

F.W. Guest Memorial Lecture: July 19 2000

Creating a Fair Intellectual Property System for the 21st Century

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I should first acknowledge the kindness and hospitality of the Dean and the members of the Faculty of Law of the University of Otago for inviting me to deliver this lecture, and for hosting me at the Law School during July and part of August, 2000. I am equally grateful to the New Zealand Law Foundation, whose generosity has made possible this visit to Otago and to the other New Zealand law schools.

I am delighted, for a number of reasons, to deliver the first Guest memorial lecture of the new century and of (some say) the new millennium on the subject of intellectual property law, in particular, on how the intellectual property system may be reconfigured to do fair service in the new century.

The first and most obvious reason for my pleasure comes from glancing at the roll of those who have preceded me at this podium, especially when I see the names of some of my former teachers and colleagues: Professor Peter Sim (who gave the lecture in 1968), Professor Richard Sutton (1981), Professor Peter Burns (1983), and Professor Peter Skegg (1988).¹ And then I find in 1975 one E.W. Thomas, coyly described in the number of the Otago Law Review that reproduced his lecture as a “partner in an Auckland law firm”.² Today, of course, he might be similarly described as a “judge of a certain Wellington court”, but my personal recollection is of him as one of my mentors (the other being now D.A.R. Williams, Q.C.) during my brief stint of practice in that Auckland law firm.

The second reason for my pleasure is the interesting coincidence that the year in which Professor F.W. Guest, whom this lecture commemorates, was born was also the year in which what some consider to be the best-drafted, most coherent and most succinct of modern intellectual property laws in the common law world was enacted, the Copyright Act 1911 (UK). That Act became the standard copyright law over territories then within Britain’s sphere of influence, encompassing vast tracts of Africa, Asia, North America, the Caribbean and Oceania. It became, with some amendments, the Copyright Act 1913 of New Zealand.

The UK Act continued for many decades as the fundamental copyright law of many of those jurisdictions – with periodic amendments, it is true – until the

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¹ The presence of Richard Sutton is comforting as proof that being named “Peter” is not a precondition to acquiring professorial status.

² (1976) 3 Otago L.Rev. 437, n. *.

1980s. Its successor Act in 1956 (and its 1962 counterpart in New Zealand) was generally considered to be an example of everything to be avoided in legislative drafting: an Act that so transformed simple concepts into complex language that almost any argument could have been, and was, made on its provisions, with sometimes quite startling results. The rewrite of the copyright law which was enacted in 1988 in the UK, and which was largely followed in New Zealand in its 1994 legislation, was in part an attempt to return to the pristine clarity of the 1911 legislation.

If clarity was the aim, succinctness was not the result, for the 37 sections and 2 short schedules of the 1911 legislation ballooned into 306 sections and 8 lengthy schedules in the 1988 Act. Comparable legislative obesity is evident in the New Zealand copyright legislation as the 54 sections of the 1913 law became the 236 sections of the 1994 New Zealand Act. Indeed, the First Schedule to the Copyright Act 1994 (NZ), with its 43 transitional sections, is longer than the entire 1911 UK Act and only a few sections shorter than was the whole 1913 New Zealand Act.

Bigger can sometimes be more beautiful, but not in this instance. Not only is the Copyright Act 1911 (UK) stylistically better than its successors, but some of its key features were lost in later iterations of the legislation. In this respect, my lecture might be subtitled "Back to the Future", for I shall suggest that – perhaps paradoxically, in light of the widespread belief that new technologies demand new legal solutions – a return to some basic features of the 1911 UK and 1913 New Zealand Copyright Acts would result in a more equitable and coherent intellectual property system than currently exists.

Finally, I am pleased to be presenting the first F.W. Guest memorial lecture that has as its theme intellectual property law. Over thirty lecturers have somehow managed to steer clear of the subject until now, so the time is surely ripe to cure that omission.

I

I say that over thirty F.W. Guest lecturers have steered clear of intellectual property law, but it may be more accurate to say that the subject has steered clear of over thirty lecturers. Intellectual property law has taken some time to gain academic respectability as a legal subject. I look at a standard textbook on English property law written in 1982 by two distinguished Oxford professors of comparative law — F.H. Lawson and Bernard Rudden — who justified their sparse treatment of the law of intellectual property by saying that it "is highly specialized and is handled by experts"³ - a sentence which the authors might well, on reflection, have recast, for cannot the same be said of almost any sphere of learning, let alone legal subjects? What the authors presumably meant — and it is hardly any more flattering — was that intellectual property was then a self-contained recondite corner of the law of little interest or concern to most academic or practising lawyers, and so need not detain or bore the reader for long. The authors did not need to add that a subject of such well-deserved obscurity and tedium had no legitimate claim to be on the curriculum of any

³ Lawson & Rudden, *The Law of Property* (2nd ed., 1982), 33.

respectable law school; and that, until recently, was indeed the position at the University of Oxford.

This view of intellectual property law was not peculiar to Oxford academics. Writing a few years later in 1988 (then from the University of California at Berkeley), a distinguished Otago law graduate, Professor Jeremy Waldron, justified his omission to discuss intellectual property in any depth in his book on “The Right to Private Property” by saying that, after all, intellectual property dealt with intangible rather than material things and that “it is clear” that questions about such things “are far from being universal questions that confront every society” (p. 34).

A decade or so later, it is equally clear that the Question of Intellectual Property has a far greater claim to be considered a universal question that does indeed confront every society, and looks to do so for quite some time to come.

I must nonetheless confess that the comments of Waldron and others are typical of the state of the discipline when I ventured into the field as a young academic in New Zealand in the early 1970s. Very few lawyers then seemed to know or care much about intellectual property in either the United Kingdom or New Zealand. There were, of course, the patent and trademark agents toiling in the trenches, but they understandably felt no pressing need to consider the field from other than a practical perspective. There was also a small clutch of barristers and solicitors servicing the industries that relied on intellectual property – mainly publishing, broadcasting, pharmaceuticals, performing right societies, and some manufacturers. Very few law faculties offered the subject (certainly none in New Zealand), and fewer still had members interested in its research. Occasionally, a course on Torts or Personal Property might sidle up to Intellectual Property, but would quickly veer away as soon as any intellectual property statute reared its ugly short title.

The intellectual property legal literature was pretty dire. There were a couple of specialized sets of UK law reports, which almost nobody looked at except under the most pressing necessity — partly because many of the volumes were set in a crabbed tiny font that discouraged browsing. Halsbury’s comprehensive multi-volume encyclopaedia on the *Laws of England* naturally included chapters on patents, trademarks and copyright, written by specialist lawyers. In addition, there was a small handful of textbooks, most tracing back to the late 19th century, updated every decade or so by their barrister or solicitor author until his death or retirement, and then passed on by him to some other barrister or solicitor author in the same chambers or firm. The hallmark of this literature was its mind-numbing dullness: little more than the glossing of the statutory texts, the rote recitation of rules with little apparent rhyme or reason, or the stringing together of long extracts from decided case law with little comment or explanation. Very few journals specialised in intellectual property law, and little appeared in the standard law reviews.

Of course, intellectual property cases did occasionally figure in the general sets of law reports that went into the libraries, but fewer and fewer cases were reported there as the specialised intellectual property reports gradually expanded their ambit. The choice of cases appearing in the general sets of reports then became quite arbitrary. One suspects that whenever there was a temporary

hiatus in the perennial squabbles between neighbours, families, defaulting trustees and overexuberant company directors, the editor would pop in an intellectual property case just to fill out the space. In the UK, the case went duly unread by everyone, including the intellectual property lawyers, who preferred to read the case in the specialised reports. And in New Zealand, the case was typically treated as a sort of parasite, the presence of which an honest taxonomic editor had a duty, reluctantly, to report, as if to underscore the impossibility of its eradication.

In such an intellectual climate, it is hardly surprising that the idea of intellectual property as a mystery wrapped inside an enigma became and remained a self-fulfilling prophesy.

Fortunately, the landscape has changed considerably over the last thirty years. The fact that the University of Oxford – not known as a hotbed of radicalism in curricular reform – saw fit to establish a chair in Intellectual Property Law in 1998, admittedly a few years after the Other Place had done so, is a further morsel that Intellectual Property's time has, somewhat belatedly, come.

II

I have got this far without saying what intellectual property is and why it matters whether or not we have a fair intellectual property system.

I start by observing that, on one level, there is no such thing as intellectual property, let alone an intellectual property system. What we have is a number of pieces of legislation – dealing mainly with patents, design rights, trademarks, copyrights and related rights such as those for performers – that establish various devices to protect creative or inventive work, supplemented by a patchwork of common law and equitable actions which fill in some of the gaps left by the legislation.⁴

So, if I write a book or a letter, paint a mural or doodle with a pen or a paintbox computer program, compose a symphony or a jingle, construct a play or scribble a limerick, record an orchestra performance or a birdsong, or take a photo of the family in the garden, I get a copyright in my work. The right arises automatically I make the work: I need not mark or register my claim with anyone. The right lasts a very long time – up to 50 years after my death – and is treated as a piece of property that I can sell, license, mortgage and bequeath. It is enforceable almost anywhere in the world, because most other countries have a similar law. Thus, if I write a letter to someone in Britain who makes a copy of it there without my approval, that person infringes my UK copyright. I can recover the copy from him and require him not to repeat the wrong. I can also recover whatever damage or loss his act may have caused me, or whatever gains he made from it.

⁴ Whether the gap in protection is deliberate or not is often unclear. It is probably safest to assume, in this era of constant governmental oversight of the economy, that if a particular activity falls outside the protective legislation, Parliament intended that it not be protected. If an apparent omission is revealed, it may be better to leave the question of rectification to Parliament, which has a wider range of options at its disposal to correct economic injustices than are available to judges seeking to administer the law.

Similarly, if I invent a better mousetrap or, these days, a better mouse (whether for my computer or my mouse farm), I can apply to the Patent Office for a patent for my invention. So long as my mousetrap or mouse is different from what is already found out there, and is not obvious in the sense that any fool skilled in the art of mousetrap or mouse engineering could have done the same with little mental sweat, then I will be granted a monopoly for 20 years from the date of filing my application, preventing anybody in New Zealand from making or selling the same thing without my consent, whether or not they knew of or had ever seen my mousetrap or mouse. Again, I can sell or license my invention as I choose. If, however, I want protection outside New Zealand — typically, Australia, the United States, Canada, Europe and Japan — I must quickly file for similar patents in those countries or regions: an expensive exercise which needs the help of professional local and foreign patent agents. (But then, why should buying monopolies come cheaply?)

I can, of course, choose not to patent and can try to keep my invention secret. But the risk then is that anybody is free to copy and sell my invention if they get hold of it legitimately. Once I sell or publicise my creation, I have lost the right of exclusivity that I had so long as I kept the idea to myself.

That is as it should be. The right to copy and compete has long been established at common law and remains basic to a free market economy. The fewer barriers that exist to market entry, the greater are the opportunities for people to work, trade and compete freely, and the greater the resulting public benefit. Commonwealth judges have long steadfastly maintained that there is nothing wrong in people competing vigorously and even, as some might think, unfairly — e.g., by dropping prices below cost or copying ways of doing business (although egregious practices may eventually attract the attention of competition or antitrust authorities). Traders who come to court complaining of unfair competition, without demonstrating some specific wrong committed against them, are sent packing.

We were recently reminded of how deeply the principle of freedom to compete is engrained in the national psyche by some English litigation a few years ago, where a company claimed damages for various alleged business wrongs, including an act of unfair competition. In rejecting the suit, Mr Justice Harman said that the claim amounted “to saying that there has been competition, and adding the old nursery cry ‘It’s unfair!’ To that I would only cite my nanny’s great nursery proposition: ‘The world is a very unfair place and the sooner you get to know it the better.’”⁵ Whereas the theories of John Maynard Keynes may come and go, the dicta of Sir Jeremiah Harman’s former nanny may indelibly leave their mark on judicial policy.

It is fashionable in some quarters to try and trace the origin of the miscellany of intellectual property rights back to time immemorial, presumably to pretend that these devices are natural and inevitable; but the attempt is hopeless and foolish. It is in this sense that Professor Waldron was right to say that the Question of Intellectual Property is not one of those “universal questions that confront every society”: neither Justinian nor Hammurabi, nor Grotius nor Locke, for

⁵ *Swedac Ltd v. Magnet & Southern plc* [1989] F.S.R. 243, 249.

that matter, had anything to say about intellectual property – not even Moses, however postmodern an exegesis one imposes on the Seventh Commandment.

A judge-made law of trademarks was developed by common law and chancery judges during the Industrial Revolution and into the latter part of the 19th century. In modern times, this law has been largely eclipsed by trademark registration statutes and, in Australasia, by beefed-up statutory provisions designed to curb misleading and deceptive business practices. There never was a common law of patents, copyrights or designs. The attempt by Mansfield's court to create such a law in the latter part of the 18th century was quickly turned aside for England by the House of Lords in 1774,⁶ and for the United States by its Supreme Court when the opportunity arose 60 years later.⁷

The answer to the second question I posed earlier, why it matters whether or not we have a fair intellectual property system, is relatively easy. If, with Macaulay, we conceive of intellectual property rights as a tax on users of intellectual property for the purpose of giving a bounty to creators,⁸ then it is important that the imposition and the level of both the tax and the bounty be fair. For example, where the activity for which the public is paying would have occurred anyway without the lure of any bounty, we may legitimately ask whether or not the tax is really necessary. If some or all of the bounty is going to the wrong people, or if the period of the bounty is too long or too short, or if the tax is illogically imposed on some activities and not on others, we may legitimately ask whether the tax and bounty should be adjusted accordingly.

IPRs are, of course, more than taxes and bounties. The holder of an IPR can often deny others the right to use the work or invention. We may legitimately ask whether this power is fairly conferred or exercised. Recently, the English Court of Appeal said that a newspaper should not have published stills taken from a security camera videotape which showed the movements of Princess Diana and Dodi Al Fayed on their last fateful day. The court said the copyright owner of the stills – a company controlled by Mr Mohamed Al Fayed – was entitled to an injunction against the newspaper: the newspaper could report what the stills revealed but could not substantiate its claims by actually showing the films.⁹ This is just one of a host of examples in recent years where copyrights have been used to censor. Whether intellectual property should be a tool of private or public censorship is a question worth asking.

⁶ *Donaldson v. Beckett* (1774), 2 Bro. Parl. Cas. 129 (H.L.), overruling *Millar v. Taylor* (1769) 4 Burr.2303 (K.B.).

⁷ *Wheaton v. Peters* 33 U.S. (8 Pet.) 591 (1834)

⁸ Macaulay was speaking in 1841 in the British House of Commons only of copyright as "a tax on readers for the purpose of giving a bounty to writers", but his categorization applies equally to all intellectual property rights.

⁹ *Hyde Park Residence Ltd v. Yelland* [2000] E.C.D.R. 275 (C.A.).

III

So what has gone wrong with our intellectual property system?

Some say the new digital technologies have rendered it obsolete and it should therefore be entirely scrapped, but both the diagnosis and thus the proposed cure seem to miss the point. The new digital technologies are certainly putting the intellectual property system under strain and are highlighting how difficult it may be to enforce IPRs on the Internet. But unwelcome activity that occurs in private, especially where consenting parties are involved, has always been difficult to detect and sanction, and intellectual property infringements on the Internet are no exception. Many who decry the new technologies forget that it was then new technology – printing, radio, television, sound and video recording, cinematography, etc. - that enabled them to profit from their endeavours in the first place.

The new technologies are no different. Intellectual property rightholders simply have to discover, and sooner rather than later, how to make the new technologies work for them. Record and film companies have belatedly realised that they are not in the record or film industry at all, but rather in the business of distributing entertainment, and that the new digital technologies have provided them with another opportunity to expand their distribution. Those which capitalise on that insight will survive; those which do not will go the way of the pianola and the gramophone. Survival may mean renegotiating relationships with artists and the consuming public, and clarifying what advantages there are in dealing with the companies rather than going some other route.

More pertinently, what digital technologies have done is to highlight the illogicalities and inequities in the current workings of the intellectual property system, and the consequent need for radical reform. I would make three points:

1. Intellectual property law protects too much for too long. The law ought to go “back to the future” to protect fewer things, and those for a shorter time.
2. Intellectual property law does not take the individual author or inventor, for whom the system is supposed to exist, seriously enough. This neglect needs remedying.
3. The intellectual property system needs to be codified to make it more internally consistent and comprehensible.

Taking these steps will result in a fairer intellectual property system that should be more acceptable nationally and internationally for both old and new technologies.

These propositions will now be substantiated.

1. Intellectual property law protects too much for too long

The proposition that intellectual property law protects too much for too long is especially true for copyright law. In Commonwealth countries, including New Zealand, it is a challenge to find any piece of writing longer than a couple of sentences or any drawing more elaborate than a straight line that does not qualify

automatically for copyright protection as an original work. The piece of writing qualifies as a literary work, because it is written; the squiggly line qualifies as an artistic work, because it is an exposition, however meagre, of the graphic arts. The fact that the work is simple and took hardly any time, money or skill to create is irrelevant. The work need not be registered; the author need not mark it with a claim of copyright; it is automatically protected, so that nobody can copy without the permission of the “writer” or “artist” during his or her lifetime, and then for another 50 years without the permission of his or her estate.

Furthermore, if the writer or artist is an employee and does the work as part of his or her job, the employer owns the copyright and can exercise these rights for the same period of up to 50 years after the employee’s death.

Not only is copyright easily acquired, but it is also easily infringed. It is true that the copyright owner must prove that the defendant copied, but the notion of copying has been stretched to breaking point by the development of doctrines such as indirect and even subconscious copying.

The concept of indirect copying was graphically illustrated in the early 1970s in New Zealand when the manufacturer of a toilet pan connector sued another manufacturer for infringing copyright by copying the plaintiff’s connector – and won.¹⁰ Here was déjà-vu all over again, for was it not Marcel Duchamp who, in a turn-of-the-century art exhibition in New York, shocked the art world by exhibiting an upside down urinal as a piece of art? Duchamp’s ghost must have been smiling as he gazed down on a judge in an Auckland courtroom, solemnly admitting a toilet pan connector into the New Zealand Pantheon.

A careful reader of the court’s judgment would have realised that the judge had not entirely become a convert to Dadaism. He did not hold the toilet pan connector itself to be art, although he did the next best thing: he found the engineering drawings, from which the connector had been made, to be original artistic works. They were, after all, lines drawn on paper. By copying the connector, the second manufacturer had indirectly copied those drawings as surely as if he had actually seen them. It is thus an infringement of copyright to copy an article, whether or not that article itself could qualify for copyright, so long as the article was visibly derived from a copyright work. It does not matter that the copier may never have seen, nor suspected the existence of, the underlying copyright work.

The second concept — subconscious copying — is well accepted in the United States and is poised for acceptance elsewhere. Under this theory, copying occurs even if the defendant did not know he was copying something he saw long ago, the memory of which now resides only in his subconscious.

George Harrison ran afoul of this rule in 1976 when a U.S. court found that he had infringed copyright by subconsciously copying the Chiffons’ hit song “He’s So Fine” when he composed his own hit “My Sweet Lord”. Harrison had heard the earlier song eight years previously when it was on the charts and getting regular airplay. The court held that he must have unwittingly copied it when he was stringing “My Sweet Lord” together nearly a decade later: he had access to the first tune, the two works were substantially similar (an unsurprising

¹⁰ *P.S. Johnson & Associates Ltd v. Bucko Enterprises Ltd* [1975] 1 N.Z.L.R. 311.

conclusion in the field of pop music), and he could not dispel the inference of copying that arose after access and similarity were proved. A large award of damages against Harrison was upheld. The appeal court swept aside a submission that the doctrine of subconscious copying was a dangerous one: any other rule, it said, could "as a practical matter ... substantially undermine" copyright protection.¹¹

This conclusion is dubious. Rather, the whole notion of subconscious copying undermines the legitimacy of copyright protection. It is patent law that grants a complete monopoly: infringement occurs once you step within the fence of the patent claims, whether you know of the fence or not. But then patents last only 20 years, not the potentially 120 years of copyrights, and even then there are defences open to innocent patent infringers that do not apply to copyright. With subconscious copying, copyright has come one large step closer to patent law. Copying implies a choice between doing your own work and taking another's, but the subconscious copier lacks this choice. His subconscious, not he, is in control, without his knowing or being able to influence it. With the constant bombardment of communications to which people are subjected daily, it is becoming ever harder for the innocent to rebut unjustified claims of copying, even without the hindrance of such notions as subconscious copying.

A personal example: In the course of recently preparing my inaugural professorial lecture, I wrote in a little joke about a topical event, admittedly of rather marginal relevance to the subject-matter of my lecture; but, in law, one finds one's humour where one can. The next day, I was watching a television news programme with my thirteen-year old son when the announcer happened to make much the same little joke about the same event.

I now realised, with a tinge of disappointment, that "my" joke was somewhat obvious. I certainly did not suspect the announcer of lifting it off my computer's hard drive.

The lecture was in six days' time. I expected very few members of my audience would have seen the programme or, if they had, that they would have retained memory of the witticism till the next week. The joke was just a short throw-away line in my lecture and I quite liked it: a "poor thing, but mine own." I decided to retain it.

I duly delivered my lecture and some time later asked my son, who had been in the audience, what he had thought of it. "Not bad", he said, "but you didn't need to use that joke you heard on the television last week." My earnest remonstrations were met with a sceptical raise of the filial eyebrow.

Now the joke uttered by the television announcer was undoubtedly scripted and was probably covered by copyright as an original literary work. Could I successfully have repelled a claim of copyright infringement had I been sued for performing the joke in public without the authority of the copyright owner?¹² I do not like my chances. If one's own kith and kin treat one's explanations with

¹¹ *Abkco Music Inc. v. Harrisongs Ltd.*, 722 F.2d 988, 999 (2d Cir. 1983), affirming with modification *Bright Tunes Music Corp. v. Harrisongs Music Ltd.*, 420 F. Supp. 177 (D.N.Y. 1976).

¹² The example is not fanciful. Comedians frequently suspect other comedians of stealing their material. One recently sued another for defamation in Canada for

scepticism, how is the story going to sound under cross-examination before a hard-bitten judge who does not believe much in coincidence?

So what to do? One might start by cutting back the doctrines of indirect and subconscious copying, or perhaps allowing only an injunction but no compensation against the innocent caught by these doctrines. More may, however, be needed. Too much gets protected in the first place, and then often for too long.

If copyright is there to encourage the production of work that would not be produced without this incentive, then this test should straightforwardly be applied to works for which copyright is claimed. The result would no doubt be to exclude a large quantity of work: not just trivial correspondence and simple drawings, but probably much industrial design. We know that firms all over the world kept producing new designs and other innovations even when no law protected them against copying. They were content to gain a competitive edge by being first in the market with their new product. Giving long protection in fact discourages innovation, since firms now have an incentive to rest on their laurels for the duration of the copyright instead of diverting time and money into investing in a continuous innovation programme.

One could, as some countries have done, exclude the trite by raising the standard of originality from the very low one currently in force in the Commonwealth. Thus, in Europe and the United States, originality means doing something creative, not something as mundane as drawing a wobbly line or writing a chatty e-mail to a friend. However, creativity itself is a puzzling concept and one might understandably hesitate to advocate it as a substitute for originality. Even under the test of creativity, which denies copyright to white pages telephone directories (too pedestrian), one finds things such as yellow pages directories being protected for a century,¹³ even when in practice they are replaced annually - an extraordinary result that captures how far law and practice have become disconnected.

I do not mean to say that the creation of yellow pages directories should be discouraged; even less, that they should have no copyright protection. But a more modest term of protection — 10 years at the outside? — is probably all that is warranted.

Such a term may suffice for large classes of work. One cannot be dogmatic about the precise duration needed for any particular work. Research could establish that. Life plus 50 years may, conceivably, be necessary to encourage some authors to create, but this is generally doubtful. Much shorter terms were in force in the 19th century and through to the mid 1970s in the United States, and literature and the arts flourished. The idea that more work would be produced if one raised the duration of copyright from, say, 50 years to 100 years is entirely implausible.

having publicly charged him with joke theft. I am tempted to say "joke theft is no laughing matter", except I suspect I may have read or heard that line somewhere.

¹³ Cf. *Tele-Direct (Publications) Inc. v. American Business Information Inc.* (1997) 76 C.P.R.(3d) 296 (Fed. C.A.).

To discourage opportunistic claims – those where someone now asserts an intellectual property right where the work was initially produced without any thought of such protection – one might also consider bringing back a version of the marking requirement that existed in the United States and other Pan-American nations until quite recently: for copyright, the copyright symbol (the circled “c”) with the author’s name and date of publication. If someone intends their work to be eligible for protection, marking it “Copyright claimed” at the time it is created is a modest enough precondition for getting automatic long-term protection against copying. Many people already believe that some such marking is necessary, so a change here would not be particularly radical.

2. The intellectual property system should take the individual creator or inventor more seriously

It is trite but nonetheless true that without inventors there will be no invention; without authors or artists, no books or art; without designers, no design. We proffer patents and copyrights as legal mechanisms specially designed to encourage invention and authorship and claim that the market by itself would not sufficiently encourage such activity without these stimuli. It follows that intellectual property laws should encourage creators and the process of creation. Yet they do not in a surprisingly large number of situations.

For example, much creative work is done by employees for their employers for salary under contracts of employment, rather than as freelance work, and the salary typically remains constant whatever the level of creative work done. Intellectual property laws usually start from the presumption that the rights over what the employee does on the job belong to the employer, not the employee. U.S. copyright law, perhaps oddly for a country which stresses the importance of the individual and of individual creativity so much, goes farthest in this direction. In the United States, not only does the copyright in creative work done by an employee on the job — and indeed some classes of freelancers too — belong to the employer, but the actual creator is even stripped of the label of author. Instead, the corporation — that legal fiction which has no tangible existence except in company registries and stock exchange listings — is called the “author” of the creative work its employees produce. He who pays the piper not only calls the tune but can call himself piper, to boot.

UK and New Zealand law do not go quite this distance, but they go far enough. The corporations that emit broadcasts and cable programming and that produce films and records are all personified as authors, while the humans doing this work become copyright’s invisible men and women. Employees doing traditional creative work – writing, drawing, composing – are only slightly better off: their heads appear above the parapet but the legislation lets them little else apart from the label of author: no copyright, no power to have their authorship revealed and consequently no power, absent that revelation, to prevent their work being changed around to represent something different from what the employee originally produced.¹⁴

¹⁴ See generally Copyright, Designs and Patents Act 1988 (U.K.), ss. 77-89; Copyright Act 1994, ss. 99-110 (N.Z.).

This phenomenon is not confined to those toiling in the fields of copyright and design. There has been occasional hand-wringing over the plight of the employee inventor who provided his employer and perhaps his country with the bonanza invention, but who personally profits little from it (although he would like to). An egregious case concerned an engineer who worked for the makers of the Sterling submachine-gun during the Second World War and became the co-owner with his employer of a number of patents for improvements to the gun. Beside his salary, the employer would habitually agree to pay the employee a royalty on sales of weapons including the patented improvements, presumably in recognition of the employee's superlative efforts and of the resulting effects on the company's balance sheet. When the employee continued applying his ingenuity at the same rate to turn out peaceful inventions after the war, his employer kept naming him as co-owner on the patents but then refused to pay him anything over his salary. The employee went to court under a provision, the counterpart of which is still found in section 65 of the Patent Act 1953 (NZ), that suggested the court could do the right thing by employees who felt they had been inadequately compensated for their inventiveness.

The case eventually ended up in the House of Lords, which rejected the engineer's arguments. The fact that the employer chose to make the employee a co-owner of the patents implied nothing, nor did the fact that the employee reasonably thought that the employer would continue to award him royalties after the war just as it had done previously. The employer owed the employee nothing over and above his salary, in the absence of any binding contract to pay him more. It did not matter whether the invention was particularly ingenious or whether the employer made an enormous profit from it.¹⁵

A case like this demonstrates that equity between an employer and his staff is not just a private matter but may have serious national and even international implications. Why should salaried employees put themselves out if the employer can legally keep all the benefits of the employee's exertions? Such a rule discourages an optimal rate of innovation, with negative consequences on a nation's rate of economic growth and its opportunities for prosperity.¹⁶

The UK Parliament recognized the resulting inequity flowing from Sterling's case and enacted elaborate provisions in the Patent Act 1977 that were supposed to encourage an employer to share the rewards flowing from an exceptionally valuable patented invention resulting from an employee's exceptional efforts. The courts or the Patent Office could award an employee a "fair share" of any patent that proved of "outstanding benefit" to an employer.¹⁷ Unfortunately, these provisions have been grudgingly interpreted in practice, and employees have recovered little beyond their contractual due even where the invention made huge profits for their employer. The cases make depressing reading. In

¹⁵ *Patchett v. Sterling Engineering Co. Ltd* [1955] A.C. 534 (H.L.).

¹⁶ In wartime, the rule could have more immediate and disastrous consequences, especially in the armaments field in which the engineer in the Sterling case had worked. Knowing of the rule in Sterling's case, would future employees exert themselves as much in wartime? More to the point, what nation is willing to take that sort of chance?

¹⁷ Patent Act 1977 (UK), ss. 39-42.

one, the employer thought that recommending the employee for an MBE (which he got) and presenting him with a few thousand pounds was enough recompense for an invention that had earned the employer millions in royalties and savings; and the Patent Office adjudicator agreed, dismissing the employee's claim for additional remuneration.¹⁸

The message sent by Parliament to employees through its patent laws remains the same discouraging one: unless they are clever enough to negotiate for a bonus or some equity participation in their initial contract, then it does not pay them to come up with anything too startling in their workplace. The best they may hope for is some *ex gratia* payment and a piece of base metal for their chest.

If the object of the intellectual property laws is to stimulate creative people to do their best, then patent legislation should include an incentive scheme that works, and that scheme should be extended across the range of all IPRs.

One might also provide a default rule that, in recognition of the contribution that both parties bring to creative work – the employer: capital and a conducive workplace; the employee: brains and persistence — employees should co-own, with their employer, any intellectual property created on the job. The employer would be licensed to exploit the intellectual property, dividing profits equally unless exceptional effort by either side demands a departure from equality.

3. The intellectual property system should be codified

Intellectual property is a particularly untidy branch of the law. There is no single place – an Intellectual Property Act or Technology Code – where one can find it, although commercial publications periodically collate intellectual property laws to create an illusion of unity. A fleeting glance, however, reveals the underlying discord.

In the UK, the situation has become particularly alarming. There is a thicket of statutes and statutory regulations drafted with different degrees of specificity and clarity; the gathering herd of European Union Directives that preambles its way through dozens of “whereases” to a final anticlimactic enclosure of comparatively few sections of operative text; and the encirclement of multilateral international treaties, which formerly sat on the horizon but have now swept in to occupy the close perimeter. To this is added a substantial body of common law and equity, which sits alongside and supplements the domestic statutes and regulations, and the rulings of European and foreign courts and, more recently, of international tribunals that influence the interpretation or shape of domestic laws.

New Zealand is not quite as bad yet, but it is bad enough for a codifying exercise to be worthwhile. The great codifications of the 19th century in the law of sale of goods, bills of exchange and crime were successful in systemizing and clarifying the law, as well as exposing shortfalls and setting the scene for periodic reform. Codification of all IPRs would have the same effect. It would remove fragmentation, deal comprehensively with common issues, minimize discrepancies and overlaps, and generally reduce transaction costs. Besides the reforms already mentioned, such a code might deal with the following matters:

¹⁸

British Steel plc's Patent [1992] R.P.C. 117 (Pat. Off.).

- Currently cumulative protection of the same item is possible and, indeed, occurs quite frequently. Cumulative protection is usually over-protection and so should be avoided as a deadweight social cost. An integrated intellectual property code would help achieve this goal. Thus, one could more easily decide whether patent, copyright or some other form of specialised protection for computer programs would be most appropriate, instead of permitting potentially overlapping triple protection under copyright, patent and special circuit topography laws.¹⁹

Similarly, trademarks are already well protected under trademark law. If they involve a little artistry — something as banal as the flowing script of the Coca-Cola trademark may qualify as artistic — do they really need the additional, automatic, more intensive and potentially worldwide protection of copyright?

- The provisions on transfer and licensing of IPRs, as well as defences to and remedies for infringement, could be standardised. So could co-ownership rules, which currently inexplicably differ between IPRs and are in any event deficient. Thus, where co-owners deadlock on whether or how to exploit their rights, an IPR often cannot be exploited or partitioned. A provision allowing the court to overrule a co-owner who is behaving unreasonably might make sense.
- A single national registry of IPRs could be established, allowing electronic filing and searching. If mirrored in other jurisdictions, such a system could eventually develop into a regional and worldwide network of registries.
- Currently, no registry for IPRs such as copyrights and performing rights exists in most states, although nations such as the United States and Canada maintain optional registries. New Zealand also had such a registry for copyrights until 1963. Registries facilitate transparency, dealing and financing of IPRs, and also enable the wealth reflected by IPRs to be more accurately detected and measured. They also offer rightholders procedural advantages such as easier proof of title in court. Reinstatement of a registry system should be considered.
- It would be easier to provide for and accommodate indigenous claims for protection over traditional culture and practices such as methods of medical treatment into what, till now, has been a Western-originating and -oriented regime, if that regime were systematised.
- Overall, the scheme could make explicit that IPRs should displace free competition for only the most compelling reasons.

Some of these initiatives can be introduced unilaterally; others cannot. For example, the TRIPs Agreement annexed to the World Trade Organisation Agreement of 1994 requires that computer programs be protected under copyright law for the standard long term that applies to literary works, typically,

¹⁹ A similar point is made for the overlap between copyright and designs by Sutton, "Industrial Design: The Copyright Amendment Act 1985" (1987) 12 N.Z.U.L.Rev. 343.

the author's life plus 50 years. WTO members would have to muster sufficient support from other members to have the Agreement amended before moving to reduce the duration of protection for such works. On the other hand, providing for co-ownership and special remuneration for patented inventions produced on the job would not implicate any international treaty and is a matter of purely national policy.

IV

Edmund Burke said that "every human benefit and enjoyment ... is founded on compromise and barter. We balance inconveniences: we give and take; we remit some rights that we may enjoy others"; and so it is with intellectual property. A fair intellectual property system is founded on a four-way compromise and barter between the creator, the person who markets the creation, the public, and the nations that trade intellectual property. It involves a balancing of inconveniences, some give-and-take, and the remitting of some rights that others may be enjoyed.

A fair intellectual property system would allow the benefits flowing from innovation to be appropriately shared between those who create and those who distribute products covered by IPRs. It would allow the public reasonable access to new works and ideas, and the ability to experiment and develop follow-on new works and ideas without undue hindrance from rightholders. A fair scheme adopted internationally would encourage greater compliance by countries where intellectual property is a relatively new concept. And a fair scheme would ensure that intellectual property deserves its "intellectual" epithet and is not a cover for protecting the trivial, the ephemeral and the opportunistic.