

Sweat of the Brow, Creativity, and Authorship: On Originality in Canadian Copyright Law

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SECTION 5 OF THE CANADIAN COPYRIGHT ACT provides, *inter alia*, that copyright shall subsist in “every original literary, dramatic, musical and artistic work.”¹ Originality is thus a cardinal requirement of copyright protection. Yet the basic features of the originality requirement in Canadian copyright law are currently uncertain. This uncertainty is often viewed as a manifestation of a long-standing and ongoing struggle between two different doctrinal schools.

On the one hand, the “sweat of the brow” or “industrious collection” school holds that labour or industry, even in the absence of creativity, may be sufficient to make out a finding of originality for copyright purposes.² For example, the labour invested in the collection of the information that makes up an ordinary phone directory is, on this view, sufficient to give rise to copyright protection. The phone directory is original in the sense that it was not copied from another person’s work.³ The fact that the production of an alphabetically arranged phone

* As this article went to press, the Supreme Court of Canada released its judgment in *CCH Canadian Ltd. v. Law Society of Upper Canada*, *infra* note 2. Please see footnote 57 for the author’s discussion of this development.

1. R.S.C. 1985, c. C-42, <<http://laws.justice.gc.ca/en/C-42/>>.
2. See e.g. *U & R Tax Services Ltd. v. H & R Block Canada Inc.*, [1995] F.C.J. No. 962, 62 C.P.R. (3d) 257 at 264: “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. 697. The sweat of the brow approach is generally viewed as the traditional Commonwealth position on originality. See e.g. Norman Siebrasse, “Copyright in Facts and Information: *Feist Publications Is Not, and Should Not Be, The Law in Canada*” (1994) 11 C.I.P.R. 191; Yo’av Mazeh, “Canadian Originality and The Tension Between the Commonwealth and The American Standards for Copyright Protection: The Myth of *Tele-Direct*” (2003) 16 I.P.J. at 561. For recent judicial discussion, see *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2002 FCA 187, <<http://reports.fja.gc.ca/fc/src/shtml/2002/pub/v4/2002fc30725.shtml>>, [2002] 4 F.C. 213, 18 C.P.R. (4th) 161 (F.C.A.) [*Law Society* cited to C.P.R.]; *Desktop Marketing Systems Pty Ltd v. Telstra Corporation Ltd*, [2002] FCAFC 112 (15 May 2002), <<http://www.austlii.edu.au/au/cases/cth/FCAFC/2002/112.html>>, 119 F.C.R. 491, 192 A.L.R. 433 (Aust. F.C.) [*Telstra*].
3. *The Copyright Act* itself does not define “originality.” Peterson J.’s authoritative definition in *University of London Press v. University Tutorial Press*, [1916] 2 Ch. 601 at 608–609 is cited more often than most:

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.

directory is a merely mechanical and automatic task requiring no creativity does not affect the directory's copyrightability.

On the other hand, the "creativity" school holds that a finding of originality is impossible in the absence of creativity. The standard of originality requires at least minimal creativity. To be subject to copyright protection, a work must be not-copied and minimally creative. More precisely, the creativity requirement subsumes the not-copied requirement. The result is that labour as such is not sufficient. It is true that the standard of creativity is not by any means high—but it is there. This means that merely mechanical arrangements of pre-existing material, even if not copied, are still not original. On this view, a garden variety phone directory lacks originality. One can therefore copy it with impunity. It is public domain material regardless of the labour invested in its production. One might say that, from the standpoint of the creativity view of originality, copyright law protects *creations*, not mere *productions*, and ordinary phone directories are produced, not created.⁴

Many regard the doctrinal battle between the sweat of the brow and the creativity schools as a far deeper theoretical encounter between two different and incompatible versions of the very meaning and purpose of copyright law. This encounter is often construed as one between a "misappropriation" model of copyright law—for which fairness to the author as labourer is the central and

4. See e.g. *Tele-Direct (Publications) Inc. v. American Business Information Inc.*, [1998] 2 F.C. 22, <<http://reports.fja.gc.ca/fc/src/shtml/1998/pub/v2/1998fc21425.shtml>>, 76 C.P.R. (3d) 296 at 303, 308 (F.C.A.) [*Tele-Direct*, cited to C.P.R.]: "... compilations of data are to be measured by standards of intellect and creativity.... While not defined in the Act, the word 'author' conveys a sense of creativity and ingenuity." Though the sweat of the brow approach is often regarded as the traditional Commonwealth approach, the jurisprudence is by no means devoid of evidence indicating that matters were always more complex and subtly textured. A few examples will suffice. In *Caron v. Association des Pompiers de Montreal Inc.*, [1992] F.C.J. No. 236, 42 C.P.R. (3d) 292 at 294–295, Pinard J. stated: "[i]n 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." In *Kilvington Bros. Ltd. v. Goldberg et al.*, (1957), 8 D.L.R. (2d) 768 at 770, Judson J. reasons on the basis that merely "automatic or mechanical" arrangements of pre-existing material would not give rise to copyright protection:

This work was the independent creation of Ridsdale. He did not copy it from any source. It embodied features that were common knowledge in the business, but it was more than an automatic or mechanical arrangement of these features. Ridsdale can draw and he did produce out of his own mind and with his own skill an independent work. My conclusion is that copyright exists in this work.

In *G. A. Cramp & Sons, Ltd. v. Frank Smythson, Ltd.* [1944] A.C. 329 at 335–336, Viscount Simon, L.C. stated:

[g]ranted that the appellants copied the respondents' tables (and this is not only admitted but is indicated by the almost precise similarity of language), there seems to be nothing that can properly be described as an "original literary 'work'" in grouping together this information. A summarized statement of the most important of the postal charges, inland, imperial and foreign, is part of the ordinary contents of any pocket diary. There would, indeed, as it seems to me, be considerable difficulty in successfully contending that ordinary tables which can be got from, or checked by, the postal guide or the Nautical Almanac are a subject of copyright as being original literary work. One of the essential qualities of such tables is that they should be accurate, so that there is no question of variation in what is stated. The sun does in fact rise, and the moon sets, at times which have been calculated, and the utmost that a table can do on such a subject is to state the result accurately. There is so far no room for taste or judgment.

And in *Macmillan & Co. v. K. & J. Cooper* [1924], 93 L.J.P.C. 113, to give one more example, the Privy Council, in distinguishing between an abridgment subject to copyright protection, and a mere compilation of "detached passages selected from an author's work" not subject to copyright protection, cited with approval at 116–117 *Copinger's Law of Copyright*:

To constitute a true and equitable abridgment the entire work must be preserved in its precise import and exact meaning, and then the act of abridgment is an exertion of the individuality, employed in moulding and transfusing a large work into a small compass, thus rendering it less expensive, and more convenient both to the time and use of the reader. To make such an abridgment requires the exercise of mind;...skill, and judgment...brought into play, and the result is not merely copying.

animating concern—and a “public interest” model of copyright law—for which the production and dissemination of authorial works in the name of the public interest is the central and animating concern.⁵

My purpose in this paper is twofold. First, I want to establish that our current confusion regarding the originality doctrine is the result of the concurrent influence in our jurisprudence not of two, but of three, different and incompatible theoretical versions of the very meaning and purpose of copyright law. My point here is to insist upon the presence in our jurisprudence of a third vision of copyright law, which I will call the “authorship” model. I will then argue that the authorship model, because it is not framed in terms of an opposition between author and public, offers a vision of copyright law for which respect for authorship is consistent with the cultivation of the public domain. The upshot of my discussion is an affirmation of originality as creativity from the standpoint of the authorship model.

In 1997, in *Tele-Direct (Publications) Inc. v. American Business Information Inc.*, the Federal Court of Appeal stated that the struggle between the sweat of the brow and the creativity schools had come to an end. The Court found that certain 1993 amendments to the *Copyright Act* had

...decided the battle which was shaping up in Canada between partisans of the “creativity” doctrine—according to which compilations must possess at least some minimal degree of creativity—and the partisans of the “industrious collection” or “sweat of the brow” doctrine—wherein copyright is a reward for the hard work that goes into compiling facts.⁶

The Court denied copyright protection to the phone directories at issue in the case.⁷ In so doing, the Court referred to the landmark American case of *Feist Publications v. Rural Telephone*, in which the United States Supreme Court expressly and unambiguously affirmed the creativity standard.⁸ The Supreme Court of Canada denied leave to appeal, and it seemed, at least for a moment, that Canadian copyright law had aligned itself with the American creativity standard formulated in *Feist*, and had consequently distanced itself from what is generally viewed as the traditional sweat of the brow Commonwealth jurisprudence.

The subsequent history of originality in Canada, however, belies the Federal Court of Appeal’s hope of having settled the battle definitively. A single

5. See e.g. Mazeh, *supra* note 2.

6. *Tele-Direct*, *supra* note 4 at 302.

7. *Ibid.* at 299. More precisely, the case involved the listings of entries in Yellow Pages Directories:

The main issue in this appeal is whether copyright subsists in the compilation of information contained in Yellow Pages directories...published by [the appellant] *Tele-Direct*.... The [respondent] American Business Information...has conceded that the Yellow Pages, when taken as a whole and given the visual aspects of the pages and their arrangement, enjoy the protection of copyright.

8. *Feist Publications v. Rural Telephone*, 499 U.S. 340 (1991) 1282 at 362–364 [Feist]:

Rural’s [i.e. plaintiff’s] selection of listings could not be more obvious: it publishes the most basic information—name, town, and telephone number—about each person who applies to it for telephone service. This is “selection” of a sort, but it lacks the modicum of creativity necessary to transform mere selection into copyrightable expression. Rural expended sufficient effort to make the white pages directory useful, but insufficient creativity to make it original....Because Rural’s white pages lack the requisite originality, Feist’s use of the listings cannot constitute infringement. This decision should not be construed as demeaning Rural’s efforts in compiling its directory, but rather as making clear that copyright rewards originality, not effort.

case will suffice. In 1999, in *CCH Canadian v. Law Society of Upper Canada*, Justice Gibson of the trial division of the Federal Court found, *inter alia*, that the headnotes (of the sort that accompany reported judicial opinions) at issue in the case were not subject to copyright protection because they lacked originality.⁹ Justice Gibson reached that conclusion by relying on what he took to be the new originality standard affirmed two years earlier in *Tele-Direct*.¹⁰ Nonetheless, the Federal Court of Appeal reversed Justice Gibson's judgment in 2001. The grounds for this reversal, however, are less than clear.

On the one hand, Justice Linden's majority judgment appears to affirm the *Tele-Direct* decision, but only by suggesting that the decision is consistent with pre-existing Canadian jurisprudence.¹¹ Hence, his judgment cannot help but leave us with a sense of unease as to whether we have a sufficiently clear view either of what the traditional jurisprudence held or of what *Tele-Direct* stands for. On the other hand, Justice Rothstein's concurrence does suggest that, at least as regards the protection of compilations of data—such as garden variety phone directories—*Tele-Direct* may have ushered in a transformation of the appropriate originality standard. Still, Justice Rothstein refrained from a discussion of the matter on the grounds that the facts before him did not involve a compilation.¹² Both majority and concurrence, then, proceed as if the *Tele-Direct* decision never took place: Justice Linden by suggesting that the widespread sense that *Tele-Direct* amounted to a departure from the traditional jurisprudence was little more than some sort of widely shared illusion;¹³ and Justice Rothstein by stating that *Tele-Direct* was not applicable to the facts before him.

The Supreme Court of Canada granted leave to appeal the *Law Society* case in late 2002. The Court heard the case on November 10, 2003. Perhaps

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9. [2000] 2 F.C. 451, <<http://reports.fja.gc.ca/fc/src/shtml/2000/pub/v2/2000fc25519.shtml>>, 2 C.P.R. (4th) 129 at 195, (F.C.T.D.) [*Law Society* (F.C.T.D.) cited to C.P.R.].
 10. *Ibid.* at 195: "I am satisfied that editorially enhanced judicial decisions should be measured by a standard of intellect and creativity in determining whether they give rise to copyright, in the same way as compilations of data might be said to be measured following the decision of the Federal Court of Appeal in *Tele-Direct*."
 11. *Law Society*, *supra* note 2 at 184, 192: "In my view, the Trial Judge misinterpreted this Court's decision in *Tele-Direct (Publications) Inc. v. American Business Information Inc.* ...and other jurisprudence as shifting the standard of originality away from the traditional Anglo-Canadian approach.... *Tele-Direct* did not introduce an additional precondition to copyright protection under Canadian law." See generally *ibid.* at 183–197.
 12. *Ibid.* at 243. "I recognize that *Tele-Direct*, *supra*, may be read to eliminate the industrious collection approach to originality that has sometimes been used for compilations.... Therefore, given that I am not here concerned with compilations, it is not necessary to enter the debate involving compilations. I am satisfied that originality outside of compilations has always required evidence of some level of intellectual effort and that, in that context, *Tele-Direct*, *supra*, is consistent with this position." See generally *ibid.* at 241–244.
 13. In *Telstra*, *supra* note 2 at para. 430 per Sackville J., for example, the Australian Federal Court interpreted *Tele-Direct* as a case following *Feist*: "There [in *Tele-Direct*] the [Canadian Federal] Court of Appeal followed the approach to originality adopted by the Supreme Court of the United States in *Feist*." See also the judgment of Lindgren J., *ibid.* at 208–217. For views of *Tele-Direct* as firmly in the creativity camp, see Howard Knopf, "A Tale of Two Columns: Confusion Concerning Compilation Copyright in Canada: *Édutile Inc. v. Automobile Protection Assn*" [2001] 23:8 E.I.P.R. 388 at 390; Daniel J. Gervais, "*Feist* Goes Global: A Comparative Analysis of the Notion of Originality in Copyright Law" (2002) 49 J. C'right Soc'y USA 949 at 963; David Lametti, "Publish and Profit? Justifying the Ownership of Copyright in the Academic Setting" (2001) 26 Queens L.J. 497 at 528. See also Robert G. Howell, "Database Protection and Canadian Laws (State of Law as of June 15, 1998)," <<http://www.pch.gc.ca/progs/ac-ca/pubs/ic-ci/pubs/fulveren.pdf>>; David Fewer, "A Sui Generis Right to Data? A Canadian Position" (1998) 30 Can. Bus. L.J. 165; Barry Sookman, *Computer, Internet, and Electronic Commerce Law*, looseleaf (Toronto: Carswell, 2001) at 3–129, 3–130; Mazeh, *supra* note 2.

their decision will indeed decide the battle between the sweat of the brow and the creativity schools. In the meantime, the basic features of the originality requirement in Canadian copyright law remain uncertain.

The stakes involved can hardly be overestimated. There is even a pervasive sense in which the current incarnation of the ongoing doctrinal battle both recalls and repeats the literally foundational opposition between rights-based and instrumentalist accounts of copyright law that structured the great “literary property” debate surrounding the interpretation of the *Statute of Anne*, the world’s first copyright statute, in late 18th century England.¹⁴

On the one hand, the sweat of the brow approach cannot help but invoke and evoke, in the language of fairness and justice, persistent images of the author’s entitlement to the products of her labour as a matter of natural right. The opening lines of Lord Halsbury’s classic judgment in *Walter v. Lane* can hardly be improved upon as a statement of the stance that informs this approach:

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.¹⁵

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.¹⁶

On the other hand, the creativity approach—as formulated by the American Supreme Court in *Feist*—expressly invokes a utilitarian discourse that reduces the author to a mere function of the public interest. This approach therefore regards concerns about fairness to the author as radically misplaced in copyright jurisprudence. Thus, denying the proposition that copyright is a reward for the hard work that goes into compiling facts, Justice O’Connor stated:

14. *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*, (U.K.), 8 Anne, c. 19 (1709). The great literary property debate surrounding the interpretation of the *Statute of Anne* culminated in the late 1700s with the landmark case of *Donaldson v. Beckett* (1774), 4 Burr. 2408, 98 E.R. 257. On the literary property debate, see Mark Rose, “The Author as Proprietor: *Donaldson v. Beckett* and the Genealogy of Modern Authorship” in Brad Sherman & Alain Strowel, eds., *Of Authors and Origins: Essays on Copyright Law* (Oxford: Clarendon Press, 1994) 23 [Rose, “Proprietor”]; Mark Rose, *Authors and Owners: The Invention of Copyright* (Cambridge, MA: Harvard University Press, 1993) [Rose, “Owners”]; Brad Sherman & Lionel Bentley, *The Making of Modern Intellectual Property Law: The British Experience, 1760–1911* (Cambridge: Cambridge University Press, 1999) at 11–42.

15. *Walter v. Lane*, [1900] A.C. 539 at 545.

16. Consider *International News Service v. Associated Press*, 248 U.S. 215 at 239 (1918):

Defendant, 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....

[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 byproduct of a statutory scheme." ... It is, rather, the "essence of copyright," ... and a constitutional requirement. The primary objective of copyright is not to reward the labor of authors, but "[t]o promote the Progress of Science and useful Arts." ... To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work.... This principle, known as the idea/expression or fact/expression dichotomy, applies to all works of authorship. As applied to a factual compilation, assuming the absence of original written expression, only the compiler's selection and arrangement may be protected; the raw facts may be copied at will. The result is neither unfair nor unfortunate. It is the means by which copyright advances the progress of science and art.¹⁷

The sublime indifference towards any issues regarding fairness to the author appears through the proposition that reaping where the compiler has sown is actually not at all unfair. The problem of misappropriation is not even recognized as a problem within the normative vocabulary of the public interest approach.

But although many regard the current incarnation of the sweat of the brow/creativity struggle as an encounter between the misappropriation model and the public interest model, previous incarnations of that struggle are best characterized as an encounter between the misappropriation model and the *authorship* model. The classic House of Lords decision in *Walter v. Lane* is the archetypal instance of that earlier version of the struggle.

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.¹⁸ 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. North J. granted an injunction that restrained the respondent from publishing the book until judgment in the action. In the Court of Appeal, the parties agreed that the appeal should be treated as the trial of the action. The Court of Appeal reversed the decision of North J. and dismissed the action. *The Times* appealed to the House of Lords.

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

17. Feist, *supra* note 8 at 349–350.

18. The items that appeared in *The Times* were "Lord Rosebery on Free Libraries" (26 June 1896) p. 12 col b; "Lord Rosebery and Sir Walter Besant on London" (8 December 1896) p. 9 col a; "Lord Rosebery on Great Britain and America" (8 July 1898) p. 8 col a; "Lord Rosebery on Burke" (11 July 1898) p. 10 col b; and "Etonian Dinner—Lord Rosebery and Lord Curzon" (28 October 1898) p. 8 col b.

Halsbury's judgment as a paradigmatic "sweat of the brow" judgment; and Lord Robertson's dissent as a paradigmatic "creativity" judgment.¹⁹

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 relies on what is known as the directory cases, which hold that garden variety phone directories are subject to copyright protection.²⁰ He writes,

[i]f the producer of such a book [i.e. a phone directory] can be an author within the meaning of the Act, 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.²¹

Lord Halsbury's reliance on the directory cases shows his insistence that no meaningful distinction can be drawn for copyright purposes between producers and authors and, by the same token, between products and works. Moreover, this refusal to distinguish the labour of production from the labour of authorship goes hand in hand with a parallel insistence that the purpose of copyright is not to protect the specific labour of authorship—whatever that may mean—but rather the labour of production *per se*. 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. Thus, Lord Halsbury's expansive conception of the word "author" is part and parcel of a view of copyright as a remedy for the misappropriation of labour.²²

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

19. Strictly speaking, the use of the terms "sweat of the brow" and "creativity" to denote Lord Halsbury's and Lord Robertson's judgments respectively is anachronistic. The terms describe schools of thought with respect to the originality requirement, but the word "original" did not find its way into the British Copyright Act until 1911, eleven years after *Walter v. Lane*. Still, in the pre-1911 jurisprudence, including *Walter v. Lane*, the very same debate about the acquisition of copyright 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" in *Contemporary Law: Canadian Reports to the 1994 International Congress of Comparative Law, Athens, 1994* (Cowansville, QC: Yvon Blais, 1995) 518 at 521–522, 542–545.

20. See e.g. *Kelly v. Morris*, *supra* note 2. See also Siebrasse, *supra* note 2.

21. *Walter v. Lane*, *supra* note 15 at 546.

22. It is true that Lord Halsbury makes reference to the appropriation of another's "skill", but he is quite definite that no "skill" of any kind is a prerequisite for a finding of copyrightability: "...if 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." *Ibid.* at 549.

and authorship, between the labour involved in mechanical transcribing and the work of authorship. Lord James frames the issue by stating that the report of the speech is “something different” from and beyond the speech itself.²³ The question is whether this difference represents a “something” of which any one can be regarded as “the author” within the meaning of the Copyright Act.²⁴ Lord James finds this mysterious “something” in what he calls the “reporter’s art.”²⁵ Taking down the words of a speaker, and certainly of a rapid speaker, Lord James points out, is “an art requiring considerable training....”²⁶ In fact, reporters less skilled are “deficient in this quality of accuracy.”²⁷ 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*....”²⁸ 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.²⁹ 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 conduit.”³⁰ The merit of the verbatim reports, says Lord Robertson, is that “they present the speaker’s thoughts untinged by the slightest trace or colour of the reporter’s mind.”³¹ 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*.”³² Lord Robertson’s judgment is thus premised on an affirmation of the specificity of the labour 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.³³ Still, he insists that even such pedestrian efforts of

23. *Ibid.* at 553.

24. *Ibid.* “The plaintiffs do not claim copyright in the speech itself, but as stated by Lord Lindley in the Court of Appeal, the report of the speech is something different from and beyond the speech, and the question to be solved is whether this difference represents a something of which any one can be regarded as ‘the author’ within the meaning of the Copyright Act.”

25. *Ibid.* at 554.

26. *Ibid.*

27. *Ibid.* at 555.

28. *Ibid.* [emphasis added].

29. *Ibid.* at 560.

30. *Ibid.*

31. *Ibid.* at 561.

32. *Ibid.* [emphasis added].

33. *Ibid.*

the mind nonetheless exhibit “structure and arrangement on the part of the maker.”³⁴ 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*.”³⁵

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.”³⁶ Authorship is the constructive process of embodying thought.³⁷

Immediately after his affirmation of the criterion of authorship, Lord Robertson states:

[t]he fact that the man who speaks in public is not a competitor with the reporter for copyright has not the slightest effect in altering the intellectual relation of the reporter to the words of the speech, nor does it render less inappropriate the result of holding the statute to confer on the stenographer a reward which has no relation whatever to his art.³⁸

34. *Ibid.*

35. *Ibid.* [emphasis added]. Like Lord Robertson, those who adopt the position that copyright does not protect labour or effort *per se* must deal with the directory cases. The strategy of choice in that respect is to assert that the directory cases do not in fact support a sweat of the brow position. Consider, for example, the following passage from *Tele-Direct*, *supra* note 4 at 307–308:

[i]t is true that in many of the cases we have been referred to, the expression “skill, judgment or labour” has been used to describe the test to be met by a compilation in order to qualify as original and, therefore, to be worthy of copyright protection. It seems to me, however, that whenever “or” was used instead of “and”, it was in a conjunctive rather than in a disjunctive way.... 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...endorsed in the 1993 amendments to the Copyright Act and that were already recognized in Anglo-Canadian law. [Italics added.]

36. *Walter v. Lane*, *supra* note 15 at 562.

37. The distinction between modes or kinds of labour is crucial to the conceptual underpinnings of the creativity approach. The distinction is present in our jurisprudence. For example, in the classic case of *Ladbroke (Football) Ltd. v. William Hill (Football) Ltd.*, [1964] 1 All E.R. 465, Lord Evershed stated (at 472 and 474):

[t]here can, in my judgment, be no doubt upon the evidence in the present case that, when all the hard work has been done in deciding on the wagers to be offered, there still remains the further distinct task, requiring considerable skill, labour and judgment (though of a different kind) of devising the way in which the chosen wagers are expressed and presented to the eye of the customer.... [T]here is in my judgment here a real distinction between the work done in arriving at conclusions upon what wagers could properly and safely be offered and the work done in designing the nature and appearance and general lay-out of the coupon as a *literary compilation*.... [Italics added.]

The distinction, however, is far from relevant for those adopting a sweat of the brow standpoint. Thus, in the same case, Lord Devlin stated (at 479): “...the work cannot be split up and parts allotted to the several objects. The value of the work as a whole must be assessed when the claim to originality is being considered.... Free trade does not require that one man should be allowed to appropriate without payment the fruit of another’s labour....” Section 2 of the Copyright Act, *supra* note 1, defines a “compilation” as, *inter alia*, “a work resulting from the selection or arrangement of data.” The distinction between modes or kinds of labour central to the creativity approach is in my view inseparable from the distinction between selection or arrangement, on the one hand, and data, on the other, that informs the Act’s definition of “compilation”. The labour involved in selection or arrangement is not the same as the labour involved in mere collection.

38. *Walter v. Lane*, *supra* note 15 at 562.

Lord Robertson understands copyright as the legal recognition of a special relation between an author and his work. What he finds lacking in the verbatim reports at issue in *Walter v. Lane* is a specific kind of intellectual relation between the reporters and their report of the speech. It is true that the reporters have some sort of special relation to their report, and nothing in Lord Robertson's judgment would necessarily preclude us from honoring this relation in some other way. But Lord Robertson is telling us that (1) there is a specific kind of relation between author and work that copyright protects, and that (2) this relation is just not that of the stenographer to her work. Whatever else she might be, a stenographer is not an author, and copyright is about authorship.

Moreover, Lord Robertson's statement is not only about the centrality of a specific kind of intellectual relation between author and work to a finding of copyrightability. Lord Robertson's statement is also—and therefore—a statement about what is not relevant to the finding of copyrightability. That is, what is relevant is the intellectual relation—or lack thereof—between author and work; neither the presence of a competitive relation between the reporters and the subsequent publisher of the reports, nor the absence of a competitive relation between the speaker and the reporters, is pertinent to the copyrightability inquiry. It is as if Lord Robertson were telling Lord Halsbury that whatever wrong may be involved in the misappropriation of another's labour, this is not the wrong for which copyright is the remedy. The mischief that the Act seeks to remedy is the unauthorized copying of another's authorial work. It is not unfair competition.³⁹

The two different interpretations of the originality requirement that emerge from the encounter between Lord Halsbury and Lord Robertson in *Walter v. Lane*, then, correspond to two different visions of the very purpose and meaning of copyright law. Whereas Lord Halsbury's sweat of the brow approach affirms a view of copyright as concerned with the misappropriation of another's labour, Lord Robertson's creativity approach affirms a view of copyright as concerned with the recognition of authorial dignity. What we have, then, is an encounter between the misappropriation model and the authorship model.

There is, of course, a third vision of copyright law operating in our midst: the public interest model. This model regards copyright law as an instrument designed to balance the incentives necessary for the author's productivity with the public interest in access to and dissemination of her products. The model is instrumentalist in the sense that it sees the author's legal entitlement as nothing more than a function of the public interest, as a means to an end, albeit a necessary means, not an end in itself. The author has rights not because of the inherent dignity of authorship, nor because of the inherent fairness in rewarding labour and preventing its misappropriation, but rather because the public interest in the production of intellectual works requires these rights as incentives for production. If these incentives were not necessary, the author would have no rights arising from either her dignity or her labour.

39. On copyright and unfair competition, see e.g. Howell, *supra* note 13; Howell and Gendreau, *supra* note 19.

There can be no doubt that the concept of the public interest has always had a role in copyright jurisprudence.⁴⁰ Permit me to access this role, however, by returning for a moment to the recent history of originality in Canada. As I stated at the outset, the Federal Court of Appeal stated in *Tele-Direct* that the struggle between the sweat of the brow and the creativity schools had come to an end. The Court relied in part on certain amendments to the *Copyright Act* which were required as a result of the *North American Free Trade Agreement*.⁴¹ I am not concerned here with the correctness or lack thereof of the way in which the court interpreted those amendments.⁴² What matters for present purposes is that, rightly or wrongly, the Court interpreted those amendments with reference to the 1991 case of *Feist* in which the United States Supreme Court explicitly and unambiguously enshrined the creativity interpretation of originality. Of course, the standpoint from which the United States Supreme Court affirms the creativity standard in that case is not that of Lord Robertson in *Walter v. Lane*. In *Feist*, creativity—what Lord Robertson would call “construction”—appears not as a vindication of authorial right, but rather as a vindication of the public interest in the dissemination of facts as against any rights which would purportedly arise from the hard labour of collecting facts. On this view, the point is not that the public’s interest in dissemination *trumps* the compiler’s right arising from the investment of hard labour in the collection of facts or data. The point, rather, is that to the extent that copyright law is but an instrument of the public interest, no right arising from labour as such is cognizable under the statute. There is no unfairness because no right of the compiler has been compromised.

It is true that both the authorship model and the public interest model affirm originality as a matter of creativity. As such, these two models share a rejection of the kind of fairness concerns raised by the misappropriation model as relevant in copyright law. But this convergence between these two models has generated counter-productive ambiguities in the recent history of originality in Canadian copyright jurisprudence. Thus, for example, in *Tele-Direct*, Justice Décaré evoked the inherent dignity of authorial right as the central copyright concern par excellence, yet he did so by invoking a case, *Feist*, that affirms a radically instrumentalist understanding of the creativity requirement, an understanding for which the author is but a “secondary” consideration.⁴³ Nowhere is the ambiguity more noticeable than in the following passage of Justice Décaré’s judgment: “[t]he 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

40. See e.g. Lyman Ray Patterson, *Copyright in Historical Perspective* (Nashville: Vanderbilt University Press, 1968); Rose, “Proprietor”, *supra* note 14; Rose, “Owners”, *supra* note 14; Sherman & Bentley, *supra* note 14. See also David Lange, “Recognizing the Public Domain” (1981) 44:4 *Law & Contemp. Probs.* 147; Jessica Litman, “The Public Domain” (1990) 39:4 *Emory L.J.* 965.

41. *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico, and the Government of the United States*, 17 December 1992, Can. T.S. 1994 No. 2, 32 I.L.M. 289 (entered into force 1 January 1994).

42. For a discussion of this issue, see Myra J. Tawfik, “Decompiling the Federal Court of Appeal’s ‘NAFTA Argument’ in *Tele-Direct (Publications) Inc. v. American Business Information Inc.*—From Facts to Fiction” 33 *Ottawa L. Rev.* 147.

43. See e.g. *Computer Associates v. Altai, Inc.*, 982 F.2d 693 at 696 (2nd Cir. 1992): “The author’s benefit, however, is clearly a ‘secondary’ consideration.... [T]he ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.”

d'auteur.' While not defined in the Act, the word 'author' conveys a sense of creativity and ingenuity."⁴⁴ The evocations of authorial dignity obviously involved in the phrase, "*le droit d'auteur*," have little to do with the pure public interest instrumentalism of the American approach that Justice Décaré went on to invoke immediately thereafter.⁴⁵

One may understandably suspect that there is no inherent need to point out this ambiguous convergence of theoretical models. So long as courts apply the very same creativity requirement, perhaps we need not care whether they do so in the name of "*le droit d'auteur*" or in the name of the public interest.⁴⁶ Nonetheless, the Federal Court of Appeal's recent treatment of the originality question in the *Law Society* case suggests not only an abandonment of the creativity requirement altogether, but also a somewhat puzzling effort to mix the fairness to the author concerns of the misappropriation model with the public interest concerns of the public interest model. Consider, for example, Justice Linden's formulation of the purpose of copyright law:

Broadly speaking, the purposes of Canadian copyright law are to benefit authors by granting them a monopoly for a limited time, and to simultaneously encourage the disclosure of works for the benefit of society at large... Copyright law should recognize the value of disseminating works, in terms of advancing science and learning, enhancing commercial utility, stimulating entertainment and the arts and promoting other socially desirable ends. In order to realize these benefits, however, creators must be protected from the unauthorized exploitation of their works to guarantee sufficient incentives to produce new and original works. The person who sows must be allowed to reap what is sown, but the harvest must ensure that society is not denied some benefit from the crops. Perhaps Lord Mansfield best characterized the tension over two centuries ago when, in the case of *Sayre v. Moore* (1785), 102 E.R. 139 at 140, 1 East 361n at 362, he stated:

...we 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.

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44. *Tele-Direct*, *supra* note 4 at 308 [italics added]. The significance of the fact that there is in Canada both an English and a French version of the Act, each of equal weight, can hardly escape us.
45. For comparative discussion of American and Continental European copyright doctrine and thought, see Neil Netanel, "Copyright Alienability Restrictions and the Enhancement of Author Autonomy: A Normative Evaluation" (1993) 24:2 Rutgers L.J. 347; Jane Ginsburg, "A Tale of Two Copyrights: Literary Property in Revolutionary France and America", in Sherman and Strowel, *supra* note 14 at 131; Paul Goldstein, *Copyright's Highway: From Gutenberg to the Celestial Jukebox* (New York: Hill and Wang, 1994) 165-196; Paul Edward Geller, "Must Copyright Be For Ever Caught Between Marketplace and Authorship Norms?" in Sherman and Strowel, *supra* note 14 at 159; Alain Strowel, "*Droit d'auteur* and Copyright: Between History and Nature" in Sherman and Strowel, *supra* note 14 at 235.
46. In fact, it is by no means clear that the standard of originality embodied in the American case of *Feist* is in any sense necessarily different from the standard of originality suggested by Lord Robertson, or the standard of originality embodied in the tradition of authorial right. See Gervais, *supra* note 13; Jane C. Ginsburg, "The Concept of Authorship in Comparative Copyright Law," (2003) 52 DePaul L. Rev. 1063.

The challenge facing this Court, and copyright law generally, is to find a fair and appropriate equilibrium that achieves both goals.⁴⁷

Central to the Court's formulation is not only the "appropriateness" of the desired equilibrium, but also its "fairness," not only the "progress of the arts," but also the "just merits" of authorial production. A concern with fairness to the author is therefore central to the Court's understanding. Yet this concern appears not as an effort to vindicate authorial dignity in Lord Robertson's sense, but rather by way of the agricultural metaphors that belong to the misappropriation model. "The person who sows," the Court tells us, "must be allowed to reap what is sown...."⁴⁸ Thus, there is no mistaking the sustained hold of Lord Halsbury's misappropriation model, the "grievous injustice"⁴⁹ involved in reaping where one has not sown. The fairness concern that animates the Court is in that sense a concern over the unfairness of misappropriation. At the same time, however, the Court carefully insists that the harvest must ensure that society is not denied some benefit from the crops. One can surmise that while no particular individual may misappropriate another's labour, society as a whole has a legitimate interest in such misappropriation. Society is not subject to the obligation of fairness towards the author—only individuals are. The "grievous injustice" suffered at the hands of another is somehow overlooked where that other is society as such. The ambivalence that traverses the Court's construction is striking: the Court cannot frankly adopt a public interest orientation because it wants to be fair to the author, but it cannot be unambiguously fair to the author because it wants to account for the public interest. The effort to be fair to the author finds itself trumped by the public interest, just as the public interest cannot proceed unobstructed by scruples about fairness. Thus, although the Court formulates its task as that of finding an equilibrium, it seems destined to find an uneasy compromise that may fail to satisfy either of the stated goals.⁵⁰

There seem to be four possible responses to this dilemma. One may leave things as they are, hoping that the ambiguity the Court wants to call an equilibrium does not show up too often. Second, one may rid oneself of the scruples about fairness, and so join the public interest model wholeheartedly along the lines of *Feist* by adopting the view that fairness concerns arising out of a person's investment of labour are not relevant to copyright law. Third, one may rid oneself of any concern for the public interest, and assert the misappropriation model unmodified, and so enshrine the sweat of the author's brow as against public interest concerns. Fourth, one may take up the kernel of truth in the task the Court sets for itself, and attempt a vision of copyright law that genuinely syn-

47. *Law Society*, *supra* note 2 at 182-183 [footnotes omitted].

48. *Ibid.* at 183.

49. *Walter v. Lane*, *supra* note 15 at 545.

50. In regards to the effort to blend the fairness concerns of the misappropriation model with the public interest concerns of the public interest model, consider the comments of Binnie J. in *Théberge v. Galerie d'Art du Petit Champlain Inc.*, 2002 SCC 34, <http://www.lexum.umontreal.ca/csc-scc/en/pub/2002/vol2/html/2002scr2_0336.html>, [2002] 2 S.C.R. 336 at 355: "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 (or, more accurately, to prevent someone other than the creator from appropriating whatever benefits may be generated)."

thesizes, as opposed to merely juxtaposes, the seemingly opposed poles of the author-society relation. It is this kernel of truth that I now wish to bring into relief.

It is true that one may regard the above passage from Justice Linden's decision as particularly ambiguous. But I wish to regard it, rather, as an opportunity. The passage is as unable to give up fairness concerns as it is to forgo public interest concerns. In so doing, it envisions the possibility of an as yet unarticulated convergence.

The problem with the Court's formulation is not that it seeks to hold author and public together, but that it misconceives the nature of their relation. It simply juxtaposes these two poles, such that each limits the other externally, as awkward trumps, instead of attempting to view their relation as aspects of a single whole called copyright law. From the standpoint of that unified and unifying vision, the problem with the misappropriation model is not that it places the irreducible principle of fairness to the author at the heart of copyright law, but that it misunderstands the nature of authorship and of the right arising therefrom. It thereby generates a view of the public domain as a kind of *deus ex machina* that, unaccountably, asserts priority over the very principle of fairness that purportedly informs copyright law. Similarly, the problem with the public interest model is not that it focuses on the importance of the public domain, but that it does so in a manner that reduces the author to a merely functional, secondary role, as if copyright, to paraphrase Jane Ginsburg's *bon mot*, were some sort of evil half way house on the way to the public domain.⁵¹ As we shall see by way of conclusion, Lord Robertson's authorship model contains the promise of a genuine convergence because it suggests the possibility of conceiving the irreducible principle of authorial dignity as a principle that contains its own internal limit.

I have argued elsewhere⁵² that the irreducible principle of authorial dignity in copyright law is indeed necessarily self-limiting. I articulated that argument as a rights-based account of the idea/expression dichotomy. A brief summary follows.

The idea/expression dichotomy provides that an author's ideas are not subject to copyright protection: only her expression of those ideas is. Thus, the plaintiff in a copyright action must show not that her ideas have been adopted by the defendant, but that the defendant has copied the plaintiff's expression. Assume for a moment that you use or adopt in your own work an idea drawn from another person's work, without copying that other person's expression of the idea. Say, for example, that you write an original play developing the idea of "star-crossed lovers." This does not mean that you have reproduced the text of *Romeo and Juliet* (i.e. William Shakespeare's expression of that idea), but that you have expressed the idea anew. To use in one's own work ideas drawn from another's is necessarily to exercise one's own expressive capacities. It is to say it in one's own words. Strictly speaking, we might say that ideas *per se* cannot pos-

51. Ginsburg, *supra* note 46 at 1068. "Copyright cannot be understood merely as a grudgingly tolerated way-station on the road to the public domain."

52. Abraham Drassinower, "A Rights-Based View of the Idea/Expression Dichotomy in Copyright Law" (2003) 16 Can. J.L. & Jur. 3.

sibly be copied; they can only be (re-)expressed anew. This is why the copyright case law speaks not of copying ideas but of “adopting” or “using” them.⁵³

The lesson to be drawn from this thesis (i.e. that ideas *per se* cannot be copied) is that where the defendant expresses an idea in his own words, the plaintiff cannot complain of a violation of her copyright because her own claim to copyright is but an affirmation that persons have a right to their expression. The idea/expression dichotomy is in this sense an affirmation of the equality as authors of the parties to a copyright action. To the extent that the defendant has not copied the plaintiff’s expression but has instead expressed an idea anew, the defendant has exercised his own authorship. The idea/expression dichotomy permits the defendant to avail himself of ideas in pursuit of his own original expression—his own authorship. The idea/expression dichotomy thus defines the scope of the plaintiff’s copyright from the standpoint of the parties’ equality as authors. The limits of the plaintiff’s right (i.e. the law’s refusal to copyright ideas) are the contours of a public domain that, as a matter of equality, the plaintiff herself must be held to recognize. One might say that the public domain is not only a space containing freely available materials. It is also a fundamental condition of free and equal interaction between persons in their capacity as authors. The public’s domain is the domain of fair interaction.

Equality in authorship, then, is the concept of fairness that the authorship model generates. On the one hand, the plaintiff’s authorship is recognized in the requirement that the defendant not copy her expression. On the other hand, the possibility of the defendant’s authorship is preserved and recognized in the free availability of the ideas expressed. The equality of the parties as authors is affirmed in the simple proposition that the defendant may draw from but not copy the plaintiff’s work.

Thus, like the misappropriation model, the authorship model places fairness to the author at the very centre of copyright law. Yet unlike the misappropriation model, the authorship model formulates this fairness not from the standpoint of the value of the author’s labour, but from the standpoint of the author’s intellectual relation to her work. By focusing on the author’s intellectual relation to her work, the authorship model narrows the field of the author’s copyright from the generality of her labour as such, to the specificity of her creativity. In so doing, the authorship model comes to resemble the public interest model in that it posits not the author’s labour *per se*, but rather only the specific labour of authorship—i.e. “creativity” or “construction”—as constitutive of the author’s copyright. Thus, it shares the public interest model’s necessary indifference to the problem of misappropriation. Yet unlike the public interest model, the authorship model formulates that indifference from the point of view of authorship itself. The authorship model does not confuse indifference to the so-called problem of misappropriation with indifference to authorial dignity as such.⁵⁴ It

53. See, for example, *Moreau v. St. Vincent*, [1950] Ex. C. R. 198 at 203 (Can. Ex. Ct.). “Every one may freely adopt and use the ideas but no one may copy his literary work without his consent.”

54. By contrast, the public interest model does seem to confuse indifference towards the problem of misappropriation with indifference towards authorial dignity as such. This confusion suggests that, ironically, the public interest model shares with the misappropriation model the view that fairness towards the author is fairness towards the author as *labourer*.

limits the author's entitlement, but it does not reduce that entitlement to a mere function of the public interest.

The authorship model thus reconfigures the opposition between author and public that informs the encounter between the misappropriation model and the public interest model. From the standpoint of the authorship model, those two models are but flipsides of each other in that each presupposes an opposition between author and public. By contrast, the authorship model challenges the shared presupposition that structures the debate. It neither takes sides in terms of the perceived opposition between author and public, nor attempts to "balance" the assumed poles as if they were heterogeneous or incommensurable values, but rather seeks to resolve that opposition into a theory of copyright able to grasp both aspects of the author/public relation within the larger whole of which they are equally necessary parts.

Neither the concept of the "author," nor that of the "public," emerges unchanged from this reconfiguration. Under the aegis of the authorship model, the author is creative rather than merely productive. At stake is the author's intellectual relation to her work, rather than her relation to others as competitors for the value of her labour.⁵⁵ The requirement of originality thus polices the difference between the generality of a person's labour and the specificity of her authorship, granting copyright protection only on the basis of her authorship and leaving other aspects of her possible entitlements arising from her mere labour to other legal regimes, such as that of unfair competition. But this narrowing of the concept of the author is necessarily paralleled by a narrowing of the concept of the public. At stake is not the generality of the public interest as such, but rather the specificity of the public domain as a matter of copyright law – that is, as a matter of the fair interaction between persons considered in their equal capacity as authors. Under the aegis of the authorship model, the relevant domain of the public is the domain specified in and through the recognition of the defendant's equal dignity as an author. The irreducible principle of authorial dignity recognizes and generates its own self-limitation under the rubric of equality. As Lord Robertson put it, "the word 'author' ... 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 the authorship."⁵⁶ From the standpoint of authorship, then,

55. In *University of London Press v. University Press*, *supra* note 3 at 610, Peterson J. famously stated: "... there remains the rough practical test that what is worth copying is ... worth protecting." The first "worth" in this sentence is a matter of value. The second is a matter of entitlement. The slippage from value to entitlement is precisely what the creativity standpoint seeks to preclude. Otherwise, it would be hard to imagine an instance of copying that would not give rise to liability.

56. *Walter v. Lane*, *supra* note 15 at 562 [italics added].

fairness to the author is not at odds with the public domain. On the contrary, authorial right and public domain appear as aspects of a single concept. Being fair to the authorship of each is being fair to the authorship of all.⁵⁷

57. March 5, 2004: The Supreme Court of Canada handed down its judgment in the *Law Society* case yesterday, March 4, 2004, at 9:45 a.m. The Editors of this Journal have kindly permitted me to add the following remarks—written in haste—to a paper that had already been typeset. Doctrinally, the Supreme Court dismissed both the “sweat of the brow” and the “creativity” standards in favour of a “skill and judgment” standard. Recalling the traditional vision of copyright law as the balance between “public interest” and “just reward for the creator,” the Court states that whereas the “creativity” approach is too public-centred, the “sweat of the brow” approach is too author-centred. The Court thus presents its own “skill and judgment” standard as a “workable, yet fair standard.” Yet the Court can differentiate its own “skill and judgment” standard from the “creativity” standard only by mischaracterizing the latter as involving something “novel,” “unique,” or “non-obvious.” That is simply not the case. The Court’s suggestion that the *Feist* creativity standard implies novelty is clearly mistaken. It is true that, in terms of the paradigmatic positions formulated in *Walter v. Lane*, the Court seeks to side neither with Lord Halsbury, nor with Lord Robertson, but rather with Lord James, who occupied a middle position requiring “skill,” as distinct from Lord Halsbury’s “labour” and Lord Robertson’s “construction.” However, since Lord James found that the verbatim reports at issue in *Walter v. Lane* were subject to copyright protection, it would seem that Lord James’ standard—despite the common use of the word “skill”—is too low for the Supreme Court of Canada. Few matters could be clearer than that the Supreme Court’s judgment represents an unambiguous rejection of *Walter v. Lane*. My point is that, misleading differences in nomenclature aside, the Supreme Court’s “skill and judgment” standard is best grasped as a vindication of Lord Robertson’s authorship standpoint. Theoretically, the Court’s affirmation of copyright as a balance between fairness to the author concerns and public interest concerns continues to assert and develop the specificity of Canadian copyright as against both the misappropriation model’s concern with the author as mere labourer and the public interest model’s indifference to fairness concerns. It is to be hoped that subsequent Canadian jurisprudence will enrich and develop the content of the “skill and judgment” standard, as well as the vision of copyright law as a balanced convergence of authorial and public domains under the animating rubric of the authorship model.