with an established local enterprise in Vancouver, why should its decision to expand automatically cut off the right of the Vancouver business to retain the goodwill associated with its own symbols?

The *Act*'s bias against concurrent or regional registrations may have suited the monolithic aspirations of the "sea-to-shining-sea" often multinational business model of the 1950s. One may query its appropriateness to the economy of the twenty-first century, where the small or localized business needs as much encouragement as the large. One possible solution may be to devise a more flexible system, under which enterprises obtain a national registration that, after five years, might be recontoured to the firm's actual customer base. The registration could be regularly reviewed, perhaps every five years or on application by the registrant or anyone else. Registrations would then more closely match the area of likely customer confusion, instead of stretching to points where the registrant can demonstrate no interest other than opportunism.

E. SOCIAL CONTROL

If one feature stands out about intellectual property law, it is how much the law affects the public, but how little the public affects it — indeed, how little the law lets the public affect it. Intellectual property law is a social construct that shuns social participation, let alone control. Few Jane and John Does turn up at legislative hearings when revision or amendment of the law is contemplated; they are certainly not present at the international meetings where global intellectual property standards are set. The registries of the Canadian Intellectual Property Office are open to the general public, but are rarely consulted by it. Trials involving intellectual property matters are by a judge alone, without a jury. The *Acts* justify themselves by how they benefit the public, but the justifications are long on assertion, short on proof. Beneath the veneer, one finds an infrastructure inhospitable to public entry. Any do-it-yourselfer trying to obtain a right (other than copyright, which is automatic) is sure to come to grief even if he assiduously tries to follow the relevant *Act* and *Regulations*.

The substance of the law is no more embracing. The tone is well set by the British judge who, admitting that the "public interest" could override a copyright, indicated how atrophied this "public" interest is: "[T]here is a world of difference between what is in the public interest and what is of interest to the public," he said, with no trace of embarrassment.[15] This approach permeates intellectual property generally.

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15 *Lion Laboratories Ltd.* v. *Evans*, [1985] Q.B. 526 at 553 (C.A.).

Patents cannot be refused even where they are shown to have no public benefit, and the language in which they are drafted is accessible only to someone skilled in the art — not to a lay person, however highly educated. Trade-mark litigants scrap over who can bring their particular brand of truth before the public; the occasional lay person who testifies at a trial about how she is or is not confused will not readily repeat the experience after the public mocking she will receive from an experienced cross-examiner.

If intellectual property rights really do benefit the public, any member of the public should be able to oppose grants that may not operate in the public interest, or have those that are not so operating expunged. Anyone can challenge the grant of a European patent before the European Patent Office, and a study on the ethical issues involved in patenting life forms has proposed a similar scheme for Canada.[16] In Canada, however, only someone "interested" or "aggrieved," or a government representative (the Attorney General or the CIPO), can apply to expunge a right, and initial grants can be opposed only under the *PBR Act* or the *Trade-marks Act*.[17] These rights of opposition are not intended as forms of social control. For example, the general public does not read the *Trade-marks Journal* (the only place pending trade-mark registrations can be found); the grounds of opposition are closely defined to exclude any matter of general public interest; and no provision exists for notifying anyone (except another registrant) possibly affected by a registration.

Meaningful public participation in the intellectual property granting process would need more than giving the public standing. Suitable grounds for opposition would need to be devised.[18] Applicants could provide an impact statement to demonstrate how the grant may affect the public. Applications could be advertised in newspapers likely to be read by potential interveners (e.g., a mark in Chinese lettering might be advertised in the Chinese language press). Applicants could carry the onus of proof that grants in their favour would, overall, benefit the public.

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16 Westminster Institute for Ethics and Human Values & McGill Centre for Medicine, Ethics and Law, *Ethical Issues Associated with the Patenting of Higher Life Forms*, (London, Ont., 1994) at 103ff, esp. 106–7.

17 Informal "protests" can be filed in the PO and, presumably, other CIPO branches. The information may be used, but the filer is treated as an interloper: see, for example, the *Patent Rules*, 1996, s. 10.

18 Presumably more specific than making the grant "objectionable on public grounds," as is provided in some corporate names registration schemes: for example, *Business Corporation Regulations*, O. Reg. 62/90, s. 13.

Imagine how these modifications might work for trade-mark registrations. The Trade-mark Office might more quickly recognize Canada's changed demographics and stop testing the registrability of obviously foreign marks according to what the notional average bilingual Canadian might think. It might learn that there are many Japanese or Spanish speakers in Canada and that they might not all treat NISHI, KOLA LOCA, or GALANOS as meaningless arbitrary marks.[19] It might more readily decide that such marks, as well as marks in foreign characters (e.g., Chinese, Arabic, Hebrew), should be judged by the reaction of speakers of that language. The Opposition Board might also take judicial notice of the obvious — for example, that "the number of Canadians fluent in Chinese" is in fact "significant," contrary to what it has so far held.[20] It might also find that the Nisga'a people of British Columbia would have preferred to be notified of the registration of a mark like NISKA for clothing and to have been given a chance to object to it, even though their existence was said by the Board to be (then) known to "relatively few Canadians."[21]

F. FIRST NATIONS

The Nisga'a example shows how trade-mark law can affect a particular social group without its knowledge until it is too late. Sometimes this result occurs through neglect; other times the policy is quite deliberate.

Consider how copyright law affects First Nations peoples. It certainly protects the work of contemporary Aboriginal artists, writers, and their publishers and distributors, just as it does the work of their non-Aboriginal counterparts.[22] Traditional First Nations work, however, is more vulnerable. What is to stop anyone from commercializing, with or without embellishment, traditional Aboriginal stories and artwork, even when this behaviour may be deeply offensive to the group that feels these stories and their art are integral to its culture, part of the glue that binds

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19 *Galanos* v. *Canada (Registrar of Trade Marks)* (1982), 69 C.P.R. (2d) 144 at 155 (Fed. T.D.); *Nishi* v. *Robert Morse Appliances Ltd.* (1990), 34 C.P.R. (3d) 161 at 167 (Fed. T.D.); *Krazy Glue Inc.* v. *Grupo Cyanomex S.A. de C.V.* (1989), 27 C.P.R. (3d) 28 (T.M. Opp. Bd.).

20 *Cheung's Bakery Products Ltd.* v. *Saint Anna Bakery Ltd.* (1992), 46 C.P.R. (3d) 261 at 268 (T.M. Opp. Bd.).

21 *Lortie* v. *Standard Knitting Ltd.* (1991), 35 C.P.R. (3d) 175 at 179 (T.M. Opp. Bd.).

22 See, for example, *Milpurrurru* v. *Indofurn Pty. Ltd.* (1994), 30 I.P.R. 209 (Austl. Fed. Ct.), for a sensitive attempt to reconcile copyright law with the customary law of an Australian aboriginal people.

it together? First Nations peoples have valid concerns about how their stories and their art are being taken and commercialized, sometimes by their own peoples, more often by others. Sometimes the commercialization itself may be offensive, as when the story or the piece of art is treated as sacred by the group to which it belongs; other times, the commercialization, while not in itself offensive, distorts the original story or artwork.

Copyright and moral rights pass these issues by. The objections to protection under the current law are often insuperable. The author may be unidentifiable because he or she is long since dead, or the work may have been communally made. The work may have been oral and unfixed. There may be no one who can put forward a plausible claim to be the author or the copyright owner, in the sense of having derived title from an identifiable author or authors. Any possible term of copyright may also have expired.

Protecting traditional culture in some way raises controversy because it suggests that some areas of thought and expression are off limits except to one identified group: a type of censorship that is anathema to writers and artists. First Nations peoples may respond that the act of translation itself may be a form of cultural oppression that, intentionally or unintentionally, recreates traditional stories according to the translator's perspective. The reformed stories then may be treated as the authentic expression of the group's culture, even by the group itself. Differences likes these are best settled through rules not designed in bureaucrats' offices, but coming out of discussions involving interested Aboriginal and non-Aboriginal leaders, writers, and artists.

The present situation has come about quite deliberately. The issue of bringing traditional culture ("folklore") under copyright was discussed during *Berne*'s 1967 revision process. An international consensus developed that favoured protection, and a working group was struck to look further into the matter. Immediately, the Canadian delegate was on guard, and he is recorded as saying that

> he had been unable to speak earlier on the question of folklore. His country had a very considerable body of folklore, which it had always regarded as falling within the public domain. Canada was therefore opposed to any action likely to restrict the public use of folklore material. His Delegation was extremely unwilling to enter into a discussion as to who owned or was entitled to use such material. He hoped the new Working Group would bear his remarks in mind, since the matter was of great concern to his Delegation.[23]

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23 *Records of the Intellectual Property Conference of Stockholm (1967)*, vol. 2 (Geneva: World Intellectual Property Organization, 1971) at 877–78.

Given *Berne*'s rule of unanimity, this objection was enough for the provision on traditional culture to be watered down to an inoffensive nonbinding scheme that has attracted few adherents. Needless to say, Canada is not one of them.

G. RETHINKING INTELLECTUAL PROPERTY

For the meantime, the international community has accepted the notion that intellectual property is integral to national and international economic welfare; and, at some level, the utility of intellectual property is of little doubt. Few would deny that some stimulus and protection has to be offered in some sectors to encourage production of goods that are easily appropriable, where copying avoids the producer's initial investment and deprives the producer of the opportunity of recoupment and making a fair profit. The question is what stimulus and what protection should be offered. The policy instruments for deciding these questions are readily at hand.

Whenever governments want fundamentally to review what services they provide or ought to provide, they introduce a system of zero budgeting. Under it, every department of government is allocated a budget of $0. To get more, the department has to show why it needs it and how much it really needs to achieve its goals. There is no presumption that a department has an entitlement simply because it has always had one or had one the previous year. Each project and the level of support to be devoted to it have to be justified separately. The map created by the total number of successfully justified projects is then surveyed, checked off against policy criteria, and finally adjusted for anomalies. The product is not timeless: there are periodic short-term reviews, based on the presumption of the prior budget's accuracy; there are periodic comprehensive audits to ensure that policy objectives are being achieved; and there are periodic longer-term reviews, where a return to zero budgeting and no presumptions are the order of the day.

Intellectual property seems ripe for a zero budget review, domestically and internationally. The broad questions to be asked would be:

- What activities do we as societies desire to encourage?
- What degree of stimulus needs to be offered for the activities to occur?
- Who should benefit from the stimulus? The initial producer(s)? Later distributors? In what proportions and to what degree? And who deserves to be called a "producer" in the first place: the blood donor as well as the researcher who isolates the cells and develops a cell-line from it?

Along the way, some other equally fascinating questions will no doubt need answering, for example:

- Should society simply set up a market for ideas and allow entrants in that market to sell those ideas to the highest bidder? Should it be concerned about people who do not have the resources to enter the market?
- Should society be concerned about the unequal distribution of intellectual property, nationally and internationally, in the same way it may be concerned about the unequal distribution of traditional property? Or should intellectual property laws be devised that do not entrench and enhance existing distributions of power and wealth?
- Should society be concerned that intellectual property laws may play a part in causing people to invest too much time and money in inventive and creative activity, to the detriment of more modest but as worthwhile improvements to existing technology? Or that the laws may contribute to new technology being introduced and exploited before its potential social impact can be fully and fairly assessed, because its promoters naturally want to reap the rewards of monopoly quickly? Or that intellectual property laws may need to be modified or supplemented to encourage activity in areas which society considers particularly necessary for its well-being or survival and which those laws are doing little or nothing to encourage?

In the heat of the battle between owners and users of intellectual property, such systemic questions are rarely asked. Not only should they be but attempts should also be made to answer them, so laws can be devised which have a coherent moral centre that the public can comprehend and accept.[24]

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24 Some paragraphs of this chapter were drawn from D. Vaver, "Some Agnostic Observations on Intellectual Property" (1991) 6 I.P.J. 125; "Rejuvenating Copyright" (1996) 75 Can. Bar Rev. 69; and "Rejuvenating Copyright, Digitally" in *Symposium of Digital Technology and Copyright* (Ottawa: Department of Justice, 1995) 1.

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GLOSSARY

* indicates cross-reference to another entry.

Account of profits: Discretionary remedy that requires an infringer to detail the net profits made from an infringement and to pay the sum over to the claimant.

Anticipation: The converse of novelty in *patent law. An invention that has been anticipated (i.e., the same subject matter is shown to exist already at a patent application's claim date) is not new and therefore cannot be patented.

Assignment: Voluntary transfer of ownership of a right. The person transferring is the assignor, who transfers (assigns) to an assignee. Such a transfer is called "cession" in Quebec.

Berne Convention [Berne]: The *Convention on the Protection of Literary and Artistic Works* signed at Berne in 1886. The latest version is the *Paris Act* of 1971. Canada has ratified only the 1928 version, but **NAFTA* and **TRIPs* bind it to give a high level of *copyright protection equivalent to the 1971 *Act*. Canada will soon formally adhere to the 1971 version.

Bill C-32: The Copyright Amendment Bill of 1996, introduced into the Canadian House of Commons on 25 April 1996. The bill increases the rights of record companies and performers, gives Canadian book distributors the right to stop unauthorized imports or distribution, and provides some exemptions for libraries, archives, museums, and people with disabilities. References are to Bill C-32 as it stood at its second reading stage in June 1996. The bill was referred to a parliamentary committee to hold hearings and, at press time, was likely to be presented with a number of amendments for third reading. It is projected to be passed by 1997.

Bootleg: *See* Piracy; Theft.

Breach of confidence: The wrong of disclosing or using information confided to or improperly taken from another for a purpose not authorized by the confider. *See* Trade secret.

Canada Gazette: The periodical in which regulations and notices of the federal government are officially published.

CIPO: Canadian Intellectual Property Office, located in Hull, Quebec. The umbrella government department under which the Patent Office, Copyright Office, Trade-marks Office, and the like operate.

Claim date: Usually the date when a *patent application is filed. It can be moved back; for example, a claim in application A filed in Canada on 1 February 1996 can be bumped by a claim in application B filed as late as 31 January 1997, if B is based on an application filed in a *Paris Convention* or *WTO* state on 31 January 1996 (up to twelve months earlier). B has priority based on its earlier claim date: it will get a patent covering its claim, and A will not.

Clearance: *See* Licence.

Common law: Judge-made law, used here to include rules of *equity.

Consent: *See* Licence.

Copyright: The protection that literary, dramatic, musical, and artistic works receive internationally, typically for the author's life plus fifty years. In Canada, copyright includes neighbouring rights (*see Rome Convention*).

Copyright Board: A tribunal established under the *Copyright Act*, with authority mainly over rate approvals for cable retransmission, performing and broadcast rights for music, and tariff disputes between collecting societies and users. Appeals go directly to the Federal Court of Appeal.

De minimis: A shortened form of the Latin legal maxim *de minimis non curat lex*: the law does not concern itself with the trivial. For example, an act that is technically an *infringement can be called *de minimis* if it is thought to be outside the purpose of the law to catch it; the claim can then be dismissed with costs. This involves a value judgment that the complaint should either have been resolved without taking up the time of a court or is a minor irritant that, like the unintentional jostle in a crowded street, the complainant should have borne with equanimity.

Disclaimer: In *patent law, the giving up of anything beyond what the inventor truly invented.

In *trade-mark law: (1) The giving up of any unregistrable parts of a trade-mark — for example, descriptive language on a label — when seeking registration. The mark owner may, however, have common law rights in the disclaimed material, which still forms part of the mark. Disclaimers take effect on being recorded on the respective *CIPO register.

(2) A notice, such as "my business or trade-mark is not associated with firm X or mark X," that is designed to minimize confusion between two trade-names or trade-marks. A clear and prominent notice that achieves this goal may help to avoid a passing-off or trade-mark infringement action.

Employee: An individual employed under a contract of service with an employer; distinguished from a *freelancer, who is not on an employer's payroll. Employers often *prima facie* own the intellectual property rights in subject matter produced by employees on the job. This may be true even where a freelancer is working under contract (e.g., an industrial designer or ICT creator), but a specific agreement is usually required where a *patent or *copyright is involved.

EPC: Abbreviation for *European Patent Convention*, signed at Munich on 5 October 1973, governing the grant of European patents.

Equity, equitable rights: A term used here in the technical sense of rules or rights historically derived from those recognized by courts of chancery to supplement legal rules or rights — those administered by the ordinary courts of the land. For example, a writing may be required for a valid legal *assignment of *copyright; but a court of chancery accepted that an oral assignment can effectively transfer the right between the parties, although the right could disappear if the assignor resold to an innocent third party. Such an assignment is called an equitable assignment; the rights that flow from it are equitable rights. Equitable rights are not always recognized as such in Quebec, although the *Code Civil* may, through other means, redress some of the injustices equity targets.

Estoppel: A legal bar, from medieval French law, meaning "stop." For example, assignors are estopped from challenging their assignee's title, and licensees are estopped from challenging their licensor's title: the assignor or licensee sued by the assignee or licensor for infringement cannot defend by (is estopped from) showing that the right is invalid. Hence, the terms "assignor estoppel" and "licensee estoppel." Someone may be

estopped without intending or knowing it. Thus, if A leads B to assume that a certain state of affairs exists, and it would be unfair to let A have a change of heart in the light of what has since happened, B's assumption is treated as true; that is, A is estopped from denying its validity.

EU: Abbreviation for the European Union and the states that belong to it. The way *intellectual property laws are harmonized within the EU influences developments in other states.

Ex parte: A term literally meaning "from one side"; an application is *ex parte* when it is made to a court or a tribunal without notifying or serving anyone else with the proceedings. Because of the proceeding's one-sided nature, applicants owe the decision maker a high duty of good faith; in practice, this means they should reveal to the decision maker any objections that might result in a decision adverse to them.

Expunge: A term meaning to "strike" or "delete"; it is used in this book in relation to an entry on an intellectual property register; the same result is achieved in *patent law by a declaration "voiding" the patent. The *CIPO can expunge entries in limited specified circumstances; more usually, the Federal Court exercises this power. Expungement invalidates the right as against the world, not merely the parties to the litigation. An entry may also be amended, corrected, or rectified, a lesser remedy than expungement that changes, but does not delete, the entry.

Freelancer: An independent contractor or contracting company. An individual working as a freelancer is different from an *employee; the latter is under a contract of service with an employer.

GATT: The acronym for *General Agreement on Tariffs and Trade* of 1947, designed to eliminate discrimination in international trade relations. The latest of its periodic revisions is the 1994 **WTO Agreement*.

ICT right: Integrated Circuit Topography right, granted on registration under the federal *ICT Act* for ten years. The U.S. equivalent is a semiconductor chip right.

Impeach: A word meaning "invalidate." In *patent law, impeachment proceedings are proceedings that seek to have a patent invalidated. Compare the term *expunge.

Industrial design: Features of shape, pattern, or ornament applied to a finished article. Mass-produced designs for most useful articles can be protected only by registration under the *Industrial Design Act*; limited protection until the fifty-first copy is made can be had under *copyright.

Infringement: Violation or breach of a statutory intellectual property right, allowing the right-holder to recover civil remedies against the infringer. Some infringements are also criminal offences — for example, certain deliberate *copyright infringements. "Substantial infringement" denotes the unauthorized taking of something less than or different from the protected subject matter — for example, using NOLEX instead of the ROLEX trade-mark, or taking a chapter from a copyright book. What takings are or are not substantial is often controversial.

Injunction: A court order requiring someone to stop doing a specified act (negative injunction) or requiring the doing of a positive act (mandatory injunction). Injunctions can be granted pre-trial (interim or interlocutory injunctions) or after a full trial (final injunction). Disobedience can result in proceedings for contempt of court, leading to a fine or even imprisonment.

Intellectual property: A term that denotes *copyrights, *patents, *trade-marks, *trade-names, *industrial designs, *PBR and *ICT rights, and sometimes rights arising from provincial law relating to, for example, *trade secrets, *misappropriation of personality, and *passing-off. Both "intellectual" and "property" may be misnomers.

Interlocutory relief: Orders granted by a court before trial. An "interlocutory injunction" is granted to preserve the claimant's rights before trial; if the claimant then loses, it may have to compensate the defendant for losses caused by the *injunction.

Intra vires: *See Ultra vires*.

Licence: Consent, permission, or clearance (all interchangeable terms) given by a right-holder (licensor) to someone (licensee) to do something only the licensor can legally do. The licence can be oral or written. An exclusive licence gives the licensee alone the right, to the exclusion of even the licensor (this licence usually has to be written). A sole licence is the same, except the licensor can compete with the licensee. A non-exclusive licence allows the licensor to appoint other licensees in the same area.

Limitation: Generally, a restriction placed on a right; specifically, a time-bar within which legal proceedings must be commenced, failing which a claimant can no longer sue.

Misappropriation: *See* Unfair competition.

Misappropriation of personality: The right to prevent commercial uses of one's name, voice, or image. It is roughly equivalent to the U.S. "right of publicity."

MOPOP: The PO's *Manual of Patent Office Practice*: a guide for patent applicants, outlining the rules patent examiners follow on patentability and other features of practice in handling *patent applications. The current version, effective as from 1 October 1996, is presently available only in electronic form. It may be downloaded from the CIPO website at http://info.ic.gc.ca/ic-data/marketplace/cipo/prod_ser/download/mopop/mopop-e.html. This covers applications filed since 1 October 1989.

Moral rights. Author's rights to have work properly attributed and not prejudicially modified or associated with other products; a poor, but commonly used, translation of the French *droits moraux* ("personal" or "intellectual" rights). The rights are as legally binding as any others; they have nothing to do with morals or morality.

NAFTA. *North American Free Trade Agreement* of 1992, between Canada, Mexico, and the United States. Chapter 17 obliges the parties to maintain high levels of *intellectual property protection. Canada implemented this treaty through the *North American Free Trade Agreement Implementation Act*, S.C. 1993, c. 44, mostly effective from 1 January 1994, which made substantial changes to all intellectual property legislation.

National treatment. An obligation to extend the rights a state grants its own citizens, residents, and corporations to foreign citizens, residents, and corporations without discrimination. Most international *intellectual property treaties oblige their adherents to extend national treatment to one another, but not necessarily to non-adherents. Thus, Canada as an adherent of the *Berne Convention* must extend to people from other *Berne* states exactly the same rights as it extends to Canadians. The other states do the same for Canadians.

Neighbouring rights. *See Rome Convention*.

Novelty. Inventions that are not new or novel cannot be patented: that is, if the same subject matter is shown to be publicly available anywhere in the world at the application's claim date. *See also* Anticipation.

Obviousness. A feature of an alleged invention that prevents its being patented; "invention" and "obviousness" are antitheses. Analogous requirements exist for *industrial designs and *ICTs. *See also* Originality.

Originality: Copyright's threshold requirement for protection: that a work not be copied and that it have some minimal creativity. For *industrial designs, some difference from prior designs or the adaptation of an old design to a new use is also required; for *ICTs, the topography must not be commonplace among ICT designers or manufacturers. *See also* Obviousness; Patents.

Parallel import: The importation, without the authorization of the owner of a Canadian *intellectual property right, of a product lawfully made abroad; it is sometimes called "grey marketing." It is often (controversially) barred by Canadian law, but is challenged by global technology like the Internet.

Paris Convention [Paris]: The *Paris Convention for the Protection of Industrial Property*, 1883, last revised in Stockholm (1967). It provides national treatment and foreign filing priorities for *patents, *trade-marks, and *industrial designs. Canada is a member.

Passing-off: The wrong of misrepresenting one's business, goods, or services as another's, to the latter's injury; for example, by a confusingly similar *trade-mark or *trade- name.

Patent: A term used here to denote a patent for invention, a twenty-year monopoly granted for new inventions. It is sometimes called "letters patent," from the Latin *litterae patentes* ("open letters"), meaning that the royal seal was placed at the bottom of the document, making the document a public record open for all to see. The *Patent Act* still defines "patent" as "letters patent for an invention," being one species of the genus of letters patent, which at various times covered franchises, land grants, honours, and company incorporations.

Patent Appeal Board: A tribunal of senior examiners that hears appeals from examiners' decisions in patent application proceedings and recommends what action the Commissioner of Patents should finally take. The Commissioner rarely rejects the Board's recommendation. Appeals from the Commissioner go directly to the Federal Court of Appeal.

Patentee: The owner or holder of a *patent.

PBR: Abbreviation for Plant Breeders' Right, registrable under the *PBR Act* for new varieties of stated plants and effective for eighteen years.

Permission: See Licence.

Piracy; pirated goods: Abusive terms, used by those who know no better or who have vested interests in a strong *intellectual property system, to describe the products of deliberate infringement. These terms are sometimes used more loosely to describe any acts *right-holders object to; for example, when British *copyright owners complained of U.S. "piracy" of their books in the nineteenth century, even though U.S. law permitted this activity. They are best reserved for the exploits of Captain Bluebeard, and are not otherwise used in this book.

PO: Abbreviation for the Canadian Patent Office, which examines and grants applications for *patents.

Prima facie: Literally, "at first sight." A *prima facie* position is one that prevails unless contrary evidence is presented.

Priority: (1) The right to acquire an *intellectual property right where competing applications are filed. In *trade-mark law, the earlier of the first to use or file usually has priority; in *patent law, the first to file for a claimed invention usually has priority. Both may be bumped by a later Canadian filing based on a timely foreign application with an earlier filing date.

(2) The better title to a proprietary interest when a right has been assigned or licensed more than once. So if A assigns the same right to B and then later to C, C will have priority if its title is better than B's. This means that C owns the right and that B can claim against A only for breach of contract. Priorities for intellectual property are not standardized. Provincial law, sometimes overlaid by federal law (e.g., for *patents, *copyrights, and *PBRs), usually governs. Typically, who registers a right first, and whether C is a good-faith buyer without knowledge of B's interest, are important factors.

Prosecution: The term sometimes used for proceedings in applications for an *intellectual property right: thus *trade-mark prosecution, *patent prosecution. It has nothing to do with criminal law.

***Quia timet* relief:** Relief, typically an injunction, sought where a wrong is anticipated. *Quia timet* literally means "because he or she fears"; so a *quia timet* injunction is granted when a claimant reasonably fears it will be injured by the imminent commission of a wrong.

Registrant: The holder of a registered right; so a *trade-mark registrant is the person registered as the trade-mark's owner.

Reissue: In patent law, the procedure by which a *patent is amended. Technically, the original patent is surrendered, and a new patent is granted.

Right-holder: A term used to indicate anyone with a proprietary interest in an *intellectual property right: for example, an owner or exclusive licensee.

Rome Convention [Rome]: *Rome Convention on the Protection of Performers, Producers of Phonograms and Broadcasting Organisations* of 1961. It protects performers, record producers, and broadcasters through *droits voisins* ("neighbouring rights") similar to traditional *copyright. *Bill C-32, the Copyright Amendment Bill of 1996, would implement these rights in Canada. About fifty states presently adhere to this Convention, though the United States is notably absent.

Service mark: A mark used or intended to distinguish one service provider's services from another's. It is often hard to distinguish a service mark from a *trade-name.

Statute of Monopolies: The English patent law of 1624 that first curbed the Crown's power to grant monopolies at its discretion, while excepting (in s. 6) fourteen-year grants for "the sole working or making of any manner of new manufactures within this realm." This statute and the Venetian *Patent Law* of 1474 are treated as progenitors of modern patent laws. Even today, Australia's patent law, entirely revamped in 1990, continues to define invention as "any manner of new manufacture . . . within section 6 of the Statute of Monopolies"!

Sui generis: A term meaning separate, stand-alone, specialized. The *ICT* and *PBR Acts* are *sui generis* pieces of legislation since they deal separately with specialized items that may not fall easily under established protective schemes like *patents or *copyrights.

Theft: An abusive term used to describe an *intellectual property infringement or, sometimes more loosely, any act to which a *right-holder objects. An association of computer software manufacturers even calls itself the Canadian Alliance against Software Theft. But intellectual property infringement is not "theft" in Canada because, after the "taking," the right-holder is still left with the "property".[1] Still, right-holders have never let facts get in the way of a good slogan. *See also* Piracy.

TMO: Abbreviation for the Canadian Trade-marks Office, which examines and grants registrations for *trade-marks, and maintains registers of geographical indications, official marks, etc.

Trade-mark: A mark distinguishing one trader's product or service from another's. It can include *service mark. In other countries, the term is also spelled "trademark" and "trade mark."

Trade-marks Opposition Board: The tribunal that decides oppositions to trade-mark registrations. Appeals go to the Trial Division of the Federal Court.

Trade-name: The name under which a corporation, firm, or individual does business. It can qualify as a *service mark and be registrable under the *Trade-marks Act*.

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1 *R. v. Stewart* [1988] 1 S.C.R. 963.

Trade secret: Commercial information that derives its value from the fact of its not being generally known and from the protection the law erects around it, mainly through contracts and the *breach of confidence action.

TRIPs: Acronym for *Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods* (Annex 1C to the *WTO Agreement* of 1994). It was probably coined by survivors of the 1960s with redirected energies. Most countries of the world (major exceptions are presently China and Taiwan) are members. Canada implemented this treaty by the *World Trade Organization Implementation Act*, S.C. 1994, c. 47, effective as from 1 January 1996.

Ultra vires: Beyond lawful authority. A statute is *ultra vires*, and therefore invalid, if Canada's *Constitution Act, 1867*, does not authorize the legislature that passed it to legislate on that matter. The opposite is *intra vires*, within lawful authority.

Unfair competition: 1. A general term describing a basket of harms — for example, *passing-off, injurious falsehood, interference with economic relations, conspiracy, *breach of confidence — that amount to torts against businesses harmed by them.

2. A synonym for "misappropriation," the wrong of unfairly taking or using business assets to the injury of their holder. It was used, for example, in the United States by Dow Jones to prevent the Chicago Board of Trade from adopting a futures trading contract based on the Dow Jones index.[2] The civil law of Quebec may recognize a similar wrong, but no Canadian common law province presently does; nor may the federal Parliament constitutionally enact it.[3]

3. An abusive, legally insignificant term an enterprise may use to describe any practice by which another manages to undersell it.

Universal Copyright Convention [UCC]: Signed in 1952 and revised in 1971, this Convention enabled the United States and other Pan-American countries that had *copyright registries and marking requirements to join with **Berne* countries in an international treaty. Less demanding than *Berne*, it allowed a marking like "© David Vaver 1997" to satisfy any formalities a state required as a prerequisite of copyright. Canada adheres to the *UCC*'s 1952 version. The *UCC* is less important today because most states, including the United States, have since joined

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2 *Board of Trade of the City of Chicago* v. *Dow Jones & Co.*, 456 N.E.2d 84 (Ill. S.C. 1983).

3 *Macdonald* v. *Vapor Canada Ltd.* (1976), [1977] 2 S.C.R. 134.

Berne, and *TRIPs* also mandates compliance with *Berne*'s higher obligations and "no-formalities" rules.

Usefulness; utility: In *patent law, the requirement that an invention must have a practical use, must relate to the "useful" (not fine or professional) arts, and do what the patent specification claims it can. In *copyright law, the design of "useful" articles receives only limited protection; further protection for their appearance may be gained by registration under the *Industrial Design Act*. *See also* Industrial design.

Waiver: The giving up of a right. It may be done expressly or may be implied from the circumstances.

WIPO: World Intellectual Property Organization. This UN agency, headquartered in Geneva, administers and holds intergovernmental conferences to revise the international *intellectual property conventions. It is a longtime promoter of the view that, without more intellectual property, the world would be a worse place (at least for some).

WTO: World Trade Organization. The *WTO Agreement* of 1994, a successor of **GATT*, contains extensive mandatory provisions on *intellectual property rights in its **TRIPs Agreement*. Breaches can lead to trade sanctions. It was implemented by Canada, effective 1 January 1996, by the *World Trade Organization Agreement Implementation Act*, S.C. 1994, c. 47.

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