A Review of Canada's International Copyright Obligations

Sunny Handa*

The intellectual-property policy of a country was often considered in the past to be a reflection of its political philosophy and was used for the protection of its culture and economic health. However, in recent decades, with the development of global markets in goods and the increase in global trade in products of intellectual innovation, countries have come under tremendous pressure to harmonize their intellectual-property laws with those of their trading and treaty partners. These pressures of harmonization often cause a country's intellectual-property laws to be based upon extra-national rather than the narrower national concerns.

This article examines the global economic and treaty-related forces that are driving this push for harmonization, and the consequent patterns of the emerging laws on intellectual property. It specifically examines the evolution and current status of Canadian laws on copyright, and Canada's commitments under the Berne Convention and other multilateral intellectual-property treaties, and under the F.T.A. and N.A.F.T.A.

On a souvent considéré que la politique d'un pays en matière de propriété intellectuelle était le reflet de sa philosophie politique et visait à protéger sa santé économique et son identité culturelle. Toutefois, suite au développement de marchés globaux de biens et à l'augmentation du commerce international d'innovations intellectuelles, les États ont commencé à subir de fortes pressions en vue d'harmoniser leurs régimes de protection de la propriété intellectuelle. Ces pressions ont souvent amené les États à adopter un régime de protection de la propriété intellectuelle qui reflète des intérêts extranationaux plutôt que des soucis purement domestiques.

Le présent article examine les forces économiques ainsi que les traités internationaux qui alimentent cette poussée vers l'harmonisation, ainsi que les modèles de régime de protection de la propriété intellectuelle qui en découlent. Il examine de manière plus spécifique l'évolution et le statut actuel du droit canadien en matière de droits d'auteur, ainsi que les engagements du Canada en vertu de la *Convention de Berne* et d'autres accords internationaux, et de l'Aecord de libre-échange avec les États-Unis et de l'ALÉNA.

* B.Comm. (McGill), LL.B. (Toronto), LL.M. (McGill), D.C.L. (candidate McGill). Barrister and solicitor (Law Society of Upper Canada). Law lecturer at McGill University in copyright law, communications law and computers and the law. Legal counsel to the law firm of Martineau Walker. Contact by e-mail: sunny@zoo.net.

Revue de droit de McGill
To be cited as: (1997) 42 McGill L.J. 961
Mode de référence : (1997) 42 R.D. McGill 961

Introduction

The forces of globalization are occurring in a variety of interrelated dimensions. Economists tend to focus on their impact on the international flows of goods and services. Among the intangible flows is the spread of ideas and knowledge, which in certain cases can be designated the intellectual property of the originator. Such intellectual property is often but not always embodied in the form of a physical product such as a book, videotape or computer software. In today's world, information increasingly travels as electrical impulses over computer networks and crosses the globe at the speed of light. Two of the most compelling and interesting trends of the last few decades and in the foreseeable future are those towards redefining the ownership of intellectual property, whether or not it is embodied in a physical form when crossing borders, and establishing an international set of laws and rules to govern such ownership within countries and across countries.

The recognition of the ownership of intellectual property occurs through the grant of state-sanctioned monopolies such as patents, trademarks and copyrights, or through the operation of the common law as with unregistered trademarks. Our concern in this article is with copyright laws and treaties. Industrialized countries, especially the United States, can expect large net gains from the effective enforcement of copyright. They therefore exert strong pressure on the rest of the world to harmonize its copyright laws to industrial-country standards and to enforce these laws vigorously. A major part of this harmonization is achieved through bilateral treaties and multilateral agreements.

The need for international-copyright treaties is not new, nor is the recognition of a linkage between copyright and international trade. In fact, one of the original reasons for the adoption of copyright-like rules in sixteenth-century England was to assist the development of a domestic printing trade by regulating foreign imports. Formalized multilateral copyright treaties, however, did not come into existence until the late nineteenth century. The *Berne Convention*, the most successful copyright treaty so far and still in force today, dates from 1886.

The balancing mechanics of devising a copyright regime are the same today as they were in the nineteenth century, with one difference. Trading frictions or transaction costs, such as the transportation of goods, are gradually being reduced or eliminated as copyrighted works are transmitted across borders in digital form. It is as easy to send a copy of a digitized manuscript across the world as it is to send it across the hallway. Further, in these cases of digital transmission, there is a separation between the intangible creation and its physical manifestation in the originating country, with the former entering into world trade without necessary accompaniment by the latter. Without the trading frictions that act as trade barriers to the physical flows of products, copyright regimes face competitive forces such as "nation shopping" for the release or multiple release of the underlying intellectual creation.

The grant of a copyright has three consequences. It establishes a barrier to the free flow of trade (in information). It also establishes the "ownership" of an intellectual

product and the corresponding right to income from that product in much the same way as ownership of something physical entitles one to its benefits. The latter is part of the fundamental nature of private property, and is appropriate to a capitalist economy. This ownership imposes restrictions on the free availability of the product to others, so that they have to pay the price demanded by the owner in order to obtain it. Copyright ownership is important in determining the level of "output" of the good in question, and therefore the extent of its dissemination. From the international perspective, this ownership determines the gains from cross-border flows to the concerned countries. Finally, copyright bestows upon the creator of a work a moral right to be associated with a work (or to remain anonymous) and to maintain the integrity of a work. Moral rights remain with the author, subject to waiver, even after the economic rights are transferred.

This paper broadly outlines the forces at work in globalizing copyright laws in both the international and Canadian contexts. Part I examines the models of reciprocity used in international copyright arrangements, and Canada's selection from among them. Part II focuses on the most important multilateral arrangement, the *Berne Convention for the Protection of Literary and Artistic Work*,[1] and Part III on the *Universal Copyright Convention*[2] ("U.C.C."). Parts IV and V deal, respectively, with the *General Agreement on Tariffs and Trade* (G.A.T.T.)[3] and the North American Free Trade Agreement (N.A.F.T.A.)[4]/Canada-U.S. Free Trade Agreement (F.T.A.).[5] PartsVI and

---

[1] *Berne Convention for the Protection of Literary and Artistic Works*, 9 September 1886, Can. T.S. 1948 No. 22, 828 U.N.T.S. 221, revised most recently by *Paris Act relating to the Berne Convention*, 24 July 1971, 1161 U.N.T.S. 3 [hereinafter *Berne Convention*]. Canada has only signed the Rome (1928) revision of this Convention; however, substantively it protects works up to the Paris (1971) revision.

[2] *Universal Copyright Convention*, 6 September 1952, 216 U.N.T.S. 132, U.K.T.S. 1957 No. 66, Can. T.S. 1962 No. 13, revised in Paris on 24 July 1971, 943 U.N.T.S. 178 [hereinafter U.C.C.].

[3] *General Agreement on Tariffs and Trade*, 30 October 1947, 55 U.N.T.S. 194, Can. T.S. 1947 No. 27 [hereinafter G.A.T.T.]. The agreement was signed at the 1947 Bretton Woods Conference. In fact, three institutions were created at that Conference: the World Bank, the International Monetary Fund and the International Trade Organization (I.T.O.). The latter institution did not survive ratification by some member states and consequently died a quick death. The Contracting States, however, agreed to follow the spirit of the I.T.O. principles agreed to at the Bretton Woods Conference.

Following completion of the Uruguay Round of G.A.T.T. talks, the participants agreed to establish the World Trade Organization (W.T.O.) to administer the G.A.T.T. (see *The Final Act and Agreement Establishing the World Trade Organization (W.T.O.). General Agreement on Tariffs and Trade, Uruguay Round (including G.A.T.T. 1994)*, Marrakesh, 15 April 1994, http://ananse.irv.uit.no/trade_law/documents/freetrade/wta-94/nav/toc.html (May 1997) [hereinafter *GATT 1994: Final Act and Agreement*]). This Act, combined with the *General Agreement on Tariffs and Trade 1994*, are collectively referred to as the World Trade Agreement (W.T.A.).

[4] *North American Free Trade Agreement Between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America*, 17 December 1992, 32 I.L.M. 289 [hereinafter N.A.F.T.A.]. See also *North American Free Trade Agreement Implementation Act*, S.C. 1993, c. 44 [hereinafter *NAFTA Implementation Act*].

[5] *Canada-United States Free Trade Agreement*, 22 December 1987, Can. T.S. 1989 No. 3, reprinted in 27 I.L.M. 281 [hereinafter F.T.A.].

VII deal, respectively, with U.S. and European trade policy which, while not directly involving Canada, have dramatic effects on Canadian copyright policy.

I. Protecting Foreign Nationals — Reciprocity

Canada's *Copyright Act*[6] generally utilizes a model of national treatment, also sometimes referred to as formal reciprocity. National treatment involves granting the nationals of other designated countries, with which there are copyright agreements or where adequate protections are granted to one's own nationals, the same level of protection/rights as one extends to one's own nationals.

As a member of the *Berne Convention* and the U.C.C. (discussed below), Canada applies the national-treatment model of protection *vis-à-vis* other member-states. Under Canadian law, copyright does not *prima facie* apply with respect to works authored by individuals who are not British subjects, from *Berne Convention* or U.C.C. member-states, or from Her (British) Majesty's Realms and Territories. It also does not apply to works whose first publication was not within either a *Berne Convention* or U.C.C. member-state or Her Majesty's Realms and Territories.[7] However, the minister of consumer and corporate affairs may extend copyright rights to these other countries on a national-treatment basis.[8] Countries that do not fall into either of these categories are not granted protection under the Act. Authors who are citizens of and ordinarily resident in those countries do not receive copyright protection in Canada. Similarly, works first published in those countries are not afforded protection.[9]

II. The *Berne Convention*

Prior to the *Berne Convention*,[10] the international copyright regime was largely made up of bilateral treaties founded on the premise of material reciprocity.[11] First

---

[6] *Copyright Act*, R.S.C. 1985, c. C-42.

[7] See *ibid.*, s. 5(1).

[8] This will occur where that other country grants or undertakes to grant "the benefit of copyright on substantially the same basis as to its own citizens or copyright protection substantially equal to that conferred by this Act ..." (*ibid.*, s. 5(2)).

[9] According to *ibid.*, s. 5(1.2):

> Copyright shall not subsist in Canada otherwise than as provided by subsection (1), except in so far as the protection conferred by this Act is extended as hereinafter provided to foreign countries to which this Act does not extend.

There is an exception to this general principle. Under s. 5(1.1), if following the first publication, the work is, within 30 days, published in either a *Berne Convention* member-state or within Her Majesty's Realms and Territories, then copyright is applied under the Act. Until the United States joined the *Berne Convention* (Paris (1971) revision) in 1989, it did not qualify for protection under the *Berne* rules. In order to obtain *Berne* protections, Americans would publish in the U.S. and Canada simultaneously. This would provide Americans with Canadian copyright protection and a first publication in a *Berne* country, thereby entitling the work to protections in all *Berne* countries.

[10] *Supra* note 1.

[11] See P. Goldstein, *Copyright's Highway: From Gutenberg to the Celestial Jukebox* (New York: Hill and Wang, 1995) at 183.

signed on 9 September 1886 in Berne, Switzerland, the *Berne Convention* continues to serve as the definitive global minimum standard of copyright protection. The initial signatories included France, Belgium, Great Britain, Germany, Spain, Italy, Haiti, Switzerland, and the Bey of Tunis.[12] By the turn of the century, Luxembourg, Montenegro, Monaco and Norway had also joined.[13] Since that time, many of the world's countries have signed the *Berne Convention*, including Canada, the United States, and most recently China.[14]

In addition to national treatment, the *Berne Convention* provides a system of minimum standards, so that a state cannot implement specific protectionist trade policies aimed at defending a particular domestic industry. For example, a member with a comparative advantage in one copyright industry might provide low protections to those works, knowing that market forces would keep that industry successful, whereas it might shore up copyright laws in areas of comparative weakness in order to stimulate the local industry by keeping out imports. To rule out such selectivity, the signatories created a scheme whereby minimum standards would be adopted by member states throughout the economy. In this way, all members would be forced to provide similar protections below a given threshold.

Numerous revisions to the *Berne Convention* have occurred, with these revisions incorporating new categories of works which did not previously exist, and gradually increasing the minimum standards of protection. Each revision has moved the *Berne Convention* one step closer to replacing the national-treatment standard with common measures of protection.

The 1908 Berlin revision freed copyright protection from the requirement of formalities. It accepted as a *desirable* standard that the general term of protection should be fifty years following the death of the author; it also recognized the right of a copyright holder to make a translation of the work. The Rome revision of 1928 recognized moral rights as being essential to copyright protection. In 1948, the Brussels revision established a term of fifty years following the death of the author as being *mandatory* and shored up other minimum rights. In 1967, *Berne* members met in Stockholm to address the issue of preferential treatment under the *Berne Convention* — essentially low-rate compulsory licenses — for developing countries which were finding the minimum standards demanded by the *Berne Convention* unduly onerous. Out of the discussions came a protocol, entitled *A Protocol Regarding Developing Countries*, which, for qualifying developing countries, reduced the minimum copyright term to twenty-five years, and granted them low-cost compulsory licenses for the reproduction, broadcast and translation of works that were essential to education and culture.[15] The *Protocol*, however, was controversial and strenuously opposed by many industrialized countries, who refused to ratify the rules. The members met again in Paris in

---

[12] See A. Birrell, *Seven Lectures on the Law and History of Copyright in Books* (London: Cassel & Co., 1899) photo reprint (South Hackensack, N.J.: Rothman Reprints, 1971) at 31.

[13] See *ibid.*

[14] The *Convention* now has 125 member states, a number that increases each year.

[15] See Goldstein, *supra* note 11 at 188.

1971 to resolve the problem. The *Protocol* was abandoned in favour of relaxing some of the *Berne Convention* rules.[16]

By this time it was quite clear that the *Berne Convention* was in difficulty. It had reached a critical point at which further proposed changes to copyright rules would inevitably result in demands for concessions by members. Consequently, the *Berne Convention* has not been amended since.

The *Berne Convention* reflects the *droit d'auteur* approach to copyright.[17] It protects authors' rights but does not protect neighbouring rights.[18] Several other conventions, including the *Rome Convention*,[19] *Geneva Phonograms Convention*[20] and *Vienna Convention*,[21] have been set np with this purpose, although they do not have the large membership of the *Berne Convention*.[22]

A. *Updating The* Berne Convention*: New W.I.P.O. Treaties*

The *Berne Convention* is currently administered by the World Intellectual Property Organization (W.I.P.O.) in Geneva. In addition to administering various intellectual property treaties, W.I.P.O. also monitors the intellectual property field and proposes changes for consideration by the member states.

After a lengthy stalemate of some twenty years, during which no amendment to the *Berne Convention* was passed, in 1992 W.I.P.O. proposed a *Possible Protocol to the Berne Convention for the Protection of Literary and Artistic Works*.[23] The proposed *Protocol*'s primary purpose was to bring various technological advancements into the fold. Most notably, the *Protocol* contained provisions for computer programs,

---

[16] See Appendix to the *Berne Convention*, *supra* note 1, regarding developing countries (added by *Paris Act relating to the Berne Convention*, *supra* note 1).

[17] See discussion of *droit d'auteur* in note 46, *infra*.

[18] See discussion in note 47, *infra*, and accompanying text.

[19] *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations*, 26 October 1961, 496 U.N.T.S. 43, U.K.T.S. 1964 No. 38, as amended in Geneva in 1985 [hereinafter *Rome Convention*].

[20] *Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms*, 29 October 1971, 25 U.S.T. 309, 866 U.N.T.S. 67, U.K.T.S. 1973 No. 41 [hereinafter *Geneva Phonograms Convention*].

[21] *Vienna Agreement for the Protection of Typefaces, and Optional Protocol*, 12 June 1973, U.K. Cmnd 5754, reprinted in World Intellectual Property Organization, *Records of the Vienna Diplomatic Conference on the Protection of Typefaces 1973*, (1980).

[22] At present, Canada is not a signatory to any of the aforementioned neighbouring-rights conventions, illustrating Canada's past copyright/neighbouring-rights policy, which emphasized not a rights-based but a trade/remuneration-based approach.

[23] *Committee of Experts on a Possible Protocol to the Berne Convention for the Protection of Literary and Artistic Works* (Geneva: World Intellectual Property Organization, 1991) in B.B. Sookman, *Computer Law: Acquiring and Protecting Information Technology* (Toronto: Carswell, 1989) (looseleaf) at Appendix 8 (1992, Rel. 2) [hereinafter *Possible Protocol to the Berne Convention*].

a public lending right, the express protection of databases, and computer produced works. The *Protocol* was not adopted, however, and was abandoned.

Building out of this failure, W.I.P.O. has recently concluded drafting two international copyright treaties that *complement* the *Berne Convention*. The *W.I.P.O. Copyright Treaty*[24] and the *W.I.P.O. Performances and Phonograms Treaty*, both adopted by the W.I.P.O. Diplomatic Conference on 20 December 1996, update the *Berne Convention* to reflect newer technologies, including computer programs and digital works. These treaties represent the latest attempt by W.I.P.O. to modernize copyright law and raise the minimum standards of protection. At present, the treaties are not in force, as they require accession by at least thirty W.I.P.O. member states; they will enter into force three months after this has been achieved. The treaties have a sunset clause whereby this level of membership must be reached by 31 December 1997; otherwise, the treaties will not enter into force.

Among other things, the *W.I.P.O. Copyright Treaty* provides copyright holders with rights over computer programs (and their rentals), database creations, and works telecommunicated to the public. These rights already exist in the Canadian law. The treaties also discuss the marking, e.g. digital coding, of information which can be transmitted in cyberspace.[25] Under the *W.I.P.O. Copyright Treaty*, interfering or changing the information without the copyright holder's consent is prohibited, as is assisting or facilitating such acts. The *W.I.P.O. Performances and Phonograms Treaty*, among other things, provides that performers be granted the exclusive rights over the recording and distribution of their performances regardless of the medium. Similarly, producers of phonograms (a term that encompasses digital sound recordings) are given rights over distribution of their works regardless of form. Of course, in order for a phonogram to be produced, producers and artists must reach an agreement.

For Canadians, these treaties serve to internationalize existing trends in our law. Once the treaties take effect and Canada's membership is confirmed, there will be very little change to the law, with the exception of recognizing the distribution of works regardless of medium (*i.e.*, digital works will be expressly covered) and the marking provisions.

Whether W.I.P.O.'s latest initiatives will meet with widespread success remains to be seen. Raising the minimum standards of copyright combined with the increased number of *Berne Convention* member states, all with differing interests, wealth and industrial profiles, has created a situation where it is extremely difficult to achieve consensus on the express protection of new technological works such as computer programs and computer databases. The difficulties posed by digitized works and the Internet only serve to further exacerbate the inertia that has now beset the *Berne Convention*. Bringing the new W.I.P.O. treaties into force will, if nothing else, break this international copyright deadlock.

---

[24] *W.I.P.O. Copyright Treaty*, adopted by the Diplomatic Conference on 20 December 1996, 36 I.L.M. 76.

[25] See *ibid.*, arts. 11 & 12.

B. *The* Berne Convention *and Canadian Membership in N.A.F.T.A.*

Although Canada did not become a signatory to the *Berne Convention* in its own right until 10 April 1928, the *Berne Convention* did apply to Canada as a colony of Britain, one of the original signatories.[26] Canada signed the Rome (1928) revision[27] to the *Berne Convention* on 2 June 1928. It officially ratified the treaty with passage of the 1931 amendments to the *Copyright Act*.[28] Until it signed N.A.F.T.A. in 1992, Canada had resisted adhering to revisions of the *Berne Convention* after the Rome revision (2 June 1928). Chapter 17 of N.A.F.T.A.,[29] however, requires that with respect to copyright each of the parties (Canada, Mexico and the United States) shall, as a minimum, comply with the substantive provisions of both the *Berne Convention* and the *Geneva Phonograms Convention*.[30] Under N.A.F.T.A., compliance with these international conventions is mandatory; however, formally becoming a signatory to them is not a requirement.[31] On the other hand, adherence to these conventions is to be regarded as a minimum standard; each state is free to implement stronger protections if it should so choose.[32]

In order to comply with N.A.F.T.A., Canada had to amend its copyright laws to reflect the changes which occurred in the *Berne Convention* between 1928 and 1971.[33] The United States, on the other hand, has pushed hard to convince the Canadian government to become a signatory to the *Berne Convention* of 1971.[34]

---

[26] Canada originally adhered to the *Berne Convention* in 1923. At that time there had already been two revisions: the Berlin revision of 1908, and the additional Protocol of Berne (20 March 1914) (see N. Tamaro, *The 1995 Annotated Copyright Act*, trans. C. McGuire (Canada: Carswell, 1995) at 14).

[27] This is also frequently referred to as the *Rome Copyright Convention, 1928*. This, however, often leads to confusion with the neighbouring-rights treaty entitled the *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations*, *supra* note 19, which is often (and in this paper) referred to as the *Rome Convention*. Accordingly, in this text, the successive amendments to the *Berne Convention* are referred to using the term "revision", *e.g.* the Rome revision.

[28] *An Act to Amend the Copyright Act*, S.C. 1931, c. 8.

[29] N.A.F.T.A., *supra* note 4, art. 1701(2)(a)&(b).

[30] *Supra* note 20.

[31] See N.A.F.T.A., *supra* note 4.

[32] See *ibid.*, art. 1702.

[33] For example, art. 1705(6) of N.A.F.T.A., *ibid.*, limits any N.A.F.T.A. party from granting compulsory translation and reproduction licenses under the Appendix to the *Berne Convention* (see *supra* note 16), where, but for that party's actions or laws, the rights holder would have been in a position to offer the work voluntarily. This Appendix to the *Berne Convention* was aimed at encouraging developing countries to join the *Berne Convention*, but is inapplicable as between the N.A.F.T.A. parties. Clearly, this N.A.F.T.A. provision was aimed at preventing Mexico, which could potentially qualify for this exception as a developing country under the *Berne Convention*, from obtaining access to compulsory copyright licenses from Canadian and American copyright holders. Both Canadian and American governments have been vigorously opposed to such a scheme, and have used the N.A.F.T.A. to exclude Mexico from its use.

[34] In his 1987 address before the U.S. House of Representatives Subcommittee on Courts, Civil Liberties, and the Administration of Justice, Ambassador Clayton Yeutern, the then U.S. trade representative, stated,

At the time of this writing, Canada has still not ratified these conventions, although its laws are substantively in compliance with their requirements.[35]

Under the Canadian government's latest copyright revision proposal (a bill proposed by the ministry of heritage), compliance with the provisions of the *Rome Convention*[36] has been recommended.[37] Once again, however, there has been no stated intention of actually becoming a signatory to that convention.

This is further evidence of what seems to be a fairly consistent government policy towards copyright and neighbouring rights. Canada continues to resist formalizing its relations with other countries so long as the principle of national treatment remains in place, combined with measures of reciprocity in other countries' legislation. In this way, Canadian copyright holders can reap the benefits of protection abroad while the government maintains the flexibility to implement those protections that it considers beneficial to domestic authors both at home and abroad.

III. The *Universal Copyright Convention*

The U.C.C.[38] was originally proposed by the United States in 1947 as a multilateral copyright treaty alternative to the *Berne Convention*. The United States had refused to sign the *Berne Convention* primarily because the 1908 Berlin revision had prohibited the requirement of formalities such as registration and marking and be-

---

> U.S. adherence to Berne has become an important issue in our free trade talks with Canada. We are asking the Canadians to make major improvements in their intellectual property regime, including implementation of the obligations of the most recent text of the *Berne Convention*. Acceptance of new Berne obligations is at the heart of important improvements we hope that Canada will make in copyright protection (Amb. C. Yeuterr, Address (before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice, U.S. House of Representatives, 23 July 1987) at 3-4).

[35] Canada's acceptance of these provisions has been regarded with some skepticism. According to one commentator, the placement of copyright provisions in the N.A.F.T.A.

> answers the question whether it is policy to accede to the 1971 text of the Berne Convention, and all that it implies. The N.A.F.T.A. goes against conventional wisdom, and previously expressed intentions, of restricting outflows. ...
>
> When N.A.F.T.A. enters into force, with the required changes in copyright law, Canada's deficit in copyright trade will increase once again. The undisclosed benefits to Canada in non-copyright areas must surely be considerable to warrant giving high-level Berne protection not only to the United States and Mexico but to all Berne countries and, by operation of the national treatment rule, to all member countries of the Universal Copyright Convention as well (A.A. Keyes, "What is Canada's International Copyright Policy?" (1993) 7 I.P.J. 299 at 318-19).

[36] *Supra* note 19.

[37] Bill C-32, *An Act to Amend the Copyright Act*, 2nd Sess., 35th Parl., 1996.

[38] *Supra* note 2. The U.C.C. is also sometimes referred to as the *Geneva Convention*. However, as with the *Berne Convention*, reference to the U.C.C. by city name leads to confusion with the *Geneva Phonograms Convention*, *supra* note 20. Accordingly, the term U.C.C. is used in this text. This should not be confused with the U.S. Uniform Commercial Code.

cause protection under the *Berne Convention* reflected an author-centered, rather than a work-centered, approach to protection. The utilitarian copyright regime in the U.S. did not accommodate moral-rights protection, which the *Berne Convention* required.[39] However, the United States, quickly becoming one of the world's largest producers of copyrightable works, was becoming isolated in the field of international copyright. The U.C.C. proposal was an offer to countries, many of which were already members of the *Berne Convention*, to enter into a less restrictive copyright treaty with the United States. The 1952 U.C.C., administered by the United Nations Educational, Scientific and Cultural Organization (U.N.E.S.C.O.), was ratified by the U.S. in 1954, and came into force in that country in 1955.[40] Canada ratifled the 1952 U.C.C. on 10 May 1962.[41]

The U.C.C. generally provides a lower level of standardized protection to member states than the *Berne Convention*. While also employing the system of national treatment,[42] the U.C.C.'s minimum standards of protection are different. For example, with regard to the issue of formalities, the U.C.C. allows member states to require formalities.[43] In a U.C.C. member state that requires formalities, foreign nationals seeking protection must affix the familiar copyright symbol © in addition to "the name of the copyright proprietor and the year of first publication placed in such manner and location as to give reasonable notice of claim of copyright."[44] As most countries were *Berne Convention* signatories, the marking requirement was typically used with foreign works being distributed in the United States.

The United States benefltted greatly from this situation as the *Berne Convention* countries had to impose higher minimum standards. With the national treatment principle at work in the U.C.C., American authors distributing works in countries that adhered to both the *Berne Convention* and the U.C.C. typically benefitted from a

---

[39] See *Berne Convention*, *supra* note 1, art. *6bis*.

[40] Goldstein, *supra* note 11 at 185.

[41] See M.J. Bowman & D.J. Harris, *Multilateral Treaties: Index and Current Status* (London: Butterworths, 1984) at 181.

[42] With respect to the national treatment principle, art. II of the U.C.C., *supra* note 2, provides that:

> 1. Published works of nationals of any Contracting State and works first published in that State shall enjoy in each other Contracting State the same protection as that other State accords to works of its nationals first published in its own territory, as well as the protection specially granted by this Convention.
>
> 2. Unpublished works of nationals of each Contracting State shall enjoy in each other Contracting State the same protection as that other State accords to unpublished works of its own nationals, as well as the protection specially granted by this Convention.
>
> ...

[43] Art. III, para. 2 of the U.C.C., *ibid.*, states:

> 2. The provisions of paragraph 1 [where requirements deemed satisfied] shall not preclude any Contracting State from requiring formalities or other conditions for the aequisition and enjoyment of copyright in respect of works first published in its territory or works of its nationals wherever published.

[44] *Ibid.*, art. III, para. 1.

higher level of protection. Furthermore, because of article 5(4) of the *Berne Convention*, American authors publishing works both at home and in a *Berne* member country — typically Canada — were protected to the full extent of *Berne*'s minimum standards.[45]

With the United States finally joining the *Berne Convention* on 1 March 1989, protections afforded under the U.C.C. have been superseded. Consequently, while the latter treaty is still in force, it has largely become redundant.

IV. International Trade, G.A.T.T. and Copyright

It is increasingly evident that the two copyright treaties — the *Berne Convention* and the U.C.C. — have reached a point of saturation, where achieving consensus from members to amend the treaties has become extremely difficult. Further, the two underlying philosophies — the Anglo-American utilitarian view and the Continental *droit d'auteur* natural-rights view — of copyright are increasingly coming into conflict at the international level.[46] This philosophical divide produces difficulties when trying to raise the minimum standards of protection. The divisive view concerning neighbouring rights is a good example of this rift: utility-based countries tend to treat neighbouring rights as part of copyright whereas *droit d'auteur* countries do not.[47] Further, in

---

[45] Art. 5(4) of the *Berne Convention*, *supra* note 1, states:

> (4) The country of origin of the work shall be considered to be
>
> ...
>
> (b) in the case of works published simultaneously in a country outside the [*Berne*] Union and in a country of the Union, the latter country;
>
> ...

According to one commentator,

> [this] so-called back door to Berne — enabled [American authors] to get high-level Berne treatment worldwide by the simple expedient of publishing simultaneously in the United States and in a Berne country such as Canada. (This is one of the reasons so many American books of the era bear the legend "Published simultaneously in Canada") (Goldstein, *supra* note 11 at 186).

[46] Anglo-American systems focus their ultimate legislative goals on a societal – collectivist – basis. The rules protecting copying are put in place in order to achieve some societal goal, such as the advancement of knowledge and progress, or the maximization of wealth. *Droit d'auteur* systems, also known as Continental systems, on the other hand, focus on the rights of the creator. These systems often presume that protecting the creation from copying is necessary for reasons of fundamental justice or natural right. The term "natural right" refers to principles said to exist *a priori* the positive law. Natural principles find their way into law because they are *recognized* by the state, not because they are *created*. Notable proponents of natural rights of property are, among others, Locke, Hegel, von Humboldt and Kant. Although positioning these views as diametric opposites in this way is convenient for the purposes of discussion, in truth no completely pure system exists. Each copyright system, whether it be copyright or *droit d'auteur*, consists of elements of the other.

[47] Neighbouring rights consist of those rights that are not "pure" copyrights. Examples of neighbouring rights include broadcast/retransmission rights, performance rights, mechanical-contrivance and phonogram rights. The distinction is typically made in Continental systems. Anglo-American

terms of incentives to join and amend the minimum standard of rights, the existing copyright treaties operate on a reciprocal basis. A country will only agree to amend the treaty if it sees a tangible *copyright* benefit from the change, or if another *copyright* benefit is offered in exchange for its agreement.

Increasingly frustrated with the relative inability to make changes to these treaties, countries supporting large copyright interests, such as the United States, have begun to adopt a broad trade-based approach to intellectual-property issues. For these countries, which are currently at the forefront of the information revolution, intellectual property represents very profitable economic products. It is for this reason that intellectual-property rights have recently appeared in the texts of various multilateral trade agreements involving Canada, including the F.T.A., the N.A.F.T.A. and, most recently, the G.A.T.T. At one level, tying intellectual-property rights to international trade is part of the basic economic nature of intellectual property. These rights require universal recognition in order to function effectively. However, at another level, the notion of intellectual property is about cultural sovereignty. It is about protecting culture, and its very ethic is reflective of the national "soul". It is increasingly apparent that the economic forces are winning this debate.[48] With each successive trade initiative, the world moves one step closer to a universal homogeneous treatment of intellectual property.

A. G.A.T.T. and Intellectual-Property Protection

Following the global economic upheaval caused by the Second World War, twenty-three nations signed the G.A.T.T.[49] in 1947. This multilateral treaty is aimed at improving trade flows through the elimination of non-tariff barriers and the gradual reduction of tariffs on imported goods.[50] Under G.A.T.T. 1947, the participants meet "in successive rounds of reciprocal bargaining" — there have been eight such rounds to the present — in order to lower tariff barriers to trade.[51] Once lowered, a tariff cannot be subsequently raised under the Agreement unless agreed to by the participants.

---

copyright regimes, on the other hand, do not typically distinguish between the rights, choosing instead to make their legislation a melting pot of all rights associated with copyrightable works.

[48] In a recent case, a W.T.O. Panel (*Canada — Certain Measures Concerning Periodicals*, WT/DS31/R, 14 March 1997, upheld on appeal (WT/DS31/AB/R, 30 June 1997)) ruled that the Canadian government's practice of imposing tariffs on magazines that run split-run editions sold in Canada violates the W.T.O. Agreement. Split-run editions are those where a foreign magazine modifies mostly the advertising content in its issues so that they may be sold in another jurisdiction. Some U.S. magazine publishers add Canadian content in this way and sell their magazines in Canada. This would expand their market at a relatively low cost through the creation of economies of scale as compared with Canadian producers. The W.T.O. claim was brought by the U.S. who argued that the measures gave Canada a monopoly on the sale of magazines within its borders. Canada unsuccessfully argued that it was entitled to enact such measures in order to protect the cultural distinctiveness of its magazines industry which was being besieged by more powerful American publishers.

[49] *Supra* note 3.

[50] See J.-G. Castel, A.L.C. deMestral & W.C. Graham, *International Business Transactions and Economic Relations* (Canada: Emond Montgomery, 1986) at 41.

[51] *Ibid.*

Other basic principles of G.A.T.T. include a national-treatment rule and a most-favoured-nation (M.F.N.) rule, whereby a member offering preferential treatment to any other country must also offer similar treatment to all member states. Unlike the two copyright conventions, G.A.T.T. provides for enforcement through retaliatory trade sanctions and provides a dispute-resolution mechanism through which members can attempt to resolve their differences. Roughly 120 countries presently subscribe to G.A.T.T., a number that testifies to its success.

The use of intellectual-property provisions in G.A.T.T. was limited for the first forty years. As one of the key principles of the Agreement was to condemn non-tariff barriers, there was a conceptual problem. Intellectual-property protections, because they are creatures of law consciously created by a state, can legitimately be categorized as non-tariff barriers to trade. Take the example of a book. The value of a book is two-fold: it has a value associated with its physical form, *i.e.* the paper and binding, and it has a value associated with the words and ideas expressed in it. The 1947 G.A.T.T. agreement, without question, dealt firmly with the physical aspect of goods. However, through intellectual-property rules, a state could easily affect the trade dynamic of these physical goods. Using the book example, the stronger the protection of the intellectual property (copyright) in the book, the greater the increase in the domestic prices of the imported books.

With a regime of national treatment, foreign authors receive the same treatment as nationals. However, if a country does not have a strong "book industry", it may lower copyright protections with respect to books, applicable to both domestic and foreign authors, so as to render the outflow of royalties to a minimal level. Of course, that country would also be harming domestic authorship, although the effects on net societal wealth of such a policy would be beneficial. The converse is also true. A country with a relatively strong domestic authorship would keep copyright protections high in order to keep wealth in the country.

The problem multiplies in complexity when one considers the availability of foreign substitutes. In such a case, keeping the protections low for such goods may cause the population to shift from the domestic to the foreign goods. Keeping the protections and price high for foreign goods may result in a large outflow of wealth through foreign royalty payments. This is the intellectual-property-trade dilemma. To properly construct an intellectual property regime that maximizes one's trade balance requires heightened attentiveness to consumer purchase patterns and a profound understanding of the nature of the products being protected. A country is further limited by multilateral multi-product trade. Trade in one area, such as books, may affect trade — through reactive trade policies — in another area, such as cars.

G.A.T.T. 1947 does make reference to intellectual property rules. Generally, Article I: "General Most-Favoured-Nation Treatment", Article III: "National Treatment on Internal Taxation and Regulation", Article IX: "Marks of Origin", Article XXII: "Consultation", and Article XXIII: "Nullification or Impairment", are all applicable to intellectual-property rights. Specific mention, however, of intellectual property is made in three G.A.T.T. articles: Article XII: "Restrictions to Safeguard the Balance of

Payments",[52] Article XVIII: "Governmental Assistance to Economic Development",[53] and most importantly, Article XX: "General Exceptions".[54] Whereas the former two articles concern themselves with specific points of sale-of-goods rights, Article XX provides a clear statement that exempts intellectual-property rules of a country from its G.A.T.T. obligations. It does, however, impose a good-faith requirement that countries use their intellectual-property rules for purposes other than manipulation of trade balances. Thus the aforementioned situation — where a country would manipulate its intellectual-property laws to maximize its trade balance on an ongoing basis — is precluded under G.A.T.T., although the prohibition is weakly worded and requires a demonstration of intent which is difficult to prove.

With trade in intellectual-property products becoming central to their economies, western industrialized nations, most notably the United States and the European Economic Community (E.E.C. — now the European Union), through successive G.A.T.T. rounds, had tried to put intellectual property rights on the G.A.T.T. agenda. One early,

---

[52] The article states:

> 1. ... [A]ny contracting party, in order to safeguard its external financial position and balance of payments, may restrict the quantity or value of merchandise permitted to be imported, subject to the provisions of the following paragraphs of this Article.
>
> ...
>
> 3. (c) Contracting parties applying restrictions under this Article undertake:
>
> ...
>
> (iii) not to apply restrictions which would prevent the importation of commercial samples or prevent compliance with patent, trade mark, copyright, or similar procedures.

[53] The article states:

> 10. In applying these restrictions, the contracting party may determine their incidence on imports of different products or classes of products in such a way as to give priority to the importation of those products which are more essential in the light of its policy of economic development; ... Provided ... that the restrictions are not so applied as to prevent the importation of commercial samples or to prevent compliance with patent, trade mark, copyright or similar procedures.

[54] The article states:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
>
> ...
>
> (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices; ...

but failed, attempt was a proposed Anti-Counterfeiting Code introduced by the U.S. and E.E.C. near the completion of the Tokyo round of G.A.T.T. talks in 1979. Although the initiative failed, it planted the seed for future consideration by G.A.T.T. members. This was followed, in 1985, by the formation of an expert group on counterfeit goods in trade. Once again, the initiative eventually failed.[55] One year later, at the Tokyo Summit, a proposal to place intellectual property rights on the agenda of the eighth (Uruguay) round of G.A.T.T. talks was made. It was opposed by some developing countries, including Brazil and India, which argued that intellectual-property matters were best left to the expert organizations, such as the World Intellectual Property Organization (W.I.P.O.) and U.N.E.S.C.O., which were already administering treaties in the field. This argument was not enough to derail the momentum that had been building for two decades. On 20 September 1986, the then seventy-four member states of G.A.T.T. released a statement[56] that intellectual property would be part of the agenda at the eighth-round talks, but that any agreement was to avoid conflict with W.I.P.O. initiatives.[57]

B. The TRIPs Text and Intellectual-Property Rights

The Uruguay round of talks produced a general intellectual-property agreement — the *Agreement on Trade-Related Aspects of Intellectual Property Rights* ("TRIPs text")[58] — applicable to the 116 member countries of G.A.T.T. The TRIPs text addresses a broad range of intellectual-property concerns, including copyright and related rights, trademarks, geographical indications, industrial designs, patents, layout-designs (topographies) of integrated circuits, protection of undisclosed information (trade secrets) and control of anti-competitive practices in contractual licenses.

The TRIPs text begins by stating that the substantive requirements it sets out are to be construed as minimum standards and that members are free to apply more stringent protections provided they do not conflict with the agreement. The General Provisions also contain both a national-treatment requirement, similar to the two aforementioned copyright conventions, and a most-favoured-nation treatment (M.F.N.) clause which remains consistent with the G.A.T.T. generally. Under the M.F.N. principle, where a member provides a foreign member with treatment more favourable

---

[55] See A.J. Bradley, "Intellectual Property Rights, Investments, and Trade in Services in the Uruguay Round: Laying the Foundations" (1987) 23 Stan. J. Int'l L. 57 at 65.

[56] *Punta Del Este Ministerial Declaration*, 20 September 1986.

[57] It is clear that the United States, which had transformed itself from a net importer to a net exporter of intellectual-property products, was the strongest voice in favour of including intellectual property in the Uruguay Round. According to one author,

> [a]fter seven successive rounds of multilateral negotiations aimed at expanding G.A.T.T.'s reach, the United States, concerned over billions of dollars lost to intellectual property pirates, succeeded in expanding the agenda of the eighth set of G.A.T.T. negotiations, the Uruguay Round, to include intellectual property (Goldstein, *supra* note 11 at 226-27).

[58] *Agreement on Trade-Related Aspects of Intellectual Property Rights*, Annex 1C to *G.A.T.T. 1994: Final Act and Agreement*, *supra* note 3 [hereinafter TRIPs text].

than it does its own nationals — which is permitted under the national treatment rule — it must extend the privilege to all other member states as well.[59] The M.F.N. provision, however, does allow existing reciprocal agreements that deviate from this principle to survive.

The General Provisions also contain an important, albeit often overlooked, statement of objectives. It unequivocally states that the purpose of the protections afforded under the agreement is to enhance "the promotion of technological innovation and ... the dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare ..."[60] The statement is reflective of an Anglo-American understanding of copyright. It ignores the author-centered philosophy found in *droit d'auteur* schemes of protection.[61] This spirit is reflected in Part II, Section 1 of the TRIPs text, which deals with copyright and related rights. The TRIPs text does require that members *comply with* the substantive provisions (articles 1 through 21) of the *Berne Convention*, 1971 as applied to G.A.T.T. members; however it does not require that members *become signatories* to *Berne*.[62] It also exempts members from rights or obligations under article 6*bis* of the *Berne Convention* which requires that members protect moral rights. This limitation arises from the unwillingness of the United States to "subject itself to the possibility of scrutiny by a panel under G.A.T.T. rules of its obligations under the *Berne Convention*."[63] In addition to its objections to article 6*bis* of the *Berne Convention,* the United States also objected to article 18 which dealt with the protection of works existing at the convention's entry into force. With the inclusion of a mandatory *Berne* adherence provision, the U.S. power to negotiate continued exceptions to these sections would have been significantly reduced.[64]

In addition, the TRIPs text placed new technologies and rights under copyright, a goal that had alluded W.I.P.O. since its last significant revision of the *Berne Convention* in 1971. Computer programs and databases (compilations) are both addressed in the TRIPs text.[65] The treatment of computer programs is similar to that in the Canadian, U.S. and British acts: computer programs are protected as literary works.[66]

Databases/compilations are protected under copyright where there is a sufficient level of selection or arrangement. This provision departs from the traditional principle

---

[59] *Ibid.*, art. 4.

[60] *Ibid.*, art. 7.

[61] See note 46, *supra*, and accompanying text for an explanation of the two competing philosophies of copyright.

[62] TRIPs text, *supra* note 58, art. 9.

[63] J. Reinbothe & A. Howard, "The State of Play in the Negotiations on Trips (G.A.T.T./Uruguay Round)" (1991) 5 E.I.P.R. 157 at 159.

[64] Although the U.S. is a signatory to the *Berne Convention, supra* note 1, that treaty lacks effective enforcement measures. The U.S. and Canada are very careful about signing copyright treaties that provide members with enforcement powers.

[65] TRIPs text, *supra* note 58, art. 10.

[66] See, respectively, *Copyright Act, supra* note 6, s. 2; 17 U.S.C. §§ 101-102; *Copyright, Designs and Patents Act 1988* (U.K.), 1988, c. 48, s. 3(1)(b).

in international copyright law that determinations of originality are left to member states. In the case of databases/compilations, the American technique set out by the U.S. Supreme Court in *Feist Publications Inc.* v. *Rural Telephone Service Inc.*[67] — of denying copyright protection where originality is essentially minimal, consisting only of the "sweat of the brow" of the author — is embraced. Canada has implemented its own compilation section which strictly adheres to the TRIPs requirements. It remains unclear whether Canada continues to embrace the "sweat of the brow" principle in protecting database creations, or whether the statutory provision has displaced it. It also remains to be determined whether "sweat of the brow" protection is valid under the TRIPs agreement, as constituting "more extensive protection", or whether it "contravenes the provisions of [that] Agreement".[68] More broadly, whether general principles of originality — embraced by Anglo-American regimes of copyright since their inception — are to be disturbed by the new database/compilation doctrine is an issue central to copyright reform today.[69]

Another notable enactment in the TRIPs text that eluded other international multilateral copyright treaties is the inclusion of rental rights for both cinematographic works and computer programs.[70] Both types of work are easily copied using modern technology — technology that was not widely available at the last *Berne Convention* revision in 1971. Video-cassette rentals and computer-program sales have become essential elements of an information economy. Rights associated with ensuring their efficient and effective distribution in such a manner as to avoid prejudicing revenues to the rights holders are essential to such an economy. The TRIPs text recognizes that the right to authorize such use is essential to maintaining the utilitarian balance of encouraging the *dissemination* of works while also continuing to encourage their *creation*. With digital media (such as computer programs and CD-ROMs) more so than with traditional forms of media (such as paper and analog magnetic recordings), the ability to reproduce works at low cost without any loss of quality has made the rental right necessary. The idea of a rental right is use-based and represents the future of digital-rights legislation. The rental right was brought into the Canadian *Copyright Act* one year earlier, in 1993, as part of Canada's obligations under N.A.F.T.A.[71]

---

[67] 499 U.S. 340 (1991).

[68] TRIPs text, *supra* note 58, art. 1.

[69] The recent case of *U&R Tax Services Ltd.* v. *H&R Block Canada Inc.* (1995), 62 C.P.R. (3d) 257 (F.C.T.D.) [hereinafter *U&R Tax*] would seem to eschew this new standard of originality with respect to databases.

[70] TRIPs text, *supra* note 58, art. 11.

[71] Section 3(1)(h) of the *Copyright Act*, *supra* note 6, was added by the *NAFTA Implementation Act*, *supra* note 4, s. 55(2). It states that a copyright holder has the right,

> in the case of a computer program that can be reproduced in the ordinary course of its use, other than by a reproduction during its execution in conjunction with a machine, device or computer, to rent out the computer program.

V. Regional Treaties — The F.T.A. and N.A.F.T.A.

In addition to the multilateral treaties mentioned, Canada also has international copyright obligations arising from regional agreements such as the F.T.A.[72] and the N.A.F.T.A.[73] Although at the time of these agreements G.A.T.T. rules were in force, because of the large number of states ascribing to G.A.T.T., changes to trading practices moved at a slow pace. The intellectual-property initiatives taken in both the F.T.A. and N.A.F.T.A. arose from dissatisfaction with certain measures, or lack thereof, under G.A.T.T. At the time, G.A.T.T. was unequipped to deal with certain trade-related issues, including "intellectual property protection, investment regulations, agricultural trade, trade in high-technology products, and trade in services".[74] Canada and the United States, which continue to share the largest bilateral trading relationship in the world,[75] were forced to look towards complementary trading arrangements.

In addition to these G.A.T.T. failings, the dispute-resolution mechanisms outlined by G.A.T.T. generally make actions under G.A.T.T. a last resort, as the delays and procedural technicalities involved in their use set a high hurdle for complaining states. Under the original G.A.T.T., there are numerous mecbanisms for resolving disputes. Article XXII of the Agreement allows consultations by members on any issue. Article XXIII provides that where a member wishes to lodge a complaint, it must first refer the complaint to the member whose conduct is in issue. Once done, the complaining member may then refer the matter to the other contracting members who may appoint a panel to investigate the dispute and then provide recommendations on its resolution. This system of dispute resolution takes a long time to complete and is often blocked by a member state, as the system requires consensus. Other forms of dispute resolution addressed by the G.A.T.T. include non-tariff barrier codes (added to the G.A.T.T. in the Tokyo Round), as well as special procedural rules which are applied in the cases of lesser-developed member states.

The impetus for negotiating N.A.F.T.A. was largely American and arose immediately following the conclusion of the F.T.A. negotiations with Canada. N.A.F.T.A. was designed not merely to complement the earlier F.T.A., but to create a new relationship between the three parties (Mexico, of course, being the third), resulting in significant overlap with the measures negotiated between the United States and Canada in the F.T.A. In fact, article 103(2) of N.A.F.T.A. explicitly states that "in the event of any inconsistency between this Agreement and such other agreements, this Agreement shall prevail to the extent of the inconsistency, except as otherwise provided in this Agreement."

---

[72] *Supra* note 5.

[73] *Supra* note 4.

[74] J.A. McKinney, "Dispute Settlement under the U.S. — Canada Free Trade Agreement" (1991) 25:6 World Trade 117 at 117.

[75] According to 1991 figures, this trading relationship accounts for roughly 75 percent of Canada's foreign trade and for just under 20 percent of U.S. trade (see *ibid.*).

N.A.F.T.A. addresses trade as it exists between the three participant nations. No longer is this trade, however, related solely to goods; it now involves investment/financial services, telecommunication services and intellectual property as well.[76] As with the F.T.A. and G.A.T.T., N.A.F.T.A. is a comprehensive document which includes detailed measures to provide for the reduction and eventual elimination of barriers to trade. In order to achieve this goal, N.A.F.T.A. employs various trade enhancing strategies including national-treatment rules, most-favoured-nation treatment, the elimination of tariffs, increases in intellectual-property protections, and the establishment of various dispute-resolution procedures.

A. Intellectual Property under N.A.F.T.A.

Surprisingly, one set of provisions that has not raised any great controversy is that relating to the protection of intellectual property.[77] Many forms of intellectual property are covered under N.A.F.T.A., including copyright, trademarks, patents, trade secrets, industrial designs, integrated circuits, satellite signals and sound recordings. There are also measures outlining the necessary procedures for enforcing these rights that must be implemented by each member's domestic legislation. The inclusion of increased intellectual-property protections is well within the overall spirit or objective of N.A.F.T.A., as harmonizing these protections facilitates the freer flow of trade between the three nations. The United States pushed hard for the inclusion of these provisions as part of a larger strategy aimed at increasing global intellectual-property protections. One reason for this action came as a result of increasing domestic pressures to alleviate the U.S. trade deficit. With N.A.F.T.A. terms paralleling those of various other U.S. intellectual-property initiatives, the United States assured itself of a fallback position — albeit with respect to Canada and Mexico only — should those other initiatives, including the TRIPs text, have failed.

In terms of generally applicable dispute-resolution provisions, N.A.F.T.A. provides for the creation of a Free Trade Commission.[78] As with the F.T.A., should a

---

[76] The preamble of the N.A.F.T.A., *supra* note 4, states, *inter alia*:

> The Government of Canada, the Government of the United Mexican States and the Government of the United States of America, resolved to:
>
> ...
>
> FOSTER creativity and innovation, and promote trade in goods and services that are the subject of intellectual property rights;
>
> ...

[77] *Ibid.*, c. 17.

[78] Under N.A.F.T.A., *ibid.*, art. 2001, the role of the Free Trade Commission is to,

> (a) supervise the implementation of this Agreement;
>
> (b) oversee its further elaboration;
>
> (c) resolve disputes that may arise regarding its interpretation or application;
>
> ... and
>
> (e) consider any other matter that may affect the operation of this Agreement..

party wish to use G.A.T.T. dispute-settlement measures, it may do so. If the other party disagrees, then N.A.F.T.A. procedures shall govern.[79] With respect to disputes relating to antidumping and couutervailing duty matters, disputes are to be settled by binational panels made up of experts, much like the procedure employed by the F.T.A.[80] Also, as with the F.T.A., there is an extraordinary challenge procedure whereby judicial officials of each country form a committee which may review and pass final judgment on panel decisions.

Chapter 17 of N.A.F.T.A. deals specifically with the protection of intellectual property. Article 1701 begins by stating generally:

> Each Party shall provide in its territory to the nationals of another Party adequate and effective protection and enforcement of intellectual property rights, while ensuring that measures to enforce intellectual property rights do not themselves become barriers to legitimate trade.[81]

With this statement of the general spirit of chapter 17 in place, the Agreement goes on to state that with respect to copyright, each of the parties shall, as a minimum, comply with the substantive provisions of both the *Berne Convention* and the *Geneva Phonograms Convention*.[82] Becoming a signatory to them, however, is not a requirement.[83] The United States, after years of declining, finally acceded to the *Berne Convention* in 1989. Consequently, it has, in the past few years, had to adapt its domestic legislation to meet the requirements of the Paris (1971) revision of the *Berne Convention*. Mexico was already a signatory to the *Berne Convention* prior to negotiating the N.A.F.T.A. As Canada was not a signatory to any revision of this convention after the Rome revision (1928), it seems clear that this provision was directed specifically at Canada.

Under N.A.F.T.A., adherence to these conventions is to be regarded as a minimum standard; each state is free to implement stronger protections if it should so choose. Also contained in chapter 17's general section is a re-affirmation of the national-treatment principle which states that each signatory must afford nationals of the other signatories "... treatment no less favorable than that it accords to its own nationals with regard to the protection and enforcement of all intellectual property rights."[84]

B. N.A.F.T.A. Copyright Provisions

Following N.A.F.T.A.'s general intellectual-property provisions, article 1705 contains specific provisions that apply only to copyright. Protected works include those covered by the *Berne Convention*, 1971, as well as two important additions: computer programs and databases. Computer programs, as in the *Possible Protocol to*

---

[79] *Ibid.*, art. 2005.
[80] *Ibid.*, art. 1904.
[81] *Ibid.*, art. 1701(1).
[82] *Ibid.*, art. 1701(2)(a)&(b).
[83] *Ibid.*, art. 1701(2).
[84] *Ibid.*, art. 1703(1).

the Berne Convention,[85] are to be protected as literary works within the meaning of article 2 of the *Berne Convention*. Compilations of material which form databases already arguably protected, at the time, as collections under article 2(5) of the *Berne Convention*, were re-affirmed as protectable by article 1705(1)(b) of N.A.F.T.A., which states that

> compilations of data or other material, whether in machine readable or other form, which by reason of the selection or arrangement of their contents constitute intellectual creations, shall be protected as such.

This database protection, of course, only extends to the arrangement of the work as a whole, and does not affect the copyrightability, whether it exists or not, of the constituent elements that make up the database.

Article 1705(4) deals with the duration of copyright and qualifies the copyright term of "the life of the author and fifty years", as fixed for most works (subject to some exceptions) by the *Berne Convention*.[86] The article states that, with the exception of photographic works or works of applied art, where a party derogates from the term under one of the *Berne* exceptions, it shall not fix the term at a period less than

> 50 years from the end of the calendar year of the first authorized publication of the work or, failing such authorized publication within 50 years from the making of the work, 50 years from the end of the calendar year of making.[87]

C. Canadian Implementation of N.A.F.T.A. Copyright Provisions

In addition to adhering to the 1971 *Berne Convention* requirements, Canada was obligated, as a result of N.A.F.T.A., to include the concept of a rental right in the Canadian *Copyright Act*.[88] Prior to the provision's enactment, it was unclear whether or not copyrightable computer programs could be commercially rented by persons without express authorization from the copyright holder. Under Canadian law there was no express copyright protection for rentals of original or legitimate copies of a work. The *Copyright Act* merely prohibited the "let[ting] for hire [of] ... any work that to the knowledge of that person [the lessor] infringes copyright or would infringe copyright if it had been made within Canada."[89] This section was designed to catch the further offence of distributing already infringing works, and not to prohibit rentals generally.

Protection of compilations was added to the *Copyright Act* following N.A.F.T.A.[90] Prior to 1993, the definition of "literary work" included "tables, compilations, trans-

---

[85] *Supra* note 23.

[86] *Berne Convention*, *supra* note 1, art. 7.

[87] N.A.F.T.A., *supra* note 4, art. 1705(4).

[88] See text above, aecompanying note 70.

[89] *Copyright Act*, *supra* note 6, s. 27(4).

[90] Section 2 of the *Copyright Act*, *ibid.* (as am. by the *NAFTA Implementation Act*, *supra* note 4, s. 53(3)), defines compilation as:

> (a) a work resulting from the selection or arrangement of literary, dramatic, musical or artistic works or parts thereof, or

lations, and computer programs." The definition has since been amended to clarify that "compilation" under the category of literary works only refers to literary compilations. Literary works are currently defined as including "tables, computer programs, and compilations of literary works."[91] What the difference is between "literary compilations" and "compilations" generally is not clear. It would appear to make the former, narrower definition redundant. The area of database protection is relatively new to the courts. Given the importance of compilation protection in an information economy, it is certain that further juridical guidance will be forthcoming in the near future. The first great debate that will undoubtedly occur is whether or not the *Copyright Act* extends compilation protection to cases where there is only "sweat of the brow" — that is, mere labour — expended in the creation of the compilation, or whether the new section in the *Copyright Act* is exclusive and requires that protection only be granted where there is a sufficient level of "selection and arrangement".[92]

Other notable provisions that relate to copyright concern the protection of sound recordings and semi-conductor chips. Although protection of the recordings of songs may, in some countries, be considered neighbouring rights, in Canada and the U.S., it forms a part of copyright. Article 1706 of N.A.F.T.A. requires that each member state protect sound recordings in a manner similar to copyright and provides the rights holder with rights of first publication and rental. It fixes the minimum term at fifty years from the fixation of the recording.

VI. Unilateral Trade Sanctions: The U.S. Example

Arguably the most important recent development in international trade, which directly affects Canadian and other foreign intellectual-property policy, is the increasingly aggressive approach to trade taken by the United States. It has served as a catalyst for the recent treaty proposals and general heightened activity in the area of intellectual-property law. In 1985, for the first time in decades, the United States became a net debtor in trade. The effect of this situation prompted the U.S. government to aggressively step up efforts to seek trade benefits in areas other than manufacturing, in which the U.S. has been increasingly unable to compete on the world market. Canada's situation is no different in this respect, except in the fact that Canada has good access, both geographical and by virtue of trading agreements, with a much larger trading partner — the United States. Intellectual property, on the other hand, continues to remain an American strength. The linking of intellectual property to a proactive American trade policy is, therefore, not surprising.

The United States put this policy into action in the mid-1980s, immediately following a period of severe economic recession. The U.S. *Trade Act of 1974*[93] was

---

(b) a work resulting from the selection or arrangement of data;

[91] *Copyright Act*, *ibid.*, as am. by the *NAFTA Implementation Act*, *ibid.*, s. 53(2).

[92] In the case of *U&R Tax*, *supra* note 69, the court held that "sweat of the brow" was in and of itself sufficient to afford a work copyright protection. See also Handa, "Addendum: Copyright As It Applies To Computer Programs In Canada" (1995) 26 I.I.C. 527 at 530-31.

[93] 19 U.S.C. §§ 2101-2495.

amended in 1988, as part of the *Omnibus Trade and Competitiveness Act of 1988*,[94] to include the protection of intellectual-property rights as a "priority". Under those amendments, the U.S. Trade Representative ("U.S.T.R.") was given the power to institute special "301 actions"[95] against countries that he or she feels do not respect U.S. intellectual-property rights. These amendments were preceded by the passage of the U.S. *Trade and Tariff Act of 1984*,[96] which provided the president with the power to take retaliatory action against countries whose intellectual-property laws did not live up to American standards.

In addition to these provisions, there is also a special review procedure conducted annually to evaluate which countries fail to meet American standards of intellectual-property protection or do not provide "fair and equitable" market access to those products and businesses that rely on intellectual-property protection.[97] These countries may eventually be designated "priority foreign countries", but are first placed within one of two further categories — "priority watch list" and "watch list" countries — depending on the severity of their failure. These lists serve as stepping stones towards being named a "priority foreign country". The lists are also publicized as a warning to American businesses considering intellectual-property-related investments in those countries.

For developing countries, there lies the additional risk of losing beneficiary status in the U.S. under the Generalized System of Preferences (G.S.P.). The G.S.P. provides preferential trade treatment to qualifying countries such that certain products from these countries may be imported into the U.S. at reduced tariff rates.[98] The *Trade Act* amendments link the G.S.P. program and intellectual property such that the G.S.P. status is to be granted taking into account "the extent to which such country is providing adequate and effective protection of intellectual property rights".[99] Use of the G.S.P. has the potential to change the pattern and extent of the world's intellectual-property protection to that which is endorsed by the United States. Many developing countries lack strong regimes of intellectual property and are not economically advanced to the point at which they would demand toughening up. Trading the enactment of intellectual-property protections, which may only marginally affect a strug-

---

[94] Pub. L. No. 100-418, §§ 1301-1303, 102 Stat. 1107 at 1164-81 (codified as amended at 19 U.S.C. §§ 2411ff.).

[95] Section 301 of the *Trade Act of 1974* (Pub. L. No. 93-618, 88 Stat. 1978) empowered the president to take retaliatory measures (*e.g.*, withhold trade-agreement concessions or impose tariffs) against foreign countries that imposed restraints on or were interfering unreasonably with U.S. commercial access to those markets. The section was modified by the *Omnibus Trade and Competitiveness Act of 1988*, *ibid.* Under the amendments, a new mechanism was introduced whereby the U.S.T.R. could identify (review the legislation and investigate practices of the foreign country and investigate specific complaints), and take retaliatory action against, countries that did not adequately protect intellectual-property rights held by American commercial interests.

[96] Pub. L. No. 98-573, §304, 98 Stat. 2948 at 3002.

[97] 19 U.S.C. § 2242(a)(1).

[98] 19 U.S.C. § 2461.

[99] 19 U.S.C. § 2462(c)(5).

gling economy, for preferential trade status in the U.S. is often beneficial in the short run. But the long-run benefits of the change are generally uncertain.

The effectiveness of the section 301 mechanism in the international intellectual-property field should not be underestimated. On 23 May 1993, the U.S.T.R. commenced a section 301 investigation against Brazil for failing to provide adequate intellectual-property protection to American products. The U.S.T.R. terminated the investigation on 28 February 1995, after the Brazilian government agreed to implement a course of legislative action that assuaged American demands. This situation was mirrored in 1994 with China. On 30 June 1994, the U.S.T.R. named China a "priority foreign country" and launched a section 301 investigation. China finally capitulated and promised to improve its enforcement of intellectual property laws.[100] Examples of other countries that have agreed to comply with American special 301 pressure include Thailand, India, Egypt, South Africa, Korea, Poland and Italy.[101]

Canada has not escaped the watchful eye of the U.S.T.R.. Under the 1995 special 301 review, Canada was named to the "watch list", along with twenty-three other countries. Eight countries were named to the "priority watch list", but no one was named a "priority foreign country". Canada also found itself the subject of a section 301 investigation with respect to a Canada Radio-television and Telecommunications Commission ("C.R.T.C.") decision that revoked the broadcast license of Country Music Television ("C.M.T."), an American-based cable company.[102] C.M.T. filed a petition with the U.S.T.R. alleging that the revocation of its broadcast license by the C.R.T.C. constituted an unfair trade practice. The C.R.T.C. issued the license to a Canadian competitor of C.M.T., New Country Network ("N.C.N."). The U.S.T.R. agreed and launched a section 301 investigation on 6 February 1995, which was privately settled in March 1996 by the private parties involved (C.M.T. and N.C.N.).[103] The U.S.T.R. has since withdrawn its investigation. The case is instructive as an indicator of U.S. policies regarding intellectual property *vis-à-vis* Canada. Canadian opponents to the U.S. move had argued that the license decision was allowed as part of the cultural exemption under the F.T.A. If there is a valid treaty exemption, such as the cultural exemption, then the 301 powers cease to apply. The U.S.T.R. disagreed with this F.T.A. interpretation.

In this way, the U.S. trade amendments of 1988 have created an environment where it is in a country's interest to enter into a negotiated agreement with the U.S. in

---

[100] At the time of this writing, China had still not complied in full with U.S. demands. In May 1996, the U.S. announced sanctions of 100 percent on Chinese exports unless intellectual-property laws were enforced against organized piracy copying everything from American movies to computer software (see D. Fagan, "U.S. Slaps China with Massive Trade Sanctions" *The [Toronto] Globe and Mail* (16 May 1996) B1).

[101] See "VIII. Trade Enforcement Activities" in *1996 Annual Report of the President of the United States on the Trade Agreements Program*, http://www.ustr.gov/reports/tpa/1997/part8.html (20 July 1997) [hereinafter "Trade Enforcement Report"].

[102] C.R.T.C. Public Notice 1994-59, C. Gaz. 1991.I.3034 and C.R.T.C. Public Notice 1994-61, C. Gaz. 1991.I.3038.

[103] See "Trade Enforcement Report", *supra* note 101.

affected fields such as intellectual property. Not to do so risks investigations and sanctions for the most minor of deviations from U.S. policy. Whether one agrees with this form of economic bullying or not, one cannot deny its effectiveness.

VII. Other Global Developments: The European Union

The practice of associating intellectual-property rights with trade in other goods is not new; it has, however, been increasing recently. For example, the European Economic Community (E.E.C.) (now the European Union (E.U.)), did not deal with intellectual-property issues upon its inception. The purpose of its founding treaty — the Treaty of Rome[104] — was to form a common economic market by encouraging the free flow of goods and services through the elimination of trade barriers between member states.[105] The Treaty of Rome was expanded in 1992 by the Treaty of Maastricht.[106] The area of intellectual property, and more specifically copyright, is not addressed by these treaties. It was not initially recognized as a barrier to trade and has since been a difficult area to harmonize.[107] The European trade calculus is no different than for other countries or regions: a lack of harmonized protections in a member state can lead to an influx of products, effectively wiping out one's own industry. Overprotection, on the other hand, may cross the line and be considered an infringement upon the free movement of goods, and act as a non-tariff barrier, giving rise to internal monopoly situations in a member state. Although harmonization has proven difficult, the need has intensified for clear inter-state intellectual-property rules as trade in informational products has increased.[108] Although little has been written with respect to

---

[104] *Treaty Establishing the European Economic Community*, 25 March 1957, 298 U.N.T.S. 4, U.K.T.S. 1979 No. 15 [hereinafter Treaty of Rome].

[105] *Ibid.*, arts. 30-34.

[106] *Treaty on European Union*, 7 February 1992, O.J. (1992) No. 191/1, 31 I.L.M. 247.

[107] In 1959, the E.E.C. charged working parties to look into issues of patents and trademarks. Copyright was ignored because it represented the rights of authors which had traditionally been quite stable and of little economic importance. These working parties attempted to devise intellectual-property rules for the E.E.C. as a whole which could be grafted onto national laws. By 1962, these initiatives had been abandoned. Instead, national laws have since then been worked on to achieve the same goals (see T.M. Cook, "Copyright in the European Community" (1992) 2 Legal Issues of European Integration 67 at 68).

[108] Patent protection has been successfully standardized in the E.U. through the use of both the *Convention on the Grant of European Patents*, 5 October 1973, U.K.T.S. 1978 No. 20, 13 I.L.M. 270 [*European Patent Convention*] ("E.P.C.") and the *Patent Cooperation Treaty*, 19 June 1970, U.K.T.S. 1978 No. 78, 28 U.S.T. 7645 ("P.C.T."). A central filing office known as the European Patent Office (E.P.O.), which follows the E.P.C., has also been set up for states who are participants in the E.P.C. (members include Germany, Greece, the Netherlands, Spain, the United Kingdom, Switzerland, Liechtenstein, Luxembourg, Italy, France, Sweden, Austria, and Belgium). Under the E.P.C., a filing with the E.P.O. will cause individual national patents to be registered in all of the member countries. Both international patent regimes (E.P.C. and P.C.T.) have developed into an effective way to protect computer software and its related processes, paralleling patent protections available in the U.S. There also exists the *Convention for the European Patent for the Common Market*, 15 December 1975, O.J. Legislation (1976) No. 17/1, 15 I.L.M. 5 [*Community Patent Convention*] ("C.P.C."), which has yet to take effect. Ireland and Denmark have still not ratified the terms of this convention, which when in

gaming[109] and intellectual property in trade relationships, as a theory that explains resistance to harmonization it clearly deserves attention.

Clearly EU rules do not directly apply to Canada and do not directly affect Canadian legislation or policy. Many countries of the world support trading arrangements that affect copyright and intellectual-property rights but do not directly affect Canada. There may, of course, be indirect effects. Typically these will be small. However, in the case of a large trading block such as the EU, the effects are magnified. Their copyright arrangements are therefore of interest to Canadians.

The European situation also provides a good example of the inherent inconsistency of nationally-based intellectual-property rules in the context of a trading relationship where the primary goal is to abolish non-tariff barriers. From Canada's perspective, with current membership in G.A.T.T. and N.A.F.T.A., the EU model provides an example of a more developed trading relationship. The dilemma arises from the fact that intellectual-property protections, including copyright rules, serve as non-tariff barriers to trade and allow the division of markets along national boundaries. The existence of such laws, of course, runs counter to the mandate and objectives of a trading block, such as the EU, N.A.F.T.A. or G.A.T.T.[110] This incongruity has consistently put great pressure on the European Commission to push for standardized community-wide protections.[111] The differences in domestic laws and their philosophical

---

force will allow for a Community wide patent to exist, as opposed to the individual filing system currently effected under the E.P.C.

[109] "Gaming" in trade refers to the ability for a state to withhold its approval in creating new trade rules in order to enhance its trade balance. With intellectual-property rules, this can be achieved by loosening and tightening rules depending on the comparative position of a particular industry (*e.g.*, film production or computer software development). Enhancing one's position is a tricky job and retaining the ability to manipulate the rules is vital. By signing a treaty that fixes the rules at a minimum, one loses the ability to manipulate them for advantage in the future.

[110] The three competing provisions in the Treaty of Rome, *supra* note 104, relevant to intellectual property, as discussed by the European Court of Justice in *S.A. CNL-SUCAL NV* v. *HAG GF AG* (No. 10/89), [1990] C.J.E.C. Rep. 3711 at 3728, (1990) 3 C.M.L.R. 571 at 578-579 [hereinafter *CNL-SUCAL* cited to C.J.E.C. Rep.], are:

> Article 30 ...Quantitative restrictions on imports and all measures having equivalent effect shall, without prejudice to the following provisions, be prohibited between Member States.
>
> Article 36 ...The provisions of Articles 30 to 34 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of ... the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.
>
> Article 222 ... This Treaty shall in no way prejudice the rules in Member States governing the system of property ownership.

[111] The European Court of Justice recognized that,

> Articles 30 and 36 articulate a conflict between two competing interests. On the one hand, Article 30, together with the succeeding articles, lays down the fundamental principle of the free movement of goods. On the other hand, Article 36 safeguards,

underpinnings combined with the gaming of member states has prevented this from happening in the copyright arena.[112] According to one commentator, "there will not be a unified European copyright law in the near future. The national copyright laws of member states will continue to apply ..."[113]

Conclusion

Several documents prepared by and for the Canadian government in recent years have recognized that the level of copyright protection granted in Canada, a net importer of copyrighted material, can seriously affect Canada's trade deficit, and have warned that Canadian copyright policy must proceed with caution. These warnings have existed for half a century, beginning with the Ilsely Commission Report[114] in 1957, and have to some degree shaped Canada's copyright policy to date. In that report, it was suggested that Canada should not adhere to the 1948 Brussels revision of the *Berne Convention.*[115] Part of the problem was the inclusion of a retransmission right in the 1948 revision which would have resulted in a net outflow of Canadian dollars to the United States. The report did, however, recommend accession to the U.C.C. as there would be a perceived benefit to Canadian rights holders through the measures set out therein.[116]

---

amongst other things, intellectual property rights, which, owing to their territorial nature, inevitably create obstacles to the free movement of goods. Article 36 goes some of the way towards explaining how that conflict is to be resolved (*CNL-SUCAL, ibid.*).

[112] The situation is not altogether bleak. There have been several directives passed concerning copyright and neighbouring rights. Member states must implement the directives into their national laws, although they are permitted to change the language (and consequently, often the exact intended effect). Examples of recent directives that effect copyright include: *European Council Directive 91/250 of 14 May 1991 on the Legal Protection of Computer Programs*; *European Council Directive 93/98 of 29 October 1993 Harmonizing the Term of Protection of Copyright and Certain Related Rights*; *European Council Directive 96/229 of 11 March 1996 on the Legal Protection of Databases*; *European Council Directive 93/83 of 27 September 1993 on the Coordination of Certain Rules Concerning Copyright and Rights Related to Copyright Applicable to Satellite Broadcasting and Cable Retransmission*; *European Council Directive 92/100 of 19 November 1992 on Rental Right and Lending Right and on Certain Rights Related to Copyright in the Field of Intellectual Property.*

[113] S. von Lewinski, "Copyright in the European Communities: The Proposed Harmonization Measures" (1992) 18 Brooklyn J.I.L. 703 at 703. In an attempt to strengthen copyright law within the E.E.C., in 1990 the European Commission adopted a proposal that would require accession, by all member states, to various international copyright and neighbouring-rights treaties, including the *Berne Convention, supra* note 1 and the *Rome Convention, supra* note 19 (*ibid.* at 708).

[114] Canada, Royal Commission on Patents, Copyright, Trade Marks and Industrial Design, *Report on Copyright* (Ottawa: Government of Canada, 1957).

[115] See *ibid.* at 15-16.

[116] Canada eventually acceded to the U.C.C., *supra* note 2, in 1962. At the time, the United States was a member of the U.C.C., having joined in 1955, but continued to refuse membership to the *Berne Convention, supra* note 1. Today, most countries have acceded to the more rigorous *Berne Convention*, most notably the United Stated (1989), and China (1993). The U.C.C., administered by U.N.E.S.C.O., has therefore lost much of its strength as an international agreement, since its protections are dwarfed by those in the *Berne Convention.*

Another report released twenty years later, entitled *Copyright in Canada*,[117] also focused its proposals to amend the Canadian *Copyright Act* on the financial concerns of Canadian rights holders by comparing potential copyright inflows and outflows. The report recommended that Canada avoid extending protection of retransmission rights to works protected under both copyright conventions while extending retransmission rights to Canadian broadcasts, thus conferring a net benefit on Canadian rights holders.[118] Other recommendations of the report included keeping the protection of computer programs outside the *Copyright Act*, as well as joining the *Geneva Phonograms Convention*,[119] as the reciprocity requirements would result in a net gain for Canadian record producers.[120] In reflecting upon what Canada's policy approach to the *Berne Convention* and *U.C.C.* should be, the report noted that

> the two international copyright conventions lack flexibility to deal with an increasing array of subject matter, as illustrated by the growing incidence of international treaties that deal with subject matter outside the scope of the two copyright conventions. ...
>
> [T]he fully developed nations, largely exporters of copyright material, have a stronger voice in international copyright conventions, and a tendency has existed over the past half century for developing countries, including Canada, to accept too readily proffered solutions in copyright matters that do not reflect their economic positions.[121]

The latter part of this statement has proved most prophetic in the last five years, with the United States deciding to actively pursue intellectual-property rights as part of a global trade initiative.[122] Other areas of American activity in securing stronger intellectual-property protections are evidenced by increased regional protection agreements (such as the F.T.A. and now N.A.F.T.A.); increased U.S. involvement in international intellectual-property organizations such as W.I.P.O.; multilateral trading agreements such as G.A.T.T., with the U.S. introduction of the TRIPs text; and increased U.S. participation in multilateral intellectual-property agreements such as the *Berne Convention.*

Both N.A.F.T.A. and G.A.T.T. provide strong evidence that Canadian intellectual-property policy is being increasingly dictated by external pressures from trading partners. This is not necessarily an unfavourable shift as copyright law is, in a Canadian context, largely designed to create and accommodate the transfer of rights with a utilitarian objective. With Canada moving towards the development of comparatively strong export markets in informational products, it is in the Canadian interest to ensure that these products receive universal protection. The cost of such a move has

---

[117] A.A. Keyes & C. Brunet, *Copyright in Canada: Proposals for a Revision of the Law* (Ottawa: Consumer and Corporate Affairs, 1977).

[118] See *ibid.* at 106-107.

[119] *Supra* note 20.

[120] See Keyes & Brunet, *supra* note 117 at 111 (computer programs), 227 (joining the convention). See also Keyes, *supra* note 35 at 302-303.

[121] Keyes & Brunet, *ibid.* at 234.

[122] See text above, accompanying notes 93-103.

been the loss of control, primarily due to American influences, of what rights copyright should protect. Canadian philosophical, social and political values, while similar to those of the Americans, have some noticeable differences. The increasing inability to use copyright as a tool to ensure cultural protection will be a loss of power for Canada. To hold out for the expression of those values in the field of intellectual property, however, will no doubt prove to be a difficult, if not futile, maneuver, yielding few gains. With increased economic reliance on intellectual-property products, the U.S. has made intellectual-property rights compliance a high priority and has equipped its president with strong trade-sanction powers to ensure such compliance. For Canadian legislators and policy makers, a careful exploitation of those differences, in order to achieve concessions in other areas of trade, as was done during the F.T.A. negotiations with respect to retransmission rights, is an opportunity that should not be missed.

Finally, as trading barriers are reduced and global markets unified, there will be pressure to harmonize copyright rules. The tension between competition law and copyright, largely unexplored in Canadian jurisprudence, will likely be brought to the fore. It may provide Canadians with yet another tool to be deployed in the international arena. The modern trend is clear: the national nature of copyright law is being pushed aside in favour of unified copyright rules within blocs of nations. The rules governing intellectual property are brought one step closer to this end with each passing trade agreement. Canadians need not fear this change. Rather, they may embrace it. As the information highway continues to develop, Canada should take advantage of its privileged position[123] to foster the development of content industries.

---

[123] Canada boasts the highest per-capita telecommunication connectivity rates with respect to cable and telephone in the world. Recent estimates put the percentage of homes with cable at 79 percent (of the 96 percent of households with access to it), and telephone at 99 percent. Furthermore, it is estimated that 40 percent of homes now have personal computers (see Canada, *Connection, Community, Content: The Challenge of the Information Highway (Final Report of the Information Highway Advisory Council)* (Ottawa: Supply and Services Canada, 1995) c. 1).