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The Crown, the Copyright, and the Law

Kim Nayer

May 2018

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The Crown, the Copyright, and the Law

Kim Nayer
University of Victoria

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Ingest with caution; thoughts welcome

- These are thoughts I've researched, discussed with others, and thought way too much about
- I'm continuing to explore these ideas
- This isn't a legal opinion!

I thank these people, but errors in logic etc are mine:

- Professor Bob Howell, UVic
- Daniel Hoadley, ICLR
- Corynne McSherry, EFF
- Xavier Beauchamp-Tremblay, CanLII
- Ken Fox, CALL/ACBD Copyright Committee
- Amanda Wakaruk, UAlberta



Proposition:

Crown copyright should not apply to primary law

This conceivably is the correct interpretation now in respect of case law

Now is the time to acknowledge that primary law is in the public domain



Outline

- a quick look at s 12: what does it say
- a bit about the origin of the *Copyright Act* and the Royal Prerogative
- another look at s 12 in light of other provisions in the Act
 - some statutory interpretation here: defined words, organization of Act, language, what's not said
- a look at some case law and interesting word choices
- then a look at some other countries and the way things have evolved
- and a return to the proposition—it's time





Wheaton v. Peters

Wheaton: “statutes [could] never [be] copyrighted” because they were enacted by legislatures.

Peters: “If either statutes or decisions could be made private property, it would be in the power of an individual to shut out the light by which we guide our actions.”

Supreme Court: We are “unanimously of opinion that no reporter has or can have any copyright in the written opinions delivered by this Court.”



s 12

Where copyright belongs to Her Majesty

12 Without prejudice to any rights or privileges of the Crown, where any work is, or has been, prepared or published by or under the direction or control of Her Majesty or any government department, the copyright in the work shall, subject to any agreement with the author, belong to Her Majesty and in that case shall continue for the remainder of the calendar year of the first publication of the work and for a period of fifty years following the end of that calendar year.

R.S., 1985, c. C-42, s. 12; 1993, c. 44, s. 60.



Context of s 12—it's about term

Find in document



☐ TERM OF COPYRIGHT [6 - 12]

6 Term of copyright

- 6.1 Anonymous and pseudonymous works
- 6.2 Anonymous and pseudonymous works of joint authorship

7(1) Term of copyright in posthumous works

7(2) Application of subsection (1)

7(3) Transitional provision

7(4) Transitional provision

8

9(1) Cases of joint authorship

9(2) Nationals of other countries

10 [Repealed]

11 [Repealed]

11.1 Cinematographic works

12 Where copyright belongs to Her Majesty

Look at Interpretation section (s 2)

copyright means the rights described in

(a) section 3, in the case of a work,

(b) sections 15 and 26, in the case of a performer's performance,

(c) section 18, in the case of a sound recording, or

(d) section 21, in the case of a communication signal; (*droit d'auteur*)



Look at s 3 to see rights described

PART I

Copyright and Moral Rights in Works

Copyright

Copyright in works

3 (1) For the purposes of this Act, **copyright**, in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof, and includes the sole right



Look at s 5 to see where copyright subsists

Works in which Copyright may Subsist

Conditions for subsistence of copyright

5 (1) Subject to this Act, copyright shall subsist in Canada, for the term hereinafter mentioned, in every original literary, dramatic, musical and artistic work if any one of the following conditions is met:

Look at Interpretation section (s 2)

every original literary, dramatic, musical and artistic work includes every original production in the literary, scientific or artistic domain, whatever may be the mode or form of its expression, such as compilations, books, pamphlets and other writings, lectures, dramatic or dramatico-musical works, musical works, translations, illustrations, sketches and plastic works relative to geography, topography, architecture or science;
(toute oeuvre littéraire, dramatique, musicale ou artistique originale)



Look at Interpretation section (s 2)

work includes the title thereof when such title is original and distinctive; (*oeuvre*)



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R.S., 1985, c. C-42, s. 12; 1993, c. 44, s. 60.



Royal Prerogative re primary law— modern utility?

- Far predates any kind of copyright legislation
- Seems to refer to the printing prerogative, one of the privileges of the King
 - Millar v. Taylor* (1769) 4 Burr. 2303
 - Stationers v. Patentees re the printing of Rolls Abridgment* (1661) Carter 89, 124 ER 842
 - Licensing of the Press Act 1662* (14 Car. II. c. 33)
- Even that discontinued when practice licensed to ICLR



Royal Prerogative re primary law— modern utility?

- Era of court reporter recording a summary was said by the judges
- Own words
- Private reporting rather than issued by court itself
- Right to print held by reporter



Statute of Anne 1710

Modern copyright's
statutory basis is the
Statute of Anne 1710

(261)

Anno O^{ct}avo

Annæ Reginae.

An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned.



Whereas Printers, Bookellers, and other Persons have of late frequently taken the Liberty of Printing, Reprinting, and Publishing, or causing to be Printed, Reprinted, and Published Books, and other Writings, without the Consent of the Authors or Proprietors of such Books and Writings, to their very great Detriment, and too often to the Ruin of them and their Families: For Preventing therefore such Practices for the future, and for the

Encouragement of Learned Men to Compose and Write useful Books: May it please Your Majesty, that it may be Enacted, and be it Enacted by the Queens most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons in this present Parliament Assembled, and by the Authority of the same, That from and after the Tenth Day of April, One thousand seven hundred and ten, the Author of any Book or Books already Printed, who hath not Transferred to any other the Copy or Copies of such Book or Books, Share or Shares thereof, or the Bookeller or Bookellers, Printer or Printers, or other Person or Persons, who hath or have Purchased or Acquired the Copy or Copies of any Book or Books, in order to Print or Reprint the same, shall have the sole Right and Liberty of Printing such Book and Books by the Term of One and twenty Years, to Commence from the said Tenth Day of April, and no longer; and that the Author of any Book or Books already Composed and not Printed and Published, or that shall hereafter be Composed, and his Assignee, or Assigns, shall have the sole Liberty of Printing and Reprinting such Book and Books for the Term of four-

6

Et t 2

teen



Statute of Anne 1710

- Long title:

"An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of Copies, during the Times therein mentioned"



Statute of Anne 1710

- Preamble:

Whereas Printers, Booksellers, and other Persons, have of late frequently taken the Liberty of Printing, Reprinting, and Publishing, or causing to be Printed, Reprinted, and Published Books, and other Writings, without the Consent of the Authors or Proprietors of such Books and Writings, to their very great Detriment, and too often to the Ruin of them and their Families: For Preventing therefore such Practices for the future, and for the Encouragement of Learned Men to Compose and Write useful Books; May it please Your Majesty, that it may be Enacted ...



s 89

PART IX

General Provisions

No copyright, etc., except by statute

89 No person is entitled to copyright otherwise than under and in accordance with this Act or any other Act of Parliament, but nothing in this section shall be construed as abrogating any right or jurisdiction in respect of a breach of trust or confidence.

1997, c. 24, s. 50.



Case law:

CCH Canadian Ltd v LSUC, 2004 SCC 13

9 In Canada, copyright is a creature of statute and the rights and remedies provided by the *Copyright Act* are exhaustive: see *Théberge v. Galerie d'Art du Petit Champlain inc.*, [2002] 2 S.C.R. 336, 2002 SCC 34 (CanLII), at para. 5; *Bishop v. Stevens*, 1990 CanLII 75 (SCC), [1990] 2 S.C.R. 467, at p. 477; *Compo Co. v. Blue Crest Music Inc.*, 1979 CanLII 6 (SCC), [1980] 1 S.C.R. 357, at p. 373. In interpreting the scope of the *Copyright Act*'s rights and remedies, courts should apply the modern approach to statutory interpretation whereby “the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament”: *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42 (CanLII), at para. 26, citing E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87.



Case law:

CCH Canadian Ltd v LSUC, 2004 SCC 13

33 The reported judicial decisions, when properly understood as a compilation of the headnote and the accompanying edited judicial reasons, are “original” works covered by copyright. Copyright protects originality of form or expression. A compilation takes existing material and casts it in a different form. The arranger does not have copyright in the individual components. However, the arranger may have copyright in the form represented by the compilation. “It is not the several components that are the subject of the copyright, but the over-all arrangement of them which the plaintiff through his industry has produced”: *Slumber-Magic Adjustable Bed Co. v. Sleep-King Adjustable Bed Co.* (1984), 1984 CanLII 54 (BC SC), 3 C.P.R. (3d) 81 (B.C.S.C.), at p. 84; see also *Ladbroke (Football) Ltd. v. William Hill (Football) Ltd.*, [1964] 1 All E.R. 465 (H.L.), at p. 469.

34 The reported judicial decisions here at issue meet the test for originality. The authors have arranged the case summary, catchlines, case title, case information (the headnotes) and the judicial reasons in a specific manner. The arrangement of these different components requires the exercise of skill and judgment. The compilation, viewed globally, attracts copyright protection.

35 This said, the judicial reasons in and of themselves, without the headnotes, are not original works in which the publishers could claim copyright. The changes made to judicial reasons are relatively trivial; the publishers add only basic factual information about the date of the judgment, the court and the panel hearing the case, counsel for each party, lists of cases, statutes and parallel citations. The publishers also correct minor grammatical errors and spelling mistakes. Any skill and judgment that might be involved in making these minor changes and additions to the judicial reasons are too trivial to warrant copyright protection. The changes and additions are more properly characterized as a mere mechanical exercise. As such, the reported reasons, when disentangled from the rest of the compilation — namely the headnote — are not covered by copyright. It would not be copyright infringement for someone to reproduce only the judicial reasons.

Case law:

CCH Canadian Ltd v LSUC, 2004 SCC 13 para 33

33 The reported judicial decisions, when properly understood as a compilation of the headnote and the accompanying edited judicial reasons, are “original” works covered by copyright. Copyright protects originality of form or expression. A compilation takes existing material and casts it in a different form. The arranger does not have copyright in the individual components. However, the arranger may have copyright in the form represented by the compilation. “It is not the several components that are the subject of the copyright, but the over-all arrangement of them which the plaintiff through his industry has produced”: *Slumber-Magic Adjustable Bed Co. v. Sleep-King Adjustable Bed Co.* (1984), 1984 CanLII 54 (BC SC), 3 C.P.R. (3d) 81 (B.C.S.C.), at p. 84; see also *Ladbroke (Football) Ltd. v. William Hill (Football) Ltd.*, [1964] 1 All E.R. 465 (H.L.), at p. 469.



Case law:

CCH Canadian Ltd v LSUC, 2004 SCC 13 para 35

35 This said, the judicial reasons in and of themselves, without the headnotes, are not original works in which the publishers could claim copyright. The changes made to judicial reasons are relatively trivial; the publishers add only basic factual information about the date of the judgment, the court and the panel hearing the case, counsel for each party, lists of cases, statutes and parallel citations. The publishers also correct minor grammatical errors and spelling mistakes. Any skill and judgment that might be involved in making these minor changes and additions to the judicial reasons are too trivial to warrant copyright protection. The changes and additions are more properly characterized as a mere mechanical exercise. As such, the reported reasons, when disentangled from the rest of the compilation — namely the headnote — are not covered by copyright. It would not be copyright infringement for someone to reproduce only the judicial reasons.



CCH Canadian Ltd v LSUC, 2004 SCC 13

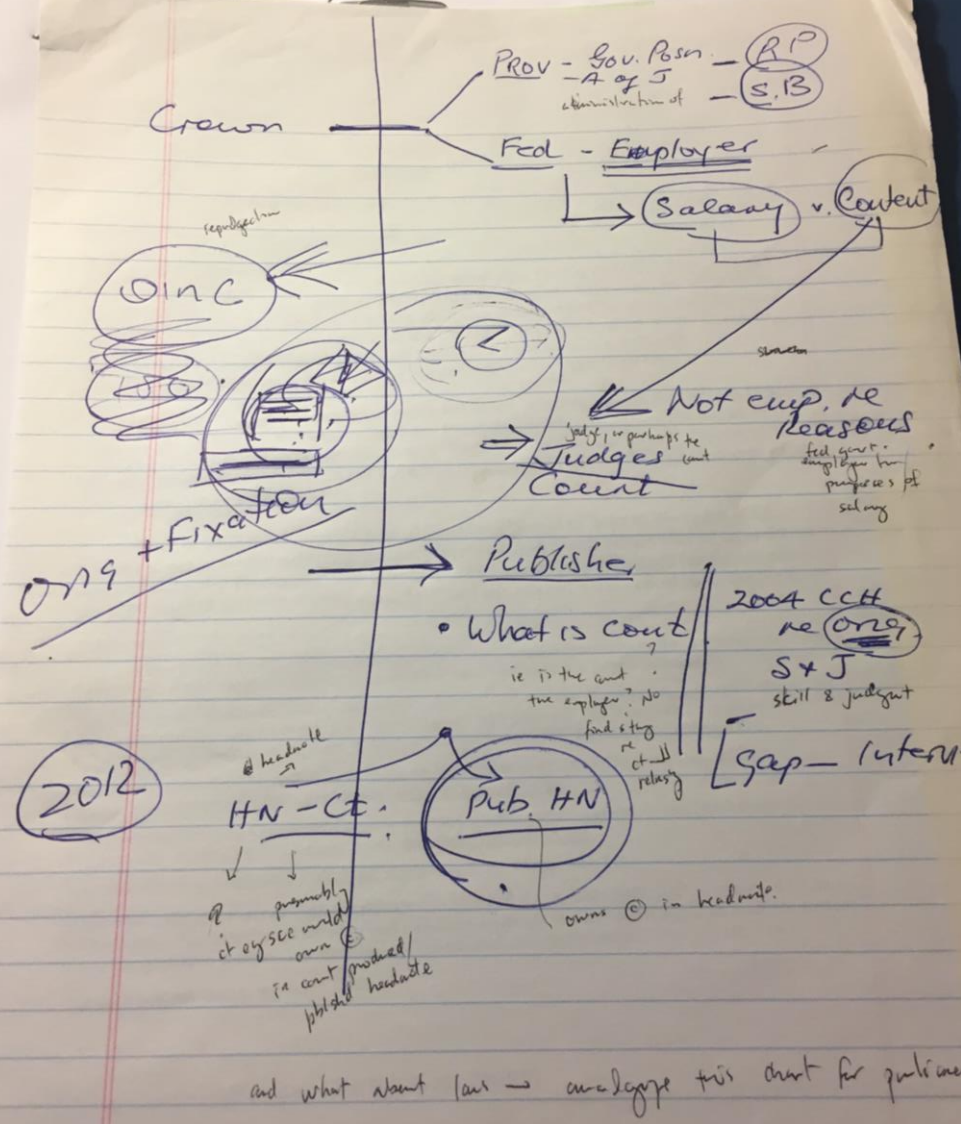
10 Binnie J. recently explained in *Théberge*, *supra*, at paras. 30-31, that the *Copyright Act* has dual objectives:

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

SOCAN v Bell Canada, 2012 SCC 36

[8] In *Théberge v. Galerie d'Art du Petit Champlain inc.*, 2002 SCC 34 (CanLII), [2002] 2 S.C.R. 336, this Court noted that copyright requires “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” (para. 30).





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Other countries: UK 1911 statute

Copyright Act 1911

1911 c. 46 ▶ Part I ▶ Special Provisions as to certain Works ▶ Section 18

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More Resources ?

◀ Previous: Provision

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Plain View

Print Options

What Version ?

● Latest available (Revised)

● Original (As enacted)

Opening Options ?

More Resources ?

Status: This is the original version (as it was originally enacted).

18 Provisions as to Government publications

Without prejudice to any rights or privileges of the Crown, where any work has, whether before or after the commencement of this Act, been prepared or published by or under the direction or control of His Majesty or any Government department, the copyright in the work shall, subject to any agreement with the author, belong to His Majesty, and in such case shall continue for a period of fifty years from the date of the first publication of the work.



UK 1988 statute

- Removed reference to the Royal Prerogative or reservation of Crown rights
- But explicitly brought legislation within statutory copyright coverage
- However, a long period in place of indefinite duration



27 No copyright in certain works

- (1) No copyright exists in any of the following works, whenever those works were made:
 - (a) any Bill introduced into the House of Representatives:
 - (b) any Act as defined in section 29 of the Interpretation Act 1999:
 - (c) any regulations:
 - (d) any bylaw as defined in section 2 of the Bylaws Act 1910:
 - (e) the New Zealand Parliamentary Debates:
 - (f) reports of select committees laid before the House of Representatives:
 - (g) judgments of any court or tribunal:
 - (h) reports of Royal commissions, commissions of inquiry, ministerial inquiries, or statutory inquiries; or
 - (i) reports of any inquiry established under section 6 of the Inquiries Act 2013.



It's time:

Prerogative powers over primary law were about Crown control and are outdated

Concerns about integrity and authenticity version can be addressed technologically

Copyright-free primary law promotes access to justice and creative ventures



Proposition:

Crown copyright should not apply to primary law

This conceivably is the correct interpretation now in respect of case law

Now is the time to acknowledge that primary law is in the public domain



Thank you!

Questions?

Kim Nayer
University of Victoria

knayer@uvic.ca
@kimnayer

