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To Serve and Protect: the Challenge for Intellectual Property Law

A Paper given at an International Law Discussion Group meeting held at Chatham House on 23 April 2009*

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Introduction

I propose to examine some basic trends in intellectual property (IP) law, taking some US and EU reforms and reform proposals as illustrations. The questions to consider are these: Is the public being well served by these laws? Is it paying too much for what it's getting?

I follow what Thomas Macaulay said in the House of Commons over a century and a half ago in successfully opposing the extension of copyright in books to 60 years after the author's life:

The question of copyright, like most questions of civil prudence, is neither black nor white, but grey. The system of copyright has great advantages and great disadvantages; and it is our business to ascertain what these are, and then to make an arrangement under which the advantages may be as far as possible secured, and the disadvantages as far as possible excluded.[1]

Macaulay went on to say that copyright was a 'tax on readers for the purpose of giving a bounty to writers'.[2] The key was to ensure the bounty was enough to induce the author to produce the best he could and to reward him fairly. A tax that did more than this was unjustified and a public burden. IP protection

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1 T. Macaulay, *The Miscellaneous Writings, Speeches and Poems of Lord Macaulay* (London: Longman, Greene & Co., 1880), vol. 3, 152; available at http://yarchive.net/macaulay/copyright.html

2 Ibid., 157.

is a zero sum game: every gain to an IP holder is a corresponding loss to a competitor or the public. To be justified, the loss has to be worth the gain, and *vice versa*.

Definition and Purpose

I should say first what is meant by intellectual property.[3] There is no single legal entity going under this name. The phrase is shorthand for a set of disparate rights; in Britain some statutory, some judge-made. Their common feature is that they protect some product of the human mind for some period of time against use by others of that product in some way or other. As one of judge put it pithily: IP is about stopping people doing things.

The general purpose of protection is to encourage those who may wish to create, finance or exploit such products to translate intent into act, particularly where they might otherwise not act at all, or act less often or less well, without the carrot of protection. New ideas are thus put into action to help society and the economy; people fulfil their potential. Of course, much protectable work is done without the need for any such stimulus; to that extent IP protection overshoots the mark and represents a deadweight social loss.

Some try to justify IP on moral grounds: everyone has a natural right to the fruit of their labours. But this high-minded concept doesn't square with any IP laws we know, nor does it say anything about what shape those laws should have. It is really nothing more than 'well-meaning sloppiness of thought.'[4]

The most familiar of the IP rights, and the mainstays of the IP system, are patents, copyrights and trademarks, but there are quite a few more hangers

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3 This part draws on D. Vaver, *Intellectual Property Law: The State of the Art* (2000), 116 L.Q.R. 621; www.nzlii.org/nz/journals/VUWLRev/2001/2.html.

4 As Lord Justice Scrutton said in 1923 of the notion of Aquasi'-contract.

on: rights over performances, designs, databases, plant breeder rights, trade secrets, and various other rights that prevent or redress specific acts of unfair competition.

A few words first about the mainstays: patents, copyrights and trademarks.

Patents are granted for new, non-obvious and useful inventions B what the first English legislation, the Statute of (or against) Monopolies of 1624, called "new manners of manufacture". That statute conceded the power of the Crown to grant monopolies for fourteen years in order to encourage the introduction of new trades or inventions into the realm. The current international standard for patents for invention is a 20-year right preventing everyone within the granting territory from exploiting the invention, even those who might make the same thing independently (and sometimes almost contemporaneously) without knowing of the existence of the earlier invention or patent. In recent years, patents have come to be granted over not only mechanical products and processes, but also new substances and the products of computer and genetic engineering B think Dolly, the cloned sheep.

Copyright traces back three centuries, and even earlier to the practices of the stationers, the printers and publishers of yore. Copyright law first protected books and then expanded to cover art, drama and music. Over the last century, it has come to protect almost anything written, drawn, or expressed in any way against copying: from the most complicated computer program, requiring months of intensive development and sometimes millions of pounds in investment, to the doodles of toddlers and the dashed off internal memorandum. Unlike a patent, copyright protects only against copying, not independent creation, although copying is very broadly construed. Also controlled are acts such as public performance, broadcast, and sometimes even rentals.

Copyright now lasts a very, very long time. From what started as a maximum of 28 years protection (14 years, renewable for another 14) in 1710,

copyrights today can last automatically for well over a century. The life of the author plus 70 years has become the European and now U.S. norm, and is being pressed by them on the world as the new international norm B of which more shortly.

Then there are *trade marks*. Merchant marks were protected even during the time of the mediaeval guilds, but the modern law of trade marks is a product of the Industrial Revolution. The law initially stopped only fraudulent imitations but quickly progressed in the nineteenth century to ban innocent confusion, and in the twentieth century against even non-confusing uses. For example, if you see the distinctive 'Rolex' watch mark on furniture, you may not believe that the Rolex firm has started making furniture but Rolex may nevertheless be able to stop that non-confusing third party use. The law now recognizes an interest in controlling the imagery with which a firm's brands are associated and in preventing uses that might harm or dilute those associations. With registration and periodical renewal, trade marks last potentially for ever, at least as long as they are used or maintain some market recognition.

Current Common Features and Trends

Viewed in historical perspective, this miscellany of rights exhibits some common features and trends:

IP has become ever more important in everyday business life. Few companies in the media, entertainment, internet, computer or pharmaceutical industries would have much value on their balance sheets if their IP holdings, or the businesses predicated on them, were factored out.

What IP rights cover has increased enormously over the years. Copyright has marched beyond books to cover almost any scratch, squiggle or squawk. Trade mark and patent law have marched along too. Thus, in the United Kingdom, up to the 1980s only certain categories of trademarks could be registered but now almost any perceptible symbol may qualify: marks for

services as well as goods, words, labels, designs, sounds, colours B maybe soon even smells, which have been protected in the US but not yet in the EU.

As for patents: new processes, not just products, eventually became patentable, initially so long as they resulted in some sort of saleable product, but that qualification eventually became watered down to non-existence. And to make such process patents effective, the courts extended them to cover the end products as well. International conventions in the 20th century consolidated these trends.

IP rights have become more intense and all-encompassing. Thus, starting modestly in the 18th century to control the unauthorized reprints of books, the law of copyright steadily grew to encompass partial reprints, then subtler forms of imitation, and then expanded exponentially throughout the 20th century into the 21st. With each fresh logical step in one direction, a vista of new paths appeared and further steps were taken along them to intensify the rights.

Take the concept of copying. In the 19th century, copying was regarded quite literally. To translate was not to copy. Harriet Beecher Stowe discovered this mid-century when she asked the U.S. courts to halt the publication of a German language translation of *Uncle Tom's Cabin*. The court dismissed the claim. The judge thought that anyone putting the two books side by side could immediately see that the German version was nothing like the English version, and so not a copy.[5]

All that is now overturned. Since the beginning of the 20th century, changes in the law and in court interpretations insist that no translation, good or bad, can be made without the consent of the copyright owner of the source work. Copying now includes running any program in a computer or accessing any Internet site. Technically, these acts involve making a copy and so are within

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5 *Stowe v. Thomas* 23 Fed. Cas. 201 (1853).

the control of the copyright owner of the program or website, even if the copy is made temporarily and only for technical reasons (i.e., to look at the website), and even if the copy is automatically deleted once the program or site is exited.

That this is so is shown by the need for a specific exemption written into the 2001 EU copyright directive, which allows internet browsing and even though these activities involve copying web content on to one's computer. But, to be exempt, the copying must be temporary, transient, incidental, an integral and essential part of a technological process and without independent economic significance[6] B whatever all that means.

Similarly, in patent law: courts now construe patents as they say they construe statutes, i.e., purposively, going beyond the literal words to the perceived purpose of the claims in the patent. So our judges have read a claim covering a load-bearing structure that extends 'vertically' to include a structure that leant eight degrees off the vertical B presumably either way. It was said that any reasonable builder reading the claim in context would understand 'vertically' to include such tolerances.[7] One hopes that same builder doesn't read building plans the same way: otherwise the Leaning Tower of Pisa could, equally reasonably, be renamed the Vertical Tower of Pisa.

IP rights have become international. Before the mid-19th century, the rights were usually good only for a particular territory and ran only in favour of the state's nationals: recall Charles Dickens' obsession with the lack of copyright that his works then had in the United States. But since the end of the 19th century, multilateral international treaties have been adopted which compel

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6 Art 5(1) of Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

7 *Catnic Components Ltd v Hill & Smith Ltd* [1982] R.P.C. 183.

ratifying states to provide national treatment to other party states and to grant minimum sets of rights B starting with the Paris Convention on Industrial Property in 1883, which covered patents, trademarks and designs, and the Berne Convention on Literary and Artistic Works in 1886 covering copyrights. With each treaty revision every generation or so, the minimum levels of protection were raised and more countries were persuaded to join in.

The latest and perhaps most significant of the treaties is the WTO Agreement of 1994 with its TRIPs annexe (Agreement on Trade- Related Aspects of Intellectual Property Rights), which entrenched high levels of IP protection worldwide (going well beyond the Berne and Paris Conventions), with procedures to haul offending states before *ad hoc* courts (so-called 'trade panels') and to have economic sanctions imposed if WTO orders are disregarded. A steady stream of IP disputes has come before those panels, and significant changes have been ordered to be made to national IP laws. As well, two multilateral treaties dealing with the copyright on the Internet were concluded in 1996 and came into force soon after.

Examples from Europe and the United States

The UK and the rest of Europe have become inured to the process of revising their national IP laws as the organs of the EU move toward standardization on the theory that different national laws create barriers to the smooth working of the internal market. At least that, to date, has been the ground on which the European Commission and Parliament have acted. These bodies have no express competence to legislate for IP under the Treaty of Rome and its successor. Their competence comes from provisions authorizing them to co-ordinate state laws to ensure the free movement of goods and services and to establish an internal market. Although the Treaties accept national laws on 'the protection of industrial and commercial property', they cannot be means

of arbitrary discrimination or a disguised restriction on trade.[8] From these provisions, the European Court of Justice (ECJ) has effectively invalidated national IP laws that treat one country's nationals differently from (typically better than) other EU nationals or that stop IP-protected goods from circulating freely within the Union.

The proposed Lisbon Treaty takes this competence a major step forward. Article 118 provides :

In the context of the establishment and functioning of the internal market, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish measures for the creation of European intellectual property rights to provide uniform protection of intellectual property rights throughout the Union and for the setting up of centralised Union-wide authorisation, coordination and supervision arrangements.

To date, the EU has created community-wide schemes for European trademarks, designs and plant breeder rights. It has allowed national trademark and design rights to co-exist with the Community right, although sometimes the grant of a Community right (eg a plant breeder right) will preempt the corresponding national right. There is a centralized system of granting national patents under the revised European Patent Convention of 2000, in addition to the grants that national patent offices may make; but there is no single Community patent or copyright. There have long been unsuccessful attempts to create a single Community-wide Patent, but no real demand so far for a Community-wide copyright. If it comes into force, the Lisbon Treaty may change things here. It gives a clearer mandate for community IP rights entirely to preempt national IP rights. It would allow the elimination of UK patents, copyrights or other IP rights in favour of a single European patent, copyright or IP right. It could create a statutory code for trade secrets. It could equally require national laws to be more uniform B

8 Art 30 ECT.

something that has to date not been entirely attainable because of the need for unanimity in the decision-making process.

We should notice here the legislative trend to make the acquisition of IP rights easier, while making the rights themselves stronger and more intrusive. The strategy of the large corporations that hold IP is to play nations off against one another to achieve these ends. As soon as one state, supposedly in its national interest, makes it easier to get an IP right or intensifies an existing right, IP holders trot the globe asserting the need for level playing fields everywhere. There is a continuous race to the bottom on the criteria needed to qualify for an IP right, a race to the top to make those rights, once granted, stronger, and a corresponding race to the bottom of what is left for the general public.

Take an example from the bill to reform patent law that is being revived in the current US Congress. US patent law requires, and until 1978 UK patent law also required, disclosure of the best mode of working an invention as a condition of getting a patent. So if the invention is a new product, the best form of it that the inventor knows of when filing the application must be disclosed. Patent holders of course want as much as they can get in exchange for as little as they have to give up; so the natural tendency is to claim broadly for your invention, but disclose as little as you can, so that competitors can't catch up too quickly. If you played the disclosure game wrongly, the penalty could be a loss of the patent altogether or at least the right to enforce it. European patent law lacks a best mode requirement: showing any way to work the invention is enough. The US now wants to copy this requirement: not disclosing your best method will not affect the validity or enforceability of a patent.[9] In other parts of the patent law, requirements can sometimes be relaxed so long as the applicant has made a genuine mistake without intent to mislead. There is no such requirement here. No penalty is

[9] Patent Reform Bill of 2009, s. 14.

attached for failing to disclose your best method. So the plan is to make getting and keeping a patent easier, but the public will now get less information than it has got for nearly two centuries as part of the price monopolists must pay in exchange for their privilege.

The European Commission is well at the forefront of the push to relax threshold requirements and intensify rights, working closely with the WIPO and WTO secretariats. It will likely treat the Lisbon Treaty as a validation of its approach. The results to date have not always been beneficial to the public. The future will not likely be any different.

Let me give some examples from the past and some for the future.

The international minimum term for copyright protection that the Berne Convention eventually established a century ago was the life of the author plus 50 years. Most states (Britain included) adopted that term. But a very small minority went further. Germany increased its term after the Second World War to author's life plus 70 years; Spain historically had life plus 60 years; France had a life plus 70 year term too, but only for the special case of musical works without words. These were the odd men out until Germany in particular complained that its works might still be in copyright in Germany while being freely copiable elsewhere in the Union for the last 20 year part of the German term. This anomaly did not fit within Germany's, and the Commission's, notion of a single European market.

There is an interesting dual dynamic in IP law reform: (a) a right, once granted to an IP holder, will never be taken away or diminished; (b) a right once granted in one place will eventually be extended to others. In Europe, this one-two jab produced a directive in 1993 that standardized the copyright term not at the level found in the majority of states in Europe or, indeed, the world, but at life of the author plus 70 years.[10] Not just future works but also all existing works were covered, including those that had fallen out of copyright in the life-plus-50 states! The reasons given were entirely specious. Nobody could gainsay Macaulay's words in 1841 on the unsuccessful attempt to introduce a life-plus-60 year term in Britain:

A monopoly of sixty years produces twice as much evil as a monopoly of thirty years, and thrice as much evil as a monopoly of twenty years. But it is by no means the fact that a posthumous monopoly of sixty years gives to an author thrice as much pleasure and thrice as strong a motive as a posthumous monopoly of twenty years. On the contrary, the difference is so small as to be hardly perceptible. We all know how faintly we are affected by the prospect of very distant advantages, even when they are advantages which we may reasonably hope that we shall ourselves enjoy. But an advantage that is to be enjoyed more than half a century after we are dead, by somebody, we know not by whom, perhaps by somebody unborn, by somebody utterly unconnected with us, is really no motive at all to action.[11]

This race to the top in duration within Europe continued worldwide because the Directive cunningly provided, as the Berne Convention allowed, that works first published abroad in a country having a shorter term of protection would get no more than that term in Europe. The Americans B spearheaded by U.S. Congressman Sonny Bono, of Sonny & Cher fame B quickly complained to their government that their works were 'losing out' in Europe to European works. So in 1998

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[10] Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights.

[11] Above note 1, 155-6.

the US Congress passed the Sonny Bono Copyright Term Extension Act, posthumously, since 9 months earlier Mr Bono had skied into a tree, with terminal consequences. The Act added 20 years to the US life-plus-50-year term, again applying it retrospectively to existing works. Now as an adherent of the life-plus-70-year sect, the US insists that countries that sign bilateral free trade agreements with it must also increase their copyright term to life plus 70 years.

This term extension nonsense may never end until the rights are made perpetual. For example, in 2008, as a result of prolonged and intense lobbying by the record industry and some aging rockers, the European Commission introduced a proposed directive to extend from 50 to 95 years the protection that record companies and performers get for their versions of recorded music. The idea was to bring performers and record companies more in line with the composers of music and lyrics. (The probability that composers had a far longer term than they deserved was naturally not an idea suggested by the record company lobbyists.) Apart from providing a lot more money for longer to record companies and a little more to far from impoverished performers like Cliff Richard and Paul McCartney , who also pressed for the change, what was the public interest case for extending this term? The US has a similar term, nominally, but allows performers and record companies to recover performing royalties in very few cases. The record companies had in fact made their case to an inquiry on the IP system headed by Andrew Gowers which produced its report in 2006. The companies failed dismally before Gowers. The report adopted the conclusions of a commissioned Cambridge economic study that found the case for a longer term 'unconvincing'. An increase 'would not increase the incentives to invest, would not increase the number of works created or made available, and would negatively impact upon consumers and industry.' The net loss on welfare was estimated to be around 155m.[12] In nevertheless

[12] *Gowers Review of Intellectual Property* (December 2006), 56; http://www.hm-treasury.gov.uk/d/pbr06_gowers_report_755.pdf.

proposing an increase, the European Commission produced nothing to refute this evidence-based case.

The astonishing thing is that Richards, McCartney and their contemporaries sang much of their stuff at a time when performers had no rights at all in the UK to recover any money for play-time. Their recording contract was all they could rely on to recover money for their performances. Record companies invested on this basis as well. Of course, when performer rights were introduced in the 1980s and extended to the existing records, Richards and the record companies began receiving money from broadcasters and public performances of their versions for the first time. Who would not want this nice little earner to continue for ever? But the rather important question of why consumers should be responsible for subsidizing the continuing welfare of performers and their estates, and record companies and their executives and shareholders, for yet more decades nowhere receives a satisfactory answer. Yet on April 23 2009, the European Parliament voted for a compromise that would extend the performers' and record companies' right to 70 years, with a sop here and there to placate critics. To the beneficiaries, this may be just half a loaf; to the public, it is an expensive additional involuntary 20-year financial imposition for which they have got precisely nothing. One thing is certain: the record companies and their proxies will be back in another 20 years demanding once more another 'rightful' extension.

The trade between the US and Europe on IP and IP reform is two-way, as one would expect given the transatlantic and global reach of US and European corporations. US law allows patents on almost 'everything under the sun that is made by man', to adopt a paraphrase their courts use about the reach of US patent law. When applications to patent computer programs and genetic technology came before US courts and tribunals in the 1970s and 1980s, after some initial setbacks and misgivings, they were warmly embraced. So the US Patent Office had no difficulty in 1991 granting a patent over a genetically modified mouse containing an implanted cancer gene. (The mouse was used as a standard tester to screen for potential cures for cancer but the patent wasn't limited to that use - in fact as

originally granted it covered all such genetically modified non-human mammals.)

Things were more contentious in Europe. The European Patent Convention from its inception forbade the patenting of 'animal varieties.' The Convention was not well adapted to biotechnology, and the politics of patenting life in Europe were more fraught, so the European Commission struggled for a decade to produce a directive on the subject that could pass muster. Despite all the verbiage and qualifications in the 1998 directive on patenting biotechnology, the oncogenic mouse was finally allowed to be patented in Europe, albeit with much hand-wringing.

The Future

The problems with international IP law mirror those of European and other laws. The recent expansion of intellectual property has come to be more an end in itself than a means to the end of stimulating desirable innovation.[13] The question whether existing protections should be scaled back or recontoured, because the activities that they supposedly foster would occur anyway and would be more widely distributed throughout society, is hardly asked any more. If intellectual property were seen as a form of subsidy B a willingness by society at large to provide economic benefits to one sector in return for the prospect of larger benefits to all B then few would question the need to keep intellectual property under constant review to ensure the scheme was working well. It would not be enough to say that intellectual property *as a whole* was returning social benefits that outweighed its costs *as a whole*. As with any other subsidy, each element within the scheme would need to be examined to see if it is fully delivering its objectives. A strong case for such systematic reviews at the national, regional and international level must surely exist.

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13 These two paragraphs are also drawn from Vaver, above note 3.

Moreover, intellectual property cannot be treated as an absolute value. Against it are ranged values of at least equal importance: the right of people to imitate others, to work, compete, talk, and write freely, and to nurture common cultures. IP laws should be able to accommodate these values internally without one having to run to human rights or competition laws to qualify them.

One solution may be to take more seriously the question of balance between the rights of IP holders and those who access or wish to use IP.

IP law should be is not just the law of IP holders; it should also be the law of IP users.[14] The rhetoric nevertheless persists that what users may do in relation to protected items constitute 'exceptions' to or 'limitations' on the control rights of owners. This usage is now endemic to international and European law. It is a style of language that certainly suits IP owners but its effects are pernicious. It treats what owners can do as rights (with all that word connotes), and what everyone else can do as indulgences, aberrations from some preordained norm, activities to be narrowly construed and not extended. The metaphor of balance cannot sensibly work from such a starting point: how can rights be balanced against exceptions? The scales already start weighted on one side.

If we are to balance like against like, what acts users may do must themselves be treated as their rights; these rights can then be balanced off against the rights of owners. Thus can compromises be fairly struck when policy is formulated and resulting laws are interpreted.

We may also need to get away from a mind set that IP law is all about rights: the rights of owners.[15] Everyone other than them, it seems, has

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[14] See D. Vaver, AReforming Intellectual Property Law: An Obvious and Not-so-obvious Agenda' (2009) I.P.Q. 143, 159-160;

www.ip-institute.org.uk/pdfs/final_publication_in_the_IPQ.pdf.

[15] This section draws partly on D. Vaver, APublishers & copyright: rights without duties?' (2006) 40 Bibliotheksdienst 743, 749 ff.,

responsibilities. Rights without responsibilities are wonderful things, especially for monopolists. The main reason for IP laws having been passed from the outset can then be conveniently forgotten: to quote from a WWI-vintage case from the US Supreme Court,[16] 'not the creation of private fortunes for the owners of [IP rights], but .. >to promote the progress of science and the useful arts''.

That point was clear in the first English copyright law, the Statute of Anne of 1710. The Statute did not merely give authors a copyright; with it came duties imposed on publishers, who, as all knew, would inevitably own the copyright by assignment from the author. As part of their obligation to advance the Statute's aim of 'the encouragement of learning', the Statute required publishers to provide nine free copies of the publication 'upon the best paper' to the centres of learning: the English and Scottish university libraries and Edinburgh's law library. Swingeing penalties were provided for failure: the value of the book, plus ,5, plus costs, for each book not delivered. As importantly, publishers owed the public another duty: to keep prices 'reasonable'.[17] Any member of the public who felt aggrieved by a price that he or she thought unreasonable could complain to one of a group of designated officials: the archbishop of Canterbury, the bishop of London, any chief judge, the vice-chancellor of the university of Oxford or Cambridge or his counterpart at Edinburgh. The tribunal could then summon the bookseller or printer to determine whether or not the price was right. If it was not, the tribunal could reduce it to what it thought 'just and reasonable.' Again, a swingeing penalty was provided for disobedience.

From its inception, then, copyright was considered a right that was freighted with a public interest. The copyright owner was in this

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www.zlb.de/aktivitaeten/bd_neu/heftinhalte2006/Recht020606.pdf.

16 *Motion Picture Patents Co. v. Universal Film Mfg. Co.* 243 U.S. 502, 511 (1917), speaking of the court's approach to patents since the early 19th century, but the same applies to all IP rights.

17 Statute of Anne 1710, s. 4.

respect like an innkeeper, who was obliged to provide food and lodgings to the wayfarer who needed to stay the night and had money to pay. The keeper could not ask an outrageous sum even if (particularly if) his inn were the only one for miles. He was providing a necessity that placed him under a special duty to deal, and to deal honestly and fairly. A return to this mind set might involve an obligation on IP owners to provide fair access at fair and non-discriminatory prices, an obligation that is particularly important for the developing world. For is the provision of such things as improved healthcare and better information to the populace any less important today than was the provision of provender and lodging to the travellers of old?

The European Commission has to date been uninterested in this sort of analysis. Its proposals leading up to the 2001 directive to update and harmonize copyright law to cope with the internet were aimed at eliminating almost all exceptions and limitations: copyright owners were to be entitled to stop almost all forms of copying. Users had to go cap in hand to owners to ask permission to use copyright material, get it on payment, or be told they couldn't use it at all or on restrictive terms. The proposals caused an uproar among member states, and the final 2001 directive contains a closed list of optional miscellaneous exceptions reflecting much of current state practice. Harmonization was not achieved. But the directive could not refrain from delivering two final kickers. States could continue to make 'minor exceptions' but not for digital content. They were required to apply the exceptions only 'in certain special cases which do not conflict with a normal exploitation of the work .. and do not unreasonably prejudice the legitimate interests of the right holder.'[18] Notably, this language, drawn from TRIPs, is not matched by any such restraint on right holders: they are not prevented from acting against users only in special cases that do not conflict with users' normal exploitations and that do not prejudice the users' legitimate interests. Such is the Commission's

[18] Art 5(5) of the directive, above note 5; see the extensive commentary on Art 5 generally and the 'exceptions and limitations' in T. Dreier & B. Hugenholtz (eds.), *Concise European Copyright Law* (Kluwer, 2006),367 ff.

view of balance. The new Lisbon treaty powers may embolden it to revisit the issue of copyright 'exceptions' once more.

What's the harm? It has been pointed out that had the way we enforce copyright today been in force in Shakespeare's day, much of his drama could not have been composed. Much of Shakespeare's historical plots characters and even sometimes language was borrowed from near contemporaries; he then varied the plot, added minor characters, changed major ones, and added dialogue. (But what changes and what additions!) One number-crunching critic claims that of the 6000 lines in *Henry VI*, nearly 1800 are taken almost intact and 2400 were paraphrased from Holinshed.[19] What modern-day Shakespeare are we in danger of losing? Whom have we already lost?

All this suggests that harmonization of IP law is a good thing up to a point. But it should not be a goal in itself. There is little point in harmonizing bad rules. It may be better to let individual states experiment and compete with different rules. There are greater threats to an internal market than this. For the developed world to force such rules on the developing world is simply cynical and immoral.

Epilogue

Macaulay ended his speech in 1841 with some words that are very pertinent to today's situation in IP. He spoke about making copyright longer than was necessary or justifiable, but lawmakers would do well to heed his words on the problems that flow when any form of IP is intensified or extended without a persuasive public case first having been made. Macaulay said this:

At present the holder of copyright has the public feeling on his side. Those who invade copyright are regarded as knaves who take the

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[19] A. Lindey, quoted in R.A. Posner, *Law and Literature: A Misunderstood Relation* (Harvard U.P., 1988), 344.

bread out of the mouths of deserving men. Everybody is well pleased to see them restrained by the law, and compelled to refund their ill-gotten gains. No tradesman of good repute will have anything to do with such disgraceful transactions. Pass this law: and that feeling is at an end. Men very different from the present race of piratical booksellers will soon infringe this intolerable monopoly. Great masses of capital will be constantly employed in the violation of the law. Every art will be employed to evade legal pursuit; and the whole nation will be in the plot. On which side indeed should the public sympathy be when the question is whether some book as popular as Robinson Crusoe, or the Pilgrim's Progress, shall be in every cottage, or whether it shall be confined to the libraries of the rich for the advantage of the great-grandson of a bookseller who, a hundred years before, drove a hard bargain for the copyright with the author when in great distress? Remember too that, when once it ceases to be considered as wrong and discreditable to invade literary property, no person can say where the invasion will stop. The public seldom makes nice distinctions. The wholesome copyright which now exists will share in the disgrace and danger of the new copyright which you are about to create. And you will find that, in attempting to impose unreasonable restraints on the reprinting of the works of the dead, you have, to a great extent, annulled those restraints which now prevent men from pillaging and defrauding the living. [20]

I make no apology for having quoted Macaulay at length in this paper. And I must say I am glad he has been well and truly dead for longer than 70 years. Were he not, I may not have lawfully read in public the passages I have, nor included them in any published version of this paper. The holders of Macaulay's posthumous copyright could, had they been so minded, have stopped me (at least deterred me with the threat of litigation) from sharing his wisdom in his inimitable words.

I ask again: is the public well served by laws like this? Is the price of suppression too high for what it is getting from the IP system?

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[20] Above note 1, pp. 166-7.