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RESISTING “SWEAT” AND REFUSING *FEIST*: RETHINKING ORIGINALITY AFTER *CCH*

CARYS J. CRAIG[†]

I. INTRODUCTION

A. THE ORIGINALITY DOCTRINE IN COPYRIGHT LAW

Copyright law offers protection for original works of artistic, literary, dramatic, or musical expression.¹ Originality is “the foundation stone of copyright”² and the defining characteristic of copyrightable expression. Like many aspects of intellectual property law, it is easy to state the basic need for originality, but it is far harder to ascertain what this means. How should originality be understood?

It is trite to say that absolute originality is impossible: We are always already part of that which surrounds us and preceded us. Even in our so-called “creativity”, we all stand on the proverbial shoulders of giants. The search for the meaning of originality may therefore appear wholly abstract—of interest to artists, philosophers, and critics, but beyond the practical concerns of the law. However, the copyright system requires consideration of the creative processes that it aims to encourage, and the way that we

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¹ *Copyright Act*, R.S.C. 1985, c. C-42, s. 5(1) states: “Subject to this Act, copyright shall subsist in Canada, for the term hereinafter mentioned, in every *original* literary, dramatic, musical and artistic work” [emphasis added].

² *Robertson v. Thomson Corp.*, 2006 SCC 43 at para. 35, 353 N.R. 104, 217 O.A.C. 332 [*Robertson* (S.C.C.)].

understand these creative processes and their results will determine how copyright functions. If copyright were to require absolute originality, it could function only upon a myth. If copyright were to require originality in the sense of inventiveness or imagination, it would be a very different creature: offering greatly restricted protection, perhaps requiring application and registration, and demanding determinations of prior art and comparisons across works. In short, it would look more like patent law. Copyright that vests automatically upon creation, that requires no registration, and that refuses to discriminate based upon the quality of a work, must ask for something less. But how much less can copyright demand before originality becomes a redundant criterion?

Because originality erects the boundaries of copyright, the demands of the originality doctrine directly affect the kinds of works to which copyright protection may extend. Works that traditionally sit at the core of copyrightable expression—novels, poems, paintings, films, songs, and so forth—are rarely affected by the particular definition of originality: In the absence of copying from a pre-existing work, such expressions will almost invariably meet whatever minimal threshold of creative authorship is required. It is at the margins of copyright that the originality doctrine becomes crucial. Generally speaking, these marginal works are not primarily aesthetic—they do not have creative or artistic expression as their primary purpose—but rather, they are utilitarian in nature, intended primarily to perform a practical or useful function. Common examples in the case law include blank accounting forms,³ competition rules,⁴ betting coupons,⁵ and most famously, telephone directories.⁶ These

³ See e.g. *Baker v. Selden*, 101 U.S. 99 (1880), 25 L. Ed. 841; cf. *Bulman Group Ltd. v. 'One-Write' Accounting Systems Ltd.*, [1982] 2 F.C. 327, 62 C.P.R. (2d) 149 (T.D.).

⁴ See e.g. *Moreau v. St. Vincent*, [1950] Ex. C.R. 198, [1950] 3 D.L.R. 713; *Morrissey v. Procter & Gamble Company*, 379 F.2d 675, 154 U.S.P.Q. (BNA) 193 (1st Cir. 1967).

⁵ See e.g. *Ladbroke (Football) Ltd. v. William Hill (Football) Ltd.*, [1964] 1 All E.R. 465, [1964] 1 W.L.R. 273 (H.L.) [*Ladbroke* cited to All E.R.].

⁶ See e.g. *Feist Publications v. Rural Telephone Service*, 499 U.S. 340, 111 S. Ct. 1282 (10th Cir. 1991) [*Feist* cited to U.S.]; *Tele-Direct (Publications) v. American Business Information* [1998] 2 F.C. 22, 37 B.L.R. (2d) 101 (C.A.)

routine functional works exist at the peripheries of copyright’s protective sphere (in originality’s “penumbra of doubt”), and fit imperfectly within the classical copyright paradigm. Typically, it is not the literary or artistic expression of these works that is of the greatest value to the would-be copyright owner; rather, their value resides in the function that they perform, or the information that they contain. It is no surprise that these are the works over which the boundaries of copyright must be fought out.

The originality debate has evolved around two prominent schools of thought: the “sweat school” and the “creativity school”. According to the “sweat school”, originality requires only the “sweat of one’s brow”. To invest time, labour, or effort into a work’s production entitles one to protection against those who would seek to benefit from one’s pains. Works that are not copied and that involve industry on the part of their creator are entitled to the protections afforded by copyright. In practical terms, this means that copyright is capable of extending to mundane functional works such as garden-variety compilations of information. Contrast this with the “creativity school”, whose adherents advocate the need for genuine authorship as evidenced by a creative spark: a modicum or scintilla of creativity or ingenuity in addition to merely not copying. Depending upon how the creativity standard is formulated and applied, it raises the bar for copyrightability, depriving garden-variety compilations of copyright on the rationale that industry is not the same as authorship.

Simply put, the originality threshold for copyrightability can be raised or lowered to either exclude or embrace the works at copyright’s margins. Whether such works deserve copyright’s protection is ultimately a policy question, the answer to which will largely depend upon the perceived purposes of the copyright system. Far from being a matter of semantics, the formulation of the originality standard thus reverberates with theoretical perspectives, political implications, and practical consequences: The foundations of the copyright interest and its justifications are encapsulated in the standard erected for copyright’s subsistence.

[*Tele-Direct*]; *Desktop Marketing Systems Pty. Ltd. v. Telstra Corp. Ltd.*, [2002] FCAFC 112, 192 A.L.R. 433.

B. *CCH V. LAW SOCIETY OF UPPER CANADA*

In the case of *CCH Canadian Ltd. v. Law Society of Upper Canada*,⁷ the Supreme Court of Canada had an opportunity to weigh in on the meaning of originality in Canadian copyright law. The plaintiffs were legal publishers who sought a declaration of subsistence and ownership of copyright in headnotes, summaries, a topical index, and a compilation of reported judicial decisions.⁸ Released on 4 March 2004, the ruling ostensibly settled the debate that had long been waged in Canada between the “sweat school” and the “creativity school”. The Supreme Court rejected the Court of Appeal’s formulation of originality, which had essentially reduced originality to a synonym for “not copying”.⁹ In doing so, the Supreme Court rejected a standard based upon industry or labour alone.¹⁰ The Supreme Court also rejected the “minimal degree of creativity” test, which had been famously adopted by the United States Supreme Court in the 1991 case *Feist Publications Inc. v. Rural Telephone Service*.¹¹ The appropriate threshold for originality, according to the Supreme Court of Canada, “falls between these two extremes” and requires “an exercise of skill and judgment.”¹²

This article will examine the meaning and significance of the “skill and judgment” test by contrasting it against previous articulations of originality in Canada, and current standards in the United Kingdom and the United States. The premise behind my methodology is that the “skill and judgment” test is best understood in light of what it leaves out—the alternative

⁷ 2004 SCC 13, [2004] 1 S.C.R. 339, 236 D.L.R. (4th) 395 [*CCH (S.C.C.)* cited to S.C.R.].

⁸ *Ibid.* The plaintiff publishers included CCH Canadian Ltd., Thomson Canada Ltd., and Canada Law Book Inc. The publishers were ultimately successful in obtaining the declaration of copyright subsistence and ownership, but nonetheless failed to obtain an injunction against the Great Library, whose activity was found by the Supreme Court to be neither direct infringement (the dealing was fair), nor indirect infringement (there was no implied authorization of infringing activity).

⁹ *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2002 FCA 187, [2002] F.C. 213, 212 D.L.R. (4th) 385 [*CCH (F.C.A.)* cited to F.C.].

¹⁰ *CCH (S.C.C.)*, *supra* note 7 at 351-52.

¹¹ *Feist*, *supra* note 6.

¹² *CCH (S.C.C.)*, *supra* note 7 at 352.

approaches that the Court could easily have adopted, but chose, instead, to reject. I argue that, by avoiding a traditional sweat-based approach and refusing an American *Feist*-like approach, the *CCH* ruling has potentially freed the concept of originality from the kinds of “labour” and “creativity” conceits that have tended to define it. In doing so, it has paved the way for the re-imagination of originality in an instrumental mode: Originality is not the root of the author’s entitlement, but a functional doctrine, the meaning and application of which is guided by the purposes of the copyright system. The *CCH* case has thus provided a much-needed opportunity to develop an originality standard in Canadian copyright law that coheres with the public policy goals that justify the copyright system—an opportunity that we are already in danger of missing.

In Part II, I provide more detail about the *CCH* case and the jurisprudential background against which it emerged. The discussion that follows in Part III considers the significance of the absence of “labour” in the “skill and judgment” standard. In Part IV, I explore the Court’s decision to also exclude “creativity” from the test, with reference to the civilian copyright tradition and the philosophy that underpins it. Part V examines the use of the creativity standard in the United States and its possible impact upon the Canadian position. In Part VI, I conclude that, consistent with the Supreme Court’s reasoning, rights-based originality inquiries into the degree of labour or personality invested in a work ought to be put aside. In their place, the public policy goals of copyright should be allowed to define the scope and limits of copyright protection through the vehicle of originality.

II. SETTING THE SCENE FOR THE SUPREME COURT

A. CONFUSION IN CANADIAN COPYRIGHT JURISPRUDENCE IN THE LEADUP TO *CCH*

In order to appreciate the significance of the Supreme Court’s ruling in *CCH*, it is important to understand the legal context within which the case arose. Each court that considered the case, from the Trial Division to the Supreme Court, relied upon a different definition of the originality threshold to make its

determination. The confusion and inconsistency displayed in these rulings¹³ was merely reflective of the tensions and contradictions that had characterized judicial determinations of originality for many years:

[A]rising in part from the tensions inherent in Canada's bijural tradition and the influence of American law on domestic doctrine, the most recent cases have tended to complicate matters by alternatively pulling towards and pushing away from conceptions of creative authorship in general and specifically in respect of compilations of factual material. In the process, the law has become uncertain both in doctrine and direction.¹⁴

Some courts remained vigorously aligned with the traditional British approach, requiring only that a work be not copied but independently created,¹⁵ while others, also drawing upon U.K. precedent, spoke interchangeably of "skill, judgment, or labour" and "work, taste and discretion".¹⁶ Illuminating the tension in Canada between civil and common law principles, decisions in the Quebec courts spoke of "a certain personal effort" accompanied by "knowledge, skill, time, reflection, judgment and imagination".¹⁷ Others spoke of the importance of demonstrating

¹³ See Part II.B, below.

¹⁴ David Freedman, "Revising Canadian Database Protection: What Lessons From Europe?" 81 Can. Bar Rev. 563 at 593.

¹⁵ See e.g. *British Columbia Jockey Club v. Standen*, 22 D.L.R. (4th) 467 at 471, 8 C.P.R. (3d) 283 (B.C.C.A.) [*B.C. Jockey* cited to D.L.R.], which agreed with the proposition that facts included in a compilation can be the subject of copyright protection "when those facts are novel and are the result of independent research and labour." The most widely cited case employing this "traditional" threshold is *University of London Press Ltd. v. University Tutorial Press Ltd.*, [1916] 2 Ch. 601 at 608-09, 32 T.L.R. 698: "[T]he 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 British approach is discussed in more detail in Part II.B.i, below.

¹⁶ *Slumber-Magic Adjustable Bed Co. Ltd. v. Sleep-King Adjustable Bed Co. Ltd.* (1984), 3 C.P.R. (3d) 81 at para. 17, [1984] 1 W.W.R. 112 (B.C.S.C.), McLachlin J. (as she then was).

¹⁷ *Éditions Hurtubise HMH ltée c. Cégep André-Laurendeau* (1989), 24 C.I.P.R. 248 at para. 55, [1989] R.J.Q. 1003 (C.S.) [translated by author]; approved by Dube J. in *Edutile Inc. v. Automobile Protection Assn.* (1997), 81 C.P.R. (3d) 338, 78 A.C.W.S. (3d) 141 (F.C.T.D.), and Gibson J. in *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2000] 2 F.C. 451, 179 D.L.R.

a "minimum of creativity", while nevertheless classifying as infringement the unauthorized adoption of another's "labour or effort."¹⁸ In 1995, in the *U & R Tax Services* case,¹⁹ the Federal Court asserted "industriousness ('sweat of the brow') as opposed to creativity is enough to give a work sufficient originality to make it copyrightable."²⁰ Justice Richard in this case found that "labour or time expended is sufficient" to attract copyright,²¹ while also citing with approval earlier dictum that a copyrightable work must be the product of "labour *and* skill"²² and pointing to the "skill and judgment" of the author.²³

The Federal Court of Appeal had a chance to add its voice to the discussion two years later, in the controversial case of *Tele-Direct (Publications) Inc. v. American Business Information Inc.*²⁴ The court acknowledged that a "battle [had been] shaping up in Canada between partisans of the 'creativity' doctrine ... and the partisans of the 'industrious collection' or 'sweat of the brow' doctrine"²⁵ and proceeded to declare victory for the creativity school that had already triumphed in the United States. While denying any departure from Anglo-Canadian principles, Justice DeCary expressed the opinion that "Canadian courts should not hesitate to adopt an interpretation that satisfies both the Anglo-Canadian standards and the American standards [following

(4th) 609 (T.D.) [*CCH (F.C.T.D.)* cited to F.C.]. The civilian tradition regards the author's right as flowing naturally from the investment of his or her personality in the work, such that the author's protected expression is, in a sense, the extension of the author. I have addressed the divergent copyright theories underlying different approaches to originality in more detail elsewhere: see Carys Craig, "The Evolution of Originality in Canadian Copyright: Authorship, Reward & the Public Interest" (2005) 2 *University of Ottawa Law & Technology Journal* 425 [Craig, "Evolution of Originality"].

¹⁸ *Caron v. Assoc. des Pompiers de Montreal Inc.* (1992), 42 C.P.R. (3d) 292 at 295, 297, 54 F.T.R. 161 (T.D.).

¹⁹ *U & R Tax Services Ltd. v. H & R Block Canada Inc.* (1995), 62 C.P.R. (3d) 257, 97 F.T.R. 259 [*U & R Tax*].

²⁰ *Ibid.* at para. 22.

²¹ *Ibid.*

²² *Ibid.* [emphasis added].

²³ *Ibid.* at para. 17.

²⁴ *Supra* note 6.

²⁵ *Ibid.* at para. 13.

Feist],²⁶ not least because international treaties appeared to bridge the divide.²⁷ On its face, the case appeared indicative of an arguably inevitable trend towards the Americanization of traditional Anglo-Canadian copyright law.

As I will explain in more detail in the following section, the Trial Division in the *CCH* case based its decision upon *Tele-Direct*'s unambiguous endorsement of a "creativity" standard. On appeal, the Federal Court of Appeal issued a dramatic turnabout ruling, reducing the originality bar to virtual obsolescence. Compounding the doubt that already surrounded the doctrine, the Federal Court of Appeal thereby released two apparently contradictory decisions on the meaning of originality within five years, each purporting to settle the question. Predictably, there was continuing confusion about the precise standard that emerged from the Court of Appeal in *CCH*,²⁸ and still more uncertainty

²⁶ *Ibid.* at para. 18.

²⁷ *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States*, 17 December 1992, Can. T.S. 1994 No. 2, 32 I.L.M. 289 (entered into force 1 January 1994), art. 1705, which referred to "intellectual creations", played an important role in DeCary J.'s reasoning: "The use of these ... two words is most revealing: compilations of data are to be measured by standards of intellect and creativity.... I can only assume that the Canadian Government in signing the Agreement and the Canadian Parliament in adopting the 1993 amendments to the Copyright Act expected the Court to follow the 'creativity' school of cases rather than the 'industrious collection' school": *Tele-Direct*, *supra* note 6 at para. 15. On the weaknesses of this line of reasoning, see Myra J. 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 L. Rev.* 147.

²⁸ See e.g. *Fraser Health Authority v. Hospital Employees' Union*, 2003 BCSC 807, 226 D.L.R. (4th) 563 at 569-70, 25 C.P.R. (4th) 172, where the court, citing Linden J. in *CCH (F.C.T.D.)*, stated: "[T]here must be evidence of skill, judgment or labour in the overall selection or arrangement" With respect, this statement of the law was in line with the ruling of Rothstein J., but Linden J. had refused to regard either skill, judgment or labour as necessary prerequisites to protection. A more accurate account of Linden J.'s ruling was given in *Great Canadian Oil Change Ltd v. Dynamic Ventures Corp.*, 2002 BCSC 1295 at para. 43, 116 A.C.W.S. (3d) 39, 21 C.P.R. (4th) 318: "The work is 'original' if it was independently produced and not copied." Furthermore, in *Delrina Corp. (c.o.b. Carolian Systems) v. Triolet Systems Inc.*, 165 O.A.C. 160 at para. 28, 22 C.P.R. (4th) 32, leave to appeal to S.C.C. refused, [2002] S.C.C.A. No. 189 [*Delrina*], the Ontario Court of Appeal appeared to adopt a

about whether *Tele-Direct* had been overruled, reinterpreted, or merely distinguished. Until the opportunity of the Law Society's appeal in the *CCH* case presented itself, the Supreme Court had not had occasion to speak to the issue of originality. Now, the lawyers, scholars, students, and stakeholders of Canada's copyright system were eager for a definitive resolution.

B. THE *CCH* CASE IN THE COURTS

The meaning of originality was unlikely to be a pivotal or deciding issue at the Supreme Court: Most of the works were capable of meeting the threshold, whether high or low.²⁹ The Supreme Court gave the originality doctrine more attention than the arguments before the Court would have demanded, presumably with the goal of settling the question that had caused such uncertainty in the lower courts.

At trial, Justice Gibson had issued a surprising judgment that endorsed the "expansion of the traditional criteria of judgment, skill and labour" to reflect the "creativity aspect inherent in the concept of originality."³⁰ While the use of a "creativity" standard may not have proved too controversial following the Federal Court of Appeal's earlier ruling in *Tele-Direct*,³¹ its application certainly was: Justice Gibson refused to find original expression in reported judicial decisions, including headnotes, catchlines,

U.S. based "abstraction-filtration-comparison" approach to determine infringement in a case concerning the non-literal copying of a computer program. This appeared to follow the approach of the U.S. 2nd Circuit in *Computer Associates International, Inc. v. Altai, Inc.*, 982 F.2d 693, 119 A.L.R. Fed. 741 (2d Cir. 1992). At the "filtration" stage of the infringement analysis, the court filtered out routine parts of the program that may well have attracted copyright protection under the Federal Court of Appeal's minimalist originality test. If U.S. authority was to be followed in infringement but not subsistence determinations, this could create further confusion, and potentially pose a threat to the internal consistency of Canadian copyright policy and doctrine: see Robert G. Howell, "Recent Copyright Developments: Harmonization Opportunities for Canada" (2003-2004) 1 *University of Ottawa Law & Technology Journal* 149, Section 2.

²⁹ My thanks to Barry Sookman of McCarthy Tétrault LLP for this observation.

³⁰ *CCH (F.C.T.D.)*, *supra* note 17 at 471.

³¹ *Supra* note 6. See Part II.A, above.

parallel citations, and running heads.³² It seems correct to say that originality is limited when the main attribute of a work is skillful faithfulness to the original.³³ However, when one takes the example of a case headnote and considers the skill, knowledge, judgment, labour—and, arguably, the minimum degree of creativity—involved in identifying, selecting, and arranging the relevant facts and ratio of a court decision, it also seems that the Trial Division ruling raised the originality bar too high.³⁴

Certainly, that was the opinion of the Federal Court of Appeal. It was open to the Court of Appeal to reach a different conclusion on the facts while affirming “creativity” as the applicable standard. Instead, the Court dismissed the “creativity” standard as a misinterpretation of the Court of Appeal’s decision in *Tele-Direct* and a distortion of the “traditional Anglo-Canadian approach”.³⁵ According to the Court of Appeal, this classic approach required as a precondition to copyright only that a work be “independently produced and not copied from another person.”³⁶ Pursuant to this test, any work that was more than a mere copy would meet the originality threshold. I would suggest that the standard as it emerged from the Court of Appeal was perhaps even lower than a traditional ‘sweat of the brow’ standard, which would generally require that the author “demonstrate that he or she has expended a significant effort in

³² Having acknowledged that such additions “involved extensive labour, skill and judgment”, he nevertheless found that they lacked “the ‘imagination’ or ‘creative spark’ ... essential to a finding of originality”: *CCH (F.C.T.D.)*, *supra* note 17 at 474.

³³ *Ibid.* at paras. 471-72.

³⁴ This was ultimately the conclusion of the Supreme Court on this issue: “Although headnotes are inspired in large part by the judgement which they summarize and refer to, they are clearly not an identical copy of the reasons. The authors must select specific elements of the decision and can arrange them in numerous different ways. Making these decisions requires the exercise of skill and judgment. The authors must use their knowledge about the law and developed ability to determine legal *ratios* to produce the headnotes. They must also use their capacity for discernment to decide which parts of the judgement warrant inclusion in the headnotes. This process is more than just a mechanical exercise. Thus the headnotes constitute ‘original’ works in which copyright subsists”: *CCH (S.C.C.)*, *supra* note 7 at 358, McLachlin C.J.C.

³⁵ *CCH (F.C.A.)*, *supra* note 9 at 242, Linden J.A.

³⁶ *Ibid.* at 246.

creating the work.”³⁷ For Justice Linden, “labour” itself was only a *possible* ingredient in the production of an original work that was not copied, and not a prerequisite: a “worthy attribute” but not a requirement.³⁸ This is about as low as the originality threshold can go, if it can be described as a threshold at all.

With the Trial Division and Court of Appeal rulings swinging from an elevated version of the creativity standard to a *de minimis* version of the sweat standard, it is easy to understand why the Supreme Court was compelled to enter the fray. It is less clear, however, why the court chose to define originality as it did. My purpose in this paper is to suggest and explore some possible and compelling explanations for this choice. While it is, admittedly, a fine line to walk, my ultimate aim in this task is not to speculate upon or assume the actual reasons behind the Court’s ruling, but rather to propose a way of reading the ruling that opens up a critical space for doctrinal innovation.

³⁷ Mark J. Davison, *The Legal Protection of Databases* (Cambridge: Cambridge University Press, 2003) at 14. But note that, at the Supreme Court, McLachlin C.J.C. described the Court of Appeal’s ruling as having “adopted the ‘sweat of the brow’ approach to originality”: *CCH (S.C.C.)*, *supra* note 7 at 357.

³⁸ *CCH (F.C.A.)*, *supra* note 9 at 254-55: “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.” As such, if someone were to produce a work without copying directly from another work, but without expending any significant labour, effort, time or expense in the process, copyright would nevertheless subsist even in the absence of industriousness.

This stands in contrast with Rothstein J.’s approach. Rothstein J. proposed an “intellectual effort” standard would have established a slightly higher threshold than that articulated by Linden J.’s (and endorsed by Sharlow J.), and would seem better able to embrace a genuine sweat of the brow test. For Rothstein J., “something in addition to not being copied is required” for a work to be original, whether that something is skill, judgment, and/or labour, or purely effort, time, and/or expense. This “intellectual effort” test could therefore have embraced a standard requiring only labour in addition to not copying. See *CCH (F.C.A.)*, *supra* note 9 at 466-68.

C. INTRODUCING THE “SKILL AND JUDGMENT” TEST

As a starting point for this discussion, it is worth reproducing the most pertinent passages of the Chief Justice McLachlin’s judgment. On the matter of the originality debate, she explained:

There are competing views on the meaning of “original” in copyright law. Some courts have found that a work that originates from an author and is more than a mere copy of a work is sufficient to ground copyright This approach is consistent with the “sweat of the brow” or “industriousness” standard of originality, which is premised on a natural rights or Lockean theory of “just desserts”, namely that an author deserves to have his or her efforts in producing a work rewarded. Other courts have required that a work must be creative to be “original” and thus protected by copyright This approach is also consistent with a natural rights theory of property law; however it is less absolute in that only those works that are the product of creativity will be rewarded with copyright protection.³⁹

On the correct approach to determining originality, the Chief Justice concluded:

... [T]he correct position falls between these extremes. For a work to be “original” within the meaning of the *Copyright Act*, it must be more than a mere copy of another work. At the same time, it need not be creative, in the sense of being novel or unique. What is required to attract copyright protection in the expression of an idea is an exercise of skill and judgment.... This exercise of skill and judgment will necessarily involve intellectual effort. The exercise of skill and judgment required to produce the work must not be so trivial that it could be characterized as a purely mechanical exercise.⁴⁰

By requiring the kind of *intellectual* effort that involves skill and judgment on the part of an author, the Court excluded from copyright’s protective sphere works that involve sheer effort or labour of a mechanical or automatic nature. It would thereby deny copyright to routine, garden-variety compilations that are the result of mere sweat. On the other side of the doctrinal divide, the Court also refused to accept the “*Feistian*” premise that the necessary intellectual effort requires some element of minimum

³⁹ *CCH (S.C.C.)*, *supra* note 7 at 351-52 [footnotes omitted].

⁴⁰ *Ibid.* at 352.

creativity. The Court thus purported to bring within copyright’s protective sphere the kinds of works that involved some degree of skill and judgment, but lack what one might properly call “creativity”.⁴¹

Importantly, in propounding a threshold based upon skill and judgment, the Court expressly rejected as inappropriate extremes both the minimalist, industriousness test drawn from the British case law, and the elevated creativity standard now found in the U.S. context. In the discussion that follows, I will examine the departure from industry- and creativity-based standards, and propose an interpretation of this decision that reimagines the meaning and function of originality in Canadian copyright doctrine.

III. WHAT HAPPENED TO “LABOUR”?

Arguably, the most critical point of departure in *CCH* from previous or alternative articulations of originality is the absence of the word “labour”—or its common companion, “effort”—from the “skill and judgment” test. The labour invested in the production of a work has traditionally had a significant role to play in determinations of originality in common law copyright. Clearly, the notion of reward for one’s labour forms the crux of the “sweat of the brow” approach to originality,⁴² but “labour” has also appeared in various articulations of originality that demanded more than mere “sweat of the brow.”⁴³

⁴¹ “While creative works will by definition be ‘original’ and covered by copyright, creativity is not required to make a work ‘original’”: *ibid.* at 356. There may, however, be cause to doubt the practical significance of this distinction: see Part V.A, below.

⁴² McLachlin C.J.C. described the “sweat of the brow” approach as “premised on a natural rights or Lockean theory of ‘just deserts’, namely that an author deserves to have his or her efforts in producing a work rewarded”: *CCH (S.C.C.)*, *supra* note 7 at 351-52. A full examination of the relevance of the author’s labour in common law copyright regimes is beyond my purposes here. For further discussion of labour-based reasoning and its consequences, see Carys J. Craig, “Locke, Labour and Limiting the Author’s Right: A Warning Against a Lockean Approach to Copyright Law” (2002) 28 *Queen’s L.J.* 1 [Craig, “Locke”].

⁴³ See Part III. B, below.

In arriving at its decision, the Supreme Court was concerned with the need to ensure that information remains within the public domain and free from private appropriation. However, the Supreme Court's ruling could be said to contain a broader proposition: namely, that mere labour is simply not part of the copyright equation. If true, the decision to exclude labour from the originality doctrine represents a larger theoretical shift than may be apparent on its face. In order to make this argument, I will show that the rejection of pure "sweat of the brow" and the desire to leave information in the public domain did not necessitate the exclusion of "labour". In my view, the first step towards understanding the "skill and judgment" test is thus to acknowledge the Court's choice to leave "labour" out; the next step is to recognize, in this choice, a repudiation of the labour-reward theory of copyright.

A. PROTECTING LABOUR; PROTECTING INFORMATION

The primary basis for rejecting a "sweat of the brow" approach appears to have been concern about its ability to extend copyright protection to facts and information contained in protected works. In *Feist*, the U.S. Supreme Court, when rejecting a "sweat of the brow" approach, identified as its "most glaring" flaw:

[T]hat it extended copyright protection in a compilation beyond selection and arrangement—the compiler's original contributions—to the facts themselves.... "Sweat of the brow" courts thereby eschewed the most fundamental axiom of copyright law—that no one may copyright facts or ideas.⁴⁴

When the Supreme Court of Canada rejected "sweat of the brow" in *CCH*, it did so with an appeal to the reasoning of Justice O'Connor in this passage. Chief Justice McLachlin agreed: "[I]n Canada, as in the United States, copyright protection does not extend to facts or ideas but is limited to the expression of ideas."⁴⁵

⁴⁴ *Supra* note 6 at 353.

⁴⁵ *CCH (S.C.C.)*, *supra* note 7 at 355. As observed by O'Connor J. in *Feist*, *supra* note 6 at 347: "'No one may claim originality as to facts'. This is because facts do not owe their origin to an act of authorship. The distinction is one between creativity and discovery: The first person to find and report a particular fact has not created the fact; he or she has merely discovered its existence. To

On this basis, she found that "O'Connor J.'s concerns about the 'sweat of the brow' doctrine's improper extension of copyright over facts also resonate in Canada."⁴⁶

The best example of the improper extension of copyright over facts in a Canadian context remains the case of *British Columbia Jockey Club et al. v. Standen*.⁴⁷ The plaintiffs produced a publication in advance of each day of horse racing, imparting information on the races, horses, jockeys, and conditions for the day ahead. The defendant's publication adopted much of this information, but in a form that was "not at all similar",⁴⁸ and included additional comments and preferences. The British Columbia Court of Appeal noted at the outset of its judgment that "[a] good deal of work has to be performed before publication of the [plaintiff's] 'Overnight'",⁴⁹ and ultimately affirmed "the right of the Club to protect its compilation of information as a whole", notwithstanding that the defendant had "adopted that information to his own style".⁵⁰ The Court of Appeal shared the trial judge's view that the defendant had taken "a substantial part of this compilation made by the plaintiff at a great deal of cost and trouble to himself",⁵¹ and that this was a sufficient basis upon which to find infringement. It was also satisfied that the legal foundation for the ruling could be found in the passages quoted by the judge, which appealed to the "painstaking labour"⁵² or the "independent research and labour"⁵³ involved in compiling the facts, and stated that "no man is entitled to avail himself of the previous labours of another for the purpose of conveying to the

borrow from *Burrow-Giles*, one who discovers a fact is not its 'maker' or 'originator.' 111 U.S. at 58."

⁴⁶ *Ibid.*

⁴⁷ *Supra* note 15. See also *Weetman (c.o.b. Beta Digital Mapping) v. Baldwin*, 2001 BCPC 292; *B & S Publications Inc. v. Max-Contracts Inc.*, (2001) 287 A.R. 201.

⁴⁸ *B.C. Jockey*, *supra* note 15 at 469.

⁴⁹ *Ibid.* at 468.

⁵⁰ *Ibid.* at 470.

⁵¹ *Ibid.* at 471-72.

⁵² *Ibid.* at 470, citing Hugh Laddie, Peter Prescott & Mary Vitoria, *The Modern Law of Copyright* (London: Butterworths, 1980) at para. 2.65.

⁵³ *B.C. Jockey*, *supra* note 15 at 471, citing Harold Fox, *The Canadian Law of Copyright and Industrial Designs*, 2d ed. (Toronto: Carswell, 1967) at 329.

public the same information”.⁵⁴ The plaintiff’s entitlement was rooted in the cost, trouble, and labour invested.

The *B.C. Jockey* case illustrates how a labour-based originality standard can confer exclusivity over the facts or information contained in a protected work to the detriment of downstream users and the public. When the basis for the copyright holder’s right in an informational work is the painstaking labour of collection, taking the information gathered will amount to appropriating the very fruits of the labour that copyright protects.⁵⁵ The copyright interest does not in itself confer a monopoly over the information, for the same information can be discovered, recorded, and published by another without liability.⁵⁶ But the key to this lawful reproduction of data is independent creation.⁵⁷ Thus, the number of milestones that separate two towns may be a fact that cannot be exclusively owned, but a “sweat of the brow” approach will protect the labour expended by the first person to count those miles against those who wish to rely upon his efforts to impart the same information. In this sense, the exclusive right does offer protection to the information, although it remains independently discoverable. However, where the source of the original compilation of information is the sole source of the information, as was the case in *B.C. Jockey*,

⁵⁴ *B.C. Jockey*, *supra* note 15 at 470, citing *Wood V.-C. in Scott v. Stanford* (1867), L.R. 3 Eq. 718 at 724, 16 L.T. 51, cited in *Laddie, Prescott, Vitoria*, *supra* note 52 at para. 2.65.

⁵⁵ If copyright protects the author’s industrious effort in compiling material, it follows that “the copyright in such a work may be infringed by appropriating an undue amount of the material”: *B.C. Jockey*, *supra* note 15 at 470, citing *Laddie, Prescott, Vitoria*, *supra* note 52 at para. 2.65. As one commentator has observed: “If there is a fine line between protecting the original work in which copyright subsists and protecting a plaintiff’s expenses and efforts in creating the work, this case would appear to cross it”: Teresa Scassa, “Originality and Utilitarian Works: The Uneasy Relationship between Copyright and Unfair Competition” (2003-4) 1 *University of Ottawa Law & Technology Journal* 51 at para. 41.

⁵⁶ See Norman Siebrasse, “Copyright in Facts and Information: *Feist* Is Not, and Should Not Be, the Law in Canada” (1994) 11 *C.I.P.R.* 191.

⁵⁷ As was famously stated in the English case of *Kelly v. Morris*, [1866] L.R. 1 Eq. 697 at 701, 14 L.T. 222 [*Kelly* cited to L.R.Eq.]: “A subsequent compiler is bound to set about doing for himself that which the first compiler has done. In case of a road-book, he must count the milestones for himself.”

copyright confers a de facto monopoly; in such cases, independent discoverability is no more than a fictional limit to the exclusivity conferred.

The indirect grant of control over facts through copyright is widely controversial, not least because it may seem to run counter to the fundamental value that our society attaches to knowledge and the free flow of information. Furthermore, to the extent that copyright is regarded as a vehicle to encourage the maximum generation and exchange of intellectual works in the public interest⁵⁸ (or in the terms of the U.S. Constitution, “to promote the Progress of Science and useful Arts”⁵⁹), the freedom of the public to use the ideas and information expressed in such works would appear to be an essential element of copyright’s social purpose.⁶⁰ Even at a practical level, the “count your own milestones” approach can appear counterproductive to the extent that it requires a duplication of effort without resulting in any added value to the work or further benefit to the public.⁶¹ While the

⁵⁸ I have argued elsewhere that copyright should be regarded from a public interest perspective as “a policy tool whose purpose is to advance our common interest in the vibrant social exchange of meaning” through the encouragement of intellectual expression: Carys J. Craig, “Putting the Community in Communication: Dissolving the Conflict Between Freedom of Expression and Copyright Law” (2006) 56 U.T.L.J. 75 at 108-11.

⁵⁹ U.S. Const. art. I, §8.

⁶⁰ The perceived importance of the freedom of ideas and information to the furtherance of copyright policy was a significant factor in both *Feist* and *CCH*. As O’Connor J. explained in *Feist*, *supra* note 6 at 350: “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.” Similarly, McLachlin C.J.C. remarked, a higher standard “helps ensure that copyright protection only extends to the expression of ideas as opposed to the underlying ideas or facts”: *CCH (S.C.C.)*, *supra* note 2 at 352. The skill and judgment test was therefore appropriate because it “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”: *CCH (S.C.C.)*, *supra* note 7 at para. 23.

⁶¹ In *Feist*, *supra* note 6 at 354, the U.S. Supreme Court observed that courts applying “sweat of the brow” were effectively declaring that “authors are absolutely precluded from saving time and effort by relying upon the facts contained in prior works. In truth, ‘it is just such wasted effort that the proscription against the copyright of ideas and facts ... [is] designed to prevent.’ *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303 at 310 (CA2

rationale behind the exclusion of facts from copyright was not identified or explained by the Supreme Court, the Court unambiguously endorsed the proposition that “copyright protection does not extend to facts”.⁶²

The Chief Justice’s rejection of a pure labour-based standard for protection should therefore be understood as a rejection of any version of originality that would indirectly confer exclusive rights over information. This is the first important lesson to be drawn from *CCH*. The Court explained that a “sweat of the brow” approach unduly favours owners’ rights and “fails to allow copyright to protect the public’s interest in maximizing the production and dissemination of intellectual works.”⁶³ It would seem to follow that, according to the Supreme Court of Canada, the appropriate copyright balance can only be struck where facts and information remain in the public domain, free for the taking.⁶⁴

1966), cert. denied, 385 U.S. 1009 (1967). ‘Protection for the fruits of such research ... may in certain circumstances be available under a theory of unfair competition. But to accord copyright protection on this basis alone distorts basic copyright principles in that it creates a monopoly in public domain materials without the necessary justification of protecting and encouraging the creation of ‘writings’ by ‘authors’’: Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* (New York: Matthew Bender, 1990) at § 3.04.

⁶² *CCH (S.C.C.)*, *supra* note 7 at para. 22.

⁶³ *Ibid.* at para. 24.

⁶⁴ It should be noted that this conclusion is not uncontroversial. From an instrumentalist perspective, an economic argument may support the grant of some form of exclusive control over industrious collections of information in order to incentivize such laborious but socially useful activity. After all, compilations of information suffer from the same public goods problems as traditional works of intellectual expression. A utilitarian argument could favour the grant of some form of control over facts in the name of incentives to engage in the costly and laborious processes of fact gathering: see e.g. Siebrasse, *supra* note 56 at 200: “[I]n general, it is precisely when the facts are expensive to gather that copyright protection is needed in order to ensure that they are gathered at all.” For an account of the economic theory of copyright more generally, see e.g. William M. Landes & Richard A. Posner, *The Economic Structure of Intellectual Property Law* (Cambridge, Mass: Belknap Press, 2003); William M. Landes & Richard A. Posner, “An Economic Analysis of Copyright Law” (1989) 18 J. Legal Stud. 325; Stephen Breyer, “The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs” (1970) 84 Harv. L. Rev. 281. Whether or not, or to what extent, compiled facts may merit some form of protection from an economic utilitarian perspective is an important question, but one that is largely beyond the scope of

It will be important for future courts applying the originality doctrine to informational works to bear this conclusion in mind. Whatever scope of protection will be afforded to works such as data compilations pursuant to the “skill and judgment” test, it should not permit the creation of effectively exclusive rights over facts. In this sense, the protection given to informational works must be “thin”.⁶⁵ As the Supreme Court appears to have understood, this requires a departure from the notion that copyright is an appropriate reward for cost, trouble, and labour alone.

B. IT DEPENDS ON WHAT THE MEANING OF “AND” IS

Resisting a pure sweat-based standard is an effective way to limit the judicial tendency to find infringement whenever information is extracted from a factual compilation.⁶⁶ But this does not offer a

this article. For the purposes of my argument here, it is sufficient to note that the Supreme Court’s decision to exclude facts was informed by its understanding of the public interest at stake in the copyright balance, and the limits of the author’s right to reward.

⁶⁵ The concept of “thin” copyright protection was explained in *Feist*, *supra* note 6 at 349: “[N]o matter how original the format, however, the facts themselves do not become original through association This inevitably means that the copyright in a factual compilation is thin. Notwithstanding a valid copyright, a subsequent compiler remains free to use the facts contained in another’s publication to aid in preparing a competing work, so long as the competing work does not feature the same selection and arrangement. As one commentator explains it: ‘No matter how much original authorship the work displays, the facts and ideas it exposes are free for the taking.... The very same facts and ideas may be divorced from the context imposed by the author, and restated or reshuffled by second comers, even if the author was the first to discover the facts or to propose the ideas’”: Jane C. Ginsburg, “Creation and Commercial Value: Copyright Protection of Works of Information” (1990) 90 *Colum. L. Rev.* 1865 at 1868 [Ginsburg, “Creation and Commercial Value”].)

⁶⁶ It is at least a shortcut to that end. However, it could be argued that a sweat-based approach to copyright protection does not necessarily entail protecting the information included in a protected compilation. For example, one could avoid this result by drawing a critical distinction between types of labour invested at different moments in the production process, such that copyright protects only labour involved in the actual expression of the information collected. Prior labour involved in producing the compilation—discovering information and deciding upon which facts to include—would then be beyond the scope of any resulting copyright interest, leaving room for the lawful

complete explanation for the “skill and judgment” test. The Court not only resisted a pure “sweat of the brow” theory, but also refused what many regard to be the traditional Anglo-Canadian approach that would require “sweat plus χ .” As I understand it, the Court thus rejected the notion that expended labour is relevant to determining copyright’s subsistence. If the ruling does indeed embrace this broader proposition—that pure labour is simply not part of the copyright equation—then this has a far greater theoretical significance than the simple assertion that information belongs in the public domain.

As such, my aim in this section is to demonstrate that nothing in the originality jurisprudence demanded the exclusion of labour as a component of original authorship. Even if the Supreme Court in *CCH* rejected “sweat of the brow” in order to ensure the public nature of information, this is not enough, in itself, to explain the omission of “labour” from the list of ingredients that make up originality. Traditionally, “labour” has been said in the same breath as “skill and judgment”, and the resulting threshold has been at least as high as “skill and judgment” alone. Such a “sweat plus” threshold would not protect mere sweat, and nor need it protect facts. The significance of the Court’s decision to omit “labour” from Canada’s originality standard therefore becomes

reproduction of the information when expressed in a different form. However, this distinction between expressive and prior labour becomes difficult to maintain when we remember that copyright protects the original selection of information (see *Copyright Act*, *supra* note 1, s. 2; *Robertson (S.C.C.)*, *supra* note 2.) Furthermore, a similar line of reasoning was rejected as “unsound” by a majority of the Lords in *Ladbroke*, *supra* note 5 at 478. Compare *The British Horseracing Board Ltd. (BHB) v. William Hill Organization, Ltd.*, C-203/02 2004 E.C.R. (Grand Chamber). A more direct route to challenging the protection of facts under “sweat of the brow” would be to appeal to the idea-expression dichotomy: Just as copyright protects not the idea (however original) but only the author’s expression of that idea, it can protect only the expression of facts and not the facts themselves. Applying the concept of “merger”, where a fact can only be expressed in one or a limited number of ways, copyright should not protect the particular expression that would confer a right over the information. We need not rely upon the originality doctrine as the sole sieve in the task of excluding facts from copyright protection. Whether, doctrinally speaking, the indirect protection of information is an inevitable consequence of a sweat-based originality doctrine should be a subject for further discussion. However, case law and commentary do suggest that this is the likely consequence.

apparent only when viewed against the backdrop of British originality jurisprudence, and earlier Canadian cases. The following discussion of this jurisprudence should reveal that a “skill, labour, and judgment” test would have been the obvious choice for a court prepared to concede any role for labour in determinations of copyrightability.

1. THE BRITISH APPROACH

A common formulation of the originality standard in Britain requires “skill and labour” or “skill, labour, and judgment”. Applying this test, labour is not the sole basis of the right conferred: An automatic or mechanical production would not necessarily be protected if it resulted from industry, but required nothing in the way of skill or judgment. Both “skill” and “judgment” import an additional ingredient into copyrightability, moving the test further along the originality spectrum, away from pure industry and towards creativity. The “labour” component is but one apparently necessary ingredient in the mix of attributes that combine to constitute “originality”.

While the United Kingdom is widely regarded as the archetypal “sweat of the brow” jurisdiction, this is an oversimplification of the originality doctrine as it emerges from the British case law.⁶⁷ Support for the proposition that labour alone is sufficient may be found in the judgment of Lord Devlin in *Ladbroke (Football) Ltd. v. William Hill (Football) Ltd.*: “The requirement of originality means that the product must originate from the author in the sense that it is the result of a substantial degree of skill, *industry or* experience employed by him.”⁶⁸ Similarly, Lord Evershed in *Ladbroke* considered whether there was “skill, labour *or* judgment” in the work.”⁶⁹ However, this position should be contrasted against other authorities from U.K.

⁶⁷ In fact, “there is no clear authoritative statement that the exercise of considerable labour is sufficient in itself to confer copyright protection, and that therefore the sweat of the brow doctrine is part of U.K. copyright law”: Davison, *supra* note 37 at 143.

⁶⁸ *Ladbroke*, *supra* note 5 at 478, cited in Davison, *supra* note 37 at 144 [emphasis added].

⁶⁹ *Ladbroke*, *supra* note 5 at 472 [emphasis added].

jurisprudence that support a formulation of originality requiring both labour *and* skill. One example is the case of *Football League Ltd. v. Littlewoods Pools Ltd.*, in which the court held:

Copyright can only be claimed in the composition or language which is chosen to express the information or the opinion.... [W]here the facts are represented in some special way, it then becomes a question of fact and degree as to whether the *skill and labour* involved in such special representation of the information is entitled to copyright.⁷⁰

Thus stated, it would seem that copyright in factual compilations in the United Kingdom does not always or necessarily flow from labour alone, and that British courts have, at least implicitly, respected the distinction between facts and their expression. Indeed, a similar conclusion may be drawn from the older House of Lords case of *Cramp v. Smythson*,⁷¹ in which the Lords' conception of original authorship was sufficient to exclude from copyright pure facts whose expression required nothing significant in the way of skill or judgment.⁷² Having inquired into "[w]hether enough work, labour *and* skill is involved",⁷³ the Lords denied protection to a compilation of data, even in the face of "slavish copying" by a competitor.

A similar standard has taken shape in more recent House of Lords rulings. In the case of *Designers Guild Ltd. v. Russell Williams (Textiles) Ltd.*,⁷⁴ Lord Hoffman understood "originality" "in the sense of the contribution of the author's *skill and labour*";⁷⁵ Lord Bingham explained that copyright vested in "anyone who by his or her own *skill and labour* creates an original work";⁷⁶ Lord Scott declared it to be an underlying principle of copyright law that "a copier is not at liberty to

⁷⁰ 2 All E.R. 546 at 651-52, [1959] 1 Ch. 63, cited in Davison, *supra* note 37 at 144 [emphasis added].

⁷¹ 2 All E.R. 92, [1944] A.C. 329 (H.L.). Cf. *Kelly*, *supra* note 56.

⁷² *Cramp*, *supra* note 71 at 336: According to Lord MacMillan: "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* judgment": *ibid.* at 338 [emphasis added].

⁷³ *Ibid.* at 340, Lord Porter [emphasis added].

⁷⁴ [2001] 1 All E.R. 700, [2000] W.L.R. 2416 (H.L.).

⁷⁵ *Ibid.* at para. 27 [emphasis added].

⁷⁶ *Ibid.* at para. 2 [emphasis added].

appropriate the benefit of another's *skill and labour*.”⁷⁷ In *Newspaper Licensing Agency Ltd v. Marks & Spencer plc.*,⁷⁸ the House of Lords found that infringement requires “copying of sufficient of the relevant *skill and labour* to constitute a substantial part of the [protected work].”⁷⁹

Even this little dip into British case law reveals the complexity of a standard that has been reduced in name to a “sweat of the brow” test,⁸⁰ and this, in turn, adds nuance to the common but overly stark dissection of originality into a sweat or creativity standard. In fact, it seems that the moment of departure comes somewhere closer to the middle of the spectrum, somewhere between “skill, labour, *or* judgment” and “skill, labour, *and* judgment”. If this is, indeed, the critical distinction, the degree of ambiguity presented by the case law cannot be overstated: Many judgments refer to the need for an author to exercise “skill, labour, and/or judgment”.⁸¹ While this may seem like a small concession to ambiguity, “and/or” collapses the doctrinal polarity, replacing it with interchangeable but critically opposed versions of original authorship: When “or” is used, labour is enough; when “and” is used, something more is required.

⁷⁷ *Ibid.* at para. 72 [emphasis added].

⁷⁸ 2001 UKHL 38, [2001] 3 All E.R. 977, [2003] 1 A.C. 551.

⁷⁹ *Ibid.* at para. 20, Lord Hoffman [emphasis added]. The infringement ruling turned upon whether the portion of the work taken by the defendant qualitatively possessed the attributes that entitled the work to protection. Thus, the relevant expression for the purposes of determining the scope of the owner’s interest was only “their expression in the original work [that had] involved sufficient of the relevant original *skill and labour* to attract copyright protection”: *ibid.* at para. 20, cited in 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 U.S.A.* 949 at n. 61 and accompanying text [emphasis added] [Gervais, “*Feist* Goes Global”].

⁸⁰ The following may be a more accurate description: “The consensus of opinion amongst academic writers is that the standard of originality under U.K. copyright law is either a sweat of the brow standard, or one very close to it in which sweat of the brow, coupled with a very small amount of creativity, will be sufficient”: Davison, *supra* note 37 at 144. My own feeling is that the U.K. position would be best described as coupling sweat of the brow with a small amount of skill and/or judgment.

⁸¹ *Ibid.* at 143.

2. “AND/OR” IN THE CANADIAN CONTEXT

The contours between “and” and “or” have been actively addressed in Canadian case law, thanks to some judicial maneuvering by the Federal Court of Appeal in the *Tele-Direct* case:

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 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.⁸²

While a convenient route by which to avoid the legal implications of the “or” list, this assertion was, respectfully, less than compelling. In its support, Justice DeCary referred to *U & R Tax Services*.⁸³ He pointed to Justice Richard’s finding that the work at issue “involved labour, skill and judgment”,⁸⁴ notwithstanding his conclusion in that case that “[i]ndustriousness ... is enough”.⁸⁵ However, the fact that the work involved all three ingredients does not support the proposition that all three were required. Indeed, Justice Richard was very specific on this point: “[L]abour or time expended is sufficient to entitle copyright protection”.⁸⁶ It is also notable that Justice Richard found the authority for a labour-only standard in a line of cases that used the word “or” instead of “and”. Thus, the need for “labour, skill, time, ingenuity, selection or mental effort”⁸⁷ was cited as an example of a standard that requires labour alone.

⁸² *Supra* note 6 at para. 29 [emphasis added].

⁸³ See *supra* note 19 and accompanying text.

⁸⁴ *Tele-Direct*, *supra* note 6 at para. 29, n. 16, citing *U & R Tax*, *supra* note 19 at para. 24.

⁸⁵ *U & R Tax*, *supra* note 19 at para. 22.

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*, citing *Underwriters Survey Bureau Ltd. v. American Home Fire Assurance Co.*, [1939] Ex. C.R. 296 at 303, [1939] 4 D.L.R. 89. Richard J. also cited *B.C. Jockey*, *supra* note 15 (discussed in Part III.A, above), and Fox, *supra* note 53 at 329: “The general rule of law is that the use of information ... still possesses copyright if it is the result of *labour, skill or judgement*, not copied

Where “and” and “or” are used interchangeably, a test that would seem to require some additional feature of skill or judgment or taste is easily reduced to a basic requirement of industry. An overarching lesson that can be learned from this jurisprudence is the overwhelming power of the “labour” component. An originality standard that posits labour as a relevant consideration seems prone to metamorphose into a standard that requires nothing more. In this sense, “and” becomes “or”. As one commentator has explained:

Courts [applying the “skill, judgment, and labour” test] have protected compilations that have displayed marginal skill in their selection or arrangement, but which have involved considerable labour or expense. Thus the application of the “skill and labour” test is a highly flexible one and it may operate as a pretext for protecting mainly investment.⁸⁸

For example, Justice Linden’s ruling in *CCH* at the Federal Court of Appeal reveals how the use of the “or” formulation of the test can reduce the standard to one of merely not copying. Noting that “originality” has been defined using “various combinations of the terms ‘labour’, ‘judgment’, ‘skill’, ‘work’, ‘industry’, ‘effort’, ‘taste’, or ‘discretion’”, Justice Linden opined that “these are all possible ingredients in the recipe for originality”, but “[t]hese are not, in themselves, prerequisites to copyright protection”.⁸⁹ If these ingredients are merely indicators and not attributes of original authorship, none of them is specifically required in order to obtain copyright, and it is a small step to assume that none of them needs to be present for copyright

from others, and even though it may be open to others to make their own composition or compilation from the same source material.”

⁸⁸ See Tanya Aplin, “When are Compilations Original? *Telstra Corporation v. Desktop Marketing Systems Pty. Ltd.*” (2001) 23 Eur. I.P. Rev. 543 at 546. Aplin cites the following cases in support of this statement: *BBC v. Wireless League Gazette Publishing Co.*, [1926] Ch. 433; *Purefoy Engineering Co. Ltd. v. Sykes Boxall & Co. Ltd.* (1955), 72 R.P.C. 89; *Kalamazoo (Aust) Pty Ltd v. Compact Business Systems Pty. Ltd.* (1984), 84 F.L.R. 101; *T. R. Flanagan Smash Repairs Pty. Ltd. v. Jones* (2000), 48 I.P.R. 19.

⁸⁹ *CCH (F.C.A.)*, *supra* note 9 at 255.

to subsist.⁹⁰ The “or” formulation thus leaves the court in search of nothing but independent origination. Without any examination of the nature of the work when determining copyrightability—whether in terms of the human, authorial input involved in its creation, or the benefit it affords to the public—the notion of a copyright balance disappears. The threshold for protection is reduced to maximize the possibility of reward until everything that is “not copied” in its production is protected, while the consequences of overprotection go unobserved.

Perhaps the Supreme Court of Canada recognized the potential for confusion or misapplication presented by the inclusion of “labour” in the “skill, judgment, and labour” test. If “labour” were allowed to remain in the test, courts could continue to regard copyright as a reward for labour, and could continue to find sufficient labour in anything independently produced. Independent origination, while undoubtedly the touchstone, or the *sine qua non*, of originality, is not its totality. By rejecting the “eviscerated” standard that emerged from the Court of Appeal, the Supreme Court can be understood to have defended the originality doctrine and its key role in protecting the public interest against

⁹⁰ In referring to the *Tele-Direct* court’s approval of a conjunctive test, Linden J. agreed that labour without skill and judgment would not *usually* be sufficient to establish originality on the basis that “[i]f one employs labour alone without any degree of skill or judgment the result will typically be, in essence, a mere copy and will be unoriginal for that reason”: *ibid.* at 251. He therefore equates this with the well-founded suggestion that labour in the process of creating a mere copy will not attract protection. With respect, the equation is somewhat flawed: That a work was “not copied” or was “independently produced” was always an essential aspect of originality, even where copyright protected mere “sweat of the brow”. The controversy was whether it was enough just to not copy, or was there some *additional* requirement of labour, skill, or judgment. Linden J.’s test comes down to requiring only not copying: Works that involved only labour in their production are not necessarily copied and so may attract protection. The Supreme Court, in contrast, insisted that originality requires more than merely independent “origination”: “‘Original’’s plain meaning implies not just that something is not a copy. It includes, if not creativity *per se*, at least some sort of intellectual effort. As Professor Gervais has noted, ‘[w]hen used to mean simply that the work must originate from the author, originality is eviscerated of its core meaning. It becomes a synonym of ‘originated,’ and fails to reflect the ordinary sense of the word’”: *CCH (S.C.C.)*, *supra* note 7 at 353, citing Gervais, “*Feist Foes Global*”, *supra* note 79 at 961.

the creeping expansion of intellectual property rights to the detriment of society.

The “skill and judgment” test should therefore be recognized as significantly different from the “skill and labour” test currently employed in the British courts, and as a significant departure from the “skill, labour, and judgment” test previously found in the Canadian court. In the United Kingdom, “[t]he role of labour has not been segregated from the other components of the tests, namely skill and judgment.”⁹¹ In Canada, this is precisely what happened with the Supreme Court’s ruling in *CCH*: “Labour” has been segregated—and set aside.

It should be acknowledged that the remaining requirements of independent origination and the exercise of skill and judgment necessarily involve some degree of intellectual labour. For example, one must have invested labour in order to possess the “developed aptitude” or “practised ability” involved in the exercise of “skill”. The fact that intellectual labour will be present wherever there is “skill and judgment” does not, however, detract from my claim that pure “labour” is no longer part of the originality test. Where the test is one of only “skill and judgment”, the author’s labour is no more than incidental. It is relevant only to the extent that it manifests itself in the exercise of “skill and judgment”, while in its own right, labour is neither necessary nor determinative.

C. CONCLUSIONS ON THE DISAPPEARANCE OF “LABOUR”

In this section, I have attempted to show that the omission of “labour” from Canada’s new originality standard was neither obvious nor inconsequential, but rather profound and potentially pivotal in the development of Canadian copyright law. Indeed, when examined in light of earlier Anglo-Canadian originality jurisprudence, it seems likely that the industry factor was not just omitted but deliberately excised. Neither the decision to reject a pure “sweat of the brow” standard, nor the desire to ensure that information remains in the public domain, offers a full explanation for why “labour” was dropped. By excluding “labour”

⁹¹ Davison, *supra* note 37 at 14.

from the “skill and judgment” test, the Supreme Court effectuated a subtle but critical departure in Canadian jurisprudence away from the minimalist formulations of originality that had “shift[ed] the balance of copyright protection too far in favour of the owner’s rights.”⁹² In my opinion, the first key to understanding the new standard for originality in Canada is to appreciate the significance of this departure, and the implicit irrelevance of “sweat”.

Of course, given the powerful, persuasive force of the labour-reward equation that has subsisted in common law copyright regimes practically since their inception,⁹³ this will be easier said than done. There are already indications that that the departure from a labour-based standard has been overlooked by lower courts interpreting the decision. In the case of *Robertson v. Thomson*,⁹⁴ the Ontario Court of Appeal considered the requirements for copyright protection and defined originality with reference to the *CCH* ruling:

The definition of original work chosen by the Supreme Court has both a labour component and a content component. This approach falls between U.K. law, which extends copyright to cover any work produced through one's labour, and U.S. law, which requires an element of creativity for copyright to apply (a relatively higher standard than the requirement of judgment).⁹⁵

⁹² *CCH (S.C.C.)*, *supra* note 7 at 356.

⁹³ The Lockean notion that a person has property in the fruits of his labour was extended into the literary realm and propounded in the literary property debates of 18th century Britain. In the case of *Millar v. Taylor*, 98 E.R. 201 (1769), (1769) 4 Burr. 2303, it was held that the author did indeed have a natural right to the fruits of his intellectual labour, justified by Lord Mansfield in Lockean terms, at 252: “[A]n author should reap the pecuniary profits of his own ingenuity and labour.” Although this decision was a short-lived precedent, being overruled five years later in the case of *Donaldson v. Beckett*, 98 E.R. 257 (1774), 1 E.R. 837, L. Ray Patterson has argued persuasively that the *Millar* judgment and the controversy that surrounded it “firmly fixed the idea of copyright as an author’s right”: L. Ray Patterson, *Copyright in Historical Perspective* (Nashville: Vanderbilt University Press, 1968) at 15.

⁹⁴ (2004), 72 O.R. (3d) 481, 243 D.L.R. (4th) 257 (Ont. C.A.) [*Robertston (C.A.)* cited to O.R.].

⁹⁵ *Ibid.* at 493, Weiler J.A. [emphasis added].

Because the Supreme Court cast the “skill and judgment” test as a middle ground between sweat and creativity, “labour” was no sooner removed than it was allowed to creep back in as a facet of the Court’s compromise. Even if we accept that the new standard can be appropriately conceived as a compromise position between two extremes,⁹⁶ part of the compromise apparently involved removing an independent “labour” component from the originality doctrine. Unless the doctrinal and political import of this is recognized, there is a risk that the potential of the *CCH* ruling will go unrealized.

It is no coincidence that the Ontario Court of Appeal in *Robertson* was expressly guided by conviction that “to deprive authors of the fruits of their labour is unjust.”⁹⁷ I have suggested that the Supreme Court’s stand against a “sweat” or “sweat plus” originality test essentially repudiates the theory that copyright is a reward for labour. According to the Chief Justice, when copyright protects works that require only labour in their production, it risks “overcompensating” the author.⁹⁸ It can be inferred that rewarding pure labour with a copyright interest gives reward where reward is not due. Following this logic, copyright is not a reward for labour, but for something more. As a reward, it is deserved only when an author exercises skill and judgment in the creation of “works of the arts and intellect”.⁹⁹ This could be conceptualized as the *quid pro quo* that society receives in return for granting the author’s right.¹⁰⁰

⁹⁶ As I discuss further below (see Part V, below), doubt could be cast upon this characterization of the “skill and judgment” test if it is closer to the U.S. creativity standard than the Supreme Court suggested.

⁹⁷ *Supra* note 94 at 496.

⁹⁸ *CCH (S.C.C.)*, *supra* note 7 at 355-56.

⁹⁹ *Ibid.* This refers to the Supreme Court’s ruling in *Théberge v. Galerie D’Art du Petit Champlain Inc.* 2002 SCC 34, [2002] S.C.R. 336 at 355, 210 D.L.R. (4th) 385 [*Théberge* cited to S.C.R.].

¹⁰⁰ In this way, the Supreme Court’s interpretation of originality in *CCH* can shed light upon its conception of copyright’s purposes as previously articulated in *Théberge*, *ibid.* at 355: “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.” Of course, the notion of authors’ “just reward” is compatible with a commitment to authors’ natural rights (see Craig, “Locke”, *supra* note 42 at 19). However, whether a reward is “just”

The Supreme Court's ruling in *CCH* eludes the philosophical and practical implications of a sweat-based approach to originality. Philosophically, awarding copyright to works that involved mere "sweat of the brow" may appear to endorse a "natural rights or Lockean theory of 'just desserts', namely that an author deserves to have his or her efforts in producing a work rewarded."¹⁰¹ Practically, granting copyright to such works may permit the "improper extension of copyright over facts"¹⁰² and thereby diminish the public domain. By rejecting "sweat of the brow", and by dropping "labour" from the components that constitute originality, the Supreme Court's decision could represent a significant step for Canadian copyright policy: a step away from labour and the author's claim of right; away from the expansion of copyright's scope and the diminishment of the information commons; and towards the public interest, the public domain, and the purposive interpretation of copyright doctrine.

IV. WHAT HAPPENED TO "CREATIVITY"?

If the Supreme Court's ruling on originality in *CCH* is understood in this way, the pure industry of the author should no longer have a part to play in subsistence determinations. However, having rejected the relevance of authorial "sweat" in terms not dissimilar to those of the U.S. Supreme Court in *Feist*, the Court also explicitly eschewed any need for creativity in the originality

depends upon the nature of the action that is thought to deserve reward. Because the Supreme Court refuses to recognize mere labour as deserving of copyright, we can conclude that copyright is not "just reward" for labour.

¹⁰¹ *CCH (S.C.C.)*, *supra* note 7 at 351-52. It seems clear from this statement that the Court intended to reject a sweat-based standard that it understood to be premised on the logic of a natural rights theory of labour. It should be noted that a "sweat of the brow" doctrine could also find support from an economic utilitarian perspective: see *supra* note 64. I have argued elsewhere, however, that there is an easy slippage from an economically rationalized interest in the product of one's labour to a morally deserved right therein: A "reward" is readily regarded as something that is "deserved", and that which is "deserved" comes to be regarded as an "entitlement": see Craig, "Locke", *supra* note 42 at 15. See also Jeremy Waldron, "From Authors to Copiers: Individual Rights and Social Values in Intellectual Property" (1992-1993) 68 *Chicago-Kent L. Rev.* 841 at 851-52.

¹⁰² *CCH (S.C.C.)*, *supra* note 7 at 355.

requirement.¹⁰³ The Supreme Court of Canada agreed in principle that originality required more than merely independent production or the investment of pure labour; the Court aimed to avoid indirectly extending protection to information; and the Court appears to have decided that the “skill, labour, and judgment” test presents too many potential problems. So the question remains: Why not adopt the ready-made solution offered by its U.S. counterpart in the form of the creativity standard?

The discussion that follows considers the arguments for resisting a creativity standard from the perspective of the Court’s stated reasons and the other possible motivations at play. Once again, in order to fully comprehend the significance of the Court’s refusal to follow *Feist*, we will have to look beyond the Court’s explicit rationale and try to identify the philosophical, political, and pragmatic considerations that may have guided the Court’s analysis. I will suggest that the Court’s choice to avoid the term “creativity” should have a bearing upon the future interpretation and application of the “skill and judgment” test. I will look first to the role and theoretical significance of “creativity” in the civil law tradition. I will argue that a further key to understanding “skill and judgment” is to acknowledge a deliberate departure from civilian conceptions of the author’s natural rights.

A. THE CONNOTATIONS OF “CREATIVITY”

It is clear that in arriving at its decision, the Supreme Court was concerned with the need to ensure that additional requirements were not imported into the originality doctrine that may involve substantive assessment of the quality, merit, or novelty of copyrightable works. Chief Justice McLachlin dismissed a creativity requirement ostensibly on the basis that:

A creativity standard implies that something must be novel or non-obvious—concepts more properly associated with patent law than copyright law. By way of contrast, a standard requiring the exercise

¹⁰³ “O’Connor J.’s concerns [in *Feist*, *supra* note 6 at 345, 358] about the ‘sweat of the brow’ doctrine’s improper extension of copyright over facts also resonate in Canada. I would not, however, go as far as O’Connor J. in requiring that a work possess a minimal degree of creativity to be considered original”: *ibid.*

of skill and judgment in the production of a work avoids these difficulties¹⁰⁴

Were novelty a requirement, copyright would protect only those works that, in some sense, departed from or improved upon the existing body of intellectual creations. It is axiomatic that copyright does not compare a work to others to determine eligibility, but inquires only into the personal processes of authorship. As the Chief Justice notes, objective novelty belongs to the realm of patent law, wherein independent production without copying is no defence to infringement, never mind a basis upon which to assert a separate and equal entitlement. According to the Court's reasons, then, this is cause enough to resist any terminology that connotes a standard of objective novelty.

It seems fair and relatively uncontroversial that the Court would wish to avoid implications of novelty.¹⁰⁵ However, in *Feist*, Chief Justice O'Connor explicitly made clear that "creativity" implied no such thing:

Originality does not signify novelty; a work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying. To illustrate, assume that two poets, each ignorant of the other, compose identical poems. Neither work is novel, yet both are original and, hence, copyrightable.¹⁰⁶

As such, "[t]he Court's suggestion that the *Feist* creativity standard implies novelty is clearly mistaken."¹⁰⁷ "Creativity", in

¹⁰⁴ *CCH (S.C.C.)*, *supra* note 7 at 356.

¹⁰⁵ See Thomas Dreier & Gunnar Karnell, "Originality of the Copyrighted Work: A European Perspective" (1992) 39 *Journal of the Copyright Society of the U.S.A.* 289 at 290: "We have found, in the literature on copyright, hesitation about the use of a novelty concept. Such hesitation is of course due to novelty being an absolute requirement for patent protection and for protectability of other forms of industrial property.... [N]ovelty has acquired a distinct meaning in intellectual property language. It may, therefore, not seem advisable to dilute it or give it a particular additional copyright meaning."

¹⁰⁶ *Supra* note 6 at 345-46. In support of the originality of identical but independent creations, the Court cited *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49 at 54 (2d Cir. 1936).

¹⁰⁷ Abraham Drassinower, "Sweat of the Brow, Creativity, and Authorship: On Originality in Canadian Copyright Law" (2003-2004) 1 *University of Ottawa Law & Technology Journal* 107 at 123, n. 57. See also Daniel J. Gervais, "Canadian Copyright Law Post-*CCH*" (2004) 18 *I.P.J.* 131 at 139 [Gervais,

copyright terms, does not demand an assessment of the inherent characteristics of the work, but speaks only to the processes of its creation. The dispositive criteria are internal to the workings of the author’s mind.¹⁰⁸ The question is not one of objective newness—whereby a work differs to a specified degree from other, pre-existing works—but rather with *subjective* newness: The work is “new” to the person who brought it into being, in the sense that it was not copied, but was independently produced:

What is not new from a strict point of view (absolute novelty) can be seen as subjectively new and thereby worthy of copyright, if only the person who brought the item into being did not know of any such earlier item or set of elements to which the relevant criteria can apply.¹⁰⁹

If the Court was afraid of a judicial inclination to misunderstand or misapply a creativity standard, it could easily have elaborated on the meaning of “creativity”. The U.S. Supreme Court gave a clear statement to the effect that creativity was not novelty, and the Canadian Supreme Court could have done the same.

The rejection of external considerations, such as literary merit¹¹⁰ or objective novelty, is fairly fundamental in the common

“Post-*CCH*”]: “Whence does the Court draw the conclusion that creativity is equivalent to novelty or non-obviousness? These notions, which belong to patent law, are not used, to my knowledge, either in *Feist* or in relevant decisions in civil-law jurisdictions.” Teresa Scassa similarly criticizes the Court’s reasoning: “[T]his critique [of the creativity standard] is overstated. While it might be true of a standard of ‘creativity’ *simpliciter*, it is much less true of a standard that requires only a ‘minimal level’ or ‘spark’ of creativity. In practical terms, a ‘spark’ of creativity may be very little indeed.” See Teressa Scassa, “Recalibrating Copyright Law? A Comment on the Supreme Court of Canada’s Decision in *CCH Canadian Limited et al. v. Law Society of Upper Canada*” (2004) 3 C.J.L.T. 89 at 90-91, online: CJLT <http://cjlt.dal.ca/vol3_no2/pdfarticles/scassa.pdf> [Scassa, “Recalibrating Copyright Law?”].

¹⁰⁸ See Ryan Littrel, “Toward a Stricter Originality Standard for Copyright Law” (2001) 43 B.C.L. Rev. 193 at 201: “[T]he author’s personal contribution, rather than the work itself, is the dispositive criterion.” The criteria of originality are therefore internal, in the sense that they “inhere in the person who creates the work”: Dreier & Karnell, *supra* note 105 at 290-91.

¹⁰⁹ *Supra* note 105 at 290 [emphasis omitted].

¹¹⁰ The creativity standard is sometimes criticized for its potential to imply the need for subjective judgments of the quality or merit of a work. However, “creativity” in copyright terminology should not be attributed the same meaning

law tradition, and does not offer much assistance in terms of defining what originality is, as opposed to what it is not. Meanwhile, nothing in the Supreme Court's critique would seem to undermine a creativity standard properly understood and correctly applied. Therefore, the Court's reasoning falls short of an emphatic repudiation of the principles that underlie a *Feist*-like creativity standard. My suggestion is that the court chose to resist the language of "creativity", rather than the practical test itself, perhaps because its adoption of that language would have wider philosophical and political implications.

B. "CREATIVITY" AND THE CIVILIAN TRADITION

1. THE CIVIL/Common LAW DYNAMIC IN CANADIAN COPYRIGHT

While the connection has been superficially muddled somewhat by the adoption of a creativity approach in the United States, there is a clear relationship between an elevated originality threshold requiring something in the way of creativity, and the civilian copyright tradition. In France, for example, the standard of originality is relatively high and demands that the works to which copyright extends are "intellectual creations" or "works of the mind".¹¹¹ The traditional understanding of this terminology was

that it possesses in the arts. As opposed to signifying inventiveness or imagination that would require some understanding and evaluation of these attributes as they are manifested in a work, it means only that the author has made some choices as to selection or arrangement of the work that were independently arrived at, and which entailed some minimal amount of creativity. Whether a work has merit or is of a certain quality is a decision that is not required to establish whether a work is "creative" in the sense intended by O'Connor J. in *Feist*, *supra* note 6 at 345: "To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, 'no matter how crude, humble or obvious' it might be. (Nimmer § 1.08 [C][1].)"

¹¹¹ Art. L112-3 C.I.P. (1992), online: Legifrance <http://www.legifrance.gouv.fr/html/codes_traduits/cpiatext.htm> on the protection of anthologies or collections of miscellaneous works or data. Pursuant to Art. L112-1, the C.I.P. protects the rights of authors in "all works of the mind". The French courts have established a threshold for protection by requiring that the author show his or her personality in the work, which at a minimum would require some intellectually

that copyrightability required the imprint of the personality of the author upon the work, which, in the modern context of computer programs and data compilations, has been interpreted to mean something akin to intellectual input or creative choice.¹¹² The search for originality is thus the search for the mark of the author's individuality as revealed in his or her expression: "[E]xpressive self-articulation"¹¹³—the heart of true authorship—is achieved through the creative imagination. While such an approach imposes a more onerous standard for obtaining copyright than the traditional industriousness approach of the common law tradition, once the label of original authorship is awarded, it comports with a strong authors-rights theory of copyright, rooted in the notion of possessive personality.¹¹⁴ Influenced by continental philosophy, the *droit d'auteur* that flows from original, creative authorship emanates from the "inalienable personality of the author."¹¹⁵

creative choice: see Daniel Gervais, *La Notion d'Oeuvre Dans La Convention de Berne et en Droit Compare* (Genève, France: Librairie Droz, 1998) at 85-86.

¹¹² See André Lucas & Robert Plaisant, "France" in Melville B. Nimmer & Paul E. Geller, eds., *International Copyright Law and Practice* (New York: Matthew Bender, 1999) at 4, cited in Davison, *supra* note 37 at 114. See also Gervais, "Feist Goes Global", *supra* note 79 at 968-70.

¹¹³ Charles Taylor describes "this new power of expressive self-articulation" and its role in the Romantic period and definitions of the modern self in *Sources of the Self: The Making of Modern Identity* (Cambridge, Mass.: Harvard University Press, 1989) at 389-90.

¹¹⁴ See Ginsburg, "Creation and Commercial Value", *supra* note 65 at 1881-88, discussing personality, individuality, and authorship. As Ginsburg explains: "Logically, the property-in-personality notion can be extended ... to the literary property right, which controls *published* manifestations of oneself as revealed in one's writings. The self-revelatory character of literary creation justifies the creator's assertion of private property rights in the work when published as well as in the work before it is disclosed": (*ibid.* at 1884). See also Jane C. Ginsburg, "A Tale of Two Copyrights: Literary Property in Revolutionary France and America" (1990) 64 Tul. L. Rev. 991.

¹¹⁵ Thomas Dreier, "Balancing Proprietary and Public Domain Interests: Inside or Outside of Proprietary Rights?" in Rochelle Cooper Dreyfuss, Diane Leenheer Zimmerman, & Harry First, eds., *Expanding the Boundaries of Intellectual Property: Innovation Policy for the Knowledge Society* (New York: Oxford University Press, 2001) at 298. The passage in full reads: "Somewhat simplified, it may be said that the Anglo-American system ... has retained much of its initial character as a limited monopoly, expressly granted in order to serve

The divergence between civilian and common law principles of authorial right has a particularly critical relevance in Canadian copyright jurisprudence. Although the federal Act ostensibly follows the British tradition and philosophy, Canadian case law and commentary manifests some degree of tension between Canada's two major legal systems. As was noted by Justice Binnie, writing for a majority of the Supreme Court Justices in the *Théberge* decision,¹¹⁶ the English and French versions of the *Canadian Copyright Act* use the terms "*droit d'auteur*" and "copyright" as though they were direct translations and equivalent terms, while, in fact, they are widely thought to encapsulate very different conceptions of the copyright interest:

[T]he distinction between the copyright tradition and the "*droit d'auteur*" tradition is based on a question of terminology: where the followers of the first tradition, the British and their spiritual heirs, talk about "copyright" to refer to a right that derives from the existence of a "copy," an object in itself, the followers of the second tradition talk about "author's right" to refer to a right that stems from intellectual effort or activity brought to bear by an author, a creator.¹¹⁷

Whereas Justice Binnie was intent upon avoiding the confusion that led others to import *civiliste* concepts into Canadian copyright, the minority ruling reached by the three judges from Quebec insisted that "it is important to recall that Canadian copyright law derives from multiple sources and draws

the public interest. In contrast, the continental system ... has developed in the course of the nineteenth century under the influence of German idealistic philosophy and French legal doctrine, from a mere printer's and publisher's right into a right based on natural justice, a right that is now understood as emanating from the inalienable personality of the author" [footnote omitted]. For a detailed comparison between the common law and continental perspective, see Alain Strowel, "Droit D'Auteur and Copyright: Between History and Nature" in Brad Sherman & Alain Strowel, eds., *Of Authors and Origins: Essays on Copyright Law* (Oxford: Clarendon Press, 1994) at 235 *et seq.*

¹¹⁶ *Supra* note 99 at 367.

¹¹⁷ Alain Strowel, *Droit d'auteur et copyright—Divergences et convergences: étude de droit comparé* (Paris: Librairie générale de droit et de jurisprudence, 1993) at 19-20, cited in *Théberge*, *supra* note 99 at 367.

on both common law tradition and continental civil law concepts."¹¹⁸

In support of this position, Justice Gonthier quoted the following passage:

Canadian law inherited [the common law copy-right] aspect while remaining receptive to the French doctrines, particularly because of Quebec's influence. This does great credit to our law since the Canadian Parliament is more inclined than any other legislature to stay attuned to external developments in order to mould its own rules.¹¹⁹

2. THE CIVIL/Common LAW DYNAMIC IN CANADA'S ORIGINALITY DOCTRINE

The continuing pervasiveness of *civiliste* conceptions of the *droit d'auteur* in Canadian copyright may have had a bearing upon the Court's chosen formulation of an "original authorship" standard. I would suggest that the use of the term "creativity" in this bi-judicial setting would present greater challenges in Canada than in the Anglo-American context. For one thing, due to the correspondence between a creativity standard and a personality-based conception of the copyright interest, it might be thought that the former affirms the latter, such that the originality doctrine determines the nature of the right that is conferred. In other words, if we adopt a creativity test that appears to demand the reflection of the author's personality in the work, then the resultant right will be understood to flow from that investment of personality. Within this context, the creativity test could fortify a conceptualization of copyright as an inalienable authorial right, which would have significant implications in terms of defining the form, scope, and limit of the right.

¹¹⁸ *Théberge*, *ibid.* at 386, Gonthier J., with L'Heureux Dubé and LeBel JJ. concurring.

¹¹⁹ Pierre-Emmanuel Moyse, "La nature du droit d'auteur: droit de propriété ou monopole?" 43 *McGill L. J.* 507 (1998) at 562, cited in *Théberge*, *supra* note 99 at 388 [translated by Gonthier J.].

“Creativity”, as it exists in the United States, does, of course, come with its own ideological baggage.¹²⁰ However, the personality theory underlying the civilian tradition places the romantic author-figure front and centre as the individual around whom the copyright system is built, and in whose interest it operates. The power of this philosophy is apparent in the *Tele-Direct* ruling at the Federal Court of Appeal. Endorsing a *Feist*-like approach to originality, the requirement of creativity was asserted, not as the basis for furthering the copyright balance or the interests of the public, but rather as a means of identifying the true and deserving “author”:

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.¹²¹

In *CCH*, Justice Gibson of the Trial Division quoted this passage as support for his application of the creativity standard,

¹²⁰ There is a great deal of interesting scholarship that critiques the pervasiveness of romantic authorship tropes as they are revealed through the notion of original, creative authorship: see e.g. James Boyle, *Shamans, Software, and Spleens: Law and the Construction of the Information Society* (Cambridge: Harvard University Press, 1996), in which Boyle argues that misguided and misplaced attachment to notions of “romantic authorship” underlie the general expansion of the intellectual property regime. But see Mark Lemley, “Romantic Authorship and the Rhetoric of Property” (1997) 75 *Tex. L. Rev.* 873, taking issue with relevance of “romantic authorship” in this regard. See also Jessica Litman, “The Public Domain” (1990) 39 *Emory L.J.* 965; Peter Jaszi, “Toward a Theory of Copyright: The Metamorphoses of ‘Authorship’” (1991) *Duke L.J.* 455; Peter Jaszi, “On the Author Effect: Contemporary Copyright and Collective Creativity” (1992) 10 *Cardozo Arts & Ent. L.J.* 293; James Boyle, “A Theory of Law and Information: Copyright, Spleens, Blackmail, and Insider Trading” (1992) 80 *Cal. L. Rev.* 1415; Martha Woodmansee & Peter Jaszi, eds., *The Construction of Authorship: Textual Appropriation in Law and Literature* (Durham: Duke University Press, 1994).

¹²¹ *Tele-Direct*, *supra* note 6 at para. 15. See also *CCH (F.C.A.)*, *supra* note 9 at 284-85. *Tele-Direct* endorsed the requirement of creativity not as the basis for furthering the public interest, but rather as a means of identifying the deserving “author”: Craig, “Evolution of Originality”, *supra* note 17 at 432.

thereby revealing that the creativity approach seemingly drawn from the U.S. jurisprudence was, in the Canadian context, welcomed as the validation of a civilian philosophy of original authorship. The U.S. creativity approach was framed by the constitutional requirements of promoting “Progress of the useful Arts” and the public interest in free exchange of ideas and information.¹²² It was explained in light of the “public-oriented justification of copyright in American law”, and depended upon a “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.”¹²³ The same standard in Canada was framed as an affirmation of the *droit d’auteur*. Abraham Drassinower has addressed this discrepancy:

Justice Decary evoked the inherent dignity of authorial right as the central copyright concern par excellence, yet he did so by invoking a case, *Feist*, that affirms a radically instrumentalist understanding of the creativity requirement, an understanding for which the author is but a “secondary” consideration The evocations of authorial dignity obviously involved in the phrase, “*le droit d’auteur*”, have little to do with the pure public interest instrumentalism of the American approach that Justice Decary went on to invoke immediately thereafter.¹²⁴

Had the Supreme Court of Canada handed down a creativity standard for originality, it would be susceptible to interpretation as the triumph of the civilian concept of the author’s right over the common law conception of copyright as an instrument to facilitate commercial exploitation. Understood in this light, a creativity standard would likely entail both the strengthening of copyright holders’ rights, and the increasing elevation of copyright’s threshold to admit only works that display “creativity and

¹²² In *Feist*, the refusal to protect facts in a compilation was neither “unfair nor unfortunate” for the compiler, but was the very means by which copyright advanced its “primary objective”, which is not to reward authors but to promote progress: see *Feist*, *supra* note 6 at 349-50 [emphasis added].

¹²³ Guy Pessach, “The Legacy of *Feist* Revisited—A Critical Analysis of the Creativity Requirement” (2002) 36 *Isr. L.R.* 19 at 43 [citation omitted].

¹²⁴ Drassinower, *supra* note 107 at 117-18.

ingenuity”, and bear the imprint of the author’s personality. Apparently, the Court felt that neither result would further “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.”¹²⁵

C. INTERIM CONCLUSIONS ON DECLINING “CREATIVITY”

To summarize, the primary difficulty posed by a “creativity” standard in Canada is the philosophical assumptions that the term entails. The concept of authorial creativity could not easily be recast as an instrumental requirement, whose purpose was to further the goals of the copyright system. By the same token, if a creativity requirement were imported into such a setting, it would be hard to cast the author’s right as anything other than a natural entitlement flowing from the investment of his or her personality in the work. Taking into account the rather unique dynamics of Canadian copyright law, the creativity standard, while justified in the United States in terms of copyright’s incentive structure, has the potential in Canada to exacerbate a critical doctrinal division, to emerge as a full-blown personality-based standard, and to substantiate a philosophical conception of authorship, ill-suited to the common law context and the purposes of copyright identified by the Court.

In my opinion, the Supreme Court of Canada took up the challenge of formulating a standard that would cohere reasonably well with the creativity standard,¹²⁶ embrace competing visions of authorship, but evade these potentialities. The key to formulating such a test was to omit the word “creativity”. The key to understanding the test is, therefore, to recognize the significance of this omission and what it implies about Canada’s new standard: With the exclusion of “creativity”—as with the exclusion of “labour”—the Court deliberately resisted a formulation of originality that would define it in terms of the author’s individual

¹²⁵ *Théberge*, *supra* note 99, cited in *CCH (S.C.C.)*, *supra* note 7 at 349. It ought to be inferred that copyright is not regarded by the Supreme Court as a “just reward” for the author’s investment of personality in her work. *Cf.* Craig, “Locke”, *supra* note 100.

¹²⁶ See Section V, below.

investment and corresponding entitlement. In doing so, it took another step away from rights-based and author-oriented determinants of copyrightability, and towards an instrumental interpretation of copyright’s reach.

V. WHAT REMAINS? THE INSTRUMENTALITY OF ORIGINALITY

I have argued that the Supreme Court’s decision to exclude both “labour” and “creativity” from its originality test suggests a willingness to expunge from the originality doctrine labour-reward and personality theories of right, both of which have influenced the doctrine’s (mis)application in the Canadian courts. This conclusion still leaves open the question of how the new standard should be understood in the absence of such theories. The answer, I suggest, lies in the reconceptualization of originality in an instrumental mode: It is not the foundation of an individual entitlement, but a legal tool with which to further a social end. In order to make this case, I will briefly turn our attention back to the U.S. position.

A. THE U.S. ORIGINALITY STANDARD COMPARED

Notwithstanding the common conflation of creativity and civil law theory in Canada, the American creativity approach is not tantamount to the “intellectual creation” standard invoked by Justice DeCary in *Tele-Direct*.¹²⁷ Describing the U.S. originality standard that emerged from *Feist*, David Freedman has warned:

The creativity standard [in the United States] is not akin to the “author’s own intellectual creation” standard in those civilian systems in which the personality of the author must be reflected in

¹²⁷ Gibson J. quoted the following passage from *Tele-Direct*: “Clearly, what the parties to the [NAFTA] [a]greement wanted to protect were compilations of data that ... constitute ‘*intellectual creations*’. The use of these last two words is most revealing: compilations of data are to be measured by standards of intellect and creativity. As these standards were already present in Anglo-Canadian jurisprudence ... I can only assume that the Canadian government in signing the Agreement ... expected the Court to follow the ‘creativity’ school of cases rather than the ‘industrious collection’ school”: *CCH (F.C.T.D.)*, *supra* note 17 at 470, citing *Tele-Direct*, *supra* note 6 at para. 15.

the work, but furthers the same policy goals that are familiar to British copyright: rewarding the judgement and taste of the author through the copyright grant, encouraging others to act likewise, but in no case making unavailable the general ideas or discrete matters of fact that ought to be available to them.¹²⁸

It can be argued that the *Feist* standard, which requires only a minimal degree of creativity, does not in fact go much—if any—further than the Canadian Supreme Court’s “skill and judgment” test, and properly understood, does not raise the bar “too high” when compared with the traditional standards employed in the United Kingdom and Canada.¹²⁹ Such a conclusion would reinforce the idea that the Court had other reasons for refusing to follow *Feist*, and could thereby provide some additional insight into the newly-formulated test.

In practice, a U.S. standard requiring creativity may be less exclusionary than it appears on its face, given the kinds of works that it has proved capable of embracing. For example, in *Key Publications v. Chinatown Today Publishing Enterprises*,¹³⁰ a telephone directory listing businesses associated with New York City’s Chinese-American community was protected by copyright.¹³¹ An interesting comparison can be made between the *Key Publications* case and that of *ITAL-Press Ltd. v. Sicoli*¹³² in the post-*Tele-Direct* Canadian context, where the court found copyright in a telephone directory that consisted only of Canadians of Italian origin.¹³³ Generally, courts applying a

¹²⁸ Freedman, *supra* note 14 at 591.

¹²⁹ The Chief Justice said, in setting out her “skill and judgment” test that she “would not, however, go as far as O’Connor J. in requiring that a work possess a minimal degree of creativity” *CCH (S.C.C.)*, *supra* note 7 at 355. She went on to say that “the creativity standard of originality is too high”: *ibid.* at 356.

¹³⁰ 945 F.2d 509, 20 U.S.P.Q.2d (BNA) 1122 (2d Cir. 1991).

¹³¹ Decisions to include some uncommon categories or to exclude some non-viable businesses could amount to creative choices sufficient to confer copyright in the selection and arrangement of the directory.

¹³² (1999), 170 F.T.R. 66, 86 C.P.R. (3d) 129 (F.C.T.D.).

¹³³ Gibson J. was satisfied that the selection process meant that this was not a “garden-variety” directory: *ibid.* at para. 108. While Gibson J. referred to *Feist* and *Tele-Direct*, it is arguable that he either failed to apply them, or applied them incorrectly, as the selection apparently involved little more than a technical

creativity standard have not struggled to find a modicum of creativity even in highly functional or mundane works.¹³⁴ Indeed, it seems likely that the kind of works that would be excluded by a “minimum degree of creativity” threshold will fall similarly short of the “more than trivial skill and judgment” requirement.¹³⁵

I submit that there is little, if any, likelihood that a “skill and judgment” test will extend protection to a work that would fail to satisfy the U.S. creativity test, properly applied.¹³⁶ One may

function: see Gervais, “*Feist Goes Global*”, *supra* note 79 at 964. However, the point here is that it takes very little for a work to be more than the mere garden-variety compilation denied copyright in the *Feist* case.

¹³⁴ A commonly cited example is that of *CCC Information Services, Inc. v. Maclean Hunter Market Reports, Inc.*, 44 F.3d 61, 33 U.S.P.Q.2d (BNA) 1183 (2d Cir. 1994), cert. refused, 516 U.S. 817 (1995), in which the Second Circuit Court of Appeals found copyright to subsist in a work documenting the value of different makes and models of cars in the resale market. Again, a parallel can be drawn with a Canadian case applying a creativity standard: *Edufile Inc. v. Automobile Protection Assn.*, [2000] 4 F.C. 195, (2000) 6 C.P.R. (4th) 211 (F.C.A.), leave to appeal refused, [2001] 1 F.C. 1 (S.C.C.). In *Edufile*, the Court confirmed and applied its ruling in *Tele-Direct*, but nonetheless found that copyright did attach to a price guide for used cars, in which the information was set out in three columns as opposed to the common dual-column format.

¹³⁵ Thus, for example, the Second Circuit Court, affirmed by the U.S. Supreme Court, refused to find copyright in the pagination and editing provided by Westlaw in its published court reports on the following basis: “In light of accepted legal conventions and other external constraining factors, West’s choices on selection and arrangement can reasonably be viewed as obvious, typical, and lacking even minimal creativity”: *Matthew Bender & Co. v. West Publishing Co.*, 158 F.3d 674 at 677, 44 U.S.P.Q.2D (BNA) 1560 (2d Cir. 1998), cert. refused, S. Ct. 526 U.S. 1154 (1999). Similarly, in *CCH* the Supreme Court of Canada denied protection to edited judicial reasons, stating: “The changes made to judicial reasons are relatively trivial Any skill and judgment that might be involved in making these minor changes and additions to the judicial reasons are too trivial to warrant copyright protection. The changes and additions are more properly characterized as a mere mechanical exercise”: *CCH (S.C.C.)*, *supra* note 7 at 360.

¹³⁶ Gervais has also argued that “the Supreme Court chose a ‘middle path’ only in appearance. In fact, Canada has taken on a standard essentially identical to that of our American neighbours and to the Continental systems”: Gervais, “Post-*CCH*”, *supra* note 107 at 139. He goes on to describe the “skill and judgment” test as “functionally indistinguishable from the modicum of creativity test explicated in *Feist*”: *ibid.* at 167. See also Scassa, “Recalibrating Copyright Law?”, *supra* note 107 at 91: “[I]t is difficult to see how, in terms of practical effect, a non-trivial exercise of skill and judgment will amount to anything other

assume that a “creativity” standard would leave less room for the protection of data compilations on the *Feistian* logic that factual compilations provide little scope for the exercise of one’s creative faculties, but may nonetheless call upon one’s skill or judgment.¹³⁷ However, both tests are premised upon—and so must respect—the proposition that “facts ... are free for the taking.”¹³⁸ Equally, both tests demand that the selection or arrangement of information is the result of more than merely mechanical or routine choice.¹³⁹ The minimal degree of creativity required in the United States is just enough to reveal some degree of authorial judgment or choice between possible alternatives that is not routine, commonplace, mechanical, or dictated by functional considerations. Arguably, it demands nothing more than did Chief Justice McLachlin in her description of “skill and judgment”. If this is accepted, then the “creativity” test is not, in application at least, any “higher” a threshold than the “skill and judgment” test, despite the Supreme Court’s statements to that effect.¹⁴⁰ It seems fair to say that “the Court can differentiate its

than a “spark” of creativity.” Cf. Daniel Gervais & Elizabeth F. Judge, *Intellectual Property: The Law in Canada* (Toronto: Thomson Carswell, 2005) at 129.

¹³⁷ See Scassa, “Recalibrating Copyright Law?”, *supra* note 107 at 91: “It is arguable that the Canadian standard is more oriented towards utilitarian works than is the U.S. standard.... [A]ssessing the ‘intellectual effort’ in the form of skill and judgment that goes into the works makes more sense than conceptualizing this effort as a ‘spark’ of creativity. It is arguable that the U.S. language of ‘creativity,’ even if what is required is minimal, could place utilitarian works at a disadvantage in assessing their worthiness for copyright protection.” However, Scassa goes on to note: “[T]he reality in the United States is that utilitarian works have been protected using the *Feist* standard”, *ibid.* The difference between the standards may therefore be no more than semantic.

¹³⁸ *Feist*, *supra* note 6 at 349, citing Ginsburg, “Creation and Commercial Value”, *supra* note 64 at 1865, 1868. See also *CCH (S.C.C.)*, *supra* note 7 at 354-55, endorsing O’Connor J.’s position that facts and information belong in the public domain.

¹³⁹ *Feist*, *supra* note 6 at 361-62; *CCH (S.C.C.)*, *supra* note 7 at 352.

¹⁴⁰ Indeed, one could imagine a work exhibiting creativity, but falling short of displaying skill and judgment, thus defined. For example, the spontaneous scribbling of a young child might be wholly, even archetypically, creative, while demonstrating little or none of the skill or judgment required by the *CCH* standard. Also, accidental or inadvertent variations might be caught by a creativity test (see e.g. *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99,

own 'skill and judgment' standard from the 'creativity' standard only by mischaracterizing the latter as requiring something 'novel', 'unique', or 'non-obvious.'"¹⁴¹ Avoiding such mischaracterization, the difference between the standards is elusive—or, perhaps, illusive.

B. WHY DISTINGUISH *FEIST*? THE LIMITS OF AMERICAN PERSUASIVENESS

If the creativity test as formulated in the *Feist* case does not necessarily go too far, or impose a barrier that is too high, it seems reasonable to suggest that something more was at play in the Supreme Court's decision to avoid use of the term "creativity". As well as the philosophical entailments of the term addressed in the previous section, the Court's refusal to follow *Feist* may reflect a general reluctance to incorporate into Canadian copyright doctrine what has come to be recognized as an essentially American standard. In Canadian cases, warnings against the adoption of American principles abound, usually with reference to the words of Justice Estey in *Compo v. Blue Crest*:

United States Courts decisions, even where the factual situations are similar, must be scrutinized very carefully because of some fundamental differences in copyright concepts which have been adopted in the legislation of that country.¹⁴²

It is common to see this wariness of U.S. precedent justified in terms of the constitutional basis for the American copyright system, as though the context and stated purpose of copyright law in the United States definitively sets it apart from the Canadian system.¹⁴³ Furthermore, the suggestion of misguided reliance

90 U.S.P.Q. (BNA) 153 (2d Cir. 1951)), but fall short of a "skill and judgment" standard because there is no use of knowledge, aptitude or practiced ability in such an unintentional variation, nor is there discernment or evaluation of possible alternatives. See also Scassa, "Recalibrating Copyright Law?", *supra* note 107 at 91. While McLachlin C.J.C. claimed that the Canadian test did not "go as far" as O'Connor J.'s, it may be that the reverse is true.

¹⁴¹ Drassinower, *supra* note 107 at 123, n. 57.

¹⁴² [1980] 1 S.C.R. 357 at 367, [1980] 10 D.L.R. (3d) 249.

¹⁴³ U.S. Const. art. I, § 8 reads: "Congress shall have the power ... to promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings

upon American authorities appears to be a popular and effective ground for appeal. For example, when Justice Linden reversed Justice Gibson's earlier ruling in *CCH*, he criticized the trial judge for having "mistakenly adopted" the American approach and having "import[ed]" an "American principle" into Canadian law, thereby exemplifying the wisdom of Justice Estey's warning.¹⁴⁴ Similar arguments have been given weight in other Canadian cases.¹⁴⁵

When exploring the Supreme Court of Canada's decision to avoid the language of "creativity", it may be wise to keep this dynamic in mind. Refusing to go as far as *Feist*, the Supreme Court cited *Compo* and observed: "U.S. copyright cases may not

and Discoveries." No equivalent statement exists in Canadian law (which is not to say that no equivalent purpose exists). Because of this perceived difference between the systems, Canadian courts have warned that "American case law must be carefully scrutinized": *CCH (F.C.T.D.)*, *supra* note 7 at 465, Gibson J., and have described U.S. law as "most fascinating from both a cultural and legal perspective" but "not ... persuasive authority in the context of Canada's particular copyright regime": *Cie générale des établissements Michelin—Michelin & Cie v. C.A.W.—Canada*, [1997] 2 F.C. 306, (1996), 71 C.P.R. (3d) 348 (T.D.), Teitelbaum J.

¹⁴⁴ *CCH (F.C.A.)*, *supra* note 9 at 242, 259.

¹⁴⁵ See e.g. *Delrina*, *supra* note 28, where the appellants argued that the trial judge erred by applying United States authorities on the copyrightability of computer programs without regard to the significant differences between the countries' copyright laws. The argument was not successful, but apparently this was because the appeal court was unconvinced that the trial judge had necessarily applied U.S. law. The lesson to be learned from this case was that, even when substantively following precedent from the United States, it is best not to be seen to follow it: Courts endorsing a U.S. approach should at least call it by another name (thus, Canada now has a "weeding out" test, as opposed to the American equivalent, the "abstraction-filtration-comparison" test). Similarly, in *Robertson (C.A.)*, *supra* note 94, the Ontario Court of Appeal criticized the motions judge for overlooking Canadian-U.S. differences when apparently following the U.S. authority of *N.Y. Times Co. v. Tasini*, (2001) 533 U.S. 483, 121 S. Ct. 2381 (2d. Cir. 2001). The majority of the Court went out of its way to stress that it was not guided in its reasoning by the U.S. approach, but ultimately arrived at what was essentially the same conclusion. The same reasoning was later affirmed by a majority at the Supreme Court in *Robertson (S.C.C.)*, *supra* note 2 at para. 43: "[C]aution must be adhered to when referencing *Tasini* in the Canadian context due to differences in the applicable governing legislation.... Nonetheless, we find the reasoning ... compelling and applicable."

be easily transferable to Canada given the key differences in the copyright concepts in Canadian and American copyright legislation."¹⁴⁶ It is therefore conceivable that the "skill and judgment" test was intended to resemble the creativity test both in substance and effect, albeit without going so far as to explicitly adopt the American terminology and thus appear to undermine these supposedly "key differences".

Such a conclusion would be important in two respects. First, it would underscore the similarities between the two tests in their application, emphasizing that Canadian copyright protection for information compilations should be just as "thin" as it is in the United States. When interpreting the "skill and judgment" standard, Canadian courts need not begin with the assumption that it catches more works than the U.S. standard.¹⁴⁷ If the prevailing assumption is that Canada has a lower standard, the temptation will be to reduce it to a point where, once again, everything makes the bar. If it is accepted that the Canadian standard will produce what is effectively a "creativity" threshold, there is a better chance that "skill and judgment" will indeed raise the bar of copyrightability, ensuring that information remains free, and that the public domain has room to flourish.

Secondly, this conclusion would have important implications for the perceived role of the originality doctrine in the copyright system. Irrespective of the Supreme Court's refusal to explicitly follow *Feist*, if it were understood that the American and Canadian standards are essentially the same, Canadian courts may be more receptive to the principles and policies that underlie U.S. originality jurisprudence. Specifically, from this perspective, it may be acknowledged that the instrumental role attributed to "creativity" in *Feist* equally describes the role that "skill and

¹⁴⁶ *CCH (S.C.C.)*, *supra* note 7 at 355.

¹⁴⁷ The Ontario Court of Appeal in *Robertson (C.A.)* described the *CCH (S.C.C.)* originality ruling in these terms: "[U]nlike the jurisprudence in the United States, a work is considered to be original and the subject of full copyright protection, even if creativity is not present. According to the court, the creativity standard of originality in the United States is too high": *Robertson (C.A.)*, *supra* note 94 at 497. It is easy to see how this description might lead to a threshold significantly lower than the U.S. threshold, and so, in my opinion, lower than that intended by the Supreme Court.

judgment” ought to perform in Canada.¹⁴⁸ In other words, requiring works to meet a threshold of “skill and judgment” is a route by which to “implement copyright’s policy of encouragement, and thus achieve the optimal result for promoting the public interest.”¹⁴⁹ Essentially, the Supreme Court should be understood to have decided that only works displaying “skill and judgment” warrant the encouragement that copyright affords: Copyright should encourage authors to employ their skill and judgment in the creation of intellectual works because these are the works that further the public interest at the heart of copyright.

The ruling of the Supreme Court, therefore, brought the Canadian position closer to the American approach, both by elevating the originality standard and by justifying that elevation with the conviction that a higher standard is the best way to achieve copyright’s purposes.¹⁵⁰ In this sense, the ruling may represent a subtle endorsement of the American approach, albeit nominally reconfigured for the Canadian context, within which a so-called “creativity” standard could not easily have functioned in the same way. The ruling, therefore, restores some substance to originality in Canada, and recognizes that originality is

¹⁴⁸ In *Feist*, O’Connor J. stated that “[t]he primary objective of copyright is not to reward the labor of authors, but ‘to promote the Progress of Science and the useful Arts’”: *supra* note 6 at 349.

¹⁴⁹ Pessach, *supra* note 123 at 43, explains: “[The] utilitarian philosophy of copyright, which characterizes American copyright law and its constitutional merits, was declared by the *Feist* court as its compass in determining what ‘originality’ means. The court’s conclusion was that by imposing a requirement of creativity it would fulfill and best serve the public interest”. He continues: “This conviction about the utilitarian basis and the public-oriented justification of copyright in American law was no more than a declaration of a long tradition in American copyright law. What was novel about 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. Although it was not stated literally in the court’s decision, put in economic terms, the court’s decision presumed that in a cost-benefit analysis of copyright law, only works with an element of creativity warranted the grant of a copyright” [footnotes omitted].

¹⁵⁰ I have argued elsewhere that “the *CCH* case is to Canada what *Feist* is to the U.S.” on that basis that both cases “looked beyond the interests of the purported rights-bearer and made an appeal to the public policy goals of copyright law”: Craig, “Evolution of Originality”, *supra* note 17 at 437.

instrumental to the goals of the copyright system: The application of an originality doctrine is a means by which to encourage the creation and dissemination of "works of the arts and intellect".¹⁵¹

C. CONCLUSIONS ON THE REJECTION OF "CREATIVITY"

This discussion suggests that "creativity" in Canada had become a loaded term: weighed down by connotations of quality or objective novelty, by personality-based theories of the author's inherent right, and by undertones of Americanization perceived as threats to the Anglo-Canadian tradition. The Supreme Court of Canada chose to exclude the term "creativity" from the originality doctrine, notwithstanding its decision to elevate the threshold. The decision to omit "creativity" from the originality requirement may prevent courts from employing the kind of exclusionary standard used by the Trial Judge in *CCH*, and should reduce the judicial inclination to assess copyrightability with reference to the perceived quality of the work (thereby achieving the commonly-stated benefits of a sweat-based standard). However, by requiring some "skill and judgment", the new test also avoids the "evisceration" of originality's meaning.

While the distinction between "a minimum amount of creativity" and a "more than trivial amount of skill and judgment" may prove negligible in application, the implications for Canadian copyright policy and theory should not be ignored: The choice to exclude "creativity" from the test restricts the potential force of personality-based theories in Canadian copyright, avoids significant upset to the civil and common law equilibrium, and appears to resist the tendency towards Americanization. At the same time, however, it makes room for an instrumental approach to originality determinations not dissimilar to that found in the United States, according to which the goals of the copyright system can act as a "compass in determining what 'originality' means."¹⁵²

¹⁵¹ *Théberge*, *supra* note 99 at 355.

¹⁵² Pessach, *supra* note 123 at 19.

VI. CONCLUSION: *CCH* AND THE INSTRUMENTALITY OF ORIGINALITY

Canada now has a definitive statement of the originality standard against which works are to be measured and copyright conferred; this is a significant improvement upon the previously uncertain state of Canadian originality jurisprudence. However, the presence of sufficient “skill and judgment” will be a matter of degree to be decided on the facts of each case. It is apparent that the test has the potential to slip towards a very low threshold: A compiler who employs a practiced aptitude for gathering data, and decides what data to include, may be granted rights over his data selection. Equally, the test could establish a relatively high threshold: Someone who makes creative choices in producing a work could conceivably be denied the status of original author if those choices demonstrate no particular skill, aptitude, or ability.¹⁵³

With such subjective and malleable concepts, and this degree of judicial discretion, courts are likely to return to first principles to determine whether the standard for protection has been met. Specifically, courts’ decisions will likely depend upon the perceived equities of the case, which will, in turn, depend upon the perceived purposes of copyright law. If copyright is believed to be a reward for labour, then the “skill and judgment” threshold is likely to be low. If copyright is believed to be a right flowing from authorial creativity, then the “skill and judgment” threshold is likely to be higher. I would suggest that courts should rather have regard to the larger legal principles and policies that emanate from the *CCH* judgment. The substance of Canada’s new originality doctrine should be determined, and its application informed, by the purposive spirit in which it appears to have been conceived.

When Canadian courts interpret and apply the “skill and judgment” test, there are a few considerations that should guide their analysis. First, they should recall that the Supreme Court

¹⁵³ Cf. Scassa, “Recalibrating Copyright Law?”, *supra* note 107 at 91: “The Canadian standard embraces a broad range of utilitarian works while raising the spectre of more subjective interpretations of copyright in the traditional categories of copyright works.”

excluded "labour" from its test. Therefore, Canadian courts ought to recognize that copyright is no longer to be granted as a reward for mere industriousness. As a related point, courts should remember that a primary motivation behind the decision to exclude "labour" was the desire to ensure that information remains in the public domain. Courts assuming that the "skill and judgment" threshold is lower than the U.S. equivalent should ensure that their interpretation of Canada's originality standard does not permit a de facto monopoly over information contained in a copyrightable work.

Secondly, courts should bear in mind that the Supreme Court has explicitly rejected any requirement of "creativity". I have suggested that, implicitly, the Court may have sought to avoid the philosophical and political implications of the creativity standard. In particular, the Court perhaps intended to avoid "creativity" in the sense used in the *Tele-Direct* case: as concomitant with the *droit d'auteur*. Therefore, it would be appropriate for Canadian courts assessing "skill and judgment" to leave aside romantic authorship ideals and the personality-based theories of individual entitlement. As a related point, it is clear that the Supreme Court meant to avoid external, qualitative evaluations of a work's worth or contribution. Courts assuming that "skill and judgment" has significantly elevated our originality threshold should take care to avoid turning "skill and judgment" into a merit-based assessment of an author's contribution.

The third and final factor for consideration is that the Supreme Court did all of this in an apparent attempt to strike the appropriate balance between authors' just rewards and the public's interests, and thereby further the stated purposes of the *Copyright Act*.¹⁵⁴ It should follow that the author's "just reward" is fair compensation for the exercise of "skill and judgment" in

¹⁵⁴ *CCH (S.C.C.)*, *supra* note 7 at 355-56. The Court described as the purpose of copyright "to balance the public interest in promoting the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator. 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."

the production of a work of art and intellect, and not an entitlement flowing from the investment of labour or personality. Rather than asking questions about the origin and scope of the author's entitlement, courts should now ask questions about the kinds of works that ought to be protected, and those that ought to remain in the public domain, in light of copyright's policy goals.

Because the "skill and judgment" test straddles several critical theoretical and practical divides, it seems clear that the "appropriate" and "workable" balance that the Supreme Court claims to have struck¹⁵⁵ is tentative and fragile at best.¹⁵⁶ However, by potentially freeing originality from the loaded assumptions that have defined and disrupted it for so long, the *CCH* case has provided a much-needed opportunity for its re-imagination. Because the Supreme Court resisted a "sweat of the brow" approach, removed "labour" per se from the subsistence determination, and avoided the language of "creativity", future courts can and should interpret and apply the originality standard without resort to the notion of copyright as a natural entitlement of the author, whether born of the investment of labour or personality. Rather, Canadian courts should appreciate the renewed instrumentality of copyright's originality doctrine.

¹⁵⁵ *CCH (S.C.C.)*, *supra* note 7 at 356.

¹⁵⁶ See Craig, "Evolution of Originality", *supra* note 17 at 440-42.