

## The Evolution of Originality in Canadian Copyright Law: Authorship, Reward and the Public Interest

Carys J. Craig\*

ORIGINALITY IS A FOUNDATIONAL CONCEPT in copyright law: it defines the works to which copyright attaches and delineates the scope of protection they receive. The Supreme Court of Canada, in its recent ruling in *CCH Canadian Ltd. v. Law Society of Upper Canada*, appears to have settled the conflict between creativity and sweat-of-the-brow standards for originality, espousing a compromise position requiring "skill and judgment." In this paper, the author aims to locate the evolution of the originality doctrine within the context of a foundational shift in Canadian copyright theory. When "benefiting authors" was copyright's only recognized purpose, originality was determined with reference to the author's rights: the emergence of a creativity threshold in Canada was infused with a personality-based vision of the author's rights; the industriousness threshold was informed by a perceived need to reward an author's labour. However, the Supreme Court in *Théberge v. Galerie d'Art du Petit Champlain* insisted that furthering the public interest in the production and dissemination of intellectual works is also a primary purpose of copyright. The *CCH* decision at the Supreme Court represents the first occasion on which a Canadian court has taken the public interest side of the copyright "balance" seriously when defining and applying the originality standard. The author argues that this elevation of public interest considerations provides a more suitable framework for developing copyright policy, particularly in the "information age." However, given the case-by-case nature of originality determinations and the tensions inherent in the *Théberge* balancing act, the author cautions that the actual consequences of this development remain to be seen.

L'ORIGINALITÉ EST UN CONCEPT FONDAMENTAL en droit d'auteur. Il définit l'œuvre protégée par le droit d'auteur et délimite la portée de la protection accordée à l'œuvre. La Cour suprême du Canada, dans sa décision récente dans l'affaire *CCH Canadian Ltd. c. Barreau du Haut-Canada*, semble avoir résolu le conflit entre les normes de créativité et de travail à la sueur de son front caractérisant l'originalité, en optant pour une solution de compromis exigeant « du talent et du jugement ». Dans cet article, l'auteur trace l'évolution de la doctrine d'originalité dans le contexte du changement fondamental de la théorie canadienne du droit d'auteur. Lorsque les auteurs n'étaient reconnus que pour les fins du droit d'auteur, l'originalité était déterminée en fonction des droits de l'auteur. La question du seuil de créativité au Canada s'est posée avec la vision des droits d'auteur fondée sur la personnalité; le seuil du travail industriel est né du besoin de récompenser l'auteur pour son labeur. La Cour suprême insiste, toutefois, dans l'affaire *Théberge c. Galerie d'Art du Petit Champlain*, que le développement de l'intérêt public au moyen de la production et de la dissémination des œuvres intellectuelles constitue également un des buts principaux du droit d'auteur. Dans l'arrêt *CCH* de la Cour suprême, pour la première fois un tribunal canadien tient réellement compte de l'équilibre entre l'intérêt public et le droit d'auteur dans sa définition et son application la norme d'originalité. L'auteur soutient que le nouveau poids accordé à l'intérêt public fournit un meilleur cadre de référence pour le développement de la politique sur le droit d'auteur, en particulier en notre « ère de l'information ». Néanmoins, étant donné les déterminations au cas par cas de la nature de l'originalité et les tensions inhérentes au processus d'équilibre énoncé dans l'arrêt *Théberge*, l'auteur suggère que le temps nous dira si ce pas en avant se traduira de façon concrète dans l'avenir.

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# The Evolution of Originality in Canadian Copyright Law: Authorship, Reward and the Public Interest

Carys J. Craig

## 1. INTRODUCTION: ORIGINALITY IN CANADIAN COPYRIGHT CASES

ORIGINALITY IS THE CENTRAL REQUIREMENT of copyright protection. A work is only protected by copyright if it consists of original expression, and copying will amount to infringement only if original elements of the protected work are taken. In this sense, the originality doctrine is responsible for delineating the nature and the scope of copyright's subject matter.<sup>1</sup> Further, originality is the foundational concept that defines the relationship between an "author" and her "work", for copyright in a work comes into existence at the moment when an author produces fixed original expression. However, as with many or most of the foundational concepts in copyright law, the meaning of originality has long been a matter of doubt and a source of contention. The debate has evolved around two prominent schools of thought. On one hand, there is the creativity school, as endorsed by the US Supreme Court in the famous *Feist* decision,<sup>2</sup> according to which originality requires that a work not be copied and contain a modicum of creativity. On the other hand, there is the so-called "sweat of the brow" school, according to which mere industrious collection involving the expense of labour or effort will be sufficient to meet the threshold for protection.

In recent years, Canadian jurisprudence has swung unpredictably between the two schools of thought, resulting in uncertainty, confusion and controversy. In 1995, in *U & R Tax Services v. H & R Block Canada Inc.*,<sup>3</sup> the Federal Court assured us, rather unequivocally, that "[i]ndustriousness ('sweat of the brow') as opposed to creativity is enough to give a work sufficient originality to make it copyrightable."<sup>4</sup>

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1. For this reason, David Vaver has described the originality doctrine as "really a proxy for answering the question: Has the author done enough to justify preventing the world from copying from his or her output for a century or more?". David Vaver, "Canada's Intellectual Property Framework: A Comparative Overview" (2004) 17 *Intellectual Property Journal* 125 at p. 141 [Vaver, "Comparative Overview"].
  2. *Feist Publications Inc. v. Rural Telephone Service*, 499 U.S. 340, <[http://www.law.cornell.edu/copyright/cases/499\\_US\\_340.htm](http://www.law.cornell.edu/copyright/cases/499_US_340.htm)>, 111 S. Ct. 1282 (1991) [*Feist* cited to U.S.].
  3. (1995), 62 C.P.R. (3d) 257, 97 F.T.R. 259 (FCTD) [*U & R Tax Service* cited to C.P.R.].

Two years later, in the *Tele-Direct* case,<sup>5</sup> the Federal Court of Appeal assured us, almost as unequivocally, that we had misunderstood the significance of the *U & R Tax* case and others like it, and that the creativity standard was part of the Anglo-Canadian copyright law (or at least, if it was not, it should have been).<sup>6</sup> According to *Tele-Direct*, the “sweat of the brow” cases had never stood for the proposition that labour alone could be determinative of originality. Apparently, “skill, judgment or labour” had always meant “skill, judgment and labour.”<sup>7</sup> If it were otherwise, the court opined, Canada would not be in compliance with its NAFTA obligations, which were said to impose standards of intellect and creativity.<sup>8</sup> In short, the Federal Court of Appeal in *Tele-Direct* purported to declare victory for the creativity school in the originality “battle.”<sup>9</sup>

The *Tele-Direct* case was identified by many as Canada’s endorsement of a *Feist*-based approach to originality. Indeed, the court expressly “found assistance” in the US experience. Several subsequent cases in Canada followed the *Tele-Direct* decision,<sup>10</sup> and the prevalent expectation at the time seems to have

4. *Ibid.* at p. 264.

5. *Tele-Direct (Publications) Inc. v. American Business Information Inc.* (1997), 2 F.C. 22, <<http://reports.fja.gc.ca/fc/src/shtml/1998/pub/v2/1998fc21425.shtml>>, 76 C.P.R. (3d) 296 (FCA) [*Tele-Direct* cited to F.C.].

6. *Ibid.* at para. 17. Décaré JA wrote: “All in all, apart from the possible qualifications one might wish to make with respect to some earlier decisions, I have come to the conclusion that the 1993 amendments did not alter the state of the law of copyright with respect to compilations of data. The amendments simply reinforce in clear terms what the state of the law was, or ought to have been: the selection or arrangement of data only results in a protected compilation if the end result qualifies as an original intellectual creation.”

7. *Ibid.* at para. 29. Décaré JA explained: “It is true that in many of the cases we have been referred to, the expression “skill, judgment or labour” has been used to describe the test to be met by a compilation in order to qualify as original and, therefore, to be worthy of copyright protection. It seems to me, however, that whenever “or” was used instead of “and”, it was in a conjunctive rather than in a disjunctive way. It is doubtful that considerable labour combined with a negligible degree of skill and judgment will be sufficient in most situations to make a compilation of data original.”

8. *Ibid.* at paras. 15, 16. But see Myra Tawfik, “Decompiling the Federal Court of Appeal’s ‘NAFTA Argument’ in *Tele-Direct (Publications) Inc. v. American Business Information Inc.—From Facts to Fiction*” (2001) 33 *Ottawa Law Review* 147.

According to Décaré JA in *Tele-Direct*, *supra* note 5 at para. 13, “... the addition of the definition of ‘compilation’ in so far as it relates to ‘a work resulting from the selection or arrangement of data’ appears to me to have decided the battle which was shaping up in Canada between partisans of the ‘creativity’ doctrine—according to which compilations must possess at least some minimal degree of creativity—and the partisans of the ‘industrious collection’ or ‘sweat of the brow’ doctrine—wherein copyright is a reward for the hard work that goes into compiling facts.”

10. See e.g. *Prism Hospital Software, Inc. v. Hospital Medical Records Institute* (1994), 97 B.C.L.R. (2d) 201, <<http://www.canlii.org/bc/cas/bcsc/1994/1994bcsc11222.html>>, 57 C.P.R. (3d) 129 (BCSC); *ITAL-Press Ltd. v. Sicoli* (1999), 170 F.T.R. 66, <<http://decisions.fct-cf.gc.ca/fct/1999/t-2908-94.shtml>>, 86 C.P.R. (3d) 129 (FCTD); *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2000] 2 F.C. 45, <<http://decisions.fct-cf.gc.ca/fct/1999/t-1618-93.shtml>>, (FCTD) [*CCH (FCTD)* cited to F.C.]; *Édutile inc. v. Association pour la protection des automobilistes*, [2000] 4 F.C. 195, <<http://decisions.fct-cf.gc.ca/cf/1997/t-1151-96.shtml>>, [2000] 188 D.L.R. (4th) 132 (FCA); *B & S Publications, Inc. v. Max-Contacts, Inc.* [2001] 287 A.R. 201, A.J. No. 143 (Q.B.); *Robertson v. Thomson Corp.* (2004), 72 O.R. 481, <<http://www.ontariocourts.on.ca/decisions/2004/october/C38148.pdf>>, [2004] O.J. No. 4029 (Ont CA) [*Robertson* cited to O.R.]. Compare *Hager v. ECW Press Ltd* (1998), [1999] 2 F.C. 287, <<http://reports.fja.gc.ca/fc/1999/pub/v2/1999fc23716.html>>, 85 C.P.R. (3d) 289 (FCTD) [*Hager* cited to F.C.], where Reed J rejected the argument that *Tele-Direct* had raised Canada’s originality standard to require creativity. Notably, Reed J appears implicitly to accept the defendant’s arguments that “reward for labour” could provide a legitimate basis for copyright protection. *Ibid.* at para. 39 (citing Lords Davey and Halsbury in *Walter v. Lane*, [1900] A.C. 539 (HL) [*Walter v. Lane*]). In line with the discussion that follows, this divergent theoretical footing might go a long way to explaining Justice Reed’s unease with the *Tele-Direct* standard. For a fuller discussion of these cases and their relationship to *Tele-Direct*, see Daniel Gervais, “Feist Goes Global: A Comparative Analysis of the Notion of Originality in Copyright Law” (2002) 49 *Journal of the Copyright Society of the USA* 949, <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=733603](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=733603)>.

been that *Feist* or something resembling it would soon become the standard approach across the common law jurisdictions.<sup>11</sup> However, just five years after the ruling in *Tele-Direct*, the Federal Court of Appeal clarified its position: if we were under the impression that it had embraced a creativity standard for Canadian originality, we had once again been mistaken.<sup>12</sup> According to the Federal Court of Appeal in the *CCH* case, the only precondition to copyright in Anglo-Canadian law was that a work be "independently produced and not copied from another person."<sup>13</sup> Skill, judgment, labour, knowledge and so forth were all possible indicators or ingredients of originality, but none was required in order for an independently produced work to receive protection.<sup>14</sup> Now, of course, in the latest twist in this chain of cases, the Supreme Court of Canada has overturned the Court of Appeal's ruling on originality in *CCH*, finding that the answer lies in between the "two extremes" of industriousness and creativity. An original, copyrightable work "must be more than a mere copy of another work," but it "need not be creative, in the sense of being novel or unique."<sup>15</sup> Rather, in order to be protected, an author's expression must also involve a more than trivial amount of "skill and judgment."<sup>16</sup>

My aim here is to offer some brief thoughts on the manner in which the originality doctrine has evolved through this convoluted and contradictory line of cases. Nowhere is the pull between the extremes of creativity and industry better illustrated than in the progression of the *CCH* case from the Trial Division to the Supreme Court. The history and outcome of this case encapsulates the dynamics that have shaped Canadian originality jurisprudence over the last ten years. As such, I will use this case as a platform from which to examine those dynamics and the significance of the apparent resolution achieved by the Supreme Court in March 2004.

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11. See Myra Tawfik, "'Aussie Rules' on the Boundaries of Copyright Protection in Factual Compilations" (2001) 1 Oxford University Commonwealth Law Journal 133, asking at p. 145: "is the Telstra decision [of the Australian Federal Court] the last great stand of the 'industrious collection' school in modern copyright law?" See also, Gervais, *supra* note 10 at p. 951: "[A] *Feist*-like standard is now applied or may soon emerge in key common law countries."
  12. *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2002 FCA 187, <<http://decisions.fct-cf.gc.ca/fct/2002/2002fca187.html>>, [2002] 4 F.C. 213, (2002), 18 C.P.R. (4th) 161 [*CCH* (FCA) cited to F.C.]: "[T]he Trial Judge misinterpreted this Court's decision in *Tele-Direct*..., and other jurisprudence as shifting the standard of originality away from the traditional Anglo-Canadian approach." *Ibid.* at para. 36: "The Trial Judge...interpreted *Tele-Direct* as altering the classic Anglo-Canadian standard of originality and adding new requirements of 'imagination' and 'creative spark'. In this, he was mistaken."
  13. *Ibid.* at para. 36. Note that there was also some doubt about whether this standard was in effect overruling any creativity standard found in *Tele-Direct*, or whether *Tele-Direct* was simply distinguished on its facts. A possible consequence of this distinction would be a flexible standard of creativity that differs according to the type of work to be protected. Thus, sub-compilations of routine data may have to meet a higher originality standard than the kind of "considerably more complex" materials at issue in the *CCH* and analogous scenarios. *Ibid.* at para. 37.
  14. See *infra* note 30 and accompanying text.
  15. *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, <[http://www.lexum.umontreal.ca/csc-scc/en/pub/2004/vol1/html/2004scr1\\_0339.html](http://www.lexum.umontreal.ca/csc-scc/en/pub/2004/vol1/html/2004scr1_0339.html)>, [2004] 1 S.C.R. 339 at para. 16 [*CCH* (SCC) cited to LexUM/S.C.R.].
  16. *Ibid.* "Skill" is defined as: "the use of one's knowledge, developed aptitude or practised ability in producing the work." "Judgment" is defined as: "the use of one's capacity for discernment or ability to form an opinion or evaluation by comparing different possible options in producing the work." The exercise of such skill and judgment necessarily involves "intellectual effort." As such, the ruling is, at least to an extent, an endorsement of Rothstein J's reasoning at the Court of Appeal that in addition to not being copied, "some intellectual effort will be necessary in order for a work to qualify as original." *CCH* (FCA), *supra* note 12 at para. 218.

In examining the development of the originality doctrine in Canada, my intention is to contextualize the formulation and application of the doctrine in light of the perceived purposes of copyright law, and correspondingly, the identification of copyright's intended beneficiaries. My argument is that some seismic shifting in the theoretical ground underlying copyright has caused the movement in copyright's doctrinal structure. From the time that the Trial Division issued its ruling in *CCH* until the Supreme Court released the final decision, copyright in Canadian Supreme Court jurisprudence evolved from a right solely for the benefit of authors<sup>17</sup> into a system for achieving a balance between authors' rights and the public interest.<sup>18</sup> My intention is to contextualize the *CCH* case within that shifting paradigm and to understand the divergent approaches of the various courts against this background.

My broad contention is that the *CCH* decision from the Supreme Court represents the first occasion wherein originality has been shaped with the public interest (and not simply the author's rights) in mind. It thus amounts to a significant advancement in the development of copyright policy by providing a more suitable framework within which to examine questions of copyrightability in the so-called "information age."

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## 2. CCH AT THE TRIAL DIVISION: CREATIVITY AND THE AUTHORSHIP MODEL

### 2.1. *Defining Originality: The Creative Spark*

THE DECISION OF THE FEDERAL COURT TRIAL DIVISION in the *CCH* case effectively confirmed and compounded the initial fears generated by the *Tele-Direct* decision that a "creativity" standard would elevate the originality threshold beyond what was reasonable, and would cause judges to become subjective arbiters of literary value or worth. Refusing to find original expression in reported judicial decisions, including headnotes, catchlines, parallel citations, and running heads, Gibson J concluded that such additions "involved extensive labour, skill and judgment" but "lacked the 'imagination' or 'creative spark'... essential to a finding of originality."<sup>19</sup> It seems correct that originality in reported judicial decisions can exist only in a "narrow groove,"<sup>20</sup> but given the skill, judgment and labour involved in selecting and arranging the relevant facts and ratio of a court decision, these works might more appropriately have been found to meet the *Tele-Direct* standard embraced by the court.

Resistance to a creativity standard has often been justified in terms of the connotations that may be assumed to attach to it. In the US, Melville Nimmer famously—and successfully—objected to the proposed inclusion of the word "creative" in the 1976 Act on the ground that the term would suggest a higher

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17. See *infra* note 24 and accompanying text.

18. See *infra* note 35 and accompanying text.

19. *CCH (FCTD)*, *supra* note 10 at para. 139.

20. *Ibid.* at paras. 133-134. Compare Gervais, *supra* note 10 at p. 966.

standard than required, implying the need for some degree of objective novelty.<sup>21</sup> In applying the *Tele-Direct* standard to the case headnotes, in particular, I would respectfully argue that Gibson J did indeed draw this mistaken inference from the concept of “creativity” when he implied that skilful faithfulness to the original material precluded original expression.<sup>22</sup> Having denied copyright to many of the legal publications at issue in the case, and having endorsed a view of creative originality that required “imagination” and “creative spark” beyond basic skill and judgment, it seemed clear that the Trial Division’s ruling in the matter was unlikely to survive on appeal. It was also clear, however, that this overly restrictive application of the creativity standard had put the standard itself in jeopardy. The threshold for originality had been raised too high.

## 2.2. *The Purpose of Copyright: Creative Originality and Benefiting Authors*

For the purposes of my argument, it is important to examine this originality ruling in light of the copyright policy assumptions at play. The court began its analysis by stating what it understood to be the object and the purpose of the *Copyright Act*:

[T]o benefit authors, albeit that in benefiting authors, it is capable of having a substantially broader-based public benefit through the encouragement of disclosure of works for the advancement of learning or, as in this case, the wider dissemination of law.<sup>23</sup>

The obvious implication is that any benefit enjoyed by the public as a result of the protection of the author’s copyright is an incidental, if fortunate, by-product of upholding the private right. This vision of copyright’s purpose echoed the position of the Supreme Court of Canada at that time. In the Supreme Court decision of *Bishop v. Stevens*, McLachlin J, as she then was, said that “the *Copyright Act* . . . was passed with a single object, namely, the benefit of authors of all kinds...”<sup>24</sup>

Having thus identified the sole intended beneficiary of the copyright system as the rights-bearing author, the formulation and application of the originality standard in the *CCH* case at trial can be understood in terms of the court’s explicit author-focus. The search for an appropriate originality standard is in fact the search for a genuine “author.”

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21. George Grossman, ed. *Omnibus Copyright Revision Legislative History: Copyright Law Revision*, part 3 (Buffalo: Hein, 1976) at pp. 42-46, cited in Timothy Young, “Copyright Protection for Factual Compilations: The White Pages of the Phone Book are Not Original Enough to be Copyrighted—But Why?” (1992) 17 *University of Dayton Law Review* 631 at p. 656. This concern was in fact raised by the Federal Court of Appeal in its judgment reversing the Trial Division’s finding on originality: “The fact that an objective and coherent definition of ‘creative’ is elusive at best and that ‘creativity’ can sometimes connote qualities that are not required of an ‘original’ work makes it preferable to avoid such unpredictable labels when assessing originality.” *CCH (FCA)*, *supra* note 12 at para. 58.
  22. *CCH (FCTD)*, *supra* note 10 at para. 140. Gibson J wrote: “Here, [regarding the reasons for judgment in issue]...faithfulness to the original, whether or not in the public domain, is the dominant editorial value and thus, the creative ‘is the enemy of the true’.”
  23. *Ibid.* at para. 116.
  24. *Per* McLachlin J, *Télé-Métropole Inc. v. Bishop (sub nom. Bishop v. Stevens)*, [1990] S.C.R. 467, at pp. 478-479, <[http://www.lexum.umontreal.ca/csc-scc/en/pub/1990/vol2/html/1990scr2\\_0467.html](http://www.lexum.umontreal.ca/csc-scc/en/pub/1990/vol2/html/1990scr2_0467.html)>, 72 D.L.R. (4th) 97 [*Bishop* cited to S.C.R.].

Arguably, then, the Trial Division's ruling is best examined through the lens of a personality-based concept of copyright: original works of authorship are protected because and to the extent that they manifest or reflect the personalities or individuality of their authors, embodying their subjective choices and intellectual energy.<sup>25</sup> This argument is reinforced by Gibson J's approval of dictum from the *Tele-Direct* decision. Citing Décary JA, Gibson J adopts the author-oriented perspective that seems to have informed the Federal Court of Appeal's articulation of a creativity standard in that case:

One should always keep in mind that one of the purposes of the copyright legislation, historically, has been "to protect and reward the intellectual effort of the author... in the work"....The use of the word "copyright" in the English version of the Act has obscured that fact that what the Act fundamentally seeks to protect is "*le droit d'auteur*". While not defined in the Act, the word "author" conveys a sense of creativity and ingenuity.<sup>26</sup>

The standard of creative originality that emerged from the Court of Appeal in the *Tele-Direct* ruling, which was embraced by Gibson J in the *CCH* case at the trial level, can therefore be seen to flow from an attempt to identify and protect "true authors"—the intended beneficiaries of the *Copyright Act*.<sup>27</sup> A personality-based theoretical model implies that originality must amount to more than the mere investment of labour or effort. If originality defines true authorship, then some personal connection and subjective contribution to the work is required, for this connection is what underpins the right. While these decisions were widely regarded as having adopted a *Feist*-like standard in Canada, this reading of the judgment would suggest, I think, a very different foundation for the creativity requirement than that upon which O'Connor J had relied in the *Feist* decision.<sup>28</sup>

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### 3. CCH AT THE FEDERAL COURT OF APPEAL: "NOT COPIED" AND THE LABOUR-REWARD MODEL

#### *3.1. Defining Originality: Independently Produced*

THE RULING ON THE MEANING of originality at the Federal Court of Appeal was, in my opinion, more problematic than the Trial Division's ruling. According to

25. See Jane Ginsburg, "Creation and Value: Copyright Protection of Works of Information" (1990) 90 *Columbia Law Review* 1865 at pp. 1881-1888, discussing personality, individuality and authorship.

26. *CCH (FCTD)*, *supra* note 10 at para. 131, quoting Décary JA in *Tele-Direct*, *supra* note 5 at pp. 37-38.

27. The focus upon the search for a "genuine author" raises concerns about the romanticization of the author-figure in copyright. Copyright's construction of the romantic author has been the subject of critique in some wonderful copyright scholarship over the last few years. See e.g. Peter Jaszi, "On the Author Effect: Contemporary Copyright and Collective Creativity" (1991) 10 *Cardozo Arts & Entertainment Law Journal* 293.

28. See *infra* note 45 and accompanying text.

Linden JA, the trial judge had “failed to conduct any substantive analysis of the American standard of originality,” and thereby “entangled the standard set out in *Feist* ... with the Canadian touchstone of originality.”<sup>29</sup> Justice Linden’s ruling emptied the originality concept of virtually all meaning, reducing the central requirement of copyrightability to the mere proposition that original works originate from the author.<sup>30</sup>

The standard as articulated is over-inclusive, and the scope of copyright protection is potentially widened well beyond the kind of intellectual productions that require protection in furtherance of copyright’s goals. A random, irrational compilation displaying no skill or judgment or knowledge in its selection or arrangement would be protected unless it could be shown to have been copied from another work.<sup>31</sup> There is, in this sense, no actual “standard” to be met; anything worth copying is worth protecting, and the only “sweat” required is the effort it takes to distinguish a work from a mere copy.<sup>32</sup> Under this view, originality determinations involve no consideration of the attributes of the work or the processes undertaken in its production, but are purely concerned with the existence of a single originating source.

### 3.2. *The Purposes of Copyright: Lowering Originality and Rewarding Producers*

Interestingly, the copyright policy articulated by Linden JA also differs quite significantly from that espoused by Gibson J at the trial level. The Court of

29. *CCH (FCA)*, *supra* note 12 at para. 52.

30. *Ibid.* at para. 53: “It is widely accepted that an ‘original’ work must be independently produced and not copied.... [D]ifferent judges and commentators have described the word ‘original’ with a host of words and phrases mentioned above, including various combinations of the terms ‘labour’, ‘judgment’, ‘skill’, ‘work’, ‘industry’, ‘effort’, ‘taste’, or ‘discretion’.... To me, these are all possible ingredients in the recipe for originality, which may be altered to suit the flavour of the work at issue.... [I]t is a mistake to treat any of these words as if they were statutory requirements. These are not, in themselves, prerequisites to copyright protection, but rather evidence of the sole prerequisite, originality.”

31. Contrast this position with the ruling of the House of Lords in *G.A. Cramp & Sons Ltd v Frank Smythson Ltd* [1944] A.C. 329, [1944] 2 All ER 92 (HL) [*Cramp* cited to A.C.], where the court refused protection to a diary prefix. Lord McMillan opined: “The inclusion or exclusion of one or more of the tables constituting the ordinary stock material of the diary-compiler seems to me to involve the very minimum of labour and judgement.... [I]f any compilation could be held to fall short of displaying the qualities requisite to attract copyright, the respondent’s collection of seven tables is such a one.” *Ibid.* at p. 338. It seems to me that a court applying Justice Linden’s originality standard would have been bound to uphold copyright protection in the work at issue in *Cramp*, because while the tables were of the type commonly found in diary prefixes, there was no evidence to suggest that this selection and seemingly random arrangement of tables had been copied from any other particular source. When the only standard is “not copied,” then a work should only fail to meet that standard if it can be shown to be derived from pre-existing work. This reveals the manner in which Justice Linden’s standard may depart even from the minimalist “sweat of the brow” position taken by the UK courts. If a work is not copied, nothing further is required—not even labour, which, according to Justice Linden, will “normally” (but not necessarily) be present when a work is not copied. See *CCH (FCA)*, *supra* note 12 at para. 54, where the language suggests that there may be works that are devoid of any intellectual effort but that are more than simple copies; presumably, a pure not-copied test would protect such works. Compare this to Justice Rothstein’s standard, *ibid.* at paras. 214-218, which envisages some investment of some additional “intellectual effort”, however that may be defined.

32. Compare *University of London Press, Ltd. v. University Tutorial Press, Ltd.*, [1916] 2 Ch. 601 at p. 610 [*University of London Press* cited to Ch.]: “[A]fter all, there remains the rough practical test that what is worth copying is *prima facie* worth protecting.” *Per* Peterson J. This case is widely cited as the original authority for a minimalist originality threshold. The court held, at pp. 608-609: “The word ‘original’ does not in this connection mean that the work must be the expression of original or inventive thought.... The originality which is required relates to the expression of the thought. But the Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work—that it should originate from the author.” The Court of Appeal in *CCH* cited this case with approval (*supra* note 12 at para. 30).

Appeal began its analysis from the position that:

[T]he purposes of Canadian copyright law are to benefit authors by granting them a monopoly for a limited time, and to simultaneously encourage the disclosure of works for the benefit of society at large.... The person who sows must be allowed to reap what is sown, but the harvest must ensure that society is not denied some benefit from the crops. ...The challenge facing...copyright law generally...is to find a fair and appropriate equilibrium that achieves both goals.<sup>33</sup>

This was in line with the most recent articulation by the Supreme Court on the matter of copyright's purposes. In the decision of *Théberge v. Galerie D'Art du Petit Champlain Inc.*,<sup>34</sup> the position of the Supreme Court had shifted away from its previous author-orientated approach and toward the idea that copyright involves a balance between two sets of interests, namely:

a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator....The proper balance among these and other public policy objectives lies not only in recognizing the creator's rights but in giving due weight to their limited nature. In interpreting the *Copyright Act*, courts should strive to maintain an appropriate balance between these two goals.<sup>35</sup>

The question becomes whether the adoption of this policy goal played a significant role in the Court of Appeal's interpretation of originality; was it somehow the search for an appropriate equilibrium between copyright's two purposes that resulted in the polar opposite approach to originality? In my view, the answer is no, not quite. In defining originality, the Court of Appeal focused on only one of the goals set out in *Théberge*: the need to provide just reward for the creator. The court noted: "A more onerous standard of originality deprives owners of the copyright protection that the signatories to these [international] agreements intended to guarantee. Their purpose is frustrated, rather than promoted by implying additional requirements of creativity, imagination or creative spark into the Act."<sup>36</sup>

As Daniel Gervais has observed, a focus upon the author is not always in the interests of those who would claim to be authors.<sup>37</sup> A personality-based notion of authorship may limit the works to which copyright protection extends. However, an author-oriented approach that defines the author's rights in terms of the effort and labour invested will lower the threshold for protection in order to "prevent someone other than the creator from appropriating whatever benefits may be generated," thereby ensuring "just reward."<sup>38</sup> It is notable that

33. *CCH (FCA)*, *supra* note 12 at para. 23.

34. 2002 SCC 34, <[http://www.lexum.umontreal.ca/csc-scc/en/pub/2002/vol2/html/2002scr2\\_0336.html](http://www.lexum.umontreal.ca/csc-scc/en/pub/2002/vol2/html/2002scr2_0336.html)>, [2002] 2 S.C.R. 336 [*Théberge* cited to LexUM/S.C.R.].

35. *Ibid.* at paras. 30-31.

36. *CCH (FCA)*, *supra* note 12 at para. 42.

37. Gervais, *supra* note 10 at p. 957, noted with reference to the *Feist* decision: "Putting the author/creator at the center of the copyright picture by requiring evidence of human (intellectual) creativity does not necessarily stem from an author-friendly perspective or benefit authors. In fact, the reverse may be true."

38. *Théberge*, *supra* note 34 at para. 30.

in the above-quoted passage, Linden JA described those who would be denied copyright protection due to additional creativity requirements as “owners of the copyright.” This implies that ownership does not flow from creativity, and so when creativity is required, true “owners” of copyright are denied their entitlement. Thus, by lowering the threshold of originality from the standard endorsed by the Trial Judge, Linden JA sought to achieve one of the two goals identified: ensuring just reward (ownership) for the creator (labourer). This reward was measured not in relation to the personality invested by the author in the substance of the work, but in relation to the effort invested in its production.

So what of the second goal and its implications for originality determinations? Linden JA wrote:

Admittedly, the public interest in the dissemination of works may be a policy reason to impose a high standard of “creativity” as a prerequisite to copyright protection. There is also the concern that overprotection of certain works will thwart social and scientific progress by precluding persons from building upon earlier works. However,... a fair interpretation of user rights can counteract the apparent imbalance potentially generated by a low threshold.... For example, the fair dealing provisions of the Act provide a mechanisms [sic.] whereby user rights are better considered.<sup>39</sup>

Particularly in a Canadian context, reliance upon the fair dealing defence to strike the appropriate balance is of little comfort to those concerned with the over-inclusiveness likely to result from the minimal originality standard. Even acknowledging the court’s improvement upon the explicitly and deliberately “narrow” interpretations that have characterized judicial consideration of exceptions in Canada,<sup>40</sup> the exceptions are drafted so narrowly that their ability to further the public interest in dissemination must be doubted. Nor does resort to fair dealing obviate the arbitrariness and subjectivity that the court associated with the “creativity” standard: once it has been established that a dealing was for an enumerated purpose, determinations of “fairness” have been notoriously arbitrary and subjective. Reliance upon substantial similarity determinations to strike the appropriate balance may be a more realistic approach, but would still leave much to be desired.<sup>41</sup> More often than not, once the existence of a right in the work has been established, the defendant who has engaged in an unlicensed use of the copyrighted work is fighting a losing battle.

The copyright “balance” is upset when considerations of the public side of this “balance” are postponed until the private right has been established (and

39. *CCH (FCA)*, *supra* note 12 at para. 59.

40. Whereas the Trial Division in *CCH*, in line with Canadian fair dealing jurisprudence at that time, had been “satisfied that the fair dealing exception should be strictly construed” (*supra* note 10 at para. 175), the Supreme Court ruled, *supra* note 15 at para. 48, that “[i]n order to maintain the proper balance between the rights of a copyright owner and users’ interests, it must not be interpreted restrictively.”

41. David Vaver has argued that the attempt to define and apply an “originality” standard has “tended to divert attention from other possibly more critical issues, such as when ... and how far copyright should be asserted.” David Vaver, *Copyright Law* (Toronto: Irwin Law, 2000) at p. 63. In a similar vein, Vaver recently observed that the issue as to how far copyright should be asserted is “particularly critical in Canada, where the lax test of originality lets almost anything into the pantheon and where the range of defences to infringement is tightly circumscribed.” Vaver, “Comparative Overview,” *supra* note 1 at pp. 145-146.

allegedly infringed). There cannot be sufficient appreciation for the public's side of the copyright "balance" when the public interest plays no part in determining the subsistence of copyright. In effect, this approach reduces the public interest at stake to the interests of an individual defendant/infringer who has used a protected work without authorization. The defendant, who apparently embodies the public interest, is already on the wrong side of a moral equation: he is the would-be free rider playing opposite the meritorious producer. To limit the consideration of the public interest to infringement determinations while excluding it from subsistence determinations both relegates and distorts the nature of the public interest at stake. If the notion of "balance" between authors' rights and the public interest is to be taken seriously, the public interest has to play a critical role in determining the subject matter to which copyright interests ought to attach. This is the moment at which the work is subjected to the exclusionary interest and is set apart from the public domain. Clearly at this stage, perhaps more than any other, the public has interests at stake.

While the Federal Court of Appeal posited as a starting point the balance articulated by the Supreme Court in *Théberge*, it failed to acknowledge the relevance of the public's side of that balance in arriving at its definition of originality. With this side of the balance neglected, the only relevant purpose remaining was that of protecting the author's reward, and thus ensuring that the author reaped what was sown. Consequently, the originality threshold was lowered to the point of virtual irrelevance, creating a real—and not merely "apparent"—imbalance in favour of the author's right (presented as a reward for the investment of labour). Such an imbalance cannot not be justified or rectified simply by appealing to the limits of copyright infringement.

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#### 4. CCH AT THE SUPREME COURT: "SKILL AND JUDGMENT" AND THE PUBLIC INTEREST

##### 4.1. *Defining Originality: "Between these Extremes"*

THE SUPREME COURT'S RECENT JUDGMENT in the *CCH* case provides a new (or at least clarified) standard for originality that requires an independent production involving skill and judgment. It is my opinion that this standard is more suitable than the minimalist, all-encompassing test adopted by the Federal Court of Appeal. However, as the history of the originality doctrine displays, sometimes the particular words used to define its meaning are far less important than the policy reasons that inform its application. Notwithstanding the Chief Justice's attempt to ascribe meaning to "skill" and "judgment",<sup>42</sup> these words remain inherently vague, and necessarily open to subjective interpretation on a case-by-case basis. In attempts to interpret and apply the *CCH* standard, then, courts will have to appeal to the relevant policy considerations as they were articulated in McLachlin CJ's judgment. Perhaps the most important implication of the ruling

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42. See *supra* note 16.

on originality flows not from the particular formulation of the standard, but rather from the acknowledgement that “the public interest in promoting the encouragement and dissemination of works of the arts and intellect”<sup>43</sup> is a relevant consideration in the determination of copyrightability.

Like Linden JA, McLachlin CJ accepted the copyright balance as formulated in *Théberge*; but the difference is that she went on to apply the balance as a framework within which to assess the meaning of originality:

When courts adopt a standard of originality requiring only that something be more than a mere copy or that someone simply show industriousness to ground copyright in a work, they tip the scale in favour of the author’s or creator’s rights, at the loss of society’s interest in maintaining a robust public domain that could help foster future creative innovation. ...

[A] “sweat of the brow”...standard...fails to allow copyright to protect the public’s interest in maximizing the production and dissemination of intellectual works.<sup>44</sup>

Having recognized the public interest at stake in the initial determination of a work’s copyrightability, McLachlin CJ decided that elevating the minimalist originality standard by endorsing the additional requirement of skill and judgment would achieve the appropriate balance between the public interest and that of the author.

#### *4.2. The Purposes of Copyright: Raising the Threshold and Protecting the Public Interest*

The importance of the Supreme Court’s earlier articulation of the purposes of copyright became evident in its subsequent *CCH* ruling. In *CCH*, the notion of balance and the concern for the public interest pervaded the Court’s interpretation and application of the law; not only with respect to originality, but also with respect to authorization and fair dealing. In the originality sphere, the acknowledgement of a relevant public interest and a public goal for copyright law was a major development, and a desirable departure from the author-orientated approach of past decisions concerning copyrightability.

On this basis, I would suggest that the *CCH* case is to Canada what *Feist* is to the US. The comparison is not premised upon the simple fact that *CCH* unambiguously rejected an industrious collection standard, as *Feist* had done several years earlier. Purely in terms of the test adopted, *Tele-Direct* would bear a closer resemblance to *Feist*. The basis for the analogy is that both courts, in establishing the meaning of originality, looked beyond the interests of the purported rights-bearer and made an appeal to the public policy goals of copyright law. In *Feist*, having asserted that originality in compilations of data required “a minimal degree of creativity” in the selection and arrangement,

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43. *CCH (SCC)*, *supra* note 15 at para. 23.

44. *Ibid.* at paras. 23 and 24.

O'Connor J addressed the public purposes of copyright:

It may seem unfair that much of the fruit of the compiler's labor may be used by others without compensation. ...It is, rather, "the essence of copyright"...and a constitutional requirement. The primary objective of copyright is not to reward the labor of authors, but "[t]o promote the Progress of Science and useful Arts"...To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work."<sup>45</sup>

Similarly, in *CCH*, McLachlin CJ justified the higher originality standard by way of a similar appeal to the public interest at stake:

[W]hen an author must exercise skill and judgment to ground originality in a work, there is a safeguard against the author being overcompensated for his or her work. This helps ensure that there is room for the public domain to flourish as others are able to produce new works by building on the ideas and information contained in the works of others.<sup>46</sup>

Whereas the originality debate in Canada had previously been framed in terms of the search for the deserving author (the meritorious producer of something worthy of protection), the *CCH* case adopts an approach similar to that of the US Supreme Court: the meaning of originality is to be determined with a view to the primary objective(s) of copyright law, which necessitates consideration of the public interest and the appropriate limits of private appropriation. This kind of openly purposive, policy-infused analysis of a copyright concept represents a significant departure from previous Canadian jurisprudence, which tended to reify these concepts, thereby denying their inherently malleable, and so political, nature.

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## 5. THE IMPLICATIONS OF *CCH* FOR ORIGINALITY AND CANADIAN COPYRIGHT LAW

### 5.1. *Defining Originality: Regarding the New Standard*

THERE IS, OF COURSE, much more that could be and should be said about the version of originality that finally emerged from the *CCH* case. After years of confusion and contradiction, Canada finally has a definitive statement from the Supreme Court about the meaning of the originality doctrine in Canadian copyright law. However, as I have suggested, certainty about the particular test

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45. *Feist*, *supra* note 2 at pp. 1289-1290. The *Feist* decision constitutionalized originality and creativity as prerequisites to copyright protection. The reasoning was based on the court's interpretation of "writings" and "authors" in the US Constitution and the result was justified in terms of the "progress" clause. See David Lange, "Sensing the Constitution in *Feist*" (1992) 17 *University of Dayton Law Review* 367 at p. 373: "Congress is empowered to grant exclusive rights to authors and inventors for limited times solely in order to promote the progress of science and the useful arts. This is the constitutional standard, the Court has said [in *Feist*], and the standard constrains; its limits cannot properly be avoided through the simple device of calling authorship (read: appropriation) by another name."

46. *CCH (SCC)*, *supra* note 15 at para. 23.

to be applied hardly guarantees certainty in the manner or consequences of its application.<sup>47</sup> The real impact of the decision, then, will be revealed in the policy considerations evoked by courts in future originality cases, and the extent to which the stated policies do in fact inform the application of the standard.

I am hopeful that the concept of balance between authors' reward and public interest, as propounded in *Théberge* and developed in *CCH*, will provide a revitalizing framework for assessing current controversies in the originality debate. Thus, for example, in the policy dilemma surrounding database protection (a controversy that will undoubtedly be reignited in the wake of this ruling), a concern for the public interest will ensure appreciation of the need for the dissemination of information and the freedom to build upon it. The unavoidable question of whether databases should receive protection, and if so to what extent, must therefore be answered in the context of the various policy considerations at stake, and not simply against the backdrop of a desire or perceived need to reward the labour, time or investment of a compiler/author or to prevent its "misappropriation."<sup>48</sup>

However, it is important to stress that the real implications of this development in the originality context have yet to be seen. The subject matter at issue in the *CCH* case does not present the degree of controversy that will inevitably be encountered elsewhere. For one thing, most people will likely agree that a "minimal degree of creativity test" should have been capable of attributing originality and extending protection to the works at issue in *CCH*. The larger point, however, is that the works at issue in *CCH* were not of the type involved in the *Feist*, *Tele-Direct*, or the Australian *Telstra*<sup>49</sup> decisions. It will be interesting to see what happens to the balance sought by the *CCH* originality

47. David Vaver, *supra* note 1 at p. 145, has noticed that agreement about the appropriate copyrightability standard does not lead to consistent results, whether across courts or across different categories of work: "In practice, the theory of homogeneity breaks down, if only because the question of how rigorously to test compilations for originality is itself a source of continuing disagreement within the United States itself. The same work might be protected in one circuit but denied protection in another."

48. For an interesting discussion of the database dilemma in the Canadian context, see David Freedman, "Revising Canadian Database Protection: What Lessons from Europe?" (2002) 82 Canadian Bar Review 253. Freedman argues, at p. 578, that copyright doctrine in Canada "reveals an uncertain and inconsistent level of protection of databases through artificial construction of the core question of originality, made worse at times by a liberal sprinkling of legal fictions," and further, that "the present proprietary models do not adequately speak to either the economic justification for protection of databases as copyrightable works, nor do they provide an adequate structure to balance competing interests in respect of such works."

49. *Desktop Marketing Systems Pty Ltd v. Telstra Corporation Ltd.*, 2002 FCAFC 112, <<http://www.austlii.edu.au/au/cases/cth/FCAFC/2002/112.html>>, 119 F.C.R. 491, 192 A.L.R. 433 [Desktop cited to AustLII]. The Australian Federal Court of Appeal in this decision held that copyright subsisted in the White Pages and Yellow Pages telephone directories at issue. *Per* Sackville JA at paras. 438-439: "The listing information incorporated in Telstra's directories satisfies the requirement of originality because of the labour and expense involved in the compilation. The originality of the compilation for copyright purposes does not lie in the prosaic method of presentation of the data.... Once it is accepted that the originality in Telstra's compilations lies in the labour and expense involved in compiling the information, the primary Judge was right to conclude that Desktop had taken a substantial part of each of Telstra's copyright works. It is not to the point that Desktop may not have adopted Telstra's mode of presentation of the data." Arguments based upon *Feist* were refused on the basis that the US Supreme Court's definition of originality was informed by the particularities of the US law and not least, by the "purposive element" in the US Constitution (see paras. 421-422). Leave to appeal was refused due to insufficient prospects for success. One might be forgiven for wondering whether the Canadian Supreme Court would have arrived at a similar standard to that adopted in *Telstra* if faced with a similar scenario: one in which a "skill and judgment" test would have denied protection to the product of industrious collection.

standard when a court is faced with allowing the unlicensed extraction of substantial amounts of information for commercial purposes from a garden-variety compilation of data, laboriously collected. Such a scenario will present the real challenge involved in striking the balance between rewarding author-compilers and disseminating information for the public interest.

### 5.2. *The Purposes of Copyright: Regarding the Concept of "Balance"*

With two goals to further in the pursuit of copyright's purposes, one must wonder whether, at a certain point, a choice will have to be made. Historically, when faced with such choices, Canadian courts have erred in favour of protecting authors' rights.<sup>50</sup> Admittedly, now that the Supreme Court has accepted the concept of "users' rights",<sup>51</sup> the claim to an author's "right" might not be as conclusory as it has been in the past. The debate can potentially be re-conceived in terms of a "clash of rights," rather than the traditional "right as trump." However, the question must still be asked: which right will prevail when the balance (or the illusion thereof) can no longer be convincingly maintained?

This question highlights the vulnerability intrinsic to the *Théberge* balancing act, as well as revealing a crucial point of divergence between the reasoning in *Feist* and *CCH*. To reiterate: in *Feist*, the refusal to protect facts in a compilation was not "unfair or unfortunate" for the compiler, but was the very means by which copyright advanced its "primary objective," which was not to reward authors but to promote progress.<sup>52</sup> By way of contrast, in *CCH*, copyright's objective was to promote the encouragement and dissemination of works *and* to obtain a just reward for the creator.<sup>53</sup> Copyright has two goals. While, following the US approach, the author's private rights are ultimately a means to secure a public end, in the Canadian context, the author's rights are at once a means to an end and an end in themselves. Indeed, when the US courts speak of the copyright balance, the nature of that balance differs significantly from the Canadian copyright balance established in *CCH*. The US copyright balance is internal to the public interest: it requires courts to establish whether the public interest in promoting progress of the useful arts has shifted from demanding the recognition of the author's copyright to necessitating its refusal. On one hand, recognition of a copyright interest will presumably incentivize the production of such works to the ultimate benefit of the public. On the other

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50. See e.g. *Robertson*, *supra* note 10 at para. 136: "[T]his assertion...[that a ruling in favour of the plaintiff will result in havoc for researchers deprived of access to historical newspaper texts]...cannot be an answer to an unlawful infringement upon authors' copyrights, if such exists. Arguably, any infringement of copyright might well inure to society's benefit by allowing for the greater dissemination of information and ideas. However, the recognition of copyright mediates between a number of competing individual and societal interests, not the least of which is to afford the protection of the law to authors of original [individual], literary works."

51. *CCH (SCC)*, *supra* note 15 at para. 48.

52. *Feist*, *supra* note 2. Guy Pessach, "The Legacy of Feist Revisited—A Critical Analysis of the Creativity Requirement" (2002) 36 *Israel Law Review* 19 at p. 43, explained the *Feist* standard in light of the "public-oriented justification of copyright in American law": underlying the Court's decision was "the conviction that the requirement of creativity was the correct and desired way to implement copyright's policy of encouragement, and thus achieve the optimal result for promoting the public interest."

53. *CCH (SCC)*, *supra* note 15 at para. 23.

hand, refusing copyright protection will allow the work to be freely accessed and disseminated, thereby also serving the public interest. Within this framework, the question is not how one balances the conflicting interests of the public on one hand and the owner on the other, but how one achieves a balance between protection and the public domain that will serve the interests of society at large.<sup>54</sup> This is in contrast to the balancing act described in *Théberge*, which appears to leave intact the notion of the author's right to reap the rewards of her intellectual effort, with the caveat that these rights will be subject to necessary limitations when balanced against the relevant public interests.<sup>55</sup>

It is worth remembering that the idea of "balancing" competing interests is no more than a metaphor itself, albeit one that is a pervasive and persuasive presence in modern legal discourse.<sup>56</sup> It seems clear that competing interests cannot simply be weighed or balanced in an ideological vacuum: they have no intrinsic weight and there exists no essential scale by which to measure them. Undeniably, "[t]he 'weight' of an interest varies according to the objective in view."<sup>57</sup> Is it enough, then, to say that our objective is to achieve a balance, or does that merely beg the question: a balance by what measure? If the overarching value or ideal that underlies Canadian copyright law and by which the balance is gauged remains the protection and promotion of authors' rights to a "just reward," then less weight will be attributed to the public interest in the access and dissemination of intellectual products than to the owners' rights in the copyright balance. As David Freedman has observed, "the balancing exercise is unhelpfully complicated by the automatic entitlements that flow necessarily from a proprietary approach."<sup>58</sup>

With the natural rights theory of copyright law escaping any serious critique, we may therefore ask whether the Canadian balancing approach is truly equipped to generate the kind of outcome reached in *Feist*, where the existence of a copyright interest was dependent upon, and so made subject to, the requirements of progress for the benefit of the public. McLachlin CJ appeared to be satisfied that the exclusory application of a higher threshold for originality, established in the name of the public interest, could be consistent with a natural

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54. Jeremy Waldron has explained this nicely: "The point is not merely that the individual rights of authors must be balanced against the social good. The Constitution stipulates that authors' rights are created to serve the social good, so any balancing must be done *within* the overall context of the public good, i.e., between the specific aspect of the public good that is served by intellectual property ('the Progress of Science and useful Arts') and other aspects of the public good such as the progressive effects of the free circulation of ideas." Jeremy Waldron, "From Authors to Copiers: Individual Rights and Social Values in Intellectual Property" (1993) 68 *Chicago-Kent Law Review* 841 at pp. 848-849 (emphasis in original).
55. I have argued elsewhere that the *Théberge* decision, while acknowledging the relevance of public interest concerns, does not depart in any meaningful way from the assumption that copyright is a means of protecting an author's natural right in the product of their intellectual labour. See Carys Craig, "Labour and Limiting the Author's Right: A Warning against a Lockean Approach to Copyright Law" (2002) 28 *Queen's Law Journal* 1 at notes 60-63 and accompanying text.
56. For an interesting discussion of the copyright balance as metaphor, see Alan Story, "Burn Berne: Why the Leading International Copyright Convention Must Be Repealed" (2003) 40 *Houston Law Review* 763 at pp. 785-793.
57. R.W.M. Dias, "The Value of a Value-Study of Law" (1965) 28 *Modern Law Review* 397 at p. 400 cited in *ibid.* at p. 793.
58. Freedman, *supra* note 48 at p. 576, goes on to quote Harvey S. Perleman, "Taking the Protection-Access Tradeoff Seriously" (2000) 53 *Vanderbilt Law Review* 1831 at p. 1834: "In the contest between property rights and access rights, property rights have the home field advantage. The incentives created by property rights are clear and the rhetoric is powerful."

rights-based copyright theory.<sup>59</sup> Whether this can play out in practice, however, remains to be seen. Undoubtedly, Canada's approach to the database protection controversy is one area in which the inevitable tension between copyright's "dual goals" will manifest itself, requiring a resolution. The nature of that resolution will be determined by the weight attributed to each goal in the balance; the weight of these goals will be determined by the theoretical or justificatory principles that guide the balancer.

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## 6. CONCLUSION

### 6.1. *The More Things Change, the More they Remain the Same: Parallels Between Walter v. Lane and CCH*

THE VARIOUS LINES OF REASONING about originality in the *CCH* case not only encapsulate the dynamics that have shaped Canadian originality jurisprudence, but also reflect the tensions that have subsisted in the originality doctrine throughout its history. In the classic originality case of *Walter v. Lane*,<sup>60</sup> the judgments of the five Lords seemed to reveal three divergent theoretical approaches underlying the determination of originality in the verbatim report of a public speech: an authorship model, a labour model and a public interest model.<sup>61</sup> Arguably, these different paradigms mirror in large part the conflicting approaches that we have seen in the Canadian cases, and in *CCH* in particular.

In *Walter*, Lord Robertson decided that the plaintiff's work was not original on the basis of the meaning attributed to the term "author."<sup>62</sup> The same concern for defining "authorship" informed the reasoning of Lord James, although it led to the opposite conclusion.<sup>63</sup> Arguably, a parallel can be drawn between this 'authorship model' and the reasoning employed by the *Tele-Direct* court and the Trial Division in the *CCH* case, where the meaning of originality was

59. See *CCH (SCC)*, *supra* note 15 at para. 15. McLachlin CJC observed that the "sweat of the brow" approach to originality was "premised on a natural rights or Lockean theory of 'just deserts'." She went on to suggest that a *Feist*-like creativity approach was "also consistent with a natural rights theory of property law; however it is less absolute."

60. *Supra* note 10. The work at issue in the case was a stenographer's report of a public speech delivered by Lord Rosebery. The House of Lords ruled, 4-1, that copyright could subsist in the verbatim report, and that the reporter was the author of the report for the purposes of copyright law.

61. I am grateful to Abraham Drassinower for this insight into the *Walter* decision. For an excellent discussion of *Walter v. Lane* as an instance of the struggle between misappropriation and authorship, see Abraham Drassinower, "Sweat of the Brow, Creativity, and Authorship: On Originality in Canadian Copyright Law" (2003-2004) 1 University of Ottawa Law & Technology Journal 105, <[www.uoltj.ca/articles/vol1.1-2/2003-2004.1.1-2.uoltj.Drassinower.105-123.pdf](http://www.uoltj.ca/articles/vol1.1-2/2003-2004.1.1-2.uoltj.Drassinower.105-123.pdf)> at pp. 112-116.

62. *Supra* note 10 at p. 562: "The word 'author'...seems to me to present a criterion consistent with the widest application of the Act to all who can claim as *embodying their own thought*, whether humble or lofty, the letterpress of which they assert the authorship." [Emphasis added] On this basis, to award copyright to the stenographer would be "to confer on the stenographer a reward which has no relation whatever to his art."

63. *Ibid.* at p. 553: "[T]he report of the speech is something different from and beyond the speech, and the question to be solved is whether this difference represents a something of which any one can be regarded as 'the author' within the meaning of the Copyright Act." Lord James concluded, somewhat surprisingly, at p. 555: "[A] reporter of a speech under the conditions existing in this case is the meritorious producer of the something necessary to constitute him an 'author' within the meaning of the Copyright Act."

derived from the demands of genuine authorship. In contrast, the Earl of Halsbury chose to avoid using the word “author” to describe the producer of the work in light of the “confusion” it would cause.<sup>64</sup> He spoke instead of the need to prevent one man from appropriating and profiting from another’s labour.<sup>65</sup> The industriousness standard for originality espoused by Lord Davey was similarly underpinned by the desire to ensure that the plaintiff was permitted to reap what he had sown.<sup>66</sup> Here, a parallel can be drawn between the approach of Lords Halsbury and Davey and the minimalist standard arrived at by the Federal Court of Appeal in *CCH* and other Canadian “sweat of the brow” cases, which looked for deserving effort and not meritorious authorship as the basis for protection.<sup>67</sup>

Taking a third tact, Lord Brampton in *Walter v. Lane* appeared to lend some credence to authorship and labour considerations, but ultimately arrived at the conclusion that the work was original by making reference to the public interest at stake. It would appear from Lord Brampton’s line of reasoning that he found the work to be original because the report furthered access to, and dissemination of, the speech. In other words, recognizing the public benefits of having reporters take down truthful records of public speeches meant awarding copyright protection to the writers engaged in this worthwhile activity.<sup>68</sup> Lord Brampton’s approach to the originality question can be roughly aligned with the Supreme Court’s ruling in *CCH*: the title of “author” and the label “original” are to be attributed not simply on the basis of an assessment of the processes of production—the degree of authorship or effort displayed—but flow at least in

64. *Ibid.* at p. 547: “[T]he judgement of the Court of Appeal [denying copyright] rests solely on the use of the word ‘author’, and I cannot help thinking that some confusion has been created between two very different things: one, the proprietary right of every man in his own literary composition; and the other the copyright, that is to say, the exclusive privilege of making copies created by statute. ...The question here is solely whether this book...can be copied by some one else than the producers of it (I avoid the use of the word ‘author’)....”
65. *Ibid.* at p. 545: “I should very much regret it if I were compelled to come to the conclusion that the state of the law permitted one man to make profit and to appropriate to himself the labour, skill, and capital of another. And it is not denied that in this case the defendant seeks to appropriate to himself what has been produced by the skill, labour and capital of others. In the view I take of this case I think the law is strong enough to restrain what to my mind would be a grievous injustice.”
66. *Ibid.* at p. 552: “[I]t is a sound principle that a man shall not avail himself of another’s skill, labour and expense by copying the written product thereof. To quote the language of North J. in another case: ‘For the purposes of their own profit they desire to reap where they have not sown, and to take advantage of the labour and expenditure of the plaintiffs in procuring news for the purpose of saving labour and expense to themselves.’”
67. Perhaps most notable is the case of *British Columbia Jockey Club v. Standen* (1985), 22 D.L.R. (4<sup>th</sup>) 467, 8 C.P.R. (3d) 283, (BC CA) [Standen cited to C.P.R.], in which the use of horse-racing information from the plaintiff’s work, albeit presented in a different form, amounted to copyright infringement. The B.C. Court of Appeal approved the Trial Judge’s reliance upon an authority to the effect that: “The true principle in all these [compilation] cases is that the defendant is not at liberty to use or avail himself of the labour which the plaintiff has been at for the purpose of producing his work; that is, in fact, merely to take away the result of another man’s labour or, in other words, his property.” *Ibid.* at p. 470 citing Hugh Laddie, Peter Prescott & Mary Vitoria, *The Modern Law of Copyright* (London: Butterworths, 1980) at para. 2.65, citing *Hogg v. Scott* (1874), Eq. 444 at p. 485.
68. *Walter v. Lane*, *supra* note 10 at p. 559: “Without [the reporter’s] brain and handiwork the book would never have had existence, and the words of Lord Rosebery would have remained unrecorded save in the memories of the comparatively few who were present on those occasions... [B]y [the publication of the report] in *The Times* the thousands of the readers of that journal might be truthfully and accurately informed of those intellectual and interesting utterances of Lord Rosebery which they had not been privileged to hear. I think, for the reasons I have given, that the proprietors of *The Times* have copyright in the article and reports in question.”

part from consideration of the public interest served by protecting the work.<sup>69</sup>

However, Lord Brampton's approach to originality in *Walter* also highlights the central conundrum of a public interest analysis in copyright law: while protecting the work might have encouraged the accurate recording of important speeches in the interest of the public, refusing protection would have further increased dissemination by allowing publication of the reported speech in the defendant's book.<sup>70</sup> Lord Brampton did not address this second component of the public interest. This additional, neglected consideration demonstrates the need for the balancing act that I have described as "internal" to the public interest. If we are going to do justice to the idea of public interest that has at last been introduced into Canada's originality jurisprudence, we must be willing to challenge the traditional assumption of the Canadian courts that awarding protection ultimately, if indirectly, furthers the public interest. Taking the public interest seriously means acknowledging that there will be occasions when protecting the socially useful results of an individual's effort, intellectual or otherwise, does not serve the interests of the public, and that on such occasions copyright protection should be denied. The Supreme Court's ruling in *CCH* represents an important step in this direction, and it is critical that Canadian courts follow suit by giving due weight and consideration to the public side of the copyright equation.

## 6.2. Summary—The Purposes of Copyright and the Evolution of Originality

The development of Canada's originality standard over the past few years has unfolded against a shifting theoretical background. While, in the foreground, controversy has focused on the creativity and industriousness debate, copyright theory and policy in Canada has also undergone significant development. The interest that the public has in the protection of copyright—in who and what is protected and how much—has been recognized not simply as a secondary and incidental benefit potentially derivable from the enforcement of authors' rights, but as a primary goal of the copyright system.

Until the Supreme Court of Canada's ruling in *CCH*, originality determinations in Canada were overwhelmingly concerned with how to understand, identify and protect authors' rights. The conflict between the creativity standard and the "sweat of the brow" standard was fought on the basis of differing conceptions of the author's entitlement; in particular, the outcome depended upon whether a court favoured a personality-based or a labour-based

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69. Compare Drassinower, *supra* note 61. According to Drassinower, *ibid.* at p. 123, the Supreme Court's ruling in *CCH* is "best grasped as a vindication of Lord Robertson's authorship standpoint." In my opinion, this reading of the "skill and judgment" standard understates the importance accorded in *CCH* to the public interest as a factor capable of limiting copyrightability and restricting the scope of the author's entitlement. Among the five judgments in *Walter v. Lane*, only Lord Brampton's ruling is capable of capturing this crucial aspect of the Supreme Court's originality standard.

70. This is especially compelling when one recalls that both the reporter and "The Times" already have a commercial incentive to accurately report the speech to the public: the reporter, because he is paid by "The Times" to do so, and "The Times" because its success as a daily newspaper depends upon its ability to provide such reports. Any need for an incentive created through the vehicle of copyright law can be more convincingly identified in relation to the defendant in the case: the party who would compile a book of Lord Rosebery's "Appreciations and Addresses" and make the complete collection available to the public in a detailed and accessible form.

understanding of authors' rights. Notwithstanding the possible limitations or weaknesses inherent in the *Théberge* balancing act, the Supreme Court's ruling in *CCH* has situated the debate about the meaning of originality squarely within the newly acknowledged public policy purposes of the copyright system. As such, the appropriate originality threshold is to be determined not only with the author's interests in mind, but also taking into account the public interest that is at stake when exclusive rights are granted over intellectual works. This approach offers a new and substantially more nuanced framework within which to develop copyright policy, beginning with questions about the kind of subject matter that copyright will protect and, of course, the suitable limits of that protection.