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Canadian Rhapsody: Copyright Law and Research Libraries

Matthew Rimmer, *Australian National University College of Law*



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Abstract This article considers the ground-breaking Supreme Court of Canada decision in *CCH Canadian Limited v The Law Society of Upper Canada*. The matter involved legal publishers bringing an action for copyright infringement against the Law Society of Upper Canada for operating a photocopy and custom copy service at the Great Library of Osgoode Hall. The Supreme Court of Canada decision laid down important precedents in relation to originality, authorisation, and the defence of fair dealing. The ruling has been hailed as 'one of the strongest pro-user rights decisions from any high court in the world, showing what it means to do more than pay mere lip service to balance in copyright'. This decision will have important implications for the regulation of new technologies. The approach has been applied in two decisions dealing with copyright law and the internet - the Canadian Federal Court case of *BMG Canada v John Doe*, and the Supreme Court of Canada 'Tariff 22' case. The Supreme Court of Canada decision in *CCH Canadian Limited v The Law Society of Upper Canada* provides an impetus to reconsider the judicial interpretation of user rights in Australian jurisprudence.

In *No trespassing*, Swedish scholar Eva Hemmungs Wirtén provides a cultural history of the photocopier. She observes that this technology deserves close critical attention:

Taken for granted in schools, offices, and even homes, we seldom consider that the photocopier once caused the same anxieties to surface in respect to print culture as the internet gives rise to today. Controversial enough to be banned in the Soviet Union until 1989, the most problematic aspect of what is now a cheap and readily accessible piece of office equipment is perhaps its capacity to be a 'killer of books'... The internet may be the most advanced device of reproduction the world

has seen today, but it was the copier that brought both author and text into the information age. [1]

Eva argues that the radical disturbance of the photocopier was addressed by new copyright laws, collective licensing practices, and the development of technological protection measures. She considers the paradox that the technology was both a mechanism of copying and control: 'The copier gave us more than the possibility to distribute, to sample, and to create new texts, and more than the possibility to make copies of copies; it also gave us new instruments of control'. [2]

There has been much legal debate over the use of photocopiers in libraries, archives and educational institutions. In November 2003, the Supreme Court of Canada heard arguments over an important copyright case, which will have ramifications for libraries and archives. The matter involved the Law Society of Upper Canada and a number of legal publishers - including CCH Canadian Limited, Canada Law Book Incorporated and Carswell. The case involved questions about originality, authorisation, the defence of fair dealing and other copyright exemptions, and the protection of access to justice under the Canadian Charter of Rights and Freedoms.

The Law Society of Upper Canada governs the legal profession in Ontario, and operates the Great Library of Osgoode Hall in Toronto. The law society operates a photocopying service that copies portions of the three legal publishers' materials on request for a fee. The service includes the delivery of print and facsimile copies to its customers who are generally lawyers and law firms in Ontario. It also provides free-standing photocopiers in the great library. The law society does not monitor the use of these photocopiers but does post notices disclaiming responsibility for infringing copies made by the users of the photocopiers. The legal publishers assert that copyright subsists in their material, and that the law society infringed those copyrights through its photocopying service and by making free-standing photocopiers available in the great library. They alleged that they were being deprived of licensing fees from more than 100 000 pages copied yearly at the great library by lawyers and students.

The Supreme Court of Canada handed down its momentous decision in *CCH Canadian Limited v The Law Society of Upper Canada* in March 2004. [3] The judgment written by Chief Justice (CJ) McLachlin on behalf of the court is a tour de force. [4] It is a logical, well-constructed and incisive judgment. Articulating the policy objectives of Canadian copyright law, her honour approves of Binnie's J comments in the *Théberge* case, which emphasised the importance of the wider public interest served by the law:

The copyright act is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator... The proper balance among these and other public policy objectives lies not only in recognizing the creator's rights but in giving due weight to their limited nature. [5]

The Supreme Court of Canada applies this statement of first principles to a number of judicial

doctrines. It emphasises the need for a higher standard of originality to ensure that there is a strong public domain. The Supreme Court of Canada takes a strong stance on the evidence needed to establish the authorisation of copyright infringement. It also take an expansive reading of the defence of fair dealing and other exceptions to copyright infringement in light of such public purposes of copyright law and wider constitutional concerns about the access to justice.

This article provides an analysis of the groundbreaking decision of the Supreme Court of Canada in *CCH Canadian Limited v The Law Society of Upper Canada*. Part 1 focuses upon the Supreme Court of Canada's finding as to the threshold of originality required for copyright protection. Such a decision has important implications for the protection of databases - a topic of particular interest for libraries. Part 2 considers the Supreme Court of Canada's rejection of the Australian decision in *University of New South Wales v Moorhouse* upon authorisation of copyright infringement. Part 3 examines the Supreme Court of Canada's broad reading of the defence of fair dealing in respect of research undertaken at the great library. Part 4 evaluates the implications of this decision for the regulation of new technologies. The approach of the Supreme Court of Canada has already been applied in a federal court case in *BMG Canada v John Doe* dealing with copyright owners seeking to obtain subscriber details from internet service providers. [6] The Supreme Court of Canada has reaffirmed its judgment in the Tariff 22 case, dealing with whether internet service providers should pay a blanket royalty for Canadian music downloaded from the internet. [7] Such Canadian jurisprudence provides an impetus to reconsider the judicial interpretation of user's rights in Australian law.

Part 1

A creative spark: copyright law and originality

The Supreme Court of Canada considered competing views as to the meaning of originality in copyright law. Traditionally, English courts - and even some Canadian judges - 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. [8] 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 deserts', namely that an author deserves to have his or her efforts in producing a work rewarded.

By contrast, American courts have required that a work must be creative to be 'original' and thus protected by copyright. In *Feist Publications Inc v Rural Telephone Service Inc*, the Supreme Court of the United States held that a telephone directory of the white pages lacked sufficient originality to be protected as copyright works. [9] O'Connor J emphasised that there was a need for a work to have a 'creative spark':

To qualify for copyright protection, a work must be original to the author. Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity. 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. 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. [10]

The Supreme Court of the United States criticised the doctrine of the 'sweat of the brow' - the notion that copyright was a reward for the hard work that went into compiling facts. It found that respondent's white pages, which contained only factual information, such as phone numbers, addresses and names listed in alphabetical order, lacked the requisite originality because the respondent had not selected, co-ordinated, or arranged the facts in any original way.

The Supreme Court of Canada was critical of both the 'sweat of the brow' approach to originality, and the 'creative spark' jurisprudence. Drawing upon academic commentary, [11] McLachlin C J observes:

The 'sweat of the brow' approach to originality is too low a standard. It shifts the balance of copyright protection too far in favour of the owner's rights, and fails to allow copyright to protect the public's interest in maximizing the production and dissemination of intellectual works. [12]

McLachlin C J observed that the precedent of the United States Supreme Court was of some significance: 'O'Connor's J concerns about the "sweat of the brow" doctrine's improper extension of copyright over facts also resonate in Canada'. [13] However, her honour maintained that the creativity standard of originality was too high: 'A creativity standard implies that something must be novel or non-obvious - concepts more properly associated with patent law than copyright law'. [14]

As opposed to the extremes of skill and labour and a creative spark, the Supreme Court of Canada maintains that the standard of originality should be set at the intermediate level of skill and judgment. McLachlin C J provides a clear explication of this threshold:

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. By skill, I mean the use of one's knowledge, developed aptitude or practised ability in producing the work. By judgment, I mean the use of one's capacity for discernment or ability to form an opinion or evaluation by comparing different possible options in producing the work. 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. For example, any skill and judgment that might be involved in simply changing the font

of a work to produce 'another' work would be too trivial to merit copyright protection as an 'original' work. [15]

McLachlin C J maintains that this is a fair and workable standard. She suggests that 'a standard requiring the exercise of skill and judgment in the production of a work avoids these difficulties and provides a workable and appropriate standard for copyright protection that is consistent with the policy objectives of the Copyright Act'. [16]

The Supreme Court of Canada provided a number of justifications for this judicial opinion on the standard of originality. First, McLachlin C J emphasises that the plain meaning of the word 'original' suggests at least some intellectual effort, as is necessarily involved in the exercise of skill and judgment. She cites with approval the view of Canadian Professor Daniel Gervais that '[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'. [17] Second, McLachlin C J stresses that the idea of 'intellectual creation' was implicit in the notion of literary or artistic work under the Berne Convention for the Protection of Literary and Artistic Works (1886). She cites the view of Australian Professor Sam Ricketson that common law countries such as England have departed from the spirit of the Berne Convention in adopting a sweat of the brow or industriousness approach to deciding what is original. [18] Third, McLachlin C J emphasised the purpose of copyright law, as articulated in *Théberge* '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'. [19] She said that the requirement for skill and knowledge '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'. [20]

Applying the standard of skill and judgment, the Supreme Court of Canada considered whether a number of items of legal publishing were original works. Michael Geist observes:

This case may have been seen by the judges as a very personal one since the work at issue was their own and the conduct called into question - the copying of cases - something they themselves likely had done throughout their careers. These facts point to the growing personalisation of copyright. [21]

The Supreme Court of Canada held that publishers' headnotes, case summaries, topical index and compilation of reported judicial decisions were all 'original' works covered by copyright. They originated from their authors, were not mere copies and were the product of the exercise of skill and judgment that was not trivial. The decision of the Supreme Court of Canada can be contrasted with recent litigation in the Australian Federal Court over the white and yellow pages. Telstra argued that Desk Top Marketing Systems had breached its copyright by selling CD Rom versions of the Telstra white and yellow pages. [22] The managing director of Desk Top Marketing Systems, Andre Scibor Kaminsky, denied that the white pages and yellow pages should gain copyright protection for mere industrious collection. [23] A single judge and subsequently the full court of the federal court held that there was originality in the directories created through Telstra obtaining and listing the data. [24] The High Court of Australia

declined to grant special leave to Desktop Marketing Systems Pty Ltd. Hayne J found: 'We are of the view that an appeal would enjoy insufficient prospects of success to warrant a grant of special leave in this matter'. [25] His opinion was that Feist did not represent the law in the United Kingdom or Australia. The judge accepted that the meaning of originality had been definitively settled in Australia in a number of precedents of the High Court. [26] This decision is a surprising one, especially given the lively policy debate over the level of originality. Arguably judges with greater expertise in intellectual property - such as Gummow J and Kirby J - would have granted special leave, and taken advantage of the opportunity to make a decisive ruling on originality.

The High Court of Australia needs to reconsider the low threshold of originality, which is set in Australia at merely skill and labour. There should be serious contemplation given to raising the bar to a higher standard - whether the skill and judgment sought by the Supreme Court of Canada, or even the creative spark demanded by the Supreme Court of United States. The Copyright Law Review Committee has argued that there should be different levels of protection for 'creations' and 'productions'. [27] It submitted that compilations and databases should not receive the same level of protection as literary and artistic endeavours. Similarly, the Intellectual Property and Competition Review Committee was concerned that the threshold of originality was set too low under copyright law. [28] It posited the removal of compilations from the category of literary works. It counselled that Australia should be cautious in international negotiations on the issue of database protection.

Hopefully the wisdom of such proposals will be recognised. A retired Chief Justice of the High Court of Australia, Sir Anthony Mason, comments: 'If there is to be a change in the concept of copyright, there should be an insistence on a stronger element of originality'. [29]

Part 2

The Americans, baby: copyright law and authorisation

At trial, the Law Society of Upper Canada applied for a declaration that it did not authorise copyright infringement by providing self-service photocopiers for patrons of the great library. No evidence was tendered that the photocopiers had been used in an infringing manner. The trial judge declined to deal with this issue, in part because of the limited nature of the evidence on this question.

Citing the Australian High Court decision in *University of New South Wales v Moorhouse*, [30] the Federal Court of Appeal concluded that the Law Society implicitly sanctioned, approved or countenanced copyright infringement of the publishers' works by failing to control copying and instead merely posting a notice indicating that the law society was not responsible for infringing copies made by the machine's users.

In the Supreme Court of Canada, Roger Hughes, the lawyer acting for the legal publishers, relied upon the famous High Court of Australia decision in *University of New South Wales v Moorhouse*. [31] The facts of the Australian precedent are somewhat different from the

Canadian case. The plaintiff in the action, Frank Moorhouse, was an enfant terrible of the Australian literary scene. [32] He was the author of a number of novellas - such as *Futility and other animals*, *Conference-Ville*, and *The Americans, baby*. Moorhouse was persuaded by the Australia Copyright Council to bring a test case in respect of copyright law and photocopiers. [33] He alleged that the university had authorised students to use photocopying machines installed in the library to make infringing reproductions of works. The author argued that the library failed to exercise control or supervision over what books were copied, and how much of any work was taken. He had a strong case, because his books were set texts on university courses, and actual copying was carried out by an obliging student.

The High Court of Australia held that the failure by a university to exercise control or supervision in relation to a photocopying machine installed in a library amounted to an authorisation of infringement of copyright. Gibbs J provided a statement of principles derived from the existing case law:

The word 'authorise', in legislation of similar intendment to s. 36 of the act, has been held judicially to have its dictionary meaning of 'sanction, approve, countenance'... A person cannot be said to authorise an infringement of copyright unless he has some power to prevent it. Express or formal permission or sanction, or active conduct indicating approval, is not essential to constitute an authorisation; 'Inactivity or 'indifference, exhibited by acts of commission or omission, may reach a degree from which an authorisation or permission may be inferred'. However, the word 'authorise' connotes a mental element and it could not be inferred that a person had, by mere inactivity, authorised something to be done if he neither knew nor had reason to suspect that the act might be done. [34]

Gibbs J concluded: 'It seems to me to follow from these statements of principle that a person who has under his control the means by which an infringement of copyright may be committed - such as a photocopying machine - and who makes it available to other persons, knowing, or having reason to suspect, that it is likely to be used for the purpose of committing an infringement, and omitting to take reasonable steps to limit its use to legitimate purposes, would authorise any infringement that resulted from its use'. [35] His colleagues largely agreed with his statement of principles and conclusions - except for the view that authorisation involved a mental element of knowledge or suspicion that the act was to be or was likely to be done.

The high court emphasised, though, that the order required copyright owners to establish separate infringement in each case. Jacobs J observed: 'A declaration of right based on facts found in the particular case can certainly be made but it is not permissible to make a declaration of right... from a hypothetical or assumed set of facts'. [36] In frustration with this order, copyright owners lobbied for the establishment of the copyright collecting society, the Copyright Agency Limited.

The Federal Government of Australia has passed a number of legislative amendments to deal with the ramifications of the High Court decision. S 39A of the Copyright Act 1968 (Cth) was

inserted into the legislation in 1980 to give libraries a limited immunity from authorisation of copyright infringement. The clause provided that libraries offering photocopying services will not be taken as having authorised the making of infringing copies if a notice bringing the provisions of the act to the attention of users of the machine is put up near the machine. This provision provided a safeguard for libraries against the spectre of litigation raised by the high court decision.

S 36 (1A) and s 101 (1A) of the Copyright Amendment (Digital Agenda) Act 2000 (Cth) were intended to codify the factors considered in the case of the *University of New South Wales v Moorhouse* [39] that are to be taken into account when determining whether a person has authorised infringement. The matters include the extent of the person's power to prevent the doing of the act concerned; the nature of any relationship existing between the person and the person who did the act concerned; and whether the person took any reasonable steps to prevent or avoid the doing of the act, including whether the person complied with any relevant industry codes of practice. Thus, the principles laid down in *University of New South Wales v Moorhouse* [39] will help regulate the conduct of telecommunications carriers and internet service providers in the digital environment. In addition to such principles, the United States-Australia Free Trade Agreement sets down a comprehensive regime to regulate the conduct of internet service providers and other intermediaries.

In *CCH Canadian Limited v The Law Society of Upper Canada*, the Supreme Court of Canada held that the great library did not authorise copyright infringement. McLachlin CJ explicitly rejected the precedent of the High Court of Australia in *University of New South Wales v Moorhouse*:

With respect, I do not agree that this amounted to authorising breach of copyright. *Moorhouse*, supra, is inconsistent with previous Canadian and British approaches to this issue. In my view, the *Moorhouse* approach to authorisation shifts the balance in copyright too far in favour of the owner's rights and unnecessarily interferes with the proper use of copyrighted works for the good of society as a whole. [40]

Instead the Supreme Court of Canada relied upon Canadian authorities such as *Muzak Corp v Composers, Authors and Publishers Association of Canada Ltd* [41] and *De Tervagne v Beloeil (Town)*. [42] It emphasised that 'authorise' means to 'sanction, approve and countenance'. The supreme court stressed that countenance in the context of authorising copyright infringement must be understood in its strongest dictionary meaning, namely, 'give approval to, sanction, permit, favour, encourage'. [43] It also acknowledged that a person does not authorise infringement by authorising the mere use of equipment that could be used to infringe copyright.

Dealing with authorisation, the Supreme Court of Canada was much influenced by academic opinion. In particular, Professor David Vaver has been critical of the decision in *University of New South Wales v Moorhouse*:

'Authorise,' 'sanction,' or 'approve' may be close paraphrases, but 'countenance' is

too wide since it connotes condonation, and to condone is not to authorise. So this equation fell out of favour in the United Kingdom in the 1980s: attempts to turn passivity into authorisation were rejected. The broader meaning, however, led to liability in Australia against a university library that let photocopying occur on its premises without taking reasonable steps to discourage suspected infringements. This is doubtful law in the United Kingdom, and probably in Canada, too. The copyright board has favoured the United Kingdom view, in holding that an internet service provider does not commit the wrong of authorising infringement simply by letting users post infringing material on a web site. [44]

Most notably, in *CBS Inc. v Ames Records & Tapes Ltd*, the United Kingdom House of Lords defined the term 'authorise' restrictively. [45] Amstrad manufactured a high-speed twin-tape recorder, and advertised the machine as allowing the user to make a 'copy of your favourite cassette'. The House of Lords held that neither the sale of the equipment or the advertisement amounted to an authorisation. It emphasised that an authorisation means an express or implied grant of the right to do the act complained of. The House of Lords emphasised that the machine could be used for both legitimate and illegitimate purposes, and the manufacturer was unable to control the behaviour of the user.

Applying the approach developed in Canadian and English case law, the Supreme Court of Canada concluded that the law society's mere provision of photocopiers for the use of its patrons did not constitute authorisation to use the photocopiers to breach copyright law. There were three main factors in its decision. First, there was no evidence that the photocopiers had been used in a manner that was not consistent with copyright law. As noted, a person does not authorise copyright infringement by authorising the mere use of equipment (such as photocopiers) that could be used to infringe copyright. Second, the court of appeal erred in finding that the law society's posting of the notice constituted an express acknowledgement that the photocopiers will be used in an illegal manner. Given that the Law Society was responsible for regulating the legal profession in Ontario, it was more logical to conclude that the notice was posted for the purpose of reminding the great library's patrons that copyright law governs the making of photocopies in the library. Finally, even if there were evidence of the photocopiers having been used to infringe copyright, the law society lacked sufficient control over the great library's patrons to permit the conclusion that it sanctioned, approved or countenanced the infringement. The law society exercised no control over which works the patrons chose to copy, the patron's purposes for copying, or the photocopiers themselves.

The decision of the Supreme Court of Canada may well prompt a reconsideration of the shibboleths of the High Court of Australia decision on copyright law and authorisation in *University of New South Wales v Moorhouse*. [46]

Part 3

A charter of users' rights: defences to copyright infringement

The decision of the Supreme Court of Canada in respect of the defence of fair dealing and

photocopiers provides a strong contrast to jurisprudence in the United States.

In the United States, there are a number of important precedents dealing with the use of photocopiers in respect of educational materials. In *Williams & Wilkins Co v The United States*, the Supreme Court of the United States was evenly divided whether the National Library of Medicine and the National Institutes of Health could raise the defence of fair use in respect of the photocopying of works from scientific publications. [47] As a result, the decision in the court of appeals in favour of fair use was allowed to stand. In *Basic Books Inc v Kinko's Graphics Corp*, the Federal Court held that Kinko's Graphics Corporation was liable for copyright infringement because it printed course packs for use in universities. [48] By contrast, in *Princeton University Press v Michigan Document Services*, the United States Court of Appeals for the Sixth Circuit ruled that Michigan Document Services was protected by the defence of fair use when it copied materials for course-packs for university students without seeking permission from the publishers or paying royalties. In *American Geophysical Union v Texaco, Inc*, the majority of the 2nd Circuit Court held that corporate copying of a small number of scientific and medical journals was not fair use under United States copyright law, because it believed that the systematic and archival copying of the journal articles had an adverse impact on the publisher's market. [49]

The Swedish scholar Eva Hemmungs Wirtén comments that such cases 'problematise the relationship between the uses of content and the owning of it, establishing a gap between the interests of two major players in print culture, publishers on one side, and libraries, and universities on the other'. [50]

In the Supreme Court of Canada, the counsel for the Law Society argued that the great library was a research library - rather than a lending library. Consequently, he maintained that users needed access to photocopiers to make copies of works because they were unable to borrow the works. If the patrons were deprived of photocopiers, they would be forced to copy out passages from manuscripts, like medieval scribes. By contrast, the counsel for the legal publishers, Roger Hughes, denied that the great library was a not-for-profit library, pointing out that its main patrons were lawyers engaged in commercial practice. He argued that the custom-copy service provided by the great library was no different from a commercial service run by commercial printers such as Kinkos.

The Supreme Court of Canada provides an articulation of general principles informing the defence of fair dealing. McLachlin CJ observed:

The fair dealing exception, like other exceptions in the copyright act, is a user's right. In order to maintain the proper balance between the rights of a copyright owner and users' interests, it must not be interpreted restrictively. As Professor Vaver, *supra*, has explained, at p171: 'User rights are not just loopholes. Both owner rights and user rights should therefore be given the fair and balanced reading that befits remedial legislation'. [51]

Her honour takes heed of Binnie's J cautionary warning in the *Théberge* case against the over-

protection of copyright: 'Excessive control by holders of copyrights and other forms of intellectual property may unduly limit the ability of the public domain to incorporate and embellish creative innovation in the long-term interests of society as a whole, or create practical obstacles to proper utilisation'. [52]

The Supreme Court of Canada emphasised that the fair dealing exception under s 29 is open to those who can show that their dealings with a copyrighted work were for the purpose of research or private study. It notes: "Research" must be given a large and liberal interpretation in order to ensure that users' rights are not unduly constrained'. [53] McLachlin C J commented:

The law society's custom photocopying service is provided for the purpose of research, review and private study... There is no other purpose for the copying; the law society does not profit from this service. [54]

The Supreme Court of Canada agreed with the court of appeals that research is not limited to non-commercial or private contexts. It observed: 'Lawyers carrying on the business of law for profit are conducting research within the meaning of s 29 of the Copyright Act'. [55]

The Supreme Court of Canada considered a number of factors in assessing whether the dealing with copyright work by the great library was fair. First, it considered the purpose of the dealing. It found that the access policy and its safeguards weigh in favour of finding that the dealings were fair. Second, it focused upon the character of the dealing. It noted that there was no evidence that the law society was disseminating multiple copies of works to multiple members of the legal profession. Copying a work for the purpose of research on a specific legal topic was generally a fair dealing. Third, it looked at the amount of the dealing. It noted that the access policy indicates that the great library will exercise its discretion to ensure that the amount of the dealing with copyrighted works will be reasonable. Fourth, the Supreme Court of Canada found that it was not apparent that there are alternatives to the custom photocopy service employed by the great library. It observed: 'Twenty per cent of the requesters live outside the Toronto area; it would be burdensome to expect them to travel to the city each time they wanted to track down a specific legal source'. [56] Fifth, the court considered the nature of the work. It found that the nature of the works in question - judicial decisions and other works essential to legal research - suggested that the law society's dealings were fair. Finally, the court observed that no evidence was tendered to show that the market for the publishers' works had decreased as a result of these copies having been made.

The Supreme Court of Canada considered whether the law society's great library qualified for exemptions for 'non-profit' libraries, archives, and museums against copyright infringement. It heard the argument of publishers that the law society, which controls the library, was indirectly controlled by the body of lawyers authorised to practise law in Ontario who conduct the business of law for profit. McLachlin C J comments:

The law society need not rely on the library exemption. However, were it necessary, it would be entitled to do so. The great library is not established or

conducted for profit. It is administered and controlled by the benchers of the law society. Although some of the benchers, when acting in other capacities, practise law for profit, when they are acting as administrators of the great library, the benchers are not acting as a body established or conducted for profit. The court of appeal was correct in its conclusion on this point. [57]

The judgment of the Supreme Court of Canada gives the lie to the myth that the exceptions for libraries, archives, and museums are somehow historical accidents and contingencies, which should be read down or even extinguished. [58] It demonstrates that such exceptions for cultural institutions are essential and necessary to promote the wider public purpose of promoting education, learning and research.

In the federal court, the law society had unsuccessfully argued that it should not be held liable for copyright infringement because of constitutional defences - such as the rule of law, equality and access to justice. [59] The Supreme Court of Canada did not address constitutional arguments raised earlier under the Canadian Charter of Rights of Freedoms. Nonetheless, the law society chief executive officer, Malcolm Heins, hailed the case as an affirmation of the importance of access to justice:

We are especially pleased that the supreme court has recognized the importance of this access to justice issue. Lawyers must have fair access to legal materials to provide clients with the best possible legal representation. This is an extremely important decision for lawyers and their clients, particularly those in smaller communities, who do not always have immediate access to court decisions from their local law libraries. Many local libraries rely on the law society for information and this court decision allows them to continue to access these materials. This ruling clearly has significant impact on anyone doing research. Its influence will be felt across Canada and worldwide because it clearly recognizes the rights of users to make single copies for research purposes. [60]

There could be scope for reading doctrines of copyright law - such as the defence of fair dealing and the exceptions accorded to cultural institutions - in light of such wider fundamental freedoms and rights recognised under the constitution.

The decision of the Supreme Court of Canada could be useful in resolving some of the confusion and uncertainty about the scope of the defence of fair dealing in Australia. In the panel case, Kirby J observed:

To the extent that it is suggested that the fair dealing defence under the act is unduly narrow, that submission should be addressed to the parliament. It would be an impermissible mode of reasoning for this court to narrow the ambit of the infringement provided by the act so as to enlarge the scope of free and unlicensed use of 'a television broadcast', contrary to the terms of the act. In any case, if the broad view of fair dealing adopted by Finkelstein J is correct, much of the sting is taken out of the criticisms of the Act voiced by the appellant in support of its submissions about the ambit of infringement. The correction of any remaining

defects is a matter for the parliament. It is not for this Court. [61]

The decision of the Supreme Court of Canada suggests that some judicial innovation is possible in respect of the defence of fair dealing. The development of first principles by the Australian High Court could be useful in providing coherence and guidance as to the meaning of fair dealing. [62]

The Copyright Law Review Committee undertook a review of exceptions to the exclusive rights of copyright owners in 1998. [63] It recommended the expansion of fair dealing to an open-ended model that referred to the current exclusive set of purposes - such as research or study, criticism or review, reporting the news and professional advice - but was not limited to those purposes. [64] The committee observed that such an approach would enable fair dealing to be adapted by the courts to new technologies. It noted that such an approach would answer the criticism that the current fair dealing provisions are inflexibly tied to specific purposes and ill-suited to new technologies. Six years later, the federal government has still not responded to the recommendations of the committee about the expansion of fair dealing, and simplification of the Copyright Act 1968 (Cth). Such delay and procrastination is of concern in this important area of copyright law.

Part 4

Unmasking John Doe: copyright law and internet service providers

The decision of the Supreme Court of Canada has the potential to influence court cases dealing with the authorisation of copyright in the digital environment. Michael Geist comments:

As society has shifted in its view of copyright, so, too, have Canadian courts. The result is a genuine revolution in the state of Canadian copyright law that will manifest itself long after the current battle over peer-to-peer file sharing has been resolved. [65]

The decision could affect sellers of MP3 technology, which plays music that could be downloaded illegally from the internet. Scott Jolliffe, the lawyer acting for the law society, said: 'The court has said that, merely providing or selling the means to make copies [or play illegal copies in this instance] doesn't mean one is liable for infringement'. [66]

In *BMG Canada v John Doe*, a Canadian Federal Court considered an action taken by record companies against internet service providers to reveal the identities of subscribers who, it was alleged, had infringed copyright laws by illegally trading in music downloaded from the internet. [67] The copyright owners submitted that the 29 internet users have each downloaded more than 1000 songs over which the producers have rights under the Copyright Act, R S, 1985, c C-42, onto their home computers. They alleged that this form of file-sharing constitutes an infringement of their rights over certain music under the copyright act. The internet service providers, other than Videotron, raise various objections to the order. Two

public interest groups, the Canadian internet Policy and Public Interest Clinic and Electronic Frontier Canada were granted intervener status for the purpose of making arguments. They argued that the record companies had not made out a prima facie case on either the law or the facts. The case raises wider concerns about copyright owners engaging in surveillance of users of file-sharing programs. [68]

Following the decision of the Supreme Court of Canada on liability for authorising copyright infringement, [69] von Finckenstein J observed:

As far as authorisation is concerned, the case of *CCH Canadian Ltd v Law Society of Canada*, 2004 SCC 13, established that setting up the facilities that allow copying does not amount to authorising infringement. I cannot see a real difference between a library that places a photocopy machine in a room full of copyrighted material and a computer user that places a personal copy on a shared directory linked to a P2P service. In either case the preconditions to copying and infringement are set up but the element of authorisation is missing. [70]

Critically, his honour noted that no evidence was presented that the alleged infringers either distributed or authorised the reproduction of sound recordings. They merely placed personal copies into their shared directories which were accessible by other computer users via a peer to peer network service. von Finckenstein J noted: 'The exclusive right to make available is included in the World Intellectual Property Organization Performances and Phonograms Treaty, (WPPT) 20/12/1996 (CRNR/DC/95, December 23, 1996), however that treaty has not yet been implemented in Canada and therefore does not form part of Canadian copyright law'. [71] Ultimately, the court took the view that the privacy concerns of consumers outweighed the public interest concerns in favour of disclosure.

In response, the Canadian Recording Industry Association has lodged a notice of appeal against the decision of von Finckenstein J in the federal court. The counsel for the record industry, Richard Pfohl, observed:

In our view Canadian copyright law doesn't allow people to make copies of hundreds or thousands of songs that belong to other people and to put them out on the internet for copying and distribution globally. It's a critical issue for our industry because those sorts of activities are having a devastating effect on our industry. [72]

In its appeal document, the record industry argues that the 'judge made serious and reviewable errors of law, made overriding and palpable errors in his assessment of the factual record before him, and, in the end, purported to exercise his discretion on improper and irrelevant bases, and in a manner of excess of his jurisdiction'. [73]

In the 'Tariff 22' case, the Society of Composers, Authors and Music Publishers of Canada (SOCAN), argued that internet service providers should pay a blanket royalty for Canadian music downloaded by the public anywhere in the world. [74] In rejecting this argument, the Supreme Court of Canada invoked its previous ruling in *CCH Canadian Limited v The Law*

Society of Upper Canada. Binnie J held: 'The operation of the internet is obviously a good deal more complicated than the operation of a photocopier, but it is true here, as it was in the CCH case, that when massive amounts of non-copyrighted material are accessible to the end user, it is not possible to impute to the internet service provider, based solely on the provision of internet facilities, an authority to download copyrighted material as opposed to non-copyrighted material'. [75] His honour concluded: 'It is clear that parliament did not want copyright disputes between creators and users to be visited on the heads of the internet intermediaries, whose continued expansion and development is considered vital to national economic growth'. [76]

In a separate judgment, Le Bel J emphasised privacy concerns: 'Insofar as is possible, this court should adopt an interpretation of s 3(1)(f) that respects end users' privacy interests, and should eschew an interpretation that would encourage the monitoring or collection of personal data gleaned from internet-related activity within the home'. [77] The decision has been welcomed by copyright users, internet service providers and other intermediaries. [78]

In response to such decisions, copyright owners are lobbying the Canadian government to engage in legislative reform. Prime Minister Paul Martin has emphasised the need to protect the local music industry: 'We are not going to let an industry that is so important to this country, so important to our ability to tell our stories and sing our songs to the rest of the world, be jeopardized'. [79] Similarly, Heritage Minister Helene Scherrer has promised to punish music file sharers. She has said her department, with Industry Canada, plans to draft legislation to amend the copyright act to ban music downloading. [80] The heritage minister wants the government to ratify two international treaties that protect the ownership of copyright materials - the World Intellectual Property Organisation *Copyright Treaty* and the *Performances and Phonograms Treaty*. However, there remains academic concern about Canada adopting a United States-style regime to regulate the internet. [81]

The Standing Committee on Cultural Heritage in the House of Commons of the Canadian Parliament released an interim report on copyright reform. [82] The committee recommends that the government of Canada ratify the World Intellectual Property Organisation *Copyright Treaty* and *Performances and Phonograms Treaty* immediately. The committee has recommended that the *Copyright Act* be amended to provide that internet service providers can be subject to liability for copyrighted material on their facilities. The committee noted, however, that internet service providers should be exempt from liability if they act as true 'intermediaries,' without actual or constructive knowledge of the transmitted content, and where they meet certain prescribed conditions. In its opinion, internet service providers should be required to comply with a 'notice and takedown' scheme that is compliant with the Canadian Charter of Rights and Freedoms, with additional prescribed procedures to address other infringements.

There has been much concern expressed about the proposals of the federal government to annul recent developments in Canadian jurisprudence in copyright law. Associate Professor Laura J Murray, an eloquent English academic from Queen's University, comments upon the report of the Standing Committee on Culture Heritage:

[Nearly] all the recommendations are harmful to the interests of Canadian citizens, consumers, educators, students, and creators. The committee demonstrated that it heard none of the eloquent defenses of the idea of balance in copyright presented to it in its April meetings. Not only does it endorse a range of US-WIPO policies that infringe on citizen rights and freedoms, but it is promoting some homegrown policy ideas that are possibly even worse: licensing the internet is the most egregious example. [83]

The Association of Universities and Colleges of Canada and the Canadian Association of Research Libraries called upon the Minister of Canadian Heritage and the Minister of Industry to honour the government's commitment to enact a balanced package of copyright law reforms that addresses 'access issues' for libraries and educational institutions. They have also expressed grave misgivings about the unbalanced nature of the Heritage Committee's Report and stressed that there needs to be a fair and balanced review of any draft legislation. Such matters will no doubt become contentious political issues in the forthcoming Canadian election in 2004.

Conclusion

The decision of the Supreme Court of Canada in the *CCH Canadian Limited v Law Society of Upper Canada* has been hailed as 'one of the strongest pro-user rights decisions from any high court in the world, showing what it means to do more than pay mere lip service to balance in copyright'. [84] The judgment provides a re-articulation of basic doctrines of copyright law - such as originality, authorisation, and defences to copyright infringement - in light of broader policy objectives. The decision harks back to the original purpose of copyright law to encourage learning and education. [85]

The Supreme Court of Canada has provided a strong critique of the 'sweat of the brow' doctrine - the notion that a work is original by mere dint of skill and labour. It has affirmed that a work can only be original through the application of skill and judgment. The Supreme Court of Canada has also demanded a stringent interpretation of authorisation of copyright infringement. Such a ruling has important implications for the regulation and liability of internet service providers and other intermediaries. The Supreme Court of Canada has developed an expansive reading of the defence of fair dealing. The lawyer representing the Great Library, Scott Joliffe, comments upon the wider implications of this ruling. He observes:

It applies to journalists, economists [for example] working at the Bank of Canada or Royal Bank, students at university, and kids doing their research projects at home and downloading an article from the internet - provided it is done for the purpose of research. The court is balancing a decision in favour of users' rights as opposed to creators' rewards. [86]

The lawyer stresses that the decision promotes access to justice, especially in regional and remote communities. He observes: 'For somebody practising in the northern regions - where there may not be a county court library and where their practice is such that they cannot

afford to have a full or complete library - they would still have access to the law'. [87] The Supreme Court of Canada emphasised the important role played by research libraries and lending libraries. It refused to curtail the operation of the exceptions provided for cultural institutions. The judgment of the Supreme Court of Canada takes place against the background of wider constitutional concerns about fundamental freedoms and rights - concerning access to justice.

However, copyright owners are discontented about the precedent of the *CCH Canadian Limited v Law Society of Upper Canada*. Ian Rhind, president of CCH Canadian Ltd, comments: 'I am not happy the [Great] library can have a photocopier there. It's like having a fox in a hen house'. [88] Such sentiments about the role of libraries are widespread amongst content industries. In his new book, *The anarchist in the library*, Siva Vaidhyanathan comments:

Libraries are a threat to the content industries and their plans for a pay-per-view delivery system. Libraries are leaks in the information economy. As a state-funded institution that enables efficient distribution of texts and information to people who can't afford to get it commercially, the library pokes holes in the commercial information system. Because a library can lend a book at no charge, the publisher only makes money once. It can't charge per reading. The new technocratic information regime aims to correct for that market failure by regulating access.

[89]

Copyright owners will no doubt seek to challenge the precedent of the *CCH Canadian Limited v Law Society of Upper Canada*, whether through test cases or law reform processes. They will try to lower the threshold of originality, and thereby expand the scope of copyrightable subject matter. They are also pushing to narrow exceptions to copyright infringement - such as the defence of fair dealing and the freedoms granted to libraries and cultural institutions. However, the courts may stand resolute in the face of such special pleading - especially given the unanimous verdict in the case.

It remains to be seen whether the enlightened decision of the Supreme Court of Canada in *CCH Canadian Limited v Law Society of Upper Canada* will become an influential precedent in other jurisdictions, such as Australia.

Notes

1. E H Wirten No Trespassing: Authorship, Intellectual Property Rights and the Boundaries of Globalization Toronto University of Toronto Press 2004 p58
2. Ibid p74
3. *CCH Canadian Limited v The Law Society of Upper Canada* (2004) SCC 13
<http://www.canlii.org/ca/cas/scc/2004/2004scc13.html>
4. The consensus and unity of the Supreme Court of Canada is striking in this decision. A stark contrast to the close divisions of recent intellectual property cases - such as *Théberge v Galerie d'Art du Petit Champlain inc* (2002) SCC 34, <http://www.canlii.org/ca/cas/scc/2002/2002scc34.html>; *Harvard College v Canada (Commissioner of Patents)* (2002) 4 SCR 45; and *Percy Schmeiser v Monsanto* (2004) SCC

5. Th  berge v Galerie d'Art du Petit Champlain inc (2002) SCC 34
<http://www.canlii.org/ca/cas/scc/2002/2002scc34.html>
6. BMG Canada v John Doe (2004) FC 488 <http://www.fct-cf.gc.ca/bulletins/whatsnew/T-292-04.pdf>
7. Canadian Association of Internet Providers v SOCAN [Tariff 22] (2004) SCC 45
<http://www.canlii.org/ca/cas/scc/2004/2004scc45.html>
8. See, for example, University of London Press Ltd v University Tutorial Press Ltd [1916] 2 Ch 601; and U & R Tax Services Ltd v H & R Block Canada Inc (1995) 62 CPR (3d) 257 (FCTD)
9. Feist Publications v Rural Telephone Service Inc (1991) 113 L Ed 2d 358
10. Ibid
11. See J Litman 'The Public Domain', 39 Emory Law Journal vol 965 1990 at p969, and C J Craig 'Locke, Labour and Limiting the Author's Right: A Warning against a Lockean Approach to Copyright Law' 28 Queen's Law Journal vol 28 2002 p1
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<http://www.canlii.org/ca/cas/scc/2004/2004scc13.html>
20. Ibid
21. M Geist 'Low-Tech Case Has High-Tech Impact' Law Bytes Toronto Star 22 March 2004
22. Telstra v Desktop Marketing Systems [2001] FCA 612
23. D Carrick 'Legally Speaking - What's In A Name?' Law Report Radio National ABC 17 June 2001
24. Desktop Marketing Systems Pty Ltd v Telstra Corporation Limited (2002) 55 IPR 1; for commentary see S Gosnell 'Feeling Rather "Sweaty" Down Under... But Would We Be Better Off with a Northerly Change? An Australian Perspective on the Legal Protection of Compilations of Information' The University of New South Wales Law Journal vol 26 no 3 2003 p 639; and B Fitzgerald and C Bartlett 'Database Protection under Australian Copyright Law: Desktop Marketing Systems Pty Ltd v Telstra Corporation Limited [2002] FCAFC 112' Southern Cross University Law Review vol 7 2003 p308
25. Desktop Marketing Systems Pty Ltd v Telstra Corporation Limited (20 June 2003), High Court special leave application
<http://www.austlii.edu.au/au/other/hca/transcripts/2002/M85/1.html>
26. Ibid.
27. Sands and McDougall Proprietary Ltd v Robinson (1917) 23 CLR 49; Victoria Park Racing and Recreation Grounds Company Limited v Taylor and Others [1937] HCA 45; Computer Edge Pty Ltd v Apple Computer Inc (1986) 161 CLR 171; and Data Access Corporation v Powerflex Services Pty Ltd (1999) 45 IPR 353
28. Copyright Law Review Committee Simplification of the Copyright Act 1968: Part 2. Rights

- and Subject Matter Canberra Attorney-General's Department 1999
29. Intellectual Property and Competition Review Committee Review of Intellectual Property Legislation under the Competition Principles Agreement Canberra Australian Government 2000
 30. A Mason 'The Users' Perspectives on Issues Arising in Proposals for the Reform of the Law of Copyright' Sydney Law Review vol 19 1997 p65
 31. University of New South Wales v Moorhouse (1975) 133 CLR 1; for commentary see D Catterns "'The Americans, Baby" by Moorhouse: An Australian Story of Copyright and the New Technology' Bulletin of Copyright Society of the USA vol 23 no 4 April 1976 pp213-232; L Docker 'The Ghost of Moorhouse' Media and Arts Law Review vol 7 no 2 June 2002 pp113-120; and L Wiseman 'Beyond the Photocopier: Copyright and Publishing in Australia' Media and Arts Law Review vol 7 no 4 2002 p299
 32. University of New South Wales v Moorhouse (1975) 133 CLR 1
 33. Frank Moorhouse has since become a Grand Old Man of Australian Letters, famous for his League of Nations novels, Grand Days and Dark Palace. He remains an activist in copyright law reform debates, arguing against the lifting of parallel importation laws with respect to books
 34. University of New South Wales v Moorhouse (1974) no 81 transcripts
 35. University of New South Wales v Moorhouse (1975) 133 CLR 1. Some of the case citations have been removed from this quotation
 36. Ibid
 37. Ibid
 38. Ibid
 39. Ibid
 40. CCH Canadian Limited v The Law Society of Upper Canada (2004) SCC 13
<http://www.canlii.org/ca/cas/scc/2004/2004scc13.html>
 41. Muzak Corp v Composers, Authors and Publishers Association of Canada Ltd [1953] 2 SCR 182, at p193
 42. De Tervagne v Beloeil (Town) [1993] 3 FC 227 (FCTD)
 43. CCH Canadian Limited v The Law Society of Upper Canada (2004) SCC 13
<http://www.canlii.org/ca/cas/scc/2004/2004scc13.html>
 44. D Vaver Copyright Law: Essentials of Canadian Law Toronto Irwin Law pp142-143. See also D Vaver 'Canada's Intellectual Property Framework: A Comparative Overview' Intellectual Property Journal vol 17 2003 pp125-188
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 48. Basic Books Inc v Kinko's Graphics Corp (1991) 758 F Supp 1522
 49. American Geophysical Union v Texaco Inc (1994) 60 F 3d 913
 50. E H Wirten No Trespassing: Authorship, Intellectual Property Rights and the Boundaries of Globalization Toronto University of Toronto Press 2004 pp 72-73
 51. CCH Canadian Limited v The Law Society of Upper Canada (2004) SCC 13
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 52. Théberge v Galerie d'Art du Petit Champlain inc (2002) SCC 34

- <http://www.canlii.org/ca/cas/scc/2002/2002scc34.html>
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54. Ibid
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<http://www.copyright.org.au/PDF/Articles/CCS0101.pdf>; and P B Hugenholtz 'Fierce Creatures. Copyright Exemptions: Towards Extinction?' IFLA/IMPRIMATUR Conference 'Rights, Limitations and Exceptions: Striking a Proper Balance' Amsterdam 30-31 October 1997 <http://www.ivir.nl/publications/hugenholtz/PBH-Fierce%20Creatures.doc>
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<http://www.canlii.org/ca/cas/fct/1999/1999fct10121.html>; and CCH Canadian Ltd v Law Society of Upper Canada [2002] 4 FC 213, 2002 FCA 187
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69. CCH Canadian Ltd v The Law Society of Upper Canada (2004) SCC 13
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71. Ibid
72. A Pacienza 'Record Giants Appeal Uploading Decision' The Ottawa Citizen 14 April 2004
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<http://p2pnet.net/index.php?page=reply&story=1212>
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