Winkler v. Hendley: The Federal Court applies a subjective standard to the notion of “history”

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“Historical facts”[1] are not protected by copyright. Referring to the Storming of the Bastille or the Battle of the Plains of Abraham will not get an author sued in Federal Court, but must these events have really happened to be considered “historical facts”? The Federal Court recently ruled on this issue in *Winkler* v. *Hendley.*[2]

In its decision, the Federal Court stated that if an author presents their literary work as a history book,[3] as long as this assertion is plausible, the events that they describe must be treated as “historical facts” even if they are not. Therefore, the author cannot claim originality when an assessment is made of whether there has been a substantial taking of their work. Originality remains only in the selection and arrangement of the facts.

Background

This case deals with the following three books written about the Donnelly family, whose crimes made headlines in late 19th century Ontario:

> *The Black Donnellys* (hereinafter referred to as *The Black Donnellys*), a history book published in 1954 by Thomas P. Kelley (hereinafter referred to as Kelley);
> *Vengeance of the Black Donnellys* (hereinafter referred to as *Vengeance*), a work of fiction published in 1962 by Kelley (the same author); and
> *The Black Donnellys: The Outrageous Tale of Canada’s Deadliest Feud* (hereinafter referred to as *The Outrageous Tale*), a history book published in 2004 by Nate Hendley (hereinafter referred to as Hendley).

John Winkler (hereinafter referred to as Winkler), Kelley’s heir and copyright holder, accused Hendley of copying, in *The Outrageous Tale,* a substantial part of both *The Black Donnellys* and *Vengeance*. He argued that both works are fiction, as many of the events described in them are

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objectively false. Winkler claimed that Hendley repeated the same mistakes in his work. He also asserted that Hendley copied the structure, tone, theme, atmosphere and dialogue in his telling of events.

For his part, Hendley admitted that he referred to both of Kelley's literary works when writing *The Outrageous Tale*. However, he contended that *The Black Donnellys* should be considered a history book, as Kelley originally described and presented it as such. Given that "historical facts" are not protected by the *Copyright Act*[4] (the "*Act*"), Hendley denied having copied Kelley's work and claimed that *The Outrageous Tale* is an original literary work.

In support of their motions for summary judgment, both parties filed affidavits. In addition, Winkler filed two expert reports. The first compared excerpts from *The Black Donnellys* and *Vengeance* to excerpts from *The Outrageous Tale*.The second was an analysis of the factual nature of *The Black Donnellys*.

The Federal Court's findings were as follows:

> Facts that are credibly presented by the author as historically factual must be excluded from copyright protection. Therefore, the author cannot claim originality when an assessment is made of whether there has been a substantial taking of their work.
> Hendley did not infringe Winkler's copyright on *The Black Donnellys* by referring to "historical facts" without copying the structure, tone, theme, atmosphere or dialogue used in presenting them in *The Outrageous Tale*.
> Hendley did not infringe Winkler's copyright on *Vengeance,* although he did copy various aspects of a fictional character in *The Outrageous Tale* in a non-literal way.This copying does not concern a substantial part of the literary work *Vengeance* whenviewed as a whole.

Facts that are credibly presented by the author as historically factual must be considered as such

The Federal Court ruled that *The Black Donnellys* was a history book, and, for all intents and purposes, considered it to be an account of "historical facts." First, the Court relied on Kelly's statement that he presented *The Black Donnellys* as "The True Story of Canada's Most Barbaric Feud" when it was published.[5] Second, the Court referred to the introduction in the original 1954 edition in which Kelly stated that the information that he used was gathered from old newspapers, police and court records, trips to the area, and other "unimpeachable sources."[6]

The Court determined that it did not have to consider the conclusions of the expert report that the work was "two-thirds fiction." The law is not a tool to ensure the accuracy of various historical accounts, and its role is not to decide between them based on an objective standard.[7] Thus, the notion of "historical facts" must necessarily include those that the author plausibly presents as such.[8] The Court has therefore introduced a subjective standard in the assessment of the factual nature of history books.

The Federal Court found that Hendley was justified in relying on the version of events presented in *The Black Donnellys*. The purpose of the law is to maintain a balance between, on the one hand, protecting the talent and judgment of authors and, on the other hand, allowing ideas and material to remain in the public domain for all to build upon. To allow Kelley to present something as a "historical fact" and then allow Winkler to sue another author on the grounds that such "historical fact" is false would unduly impede the flow of ideas and disturb this fair balance.[9]In short, Winkler cannot seek to refute the historical nature of Kelley's book and claim copyright over the fabricated facts it contains.[10] Given that they are considered "historical facts," Winkler cannot claim originality as part of the assessment of whether there has been a copying of a substantial part of his work.

Hendley did not copy a substantial part of Kelley's work

The Federal Court reiterated that the law protects original literary, dramatic, musical and artistic

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work. Thus, copyright protection exists whether a literary work is a history book or a piece of fiction. However, in the case of a history book, the protection does not extend to “facts of history” or their chronological sequence.[11] The originality of Kelley’s work lies solely in the means of expression and thus in the selection and arrangement of facts. Consequently, the Court analyzed the copying of structure, tone, theme, atmosphere and dialogue in the telling of “historical facts,” not the facts themselves.

The Supreme Court advocated a holistic and comprehensive approach to determining whether a substantial part of a plaintiff’s work was copied by a defendant.[12] However, given the format of the expert report, the Federal Court found it necessary to analyze every single excerpt and then assess whether their cumulative effect amounted to a substantial copying of each of Kelley’s works.[13]

A) *The Outrageous Tale* does not amount to a reproduction of a substantial part of *The Black Donnellys*

The Federal Court concluded that the expert report did not demonstrate any significant similarities in the comparison of some twenty excerpts from *The Black Donnellys* with allegedly analogous excerpts from *The Outrageous Tale*. Winkler alleged that the mere copying of fictional events in *The Outrageous Tale* constituted an unauthorized reproduction. The Court rejected this argument because to consider *The Black Donnellys* a history book implies that the “historical facts” it contains are not part of the originality of the work.[14] Consequently, the Federal Court excluded the 20 or so excerpts because they merely mentioned the same “historical facts.”[15]

As for the excerpts that show some significant similarities, the Federal Court criticized the expert’s method of analyzing isolated words out of context to demonstrate greater similarities between the two texts. Instead, the Court chose to rely on more complete passages taken directly from the works to assess similarities in the selection and arrangement of facts.

The reproduction of fictional events is more easily detectable. Indeed, describing the same “historical facts” means that some significant similarities are inevitable. The Federal Court said the following regarding the description of a street battle:

> In the foregoing passage, the linguistic similarity—references to Flanagan, the gun, the road, the 17 men—are all important parts of the factual aspect of the event. There may be a vast number of ways in which to recount facts. However, it would be difficult if not impossible to describe an event in which Flanagan, carrying a shotgun, went down the road with 17 men without using those terms. Here, the lack of copyright in “facts,” whether actually factual or simply asserted to be factual, becomes particularly important. If these descriptions of a fight were found in two works of fiction, there would be a stronger case that copying these elements contributed to a substantial taking. In a work of nonfiction, these factual elements are not part of the work’s originality.[16]

The Federal Court rejected the allegations of copying in the other passages based on the same argument. It concluded that the analysis carried out on the structure, tone, theme, atmosphere and dialogue of the work does not demonstrate that Hendley copied in *The Outrageous Tale* any substantial part of *The Black Donnellys*.

The decision is surprising in that the protection given to works under copyright and the assessment of whether there has been a substantial taking of the work should be objective: Was a substantial part of the first work copied in the second work in terms of quality? A fact is either historical or it is not. That an author may reasonably believe that such fact is historical should not affect the originality of the first work, nor should it affect the issue of “substantial taking” in the second work. While one understands that the judge was trying to achieve a fair outcome, one might question whether the legal means adopted were adequat

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1. For the purposes of this text, “historical facts” refer to events of a factual nature.
2. 2021 FC 498
3. In this text, the notion of “history book” refers to a work of “history,” understood as the branch of knowledge that studies the past and seeks to reconstruct “historical facts.”
4. *R.S.C., 1985*, c. C-42
5. *Winkler* v. *Hendley*, supra note 2, para. 72
6. *Id.,* para. 73
7. *Id.,* para. 96
8. *Id.,* para. 92
9. *Id.,* para. 92
10. *Id.,* para. 92
11. *Id.,* para. 56
12. *Cinar Corporation v. Robinson,* 2013 SCC 73; *Copyright Act, supra note 6, s. 3*
13. *Id.,* para. 113
14. *Winkler* v. *Hendley*, supra note 2, para. 58
15. *Id.*
16. *Id.,* para. 122

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