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COPYRIGHT: Intellectual Property in the Information Age

An Outline for a Three-Part *Ideas* Series

by Robert J. Sawyer

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Overview

The Canadian Copyright Act is more than 60 years old, a relic of an age before television, computers, photocopiers and communications satellites.

Today, Canada's already-impoverished artistic community struggles for its fair share of the wealth made available by new ways of creating, storing and distributing intellectual property.

But intellectual property isn't only of interest to artists. Huge entertainment conglomerates have sprung up around the licensing of copyrights. The computer revolution was built upon code written by programmers but rendered in a form no human can read. And most Canadian corporations grow based on the ideas and creative work of their employees.

The Canadian government is finally taking steps towards revising its out-dated copyright legislation. A 1984 white paper entitled *From Gutenberg to Telidon* provides the framework for the government's copyright revision. In 1985, the Sub-Committee of the Standing Committee on Communications and Culture on The Revision of Copyright tabled a 136-page report that will form the basis for Parliamentary debate towards the creation of a new *Charter of Rights for Creators*.

But the copyright issues are far from settled. The Sub-Committee's report is at odds with the white paper on many recommendations. Lynn McDonald, one of five members of the Sub-Committee, filed a dissenting opinion, disagreeing with her colleagues about the fundamental approach to protecting creators. In the coming Parliamentary session, Canada's leaders will begin what promises to be a protracted and divisive debate about copyright reform.

COPYRIGHT: Intellectual Property in the Information Age will provide a Canadian perspective on issues affecting artists and academics, corporations and communities, writers and information workers.

The three programs will deal with copyright reform not in abstract terms but rather as concrete realities. Issues will be brought into sharp focus by concentrating on case studies: the real human beings affected by intellectual property laws.

Program 1: In the Beginning Was the Word

What is intellectual property? What is copyright? What must be done to obtain copyright protection? What sorts of things are currently eligible for such protection? Why is a complete overhaul of Canada's Copyright Act long overdue? These questions will be answered in an opening round-table sequence of clips, introducing the high-profile interview subjects who will appear throughout the three programs.

Copyright is a basic, inalienable human right: the entitlement of all people to benefit from their unique thoughts and creations. Copyright protects not only a creator's economic rights (which enable him or her to earn money) but also his or her moral rights (the rights to claim authorship of a work and to control or prevent its distortion, mutilation or modification).

The concept of copyright originally applied only to the written word. This first program will concentrate on the plight of writers, using the following case-studies as springboards to debate by the expert participants.

After 20 years of lobbying, a Canadian public-lending-rights commission was established in 1986 to disburse \$3 million a year to Canadian writers in compensation for the lending of their works by libraries. It turns out, though, that some writers, including John Robert Colombo, are dead-set against public-lending rights and others, including most of Canada's academics, will not share in the money at all.

Generally, Canadian novelists don't make much money. But by carefully licensing rights throughout the world, Canadian agent Lucinda Vardey managed to obtain over \$1.3 million for the novel *The Red Fox*.

The current Sub-Committee report on copyright reform recommends that the production of Talking Books and Braille transcripts should require neither authorization from nor royalty payments to the copyright owner. The Canadian Copyright Institute opposes this exemption on the principle that no other group is similarly forced to make donations to the disabled and that, given the popularity of spoken-word audio cassettes, without an authorization procedure there would be no easy way to police use of exempted materials.

Copyright collectives are an important tool for controlling rights and collecting royalties. Last year, Canada's freelance magazine writers established the PWAC Copyright Collective to negotiate fair payments for the increasingly common practice of storing the text of magazines and newspapers in electronic databases. PWAC's negotiations with Canada's media giants highlight corporate hostility towards copyright reform.

Program 2: Forging the Signature of Civilization

The current freer-trade negotiations with the United States have spotlighted just how delicate Canada's cultural industries are. But an even greater threat than unbridled importation of pop Americana is the erosion of economic incentives for Canada's artists to continue their work. Copyright reform is crucial to preserving Canada's unique identity. This hour will focus on the following case studies.

In March, 1986, six Winnipeg-area grade schools were disqualified from a choral music competition because their teachers had photocopied sheet music instead of buying originals. As one organizers said, "We can't give an award for theft."

Because of a clause in the existing Copyright Act, Canadian composers and performers receive only one cent each per music track on a recording sold in Canada -- the lowest royalty rate of any country in the free world.

As a result of a July, 1986, arbitrator's decision, CBC now pays double what it did in the past for the use of copyrighted music. Although it still pays far less than private broadcasters do, CBC is appealing the decision.

In November, 1986, choreographer Constantin Patsalas tried to stop the National Ballet of Canada from performing his "Piano Concerto" at Toronto's O'Keefe Centre without him as choreographer. Patsalas contended before the Ontario Supreme Court that, without an annotated copy of the score, no one but he could perform his work as he intended it.

In October, 1986, the Directors Guild of America demanded that the U.S. Copyright Office prohibit companies that colorize movies from copyrighting the revised products. Colorization, Inc., of Toronto has added color to than 100 black-and-white films (including *Casablanca* and *It's a Wonderful Life*) for the American-based Turner Broadcasting System.

The Canadian Cable Television Association has as one of its top priorities the vigorous policing of theft of signal. However, those who use satellite dishes contend that they are free to make use of any information that indiscriminately radiates down on their homes.

The Sub-Committee Report recommends that artists be compensated when people tape at home. However, tape manufacturers say a levy on blank recording material would kill their industry. The Canadian Copyright Institute objects to the levy as a matter of principle, maintaining that reproduction should only be permitted when specific permission has been obtained from the copyright owner.

Program 3: Pirates on the Silicon Seas

Copyright matters related to computers pose special problems. For one thing, those seeking protection are generally big businesses, not individuals. For another, the esoteric nature of the field makes the issues difficult to grasp for laypeople and jurists alike. Canada has a \$1.1 billion software industry. Although the revision of our Copyright Act may take several years, the software community is pushing for immediate "quick fix" legislation to provide the protection it feels it needs to survive. The following cases will help bring high-tech copyright concerns into perspective.

Toronto's TR/Software makes unauthorized copies of personal computer programs. Terence Ram, the company's owner, contended in court that he provides only single copies of programs and manuals for "research, criticism, review, private study or evaluation," all of which are allowed under the "fair dealings" provision of the Copyright Act. His case ended in a hung jury.

For four years, IBM successfully demonstrated that most clones of its computers contained plagiarized versions of IBM's proprietary basic input-output system (BIOS). In 1985, Phoenix Systems introduced an IBM work-alike BIOS created under revolutionary "cleanroom code" conditions: none of the programmers had ever studied or seen the original IBM BIOS. The Phoenix BIOS has made the current flood of IBM clones possible, costing IBM hundreds of millions of dollars in sales.

But are such work-alikes legal? Lotus, makers of 1-2-3, the best-selling spreadsheet program for microcomputers, recently successfully sued a competitor for copying the "look and feel" of its software, even though no actual code was plagiarized.

Computer programs can be represented as written instructions that humans can read and understand. But the information contained in computer chips, such as the Intel central processor at the heart of the IBM PC, can only be understood by machines. Recently, NEC has been selling its own versions of Intel's central processors. Intel is suing NEC, claiming copyright infringement. Although admitting that it directly copied Intel's code, NEC contends that because such code is not readable by humans, it is not entitled to copyright protection.

Computing isn't the only scientific pursuit affected by copyright law. The Mulroney government wants to encourage generic copying of brand-name drugs. Should copyright protection be afforded to large foreign corporations at the expense of ill Canadians? *COPYRIGHT: Intellectual Property in the Information Age* will close with a look at the very human affects of this issue.

Sound Elements

Each program will consist of an exciting mix of sound elements. The backbone would be interview clips. These would be balanced with readings, linking commentary, special sequences and appropriate music (including Patsalas's "Piano Concerto").

INTERVIEW CLIPS

Lively interview material will be gathered, encompassing a diverse range of expert opinions and emotional stances. Since most of the interviewees are in Toronto, it should be possible to arrange face-to-face confrontations between experts with opposing views, yielding some exciting tape.

A balance will be struck between interviews with creators, with those whose businesses depend on the creative process, and with experts on intellectual property. The series will scrupulously avoid becoming bogged down in legalese. Lawyers chosen as interview subjects are those rare few who can present matters of the law in warm, human terms.

EDITED PROCEEDINGS

The Federal Government has already held dynamic public hearings on copyright reform and Parliamentary debate on this issue should begin in the spring. Such proceedings are always taped. Key clips that capture the flavour of the on-going deliberations could be used to augment the interview material. Where sound quality is a problem, readings from transcripts can be substituted.

READINGS

To show the immediacy of copyright issues, we could use lead paragraphs from newspaper stories about the copyright cases being discussed. Perhaps accompanied by a teletype sound effect, these brief readings would fade out as we moved into supporting interview clips and commentary.

Some brilliant rhetoric -- much of it prepared by Canada's best professional writers -- has been written about copyright reform. Punchy readings of this material could highlight key issues and provide a change of pace from the less structured, off-the-cuff interview clips.

Carefully selected passages from Government and arts council policy papers on copyright would be used sparingly.

SPECIAL SEQUENCES

Special audio sequences would enhance the programs, providing humorous or dramatic counterpoints to the interview clips. These sequences could include:

The bit from the BBC radio series *The Hitch-Hiker's Guide to the Galaxy* demonstrating a way in which time travel could be used to undermine copyright law.

Tom Lehrer's song *Lobachevsky*, an amusing insight into how copyright infringement is the key to success in the academic world.

Howard Roark's stirring courtroom summation from Ayn Rand's *The Fountainhead*. This could be done either as a dramatic reading or with a sound clip from the 1949 movie version starring Gary Cooper.

Timetable, Travel and Expenses

Copyright reform is a major contemporary issue and I am prepared to devote my full energies to these programs starting immediately. All three installments can be ready for broadcast in September. Although the series could be prepared without leaving Toronto, a trip to Ottawa would be convenient.

One actor would be required to do readings. A few of the proposed interview subjects are ACTRA members and would thus require compensation.

Preliminary List of Interview Subjects

Harvie Andre is Canada's Federal Minister of Consumer and Corporate Affairs.

John Robert Colombo is a strong critic of public-lending rights.

W. C. C. Crich is a constable with the RCMP. He led the investigation against Terry Ram.

The Honourable **Judy Erola** co-authored *From Gutenberg to Telidon: A White Paper on Copyright*.

Gabriel Fontaine chairs the House of Commons Sub-Committee on the Revision of Copyright. He was senior author of the Sub-Committee's report.

The Honourable **Francis Fox** co-authored *From Gutenberg to Telidon*. **William Gragnoli** is vice-president of marketing for Canadian Satellite Communications (CANCOM).

Jack Gray is Chairperson of the Copyright Committee for the ACTRA Writers Guild. He was a witness at the recent government copyright hearings.

William L. Hayhurst is Canada's leading intellectual-property lawyer. He is a partner with Ridout and Maybee, Toronto.

Michael Hind-Smith is president of the Canadian Cable Television Association.

Bill Holtzman is Manager of Apple Computer (Canada) Inc., responsible for a legal crackdown on clones of Apple products. He was a witness at the recent government copyright hearings.

Jacqueline Hushion is Executive Director of the Canadian Book Publishers' Council.

Andrew Keyes is Director of Copyright Policy for the Department of Communications.

Yvon Leveille is chairperson of the Software Committee of the Canadian Association of Data Processing Service Organizations (CADAPSO). He was senior author of CADAPSO's five-step plan to combat software piracy.

Entertainment lawyer **Michael Levine** is a partner in the Toronto firm of Goodman and Goodman.

Flora MacDonald is Canada's Federal Minister of Communications.

As president of the Association of Universities and Colleges of Canada, **W. A. MacKay** provided insights into academic copyright infringements at the recent government copyright hearings.

Lynn McDonald, a member of the House of Commons Sub-Committee on the Revision of Copyright, is NDP Arts-and-Culture critic. Her dissenting opinion to the Sub-Committee's report appears as Appendix A of that report. Among other things, she is concerned that private broadcasting corporations rather than individual writers and composers would benefit most from the proposed changes and that employees and not their employers should own copyright in works they create.

Wilson Markle is the president of Colorization, Inc., of Toronto, the world's largest colour-tinter of black-and-white films.

Jim Matejcek heads the Performing Rights Organization of Canada.

Louis H. Milrad is a partner in the Toronto Law Firm of Goodman and Carr. He practices exclusively in the area of computer law.

Constantin Patsalas is former resident choreographer and artistic adviser to the National Ballet of Canada.

Timothy Perrin gave up the practice of law to become a freelance writer. His monthly "Legally Yours" column appears in *Your Money* magazine. He is the most vocal fighter for freelancers' rights in the Periodical Writers Association of Canada.

Michael Pitman is past president of the Canadian Copyright Institute.

Terry Ram is owner of TR/Software, a firm that copies commercial computer programs.

Brian Robertson is president of the Canadian Recording Industry Association.

Earl Rosen is executive director of the Canadian Independent Record Production Association.

Arthur Sinclair chairs the audio markets research committee for the Consumer Electronics Marketers of Canada. He is concerned about market damage that might be caused by a levy on blank tapes.

Lucinda Vardey is Canada's leading literary agent.

Biographical Note

Robert J. Sawyer, B.A.A., prepared and presented *Other Worlds, Other Minds: A Science Fiction Odyssey*, a three-part IDEAS series produced by Bernie Lucht. It was first broadcast in January, 1986, and was repeated in September, 1986.

He was formerly both a staff member and a student of the School of Radio and Television Arts, Ryerson Polytechnical Institute, Toronto. He now works full-time as a freelance writer and journalist.

His articles appear regularly in *Access: Management's Guide to Office Automation, Broadcaster, The Financial Post, Science & Technology Dimensions* and *Playback*.

He is a founding member of the Copyright Collective of the Periodical Writers Association of Canada. He is also a member of the Science Fiction Writers of America and the North York Arts Council.