7. Canadian originality: remarks on a judgment in search of an author¹

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The standard of originality in Canadian copyright law has recently undergone significant transformation. Traditionally a jurisdiction that, in the eyes of many, had adopted a ‘sweat of the brow’ standard, Canada is now a ‘skill and judgment’ jurisdiction.²

This chapter (1) describes and contextualizes the shift; (2) analyzes its presuppositions in respect of the Canadian conception of the purpose of copyright law; and (3) identifies difficulties and ambiguities that may preclude its full development. I will argue that the doctrinal shift is in tension with certain

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² See *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339 at para. 16 [CCH]. For commentary, see Teresa Scassa, ‘Original Facts: Skill, Judgment, and the Public Domain’ (2006) 51 McGill Law Journal 253; Ramón Casas Vallés, ‘Bibliotecas jurídicas y propiedad intelectual: El caso de la Gran Biblioteca del Colegio de Abogados de Ontario’ (2005) 4 Revista Jurídica de Catalunya 26; Carys Craig, ‘The Evolution of Originality in Canadian Copyright Law: Authorship, Reward and the Public Interest’ (2005) 2 University of Ottawa Law & Technology Journal 425; Abraham Drassinower, ‘Taking User Rights Seriously’ in Michael Geist, ed., *In the Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin, 2005), 462 [Drassinower, ‘User Rights’]; Michael Geist ‘Low-Tech Case Has High-Tech Impact’ *Toronto Star* (22 March 2004); Daniel J. Gervais, ‘Canadian Copyright Law Post-CCH’ (2004) 18 Intellectual Property Journal 131 [Gervais, ‘Post-CCH’]; Matthew Rimmer, ‘Canadian Rhapsody: Copyright Law and Research Libraries’ (2004) 35 Australian Academic & Research Libraries 193; Teresa Scassa, ‘Recalibrating Copyright Law? A Comment on the Supreme Court of Canada’s Decision in *CCH Canadian Ltd. v. Law Society of Upper Canada*’ (2004) 3 Canadian Journal of Law and Technology 89 [Scassa, ‘Recalibrating’]; Barry B. Sookman, ‘CCH: A Seminal Canadian Case on Originality and the Fair Dealing Defence’ (2004) 18 BNA World Intellectual Property Report 08.

aspects of the vision of the purpose of copyright law in the name of which it took place. I will also speculate as to the conditions for the possibility of a resolution of that tension. In short, my point is that the historical struggle between originality schools has not been overcome. It has transmuted into a struggle between a value paradigm and an authorship paradigm of copyright law.

I *CCH v. LAW SOCIETY* AND THE COPYRIGHT TRADITION

In *CCH*, the Supreme Court of Canada set out to settle the meaning of originality in Canadian copyright law.³ Faced with a battle between two opposing originality schools, the ‘sweat of the brow’ and the ‘creativity’ schools, the Court refused to take sides in the debate.⁴ It posited, rather, a third standpoint, for which the requirement of originality is a requirement of ‘skill and judgment’. The Court formulated its refusal to side with either school by invoking a vision of the purpose of copyright law as a ‘balance’ between ‘promoting the public interest’ and ‘obtaining a just reward for the creator’.⁵ On this basis, the Court found that while the sweat of the brow school supports too author-centred a standard, the creativity school supports too public-centred a stan-

³ The case opposed plaintiff publishers CCH Canadian, Thomson Canada, and Canada Law Book, and defendant library Great Library at Osgoode Hall in Toronto, operated by the Law Society of Upper Canada. Members of the Law Society, the judiciary and other authorized researchers could request photocopies of materials from the library. The materials were copied by the library staff and delivered in person, by mail or by fax to the requesters. The publishers commenced an action against the library in respect of alleged infringements of copyright resulting from the library’s photocopying service, and also from usage by the patrons of self-service photocopiers provided by the library. The Court held, *inter alia*, (1) that the publishers’ materials were original works subject to copyright protection; (2) that the self-service photocopiers did not implicitly authorize reproduction of the materials; and (3) that the library successfully made out the defence of fair dealing for research purposes in respect of the photocopying service. In the course of its reasoning the Court defined originality as ‘skill and judgment’ and fair dealing as a ‘user’s right’ not to be interpreted restrictively.

⁴ On the struggle between the sweat of the brow and creativity schools, see Abraham Drassinower, ‘Sweat of the Brow, Creativity, and Authorship: On Originality in Canadian Copyright Law’ (2004) 1 University of Ottawa law & Technology Journal 105 [Drassinower, ‘Sweat of the Brow’]. See also Yo’av Mazeh, ‘Canadian Originality and the Tension Between the Commonwealth and The American Standards for Copyright Protection’ (2003) 16 Intellectual Property Journal 561.

⁵ *CCH*, *supra* note 2 at para. 10.

dard.⁶ In this vein, the Court presented its own skill and judgment standard as ‘workable, yet fair’.⁷ Thus the Court viewed the skill and judgment standard as an in-between truly attuned to the dual purpose animating copyright law as a whole.

The Court defined ‘skill and judgment’ as follows:

I conclude that the 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. 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.⁸

The difference between sweat of the brow and skill and judgment is sufficiently clear. The sweat of the brow standard provides that labour and industry, even in the absence of skill and judgment, may be sufficient to make out a finding of originality.⁹ Under the sweat of the brow standard, the labour invested in the collection of the information that makes up an ordinary phone directory, for example, gives rise to copyright protection. The phone directory is original in the sense that it was not copied from another work. The fact that

⁶ *Ibid.* at para. 24: ‘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. On the other hand, the creativity standard of originality is too high. 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 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*.’

⁷ *Ibid.*

⁸ *Ibid.* at para. 16.

⁹ See, for example, *U & R Tax v. H & R Block* (1995), 62 C.P.R. (3d) 257 at 264 (F.C.T.D.): ‘A work must be “original” in order to be afforded copyright. Industriousness (“sweat of the brow”) as opposed to creativity is enough to give a work sufficient originality to make it copyrightable.’ See also *Kelly v. Morris* (1866), L.R. 1 Eq. 69.

the production of an alphabetically arranged phone directory could be characterized as a merely mechanical and automatic task does not affect the directory's copyrightability.

The difference between creativity and skill and judgment, however, is more elusive. This impression is reinforced by the peculiar and surprising fact that in *CCH* the Canadian Supreme Court misrepresented the creativity standard. In the context of a discussion of the landmark US Supreme Court case, *Feist Publications v. Rural Telephone Service*,¹⁰ the Court stated that the creativity standard entails a patent-like requirement of novelty or non-obviousness.¹¹ The Court then added that its own Canadian skill and judgment standard is therefore preferable for copyright purposes. In *Feist*, however, the US Supreme Court explicitly stated that 'originality does not signify novelty' and, moreover, that the creativity standard is 'extremely low'.¹² Thus, it is hard to avoid the impression that, given its misunderstanding of the creativity standard, the Supreme Court of Canada happens to occupy with the phrase 'skill and judgment' the very same space generally thought to be occupied by the word 'creativity'.¹³ Otherwise, one would have to credit the Supreme Court of Canada with the mysterious achievement of having found a significant midpoint between zero and 'extremely low'.

While important ambiguities regarding the difference between the Court's skill and judgment standard and the creativity standard have been noted, few have doubted that *CCH* represents an unambiguous rejection of the sweat of the brow standard, a standard many regard as the traditional Anglo-Canadian standard.¹⁴ This rejection of the traditional sweat of the brow approach to orig-

¹⁰ 499 U.S. 340 (1991) [*Feist*]. The US Supreme Court denied copyright protection to an ordinary white pages phone directory, establishing explicitly and definitively that 'creativity', not 'sweat of the brow', is the applicable originality standard in the US.

¹¹ *CCH*, *supra* note 2 at para. 24: 'A creativity standard implies that something must be novel or non-obvious – concepts more properly associated with patent law than copyright law.'

¹² *Feist*, *supra* note 10 at para. 10. See also paras. 41 and 49.

¹³ See, for example, Daniel J. Gervais and Elizabeth Judge, *Intellectual Property: The Law in Canada* (Toronto: Carswell, 2005) at 23: 'But it seems that the Supreme Court [of Canada] chose a "middle-path" only in appearance. Canada instead has taken on a standard essentially identical to those of our American neighbours and to the Continental systems.' See also Drassinower, 'Sweat of the Brow', *supra* note 4 at 123; Gervais, 'Post-CCH', *supra* note 2 at 7; Scassa, 'Recalibrating', *supra* note 2 at 91.

¹⁴ See, for example, Norman Siebrasse, 'Copyright in Facts and Information: Feist Publications is Not and Should Not be, the Law in Canada' (1994) 11 Canadian Intellectual Property Review 191 [Siebrasse, 'Facts and Information'].

inality is one manifestation of the judgment's status as a landmark transformation of the originality standard in Canadian copyright jurisprudence.

Of course, while it is not incorrect to emphasize the innovative dimension of the judgment, and hence its discontinuity with antecedent case law, it would be incorrect to forget that the judgment settled an ongoing struggle between originality schools, and that therefore elements of the side that emerged victorious in *CCH* were themselves present in the copyright tradition from which *CCH* apparently seeks to differentiate itself. The continuity between *CCH* and the copyright tradition should not be underestimated.¹⁵ Moreover, just as it is to be expected that elements of the victorious side were already present in the copyright tradition, it is equally to be suspected – contrary to first impressions – that elements of the defeated side, albeit in altered or disguised form, remain operative in *CCH*. This is all the more likely where – at least in the Court's own self-understanding – *CCH* did not so much pick a side in the struggle it settled, as much as framed a mid-point between the contending schools.

In what follows I analyze two classic authorities on originality, *University of London Press v. University Tutorial Press* and *Walter v. Lane*. My purpose in doing so is twofold. First, I want to find in these two classic authorities traces of the struggle between sweat of the brow and creativity schools, and hence to appraise the presence in each of these authorities of an alternative to the sweat of the brow standard. Second, I expect to learn from that exercise what some of the fundamental implications of the shift from sweat of the brow to skill and judgment must be. It is only in this way that we can hope to understand the relationship between *CCH* and the copyright tradition, and therefore the significance of *CCH* for the development of that tradition.

II *UNIVERSITY OF LONDON PRESS v. UNIVERSITY TUTORIAL PRESS*

Briefly stated, the facts in *University of London Press* pertinent to the originality question were as follows. Professor Lodge and Mr Jackson were hired

¹⁵ Consider, for example, *Caron v. Association des Pompiers* (1992), 42 C.P.R. (3d) 292 at 294–295 (F.C.T.D.) [*Caron*]: 'In this regard, I consider that they [the defendants] were not able to show on a balance of probabilities that the compilations produced by the plaintiff required no creativity.' See also *Tele-Direct (Publications) Inc. v. American Business Information, Inc.* (1997), 76 C.P.R. (3d) 296 at 303, 307–8 (F.C.A.) [*Tele-Direct*]; *Kilvington v. Goldberg* (1957), 8 D.L.R. (2d) 768 at 770 (Ont. H.C.) [*Kilvington*]; *Cramp v. Smythson*, [1944] A.C. 329 at 335–6 [*Cramp*]; and *MacMillan v. Cooper* (1923), 93 L.J.P.C. 113 at 186–7, 40 T.L.R. 186 (J.C.P.C. – India) [*Macmillan*].

by the University of London to set entrance examinations in mathematics. It was a condition of their being hired that copyright in the examination papers vested in the University. Together they set three examination papers, one in arithmetic and algebra, a second in geometry, and a third in more advanced mathematics. (Accordingly, the Court referred to the first two papers as 'elementary', in contrast to the third paper in more 'advanced' mathematics.)¹⁶ The University then assigned the copyright in the examinations to the plaintiff, University of London Press. The Press published the examination papers. But, having obtained copies of the examination papers from students who had taken the examinations, the defendant, University Tutorial Press, also published the examination papers. University of London Press sued for copyright infringement.

In a famous passage, the Court defined 'originality' as follows:

The word 'original' does not in this connection mean that the work must be the expression of original or inventive thought. Copyright Acts are not concerned with the originality of ideas, but with the expression of thought, and, in the case of 'literary work', with the expression of thought in print or writing. The originality which is required relates to the expression of the thought. But the Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work – that it should originate from the author.¹⁷

This passage involves three closely related propositions worth parsing. Two of these propositions tell us what originality is not, and one tells us what it is.

The first proposition is that originality is not novelty of thought. It is trite copyright law that to express an old or familiar idea anew in one's own words is to be original for copyright purposes.¹⁸ Originality is not about *what* the work says – whether novel or otherwise – but about *how* the work says it. It pertains not to content but to form, not to idea but to expression.

The second proposition is that originality is not about novelty in expres-

¹⁶ *University of London Press v. University Tutorial Press*, [1916] 2 Ch. 601 at 609 [*University of London Press*].

¹⁷ *Ibid.* at 608–9.

¹⁸ On the idea/expression dichotomy, see, for example, *Moreau v. St. Vincent*, [1950] Ex. C.R. 198 at 203 (Can. Ex. Ct.): 'It is an elementary principle of copyright law that an author has no copyright in ideas but only in his expression of them. The law of copyright does not give him any monopoly in the use of the ideas with which he deals or any property in them, even if they are original. His copyright is confined to the literary work in which he has expressed them. The ideas are public property, the literary work is his own. Every one may freely adopt and use the ideas but no one may copy his literary work without his consent.' For commentary on the idea/expression dichotomy, see Abraham Drassinower, 'A Rights-Based View of the Idea/Expression Dichotomy in Copyright Law' (2003) 16 Canadian Journal of Law and Jurisprudence 3.

sion. While it is true that originality pertains exclusively to expression, this does not mean that the expression must itself be novel. This is aptly captured in the defence of independent creation. As Justice Learned Hand put it, 'if by some magic a man who had never known it were to compose anew Keats's Ode on a Grecian Urn, he would be an "author", and, if he copyrighted it, others might not copy that poem, though they might of course copy Keats's.'¹⁹

The third proposition is already contained in the second. What is required for originality is not that the expression be novel in the sense that it has never been composed by anyone else before, but that it be not-copied from another work – that is, that it be original in the sense of being the author's own product. One does not cease to have said something in one's own words just because, coincidentally, another person happens to have used those very same words. The co-incidence, however unexpected or unlikely, does not make one's expression any less one's own. It is this sense of 'one's own' – that of the origins or pedigree of the expression – that originality recognizes. Original means independently created.

Having described the originality standard, the Court in *University of London Press* proceeded to apply it to the facts of the case. Peterson J. pointed out that Professor Lodge and Mr Jackson had proved that they had themselves thought of the questions which they set. They had notes or memoranda proving that they had themselves come up with the questions – that is, that they had not copied them. The examination papers were therefore original within the meaning of the Copyright Act.²⁰

The Court then moved on to consider four objections to its holding. Three of them are directly relevant to our present purposes. In essence, the Court's response to these objections was that they are all rooted in a misunderstanding of the meaning of originality. In particular, the objections misunderstand the crucial proposition that originality does not mean novelty. Examining these objections is instructive because, in the course of its response to them, the Court's reasons appear to give rise to a struggle between two distinct views of originality. One of these views is consistent with the Court's manifest formulation that 'original' means 'not-copied from another work'. The other view announces, as it were in latent form, the proposition that 'original' means – to use the Court's own words – involving 'selection, judgment and experience'.²¹

The first objection dealt with by the Court was that, in composing the examinations, the authors '*drew upon* the stock of knowledge common to

¹⁹ *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49 at 54 (2d Cir. 1936).

²⁰ *University of London Press*, *supra* note 16 at 609.

²¹ *Ibid.*

mathematicians’.²² The Court replied that drawing from the common stock of knowledge does not preclude originality. Originality is not novelty, otherwise ‘only those historians who discovered fresh historical facts could acquire copyright for their works’.²³ The objection is untenable in that it suggests that originality turns on the novelty of the information conveyed in a work. The work of Professor Lodge and Mr Jackson met the originality standard because they did not copy from the common stock; they only drew upon it. While *copying* from the common stock is indeed inconsistent with originality, *drawing* from the common stock does not preclude originality.

The second objection was that the examination questions set by Professor Lodge and Mr Jackson were questions in ‘book work’ – that is, ‘questions set for the purpose of seeing whether the student has read and understood the books prescribed by the syllabus’.²⁴ This objection is but a version of the first; namely, that a work is not original if it draws from another. The Court therefore responds by affirming once again the proposition that originality is not novelty and that drawing from another work does not preclude originality. To be sure, the objection here is not that the examiners drew from the common stock but rather that they drew from the specific books prescribed by the syllabus. Still, the answer is basically the same in that it restates that original means not-copied: ‘the questions set are not copied from the book’.²⁵

Yet the passage in which the Court responds to the ‘book work’ objection gives us reason to pause:

Some of the questions, it was urged, are questions in book work, that is to say, questions set for the purpose of seeing whether the student has read and understood the books prescribed by the syllabus. But the questions set are not copied from the book; they are questions prepared by the examiner for the purpose of testing the student’s acquaintance with the book, *and in any case it was admitted that the papers involved selection, judgment, and experience*. This objection has not, in my opinion, any substance; if it had, it would only apply to some of the questions in the elementary papers, and would have little, if any, bearing on the paper on advanced mathematics.²⁶

The Court’s additional remark that the papers involved ‘selection, judgment and experience’ is puzzling. The remark is at best unnecessary and at worst counter-productive. It is unnecessary in that, on the view that original means not-copied from another work, the papers would be original even if they had

²² *Ibid.* [emphasis added].

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ *Ibid.* [emphasis added].

involved no selection, judgment and experience. The Court does not need to assert that the papers involved 'selection, judgment, and experience' in order to find them original.

The remark is counter-productive in that the criteria of 'selection, judgment and experience' are not necessarily consistent with the 'not-copied from another work' criterion. Garden variety phone directories, to use once again the classic example, can be both 'not copied from another work' *and* involve no 'selection, judgment and experience' in their production. Peterson J. himself raises the possibility of works of such a kind when he comments that the 'book work' objection 'would only apply to some of the questions in the elementary papers, and would have little, if any, bearing on the paper on advanced mathematics'. It is as if Peterson J. were saying that if originality were about 'selection, judgment, and experience', the 'elementary papers' could be denied protection. Thus the comment seems to be some kind of concession on Peterson J.'s part that the originality determination is easier in respect of the paper on advanced mathematics because it is easier to characterize that paper as involving 'selection, judgment and experience'. Paradoxically, then, Peterson J. invoked the admission that the papers involved 'selection, judgment, and experience' as a response to the objection that the papers were mere 'book work', yet in so doing he in fact wound up raising the spectre of a standard of originality that at least some of the papers in issue could have some difficulty meeting.

The Court's treatment of the third objection, however, consolidated the proposition that 'selection, judgment, and experience' are not necessary for originality. The third objection was that 'the questions in the elementary papers were of common type'.²⁷ That is, even if the advanced examination were to be regarded as original on the grounds that its production involved 'selection, judgment, and experience', the elementary examinations could not be so regarded because they were of 'common type'. Note that the objection here was not that the elementary examinations *drew* from the common, but rather that they *were* common, too common – so the objection goes – for the Court to hold that their production involved anything other than copying from the common. Whereas *drawing* from the common in the absence of copying likely involves 'selection, judgment, and experience', *being* common or ordinary is not clearly the result of anything other than purely mechanical or automatic repetition.

Nonetheless, the Court dismissed this objection. The Court once again affirmed the proposition that original does not mean novel – that to be original is simply to be not-copied from another work. Thus, the Court insists that

²⁷ *Ibid.*

the elementary examinations, even if common, were not copied from other papers, and therefore, they were original within the meaning of the Copyright Act. What is original as a matter of copyright law may well be common, even ordinary, like the questions in the elementary examinations: 'I suppose that most elementary books on mathematics may be said to be of a common type, but that fact would not give impunity to a predatory infringer. The book and the papers alike originate from the author and are not copied by him from another book or other papers.'²⁸

In the wake of the suggestion that 'selection, judgment, and experience' may have a role to play in the determination of originality, the Court's insistence that original means not-copied may seem slightly less persuasive. Yet it is precisely this insistence that renders the judgment a classic 'sweat of the brow' authority. The word 'original' did not find its way into the English Copyright Act until 1911. At the very least, this represented an opening, not seized by the *University of London Press* 1916 Court, to introduce criteria such as 'selection, judgment, and experience' into the copyrightability determination. Had the Court done so, it could have of course reached the same result it actually did. It could have held that the elementary papers, too, involved 'selection, judgment, and experience', even if to a lesser degree than the paper in more advanced mathematics. Such interpretive path would have inevitably brought with it a distinction between mere products and works, as well as between producers and authors. Products lacking 'selection, judgment, and experience' could not be regarded as works of authorship subject to copyright protection, and the requirement of originality would have arisen – however slightly – as a more robust way of guarding entry into the world of copyright. If not the elementary examinations in issue in the case, some products – such as ordinary phone directories – would be refused entry, and by implication, some producers would be denied the honours of authorship. The Court's refusal in 1916 to take up this opportunity is all the more telling in light of the introduction of the word 'original' into the Act in 1911. The refusal is nothing less than a self-conscious decision to affirm a view decisively foreign to any rendering of originality premised on a distinction between production and authorship, between the labour of mere production and the specific work of authorship.

The Court's decision to steer away from narrowing the meaning of originality in response to the 1911 legislative amendment had at least two related determinants. On the one hand, the Court relied on precedents evidencing a wide conception of copyrightability. Before discussing the originality issue, the Court discussed the question whether the examination papers could be

²⁸ *Ibid.*

regarded as 'literary work' within the meaning of the Act. 'Under the Act of 1812, which protected "books"', Peterson J. wrote, 'many things which had no pretensions to literary style acquired copyright; for example, a list of registered bills of sale, a list of foxhounds and hunting days, and trade catalogues; and I see no ground for coming to the conclusion that the present Act was intended to curtail the rights of authors'.²⁹ If a list of foxhounds and hunting days is worthy of copyright protection, and its producer is therefore an author within the meaning of the Act, then it is understandable that elementary examination papers, and Professor Lodge and Mr Jackson, must also be worthy of the same status. Peterson J. found no reason to hold that 'originality' should be given a more restrictive meaning.

On the other hand, the Court derived inspiration from a particular conception of the purpose of copyright law. Famously, Peterson J. concluded his examination of originality as follows:

The objections with which I have dealt do not appear to me to have any substance, and, after all, there remains the rough practical test that *what is worth copying is prima facie worth protecting*. In my judgment, then, the papers set by Professor Lodge and Mr. Jackson are 'original literary work' and proper subject for copyright under the Act of 1911.³⁰

David Vaver makes an important point when he remarks that 'As a legal invitation, this is too crude to be overtly accepted. Taken literally, it begs all questions of copyrightability, infringement, and substantiality.'³¹ In *University of London Press*, to give but the nearest of examples, the question was whether copying by the defendants amounted to a wrong to the plaintiff. Naturally, the answer to this question required a determination whether the material copied was subject to copyright. After all, no wrong can be found in the absence of a right. It was precisely in order to determine whether a right had been obtained that Peterson J. examined the issue of originality. Thus, even if only under the guise of a 'rough practical test', inferring the existence of the copyright from the fact of copying is at best puzzling. The procedure raises a presumption that copying is wrongful, yet before any determination as to whether an exclusive right to copy obtains to begin with. The presumption is as odd as would be one establishing that, in negligence cases, damage suffered by a plaintiff is worthy of compensation, yet before reaching a determination as to whether the damage caused was reasonably foreseeable (that is, negligently caused). Just as, in the law of negligence, not all damage caused by the defendant is actionable, so in

²⁹ *Ibid.* at 608.

³⁰ *Ibid.* at 609–10 [emphasis added].

³¹ David Vaver, *Copyright Law* (Toronto: Irwin Law, 2000) at 148.

the law of copyright not all copying amounts to copyright infringement. The maxim that ‘what is worth copying is prima facie worth protecting’ threatens to collapse any viable distinction between harm and wrong, between mere loss and actionable injury.

A more sympathetic rendering of the maxim would point out that the Court seems concerned with the unauthorized transfer of value from plaintiff to defendant as a result of the defendant’s act of reproduction. The defendant could not have denied that what he copied was worth copying – his very act is an affirmation of that proposition. It does not lie in his mouth, so to speak, to deny the appropriation of value involved in his act.³² The fact of copying thus permits us to deploy against the defendant the inference that the material produced by the plaintiff is worth copying – that is, that in the defendant’s own view there is value to be taken. The defendant has after all copied the plaintiff’s examination papers in order to publish them in a book of his own, in the expectation of selling that book to students interested in studying previous examinations.

The first ‘worth’ in the maxim ‘what is worth copying is prima facie worth protecting’, then, is about *value* – it is literally about the worth of the material copied. But the second ‘worth’ in the maxim is about *entitlement*. It is less about the value of the plaintiff’s product *per se* than about the plaintiff’s legally recognized right to exclude others from that value. It is not about the worth of the material, but about whether that material is, so to speak, worthy of legal protection as a matter of copyright law.

As a whole, then, the maxim conveys an affinity between value and entitlement, between the production of value and the entitlement to exclude others from benefits to be derived therefrom; in a word, between origination and copyright protection. From the point of view of this affinity, the purpose of copyright law is to prevent defendants from reaping where they have not sown. Copyright guarantees plaintiffs the value generated through the sweat of their brow.

Peterson J.’s classic judgment is a decision to opt for a standpoint for which originality as a matter of copyright law is a proxy for value-origination, and for which the purpose of copyright law is to remedy the misappropriation of that value. The decision is also a refusal to distinguish the labour of value-production from the specific work of authorship. From this viewpoint, the

³² Consider in this regard *International News Service v. Associated Press*, 248 U.S. 215 (1918) at 239: ‘[D]efendant, by its very act, admits that it is taking material that has been acquired by complainant as the result of organization and the expenditure of labor, skill, and money, and which is salable by complainant for money, and that defendant in appropriating it and selling it as its own is endeavoring to reap where it has not sown.’

question whether any given value is properly the subject matter of copyright law is to be decided not through an investigation of the specificity of authorship but rather through an interpretation of particular categories of subject matter listed in the statute. Thus, for example, copyright protects not works of authorship, but – to use the language of the Act of 1812 – the value of ‘books’: whether these are the writings of Robert Louis Stevenson, registered bills of sale, a list of foxhounds and hunting days, trade catalogues, examinations in elementary mathematics, ordinary phone directories, or the poems of Lord Byron.

III *WALTER v. LANE*³³

The opening lines of Lord Halsbury’s classic judgment in *Walter v. Lane* eloquently capture the sweat of the brow approach to originality:

I should very much regret it if I were compelled to come to the conclusion that the state of the law permitted one man to make profit and to appropriate to himself the labour, skill, and capital of another. And it is not denied that in this case the defendant seeks to appropriate to himself what has been produced by the skill, labour, and capital of others. In the view I take of this case I think the law is strong enough to restrain what to my mind would be a grievous injustice. The law which I think restrains it is to be found in the Copyright Act, and that Act confers what it calls copyright – which means the right to multiply copies – which it confers on the author of books first published in this country.³⁴

The affirmation of the normative significance of the sweat of the author’s brow generates a vision of copyright law as a remedy for the grievous injustice of misappropriation. Copyright is there in order to preclude reaping by those who have not sown.

³³ [1900] A.C. 539. The following discussion of *Walter v. Lane* follows closely, though with some alterations, parts of the text of Drassinower, ‘Sweat of the Brow’, *supra* note 4.

³⁴ *Walter v. Lane*, *ibid.* at 545. Strictly speaking, use of the phrase ‘sweat of the brow’ to denote Lord Halsbury’s judgment is anachronistic. The phrase describes a school of thought with respect to the originality requirement, but the word ‘original’ did not find its way into the English Copyright Act until 1911, eleven years after *Walter v. Lane*. Still, in the pre-1911 jurisprudence, including *Walter v. Lane*, the debate about copyrightability took place through inquiry into the meaning of the word ‘author’. See Robert Howell & Ysolde Gendreau, ‘Qualitative Standards for Protection of Literary and Artistic Property’ (Canadian report to the 1994 International Congress of Comparative Law, Athens, 1994) in *Contemporary Law 1994* (Cowansville, Que.: Yvon Blais, 1994) 518 at 521–2, 542–5.

Walter v. Lane involved several public speeches delivered by the Earl of Rosebery. Journalists attended the speeches and reported them *verbatim* in *The Times* newspaper. Sometime after publication of the reports of the Earl of Rosebery's speeches, the defendant published a book that consisted of reports of the very same speeches, preceded by short notes. It was admitted that these reports were taken from the reports in *The Times*. *The Times* sued for copyright infringement, asserting copyright in the verbatim reports of the speeches.

Five judgments were delivered. Four (Earl of Halsbury L.C., Lord Davey, Lord James of Hereford, and Lord Brampton) found in favour of the plaintiff. Lord Robertson dissented.

In *Walter v. Lane*, the Court of Appeal had found in favour of the defendant on the grounds that the reporters were not 'authors' for copyright purposes. To produce a verbatim report of a speech is not to *author* a work subject to copyright protection. In Lord Halsbury's view, however, the Court of Appeal's judgment was based on too narrow and misleading a use of the word 'author'. Whatever the word 'author' means in some ordinary or general sense, the word 'author' within the meaning of the Act cannot exclude the producers of a verbatim report such as the one in the case at hand. Lord Halsbury relied on the directory cases, which hold that garden variety phone directories are subject to copyright protection.³⁵ 'If the producer of such a book [i.e. a phone directory] can be an author within the meaning of the Act,' he writes, 'I am unable to understand why the labour of reproducing spoken words into writing or print and first publishing it as a book does not make the person who has so acted as much an author as the person who writes down the names and addresses of the persons who live in a particular street.'³⁶ Lord Halsbury's reliance on the directory cases displays an insistence, echoed by Peterson J. in *University of London Press*, that no meaningful distinction can be drawn for copyright purposes between producers and authors, and, by that same token, between products and works. Once again, what is at stake is not 'authorship' in any special sense, but rather the 'grievous injustice' involved in the misappropriation of another's effort – in reaping where another has sown.

Before moving on to Lord Robertson's dissent, I want to pause briefly on Lord James's judgment. Lord James's view is of interest at this point because, while Lord James agrees with Lord Halsbury as regards the result, he nonetheless reaches that result from the standpoint of a distinction between production and authorship. Lord James frames the issue by stating that the report of the speech is 'something different' from and beyond the speech itself.³⁷ The question is whether this difference represents a 'something' of which any one can

³⁵ See, for example, *Kelly v. Morris*, *supra* note 9.

³⁶ *Walter v. Lane*, *supra* note 33 at 546.

³⁷ *Ibid.* at 553.

be regarded as 'the author' within the meaning of the Copyright Act.³⁸ Lord James finds this mysterious 'something' in what he calls the 'reporter's art'.³⁹ Taking down the words of a speaker, and certainly of a rapid speaker, Lord James points out, is 'an art requiring considerable training'.⁴⁰ In fact, reporters less skilled are 'deficient in this quality of accuracy'.⁴¹ It is on the basis of this quality that Lord James concludes that 'a reporter of a speech under the conditions existing in this case is the *meritorious producer of the something necessary to constitute him an "author"* within the meaning of the Copyright Act.'⁴² Thus, although Lord James applies an authorship standard, he nonetheless concurs with Lord Halsbury at the level of the result. Lord James finds the features of authorship in the verbatim reports.

In his dissent, Lord Robertson restricts the meaning of 'authorship' even further than does Lord James. Nothing but literal accuracy, Lord Robertson notes, is required to produce the verbatim reports in question.⁴³ The reporter of a speech is a good reporter by virtue of a contribution of a purely negative kind. The good reporter 'does not interfere, but faithfully acts as a conduit'.⁴⁴ The merit of the verbatim reports, says Lord Robertson, is that 'they present the speaker's thoughts untinctured by the slightest trace of colour of the reporter's mind'.⁴⁵ Thus, Lord Robertson's view is that the very merit of the reports is what indicates that the reports are not copyrightable. The rival of a good stenographer is the phonograph, and it is hard to see, says Lord Robertson, 'how, in the widest sense of the term "author", we are in the *region of authorship*'.⁴⁶ Lord Robertson's judgment is thus premised on an affirmation of the specificity of the work of authorship, and, therefore, on a distinction between mental products *per se* and the specific works of authorship.

As regards the directory cases on which Lord Halsbury relies, Lord Robertson insists that they are not inconsistent with his affirmation of the specificity of authorship. Thus Lord Robertson admits that there are cases that apply the words of the Act to 'very pedestrian efforts of the mind', such as furniture catalogues and timetables.⁴⁷ Still, he insists that even such pedestrian efforts of the mind nonetheless exhibit 'structure and arrangement on the part

³⁸ *Ibid.*

³⁹ *Ibid.* at 554.

⁴⁰ *Ibid.*

⁴¹ *Ibid.* at 555.

⁴² *Ibid.* [emphasis added].

⁴³ *Ibid.* at 560.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.* at 561.

⁴⁶ *Ibid.* [emphasis added].

⁴⁷ *Ibid.*

of the maker'.⁴⁸ In the end, Lord Robertson's view is that 'the recording by stenography the words of another is in a *different region* from the making-up a timetable'. 'I do not say it is [a] lower or higher [region],' he is careful to add, 'but in a different plane, *because there is no construction*'.⁴⁹

Thus, if Lord Halsbury does not require anything more than the undifferentiated and unspecified labour of production, and Lord James requires, in addition, the application of a 'skill' of some kind, Lord Robertson requires not the application of just *any* skill, but the application of a *particular skill or faculty he identifies with 'authorship'*: 'The word "author" ', he writes, 'seems to me to present a criterion consistent with the widest application of the Act to all who can claim as embodying their own thought, whether humble or lofty, the letterpress of which they assert their authorship'.⁵⁰ Whatever else he might be, a stenographer is not an author, and copyright is about authorship.

Whereas Lord Halsbury affirms a view of copyright concerned with the origination and protection of value, Lord Robertson affirms a view of copyright concerned with the specificity of authorship. This tension *between* the two judgments appears internalized as a tension *within* Peterson J.'s judgment in *University of London Press*. It is as if the intervening insertion of the word 'original' into the Act had compelled Peterson J. to gesture, albeit unnecessarily and counter-productively, toward 'selection, judgment, and experience' in his discussion of the distinction between elementary and advanced examinations. Lord Halsbury was far less ambiguous: '[I]f I have not insisted upon the skill and accuracy of those who produce in writing or print spoken words', he wrote, 'it is not because I think the less of those qualities, but because, as I have endeavoured to point out, neither the one nor the other are conditions precedent to the right created by the statute'.⁵¹

IV CCH REVISITED

It will be recalled that in *CCH* the Supreme Court of Canada affirmed the skill and judgment originality standard by invoking a vision of the purpose of copyright law as a balance between two objectives, promoting the public interest, on the one hand, and obtaining a just reward for the creator, on the other. As noted above, it was in terms of this balance that the Court dismissed both the sweat of the brow and the creativity standards as extremes of which the skill

⁴⁸ *Ibid.*

⁴⁹ *Ibid.* [emphasis added].

⁵⁰ *Ibid.* at 562.

⁵¹ *Ibid.* at 549.

and judgment standard is the appropriate mean – in between inappropriately ‘low’ and inappropriately ‘high’ alternatives.

Neither the metaphor of a balance, nor that of a continuum from ‘low’ to ‘high’, however, provide sufficient basis either to explain or to justify the shift from sweat of the brow to skill and judgment. The result of this justificatory vacuum is truly striking. In *CCH* the skill and judgment rhetoric of a copyright model centred on the specificity of authorship co-exists with the generation and distribution of benefits rhetoric of a copyright model centred on the origination of value. If *University of London Press* exhibited traces, however slight, of an internalized struggle, so to speak, between Lord Halsbury and Lord Roberston, *CCH* manages to reconstitute the tension in altered form: a vision of copyright fundamentally preoccupied with the balancing of value presides over a doctrinal shift in the direction of authorship.

Nothing about the concept of copyright as a balance between dual objectives necessarily entails the proposition that the sweat of the brow standard is too low. On the contrary, many regard the sweat of the brow standard as appropriate from the standpoint of copyright law as a balance between authors and users, ownership and access.⁵² After all, the vision of copyright law as a balance is by no means novel. In 1785, in *Sayre v. Moore*, for example, Lord Mansfield famously formulated the task of copyright law as one in which:

[w]e must take care to guard against two extremes equally prejudicial; the one, that men of ability, who have employed their time for the service of the community, may not be deprived of their just merits, and the reward of their ingenuity and labour; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded.⁵³

The sweat of the brow standard is part and parcel of a centuries old tradition that, at least nominally, devoted itself to finding an in-between ‘two extremes equally prejudicial’. To be sure, there can be no doubt that in *CCH* the Supreme Court of Canada presents its dismissal of the sweat of the brow standard in the name of the copyright balance. But a bare assertion that the traditional originality standard is too low is surely insufficient in a context that has always aspired to that balance precisely through that standard. The same is true of the Court’s dismissal of the creativity standard as too high. Once again, a bare assertion is simply insufficient in light of the adherence to that standard in the name of a balanced copyright in US copyright jurisprudence.

⁵² See Siebrasse, ‘Facts and Information’, *supra* note 14. Consider also *CCH Canadian Ltd. v. Law Society of Upper Canada* (2002), 18 C.P.R. (4th) 161 at para. 59 (F.C.A.) [*CCH FCA*].

⁵³ *Sayre v. Moore*, 1 East 361, 102 Eng. Rep. 139 (K.B. 1785) at 139.

Moreover, even if we were to accept that varying originality standards can somehow be understood and classified as more or less conducive to the achievement of a balance between authors and public, it seems clear that the degree to which any given standard would either promote or be consistent with the balance in question would depend crucially on one's construal of other copyright doctrines, such as, for example, fair dealing. The Court of Appeal in *CCH*, for example, addressed in its reasons the relation between originality and fair dealing in this light. It suggested that the interaction between originality and fair dealing as central copyright doctrines, not either one in isolation, is to be considered as instrumental in achieving the requisite balance.⁵⁴

In other words, conclusions about the role of the originality standard in the achievement of the copyright balance cannot possibly be persuasive in the absence of more integrated assessments of its combined and concurrent action in light of other copyright doctrines. Because the Supreme Court's dismissal of the sweat of the brow standard takes place in the absence of any such integrated assessment, it cannot help but remain at best unpersuasive, and at worst short-lived and precarious. (Once again, the same can be said of the Court's dismissal of the creativity standard.) While *CCH* did deal extensively with fair dealing, it did not deal explicitly with the balanced and integrated interaction between originality and fair dealing. It seems *prima facie* clear that a decision, such as *CCH*, that both narrows originality and widens fair dealing in the same breath must do more than merely invoke the copyright balance and assert without more ado that the sweat of the brow standard is too low, or that the creativity standard is too high.

Finally, even if we were to assume that originality standards can (whether in isolation or along the lines of more integrated assessments) be correlated with certain outcomes at the level of the copyright balance, there is no self-evident reason to believe that these correlations would be industry neutral. That is, it is entirely plausible, perhaps even probable, that one originality standard may be more conducive to 'balance' in one industry or field of activity (such as phone-directory production), and another in another industry or

⁵⁴ *CCH FCA*, *supra* note 52 at para. 59: 'Admittedly, the public interest in the dissemination of works may be a policy reason to impose a high standard of "creativity" as a prerequisite to copyright protection. There is also the concern that overprotection of certain works will thwart social and scientific progress by precluding persons from building upon earlier works. However, I would suggest that copyright monopolies are better controlled through the avenues that Parliament has established than through the imposition of an arbitrary and subjective standard of "creative spark" or "imagination". As will be discussed below, a fair interpretation of user rights can counteract the apparent imbalance potentially generated by a low threshold (see *Vaver, Copyright Law*, *supra* at 169–70). For example, the fair dealing provisions of the *Act* provide a mechanisms [sic!] whereby user rights are better considered.'

field of activity (such as sculpture or painting).⁵⁵ In short, the Supreme Court's holding that the sweat of the brow and creativity standards are inadequate may well be correct, but unfortunately the Court has hardly provided any reasons for its holding.

A similar situation obtains as regards the metaphor of a continuum from 'low' to 'high' in terms of which originality standards can somehow be meaningfully classified. The image of the continuum presupposes that the sweat of the brow standard requires less of authors than the skill and judgment standard, and that, in turn, the skill and judgment standard requires less than does the creativity standard. It is by no means clear, however, what it is that these standards share, so as to make it meaningful to place them in a continuum moving from less to more, or – for that matter – in any kind of continuum. It may be that what the Court has in mind is that the sweat of the brow standard is 'lower' in that the requirements it imposes for admission to the world of copyright protection are such that any work qualifying under the other two standards would also qualify under the sweat of the brow standard, whereas the reverse is simply not true. Similarly, it may be that what the Court also has in mind is that any work qualifying under the creativity standard would also qualify under the skill and judgment standard, whereas the reverse, again, is simply not true. Nonetheless, these observations are radically insufficient. They do nothing by way of providing reasons for the view that there is a shared something at all, or by way of providing a description of what this shared something is.

Consider the Court's conclusions regarding the nature of 'originality'. The text of the judgment suggests that the Court does indeed have in mind a kind of creativity continuum moving from 'none' (sweat of the brow), through 'enough' (skill and judgment), to 'more than enough' (creativity):

For these reasons, I conclude that an 'original' work under the *Copyright Act* is one that originates from an author and is not copied from another work [i.e. sweat of the brow]. That alone, however, is not sufficient to find that something is original. In addition, an original work must be the product of an author's exercise of skill and judgment. 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. While *creative works will by definition be 'original' and covered by copyright*, creativity is not required to make a work 'original'.⁵⁶

⁵⁵ See, for example, Alfred Chueh-Chin Yen, 'The Legacy of Feist: Consequences of the Weak Connection Between Copyright and the Economics of Public Goods' (1991) 52 Ohio State Law Journal 1343.

⁵⁶ *CCH*, *supra* note 2 at para. 25 [emphasis added].

Thus, whereas the sweat of the brow standard is too low in that it would admit a ‘purely mechanical’ yet ‘not copied’ product into the world of copyright, the creativity standard is too high in that, as the Court puts it in this context, it ‘implies that something must be novel or non-obvious – concepts more properly associated with patent law than copyright law’.⁵⁷ The Court, then, appears to affirm the following three propositions:

- (1) sweat of the brow, skill and judgment and creativity are part of a continuum of which creativity is the highest form;
- (2) this highest form must be ruled out as an originality standard because it requires novelty or non-obviousness, which are associated with patent law, not copyright law;
- (3) creative works will by definition be original and covered by copyright.

The problem with these propositions is that if proposition (2) is true, then proposition (3) is false. Proposition (2) defines creative works as novel or non-obvious. Proposition (3) asserts that such works will by definition be covered by copyright. But that is simply not true. Patentable subject matter is indeed novel and non-obvious. But it is trivially true that such subject matter is *not* – and certainly not ‘by definition’ – subject to copyright protection.⁵⁸

The point is not that patentable inventions are in some sense not sufficiently creative. Nor is the point that inventions do not involve skill and judgment in their production. The point, rather, is that the human faculty exercised in the production of a patentable invention, even where such exercise is significant and cannot possibly be characterized as purely mechanical, is qualitatively distinct from that exercised in the production of works of authorship. The invention of a mouse-trap, for example, no doubt requires creativity and/or skill and judgment. But a mouse-trap is not a literary work, and an inventor is not an author. It is as absurd to place these human faculties in a continuum as it is to suggest that an author is less creative than an inventor, or that Lord Byron is somehow better at compiling phone directories than your local telephone company. It seems far more fruitful to regard these activities as distinct, to refrain from regarding them as belonging in a continuum moving from low to high, and to attempt the elaboration of the specificity of each.

Of course, there is no denying that the *CCH* Court specifies that the skill and judgment it has in mind is not *any* skill and judgment but rather the skill

⁵⁷ *Ibid.* at para. 24.

⁵⁸ For discussion of the distinction between copyright and patent, see Abraham Drassinower, ‘A Note on the Distinction Between Copyright and Patent’ in *Intellectual Property at the Edge: New Approaches to IP in a Transsystemic World* (Montreal: Centre for Intellectual Property Policy, 2006) 285.

and judgment of *an author*: ‘an original work must be the product of *an author’s* exercise of skill and judgment’.⁵⁹ Similarly, the Court also specifies that the skill and judgment in issue is specifically the skill and judgment involved in the expression of an idea: ‘What is required to attract copyright protection *in the expression of an idea* is an exercise of skill and judgment’.⁶⁰ Moreover, the Court’s definition of judgment arguably excludes certain modes of judgment, such that not all exercise of judgment would qualify for copyright protection. Finally, even where the Court asserts that ‘creative *works* will by definition be ... covered by copyright’, the letter of its text is careful to refer to ‘works’, not to just any product of intellectual effort.

These aspects of the *CCH* decision fruitfully engage issues pertinent to the specificity of authorship vis-à-vis inventorship, or to the specific work of authorship vis-à-vis productive labour more generally. It is these aspects that would indicate that the continuum from ‘low’ to ‘high’ should not be understood quantitatively but rather as a series, so to speak, of copyright models differing from each other at the level of their conception of the conditions defining a copyrightable work. Thus, it is not so much, for example, that Lord Halsbury’s standard was ‘lower’ than Lord Robertson’s. It is rather that Lord Halsbury and Lord Robertson operated with different definitions of the nature of a ‘work’.

Still, even with these aspects in mind, it seems difficult to avoid the impression that the *CCH* decision remains undeveloped in this respect. The problem is not that the judgment does not elaborate the content of skill and judgment, and therefore of originality, beyond the indication that a ‘purely mechanical exercise’ will not do, or beyond the example that ‘simply changing the font of a work to produce “another” work would be too trivial to merit copyright protection as an “original” work’. One may after all take some comfort in the well-settled view that ‘originality’ is ultimately a finding of fact.

The problem is rather that the pervasive images of a continuum and a balance generate a conceptual environment not ideally conducive to an independent inquiry into the nature or specificity of skill and judgment, and therefore into the findings of fact that are to determine the outcome of any given case. This is because, once it has been understood as falling between two extremes, one ‘low’ and the other ‘high’, the inquiry into skill and judgment appears less as an inquiry into the defining conditions of a copyrightable work, than as an inquiry into the amount of protection to be regarded as consistent with the copyright balance. Thus originality is less about the nature of skill and judgment or authorship than about the amount of value-protection and distribution that would be

⁵⁹ *CCH*, *supra* note 2 at para. 25 [emphasis added].

⁶⁰ *Ibid.* at para. 16 [emphasis added].

attuned to the purpose of copyright. The crucial question of *what* it is that is being protected and distributed, as distinct from the question of *how much* of it to protect and *how much* of it to distribute, remains undeveloped, as it were hidden behind the veil of the balance-cum-continuum metaphor. Not a way to think through the nature of authorship, originality is but a way to talk about value-distributions magically formulated elsewhere.

Preoccupying about this standpoint is that it puts obstacles in the way of a fully articulated elaboration of a viable alternative to the sweat of the brow position. To be sure, there can be no doubt that, by jettisoning the sweat of the brow standard, the Court jettisons the view that authors should appropriate the value they originate. To put it otherwise, the Court jettisons the presumption, characteristic of the sweat of the brow school, that the author is *prima facie* entitled to the value she originates, and that, therefore, instances in which copyright law does not guarantee her that value ought to be regarded as exceptions. It is in this vein that the Court insists that such so-called ‘exceptions’ are rather ‘user rights’, integral to the innermost structure of copyright law.⁶¹ But what the Court alters in this way is the nature of the default distribution of value between authors and users, ownership and access. It does not, however, challenge the deeper and more fundamental assumption, also characteristic of the sweat of the brow standpoint, that authorship is fundamentally about value-origination.

In his dissent in *Walter v. Lane*, Lord Roberston was careful to avoid ‘disparaging the gifts of the shorthand writer’. He in fact discussed in some detail, and not without eloquence, the value and merit of the ‘art of stenography’. As noted above, he concluded his discussion as follows:

These observations apply to the stage of taking down in shorthand what the speaker says. The next stage, copying out the notes, is purely clerical work. Now I recognise the skill of the stenographer, I find that, for the reasons which I have mentioned, an educated man is the better qualified to be a faithful reporter. *But I fail entirely to see how, in the widest sense of the term ‘author’, we are in the region of authorship.*⁶²

This metaphor of a specific region of authorship, as distinct from other regions wherein skill and/or judgment may also be found, is fruitful. It is certainly more fruitful than the metaphor of a continuum through which variegated aspects of human agency are homogenized and commodified by being reduced to mere quantities to be measured or balanced. Lord Robertson was surely correct when he insisted that the region of authorship is not ‘lower or higher,

⁶¹ *Ibid.* at para. 48.

⁶² *Walter v. Lane*, *supra* note 33 at 561 [emphasis added].

but in a different plane'. In so doing, he identified not value-origination as such but the specificity of authorship as the pivotal concern.

V CONCLUDING REMARKS

In my view, *CCH* situates Canadian copyright culture at a juncture analogous to that faced by Peterson J. in *University of London Press* in 1916. In 1916, in the wake of the introduction of the word 'original' into the English Copyright Act in 1911, Peterson J. opted to affirm an affinity between value-origination and entitlement as the organizing principle of copyright law. Thus he rejected 'selection, judgment, and experience' as relevant criteria in the originality determination, and concluded his examination of originality with the maxim that 'what is worth copying is prima facie worth protecting'. Almost a century later, the Supreme Court of Canada in *CCH* unambiguously affirmed a skill and judgment originality standard. This is by any account a decisive movement away from the sweat of the brow standard. Yet this movement at the level of doctrine has not yet crystallized at the level of principle. By way of the skill and judgment standard, *CCH* alters the prima facie default distribution of value, but it does not question the very concept of the author as a value-originator. It is only that the author is now, in the name of balance, entitled to less of that value.

Faced with this juncture, we can retain the vision of copyright law as a mode of governing the origination and distribution of value. Should we follow this option, the immediate task will be to distinguish the specific kind of value or values to which copyright applies. Available for this task is not only the Court's concept of skill and judgment, but also the arsenal of copyright doctrines that separates out different kinds of values and reserves protection for only some of them. Thus, for example, the idea/expression dichotomy refuses protection to ideas, regardless of their value, and regardless also of the kind of skill and judgment, if any, that their production may have involved. This is a decision to curtail the value to which the author is entitled. The same could be said of fair dealing as a refusal to grant protection for the use of copyright subject matter in respect of certain purposes. Again, this is a decision to distribute value towards users rather than authors.

Alternatively, we can seize the unambiguous affirmation of skill and judgment at the doctrinal level as an invitation to elaborate the specificity of authorship. Should we choose this option, the immediate task will be the elaboration of an interpretation of *CCH* bringing into relief those aspects of the decision that emphasize that the skill and judgment at issue are specifically the skill and judgment of authorship. Lord Robertson's judgment in *Walter v. Lane* is by no means the only helpful referent in this respect. The tradition of originality

jurisprudence is not monolithic, and a vigorous constellation of judgments inconsistent with the sweat of the brow school does exist.⁶³ *CCH* is not as innovative as we at times appear to assume.

Most recently, it was the Federal Court of Appeal in *Tele-Direct (Publications) Inc. v. American Business Information, Inc.* that invoked that constellation most forcefully:

The use of the word 'copyright' in the English version of the Act has obscured the 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. I do not read these cases which have adopted the 'sweat of the brow' approach in matters of compilations of data as having asserted that the amount of labour would in itself be a determinative source of originality. If they did, I suggest that their approach was wrong and is irreconcilable with the standards of intellect and creativity that were expressly set out in NAFTA and endorsed in the 1993 amendments to the Copyright Act and that *were already recognized in Anglo-Canadian law*.⁶⁴

Deploying this constellation would set the stage for an elaboration of the content of skill and judgment as well as for an effort to link that elaboration with an affirmation of the inherent dignity of authorship as the organizing principle of copyright law. Essaying this task in the current juncture in the development of Canadian copyright would also require an interpretation of copyright law integrating the recognition of the inherent dignity of authorship characteristic of Continental copyright with the openness to fair dealing in particular and to the public domain in general more palpably present, albeit in different modes and degrees, in common law copyright. This is a difficult and perhaps impossible task.⁶⁵ As a bi-jural jurisdiction, however, Canada is well placed to attempt it.

We would in any case do well to keep in mind that the altered yet still ongoing struggle between the sweat of the brow and skill and judgment schools in Canadian copyright is not a struggle between pro-author and pro-user construals of originality. From the standpoint of the region of authorship, the pro-author/pro-user squabble is but a disagreement about domestic relations in a foreign country – a country for which copyright is less about authorship than about the generation and distribution of value. It is to be hoped that the future growth of Canadian copyright jurisprudence will manage, as it were retrospectively, to seize the promise of authorship that *CCH* evokes but does not quite capture.

⁶³ See, for example, *Tele-Direct*, *supra* note 15; *Caron*, *supra* note 15; *Kilvington*, *supra* note 15; *Cramp*, *supra* note 15; *Macmillan*, *supra* note 15.

⁶⁴ *Tele-Direct*, *ibid.* at 308 [emphasis added].

⁶⁵ For an interpretation of *CCH* from an authorship standpoint, see Drassinower, 'User Rights', *supra* note 2.