

## REVIEW

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### *Intellectual Property Law*

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All the evils of publishing can be traced to one source—copyright.<sup>1</sup>

*Intellectual Property Law*, David Vaver  
Toronto: Irwin Law 1997, xx + 347 pages.

IN THE PHOTOCOPY ROOM of our university department is a rubber stamp sitting on a stamp pad. It has a blank line for *publisher* and a blank line for *author*, followed by this statement: "This material has been copied under license from CANCOPY. Resale or further copying is strictly prohibited." It is difficult to know precisely what *strictly* contributes to any prohibition, but this warning has particularly illusive effect. There is no serious, much less systematic, attempt to match copies taken with the copyright notice. The rubber stamp, and the purpose it is intended to convey, is honoured more in the breach. Few copies taken from the photocopier are singles, and even fewer persons using the copier on a daily basis have an active concern for copyright law and licenses with collectives.

This rudimentary understanding of intellectual property rights by lay persons, and lawyers alike, defaults to an obscure sense that there *are* some rules that limit the appropriation of creative work of others. These rules are not understood both because they are not easy to find and understand, and because an accurate understanding of them imposes obligations on one's conscience. Anything that will get in the way of a quick few copies of convenience is not a matter to be pursued. Copying the work of others is so easy to do from a mechanical point of view. Full texts of journals and articles are now on-line, and readily downloaded. With the ease of unauthorised copying, we all have a di-

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<sup>1</sup> K. Dobbs, *The Living Name: A Tribute to Stefan Stykolt from Some of His Friends*, ed. By W. J. Stankiewicz (Toronto: University of Toronto Press, 1964).

minished expectation of privacy and we place a low value on creative and commercially useful information.

This rubber stamped license notice, together with other intellectual property rights notices, will continue to serve a vague cautionary function only. They fail to meaningfully advance the benefits, including financial rewards, that flow with these rights. Quite frankly, in the same way that most Canadians cannot understand why a lawyer's opinion letter would cost \$700—it is 'just a letter'—they do not appreciate why they should pay to copy a few magazine articles or cartoons. After all, this too is 'just paper' and paper costs are negligible.

Interest in intellectual property law is usually sparked by necessity. Beyond a law student's requirements on research papers, interest is largely from authors, inventors, small business people, or others with several basic, practical questions. Individual Canadians in search of information on intellectual property law that governs them have several options. The Canadian Intellectual Property Office provides basic information on the characteristics and mechanics of different types of protection.<sup>2</sup> There are also guides for specific areas of protection or specific business sectors. One could also read the legislation and expert-level interpretations. There are few intermediate-level guides to intellectual property law in Canada.

York University (now Oxford) professor David Vaver's recent work, *Intellectual Property Law*, is a timely entry into this intermediate level reference market. Experience shows that, next to legal forms of business organisation, intellectual property and confidential information are the most pressing concerns of developers of new products and businesses.

Others are charged with licensing technology to commercial partners or start-up companies. These technology transfer managers have specific questions regarding intellectual property law for their own work. To that end, a broad range of non-legally trained people seek a reference that is accessible, clear, and complete enough to be helpful in complex situations.

While modern intellectual property law in digest form is indeed welcome in Canada, not all digests are equally valuable for all users. Nutshells and "essentials" series often pursue different objectives, according to the tastes of the individual authors. Some are summaries of the main topics and principles of law; others adopt more of a problem-solving approach.<sup>3</sup>

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<sup>2</sup> Canada, Bureau of Corporate Affairs and Legislative Policy, *Copyright: Questions and Answers and Patents: Questions and Answers*, (Ottawa: Consumer and Corporate Affairs, 1992).

<sup>3</sup> An example of the latter approach is C. Brown, *Canadian Insurance Contracts Law in a Nutshell*, (Scarborough: Carswell, 1995).

A survey of the landscape of legal literature on the subject of intellectual property law produces a glittering array of how-to manuals,<sup>4</sup> some of which are sector-specific,<sup>5</sup> as well as government pamphlets created to generally inform the lay person, and policy reports.<sup>7</sup> At the other end of the spectrum, one finds turgid and technical references for lawyers, whether that be legislation,<sup>8</sup> case reports, monographs, or academic commentary.<sup>11</sup> That one of these Canadian reference books was updated only once in 55 years demonstrates the static na-

<sup>4</sup> S. Burshtein, *Patent Your Own Invention in Canada: A Complete Step-by-Step Guide* (Brampton: International Self Counsel Press, 1992); M. Coates, *Register Your Trademark in Canada: A Complete Step-by-Step Guide* (Brampton: International Self Counsel Press, 1992); and R. Dimock, D. M. Cameron, and B. L. Boardman, *Eureka! Now What? An Introduction to Patents, Trademarks and Copyright* (Don Mills: CCH Canada, 1993).

<sup>5</sup> M. Smith, *Patent Protection for Pharmaceutical Products* (Ottawa: Library of Parliament Research Branch, 1990); and L. E. Harris, *Canadian Copyright Law: The indispensable Guide for Writers, Musicians, Visual Artists, Film-makers* (McGraw-Hill Ryerson, 1995).

<sup>6</sup> See e.g. *Protecting Intellectual Property: An Introduction to Japan* (Ottawa: External Affairs and International Trade Canada; 1991); Canada, Bureau of Corporate Affairs and Legislative Policy, *Copyright: Questions and Answers* (Ottawa: Consumer and Corporate Affairs, 1992); Canada, Bureau of Corporate Affairs and Legislative Policy, *Patents: Questions and Answers* (Ottawa: Consumer and Corporate Affairs, 1992); and Canada, Industry Canada, *A Guide to Copyrights* (Ottawa: Industry Canada, 1994).

<sup>7</sup> See e.g. Canada, Consumer and Corporate Affairs, *A Framework for Evaluating Canada's Trade Marks Act* by S. Globerman, (Ottawa: Consumer and Corporate Affairs, 1983); Canada, Department of Communications, *Copyright and the Cultural Community* (Ottawa: Department of Communications, 1984); R. Grey, *Services and Intellectual Property Rights*, (Halifax: Institute for Research on Public Policy, 1988); M. G. Smith, *Global Rivalry and Intellectual Property: Developing Canadian Strategies* (Halifax: Institute for Research on Public Policy, 1991); Canadian Institute for Advanced Research, *The Commercialization of University Research in Canada: A Discussion Paper* (Toronto, 1995); J. Baldwin, *Innovation and Intellectual Property* (Ottawa: Statistics Canada and Industry Canada; 1997); and R. G. Howell, *Database Protection and Canadian Laws* (Ottawa: Industry Canada, 1998).

<sup>8</sup> This includes the Consolidated Intellectual Property Statutes and Regulations (Carswell: Scarborough, Ont.; 1993 *et seq.*).

<sup>9</sup> A short-lived specialized case reporting service was *The Annotated Intellectual Property Rights Reports* (Agincourt: Carswell; 1984–1990).

<sup>10</sup> H. G. Fox, *The Canadian Law and Practice Relating to Letters Patent for Inventions*, 4d. (Scarborough: Carswell, 1969), and *The Canadian Law of Trade Marks and Unfair Competition*, 3d. (Scarborough: Carswell, 1972); and I. Goldsmith, *Patents of Invention* (Scarborough: Carswell, 1981).

<sup>11</sup> One international periodical edited in Canada is dedicated to the subject, *Intellectual Property Journal*, (Scarborough: Carswell, 1984 *et seq.*). See also, *Making Business Sense of Intellectual Property* (Montreal: Faculty of Law, McGill University, 1996) and R. T. Hughes (ed.) *Trade Secrets* (Toronto: Law Society of Upper Canada, 1990), which is a series of papers presented at the Law Society of Upper Canada's Continuing Legal Education Program "Trade Secrets in Law and Practice", held in November 1989 at Osgoode Hall, Toronto.

ture of the legislative terrain and intellectual development of the subject until recently.<sup>12</sup> Most of the work has been targeted to the legal profession as an audience, and now includes loose-leaf services.<sup>14</sup>

Given that there are very few available works positioned between the general and the technical covering all of patents, copyright and trademarks,<sup>15</sup> such a book has found a grateful market of lawyers, creators and entrepreneurs. The well-written, comprehensive and practical guide has found a large and receptive audience in Canada<sup>16</sup>. Vaver has not only presented an important, complex and broad subject where general treatments are rare. He has done it in the summary format of a "nutshell", eschewing self-help generality, the formal hard cover monograph and the loose leaf format, the latter of which we believe is too often favoured by legal publishers.

The intellectual property field is large and burgeoning. One can imagine the usefulness of books solely on international licensing, database protection, technology transfer, life forms, monopolistic use of common words and combinations, business methods<sup>17</sup>, electronic commerce, the World Intellectual Property Organization, confidential information and trade secrets,<sup>18</sup> and security on the World Wide Web. Intellectual property is now a truly international subject. One organizing the subject into accessible digest form, therefore, must be selective.

Addressed to the general audience, including students of law and generalist lawyers in private practice, Vaver's book sticks to the basics of modern intellectual property law under one cover: copyrights, patents and trademarks.<sup>19</sup> For

<sup>12</sup> H. G. Fox, *The Canadian Law of Copyright* (Scarborough: Carswell, 1967).

<sup>13</sup> *Intellectual Property Litigation: Practice, Evidence, Advocacy* (Ottawa: Canadian Bar Association, 1989); G. Takach, *Patents: A Canadian Compendium of Law and Practice* (Edmonton: Juriliber, 1993); and J. Ramsay, *Technology Transfer and Licensing* (Scarborough: Butterworths, 1996).

<sup>14</sup> R. T. Hughes and J. H. Woodley, *Hughes and Woodley on Patents* (Scarborough: Butterworths, 1984 et. seq.); and R.T. Hughes, *Hughes on Trademarks* (Scarborough: Butterworths, 1984 et. seq.).

<sup>15</sup> J. T. Ramsay, *Who Owns the Idea?* (Calgary: Macleod Dixon, 1989).

<sup>16</sup> The digest format was followed in M. P. J. Kratz, *Canada's Intellectual Property in a Nutshell* (Scarborough: Carswell; 1998), which is half the length of Vaver's book.

<sup>17</sup> See *eg.*, a recent American decision on exclusivity to a hub and spoke organizational configuration: *State Street Bank and Trust v. Signature Financial Group* 47 U.S.P. U.S.P.Q., 2d 1396, U.S. Court of Appeals, Federal Circuit (July 1998).

<sup>18</sup> J. A. Thorburn and K. G. Fairbairn, *Law of Confidential Business Information* (Aurora: Canada Law Book, 1998).

<sup>19</sup> See Preface.

greater specialization, one can examine other resources as the case arises. For most users, the answers they need relate to securing a competitive advantage to a start-up business or with a commercial partner, how to obtain protection, and what rights does this protection afford.

Vaver's book offers an introduction to the origins, philosophy and fundamentals of the law. A lay reader understands what a benefits a government confers to society through intellectual property law. Vaver does not stop with discussing the foundations. He challenges the reader to question whether the stated benefits—increased research and creativity for society—are really achieved by the current system. This brings the small business owner no closer to answering practical questions at hand, but it does provide a new vantage point for reflection. From this foundation, Vaver is detailed in his discussion of the subject matter, criteria and rights afforded by Canadian copyright, patent and trademark legislation. A solid foundation is established for intermediate-level coverage. Issues such as plant breeder's rights and specialty surface topography and microchip legislation are avoided.

The chapters begin with a short introduction of pertinent details one will need—such as what types of works are eligible for each type of protection, what rights are afforded, how long does the protection stay in effect, and what actions the owner needs to take to secure protection. An introductory tool, such as a CIPO circular, might put this information in a table format. This style of presentation forces the reader to scan at length for specific information.

This book could be significantly improved in this respect. The structure and presentation of the information does not flow well. I recently sought information on plagiarism as copyright infringement.<sup>20</sup> Vaver's book was not a quick reference because I took a long time working through the discussions on copyright strung together, to know that the plagiarism topic was not in this book. The structure and organization of the content could be more helpful for a reader looking for a quick answer to a practical question.

Vaver deals only with Canadian legislation, appropriate for a reasonably comprehensive work. Yet, this may render the book less practical for some users, such as technology transfer officers. For example, the decision to apply for patent protection in a work or technology is a business decision; the effort and money will only be expended if it enhances the office's ability to commercialise the technology. Canada is a small market, and it is the practice of most Canadian technology transfer offices to file patent protection first in the United States. Then if the market warrants, one might file for Canadian protection as the list of "foreign" patents in a Patent Cooperation Treaty application. Vaver provides a short explanation that there is no "worldwide" patent process, and discusses Canada's involvement in the Patent Cooperation Treaty.

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<sup>20</sup> *Boudreau v. Lin* (1997) 150 D.L.R. (4th) 324, 75 C.P.R. (3d) 1.

There is very little discussion of how rights in Canada can be translated into rights in other markets. This may be beyond the scope of a law book (compared to commercialisation), but this limits the book's value as a reference for a technology transfer office.<sup>21</sup> An office will find much more practical information on commercialisation from the Ramsay book.<sup>22</sup> Vaver's discussion of international rights for copyrighted works (such as in the Berne Convention, World Trade Organization, and the Universal Copyright Convention) and trademarks (Paris Convention) is more complete, perhaps because these two fields are remarkably less complex when concerned with international rights.

Vaver's interest in the philosophy and history of intellectual property protection makes the work useful for educators in the broadest sense. Few users, if any, would be able to influence legislation. Nevertheless, this level of questioning helps one know and apply the benefits of protection. It also facilitates one to explore whether pursuing intellectual property protection advances the goals for a technology. Patent protection is not always the best way of securing a competitive advantage. The expense may not be justified by the market potential. In this respect, Vaver moves the discussion of intellectual property rights far beyond the basic "how to get a patent" level of many guides for inventors and entrepreneurs.

With respect to the world of property, Maurice L. Duplessis has been quoted as saying that "the best land is the human mind." If imitation is the truest form of flattery in format and content of complicated law subjects, we can look forward to seeing more in the genre of this Vaver book.

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<sup>21</sup> It is not practically realistic to locate in Canada a single reference for intellectual property law and commercialization.

<sup>22</sup> J. Ramsay, *supra* note 13.