

7 MAKING LEGAL KNOWLEDGE IN GLOBAL DIGITAL ENVIRONMENTS: THE JUDICIAL OPINION AS REMIX

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As a highly social knowledge-making practice, writing depends on the ability of authors to draw on, question, critique, build on, advance, or in other ways “remix” work produced by other writers. Accordingly, writing has long been a highly regulated social practice, with copyright laws striking a balance between the rights of authors and publishers to protect and benefit from their intellectual property on the one hand and their right to use existing work by other writers in order to produce their own work, that is, their right to the fair use of copyrighted works, on the other hand. In any society, much depends on this balance: Creativity, innovation, and knowledge production directly depend on both the rewards and recognition authors receive for their work and the extent to which they can access and build on existing work (DeVoss & Porter, 2006; Lessig, 2008; Rife, 2008).

In digital environments, however, writing undergoes important change because the current balance inscribed in existing copyright law is upset by the ease with which the Internet, as a set of global technologies, allows for the sharing and copying of files (DeVoss & Porter, 2006; Lessig, 2008; Rife, 2008). The ease with which files can be copied and shared allows for new forms of writing and, specifically, new ways of drawing on, combining, or “remixing” existing work in new ways and for new purposes. Although people have always drawn on each other’s work to advance knowledge and to produce new cultural expression, digital technologies allow for new ways of bringing existing works together and making them speak to each other for new purposes, thus enabling new

forms of creativity, cultural expression, and knowledge production (DeVoss & Porter, 2006; Lessig, 2008; Rife, 2008).

At the same time, concerns about legal repercussions for copyright infringement triggered by remix writing are growing exponentially (CCCC, 2009; Center for Social Media, 2009; DMCA Rulemaking, 2009; Lessig, 2008). In particular, the content industry, whose business model has long rested on holding the copyright to the creative and other work it distributes, has viewed the ease of file sharing enabled by digital technologies as a threat to its business model. As a result, the balance between the rights of copyright holders and those of users are being recalibrated in each national context—a highly contested and complex process of local legal knowledge making in response to global technological change.

As such, this process also raises an important question about the role of writing as a knowledge-making practice in legal settings: How does legal discourse work to arrive at the knowledge necessary in order to develop opinions and judgments in local jurisdictions when responding to the contestation surrounding global digital technologies? To address this question, this chapter examines the judicial opinion that justified Canada's Supreme Court ruling in *CCH Canadian Ltd. v. Law Society of Upper Canada* (2004), a case in which a group of publishers of legal materials, including the publisher CCH Canadian Ltd., sued the Law Society of Upper Canada, which maintains the Great Library of Toronto, for copyright infringement over the copy machines it provided for patron use as well as over copies of legal materials the library mailed out to patrons on request.

The case is of particular relevance for the question examined here for a number of reasons. To begin with, the case addresses the very question of how the balance between copyright protection and fair use, a balance that is critical to writing as a knowledge-making practice, is being renegotiated. The case is particularly important because, while originally concerned with copy machines, it has had wide-reaching implications for the regulation of file sharing through peer-to-peer technologies. For this and a number of other reasons, the case is widely considered a landmark case in copyright and fair dealings regulation in Canada and possibly worldwide. As Geist (2006) remarks, the unanimous court decision was “one of the strongest pro-user rights decisions from any high court in the world, showing what it means to do more than pay mere lip service to balance in copyright.” Although the focus and the stature of the case alone render it highly relevant for analysis, as I illustrate in this chapter, the case most importantly demonstrates how legal writing—in this case, the judicial opinion—relies on innovative forms of global remixing by drawing on related legal cases, statutes, and regulations in other national jurisdictions in order to arrive at the globally informed but locally situated legal knowledge that underlies the court's decision

to redefine Canadian fair dealing rights in a way that meets the needs of Canadians for the sharing, remixing, and collaborative creation of knowledge. In short, the case is important for examining not only how law shapes writing, but also how writing shapes law.

For this purpose, I first provide a context for the CCH decision, highlighting key developments in both U.S. and Canadian copyright and fair use regulation as they pertain to the case. I then provide a brief overview of the case, outlining some of its main achievements in striking a balance between copyright and user rights to fair dealings with copyrighted materials. To show how the court arrived at the knowledge needed to attain this achievement, I then briefly sketch the theoretical framework of intertextual analysis and remix writing that then informs my analysis of Justice McLachlin's judicial opinion. I conclude with considerations for legal writing as a knowledge-making practice in response to global digital technologies as well as with implications for the teaching of writing.

COPYRIGHT AND FAIR USE OR FAIR DEALING IN CANADA AND IN THE U.S.

In both Canada and the U.S., copyright law has long given exclusive rights to copy, distribute, perform, display, and make derivative works to the copyright holder for all types of writing, including literature, user manuals, creative non-fiction, as long as that writing is “original” and “fixed.” While copyright law gives exclusive rights to copyright holders, in both Canada and the U.S., exceptions to copyright law are provided by way of fair dealing and fair use, respectively. These exceptions allow for limited uses of copyrighted work under certain conditions without the copyright holder's permission. Traditionally, however, Canada and the U.S. have taken different approaches to fair use. The U.S. provided a broad definition of fair use while Canada developed its fair dealing doctrine on a case-by-case basis.

In the United States, the fair use doctrine was introduced in Section 107 of Title 17, United States Code (U.S.C.) as part of the Copyright Act of 1976. Fair use in Section 107 contains what is commonly referred to as the four-factor test. This test serves as a heuristic that is applied to individual situations, allowing one to determine whether or not a use is “fair” and therefore potentially to avoid copyright infringement. In the U.S., the four factors include the “purpose and character of the use,” the “nature of the copyrighted work,” the “amount and substantiality” of the portion used in comparison to the work as a whole, and the impact the use has on the copyright holder's “potential market” (Section 107, Title 17, U.S. Code).

Importantly for the purpose of this chapter, although not explicitly acknowledged, the U.S. fair use doctrine very closely reflects the UK opinion on the issue of fair use from a few years earlier: *Hubbard v. Vosper* (1972). *Hubbard v. Vosper* involved the case of Mr. Cyril Vosper, who, after becoming disillusioned with his indoctrination into the Church of Scientology, wrote a book critiquing Scientology. The criticism involved incorporating lengthy passages of Scientology literature, but the Hubbard court nonetheless found fair use. In 1972, the U.S. had not yet created the fair use doctrine in Section 107, since that statute was part of the Copyright Act of 1976. Prior to that time, the U.S. relied on U.S. case law to define fair use. The UK's Hubbard analysis therefore preceded Section 107, and appears to have been leveraged in the drafting of Section 107, although the U.S. statute offers no attribution to Hubbard or the UK. Of course, attribution is not normally a component of statutes or legislation, so it would be difficult to prove or disprove empirically whether or not the Hubbard opinion was expressly referenced without completing a full-study of the legislative record, to the extent such legislative record exists. This kind of deep research into the origins, history, and cross-cultural influence within a country's law and judicial opinions is an area of study and one that seems to be expanding (see for example Black, 2008). The Hubbard opinion states,

It is impossible to define what is 'fair dealing'. It must be a question of degree. You must consider first the number and extent of the quotations and extracts. Are they altogether too many and too long to be fair? Then you must consider the use made of them. If they are used as a basis for comment, criticism or review, that may be a fair dealing. If they are used to convey the same information as the author, for a rival purpose, that may be unfair. Next, you must consider the proportions. To take long extracts and attach short comments may be unfair. But, short extracts and long comments may be fair. Other considerations may come to mind also.

Section 107 echoes much of the Hubbard analysis: Hubbard's "number and extent" connects to the U.S. "amount and substantiality." The "use made of them" maps onto Section 107's "nature of the use." "Rival purpose" connects to 107's "effect on market." While not stated in this passage, important to the Hubbard court was the nature of the copyrighted work. In this case, the Scientology literature contained material that raised public safety issues. Therefore the Hubbard court found a public interest in exposing these issues. In addition to drawing upon the Hubbard opinion in shaping its fair use statute back in 1976,

the U.S. also appropriated and remediated the English term “fair abridgement” from a line of English cases of the 1700’s (Duhl, 2004), localizing the concept into its doctrine of “fair use” (see also Rife, 2007). The point is that even the U.S.’s fair use doctrine has been internationally influenced, although it might not appear so from simply reading the statute.

Canadian copyright and fair use regulation differs in important ways from that in the U.S. For example, Canada maintains a private copyright exemption—balanced by collecting a tax on media products that is used to compensate copyright holders. Having the foresight to realize that private copying by users could not be stopped with a mere law, in 1997 Canadian law via parliamentary effort formally made private copying legal (Copyright Act Part VIII). In return for consumers’ right to make private copies, a levy is added to blank recording materials such as CDs and cassette tapes.

Moreover, in contrast to the U.S., Canada originally developed a piecemeal approach to fair dealing by crafting detailed copyright exceptions for various uses. Defined in great detail in the Canadian Copyright Act of 1985, user rights were localized in a list of exceptions to copyright protection characterized as a “ragbag of simple instances” and a “piecemeal approach” (Geist, 2006; Vaver, 2004). Pre-CCH rights to fair dealings in copyrighted work were an exhaustive list of exceptions continuing on (and on) for several pages, listing extremely specific exceptions and then subjecting them to a multitude of limitations. For example, excepted from copyright infringement are educational uses involving dry-erase boards, flip charts, overhead projectors, communicating or performing copyrighted materials for purposes of testing, and various other kinds of live performances on the premises of the educational institution, but they are subject to a variety of additional limitations. The piecemeal approach was complicated, and it remained difficult for Canadian users to know whether the copying and use of educational materials was legal or infringing. This piecemeal approach likely developed as exceptions were continually needed in light of the development and dissemination of new technologies.

The regulation of these new technologies is of particularly great concern to the content industry, including publishers, the music industry, and the motion picture industry, whose business model depends on holding the copyright to creative works for distribution, a model that is challenged by the ease of distribution of such work in digital environments (DeVoss & Porter, 2006; Lessig, 2008; Rife, 2008). Accordingly, the industry, with its associations, such as the Motion Picture Association of America and the Recording Industry Association of America, has engaged in massive efforts to influence the regulation of these technologies—as Bazerman (this volume) notes, to “bend” these technologies back in line with established business models—to make peer-to-peer (P2P) file

sharing illegal in the U.S. These efforts have included a wide range of strategies, including legislative lobbying as well as massive lawsuits with the goal of having file sharing technologies declared illegal, lawsuits whose judicial opinions then have wide ranging precedent both for how legislation is interpreted and applied as well as for how future lawsuits are decided. Key examples of U.S. cases involving P2P filesharing technologies are the cases of Napster and Grokster (*A&M Records v. Napster*, 2001; *Metro-Goldwyn-Mayer Studios Inc., et al. v. Grokster*, 2005). The Napster court basically said that because a centralized server was used, the technology producer had actual or constructive knowledge that illegal file sharing was taking place. So, that judicial opinion created a possible loophole for file sharing technologies that did not use a centralized server. This is what Grokster tried to accomplish. Grokster users used the Grokster file sharing technology by downloading the software and then sharing from computer to computer rather than through a centralized server. However, in Grokster the court said the technology producer/distributor cannot purposely turn a blind eye to illegal activity just to evade the law. So, that type of file sharing software was made illegal as well. Following Grokster, there was a legal loophole because, of course, U.S. courts have jurisdiction only over their own territories, for the most part, and so the P2P innovation just moved to Canada or offshore (Samuelson, 2004; for a detailed analysis of the P2P file sharing cases in the U.S., see Rife, 2006).

Ultimately, the judicial opinions of Napster and Grokster did not accomplish their goal, which was to eliminate technologies that permit “illegal” file sharing. Illegal file sharing is still occurring. Because in cyberspace geographical locations do not matter as much, the producers of dual-use technologies (i.e. technologies that can be used for both illegal and legal activities, like copy machines) just move to offshore locations, or in this case, to Canada. All that Napster accomplished was to spur innovation of file sharing technologies that avoid the reasoning in Napster. All that Grokster did was move P2P innovation to Canada or offshore. People are still engaging in what the U.S. deems “illegal” file sharing. It is “illegal” in the U.S., but not in Canada.

These efforts by the content industry to influence the regulation of the copyright and fair use balance continue worldwide. Example international treaties/organizations covering this area include TRIPS (Trade-Related Aspects of Intellectual Property Rights, 1994) and WIPO (World Intellectual Property Organization). However, Canada has not imitated some of the more corporate-friendly/copyright holder-friendly legal stances that the U.S. has. For example, Canada has not yet implemented a law similar to the DMCA (Digital Millennium Copyright Act, 1998), illustrating what is perceived by many to be Canada’s more pro-user rights stance (as compared to the U.S., for example). Just recently, Canada was placed on the U.S.’s priority watch list in the “Annual 301 Report”

(Geist, 2009; Viana, 2009), an annual report unilaterally evaluating U.S. trade partners' intellectual property regulations by the Office of the U.S. Trade Representative, with implications for possible trade sanctions against Canada. The pressures from lobbying influences continue to increase for Canada. And it is in light of these developments that the CCH case becomes even more interesting in that it shows how the judicial opinion has worked to protect Canadian rights for sharing knowledge despite the interests of the U.S. content industry.

CCH CANADIAN LTD. V. LAW SOCIETY OF UPPER CANADA (2004).

In CCH, the publishers CCH Canadian Ltd., Thomson Canada Ltd., and Canada Law Book Inc. (CCH) sued the Law Society of Upper Canada, a professional society that regulates the legal profession in Ontario and maintains the Great Library in Toronto, for copyright infringement. The publishers, all publishing legal materials, filed a lawsuit because the Great Library, as is common practice in many libraries both in the U.S. and in Canada, provided self-service copy machines in the library and sent out copies of select texts (articles, chapters, case summaries) on the request of patrons to improve public access to the law. The publishers argued that the Great Library's practices of providing copy machines and of copying and distributing copyrighted texts were both direct copyright infringement and authorization for library patrons to commit copyright infringing behaviors. Specifically, the publishers argued that the Law Society expressly acknowledged the infringing use of the copy machines through posting a notice with the copy machines indicating that the Law Society was not responsible for copyright infringing uses. According to section 27(1) of the Canada Copyright Act (1985), "It is an infringement of copyright for any person to do, without the consent of the owner of the copyright, anything that by this Act only the owner of the copyright has the right to do," such as reproducing the work. The publishers argued that since the Great Library maintained copy machines, it violated the copyright act because it authorized users to infringe on the copyrights of others. The Law Society denied liability, arguing that providing a copy machine in the library was not an authorization for others to infringe and that copying texts for research purposes in these limited circumstances was fair dealing. After the lower courts struggled with this issue (holding mainly in favor of the publishers), the Canadian Supreme Court ruled in favor of the Law Society.

The CCH ruling was a landmark case in Canadian copyright legislation, with far reaching implications for fair use not only in Canada, but also worldwide. Although there are many ways in which the ruling was revolutionary, for

the purpose of this chapter, three reasons stand out in particular: First, in its holding, the CCH court made a critical policy statement about the purpose of Canadian copyright law as that of “balance[ing] the public interest in promoting the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator” (p. 16). In line with this purpose, the CCH court localized its definition of fair dealing by dramatically broadening the concept away from Canada’s former statutory piecemeal approach as well as exceeding fair use standards in other jurisdictions, specifically in the United States. The CCH court stated that the fair dealing exception is “always available,” again pushing against a construct of fair dealing as a list of narrow and limited exceptions, or a ragbag of user rights. The user must only show two elements in order to be within fair dealing: that the purpose of the use was for research or private study and that the use was fair.

Second, the court addressed the vital question of whether the provision of a technology (in this case, the copy machine) that can be used in dual ways, that is both in legal ways—i.e., for copying under the exceptions for fair dealings—and in copyright infringing ways, automatically constitutes the authorization of users to infringe on copyright and thus makes the provider of the technology responsible for copyright infringement. This question is an important focus for the content industry in its effort to ban technologies that challenge its established business models as attempted in its lawsuit against Grokster. In *Grokster*, software was provided, which, according to the U.S. Supreme Court, “induced” users to infringe; in CCH, the suspect technology was the copy machine sitting in the library. The Canadian trial court had not decided the issue and the Federal Court of Appeals, relying on an Australian case, decided in favor of the publishers holding that “the Law Society implicitly sanctioned, approved or countenanced copyright infringement of the publishers’ works by failing to control copying and instead merely posting a notice indicating that the Law Society was not responsible for infringing copies made by the users of these machines” (CCH, 2004, p. 32). The CCH court rejected the Federal Court of Appeals’ holding and acted wisely in limiting the definition of authorization. The CCH court argued that rather than assuming illegal behavior, technology providers and courts should equally be able to assume legal behavior:

38. “Authorize” means to “sanction, approve and countenance”: ... Countenance in the context of authorizing copyright infringement must be understood in its strongest dictionary meaning, namely, “[g]ive approval to; sanction, permit; favour, encourage”: see *The New Shorter Oxford English Dictionary* (1993), vol. 1, at p. 526.... a person does not authorize

infringement by authorizing the mere use of equipment that could be used to infringe copyright. Courts should presume that a person who authorizes an activity does so only so far as it is in accordance with the law: Muzak, *supra*. This presumption may be rebutted if it is shown that a certain relationship or degree of control existed between the alleged authorizer and the persons who committed the copyright infringement (p. 31)

The court further argued that rather than presuming illegal behavior, “courts should presume that a person who authorizes an activity does so only so far as it is in accordance with the law” (p. 31). This is the opposite assumption to that in *Grokster*. In *Grokster*, the court implied that the burden was on the dual use technology producer/distributor to show that there was at least some legal use. In contrast, the CCH court said that regarding one who authorizes an activity which could potentially be copyright infringing (i.e. copying at a library), the assumption should be that the authorized use is meant to be legal unless there is evidence otherwise.

Third, the CCH ruling was significant through its considerable legal force as a judicial opinion. As defined by *Black’s Law Dictionary* (1979), a judicial opinion is “the statement by a judge or court of the decision reached in regards to a cause tried or argued before them, expounding the law as applied to the case, and detailing the reasons upon which the judgment is based” (p. 985). Judicial opinions differ from legal opinions, which are crafted by an attorney in response to a client request and serve to assess the possible legal liabilities for a client’s future behaviors. A judicial opinion, in contrast, is crafted by a judge or court in deciding the outcome of a legal case or trial. Supreme Court judicial opinions in both the U.S. and Canada are particularly powerful regulatory documents because they set precedent for their respective country’s lower courts as these must follow the holdings espoused via writing in the higher court opinions. In addition, they dictate the rules that must be followed by the citizens they govern. Judicial opinions extend and refine legislation by interpreting it and by determining how it is to be understood and applied in the lower courts.

The knowledge produced in judicial opinions therefore often has far reaching consequences, since the law defers to precedent. That is, in order to prevent laws from changing too quickly, a court in Canada and/or the U.S., will look to the decisions made by previous courts (within its jurisdiction) on the same particular issue. Unless a court can distinguish the current litigants’ fact situation from that of previous cases, the court will follow previous court holdings because of the importance of following precedent. The CCH judicial opinion, for example, laid the foundation for *BMG Canada Inc. v. John Doe*

(2004) the largest members of Canada's recording industry brought a motion seeking disclosure from five ISPs (Internet service providers) of the 29 identities of users downloading copyrighted music files by way of P2P file-sharing services offered by KaZaA and iMesh. The court held in favor of "John Doe," denying BMG the right to discover the names. Judge Finckenstein stated that simply making available a folder or file that others might share is not enough to meet the heavy intent required to make private copying illegal under CCH. Addressing the issue of authorization, Judge Finckenstein stated, "Before it constitutes [the affirmative act of authorizing] distribution, there must be a positive act by the owner of the shared directory, such as sending out the copies or advertising that they are available for copying" (BMG Canada Inc. v. John Doe, 2004). Judge Finckenstein followed CCH by creating a presumption that an "authorization" of an activity, such as file sharing or the provision of copying machines, is legal unless proven otherwise. He states,

I cannot see a real difference between a library that places a photocopy machine in a room full of copyrighted material and a computer user that places a personal copy on a shared directory linked to a P2P service. In either case the preconditions to copying and infringement are set up but the element of authorization is missing. (BMG Canada Inc. v. John Doe, 2004)

The Canadian stance here, then, is in contrast to the U.S. *Grokster* decision because the BMG case held that private file sharing of music by users is not copyright infringement. As Tabatabai (2005) points out, this decision was particularly remarkable in light of Canada's previous focus on protecting copyright holder rights.

Because of their strong regulatory force, judicial opinions often also receive both considerable scholarly and media attention nationally and internationally, thus often becoming paradigmatic locations where they may not be precedential. For example, when P2P technologies were made virtually illegal in the U.S., Canada opened its doors with BMG. As the *Napster* case was decided, the headlines across Canada noted that under BMG, file sharing was legal in Canada (Borland, 2004; McFarland, 2004; Online, 2004; Webb, 2004).

Accordingly, the knowledge created in a written judicial opinion often serves (on the global level) as a non-precedential paradigm, open to appropriation by allies or competing sovereign entities. When the U.S. produced *Napster* and *Grokster* opinions, holding that file sharing service providers were indeed secondarily liable for the copyright infringing behavior of users, they provided examples for other jurisdictions. When Canada churned out the CCH opinion, it provided an example for other jurisdictions as well. Canada's CCH opinion

was particularly significant as there currently is no international fair use doctrine, and many countries do not currently have such a doctrine for their local jurisdiction. Having produced one of the most important user-rights oriented fair-dealings statements, the CCH opinion provides a particularly powerful example of addressing the ways in which global digital technologies upset the existing balance. Perhaps more importantly, because judicial opinions reflect the ideology of their originating jurisdiction (Bowrey, 2005), the CCH opinion also makes an important statement in affirming the rights of Canadian citizens to fair dealings for sharing knowledge, thus resisting the long-standing pressures of the content industry on Canada to establish a copyright regime similar to that in the United States.

The considerable significance of the CCH judicial opinion raises the question of how the opinion worked to arrive at the knowledge necessary for this achievement. As I argue, the CCH judicial opinion relies on remix, a judicious process of considering, rejecting, and weaving together legal texts from other jurisdictions. To analyze and illustrate how this process unfolds in CCH, I draw on Lessig's (2008) notion of remix as well as on the concept of intertextuality as articulated by Bazerman (2004).

REMIX AND INTERTEXTUALITY

As Lawrence Lessig (2008) points out,

[Remix] is the essence of good writing in the law. A great brief seems to say nothing on its own. Everything is drawn from cases that went before, presented as if the argument now presented is in fact nothing new. Here again, the words of others are used to make a point the others didn't directly make. Old cases are remixed. The remix is meant to do something new. (p. 52)

Writing in legal contexts has always depended on the techniques of remix, but that fact has become more visible with the attention to remix writing afforded by digital environments. Due to the digital age, those specializing in writing are acknowledging the remixed nature of most texts, especially since the Internet allows quick access to information and others' work.

However, much [digital] writing is done ... collaboratively, across time and space and documents ... remix [is] a key practice for invention and composing. That is, writing by appro-

priation—taking bits, pieces, and ideas and compiling and remixing them in new and innovative ways. Sometimes these acts of appropriation ... are in a spirit of sharing and within an environment where this use is expected. (Rife & DeVoss, in press)

As Lessig (2008) points out, with the history of judicial opinions “plagiarizing” attorney briefs, it appears that these acts of appropriation may be “in a spirit of sharing” and in a discourse community where such uses are expected. In non-legal digital-writing environments, the theory around how to understand appropriation and textual sharing is still being developed (as is clear from the scholarly attention to student plagiarism and remix—See Rife & DeVoss, in press, for example).

Remix is a term used with respect to digital writing, but it is connected to our understanding of intertextuality. Intertextuality is a term that was mainly developed for use with respect to alphabetic texts. As Bazerman (2004) explains, “almost every word and phrase we use we have heard or seen before ... We create our texts out of the sea of former texts that surround us, the sea of language we live in ... The relation each text has to the texts surrounding it, we call intertextuality” (pp. 83-84). By taking “bits, pieces, and ideas and compiling and remixing them in new and innovative ways” (Rife & DeVoss, in press), writers create an end product that is intertextual because that end product, such as the judicial opinion, is in relationship to the texts surrounding it. As Lessig (2008) points out, legal writing is remix writing, and always has been, because it draws from the “sea of former texts,” those precedents and documents, those opinions, that have come before (see also Prior, 2004).

In examining the extent to which a piece of writing is remixed, one needs to trace the textual origins of that writing. Tracing the origins of writing, or from where a piece of writing derived, is “intertextual analysis” (Prior, 2004, p. 168) due to the fact that such tracing will provide a snapshot of that particular text’s “intertextual” nature.

Judicial writing practices as impacted by remix culture can be productively researched by examining the similarities and differences between the texts/laws drawn upon, i.e. their intertextuality. By definition, remix writing takes the old, the existing, and mixes it in with the new in order to create something novel. Both the past and the present appear simultaneously in a judicial opinion—simultaneously, the remix has an element of anticipation—anticipating the future (Rife, 2008).

In digital spaces like creative commons, it often remains visible that many authors have contributed to a text. In describing a story of remixing sound tracks in the creative commons Web site, Lawrence Lessig (2008) details how it is clearly visible that the remixed track that is eventually created is authored by many: “People were asked to upload tracks. As those tracks got remixed, the new tracks would keep a reference to the old. So you could see, for example, that a

certain track was made by remixing two other tracks. And you could see that four other people had remixed that track” (p. 16). In judicial opinions written in standard alphabetic prose (or in statutes and legislation as I mentioned earlier), that multi-authorship is not visible unless a citation is expressly given. It is commonly known that U.S. opinions “plagiarize” attorney briefs in a major way (See Durscht, 1996). Because U.S. courts have access to many countries’ judicial opinions and because these issues are now widely covered by media watchdog groups such as the Intellectual Property Watch and Global Voices Online, it is simply not possible that such forces have no bearing on the knowledge produced in U.S. judicial opinions.

REMIX AND INTERTEXTUALITY IN THE CCH JUDICIAL OPINION

In CCH the court remixed the laws of several nations, and moved closer to Section 107, the U.S. fair use clause (Geist, 2006; Gervais, 2004; Scassa, 2004; Tabatabai, 2005; Vaver, 2004), while distancing itself from the U.S. stance on authorization and inducement.

Remixing Fair Dealing

The CCH opinion refers to and takes bits and pieces of the “law in the United States” in crafting an open-ended definition of fair dealing, setting forth an analysis, remixing the four-factor test of the U.S. fair use law contained in Section 107. In CCH, the court explained its new vision of fair dealing in Canada. Drawing upon U.S. fair use, the opinion states that examinations for fair dealing should include examining the purpose, character, and amount of the dealing plus alternatives to the dealing, the nature of the copyrighted work, and the “effect of the dealing on the work” (CCH Canadian Ltd. v. Law Society of Upper Canada, 2004). As Figure 1 shows, the CCH analysis of fair dealing literally maps onto the U.S. fair use analysis, illustrating the intertextuality between U.S. fair use and the new version of fair dealing in Canada.

As illustrated in Figure 1, the first and second factors listed in CCH map onto the first factor in Section 107, while the third CCH factor, amount of dealing, maps onto the third factor listed in 107. There is no “alternatives to the dealing” factor listed in Section 107, but CCH’s sixth factor maps onto the fourth factor in Section 107. While “alternatives to the dealing” might initially appear to map onto U.S. market effect issues (is legal licensing available?), instead the CCH opinion makes clear that the availability of licensing should not be a factor

| <i>Canada's Fair Use Factors per CCH</i> | <i>United States Fair Use Four Factors per §107</i> |
|---|---|
| (1) the purpose of the dealing: | (1) the purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purposes: |
| (2) the character of the dealing: | (2) the nature of the copyrighted work: |
| (3) the amount of the dealing: | (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and |
| (4) alternatives to the dealing: | |
| (5) the nature of the work; and | |
| (6) the effect of the dealing on the work. | (4) the effect of the use upon the potential market for or value of the copyrighted work. |

Figure 1: The Canadian fair use analysis maps onto the U.S. fair use analysis.

when considering “alternatives.” The opinion states the availability of licensing is not relevant to a fair use interpretation because otherwise, the copyright holder’s limited monopoly over use of material would extend too far in scope against the need to protect user rights. Canada’s version of fair dealing and the U.S. version of fair use are now intertextual because Canada has remixed the U.S. fair use statute and created something drawing upon Section 107, but at the same time, created something specific for Canada.

With respect to library staff copying material for patrons and the provision of self-serve copy machines in the library, the court said because many library materials did not circulate and patrons lived outside the Toronto area, if copying was not permitted, patrons would have to do all of their research and note taking at the library at great inconvenience. The court found this was not reasonable, and therefore alternatives to the dealing were not viable. This particular consideration is fairly unique to Canada in a U.S.-Canadian comparison. But overall, the two fair dealing/fair use analyses fold in together almost completely and are thus intertextual; words in common are “purpose,” “character,” “amount,” “nature,” “work,” and “effect” in addition to the numerals in parentheses and the use of semi-colons between factors. This is a prime example of remix writing techniques used by Judge McLachlin; the CCH judicial opinion remixes, or identifies with U.S. law, but simultaneously differentiates itself from Section 107 by making changes and additions, thus crafting something new and innovative.

However, the CCH court openly references not just the United States, but also British and Australian law for examples. And so, this explicit mentioning and stitching together of other countries' cases and rules-of-law might be illustrative of not so much a power imbalance, but instead the innovative Canadian judicial practice of openly and honestly acknowledging the collaborative nature of writing, the unavoidable "remixing" process that takes place when new laws are written, even at the Supreme Court level. As many writing specialists in non-legal settings are now developing an understanding about remix writing through research, so too, the Canadian CCH opinion seems to embrace the idea that all writing is collaborative, even if in some cases attribution is not appropriate or expected.

The Canadian approach in CCH is unique in comparison to U.S. approaches in that the Canadian court openly references paradigms of fair use/fair dealing from other countries. In the research I have conducted specifically in the area of U.S. copyright law over the last five years, as well as in the legal opinions I have read since I graduated from law school almost 25 years ago, I have not noticed the U.S. courts, in copyright or other contexts, citing the laws of other countries as openly as the CCH court did. This is one reason why my first impression of the CCH opinion was astonishment at how open the court was in its strategy of drawing upon and evaluating the laws of other countries. U.S. Supreme Court Judge Scalia has made it a political point to openly state how inappropriate it is, in his opinion, to look at foreign law in the context of U.S. Constitutional interpretation (Dodge, 2006). However, the willingness of the U.S. Supreme Court to draw upon foreign laws is certainly an important area for further research (See Black, 2008), and especially so now that Barack Obama has been elected and may change the political shape of the U.S. Supreme Court through appointments. Clearly, the issue of whether or not U.S. Supreme Court judicial opinions should cite foreign law is a political topic that has been around since the early days of the United States. The current Supreme Court judges do not agree on this point. Here is an excerpt on this debate from a speech given by Justice Ginsberg in 2006. She explains,

Justice Scalia counsels: The Court "should cease putting forth foreigners' views as part of the reasoned basis of its decisions. To invoke alien law when it agrees with one's own thinking, and ignore it otherwise, is not reasoned decision making, but sophistry."

Another trenchant critic, Seventh Circuit U.S. Court of Appeals Judge Richard Posner, commented not long ago: "To cite foreign law as authority is to flirt with the discredited ... idea

of a universal natural law; or to suppose fantastically that the world's judges constitute a single, elite community of wisdom and conscience." (Ginsberg, 2006)

Admitting that Judge Posner is correct in that foreign judicial opinions are not precedential in the sense that they are not authoritative for U.S. judges, Ginsberg argues that foreign laws can serve as examples and paradigms. Ginsberg states,

They can add to the store of knowledge relevant to the solution of trying questions. Yes, we should approach foreign legal materials with sensitivity to our differences, deficiencies, and imperfect understanding, but imperfection, I believe, should not lead us to abandon the effort to learn what we can from the experience and good thinking foreign sources may convey. (Ginsberg, 2006)

It appears that the CCH strategy sides more with Ginsberg's outlook on this issue than with Scalia's.

After identifying with U.S. approaches to fair use/fair dealing, CCH then differentiates its own position, creating a fair dealing doctrine that is uniquely Canadian. However, the differentiation in CCH also leaves telltale signs of what might be a power imbalance between copyright regimes in the U.S. and Canada. In the opinion the word "U.S." appears five times, "American" three times, and "United States" three times either in reference to U.S. case law, or as Judge McLachlin explicitly compares her moves to those in the U.S. In other words, the U.S. presence in CCH looms large. This issue is worthy of further exploration since I have read innumerable U.S. legal opinions over the last couple decades and found almost no mention of Canadian laws, nor the laws of other countries (of course in early U.S. opinions English law is often cited).

REMIXING AUTHORIZATION AND INDUCEMENT

As mentioned earlier, Canada's legal term "authorization" maps onto the U.S. term "inducement." By looking at the laws and practices of other countries, the Canadian judge implicitly acknowledged the inherent social construction and collaboratively-authored nature of all texts. Ultimately the court created something new in its remix by reshaping the law. It rejected the Australian stance on authorization, stating that it went too far in shifting the balance favoring copyright hold-

ers as opposed to user rights. It qualified its holding by noting that no evidence showed actual infringing use of copy machines and therefore the presumption that copyrights were being infringed was equal to the presumption that they were not. Finally, in a discussion similar to the *Grokster* discussion of vicarious liability, the CCH court noted that the Law Society and the Great Library had no duty to control the actions of patrons. Ultimately, CCH came to a different conclusion than the *Grokster* court. In *Grokster*, the peer-to-peer software provider was held secondarily liable. In CCH, the library was not held liable for patron actions. The CCH court rejected the Federal Court of Appeals' holding that the posting of a notice above the copy machine requesting users not to infringe acted as "express acknowledgment" that copyright infringement was occurring. Thus, Canada took a clear stance in opposition to U.S. media-industry interests.

While the Canadian court's discussion of "authorization" of copyright infringement is similar to the U.S. development of secondary liability examinations in copyright infringement contexts such as expressed in *Grokster*, the CCH court did not look to U.S. law in its discussion, but did create a remix in its opinion by openly referring to Australian case law and British practice, along with previous Canadian holdings. Not only did Canada adopt and surpass U.S. fair use, the Canadian court strategy here again is innovative. The Canadian courts appear to carefully consider legal measures around the world, and then select, stitch together, and remix the very best parts.

This remix approach allowed the CCH court to anticipate carefully possible future conditions under the effect of globalization when it narrowed what was considered "authorization" of another's infringing behaviors. Instead, the CCH court could have limited its definition of authorization to just copy machines in libraries, but was smart by leaving the notion of "authorization" a little uncertain and open-ended, thus leaving more room for interpretation of future events under the effect of globalization and in light of the affordances of digital writing environments. By creating something novel in its definition of authorization, the Canadian court was innovative by openly considering the legal measures in other sovereign states in order to inform its own decisions.

CONCLUSION—IMPLICATIONS FOR LEGAL WRITING AS A KNOWLEDGE-MAKING PRACTICE AND FOR THE TEACHING OF WRITING

Law, and specifically legal writing, has a role in regulating writing as a knowledge-making practice in global digital environments. Writing shapes law. Regardless of the form it takes, all writing involves some level of remix, and legal

writing is no exception. The CCH judicial opinion is innovative in both its willingness to adapt to a new age, and in the creative way it pieces together the laws and ideas from other countries to craft something uniquely Canadian.

They say that history repeats itself. If copyright machines were outlawed, I imagine we might revisit the times of monks and medieval scribes. In the Middle Ages, even though the church was heavily involved in the production of knowledge via the written text, “The copying of books was also slow, tedious, and very time-consuming” (Yu, 2006, p. 7). It took years for a scribe to complete a “fine” manuscript that included colored initials and art work. Yu (2006) writes,

When Bishop Leofric took over the Exeter Cathedral in 1050, he found only five books in its library. Despite immediately establishing a scriptorium of skilled workers, his crew managed to produce only sixty-six books in the twenty-two years before the bishop’s death in 1072. Likewise, although the Library of

Cambridge University had a remarkable collection of 122 books in 1424, it labored for a half-century to increase the number to 330. (p. 7)

This example is a small illustration that collapses time, giving context to how integral technology, like copy machines, is to the production of knowledge. CCH contains this wisdom. Not only has Canada adopted and even exceeded U.S. protection of user rights via CCH, but, in contrast to the U.S., Canada deems private use not copyright infringing.

Like the court in CCH, judges working in networked environments must be able to craft language and texts that anticipate effects of globalization, fast information streams, changing technologies, language and texts that are not too open-ended and not too specific (piecemeal). This is a challenge to all judges who remix laws from other countries in order to create something new.

Because the issues decided in CCH are at the heart of education, research, and writing, like authors such as DeVoss and Porter (2006), I argue that writing teachers should maintain awareness of current copyright developments and should also make their students aware of these issues. Also, as we move forward in the digital age, mapping some of our understandings and research in the area of intertextuality and intertextual analysis onto our developing theories of remix writing might prove generative. As I have illustrated in this chapter, by meshing these two concepts and using this frame to think about remix writing and intertextuality in the context of internationally circulating judicial opinions, new understandings and new knowledge may develop. Certainly, there are

political issues that arise when one considers why one court might openly attribute another, and why another court might have reservations about doing so (as evidenced, for example, by the debate between Ginsberg and Scalia). These issues in the context of legal writing may inform how we understand remix writing, attribution, and intertextuality in more local settings, such as our writing classrooms.

Using comparative techniques to teach differences and similarities between new texts and old texts, to examine the process of remix, to examine intertextuality in new contexts including legal forums, and to raise the issue of power and politics in the strategies of remix writing itself, gives students an awareness of how complicated digital writing might be from a legal standpoint (see also Yancey, 2009). In gaining increased awareness of these issues, it is generative for composition teachers to explore judicial opinions using the tools that they always have—examining rhetorical turns taken by judges. Such explorations provide opportunities to examine the power of writing.

Copyright law and fair use/fair dealing are important to writing teachers and their students in the digital age because these legal concepts shape knowledge-making practices (Rife, 2007). Copyright law, law that deals specifically with writing, shapes our classroom practices as well as how (and whether) field knowledge is constructed, whether we acknowledge this or not (Durack, 2006; Westbrook, 2006).

Copyright law is important to writing teachers and researchers because such law attempts to control the process and product with which we are most concerned: writing. For educators, fair dealing/use is crucial in order to teach and in order to encourage student learning. It follows then that copyright should be taught in writing classes, and along this trajectory, it will also be productive to examine the law itself as writing, and how the law-as-knowledge is constructed by writing, thus illuminating the power that can be achieved through the remix, creation, and circulation of texts such as judicial opinions, in global contexts.

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