

Copyright

in 28 jurisdictions worldwide

Contributing editors: Stuart Sinder,
Jonathan Reichman and James Rosini

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Canada

Keri A F Johnston and Andrea Long

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Legislation and enforcement

1 What is the relevant legislation?

In Canada, copyright is governed by the Copyright Act, RSC 1985, chapter C-42. The Act was last updated in 1997; proposed legislation to modernise it was introduced by the Canadian government on 2 June 2010. Provisions relating to copyright are also found in the Library and Archives of Canada Act, SC 2004, which requires deposits of published material made available in Canada with the Canadian Library and Archives Canada. Section 432 of the Criminal Code, RS, 1985, chapter C-46 includes a provision on the unauthorised recording of a movie. There is no common law copyright in Canada.

2 Who enforces it?

The copyright owner must initiate a proceeding to enforce a provision of, or a civil remedy under, the Act. Such a proceeding may be brought in the Federal Court of Canada or a provincial court. The criminal provisions of the Copyright Act (sections 42 and 43) and the copyright provision under the Criminal Code (section 432) are enforced by the Crown in criminal proceedings. It is at the discretion of the Crown to determine whether sufficient facts exist to press criminal charges.

Agency

3 Is there a centralised copyright agency? What does this agency do?

The Copyright Office is a branch of the Canadian Intellectual Property Office that maintains the official public register of copyrights and a public record of all registrations of grants of interest. The Copyright Office also processes copyright applications and issues registration certificates.

Subject matter and scope of copyright

4 What types of works are copyrightable?

Copyright subsists in original works whose creation requires skill and judgement. The following types of works are protected by copyright in Canada:

- artistic works, including paintings, drawings, maps, charts, plans, photographs, engravings, sculptures, works of artistic craftsmanship, architectural works and compilations of artistic works;
- collective works, including encyclopaedias, dictionaries, year-books or similar works, newspapers, reviews, magazines or similar periodicals, and works written in distinct parts by different authors, or in which works or parts of works of different authors are incorporated;
- compilations resulting from the selection or arrangement of literary, dramatic, musical or artistic works or of parts thereof, or resulting from the selection or arrangement of data;

- dramatic works, including any piece for recitation, choreographic work or mime, the scenic arrangement or acting form of which is fixed in writing or otherwise; any cinematographic work; and any compilation of dramatic works;
- literary works, including tables, computer programs and compilations of literary works;
- musical works, including any work of music or musical composition with or without words and any compilations thereof;
- performers' performances, whether or not the performance is fixed; and
- sound recordings.

5 What types of rights are covered by copyright?

The owner of the copyright has the sole right to produce or reproduce the work or any substantial part of the work in any material form; to perform the work or any substantial part of the work in public; and to publish an unpublished work or any substantial part of the work, including the sole right to authorise the following acts:

- production, reproduction, performance or publishing of any translation of the work;
- conversion of a dramatic work into a novel or other non-dramatic work;
- conversion of a novel, other non-dramatic work or artistic work into a dramatic work by way of performance in public or otherwise;
- making any sound recording, cinematographic file or other contrivance by means of which the work may be mechanically reproduced or performed;
- reproduction, adaptation and public presentation of a literary, dramatic, musical or artistic work as a cinematographic work;
- communication of a literary, dramatic, musical or artistic work to the public by telecommunication;
- presentation at a public exhibition, for a purpose other than sale or hire, of an artistic work created after 7 June 1998, other than a map, chart or plan;
- renting out a computer program; and
- renting out a sound recording in which a musical work is embodied.

The author of the copyrighted work has the moral right to the integrity of the work in connection with the above-noted acts and, when reasonable in the circumstances, to be associated with the work as its author by name or under a pseudonym or to remain anonymous.

The proposed legislation seeks to expand what is covered by copyright to include the right to sell or otherwise transfer ownership of a work that is in the form of a tangible object, providing that ownership of the object has never previously been transferred in or outside Canada with the authorisation of the copyright owner.

6 What may not be protected by copyright?

The following works do not receive copyright protection under Canadian law:

- works that are not original, in that the author did not exercise skill and judgment in creating the work;
- ideas and schemes;
- works whose author was not a citizen or subject of, or a person ordinarily resident in, a WTO or Berne Convention country;
- any work that is not fixed, unless it is a performer's performance; and
- single words, basic phrases or titles of works (unless the title is original and distinctive).

7 Do the doctrines of 'fair use' or 'fair dealing' exist?

The Act provides for fair dealing for the purpose of research or private study, and for criticism or review and news reporting if the source is mentioned and if the name of the author, performer, maker or broadcaster is given in the source. The Act also provides exceptions to infringement for educational institutions, libraries, archives and museums in specific circumstances. Furthermore, it sets out specific exclusions to infringement relating to computer programs, ephemeral recordings, pre-recorded recordings, retransmission by telecommunication, and a series of miscellaneous provisions of exemptions to infringement. Persons with perceptual difficulties are permitted to make a copy, translate, adopt or reproduce a work into a format specially designed for the person with the difficulty.

Among other things, the proposed revisions seek to extend the fair dealing provisions of the Act to education, parody and satire, and to allow users to remix works under certain circumstances for non-commercial purposes.

8 What are the standards used in determining whether a particular use is fair?

There is no test or standard for fair dealing set out in the Act; the question of whether fair use exists is factually driven and at the discretion of a court. Canadian courts have made use of the following considerations in assessing whether fair use exists: the purpose of the dealing; the character of the dealing; the amount of the dealing; the nature of the work; the available alternatives to dealing; and the effect of the dealing on the work.

The Federal Court of Canada has recently found that a consumer can freely listen to 30 seconds of a song to determine whether or not they want to purchase the song. This is classed as 'research' within the fair dealing principles in Canada.

9 Are architectural works protected by copyright? How?

Architectural works are protected as artistic works and are defined in the Act as any building or structure or any model of a building or structure. It is not an infringement of copyright in an architectural work to reproduce it in a painting, drawing, engraving, photograph or cinematographic work, so long as the reproduction is not an architectural drawing or plan or providing that it is permanently situated in a public place or building.

10 Are performance rights covered by copyright? How?

Performers' performances are protected under the Act. The nature of what is protected is dependent upon whether or not the work is fixed.

If the work is fixed, the performer has the right to:

- reproduce any fixation that was made without the performer's authorisation;
- where the performer authorised a fixation, to reproduce any reproduction of that fixation, if the reproduction being repro-

duced was made for a purpose other than that for which the performer's authorisation was given; and

- where fixation was permitted under the Act, to reproduce any reproduction of that fixation, if the reproduction being reproduced was made for a purpose other than one permitted under the Act.

If the work is not fixed, the performer has the right:

- to communicate it to the public by telecommunication;
- to perform it in public where it is communicated to the public by telecommunication other than by communication signal; and
- to fix it in any material form.

The performer also has the right to rent out a sound recording of the performance, and to authorise any of the acts set out in this section.

11 Are other 'neighbouring rights' recognised? How?

While no definition of 'neighbouring rights' exists in the Act, they are recognised in the Act as performers' rights, sound recording makers' rights, and broadcasters' rights.

12 Are moral rights recognised?

The author of a work has the right to the integrity of the work and, under reasonable circumstances, to be associated with the work as its author by name or under a pseudonym. Moral rights may not be assigned but may be waived in whole or in part. An assignment of copyright does not constitute a waiver of moral rights. Moral rights are infringed by any act or omission that is contrary to any of the moral rights of the author of a work. The author's right to the integrity of a work is infringed if the work is distorted, mutilated or otherwise modified, or used in association with a product, service cause or institution to the prejudice of the honour or reputation of the author.

Proposed changes to the Act currently extend moral rights to performers' performances.

Copyright formalities

13 Is there a requirement of copyright notice?

There is no requirement that notice of copyright ownership be provided.

14 What are the consequences for failure to display a copyright notice?

There is no consequence to the copyright owner for failing to give copyright notice. However, by displaying a copyright notice, the copyright owner deprives a defendant infringer of the ability to plead and rely on the defence of innocent infringement, which would entitle the defendant infringer to a reduction in statutory damages.

15 Is there a requirement of copyright deposit?

There is no requirement to deposit copyright with the Canadian Copyright Office, and the Copyright Office does not accept copyright deposits. However, the Library and Archives of Canada Act, SC 2004, c. 11 requires that two copies of every publication be sent to the Librarian and Archivist of Canada within seven days of the publication being made available in Canada. A publication is defined as library matter that is made available in multiple copies or at multiple locations, whether without charge or otherwise, to the public generally or to qualifying members of the public by subscription or otherwise. Publications may be made available through any medium and may be in any form, including printed material, online items or recordings.

16 What are the consequences for failure to make a copyright deposit?

There is no consequence for failing to make a copyright deposit with the Copyright Office, as deposits are not accepted. Failure to make a copyright deposit pursuant to the Library and Archives of Canada Act is an offence. It is punishable by a fine of up to C\$100,000 for a corporation and a fine of not more than C\$5000 or a term of imprisonment not exceeding six months for an individual. Where an individual pays the fine, a term of imprisonment may not be imposed.

17 Is there a system for copyright registration?

The Copyright Office maintains a public register of copyright registrations and transfers of copyright.

18 Is copyright registration mandatory?

There is no legal requirement that copyright be registered in Canada. However, in infringement proceedings, registration of copyright carries with it a presumption that copyright subsists, without further proof. In addition, any assignment or exclusive licence will be void against a subsequent assignee or licensee unless it is registered with the Copyright Office.

19 How do you apply for a copyright registration?

A registration of copyright or a transfer of copyright is obtained through filing an application with the Copyright Office that includes the title of the work, the category of the work (eg literary, musical, artistic, dramatic); whether or not the work is published, and if published the date of first publication; the name(s) and location(s) of the author(s); the name(s) and location(s) of the owner(s) if different from the author; a declaration that the applicant is the author of the work, the owner of the copyright in the work, and assignee of the copyright, or a licensee of the copyright in the work; and the prescribed fee. A similar application may be completed for registration of other subject matter, including performers' performances, sound recordings and communication signals, for which the date of first fixation, first performance or first broadcast must be provided. Deposits of copyright with the Copyright Office are not permitted.

20 What are the fees to apply for a copyright registration?

If the application and fee are submitted to the Copyright Office online via the Canadian Intellectual Property Office's website, the fee is C\$50. In all other cases – hand delivery of an application to the Copyright Office, for example – the fee is C\$65.

21 What are the consequences for failure to register a copyrighted work?

In Canada, a certificate of copyright registration serves as prima facie proof that copyright subsists in the work and that the person named as the registrant is the owner of copyright in that work. If an infringement occurs and copyright is registered at the date of infringement, the defendant is deemed to have had reasonable grounds for suspecting that copyright subsists in the work. Certified copies of entries on the Register of Copyrights are admissible in court without further proof or production of originals. An assignment or exclusive licence that has not been registered is void as against a subsequent assignee or licensee.

Ownership and transfer**22** Who is the owner of a copyrighted work?

The author of the work is the first owner of copyright unless the author who created the work did so in the course of their employment, in which case the employer is the first owner of the copyright.

23 May an employer own a copyrighted work made by an employee?

The Act states that 'where the author of a work was in the employment of some other person under a contract of service or apprenticeship and the work was made in the course of his employment by that person, the person by whom the author was employed shall, in the absence of any agreement to the contrary, be the first owner of the copyright.' The determining test, therefore, is whether the author was employed under a contract of service or apprenticeship. This is to be distinguished from a 'contract for services' and various tests developed under employment and tax law can be applied. The work must have been made in the course of employment, and there must be no agreement to the contrary.

24 May a hiring party own a copyrighted work made by an independent contractor?

A hiring party will not own a copyrighted work made by an independent contractor unless there is an agreement in place specifically stating that the copyright is the property of the hiring party and not the independent contractor. There is no requirement that such a term must be in writing and an implied term of contract may suffice.

25 May a copyrighted work be co-owned?

A work that was produced by the collaboration of two or more authors, in which the contribution of one author is not distinct from the other author(s), is jointly owned by each author. Joint authorship is ownership as tenants in common rather than as joint tenants, which means that upon the death of an author, the right is transferred to the author's beneficiaries and not the other author(s). Joint authors may not grant a licence for the work(s) in question.

Copyright is divisible in Canada and a copyright owner may assign some or all of the specific rights.

26 May rights be transferred?

Rights may be transferred via assignment or grant of interest, which must be in writing. In the instance of bankruptcy, copyright owned by the bankrupt immediately passes and vests with the trustee in bankruptcy.

27 May rights be licensed?

Rights may be licensed. A proprietary or exclusive licence is only valid if it is in writing and signed by the owner of the right in respect of which the licence is made. A non-proprietary, non-exclusive licence need not be in writing. Licences may also be implied from surrounding circumstances.

28 Are there compulsory licences? What are they?

There is no compulsory licensing under Canadian copyright law.

29 Are licences administered by performing rights societies? How?

Licences may be administered by performing rights societies if the author(s) have assigned their copyright to the society. There are a number of performing rights societies in Canada that collect royalties from users and allocate them to rightholders.

30 Is there any provision for the termination of transfers of rights?

The Act provides that 25 years after the death of an author, the author's rights will revert to the author's beneficiaries. Otherwise there is no provision for the termination of the transfer of rights, although most agreements will contain provisions relating to the term of the transfer of rights, which may include a termination date.

31 Can documents evidencing transfers and other transactions be recorded with a government agency?

Evidence of transfers, including assignments and licences, may be recorded with the Copyright Office following the same procedure used to register copyright. Filing a Grant of Interest with the Copyright Office requires the registration number of the work (if registered) or the title of the work (if unregistered); the title of the grant of interest (eg assignment, licence); the name and address of the assignor; the name and address of the assignee; a copy of the grant of interest; and payment of the applicable fee.

The fee is C\$50 if the application and fee are submitted online to the Copyright Office via the Canadian Intellectual Property Office's website. In all other cases – hand delivery of an application to the Copyright Office, for example – the fee is C\$65.

Duration of copyright

32 When does copyright protection begin?

Copyright protection begins on the date the work is created.

33 How long does copyright protection last?

Generally, the term of copyright protection is the life of the author, plus 50 years after the end of the calendar year in which the author dies. For anonymous and pseudonymous works, the term is the earlier of 50 years following the end of the calendar year in which the work was first published and 75 years following the end of the calendar year in which the work was made. This is also the case for works of joint authorship where one or more of the joint authors are unknown. However, if and when the identity of the unknown authors becomes commonly known, the term of copyright will be 50 years following the end of the calendar year in which the last author dies.

In the case of posthumous works, the term is 50 years following the end of the calendar year in which the work was first published. The term of copyright in photographs is 50 years following the end of the calendar year in which the initial negative was made or, where there is no negative, the year in which the photograph was taken (the proposed amendments seek to extend this term to 50 years after the death of the photographer). For cinematographic works, the term is 50 years following the end of the calendar year in which the cinematographic work was first published or, if it is not published, 50 years following the end of the calendar year in which the work was made. For works made for the Canadian government, the term of copyright is 50 years following the end of the calendar year in which the work was first published.

Moral rights exist for the same term as copyright.

34 Does copyright duration depend on when a particular work was created or published?

The duration of copyright depends on when a work was created or published only in the case of anonymous or pseudonymous works (see question 33).

In addition, if the work was not published before 31 December 1998 and the author died within 50 years prior to that time, copyright will subsist until the calendar year end of the 50th year after 31 December 1998.

35 Do terms of copyright have to be renewed? How?

There is no renewal of copyright in Canada.

Copyright infringement and remedies

36 What constitutes copyright infringement?

It is copyright infringement for any person to do, without the consent of the copyright owner, anything that is the sole right of the copyright owner to do under the Act. The proposed amendments to the Act would also make it an offence to circumvent technological protection measures or digital locks placed on works, to provide services primarily for the purpose of circumventing digital locks, or to manufacture, import, distribute, offer for sale, rent or provide a device or component that circumvents digital locks.

37 Does secondary liability exist for indirect copyright infringement? What actions incur such liability?

Secondary liability is established under the Act as an infringement of copyright for any person to do, to possess for the purposes of doing, or to import into Canada for the purpose of doing, the following:

- selling or renting out;
- distributing to such an extent as to affect prejudicially the owner of the copyright; or
- by way of trade, distributing, exposing or offering for sale or rental, or exhibiting in public;

a copy of a work, sound recording or fixation of a performer's performance, or of a communication signal that the person knows or should have known infringes copyright, or would infringe copyright if it had been made in Canada by the person who made it.

38 What remedies are available against a copyright infringer?

The owner of infringed copyright is entitled to all remedies by way of injunction, damages, accounts, and delivery up of the infringing goods. The Act also provides for statutory damages in lieu of damages and profits if so elected by the copyright owner before the final judgment is rendered.

39 Is there a time limit for seeking remedies?

A civil action for copyright infringement must be brought within three years of the infringement's occurrence when the plaintiff knew or could reasonably have been expected to know of the infringement at the time it occurred. If the plaintiff did not know and could not have reasonably been expected to know of the infringement at the time it occurred, the infringement action must be commenced within three years of the time when the plaintiff first knew or could reasonably have been expected to know of the infringement.

40 Are monetary damages available for copyright infringement?

Monetary damages are available for copyright infringement. The infringer is liable to pay damages to the copyright owner if the owner has suffered due to the infringement. In addition to those damages, the infringer may also be liable to pay such part of the profits that the infringer has made from the infringement and that were not taken into account in calculating the damages, at the court's discretion. Exemplary or punitive damages may also be available at the discretion of the court, and are only awarded in the most egregious cases.

The copyright owner plaintiff may elect for statutory damages in lieu of damages and profits, in which case the infringer is liable to pay the owner a sum of not less than C\$500 or more than C\$20,000 as the court considers just, in an instance where the infringer knows of the existence of the copyright. Where the defendant infringer was not aware that copyright had been infringed, the court may reduce the

amount of the award to less than C\$500, but not less than C\$200. The proposed amendments to the Act seek to differentiate between commercial infringement (damages of C\$500 to C\$20,000 for each work) and non-commercial infringement (damages of C\$100 to C\$5,000 with respect to all infringements involved).

41 Can attorneys' fees and costs be claimed in an action for copyright infringement?

Attorneys' fees and costs may be claimed in a civil action for copyright infringement. Costs are generally awarded on a party-to-party basis; solicitor-client costs are only awarded in exceptional circumstances.

42 Are there criminal copyright provisions? What are they?

Criminal copyright provisions are found at sections 42 and 43 of the Copyright Act and section 432 of the Criminal Code.

Section 42 of the Copyright Act makes it an offence to knowingly:

- make for sale or rental an infringing copy of a work or other subject matter in which copyright subsists;
- sell or rent out, or by way of trade exposes or offers for sale or rental, an infringing copy of a work or other subject matter in which copyright subsists;
- distribute infringing copies of a work or other subject matter in which copyright subsists, either for the purpose of trade or to such an extent as to affect prejudicially the owner of the copyright;
- by way of trade, exhibit in public an infringing copy of a work or other subject matter in which copyright subsists;
- import for sale or rental into Canada any infringing copy of a work or other subject matter in which copyright subsists.

The sanction pursuant to section 42 is, on summary conviction, a fine not exceeding C\$25,000, imprisonment for a term not exceeding six months, or both; or, on conviction or indictment, a fine not exceeding C\$1 million, imprisonment for a term not exceeding five years, or both.

Under section 43 of the Copyright Act it is an offence to knowingly perform or cause to be performed in public and for private profit the whole or any part of any dramatic or operatic work or musical composition in which copyright subsists in Canada. An offence under Section 43 is liable, on summary conviction, to a fine not exceeding C\$250 and, in the case of a second or subsequent offence, either to that fine or to imprisonment for a term not exceeding two months, or to both.

Update and trends

Proposed changes to the Copyright Act were tabled on 2 June 2010 and are intended to modernise the Act. Previous attempts to modernise the Act were met with much controversy and the earlier bill died during a previous election period. Canada has faced much criticism for what some perceive to be an outdated Act that does not adequately address modern technology and issues faced in the global marketplace. Some of the proposed amendments have been discussed throughout this article. In introducing the legislation the Canadian government has acknowledged that it is likely that changes will be made following public consultation before the bill is passed into law, and certain provisions, particularly the digital lock provisions, have been met with much controversy. It is anticipated that some of the proposed amendments will pass into law in the coming year, and one of the proposed amendments is a requirement that the Act be reviewed every five years.

Section 432 of the Criminal Code makes it an offence to record in a movie theatre a performance of a cinematographic work or its soundtrack for the purpose of the sale, rental or other commercial distribution of a copy of the cinematographic work without the consent of the theatre manager. Section 432 is an indictable offence punishable by imprisonment for a term of not more than five years, or is an offence punishable on summary conviction.

43 Is online copyright infringement actionable?

Online infringement is actionable through traditional copyright measures prescribed by the Act. There are no notice and take-down provisions or legislation in Canada, as there are in the United States. The proposed amendments seek to introduce notice and notice provisions requiring that if an ISP is notified by a copyright owner that one of its subscribers is allegedly hosting or sharing infringing content, the ISP must forward the notice to the subscriber and keep a record of this activity. An ISP's failure to take such prescribed action would result in civil damages.

44 How may copyright infringement be prevented?

There is no mechanism to prevent copyright infringement, and it is the obligation of the copyright owner to monitor infringing activity and take action against such activity. Putting a copyright notice on works gives notice to third parties of the right, but may act only as a deterrent to infringement and does not prevent it.



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Relationship to foreign rights

45 Which international copyright conventions does your country belong to?

Canada is a member of, and has ratified, the Berne Convention, the Rome Convention, the Paris Act of 1971, and the TRIPS Agreement.

46 What obligations are imposed by your country's membership of international copyright conventions?

Pursuant to its obligations as a member of international copyright conventions, Canada recognises and honours the copyright of citizens of countries also party to these conventions.



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