of works protected by moral rights. Under section 14.1 of the *Copyright Act*, as was mentioned in Chapter I of this paper, authors are given "the right to the integrity of the work", as well as the right "to be associated with the work as its author". The first of these rights is delimited in section 28.2 of the Act, where the conditions are set out under which, provided there is a "prejudice to the honour or reputation of the author," the integrity of the work will have been violated. One of these conditions is satisfied where the work is "used in association with a product, service, cause or institution". It is not difficult to see how this might be a formidable tool for those authors seeking not to have their works used in parodies or in more serious re-contextualization critiques of politics, economics or of society in general. In one case, for example, Le Nordet Inc. v. 82558 Canada Ltee. [1978] C.S. 904, songwriters known for

their devotion to the cause of Quebec separation successfully invoked their moral right of integrity when their songs were used in association with the promotion of Canadian unity.

The moral right of integrity, the restrictive nature of fair dealing, and the policy foundation of Canadian copyright law have seemed, for some time, to be the three horsemen harkening postmodern appropriational art's apocalypse, and recent judicial pronouncements such as those in *Michelin*, have confirmed that the specters are real. In *Michelin* it becomes blatantly obvious that, while American courts seem to be heading towards the application of more liberal interpretations of the acceptability of appropriational art practices, their Canadian counterparts are becoming dangerously strict.

There does not seem to be any conceivable way in which the existing law in Canada can allow for these contemporary practices to exist. When Torontonians John Oswald was pursued by lawyers acting on behalf of Michael Jackson (Oswald had pasted a photo of Jackson's head onto the body of a young naked woman for use as the cover of his digital re-mix album, "Plunderphonics"), he didn't even put up a fight. Had he been in the U.S., he might have stood a chance, but recognizing the highly protective author's rights in this country, he gave in immediately.

Given that neither the U.S. nor Canada have made any substantial moves toward the recognition of appropriational art forms as legitimate exceptions to infringement rules, and seem to be moving away from that recognition, this appears to be the critical juncture at which we might ask: what reforms would be necessary and possible in order to accept these practices as non-infringing uses, without upsetting established copyright law in any substantial way? In the next chapter, we will review several options, as well as looking to see what reforms are under way.

Chapter III: Legislative and Judicial Solutions

Although the Canadian *Copyright Act* came into force in 1924, it has been amended very seldom since that time. In 1988 and then again in 1997, however, the *Act* was amended by what are referred to as the Phase I and Phase II copyright reforms. While Phase I changes were designed to make uncontroversial amendments, Phase II was supposed to “balance authors’ and users’ rights by addressing a perceived need for increased exemptions to copyright infringement” (McLeod, p.39). No such changes occurred, however, and there does not currently appear to be any movement towards this sort of modification of existing law. For this reason, as was mentioned in this paper’s introduction, the arguments set out herein are, perhaps, based on an unrealistic desire by the author and numerous other thinkers, cited or not, to see changes in the policies and property law paradigms of our legislatures and judiciaries which would better address the problem of preventing copyright from impinging on democratic critical discourse. Furthermore, it is difficult to see how any changes in favour of users’ rights will be affected in light of the lack of economic and economic clout possessed by those users. Coombe comments:

Those who copy the expressive forms claimed by legally recognized authors may be visited with *ex parte*¹⁷ injunctions and even Anton Piller orders involving raids in which goods and records are seized and confiscated without notice. In circumstances such as these, those visited

¹⁷ An *ex parte* injunction is an order by a court, made after hearing only the copyright owner, with neither the presence nor the notification of the copyright user, forcing the copyright user to, in most cases, stop reproducing the copyrighted work and/or to hand

with accusations of “piracy” are unlikely to have the resources and wherewithal to engage in protracted constitutional litigation. (p. 79)

In addition to the problem of making arguments against the existing copyright regime in the courtroom context, some caution may be necessary in dealing with the making of arguments of this sort during legislative considerations of copyright amendment. Law Professor Karjala discusses the one-sided process in which the Sonny Bono Copyright Term Extension Act was pushed through the legislative process in the United States by a powerful lobby group, the members of which included the Motion Picture Association of America, Disney, ASCAP, and several representatives of the recording industry:

The special-interest proponents of term extension were successful at making the bill look non-controversial, as shown by the way the House Subcommittee held its “hearings”. (the hearings were combined with some other bills, so they were not publicized under the bill numbers for those trying to follow the legislation. The proponents of extension... knew about the House hearings and of course testified in favor. The opponents did not even know the hearings took place until several months later... (p.3).

Despite the possible mootness of our suggestions for this dismal situation¹⁸, however, we will now consider what possibilities for change exist, provided the voices of users are somehow heard by the Federal legislature or by the appellate courts.

over the “copies” already made. It is usually immediate in its effect, and failure to comply on behalf of the copyright user can result in fines, damages and even jail time.

¹⁸ It should be noted that this legislation is currently being subjected to a constitutional challenge. A lawsuit has been filed by professors Larry Lessig and Charles Nesson of

If appropriation practices such as those used by Jeff Koons and John Oswald are to be made possible in Canada, one or more alterations in the law would have to be affected. In light of the current Canadian position, as demonstrated by *Michelin*, however, it seems blatantly clear that the courts cannot be expected to effect such a change and that if, in fact, the desired modifications are not made by the Federal legislature, the interpretation of the *Copyright Act* by the judiciary may become more and more restrictive, conservative, and focused on nothing more than the protection of private interests in intellectual property, without any just regard for the public aspect of media.

Because engaging in critique has little value if it fails to generate the construction of solutions, we will now examine several copyright law reform options which have been designed by this author in an attempt to negotiate the acceptance of appropriational art practices with a minimum of upset to the existing rights of authors. Of the six proposals below the first three are confined in their applicability to Canadian copyright law, while the last three might be used in the American context as well.

The first option for Canadian copyright's legitimation of appropriation as a valid defence to an infringement action would be the introduction into the *Copyright Act* of fair use provisions which might be similar, or even more permissive, than those in the American *Copyright Act*. As we have seen in *Rogers* and in *Campbell*, these provisions are somewhat limited in their ability to deal with some types of appropriation, but do

Harvard and by the Boston law firm of Hale and Dorr, on behalf of Eldritch Press, naming Attorney General Janet Reno as a defendant. The constitutional challenge will argue that the latest copyright term extension (if not some of the previous ones as well) are unconstitutional in that they provide far more protection to copyright owners, and far too little to the public domain, than is justified by the constitutional directive to "secure

allow for the making of parodies. If this allowance were made, it would represent a substantial broadening of the rights of users in this country, and would legitimize at least some types of appropriation. Furthermore, the introduction of identical or similar fair use provisions into the Canadian Copyright Act would more readily allow the application of the American fair use cases, such as *Rogers* and *Campbell*, to Canadian copyright law.

If these legislative importations were to occur, however, it might be necessary to modify the fair use provisions to make them even more permissive than their American cousins, in order to compensate for the lack of a constitutional policy statement which places a priority on the public interest. An explicitly permissive mode of legislative drafting might be necessary to inform our conservative and property-rights centered judiciary of the expanded scope and number of copyright defences.

The second reform option would involve the serious consideration by the courts of the real conflict between the rights conveyed by the *Copyright Act* and the more important right of freedom of expression set out in the *Charter*. A substantial body of fair use/First Amendment jurisprudence is developing in the United States that might be of some assistance to our courts in making this leap. Most important to this consideration, however, would be the recognition, which was not made by the court in *Michelin*, that the world has changed since the 19th century, and that traditional understandings of tangible, non-reproducible property must be supplemented with a new, extra category. Further, the courts would have to recognize that the commercialization of the public's visual and acoustic environment is an intrusion and a loss of public space which might readily

for limited times to authors and inventors the exclusive right to their respective writings and discoveries" in order to "promote the progress of science and the useful arts".

justify the reciprocal obligation on those sufficiently intrusive corporate actors and other copyright owners, to accept a quasi-public aspect to the images and sounds which they thrust upon the world. After all, if they seek to use the public's minds, culture and environment for participation in their private pursuit of capital gain, then is it not fair, just and reasonable that the public receive, at minimum, some return from the deal¹⁹?

A third reform option, and one that would require a lesser amount of effort than the legislative reform set out in the first option, above, would be for the judiciary to recognize an expanded definition of the fair dealing exception for "criticism" as it already exists in the *Copyright Act*. This term might be made to include criticisms of society in general (as in Koons' works), or of particular works, so long as the critical work does not act as a market replacement for the original. As we have seen earlier, the constitutional arguments and rationales in support of such an expanded view of the meaning of "criticism" in the *Copyright Act* are neither difficult to make nor are they difficult to accept. Apparently, however, our judiciary must be willing to seriously consider, and legally recognize, the interaction between the legislative objectives of the *Copyright Act*, the rights it actually conveys, the extent to which those rights need to be enforced and granted in order to fulfill those legislative objectives, and, most importantly, the dangers which the fulfillment of those objectives present to the fundamental constitutional right of freedom of expression.

¹⁹ The interrelationship between corporation and public is noted by Coombe: "The value of a product, in other words, lies in the exchange value of its brand name, advertising image, or status connotations: the "distinction" it has, or will acquire, in the market... For today it is no longer the production of goods but the production of consumers to produce demand that is fundamental to profit expansion and a strategic site for corporate investment" (p. 56).

A fourth option would be for the judiciary to recognize that a greater allowance should be made in favour of users during determination of whether a work has been copied substantially, where the original has such wide distribution and is so well known by the public so as to have attained the status of a cultural icon. In other words, where a work's popularity has become so much a part of the *conscience collective*, the lexicon of a culture, that it is identified more with that culture than with the original author, the right of users to utilize that work as a part of other works should be expanded. Incorporated into the test for deciding whether this status has been reached should be the requirement that the original author has been able to exploit the work to a large degree. If this exploitation factor has been satisfied, then one of the underlying goals of copyright would be reached, that of rewarding authors well enough for their labours that they are encouraged to continue creating.

As the judiciary seems to be terribly concerned with understanding and deciding copyright law cases by reference to traditional common law axioms of property ownership, it might be argued in this regard that the right of the public to appropriate works of sufficient notoriety might be based in an understanding of widespread public consumption of this intellectual property as not a mere rental of these works, but rather, as the gradual purchase of the works, or, at least, of a more expansive range of rights to use the works than the public would have where sufficient exploitation has not been achieved by the copyright owner. The public right to use a copyrighted work, in other words, would become greater and greater the more, in terms of both monetary spending and widespread recognition, that public embraced the work. Although, arguably, such a determination might seem a difficult one to make for a court, the task might be simplified

by designing both monetary and statistical standard thresholds. Quite possibly, the resulting test would not be any more impossible to apply than many of the factual determinations utilized by courts every day²⁰.

A fifth recommendation is one which builds upon the fourth, the legal recognition of cultural-icon status, but involves a recognition of a new category of property into which that status can be pigeonholed in a manner which is not inconsistent with the basic tenets of property law. As yet, the law distinguishes between only two primary categories of property: tangible and intangible. Tangible property includes all real property (land, buildings) and chattels (movables). Intangible property includes such things as shares in corporations, bonds, promissory notes, etc. The value in the latter form is impossible to grasp physically. Traditionally, this latter form of property would also include intellectual property. What we argue here, however, is that such a categorization is inappropriate.

As was discussed briefly in our analysis of the *Michelin* decision, intellectual property has one defining feature that makes it unlike all other forms of property and that is its reproducibility. While no land or house or share in a company can be held by any more than one owner at a time, intellectual property is infinitely reproducible without detriment to, or loss of, the original work. In addition, as was discussed in relation to the *Michelin* case, the value of intellectual property is, in most cases, created not by its

²⁰ The famous Oakes test, for example, whereby the courts determine whether or not any given government act or legislative work is unconstitutional is, arguably, far more complex than the test for a copyrighted work's notoriety proposed here. The Oakes test requires the court not only to make assessments of the objectives of government acts and legislation, and of the degree to which the acts or legislation "infringe [the Charter] as little as is reasonably possible", but it also requires that the court determine the extent to which the act or legislation can be justified as a "reasonable limitation" on any of the Charter's fundamental rights.

exclusive possession by one owner, but rather, by its popular distribution, consumption, and recognition. It is the public, in other words, that, by its participation and internalization of a copyrighted work, gives it its value and makes the difference between a valueless work and one which brings its owner untold riches. No other form of property can be obtained so easily and then sold again and again to an infinite number of users simultaneously. In this manner, intellectual property is not only far too well protected for the furtherance of the objectives of copyright law, but cannot be linked in any clear way to a model of just deserts for labour expended. And when, into this mix of problems, one adds that its powerful protection may interfere with the legitimate exercise of democratically-mandated free speech and expression, it seems incontrovertible that its powers ought to be restricted by the legal recognition of a special public aspect category of property, one which has different rules and a less than absolute character. The recognition of this category would allow the judiciary to cease their application of the rules of tangible and non-reproducible property to the radically different and incomparable form of property known as intellectual property.

The last of the recommendations proposed here is less obvious in its effect, but involves a consideration that may have made all the difference in the *Rogers* case. Currently, although a judge may hear expert opinion on whether the copying which has been done by a defendant of a plaintiff's work is substantial:

[i]n the final analysis, it is for the judge - so much the better if he has a musical ear and knowledge - to decide whether according to his own assessment, experience and judgement an impression of similarity is

created by the disputed musical works. (*Grignon v. Roussel*, (1991), 38 C.P.R. (3d) 4 (Fed. T.D.)).

This standard fails to deal with cases where the judge does not have the personal knowledge of the arts necessary to make a just determination, including the contextual dimension which, as was discussed earlier, is such an important element in what makes a particular work good or bad, valuable or worthless. If the courts would encourage greater deference by triers of fact to expert opinions on what differences exist between "original" and "infringing" works, then this contextual dimension could be better considered. Furthermore, proceeding on the assumption that experts are better able to evaluate substantiality than is a judge may also more accurately estimate the degree to which the "infringing copy" might, or might not, usurp the original work's potential market. It seems, in the *Rogers* case, that had the court given greater consideration to the opinions of artists, art scholars, and potential collectors of works such as "String of Puppies", and had it not assumed that its own ability to determine similarity was on par with the experts, it might not have used such a superficial and cursory examination of the differences between the original and the "copy".

Needless to say, none of the above reforms is without drawbacks, difficulties or probable opposition. Each would impact negatively on the rights of Canadian copyright owners to control the reproduction and use of their works. On the other hand, there may be substantial gains to be had in terms of the potential for development of new and stimulating forms of art and criticism, and for the voices of the receivers of advertisement, broadcast, print and film projections to respond to their surroundings, without fear of reprisal by corporate counsel or the courts.

One of the areas in which difficulties most certainly would be encountered would be in any attempt to create quantified guidelines for the measurement and identification of a work's "cultural icon" status, discussed above. Whether the defining guidelines are drawn by the Copyright Board, the Legislature or by the judiciary, they will give rise to substantial problems. It is, however, in many areas of law in which it is exceptionally difficult to arrive at specific rules, often the drafter's and judges' solution to apply a broad or general principle which demands that the final test to be applied is determined on a case-by-case basis. Notions of "fairness under all the circumstances" or "a just determination arrived at by weighing the competing rights and factual circumstances" may be the sort of methodologies prescribed. If more is needed, the broad analysis can be required to take a broad range of facts into consideration. These facts might include: the copier's reputation and history as a copier; the commercial aspects of the copier's use, including the intended markets; public recognition of the original work and the likelihood of the public's confusion as to the origin of the copy; the quantity of the original work copied; evidence of the "critical" aspects of the copying context and product; the use and purpose of the original; etc. Some of these considerations have, as was discussed previously, already played a part in the traditional analysis applied by Canadian and English courts. Others, such as the last, have not, and may add to the subtlety of the analysis recommended by Lord Denning in which, "...after all is said and done, it must be a matter of impression" (Hubbard v. Vosper, p 1027). By employing these factors, a court hearing a copyright infringement action may be informed as to the important considerations to be applied in an analysis of this type of problem without having its

hands tied in ways that will restrict the creative thinking required to justly deal with these complex disputes.

Besides the difficulties of analysis, the other possible problem area is that of domestic and international opposition to the above changes. Various lobby groups, whose funding is substantial, combined with the international trade treaties, copyright conventions, and plain old-fashioned diplomacy, may become considerable forces to reckon with if their toes are stepped on. And while it is not difficult to respect the basic rights protected by the various international agreements impacting copyright²¹, it is the more specific and domestically-created rights that are particularly hard to avoid rolling back. In this regard, however, we should start by reminding ourselves that, legally speaking, copyright is not a fundamental right, such as freedom of expression, but is, instead, a pure creature of statute. Also, we should remember that the majority of the proposed changes, especially those changes of interpretation, are firmly rooted in existing Constitutional and statutory law. Furthermore, Canada's copyright laws, and their

²¹ The subject of international copyright law is too broad to be fully addressed in this paper. Suffice it to say that Canada is signatory, directly or indirectly, to various international agreements effecting domestic copyright. These agreements include: The Berne Convention for the Protection of Literary and Artistic Works (Paris Revision 1971); The International Copyright Convention; The North American Free-Trade Agreement; The International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention 1961); the General Agreement on Tariffs and Trade; the Agreement on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods (a.k.a. "TRIPS"). Generally, these various agreements set minimum levels of protection and guarantee that nationals of signatory countries are given, at a minimum, the same protection abroad as nationals of the country in question. For the purposes of this paper, it is of note that, other than NAFTA, which created the fair dealing requirement that the name of the original author be stated by the copier, these agreements do not have any direct bearing on the fair dealing exception. Thus, Canada is free under international law to expand or restrict its

interpretation is, as we have seen, particularly owner-based, especially when contrasted with the constitutionally-mandated copyright laws of the United States. Because of this, we could go a fair ways towards broadening our understanding of what the “criticism” exception allows for without being out of line with either our domestic laws or with the “parody” exception in the United States. More importantly, we could more reasonably align our interpretation of the Copyright Act with the supposedly controlling principles of our *Charter of Rights and Freedoms*. Lastly, while it may seem jejune to say so, opposition is a natural result of any move that will limit the power of, in this case, a particularly powerful group of interested corporations holding copyrights. Such opposition, though real, must not be confused with logic or correctness.

In contrast to these problematic aspects of the various copyright reforms proposed above is the danger of underestimating the potential for, and necessity of, the cultural and social evolutions which a weakening of the noose of copyright might precipitate. Coombe states that:

...practices of appropriation and “recoding” cultural forms are the essence of popular culture, understood by postmodernists to be central to the political practice of those in subordinate social groups and marginal to the centers of cultural production. It is now evident that mass-media imagery and commodified cultural texts provide important cultural resources for the articulation of identity and community in Western societies where

fair dealing exception so long as it does not interfere with the basic rights set out in the agreements set out above.

traditional ethnic, class, and cultural indicia are fading and minority groups organize along alternative lines... (p. 57)

If there is anything to Coombe's words, then the works of appropriation which have given rise to the cases examined in this paper are, for the most part, merely the tip of the iceberg; we cannot know what progress these changes would spawn until they are actually made. Without the experiment of accepting some or all of the changes offered here, however, we shall undoubtedly never fully know the rewards and dangers they may hold. Without any question, we may rest assured that if efforts are not made to protect the democratic interests of the public in these matters, there are a few private entities and individuals, such as Microsoft, Bill Gates, Sony, and Disney, that will make very substantial and well-heard efforts to make copyright protection as durable and permanent as possible.

Conclusion: Towards a New Vision of Property

John Grierson, the founder of the National Film Board of Canada, once said that "art is both a hammer and a mirror". Art shapes and generates the numerous discourses that make a culture what it is, and it also reflects that collective identity. As such, we might say that Canadian art is the fuel and the reification of our national soul. But Canada is no longer the great wilderness that it once was, where mere physical survival was a feat of strength and cunning. As much as we may wish that it were not so, our landscape has changed, as have our lives, and these aspects of our experience are in a large way dominated by commercial images and sounds, most of which come from our southern neighbours. In assessing what protection to give copyright owners it seems to be of increasingly greater importance to consider the effect that overextending these protections may have on our ability to exercise the essential democratic right to free, unhampered discourse about what our world is, and what it is becoming. It would seem that the preservation of these rights, and the benefit that they bestow upon us, far outweighs the minimal cost which these reforms would likely cause to copyright owners.

Contrary to what Teitelbaum J. says in *Michelin*, gone are the days when the argument might be made that freedom of expression cannot be applied to the use of private property. If this freedom is intended to allow full and free discourse by the people about their social and cultural predicaments, then such an objective cannot be reached unless those people may fully discuss and respond to not only the messages of their government, but to the more intrusive and unrelenting bombardment of messages by private sector corporate actors.

It may be that the most important point that Teitelbaum J. missed in his analysis was that the C.A.W. attack was not against the Bibendum itself, but rather, it was an attack on Michelin, for which the Bibendum is merely a name in the language of visual representations. Clearly, it was not the market for the copyrighted work that was in any danger, but the reputation of the entity for which it stood. For Teitelbaum J. to have protected Michelin from its critics in such a roundabout way, in the face of true constitutional concerns, is a disturbing distortion of the fundamental principles on which our law is based.

Contrary to popular belief, democracy and capitalism, though often seen together, are not one and the same. Noam Chomsky and other writers too numerous to name have pointed out that corporations often serve to stifle, rather than promote, the aims of democracy and free expression. The right to freedom of expression in the *Charter* should, if anything, be about the protection of the right to freely disagree with aspects of the Canadian environment which, in some cases, come in the form of an advertisement or a song. Furthermore, this right ought to protect the ability of those who have paid for, adopted, internalized and culturally incorporated various forms of copyrighted material to be able to publicly express themselves with that material. Coombe notes:

Because these texts are constitutive of the cultural milieu in which we live, constructing many of the socially salient realities we recognize, their status as exclusive properties that cannot be reproduced without consent and compensation operates to constrain communication within, through, and about the media that surrounds us. (p. 51)

Or, we might ask, is corporate ownership now to be allowed to extend to our memories and minds as well?

Furthermore, it is essential to the attainment of the democratic ideals expressed in this paper that the future formation and amendment of copyright law be made with reference to, and within the confines of, its purpose: the pragmatic reward of innovation in a degree sufficient to encourage innovation and creation. Copyright, if it is to carry out this function, is nothing more than the provision of such an incentive, and its conflict with the ruling principles of the *Constitution* might be avoided if only the courts were able to remember the narrowness of this objective, rather than holding up copyright as a sacred and absolutely inviolable right, subject to no limitation.

As the law stands following *Michelin*, however, the ability of Canadian artists and regular citizens to describe their own experiences and surroundings is severely limited by an outdated and unjustifiable view of art and of the landscape which it attempts to describe. And with the increasing commercialization of our environment and the giving of ever-broadening powers to copyright holders, this ability to describe is being subjected to greater and greater limitations.

A Crack in the Armour, Maybe

Since the research for this paper was performed, an interesting Quebec case, Productions Avanti Cine Video Inc. c. Favreau [1999] C.S.C.R. no 479, which had been winding its way through the courts, was finally halted when the Supreme Court of

Canada refused to hear a final appeal. The decision of the Quebec Court of Appeal, therefore, stands²².

The facts of *Favreau* are as follows. Mr. Favreau, a video producer, made what appeared to be a pornographic version of the highly popular Quebec television show “La Petite Vie”, which he titled “La Petite Vite”. As Rothman J.A., one of the three judges who heard the appeal writes, the similarities between the two productions were great:

...Favreau... copied the most original and important elements of La Petite Vie: the principal characters, their costumes and appearances, and the décor. (para. 6)

In defence of his actions, Favreau raised the parody defence. Unlike in *Michelin*, however, the court took this argument very seriously.

Gendreau J., who delivered the opinion of the Court, conducted a substantial survey of the law of parody both internationally and domestically. He considered that parody is a recognized defence in the United States, France, Belgium and Spain. In considering the law in Canada, he noted that the fair dealing defence includes criticism.

It is at this point that the Quebec Court of Appeal diverged from existing jurisprudence, and did some other peculiar things as well. First, Gendreau J. makes passing reference to the *Michelin* decision and notes that *Michelin* is “une affaire actuellement en appel” (para. 57). In fact, when Gendreau J. made this statement, in

²² To clarify, the Federal Court and the provincial courts have concurrent, or overlapping, jurisdiction to hear copyright infringement cases. Thus, a case may be heard in either forum. Generally, however, most large cases are brought before the Federal Court. This is because the Federal Court has a specialized familiarity with copyright law, and also because judgments of that court are enforceable throughout Canada whereas a judgment of a provincial court is usually limited to that province.

August of 1999, the Michelin appeal had been discontinued by both parties for almost two years, since late 1997. Michelin was, therefore, settled law insofar as the Federal Court is concerned. Second, Gendreau J. came to the following bizarre conclusion in regards to the state of the parody defence in Canada:

L'absence de decision formelle sur ce point au Canada, du moins suivant mes recherches et celles des parties, decoule peut-etre du fait qu'en realite, cette vision des choses est celle communement acceptee et que la veritable parodie est reconnue. (para. 68)

Besides the incorrect understanding of the “formal” finality of the *Michelin* decision, Gendreau J.’s understanding is absolutely contrary to what Teitelbaum J. said in that case, as is it contrary to the principle set down by the Supreme Court of Canada in Bishop v. Stevens, [1990] 2 S.C.R. 467, which is relied upon by Teitelbaum J.:

The exceptions to acts of copyright infringement are exhaustively listed as a closed set... in the Copyright Act. They should be restrictively interpreted as exceptions. Justice McLachlin in Bishop v. Stevens... cautioned the Court against reading in exceptions to copyright infringement given the detailed and explicit exemptions (p. 381)

Third, Gendreau J., apparently based on this erroneous understanding of things, states that although, in the case before him, *Favreau* had not actually parodied *La Petite Vie* and, therefore, could not rely on parody as a defence, the parody defence could be used under different circumstances. In his view, two different approaches might be acceptable. One would be to include parody as a subset of “criticism” in s.29 of the *Act*.

A second approach would be applicable in situations where the copy is sufficiently original in and of itself so as to be considered a new original work on its own.

So what is the significance of *Favreau* in the context of our discussion? That is unclear. On the one hand, *Favreau* might signal the beginning of a departure towards a more permissive, sophisticated approach to fair dealing analyses. On the other hand, considering the unstable foundation of legal assumptions on which it is based, it might be viewed as an anomaly in this area of the law, an area which, as we have seen, seems to be heading more and more towards the increased protection of copyright owners.

In addition to the above, there is the problem of which view non-Quebec provincial courts will adopt²³. They are not bound by either the Quebec Court of Appeal

²³ The various levels and jurisdictions of the different courts in Canada is too lengthy a subject to cover here. Suffice it to say that each province has its own particular court organizational structure, usually with one or more lower "trial" courts, and a highest court, usually known as the Court of Appeal. Within the provinces the lower court judges are bound to follow the decisions of their own court of appeal. The decisions of other provinces' courts are not binding, but may be of *persuasive authority*, meaning that they may be followed and, the higher the extra-provincial court, the greater the persuasive authority should be.

The Federal Court is, as has been mentioned, a court of federal jurisdiction, but this does not mean that it has binding power on all provinces. It is, like the various provincial courts, confined in jurisdiction and binding power, to its own limited hierarchy. Furthermore, because the Federal Court is a creature of statute, unlike the Constitutionally-created provincial courts, it has a much more limited jurisdiction and range of powers than provincial courts do.

There is one court that forms the exception to all that has been said above, and that is the Supreme Court of Canada, the decisions of which are binding on every court in Canada without exception.

As a result of the numerous concurrently-existing but non-binding courts in Canada, all of which may hear copyright cases, it is possible to, at any point in time, have several completely different decisions on the meaning of a particular section of the *Copyright Act*. And unless the Supreme Court of Canada decides the issue things can remain this way indefinitely. In many cases the different courts of appeal will attempt to defer to other provinces' courts' reasoning, or to that of the Federal Court, but in many instances they simply cannot agree on a unified approach. This is exemplified in *Favreau*.

or by the Federal Court Trial Division. In light of the generally-recognized expertise of the Federal Court in dealing with these matters, there is a substantial likelihood that they will favour the *Michelin* principles.

In an attempt to resolve *Favreau* with our discussion, this author spoke at some length with Alain-Claude Desforges, of Bélanger Sauvé, a Montreal law firm, who was counsel for Productions Avanti Cine Video inc. in the *Favreau* case. When asked what he thinks the current state of the law is, in light of this decision, he said:

The decision in *Favreau* represents a substantial departure from previous Canadian decisions which have made it quite clear that parody is not a defence under the fair dealing part of the Copyright Act. It is unclear at this point what the courts in other provinces and, most importantly, the Federal Court, will do with this decision. We can only wait and see. In any event, it should be pointed out that despite the fact that the Court of Appeal appeared ready to accept parody as a defence, it found that there was no parody in this case. We have yet, therefore, to see a positive example of a situation in Canadian Law where parody is not only accepted as a legal defence, but is a successful one.

To Mr. Desforges' comments one would have to add that even if *Favreau* became the recognized approach to fair dealing, it is still a fair ways from the recognition of re-contextualization. Nevertheless, *Favreau* may have opened the door to this sort of analysis when Gendreau J. says:

... one knows that the critique of an intellectual or artistic work is not only serious or learned; it can also be humorous or funny by virtue of the use of

amplification, or deformation, or of exaggeration of the subject work...

(Translation by Tamaro, pp.413-414)

Does not this sentence imply that criticism that is serious and that modifies a work in various ways might be exempted under the criticism exception? Only time can tell.

Regardless of what use is made of the *Favreau* decision, there is a great deal of ground that must be covered between the recognition of parody as a defence to copyright infringement, and the re-thinking of copyright law in the context of the various historical, philosophical and constitutional perspectives presented in this paper. A failure to ground future arguments and amendments of copyright with these perspectives may lead copyright to stray further and further from the justifiable principles of creative incentive and just recognition of labour, and more towards an unquestionable right equivalent to, and undifferentiated in character from, real property. To allow such an end to be reached would, in this author's view, be pure folly, and would mark the beginning of the possibility of total ownership by corporations, not only of the words, sounds and images of our society, but of the audio-visual landscape which makes up our everyday public experience.

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