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Copyright in Legal Documents

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Copyright in Legal Documents

Abstract

Original legal documents and forms have long enjoyed copyright protection. After looking at Commonwealth and U.S. decisions, the author discusses the nature, extent, and desirability of protection. An examination of the technicalities of copyright protection reveals a law drafted in broad generalities and ill-suited to respond adequately to the common practices arising from this class and, by implication, other classes of creative work. The author concludes by suggesting practical ways in which legislators, lawyers, and judges can solve some of the copyright problems generated through the use of legal documents.

Keywords

Legal instruments; Legal documents; Copyright

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COPYRIGHT IN LEGAL DOCUMENTS[®]

BY DAVID VAVER*

Original legal documents and forms have long enjoyed copyright protection. After looking at Commonwealth and U.S. decisions, the author discusses the nature, extent, and desirability of protection. An examination of the technicalities of copyright protection reveals a law drafted in broad generalities and ill-suited to respond adequately to the common practices arising from this class and, by implication, other classes of creative work. The author concludes by suggesting practical ways in which legislators, lawyers, and judges can solve some of the copyright problems generated through the use of legal documents.

[Take the] case of a client who goes to his solicitor to draw a will, assuming that the instructions do not exclude the will when drawn from being an original literary work, is it to be said that the solicitor thereby has a copyright in another man's will during his lifetime and is entitled to the rights which the statute gives to the owner of a copyright? The whole idea seems to me absolutely absurd.¹

—Mr. Justice Astbury

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¹ *Harrold Drabble, Ltd. v. Hycolite Manufacturing Co.* (1928), [1923-1928] MacGillivray's Copyright Cases 322 at 332 (Ch.D.).

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I. INTRODUCTION

In the course of their daily business, lawyers routinely produce a variety of documents—contracts, deeds, wills, court papers—which create, regulate, protect, or initiate legal relationships or commercial transactions. Lay and professional people also produce such documents, which may later be redrafted, edited, or vetted by lawyers.

Many of these documents are not drafted from scratch. Instead, the drafter has a precedent or legal form upon which the writing is based. This is even more common today with the widespread use of do-it-yourself legal kits and computerized databases, which make standard forms and clauses available to both lawyers and laypeople.

How the law of copyright touches on these activities is not well understood. Some might be surprised to learn that the legal issues surrounding such a common activity, as the assembly of documents from various sources, is far from clear. The reported litigation from various parts of the Commonwealth and the United States is enough to create anxiety, while leaving many critical issues unsettled. This paper therefore considers some problems involved in granting or denying copyright to legal documents.

II. QUALIFYING FOR COPYRIGHT

Ordinary letters and printed forms, like questionnaires and business blanks, have long been protected by copyright.² There is, apparently, little thought of changing this position. This is not as odd as it at first seems. Copyright was originally conceived or justified as a means to encourage the production and dissemination of literature, but eventually descended into a reductionist and generalizing tendency. Thus, anything written or stabilized in some way is protected, however mundane it may be, whatever its function or its economic or social purpose. What else can an ordinary business letter or memorandum, taking a few minutes to compose; and a computer programme, taking months and millions of dollars to develop, have in common? Yet copyright law treats both indiscriminately as literary works and protects both to the hilt.

In Canada, the most recent blueprint for copyright law reform, *A Charter of Rights for Creators (1985)*,³ endorsed this approach. It recommended, for example, that business forms should continue to be protected as literary works, although Canadian form makers told the parliamentary committee producing this report that the law inhibited their ability to compete in Canada with American form makers. American firms cannot stop their forms from being reproduced in their home country but can stop this activity in Canada.⁴ Canadian policy-makers apparently thought the pristine purity of copyright theory, as they conceived it, should stay untainted by anything as crass as economics. The *North American Free Trade Agreement (NAFTA)* and its implementing legislation changed nothing.⁵ It allowed American form makers to continue to reproduce Canadian forms in the U.S., while preventing Canadians from reproducing American forms in Canada. A trade restriction can slip unnoticed through the free trade cordon so long as it flies the flag of copyright.

² *Church v. Linton* (1894), 2 C.C.L.R. 176 at 179 (Ont. H.C.J.); *Laidlaw v. Lear* (1898), 30 O.R. 26 (Div. Ct.); *British Oxygen Co. v. Liquid Air Ltd.*, [1925] Ch. 383 [hereinafter *British Oxygen*]; *Beloff v. Pressdram Ltd.* (1972), [1973] 1 All E.R. 241 (Ch.); and *Bulman Group Ltd. v. "One Write" Accounting Systems Ltd.* (1982), 62 C.P.R. (2d) 149 (F.C.T.D.).

³ Report of the Subcommittee on the Revision of Copyright, Standing Committee on Communications and Culture (Ottawa: Queen's Printer, 10 October 1985) at 17 [hereinafter *Charter of Rights*].

⁴ See D. Vaver, "Copyright Phase 2: The New Horizon" (1991) 6 I.P.J. 37 at 42-43.

⁵ See the *North American Free Trade Implementation Act*, S.C. 1993, c. 44, effective 1 January 1994 [hereinafter *NAFTA Act*].

If ordinary business forms and letters are protected in Canada, it follows that legal documents also qualify as "literary works." Though not aspiring toward literature, they are writings and therefore "literary;" if "original," they are entitled to copyright.⁶ A Scottish judge of the last century observed, not entirely tongue-in-cheek, that lawyers "esteem such works far above the products of the most brilliant imagination or profound science—finding them, no doubt, greatly more useful."⁷ Still, the sort of protection legal documents deserve should, as is indicated below, differ from that extended to works of literature and learning.

Legal documents may also fall into other copyright classifications. A legal document consisting mainly of provisions found in earlier documents may qualify as a "compilation." The compilation will be classified as a literary work.⁸ A document may form part of a larger document, for example, a quotation, order, or application form, or a collection of forms, in which case, it will come under the umbrella of whatever copyright protection the larger document has.

The extent of protection may depend on the classification. For example, a compilation of out-of-copyright documents may be protected by copyright if skill and judgment were required to produce it, but only the selection, structure, and ordering of the material, rather than the forms themselves, will have copyright. Anybody can take any documents from the compilation, but a rival compilation cannot copy a substantial part of the earlier selection.

The sort of dispute that may arise is easily envisaged. For example, a commercial publisher of legal forms may object to another publisher copying and selling them. The copyright owner of a published book of forms may complain about a rival's copying. A lawyer may wish to stop a form she devised from being used commercially. One would expect these different business situations to receive different legal treatment. This, as we shall see, does not always happen.

A. Authors and Owners

It is always necessary to identify the author of any work for which copyright protection is claimed. The author is a central figure in

⁶ *Copyright Act*, R.S.C. 1985, c. C-42, s. 5(1).

⁷ *Alexander v. Mackenzie* (1847), 9 Sess. Cas. 748 at 754, note 3 (Scot.) [hereinafter *Alexander*].

⁸ *Capital Finance Co. v. Lombank Ltd.*, [1964] R.P.C. 467 at 468-69 (Scot.) [hereinafter *Lombank*]. See also the new definition of "compilation" in ss. 2 and 2.1 of the *Copyright Act*, *supra* note 6, as inserted by the *NAFTA Act*, *supra* note 5.

copyright law. Title or root of title is generally established through her; the duration of copyright is generally the author's life plus 50 years; and the author has certain "moral rights," even where she is not the copyright owner, allowing her to claim a by-line and prevent prejudicial changes to her work. And, for a work to have copyright in Canada, its author must qualify as a Commonwealth national or a national from a state that is a member of the Berne or Universal Copyright Conventions, or the work must be first published in one of these countries.⁹

Identifying authorship is sometimes tricky. In the simplest case, the author of a legal document is its drafter or compiler. Where the work is a book of forms, its author is whoever selects and organizes the forms.

The author is the first copyright owner. The exception is where she produces documents as part of her duties as an employee (for example, an in-house lawyer), in which case the employer is the first owner.¹⁰

A client who hires a lawyer for legal work in the usual way does not own copyright in any legal documents the lawyer produces; the lawyer does. Whether on retainer or hired for a single task, a lawyer does not work for wages or salary and so is not her client's employee.¹¹ She may, of course, specifically agree to transfer her copyright to the client, but an agreement like this is not implied from the fact that she may be paid to produce the document. Otherwise, lawyers could not effectively serve clients because they could not repeat documents or provisions over which former clients held copyrights.

On the other hand, a lawyer unfamiliar with a particular activity may adapt forms provided by the client to the client's particular situation. The client may express preferences but, if the lawyer ultimately chooses the words and takes responsibility for them, she is the sole owner of copyright in the document.¹² The situation differs where a client produces his own wording, and the lawyer gives it automatic approval or makes minor changes. In this instance, the lawyer acquires no interest in the client's copyright. Lengthy or significant changes may, as we shall see shortly, make the lawyer a joint author; but assuming

⁹ *Copyright Act, ibid.*, ss. 5(1), (1.1), and (2), as amended by the *NAFTA Act, ibid.*, s. 57(1). Note that work produced by a non-Berne national (for example, a citizen of the People's Republic of China, before it became a member of the Berne Convention) may be unprotected in Canada.

¹⁰ *Copyright Act, ibid.*, ss. 13(1) and (3).

¹¹ *Arcon Can. Inc. v. Arcobec Aluminium Inc.* (1984), 5 C.I.P.R. 94 at 106-07 (Qué. C.S.).

¹² *Delrina Corp. v. Triolet Systems Inc.* (1993), 47 C.P.R. (3d) 1 at 46-47 (Ont. Ct. Gen. Div.) [hereinafter *Delrina*].

ultimate legal and professional responsibility for wording does not make anyone an author. In copyright law, the status of author is reserved for someone responsible for putting ideas into written form, not someone providing the actual ideas.¹³

B. Joint Productions

Legal documents, produced through the input of two or more people, can create authorship and ownership complexities. For example, in negotiating a contract, A may proffer a ten-clause agreement. B likes it all, except clause ten. He proposes a substitute; A agrees. If clauses one to nine and clause ten all qualify as original, the result is two separate copyrights: one based on A's authorship of clause one through nine, the other on B's authorship of clause ten.¹⁴ The same result follows if, instead of accepting B's proposal outright, A proposes minor changes of expression, to which B agrees.¹⁵ But if A proposes *major* changes of expression—major enough to qualify them independently as an original work—she may then share joint authorship of clause 10 with B.¹⁶

B can claim authorship or joint authorship only if he contributes actual *wording*. Suppose B objects to A's clause ten, giving reasons, and A supplies a substitute clause that overcomes the objection. A, not B, has authored clause ten. "Ideas people" are not authors unless they express their ideas in writing.¹⁷

Matters can become more complicated. For example, negotiators may build up a document by give-and-take. At the end of the day, no one knows who contributed what. Copyright in the

¹³ *Donoghue v. Allied Newspapers Ltd.* (1937), [1938] Ch. 106.

¹⁴ Single words, even neologisms, are treated as the basic building blocks of language and so cannot be the preserve of any one person. But the product of even modest compositional skill can have copyright: witness the six-sentence business letter, containing an offer to sell, protected from reproduction in *British Oxygen*, *supra* note 2.

¹⁵ *FAI Insurances Ltd. v. Advance Bank Australia Ltd.* (1986), 68 Aust. L.R. 133 at 140 (Fed. Ct. of Australia) [hereinafter *FAI Insurances*].

¹⁶ A joint author collaborates in the common design of a work by contributing material that is (a) not distinct from the contribution of the other author(s), and (b) substantial enough on its own to have copyright. See *Copyright Act*, *supra* note 6, s. 2 for the definition of "work of joint authorship;" *Kantel v. Grant*, [1933] Ex. C.R. 84 at 92-94; *Ashmore v. Douglas-Home* (1982), [1987] F.S.R. 553 at 560 (Ch.); and *Ashton-Tate Corp. v. Ross*, 16 U.S.P.Q. 2d 1541 at 1546 and following (9th Cir. 1990).

¹⁷ See note 16.

agreement then is jointly authored and co-owned by the negotiators or their respective employers. In another situation, a client may supply forms to a lawyer to help her produce a document suitable for his needs. A lawyer who then assembles a form from the best clauses she can find, whether in the supplied documents or her own form books, is the author of a fresh compilation. The client who has supplied the raw material does not share in the authorship, any more than a parts supplier owns an interest in an automobile assembled from them.¹⁸

A joint owner of copyright retains considerable power. She may claim an injunction against an infringer without joining her co-owner, and can get damages or an account of profits to the extent of her interest. She can even stop her co-owner from exploiting the work—for example, by including the document in a published book of precedents—without her consent.¹⁹ If she does not have any interest in the copyright (because, for example, her employer owns it), a joint author may still be able to assert her moral rights, such as her right to be identified as joint author where another claims sole credit.²⁰

C. Originality

To be protected, a legal document must be original. If the work is a book of forms, originality may be found in such skill or labour as has gone into selecting and organizing the material.

Commonwealth judges find originality quite easily. In Scotland, for example, a set of forms a lawyer drafted to conform to the requirements of new legislation,²¹ and finance agreements designed to exploit tax loopholes and presumably also drafted by a lawyer,²² have been found original. Elsewhere, courts have denied protection where the material, or its order or design, is simply reproduced from legislation,²³ or where a work is routinely assembled from obvious

¹⁸ *Delrina*, *supra* note 12.

¹⁹ *Massie & Renwick Ltd. v. Underwriters' Survey Bureau, Ltd.*, [1940] S.C.R. 218 at 243; *Prior v. Lansdowne Press Pty Ltd.* (1975), 12 Aust. L.R. 685 at 688 (S.C. of Victoria); and *Cescinsky v. Geo. Routledge & Sons, Ltd.*, [1916] 2 K.B. 325.

²⁰ See text below, accompanying note 31.

²¹ *Alexander*, *supra* note 7.

²² *Lombank*, *supra* note 8 at 469; and *Capital Finance Co. v. Bowmaker (Commercial) Ltd.*, [1964] R.P.C. 463 at 464 (Scot.) [hereinafter *Bowmaker*].

²³ *Alexander*, *supra* note 7 at 755; and *Sampson v. Brokensha & Shaw Ltd.* (1935), 37 W.A.L.R. 90 at 92 (S.C. of W. Aust.).

sources, without any skill or effort. Thus, in Australia, a judge was unwilling to find originality in simple directions on how to use a proxy form, without first hearing evidence on how much of the work was original and "how much was itself taken from other previous versions of similar forms."²⁴

American courts have elaborated this theme. Since the early 1970s, sellers of business forms have been unable to claim copyright for personal property security agreements, receipts, or guarantees, which were compiled using standard lawyers' form books. Whether a lawyer does the drafting,²⁵ or the forms are put to uses a layperson might think novel,²⁶ is irrelevant. The work of drafters or compilers who produce such "unoriginal" work, with "negligible efforts," and as "nothing more than a mosaic of the existing forms, with no original piece added," is free for the taking.²⁷

"Original" forms—the result of original legal research or some non-trivial variant on the past—do, however, have copyright in the U.S., even when produced by non-lawyers. For example, a business college major with a banking background went into the business of selling forms to banks. He worked hard and long to produce a useful bank loan form quite different from past forms. An American judge said he had done enough "original" work to be entitled to a copyright and to stop a rival form seller from duplicating the form.²⁸

Unfortunately, there is no litmus test for originality. Judges continue to call it a question of fact, depending on fact and degree, which tells us almost nothing. American judges have recently demanded some evidence of creativity before finding originality. In practice, this has meant that a telephone directory's white pages have not been protected (too mundane),²⁹ but its yellow pages have (a work of creativity if ever there was).³⁰ Somewhere on the spectrum between white and yellow, originality kicks in. Canadian courts are no more revealing. Presumably, a judge who thinks a work deserves protection

²⁴ *FAI Insurances*, *supra* note 15 at 140-41.

²⁵ *M.M. Business Forms Corp. v. Uarco, Inc.*, 472 F.2d 1137 at 1140 (6th Cir. 1973).

²⁶ *Donald v. Uarco Business Forms*, 478 F.2d 764 at 766 (8th Cir. 1973).

²⁷ *Donald v. Zack Meyer's T.V. Sales & Service*, 426 F.2d 1027 (5th Cir. 1970).

²⁸ *Professional Systems & Supplies Inc. v. Databank Supplies & Equipment Co.*, 202 U.S.P.Q. 693 at 696 (W.D. Okl. 1979).

²⁹ *Feist Publications Inc. v. Rural Telephone Service Co.*, 111 S. Ct. 1282 (1991).

³⁰ *Bellsouth Advertising & Publishing Corp. v. Donnelly Information Publishing Inc.*, 19 U.S.P.Q. 2d 1345 (11th Cir. 1991).

will call it original, and *vice versa*. This folds into the policy question of how much, if any, protection such documents should have. We return to this shortly.

III. MORAL RIGHTS

“Moral rights,” as used in copyright law, describe the rights an author has to control the way in which her work is presented to the public. For example, the author may wish to claim a by-line or preserve the integrity of her work.³¹ These rights, while applying more obviously to fine art and *belles lettres*, may also affect legal documents. A well-drafted legal document obviously follows the canons of good writing, but it is primarily a functional, not an aesthetic, work. The application of moral rights must take this into account.³²

A. Right of Attribution

The author of a legal document may occasionally have the right to claim a by-line for it, for example, where it appears in a compilation she has edited, where it is a blank form the author is selling and her name appears on it as author or copyright owner, or where she is a joint author and someone else is claiming sole credit.

The occasion to claim a by-line elsewhere will be rare. In the case of private documents drafted by a lawyer, the name of the lawyer or her firm that appears on them indicates responsibility for the document, to advise whom to contact if queries arise, and, no doubt, partly as advertising. But it is not there to indicate authorship. This can be seen most clearly where it is the law firm’s name that appears. A firm may own copyright in the document but, except for the rare case where all the partners contributed to the wording of the document, the firm is not the *author*, and only an author can claim a moral right.³³

³¹ *Copyright Act*, *supra* note 6, ss. 14.1, 28.1, and 28.2.

³² *John Maryon International Ltd. v. New Brunswick Telephone Co.* (1982), 141 D.L.R. (3d) 193 at 248-49 (N.B.C.A.).

³³ The moral rights of junior lawyers may not always be respected by the firm that employs them. A senior partner may sometimes take the credit for a junior’s work by suppressing the identity of the true author. The partner would probably claim that the junior has impliedly consented to her attribution right being waived. The quality of this consent is probably the same as that which informs the rest of the junior’s relationship with her firm. If it is any consolation, Lord Kenyon had the same problem 200 years ago when he worked for a senior barrister; see D. Vaver,

B. *Right of Integrity*

Situations in which the author can prevent alterations to the document will be equally rare. Where the document retains the author's by-line, the author can presumably prevent alterations that would prejudice her reputation when seemingly made by her; otherwise people might wrongly think she authored or endorsed the changes. Sometimes a claim for defamation might also be possible.

It is difficult to envisage a successful claim to maintain a document's integrity, where the document does not carry the author's by-line. Legal documents are regularly changed to suit their users' specific needs. The author anticipates, and so impliedly licenses, this.³⁴ The adaptor cannot be expected to consider the author's literary reputation as he makes changes, and in any event it is difficult to see how any changes could reflect on the original author.

IV. INFRINGEMENT

Anyone who copies a copyrighted legal document fully or substantially, or publishes, faxes, or translates an unpublished document, infringes copyright in the document, unless he can justify the act. The main defences or justifications occur where the copier:

- has the copyright owner's express or implicit consent;³⁵
- can rely on a specific exemption, such as fair dealing;³⁶
- wishes to use the idea of the document, but cannot practically avoid taking the expression;³⁷ or
- can show a business or professional custom, or a public policy reason, that allows copying.³⁸

"Authors' Moral Rights—Reform Proposals in Canada: Charter or Barter of Rights for Creators?" (1987) 25 Osgoode Hall L.J. 749 at 764, note 44.

³⁴ Courts in copyright cases use the "implied licence" technique quite frequently when they think that a copyright owner is trying to exercise her rights too extensively. See, for example, *Netupsky v. Dominion Bridge Co.* (1971), [1972] S.C.R. 368 [hereinafter *Netupsky*].

³⁵ *Copyright Act*, *supra* note 6, s. 27(1). On implied licence, see *Netupsky*, *ibid.*

³⁶ *Copyright Act*, *ibid.*, s. 27(2)(a) and (a.1), as inserted by the *NAFTA Act*, *supra* note 5, s. 64(1).

³⁷ Copyright protects only the expression of ideas, and not the ideas themselves. See, for example, *Cuisenaire v. South West Imports Ltd.* (1968), [1969] S.C.R. 208 at 211-12; and *supra* note 13 and accompanying text.

³⁸ For examples, see *infra* note 45.

An infringer does not escape liability by saying he is giving away, not selling, the copies, or by making minor changes to the document. In one extraordinary case in the 1840s, the Scottish Law Society decided that it would recommend some redesigned “styles” (legal forms) needed to cope with new conveyancing legislation for general use. These had been produced by one of its lawyer members, William Alexander, who had compiled them into a book he was selling. Instead of simply recommending Alexander’s book to its members, the society printed a report appending the styles, with minor amendments, to circulate free of charge to its members. Alexander obtained an injunction ordering the society to desist. The society’s defences, that it was not acting for profit and that its styles were different, both failed. One judge said of the second defence:

Any merely colourable changes on the titles of the several styles, or verbal transmutations of no essential importance (made to evade the complainer’s claim), can be of no avail to the respondents [the Society]; such changes as *I, A.B. (name and designation of cedent)*, to *I, A.B., merchant in Edinburgh*; or *the sum of (insert sum)*, to *the sum of L. ___*; or from *(insert date)*, to *___ day of ___*; are too frivolous to be regarded as indicative of any thing but the pretence of change, the substance remaining unaltered.³⁹

Since this decision, it has never been doubted that legal documents deserve copyright protection, at least in some instances.

A. Do Improvements Infringe?

It will not generally matter if the copier has improved the source work; if he has taken a substantial part of it then he may still infringe copyright. In *Alexander*, the point was not directly in issue, because the judges thought the Scottish Law Society had, if anything, made the styles worse.⁴⁰ But two judges dealt in passing with improvements. One analogized from the patent law, where even a patentable improvement to a patented invention may nevertheless still infringe the earlier patent, adding:

if there had been some of these styles which required correction in order to constitute a good body of styles, the respondents [the Society] could have made some compensation to Mr. Alexander for his labour, in so far as they availed themselves of it; or, on the other hand, they should have allowed him to adopt their suggestions.⁴¹

³⁹ *Alexander*, *supra* note 7 at 755, note 3 [some original punctuation omitted, emphasis added].

⁴⁰ *Ibid.*

⁴¹ *Ibid.* at 760.

The other judge said that improvements might give the second work a “new character” and so would not infringe. He analogized from the case of an improved copy of a sea chart⁴² that did not infringe copyright because it was, unlike its mistake-laden source, useful to mariners:

For to what danger of shipwreck, at least to what storms and tempests of litigation, may not parties be subjected in that adventure of their property which they make in transferring or acquiring, or in granting securities over it? If, therefore, great, and material, and essential improvements were to be made in the matter of styles, to avoid risks incident on the use of the original styles, I rather think the party making such improvements would be entitled to use those original styles in preparing his improved styles.⁴³

To update this example, what would happen today if a published book included a form of agreement that inadvertently contravened a statute and which, if used, would result in an unenforceable contract? We would hope that any lawyer noticing the fault should be encouraged to contact the author or publisher so the error could be corrected and users notified. If the action taken is ineffective, what would be wrong in a conscientious lawyer or law society—or any one, for that matter—circulating a corrected version of the form, whether free of charge or for profit? The copyright owner would have only herself to blame for this state of affairs.

Reaching this conclusion in copyright law requires, however, some fancy footwork. Three alternative arguments seem plausible:

- the improving copier does not infringe copyright because, where the original form is worse than valueless, the copier does not take a qualitatively substantial part of the form book.⁴⁴
- it is against public policy for an infringement suit to succeed. The claimant’s inaction harms the public and the copier has, from moral necessity, rectified the copyright owner’s failure.⁴⁵

⁴² *Sayre v. Moore* (1785), 1 East. 361n (K.B.).

⁴³ *Alexander*, *supra* note 7 at 761. Whether a court would be as tolerant towards the “copying-but-improving” cartographer today is less certain.

⁴⁴ *Copyright Act*, *supra* note 6, s. 3(1) provides that copyright is infringed only where the whole work or “a substantial part” of it is taken. What is substantial depends on the quality, more than the quantity, of what is taken. Courts may factor in their view of the desirability of the parties’ conduct in deciding whether a taking is “substantial.” On some of the relevant factors in deciding what is substantial, see D. Vaver, “Dramatic and Musical Reproductions and Performances: Copyright and Performers’ Rights and Their Implications for Educators” (1991) 6 I.P.J. 239 at 251-53.

⁴⁵ A public policy defence, borrowed from British practice, is available in copyright infringement cases. See, for example, *R. v. James Lorimer & Co.* (1984), 77 C.P.R. (2d) 262 at 273 (Fed. C.A.); *Ontario (A.G.) v. Gowling & Henderson* (1984), 12 D.L.R. (4th) 623 (Ont. H.C.J.); and *British Columbia Jockey Club v. Standen* (1985), 22 D.L.R. (4th) 467 at 472 (B.C.C.A.). However,

- the improver is dealing fairly with the first form for the purposes of criticism.⁴⁶ The improver need not have criticism as his sole purpose, but apparently may not criticize by implication; some express criticism of the first form must be included.⁴⁷ The improver must also mention on the improved form the first form and its author's name.⁴⁸

B. Copyright Owner's Consent

Copyright is obviously not infringed where the copyright owner has expressly consented to the act. *Implied* consent is just as effective;⁴⁹ if the copyright owner can expect reasonable users to do certain things with her work, given its character, she impliedly consents to those uses—unless, of course, she has explicitly forbidden them.

On this theory, a person may copy a blank form bought and used for a specific transaction, if this is necessary to complete the transaction.⁵⁰ Similarly, proxy forms set out in a corporation's constitution can be copied and used by anyone wishing to take part in the corporation's affairs.⁵¹ But this does not mean a copier can legitimately acquire one blank form and then run off copies to use generally as he wishes.

If legal forms appear in a published book, buyers and readers are obviously entitled to read and learn from them. Again, they may copy the whole or part of the form for specific transactions; that is the avowed purpose of the book, unless the copyright owner has made the contrary clear.⁵² Buyers and readers cannot, however, print or publish any form, for use gratis or commercially, unless the copyright owner has allowed them to.⁵³

the contours of this defence are ill-defined.

⁴⁶ *Copyright Act*, *supra* note 6 at s. 27(2)(a), as inserted by the *NAFTA Act*, *supra*, note 5, s. 64(1).

⁴⁷ *Sillitoe v. McGraw-Hill Book Co. (U.K.)*, [1983] F.S.R. 545 (Ch.).

⁴⁸ *Copyright Act*, *supra* note 6, s. 27(2)(a.1), as inserted by the *NAFTA Act*, *supra* note 5, s. 64(1).

⁴⁹ *Netupsky*, *supra* note 34.

⁵⁰ *Real Estate Institute of N.S.W. v. Wood* (1923), 23 S.R. (N.S.W.) 349 at 353-54 (C.J. in Eq.).

⁵¹ *FAI Insurances*, *supra* note 15 at 140-41.

⁵² *American Institute of Architects v. Fenichel*, 41 F.Supp. 146 at 147 (S.D.N.Y. 1941).

⁵³ *Alexander*, *supra* note 7 at 754-55, note 3.

C. *Ideas/Expression*

The idea underlying a legal document is always free for the taking, since copyright law protects only the way in which the idea is expressed. But drafting legal documents is not like writing literature. To express intentions clearly, the drafter will suppress stylistic individualism. She may favour time-worn phrases and terms of art. Once the intention—the idea—of a document is gathered, the drafter may, in practice, utilize a limited range of structures and language in which to express it.

Two drafters working independently will differ in the detail of their expression but, if they are doing their job, their drafts should be similar. Certainly, they should not be as different as, for example, William Shakespeare's and Leonard Bernstein's respective treatments of the idea of star-crossed young lovers trying to persevere in the face of the enmity of their families. The drafter who expresses a business contract in rhyming couplets or observing the dramatic unities is destined for a short career, at least in law.

Some legal forms, therefore, are like the rules in the sweepstake contest discussed in *Morrissey v. Procter & Gamble Co.*,⁵⁴ where the judges denied all copyright protection:

When the copyrightable subject matter is very narrow, so that 'the topic necessarily requires' ... if not only one form of expression, at best only a limited number, to permit copyrighting would mean that a party or parties, by copyrighting a mere handful of forms, could exhaust all possibilities of future use of the substance. In such circumstances it does not seem accurate to say that any particular form of expression comes from the subject matter. However, it is necessary to say that the subject matter would be appropriated by permitting the copyrighting of its expression. We cannot recognize copyright as a game of chess in which the public can be checkmated.⁵⁵

Other forms may have copyright, but the scheme they implement or the style in which they are written (for example, plain language rather than legalese) should be free for the taking. Despite this, pre-trial injunctions were granted in Scotland to stop the copying of one or two provisions in documents drafted to make the financing of purchases attractive by taking advantage of a tax loophole.⁵⁶ The provisions were central to the scheme and so no doubt a substantial part of it. Yet how

⁵⁴ 379 F.2d 675 (1st Cir. 1967).

⁵⁵ *Ibid.* at 678-79, apparently approved in *Les Promotions Atlantiques v. Hardcraft Industries Ltd.* (1987), 17 C.P.R. (3d) 552 at 555-56 (Fed. T.D.), where the court queries the copyrightability of simple instructions on how to operate a carwash brush.

⁵⁶ *Lombank*, *supra* note 8 at 469; *Bowmaker*, *supra* note 22 at 465.

could someone take their idea, which copyright law permits, without “substantially” or “colourably” copying their expression? The copier presumably found some way around this prohibition, perhaps by changing a few words or phrases. But to grant temporary judicial monopolies until competitors rewrite a document not only gives the established firm a competitive advantage, but also misses the point that there are both legal and aesthetic differences between the words of Walter Scott, legal drafter, and those of Walter Scott, author of *Rob Roy*.

V. PUBLIC POLICY

A court occasionally finds a work unoriginal or finds the copier’s acts impliedly licensed by the copyright owner, where the real reason for allowing the copying is that the activity is customary and that it should occur in the public interest, whether or not the copyright owner agrees. Judges are, however, traditionally reluctant to discuss questions of public policy directly; politics are supposedly not their concern. Instead, they act covertly by manipulating concepts that achieve the desired result. Nothing clear or certain emerges from this.

This is apparent in our earlier discussion of originality. As experts in legal documents, judges feel comfortable labelling some legal work as unoriginal, more so than they would in cases involving the arts, where they are not expert. But, even if legal documents are judged differently from works of literature, nobody can tell in advance what quality or quantity of work, skill, judgment, research, or time a judge will demand before calling a document original. Quantitative and qualitative tests for originality are notoriously unpredictable and to avoid them wherever possible is a good idea. As a legal technique, it might be better instead to accept all legal documents a person produces, without slavishly copying a prior form, as original to that person. Judges could then concentrate more on the real questions at stake: not how high the copyright threshold should be, but rather when, by whom, and how far copyright should be asserted. “When” and “by whom” are sometimes easily answerable. Authors and their publishers should not suffer because the work they produce is a book of legal documents. Like copyright owners of other sorts of useful compilations, they make public work that otherwise might not be circulated widely, or at all. Similarly, sellers of blank forms, who invest time and cost in creating their product, also deserve protection from competing copiers who avoid those initial costs. It does not follow from this that lawyers, their clients or businesses generally ought to be allowed to prevent competition from

other lawyers or businesses, by asserting copyright in legal forms. These issues cannot be adequately resolved by relying on courts to manipulate accurately the concepts of originality or implied licence. The issues should be addressed directly.

A. *Lawyers and Copyright*

It is rare for a lawyer to complain that another lawyer has taken her legal form. Speaking of professions generally, a sociologist observes:

[t]he ethics governing colleague relationships demand behavior that is cooperative, equalitarian, and supportive. Members of a profession share technical knowledge with each other. Any advance in theory and practice made by one professional is quickly disseminated to colleagues through the professional associations. *The proprietary and quasi-secretive attitudes toward discovery and invention prevalent in the industrial and commercial world are out of place in the professional.*⁵⁷ [emphasis added]

This is true of lawyers and copyright. From their days as apprentices, lawyers customarily amass their own file of useful forms, usually with their employer's encouragement, copying from the employer's files, or from other documents crossing their desk. These files become part of the stock-in-trade a lawyer takes with her from firm to firm and job to job.⁵⁸ As a matter of professional conduct, no lawyer should normally impede the use another lawyer might wish to make of a document the former has drafted. The second lawyer, if he is doing his job, does not simply copy the form; he decides whether and how far it suits his client's purposes and tailors it accordingly. This involves a separate exercise of professional skill and judgment. To interfere would detract from the profession's obligation to serve the public to the best of its ability.

This is especially so where a particular clause or form has been litigated and received judicial approval. The public interest is disserved if the drafter can use her copyright to force other lawyers to adopt different language and risk a different effect for a legal act. Nor should she be able to sit back and rake in royalties from those who want to use "her" clause or form. The lawyer who drafts the perfect document is merely returning to the profession the result of the accumulated

⁵⁷ R. Greenwood, "Attributes of a Profession" (1957) 2:3 *Social Work* 44-55, reprinted in H.M. Vollmer & D.L. Mills, eds., *Professionalization* (Englewood Cliffs, N.J.: Prentice-Hall, 1966) 10 at 15.

⁵⁸ *Merryweather v. Moore*, [1892] 2 Ch. 518 at 525; and *Lamb v. Evans* (1892), [1893] 1 Ch. 218 at 231.

knowledge and experience it has given her. Logically, this means that a lawyer should be unable to sue another lawyer's client; otherwise, the free use of forms is discouraged and a form of unethical competition for clients is promoted. More broadly, allowing litigation would violate the professional ethic of solidarity, since "professional colleagues must support each other vis-à-vis clientele and community. The professional must refrain from acts which jeopardize the authority of colleagues."⁵⁹

Whether a lawyer should be able to sue anyone at all over a form produced for a particular client is more difficult. A lawyer needs no encouragement from copyright to do the best for her client, nor should she seek adventitious reward from those laws beyond her professional fees. Moreover, from a social perspective, the means by which particular legal ends can be effectively achieved should normally be transparent and available for all to use. To adjust copyright to accommodate these principles, a scheme along the following lines could be devised:

- the lawyer ought probably to have a final say over whether her document should be commercially published or otherwise publicly issued,⁶⁰ but her estate's ability to exercise this right in perpetuity, as the *Copyright Act* permits for other unpublished literary work,⁶¹ seems unjustifiable. The estate might be given a limited time, perhaps five years after the author's death, to decide whether or not to publish. The standard copyright term of fifty years after publication for posthumous works would then apply.⁶² If the estate did not publish within this time, the documents should be free for anyone to publish or should be made available under a compulsory licence.⁶³

⁵⁹ Greenwood, *supra* note 57.

⁶⁰ Documents appearing on public registers are still considered "unpublished" under copyright law, if they are produced only for private clients. Publication means "the issue of copies of the work to the public" or, after 1 January 1994, "making copies of the work available to the public." *Copyright Act*, *supra* note 6, s. 4(1), and as amended by the *NAFTA Act*, *supra* note 5, s. 56.

⁶¹ *Copyright Act*, *ibid.*, s. 7, as amended by the *NAFTA Act*, *ibid.*, s. 58. The estate can always exercise its rights of ownership and privacy over private drafts the lawyer had kept to herself, and so prevent publication by this means. The discussion in the text applies only to documents the lawyer had used professionally.

The *Copyright Act* has some provisions allowing compulsory licensing where the reasonable demands of the Canadian market are not being met, but this applies only to *published* works; see, for example, s. 16(1). A similar provision allowed compulsory licensing for any published works after an author's death (s. 15), but this was repealed by the *NAFTA Act*, s. 61.

⁶² *Copyright Act*, *ibid.*, s. 7, as amended by the *NAFTA Act*, *ibid.*, s. 58.

⁶³ The publisher would need to delete any reference that might identify the lawyer's clients, to avoid infringing their right of privacy; see *Prince Albert v. Strange* (1849), 1 Mac. & G. 25 (Ch.).

- lawyers should be encouraged to publish their forms without fearing another will publish a rival version. Copyright law should protect them in this endeavour.⁶⁴
- a lawyer who does not authorize publication of her forms should, however, be unable to claim copyright against anyone who comes across her document and reproduces, adapts, or uses it in the class of transaction it was designed for.

This last suggestion runs contrary to a relatively recent Australian case.⁶⁵ A lawyer devised a tax avoidance scheme that proved popular with some of his clients. To this end, he drafted a trust deed and a set of company articles of association. A seller of life insurance came and asked him for a copy of the documents. The lawyer gave him a copy and some general advice about tax avoidance schemes. When the seller reproduced the documents for his own clients, the lawyer claimed the seller was both using secret information the lawyer had given him and infringing the lawyer's copyright. The first claim failed because the information in the deed and articles was not secret. Legal documents generally become public knowledge because, even when they are not filed in public registries, clients may disclose them as they choose. Similarly, documents may also fall into the hands of other lawyers and their clients in non-confidential circumstances. The claim for copyright infringement, however, succeeded and the seller was enjoined from further using the forms.

It seems odd that a seller of investments needs the consent of a lawyer to use publicly known or available documents for which the lawyer has already received payment from his clients. It seems even odder that the lawyer could charge whatever royalty he liked or refuse consent outright. If he refused, then the seller would have to take advice from another lawyer. If the discussion earlier in this section is accepted, the second lawyer could reproduce the form. The Australian court's decision can then be seen as a sympathetic attempt to shore up the legal profession's monopoly over drafting legal documents. If, contrary to the theory suggested, the second lawyer must, under copyright law, express the second document differently, although to the same effect, needless diversity is encouraged where standardization seems particularly beneficial.

⁶⁴ *Alexander*, *supra* note 7 at 754-55, note 3.

⁶⁵ *O'Brien v. Komesaroff* (1982), 41 Aust. L.R. 255 (Aust. H.C.).

B. *Litigation Between Competitors*

The motive for some copyright infringement litigation dealing with legal documents has been to slow down or foil the entry of a competitor into a market, where the new entrant has copied a legal document important to successful competition. Judges trying these cases have not always been careful in preventing copyright law from becoming a weapon of harassment or restraint of trade.⁶⁶

Should any producer of a legal document be able to prevent it from being copied by a rival where the producer is not selling the form itself, but is simply using it to garb a product both want to sell? If the document is drafted by a lawyer, whether independent or in-house, then the lawyer should not be able to claim copyright for the reasons mentioned in the previous section. Why should the claim of the client (after getting an assignment of copyright from the lawyer) or of the employer be better than the author's? The business itself may be, or claim to be, a profession—as is common where financial services are offered—in which case, the arguments on professional conduct made in relation to lawyers apply equally. They do not directly apply to non-professional businesses where employees, who are not lawyers, draft the documents.

The closest this point has come to judicial consideration occurred in the U.S. case of *Merritt Forbes & Co. v. Newman Investment Securities Inc.*⁶⁷ A bond-seller claimed it could prevent others from copying a type of bond it had devised. At first instance, the judge refused to strike out defences based on standardization and an industry practice of pooling knowledge. This seems a good move. Financial innovation needs no stimulus from copyright, nor should copyright hinder competition in financial markets, especially since everyone is free to copy the idea behind a new instrument. Such markets benefit from standardization; forcing competitors to “draft around” creates needless deadweight costs and uncertainties. The practical conclusion is that judges should not readily grant pre-trial injunctions in these cases; and, if the cases come to trial, they should take especial care not to let copyright unduly distort market competition.

⁶⁶ See for example, *Lombank*, *supra* note 8 at 469; and *Bowmaker*, *supra* note 22 at 465.

⁶⁷ 604 E.Supp. 943 at 949-52 (S.D.N.Y. 1985).

VI. REMEDIES

Remedies for copyright infringement can be as severe as, or even more severe than, the remedies available for infringing any property right: damages, accounts of profits, injunctions, and remedies for conversion or detinue in respect of infringing copies.⁶⁸ The preceding discussion suggests that courts should be most circumspect in the remedies they award when copyright is asserted in legal documents. Copyright protection here is often adventitious and its implications are largely unexplored. In particular, pre-trial injunctions should be granted only if people are not discouraged from copying the scheme or ideas of the document. The more succinctly a scheme is expressed, the more likely an injunction will create a monopoly in the scheme itself; and temporary monopoly is still monopoly. Scottish courts overlooked this, as already noted, in enjoining the copying of a clause or two in some financing documents.⁶⁹ An Australian court did somewhat better in denying pre-trial relief to one faction in a proxy fight against another faction that had copied proxy directions in which the first claimed copyright. The judge thought the copyright case was weak; the words copied were "very ordinary words indeed," there was "no great number of other ways in which to convey the same information," and the second drafter had saved only "a slight amount of thought and trouble."⁷⁰ Even if there had been a strong copyright claim, a proxy fight surely should not be halted for that, any more than a general election should be invalidated because the votes were cast on ballots that infringed somebody's copyright.⁷¹

Final relief, too, needs careful attention. An English cooperative society was granted a declaration that an Irish society had infringed copyright by copying its by-laws from the claimant, but the court refused an injunction because the copier's operation would be brought to a grinding halt. There is, however, a suggestion that an injunction might have been issued requiring the society's board or members to change the

⁶⁸ *Copyright Act*, *supra* note 6, ss. 34, 35, and 38, as amended by the *NAFTA Act*, *supra* note 5.

⁶⁹ *Lombank*, *supra* note 8; *Bowmaker*, *supra* note 22.

⁷⁰ *FAI Insurances*, *supra* note 15 at 141.

⁷¹ A voting paper can be protected by copyright; see *Kenrick & Co. v. Lawrence & Co.* (1890), 25 Q.B.D. 99. The judge was, however, careful to limit the scope of protection so as not to impair the constitutional right to vote.

rules, had they been parties to the litigation.⁷² The English society was, however, in the business of licensing its rules for use by other societies, so an order that the copier pay damages equal to the normal licence fee, in addition to the costs of the litigation the court had ordered the copier to pay, would have done justice.

VII. CONCLUSION

To decide whether legal documents should have some form of copyright protection is no easy task. We *can* say the current position, where *all* these documents apparently have copyright protection like any other literary work, is unsatisfactory. It has created a situation in which nobody can really say how the law applies to activities that occur routinely. In the end, the activity may be found legitimate, but to do so requires some tricky manoeuvring to bend the rigid structures of copyright law to achieve sensible results.

A. Amending the Law

One solution is to give legal documents no protection at all. A simple amendment to the *Copyright Act* could achieve that. This is, however, unlikely to occur. The Canadian policy-makers who said that business forms should be protected in Canada, although they lack protection in the U.S.,⁷³ presumably would not be willing to distinguish between what are, to them, very similar literary works.

A better solution may be to accept that *some* legal documents need protection in *some* circumstances. For example, copyright policy could fairly offer protection where, without it, producers would decline to produce documents at all, would produce lower quality or fewer documents than was socially desirable, or would take costly steps to prevent copying. Some of these circumstances have been suggested above but, for policy-making purposes, the circumstances should first be established through an examination of existing practices. The situations in which protection was thought necessary would be identified, and the appropriate level of protection to make up for the shortfall would then be extended.

⁷² *Co-operative Union, Ltd. v. Kilmore, Aughrim & Killucan Dairy Society Ltd.* (1912), 47 Ir. L.T.R. 7 at 8-9 (Ch. D.).

⁷³ *Charter of Rights*, *supra* note 3 at 17.

Before the Anglo-American and Canadian copyright reforms of the early twentieth century and onwards, copyright law tended to deal with isolated instances. In Britain, books, fine art, music, drama, and even lectures had their own copyright statutes, tailoring protection closely to the exigencies of the subject-matter. The search for rationality, tidiness, and consistency typical of the mid-Victorian era, created a late nineteenth century movement towards generalization and reductionism: all creative work should be treated identically. "To each cow its calf" was the catch-phrase, and the many claimants clamouring for protection avoided examining too closely whether the animal was really bovine or an entirely different beast.

In truth, the incrementalism of the eighteenth and early nineteenth century statutes, which extended copyright step-by-step to particular subject-matters as each case was made, contained within it much wisdom. The process recognized that there might be as many laws of copyright as there were subject-matters deserving protection. Uniformity was necessary only when proponents could establish that a particular subject-matter shared another's creative process, and also that protection would achieve similar desirable social and economic ends. The idea that some creative work needed no protection, because it would occur anyway, was not then as heretical as copyright campaigners would make it seem today. It is now easier to claim that anything that might be of some use to somebody is potentially valuable and should be turned into a commodity; and if commodified, it almost goes without saying that it should be protected.

Perhaps it is time to return to an earlier mindset when dealing with the question of how far copyright law should protect legal documents. One could start by presuming that the work should have no protection. A solid factual case would then be needed before protection was extended to the work. One should keep an open mind on the type and duration of protection, and what other infringing activities should be permitted. If this approach is thought too radical, one might start with the opposite presumption: the work should be protected like any other work, and a solid factual case would need to be made for diminishing or modifying protection where desirable. But this second approach should not be simply a way of returning to the *status quo ante*. Once situations justifying copying are identified, an exemption should be enacted and its operation monitored to see whether it should be broadened or widened. Either approach would deal more effectively with the question of how far copyright law should protect legal documents than the current process of extending protection to works by simplistic analogy, making a

legal document like a memorandum like a business form like a computer program.⁷⁴

B. Guidelines

What should lawyers and judges do pending statutory reform? The following guidelines, though they may not attract universal support, at least seem consistent with copyright law and policy, as well as broader public interests:

- lawyers or their clients should generally be unable to resort to copyright law to prevent the use of documents drafted as part of the ordinary duties a lawyer performs for her client. Professional pride, codes of ethics, and legal standards of care, confidentiality and fiduciary obligation influence the level of service a lawyer renders much more than copyright law does. Copyright law encourages nothing to be done beyond what these aspects of the client-lawyer relationship already suggest.
- a lawyer should be entitled to claim copyright infringement against the *commercial publication* of her form separately or in a book of precedents, or against its being made available on a public database. Copyright law encourages public dissemination of knowledge, but the drafter ought to be the one to decide whether her document is in a form fit for publication, and should be able to reap the reward of her work. This right should not last forever. After the lawyer's death, her estate should have a reasonable time to decide on publication. If it decides not to publish, then anyone may, while preserving client confidentiality, publish any forms the lawyer had used professionally, either for free or upon paying the estate a reasonable royalty.
- the design of legal forms and compilations for publication are businesses that copyright law can legitimately protect against some types of unfair competition. Persons engaging in these businesses can fairly insist that their competitors put their own money and effort into document and compilation design, and not simply copy substantial parts of their competitors' products.
- in the last two cases, there should be an exception at least where a document is faulty. Pointing out and correcting errors in legal documents should be encouraged in the public interest.

⁷⁴ It would also deal more effectively with the question of how far copyright law ought to protect other types of subject-matter. But that is another story.

Publication of a corrected document should be allowed, as should publication of the faulty document to the extent necessary to point out or correct errors.

- businesses that do not publish or sell legal documents but use them as vehicles for products or services they do sell—for example, financial instruments—should not be able to use the copyright law to prevent competitors from copying the forms. Copyright here provides no additional stimulus to innovation. In practice, too, drafters may have few alternatives available to express the idea underlying a document. Preventing copying may end up by protecting ideas—the function of patent, not copyright, laws—rather than expression. Standardization of these documents may also be a benefit: the public can choose between products on their intrinsic merits, and avoid the artificial differentiations, risks, and costs attendant on rewrites.
- judges should avoid spending too much time on the threshold issue of whether or not a particular form or clause is original. Where there is no outright copy of an earlier work, it is better to assume originality and proceed to the question of whether the copying is justified on policy grounds. Experience has shown that focusing on originality diverts attention from the real issues at stake and provides little guidance on how future cases should be resolved.

C. *The Future*

For several reasons Parliament is unlikely to deal soon with the legal documents problem. Copyright reforms are thought to impinge on culture, a minefield in which Canadian legislators have learned to tread warily. Solutions that are compact, politically acceptable, and consistent with Canada's international obligations under the copyright treaties—and now *NAFTA*—are increasingly hard to find. Most legislators would concur with the comment by a British observer: copyright laws are so “mind-bogglingly complicated that they usually last at least a generation because few legislators can bear the experience twice.”⁷⁵ It is therefore tempting to slough off a subject like copyright for legal documents as of interest mainly to lawyers, who therefore

⁷⁵ J. Erlichman, “Lobbyists with Designs on the Complex Art of Copyright” *The Guardian* (25 July 1988) 2.

should be the ones to regulate them through their professional associations.

Law societies would no doubt find it worthwhile to consider the ethics surrounding the copying of legal documents, but as we have seen, the problem is more widespread. In commercial arenas, it will be resolved like other disputes along cost/benefit lines (does the expectation of profit outweigh the risks of legal entanglement?) and ultimately litigation. Judges called on to handle these disputes should recognize that the wording of the *Copyright Act* does not—indeed cannot—solve all such questions. What is needed is a particularistic search for a solution that is tailor-made to the kind of work at issue, that simultaneously encourages the production of creative work and that ensures the public fair access and rights of reasonable use. Following this procedure will adjust rights relating to legal documents—as well as other works—more efficiently than heroic attempts to “interpret” the *Copyright Act*’s opaque language.

