Copyright and the Right to Copy, *David Lametti*

In a ruling that is likely to have profound implications for the internet, universities and libraries, the Supreme Court of Canada issued a landmark decision on March 4, 2004, in CCH Canadian Ltd. v Law Society of Upper Canada, in the area of copyright.

What the Supreme Court did was to get right the balance between the needs of creators and those using knowledge. In the case, three Canadian legal publishers commenced a test case against the Great Library of the Law Society of Upper Canada, which not only provided freestanding photocopy machines for the use of library patrons but also performed the copying for clients after having considered the reasonableness of the request according to its copying policy.

The Law Society would even fax out the photocopies to firms outside of Toronto. The kinds of documents in question are the essential stuff of legal practice and legal research: reported court decisions, summaries or "headnotes", case analyses, legal indexes, legal textbooks, etc.

This ruling settles three issues which had been disputed and were even controversial.

First, the Court re-affirmed a relatively settled position in Canada that merely providing a means of infringement does not constitute authorizing infringement. An Australian decision had called this into question, and the Supreme Court ruling could very well guide rulings beyond photocopiers such as a pending decision on the liability of internet service providers for copyright infringement by uploaders and downloaders using their services.

Second, and more profoundly, the Court settled a longstanding debate in Canada as to the level of originality necessary to obtain copyright protection: should copyright protection arise merely because intellectual or physical labour was expended, or should some higher, more creative standard be required? The Court opted for the latter standard without being too demanding. In doing so, it affirmed the interest that society has in maintaining and fostering a robust public domain. Carving out private intellectual property rights from this larger public realm requires some original intellectual expression, or some intellectual judgment or skill in selecting or arranging otherwise unprotectable factual or standard elements. This higher standard of originality is critical for information products, whose factual substance is not usually protected by copyright. The legal materials at issue in this decision were found to be original enough and protected by copyright.

However, by framing the standard of originality as it did, the Court has made copyright claims over other sorts of information products such as directories and databases more difficult to maintain. In an information age, such information products might be of significant economic value, and it may very well be that the decision will push us to concede what many have argued has been clear all along: that traditional copyright protection is an inappropriate governance tool for protecting rights in information, and

other sorts of legislative protections might be preferable. A special intellectual right protecting information, significantly weaker in scope and shorter in duration than copyright, might be more appropriate.

Third, the Court gave life to the idea of fair dealing in Canada. Fair dealing is a limited right to copy a protected work in whole or in part for the purposes of research and private study, criticism and review, and news reporting, with some additional rights to copy accorded to libraries and educational institutions.

Prior to the CCH decision, fair dealing was cast in the Copyright Act to an emaciated defense to copyright infringement. The Court replaced this narrow reading of the Act with a wide and vigorous definition, characterizing fair dealing as an integral part of copyright law whose fairness is to be judged according to the purposes for which the copy was made, its economic impact on the original work and other contextually-based assessments of reasonableness.

In so doing, the Court did more than pay lip service to the traditional balances of copyright: it applied them forcefully.

This strong understanding gives hope to libraries, universities and educational institutions generally, who have for the past few years been looking over their shoulders as they try to legally implement new technologies, all the while fearing challenges from copyright holders.

As a university professor and teacher, I face the question of whether I am engaged in fair dealing on a regular basis, and I can only applaud this bold ruling. This part of the ruling has significant implications in the digital world as technology has begun to undermine some of these copyright balances - encryption technology that prevents user access to a work for legitimate purposes, for example.

The Court's reasons give further weight to calls against such attempts at "fencing off" information and other works or laws that protect these digital fences. By drawing all of these philosophical, historical and doctrinal strands together, the Court has articulated a balanced vision that ought to animate copyright. It is a vision that a society too focused on copyright's rights had begun to lose, a process which has been accelerated by digital technology.

Copyright was all too quickly becoming a hammer in the hands of copyright holders, stifling legitimate appropriation and silencing valuable discourses. The Supreme Court has attempted to stem this tide by reminding us of copyright's underlying premises and purposes: to inspire and foster artistic, musical, dramatic, and literary discourse, by allowing authors their just desserts and the public its ability to profit from and build upon the genius of previous generations. In doing so, it has underscored that copyright is as much about protecting the user's (limited) right to copy as it is about protecting the creator's (limited) right to prevent such copying.