



An Emerging Intellectual Property Paradigm

Perspectives from Canada

Edited by Ysolde Gendreau

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Professor of Law, Université de Montréal, Canada

QUEEN MARY STUDIES IN INTELLECTUAL PROPERTY

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An Emerging Intellectual Property Paradigm

QUEEN MARY STUDIES IN INTELLECTUAL PROPERTY

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The Centre for Commercial Law Studies at Queen Mary, University of London, has teamed up with international social science publisher, Edward Elgar Publishing Ltd, to re-launch its prestigious book series, Queen Mary Studies in Intellectual Property. Already established as an important forum for acute and relevant debate in the field of intellectual property, the series aims to build further upon its success, publishing books by renowned guest editors who will commission original and often provocative work by both leading scholars and specialist practitioners on key subjects and issues in IP. Combining volumes that are theoretical in their analysis with others that seek to explore the issues from a more practical perspective, all will be rigorous, as well as international in origin, outlook and appeal. The scope of the series will be wide-ranging and its approach will be to synthesize insights from a range of disciplinary backgrounds. The books in this series will not only provide unique sources of reference for researchers and students in IP, but will offer a level of insight to lawyers, policymakers and legislators that is consistent with the reputation of the Centre.

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An Emerging Intellectual Property Paradigm

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Biographical notes

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Dianne Daley, LLB (Hons.), LLM (McGill) is an Attorney-at-Law and a founding partner of the Law Firm of Foga Daley & Co. based in Jamaica. Admitted to the Jamaican Bar in 1990 Dianne has a Master of Laws Degree in Comparative Law from McGill University with International Copyright as an area of specialization. She lectures Intellectual Property Law in the Master of Laws Programme at the Faculty of Law, University of the West Indies and is a member of ATRIP and INTA. Dianne was a founding member of the Jamaica Intellectual Property Office Advisory Board and its acting chairman from January 2006 to September 2007. She has been the Honorary Secretary of the Jamaican Copyright Licensing Agency for several years. Dianne has been published in *Copyright World*, *Intellectual Asset Management*, *IP Value: Building and Enforcing Intellectual Property Value*, the International Law Office and *Managing Intellectual Property*.

Abraham Drassinower, PhD, LLB is Associate Professor at the University of Toronto Faculty of Law; Chair in the Legal, Ethical and Cultural Implications

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Ysolde Gendreau, BCL, LLB, LLM (McGill University); docteur en droit (Université de Paris II) is professor at the Faculty of Law and researcher at the Centre de recherche en droit public of the Université de Montréal where she teaches intellectual property law and competition law. She has also been guest professor at several universities. Her publications mainly focus on copyright and include *The Retransmission Right: Copyright and the Rediffusion of Works by Cable* (Oxford, ESC Publishing Ltd, 1990), *La protection des photographies en droit d'auteur français, américain, britannique, et canadien* (Paris, L.G.D.J., 1994), *Copyright Administrative Institutions* (Montreal, Yvon Blais, 2002). Her articles appear in Canadian and foreign journals and she is the Canadian contributor to Paul Geller's *International Copyright Law and Practice*.

She was President of the *Association for the Advancement of Teaching and Research in Intellectual Property* (ATRIP) in 2003–2005 and is currently the President of the Canadian group of the Association littéraire et artistique internationale (ALAI). She is also an associate member of the International Academy of Comparative Law.

Daniel J. Gervais, LLB, LLM, DIUHÉI, Doctorate (Nantes), is the Acting Dean, Osler Professor and University Research Chair in Intellectual Property at the Faculty of Law of the University of Ottawa (Common Law Section). Prior to his teaching career, Prof. Gervais was successively Legal Officer at the GATT (now WTO); Head of Section at the World Intellectual Property Organization (WIPO); Deputy Secretary General of the International Confederation of Societies of Authors and Composers (CISAC); and Vice-President, International of Massachusetts-based Copyright Clearance Center, Inc. (CCC). He also served as consultant to the Organisation for Economic Co-operation and Development (OECD) in Paris. He is Editor in Chief of the *Journal of World Intellectual Property*.

Robert G. Howell has been with the Faculty of Law at the University of Victoria since 1980. He specializes in Intellectual Property Law and Policy, Managing Intellectual Property Law, Telecommunications Law and related areas. He has published nationally and internationally in these areas and has organized and participated in national and international conferences in his areas of specialization. In 1999 and 2002 he completed Reports on Databases and Canadian laws for Canadian Federal Ministries. From 2002 to 2007 he has Co-Directed the International Intellectual Property Summer Studies Program, a joint venture of the University of Victoria Faculty of Law, St Peter's College University of Oxford, and the University of Illinois College of Law, USA.

Jean-Frédéric Morin is professor at Université Libre de Bruxelles (ULB) where he holds a chair in international relations. He has an interdisciplinary background, including a dual Ph.D. in political science and law. Prior to joining ULB in 2008, he was researcher at the Centre for Intellectual Property Policy (CIPP) of McGill University, where he taught international intellectual property law and led a research project on access to medicines. Professor Morin has published several peer-reviewed articles on various issues, including patent lawmaking, biodiversity governance, social movements, and international investment law.

Pierre-Emmanuel Moyse joined the McGill Faculty of Law in 2006 as a Wainwright Junior Fellow. The same year, he successfully defended his thesis at the University of Montreal entitled 'Le droit de distribution – Analyse historique et comparative en droit d'auteur' (Yvon Blais/Carswell, 2007). He was appointed assistant professor in 2007. Professor Moyse is also a member of McGill's Centre for Intellectual Property Policy, an interdisciplinary research centre focusing on the nexus between intellectual property, creativity, innovation and trade.

Before being appointed assistant professor, Professor Moyse practiced for several years commercial and intellectual property law with the Montreal-based firm Leger Robic Richard. Most recently, he pleaded successfully before the Supreme Court of Canada in the 2007 case *Euro-Excellence v. Kraft Canada*, the first Canadian case where copyright misuse theory has been invoked.

Mark Perry is jointly appointed to the Department of Computer Science and the Faculty of Law at The University of Western Ontario in London, Canada. He is also an Adjunct Professor of Law at QUT in Brisbane.

Professor Perry's research focuses on the nexus of science and law, and on autonomic computing system development. He has most recently published in the areas of digital rights management, copyright reform and software

licensing automation. He holds grants from the Natural Science and Engineering Research Council, IBM, and the Social Science and Humanities Research Council.

Professor Perry is a frequent invited speaker at research-intensive colloquia and classes at universities in Australia, India, New Zealand, United Kingdom, United States and Canada. He has been interviewed by the media around the world for his ideas on technology law issues. In addition to serving on the Executive of ACM SIGCAS, he is a Faculty Fellow at IBM's Center for Advanced Studies, a Barrister and Solicitor of the Law Society of Upper Canada, and serves on many review and editorial boards.

More information can be found at <http://www.csd.uwo.ca/~markp>.

Teresa Scassa holds a Canada Research Chair in Information Law at the University of Ottawa, Faculty of Law. She has undergraduate law degrees in civil and common law from McGill University, as well as a LLM and an SJD from the University of Michigan. She taught at Dalhousie Law School for 15 years before joining the faculty of law at the University of Ottawa as a full professor in July 2007. She has taught a range of subjects including Intellectual Property, Law and Technology, Public Law, Administrative Law, Public Law and Professional Responsibility. She is co-editor of the *Canadian Journal of Law and Technology*, published by CCH Canadian Ltd, and co-author of the recent book *Electronic Commerce and Internet Law in Canada* (CCH Canadian Ltd.). Her research and scholarship is primarily in the areas of intellectual property law, law and technology, and privacy.

Myra J. Tawfik is a Professor of Law at the University of Windsor and a former Associate Dean of the Faculty. She is a graduate of McGill University with degrees in both common law and civil law and the University of London (LLM – Queen Mary College 1989). Appointed to the Faculty of Law in 1991, Professor Tawfik teaches in the area of intellectual property law including copyright law, trademark law, international intellectual property law and the law of confidential information. Her research centres on intellectual property law, primarily, but not exclusively, in the area of copyright and she has published and spoken nationally and internationally on a wide range of intellectual property law issues. She is the director of the Intellectual Property Legal Information Network, a student-run community legal education initiative that has recently received a substantial grant to develop workshops and mentoring programmes to foster entrepreneurship in a knowledge-based economy. Her current research interests lie in the historical dimensions of intellectual property law and she is completing a monograph on the 19th century origins of Canadian copyright law.

Margaret Ann Wilkinson attended law school at The University of Toronto and was called to the Bar of Ontario in 1980. She practiced law in Toronto for a number of years. Her doctoral dissertation on 'The Impact of the Ontario Freedom of Information and Protection of Privacy Act, 1987 upon Affected Organizations', won the 1992 American Society for Information Science Doctoral Dissertation Award. Dr Wilkinson has spoken and published in the areas of intellectual property, information policy, information and media law, management, professionalism and professional ethics.

On faculty at the University of Western Ontario since 1991, Dr Wilkinson held a joint appointment between the Faculty of Law and the Faculty of Information and Media Studies. A full professor in both faculties, Professor Wilkinson was appointed full-time to Law in 2007 and is Director of the Area of Concentration in Intellectual Property, Information and Technology Law. She is also an Adjunct Professor at The Richard Ivey School of Business. She is the current editor of the *Canadian Intellectual Property Review*.

Preface

Whenever one is confronted with a particular intellectual property issue for which one's national law does not appear to offer an immediate answer, a common reflex is often to enquire whether that issue has already given rise to some discussion in the United States or in the European Union. The state of their technological development and the size of their economies make these two jurisdictions natural leaders in the search for solutions with respect to intellectual property matters. This leadership has also manifested itself on an institutional scale: if several European countries were instigators of the founding intellectual property conventions, the *Paris Convention for the Protection of Industrial Property* of 1883 and the *Berne Convention for the Protection of Literary and Artistic Works* of 1886, the driving force behind the *Agreement on Trade-related Aspects of Intellectual Property Rights* of 1994 has been the United States.

Over a century of events separates these two eras in the development of intellectual property law. It is already possible to appreciate that one of the key differences in the political environment of these instruments is the rise of the developing world as an active participant in the quest for a truly international understanding of intellectual property law. The Doha Declaration on the TRIPS Agreement and Public Health is the most conspicuous manifestation of this evolution. At the forefront of the international process, a North–South dialogue is thus engaged between developing countries and the leaders of the industrialised world.

While this dialogue is taking place, another movement is unfolding: other industrialised and industrialising countries are trying to find their own position amid these circumstances. One of these countries is Canada. Neither a super-power nor a developing country, yet a member of the G8, Canada must have intellectual property rules that are in keeping with international developments, but that remain adapted to its own economic and social realities. The texts that have been brought together in this volume are meant to highlight particular approaches to various issues within intellectual property law that have developed in Canada. Some pertain more to legislative solutions, while others stem mostly from judicial reasonings. All of them betray a preoccupation for solutions that suit national needs that need not necessarily coincide perfectly with those of its international allies. Of course, it has not been possible to be exhaustive. Yet, one hopes that this sampling of Canadian intellectual property

issues by some of the foremost experts in the field today will give the reader a taste of the originality of this law.

On a more personal note, I should like to express my gratitude to all the contributors to this volume who have so readily accepted to take part in this project. Many thanks also go to François Senécal who coordinated the revision of the texts, to Mohamed Saifeddine Hichri who completed the table of jurisprudence, as well as to Luke Adams and Nep Elverd and all the members of the editorial team at Edward Elgar Publishing for their professionalism in making this book a reality.

Ysolde Gendreau
Montreal, November 2007

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