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Copyright in the Digital Age: court judgments

Philip Leith
Professor of Law
Queen's University of Belfast
BT7 1NN.

There is a substantial copyright barrier to innovators who wish to produce new legal information products. This is the barrier of ownership of court judgments – that is access to the body of judgements which make up our common law system.

Case law is the basis for understanding legislation and making sense of law. In most European countries, case law is perceived as public sector information and is made available to users as such. In the UK, this has never been the case and we have a situation where it is not possible for new entrants to move into the legal field to build information products which utilise judgments since the copyright status of most judgments is unclear.

First, unlike Europe, there is an argument over whether the judge is the owner of the copyright since he is not an employee of the crown. Picciotto (in 1996) outlined a situation which still remains unclear:

> "There remains a fog of ambiguity and disagreement as to copyright in court judgments. They may be Crown copyright, if judges are 'servants or officers of the Crown' Cornish says with some diffidence that:
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> > While no judge would hold himself to be a servant of the Crown, he or she is appointed by royal authority and is therefore probably an officer of the Crown (Cornish, 1989, p. 367).
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> Not surprisingly, the Treasury Solicitor agrees with this view. Although no action has yet been taken to enforce it, HMSO states that it intends to issue a policy statement soon. Laddie, Prescott and Vitoria, 1995 hold the contrary view, and point out that in all the debates leading to the passage of the 1988 Act no mention was made that it might have this effect (para 22.39). They point out that in legislation such as the Supreme Court Act the term court 'officers' is used only for various clerks, masters, registrars etc., and not for judges. They conclude that "while it is plain that a judge holds an 'office', this does not thereby make him an 'officer of the Crown' "

> (para. 22.38). They ingeniously argue that, since judges have never asserted a copyright, and often deliver their judgments in open court where they may be taken down by reporters, judges have either abandoned copyright by dedication to the public, or are estopped from denying the existence of an irrevocable licence to publish (para 22.40). This argument effectively puts the judgments themselves in the public domain." (JILT 1996 (2) – S. Picciotto, "Towards Open Access to British Official Documents")

It seems unlikely that any judge would enforce his copyright (and there are other limitations on the publication of certain judgments) but it is clear that if Laddie et. al. are correct then judgments are outwith the PSI environment.

Second, the low level of originality which is found in the UK and Ireland as a requirement for copyright protection means that almost all older cases are copyright of either the transcriber or the reporter. It was the case – prior to word processing judges – that the judgment would be read out in open court and since this fixing of the transcription was carried out by the transcriber, this person (or their employer) would have copyright in that transcription. Further, the Reporter (for example with the Incorporated Council of Law Reporting) who is a barrister who prepares the judgments into a format suitable for the law reports will have copyright in both his creative work (the headnotes in particular) but also the body of the judgment, since it is <u>possible</u> that he has input labour, skill and effort into correcting the spelling, grammar and citations etc. and impossible to tell that he has not. This UK approach to originality has been termed, the 'sweat of the brow' approach.

In recent US and Canadian judgments on copyright in judgments, it has been found that low level input is not substantial enough to jump the hurdle of copyright 'creativity'. In the UK, since we do not have a 'creative' hurdle, simply one of originality, this means that the UK is out of step with European and worldwide approaches to copyright.

The view of the US Supreme Court is:

> "The "sweat of the brow" doctrine had numerous flaws, the most glaring being that it extended copyright protection in a compilation beyond selection and arrangement -- the compiler's original contributions -- to the facts themselves. Under the doctrine, the only defense to infringement was independent creation. A subsequent compiler was "not entitled to take one word of information previously published," but rather had to "independently wor(k) out the matter for himself, so as to arrive at the same result from the same common sources of information." ... "Sweat of the brow" courts thereby eschewed the most fundamental axiom of copyright law – that no one may copyright facts or ideas."

O'Connor J, p353 in Feist Publications Inc. v. Rural Telephone Service Co., 499 U.S. 340 (1991)

This approach was utilised in the Hyperlaw litigation (Matthew Bender & Co. V. West Publishing Co., 158 F.3d 674 (2nd Cir. 1998)) where judgments were stated to be in the public domain even though part of a compilation.

The Canadian Supreme Court has taken a similarly different approach to that of the UK:

> "This said, the judicial reasons in and of themselves, without the headnotes, are not original works in which the publishers could claim copyright. The changes made to judicial reasons are relatively trivial; the publishers add only basic factual information about the date of the judgment, the court and the panel hearing the case, counsel for each party, lists of cases, statutes and parallel citations. The publishers also correct minor grammatical errors and spelling mistakes. Any skill and judgment that might be involved in making these minor changes and additions to the judicial reasons are too trivial to warrant copyright protection. The changes and additions are more properly characterized as a mere mechanical exercise. As such, the reported reasons, when disentangled from the rest of the compilation – namely the headnote -- are <u>not</u> covered by copyright. It would not be copyright infringement for someone to reproduce only the judicial reasons."
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> *p35, CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339, 2004 SCC 13 (CanLII)

The underlying aim of a sensible copyright system is to enable competition between parties to provide services and added-value to new products for the Information Society. It is clear that the copyright regime in the UK is not enabling this to happen in the provision of legal information based systems: the low level of originality means that most of the judgments from our courts are tied up with copyrights owned by transcribers or reporters under the 'sweat of the brow' principal.

There is a clear solution to the problem: copyright in the UK will require harmonisation with the current US and European approaches in the matter of requirements of authorship – correcting spelling and minor grammatical mistakes, or having the sole access to a publicly funded recording of a judge's oral decision should not give authorship to transcribers or reporters. This move would not, of course, remove protection for anything which is rightfully the <u>creative product</u> of the reporter: only that which is freely available in almost every other western country should be made freely available in the UK, too.