
COPYRIGHT IMPLICATIONS OF EPIGRAPHIC SQUEEZES



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INTRODUCTION

Epigraphy is invaluable to the research of many disciplines; epigraphic squeezes are central to the study of epigraphs. While distance, instability, and other factors can keep scholars from directly studying inscriptions, an epigraphic squeeze can serve as an excellent facsimile of the underlying work. Furthermore, at times a squeeze can be more useful than the underlying inscription, as given the often fragmentary and displaced nature of inscriptions, squeezes can allow researchers to compare and potentially recreate inscriptions that have become fragmented over history. Thus, they are a vital tool to research, scholarship, and learning.

However, as valuable as they are, it can be quite difficult, expensive, or even dangerous for researchers to create new squeezes from the source material. In addition to this, certain inscriptions may be disrupted to the point that creating new squeezes may be dangerous to the underlying work. Because of this, there is a great need for researchers to be able to share squeezes, and for interdepartmental and interdisciplinary collaboration.

Sharing squeezes in this manner is not unheard of; the University of British Columbia hosts the McGregor Squeeze Collection.¹ However, there are still some existing concerns about copyright and epigraphic squeezes, as the legal status of epigraphic squeezes is not entirely clear. This article investigates copyright questions surrounding epigraphic squeezes and hopes to clarify the issue, arguing that copyright should not be an impediment in the sharing of squeezes.

THE LAW OF THE SQUEEZE

From a legal perspective, it is doubtful that there are any copyright rights to assert in an epigraphic squeeze, and it is equally doubtful that granting rights to squeeze makers would serve the central purpose of copyright protection. Fundamentally, copyright is a bargain between the statutory monopoly (the exclusive rights) and the benefit to socie-

ty (incentives to create and the limitations to the exclusive rights, such as fair dealing). That is to say, the state gives authors exclusive rights so as to encourage authorship that would not have otherwise happened in the absence of rights.²

This bargain is represented concretely in copyright law by the requirement that a work must be original in order to receive copyright protection.³ Until relevantly recently, the originality requirement was not particularly well defined in Canadian law, with case law swinging between the more liberal “sweat of the brow” doctrine,⁴ and the necessity for a “creative spark” laid out in the US Supreme Court’s *Feist* decision.⁵ Granting protection for works produced by the sweat of the brow rewards authors for their hard work and industry, and necessitates that mundane tasks, such as assembling lists, databases, or collections of facts should be protected on the basis that without protection, authors would not expend the effort to needed to create them.⁶ Early Commonwealth jurisprudence supported this interpretation of the originality threshold, stating that “[t]he word “original” does not in this connection mean that the work must be the expression of original or inventive thought... but that the work must not be copied from another work—that it should originate from the author.”⁷ More recently in, *U & R Tax Services v. H & R Block Canada Inc.*, the court indicated that “[i]ndustriousness (‘sweat of the brow’) as opposed to creativity is enough to give a work sufficient originality to make it copyrightable.”⁸

In the United States, the sweat of the brow doctrine was categorically rejected by the Supreme Court in *Feist Publications, Inc., v. Rural Telephone Service Co.*⁹ At issue in *Feist* was the copying of Rural Telephone Service Company’s phone directory by Feist Publications, an aggregator of telephone listings which had repeatedly tried to license Rural’s listings without success.¹⁰ When the issue reached the Court, J. O’Connor, writing for the majority ruled that Rural’s listing were not sufficiently original as to merit copyright protection,¹¹ stating that “The *sine qua non* of copyright is originality. To qualify for copyright protection, a work must be original to the author...[with] at least some minimal degree of creativity.”¹² Continuing, J. O’Connor further stated that while:

[i]t may seem unfair that much of the fruit of the compiler's labor may be used by others without compensation. As Justice Brennan has correctly observed, however, this is not "some unforeseen by-product of a statutory scheme." *Harper & Row*, 471 U.S., at 589 (dissenting opinion). It is, rather, "the essence of copyright;" *ibid.*, and a constitutional requirement. The primary objective of copyright is not to reward the labor of authors, but "to promote the Progress of Science and useful Arts."¹³

In that vein, under the theory of the creative spark, it is not unfairness, but rather the necessary bargain of copyright law that unoriginal and uncreative work is denied protection, as that protection is only designed to protect that creativity, and if other forms of work are to be given exclusive rights, then the legislative body should see fit to create a statutory regime to protect them.

Canadian courts have gone ahead and forged a third way between sweat of the brow and the creative spark. In Canadian jurisprudence, a work is considered sufficiently original if it is the “product if an author’s exercise of skill and judgement.” In their

decision in *CCH Canadian Ltd., v. Law Society of Upper Canada*, the Supreme Court of Canada, the Court moved away from sweat of the brow by stating that “[t]he exercise of skill and judgement required to produce the work must not be so trivial that it could be characterized as a purely mechanical exercise.”¹⁴ However, the Court affirmatively rejects the requirement of a creative spark laid out in *Feist*, stating that while “creative works will by definition be “original” and covered by copyright, creativity is not required to make a work “original”.”¹⁵ Thus, *CCH* can be seen to lay out a middle ground between sweat of the brow and the creative spark, one which allows for some non-creative works to receive copyright, while not rewarding mere effort and diligence.

FITTING INTO SQUEEZES

How then, should the standard be drawn, and how should it be applied in the case of epigraphic squeezes? It seems clear that under *Feist* there is no copyright protection for squeezes in the United States. However, it’s less clear in Canada, where the more nebulous “process of skill and judgement” holds sway. Fortunately, we can take guidance from the Court in *CCH*. At issue in *CCH* was whether the systematic copying of legal sources by the Law Society of Upper Canada for the faculty and other authorised researchers at Osgoode Hall Law School was copyright infringement or fair dealing. While the Court ultimately ruled that the dealing was fair, on their way to that decision, they ruled that the publishers were not entitled to copyright protection in the legal decisions which they collected, bound, and published.¹⁶ While there may have been copyright in the headnotes of the cases, which are summaries and excerpts of the decisions, the compilations of the underlying decisions themselves are not sufficiently original to merit copyright protection.¹⁷

Applying this standard to epigraphic squeezes, it seems that there should be no copyright in the squeezes themselves, as making a squeeze only requires diligence and attention as opposed to the higher standard of “requiring skill and judgement.” As argued above, a squeeze can be made by anyone with a piece of paper, some water, and a brush; it does not require any particular specialized skill. Because of this, it is equally unlikely that squeezes are protected by Canadian copyright law as well.

CONCLUSION

The sharing of epigraphic squeezes, so key to the research and scholarship of many disciplines, should be undertaken without fear of copyright concerns. Under the dual tests of “spark of creativity” and “process of skill and judgment,” squeezes do not merit copyright protection for a lack of originality. In fact, one can argue that it is their main value, i.e., their faithfulness to the source material, that sets them outside of the realm of copyright protection. Moving forward, it seems that increasing digitization of squeeze collections and increasing cooperation between the holders of squeezes can do nothing but benefit the disciplines. Removing copyright concerns from a list of impediments to this sharing is one small but important step to seeing this sharing become a reality.

NOTES

¹ UBC Library Digital Collections, Epigraphic Squeezes, <http://digitalcollections.library.ubc.ca/cdm/landingpage/collection/squeezes>, last accessed 11/7/14.

² The idea that this incentive is necessary is perhaps a bit stale in the age of the internet and user generated content, but the words of Samuel Johnson “No man but a blockhead ever wrote except for money,” still hold a good deal of sway. Hester Thrale, *The Anecdotes of the Late Samuel Johnson*, Vol III, April 5 1776, p. 302.

³ Canadian Copyright Act Section 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...”

⁴ See *University of London Press Ltd v University Tutorial Press Ltd*, [1916] 2 Ch 601, “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.”

⁵ *FEIST PUBLICATIONS, INC. v. RURAL TELEPHONE SERVICE CO.*, 499 U.S. 340 (1991)

⁶ For an example of this reasoning, see *Jeweler’s Circular Publishing Co v. Keystone Publishing Co*, 281 F 83 (CA2 1922).

⁷ *University of London Press v. University Tutorial Press*, [1916] 2 Ch. 601 at 609–610

⁸ Carys J. Craig, *The Evolution of Originality in Canadian Copyright Law: Authorship, Reward and the Public Interest*, <http://www.uoltj.ca/articles/vol2.2/2005.2.2.uoltj.Craig.425-445.pdf>, citing *U & R Tax Services v. H & R Block Canada Inc.*, (1995), 62 C.P.R. (3d) 257, 97 F.T.R. 259 (FCTD).

⁹ *Feist*, 499 U.S. 340 (1991)

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *CCH Canadian Limited v. Law Society of Upper Canada*, [2004] 1 SCR 339, [1] 2004 SCC 13

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*